No. 15-606

In The
Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Writ Of Certiorari To The Colorado Supreme Court

BRIEF OF AMICUS CURIAE THE UNITED MEXICAN STATES IN SUPPORT OF PETITIONER

GREGORY J. KUYKENDALL*
Director, MEXICAN CAPITAL LEGAL ASSISTANCE PROGRAM
AMY P. KNIGHT
531 S. Convent Avenue
Tucson, AZ 85701
(520) 792-8033
greg@kuykendall-law.com

Counsel for Amicus Curiae
**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICUS CURIAE[1]

Petitioner, Miguel Angel Peña Rodriguez, is a Mexican national. The United Mexican States ("Mexico") has a vital stake in ensuring that its nationals abroad are afforded all of the rights to which they are entitled under international and domestic law. Mexico's obligation necessarily includes protecting the right of its nationals within the United States to trial by a truly impartial jury – one that does not discriminate on the basis of ethnicity or national origin. Mexico respectfully presents this brief in an effort to broaden the Court's perspective, by addressing the potential implications of its decision in this case for the more than 33 million Hispanics of Mexican origin residing in the United States, 11 million of whom are Mexican-born.[2]

SUMMARY OF THE ARGUMENT

Hispanics and Mexican nationals have long been the victims of discriminatory treatment in the U.S. criminal justice system. Along with this Court's precedents, international law prohibits discriminatory

[1] No person or entity other than the Government of Mexico made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this amicus brief.

[2] ANA GONZALEZ-BARRERA & MARK HUGO LOPEZ, PEW RESEARCH CTR., A DEMOGRAPHIC PORTRAIT OF MEXICAN-ORIGIN HISPANICS IN THE UNITED STATES (2013), *available at* http://www.pewhispanic.org/2013/05/01/a-demographic-portrait-of-mexican-origin-hispanics-in-the-united-states/ (last visited June 20, 2016).

treatment in the courts on the basis of race or nationality and requires courts to provide an effective judicial remedy for any violation of this requirement.

For over a century, this Court has recognized the need to protect Hispanics and Mexicans from discrimination in the courts, and has forbidden discriminatory treatment in jury selection and in the State's presentation of its case. Consistent with this long-standing recognition, this Court must require lower courts to consider evidence of overt racial bias during jury deliberations in the rare cases where it arises. Such a requirement protects the constitutional and international law rights of all defendants, including foreign nationals, and prevents convictions and even executions tainted by known racial or ethnic bias.

Although jurors may be biased against defendants in myriad ways, courts have long been tasked with recognizing the uniquely dangerous presence of racial or nationality-based bias, even when they are accompanied by other forms of animus. Mexico urges this Court to reverse the decision below and to reject a rule that privileges mere policies and prudential concerns over the Constitution's sacred guarantee of a truly impartial jury.

ARGUMENT

I. This Case Must Be Viewed in the Context of a History of Discrimination Against Mexicans and Other Hispanics in the Criminal Justice System.

This Court has long acknowledged that "[t]hroughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws,"[3] and has "continued to acknowledge the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination."[4] This history includes discrimination against Mexicans, specifically in the administration of criminal justice; more than 50 years ago this Court recognized that Mexican Americans faced systematic exclusion from jury service in Texas.[5]

Despite this early judicial recognition, the lynchings and mob violence commonly known to have targeted African Americans in the 19th and 20th centuries were also directed at Mexicans, and this fact is not nearly as widely known. Leading historians on the subject have explained, "[f]rom the California Gold Rush to the last

---

[3] *See Hernandez v. Texas*, 347 U.S. 475, 478 (1954); *see also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 421 (1978) (opinion of Marshall, J.) (recognizing the "sorry history of discrimination and its devastating impact on the lives of Negroes").

[4] *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997).

