No. 18-1259

IN THE
Supreme Court of the United States

BRETT JONES,
Petitioner,
v.

MISSISSIPPI,
Respondent.

On Writ of Certiorari to the Mississippi Court of Appeals

BRIEF OF INDIANA, ALABAMA, ARKANSAS, FLORIDA, IDAHO, KENTUCKY, MISSOURI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Miller v. Alabama, 567 U.S. 460 (2012), held that mandatory life-without-parole sentencing schemes are unconstitutional as applied to juveniles. Four years later, this Court applied *Miller*'s substantive rule proscribing mandatory life-without-parole sentences retroactively. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). To give effect to *Miller*'s substantive holding, the Eighth Amendment requires a "hearing where 'youth and its attendant characteristics'" are considered, but there is no "formal factfinding requirement." *Montgomery*, 136 S. Ct. at 735 (quoting *Miller*, 567 U.S. at 465).

The question presented is:

Does a life-without-parole sentence imposed under a discretionary sentencing scheme where the sentencer considers youth and its attendant characteristics violate the Eighth Amendment if the sentencer does not make an express, on-the-record finding that a juvenile is permanently incorrigible?

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Arkansas, Florida, Idaho, Kentucky, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and Wyoming respectfully submit this brief as *amici curiae* in support of Respondent.

Amici States have a strong interest in preserving the finality of their criminal judgments, *Kuhlmann v. Wilson*, 477 U.S. 436, 452–53 (1986), and maintaining their "sovereignty over criminal matters," *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Because the Constitution vests States with "primary authority for defining and enforcing the criminal law," *Engle v. Isaac*, 456 U.S. 107, 128 (1982), the Court has long recognized "States' sovereign administration of their criminal justice systems" as an "important principle of federalism" that strictly limits federal-court intrusion into state criminal matters, *Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016).

Petitioner here asks the Court to require state sentencing bodies to find that a juvenile murderer is permanently incorrigible before imposing a sentence of life without parole—and to authorize federal courts to flyspeck sentencing transcripts to ensure they do so.

Amici States file this brief to explain why the Eighth Amendment does not require—on pain of invalidation of an otherwise-final criminal sentence—state sentencers to recite any particular formula or make any explicit finding before imposing life-without-parole sentences on juveniles convicted of murder.

SUMMARY OF ARGUMENT

The decision below correctly concluded, based on the language and reasoning of this Court's precedents—including *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)—that the sentencing court complied with the Eighth Amendment when it sentenced Brett Jones to life without parole while "cognizant of the fact that children are generally different [and] that consideration of [these] factors and others relevant to the child's culpability might well counsel against irrevocably sentencing a minor to life in prison," App. 149. The Eighth Amendment requires nothing more.

1. The origins of this case trace to a series of recent decisions in which the Court has—over vigorous and well-reasoned dissents—expanded its Eighth Amendment doctrine to apply categorical restrictions to prison sentences imposed for crimes committed by juveniles. This case arises from the last two of these decisions—*Miller*, which held that the Constitution prohibits *mandatory* life-without-parole sentences for juveniles, and *Montgomery*, which held that *Miller* applies retroactively to cases on collateral review.

Petitioner seeks to stretch these already-doubtful precedents to create a new categorical rule for *discretionary* juvenile life-without-parole sentences—that sentencers must specifically find that a juvenile murderer is "permanently incorrigible" before imposing such a sentence. Pet. Br. 1. And even beyond a specific factual finding, Petitioner insists that the Eighth Amendment categorically "forbids sentencing a corrigible juvenile to life without parole," *id.* at 31, which

would imply that federal courts have the power to overturn a state juvenile life-without-parole sentence if they conclude that the state sentencer *incorrectly* found the juvenile incorrigible, *see id.* at 32–36 (urging the Court to answer the incorrigibility question itself). Petitioner's theory would thus require States to convince a state sentencer and a federal judge of a juvenile's "incorrigibility"—a prediction difficult for even trained psychologists to make. *See Graham v. Florida*, 560 U.S. 48, 73 (2010) (quoting *Roper v. Simmons*, 543 U.S. 551, 572 (2005)).

The Court should refuse to endorse this additional intrusion into States' sovereign interests. Petitioner's rule would oblige federal courts to review state sentencing transcripts line by line and second-guess state sentencers' evaluation of the evidence—something federal courts do not do even in capital cases. *See Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982).

The premise of Petitioner's theory is that the Eighth Amendment compels a rehabilitative—rather than retributive—penological theory and thus forbids a State from imposing a life-without-parole sentence on a juvenile unless it shows that the juvenile "is incapable of rehabilitation." Pet. Br. 15. This premise is squarely contradicted by the Court's decisions, which have long held that "[r]etribution is a legitimate reason to punish," *Graham*, 560 U.S. at 71, and that the Constitution places "the primacy . . . in setting sentences" in state legislatures, not federal courts, *id.* at 87 (Roberts, C.J., concurring in judgment).

