No. 05-11304

IN THE

Supreme Court of the United States

LAROYCE LATHAIR SMITH,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR THE CONSTITUTION PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Amicus curiae The Constitution Project respectfully submits this brief supporting reversal of the judgment below.[1]

INTEREST OF AMICUS CURIAE

The Constitution Project is a bipartisan non-profit organization that seeks solutions to contemporary constitutional issues through a combination of scholarship and public education. The Project's essential mission is to promote constitutional dialogue. To that end, it creates bipartisan blue-ribbon committees comprised of former government officials, judges, scholars, and other prominent citizens to reach across ideological and partisan lines. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and with ensuring that those guarantees are respected and enforced by all three branches of govern-

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus and its counsel made any monetary contribution toward the preparation or submission of this brief. Letters indicating the parties' consent to the filing of this amicus brief have been submitted to the Clerk.

ment. More specifically, the Project recognizes this Court's role as the ultimate arbiter of the meaning of those constitutional guarantees.

In May 2000, the Project's Death Penalty Initiative convened a blue-ribbon committee including supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others. Although the Initiative neither supports nor opposes capital punishment itself, it is concerned that, as currently administered, the death penalty lacks adequate procedural safeguards and other assurances of fundamental fairness. In 2006, the Initiative released an updated version of its 2001 report and consensus recommendations. *Mandatory Justice: The Death Penalty Revisited*[2] describes 32 reforms that the committee believes are essential to reduce the risk of wrongful capital convictions and executions.

This Court's decision in *Smith* v. *Texas*, 543 U.S. 37 (2004), addressed and reinforced one of the most important procedural protections for capital defendants: the ability to present all relevant mitigating evidence to the jury and have the jury consider that evidence. Recommendations 26 and 27 in *Mandatory Justice* describe the Death Penalty Initiative committee's belief in the importance of mitigating factors in the jury's decision-making process. By disregarding the plain import of this Court's decision in *Smith*, the decision of the Texas Court of Criminal Appeals on remand threatens to eviscerate that essential protection. Perhaps even more significantly, however, it threatens this Court's role as the final judicial arbiter of federal constitutional law.

The Constitution Project recognizes that, in light of the grants of certiorari in *Brewer* v. *Quarterman*, No. 05-11287, and *Abdul-Kabir* v. *Quarterman*, No. 05-11284, the Court will consider a number of issues relating to the scope and application of its holdings in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), and *Penry* v. *Johnson*, 532 U.S. 782 (2001) ("*Penry II*"), at the time it considers this case. It files

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[2] *Available at* http://www.constitutionproject.org/pdf/MandatoryJusticeRevisited.pdf.

this brief because, in its view, the significance of *Smith* v. *Texas* extends beyond the particular holdings of *Penry I* and *Penry II*, or the Texas special-issues scheme generally. Rather, this case poses fundamental questions regarding this Court's constitutional authority. The Court should reaffirm that authority by reversing the decision below.

STATEMENT OF THE CASE

In 1991, petitioner LaRoyce Lathair Smith was convicted of capital murder in Dallas County, Texas. At sentencing, Smith presented a variety of mitigation evidence, including evidence that he suffered from "potentially organic learning disabilities and speech handicaps"; that he had a low IQ, with a verbal score of 75 and a full IQ score of 78, and had been placed in special education classes; that he had a difficult and troubled childhood, with a father who was a drug addict "involved with gang violence and other criminal activities," and who stole from his family to support his addiction; and that he was only nineteen when he committed the crime. *Smith* v. *Texas*, 543 U.S. 37, 41 (2004).

The jury was instructed on two "special issues": whether the murder was deliberate and whether the defendant was likely to be dangerous in the future.[3] Under Texas law, affirmative answers to those two questions mandated the death penalty. Two years before, this Court had held that presenting only those two special issues to the jury, without proper instructions regarding the jury's consideration of mitigating evidence, contravened the Eighth Amendment. *See Penry* v. *Lynaugh*, 492 U.S. 302, 328 (1989) (*Penry I*). At the time of Smith's trial, however, Texas had not yet amended its statutory "special-issues" sentencing scheme in response to *Penry I*. The trial judge therefore attempted to square the special-issues instruction

[3] Specifically, the jury was asked (1) "Was the conduct of the defendant that caused the death of the deceased committed deliberately, and with the reasonable expectation that the death of the deceased or another would result?" and (2) "Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?" JA 123-124.

with *Penry I* by giving the jury a supplemental "nullification" instruction. The instruction informed the jury that, if it determined that Smith's mitigating evidence warranted a life sentence, it should answer "No" to one of the special issues, even if the evidence otherwise required an affirmative answer. JA 106-107. The verdict form provided to the jury, however, listed only the special issues and did not mention mitigating evidence or nullification. JA 123-124.[4] The jury answered "Yes" to both special issues, and Smith was sentenced to death. *Id.*

Smith's direct appeal, which included a challenge to the constitutionality of the jury instructions citing *Penry I*, was rejected by the Texas Court of Criminal Appeals, *see Smith* v. *State*, No. 71,333, slip op. (Tex. Crim. App. June 22, 1994) (unpublished) (JA 135), and this Court denied certiorari, *Smith* v. *Texas*, 514 U.S. 1112 (1995). Smith subsequently sought postconviction relief in state court, again challenging the constitutionality of the jury instructions. In 2001, while those proceedings were still pending, this Court decided *Penry* v. *Johnson*, 532 U.S. 782 (2001) (*Penry II*), which held that a very similar "nullification" instruction failed to correct the constitutional flaw in the special-issues scheme. Shortly thereafter, the Texas Court of Criminal Appeals addressed the merits of Smith's claim and denied relief. It reasoned that Smith's mitigating evidence was not constitutionally relevant because it did not demonstrate "a severe and permanent handicap, not of [Smith's] own making, . . . related to the commission of the capital offense." *Ex parte Smith*, 132 S.W.3d 407, 415 (Tex. Crim. App. 2004). It then concluded that even if Smith had presented constitutionally relevant mitigating evidence, the special issues, supplemented by the

