

No. 08-897

IN THE
SUPREME COURT OF THE UNITED STATES

RUBEN CAMPA, RENE GONZALEZ, ANTONIO GUERRERO,
BERARDO HERNANDEZ, AND LUIS MEDINA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

**BRIEF OF THE IBERO-AMERICAN FEDERATION
OF OMBUDSMAN; THE ORDER OF ATTORNEYS OF
BRAZIL; THE BELGIUM BAR ASSOCIATIONS; THE
BERLIN BAR ASSOCIATION; THE COMMITTEE
FOR HUMAN RIGHTS OF THE PORTUGUESE BAR
ASSOCIATION; THE INTERNATIONAL
FEDERATION FOR HUMAN RIGHTS; FEDERICO
MAYOR ZARAGOZA (DIRECTOR-GENERAL OF
UNESCO, 1987-1999); JUDGE JUAN GUZMÁN TAPIA
OF CHILE; AND HUMAN RIGHTS, RELIGIOUS AND
LEGAL ORGANIZATIONS, LAW PROFESSORS AND
LAWYERS FROM ARGENTINA, CHILE, COLUMBIA,
ECUADOR, GERMANY, JAPAN, MEXICO, PANAMA,
PORTUGAL, SPAIN AND UNITED KINGDOM AS
AMICUS CURIAE IN SUPPORT OF THE PETITION
FOR WRIT OF CERTIORARI**

AMICUS CURIAE

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INTEREST OF THE AMICI CURIAE¹

The Amici are a diverse array of foreign bar associations, foreign government officials whose legal duty is the protection of human rights, foreign lawyers and law professors, the former Director-General of United Nations Educational, Scientific and Cultural Organization (UNESCO), a prominent former Chilean judge, and foreign human rights, non-governmental, religious and legal organizations. They are deeply disturbed about the violation of petitioners internationally guaranteed right to a fair trial due to Miami's climate of pervasive community hostility, prejudice, unfavorable publicity and violence against agents or perceived sympathizers of the government of Cuba. Amici view petitioners' trial and conviction as contradicting the United States' international commitment to accord all defendants a fair trial before an impartial tribunal. Amici's interest in this case stems from and is reflective of the intense public interest, discussion and dialogue that petitioners' trial and conviction in Miami has engendered in their countries.

¹ This brief is filed with the written consent of all parties. No counsel for a party authored the brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. This brief was prepared by counsel for amici with the extremely helpful assistance of University of Pittsburgh Law School students Amanda Fisher and Elizabeth Tuccillo.

IBERO-AMERICAN FEDERATION OF OMBUDSMAN

The Ibero-American Federation of Ombudsman (FIO) represents 86 national, state, autonomous and provincial government officers serving as Ombudsmen, Public Defenders, Commissioners, and Presidents of Public Human Rights Commissions from Spain, Andorra, Argentina, Bolivia, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal and Venezuela. Their official duty, imposed by law, is the protection of the human rights of citizens against government abuse. On March 27, 2008, the Governing Council of FIO approved a resolution that recommended the United States' full compliance with opinion No. 19/2005 of the Work Group of Arbitrary Detentions of the United Nations with respect to the petitioners in this case, and requested a fair and expeditious new trial based on the U.S. Constitution and international law for the five petitioners. The Governing Council of FIO considered this situation to present a special case where FIO felt it had a strong moral and ethical duty to speak out about this important human rights violation despite the fact that neither the United States nor Cuba are parties to FIO.

THE ORDER OF ATTORNEYS OF BRAZIL

The OAB was founded in 1930 and is the Brazilian Bar Association, with almost 700,000 lawyer members. Membership in OAB is required in order to practice law in Brazil. OAB is responsible by law for the regulation of the legal profession in Brazil. One of

its guiding principles is the right articulated in Article 10 of the Universal Declaration of Human Rights that “every person has the equal right to a fair and public trial, by an independent and impartial court, which shall decide about their rights and duties or about any criminal accusation against them,” a right it believes was violated in petitioners’ case.

BELGIUM BAR ASSOCIATIONS

The Flemish Bar Association (Orde van Vlaamse Balies O.V.B.) is a Belgium Bar association composed of more than 8,600 Dutch-speaking lawyers. The Bar Association for French and German Speakers (Ordre des barreaux francophones et germanophones, O.B.F.G.) is a Belgium Bar association composed of approximately 7,000 French and German-speaking lawyers. Membership in either the O.V.B. or the O.B.F.G. is required by law for all attorneys practicing in Belgium.

GERMANY

The German amici include the Berlin Bar Association (Rechtsanwaltskammer Berlin), which is composed of over 12,000 members; the League of Human Rights and the Defense Bar Association (die internationale Liga für Menschenrechte, Berlin); the Association of Republican Lawyers (RAV) (der Republikanische Anwältinnen und Anwälteverein); and the Working Group law students at the Universidad Humboldt in Berlin (akj) (der Arbeitskreis kritischer Juristinnen und Juristen an der Humboldt universität).

PORTUGUAL

The Committee for Human Rights of the Portuguese Bar Association (Comissão dos Direitos Humanos, Ordem dos Advogados) and the Committee's President, José Augusto Rocha are amici. The Portuguese Bar Association (Ordem dos Advogados Portugueses) is responsible for regulation of the legal profession and was established by law in 1926.

