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

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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CAPITAL CASE

QUESTIONS PRESENTED

In the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31), the International Court of Justice determined that José Ernesto Medellín and fifty other Mexican nationals under sentence of death in the United States were entitled to receive judicial review and reconsideration of their convictions and sentences in light of the violation of their rights under the Vienna Convention on Consular Relations in their capital murder trials. In *Medellín v. Texas*, 128 S. Ct. 1346 (2008), this Court held that the United States is bound under Article 94(1) of the United Nations Charter to comply with the *Avena* Judgment and settled the procedures by which, as a matter of U.S. constitutional law, the international obligation to comply may be given domestic effect. Specifically, this Court held that neither it nor the President had the authority to execute the international obligation, which instead lies with the Congress. In response to that ruling, legislation to implement *Avena* has been introduced in the U.S. House of Representatives, yet the State of Texas, having scheduled Mr. Medellín's execution for August 5, 2008, has indicated that it intends to go forward with the execution before Congress has had a reasonable opportunity to exercise its constitutional prerogative to determine compliance.

This case presents the following questions:

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.

PARTIES

All parties to the proceedings below are named in the caption of the case.

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OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas has not yet issued. In light of his scheduled execution on August 5, 2008, Petitioner lodges this submission with the Court in the event that that Court denies him the relief sought.

JURISDICTION

The final judgment of the Court of Criminal Appeals of Texas, that state's court of last resort in criminal matters, will issue before August 5, 2008. Having been lodged, this petition will have been filed within 90 days of that judgment. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions, which are reproduced beginning at page 1a in the Appendix.

STATEMENT OF THE CASE

A. *Avena* and Subsequent Proceedings

In the *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31) ("*Avena*"), the International Court of Justice ("ICJ") determined that Mr. Medellín and fifty other Mexican nationals under sentence of death in the United States, whose rights to consular notification and access under the Vienna Convention on Consular Relations had been violated in their capital murder trials, were entitled to receive judicial review and reconsideration of their convictions and sentences in light of the violations in their cases. On December 10, 2004, in response to Mr. Medellín's petition, this Court granted a writ of certiorari to decide whether, under the Supremacy

Clause of the Constitution, courts in the United States must give effect to the United States's treaty obligations to comply with the Judgment of the ICJ. *Medellín v. Dretke*, 543 U.S. 1032 (2004) (order granting writ of certiorari).

On February 28, 2005, before the case had been fully submitted, President George W. Bush issued a written determination that the United States had a binding obligation under international law to comply with *Avena*. Br. for U.S. as Amicus Curiae Supporting Resp't at App. 2, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). He also determined that, to achieve compliance, state courts should provide review and reconsideration to the fifty-one Mexican nationals named in the *Avena* Judgment, including Mr. Medellín, pursuant to the criteria set forth by the ICJ, notwithstanding any state procedural rules that might otherwise bar review of the claim on the merits.

In deference to the President's determination, Mr. Medellín filed a motion to stay his case in this Court, requesting that the case be held in abeyance while he exhausted in state court his claims based on *Avena* and the President's determination, neither of which had been issued at the time of his first state post-conviction petition.

On May 23, 2005, this Court dismissed the writ of certiorari as improvidently granted, in part because of the prospect of relief in Texas state court and in part because of potential obstacles to reaching the merits posed by the procedural posture of the case as then before the Court. *Medellín v. Dretke*, 544 U.S. 660, 662 (2005) (per curiam).

Following this Court's dismissal, Mr. Medellín pursued relief in the Texas Court of Criminal Appeals, where he argued that the treaty obligation to abide by the *Avena* decision and the President's determination to comply each constituted binding federal

law that, by virtue of the Supremacy Clause of the Constitution, preempted any inconsistent provisions of state law. On November 15, 2006, the Court of Criminal Appeals dismissed Mr. Medellín's application, holding that neither the *Avena* Judgment nor the President's determination constituted preemptive federal law and that Mr. Medellín was procedurally barred from seeking relief on a subsequent habeas application. *Ex parte Medellín*, 223 S.W.3d 315 (Tex. Crim. App. 2006).

On April 30, 2007, on Mr. Medellín's petition, the Court granted a writ of certiorari to determine whether courts in the United States or the President had the authority to execute the United States's obligation to comply with *Avena*. *Medellin v. Texas*, 127 S. Ct. 2129 (U.S. 2007) (order granting writ of certiorari).

B. *Medellín v. Texas*

In *Medellín v. Texas*, 128 S. Ct. 1346 (2008), the Court held that under Article 94(1) of the United Nations Charter, a valid treaty of the United States, the United States has a binding international obligation to comply with *Avena* by providing review and reconsideration to Mr. Medellín and the other Mexican nationals subject to that judgment. Specifically, the Court observed that "no one disputes" that the obligation to abide by the *Avena* judgment, which "flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States." *Id.* at 1356. The Court also expressly noted its agreement with the President as to the importance of United States's compliance with that obligation. *Id.* at 1367.