[4] In pretrial motions, Smith cited *Penry I* in arguing that the special-issues scheme did not afford the jury an adequate opportunity to give effect to his mitigating evidence, and that Texas law did not permit the court to supplement the special issues with a statutorily unauthorized instruction on mitigation. JA 7-10, 11-16. The trial court denied those motions. JA 21.

nullification instruction, provided a sufficient vehicle for the jury to give effect to that evidence. *See id.* at 415-417.[5]

This Court granted certiorari and reversed. *Smith* v. *Texas*, 543 U.S. 37 (2004) (per curiam). Rejecting the Texas court's conclusion that Smith's mitigating evidence was not constitutionally relevant, it explained that the court had "erroneously relied on a [relevance] test we never countenanced and now have unequivocally rejected." *Id.* at 45 (citing *Tennard* v. *Dretke*, 542 U.S. 274 (2004)). Contrary to the Texas court's belief, "[t]here is no question that a jury might well have considered [Smith's] IQ scores and history of participation in special-education classes as a reason to impose a sentence more lenient than death." *Id.* at 44. Smith's evidence of a troubled childhood was also relevant mitigating evidence, whether or not it had any "nexus" to the crime. *See id.* at 45. In short, "[t]hat [Smith's] evidence was relevant for mitigation purposes is plain under our precedents." *Id.* Accordingly, "the Eighth Amendment required . . . a vehicle capable of giving effect to that evidence." *Id.*

Turning to the sufficiency of the jury instructions for that purpose, the Court unequivocally found that the instructions were "constitutionally inadequate," 543 U.S. at 48, because they "did not provide the jury with an adequate vehicle for expressing a 'reasoned moral response' to all of the evidence relevant to the defendant's culpability," *id.* at 46 (citation omitted) (emphasis in original). This Court emphasized that the statutory special-issues instruction "made no mention whatsoever of mitigation evidence," instead focusing solely on "findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence [Smith] presented." *Id.* at 48. Moreover, it held that the nullification instruction was necessarily inadequate

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[5] Four judges would have held that Smith's claim was procedurally defaulted, contending that he had not adequately raised his objection to the nullification instruction at trial. *See id.* at 423 (Hervey, J., concurring, joined by Keasler, J.); *id.* at 428 (Holcomb, J., concurring, joined by Price, J.). As this Court previously noted, however, "[t]he majority of the court . . . declined to adopt this holding and reached [Smith's] claims on the merits." 543 U.S. at 43 n.3.

to cure that deficiency, because "'it would have been both logically and ethically impossible for a juror to follow both sets of instructions.'" *Id.* at 46 (quoting *Penry II*, 532 U.S. at 799). Even if the jury had fully comprehended the nullification instruction, it was confronted with an intractable ethical dilemma, because it "'was essentially instructed to return a false answer to a special issue in order to avoid a death sentence.'" *Id.* at 48 (quoting *Penry II*, 532 U.S. at 801). Holding that the jury instructions were therefore constitutionally insufficient, this Court reversed and remanded for further proceedings not inconsistent with its opinion. *See id.* at 48-49.

On remand, the Texas Court of Criminal Appeals again denied relief. *Ex parte Smith*, 185 S.W.3d 455 (Tex. Crim. App. 2006). The court acknowledged that this Court had rejected its holding that Smith's mitigation evidence was not constitutionally relevant, and had held that the nullification instruction did not permit the jury to give effect to that evidence. *See id.* at 457. But it professed to be "uncertain whether the Supreme Court also concluded that some of [Smith's] mitigation evidence was outside the reach of the two special issues, and, if so, exactly what evidence was beyond the ambit of those special issues." *Id.* at 464.[6] While reiterating its view that Smith's mitigation evidence could be adequately considered within the special-issues framework, it stated that it would "assume, for the sake of argument, that at least some of [Smith's] evidence was not fully encompassed by the two special issues" and that "the jury charge in this case was constitutionally deficient under *Penry II*." *Id.* at 467.

Rather than granting relief based on the constitutionally deficient jury instructions, however, the Texas court

[6] The Texas court made conflicting statements on this point, opining elsewhere that "[t]he Supreme Court did not address our conclusion 'that the two special issues provided [Smith's] jury with a constitutionally sufficient vehicle to give effect to his mitigating evidence.'" 185 S.W.3d at 463. That statement, of course, ignores this Court's express conclusion that the statutory special issues "had little, if anything, to do with the mitigation evidence [Smith] presented." 543 U.S. at 48.

reasoned that Smith had failed adequately to object to the jury instructions at trial, and that under Texas law he could thus obtain relief only if he demonstrated that the jury instructions caused him "'egregious harm.'" 185 S.W.3d at 467 (quoting *Almanza* v. *State*, 686 S.W.2d 157 (Tex. Crim. App. 1984)). It adopted this line of reasoning despite the fact that, in its previous opinion, it had addressed Smith's *Penry* claim on its merits, declining to follow the concurring judges' view that Smith had not adequately preserved it.

Applying the *Almanza* standard, the Texas court concluded that Smith had failed to show that the jury instructions caused him "egregious harm." 185 S.W.3d at 472. It dismissed this Court's concern that the nullification instruction placed jurors in an ethical dilemma as merely "theoretical," contending that "neither the jurors . . . nor the parties or trial judge noted such a potential dilemma." *Id.* at 468. It remarked that the prosecutor "never suggested that [Smith's] mitigation evidence should be ignored." *Id.* at 471. And it observed that "defense counsel did a superb job of weaving all of that evidence into a compelling theory of the case, and . . . presented a strong, coherent, and persuasive closing argument on punishment." *Id.* at 472. It therefore concluded that Smith had "fail[ed] to provide any persuasive evidence that the jury was unable to consider the totality of his extensive mitigating evidence." *Id.* at 471.

