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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APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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

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To the Honorable Antonin Scalia, Circuit Justice for the Fifth Circuit:

Petitioner Humberto Leal García respectfully submits this application for a stay of his execution, now scheduled for July 7, 2011, in the above entitled proceeding, pending resolution of his Petition for Writ of Certiorari to the Texas Court of Criminal Appeals.

These filings raise issues of extraordinary importance. As an initial matter, nine Justices of this Court, the Bush and Obama Administrations, and, indeed, the State of Texas have confirmed that Applicant Humberto Leal García has a right arising under treaty commitments voluntarily made by the United States not to be executed unless and until he receives the review and reconsideration specified by the International Court of Justice in its judgment in the *Avena* case. There is no dispute that if Texas executes Mr. Leal in these circumstances, Texas would cause the United States irreparably to breach treaty commitments made on behalf of the United States as a whole and thereby compromise U.S. interests that this Court and the Executive Branch have described as compelling.

Although the constitutional and foreign policy issues implicated by Mr. Leal's impending execution were before this Court in *Medellin v. Texas,* 554 U.S. 759 (2008), the ground has shifted dramatically since then. Federal actors at the highest levels of government are currently engaged in unprecedented efforts to bring the Nation into compliance by providing a judicial forum to grant him the review and reconsideration to which he is entitled. 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. Those efforts recently bore fruit: on June 14, 2011, Senator Patrick Leahy of Vermont, Chairman of the Senate Judiciary Committee and the Senate Appropriations Subcommittee on the State Department and Foreign Operations, introduced the "Consular Notification Compliance Act of 2011"—legislation that has 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. 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, ¶ 10; A261, ¶ 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.

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. Yet to date, no Texas actor has taken steps to halt his execution.[1] Should Texas carry out Mr. Leal's execution before Congress has had a

[1] 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.'

reasonable opportunity to implement this legislation, it will irreparably violate the nation's treaty obligations just as the appropriate political branches are attempting to prevent such a breach.

There are several factors unique to this case that compel the issuance of a stay.

First, Mr. Leal's petition reflects unique and compelling circumstances weighing heavily in favor of a grant of a writ of certiorari. Fundamental principles of due process under the Fifth and Fourteenth Amendments dictate that Mr. Leal cannot lawfully be 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. 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. In these exceptional circumstances, this Court should exercise its equitable powers to grant a stay to fully consider the issues of extraordinary importance presented by his petition. *See* All Writs Act, 28 U.S.C. § 1651(a); Petition for Writ of Certiorari, Part I, and Petition for Writ of Habeas Corpus, Part I, *Leal v. Texas*, No. 11-__ (June 27, 2011).

Second, a stay of execution is necessary to preserve the ability of the political branches to comply with the nation's treaty obligations by the constitutional process settled by this Court in *Medellin v. Texas*, 552 U.S. 491 (2008). Texas should not be permitted to impinge on the constitutional authority of Congress, as confirmed by this

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

Court, to give effect to the United States' obligations under Article 94(1) of the United Nations Charter to comply with the *Avena* judgment. *See* Petition for Writ of Certiorari, Part I.B, *Leal v. Texas*, No. 11-__ (June 27, 2011).

Third, the Court should grant a stay to vindicate the public's interest in preserving the United States' international standing, maintaining cordial bilateral relations with the Government of Mexico, and protecting the rights of Americans abroad. This Court has already recognized that the "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." *Medellin v. Texas*, 552 U.S. at 513-14, 524. By granting a stay, this Court will avoid an irreversible breach of the nation's international obligations and protect the welfare of all Americans who rely on the protections afforded by the Vienna Convention on Consular Relations and various other treaty regimes that would be implicated by the United States' breach here. The public interest could not be stronger in favor of a stay because the breach caused by Mr. Leal's execution *could not be remedied*. *See* Petition for Writ of Certiorari, Part I.C, *Leal v. Texas*, No. 11-__ (June 27, 2011).

Finally, a stay is also necessary to give "respectful consideration" to the findings and proceedings of the ICJ and the Inter-American Commission on Human Rights. The ICJ has issued a decision reiterating the United States' obligation to refrain from executing Mr. Leal until it has provided the review and reconsideration mandated by the *Avena* Judgment. *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, ¶

54. Another international body, the Inter-American Commission on Human Rights, has likewise concluded that Mr. Leal was prejudiced by the violation of his Vienna Convention rights, and has called upon the United States to prevent his execution until the Commission's recommendations are implemented. A81, ¶159; A75-76, ¶¶128-132.

