No. 08-_____

IN THE

# Supreme Court of the United States

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JOSÉ ERNESTO MEDELLÍN,

*Petitioner,*

VS.

THE STATE OF TEXAS,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS
OR FOR WRIT OF HABEAS CORPUS

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**APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF MOTION TO RECALL AND STAY THE MANDATE AND PETITION FOR WRIT OF CERTIORARI OR WRIT OF HABEAS CORPUS**

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

Petitioner José Ernesto Medellín respectfully submits this application for a stay of his execution, now scheduled for August 5, 2008, in the above entitled proceeding, pending resolution of his Motion to Recall and Stay the Court's Mandate in *Medellín v. Texas*, 128 S. Ct. 1346 (2008), and his Petition for Writ of Certiorari from the Texas Court of Criminal Appeals and for a Writ of Habeas Corpus.

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

Federal and state actors at the highest levels of government are currently engaged in unprecedented efforts to bring the Nation into compliance by providing a judicial forum to grant him the review and reconsideration to which he is entitled. Members of the House of Representatives have introduced legislation, the Secretary of State and Attorney General have requested Texas to assist the United States in carrying out its international obligations, a Texas senator has committed to introducing legislation at the

earliest opportunity when the Texas Legislature reconvenes, and leaders of the diplomatic and business communities have warned that Mr. Medellín's execution could have grave consequences for Americans abroad. But as the United States informed the ICJ a few weeks ago, "[g]iven the short legislative calendar for our Congress this year, it [will] not be possible for both houses of our Congress to pass legislation" implementing the *Avena* decision.

Yet Mr. Medellín remains scheduled for execution on August 5, 2008, and to date, no Texas actor has taken steps to halt his execution. Should Texas carry out Mr. Medellín's execution before Congress has had a reasonable opportunity to implement this legislation, it will irreparably violate the nation's treaty obligations just as the appropriate political branches are attempting to prevent such a breach.

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

*First*, Mr. Medellín's petition reflects unique and compelling circumstances weighing heavily in favor of a grant of a writ of certiorari or habeas corpus. Fundamental principles of due process under the Fourteenth Amendment dictate that Mr. Medellín cannot lawfully be executed in violation of a binding legal obligation arising from a treaty voluntarily entered into by the United States to provide him additional process in the form of review and reconsideration. To carry out a sentence of death when an undisputed legal obligation, albeit one not yet effective on the domestic level, remains unfulfilled would be antithetical to the very notion of lawful process. In these unique circumstances, this Court should exercise its discretion to grant a stay to fully consider the issues of extraordinary importance presented by his petition. *See* Petition for Writ of

Certiorari and for a Writ of Habeas Corpus, Part I.A, *Medellin v. Texas*, No. 08-__ (July 31, 2008).

*Second*, a stay of execution is necessary to preserve the ability of the political branches to comply with the nation's treaty obligations by the constitutional process settled by this Court in *Medellín v. Texas*, 128 S. Ct. 1346 (2008). Texas should not be permitted to impinge on the constitutional authority of Congress, as just confirmed by this Court, to give effect to the United States's obligations under Article 94(1) of the United Nations Charter to comply with the *Avena* judgment. *See* Petition for Writ of Certiorari and for a Writ of Habeas Corpus, Part I.B, *Medellin v. Texas*, No. 08-__ (July 31, 2008).

*Third*, the Court should grant a stay to vindicate the public's interest in preserving the United States's international standing and protecting the rights of Americans abroad. This Court has already recognized that the "United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law . . . are plainly compelling." *Medellin v. Texas*, 128 S. Ct. at 1361, 1367. By granting a stay, this Court will avoid an irreversible breach of the nation's international obligations and protect the welfare of all Americans who rely on the protections afforded by the Vienna Convention on Consular Relations and various other treaty regimes that would be implicated by the United States's breach here. The public interest could not be stronger in favor of a stay because the breach caused by Mr. Medellín's execution *could not be*

*remedied. See* Petition for Writ of Certiorari and for a Writ of Habeas Corpus, Part I.C, *Medellin v. Texas*, No. 08-__ (July 31, 2008).

