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

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

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INTEREST OF *AMICUS CURIAE*

Amicus curiae was appointed by the Court to "argue against this Court's jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to [the Court's] decision in *Miller v. Alabama*, 567 U.S. ___ (2012)."[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has correctly asked whether it has jurisdiction to decide a particular *issue* in this case. Pursuant to both Article III of the Constitution and 28 U.S.C. § 1257, this Court has limited appellate jurisdiction when cases come from state courts. That jurisdiction does not extend to either issues of state law or advisory opinions on issues of federal law. Under these principles, this Court does not have jurisdiction to decide whether the Louisiana Supreme Court correctly refused to give retroactive effect in this case to *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012), which this brief calls "the *Miller* retroactivity issue."

The Louisiana Supreme Court has made four rulings that are relevant to whether this Court's jurisdiction in this case extends to the *Miller* retroactivity issue. (A) Since 1992, the Louisiana Supreme Court has held that

1. Pursuant to Rule 37.6 of the Rules of the Supreme Court, no counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution to fund the preparation or submission of this brief. In addition, no persons or entities other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

the availability of state collateral review proceedings for the retroactive application of new constitutional rules to already final convictions[2] is governed by state law, *not* federal law. (B) Nonetheless, since 1992, Louisiana has voluntarily used the non-binding "standards" of *Teague v. Lane*, 489 U.S. 288 (1989), including *Teague*'s exceptions to non-retroactivity, for guidance concerning the state law issue of when Louisiana's collateral review proceedings are available to provide retroactive application of a new federal constitutional rule to final criminal convictions. (C) In 2013, in a prior case, the Louisiana Supreme Court cited its 1992 decision and decided that the *Teague* standards do not support the use of Louisiana's collateral review proceedings to apply *Miller* retroactively to convictions that were already final before *Miller*. (D) In 2014, the Louisiana Supreme Court in the judgment below summarily denied petitioner's appeal, citing its 2013 decision.

This Court's appellate jurisdiction in this case does not extend to deciding the issue whether, under federal law, *Miller* falls within a *Teague* exception unless this Court first decides that ruling (A) is wrong. That is, this Court has jurisdiction in this case to decide *Miller*'s retroactivity *only if* this Court first decides that *binding* federal law requires *state* collateral review proceedings to

2. By "final," this brief means that the direct review process, including any petition for certiorari to this Court, had concluded. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."). By "new constitutional rules," this brief means federal constitutional rules that were newly announced after a conviction became final.

be available for retroactive applications to final convictions of new federal constitutional rules that fall within the *Teague* exceptions. It is not sufficient for this Court's appellate jurisdiction that a state court has used non-binding federal decisions as non-binding guidance for the state court's application of its own law.

The presumption of *Michigan v. Long*, 463 U.S. 1032 (1983), does not create jurisdiction over the *Miller* retroactivity issue in this case for two reasons. First, on its own terms, the first predicate condition for the *Michigan v. Long* presumption requires that the judgment below either rest on or be interwoven with binding federal law. This condition is not satisfied by a summary denial like the judgment below. *See Coleman v. Thompson*, 501 U.S. 722, 735-40 (1991). Instead, this Court must inquire into prior Louisiana decisions. Because the Louisiana Supreme Court has ruled that *Teague* does *not* create binding exceptions in state court collateral review proceedings for final convictions, the first *Michigan v. Long* condition has not been satisfied.

Independently, the *Michigan v. Long* presumption is a means to determine, when there is both a state issue and a federal issue in a state court case, which one was the basis for the judgment by the state court. The presumption is not a means to confer appellate jurisdiction to decide an issue that, in this Court's view, is governed by state law in the case under review. This Court's appellate jurisdiction in a case from state court stops when this Court determines that the issue on which certiorari was granted is actually governed by state law in that case. This Court never has jurisdiction to issue advisory opinions. Thus, this Court's appellate jurisdiction does not extend to

deciding the *Miller* retroactivity issue in this case unless federal law governs the issue of the retroactivity of new constitutional rules in state court collateral proceedings for final convictions.

Federal law, however, does not govern whether state collateral review courts must apply the *Teague* exceptions to final convictions. Accordingly, this Court's jurisdiction in this case does not extend to whether *Miller* falls within the *Teague* exceptions.

It is the federal habeas statute that provides the authority for *Teague*'s exceptions to the finality of state convictions that require retroactivity for some new constitutional rules in federal habeas cases. That federal statute, however, imposes requirements on *only* federal habeas courts. Under its plain meaning, the federal habeas statute does not impose any binding requirements on state collateral review courts for when those courts must recognize exceptions to finality. Especially given that Congress has enacted an adequate federal court habeas remedy that enforces the *Teague* exceptions, this Court should not create in addition an implied constitutional remedy that requires state collateral review courts to grant relief based on the *Teague* exceptions to finality. Likewise, especially as Congress has chosen not to impose requirements on state collateral review courts, there is no warrant in this case to create a judge-made federal common law rule to overturn that decision by Congress.

This Court's lack of appellate jurisdiction does not leave Mr. Montgomery without a federal forum to interpret and apply the *Teague* exceptions as binding federal law. Petitioner may file a case in federal court seeking a federal

habeas writ and argue there that *Miller* fits within the *Teague* exceptions. In that federal forum, federal law and *de novo* federal interpretations of the *Teague* exceptions are binding. This well-trodden route will take longer for Mr. Montgomery than if this Court decided now whether *Miller* fits within the federal interpretation of the *Teague* exceptions. But that is simply the natural consequence of this Court's limited appellate power under our federalist system.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. III, § 2:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority*;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in

> which a State shall be Party, the supreme Court shall have original Jurisdiction. *In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.*[3]

28 U.S.C. § 1257:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a *treaty or statute of the United States* is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the *Constitution, treaties, or laws of the United States*, or where any title, right, privilege, or immunity is specially set up or claimed *under the Constitution or the treaties or statutes of*, or any commission held or authority exercised under, the United States.

