No. 14-280

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IN THE
SUPREME COURT OF THE UNITED STATES

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HENRY MONTGOMERY,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

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On Writ Of Certiorari To The
Supreme Court Of Louisiana

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REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES iii

ARGUMENT 1

I. This Court Has Jurisdiction To Consider Mr. Montgomery's Constitutional Claim 1

II. *Miller v. Alabama* Applies Retroactively 2

A. *Miller v. Alabama* Is A Substantive Rule That Applies Retroactively 2

1. *Miller v. Alabama* Expands The Range Of Sentencing Options Available To Mr. Montgomery 2

2. The Major Strands Of Eighth Amendment Precedent Upon Which *Miller* Relies Apply Retroactively 6

a. Rules Prohibiting A Certain Category Of Punishment On A Certain Class Of Defendants Apply Retroactively 7

b. Precedent Suggests That This Court's Capital Cases Requiring Individualized Sentencing Have Been Applied Retroactively 8

c. The Confluence Of Categorical Sentencing Cases And Individualized Sentencing Cases Further

Reinforce *Miller*'s Retroactivity 9

3. Finality And Practicality Concerns Do Not Preclude A Finding of Retroactivity of *Miller* 11

B. This Court Can Consider Mr. Montgomery's Alternative Argument That Miller Is A Watershed Rule Of Procedure 13

CONCLUSION 14

TABLE OF CITED AUTHORITIES

Cases

Alleyne v. United States,
133 S. Ct. 2151 (2013) 7

Atkins v. Virginia,
536 U.S. 304 (2002) 4, 7

Beard v. Banks,
542 U.S. 406 (2004) 3

Black v. Bell,
664 F.3d 81 (6th Cir. 2011) 4

Bobby v. Bies,
556 U.S. 825 (2009) 4

Bousley v. United States,
523 U.S. 614 (1998) 10

Brumfield v. Cain,
135 S. Ct. 2269 (2015) 4

Eddings v. Oklahoma,
455 U.S. 104 (1982) 8

Engle v. Isaac,
456 U.S. 107 (1982) 13

Gilmore v. Taylor,
508 U.S. 333 (1993) 14

Graham v. Collins,
506 U.S. 461 (1993) 3, 14

Graham v. Florida,
560 U.S. 48 (2010) 10, 12

Hooks v. Workman,
689 F.3d 1148 (10th Cir. 2012) 4

Lambrix v. Singletary,
520 U.S. 518 (1997) 3

Lindsey v. Washington,
301 U.S. 397 (1937) 7

Lockett v. Ohio,
438 U.S. 586 (1978) 8

Mata v. Lynch,
135 S. Ct. 2150 (2015) 1

Miller v. Alabama,
132 S. Ct. 2455 (2012) ..... *passim*

Miller v. State,
148 So. 3d 78 (Ala. Crim. App. 2013) 11

O'Dell v. Netherland,
521 U.S. 151 (1997) 3

Penry v. Lynaugh,
492 U.S. 302 (1989) 7

Roper v. Simmons,
543 U.S. 551 (2005) 12

Saffle v. Parks,
494 U.S. 484 (1990) 4

Sawyer v. Smith,
497 U.S. 227 (1990) 3

Schriro v. Summerlin,
542 U.S. 348 (2004) ..... *passim*

State v. Tate,
130 So. 3d 829 (La. 2013) 13

Sullivan v. Florida,
560 U.S. 181 (2010) 12

Sullivan v. Jones,
165 So. 3d 26 (Fla. Dist. Ct. App. 2015) 12

Sumner v. Shuman,
483 U.S. 66 (1987) 9

Teague v. Lane,
489 U.S. 288 (1989) ..... *passim*

Woodson v. North Carolina,
428 U.S. 280 (1976) 8, 9

Yee v. City of Escondido,
503 U.S. 519 (1992) 14

Other Authorities

Merriam-Webster Dictionary, *available online at*
http://www.merriam-webster.com/dictionary 5

ARGUMENT

I. This Court Has Jurisdiction To Consider Mr. Montgomery's Constitutional Claim

Both Petitioner Montgomery and Respondent State of Louisiana agree that this Court has jurisdiction to hear this case. *See* Resp't Br. 11 ("It is undisputed that the Louisiana Supreme Court relied solely on the *Teague* framework in determining that *Miller* is non-retroactive on collateral review."). Both Parties are joined by the Solicitor General of the United States in recognizing that well-established principles governing jurisdiction in this Court allow for consideration of this matter. *See* U.S. Amicus Curiae Br. Supp. Pet'r 25-34.