Judge Holcomb dissented, arguing that the majority had "misapprehend[ed] the plain directive of the United States Supreme Court in its reversal of this court" that the jury instructions were constitutionally inadequate because they "prevent[ed] the jury from giving full effect to Smith's relevant mitigating evidence." 185 S.W.3d at 474 (Holcomb, J., dissenting). Judge Holcomb would have found that Smith adequately objected to the jury instructions at trial; he expressed concern that the court's application of state error-preservation rules was "capricious[] and arbitrar[y]." *Id.* at 477-478. "Because our holding was reversed by a higher court, a court which addressed the merits and found our holding on the merits to be erroneous, we may not now remedy the problem by failing to address the merits, and in-

stead, decide that the substantive complaint was not preserved." *Id.* at 478. Moreover, Judge Holcomb expressed strong disagreement with the majority's suggestion that this Court had not disapproved the Texas court's holding that the special issues were an adequate vehicle for consideration of Smith's evidence. "[T]he Supreme Court spoke quite clearly, holding . . . that . . . 'findings of deliberateness and future dangerousness . . . had little, if anything, to do with the mitigation evidence [Smith] presented.' Thus, there can be no reasonable conclusion that we were ordered to address anew whether there was error[.] Reversed means reversed." *Id.* at 478-479.

SUMMARY OF ARGUMENT

The Texas Court of Criminal Appeals' decision on remand cannot be reconciled with this Court's opinion and mandate. This Court held, in unmistakable terms, that the jury instructions at Smith's sentencing were "constitutionally inadequate," 543 U.S. at 48, because they "did not provide the jury with an adequate vehicle for expressing a 'reasoned moral response' to *all* of the evidence relevant to the defendant's culpability," *id.* at 46 (citation omitted) (emphasis in original). Vacating the Texas court's contrary holding, this Court remanded for further proceedings not inconsistent with its ruling.

On remand—and only after this Court reversed its decision on the merits—the Texas court for the first time decided that Smith had not preserved his claim of instructional error. On that basis, it applied a state-law harmless-error standard under which Smith could obtain relief only if he showed "egregious harm." 185 S.W.3d at 467. In deciding that Smith had not shown "egregious harm," the Texas court openly revisited the merits of this Court's analysis, concluding that this Court had not meant what it plainly said, and that in fact there was no "persuasive argument that the jury was unable to consider the totality of [Smith's] extensive mitigating evidence." *Id.* at 471.

Although the Texas court framed its analysis of the Eighth Amendment right at issue as the application of a

state harmless-error rule, that should not prevent this Court from reviewing—and reversing—its decision. The Texas court's harmless-error analysis is neither an adequate nor an independent state ground for its judgment; instead, it is a belatedly and arbitrarily asserted procedural hurdle, whose application is itself inextricably intertwined with the court's erroneous assessment of the merits of the federal constitutional question.

Over the course of this Court's history, it has been confronted with similar state and lower court decisions that have openly flouted or covertly undermined its judgments on a wide range of questions of federal law. Such decisions have often attempted to evade the force of this Court's rulings by asserting purported state-law grounds. The Court has not hesitated to overturn such decisions where the asserted state-law ground was not a truly adequate and independent basis for decision, but in substance a means to avoid compliance with federal law. Just as in those past cases, the Texas Court of Criminal Appeals' decision—under the guise of applying a state procedural rule—contravenes this Court's plain holding on a question of federal law. The Court should reaffirm that it meant what it said when it first decided this case—and, equally importantly, should reaffirm its final authority on matters of federal constitutional law—by reversing.

ARGUMENT

I. THIS COURT HAS REPEATEDLY REVERSED STATE-COURT DECISIONS THAT THWART ITS MANDATES—INCLUDING THROUGH PURPORTED APPLICATION OF STATE PROCEDURAL RULES

Over the years since the Founding, this Court has repeatedly been faced with challenges to its authority by lower court decisions that have thwarted, evaded, or simply misapprehended its mandates. The Court has found it necessary to defend its mandates in cases involving a broad range of issues, including the treaty-granted rights of British nationals to own local property in the wake of the Revolution, *see Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816);

the power of the federal government to enforce the Fugitive Slave Law in antebellum enclaves of anti-slavery sentiment, *see Ableman* v. *Booth*, 62 U.S. (21 How.) 506 (1858); title to lands acquired in the Louisiana Purchase, *see Tyler* v. *Magwire*, 84 U.S. (17 Wall.) 253 (1872); the rights of injured railway employees, *see Deen* v. *Hickman*, 358 U.S. 57, 58 (1958); the privacy, associational, and expressive rights of locally unpopular minorities, *see NAACP* v. *Alabama ex rel. Patterson*, 360 U.S. 240, 244-245 (1959); *Henry* v. *City of Rock Hill*, 376 U.S. 776 (1964) (per curiam); relief from forms of gender discrimination sanctioned by local tradition, *see Stanton* v. *Stanton*, 429 U.S. 501 (1977) (per curiam); the right of a corporation to assert in a federal forum its entitlement to arbitration, *see General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978) (per curiam); and a State's obligation to grant restitution of moneys collected in violation of the constitutional rule of intergovernmental tax immunity, *see Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86 (1993); *Reich* v. *Collins*, 513 U.S. 106 (1994).

In such cases, this Court has refused to permit its role as the final arbiter of federal constitutional law to be compromised by a state court's recalcitrance or failure to comprehend and give effect to the full purport of this Court's decisions. The Court's resolve to enforce its lawful judgments—no matter how contentious the issues they decided or how powerful the interests arrayed against them—slowly won acceptance of its paramount authority, together with respect for the rule of law, as pillars of the Constitution. The Supremacy Clause thus evolved from a visionary hope of the Framers into a settled feature of the American constitutional order.

1. During the early years of the Republic, many state courts openly resisted this Court's authority to review their judgments on matters of federal law. *See* Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 Am. L. Rev. 1 & 161 (1913); Richard Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 479-480 (5th ed. 2003).

In the most notorious dispute of this Court's early years, Virginia's highest court refused to acknowledge the Court's authority to review a decision regarding the effect of a post-Revolutionary War treaty on the rights of two purported landowners, contending that section 25 of the Judiciary Act of 1789, which granted this Court appellate jurisdiction over decisions of state courts, was unconstitutional. *See Hunter* v. *Martin*, 18 Va. (4 Munf.) 1, 58-59 (1815). Thus, the state court refused to follow this Court's express instructions to enter judgment for the devisee of the British subject whose land had been confiscated in violation of the federal treaty. *See id.* In response, this Court issued another decision affirming its authority and renewed its order to the Virginia court to comply with its first mandate, emphasizing that its final judgments are "conclusive upon the parties, and [cannot] be re-examined" by state courts. *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 355.

