No. 18-217

IN THE
Supreme Court of the United States

RANDALL MATHENA,
Petitioner,
v.

LEE BOYD MALVO,
Respondent.

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

BRIEF OF INDIANA, ALABAMA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, LOUISIANA, MONTANA, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In 2004, Lee Boyd Malvo, one of the D.C. snipers, was sentenced to life without parole in Virginia state court. Eight years later, this Court "h[e]ld that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" *Miller v. Alabama*, 567 U.S. 460, 465 (2012). Four years later, the Court held that "*Miller* announced a substantive rule that is retroactive to cases on collateral review." *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016).

The question presented is:

Did the Fourth Circuit err in concluding that a decision of this Court (*Montgomery*) addressing whether a new constitutional rule announced in an earlier decision (*Miller*) applies retroactively on collateral review is properly interpreted as modifying and substantially expanding the very rule whose retroactivity was in question?

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Arkansas, Florida, Georgia, Idaho, Louisiana, Montana, Nebraska, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming respectfully submit this brief as *amici curiae* in support of the respondent.

Amici States have a strong interest in the finality of criminal judgments. Finality is an important consideration "in determining the proper scope of habeas review," *Teague v. Lane*, 489 U.S. 288, 308 (1989), and "serves many . . . important interests," including deterrence, rehabilitation, and punishment, *Kuhlmann v. Wilson*, 477 U.S. 436, 452–53 (1986).

States also have a strong interest in maintaining their "sovereignty over criminal matters." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). "States' sovereign administration of their criminal justice systems" is an "important principle of federalism" that this Court seeks to preserve. *Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016). "The States possess primary authority for defining and enforcing the criminal law," *Engle v. Isaac*, 456 U.S. 107, 128 (1982), and federal courts should not intrude on this authority any further than the Constitution requires.

Amici States file this brief to explain why the Eighth Amendment does not require—on pain of invalidation of an otherwise-final criminal sentence—state sentencing bodies to recite a particular verbal formula before imposing a life-without-parole sentence on a juvenile convicted of murder.

SUMMARY OF ARGUMENT

The decision below wrongly holds that the Eighth Amendment categorically prohibits life-without-parole sentences for defendants who committed homicide before they turned 18—unless, so says the decision below, the sentencer makes an explicit finding that the "crimes reflected irreparable corruption or permanent incorrigibility." Pet. App. 22a. The Eighth Amendment contains no such magic-words requirement. Rather, this Court has held that the Eighth Amendment merely prohibits grossly disproportionate sentences and, in order to prevent the risk of such sentences, requires sentencers to consider a juvenile offender's youth before imposing a sentence of life without parole. The Court has thus held that while the Eighth Amendment prohibits *mandatory* life-without-parole sentences for juvenile offenders, it does not prohibit such sentences when they are *discretionary*: Sentencers exercising their discretion to impose a juvenile life-without-parole sentence will have considered the offender's youth, and such sentences therefore comply with the Eighth Amendment. The below decision's contrary conclusion misreads the Court's precedents and should be reversed.

1. The origins of this case trace to a recent series of decisions in which the Court has—over vigorous and well-reasoned dissents—expanded Eighth Amendment doctrine to apply categorical restrictions to prison sentences imposed for crimes committed by juveniles. This case directly arises from the last two decisions in this sequence: *Miller v. Alabama*, 567

U.S. 460 (2012), which held that the Eighth Amendment prohibits imposing *mandatory* life-without-parole sentences on juveniles, and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), which held that *Miller*'s rule applies retroactively to cases on collateral review. The decision below stretched these decisions to apply a new categorical rule to *discretionary* juvenile life-without-parole sentences, requiring sentencers to make a specific finding of "permanent incorrigibility" before imposing such a sentence. Pet. App. 22a. Particularly given the doubtful expansions of the Eighth Amendment that underlie *Miller* and *Montgomery*, the Court should refuse to endorse this still further intrusion into States' sovereign interests.

