Nos. 08-7412, 08-7641

IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

JOE HARRIS SULLIVAN
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

On Writs of Certiorari to the District Court of Appeal of Florida, First District

BRIEF FOR SOLIDARITY CENTER FOR LAW AND JUSTICE, THE SOVEREIGNTY NETWORK, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Additional *Amici*:

Americans United for Life

Catholic Family and Human Rights Institute

Center for Security Policy

Concerned Women for America

Family Advocacy International

Family Watch International

Freedom Alliance

Hudson Institute

The Cato Institute

The Competitive Enterprise Institute

United Families International

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF INTEREST

Americans United for Life, Catholic Family and Human Rights Institute, Center for Security Policy, Concerned Women for America, Family Advocacy International, Family Watch International, Freedom Alliance, Hudson Institute, Solidarity Center for Law and Justice, The Cato Institute, The Competitive Enterprise Institute, The Sovereignty Network, and United Families International hereby request that this Court consider the present brief pursuant to Sup. Ct. Rule 37.2(a) in support of Respondent. The interests of *amici* are described in detail in the Appendix.[1]

The consideration and adoption of state and federal laws and policies relating to the sentencing of juveniles for the crimes that they commit is an essential undertaking in a democratic society. The United States Congress and the overwhelming majority of states have adopted laws permitting juvenile offenders to be sentenced to life in prison without the possibility of parole. These laws reflect the will of the people and were enacted after due consideration of the nature of, and threats posed by, juvenile criminal activity in modern America, as well as the possibilities for the rehabilitation of juvenile offenders. For this reason, given their steadfast commitment to the democratic process, the rule of law, and national sovereignty, *amici* urge this Court, in deciding this case, not to consider the non-binding provisions of in-

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[1] Letters from all counsel consenting to its filing are being sent with this brief to the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

ternational human rights treaties or an insufficiently definite international norm regarding the sentencing of juveniles to life without parole.

SUMMARY OF ARGUMENT

In the present cases, the citizens of the State of Florida adopted laws through the democratic process that permit the sentencing of juveniles to life in prison without the possibility of parole. By referencing non-binding provisions of international human rights treaties or an international norm regarding the sentencing of juveniles to prison without the possibility of parole as a basis for deciding whether Florida law violates the Eighth Amendment's clause prohibiting cruel and unusual punishments, this Court risks undermining the democratic process and the rule of law and creating uncertainty about a multitude of U.S. domestic laws.

This Court should only allow international law to override domestic law in those cases where the former has been ratified by the domestic political process. If this Court determines otherwise, then, in deciding whether to refer to a purported international norm as a basis for constitutional interpretation, this Court should apply the same test it recently used to determine whether an international norm prohibiting arbitrary arrest and detention could serve as a basis for creating a federal common law claim under the Alien Tort Statute. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Specifically, this Court should determine whether the international norm relating to the sentencing of juveniles to life without parole is sufficiently definite to be used as a basis for constitutional interpretation. This test, which was used in by the Court in *Sosa* to determine whether, in the absence of statutory authority for a cause of

action, an international norm can be used to create a federal common law action, is no less appropriate in the present cases, where this Court must decide whether to use a purported international norm to overturn existing domestic statutes that have been enacted at the state and Federal levels.

Applying the "defined with specificity" test, there is little doubt that no sufficiently definite international norm exists that can serve as a basis for determining that the Florida juvenile life without parole sentencing law violates the Eighth Amendment. The international norm relating to sentencing juveniles to life without parole has not attained the status of customary law because: 1) there is only general, "high-level" authority cited for the norm; 2) the implications of enforcing such a broad norm are "breathtaking;" 3) enforcement of the norm would supplant United States domestic laws; and 4) there is a lack of a factual basis for determining which juvenile life without parole policies violate the law of nations with the certainty comparable to that afforded by Blackstone's three common law offenses (violations of safe conducts, infringement of the rights of ambassadors, and piracy).

If this Court relies on a non-binding provision of an international treaty or an insufficiently definite international norm to overturn Florida juvenile life without parole sentencing laws and, consequently, comparable Federal law and laws in over 40 states, serious questions will arise regarding the long-term viability of the democratic process and rule of law. Additionally, uncertainty will be created about a multitude of other U.S. domestic laws relating to human rights.

ARGUMENT

I. REFERRING TO NON-BINDING TREATY PROVISIONS OR AN INSUFFICIENTLY DEFINITE INTERNATIONAL NORM AS A BASIS FOR DETERMINING WHETHER FLORIDA'S SENTENCING OF JUVENILES TO LIFE WITHOUT PAROLE VIOLATES THE EIGHTH AMENDMENT WILL UNDERMINE THE DEMOCRATIC PROCESS AND RULE OF LAW

The citizens of the State of Florida have adopted laws through the democratic process that permit the sentencing of juveniles to life in prison without the possibility of parole. They did so after taking into consideration trends in juvenile crime and after weighing different options regarding the incarceration of juveniles and the likelihood for rehabilitation that would enable them to serve as functioning citizens in their later lives.

Although it is important for this Court to evaluate whether Florida juvenile sentencing laws violate the Eighth Amendment's clause prohibiting cruel and unusual punishments, this Court should refrain from considering, citing, or otherwise referencing non-binding provisions of international treaties or an insufficiently definite international norm as a basis for its decision. Doing so would undermine the democratic process in Florida and across the United States and create a great deal of uncertainty regarding the continued validity of laws relating to a multitude of human rights.

A. Florida's Public Officials, its Juvenile Justice Advocacy Groups, and Concerned Florida Citizens Should Be Permitted to Continue to Utilize the Democratic Process to Address the Problem of Increased Youth Violence in Their State.