2. Moreover, regardless whether the Court takes a skeptical view of its recent Eighth Amendment decisions, *Miller* and *Montgomery* themselves merely prohibit *mandatory* juvenile life-without-parole sentences. *Miller* held that the Eighth Amendment prohibits courts from imposing life-without-parole sentences without considering "youth (and all that accompanies it)," because doing so "poses too great a risk of disproportionate punishment." 567 U.S. at 479. And *Montgomery* recognized that because *Miller* is premised on the substantive right to be free from grossly disproportionate sentences, its rule is retroactively applicable to cases on collateral review. *Miller* and *Montgomery* thus merely require that "the sentencing authority take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," *id.* at 480, by "consider[ing] mitigating circumstances before imposing the harshest possible penalty for juveniles," *id.* at 489; *Montgomery*, 136 S. Ct. at 735 (explaining that *Miller* requires "[a] hearing where youth and its attendant circumstances are considered as sentencing factors").

This rule accords with the Court's precedents "demanding individualized sentencing when imposing the death penalty"—precedents upon which *Miller* itself explicitly relied. *Miller*, 567 U.S. at 475–476. The Court's death-penalty decisions merely prohibit States from "cut[ting] off in an absolute manner" the consideration of mitigating evidence or so limiting its weight "that the evidence could never be part of the sentencing decision at all." *McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring).

Short of that, these decisions permit States to limit "the manner in which [the] evidence may be considered," *Saffle v. Parks*, 494 U.S. 484, 491 (1990), in light of States' "constitutionally permissive range of discretion" in determining the procedure for "imposing sentences," *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990). The Court's capital-punishment jurisprudence does not permit federal courts from second-guessing state sentencers' judgments regarding the ultimate justice of a capital sentence. The Court should respect the analogy it drew in *Miller* and refuse to license such second-guessing here as well.

3. Because *Miller* and *Montgomery* merely require sentencers to consider a juvenile's youth before imposing a sentence of life without parole, when such sentences are discretionary they necessarily comply with these decisions. Sentencers deciding whether to impose such sentences will invariably consider the offender's youth and any related circumstances. Particular factual findings or precise verbal formulations are thus unnecessary to protect the right announced in *Miller* and would improperly undermine States' authority to set their own rules of criminal procedure.

Miller announced a single, categorical rule prohibiting *mandatory* juvenile life-without-parole sentences. The Court should refuse to expand that rule still further. The decision below correctly held that state sentencers may impose life-without-parole sentences on juvenile murderers without making on-the-record findings that such murderers are permanently incorrigible. That decision should be affirmed.

ARGUMENT

I. The Court Should Refuse to Expand Its Already-Doubtful Juvenile-Sentencing Cases to Intrude Further into States' Sovereign Sentencing Authority

1. The fundamental basis for the rule Petitioner asks the Court to adopt is the proposition that the Eighth Amendment prohibits "disproportionate" sentences. And that proposition stands in tension, to say the least, with the historical evidence of the Eighth Amendment's meaning. Members of the Court have long "raised serious and thoughtful questions about whether, as an original matter, the Constitution was understood to require any degree of proportionality between noncapital offenses and their corresponding punishments." *Graham v. Florida*, 560 U.S. 48, 86 (2010) (Roberts, C.J., concurring in judgment).

Substantial historical evidence, for example, shows that the Cruel and Unusual Punishments Clause was originally understood to limit the *methods*, rather than the *proportionality*, of punishment. *See Miller v. Alabama*, 567 U.S. 460, 503–04 (2012) (Thomas, J., dissenting); *Ewing v. California*, 538 U.S. 11, 32 (2003) (Thomas, J., concurring in judgment). Because at common law the word "unusual" often meant "illegal," the ratifiers of the Eighth Amendment likely understood its prohibition on "cruel and unusual punishments" to bar punishments that were neither authorized by statute nor recognized by the common law. *See, e.g.,* Robert M. Casale & Johanna S. Katz, *Would Executing Death-Sentenced Prisoners After the Repeal of the Death Penalty Be Unusually*

Cruel Under the Eighth Amendment?, 86 Conn. B.J. 329, 338 (2012) ("At the time of the drafting of the Bill of Rights, an 'unusual' punishment was one not clearly authorized by law or not established by common usage."); *Harmelin v. Michigan*, 501 U.S. 957, 973–74 (1991) (opinion of Scalia, J.) ("In the legal world of the time . . . "illegall" and "unusuall" were identical for practical purposes."). Adopting this historically accurate understanding of the Eighth Amendment avoids the profound rule-of-law problems attendant to a freewheeling "proportionality" inquiry that allows judges to employ their own subjective perceptions and values to override sentences that "*some* assemblage of men and women *has* considered proportionate." *Id.* at 986.