2. Moreover, whether or not the Court takes a skeptical view of *Miller* and *Montgomery*, these decisions merely prohibit *mandatory* juvenile life-without-parole sentences; they do not require sentencers imposing *discretionary* juvenile life-without-parole sentences to make an explicit finding of permanent incorrigibility. *Miller* held that the Eighth Amendment prohibits courts from imposing life-without-parole sentences without considering "youth (and all that accompanies it)," because doing so "poses too great a risk of disproportionate punishment." 567 U.S. at 479. And *Montgomery* recognized that, because *Miller* is fundamentally premised on the substantive right to be free from grossly disproportionate sentences, its rule is substantive and therefore retroactively applicable to cases on collateral review.

Crucially, *neither* of these decisions held that the Eighth Amendment requires state sentencing bodies

to adopt specific procedures or recite particular words. And rightly so: The Court has interpreted the Eighth Amendment only to prohibit disproportionate punishments. And while it has observed, most recently in *Montgomery*, that substantive rights sometimes necessitate procedural changes, the Court has long held that States, not federal courts, have the authority to define these procedures, in keeping with principles of federalism and respect for state sovereignty.

3. Because *Miller* merely requires sentencers to consider the offender's youth before imposing a sentence of life without parole on a juvenile, when such sentences are discretionary they necessarily comply with *Miller*'s categorical rule. Sentencers with discretion to choose whether to impose such sentences will invariably consider the offender's youth and any related circumstances; there is thus no need for the Court to require factual findings to recite precise formulations such as "permanent incorrigibility." Such a requirement is unnecessary to protect the right announced in *Miller* and would improperly undermine States' authority to set their own rules of criminal procedure. *Miller* announced a single, categorical Eighth Amendment rule prohibiting *mandatory* juvenile life-without-parole sentences. The Court should reverse the below decision's holding that the Eighth Amendment also imposes a categorical magic-words requirement on *discretionary* juvenile life-without-parole sentences.

ARGUMENT

I. The Court Should Refuse to Expand Its Already-Doubtful Juvenile-Sentencing Cases to Intrude Further into State Sentencing Procedures

The journey to the erroneous decision below begins with the proposition that the Eighth Amendment prohibits "disproportionate" sentences—a proposition in serious tension with the historical evidence of the Amendment's meaning. Members of the Court have long "raised serious and thoughtful questions about whether, as an original matter, the Constitution was understood to require any degree of proportionality between noncapital offenses and their corresponding punishments." *Graham v. Florida*, 560 U.S. 48, 86 (2010) (Roberts, C.J., concurring in judgment).

There is strong reason to believe, for example, that the Cruel and Unusual Punishments Clause was originally understood to limit the *methods* of punishment, rather than a punishment's *proportionality*. *See Miller v. Alabama*, 567 U.S. 460, 503–04 (2012) (Thomas, J., dissenting); *Ewing v. California*, 538 U.S. 11, 32 (2003) (Thomas, J., concurring in judgment). The historical evidence suggests that the common-law meaning of "unusual" was synonymous with "illegal," and the Cruel and Unusual Punishments Clause thus meant that judges were not free to devise strange new methods of punishment that were neither statutorily authorized nor recognized by the common law. *Harmelin v. Michigan*, 501 U.S. 957, 973-74 (1991) (opinion of Scalia, J.). And in addition to being historically

accurate, this narrow reading of the Eighth Amendment avoids the profound practical problems with a "proportionality" standard that invites courts to use their subjective perceptions to invalidate as disproportionate sentences that "*some* assemblage of men and women *has* considered proportionate." *Id.* at 986.

Notwithstanding these well-reasoned objections, over the course of the last few decades the Court has found in the Eighth Amendment "a 'narrow proportionality principle'" that it applies "on a case-by-case basis," *Graham*, 560 U.S. at 87 (Roberts, C.J., concurring in judgment) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003)). In conducting this "highly deferential 'narrow proportionality' analysis," the Court has "emphasized the primacy of the legislature in setting sentences, the variety of legitimate penological schemes, the state-by-state diversity protected by our federal system, and the requirement that review be guided by objective, rather than subjective, factors." *Id.* For these reasons, the Court has consistently held that the "narrow proportionality" requirement "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* at 60 (opinion of the Court) (internal quotation marks and citation omitted).