Juvenile crime is a significant problem in the United States. In 2008, persons under the age of 18 committed 11.9% of the 459,553 violent crimes and 18.4% of the 1,306,464 property crimes cleared by law enforcement officials. Federal Bureau of Investigation, Table 28. In Florida, murder/manslaughter referrals in the case of juvenile offenses increased 55%, from 84 referrals during fiscal year 2003-2004 to 130 referrals during fiscal year 2007-2008. During the same period, attempted murder/attempted manslaughter referrals increased 50%, from 46 to 69 and armed robbery referrals increased 103%, from 708 to 1,434. Florida Department of Juvenile Justice 1.

Despite these discouraging statistics, since 1994, Florida citizens have dutifully examined their juvenile justice system and pursued necessary reforms. Florida elected officials, state juvenile justice officials, business leaders, juvenile justice policy advocates, human rights advocates, education leaders, youth representatives, parents of detained juveniles, and victims' rights organizations have participated in these democratic deliberations.

- The Juvenile Justice Act of 1994 created the Florida Department of Juvenile Justice, which is responsible for planning and managing all programs and services in the juvenile justice system.

- In 1994, the Florida Juvenile Justice Association was created. The Association promotes public awareness and education on juvenile justice issues; contributes to the development of public policy regarding juvenile justice issues; supports evaluation and research of juvenile justice issues; and provides training, technical assistance and consultation to Association members and related parties.
- Since 1999, the National Council of Juvenile and Family Court Judges ("NCJFCJ") has conducted 74 training sessions in Florida for more than 12,500 judges, magistrates, commissioners, attorneys, and other juvenile and family court-related professionals. The training activities were undertaken by the NCJFCJ over the past ten years to support and enhance widespread systemic reforms and facilitate the achievement of better outcomes for Florida's children and families. As of 2009, NCJFCJ has 64 members in Florida out of a nationwide membership of over 1,900.
- In 2000, the Florida Juvenile Justice Foundation, Inc. was formed to serve as a Direct Support Organization for the Florida Department of Juvenile Justice. Among other things, the Foundation fosters collaboration among business people, community members, parents, youths and Florida's juvenile justice system.
- In July 2007, Florida Governor Charlie Crist authorized creation of a Blueprint Commission as a time-limited workgroup charged with developing recommendations to reform Florida's juvenile justice system. The Blue-

print Commission's 25 members traveled the state, held public hearings, and received testimony from a host of stakeholders—community leaders, law enforcement and court officers, representatives of the public school system, health and mental health officials, parents, youth, advocates, national experts in juvenile justice, and department staff.

- In January 2008, after conducting a thorough examination of the state of juvenile justice in Florida, the Blueprint Commission produced its report, *Getting Smart About Juvenile Justice in Florida*. Working with expert advisors, the members of the Commission, consisting of representatives from law enforcement, civil and human rights, education, juvenile justice, and business organizations, identified 52 recommendations for change, organized under seven guiding principles and 12 key goals designed to be implemented over multiple years.
- During the 2009 session of the Florida House of Representatives, several representatives introduced House Bill 757, the Second Chance for Children in Prison Act of 2009. The Act, which was never passed out of committee, provided that an offender 15 years of age or younger who is sentenced to life or more than 10 years in prison is eligible for parole if he or she has been incarcerated for a minimum period and has not previously been convicted or adjudicated of, or had adjudication withheld, for certain offenses.

Perhaps, after further deliberation among Florida citizens and their duly elected representatives, HB 757 will become law and, perhaps, in the future, the sentencing of juveniles to life without parole will no longer be a part of the Florida legal landscape. It is also possible that Florida's elected officials serving in the United States House of Representatives will choose to support H.R. 2289, the Juvenile Justice Accountability and Improvement Act of 2009. H.R. 2289, introduced on May 6, 2009, is designed to establish a meaningful opportunity for parole or similar release for juvenile offenders sentenced to life in prison.

This Court should respect the democratic process as it is unfolding in Florida, other states, and in the United States Congress. It should resist the urge to refer to the provisions of non-binding international treaties or an insufficiently definite international norm to overturn a majority of state and federal laws relating to the sentencing of juveniles to life without parole. State officials enacted these laws to address valid concerns regarding increases in juvenile offenses and are reviewing their merit in light of sentencing outcomes. When it comes to fashioning juvenile justice solutions with an eye toward human rights concerns, "there is no reason to think that national institutions in a constitutional democracy are unfit to ultimately and authoritatively determine these rules for themselves." Kumm 23-24.

Florida has unique historic, public safety, legal, development, cultural, economic, political, and social concerns relating to the issues of youth violence and juvenile justice. There have been, and will be, regular opportunities for meaningful participation among the various stakeholders involved in the issue of juvenile

life without parole sentencing. Florida citizens can hold elected and other public officials accountable for failed or unjust juvenile justice policies.

Due to the relatively violent nature of American society, the United States and the State of Florida have been at the vanguard dealing with the issues of youth violence and juvenile justice. Few, if any, other developed nations and their political subdivisions have had to address these issues to the same extent and in the same context as has been the case in the United States, in general, and Florida, in particular. Meanwhile, in at least eleven countries, including Australia, the life without parole sentence is available with respect to juveniles. Also, many countries allow sentences of long durations for juvenile offenders. Other countries have agreed to prohibit the sentence, but have not done so in practice. Grossman and Stimson 39.

The fact that high-level government officials from foreign countries have ratified international human rights treaties that contain vague provisions relating to the sentencing of juveniles provides scant evidence that their citizens have seriously considered the merits of such prohibitions in a context comparable to that which exists in Florida and the United States. "International law, both formally and practically, represents the consensus of states, not people, and thus there is much less reason to think it should trump or even cast doubt on the judgments reached by democratic deliberations in particular nations." McGinnis 312.