28 U.S.C. § 2254:

> (a) *The Supreme Court, a Justice thereof, a circuit judge, or a district court* shall *entertain an application for a writ of habeas corpus* in behalf of a person in custody pursuant to *the judgment of a State court* only on the

3. Throughout this brief, all emphases are added unless otherwise noted.

> ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

In February 1964, petitioner Henry Montgomery was convicted of a murder he committed when he was seventeen. He was later retried, found guilty, and, on March 19, 1969, sentenced to mandatory life imprisonment under Louisiana law. J.A. 1. His conviction was affirmed by *State v. Montgomery*, 242 So. 2d 818 (La. 1970).

In 2012, this Court decided *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 2469.

Mr. Montgomery subsequently filed a motion in the Louisiana Nineteenth Judicial District Court, arguing that "a person … who[] was convicted as a juvenile and sentenced to life has endured an illegal sentence …. [T]he law requires that the movant be resentenced." J.A. 21-22. The trial court denied the motion, holding that *Miller* did not satisfy either of the two exceptions articulated in *Teague v. Lane*, 489 U.S. 288, 307 (1989). App'x to Pet. for Writ of Certiorari at 2.

On his application for a supervisory writ of review to the Louisiana First Circuit Court of Appeal, Mr. Montgomery argued that:

> [F]or at least three reasons the trial court erred: (1) the Louisiana Supreme Court held that **Miller** is retroactive, ruling so two weeks after **Craig** [*v. Cain*, No. 12-30035, 2013 WL 69128 (5th Cir. Jan. 4, 2013)] …. (2) although the federal court in **Craig** held that **Miller** is not retroactive – specifically in a federal habeas proceeding – no rule of law prohibits the Louisiana Supreme Court from applying the ruling retroactively. In **Danforth v. Minnesota**, the United States Supreme Court held that **Teague v. Lane** … does not constrain a state court to give broader effect to new rules of criminal procedure that [sic] is required by that opinion; and (3) a close reading of **Miller** demonstrates that the United States Supreme Court applied the decision retroactively.

J.A. 96.

The appeal was transferred to the Supreme Court of Louisiana, which denied Mr. Montgomery's petition on June 20, 2014, citing *State v. Tate*, 130 So. 3d 829 (La. 2013). Justice Johnson dissented because "*Miller* announced a new rule of criminal procedure that is substantive and consequently should apply retroactively." App'x to Pet. for Writ of Certiorari at 2.

In briefing the petition for certiorari to this Court, both parties argued that this Court has jurisdiction in this case to decide whether *Miller* adopted a new substantive rule that applies retroactively on collateral review. The Court granted certiorari but also posed the additional question of whether in this case it has jurisdiction to decide whether *Miller* has retroactive effect.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION TO REACH THE *MILLER* RETROACTIVITY ISSUE UNLESS FEDERAL LAW MAKES THE *TEAGUE* EXCEPTIONS BINDING IN STATE COLLATERAL PROCEEDINGS.

A. The Court Lacks Jurisdiction To Decide Issues Of State Law Or Render Advisory Opinions On Federal Issues.

Article III of the Constitution and 28 U.S.C. § 1257(a) limit this Court's appellate jurisdiction over state courts to reviewing federal questions. *See* Stephen M. Shapiro, SUPREME COURT PRACTICE 208 (10th ed. 2013) ("[T]he Court lacks jurisdiction to review matters of state law. That principle in turn reflects the Article III limitations on federal judicial power, as well as the jurisdictional restrictions imposed on the Court by 28 U.S.C. § 1257."). Section 2 of Article III grants this Court "appellate Jurisdiction" to review state cases "arising under" the Constitution, federal laws, or treaties "with such Exceptions, and under such Regulations as the Congress shall make." U.S. Const., art. III, § 2. Section 1257(a), since its genesis stemming back to section 25 of the Judiciary Act of 1789, limits the Court's jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" to issues governed by binding federal law. *See Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991) (holding that the Court's appellate jurisdiction under § 1257(a) is limited "to enforcing the *commands* of the United States Constitution").

Specifically, "in a case coming from a state court this court can consider only Federal questions, and … it cannot entertain the case unless the decision was against the plaintiff in error upon those questions." *Leathe v. Thomas*, 207 U.S. 93, 98 (1907). In contrast, this Court "must accept as controlling" a state court ruling on a state law issue. *Am. Ry. Express Co. v. Kentucky*, 273 U.S. 269, 272 (1927).

Consequently, this Court's 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). Where federal law is not binding, and thus the state court could render the same judgment on remand even after this Court "corrected its views of federal laws," this Court's review would amount to nothing more than an advisory opinion. *Id*. at 126.

B. *Michigan v. Long*'s Presumption Does Not Apply To The *Miller* Retroactivity Issue Because The Louisiana Supreme Court Has Held That Federal Law Is Not Binding.

During the certiorari briefing, both parties asserted that this Court has appellate jurisdiction under *Michigan v. Long*, 463 U.S. 1032 (1983), to decide in this case whether the Louisiana Supreme Court correctly refused to give retroactive effect to *Miller*. Such jurisdiction would constitute a substantial and unwarranted extension of *Michigan v. Long*.

