No. 11-_____

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IN THE

Supreme Court of the United States

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HUMBERTO LEAL GARCÍA,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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THIS IS A CAPITAL CASE. MR. LEAL IS SCHEDULED TO BE EXECUTED JULY 7, 2011

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CAPITAL CASE

QUESTIONS PRESENTED

In the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31), the International Court of Justice determined that Humberto Leal García and fifty other Mexican nationals under sentence of death in the United States were entitled to receive judicial review and reconsideration of their convictions and sentences in light of the violation of their rights under the Vienna Convention on Consular Relations. In *Medellin v. Texas*, 552 U.S. 491 (2008), this Court held that the United States is bound under Article 94(1) of the United Nations Charter to comply with the *Avena* Judgment and settled the procedures by which, as a matter of U.S. constitutional law, the international obligation to comply may be given domestic effect. Specifically, this Court held that neither it nor the President had the authority to execute the international obligation, which instead lies with the Congress.

In response to that ruling, the U.S. Government has worked closely with Congressional leaders to introduce legislation that would fully implement the United States' international legal obligations while remaining faithful to this Court's jurisprudence regarding the application of the Vienna Convention on Consular Relations in domestic courts. On June 14, 2011, legislation was introduced in the Senate with the full support of the U.S. Department of Justice, Department of State, Department of Defense, and Department of Homeland Security. Nonetheless, the State of Texas intends to execute Mr. Leal on July 7, 2011 before Congress has had a reasonable opportunity to exercise its constitutional prerogative to determine compliance.

This case presents the following questions:

1. Whether Mr. Leal's Fifth and Fourteenth Amendment rights not to be deprived of his life without due process of law entitle him to remain alive until Congress has had a reasonable opportunity to exercise its constitutional prerogative to implement the right to judicial review and reconsideration under *Avena and Other Mexican Nationals*, so that he can secure access to a remedy to which he is entitled by virtue of a binding international legal obligation of the United States; and

2. Whether the Court should grant a writ of habeas corpus to adjudicate Mr. Leal's claim on the merits, where he seeks relief pursuant to a binding international legal obligation that the federal political branches seek to implement, and where adequate relief cannot be obtained in any other form or from any other court.

PARTIES

All parties to the proceedings below are named in the caption of the case.

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OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas was issued on June 27, 2011. *See* A397. The Court held that Mr. Leal's Second Subsequent Application for Post-Conviction Writ of Habeas Corpus was barred under Tex. Code Crim. P. Art. 11.071, §5. Three judges concurred in the result, but urged the Texas Board of Pardons and Paroles and Governor Rick Perry to exercise their powers to grant a reprieve. A404.

JURISDICTION

The final judgment of the Court of Criminal Appeals of Texas, that state's court of last resort in criminal matters, issued on June 27, 2011. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions, which are reproduced beginning at page A31 in the Appendix:

1. United States Constitution, Amend. V;
2. United States Constitution, Amend. XIV;
3. United States Constitution, art. VI, cl. 2;
4. All Writs Act, 28 U.S.C. §1651(a);
5. United Nations Charter, art. 94(1), 59 Stat. 1031 (opened for signature June 26, 1945) (the "UN Charter");

6. Statute of the International Court of Justice, arts. 36(1), 59-60, 59 Stat. 1031 (opened for signature June 26, 1945) (the "ICJ Statute");

7. Texas Code of Criminal Procedure, art. 11.071, § 5(a), (d)-(e).

STATEMENT OF THE CASE

A. *Avena,* The Presidential Determination, and *Medellin v. Texas*

In the *Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 12 (Mar. 31) ("*Avena*"), the International Court of Justice ("ICJ") determined that the United States had violated the rights of Mr. Leal and fifty other Mexican nationals under sentence of death in the United States to consular notification and access under the Vienna Convention on Consular Relations. As a remedy for those violations, the ICJ determined that each national was entitled to judicial review and reconsideration of his conviction and sentence to determine whether the consular rights violation resulted in actual prejudice.

On February 28, 2005, President George W. Bush issued a written determination that the United States had a binding obligation under international law to comply with *Avena*. Br. for U.S. as Amicus Curiae Supporting Resp't at App. 2, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). He also determined that, to achieve compliance, state courts should provide review and reconsideration to the fifty-one Mexican nationals named in the *Avena* Judgment, including Mr. Leal, pursuant to the criteria set forth by the ICJ, notwithstanding any state procedural rules that might otherwise bar review of the claim on the merits.

In *Medellin v. Texas*, 552 U.S. 491 (2008), the Court held that under Article 94(1) of the United Nations Charter, a valid treaty of the United States, the United States has a binding international obligation to comply with *Avena* by providing review and reconsideration to the Mexican nationals subject to that judgment. Specifically, the Court observed that "no one disputes" that the obligation to abide by the *Avena* judgment, which "flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States." *Id.* at 504 (emphasis in original). The Court also expressly noted its agreement with the President as to the importance of United States' compliance with that obligation. *Id.* at 524.

The Court held, however, that that international obligation had not yet been validly executed as a matter of U.S. domestic law. *First*, courts are not empowered to automatically enforce ICJ decisions as domestic law because the "sensitive foreign policy decisions" of whether and how to comply are reserved for the political branches. *Id.* at 511. *Second*, the "array of political and diplomatic means available [to the President] to enforce international obligations" does not include the power to "unilaterally convert[] a non-self-executing treaty into a self-executing one." *Id.* at 525. Hence, "while the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions." *Id.* at 522-23. Instead, an additional step by the political branches is necessary, including action by Congress to pass implementing

legislation, *id.* at 527, or by the President "by some other means, so long as they are consistent with the Constitution," *id.* at 530.

Concurring in the judgment, Justice Stevens also noted that the United States' international obligation to provide review and reconsideration under the *Avena* Judgment was undisputed. *Id.* at 536. He urged action by Texas to "shoulder the primary responsibility for protecting the honor and integrity of the Nation," *id.*, particularly where "the costs of refusing to respect the ICJ's judgment are significant," *id.* at 537.

Justice Breyer, joined by Justices Souter and Ginsburg, dissented, stating that the Supremacy Clause of the U.S. Constitution required that the state courts comply with *Avena*, since "the treaty obligations, and hence the judgment, resting as it does upon the consent of the United States to the ICJ's jurisdiction, bind[s] the courts no less than would 'an act of the [federal] legislature.'" *Id.* at 538-39 (internal cites omitted). Like the majority, Justice Breyer recognized that noncompliance would exact a heavy toll on the United States. *Id.* at 565-66.