INTERNATIONAL FEDERATION FOR HUMAN RIGHTS

Established in 1922, the International Federation for Human Rights (FIDH) is a federation of 155 non-profit human rights organizations in more than 100 countries. FIDH has consultative status before the United Nations, UNESCO and the Council of Europe. FIDH coordinates and supports its affiliates' activities at the local, regional and international level, to obtain effective improvements in the prevention of human rights violations, the protection of victims, and the sanction of their perpetrators, in accordance with international standards on due process and the right to a fair trial. With activities ranging from judicial enquiry, trial observation, research, advocacy, and litigation, FIDH seeks to ensure that all international human rights and humanitarian law instruments are respected by State parties. FIDH has initiated and supported proceedings before domestic courts and regional and international bodies in cases concerning arbitrary detention, torture, and other abusive practices.

FEDERICO MAYOR ZARAGOZA

Federico Mayor Zaragoza was the Director-General of United Nations Educational, Scientific and Cultural Organization (UNESCO) from 1987 to 1999 and Minister of Spain from 1981 to 1982.

JUDGE JUAN GUZMÁN TAPIA

Judge Juan Guzmán Tapia is a prominent and respected Chilean jurist who served on Chile's Court of Appeals for 22 years. He was appointed to investigate and then try former Chilean dictator Augusto Pinochet on human rights charges, and investigated a total of 99 cases of human rights violations. He is the former Dean of the law school at the Central University of Chile (Universidad Central de Chile) and is currently the director of its Center for the Study of Human Rights and also a Professor of Law at the Catholic University of Chile, and the Santiago Police Academy. He has received numerous awards within Chile and abroad; received honorary doctorates from the Catholic University of Leuven, Belgium, from the Monterrey Institute of International Studies, California, and from Oberlin College, Ohio. He has authored numerous books on law that have been published in various countries and is a member of the Royal Academy of Financial Sciences of Barcelona, Spain. Judge Guzmán joins as amicus particularly because he believes that the United States, a country that has traditionally been an example of democracy and justice, must return to that course and ensure that rights are respected and continue to serve as an example for other nations.

LATIN AMERICAN COUNCIL OF CHURCHES

The Latin-American Council of Churches (Consejo Latinoamericano de Iglesias) is an organization of churches and Christian movements from 21 countries in Latin America and the Caribbean. It is composed of more than 150 churches of different denominations, including Episcopalian, Lutheran, Baptist, Methodist, Presbyterian, Mennonite and Pentecostal churches and was founded in 1982.

ECUADOR

The Permanent Human Rights Assembly—APDH of Ecuador (Asamblea Permanente de Derechos Humanos—APDH del Ecuador) is a not-for-profit, non-governmental organization for the defense, education and promotion of human rights. It is concerned that petitioners' trials violated Article 14 of the International Covenant on Civil and Political Rights.

JAPAN

The Japanese amici, lawyers, law professors and legal organizations dedicated to promoting human rights and social justice, believe that this case presents violations of both the constitutional right to a fair trial in the United States, and the corresponding rights contained in Article 14 of the International Covenant on Civil and Political Rights. The Japanese amici are composed of two legal and human rights organizations, 46 lawyers and three law professors. The Japanese amici believe that the United States generally respects fundamental human rights, has provided an example

of the rule of law to the rest of the world, and urges other nations of the world to respect human rights. They have a deeply held belief in the fairness of the U.S. judiciary, and therefore fail to understand how United States courts can consider the petitioners' trial to comport with the requirements of a fair trial and impartial tribunal. In their view, the integrity of the U.S. judiciary will be verified if the United States Supreme Court overturns the Court of Appeals decision and uses this case to demonstrate that constitutional values and human rights are not to be neglected on grounds of the political affiliations of the defendants.

UNITED KINGDOM

United Kingdom amici include 14 professors of law, including professors from Oxford, the London School of Economics and King's College, and 18 barristers and solicitors.

CHILE

The Chilean amici besides Judge Guzmán are the National Group of Former Political Prisoners of Chile (Agrupación Nacional de Ex Presos Políticos de Chile), composed of 25 organizations throughout Chile, and the Group of Family Members of Executed Political Figures (Agrupación de Familiares de Ejecutados Políticos de Chile).

SPAIN

The Spanish amici besides Federico Mayor Zaragoza are composed of nine legal and human rights

organizations, one bar association, six professors of law and 98 attorneys. In Spain, as in many other countries, petitioners' case has raised intense public interest, even creating social alarm in wide strata, especially among the law professionals and human rights defenders. Since the trial of the petitioners, many activities have taken place in Spain expressing concern about the case. In the last few years, there have been numerous activities, conferences and debates in Spain that many of the Spanish amici have participated in concerning the lack of conformity of petitioners' trial with international human rights norms.

COLUMBIA

The Collective Corporation of Lawyers José Alvear Restrepo (Corporación Colectivo de Abogados José Alvear Restrepo) is a Colombian non-governmental human rights organization with consultative status to the Organization of American States. It is composed of attorneys who defend and promote human rights. The organization has received several international awards including an award for its work from the Republic of France given to them by then President Chirac in 1996. It has successfully brought cases before the Inter-American Court of Human Rights and the Working Group on Arbitrary Detention of the United Nations. In 2003, the organization's president won the Martín Ennals Human Rights Award.

