Nos. 08-5573, 08-5574, 08A98 & 08A99

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

In re JOSÉ ERNESTO MEDELLÍN,

Petitioner.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND TO RESPONSE TO PETITION FOR HABEAS CORPUS, MOTION TO RECALL AND STAY MANDATE, AND APPLICATION FOR STAY OF EXECUTION

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

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

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL CONSTITUTIONAL PROVISIONS, STATUTES, AND TREATIES

INTERNATIONAL CASES

ARGUMENT

I. Texas's Response to Petitioner's Due Process Argument Ignores Entirely the Undisputed Legal Obligation of the United States to Comply with the *Avena* Judgment.

Texas focuses on the unfinished state of the legislative process of implementing *Avena* and argues that Mr. Medellín has made no showing of a constitutional right. Texas, in particular, argues that Mr. Medellín's petition would mean that "a single member of the House of Representatives" could obtain a stay of execution merely by introducing legislation. BIO at 8-9. Texas argues that Mr. Medellín is no different from any other prisoner who might benefit from prospective legislation. BIO at 10.

But Texas wholly overlooks that the United States has an existing legal obligation to comply with the *Avena* judgment, and that this Court recently made clear that Congressional action is the mechanism for compliance with the judgment. Remarkably, Texas attaches no significance whatsoever to the ICJ's judgment in *Avena* adjudicating the international legal obligation of the United States. Nor does Texas attach any importance to the treaty ratified by the President and Senate making compliance with the judgment an international legal obligation, to the federal Executive's recognition that that judgment creates a binding international legal obligation, or to this Court's recognition that compliance with that undisputed international legal obligation is a "compelling" federal interest. *Medellín v. Texas*, 128 S. Ct. 1346, 1367 (2008). Texas also dismisses, as irrelevant, the action by the President declaring that it was in the paramount interest of the United States to comply with its treaty obligation to abide by the *Avena* judgment, the efforts by the Executive to urge Texas to comply voluntarily in the wake of this Court's decision in *Medellín v. Texas*, and the actions by members of the Congressional leadership—including the chairpersons of the House Judiciary Committee and House Foreign Relations Committee—seeking to implement the *Avena* judgment through domestic legislation

once this Court made clear in *Medellín v. Texas* that legislation was necessary before the courts would enforce the treaty in domestic law.

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). Contrary to what Texas suggests, Mr. Medellín's due process right not to be executed before a mechanism for implementing the *Avena* judgment is in place not only is consistent with this Court's opinion in *Medellín v. Texas*; it is a direct consequence of it. In *Medellín v. Texas*, this Court held that the Constitution requires that the implementation of the United States's undisputed treaty obligation under Article 94(1) should come from Congress. *See* 128 S. Ct. at 1356, 1366, 1368-71. In direct response to this Court's decision, which held for the first time that such legislative implementation was necessary as to the *Avena* judgment, members of the leadership of the House of Representatives have introduced the Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong., 2d Sess (5a-6a). The stated purpose of that legislation is to "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." *Id.*, long title (5a).

Texas is proposing, for the first time in our Nation's history, to proceed with an execution that is undisputedly illegal under a binding international legal obligation of the United States.[1] Because significant "difficulties attend[] the notion that due process of law can be embodied in fixed rules," *United States v. Russell*, 411 U.S. 423, 431 (1973), the Court must look to basic principles of fundamental fairness in explicating the scope of due process in these novel

[1] By contrast, in *Breard v. Greene*, 523 U.S. 371 (1998), and *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999), the ICJ had not yet rendered a final judgment, and the United States disputed that the type of ICJ order at issue in those cases was legally binding.

circumstances. *See Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) ("fundamental fairness" is the "touchstone of due process"); *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."). "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961), in turn quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162-163 (1951) (Frankfurter, J., concurring)).

