

No. 06-0341-pr

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICARDO A. DE LOS SANTOS MORA,
Plaintiff-Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK;
RICHARD A. BROWN, DISTRICT ATTORNEY; and
FLUSHING QUEENS POLICE DEPARTMENT,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF DEFENDANTS-APPELLEES

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BRIEF OF THE UNITED STATES AS AMICUS CURIAE
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INTERESTS OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(a),
the United States files this brief as amicus curiae in support of affirmance.

The United States wishes to emphasize at the outset that our Government
firmly believes in and supports consistent adherence to the Vienna Convention on
Consular Relations. The consular notification provisions at issue in this appeal are
very important, and serve as a significant protection to U.S. nationals who reside
or travel abroad. Our Government also places high importance on compliance by

federal, state, and local officials with the Convention, and regularly advises those officials of their obligations under Article 36.

Nevertheless, the district court correctly dismissed the plaintiff's claims, because the Vienna Convention does not create judicially enforceable individual rights, but was intended to be enforced through the usual means of diplomatic negotiation and political intercession. Even if the Convention did create certain enforceable individual rights, furthermore, the appropriate mechanism for enforcing those rights would not be a private suit for money damages. Nothing in the Convention creates such an unprecedented remedy, nor has Congress expressed any intent to implement the Convention in this manner. Although the plaintiff invokes 42 U.S.C. § 1983, Article 36 does not create any "rights" within the meaning of that provision, nor is the Vienna Convention encompassed within § 1983's reference to the "Constitution and laws."

The United States has a substantial interest in the interpretation and effect that domestic courts give to international instruments to which our Government is a party. Permitting enforcement of the Vienna Convention's consular notification provision through private tort actions could have ramifications for domestic law enforcement operations. Accordingly, the United States files this brief as *amicus curiae* to set out the Government's views regarding the appropriate construction and application of the Convention and 42 U.S.C. § 1983.

STATEMENT OF THE ISSUE PRESENTED

Whether a foreign national may sue state or local law enforcement officials for money damages based on their alleged failure to provide consular notification information pursuant to the Vienna Convention on Consular Relations.

STATEMENT

1. The Vienna Convention on Consular Relations governs “consular relations, privileges and immunities” between state parties. Vienna Convention, preamble. The Convention expressly states that it is intended to promote “friendly relations among nations,” and that the privileges and immunities it confers are “to ensure the efficient performance of functions by consular posts on behalf of their respective States” — but “not to benefit individuals.” *Id.* Consular functions recognized under the Convention include “protecting * * * the interests of the sending State and of its nationals”; “helping and assisting nationals * * * of the sending State”; and “representing or arranging appropriate representation for nationals of the sending State.” Art. 5.

Article 36 of the Vienna Convention governs communications between a foreign consulate and that country’s nationals. In relevant part, the Article provides that, “[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State,” consular officers will be free to

communicate with and have access to their own nationals, and those nationals will be free to communicate with and have access to consular officials. ¶ 1(a). Article 36 directs receiving state officials to inform consular officials, at the request of a foreign national, that the national has been arrested or taken into custody, and also to “inform the person concerned without delay of his rights” to have consular officials notified and to have access to those officials. ¶ 1(b). Finally, Article 36 provides consular officials “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.” ¶ 1(c).

2. Ricardo de los Santos Mora is a citizen of the Dominican Republic, who was arrested in 1992 in Flushing, Queens, and charged with attempted robbery. See Appendix for Plaintiff-Appellant (Pl. App.) 4. Mora claims that, during his arrest and subsequent detention, he “was not afforded access to his country consulate” or advised of his right to contact the Dominican consulate to seek assistance. See *id.* Mora alleges that, as a result, he was “coerced into taking a [guilty] plea without the benefit of an interpreter.” See *id.*

Mora sued the State of New York, the District Attorney, and the Queens Police Department for \$1 million in damages, asserting that he was the “victim of a tort committed in violation of a treaty of the United States,” namely, Article 36 of the Vienna Convention on Consular Relations. Pl. App. 3-4, 5.

The district court dismissed Mora’s complaint pursuant to 28 U.S.C. § 1915A(b) for failure to state a legally valid claim.¹ Pl. App. 11. Noting the “strong presumption against inferring individual rights from international treaties,” Pl. App. 12 (quoting *United States v. De la Pava*, 268 F.3d 157, 164 (2d Cir. 2001)), the district court held that the Vienna Convention on Consular Relations did not create any “fundamental rights for a foreign national.” Pl. App. 12. Accordingly, the court recognized, failure to notify a foreign national of his right to contact consular officials would not be legally sufficient “grounds for vacating a sentence” — or, presumably, for a civil suit for money damages. Pl. App. 12-13.

