No. 20-831

IN THE
Supreme Court of the United States

STATE OF WASHINGTON,
Petitioner,
v.

ENDY DOMINGO-CORNELIO,
Respondent.

On Petition for Writ of Certiorari to the Washington Supreme Court

BRIEF OF INDIANA AND 13 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Eighth Amendment categorically bars the death penalty for juvenile offenders, *Roper v. Simmons*, 543 U.S. 551, 571 (2005), and life without parole for juvenile nonhomicide offenders, *Graham v. Florida*, 560 U.S. 48, 74 (2010). In *Miller v. Alabama*, 567 U.S. 460, 465 (2012), the Court introduced an individual proportionality determination and held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment[.]"

The question presented is:

> Whether *Graham* and *Miller* require an individual proportionality determination before imposing *any* sentence on a juvenile offender convicted in adult court.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI* STATES 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 7

I. There Is a Deep and Persistent Conflict Among the Lower Courts Regarding Which Sentences Are Subject to *Miller* 7

II. Resolution of This Question Is Highly Important, for the Validity of Thousands of Sentences May Turn on Its Answer 13

III. The Decisions Below Illustrate the Urgent Need for the Court to Clarify to Which Sentences *Miller* Applies 20

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Bear Cloud v. State,
334 P.3d 132 (Wyo. 2014) 11

Blakely v. Washington,
542 U.S. 296 (2004).....24

Brecht v. Abrahamson,
507 U.S. 619 (1993).....1

Carter v. State,
192 A.3d 695 (Md. 2018).....10

Casiano v. Comm'r of Corr.,
115 A.3d 1031 (Conn. 2015) 10, 19

Commonwealth v. Foust,
180 A.3d 416 (Pa. 2018).....11

Davis v. McCollum,
798 F.3d 1317 (10th Cir. 2015).....9

Graham v. Florida,
560 U.S. 48 (2010).....*passim*

Ira v. Janecka,
419 P.3d 161 (N.M. 2018) 10

Jones v. Mississippi,
No. 18-1259 7

Kinkel v. Persson,
417 P.3d 401 (Or. 2018) 23

CASES [CONT'D]

Kuhlmann v. Wilson,
477 U.S. 436 (1986).....1

Lewis v. State,
428 S.W.3d 860 (Tex. Crim. App. 2014).....8

Lucero v. People,
394 P.3d 1128 (Colo. 2017) 8, 17

Miller v. Alabama,
567 U.S. 460 (2012).....*passim*

Montgomery v. Louisiana,
136 S. Ct. 718 (2016).....4

Pedroza v. State,
291 So.3d 541 (Fla. 2020) 10

People v. Contreras,
411 P.3d 445 (Cal. 2018).....18, 20

People v. Reyes,
63 N.E. 3d 884 (Ill. 2016).....10

Roper v. Simmons,
543 U.S. 551 (2005).....3

Rummel v. Estelle,
445 U.S. 263 (1980).....2, 3

Sanders v. Eckstein,
981 F.3d 637 (7th Cir. 2020).....11

CASES [CONT'D]

State v. Ali,
895 N.W.2d 237 (Minn. 2017).....8

State v. Nathan,
522 S.W.3d 881 (Mo. 2017).....8

State v. Patrick,
2020 WL 7501940 (Ohio Dec. 22, 2020).....10

State v. Quevedo,
947 N.W.2d 402 (S.D. 2020) 23

State v. Ragland,
836 N.W. 2d 107 (Iowa 2013) 10

State v. Shanahan,
445 P.3d 152 (Idaho 2019).....10

State v. Slocumb,
827 S.E.2d 148 (S.C. 2019) 8, 23

State v. Soto-Fong,
474 P.3d 34 (Ariz. 2020) 12, 22, 23

State v. Taylor G.,
110 A.3d 338 (Conn. 2015) 19

State v. Zuber,
152 A.3d 197 (N.J. 2017) 9

Steilman v. Michael,
407 P.3d 313 (Mont. 2017*)*.....9

CASES [CONT'D]

United States v. Grant,
887 F.3d 131 (3d Cir. 2018) 18, 19

United States v. Sparks,
941 F3d 748 (5th Cir. 2019).....8

Vasquez v. Commonwealth,
781 S.E.2d 920 (Va. 2016) 23, 24

Veal v. State,
810 S.E.2d 127 (Ga. 2018) 8

White v. Premo,
443 P.3d 597 (Or. 2019 .....10, 11

Williams v. United States,
205 A.3d 837 (D.C. 2019).....10

Wilson v. State,
157 N.E.3d 1163 (Ind. 2020).....8

OTHER AUTHORITIES

Dep't of Justice, Bureau of Justice Statistics, *Jail Inmates in 2018* (Mar. 2020), https://www.bjs.gov/content/pub/pdf/ji18.pdf 14

OTHER AUTHORITIES [CONT'D]