The Columbian amici also includes Professor Renán Vega Cantor, Doctor in Political Studies and Professor at the National Teaching University.

PANAMA

The Panamanian amici are organizations and prominent lawyers that are committed to promoting the defense and respect of human rights and of fundamental judicial and political guarantees, both in Panama and abroad. Those organizations include: the Ecumenical Committee of Panama (Comité Ecuménico de Panamá) (CEOPA), whose membership consists of major denominations such as the Catholic Church, the Greek Orthodox Church, the Russian Orthodox Church, the Anglican Church, the Evangelical Methodist Church of Panama, the Methodist Church of the Caribbean and the Americas, the Baptist Calvary Church, the Union Church, the Lutheran Church and the Salvation Army of Panama; the Coordinator of Human Rights of People Panama (Coordinadora Popular de Derechos Humanos de Panamá) (CHRPP), which is made up of a variety of organizations and Panamanian unions with thousands of members; Association of Litigant Lawyers of Panama (Asociación de Abogados Litigantes de Panamá); the Association of Independent Lawyers of Panama (FRAI) (Frente de Abogados Independientes de Panamá), composed of approximately four hundred and twenty Panamanian lawyers; the Istmeña Academy of International Law (Academia Istmeña de Derecho Internacional); the Latin American Academy of International Law (Academia Latinoamericana de Derecho

Internacional); Columbian-Panamanian Institute of Procedural Law (Instituto Colombo Panameño de Derecho Procesal); the Peace and Justice Service in Panama (Servicio Paz y Justicia en Panamá), which has consultative status before official United Nations bodies; Alternative Legal Assistance of Panama (Asistencia Legal Alternativa de Panamá); the Social Training Center of Panama (Centro de Capacitación Social de Panamá), which has consultative status at the United Nations; the National Indigenous Lawyers Union of Panama (Unión Nacional de Abogados Indígenas de Panamá), a non-profit legal organization, whose guiding principles include respect for the guarantees of due process; Center for Social Training of Panama (Centro de Capacitación Social de Panamá).

In addition three prominent Panamanian lawyers join as amici: Dr. Hernando Franco Muñoz, the former legal advisor of the President of the National Assembly of Panama as well as the Assembly's international relations legal advisor and currently Director of the Department of Public Law, Department of Law and Political Science at the University of Panama; Lic. Ramiro Guerra Morales, a Member of the Board of Directors of the National College of Attorneys, Panama; and Lic. Carlos Ayala Montero, the Advisor to the National Assembly's Commission on Work and Social Welfare and Executive Director of the Panamanian Academy of Labor Law.

MEXICO

The Human Rights Program at the UACM, dedicated to teaching, research, training, and advocacy specialized in international human rights issues, is one of only three such programs at the Master's level in Mexico. The UACM is Mexico's largest urban public university. The program's advocacy activities include participation as counsel in human rights cases in the Mexican courts and in the context of the UN and Inter-American Human Rights systems. Enrique González Ruiz is the program's current coordinator and former Rector (President) of the Autonomous University of Guerrero. Camilo Pérez Bustillo (J.D., Northeastern University Law School, 1981) is a Research Professor in the same Program and former holder of the endowed W. Haywood Burns Memorial Chair in Civil Rights Law at the City University of New York (CUNY) Law School.

ARGENTINA

The Argentina amici include the Argentinean League for the Rights of Man founded in 1937 (Liga Argentina por los Derechos del Hombre); Argentinean League for the Rights of Man Rosario (Liga Argentina por los Derechos del Hombre Rosario); Family Members of Those Who Have Disappeared or Been Detained for Political Reasons Rosario (Familiares de Desaparecidos y Detenidos por Razones Políticas Rosario); Center of Study and Investigation of Human Rights (Centro de Estudio e Investigación en Derechos Humanos); Permanent Assembly for Human Rights

Rosario (Asamblea Permanente por los Derechos Humanos Rosario).

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' trial took place in an extraordinary climate of violence, intimidation, pervasive community prejudice, and publicity in Miami directed against the Cuban government, its agents, and anyone perceived to be sympathizers. This "climate of bias and prejudice against the accused" led the United Nations Human Rights Commission for the first time in its history to condemn an American judicial proceeding, stating that, "the trial did not take place in the climate of objectivity and impartiality that is required to conform to the standards of a fair trial as defined in Article 14 of the International Covenant on Civil and Political Rights." Report of the United Nations Working Group on Arbitrary Detentions, U.N. Doc. E/CN.4/2006/7/Add. 1, at 65 (Oct. 19, 2005). Numerous human rights, non-governmental and legal organizations throughout the world concur in the Human Rights Commission's assessment. The en banc Court of Appeals erred in virtually ignoring this extensive factual record of community bias and prejudice against the Castro government and its agents or perceived sympathizers in Miami.

