No. 18-217

In the Supreme Court of the United States

RANDALL MATHENA, WARDEN,

Petitioner,

v.

LEE BOYD MALVO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association (ABA), as *amicus curiae*, respectfully submits this brief in support of the Respondent. The ABA is the leading organization of legal professionals in the United States. Its more than 400,000 members come from all 50 States and other jurisdictions. They include prosecutors, public defenders, and private defense counsel, as well as attorneys in law firms, corporations, non-profit organizations, and government agencies. The ABA's membership also includes judges, legislators, law professors, law students, and non-lawyer associates in related fields.[2]

Promoting the rule of law is central to the ABA's mission. Specifically, Goal IV of the ABA is to advance the rule of law.[3] In furtherance of this goal, in 2006, the ABA adopted as policy a Statement of Core Principles, adopted by the international bar presidents in Paris, France, which committed the legal profession to core rule-of-law principles.[4]

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part. No person other than *amicus curiae* or its counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this amicus brief.

[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of its positions.

[3] See, *e.g.*, Goal IV, *available at* https://perma.cc/5UFF-JX2Q.

[4] ABA Policy #111 (adopted midyear 2006), *available at* https://perma.cc/Z6YX-AJJ8. In addition, the ABA has established a Rule of Law Initiative that works, particularly in developing countries, to "promote justice, economic opportunity and human dignity through the rule of law." ABA, Rule of Law Initiative Pro-

The ABA policy on advancing the rule of law provided the basis for the ABA's *amicus curiae* brief in *Moore* v. *Texas*, 139 S. Ct. 666 (2019), in which the ABA explained, "No practice is more vital to preserving the rule of law—and ensuring that the ABA's promotion of that rule is legitimized in the eyes of developing countries—than the following by lower courts of binding precedent of this Court."[5]

In *Miller* v. *Alabama*, 567 U.S. 460, 479-480 (2012), the Court required a sentencing court "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" and concluded that that no juvenile may be sentenced to life without parole for a crime that reflects "unfortunate yet transient immaturity," rather than "irreparable corruption." A ruling in this case undercutting the *Miller* standard would undermine the rule of law. It could also jeopardize significant juvenile justice reforms that state legislatures and courts have adopted in reliance on the *Miller* standard.

A ruling affirming the court of appeals decision below, however, would be consistent not only with the rule of law, but also with the ABA policy of supporting juvenile justice. For over 40 years, the ABA has worked to ensure appropriate protections for juvenile defendants when transferred to the adult criminal justice system and has taken positions against imposing capital

gram Book 4 (2016). For more than 25 years, and through its work in more than 100 countries, the ABA Rule of Law Initiative and its partners have sought to strengthen legal institutions, to support legal professionals, to foster respect for human rights and to advance public understanding of the law and of citizen rights.

[5] The ABA's *amicus curiae* brief in *Moore* v. *Texas* is available at https://perma.cc/PHQ7-6JAE.

punishment and life without the possibility of parole on juvenile offenders. In 1980, after ten years of work, the ABA promulgated a comprehensive body of Juvenile Justice Standards, addressing the entire juvenile justice continuum, from police handling and intake to adjudication, disposition, and juvenile corrections.[6]

Concerned with the growing imposition of capital punishment on juvenile offenders, the ABA adopted policy in 1983 that opposed "the imposition of capital punishment upon any person for an offense committed while under the age of eighteen."[7] The ABA did so, despite its long-standing policy of taking no position on the death penalty as a general matter, after concluding that the arguments used to support capital punishment for adults, including retribution and deterrence, did not apply in the same manner to juveniles.

The ABA has repeatedly reaffirmed its position that "children are different."[8] And the ABA drew upon

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[6] Merril Sobe & John D. Elliott, *The IJA-ABA Juvenile Justice Standards*, Crim. Justice, 24 (Fall 2004). The ABA policies dating from 1988 onward that are discussed in this brief are available online at https://perma.cc/22CZ-C5Q4. Policies dated prior to 1988 are available from the ABA.

[7] ABA Policy #117A (adopted Aug. 1983) and its accompanying report are available from the ABA. The policy was cited in *Stanford* v. *Kentucky*, 492 U.S. 361, 388 (1989) (Brennan, J., dissenting), and in *Thompson* v. *Oklahoma*, 487 U.S. 815, 830 (1988).

