No. 08-___

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

VS.

THE STATE OF TEXAS,

Respondent.

MOTION TO RECALL AND STAY THE COURT'S MANDATE IN *MEDELLIN V. TEXAS*

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TABLE OF AUTHORITIES

Federal Cases:

Federal Statute:

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

Petitioner José Ernesto Medellín respectfully moves this Court to recall and stay its mandate in *Medellin v. Texas*, 128 S. Ct. 1346 (2008). The purpose of the recall is not to revisit the merits of the Court's judgment, but to grant the political branches a reasonable opportunity to act in accordance with that judgment. Having declared unconstitutional the Executive's attempt to comply with the *Avena* Judgment of the International Court of Justice without the aid of Congress, the Court should ensure that its judgment does not have the unintended effect of preventing the political branches from complying with the nation's treaty obligations.

FACTS AND PRIOR PROCEEDINGS

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

REASONS FOR GRANTING A RECALL OF THE MANDATE

The Court Should Recall The Mandate To Avoid An Irreparable Breach Of The Nation's Treaty Obligations And In The Interest Of Justice.

This Court has not hesitated to stay the issuance of its mandate to allow Congress an opportunity to act in a manner consistent with its decisions, particularly when Congressional action is necessary to implement valid enforcement mechanisms. For instance, after finding the 1978 Bankruptcy Reform Act unconstitutional and determining that it fell to Congress to "restructure[e] the [Act] to conform to the requirements of Art. III in the way that will best effectuate the legislative purpose," the Court stayed its

mandate in order to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 & n.40 (1982). Similarly, after deeming unconstitutional the conferral of certain powers on the Federal Election Commission, the Court stayed its judgment to "afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission in the interim to function de facto in accordance with the substantive provisions of the Act." *Buckley v. Valeo*, 424 U.S. 1, 143 (U.S. 1976).

The Court also has recalled its mandate "in the interest of fairness." *See Cahill v. New York, New Haven & Hartford R.R. Co.*, 351 U.S. 183-84 (1956) (granting motion to recall and amend mandate to provide for remand of unresolved issue). Indeed, the Court's authority is broad, founded in 28 U.S.C. § 2106 as well as the inherent power of a court to recall a mandate to "avoid injustice." *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 277 (D.C. Cir. 1972) (as a matter of general doctrine, appellate courts have inherent authority to recall a mandate to avoid injustice); 28 U.S.C. § 2106 ("The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.").

In cases involving election laws, for instance, the Court has been sensitive to the need to provide legislatures sufficient time to react to its judgments. In *Georgia v. United States*, 411 U.S. 526, 541 (1973), the Court affirmed the judgment of the district court enjoining the Georgia House of Representatives from conducting elections under a new reapportionment plan, and on remand, the Court instructed the district court to enjoin any future elections until the State complied with a requirement that it obtain federal approval of its districting plan. *See also Fortson v. Morris*, 385 U.S. 231, 235 (1966) (allowing state legislature to act even though it had been found malapportioned and was under court order to reapportion itself); *cf. Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 675-76 (1964) (not needing to reach question of remedy because "sufficient time exists for the Maryland Legislature to enact legislation reapportioning seats in the General Assembly prior to the 1966 primary and general elections.").

On July 14, 2008, Members of the U.S. House of Representatives, in response to this Court's decision settling the process required under the Constitution to give domestic force to the *Avena* Judgment, introduced the "Avena Case Implementation Act of 2008," "[t]o create a civil action to provide judicial remedies to carry out certain treaty obligations of the United States under the Vienna Convention on Consular Relations and the Optional Protocol to the Vienna Convention on Consular Relations." 5a. 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." *Id.* § 2(b)(2). But as the United States represented to the ICJ a short time ago, "[g]iven the short

legislative calendar for our Congress this year, it [will] not be possible for both houses of our Congress to pass legislation" implementing the *Avena* decision before Mr. Medellín's scheduled execution on August 5.

Likewise, Texas Senator Rodney Ellis has stated that he intends to introduce implementing legislation at the state level. 16a. But as he advised the Texas trial court that scheduled Mr. Medellín's execution, the Texas Legislature is not presently in session, and it will not reconvene until January 2009. In other words, the competent political actors have the necessary will, but need the time to implement.

Should Texas execute Mr. Medellín before Congress has a reasonable opportunity to convert the *Avena* Judgment into a justiciable federal right, the State of Texas will forever deprive Mr. Medellín of 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 braches—advocated by 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, the authority of Congress to determine compliance with *Avena*, and the Nation's credibility in world affairs by racing to execute Mr. Medellín before Congress has had an opportunity to act. *See* Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas or for Writ of Habeas Corpus, filed concurrently herewith, at Part 1.

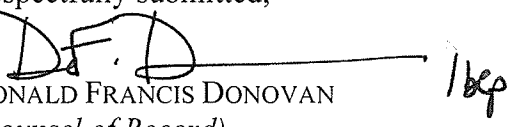
This Court has warned that recall of a mandate to revisit the merits of a case carries the risk of impinging on the finality of judgments and should only be used in extraordinary circumstances. *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). That concern is not implicated here. Mr. Medellín does not ask the Court to revisit the merits of his case. Instead, he asks the Court to recall and stay its mandate to ensure that its judgment has its intended effect of guiding the political branches to a constitutionally permissible method of complying with the Nation's treaty obligations.

CONCLUSION

For the foregoing reasons, Mr. Medellín respectfully requests that this Court (a) recall the mandate in *Medellín v. Texas*, and (b) stay further proceedings until Congress has had a reasonable opportunity to enact legislation consistent with this Court's decision in that case. By separate motion, Mr. Medellín respectfully requests that upon recall of the mandate, the Court stay his execution now scheduled for August 5, 2008.

Dated: July 31, 2008

Respectfully submitted,



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