No. 21-

In the Supreme Court of the United States

EMOND S. GULLEY,

Petitioner,

v.

KANSAS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

PETITION FOR A WRIT OF CERTIORARI

JACOB NOWAK
Kansas Appellate Defender Office
Jayhawk Tower
700 Jackson, Suite 900
Topeka, KS 66603

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu

QUESTION PRESENTED

In *Miller v. Alabama*, 567 U.S. 460 (2012), the Court held that the Eighth Amendment bars the mandatory imposition of life in prison without parole for offenses committed by juveniles.

The question presented is whether, and under what circumstances, the same principle applies to the mandatory imposition of a term-of-years sentence so long as to be equivalent to life without parole.

RELATED PROCEEDINGS

Supreme Court of Kansas: *State v. Gulley*, No. 122,271 (Mar. 4, 2022)

District Court, Sedgwick County, Kansas: *State v. Gulley*, No. 18CR3102 (Nov. 25, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Emond S. Gulley respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Kansas.

OPINION BELOW

The opinion of the Supreme Court of Kansas is published at 505 P.3d 354 (Kan. 2022).

JURISDICTION

The judgment of the Supreme Court of Kansas was entered on March 4, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT

The Eighth Amendment prohibits mandatory sentences of life without parole for juveniles. *Miller v. Alabama*, 567 U.S. 460 (2012). But what about mandatory sentences of "X years without parole," where X is a number so large as to amount to life as a practical matter? There is an enormous, lopsided split on this question. Most courts have held that the principle of *Miller* applies to these sentences as well, because otherwise the states would have an obvious way to sidestep the Constitution—they could simply replace "life" with "100 years" in their sentencing statutes. But a few courts have taken the opposite

view. These courts have read *Miller* to apply only to sentences expressly worded as life without parole.

Because of this conflict, identical sentences are constitutional in some jurisdictions and unconstitutional in others. Here, for example, petitioner Emond Gulley received a mandatory sentence of 51½ years without parole for an offense he committed at the age of 15. Several courts have held this sentence unconstitutional under *Miller*, but the Kansas Supreme Court did not.

1. Emond Gulley was convicted of a murder that took place when he was 15 years old. App. 2a. He was sentenced to 618 months in prison—51½ years—without the possibility of parole. *Id.* This was a mandatory sentence; under Kansas law, the trial court had no discretion to consider Gulley's youth as a mitigating factor or to impose a lesser sentence. *Id.* at 22a.[1]

On appeal to the Kansas Supreme Court, Gulley argued that a mandatory sentence of 51½ years without parole is contrary to *Miller v. Alabama*, because it is the functional equivalent of life without parole. *Id.* at 19a. The Kansas Supreme Court decided the issue on the merits. *Id.* at 20a.

2. The Kansas Supreme Court affirmed. *Id.* at 1a-26a.

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[1] Gulley was also convicted of robbery and sentenced to another 61 months to be served consecutively, *id.* at 2a, 5a-6a, but this additional sentence has no bearing on the Question Presented, which concerns the constitutionality of a single 51½-year sentence, not the constitutionality of the aggregate length of consecutive sentences.

The court noted that under *Miller*, "*mandatory* life without parole for any juvenile offender—even one who commits homicide—violates the Eighth Amendment because it will be a rare circumstance in which life without parole is a proportionate sentence for a juvenile." *Id.* at 21a (citing *Miller*, 567 U.S. at 479). The court recognized that "before sentencing a juvenile to life without parole," *Miller* requires the sentencer to "consider 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" App. 21a (quoting *Miller*, 567 U.S. at 480).

But the Kansas Supreme Court nevertheless held that Gulley's 51½-year sentence is not unconstitutional under *Miller*, because it is not literally a sentence of life without parole. *Miller*'s "clear language dooms Gulley's claim," the Kansas Supreme Court explained. App. 23a. "Nowhere in the opinion does the Court indicate that a sentence that offers parole within an offender's lifetime falls within *Miller*'s protective sphere." *Id.* The court reasoned that *Miller* and its predecessor case, *Graham v. Florida*, 560 U.S. 48 (2010), "refer repeatedly and unambiguously to the sentence of life without parole," but they do not mention term-of-years sentences that are equivalently long. App. 23a (citation and internal quotation marks omitted).