[8] ABA Policy #119 (adopted Feb. 1991) (endorsing the United Nations Convention on the Rights of the Child), *available at* https://perma.cc/RMM7-N97G; ABA Policy #107 (adopted Feb. 1997) (supporting moratorium on death penalty until jurisdictions implemented procedures that, *inter alia*, "prevent[ed] execution of * * * persons who were under the age of 18 at the time of their offenses."), *available at* https://perma.cc/CAR5-Y7GV; ABA, *Youth*

its expertise and efforts to protect children in the juvenile justice system when it filed its *amicus curiae* briefs in *Roper* v. *Simmons*, 543 U.S. 551 (2005);[9] *Graham* v. *Florida*, 560 U.S. 48 (2010);[10] *Miller;*[11] and *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016).[12]

ABA support for the respondent in this case continues the ABA's consistent support for what the Court recognized in *Miller*—that juveniles' diminished culpability and greater prospects for reform make them different from adults for sentencing purposes, and that juveniles whose crimes reflect transient immaturity, rather than irreparable corruption, should not be subject to life imprisonment without parole.

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in the Criminal Justice System: Guidelines for Policymakers and Practitioners (2001), *available at* https://perma.cc/MH5M-97LP; ABA Policy #105C (adopted Feb. 2008) (urging that all jurisdictions implement sentencing laws and procedures that appropriately recognize the mitigating considerations of age and maturity of offenders under the age of 18 at the time of their offenses), *available at* https://perma.cc/3ZLV-PBTV; ABA Policy #107C (adopted Feb. 2015) (urging that all jurisdictions "[e]liminate life without the possibility of release or parole for youthful offenders both prospectively and retroactively," and provide them "with meaningful periodic opportunities for release based on demonstrated maturity and rehabilitation beginning at a reasonable point into their incarceration, considering the needs of the victims."), *available at* https://perma.cc/4BKH-NQ6Z.

[9] The ABA's *amicus curiae* brief is available at https://perma.cc/6FJ9-APFA.

[10] The ABA's *amicus curiae* brief is available at https://perma.cc/DPZ8-TEUU.

[11] The ABA's *amicus cu*riae brief is available at https://perma.cc/4YJY-CLU3.

[12] The ABA's *amicus curiae* brief is available at https://perma.cc/HH6Y-HBTK.

SUMMARY OF ARGUMENT

The Court initially addressed life without parole for juvenile homicide offenders in *Miller*. In that decision, the Court required a sentencing court "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" and concluded that no juvenile may be sentenced to life without parole for a crime that reflects "unfortunate yet transient immaturity," rather than "irreparable corruption." 567 U.S. at 480 (internal quotation marks omitted).

The Court held that the *Miller* ruling was a substantive rule of constitutional law in *Montgomery*. The issue in *Montgomery* was limited to whether *Miller* was retroactive on collateral review. Citing *Miller*, the Court again explained that a life without parole sentence violates the Eighth Amendment except for "the rare juvenile offender whose crime reflects irreparable corruption." *Montgomery*, 136 S. Ct. at 734 (citing *Miller*, 567 U.S. at 479-480). The Court held that *Miller* announced a new "substantive rule of constitutional law" rendering life without parole an unconstitutional penalty for a class of defendants "whose crimes reflect the transient immaturity of youth." *Montgomery*, 136 S. Ct. at 734. Accordingly, the Court held that the *Miller* decision was retroactive to collateral challenges to convictions. *Ibid.*

This case presents no new issues for the Court. The Court simply needs to reaffirm its holding in *Miller* that no juvenile may be sentenced to life without parole for a crime that reflects transient immaturity rather than irreparable corruption.

For the Court to decide otherwise would violate fundamental rule of law principles. The rule of law,

which is "indispensable" for a just society, is secured by the Supremacy Clause and held sacrosanct by the Court. Moreover, a decision undercutting *Miller* could upset numerous state sentencing legislative acts and judicial decisions that relied upon the Court's *Miller* decision.

The ABA urges the Court to reaffirm what it already held in *Miller*, safeguard the rule of law, and affirm the judgment below.

ARGUMENT

The Fourth Circuit correctly held that under this Court's decision in *Miller*, no juvenile may be sentenced to life without parole for a crime that reflects transient immaturity rather than irreparable corruption. Curtailing *Miller's* holding would violate fundamental rule of law principles and call into doubt numerous legislative and judicial state actions that relied upon the Court's substantive rule in *Miller*.