In the years following *Martin*, the Court repeatedly made clear that its decisions on matters of federal law were binding and must be followed. *See* Warren, *supra*, at 12-22, 25, 161-162, 129-186 (detailing state-court resistance to the Court's authority); *see also Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (reaffirming the authority of the Court to review state-court judgments). For example, the Court repeatedly reversed state courts that issued writs of mandamus and habeas corpus to federal officials, or that tried to prevent the execution of federal writs. *See* Charles Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 350-356 (1930); *see also M'Clung* v. *Silliman*, 19 U.S. (6 Wheat.) 598 (1821) (states have no right to issue a writ of mandamus to a federal official); *Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166, 195 (1867) (states lack "all power to restrain either the process or proceedings in the national courts"). In a case involving the Fugitive Slave Law, the Court acted no less than four times in order to stop the Supreme Court of Wisconsin from discharging a federal prisoner in violation of this Court's mandate. *Ableman* v. *Booth*, 62 U.S. (21 How.) 506, 513-525 (1859), *reversing In re Booth*, 3 Wis. 1 (1854), *Ex parte Booth*, 3 Wis. 145 (1854). The Court

made clear in its final judgment in the case that "no power is more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws; and for that purpose to bring here for revision, by writ of error, the judgment of a State court where such questions have arisen." *Id.* at 525.

2. After the Civil War, as this Court's power to render final and binding decisions on questions of federal law became firmly established, lower courts largely abandoned overt defiance. Over the last century, perhaps the most common means by which state courts have attempted to evade the force of a federal constitutional holding by this Court is to interpose a purported state-law ground of decision. Although the Court has always properly recognized the state courts' role as the final arbiters of questions of state law—itself a key feature of our federal system—it has consistently overturned state judgments that lack a truly adequate and independent foundation in state law and instead represent a covert attack on this Court's authority.

As this Court has recognized, "if nonfederal grounds, plainly untenable, may be . . . put forward successfully, our power to review easily may be avoided." *Ward* v. *Board of County Comm'rs*, 253 U.S. 17, 22 (1920). Although the Court lacks jurisdiction to review state-court judgments supported by adequate and independent state-law grounds, the adequate and independent "qualification is a material one and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution." *Id.* at 23. Justice Holmes succinctly stated the basic underlying principle many years ago: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923).

Accordingly, this Court has held that the adequacy and independence of an asserted state-law ground of decision is

itself a federal question. *See Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965). And it has established a set of safeguards designed to ensure that an asserted state-law ground is in fact an *adequate* and *independent* basis for the judgment, rather than a screen for resistance to the substance of this Court's constitutional adjudication.

For example, a state court may not defeat a federal right by imposing unfounded procedural obstacles or making conclusions that lack "fair or substantial support" in the record. *Ward*, 253 U.S. at 22; *see also, e.g.*, *Davis*, 263 U.S. at 24; *Postal Tel. Cable Co.* v. *City of Newport*, 247 U.S. 464, 475-476 (1918). It may not apply a state procedural bar irregularly and selectively, so as to deprive disfavored litigants of a federal constitutional adjudication on the merits. *See, e.g.*, *Johnson* v. *Mississippi*, 486 U.S. 578, 587-588 (1988); *James* v. *Kentucky*, 466 U.S. 341, 348-349 (1984); *Hathorn* v. *Lovorn*, 457 U.S. 255, 262-265 (1982); *Barr* v. *City of Columbia*, 378 U.S. 146, 149-150 (1964) (per curiam). It may not apply a previously unannounced or unclearly announced procedural requirement to prevent a litigant from asserting a federal right, *see, e.g.*, *Ford* v. *Georgia*, 498 U.S. 411, 421-425 (1991); *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 293-301 (1964); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 454-458 (1958), or enforce a state procedural rule with "pointless severity," *Flowers*, 377 U.S. at 297; *see also Staub* v. *City of Baxley*, 355 U.S. 313, 319-320 (1958).

Of particular import for this case, this Court has made clear that a state court may not decide the merits of a federal claim against a litigant and then, when that decision is reversed by this Court, belatedly interpose a state procedural rule to deprive the litigant of the federal right this Court has upheld. *See Ford*, 498 U.S. at 424-425; *NAACP* v. *Alabama ex rel. Patterson*, 360 U.S. 240, 244-245 (1959); *Tyler* v. *Magwire*, 84 U.S. (17 Wall.) at 284-285; *cf. also Sibbald* v. *United States*, 37 U.S. (12 Pet.) 488, 492 (1838). Nor may a state court predicate a state procedural bar on an incorrect analysis of federal law and thereby evade this Court's review of its erroneous treatment of the federal question. *See*,

e.g., *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 100 (1993); *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985).

In short, this Court has not hesitated to exercise jurisdiction over a state-court judgment—and reverse, if necessary—where an asserted state-law ground is unfounded, arbitrary, or a covert attempt to revisit this Court's ruling on the merits. It should not hesitate here.

II. THE TEXAS COURT OF CRIMINAL APPEALS' HARMLESS-ERROR ANALYSIS IS NEITHER ADEQUATE NOR INDEPENDENT AND CANNOT BE RECONCILED WITH THIS COURT'S MANDATE

Just as in past cases that have prompted the Court to reassert its authority as the final arbiter of federal law, the Texas court's opinion here in essence repudiates the rule of federal constitutional law this Court has announced, while seeking to shield its analysis behind a purported state procedural ground. The Texas court's harmless-error analysis, however, is neither an adequate nor an independent basis for its judgment. It should not prevent this Court from correcting the Texas court's distortion of this Court's prior ruling.

