No. 14-280

IN THE

Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

REPLY BRIEF OF COURT-APPOINTED *AMICUS CURIAE* ARGUING AGAINST JURISDICTION

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The opening brief of the Court-Appointed *Amicus* ("Opening Br.") established three propositions demonstrating why the Court lacks jurisdiction in this case to decide the issue of whether the Louisiana Supreme Court correctly refused to give retroactive effect to *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012) (the "*Miller* retroactivity issue"). First, it is not enough for this Court to have appellate jurisdiction over some issue in this *case*—the Court's jurisdiction must also extend to the *Miller* retroactivity issue. Second, that the Louisiana Supreme Court used *non*-binding federal precedents for guidance does not provide a basis for extending this Court's jurisdiction to deciding the *Miller* retroactivity issue in this case. Third, this Court's appellate jurisdiction would extend here to the *Miller* retroactivity issue only if the *Teague* exceptions were binding in state collateral review proceedings on the retroactivity of new constitutional rules to final convictions. They are not.

No one disputes the first proposition. The parties, as well as certain *amici curiae*, dispute the second proposition. And Petitioner and certain *amici* dispute the third proposition. Accordingly, this reply focuses on the disputed second and third propositions.

A. As reflected in the plain language of 28 U.S.C. § 1257(a), this Court has appellate jurisdiction over state court decisions in order to enforce the Supremacy Clause—that is, to ensure that state courts do not deny a "right" conferred by federal law. When federal law is not binding, there is no *federal right* and thus no basis for this Court to correct a state court's reading of merely persuasive non-binding federal cases.

In pertinent part, § 1257(a) limits this Court in this case to deciding if Petitioner was denied a "title, right, privilege, or immunity [that] is specially set up or claimed under the Constitution or the treaties or statutes of … the United States." It would contravene the language and purpose of § 1257(a) for this Court to extend jurisdiction in this case to the *issue* of the proper scope of federal law without first deciding whether federal retroactivity law in fact creates a binding federal right in state collateral review courts.

The United States and Respondent urge the Court to ignore this predicate jurisdictional question. Instead, they argue that it is sufficient for this Court to exercise appellate jurisdiction if a state court potentially misreads non-binding federal precedents. They argue that this admittedly novel expansion of this Court's jurisdiction is warranted to avoid the "difficult" constitutional issue of whether the *Teague v. Lane*, 489 U.S. 288 (1989), exceptions are binding on state collateral review courts. *E.g.*, United States Br. at 33. But they do not cite any precedent where this Court *expanded* its limited jurisdiction over state courts to avoid a constitutional question.

The parties and their *amici* seek an unprecedented expansion of this Court's jurisdiction over state courts that will extend to myriad state criminal *and* civil cases. Recognizing what this brief will call "Montgomery" jurisdiction would be an open call to the Supreme Court bar to flood this Court with certiorari petitions seeking review of state court decisions that cite federal cases as persuasive authority on procedure, evidence, and substantive issues from materiality and causation to anti-competitive effect, and so on. The Court inevitably would

review some state court cases under such newly minted jurisdiction, thus encouraging even more petitions.

B. There is thus no sound reason to avoid a very narrow constitutional question that the rationale of *Danforth v. Minnesota*, 552 U.S. 264 (2008), already answers: the Constitution does not require state collateral review courts to provide a mirror retroactivity remedy to the one Congress has provided under the federal habeas statute for federal courts only. *Danforth* held that the basis for the *Teague* standards is the federal habeas statute, not the Constitution. *Id.* at 278-79. As the federal habeas statute empowers only federal habeas courts, federal law does not require state collateral review courts to mirror the *Teague* standards.

As to the specific "*Miller* retroactivity issue," as the United States notes, that issue can be decided this Term by granting certiorari in *Johnson v. Manis*, *petition for certiorari pending* (U.S. June 29, 2015) (No. 15-1).[1] *Johnson v. Manis* raises the *Miller* retroactivity issue in the context where the *Teague* exceptions unquestionably govern—a federal habeas proceeding.

