tantly, these principles signal an end to the *Casey* facial invalidation approach in the abortion context. Indeed, the separation-of-powers principles underlying *Ayotte* are starkly inconsistent with the *Casey* approach. By once again invoking and applying *Salerno* in the abortion context, the Court can resolve this inconsistency and clarify the standard that lower courts should apply to facial challenges of abortion regulations. The Court should do so this Term in *Gonzales v. Carhart*.[70]

B. Status of International Law

Enforceability of Treaties in Domestic Courts — Vienna Convention on Consular Relations. — Article 36 of the Vienna Convention on Consular Relations[1] (VCCR) "guarantees open channels of communication between detained foreign nationals and their consulates in signatory countries."[2] In a 2005 case, *Medellin v. Dretke*,[3] the Supreme Court chose not to consider whether that Article "create[d] a judicially enforceable individual right,"[4] instead dismissing the writ of certiorari as improvidently granted.[5] Justice O'Connor, dissenting from the Court's dismissal, noted that it is "unsound to avoid questions of national importance when they are bound to recur."[6] Confronting the same issue a year later, the Court again failed to heed Justice O'Connor's advice. Last Term, in *Sanchez-Llamas v. Oregon*,[7] the Supreme Court declined to decide whether Article 36 creates a judicially enforceable right,[8] holding that even if it does, suppression is not an appropriate remedy, and state procedural default rules apply.[9] By avoiding the question of the existence of judicially enforceable rights under Article 36 and by considering only a very limited set of remedies, the Court's decision exemplifies judicial minimalism. While

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[70] 126 S. Ct. 1314 (2006), *granting cert. to* Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005) (facially invalidating the Partial-Birth Abortion Ban Act of 2003).

[1] Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].

[2] Medellin v. Dretke, 125 S. Ct. 2088, 2096 (2005) (O'Connor, J., dissenting).

[3] 125 S. Ct. 2088 (per curiam).

[4] *Id.* at 2095 (O'Connor, J., dissenting).

[5] *Id.* at 2092 (per curiam).

[6] *Id.* at 2096 (O'Connor, J., dissenting).

[7] 126 S. Ct. 2669 (2006). In *Sanchez-Llamas*, the Court consolidated two cases — *Sanchez-Llamas v. Oregon*, 126 S. Ct. 620 (2005) (mem.), and *Bustillo v. Johnson*, 126 S. Ct. 621 (2005) (mem.).

[8] The relevant part of Article 36 provides that if a national of a sending state arrested in the receiving state "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of the arrest. VCCR, *supra* note 1, art. 36. The authorities of the receiving State must also inform the arrested foreign national "without delay" of this right. *Id.*

[9] *Sanchez-Llamas*, 126 S. Ct. at 2674.

"leaving things undecided" may be advisable in some circumstances,[10] in *Sanchez-Llamas* it was an unwise approach that is likely to result in excessive uncertainty and confusion when the question resurfaces in the lower courts.

Moises Sanchez-Llamas, a Mexican national, was arrested in December of 1999 for his involvement in the shooting of a police officer.[11] After being advised of his *Miranda*[12] rights, Sanchez-Llamas made self-incriminating statements in the course of interrogation.[13] He was never informed of his right under Article 36 to contact the Mexican consulate.[14] Sanchez-Llamas was charged with attempted aggravated murder, attempted murder, and other offenses.[15]

Before trial, Sanchez-Llamas moved to suppress his custodial statements, arguing that they were made involuntarily and resulted from a violation of Article 36.[16] The trial court denied the motion, and Sanchez-Llamas was convicted and sentenced to over twenty years in prison.[17] The Oregon Court of Appeals affirmed the trial court's decision.[18] The Oregon Supreme Court also affirmed, holding that Article 36 did not create individually enforceable rights and that suppression would be an inappropriate remedy in any event.[19]

Mario Bustillo, a Honduran national, was arrested in December 1997 and charged with murder.[20] Like Sanchez-Llamas, he was never informed of his Article 36 rights.[21] Bustillo was convicted of first-degree murder and sentenced to thirty years in prison.[22] He did not raise the VCCR violation at trial or on direct appeal, asserting it for the first time in his state habeas corpus petition.[23] The court dismissed Bustillo's petition, holding that the Article 36 claim was "procedurally barred" because Bustillo had not previously asserted it.[24] The Su-

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[10] *See* Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

[11] *Sanchez-Llamas*, 126 S. Ct. at 2675–76.

