No. 16-1167

IN THE
Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

BRANDON MOORE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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May 26, 2017

QUESTIONS PRESENTED

In *Graham v. Florida*, 560 U.S. 48, 79 (2010), this Court held that the Eighth Amendment forbids life without parole sentences for juvenile offenders who did not commit homicide. While the Court made clear that a state "is not required to guarantee eventual freedom" to such an offender, it must give them "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

The questions presented are:

1. Whether a state may evade *Graham*'s categorical prohibition on life without parole sentences for juvenile nonhomicide offenders by sentencing those offenders to consecutive term-of-years sentences that effectively deny them any meaningful possibility of release within their lifetime but lack the formal label "life without parole."

2. Whether, despite *Graham*'s admonition that states must "explore the means and mechanisms for compliance," *id.*, and absent any evidence that states cannot complete this task, this Court must step in now to craft a bright-line rule about what constitutes a "meaningful opportunity" for release.

3. Whether the substantive limitation on sentencing juvenile offenders recognized in *Graham* is retroactive.

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INTRODUCTION

In *Graham v. Florida*, this Court held that sentencing a juvenile nonhomicide offender to spend life in prison "without any meaningful opportunity to obtain release" violates the Eighth Amendment. 560 U.S. 48, 79 (2010). Even though Terrance Graham, had an "escalating pattern of criminal conduct," the Eighth Amendment prohibited a sentence that "guarantees [that] he will die in prison . . . no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character." *Id.* at 73, 79.

Respondent Brandon Moore is serving a 112-year sentence for nonhomicide crimes he committed when he was 15 years old. The Ohio Supreme Court held that this sentence is unconstitutional following a straightforward application of *Graham*. Like Terrance, Brandon "did not commit the ultimate crime of murder and was not fully formed when he committed his nonhomicide crimes." Pet. App. 27–28. Like Terrance's sentence, Brandon's sentence gave him no meaningful opportunity to demonstrate rehabilitation and maturity and thereby obtain release. And like in Terrance's case, Brandon's sentencing judge determined that he was incorrigible and that he "should never be released from the penitentiary." *Id.* at 7. The only difference between Brandon and Terrance is that Brandon's sentence was *functionally*, not *formally*, a life without parole sentence. The trial court sentenced Brandon on multiple nonhomicide counts, running the sentences consecutively to ensure that he would have no possibility for release until after 77 years—at age 92, "undoubtedly" past his life expectancy. *Id.* at 23. Correctly recognizing this as a distinction without a difference, the Ohio Supreme Court held that

Brandon's sentence denies him the "meaningful chance to demonstrate rehabilitation and obtain release" that *Graham* requires. *Id.* at 26, 29.

Still, the State of Ohio petitions for certiorari seeking to overturn the judgment below.[1] The State raises three questions presented, but none is worthy of this Court's review.

First, the State argues that *Graham* applies only to juveniles who receive a single "life without parole" sentence, and does not apply to consecutive, aggregate term-of-years sentences that are the functional equivalent. Despite the State's efforts to demonstrate a split, there is instead broad consensus among state and federal courts that *Graham* is not so limited. That is for good reason: *Graham* would have been an inconsequential decision if states could easily evade its requirements by imposing a lifetime of incarceration through consecutive sentencing.

Second, the State asks the Court to define the specific contours of what constitutes a "meaningful opportunity" for release. But out of respect for state courts and legislatures, *Graham* left the details of its "means and mechanisms for compliance" for the states to determine in the first instance. 560 U.S. at 75. And there is no reason now to think that the states cannot carry out this charge. At any rate, this case would be a poor vehicle for the resolution of this issue. Here, the Ohio Supreme Court did not need to address what constitutes a "meaningful opportunity" for release because there was no dispute that Brandon's sentence provided no such opportunity.

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[1] Though the petitioner is the State of Ohio, the petition was filed only by the Mahoning County Prosecutor's Office. In contrast with prior cases filed on behalf of the State of Ohio in this Court, neither the Attorney General of Ohio nor the State Solicitor General joined in this petition. *See, e.g.*, *Ohio v. Clark*, 135 S. Ct. 2173 (2015).

Finally, the State seeks review on a question—*Graham*'s retroactivity—that the Court has already settled. The State does not even suggest that there is a split on this question. And in fact, the Court made clear that *Graham*'s rule is substantive and thus retroactive. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016); *accord Teague v. Lane*, 489 U.S. 288, 307–08 (1989).

STATEMENT OF THE CASE

1. Brandon is serving a 112-year sentence for nonhomicide offenses he committed when he was only 15 years old. He has no possibility for release until he serves at least 77 years (until age 92)—well beyond his life expectancy. Pet. App. 13. On October 2, 2002, a jury found Brandon guilty of twelve counts: three counts of aggravated robbery, three counts of rape, three counts of complicity to commit rape, one count of kidnapping, one count of conspiracy to robbery, and one count of aggravated menacing. *Id.* at 5–6. The trial judge sentenced Brandon to the maximum term for each count, running all but the menacing count consecutively. *Id.* at 6.