ARGUMENT

I. ARTICLE 36 OF THE VIENNA CONVENTION DOES NOT CREATE JUDICIALLY ENFORCEABLE INDIVIDUAL RIGHTS.

A. As this Court has recognized, the Vienna Convention was negotiated and adopted in the face of “a strong presumption against inferring individual rights from international treaties.” *United States v. De La Pava*, 268 F.3d 157, 164 (2d

¹ Section 1915A directs a court to “review” a civil complaint filed by a prisoner seeking redress from a government entity or officer either “before docketing” or “as soon as practicable after docketing,” and to dismiss the complaint if it fails to state a claim upon which relief may be granted. 28 U.S.C. § 1915A(a), (b)(1). At the time he filed the complaint, Mora was incarcerated in Virginia on unrelated criminal charges. *See* Pl. App. 6.

Cir. 2001); *see also Head Money Cases*, 112 U.S. 580, 598 (1884) (recognizing that treaty violations are typically “the subject of international negotiations and reclamation,” not judicial redress). Although it is possible for a treaty to create judicially enforceable private rights, such treaties are exceptions to the general rule that enforcement is exclusively through political and diplomatic channels. *See De La Pava*, 268 F.3d at 164.

This general rule that treaties do not create enforceable private rights applies even when a treaty benefits private individuals. *See De La Pava*, 268 F.3d at 164. Thus, in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the Supreme Court held that treaties specifying that a merchant ship “shall be compensated for any loss or damage” and that a “belligerent shall indemnify the damage caused by its violation” of treaty provisions did not confer enforceable individual rights. *Id.* at 442 & n.10 (citations omitted). The Court explained that the treaties “only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs,” but do not “create private rights of action for foreign corporations to recover compensation from foreign states in United States courts.” *Id.* at 442.

As we next elaborate — and as this Court has already recognized, *see De La Pava*, 268 F.3d at 164-165 — the text, structure, history, and functioning of the Convention fail to overcome the presumption that it does not create enforceable

individual rights. Article 36 of the Vienna Convention may benefit a detained foreign national, but it does not give that national the right to sue to enforce the requirement that law enforcement officials notify him of the opportunity to contact a consular representative to seek assistance. *See also United States v.*

Emuegbunam, 268 F.3d 377, 391-394 (6th Cir. 2001), *cert. denied*, 535 U.S. 977 (2002); *United States v. Jimenez-Nava*, 243 F.3d 192, 195-198 (5th Cir.), *cert. denied*, 533 U.S. 962 (2001); *United States v. Li*, 206 F.3d 56, 66-68 (1st Cir.) (Selya, J., and Boudin, J., concurring), *cert. denied*, 531 U.S. 956 (2000).²

B. The text and structure of the Vienna Convention show that it was not intended to create judicially enforceable rights. The Supreme Court has held that, in order for a federal statute to create enforceable private rights, “its text must be phrased in terms of the person benefitted.” *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (quotation marks and citation omitted). The Convention explicitly provides that the privileges and immunities it confers are “*not to benefit*

² We are aware of only one court of appeals that has held that the Vienna Convention’s consular notification provision is enforceable in court through a private lawsuit for money damages. *See Jogi v. Voges*, 425 F.3d 367 (7th Cir. 2005). The United States believes that the panel decision in *Jogi* is erroneous, and has submitted two briefs as amicus curiae in support of a pending petition for rehearing or rehearing en banc. Tellingly, the primary rationale in *Jogi* for recognizing an individual claim for money damages — that the drafters of the Convention must have intended *some* means of judicial enforcement, *see id.* at 385 — was questioned by the Supreme Court in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2681 (2006).

individuals.” Vienna Convention, preamble (emphasis added). Although this specific limitation refers to “privileges and immunities,” it reflects the broader point that the entire treaty, including Article 36, is intended to enhance the ability of States to protect their nationals abroad rather than to create freestanding individual rights. *See De La Pava*, 268 F.3d at 164 (“The preamble to the Vienna Convention supports the view that the Convention created no judicially enforceable individual rights * * *.”).