*Finally*, a stay is also necessary to give "respectful consideration" to the findings and proceedings of the ICJ. The ICJ has issued provisional measures on July 16, 2008 calling on the United States to "take all measures necessary" to prevent Mr. Medellín's execution. The ICJ's provisional measures order was issued in connection with Mexico's request for interpretation of its 2004 *Avena* judgment. The ICJ has set an accelerated briefing schedule in the case, reflecting its appreciation of all parties' interest in a speedy resolution of Mexico's request. The United States's pleadings are currently due on August 29, and the ICJ will likely issue a decision on the merits before the end of 2008.

Another international body, the Inter-American Commission on Human Rights, has likewise issued precautionary measures calling upon the United States to prevent Mr. Medellín's execution. The Commission is the only body to have reviewed all of the evidence pertaining to the Vienna Convention violation in Mr. Medellín's case and to have done so under in a manner consistent with the *Avena* Judgment. Only days ago, the Commission issued a preliminary report concluding that he had been prejudiced by the Vienna Convention violation and recommending that he be granted a new trial as a result.

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

## FACTS AND PRIOR PROCEEDINGS

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

## REASONS FOR GRANTING A STAY OF EXECUTION

### I. The Court Should Exercise its Discretion to Grant a Stay of Execution.

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

These general principles apply to cases on review in this Court from both state and federal courts. *See California v. Brown*, 475 U.S. 1301 (1986) (Rehnquist, J., in chambers) (applying these principles in granting stay of state court judgment invalidating a death sentence); *In re Roche*, 448 U.S. at 1314 (granting stay of state court mandate,

following denial of stay by state court). The Court has never had occasion to consider these principles in connection with a motion to recall and stay its mandate.

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

The issues presented in the accompanying motion to recall the mandate and petition for writ of certiorari raise compelling questions of extraordinary importance, including:

1. Whether Mr. Medellín's Fourteenth Amendment right not to be deprived of his life without due process of law entitles him to remain alive until Congress has had a reasonable opportunity to exercise its constitutional prerogative to implement the right to judicial review and reconsideration under *Avena and Other Mexican Nationals*, so that he can secure access to a remedy to which he is entitled by virtue of a binding international legal obligation of the United States;

2. Whether the Court should grant a writ of habeas corpus to adjudicate Mr. Medellín's claim on the merits, where he seeks relief pursuant to a binding international legal obligation that the federal political branches seek to implement, and where adequate relief cannot be obtained in any other form or from any other court; and

3. Whether the Court should recall and stay its mandate in *Medellín v. Texas,* 128 S. Ct. 1346, not to revisit the merits, but to allow Congress a reasonable opportunity to implement legislation consistent with the Court's decision in that case.

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

having state courts provide the required review and reconsideration. *Medellin v. Texas*, 128 S. Ct. 1346, 1366 (2008). The Court has held that, instead, action by the federal political branches is needed to render the *Avena* decision enforceable in Mr. Medellín's case. *Id.* at 1366 ("Congress is up to the task of implementing non-self-executing treaties."); *see also id.* at 1369, 1371 (noting action by Congress and/or by the President); *id.* at 1374 (Stevens, J., concurring in judgment) ("[T]he fact that the President cannot legislate unilaterally does not absolve the United States from its promise to take action necessary to comply with the ICJ's judgment.").

In response, the "Avena Implementation Act of 2008" has been introduced in the House of Representatives to confer on Mr. Medellín the right to judicial review and reconsideration mandated by the ICJ. 5a-6a. Such relief would include "any declaratory or equitable relief necessary to secure the rights," and "any relief required to remedy the harm done by the violation [of his consular rights], including the vitiation of the conviction or sentence where appropriate." *Id.* § 2(b). Texas State Senator Rodney Ellis also has said that he will propose implementing legislation at the state level as soon as the Texas legislature reconvenes in January 2009. *See* 15a-16a. And negotiations at the highest levels of the federal and state executives continue to settle upon a means of compliance. *See* 80a-83a.

The fact that additional time is required for the political branches to give the *Avena* Judgment domestic legal effect should not operate to deprive Mr. Medellín of his undisputed rights, particularly where his very life hangs in the balance. Simply put, Mr. Medellín cannot be executed consistent with a binding legal obligation arising from a

treaty voluntarily entered into by the United States to provide him additional process in the form of review and reconsideration. As a matter of law, therefore, his execution would violate the most fundamental objectives of the due process clause. *See* Pet. for Writ of Certiorari or for Writ of Habeas Corpus, Part I, *Medellin v. Texas*, No. 08-__ (July 31, 2008).