ARGUMENT

A. The Court Should Not Create Jurisdiction To Review A State Court's Use Of Non-Binding Federal Precedents.

This Court has no jurisdiction in this case to decide how *Teague* applies to *Miller* without first deciding that

1. Filed as *Johnson v. Ponton*.

the *Teague* exceptions are binding in state court collateral review proceedings.[2] It is insufficient that the Louisiana Supreme Court used non-binding federal precedents as a guide for "its law," United States Br. at 31. None of the justifications offered for such an unprecedented expansion of the Court's appellate jurisdiction withstands scrutiny.

1. Petitioner argues that 28 U.S.C. § 1257(a) confers jurisdiction over the *Miller* retroactivity issue in this case even if state law governs retroactivity in state collateral review courts. Pet. Br. at 37-40. No one disputes that § 1257(a) gives the Court appellate jurisdiction to decide in this case whether federal law is binding. This is because Petitioner claimed in his certiorari petition and below that federal law *requires* state courts on collateral review to apply *Miller* retroactively. *See* Opening Br. at 21. However, as its language makes plain, § 1257(a) limits the Court in this case to deciding whether the Louisiana Supreme Court denied Petitioner a "title, right, privilege, or immunity [that] is specially set up or claimed under the Constitution or the treaties or statutes of … the United States." 28 U.S.C. § 1257(a).[3]

Section 1257(a) would be a timid sentinel if this Court's limited appellate jurisdiction extended to deciding an

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2. By "binding," this brief and our Opening Brief mean that federal law *requires* a state court to apply federal law.

3. "Under long-settled doctrine, this statutory designation [§ 1257(a)] of cases eligible for review is an implicit denial of jurisdiction in all other cases that might fall within the constitutional description of the Supreme Court's appellate jurisdiction." 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4006, at 176 & n.13 (3d ed. 2012) ("Wright") (citing cases).

issue governed by state law because a state court gave content to state law by voluntarily choosing to be guided by *non*-binding federal precedents. A *non*-binding federal precedent can no more create a "title, right, privilege, or immunity … under" federal law than could a non-binding resolution of Congress. Surely, if Petitioner had never argued in his petition that federal law was binding, but instead had argued *only* that the Louisiana Supreme Court misread *non*-binding federal precedents, this Court would have no basis for appellate jurisdiction over the case under the plain language of § 1257(a).

As Petitioner and *amicus* Center on the Administration of Criminal Law ("CACL") recognize, the evident purpose of § 1257(a) is to enable the Court to enforce the Supremacy Clause. *See* Pet. Br. at 38-39; CACL Br. at 10-12. But there is no such thing as supreme but non-binding federal law. In exercising its limited jurisdiction under § 1257(a), this Court is not like an author's blog that corrects every misinterpretation by someone else of anything the author ever wrote. Rather, this Court's jurisdiction under § 1257(a) over state courts extends to enforcing a title, right, privilege, or immunity that federal law makes binding in that state court case.

2. As the United States admits: "In a typical *Long* case, federal law applies of its own force; here, Louisiana chose to apply federal law." United States Br. at 7. Specifically, in *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296 (La. 1992), the Louisiana Supreme Court stated that "we are not bound to adopt the *Teague* standards."[4]

4. No one disagrees that under *Coleman v. Thompson*, 501 U.S. 722, 735 (1991), the summary dismissal by the Louisiana Supreme Court in this case could not itself satisfy *Long*'s first

Although the United States admits that the jurisdictional issue in this case therefore "presents a novel question under *Long*," it argues that the Court should exercise jurisdiction over the *Miller* retroactivity issue based on the Court's purported ability "to review certain embedded federal-law issues in state cases because those cases raise federal questions." United States Br. at 27-28. According to the United States, this Court's jurisdiction to "correct" a state court's "mistaken understanding of federal law" should apply to non-binding federal precedents. *Id*. at 7.