[5] *See Hernandez*, 347 U.S. 475.

recorded instance of a Mexican lynched in public in 1928, vigilantes hanged, burned, and shot thousands of persons of Mexican descent in the United States. The scale of mob violence against Mexicans is staggering, far exceeding the violence exacted on any other immigrant group and comparable, at least on a per capita basis, to the mob violence suffered by African Americans."[6] Nor is this history of discrimination in the criminal justice arena limited to mob violence; in the late 19th and early 20th centuries, "[t]he sentencing policy of the [New Mexico] court appears to have been in part determined by the ethnic identity of the convicted felon, evidenced by the fact that they imposed particularly harsh prison terms on Nuevomexicanos [Mexicans living in New Mexico]. . . . The disproportionate number of Nuevomexicanos executed during these years demonstrates that state authorities had to a certain extent supplanted the role of the lynch mob."[7]

Although the mob violence has abated, discrimination persists. More than 60 percent of Latinos surveyed by the Pew Research Center in 2010 agreed that discrimination against Hispanics was a "major problem" – a number that had risen significantly since a survey three years earlier.[8] And studies have reported

---

[6] WILLIAM D. CARRIGAN & CLIVE WEBB, FORGOTTEN DEAD 1 (2013).

[7] *Id.* at 162.

[8] MARK HUGO LOPEZ ET AL., PEW RESEARCH CTR. HISPANIC TRENDS, ILLEGAL IMMIGRATION BACKLASH WORRIES, DIVIDES LATINOS (2010), *available at* http://www.pewhispanic.org/2010/10/28/illegal-immigration-backlash-worries-divides-latinos/ (last visited June 20, 2016).

differential treatment of Latinos in the criminal justice system.[9]

Public attitudes toward immigration issues tend to reinforce negative stereotypes of Latin Americans. A 2015 opinion poll found "Americans are more likely to say the impact of Latin American immigrants on U.S. society is mostly negative (37%) than to say it is mostly positive (26%)."[10] In addition, "fully half of U.S. adults say that immigrants make American society worse when it comes to crime" and "only 8% say immigrants lessen the crime problem in their communities. . . ."[11]

Attempts by state legislators to criminalize undocumented migrants also exacerbate latent discrimination against Mexicans and other Hispanic immigrants within the criminal justice system. Several U.S. states have passed anti-immigration laws effectively singling out Mexican nationals and other Hispanics, authorizing police to stop and check the residency status of people based on little more than their appearance. As

---

[9] NANCY E. WALKER ET AL., NAT'L COUNCIL OF LA RAZA, LOST OPPORTUNITIES: THE REALITY OF LATINOS IN THE U.S. CRIMINAL JUSTICE SYSTEM (2004) at 1 ("[R]esearch and information to date show that, along with other persons of color, Latinos receive more severe treatment at all stages of the criminal justice system, beginning with police stops and ending with longer periods of incarceration, than similarly-situated White Americans.").

[10] PEW RESEARCH CTR., MODERN IMMIGRATION WAVE BRINGS 59 MILLION TO U.S., DRIVING POPULATION GROWTH AND CHANGE THROUGH 2065 (2015) at 51-54, *available at* http://www.pewhispanic.org/2015/09/28/chapter-4-u-s-public-has-mixed-views-of-immigrants-and-immigration/ (last visited June 20, 2016).

[11] *Id.*

Mexico stated in a brief challenging one such state law, this approach "creates an imminent threat of state-sanctioned bias or discrimination, resulting not only in individual injury, but also in broader social and economic harms to Mexico's citizens; thereby undermining U.S.-Mexico relations."[12]

Taken together, these attitudinal and political trends demonstrate that a significant portion of the population shares, or is now coming to share, a viewpoint linking Mexicans living and working in the United States with criminality. Some people holding these negative perceptions have undoubtedly served, and will continue to serve, on juries. The frequency of toxic attitudes toward Mexicans and other Hispanics being expressed in public discourse may well embolden some individuals to express their xenophobic and racist beliefs to their fellow jurors. If the Respondent's position were to become the legal standard, courts would be powerless to address compelling allegations of actual bias that poisoned jury deliberations, and convictions known to be tainted by impermissible animus would stand.