The plaintiff relies on Article 36’s use of the term “rights” and its mandatory language as supposed evidence that the provision creates enforceable individual rights. *See* Pl. Br. 16-17, 19. But the “right[s]” conferred on consular officials by Article 36 are not intended to benefit or create rights in individual officials, *see Breard v. Greene*, 523 U.S. 371, 378 (1998), and the same is true of the parallel “rights” conferred by Article 36 upon detained foreign nationals. Both “rights” are for the same purpose: “to facilitat[e] the exercise of consular functions.” *De La Pava*, 236 F.3d at 164-165 (quoting Vienna Convention, Article 36(1)); *cf. Pennhurst State Sch. v. Halderman*, 451 U.S. 1, 18-19 (1981) (statutory reference to disabled individuals’ “right to appropriate treatment, services, and habilitation” did not create enforceable private rights).

In this regard, it is significant that the first protection extended under Article 36 is to consular officials, who “shall be free to communicate with nationals of the

sending State and to have access to them.” The “rights” of foreign nationals were deliberately placed underneath, 1 Official Records, United Nations Conference on Consular Relations, Vienna, 4 Mar. - 22 Apr. 1963, at 333 (Chilean delegate), signaling what the introductory clause spells out — that the function of Article 36 is not to create freestanding individual rights, but to facilitate a foreign State’s ability to protect its nationals. As a practical matter, a foreign national’s rights are necessarily subordinate to, and derivative of, his country’s rights. An individual may ask for consular assistance, but it is entirely up to the sending State whether to provide it. Given that neither a foreign State nor its consular official can sue under the Vienna Convention to remedy an alleged violation, *see Breard*, 523 U.S. at 378, it follows that an individual alien should not be able to do so either.

Furthermore, even if the term “rights” in Article 36 manifested an intent to create enforceable individual rights, that would not assist Mora, who alleges that the defendants violated the Vienna Convention by failing to notify him of the opportunity “to contact an officer representative of his * * * native country for assistance with legal proceedings.” Pl. App. 5; *see also* Pl. Br. 4 (asserting that the defendants unlawfully failed to notify Mora “of his right to seek assistance from the consulate of his home country, the Dominican Republic”). The only “right[s]” of a foreign national to which Article 36 refers are the right to have a consular representative notified by law enforcement officials that a foreign

national has been detained, and the right to have communications from the detainee to his consular post forwarded by law enforcement officials without delay. Art. 36(1). The provision governing law enforcement officials' obligation to inform a detainee that he can contact consular representatives for assistance uses different terminology altogether.

Nor is there any indication in the Convention's text that the "rights" referred to in Article 36(1)(b) may be privately enforced. Rather, the remedies for violations of that provision are the traditional means by which international disputes are resolved. A foreign national's government may protest the failure to observe the terms of Article 36 and attempt to negotiate a solution. If diplomatic channels fail to provide a satisfactory resolution, the Optional Protocol establishes a mechanism that States may choose for resolving disputes. The United States is not a party to the Optional Protocol, having noticed its withdrawal in March 2005. Under the Protocol, furthermore, only a State may initiate a proceeding before the ICJ, and the ICJ's ruling "has no binding force except between the parties and in respect to the particular case." Statute of the ICJ, art. 59, 59 Stat. 1062. The fact that the only remedy created by the drafters of the Vienna Convention is this limited and purely voluntary one, to be invoked only by a State, is inconsistent with any argument that the Convention created judicially enforceable individual

rights. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120-122 (2005).

The plaintiff also relies on the Article's instruction to consular officials to "refrain from taking action on behalf of a [detained foreign national] * * * if he expressly opposes such action," and its direction to law enforcement officials to notify a foreign consulate that a foreign national has been detained "if [the detained foreign national] so requests." *See* Pl. Br. 18-19 & n.4. These provisions, however, underscore that Article 36 was *not* intended to create enforceable individual rights. Pursuant to bilateral agreements with dozens of foreign governments, the United States Government provides notification of the detention of each foreign national "regardless of the national's wishes." U.S. Dep't of State, Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them 3 (available at http://travel.state.gov/law/consular/consular_2003.html); *see id.* at 5 (collecting countries). And foreign governments can surely enter into diplomatic negotiations with the Executive Branch, even if those talks involve an unwilling foreign national.