Dep't of Justice, Bureau of Justice Statistics, *Reported number of inmates age 17 or younger held in custody in federal or state prisons, December 31, 2000–2018* (Dec. 9, 2019), https://www.bjs.gov/nps/resources/documents/QT_less%20than%2018%20year%20olds_total.xlsx 14

Dep't of Justice, Federal Bureau of Investigation, *Ten-Year Arrest Trends*, 2019 Crime in the United States, https://ucr.fbi.gov/crime-in-the-u.s//crime-in-the-u.s.-2019/topic-pages/tables/table-32 14

Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Characteristics of Cases Judicially Waived from Juvenile Court to Criminal Court* (July 2019), https://www.ojjdp.gov/ojstatbb/snapshots/_Waiver2017.pdf 15

Easy Access to Juvenile Court Statistics 2005-2018, Nat'l Ctr. Juv. Just., https://www.ojjdp.gov/ojstatbb/ezajcs/asp/selection.asp 16

Supreme Court Rule 37.2(a) 1

OTHER AUTHORITIES [CONT'D]

Washington State Institute for Public Policy, *The Effectiveness of Declining Juvenile Court Jurisdiction of Youth* (Dec. 2013), https://www.courts.wa.gov//mjc/docs/Wsipp_Effectiveness-of-Declining-Juvenile-Court-Jurisdiction-of-Youth_Final-Report.pdf.....16

INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Alaska, Arizona, Idaho, Kansas, Kentucky, Louisiana, Montana, Nebraska, Ohio, South Carolina, South Dakota, Texas, and Utah respectfully submit this brief as *amici curiae* in support of Petitioner.

States have a strong interest in preserving the finality of their criminal judgments, *Kuhlmann v. Wilson*, 477 U.S. 436, 452–53 (1986), and in maintaining their "sovereignty over criminal matters," *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The decisions below seriously threaten these interests, for they hold that this Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), requires States to give judges complete discretion in *all* juvenile sentencing. They thus prohibit *all* mandatory juvenile sentences and rob the legislature of its rightful authority over criminal sentencing.

Amici States file this brief to explain why the Court should grant the petition and reverse the decisions below. The decisions below misread the Court's precedents and underscore the need for the Court to reiterate that it meant what it said in *Miller*: The *only* juvenile sentences *Miller* categorically prohibits are mandatory sentences of "life in prison without possibility of parole." *Id.* at 479.

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of Amici States' intention to file this brief at least ten days prior to the due date of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In these two companion cases, *State v. Ali* and *State v. Domingo-Cornelio*, the Washington Supreme Court issued a sweeping decision that fundamentally misunderstands the scope of this Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012). The Washington Supreme Court held that the Eighth Amendment requires judges to have "absolute discretion" over juvenile sentencing. Pet. App. 1a. It held, in other words, that the Eighth Amendment prohibits *all* mandatory juvenile sentences, no matter the sentence and no matter the crime. This conclusion ignores the text and reasoning of *Miller*, creates numerous legal and practical issues, and further exacerbates an already-serious divide among the lower courts regarding which juvenile sentences are subject to *Miller*'s individualized-sentencing requirement. For these reasons, the Court should grant the petitions and reverse the decisions below.

To understand how the Washington Supreme Court reached such a stunning interpretation of the Eighth Amendment, it is first necessary to summarize this Court's recent Eighth Amendment doctrine. Up until the last decade, this Court had recognized just one exception to the highly deferential, case-by-case proportionality review it ordinarily uses to implement the Eighth Amendment—capital punishment. Due to "the unique nature of the death penalty" the Court has been willing to impose *categorical* limitations on capital sentences, even while it has refused to impose such

limitations on prison sentences. *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

For example, in *Roper v. Simmons*, this Court's first major juvenile-sentencing decision, the Court used the categorical approach to hold that the Eighth Amendment prohibits the imposition of the death penalty for any crime committed by an offender under the age of eighteen. 543 U.S. 551 (2005). The Court decided that capital punishment for juveniles is unnecessary for deterrence because "the punishment of life imprisonment without the possibility of parole" remained available and "is itself a severe sanction, in particular for a young person." *Id.* at 572.

Indeed, before *Graham v. Florida*, *every* case in which the Court categorically proscribed a particular punishment for a particular kind of offender "involved the death penalty." 560 U.S. 48, 60 (2010) (opinion of the Court). In *Graham*, however, the Court extended its categorical approach beyond the death penalty, declaring that the "Constitution prohibits the imposition of a life-without-parole sentence on a juvenile offender who did not commit homicide." *Id.* at 82. The Court announced this new categorical rule over the objections of four justices, who pointed out that doing so was "at odds" both with the Court's longstanding view that "the death penalty is different from other punishments in kind rather than degree," and with *Roper*, which explicitly "bless[ed] juvenile sentences that are less severe than death despite involving forfeiture of some of the most basic liberties." *Id.* at 89–90 (Roberts, C.J., concurring in judgment) (internal quotation

marks and citations omitted); *see also id.* at 102–03 (Thomas, J., dissenting).