Historically, there has been just one exception to the Court's highly deferential, case-by-case Eighth Amendment proportionality review: capital punishment. "Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long," the Court has been willing to impose *categorical* limitations on use of the death penalty but not prison

sentences. *Rummel v. Estelle*, 445 U.S. 263, 272 (1980). The Eighth Amendment significance of "the unique nature of the death penalty" "has been repeated time and time again in [the Court's] opinions." *Id.* As the Court explained in *Graham*, with respect to categorical rules proscribing punishments, all "previous cases involved the death penalty." 560 U.S. at 60 (opinion of the Court).

Graham, however, expanded the categorical approach the Court had previously limited to the death penalty context to declare that the "Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Id.* at 82. *Graham* followed that path even though doing so was "at odds with [the Court's] longstanding view that 'the death penalty is different from other punishments in kind rather than degree." *Id.* at 89–90 (Roberts, C.J., concurring in judgment) (quoting *Solem v. Helm*, 463 U.S. 277, 294 (1983)). The decision's holding was also "at odds" with the Court's then-recent decision prohibiting capital punishment for crimes committed prior to age 18, which explicitly "*bless[ed]* juvenile sentences that are 'less severe than death' despite involving 'forfeiture of some of the most basic liberties.'" *Id.* at 90 (quoting *Roper v. Simmons*, 543 U.S. 551, 573–74 (2005)) (emphasis added).

Graham put aside these earlier precedents and held that the Eighth Amendment categorically bars life-without-parole sentences for juveniles convicted of nonhomicide crimes, reasoning that such crimes, "in terms of moral depravity and of the injury to the person and to the public, . . . [] cannot be compared to

murder in their severity and irrevocability." *Graham*, 560 U.S. at 69 (opinion of the Court) (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008) (ellipsis in original; internal quotation marks removed)). Thus, even while expanding the "categorical" line of the Court's Eighth Amendment cases, *Graham*, like the Court's decisions before and since, affirmed States' authority to impose life-without-parole sentences on juveniles convicted of murder. *See Roper*, 543 U.S. at 572 (explaining that capital punishment for juveniles is unnecessary for deterrence because "the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person"); *Miller*, 567 U.S. at 473 ("*Graham*'s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm."); *id.* at 480 ("[W]e do not foreclose a sentencer's ability to make that judgment [that a sentence of life without parole is appropriate] in homicide cases").

Yet two years after *Graham* assured States that the Eighth Amendment did not categorically preclude life-without-parole sentences on juveniles convicted of murder, *Miller* declared that States may *not* impose such sentences if those sentences are "mandatory." 567 U.S. at 470. As the dissenting justices observed in *Miller*, the Court's decision effected "a classic bait and switch, . . . tell[ing] state legislatures that—*Roper*'s promise notwithstanding—they do not have power to guarantee that once someone commits a heinous murder, he will never do so again." *Miller*, 567

U.S. at 500 (Roberts, C.J., dissenting). *Miller* did so even though "most States have changed their laws relatively recently to expose teenage murderers to mandatory life without parole," *id.* at 495, and even though "the number of mandatory life without parole sentences for juvenile murderers, relative to the number of juveniles arrested for murder, is over *5,000 times higher* than the corresponding number in *Graham*," *id.* at 496 (emphasis added).

Notably, although it imposed a categorical rule against mandatory life-without-parole sentences, *Miller* was grounded in the Court's—traditionally case-by-case—"narrow proportionality" principle: The Court reasoned that "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, [a mandatory life-without-parole sentencing] scheme *poses too great a risk of disproportionate punishment*." *Miller*, 567 U.S. at 479 (opinion of the Court) (emphasis added). And when *Montgomery* held this rule retroactively applicable to cases on collateral review, the Court reiterated this justification. *See Montgomery*, 136 S. Ct. at 733 (noting that *Miller* held "that mandatory life-without-parole sentences for children 'pos[e] too great a risk of disproportionate punishment.'" (quoting *Miller*, 567 U.S. at 479) (alteration in original)).

