No. 15-276

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

BRYCE M. DULL,

Respondent.

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

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Bryce Dull was arrested for engaging in sexual intercourse with a girl he was dating when she was 13 and he was 17. The charge was based on the girl's age and did not involve any allegation of forcible or otherwise nonconsensual conduct. Dull subsequently pleaded guilty to the reduced charge of aggravated indecent liberties with a child, which also does not require proof of forcible or nonconsensual acts.

Dull received a sentence of 45 month' imprisonment—half the standard of 94 months—because, among other reasons, the trial court found that "Dull's mental impairment caused him to lack substantial judgment when the crime was committed." Pet. App. 7.

The trial court was required by Kansas law to subject Dull to mandatory lifetime postrelease supervision, even though the offense was committed when Dull was a juvenile and did not involve force or coercion. The lifetime supervision requirements include notifying employers of his offender status, a ban on ownership or possession of a firearm, travel restrictions, and consent to search. And Kansas law provides no mechanism for removal of these restrictions—they are imposed for life.

Only one other State (Iowa) mandates a lifetime supervision requirement for juveniles who commit such offenses. Other States exclude offenses committed by juveniles, permit sentencing courts to exercise discretion whether or not to impose this sanction, restrict lifetime supervision to more serious offenses, or provide a procedure for lifting the supervision—or have adopted a combination of these limitations.

Lifetime supervision—which this Court has held to be punishment under the Eighth Amendment—seriously constrains the liberty of juvenile offenders. The court below held that imposing this severe, lifetime punishment on juvenile offenders who commit an indecent liberties offense, as Dull did in this case, violates the Eighth Amendment.

That decision does not warrant this Court's review. To begin with, there is no disagreement in the lower courts over whether lifetime postrelease supervision for juvenile offenders is unconstitutional. Petitioner does not identify any case rejecting a constitutional claim in the circumstances presented here, and we are not aware of any such ruling.

Moreover, the issue is quite unlikely to recur with any frequency. Just one other State imposes mandatory lifetime postrelease supervision on juvenile offenders convicted of offenses like the one here.

The decision below is also consistent with this Court's decision in *Graham* v. *Florida*, 560 U.S. 48 (2010), given the consensus against mandatory lifetime postrelease supervision for juvenile offenders who commit an indecent liberties offense, the disproportionality of the sanction, and the absence of any penological justification for its imposition.

Finally—although the court below did not reach the issue—mandating lifetime supervision for juveniles also runs afoul of the individualized sentencing requirement applied by this Court in *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012).

Review by this Court is not warranted.

STATEMENT

1. Bryce Dull was seventeen years old in 2009 and was dating a thirteen-year-old girl. Sent. Tr. 26, 30. Dull was arrested and charged with statutory rape for engaging in "sexual intercourse with a child who is under 14 years of age." Kan. Stat. § 22-5503(a)(3). See also Pet. App. 6. Although Dull was a juvenile when the offense occurred, the court authorized his prosecution as an adult. Dull eventually pleaded guilty to the reduced charge of aggravated indecent liberties with a child, in violation of Kan. Stat. § 22-5506(b)(3), which requires proof of engaging in lewd acts with an individual under 14. Pet. App. 7.

At sentencing, Dull testified that he "learn[s] slower than normal people" and is enrolled "in special ed classes in school because [he] learn[s] slow." Sent Tr. 26. Dull's attorney described an evaluation conducted by a licensed counselor finding that Dull's behavior reflected "an immaturity in dealing with things." *Id.* at 11. His attorney stated that Dull was probably on a "13-year-old level in the way he relates to things." *Id.* at 14.

The court granted a downward durational departure of fifty percent on the sex offense—from the standard of 94 months' imprisonment to 45 months' imprisonment. Pet. App. 7.

