No. 10-9646

In the
Supreme Court of the United States

EVAN MILLER,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Writ of Certiorari to the
Alabama Court of Criminal Appeals

BRIEF OF RESPONDENT

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February 14, 2012

QUESTIONS PRESENTED

When Evan Miller was 14, he robbed his neighbor, beat him bloody with a baseball bat, set his home on fire, and left him to die in the blaze. The juvenile court transferred him to the criminal system, and a jury convicted him of capital murder. Like most States and the federal government, Alabama requires all persons convicted of certain aggravated murders to be sentenced to, at a minimum, life imprisonment without the possibility of parole. Miller's Eighth Amendment challenge therefore raises the following two questions about governments' ability to punish juveniles who commit these crimes:

I. Does the Eighth Amendment categorically bar governments from imposing life-without-parole sentences on persons who commit aggravated murder when they are 14 years old?

II. If the Eighth Amendment does not categorically bar governments from imposing life-without-parole sentences on these offenders, does it nevertheless require governments to exempt these offenders from statutes that, for the worst forms of murder, make life without parole the minimum sentence?

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INTRODUCTION

Policymakers face no easy task when they decide what society should do with teenagers who commit the worst forms of murder. These cases are tragic for everyone involved, and they raise questions that admit of no obvious answers. The offenders have extinguished at least one person's life in a way that is unspeakably sad, and the loss will burden the victims' loved ones for the rest of their days. Choosing a response that best respects our Nation's values is among the most difficult decisions any government must make.

But most American governments have made this choice, and they have adopted a judgment that is decidedly different from the one Miller proposes. Most legislatures have not just made it theoretically possible for courts to impose life-without-parole sentences on 14-year-olds who are transferred to adult court and convicted of aggravated murders. They instead have made it mandatory and have otherwise expressly endorsed the practice. That makes this case different from *Roper v. Simmons*, 543 U.S. 551 (2005), where the juvenile death penalty was at issue and a majority of American jurisdictions had abolished it. It also makes this case different from *Graham v. Florida*, 130 S. Ct. 2011 (2010), where the defendants had not committed murder and legislatures thus had not endorsed life-without-parole sentences in so definitive a way. The fact that judges have imposed this sentence on few 14-year-olds does not evince a *de facto* consensus against it. It instead reflects the reality that few 14-year-olds ever commit murder, and prosecutors appropriately exercise discretion when they do.

The Eighth Amendment stands as no barrier to these sentences. For the purposes of assessing whether a juvenile may receive life without parole, *Graham* draws a critical line, consistent with widely shared values, "'between homicide and other serious violent offenses against the individual.'" 130 S. Ct. at 2027 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008)). Another precedent, *Harmelin v. Michigan*, draws a line that is just as important here. The Court there held that in non-death-penalty cases, "[t]here can be no serious contention . . . that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.'" 501 U.S. 957, 995 (1991).

Miller is asking the Court to erase these lines—or, in the very least, to draw new, more intricate ones. But the Eighth Amendment is not the Sentencing Guidelines, and *Graham* and *Roper* did not hold that the Constitution requires courts to draw detailed sentencing grids. *Graham* and *Roper* instead drew fundamental lines that were supported by national consensus and widely shared moral principles. This case presents no similar consensus and no compelling argument that these punishments are contrary to prevailing values. These sentences are a reasonable solution to a difficult problem, and the values underlying the Constitution should allow them to stand.

RELEVANT STATUTORY PROVISIONS

Numerous statutory provisions pertinent to the Eighth Amendment analysis in this case are set out in a separately bound appendix to this brief.

STATEMENT OF THE CASE

A. Trends in the criminal-justice system

As Miller acknowledges, this case arrives at this Court in the wake of two important trends. One relates to the way American jurisdictions have been dealing with crime in general. The other relates to the way American jurisdictions have been dealing with crimes committed by juveniles in particular.

1. Trends in the parole system

The first trend is the decline of parole. In the 1970s and '80s, what previously had been the "pillars of the American corrections systems—indeterminate sentencing coupled with parole release, for the purposes of offender rehabilitation—came under severe attack and basically collapsed." Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 492 (1999). Numerous factors, including public outrage over crimes that parolees had committed, led many legislatures to abolish the practice or severely limit its use. *See id.* at 493-95.

During the same timeframe, many American governments began imposing life-without-parole sentences on their most serious offenders. Alabama, for one, adopted the penalty in the early 1970s out of "general public dissatisfaction with murderers serving" purportedly "'life' terms" but in fact "leaving prison early on parole." Julian H. Wright, Jr., Note, *Life-Without-Parole: An Alternative to Death or Not Much of a Life At All?*, 43 VAND. L. REV. 529, 548 (1990). Defense advocates also pushed for the sentence as an alternative to the death penalty. *See*

Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1839, 1841-44 (2006). Now 49 States and the federal government have some form of life imprisonment without parole, "with the majority of statutes enacted within the last two decades." *Baze v. Rees*, 553 U.S. 35, 78 n.10 (2008) (Stevens, J., concurring in the judgment).

2. Trends in juvenile justice

Around the same time, American legislatures also revamped their juvenile-justice systems. In the 1990s, no fewer than 45 States adopted laws making "it easier to transfer juvenile offenders from the juvenile justice system to the criminal justice system." HOWARD SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 96 (DOJ Office of Juvenile Justice & Delinquency Prevention 2006). These changes sprang from concerns about increases in juvenile crime and a general sentiment that the law should hold these offenders responsible for their actions. *See id.*

These juvenile-transfer laws generally take one of three forms:

- *Judicial-waiver statutes* give juvenile courts discretion, based on several factors, "to waive juvenile court jurisdiction and transfer the case to criminal court." *Id.* at 110.
- *Concurrent-jurisdiction statutes* give the prosecutors discretion to choose to file "cases in either" court. *Id.*

- *Statutory-exclusion laws* grant adult courts exclusive jurisdiction over certain cases. *Id.*

Many States mix and match these approaches. *See id.* at 111. In Alabama, for example, the minimum age at which the courts may transfer juveniles is 14, and the rules change depending on the defendant's age. If he or she is 14, the rule is judicial waiver: after considering a variety of factors, the juvenile court will either keep the case or instead transfer it to criminal court. ALA. CODE §12-15-203(a). These factors include: the nature of the offense; the juvenile's delinquency record; his or her responses to previous treatment; his or her demeanor and maturity; and the community's interests. *See id.* §12-15-203(d). Meanwhile, if the offender is at least 16 and charged with certain crimes, the rule becomes statutory exclusion: the offender "shall be charged, arrested, and tried as an adult." *Id.* §12-15-204(a).

Alabama's framework is fairly typical. Most States allow, if not require, adult jurisdiction over 14-year-olds accused of serious crimes, and most set the minimum age for transfer at some point between 12 and 14. *See* SNYDER AND SICKMUND, *supra*, at 112 tbl.

B. Facts and proceedings below

It was against this backdrop that 14-year-old Evan Miller murdered Cole Cannon in 2002—and was transferred to criminal court, convicted of capital murder, and sentenced to the mandatory-minimum punishment of life without parole.

1. The murder

Even when a defendant makes a categorical challenge to a sentencing practice, the facts in "[s]pecific cases" still are "illustrative." *Graham*, 130 S. Ct. at 2031. Here, the evidence presented at trial shows why life without parole can be an appropriate punishment when 14-year-olds commit aggravated murder.

Trial testimony revealed that Miller and his mother lived next door to Cannon, a 52-year-old father of three, in a trailer park. On the night of the murder, Colby Smith, Miller's 16-year-old friend, was the Millers' guest. JA 132. Around midnight, an apparently intoxicated Cannon came asking for food, explaining that he had burnt his dinner. *Id.* While Miller's mother cooked him spaghetti, Miller and Smith sneaked into his home. *Id.* They were looking for drugs, but found none. *Id.* They did, however, pilfer some baseball cards. *Id.*

Miller and Smith believed that Cannon had a substantial amount of cash in his wallet, and they devised a scheme to "get him drunk and rob him." R. 981. After Cannon returned to his trailer, they joined him and smoked marijuana together. JA 132, R. 982-93. The three then played a drinking game; but while Cannon drank, Miller and Smith only pretended to do so. R. 983, 1013. When Cannon passed out, Miller picked his pocket of a little more than $300. JA 133.

Violence ensued when Miller tried to slip the empty wallet back into Cannon's pocket. Cannon regained consciousness and grabbed Miller by the throat. *Id.* Smith responded by hitting Cannon with a baseball bat, once, in the head. *Id.* at 133; R. 1016. Miller then leapt on Cannon, hitting him several

times in the face. JA 133. Despite Cannon's pleas to stop, Miller picked up the bat. *Id.* As Cannon screamed, Miller beat him repeatedly, breaking his ribs. JA 133, 137; R. 985, 1031. Miller told him, "I am God, I've come to take your life." JA 133. He then took one more swing. *Id.*

Miller and Smith initially left Cannon alive, but they returned "to cover up the evidence." R. 987, 990. As Cannon lay helpless on the floor, they tried to clean up his blood, which had splattered in the kitchen. R. 987-90. After that, Miller "lit the couch" on fire, telling Smith they "had to do it." R. 990. They then set several more fires throughout the trailer. JA 133. Cannon, who was unable to move, asked why they were doing this to him. R. 990-91, 711-12. They ignored him and left him to die.

Minutes later, Smith changed his mind and went back to get Cannon out of the burning trailer. R. 992, 1028-29. Although Smith "heard Cole coughing," Miller stopped him from going in. R. 992, 1029. Cannon died of smoke inhalation, and firefighters found his charred body when they put out the flames. R. 575-78; State's Exhs. 5 & 67.

The cover-up succeeded at first, and authorities attributed Cannon's death to accident. R. 796, 804. But the police later questioned Miller and recovered the baseball cards. JA 134, R. 620-21. He initially concocted two different exculpatory stories but later confessed to being complicit in Cannon's death. JA 135-39.

2. Juvenile proceedings

Miller's acts constituted capital murder under Alabama law—a crime for which the maximum

punishment is death and the minimum punishment is life without parole. This crime encompasses several forms of aggravated murder, and Miller's actions qualified on at least one ground: they constituted "[m]urder by the defendant during arson in the first or second degree." ALA. CODE §13A-5-40(a)(9).