A. The Texas Court's Harmless-Error Analysis Is Not An Adequate Ground For Its Judgment

The Texas court's decision on remand is based on its conclusions that Smith failed to preserve his *Penry* claim by properly objecting to the jury instructions at trial and that a belated *Penry* claim is subject to review for "egregious harm." *Ex parte Smith*, 185 S.W.3d at 467-472. Those conclusions are not adequate to support the Texas court's judgment. First, the record shows that Smith did in fact preserve his claim. Second, the Texas court's application of the contemporaneous-objection rule in this case is inconsistent with its past treatment of newly recognized constitutional rights, and its application of harmless-error analysis is inconsistent with its past treatment of *Penry* claims. Finally, and perhaps most tellingly, the Texas court's belated assertion of a procedural obstacle to Smith's Eighth Amendment claim is inconsistent with its previous decision to resolve that claim on the merits.

1. The history of these proceedings shows that Smith raised the substance of his constitutional challenge to the jury instructions at every stage of the litigation. In both his pretrial motions and his brief on direct appeal, Smith argued that the jury was not provided an effective vehicle to address his mitigation evidence, and cited *Penry I*. JA 7-10, 11-16, 132-134. While he did not cite authority specific to the nullification instruction (*Penry II* was decided ten years after Smith's trial), he expressly argued that Texas law provided "no" effective vehicle for the jury to address mitigation evidence (JA 132), and thus necessarily contended that the nullification instruction was insufficient to remedy the flaws of the special-issues charge. The sufficiency of the nullification instruction was squarely before the trial court and the Texas Court of Criminal Appeals, which expressly relied on it to affirm Smith's sentence. *Smith* v. *State*, No. 71,333, slip op. 11 (Tex. Crim. App. June 22, 1994) (JA 145-147).[7] Texas law requires no more. *See Lankston* v. *State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992) (en banc) (holding that "no technical considerations or form of words" are required to maintain objections).

The Texas court suggested that Smith should have "objected to the specific wording of the charge." 185 S.W.3d at 461 n.8. But Smith's claim does not depend on the "specific wording" of the nullification instruction; this Court has made it clear that *any* reliance on jury nullification is improper. *See Smith*, 543 U.S. at 46 ("*Penry II* identified a broad and intractable problem . . . inherent in any requirement that the jury nullify special issues" in order to give effect to mitigating evidence). Moreover, the Texas statute governing jury instructions specifically dispenses with any need to "present special requested charges to preserve or maintain any error." *Ex parte Smith*, 185 S.W.3d at 476 & n.6 (Holcomb, J., dissenting) (quoting Tex. Code Crim. Proc. Ann. art. 36.14).

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[7] In Texas, as in the federal system, "it is axiomatic that a reviewing court will not condemn a jury charge unless it is misleading when read as a whole." *Vuong* v. *State*, 830 S.W.2d 929 (Tex. Crim. App. 1992) (en banc).

The statute simply requires that a party "specif[y] each ground of objection." *Id.* Smith, citing *Penry I*, did just that.

State courts cannot avoid the jurisdiction of this Court by asserting unfounded or arbitrary procedural bars. Thus, a state court cannot apply a contemporaneous-objection rule to preclude review of a federal claim where the complaining party's objection was sufficient "to bring the alleged federal error to the attention of the trial court and enable it to take appropriate action." *Douglas* v. *Alabama*, 380 U.S. 415, 421-422 (1965). The Court has also rejected as inadequate procedural rulings that would "force resort to an arid ritual of meaningless form," where the substance of the objection was plain. *Staub* v. *City of Baxley*, 355 U.S. 313, 320 (1958); *see also*, *e.g.*, *Osborne* v. *Ohio*, 495 U.S. 103, 123-124 (1990) (finding federal jurisdiction preserved despite petitioner's failure to make a specific objection to jury instructions where petitioner filed a motion to dismiss on the same grounds and the motion was denied shortly before the instructions conference). Because Smith plainly asserted the substance of his claim—that the jury instructions contravened the Eighth Amendment because they failed to give the jury an adequate vehicle for consideration of mitigation evidence—the Texas court cannot now erect a putative waiver as a bar to relief.

2. Even if the Texas court were correct that Smith failed to object to the nullification instruction with adequate specificity, the application of the "egregious harm" standard to this case is not consistent with the court's previous treatment of newly recognized constitutional claims, or with its treatment of *Penry* claims more generally. This Court has repeatedly held that "state procedural requirements which are not strictly or regularly followed cannot deprive [the Court] of the right to review." *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964) (finding inadequate state procedural bar based on conclusion that petitioner's objections were "too general to be considered," because the state court had previously addressed the merits of similarly general objections); *see also Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 231 (1969) (Virginia Supreme Court's imposition of

procedural bar based on petitioner's failure to provide copy of trial transcript was not adequate because it had not been "so consistently applied . . . as to amount to a self-denial of power to entertain the federal claim"); *James* v. *Kentucky*, 466 U.S. 341, 348-349 (1984) (finding procedural bar based on petitioner's request for an "admonition" rather than an "instruction" inadequate to prevent review of petitioner's claim of jury instruction error, because the distinction was "not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights").

The Texas court's application of the contemporaneous-objection rule in this case is similarly inadequate. If, as the Texas court contends, the rights recognized in *Penry I* and *Penry II* are sufficiently distinct that an argument citing *Penry I* could not adequately preserve an argument implicating *Penry II*, under Texas law Smith could not have waived claims based on *Penry II* because those claims had not been recognized at the time of his trial. In Texas, "a defendant does not waive his right to assert a constitutional violation by failing to object at trial if, at the time of his trial, that right had not been recognized." *Ex parte Smith*, 185 S.W.3d at 475 (Holcomb, J., dissenting) (citing *Ex parte Taylor*, 484 S.W.2d 748 (Tex. Crim. App. 1972)); *see also Mathews* v. *State*, 768 S.W.2d 731, 733 (Tex. Crim. App. 1989) (en banc); *Ex parte Chambers*, 688 S.W.2d 483, 486 (Tex. Crim. App. 1985) (Campbell, J., concurring).