The court granted the departure on two grounds. First, it acknowledged "Dull's mental impairment caused him to lack substantial judgment when the crime was committed." Pet. App. 7. Second, the court noted that neither the victim nor the victim's family participated in the court proceedings, and the nature of the relationship between Dull and the victim was

undisputed. Sent. Tr. 30. It concluded that the "degree of harm for the crime * * * [was] significantly less than is typical for such offense." *Ibid.*

In addition to the term of imprisonment, the court sentenced Dull to lifetime postrelease supervision by the Department of Corrections. Sent. Tr. 30. Lifetime postrelease supervision in Kansas subjects a defendant to a number of restrictions, including, but not limited to the following:

- **Employment**. The defendant must notify any employer of his adult felony convictions and status as an offender. Pet. App. 87.
- **Firearms**. The defendant may not own, possess or constructively possess, purchase, receive, sell or transport any firearms. *Id.* at 85.
- **Reporting, Travel, and Residence.** The defendant may not travel outside his assigned parole district or the State of Kansas without advance permission from his parole officer. *Ibid.*
- **Search.** The defendant is subject to search, without a warrant, and without cause, of his person, residence, and any other property by parole officers, authorized parole staff, and department of corrections enforcement, apprehension and investigation officers. *Id.* at 87-88.

The statute provides that these conditions apply for the rest of the defendant's life, without any opportunity for relief.[1]

2. Dull appealed to the Kansas Court of Appeals on the ground that the mandatory sentence of lifetime postrelease supervision violated the Eighth Amendment. That court affirmed by a divided vote, holding that this Court's decisions in *Graham* v. *Florida*, 560 U.S. 48 (2010), and *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012), did not apply and that Dull's sentence was not unconstitutional. Pet. App. 65-79.

Judge Pierron dissented. Pet. App. 80-82. He stated that "this case * * * appears to be a case of first impression not only in Kansas, but nationally." *Id.* at 80. Due to the severe and disproportionate consequences of the lifetime postrelease supervision, such as "[t]he real possibility of a lifetime [prison] sentence for the later commission of a minor felony," Judge Pierron would have held the sentence unconstitutional for juveniles such as Dull. *Id.* at 82. He observed that "even a previous murder does not carry the heavy penalty" of lifetime postrelease supervision in the State of Kansas. *Ibid.*

3. The Kansas Supreme Court unanimously reversed, holding that the mandatory lifetime postrelease supervision violated the Eighth Amendment in light of the nature of the conduct and the fact that Dull engaged in it while a juvenile. Pet.

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[1] Dull also pleaded guilty to a burglary and misdemeanor theft charge for offenses committed shortly after he turned 18. Pet. App. 6-7. The court sentenced Dull to 24 months' imprisonment for the burglary, concurrent with 12 months' imprisonment for the theft. *Id.* at 7.

App. 9-48. Applying the "two-prong analysis" of *Graham*, the Kansas Supreme Court (1) considered the "objective indicia of society's standards;" and (2) exercised its "own independent judgment" of the sentence's propriety under the Eighth Amendment. *Id.* at 21, 30.

First, the court below identified at most four other States (Colorado, Iowa, Nebraska, and Oklahoma) that mandate lifetime postrelease supervision for juveniles committing somewhat analogous offenses. Pet. App. 27, 29-30. It found that three States (Indiana, Montana, and Oregon) exempt juveniles from such penalties. *Id.* at 29. The Kansas Supreme Court found no national consensus in favor of such punishments for juveniles, observing that "application of adult mandatory sentencing statutes to juveniles skews the analysis" and noting the "changing landscape of juvenile sentencing in the wake of *Roper*, *Miller*, and *Graham*." *Id.* at 29-30.

Second, the Kansas court, applying this Court's precedent, exercised its own independent judgment regarding the application of mandatory lifetime postrelease supervision to juveniles such as Dull. It determined that "both United States Supreme Court and Kansas caselaw suggest that 17-year-old Dull had a diminished moral culpability." Pet. App. 33. Further, "[w]hile the postrelease conditions are not confinement per se, they do restrain one's freedom with significant restrictions and limitations." *Id.* at 39. The registration requirements and possibility of revocation of the postrelease supervision heightened the sentence's consequences, the court found, and "may result in further incarceration up to a lifetime sentence without the possibility of parole." *Id.* at 40. Finally, because "juveniles have a lower risk of recid-

ivism," no penological purpose is served by punishing minimally culpable juveniles. *Id.* at 47.