But the United States never explains how correcting a misinterpretation of non-binding federal precedents fits within the limitation of § 1257(a) under which this Court decides whether a state court denied a "right" (or title, privilege, or immunity) "*under*" federal law. As the Court has emphasized, its appellate jurisdiction over state court decisions is limited to "correct[ing] them *to the extent* that they incorrectly adjudge *federal rights*." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (emphasis added). Thus, the Court has no appellate jurisdiction over an issue in state court where "federal cases are being used only for the purpose of guidance." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

As the United States frankly concedes, in every case it relies upon, federal law "independent[ly] governed." United States Br. at 31. That is, in those cases, both the state court and this Court addressed the scope of *binding* federal law. Thus, in *Three Affiliated Tribes of*

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predicate condition. So the Court must look to the prior Louisiana decisions. *See* Opening Br. at 12-13.

Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138 (1984), the Court first decided that binding federal law did not "preclude[] the state courts from asserting jurisdiction over petitioner's claim" in that case. *Id.* at 147. Then, the Court exercised its jurisdiction over circumstances when a state court "may construe state law narrowly to avoid a perceived conflict with federal statutory or constitutional ***requirements***." *Id.* at 152 (emphasis added). The Court remanded because the state court had suggested it "regarded federal law as an ***affirmative bar***" to the state court's jurisdiction. *Id.* at 152, 155 (emphasis added). *See also Standard Oil Co. v. Johnson*, 316 U.S. 481, 483 (1942) ("the relationship between post exchanges and the government of the United States … is ***controlled*** by federal law") (emphasis added); *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 816 & n.14 (1986) (dictum) (this Court would have appellate jurisdiction if a state court rejected a preemption defense based on a federal statute); *Ohio v. Reiner*, 532 U.S. 17, 20-21 (2001) (state court made "determination of federal law" that petitioner "did not have a valid Fifth Amendment privilege"). *Cf.* Wright, § 4031, at 550-51 (suggesting that a state court's "mistaken conclusions of federal law" only "justify Supreme Court review after a completed state court decision has ***made it clear*** that federal questions ***control*** the outcome") (emphasis added).

Although § 1257(a) is 226 years old, neither the United States nor anyone else cited a single case where this Court said it was skipping over whether federal law was binding in order to explicate the scope of federal law. Petitioner and certain *amici* (but not the United States) cite the plurality in *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167 (1990), but it is the opposite of such a

decision. The plurality stated that it was not interpreting the scope of "federal law unnecessarily" because in a state court civil action pending on direct review, "whether a constitutional decision of this Court is retroactive … is a matter of federal law" as "federal law sets certain minimum requirements that States must meet." *Id.* at 177-79. In contrast, here the parties and their *amici* ask this Court to decide the *Miller* retroactivity issue in this case *without* first deciding whether retroactivity in state collateral review courts "is a matter of federal law."

The parties and their *amici* also ignore this Court's prior holding that even under a federal appellate court's far *broader* jurisdiction under 28 U.S.C. § 1291 over appeals from federal district courts, a federal appellate court is "not free" to decide the scope of federal law unless it first rules that federal law governs, regardless of any waiver by the parties. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991); Opening Br. at 17-18. The justification for an antecedent jurisdictional requirement that federal law must govern before this Court opines upon the scope of federal law is at its strongest under the much narrower language of § 1257(a).

The United States concedes that this Court would not have jurisdiction to correct a state court's misunderstanding of non-binding federal precedents if the question at issue "could be given content through state decisions." United States Br. at 32. But that is *this case* if the Louisiana Supreme Court was correct that federal law is not binding. As the United States admits, "[o]n remand, the state court *could* abandon *Teague* as a matter of state law and apply a different standard, subject to federal constitutional review." *Id.* at 28 n.11 (first emphasis added).

Neither the United States nor anyone else articulates any principled limit if jurisdiction under § 1257(a) extends to "correct[ing a state court's] mistaken understanding of [non-binding] federal law." *Id.* at 7. The United States notes that the Louisiana Supreme Court "relied solely on federal precedents." *Id.* at 27. But the United States never explains how its rationale that this Court has jurisdiction to correct a state court's misunderstanding of non-binding federal precedents would not apply to a state court decision that, for example, interprets five federal precedents and two precedents from another state. Or, where a single state judge's concurrence was necessary for the majority and only it relied exclusively on federal precedents.