The specific objection the Texas court now asserts Smith should have raised was not recognized until 2001.[8] For that reason, the Texas court has at least twice allowed successive habeas applications raising such *Penry II* claims to proceed on the theory that the claims were not recognized

[8] Notably, in its Supplemental Brief in Opposition at the petition stage the State noted that "the errors committed by the [Texas Court of Criminal Appeals] in this case *did not even exist until the opinions in Penry II and Tennard issued in 2001 and 2004*" (Supp. Br. in Opp. 5 (emphasis in original)), and referred to the "vast changes made to *Penry* jurisprudence in 2001 and 2004" (*id.* at 9).

prior to *Penry II*. *See Ex parte Davis*, No. WR-40,399-06, 2006 WL 829616 (Tex. Crim. App. Mar. 29, 2006) (per curiam) (unpublished) (holding that the applicant's challenge to a nullification instruction "was not available" when his initial habeas application was filed); *Ex parte Robertson*, No. AP-74,720, slip op. (Tex. Crim. App. Mar. 16, 2005) (unpublished) (concluding that "the legal basis for Applicant's [*Penry II*] claim was unavailable" when he filed his previous application); *cf. Ex parte Staley*, 160 S.W.3d 56 (Tex. Crim. App.) (declining to address the question), *cert. denied sub nom. Staley* v. *Texas*, 125 S. Ct. 2975 (2005).[9] In this case, however, the Texas court failed even to address the question whether Smith's claim could fall within the "right not recognized" exception to the contemporaneous-objection rule.[10]

Moreover, before its decision on remand in this case, the Texas Court of Criminal Appeals had not consistently applied any form of harmless-error analysis—let alone the heightened standard set out in *Almanza*—to *Penry* claims; rather, it had routinely granted *Penry* relief without reviewing the record for harm. *See*, *e.g.*, *Ex parte Williams*, 833 S.W.2d 150 (Tex. Crim. App. 1992); *Ex parte McGee*, 817 S.W.2d 77 (Tex. Crim. App. 1991); *Ex parte Goodman*, 816 S.W.2d 383 (Tex. Crim. App. 1991); *Ramirez* v. *State*, 815

[9] Texas law permits successive applications for postconviction relief only in the case of claims that "could not have been presented" at the time of the first application "because the factual or legal basis for the claim was unavailable," meaning that "the legal basis was not recognized by or could not have been reasonably formulated" from existing precedent. Tex. Code Crim. Proc. Ann. art. 11.071(5)(a), (d).

[10] The Texas court's inconsistency is further highlighted by its treatment of *Penry I* claims, which it regularly treated as falling within the "right not recognized" exception. *See Ex parte Williams*, 833 S.W.2d 150, 151 & n.3 (Tex. Crim. App. 1992) (noting that applicant "need not have objected . . . to have preserved a *Penry* claim"); *Fuller* v. *State*, 827 S.W.2d 919, 936 (Tex. Crim. App. 1992) (holding that failure to object did not waive *Penry* claim); *Selvage* v. *Collins*, 816 S.W.2d 390 (Tex. Crim. App. 1991) (per curiam) (same).

S.W.2d 636 (Tex. Crim. App. 1991) (en banc).[11] While the Texas court recently applied harmless-error analysis on direct appeal in *Penry* v. *State*, 178 S.W.3d 782 (Tex. Crim. App. 2005), the court did not repudiate or even address the aforementioned precedent. Whatever the merits of the *Almanza* analysis, it has not been "consistently or regularly applied," *Johnson* v. *Mississippi*, 486 U.S. 578, 587 (1988), to *Penry* error.

3. Perhaps most significantly, the Texas court here determined that Smith had failed to preserve his claim, and applied the "egregious harm" rule to deny him relief, only after it had already addressed his claim on the merits and this Court had reversed. In its initial decision, the Texas court declined to adopt the argument that Smith had procedurally defaulted his claim by failing to object to the instructions with adequate specificity at trial. *See Smith*, 543 U.S. at 43 n3. The issue was squarely before the court; four concurring judges would have found that Smith's claim was "procedurally defaulted." *Ex parte Smith*, 132 S.W.3d at 423 (Hervey, J., concurring); *id.* at 428 (Holcomb, J., dissenting). By contrast, the majority reached and decided Smith's *Penry* claim on the merits with no hint that he had failed adequately to preserve it.

The fact that the Texas court asserted waiver and applied its egregious harm analysis only *after* this Court reversed its judgment on the merits is alone reason to doubt whether its procedural ruling is genuinely "adequate" to support its judgment. Indeed, the Texas court's procedural maneuver bears a striking resemblance to tactics of resistance that the Court has repeatedly discountenanced in the past. As discussed above, *see supra* Part I.2, courts have in the past revisited prior determinations and applied new state-law grounds on remand—as the Texas court did here—in order to reinstate a ruling this Court had set aside. In such cases, this Court has not permitted state courts to

[11] The Texas Court of Criminal Appeals cited *Almanza* in a footnote in *Goff* v. *State*, but the Court found no error and thus did not directly address the issue. 931 S.W.2d 537, 551 n.13 (Tex. Crim. App. 1996).

shield their failure to comply with the substance of this Court's judgments behind the belated assertion of a purported rule of state law.

Ford v. *Georgia*, for instance, presented circumstances very similar to this case. In that case, the Georgia Supreme Court had addressed on the merits and rejected Ford's claim of discriminatory jury selection. *Ford* v. *State*, 355 S.E.2d 567 (Ga. 1985). This Court granted certiorari, vacated, and remanded for reconsideration in light of *Batson* v. *Kentucky*, 476 U.S. 79 (1986). *Ford* v. *Georgia*, 479 U.S. 1075 (1987). Like the Texas court here, on remand the Georgia court for the first time held that Ford's claim was procedurally barred, reasoning that Ford had failed adequately to raise a *Batson* claim at trial, despite his timely invocation of *Swain* v. *Alabama*, 380 U.S. 202 (1965), *Batson*'s antecedent. *Ford* v. *State*, 362 S.E.2d 764, 765-766 (Ga. 1987). Rather than permit the Georgia court thus to avoid the effect of its prior decision, this Court granted certiorari and reversed, holding that Ford had adequately preserved his claim and that the Georgia court's tardy assertion of a procedural obstacle was inadequate to prevent review of that claim. 498 U.S. 411, 424-425 (1991).[12]