Mr. Medellin was executed on August 5, 2008. Prior to his execution, he sought a stay of execution from this Court on the grounds that legislation had recently been introduced in the House of Representatives to enforce the *Avena* judgment. Brief for Petitioner, *Medellin v. Texas*, 554 U.S. 759 (2008) (No. 08-5573). The Court denied the stay, noting that the Government had provided no assurances that legislation would be adopted, and had refrained from providing its views on the matter. *Medellin v. Texas*, 554 U.S. 759 759-60 (2008). Four justices would have granted the stay in order to request the views of the Solicitor General. *Id.* at 761-63, 765.

B. Subsequent Proceedings Before the International Court of Justice

On June 5, 2008, Mexico instituted new proceedings in the International Court of Justice by filing a Request for Interpretation of the *Avena* Judgment. *See* Application Instituting Proceedings, Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), June 5, 2008.[1] The ICJ held oral proceedings on June 19 and 20, 2008. At argument, the Legal Adviser to the Secretary of State confirmed "that the United States takes its international law obligation to comply with the Avena Judgment seriously" and agreed that *Avena* requires the provision of review and reconsideration prior to the imposition of any death sentence. *See* A133; A134; A136; A184.

On January 19, 2009, the Court issued its judgment. Although it refrained from issuing a reinterpretation of *Avena*, it held that the United States had violated its international legal obligations by executing José Medellin on August 5, 2008. *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2009 I.C.J. 139, ¶ 53. It declared that the United States' commitments under *Avena* "must be met within a reasonable period of time," and noted that the United States "has insisted that it fully accepts" this obligation. Id. ¶ 28. Meanwhile, the Court emphasized that "the obligation upon the United States not to

[1] The parties' written and oral pleadings and the judgment, orders and press releases of the International Court of Justice in respect of the Request for Interpretation are available at http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=&case=139&k=11 (last visited June 27, 2011).

execute . . . Humberto Leal García . . . pending review and reconsideration being afforded to [him] is fully intact." Id. ¶ 54.

C. Congressional Action to Implement the ICJ's Judgment

Following this Court's decision in *Medellin v. Texas*, Members of the House of Representatives introduced legislation to give the *Avena* Judgment domestic legal effect. The "Avena Case Implementation Act of 2008" would have granted foreign nationals such as Mr. Leal a right to judicial review of their convictions and sentences in light of Vienna Convention violations in their cases. Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong. (2d Sess. 2008). Introduced late in the congressional term during a presidential election year, the bill failed to pass.

In October 2009, a group of leading Senators requested the views of the Obama Administration as to whether legislation was warranted to implement the *Avena* judgment. A226, Affidavit of Katharine Huffman, ¶ 5. In April 2010, the Department of Justice and the Department of State confirmed, in separate letters, that legislation was the "optimal" means of ensuring compliance with the United States' international legal obligations under the ICJ's ruling. *Id.* at A246, App. C; A249, App. D. In response, on July 29, 2010, the Senate Appropriations Committee included legislative language to implement the *Avena* Judgment as part of the Department of State, Foreign Operations, and Related Programs Appropriation Act for Fiscal Year 2011. *Id.* at A253, App. E. The bill would have provided federal courts with jurisdiction to review the merits of Mr. Leal's Vienna Convention claim. Upon a finding of actual prejudice from the violation of Mr. Leal's

consular rights, the bill would have required the court to fashion "appropriate relief, including ordering a new trial or sentencing proceeding." S. 3676, 111th Cong. (2d Sess. 2010). In December 2010, Congress adopted a continuing resolution in lieu of an omnibus appropriations bill. As a result, the appropriations bill and all legislative initiatives attached to the bill—including the *Avena* implementing legislation—failed to pass. A227, Affidavit of Katharine Huffman, ¶ 7.

On June 14, 2011, Senator Patrick Leahy introduced the "Consular Notification Compliance Act," which would grant Mr. Leal a right to the judicial process required by *Avena*. The new legislation has the full support of the Department of Justice, the Department of State, the Department of Defense and the Department of Homeland Security—a fact that distinguishes this legislation from previous congressional efforts and greatly enhances the chances of passage. A225, Affidavit of Katharine Huffman. The proposed bill specifically authorizes federal courts

> to review the merits of a petition claiming a violation of Article 36(1)(b) or (c) of the Vienna Convention on Consular Relations, or a comparable provision of a bilateral agreement addressing consular notification and access, filed by a person convicted and sentenced to death by any federal or state court prior to the date of enactment of this Act.

A36, Consular Notification Compliance Act, § 4 (a)(1). Significantly, the legislation provides that a petition raising a violation of Article 36 shall not "be considered a second or successive habeas corpus application or subjected to any bars to relief based on pre-enactment proceedings other than as specified in paragraph (2) of this subsection." *Id.* § 4(a)(4).

D. Decision of the Inter-American Commission on Human Rights

On December 12, 2006, Mr. Leal filed a petition before the Inter-American Commission on Human Rights raising the violation of his consular rights as well as several violations of the 1948 Declaration of the Rights and Duties of Man ("American Declaration"). The Inter-American Commission is the principal human rights organ of the Organization of American States ("OAS") and is empowered to consider and evaluate the merits of human rights violations raised by individuals from any OAS member state. *See* Inter-American Commission on Human Rights, *What is the IACHR?*, *available at* http://www.cidh.oas.org/what.htm; *see also* Thomas Buergenthal, International Human Rights in a Nutshell 174, 179, 181-82 (2d ed. 1995). As a member of the OAS, the United States has recognized the Commission's competence to consider such petitions.[2]

On August 7, 2009, after reviewing the legal arguments of both parties and the facts submitted in support of Mr. Leal's claims for relief, the Inter-American Commission on Human Rights issued a report concluding, in pertinent part, that Mr. Leal was prejudiced by the violation of his rights to consular notification and assistance. Specifically, the Commission found that it was "apparent from the record before the

[2] The United States has signed and ratified the Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, as well as the Protocol of Buenos Aires that amended the OAS Charter and established the Commission as a principal organ through which the OAS would accomplish its purposes. Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847. As ratified treaties of the United States, both instruments apply with equal force and supremacy to all states, including Texas. U.S. Const. art. VI, cl. 2. The amended OAS Charter specifically provided that "[t]here shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters." OAS Charter, art. 106. Under Article 145, the Inter-American Commission is given the responsibility to "keep vigilance over the observance of human rights." *Id.* art. 145.

Commission that, following [Mr.] Leal García's conviction and sentencing, consular officials were instrumental in gathering significant evidence concerning [his] character and background. This evidence, including information relating to [his] family life as well as expert psychological reports, could have had a decisive impact upon the jury's evaluation of aggravating and mitigating factors in [his] case. . . ." A50, Medellin, Ramírez Cárdenas and Leal García v. United States, Case 12.644, Inter-Am. Comm'n H.R., Report No. 90/09, OEA/Ser.L/V/II.135, doc. 37, ¶¶ 128, 131 (2009).