The court added that the logic of *Miller* provides further support for this conclusion. "[C]entral" to *Miller*, the Kansas Supreme Court observed, was this Court's "observation that life without parole is analogous to a death sentence." *Id.* So long as there is a chance the juvenile could be released from prison before his death, the court continued, a long term-

of-years sentence is more analogous to "[l]ife *with* parole," because the juvenile can have some hope of eventual release. *Id.* at 24a.

The Kansas Supreme Court concluded that Emond Gulley has such a hope of release, despite his mandatory sentence of 51½ years without parole. *Id.* at 25a. "Gulley's life with parole sentence makes him eligible for parole at 66 years old," the court explained. *Id.* "Even if we add the sentence for the aggravated robbery, Gulley will be eligible for release at 71. Neither of these ensures that Gulley will be executed by the State or live his entire life in prison. Consequently, *Miller* is inapplicable to his case and his claim fails." *Id.* at 25a-26a.

Justice Rosen, joined by Justice Wall, concurred in part and dissented in part. *Id.* at 26a-30a. In their view, the trial court had misinterpreted the state's sentencing statute. *Id.*

3. Justice Standridge dissented. *Id.* at 30a-55a. She disagreed with the majority's holding "that if a sentence imposed on a juvenile offers even a glimmer of the chance at release before death, it can never be the functional equivalent of life without the possibility of parole." *Id.* at 30a. Justice Standridge concluded instead that "*Miller* applies to sentences that are the functional equivalent of life without parole" and that "the sentence of life without the possibility of parole for 618 months imposed here is the functional equivalent of life without parole." *Id.* at 31a.

Under *Miller*, Justice Standridge explained, "[o]ne could not reasonably argue … that a sentence fixed for a term of 100 years provides a meaningful opportunity for release, even though it is not characterized

as a sentence of life without parole." *Id.* at 40a-41a. She drew the conclusion that "at some point on the sentencing spectrum, a lengthy fixed sentence equates to a fixed life sentence without parole." *Id.* at 41a. Otherwise, a sentencer could "circumvent the Eighth Amendment prohibition against cruel and unusual punishment simply by expressing the sentence in the form of a lengthy term of numerical years rather than labeling [it] for what it is: a life sentence without parole." *Id.* This principle, she continued, "necessarily includes sentences that technically offer a chance at parole late in a juvenile's life." *Id.*

Justice Standridge acknowledged that "there is a split of authority among the states and the federal circuits on the issue." *Id.* at 46a. She noted that "[m]ost courts considering the issue focus not on the label attached to a sentence but on whether imposing the sentence would violate the principles *Miller* and *Graham* sought to bring about." *Id.* at 42a (citing *Williams v. United States*, 205 A.3d 837 (D.C. Ct. App. 2019); *Henry v. State*, 175 So. 3d 675 (Fla. 2015); *State v. Shanahan*, 445 P.3d 152 (Idaho 2019); *People v. Reyes*, 63 N.E.3d 884 (Ill. 2016); *State v. Null*, 836 N.W.2d 41 (Iowa 2013); *Commonwealth v. Brown*, 1 N.E.3d 259 (Mass. 2013); *State v. Zuber*, 152 A.3d 197 (N.J. 2017); *Ira v. Janecka*, 419 P.3d 161 (N.M. 2018); *State v. Moore*, 76 N.E.3d 1127 (Ohio 2016); *White v. Premo*, 443 P.3d 597 (Or. 2019); *Commonwealth v. Foust*, 180 A.3d 416 (Pa. Super. Ct. 2018); *State v. Ramos*, 387 P.3d 650 (Wash. 2017); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014); *Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017); *McKinley v. Butler*, 809 F.3d 908 (7th Cir.

2016); *United States v. Jefferson*, 816 F.3d 1016 (8th Cir. 2016); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013); *People v. Caballero*, 282 P.3d 291 (Cal. 2012); *State v. Riley*, 110 A.3d 1205 (Conn. 2015); *Parker v. State*, 119 So. 3d 987 (Miss. 2013); *Steilman v. Michael*, 407 P.3d 313 (Mont. 2017); and *State v. Finley*, 831 S.E.2d 158 (S.C. Ct. App. 2019)).

On the other side of the split, she recognized, are courts holding that a term-of-years sentence is categorically different from a sentence of life without parole. App. 46a (citing *United States v. Sparks*, 941 F.3d 748 (5th Cir. 2019); *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012); *State v. Ali*, 895 N.W.2d 237 (Minn. 2017); *Mason v. State*, 235 So. 3d 129 (Miss. Ct. App. 2018); *State v. Zimmerman*, 63 N.E.3d 641 (Ohio Ct. App. 2016); *Lewis v. State*, 428 S.W.3d 860 (Tex. Ct. Crim. App. 2014); *Vasquez v. Commonwealth*, 781 S.E.2d 920 (Va. 2016); and several unpublished opinions).

