

BREYER, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 04–5928

JOSE ERNESTO MEDELLIN, PETITIONER *v.* DOUG
DRETKE, DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE, CORRECTIONAL
INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[May 23, 2005]

JUSTICE BREYER, with whom JUSTICE STEVENS joins,
dissenting.

I agree with JUSTICE GINSBURG that, in light of recent developments, this Court should simply grant Medellín’s motion for a stay. See *ante*, at 2 (GINSBURG, J., concurring); see also *ante*, at 1–2 (SOUTER, J., dissenting). But, in the absence of majority support for a stay, I would vacate the Fifth Circuit’s judgment and remand the case rather than simply dismiss the writ as improvidently granted. I join JUSTICE O’CONNOR’s dissent, for she would do the same. See *ante*, at 6, 19–20.

For one thing, Medellín’s legal argument that “American courts are now bound to follow the ICJ’s decision in *Avena*” is substantial, and the Fifth Circuit erred in holding the contrary. *Ante*, at 11 (O’CONNOR, J., dissenting); see 371 F. 3d 270, 279–280 (2004). By vacating its judgment and remanding the case, we would remove from the books an erroneous legal determination that we granted certiorari to review.

Nor would a remand “invite the Fifth Circuit to conduct proceedings rival to those” unfolding in the Texas courts. *Ante*, at 2 (GINSBURG, J., concurring). Rather, I should expect the Fifth Circuit to recognize two practical circum-

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stances that favor its entering a stay. See *ante*, at 19–20 (O’CONNOR, J., dissenting); see also *ante*, at 2–3 (SOUTER, J., dissenting).

First, the President has decided that state courts should follow *Avena*. See *Case Concerning Avena and Other Mexican Nationals (Mex. v. U. S.)*, 2004 I. C. J. No. 128 (Judgment of Mar. 31); George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005), App. 2 to Brief for United States as *Amicus Curiae* 9a. And that fact permits Medellín to argue in the Texas courts that the President’s determination—taken together with (1) the self-executing nature of the treaty, (2) the Nation’s signature on the Optional Protocol, (3) the International Court of Justice’s (ICJ) determination that the United States give Medellín (and 50 other Mexican nationals) “*judicial*,” *i.e.*, court, “review and reconsideration” of their Convention-based claims, “by means of [the United States] own choosing,” and (4) the United States’ “undertak[ing]” in the United Nations Charter to comply with ICJ judgments—requires Texas to follow the *Avena* decision in Medellín’s case. *Avena, supra*, ¶¶ 138–143, 153(9) (emphasis added); Charter of the United Nations, Art. 94.1, 59 Stat. 1051; cf. *Ware v. Hylton*, 3 Dall. 199, 237 (1796) (treaties “superior to the Constitution and laws of any individual state” (emphasis deleted)); *Sale v. Haitian Centers Council, Inc.*, 509 U. S. 155, 188 (1993) (President possesses “unique responsibility” for the conduct of “foreign . . . affairs”); see also *American Ins. Assn. v. Garamendi*, 539 U. S. 396, 414–416 (2003) (President has a degree of independent authority to pre-empt state law); Tex. Code Crim. Proc. Ann., Arts. 11.01, 11.071 (Vernon 2005) (Texas courts possess jurisdiction to hear Medellín’s claims).

Second, several Members of this Court have confirmed that the federal questions implicated in this case are important, thereby suggesting that further review here after the Texas courts reach their own decisions may well

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be appropriate. See *ante*, at 5 (GINSBURG, J., concurring) (it is “this Court’s responsibility” to address and resolve any significant legal ICJ-related issues that may arise in the state-court proceedings).

The first consideration means that Medellín’s claims when considered in state court are stronger than when considered in federal court—and suggests the very real possibility of his victory in state court. The second consideration means that a loss in state court would likely be followed by review in this Court. Taken together they mean that, by staying the case on remand, the Fifth Circuit could well avoid the need for any further federal proceedings, or at least obtain additional guidance from this Court before taking further action. Given these practical circumstances, it seems to me unlikely that, were we to remand this case, the Fifth Circuit would move forward on its own, rather than stay its hand until the conclusion of proceedings in the state courts and possibly here.

For these reasons and those set forth by JUSTICE O’CONNOR, I agree with the course of action she suggests and respectfully dissent from the Court’s decision to dismiss the writ.