The right to a fair and "impartial" tribunal, free from outside influences, is a fundamental principle of all democratic societies and of international law. Strict adherence to this principle is particularly significant in this case in light of the important role that the United States plays in promoting this right throughout the world. Numerous State Department

human rights reports criticize other nations for their failure to adhere to the principle that tribunals shall operate “impartially,” “without improper influence” and free from “political and other extraneous considerations.” *See, e.g.*, United States Dept. of State, Bureau of Democracy, Human Rights, and Labor, *2007 Country Reports on Human Rights Practices*, available at <http://www.state.gov/g/drl/rls/hrrpt/2007/> (see specifically reports on Timor-Leste, Burma, Tunisia, Croatia, Malaysia, Syria, Iran), United States Dept. of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices*, Intro., available at <http://www.state.gov/g/drl/rls/hrrpt/2001/8147.htm>. Friendly nations and civic organizations view the U.S. with expectations based on widely accepted international law and a shared commitment to a democratic legal tradition. Unfriendly countries look for an opportunity to accuse the United States of violating minimal standards of international law or to seize upon an American precedent to justify their own violations.

Petitioners’ case has received substantial international attention and concern regarding the perceived conflict between the United States’ commitment to human rights and its failure to accord nationals of a country with which it has had substantial political tensions the fundamental guarantees of a fair trial and impartial tribunal. As the United States government pointed out in *Brown v. Board of Education*:

The United States is trying to prove to the people of the world, of every nationality, race and color, that a free democracy is the most civilized and most secure form of government yet devised by man. We must set an example for others by showing firm determination to remove existing flaws in our democracy.

Brief for the United States Government as Amicus Curiae, at 6 in *Brown v. Board of Education*, 347 U.S. 483 (1954).

It is this Court's responsibility to ensure that the right to a fair and impartial trial that the United States cherishes at home and promotes abroad is applied equally to citizens and aliens of all races, creeds and political views, especially in those cases which arouse the strong political and emotional passions which historically have presented the gravest threat to the impartial administration of justice. The intense international interest, concern and criticism that petitioners' trial engendered affords this Court the opportunity to affirm this nation's commitment and adherence to that universally recognized fundamental principle.

ARGUMENT**I. THE PETITIONERS' TRIAL DID NOT
COMPORT WITH INTERNATIONAL
STANDARDS OF A FAIR TRIAL BY AN
IMPARTIAL TRIBUNAL**

The right to a fair and impartial tribunal, free from outside influences, is a fundamental right recognized by United States and International Law. Article 14(1) of the International Covenant on Civil and Political Rights imposes on all member States, including the United States, the duty to provide all persons facing criminal charges “[. . .] a fair and public hearing by a competent, independent and impartial tribunal established by law.” International Covenant on Civil and Political Rights art. 14(1), Oct. 5, 1977, 999 U.N.T.S. 171. Regional systems of international human rights law put forth the same guarantee, including the European Covenant on Human Rights, which states in Article 6(1) that “In the determination of . . . any criminal charge against him, everyone is entitled to a . . . hearing . . . by an independent and impartial tribunal . . .”; and Article 8(1) of the American Convention on Human Rights, which states that “Every person has the right to a hearing [. . .] by a competent, independent, and impartial tribunal [. . .].” American Convention on Human Rights art. 8(1), June 1, 1977, 1144 U.N.T.S. 123; Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, art. 6(1), Sept. 3, 1953, 213 U.N.T.S. 221. *See also* Universal Declaration of Human Rights art. 10, G.A. Res. 217A

(III), U.N. Doc. A/810 (Dec. 10, 1948) (“every person has an equal right to a fair and public trial, by an independent and impartial court”).

The European Court of Human Rights (ECHR) views the fundamental importance of the right to an impartial tribunal as instilling the confidence that courts in a democratic society must inspire in the public. *Wettstein v. Switzerland*, 2000-XII Eur. Ct. H.R. 695. The Inter-American Court of Human Rights (IACtHR) has echoed this position, describing the right to be tried by an impartial tribunal as a fundamental guarantee of due process, which inspires the necessary trust and confidence in the parties to the case, and to the citizens of a democratic society. *Herrera-Ulloa v. Costa Rica*, Case 12,367, Int-Am. C.H.R., Series C No. 107 (2004). Courts of democratic foreign nations have stated that the public confidence in the legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice, and must appear to all reasonable observers as fair to those of every race, religion, nationality, ethnic origin and political viewpoint. *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 (Can.). As the widespread international condemnation of petitioners’ trial demonstrates, that confidence and trust has clearly been undermined in this case.

Both the Inter-American Court of Human Rights and the European Court of Human Rights, have held that a Tribunal’s “impartiality” entails both objective and subjective aspects.

First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect. Under the objective test, it must be determined whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts as to their impartiality. *In this respect even appearances may be of certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings.*

Inter-American Court of Human Rights, Case of *Herrera-Ulloa v. Costa Rica*, para. 170-171 (2004) (emphasis added) (citing *Pabla Ky v. Finland*, [2004] Eur. Ct. H.R. 279, ¶ 27, Judgment of June 26, 2004, para. 27; Eur. Ct. H.R. *Morris v. United Kingdom*, [2002] Eur. Ct. H.R. 162, ¶ 58, Judgment of Feb. 26, 2002, para. 58).

