No. 06-8273

IN THE

Supreme Court of the United States

STEPHEN DANFORTH,
Petitioner,
v.
STATE OF MINNESOTA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Minnesota

REPLY BRIEF FOR PETITIONER

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I. INTRODUCTION

This case is before the Court on grant of certiorari from a state postconviction proceeding, originating in state court, in which petitioner Stephen Danforth challenged his conviction for a violation of a state law. Petitioner seeks to use state law to allow the Minnesota Supreme Court to consider the validity of his conviction under the current understanding of the meaning of the Confrontation Clause of the Federal Constitution. Respondent contends that this Court in *Teague v. Lane*, 489 U.S. 288 (1989), deprived the Minnesota state courts of their ability to fully adjudicate petitioner's Federal constitutional claims. Respondent is wrong.

II. ALLOWING STATE COURTS TO USE BROADER RETROACTIVITY STANDARDS THAN *TEAGUE* SETS FORTH WOULD NOT AFFECT THE ABILITY OF THE FEDERAL COURTS TO REVIEW IMPORTANT FEDERAL CONSTITUTIONAL ISSUES.

Respondent posits that this Court would be unable to review the merits of any decision on Federal constitutional issues reached by a state court that entertains a claim that the *Teague* rule, if properly invoked, would prevent a federal habeas court from considering. Resp. Brief at 21-24. Respondent is incorrect.

Assume that the Minnesota Supreme Court considered whether the statement at issue in this case was admitted in violation of *Crawford v. Washington*, 541 U.S. 36 (2004). No matter which party prevailed in state court, this Court would be able to review the state court's substantive ruling on whether petitioner's rights under the Confrontation Clause were violated. If the state court concluded that the statement at issue was testimonial, was admitted in violation of petitioner's Confrontation Clause rights, and that the error entitled petitioner to a new trial, the State could petition this Court for a writ of certiorari to review the substantive *Crawford* issue.[1] Petitioner is not aware of any authority that would

[1] The only judge to ever consider this issue ruled that the statement "was testimonial for purposes of *Crawford*." *Danforth v. Crist*, 2005 WL 2105502, *2 (D. Minn. Aug. 26, 2005) (citing *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005) (attached in appendix to petition for certiorari at F-1)). Of course, the merits of petitioner's Confrontation Clause claim are not before the Court.

allow him to insulate a state court's decision on the substantive meaning of the Sixth Amendment from this Court's review.

If the state court concluded that the statement at issue was not testimonial, this Court could grant petitioner's petition for writ of certiorari to review the state court's substantive *Crawford* decision. Respondent claims that, in that scenario, it would be able to block this Court's review of the Confrontation Clause issue by invoking the *Teague* rule. This is incorrect. *Teague* is a rule for habeas courts, and this Court, directly reviewing a decision of a state court, is not a habeas court. The only limit that this Court has suggested exists on its ability to directly review federal questions presented in a state-court case is that the parties thereto, or at least the petitioner, must satisfy Article III standing requirements. *See United States Dept. of Labor v. Triplett*, 494 U.S. 715, 719 (1990); *ASARCO Inc. v. Kandish*, 490 U.S. 605, 623-24 (1989). Both parties to a pending criminal case, including one on state-court postconviction review, would satisfy such requirements. Nothing about *Teague* suggests otherwise. *See Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (*Teague* rule is not a jurisdictional one). *See also* 28 U.S.C. § 1257(a) (1988) (Supreme Court has jurisdiction to review any "judgments or decrees rendered by the highest court of a State" where, among other things, "any title, right, privilege, or immunity is specially set up or claimed under the Constitution").

This Court has repeatedly considered without criticism situations in which state-court civil plaintiffs and criminal defendants use state law to open the state courthouse door for consideration of the merits of Federal claims that might not be cognizable

in federal court. This was the situation in *ASARCO*, *see* Pet. Brief at 32-34, and in *Virginia v. Hicks*, 539 U.S. 113 (2003).