For those reasons, the court below held the mandatory lifetime postrelease supervision sentence unconstitutional in the factual circumstances of this case.

ARGUMENT

The petition should be denied for three reasons. *First*, there is no conflict in the lower courts over the question whether mandatory lifetime postrelease supervision for juvenile offenders violates the Eighth Amendment—indeed, petitioner does not argue that any such conflict exists. *Second*, this issue is unlikely to recur with any frequency, because only one State other than Kansas imposes mandatory postrelease supervision for offenses such as the one here when committed by a juvenile. *Third*, the decision below is consistent with this Court's rulings in *Graham* v. *Florida*, 560 U.S. 48 (2011), and *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012).

A. There Is No Conflict In The Lower Courts.

Petitioner does not even attempt to allege a conflict in the lower courts with respect to this question. Indeed, petitioner does not cite a single decision, other than the ruling below, that addresses the status under the Eighth Amendment of lifetime postrelease supervision for juveniles.

The rationale of the court below focused narrowly on "mandatory lifetime postrelease supervision * * * imposed on a juvenile who committed and was later convicted of aggravated indecent liberties with a child." Pet. App. 8. Each of the cases petitioner *does*

cite are fundamentally different because they involve either an adult offender or a different sentence.

For example, three of the cases cited by petitioner (Pet. 9, 15) involve offenses committed when the defendant was an *adult*. See *State* v. *Sallis*, 786 N.W.2d 508 (Ct. App. Iowa 2009) (offense committed as an adult); *State* v. *O'Dell*, 183 Wash.2d 680 (2015) (offense committed 10 days after 18th birthday); *State* v. *Hart*, 353 P.3d 253 (Wash. Ct. App. 2015) (offense committed as an adult). That fact is critical under *Graham* and *Miller*, as one of these courts emphasized. *Hart*, 353 P.3d at 258 (noting that the defendant "was not a juvenile" and that "*Graham* and *Miller* unmistakably rest on the differences between children and adults") (quoting *State* v. *Witherspoon*, 329 P.3d 888, 890 (Wash. 2014)).

Six of the cases petitioner cites involve challenges to terms of imprisonment, not to mandatory lifetime postrelease supervision. See *Bunch* v. *Smith*, 685 F.3d 546 (6th Cir. 2012) (challenging total sentence of 89 years for robbery, kidnapping and rape); *People* v. *Ellis*, 2015 WL 4760322 (Colo. Ct. App. 2015) (challenging total sentence of 72 years for first degree murder and second degree murder with use of a deadly weapon); *People v. Jordan*, 185 Cal. Rptr.3d 174 (Cal. Ct. App. 2015) (challenging sentence of fifty years to life for murder); *St. Val* v. *State*, 2015 WL 4636953 (Fla. Dist. Ct. App. 2015) (challenging 25-year mandatory minimum sentence for first-degree murder); *People* v. *Edwards*, 32 N.E.3d 116 (Ill. Ct. App. 2015) (challenging 76-year mandatory minimum combined sentence for first-degree murder and attempted murder).

Finally, one of the decisions denied a challenge to a lifetime sex registration requirement. See *State* v.

Reidenbach, 2015 WL 4448009 (Ohio 2015). But registration requirements, which merely require convicted sex offenders to self-report in various ways, differ significantly from the multiple, pervasive restrictions imposed by Kansas's lifetime postrelease supervision law. See page 13, *infra*.

There is accordingly no conflict among the lower courts regarding the question decided by the court below in this case.

B. The Question Here Regarding Mandatory Lifetime Postrelease Supervision For Offenses Committed By A Juvenile Is Unlikely To Recur Because Only One Other State Imposes The Penalty In These Circumstances.