As to remedies, the Commission recommended that Mr. Leal's death sentence be vacated and that he be afforded "a new trial in accordance with the equality, due process and fair trial protections, prescribed under . . . the American Declaration, including the right to competent legal representation." *Id.* ¶¶ 160(1), 169(1). The Commission also reiterated that the United States is required to "take the necessary measures to preserve" Mr. Leal's life and physical integrity "pending the implementation of the Commission's recommendations in the matter." *Id.* ¶ 159. His execution under these circumstances, the Commission warned, would constitute a failure by the United States "to act in accordance with its fundamental human rights obligations as a member of the Organization of American States." *Id.* ¶ 168.

E. Denial of Federal Habeas Relief and the Filing of Mr. Leal's State Habeas Petition

On June 16, 2011—two days after the introduction of the Consular Notification Compliance Act—Mr. Leal filed a habeas petition in the U.S. District Court for the Western District of Texas, arguing that he had a due process right to remain alive while

Congress considered and passed legislation providing him the remedy to which he is entitled under *Avena.* On June 22, 2011, the court denied relief, finding that Mr. Leal's claims were foreclosed by this Court's decision in *Medellin v. Texas. Leal Garcia v. Thaler,* ___F.Supp. ___, 2011 WL 2479912 (W.D.Tex.) at *15.

F. The Proceedings Below

On June 23, 2011, Mr. Leal filed a Second Subsequent Application for Writ of Habeas Corpus with the Texas Court of Criminal Appeals and an application for a stay of execution.[3] Mr. Leal argued that his constitutional rights to life and due process of the law entitle him to reasonable access to a remedy of judicial process that the United States is bound as a matter of international law to provide, and that to execute Mr. Leal before the competent political actors have had a reasonable opportunity to convert the Nation's international law obligation under the *Avena* Judgment into a justiciable legal right would amount to an unconstitutional deprivation of his right to life without due process of law. In addition, Mr. Leal argued that his execution without having received the required review and reconsideration would impinge upon the constitutional authority of Congress, confirmed by this Court, to give effect to the United States' obligation under Article

[3] The Texas Court of Criminal Appeals will not entertain any petition for writ of habeas corpus while a parallel proceeding is pending in federal court. *See Ex parte Soffar*, 143 S.W.3d 804, 805-06 (Tex. Crim. App. 2004) (Texas state courts defer action on causes properly within their jurisdiction "until the courts of another sovereignty with concurrent powers, and already cognizant of litigation, have had an opportunity to pass upon the matter."). Although Mr. Leal had filed a motion to stay and abate the federal habeas corpus proceedings on June 16, 2011—the same day that he filed his federal petition for writ of habeas corpus—the federal court denied his motion. For this reason, Mr. Leal was compelled to wait until the federal court had dismissed his petition before initiating habeas corpus proceedings in the Texas courts.

94(1) of the United Nations Charter to comply with the *Avena* Judgment. Finally, Mr. Leal argued that his execution would violate his First Amendment Rights to petition Congress for redress of grievances and to free speech. In his stay application, Mr. Leal asked the Court to delay his execution to allow the competent political authorities a reasonable opportunity to implement the ICJ's judgment.[4]

On June 27, 2011, the Texas court denied relief, finding that Mr. Leal's habeas application was barred under Tex. Code Crim. P. Art. 11.071, §5. *See* A397. Three judges concurred in the result, but urged the Texas Board of Pardons and Paroles and Governor Rick Perry to exercise their powers to grant a reprieve. A404.

REASONS FOR GRANTING A WRIT OF CERTIORARI

Mr. Leal is scheduled to be executed by lethal injection on July 7, 2011, although he has yet to receive the review and reconsideration of his conviction and sentence mandated by the *Avena* Judgment of the International Court of Justice. In *Medellin v. Texas*, 552 U.S. 491 (2008), this Court confirmed that the United States is bound as a

[4] Mr. Leal has also filed a Petition for Clemency with the Texas Board of Pardons and Paroles, and has asked Texas Governor Rick Perry for a reprieve. Mr. Perry's views are reflected in a June 27, 2011 New York Times article:

> Mr. Perry's press secretary, Katherine Cesinger, suggested that he did not view the matter through the lens of reciprocal international obligations. 'If you commit the most heinous of crimes in Texas,' she said, 'you can expect to face the ultimate penalty under our laws, as in this case.'

Adam Liptak, *Texas is Pressed to Spare Mexican Citizen on Death Row*, June 27, 2011, *available at* http://www.nytimes.com/2011/06/28/us/28bar.html?_r=2.

matter of international law to comply with the *Avena* Judgment, and clarified that it falls to Congress to determine whether and how to give the Judgment domestic legal effect.

No one—not this Court, not the Executive, not Congress, not Texas—disputes the United States' "plainly compelling" interest in complying with the international obligation reflected in *Avena*. The Executive and Legislative branches have been continuously engaged in efforts to find an alternative and expeditious means of implementing the United States' obligations under the *Avena* Judgment. Most important, legislation has been introduced in the U.S. Senate with the full support of the Department of Justice, the Department of State, the Department of Defense, and the Department of Homeland Security. A45, 157 CONG. REC. S3779-80 (daily ed. June 14, 2011) (statement of Sen. Leahy). Leaders of the diplomatic and business communities have warned that Mr. Leal's execution could have grave consequences for Americans abroad. *Id.* at S3781-82.

Despite this extraordinary and unique set of circumstances, Texas proceeds implacably towards execution on July 7. If allowed to proceed, Texas will simultaneously deprive Mr. Leal of reasonable access to a remedy required under a binding international legal obligation and place the United States in irreparable breach of its treaty obligations. Under these unique circumstances, Mr. Leal's execution would violate his constitutionally protected right not to be deprived of his life without due process of law. And by placing the United States in irreparable breach of its treaty commitments before Congress and the federal Executive can act to compel compliance, Texas effectively will usurp the institutional prerogative of the federal political

branches—advocated by Texas in *Medellin v. Texas* and confirmed by this Court—to determine whether and how to give domestic legal effect to the treaty obligations of the Nation. This Court must not allow Texas to subvert Mr. Leal's constitutional rights and the compelling institutional interests of Congress and the Executive in a race to execution, particularly given the overwhelming public interest in achieving compliance with the *Avena* Judgment.