Justice Standridge concluded that a sentence with no possibility of parole for 51½ years is the functional equivalent of life without parole. App. 49a. She observed: "My research reveals no state high court has found [that] a single sentence in excess of 50 years for a single homicide provides a juvenile with a meaningful opportunity for release." *Id.* Justice Standridge cited Judge Posner's observation that the average life expectancy of a juvenile sentenced to life in prison is only 50½ years. *Id.* at 50a (citing *Kelly v. Brown*, 851 F.3d 686, 688 (7th Cir. 2017) (Posner, J., dissenting)). She noted that "for the average inmate serving their entire life in prison, a 50-year sentence means death in prison." App. 50a.

Justice Standridge accordingly concluded that "Gulley's sentence of life in prison without the possibility of parole for 618 months is the functional equivalent of life without parole for purposes of applying the rule in *Miller*." *Id.* at 52a.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari. There is a deep conflict among the lower courts over whether, and under what circumstances, the principle of *Miller* applies to a term-of-years sentence that is so long as to be equivalent to life without parole. This case is an excellent vehicle in which to resolve the conflict because the sentence Emond Gulley received, 51½ years without parole, has been held unconstitutional in several other jurisdictions. The issue is important—indeed, it is so important that just a few years ago, Kansas urged the Court to decide it. And the decision below is wrong. As most of the courts addressing this issue have recognized, it makes no sense to treat a sentence formally designated as "life" differently from a sentence expressed as a lengthy term of years, where the two sentences are functionally equivalent.

I. The lower courts are divided as to whether, and under what circumstances, the holding of *Miller* applies to term-of-years sentences so long as to be equivalent to life without parole.

The decision below adds one more state to a split that was already very large.

On one side of the conflict, eighteen state high courts have held that the principle of *Miller* applies

to a term-of-years sentence so long as to be equivalent to life without parole. *See People v. Contreras*, 411 P.3d 445, 455 (Cal. 2018) ("a sentence of 50 years to life is functionally equivalent to LWOP" and is therefore unconstitutional under *Miller* and *Graham*); *Casiano v. Comm'r of Correction*, 115 A.3d 1031, 1044 (Conn. 2015) ("the Supreme Court's focus in *Graham* and *Miller* was not on the label of a life sentence but rather on whether a juvenile would, as a consequence of a lengthy sentence without the possibility of parole, actually be imprisoned for the rest of his life") (internal quotation marks omitted); *Williams v. United States*, 205 A.3d 837, 844 (D.C. Ct. App. 2019) (holding that the principle of *Miller* applies "not only to sentences that literally impose imprisonment for life without the possibility of parole, but also to lengthy term-of-years sentences … that amount to 'de facto' life without parole because they foreclose the defendant's release from prison for all or virtually all of his expected remaining life span"); *Henry v. State*, 175 So. 3d 675, 679-80 (Fla. 2015) ("*Graham* requires a juvenile nonhomicide offender, such as Henry, to be afforded such an opportunity [to be released from prison] during his or her natural life. Because Henry's aggregate sentence, which totals ninety years and requires him to be imprisoned until he is at least nearly ninety-five years old, does not afford him this opportunity, that sentence is unconstitutional under *Graham*.") (citation omitted); *State v. Shanahan*, 445 P.3d 152, 159 (Idaho 2019) ("the rationale[] of *Miller* also extend[s] 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) ("A mandatory term-of-years sentence that cannot be served in one lifetime

has the same practical effect on a juvenile defendant's life as would an actual mandatory sentence of life without parole—in either situation, the juvenile will die in prison. *Miller* makes clear that a juvenile may not be sentenced to a mandatory, unsurvivable prison term without first considering in mitigation his youth, immaturity, and potential for rehabilitation."); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) ("while a minimum of 52.5 years imprisonment is not technically a life-without-parole sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger *Miller*-type protections. Even if lesser sentences than life without parole might be less problematic, we do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*."); *State ex rel. Morgan v. State*, 217 So. 3d 266, 272 (La. 2016) (holding a term-of-years sentence unconstitutional where "the defendant was convicted of a single offense and sentenced to a single term which affords him no opportunity for release"); *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.' Otherwise, the Eighth Amendment proscription against cruel and unusual punishment in the context of a juvenile offender could be circumvented simply by stating the sentence in numerical terms that exceed any reasonable life expectancy rather than labeling it a 'life' sentence."); *Commonwealth v. Brown*, 1 N.E.3d 259, 270 n.11 (Mass. 2013) ("a constitutional sentencing