Notwithstanding these well-founded objections, the Court in recent decades has found in the Eighth Amendment "a 'narrow proportionality principle'" that it applies "on a case-by-case basis," *Graham*, 560 U.S. at 87 (Roberts, C.J., concurring in judgment) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003)). And in conducting the "highly deferential 'narrow proportionality' analysis" under this purported Eighth Amendment principle, the Court has repeatedly "emphasized the primacy of the legislature in setting sentences, the variety of legitimate penological schemes, the state-by-state diversity protected by our federal system, and the requirement that review be guided by objective, rather than subjective, factors." *Id.* For these reasons, the Court has consistently held that the "narrow proportionality" requirement "forbids

only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* at 60 (opinion of the Court) (internal quotation marks and citation omitted).

Up until the last decade, the Court had recognized just one exception to the highly deferential, case-by-case Eighth Amendment proportionality review—capital punishment. Due to "the unique nature of the death penalty"—which "has been repeated time and time again in [the Court's] opinions"—the Court has been willing to impose *categorical* limitations on capital sentences, even while refusing to impose such limitations on prison sentences. *Rummel v. Estelle*, 445 U.S. 263, 272 (1980). As the Court observed in *Graham*, with respect to categorical rules proscribing particular punishments, all "previous cases involved the death penalty." 560 U.S. at 60 (opinion of the Court).

Graham, however, expanded the categorical approach the Court had previously limited to the death penalty to declare that the "Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Id.* at 82. *Graham* followed that path even though doing so was "at odds with [the Court's] longstanding view that 'the death penalty is different from other punishments in kind rather than degree." *Id.* at 89–90 (Roberts, C.J., concurring in judgment) (quoting *Solem v. Helm*, 463 U.S. 277, 294 (1983)). *Graham* was also "at odds" with the Court's then-recent decision prohibiting capital punishment for crimes committed prior to age 18, which explicitly "*bless[ed]* juvenile sentences that are 'less severe than death' despite involving 'forfeiture of some of the most basic liberties.'" *Id.* at 90 (quoting

Roper v. Simmons, 543 U.S. 551, 573–74 (2005)) (emphasis added). Nevertheless, *Graham* put aside these earlier precedents and categorically barred life-without-parole sentences for juveniles convicted of all nonhomicide crimes, reasoning that such crimes, "in terms of moral depravity and of the injury to the person and to the public, . . . [] cannot be compared to murder in their severity and irrevocability." *Graham*, 560 U.S. at 69 (opinion of the Court) (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008) (ellipsis in original; internal quotation marks omitted)).

Accordingly, even while expanding the "categorical" line of the Court's Eighth Amendment cases, *Graham*, like the Court's decisions before and since, affirmed States' authority to impose life-without-parole sentences on juveniles convicted of murder. *See Roper*, 543 U.S. at 572 (arguing that capital punishment for juveniles is unnecessary for deterrence because "the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person"); *Miller*, 567 U.S. at 473 ("*Graham*'s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm.").

Yet two years after *Graham* assured States that the Eighth Amendment does not categorically preclude life-without-parole sentences for juveniles convicted of murder, in *Miller* the Court declared a new Eighth Amendment rule: States may *not* impose such sentences if those sentences are "mandatory," 567 U.S. at 470, a rule the Court made retroactive four years later in *Montgomery v. Louisiana*, 136 S. Ct. 718

(2016). As the dissenting justices in *Miller* observed, the Court's decision effected "a classic bait and switch, . . . tell[ing] state legislatures that—*Roper*'s promise notwithstanding—they do not have power to *guarantee* that once someone commits a heinous murder, he will never do so again." 567 U.S. at 500 (Roberts, C.J., dissenting) (emphasis added).

Miller barred mandatory juvenile life-without-parole sentences even though "most States" had relied on *Roper* by "chang[ing] their laws relatively recently to expose teenage murderers to mandatory life without parole." *Id.* at 495. In fact, imposing mandatory sentences of life without parole on murderers who committed their crimes as juveniles "could not plausibly be described as" "unusual." *Id.* at 493. While "*Graham* went to considerable lengths to show that" life-without-parole sentences for juvenile *nonhomicide* offenders were "'exceedingly rare'" (123 prisoners were serving such sentences in a year that saw nearly 400,000 nonhomicide juvenile offenses committed), in *Miller* "the number of mandatory life without parole sentences for juvenile *murderers*, relative to the number of juveniles arrested for murder, [wa]s *over 5,000 times higher*." *Id.* at 496–97 (emphasis added).