During sentencing, the trial judge rejected the notion that Brandon should be treated differently because he was a juvenile. Instead, the judge stated that Brandon and his codefendants "are adults," and are "to be considered and dealt with as adults." The judge concluded that Brandon, at age 15, "[could not] be rehabilitated, that it would be a waste of time and money and common sense to even give it a try." *Id.* at 6. So he made sure to give Brandon what amounts to a life sentence. Indeed, the trial judge made clear on the record that this was his goal, telling Brandon: "I want to make sure that you never get out of the penitentiary." *Id.*

2. After Brandon's direct appeal concluded, this Court decided *Graham v. Florida*, holding that the Eighth Amendment forbids sentences that deny a juvenile defendant "any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law." 560 U.S. at 79.

The same day the Court handed down that decision, Brandon filed a pro se notice of appeal challenging his 112-year sentence as a violation of the Eighth Amendment. Pet. App. 9. The Court of Appeals refused to consider the merits of Brandon's claim. *Id.* at 9–10. But less than a month after gaining new representation, Brandon filed a motion for delayed reconsideration. The appellate court denied his motion in a split decision, concluding that *Graham* was "based specifically on life sentences without the possibility of parole," and that Brandon was given only a "de facto" life sentence. *Id.* at 10–11, 168–69.

3. The Ohio Supreme Court reversed. While acknowledging that the facts of Brandon's case "do not engender a sense of sympathy," the Ohio Supreme Court nonetheless held that Brandon's 112-year aggregate sentence for nonhomicide crimes committed as a juvenile violated the Eighth Amendment. *Id.* at 3, 46. The court reasoned that, "pursuant to *Graham*, a term-of-years prison sentence that exceeds a defendant's life expectancy violates the Eighth Amendment to the United States Constitution when it is imposed on a juvenile nonhomicide offender." *Id.* at 2. That principle applied equally to Brandon's aggregate term-of-years sentence because, as the court found, there is "no significant difference" between Brandon's 112-year "de facto" life sentence and an officially designated "life without parole sentence." *Id.* at 26.

In applying *Graham* to Brandon's sentence, the Ohio Supreme Court first emphasized that "*Graham* was not barring a terminology—'life without parole'—but rather a punishment that removes a juvenile from society without a meaningful chance to demonstrate rehabilitation and obtain release." *Id.* Because Brandon's sentence denies any opportunity for release until he is 92 years old, it has "the same mathematical reality" as a life without parole sentence. *Id.* at 23. So the court asked: "Could a court that imposed an unconstitutional life-without-parole sentence on a juvenile offender correct Eighth Amendment deficiencies upon remand by resentencing the defendant to a term-of-years sentence when parole would be unavailable until after the natural life expectancy of the defendant?" The answer: "Certainly not." *Id.* at 26–27.

Next, the Ohio Supreme Court rejected the State's argument that *Graham* does not apply to a term-of-years sentence that is the product of multiple separate counts or offenses. *Id.* at 29–33. "The number of offenses committed," the court explained, "cannot overshadow the fact that it is a child who committed them." *Id.* at 32–33. Indeed, the Ohio Supreme Court properly recognized that the juvenile in *Graham* committed multiple nonhomicide crimes. Yet, "[i]n full recognition" of "what the trial court described as an 'escalating pattern of criminal conduct,'" the Supreme Court still concluded that "'it does not follow that he would be a risk to society for the rest of his life.'" *Id.* at 30 (quoting *Graham*, 560 U.S. at 73). Instead, "[t]he nature or number of the crimes he committed was less important than who he was at the time he committed them: a juvenile whose age, coupled with his commission of nonhomicide crimes, left him with 'limited moral culpability' such that he could not be condemned at the outset to a lifetime of

imprisonment without any hope for release." *Id.* at 30–31 (quoting *Graham*, 560 U.S. at 74).

The Ohio Supreme Court further reasoned that its "holding is consistent with those of other high courts," which have overwhelmingly recognized that *Graham* applies to lifelong consecutive aggregate sentences like Brandon's. *Id.* at 33–41.

Justice Sharon Kennedy's dissent opined that *Graham* applied strictly to formal life-without-parole sentences, though she recognized that *Graham* "did not decide" whether aggregate consecutive sentences for nonhomicide offenses fell within its scope. *Id.* at 72–73. And several justices dissented on state-law procedural grounds. *Id.* at 88.

REASONS FOR DENYING THE PETITION

I. There is broad consensus in the lower courts that *Graham*'s prohibition on sentencing juvenile nonhomicide offenders to "life behind bars" applies to lengthy aggregate sentences like Brandon's.

The Ohio Supreme Court's decision both follows the widespread consensus among lower courts and faithfully reads *Graham*, leaving no basis for granting certiorari. Despite the petition's best efforts to conjure up a split (at 17–27), a thorough review of both state and federal cases throughout the country reveals broad agreement that *Graham* applies to functional life-without-parole sentences composed of multiple consecutive terms. Such consensus is unsurprising. *Graham* recognized a substantive limit on punishment for a particular class of offenders—not a formal rule about how sentences must be labeled or structured in order to pass constitutional muster. As *Graham* recognized, the unique characteristics of youth forbid sentencing any juvenile

nonhomicide offender to "die in prison without any meaningful opportunity to obtain release." 560 U.S. at 79.

A. There is widespread agreement among lower courts.

There is no significant split in authority meriting this Court's review. The petition only makes it appear otherwise by ignoring or mischaracterizing key cases.

1. The State claims that only two state supreme court cases align with the decision here. Pet. 25–27 (citing California and Iowa). But in fact *nine* other state supreme courts have agreed with the Ohio Supreme Court's understanding of *Graham*.