The proposed expansion of the Court's appellate jurisdiction resulting from "Montgomery" jurisdiction would reach myriad types of civil and criminal cases and issues where state courts rely on non-binding federal precedents.[5] In addition to federal evidentiary and procedural precedents, federal precedents address numerous substantive issues that routinely arise in state court cases. For example, this Court has decided various tort issues, including proximate causation, *see Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (1934 Act); *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 265-68 (1992) (RICO), and materiality, *see Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (1934 Act). Likewise, the common law of federal contracts adopts and applies the Restatement (Second) of Contracts. *See Mobil Oil*

5. To start, a majority of states use the *Teague* standards. United States Br. at 33 n.12. This Court would thus be creating appellate jurisdiction over all these cases because they will all cite federal precedents.

Expl. & Producing Se., Inc. v. United States, 530 U.S. 604, 608 (2000). Given the broad reach of persuasive but non-binding federal precedents, adopting "Montgomery" jurisdiction would "greatly and unacceptably expand the risk" that this Court's appellate jurisdiction over state courts would be used to decide issues governed by state law. *Coleman v. Thompson*, 501 U.S. 722, 737-38 (1991).

Congress did not write § 1257(a) to include "whenever a state court relies on federal precedents." Accordingly, this Court should continue to limit its § 1257(a) jurisdiction to deciding issues where federal law is binding.

3. If this Court recognized jurisdiction to correct a state court's misunderstanding of non-binding federal precedents, this would also create a very strange kind of jurisdiction. Until this case, this Court's jurisdiction has always empowered the Court to exercise two options when assessing a federal standard: (a) usually, to explicate and apply the existing standard *or* (b) less often, to replace the existing federal standard with a different, better standard. *Teague* itself did the latter when it jettisoned the prior standard set forth in *Linkletter v. Walker*, 381 U.S. 618 (1965).

The rationale for "Montgomery" jurisdiction, however, is to assist the state court by correcting the state court's misreading of existing federal precedents. *See* United States Br. at 7. In a case of "Montgomery" jurisdiction, that rationale would nullify any option to change the existing standard, as such replacement would not correct the state court's misunderstanding of existing federal precedents. The resulting truncated jurisdiction would offend the "long and venerable" line of cases holding that

jurisdiction confers "'power to declare the law,'" whatever the law may be. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 101-02 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)).

4. Petitioner and certain *amici*, but *not* the United States, argue that this Court's adequate and independent state ground precedents extend the Court's appellate jurisdiction to where a state court relied on non-binding federal cases. Pet. Br. at 40-45; Equal Justice Initiative ("EJI") Br. at 24-30; CACL Br. at 7-12. But the first requirement in *Michigan v. Long* requires that a state court have relied on binding federal law, *supra*, at 6, and only the second requirement addresses the absence of an adequate and independent state ground. That first requirement is not satisfied here because the Louisiana Supreme Court has relied on what it has written were *non*-binding federal precedents. *Supra*, at 5.[6] The adequate and independent state ground prong cannot come into play because the *first* requirement of *Long* is unsatisfied.

If the *Teague* exceptions are not binding federal law in state court, then there can be no issue whether state law adequately and independently precludes the application of what would otherwise be binding federal law. If, however, the Louisiana Supreme Court was wrong because the

6. Every cited decision finding *Long* jurisdiction has involved binding federal law, typically under a parallel, binding federal constitutional provision or under a binding federal statute. *See, e.g.*, *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 502-03 (2012) (state court decision "necessarily depended upon a rejection of the federal claim"); *Florida v. Powell*, 559 U.S. 50, 56-59 (2010) (state decision rested on interpretation of "what *Miranda* demands").

federal *Teague* exceptions *do* bind state collateral review courts, then this Court has jurisdiction over the *Miller* retroactivity issue in this case. Either way, the adequate and independent state ground prong has nothing to do with whether this Court's jurisdiction in this case extends to the *Miller* retroactivity issue.

