

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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No 08-\_\_

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**In re JOSÉ ERNESTO MEDELLÍN,**

Petitioner

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**MOTION FOR AUTHORIZATION  
TO FILE SUCCESSIVE PETITION FOR  
WRIT OF HABEAS CORPUS**

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**THIS IS A CAPITAL CASE**

**MR. MEDELLÍN IS SCHEDULED TO BE EXECUTED AUGUST 5, 2008**

**Submitted by:**

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Dated: August 1, 2008

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Petitioner José Ernesto Medellín hereby moves this Court for authorization to file a successive petition for writ of habeas corpus in the United States District Court for the Southern District of Texas.

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), the United States Supreme 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 the Supreme 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 the Supreme 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 law, diplomatic, and business communities have warned that Mr. Medellín's execution could have grave consequences for Americans abroad.

Despite this extraordinary set of circumstances, Texas has set Mr. Medellín's execution for the earliest possible date under Texas law, August 5, and proceeds implacably towards execution. 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 the U.S. Supreme Court in that case—to determine whether and how to give domestic legal effect to the treaty obligations of the Nation.

In these circumstances, Mr. Medellín respectfully requests authorization to file a successive petition for writ of habeas corpus in the United States District Court for the Southern District of Texas so that his claims may be heard on the merits. In addition, in his accompanying Application to Stay the Execution, Mr. Medellín asks that this Court stay his imminent execution. 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.

### **STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to 28 U.S.C. § 2244(b)(3).

### **STATEMENT OF THE CASE**

#### **A. Mr. Medellín’s Conviction, Sentence, and Application for Collateral Review**

On June 29, 1993, law enforcement authorities arrested Mr. Medellín, 18 years old at the time, in connection with two murders in Houston, Texas. The Texas trial court appointed counsel to represent Mr. Medellín, who was indigent. On September 16, 1994, Mr. Medellín was convicted of capital murder and, upon the jury’s recommendation, the trial court sentenced Mr. Medellín to death on October 11, 1994. Exhibit 20, *State v. Medellin*, Judgment, No. 675430 (Tex. 339th Dist. Ct. Oct. 11, 1994). On March 19, 1997, the Texas Court of Criminal

Appeals affirmed Mr. Medellín's conviction and sentence in an unpublished opinion. *Ex parte Medellin*, Order, No. 71,997 (Tex. Crim. App. Mar. 19, 1997).

On April 29, 1997, some six weeks after the affirmance of his death sentence on direct appeal and nearly four years after he was first arrested, Mexican consular authorities first learned of Mr. Medellín's arrest, detention, trial, conviction, and sentence. *See* Exhibit 27, Affidavit of Víctor Manuel Uribe, ¶ 24. They promptly began rendering assistance. *See id.*

On March 26, 1998, Mr. Medellín filed a state application for habeas corpus, alleging the violation of his rights under Article 36 of the Vienna Convention on Consular Relations. Application for Writ of Habeas Corpus at 25-31, 45, *Ex parte Medellin*, No. 675430-A (Tex. 339th Dist. Ct. Mar. 26, 1998). The State did not contest that Mr. Medellín was a citizen of Mexico or that state officials had failed to advise Mr. Medellín of his right under Article 36 of the Vienna Convention to contact the Mexican consulate. Original Answer at 21-23, *Ex parte Medellin*, No. 675430-A (Tex. 399th Dist. Ct.).

On January 22, 2001, the trial court adopted the state's proposed findings and conclusions and recommended denial of relief on all claims, including those predicated on the violation of Mr. Medellín's Vienna Convention rights. *Ex parte Medellin*, Order, No. 675430-A, \*19-20 (Tex. 339th Dist. Ct. Jan. 22, 2001). It held that the Texas contemporaneous-objection rule barred the Vienna Convention

claim because Mr. Medellín had not raised the claim at trial and that he had no individual right to raise the Article 36 violation. *Id.*<sup>1</sup> The court also denied Mr. Medellín's request for an evidentiary hearing. *Id.* at \*22. On October 3, 2001, by an unpublished order, the Texas Court of Criminal Appeals adopted the trial court's findings and conclusions. *Ex parte Medellin*, Order, No. 50,191-01 (Tex. Crim. App. Oct. 3, 2001).

