

No. 18-1259

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IN THE  
*Supreme Court of the United States*

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BRETT JONES,

*Petitioner,*

—v.—

MISSISSIPPI,

*Respondent.*

ON WRIT OF CERTIORARI TO  
THE MISSISSIPPI COURT OF APPEALS

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**BRIEF FOR *AMICUS CURIAE* THE AMERICAN  
CIVIL LIBERTIES UNION FOUNDATION, THE ACLU OF  
MISSISSIPPI, THE AMERICAN CONSERVATIVE UNION  
FOUNDATION, THE RUTHERFORD INSTITUTE, THE  
R STREET INSTITUTE, AND LARRY W. YACKLE  
IN SUPPORT OF PETITIONER**

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## STATEMENTS OF INTEREST<sup>1</sup>

Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole interest of amici

Amici represent organizations from across the ideological spectrum. But we are united on the notion that sentencing children to die in prison runs counter to our constitutional traditions. To sentence a child to life without parole is to give up all possibility of hope or redemption for that individual. Indeed, under this Court's jurisprudence, only those who are found to be "permanently incorrigible," as this Court has put it, may be subject to such a punishment. And the Court has also recognized that the vast majority of youth, because of their immaturity, their undeveloped brains, and their capacity for change, should not be subject to such punishment.

The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding more than 100 years ago, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as *amicus curiae*, including cases implicating the constitutional rights of juvenile

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<sup>1</sup> All parties have consented to this amici curiae brief in support of petitioner and letters of consent have been filed with the Clerk. No counsel for a party authored this brief, or contributed to the preparation or submission of this brief.

offenders. The ACLU opposes life without parole sentences for all children.

The American Civil Liberties Union of Mississippi (“ACLU of MS”) is a statewide nonprofit, nonpartisan organization with nearly 1500 members dedicated to the principles of liberty and equality embodied in the U.S. Constitution and our nation’s civil rights laws. A core mission of the ACLU of MS is fighting to ensure the criminal legal system operates fairly and justly.

The American Conservative Union Foundation (ACUF) is a 501(c)(3) organization based in Alexandria, Virginia. Established in 1983, ACUF is dedicated to educating Americans about conservative beliefs and policies at all levels of government. Its Nolan Center for Justice works to reform America’s criminal justice system to improve public safety, foster greater government accountability, and advance human dignity. ACUF values human life at all stages. It is the organization’s view that an unalterable life sentence for conduct committed by a minor forecloses any notion of the possibility of redemption. When the state exercises such power, particularly against a youthful offender, it must be in the most measured circumstances.

The R Street Institute is a non-profit, non-partisan public policy research organization. R Street’s mission is to engage in policy research and educational outreach that promotes free markets, as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth. The R Street Institute is interested in this case because of the significant constitutional issues and fundamental issue of

fairness and dignity implicated by the government's argument. It believes that children are different and should be treated differently by our institutions. Specifically, it believes that it should be incredibly rare for a child to be sentenced to life without parole, not just because their age and immaturity makes them less culpable, a fundamental tenet of our legal system, but also because of their capacity to change and grow into better people.

The Rutherford Institute is an international civil liberties organization with its headquarters in Charlottesville, Virginia. Its President, John W. Whitehead, founded the Institute in 1982. The Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated and in educating the public about constitutional and human rights issues.

### **SUMMARY OF ARGUMENT**

Because at a minimum the vast majority of children cannot be sentenced to life without parole, the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole. This conclusion follows directly from the Court's recent precedents.

In *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court recognized that children are categorically different from adults in ways that almost always make lifetime imprisonment for wrongs they commit as children cruel and unusual punishment. Children's "diminished culpability and heightened capacity for change" generally defeat the penological

justifications for a life-without-parole sentence. *Miller*, 567 U.S. at 479; *Montgomery*, 136 S. Ct. at 733. Therefore, the Court held, the Eighth Amendment bars imposition of life without parole on “a class of defendants”—namely, “juvenile offenders whose crimes reflect the transient immaturity of youth.” *Montgomery*, 136 S. Ct. at 734. Almost all juveniles are in this class and so cannot be sentenced to life without parole.