Because the juvenile court had limited power to punish him, *see id.* §12-15-219(b), the District Attorney asked that court to move the case to adult court. The court, considering the various factors set forth in Alabama's transfer statute, granted the motion. *See* JA 13-16. The Alabama Court of Criminal Appeals affirmed, citing, in addition to the nature of the crime, Miller's delinquency history and a licensed psychologist's testimony that he was competent to stand trial. *See E.J.M. v. State*, 928 So. 2d 1077 (Ala. Crim. App. 2004); *E.J.M. v. State,* No. CR-03-0915 (Ala. Crim. App. Aug. 27, 2004) (unpub. mem.).

3. Trial and sentencing

Smith, who had pleaded guilty to felony murder and received a sentence of life with the possibility of parole, testified at Miller's trial. R. 978-1037. His testimony and other evidence left no doubt that Miller was guilty, and the jury convicted him of capital murder. C. 93. Because this Court's decision in *Roper* exempted him from the death penalty, the sentencing court entered the only other sentence available under the statute, life without parole. C. 92.

The Alabama Court of Criminal Appeals affirmed. JA 131-90. The court found that Miller had failed to establish any national consensus against imposing these sentences on 14-year-olds who commit capital murder. JA 142. The court exercised its independent judgment as well, finding that life without parole is an appropriate sentence for these offenders. JA 145-51. The court also rejected Miller's argument that the mandatory-minimum nature of the punishment rendered it unconstitutional. JA 151-52.

SUMMARY OF THE ARGUMENT

I. The Eighth Amendment allows governments to impose life-without-parole sentences on defendants who commit the worst forms of murder, even when those defendants are juveniles as young as 14.

A. Objective indicia demonstrate that, particularly in light of the nature of these offenses, this sentencing practice is consistent with evolving standards of decency.

1. Legislation in most American jurisdictions endorses life-without-parole sentences for these offenders. Thirty-nine jurisdictions have statutes allowing 14-year-olds to be sentenced to life without parole for aggravated murder. In 27 of these, statutes make this sentence the mandatory minimum, thus indicating that these legislatures affirmatively intended for these offenders to receive the sentence. Thirteen of the jurisdictions within this group have statutes contemplating even more expressly that courts will impose life-without-parole sentences on juvenile murder offenders. An additional two jurisdictions, in States where the

punishment is not the mandatory minimum, have statutes making clear that the legislatures intended to impose the sentence on these offenders. The few jurisdictions that do not allow these sentences come nowhere close to establishing a national consensus against them.

2. Actual sentencing practices bolster the inference from the statutes. If these sentences are rare, it is only because very few 14-year-olds commit aggravated murder. As a relative matter, these sentences are much more common than the sentences in *Graham*. They also are more widely distributed. Miller's allegation that a substantial number of these sentences have resulted from mandatory-sentencing statutes only underscores that numerous legislatures determined that these sentences are appropriate when juveniles commit aggravated murder.

B. The judgment governments have reached on this issue is consistent with the Eighth Amendment.

1. These sentences are legitimate in light of the differences between aggravated murder and the nonhomicide crimes at issue in *Graham*.

As a general matter, juveniles have sufficient culpability to warrant life-without-parole sentences when they commit aggravated murder. *Graham* reasoned that when juveniles commit nonhomicide offenses, their culpability is twice diminished because nonhomicide offenses are categorically less severe than homicide offenses. When juveniles commit aggravated murder, on the other hand, their culpability is only once diminished. That once-diminished culpability exempts them from the death penalty, but not from sentences of life without

parole. Exempting these offenders from life-without-parole sentences would mean that juvenile homicide offenders would be subject to no more punishment, under the Constitution, than juveniles who commit nonhomicide offenses.

Likewise, 14-year-old murderers are not categorically less culpable than older juveniles who commit these crimes. Whereas society recognizes a fundamental line between juveniles and adults at age 18, it recognizes no similarly fundamental line between younger adolescents and older ones. Fourteen-year-olds are no doubt two years younger than sixteen-year-olds, but they are not categorically less capable of understanding that it is wrong to commit murder. The science on this issue supports that proposition, and in any event the scientific community has not come to a consensus that 14-year-olds are categorically different from older juveniles in this respect.

2. Imposing life-without-parole sentences on juvenile murderers serves legitimate penological goals.

First among these is retribution. Because these defendants have committed aggravated murder, life-without-parole sentences are proportional to their offenses. These sentences give governments a means of expressing appropriate outrage over the worst crimes. These sentences also allow governments to alleviate the anguish suffered by victims' families.

Imposing these sentences on aggravated murderers serves additional goals. Even if these sentences deter only a few murders, the lives they save will justify their use. Life-without-parole sentences also further the incapacitation goal by

ensuring that convicted murderers will not kill again. Although the sentence is severe, it adequately respects the human dignity of both the victim and the offender.

3. Other countries' decisions not to impose these sentences does not render them contrary to the Eighth Amendment. When objective indicia and the Court's independent judgment support a punishment, international opinion should not have substantial weight. The international opposition to this sentence has little probative value because it is a single manifestation of a larger worldview—one that favors leniency not only for juveniles as a whole, but also for adults—that is far from the mainstream in the United States.

II. Likewise, the mandatory-minimum nature of Miller's sentence comports with the Eighth Amendment. The Court in *Harmelin* held that a life-without-parole sentence that is not cruel and unusual does not become that way simply because it is mandatory. *Stare decisis* counsels against creating an exception to this rule.

A. Miller properly does not argue that a national consensus has developed against making this sentence the minimum in murder cases involving juveniles.

B. The sentence's mandatory-minimum nature is consistent with Eighth Amendment values. *Graham*'s logic neither compels nor allows an exception to *Harmelin*. In capital-murder prosecutions like the one at issue here, courts account for defendants' youth by exempting them from the death penalty and by considering whether the life-without-parole sentence is grossly

disproportionate in light of their age. That approach is consistent with the Eighth Amendment.

ARGUMENT

This case is not about the age at which people ought to be allowed to apply for driver's licenses. It is not even about the appropriate punishment for each and every homicide a juvenile may commit. It is instead about the distinct question of what punishments are permissible for juveniles, including those as young as 14, who are guilty of the worst forms of murder. Most American legislatures have determined that the respect due to all human lives makes it appropriate to require these offenders to spend the rest of their lives in prison. As explained below, both that sentence and the wide array of statutes making it the mandatory minimum for crimes like Miller's are consistent with the Eighth Amendment.

I. Governments may impose life-without-parole sentences on 14-year-olds who commit the worst forms of murder.

In cases like this one, where the defendant makes no argument that the challenged practice is contrary to norms extant at the Founding, *see Thompson v. Oklahoma*, 487 U.S. 815, 864-65 (1988) (Scalia, J., dissenting)), the Eighth Amendment analysis has two critical steps. Yet Miller is trying to short-circuit the first. To determine whether a sentencing practice violates "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion),

this Court always begins by reviewing "'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue." *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010) (quoting *Roper v. Simmons*, 543 U.S. 551, 572 (2005)). Only after evaluating the national consensus does the Court move on to the task, which Miller is trying to elevate to threshold status, of exercising its "own independent judgment" on the matter. *Id.* (quoting *Kennedy v. Louisiana,* 554 U.S. 407, 421 (2008)).

There are eminently good reasons why the objective indicia are the Court's "beginning point." *Roper*, 543 U.S. at 564. The sentencing practices that require this Court's consideration generally do not present the easy moral questions. They instead usually present the "difficult" ones. *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring in part and concurring in the judgment). The federal and state governments' experience grappling with these questions is valuable not only for the hard data it provides on whether the practice is unusual, but also for the insight it offers into the more fundamental question whether the practice is cruel. Current legislative enactments and court practices thus give "essential instruction," necessary at the outset, to inform the Court's independent judgment. *Roper*, 543 U.S. at 564.

With that in mind, this case is not *Graham* and *Roper* redux. Consideration of the federal and state governments' views on life without parole for juvenile murderers, and the insight these views reveal on the different moral questions these cases

present, requires deference to the democratic processes in this instance.

A. Objective indicia establish that these sentences are consistent with contemporary values.

When it comes to the objective indicia, this case does not even approach *Graham* and *Roper*. The data in those cases revealed a "national consensus" against the practices then under review. *Graham*, 130 S. Ct. at 2026; *Roper*, 543 U.S. at 567. This case involves a categorically more lenient punishment than *Roper*, and a categorically worse offense than *Graham*. It thus should come as no surprise that the data yields a different conclusion about national consensus in this case.

1. Legislation in most American jurisdictions endorses life-without-parole sentences for 14-year-old murder offenders.

The first distinguishing mark from *Graham* and *Roper* is legislation—"[t]he clearest and most reliable objective evidence of contemporary values." *Graham*, 130 S. Ct. at 2023 (internal quotation marks omitted). As explained below, in 39 American jurisdictions, statutes make it at least possible for juveniles as young as 14 to receive life-without-parole sentences when they commit aggravated murders; and in at least 29 of these jurisdictions, legislatures have expressly endorsed the practice.

a. Legislation in 27 jurisdictions makes life without parole the statutory-minimum sentence for 14-year-old aggravated murderers when they are transferred from juvenile court.

As an initial matter, enactments by 26 States and the federal government do not simply make life-without-parole sentences theoretically possible when juvenile judges transfer 14-year-olds and juries convict them of aggravated murders. The statutes in these jurisdictions make these punishments mandatory in these circumstances.

The table on the following two pages lists the pertinent statutes, and the separately bound appendix sets forth those statutes' text. Each of these jurisdictions has a mechanism for moving 14-year-olds into the adult system—a transfer that is discretionary in some jurisdictions and mandatory in others. Regardless, once a defendant is transferred and convicted of certain forms of aggravated murder, the law in each of these jurisdictions requires, at a minimum, a sentence of life without parole. To be clear, these jurisdictions do not define these murders in a uniform way, and a killing that requires a life-without-parole sentence in one State may not require it in another.[1] But each of these jurisdictions makes

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[1] Thus, a juvenile who committed Miller's particular crime in Illinois, New Jersey, or Ohio would not be subject to a mandatory-minimum life-without-parole term. *Cf.* 730 ILL. COMP. STAT. 5/5-8-1(a)(1)(c)(ii) (mandatory when defendant kills multiple victims); N.J. STAT. ANN. §2C:11-3b(2)&(5) (mandatory when defendant kills police officer); OHIO REV. CODE ANN. §2929.03(E)(1)(d)&(E)(2) (mandatory for sexually violent murders).