**B. Proceedings Before the U.S. District Court for the Southern District of Texas (2001-2003)**

On November 28, 2001, Mr. Medellín filed a petition for a writ of habeas corpus, and on July 18, 2002, an amended petition, in the U.S. District Court for the Southern District of Texas. *See* Amended Petition for Writ of Habeas Corpus, *Medellin v. Cockrell*, No. H-01-4078 (S.D. Tex. July 18, 2002). Mr. Medellín raised, among others, a claim under Article 36 of the Vienna Convention, requesting an evidentiary hearing and vacatur of his conviction and sentence. On June 26, 2003, the District Court denied relief and a certificate of appealability. *Medellin v. Cockrell*, Civ. No. H-01-4078 (S.D. Tex. Apr. 17, 2003).

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<sup>1</sup> While not questioning Mr. Medellín's Mexican citizenship, the state's proposed findings adopted by the state court also stated in the alternative that Mr. Medellín "fail[ed] to show foreign nationality which requires notification of a foreign consulate" and could not show that the violation affected the constitutional validity of his conviction and sentence. *Ex parte Medellin*, Order, No. 675430-A, at \*19-20 .

### **C. Proceedings Before the International Court of Justice (2003-2004)**

On January 9, 2003, while Mr. Medellín's habeas petition was pending before the U.S. District Court, the Government of Mexico initiated proceedings in the International Court of Justice ("ICJ") against the United States, alleging violations of the Vienna Convention in the cases of Mr. Medellín and 53 other Mexican nationals. The ICJ issued its judgment on March 31, 2004, after extensive briefing and oral argument. *See* Exhibit 17, Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31). With respect to Mr. Medellín's case, the ICJ held that the United States had breached its obligations under Article 36 of the Vienna Convention to (1) inform him of his rights under Article 36, (2) notify Mexican consular officers of his detention, (3) enable Mexican consular officers to communicate with, have access to and visit him, and (4) enable Mexican consular officers to arrange for his legal representation. *Id.* ¶¶ 106(1)-(4), 153(4)-(7).

As a remedy for these violations, the ICJ ordered the United States to provide "review and reconsideration" of Mr. Medellín's conviction and sentence. *Id.* ¶ 153(9). The ICJ specified that, *first*, the required review and reconsideration must take place "within the overall judicial proceedings relating to the individual defendant concerned;" *second*, procedural default doctrines could not bar the required review and reconsideration when the competent authorities of the

detaining State had themselves failed in their obligation of notification; *third*, the review and reconsideration must take account of the Article 36 violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right; and *finally*, the forum in which the review and reconsideration occurs must be capable of “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.* ¶¶ 111-113, 120-122, 133-134, 138-141.

#### **D. Prior Proceedings Before This Court (2003-2004)**

On October 24, 2003, while *Avena* was pending before the ICJ, Mr. Medellín sought a certificate of appealability on several grounds, including his Vienna Convention claim. *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2003). On May 20, 2004, after the ICJ had rendered its judgment in *Avena*, this Court denied Mr. Medellín’s application. *Id.* at 281.

#### **E. Proceedings Before the U.S. Supreme Court (2004-2005)**

On August 18, 2004, Mr. Medellín filed a petition for a writ of certiorari before the Supreme Court and, on December 10, 2004, the Court agreed to hear the case to consider the enforceability of the *Avena* Judgment. *Medellin v. Dretke*, 543 U.S 1032 (2004). On May 23, 2005, the writ of certiorari was dismissed as improvidently granted in light of an intervening decision by the President of the United States to comply with the *Avena* Judgment. *Medellin v. Dretke*, No. 04-

5928, 544 U.S. 660 (2005). The Supreme Court noted that dismissal was appropriate at that stage “[i]n light of the possibility that the Texas courts [would] provide Medellín with the review he seeks pursuant to the *Avena* judgment and the President’s memorandum.” *Id.* at 666.