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. Texas's attempt to reduce the argument to one about possible future legislation ignores that the obligation to comply with *Avena* is a real, existing, legal obligation binding on the United States, which this Court only recently held falls to Congress to implement. To allow Texas to execute Mr. Medellín now, when the enforcement mechanism identified by this Court in his own case has not yet been given even a chance to work, would run counter to the requirement of fundamentally fair procedure that forms the core of the Fourteenth Amendment's due process clause.

II. Texas Ignores Entirely the U.S. Constitutional Scheme for Congressional Enforcement of Article 94(1) of the United Nations Charter as Expounded by This Court in *Medellín v. Texas*.

Texas argues that to grant relief to Mr. Medellin would be contrary to this Court's holding in *Medellin v. Texas*, 128 S. Ct. 1346 (2008). Texas is wrong. To the contrary, Texas's unseemly rush to execution can only be described as open defiance of—and an attempt to frustrate—the constitutional process of legislative treaty implementation that this Court prescribed in *Medellín v. Texas.* In that decision, this Court emphasized that the possibility that a treaty "might not automatically become domestic law hardly means the underlying treaty is 'useless'" because "Congress is up to the task of implementing non-self-executing treaties." *Id.*

at 1365-66. The Court also held that Congress has authority to implement ICJ judgments either judgment by judgment or on a blanket basis. *Id.* at 1365. Although Texas argues that some significance should be attributed to the absence of Congressional action in the four years since the *Avena* judgment, Congress in fact had no reason to believe implementing legislation was necessary until this Court issued its recent decision in *Medellín v. Texas.*

Indeed, just three days ago, on August 1, 2008, the leadership of the Committee on the Judiciary—including its Chairman and the respective Chairmen of the Subcommittees on the Constitution, Civil Rights, and Liberties and on Crime, Terrorism, and Homeland Security—appealed to Texas Governor Rick Perry to stay Mr. Medellín's execution while Congress works "to implement procedures to effectuate our treaty obligations." Supplemental Appendix, 139a-140a. Their letter made clear that the Avena Case Implementation Act of 2008 was introduced in response to the decision in *Medellin v. Texas*, wherein "the Supreme Court determined that Congress has the legislative authority to authorize the judicial review directed [in the *Avena* Judgment], and to ensure compliance with this legal obligation across the United States." *Id.* The letter further affirmed the observation, made by this Court and many others, that "compliance with the Vienna Convention is a critical aspect of national security and foreign policy, including the reciprocal treatment of U.S. persons overseas." *Id.* And, as previously noted, Secretary of State Rice and Attorney General Mukasey also urged Texas to abide by the international-law obligations of the United States to comply with the *Avena* judgment.

Yet, far from acknowledging the need to stay its hand to allow Congress to act, Texas filed its brief in this Court today, arguing that it should be allowed to proceed to Mr. Medellín's execution. The State would have this Court conclude that the "momentum of the death machine in Texas," *Ex parte Alba*, 2008 Tex. Crim. App. LEXIS 691, at *28 (June 9, 2008) (Price, J.,

dissenting), must not yield even to allow Congress a reasonable opportunity to act where paramount national interests and fundamental constitutional rights hang in the balance. Texas, however, does not act in isolation when the international obligations of the United States are involved; the United States as a whole is responsible for the consequences. *See, e.g., Chy Lung v. Freeman*, 92 U.S. 275, 279-80 (1876) (United States government is answerable internationally for treaty breaches by the states, and the consequences of such breaches fall upon not just one state but "all the Union"). This Court's decision in *Medellín v. Texas* does not question the long-settled principle that international relations is exclusively a federal responsibility, *see, e.g., United States v. Belmont*, 301 U.S. 324, 331 (1937), *Chy Lung*, 92 U.S. at 280, but merely clarifies the allocation of that responsibility among the federal executive, judicial and legislative branches.

Particularly given the shortened legislative calendar this year as a result of the upcoming party conventions, Congress has not yet had a reasonable opportunity to perform its constitutionally assigned function as explicated by this Court in *Medellín v. Texas.* Petitioner requests that, in these circumstances, the mandate in his case be stayed for a period of one year to allow Congress an opportunity to enact implementing legislation in the next session of Congress that would implement the international obligations of the United States in accordance with this Court's decision.