Under these circumstances, and for the additional reasons outlined below, a stay in this case is both warranted and necessary.

FACTS AND PRIOR PROCEEDINGS

Mr. Leal hereby incorporates by reference the statement of facts and prior proceedings set forth in his Petition for Writ of Certiorari, filed simultaneously herewith.

REASONS FOR GRANTING A STAY OF EXECUTION

I. The Court Should Exercise its Equitable Powers to Grant a Stay of Execution.

As an initial matter, this Court has the inherent power to grant a stay of execution to allow for full consideration of Mr. Leal's accompanying petition for writ of certiorari. *See In re Peterson*, 253 U.S. 300, 312 (1920) ("Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties."). The Court likewise has the power to issue a stay to preserve its jurisdiction over Mr. Leal's claims under the 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."). *See F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966). It is well established that the Court may issue injunctive relief under the All Writs Act "to safeguard not only ongoing proceedings, but potential future proceedings." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1099 (11th Cir. 2004) (citing *Heckler v. Redbud Hosp. Dist.*, 473 U.S. 1308, 1313 (1985)). Where Congress and the Executive Branch are jointly taking measures to implement Mr. Leal's undisputed legal right to "review and reconsideration" of his Vienna Convention violation through proposed legislation, and where the federal courts have not yet been able to provide that review due to procedural bars, a stay is necessary to preserve this Court's appellate jurisdiction over Mr. Leal's prospective federal claim for relief.[2]

Because this case raises uniquely compelling issues that go to the United States' ability to comply with its undisputed international legal obligations, the power of Congress to enforce those obligations, the interest of the Executive Branch in avoiding a rupture in its bilateral relations with the Government of Mexico, and the consideration in

[2] In *ITT Community Development Corp. v. Barton*, 569 F.2d 1351 (11th Cir. 1978), the Eleventh Circuit clarified the distinction between the All Writs Act and the inherent powers doctrine:

> Both the All Writs Act and the inherent powers doctrine provide a federal court with various common law equity devices to be used incidental to the authority conferred on the court by rule or statute. The All Writs Act may be said to provide a federal court with those writs necessary to the preservation or exercise of its subject matter jurisdiction. The Act is necessary because federal courts, being courts of limited jurisdiction, would not otherwise possess the tools necessary to implement their jurisdictional grants. The inherent powers doctrine, however, does not derive from a statutory base. Instead, the doctrine is rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion.

Id. at 1359 (citation omitted).

Congress of recently-introduced legislation with the full support of the Executive Branch, a stay is warranted to allow for full consideration of the issues raised in Mr. Leal's accompanying petitions. It would also be appropriate for the Court request the views of the Solicitor General in light of the United States' support of the "Consular Notification Compliance Act," introduced on June 14, 2011 by Senator Patrick Leahy. Moreover, a stay of execution will allow the Court an opportunity to evaluate Congressional willingness to move toward passage of the Consular Notification Compliance Act in the current Congressional term.

II. Mr. Leal Meets the Four-Part Standard Set Forth in *Barefoot v. Estelle*

A stay of execution is also warranted under the four-part showing required by *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). *First*, there is a "reasonable probability" that four Justices of the Court will vote to issue a writ of certiorari; *second*, there is a "fair prospect" that a majority of the Court will reverse the decision below; *third*, irreparable harm will likely result if the stay is not granted; and *fourth*, the "balance [of] the equities" weighs in favor of a stay, based on the relative harms to the applicant and respondent, as well as the interests of the public. Where a stay is sought in conjunction with a petition for a writ of certiorari, as opposed to on direct appeal, "the consideration of prospects for reversal dovetails, to a greater extent, with the prediction that four Justices will vote to hear the case." *In re Roche*, 448 U.S. 1312, 1314 n.1 (1980) (Brennan, J., in chambers).

These general principles apply to cases on review in this Court from both state and federal courts. *See California v. Brown*, 475 U.S. 1301 (1986) (Rehnquist, J., in

chambers) (applying these principles in granting stay of state court judgment invalidating a death sentence); *In re Roche*, 448 U.S. at 1314 (granting stay of state court mandate, following denial of stay by state court).

A. Mr. Leal Meets Both the "Reasonable Probability" and "Fair Prospect" Prongs of the Standard.

The issues presented in the accompanying petition for writ of certiorari raise compelling questions of extraordinary importance, including:

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.