#### **F. Proceedings Before the Texas Court of Criminal Appeals (2005-2006)**

On March 24, 2005, following the President’s determination to comply with *Avena* and while Mr. Medellín’s case was pending before the U.S. Supreme Court, Mr. Medellín filed a subsequent petition for a writ of habeas corpus in the Texas Court of Criminal Appeals and asked the Court to hold that petition in abeyance while the Supreme Court considered whether to stay Mr. Medellín’s case to permit exhaustion of his claims in state court. Following the dismissal of Mr. Medellín’s case from the Supreme Court, the Court of Criminal Appeals set his petition for briefing and oral argument on whether it satisfied the requirements of Article 11.071, Section 5, of the Texas Code of Criminal Procedure. On November 15, 2006, the Court of Criminal Appeals dismissed Mr. Medellín’s application, holding that he was procedurally barred from seeking review and reconsideration and that neither the *Avena* Judgment nor the President’s determination required a different result. *Ex parte Medellin*, 223 S.W.3d 315 (2006).

### **G. Proceedings Before the U.S. District Court for the Southern District of Texas (2006-2007)**

On November 21, 2006, to satisfy the applicable statute of limitations while his subsequent habeas application was pending in state court, 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 the applicable treaties and the President's Determination. After the U.S. Supreme Court granted the writ of certiorari to review the denial of his subsequent application, the district court stayed and administratively closed Mr. Medellín's case.

### **H. Proceedings Before the U.S. Supreme Court (2007-2008)**

After the Texas Court of Criminal Appeals dismissed his subsequent application, Mr. Medellín returned to the U.S. Supreme Court, which granted certiorari on April 30, 2007, and issued a decision on March 25, 2008. *Medellin v. Texas*, 128 S. Ct. 1346 (2008). The Supreme Court affirmed the decision of the Texas Court of Criminal Appeals, holding that neither the *Avena* Judgment nor the President's determination to comply constituted directly enforceable federal law that precluded Texas from applying state procedural rules that would otherwise bar review of Mr. Medellín's Vienna Convention claim. *Id.* at 1356-72. The Supreme Court acknowledged that the United States is obligated as a matter of international law to comply with the *Avena* Judgment, noting that "[n]o one disputes that the

*Avena* decision—a decision that 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 was unanimous on this point. *Id.* at 1356, 1372, 1376.

The Supreme Court further clarified the means available to the United States under the Constitution to come into compliance with its obligations under *Avena*, including legislation by the U.S. Congress. *Id.* at 1365. Justice Stevens, concurring in the judgment but not the opinion, urged the State of Texas to effect statewide compliance with *Avena*, noting that “the United States’ obligation to ‘undertak[e] to comply’ with the ICJ’s decision falls on each of the States as well as the Federal Government.” *Id.* at 1374 (Stevens, J., concurring). “[T]he fact that the President cannot legislate unilaterally does not absolve the United States from its promise to take action necessary to comply with the ICJ’s judgment.” *Id.*

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

[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. Justice Stevens agreed that “the costs of refusing to respect the ICJ’s judgment are significant.” *Id.* at 1375 (citation omitted). 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.

### **I. Scheduling of Execution Date (2008)**

Almost immediately after the Supreme Court’s decision was issued and before Congress took action, prosecutors requested that an execution date be set for Mr. Medellín. The trial court held a hearing for this purpose on May 5, 2008. Texas State Senator Rodney Ellis and Mr. Medellín’s counsel urged the court to defer scheduling an execution date in order to allow the national and state legislatures time to implement the *Avena* Judgment. Indeed, Senator Ellis wrote a letter to the judge indicating his intent to introduce a bill to implement the *Avena* Judgment in Texas as soon as the state legislature reconvenes in January 2009. Exhibit 2, Letter from Rodney Ellis, Texas State Senator, to Judge Caprice Cosper,

Tex. 339th District Court (May 5, 2008). Further, 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 in which he observed:

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

Exhibit 19, Affidavit of Jeffrey Davidow, ¶ 3. After denying the request of Mr. Medellín's counsel to present evidence, the court scheduled Mr. Medellín's execution for August 5, 2008, the first date available under state law. Exhibit 21, Execution Order, *Ex parte Medellin*, No. 675430 (Tex. 339th Dist. Ct. May 5, 2008).

#### **J. Introduction of Legislation to Implement *Avena* in the U.S. House of Representatives (2008)**

Following the Supreme Court opinion, on July 14, 2008, 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. Exhibit 1, Avena Case Implementation Act of 2008, H.R. 6481, 110th Cong. (2d Sess. 2008). 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.