III. Texas's Argument That Mr. Medellín Has Already Received Review and Reconsideration, If Accepted, Would Leave the United States in Breach of Its International Obligations.

Texas argues that the state trial court on collateral review already complied with *Avena* because Mr. Medellín raised a Vienna Convention claim in 2001, before *Avena* was decided, and the trial court rejected it. *See* BIO Appx. A. Texas's position, however, misstates both the state trial court's decision and the requirements that the ICJ set forth in *Avena*.

The state trial court decision to which Texas refers concluded that any violation of Article 36 of the Vienna Convention in Mr. Medellín's case did not "impact on the validity of his conviction and sentence" under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution. BIO Appx. A, Conclusions of Law, ¶ 17. The *Avena* judgment, however, requires that the Article 36 violation must be reviewed on its own terms and must not be required to also qualify as a violation of a constitutional right. *Avena* ¶¶ 122, 134, 138-40. The review must be capable of effectively "examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Id*. ¶ 122. But the state court did not take account of whether the Article 36 violation prejudiced Mr. Medellín in his conviction or sentence, because it focused solely on whether it resulted in a violation of his U.S. constitutional rights.

Indeed, the *Avena* Judgment itself rejected Texas's contention: the ICJ was well aware of the state trial court's review of Mr. Medellín's Vienna Convention claim, as the trial court's findings of fact and conclusions of law were submitted to the ICJ and discussed by both parties in their briefing. *See* Brief Amicus Curiae of the Government of the United Mexican States at 23-24, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). On this record, the ICJ rejected the argument of the United States that it was already in compliance with the required remedy. *Avena* ¶¶ 130-134, 153(9).

As a result, the United States has recognized—as it must—that the existing record does not suffice to comply with *Avena*. The United States pointed out at oral argument in the Texas Court of Criminal Appeals that the prior state-court review did not comply with *Avena*'s review and reconsideration requirement, because the prior review "d[id] not give full and independent weight to the treaty violation, which is what *Avena* requires." Exhibit 14 in the court below, at

49: 8-11. And just a few weeks ago, the United States represented to the ICJ that "[t]here is no question that if a death sentence were carried out in any of these cases [including Mr. Medellín's] without the required review and reconsideration, this would be inconsistent with the *Avena* judgment," 92a ¶ 27, and that steps remained to be taken to give effect to the *Avena* judgment in these cases, 90a ¶ 4. In effect, Texas is seeking to impeach the United States government's representations to the Texas Court of Criminal Appeals and the ICJ, expressing the considered and consistent view of the United States government, despite this Court's holding that "[i]t is well settled that the United States' interpretation of a treaty 'is entitled to great weight.'" *Medellín v. Texas*, 128 U.S. at 1361.

Not surprisingly, the Texas Court of Criminal Appeals does not even suggest, in its 2005 or 2008 decision, that the earlier state collateral review proceeding might constitute the "review and reconsideration" that *Avena* requires, even though Texas made essentially the same argument in the 2005 proceedings that it makes here. Judge Cochran of that court, in a concurring statement cited by Texas, argued that review and reconsideration was likely to lead to a finding of no prejudice, and pointed to earlier decisions rejecting Mr. Medellín's constitutional claim of ineffective assistance of counsel, but she did not conclude that the review and reconsideration required by *Avena* had already occurred. Similarly, this Court's footnote in *Medellín v. Texas* noted some arguments that Texas could raise in opposition to a finding of prejudice, but expressly declined to "consider whether Medellin was prejudiced in any way by the violation of his Vienna Convention rights," and did not suggest that Mr. Medellín had previously received a determination as to prejudice in compliance with *Avena*. *Medellín v. Texas*, 128 S. Ct. at 1355 n.1. Texas has also previously argued to this Court that Mr. Medellín already received the review and reconsideration required by *Avena*, and this Court, like the Texas Court

of Criminal Appeals, has ever endorsed that view. As noted, any suggestion that such prior review might comply with *Avena* is foreclosed by the fact that the ICJ specifically held in *Avena* that Mr. Medellín had not received the review and reconsideration that would be required to remedy the Vienna Convention violation in his case.