With respect to juvenile nonhomicide offenders, the New Jersey, Florida, Nevada, and California Supreme Courts have each rejected the notion that *Graham* applies only to a single sentence formally labeled "life without parole." Like the Ohio Supreme Court, these courts have held that a juvenile who does not kill cannot be sentenced to the functional equivalent of life without parole using aggregate consecutive terms. The Supreme Court of Florida, for example, held that a juvenile nonhomicide offender's "aggregate sentence, which totals ninety years and requires him to be imprisoned until he is at least nearly ninety-five years old . . . is unconstitutional under *Graham*." *Henry v. State*, 175 So. 3d 675, 679–80 (Fla. 2015), *cert. denied*, 136 S. Ct. 1455 (2016). This Court, it explained, "had no intention of limiting its new categorical rule to sentences denominated under the exclusive term of 'life in prison.'" *Id.* at 680. Irrespective of the "specific sentence that a juvenile nonhomicide offender receives," he must be afforded "a meaningful opportunity for early release based on a demonstration of maturity and rehabilitation." *Id.*

Similarly, the Nevada Supreme Court explained that limiting *Graham* to "life without parole" sentences (as the State urges) would "undermine the Court's goal of 'prohibit[ing] States from making the judgment at the outset that [juvenile nonhomicide] offenders never will be fit to reenter society.'" *State v. Boston*, 363 P.3d 453, 457 (Nev. 2015), *as modified* (Jan. 6, 2016) (invalidating an aggregate sentence requiring 100-years imprisonment for a juvenile nonhomicide offender). Accordingly, as the New Jersey Supreme Court held, "The proper focus belongs on the amount of real time a juvenile will spend in jail and not on the formal label attached to his sentence." *State v. Zuber*, 152 A.3d 197, 201, 212 (N.J. 2017) (holding that *Graham* applies with "equal strength" to an aggregate consecutive sentence requiring 55-years imprisonment before parole); *accord People v. Caballero*, 282 P.3d 291, 294 (Cal. 2012) (invalidating an aggregate sentence requiring 110-years imprisonment for a juvenile convicted of multiple counts of attempted murder because *Graham* applies "regardless of . . . how a sentencing court structures the life without parole sentence").

Five state supreme courts—Washington, Illinois, Connecticut, Wyoming, and Iowa—have likewise held, in the context of juvenile *homicide* defendants, that consecutive term-of-years sentences that are the functional equivalent of life without parole should be treated like sentences formally labeled "life without parole." Following *Graham*, this Court held in *Miller v. Alabama* that juveniles cannot be given life-without-parole sentences even for homicide offenses, unless the trial court, in exercising its discretion, considers age and other mitigating factors. 132 S. Ct. 2455, 2474–75 (2012). And, as the State concedes, discerning what counts as a "life without parole" sentence under *Miller*

involves an analysis identical to that in *Graham*. *See* Pet. 26 (citing cases regarding "life without parole" sentences that trigger protections for juvenile homicide offenders).

As the Washington Supreme Court explained: "Whether that sentence is for a single crime or an aggregated sentence for multiple crimes," it is "undisputed that [the defendant] was in fact sentenced to die in prison for homicide offenses he committed as a juvenile." *State v. Ramos*, 387 P.3d 650, 660–61 (Wash. 2017), *as amended* (Feb. 22, 2017) (concluding that *Miller* applies to an 85-year aggregate sentence); *see also People v. Reyes*, 63 N.E.3d 884 (Ill. 2016) (holding that consecutive mandatory minimum sentences requiring 89 years without parole eligibility violated *Miller*); *State v. Riley*, 110 A.3d 1205 (Conn. 2015), *cert denied*, 136 S. Ct. 1361 (2016) (concluding that *Miller* applies to an aggregate term of 100 years); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014) (holding that an aggregate term with 45-years parole ineligibility is subject to *Miller*'s protections); *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013)[2] (holding that an aggregate term of 75 years with 52.5 years before parole eligibility "trigger[s] *Miller*-type protections").[3]

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[2] The Iowa Supreme Court relied on the state constitution in *State v. Null*, 836 N.W.2d 41 (Iowa 2013), but, as the petition acknowledges (at 26–27), its analysis is based on the Supreme Court's decisions in *Graham* and *Miller* and is consistent with the Ohio Supreme Court's analysis here.

[3] Because *Miller* held only that mandatory life sentences for juvenile homicide offenders violate the Eighth Amendment, the State cannot rely on cases that allow discretionary life-equivalent sentences for juvenile homicide offenders to suggest a split. *See, e.g., In re Harrell*, No. 16-1048, 2016 WL 4708184, at *2 (6th Cir. Sept. 8, 2016) (aggregate 60-year sentence that "was not mandatory" does not violate *Miller*); *State v. Ali*, No. A16-0554, 2017 WL 2152730, at *2 (Minn. May 17, 2017) (aggregate sentence that allowed for release after 90 years, imposed in judge's discretion after judge considered defendant's age, did not violate *Miller*).

2. Federal court decisions only serve to reinforce the state consensus. Although the State recognizes (at 19) that the Ninth Circuit is in accord with the Ohio Supreme Court, it omits that the Seventh and Tenth Circuits have likewise held that *Graham* and *Miller* apply straightforwardly to aggregate term-of-years sentences that are the functional equivalent of life without parole.