B. Neither Non-Binding Treaty Provisions Nor an Insufficiently Definite International Norm Regarding the Sentencing of Juveniles to Life Without Parole Should Serve as a Basis for Determining Whether Florida Juvenile Life Without Parole Sentencing Laws Violate the Eighth Amendment to the United States Constitution.

This Court should only allow international law to override domestic law in those cases where the former has been ratified by the domestic political process. Under a modern conception of international custom, many scholars embrace a methodology that permits substantial human rights norms to be encompassed within customary international law. Instead of requiring that nation-states actually engage in a practice, they substitute statements by nation-states that give the norms verbal endorsement. These include resolutions of the General Assembly of the United Nations and multilateral treaties. Under the modern conception, "customary international law suffers from a democracy deficit and is therefore likely to produce lower quality norms than a democratic domestic political process." McGinnis and Somin 1201.

This democracy deficit is created by: 1) the large role played by unrepresentative and unaccountable "publicists," including elite international law professors and non-governmental organization leaders in the United States, who determine what level of practice is required to support an international norm; 2) the non-democratic governments that participate in the negotiation of international human rights treaties; 3) the failure of democratic nations to

voluntarily incorporate the international norms to displace their domestic laws; and 4) the inability of uninformed citizens to monitor or control the individuals and institutions responsible for international law fabrication, which exacerbates the potential for interest group influence and manipulation by elites. *Id*. 1202-1211.

To avoid this democracy deficit, this Court should leave it to the political branches to decide whether to incorporate international law into domestic law through the ordinary legislative processes that ensure democratic control over lawmaking. "In holding open the possibility that judges may create rights where Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people's representatives." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 747 (2004) (Scalia, J., concurring in part and concurring in the judgment).

If, however, this Court is inclined to rely on international law as a basis for deciding these cases, it should use the test recently employed by the Court in *Sosa* to determine whether to recognize private claims under federal common law for violations of an international norm.

In *Sosa*, the Court explained that it is limited in its ability to recognize international law norms to create substantive rights that can give rise to private claims under federal law:

> We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity. . . . Several times,

> indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.

Id., at 728, *citing*, 138 Cong. Rec. 8071 (1992). Yet, in certain limited cases, even without relying on the provisions of international human rights treaties, independent judicial recognition of actionable international norms is possible: "[F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less than definite content and acceptance among civilized nations than the historical paradigms familiar" when the jurisdictional statute giving rise to such violations was enacted. *Id*. at 732.

Thus, in *Sosa*, the Court held that the Alien Tort Statute authorized federal courts to recognize federal common law causes of action based on an international law norm only if the norm in question is "defined with specificity" comparable to the historic law of nations norms.

The "defined with specificity" test is designed to make certain that the international opinion and practices that give rise to the norm are rooted in facts and policies that have been developed, agreed upon, and implemented at the national level. That is, the international norm must manifest a solidarity achieved through respect for the subsidiarity principle. It is not enough that the "international community" recognizes the norm. Instead, there must be evidence that the norm is universally recognized due to the fact that it has attained such status as a result of

actual democratic discourse, deliberation, and development.

Under the "defined with specificity" test, the Court first considers whether the United States is obligated to respect the international norm under any applicable international human rights declaration or treaty. If a declaration consists only of a statement of principles, no such obligation exists. If, in ratifying a treaty, the United States made reservations that make the international norm inapplicable, no such obligation exists. In the absence of any binding declaration or treaty provision, there is no evidence that the norm has been adopted through the democratic process as manifested in the approval of the U.S. Senate by at least two-thirds of its members. In such cases, the Court then considers whether, regardless of the lack of a binding declaration or treaty provision, the international norm has attained the status of binding customary international law. If the international norm consists of a general prohibition with limited specificity as to its content, authority must be cited that "a rule so broad has the status of a binding customary norm today." *Id*., at 736.

In *Sosa*, the Court considered whether the international norm prohibiting arbitrary arrest and detention was sufficiently definite to support a cause of action under the Alien Tort Statute. First, the Court rejected the claim that two international human rights agreements to which the United States is a party provided definite content regarding the scope of the norm. It dismissed as having little utility the prohibition against arbitrary arrest contained in the Universal Declaration of Human Rights (the "Declaration") and a similar prohibition contained in the International Covenant on Civil and Political Rights

(the "ICCPR"). The Court determined that "the Declaration does not of its own force impose obligations as a matter of international law," instead sharing Eleanor Roosevelt's view that the Declaration constitutes "a statement of principles . . . setting up a common standard of achievement for all peoples and nations." *Id*., at 734 (citation omitted). As for the ICCPR, the Court determined that, although the treaty binds the United States as a matter of international law, the United States "ratified the ICCPR on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts." *Id*., at 735. As a result, the Court rejected the assertion that the Declaration and ICCPR themselves established the relevant and applicable rule of international law.

Similarly, in the present case, the United States' reservations to the ICCPR effectively counter any claims that specific articles of the ICCPR provide the definite content necessary to prohibit the sentencing of juveniles to life without parole, a right not specifically contained in the ICCPR.

Article 7 of the ICCPR contains a general prohibition on "cruel, inhuman or degrading treatment or punishment" without defining or further elaborating upon the meaning of the phrase. As it turns out, the United States submitted a reservation to Article 7 specifying that the United States would only be considered bound by that provision "to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." As a result, Article 7 (to the extent executed) cannot impose any additional obligations

on the United States beyond those already required by the Fifth, Eighth, and Fourteenth Amendments, none of which has been interpreted to prohibit sentencing juveniles to life without parole.