As an initial matter, this Court has settled the constitutional processes that must be undertaken for the United States to comply with its international legal obligation to comply with the *Avena* Judgment. In *Medellin v. Texas*, this Court held, *first*, that the Article 94(1) obligation to comply with *Avena* was not self-executing so as to allow a court in the United States to enforce it, and, *second*, that the President acted beyond his authority when he ordered that the United States would comply with the obligation by having state courts provide the required review and reconsideration. *Medellin v. Texas*,

552 U.S 491, 521-23 (2008). The Court has held that, instead, action by the federal political branches is needed to render the *Avena* decision enforceable in Mr. Leal's case. *Id.* at 521 ("Congress is up to the task of implementing non-self-executing treaties."); *see also id.* at 526, 529-30 (noting action by Congress and/or by the President); *id.* at 536 (Stevens, J., concurring in judgment) ("[T]he fact that the President cannot legislate unilaterally does not absolve the United States from its promise to take action necessary to comply with the ICJ's judgment.").

The "Consular Notification Compliance Act," introduced in the U.S. Senate by Senator Patrick Leahy, is the product of careful consultation with relevant Executive Branch agencies, which fully support the legislation. *See* A46. 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.

A46, 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). The legislation further provides that if an execution date has been set, "the court shall grant a stay of execution if necessary to allow for its review of a petition filed pursuant to Section 4(a)(1)." *Id.* § 4(a)(2). Although the legislation has the full backing of the U.S. Government, including the Department of State, the Department of Justice,

the Department of Defense, and the Department of Homeland Security, there is insufficient time remaining before July 7 for Congress to consider and pass the Act.

The fact that additional time is required for the political branches to give the *Avena* Judgment domestic legal effect should not operate to deprive Mr. Leal of his undisputed rights, particularly where his very life hangs in the balance. Simply put, Mr. Leal cannot be executed consistent with 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, therefore, his execution would violate the most fundamental objectives of the due process clause. *See* Pet. for Writ of Certiorari, Part I, *Medellin v. Texas*, No. 11-__ (June 27, 2011).

Mr. Leal's ability to demonstrate prejudice has no bearing on his entitlement under international law to the procedural remedy of review and reconsideration. The remedy mandated by the *Avena* Judgment was one of *process*, and the Mexican nationals subject to the judgment are not required to make any threshold showing of prejudice as a prerequisite to obtaining review in accordance with the criteria set forth in the ICJ's decision. Nonetheless, it bears mention that providing review and reconsideration in Mr. Leal's case would not be an empty exercise. The undisputed violation of the Vienna Convention on Consular Relations in Mr. Leal's case goes to the very heart of the validity of his conviction and sentence. Evidence submitted to the court below but never considered by it or any other U.S. court on the merits establishes that the Mexican consulate would have provided substantial and meaningful assistance in Mr. Leal's capital murder trial if it had been notified of his detention in a timely manner. Among

other things, Mexico would have ensured that he was represented by highly qualified and experienced defense counsel who would have challenged the prosecution's reliance on junk science to obtain a conviction and would have presented powerful mitigating evidence at the penalty phase, including expert testimony regarding Mr. Leal's learning disabilities, brain damage, and sexual abuse at the hands of his parish priest. With consular assistance, there is a reasonable likelihood that Mr. Leal would not have been convicted at all, or at a minimum that he would not have been sentenced to death. *See* Second Subsequent Application for Post-Conviction Writ of Habeas Corpus, No. WR-41,743-03 (Tex. Crim. App. Jun. 23, 2011), at 37-66. Indeed, the Inter-American Commission on Human Rights, the only tribunal to consider Mr. Leal's claim of prejudice resulting from the Vienna Convention violation on the merits using a standard consistent with the Avena Judgment, has determined that he was prejudiced and that due process demanded a new trial. A75-76, ¶¶128-132; 160(1).

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.*

In his initial post-conviction application before the Texas post-conviction court, Mr. Leal raised the violation of his Vienna Convention rights but at the time, the *Avena* Judgment had not yet issued. Accordingly, that court's analysis failed to comply with the criteria set forth by the *Avena* court. First, the state court found that the claim was procedurally defaulted. *Ex Parte Leal*, No. 94-CR-4696-WI (186th Dist. Tex. Oct. 20, 1999), at 69. Second, the court reasoned that since Mr. Leal had "received his federal and state constitutional rights and state statutory rights," the Vienna Convention claim was irrelevant since it could not "trump" those rights. *Id.* at 70. In *Avena*, however, the ICJ held that this sort of analysis was inconsistent with effective review and reconsideration. *See Avena* Judgment ¶ 139. Finally, in the alternative, the court held that Mr. Leal had failed to show that the violation had an effect on the trial. *Id.*