The Court allowed that, at least in theory, there may be extremely rare children who do not share the reduced culpability and elevated capacity for change that characterize juveniles generally. Such individuals, whom the Court has described as permanently incorrigible, may therefore be sentenced to life without parole. Given this principle, which draws a sharp line between most children and the rare “permanently incorrigible” exception, the only way the sentencing authority can distinguish a juvenile offender who can be given a life-without-parole sentence from the vast majority who cannot is to make a finding that the particular offender is “permanent[ly] incorrigib[le].” *Id.*

If a state chooses to pursue a life-without-parole sentence, it must conduct a hearing to determine whether a particular juvenile offender is permanently incorrigible. The purpose of the hearing is to determine whether the offender is an exception, one who does not reflect the characteristics that typically make life without parole an unconstitutional penalty for children. A finding of permanent incorrigibility is a condition precedent to the imposition of a life-without-parole sentence on a juvenile offender.



The Mississippi Court of Appeals affirmed Brett Jones' sentence even though the trial court had not found him to be permanently incorrigible. See *Jones v. State*, 285 So. 3d 626, 634 (Miss. Ct. App. 2017). The state court denied that the Eighth Amendment requires such a finding. Instead, according to the state court, any juvenile can receive a life-without-parole sentence if the sentencing authority first considers the characteristics associated with youth. The state court's holding that no finding of permanent incorrigibility is necessary renders the Eighth Amendment's protection of juveniles from this punishment toothless.

The Mississippi court's decision and reasoning flatly contradict this Court's precedents. The Court has not held merely that youthful characteristics must be considered as a procedural matter in sentencing. Instead, *Miller* held, and *Montgomery* affirmed, that the distinctive attributes of youth make life without parole unconstitutional as a substantive matter for a large class of juveniles. Concomitantly, such a sentence is valid only if a juvenile does not have those characteristics and so is outside the class.

The state court's error lay in misreading a passage in *Montgomery*, in which this Court recognized that the opinion in *Miller* did not state explicitly that a finding of permanent incorrigibility is required. But the relevant passage in *Montgomery*, 136 S. Ct. at 735, merely acknowledges that *Miller* was silent on this question. The Mississippi court pulled that observation out of context, isolated it from the rest of the *Montgomery* opinion, and adopted it as a categorical answer to the question

presented in this case. The state court treated the acknowledgment of *Miller's* silence regarding a finding requirement to mean that *Miller* actually reached a dispositive *holding* that a finding is *not* required.

But there is a critical difference between granting, on the one hand, that *Miller* did not expressly refer to a finding of incorrigibility, and asserting, on the other, that *Miller held* that a finding is not required. The Court did the former in *Montgomery*, not the latter. Indeed, the latter interpretation is directly at odds with the logic of both *Miller* and *Montgomery*.

In essence, the Mississippi court resurrected an argument this Court had already rejected in *Montgomery* itself. In *Montgomery*, Louisiana contended that, if *Miller* had meant that life without parole is confined to the permanently incorrigible, *Miller* would have expressly required a finding of incorrigibility. This Court conceded *Miller's* silence, but did so in the course of *dismissing* Louisiana's argument. The Court explained that the omission did not cast doubt on the Eighth Amendment principle that *Miller* established: Only juveniles outside the constitutionally exempt class—because they are “permanently incorrigible”—can be sentenced to life without parole. That rule of substantive law plainly entails a finding of incorrigibility.

The Court explained in *Montgomery* that, when the Court establishes a new substantive rule, it typically allows states to incorporate the new rule into their systems. *Miller's* silence regarding the finding requirement is explained by the Court's

prudent policy of letting states choose effective means of putting the *Miller* rule into practice.