[12] Miranda v. Arizona, 384 U.S. 436 (1966).

[13] *Sanchez-Llamas*, 126 S. Ct. at 2676.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] State v. Sanchez-Llamas, 84 P.3d 1133 (Or. Ct. App. 2004).

[19] State v. Sanchez-Llamas, 108 P.3d 573, 578 (Or. 2005) (en banc).

[20] *Sanchez-Llamas*, 126 S. Ct. at 2676.

[21] *Id.*

[22] *Id.* Bustillo's sentence was affirmed on appeal. *Id.*

[23] *Id.* Bustillo contended that if he had been notified of his rights under the VCCR, he would have contacted the Honduran consulate as soon as possible, and the consulate in turn could have helped him locate a person important to Bustillo's trial defense. *Id.* at 2676–77. Bustillo also asserted a claim of ineffective assistance of counsel based on his attorney's failure to notify him of his Article 36 rights. *Id.* at 2677.

[24] *Id.* at 2677. The court also denied his ineffective assistance of counsel claim. *Id.*

preme Court of Virginia denied Bustillo's petition for appeal, finding no reversible error in the habeas court's dismissal of the VCCR claim.[25]

The Supreme Court affirmed both judgments. Writing for the majority, Chief Justice Roberts[26] declared it unnecessary to decide whether Article 36 granted individually enforceable rights.[27] Instead, the Court assumed without deciding that the VCCR conferred such rights and proceeded directly to the issue of "whether suppression of evidence is a proper remedy for a violation of Article 36."[28]

Turning first to Sanchez-Llamas's arguments, the Court held that the VCCR did not itself mandate suppression.[29] Because the treaty did not require a specific remedy, the Court could not create one for the state courts given the limits of its supervisory powers.[30] In any case, Article 36(2) required that Article 36 rights be "exercised in conformity with the laws and regulations of the receiving State."[31] Chief Justice Roberts pointed out that suppression is "not a remedy [this Court] appl[ies] lightly"[32] and provided three reasons for its inappropriateness with respect to an Article 36 violation. First, in the United States, the exclusionary rule is limited largely to remedying constitutional violations dealing with searches or interrogations.[33] Consular notification "has nothing whatsoever to do with" either, and in fact does not guarantee any specific assistance to the defendant.[34] Second, other legal protections, such as the right to counsel, can mitigate the potential damage resulting from the violation of the right to consular notification.[35] Third, the right to consular notification can be vindicated by means other than suppression of evidence, such as communicating through diplomatic channels.[36]

Turning then to Bustillo's claim, the Court addressed whether the procedural default rule applies to Article 36 violations. Many states apply this rule in post conviction proceedings to bar claims not raised

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[25] *Id.*

[26] Chief Justice Roberts was joined by Justices Scalia, Kennedy, Thomas, and Alito.

[27] *Sanchez-Llamas*, 126 S. Ct. at 2677.

[28] *Id.*

[29] *Id.* at 2678. The VCCR's text does not specify any particular remedy and "nearly all [foreign States] refuse to recognize [the suppression remedy] as a matter of domestic law." *Id.*

[30] *Id.* at 2679.

[31] *Id.* at 2680 (quoting VCCR, *supra* note 1, art. 36(2)) (internal quotation marks omitted).

[32] *Id.* In fact, earlier in the Term the Court held that the exclusionary rule is an inappropriate remedy for knock and announce violations because they "have nothing to do with the seizure of the evidence." Hudson v. Michigan, 126 S. Ct. 2159, 2165 (2006); *see also supra* p. 175.

[33] *Sanchez-Llamas*, 126 S. Ct. at 2680–81.

[34] *Id.* at 2681.

[35] *Id.* at 2681–82.

[36] *Id.* at 2682.

on direct appeal,[37] but Bustillo argued that it should not apply to consular non-notification claims.[38] Though the Court in *Breard v. Greene*[39] held that the procedural default rule applies to Article 36 violations,[40] Bustillo argued that *Breard* should not control because the procedural default issue was not necessary to the resolution of that case.[41] The Court disagreed, explaining that the "resolution of the procedural default question . . . was the principal reason for the denial of the petitioner's claim."[42]

The Court then analyzed *Breard*'s precedential value in light of the more recent International Court of Justice (ICJ) decisions in *LaGrand*[43] and *Avena*,[44] which held that applying procedural default rules to Article 36 violations may fail to give full effect to the VCCR.[45] Observing that the ICJ's decisions deserve "respectful consideration," the Court nevertheless found the reasoning in these two decisions to be unpersuasive.[46] Under Article 36(2), the right to consular notification must be exercised in accordance with domestic law.[47] In the U.S. adversarial system, this mandate requires the application of procedural bars, even to constitutional claims.[48] The Court illustrated the propriety of applying procedural default rules to the VCCR violations by comparing Article 36 rights to *Miranda* rights.[49] Although a violation of either *Miranda* or Article 36 is likely to result in a defendant's ignorance of his rights, the procedural default rules nonetheless apply to *Miranda* claims, preventing the defendant from raising such claims on post conviction appeal.[50] The same should be true, the Court reasoned, for Article 36 violations.[51]

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[37] *Id.* The procedural default doctrine does not apply if the defendant can show "both 'cause' for not raising the claim and 'prejudice' from not having done so." *Id.* (quoting Massaro v. United States, 123 S. Ct. 1690, 1693 (2003)).

[38] *Id.*

[39] 523 U.S. 371 (1998) (per curiam).

[40] *Id.* at 375; *see Sanchez-Llamas*, 126 S. Ct. at 2682.

[41] *Sanchez-Llamas*, 126 S. Ct. at 2683. The *Breard* Court also held that the violation could not have had an effect at trial. *Breard*, 523 U.S. at 377–78.

[42] *Sanchez-Llamas*, 126 S. Ct. at 2683.

[43] LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

[44] Avena and Other Mexican Nationals (Mex. v. U.S.), 43 I.L.M. 581 (Mar. 31, 2004).

[45] *LaGrand*, 2001 I.C.J. at 498; *Avena*, 43 I.L.M. at 613.

[46] *Sanchez-Llamas*, 126 S. Ct. at 2685 (quoting *Breard*, 523 U.S. at 375) (internal quotation marks omitted). The Court reasoned that because Article 36 specifically accommodates domestic law, procedural default rules do not violate the Convention. *Id.*

[47] *Id.*

[48] *Id.* at 2686 (noting the special role of the procedural default rule in adversarial systems, in which litigants bear the responsibility for their own failure to raise claims).

[49] *Id.* at 2687.

[50] *Id.*

[51] *Id.*

Justice Ginsburg concurred in the judgment. She joined the dissent's argument that Article 36 created judicially enforceable rights for foreign detainees.[52] However, after reciting the specific facts of Sanchez-Llamas's and Bustillo's arrests and trials,[53] Justice Ginsburg determined that the majority's disposition of the cases before the Court was correct.[54] Leaving open the possibility that some cases may warrant suppression or "displacement of . . . procedural default rules," she concluded that "neither Sanchez-Llamas'[s] case nor Bustillo's belongs in that category."[55]

Justice Breyer dissented.[56] Unlike the majority, the dissent would have reached the individual rights issue and would have held that Article 36 created judicially enforceable rights for detained foreign nationals.[57] Focusing on the "full effect" provision of Article 36,[58] the dissent argued that the procedural default rules do not apply if, first, the failure to raise the Article 36 claim resulted from the claimant's ignorance of his rights, and second, state law provides no other way to "effectively cure related prejudice."[59] Consequently, Justice Breyer would have remanded both *Sanchez-Llamas* and *Bustillo*, "permitting the States to apply their own procedural and remedial laws" in a way that is "consistent with [Article 36's] demand for an effective remedy."[60]

Sanchez-Llamas is an example of judicial minimalism: it decided a fairly narrow set of issues, and it did so without broaching the core underlying subject, the availability of individually enforceable rights under Article 36. Though such judicial reluctance to make unnecessarily broad decisions may be prudent in many situations,[61] that ap-

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[52] *Id.* at 2688 (Ginsburg, J., concurring in the judgment).

[53] *Id.* (Sanchez-Llamas); *id.* at 2690 (Bustillo).

[54] *Id.* at 2690.

[55] *Id.*

[56] Justices Stevens and Souter joined the dissent in full, and Justice Ginsburg joined in part.

[57] *Sanchez-Llamas*, 126 S. Ct. at 2694–98 (Breyer, J., dissenting). Justice Breyer reached this conclusion by considering the "'nature' of the [VCCR] provisions," *id.* at 2695, "the language of Article 36," *id.* at 2695–96, "treaty provisions similar to Article 36," *id.* at 2696, and the ICJ opinions in *LaGrand* and *Avena*, *id.* at 2696–97. It was this portion of the dissent that Justice Ginsburg joined.

[58] Article 36 rights are to 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 [these rights] are intended*." VCCR, *supra* note 1, art. 36 (emphasis added).

[59] *Sanchez-Llamas*, 126 S. Ct. at 2698, 2709 (Breyer, J., dissenting). Justice Breyer drew support for this conclusion from the text of the VCCR, its drafting history, and ICJ decisions. *Id.* at 2698–2702.

[60] *Id.* at 2691.

[61] As Professor Cass Sunstein notes, "with its insistent focus on procedural safeguards, minimalism has real attractions, perhaps above all in a period in which judges are forced to reconcile

proach was inappropriate in the instant case. Predictability is extremely important in interpreting international agreements, the Court did not face rapidly changing circumstances, and the value of the right to consular notification was not in dispute. Without providing sufficient reason, the Court refused to resolve an issue that has plagued the lower courts for many years, which will likely lead to needless uncertainty in the future.

Professor Cass Sunstein argues that many of the Rehnquist Court's decisions can best be seen as products of judicial minimalism.[62] Minimalists, Professor Sunstein observes, "try to decide cases rather than to set down broad rules."[63] Minimalist decisions can be described as narrow, because "they do not decide other cases . . . unless they are forced to do so,"[64] and shallow, because "they avoid foundational issues if and to the extent that they can."[65] Concretizing Professor Sunstein's conception, Professor Neil Siegel defines a minimalist decision as one that must "result from the (apparently) intentional choice by a majority of Justices" to decide the case as "narrowly and shallowly" as reasonably possible in the face of an available broader and deeper alternative.[66]

Sanchez-Llamas falls largely within Professor Sunstein's and Professor Siegel's respective definitions of a minimalist decision. First, it "appears to reflect a conscious choice" of the Court to make a very limited ruling, as "all the Justices knew . . . that broader options were on the table."[67] In *Sanchez-Llamas*, the Court explicitly refused "to resolve the question whether the VCCR granted individuals enforceable rights."[68] Given that the Court had granted certiorari "in significant part in order to decide this question,"[69] the Justices were undoubtedly aware that they were electing not to make a more expansive decision.

Second, it is clear that the Court's decision could have been deeper, but that the Court instead picked the shallowest alternative. The

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the demands of national security with the commitment to liberty." Cass R. Sunstein, Op-Ed., *The Smallest Court in the Land*, N.Y. TIMES, July 4, 2004, § 4 (Week in Review), at 9.

62 CASS R. SUNSTEIN, ONE CASE AT A TIME 9 (1999) (arguing that Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer "embrace minimalism").

63 Sunstein, *supra* note 10, at 15.

64 *Id.*

65 *Id.* at 21.

66 Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1963 (2005). Professor Siegel sought to fashion "a (relatively) falsifiable definition of minimalism." *Id.* He also disputed Professor Sunstein's claim that judicial minimalism characterized the Court's October 2003 Term. *Id.* at 2001. However, that disagreement is beyond the scope of this Comment.

67 *Id.* at 1981.

68 *Sanchez-Llamas*, 126 S. Ct. at 2677.

69 *Id.* at 2694 (Breyer, J., dissenting); *see also id.* at 2677 (majority opinion).

Court could have addressed the "core issue"[70] of the existence of individual rights under Article 36 — the course of action urged by both the dissent and the concurrence.[71] Moreover, the petitioners extensively briefed the Court on the individual rights issue,[72] and it was discussed at length at oral argument.[73] In the end, however, the Court decided the remedial issue only.[74]

Third, the holding is relatively narrow; it does not address other possible remedies for the Article 36 violation. The *Sanchez-Llamas* majority readily acknowledged that "[t]he relief petitioners request[ed] [was], by any measure, extraordinary."[75] Yet it failed to consider the availability of other remedies, such as private rights of action or a continuance.[76] The Court's judgment on the range of available remedies would have been especially helpful in light of the ICJ's request that the U.S. courts provide "review and reconsideration" in cases of Article 36 violations.[77] Admittedly, the Court did not choose the narrowest option available, as would have been necessary in order to fit Professor Siegel's rather strict definition of minimalism.[78] For instance, it could have taken Justice Ginsburg's approach and ruled that suppression and inapplicability of procedural default were inappropriate remedies in the petitioners' cases specifically.[79] Nevertheless, the case still qualifies as a "relatively narrow and shallow holding[]."[80]

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[70] Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com (Mar. 29, 2006, 13:17 EST).

[71] *See Sanchez-Llamas*, 126 S. Ct. at 2694 (Breyer, J., dissenting); *id.* at 2688 (Ginsburg, J., concurring in the judgment).

[72] *See, e.g.*, Petition for Writ of Certiorari at 16–18, *Sanchez-Llamas*, 126 S. Ct. 2669 (No. 04-10566).

[73] *See* Transcript of Oral Argument at 5–8, 43, 46, 55–56, 65–72, 76–81, *Sanchez-Llamas*, 126 S. Ct. 2669 (No. 04-10566).

[74] As Professor Sunstein points out, shallow decisions enable judges "who disagree or are unsure about the foundations of constitutional rights [to] agree on how particular cases should be handled." SUNSTEIN, *supra* note 62, at 13. Given that at least four Justices in *Sanchez-Llamas* viewed Article 36 as creating individually enforceable rights, it is possible that this pragmatic concern was behind the Court's decision.

[75] *Sanchez-Llamas*, 126 S. Ct. at 2687.

[76] *See, e.g.*, Aaron A. Ostrovsky & Brandon E. Reavis, Comment, Rebus Sic Stantibus*: Notification of Consular Rights After* Medellin, 27 MICH. J. INT'L L. 657, 683–85 (2006) (discussing possible remedies for Article 36 violations). The *Sanchez-Llamas* Court briefly suggested that "[a] defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police." *Sanchez-Llamas*, 126 S. Ct. at 2682. However, the Court never elaborated on the exact contours of such relief.

[77] Avena and Other Mexican Nationals (Mex. v. U.S.), 43 I.L.M. 581, 615 (Mar. 31, 2004).

[78] As Professor Sunstein points out, the Supreme Court is unlikely to "pursue minimalism with the intensity and rigor suggested by Siegel's hypothesis." Cass R. Sunstein, *Testing Minimalism: A Reply*, 104 MICH. L. REV. 123, 125 (2005).

[79] *See Sanchez-Llamas*, 126 S. Ct. at 2688–90 (Ginsburg, J., concurring in the judgment).

[80] Siegel, *supra* note 66, at 2018 (emphasis omitted); *see also* Sunstein, *supra* note 78, at 125 & n.15.

The virtues and vices of judicial minimalism have been hotly contested among academics,[81] and this Comment does not attempt to contribute to that debate. However, even proponents of minimalism admit that it is ill-advised in some situations. Professor Sunstein observes that nonminimalist decisions are most appropriate when there is no relevant factual or moral uncertainty surrounding the issue, suggesting that circumstances are not likely to change "in large and relevant ways in the near future,"[82] and when there is a need to give guidance to lower courts to "reduce costly uncertainty."[83] In short, the assessment of minimalism depends on the respective costs of decisions and of errors; if minimalist decisions are not cost reducing in the aggregate, they are less justified. As long as the relevant situation is likely to remain the same, there is little reason for the Court to postpone its ruling on an issue. And if the lower courts, litigants, and ordinary people need direction from the Court, there is a great imperative to decide.

The factual situation surrounding the Article 36 claims is likely to remain unchanged. The VCCR was concluded in 1963,[84] and the United States ratified the Convention in 1969.[85] Since the VCCR's entry into force, no state party has repudiated the treaty, and the United States has made no reservations to the treaty.[86] It is exceedingly unlikely that the United States would withdraw from the VCCR, given its support for the treaty and the need to protect U.S. diplomats abroad.[87] Nor are relevant contexts likely to vary widely in a way that would confound or unsettle a clear ruling. All cases brought under Article 36 involve the same factual situation: an arrested foreign national was not apprised of his rights under the VCCR.

In addition, while the enforceability of and means for enforcing Article 36 have been widely debated, the underlying policy goal — that

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[81] *See, e.g.*, SUNSTEIN, *supra* note 62, at 3–72.

[82] Sunstein, *supra* note 10, at 17.

[83] *Id.* at 30.

[84] VCCR, *supra* note 1.

[85] *See* 115 CONG. REC. 30953, 30997 (1969).

[86] 1 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL at 105 (2005). The United States generally does not shy away from making numerous reservations to its treaty commitments, suggesting that the VCCR is an especially stable document. *See generally* Kenneth Roth, *The Charade of U.S. Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347 (2000) (discussing U.S. reservations to human rights treaties).

[87] *See, e.g.*, U.S. Department of State, Assistance to U.S. Citizens Arrested Abroad, *available at* http://travel.state.gov/travel/tips/emergencies/emergencies_1199.html (last visited Oct. 15, 2006). The United States did pull out of the Optional Protocol to the VCCR, withdrawing from the ICJ's jurisdiction. U.S. Dep't of State, Announcement: All Consular Notification Requirements Remain in Effect, *available at* http://travel.state.gov/news/news_2155.html (last visited Oct. 15, 2006). At the same time, however, it reaffirmed its commitment to the "principles and provisions" of the VCCR itself. *Id.*

all foreign defendants should receive consular notification — has been accepted by the United States as a valuable objective deserving of governmental support and implementation.[88] This factor distinguishes the present case from other controversial issues of today, such as abortion and gay rights, in which the debates about the meaning of federalism and the Equal Protection Clause often mask disagreements as to the morality of the underlying issues themselves.

While the relative stability of the Article 36 enforcement controversy suggests that there is no harm in immediately deciding the issue, the need to provide guidance to the lower courts affirmatively counsels in favor of providing a decision. Courts are split on the availability of an individually enforceable right under Article 36.[89] Some cases simply decide the remedial issue without addressing the individual rights question, much like *Sanchez-Llamas*.[90] One commentator suggests that the "confusion arises because of the Supreme Court's dicta in *Breard*, which states that the [VCCR] 'arguably confers on an individual the right to consular assistance following arrest.'"[91] This dictum may have led the lower courts to "avoid[] the issue pending further Supreme Court guidance."[92]

There is also confusion in the lower courts as to the appropriate remedy for an Article 36 violation. Even as *Sanchez-Llamas* was decided, there was at least one case in the lower courts fashioning a remedy that neither the *Sanchez-Llamas* majority nor the dissent considered. In *Jogi v. Voges*,[93] a three-judge panel of the Seventh Circuit held that Article 36 did create an individually enforceable rights[94] and that damages are an appropriate remedy.[95] The defendants in that case — county law enforcement officials — have appealed the decision

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[88] *See, e.g.*, U.S. Department of State Telegram to All U.S. Diplomatic and Consular Posts Abroad Concerning Consular Assistance for American Nationals Abroad, Jan. 1, 2001, *available at* http://www.state.gov/s/l/16139.htm ("[C]onsular notification . . . has long been crucial to providing basic protective services abroad. . . . [T]he Department is working to improve our record domestically.").

[89] *Compare* Cardenas v. Dretke, 405 F.3d 244, 253 (5th Cir. 2005) (holding that the VCCR did not confer individually enforceable rights), *and* United States v. Emuegbunam, 268 F.3d 377, 392 (6th Cir. 2001) (same), *with* Jogi v. Voges, 425 F.3d 367, 382 (7th Cir. 2005) (holding that Article 36 created an individually enforceable right), *and* United States v. Hongla-Yamche, 55 F. Supp. 2d 74, 78 (D. Mass. 1999) (same).

[90] *See, e.g.*, United States v. Page, 232 F.3d 536, 541 (6th Cir. 2000); United States v. Lombera-Camorlinga, 206 F.3d 882, 885 (9th Cir. 2000); United States v. Li, 206 F.3d 56, 66 (1st Cir. 2000).

[91] Mani Sheik, Comment, *From* Breard *to* Medellin*: Supreme Court Inaction or ICJ Activism in the Field of International Law?*, 94 CAL. L. REV. 531, 548 (2006) (quoting Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam)).

[92] *Id.*

[93] 425 F.3d 367 (7th Cir. 2005).

[94] *Id.* at 380–82.

[95] *Id.* at 385.

and petitioned for rehearing en banc.[96] Regrettably, the *Sanchez-Llamas* decision will not give helpful direction to the court because "the Supreme Court has not addressed the issue that is at the heart of Mr. Jogi's case": the availability of monetary damages.[97]

Moreover, the Court did not consider whether a defendant may be prejudiced by an Article 36 violation or what the appropriate test for prejudice might be. An Oklahoma court, for example, has ruled that a defendant need not prove that consular assistance would have affected the outcome of the trial in order to prevail on the prejudice issue.[98] Yet in *Breard*, the Court noted that "it is extremely doubtful that the [Article 36] violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial."[99] The test for prejudice, then, is another area in which the Court dropped a hint as to the appropriate holding but failed to provide an affirmative solution.

From *Breard* to *Medellin*, Article 36 of the VCCR has had a long history in the U.S. courts. Yet the Supreme Court has persistently refused to resolve the basic question of the existence of an individually enforceable right. Unfortunately, in *Sanchez-Llamas*, it again failed to "provide the ultimate answer[]."[100]

III. FEDERAL STATUTES AND REGULATIONS

A. Civil Rights Act, Title VII

Standard for Retaliatory Conduct. — In the past decade, the number of retaliation claims under Title VII of the Civil Rights Act of 1964[1] has skyrocketed,[2] and commentators have highlighted the impact of retaliation on workplace dynamics.[3] However, the circuits

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[96] *See* Jennifer Koons, *Reaction:* Sanchez-Llamas v. Oregon/Bustillo v. Johnson, MEDILL NEWS SERVICE, June 2006, http://docket.medill.northwestern.edu/archives/003751.php.

[97] *Id.*

[98] Torres v. State, 120 P.3d 1184, 1187 (Okla. Crim. App. 2005).

[99] Breard v. Greene, 523 U.S. 371, 377 (1998) (per curiam).

[100] Medellin v. Dretke, 125 S. Ct. 2088, 2095 (2005) (Ginsburg, J., concurring).

[1] Pub. L. No. 88-352, 78 Stat. 241.

[2] The number of retaliation charges increased from 10,499 in fiscal year 1992 (approximately 14.5% of all annual Equal Employment Opportunity Commission cases) to 19,429 in fiscal year 2005 (approximately 25.8% of all annual cases). Equal Employment Opportunity Commission, Charge Statistics FY 1992 Through FY 2005, http://www.eeoc.gov/stats/charges.html (last visited Oct. 15, 2006); *see also* Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 122 (1995) (describing a survey of state employees in which sixty-two percent of respondents indicated that they experienced retaliation after reporting harassment).

[3] *See, e.g.*, Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 67–76 (2005) (discussing the importance of retaliation protection to the goals of achieving equal citizenship, eradicating sexism, and facilitating the development of social bonds across the sexes); Edward A. Marshall, *Excluding*