scheme for juvenile homicide defendants must … avoid imposing on juvenile defendants any term so lengthy that it could be seen as the functional equivalent of a sentence of life without parole"); *Steilman v. Michael*, 407 P.3d 313, 319 (Mont. 2017) ("Logically, the requirement to consider how 'children are different' cannot be limited to de jure life sentences when a lengthy sentence denominated in a number of years will effectively result in the juvenile offender's imprisonment for life."); *State v. Boston*, 363 P.3d 453, 457 (Nev. 2016) ("the *Graham* rule applies to aggregate sentences that are the functional equivalent of a sentence of life without the possibility of parole"); *State v. Zuber*, 152 A.3d 197, 212 (N.J. 2017) ("Defendants who serve lengthy term-of-years sentences that amount to life without parole should be no worse off than defendants whose sentences carry that formal designation. The label alone cannot control; we decline to elevate form over substance."); *Ira v. Janecka*, 419 P.3d 161, 166 (N.M. 2018) ("Although there is a distinction [between life without parole and an equivalently long term of years], the distinction is immaterial to an Eighth Amendment analysis."); *State v. Moore*, 76 N.E.3d 1127, 1128-29) (Ohio 2016) ("a term-of-years prison sentence that exceeds a defendant's life expectancy violates the Eighth Amendment"); *White v. Premo*, 443 P.3d 597, 605 (Or. 2019) ("we conclude that petitioner's sentence [of 54 years] is sufficiently lengthy that a *Miller* analysis is required"); *State v. Ramos*, 387 P.3d 650, 659 (Wash. 2017) ("We now join the majority of jurisdictions that have considered the question and hold that *Miller* does apply to juvenile homicide offenders facing de facto life-without-parole sentences."); *Bear Cloud v. State*, 334 P.3d 132, 141-

42 (Wyo. 2014) ("We hold that the teachings of the *Roper/Graham/Miller* trilogy require sentencing courts to provide an individualized sentencing hearing to weigh the factors for determining a juvenile's diminished culpability and greater prospects for reform when, as here, the aggregate sentences result in the functional equivalent of life without parole.") (internal quotation marks omitted).

In addition, three federal courts of appeals have held, on habeas review, that *Miller*'s (and *Graham*'s) application to very long term-of-years sentences is not merely correct but is also clearly established federal law. *See McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016) ("the 'children are different' passage that we quoted earlier from *Miller v. Alabama* cannot logically be limited to *de jure* life sentences, as distinct from sentences denominated in number of years yet highly likely to result in imprisonment for life"); *Moore v. Biter*, 725 F.3d 1184, 1191 (9th Cir. 2013) (holding that a long term-of-years sentence is, for Eighth Amendment purposes, "materially indistinguishable from a life sentence without parole because Moore will not be eligible for parole within his lifetime"); *Budder v. Addison*, 851 F.3d 1047, 1056 (10th Cir. 2017) ("The Constitution's protections do not depend upon a legislature's semantic classifications. Limiting the Court's holding by this linguistic distinction would allow states to subvert the requirements of the Constitution by merely sentencing their offenders to terms of 100 years instead of 'life.' The Constitution's protections are not so malleable.").

The courts on this side of the split have used two methods to determine whether a term-of-years sen-

tence is long enough to be equivalent to life without parole. Some courts have held that a sentence must not be so long as to preclude the possibility that the juvenile defendant, if rehabilitated, will have "a sufficient period" after being paroled "to achieve reintegration as a productive and respected member of the citizenry." *Contreras*, 411 P.3d at 454. Other courts have used the juvenile defendant's life expectancy as the measure. Under this method, a term-of-years sentence is equivalent to life without parole if the defendant is likely to die before he becomes eligible for parole. *See, e.g.*, *Moore*, 76 N.E.3d at 1140 ("a term-of-years prison sentence extending beyond a juvenile defendant's life expectancy does not provide a realistic opportunity to obtain release").

Most of the lower courts to address the issue have thus concluded that the holding of *Miller* applies to a term-of-years sentence that is equivalent to life without parole, with equivalence measured either by the defendant's life expectancy or by a requirement that the defendant have the opportunity to be paroled when he is not too old to become a productive member of society.