5. Adopting "Montgomery" jurisdiction is particularly inappropriate in the collateral review context because it would narrow federal habeas review for state prisoners under the federal statute. *See* Opening Br. at 30-31. If this Court has "Montgomery" jurisdiction in this case, "*Teague* principles will control … retroactivity … on state collateral review and on federal habeas corpus review." United States Br. at 33. As the claim would be the same, the deferential standard of review in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") would apply: a federal habeas court could only grant relief where a state court's interpretation of *Teague* was "contrary to, or involved an *unreasonable* application of, *clearly established* Federal law." 28 U.S.C. § 2254(d)(1) (emphasis added). Consequently, state prisoners could obtain federal *de novo* review concerning a *Teague* exception *only* in the rare instance that this Court grants discretionary certiorari from a state court ruling. Moreover, States also could ask this Court to grant certiorari to vacate any state court decision that purportedly misreads non-binding federal precedents in *granting* a retroactive remedy. Indeed, obtaining that opportunity for States is the original reason that Respondent gave for supporting "Montgomery" jurisdiction. *See* Resp't's Br. in Opp'n to Pet. for Cert. at 4-6.

If, by contrast, the retroactivity of a new constitutional rule in a state collateral review court is not a federal issue, then federal habeas courts *must* assess retroactivity issues *de novo*, because the state courts would not have made any "'adjudica[tion] on the merits'" of any federal claim for retroactivity. *See Cone v. Bell*, 556 U.S. 449, 472 (2009) (quoting 28 U.S.C. § 2254(d)); Opening Br. at 30-31. State prisoners will benefit far more often from having a mandatory *de novo* assessment of retroactivity in every federal habeas case, than from allowing prisoners *and* States to seek the rare grant of certiorari from this Court.[7]

6. The United States argues that "Montgomery" jurisdiction respects federalism and promotes comity by avoiding intrusive federal habeas litigation. United States Br. at 33-34. This exalts form over substance. Whether it comes from this Court or a subsequent federal habeas court, a federal court is nonetheless deciding whether a state prisoner must be re-sentenced or released. The name of the federal court is a distinction without a difference for comity concerns. Indeed, this Court has already rejected the argument that *Teague* requires uniformity between state court and federal retroactivity decisions, as such uniformity would undermine, rather than promote, federalism. *Danforth*, 552 U.S. at 280 ("Nonuniformity is, in fact, an unavoidable reality in a federalist system of government.").

7. Perhaps this explains why numerous *amici* such as the ACLU support Petitioner on retroactivity but are silent on the jurisdictional issues.

7. The United States is also wrong that the constitutional avoidance doctrine justifies creating "Montgomery" jurisdiction. United States Br. at 33. Never before has constitutional avoidance been used to *expand* this Court's limited appellate jurisdiction over state courts. Constitutional avoidance is used, *after* this Court has jurisdiction, to decide the merits on a non-constitutional basis (*e.g.*, statutory interpretation). *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600-01 (2012). It does not enable the Court to skip over its jurisdiction, much less to expand its jurisdiction broadly to a mass of new kinds of cases and issues.

Accordingly, this Court should decide whether the *Teague* exceptions are binding on state collateral review courts to avoid creating unbounded "Montgomery" jurisdiction. Resolving that issue will provide clarity not only for state courts, but also for federal habeas courts as to whether their assessments of retroactivity are *de novo* or deferential. *See supra*, at 12-13.

B. The *Teague* Exceptions Are Not Binding In State Collateral Review Proceedings.

The opening brief of the Court-Appointed *Amicus* raised and rebutted the four possible sources that could make the *Teague* exceptions binding in state collateral review proceedings of final convictions: (1) *Miller* itself, (2) a judge-created rule such as federal common law or "Reverse-Erie," (3) a federal statute, and (4) a judicially created implied remedy for constitutional violations. The parties and *amici* supporting jurisdiction have

championed only the last two of those four grounds.[8] This reply addresses these two arguments in turn.