In view of the exceptional circumstances of this case, Mr. Leal respectfully asks that this Court either grant a writ of certiorari or hold his petition in abeyance to allow Congress a meaningful opportunity to consider and pass the Consular Notification Compliance Act. *See* All Writs Act, 28 U.S.C. §1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."). In the alternative, he asks the Court to grant him a writ of habeas corpus for the purpose of preserving Congress's ability to bring the nation into compliance with the *Avena* Judgment. In addition, in connection with whichever form of relief the Court may deem appropriate to grant, Mr. Leal asks this Court to grant his motion for a stay of his execution for such time as is necessary to permit the competent political actors a reasonable opportunity to act consistent with this Court's decision in *Medellin v. Texas*.[5] Finally, Mr. Leal requests that the Court seek the views of the Solicitor General of the United States with regard to this filing.

[5] A Motion for Stay of Execution is filed concurrently with this Petition.

I. The Court Should Grant The Writ of Certiorari In Order To Protect Mr. Leal's Due Process Rights, The Constitutional Prerogatives Of Congress, And The Foreign Policy Interests Of The United States.

A. The Court Should Grant The Writ In Order To Prevent The Irreparable Deprivation Of Mr. Leal's Life Without Due Process Of Law By Virtue Of His Execution In Violation Of An Undisputed Legal Obligation Of The United States.

This case comes to this Court in a unique but extraordinarily compelling set of circumstances. Nine Justices of this Court, the President of the United States, and, in pleadings before this Court, the State of Texas have confirmed that the United States has a binding legal obligation arising under Article 94(1) of the United Nations Charter not to execute Mr. Leal unless and until he has received the review and reconsideration ordered by the ICJ in *Avena*. The United States has reiterated its intention to comply with this obligation before the International Court of Justice and the Human Rights Council, and has devoted substantial time and effort to draft legislative language acceptable to the federal government and key members of Congress. If Texas were to proceed with the scheduled execution of Mr. Leal next Thursday, July 7, there could be no dispute that that execution would be unlawful—specifically, in violation of treaty commitments validly made by the United States through constitutionally prescribed processes.

For the past three years, Congress has been moving steadily toward the passage of legislation to implement the *Avena* Judgment. Significantly, two experts on congressional procedure believe there is a substantial likelihood that the Consular Notification Compliance Act will pass before the end of 2011. *See* A225, Affidavit of Katharine Huffman, ¶ 10; A256, Affidavit of Prof. Ross Baker, ¶ 16. As Professor Baker explains,

the time that Congress has taken to introduce legislative language should not be considered as an indication of Congress's disinterest in implementing *Avena*; the process by which bills are introduced, considered and presented for a vote is cumbersome and complex. A256, Affidavit of Prof. Ross Baker. In addition, the introduction of legislation to implement the *Avena* Judgment has required extensive consultation with several agencies of the Executive Branch,[6] and has involved difficult questions of federalism, habeas corpus procedure, and international law. Nonetheless, Members of Congress and the Executive Branch have worked diligently to promote *Avena* legislation. Significantly, the introduction of the "Consular Notification Compliance Act" marks the first time that the legislation has been introduced with the full support of all relevant departments of the Executive Branch, including the Department of State, the Department of Justice, the Department of Defense, and the Department of Homeland Security. A225, Affidavit of Katharine Huffman; A45, 157 CONG. REC. S3779-80 (daily ed. June 14, 2011) (statement of Sen. Leahy). With the Administration's vigorous support, experts believe that there is a substantial likelihood that the Consular Notification Compliance Act will pass by the end of the year. *See* A228, Affidavit of Katharine Huffman, ¶ 10; A261, Affidavit of Prof. Ross Baker, ¶ 16. There is no time, however, for committee hearings, deliberations and floor debates in both the House and Senate before Mr. Leal's scheduled execution on July 7, 2011.

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[6] A45, 157 CONG. REC. S3779-80 (daily ed. June 14, 2011) (statement of Sen. Leahy). (noting that the legislation has the full support of the Department of State, Department of Justice, Department of Defense, and Department of Homeland Security).

In these circumstances, it would violate Mr. Leal's right not to be deprived of his life without due process of law were he to be executed as scheduled on July 7. *See* U.S. Const. amends. V, XIV; *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288 (1998) ("[a] prisoner under death sentence remains a living person and consequently has an interest in his life") (O'Connor, J., concurring); *id.* at 291 ("There is . . .no room for legitimate debate about whether a living person has a constitutionally protected interest in life.") (Stevens, J., concurring in part and dissenting in part). "[A]s [the Supreme Court has] often stated, there is a significant constitutional difference between the death penalty and lesser punishments." *Beck v. Alabama*, 447 U.S. 625, 637 (1980).

At its most basic, due process guarantees to a criminal defendant a right not to be deprived of "fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (noting "the truism that '[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."); *cf. Logan v. Zimmerman*, 455 U.S. 422, 429-30 (1982) (due process bars a state from denying a litigant "an opportunity to be heard upon [his] claimed [right]."") (quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)). Applying that basic principle here, Mr. Leal cannot be executed consistent with due process if he is executed in violation of a binding legal obligation arising from a treaty voluntarily entered into by the United States to provide him additional process in the form of review and reconsideration. As a matter of

law, that additional process could change the outcome on either his conviction or sentence.[7] *See* A50, Medellin, Ramírez Cárdenas and Leal García v. United States, ¶ 128, 131 (finding prejudice as a result of the Vienna Convention violation in Mr. Leal's case); Second Subsequent Application for Writ of Habeas Corpus at Part II.b; *Leal v. Texas*, No. 11-___ (June 27, 2011) (discussing factual basis for claim of prejudice); *cf. United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("[T]he right[] . . . to petition for a redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights."); *Bounds v. Smith*, 430 U.S. 817, 822 (1977) (there is a constitutional right to "adequate, effective, and meaningful" access to process). As a matter of law, therefore, his execution would violate the most fundamental objectives of the due process clause.

That conclusion is reinforced by the character of the penalty Mr. Leal faces. *See Gardner v. Florida*, 430 U.S. 349, 357 (1977) ("[D]eath is a different kind of punishment from any other which may be imposed in this country.") (opinion of Stevens, J.). It is

[7] Mr. Leal has yet to receive the requisite review and reconsideration mandated by *Avena*. State and federal courts have both found the issue to be procedurally defaulted. Although each court purported to find, in the alternative, that Mr. Leal had not been prejudiced by the consular notification violation, neither court had jurisdiction over the question or authority to grant any relief. Under the circumstances, this sort of "alternative" prejudice finding does not constitute sufficient review and reconsideration. Indeed, the ICJ rejected precisely this type of putative review by the state and federal courts in the case of José Medellín, another Mexican national whose case was adjudicated by the ICJ in *Avena*, and who was executed by the state of Texas in August 2008. In January 2009, the ICJ determined that the United States had failed to comply with its obligations to provide review and reconsideration in Medellín's case—despite Texas' contention that such "alternative" merits assessments were sufficient "review and reconsideration" under Avena. 2009 I.C.J. 139 at ¶¶ 53-54. The ICJ accordingly held that the United States had violated its international legal obligations by executing Medellín without providing him the requisite review and reconsideration. *Id.*

thus "of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner*, 430 U.S. at 358; *see also Barefoot v. Estelle*, 463 U.S. 880, 888 (1983) ("[A] death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding."). To carry out a sentence of death when an undisputed legal obligation, albeit one not yet effective on the domestic level, remains unfulfilled would be antithetical to the very notion of lawful process.