2. Here, Petitioner demands yet another "bait and switch," this time with the Court's decisions in *Miller* and *Montgomery*. In *Miller* the Court repeatedly reiterated that its decision "does *not categorically bar a penalty for a class of offenders* or type of crime—as, for example, [the Court] did in *Roper* or *Graham*." 567 U.S. at 483 (opinion of the Court) (emphasis added). Rather, *Miller* "mandates *only that a sentencer follow a certain process*—considering an offender's youth

and attendant characteristics—before imposing a particular penalty." *Id.* (emphasis added). And in *Montgomery* the Court reaffirmed that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility." 136 S. Ct. at 735.

Now, however, after States have complied with *Miller* by ensuring sentencers have the discretion to consider a juvenile offender's youth before imposing a life-without-parole sentence, Petitioner asks the Court to transmogrify *Miller* and *Montgomery* to impose precisely what these decisions disclaim—a fact-finding requirement and a categorical prohibition. Petitioner and his supporting *amici* claim that life without parole can *never* be imposed on juveniles who are not "permanently incorrigible" and that sentencers must therefore specifically find that a juvenile is such a murderer before imposing a life-without-parole sentence. *See* Pet. Br. 18, 25; ACLU Amicus Br. 6 (contending that *Miller* held that "[o]nly juveniles outside the constitutionally exempt class—because they are 'permanently incorrigible'—can be sentenced to life without parole," and that this categorical rule "plainly entails a finding of incorrigibility"). That such a reversal can even be suggested—less than a decade after *Miller* was decided—illustrates the instability and arbitrariness of a "proportionality" analysis unmoored from objective, historical evidence.

The underlying assumption of Petitioner's theory is that a State violates the Eighth Amendment whenever it imposes a life-without-parole sentence on a juvenile who is not "incapable of rehabilitation." Pet. Br. 15. The Eighth Amendment, however, "does not man-

date adoption of any one penological theory." *Harmelin*, 501 U.S. at 999 (plurality opinion). "The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation," and "competing theories of mandatory and discretionary sentencing have been in varying degrees of ascendancy or decline since the beginning of the Republic." *Id.* The Eighth Amendment therefore permits a state sentencer to conclude that a juvenile has committed a murder so heinous that—regardless of what sort of person that juvenile might be decades from now—the principle of retribution requires sentencing that juvenile to life in prison without the possibility of parole. *See, e.g., Graham*, 560 U.S. at 71 ("Retribution is a legitimate reason to punish.").

Accordingly, the Court should refuse to endorse Petitioner's proposed expansion of its even-now-precarious Eighth Amendment precedents. States impose countless sentences for homicide convictions under a particular understanding of the Eighth Amendment's requirements, and altering these requirements—particularly when doing so contradicts the language of the Court's prior decisions—severely subverts state interests. Constantly changing the constitutional rules of criminal procedure threatens to undermine the validity of state criminal convictions and thus frustrates the finality interest States have in their criminal sentences—especially if the new rule is then made retroactive under *Teague v. Lane*, 489 U.S. 288, 308 (1989). *See, e.g., id.* ("[I]nterests of comity and finality must . . . be considered in determining the

proper scope of habeas review."); *Kuhlmann v. Wilson*, 477 U.S. 436, 452–53 (1986) (noting that finality "serves many . . . important interests" in "administration of [state] criminal statutes").

3. Furthermore, the rule Petitioner proposes here would intrude into the very procedures States use to conduct sentencing, impeding States' interest in maintaining their "sovereignty over criminal matters." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Petitioner's rule would even have federal courts reweigh the evidence presented to state sentencers: After all, in this very case Petitioner has asked the Court not only to decide that the Constitution requires a finding of permanent incorrigibility, but also to determine itself whether Petitioner is in fact permanently incorrigible. Pet. Br. 32–36. That, however, is something the Court has refused to do even in capital cases. *See Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982) ("[T]he state courts must consider all relevant mitigating evidence and weigh it against the evidence of aggravating circumstances. We do not weigh the evidence for them.").

If, as Petitioner would have it, "incorrigibility" is a fact that must always be found before imposing a juvenile life-without-parole sentence, any such factual finding likely would be subject to substantial evidence review on direct appeal as well as reasonableness review in a federal habeas proceeding. *See* 28 U.S.C. § 2254(d)(2). Accordingly, for a State to impose a sentence of life without parole for a murder committed while the killer was not yet eighteen, Petitioner would require the State to convince a state sentencing court

and state appellate court, as well as a federal habeas court, of the killer's permanent incorrigibility.