Finally, no intent to create privately enforceable rights is shown by the provision in Article 36 that rights of consular access "shall be exercised in

conformity with [domestic law], subject to the proviso * * * that [domestic law] must enable full effect to be given to the purposes for which the rights * * * are intended.” The provision refers to how rights “shall be *exercised*,” *i.e.*, how rights will be implemented in practice in situations where they apply, such as how and when detainees will be notified of the right to contact a consular representative, how consular officers will be informed if the detainee requests (“exercises” his right), and how consular officers can exercise the right of visitation. The means by which any rights will be “exercised” under the Convention does not speak to the available *remedies* if those rights are violated or not afforded. If a person sues for damages a police officer who has violated his First Amendment rights, the person is not exercising his First Amendment rights when bringing the lawsuit; he is suing to remedy a prior interference with the exercise of his rights. Notably, the Supreme Court in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), rejected the argument that the “full effect” provision in Article 36 barred application of procedural default rules. *Id.* at 2682-2687. The Court also expressed “doubt” that the Convention requires a “judicial remedy of *some* kind,” noting that “diplomatic avenues” were the “primary means of enforcing the Convention.” *Id.* at 2680-2682.

C. The drafting and implementation history of the Vienna Convention confirm that Article 36 does not create enforceable private rights in detained foreign nationals.

An initial draft of the Convention was prepared by the International Law Commission (ILC), the members of which recognized that the proposed article on consular notification “related to the basic function of the consul to protect his nationals vis-a-vis the local authorities,” and that “[t]o regard the question as one involving primarily human rights or the status of aliens would be to confuse the issue.” ILC, Summary Records of 535th Meeting, U.N. Doc. A/CN.4/SR.535, at 48-49 (1960) (Sir. Gerald Fitzmaurice); *see also id.* (Mr. Erim agreed “that the proposed new article * * * dealt with the rights and duties of consuls and not with the protection of human rights or the status of aliens”). Significantly, the ILC drafters observed that the consular notification provision would be subject to the “normal rule” of enforcement under which a country that “did not carry out a provision” of the Convention would “be estopped from invoking that provision against other participating countries.” *Id.* at 49.

The final ILC draft of the proposed convention submitted to the United Nations Conference did not require law enforcement officials to notify detained foreign nationals that they could contact a consular representative, but instead required notification of consular representatives whenever a foreign national was

detained. *See* ILC, Draft Articles on Consular Relations, With Commentaries 112 (1961), available at http://untreaty.un.org/ilc/texts/9_2.htm. Following numerous delegates' expression of concern that requiring mandatory notice would impose a significant burden on receiving States, particularly those with large tourist or immigrant populations, *see* 1 Official Records, at 36-38, 82-83, 81-86, 336-340, the Conference adopted a compromise proposal that required notice to consular representatives at the foreign detainee's request. *Id.* at 82. The purpose of the change was not to enshrine in the Convention an individual right for the detainee, but "to lessen the burden on the authorities of receiving States." *Id.* Given the circumstances in which it was added and the stated purpose for its inclusion, the notification provision cannot reasonably be interpreted to create enforceable private rights.

The history of the Vienna Convention's consideration by the United States Senate and its post-ratification implementation by the Executive Branch provide further evidence that the Convention was not understood to create new private rights within our domestic legal system. The only inference that can be drawn from that history is that the Convention was understood to be "self-executing," *i.e.*, to impose legal obligations on U.S. officials without the need for implementing legislation. As with federal legislation, the fact that the Convention imposes a legal constraint on official conduct does not establish that it creates

enforceable private rights. *See Gonzaga Univ.*, 536 U.S. at 283-284; *see also* Restatement (Third) of Foreign Relations Law of United States § 111, cmt. h (1987) (noting that whether a treaty is “self-executing” is different from whether treaty creates enforceable private rights).

At the time of Senate consideration and approval of the Vienna Convention, the Senate Foreign Relations Committee and the State Department agreed that Article 36 of the Convention would “not change or affect present U.S. laws or practice.” S. Exec. Rep. No. 9, 91st Cong., 1st Sess., at 2 (1969); *see also id.* at 18. The State Department also noted that disputes under the Convention “would probably be resolved through diplomatic channels” or, “[f]ailing resolution,” potentially through the processes set out in the Optional Protocol. *Id.* at 19. Consistent with the understanding that the Vienna Convention does not create free-standing individual rights, the State Department’s longstanding practice has been to respond to foreign States’ complaints about violations of Article 36’s notification requirements by investigating those complaints and, where a violation has occurred, making a formal apology to that country’s government and taking steps to lessen the likelihood of a recurrence of the problem. *See Li*, 206 F.3d at 65.