Tbl. 1: MANDATORY LWOP FOR 14-YEAR-OLD AGGRAVATED MURDERERS TRANSFERRED FROM JUVENILE SYSTEM*

	TRANSFER §	LWOP §
US	18 U.S.C. §5032	*Id.* §1111 & 3591
AL	ALA. CODE §12-15-203	*Id.* §13A-5-45
AZ	ARIZ. REV. STAT. ANN. §13-501(B)	*Id.* §§13-751 & 41-1604.09
AR	ARK. CODE ANN. §9-27-318(c)(2)	*Id.* §5-4-104(b)&(f)
CT	CONN. GEN. STAT. §46b-127	*Id.* §53a-35a
DE	DEL. CODE ANN. tit. 10, §1010(a)(1)	*Id.* tit. 11, §4209(a)
FL	FLA. STAT. §985.56(1)(a)	*Id.* §775.082(1)
HI	HAW. REV. STAT. §571-22(b)&(d)	*Id.* §706-656(1)
ID	IDAHO CODE ANN. §20-509(1)(a)	*Id.* §18-4004
IL	705 ILL. COMP. STAT. 405/5-805(3)(a)	730 *id.* 5/5-8-1(a)(1)(c)
IA	IOWA CODE §232.45	*Id.* §902.1
MA	MASS. GEN. LAWS ch. 119, §74	*Id.* §72B & ch. 265, §2
MI	MICH. COMP. LAWS §712A.2	*Id.* §§750.316 & 791.234
MN	MINN. STAT. ANN. §260B.125	*Id.* §§609.106 & .185

*All statutory citations in this brief are to the Westlaw database, updated as of February 12, 2012.

Tbl. 1(CONT.): MANDATORY LWOP

	TRANSFER §	LWOP §
MS	MISS. CODE ANN. §43-21-157	*Id.* §§47-7-3(1)(e) & 99-19-101
MO	MO. REV. STAT. §211.071	*Id.* §565.020
NE	NEB. REV. STAT. §43-247	*Id.* §29-2522**
NH	N.H. REV. STAT. ANN. §169-B:24	*Id.* §630:1-a
NJ	N.J. STAT. ANN. §2A:4A-26	*Id.* §2C:11-3
NC	N.C. GEN. STAT. §7B-2200	*Id.* §14-17
OH	OHIO REV. CODE ANN. §§2152.10 & .12	*Id.* §2929.03(E)(2)
PA	42 PA. CONS. STAT. ANN. §6355	61 *id.* §6137(a)(1); 18 *id.* §1102
SD	S.D. CODIFIED LAWS §§26-8C-2 & 26-11-4	*Id.* §§22-6-1(1) & 24-15-4
VT	VT. STAT. ANN. tit. 33, §5201(c)	*Id.* tit. 13, §2311(a)&(c)
VA	VA. CODE ANN. §16.1-269.1	*Id.* §§18.2-10 & 53.1-165.1
WA	WASH. REV. CODE §13.40.110(1)	*Id.* §§10.95.020 & 10.95.030
WY	WYO. STAT. ANN. §14-6-203(f)(iv)	*Id.* §§6-2-101 & 6-10-301(c)

** Persons sentenced to life imprisonment in Nebraska have no parole eligibility. *See* Brief of Nebraska, *State v. Conover,* No. S-04-0576, 2005 WL 5572866, at *2 (Neb. 2005).

14-year-olds triable as adults for murder, and each sets the minimum sentence for certain aggravated murders as life without parole.

These statutes evince shared legislative judgment that certain aggravated murders are so offensive to society's standards that life without parole is the minimum appropriate sentence, even when the defendant is as young as 14. This evidence makes this case obviously different from *Roper*, where a strong majority of legislatures had banned the death penalty for juveniles. *See* 543 U.S. at 564-65. It also distinguishes this case, in critical respects, from *Graham*.

Graham was different because it was not possible to conclude that a large number of legislatures had deliberately decided to apply life-without-parole sentences to juveniles convicted of the less serious crimes at issue there. *See* 130 S. Ct. at 2025-26. To be sure, several state statutes did make life-without-parole sentences mandatory for certain egregious, often sexually violent, nonhomicide offenses. *See id.* at 2034 (citing, *e.g.,* ARIZ. REV. STAT. ANN. §13-1423; DEL. CODE ANN., tit. 11 §773(c); MINN. STAT. ANN. §609.3455(2)). But most of the statutes the Court cited did one of two other things. Some made life without parole the maximum sentence rather than the minimum for specified nonhomicide crimes. *See id.* (citing, *e.g.*, GA. CODE ANN. §16-6-1(b)). Others made the sentence mandatory only when the nonhomicide offender had a criminal history that no one would expect to see from someone under age 18. *See id.* (citing, *e.g.,* CAL. PENAL CODE §667.7(a)(2)). The *Graham* Court noted that those statutes made it only "theoretically" possible, at most, for a juvenile to

receive the sentence. *Graham*, 130 S. Ct. at 2025 (quoting *Thompson*, 487 U.S. at 850 (O'Connor, J., concurring in the judgment)). The Court concluded that this mere possibility was not strong evidence that "the legislatures in those jurisdictions" had "deliberately concluded that it would be appropriate" to impose life-without-parole sentences on juveniles for nonhomicide crimes. *Id.* (quoting *Thompson,* 487 U.S. at 850 (O'Connor, J., concurring in the judgment)).

The statutes dealing with murder offenses, on the other hand, go far beyond theoretical possibility. Unlike the repeat-offender laws cited in *Graham*, the murder statutes deal with crimes that legislatures would have readily envisioned juveniles committing. *See* Jackson Br. 54. And these statutes consistently make clear that once a defendant is transferred to the adult system and convicted of one of those murders, the court has no choice but to impose a life-without-parole sentence. By their very nature, mandatory-minimum sentences uniquely reflect "the collective wisdom of the . . . Legislature" that a particular punishment is appropriate. *Harmelin*, 501 U.S. at 1006 (Kennedy, J., concurring in part and concurring in the judgment). These statutes thus "justify a judgment that many States," indeed more than half of them, affirmatively "intended to subject such offenders to life without parole sentences" for aggravated murders. *Graham*, 130 S. Ct. at 2025.

There is even more specific evidence that the legislatures in 14 of these 27 jurisdictions intended to subject juvenile murderers to these sentences. This evidence falls into three general categories.

First, one of these States, Iowa, responded to *Graham* in a way that makes clear that its legislature intended for juveniles to be subject to these sentences for certain murders. The Iowa Legislature generally banned life-without-parole sentences for all crimes committed by persons who were "under the age of eighteen at the time the offense was committed." IOWA CODE §902.1(1)&(2)(a). But the Legislature made one exception. "A person convicted of murder in the first degree," the statute says, "shall not be eligible for parole pursuant to this subsection." *Id.* §902.1(2)(c).

Second, the aggravated-murder statutes in no fewer than ten of these jurisdictions expressly contemplate that juvenile offenders will receive life-without-parole sentences:

- Statutes in three of these jurisdictions—Missouri, North Carolina, and Virginia—expressly say that if the defendant is a juvenile, the punishment for capital murder "shall be" life without parole. MO. REV. STAT. §565.020; N.C. GEN. STAT. §14-17; VA. CODE ANN. §18.2-10.

- Similarly, three of these jurisdictions—the United States, Connecticut, and Wyoming—exempt juveniles from the death penalty without exempting them from the only other penalty the law there allows, life without parole. *See* 18 U.S.C. §3591(a); CONN. GEN. STAT. §53a-46a(h)(1); WYO. STAT. ANN. §6-2-101.

- Another of these jurisdictions, Massachusetts, provides that when a juvenile 14 or older is convicted of first-degree murder, the court "shall commit the person to such punishment as is provided by law for the offense." MASS. GEN. LAWS ch. 119, §72B. The punishment the law provides for first-degree murder is life without parole. *Id.* ch. 265, §2.

- Three jurisdictions that make life-without-parole sentences mandatory only in particularly egregious cases specify that juveniles are subject to the minimum in those cases. *See* 730 ILL. COMP. STAT. 5/5-8-1(a)(1)(c)(ii) (sentence mandatory for certain murders "irrespective of the defendant's age"); N.J. STAT. ANN. §2C:11-3b (5) (juveniles "shall be sentenced" under provisions mandating life without parole); OHIO REV. CODE ANN. §2929.03(E)(1)(d) &(E)(2) (court "shall impose" a sentence of "life imprisonment without parole" on juveniles guilty of sexually violent murders); *see also id.* §2929.03(E)(1)(a) (specifying that courts can sentence juveniles to "[l]ife imprisonment without parole" for other aggravated murders).

Third, three more legislatures from the group of 27 have enacted statutes that, while designed to grant leniency to juveniles in certain cases, make clear that in some murder cases courts must sentence juveniles to life without parole:

- Hawaii gives courts the option of sentencing certain youthful offenders to a maximum of eight years in lieu of the punishment otherwise provided, but specifies that "[t]his section shall not apply to the offenses of murder or attempted murder." HAW. REV. STAT. §706-667.

- Mississippi allows courts to sentence juveniles to one year of imprisonment, but only for conviction of "a felony not capital." MISS. CODE ANN. §99-19-15.

- The same Arkansas statute that makes life-without-parole the minimum sentence for capital murder gives the court discretion not to impose various adult sentences if the defendant is a juvenile. But it limits the court's discretion to cases in which the State has not committed the juvenile to the Department of Youth Services on more than one previous occasion. *See* ARK. CODE ANN. §5-4-104(b)&(f).

These provisions' text is enough to warrant an inference that these legislatures intended to subject juvenile murderers to these sentences, but the background trends that gave rise to all these laws make it all the more clear. As Miller acknowledges, in the 1990s almost every State passed laws "increasing the exposure of children to adult

prosecution." Jackson Br. 55; *see generally* PATRICIA TORBET ET AL., STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 3-6 (DOJ Office of Juvenile Justice & Delinquency Prevention 1996). In most of those States, legislatures had enacted the laws imposing life-without-parole sentences not long before, or were in the process of adopting those laws at approximately the same time. *See* Death Penalty Information Center, *Year that States Adopted Life-Without-Parole (LWOP) Sentencing*, available at http://www.deathpenaltyinfo.org/life-without-parole (visited Feb. 12, 2012). It is implausible that these legislatures, having determined that juveniles ought to be tried in the adult system for the most serious and violent crimes, never reached a judgment as to whether those juveniles ought to be subject to the minimum punishments the law would provide.

b. Legislation in 12 other States allows this punishment, and two of those legislatures have expressly endorsed it.