The Court held, however, that that international obligation had not yet been validly executed as a matter of U.S. domestic law. *First*, courts are not empowered to automatically enforce ICJ decisions as domestic law because the "sensitive foreign policy decisions" of whether and how to comply are reserved for the he political branches. *Id.* at 1360. *Second*, the "array of political and diplomatic means available [to the President] to enforce international obligations" does not include the power to "unilaterally convert[] a non-self-executing treaty into a self-executing one." *Id.* at 1368. Hence, "while the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions." *Id.* at 1367. Instead, an additional step by the political branches is necessary, including action by Congress to pass implementing legislation, *id.* at 1369, or by the President "by some other means, so long as they are consistent with the Constitution," *id.* at 1371.

Concurring in the judgment, Justice Stevens also noted that the United States's international obligation to provide review and reconsideration under the *Avena* Judgment was undisputed. *Id.* at 1374. He urged action by Texas to "shoulder the primary responsibility for protecting the honor and integrity of the Nation," *id.* at 1374, particularly where "the costs of refusing to respect the ICJ's judgment are significant," *id.* at 1375.

Justice Breyer, joined by Justices Souter and Ginsburg, dissented, stating that the Supremacy Clause of the U.S. Constitution required that the state courts comply with *Avena*, since "the treaty obligations, and hence the judgment, resting as it does upon the

consent of the United States to the ICJ's jurisdiction, bind[s] the courts no less than would 'an act of the [federal] legislature.'" *Id.* at 1376 (internal cites omitted). Like the majority, Justice Breyer recognized that noncompliance would exact a heavy toll on the United States. *Id.* at 1391.

C. Scheduling of Execution Date

Almost immediately following this Court's decision, Texas state prosecutors sought an execution date for Mr. Medellín. At a hearing before the Texas trial court on May 5, 2008, Mr. Medellín requested that the court defer scheduling an execution date in order to allow the national and state legislatures time to implement the *Avena* Judgment, as this Court's decision contemplated. Texas State Senator Rodney Ellis wrote to the court to request that it defer setting a date in light of his intention to introduce legislation by which Texas would comply with *Avena* as soon as the Texas Legislature reconvened in January 2009. 15a-16a. On May 2, 2008, 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, submitted a declaration addressing the negative ramifications for U.S. foreign relations, including for the protection of Americans abroad. The court declined to hear evidence and instead scheduled Mr. Medellín's execution for the first date available under state law. *See* 136a. Hence, Mr. Medellín is scheduled to die by lethal injection on August 5, 2008.

D. Subsequent Proceedings Before the International Court of Justice

On June 5, 2008, in light of the action by Texas to execute Mr. Medellín without having provided him review and reconsideration and the failure as of that date by the United States effectively to implement the judgment within its domestic legal system, Mexico instituted new proceedings in the International Court of Justice by filing a Request for Interpretation of the *Avena* Judgment. *See* Application Instituting Proceedings, Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), June 5, 2008.[1] Mexico asked the ICJ to declare that the United States has an obligation to use any and all means necessary to provide that review before any execution is carried out. In conjunction with its Request for Interpretation, Mexico also asked the ICJ to indicate provisional measures with respect to Mr. Medellín and four other Mexican nationals named in the *Avena* Judgment who face imminent execution in Texas.[2] Mexico's Request for Interpretation of the *Avena* Judgment opens a new case before the ICJ and is currently pending review.

The ICJ held oral proceedings on the request for provisional measures on June 19 and 20, 2008. At argument, the Legal Adviser to the Secretary of State confirmed "that the United States takes its international law obligation to comply with the Avena

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[1] The parties' written and oral pleadings and the judgment, orders and press releases of the International Court of Justice in respect of the Request for Interpretation are available at http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=&case=139&k=11 (last visited July 30, 2008).

[2] The four other Mexican nationals subject to the request for provisional measures have not received execution dates but are eligible under state law to have dates scheduled.

Judgment seriously" and agreed that *Avena* requires the provision of review and reconsideration prior to the imposition of any death sentence. *See* 90a; 92a; 93a.

On June 16, 2008, the ICJ rejected the United States's request to dismiss the case and granted Mexico's request for provisional measures, directing the United States to "take all measures necessary to ensure that Messrs. José Ernesto Medellín Rojas [and 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). In particular, the Court noted

> that the United States has recognized that, were any of the Mexican nationals named in the request for the indication of provisional measures to be executed without the necessary review and reconsideration required under the *Avena* Judgment, that would constitute a violation of United States obligations under international law; … in particular, the Agent of the United States declared before the ICJ that "[t]o carry out Mr. Medellín's sentence without affording him the necessary review and reconsideration obviously would be inconsistent with the *Avena* Judgment[.]"

37a, ¶ 76. The Court further noted that "the Agent of the United States acknowledged before the Court that 'the United States would be responsible, clearly, under the principle of State responsibility for the internationally wrongful actions of [state] officials[.]'" *Id.* at ¶ 77. Nonetheless, commenting on reports of the ICJ's Order in the press, Texas Governor Perry's office stated: "The world court has no standing in Texas and Texas is not bound by a ruling or edict from a foreign court." Allan Turner & Rosanna Ruiz, *Texas to World Court: Executions Are Still On*, Houston Chron., July 17, 2008, at A1.

The submission of the United States in response to Mexico's Request for Interpretation is due on August 29, 2008. The case has been set on an expedited schedule and a decision is likely to issue this year.