The other side of the split is much smaller. It consists of four state supreme courts and two federal courts of appeals which have held either (1) that the principle of *Miller* applies only to sentences explicitly expressed as life without parole, and not to any term-of-years sentences, no matter how long; or (2) that a term-of-years sentence complies with *Miller* if there is *any* chance that the defendant will live long enough to be paroled.

In the first of these two categories—jurisdictions holding that the principle of *Miller* applies only to

sentences expressly worded as "life without parole"—are Indiana, Georgia, and the Fifth and Sixth Circuits. *See Wilson v. State*, 157 N.E.3d 1163, 1176 (Ind. 2020) ("*Miller*'s enhanced protections do not currently apply to Wilson's 181-year term of years sentence. The sentence does not violate the Eighth Amendment because *Miller*, *Graham*, and *Montgomery* expressly indicate their holdings apply only to life-without-parole sentences."); *Veal v. State*, 810 S.E.2d 127, 129 (Ga. 2018) ("Because the Supreme Court has not expanded its mandate that the Eighth Amendment's prohibition of cruel and unusual punishment as it applies to juvenile offenders requires a sentencer to consider a juvenile's youth and its attendant characteristics before imposing a sentence other than LWOP, this Court will not do so."); *United States v. Sparks*, 941 F.3d 748, 754 (5th Cir. 2019) ("*Miller* has no relevance to sentences less than LWOP" because "a term-of-years sentence cannot be characterized as a *de facto* life sentence," so lengthy term-of-years "sentences can be imposed on a mandatory basis for juveniles without implicating *Miller* because they are not LWOP sentences"); *Atkins v. Crowell*, 945 F.3d 476, 478 (6th Cir. 2019) ("*Miller*'s holding simply does not cover a lengthy term of imprisonment that falls short of life without parole.").

In the decision below, the Kansas Supreme Court joined the Oklahoma Court of Criminal Appeals in the second category, by holding that a term-of-years sentence complies with *Miller* if there is any chance, no matter how small, that the defendant will live long enough to be paroled. The Kansas Supreme Court held that "*Miller* is inapplicable to sentences that offer parole within an offender's lifetime." App.

23a. But the court then made clear that it was *not* using the defendant's life expectancy as the measure of whether he would be eligible for parole within his lifetime. Rather, the court's measure was whether Gulley's sentence "ensures that Gulley will be executed by the State or live his entire life in prison." *Id.* at 25a-26a. Under this standard, the inquiry is whether the defendant has any "hope of restoration"—that is, whether he has any hope of "an opportunity for release within [his] lifetime." *Id.* at 24a. Rather than asking whether the sentence exceeds the defendant's life expectancy, the Kansas Supreme Court asks whether the sentence is longer than the defendant can hope to live. In Kansas, if a sentence affords "even a glimmer of the chance at release before death, it can never be the functional equivalent of life without the possibility of parole." *Id.* at 30a.

As Justice Standridge pointed out below, *id.* at 42a-45a, this is a different rule than the one used in most jurisdictions. Life expectancy is the average age at which members of a group will die. Half of any group of people will outlive the group's life expectancy. A person's life expectancy is much lower than the longest sentence that will ensure that he dies in prison. Most jurisdictions look to the peak of the bell curve of the age distribution, but Kansas looks to the far-right tail.

As Justice Standridge also pointed out below, *id.* at 50a, although Emond Gulley may hope to live long enough to be released from prison, his sentence exceeds his life expectancy. His sentence would therefore be unconstitutional in most jurisdictions. In Kansas, however, a juvenile can receive a mandatory sentence that is actually *longer* than life without pa-

role, as measured by the juvenile's life expectancy rather than the maximum possible length of his life.

Oklahoma has adopted the same rule as Kansas. In *Martinez v. State*, 442 P.3d 154, 156 (Okla. Ct. Crim. App. 2019), the 16-year-old defendant was not eligible for parole until he reached the age of 79, an age past his life expectancy. The Oklahoma Court of Criminal Appeals held that this sentence complied with *Miller* because "[a] State is not required to guarantee eventual freedom to a juvenile offender." *Id.* Because the defendant had a chance of living long enough to become eligible for parole, he had "some meaningful opportunity to obtain release on parole during his lifetime." *Id.*

Kansas has thus joined the smaller side of a well-developed conflict over how *Miller* applies to very long term-of-years sentences.