In *Michigan v. Long*, the Court reaffirmed that it has no appellate jurisdiction over a state court decision where "federal cases are being used only for the purpose

of guidance." 463 U.S. at 1040-41. *Michigan v. Long* created a two-part test that would determine whether "the most reasonable explanation [is] that the state court decided the case the way it did because it believed that federal law *required* it to do so." *Id.* at 1041. This test is satisfied only "[(1)] when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, *and* [(2)] when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Id.* at 1040-41. If the first condition is satisfied, the second condition is also satisfied unless the state court decision includes a "plain statement" that it is not relying on federal law as binding. *Id.*

The Court held in *Harris v. Reed*, 489 U.S. 255 (1989), that *Long*'s jurisdictional presumption applies equally to federal habeas review of state collateral review decisions. "*Harris* applies precisely the same rule as *Long*." *Coleman v. Thompson*, 501 U.S. 722, 736 (1991) ("It is unmistakably clear that *Harris* applies the same presumption in habeas that *Long* and *Caldwell* adopted in direct review cases in this Court.").

In explaining the first condition for the *Michigan v. Long* and *Harris* presumption, this Court has held that "[a] *predicate* to the application of the *Harris* [and *Long*] presumption is that the decision of the last state court to which the petitioner presented his federal claims must *fairly appear to rest primarily on* federal law or be *interwoven with* federal law." *Id.* at 735. "[S]ome ambiguity" is not enough. *Id.* at 744. "In those cases in which it does not fairly appear that the state court rested its decision primarily on federal grounds, it is simply not

true that the 'most reasonable explanation' is that the state judgment rested on federal grounds." *Id.* at 737.

In particular, *Coleman* held that a summary dismissal that did not mention federal law by a state's highest court of an appeal from a denial of collateral relief is not sufficient to satisfy *Long*'s first condition. *Id.* at 735-40. The Court rejected effectively eliminating the first *Long* condition so that in "every case in which a state prisoner presented his federal claims to a state court," federal law would apply absent a plain statement by the state court that it was not relying on federal law. *Id.* at 737-38. Rather, *Coleman* held that "we will not impose on state courts the responsibility for using particular language in ... every denial of state collateral review ... in order that federal courts might not be bothered with reviewing state law …." *Id.* at 739. Such an approach would not serve *Long*'s objectives of respect for state interests and efficiency for federal courts. *Id.* at 738. Under such an approach, states and state courts would be burdened by federal review merely because overwhelmed state courts did not always provide a plain statement in cases not fairly resting on federal law. *Id.* at 738-39. And federal courts would not avoid that much extra work by blindly invoking the presumption rather than checking for themselves whether the first *Long* condition is satisfied. *Id.* at 739-40.

Here, as it did when faced with the summary dismissal in *Coleman*, this Court must look beyond the particular words in the Louisiana Supreme Court's summary denial, which did not mention federal law, to determine whether Louisiana decisions in this particular context fairly rest on or are interwoven with federal law. *See id.* at 740-44. *Long* itself favorably cited *Delaware v. Prouse*, 440 U.S. 648,

653 (1979), as having "referred to *prior* state decisions that confirmed [this Court's] understanding of the opinion in that case." 463 U.S. at 1042 n.8.

Here, "it is simply not true that the 'most reasonable explanation' is the state judgment rested on federal grounds." *Coleman*, 501 U.S. at 737. The judgment below cites no federal decision whatsoever. The only decision it does cite, *State v. Tate*, 130 So. 3d 829 (La. 2013), in turn grounds its analysis on the Louisiana Supreme Court's foundational retroactivity decision of *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296 (La. 1992) ("*Taylor*"). *Taylor* could not have provided a clearer or plainer statement that the Louisiana Supreme Court believed it was *not bound* in state collateral proceedings for final convictions by federal law on retroactivity. *Taylor* held: "*We ... adopt the* Teague *standards* for all cases on collateral review in our state courts. In doing so, we recognize that *we are not bound to adopt the* Teague *standards*." *Id.*

Thus, unlike in *Long*, it is not the case here that "the state court 'felt *compelled* by what it understood to be federal constitutional considerations to construe ... its own law in the manner it did.'" 463 U.S. at 1044 (quoting *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 568 (1977)). Quite the opposite, the Louisiana Supreme Court has held expressly that it is not bound by federal law as embodied in *Teague*. There is no basis for the *Long* presumption because Louisiana's Supreme Court has established a binding precedent that state, not federal, law governs retroactivity for new constitutional rules announced after a final conviction in Louisiana's collateral review courts.

This case is nothing like the most common application of *Michigan v. Long*—where this Court is determining whether the state court judgment rested on a procedural default under state law. In such instance, absent the potential procedural default, *binding* federal law would apply.

The present case also presents a fundamentally different context from one in which a state court interprets state law to conform to, or be the same as, federal law that is *binding* in state court. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984), illustrates this critical distinction. In *Three Affiliated Tribes*, the Supreme Court of North Dakota interpreted a state statute as disclaiming state-court jurisdiction over a claim against a non-Native American by a Tribe that had not accepted jurisdiction under the statute. This Court concluded that the state court decision was interwoven with federal law because the North Dakota Supreme Court interpreted the state statute under the mistaken view that a federal statute ***required*** this interpretation. Because the state court's opinion suggested that it viewed "federal law as an affirmative ***bar***" to interpreting more broadly the state statute on state court jurisdiction over claims by Tribes, this Court had appellate jurisdiction. *Id.* at 155-58.

By contrast, the Louisiana Supreme Court could not have been seeking "to avoid a perceived conflict with federal statutory or constitutional *requirements*," *id.* at 152, because it had held that federal law was not binding. Federal law is simply not interwoven with state law where the Louisiana Supreme Court has said it is applying state law to retroactivity and using non-binding federal cases

as persuasive authority. *See Colorado v. Nunez*, 465 U.S. 324, 326 (1984) (dismissing writ as improvidently granted where, despite citing federal cases in the state court opinion, the state court judgment rested on state law grounds) (White, J., concurring).

That a state models state law on non-binding federal law does not make state and federal law "interwoven." To use a weaving analogy, imagine that another designer models her suit on a classic Chanel suit. The two suits would look similar but they would not be interwoven.