E. Introduction of Congressional Legislation

On July 14, 2008, following this Court's decision in *Medellín v. Texas*, Members of the House of Representatives introduced legislation to give the *Avena* Judgment domestic legal effect. The "Avena Case Implementation Act of 2008" grants foreign nationals such as Mr. Medellín a right to judicial review of their convictions and sentences in light of Vienna Convention violations in their cases. 5a-6a. The proposed bill specifically authorizes courts to provide "any relief required to remedy the harm done by the violation [of rights under Article 36 of the Vienna Convention], including the vitiation of the conviction or sentence where appropriate." 6a, § 2. The bill was introduced by Howard L. Berman, Chairman of the Committee for Foreign Affairs and Vice Chairman of the Judiciary Committee, and referred to the Judiciary Committee for consideration. Since that time, the Chairman of that Committee, John Conyers, Jr., and Committee Members Zoe Lofgren and William D. Delahunt have joined as co-sponsors of the bill.

The bill is now under review. On June 19, 2008, before the International Court of Justice, the United States stated that "[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. 88a, ¶ 26.

F. Denial of Federal Habeas Relief

On November 21, 2006, to satisfy the applicable statute of limitations while his first subsequent habeas application was pending in the Texas Court of Criminal Appeals, Mr. Medellín filed a habeas petition in the U.S. District Court for the Southern District of Texas, raising claims related to the enforceability of the *Avena* Judgment as a matter of applicable treaties and the President's 2005 determination to comply. After this Court granted a writ of certiorari to review the denial of Mr. Medellín's first subsequent application, the district court stayed and administratively closed Mr. Medellín's case. On July 22, 2008, the court reopened proceedings for the limited purpose of determining jurisdiction over Mr. Medellín's petition, and denied relief. *Medellin v. Quarterman*, No. H-06-3688, 2008 U.S. Dist. LEXIS 55758 (S.D. Tex. July 22, 2008). The court concluded that the federal habeas statute's limitation on successive petitions prevented it from considering Mr. Medellín's petition on the merits without prior authorization from the Court of Appeals. *Id.* at *7.

G. Decision of the Inter-American Commission on Human Rights

On November 21, 2006, Mr. Medellín filed a petition before the Inter-American Commission on Human Rights raising the violation of his consular rights as well as several violations of the 1948 Declaration of the Rights and Duties of Man ("American Declaration"). The Inter-American Commission is the principal human rights organ of the Organization of American States ("OAS") and is empowered to consider and evaluate the merits of human rights violations raised by individuals from any OAS member state.

See Inter-American Commission on Human Rights, *What is the IACHR?*, *at* http://www.cidh.oas.org/what.htm; *see also* Thomas Buergenthal, International Human Rights in a Nutshell 174, 179, 181-82 (2d ed. 1995). As a member of the OAS, the United States has recognized the Commission's competence to consider such petitions.[3]

On December 6, 2006, the Commission issued precautionary measures—analogous to a temporary injunction and similar to the provisional measures ordered by the ICJ—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. 74a-75a. After Mr. Medellín was scheduled for execution, the Commission reiterated to the United States the precautionary measures it adopted in favor of Mr. Medellín in 2006 and reminded the United States of its request that Mr. Medellín's life be preserved pending the investigation of his petition. 76a; *see also* 77a-79a.

Both Mr. Medellín and the United States filed written submissions and made oral arguments to the Commission at a hearing conducted on March 7, 2008, at the Commission headquarters in Washington, D.C. The Commission also considered extensive documentary evidence, including many of the documents submitted to the court

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3 The United States has signed and ratified the Charter of the Organization of American States ("OAS Charter"), Apr. 30, 1948, 2 U.S.T. 2394, as well as the Protocol of Buenos Aires that amended the OAS Charter and established the Commission as a principal organ through which the OAS would accomplish its purposes. Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847. As ratified treaties of the United States, both instruments apply with equal force and supremacy to all states, including Texas. U.S. Const. art. VI, cl. 2. The amended OAS Charter specifically provided that "[t]here shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters." OAS Charter, art. 106. Under Article 145, the Inter-American Commission is given the responsibility to "keep vigilance over the observance of human rights." *Id.*, art. 145.

below. On July 24, 2008, after reviewing the legal arguments of both parties and the facts submitted in support of Mr. Medellín's claims for relief, the Commission issued a preliminary report concluding, in pertinent part, that Mr. Medellín was prejudiced by the violation of his rights to consular notification and assistance. Specifically, the Commission found:

> It is apparent from the record before the Commission that, following [Mr.] Medellin['s] conviction and sentencing, consular officials were instrumental in gathering significant evidence concerning [his] character and background. This evidence, including information relating to [his] family life as well as expert psychological reports, could have had a decisive impact upon the jury's evaluation of aggravating and mitigating factors in [his] case[]. In the Commission's view, this information was clearly relevant to the jury's determination as to whether the death penalty was the appropriate punishment in light of [his] particular circumstances and those of the offense.

65a, ¶ 128. The Commission concluded that the United States's obligation under Article 36(1) of the Vienna Convention to inform Mr. Medellín of his right to consular notification and assistance constituted a fundamental component of the due process standards to which he was entitled under the American Declaration, and that the United States's failure to respect and ensure this obligation deprived him of a criminal process that satisfied the minimum standards of due process and a fair trial required by the Declaration. 66a, ¶ 132.