In *Hicks*, a state-court criminal defendant challenged his trespassing conviction, arguing that the policy he was alleged to have violated was unconstitutionally overbroad in violation of the First Amendment. *Hicks*, 539 U.S. at 118. Because Hicks did not contend that he was engaged in any constitutionally protected conduct at the time of the offense, Virginia and the United States as *amicus* asked the Court to "impose restrictions on 'the use of overbreadth standing'"; restrictions that would have eliminated Hicks' ability to challenge the policy. *Id.* at 120. This Court unanimously refused to even consider such restrictions because it was "reviewing . . . the decision of a State Supreme Court," and the Court's authority to limit jurisdiction only applies to federal courts. *Id.* (emphasis original). Whether the state court "should have entertained th[e] [Federal Constitutional] challenge [in *Hicks*] [was] entirely a matter of state law." *Id.* (emphasis original). So too is the issue of whether the Minnesota state courts should have entertained petitioner's claim that his conviction should be reversed because his rights under *Crawford* were violated. The substance of that claim is governed by federal law, just as it was in *Hicks* and *ASARCO*. But "[w]hether [the state court] should have entertained [the]…challenge is entirely a matter of state law." *Hicks*, 539 U.S. at 120 (emphasis original).[2]

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[2] Respondent asserts in a footnote, without citing any authority, that any review of the merits of a prisoner's federal claim would be "dependent" upon review of the state-court rule allowing the petitioner to bring the claim in the first place. Resp.

At bottom, respondent's concern seems to be that, in some cases, Federal constitutional issues may escape this Court's attention. This happens every day. State courts handle some 20 million criminal cases every year. Resp. Brief at 19. This Court accepts review of a small fraction of them. Thus, it is an understatement to say that the overwhelming majority of Federal constitutional issues are resolved in the state courts with no review from this Court. *Cf. ASARCO*, 490 U.S. at 636 (Rehnquist, C.J., concurring in part and dissenting in part) (describing as "unremarkable" the possibility that "state courts will [be] free to decide important questions of federal statutory and constitutional law without the possibility of review in this Court"). The impact of a state court's decision on a Federal constitutional issue is limited to that state alone. *Id.* And, if the issue is important enough, this Court will eventually have the opportunity to consider it via a case on direct review.

Confirming for the state courts their ability to fully adjudicate the merits of Federal constitutional claims raised by state prisoners will not hamper this Court's ability to consider important Federal constitutional issues.

III. PETITIONER SEEKS TO USE STATE LAW, NOT FEDERAL LAW, TO ALLOW THE STATE COURT TO CONSIDER THE FULL MERITS OF HIS FEDERAL CONSTITUTIONAL CLAIM.

Respondent repeatedly contends that if state courts do not have to adopt the *Teague* rule in state post-

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Brief at 23 n. 11. Respondent is wrong and *Hicks* and *ASARCO* demonstrate as much.

conviction proceedings, the state courts will "create preferred federal constitutional rights." Resp. Brief at 6, 7, 9, 16, 24, 25. Nothing of the sort will occur. The question is whether federal law prohibits state courts or state legislatures from using state law to open the state courthouse door to state prisoners who are attempting to challenge their state-court convictions on Federal constitutional grounds. Any broader retroactivity standard used in state court is a creature of state, not federal, law.

Because any non-*Teague* retroactivity standard used in state court would be based upon state law, this Court need not concern itself with how its various permutations might appear. State courts could properly employ each of the standards suggested by respondent at page 20 of its brief as long as the state court satisfies the "clear statement rule," *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), and makes plain that its decision to apply a new rule to an otherwise final case was based upon state law. In such a situation, federal law would not change at all. As long as the state court afforded the prisoner as much protection as federal law requires, such as following any applicable *Teague* exceptions, then the state court would not run afoul of federal law.

Respondent correctly recognizes that this case concerns the difference between what federal law does and does not require and what federal law does and does not allow. Respondent states the following:

> In *Griffith* and *Teague*, this Court was asked to decide whether the defendants were entitled to the benefit of new federal constitutional rulings.

Resp. Brief at 8. Griffith was entitled to the benefit of a new federal constitutional ruling and all other similarly situated defendants – those whose cases are

pending on direct review when the new rule is announced – are similarly so entitled. Teague, on the other hand, was not entitled to the benefit of a new federal constitutional ruling, and no similarly situated defendant is so entitled either. But this Court did not forbid a state court on state postconviction review from affording other defendants in Teague's position the benefit of new rules if the state court saw fit to do so.

As respondent says,

> If a state court deviates from *Teague*, it grants relief that is not required under federal law and is inconsistent with the federal and state interests identified by Justice Harlan and in *Griffith*, *Teague*, and their progeny.