The question addressed by the court below has very limited practical importance beyond Kansas because only one other State—Iowa—imposes mandatory, non-terminable lifetime supervision for juvenile offenders by statute. Iowa Code § 903B.1 (2015). The federal government and each of the other States' statutory schemes vary from Kansas's in one, or more, of three basic ways:

- first, by committing the decision whether to impose lifetime postrelease supervision on a juvenile offender to the discretion of the courts or an independent review board;
- second, by permitting termination of lifetime postrelease supervision through petition to a review board or a court; or
- third, by limiting lifetime postrelease supervision to more serious offenses.

Each of those three differences is critical to the substantive Eighth Amendment analysis; and the decision below therefore has little relevance to the permissibility of imposing lifetime supervision under those different statutory schemes.

The various state and federal sentencing schemes for juvenile offenders convicted of crimes similar to respondent's utilize complex—and different—statutory frameworks. Despite their varying design, each state and federal statutory scheme differs from that of Kansas (and Iowa) in one of these critical ways.

For example, at least four States (Colorado,New Jersey, Nevada, and Utah) allow parole boards or courts to terminate mandatory postrelease supervision. See Colo. Rev. Stat. § 18-1.3-1006(3) (2015); N.J. Stat. Ann. § 2C: 43-6.4(c) (West 2015); Nev. Rev. Stat. § 176.0931(3) (2015); Utah Code Ann. § 76-3-202(3)(a) (West 2015).

Five States (Arizona, Delaware, New Mexico, North Dakota, and Wisconsin) and the United States permit, but do not require, a sentence of lifetime postrelease supervision for this class of offense with the added possibility of elimination of supervision through post-conviction application. See 18 U.S.C. § 3583(e)(1), (k); Ariz. Rev. Stat. Ann. §§ 13-902(E), 923 (2015); Del. Code Ann. tit. 11, § 4333(d)(1) (2015); N.M. Stat. § 31-21-10.1 (2015); N.D. Cent. Code § 12.1-32-06.1(4); Wis. Stat. § 939.615 (2015). These systems thus have two levels of discretion at and after sentencing: (1) lifetime postrelease supervision is not mandatory; and (2) judges or parole boards can correct any long-term inequities.

Massachusetts had a similar scheme until 2014, when the Massachusetts Supreme Judicial Court ruled that it violated a state separation of powers doctrine. See *Commonwealth* v. *Cole*, 10 N.E.3d 1081, 1084 (Mass. 2014). Georgia's sentencing scheme for persons convicted "sexual offense," including sex acts with children under the age of 16, see Ga. Stat. § 16-6-4(a)(1), requires that a Sexual Offender Registration Review Board make an independent determination of the offender's dangerousness, and set the terms of his postrelease supervision. Ga. Stat. § 17-10-6.2(b), d; Ga. Stat. § 42-1-14(a)(2).

At least four States (Indiana, Montana, Oregon, and Washington) explicitly exempt juvenile offenders from mandatory postrelease supervision, even for more serious offenses. Ind. Code § 35-50-6-1(d) (2015); Mont. Code Ann. § 45-5-625(4)(a) (2015) (exempting offenders under 18 from mandatory postrelease supervision provision); Or. Rev. Stat. § 137.765(2)(a) (2015); Wash. Rev. Code § 9.94A.507(2) (2015).

The other States that allow or require lifetime postrelease supervision limit that sanction to offenses more serious than the one involved here. For example, two States do not permit such sentences for this class of offense and only allow, without requiring, lifetime postrelease supervision for more serious sex offenses, such as offenses deserving of lifetime incarceration. Idaho Code § 20-222(1) (2015) (limiting probation to the "maximum period for which the defendant might have been imprisoned," which, in Idaho, is 25 years even when a defendant in respondent's position is 18 or over at the time of the act, see Idaho Code § 18-1506(1), (5) (2015)); N.H.