The bill was referred to the Committee on the Judiciary for consideration and is now under review. On June 19, 2008, 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. Exhibit 15, Presentation of John B. Bellinger, III, Legal Advisor to the Secretary of State, Agent of the United States, Public Sitting in the Case Concerning the Request for Interpretation of the Judgment of 31 March 2004 in *Avena* and Other Mexican Nationals (*Mex. v. U.S.*) (hereafter “ICJ Oral Argument Tr.”), at 17 (June 19, 2008), *available at* <http://www.icj-cij.org/docket/files/139/14592.pdf> .

In a letter to House Speaker Nancy Pelosi urging Congress to pass legislation implementing *Avena*, Peter M. Robinson, President and CEO of the United States Council for International Business observed that

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

its obligations under the Vienna Convention on Consular Relations. American citizens abroad are at times detained by oppressive or undemocratic regimes, and access to the American consulate is their lifeline . . . . While examples of Americans 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.

Exhibit 11, Letter to The Honorable Nancy Pelosi, Speaker of the House of Representatives, from Peter M. Robinson, (June 13, 2008); *see also* Exhibit 13, Letter from current and past presidents of the American Society of International Law to Members of the Senate (July 17, 2008).

#### **K. Proceedings Before the International Court of Justice (2008)**

Following the setting of an execution date, on June 5, 2008, Mexico filed in the ICJ a Request for Interpretation of the *Avena* Judgment, asking the ICJ to declare that the United States has an obligation to use any and all means necessary to provide the judicial review and reconsideration mandated by the Judgment *before* any execution is carried out. *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.<sup>2</sup> 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

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<sup>2</sup> The parties' written and oral pleadings and the judgment, orders and press releases of the ICJ 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>.

nationals named in the *Avena* Judgment who face imminent execution in Texas.<sup>3</sup> 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 oral 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* Exhibit 15, ICJ Oral Argument Tr. (June 19, 2008), at 60; Exhibit 16, ICJ Oral Argument Tr. (June 20, 2008), at 14-15.

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." Exhibit 4, Order, Provisional Measures, ¶ 80(a) (July 16, 2008). In particular, the ICJ noted

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<sup>3</sup> The four other Mexican nationals subject to the Order have not received execution dates but are eligible under state law to have dates scheduled.

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[.]”

*Id.* at ¶ 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.

Separately, on June 30, 2008, Professor Phillip Alston, who serves as the United Nations Human Rights Council Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 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.

Exhibit 12, Press Statement, Professor Philip Alston, Nations Human Rights Council Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, at 4 (June 30, 2008).

**L. Proceedings Before 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.

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. Exhibit 6, Letter from Mario López Gàrelli,

Inter-American Commission on Human Rights, to Sandra L. Babcock (Dec. 6, 2006) (reciting text of precautionary measures adopted in favor of José Medellín). 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 thereby reminded the United States of the Commission's request that Mr. Medellín's life be preserved pending the investigation of his petition. Exhibit 7, Letter from Elizabeth Abi-Mershed, Inter-American Commission on Human Rights, to Condoleezza Rice, Secretary of State (June 20, 2008) (reiterating precautionary measures adopted in favor of José Medellín); Exhibit 8, Letters from Hector Morales, Jr., Permanent Representative of the United States of America to the Organization of American States, to Rick Perry, Governor of Texas, Greg Abbott, Attorney General of the State of Texas, and Rissie Owens, Presiding Officer, Texas Board of Pardons and Paroles (June 23, 2008).

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 attached to this application. 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.] Medellín[’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.

Exhibit 5, *Medellin v. United States*, Case 12.644, Inter-Am. C.H.R., Report No. 45/08, OEA/Ser/L/V/II.132, doc. 21 ¶ 128 (2008). Based upon the foregoing, 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 State’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. *Id.* ¶ 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.” *Id.* ¶ 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. *Id.* ¶ 159.<sup>4</sup>

### **M. Further Political and Diplomatic Efforts to Effect 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

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<sup>4</sup> 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.

give effect to the *Avena* decision with respect to the convictions and sentences addressed therein.