Two years after *Graham*, the Court issued its decision in *Miller*, again creating an entirely new categorical Eighth Amendment rule, "hold[ing] that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479. *Miller*, in other words, prohibits States from imposing life-without-parole sentences on juveniles if those sentences are "mandatory," *id.* at 470, a rule the Court made retroactive four years later in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Notably, in *Miller* the Court made clear that its "decision does not categorically bar a penalty for a class of offenders or type of crime," but "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty"—namely, life without parole. *Miller*, 567 U.S. at 483. Once more, four justices objected to the Court's expansion of its Eighth Amendment limits, observing that 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." *Miller*, 567 U.S. at 500 (Roberts, C.J., dissenting) (emphasis added).

Here, the Washington Supreme Court purported to extract from these decisions—*Miller* in particular—the rule that courts "must have absolute discretion to

impose anything less than the standard adult sentence based on youth." Pet. App. 1a. It thus held that *Miller*'s prohibition of mandatory sentences applies to *all* juvenile sentences. That neither of the defendants here received life-without-parole sentences was irrelevant, the Washington Supreme Court said, because the "Eighth Amendment requires trial courts to exercise discretion to consider the mitigating qualities of youth" in *every* juvenile sentencing proceeding, no matter how low the applicable mandatory or presumptive sentence. *Id.* at 11a.

The Washington Supreme Court reached this conclusion even though *Miller* emphasized time and again that its holding was limited to life-without-parole sentences. The sole justification it offered is the idea that this Court's juvenile-sentencing decisions require courts "'to recognize that children are different.'" *Id.* (quoting *State v. Houston-Sconiers*, 391 P.3d 409, 418 (Wash. 2017)). And the notion that children are different, the Washington Supreme Court asserted, means courts always "must have *absolute discretion to impose anything less than the standard adult sentence based on youth*." *Id.* at 1a (emphasis added).

Neither the Eighth Amendment nor *Miller* support such a radical proposition. The Court should grant the petitions, reverse the decisions below, and reaffirm that *Miller* requires only that a sentencer "have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles"—namely, "lifetime incarceration without possibility of parole." *Miller*, 567 U.S. at 489.

1. Although the decisions below are well outside any reasonable interpretation of *Miller*, they nevertheless exemplify the genuine confusion among the lower courts regarding precisely which sentences are subject to *Miller*'s individualized-sentencing requirement. Some courts have held that *Miller* applies only to *de jure* life-without-parole juvenile sentences—the type of sentences at issue in *Miller* itself. *See Miller*, 567 U.S. at 466, 469. Other courts, meanwhile, have extended *Miller* beyond *de jure* life-without-parole sentences to a variety of other sentences; the decisions below are the most extreme example of this approach. This lower-court conflict has arisen among state and federal appellate courts and shows no sign of resolution. This Court should grant the petitions to resolve this conflict and clarify the scope of *Miller*.

2. States urgently need an answer to this question. The American criminal justice system adjudicates thousands of criminal offenses each year, and many of these offenses were committed by individuals who are currently juveniles or were juveniles at the time of their crimes. States need a clear understanding of precisely what the Constitution requires to sentence such offenders. If—as the Washington Supreme Court says—all juvenile offenders are entitled to resentencing because their sentencers did not have absolute discretion to choose any sentence they wished, tens of thousands of sentences across the nation would become subject to judicial second-guessing. States deserve to know what they must do to preserve their criminal judgments.

3. Finally, the decisions below aptly illustrate the need for the Court's intervention—and what happens when *Miller* is extended beyond *de jure* life-without-parole sentences. Stretching *Miller* to apply to other sentences raises questions about what exactly constitutes a "life" sentence and leaves legislatures nearly powerless to create meaningful juvenile sentencing regimes. The Court should resolve these issues by answering the question presented in these petitions.

ARGUMENT

I. There Is a Deep and Persistent Conflict Among the Lower Courts Regarding Which Sentences Are Subject to *Miller*

In the wake of *Miller*, two fundamental questions about the decision have arisen among the lower courts. The first pertains to the content of the Court's decision—what exactly are the requirements *Miller* places on juvenile sentencing? The second pertains to the object of that decision—to which sentences does *Miller* apply? The Court is set to answer the first of these questions in *Jones v. Mississippi*, No. 18-1259 (argued Nov. 3, 2020). These petitions give the Court an opportunity to answer the second—a question that will otherwise continue to create confusion among courts and litigants on the federal and state level.