Following the six-year sequence where *Graham*, *Miller*, and *Montgomery* each incrementally extended the Eighth Amendment's reach, the decision below extends it still further. It stretches *Miller* and *Montgomery*'s prohibition on *mandatory* life-without-parole sentences to impose an unusual procedural rule—

unique in the noncapital context—on *discretionary* life-without-parole sentences. The decision below claims the Eighth Amendment requires sentencers, before imposing such sentences, first to make a particularized finding of "permanent incorrigibility." Pet. App. 20a.

The Court should refuse to endorse this expansion of its already-precarious Eighth Amendment precedents. States have imposed countless sentences for homicide convictions under a particular understanding of what the Eighth Amendment requires, and the Court's decisions altering the Eighth Amendment's requirements severely frustrate the finality of criminal judgments—particularly when the Court makes these decisions retroactive. *See, e.g., Teague v. Lane*, 489 U.S. 288, 308 (1989) ("[I]nterests of comity and finality must . . . be considered in determining the proper scope of habeas review."); *Kuhlmann v. Wilson*, 477 U.S. 436, 452–53 (1986) (noting that finality "serves many . . . important interests" in "administration of [state] criminal statutes").

The decision below only exacerbates this problem. And worse, it intrudes into the very procedures States use to conduct sentencing, impeding States' interest in maintaining their "sovereignty over criminal matters." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Nothing in the history of the Eighth Amendment suggests that it requires sentencers to recite particular formulas before sentencing a juvenile convicted of murder to life without parole.

II. *Miller* and *Montgomery* Require Only That the Sentencer Consider the Youth of the Offender

The uncertain precedential foundations for the decision below are reason enough to view its conclusion with skepticism. But even putting aside all doubts regarding the correctness of *Miller*, *Montgomery*, and their precursors, the decision below misinterprets the Court's precedents. It reads *Miller* and *Montgomery* to hold that a sentencer violates the Eighth Amendment "any time it imposes a discretionary life-without-parole sentence on a juvenile homicide offender without first concluding that the offender's 'crimes reflect permanent incorrigibility,'" Pet. App. 20a (quoting *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016)), even though both decisions expressly disclaim this result. *See Miller v. Alabama*, 567 U.S. 460, 480 (2012) ("Although we do not foreclose a sentencer's ability to . . . [impose a life-without-parole sentence on juveniles] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."); *Montgomery*, 136 S. Ct. at 735 ("*Miller* did not impose a formal fact-finding requirement . . . ."). Instead, *Miller* and *Montgomery* hold that the Eighth Amendment "mandates *only* that a sentencer . . . consider[] an offender's youth and attendant characteristics . . . before imposing a particular penalty [of life without parole]." *Miller*, 567 U.S. at 483 (emphasis added)).

Importantly, *Miller* began with the proposition that the Eighth Amendment prohibits "'excessive

sanctions'" that are not "'proportioned' to both the offender and the offense." *Miller*, 567 U.S. at 469 (quoting *Roper*, 543 U.S. 551, 560 (2005)). *Miller* is thus premised on the idea that proportionate sentencing in the juvenile context requires courts to consider such factors as the defendant's: potentially "greater prospects for reform," reduced ability to consider consequences maturely, and vulnerability to influences outside the defendant's control. *Id.* at 471. *Miller* concluded that if sentencers were to ignore these factors and "proceed as though [the defendants] were not children," *id.* at 474, they likely would miss important circumstances in measuring culpability, creating "too great a risk" of disproportionately excessive punishment, *id.* at 479. For this reason the Court "h[e]ld that the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders." *Id.* (emphasis added).