In addition to the 27 jurisdictions that have affirmatively endorsed the practice, 12 others have adopted statutes under which it is at least possible for 14-year-olds to receive life without parole for aggravated murders. *See* Table 2, *infra*. And statutes in two of those jurisdictions endorse the practice in even more express terms:

- Maryland's capital-murder statute, in specifying that juveniles cannot receive the death penalty, provides that these offenders "shall be sentenced to imprison-

Tbl. 2: ADDITIONAL STATES AUTHORIZING LWOP FOR 14-YEAR-OLD MURDERERS

	TRANSFER §	LWOP §
GA	GA. CODE ANN. §15-11-28	*Id.* §17-10-31
MD	MD. CODE ANN., CTS. & JUD. PROC. §3-8A-03(d)(1)	*Id.*, CRIM. LAW §2-202
ME	ME. REV. STAT. ANN. tit. 15, §3101	*State v. St. Pierre,* 584 A.2d 618, 621 (Me. 1990)
NV	NEV. REV. STAT. ANN. §62B.330	*Id.* §176.025
ND	N.D. CENT. CODE §27-20-34	*Id.* §§12.1-32-01 & -09.1
OK	OKLA. STAT. ANN., tit. 10A, §2-5-205	*Id.* tit. 21, §§13.1 & 701.9
RI	R.I. GEN. LAWS §14-1-7(a)	*Id.* §11-23-2
SC	S.C. CODE ANN. §63-19-1210(5)	*Id.* §16-3-20
TN	TENN. CODE ANN. §37-1-134	*Id.* §39-13-202
UT	UTAH CODE ANN. §78A-6-602	*Id.* §76-3-206
WV	W. VA. CODE ANN. §49-5-10(d)(1)	*Id.* §62-3-15
WI	WIS. STAT. ANN. §938.183(1)(am)	*Id.* §939.50

ment for life without the possibility of parole . . . or imprisonment for life." MD. CODE ANN., CRIM. LAW §2-202(b)(2)(i).

- Nevada's statutes likewise provide that juveniles are not subject to capital punishment, but do not exempt them from either form of "life imprisonment" state law provides, including "life imprisonment without the possibility of parole." NEV. REV. STAT. ANN. §200.030; *id.* §176.025, as amended by Nev. Laws 2005, ch. 33, §2.

So the legislatures in Maryland and Nevada belong on the list of those—29 in all—that have expressly endorsed life-without-parole sentences for juvenile murder offenders.

c. Legislation in remaining jurisdictions establishes no consensus against the practice.

Although life-without-parole sentences are not a possibility for 14-year-olds in the 13 jurisdictions that remain, *see* Table 3, *infra*, this number hardly embodies a national consensus against the practice.

The statutes in these jurisdictions cannot be said to reflect a "consisten[t]" trend among the legislatures that have "recently" addressed the question. *Atkins v. Virginia*, 536 U.S. 304, 315, 321 (2002) (internal quotation marks omitted). Many of these statutes have been around much longer than provisions, recounted above, approving life-without-parole sentences for juvenile murderers. *Compare* CAL. PENAL CODE §190.5(b) (adopted in 1990), *and*

Tbl. 3: JURISDICTIONS NOT AUTHORIZING LWOP FOR 14-YEAR-OLDS

	TRANSFER §	**LWOP §**
AK	ALASKA STAT. §47.12.030	*Id.* §12.55.125
CA	CAL. WELF. & INST. CODE §602	CAL. PENAL CODE §190.5
CO	COLO. REV. STAT. ANN. §19-2-517(1)(b)	*Id.* §17-22.5-104(2)(d)
DC	D.C. CODE ANN. §16-2307	*Id.* §22-2104(a)
IN	IND. CODE ANN. §31-30-3-4	*Id.* §35-50-2-3(b)
KS	KAN. STAT. ANN. §38-2347(a)(2)	*Id.* §§21-6621 & -6623
KY	KY. REV. STAT. ANN. §635.020(2)	*Id.* §640.040
LA	LA. CHILD. CODE ANN. art. 857(A)	*Id.* art. 857(B)
MT	MONT. CODE ANN. §41-5-206(1)(a)	*Id.* §46-18-222
NM	N.M. STAT. ANN. §32A-2-3(J)(1)(3)	*Id.* §§31-18-14 & 32A-2-20(E)
NY	N.Y. PENAL LAW §30.00(2)	*Id.* §70.05
OR	OR. REV. STAT. ANN. §419C.352	*Id.* §161.620(1)
TX	TEX. FAM. CODE ANN. §54.02(a)(2)(A)	TEX. PENAL CODE ANN. §12.31(a)(1)

D.C. CODE ANN. §22-2104 (adopted in 1992), *and* OR. REV. STAT. ANN. §§161.620 (adopted in 1999), *with* IOWA CODE §902.1(1)&(2)(a)-(c) (adopted in 2011); NEV. REV. STAT. §§176.025 & 200.30 (adopted in 2005); VA. CODE ANN. §18.2-10 (adopted in 2006).

Nor have these 13 jurisdictions adopted, in any consistent way, the underlying moral and policy views Miller and his amici are asserting here. For example:

- One of these States, Alaska, simply does not impose life-without-parole sentences on anyone at all.

- Four of these States impose lengthy, mandatory terms before juvenile murderers may become parole-eligible. *See* KAN. STAT. ANN. §§21-6621 & 21-6623 (mandatory 50 years before parole); ALASKA STAT. §12.55.125(a)&(j) (49½ years); COLO. REV. STAT. ANN. §17-22.5-104(2)(d)(IV) (40 years); OR. REV. STAT. ANN. §§161.620(1) & 163.105(1)(c) (30 years).

- One of these States does not bar life-without-parole sentences for 15-year-olds. Three others do not bar them for 16-year-olds, and still one more does not bar them for 17-year-olds. *See* LA. CHILD. CODE ANN. art. 857(b) (15-year-olds); CAL. PENAL CODE §190.5(b) (16-year-olds); IND. CODE ANN. §35-50-2-3(b) (16-year-olds); N.Y. PENAL

LAW §30.00; *id.* §60.06 (16-year-olds); TEX. PENAL CODE §12.31(a)(1); TEX. FAM. CODE ANN. §§51.02(2), 51.04(a), 54.02 (17-year-olds).

- At least two of those jurisdictions have abolished the sentence only prospectively, leaving undisturbed all life-without-parole sentences that courts had imposed on juvenile murderers in the past. *See Meadoux v. State*, 325 S.W.3d 189, 194 (Tex. Crim. App. 2010); Jackson Br. 49 n.60 (14-year-old serving sentence in Colorado).

Thus, even those governments that do not authorize life-without-parole sentences for these offenders have reached no consensus on how the various competing policy considerations ought to play out.

2. Actual sentencing practices are consistent with these legislative judgments.

The other critical objective indicia—actual sentencing practices—distinguish *Roper* and *Graham* even further. Even assuming that Miller's proffered numbers reflect a full tally of persons sentenced to life without parole for murders they committed at age 13 or 14,[2] this case does not approach *Graham*-and-*Roper* territory.

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[2] Alabama has every reason to believe that Miller was diligent in gathering these numbers, but his count may not be 100% accurate. Advocates on both sides agree that "many state departments of corrections do not keep records on an inmate's

As an initial matter, Miller does not and cannot contend that life without parole is an unusual sentence for *all* juveniles convicted of murder, including those who were 15, 16, or 17 at the time. The published estimates that Miller cites suggest that the total number of those persons may exceed 2,300. *See* Jackson Br. 62 n.80. Thus, although Miller at one point floats the notion that the Eighth Amendment might preclude life-without-parole sentences for all juvenile murderers, *see* Jackson Br. 61, he has not even tried to satisfy his "heavy burden" of establishing a national consensus against this practice. *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

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age 'at the time he or she committed an offense but only record an individual's age at the time of admission to the prison.'" CHARLES D. STIMSON & ANDREW M. GROSSMAN, ADULT TIME FOR ADULT CRIMES: LIFE WITHOUT PAROLE FOR JUVENILE KILLERS AND VIOLENT TEENS 15 (Heritage Found. Aug. 2009) (quoting AMNESTY INT'L & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 119 (2005)). Thus, when developing their 2008 estimate of the number of people serving life-without-parole sentences for crimes they committed when they were 13 or 14, Miller's counsel at the Equal Justice Initiative had to review "court decisions," search "media reports," and contact "prisoners directly." EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 20 (Jan. 2008). Although Alabama's independent research has revealed numbers that approximate EJI's current totals in States that have been able to provide the information, it is possible that, due to the general unavailability of this information, the estimates currently before the Court may understate the number of people serving these sentences.

Miller instead whittles down the number by focusing on offenders who were 13 or 14 when they committed their crimes. He estimates that in light of developments since *Graham*, this number now amounts to 79 "plus or minus one or two." Jackson Br. 47 n.57. Yet Miller's proffered headcount does not indicate that imposing life-without-parole sentences on 14-year-old murderers is "unusual" in the Eighth Amendment sense. That is so for at least two reasons.

a. In relative terms, life-without-parole sentences are not rare for these offenders.

First, the absolute number of sentences is far less probative than the number of sentences relative to the "opportunities for" their "imposition." *Graham*, 130 S. Ct. at 2025. In that respect this case appears to differ from *Graham* by, quite literally, several orders of magnitude.

The Court in *Graham* acknowledged that in terms of absolute numbers, the count of nonhomicide offenders sentenced to life without parole—123—was high for an assertedly "unusual" practice. *See id.* at 2024-25. But the Court found it critical that DOJ statistics showed that authorities arrested more than 380,000 juveniles for serious nonhomicide crimes in the United States in 2007. *See id.* at 2025. That meant that for each juvenile who was serving life without parole for a nonhomicide crime, authorities had arrested more than 3,000 persons, in 2007 alone, for roughly comparable crimes. The number of sentences relative to the opportunities for their imposition thus was by all appearances low.