Courts addressing which sentences are subject to *Miller* have fallen into two camps. The first comprises courts that have held that because *Miller* specifically pertains to *de jure* life-without-parole sentences, the

decision applies *only* to such sentences. For example, the courts of last resort of Colorado, Georgia, Indiana, Minnesota, Missouri, South Carolina, and Texas have adopted this approach,[2] as have the Fifth and Tenth Circuits.[3]

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[2] *Lucero v. People*, 394 P.3d 1128, 1133 (Colo. 2017) ("Life without parole . . . remains distinct from aggregate term-of-years sentences resulting from multiple convictions."); *Veal v. State*, 810 S.E.2d 127, 129 (Ga. 2018) ("Because the Supreme Court has not expanded its mandate that . . . a sentencer . . . consider a juvenile's youth and its attendant characteristics before imposing a sentence other than life without parole, this Court will not do so."); *Wilson v. State*, 157 N.E.3d 1163, 1174 (Ind. 2020) (joining the "jurisdictions who have found *Miller*'s requirements only apply to *de jure* life-without-parole sentences and therefore are inapplicable to other discretionary sentences, including life with the possibility of parole."); *State v. Ali,* 895 N.W.2d 237, 246 (Minn. 2017) ("[The Supreme Court] has not held that the *Miller/Montgomery* rule applies to sentences other than life imprisonment without the possibility of parole . . . we will not extend the *Miller/Montgomery* rule."); *State v. Nathan*, 522 S.W.3d 881, 891 n.16 (Mo. 2017) (concluding that *Miller* is inapplicable "to consecutive sentences that amount to the functional equivalent of life in prison without the possibility of parole"); *State v. Slocumb*, 827 S.E.2d 148, 156 & n.16 (S.C. 2019) (declining "to extend *Graham*'s explicit holding . . . without further input from the Supreme Court" and noting that "[a]pproximately half of the courts around the country have similarly declined to find *Graham*, *Miller*, or the Eighth Amendment bars de facto life sentences"); *Lewis v. State*, 428 S.W.3d 860, 863 (Tex. Crim. App. 2014) (concluding that *Miller* applies "only when a juvenile can be sentenced to life without the possibility of parole.").

[3] *United States v. Sparks*, 941 F3d 748, 754 (5th Cir. 2019) ("*Miller* has no relevance to sentences less than [life without parole].");

A second group of courts have extended *Miller* beyond *de jure* life-without-parole sentences, though they have taken varying approaches to determining precisely to which sentences *Miller* applies. Some courts have merely extended the requirement to consider youth to life sentences and those that "effectively result in the juvenile offender's imprisonment for life," *Steilman v. Michael*, 407 P.3d 313, 319 (Mont. 2017), while other courts have taken a more expansive view, *see State v. Zuber*, 152 A.3d 197, 213 (N.J. 2017) (holding that *Miller* applies "broadly: to cases in which a defendant commits multiple offenses during a single criminal episode; to cases in which a defendant commits multiple offenses on different occasions; . . . to homicide and non-homicide cases[;]" to a 110-year sentence with possibility of parole after 55 years served; and a 75-year sentence with parole eligibility after 68 years and 3 months). And of course the most expansive of these are the decisions below, applying *Miller* analysis to *all* juvenile sentences. This group includes, for example, the high courts of Connecticut, the Dis-

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Davis v. McCollum, 798 F.3d 1317, 1321–22 (10th Cir. 2015) (concluding that the option of imposing a life-*with*-parole sentence made *Miller* inapplicable).

trict of Columbia, Florida, Idaho, Illinois, Iowa, Maryland, New Mexico, Ohio, Oregon, Pennsylvania, and Wyoming,[4] as well as the Seventh Circuit.[5]

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[4] *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1044 (Conn. 2015) (holding a fifty-year sentence without the possibility of parole "subject to the sentencing procedures set forth in *Miller*"); *Williams v. United States*, 205 A.3d 837, 844 (D.C. 2019) (stating that "numerous courts have understood *Miller*" to apply to *de facto* as well as *de jure* life-without-parole sentences, and that the court "agree[s] with that understanding."); *Pedroza v. State*, 291 So.3d 541, 548 (Fla. 2020) (holding that a "juvenile offender's sentence does not implicate *Graham*, and therefore *Miller* unless" it is "a life sentence or the functional equivalent of a life sentence"); *State v. Shanahan*, 445 P.3d 152, 159 (Idaho 2019) (holding that *Miller* applies to "lengthy fixed sentences that are the functional equivalent of a determinate life sentence"); *People v. Reyes*, 63 N.E. 3d 884, 888 (Ill. 2016) ("[S]entencing a juvenile offender to a mandatory term of years that is the functional equivalent of life without the possibility of parole constitutes cruel and unusual punishment in violation of the eighth amendment."); *State v. Ragland*, 836 N.W. 2d 107, 121–22 (Iowa 2013) ("[W]e hold *Miller* applies to sentences that are the functional equivalent of life without parole."); *Carter v. State*, 192 A.3d 695, 725 (Md. 2018) ("The initial question is whether a sentence stated as a term of years for a juvenile offender can ever be regarded as a sentence of life without parole for purposes of the Eighth Amendment. It seems a matter of common sense that the answer must be 'yes.'"); *Ira v. Janecka*, 419 P.3d 161, 167 (N.M. 2018) ("We conclude that the analysis contained within *Roper* and its progeny should be applied to a multiple term-of-years sentence."); *State v. Patrick*, 2020 WL 7501940 at *6 (Ohio Dec. 22, 2020) ("[T]he difference between a sentence of life in prison with parole eligibility after a term of years and a sentence of life without the possibility of parole is not material for purposes of an Eighth Amendment challenge by an offender who was a juvenile"); *White v. Premo*, 443 P.3d 597, 604 (Or. 2019) (applying