This conflict is at its sharpest in the precise factual circumstances of this case. Emond Gulley's 51½-year sentence would be unconstitutional in California, Connecticut, Maryland, and Wyoming. These states' highest courts have all held that a mandatory sentence of this length is inconsistent with *Miller*. *See Contreras*, 411 P.3d at 455 (holding that a 50-year sentence is unconstitutional because it is the equivalent of life without parole); *Casiano*, 115 A.3d at 1048 (same); *Carter*, 192 A.3d at 734 (same for a sentence with no parole eligibility for 50 years); *Bear Cloud*, 334 P.3d at 141-42 (same for a 45-year sentence). Several other state supreme courts have reached the same holding with regard to sentences only slightly longer. *See Null*, 836 N.W.2d at 71 (same for a 52½-year sentence); *Zuber*, 152 A.3d at 201 (same for a sentence with no parole eligibility for

55 years); *White*, 443 P.3d at 605 (same for a sentence with no possibility of release for 54 years); *see also Ira*, 419 P.3d at 170 (describing 46 years before release as "the outer limit of what is constitutionally acceptable").

By contrast, Gulley's 51½-year sentence would not be unconstitutional in the Fifth or Sixth Circuits, in Georgia, in Indiana, in Oklahoma, and of course in Kansas. *See Sparks*, 941 F.3d at 754 (holding *Miller* inapplicable to term-of-years sentences); *Atkins*, 945 F.3d at 478 (same); *Veal*, 810 S.E.2d at 129 (same); *Wilson*, 157 N.E.3d at 1176 (holding *Miller* inapplicable to a 181-year sentence); *Martinez*, 442 P.3d at 156 (holding *Miller* inapplicable to a sentence of 63 years without parole).

A conflict of this magnitude will never be resolved without this Court's intervention.[2]

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[2] There are actually two distinct lower court conflicts involving the application of *Miller* to term-of-years sentences. This certiorari petition involves only one of them, the more fundamental of the two—whether the principle of *Miller* applies to a *single* term-of-years sentence for a single offense. The other conflict is over whether, *if* the principle of *Miller* applies to a single sentence, it also applies to *consecutive* sentences that add up to the equivalent of life without parole. The lower courts are divided on the latter question as well. On one side, several state supreme courts have declined to extend *Miller* and *Graham* to consecutive sentences. *See State v. Soto-Fong*, 474 P.3d 34, 41 (Ariz. 2020); *Proctor v. Kelley*, 562 S.W.3d 837, 841-42 (Ark. 2018); *Lucero v. People*, 394 P.3d 1128, 1132-33 (Colo. 2017); *Veal*, 810 S.E.2d at 128-29; *State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017); *Willbanks v. Dep't of Corrections*, 522 S.W.3d 238, 239-40 (Mo. 2017); *State v. Slocumb*, 827 S.E.2d 148, 154-56 (S.C. 2019); *Vasquez v. Commonwealth*, 781 S.E.2d 920, 926 (Va. 2016). On the other side, several state supreme courts

II. This case is an excellent vehicle in which to resolve the conflict.

This case has the ideal facts for resolving the conflict, because Emond Gulley's sentence would be constitutional in some jurisdictions but unconstitutional in others. The case is on direct appeal, so the issue can be reviewed de novo. And this case raises the issue in its pure form, involving a single sentence for a single offense, without the complicating factor of how *Miller* applies to multiple consecutive sentences.

The Court has denied certiorari in cases raising similar questions, but these cases had vehicle problems that are not present here.

Some of these cases were on habeas, so the Court would have had to apply a deferential standard of review. *See Sanders v. Radtke*, 142 S. Ct. 104 (2021) (mem.) (No. 20-1728); *Atkins v. Crowell*, 140 S. Ct. 2786 (2020) (mem.) (No. 19-8214); *Byrd v. Budder*, 138 S. Ct. 475 (2017) (mem.) (No. 17-405).