Rev. Stat. Ann. §§ 632-A:4(II) (2015) (exempting from registration requirement any person found guilty of sexual contact with a person 13 or older when the age difference between them is four years or less).

Meanwhile, thirteen other States (Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, Oregon, Tennessee, Texas, Washington, West Virginia) mandate lifetime postrelease supervision, but only for more serious offenses than the one here. Those more serious offenses typically include crimes by prior sex offenders, crimes against victims younger than thirteen, and violent crimes, and typically exclude offenses that do not involve force, coercion, or trickery. See Ky. Rev. Stat. Ann. § 439.354(2) (West 2015) (limiting time on parole to the duration of the maximum prison sentence had the prisoner *not* been paroled); Ky. Rev. Stat. Ann. § 17.500(3)(b) (2015) (exempting conduct "which is criminal only because of the age of the victim" from the definition of a "criminal offense against a victim who is a minor" when the "perpetrator was under the age of eighteen" at the time of commission); La. Stat. Ann. § 15:561.2 (2015) (when victim is under age of thirteeen); Md. Code. Ann. Crim. Proc. § 11-723 (LexisNexis 2015) (when prior offender, sexually violent predator, or other more serious offense); Me. Stat. tit. 17-A, §§ 1231, 1252 (2015) (when victim was less than twelve years old); Minn. Stat. § 609.3455, Subd. 7 (2015) (when prior conviction or heinous element); Mo. Rev. Stat. §§ 217.735, 559.106 (2015) (when prior sex offender); Mont. Code Ann. § 46-23-216(1) (2015) (when lifetime incarceration was maximum term for which prisoner was sentenced); Neb. Rev. Stat. §§ 83-174.03, 29-4001.01 (2015) (when the victim is under the age of thirteen

years old; or when the victim is at least thirteen and, unlike here, does not consent); Neb. Rev. Stat. §§ 83-174.03, 28-319.01 (2015) (when victim is under twelve years old and offender is at least nineteen; and when victim is at least twelve years old and offender is at least twenty-five years old); Or. Rev. Stat. § 137.765(2) (2015) (when sexually violent offenders or 18 years of age or older); Tenn. Code Ann. § 39-13-524 (2015) (when rape or victim under thirteen years old); Tex. Gov't Code Ann. § 508.148 (West 2015) (when sentenced to lifetime incarceration); W. Va. Code § 62-12-26(a) (2015) (when sexually violent predator); Wash. Rev. Code § 9.94A.507(5) (2015) (when lifetime incarceration was maximum sentence). None of these States require mandatory lifetime postrelease supervision for a statutory sex offenses involving a thirteen-year-old girlfriend.

At least five of these States, moreover (Maine, Missouri, Tennessee, Texas, and West Virginia), allow termination of the postrelease supervision. See Me. Stat. tit. 17-A, §§ 1231(4), 1252 (2015); Mo. Rev. Stat. §§ 217.735(5), 559.106(4) (2015); Tenn. Code Ann. §§ 39-13-525 (2015); Tex. Gov't Code Ann. §§ 508.155(c), 1555 (West 2015); W. Va. Code § 62-12-26(a), (g) (2015).

In sum, the issue decided below is not likely to arise frequently because only one other State has adopted a sentencing regime that requires lifetime supervision for the offense to which Dull pleaded guilty and does not provide any mechanism for terminating supervision.

C. The Decision Below Is Correct.

The decision below is correct for two independent reasons. First, contrary to petitioner's assertions, the

decision below faithfully applied *Graham* v. *Florida* to the unique factual circumstances of this case, correctly concluding that mandatory lifetime postrelease supervision for a juvenile offender such as respondent violates the Eighth Amendment. Second, although the court below did not reach the issue, Kansas's mandatory lifetime supervision requirement for juveniles violates the individualized sentencing requirement applied in *Miller* v. *Alabama*.

1. Lifetime postrelease supervision imposes severe adverse consequences and plainly qualifies as a "punishment" subject to Eighth Amendment scrutiny.