This conflict among the lower courts urgently calls for this Court's intervention. Beyond the intrinsic problems with lower-court conflicts, that this dissensus arises in the criminal context creates particularly acute problems: If a state high court and the corresponding federal circuit court disagree about what the Eighth Amendment requires of juvenile sentencers, many state juvenile sentencing decisions—while constitutionally sufficient under the state supreme court's interpretation of *Miller*—will be judged wanting by federal habeas courts. This result undermines the purpose of habeas review: If the reviewing court adopts an entirely different constitutional rule than the court whose decision is being reviewed, the very exercise of "review" is thwarted. Habeas review, after all, is predicated on the notion that federal and state courts will apply the same constitutional rules. This

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Miller to an 800-month sentence, and stating that in the absence of "additional penological justifications for a sentence that is the functional equivalent of life," the Court saw "no reason to treat such a sentence differently."); *Commonwealth v. Foust*, 180 A.3d 416, 441 (Pa. 2018) ("[W]e hold that a fixed term-of-years sentence can constitute a *de facto* [life without parole] sentence and, therefore, violates *Miller* in certain circumstances."); *Bear Cloud v. State*, 334 P.3d 132, 141–42 (Wyo. 2014) ("[T]he teachings of the *Roper*/*Graham*/*Miller* trilogy require sentencing courts to provide an individualized sentencing hearing . . . when, as here, the aggregate sentences result in the functional equivalent of life without parole.").

[5] *Sanders v. Eckstein*, 981 F.3d 637, 641, 643 (7th Cir. 2020) (explaining that it has "held that the Eighth Amendment prohibits not only *de jure* life sentences, but also *de facto* life sentences" while, nevertheless, deeming a 140-year sentence with possibility of parole not a *de facto* life-without-parole sentence).

persistent lower-court split threatens to make such review impossible.

Indeed, if this Court declines to resolve this confusion, such state-federal disagreements will only become more common. This problem has already arisen with respect to the closely related question concerning which sentences are subject to *Graham*—which, as noted, prohibits life-without-parole sentences for non-homicide juvenile offenders, *see Graham*, 560 U.S. at 74–75. The Arizona Supreme Court recently refused to follow a Ninth Circuit decision that had applied *Graham* to overturn a purportedly *de facto* life sentence arising out of multiple term-of-years sentences for multiple crimes; the Arizona Supreme Court considered the Ninth Circuit's decision "untenable" and instead joined the Ninth Circuit judges who dissented from the denial of rehearing en banc in concluding that *Graham* does not apply to such sentences. *See State v. Soto-Fong*, 474 P.3d 34, 42 (Ariz. 2020) (discussing *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013)). Such disagreement not only creates confusion for lower courts attempting to properly apply the law, but also prevents States from ensuring the finality of their criminal judgments. The Court should grant the petitions and resolve this uncertainty.

II. Resolution of This Question Is Highly Important, for the Validity of Thousands of Sentences May Turn on Its Answer

The question raised in these petitions has tremendous practical significance for States and thus particularly merits the Court's attention. If courts nationwide were to adopt the position of the Washington Supreme Court, tens of thousands of settled juvenile sentences would become open to collateral attack, as the Eighth Amendment would then require any and all juvenile sentences—even those for moderate or minor offenses—to be imposed without regard to statutorily mandated or presumptive sentences. *Graham* makes these concerns even more pressing: Some courts have concluded that *Graham* and *Miller* necessarily apply to the same sorts of sentences, which means courts are confused not only about when which sentences cannot be mandatory but also which sentences can never be imposed on nonhomicide offenders. Exacerbating matters still further, courts have that have extended *Miller* beyond *de jure* life-without-parole sentences have found themselves beset with extraordinarily difficult practical and legal questions, including how judges should go about determining what counts as a "life" sentence, and how to avoid the serious constitutional concerns that attend the proposed approaches to doing so. The Court should settle this important issue and resolve this costly lower-court confusion.

1. A great number of juveniles are involved with the American criminal justice system, and rules that extend the range of *Miller*—particularly those, such

as that of the Washington Supreme Court, that extend the decision to all juvenile sentences—have significant consequences for state criminal justice systems.