Exhibit 9, Letter from Condoleezza Rice, Secretary of State, and Michael B. Mukasey, Attorney General, to Rick Perry, Governor of Texas (June 17, 2008); *see also* Exhibit 13, Letter from current and past presidents of the American Society of International Law to Members of the Senate (July 17, 2008). 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. Exhibit 22, Letter from Rick Perry, Governor of Texas, to Condoleezza Rice, Secretary of State, and Michael B. Mukasey, Attorney General (July 18, 2008) at 1. Governor Perry further pledged to urge any federal habeas court seized of a Vienna Convention claim by an individual subject to the *Avena* Judgment to address that individual’s prejudice 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, copying Secretary Rice, 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. Exhibit 23, Letter from Patricia Espinosa Cantellano, Secretary of Foreign Affairs, to Rick Perry, Governor of Texas (July 28, 2008); *see also* Exhibit

10, Letters from Brazil, Uruguay, the Council of Europe, Argentina, Bolivia, Ecuador, El Salvador, Guatemala, Honduras, Peru, Paraguay, and Chile to Rick Perry, Governor of Texas, and Rissie Owens, Presiding Officer, Texas Board of Pardons and Paroles.

A petition for clemency requesting, among other things, a reprieve of 240 days so that Congress may implement the proposed legislation remains pending before the Texas Board of Pardons and Paroles.

**N. Dismissal of Federal Habeas Petition, U.S. District Court for the Southern District of Texas**

On July 22, 2008, the district court reopened proceedings for the limited purpose of determining the viability of Mr. Medellín's habeas petition, and denied relief. *Medellin v. Quarterman*, No. H-06-3688 (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 Fifth Circuit.

**O. Second Subsequent State Application for Habeas Corpus and Application for Stay of Execution**

On July 28, 2008, Mr. Medellín filed a second subsequent application for a post-conviction writ of habeas corpus in the Texas Court of Criminal Appeals, along with an application for a stay of execution, arguing that Mr. Medellín met the exceptions to Texas' bar on subsequent habeas petitions because the Supreme

Court's ruling in *Medellin v. Texas*, 128 U.S. 1346 was a new legal basis for relief and the introduction of legislation, the prejudice finding of the Inter-American Commission on Human Rights, and other political developments constituted a new factual basis for relief. Mr. Medellín argued that his rights to life and to due process would be violated if he were executed before Congress had an opportunity to provide him with review and reconsideration. On July 31, 2008, the Court of Criminal Appeals dismissed the application, ruling that it did not fall within the exceptions to the bar on subsequent habeas petitions. *Ex parte Medellin*, No. WR-50,191-03 (Tex. Crim. App. July 31, 2008).

On July 31, 2008, the Texas Court of Criminal Appeals issued a decision, *per curiam*, dismissing Mr. Medellín's second subsequent habeas application and his motion in the alternative for leave to file the application as an original writ of habeas corpus, and denying his motion for a stay of execution. *Ex parte Medellin*, No. WR-50,191-03, at 4 (Tex. Crim. App. July 31, 2008) (*per curiam*). The court concluded that Mr. Medellín's claim did not meet the jurisdictional dictates of Article 11.071, § 5, of the Texas Code of Criminal Procedure, which restricts the filing of successive habeas petitions. In so holding, the court declined to recognize as a previously unavailable source of law or fact the U.S. Supreme Court's decision in *Medellin v. Texas* and ensuing legislative bill to give the *Avena*

Judgment domestic legal effect. The Court also denied the issuance of a Certificate of Appealability (“COA”).

In a concurring statement, three judges addressed the court’s difficulty in reaching Mr. Medellín’s constitutional due process claim, noting that “the Court’s hands are tied.” Concurring Statement, *Ex parte Medellin*, No. WR-50,191-03, at 2 (Tex. Crim. App. July 31, 2008) (Price, J., concurring, joined by Holcomb and Cochran, JJ.). They concluded that until the *Avena* Judgment is made binding through implementing legislation, Mr. Medellín cannot have sufficient expectation that the proposed legislation will be enacted to predicate a due process claim upon it. *Id.* at 5-6. Judge Price, writing for himself, then called upon the Texas Executive branch to prevent Mr. Medellín’s execution in breach of the *Avena* Judgment, noting that “[t]he Executive Branch most appropriately exercises its clemency authority when the judicial branch finds itself powerless to rectify an obvious and manifest injustice.” *Id.* at 7. Judge Price commented that

It would be an embarrassment and a shame to the people of Texas and the rest of the country (albeit not presently unconstitutional) if we were to execute the applicant despite our failure to honor the international obligation embodied in the *Avena* judgment when legislation may well be passed in the near future by which that obligation would become, not merely precatory, but legally (and retroactively) binding upon us.