I. THE RULE OF LAW SHOULD BE UPHELD IN THIS CASE

The rule of law is ingrained in the fabric of American jurisprudence. It is a well-established principle that a constitutional rule is "binding upon the States and, under the Supremacy Clause of Article VI of the Constitution, it must be obeyed." *Sims* v. *Georgia*, 385 U.S. 538, 543–544 (1967). The supremacy of this Court's interpretation of the Constitution is beyond question. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). That interpretation is binding upon the States. See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 309 (1821) ("Let it be remembered that the several State legislatures and

judiciaries, are all bound by the solemn obligation of an oath, to support the federal constitution.").

As the Founders recognized: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." Alexander Hamilton, The Federalist No. 78. The Court endorsed this foundational standard by its elaboration on the "principles of law." *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (quoting *Republican Party of Minn.* v. *White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)). The legitimacy of the Court's power rests "in the end, upon the respect accorded to its judgments." *Ibid.* The rule of law only prevails if "a lower court in a system of absolute vertical stare decisis headed by one Supreme Court * * * follows both the words and music of Supreme Court opinion." *United States* v. *Martinez-Cruz*, 736 F.3d 999, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting). It is axiomatic that "respect for the rule of law must start with those who are responsible for pronouncing the law." *McCleskey* v. *Zant*, 499 U.S. 467, 529 (1991) (Marshall, J., dissenting).

The Court is thus justifiably loath to overrule its prior decisions. "[Stare decisis's] greatest purpose is to serve a constitutional ideal—the rule of law." *Citizens United* v. *FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring). Stare decisis is "a foundation stone of the rule of law." *Michigan* v. *Bay Mills Indian Community*, 572 U.S. 782, 798 (2014). It "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the ju-

dicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991); see also *Vasquez* v. *Hillery*, 474 U.S. 254, 265 (1986) (stare decisis contributes to the actual and perceived integrity of the judicial process by ensuring that decisions are founded in the law rather than in the proclivities of individuals); *Planned Parenthood of Southeastern Penn.* v. *Casey*, 505 U.S. 833, 84 (1992) ("[N]o judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." (citations omitted)).

As the Court recently reiterated, overruling prior precedent requires "special justification," which is more than just "an argument that the precedent was wrongly decided." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2422–2423 (2019) (internal quotation marks omitted). See also *Kimble* v. *Marvel Entertainment*, *LLC*, 135 S. Ct. 2401, 2409 (2015) (departure from Court's precedent requires a "special justification—over and above the belief that the precedent was wrongly decided."). Rather, precedent should not be reconsidered unless it has become "unworkable" or a "doctrinal dinosaur." *Kisor*, 139 S. Ct. at 2411.

The rule of law plays a critical role in this case. The Court in *Miller* ruled that no juvenile can be sentenced to life without parole, under any sentencing procedure, for a crime that reflects "transient immaturity" of youth rather than "irreparable corruption." *Miller*, 567 U.S. at 473, 479. This sentencing standard for juveniles has been binding on the States since 2012. The petitioner does not provide any special justification

for reconsidering that precedent; the *Miller* standard is neither "unworkable" nor a "doctrinal dinosaur."

Petitioner argues that the court of appeals here interpreted *Montgomery* as modifying and substantially expanding the substantive rule in *Miller*. Not true. The court of appeals was entirely faithful to *Miller* and *Montgomery*. Citing *Miller*, the Court in *Montgomery* again explained that a life without parole sentence violates the Eighth Amendment except for "the rare juvenile offender whose crime reflects irreparable corruption." *Montgomery*, 136 S. Ct. at 734 (citing *Miller*, 567 U.S. at 479-480). As the court of appeals noted, the Court in *Montgomery* explained that *Miller* announced a new "substantive rule of constitutional law" rendering life without parole an unconstitutional penalty for a class of defendants "whose crimes reflect the transient immaturity of youth," as opposed to "irreparable corruption." *Montgomery*, 136 S. Ct. at 734. Thus, the Court in *Montgomery* did not modify or expand the *Miller* standard. It simply held that the *Miller* standard was a substantive rule of constitutional law and thus, retroactive to collateral challenges to convictions. *Ibid.*

Although a *mandatory* life without parole sentencing scheme was the factual predicate in *Miller*, that predicate was not the necessary foundation for the Court's decision in *Miller*. Instead, it was the recognition that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471-474. *Miller* did not turn on the *procedure* through which a juvenile life without parole sentence is imposed—that is, through a mandatory or discretionary scheme—but upon the nature of the sentence itself, which *Miller* described as the "harshest possible penalty," and its inherent excessiveness for juveniles whose

crimes reflect the transient immaturity of youth. *Id*. at 479. That is why *Miller* repeatedly stated that it "require[d]" sentencers "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison"—a requirement that necessarily applies to *all* juvenile life without parole sentences.