D. To the extent that there is any remaining ambiguity about whether the Vienna Convention creates enforceable individual rights, it should be resolved in favor of the Executive Branch's construction of the Convention.

In matters of foreign affairs, our Constitution vests the responsibility for speaking on behalf of the nation in the Executive Branch: "There is an elaborate regime of practices and institutions by which the United States and other nations enforce" treaty commitments, with nations sometimes choosing to forego enforcement "for reasons of prudence,* * * convenience, or *** to secure advantage in unrelated matters." *Li*, 206 F.3d at 68. For a U.S. court to inject itself into this delicate process, by asserting the right to adjudge and remedy treaty violations, could cause significant harm to our foreign relations.

As the United States has made clear in various Supreme Court filings, the Executive Branch has construed the Vienna Convention not to provide for judicial enforcement in habeas corpus or other equitable actions brought by private individuals and foreign governmental officials. *See, e.g.*, Brief for United States at 11-30, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (Nos. 05-51, 04-10566); Brief for United States at 18-30, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928); Brief for United States at 18-23, *Republic of Paraguay v. Gilmore*, 523 U.S. 1068 (1998) (No. 97-1390), and *Breard v. Greene*, 523 U.S. 371 (1998) (No. 97-8214). The State Department's practices relating to the Vienna

Convention also demonstrate that the Convention was not understood to create judicially enforceable individual rights.

The Executive’s longstanding interpretation of the Convention “is entitled to great weight.” *United States v. Stuart*, 489 U.S. 353, 369 (1989) (citation and quotation marks omitted). In this instance, the construction adopted by the Executive is supported by the text, structure, and history of the Convention, as well as the presumption against construing treaties to create enforceable individual rights. Accordingly, this Court should affirm the district court’s ruling that the Convention does not create judicially enforceable individual rights.³

II. ANY RIGHTS CREATED BY ARTICLE 36 OF THE VIENNA CONVENTION ARE NOT ENFORCEABLE IN A PRIVATE CIVIL ACTION FOR MONEY DAMAGES.

Even assuming that the Vienna Convention creates individual rights to contact a consular representative and to be notified of the opportunity to do so,

³ Nothing in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), undercuts the conclusion that Article 36 of the Vienna Convention does not create judicially enforceable individual rights. Although one issue litigated in *Hamdan* was whether the 1949 Geneva Convention confers privately enforceable rights, the Court simply assumed without deciding that the 1949 Geneva Convention did not itself “furnish[] petitioner with any enforceable right.” *Id.* at 2794. Instead, the Court held that Congress specifically incorporated the 1949 Geneva Convention as a limitation on the President’s authority, through Article 21 of the Uniform Code of Military Justice. *See id.*

such rights are not enforceable in a private civil action for retrospective money damages.

A. The Vienna Convention does not create a private right of action for damages for violation of Article 36's consular notification requirements. Nothing in the text of the Convention or its drafting history suggests that it was intended to be enforced in this manner. The history of Senate consideration of the Convention demonstrates that it was understood to impose legal obligations on U.S. officials without the need for implementing legislation, see pp. 14-15, *supra*, but this fact does not show or even suggest that the Convention was intended to create a private claim for money damages. To the contrary, the fact that the drafters of the Convention found it necessary to create an optional mechanism for resolving disputes suggests strongly that the Convention did not create a private right of action. *Cf. Abrams*, 544 U.S. at 121-123.

The fact that a private damages remedy would be a highly unusual method of enforcing a treaty also weighs heavily against interpreting the Convention as implicitly creating such a remedy. In *Sanchez-Llamas*, the Supreme Court emphasized the unlikelihood that State parties to the Convention would have intended to require a remedy — there, application of an exclusionary rule in criminal proceedings — that had been rejected under most countries' domestic law. 126 S. Ct. at 2678. The State Department has found no instance in which a

foreign court or authority has awarded monetary damages as a remedy for breach of Article 36 of the Convention. *Cf. Stuart*, 489 U.S. at 366 (relying on “subsequent operation” of treaty as evidence of its intended scope). Absent clear evidence that the Convention was intended to create a private money damages remedy, a court should decline to hold that it did so *sub silentio*.