Whether Article 7's prohibition on "cruel, inhuman or degrading treatment or punishment" would encompass the sentencing of a juvenile to life without parole remains an open question, a question that is debated every four years when the U.S. submits its report to the United Nations Human Rights Committee, which oversees the implementation of the ICCPR. As concerns the domestic law of the United States, however, the question is moot because of the reservation and the treaty's non-self-executing status.

Claims that Articles 10 and 14 of the ICCPR prohibit such sentences are likewise unsupported. Article 10(3), which addresses permissible conditions of confinement, declares, "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation." Article 14 does not deal with sentencing or conditions of confinement, but rather addresses criminal procedure. Specifically, regarding juveniles, it states, "In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."

As with Article 7, the United States entered a specific reservation regarding Articles 10 and 14, expressly reserving "the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of article 10 and paragraph 4 of article 14." Moreover, to make clear to the Human Rights Committee and the other ICCPR States Parties regarding U.S. views concern-

ing incarceration, the United States entered a separate understanding that states: "The United States further understands that paragraph 3 of Article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system."

Read together, these reservations and understandings eviscerate the argument that either Article 10 or Article 14 obliges the United States to cease sentencing juveniles to life imprisonment without parole. Notwithstanding any broad interpretation of the text of these articles, the United States' reservation contemplates that juveniles may be tried and sentenced the same as adults under "exceptional circumstances," presumably for heinous crimes such as murder and other violent felonies, and that they may be imprisoned for the purposes of "punishment, deterrence, and incapacitation," all of which are significantly furthered by the sentence of life without parole.

In *Sosa*, once the Court established that the United States was not obligated to adhere to any prohibition against arbitrary arrest contained in an international declaration or treaty to which it was a State Party, the Court considered whether the prohibition of arbitrary arrest had independently attained the status of binding customary international law. In doing so, it focused on whether the norm constituted a binding customary rule with specificity as to content, or, to the contrary, merely expressed an aspiration that this Court could not rely upon in "[c]reating a private cause of action to further that aspiration . . . ." *Id*., at 738.

In *Sosa*, the respondent Alvarez invoked a general prohibition of "arbitrary" detention defined as offi-

cially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances. For several reasons, the Court determined that such a norm was too broad and indefinite to attain the status of binding customary law. It focused on the fact that only "high-level" general authority was cited as the basis for the norm; the "breathtaking" implications of enforcing the norm; the fact that enforcement of the norm would supplant domestic law; and the lack of a factual basis for determining which policies cross the line into an arbitrary arrest with the certainty afforded by the three common law offenses of violations of safe conducts, infringement of the rights of ambassadors, and piracy.

First, the Court noted that Alvarez cited little authority that a rule against arbitrary arrest has the status of a binding customary norm, explaining that a survey of national constitutions on which he relied as evidencing adherence to the norm "does show that many nations recognize a norm against arbitrary detention, but that consensus is at a high level of generality." *Id*., at 736 n.27. If, instead of a survey pertaining to national constitutions, Alvarez had cited a survey of actual laws passed at the state level through democratic consideration of the issue, the Court may have found a more definite norm that rose to the level of customary international law.

Second, the Court considered the implications of a general prohibition on arbitrary arrest, regardless of the circumstances of the arrest. The Court noted that the rule proposed by Alvarez would support a cause of action in federal court "for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would

create a cause of action for any seizure of an alien in violation of the Fourth Amendment . . . ." *Id*., at 736.

Third, the Court considered the effect that adoption of the norm would have on United States domestic law relating to arbitrary arrest, noting that it would create a cause of action "supplanting the actions under . . . 42 U.S.C. §1983 and *Bivens v. Six Unknown Fed. Narcotics Agents* . . . that now provides remedies for such violations." *Id*., at 736-37. Such a broad rule would create an action in federal court for arrests made by state officers who simply exceed their authority; and for the violation of any limit that the law of any country might place on the authority of its own officers to arrest.

Finally, the Court explained that "[a]ny credible invocation of an international norm that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority." *Id*., at 737. The mere reference to a general norm against arbitrary arrest provides no factual basis for determining which "policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race." *Ibid*. In short, the norm had not been developed through practical experiences considered and addressed within the democratic process. In this regard, it is an especially formidable task for judges to consider the factual underpinnings of an international norm.

> To understand whether a foreign law casts doubt on the wisdom of our own law, one would have to undertake a systematic comparative enterprise of the two different cultures and legal systems to determine whether the other legal culture had sufficiently good methods of rule generation, and

> whether the systems were sufficiently alike that it made sense to conclude that the difference between their rules and ours on an issue cast doubt on the beneficience of ours. The question is not strictly a legal one but demands comparative cultural sociology as well as comparative law.

McGinnis 325.

Because, as was the case in *Sosa* with respect to arbitrary arrest, in the present case, the United States is not bound by any limits on the sentencing of juveniles to life without parole that is contained in an international declaration or treaty to which it is a party, it is necessary to determine whether such an international norm has been defined with the level of specificity required by the Court to be considered customary international law. Just as the international norm prohibiting arbitrary arrest was not sufficiently definite to attain the status of a binding customary norm that could be used to create a federal remedy, the international norm relating to the sentencing of juveniles to life without parole is not sufficiently definite to attain the status of a binding customary norm that can be used by this Court to interpret whether such a sentence violates the Eighth Amendment.

Application of the same test used by the Court in *Sosa* supports that conclusion. In essence, the international norm prohibiting the sentencing of juveniles to life without parole has not attained the status of binding customary law because: 1) there is only general, "high-level" authority cited for the norm; 2) the implications of enforcing such a broad norm are "breathtaking;" 3) enforcement of the norm would supplant United States domestic laws; and 4) there is

a lack of a factual basis for determining which juvenile life without parole policies violate the law of nations with the certainty comparable to that afforded by Blackstone's three common law offenses.