That reasoning is critical for present purposes because the number of life-without-parole sentences courts have imposed on 13- and 14-year-old murderers, relative to the apparent opportunities for their imposition, is considerably higher. Whereas the DOJ statistics referenced in *Graham* showed that 380,000 juveniles were arrested for serious nonhomicide crimes in the United States in 2007, those same statistics show that only 135 persons under the age of 15 were arrested for murder or non-negligent homicide that year. *See* Charles Puzzanchera, *Juvenile Arrests 2007*, JUVENILE JUSTICE BULLETIN (DOJ Office of Juvenile Justice & Delinquency Prevention), Apr. 2009, at 3. This means that for every 13- and 14-year-old Miller claims to be serving a life-without-parole sentence, authorities made fewer than two arrests in 2007 for homicide crimes. So whereas the ratio was approximately 1:3,000 in *Graham*, it is approximately 1:2 in this case. Drawing precise conclusions from these comparisons is not easy, given that they are keyed to a single year's worth of arrests. But it seems safe to assume that, in relative terms, life-without-parole sentences for 14-year-old murderers are much more common than the life-without-parole sentences imposed on nonhomicide offenders in *Graham*. If the sentences at issue here are rare, it is likely because, as the Wisconsin Supreme Court has put it, 14-year-olds "rarely commit homicide and, more to the point, rarely commit homicide in" a "horrific and senseless fashion." *State v. Ninham*, 797 N.W.2d 451, 468 (Wis. 2011).

b. Life-without-parole sentences for these offenders are more widely distributed than the sentences in Graham.

The 79 offenders apparently at issue here also appear to be more evenly distributed, in a geographic sense, than the 123 nonhomicide offenders in *Graham*. A "significant majority of" the 123 in *Graham*, "77 in total," were "serving sentences" in Florida. 130 S. Ct. at 2024. The "other 46" were "imprisoned in just 10 States." *Id.* Although 35% fewer life-without-parole sentences are at issue here, Miller's own count acknowledges that they are spread out over seven more States. No State is holding a percentage of these prisoners that even approaches Florida's 62% share in *Graham*. According to EJI's 2008 report, the two States with the highest totals, Pennsylvania and Florida, held less than half the relevant prisoners at that time. The remainder were evenly distributed across 17 States throughout the country. *See* EQUAL JUSTICE INITIATIVE, *supra*, at 20.

c. The mandatory nature of the sentence underscores its societal approval.

With these factors working against him, Miller falls back on an assertion that governments imposed "[n]inety percent" of these sentences under statutes making life without parole the statutory minimum. Jackson Br. 49. From that premise, he infers that when given the choice, judges generally have chosen not to impose the sentence on these offenders. But even if this statistic were properly before the Court

and confirmed to be correct,[3] there would be all sorts of reasons why it would not bear on the questions at hand. For one thing, a solid majority of jurisdictions that approve the sentence make it mandatory in certain cases, so it would hardly be surprising if a large majority of the sentences were, in fact, the product of these statutes. *See supra* at 17-18. Moreover, Miller's 10% figure could be probative only if he simultaneously offered a count of the number of "opportunities" judges have had to "impos[e]" this sentence in jurisdictions where it is not the mandatory minimum. *Graham*, 130 S. Ct. at 2025.

Beyond all this, there is something much more fundamentally wrong with Miller's argument. In claiming that the sentence's mandatory-minimum nature in many jurisdictions is a reason to deem it inconsistent with contemporary values, he is ignoring the reason *why* it is the mandatory minimum in these jurisdictions. It is the minimum there because *the legislatures* made it that way. The sentences thus reflect not "the judgment of a single jurist, . . . but rather the collective wisdom of the . . . Legislature and, as a consequence, the . . . citizenry." *Harmelin*, 501 U.S. at 1006 (Kennedy, J., concurring in part and concurring in the judgment). Their collective wisdom is that all persons who meet the law's requirements for responsibility, including those

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[3] Because Miller did not make this assertion below and has not submitted the names of all persons he claims are serving these sentences, Alabama cannot stipulate to the statistic's accuracy for present purposes. *Cf.* Miller Br. 24-25 n.31 (listing only the names of the offenders Miller claims received non-mandatory sentences).

as young as 14, understand that it is wrong to commit murder. Their collective wisdom is also that when these persons flout that basic precept, a life-without-parole sentence is the appropriate punishment. Whether or not our Nation as a whole has come to a consensus favoring this precise judgment, it emphatically has not come to a consensus against it.

B. The governments' judgment is consistent with Eighth Amendment values.

The legislatures' collective wisdom on these matters is "entitled to great weight," *Kennedy*, 554 U.S. at 434, and it comports with the principles that guide the Court's independent judgment on the matter. Two considerations have been critical in this regard. The first is culpability: the Court has asked whether "the severity of the punishment in question" is justified due to common understandings about the "culpability of the offenders at issue in light of their crimes and characteristics." *Graham*, 130 S. Ct. at 2026. The second is penological policy: the Court has asked "whether the challenged sentencing practice serves legitimate penological goals." *Id.* Whereas both these considerations buttressed the national consensus against the practices in *Roper* and *Graham*, both counsel deference to the different choices governments have made regarding life-without-parole sentences in murder cases.

1. These sentences comport with these murderers' culpability.

Governments that impose these sentences are operating well within the lines the Court has drawn

as to culpability. In asserting otherwise, Miller contends that even though *Graham* limited its holding to nonhomicide offenses, its analysis means that juvenile murderers as a class, including those who are 15, 16, and 17, are insufficiently culpable to receive life-without-parole sentences. Miller also advances the more limited proposition that 14-year-old murderers are categorically less culpable than older juveniles and therefore categorically less deserving of these sentences. *See* Jackson Br. 8, 16-41. As explained below, neither theory is compatible with the principles on which this Court decided *Graham* and *Roper*.

a. Juvenile murderers are sufficiently culpable to warrant these sentences.

As an initial matter, Miller is wrong to assert that the *Graham* Court's culpability analysis calls for a categorical prohibition on life-without-parole sentences in every murder case involving a defendant under age 18. Miller has not even tried to argue that a national consensus supports that far-ranging proposition, and, in fact, just the opposite is true. The law and sentencing practices in most every American jurisdiction embody a judgment that, in the very least, a 17-year-old murderer is sufficiently culpable to warrant the second-most-severe punishment under the law. *See supra* at 17-18, 28-29, 30.

That consensus is consistent with the framework in *Graham*. The analysis requires consideration of not only the defendants' "characteristics," but also their "crimes." 130 S. Ct. at 2026. "[T]he age of the

offender and the nature of the crime each bear on the analysis." *Id.* at 2027.

This reality is critical because the crimes at issue here are categorically worse than the ones in *Graham*. Nonhomicide offenses "differ from homicide crimes in a moral sense." *Graham*, 130 S. Ct. at 2027. "'[I]n terms of moral depravity and of the injury to the person and to the public,'" nonhomicide crimes "cannot be compared to murder in their 'severity and irrevocability.'" *Kennedy*, 554 U.S. at 438 (quoting *Coker v. Georgia,* 433 U.S. 584, 598 (1977) (plurality opinion)). There is a critical "line," for Eighth Amendment purposes, "'between homicide and other serious violent offenses against the individual.'" *Graham*, 130 S. Ct. at 2027 (quoting *Kennedy*, 554 U.S. at 438).

It was only because of this line that culpability concerns barred life-without-parole sentences for the nonhomicide offenders at issue in *Graham*. The *Roper* Court had made clear that juvenile murderers cannot receive the death penalty because the average juvenile offender is "'categorically less culpable than the average criminal.'" *Roper*, 543 U.S. at 567 (quoting *Atkins*, 536 U.S. at 316). In light of that premise, the *Graham* Court reasoned that juvenile nonhomicide offenders have "a twice diminished moral culpability." 130 S. Ct. at 2027. That is so because "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Id.* Culpability concerns thus precluded imposition of not only the death penalty on those offenders, but also "'the second most severe penalty permitted by law.'" *Id.* (quoting *Harmelin*,

501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment)).

That analysis calls for a different result when the juvenile has committed aggravated murder. The Eighth Amendment does not require clinical precision in lining up culpability and punishment, but rather a "rough, basic connection between criminal law and generally accepted principles of morality." Transcript of Oral Argument at 34, *Sullivan v. Florida*, 130 S. Ct. 2059 (2010) (No. 08-7621) (question of Breyer, J.). Governments satisfy this requirement when they impose life-without-parole sentences on these murderers. All agree that juveniles who commit murder deserve "severe sanctions." *Graham*, 130 S. Ct. at 2028. They are categorically more "deserving of the most serious forms of punishment" than juveniles who commit nonhomicide offenses. *Id.* Their culpability is not twice diminished, but only once so. Thus, whereas culpability concerns still preclude the death penalty for these offenders, they do not preclude sentences of life without parole. It is no doubt a severe punishment, but it is less severe than the crime.

Miller's argument to the contrary is incompatible with widely shared understandings about culpability. Few people would say that 17-year-olds who commit aggravated murder stand on the same moral ground as 17-year-olds who commit non-homicide offenses. Still fewer would say that 17-year-old murderers are categorically *less* culpable than 18-year-olds who are guilty only of nonhomicide crimes. Yet if Miller's theory were correct, then the maximum punishment the Constitution would tolerate for a 17-year-old who commits aggravated

murder—namely, life *with* the possibility of parole—would be no different from the maximum punishment the Constitution would tolerate for a 17-year-old who is guilty only of a nonhomicide offense. *See Graham*, 130 S. Ct. at 2034 (holding that a "State need not guarantee" a juvenile nonhomicide offender "eventual release"). Also, if Miller's theory were correct, a 17-year-old who commits aggravated murder would be categorically *exempt* from the maximum punishment the Constitution would tolerate for 18-year-olds convicted of nonhomicide crimes. And if Miller's theory were correct, an 18-year-old murderer could be exposed to the death penalty, while a condefendant only a few months his junior would not even be subject to life without parole. There are exceedingly good reasons why most American governments have declined to adopt that approach.

b. Fourteen-year-olds who commit these murders are culpable enough to warrant these sentences.

Miller cannot get any more traction out of the proposition that 14-year-olds are categorically less culpable than 15-, 16-, and 17-year-olds and thus, unlike older juveniles, exempt from these sentences even when they commit murder. American governments already recognize the only two categorical lines needed to account for the effect youth has on culpability in these cases. The first, recognized by practice and statute throughout the country, sets the lower boundary for the transfer of murder offenders to criminal court at around age 13. *See* Tables 1-3, *supra*; SNYDER & SICKMUND, *supra*, at

112. The second line, affirmed in *Roper*, sets the boundary between adolescence and adulthood, and thus between the death penalty and life without parole in murder cases, at age 18.