It is not at all clear how States would even begin to make such a showing, for as the Court itself has observed, "[i]t is difficult even for expert psychologists" to determine if a juvenile's crime "reflects irreparable corruption." *Roper*, 543 U.S. at 573 (citation omitted). If the Court were to require such a subjective finding, some lower courts will no doubt decide that, at least as a practical matter, there *is* a categorical prohibition on juvenile life-without-parole-sentences—notwithstanding the Court's repeated pronouncements otherwise. *See, e.g., Roper*, 543 U.S. at 572; *Miller*, 567 U.S. at 483. Eventually, the number of juvenile life-without-parole sentences would decrease and the Court would be faced with the argument that such sentences have become "unusual" and are thus categorically barred. *See Miller*, 567 U.S. at 501 (Roberts, C.J., dissenting) (predicting that if "such sentences for juvenile offenders "do in fact become 'uncommon,' the Court will have bootstrapped its way to declaring that the Eighth Amendment absolutely prohibits them").

4. Finally, if the Court were to adopt Petitioner's factfinding requirement, it would likely soon be forced to decide whether that fact must be found by a jury—that is, whether it "increases the penalty" possible, *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *id.* at 501 (Thomas, J., concurring), or if it "mitigates punishment," *id.* And regardless of the answer to that question, the very fact that Petitioner's position raises it counts as a further strike against his position. Requiring juries to make nebulous judgments regarding

juvenile offenders' "incorrigibility" would not only give jurors an impossible task but would cast into doubt longstanding state criminal convictions—and state criminal procedures—across the country.

In contrast, the rule adopted by the decision below—that the Eighth Amendment merely requires the sentencer to consider a juvenile offender's youth and attendant characteristics before imposing a life-without-parole sentence—clearly complies with *Apprendi*. After the juvenile's defense counsel presents the mitigating evidence, the sentencer exercises discretion as to whether to afford the possibility of parole. *See Alleyne v. United States*, 570 U.S. 99, 116 (2013) ("[N]othing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing judgement *within the range* prescribed by statute." (citing *Apprendi*, 530 U.S. at 481)).

Neither the evidence surrounding the Eighth Amendment's ratification nor any historical practice since supports Petitioner's novel, disruptive theory. On the contrary, the Court has consistently reiterated that "[i]n our federal system, 'States possess primary authority for defining and enforcing' criminal laws, including those prohibiting the gravest crimes." *Torres v. Lynch*, 136 S. Ct. 1619, 1629 n.9 (2016) (quoting *Brecht*, 507 U.S. at 635); *see also Payne v. Tennessee*, 501 U.S. 808, 824 (1991). The Court should decline Petitioner's invitation to further entangle federal courts in this difficult, value-laden task.

II. *Miller* and *Montgomery* Require Only That the Sentencer Consider the Youth of the Offender

The highly suspect precedential foundations for Petitioner's theory are reason enough to view it with skepticism. But even if *Miller* and *Montgomery* were correct, they do not help Petitioner in any event, for these decisions require a sentencer to do nothing more than consider a juvenile murderer's youth before sentencing him to life without parole.

1. The text of both *Miller* and *Montgomery* belie the notion that they "prohibit[] life-without-parole sentences for corrigible juvenile homicide offenders" and require sentencers to make a specific finding of permanent incorrigibility, Pet. Br. 18, for both decisions expressly disclaim this result, *see Miller v. Alabama*, 567 U.S. 460, 480 (2012) ("Although we do not foreclose a sentencer's ability to . . . [impose a life-without-parole sentence on juveniles] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."); *Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016) ("*Miller* did not impose a formal factfinding requirement . . . ."). Rather, the rule announced by *Miller* and made retroactive by *Montgomery* is simple: The Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders." *Miller*, 567 U.S. at 479 (emphasis added).

2. The Court's reasoning in *Miller* and *Montgomery* confirms this straightforward interpretation. *Miller* rested on the proposition that the Eighth Amendment prohibits "'excessive sanctions'" that are not "'proportioned' to both the offender and the offense." *Id.* at 469 (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). The Court reasoned that proportionate sentencing of juveniles requires courts to consider such factors as "greater prospects for reform," reduced ability to consider consequences, and vulnerability to outside influences. *Id.* at 471. Mandatory sentencing schemes, of course, do not permit such consideration, and the Court concluded that for this reason mandatory life-without-parole sentences create "too great a risk of disproportionate punishment." *Id.* at 479. "By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics . . . mandatory-sentencing schemes . . . violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment." *Id.* at 489.

Accordingly, because *Miller* was premised only on the need to consider the mitigating circumstances of youth, it made clear that the Eighth Amendment "mandates *only* that a sentencer . . . consider[] an offender's youth and attendant characteristics . . . before imposing a particular penalty [of life without parole]." *Id.* at 483 (emphasis added)). So long as a sentencer considers these circumstances before sentencing a juvenile to life without parole, the Eighth Amendment is satisfied.