The Ninth Circuit recognized that *Graham* "drew only one line" "in crafting its categorical bar"—it "distinguished between homicide and nonhomicide crimes." *Moore v. Biter*, 725 F.3d 1184, 1192 (9th Cir. 2013). Thus, a juvenile sentenced to 24 counts for "sexually victimizing four separate women on four occasions during a five-week period" could not receive an aggregate sentence so long that it denied "the chance to return to society." *Id.* at 1186, 1192 (rejecting a 254-year aggregate sentence that denied parole eligibility before 127 years).

Both the Tenth and Seventh Circuits echo that reasoning. In *Budder v. Addison*, the Tenth Circuit recognized that "[a]t no point did the Court draw any distinctions with regard to the severity or number of nonhomicide crimes a defendant had committed or indicate that anything short of homicide would rise to the level of moral culpability that could justify a sentence of life without parole for a juvenile offender." 851 F.3d 1047, 1057 (10th Cir. 2017). It therefore concluded that *Graham* prohibits an aggregate sentence of 131 years before parole eligibility. *Id.* at 1060–61; *see also McKinley v. Butler*, 809 F.3d 908, 911 (7th Cir. 2016) (applying *Miller* to two consecutive 50-year terms).[4]

[4] A number of federal district courts agree as well. *See Thomas v. Pennsylvania*, No. 10-cv-4537, 2012 WL 6678686, at *2 (E.D. Pa. Dec. 21, 2012) (finding a juvenile sentence based on separate counts for rape, indecent assault, armed robbery, and

Just like the Ohio Supreme Court, then, the Seventh, Ninth, and Tenth Circuits have all recognized that *Graham*'s "holding applies, not just to the factual circumstances of Graham's case, but to all juvenile offenders who did not commit homicide, and it prohibits, not just the exact sentence Graham received, but all sentences that would deny such offenders a realistic opportunity to obtain release." *Budder*, 851 F.3d at 1053.

3. The State attempts to show widespread disagreement among lower courts, but this effort is unavailing because the cases it cites are inapposite.

The State first points to several cases (at 17, 21–22) that found *Graham* inapplicable where a term-of-years sentence ended *before* a defendant was likely to die. *See, e.g.*, *United States v. Walton*, 537 F. App'x 430, 437 (5th Cir. 2013), *cert. denied* 134 S. Ct. 712 (2013) (not "plain error" for district court to deny a juvenile's unpreserved claim that a 40-year sentence was unconstitutional); *Adams v. State*, 707 S.E.2d 359, 365 (Ga. 2011) (25-year sentence did not amount to "life without parole" sentence categorically barred by *Graham*).

The Virginia Supreme Court's decision in *Vasquez v. Commonwealth* is no different. 781 S.E.2d 920 (Va. 2016), *cert. denied*, 137 S. Ct. 568 (2016). There, although the majority concluded that *Graham* provides relief only for juveniles "convicted of a single crime accompanied by a life-without-parole sentence," the defendant had an opportunity for release before his life expectancy. *Id.* at 926. As the concurrence also

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burglary unconstitutional under *Graham* because the offender would not be eligible for parole until age 83, an "age more than a decade beyond his life expectancy"); *United States v. Mathurin*, No. 09–21075–Cr., 2011 WL 2580775, at *3 (S.D. Fla. June 29, 2011) (holding a portion of the Hobbs Act that requires consecutive terms of imprisonment unconstitutional as applied to a juvenile because resulting 307-year sentence violated *Graham*).

pointed out, Virginia's conditional release statute already provides an opportunity for all juvenile nonhomicide offenders to seek parole before they reach their life expectancy. *Id.* at 931 (Mims, J.). Indeed, the Virginia Supreme Court previously concluded that Virginia's statute provided the "meaningful opportunity" for release that *Graham* requires, "preclud[ing]" reversal in *Vasquez*. *Id.* (citing *Angel v. Commonwealth*, 704 S.E.2d 386, 402 (Va. 2011)); *see also Lucero v. People*, __ P.3d__, No. 13SC624, 2017 WL 2223922, at *5 (Colo. May 22, 2017) (distinguishing the defendant's sentence because "Colorado has a parole system, and the parties agree that Lucero will be eligible for parole when he is fifty-seven"); *id.* at *11 (Gabriel, J.) (concurring in the judgment because the juvenile nonhomicide offender could seek parole before his life expectancy expires and thus "did not receive a de facto" life without parole sentence). Because these defendants all had a meaningful opportunity for release within their life expectancy, their sentences are distinguishable from Brandon's.[5]

The State next relies on federal habeas cases to support its contention that there is a "clear split" among the circuits. Pet. 20. But these cases arise under the demanding AEDPA standard, and stand only for the proposition that a state court's decision was not contrary to "clearly established" federal law. For example, the Sixth Circuit, upon which the State extensively relies (at 17–19), held only that *Graham* did not "clearly establish"

[5] The petitioners' reliance on state intermediate appellate courts is similarly unavailing. The Arizona appellate court considered a consecutive aggregate sentence that included crimes committed *after* the juvenile turned 18-years-old. *See State v. Kasic*, 265 P.3d 410 (Ariz. Ct. App. 2011). And the Tennessee intermediate appellate court reduced a juvenile homicide offender's sentence from 225 years to 50 years so that it, among other things, "bears some relationship to his potential for rehabilitation." *State v. Merritt*, No. M2012-00829-CCA-R3CD, 2013 WL 6505145, at *7 (Tenn. Crim. App. Dec. 10, 2013).