In a habeas petition filed with the U.S. District Court for the Western District of Texas in 2007, Mr. Leal again raised the violation of his Article 36 rights. That court also determined that Mr. Leal's claims were subject to a procedural bar—namely, the successive petition requirements as set forth in 28 U.S.C. § 2244—and dismissed the petition without receiving a response from the Attorney General and in the absence of

discovery, factual development, or an evidentiary hearing. *Leal v. Quarterman*, 2007 WL 4521519 (W.D. Tex. Dec. 17, 2007). Although that court purported to conduct a prejudice review in the alternative, the court did so despite its conclusion that it lacked jurisdiction over the questions raised. The Court's assessment of the facts of Mr. Leal's case, unsurprisingly, is also riddled with misstatements and fails to consider critical evidence.[3] More important, on appeal the Fifth Circuit vacated the part of that court's opinion that concluded that Mr. Leal had not been prejudiced. *Leal García v. Quarterman*, 573 F. 3d 214, 225 (5th Cir. 2009). The Fifth Circuit held that the district court's "hypothetical" analysis was improper, and on that basis vacated the court's "alternative" prejudice determination. *Id.* at 216, n 4.

To allow an execution to proceed in these circumstances, before a U.S. court that would be capable of granting relief can consider his claims, cannot be said to be "based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (opinion of Stevens, J.) ("[D]eath is a different kind of punishment from any other

[3] For example, the Court's assumption that the consulate could not have extended meaningful assistance because Mr. Leal spent most of his life in the United States, 2007 WL 4521519 at *17-18, is mistaken. As an initial matter, even though Mr. Leal had grown up in the United States, his parents and many other witnesses in this case are Mexican nationals who speak no English. Moreover, the observation misses the point, for Mexico's consular assistance goes beyond gathering records in Mexico. As pointed out by Mr. Uribe in his affidavit, *see* A285, Mexican consular officers ensure that their nationals receive highly competent defense counsel, along with investigative and expert assistance – regardless of how long they have resided in the United States. Likewise, the district court's assumption that the nature of consular assistance at the time of trial would have been coterminous with the assistance provided in post-conviction proceedings is not supported by the record. In its amicus curiae brief filed in this case, the Government of Mexico makes clear that it devotes the majority of its resources to consular assistance prior to trial. See Brief Amicus Curiae of the Government of the United Mexican States, Leal v. Texas, No. 11-___ (Jun. 27, 2011), at 6.

which may be imposed in this country" and it is 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."). Although the nature of the death penalty alone does not justify a stay in every instance, "a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding." *Barefoot v. Estelle*, 463 U.S. at 888.

B. The Balance of Equities Strongly Weighs In Favor of A Stay of Execution.

Here, the balance of equities could not be stronger in favor of a stay of execution. There can be no doubt that the paramount interest in human life is at stake here and that that interest would be irreparably harmed if Mr. Leal were to be executed without having received the review and reconsideration to which he is entitled. In that event, Mr. Leal would forever be deprived of the opportunity to vindicate his rights. *See, e.g.*, *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) ("[T]hat irreparable harm will result if a stay is not granted . . . is necessarily present in capital cases."). But Mr. Leal's execution would go far beyond the confines of his individual case; his case raises unique circumstances implicating the public interest that make the grant of a stay imperative not only to maintain the standing of the United States in its international relations, but also to protect the lives of countless Americans living, working and traveling abroad.

First, Mr. Leal would suffer the gravest possible form of irreparable injury were he to be put to death before having a chance to be afforded the protections to which he is

undisputedly entitled by virtue of the treaty obligations of the United States. The "Consular Notification Compliance Act" would confer on Mr. Leal the right to raise the violation of his Vienna Convention rights in federal court and to receive a merits review of his claim, unencumbered by procedural bars. This 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 510-11. Texas should not be allowed to deprive the Executive and Congress of the opportunity to comply by executing Mr. Leal before they have had a reasonable opportunity to act and thereby placing the United States in irreparable breach. As a result of the irreparable injury not only to Mr. Leal, but also to the institutional interests of both the Executive and Congress, the equities weigh heavily in favor of a stay.