Consider first the number of juveniles currently held in custody. At year-end in 2018, 2,700 juveniles were "held as adults" in local jails across the United States, a category that included "juveniles who were tried or awaiting trial as adults." Dep't of Justice, Bureau of Justice Statistics, *Jail Inmates in 2018*, at 4 tbl. 3 (Mar. 2020), https://www.bjs.gov/content/pub/pdf/ji18.pdf. That same year state prisons held a further 699 juveniles. Dep't of Justice, Bureau of Justice Statistics, *Reported number of inmates age 17 or younger held in custody in federal or state prisons, December 31, 2000–2018* (Dec. 9, 2019), https://www.bjs.gov/nps/resources/documents/QT_less%20than%2018%20year%20olds_total.xlsx.

Of course, in addition to those who are currently under eighteen and in custody, a full accounting of the potentially affected sentences must also include the many people who are arrested as juveniles but who are sentenced after they reach adulthood. It is thus instructive that in 2019 alone, 28,999 persons under the age of eighteen were arrested for violent crimes in the United States. Dep't of Justice, Federal Bureau of Investigation, *Ten-Year Arrest Trends*, 2019 Crime in the United States, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-32. Surely many of these individuals were tried and convicted as adults.

Indeed, each year sees thousands of serious juvenile offenders transferred into the adult criminal justice system. In 2019, for example, nearly 4,000 juvenile cases were transferred into adult court. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Characteristics of Cases Judicially Waived from Juvenile Court to Criminal Court* (July 2019), https://www.ojjdp.gov/ojstatbb/snapshots/DataSnapshot_Waiver2017.pdf. Each one of those juveniles who are convicted will face adult sentences—sentences the validity of which would be undermined by the rule the Washington Supreme Court announced in the decisions below.

In addition, *Montgomery*, which made the rule of *Miller* retroactive, further expands the number of potentially affected sentences: Under *Montgomery*, *Miller* applies not just to current and future juvenile sentences, but to previously imposed juvenile sentences as well. For this reason, expanding the set of sentences to which *Miller* applies will invariably have extremely wide-ranging consequences.

The decisions below are illustrative: Because these decisions effectively prohibit all mandatory and presumptive juvenile sentences, every juvenile in Washington State who has ever been sentenced in adult court, for any offense, may have a possible claim for resentencing based on *Miller*. In Washington alone, the number of otherwise-final sentences now open for reexamination is considerable: Between 1994 and 2013, for example, about 1,300 juveniles were trans-

ferred into the adult system under the State's mandatory transfer rules, and the Washington Supreme Court's decisions likely affect the vast majority of sentences imposed on these offenders. Washington State Institute for Public Policy, *The Effectiveness of Declining Juvenile Court Jurisdiction of Youth* (Dec. 2013), https://www.courts.wa.gov/subsite/mjc/docs/Wsipp_The-Effectiveness-of-Declining-Juvenile-Court-Jurisdiction-of-Youth_Final-Report.pdf. And these figures understate matters, for they exclude juvenile offenders who were discretionarily transferred to adult court, as well as offenders who committed crimes as juveniles but were not charged until after they turned eighteen.

Across the United States as a whole, in the most recent fourteen-year period for which data are available (2005 through 2018), 69,155 cases were waived from juvenile court to adult court. *Easy Access to Juvenile Court Statistics 2005-2018*, Nat'l Ctr. Juv. Just., https://www.ojjdp.gov/ojstatbb/ezajcs/asp/selection.asp.[6] This figure underscores the extremely disruptive effect the Washington Supreme Court's rule would have if it were adopted nationwide: Tens of thousands of juveniles could be up for resentencing across the nation. The potential invalidation of so many otherwise-final sentences—and the accompanying strain such litigation would impose on already-

[6] Figures generated by selecting "Waived" as disposition outcome and then clicking "show table."

burdened court systems—calls out for the Court's intervention.

2. Moreover, the question raised in these petitions is even more significant in light of *Graham*. As noted, in *Graham* the Court held that life-without-parole sentences were not permissible for non-homicide juvenile offenders under any circumstances, and in *Miller* the Court held that this same category of sentences—that is, sentences of life without parole—could be imposed on homicide offenders only if the sentencer retained discretion to impose a lesser sentence in light of youth and its attendant characteristics. Because both *Graham* and *Miller* addressed life-without-parole sentences, some courts have concluded that the set of sentences subject to *Miller*'s individualized-sentencing requirement is the same as the set of sentences subject to *Graham*'s limitation to only homicide offenders. *See, e.g., Lucero v. People*, 394 P.3d 1128, 1130 (Co. 2017) (considering *Graham* and *Miller* together and concluding that "neither Graham nor Miller applies to an aggregate term-of-years sentence").

