No. 08-_____

IN THE

Supreme Court of the United States

IN RE JOSÉ ERNESTO MEDELLÍN,
Petitioner,

ON PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS

PETITION FOR WRIT OF HABEAS CORPUS

SANDRA L. BABCOCK
Clinical Professor of Law
Northwestern University School of Law
357 E. Chicago Avenue
Chicago, Illinois 60611
Tel: (312) 503-0114

DONALD FRANCIS DONOVAN
(Counsel of Record)
CATHERINE M. AMIRFAR
JILL VAN BERG
WILLIAM C. WEEKS
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022-3916
(212) 909-6000

Attorneys for Petitioner

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

State Cases:

International Cases:

Constitutional Provisions:

Treaties and Federal Statutes:

Other Authorities:

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 2241.

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 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

---

[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.

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 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

---

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.

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.

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

---

[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.

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 HABEAS CORPUS

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, 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 Same Compelling Circumstances That Weigh In Favor of A Grant of A Writ of Certiorari Weigh In Favor of a Grant of A Writ Under This Court's Original Habeas Powers.

The Court may act to prevent Mr. Medellín's execution in violation of the *Avena* Judgment by the grant of a writ of habeas corpus pursuant to 28 U.S.C. § 2241, which empowers this Court to grant the Great Writ where a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States[.]" 28 U.S.C. § 2241(c)(3). By exercising its discretion in the form of an extraordinary writ, this Court would preserve its ability, in truly exceptional circumstances, to prevent the incalculable harm that would ensue from a breach of the nation's treaty commitments, to preserve the undisputed right of Congress to take action, and to protect Mr. Medellín's right not to be deprived of his life without due process of law.

A. If A Writ Of Certiorari Is Unavailable, This Court Should Grant A Writ of Habeas Corpus.

Although the extraordinary writs are a rare form of relief, sparingly exercised in the discretion of the Court, the circumstances of this case plainly are exceptional—indeed unprecedented, unlikely to repeat themselves, and of the highest possible significance, in

terms both of the caliber of interests implicated and the detriment that will befall the institutions of federal government, the American public, and Mr. Medellín himself if his case is permitted to fall into a black hole in the constitutional design.

Indeed, the circumstances here are in some respects reminiscent of—yet easily more extraordinary than—the cases where this Court has granted a writ of habeas corpus in an original action. For example, in *Ex parte Grossman*, 267 U.S. 87 (1925), the petitioner had been sentenced to a single year of imprisonment for the unlawful sale of liquor. The President issued a pardon; the district court committed the petitioner to serve the sentence notwithstanding the pardon; and this Court intervened to vindicate the authority of the President to pardon criminal contempt. *Id.* at 107-08. There, the stakes were plainly less dramatic where the sentence was minor and there was no claim that the petitioner's case had broader implications, yet the Court intervened to make effective the President's constitutional power to issue pardons. *See* U.S. Const. art. II, § 2. The intervention of this Court here would not only protect Congress's constitutional prerogative to enact legislation to give effect to a non-self-executing treaty commitment of the United States, but also the right of the petitioner not to be deprived of a remedy that the competent political actors seek to provide him. *See* Part I above.

This Court's jurisdiction under 28 U.S.C. § 2241 to entertain and grant original writs of habeas corpus was not repealed by the amendments to 28 U.S.C. §§2244 and 2254 in the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Felker v. Turpin*, 518 U.S. 651, 654 (1996) ("[AEDPA] does not preclude this Court from

entertaining an application for habeas corpus relief[.]"); *see also id.* at 658 (AEDPA "does not deprive this Court of jurisdiction to entertain original habeas petitions.").

B. Adequate Relief Cannot Be Obtained In Any Other Form Or From Any Other Court.

The Court has made it clear that its exercise of discretion to issue a writ of habeas requires that the petitioner also "show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted." *Id*. at 665 (quoting Sup. Ct. R. 20.4(a)). This case meets this demanding test.

As the United States has stated, Mr. Medellín has never received review and reconsideration in conformity with the guidelines set forth in *Avena*. 98a, lines 8-11 ("[The previous holding] does not give full and independent weight to the treaty violation, which is what *Avena* requires and which is what the President has directed."); *see also Medellin v. Texas*, 128 S. Ct. at 1389-90 (Breyer, J., dissenting) ("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."). While the Governor of Texas has conveyed his understanding that the Texas Attorney General's office will now seek merits review of all Vienna Convention claims presented in federal court by Mexican nationals subject to the *Avena* Judgment who have never before received such review, he has not explicitly acknowledged that that process must

represent prospective, de novo review, on a full record presented at an evidentiary hearing, and in light of the correct legal standard, all in accord with the ICJ's rulings in *Avena*. In any event, Mr. Medellín petitions this Court for a writ of habeas corpus because he anticipates that the Court of Appeals will hold that he is effectively without any federal forum in which he can benefit from Texas's newly announced position.

Petitioner files this petition in anticipation of the prospect that he will be unable to obtain relief from any other court.[5] He has applied for relief from the Texas state courts, and that application remains pending. *See* Second Subsequent Application for Post-Conviction Writ of Habeas Corpus. Further, while Mr. Medellín has not yet filed in the Court of Appeals because of the Texas two-forum rule,[6] he anticipates that if it becomes necessary to file in that Court, the Court will hold that he is unable to meet the successive petition requirements of 28 U.S.C. § 2244(b). The District Court has already held that he cannot meet those literal standards and therefore cannot obtain leave to file a § 2254 petition in the lower federal courts. *Medellin v. Quarterman*, No. H-06-3688, 2008 U.S. Dist. LEXIS 55758, at *7 (S.D. Tex. July 22, 2008). Even if the Court of Appeals were to accept his argument that his present claim arises from the *Avena* Judgment, a decision that came down after he had already presented his Vienna Convention claim in his initial

---

[5] Petitioner is also seeking to obtain relief from this Court in every "other form" that he believes to be arguably available, including a petition for a writ of certiorari for review of the judgment of the Texas Court of Criminal Appeals and a motion to recall and stay the Court's mandate in *Medellin v. Texas*.