The Court in *Montgomery* acknowledged the specific holding in *Miller* that "mandatory life-without-parole sentences for children 'pose[] too great a risk of disproportionate punishment.'" *Montgomery*, 136 S. Ct. at 733 (citing *Miller*, 567 U.S. at 479). But then it immediately thereafter explained that "*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison'" without distinguishing between mandatory and discretionary sentences. *Ibid*.

The rule of *Miller* is that lower courts must, as the court of appeals here recognized, not only take into account a juvenile's "age before sentencing him or her to a lifetime in prison," *Montgomery*, 136 S. Ct. at 734, but cannot impose such a sentence unless the juvenile is the "rare juvenile offender whose crime reflects irreparable corruption," rather than transient immaturity, *Miller*, 567 U.S. at 479-480. That is the substantive rule of constitutional law that *Montgomery* held retroactive. There is no justifiable basis for the Court to overturn, distinguish, or otherwise alter the rule of law it announced in *Miller*. To do so would not only weaken the rule of law—but have far-reaching effects for juvenile sentencing schemes implemented by state legisla-

tures and courts throughout the country in reliance upon *Miller*.

II. COURTS AND LEGISLATURES RELIED ON *MILLER* TO MODIFY THEIR SENTENCING REGIMES

The rule of law "fosters reliance on judicial decisions" when there is "evenhanded, predictable, and consistent development of legal principles." *Payne*, 501 U.S. at 827. State courts across the United States have relied on the consistent legal principles of *Roper, Graham* and now *Miller* to resentence juveniles sentenced to life without parole. Since *Miller*, the consensus among States has concretely shifted towards taking the transient immaturity of youth into account in determining whether sentences of life without parole are appropriate under the U.S. Constitution and the respective state constitutions. Any limitation or modification of *Miller* here could send conflicting signals to the States and upend significant juvenile justice reforms that state legislatures and courts have made in the wake of *Miller*.

The Court's ruling in *Miller* has had, and continues to have, a significant impact on state legislatures and courts throughout the country. Many states have amended their state laws or drafted new statutes to comply with *Miller*. Other states have developed protocols for resentencing or for considering parole and release. And in other states, courts have either addressed or continue to embrace the substantive rule of constitutional law decided by the Court. The American Civil Liberties Union and other organizations estimate that approximately 2,500 adults who were convicted as juveniles are impacted by these changes across the country. American Civil Liberties Union, *Juvenile Life*

Without Parole (Aug. 2, 2019).[13] If the rule of law is to retain its vitality, the Court should not disturb its decision in *Miller* and allow states to continue to apply the Court's teachings as to juvenile sentencing issues through their legislative and legal processes.

Since *Miller*, 28 states and the District of Columbia have now either banned or do not use juvenile life without parole as a sentencing option under any circumstance. See Josh Rovner, *Juvenile Life Without Parole: An Overview* 2, The Sentencing Project (July 23, 2019).[14] When *Miller* was decided in 2012, this number was just five states. See *Montgomery Momentum: Two Years of Progress since Montgomery* v. *Louisiana*, The Campaign for the Fair Sentencing of Youth (Jan. 25, 2018).[15] Twenty states and the District of Columbia currently do not have any prisoners serving life without parole for crimes committed as juveniles, because laws have been enacted prohibiting such a sentence or because there are no individuals serving such a sentence. See Rovner, *supra* at 2.

West Virginia's pre-*Miller* sentencing scheme involved a presumption against parole eligibility, but left it to the jury to "in their discretion recommend mercy," which meant parole eligibility after fifteen years. W. Va. Code Ann. § 62-3-15. After *Miller*, the West Virginia legislature outlawed juvenile life without parole prospectively and made juveniles currently serving life

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[13] *Available at* https://www.aclu.org/issues/juvenile-justice/youth-incarceration/juvenile-life-without-parole.

[14] *Available at* https://perma.cc/82Q6-B549.