While Mr. Medellín's ability to demonstrate prejudice has no bearing on his entitlement under international law to the procedural remedy of review and reconsideration—which is undisputed—the remedy would not be an empty exercise. The undisputed violation of his Vienna Convention rights in his case goes to the very heart of the validity of his conviction and sentence. Evidence submitted to the court below but never considered by it or any other U.S. court on the merits establishes that during the investigation and prosecution of Mr. Medellín's case, his defense attorney was under a six-month suspension from the practice of law, was jailed prior to trial for seven days for violating his suspension, and indeed, less than three weeks before the beginning of Mr. Medellín's trial, was forced to file a writ of habeas corpus *on his own behalf* in order to keep himself out of jail. *See* Second Subsequent Application for Post-Conviction Writ of Habeas Corpus at 40, *In re Medellin*, No. __ (Tex. Crim. App. July 28, 2008). Billing records indicate that the sole investigator for the defense spent *a total of eight hours* on the case prior to trial, including time spent with Mr. Medellín. *Id.* at 41. Had Mr. Medellín received review and reconsideration, he would have been able to demonstrate that if the Mexican consulate had been notified of his detention *before* he was tried and convicted, the consulate would have rendered material assistance. *Id.* at 38-39, 46-47.

Indeed, the Inter-American Commission on Human Rights, the only tribunal to consider Mr. Medellín's claim of prejudice resulting from the Vienna Convention violation on the merits using a standard consistent with the *Avena* Judgment, has determined that he was prejudiced and that due process demanded a new trial. *Id.* at 34-36.

As the United States has acknowledged, Mr. Medellín has yet to receive the requisite review and reconsideration mandated by *Avena*, notwithstanding the alternative prejudice findings by the Texas Court of Criminal Appeals and the federal district court in his first habeas applications. *See* 98a ("[The previous holdings] do[] not give full and independent weight to the treaty violation, which is what *Avena* requires and which is what the President has directed.").[1] Justice Breyer, writing also on behalf of Justices

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[1] The Texas trial court considering Mr. Medellin's first habeas application found, in its consideration of the merits of the Vienna Convention violation, that Mr. Medellin "fail[ed] to show foreign nationality which requires notification of a foreign consulate" and could not show that the violation affected the constitutional validity of his conviction and sentence. *See* Second Subsequent Application for Post-Conviction Writ of Habeas Corpus at 6, 33-34, *In re Medellin*, No. __ (Tex. Crim. App. July 28, 2008). That decision was before the ICJ when it issued *Avena*. Not only does it apply the wrong standard, but any finding on nationality or prejudice could not trump the obligation under that judgment to prospectively review and reconsider the conviction and sentence. Mr. Medellin recognizes that in *Medellin v. Texas*, slip op at 5 n.1, this Court suggested, in dictum on a point not at issue in the case, that he had "likely waived" any claim that he had been deprived of the assistance of Mexican consular officers in developing mitigation evidence. The ICJ judgment in *Avena*, however, requires that the Mexican nationals subject to the judgment be given a full, prospective opportunity to present all evidence relevant to the issue of prejudice. *See* Second Subsequent Application for Post-Conviction Writ of Habeas Corpus at 6-7, *In re Medellin*, No. __ (Tex. Crim. App. July 28, 2008). Hence, only if Mr. Medellin is given that opportunity to put on that evidence would the United States fulfill its treaty obligation under Article 94(1) of the United Nations Charter and Avena. Mr. Medellin respectfully suggests that, if given an opportunity to fully consider that issue on the merits, a court would so hold.

Souter and Ginsburg, noted: "While Texas has already considered [whether the police failure to inform Medellin of his Vienna Convention rights prejudiced Medellin], it did not consider fully, for example, whether appointed counsel's coterminous 6-month suspension from the practice of the law 'caused actual prejudice to the defendant'--prejudice that would not have existed had Medellin known he could contact his consul and thereby find a different lawyer." *Medellin v. Texas*, 128 S. Ct. at 1389-1390 (Breyer, J., dissenting).