B. Congress did not create a private right of action under 42 U.S.C. § 1983 to vindicate rights asserted under Article 36 of the Vienna Convention. The private right of action created by § 1983 is limited to the deprivation under state law of “rights, privileges, or immunities secured by the Constitution or laws.” The treaty-based interests that Mora seeks to vindicate are not within the “rights” encompassed by § 1983, nor are they “secured by the Constitution and laws” within the meaning of that statute.

1. As the Supreme Court held in *Gonzaga University*, only “an unambiguously conferred right [will] support a cause of action” under 42 U.S.C. § 1983. 536 U.S. at 283. Even where Congress legislates for the benefit of an identified class, the statute cannot be the basis for a private § 1983 claim unless Congress clearly intended to create individually enforceable federal rights. *See Abrams*, 544 U.S. at 120-122. This inquiry whether federal law creates enforceable private rights should be guided by the analysis whether the law creates an implied right of action. *See Gonzaga Univ.*, 536 U.S. at 284.

We have already explained that Article 36 of the Vienna Convention itself does not create any judicially enforceable individual rights. Under *Gonzaga University*, that analysis also bars any attempt to enforce the provision through an action brought under 42 U.S.C. § 1983. *See Abrams*, 544 U.S. at 120-122.

This Court should be particularly reluctant to recognize private rights enforceable under 42 U.S.C. § 1983 based on an international treaty. International treaties are entered into by the Executive and approved by the Senate against the background understanding that they will not be privately enforceable.

Furthermore, treaties are not the product of bicameral legislation, and private rights enforceable under 42 U.S.C. § 1983 must typically be created by Congress. *See D.D. ex rel. V.D. v. New York City Bd. of Educ.*, 465 F.3d 503, 513 (2d Cir. 2006) (noting majority view on question but declining to decide the question).

Given the absence of clear evidence that Article 36 was intended to create private rights enforceable under 42 U.S.C. § 1983, this Court should decline to recognize such a claim.

2. Article 36 of the Vienna Convention is not within the “Constitution and laws” that can secure rights, the deprivation of which is actionable under 42 U.S.C. § 1983. At best, the textual reference to “laws” is ambiguous about whether it includes international treaties, and the available

evidence of Congress' intent as well as general interpretive principles weigh heavily against that construction of the statute.⁴

Section 1983 derives from § 1 of the Ku Klux Klan Act of 1871, establishing and conferring federal jurisdiction over a private right of action to vindicate the deprivation, under color of state law, of “any rights, privileges, or immunities secured by the Constitution of the United States.” Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13. In 1874, following a multi-year effort to “simplify, organize, and consolidate all federal statutes of a general and permanent nature,” Congress enacted the Revised Statutes of 1874. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 624 (1979) (Powell, J., concurring). In relevant part, the revised statutes divided the original provision of the 1871 Act into one remedial section and two jurisdictional sections. *See Maine v. Thiboutot*, 448 U.S. 1, 6-7 (1980); *Chapman*, 441 U.S. at 627-628.

The remedial provision enacted as part of the revised statutes in 1874, and now codified at 42 U.S.C. § 1983, created a private right of action for the deprivation of “any rights, privileges, or immunities secured by the Constitution

⁴ As we next explain, the conclusion that § 1983's reference to “Constitution and laws” does not encompass treaties is based on the specific text, history, and context of Section 1 of the Ku Klux Klan Act of 1871, now codified in relevant part at 42 U.S.C. § 1983. This analysis does not imply that the Executive Branch generally construes the term “laws” to exclude treaties. In some contexts, Congress' use of the word can reasonably be interpreted to encompass treaties.

and laws.” *See Maine*, 448 U.S. at 6-7 (describing history); *Chapman*, 441 U.S. at 624. The Supreme Court has concluded that, notwithstanding statements in the legislative history that the adoption of the revised statutes was not intended to make substantive changes, the inclusion of “and laws” broadened the right of action created by that provision to include claims seeking to vindicate certain individual rights protected by federal statutes. *See Maine*, 448 U.S. at 4-5; *cf. Chapman*, 441 U.S. at 625-626, 627-644 (Powell, J., concurring).

There is no indication, however, that in enacting the revised statutes *in toto* in 1874 Congress intended to create a new private remedy for *treaty* violations (which, as we have explained, do not generally afford judicially enforceable private rights). The plain language of the provision — which refers to the vindication of rights protected by “the Constitution and laws,” rather than by the “Constitution, the Laws of the United States, and Treaties,” U.S. Const., art. III, § 2, cl. 1; *see also* U.S. Const., art. VI, cl. 2 (Supremacy Clause) — does not manifest an intent to reach claims arising under international treaties. Nor does the underlying purpose for the provision: Congress’ “prime focus” in enacting the Ku Klux Klan Act and other Reconstruction-era civil rights laws was to “ensur[e] a right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto.” *Chapman*, 441 U.S. at 611. The Supreme Court cautioned in *Chapman* that a court should be “hesitant,” in interpreting the

jurisdictional provisions that were adopted as part of the statutory codification of the Ku Klux Klan Act, to construe them to encompass “new claims which do not clearly fit within the terms of the statute.” *Id.* at 612. That concern is particularly acute in the context of recognizing a private right of action to enforce a provision of an international treaty.

Other historical evidence supports the conclusion that 42 U.S.C. § 1983’s reference to “laws” does not include international treaties. Just one year after enacting the statutory revision adding that term, Congress enacted a statute giving circuit courts original jurisdiction over civil claims above the jurisdictional amount and “arising under the Constitution or laws of the United States, or treaties made.” Act of Mar. 3, 1875, ch. 137, 18 Stat. 470. The clear implication is that the term “laws” as used in both statutes does not include treaties.

Similarly, the Habeas Corpus Act of 1867 extended the federal habeas power to “all cases where any person may be restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States.” Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. Once again, the distinction between this text and the text of § 1983 supports the conclusion that “laws” in § 1983 does not include treaties. The distinction between the two provisions also suggests that Congress might have intended to provide for judicial review, through the specific equitable remedy of habeas corpus, of confinement alleged to be in violation of a

treaty (assuming that the treaty created enforceable individual rights), but not to provide the full panoply of equitable and legal relief under § 1983 for any treaty violation, no matter how minor the resulting harm.

In contrast to these broadly-worded statutory provisions, the provision of the 1874 revised statutes that codified the jurisdictional grant to district courts in § 1 of the Ku Klux Klan Act (now codified at 28 U.S.C. § 1343(a)(3)), conferred jurisdiction over civil actions to redress the deprivation of rights secured “by the Constitution of the United States, or * * * by any law providing for equal rights.” *See Thiboutot*, 448 U.S. at 15-16 (describing history). Although the Supreme Court has held that this provision is narrower than a plain-language reading of 28 U.S.C. § 1983, *see id.* at 20-21, Congress’ use of this construction in the jurisdictional provision weighs against reading the parallel remedial provision in § 1983 to have a wholly different, and significantly broader, scope, that does *not* follow from a plain-language reading of the phrase “and laws.”

These historic provisions have been repeatedly amended and recodified since their original enactment, yet Congress has chosen not to change the differences in wording among the various statutes. Both the general federal-question statute, 28 U.S.C. § 1331, and the federal habeas statute, 28 U.S.C. § 2241, continue to include the “Constitution,” “laws,” and “treaties” as among the sources of rights that can be invoked under those provisions. In contrast, 42

U.S.C. § 1983 continues to refer only to rights secured by the “Constitution and laws.” This Court should decline to read 42 U.S.C. § 1983 so as to render those textual differences a nullity.

The Supreme Court has not addressed the question whether an international treaty is one of the “laws” that secures rights that can be vindicated under § 1983. However, the Court has rejected an expansive interpretation of § 1983, describing the cause of action created as vindicating rights under “the United States Constitution and federal statutes that it describes.” *Baker v. McCollan*, 443 U.S. 137, 145 n.3 (1979). Consistent with this construction, the Supreme Court has held that § 1983 does not encompass claims arising under common or “general” law, *see Bowman v. Chicago N.W. Ry. Co.*, 115 U.S. 611 (1885), or claims arising out of rights or privileges conferred by state law. *See Baker*, 443 U.S. at 142-144; *Carter v. Greenhow*, 114 U.S. 317 (1885).