United States v. *Weems*, 217 U.S. 349 (1910), held that a law imposing a fifteen year prison sentence and other "accessory penalties," including lifetime postrelease surveillance, on persons who falsified public documents violated the Eighth Amendment. And the Court has reaffirmed that conclusion on a number of occasions. *See, e.g.*, *Thompson* v. *Oklahoma*, 487 U.S. 815, 821 n.4 (1988); *Rummel* v. *Estelle*, 445 U.S. 263, 273-274 (1980).

Focusing on the harsh consequences of lifetime supervision, the *Weems* Court explained that a defendant subject to lifetime supervision goes from prison "to a perpetual limitation of his liberty." *Weems*, 217 U.S. at 366. The defendant "is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate." *Ibid.* That in part is because the supervised offender cannot "change his domicil without giving notice to the authority immediately in charge of his surveillance, and without permission in writing." *Ibid.* (internal quotation marks omitted).

Weems concluded that lifetime supervision was especially harsh because the punishment made it impossible for the offender to reintegrate into society. The offender "may not seek, even in other scenes and among other people, to retrieve his fall from rectitude." *Ibid.* As *Weems* explained, "hope is taken" from the offender because he is "subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty." *Ibid.*

Kansas's lifetime postrelease supervision punishment imposes many of the same burdens as the punishment in *Weems*. Postrelease supervision in Kansas carries over a dozen standard conditions. For the rest of their lives, juvenile offenders sentenced to lifetime postrelease supervision:

- Cannot travel out of their assigned probation district without a parole officer's permission;
- Cannot own firearms;
- Can at any time be subject to a search by parole officers without cause and without a warrant;
- Must pay restitution, all court costs and any fees associated with their supervision; and
- Cannot consume liquor, including beer or wine, without a parole officer's permission.

See Standard Conditions of Post-Release Supervision, Kan. Dep't of Corr., June 11, 2015, http://www.doc.ks.gov/prb/conditions. These conditions apply for the rest of the offender's life. Any violation at any point

during the offender's life can result in reincarceration.[2]

2. *Graham* v. *Florida* held that life sentences without possibility of parole for juvenile nonhomicide offenders are unconstitutional. 560 U.S. 48 (2010). The factors this Court found dispositive in *Graham* apply to mandatory lifetime postrelease supervision as well.

First, there are objective indicia of a broad consensus against mandatory lifetime postrelease supervision for offenders like Dull. Second, juveniles are less culpable than adults, but Kansas imposes a severe punishment on juveniles for a non-violent sex offense. Finally, the punishment does not serve legitimate penological goals.

First, "the enactments of legislatures that have addressed the question" provide "objective indicia of consensus" against mandatory lifetime supervision for juvenile offenders who have committed offenses like Dull's. *Roper* v. *Simmons*, 543 U.S. 551, 564 (2005).

As discussed above, only one other state, Iowa, mandates postrelease supervision for juveniles convicted of similar sex offenses and also does not provide a mechanism for releasing the offender from supervision. All of the other States either exempt juvenile offenders from mandatory postrelease supervision; or provide a procedure for terminating

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[2] These conditions make lifetime postrelease supervision a far more severe punishment than simple sex offender registration requirements, which merely impose reporting requirements on offenders. See *Frequently Asked Questions*, Kan. Bureau of Investigation, http://www.kbi.ks.gov/registeredoffender/FAQ.aspx.

supervision; or impose mandatory postrelease supervision only for more serious sex offenses—and, even then, some states explicitly exempt some juvenile offenders from mandatory postrelease supervision. See pages 10-12, *supra*.

There is thus an overwhelming consensus against applying mandatory lifetime supervision punishments to juveniles who have been convicted of offenses like Dull's. Forty-eight states decline to impose mandatory lifetime postrelease supervision without possibility of release from supervision for this class of offenders. That consensus is much stronger the one in *Roper*, where thirty states had rejected the juvenile death penalty, 543 U.S. at 564, or in *Graham*, where just thirteen jurisdictions prohibited life without parole for juvenile non-homicide offenders, 560 U.S. at 62.

