

**IN THE SUPREME COURT OF OHIO**

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<b>STATE OF OHIO,</b>	)	
<b>Appellee,</b>	)	
	)	<b>Case No. 1993-1245</b>
<b>v.</b>	)	
	)	
<b>JOSÉ TRINIDAD LOZA,</b>	)	<b>Death Penalty Case</b>
<b>Appellant.</b>	)	

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**MEMORANDUM OF  
AMICUS CURIAE, THE UNITED MEXICAN STATES,  
in support of  
JOSÉ TRINIDAD LOZA’S RESPONSE IN OPPOSITION TO STATE’S MOTION TO  
SET EXECUTION DATE**

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## **I. THIS CASE IS UNIQUE**

Mr. Trinidad Loza is the only Mexican national on Ohio's death row. He was convicted and sentenced to death in Ohio without ever being informed of his rights to consular notification and access pursuant to Article 36 of the Vienna Convention on Consular Relations. Counsel appointed to represent him at trial "had never represented a Mexican before." The decision to prosecute Petitioner capitally was made by a detective who referred to Petitioner as "the Mexican" and is heard on the crime scene video saying "the wetback from California" committed the offense, before any evidence had been collected. The capital prosecution of a Mexican national deprived of all consular assistance by law enforcement officials who harbored substantial ethnic bias is deeply troubling. Yet no court has ever reviewed the consular rights violation, or the prejudice that resulted.

The execution of Mexican nationals by the United States has frayed the relations between our two countries. The state of Ohio has never executed a Mexican national. Litigation and review of the issues raised by Mr. Loza's case are not complete. As such, amicus curiae respectfully suggests that to schedule Mr. Loza for execution at this time – particularly in light of facts of his case – will only aggravate the tense relations that surround the United States' pursuit of the execution of citizens of Mexico.

## **II. THIS COURT HAS NEVER EXAMINED THE EFFECT OF THE AVENA DECISION OF THE INTERNATIONAL COURT OF JUSTICE IN MR. LOZA'S CASE.**

### **A. The Vienna Convention on Consular Relations and the decision of the International Court of Justice.**

Mexico and the United States are both parties to the Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77. Pursuant to Article 36 of the

Convention, each nation agreed to advise without delay detained foreign nationals of their rights to consular notification and access. Each nation also agreed to give consular officials access to their nationals for the purposes set forth in Article 36 (1), which include the rights to visit, converse with, and “arrange for [the] legal representation” of their nationals.

Nowhere is this assistance more vital than in the case of a foreign national facing a capital murder prosecution. There is no dispute that the “competent authorities” of the state of Ohio failed to comply with these obligations at the time they arrested José Trinidad Loza. It is likewise undisputed that both state and federal courts have refused to review the violation of Mr. Loza’s Article 36 rights.

The absence of judicial review of Mr. Loza’s claim stands in stark contrast to the practice of Mexican courts, which have not only reviewed Article 36 claims raised by foreign national defendants, but have ordered substantial remedies for those violations. For example, in the case of Florence Cassez, a French national’s appeal of her criminal conviction and 96-year sentence, the Supreme Court of Mexico found that the defendant’s rights to consular notification, contact and assistance had been violated, and ordered that she be immediately released, recognizing that Article 36 conferred “fundamental rights” on detained foreign nationals to be advised of their rights to communicate with the consulate, rights that were indispensable to guaranteeing a fair trial in cases involving foreign nationals and are part of due process.<sup>1</sup> *See also Amparo Directo en Revisión 886/2013*<sup>2</sup> (in case of United States national convicted of kidnapping, Mexico’s Supreme Court reversed conviction and ordered a new trial on the basis of Article 36 violation);

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<sup>1</sup> Amparo Directo en Revisión 517/2011 Florence Marie Cassez Crepin, Primera Sala de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Seminario Judicial de la Federación y su Gaceta, Novena Época, Enero de 2013, Páginas 20-21,85 (Mex.) [hereinafter “Cassez”].

<sup>2</sup> Amparo Directo en Revisión 886/2013, Primera Sala de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Novena Época, Mayo de 2013, Página 3 (Mex.).

*Amparo Directo 2/2013*<sup>3</sup> (ordering new trial in case involving violation of Article 36 rights of Guatemalan national convicted of human trafficking).

On March 31, 2004, the International Court of Justice (“ICJ”) concluded that the United States had violated the rights of Mexico and of Mr. Loza under Article 36. *Avena and Other Mexican Nationals (Mex v. U.S.)*, 2004 I.C.J. 128 (Mar. 31) [hereinafter “*Avena*”]. As a remedy, the ICJ held that the United States must review and reconsider Mr. Loza’s conviction and sentence to determine the impact of those violations on his capital murder prosecution.