for federal habeas purposes that consecutive, fixed-term sentences for juveniles who have been convicted on multiple nonhomicide counts are unconstitutional when they amount to the practical equivalent of life without parole. *Bunch v. Smith*, 685 F.3d 546, 547 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1996 (2013). But the Sixth Circuit itself acknowledged that a court "on direct review" could reach the opposite conclusion. *Id.* at 552; *see also Starks v. Easterling*, 659 F. App'x 277, 278–80 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 819 (2017) (recognizing that the Supreme Court would likely hold that "fixed-term sentences for juvenile offenders that are the functional equivalent of life without parole are unconstitutional," but denying habeas for a juvenile with a 60-year sentence for felony murder and robbery). And, as the Ohio Supreme Court explained, "in federal habeas review, reasonable, good-faith interpretations of federal constitutional precedent by state courts will stand even if subsequent federal constitutional decisions render them incorrect." Pet. App. 54 (O'Connor, C.J., concurring).

Of all the State's cases, the only one left standing is *State v. Brown*, 118 So.3d 332, 335 (La. 2013) (holding that *Graham* does not apply to a "juvenile offender who committed multiple offenses resulting in cumulative sentences matching or exceeding his life expectancy without the opportunity [for] early release"). *Brown* is concededly inconsistent with the judgment below. But there is no good reason to think that this Court's review is needed, as the one outlier, Louisiana, could change course, or its legislature could moot the issue.

Far from deepening a conflict, the Ohio Supreme Court joined the broad consensus among state and federal courts that the Eighth Amendment prohibits sentencing all

juvenile nonhomcide offenders to "die in prison," whether they receive one "life without parole" sentence or a consecutive term-of-years sentence that is the functional equivalent of life without parole.

B. The Ohio Supreme Court properly held that Brandon's 112-year sentence violates the Eighth Amendment.

This Court should also deny certiorari because there is no basis to disturb the Ohio Supreme Court's decision. Adhering closely to the language and reasoning of *Graham*, the Ohio Supreme Court correctly determined that Brandon—a juvenile nonhomicide offender—cannot be sentenced to "life behind bars" irrespective of how his sentence is formally labeled or structured. *Graham*, 560 U.S. at 82; Pet. App. 26. While the State does not have to guarantee that Brandon will ever be released, his sentence at a minimum must afford him "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. The State's formalistic interpretation that *Graham* applies only to single "life without parole" sentences would render *Graham* meaningless.

1. *Graham*'s language is plain and categorical: The decision ensures "*all* juvenile nonhomicide offenders a chance to demonstrate maturity and reform." 560 U.S. at 79 (emphasis added). And the decision was unequivocal: The State cannot at the outset sentence a juvenile to life in prison, but "must . . . give [juvenile nonhomicide offenders] some meaningful opportunity to obtain release." *Id.* at 75. To prevent states, judges, or juries from evading its holding, the Court set forth a categorical rule barring "a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes." *Id.* at 61, 69, 75–80. Whether a judge imposes a single "life without parole"

sentence or a consecutive term-of-years sentence that is so long it ensures the juvenile's death in prison, the result is the same—a juvenile nonhomicide offender is denied the "meaningful opportunity [for] release" that *Graham* requires. *Id.* As the Ohio Supreme Court recognized, *Graham*'s categorical rule cannot be evaded.

The State seeks to cabin *Graham* to a single "life without parole" sentence. Pet. 15–16. But that narrow reading would allow states to easily circumvent *Graham* by manipulating charging decisions and sentence structure. Imagine, for example, if in *Graham* the judge had exercised its discretion under Florida law and instead sentenced Terrance to 60 years for armed burglary (rather than "life" imprisonment) and 15 years for attempted armed robbery (as it did)—both without the possibility of parole and running consecutively. The State argues that this hypothetical aggregate 75-year sentence would have been constitutional, even though Terrance's life sentence was not.

But *Graham*'s reasoning was not so formalistic. Indeed, the Court expressly urged attention to functional realities, and not formal labels. As it explained, life without parole is a particularly troubling sentence for juveniles precisely because "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." 560 U.S. at 70; *see* Pet. App. 27 (Brandon's "period of incarceration likely would be among the longest ever served in Ohio."). Thus, "[a] 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Id.* The corollary of that proposition is that a 15-year-old sentenced to life without parole or to a 112-year aggregate sentence would serve a sentence different in "name only." "[S]tates

may not circumvent the strictures of the Constitution merely by altering the way they structure their charges or sentences." *Budder*, 851 F.3d at 1058.

Accordingly, the proper test looks to practical realities, not labels. "Just as [states] may not sentence juvenile nonhomicide offenders to 100 years instead of 'life,' they may not take a single offense and slice it into multiple sub offenses in order to avoid *Graham*'s rule that juvenile offenders who do not commit homicide may not be sentenced to life without the possibility of parole." *Budder*, 851 F.3d at 1058. As the Iowa Supreme Court explained: "The unconstitutional imposition of a . . . life-without-parole sentence is not fixed by substituting it with a [long, term-of-years sentence] that is the practical equivalent of a life sentence without parole." *State v. Ragland*, 836 N.W.2d 107, 121 (Iowa 2013). Allowing the states "to have complete autonomy to define [sentences] as they wished" would risk rendering *Graham* "a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Hall v. Florida*, 134 S. Ct. 1986, 1999 (2014).