To allow an execution to proceed in these circumstances, before a U.S. court can consider his claims, cannot be said to be "based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (opinion of Stevens, J.) ("[D]eath is a different kind of punishment from any other which may be imposed in this country" and it is thus "of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."). Although the nature of the death penalty alone does not justify a stay in every instance, "a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding." *Barefoot v. Estelle*, 463 U.S. at 888.

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

Here, the balance of equities could not be stronger in favor of a stay of execution. There can be no doubt that the paramount interest in human life is at stake here and that that interest would be irreparably harmed if Mr. Medellín were to be executed without

having received the review and reconsideration to which he is entitled. In that event, Mr. Medellín would forever be deprived of the opportunity to vindicate his rights. *See, e.g., Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) ("[T]hat irreparable harm will result if a stay is not granted . . . is necessarily present in capital cases."). But Mr. Medellín's execution would go far beyond the confines of his individual case; his case raises unique circumstances implicating the public interest that make the grant of a stay imperative not only to maintain the standing of the United States in its international relations, but also to protect the lives of countless Americans living, working and traveling abroad.

*First*, Mr. Medellín would suffer the gravest possible form of irreparable injury were he to be put to death before having a chance to be afforded the protections to which he is undisputedly entitled by virtue of the treaty obligations of the United States. Members of the House of Representatives have taken the first step towards compliance by proposing the "Avena Implementation Act of 2008," which would confer on Mr. Medellín the right to raise in domestic courts what all entities agree is an undisputed international legal obligation. This Court interpreted the scheme of Article 94 of the United Nations Charter to preserve to the political branches the "option of noncompliance"—specifically, their ability "to determine whether and how to comply with an ICJ judgment." *Medellin v. Texas*, 128 S. Ct. at 1360. Texas should not be allowed to deprive the Executive and Congress of the opportunity to comply by rushing to execute Mr. Medellín before they have been able to act and thereby placing the United States in irreparable breach. As a result of the irreparable injury not only to Mr. Medellín,

but also to the institutional interests of both the Executive and Congress, the equities weigh heavily in favor of a stay.

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

Indeed, far from harming Texas, a stay of execution is apt given Texas's role in the treaty violation itself. As Justice Stevens stated in *Medellin v. Texas*, "Texas' duty [to protect the honor and integrity of the Nation] is all the greater since it was Texas that – by failing to provide consular notice in accordance with the Vienna Convention – ensnared the United States in the current controversy." *Medellin v. Texas*, 128 S. Ct. at 1374 (Stevens, J., concurring). "Having already put the Nation in breach of one treaty," Justice Stevens wrote, "it is now up to Texas to prevent the breach of another." *Id.*

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

The President, who shoulders the primary responsibility for our nation's foreign relations, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), has set forth the critical U.S. interests at stake in this case. In an amicus brief submitted to the Court, the United States cited two principal foreign policy considerations prompting the President's 2005 decision to direct state courts to provide review and reconsideration: "the need for the United States to be able to protect Americans abroad" and the need to "resolve a dispute with a foreign government by determining how the United States will comply with a decision reached after the completion of formal dispute-resolution procedures with that foreign government." Br. for the United States as Amicus Curiae Supporting Respondent at 43, 45, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). In light of these objectives, the President considered it in the "paramount interest of the United States" to achieve "prompt compliance with the ICJ's decision with respect to the 51 named individuals" including Mr. Medellín. *Id.* at 41.

All nine Justices of this Court recognized that the United States has a vital public interest in complying with its obligations under the *Avena* Judgment. Writing for the majority, Chief Justice Roberts noted that

> In this case, the President seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. These interests are plainly compelling.

*Medellin v. Texas*, 128 S. Ct. at 1367. In a concurring opinion, Justice Stevens agreed that "the costs of refusing to respect the ICJ's judgment are significant." *Id.* at 1375. And Justice Breyer, joined by Justices Souter and Ginsburg, observed in his dissenting

opinion that noncompliance with the *Avena* Judgment would exact a heavy toll on the United States by "increase[ing] the likelihood of Security Council *Avena* enforcement proceedings, [] worsening relations with our neighbor Mexico, [] precipitating actions by other nations putting at risk American citizens who have the misfortune to be arrested while traveling abroad, or [] diminishing our Nation's reputation abroad as a result of our failure to follow the 'rule of law' principles that we preach." *Id.* at 1391.