Montgomery did not purport to alter *Miller*'s reasoning or its holding. It simply held that *Miller*'s rule applies retroactively, recognizing that, under the test announced in *Teague v. Lane*, 489 U.S. 288 (1989), "*Miller* announced a substantive rule that is retroactive in cases on collateral review," *Montgomery*, 136 S. Ct. at 732. *Montgomery* explained that *Miller*'s rule is substantive because *Miller* applied the "[p]rotection against disproportionate punishment[,] . . . the central *substantive* guarantee of the Eighth Amendment." *Id.* (emphasis added). *Miller*, after all, expressly determined that "mandatory-sentencing schemes . . . *violate this principle of proportionality*." *Miller*, 567 U.S. at 489 (emphasis added). In light of

this substantive principle, *Miller* held that life-without-parole sentences would be unconstitutionally disproportionate for many juveniles; according to *Montgomery*, it thereby announced a substantive rule that "alters the . . . class of persons that the law punishes." *Montgomery*, 136 S. Ct. at 732 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

Notably, *Montgomery* observed that the only "procedure *Miller* prescribes" is a "hearing where 'youth and its attendant characteristics' are considered as sentencing factors . . . ." *Montgomery*, 136 S. Ct. at 735 (quoting *Miller*, 567 U.S. at 465). It thus correctly recognized that *Miller* "did *not* impose a formal factfinding requirement." *Id.* (emphasis added).

There are good reasons *Miller* did not impose such a requirement. When establishing new constitutional protections, the Court always is "careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Id.* (citing *Ford v. Wainwright*, 477 U.S. 399, 416–417 (1986) ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences")). The Court has long observed that States are responsible for developing and refining their own criminal procedures in light of substantive constitutional guarantees: "In criminal trials [States] . . . hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish

offenders and their good-faith attempts to honor constitutional rights." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). *Cf. Lynch v. Arizona*, 136 S. Ct. 1818, 1821 (2016) (Thomas, J., dissenting) ("The Due Process Clause does not compel such micromanagement of state sentencing proceedings." (internal brackets, quotation marks, and citation omitted)).

Accordingly, the only procedure required by *Miller* is individualized consideration of a juvenile defendant's "age and age-related characteristics." *Miller*, 567 U.S. at 489. This procedure ensures that a life-without-parole sentence is not unconstitutionally disproportionate in light of the circumstances of a particular defendant and a particular case. *See Montgomery*, 136 S. Ct. at 735 ("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.") (internal quotation marks and citation omitted).

In sum, *Miller* and *Montgomery* do not prescribe any particular formula for state sentencing hearings. They do not require a recitation of magic words precisely because the Constitution itself does not do so. *Cf. Railway Express Agency, Inc. v. Virginia*, 358 U.S. 434, 441 (1959) (noting that the constitutionality of state action should not turn on "magic words").

III. Sentencers Imposing Discretionary Life-Without-Parole Sentences Necessarily Consider the Offender's Youth and Thus Comply With *Miller* and *Montgomery*

Because *Miller* merely requires individualized consideration of a juvenile defendant's "age and age-related characteristics," *Miller v. Alabama*, 567 U.S. 460, 489 (2012), its holding is limited to the "determination that *mandatory* life without parole for juveniles violates the Eighth Amendment," *id.* at 487 (emphasis added). *Miller* repeatedly drew a crucial distinction between mandatory and discretionary sentences: Mandatory sentences prevent sentencers from considering the defendant's youth, while sentencers imposing discretionary life-without-parole sentences *do* "consider[] an offender's youth and attendant characteristics . . . before imposing" a sentence of life without parole. *Id.* at 483. Because sentencers imposing discretionary life-without-parole sentences inevitably consider "a juvenile's 'lessened culpability' and greater 'capacity for change.'" *Id.* at 465 (2012) (quoting *Graham v. Florida*, 560 U.S. 48, 68, 74 (2010)), these sentences fully comply with *Miller*. The below decision's extension of *Miller*'s categorical rule to *discretionary* life-without-parole sentences is therefore unsupported and unnecessary—and even nonsensical.