No court has had occasion to review the impact of the ICJ’s decision on Mr. Loza’s case. In *Medellin v. Texas*, 552 U.S. 491 (2008), the Supreme Court determined that *Avena* is not binding federal law that preempts the application of state procedural default rules. Nonetheless, the state courts of Nevada and Oklahoma have each determined to give effect to the ICJ’s judgment.

In *Gutierrez v. State*, 2012 WL 4355518 (Nev. 2012), the Supreme Court of Nevada remanded Mr. Gutierrez’s case to the trial court for an evidentiary hearing for a determination of the prejudice that resulted from the violation of his rights under Article 36. In so doing, the Court recognized that the Supreme Court’s decision in *Medellin* does not preclude a state court from conducting a merits evaluation – including a determination of prejudice – in the case of a Mexican national subject to *Avena*. Thus, the Court concluded, while “state procedural default rules do not *have* to yield to *Avena*, they *may* yield, if actual prejudice can be shown.” *Id.* at \*2.

Similarly, the Oklahoma Court of Criminal Appeals applied the judgment of the International Court of Justice in the case of a Mexican national whose consular rights had been

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<sup>3</sup> Amparo Directo 2/2013, Primera Sala de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Novena Época, Junio de 2013, Páginas 9, 55-60 (Mex.).

violated. *See Torres v. State*, 120 P.3d 1184 (2005). The Oklahoma court remanded the matter for an evidentiary hearing to determine the prejudice resulting from the Vienna Convention violation. In the wake of that hearing, and “the ample evidence that the Mexican government takes its consular obligations to its nationals very seriously, particularly when those citizens are capital defendants in another country,” the Oklahoma Supreme Court recognized that “[i]f Torres were still under a capital sentence, [the evidence presented at the evidentiary hearing] would indeed amount to a showing of prejudice.” *Id.* at \*1188.<sup>4</sup> Thus, although its own precedent would have required otherwise, the Oklahoma Court followed the holding in the *Avena* Judgment, and applied the remedy and standards outlined therein.

The issue is not whether a government can actually affect the outcome of a citizen's case, but whether under the Convention a citizen has the opportunity to seek and receive his government's help. This protection extends to every signatory of the Convention, including American citizens. It is often impossible to say whether a particular action in a criminal trial could affect the outcome. However, it is possible to show what particular assistance, if any, a government would offer its citizen defending against a crime in a foreign country. That is the right and privilege safeguarded by the Convention. This Court is unwilling to raise the bar beyond that which the Convention guarantees. If a defendant shows that he did not know he could have contacted his consulate, would have done so, and the consulate would have taken specific actions to assist in his criminal case, he will have shown he was prejudiced by the violation of his Vienna Convention rights.

*Id.*

The rulings of the courts of Oklahoma and Nevada are consistent with the U.S. Supreme Court's holding that the ICJ's judgments are entitled to “respectful consideration.” *See, e.g., Sanchez Llamas v. Oregon*, 548 U.S. 331, 353 (2006). Indeed, in his concurring opinion in

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<sup>4</sup> After the remand and an evidentiary hearing, the trial court found that Mr. Torres was prejudiced by the violation of his Vienna Convention rights, and the Oklahoma Court of Criminal Appeals agreed. However, the prejudice found was related to Mr. Torres' sentence of death, not his conviction. As his death sentence had already been vacated, the prejudice that resulted from the violation of Mr. Torres' consular rights did not mandate relief. *Id.* at 1187-1188. Here, Mr. Loza remains under a sentence of death without ever having the benefit of such an evidentiary hearing.

*Medellin*, Justice Stevens praised the Oklahoma court for remedying the Vienna Convention violation in *Torres*:

One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation. Texas' duty in this respect 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. Having already put the Nation in breach of one treaty, it is now up to Texas to prevent the breach of another. . . The cost to Texas of complying with *Avena* would be minimal . . . It is a cost that the State of Oklahoma unhesitatingly assumed.

*Medellin*, 552 U.S. at 536-37 (Stevens, J., concurring). This case provides the State of Ohio the opportunity to accord the ICJ's judgment the deference it is due, in accordance with the United States' international legal obligations.

### **III. THE THREAT TO U.S.-MEXICO RELATIONS**

The execution of Mexican nationals by the United States has strained U.S.-Mexico relations and undermined the two nations' bilateral agenda.