“What is decisive is whether his [the accused’s] doubts can be held to be objectively justified.” *Sahiner v. Turkey*, [2001] Eur. Ct. H.R. 552, ¶ 44. A violation of Article 6(1) occurs where the tribunal “did not present the necessary appearance of impartiality.” *Kingsley v. United Kingdom*, [2002] Eur. Ct. H.R. 468, ¶¶ 32, 34. The tribunal must “exclude any legitimate doubt in respect to its impartiality,” or any appearance of bias to ensure that “justice must not only be done, it must also be seen to be done.” *Micallef v. Malta*,

[2008] Eur. Ct. H.R. 41, ¶¶ 71, 75. The objective test for impartiality is not met where safeguards are “insufficient to exclude the risk of outside pressures being brought to bear on the tribunals members.” *Morris v. United Kingdom*, *supra* (2002) ¶ 72.

Here, neither the subjective nor the objective tests for impartiality were met. For example, the jury foreperson was clearly subjectively biased against the Cuban government. *United States v. Campa*, 419 F.3d 1219, 1235 n.73 (11th Cir. 2005). More importantly, under the objective test, quite apart from the juror’s or judge’s personal conduct and beliefs, there were objective “ascertainable facts which may raise doubts as to [the jurors] impartiality.” Case of *Herrena-Ulloa*, para. 170-71 (2004); *Morris v. U.K. Judgment*, *supra*. Nonetheless, in disregard of the international standard articulated by the Inter-American and European Courts of Human Rights and the UN Human Rights Committee, the Eleventh Circuit Court of Appeals inappropriately ignored and categorically dismissed the extensive objective facts of pervasive bias against perceived agents or sympathizers in the Miami community.

As the panel of the Court of Appeals unanimously found and the petition sets forth, the climate in Miami included: scores of bomb threats and actual bombings against persons and institutions perceived supportive of the Cuban government during the decade before the trial; pervasive publicity both before and during the trial generating an atmosphere of great hostility toward any person associated with

the Castro government, including news articles relating directly to the charged crimes and the defendants; the very numerous, passionate and vocal Cuban American exile community living in Miami that considered Cuban-related matters “hot-button issues”; demonstrations, press conferences with victims’ families, commemorative flights in honor of the deceased pilots, televised media filming of the jurors entering and leaving the courthouse during the trial; and an overall community environment in which, according to a survey by Professor Gary Moran approximately 70% of all respondents in Miami were prejudiced against the defendants.

These circumstances created an atmosphere of intimidation and bias in which a number of potential jurors admitted to fearing for their own safety or their employment, some of the jurors eventually empanelled indicated that they felt pressured, and three jurors expressed negative beliefs regarding Castro or the Cuban government but believed that they could nevertheless ignore their beliefs while on the jury. For example, during voir dire, one venire member stated that he would “feel a little bit intimidated and maybe a little fearful for my own safety if I didn’t come back with a verdict that was in agreement with what the Cuban community feels, how they think the verdict should be.” *United States v. Campa*, 419 F.3d *supra*, at 1234. He went on to state that he “would probably be a nervous wreck, if you want to know the honest truth. I could try to be as objective as possible and be as open minded as possible, but I would have some trouble dealing with the case.” *Id.* Another indicated

that he was concerned about his future ability to do his job as a banker “because he dealt with a lot of developers in the Hispanic community and knew the case was high profile enough that there may be strong opinions which could affect his ability to generate loans.” *Id.* During the trial and deliberations, members of the jury were on various occasions filmed entering and leaving the courthouse, footage that was aired on television. *Id.* at 1252. Jurors expressed concern that they were filmed all the way to their cars and “that their license plates had been filmed.” *Id.* These undisputed facts were simply disregarded as irrelevant by the en banc Court of Appeals.

The jurors’ fears were objectively justified. Reports by news media and human rights organizations document the extensive history of violence and intimidation that has created a climate in Miami on matters involving Cuba in which “only a narrow range of speech is acceptable and views that go beyond those boundaries may be dangerous.” Human Rights Watch, Americas Human Rights Watch Free Expression Project Report, *Dangerous Dialogue Revisited: Threats to Freedom of Expression Continue in Miami’s Cuban Exile Community* (1994); Jim Mullin, *The Burden of a Violent History*, Miami New Times, Apr. 20, 2002, cited in *United States v. Campa*, 419 F.3d *supra*, at 1255.

The European Court has required particularly heightened scrutiny to ensure the appearance of an impartial and independent tribunal where a trial involves a member of a political group that has been in

bitter or violent confrontation with other groups in society. In reviewing the conviction of a defendant sentenced to life imprisonment for instigating deadly terrorist acts in Turkey, the Court held that the original make up of the court improperly included a Turkish military judge, even though by the time the judgment was rendered this judge had been replaced by a civilian judge and there was no evidence that the military judge himself was improperly biased. *Öcalan v. Turkey*, 2005-IV Eur. Ct. H.R. 282. The Court noted that because of the national security issues involved, and the conflict between the defendant's organization and the military, the defendant could have a legitimate fear that the Turkish Court "might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case." *Id.* at ¶ 113. The ECHR held that this was a violation of Article 6, despite the replacement of the military judge prior to the final verdict. Similarly, in *AB Kurt Kellerman v. Sweden*, [2004] Eur. Ct. H.R. 546, ¶ 63 the Court stated that impartiality could be threatened if members of the Court had a common interest contrary to those of the applicant, or if their interests, although not common, were such that they were nevertheless opposed to those of the applicant.

