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 *AMICI CURIAE* DAVID I. BRUCK, WILLIAM B. CUMMINGS, JULIE E. MCCONNELL, ANTHONY F. TROY, THE VIRGINIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER, THE VIRGINIA CAPITAL CASE CLEARINGHOUSE, AND THE VIRGINIA INDIGENT DEFENSE COMMISSION IN SUPPORT OF RESPONDENT**

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## INTEREST OF AMICI CURIAE*

*Amici* are former Virginia prosecutors and individuals and organizations with extensive experience working with criminal defendants in Virginia courts, including juvenile defendants. *Amici* have a strong interest in the question presented and submit this brief to explain how Virginia's sentencing scheme works in practice.

*Amici* are concerned that petitioner is urging this Court to carve out an unwarranted exception to the constitutional principles recognized in *Miller v. Alabama*, 567 U.S. 460 (2012). *Miller* concluded that life without parole is a disproportionate sentence for all but the rare juvenile offender whose crime reflects irretrievable depravity. Accepting petitioner's request to limit *Miller* only to state sentencing schemes that impose a "mandatory" life-without-parole sentence, without assessing whether the sentencing court has in fact taken account of the offender's youth when imposing sentence, would gut *Miller* and transgress the essential principles it expounds.

The required inquiry for Eighth Amendment purposes is not whether a juvenile's life-without-parole sentence can be characterized as resulting from either a legislative mandate or a discretionary act, but instead whether the sentencing court has

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* Counsel for all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici* and their counsel contributed monetarily to the preparation or submission of this brief.

made an individualized sentencing determination that takes account of the juvenile's youth and propensity for rehabilitation. A juvenile cannot "be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances," *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016), and determining whether those circumstances "counsel against irrevocably sentencing" the juvenile "to a lifetime in prison," *Miller*, 567 U.S. at 480.

The signatories to this brief are:

***David I. Bruck.*** Professor Bruck has practiced criminal law since 1976 and has specialized in the defense of capital cases at the trial, appellate, and post-conviction stages since 1980. He has served as the Director of the Virginia Capital Case Clearinghouse at Washington and Lee University School of Law since 2004.

***William B. Cummings.*** Mr. Cummings served as United States Attorney for the Eastern District of Virginia from March 1975 to June 1979.

***Julie E. McConnell.*** Professor McConnell is a Clinical Law Professor and the Director of the Children's Defense Clinic at the University of Richmond School of Law. Through the clinic, Professor McConnell and her students represent indigent youth throughout Central Virginia who are charged with acts of delinquency. Before joining the faculty at the University of Richmond School of Law, Professor McConnell served six years as a prosecutor in the Richmond Commonwealth's Attorney's Office, where she was a supervisor in the Juvenile and Domestic Relations Court.

***Anthony F. Troy***. Mr. Troy served as the attorney general of Virginia from 1977 to 1978. He is a former chair of the Virginia Capital Representation Resource Center. Mr. Troy is currently a member of Eckert Seamans, a law firm with offices in Richmond, Virginia.

***Virginia Association of Criminal Defense Lawyers* ("VACDL").** The VACDL is a state-wide organization of attorneys whose practice focuses primarily on criminal defense. The organization's goal is to improve the quality of justice in criminal cases in the courts of the Commonwealth of Virginia. In order to accomplish its goal, the VACDL presents continuing legal education seminars for criminal defense practitioners to improve the quality of representation and skill brought to bear on behalf of those who come before a court accused of a crime. The VACDL also enters a few select cases as *amicus curiae* where the issues, such as in this case, are important to the fair administration of justice.

***Virginia Capital Representation Resource Center.*** The Virginia Capital Representation Resource Center is a not-for-profit law firm dedicated to providing direct representation in death-penalty cases in the Commonwealth of Virginia and assisting attorneys representing death-sentenced inmates or those facing possible death sentences.

***Virginia Capital Case Clearinghouse.*** The Clearinghouse, founded at Washington and Lee University School of Law in 1988, is a trial-level legal aid clinic staffed by eight third-year law students that provides free services to court-appointed defense attorneys representing capital-murder defendants in cases throughout Virginia. The Clearinghouse also

provides free direct representation in parole hearings to Virginia prisoners, including juvenile offenders, who are serving sentences for offenses committed prior to Virginia's abolition of parole in 1995.

***Virginia Indigent Defense Commission ("VIDC")***. The VIDC was statutorily created to protect the Constitutional right to counsel for people who cannot afford to hire their own lawyer. As reflected in its mission statement, the VIDC is "[d]edicated to protecting and defending the rights and dignity of our clients through zealous, compassionate, high-quality legal advocacy." Clients include juveniles who are represented at every stage of the criminal and juvenile justice processes in Virginia. The VIDC certifies and re-certifies attorneys to serve as court-appointed counsel, provides training to court-appointed counsel, and promulgates and enforces the mandatory Standards of Practice for Court-Appointed Counsel. The VIDC offers specific juvenile certification and re-certification to counsel, which requires adherence to the Standards of Practice for Juvenile Defense Counsel. The VIDC oversees 25 public defender offices and four capital defender offices across Virginia.

## SUMMARY OF ARGUMENT

In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court concluded that a sentence of life without the possibility of parole is a cruel and unusual punishment for most juvenile offenders. Because juveniles have "diminished culpability and greater prospects for reform," *id.* at 471, this harshest of sentences is disproportionate except in the rare circumstance where a juvenile is incorrigible, with no capacity for potential rehabilitation. As *Montgomery v. Louisiana* explained, a state's sentencing scheme must "give effect[] to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." 136 S. Ct. 718, 735 (2016).

Virginia's sentencing scheme does not satisfy these requirements. When a Virginia court sentences a juvenile offender for capital murder, there is no meaningful procedure by which the court engages in the individualized inquiry that *Miller* requires. As this case illustrates, juvenile offenders in Virginia routinely receive life-without-parole sentences without any court making an individualized assessment that takes account of the offender's youth and whether the child is irreparably corrupt.

The Warden does not dispute the reality of how Virginia's sentencing scheme works in practice. Nor does he deny that the sentencing court in this case never undertook an individualized assessment that considered the defendant's youth and his capacity for rehabilitation. Instead, the Warden urges the Court to limit *Miller* to "mandatory" life-without-parole sentences and argues that Virginia's sentencing scheme is "discretionary" because courts have

residual authority to suspend a sentence. But Virginia courts very rarely use their suspension power, and nothing compels them to engage in the individualized inquiry that *Miller* requires. If the Warden's position is accepted, the substantive rule of constitutional law that *Miller* recognizes will be rendered ineffectual for juvenile offenders in Virginia. Instead of being a rare exception, life-without-parole sentences for juveniles will remain commonplace, imposed in virtually every capital-murder case in which they are proposed.

This Court should not countenance the Warden's attempt to carve out a large, unwarranted exception to the constitutional guarantee that *Miller* recognized as beyond a State's power to evade. Instead, the Court should hold that because the sentencing court in this case did not undertake an individualized inquiry into the defendant's youth and his capacity for rehabilitation, re-sentencing is required. The Court should affirm the Fourth Circuit's judgment.

## ARGUMENT

### I. Virginia Courts Impose Life-Without-Parole Sentences on Juveniles Without Making the Constitutionally Required Assessment.

Virginia's sentencing scheme allows courts to impose life-without-parole sentences on juveniles without undertaking an individualized inquiry to determine whether the sentence is constitutionally proportionate. Because the sentencing court in this case did not take account of the defendant's youth before sentencing him to life in prison, the sentence violates constitutional requirements.

#### A. *Miller* Safeguards A Substantive Constitutional Right with Procedural Guarantees.

In *Miller*, this Court concluded that state sentencing schemes that impose mandatory life-without-parole sentences on juvenile offenders violate the Eighth Amendment's prohibition on cruel and unusual punishment. The Court held that this harshest of sentences is disproportionate—and therefore unconstitutional—for all but "the rare juvenile offender whose crime reflects irreparable corruption." 567 U.S. at 479–80. To satisfy constitutional requirements, it is essential that the sentencing court impose an individualized sentence that appropriately accounts for the "mitigating qualities of youth." *Id.* at 476 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). As the Court explained, the sentence must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to life in prison." *Id.* at 480.

*Miller* emphasized that Alabama law *mandated* a sentence of life without parole. But contrary to petitioner's suggestion, the Court's vital reasoning was not limited to the fact that the sentence was mandatory. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) (noting that a decision's binding holding includes its essential reasoning). *Miller*'s reasoning instead focused broadly on what requirements a sentencing court must satisfy before imposing a life-without-parole sentence—namely, the constitutional guarantee that a juvenile offender is entitled to an individualized sentencing proceeding to determine whether, in light of his youth, life without parole is an excessive punishment.

As the Court explained, an individual assessment is required because "[i]mprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable.'" 567 U.S. at 474 (quoting *Graham v. Florida*, 560 U.S. 48, 69 (2010)). A life-in-prison punishment is especially harsh for a juvenile because it nearly always means the juvenile will serve more years behind bars than an adult offender found guilty of the same crime. *See id.* Moreover, juveniles are different from adults—less culpable and with a greater capacity for change—meaning that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* Indeed, a life-without-parole sentence is unconstitutionally excessive for "all but the rarest of juvenile offenders." *Montgomery*, 136 S. Ct. at 734. As a result, courts must carefully consider the "wealth of characteristics and circumstances attendant to" the offender's youth before the sentence can be imposed. *Miller*, 567 U.S. at 476.

As this Court held in *Montgomery*, *Miller* identified a substantive rule of constitutional law barring States from imposing life-without-parole sentences on juvenile offenders who are capable of rehabilitation and are not irretrievably depraved. 136 S. Ct. at 734–35. But that rule "has a procedural component": a juvenile facing the possibility of life without parole is entitled to "[a] hearing where youth and its attendant characteristics are considered as sentencing factors." *Id.* at 734 (quotation marks omitted). "The hearing … gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id.*

When a court considers an appropriate sentence for a juvenile, the court is not required to engage in "formal factfinding." *Id.* But if the resulting sentence is imposed without a hearing that allows the court to take account of the juvenile's "transient immaturity," the sentence is unconstitutional. *Id.* The State must then either (1) re-sentence the juvenile or (2) ensure that the juvenile is eligible for parole. *See id.* at 736. As the Court explained, extending "parole eligibility to juvenile offenders does not impose an onerous burden on the States" and does not "disturb the finality of state convictions." *Id.* It does, however, ensure that "juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Id.*

### B. Virginia's Sentencing Scheme for Juveniles Is Constitutionally Inadequate.

The Commonwealth's sentencing scheme for juveniles convicted of crimes yielding life sentences does not satisfy *Miller*. Virginia law provides no hearing or other mechanism by which a sentencing court undertakes the inquiry necessary to distinguish the rare incorrigible juvenile offender from the vast majority of juvenile offenders who remain capable of rehabilitation. Moreover, any residual discretion provided under Virginia law for a court to suspend a sentence does not satisfy *Miller*. That discretion is not exercised in practice and, even if it were, it would not ensure that the sentence imposed is proportionate for purposes of the Eighth Amendment.

In Virginia, capital murder is punishable as a Class 1 felony, *see* Va. Code Ann. § 18.2-31, which Virginia law specifies "*shall be*" punished by either "death … or imprisonment for life." Va. Code Ann. § 18.2-10(a) (emphasis added); *see also id.* § 18.2-31 (classifying capital murder as a Class 1 felony); *see also id.* § 19.2-264(A) & (E) (requiring life imprisonment if the jury does not recommend death or cannot agree on a penalty); *id.* § 53.1-165.1 (abolishing parole). Within these limited sentencing options, Virginia law does not make even the slightest nod in the direction of sentencing-court discretion. If a defendant is convicted of capital murder, the *only* proceeding available to the defendant is one for the jury to determine if he should be sentenced to death or life without parole. Virginia law offers no third option. *See* Va. Code § 19.2-264.4. In short, when a juvenile has been convicted of capital murder,

procedures in Virginia offer no opportunity for the jury to consider whether the juvenile's crimes reflect transient immaturity or irreparable corruption.

On its face, Virginia's sentencing scheme does not satisfy the constitutional requirements that *Miller* recognizes. It is also clear that, in this case, neither the jury nor the court considered the defendant's youth and its attendant characteristics before imposing a life-without-parole sentence. The Warden nevertheless suggests that the sentence does not violate *Miller* because it was purportedly "discretionary." But the Warden identifies no evidence that the Virginia court exercised discretion to undertake the inquiry that is constitutionally required. Instead, the Warden takes the position that because Virginia courts always have residual discretion to suspend a sentence, the availability of that seldom-used power is sufficient to escape the constitutional guarantee that a state court may not sentence a juvenile to life without parole without first considering whether the distinctive characteristics of youth justify a more lenient sentence.

That position fails as a matter of constitutional first principles. The substantive rule recognized in *Miller* is not about policing formalistic distinctions in state law between mandatory and non-mandatory sentences. Instead, it is a "categorical constitutional guarantee," *Montgomery*, 136 S. Ct. at 729, designed to protect individual rights by ensuring that any punishment imposed on a certain "class of offenders" (juveniles) satisfies the Eighth Amendment's proportionality requirements, *Miller,* 567 U.S. at 471; *see also Roper v. Simmons*, 543 U.S. 551, 560 (2005) (noting that the Eighth Amendment "guarantees

individuals the right not to be subjected to excessive sanctions"). When an individual offender falls within the class, the question is not whether a sentencing court has an *opportunity* to make the constitutionally required inquiry but whether it has seized that opportunity and actually provided the individual with the protections that the Constitution requires.

The mere opportunity for a court to exercise its discretion to impose a suspended sentence under Virginia law falls far short of ensuring that a juvenile sentenced to life without parole has received an individualized consideration of his youth and capacity for rehabilitation. Under Virginia law, the circumstances in which a court may suspend a sentence's execution are not defined by statute. *See* Va. Code Ann. § 19.2-303. But the suspension power is most often used as a mechanism for ensuring good conduct. In fact, courts have suggested that a focus on "good behavior is implicitly a condition of every suspension of sentence." *Marshall v. Commonwealth*, 116 S.E.2d 279 (Va. 1960); *see also Hamilton v. Commonwealth*, 228 S.E.2d 555, 556–57 (Va. 1976) (noting that a suspended sentence is intended to reward "good conduct").

The Virginia Supreme Court has concluded that because courts have this general suspension power, nothing in Virginia law "preclude[s]" a sentencing court from considering a juvenile offender's youth and capacity for rehabilitation when deciding whether to suspend part of a life-without-parole sentence. *See Jones v. Commonwealth,* 795 S.E.2d 705, 708 (Va. 2017) ("*Jones II*"). But that misses the point. There is a fundamental difference between, on one hand, *allowing* courts to exercise discretion to "consider" a

juvenile's youth before imposing a sentence and, on the other, affirmatively *requiring* sentencing courts to consider "an offender's age and the wealth of characteristics and circumstances attendant to it" before a sentence can be imposed. *Miller,* 567 U.S. at 476. Merely authorizing a court to consider at its option whether a sentence should be suspended is not remotely the same as enforcing a juvenile offender's constitutional right to an individualized assessment as to "whether the law's harshest term of imprisonment" is a proportionate punishment. *Id.* at 474.

The constitutional inadequacy of Virginia's sentencing scheme is confirmed by the fact that the Warden has not identified *any* case before *Miller* in which a Virginia court suspended a life-without-parole sentence for capital (or even first-degree) murder. In *Jones II*, the Virginia Supreme Court could cite only six instances over a period of 20 years in which a Virginia court has ever suspended a life sentence. *See Tyson v. Commonwealth*, No. 140917, 2015 WL 10945037, at *1 (Va. S. Ct. Aug. 14, 2015) (defendant sentenced to life for rape, with all but 13 years suspended); *Hamilton v. Director*, No. 131738, 2014 Va. LEXIS 201, at *1 (June 6, 2014) (defendant given two life sentences plus 68 years for robbery, abduction, and other offenses, with all but 22 years suspended); *Harris v. Commonwealth*, 688 S.E.2d 279, 280 n.2, 282 (Va. 2010) (defendant sentenced to life for abduction and terms-of-years for lesser offenses, with total suspended for all but 8 years); *Moore v. Hinkle*, 527 S.E.2d 419, 422 (Va. 2000) (defendant sentenced to life for abduction with intent to defile, with all but 10 years suspended); *Jefferson v. Commonwealth*, 2013 Va. App. LEXIS 311, at *2

(Oct. 29, 2013) (defendant sentenced to life for possessing more than 100 kilos of marijuana with intent to distribute, with all but 20 years suspended); *White v. Commonwealth*, No. 1998–96–2, 1997 WL 5835781997, at *1 (Va. Ct. App. Sept. 23, 1997) (defendant given two life sentences for distribution of cocaine and terms-of-years for lesser offenses, with total suspended to all but 20 years). Not one of those six suspensions involved a capital-murder sentence.

Virginia courts also have never exercised their purported sentencing "discretion" to suspend a juvenile life-without-parole sentence. That by itself demonstrates that Virginia courts' suspension authority cannot and does not ensure that a juvenile's life-without-parole sentence is constitutionally proportionate. Under *Miller,* a life-without-parole sentence is "disproportionate … for all but the rarest of children." *Montgomery*, 136 S. Ct. at 726. In Virginia, the constitutional rule is inverted: all juveniles convicted of capital murder are sentenced to life without parole and *relief* from that harshest of punishments is virtually never granted even to the rarest, least culpable child.

Virginia's suspension power is, in short, a false hope. It was never employed before *Miller*. It provides no assurance that the sentence imposed takes account of the "mitigating qualities of youth." *Miller*, 567 U.S. at 467 (quoting *Johnson*, 509 U.S. at 367). And, in any event, where, as here, a court has *not* exercised its suspension power, the mere fact that an opportunity existed does nothing to safeguard the individual rights guaranteed by the Eighth Amendment. There is no basis to assume that the sentencing court actually considered the defendant's

youth and whether his crime reflected transient immaturity or permanent incorrigibility.

## II. Juveniles Sentenced to Life Without Parole in Virginia Are Entitled to Retroactive Review of Their Sentences.

The defendant's crimes were horrifying and, not surprisingly, the Warden has emphasized them in his briefing. But the nature of the defendant's crimes is not relevant to the question presented. And while any resentencing proceeding would take account of the nature of the crimes, *Miller* holds that even juveniles who commit the most heinous crimes are entitled to consideration of their youth and may not be sentenced to life without parole if they are not irreparably corrupt. *See Miller*, 567 U.S. at 472 ("the penological justifications for imposing the harshest sentences on juvenile offenders" are "diminished," and that is so "even when they commit terrible crimes"). The fact-specific circumstances of this case should not allow Virginia's sentencing scheme to escape compliance with constitutional requirements.

The consequences of the Court's decision here will extend far beyond the defendant in this case. Many juveniles in Virginia have been sentenced in violation of their Eighth Amendment rights under *Miller*, with sixteen juveniles sentenced for capital murder. Virginia sentenced *every one* of them to life without parole. If nothing else, this history demonstrates that Virginia is not reserving this harshest of sentences only for the rarest of children.

Nor is the issue whether all of these juveniles should receive a lesser sentence. Instead, the question is whether they are entitled to a

resentencing hearing (or given the opportunity for parole). "A hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." *Montgomery*, 136 S. Ct. at 735. As *Montgomery* emphasized, the process due juvenile offenders must be sufficient to "give[] effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Id.*

There are several juveniles who have been sentenced to life without parole in Virginia and who have characteristics suggesting that they are not "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 136 S. Ct. at 733–734. For example, a Virginia court sentenced Holly Landry to life without parole, plus 50 years, for her role in a robbery-homicide that took place in 1996. *See* Supp. Brief, *Landry v. Baskerville*, 3:13-cv-00367-RCY (E.D. Va. 2016). Landry and her four male co-defendants, including adults aged 25 and 35, entered a neighbor's apartment where they robbed the neighbor and a visitor, injuring one and killing the other. *Id.* Landry was then 16 years old; she had no prior criminal record. *Id.* A court-appointed psychologist has since determined that Landry's crime was "very much a function" of her youth, reflecting an adolescent's "social immaturity" and vulnerability to "social pressures." *Id.* And the record of Landry's more than twenty years in prison proves that she has never been irretrievably depraved. Since being imprisoned, she has earned her G.E.D., taken several vocational courses, maintained consistent employment, become

an expert cosmetologist, started a support group for inmates entering the prison system as juveniles, and earned the admiration of prison staff. *Id.* If a court were to undertake the inquiry that *Miller* requires, there is powerful evidence that Landry would not qualify as the rare juvenile offender who is incapable of rehabilitation.

Similarly, David Sanchez, Jr. was sentenced in 1999 to life without parole, plus 18 years, for a crime he committed when he was 17 years old. *See* Pet. For Writ of Habeas Corpus, *Sanchez v. Vargo*, 3:13-cv-400 (E.D. Va. 2013). He was convicted of attempted robbery, use of a firearm during the commission of a felony, and capital murder. *Id.* Since the beginning of his time in prison Sanchez has obtained his G.E.D., completed every job training course available to him, completed all personal betterment courses available to him, completed paralegal training, and re-built relationships with family members. These accomplishments are compelling evidence that Sanchez is also not among the rare incorrigible juvenile offenders for whom a life-without-parole sentence is proportional (and further evidence that *Miller* is correct in its central premises).

Under *Miller*, juvenile offenders like Landry and Sanchez have a constitutional right to have a court consider the characteristics attendant to their youth before imposing a life-without-parole sentence. Yet *not one* of the juvenile offenders now serving life without parole for capital murder in Virginia has received that consideration, let alone been determined to be "the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 132 S. Ct. at 2469. *Miller* requires that they be resentenced.

## III. Distinguishing Between Mandatory and Discretionary Sentencing Schemes Will Encourage Mischief.

One key aspect of *Miller* is that it vindicates an important substantive right while minimizing the intrusion on a State's "weighty interests in ensuring the finality of convictions and sentences." *Montgomery*, 136 S. Ct. at 732. To comply with *Miller,* a State may either (1) provide a hearing at sentencing that results in an individualized sentencing determination that takes account of the offender's youth, or (2) permit the juvenile offender to be considered eligible for parole. *Id.* at 736. Within those confines, a State retains broad discretion to decide how to conduct a hearing or to structure the requirements for parole.

The Warden has not openly asked this Court to reverse *Miller* or to abandon its longstanding precedents recognizing that children are different from adults. He nonetheless attempts to accomplish that result indirectly by advancing a tendentious reading of this Court's decisions that, if accepted, would drain the constitutional right that *Miller* recognized of any meaning. If the categorical constitutional guarantee set forth in *Miller* is nothing more than a potential opportunity for a court to exercise discretion when sentencing a child to life without parole, then as a practical matter, children are not different from adults and there is no reasonable limit on when state courts may subject children to the harshest of punishments.

Allowing States to evade *Miller* on the ground that their sentencing schemes involve some element of "discretion" will force federal courts into a new

round of difficult line-drawing. If *Miller* does not apply to "discretionary" sentencing regimes, and a general suspension power that is rarely or never actually exercised is enough to render that sentence "discretionary," what about, for example, the possibility of executive clemency? Or a law that allows prison officials to designate certain prisoners for early release to address issues of prison overcrowding? A wide variety of imaginable scenarios exist under which state officials might retain some residual discretion to suspend or alter a life-without-parole sentence, without being required to exercise that discretion to determine whether the sentence imposed is proportionate for the juvenile offender. State officials disinclined to accept the constitutional requirements recognized in *Miller* will undoubtedly raise a host of arguments that seldom-exercised loopholes in their own sentencing regimes provide at least as much "discretion" as does Virginia's.

The consequence of accepting the Warden's distinction between "mandatory" and "discretionary" sentences will be more years of different sentencing schemes percolating through the lower courts until this Court is forced to step in once again to provide the next stopgap guidance, sending courts scrambling in some new direction. The proper course is to enforce the rule that *Miller* announced: Courts must consider juvenile offenders' youth—and the heavy weight youth places on the scale counseling against deciding at the outset that juveniles cannot be rehabilitated—before sentencing them to life without parole. And juvenile offenders who were sentenced without that consideration must be re-sentenced *or* given a chance for parole.

The Constitution forbids the punishment Virginia imposed here in all but the rarest of cases. Even when a juvenile commits a horrendous crime, an individualized sentencing assessment must be made before the juvenile is sentenced to life without parole. Letting the Commonwealth evade this straightforward rule will only invite mischief and undermine the categorical constitutional guarantee provided under the Eighth Amendment. This Court should reject the Warden's gambit, reaffirm *Miller*, and enforce the constitutional principles it set forth.

## CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted.

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