In any sentencing hearing—and certainly in any case in which a juvenile is charged with murder—the defendant's attorney will be tasked with bringing to the sentencer's attention all mitigating factors, in-

cluding the defendant's "youth and attendant characteristics." *Miller*, 567 U.S. at 483. The sentencer—whether a judge or a jury—will then consider all permissible factors in deciding what sentence would best serve the interests of deterrence, punishment, and rehabilitation. And in *every* State the defendant's youth is a permissible mitigating factor: Every State either specifically instructs sentencers to account for age[1] or allows them to do so.[2] Indeed, many States not only

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[1] Tenn. Code Ann. § 40-35-113(6); *State v. Dvorsky*, 322 N.W.2d 62, 67 (Iowa 1982) ("Trial court, however, must exercise its discretion. We have said that . . . the defendant's age . . . [is one of the] 'minimal essential factors' to be considered when exercising sentencing discretion." (citing *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979))).

[2] Ala. R. Crim. P. 26.6(b)(2); Alaska R. Crim. P. 32.1; Ariz. Rev. Stat. Ann. § 16A-26.7; Ark. Code Ann. § 16-90-804(c)(9); Colo. R. Crim. P. 32(a)(1)(I)(a), (b)(1); Ga. Code Ann. § 17-10-2(a)(1); Haw. Rev. Stat. Ann. §§ 706-604(1), 706-606(1); Idaho Code Ann. § 19-2521; 730 Ill. Comp. Stat. Ann. 5/5-4-1; Ind. Code Ann. § 35-38-1-7.1(c); Kan. Stat. Ann. § 22-3424(e); Ky. R. Crim. P. 11.02(1); Me. Rev. Stat. Ann. tit. 17-A, § 1252-C(2); Md. R. 4-342(e); Minn. Stat. Ann. § 631.20; Mont. Code Ann. §§ 46-18-101(3)(d), 46-18-115; Nev. Rev. Stat. Ann. §§ 176.015(2), (6); N.J. Stat. Ann. § 2C:44-1(b)(4); N.M. Stat. Ann. § 31-18-15.1(A)(1); N.Y. Crim. Proc. Law § 380.50(1); N.D. Cent. Code Ann. § 12.1-32-04; Ohio Rev. Code Ann. § 2929.12; Okla. Stat. Ann. tit. 22, § 973; Or. Rev. Stat. Ann. §§ 137.080(1), 137.090(1); 42 Pa. Stat. and Cons. Stat. Ann. § 9752; 12 R.I. Gen. Laws Ann. § 12-19.3-3; Tex. Code Crim. Proc. Ann. art. 37.07 § (3)(a)(1); Vt. Stat. Ann. tit. 13, § 7030; Va. Code Ann. § 19.2-295.1; Wash. Rev. Code Ann. § 9.94A.500; Wis. Stat. Ann. § 973.017(2)(b); *People v. Brown*, 54 Cal. Rptr. 3d 887, 899 (Cal. Ct. App. 2007); *State v. Huey*, 505 A.2d 1242, 1245 (Conn. 1986); *Osburn v. State*, 224 A.2d 52, 53 (Del. 1966); *Nusspickel v. State*, 966 So. 2d 441, 445 (Fla. Dist.

list the defendant's age among the specific permissible mitigating factors, but also explicitly direct sentencers to consider other factors that are closely linked with youth and its vulnerabilities.[3]

Because individualized sentencing hearings imposing *discretionary* life-without-parole sentences will inevitably encompass the defendant's youth—as well as any other mitigating factors that defense counsel will surely raise—such sentences will comply with the rule articulated in *Miller* and *Montgomery*. *Miller* properly recognized that there is a fundamental difference between mandatory and discretionary sentences of life without parole: When considering

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Ct. App. 2007); *State v. Williams*, 446 So. 2d 565, 567 (La. Ct. App. 1984); *Commonwealth v. Lykus*, 546 N.E.2d 159, 166 (Mass. 1989); *People v. Albert*, 523 N.W.2d 825, 826 (Mich. Ct. App. 1994); *Evans v. State*, 547 So.2d 38 (Miss. 1989); *State v. Cline*, 452 S.W.2d 190, 194 (Mo. 1970); *State v. Miller*, 381 N.W.2d 156, 158 (Neb. 1986); *State v. Timmons*, 756 A.2d 999, 1000 (N.H. 2000); *State v. Goode*, 191 S.E.2d 241, 241–42 (N.C. Ct. App. 1972); *In re M.B.H.*, 692 S.E.2d 541 (S.C. 2010); *State v. Grosh*, 387 N.W.2d 503, 508 (S.D. 1986); *State v. Lineberry*, 391 P.3d 332, 334 (Utah 2016); *State v. Nicastro*, 383 S.E.2d 521, 529 (W. Va. 1989); *Hackett v. State*, 233 P.3d 988, 992 (Wyo. 2010).