Resp. Brief at 31. This passage illustrates the limited nature of the *Teague* rule. It is a procedural defense that, if properly invoked by the State in a habeas case, limits what claims can be brought in that particular forum. *Beard v. Banks*, 542 U.S. 406, 412-13 (2004) (the *Teague* rule "acts as a limitation on the power of federal courts to grant habeas corpus relief to…state prisoner[s]"). But any state court or legislature that chooses not to provide that defense to the State (as party to the litigation) simply makes a policy decision to provide extra protections to its state prisoners. This is the state court's or state legislature's right, and it is how our federalism works.

Finally, it is axiomatic that respondent's argument that applying the holding of *Crawford* to petitioner's case would somehow violate the Confrontation Clause itself is incorrect. "[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based." *Johnson v. New Jersey*, 384 U.S. 719, 728

(1966). In other words, the Sixth Amendment itself is silent on whether or not the state postconviction court can consider petitioner's claim under *Crawford*. *See* ACLU Brief at 22-24. The only bars to such consideration in state court are whatever procedural rules the state court or state legislature determine to be appropriate.

IV. RESPONDENT'S ARGUMENTS PERPETUATE THE MINNESOTA SUPREME COURT'S CONFUSION BETWEEN DECISIONS ANNOUNCING CONSTITUTIONAL REQUIREMENTS AND DECISIONS ANNOUNCING PRUDENTIAL LIMITATIONS UPON FEDERAL COURTS.

Respondent's argument rests upon a fundamentally flawed position: it links the holding of *Teague* to the holding of *Griffith v. Kentucky*, 479 U.S. 314 (1987), and proceeds to the simplistic conclusion that because state courts are required to follow the holdings of the latter, they are required to follow the holding of the former. Resp. Brief at 6, 15, 16. This requirement, posits respondent, stems from some previously unrecognized "federal authority." Resp. Brief at 36.

But *Griffith* and *Teague* could not be more different. *Griffith* was a constitutional decision requiring all courts, state and federal, to apply new federal constitutional rules to criminal cases pending on direct review when the new rule is announced. *Griffith*, 479 U.S. at 317-23. The Constitution forbids state courts or legislatures from placing "selective temporal barriers to the application of" new constitutional rules when federal law requires such application. *Harper v. Virginia Dept. of Taxation*, 508 U.S. 86, 97 (1993) (discussing rationale behind

Griffith); *see also Id.* at 100 (holding that, while state courts may "limit the retroactive application of their own interpretations of state law," they may not similarly limit the application of federal law). *Griffith* set the floor. *See* Pet. Brief at 17-19.

Teague, on the other hand, is about what federal law does not require. *Teague* informs state courts that nothing in federal law, constitutional or otherwise, requires the application of new constitutional rules to cases that became final before the rule was announced, unless the new rule fits into *Teague*'s exceptions. *See Teague*, 489 U.S. at 316 (holdings falling into *Teague*'s exceptions "would be applied retroactively to all defendants on collateral review") (emphasis original).[3] But *Teague* does not discuss, let alone limit, a state court's ability to choose to apply such a holding under state law. In other words, *Teague* did not set a ceiling on the state courts' ability to review Federal constitutional claims.[4]

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[3] The *Teague* exceptions, like the *Griffith* rule, are grounded in the Federal constitutional requirement that trials be "fundamentally fair." *Teague*, 489 U.S. at 311-12 (quoting *Mackey v. United States*, 401 U.S. 667, 693-94 (1971) (Harlan, J., concurring in part and dissenting in part)). The "watershed rule" exception lies only for such rules of "basic due process." *Teague*, 489 U.S. at 313. Any decision of this Court announcing that certain conduct was beyond the ability of the Government to prosecute or that a procedural rule was one of basic due process without which a trial is rendered fundamentally unfair would apply to "all defendants." *Teague*, 489 U.S. at 316 (emphasis original).

[4] *Amici* Alaska, et al., claim that Justice Harlan's policy views on retroactive application of new rules drew no distinction between federal habeas-corpus review and state postconviction review. Alaska Brief at 7-8. This is misleading. While Justice Harlan drew no distinction between federal and state prisoners

V. NEITHER RESPONDENT NOR ITS *AMICI* DEMONSTRATE A SOURCE OF AUTHORITY FOR THIS COURT TO REQUIRE STATE COURTS TO USE THE *TEAGUE* STANDARD.