1. Petitioner, unsupported by any *amicus*, argues that the *Teague* exceptions are made binding on state courts by 28 U.S.C. §§ 1257, 2241, and 2254. Pet. Br. at 37-39. Section 1257 limits this Court's appellate jurisdiction. *See supra*, at 4 & n.3. It certainly cannot make *other* federal statutes that apply only to federal courts also binding on state courts. Here, the other two federal statutes, §§ 2241 and 2254, go to this Court's almost-never-exercised *original* jurisdiction to hear habeas petitions from federal and state prisoners.[9] Neither statute imposes federal

8. No one argued that *Miller* itself federalizes retroactivity issues in state collateral review proceedings. Likewise, no one mentioned federal common law or "Reverse-Erie" as a basis to make the *Teague* exceptions binding on state collateral review courts. One *amicus* does cite inapposite Reverse-Erie cases. *See* CACL Br. at 20-22. This *amicus* ignores that *Johnson v. Fankell*, 520 U.S. 911 (1997), held that Reverse-Erie will not be used to require state courts to mimic the relief provided by federal courts under a federal statute that "simply does not apply in a nonfederal forum." *Id.* at 921. That fits this case precisely. *See* Opening Br. at 36.

9. Per 28 U.S.C. § 2241(b), this Court virtually always refers every original habeas petition filed in this Court to a federal district court. The Court's Rules state: "To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form *or from any other court. This writ is rarely granted*." Sup. Ct. R. 20-4(a) (emphasis added). "This Court does not, absent exceptional circumstances, exercise its jurisdiction to issue writs of habeas corpus when an adequate remedy may be had in a lower federal court." *Dixon v. Thompson*, 429 U.S. 1080, 1080-81 (1977).

retroactivity requirements on state court collateral review proceedings. Accordingly, no federal statute provides a basis for making the *Teague* exceptions binding in state collateral review courts.

2. *Danforth* specifically rejected the dissent's argument that the Constitution makes *Teague* binding on state collateral review courts, and instead held that *Teague*'s standard comes from "the statute's command." *Danforth*, 552 U.S. at 278-79, 288, 290-91; *id.* at 301, 307-09 (Roberts, C.J., dissenting). *Danforth* held that "[s]ince *Teague* is based on statutory authority that extends only to federal courts applying a federal statute, it cannot be read as imposing a binding obligation on state courts." *Id.* at 278-79.[10] In state collateral review proceedings for final convictions, therefore, any retroactivity "a state court chooses to provide its citizens" is "a question of state law," "primarily concerned, not with the question whether a constitutional violation occurred, but with the availability or nonavailability of remedies." *Id.* at 288, 290-91.[11]

Even if the Court revisits the statutory rationale of *Danforth*, that rationale was correct. Because the federal habeas statute unquestionably provides state prisoners retroactivity remedies in federal habeas court, the only

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10. *See also* United States Br. at 31 ("*Teague*'s framework was not formulated to govern state collateral review; it developed to interpret the federal habeas statute.").

11. The reliance of CACL's *amicus* brief (at 19 n.13) on "early retroactivity cases" before *Teague* is misplaced, because this Court "did not at the time distinguish between direct appeal and collateral review for purposes of retroactivity," *Danforth*, 552 U.S. at 296 n.1 (Roberts, C.J., dissenting).

constitutional question is whether this Court should create an additional, judicially implied remedy under the Constitution to require that state collateral review courts provide at least the same retroactivity remedy as federal habeas courts would. The answer is plain: where "Congress has provided what *it* considers adequate remedial mechanisms for constitutional violations[,]" this Court will not create an additional implied remedy for such constitutional violations. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (emphasis added). It is up to Congress—not the Court—to decide whether, as certain *amici* contend, the statutory limitation of federal habeas remedies to federal courts should be changed for policy reasons such as being "intrusi[ve,]" EJI Br. at 37, or a "waste of judicial resources," CACL Br. at 21 n.14.

Petitioner and various *amici* conflate the judicially implied remedy they seek with state court consideration of constitutional claims under 42 U.S.C. § 1983. *See, e.g.*, CACL Br. at 20-22. But this ignores two critical distinctions. First, § 1983 is an express remedy.