Finally, Texas's speculation that review and reconsideration would show that Mr. Medellín was not prejudiced by the Vienna Convention violation in his case not only is irrelevant to the legal obligation to provide review and reconsideration but is contradicted by the facts in the record. Resp't Br. at 12-16. Mr. Medellín did not know, nor did anyone attempt to inform him, of his right to consular assistance. *See* Second Subsequent Application for Post-Conviction Writ of Habeas Corpus, Ex. 19, ¶¶ 3-5, *In re Medellin*, No. WR-50,191-03 (Tex. Crim. App. July 28, 2008). It is unquestioned that Mexico would have provided substantial assistance to Mr. Medellín, as it has for many Mexican nationals in his position, had the consulate been aware of his case. *Id.* Ex. 21, ¶¶ 25-34.

In lieu of careful review and reconsideration of the entire record, however, Texas would have this Court assume prejudice based on the incorrect standard and incomplete record that characterized the state and federal post-conviction findings. Yet the record as it stands now establishes that Mr. Medellín was represented at trial by a lawyer whose performance, even in the pantheon of ineffective lawyers known to this Court, was grossly deficient. It is not contested that Mr. Millin continued to represent Mr. Medellín while suspended from the practice of law, that Mr. Millin was occupied with defending himself against criminal charges when he should have been preparing to defend Mr. Medellín, that Mr. Millin was suffering from serious health problems that resulted in his death shortly after Mr. Medellín's trial, and that only four hours were spent on investigation prior to the commencement of jury selection. *See id.* at 40-41

& Ex. 30, ¶ 24. Indeed, the record before the court below documents in excruciating detail how Mr. Millin repeatedly violated the terms of his suspension, was booked into jail on contempt charges, and spent years trying to defend his license and keep himself from serving additional jail time. Around this time, he was diagnosed with a cancer that led to his death two years later. Not surprisingly, Mr. Millin was not focused on defending his client against capital murder charges. He presented only the most perfunctory penalty phase case; the highlight was a psychologist who had never before met Mr. Medellín.

The evidence also shows that if the Mexican Consulate had been involved at the time of the trial, it would have monitored Mr. Millin's performance and provided him assistance in investigating Mr. Medellín's case or retained different counsel for Mr. Medellín upon perceiving his deficiencies. *See id.* at 38-39, 45-47. It goes without saying that the quality of counsel is the single most important fact in determining whether a defendant receives the death penalty. But Mexico would have done more than that: it would have ensured that counsel had funds to retain experts and investigators, it would have served as a liaison to Mr. Medellín's Spanish-speaking relatives, it would have made every effort to gather and present life history evidence that has, in countless cases, convinced a jury to spare the accused's life – even in cases involving highly aggravated crimes. These facts alone – which deserve consideration by a court empowered to conduct the review and reconsideration mandated by ICJ – provide ample support for a finding of prejudice.

IV. Texas Does Not Dispute The Authority of This Court to Recall the Mandate in *Medellin v. Texas* in the Interest of Justice and to Preserve the Integrity of Its Judgment.

Texas concedes that this Court has authority to stay its decision in order to permit legislative action. *See* BIO at 11 (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458

U.S. 50, 88 & n. 40 (1988); *Buckley v. Valeo*, 424 U.S. 1, 143 (1976)).[2] Texas merely argues that the present circumstances are not sufficiently compelling to warrant such a recall and stay.[3]