If this Court finds appellate jurisdiction in this case because state court citations to non-binding federal law make state and federal law "interwoven," this would invite a host of other petitions in civil and criminal cases where state law has been voluntarily modeled on federal law. This is because many state law claims are modeled on federal law.[4]

Consider, for example, the 44 states that have adopted rules patterned on the Federal Rules of Evidence.[5] In those states, state courts often cite exclusively federal evidentiary cases as guiding authority for interpreting a

4. State antitrust statutes, for example, are generally modeled on federal law. "All fifty states, as well as the District of Columbia, Puerto Rico, and the Virgin Islands, have some type of antitrust statute. Generally, these statutes are modeled after the federal antitrust laws …." 1 American Bar Association, ANTITRUST LAW DEVELOPMENTS 633 (7th ed. 2012).

5. "Forty-four states, Guam, Puerto Rico, the Virgin Islands, and the military have adopted rules of evidence patterned on the Federal Rules of Evidence." 6 Jack B. Weinstein & Margaret A. Berger, WEINSTEIN'S FEDERAL EVIDENCE T-1 (2d ed. 2015).

state rule of evidence. If reliance on non-binding *Teague*-based standards is enough for appellate jurisdiction in this case, then there would be no principled reason why a state court's reference to guiding federal authority interpreting the Federal Rules of Evidence should not also give rise to this Court's jurisdiction. And so on in the many areas where state law is modeled on federal law.

Justices long have warned against the "emerging tendency" to "enlarge [this Court's] own involvement in litigation conducted by state courts," which tendency "feeds on itself." *See, e.g.*, *Nunez*, 465 U.S. at 328-29 (Stevens, J., dissenting). If this Court has jurisdiction based on a state court's use of non-binding federal decisions, litigants, especially institutional litigants, will file a flood of petitions for certiorari. *Id.*

In sum, the Louisiana Supreme Court's collateral review retroactivity decisions do not rest on, and are not interwoven with, binding federal law. Accordingly, *Michigan v. Long* does not give this Court jurisdiction in this case to decide the *Miller* retroactivity issue.[6]

6. If this Court believes the existence of a state law ground needs further clarification, this Court has the option to remand to the state court to clarify whether the state court's decision was based on binding federal law. *See Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 78 (2000); *Long*, 463 U.S. at 1041 n.6.

C. Independently, *Michigan v. Long* Does Not Confer Appellate Jurisdiction To Decide An Issue Governed By State Law In This Case.

Even if the *Michigan v. Long* presumption were satisfied, the extent of this Court's appellate jurisdiction would be to decide—but only to decide—issues governed by federal law in this case. Nothing in *Michigan v. Long* would give the Court appellate jurisdiction to decide the retroactivity of *Miller* in this case *if* it is this Court's view that the *Teague* exceptions are not binding as a matter of federal law in state collateral review proceedings.

This follows from three established propositions. First, this Court's appellate jurisdiction over state courts does not extend to an issue governed by state law. *Supra* at 9-10 (citing authorities). Second, whether claims made in state court "are based on a federal right or are merely of local concern is itself a federal question *on which this Court*, and not the [highest state court], *has the last say.*" *Angel v. Bullington*, 330 U.S. 183, 189 (1947). Third, if this Court decides that federal law does not make the *Teague* exceptions binding in state court collateral review proceedings, this Court's appellate jurisdiction in this case is at an end. *See* Stephen M. Shapiro, SUPREME COURT PRACTICE 227 (10th ed. 2013) ("If the Court does assume jurisdiction of a case because of a federal question decided in the state court, it will generally not proceed further and consider separate questions of state law.").

Even when exercising the broader appellate jurisdiction under 28 U.S.C. § 1291 over an appeal from a federal district court, a federal appellate court is "*not free* to promulgate a federal common law rule without"

first deciding that federal law governs, regardless of any waiver by the parties. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991). Surely under this Court's more limited appellate jurisdiction over issues from state courts, a necessary antecedent to the power to declare the contours of a federal rule is a determination that federal law governs in the state court proceeding. This Court thus lacks appellate jurisdiction in this case to decide the *Miller* retroactivity issue if the Court determines, as a threshold matter, that retroactivity in this case is actually governed by state law.

If state law governs retroactivity in state collateral review proceedings for final convictions, anything this Court says in this case about federal retroactivity law in federal habeas proceedings for final state convictions would be an advisory opinion. But *Michigan v. Long* "does not in any way authorize the rendering of advisory opinions." 463 U.S. at 1042. Expanding this Court's appellate jurisdiction to deciding a state law issue that was guided by non-binding federal decisions would lead here to an advisory opinion in that "the same judgment" in this case could "be rendered by the state court [on remand] after we corrected its views of federal laws." *Id.* (quoting *Herb*, 324 U.S. at 126).

Assume this case were to be reversed and remanded by a divided Court, *without* deciding that the *Teague* exceptions are *binding* federal law in state collateral proceedings for final convictions.[7] On remand, the

7. This Court's decisions about the scope of the *Teague* exceptions often have dissents. *See, e.g.*, *Chaidez v. United States*, 133 S. Ct. 1103 (2013) (two Justices dissent); *Beard v. Banks*, 542 U.S. 406 (2004) (four Justices dissent).

Louisiana Supreme Court would be entirely free to agree with the dissent. By issuing an interpretation of *Teague* that is not binding on the Louisiana Supreme Court, this Court would be issuing an advisory opinion.

This would starkly contrast with the core uses of *Michigan v. Long*. When the issue is whether the decision below rested on a procedural default under state law, if it did not, then *binding* federal law (usually a constitutional command) applies. *See supra* at 14. When a state statute has been interpreted, the issue is whether that interpretation was based on a misconstruction of *binding* federal law. *See supra* at 14-15. In neither situation is the Court issuing an advisory opinion about federal law that is not binding in that case.