For example, a state might effectuate the *Miller* rule with respect to juvenile offenders already serving invalid sentences in either of two ways: by giving them new sentencing hearings consistent with *Miller* or by making them eligible for parole. Similarly, a state might implement the *Miller* rule either by eliminating life without parole for juveniles or by establishing a process for identifying the rare juveniles who can receive such a sentence.

What is non-negotiable, however, is that any arrangement a state adopts must respect the substantive rule to be enforced—here the rule barring life-without-parole sentences for all but the rare children found to be permanently incorrigible.

This conclusion is reinforced by *Montgomery's* holding that *Miller* announced not a procedural requirement that youth be considered, but a substantive rule prohibiting life without parole for the vast majority of youthful offenders. The question before the Court was whether the *Miller* rule is substantive and so enforceable in collateral proceedings. To resolve that issue, the Court had to examine and describe the rule. The description of *Miller* as substantive was therefore essential to the decision in *Montgomery*.

The substantive *Miller* rule logically entails distinguishing juveniles who are in the constitutionally exempt class from the rare youths who are not. It follows that the sentencing authority must find that a particular juvenile is permanently incorrigible before imposing a life-without-parole

sentence.

## ARGUMENT

### I. A FINDING OF INCORRIGIBILITY IS AN ESSENTIAL PART OF THE SENTENCING AUTHORITY'S DUTY TO SEPARATE A JUVENILE WHO CAN BE SENTENCED TO LIFE WITHOUT PAROLE FROM THE LARGE CLASS OF JUVENILES WHO CANNOT.

Existing precedents compel an affirmative answer to the question presented. The Eighth Amendment *does* require the sentencing authority to find that a youthful offender is permanently incorrigible before imposing a life-without-parole sentence.

In *Miller v. Alabama*, this Court recognized that the overwhelming majority of juvenile offenders have “diminished culpability and heightened capacity for change.” 567 U.S. 460, 479 (2012). In *Miller*, and again in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court explained that the penological justifications for a sentence of life without parole collapse in light of these “distinctive attributes.” *Miller*, 567 U.S. at 472; *Montgomery*, 136 S. Ct. at 733–34. For that reason, life without parole is an unconstitutional penalty for “a class of defendants”—namely, “juvenile offenders whose crimes reflect the transient immaturity of youth.” *Montgomery*, 136 S. Ct. at 734. Almost all juveniles are in this class and so cannot be sentenced to life without parole. The only youthful offenders who can be sentenced to die in prison are the “rare” exceptions who are permanently incorrigible. *Miller*,

567 U.S. at 479–80; *Montgomery*, 136 S. Ct. at 734.<sup>2</sup>

The Court did not decide in *Miller* whether the Eighth Amendment prohibits life without parole for all juveniles. For the moment, it was sufficient to conclude that the large class of juveniles who exhibit the characteristics generally associated with youth cannot be so punished. *Miller*, 567 U.S. at 479–80. More recently, in *Montgomery*, the Court reaffirmed that *Miller* bars life without parole for “all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” *Montgomery*, 136 S. Ct. at 734.

The Court reasoned that only children who are “permanently incorrigible” may be sentenced to life without parole, because only those individuals are, in the Court’s view, beyond rehabilitation, reform, or redemption. As such, they are not within the class shielded by the Eighth Amendment from such a sentence. Given this dividing line, it follows that the state must conduct a hearing to determine whether a particular offender is permanently incorrigible and so may receive a life-without-parole sentence. *Montgomery*, 136 S. Ct. at 735.