The very cases populating the split that this Court has now undertaken to resolve illustrate with uncomfortable starkness the prejudicial attitudes specifically against Mexicans and other Hispanics that have infected jury deliberations. The appalling facts of some of

[12] Brief of the United Mexican States as Amicus Curiae in Support of Plaintiffs' Complaint for Declaratory and Injunctive Relief at 1, Hispanic Interest Coalition v. Governor of Ala., No. 5:11-cv-02484-SLB (N.D. Ala. Aug. 3, 2011).

these cases bear repeating. For example, the Massachusetts case *Commonwealth v. Laguer* is cited in the briefing for its legal ruling – that the Sixth Amendment requires consideration of juror testimony – but this Court should not lose sight of what the juror affidavit submitted in that case actually said:

> "One juror, [juror X], remarked about the defendant, 'the goddamned spic is guilty just sitting there; look at him. Why bother having the trial.' . . . Moreover, during the jury deliberations, there was much unsubstantiated speculation about how anyone could have raped someone all night. This time [juror X] stated that 'spics screw all day and night,' and again alluded to the defendant's guilt."[13]

This startling affidavit reveals that a juror not only harbored racial animus against Hispanics, but explicitly tied his belief in the defendant's guilt to his Hispanic ethnicity, just as the juror did in Petitioner's trial.

Nor was the racist conduct in *Laguer* limited to individual jurors' expression of the reason for their votes. The affidavit continued, explaining that "[Juror X] not only made specific comments, but during deliberations as well as outside deliberations (for example, at lunch) he would go from one juror to another invoking racist overtones while discussing the defendant's guilt"; the juror who submitted the affidavit felt "constantly bombarded with racist attacks on the defendant uttered by

---

[13] 410 Mass. 89, 94 (1991).

other jury members."[14] This extreme example starkly illustrates an additional problem with failing to address jury room bias: one biased juror can infect others, spreading his discriminatory and unconstitutional reasoning to jurors who would otherwise have been impartial.

In another case, a juror emailed defense counsel and reported that a fellow juror had said, "I guess we're profiling but they cause all the trouble," which the First Circuit recognized as referring to the defendant's Hispanic ethnicity.[15] This juror apparently realized his actions were improper, but injected these unconstitutional considerations into the deliberations anyway. Importantly, these are not subtle jabs or indiscretions of terminology; instead, the jurors forthrightly connected the defendants' Hispanic race with guilt, in direct contradiction to the right to a fair trial before an impartial jury.

Although the Petitioner in the instant case was not facing capital charges, the Court's decision clearly will impact death penalty cases, where racial discrimination is most alarming.[16] Even if racial bias only impacts a small number of prosecutions, the problem

---

[14] *Id.*

[15] *United States v. Villar*, 586 F.3d 76, 76 (1st Cir. 2009).

[16] *See, e.g.*, Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U.L. REV. 513, 558 (2014) (finding that death-qualified jurors held both greater implicit and greater explicit racial bias than non-death-qualified jurors); John J. Donohue III, *An Empirical Evaluation of the Connecticut Death*

remains significant for the Mexican and Mexican American communities. Today approximately 383 Hispanics reside on death row in the United States,[17] including 59 Mexican nationals,[18] as a result of a system that this Court has acknowledged involves racial disparities.[19]

While systemic and cultural racism are not squarely at issue in this case, this long and continuing history must inform the Court's response to known, overt, and explicit bias. This country's, and this Court's, long struggle against racism in the criminal justice system demonstrates that racial bias is a largely intractable problem.[20] It is virtually impossible to prove systemic discrimination in particular cases,

---

Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?, 11 J. EMPIRICAL LEGAL STUD. 673 (2014) (presenting sophisticated statistical evidence that minority defendants who kill white victims are far more likely to be sentenced to death); Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337, 349 (2000) (mock juror study found that white jurors were more likely to impose the death penalty on a black defendant than on a white defendant).

[17] Death Penalty Information Center, National Statistics on the Death Penalty and Race, http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976#inmaterace (last visited June 20, 2016).

[18] Death Penalty Information Center, Foreign Nationals and the Death Penalty in the U.S., http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us#Nationality (last visited June 20, 2016).