There is no indication that these two lines, combined with whatever case-by-case, gross-disproportionality review may be appropriate, do not adequately account for the culpability concerns associated with these defendants' youth. Widely shared values support the lower boundary for criminal-court adjudication of these cases around age 13. Likewise, common sense, scientific research, and societal values all point to 18 as the boundary between the death penalty and life without parole in murder cases. As explained below, no pertinent factor suggests that the Constitution mandates other categorical lines at points in between.

i. Societal values provide no basis for a categorical line between 14-year-olds and older juveniles.

Prevailing societal values support the governments' current approach to murderers who fall within the 13-to-17 range. Whereas "any parent knows" that there is a fundamental line between childhood and adulthood, *Roper*, 543 U.S. at 569, the same is not true of a line between early and late adolescence. This case is not *Roper*, which dealt with a "dividing line between people who are members of the community" that was "pervasively 18, to vote, to sit on juries, to serve in the military." Transcript of Oral Argument at 5, *Roper,* 543 U.S. 551 (2005) (No. 03-633) (question of Ginsburg, J.). As Miller's own inability to say where he would draw the line attests,

see Jackson Br. 61-63, society builds no similar boundary between early and late adolescence.

The most pertinent societal lines for present purposes are not found in the various statutes Miller cites in the appendix to his brief. They instead are found in the statutes, recounted above, governing transfer of these cases from juvenile to criminal court. *See supra* at 17-18. Those statutes do not make categorical distinctions between the culpability of 14-year-olds and the culpability of older adolescents. And that approach makes sense. Every parent knows that 14-year-olds understand, no less than 16-year-olds do, that in the very least they shall not kill.

The various other statutes Miller has cited—addressing things like the age of consent for sexual relations with adults—do not call that judgment into question. They establish no pervasive line between younger and older adolescents in any given State, much less a line that crosses state borders.

No State draws a unitary line, at a particular age, denoting a fundamental distinction between younger and older adolescents. States instead draw all sorts of lines at all sorts of ages, depending on what activity they are regulating. Thus, for practically every statute Miller cites that restricts 14-year-olds from engaging in certain activities, there is another statute from that same State authorizing 14-year-olds to do other things. Alabama, for example, makes 15 the threshold age for obtaining a learner's permit to drive a car. *See* ALA. CODE §32-6-7.2. But other Alabama laws authorize 14-year-olds to obtain motorcycle driver's licenses, to operate boats, to consent to health services, and to work certain kinds

of jobs. *See id.* §§ 22-8-4, 25-8-39, 32-12-22, & 33-5-51. Likewise, New Mexico's residents have to stay in school until they are 18, cannot consent to sex with an adult outside of marriage until they are 17, and cannot marry, unless they have their parents' blessing, until they are 16. *See* Miller Br. App. 56. But when they are 14, they can, without their parents' permission, consent to the administration of psychotropic drugs. *See* N.M. STAT. ANN. §32A-6A-15. Legislatures quite understandably vary these lines based on the activity at issue. Thus, statutes setting the age limit for other activities, like driving, tell us very little about the appropriate age for imposing life-without-parole sentences on people who commit aggravated murder.

Moreover, even when different States regulate the same activity, they do not agree on the optimal age limits. When it comes to driver's licenses, for example, States are all over the map. *See, e.g.*, WYO. STAT. ANN. §31-7-117(c) (14-year-olds can drive solo with restricted driver's license upon showing of need); KAN. STAT. ANN. §§8-2,101(a)-(b) (15-year-olds can do the same); N.J. STAT. ANN. §39:3-13.4 (graduated license system where probationary license is not available until age 17). States' policies on marriage are similarly asunder. *See, e.g.*, ALASKA STAT. §25.05.171 (14-year-olds can marry with judicial and parental consent); N.Y. DOM. REL. LAW §§ 15, 15-a (14- and 15-year-olds can marry only with both parental and judicial consent); ALA. CODE §30-1-4 (15-year-olds cannot marry at all); ARK. CODE ANN. §§9-11-102 & 103 (absent a pregnancy, 15-year-old women and 16-year old men cannot marry).

These statutes thus do not support any particular "line" for life-without-parole sentences between younger and older adolescents. The only meaningful consensus these statutes reflect is a judgment that people generally form different capabilities, at different times, between the ages of 12 and 18. Just as the uniform drinking age of 21 does not call into doubt the *Roper* Court's conclusion that 18 is the right line for the purposes of the death penalty, these statutes do not call into doubt American society's general judgment that 14 is a proper age to sentence aggravated murderers like Miller to life without parole.

ii. Science provides no basis for a new categorical line between 14-year-olds and older juveniles.

If science sheds any light on this matter, it only confirms these common-sense intuitions. It is "simply wrong," Harvard psychologists have explained, to conclude "that once a capability has been displayed at a certain level in a certain context it will be displayed at that same level across a variety of contexts." Kurt W. Fischer et al., *Narrow Assessments Misrepresent Development and Misguide Policy: Comment on Steinberg, Cauffman, Woolard, Graham, and Banich (2009)*, 64 AM. PSYCHOLOGIST 595, 598 (2009). Correspondingly, the science establishes no firm evidence that would support a categorical line, for the purposes of criminal responsibility, between 14-year-olds and older adolescents.

Research before the Court in *Roper* and *Graham* pointed to differences between adolescents and adults generally, not to any categorical distinctions

between age groups within the adolescent range. It was in part because of that reality that the Court in *Roper* held that the line previously drawn in *Thompson*, at age 16, was not viable. *See* 543 U.S. at 570-71. And it is telling that none of the amici in this case appears to be arguing that current research supports a categorical line at any age besides 18. *See* AMA Br. 4 n.1; APA Br. 6 n.3. Miller nonetheless suggests that a "[s]cientific [c]onsensus" supports the proposition that 14-year-olds are categorically different from 15-, 16-, and 17-year olds in several respects. Jackson Br. 16. But the literature, as it currently stands, does not justify that conclusion.

For example, researchers are nowhere near a consensus on the proposition that 14-year-olds are categorically different in their capacity to make the kinds of "reasoned judgments" that would matter for present purposes. Jackson Br. 19. To the contrary, the article referenced above by the Harvard psychologists—a critique of a study led by Laurence Steinberg, the lead author of many of the papers on which Miller relies—explains that "[a]t all ages, development of new capabilities is marked by discontinuities, spurts, and regressions and can unfold along diverse pathways as various lines of development interact." Fischer et al., *supra*, at 596 (criticizing Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583 (2009)). These authors explain that "development involves many skills that develop along complex pathways from infancy through adulthood, with many capabilities developing both before age 16 and afterward during

early adulthood." *Id.* at 599. They therefore argue that Steinberg and his colleagues were wrong to make "the bold claim" that "general cognitive capacity plateaus around age 16." *Id.* at 596. Instead, "complex and important cognitive capabilities continue to develop long afterward." *Id.* at 597. At the same time, they contend that Steinberg and his colleagues had understated certain "[p]sychosocial capabilities" that "develop richly in childhood and early adolescence." *Id.* at 598. For example, "standard measures" show that "[g]rade-school children" develop skills that "lay the foundation for understanding about abortion and murder, although sophisticated understanding certainly awaits development of higher capabilities." *Id.* at 598.

Scientists also do not appear to have developed any consensus on whether 14-year-olds have a categorically higher "propensity for risk-taking" than older juveniles. Jackson Br. 23. One study found that by at least one measure, 14-year-olds exhibited *lower* levels of "sensation-seeking" than 15-, 16-, and 17-year-olds. Daniel Romer, *Adolescent Risk Taking, Impulsivity, and Brain Development: Implications for Prevention*, 52 DEV. PSYCHOBIOLOGY 263, 268 fig.4 (2010). Likewise, another recent study notes that "mid- and late adolescents (i.e., ages 15–19) are disproportionately more likely than younger or older individuals to engage in many high-risk behaviors," including "both violent and nonviolent crime." Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEV. PSYCH. 193, 193 (2010). These findings comport with statistics showing that offenders under the age of 15 account

for a much smaller number of arrests than 15-, 16-, and 17-year-olds. *See* Puzzanchera, *supra*, at 3.

Nor does any consensus appear to be looming on whether 14-year-olds are categorically "distinguishable from 15- and 16-year olds" because of "excruciatingly low self-esteem" that fixates them "on the instantaneous present." Jackson Br. 25. To the contrary, one of the authors on whom Miller relies concludes that although studies have pointed in different directions, in his judgment "younger adolescents' thinking extends further into the future measured by years compared with relatively older ones." Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 DEV. REV. 1, 47 (1991). One of the Steinberg papers likewise says, more equivocally, that "[a]lthough adolescents' feelings about themselves fluctuate, particularly during the early and middle adolescent years (ages 11 through 15), self-esteem either remains at about the same level or increases gradually over the course of middle and late adolescence." Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 255-56 (1996). That article also professed to "know of no systematic research examining the direct link between self-esteem and either judgment or decision making," and Miller does not profess to cite to any such research here. *Id.* at 256.

Likewise, there does not appear to be even an arguable consensus that differences between the "brain structure[s]" of 14-year-olds and older adolescents translate into culpability distinctions.

Jackson Br. 19. Instead, scientists appear to be in the midst of a vigorous debate over whether it is legitimate to draw conclusions about culpability from brain structure at all. One psychologist who disagrees with Miller's view notes that "most of the brain changes that are observed during the teen years lie on a continuum of changes that take place over much of our lives." Robert Epstein, *The Myth of the Teen Brain*, SCIENTIFIC AM. MIND, April/May 2007, at 60. He knows of no "study that establishes a *causal* relation between the properties of the brain being examined and the problems we see in teens." *Id.* Another scholar explains that "[t]he neuroscience evidence in no way independently confirms that adolescents are less responsible." Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397, 409 (2006). These psychologists also argue that in any event "we make a serious error of logic when we blame almost any behavior on the brain—especially when drawing conclusions from brain-scanning studies." Epstein, *supra,* at 61; *accord* Morse, *supra*, at 406-10.