To be sure, if this case were remanded, because of the availability of subsequent federal habeas proceedings, it is likely that the Louisiana Supreme Court would adopt state law standards similar to the federal standards articulated in an advisory opinion from this Court. But it is not a certainty. Louisiana's Supreme Court might decide that it is better for a federal habeas court to order a resentencing for a 46-year-old murder conviction rather than have the Louisiana Supreme Court itself apply non-binding standards that it considered too broad. Most importantly, this Court does not weigh the probabilities so that it sometimes issues advisory opinions in cases coming from the state courts. The effect of exercising jurisdiction in this case would "greatly and unacceptably expand the risk" that this Court's appellate jurisdiction over state court judgments would result in advisory opinions. *Coleman*, 501 U.S. at 738.

Accordingly, for all these reasons, *Michigan v. Long* does not create jurisdiction over an issue where a state's highest court has held that the issue is governed by state law, and that state's courts cite federal cases as guiding but non-binding authority. To have jurisdiction to decide the issue of *Miller*'s retroactivity in this case, this Court must first decide that, contrary to the Louisiana Supreme Court, the *Teague* exceptions to finality are binding federal law in state court collateral proceedings. We turn to that issue next.

II. THIS COURT'S JURISDICTION DOES NOT EXTEND IN THIS CASE TO THE *MILLER* RETROACTIVITY ISSUE BECAUSE FEDERAL LAW DOES NOT MAKE THE *TEAGUE* EXCEPTIONS BINDING IN STATE COLLATERAL REVIEW PROCEEDINGS.

Point I shows that this Court would have appellate jurisdiction to decide the *Miller* retroactivity issue in this case only if, contrary to what the Louisiana Supreme Court has held, federal law makes the *Teague* exceptions binding in state collateral review proceedings for final convictions. In other words, only if federal law governs *Miller*'s retroactivity in this case does this Court have jurisdiction to review whether the non-retroactivity decision below was correct.

This Court undoubtedly has appellate jurisdiction to decide the threshold issue of whether binding federal law requires state collateral review courts to apply the *Teague* exceptions. *See supra* at 17 (quoting *Angel v. Bullington*). Petitioner preserved this threshold federal issue below. Petitioner argued to the Louisiana Circuit

Court of Appeal and Louisiana Supreme Court that "a close reading of *Miller* demonstrates that the United States Supreme Court applied the decision retroactively." J.A. 96. Petitioner thus presented below the claim that federal law requires state courts on collateral review to apply *Miller* retroactively. Petitioner's certiorari petition similarly presented the same argument to this Court. *See* Pet. at 13-14. "[O]nce a federal claim is properly presented, a party can make any argument in support of that claim" in this Court. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992) (quotation marks omitted); *see also Illinois v. Gates*, 462 U.S. 213, 248 (1983) ("We have never suggested that the jurisdictional stipulations of § 1257 require that all arguments on behalf of, let alone in opposition to, a federal claim be raised and decided below.") (White, J., concurring); *Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899) ("Parties are not confined [in this Court] to the same arguments which were advanced in the courts below upon a federal question there discussed.").

There are only three potential sources of authority for making federal law binding in state court proceedings—(1) a federal statute, (2) a judicially created implied remedy for applicable constitutional violations, and (3) a judge-created rule such as federal common law. None applies here. First, the federal habeas statute is the source of the *Teague* exceptions to finality, but that statute expressly applies only to *federal* habeas proceedings. Second, in light of the statutory habeas remedy available in federal courts, there is no constitutional basis for a judicially created implied remedy that would require state courts also to provide relief in state collateral review proceedings for final convictions whenever federal courts would grant

relief under the *Teague* exceptions. Third, this is also not one of the rare instances that justifies a judge-created federal rule of decision under federal common law or any other label.

A. *Miller* Was Silent On Whether Federal Or State Law Controls Retroactivity.

According to the petitioner, *Miller* itself makes the retroactivity of *Miller* in state collateral review proceedings a federal issue. *See* Pet. at 13-14. Petitioner is wrong. In *Miller*, as in this case, one of the petitioners, Kuntrell Jackson, had filed a proceeding for state court collateral review. *Miller* remanded Jackson's case for resentencing in accordance with the guidelines enunciated in *Miller*. *See* 132 S. Ct. at 2475. However, that this Court remanded Jackson's case for resentencing without mentioning *Teague* does not constitute a ruling on whether the *Teague* exceptions make a new rule retroactive as a matter of federal law. *See Chaidez v. United States*, 133 S. Ct. 1103 (2013) (holding *Padilla v. Kentucky*, 559 U.S. 356 (2010), was not retroactive even though *Padilla* was decided on review of a state court collateral review proceeding).

More generally, a decision by this Court that does not address its jurisdiction is *not* a precedent that this Court has jurisdiction. *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) ("[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect."). Here, nothing about the *Teague* exceptions was at issue in *Miller* because, unlike Louisiana here, the State of Arkansas failed to contend that *Miller* was not retroactive. The state bears the burden of asserting non-retroactivity

under *Teague*, and when the state fails to do so, this Court has made plain that its decisions generally will not address retroactivity. *See Bradshaw v. Stumpf*, 545 U.S. 175, 182 (2005); *Schiro v. Farley*, 510 U.S. 222, 229 (1994). Because *Miller* did not address retroactivity, it is not a precedent on whether federal law governs retroactivity in state court collateral proceedings for final convictions.

B. The Source Of The *Teague* Exceptions Is A Federal Statute That Applies Only To Federal Habeas Proceedings.

The federal habeas statute supplied the exclusive source of the *Teague* exceptions to finality. The *Teague* plurality opinion described its task as "'defin[ing] the scope of the writ.'" 489 U.S. at 308 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986)). The *Teague* plurality explained that its entire framework was based on "the principle that *habeas corpus* cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated." *Id.* at 316 (second emphasis in original).