*Id.* In a separate concurring opinion, Judge Cochran, joined by Judge Holcomb, stated, “Texas law does not permit a defendant to raise a claim four [sic] years

after his trial that he was not notified before or during his trial of his rights under the Vienna Convention, the U.S. Constitution, the Texas Constitution, or any other law,” and that the U.S. Supreme Court honors the state’s contemporaneous objection rule. Concurring Opinion, *Ex parte Medellín*, No. WR-50,191-03, at 3 (Tex. Crim. App. July 31, 2008) (Cochran, J., concurring, joined by Holcomb, J.). Judge Meyers dissented, noting that he would have set Mr. Medellín’s case for submission. Dissenting Statement, *Ex parte Medellín*, No. WR-50,191-03, at 2 (Tex. Crim. App. July 31, 2008) (Meyers, J., dissenting).

**P. Proceedings in the Supreme Court of the United States**

On July 31, 2008, Mr. Medellín petitioned the Supreme Court for a writ of certiorari to the Texas Court of Criminal Appeals. Mr. Medellín argued that it would violate his due process rights to execute him before Congress had an opportunity to enact legislation as required by the Supreme Court’s decision in *Medellin v. Texas*, 128 S. Ct. 1346 (2008). In the alternative, Mr. Medellín sought a writ of habeas corpus under the Court’s original habeas jurisdiction.

Concurrently, Mr. Medellín moved for a stay of execution. He also filed a motion asking the Supreme Court to recall its mandate from *Medellin v. Texas*, not to revisit the merits of that decision, but simply to allow Congress time to act in accordance with its holding.

## ARGUMENT

Mr. Medellín's claim is cognizable under the successive petition provisions found in 28 U.S.C. § 2244(b), which places restrictions on a prisoner's ability to file a successive habeas petition. In pertinent part, Section 2244(b)(2) states that:

A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless

—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. . . .

In these circumstances, Mr. Medellín should be allowed to avail himself of the new constitutional rule announced in his own case, namely the requirement that implementation of the treaty obligation to comply with the *Avena* judgment is a task for Congress. *Medellin v. Texas*, 128 S. Ct. at 1368-69. That rule is necessarily retroactive to Mr. Medellín because it was announced in his own case and because compliance with the *Avena* judgment would, in the Supreme Court's words, "require domestic courts to set aside ordinary rules of procedural default." *Medellin v. Texas*, 128 S. Ct. at 1366. The exceptional circumstances of this case satisfy the equitable principles underlying the statutory standards: Mr. Medellín has not abused the writ by holding back his Vienna Convention claim, as he raised the claim in his first state and federal habeas petition, and the *Avena* judgment and efforts to implement it postdated those petitions.

## **I. Mr. Medellín Has Been Denied His Constitutional Rights.**

This case comes to this Court in a unique but extraordinarily compelling set of circumstances. Every Member of the Supreme Court, the President of the United States, and, in its pleadings before the Supreme Court and the courts of Texas, 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*, the Supreme 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 the Supreme 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. 08A99 (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 Medellín 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 treaty-making 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, the Supreme 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 the Supreme 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 statutes 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 treaty-makers: 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 the Supreme 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 the Supreme 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 went to the Supreme 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 the Supreme 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. Medellín's conviction and sentence take place in the context of judicial

proceedings in *Mr. Medellín*'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.

## **II. The Requirements for a Second or Successive Petition for Habeas Corpus Have Been Met.**

Under these circumstances, the Court should hold that Mr. Medellín has satisfied the requirements for a second or successive petition for habeas corpus.