The hearing is necessary to effectuate “*Miller*’s substantive holding that life without parole is an excessive sentence for children whose crimes reflect

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<sup>2</sup> The Court has used other formulations to describe juveniles who are outside the constitutionally exempt class. Their crimes reflect “irreparable corruption,” *Miller*, 567 U.S. at 480; they “exhibit such irretrievable depravity that rehabilitation is impossible,” *Montgomery*, 136 S. Ct. at 734. The question presented in this case adopts the “permanent incorrigibility” label as an inclusive shorthand. *Amici* follow suit.

transient immaturity.” *Id.* The sentencing authority is “require[d]” to consider age and age-related factors in order “to separate those juveniles who may be sentenced to life without parole from those who may not.” *Id.* at 734–35. That line of demarcation can be drawn, and a life-without-parole sentence can be imposed, only if the sentencing authority finds that an individual is permanently incorrigible.

In this case, the Mississippi Court of Appeals held that a juvenile can be sentenced to life without parole even if the sentencing authority does not find that the offender is permanently incorrigible. The state court was satisfied that the sentencing authority need only consider the “factors discussed in *Miller*” (the characteristics associated with youth) before imposing such a sentence. *Jones v. State*, 285 So.3d 626, 632 (Miss. App. 2017). Yet *Miller* did not merely impose a procedural requirement of due consideration. The Court held that the Eighth Amendment makes life without parole unconstitutional as a substantive matter for all juveniles, except those who are permanently incorrigible:

Even if a court considers a child’s age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects “unfortunate yet transient immaturity.”

*Montgomery*, 136 S. Ct. at 734 (citing *Miller*, 567 U.S. at 480).

To conform to this Court’s precedents, the sentencing authority must distinguish the vast

majority of youth who exhibit the usual transient characteristics from the rare outlier who does not. A finding of permanent incorrigibility is logically essential to singling out a juvenile offender who can receive a life-without-parole sentence.

**II. THE MISSISSIPPI COURT OF APPEALS MISUNDERSTOOD THIS COURT'S ACKNOWLEDGMENT IN *MONTGOMERY* THAT *MILLER* DID NOT STATE EXPLICITLY THAT A FINDING OF INCORRIGIBILITY IS REQUIRED.**

The Mississippi Court of Appeals justified its refusal to require a finding of incorrigibility by pointing to this Court's acknowledgment in *Montgomery* that the *Miller* opinion did not state expressly that such a finding is necessary. The Mississippi court lifted that observation out of context, isolated it from the rest of the *Montgomery* opinion, and adopted it as a categorical answer to the question presented in this case. The state court treated *Montgomery's* recognition of *Miller's* silence regarding a finding requirement to mean that *Miller* actually reached a dispositive *holding* that a finding is *not* required. That reading cannot be squared with *Miller* or *Montgomery*.

The state court proceeded from an erroneous premise. To be sure, this Court conceded in *Montgomery* that *Miller* did not state that a finding is necessary. But the Court did not purport to interpret *Miller's* silence on the finding issue as a *holding* that a finding is *not* required. An opinion of this Court is no occasion for invoking the maxim *expressio unius est exclusio alterias*. What the Court

says expressly is law. But it does not follow that what the Court does not say expressly is, by inference, *negated*.<sup>3</sup> *Montgomery*'s observation about *Miller* suggested no such thing.

The Mississippi court compounded its error by disregarding *Montgomery*'s description of what *Miller did* squarely hold—namely, that only a juvenile who is outside the constitutionally exempt class by virtue of being permanently incorrigible can be sentenced to life without parole. A finding of incorrigibility is logically entailed in that rule of substantive law. Without a finding requirement, the Eighth Amendment's reservation of life without parole for the permanently incorrigible would be unintelligible.