The claim presented by Mr. Montgomery is a federal constitutional claim, namely, whether continuing to hold Mr. Montgomery in prison pursuant to a mandatory sentence of life without parole is a violation of this Court's ruling that such sentences imposed on juveniles violate the Eighth Amendment of the United States Constitution. *See Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012).[1] Both the State of Louisiana, represented by its Attorney General, and Petitioner stress that the Louisiana Supreme Court's ruling denying Mr. Montgomery relief is based entirely on its application of this Court's

[1] This Court's recent ruling in *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015) applies equally to Mr. Montgomery's claim: "The jurisdictional question (whether the court has power to decide if [retroactive application] is proper) is of course distinct from the merits question (whether [retroactive application] is proper" (substituting "retroactive application" for "tolling").

federal retroactivity analysis. Court-Appointed Amicus argues that the state court's retroactivity determination is a matter of state, not federal, law; he therefore argues that this Court lacks jurisdiction. But, as the State and the United States conclude, a federal issue is unquestionably presented here: whether the Louisiana Supreme Court correctly applied the federal Teague standards that it incorporated into its law. That presents a federal issue over which this Court has jurisdiction, even if, on remand, Louisiana could choose to deviate from federal law and adopt a state retroactivity standard. *See* U.S. Amicus Curiae Br. Supp. Pet'r 25-33; Resp't Br. 6-11.

II. *Miller v. Alabama* Applies Retroactively

A. *Miller v. Alabama* Is A Substantive Rule That Applies Retroactively

Pursuant to *Teague v. Lane*, 489 U.S. 288 (1989), this Court has held that "[n]ew *substantive* rules generally apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). The new rule announced in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) applies retroactively because it is a substantive rule rather than, as urged by Respondent, a mere procedural change. Resp't Br. 16-41.

1. *Miller v. Alabama* Expands The Range Of Sentencing Options Available To Mr. Montgomery

Respondent argues that, because this Court has held that certain "new rules" in capital sentencing

cases are "procedural," the new rule in *Miller* should not be applied retroactively. Resp't Br. 24-27. However, in all of the cases cited by Respondent, the original sentencing options – death or one other mandatory alternative – remained unchanged by this Court's ruling. The new rules at issue in those cases concerned who made the sentencing decision; what factors were weighed at sentencing; what information a sentencer must consider prior to imposing a sentence; or the degree of unanimity required to impose a sentence.[2] *See O'Dell v. Netherland*, 521 U.S. 151, 155 (1997) (involving a rule that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, the Due Process Clause of the Fourteenth Amendment requires that the sentencing jury be informed that the defendant is not eligible for parole") (internal citation omitted); *Beard v. Banks*, 542 U.S. 406, 408 (2004) (involving a rule that invalidated capital sentencing schemes that required juries to disregard mitigating factors that were not found unanimously); *Lambrix v. Singletary,* 520 U.S. 518, 521 (1997) (involving a rule precluding capital sentencers from giving weight to invalid aggravating circumstances); *Sawyer v. Smith*, 497 U.S. 227, 233 (1990) (involving a rule "that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere"); *Graham v. Collins*, 506 U.S. 461, 478 (1993) (involving a rule that would require "special jury instructions

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[2] This Court's mandatory death penalty decisions are discussed separately, *infra*, at Section II.A.2.b.

concerning [a capital defendant's] mitigating evidence of youth, family background, and positive character traits"); *Saffle v. Parks*, 494 U.S. 484, 486 (1990) (involving a rule that would preclude an instruction that a sentencing jury must "avoid any influence of sympathy"). None of the cases cited required states to expand the range of sentencing options for the defendant.

Miller is fundamentally different from the "procedural" cases cited by Respondent. In *Miller*, this Court *mandated* an expanded range of available sentencing options, rather than modifying an existing sentencing process with no impact on the range of sentencing possibilities.[3]