While the circumstances of this case may be unique, those circumstances all militate in favor of recognizing a right to relief here. *First*, it is no answer to the request for relief that Mr. Leal's entitlement to review and reconsideration has not yet been realized as a matter of U.S. domestic law. After all, the treaty-making processes by which the United States undertook the obligation have constitutional significance. Under the plain and unambiguous terms of the Supremacy Clause, "treaties made . . . under the authority of the United States [are] the supreme law of the land." U.S. Const. art. VI, cl. 2; *see also Medellin v. Texas*, 552 U.S. at 510 ("If ICJ judgments were instead regarded as automatically enforceable domestic law, they would be immediately and directly binding on state and federal courts pursuant to the Supremacy Clause."). Unless the Court means to write the plain and unambiguous language of the Supremacy Clause out of the Constitution, the treaty relevant here—Article 94(1) of the United Nations Charter—must be taken into account as part of the due process analysis, even if it has not yet been executed as a matter of U.S. law. It remains, as the Supremacy Clause tells us,

an exercise of the constitutional authority of the President and Senate and, as such, part of the supreme law of the land.

And it is precisely this previous exercise of constitutional treaty-making authority—now manifest in the undisputed international legal obligation to provide review and reconsideration—that distinguishes Mr. Leal from an individual who merely awaits, with no guarantee of success, a prospective conferral of rights by the legislative process. To be sure, there can be no due process violation of a right Congress has not yet created. But that is not the case here. The constitutionally designated house of Congress has *already acted*, when the Senate advised on and consented to the Optional Protocol to the Vienna Convention and the UN Charter and the President thereby ratified them. By the action of the President and the Senate, the constitutionally designated political branches, the treaty obligation to provide review and reconsideration *already exists*, as a matter of international law. And the constitutionally designated domestic lawmaking branches have *already begun to act* to convert that international law obligation into a domestic right. In these circumstances, Mr. Leal indisputably has a right to remain alive until he can vindicate the right to the relief contemplated by this country's treaty commitment.

Second, it is no answer to the request for relief that it is uncertain whether Congress will enact legislation to execute the treaty obligation to comply with *Avena*. In *Medellin v. Texas*, 554 U.S. 759, 759-60 (2008), this Court denied the petitioner's motion for stay of execution on the grounds that the prospects for legislative relief were too speculative, noting that "neither the President nor the Governor of the State of Texas

ha[d] represented…that there [wa]s any likelihood of congressional or state legislative action." The Government's full endorsement of the Consular Notification Compliance Act distinguishes this case from *Medellin*, where legislation had been introduced in the House of Representatives that the Government did not support. To be sure, this Court has construed Article 94(1) to preserve to Congress the "option of noncompliance," *Medellin v. Texas*, 552 U.S. at 511, and even had the Court held Article 94(1) to be self-executing with respect to the judicial right at issue here, Congress would have retained, by virtue of the last-in-time rule, the authority to legislate a breach of the treaty. *See, e.g.*, *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); *Head Money Cases (Edye v. Robertson)*,112 U.S. 580, 598-99 (1884). But this Court has long instructed that, as a matter of law, it should decide cases on the presumption that Congress intends the United States to comply with the treaty commitments it makes. *Cf. Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (in the absence of clear instruction from Congress, courts should not construe statutes in a manner that would place the United States in breach of its treaty obligations). Any other approach would be an insult to the constitutionally designated treaty-makers: the President, in negotiating a treaty, and the Senate, in providing its advice and consent, would fulfill those roles under a cloud.

Here, the presumption that the United States will do what it promises to do is reinforced by the Executive Branch's unequivocal determination that the United States should do just that. *See* Br. for the United States as Amicus Curiae Supporting Petitioner at 8-9, *Medellin v. Texas*, 552 U.S. 491 (No. 06-984); Br. for the United States as Amicus

Curiae Supporting Respondent at 43, 45, *Medellin v. Dretke*, 544 U.S. 660 (No. 04-5928) (President has determined it is in the "paramount interest of the United States" to achieve "prompt compliance with the ICJ's decision with respect to the 51 named individuals"). The President is the sole organ of the United States in conducting its foreign affairs. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). While this Court has held that the Executive Branch does not have the constitutional or statutory authority to execute the Article 94(1) obligation here, its views on compliance are entitled to respect in this Court, and they surely will carry weight in the Congress, as will this Court's endorsement of those views. *See Medellin v. Texas*, 552 U.S. at 513-14, 524 ("United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law . . . are plainly compelling").

Third, it is no answer to the request for relief that Congress has not yet acted. Until this Court issued its decision in *Medellin v. Texas*, there was simply no reason for Congress to believe it needed to act. Indeed, one of the indicia of a self-executing treaty is the failure of Congress to take up the question of implementation. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 reporters' notes 5 ("[I]f the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by courts."). It was not until April 2010 that the Executive Branch indicated to Congress the need for legislation to implement the *Avena* Judgment. A246, App. C; A249, App. D.

Three months after receiving that confirmation, legislative language was introduced in the Senate as part of the Omnibus Appropriations bill. A227, Affidavit of Katharine Huffman, ¶ 7. That legislation came very close to passage before Congress decided to adopt a "continuing resolution" in lieu of an appropriations bill. *Id*. Now, early in the 2011-12 Congressional term, legislation has already been introduced with the Government's full and public support. *Id*. at ¶ 8. In sum, the fact that legislation has not yet passed since this Court's decision in *Medellin* cannot be taken as Congressional indifference, much less Congressional opposition: the previous bills have not come up for a floor vote, and as Professor Baker points out, very few pieces of legislation are introduced and passed in one Congressional term. A256, ¶¶ 2, 13.

B. The Court Should Grant The Writ, Or, In The Alternative, Hold the Petition in Abeyance In Order To Preserve The Constitutional Prerogative Of Congress To Determine Compliance With The United States' Obligation Under Article 94(1).