In concluding that no such finding is necessary, and that the sentencing authority need only consider an offender's age and age-related characteristics, the state court embraced the very reading of *Miller* that *Montgomery* rejected. But context matters, and shows that the Mississippi court erred. In *Montgomery*, it was Louisiana, not this Court, that sought to attach significance to *Miller*'s silence regarding the finding requirement. The state contended that, if *Miller* had meant that life without parole is restricted to the permanently

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<sup>3</sup> Such an approach to precedent would make no sense. Our case-based judicial system generates legal rules incrementally. Narrowly drawn opinions necessitate subsequent litigation to fill gaps. But our system has never contemplated that any later decision that elaborates on what went before must necessarily overturn prior "law" in the form of inferences from previous silence. That conception would impose an impossible burden for this Court's opinions to bear.



incurrigible, *Miller* would have expressly mandated a finding of incurrigibility. This Court granted *Miller's* silence, but in the course of *dismissing* Louisiana's argument. The Court explained that *Miller's* omission did not take away from the substantive rule that only an incurrigible offender can be sentenced to life without parole:

That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment.

*Montgomery*, 136 S. Ct. at 735.

The Mississippi Court of Appeals seized on the first half of the first sentence of this passage (the acknowledgment of *Miller's* silence) and ignored the rest (the dismissal of its significance). Bluntly stated, the Mississippi court's position is a reprise of the argument that lost in *Montgomery*.

The Court explained in *Montgomery* why *Miller's* silence regarding the finding requirement was not a negative-pregnant holding that displaced the substantive rule for which *Miller* stands. When the Court establishes "a new substantive rule," the Court is "careful to limit the scope of any attendant procedural requirement" to avoid intruding needlessly on a state's criminal justice scheme. *Montgomery*, 136 S. Ct. at 735. *Miller's* failure to specify that a finding of incurrigibility is required went "only to the degree of procedure *Miller*

mandated in order to implement its substantive guarantee.” *Id.* Silence regarding enforcement machinery allowed the states to adjust their policies and practices to accommodate the *Miller* rule.

This approach makes sense, because there are several ways in which a state can conform its law and practice to the *Miller* rule without obligating the sentencing authority to find that an offender is permanently incorrigible. For example, for children already sentenced, the Court acknowledged in *Montgomery* that a state need not conduct resentencing proceedings for offenders sentenced invalidly to life without parole in the past. Instead, a state may simply choose to extend parole eligibility to offenders already serving life sentences. *Id.* at 736. Going forward, moreover, a state might eschew life-without-parole sentences for any juveniles. *See, e.g., State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016) (“[W]e adopt a categorical rule that juvenile offenders may not be sentenced to life without the possibility of parole”). That, too, would eliminate the need to determine whether a particular youth is incorrigible.

If a state chooses to impose life-without-parole sentences to the full extent this Court’s current precedents allow, there are various ways in which the state might incorporate the finding requirement into its sentencing scheme. *See, e.g., State v. Montgomery*, 194 So. 3d 606, 607 (La. 2016) (“In resentencing, the District Court shall determine whether relator was ‘the rare juvenile offender whose crime reflects irreparable corruption,’ or he will be eligible for parole under the conditions established.” (internal citation omitted)); *People v. Padilla*, 209 Cal. Rptr. 3d 209, 220–21 (Cal. Ct. App. 2016) (“In

view of *Montgomery*, the trial court must assess the *Miller* factors with an eye to making an express determination whether the juvenile offender's crime reflects permanent incorrigibility arising from irreparable corruption."). For example, a state might enact a statute setting forth the procedure for conducting a hearing on an offender's incorrigibility, specifying the burden and standard of proof, and prescribing a sentencing order that matches a finding of permanent incorrigibility with particularized supporting evidence. A statute of that kind would not only ensure that the sentencing authority performs its duty under *Miller*. It would also facilitate review in the state appellate courts.

The Court in *Miller* and *Montgomery* left all of these options to the states. But the Court made it clear that any arrangement a state adopts must respect the substantive rule to be enforced. "Fidelity to . . . federalism. . . should not be construed to demean the substantive character of the federal right at issue." *Montgomery*, 136 S. Ct. at 735.

Permitting a life-without-parole sentence without a finding of incorrigibility does just that. The rule announced in *Miller* can be realized only if the sentencing authority first makes the necessary determination whether a particular offender is within the class "whose crimes reflect the transient immaturity of youth," or is permanently incorrigible and so outside it. *Id.* at 734.