In *Baldwin v. Franks*, 120 U.S. 678 (1887), the Supreme Court held that the forcible removal of Chinese nationals from their homes and businesses in violation of a treaty between the United States and China did not constitute a crime under federal statutes prohibiting conspiracies to forcibly “prevent, hinder, or delay the execution of any law of the United States,” and “to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States.” *Id.* at 662-663,

693-695. In reaching that conclusion, the Court assumed that the treaty could constitute a “law” within the meaning of the statutes, *id.* at 693-694, 661-662 — a point that the petitioner had not challenged in his brief to the Court. *See Baldwin v. Franks*, 120 U.S. 678, Brief of Petitioner in Error, in Transcript of Record (filed Apr. 18, 1886). The Court’s assumption that the term “laws” as used in certain criminal civil-rights statutes included treaties, which was made under different operative statutes and without an analysis of their text and history, does not support an interpretation of the unexplained addition of the term “and laws” in the *civil* remedy under § 1983 to encompass violations of international treaties. In the criminal context, the exercise of prosecutorial discretion can safeguard against harmful applications of the statute, which could interfere with our foreign relations or the State Department’s implementation of treaty obligations. The private civil remedy created by 42 U.S.C. § 1983, in contrast, contains no such safeguard — weighing against a broad construction of the statutory cause of action it creates. *Cf. Central Bank v. First Interstate Bank*, 511 U.S. 164, 190-191 (1994) (refusing to interpret criminal aiding-and-abetting liability as evidence of Congress’ intent to impose civil aiding-and-abetting liability). In the criminal context, furthermore, the United States Government can provide an authoritative interpretation of an international treaty, taking into account foreign policy and other considerations. When a private party sues under § 1983, the United States is not a party to the

litigation, and may not be before the court to offer its construction of a treaty or international agreement.

Indeed, even in the context of treaties between the United States Government and Indian tribes, courts have questioned whether claims seeking to vindicate rights to tribal self-government and to take fish are cognizable under 42 U.S.C. § 1983, because they are “grounded in treaties, as opposed to specific federal statutes or the Constitution.” *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 662 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990). Even if treaties with Indian tribes were encompassed by § 1983’s reference to “laws,” furthermore, that fact would not mean that Congress intended for international treaties to be covered by the statute. The United States Government’s “unique obligation toward the Indians” warrants in some circumstances more favorable treatment than is afforded to others. *Morton v. Mancari*, 417 U.S. 535, 555 (1974); *see also, e.g.,* *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675-676 (1979). The Indians also have a federal common-law right, dating back to the adoption of the Constitution, to sue to vindicate certain rights. *See Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 234-236 (1985). And Indian tribes, as dependent sovereigns, have no recourse against the United States under public international law or through diplomatic means to redress violations of Indian treaties. *See also* Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566

(providing that no Indian tribe in territory of the United States would thereafter “be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty”), *codified as amended at 25 U.S.C. § 71*.

International treaties, in contrast, are adopted with a background presumption against judicial enforcement, *see pp. 5-6, supra*, which protects the prerogatives of the Executive in the conduct of foreign affairs. As the Supreme Court explained in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004), the potential foreign-policy implications of permitting private rights of action to enforce international law “should make courts particularly wary” of recognizing claims of this sort. *Cf. Gonzaga Univ.*, 536 U.S. at 291 (Breyer, J., concurring) (noting that no “single legal formula” can govern the “ultimate question” whether Congress intended for private individuals to have a cause of action under § 1983).

Finally, even if some treaties could fall within the “laws” that create rights enforceable under 42 U.S.C. § 1983, this Court should decline to recognize a cause of action under § 1983 to enforce Article 36 of the Vienna Convention — a treaty that, as we have explained, confers no enforceable individual rights. Courts have held that the federal habeas statute’s reference to “treaties,” 42 U.S.C. § 2241, encompasses only treaties conferring enforceable individual rights. *See, e.g., Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005), *rev’d on other*

grounds, 126 S. Ct. 2749 (2006); *Bannerman v. Snyder*, 325 F.3d 722, 724 (6th Cir. 2003); *Wang v. Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003). There certainly would be no basis for reading the term “laws” in § 1983 more broadly, to permit a cause of action to enforce a treaty provision that was not intended to create privately enforceable rights.

Furthermore, where Congress creates a specific statutory remedy for the vindication of a federal right, that is “ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983.” *Abrams*, 544 U.S. at 121. A court should be particularly willing to find displacement of a § 1983 remedy in the area of foreign affairs. *Cf. Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942) (recognizing that courts are more likely to find federal preemption when Congress legislates “in a field that touche[s] international relations” than in an area of traditional police power). Here, the Senate gave its advice and consent to the Convention and to the Optional Protocol, which set out a specific remedial scheme.⁵ The existence of explicit government-to-government remedies under the Optional Protocol should bar recognition of a suit under § 1983.

⁵ While the Executive Branch subsequently exercised its authority to withdraw from the Protocol, no affirmative action by Congress was required to effect that withdrawal.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

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MARCH 2007

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