As to remedies, the Commission recommended, among other things, that the United States vacate Mr. Medellín's death sentence and provide him with "an effective remedy, which includes a new trial in accordance with the equality, due process and fair

trial protections prescribed under . . . the American Declaration, including the right to competent legal representation." 72a, ¶ 160. The Commission also reiterated its requests of December 6, 2006, and January 30, 2007, that the United States take precautionary measures to preserve Mr. Medellín's life pending the implementation of the Commission's recommendations in the matter. 71a, ¶ 159.[4]

H. Further Political and Diplomatic Efforts to Effect Compliance with the *Avena* Judgment.

Since this Court issued its decision in *Medellin v.* Texas, the governments of Mexico and the United States have resumed their efforts to achieve compliance with the *Avena* Judgment. On June 17, 2008, Secretary of State Condoleezza Rice and Attorney General Michael B. Mukasey asked for Texas's help in complying with the *Avena* Judgment. In a joint letter to Governor Rick Perry, the Secretary of State and Attorney General stated:

> The United States attaches great importance to complying with its obligations under international law . . . . We continue to seek a practical and timely way to carry out our nation's international legal obligation [under *Avena*], a goal that the United States needs the assistance of Texas to achieve. In this connection, we respectfully request that Texas take the steps necessary to give effect to the *Avena* decision with respect to the convictions and sentences addressed therein.

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[4] The Commission has not yet issued its final report, and will not do so until the United States has had an opportunity to respond to the Commission's findings. *See* Rule 43.2, Rules of Procedure of the Inter-American Commission on Human Rights, *available at* http://www.cidh.org/Basicos/English/Basic18.Rules%20of%20Procedure%20of%20the%20Commission.htm. Until the United States takes steps to implement the Commission's recommendations, precautionary measures remain in effect.

80a-81a. On July 18, 2008, Governor Perry responded, acknowledging the "concerns from a federal standpoint about the importance of international law" and stating his belief that the "international obligation" to comply with *Avena* is properly a matter within the province of the federal executive branch and Congress. 82a. Governor Perry further stated that he was "advised" that the "State of Texas will ask the reviewing court [in federal habeas proceedings] to address the claim on the merits." *Id.*

On July 28, 2008, Mexico's Secretary of Foreign Affairs, Patricia Espinosa Cantellano, also sent a letter to Governor Perry and asked him to suspend Mr. Medellín's execution and to help ensure that Mr. Medellín is afforded the judicial hearing to which he is entitled as a result of the *Avena* Judgment. 84a-85a.

I. The Proceedings Below

On July 28, 2008, after his federal habeas petition was dismissed, Mr. Medellín filed a second subsequent application for a writ of habeas corpus in the Texas Court of Criminal Appeals, and along with it, an application for a stay of execution. Mr. Medellín argued that his constitutional rights to life and due process of the law entitle him to reasonable access to a remedy of judicial process that the United States is bound as a matter of international law to provide, and that therefore to execute Mr. Medellín before the competent political actors have had a reasonable opportunity to convert the Nation's international law obligation under the *Avena* Judgment into a justiciable legal right would amount to an unconstitutional deprivation of his right to life without due process of law. In addition, Mr. Medellín argued that his execution without having received the required

review and reconsideration would impinge upon the constitutional authority of Congress, confirmed by this Court, to give effect to the United States's obligation under Article 94(1) of the United Nations Charter to comply with the *Avena* Judgment. In his stay application, Mr. Medellín asked the Court to delay his execution to allow the competent political authorities a reasonable opportunity to implement the Judgment.

Although the Texas Court of Criminal Appeals has not yet ruled on Mr. Medellín's applications, his scheduled execution in six short days from now compels him to file in the event the CCA denies relief.

REASONS FOR GRANTING A WRIT OF CERTIORARI

Mr. Medellín is scheduled to be executed by lethal injection on August 5, 2008, although he has yet to receive the review and reconsideration of his conviction and sentence mandated by the *Avena* Judgment of the International Court of Justice. In *Medellin v. Texas*, 128 S. Ct. 1346 (2008), this Court confirmed that the United States is bound as a matter of international law to comply with the *Avena* Judgment, and clarified that it falls to Congress to determine whether and how to give the Judgment domestic legal effect.

No one—not this Court, not the Executive, not Congress, not Texas—disputes the United States's "plainly compelling" interest in complying with the international obligation reflected in *Avena*. In the four months since this Court's decision in *Medellín v. Texas,* federal and state actors have been engaged in unprecedented efforts to find an alternative and expeditious means of implementing the United States's obligations under the *Avena* Judgment. The House of Representatives has introduced legislation sponsored

jointly by the Chairmen of both the Committees of Foreign Affairs and the Judiciary, the Secretary of State and Attorney General have called upon Texas to work with the federal government to avoid a breach of its treaty commitments, a Texas senator has promised to introduce legislation to implement *Avena* as soon as 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.

Despite this extraordinary and unique set of circumstances, Texas has set Mr. Medellín's execution for the earliest possible date under Texas law, and proceeds implacably towards execution on August 5. If allowed to proceed, Texas will simultaneously deprive Mr. Medellín of reasonable access to a remedy required under a binding international legal obligation and place the United States in irreparable breach of its treaty obligations. Under these unique circumstances, Mr. Medellín's execution would violate his constitutionally protected right not to be deprived of his life without due process of law. And by placing the United States in irreparable breach of its treaty commitments before Congress and the federal Executive can act to compel compliance, Texas effectively will usurp the institutional prerogative of the federal political branches—advocated by Texas in *Medellin v. Texas* and confirmed by this Court—to determine whether and how to give domestic legal effect to the treaty obligations of the Nation. This Court must not allow Texas to subvert Mr. Medellín's constitutional rights and the compelling institutional interests of Congress and the Executive in a race to execution, particularly given the overwhelming public interest in achieving compliance with the *Avena* Judgment.