Some of these cases involved multiple consecutive sentences rather than a single sentence for a single offense. *See Bever v. Oklahoma*, 141 S. Ct. 1272 (2021) (mem.) (No. 20-6396); *Proctor v. Kelley*, 140 S. Ct. 481 (2019) (mem.) (No. 18-8951); *Kinkel v. Laney*, 139 S. Ct. 789 (2019) (mem.) (No. 18-5634); *Veal v. Georgia*, 139 S. Ct. 320 (2018) (mem.) (No. 17-1510); *Flowers v. Minnesota*, 139 S. Ct. 194 (2018) (mem.) (No. 17-9574); *Ali v. Minnesota*, 138 S. Ct. 640 (2018)

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have held that the principle of *Miller* and *Graham does* apply to consecutive sentences that aggregate to the equivalent of life without parole. *See Contreras*, 411 P.3d at 447-48; *Henry*, 175 So. 2d at 679-80; *Reyes*, 63 N.E.3d at 886; *Zuber*, 152 A.3d at 201-02; *Moore*, 76 N.E.3d at 1130; *Ramos*, 387 P.3d at 656-57; *Bear Cloud*, 334 P.3d at 141-42.

(mem.) (No. 17-5578); *Willbanks v. Missouri Dep't of Corrections*, 138 S. Ct. 304 (2017) (mem.) (No. 17-165); *New Jersey v. Zuber*, 138 S. Ct. 152 (2017) (mem.) (No. 16-1496); *Demirdjian v. Gipson*, 138 S. Ct. 71 (2017) (mem.) (No. 16-1290); *Ohio v. Moore*, 138 S. Ct. 62 (2017) (mem.) (No. 16-1167); *Vasquez v. Virginia*, 137 S. Ct. 568 (2016) (mem.) (No. 16-5579).

Some of these cases involved sentences that were not long enough to implicate the issue. *See Shanahan v. Idaho*, 140 S. Ct. 545 (2019) (mem.) (No. 19-6254); *Steilman v. Michael*, 138 S. Ct. 1999 (2018) (mem.) (No. 17-8145).

In one case, the relevant sentencing scheme had been amended to allow the defendant to be released from prison earlier than originally contemplated. *See Lucero v. Colorado*, 138 S. Ct. 641 (2018) (mem.) (No. 17-5677).

In one case, the certiorari petition failed to present the issue in a coherent way. *See Sparks v. United States*, 140 S. Ct. 1281 (2020) (mem.) (No. 19-7437).

Finally, in the earliest of these cases, it still made sense to await further percolation. *See Florida v. Henry*, 136 S. Ct. 1455 (2016) (mem.) (No. 15-871); *Semple v. Casiano*, 136 S. Ct. 1364 (2016) (mem.) (No. 15-238).

By now, additional percolation would serve no purpose. The Court will not gain any new information by letting the split grow even larger. Meanwhile, teenagers in some states are receiving longer sentences than identically situated teenagers in other states.

III. As Kansas has recognized, the issue is important.

The importance of this issue is demonstrated by the sheer number of state supreme courts and federal courts of appeals that have addressed it in the past few years. When teenagers are tried as adults, they enter a sentencing regime designed without teenagers in mind, in which very long term-of-years sentences are routine. The question of how *Miller* applies to such sentences recurs frequently.

One measure of the issue's importance is that just a few years ago, Kansas also urged the Court to resolve it. *New Jersey v. Zuber*, 138 S. Ct. 152 (2017) (mem.) (No. 16-1496), raised the question of how to apply *Miller* to consecutive sentences for multiple offenses. Kansas joined thirteen other states in urging the Court to grant certiorari and decide a second question as well: whether a juvenile's eligibility for parole at the age of 60 or older constitutes a meaningful opportunity for release under *Miller* and *Graham*. Brief of *Amici Curiae* Utah and Thirteen Other States Supporting Petitioner, *New Jersey v. Zuber*, No. 16-1496 (filed July 17, 2017), at 12-16. The issue is important, Kansas and the other states argued, because "the States have set inconsistent upper limits for juvenile parole eligibility." *Id.* at 13. As Kansas and the other states explained, some state supreme courts allow juveniles to be sentenced to very long terms of years without parole, while other state supreme courts hold such sentences unconstitutional. *Id.* at 14 (citing cases).

IV. The decision below is wrong.

The majority view among the lower courts is the correct view. A sentence in the form of "X years without parole," where X is a number so large as to amount to life as a practical matter, is equivalent to a sentence of life without parole. The Kansas Supreme Court erred in holding otherwise.

"Under *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), an individual who commits a homicide when he or she is under 18 may be sentenced to life without parole, but only if the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment." *Jones v. Mississippi*, 141 S. Ct. 1307, 1311 (2021). "*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence." *Montgomery v. Louisiana*, 577 U.S. 190, 209-10 (2016). In short, "[y]outh matters in sentencing. And because youth matters, *Miller* held that a sentencer must have discretion to consider youth before imposing a life-without-parole sentence." *Jones*, 141 S. Ct. at 1316.