2. Moreover, *Graham*'s holding rests on three lines of reasoning—none of which hinges on whether a juvenile nonhomicide offender receives a single "life without parole" sentence or a consecutive aggregate sentence extending beyond the juvenile's life expectancy.

First, the Supreme Court reasoned that giving juveniles who "do not kill" the harshest penalty available to juveniles would defy basic notions of Eighth Amendment proportionality. *Graham*, 560 U.S. at 69. As this Court has repeatedly recognized, juveniles are inherently less culpable because of their physiological immaturity and

capacity for reform. *Id.* at 68; *see Roper v. Simmons*, 543 U.S. 551, 569–70 (2005). Additionally, a juvenile who "did not kill" is "categorically less deserving of the most serious forms of punishment." *Id.* at 69. This Court emphasized that even crimes like rape "'cannot be compared to murder in their severity and irrevocability.'" *Id.* (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008)). Accordingly, because of (1) their age, and (2) the fact that they did not commit murder, juvenile nonhomicide offenders have "twice diminished capacity," making a life-without-parole sentence unconstitutionally excessive. This fact remains true of all juvenile nonhomicide offenders, whether their bad acts are punished with one count carrying life without parole or many counts adding up to the same result.

Second, the Supreme Court explained that "none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification" for sentencing juvenile nonhomicide offenders to die in prison. *Id.* at 71 (internal citation omitted). Even for the juvenile in *Graham*, whose multiple crimes reflected an "escalating pattern of criminal conduct," the Supreme Court found that no penological theory adequately justified locking him away for life. *Id.* at 73–74. The same is true for juveniles who are sentenced for multiple nonhomicide offenses—none of the four justifications suffice.

"[R]etribution," the Court explained, "does not justify imposing the second most severe penalty on the less culpable juvenile" who did "not commit homicide." *Id.* at 71–72. That reasoning applies to juveniles who committed multiple nonhomicide offenses. The relevant line is drawn between those who kill and those who do not, not between those

who commit only one crime and those who commit more than one. Indeed, if the *number* of crimes of conviction were relevant, Terrance himself should have been denied relief, as he was convicted of two different crimes (burglary and attempted armed robbery), and the trial judge focused on his "escalating pattern" of criminal conduct. *Id.* at 58.

As for deterrence, "the same characteristics that render juveniles less culpable than adults"—their lack of maturity, impetuousness, and ill-considered actions—mean "they are less likely to take a possible punishment into consideration when making decisions." *Id.* at 72. This, too, is true regardless of how the juvenile's bad acts translate into individual or multiple crimes.

Similarly, the Court rejected the proposition that imprisoning a juvenile for the rest of his life could be justified based on an incapacitation rationale. That would require "the sentencer to make a judgment that the juvenile is incorrigible" and will forever pose a threat to society. *Id.* at 72–73. But the characteristics of juveniles make that judgment inherently suspect. Indeed, as this Court emphasized, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 73. It is therefore unconstitutional to decide "at the outset" that a juvenile may never mature and deserve release, whether that juvenile has been convicted of only one charge or several. *Id.*

Moreover, a de facto life sentence based on consecutive aggregate terms, just like a single "life without parole" sentence, "forswears altogether the rehabilitative ideal"—a

judgment that is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability. *Id.* at 74.

Third, *Graham*'s reasoning also rested on an analogy between a life without parole sentence for juveniles and the death penalty for adults. *Id.* at 69–70. Because this Court "viewed this ultimate penalty [of life without parole] for juveniles as akin to the death penalty," it adopted a categorical bar that "mirrored a proscription first established in the death penalty context—that the punishment cannot be imposed for any nonhomicide crimes against individuals." *Miller*, 132 S. Ct. at 2466–67 (citing *Kennedy*, 554 U.S. 407). And, as *Graham* recognized, an adult defendant convicted of nonhomicide crimes—no matter how many or how severe—cannot receive the death penalty. 560 U.S. at 60–61; *see Kennedy*, 554 U.S. at 407 (holding that "the death penalty should not be expanded to instances where the victim's life was not taken," including for the rape of an 8-year-old child); *Coker v. Georgia*, 433 U.S. 584, 599–600 (1977) (rejecting the argument that the Court's categorical bar against the death penalty for nonhomicide crimes "effective[ly]" prevented punishing a defendant, already serving life without parole, who escaped and committed another brutal rape, kidnapping, and armed robbery). Accordingly, just like an adult who commits multiple nonhomicide offenses cannot receive the harshest adult sentence (the death penalty), by analogy, a juvenile who commits multiple nonhomicide crimes cannot receive the harshest juvenile sentence (life with no possibility of release). *Graham*, 560 U.S. at 69–70; *Miller*, 132 S. Ct. at 2467.

Graham articulated a categorical rule about substantive outcomes, not formal labels. And what *Graham* required—a "meaningful opportunity for release" for juvenile

nonhomicide offenders—is exactly what the Ohio Supreme Court determined Brandon was entitled to here.

II. This Court does not need to determine in the first instance what constitutes a "meaningful opportunity for release," and this case is a poor vehicle for resolving that question in any event.