Second, viewing the "culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question," confirms the unconstitutionality of the punishment imposed by Kansas. *Id.* at 67.

Roper, *Graham*, and *Miller* establish that juvenile offenders are less culpable than adults for three reasons. Juveniles are more likely to lack maturity and have an "underdeveloped sense of responsibility," resulting in "impetuous and ill-considered actions and decisions." *Johnson* v. *Texas*, 509 U.S. 350, 367 (1993). They "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and they have "less control, or less experience with control, over their own environment." *Roper*, 543 U.S. at 569. And, finally, "the character of a juvenile is not as well formed as that of an adult," and the juvenile's personality traits are

"more transitory." *Id.* at 570. For these reasons, "children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S. Ct. at 2464.

Because of the unique attributes of juveniles, offenses committed by juveniles are "not as morally reprehensible." *Thompson* v. *Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion). That is certainly true for "a juvenile offender who did not kill or intend to kill." *Graham*, 560 U.S. at 69. And it is particularly true for a non-violent sex offense like the one committed by Dull in this case—a 17-year-old, who engaged "lewd fondling or touching" with a 13-year-old girl who he was dating. See Kan. Stat. § 22-5506(3)(A); see page 3, *supra*. This was neither a violent offense nor as reprehensible an offense as considered in this Court's prior decisions. See, *e.g.*, *Miller*, 132 S. Ct. 2455 (murder conviction); *Graham*, 560 U.S. 48 (armed burglary conviction).

Petitioner errs in asserting that *Graham* extends only to punishments as severe as life sentences without parole. Pet. 11. This Court's observation that life without parole results in "a forfeiture that is irrevocable" and "deprives the convict of the most basic liberties without giving hope of restoration," 560 U.S. at 69-70, is also relevant to mandatory lifetime postrelease supervision. An offender sentenced to lifetime supervision "is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity." *Weems*, 217 U.S. at 366.

Offenders sentenced to lifetime postrelease supervision cannot move where they wish, nor can they act as they wish. For the rest of their lives, their liberty is constrained, and they have no chance for full

restoration of their rights. And lifetime postrelease supervision is harsher for juveniles than for adults because "a juvenile offender will on average serve more years and a greater percentage of his life" under supervision than an adult offender. *Graham*, 560 U.S. at 70.

The offender is "forever kept under the shadow of his crime" and "deprive[d] of essential liberty." *Weems*, 217 U.S. at 366. His "good behavior and character improvements are immaterial" to the length of his postrelease supervision, Pet. 11 (quoting *Graham*, 560 U.S. at 70), and he has no "meaningful opportunity to obtain release" from postrelease supervision, *Graham*, 560 U.S. at 75.

Third, none of the four main penological goals of sentencing—retribution, deterrence, incapacitation, and rehabilitation—justify mandatory lifetime supervision. Petitioner acknowledges that lifetime supervision for juveniles does not serve retributive aims, Pet. 14, a conclusion bolstered by this Court's recognition that the retributive rationale "is not as strong with a minor as with an adult," *Roper*, 543 U.S. at 571.

Nor, petitioner admits, does lifetime supervision serve the goal of incapacitation. Pet. 15. Likewise, the deterrence rationale for lifetime supervision of juvenile offenders is weak. Juveniles are less likely to engage in "the kind of cost-benefit analysis that attaches any weight" to the possibility of punishment. *Thompson*, 487 U.S. at 837.

The rehabilitation rationale also does not justify mandatory lifetime postrelease supervision. *Graham* explained that the rehabilitation rationale is compromised when the defendant loses "the right to

reenter the community." *Graham*, 560 U.S. at 74. Even though juvenile offenders sentenced to lifetime supervision are eventually released, they cannot "seek, even in other scenes and among other people, to retrieve [their] fall from rectitude." *Weems*, 217 U.S. at 366.