[19] *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987).

[20] *Id.*

although this Court requires such proof for relief.[21] Similarly, the difficulty of ferreting out and interrupting *implicit* biases makes it essential that, in those rare cases where jurors *do* overtly express their biases, courts not turn a blind eye. Refusing to allow juror testimony about racial bias during deliberations in the rare cases where racial bias explicitly surfaces would perpetuate a rule tolerating not simply the conviction, but in some cases the execution of defendants sentenced by demonstrably racially biased jurors.

II. International Law Prohibits Discriminatory Treatment Before the Courts and Mandates an Effective Judicial Remedy for Any Violation of This Binding Norm.

This Court has at times recognized the valuable guidance that international human rights law provides in resolving difficult questions. In particular, in its constitutional analyses of equal protection cases, this Court has recognized international law reflects the "values that we share with a wider civilization."[22] These principles are especially appropriate in this case, where race and national origin discrimination infected the U.S. trial of a foreign national, thus

---

[21] *Id.*

[22] *Lawrence v. Texas*, 539 U.S. 558, 573 (2003); *see also Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (citing the Convention on the Elimination of All Forms of Racial Discrimination as instructive in determining merits of a discrimination claim).

implicating not only the U.S. Constitution, but the relationship between two countries.

The International Covenant on Civil and Political Rights ("ICCPR") and the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") are especially informative on the issues in this case. Both instruments expressly prohibit any form of discrimination within the criminal justice system and both mandate effective remedies for any violation of equal treatment before the courts.

One hundred and sixty-eight countries have adopted the ICCPR, including the United States and Mexico. Upon its ratification in 1992, "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land."[23] Article 14 of the ICCPR declares that all persons "shall be equal before the courts" and that everyone facing charges "shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." These rights apply "without distinction of any kind," such as race, national origin, birth or other status.[24]

Similarly, the provisions of the CERD bind the United States, Mexico and 175 other countries. Article

---

[23] *United States v. Duarte-Acero*, 208 F.3d 1282, 1284 (11th Cir. 2000); *accord State v. Carpenter*, 69 S.W.3d 568, 578 (Tenn. 2001).

[24] International Covenant on Civil and Political Rights, art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force for the United States Sept. 8, 1992).

5 of the CERD guarantees "the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law," including the right to "equal treatment before the tribunals and all other organs administering justice."[25]

Even a single juror judging a defendant on the basis of race or nationality violates these guarantees. If and when such inequality becomes known to the Court, the Court must respond to the violation.

Both the ICCPR and CERD require effective remedies for breaches of their non-discrimination provisions. Under CERD Article 6, the United States must provide "effective protection and remedies, through the competent national tribunals" for any discriminatory acts contrary to the Convention. For its part, ICCPR Article 2(3) requires that any such breach "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity," and that each State Party shall "develop the possibilities of judicial remedy." This case presents the perfect opportunity to develop exactly such a remedy.

Allowing the decision below to stand would allow courts to acknowledge that the jury determination was biased, in violation of these treaties, but fail to provide the required remedy. Failure to rectify the manifestly biased jury deliberations in this case would thus run afoul of binding international norms. At a minimum,

---

[25] International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, arts. 5, 5(a), 660 U.N.T.S. 195 (entered into force for the United States Nov. 20, 1994).

these "express affirmation[s] of certain fundamental rights by other nations and peoples" should serve to "underscore[] the centrality of those same rights within our own heritage of freedom."[26]

III. The Federal Courts Have Long Recognized the Need for Safeguards to Prevent Discrimination, Specifically Against Hispanics, in Jury Selection and Jury Deliberations.

For more than half a century, this Court has acted systematically to insulate each stage in the jury process from discrimination against Mexican-Americans and other Hispanics. For example, the wholesale exclusion of persons of Mexican descent from grand jury service is unconstitutional,[27] and the grand jury selection process may not discriminate against Mexican-Americans through substantial underrepresentation.[28] Likewise, prosecutors may not use peremptory challenges to exclude Latinos from jury service based on their ethnicity.[29]

Courts have also forbidden prosecutors from making race- and nationality-based appeals to juries. Following this Court's dictates, other Article III courts have explained that the Constitution "prohibits a prosecutor from making race-conscious arguments since it draws the jury's attention to a characteristic that the

---

[26] *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

[27] *Hernandez*, 347 U.S. 475.