As noted, the rights and obligations set forth in Article 36 of the Vienna Convention are entirely reciprocal in nature. And the risks of noncompliance, well-known to those entrusted with carrying out the nation's foreign relations, are severe. As Ambassador Jeffrey Davidow, who holds the rank of Career Ambassador (the highest rank available to diplomats) and served as an ambassador for the United States in the administrations of Presidents Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush, observed:

> Diplomats function in the international arena based on a basic reality: governments will respond in kind to the treatment they receive. This notion of reciprocity is a bedrock principle governing relations between nations, and the United States' good faith enforcement of its own treaty obligations is the only means by which we can ensure other nations will abide by their treaty obligations to us .... Without our own strong enforcement of treaties, the United States' efforts in a vast array of contexts—economic, political and commercial—would be significantly undermined.

99a, ¶ 3.

For these reasons, failure to comply with the *Avena* Judgment "would significantly impair the ability of American diplomats to advance critical U.S. foreign policy." *Id.* The importance of the United States's compliance to the United States's treaty partners is dramatically illustrated here by the submission in 2007 of amicus briefs from *sixty countries* urging compliance in *Medellin v. Texas*. *See* Br. of Amici Curiae the European Union and Members of the Int'l Community in Support of Petitioner, *Medellin v. Texas*, 128 S. Ct. 1346 (No. 06-984) (forty seven nations and the European Union); Br. Amicus Curiae of the Government of the United Mexican States in Support of Petitioner José Ernesto Medellín, *Medellin v. Texas*, 128 S. Ct. 1346 (No. 06-984) (Mexico); Br. of Foreign Sovereigns as Amici Curiae in Support of Petitioner José Ernesto Medellín, *Medellin v. Texas*, 128 S. Ct. 1346 (No. 06-984) (twelve nations); *see also* 101a-122a.

There can be no doubt, moreover, that the consular rights afforded by the Vienna Convention are critical to the safety and security of Americans who travel, live and work abroad: missionaries, Peace Corps volunteers, tourists, business travelers, foreign exchange students, members of the military, U.S. diplomats, and countless others. Timely access to consular assistance is crucially important whenever individuals face prosecution under a foreign and often unfamiliar legal system. The United States thus insists that other countries grant Americans the right to prompt consular access.[2] For

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[2] U.S. consulates provide arrested Americans with a list of qualified local attorneys, explain local legal procedures and the rights accorded to the accused, ensure contact with family and friends, protest any discriminatory or abusive treatment, and monitor their well-being throughout their incarceration. *See* U.S. Department of State, Assistance to U.S. Citizens Arrested Abroad, http://travel.state.gov/travel/tips/emergencies/emergencies_1199.html.

example, in 2001, when a U.S. Navy spy plane made an emergency landing in Chinese territory after colliding with a Chinese jet, the State Department cited the Vienna Convention in demanding immediate consular visits to the plane's crew. *See* State Department Daily Press Briefing, April 2, 2001, *available at* http://www.state.gov/r/pa/prs/dpb/2001/1889.htm. Chinese authorities granted consular visits to the crew members, who were detained in China for eleven days. During the tense standoff, the U.S. Ambassador to China emphasized that these rights of immediate and unobstructed consular access to detained American citizens are "the norms of international law," *China grants U.S. access to spy plane crew*, CNN, April 3, 2001, while the President warned that the failure of the Chinese government "to react promptly to our request is inconsistent with standard diplomatic practice and with the expressed desire of both our countries for better relations[,]" Statement by the President on American Plane and Crew in China, The White House, April 2, 2001, *available at* http://www.whitehouse.gov/news/releases/2001/04/20010402-2.html.

The business community is similarly concerned about the consequences of noncompliance with the *Avena* Judgment. In a letter to House Speaker Nancy Pelosi urging Congress to pass legislation implementing *Avena*, Peter M. Robinson, President and CEO of the United States Council for International Business observed that

> The security of Americans doing business abroad is clearly and directly at risk by U.S. noncompliance with its obligations under the Vienna Convention on Consular Relations. American citizens abroad are at times detained by oppressive or undemocratic regimes, and access to the American consulate is their lifeline . . . . While examples of Americans being assisted in this way are too numerous to

> list, suffice it to say that the overseas employees of the U.S. business community need this vital safety net.