First, there is only general, "high-level" authority for the international norm relating to the sentencing of juveniles to life without parole. The primary authority for the norm is contained in Article 37(a) of the United Nations Convention on the Rights of the Child ("CRC"), a treaty to which the United States is not a party.

Article 37(a) of the CRC provides that:

> States Parties shall ensure that:
>
> (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

UN Convention on the Rights of the Child, Art. 37(a). During the drafting stages of Article 37(a), in late 1988, a special Working Party session of the Commission on Human Rights reported that there was a lack of consensus on whether Article 37(a) should contain a blanket prohibition on both capital punishment and life imprisonment without the possibility of release. As explained by a leading commentary on Article 37(a), although, at the time of the report, the prohibition of torture and of capital punishment for juveniles could hardly be contested as norms of existing human rights treaty law, "the reference to life imprisonment was very much a matter of progressive development of the law, and no prior text existed on this subject." Sax and Schabas 10.

Thus, at the time of the adoption of the CRC in 1989 and its entering into force in 1992, there was no evidence of the existence of an international consensus as to whether, and under which circumstances, sentencing juveniles to life without parole violated the law of nations. Other than the general, high-level authority contained in Article 37(a), the main authorities cited for the international norm prohibiting the sentencing of juveniles to life without parole are a myriad of United Nations resolutions and many national constitutions. The citing of such general, high-level authorities for an international norm against the sentencing of juveniles to life without parole suffers the same democratic deficiency as did the general, high-level authority cited for the international norm on arbitrary arrest in *Sosa*.

Second, the implications of enforcing such a broad norm would be, according to the analysis in *Sosa*, "breathtaking." If this Court enforced Article 37(a) of the CRC, the sentencing of *any* juvenile to life without parole anywhere in the United States would be completely prohibited, regardless of the heinous nature of the crime; whether the juvenile was a repeat, violent offender; the age and maturity level of the offender; the proven psychological or other anti-social disposition of the offender; the degree of violent crimes being committed by juveniles in that particular state; the failure to rehabilitate prior similar offenders outside of the correctional system; or the conditions of lifetime confinement.

Third, the enforcement of such a broad, indefinite norm relating to the sentencing of juveniles to life without parole would supplant and overturn laws permitting such sentencing in over 40 U.S. states and at the federal level, which flies in the face of the

democratic process. Such an action would not comport with the traditional view of international law within the U.S. legal system. "International law is a system of treaties, agreements, and customs created in large part outside this representative system, untested by the pluralistic forces that drive the legislative and executive branches. The use of international sources introduces new players and new forms of "legislation" into the carefully balanced Madisonian system." Turley 193.

Finally, there is a lack of a factual basis for determining which juvenile life without parole policies violate the law of nations with the certainty comparable to that afforded by Blackstone's three common law offenses of violations of safe conducts, infringement of the rights of ambassadors, and piracy. Obviously, for a norm relating to the sentencing of juveniles to life without parole to attain a level of definiteness that would give rise to customary international law, consideration would have to be given at the national level to the question of which crimes committed by juvenile offenders warrant such sentencing. This is the factual determination in which this Court is engaged in the present cases and, in deciding these cases, this Court should not rely in whole or in part on an international norm that has not itself been developed on a similar factual basis.

In short, the purported international norm prohibiting the sentencing of juveniles to life without parole suffers the same defect expressed by the Court in relation to the purported international norm advanced by Alvarez in *Sosa*; "in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require." *Id*., at 738.

By relying on an insufficiently definite international norm as a basis for determining whether the juvenile life without parole sentence violates the Eighth Amendment, this Court would be condoning an outcome similar to the one specifically rejected in *Sosa*—the recognition of a federal common law cause of action based on an international norm that was "created" at a general, high-level; that has broad implications for American jurisprudence; that supplants domestic laws enacted through the democratic process; and that has not been generated with consideration for the facts which would dictate a more specific, narrowly-tailored policy.

Even worse, in the present cases, instead of merely creating a federal common law action where there is no existing statute, this Court would be using an insufficiently definite international norm to overturn existing statutes.

II. REFERRING TO NON-BINDING TREATY PROVISIONS OR AN INSUFFICIENTLY DEFINITE INTERNATIONAL NORM AS A BASIS FOR DETERMINING WHETHER FLORIDA'S SENTENCING OF JUVENILES TO LIFE WITHOUT PAROLE VIOLATES THE EIGHTH AMENDMENT WILL CREATE UNCERTAINTY ABOUT A MULTITUDE OF U.S. DOMESTIC LAWS

The Court has made it clear that "the determination of whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that norm available to litigants in the federal courts." *Sosa*, at 732-33 (footnote omitted). Likewise, the determination of whether a non-binding international treaty provision or customary international law norm is sufficiently

definite to be referred to by this Court as a basis for overturning a majority of state and Federal juvenile life without parole sentencing laws must involve an element of judgment about the practical consequences of recognizing the norm for that purpose.

By referring to a non-binding treaty provision or an insufficiently definite international norm as a basis for interpreting the Eighth Amendment and overturning a majority of state and Federal juvenile life without parole sentencing laws, this Court would create a great deal of uncertainty about many U.S. domestic laws involving human rights. Many international human rights treaties contain general, undefined aspirations, not specific, detailed obligations. The language of such treaties is far less precise than the language that any State party would contemplate using to draft a statute.

> Parties in the past often drafted customary international law outputs without an understanding or expectation that it could create legally enforceable standards. Yet NGOs can now use broad aspirational commitments as a means of imposing legal duties. Second, unless and until adversely affected individuals become aware of potential liabilities, NGOs can continue to lobby for broad customary law outputs.

Kochan 2004, 275.