In describing *Teague*'s "general rule" of nonretroactivity absent "an exception," the *Teague* plurality held: "we now adopt Justice Harlan's view of retroactivity for cases on collateral review." *Id.* at 310. Justice Harlan had written: "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 reach of the Great Writ* …." *Mackey v. United States*, 401 U.S. 667, 701-02 (1971) (Harlan, J., concurring).

The concurring and dissenting opinions in *Teague* also characterized the issue of when collateral review would be available to order relief from final convictions based on new constitutional rules as one of construing the federal habeas statute. Justice White's concurrence stated: "If we are wrong in construing the reach of the habeas corpus statutes, Congress can of course correct us …." 489 U.S. at 317 (White, J., concurring in part and concurring in judgment). And Justice Brennan's dissent criticized the Court's "reading" and "interpretation" of the "federal habeas statute," including its failure "to follow the principle of *stare decisis* in *nonconstitutional* cases." *Id*. at 326-27, 332-33 (Brennan, J., dissenting) (first emphasis in original).

Although the specific holding in *Danforth v. Minnesota* was that federal law did not preclude state courts from providing collateral relief for additional new constitutional rules beyond the *Teague* exceptions, *Danforth*'s rationale explains that *Teague*'s exceptions to finality are based on the federal habeas statute. Immediately after discussing both *Teague*'s "general rule of nonretroactivity for cases on collateral review" and the "two exceptions," *Danforth* explained: "It is clear that … *Teague* considered what constitutional violations may be remedied on federal habeas. [*Teague*] did *not* define the scope of the 'new' constitutional rights themselves." 552 U.S. 264, 274-75 (2008). Rather, *Danforth* found in "the *statute's command* to dispose of habeas petitions 'as law and justice require,' 28 U.S.C. § 2243[,] … an *authorization* to adjust the scope of the writ in accordance with equitable and prudential considerations." *Id.* at 278. Thus, *Danforth* held: "Since *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.

No provision of the federal habeas statute imposes a binding rule for when state courts must give retroactive application to new constitutional rules in collateral review proceedings for final convictions. Instead, § 2254(a) provides:

> *The Supreme Court, a Justice thereof, a circuit judge, or a district court* shall *entertain* an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a *State* court only on the ground that he is in custody *in violation of the Constitution or laws or treaties of the United States.*

28 U.S.C. § 2254(a); *accord* §§ 2241(a)-(b), 2242.

As the ACLU aptly described in its amicus brief in *Danforth*:

> No federal statute remotely prescribes federal arrangements for the states to follow in their own post-conviction proceedings. To the contrary, the statutes in place focus exclusively on the *federal* courts. Time and again, *federal* habeas statutes are expressly addressed to *federal* courts, justices or judges, and, concomitantly, to applications for the *federal* writ of habeas corpus. E.g., 28 U.S.C. § 2254. The unavoidable conclusion is that Congress has taken responsibility for establishing (and limiting) the purview of federal courts, but

> has not thought it advisable or appropriate to superintend the states and their courts.

Amicus Brief of the ACLU at 12, *Danforth v. Minnesota*, 552 U.S. 264 (2008).

In this critical aspect, the federal habeas statutes operate the same as the Federal Rules of Evidence, which also limit their binding application to federal courts. *See* Fed. R. Evid. 1101(a) ("These rules apply to proceedings before: [listing only federal courts]."). Just as there is no dispute that the Federal Rules of Evidence are binding only on federal courts, there should be no dispute that the federal habeas statute is binding only on federal habeas courts.

Because the *Teague* exceptions derive from the federal habeas statute, and that statute imposes binding requirements on federal courts but not on state courts, it follows that federal law does not make the *Teague* exceptions binding in state court collateral review proceedings.

C. This Court Should Not Interpret The Constitution To Imply An Additional Remedy That Requires State Collateral Review Courts To Apply The *Teague* Exceptions.

As demonstrated above in Part II.B, all the Justices in *Teague* viewed the inextricably entwined framework announced there, including the exceptions, as stemming from the federal habeas statute. In light of that statutory remedy, the Court has declined to interpret the Constitution to imply retroactive application of new

constitutional rules that fall within the *Teague* exceptions. Before *Teague*, this Court had held that in collateral review proceedings, "'the Constitution neither prohibits nor requires retrospective effect." *Linkletter v. Walker*, 381 U.S. 618, 629 (1965). Nothing in *Teague* overruled that part of *Linkletter*. To the contrary, the *Teague* plurality reiterated that "the Court *never* has defined the scope of the writ 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) (quoting *Kuhlmann,* 477 U.S. at 447 (plurality opinion)).

Justice Harlan likewise declined to describe the portion of his concurrence in *Mackey* regarding collateral review as fashioning an extra-statutory remedy for constitutional violations. He stated that whether new constitutional rules are exceptions to finality "on collateral review ... *must be considered as none other than* a problem as to *the scope of the habeas writ*." 401 U.S. at 684. Justice Harlan added: "To argue that a conclusion reached by one of these 'inferior' courts is somehow forever erroneous because years later this Court took a different view of the relevant constitutional command carries more emotional than analytical force." *Id.* at 689-90.