One of the central issues in this case is under what authority could this Court require state courts to use the *Teague* standard exclusively to determine whether a state-court defendant, who challenges his conviction in state court under a state's postconviction-review process, is able to benefit from a federal constitutional ruling. Respondent presents no answer to this question. It relies upon some kind of oblique, general, amorphous "federal authority" that is supposedly "binding" on state courts. Resp. Brief at 17, 18, 30, 36. But respondent does not, or cannot, identify the source of that authority. Instead, respondent simply throws its hands in the air and posits that the authority is "without a label." Resp. Brief at 36. In our system, in which "[t]he Federal Government's powers are limited and enumerated," there are no such authorities. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 848 (1995) (Thomas, J., dissenting); *see also Alden v. Maine*, 527 U.S. 706, 739 (1999) ("The Federal Government… 'can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.'") (quoting *Martin v. Hunter's Lessee,* 1 Wheat. 304, 326, 4 L.Ed. 97 (1816)).

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petitioning for federal court review of their convictions, *Mackey*, 401 U.S. at 681 n. 1 (Harlan, J., concurring in part and dissenting in part), he did not discuss the differences between collateral review in state and federal court.

Respondent's mostly unstated implication is that its proposed source of authority for the *Teague* rule is the Federal Constitution.[5] Respondent is alone in this position, and it is wrong. *See* Pet. Brief at 15; NACDL Brief at 19-25; ACLU Brief at 5-10; Kansas Brief at 14-16; Alaska Brief at 9, 19, 29-30 (discussing why the *Teague* rule is not a constitutional command). The *Teague* rule is not a constitutional command. It is simply one of the "prudential" rules – rules based upon "equity and federalism" – which this Court has promulgated to limit a federal habeas court's ability to review a state-court conviction. *Withrow v. Williams*, 507 U.S. 680, 688-89 (1993) (O'Connor, J., concurring in part and dissenting in part) (quoting *Mackey*, 401 U.S. at 682 (Harlan, J., concurring in part and dissenting in part) (listing some such rules, including that announced in *Stone v. Powell*, 428 U.S. 465 (1976), and that announced in *Teague*); *see also Withrow*, 507 U.S. at 717-18 (Scalia, J., concurring in part and dissenting in part) (describing *Teague* rule as an "equitable," "gateway[]" claim "grounded in the 'equitable discretion of habeas courts.'") (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). This Court grounds such rules either in its interpretation of the federal habeas corpus statutes or by exercising its supervisory authority over the lower federal courts. Neither source of authority controls state-court procedures.

Respondent claims there is "no textual support" for the *Teague* rule in the federal habeas statues. Resp.

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[5] The contention is only mostly unstated. In a footnote near the end of its brief, respondent appears to make plain its position. Resp. Brief at 30 n. 15 ("*Teague*, like many other constitutional provisions, is subject to waiver by a party.") (emphasis added).

Brief at 16. This Court, to the contrary, has found such support for prudential rules limiting the availability of habeas corpus, including the *Teague* rule, in 28 U.S.C. § 2243, which authorizes a habeas court to "dispose of the matter as law and justice require." (emphasis added). *Withrow*, 507 U.S. at 686; *see also Id.* at 699 (O'Connor, J., concurring in part and dissenting in part) (prudential doctrines, including *Teague* rule, are grounded in "the express language of the habeas statute") (citing 28 U.S.C. § 2243).

Respondent relies upon language in *Teague* discussing "collateral review" and uses this as evidence to support its position that the Court always intended the *Teague* rule to govern in state-court postconviction proceedings. Resp. Brief at 12-13 n. 7. But the cases cited by respondent involve a single procedural posture: federal habeas corpus review of a state-court conviction. *See, e.g., Wright v. West*, 505 U.S. 277, 309 (1992) ("*Teague* gives substantial assurance that habeas proceedings will not use a new rule to upset a state conviction.") (Kennedy, J., concurring) (emphasis added).

Amici Alaska, et al., concede that the *Teague* rule does not have its origins in the Constitution. Alaska Brief at 9, 19, 29-30. They posit that the rule is one of federal common law. Alaska Brief at 9-20. This is theoretically possible but unlikely. There is no federal common law in the vast majority of situations. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 71-80 (1938). This Court only promulgates federal common law to govern a particular situation in the absence of congressional action. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313 (1981) (citations omitted). Congress has, to put it mildly, regulated the extent, availability, and rules surrounding fed-

eral habeas corpus relief, including the availability of federal habeas for state prisoners, and has done so for more than one hundred years. The Court does not insert federal common law into an area in which Congress has so authoritatively regulated. *See City of Milwaukee*, 451 U.S. at 313 (federal common law only applies "[w]hen Congress has not spoken to a particular issue") (citations omitted).