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[12] Likewise, in *Yates* v. *Aiken*, 484 U.S. 211 (1988), the South Carolina Supreme Court had rejected petitioner's claim that the jury instructions at his trial violated his federal constitutional right to have the jury find every element of the crime beyond a reasonable doubt. *See id.* at 212-213 (describing prior proceedings). This Court vacated and remanded for reconsideration in light of *Francis* v. *Franklin*, 471 U.S. 307 (1985). *See* 484 U.S. at 213. On remand, the South Carolina court acknowledged that petitioner's trial suffered from the error recognized in *Francis*, but again denied relief, this time on the basis of a state-law nonretroactivity rule. *See id.* This Court again granted certiorari, reversed, and remanded, observing that since the state court had "considered the merits of the federal claim, it has a duty to grant the relief that federal law requires." *Id.* at 218. On the second remand, the South Carolina court again denied relief based on its conclusion that the error was harmless, and this Court once again granted certiorari, conducted its own harmless-error analysis based on the record, found the error not harmless, and reversed. *See Yates* v. *Evatt*, 500 U.S. 391 (1991), *overruled on other grounds*, *Estelle* v. *McGuire*, 502 U.S. 62, 72-73 & n.4 (1991).

State courts have indulged in similar sleight-of-hand throughout this Court's history. For example, in *Maguire* v. *Tyler*, the Court held that the plaintiff held legal title to certain lands. 75 U.S. (8 Wall.) 650 (1869). On remand, while accepting that the plaintiff held title as a matter of law, the Supreme Court of Missouri concluded that his petition sounded in equity, that an award of legal title could not be based upon such a petition, that he had an adequate remedy at law, and that therefore the petition should be dismissed. *See Tyler* v. *Magwire*, 84 U.S. at 284-285. This Court reversed, concluding that the Missouri court had, "in effect evade[d] the directions given by this court, and practically reverse[d] the judgment and decree which the mandate directed them to execute." *Id.* at 282.

More recently, in *NAACP* v. *Alabama ex rel. Patterson*, this Court reversed the Alabama Supreme Court's decision upholding a judgment of civil contempt against the NAACP for failing to comply with a court order to reveal the names of its members. 357 U.S. 449, 467 (1958). The Court rejected the State's argument that the judgment was supported by an adequate state procedural ground. *See id.* at 454-458. On remand, the state court acknowledged this Court's holding, but nonetheless re-instituted its contempt order, concluding that the NAACP had failed to comply with a different provision of the original order. *Ex parte NAACP*, 109 So. 2d 138 (Ga. 1959) (per curiam). This Court again reversed, noting that the parties had not previously disputed compliance on that point, and explaining that the state court was precluded from re-examining its decision: "'Whatever was before the Court, and is disposed of, is considered as finally settled.'" *NAACP* v. *Alabama ex rel. Patterson*, 360 U.S. 240, 244-245 (1960) (quoting *Sibbald* v. *United States*, 37 U.S. (12 Pet.) 488, 492 (1838)).

The same logic applies here. Having reached the merits of Smith's federal claim, the Texas court had "a duty to grant the relief that federal law requires." *Yates*, 484 U.S. at 218. It could not properly sidestep this Court's ruling by imposing new state-law procedural barriers on remand, after

this Court had already reversed its earlier decision on the merits.

B. The Texas Court's Harmless-Error Analysis Is Not An Independent State-Law Ground Of Decision Because It Rests On An Erroneous Analysis Of Federal Constitutional Law

The Texas Court of Criminal Appeals' harmless-error analysis also cannot shield its judgment from federal review because it is not an "independent" ground of decision. The Texas court's application of its harmless-error standard depended entirely on its express reassessment of the merits of Smith's federal constitutional claim—and on its refusal to accept this Court's analysis of the federal constitutional question.

This Court has previously explained that, "when resolution of [a] state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent." *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985). *Ake* addressed Oklahoma's waiver rule, which held objections waived if not asserted in a motion for a new trial, but incorporated an exception for "fundamental trial error," including federal constitutional error. *Id.* at 74-75. This Court held that the rule was not an independent state-law ground of decision because "the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed." *Id.*; *see also Oregon* v. *Guzek*, 126 S. Ct. 1226, 1229-1230 (2006) (state court's construction of a state rule of evidence was not an independent state ground barring review because the court construed the scope of the rule by reference to the scope of a capital defendant's federal constitutional right to present mitigating evidence); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 100 (1993) (no independent ground where the state-law holding "rested solely" on a failure properly to apply federal law).

There can be no doubt that the Texas court's conclusion that Smith did not suffer "egregious harm" rested entirely

on that court's misguided view of the merits of his federal constitutional claim. Indeed, the Texas court's harmless-error analysis improperly revisited, and rejected, this Court's specific conclusions regarding the merits of Smith's claim.

First, the Texas court ignored this Court's finding that Smith's mitigation evidence did not fit "within the scope of the special issues" in such a way that the jurors could properly consider and give effect to that evidence. *Smith*, 543 U.S. at 46 (quoting *Penry II*, 532 U.S. at 799-800); *see id.* at 47-48. Claiming to be "uncertain whether the Supreme Court . . . concluded that some of the applicant's mitigation evidence was outside the reach of the two special issues," 185 S.W.3d at 464, it proceeded to "re-examine" Smith's mitigation evidence and concluded that almost all such evidence was, in fact, "encompassed under the 'future dangerousness' special issue," with the remainder likely covered by deliberateness. *Id.* at 465-466; *see also id.* at 472.

That reasoning flatly contradicts this Court's decision, which made perfectly clear that the special issues were inadequate for consideration of Smith's mitigating evidence. After carefully reviewing that evidence, 543 U.S. at 41, 44-45, this Court expressly concluded that the questions regarding "deliberateness and future dangerousness . . . had little, if anything, to do with the mitigation evidence [Smith] presented," *id.* at 48. The jury instructions, including the special issues, were thus "constitutionally inadequate," *id.*, because they did not "empower the jury with a vehicle capable of giving effect to that evidence," *id.* at 45.