The courts of other nations have also recognized the potential threat to justice posed by pervasive community bias or detrimental publicity irrespective of whether the publicity or bias subjectively affects particular jurors, and have imposed unusual or extraordinary means when faced with such threats to a jury's impartiality. For example, the Canadian

Supreme Court has repeatedly recognized, in contrast to the Court of Appeals' decision in this case, that where there is demonstrable, widespread prejudice in a community that is likely to result in "aberrant juror behavior" despite instructions from the Judge to act impartially, special measures are called for even if there is "no concrete evidence" that any of the individual jurors could not set aside their biases. *Her Majesty the Queen v. Sean Spence* [2005] SCC 72 (Can.); *Williams v. R* [1998] 6 BHRC 189 (Can.). As the Canadian Court has noted, where widespread bias is demonstrated, "we should not assume that instructions from the judge or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches of the jurors." *Spence*, at ¶ 36. Indeed, while the Eleventh Circuit here categorically rejected evidence of prejudice that did "not relate directly to the defendants' guilt for the crime charged," the Canadian Court recognized that the potential for partiality can be shown even in the absence of prejudice linked to the specific defendants. *Williams v. R*, ¶ 27. As one international study has noted, generic prejudice can occur by "media coverage that does not specifically relate to a defendants case, but is of such pervasiveness that it paints a defendant with an incriminating and indelible brush." M. Chesterman, J. Chan & S. Hampton, *Managing prejudicial publicity: an empirical study of criminal jury trials in New South Wales*, Law and Justice Foundation of NSW (2000).

It is precisely such objective, "generic prejudice" that the Eleventh Circuit categorically rejected. While

foreign courts may have differing specific approaches to preventing bias from affecting an impartial tribunal, they recognize the problem of pervasive community prejudice or publicity that the Court of Appeals in this case studiously ignored. A trial in the Miami venue was manifestly unfair.

The conflict between the United States' commitment to promote human rights abroad as well as to set an example for other nations, and the view of many informed international observers that petitioners were not tried before an impartial tribunal, can only undermine the confidence and trust the international community has in the United States judiciary. For significant sectors of international society, this case tests both the appearance and reality of the American judiciary's impartiality that is so important to maintaining societal confidence in an independent judiciary. This Court should grant the petition to affirm and restore international confidence in the United States' commitment to fair trials before an impartial tribunal.

II. HERNANDEZ'S CONVICTION FOR CONSPIRACY TO MURDER ILLUSTRATES THE EFFECT THE PERVASIVE COMMUNITY BIAS HAD ON PETITIONERS' TRIAL

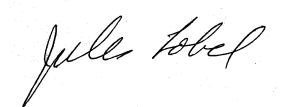
As the UN Human Rights Commission pointed out, the confluence of both the climate of bias and prejudice against the accused in Miami and "the nature of the charges and the harsh sentences handed down to the accused," lead to the conclusion that the trial was neither impartial nor conformed to the

standards of a fair trial. Report of the United Nations Working Group on Arbitrary Detentions, *supra* at ¶ 29. That Petitioner Hernandez was convicted of conspiracy to murder and received a life sentence when there was virtually no evidence that he had conspired with the Cuban government to intentionally shoot down airplanes *in international airspace* simply confirms that “it is inconceivable that petitioner . . . received an impartial assessment of his guilt or innocence on the basis of the evidence.” *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985). That a highly political trial took place in such a highly politicized venue and resulted in a verdict against Hernandez on conspiracy to murder that is unsupported by substantial evidence, supports the view of many informed international observers that politics, not facts, played the decisive role in the trial.

CONCLUSION

For the aforementioned reasons, Amici urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,



Jules Lobel

APPENDIX—LIST OF AMICI

**Ibero-American Federation of Ombudsman
(Federación Iberoamericana del
Ombudsman)**

**Order of Attorneys of Brazil (Ordem dos
Advogados do Brasil)**

Belgium—The Belgium Bar Associations:
Flemish Bar Association (Orde van Vlaamse
Balies); Bar Association for French and
German Speakers (Ordre des barreaux
francophones et germanophones)

Germany: Berlin Bar Association
(Rechtsanwaltskammer Berlin); League of
Human Rights and the Defense Bar
Association (die internationale Liga für
Menschenrechte, Berlin); Association of
Republican Lawyers (RAV) (der
Republikanische Anwältinnen und
Anwälteverein); the Working Group law
students at the Universidad Humboldt in
Berlin (akj) (der Arbeitskreis kritischer
Juristinnen und Juristen an der Humboldt
universität)

Portugual: Committee for Human Rights of the
Portuguese Bar Association (Comissão dos
Direitos Humanos, Ordem dos Advogados) and
the Committee's President, José Augusto
Rocha

**International Federation for Human Rights
(Fédération internationale des droits de
l'homme)**

Latin American Council of Churches

Ecuador: Permanent Assembly of Human Rights—APDH of Ecuador (Asamblea Permanente de Derechos Humanos—APDH del Ecuador)