Second, beginning with the Habeas Corpus Act of 1867, the federal habeas statute has applied only to *federal* courts giving remedies to state prisoners. Ch. 28, 14 Stat. 385. In contrast, 42 U.S.C. § 1983, originally enacted in the Enforcement Act of 1871 (third act), has provided civil plaintiffs remedies enforceable in federal or state court. Ch. 22, 17 Stat. 13. Thus, the federal statutory habeas remedy for state prisoners is unlike § 1983 because the federal habeas statutory remedy applies in only federal courts.

Likewise, the EJI incorrectly relies on *Griffith v. Kentucky*, 479 U.S. 314 (1987). *See* EJI Br. at 34-35. The EJI omitted two critical words—"direct review"—from

its quote: "failure to apply a newly declared constitutional rule to criminal cases pending on *direct review* violates basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 321-22 (emphasis added). Accordingly, *Griffith v. Kentucky* did not overrule the statement in *Linkletter v. Walker* that "the Constitution neither prohibits nor requires retrospective effect" as applied to *collateral review* proceedings after convictions became final. *Linkletter*, 381 U.S. at 629; *see Danforth*, 552 U.S. at 297 (Roberts, C.J., dissenting) ("In *Griffith* … we abandoned *Linkletter* as it applied to cases still on direct review.").

Similarly, although Justice Harlan in *Mackey* referred to the Constitution, he did so for guidance in exercising the statutory discretion provided by the federal habeas statute to make some new rules retroactive on federal collateral review, not because the Constitution itself requires retroactivity for those new rules. Justice Harlan's concurrence was rooted in "the purposes for which the writ of habeas corpus is made available," and "*not* the purpose of the new [constitutional] rule." *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J., concurring) (emphasis added). As Justice Harlan explained: "As regards cases coming here on collateral review, the problem of retroactivity is in truth none other than one of resettling the limits of the … Great Writ …." *Id.* at 701-02. As the *Teague* plurality later reiterated, "the Court *never* has defined the scope of the writ simply by reference to a *perceived need to assure* that an individual accused of a crime is afforded a trial free of *constitutional* error." *Teague*, 489 U.S. at 308 (brackets omitted) (emphasis added) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion)).[12]

12. No one disputes that in *Teague*, Justice White and Justice Brennan also expressly stated, without contradiction, their

Petitioner and its *amici* reprise the argument of the *Danforth* dissent, 552 U.S. at 303-10, that this Court's precedents on retroactivity in state actions for civil damages on direct review support making the *Teague* exceptions for final criminal convictions binding in state collateral review proceedings. *See* Pet. Br. at 47; EJI Br. at 29-35; CACL Br. at 12-13. *Danforth* already rejected this argument because of the difference between direct and collateral review. *See Danforth*, 552 U.S. at 284-88.

In particular, *Danforth* held that Justice Stevens's dissent in *American Trucking*, not the plurality, provided the more pertinent retroactivity analysis. *See* 552 U.S. at 286-87. As *Danforth* explained, Justice Stevens's retroactivity analysis in *American Trucking* was joined by four other justices in that case. *Id.* As *Danforth* further noted, *id.* at 287, *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), explicitly adopted the *American Trucking* dissent's direct versus collateral distinction. *See Harper*, 509 U.S. at 97 (new civil constitutional rules must be "given full retroactive effect in *all cases still open on direct review*") (emphasis added).

Quoting Justice Harlan, Justice Stevens's dissent in *American Trucking* had explained:

> The critical factor in determining when a new decisional rule should be applied to a

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understanding that the *Teague* plurality's exceptions were an exercise "in construing the reach of the habeas corpus statutes." 489 U.S. at 317 (White, J., concurring in part and concurring in judgment); *see id.* at 332-33 (Brennan, J., dissenting) (referring to the *Teague* plurality's "reading" and "interpretation" of the "federal habeas statute").