[28] *Castañeda v. Partida*, 430 U.S. 482 (1977).

[29] *Hernandez v. New York*, 500 U.S. 352, 355 (1991).

Constitution generally demands that the jury ignore."[30] In *United States v. Cabrera*, the Court reversed the convictions of two defendants from Cuba because "the lead detective injected extraneous, prejudicial material, including impermissible references to [the defendants'] national origin."[31] The First Circuit did the same with a defendant from Colombia when an otherwise irrelevant identification card identifying him as being Colombian was admitted into evidence: "A card identifying the defendant as a native Colombian could have been and was, in fact, used as the basis for making generalizations about all Colombians. The admission of the card as an exhibit made it more likely that whatever preconceived notions the jury might have had about Colombians and drug trafficking would infect the deliberative process."[32] And this Court has condemned Texas's practice of presenting testimony in capital cases that links a defendant's ethnicity to his future propensity for violence.[33]

---

[30] *United States v. Hernandez*, 865 F.2d 925, 928 (7th Cir. 1989).

[31] *United States v. Cabrera*, 222 F.3d 590, 591 (9th Cir. 2000).

[32] *United States v. Rodriguez Cortes*, 949 F.2d 532, 542 (1st Cir. 1991).

[33] *Saldano v. Texas*, 530 U.S. 1212 (2000). The *Saldano* Court vacated the judgment against a death-sentenced Argentine national and remanded for a new sentencing hearing after the State confessed error: the psychologist who testified for the State at trial opined that the defendant's Hispanic ethnicity was a factor weighing in favor of a future dangerousness finding. *See also Buck v. Stephens*, 623 F. App'x 668, 670 (5th Cir. 2015), *cert. granted*, 2016 U.S. LEXIS 3625 (June 6, 2016) (noting that after *Saldano*,

This Court has written that providing an accused with the right to be tried by an impartial jury of his peers "gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[34] While that is undoubtedly true, the damage to fairness is just as great – indeed, it could be much greater – from a bigoted juror who eludes detection at voir dire and who sows his prejudices in the jury room with the authority of an officer of the law. While prosecutors and judges *influence* the outcome, jurors *determine* the outcome. The remedy that the Petitioner seeks in this case is simply the culmination of a decades-long process by which this Court has given full effect to the Sixth Amendment promise of trial by a genuinely impartial jury. It would be counterproductive to close every other portal in pursuit of jury impartiality while leaving one gate standing wide, through which insidious racist beliefs openly enter.

IV. Preventing Impermissible Discrimination During Jury Deliberations Requires Additional Safeguards.

The court below and the State make much of the fact that jurors are only seated after the court and the lawyers have the opportunity to conduct voir dire. The briefing identifies several reasons why voir dire

---

"the AG publicly identified eight other cases involving racial testimony by [the same psychologist], six of which the AG said were similar to Saldano's case").

[34] *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

insufficiently identifies racially biased jurors (as opposed to other types of juror issues discussed in *Tanner v. United States*[35]), including sound strategy often dictating avoiding overt questions about racial bias, and few potential jurors being willing to admit to holding racist views in a formal courtroom in front of a judge. Even if voir dire could sufficiently identify racial bias, trial judges have broad discretion to control voir dire, and are not required to permit defense counsel to ask the necessary questions in every case. This Court's decisions have not required specific questioning about racial bias in cases where race is not a central factor.[36] Thus, even assuming voir dire on racial bias could be efficacious, defendants cannot rely on it to protect their right to an impartial jury. The mere *possibility* of such an avenue in some cases is not sufficient to effectuate a constitutional guarantee.