In a 2011 letter to Senator Leahy in support of the proposed Consular Notification Compliance Act (CNCA), then Secretary of State Hillary Clinton and former Attorney General Eric Holder described the law enforcement relationship between the U.S. and Mexico as having "reached unprecedented levels of cooperation." 157 Cong. Rec. S4215-01 (daily ed. July 29, 2011) (statement of Senator Leahy), 2011 WL 2565801. They observed, however, that noncompliance with *Avena* was a persistent and "significant" problem between the two countries that threatened their "bilateral agenda." *Id.* In 2013, Secretary of State John Kerry advised Texas officials that the execution of Edgar Arias Tamayo<sup>5</sup> would "damage relations between the United States and Mexico and complicate the ability of the United States to help Americans detained

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<sup>5</sup> Mr. Tamayo was executed on January 22, 2014. See Tom Dart, *Mexican Edgar Tamayo Executed in Texas Despite Last Minute Pleas*, THE GUARDIAN, Jan. 22, 2014, available at <http://www.theguardian.com/world/2014/jan/23/mexican-edgar-tamayo-executed-texas>.

overseas.” Manny Hernandez, *Texas Plan to Execute Mexican May Harm U.S. Ties Abroad, Kerry Says*, N.Y. TIMES, Dec. 11, 2013, at A27. Mr. Kerry’s letter quoted one he himself received from the Mexican ambassador, explaining that the “issue has become and could continue to be a significant irritant in the relations between the two countries.” *Id.*

Indeed, the United States’ failure to remedy a now decade-old legal obligation continues to undermine the bilateral relationship of the two countries. Since *Avena* was decided in 2004, the U.S. has executed four Mexican nationals without providing them the review and reconsideration mandated by the decision: José Ernesto Medellín Rojas, Humberto Leal García, Edgar Arias Tamayo, and Ramiro Hernández Llanas. Each time, there has been outcry not only from Mexico, but also from the international community at large. *See, e.g.*, Jason Ukman, *Mexican National’s Execution in U.S. Prompts Diplomatic Disappointment*, WASH. POST, July 8, 2011. The Mexican embassy has sent numerous letters to United States officials, asking for their support in implementing *Avena* and voicing their concerns about the consequences of failing to do so. After the 2014 executions of Edgar Tamayo and Ramiro Hernández-Llanas, Mexico took the unprecedented step of advising the United Nations Security Council of this “grave and urgent situation” of noncompliance, noting that it was “[o]utraged by the execution of Mexican citizens in contravention of the ICJ’s orders, and concerned with the negative effect that this situation causes to the international regime of consular protection and assistance.” *See* Exhibit A (Letter to Ambassador Sylvie Lucas, President, U.N. Security Council, March 20, 2014).

**IV. THE COURT SHOULD REFRAIN FROM SETTING AN EXECUTION DATE TO ALLOW THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS AN OPPORTUNITY TO REVIEW MR. LOZA’S CASE.**

On July 17, 2014, Mr. Loza submitted an Urgent Request for Precautionary Measures to the Inter-American Commission on Human Rights, asking that the Commission call on the State

of Ohio not to set an execution date until the Commission has had an opportunity to fully review the alleged violations of Mr. Loza's rights under the American Declaration of the Rights and Duties of Man. The proceedings before the Inter-American Commission will provide Mr. Loza his first opportunity for merits review of the consular rights violation in his case. The Commission's rules require that petitioners first exhaust domestic remedies before appealing to the Commission. As the Supreme Court denied *certiorari* just over two weeks ago, his petition is only now ripe for review.

The Inter-American Commission was established in 1960 as an autonomous entity of the Organization of American States.<sup>6</sup> The Organization of American States (hereinafter "OAS") is a regional, inter-governmental organization with approximately 35 members, including the United States. *Id.* at 174. The Commission's principal function is to "promote the observance and protection of human rights" within the Inter-American system. *Id.* at 179. As an OAS charter organ, the Commission has "constitutional legitimacy," *id.*, and is entitled to receive and act upon individual petitions charging OAS member states with human rights violations. *Id.* at 182.

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. Both instruments are ratified treaties of the United States, applying with equal force and supremacy to all states, including Ohio. Under Article 3(1) of the OAS Charter, member

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<sup>6</sup> 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* 181 (2d ed. 1995).

states “proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex”. 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.” *Id.* art. 106. Under Article 145, the Inter-American Commission is given the responsibility to “keep vigilance over the observance of human rights.”