Most important, the back-and-forth in *Danforth* shows that it is no longer an open question whether the *Teague* exceptions are judicially created implied remedies for constitutional violations. The *Danforth* dissent argued that "the question whether a particular ruling is retroactive is itself a question of federal law." 552 U.S. at 291. The dissent further argued that the majority's contrary approach made sense "only if *Teague*

… adopted the argument rejected in *Yates* [*v. Aiken*, 484 U.S. 211 (1988)]—that when it comes to retroactivity, a State 'has the authority to establish the scope of its own habeas corpus proceedings.'" *Id.* at 299.[8] The *Danforth* majority rejected these arguments, grounding the *Teague* exceptions in the federal habeas statute. *See supra* at 24-25. *Danforth* further explained that the *Teague* framework was not concerned with "the question whether a constitutional violation occurred, but with the availability or nonavailability of [collateral] remedies." 552 U.S. at 290-91. Indeed, the *Teague* plurality had recognized, in agreeing with Professor Paul J. Mishkin, that the issue in collateral review proceedings for final convictions is "'not so much one of prospectivity or retroactivity of the [new] rule but rather of the availability of collateral attack.'" 489 U.S. at 309 (quoting Mishkin, *Foreword*: *the High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 77-78 (1965)).

The federal Constitution does not require the "availability of collateral attack" against final convictions in state courts. *See Murray v. Giarratano*, 492 U.S. 1, 10 (1989) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more

8. With respect, *Yates* was narrower than the *Danforth* dissent suggests. *Yates* held that the decision in *Francis v. Franklin*, 471 U.S. 307 (1985), should be applied on collateral review because it did *not* announce a new rule. *Yates*, 484 U.S. at 217-18 ("*Francis* did not announce a new rule."). As the *Teague* plurality explained, because *Yates* did not address a new rule, *Yates* "found it unnecessary to adopt Justice Harlan's view of retroactivity for cases on collateral review." *Teague*, 489 U.S. at 307.

limited purpose than either the trial or appeal."). Accordingly, under the rationale of *Danforth*, state law governs whether state courts are available for a collateral attack based on a new constitutional rule announced after a final conviction. *See Danforth*, 552 U.S. at 280 ("States are independent sovereigns with *plenary authority* to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees.").

Moreover, it would be a stark departure for this Court, notwithstanding the express federal remedy created by the federal habeas statute, to create an additional remedy implied from the Constitution that requires state courts to make collateral review available when the *Teague* exceptions would apply in a federal habeas court. In the analogous context of potential *Bivens* actions, this Court will not "create" an additional, implied remedy for a constitutional violation when "Congress has provided what *it* considers adequate remedial mechanisms for constitutional violations." *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). This is so even if using the statutory remedy—here, a federal habeas action—involves "delay" that constitutes "trauma" and this Court could fashion a better remedy than Congress did. *Id.* at 428-29.

If the Constitution itself implied a remedy requiring state collateral review courts to grant claims based on new constitutional rules, it would be an open question whether such a remedy would be limited to the two *Teague* exceptions. For example, the Constitution draws no distinction amongst constitutional rules announced before a conviction became final on direct review. To the contrary, the Constitution requires enforcement of *all* "newly declared" constitutional rules that were announced

after the conviction but before it became final on direct review. *See Griffith v. Kentucky*, 479 U.S. 314, 321-22 (1987) ("[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.").[9]

Griffith recognized, however, citing Justice Harlan's views, that "the retroactivity analysis for convictions that have become final must be different from the analysis for convictions that are not final at the time the new decision is issued." *Id.* at 321-22. As we have seen, Justice Harlan had concluded that this difference existed because the availability for final convictions of collateral relief based on new constitutional rules was a statutory issue, not a constitutional one. *See supra* at 23, 27. As Justice Harlan put it: "The relevant frame of reference, in other words, is not the purpose of the new [constitutional] rule … but instead the purposes for which the writ of habeas corpus is made available." *Mackey*, 401 U.S. at 682.

Here, Congress has created an express statutory habeas remedy that applies only in federal courts. *Supra* at 25-26. Indeed, it would strengthen the federal habeas remedy for this Court to recognize that state law rather than federal law governs retroactivity for final convictions in state collateral review courts. Assume federal law governs retroactivity for new constitutional rules in state collateral review proceedings. Then a subsequent federal habeas court could not grant relief unless a state court's

9. That requirement extends to state collateral review courts under *Yates* v. *Aiken*, discussed *supra* at 28 n.8. For collateral review purposes, a constitutional rule declared before a conviction became final is *not* new. *See Teague*, 489 U.S. at 307 (plurality opinion); *Yates*, 484 U.S. at 217-18.

denial "of the [federal] claim" for retroactivity was "an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

In contrast, if this Court rules that state law governs the retroactivity of new constitutional rules in state collateral review courts, the state court will not have made any "'adjudica[tion] [of the claim] on the merits'" for retroactivity under *federal* law. *See Cone v. Bell*, 556 U.S. 449, 472 (2009) (quoting 28 U.S.C. § 2254(d)) ("Because the Tennessee courts did not reach the merits of [the prisoner's federal constitutional] claim, federal habeas review is not subject to the deferential standard" under § 2254(d)(1).). A subsequent federal habeas court is thus required to address the federal claim for relief under the *Teague* exceptions "*de novo*." *Id.* In view of the federal statutory habeas remedy, this Court should decline to interpret the Constitution to imply an additional remedy that requires state collateral review courts to grant collateral relief from final convictions based on the *Teague* exceptions.

D. This Court Should Not Create Federal Common Law To Make The *Teague* Exceptions Binding In State Court Collateral Proceedings For Final Convictions.

As this Court explained in *Danforth*:

> While we have ample authority to control the administration of justice in the federal courts—particularly in their enforcement of federal legislation—we have no comparable supervisory

> authority over the work of state judges. And while there are federal interests that occasionally justify this Court's development of common-law rules of federal law, our normal role is to interpret law created by others and not to prescribe what it shall be.