Japan: Foundation of Human Rights in Asia; Lawyers Center for Social-Democracy; Professor Osamu Niikura; Professor Kenji Urata; Professor Masahiro Usaki; Fumio Asano; Takemura Fumio; Mitsuko Fujiwara; Masako Gotoh; Koh Haginoya; Yoshitaka Hirao; Takayuki Hiruta; Kazuo Hizumi; Choji Honda; Hitoshi Horii; Toshio Ikemiyagi; Satoshi Imai; Hideaki Inomata; Kazuko Ito; Kazuo Ito; Setsuo Kadoi; Kozou Kaifu; Hiroyuki Kamagata; Yasuhiro Kanaitzuka; Shigeru Kanazawa; Shinsuke Kato; Kuraishi Kawamoto; Takahiko Kawarabuki; Hirohisa Kitano; Hiroko Kotake; Tomokata Maeda; Toshinari Minamitani; Kunio Miyazato; Ko Mizushima; Yoshinori Murai; Shin Nakano; Shuichi Nomura; Yuji Ogawara; Koji Ono; Hidenori Sasaki; Mutsumi Sato; Toichiro Sawafuji; Shojun Sugimoto; Fumio Takemura; Masako Tange; Takehiko Tsukushi; Masatoshi

Uchida; Aiko Utsumi; Hiroshi Yamamoto;
Hiroshi Yasui; Takashi Yatabe

United Kingdom: 14 professors of law and 18 barristers and solicitors: **Professors of Law:** Benjamin Bowling (Professor of Criminology, School of Law, King's College London); Bill Bowring, Barrister (Professor of Law, School of Law—Birkbeck College, University of London); Christine Chinkin (Professor of International Law, London School of Economics); Emiliios Christodoulidis (Professor of Law, Glasgow University); Professor Aileen McColgan (Professor of Human Rights Law, King's College London); Keith Ewing (Professor of Public Law, University College, London); Conor Gearty (Professor of Human Rights Law, London School of Economics); Guy S. Goodwin-Gill (Professor of International Refugee Law, University of Oxford); Alan W. Norrie (Professor of Criminal Law and Criminal Justice, School of Law, King's College, London); Javaid Rehman (Professor of Law and Advocate, Brunel Law School, Brunel University); Dr. Phil Scraton (Professor, School of Law, Queen's University, Belfast); Adam Tomkins (Professor of Public Law, School of Law, University of Glasgow); Thomas Scott Veitch (Professor of Public Law, School of Law, University of Glasgow); Stuart Weir (University of Essex); **Barristers and Solicitors:** Baroness Helena Kennedy Q.C. (Member of the House of Lords and Chair of

Justice—the British arm of the International Commission of Jurists; member of the governing body of Gray’s Inn, one of the four professional associations to one of which every barrister in England and Wales must belong); John Hendy Q.C.; Michael Mansfield Q.C.; Bushra Ahmed; Sarah Bourke; Matthew Cartledge; Steve Cottingham; Georgina Hirsch; Catrin Lewis; Alastair Logan CBE (Commander of the British Empire); Damian McCarthy; Bronwyn McKenna; Gary Morton; Gareth Peirce; Greg Powell; Michael Seifert; Geoffrey Shears; Elizabeth Woodcraft

Chile: Judge Juan Guzmán Tapia

Chile: Group of Family Members of Executed Political Figures (Agrupación de Familiares de Ejecutados Políticos de Chile); National Group of Former Political Prisoners of Chile (Agrupación Nacional de Ex Presos Políticos de Chile)

Spain: Federico Mayor Zaragoza

Spain: Pro Human Rights Association of Spain (Asociación Pro Derechos Humanos de España); Spanish Association for the International Law of Human Rights (Asociación Española para el Derecho Internacional de los Derechos Humanos); Justice and Society Association (Asociación Justicia y Sociedad); Free Association of

Lawyers of Madrid (Asociación Libre de Abogados de Madrid); Free Association of Lawyers of Málaga (Asociación Libre de Abogados de Málaga); Free Association of Lawyers of Asturias (Asociación Libre de Abogados de Asturias); Canarian Association of Lawyers for Peace and Human Rights (Asociación Canaria de Juristas por la Paz y los Derechos Humanos); Aragonian Observatory for the Western Sahara (Observatorio Aragonés para el Sáhara Occidental); International Association of Lawyers for the Western Sahara (Asociación Internacional de Juristas por el Sáhara Occidental); Professor Anna M. Badía Martí (international public law professor, University of Barcelona); Professor Javier Chincón Álvarez (international public law professor, Complutense University, Madrid); Professor Pedro Expósito (international law professor, University of Málaga); Professor Carmelo Faleh Pérez (international public law professor, University of Las Palmas of the Grand Canaries); Professor Diana Malo de Molina y Zamora (constitutional law professor, University of Las Palmas of the Grand Canaries); Professor Benito Reverón Palenzuela (procedural law professor, University of La Laguna, Tenerife); Max Adam Romero; Pascuel Agueló Navarro; Paulino Álamo Suárez; Ignacio Almandoz Ríos; Pedro Amador Jiménez; José María Arando González; Bruno Armas Domínguez; Inés