Texas is wrong. Specifically, Texas cites to *Calderon v. Thompson*, 523 U.S. 538, 558 (1998), supposedly for the proposition that recall of mandate requires a showing of actual innocence or fraud on the court. What *Calderon v. Thompson* actually holds, however, is that the "general rule" is that "where a federal court of appeals *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence." *Id.* But here, the Court not acting *sua sponte*, and Mr. Medellín is not asking the Court "to revisit the merits of an earlier decision." *Id.* Rather, Mr. Medellín is asking this Court to recall and stay the mandate in order to give effect to merits of its decision by allowing Congress sufficient time to act.[4]

---

[2] Likewise, state supreme courts have stayed their mandates for a year or more to permit state legislatures a reasonable opportunity to act in accordance with their rulings. *See*, *e.g.*, *Lake View Sch. Dist. No. 25 of Phillips County v. Huckabee*, 91 S.W.3d 472, 511 (Ark. 2002) (staying mandate for approximately thirteen months to give state legislature and executive branch "time to correct constitutional disability" occasioned by determination that public school funding system was unconstitutional); *Derolph v. State*, 677 N.E.2d 733, 747 (Ohio 1997) (staying effect of decision for twelve months and remanding to trial court for retention of jurisdiction until legislation in conformity with opinion is enacted and put into effect); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1360 (N.H. 1997) (staying all further proceedings until end of upcoming legislative session and further order of the court to permit the legislature a reasonable time to address issues involved in the case); *see also*, *e.g.*, *Brigham v. State*, 692 A.2d 384, 398 (Vt. 1997) (remanding case so that jurisdiction could be retained until valid legislation was enacted and put into effect); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 816 (Ariz. 1994) (directing trial court to "retain jurisdiction to determine whether, within a reasonable time, legislative action has been taken").

[3] Similarly, Texas does not question this Court's jurisdiction to issue an original writ of habeas corpus, but only whether it should exercise its discretion to do so.

[4] Texas also cites *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-245 (1944), but that case merely holds that a final judgment may be set aside to remedy fraud or injustice. It does not address the question of recall of the mandate to allow for legislative action.

In any event, in these extraordinary and unprecedented circumstances, Texas has no basis to insist that this Court follow the "general rule" that the Court has set forth to guide the federal courts of appeals in exercising their discretion in more ordinary cases. Petitioner is not asking for an indefinite opportunity for Congress to act, but a reasonable one, to allow Congress the option of enacting implementing legislation in its next session.

V. Texas's Position Would Confer on Each State the Authority to Prevent the United States from Complying with Its International Legal Obligations.

In *Medellín v. Texas*, the Court interpreted the obligation to comply with an ICJ judgment under Article 94 of the U.N. Charter to be non-self-executing, in order to "preserve the option of noncompliance." 128 S. Ct. at 1360. But if the United States's word in entering into an international agreement is to mean anything, the option of *compliance* must be even more carefully protected. By simply assuming that Congress never wanted the United States to comply with its obligations—and self-assuredly predicting there is "no prospect" of Congress passing implementing legislation, BIO at 10—Texas indulges the most cynical assumptions about the intentions of the United States in entering into treaties. An honorable nation does not enter into binding international legal commitments with the intent of breaching them. Nor, for that matter, does a pragmatic nation, which recognizes that the reciprocal observance of international legal obligations is crucial to the protection of its own interests abroad, enter into treaties that it means to breach. As this Court observed, "Congress has not hesitated to pass implementing legislation for treaties that in its view require such legislation," *id.* at 1366 n.12; but Congress only recently learned of this Court's conclusion that this treaty requires such legislation to be effective.

If, as this Court held in *Medellín*, separation of powers prevents the courts or the President from requiring the United States to comply with a treaty absent action from Congress,

it is at least equally true that state courts and executive officials cannot require the United States to irrevocably *breach* a treaty before Congress has had a chance to act. If the Supremacy Clause is to mean anything, it is that one State cannot, acting alone, subordinate the Nation's ability to negotiate and implement treaties—self-executing or otherwise—to the State's own parochial interests. The Constitution has given the federal government exclusive power to conduct foreign relations, yet Texas would have this Court suppose that "the Constitution, which provides for this, [has] done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while . . . not prohibit[ing] to the States the acts for which [the United States] is held responsible." *Chy Lung*, 92 U.S. at 280.