That some courts view the sentences subject to *Miller* and *Graham* as coterminous makes it all the more important that the Court answer the question presented. Expanding *Miller* beyond *de jure* life-without-parole sentences undermines the finality of sentences and interferes with state criminal procedures, but at least the state courts retain their authority to impose any prison sentence they deem appropriate. Expanding *Graham*, on the other hand, places yet more sentences entirely beyond States' authority to

impose on all nonhomicide offenders. These cases give the Court an opportunity to put an end to such intrusions on state sovereignty and clarify once for all that *Graham* and *Miller* apply *only* to *de jure* life-without-parole sentences.

3. Finally, the uncertainty over which sentences are subject to *Miller* has confronted courts with extremely difficult practical and philosophical problems. Courts that have sought to extend *Miller* beyond *de jure* life-without-parole sentences have struggled to determine what, exactly, a "life" sentence is. Some courts have adopted an "actuarial" approach, deeming a sentence a "life" sentence if actuarial tables and other evidence of mortality indicate a term-of-years sentence likely will leave the particular offender without a "'meaningful opportunity for release'"—that is, "an opportunity for release at a point in his or her life that still affords 'fulfillment outside prison walls.'" *United States v. Grant*, 887 F.3d 131, 147 (3d Cir. 2018) (quoting *Graham*, 560 U.S. at 79), *reh'g en banc granted, opinion vacated*, 905 F.3d 285 (3d Cir. 2018). But as the California Supreme Court has pointed out, the actuarial approach "gives rise to a tangle of legal and empirical difficulties." *People v. Contreras*, 411 P.3d 445, 449 (Cal. 2018), *as modified* (Apr. 11, 2018). There are practical considerations—what sources should courts use to determine life expectancy? Actuarial tables, government statistics? Beyond that, how should courts determine at what age a person has a "meaningful opportunity" to live a life outside of a prison?

The Third Circuit's now-vacated decision in *Grant* illustrates the extensive factfinding requirements these questions have imposed on sentencing courts. There, the Third Circuit panel concluded that under the Eighth Amendment "a juvenile offender that is found to be capable of reform should presumptively be afforded an opportunity for release at some point before the age of retirement." *Grant*, 887 F.3d at 150. The panel held that this requirement means sentencing courts must "conduct an individualized evidentiary hearing to determine the non-incorrigible juvenile homicide offender's life expectancy before sentencing him or her to a term-of-years sentence that runs the risk of meeting or exceeding his or her mortality." *Id.* at 149. The sentencing court must then identify the offender's retirement age, using the national retirement age—"a figure that incrementally fluctuates over time"—as a "rebuttable presumption," not a "hard and fast rule." *Id.* at 151–52.

Other courts that have extended *Miller* beyond *de jure* life-without-parole sentences have declined to adopt such precise procedures, but that simply aggravates the already-difficult line-drawing problem. The Connecticut Supreme Court, for example, has held that while *Miller* does not apply to ten-year mandatory-minimum sentences, *State v. Taylor G.*, 110 A.3d 338, 345 (Conn. 2015), it *does* apply to a fifty-year sentence, *Casiano v. Commissioner of Correction*, 115 A.3d 1031, 1044 (Conn. 2015). The Connecticut Supreme Court declined to decide "whether the imposition of a term of less than fifty years imprisonment without parole on a juvenile offender would require

the procedures set forth in *Miller*," *id.* at 1047, which inevitably leaves Connecticut courts and litigants to wonder where the line is.

Beyond these practical issues, imposing sentences on the basis of actuarial tables and retirement ages could lead to offenders receiving different sentences because of their race or gender—factors statistically associated with life expectancy. And taking such factors into account presents serious constitutional concerns. *See Contreras*, 411 P.3d at 450 ("Although persons of different races and genders are not similarly situated in terms of life expectancy, it seems doubtful that considering such differences in juvenile sentencing would pass constitutional muster.").

In sum, these petitions present a question of considerable significance for state criminal justice systems. The question goes far beyond affecting a few outlier cases: Tens of thousands of juvenile sentences, thought until now to be valid, could be subject to review, and such relitigation would inevitably present difficult practical and constitutional questions for state courts. This Court should grant the petition and make clear that the Eighth Amendment requires no such thing.

III. The Decisions Below Illustrate the Urgent Need for the Court to Clarify to Which Sentences *Miller* Applies

1. The decisions below aptly demonstrate the need for the Court to reaffirm what it said in *Miller*—that

the Eighth Amendment simply forbids mandatory life-without-parole sentences for juvenile offenders. *Miller v. Alabama*, 567 U.S. 460, 465 (2012). The Washington Supreme Court's decisions constitute a clear departure from this Court's juvenile sentencing jurisprudence, and they show just how destructive such errors can be if the Court fails to correct them.