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[3] Though *Miller* requires states to create a "process" to ensure juveniles convicted of homicide offenses receive individualized sentencing hearings, the fact that a new rule requires new "processes" does not necessitate a finding that the new rule is "procedural." For example, in response to this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002) prohibiting the execution of intellectually disabled persons, states needed to establish a "process," i.e, new procedures or hearings, to determine whether a defendant was "mentally retarded" within the meaning of *Atkins*. *See Bobby v. Bies*, 556 U.S. 825, 831 (2009) ("Our opinion [in *Atkins*] did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall [within *Atkins*' compass].' We 'le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction.'") (quoting *Atkins,* 536 U.S. at 317); *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2274 (2015) (discussing the processes Louisiana put in place to implement the new rule in *Atkins*). In spite of the fact that *Atkins* required states to develop new processes, the substantive nature of the ruling required that it be applied retroactively. *See, e.g., Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012) (applying *Atkins* retroactively); *Black v. Bell*, 664 F.3d

This distinction between a new rule that modifies existing procedures and a new rule that alters and expands the range of available sentences is key to the *Teague* analysis in this case. *Miller* fundamentally reshaped juvenile homicide sentencing. Failing to apply *Miller* retroactively creates a near-certain risk that the vast majority of juveniles sentenced to mandatory life without parole prior to this Court's ruling are serving unconstitutionally disproportionate punishments. *See Miller*, 132 S. Ct. at 2469 (mandatory life without parole for juveniles "poses too great a risk of disproportionate punishment"). *Miller* therefore is substantive and must apply retroactively. *See Summerlin*, 542 U.S. at 352.

Though Respondent argues that this Court should not "extend" *Teague*'s exceptions, *see* Resp't Br. 28-32, applying *Miller* retroactively is fully consistent with *Teague* and *Summerlin*. In *Summerlin*, the Court stated that "rules that regulate only the *manner of determining* the defendant's culpability are procedural." 542 U.S. at 353. The *Miller* rule cannot be classified as procedural under that definition. The "manner of determining" describes the "way that something is done or happens." *See* Merriam-Webster Dictionary, *available online at* http://www.merriam-webster.com/dictionary/manner (defining "manner"). This definition applies, for example, to the type of evidence that is admissible or the burden of proof: those matters concern the way a sentence is imposed. It does not apply to a rule mandating newly

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81 (6th Cir. 2011) (same). Therefore, in determining whether a new rule is "substantive" or "procedural," the fact that new procedures or processes are required to implement the rule is not dispositive.

available sentencing options. But the *Miller* rule does just that: it provides a substantive opportunity for an entirely different judgment – a lesser sentence that did not exist at the time of the original sentencing. That cannot be described as purely "procedural" under *Summerlin*'s approach.

Moreover, *Summerlin* provides examples, but not an exclusive list of rules considered substantive. *See Summerlin*, 542 U.S. at 351-52 ("New *substantive* rules generally apply retroactively. *This includes* decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish") (internal citations omitted) (second emphasis added). Applying *Miller* retroactively is not contrary to this Court's jurisprudence.

2. The Major Strands Of Eighth Amendment Precedent Upon Which *Miller* Relies Apply Retroactively

In reaching its holding, *Miller* relied on two strands of Eighth Amendment precedent: "[t]he first [ ] adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty"; the second "prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Miller*, 132 S. Ct. at 2463-64. Both of these strands apply retroactively and so, too, should *Miller*.

a. Rules Prohibiting A Certain Category Of Punishment On A Certain Class Of Defendants Apply Retroactively

Respondent does not dispute that the first strand of precedent upon which *Miller* relies – rules that prohibit a certain category of punishment for a certain class of defendants – are substantive. Resp't Br. 16. *See also Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002) (finding that substantive rules include rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense."). Instead, Respondent contends that "mandatory life without parole" is not a "category of punishment" because it refers to the "manner" of punishment, not the "category" of punishment. Resp't Br. 17.

This Court has held that "mandatory" penalties are different in nature and severity than discretionary penalties. *See Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013) ("Mandatory minimum sentences increase the penalty for a crime."); *see also Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (holding that applying a *mandatory* maximum sentence to a defendant would violate the *ex post facto* clause, noting that "[r]emoval of the possibility of a sentence of less than fifteen years . . . operates to their detriment in the sense that *the standard of punishment adopted by the new statute is more onerous than that of the old*.") (emphasis added). Because a mandatory life without parole sentence is more severe than a discretionary life without parole

sentence – and therefore qualitatively different – "mandatory life without parole" is a distinct category of punishment. The new rule announced in *Miller* is substantive and must apply retroactively.

b. Precedent Suggests That This Court's Capital Cases Requiring Individualized Sentencing Have Been Applied Retroactively

Respondent argues that no U.S. Supreme Court case law establishes that the second strand of precedent upon which *Miller* relies – this Court's capital cases requiring individualized sentencing – must apply retroactively. Resp't Br. 27.[4] Most analogously, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) held the mandatory death penalty unconstitutional for certain offenses, just as *Miller* held mandatory life without parole sentences unconstitutional for juvenile offenders.[5] The lack of U.S. Supreme Court precedent specifically addressing

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[4] Since *Woodson v. North Carolina*, 428 U.S. 280 (1976) pre-dated *Teague*, the Court never directly applied the *Teague* analysis.