And to be clear, it is not even the highest executive, legislative, or judicial officials of Texas who stand to place the Nation in breach of its international obligations. In Texas, unlike most states, no action by the Governor is needed to set an execution date. Rather, it is a single District Attorney, with the rubber-stamp approval of a single Texas trial court judge, who exercised the authority to set an execution date for Mr. Medellín despite the pendency of efforts to comply with *Avena*. At the May 5, 2008 hearing convened on the Assistant District Attorney's motion to schedule an execution date, Judge Caprice Cosper of the 339th Judicial District Court of Harris County, Texas, refused to hear the testimony of an international law expert and denied the request of a Mexican ambassador to present the views of Mexico, stating "I did not intend to hold a lengthy hearing. I intend to set an execution date." 167a. And as three judges of the Texas Court of Criminal Appeals pointed out in concurrence, that court has no authority to stay executions; even in the most compelling circumstances, "the Court's hands are tied." *Ex parte Medellin*, No. WR-50,191-03, 2008 Tex. Crim. App. LEXIS 851, at *25, 29

(Tex. Crim. App. July 31, 2008) (Price, J., concurring, joined by Holcomb and Cochran, JJ.). Judge Price, writing for himself, further stated that executing Mr. Medellín in these circumstances would be "an embarrassment and a shame to the people of Texas and the rest of the country," but concluded that "the [Texas] judicial branch [was] powerless to rectify an obvious and manifest injustice." *Id.* at *32-33 (Price, J., concurring).

CONCLUSION

If this execution goes forward tomorrow, the world—including the nearly 200 other countries who reciprocally agreed with the United States to abide by ICJ judgments in cases to which they were party—will have every reason to question the value of that commitment and of the United States's treaty commitments generally. This Court, the highest judicial organ of the United States under our Constitution, has confirmed that the United States has an international legal obligation to provide Mr. Medellin review and reconsideration. The President, the authority exclusively responsible for our international relations under our Constitution, has come to the same conclusion and, at the same time, emphasized the importance of complying with that obligation. The Congress, the highest legislative authority and the organ that, this Court has just ruled, is entrusted under our Constitution with the decision whether and how to comply with the obligation, has now begun to take steps to comply. Yet Texas is about to execute Mr. Medellín anyway, taking the decision out of Congress's hands and placing the United States irrevocably in breach. That course of affairs is fundamentally inconsistent with the holding and rationale of this Court decision in *Medellín v. Texas*.

In considering the constitutional design settled by the Court in *Medellin v. Texas*, it is important to be specific about how Texas has come to the decision to execute Mr. Medellín tomorrow, August 5. Because the Board of Pardons and Paroles has today declined to recommend any relief (171a), the Governor has authority under Texas law to grant no more than

a reprieve of thirty days. The court below held it lacked power to interfere with the execution. As a result, the decision to breach the treaty has effectively been made by the District Attorney of Harris County, Texas, who, with the approval of a state trial-court judge, set an execution date at the earliest point allowed under Texas law. It in no way disparages the diligence, competence, or integrity of those local and state officials, attuned as they understandably are to state and local interests, to suggest that they should not be left with the discretion to decide whether the United States should breach an international commitment made by the President and Senate on behalf of the United States as a whole. We respectfully submit that this Court's decision in *Medellín v. Texas* was never intended to lead to such a result without giving Congress a reasonable opportunity to act.

This afternoon, the United States Court of Appeals for the Fifth Circuit held that it has no authority to grant a stay. *Medellín v. Quarterman*, No. 08-20495, slip op. at 4 (5th Cir. Aug. 4, 2008) (unpublished). For the foregoing reasons, this Court should grant a writ of certiorari or a writ of habeas corpus or 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,

DONALD FRANCIS DONOVAN
(Counsel of Record)
CATHERINE M. AMIRFAR
CARL MICARELLI
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

August 4, 2008