123a. Accordingly, Mr. Robinson wrote: "Failure to honor our universally recognized treaty obligations will erode global confidence in the enforceability of the United States' international commitments across a broad range of subjects, and will have a negative impact upon its international business dealings." 124a.

Key international observers have likewise observed the importance to the United States of achieving compliance with *Avena*. In particular, Professor Phillip Alston, who serves as the United Nations Human Rights Council Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, recently singled out the lack of compliance with the *Avena* Judgment as an issue of particular concern:

> The provision of consular rights seems to be treated as an issue affecting only those foreign nationals currently on death row in Texas. But precisely the same issue applies to any American who travels to another country. One legislator with whom I spoke noted that when he travels overseas he is hugely reassured by the fact that he would have the right of access to the US consulate if he was arrested. The present refusal by Texas to provide review undermines the role of the US in the international system, and threatens the reciprocity between states with respect to the rights of each others' nationals.

128a. Professor Alston further noted that non-compliance with *Avena* threatens to undermine other treaty regimes involving such varied subjects as trade, investment and the environment. "Why," he queried, "would foreign corporations, relying in part upon treaty protections, invest in a state such as Alabama or Texas if they risked being told that

the treaty bound only the US government but was meaningless at the state level? This is where the *Medellin* standoff leaves things." 127a-128a.

Simply put, if Texas places the United States in breach of its treaty obligations, the risk that our treaty partners will suspend compliance with their obligations under those same treaties increases dramatically. Such a response could compromise, among other things, the crucial rights of consular notification and assistance of all American citizens abroad. With thousands of Americans arrested or detained abroad every year, *see* 100a, ¶ 4, that risk is palpable. Indeed, "[i]f the United States fails to keep its word to abide by the *Avena* judgment, that action will not only reduce American standing in the world community, but affirmatively place in jeopardy the lives of U.S. citizens traveling, working, and living abroad." *Id.* Allowing Mr. Medellín's execution to proceed in contravention of the United States's obligations under the *Avena* Judgment, when steps to implement that obligation consistent with this Court's guidance are in process, would also send the message that the United States is indifferent not only to the rule of law but to human life itself.

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

The ICJ is currently considering Mexico's Request for Interpretation of the *Avena* Judgment. In conjunction with its Request for Interpretation, Mexico also requested that the ICJ grant provisional measures of protection in respect of Mr. Medellín and four other Mexican nationals named in the *Avena* Judgment who are currently on Texas's death row. The ICJ granted Mexico's request for provisional measures on July 16, 2008, directing

the United States to "take all measures necessary to ensure that Messrs. José Ernesto Medellín Rojas [and the four other Mexican nationals] are not executed pending judgment on the Request for interpretation submitted by the United Mexican States, unless and until these five Mexican nationals receive review and reconsideration consistent with paragraphs 138 to 141 of the [*Avena*] Judgment." 38a, ¶ 80(a). The ICJ has set an accelerated briefing schedule in the case, reflecting its appreciation of all parties' interest in a speedy resolution of Mexico's request. The United States's pleadings are currently due on August 29, and the ICJ will likely issue a decision on the merits before the end of 2008.

The Court should stay Mr. Medellín's execution both out of respect for the ICJ's order of provisional measures and to allow the ICJ an opportunity to consider and resolve Mexico's Request for Interpretation. The United States led the effort to create the ICJ, and has not hesitated to avail itself of the Court, initiating ten cases as an applicant or by special agreement with another state. *See* International Court of Justice, Contentious cases ordered by countries involved, United States of America, http://www.icj-cij.org/docket/index.php?p1=3&p2=3&p3=1&p=US. Indeed, the United States was the first State to invoke the Optional Protocol, when it sued Iran in 1979 on claims, among others, of breach of the Vienna Convention. *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7 (Provisional Measures Order of Dec. 15); 1980 I.C.J. 3 (Judgment of May 24).