Having failed to meaningfully distinguish *Graham* on the merits, the State next argues that it is too "daunting" for trial courts to determine what constitutes a "meaningful opportunity for release." Pet. 27, 28. The State asks this Court to define the precise age at which a juvenile nonhomicide offender can seek release and the means for determining whether release is warranted. But this Court appropriately left those tasks to the states. And there is no reason to think they are having trouble with that responsibility. Even if the Court were to review a state's implementation of *Graham*, this would be the wrong case in which to do so because the Ohio Supreme Court did not yet define when and how it would provide juveniles like Brandon with that "meaningful opportunity."

A. This Court held that states should determine how to provide a "meaningful opportunity for release."

In seeking "guidance" on when to provide juveniles "a meaningful opportunity to obtain release," the State insists that certiorari is necessary so that this Court can select—among other details—the appropriate life expectancy chart and the life-expectancy factors (*e.g.*, race, socioeconomic status, health issues) that judges should employ in implementing *Graham*'s mandate. Pet. 29–30. But this Court need not draw constitutional lines with such precision. Rather, as *Graham* recognized, these are questions best left to the states in the first instance. 560 U.S. at 75. Indeed, few states at

this point have delineated the contours of what constitutes that "meaningful opportunity," so the petition does not even claim a developed split, making this Court's consideration premature.

1. The State disregards *Graham*'s direction that states should "in the first instance . . . explore the means and mechanisms for compliance" with its requirement that all juvenile nonhomicide offenders have some "meaningful opportunity to obtain release." *Graham*, 560 U.S. at 75. Allowing states to interpret *Graham*'s standard in the first instance comports with the basic principles of federalism and judicial restraint and leaves room for state expertise and autonomy. There is no reason to think that this Court must micromanage state courts by deciding, as the petition requests (at 29), whether trial judges must use a particular life expectancy table or account for the particulars of a defendant's family medical history. Indeed, in *Graham* itself this Court ruled that the sentence was unconstitutional, but felt no need to dictate exactly how many years could go by before Terrance received an opportunity for release, nor to instruct Florida on what that opportunity must look like to count as "meaningful." *See* 560 U.S. at 82.

Graham is hardly the first time the Court announced a new constitutional principle and left it to the states to interpret and implement it in the first instance. In *Atkins v. Virginia*, for example, the Court prohibited states from executing the "intellectually disabled" but did not define how to discern which defendants met this standard. 536 U.S. 304, 321 (2002). Instead, the Court sought the states' expertise in "developing appropriate ways to enforce the constitutional restriction." *Id.* at 317 (quoting *Ford v. Wainwright*,

477 U.S. 399, 405 (1986)). It gave states time to develop their own mechanisms to enforce *Atkins* through both judicial and legislative means.

To be sure, the Court has refused to allow states to evade *Atkins*, striking down a Florida law that set the bar too high for defendants to prove an intellectual disability, *Hall*, 134 S. Ct. at 1990, and more recently overturning Texas's too restrictive approach, *Moore v. Texas*, 137 S. Ct. 1039 (2017). But this Court stepped in only after allowing states the space to implement *Atkins* in the first instance, and only when it became clear that some states were manipulating the standards to evade the Eight Amendment's requirements. And while cautioning states against making a constitutional protection into a "nullity," the Court has continued to allow them to define enforcement that was within constitutional parameters. *Hall*, 134 S. Ct. at 1999. Here, there is no reason to think that states are relying on standards designed to evade *Graham*—and certainly that is not so in this case, given that the lower court found *Graham* applicable.

2. Even if this Court's guidance might be helpful at some point, further percolation would be necessary. Few states have addressed the contours of what constitutes a "meaningful opportunity for release." As in Ohio, a number of state supreme courts have left it to their trial courts or state legislatures to establish sentencing guidelines and mechanisms that comport with *Graham*. *See, e.g.*, *Null*, 836 N.W.2d at 67–68; *Caballero*, 282 P.3d at 295–96. For example, Ohio's sentencing commission has proposed a law to bring Ohio in compliance with *Graham* and also to reflect its best policy judgments about juvenile sentencing. *See* Ohio Sentencing Comm'n, Summary of Juvenile Life without Parole (JLWOP) Proposal (Nov. 23, 2015), available at http://bit.ly/2qhgbPB. Similarly, a

concurring opinion in the Ohio Supreme Court decision below suggested how *Graham* could be implemented consistently with Ohio's existing statute governing judicial release. *Id.* at 67. While the State cites emerging state laws regarding juvenile sentencing as raising a problem of inconsistency (at 30–31), state legislation instead highlights the promise of our federalist system. And rather than cut short this healthy experimentation, this Court should—consistent with *Graham*—permit states to develop their own means of complying with the Eighth Amendment.

3. Nor is there merit to the State's argument (at 27, 31–32) that asking trial courts to determine when to provide juveniles a "meaningful opportunity to obtain release" improperly requires a case-by-case approach. Instead, the Court prohibited a case-by-case proportionality approach for discerning *which* juvenile nonhomicide offenders could be locked up for the rest of their lives; it announced a uniform rule that *no* juvenile nonhomicide offenders could be subjected to that sentence.