In view of the exceptional circumstances of this case, Mr. Medellín respectfully seeks three alternative forms of relief from this Court: (1) a writ of certiorari in the event that the Texas Court of Criminal Appeals dismisses his pending applications for habeas relief and a stay of execution; or (2) a writ of habeas corpus; or (3) recall of this Court's mandate in *Medellin v. Texas*, 128 S. Ct. 1346 (2008), for the purpose of preserving Congress's ability to bring the nation into compliance with the *Avena* Judgment. Finally, in connection with whichever form of relief the Court may deem appropriate to grant, Mr. Medellín asks this Court to grant his motion for a stay of his execution for such time as is necessary to permit the competent political actors a reasonable opportunity to act to comply consistent with this Court's decision in *Medellin v. Texas*.

I. The Court Should Grant The Writ of Certiorari In Order To Protect Mr. Medellín's Due Process Rights, The Constitutional Prerogatives Of Congress, And The Foreign Policy Interests Of The United States.

A. The Court Should Grant The Writ In Order To Prevent The Irreparable Deprivation Of Mr. Medellín's Life Without Due Process Of Law By Virtue Of His Execution In Violation Of An Undisputed Legal Obligation Of The United States.

This case comes to this Court in a unique but extraordinarily compelling set of circumstances. Every Member of this Court, the President of the United States, and, in pleadings before this Court, the State of Texas have confirmed that the United States has a binding legal obligation arising under Article 94(1) of the United Nations Charter not to execute Mr. Medellín unless and until he has received the review and reconsideration ordered by the ICJ in *Avena*. That obligation has been confirmed within the last two weeks in correspondence between, on the one hand, the Attorney General and Secretary

of State of the United States and, on the other, the Governor of Texas. Hence, if Texas were to proceed with the scheduled execution of Mr. Medellín next Tuesday, August 5, there could be no dispute that that execution would be unlawful—specifically, in violation of treaty commitments validly made by the United States through constitutionally prescribed processes.

In *Medellín v. Texas*, this Court has just held, however, that the international legal obligation arising from the U.S.'s ratification of the United Nations Charter has not yet been made effective as a matter of U.S. domestic law. Specifically, the 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. Hence, the Court held, it was Congress to which the Constitution assigned the authority to determine whether and how the United States would comply with the undisputed international obligation arising from Article 94(1).

In response to this Court's decision, Congress has begun to act. On July 14, 2008, legislation was introduced by leaders of the U.S. House of Representatives that would grant to Mr. Medellín a domestic-law right to the review and reconsideration ordered by the ICJ. The bill is now sponsored by the Chairman, and two additional Members, of the Judiciary Committee as well as the Chairman of the Committee for Foreign Affairs. *See* Statement of the Case, Part E. In addition, on May 5, 2008, Texas State Senator Rodney Ellis stated that he would introduce legislation by which Texas would, as a matter of state

law, achieve compliance with *Avena*. *See* Statement of the Case, Part C. Needless to say, however, there has not been enough time for either of these legislative initiatives to bear fruit. It will simply not be possible for Congress to complete consideration of the bill in light of the short legislative calendar this year, 88a, ¶ 26, and Senator Ellis will not be able to introduce his bill until the Texas Legislature reconvenes in January 2009.

In these circumstances, it would violate Mr. Medellín's right not to be deprived of his life without due process of law were he to be executed as scheduled on August 5. *See* U.S. Const. amend. XIV; *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288 (1998) ("[a] prisoner under death sentence remains a living person and consequently has an interest in his life") (O'Connor, J., concurring); *id.* at 291 ("There is . . .no room for legitimate debate about whether a living person has a constitutionally protected interest in life.") (Stevens, J., concurring in part and dissenting in part). "[A]s [the Supreme Court has] often stated, there is a significant constitutional difference between the death penalty and lesser punishments." *Beck v. Alabama*, 447 U.S. 625, 637 (1980).

At its most basic, due process guarantees to a criminal defendant a right not to be deprived of "fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (noting "the truism that '[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."); *cf. Logan v. Zimmerman*, 455 U.S. 422, 429-30 (1982) (due process bars a state from denying a litigant "an opportunity

to be heard upon [his] claimed [right].") (quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971). Applying that basic principle here, Mr. Medellín cannot be executed consistent with due process if he is 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. As a matter of law, that additional process could change the outcome on either his conviction or sentence. *See* 65a, ¶ 128 (finding prejudice as a result of the Vienna Convention violation in Mr. Medellín's case); App. for Stay of Execution Pending Disposition of Mot. to Recall and Stay the Mandate and Petition for Writ of Certiorari at Part I.A, *Medellin v. Texas*, No. 08-___ (July 31, 2008) (discussing factual basis for claim of prejudice); *cf. United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("[T]he right[] . . . to petition for a redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights."); *Bounds v. Smith*, 430 U.S. 817, 822 (1977) (there is a constitutional right to "adequate, effective, and meaningful" access to process). As a matter of law, therefore, his execution would violate the most fundamental objectives of the due process clause.