Under the Protocol of Buenos Aires, the United States accepted the Commission’s function as one of the core OAS organs. As a consequence, the treaty obligations of the United States include recognition of the Commission’s role to promote and protect rights enshrined in Inter-American human rights instruments, as well as its authority to receive and rule on individual complaints. OAS Charter, art. 6 (member States “accept all the obligations inherent in membership” in the OAS); *id.* art. 17 (member States “shall respect the rights of the individual”); *id.* art 18 ( “Respect for and the faithful observance of treaties” enshrined as a standard for member States); *id.* art. 95(c)(3) (priorities of OAS Member States include “the observance of the rights and duties of man.”).

Appearing before the Inter-American Commission, the U.S. Government has itself argued:

Under the Charter of the OAS, the Commission has of course the competence and responsibility to promote observance of and respect for the standards and principles set forth in the Declaration. The United States has consistently displayed its respect for and support of the Commission in this regard, *inter alia* by responding to petitions presented against it on the basis of the Charter and the Declaration.

I/A Comm. H.R., Report No. 57/96, Case 11.139, *William Andrews v. United States* (December

6, 1996), IACHR ANNUAL REPORT 1996, para. 59.<sup>7</sup>

In short, the Inter-American Commission is a respected body with demonstrated competence to review the violations of Mr. Loza's rights under applicable international instruments. Given the uncontested violation of Mr. Loza's consular rights, and the failure of U.S. courts to review the consequences of that violation, the Government of Mexico respectfully urges this Court to accord the Commission the respect it deserves, and the time that it needs, to review Mr. Loza's claims.

**V. SUBSTANTIAL ALLEGATIONS OF STATE MISCONDUCT HAVE NEVER BEEN ADDRESSED BY THE STATE COURTS.**

In federal habeas corpus proceedings, Mr. Loza discovered that the state of Ohio had withheld exculpatory evidence in the form of a confession from the co-defendant in this case. This evidence was not disclosed to Mr. Loza until the federal court granted his discovery motions. This revelation is emblematic of a pattern of misconduct by state officials in Mr. Loza's case. These irregularities call for renewed investigation into the facts surrounding the role of Mr. Loza and his co-defendant – irregularities that were aggravated by the absence of consular assistance. Until such investigation has taken place, it would be premature to schedule Mr. Loza's execution.

**VI. IMPERMISSIBLE ETHNIC ANIMUS PERVADED MR. LOZA'S CAPITAL PROSECUTION AND SENTENCE OF DEATH.**

Mr. Loza's case also presents uniquely disturbing evidence of ethnic animus. The lead detective in his case was recorded on videotape calling Mr. Loza a "wetback"—an odious ethnic slur—whom he identified as the prime suspect before any evidence was gathered and before Mr.

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<sup>7</sup> See also U.S. Views on the American Convention on Human Rights and the Inter-American Human Rights System, Remarks by Victor Marrero, U.S. Permanent Representative to the OAS, presented to the Committee on Juridical and Political Affairs, Organization of American States, October 20, 1999 ("We affirm no standard that we are not prepared to have applied to ourselves and our support is for a process to which we ourselves have submitted.").

Loza was charged. This same detective was entrusted with the decision to seek the death penalty against Mr. Loza. The lead detective's use of the term "wetback" to describe Mr. Loza is deeply offensive, and reflects a law enforcement culture that harbored substantial bias toward Mexican nationals. That this same detective made the decision to seek the death penalty presents an intolerable risk that ethnic bias infected Mr. Loza's capital prosecution.

This fact calls for an investigation into the manner in which ethnic bias pervaded Mr. Loza's prosecution, the decision to seek death, and the presentation of the punishment phase case. No capital sentence should be permitted to stand where there is any risk that it resulted from any form of racial or ethnic discrimination. The risk of such bias in the prosecution of Mr. Loza's case is clear.

## **CONCLUSION**

Through no fault of Mr. Loza, there are numerous serious issues that have yet to be addressed by the courts. Each alone, as well as in combination, substantially undermine the reliability and fairness of Mr. Loza's conviction and death sentence. *Amicus curiae* the Government of the United Mexican States respectfully submits that the setting of an execution date at this stage is premature, and respectfully requests that this Court deny the State of Ohio's Motion to schedule Mr. Loza for execution. In the alternative, *amicus curiae* requests that this Court refrain from setting an execution date until, at a minimum, the resolution of the proceedings before the Inter-American Commission on Human Rights.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

This is to certify that a fair and accurate copy of the foregoing pleading, Amicus Curiae of United Mexican States in support of Response In Opposition to State's Motion to Set Execution Date, was served upon the following by regular U.S. mail this 20th day of July, 2015:

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