[3] *See, e.g.* Ala. Code § 13A-5-51(4) ("The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor"); Alaska Stat. Ann. § 12.55.155(d)(4) ("the conduct of a youthful defendant was substantially influenced by another person more mature than the defendant"); Colo. Rev. Stat. Ann. § 18-1.3-1201(4)(k) ("The defendant is not a continuing threat to society"); Fla. Stat. Ann. § 921.141(7)(b) ("The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance").

discretionary life without parole sentences, state sentencing bodies necessarily consider the very factors that touch on "how children are different" due to youthful "age and its hallmark features," *Miller,* 567 U.S. at 477, 480.

The decision below, however, flatly ignores the fundamental distinction *Miller* drew between mandatory and discretionary sentences: It held that it did not need to "resolve whether any of Malvo's sentences were mandatory," Pet. App. 19a, because it concluded that a specific finding of "irreparable corruption or permanent incorrigibility" is now a constitutional "prerequisite" for imposing a sentence of life without parole sentences on a juvenile, Pet. App. 22a.

This decision not only contradicts this Court's explicit statements in both *Miller* and *Montgomery*, but also undermines the very purpose of *Miller*'s rule—preventing excessive punishment. The decision below would hold sentences unconstitutional for failure to follow a particular verbal formula even when they are imposed pursuant to detailed statutory schemes that specifically require consideration of the defendant's youth. Missouri, for example, prohibits life-without-parole sentences for juveniles unless a unanimous jury finds beyond a reasonable doubt *both* that the defendant inflicted the mortal injuries *and* that one of nine aggravating factors also existed. Mo. Ann. Stat. § 565.034(6)(1)-(2). But the decision below would invalidate such sentences imposed under this statute—and similar statutes— if the sentencer failed to recite the words "permanent incorrigibility." *See, e.g.*, Neb. Rev. Stat. Ann. § 28-105.02(2) (requiring courts to

consider mitigating factors submitted by the defendant, including age, "impetuosity," "family and community environment," "ability to appreciate the risks and consequences of the conduct," "intellectual capacity," and mental health evaluations); Iowa Code Ann. § 902.1(2) (requiring notice before prosecutor seeks life without parole and requiring the court to consider twenty-two sentencing factors); 730 Ill. Comp. Stat. Ann. 5/5-4.5-105(a) (requiring the court to consider at least eight mitigating factors in every juvenile sentencing).

Nothing in *Miller* or *Montgomery* so much as suggests that these state laws fail to provide the procedure required by the Eighth Amendment. Indeed, these laws go far beyond *Miller*'s requirement that sentencers simply "consider[] an offender's youth and attendant characteristics" before imposing a sentence of life without parole. *Miller*, 567 U.S. at 483. The Eighth Amendment does not authorize federal courts to brush aside these constitutionally satisfactory procedures and institute requirements of their own.

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The Eighth Amendment does not require state sentencing bodies to make a specific finding of "permanent incorrigibility" before sentencing juveniles to life without parole. In concluding otherwise, the decision below improperly extends *Graham*, *Miller*, and *Montgomery*—decisions that even taken alone lack firm grounding in history or the Court's prior case law. The decision below misreads *Miller* and *Montgomery*: Both of these decisions expressly disavow any "formal factfinding requirement." *Montgomery*, 136 S.

Ct. at 735, and repeatedly insist that they require only that sentencers consider a defendant's "youth and attendant characteristics" before imposing a sentence of life without parole. *Id.* at 734. The Court should refuse to endorse any further unjustified intrusion into State authority over sentencing procedures.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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