That conclusion is reinforced by the character of the penalty Mr. Medellín faces. *See Gardner v. Florida*, 430 U.S. 349, 357 (1977) ("[D]eath is a different kind of punishment from any other which may be imposed in this country.") (opinion of Stevens, J.). 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." *Gardner*, 430 U.S. at 358; *see also Barefoot v. Estelle*, 463 U.S.

880, 888 (1983) ("[A] death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding."). 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.

While the circumstances of this case may be unique, those circumstances all militate in favor of recognizing a right to relief here. *First*, it is no answer to the request for relief that Mr. Medellín's entitlement to review and reconsideration has not yet been realized as a matter of U.S. domestic law. After all, the United States was by no means a stranger to the processes by which the obligation that binds it arose, and the treaty-making processes by which the United States undertook the obligation have constitutional significance. Under the plain and unambiguous terms of the Supremacy Clause, "treaties made . . . under the authority of the United States [are] the supreme law of the land." U.S. Const. art. VI, cl. 2; *see also Medellin v. Texas*, 128 S. Ct. at 1360 ("If ICJ judgments were instead regarded as automatically enforceable domestic law, they would be immediately and directly binding on state and federal courts pursuant to the Supremacy Clause."). Unless the Court means to write the plain and unambiguous language of the Supremacy Clause out of the Constitution, the treaty relevant here—Article 94(1) of the United Nations Charter—must be taken into account as part of the due process analysis, even if it has not yet been executed as a matter of U.S. law. It remains, as the Supremacy Clause tells us, an exercise of the constitutional authority of the President and Senate and, as such, part of the supreme law of the land.

And it is precisely this previous exercise of constitutional treatymaking authority—now manifest in the undisputed international legal obligation to provide review and reconsideration—that distinguishes Mr. Medellín from an individual who merely awaits, with no guarantee of success, a prospective conferral of rights by the legislative process. To be sure, there can be no due process violation of a right Congress has not yet created. But that is not the case here. The constitutionally designated house of Congress has *already acted*, when the Senate advised on and consented to the Optional Protocol to the Vienna Convention and the UN Charter and the President thereby ratified them. By the action of the President and the Senate, the constitutionally designated political branches, the treaty obligation to provide review and reconsideration *already exists*, as a matter of international law. And the constitutionally designated domestic lawmaking branches have *already begun to act* to convert that international law obligation into a domestic right. In these circumstances, Mr. Medellín indisputably has a right to remain alive until he can vindicate the right to the relief contemplated by this country's treaty commitment.

Second, it is no answer to the request for relief that it is uncertain whether Congress will enact legislation to execute the treaty obligation to comply with *Avena*. To be sure, this Court has construed Article 94(1) to preserve to Congress the "option of noncompliance," *Medellin v. Texas*, 128 S. Ct. at 1360, and even had the Court held Article 94(1) to be self-executing with respect to the judicial right at issue here, Congress would have retained, by virtue of the last-in-time rule, the authority to legislate a breach of the treaty. *See*, *e.g.*, *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); *Head Money*

Cases (Edye v. Robertson),112 U.S. 580, 598-99 (1884). But this Court has long instructed that, as a matter of law, it should decide cases on the presumption that Congress intends the United States to comply with the treaty commitments it makes. *Cf. Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (in the absence of clear instruction from Congress, courts should not construe statues in a manner that would place the United States in breach of its treaty obligations). Any other approach would be an insult to the constitutionally designated treatymakers: the President, in negotiating a treaty, and the Senate, in providing its advice and consent, would fulfill those roles under a cloud.

Here, the presumption that the United States will do what it promises to do is reinforced by the President's unequivocal determination that the United States should do just that. *See* Br. for the United States as Amicus Curiae Supporting Petitioner at 8-9, *Medellin v. Texas*, 128 S. Ct. 1346 (No. 06-984); Br. for the United States as Amicus Curiae Supporting Respondent at 43, 45, *Medellin v. Dretke*, 544 U.S. 660 (No. 04-5928) (President has determined it is in the "paramount interest of the United States" to achieve "prompt compliance with the ICJ's decision with respect to the 51 named individuals"). The President is the sole organ of the United States in conducting its foreign affairs. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). While this Court has held that he does not have the constitutional or statutory authority to execute the Article 94(1) obligation here, his views on compliance are entitled to respect in this Court, and they surely will carry weight in the Congress, as will this Court's endorsement of those views. *See Medellin v. Texas*, 128 S. Ct. at 1361, 1367 ("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").

Third, it is no answer to the request for relief that Congress has not yet acted. When Mr. Medellín first came to this Court, the only four Justices who reached the issue concluded that Mr. Medellín arguably had an individual right to raise claims in court under the *Avena* Judgment or the Vienna Convention itself. *See Medellin v. Dretke*, 544 U.S. 660, 687 (2005) (O'Connor, J., dissenting) (joined by Stevens, Souter, Breyer, JJ.); *id.* at 693 (Breyer, J. dissenting) (joined by Stevens, J.). And, of course, while his case was pending, the President asserted constitutional authority to execute the obligation. Until this Court issued its decision in March, there was simply no reason for Congress to believe it needed to act. Indeed, one of the indicia of a self-executing treaty is the failure of Congress to take up the question of implementation. *See, e.g.,* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 reporters' notes 5 ("[I]f the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by courts."). Here, prior to the issuance of *Medellin v. Texas*, Congress had neither indicated that it needed to implement the obligation or indicated that it did not intend the United States to comply.