The foregoing is not an exhaustive review of the literature, and scholars disagree about many of these issues. *Cf.* Laurence Steinberg et al., *Reconciling the Complexity of Human Development With the Reality of Legal Policy: Reply to Fischer, Stein, and Heikkinen (2009)*, 64 AM. PSYCHOLOGIST 601, 601-04 (2009)) (replying to the critique of their study). But that is precisely the point. The current science is, in the very least, inconclusive, and it provides no basis for questioning the pragmatic approach American governments currently take on offenders within the

13-to-17 range. When it comes to determining their relative culpability, the current neuroscience and psychology cannot "create[] a simple story for policymakers" or "draw simple lines in the sand." Fischer et al., *supra*, at 598, 599. "Development," it is safe to say, "is more complex and variable than that." *Id.* at 599. For now at least, the right way for the Eighth Amendment to address this complexity and variability within the adolescent range is through "'narrow proportionality' review," not any categorical rule. *Graham*, 130 S. Ct. at 2039 (Roberts, C.J., concurring in the judgment) (quoting *Solem v. Helm*, 463 U.S. 277, 292 (1983)).

2. These sentences are consistent with valid penological goals.

These same considerations also make the other factor that matters in this Court's exercise of independent judgment—namely, whether the sentence serves legitimate penological goals—dramatically different from *Roper* and *Graham*. Governments have soundly concluded that goals of retribution, deterrence, and incapacitation justify imposing these sentences on offenders like Miller.

a. Imposing life-without-parole sentences on juvenile murderers serves legitimate retributive purposes.

"Retribution is a legitimate reason to punish," *Graham*, 130 S. Ct. at 2028, and this rationale is sufficient, by itself, to justify life-without-parole sentences for juveniles who commit these murders. Although retributive goals apply with less force to juvenile offenders, they still apply. "Society is

entitled to impose severe sanctions," even on a juvenile "nonhomicide offender," in order to "express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense." *Id.* When a juvenile has gone so far as to commit aggravated murder, life-without-parole sentences serve these goals in three different ways.

i. Life-without-parole sentences address the moral imbalance caused by these murders.

As an initial matter, governments can legitimately conclude that life-without-parole sentences are needed to counteract the moral harm done by a juvenile who commits aggravated murder. *Graham* was different because the moral imbalance there was not nearly the same. *Id.* Life-without-parole sentences are not proportional for juvenile nonhomicide offenders because these sentences are, even for adults, "'the law's most severe penalty'" for nonhomicide offenses. *Id.* (quoting *Roper*, 543 U.S. at 571). But the present case does not involve nonhomicide offenses, or even homicides in general. It involves aggravated murders, and life without parole is not the law's most severe penalty for these crimes.

If governments can use the death penalty to restore the moral imbalance that results when adults commit these crimes, they can use life-without-parole sentences for that same purpose when the offenders are under 18. In these cases, the defendants have taken away the victims' lives in a senseless and often "deprav[ed]" way, and the harm is irrevocable. *Coker*, 433 U.S. at 598 (plurality opinion). Governments can determine that murders

of this variety tear so harshly at the social contract that people who commit them must spend the rest of their lives in prison, no matter how likely they are to later regret their transgressions.

ii. Life-without-parole sentences express society's condemnation of these murders.

Governments also are justified in concluding that life-without-parole sentences are needed to adequately "express[] . . . condemnation" of these aggravated murders. *Graham*, 130 S. Ct. at 2028. These sentences send a much more powerful message about the unacceptability of aggravated murder than life-with-parole sentences do. They are a more effective way of assuring the community that the government will not tolerate these crimes, even when committed by relatively young offenders. And they allow the government to express its view that these murders are even more condemnable than other homicide offenses.

"Specific cases are illustrative." *Graham*, 130 S. Ct. at 2031. The only other known Alabamian serving a life-without-parole sentence for a crime committed before age 15 is Ashley Jones. *See* EQUAL JUSTICE INITIATIVE, *supra*, at 25. When she was 14, Jones and her boyfriend conspired to kill her family because the family did not "approve of" the couple's "relationship." *Hart v. State*, 852 So. 2d 839, 842 (Ala. Crim. App. 2002). Using a gun Jones had stolen and given to him for that purpose, the boyfriend shot her 76-year-old grandfather at Jones's home. *See id.* While the grandfather was "still alive," Jones "poured charcoal lighter fluid on" him "and set him on fire." *Id.* He eventually died, as did Jones's aunt—

after Jones and her boyfriend "hit her with portable heaters, stabbed her in the chest, and set her room on fire." *Id.* Jones's grandmother and 10-year-old sister survived the attack, but not because Jones and her boyfriend intended to spare them. After the boyfriend shot the grandmother, Jones "poured the charcoal fluid" on her, and they "set her on fire" as well. *Id.* Jones also stabbed her 10-year-old sister 14 times. *Id.*; *see also* STIMSON & GROSSMAN, *supra*, at 26-27 (discussing Jones's crime in more detail).

The facts of Jones's case, like the facts of Miller's case, do not simply underscore the sad reality that 14-year-olds sometimes commit horrific murders. They also underscore the critical role that life-without-parole sentences can serve in expressing society's condemnation of these crimes. Miller's and Jones's crimes rank among the worst of the worst. Governments need the ability to impose a "forfeiture that is irrevocable" on murders of this kind, *Graham*, 130 S. Ct. at 2027, to distinguish them from lesser homicides for which a life-with-parole sentence is appropriate.

iii. Life-without-parole sentences ease mental anguish for some victims' families.

These sentences also serve a third retributive function of allaying the suffering of murder victims' families. Unlike nonhomicide offenses, aggravated murders create harm that is "beyond repair," and not only to the victims themselves. *Coker,* 433 U.S. at 598 (plurality opinion). As Cole Cannon's daughter explained immediately after Miller's sentencing, a family member's feelings of loss can endure "for the rest of [her] life." JA 74. The pain can be much worse

when the offender is parole-eligible. Some families say the offenders' potential release makes them feel as though they "constantly have a shadow hanging over [their] lives." Ian Lovett, *Grieving Kin Endure Pain of Fighting for the Dead*, N.Y. TIMES, Aug. 20, 2011, at A11. Many periodically put their lives on hold to attend parole hearings "so the board understands what this has done to your life." *Id.* at A12. The process is, in the words of one advocate whose sister was killed by a juvenile, "incredibly re-traumatizing." *Juvenile Justice Accountability Act of 2009: Hearing on H.R. 2289 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 30 (2009) (statement of Jennifer Bishop-Jenkins, Co-Founder, National Organization of Victims of Juvenile Lifers).

Governments can rationally conclude that for certain aggravated-murder offenses, including those committed by juveniles, this process simply should not happen. The Constitution does not compel governments to "re-traumatiz[e]" victims by providing violent murderers an outside chance at parole. A basic respect for human dignity gives juvenile offenders the right to "hope of restoration" when they have not killed another human being. *Graham*, 130 S. Ct. 2027. But governments act within constitutional bounds when they decide that the same basic respect for human dignity—including the dignity of the victims and their families—means that juveniles who commit aggravated murders should not have this same right.

b. Imposing life-without-parole sentences on juvenile murderers serves other legitimate purposes.

Although the retribution principle suffices by itself to justify these sentences, other penological goals support them as well.

The first is deterrence. The Court in *Roper* did note that "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." 543 U.S. at 571. But the Court also observed that "[t]o the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." 543 U.S. at 572. And the Court in *Graham* acknowledged that it is "perhaps plausible" that life-without-parole sentences will deter juveniles "in a few cases." 130 S. Ct. at 2029. Unlike in *Graham*, for the murder offenses at issue here, "a few cases" means "a few lives." Even if the sentence deters only a few would-be murderers, the deterrence goal justifies its use.

So, too, does the policy of preventing convicted murderers from killing again. The Court in *Graham* found the incapacitation rationale inadequate to justify life-without-parole sentences "for juveniles who did not commit homicide," but the calculus changes when juveniles are guilty of aggravated murder. 130 S. Ct. at 2029. Any parole system will have some success stories, particularly for offenders whose crimes are less egregious than Miller's and Ashley Jones's. *See, e.g.*, Probation & Parole Assoc. Br. 13-15 (heat-of-passion killing of abusive parent);

Juvenile Judges Br. 14-16 (killings during fights at parties). But any such system also will make mistakes that can cost people their lives. One example from Alabama was Raymond Eugene Brown, who murdered three people in 1960, when he was 14, before Alabama adopted its life-without-parole statute. *See* Wright, *supra*, at 531. The parole board later released him, and in 1988, he murdered "a woman and her nine-year-old daughter." *Id.*

To be clear, when the government bolsters the case for these sentences with the incapacitation rationale, it is not determining, *ex ante*, "that the juvenile is incorrigible." *Graham*, 130 S. Ct. at 2029. It is instead determining that the defendant *may* reoffend; and it is acknowledging that it cannot predict which offenders will do so with any degree of precision. *See, e.g.*, Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years?* 86 TULANE L. REV. 309, 336 & n.114 (2011). Society reacts with particular revulsion when convicted murderers, released on parole, kill again. It is fair for governments to decide that when it comes to these offenders, the costs of recidivism are too high to justify the risk.

Although retribution, deterrence, and incapacitation are the primary goals these sentences serve—rather than rehabilitation—this practice is still consistent with the government's responsibility "to respect the dignity of all persons." *Roper*, 543 U.S. at 460. The Eighth Amendment grants legislatures leeway to "mak[e] these fundamental choices" about criminal punishment and to "implement[] them." *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in

the judgment). The State's choice here amounted to a rational balancing of the various considerations that factor into any decision on how to punish. Miller violated society's most basic command at an age when society could demand that he obey it. Taunting and torturing his victim, he showed no respect for Cole Cannon's own human dignity. And although Miller's sentence likely means he will spend the rest of his life in prison, he will still, unlike Cannon, have a life. Even behind bars, Miller can try, like the defendant in *Roper*, to "attain a mature understanding of his own humanity." *Roper,* 543 U.S. at 574. Governments cannot possibly set the world completely right when these tragedies occur. But the State's response here was a fair means of dealing with the harm Miller has caused.