[15] *Available at* https://perma.cc/R3EV-3FYJ.

without parole eligible for parole after 15 years. *Id.* §§ 61-11-23, 61-12-13b.

Nevada's sentencing scheme, unlike West Virginia, did not involve a presumption in favor of life without parole for juveniles; it was a truly discretionary scheme. Nev. Rev. Stat. § 200.030(4) (2012). Nonetheless, following *Miller*, the Nevada legislature eliminated juvenile life without parole sentences, *id.* § 176.025 (2019), and established parole eligibility for most juveniles sentenced to life without parole after 15 years, *id.* § 213.12135(1)-(2).

The majority of youth currently sentenced to life without parole are concentrated in just three states: Louisiana, Michigan and Pennsylvania. Campaign for the Fair Sentencing of Youth, *Facts About Juvenile Life Without Parole* (Aug. 2, 2019).[16] Each of these states has undertaken significant reforms to come into compliance with *Miller*. Louisiana has enacted a statute that provides juveniles serving life-without-parole sentences with automatic parole eligibility, unless the district attorney timely seeks life without parole – in which case the court must hold an individualized sentencing hearing before reimposing life without parole. La. Code Crim. Proc. Art. 878.1 (2017). Michigan has also begun a process for resentencing juvenile offenders, and, as of 2017, 86 juvenile offenders have been sentenced to a term of years, 47 became immediately eligible for parole, and 22 have been released. See Associated Press, *50-state examination* (July 31, 2017).[17] According to data from the Pennsylvania Department

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[16] *Available at* https://perma.cc/9TGS-PQ32.

[17] *Available at* https://perma.cc/8WJN-WW83.

of Corrections, 416 of those serving juvenile life-without-parole sentences have been resentenced, and 189 have been released. Pennsylvania Department of Corrections, Juvenile Lifers Information (May 7, 2019).[18]

Since *Montgomery*, at least nine states have banned or modified sentences of life without parole for juvenile offenders through legislation and through the state courts. See Associated Press, *supra*. For example, although a California court had discretion to impose sentences of 25 years to life (with or without parole), California's intermediate court of appeals had interpreted the sentencing guidelines to establish a presumption in favor of life without parole. See *People v. Gutierrez*, 324 P.3d 245, 254-255 (Cal. 2014). Post-*Miller*, the California Supreme Court determined that this presumption raised "serious constitutional concerns" under *Miller*, abrogated the lower court decisions that relied on the presumption, and remanded for resentencing, clarifying that sentencing courts must "consider all relevant evidence bearing on the 'distinctive attributes of youth' discussed in Miller." *Id.* at 267, 269. After *Miller*, the California legislature enacted a statute that allows juveniles sentenced to life without parole to petition for resentencing; after *Montgomery*, it provided for automatic parole eligibility after 25 years. See Cal. S.B. 394 (amending Cal. P.C. §§ 3051 and 4081). Iowa, Missouri, Utah, Arkansas, New Jersey, North Dakota, South Dakota, Oregon and Washington have all similarly amended their juvenile sentencing laws to comport with *Miller*. See Associated

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[18] *Available at* https://www.cor.pa.gov/About%20Us/Initiatives/Pages/Juvenile-Lifers-Information.aspx.

Press, *supra*; see also Ark. S.B. 294, 91st Gen. Assemb. (Reg. Sess. 2017) (amending Ark. Code §§ 5-4-104(b), 5-4-602(3), 5-10-101(c), 5-10-102(c), 16-93-612(e), 16-93-613, 16-93-614, 16-93-618, and enacting new sections); A. 373, 217th Leg. Assemb. (N.J. 2017) (amending N.J.S. 2C:11-3); North Dakota Century Code Ch. 12.1-32; S.B. 140, 2016 S.D. Sess. Laws (S.D. 2016) (amending S.D. Codified Laws § 22-6-1 and enacting a new section); Or. S.B. 1008 (July 22, 2019) (banning juvenile life without parole); *State* v. *Bassett*, 192 Wash.2d 67, 428 P.3d 343 (Wash. 2018).

The majority of states have thus reacted to *Miller* as the rule of law dictates they should—by following the pronouncements of the Court whose duty it is to "say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. The Court should reject the petitioner's outlier position and invitation to overrule or limit *Miller*, which could upend the States' substantial efforts to adhere to the rule of law.

CONCLUSION

The Court should affirm the judgment entered below.

Respectfully submitted.

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