Neither the *Avena* judgment nor the subsequent efforts to implement in light of the Supreme Court's decision in *Medellin v. Texas* it had occurred at the time Mr. Medellín filed his first petition for habeas corpus in the District Court. Although this Court took note of the *Avena* judgment, the issues had not been litigated before the District Court, and the Supreme Court declined to address them on certiorari until after the Texas Court of Criminal Appeals had considered them. Moreover, the 2008 decision in *Medellin v. Texas*, and the efforts in Congress to implement that decision, are wholly new.

The exceptional circumstances of this case satisfy the equitable principles underlying the statutory standards. Mr. Medellín has not abused the writ by holding back his Vienna Convention claim, as he raised the claim in his first state and federal habeas petition. His claim has now been transformed by the *Avena* judgment, which, although not itself announcing a rule of constitutional law, interprets a treaty made under the authority of the United States. And the decision in *Medellin v. Texas* does announce a new rule of constitutional law, namely “[t]he requirement that Congress, rather than the President, implement a non-self-executing treaty.” *Medellin v. Texas*, 128 S. Ct. at 1368-69. As a result of the Supreme Court’s announcement of that new rule, Congress is in the process of implementing the *Avena* decision.

The Supreme Court also recognized that the rights to be implemented by Congress under the *Avena* judgment are necessarily retroactive, in indicating that the review and reconsideration required by *Avena*, if enforceable in domestic courts, must be given without regard to procedural default. *Medellin v. Texas*, 128 S. Ct. at 1355. The *Avena* decision was also made retroactive—and, indeed, directly applicable to petitioner’s own case—by the ICJ, which had, by treaty, authority with 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.<sup>5</sup>

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. The Commission recommended that the United States vacate Mr. Medellín’s death sentence and provide him with a new trial. While Mr. Medellin should not have to show that he would prevail in the course of review and reconsideration in order to vindicate his

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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)).

entitlement to receive it, the Inter-American Commission's determination adds weight to the factors counseling in favor of granting the writ.<sup>6</sup>

Thus, under these exceptional circumstances, this case meets the requirements for a second or successive petition. Indeed—unique in the Nation's history—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; the President has determined to require it; members of Congress are moving to implement it; and judicial intervention is necessary to prevent the State of Texas from interfering with the authority of the federal political branches to act in a matter affecting the international relations of the United States.

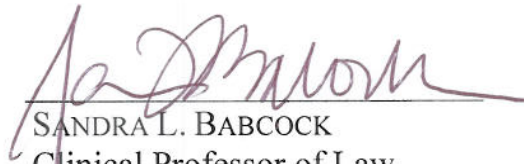
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<sup>6</sup> Petitioner recognizes that in *Breard v. Greene*, 523 U.S. 371, 378 (1998), and *Federal Republic of Germany v. United States*, 526 U.S. 111, 111 (1999), the Supreme Court declined to stay executions in cases in which the International Court of Justice had issued provisional measures. In neither of those cases, however, had the ICJ reached a final judgment prescribing relief, and in neither of those cases had the President determined that the United States should comply nor had Congress begun steps to effect compliance.

**CONCLUSION AND PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court grant petitioner authorization to file a successive petition for a writ of habeas corpus in the United States District Court for the Southern District of Texas.

Respectfully submitted,



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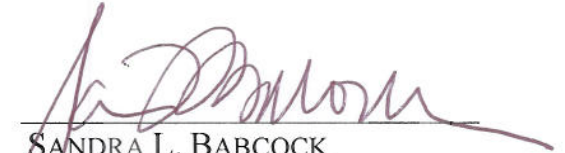
Dated: August 1, 2008

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), as made applicable by Fifth Circuit Local Rule 22, because this brief contains 9479 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced type face using Microsoft Office Word 2003 with 14-point Times New Roman.

Dated: August 1, 2008



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### CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August 2008, I caused a true and correct copy of the foregoing motion to be served upon opposing counsel by electronic mail and by Federal Express to:


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\_\_\_\_\_  
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### CERTIFICATE OF CONFERENCE

I hereby certify that movant has attempted to contact all other parties to determine whether an opposition will be filed. Movant has not yet received an indication whether an opposition will be filed.

  
\_\_\_\_\_  
Sandra Babcock