Supervision dramatically curtails the rights of offenders, preventing them from fully reintegrating into their communities. Because offenders cannot travel outside their probation districts without prior permission, they often cannot easily visit family and access familial support networks. In some cases, because the nearest hospital falls outside the probation district, offenders cannot even obtain emergency medical treatment without facing the threat of reincarceration. And the restrictions associated with supervision make it difficult for offenders to find or hold down a job. See Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. Rev. 421, 448-450 (2011).

If anything, the restraints imposed by lifetime supervision *conflict* with the goal of rehabilitation. As the court below noted, "[p]lacing lifetime restraints on a juvenile offender's liberties requires a determination that the juvenile will forever be a danger to society and 'forswears altogether the rehabilitative ideal.'" Pet. App. 47 (quoting *Graham*, 560 U.S. at 74). Because juvenile sex offenders are treated as though they will forever pose a threat to society even though they present a low recidivism risk, lifetime supervision is likely to be counterproductive in rehabilitating juvenile offenders. See Amy E. Halbrook, *Juvenile Pariahs*, 65 Hastings L.J. 1, 13 (2013).

In sum, the court below correctly concluded that Kansas's mandatory lifetime postrelease supervision sentence for juvenile offenders convicted of aggravated indecent liberties with a child violates the Eighth Amendment.

3. Imposing mandatory lifetime postrelease supervision on juveniles like Dull is unconstitutional for another reason: it violates the individualized sentencing requirement articulated in *Miller* v. *Alabama*. The individualized sentencing issue was raised below, but the court did not reach it. Pet. App. 48. Because a violation of the individualized sentencing requirement provides an alternative constitutional basis for the judgment below, it provides another reason why the Court should deny the petition.

Miller reasoned from the Court's death penalty cases, noting that capital sentencing authorities must "consider the characteristics of a defendant and the details of his offense before sentencing him to death." 132 S. Ct. at 2463-2464 (citing *Woodson* v. *North Carolina*, 428 U.S. 280 (1976) (plurality opinion); *Lockett* v. *Ohio*, 438 U.S. 586 (1978)). The sentence must account, for instance, for the "mitigating qualities of youth." *Johnson*, 509 U.S. at 367.

Mandatory punishments for juveniles prevent the sentencing official from accounting for age. Based on the similarities between the death penalty and life without parole—namely, that both penalties inflict a "forfeiture that is irrevocable"—the Court then applied the individualized sentencing requirement from the death penalty context to a mandatory life without parole sentence. *Miller*, 132 S. Ct. at 2466.

Although *Miller* addressed mandatory life without parole sentences, the logic of the decision also ex-

tends to mandatory lifetime postrelease supervision for juveniles. *Miller* emphasized that "children are constitutionally different from adults for purposes of sentencing." *Id.* at 2464. The Court then explained that "none of what [*Roper* and *Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." *Id.* at 2465. And the Court concluded that "if 'death is different,' children are different too." *Id.* at 2470.

For these reasons, juvenile offenders have a special claim to individualized sentencing under the Eighth Amendment. This does not mean that all forms of punishment are subject to an individualized sentencing requirement. But at a bare minimum, it must mean that punishments effecting "a forfeiture that is irrevocable" should not be imposed on juveniles without some individualized consideration of the juvenile's circumstances. *Miller*, 132 S. Ct. at 2466 (quoting *Graham*, 560 U.S. at 69). As noted above, lifetime supervision dramatically limits the offender's liberty. These limitations are irrevocable, no matter how well the offender behaves.

Because lifetime postrelease supervision is required for all Kansas offenders convicted of aggravated indecent liberties, regardless of age or the characteristics of the offense, the State's supervision mandate violates the Eighth Amendment.[3] That is

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[3] Petitioner argues that Kansas law takes the offender's youth into account because juvenile offenders like Dull face a different length prison sentence than adults tried for the same crime. Pet. 13. But whatever accommodations Kansas makes with respect to prison sentences, it makes no such accommodations for lifetime postrelease supervision.

another, independent reason why review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] The representation of respondent by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.