Second, the Texas court disregarded this Court's holding that the nullification instruction also could not provide an adequate vehicle for the consideration of mitigating evidence, because it would have been "both logically and ethically impossible for a juror to follow both" the special-issues instruction and the nullification instruction. 543 U.S. at 46 (quoting *Penry II*, 532 U.S. at 799). "Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a 'true verdict.'" *Id.* (quoting *Penry II*,

532 U.S. at 800). Furthermore, for Eighth Amendment purposes, the jury instruction in *Smith* was indistinguishable from the one the Court had held unconstitutional in *Penry II*: "[T]he clearer instruction given to [Smith's] jury did not resolve the ethical problem .... To the contrary, the mandatory language in the charge could possibly have intensified the dilemma faced by ethical jurors." *Id.* at 47-48.

On remand, the Texas court paid lip-service to this Court's conclusion, but went on to dismiss the ethical dilemma as a mere "possibility," insufficiently real to warrant granting Smith relief. 185 S.W.3d at 468 (internal quotations omitted). According to the Texas court, there was no "actual" ethical dilemma because neither the jurors, the parties, nor the trial judge noted one, and during *voir dire* the jurors "[o]verwhelmingly ... agreed" that they understood and could follow the nullification procedure. *Id.* Moreover, "the prosecutor never suggested that the jury should ignore or fail to consider any of [Smith's] mitigation evidence," *id.* at 471, and "[a]ll of [Smith's] mitigating evidence was admitted, defense counsel did a superb job of weaving all of that evidence into a compelling theory of the case, and his attorneys presented a strong, coherent, and persuasive closing argument on punishment," *id.* at 472.

None of the factors on which the Texas court relied can justify its disregard of this Court's express holding that, on these facts, the nullification instruction was constitutionally inadequate. The Texas court's reliance on jurors' statements during *voir dire* ignores this Court's holding that, by its very nature—even if jurors clearly understood it—the nullification instruction placed jurors in an intractable bind: it would have been "logically and ethically impossible" to comply both with the nullification instruction and their oath to render a true verdict on the special issues. *Smith*, 543 U.S. at 46 (quoting *Penry II*, 532 U.S. at 799). The notion that the prosecutor's closing mitigated this dilemma contradicts this Court's finding that the prosecutor heightened the jurors' ethical dilemma when he "reminded the jury that each and every one of them had promised to 'follow the law' and return a 'Yes' answer to the special issues so long as the

State met its burden of proof." *Id.* at 48 n.5. And the Texas court's assertion that Smith suffered no egregious harm from the deficient instructions because he presented a "compelling" and "persuasive" case on mitigation is both legally and logically incoherent. To the contrary, as this Court recognized, Smith was harmed precisely *because* he presented powerful mitigating evidence and the jury had no adequate vehicle to give effect to that evidence.

In short, the Texas court's conclusion that Smith failed "to provide any persuasive argument that the jury was unable to consider the totality of his extensive mitigating evidence," 185 S.W.3d at 471, is in clear and irreconcilable conflict with this Court's holding that the jury instructions were "constitutionally inadequate" because they disabled the jury from considering Smith's extensive mitigating evidence. 543 U.S. at 48. Far from being independent of federal law, it relies entirely on a distorted and overly narrow view of the Eighth Amendment principle at issue and of this Court's decision specifically addressing the application of that principle in this case. A decision reached in this manner not only intertwines state and federal law but deliberately twists federal law in the process.[13]

As discussed above, *see supra* Part I, this Court has repeatedly reversed state courts when, on remand, they refused to accept that the Court meant what it said initially. *See, e.g.*, *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978) (per curiam); *Stanton* v. *Stanton*, 429 U.S. 501 (1977) (per curiam); *Deen* v. *Hickman*, 358 U.S. 57 (1958) (per curiam). The Court has made clear that it is not enough to purport to adhere to its rulings while disregarding them in substance; the court to which this Court remands a case must respect

[13] Indeed, Judge Hervey's concurring opinion stated quite forthrightly that the *Almanza* harmless-error analysis provided a means of escaping the binding effect of this Court's judgments. "Since we are disposing of this case on an independent state ground, we are not bound by the views expressed in *Penry II* that Texas jurors are incapable of remembering, understanding, and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case." 185 S.W.3d at 474 (Hervey, J., concurring, joined by Keasler, J.).

the "thrust" of the Court's decision. *See Stanton*, 429 U.S. at 503.

Thus, this Court has not only corrected instances of outright disobedience, where the state court does "precisely what [the Court] held that it lacked the power to do," *Felter*, 436 U.S. at 496, or undertakes "its own independent evaluation of the evidence . . . wholly apart from the judgment of the Supreme Court," *Deen*, 358 U.S. at 57; it has also refused to allow state and lower courts to evade its judgments on remand based on an unduly narrow reading of this Court's case law, or on implausible distinctions between the facts of their cases and the precedents upon which a remand order was based. *See, e.g.*, *Henry* v. *City of Rock Hill*, 376 U.S. 776 (1964) (per curiam) (reversing for the second time a state-court decision after the state court purported to comply with this Court's remand order but reinstated its original judgment based on an improperly constricted view of this Court's precedent); *Chamberlin* v. *Dade County Bd. of Pub. Instruction*, 377 U.S. 402 (1964) (per curiam) (same). As the Court explained in *Henry*, "under the Supremacy Clause," Supreme Court decisions are "binding upon state courts as well as upon federal courts," and a state court cannot pay lip service to this Court's precedents, while evading their clear import. *Id.* at 777.

That principle is equally relevant here. The questions the Texas court addressed in this case are questions of federal law. This Court settled them in *Smith* v. *Texas*, 543 U.S. 37 (2004). The Texas court had no authority to revisit them on remand. This Court has jurisdiction and should reverse the judgment below.

CONCLUSION

The judgment of the Texas Court of Criminal Appeals should be reversed.

Respectfully submitted,

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