The constitutional flaw in a mandatory sentence of life without parole for a juvenile is that it "precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 567 U.S. at 477. Mandatory life without parole "prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, in-

cluding the extent of his participation in the conduct and the way familial and peer pressures may have affected him." *Id.* In addition, "this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." *Id.* at 478.

These rationales are identical if a sentence is expressed as a very long term of years rather than literally as "life without parole." Either way, the sentencer is precluded from considering the teenage defendant's immaturity, his home environment, and the possibility that he might reform as he grows into adulthood. Everything the Court said in *Miller* about mandatory life without parole applies just as well to a mandatory 50 years without parole. Indeed, if the two types of sentences were treated differently, the states could evade *Miller* simply by replacing "life" with "50 years" (or indeed "100 years" or "1,000 years") in their sentencing statutes. At some point, a mandatory term-of-years sentence must become long enough to run afoul of *Miller*.

The Kansas Supreme Court erred in concluding that Emond Gulley's 51½-year sentence is not the equivalent of life without parole. Gulley is more likely than not to die in prison before he even becomes eligible for parole. For this reason, he lacks the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" that *Miller* requires. *Miller*, 567 U.S. at 479 (quoting *Graham*, 560 U.S. at 85).

The Kansas Supreme Court also erred in determining that a sentence satisfies *Miller* so long as the juvenile defendant has "even a glimmer of the chance at release before death." App. 30a. As this

Court recently explained, *Miller* should make it "relatively rare" that a teenager will be sentenced to die in prison. *Jones*, 141 S. Ct. at 1322 (quoting *Miller*, 567 U.S. at 484 n.10) (brackets omitted). But sentences of this length would be common, not rare, under the view taken by the court below, because *Miller* would apply only to sentences so lengthy that no mortal could ever outlive them.

The court below and the lower courts that have interpreted *Miller* to apply only to sentences formally phrased as "life without parole" have relied on two arguments, neither of which has any merit.

First, some of these courts, including the Kansas Supreme Court below, have emphasized the literal language used in *Miller*, which refers only to life without parole, not to equivalently long term-of-years sentences. *See* App. 23a; *Wilson*, 157 N.E.3d at 1174-75; *Sparks*, 941 F.3d at 754. But the Court's opinions cannot be "parsed as though we were dealing with language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). The precedential effect of the Court's decisions is based on the Court's reasoning, not on arbitrary factual distinctions. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 (2020) ("It is usually a judicial decision's reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases."). *Miller* referred to life without parole because the case involved life without parole. The Court did not mention equivalently long term-of-years sentences because there was no occasion to do so.

The holding of *Miller* concerns the substance of sentences, not their semantics. In *Miller*, the Court held that a sentencer must be able to take a teenag-

er's youth into account before locking him away for life, not merely that a state can lock teenagers away for life so long as the state is clever enough to use very large numbers in its sentencing statutes rather than the word "life."

Second, some of the lower courts have worried that it would be impossible to determine when a sentence is long enough to be equivalent to life without parole. *See Wilson*, 157 N.E.3d at 1175-76; *Sparks*, 941 F.3d at 754. But this worry is unfounded. The courts on the majority side of the split have had no difficulty making this determination. They have drawn the line right around 50 years—that is, where the teenage defendant would become eligible for parole in his late 60's. The lower courts have held that sentences of 50 years or longer are equivalent to life without parole. *See Contreras*, 411 P.3d at 455; *Casiano*, 115 A.3d at 1048; *Henry*, 175 So. 3d at 679-80; *Null*, 836 N.W.2d at 71; *Reyes*, 63 N.E.3d at 888; *Morgan*, 217 So. 3d at 268; *Carter*, 192 A.3d at 734; *Zuber*, 152 A.3d at 201; *Moore*, 76 N.E.3d at 1141; *White*, 443 P.3d at 605. The lower courts have found that sentences shorter than that, by contrast, are not equivalent to life without parole. *See Shanahan*, 445 P.3d at 160-61; *Steilman*, 407 P.3d at 320; *Ira*, 419 P.3d at 170; *State v. Lopez*, 261 A.3d 314, 320 (N.H. 2021).

As most lower courts have recognized, there is no reason to treat life without parole differently from equivalently long term-of-years sentences. The holding of *Miller* applies equally to both.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB NOWAK
Kansas Appellate
Defender Office
Jayhawk Tower
700 Jackson, Suite 900
Topeka, KS 66603

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu