No. 17-1510

IN THE
Supreme Court of the United States

ROBERT VEAL, PETITIONER,

v.

GEORGIA, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF OF *AMICI CURIAE* PHILLIPS BLACK INC. AND FAIR PUNISHMENT PROJECT IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

BRIEF OF *AMICI CURIAE*[1]

Amici curiae respectfully submit this brief in support of petitioner Robert Veal, and urge that the petition for certiorari be granted.

INTEREST OF THE *AMICI*

Philips Black, Inc. is a nonprofit, public interest law practice dedicated to providing the highest quality of legal representation to prisoners in the United States sentenced to the severest penalties under law, in particular, capitally sentenced defendants and juveniles serving life-without-parole sentences. Phillips Black represents persons across the nation and has been at the forefront of research and scholarship concerning these punishments and the procedures governing their implementation.

Fair Punishment Project (FPP) is an initiative of Harvard Law Schools' Criminal Justice Institute. The mission of FPP is to address ways in which our laws and criminal justice system contribute to the imposition of excessive punishment. FPP believes that punishment can be carried out in a way that holds offenders accountable and keeps communities safe, while still

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[1] *Amici* certify that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. All counsel of record received notice of *Amici*'s intent to file this brief more than ten days in advance of the filing deadline and all parties consented to the filing of this brief.

affirming the inherent dignity that all people possess.

Both our experience representing persons serving such sentences and conducting research in this field have taught us the importance of the real-world impacts of these punishments. Empty formalisms must give way to meaningful protections if the rule of law is to have real meaning. It is with this perspective that we approach the question in this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Without this Court's intervention, Robert Veal will die in prison for a juvenile conviction without having had a sentencing proceeding that complies with *Miller v. Alabama*, 567 U.S. 460 (2012). For an offense he committed when he was 17 years old, Mr. Veal has to serve 60 years before parole eligibility, which exceeds his life expectancy.

All but the rarest juvenile offenders are ineligible for the sentence of life without parole. "*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016). Only the latter, those juveniles who are irreparably corrupt, may be lawfully sentenced to life without parole (JLWOP). *Miller*, 567 U.S. at 465. To assess which side of the line a particular juvenile falls on, the Court has required a sentencer to consider certain factors inherent to the condition of being a youth. If the sentencer does not make such an assessment, the sentence must provide for a

meaningful opportunity to obtain release. *Graham v. Florida*, 560 U.S. 48 (2010).

The Georgia courts unquestionably did not make any such assessment. They declined to do so for one simple reason: Mr. Veal's sentence is not denominated "life without parole." Pet. App. 4-5. For the Georgia Supreme Court, that distinction is all the difference.

For Mr. Veal, and those similarly situated, it is a distinction without a difference. Under both sentences—his original JLWOP sentence and his current sentence—he will die in prison. There is no meaningful, real-world difference if he dies in prison pursuant to LWOP or a sentence that extends parole eligibility beyond his life expectancy.

Such formalisms and distinctions have no place in either the law generally or in the context of the Eighth Amendment. The reasoning underlying *Miller*'s protections reaches sentences banishing juveniles to die in prison, whatever the label.

Unfortunately, Georgia has joined a growing minority of jurisdictions that have raised form over substance and denied *Miller*'s protections based on the sentence's label alone. *See infra*, § II. In a remarkable dereliction of duty, the Supreme Court of Georgia has declared that, absent this Court's instruction to do so, it will not extend *Miller*'s protections beyond what it views as its current reach: *per se* JLWOP sentences. Pet. App. 4-5.

To bring an end to the use of such an empty formalism, to ensure that similarly situated states are not able to circumvent the substance of *Miller*,

and to provide Mr. Veal with an opportunity to demonstrate that he is not among the rare juveniles eligible for JLWOP, this Court should grant review and reverse the decision of the Supreme Court of Georgia.

ARGUMENT

I. *Miller* Excludes Most Juvenile Offenders From Sentences That Fail To Provide A Meaningful Opportunity For Release.

Since 2005, the Court has recognized that the traditional justifications for punishment—retribution, deterrence, incapacitation, and rehabilitation—are insufficient to warrant imposing the most severe punishments on most juveniles. On this basis, *Roper v. Simmons*, 543 U.S. 551 (2005) excluded juveniles from capital punishment. *Graham v. Florida*, 560 U.S. 48 (2010) foreclosed life without parole for juveniles convicted of nonhomicide offenses. And, while reserving judgment on whether JLWOP was ever warranted, *Miller v. Alabama*, 567 U.S. 460 (2012) definitively foreclosed JLWOP for most (if not all) juveniles. While avoiding the question of whether JLWOP could ever be constitutional, the Court made it clear that, at a minimum, that sentence must be limited to the rare juvenile offender who is irreparably corrupt. *Id.* at 479 (declining to address whether "the Eighth Amendment requires a categorical ban on life without parole for juveniles").

Each holding was based on shared premises about the characteristics of juveniles. In addition to providing a categorical bar on JLWOP for most

juveniles, *Miller* held that, in assessing eligibility, courts must assess certain characteristics inherent to the circumstances of youth. That is, before imposing a JLWOP sentence, the sentence must consider "chronological age and its hallmark features." *Id.* at 477. The sentencer must take into account "the family and home environment," the "circumstances of the homicide offense, including the extent of [the juvenile's] participation in the conduct and the way familial and peer pressures may have affected him," and juveniles' diminished ability to protect their own interests in the criminal justice system as compared to their adult counterparts. *Id.* at 477-78.[2]

Graham and *Miller* clearly establish that unless a court has assessed whether a juvenile offender is irreparably corrupt, that juvenile must be given a meaningful opportunity to obtain release.

A. *Miller*'s holding is premised on the acknowledgement that the characteristics of juvenile offenders rarely, if ever, justifies an irrevocable sentence to die in prison.

Three characteristics of juvenile offenders establish their "lessened culpability": "[1] a lack of maturity and an underdeveloped sense of responsibility; [2] they are more vulnerable or susceptible to negative influences and outside

[2] These requirements make the meaning of the import of Question Presented clear: if Mr. Veal's sentence is considered the equivalent of JLWOP, he is entitled to these protections. Pet. App. i.

pressures, including peer pressure; and [3] their characters are not as well formed." *Graham*, 560 U.S. at 68 (quotations omitted). All three characteristics undermine culpability and, therefore, lessen the penological justifications for imposing the harshest penalties on juvenile offenders. *Id.* at 71-72 (quoting *Roper*, 543 U.S. at 571 ("[T]he case for retribution is not as strong with a minor as with an adult.")).

The first characteristic "often result[s] in impetuous and ill-considered actions and decisions," and this fact, along with the second characteristic—susceptibility to outside pressures—undermines both retribution and deterrence. *Id.* at 72 (quotation omitted). The third characteristic reflects the understanding that juveniles are more capable of change than adults, making it difficult at sentencing to distinguish between juveniles whose crimes are the result of "unfortunate yet transient immaturity" and the "rare" irreparably corrupt or incorrigible juvenile offender. *Id.* at 72-73. Therefore, the goal of incapacitation never (or almost never) requires a sentence guaranteeing the juvenile offender will die in prison. *Id.*; *Miller*, 567 U.S. at 479. Finally, the third factor also underscores a juvenile's "capacity for change" and therefore rehabilitation, making an irrevocable sentence to die in prison inconsistent with the rehabilitative ideal. *Graham*, 560 U.S. at 74. A defendant's status as a juvenile alters the balance for assessing culpability.

B. The rationale applies, regardless of whether the sentence is designated LWOP or is the

aggregate effect of multiple sentences imposed consecutively.

It is the substance of juvenile sentences, not their form, that render them unjustifiable. "[C]hildren are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471 (citing *Roper*, 543 U.S. at 569-570, and *Graham*, 560 U.S. at 68). Neither the characteristics of the offender nor the nature of the offense change depending on whether the offense is denominated "LWOP," a term of years, or something else. The Court has made this clear: "[A] categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform." *Graham*, 560 U.S. at 79.

The Court's concern regarding the lessened culpability of juvenile offenders would have been the same whether Mr. Graham had received an aggregate term-of-years sentence with parole eligibility at an age exceeding his life expectancy (like Mr. Veal) or a life sentence.[3] In either case, the sentence "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Graham*, 560 U.S. at 79. Such sentences lead juvenile offenders to believe that "good behavior and character improvement are immaterial," and "that whatever the future might hold in store for [his] mind and spirit . . . , he will remain in prison for the rest of his days." *Id.* at 70

[3] In fact, *Graham* also involved a *de facto* sentence of life without parole. Mr. Graham's actual sentence was life imprisonment, but because Florida had "abolished its parole system, the life sentence left Graham no possibility of release except executive clemency." *Graham*, 560 U.S. at 48.

(quoting *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989)).

Such a distinction—where LWOP is barred for all but the irreparably corrupt and only after considering particular factors, but lifetime term-of-years sentences are permitted—would, in the extreme, elevate form over substance. This state of affairs would disregard this Court's long-standing instruction that, "in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect." *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 708 (1931); *see also Willbanks v. Dep't of Corr.*, 522 S.W.3d 238, 249 (Mo. 2017), *cert. denied*, 138 S. Ct. 304 (2017) (Steith, J., dissenting) ("It is a fiction to suggest [that imposition of aggregate consecutive sentences] is just a collateral result of sentencing the juvenile for multiple crimes. Judges impose consecutive sentences cognizant of the overall effect.").

II. A Minority Of Jurisdictions Sanction Aggregate Term-Of-Year Sentences That Provide Juveniles With Neither A Meaningful Opportunity For Release Nor An Opportunity To Present Evidence Relevant To Their Eligibility For JLWOP.

Most jurisdictions recognize that *Miller* likely prohibits the sentence that Mr. Veal received—a sentence that does not carry the label "life without parole," but that is in effect a life without parole sentence. Eleven state supreme courts have held that *Graham* and *Miller* apply to aggregate term-of-

year sentences that guarantee a juvenile offender will die in prison.[4] *See People v. Caballero*, 282 P.3d 291 (Cal. 2012); *State v. Riley*, 110 A.3d 1205 (Conn. 2015), *cert. denied*, 136 S. Ct. 1361 (2016); *Henry v. State*, 175 So. 3d 675 (Fla. 2015), *cert. denied*, 136 S. Ct. 1455 (2016); *People v. Reyes*, 63 N.E.3d 884 (Ill. 2016); *State v. Pearson,* 836 N.W.2d 88 (Iowa 2013); *Com. v. Brown*, 1 N.E.3d 259 (Mass. 2013); *State v. Boston*, 363 P.3d 453 (Nev. 2015); *State v. Zuber*, 152 A.3d 197 (N.J. 2017), *cert. denied*, 138 S. Ct. 152 (2017); *State v. Moore*, 76 N.E.3d 1127 (Ohio 2016), *cert. denied*, 138 S. Ct. 62 (2017); *State v. Ramos*, 387 P.3d 650 (Wash. 2017), *cert. denied*, No. 16-9363, 2017 WL 2342671 (U.S. Nov. 27, 2017); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014).

In addition, three federal courts of appeals have held that this position constitutes clearly-established federal constitutional law. *See McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013); *Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017).[5] A fourth has found a constitutional violation on the same

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[4] The question whether such an aggregate term-of-years sentence amounts to a *de facto* sentence of life without parole arises both in the context of nonhomicide juvenile offenses and homicide juvenile offenses. For the former, the question is whether *Graham* prohibits such a sentence. For the latter, the question is whether *Miller*'s prohibition on sentences of life without parole for all but the rare juvenile offender who is irreparably corrupt adheres. In either scenario, the question of what constitutes a *de facto* life sentence is the same.

[5] One federal court of appeals—the Sixth Circuit—disagrees that this view is clearly established federal law. *Bunch v. Smith*, 685 F.3d 546, 547 (6th Cir. 2012), *cert. denied*, 133 S. Ct 1996 (2013) (holding undermined by *State v. Moore*, 76 N.E.3d 1127 (Ohio 2016)).

basis. *See United States v. Grant*, 887 F.3d 131, 142-46 (3d Cir. 2018).

On the other side of the conflict, a growing number of jurisdictions have held that the principles of *Graham* and *Miller* apply only to sentences that are formally labeled life without parole, and not to aggregate term-of-year sentences that are the functional equivalent of life without parole. *See Taylor v. State*, 86 N.E.3d 157, 167 (Ind. 2018) (distinguishing an 80-year sentence from JLWOP); *Lucero v. People*, 394 P.3d 1128, 1132 (Colo. 2017); *State v. Brown*, 118 So. 3d 332 (La. 2013); *State v. Ali*, 895 N.W.2d 237 (Minn. 2017); *Willbanks*, 522 S.W.3d at 239; *Vasquez v. Com.*, 781 S.E.2d 920 (Va. 2016), *cert. denied*, 137 S. Ct. 568 (2016). The Supreme Court of Georgia has joined this group. *See Veal v. State*, 810 S.E.2d 127, 129 (Ga. 2018).

Some of the high courts in these states have placed undue importance upon the fact that the life sentence in *Graham* was imposed for a single nonhomicide offense. In Missouri, the supreme court reasoned that *Graham* did not apply to sentences like Mr. Veal's because "*Graham* held that the Eighth Amendment barred sentencing a juvenile to a **single** sentence of life without parole for a nonhomicide offense," and "did not address juveniles who were convicted of **multiple** nonhomicide offenses and received multiple fixed-term sentences." *Willbanks*, 522 S.W.3d at 239-240 (emphasis in original).

The high courts in Colorado, Louisiana, and Virginia have applied the same faulty reasoning. *See Lucero*, 394 P.3d at 1132 ("*Graham* and *Miller* apply only where a juvenile is sentenced to the

specific sentence of life without the possibility of parole for one offense."); *id.* at 1133 ("Life without parole is a specific sentence, imposed as punishment for a single crime, which remains distinct from aggregate term-of-years sentences resulting from multiple convictions."); *Brown*, 118 So. 3d at 341 ("In our view, *Graham* does not prohibit consecutive term-of-year sentences for multiple offenses committed while a defendant was under the age of 18, even if they might exceed a defendant's lifetime.");[6] *Vasquez*, 781 S.E.2d at 925 ("Nowhere did *Graham* address multiple term-of-years sentences imposed on multiple crimes that, by virtue of the accumulation, exceeded the criminal defendant's life expectancy.").

In addition, Minnesota has applied this line of reasoning in upholding a mandatory aggregate life sentence in a homicide case. *Ali*, 895 N.W.2d at 239 (declining to apply *Miller* to three consecutive mandatory sentences of life without parole for 30 years because "*Miller* and *Montgomery* involved the imposition of a single sentence of life imprisonment without the possibility of parole and the United States Supreme Court has not squarely addressed the issue of whether consecutive sentences should be viewed separately when conducting a proportionality analysis under the Eighth Amendment.").

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[6] In a subsequent case in Louisiana, the Louisiana Supreme Court held that a single sentence of 99 years imposed for a single offense violated *Graham*. *State ex rel. Morgan v. State*, 217 So.3d 266 (La. 2016). The court distinguished *Brown*, stating that "[t]his Court found it dispositive that Brown was sentenced for multiple convictions." *Id.* at 271.

In this minority of jurisdictions, juveniles can be locked away forever so long as courts avoid imposing a literal life without parole sentence for a single offense. But in *Graham* and *Miller* the Court did not draw distinctions between the number of offenses charged in an indictment, or suggest that those convicted of homicide need not ever be provided an opportunity to "demonstrate that he is fit to rejoin society." *Graham*, 560 U.S. at 79. In fact, in *Graham*, the Court specifically referred to juveniles who had been convicted of multiple crimes as belonging in the "juvenile nonhomicide offender" category to which its decision applied. *Id.* at 64; *see also id.* at 76 (noting offender's "past encounters with the law").

Moreover, Mr. Graham himself was sentenced on multiple convictions, and the trial court referenced other uncharged felonies (as parole violations) as the reason for imposing a sentence greater than that which the State recommended. *Id.* at 56-57. As the Tenth Circuit recognized in *Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017), "When the [*Graham*] Court compared the severity of the crime with the severity of the punishment, in light of the characteristics of the offender, it did not look to the state's definitions or the exact charges brought. It looked to whether the offender was a juvenile, whether the offender killed or intended to kill the victim, and whether the sentence would deny the offender any realistic opportunity to obtain release." *Id.* at 1058.

By focusing on form over substance, states elevate charging decisions and sentence structure over the protections in *Graham* and *Miller*.

Prosecutors have virtually unlimited discretion in deciding what charges to bring and whether to parse a single criminal act into multiple charges. *Ball v. United States*, 470 U.S. 856, 859-60 (1985); *Albernaz v. United States*, 450 U.S. 333, 344 (1981). Sentencing courts likewise have discretion to require that the sentences for each charge be served consecutively or concurrently. *See Oregon v. Ice*, 555 U.S. 160 (2009).

To constitutionalize a difference based on such distinctions needlessly imperils the protections *Graham* and *Miller* provide. However serious Mr. Veal's offenses may be, "it does not follow that he would be a risk to society for the rest of his life." *Graham*, 560 U.S. at 73. Most courts are heeding *Miller*'s mandates and requiring *Miller* compliant hearings even in the most serious cases. *See, e.g.*, *Malvo v. Mathena*, slip op. Nos. 17-6746, 17-6758, 2018 U.S. App. LEXIS 16768, 2018 WL 3058931 at *3, *32 (4th Cir. June 21, 2018) (ordering re-sentencing for "D.C. sniper"). However, a minority of jurisdictions elevate form over substance and exclude persons such as Mr. Veal from the demands of the constitution.

III. This Case Is A Strong Vehicle For Resolving The Question.

Mr. Veal's case presents a good opportunity to resolve this split of authority. The court below solely rested its outcome on resolution of this question. The Supreme Court of Georgia has already determined that *Miller* protections apply to its implementation of JLWOP, so holding in Mr. Veal's own case that led to the resentencing proceeding at issue here. *Veal v. State*, 784 S.E.2d

403, 412 (Ga. 2016). Here, the court squarely considered the question and rejected the notion that the Eighth Amendment provided protection based on the effect of the sentence, regardless of the label attached to it. Pet. App. 4-5. This was the sole basis for the decision below. Thus, granting review will have a meaningful impact on Mr. Veal and those under similar sentences.

At bottom, for persons such as Mr. Veal there is not a dime's worth the difference between dying in prison pursuant to a JLWOP sentence and a term-of-years that exceeds life expectancy. Basic human decency requires acknowledgement of as much, and the evolving standards of decency demand the same.

CONCLUSION

The Court should grant the petition for certiorari and reverse the decision of the Supreme Court of Georgia.

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June 28, 2018

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