In *Medellin v. Texas*, this Court held that it was up to Congress to determine whether the United States would comply with its commitment under Article 94(1) of the United Nations Charter to comply with *Avena*. 552 U.S. at 508, 515 (2008). In settling the constitutional process for enforcement of Article 94(1), this Court confirmed that a treaty is "'equivalent to an act of the legislature,'" and self-executing when it "'operates of itself without the aid of any legislative provision.'" *Id.* at 505 (quoting *Foster v. Nelson*, 26 U.S. (2 Pet.) 253, 315 (1829) (Marshall, C.J.), overruled on other grounds, *United States v. Percheman*, 26 U.S. (7 Pet.) 51 (1833)). However, the Court explained, some treaties are not fully realized at the time ratified, and in those cases, Congress must

take further action to execute the treaty by enacting implementing legislation. *Medellin v. Texas*, 552 U.S. at 504-05 (citing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)). Thus, in those cases, Congress retains the option to choose not to comply—"always regarded as an option by the political branches." *Medellin v. Texas*, 552 U.S. at 511. This Court noted that it would be "particularly anomalous" to leave Congress without that choice, "in light of the principle that 'the conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative –'the political' – Departments.'" *Id.* (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)).

In holding that it was up to Congress to determine the question of compliance with *Avena*, the Court vindicated the position of Texas and several of its amici states. For example, in *Medellin v. Dretke*, Texas took it for granted that the United States would comply with *Avena*, but emphasized the importance of allowing the federal political branches to determine how:

> It is beyond cavil that . . . America should keep her word. But the choice of how to do so, and how to respond to alleged treaty violations, is left to the political branches of government. . . . The President and Congress could seek to pass legislation addressing the *Avena* decision[.]

Respondent's Br. at 7, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). Again, in *Medellin v. Texas*, Texas stated: "To be sure, Texas recognizes the existence of an international obligation to comply with the United States' treaty commitments, including, as appropriate, through changes to domestic law." Respondent's Br. at 12, *Medellin v. Texas*, 552 U.S. 491 (2008) (No. 06-984). Nearly half the states supported that position in this Court and the Texas Court of Criminal Appeals. *See* Br. of the States of Alabama,

Montana, Nevada and New Mexico as Amici Curiae in Support of Respondent at 16 n.8, *Ex parte José Ernesto Medellin*, 223 S.W.3d 315 (No. AP-75,207) ("the proper way to render the ICJ's judgment binding on the state courts would be by an Act of Congress"); Br. for the States of Alabama et al., as Amici Curiae, in Support of Respondent at 17-18, *Medellin v. Dretke*, 544 U.S. 660 (No. 04-5928) ("As a delicate matter of foreign policy, [the] task [of choosing how to comply with *Avena*] should be left to the Executive Branch and Congress, at least in the first instance.").

Having determined that Congress has the authority to determine compliance with *Avena*, this Court should ensure that it has the opportunity to do so. The Court interpreted the scheme of Article 94 of the United Nations Charter to preserve to the political branches the "option of noncompliance"—specifically, their ability "to determine whether and how to comply with an ICJ judgment." *Medellin v. Texas*, 552 U.S. at 511. It need hardly be said that, if the option of noncompliance must be preserved for decision by the political branches, so too should the option of compliance.

Yet Texas's rush to execute Mr. Leal threatens to deprive the political branches of the very decision the Court reserved to them. There can be no dispute that, if Texas executes Mr. Leal without providing review and reconsideration in accord with *Avena*, it will cause the United States to breach a treaty obligation that, in light of the Court's decision that the obligation was non-self-executing, Congress has already begun to take steps to execute, that Congress has to this date given no indication that it wishes the United States to breach, and with which the Executive Branch has taken vigorous steps to bring about compliance. That result would turn the constitutional design set out by this

Court in *Medellin v. Texas* on its head, and, at the same time, indulge the most cynical view of the United States' intentions when, by the considered actions of its President and Senate, it enters into bilateral or multilateral treaty commitments with other nations.

C. The Court Should Grant The Writ In Order To Preserve The United States' Credibility In International Affairs Generally And In Its Treaty-making Activity Specifically.

The point has been made so many times during the course of this and related cases that it is important not to become inured to its significance: by constitutionally prescribed processes, by constitutionally designated actors, acting on behalf of the American people as a whole, the United States promised the international community that it would abide by judgments of the ICJ in cases in which it was a party. U.N. Charter, art. 94(1); Statute of the International Court of Justice, art. 59. The United States fully participated in the proceedings that led to the *Avena* judgment, and both Republican and Democratic Administrations have told the world that the United States must and will comply. Yet Texas, by insisting on executing Mr. Leal before Congress has had a chance to act, seeks to break the United States' promise. The damage that would be done to the United States' credibility in world affairs if Texas were permitted to do so would be incalculable. And by placing in doubt the United States' ability to comply with these treaty commitments, the decision would compromise the ability of United States consular officials and citizens to rely on the important protections embodied in the Vienna Convention.

In its amicus brief submitted in *Medellin v. Texas*, the United States advised this Court of the critical interests at stake in this matter. The United States cited two principal foreign policy considerations prompting former President George W. Bush's 2005 decision to direct state courts to provide review and reconsideration: "the need for the United States to be able to protect Americans abroad" and the need to "resolve a dispute with a foreign government by determining how the United States will comply with a decision reached after the completion of formal dispute-resolution procedures with that foreign government." Br. for the United States as Amicus Curiae Supporting Respondent at 43, 45, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). In light of these objectives, the President considered it in the "paramount interest of the United States" to achieve "prompt compliance with the ICJ's decision with respect to the 51 named individuals" including Mr. Leal. *Id.* at 41; *see also* Br. for the United States as Amicus Curiae Supporting Petitioner 8-9, *Medellin v. Texas*, 522 U.S. 491 (No.06-984).

Every Member of this Court recognized that there is a vital public interest in achieving compliance with the United States' obligations under the *Avena* Judgment. Writing for the majority, Chief Justice Roberts noted that

> In this case, the President seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. These interests are plainly compelling.

Medellin v. Texas, 552 U.S. at 524. Concurring in the judgment, Justice Stevens agreed that "the costs of refusing to respect the ICJ's judgment are significant." *Id.* at 537. And Justice Breyer, joined by Justices Souter and Ginsburg, observed in his dissenting opinion

that noncompliance with the *Avena* Judgment would exact a heavy toll on the United States by "increas[ing] the likelihood of Security Council *Avena* enforcement proceedings, worsening relations with our neighbor Mexico, precipitating actions by other nations putting at risk American citizens who have the misfortune to be arrested while traveling abroad, or diminishing our Nation's reputation abroad as a result of our failure to follow the 'rule of law' principles that we preach." *Id.* at 566.

In letters submitted to Governor Rick Perry calling for a stay of execution in Mr. Leal's case, retired military leaders, diplomats and groups representing the interests of the American expatriate community have cautioned that non-compliance with the nation's treaty obligations would jeopardize the welfare of countless soldiers and other ordinary Americans traveling abroad. A group of retired military leaders has appealed to the Texas Board of Pardons to stay Mr. Leal's execution, noting, "[a]s retired military leaders, we understand that the preservation of consular access protections is especially important for U.S. military personnel, who when serving our country overseas are at greater risk of being arrested by a foreign government." A264, Letter from Retired Military Leaders (June 6, 2011). A bipartisan group of former diplomats has echoed the need for legislation and a stay of execution, citing the risk to Americans abroad:

> Clearly, the safety and well-being of Americans abroad is endangered by the United States maintaining the double standard of protesting denials of consular notification and access to its own citizens while simultaneously failing to comply with its obligation to remedy identical violations. We cannot realistically expect other nations to continue to comply with consular treaty commitments that we refuse to uphold.

A267, Letter from Former Diplomats (June 6, 2011). An additional letter of support from former prosecutors and judges observes that "[d]elaying the execution of Humberto Leal García to ensure full opportunity for congressional action and appropriate review of the case will demonstrate to foreign governments the United States' good faith in upholding its consular access obligations, increasing the likelihood that foreign governments will grant access to Americans in their custody." A270, Letter from Former Prosecutors and Judges (June 6, 2011).

Americans who have a direct stake in compliance with the Vienna Convention have also called for a stay of Mr. Leal's execution and for the passage of legislation. Billy Hayes, whose terrifying experience in a Turkish prison gave rise to the book and film, "Midnight Express," has stated that U.S. consular assistance was critical to his ability to obtain legal counsel. In a letter to the Texas Board of Pardons and Paroles, he highlights the vulnerability of Americans detained overseas, and asks the Board to grant a reprieve so that Congress can address "this vitally important concern." A272, Letter from Billy Hayes (May 27, 2011). Euna Lee, a journalist who was detained in North Korea, describes the "unbearable" "sense of darkness" she experienced while in North Korean custody. A274, Letter from Euna Lee (June 3, 2011). She states that it is "hard to describe in words" the significance of her first consular visit. *Id.* "For every endangered American hidden in a foreign prison—and for their fearful families back at home—there can be no more important priority than upholding the reciprocal right to consular protection." *Id. See also* Euna Lee, *Consular Access: A Two Way Street on a Crucial Right*, THE WASHINGTON POST, June 24, 2011, *available at*

http://www.washingtonpost.com/opinions/consular-access-a-two-way-street-on-a-crucial-right/2011/06/22/AGYkPdjH_print.html. Finally, a coalition of organizations that represent the concerns of the countless American citizens who live overseas has joined in the call to stop Mr. Leal's execution, noting that "[i]nternational compliance with these provisions is essential to the protection of the United States' vast overseas population: thousands of our fellow-citizens are held in foreign custody each year, while many thousands more rely on access to U.S. consular support after natural disasters, civil unrest or other emergencies." A276, Letter from Organizations Representing Americans Abroad (June 13, 2011); *see also* Br. of Former U.S. Diplomats as Amici Curiae in Support of Petitioner at 5, 28, *Medellin v. Texas*, 552 U.S. 491 (No. 06-984); Br. of Former U.S. Diplomats as Amici Curiae in Support of Petitioner at 5, 26, *Medellin v. Dretke*, 544 U.S. 660 (No. 04-5928). The importance to the United States' treaty partners of its compliance with its treaty obligations is dramatically illustrated here by the submission in 2007 of amicus briefs from *sixty countries* urging compliance in *Medellin v. Texas*. *See* Br. of Amici Curiae the European Union and Members of the Int'l Community in Support of Petitioner, *Medellin v. Texas*, 552 U.S. 491 (No. 06-984) (forty-seven nations and the European Union); Br. Amicus Curiae of the Government of the United Mexican States in Support of Petitioner José Ernesto Medellin, *Medellin v. Texas*, 552 U.S. 491 (No. 06-984) (Mexico); Br. of Foreign Sovereigns as Amici Curiae in Support of Petitioner José Ernesto Medellin, *Medellin v. Texas*, 552 U.S. 491 (No. 06-984) (twelve nations).

From a perspective even closer to the ground, there can be no doubt, moreover, that the consular rights afforded by the Vienna Convention are critical to the safety and security of Americans who travel, live and work abroad: tourists, business travelers, expatriates, foreign exchange students, members of the military, missionaries, Peace Corp volunteers, U.S. diplomats, and countless others. Timely access to consular assistance is crucially important whenever individuals face detention or prosecution under a foreign and often unfamiliar legal system. The United States thus insists that other countries grant Americans the right to prompt consular access.[8] For example, in 2001, when a U.S. Navy spy plane made an emergency landing in Chinese territory after colliding with a Chinese jet, the State Department cited the Vienna Convention in demanding immediate consular visits to the plane's crew. *See* Press Briefing, U.S. DEP'T STATE (Apr. 2, 2001), *available at* http://2001-2009.state.gov/r/pa/prs/dpb/2001/1889.htm. Chinese authorities granted consular visits to the crew members, who were detained in China for eleven days. During the tense standoff, the U.S. Ambassador to China emphasized that these rights of immediate and unobstructed consular access to detained American citizens are "the norms of international law," *China Grants U.S. Access to Spy Plane Crew*, CNN, Apr. 3, 2001, *available at*

[8] U.S. consulates provide arrested Americans with a list of qualified local attorneys, explain local legal procedures and the rights accorded to the accused, ensure contact with family and friends, protest any discriminatory or abusive treatment, and monitor their well-being throughout their incarceration. *See* U.S. DEP'T STATE, Assistance to U.S. Citizens Arrested Abroad, TRAVEL.STATE.GOV, http://studentsabroad.state.gov/emergencies/arrestedabroad.php (last visited June 20, 2011).

http://archives.cnn.com/2001/WORLD/asiapcf/east/04/03/china.aircollision, while the President warned that the failure of the Chinese government "to react promptly to our request is inconsistent with standard diplomatic practice, and with the expressed desire of both our countries for better relations[,]" Statement by the President on American Plane and Crew in China, The White House (Apr. 2, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/04/20010402-2.html.

The case of three young Americans detained in Iran provides a more recent illustration of the vital importance of consular assistance to Americans detained abroad. On July 31, 2009, Iranian security forces detained the three Americans after they crossed an unmarked border into Iran while on a hiking vacation in northern Iraq. On August 10, 2009, the U.S. Department of State reminded Iran "of its responsibilities under the Vienna Convention on Consular Relations, which is to provide consular access to people that have been detained in what we would call without delay." Press Briefing, U.S. DEP'T STATE (Aug. 10, 2009), *available at* http://www.state.gov/r/pa/prs/dpb/2009/aug/127094.htm. On August 15, the Secretary of State further called on the Iranian government "to live up to its obligations under the Vienna Convention…by granting consular access and releasing these three young Americans without further delay." U.S. Secretary of State, *Missing and Detained Americans in Iran*, Aug. 15, 2009, *available at* http://www.state.gov/secretary/rm/2009a/08/127948.htm. After consular access was finally granted on September 29, 2009, one of the Americans was released and Swiss authorities were able to monitor the judicial proceedings. *See* Press Briefing, U.S. DEP'T

STATE (Sept. 16, 2010), *available at* http://www.state.gov/r/pa/prs/dpb/2010/09/147268.htm; Press Briefing, U.S. DEP'T STATE (May 10, 2011), *available at* http://www.state.gov/r/pa/prs/dpb/2011/05/162971.htm. The United States has repeatedly protested Iran's failure to grant consular officers more frequent access to the detained Americans. Press Briefing, U.S. DEP'T STATE (June 21, 2011), *available at* http://www.state.gov/r/pa/prs/dpb/2011/06/166680.htm#IRAN. And in October 2009, the United States Senate and House of Representatives passed concurrent resolutions calling upon Iran to grant the hikers consular access. S. Con. Res. 45, 111th Cong. (2009) (enacted). In response to criticism over its handling of the case, the Iranian government has accused the United States of violating the Vienna Convention in the cases of Iranians detained in the United States.[9]

The business community has likewise expressed grave concern about the prospect of noncompliance with the *Avena* Judgment. In a letter to Secretary of State Hillary Rodham Clinton urging Congress to pass legislation implementing *Avena*, Peter M. Robinson, President and CEO of the United States Council for International Business observed that

> The security of Americans doing business abroad is clearly and directly at risk by U.S. noncompliance with its obligations under the Vienna Convention. As recent history has shown, American citizens abroad are at times

[9] Fars News Agency, *Spokesman: Iran to Try 3 US Nationals Soon*, Jan. 13, 2010, *available at* http://english.farsnews.com/newstext.php?nn=8810221286 (referring to five Iranians detained by U.S. forces in northern Iraq in 2007).

> detained by oppressive or undemocratic regimes, and access to the American consular officers may be their lifeline. Overseas employees of the U.S. business community as well as all other Americans traveling or living abroad need this vital safety net. As it stands now, U.S. citizens abroad are at grave risk that other countries may not honor their reciprocal obligation.

A263, Letter from Peter M. Robinson (November 16, 2009).

Key international observers have likewise emphasized the importance to the United States of achieving compliance with *Avena*. Professor Phillip Alston, the former United Nations Human Rights Council Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, has singled out the lack of compliance with the *Avena* Judgment as an issue of particular concern:

> The provision of consular rights seems to be treated as an issue affecting only those foreign nationals currently on death row in Texas. But precisely the same issue applies to any American who travels to another country. One legislator with whom I spoke noted that when he travels overseas he is hugely reassured by the fact that he would have the right of access to the US consulate if he was arrested. The present refusal by Texas to provide review undermines the role of the US in the international system, and threatens the reciprocity between states with respect to the rights of each others' nationals.

Press Statement, Professor Philip Alston, United Nations Human Rights Council Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (June 30, 2008), *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=8815&LangID=E. Professor Alston further noted that noncompliance with *Avena* threatens to undermine other treaty regimes involving such varied subjects as trade, investment and

the environment. "Why," he queried, "would foreign corporations, relying in part upon treaty protections, invest in a state such as Alabama or Texas if they risked being told that the treaty bound only the US government but was meaningless at the state level? This is where the *Medellin* standoff leaves things." *Id.*

In short, failure to provide the modest remedy of review and reconsideration of Mr. Leal's case will jeopardize the "reciprocal rights and safety of [our] overseas citizens." A266, Letter from Former Diplomats (June 6, 2011). Those consequences will be suffered not only by Texas, but by the Nation. As James Madison emphasized at the Constitutional Convention, "[a] rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Max Farrand ed., rev. ed. 1996). Yet Texas's action threatens to cause irreparable damage to the United States' bilateral relations with Mexico, as Ambassador Arturo Sarukhan made clear in a letter addressed to the Legal Adviser to Secretary Hilary Clinton on July 11, 2010:

> [T]he Government of Mexico is profoundly concerned that setting an execution date for Mr. Garcia-Leal in the coming months could have a very detrimental effect on our bilateral relationship and on public support for policies that Presidents Calderon and Obama recently agreed to implement in order to deepen the bilateral relationship and more importantly, to provide it with a strategic footing. As a result, the unprecedented level of cooperation that both Leaders committed to continue fostering in priority areas such as the fight against transnational organized crime and drug-trafficking; judicial assistance; extraditions of high profile criminals and drug kingpins; and their renovated commitment to developing a secure and competitive 21st Century Border could be potentially jeopardized.

A283, Letter from Ambassador Arturo Sarukhan to the Honorable Harold Hongju Koh (July 11, 2010).

If denying Mr. Leal the review and reconsideration of his conviction and sentence ordered by the ICJ is so important as possibly to justify the serious harm to U.S. interests identified by the President, this Court, and many, many others that would follow from that treaty breach, that judgment should be made by the U.S. Congress, not Texas. The United States' word should not be so carelessly broken, nor its standing in the international community so needlessly compromised. In order to vindicate the constitutional allocation of authority to determine compliance with *Avena* that the Court identified in *Medellin v. Texas*, and to allow the competent political actors to comply with this country's international commitments, this Court should grant the writ and stay the execution.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari or, in the alternative, hold this petition in abeyance to allow Congress a meaningful opportunity to consider and pass legislation that implements the Nation's obligations under *Avena and Other Mexican Nationals*. The Court should also stay the execution of Mr. Leal to allow the competent political actors a reasonable opportunity to implement the international law obligations of the United States as reflected in the Judgment of the International Court of Justice.

Respectfully submitted,

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June 27, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court; that I am counsel in this matter for Humberto Leal García; that on this day, June 27, 2011, I caused the foregoing **Petition for Writ of Certiorari** to be served electronically on opposing counsel via e-mail delivery to:

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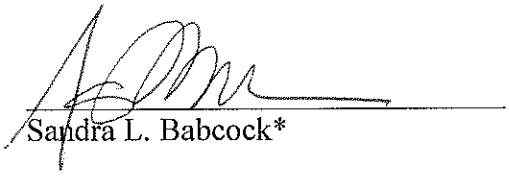
and that all parties required to be served have been served.



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