This is why, unless two-thirds of the U.S. Senate gives its consent to ratification of a treaty with the necessary reservations, understandings, and declarations, it does not become binding on the United States. Also, unless a treaty is self-executing, additional implementing legislation passed by Con-

gress and signed by the President is required to make the treaty provisions actionable at law.

For instance, the CRC, a treaty that has not even been considered for advice and consent by the U.S. Senate, covers a wide range of issues relating to purported civil, political, economic, social and cultural rights of children.

The rights listed in the CRC include, but are not limited to: the right to life; the right to preserve one's identity, including nationality; the right to leave one's own country and to enter another country for the purpose of being reunited with one's parents; the right to freely express one's views and the opportunity to be heard in judicial or administrative proceedings; the right to expression, including the freedom to seek, receive and impart information and ideas of all kinds, "regardless of frontiers;" the right to freedom of thought, conscience, and religion; the right to freedom of association and assembly; the right to privacy; the right to access to information and material from "a diversity of national and international sources;" the right to adoption; the right to a safe family environment; the right to enjoy the highest attainable standard of health; the right to an adequate standard of living; the right to education; the right to practice one's own religion and use one's own language; the right to rest, leisure, and play; the right to be protected from economic exploitation; the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment; and the right not to suffer capital punishment or life imprisonment without possibility of release.

If this Court refers to Article 37(a) of the CRC to support its decision to overturn the juvenile sentencing laws of Florida and over 40 other U.S.

states, in subsequent cases, will this Court overturn federal restrictions on immigration by reference to a child's right under the CRC to leave his or her country and enter another country to be reunited with his or her parents? Require the teaching of comparative religion in public schools by reference to the right under the CRC to seek and receive information and ideas of all kinds? Overturn state laws requiring a minor to secure parental consent prior to having an abortion by reference to the CRC's right to privacy for children? Overturn state bans on the adoption of children by same-sex couples by reference to the CRC's right to adoption? Mandate the unlimited provision of government-funded health care to all children by reference to the CRC's right to health care? Require state and local governments to increase their spending on public schools by reference to the CRC's right to education? Require public schools to educate children in their native languages by reference to the CRC's requirement that children be permitted to use their own language?

Although the terms of the CRC do not authorize them to do so, the 18 independent expert members of the Committee on the Rights of the Child interpret provisions of the CRC and publish non-binding General Comments suggesting the substance of the various rights. The areas covered by the Committee's published General Comments include, but are not limited to, the aims of education; HIV/AIDS and the rights of the child; adolescent health; implementing child's rights in early childhood; the right of the child to protection from corporal punishment and other "degrading" forms of punishment; the rights of children with disabilities; children's rights in juvenile justice; the rights of indigenous children; and the right of the child to be heard.

The General Comments are derived in part from the Committee's observations and conclusions made in connection with the reports that States parties to the CRC must file with the Committee every five years. Based on documentation submitted by relevant United Nations bodies and specialized agencies and non-governmental organizations that are familiar with children's rights issues in the country under review, a Committee working group determines the most important issues to be discussed with the representatives of the States. During their regular sessions, the Committee examines the State reports together with government representatives. The Committee then publishes its concerns and recommendations in "concluding observations," in which it sets out whether or not the reporting State was acting in conformity with its treaty obligations. The reporting State may provide a response to the Committee's concluding observations. In the State's report five years later, the Committee expects the reporting State to provide follow-up information regarding the problems highlighted in the previous concluding observations.

Thus, between the list of rights contained in the provisions of the CRC, the General Comments promulgated by the Committee, and the Committee's concluding observations on States' reports, there is a significant body of human rights resource materials to which this Court could arguably refer to as a basis for its decisions to overturn U.S. laws and policies relating to children's rights. But should it?

"Some claim that problems arise when treaties create institutions in which unelected officials in conjunction with other actors may create new obligations, which, at the time the treaty was signed, were

impossible to foresee." Kumm 14. At the time that the CRC was adopted in 1989, was it foreseeable that the 18 international experts of what was only intended to be a technical monitoring committee would examine the substance of the CRC's provisions; interpret them (with the assistance of unelected and unaccountable United Nations officials and representatives of non-governmental organizations); publish regulation-like General Comments defining the scope of the rights and explaining the manner in which States parties should implement them; audit the domestic laws and policies of States parties every five years to determine whether they are in "compliance;" publish a concluding report with observations about the status of children's rights in the country; encourage non-governmental organizations to use that report to shame even the most progressive governments into funding the immediate realization of every right of the child imaginable; and embark on a systemic campaign to convince national, regional, and international court judges to cite the rights of the child and General Comments as authority for their decisions?

Unfortunately, the provisions of the CRC and the dictates of the Committee on the Rights of the Child are only two of the many "friends at the cocktail party" to which this Court might look if it intends to "globalize" the United States Constitution.[2] There are other international human rights treaties, institutions, and organizations that, with the CRC

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[2] "Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993), Scalia, J. concurring in the judgment. See Kochan 2006, 542-546.

and the Committee, form a matrix of human rights governance networks to which the United States could become subject should this Court continue its recent practice of referring to the provisions of such treaties as a basis for its decisions. *See* Kelly.

The International Covenant on Economic, Social and Cultural Rights ("ICESCR"), to which the United States is not a party, contains many established, emerging, and undefined norms that, if recognized by the Court, would impact existing U.S. domestic laws and policies, including, but not limited to, purported norms such as: the right to work; the right to fair wages; the right to join a union; the right to social security; the right to an adequate standard of living, including food, clothing and housing; the right to the highest attainable standard of physical and mental health; the right to education; and the right to the benefits of scientific progress. In addition, the Committee on Economic, Social and Cultural Rights has promulgated a General Comment setting forth the nature and scope of a right to water, though such a right is not expressly contained in the ICESCR.

The Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), to which the United States is not a party, contains many worthy, though broad, open-ended, and undefined, aspirations regarding the rights of women that, if recognized and enforced by the Court, would directly impact existing U.S. domestic laws and policies. These include, but are not limited to: that the principle of the equality of men and women be embodied in national constitutions or other appropriate legislation; that States take all appropriate measures to ensure the full development and advancement of women, including legislation, in all fields, in partic-

ular the political, social, economic and cultural fields; that States take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to eliminating prejudices, customary practices, and stereotypes regarding men and women; and that States take all appropriate measures to ensure that there is no discrimination against women and equality between men and women in the fields of political life and public service (both domestic and international), education, and employment, health care, and all other areas of economic and social life.

For the express purpose of considering the progress made in the implementation of CEDAW, the treaty provided for the creation of the Committee on the Elimination of Discrimination against Women (the "CEDAW Committee"). As has been the case with all human rights treaty bodies, the CEDAW Committee has morphed into a quasi-rule making body, which has produced 26 General Recommendations against which the performance of States parties on domestic laws and policies involving women's rights is measured to determine compliance with CEDAW. States parties to CEDAW are required to report to the CEDAW Committee on measures that they have taken to implement the provisions of CEDAW into their domestic laws and policies. The CEDAW Committee produces a final report in which, after commending the State party for whatever positive steps it has taken in regards to CEDAW, the experts on the CEDAW Committee detail the various ways in which the State party is failing to honor the CEDAW provisions. Non-governmental organizations, who assist the CEDAW Committee members with their investigation of the State party and who submit "shadow" reports detailing alleged shortcomings of

the State party, are able to use the CEDAW Committee's final report to publicly shame the State party and raise money for the NGO's next foray into the building of customary international law. International Women's Rights Action Watch 1. This enables NGOs to avoid messy, and often unsuccessful, attempts to influence constitutional and legislative changes at the state and national level through democratic means.

Of course, in the eyes of some NGOs, to have the Court conveniently reference a human rights treaty (*any* such treaty) as a basis for one of its decisions is a victory of incalculable value, regardless of whether the United States is a party to the treaty.

> NGOs, like other entities, act as interest groups focused on maximizing private benefits. In seeking the production of customary international law outputs for use in future litigation, NGOs will not necessarily be seeking specific outcomes from each output; but rather, these outputs can result in the production of tools for use in other forums.

Kochan 2004, 263.

The reporting processes relating to two international human rights treaties to which the United States is a party evidence the manner in which treaty body committees and NGOs partner to influence U.S. civil and human rights laws and policies outside the regular channels for democratic participation. These two treaties are the International Convention on the Elimination of all Forms of Racial Discrimination ("ICERD") and the ICCPR.

The Committee on the Elimination of Racial Discrimination ("CERD") is responsible for receiving

and considering periodic State party reports under ICERD. In its February 2008 report regarding the United States, the CERD set forth a list of recommendations that, if adopted or otherwise recognized by the Court, would result in the *de facto* transfer to the CERD of supervisory authority over state and federal responsibilities and measures for addressing racial discrimination in both public and private settings.

In its 2008 report, the CERD recommended that the United States: change its definition of racial discrimination used in federal and state legislation to include indirect, or *de facto*, discrimination; broaden the protection afforded by the law against discriminatory acts by private individuals, groups or organizations; establish an independent human rights institution; strengthen its efforts to combat racial profiling and adopt federal legislation to that end; not discriminate against non-citizens, particularly in the fight against terrorism; adopt and implement federal and state legislation to combat discrimination in housing; enact legislation to enable school districts to promote school integration; prohibit the expression of all ideas based upon racial superiority or hatred; design and implement strategies for the elimination of structural racial discrimination in the criminal justice system; discontinue the sentencing of juveniles to life without parole; allocate sufficient resources to provide for the legal representation of indigent persons; adopt all necessary measures, including a moratorium, to ensure that the death penalty is not imposed as a result of racial bias on the part of prosecutors, judges, juries, and lawyers; report to the CERD on the results of measures taken to prevent and punish violence and abuse against women belonging to minorities; automatically restore the

right to vote of those who have completed criminal sentences; explore ways to hold transnational corporations registered in the United States accountable for negatively impacting the rights of indigenous peoples outside the United States; report to the CERD on the results of measures taken to remedy obstacles that prevent or limit the access of minorities to adequate health care; continue to address racial disparities in sexual and reproductive health, including access to adequate contraception and family planning; and adopt all appropriate measures to reduce the persistent "achievement gap" between minority and white students in education. *See* Groves.

Meanwhile, the human rights regime under the ICCPR has resulted in an unwarranted and unauthorized intrusion into United States domestic and foreign policy. In its December 2006 concluding observations regarding the United States, the ICCPR's Human Rights Committee ("HRC") requested the United States to provide information and take action regarding a number of issues. Most of the HRC's requests for follow-up information concerned matters outside the territory of the United States, even though the ICCPR explicitly does not apply outside the territory of a State party. Nevertheless, the Government of the United States submitted comments to the HRC addressing the matters raised in the HRC's concluding observations, primarily matters relating to the United States' engagement in an armed conflict with al Qaida, the Taliban, and their supporters.

The HRC's investigation of matters outside the territory of the United States, involving armed conflict with terrorists, provides compelling evidence in support of the U.S. Senate's wisdom in having rati-

fied the ICCPR with five reservations, five understandings, and four declarations, and in having not ratified other international human rights conventions. Fortuitously, the United States declared that the provisions of Articles 1 through 27 of the ICCPR are not self-executing, thereby enabling the citizens of the United States and their elected officials to respond to the unforeseeable war against global terrorism within the confines of the United States Constitution and duly enacted federal legislation, and without the interference of unelected and unaccountable international committees.