Moreover, the additional *Tanner* safeguard of jurors being able to come forward with their concerns before a verdict is rendered is hampered by the exclusion of noncitizens from juries, especially where the bias concerns nationality. While of course any juror could raise the issue of bias based on nationality with the judge or counsel, those most likely to do so – those who

---

[35] 482 U.S. 107 (1987).

[36] *See Ristaino v. Ross*, 424 U.S. 589, 598 (1976) (holding that where the racial angle in a case was "[t]he mere fact that the victim of the crimes alleged was a white man and the defendants were Negroes," "the demands of due process could be satisfied by [] more generalized but thorough inquiry into the impartiality of the veniremen").

share the pertinent characteristic – are not on the jury to begin with.

Experience confirms that voir dire cannot be relied upon to prevent racial bias in the jury room. The Government of Mexico funds a program, the Mexican Capital Legal Assistance Program (MCLAP), supervised through the Mexican Foreign Office in Mexico City. With a staff of highly experienced capital defense counsel around the United States, MCLAP monitors and offers assistance in every capital case in the United States with a Mexican national defendant.[37] This program gives the Government of Mexico a unique perspective, as it is able to identify trends and issues that recur in case after case. Time and again, MCLAP attorneys have seen trial judges place significant limits on both the time and the type of questions permitted in capital voir dire.[38] Some trial courts literally allow just five minutes of questioning per juror, even in capital cases[39] – and in a capital case, defense counsel must

---

[37] Several courts have remarked on the assistance provided by MCLAP. *See, e.g.*, *Marquez-Burrola v. State*, 157 P.3d 749, ¶ 48 (Okla. Crim. App. 2007); *United States v. Cisneros*, 397 F. Supp. 2d 726, 728-29 (E.D. Va. 2005); *Moreno v. State*, 2010 Tenn. Crim. App. LEXIS 514 *15 (2010); *Hernandez-Alberto v. State*, 126 So. 3d 193, 202 (Fla. 2013).

[38] *Cf.* Ann M. Roan, *Cover Story: Reclaiming Voir Dire*, 37 CHAMPION 22, 23 (2013).

[39] *See, e.g.*, *Dunlap v. State*, 360 P.3d 289, 300 (Idaho 2015) ("Individual voir dire was limited by the district court to five minutes per side for each juror."); *Parker v. State*, 216 P.3d 841 (Okla. Crim. App. 2009) ("The five-minute time limit that the trial court imposed on the parties, starting on the second day of voir dire, was repeatedly challenged by defense counsel.").

additionally uncover jurors' attitudes about the death penalty and receptiveness to mitigation. In such cases, even if a trial court were to permit questioning about attitudes regarding race, counsel primarily concerned with preventing a death sentence could often not afford to spend their limited time attempting to get an enlightening answer on this topic.

In addition to observing difficulties with voir dire, Mexico has documented numerous cases in which Mexican nationals have been subjected to discriminatory treatment. As Mexico observed in its Memorial to the International Court of Justice in the *Avena* case:[40] "At times, authorities are overtly hostile to Mexican nationals, and in a high percentage of cases, the media emphasize the defendants' nationality in reporting on the allegations against him."[41]

At the same time, allegations of overtly racist statements made by jurors during deliberations are extremely rare. Indeed, since its founding in 2000, MCLAP has not yet seen a capital case with a Mexican national defendant in which allegations of a juror's explicit expression of racial bias during deliberations arose and were brought to the court's attention. While racial bias arises frequently, the particular evidence of the problem that arose in Petitioner's case is rare.

---

[40] *Avena and Other Mexican Nationals* (*Mexico v. United States*), 2004 I.C.J. 12 (Mar. 31, 2004).

[41] Memorial of Mexico (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) (June 20, 2003), ¶ 40; *see also id.* ¶¶ 43-48 (describing specific cases).

Because racial and ethnic discrimination, in general and specifically against Mexicans, is so widespread a problem, enduring for centuries and proving itself intractable, and because the existing safeguards to prevent bias from influencing criminal proceedings cannot guarantee an impartial jury, this Court must allow the additional safeguard of receiving available evidence of overt racial bias during deliberations.