The decisions below sweep into *Miller*'s purview any decision involving a juvenile, requiring courts in *all* juvenile cases to "have *absolute* discretion to impose *anything less* than the standard adult sentence based on youth." Pet. App. 1a (emphasis added). This rule squarely contradicts both the language and the reasoning of *Miller*. Again and again *Miller* limits its holding to *life-without-parole* sentences. *See, e.g., Miller*, 567 U.S. at 465 ("We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"); *id.* at 470 ("[M]andatory life-without-parole sentences for juveniles violate the Eighth Amendment."); *id.* at 479 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.").

And if the Court's repeated statements were not enough, the Court's rationale for its decision in *Miller* confirms that the decision is limited to life-without-parole sentences. *Miller* rested on a simple syllogism "implicat[ing] two strands of precedent." *Id.* at 470. The major premise of the Court's argument was the

proposition, premised on *Graham*, that "life-without-parole sentences imposed on juveniles" are "akin to the death penalty." *Id.* at 474–75. The minor premise was the notion, derived from "a second line of . . . precedents," that the Eighth Amendment "demand[s] individualized sentencing when imposing the death penalty." *Id.* Because life-without-parole sentences imposed on juveniles are equivalent to death sentences imposed on adults, the Court reasoned, the Court's individualized-sentencing cases prohibit mandatory life-without-parole sentences for juveniles. *Id.* at 476–80. Crucially, imposing a term-of-years sentence on a juvenile, on the other hand, is *not* equivalent to imposing a death penalty on an adult. Such sentences accordingly do not implicate the Court's individualized-sentencing precedents and do not fall within the ambit of *Miller*.

2. Though the below decisions' misinterpretation of *Miller* is more obvious than most, these decisions illustrate in extreme form the severe consequences of the many decisions that have extended *Miller* beyond *de jure* life-without-parole sentences. The Washington Supreme Court's decisions effectively rob the State's legislature—and the legislature of any State whose courts adopt a similar rule—of its authority to make any meaningful rules about sentencing juveniles. By giving sentencing courts "absolute discretion" over juvenile sentencing, Pet. App. 1a, the decisions below cause courts "to assume the legislative prerogative to establish criminal sentences," invalidating legislative efforts to standardize sentences and ensure appropriate sentences are imposed for the most heinous

crimes, *State v. Soto-Fong*, 474 P.3d 34, 42 (Ariz. 2020). "[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Graham v. Florida*, 560 U.S. 48, 62 (2010) (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002)). The decisions below replace the values of legislators with the absolute discretion of sentencing courts.

The fact is juveniles occasionally commit grievous crimes, and any extension of *Miller* necessarily further limits legislatures'—and voters'—"power to guarantee that once someone commits a heinous" crime against their community, they will receive a sentence that their community believes is just and that will prevent such a crime from reoccurring. *Miller*, 567 U.S. at 500 (Roberts, C.J., dissenting). In *State v. Slocumb*, for example, a thirteen-year-old attacked a high school teacher in a parking lot, forced her to drive to a wooded area, digitally penetrated her vagina at gunpoint, and then shot her five times in the head, leaving her body on the side of the road; three years later, the then-sixteen-year-old escaped from custody for forty-five minutes, during which time he forced his way into a woman's apartment and raped her. 827 S.E.2d 148, 149 (S.C. 2019); *see also, e.g., State v. Quevedo*, 947 N.W.2d 402, 403 (S.D. 2020) (seventeen-year-old fatally stabs a convenience store clerk thirty-eight times); *Kinkel v. Persson*, 417 P.3d 401, 403 (Or. 2018) (fifteen-year-old murders his parents and then shoots dozens of schoolmates, killing two and injuring more than two dozen more); *Vasquez v. Commonwealth*, 781 S.E.2d 920, 922 (Va. 2016) (two sixteen-year-olds

break into a college student's apartment, stealing property, threatening to kill her, and raping her multiple times). The decisions below would deprive legislatures of the ability to set *any* minimum sentence for such horrific acts. Surely, this is neither what the Eighth Amendment nor *Miller* requires.

Finally, mandatory minimums, and legislative sentencing schemes more generally, do more than ensure some minimum punishment is meted out: They also limit the influence on sentencing decisions of individual judges' opinions and biases. As Justice O'Connor noted in *Blakely v. Washington*—discussing a prior sentencing regime in Washington State—a "system of unguided discretion" in sentencing "inevitably result[s] in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories." 542 U.S. 296, 315 (2004) (O'Connor, J., dissenting).

Mandatory minimums allow States to address such concerns and to ensure that sentences for similarly situated offenders are reasonably similar. The decisions below entirely invalidate the Washington legislature's attempts to do so. And every decision expanding *Miller* beyond de jure life-without-parole sentences imposes greater restrictions on legislative authority in this area than this Court's precedents require. The Court should take this opportunity to reiterate the narrow scope of *Miller* and ensure that States retain their longstanding sovereign authority to regulate juvenile sentencing.

CONCLUSION

The Court should grant the Petitions.

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