The state court below did not propose that Mississippi has devised some means of respecting the *Miller* substantive rule without requiring a finding of incorrigibility. Instead, the Mississippi court abandoned the *Miller* rule as confirmed in

*Montgomery* and substituted an interpretation of the Eighth Amendment that this Court has already rejected.

**III. MONTGOMERY’S ACCOUNT OF THE SUBSTANTIVE RULE IN MILLER REINFORCES THE CONCLUSION THAT A FINDING OF PERMANENT INCORRIGIBILITY IS REQUIRED.**

The Mississippi Court of Appeals placed no weight on *Montgomery*’s characterization of the holding in *Miller* as a rule of substantive law. Yet that account of *Miller* was *Montgomery*’s *raison d’etre*. The state court read *Miller* only to establish a *procedural* requirement that age-related factors be considered. But the whole point of the *Montgomery* opinion was to explain that *Miller* announced a *substantive* rule:

*Miller*, then, did more than require a sentencer to consider a juvenile offender’s youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of “the distinctive attributes of youth.” . . . Because *Miller* determined that sentencing a child to life without parole is excessive for all but “the rare juvenile offender whose crime reflects irreparable corruption,” . . . it rendered life without parole an unconstitutional penalty for “a class of defendants because of their status”—that is, juvenile offenders whose crimes reflect

the transient immaturity of youth.

*Montgomery*, 136 S. Ct. at 734 (internal citations omitted).

This crucial language in *Montgomery* cannot be ignored or treated as surplusage. The question in *Montgomery* was whether the rule announced in *Miller* is substantive and so enforceable in collateral proceedings under *Teague v. Lane*, 489 U.S. 288 (1989). To decide that question, the Court necessarily examined the *Miller* rule and identified its content. The Court held that the *Miller* rule is substantive, *because* it prohibits a life-without-parole sentence for a class of offenders and allows it only in aberrational cases.<sup>4</sup> The Court’s characterization of *Miller* was, then, necessary to the judgment in *Montgomery*. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 (2020) (reiterating that “[i]t is usually a judicial decision’s reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases”).

The Mississippi court’s contrary understanding of *Miller* as a procedural rule contradicts *Montgomery*’s reasoning.<sup>5</sup> If this Court

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<sup>4</sup> The class of juveniles *Miller* exempts from life without parole is not coextensive with all youthful offenders. *Montgomery* made clear that it is nonetheless a substantive rule. *Montgomery*, 136 S. Ct. at 734 (explaining that the *Miller* rule was no less substantive than rules shielding all juveniles merely because it “drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption”).

<sup>5</sup> Indeed, it contradicts even the dissent’s view of *Montgomery*. Justice Scalia recognized that the Court read *Miller* to

had accepted the state court's account of *Miller*, the Court would not have concluded that the *Miller* rule is substantive.

To adopt the Mississippi Court of Appeals' understanding of *Miller* would be to cut the heart out of the rule that the diminished culpability and heightened capacity for change that characterize the vast majority of children make life without parole a disproportionate and unconstitutional sentence. The Court said in *Miller* that the Eighth Amendment principle announced in that case would make life without parole an uncommon sentence. *Miller*, 567 U.S. at 479; accord *Montgomery*, 136 S. Ct. at 734. The Mississippi court's decision below invites the Court now to thwart that purpose—by disregarding the reasoning behind both *Miller* and *Montgomery*.

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announce a substantive rule that life without parole can be imposed only on juveniles who are not in the class of offenders who share the usual characteristics of youth. He thought that understanding of *Miller* was wrong; that is one of the reasons he dissented. *Montgomery*, 136 S. Ct. at 743 (Scalia, J., dissenting).

## CONCLUSION

For the foregoing reasons, the Court should vacate the judgment below.

Respectfully Submitted,

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