But concluding that *Teague* is a federal common-law rule is one thing. Accepting the radical proposition that it preempts the rules of procedure in every state court in the country is quite another. *Amici*, tellingly, do not analyze this aspect of the issue. They seem to assume that if *Teague* is a common-law rule it *ipso facto* preempts all contrary state laws.[6] Alaska Brief at 11, 16-17. For several reasons, the Court should reject this unwarranted, radical expansion of federal power.

First, it is not at all clear whether the Federal government has the constitutional authority to preempt state-court rules of procedure unless necessary to protect the Federal constitutional rights of litigants. *See Jinks v. Richland County*, 538 U.S. 456, 465 (2003). Here, *amici* asks the Court to preempt state law and require the States to deny to their citizens the full protections of the Federal Constitution.

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[6] *Amici* acknowledge that, ordinarily, "each sovereign is free to apply its own rules of procedure when applying the other sovereign's substantive law and that the federal government does not attempt to control procedure in state court (except where explicitly required by the Federal Constitution, such as by the Due Process Clause)." Alaska Brief at 16. *Amici* then contend, without support, that the rule "should" be different in this situation. *Id.* at 17.

Second, even if a federal common-law procedural rule could theoretically preempt a state-court procedural rule, such action would be inappropriate here. As the Court has observed:

> [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) (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954) (internal quotations and other citations omitted)). To say, therefore, that there is a presumption against preemption would be an understatement. Preemption only would be proper to protect some vitally important federal interest in a situation where the States' interests are minimal. Here, the opposite is true. The Federal interests in forcing the state courts to use a particular procedural rule are almost nonexistent.

Amici settle upon "that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity."[7] *O'Melveny & Myers v. Fed. Deposit Insurance Corp.*, 512 U.S. 79, 88 (1994). But in collateral review of state-court criminal convictions, the Federal government, through Congress, has adopted the opposite goal. Habeas relief no longer lies to ensure the uniform interpretation of federal law by state courts. Instead, at least since the 1996 passage of the Antiterrorism and Effective Death

[7] Our federal system is traditionally accepted as inherently non-uniform. Respondent's criticism of non-uniformity is a quarrel with our federal system not with petitioner's well-founded claim.

Penalty Act (AEDPA), the purpose of federal habeas review of state-court cases is simply to determine whether state court's decision was, in some way, reasonable. *See* 28 U.S.C. § 2254(d)(1) (1994 ed. Supp. III) (providing that writ shall not issue unless the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law"); *see also Schriro v. Landrigan*, 127 S.Ct. 1933, 1939 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable") (citing *Williams v. Taylor*, 529 U.S. 362, 410 (2000)). Congress has thus provided that habeas relief should not be granted just because a state-court decision is, in some way, wrong. Instead, regardless of whether the result is "right," "wrong," or uniform with results reached by other courts in similar situations, the state court need only act reasonably in order to protect its judgment from being upset by a federal court. Different state courts might reach different decisions on similar issues of federal law, with each such decision being reasonable, and each such decision thus not subject to vacation by a habeas court. *See Yarborough v. Alvarado*, 541 U.S. 652, 663-64 (2004) (noting that different courts may reach different, albeit reasonable, results in similar cases especially when applying a general legal standard) (citing, inter alia, *West*, 505 U.S. at 308-09 (Kennedy, J., concurring)). Far from discouraging non-uniformity in state court rulings on Federal constitutional issues, as respondent claims, Congress has expressly endorsed it.[8]

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[8] Long before AEDPA, this Court endorsed similar non-uniformity of results when it held that state prisoners may not raise Fourth Amendment claims on Federal habeas, as long as

On the other hand, the States' interest in controlling access to their courts, and in vindicating the Federal constitutional rights of their citizens, is paramount. This Court has "made it quite clear that it is a matter for each State to decide how to structure its judicial system." *Johnson v. Fankell*, 520 U.S. 911, 922 n. 13 (1997) (citations omitted); *Howlett*, 496 U.S. at 372 ("The States . . . have great latitude to establish the structure and jurisdiction of their own courts.").