> transaction consummated prior to the decision's announcement is … the point at which the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen…. [A]s in the criminal field the crucial moment is, for most cases, *the time when a conviction has become final*, see my *Desist* dissent, *supra,* so in the civil area that moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become *res judicata*.

496 U.S. at 215 (first emphasis added) (quoting *United States v. Donnelly*, 397 U.S. 286, 295-97 (1970)).[13] Of course, Petitioner's post-*Miller* case was brought for collateral review, not direct review.

At bottom, no one has explained how the Court can constitutionalize the *Teague* exceptions without overruling the rationale of *Danforth* that *Teague* is statutory, not constitutional. *See supra* at 16-17. That rationale leaves no principled basis to hold that *Teague* is statutory when

13. *Danforth* did quote the *American Trucking* plurality's statement that federal law "sets certain minimum requirements that States must meet but may exceed in providing appropriate relief." 552 U.S. at 288. However, this came a sentence after noting *Griffith*'s holding that "a new constitutional holding" must be applied in "all cases still pending on direct review." *Id.* at 288 n.23. Accordingly, *Danforth* did not recognize any constitutional minimum retroactivity requirements for state collateral review courts for convictions that had become final before the new constitutional rule.

assessing whether federal retroactivity standards are a ceiling in state collateral review courts but constitutional when assessing whether they are a floor. *See Danforth*, 552 U.S. at 309-10 (Roberts, C.J., dissenting) ("I do not see any basis in the majority's logic for concluding that States are free to hold our decisions retroactive when we have held they are not, but not free to hold that they are not when we have held they are."). *Stare decisis* precludes inconsistency with *Danforth*'s rationale. *See Cty. of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring) ("As a general rule, the principle of *stare decisis* directs [this Court] to adhere not only to the holdings of [its] prior cases, but also to their explications of the governing rules of law.").

In all events, creating a judicially implied constitutional remedy for the *Teague* exceptions would hurt more state prisoners than it helps. As shown, *supra*, at 12-13, if the state collateral review courts are *not* required by federal law to apply the *Teague* exceptions, then federal habeas courts in cases brought by state prisoners will make *de novo* rulings on the retroactivity under federal law of a new constitutional rule, subject to full appellate review, including by this Court through its much broader appellate jurisdiction under 28 U.S.C. § 2254(a). In contrast, if state collateral review courts *are* required by federal law to apply the *Teague* exceptions, the only opportunity available to state prisoners for federal *de novo* review would be under this Court's discretionary, and rarely exercised, certiorari jurisdiction over state court decisions. *See supra*, at 12. Federal habeas court assessment of state-prisoner retroactivity claims would be limited to the deferential standard of review under AEDPA. *See supra*, at 12.

EJI argues that a future Congress "*could* … limit or eliminate access to federal habeas for prisoners seeking retroactive application of new substantive rules." EJI Br. at 37 n.21 (emphasis added). This does not present a justiciable reason to imply a constitutional remedy now. This Court decides cases and controversies, not hypotheticals. If Congress ever were to limit or eliminate retroactivity in federal habeas proceedings brought by state prisoners, this Court could then decide whether such limitation is constitutional. Because that question is not presented *in this case*, it provides no basis to create a judicially implied constitutional remedy that requires state collateral review courts to mirror the *existing* retroactivity remedy under the *existing* federal habeas statute.

Finally, Petitioner and his *amici* ignore the uncertainty and burden for the judiciary that would be created under a judicially implied constitutional remedy. Numerous questions would arise, including whether the judicially implied constitutional remedy matched or was broader than the *Teague* exceptions, whether procedural limitations imposed under the federal habeas statute also limit the implied constitutional remedy, and whether federal prisoners also may assert the judicially implied constitutional remedy. Based on the Court's experiences with the judicially implied constitutional remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), it is reasonable to expect that these and other questions would likely take many years to resolve. The Court should not engage in this new experiment in judicially implied constitutional remedies. *See* Opening Br. at 29.

CONCLUSION

The Court's jurisdiction in this case does not extend to deciding whether the Louisiana Supreme Court correctly refused to give retroactive effect to *Miller*.

Respectfully submitted,

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