Montgomery did not purport to alter *Miller*'s reasoning or its holding, but simply held that *Miller* announced a "substantive" rule retroactively applicable to cases on collateral review. *Montgomery* explained that *Miller*'s rule is substantive because, as noted, *Miller*'s "'foundation stone'" was the "[p]rotection against disproportionate punishment[,] . . . the central *substantive* guarantee of the Eighth Amendment." *Montgomery*, 136 S. Ct. at 732 (emphasis added); *see also Miller*, 567 U.S. at 489 ("[M]andatory-sentencing schemes . . . violate this principle of proportionality."). *Montgomery* also pointed out that *Miller* held "that mandatory life-without-parole sentences for children 'pos[e] *too great a risk of disproportionate punishment*.'" *Montgomery*, 136 S. Ct. at 733 (quoting *Miller*, 567 U.S. at 479) (alteration in original; emphasis added)). Thus, "[l]ike other substantive rules, *Miller* . . . '"necessarily *carr[ies] a significant risk* that a defendant' . . . 'faces a punishment that the law cannot impose upon him.'" *Id.* at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004)) (emphasis added).

All of this reasoning is consistent with reading *Miller* to mean what it says—that the Eighth Amendment requires nothing more than that a sentencer consider youth and its attendant circumstances before sentencing a juvenile to life without parole. *Montgomery* itself observed that the only "procedure *Miller* prescribes" is a "hearing where 'youth and its attendant characteristics' are considered as sentencing factors . . . ." *Montgomery*, 136 S. Ct. at 735 (quoting *Miller*, 567 U.S. at 465). It thus correctly recognized

that, contrary to Petitioner's theory, *Miller* "did not impose a formal factfinding requirement." *Id.*

3. The Court had good reason for not imposing such a factfinding requirement. When establishing new constitutional protections, the Court always is "careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–417 (1986) ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." (alterations in original))).

The Court has long observed that States are responsible for developing and refining their own criminal procedures in light of substantive constitutional guarantees: "In criminal trials [States] . . . hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). *Cf. Lynch v. Arizona*, 136 S. Ct. 1818, 1821 (2016) (Thomas, J., dissenting) ("The Due Process Clause does not compel such micromanagement of state sentencing proceedings." (internal brackets, quotation marks, and citation omitted)).

Indeed, the "correspondence" *Miller* drew in treating "'juvenile life sentences as analogous to capital punishment'" underscores why the decision requires nothing more than consideration of the mitigating circumstances of youth. *Miller*, 567 U.S. at 475 (quoting

Graham v. Florida, 560 U.S. 48, 89 (Roberts, C.J., concurring in judgment)). Relying on this analogy, the Court invoked its precedents "demanding individualized sentencing when imposing the death penalty," *id.*, which prohibited mandatory capital sentences and—"[o]f special pertinence"—"insisted . . . that a sentencer have the ability to consider the 'mitigating qualities of youth,'" *id.* at 476 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). The Court explained that mandatory life-without-parole sentences imposed on juveniles are unconstitutional for the same reason mandatory capital sentences imposed on adults are unconstitutional: "Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.*

Strikingly, the "individualized sentencing" line of cases on which *Miller* relied have consistently *rejected* the notion that the Eighth Amendment requires capital sentencers to make a particular factual finding—much less that any such finding would be reviewable by federal courts. In *Eddings v. Oklahoma*, for example, the Court held that while state capital sentencing bodies may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence," such sentencers enjoy wide discretion in "determin[ing] the weight to be given relevant mitigating evidence." 455 U.S. 104, 114–15 (1982) (emphasis in original). It is not the role of federal courts to "weigh the evidence for them." *Id.* at 117; *see also Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990) ("The requirement of individualized sentencing . . . is satisfied by allowing [the sentencer] to consider all relevant mitigating evidence.").

Recognizing that "States enjoy 'a constitutionally permissible range of discretion,'" over sentencing, *Kansas v. Marsh*, 548 U.S. 163, 175 (2006) (quoting *Blystone*, 494 U.S. at 308), in the capital context the Court has refused to require States to adopt "specific standards" for considering aggregating and mitigating circumstances, *see Zant v. Stephens*, 462 U.S. 862, 890 (1983); *see also Marsh*, 548 U.S. at 175 (collecting cases). All the Court has required is that the mitigating evidence be within the "effective reach of the sentencer," *Johnson,* 509 U.S. at 368 (internal quotation marks and citation omitted).

These capital-sentencing decisions—and *Miller*'s analogy to them—foreclose Petitioner's theory. He is asking the Court to impose exactly the sort of "specific standards" to sentencing that the Court has rejected time and time again in the capital context. *Zant*, 462 U.S. at 890. And he is asking the Court to weigh evidence of evidence of incorrigibility itself, directly contrary to *Eddings*, 455 U.S. at 117.