This Court now has repeatedly held that the decisions of the ICJ are entitled to "respectful consideration." *Medellin v. Texas*, 128 S. Ct. at 1361 n.9 (quoting *Breard v.*

*Greene*, 523 U.S. 371, 375 (1998)); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355-56 (2006).[3] But to execute Mr. Medellín when the ICJ is still considering the merits of Mexico's request would convey nothing but disrespect for the tribunal's professionalism and competence. The interest of Mr. Medellín, as an individual whose very life is at stake, in enforcing his procedural rights, and the public interest in preserving the commitment of the United States to the rule of law in a sensitive matter involving relations with one of our closest neighbors, provide compelling reasons to extend comity to the ICJ's proceedings.[4]

Comity is likewise due to the Inter-American Commission on Human Rights, which recently adjudicated a petition filed by Mr. Medellín on November 21, 2006,

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[3] Mr. Medellin recognizes that in *Breard v. Greene*, 523 U.S. 371, 378 (1998) and *Fed. Republic of Germany v. United States*, 526 U.S. 111, 111 (1999), this Court declined to stay executions in cases in which the International Court of Justice had issued provisional measures. In neither of those cases, however, had the ICJ reached a final judgment prescribing relief, and in neither of those cases had the President determined that the United States should comply or had Congress begun steps to effect compliance.

[4] As the Court explained in *Hilton v. Guyot*, 159 U.S. 113 (1895), comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Id.* at 163-64. Under the principle of comity and similar doctrines, the Court has repeatedly counseled respect for the competence of international or foreign courts and the efficacy of their proceedings. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985) (agreement to arbitrate before foreign arbitral tribunal enforced); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 257-61 (1981) (action dismissed in favor of foreign court under doctrine of forum non conveniens); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972) (agreement to litigate before foreign court enforced); *Ritchie v. McMullen*, 159 U.S. 235, 243 (1895) (foreign judgment enforced under Hilton comity rule).

raising the violation of his consular rights and several violations of the 1948 Declaration of the Rights and Duties of Man. As discussed above, the Commission issued precautionary measures calling upon the United States to take all measures necessary to preserve Mr. Medellín's life pending the Commission's investigation of the allegations raised in his petition. At a March 7, 2008 hearing before the Commission in Washington, D.C., representatives of the U.S. Department of State noted that the United States was complying with those precautionary measures.

The Commission has now issued its findings, making it the first adjudicative body to consider whether Mr. Medellín was prejudiced in his 1994 trial by the violation of his rights to consular notification and assistance under a standard consistent with that mandated by the ICJ.[5] The Commission concluded that he was prejudiced, and recommended that the United States vacate his death sentence and provide him with a new trial. 65a, ¶ 128; 72a, ¶ 160. In addition, the Commission reinstated the precautionary measures it had issued, calling upon the United States to preserve Mr. Medellín's life pending the implementation of its recommendations. 71a, ¶ 159.

This Court should stay Mr. Medellín's execution in the interest of comity to permit the United States to give effect to the Commission's recommendations and the precautionary measures issued in respect thereof. To disregard the finding of prejudice by an esteemed body of experts, whose authority the United States fully recognizes, on

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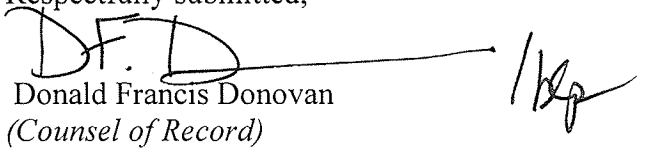
[5] As discussed in Mr. Medellín's Second Subsequent Application, the alternative prejudice findings made by the trial court and adopted by this Court in connection with Mr. Medellín's initial habeas application failed to independently analyze the Vienna Convention violation. *See* Second Subsequent Application at Part II.A.

the basis of facts never before considered on the merits by any domestic court would signal profound disrespect for the Commission and Mr. Medellín's inalienable right not to be deprived of his life without due process of law.

## CONCLUSION

For the foregoing reasons, Mr. Medellín respectfully requests that this Court grant him (a) a stay of execution, now scheduled for August 5, 2008, pending resolution of his petition for a writ of certiorari and, if the writ is granted, further order of the Court, or (b) in the alternative, an order temporarily enjoining respondent Texas officials from carrying out the execution subject to the same terms.

Respectfully submitted,



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