Johnson is instructive. There, the Court considered a claim by Idaho state officials that *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985), interpreting 28 U.S.C. § 1291 to allow for an interlocutory appeal by defendants in a suit pressed in federal court under 42 U.S.C. § 1983, preempted an Idaho state-court rule disallowing such appeals in state court. *Johnson*, 520 U.S. at 914, 919-20. The Idaho officials claimed that preemption was necessary "to avoid 'different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court.'" *Id.* at 919 (citation omitted). This is nearly identical to the claim made by respondent – that *Teague* must govern in state court lest state courts hear federal constitutional claims that no federal court could hear. Resp. Brief at 22-23.

The Court rejected the Idaho officials' claim in *Johnson* and it should do the same with the claim here. The *Johnson* Court recognized that "the pur-

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the state court had provided the prisoner with a full and fair opportunity to litigate the issue in state court. *Stone*, 428 U.S. at 494-95. Thus, even if the state court's decision on the Fourth Amendment issue is unreasonable – indeed, even if it is flat wrong and contrary to every other decision on similar facts from other courts around the country – habeas relief will not lie.

pose of qualified immunity is to protect the State and its officials from overenforcement of federal rights." *Johnson*, 520 U.S. at 919. Therefore, the Idaho courts' refusal to allow an interlocutory appeal on the issue was "less an interference with federal interests than a judgment about how best to balance the competing state interests of limiting interlocutory appeals and providing state officials with immediate review of the merits of their defense." *Id.* at 919-20 (emphasis original). In other words, the State of Idaho chose not to avail itself of the full protections of Federal law, and that was the State's choice to make.

The same is true here. A State's decision not to use the *Teague* procedural-bar rule in its collateral-review proceedings does not upset any federal interests. The *Teague* rule "is a federal procedural right that simply does not apply in a nonfederal forum" unless the nonfederal forum chooses to adopt it. *Johnson*, 520 U.S. at 921. The answer to the question of whether or not to do so is a policy judgment about how best to balance the competing state interests in finality of convictions and those of affording state prisoners a forum to challenge their convictions on the basis of alleged Federal Constitutional errors. *See* Pet. Brief at 24-27. Like the interlocutory-appeal rule at issue in *Johnson*, the *Teague* rule was designed to prevent overenforcement of federal rights in federal court. *See West*, 505 U.S. at 308 (Kennedy, J., concurring) (describing the purpose of *Teague* as to not "subject" state-court convictions to federal review under "ever changing" federal law); *Teague*, 489 U.S. at 310 (without *Teague* rule, States are "force[d] . . . to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards"). But if a state court or a state legislature determines that it is

in its best interests to forgo *Teague*'s protections in its own courts – in other words, if a state court chooses to subject itself to ever-changing federal law – it should be permitted to do so.[9] No one, in that situation, would be forcing the State to do anything.

VI. THE RESULT POSITED BY *AMICI* KANSAS, ET AL., IS CORRECT. THE BASIS FOR ACHIEVING THAT RESULT, HOWEVER, IS WRONG.

Amici Kansas, et al., agree with petitioner that the Minnesota Supreme Court erred and that state courts are not required to use the *Teague* standard to determine whether to apply new rules of federal constitutional criminal procedure to cases pending on state-court collateral review. Kansas Brief at 4, 18. But Kansas claims that not only are state courts free to ignore *Teague*, they are free to ignore all federal due-process requirements when considering cases on collateral review. Kansas Brief at 7-10.

Specifically, Kansas claims for itself the authority to "decline to recognize retroactivity at all." Kansas Brief at 9. If this is true, then *Yates v. Aiken*, 484 U.S. 211, 215-17 (1988), was wrongly decided. In *Yates*, this Court made plain that state courts, including those reviewing criminal cases on postconviction review, are obligated to apply Federal constitutional decisions retroactively if federal law so requires. *Id.* Kansas' radical position cannot be squared with the holding in *Yates*. *Cf. Halbert v.*

[9] After all, a State's executive branch is free to forgo *Teague*'s protections even when litigating in Federal habeas corpus, the very forum for which *Teague* was designed. *Youngblood*, 497 U.S. at 41. The co-equal legislative and judicial branches of state government should be afforded the same respect.

Michigan, 545 U.S. 605, 610-24 (2005) (recognizing that States have no constitutional obligation to provide a right to an appeal, but holding if a State does provide such a right, the Due Process Clause requires appointment of counsel for indigent defendants).

CONCLUSION

This Court should reverse the judgment of the Minnesota Supreme Court and remand this case to that court for further proceedings.

Respectfully submitted,

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