Arnaldos de Armas; Jorge Arozena Sánchez;
María Soledad Batalla Galera; Ramón Benítez
Robayna; Esther Bento de Urquía; Felipe
Briones Vives; Margarita Carmona Betancor;
Alfredo Carrera Pérez; David Casalins
Rodríguez; Simón Concepción Santana; Nieves
Cubas Armas; Ignacio Díaz de Aguilar
Cantero; Aracelí Fernández de Córdoba
Cantizano; Ana Sagaseta de Ilurdoz
Cortadella; Joaquín Sagaseta de Ilurdoz
Paradas; Augustina de León Rodríguez;
Simplicio del Rosario García; Ana Doreste
Suárez; Aida Espinel Gómez; Margarita Etala
Socas; María Lourdes Etxebarria Zudaire;
María Teresa Farray Mihalic; Ana C. Febles
Santana; María Francisca Ferrís Duarte; Yeray
Figieras Estevez; Milagros Fuentes González;
Javier Galparsoro García; Domingo Luis
Galván Betancor; Domingo García Hernández;
Gustavo A. García Martel; María García
Salguero; Inmaculada González Sánchez; José
Manuel Guerra Aguilar; María Teresa Guillén
Castellano; Alejandra Gutiérrez García; Taida
Hernández Rodríguez; José Miguel Jaubert
Lorenzo; Alfonso Lago Rayón; Pedro Limiñana
Cañal; Leonor López Ojeda; Juan Carlos
Lorenzo de Armas; Juan Antonio Luque Maza;
Luis Alejandro Mangrané Cuevas; Francisco
Mazorra Manrique de Lara; Antonio Marrero
de Armas; Flora Marrero Ramos; Juan P.
Martín Luzardo; Juan Ramón Martín
Rodríguez; Raúl Martínez Turrero; José J.
Mazorra Alvarado; María Cristina Mazorra

Alvarado; Héctor Mejías López; Raúl Mirando Lopez; Inés Miranda Navarro; Daniel Montero del Río; Anselmo Moreno Sosá; Luis Moros Calvo; Alicia Beatriz Mujica Dorta; Carman Yanira Naranjo Rivero; Antonio Nuevo Hidalgo; Carmelo Ortiz Pérez; Ana Pérez Nordelo; José Ramón Pérez Meléndez; Nieves Cruz Pérez Rodríguez; Fernando Piernavieja Niembro; Antonio Pineda García; Lucía Ramírez Santiago; Mercedes Ramírez Jiménez; Miguel Redondo Rodríguez; José Manuel Rivero Pérez; Eusebio Rocío Rodríguez; Pedro Rodríguez Rodríguez; Pedro Rodríguez Suárez; Urpi Rodríguez Losada; Emilio Ruano Martín; Elena Ruiz Suárez; Nereida San luis Santana; Agustín Santana Santana; Antonio María Santana Melián; Carmen Santana Ramírez; Eduardo Santos Itoiz; Ruh Sebastián García; Cristina Suárez García; Ana Taboada Coma; Marta Torres de León; Manuel Travieso Darias; Pablo Travieso Darias; María Dolores Travieso Darias; Betariz Trujillo Sánchez; Ana María Uría Pelayo; Carlos Villán Durán

Columbia: Collective Corporation of Lawyers José Alvear Restrepo (Corporación Colectivo de Abogados José Alvear Restrepo); Professor Renán Vega Cantor, Doctor in Political Studies and Professor at the National Teaching University (Universidad Pedagógica Nacional) in Bogotá, Colombia.

Panama: Ecumenical Committee of Panama (Comité Ecuménico de Panamá); National Indigenous Lawyers Union of Panamá (Unión Nacional de Abogados Indígenas de Panamá); Coordinator of Human Rights of People Panama (Coordinadora Popular de Derechos Humanos de Panamá); Peace and Justice Service in Panama (Servicio Paz y Justicia en Panamá); Association of Independent Attorneys of Panama (Frente de Abogados Independientes de Panamá); Istmeña Academy of International Law (Academia Istmeña de Derecho Internacional); Latin American Academy of International Law (Academia Latinoamericana de Derecho Internacional); Columbian-Panamanian Institute of Procedural Law (Instituto Colombo Panameño de Derecho Procesal); Alternative Legal Assistance of Panama (Asistencia Legal Alternativa de Panamá); Social Training Center of Panama (Centro de Capacitación Social de Panamá); Association of Litigant Lawyers of Panama (Asociación de Abogados Litigantes de Panamá); Dr. Hernando Franco Muñoz (former legal advisor of the President of the National Assembly of Panama as well as the Assembly's international relations legal advisor and currently Director of the Department of Public Law, Department of Law and Political Science at the University of Panama); Lic. Ramiro Guerra Morales (Member of the Board of Directors, National College of Attorneys, Panama); Lic. Carlos

Ayala Montero (Advisor to the National Assembly's Commission on Work and Social Welfare and Executive Director of the Panamanian Academy of Labor Law; former professor at the University of Panama and author of 8 legal and sociological books)

Mexico: Human Rights Program at the Autonomous University of Mexico City (Programa de Derechos Humanos, Universidad Autónoma de la Ciudad de México); Enrique González Ruiz, Camilo Pérez Bustillo

Argentina: Argentinean League for the Rights of Man (Liga Argentina por los Derechos del Hombre); Argentinean League for the Rights of Man Rosario (Liga Argentina por los Derechos del Hombre Rosario); Family Members of Those Who Have Disappeared or Been Detained for Political Reasons Rosario (Familiares de Desaparecidos y Detenidos por Razones Políticas Rosario); Center of Study and Investigation of Human Rights (Centro de Estudio e Investigación en Derechos Humanos); Permanent Assembly for Human Rights Rosario (Asamblea Permanente por los Derechos Humanos Rosario)