C. International sentiment does not render these sentences unconstitutional.

The fact that the rest of the world is currently dealing with this problem in a different way does not render these sentences constitutionally invalid. Other countries' views "do not control." *Graham,* 130 S. Ct. at 2033. When this Court "has looked beyond our Nation's borders" in Eighth Amendment cases, it has done so only "for support for its independent conclusion that a particular punishment is cruel and unusual." *Id.* International opinion cannot play that role here because, for the reasons already given, these sentences are consistent with the Eighth Amendment. *Cf. Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment) ("[I]nterjurisdictional analyses are appropriate only in the rare case in which a

threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.").

Additional factors militate heavily against giving international views special weight in this particular case. Even within the United States, "[s]tate sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise." *Id.* at 999-1000 (Kennedy, J., concurring in part and concurring in the judgment). Those difficulties can be compounded when it comes to foreign nations, and that is true here. The judgment other countries have reached on this specific question reflects premises that are fundamentally different from prevailing American assumptions in at least two respects.

First, for both adult and juvenile murder offenders, other countries have a markedly more lenient policy toward criminal sentencing in general. Many foreign nations do not even impose life-without-parole sentences on adults. Countries influenced by the Spanish or Portuguese tradition, for example, often set all imprisonment in terms of years. *See, e.g.*, BRAZIL CONST. Art. 5, ¶ XLVII. In the same vein, most European countries either provide for determinate sentencing or automatic parole eligibility for every offender. *See* Dirk Van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?* 23 FED. SENT. R. 39, 40 (2010). One scholar even predicts that developments in the European Court of Human Rights soon will lead to "the unambiguous outlawing of irreducible life sentences" for adults throughout Europe. *Id.* at 46.

Second, when it comes to juvenile-justice issues in particular, other countries are operating under assumptions that vary even more widely from the United States'. One scholar says that the mere practice of trying juveniles as adults is something "Western Europeans find little less than shocking." JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 3 (Oxford Univ. Press 2003). The countries that have ratified the United Nations Convention on the Rights of the Child decline to impose life-without-parole sentences not only on 14-year-old murderers, but also on those juveniles—aged 15, 16, and 17—with respect to whom Miller has not even tried to argue that a consensus exists in the United States. "In fact, the majority of European countries do not allow life sentences" even *with* the possibility of parole "to be imposed on children at all." Van Zyl Smit, *supra,* at 39. What is more, in cases involving juvenile defendants, "countries such as Portugal or Switzerland do not allow for longer sentences than three or four years even for very serious (murder) offenses." *Id.* at 39 n.4 (internal quotation marks and emphasis omitted). Because American governments are nowhere near that worldview, these countries' stance tells us very little about what the Eighth Amendment means.

The pragmatic argument for deferring to international opinion is substantially weaker here than it was in *Graham* and *Roper*. Americans are far from a consensus against these punishments, and the United States has not ratified the Convention on the Rights of the Child. Eighth Amendment jurisprudence recognizes that "differing attitudes

and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes." *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring in part and concurring in the judgment). That is what is happening in the United States with respect to juveniles who commit aggravated murder.

II. Governments may make life without parole the minimum sentence for these offenders.

These sentences do not become unconstitutional merely because some state statutes, like Alabama's, make life without parole the minimum punishment for these murders. Miller's argument on this point is foreclosed by the Court's decision in *Harmelin*, which held that outside the death-penalty context, "[t]here can be no serious contention . . . that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.'" 501 U.S. at 995.

The Court in *Harmelin* considered an adult defendant's claim that his life-without-parole sentence for a drug offense was unconstitutional because the statute at issue made that punishment the mandatory minimum. The Court rejected the notion that the Eighth Amendment requires States "to create a sentencing scheme whereby life in prison without possibility of parole is simply the most severe of a range of available penalties that the sentencer may impose after hearing evidence in mitigation and aggravation." *Id.* at 994. The Court acknowledged that the Eighth Amendment requires States to adopt individualized-sentencing schemes in death-penalty cases, but saw "no basis for extending" the doctrine "further." *Id.* at 996. The Eighth

Amendment requires individual-sentencing statutes in that context only "because of the qualitative difference between death and all other penalties," including life without parole. *Id.* at 995.

The Court in *Harmelin* admitted of no exceptions to this rule, and that is reason enough to reject Miller's argument. Previously, when "[l]egislatures and their constituents" have relied on the Court's precedents "to exercise control over sentencing" through mandatory-minimum statutes, the Court has been reluctant to extend new precedents in a way that would "overturn those statutes or cast uncertainty upon the sentences imposed under them." *Harris v. United States*, 536 U.S. 545, 567-68 (2002) (plurality opinion). *Stare decisis* concerns therefore require a principled application of *Graham*, *Roper*, and *Harmelin* that respects the States' settled expectations in this area.

No principled application of these decisions would mandate the exception to *Harmelin* that Miller is seeking here. Indeed, creating that exception would effectively overrule *Harmelin*. The adult nonhomicide offender in that case was in the same position as the juvenile homicide offender at issue here. Courts sentenced both of them to the maximum sentence the Constitution allows for someone in their shoes: life without parole. The Court in *Harmelin* held that in spite of that reality, the State was not required to create an individualized sentencing scheme to ensure that the defendant deserved that sentence. The same logic applies here, and nothing in *Graham* or *Roper* changes that conclusion.

A. Objective indicia show that these minimum-sentencing schemes are consistent with contemporary values.

As a threshold matter, Miller has not even tried to argue that a national consensus has emerged in favor of overruling *Harmelin* or creating a special exemption to its holding for juveniles. Nor could he, in light of the number of jurisdictions that make life without parole the mandatory-minimum sentence for these offenses. *See supra* at 17-18. Miller practically concedes the point when he asserts that courts have sentenced 90% of the prisoners at issue here under one of these statutes. *See* Miller Br. 24-25. To the extent he is trying to argue that the sentence's asserted infrequency in non-mandatory jurisdictions is a basis for deeming mandatory-minimum sentencing "unusual," he has not, for reasons already discussed, laid a sufficient predicate for this claim. *See supra* at 33-35. Given that he is arguing that *Graham* and *Roper* require individualized sentencing for all juvenile defendants, the 90% statistic—which is limited to just 13- and 14-year-olds—is not illuminating in any event.

B. The sentence's mandatory-minimum nature is consistent with Eighth Amendment principles.

Legislatures' use of these statutes is also quite consistent with "'the standards elaborated by controlling precedents." *Graham*, 130 S. Ct. at 2022 (quoting *Kennedy,* 554 U.S. at 421). On this front, Miller looks past *Harmelin*, and instead asserts that these statutes are contrary to the "most rudimentary understanding of *Roper* and *Graham*" because they

"'fail to take defendants' youthfulness into account at all.'" Miller Br. 26-27 (quoting *Graham*, 130 S. Ct. at 2031). But Miller is ignoring the fact that the juvenile court, in considering whether to transfer him to the criminal court in this case, considered his age. *See supra* at 5, 8. He also is ignoring the fact that "[p]rosecutorial discretion before sentence and executive or legislative clemency afterwards provide means for the State" to account for the defendant's youth. *Harmelin*, 501 U.S. at 1008 (Kennedy, J., concurring in part and concurring in the judgment). And even more critically, he is overlooking two important facts about what happened during his sentencing proceedings.

First, the sentencing court did take his youthfulness into account, and did so precisely because of *Graham* and *Roper*. The court accounted for his youth by granting him the categorical exemption from the death penalty that *Roper* required. *See* JA 78 (citing *Roper*). Life without parole was "mandatory" for Miller only because, per that ruling, *Roper* rendered him exempt from the more severe sentence that the capital-murder statute otherwise could have allowed. It is precisely through this sort of categorical exemption, not individualized sentencing, that *Graham* and *Roper* require courts to take a defendant's "youthfulness into account." *Graham*, 130 S. Ct. at 2031. After all, this Court rejected arguments in both cases that sentencing courts could simply consider "mitigating arguments related to youth on a case-by-case basis" rather than create a categorical rule. *Roper*, 543 U.S. at 572 (citing Br. for Ala. et al. as *Amici Curiae*); *accord Graham*, 130 S. Ct. at 2031-32.

Second, although the court below adequately accounted for Miller's youth by granting him the categorical exemption, nothing about Alabama's sentencing scheme precluded the court from taking his youth into account in a second way. Under these statutes, life without parole is the "mandatory minimum" only in a statutory sense. These state laws cannot eliminate a sentencing court's ability to conduct a case-by-case review, under the Eighth Amendment, to assess whether a life-without-parole sentence is grossly disproportionate in light of the defendant's particular circumstances. *See Harmelin*, 501 U.S. at 997-1001 (Kennedy, J., concurring in part and concurring in the judgment). An "offender's juvenile status can play a central role in the inquiry." *Graham*, 130 S. Ct. at 2039 (Roberts, C.J., concurring in the judgment). Here, the appellate court declined to engage in that review only because Miller himself chose not to "challenge his sentence as grossly disproportionate." JA 141 n.2.

Miller is thus doubly wrong when he asserts that these sentencing schemes remove, from "the process of proportioning punishment to culpability," any "consideration of the special features of childhood which *Roper* and *Graham* found constitutionally compelling." Miller Br. 26. The way these statutes work is fully consistent with *Harmelin*, *Roper,* and *Graham*.

* * *

At every turn, Miller is seeking results that are emphatically not obvious implications of "[t]he constitutional logic of *Roper v. Simmons* and *Graham v. Florida*." Miller Br. 8. He is not just

asking the Court to use these precedents to create a gaping hole in *Harmelin*. He is also asking the Court to erase the line society has long observed, and on which the *Graham* Court heavily relied, between murder and other offenses. He is asking the Court to draw a new line between younger and older adolescents, even though the *Roper* Court found that line not viable. And he is asking the Court to do so without even a colorable argument that a national consensus, like the ones that played important roles in both *Roper* and *Graham*, supports the elimination of life-without-parole sentences for these murderers.

The principles that gave rise to *Graham* and *Roper* cannot get him that far, and with good reason. Evolutions in sentencing policy can mark the progress of a "maturing society" only when they are, in fact, the product of society. *Trop*, 356 U.S. at 101 (plurality opinion). Miller has no meaningful argument that our society has gone so far as to condemn life-without-parole sentences for crimes as serious as his. If Miller and his *amici* wish to alter that sentiment, they should continue trying to change society, through public debate and the democratic processes. In the meantime, the Constitution will give governments room to address difficult sentencing issues through punishments that are consistent with societal values as they currently stand. This practice fits that bill.

CONCLUSION

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

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February 14, 2012