[6] *See* Ex parte Soffar, 143 S.W.3d 804, 805-06 (Tex. Crim. App. 2004) (Texas state courts defer action on causes properly within their jurisdiction "until the courts of another sovereignty with concurrent powers, and already cognizant of litigation, have had an opportunity to pass upon the matter."). Given the imminent execution date, Mr. Medellin will lodge his papers in the Court of Appeals, for filing if the Court of Criminal Appeals does not grant relief.

application, the Court of Appeals could hold that it is bound by the wording of the successor provision's requirements of "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2244(b)(2); *Medellin v. Dretke*, 544 U.S. at 666 (2005) ("A certificate of appealability may be granted only where there is 'a substantial showing of the denial of a *constitutional* right.' To obtain the necessary certificate of appealability to proceed in the Court of Appeals, Medellin must demonstrate that his allegation of a treaty violation could satisfy this standard.") (Court's emphasis)). This Court would not be so bound.[7]

The exceptional circumstances of this case satisfy the equitable principles embodied in the statutory standards. Mr. Medellin has not abused the writ by holding back his Vienna Convention claim, having raised the claim in his first state and federal habeas petition. His claim has now been transformed by the *Avena* judgment, which, although not announcing a rule of constitutional law, interprets a treaty made under the authority of the United States which is also part of the Supreme Law of the Land under Article VI, clause 2 of the Constitution. That decision was made retroactive—and, indeed, directly applicable to petitioner's own case—by a court possessing authority with

---

[7] Just as the Court's jurisdiction under 28 U.S.C. § 2241 was not repealed by AEDPA, the limitations on second or successive petitions imposed by AEDPA similarly do not apply to original writ applications made under § 2241. Rather, those limitations apply specifically and exclusively to "claim[s] presented in a second or successive habeas corpus application under section 2254." 28 U.S.C. §§ 2244(b)(1)-(2). However, the Court has held that the statutory limitations reflect "'a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions,'" and hence should "certainly inform our consideration of original habeas petitions." *Felker v. Turpin*, 518 U.S. at 663-64 (quoting *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)). Although the Court's decisions under § 2241 are informed by those principles, its jurisdiction is not limited by them; that jurisdiction extends to any case in which "a prisoner . . . is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). *See Felker v. Turpin*, 518 U.S. at 659 n.2.

regard to the interpretation of this treaty. Even if in the process of becoming judicially enforceable, that decision established new predicates for the claim that were not previously available to petitioner, those predicates are, at a minimum, determinations by a court whose judgments on the subject are entitled to "respectful consideration," *see Medellin v. Texas*, 128 S. Ct. at 1361 n.9 (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2683 (2006), especially when rendered in a full and fair proceeding in which the United States fully participated.[8]

Further, the Inter-American Commission has now determined, after reviewing evidence that would have to be considered in the course of the review and reconsideration ordered by the ICJ but has never been considered on the merits in a U.S. court, that the Vienna Convention violation caused Mr. Medellin prejudice, in large part by preventing Mexico from arranging for his legal representation and ensuring he had an adequate defense. *See* 65a, ¶ 128. The Commission recommended that the United States vacate Mr. Medellín's death sentence and provide him with a new trial. Pet. App. 65a, ¶ 128; 72a, ¶ 160. While Mr. Medellin should not have to show that he would prevail in the course of review and reconsideration in order to vindicate his entitlement to receive it, the

---

[8] In *Garza v. Lappin*, 253 F.3d 918 (7th Cir. 2001), the United States Court of Appeals for the Seventh Circuit allowed a habeas petition raising a treaty claim to be brought under § 2241, although the petitioner could not surmount the restrictions on successive § 2255 petitions. The court in *Garza* held that because the petitioner's treaty claim had not ripened until the announcement of the decision of the international tribunal on which it was based, the § 2255 remedy was "inadequate or ineffective to test the legality of [his] detention," making his petition "properly cognizable under § 2241." *Id*. at 921 (quoting 28 U.S.C. § 2255(e)). In *Garza*, the Court of Appeals also noted that, because the legal predicate for the treaty claim did not exist at the time of petitioner's earlier habeas filings, it was arguable that the petition before it was not "second or successive" at all. *Id.* at 923-24 (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637, 642-45 (1998)).

Inter-American Commission's determination adds weight to the factors counseling in favor of granting the writ.

Thus, to the extent that this Court's exercise of its equitable discretion under § 2244 is informed by the terms of § 2244, this case qualifies for its consideration. But that is only one aspect of the exceptional circumstance this case presents. Far more exceptional—indeed, unique in this Court's history—are the circumstances set forth above in support of the petition for a writ of certiorari: a court of competent jurisdiction, vested by treaty made by the President and ratified by the Senate with the authority to resolve disputes regarding the interpretation and application of that treaty, has found a violation of petitioner's rights and required a judicial remedy that appears to be available in no other forum.

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 *Avena* Judgment of the International Court of Justice.

Respectfully submitted,

DONALD FRANCIS DONOVAN
(Counsel of Record)
CATHERINE M. AMIRFAR
JILL VAN BERG
WILLIAM C. WEEKS
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022-3916
(212) 909-6000

SANDRA L. BABCOCK
Clinical Professor of Law
Northwestern University School of Law
357 E. Chicago Avenue
Chicago, Illinois 60611
(312) 503-0114

Attorneys for Petitioner

July 31, 2008