The Court should continue to refuse to insert federal courts into sentencing decisions the Constitution reserves to States. The only procedure required by *Miller* and *Montgomery* is individualized consideration of a juvenile defendant's "age and age-related characteristics"; this ensures that a life-without-parole sentence is not unconstitutionally disproportionate in light of the circumstances of a particular defendant and a particular case. *Miller*, 567 U.S. at 489. These decisions neither prescribe any particular formula for state sentencing hearings nor require a recitation of "magic words." *Railway Express Agency, Inc. v. Virginia*, 358 U.S. 434, 441 (1959).

III. Sentencers Imposing Discretionary Life-Without-Parole Sentences Necessarily Consider the Offender's Youth and Thus Comply With *Miller* and *Montgomery*

Because *Miller* merely requires individualized consideration of a juvenile defendant's "age and age-related characteristics," *Miller v. Alabama*, 567 U.S. 460, 489 (2012), its holding is limited to the "determination that *mandatory* life without parole for juveniles violates the Eighth Amendment," *id.* at 487 (emphasis added). *Miller* repeatedly drew a crucial distinction between mandatory and discretionary sentences: Mandatory sentences prevent sentencers from considering the defendant's youth, while discretionary sentences allow sentencers to "consider[] an offender's youth and attendant characteristics . . . before imposing" a sentence of life without parole. *Id.* at 483. Because sentencers imposing discretionary life-without-parole sentences inevitably consider "a juvenile's 'lessened culpability' and greater 'capacity for change.'" *Id.* at 465 (quoting *Graham v. Florida*, 560 U.S. 48, 68, 74 (2010)), these sentences fully comply with *Miller*. Extending *Miller* to *discretionary* life-without-parole sentences is therefore both unsupported and unnecessary.

In any sentencing hearing—and certainly in any case in which a juvenile is charged with murder—the defendant's attorney will be tasked with bringing to the sentencer's attention all mitigating factors, including the defendant's "youth and attendant characteristics." *Miller*, 567 U.S. at 483. The sentencer—whether a judge or a jury—will then consider all permissible factors in deciding what sentence would best

serve the interests of deterrence, punishment, and rehabilitation. And in *every* State the defendant's youth is a permissible mitigating factor: Every State either specifically instructs sentencers to account for age[1] or allows them to do so.[2] Indeed, many States not only

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[1] Tenn. Code § 39-13-204(j)(7); *State v. Dvorsky*, 322 N.W.2d 62, 67 (Iowa 1982) ("Trial court, however, must exercise its discretion. We have said that . . . the defendant's age . . . [is one of the] 'minimal essential factors' to be considered when exercising sentencing discretion." (citing *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979))).

[2] Ala. R. Crim. P. 26.6(b)(2); Alaska R. Crim. P. 32.1; Ariz. Rev. Stat. Ann. § 16A-26.7; Ark. Code Ann. § 16-90-804(c)(9); Colo. R. Crim. P. 32(a)(1)(I)(a), (b)(1); Ga. Code Ann. § 17-10-2(a)(1); Haw. Rev. Stat. Ann. §§ 706-604(1), 706-606(1); Idaho Code Ann. § 19-2521; 730 Ill. Comp. Stat. Ann. 5/5-4-1; Ind. Code Ann. § 35-38-1-7.1(c); Kan. Stat. Ann. § 22-3424(e); Ky. R. Crim. P. 11.02(1); Me. Rev. Stat. Ann. tit. 17-A, § 1252-C(2); Md. R. 4-342(e); Minn. Stat. Ann. § 631.20; Mont. Code Ann. §§ 46-18-101(3)(d), 46-18-115; Nev. Rev. Stat. Ann. § 176.015; N.J. Stat. Ann. § 2C:44-1(b)(4); N.M. Stat. Ann. § 31-18-15.1(A)(1); N.Y. Crim. Proc. Law § 380.50(1); N.D. Cent. Code Ann. § 12.1-32-04; Ohio Rev. Code Ann. § 2929.12; Okla. Stat. Ann. tit. 22, § 973; Or. Rev. Stat. Ann. §§ 137.080(1), 137.090(1); 42 Pa. Stat. and Cons. Stat. Ann. § 9752; 12 R.I. Gen. Laws Ann. § 12-19.3-3; Tex. Code Crim. Proc. Ann. art. 37.07 § (3)(a)(1); Vt. Stat. Ann. tit. 13, § 7030; Va. Code Ann. § 19.2-295.1; Wash. Rev. Code Ann. § 9.94A.500; Wis. Stat. Ann. § 973.017(2)(b); *People v. Brown*, 54 Cal. Rptr. 3d 887, 899 (Cal. Ct. App. 2007); *State v. Huey*, 505 A.2d 1242, 1245 (Conn. 1986); *Osburn v. State*, 224 A.2d 52, 53 (Del. 1966); *Nusspickel v. State*, 966 So. 2d 441, 445 (Fla. Dist. Ct. App. 2007); *State v. Williams*, 446 So. 2d 565, 567 (La. Ct. App. 1984); *Commonwealth v. Lykus*, 546 N.E.2d 159, 166 (Mass. 1989); *People v. Albert*, 523 N.W.2d 825, 826 (Mich. Ct. App. 1994); *Evans v. State*, 547 So.2d 38 (Miss. 1989); *State v. Cline*, 452 S.W.2d 190, 194 (Mo. 1970); *State v. Miller*, 381 N.W.2d 156, 158 (Neb. 1986); *State v. Timmons*, 756 A.2d 999, 1000 (N.H.