Indeed, this Court has long held that jurors may testify in post-conviction hearings where juror impartiality is at issue.[42] Determining the impact upon the juror obviously contemplates testimony by that juror, and to "hold otherwise would be to exalt artifice above reality."[43] The State has not even tried to explain why the practice of taking post-conviction juror testimony is uniquely inapplicable here, where this Court's protections should be at their height.

---

[42] *Smith v. Phillips*, 455 U.S. 209 (1982); *Remmer v. United States*, 347 U.S. 227, 230 (1954) (trial court "should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate").

[43] *Gregory v. Helvering*, 293 U.S. 465, 470 (1935); *see also Interspiro USA, Inc. v. Figgie Int'l, Inc.*, 18 F.3d 927, 932 (Fed. Cir. 1994) (rejecting an argument that "impermissibly elevates form over substance").

V. Courts Should Be Required to Consider Evidence of Juror Bias Reasonably Tied to Race and Nationality.

The clear standards articulated by Retired Judges[44] provide a fair and practical procedure for enacting this protection. Courts can "determine the precise content and context of the statement to determine whether it reflects the juror's actual racial or ethnic bias," which, if established, requires a new trial, and even in the absence of true bias, the court can determine "whether the juror's statements so infected the deliberative process as to compromise the defendant's right to a fair trial."[45]

In announcing a rule in this case, this Court must clearly articulate its boundaries. As an initial matter, it is impossible to separate a claim about race from a claim about nationality; in many contexts, the two are used interchangeably. In this case, the opinion below referred to "affidavits suggesting that one of the jurors exhibited racial bias against the defendant," when the affidavits in question used the term "Mexican."[46] Courts, including this Court, routinely couple the two terms when discussing discrimination, and have done so for more than a century.[47]

---

[44] *See* Cert. Amicus Br. of Retired Judges at 6-7.

[45] *Id.* at 6.

[46] Pet. for Cert. at 2A.

[47] *See, e.g.*, *Jean v. Nelson*, 472 U.S. 846, 856 (1985); *Grutter*, 539 U.S. 306; *Hernandez*, 347 U.S. 475; *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (equal protection clause applies "to all persons

Bias and discrimination come in many forms. Indeed, in this very case the jurors' allegations at times conflated multiple attributes, referring sometimes specifically to Mexican nationality and other times to a witness's (wrongly) presumed immigration status – itself a race-based attitude, as the juror apparently operated on the racial stereotype that all people of Hispanic appearance were undocumented Mexican immigrants. In truth many are U.S. citizens or authorized to be in the U.S.; many are not Mexican at all, but come from other countries in Latin America. Thus, race, nationality, and immigration status are often grouped together in a single set of stereotypes. Similarly, race and religion are increasingly interrelated as, for instance, public views of people of Middle Eastern descent have shifted increasingly toward assuming they are Muslim, but this does not render stereotypes about these individuals non-racial. Biased attitudes are not always neatly contained to a single axis.

Whether other concerns, including immigration status and religion, factored into the biased statements and attitudes or not, the question for the Court must simply be whether the juror's statements reflect the *existence* of bias *based on race or nationality*. If a juror articulated such a bias during deliberations, no matter what other statements he made, courts must be free to accept that evidence and grant a new trial. Trial courts, faced with the actual facts of what is said and

---

within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws").

in what context, are well equipped to determine if a statement truly reflects bias based on race or nationality. They can do this regardless of whether the content of the remarks extends to other forms of bias.

CONCLUSION

For the foregoing reasons, the Court should reverse the opinion of the Colorado Supreme Court and hold that courts must consider evidence of racial or nationality bias expressed during jury deliberations, rules of evidence to the contrary notwithstanding.

Respectfully submitted,

GREGORY J. KUYKENDALL*
Director, MEXICAN CAPITAL
LEGAL ASSISTANCE PROGRAM
AMY P. KNIGHT
531 S. Convent Avenue
Tucson, AZ 85701
(520) 792-8033
greg@kuykendall-law.com

Counsel for Amicus Curiae
**Counsel of Record*