The Ohio Supreme Court recognized as much, explaining that this Court "specifically rejected" a fact-specific inquiry that would have required courts "'to take the offender's age into consideration as part of a case-specific gross disproportionality inquiry, weighing it against the seriousness of the crime.'" Pet. App. 31 (quoting *Graham*, 560 U.S. at 77). Instead, this Court drew a "clear line" requiring that all "juvenile nonhomicide offenders" must be given a realistic chance of release. *Graham*, 560 U.S. at 74. "[N]ot only was a categorical rule appropriate, it was 'necessary,'" because giving courts the leeway to choose which few youth were indeed irreparably depraved would "pose too great a risk that some juveniles would receive life without parole sentences

'despite insufficient culpability.'" *Budder*, 851 F.3d at 1058 (quoting *Graham*, 560 U.S. at 78). Allowing for "discretionary, subjective judgment[s]" creates an "'unacceptable likelihood . . . that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course.'" *Graham*, 560 U.S. at 77–78 (quoting *Roper*, 543 U.S. at 573).

But this categorical approach requiring that all juvenile nonhomicide offenders, including Brandon, have a "chance to demonstrate maturity and reform," *id.* at 79, does not foreclose a trial court's role in determining whether a defendant's sentence actually provides that "meaningful opportunity." Contrary to the State's argument, that is what Ohio must do for Brandon.

B. This case is an inappropriate vehicle for reviewing what constitutes a "meaningful opportunity for release."

Even assuming this Court thought it necessary to craft a bright-line rule about what constitutes a "meaningful opportunity" for release, this case is the wrong vehicle in which to undertake that effort. The Ohio Supreme Court, quite simply, drew no line for this Court to review. Because Brandon's 112-year sentence denies him any opportunity for release until he is 92, there is "no dispute" that it exceeds his life expectancy. Pet. App. 13. Indeed, the trial judge stated his intention that Brandon "should never be released from the penitentiary." *Id.* at 7. Thus, the Ohio Supreme Court did not need to—and did not—decide the precise age (or life expectancy chart or demographic factors) governing when a juvenile nonhomicide offender must be given a "meaningful opportunity for release." Under any measure, Brandon's sentence is unconstitutional. The Court, then, would have little to work with on this issue and would essentially have to draw on a blank

slate. In that sense, the Court would find its task no simpler than it would have been in *Graham* itself. Far better would be a case in which the court below had actually specified the parameters of a "meaningful opportunity" for release.

Making the vehicle worse, there is no record here upon which to evaluate this question. Because of unique features of Ohio post-conviction proceedings and the case's "lengthy and knotty" procedural history, Pet. App. 6, Brandon sought constitutional review of his sentence at the appellate level. Therefore, he never developed any factual record at the trial level to argue when he is entitled to a "meaningful opportunity for release." There is no life expectancy chart admitted in the record, no facts about Brandon's health, nor any other evidence of demographic factors that the State claims may bear on this inquiry. As a result, the Ohio Supreme Court recognized that it would be premature for it to establish a specific age or procedure to dictate when Brandon must have a chance to demonstrate that he has rehabilitated. That applies all the more to review in this Court.

Moreover, this Court could also address that question in a case that does not raise the entirely distinct issue of whether *Graham* applies to a lengthy term-of-years sentence or to an aggregate consecutive sentence. If the Court were determined to address the "meaningful opportunity" issue, it would be simpler to do so in a case involving a traditional life-without-parole sentence.

III. There is no room for reasonable disagreement about whether *Graham* applies retroactively.

Finally, there is no merit to the State's request for this Court to determine whether *Graham* applies retroactively. No split exists on this question, and the State

makes no suggestion to the contrary. In fact, the State presents no argument whatsoever on the retroactivity question in its petition (having similarly failed to do so before the Ohio Supreme Court). And Ohio already conceded this point in a prior case. *Goins v. Smith*, No. 4:09-cv-1551, 2012 WL 3023306, at *5 (N.D. Ohio July 24, 2012) ("Goins and [the Ohio warden] agree" that *Graham* "applies retroactively.").

Nor would any argument against *Graham*'s retroactive application withstand scrutiny. "The Constitution . . . requires substantive rules to have retroactive effect regardless of when a conviction became final." *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016); *accord Teague v. Lane*, 489 U.S. 288, 307–08 (1989). And *Graham*'s rule is a substantive one because it prohibited a particular punishment for a class of individuals based on their status. "[N]o circumstances call more for the invocation of a rule of complete retroactivity." *Montgomery*, 136 S. Ct. at 730 (citing *United States v. United States Coin & Currency*, 401 U.S. 715, 724 (1971)).

Lest there be any doubt, this Court implicitly confirmed last term in *Montgomery v. Louisiana* that *Graham* applies retroactively.[6] 136 S. Ct. at 736. In holding that *Miller* created a substantive rule and applies retroactively, the Court stated that "*Miller* is no less substantive than are *Roper* and *Graham*." *Id.* at 734. This Court need not take this case in order to say again what it already has assumed.

[6] Even prior to *Montgomery*, there was no circuit court disagreement on whether *Graham* applied retroactively. *See Biter*, 725 F.3d at 1190 ("Thus, we hold that *Graham* is retroactive under *Teague*."); *In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013) (finding a sufficient showing that "*Graham* has been made retroactively applicable by the Supreme Court"); *In re Sparks*, 657 F.3d 258, 260 (5th Cir. 2011) (acknowledging that *Graham* applies retroactively).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 26, 2017