Finally, it is no answer to the request for relief that it was Mexico, not Mr. Medellín, who was the party that obtained the judgment in *Avena* whose implementation Congress has now taken up. *See Medellin v. Texas*, 128 S. Ct. at 1360-61. There is no

dispute that the ICJ ordered that review and reconsideration of *Mr. Medellin*'s conviction and sentence take place in the context of judicial proceedings in *Mr. Medellin*'s own case. *Avena*, ¶¶ 141, 153(9). Hence, the United States cannot fulfill its obligation under Article 94(1) unless *he* receives review and reconsideration, and it is *his* life that hangs on the outcome of that review and reconsideration. Confirming that point, the Avena Implementation Act of 2008 that has now been introduced in Congress would give Mr. Medellín the right to bring a claim for review and reconsideration. It follows that the due process right not to be executed until Congress has had an adequate opportunity to implement the Article 94(1) obligation to comply with *Avena* belongs to Mr. Medellín.

B. The Court Should Grant The Writ In Order To Preserve The Constitutional Prerogative Of Congress To Determine Compliance With The United States's Obligation Under Article 94(1).

In *Medellin v. Texas*, this Court held that it was up to Congress to determine whether the United States would comply with its commitment under Article 94(1) of the United Nations Charter to comply with *Avena*. 128 S. Ct 1346, 1358, 1362 (2008). In settling the constitutional process for enforcement of Article 94(1), this Court confirmed that a treaty is "'equivalent to an act of the legislature,'" and self-executing when it 'operates of itself without the aid of any legislative provision." *Id.* at 1356 (quoting *Foster v. Nelson*, 26 U.S. (2 Pet.) 253, 315 (1829) (Marshall, C.J.), overruled on other grounds, *United States v. Percheman*, 26 U.S. (7 Pet.) 51 (1833)). However, the Court explained, some treaties are not fully realized at the time ratified, and in those cases, Congress must take further action to execute the treaty by enacting implementing

legislation. *Id.* at 1356 (citing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)). Thus, in those cases, Congress retains the option to choose not to comply—"always an option by the political branches." *Id.* This Court noted that it would be "particularly anomalous" to leave Congress without that choice, "in light of the principle that 'the conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative –'the political' – Departments.'" *Id.* at 1360 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)).

In holding that it was up to Congress to determine the question of compliance with *Avena*, the Court vindicated the position of Texas and several of its amici states. For example, in *Medellin v. Dretke*, Texas took it for granted that the United States would comply with *Avena*, but emphasized the importance of allowing the federal political branches to determine how:

> It is beyond cavil that . . . America should keep her word. But the choice of how to do so, and how to respond to alleged treaty violations, is left to the political branches of government. . . . The President and Congress could seek to pass legislation addressing the *Avena* decision[.]

Respondent's Br. at 7, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). Again, in *Medellin v. Texas*, Texas stated: "To be sure, Texas recognizes the existence of an international obligation to comply with the United States's treaty commitments, including, as appropriate, through changes to domestic law." Respondent's Br. at 12, *Medellin v. Texas*, 128 S. Ct 1346 (2008) (No. 06-984). Nearly half the states supported that position in this Court and the Texas Court of Criminal Appeals. *See* Br. of the States of Alabama, Montana, Nevada and New Mexico as Amici Curiae in Support of Respondent at 16 n.8,

Ex parte Jose Ernesto Medellin, 223 S.W.3d 315 (No. AP-75,207) ("the proper way to render the ICJ's judgment binding on the state courts would be by an Act of Congress"); Br. for the States of Alabama et al., as Amici Curiae, in Support of Respondent at 17-18, *Medellin v. Dretke*, 544 U.S. 660 (No. 04-5928) ("As a delicate matter of foreign policy, [the] task [of choosing how to comply with *Avena*] should be left to the Executive Branch and Congress, at least in the first instance.").

Having determined that Congress has the authority to determine compliance with *Avena*, this Court should ensure that it has the opportunity to do so. The 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. It need hardly be said that, if the option of noncompliance must be preserved for decision by the political branches, so too should the option of compliance.

Yet Texas's rush to execute Mr. Medellín threatens to deprive the political branches of the very decision the Court reserved to them. There can be no dispute that, if Texas executes Mr. Medellín without providing review and reconsideration in accord with *Avena*, it will cause the United States to breach a treaty obligation that, in light of the Court's decision that the obligation was non-self-executing, Congress has already begun to take steps to execute, that Congress has to this date given no indication that it wishes the United States to breach, and with which the President has taken vigorous steps to bring about compliance. That result would turn the constitutional design set out by this Court in *Medellin v. Texas* on its head, and, at the same time, indulge the most cynical

view of the United States's intentions when, by the considered actions of its President and Senate, it enters into bilateral or multilateral treaty commitments with other nations.

C. The Court Should Grant The Writ In Order To Preserve The United States's Credibility In International Affairs Generally And In Its Treatymaking Activity Specifically.