[5] Unlike *Woodson*, this Court's other individualized sentencing cases (including *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)) did not address *mandatory* death penalty statutes; instead, those cases addressed sentencer's ability to consider mitigating factors, without changing the range of available sentencing options. *See, e.g., Lockett*, 438 U.S. at 597; *Eddings*, 455 U.S. at 117. In *Lockett*, for example, Ohio failed to allow consideration of all of a defendant's mitigation evidence. 438 U.S. at 597. *Lockett* could be characterized as a "procedural" rule that is not retroactive because it did not expand outcomes; *Miller* does, and is therefore substantive. Only *Woodson*, like *Miller*, expanded the sentencing options available to defendants.

Woodson's retroactivity is unsurprising since states uniformly applied *Woodson* retroactively. *See Sumner v. Shuman*, 483 U.S. 66, 72 n. 2 (1987) (finding that only three individuals in the country were still serving mandatory death sentences, all based on statutes at issue in *Shuman*, in which individuals were convicted of murder while serving life sentences).

The fact that states universally applied *Woodson* retroactively suggests that the substantive nature of the ruling was self-evident; once this Court held that mandatory death sentences violated the Eighth Amendment, states understood that carrying out the execution of individuals who received these mandatory death sentences would be unconstitutional. The same result should apply here as this Court has found that life without parole for juveniles is "akin to the death penalty." *Miller*, 132 S. Ct. at 2466.

c. The Confluence Of Categorical Sentencing Cases And Individualized Sentencing Cases Further Reinforce *Miller*'s Retroactivity

Even if this Court disagrees that new rules striking down the mandatory death penalty must apply retroactively under *Teague*, the confluence of the two separate strands of precedent relied upon in *Miller* provides even stronger support for *Miller*'s retroactive application than the individualized capital sentencing cases alone. In this Court's cases striking the mandatory death penalty, there was no finding

that those subjected to the mandatory sentence were, as a class, less culpable and less deserving of the harshest available sentence. In contrast, *Miller* found that juvenile offenders have a "diminished culpability" and "they are less deserving of the most severe punishments." *Miller*, 132 S. Ct. at 2464 (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)).[6]

In light of juvenile's diminished culpability and increased prospects for rehabilitation, this Court concluded that appropriate occasions for the imposition of juvenile life without parole would be "uncommon," *Miller*, 132 S. Ct. at 2469, and that only the very rare juvenile homicide offender should receive a life without parole sentence. *See Miller*, 132 S. Ct. at 2469 (noting the sentence should be imposed on only the "rare juvenile offender whose crime reflects irreparable corruption") (internal quotation omitted). Therefore, even more than the individualized sentencing cases, failing to apply *Miller* retroactively "'necessarily carr[ies] a significant risk that a defendant' . . . faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. 348 at 352 (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)). *See Miller*, 132 S. Ct. at 2469 (mandatory life without parole for juveniles "poses too great a risk of disproportionate punishment").

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[6] Notably, *Miller* "require[s] [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S. Ct. at 2469. When this Court makes a certain fact essential to the imposition of the harshest available sentence (here, a rejection of youth as a mitigator), that rule is necessarily substantive. *Summerlin*, 542 U.S. at 354.

3. Finality And Practicality Concerns Do Not Preclude A Finding of Retroactivity of *Miller*

Emphasizing the importance of finality and concerns with the passage of time between conviction and resentencing, Respondent argues that the retroactive application of *Miller* would unduly burden the criminal justice system. Resp't Br. 34-36.

While the passage of time necessarily creates some obstacles to locating records, evidence, and witnesses, requiring individualized sentencing hearings after years or even decades have passed since the initial conviction is hardly unusual. *Miller*, for example, indisputably applies to cases on direct review at the time of the decision, including Petitioner Evan Miller's 2003 homicide case. *Miller*, 132 S. Ct. at 2462. In Mr. Miller's case, the Alabama courts remanded Mr. Miller's case for a new sentencing hearing *a decade after the original offense*. *See Miller v. State*, 148 So. 3d 78 (Ala. Crim. App. 2013). Moreover, as *Amici* Former Juvenile Court Judges describe, states around the country have readily applied *Miller* retroactively and held individualized resentencing hearings, even in cases that were decades old. Former Juvenile Court Judges Amicus Br. 11-16.