In sum, by referencing Article 37(a) of the Convention on the Rights of the Child or provisions of other international human rights treaties as a basis for its decision in these cases, this Court would be undermining the ability of the United States to govern its internal affairs democratically, without the involvement of unelected and unaccountable "experts" working with United Nations treaty body committees in Geneva. When, at any time, a majority of the Justices of this Court can refer to a provision of a non-binding international human rights treaty or an insufficiently definite international norm and thereby end all state and national democratic discourse, deliberation, and decision-making in regards to ultimate questions of civil, political, economic, social, and cultural rights, the democratic process and the rule of law are in great jeopardy.

III. CONCLUSION

For the foregoing reasons, this Court should affirm the judgments of the Florida First District Court of Appeal.

Respectfully submitted,

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APPENDIX

Interests of *Amici*

Americans United for Life is a nonprofit, public-interest law and policy organization whose vision is a nation in which everyone is welcomed in life and protected in law. The first national pro-life organization in America, AUL has been committed to defending human life through vigorous judicial, legislative, and educational efforts state by state since 1971. **William L. Saunders** is Senior Vice President of AUL.

Catholic Family and Human Rights Institute is a New York and Washington DC-based research institute concerned with international social policy, particularly in the areas of life and family issues. While C-FAM is agnostic on the underlying issue of juvenile sentencing, C-FAM is deeply concerned with the threat to democratic institutions that comes through the misuse of international treaties in the creation of supposedly new international norms such as is happening with the case under review here. **Austin Ruse** is the President of C-FAM.

Center for Security Policy specializes in identifying policies, actions, and resource needs that are vital to American security. A fundamental precondition for the exercise of national power, of course, is the maintenance of U.S. control over the decision-making process—in short, sovereignty. The Center's Sovereignty Project seeks to revitalize the determination of American leaders to develop policies free from undue international influence and to prevent the establishment of global government. **Frank J. Gaffney, Jr.** is the President and CEO of the Center for Security Policy.

Concerned Women for America is a non-profit public policy organization representing 500,000 people nationwide. One of its core issues is to protect America's sovereignty from the unconstitutional application of international law, treaties or norms. **Wendy Wright** is President of CWA.

Family Advocacy International is a non-profit organization with substantial experience in protecting and promoting the family as the fundamental unit of society in the United Nations and related international venues. **E. Douglas Clark** is the President of FAI.

Family Watch International was founded in 1999 and is a nonprofit, international organization with members and supporters in over 100 countries. Its mission is to preserve and promote the family, based on marriage between a man and a woman as the societal unit that provides the best outcome for men, women and children. FWI works at the United Nations and in countries around the world educating the public and policymakers regarding the central role of the family and advocating for women, children and families at the international, national, and local level. **Sharon Slater** is the President of FWI.

Freedom Alliance is a non-profit educational and charitable foundation founded in 1990 by Lt. Col Oliver L. North, who now serves as the organization's honorary chairman. Its mission is to advance the American heritage of freedom by honoring and encouraging military service, defending the sovereignty of the United States and promoting a strong national defense. **Thomas P. Kilgannon** is the President of Freedom Alliance.

Hudson Institute is a non-partisan policy research organization dedicated to innovative research and analysis that promotes global security, prosperity, and freedom. The Institute challenges conventional thinking and helps manage strategic transitions to the future through interdisciplinary and collaborative studies in defense, international relations, economics, culture, science, technology, and law. Through publications, conferences and policy recommendations, we seek to guide global leaders in government and business. **Herbert I. London** is President and **John Fonte** is a Senior Fellow at Hudson.

Solidarity Center for Law and Justice is a professional corporation organized under the laws of the State of Georgia for the promotion of social welfare by defending human rights secured by law, to wit: those individual liberties, freedoms, and privileges involving human dignity that are either specifically guaranteed by the U.S. Constitution or by a special statutory provision coming directly within the scope of the 13th or 14th Amendment, some other comparable constitutional provision, or that otherwise fall within the protection of the Constitution by reason of their long established recognition at the common law as rights that are essential to the orderly pursuit of happiness by free men and women. When permitted by court rules and practice, Solidarity Center for Law and Justice files briefs as amicus curiae in litigation of importance to the protection of human rights.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in

1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual Cato Supreme Court Review, and files amicus briefs with the courts. Cato's interest in this particular case lies not in the underlying criminal law issues but in that it could be used as a vehicle for improperly inserting foreign and international law—and non-binding aspirations—into domestic constitutional (and statutory) interpretation. **Ilya Shapiro** is a senior fellow in constitutional studies at Cato and editor-in-chief of the *Cato Supreme Court* Review.

The Competitive Enterprise Institute is a public interest group dedicated to free enterprise and limited government. In its view, the use of vague international norms to interpret constitutional provisions poses grave dangers to liberty. **Christopher C. Horner** is a Senior Fellow at CEI.

The Sovereignty Network was organized to formulate proper courses of action in response to U.S. government policies, federal legislation, and actions of the United Nations system which erode or otherwise impinge on American sovereignty, and takes concerted action to strengthen American independence and self-government by opposing global governance and transnational progressivism. The Network is an association of analysts, activists, and academics based in Washington, DC.

United Families International is a non-profit, non-partisan, non-religious international organization founded in 1979. It is devoted to maintaining and strengthening the family. UFI strengthens the family by respecting existing law, political structure,

religion and cultural norms that preserve the family. Apropos to the present cases, UFI strengthens the family by promoting respect for the sovereign rights of each individual nation as it works in the world community to protect the common good of individual families. **Michael Duff** is the President of UFI.