552 U.S. at 289-90 (internal quotation marks and citations omitted).

This Court creates federal common law only "where there is a significant conflict between some federal policy or interest and the use of state law" *and* Congress has not comprehensively addressed the subject matter. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85, 87 (1994) (internal quotation marks omitted) ("Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law."); *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (stating that federal common law applies only "[w]hen Congress has not spoken to a particular issue ... and when there exists a significant conflict between some federal policy or interest and the use of state law") (internal quotation marks omitted).

This Court should not create federal common law here because Congress has spoken comprehensively to the subject of when and where federal law requires collateral relief from final state court convictions. Through extensive legislation over a period of nearly 150 years, Congress has designed a comprehensive procedure providing for *federal* collateral review of final state convictions. *See, e.g.*, Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385. Congress

was mindful of state proceedings in drafting the federal habeas statute, and yet chose not to impose binding federal rules on state collateral review courts. *See* 28 U.S.C. § 2254 (providing that a *federal* court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a *State* court").

Instead, Congress imposed an exhaustion condition, with certain exceptions, on *state* prisoners to present their federal claim first to a state court. 28 U.S.C. § 2254(b)(1)(A). Congress also created an exception to the exhaustion condition before seeking *federal* habeas review where "circumstances exist that render such [state] process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B)(ii). As this Court has held, where a state's highest court has rejected a type of claim based on non-retroactivity principles, "exhaustion would have been futile" for a different petitioner in a subsequent case. *Lynce v. Mathis*, 519 U.S. 433, 436 n.4 (1997); *see also Smith v. Blackburn*, 632 F.2d 1194, 1195 (5th Cir. 1980) (exhaustion unnecessary where Louisiana Supreme Court had previously determined that *Ballew v. Georgia* did not apply retroactively).

Because Congress has extensively legislated on collateral review for state prisoners, this Court has no cause to engage in the federal common law interests analysis to determine whether the *Teague* exceptions to finality should apply to state collateral review courts as a binding federal rule of decision. As *O'Melveny* held, when Congress has legislated comprehensively, "[t]o create additional 'federal common-law' ... is not to 'supplement' this [statutory] scheme, but to alter it." 512 U.S. at 87; *see also City of Milwaukee*, 451 U.S. at 314 ("[W]hen Congress

addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."). In other words, that Congress has chosen not to impose federal retroactivity requirements on state collateral review proceedings is a choice that federal courts must respect, not a gap to be filled.

Nonetheless, were this Court to engage in such an interests analysis, the result would be the same—there is no warrant to create federal common law to impose requirements on state collateral review proceedings. This is because "[t]he general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (internal quotation marks omitted). Again, *Danforth*'s logic is equally as applicable whether the *Teague* exceptions are incorrectly argued to be a federally binding ceiling or floor in state collateral proceedings. As *Danforth* stated, "finality of state convictions is a *state* interest, not a federal one. It is a matter that States *should be free to evaluate*, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts." 552 U.S. at 280 (first emphasis in original).

Some may argue that it would be more efficient to require that state courts in collateral review proceedings apply federal retroactivity standards to new constitutional rules because subsequent federal habeas proceedings must apply federal standards. The short but complete answer is that federalism is not efficient. But federalism is the system we have.

In this context, efficiency is merely another label for uniformity, and uniformity is the "most generic (and lightly invoked) of alleged federal interests" used to argue that judges should create federal common law. *O'Melveny & Myers*, 512 U.S. at 88. "[N]onuniformity is a necessary consequence of a federalist system of government." *Danforth*, 552 U.S. at 290. As the ACLU wrote in its amicus brief in *Danforth*:

> To be sure, local arrangements peculiar to individual states necessarily produce different results in factually similar cases. But variations of that sort are necessarily entailed in federalism. It is a mistake to expect the bifurcated American justice system to generate uniformity in every instance, and a mistake to believe that disuniformity, when it occurs, is necessarily a bad thing.

Amicus Br. of the ACLU in *Danforth* at 20.

As we have seen, *supra* at 24-26, the federal habeas statute uses *federal* court proceedings to provide uniformity and efficiency in the event that state courts have a more limited approach to retroactivity in collateral review of final state convictions. Indeed, Congress has provided state prisoners faster access to *federal* habeas proceedings when seeking state court collateral review for a retroactivity claim would be futile. *See supra* at 33.

Nor would invoking the even rarer label "Reverse-Erie," instead of federal common law, provide any support for creating a judge-made rule making the *Teague* exceptions to finality binding in state collateral

proceedings. First, as explained *supra* at 32-34, because Congress has chosen not to extend the federal habeas statute to impose rules on state collateral review courts, this Court also should not do so. *See Johnson v. Fankell*, 520 U.S. 911, 912 (1997) (because the right to immediate appellate review in a § 1983 case of a qualified immunity ruling is provided by a federal statute, 28 U.S.C. § 1291, that "simply does not apply in a nonfederal forum," there is no federal basis to require interlocutory review when a § 1983 claim is brought in state court).

Second, upholding Louisiana's precedent that state law governs retroactivity in state collateral proceedings for final convictions would only postpone, *not* eliminate, the resolution of Mr. Montgomery's federal claim that *Miller* is retroactive under binding *Teague* exceptions. *See Johnson*, 520 U.S. at 912 (the availability of later review weighed against creating federal law to require immediate appellate review in state court, as "the postponement of the appeal until after final judgment will not affect the ultimate outcome of this case"). A federal habeas court will apply the *Teague* exceptions *de novo* as a matter of binding federal law when petitioner brings federal habeas proceedings. *See supra* at 31.

Accordingly, whether under the label federal common law or Reverse-Erie, this Court should not fashion a judge-created federal rule of decision that requires state collateral review courts to apply the *Teague* exceptions.

CONCLUSION

The Court's jurisdiction does not extend to deciding whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to this Court's decision in *Miller v. Alabama*, 567 U.S. ___ (2012).

Respectfully submitted,

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June 2015