Similarly, after this Court in *Graham* held that life without parole is unconstitutional for juvenile non-homicide offenders, courts held resentencing hearings – often decades after the initial crime and conviction – to determine the appropriate sentence for this group of juvenile offenders. For example, Joe Sullivan, the

petitioner in the companion case to *Graham*,[7] was convicted in 1989 for nonhomicide offenses and did not receive a resentencing hearing until more than two decades later. *See Sullivan v. Jones*, 165 So. 3d 26, 27-28 (Fla. Dist. Ct. App. 2015), *reh'g denied* (June 12, 2015). *See also* Former Juvenile Court Judges Amicus Br. at 16-19 (describing post-*Graham* resentencings).

Importantly, trials are backward-looking fact-finding proceedings; sentencing hearings have an essential forward-looking component. Specifically, in recent juvenile sentencing cases, this Court's Eighth Amendment holdings have relied upon juvenile offenders' unique capacity for rehabilitation. *See Miller*, 132 S. Ct. at 2468 (mandatory life without parole "disregards the possibility of rehabilitation even when the circumstances most suggest it"); *Graham*, 560 U.S. at 74 (noting juvenile offender's "capacity for change"); *Roper v. Simmons*, 543 U.S. 551, 570 (2005) ("From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed"). With this concern for rehabilitation at the center of these cases, the passage of time between the juvenile offense and a resentencing hearing may provide evidence of *real* rehabilitation (or its lack), rather than the mere *possibility* of rehabilitation.

Mr. Montgomery is serving an unconstitutional sentence and, like juveniles convicted of homicide offenses today or juvenile offenders whose cases were

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[7] *Sullivan* was argued the same day as *Graham*, *see Graham*, 560 U.S. at 76, but dismissed as improvidently granted. *Sullivan v. Florida*, 560 U.S. 181, 181-82 (2010).

on direct review in 2012, is entitled to an individualized sentencing hearing in which his reduced culpability is considered as a mitigating factor. The passage of time – and the fact that Mr. Montgomery has been incarcerated for more than half a century – should not be used to justify leaving him to die in prison while serving an unconstitutional sentence. The principles of finality and comity "must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle v. Isaac*, 456 U.S. 107, 135 (1982).

B. This Court Can Consider Mr. Montgomery's Alternative Argument That *Miller* Is A Watershed Rule Of Procedure

This Court can consider Petitioner's alternative argument that *Miller* is a watershed rule of procedure. The issue of whether *Miller* is a watershed rule is addressed at length as part of the *Teague* analysis in the state court decision relied upon as the sole basis for the Louisiana Court's opinion below. S*ee State v. Tate*, 130 So. 3d 829, 838-41 (La. 2013), *cert. denied*, 134 S. Ct. 2663 (2014). The dissent in *Tate* specifically found that *Miller* is a watershed rule. *Id.* at 847 (Johnson, C.J., dissenting). This issue has also been briefed by the parties. Pet'r Br. 28-30; Resp't Br. 42-43.

Watershed rules are those "implicating the fundamental fairness and accuracy of the criminal proceeding." *Summerlin*, 542 U.S. at 352 (internal quotations omitted). Because, by definition, a watershed rule of procedure must implicate

fundamental fairness and accuracy, any rule this Court found to be watershed would necessarily have some substantive dimensions. *See Gilmore v. Taylor*, 508 U.S. 333, 345 (1993) (describing as "watershed" rules "that 'small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty'") (quoting *Graham v. Collins,* 506 U.S. at 478) (internal quotation marks omitted). Since any rule that is "implicit in the concept of ordered liberty" is in part substantive, the question of whether *Miller* is a watershed rule that applies retroactively is fairly included in the question presented.

Even were this Court to conclude that the issue is not clearly included in the question presented, the interests of judicial economy are best served by considering the question in this case given the close nexus between the "substantive" and "procedural" analysis in *Teague* and the fact that the issue has been fully briefed. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (finding that courts can consider questions not explicitly listed in the questions presented when fairly included in the petition or "where reasons of urgency or of economy suggest the need to address" the question).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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