Second, compared with the irremediable loss of a human life and the paramount federal interests at stake, any prejudice that Texas might suffer due to a delay in Mr. Leal's execution would be inconsequential. Mr. Leal would remain incarcerated on death row, as he has been for sixteen years. While Texas has a legitimate interest in implementing its criminal laws, a further delay equal to the length of time needed to implement the *Avena* Judgment could hardly constitute a hardship to Texas.

Indeed, far from harming Texas, a stay of execution is apt given Texas's role in the treaty violation itself. As Justice Stevens stated in *Medellin v. Texas*, "Texas' duty [to protect the honor and integrity of the Nation] is all the greater since it was Texas that – by failing to provide consular notice in accordance with the Vienna Convention – ensnared

the United States in the current controversy." 552 U.S. at 536 (Stevens, J., concurring). "Having already put the Nation in breach of one treaty," Justice Stevens wrote, "it is now up to Texas to prevent the breach of another." *Id.*

Third, the repercussions of Mr. Leal's execution in violation of the *Avena* Judgment would be felt far beyond the borders of Texas, damaging the United States' relations with its treaty partners, eroding our allies' confidence in the ability of the United States to live up to its international commitments, and potentially endangering thousands of Americans overseas who require the assistance of U.S. consulates. The public interest in affording Congress the opportunity to effect compliance with *Avena* is thus profound.

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."). In an amicus brief submitted to the Court in *Medellin v. Dretke*, 544 U.S. 660 (2005), 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.

Nine Justices of this Court recognized that the United States has a vital public interest in complying with its obligations under the *Avena* Judgment. Writing for the majority in *Medellin*, 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. In a concurring opinion, Justice Stevens agreed that "the costs of refusing to respect the ICJ's judgment are significant." *Id.* at 537 (citation omitted). 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.

As noted, the rights and obligations set forth in Article 36 of the Vienna Convention are entirely reciprocal in nature. And the risks of noncompliance, well-known to those entrusted with carrying out the nation's foreign relations, are severe. 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. 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. 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.

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. Euna Lee, a journalist who was detained in North Korea, describes the "unbearable" "sense of darkness" she experienced while in North Korean custody. A274. 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; *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. 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, 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 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 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.

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), *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.*

Simply put, if Texas places the United States in breach of its treaty obligations, the risk that our treaty partners will suspend compliance with their obligations under those same treaties increases dramatically. Such a response could compromise, among other things, the crucial rights of consular notification and assistance of all American citizens abroad. With thousands of Americans arrested or detained abroad every year, that risk is palpable. Indeed, failure to provide the modest remedy of review and reconsideration required in this case will undermine America's credibility as a global champion of the rule of law and will jeopardize the "reciprocal rights and safety of [our] overseas citizens." A266. Allowing Mr. Leal's execution to proceed in contravention of the United States' obligations under the *Avena* Judgment, when steps to implement that obligation consistent with this Court's guidance are in process, would also send the message that the United States is indifferent not only to the rule of law but to human life itself.

C. The Court Should Grant a Stay in the Interest of Comity.

This Court should also grant a stay out of comity to the Inter-American Commission on Human Rights. On December 12, 2006, Mr. Leal filed a petition before the Inter-American Commission 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?*, *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.

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 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. . . ." A75, Medellín,

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.

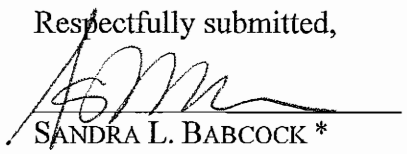
This Court should stay Mr. Leal's execution in the interest of comity to permit the United States to give effect to the Commission's recommendations and the precautionary measures issued in respect thereof. To disregard the finding of prejudice by an esteemed body of experts, whose authority the United States fully recognizes, on the basis of facts never before considered on the merits by any domestic court would signal profound disrespect for the Commission and Mr. Leal's inalienable right not to be deprived of his life without due process of law.

CONCLUSION

For the foregoing reasons, Mr. Leal respectfully requests that this Court grant him a stay of execution, now scheduled for July 7, 2011, pending resolution of his petition for

a writ of certiorari and for writ of habeas corpus, and, if the writ is granted, further order of the Court.

Respectfully submitted,



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Dated: 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 Motion for Stay of Execution to be served electronically on opposing counsel via e-mail delivery to:

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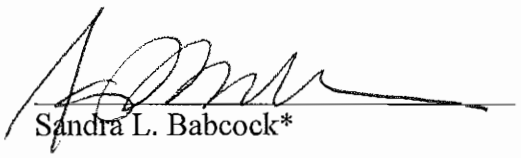
and that all parties required to be served have been served.



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