The point has been made so many times during the course of this and related cases that it is important not to become inured to its significance: by constitutionally prescribed processes, by constitutionally designated actors, acting on behalf of the American people as a whole, the United States promised the international community that it would abide by judgments of the ICJ in cases in which it was a party. U.N. Charter, art. 94(1); Statute of the International Court of Justice, art. 59. The United States fully participated in the proceedings that led to the *Avena* judgment, and the President has told the world that the United States must and will comply. Yet Texas, by rushing to execution before Congress has had a chance to act, seeks to break the United States's promise. The damage that would be done to the United States's credibility in world affairs if Texas were permitted to do so would be incalculable. And by placing in doubt the United States's ability to comply with these treaty commitments, the decision would compromise the ability of United States consular officials and citizens to rely on the important protections embodied in the Vienna Convention.

The President shoulders the primary responsibility for our nation's foreign relations, *Curtiss-Wright*, 299 U.S. at 319, and he has already advised this Court of the critical interests at stake. In its amicus brief submitted in *Medellin v. Texas*, 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; *see also* Br. for the United States as Amicus Curiae Supporting Petitioner 8-9, *Medellin v. Texas*, 128 S. Ct. 1346 (No.06-984).

Every Member of this Court recognized that there is a vital public interest in achieving compliance with the United States's obligations under the *Avena* Judgment. Writing for the majority, Chief Justice Roberts noted that

> [I]n 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. Concurring in the judgment, 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.

In a submission to the Texas trial court prior to the hearing at which Mr. Medellín urged that court to defer setting an execution date, Ambassador Jeffrey Davidow, who holds the rank of Career Ambassador and served as ambassador for the United States in the Administrations of Presidents Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush, elaborated on those interests. Noting the reciprocal character of the rights and obligations set forth in Article 36 of the Vienna Convention on Consular Relations, which the *Avena* judgment interprets and applies, Ambassador Davidow explained:

> 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; *see also* Br. of Former U.S. Diplomats as Amici Curiae in Support of Petitioner at 5, 28, *Medellin v. Texas*, 128 S. Ct 1346 (No. 06-984); Br. of Former U.S. Diplomats as Amici Curiae in Support of Petitioner at 5, 26, *Medellin v. Dretke*, 544 U.S. 660 (No.

04-5928). Hence, failure to comply with the *Avena* Judgment "would significantly impair the ability of American diplomats to advance critical U.S. foreign policy." 88a, ¶ 3. The importance to the United States's treaty partners of its compliance with its treaty obligations 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 (letters from Council of Europe and eleven nations to Texas officials).

From a perspective even closer to the ground, 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: tourists, business travelers, expatriates, foreign exchange students, members of the military, missionaries, Peace Corp volunteers, U.S. diplomats, and countless others. Timely access to consular assistance is crucially important whenever individuals face detention or 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.[5] For example, in 2001, when a U.S.

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[5] 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*

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* Press Briefing, U.S. State Department (Apr. 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, Apr. 3, 2001, http://archives.cnn.com/2001/WORLD/asiapcf/east/04/03/china.aircollision, 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 (Apr. 2, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/04/20010402-2.html.

For that reason, the business community has expressed grave concern about the prospect 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 (the United States branch of the International Chamber of Commerce), observed:

> The security of Americans doing business abroad is clearly and directly at risk by U.S. noncompliance with its

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U.S. Department of State, Assistance to U.S. Citizens Arrested Abroad, http://travel.state.gov/travel/tips/emergencies/emergencies_1199.html.

> 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 emphasized the importance to the United States of achieving compliance with *Avena*. For example, on July 17, 2008, the current and nine past presidents of the American Society of International Law urged Members of the Senate to act expeditiously on the pending legislation in order to ensure compliance with international law:

> [T]he United States is poised irreparably to violate the Vienna Convention and a judgment of the ICJ. ..Such violations would also damage the reputation of the United States as a nation that respects its international legal obligations and holds others to the same high standard. Our ability to conclude agreements binding on other countries facilitates nearly every aspect of our international relations, including critically important issues relating to cooperation in counter-terrorism efforts, trade, nuclear non-proliferation, environmental protection, and international investment.135a.

For another example, Professor Phillip Alston, 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 noncompliance 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.

In short, "[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." 100a, ¶ 4. Those consequences will be suffered not only by Texas, but by the Nation. As James Madison emphasized at the Constitutional Convention, "[a] rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Max

Farrand ed., rev. ed. 1996). If denying Mr. Medellín the review and reconsideration of his conviction and sentence ordered by the ICJ is so important as possibly to justify the serious harm to U.S. interests identified by the President, this Court, and many, many others that would follow from that treaty breach , that judgment should be made by the U.S. Congress, not Texas.

The United States's word should not be so carelessly broken, nor its standing in the international community so needlessly compromised. In order to vindicate the constitutional allocation of authority to determine compliance with *Avena* that it has just identified in *Medellin v. Texas,* and to allow the competent political actors to comply with this country's international commitments, this Court should grant the writ and stay the execution.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari or, in the alternative, grant a writ of habeas corpus, or, in the further alternative, pursuant to the accompanying motion, recall and stay its mandate in *Medellin v. Texas*, 128 S. Ct. 1346 (2008). In addition the Court should stay the execution of José Ernesto Medellín to allow the competent political actors a reasonable opportunity to implement the international law obligations of the United States reflected in the Judgment of the International Court of Justice.

Respectfully submitted,

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