list the defendant's age among the specific permissible mitigating factors, but also explicitly direct sentencers to consider other factors that are closely linked with youth and its vulnerabilities.[3]

Because individualized sentencing hearings imposing *discretionary* life-without-parole sentences will inevitably encompass the defendant's youth—as well as any other mitigating factors that defense counsel will surely raise—such sentences will comply with the rule articulated in *Miller* and *Montgomery*. *Miller* properly recognized a fundamental difference between mandatory and discretionary sentences of life without parole: When considering *discretionary* life without parole sentences, state sentencing bodies necessarily consider the very factors that touch on "how children are different" due to youthful "age and its hallmark features," *Miller,* 567 U.S. at 477, 480.

2000); *State v. Goode*, 191 S.E.2d 241, 241–42 (N.C. Ct. App. 1972); *In re M.B.H.*, 692 S.E.2d 541 (S.C. 2010); *State v. Grosh*, 387 N.W.2d 503, 508 (S.D. 1986); *State v. Lineberry*, 391 P.3d 332, 334 (Utah 2016); *State v. Nicastro*, 383 S.E.2d 521, 529 (W. Va. 1989); *Hackett v. State*, 233 P.3d 988, 992 (Wyo. 2010).

[3] *See, e.g.* Ala. Code § 13A-5-51(4) ("The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor"); Alaska Stat. Ann. § 12.55.155(d)(4) ("the conduct of a youthful defendant was substantially influenced by another person more mature than the defendant"); Colo. Rev. Stat. Ann. § 18-1.3-1201(4)(k) ("The defendant is not a continuing threat to society"); Fla. Stat. Ann. § 921.141(7)(b) ("The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance").

Petitioner's position, however, both contradicts the Court's explicit statements in *Miller* and *Montgomery* and undermines the very purpose of *Miller*'s rule—preventing excessive punishment. Petitioner asks the Court to hold a sentence unconstitutional for failure to follow a particular verbal formula even when the sentence is imposed pursuant to detailed statutory schemes that specifically require consideration of the defendant's youth. Missouri, for example, prohibits life-without-parole sentences for juveniles unless a unanimous jury finds beyond a reasonable doubt *both* that the defendant inflicted the mortal injuries *and* that one of nine aggravating factors also existed. Mo. Ann. Stat. § 565.034(6)(1)–(2). But Petitioner would have the Court invalidate sentences imposed under that statute—and similar ones—if the sentencer failed to recite the words "permanent incorrigibility." *See, e.g.*, Neb. Rev. Stat. Ann. § 28-105.02(2) (requiring courts to consider mitigating factors submitted by the defendant, including age, "impetuosity," "family and community environment," "ability to appreciate the risks and consequences of the conduct," "intellectual capacity," and mental health evaluations); Iowa Code Ann. § 902.1(2) (requiring notice before prosecutor seeks life without parole and requiring the court to consider twenty-two sentencing factors); 730 Ill. Comp. Stat. Ann. 5/5-4.5-105(a) (requiring the court to consider at least eight mitigating factors in every juvenile sentencing).

Nothing in *Miller* or *Montgomery* suggests that such state laws fail to provide the procedure required by the Eighth Amendment. These and other state laws do all *Miller* says is necessary: They ensure that

sentencers "consider[] an offender's youth and attendant characteristics" before imposing a sentence of life without parole. *Miller*, 567 U.S. at 483. The Eighth Amendment does not authorize federal courts to brush aside these constitutionally satisfactory procedures and institute requirements of their own.

***

The Eighth Amendment does not require state sentencing bodies to make a specific finding of "permanent incorrigibility" before sentencing juveniles to life without parole. In contending otherwise, Petitioner misreads *Graham*, *Miller*, and *Montgomery*—decisions that themselves lack firm grounding in history or the Court's earlier precedents. The Court should refuse to endorse any further unjustified intrusion into State authority over sentencing procedures. It should affirm the decision below.

CONCLUSION

The Court should affirm the decision below.

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