No. 18-192

In the Supreme Court of the United States

J. B. R., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Due Process Clause of the Fifth Amendment prohibits applying 18 U.S.C. 5032 to transfer petitioner to adult proceedings for trial on a charge that he committed first-degree murder within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 1111, shortly before turning 18.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unreported. The orders of the district court (Pet. App. 7a-13a, 14a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2018. A petition for rehearing was denied on April 24, 2018 (Pet. App. 28a-29a). The petition for a writ of certiorari was filed on July 23, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following proceedings in the United States District Court for the Southern District of Texas conducted pursuant to the Federal Juvenile Delinquency Act (FJDA), 18 U.S.C. 5031 *et seq.*, the district court ordered petitioner's transfer to adult criminal proceedings for trial on a charge of first-degree murder within

the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 1111. Pet. App. 14a-27a; see *id.* at 7a-13a. The court of appeals affirmed. *Id.* at 1a-6a.

1. Petitioner is a member of MS-13, a violent international criminal gang. See Pet. App. 7a, 17a-18a. In September 2013, when petitioner was 17 years and nine months old, he and two other MS-13 members received orders from gang leadership in El Salvador to kill Josael Guevara, who was 16 years old. *Id.* at 1a, 14a, 18a-19a. Petitioner and his accomplices drove Guevara to an "execution site" in the Sam Houston National Forest in Texas, where they murdered him using a machete and a baseball bat. *Id.* at 18a-19a; see C.A. Supp. ROA 400-402. Guevara's "head was almost severed and his knees and ankles were cut almost through the joints." Pet. App. 18a. Petitioner later admitted to participating in the killing and to "hitting Guevara in the head with a bat." *Id.* at 19a.

In 2014, the government filed a juvenile information under the FJDA charging petitioner with "an act of juvenile delinquency" (C.A. ROA 43)—*i.e.*, a violation of federal law committed by a person under the age of 18 that would have been a crime if committed by a person over the age of 18, see 18 U.S.C. 5031. The government also filed a certification under the FJDA to proceed against petitioner in federal court. Pet. App. 2a, 15a; see C.A. ROA 48-49; 18 U.S.C. 5032. The information alleged that petitioner "willfully, deliberately, maliciously, and with premeditation and malice aforethought" killed Guevara and that petitioner's conduct, had he been over the age of 18 at the time, would have qualified as murder within the special maritime and territorial jurisdiction of the United States, in violation of

18 U.S.C. 1111. C.A. ROA 43. Section 1111 provides that a "murder perpetrated by * * * willful, deliberate, malicious, and premeditated killing" is first-degree murder, punishable "by death or by imprisonment for life." 18 U.S.C. 1111(a) and (b). "Any other murder" qualifies as second-degree murder, punishable by imprisonment "for any term of years or for life." *Ibid.*

2. On July 11, 2014, the government filed a motion to transfer petitioner to adult proceedings pursuant to 18 U.S.C. 5032. Pet. App. 2a, 15a-16a; see C.A. ROA 66-67, 182-191. Section 5032 provides that a juvenile who commits certain violent offenses, including murder in violation of Section 1111, may be prosecuted as an adult in the "interest of justice." 18 U.S.C. 5032. In determining whether the "interest of justice" supports a transfer to adult proceedings, a court must consider several factors set forth in Section 5032: the juvenile's "age and social background," "the nature of the alleged offense," "the extent and nature of the juvenile's prior delinquency record," the juvenile's "intellectual development and psychological maturity," the juvenile's response to "past treatment efforts," and the "availability of programs designed to treat the juvenile's behavioral problems." *Ibid.* The government contended that all those factors weighed in favor of a transfer. C.A. ROA 183-191.

Petitioner did not dispute that the statutory factors favored his transfer to adult proceedings. Pet. App. 2a. Instead, he argued that a transfer would subject him to cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 2a, 16a; see C.A. ROA 193-194. Petitioner observed that neither of the statutorily specified punishments for first-degree murder—death or mandatory life imprisonment—could constitutionally

be imposed on him for this offense. C.A. ROA 193-194; see *Miller* v. *Alabama*, 567 U.S. 460, 465 (2012) (holding that the Eighth Amendment forbids imposing a mandatory term of life imprisonment without parole for an offense committed by a person under the age of 18); *Roper* v. *Simmons*, 543 U.S. 551, 578 (2005) (same for capital sentence). Petitioner contended that, "because transfer would necessarily subject [him] to unconstitutionally cruel and unusual punishment," his transfer to adult proceedings would "not [be] in the interest of justice." C.A. ROA 194.

The district court granted the government's transfer motion. Pet. App. 14a-27a. The court determined that, in light of "the totality of the statutory factors pertaining to [petitioner] and the horrific and premeditated nature of the crime alleged," the "interest of justice" favored trying petitioner as an adult. *Id.* at 23a; see *id.* at 17a-23a. The court acknowledged that, if petitioner were ultimately convicted of first-degree murder, he could not receive either of the penalties specified in the statute for that offense. *Id.* at 24a. The court explained, however, that the appropriate solution to that problem (if it arose) would be to sentence petitioner within the statutory range for the lesser-included offense of second-degree murder—imprisonment for "any term of years or for life"—which would pose no constitutional concerns. *Id.* at 27a (quoting 18 U.S.C. 1111(b)); see *id.* at 25a-26a (citing decisions of "multiple federal courts" resentencing defendants convicted of committing murder before the age of 18 to terms of imprisonment less than life following *Miller*, notwithstanding that the defendants' crimes carried mandatory life sentences). The court further noted that, in any event, the transfer decision under 18 U.S.C. 5032 rested not on sentencing

considerations but on whether the transfer was in the "interest of justice" based on the relevant statutory factors. Pet. App. 27a.

3. Petitioner filed an interlocutory appeal challenging the district court's transfer order. C.A. ROA 235. While petitioner's appeal was pending, he agreed to plead guilty to first-degree murder as an adult. See C.A. Supp. ROA 378, 392. At the parties' request, the court of appeals stayed petitioner's appeal and remanded to the district court for petitioner to enter his plea. *Id.* at 374.

a. Petitioner entered into a plea agreement in which he agreed to plead guilty to first-degree murder and to withdraw his pending appeal. C.A. Supp. ROA 392-393. Petitioner acknowledged in the plea agreement that, because the Eighth Amendment would preclude the district court from imposing a sentence of death or mandatory life imprisonment in his case, the appropriate sentencing procedure would be for the court to sever "the 'death' or mandatory 'for life' language in the first-degree murder penalty provision of Section 1111(b)" and to instead sentence petitioner within the range for second-degree murder, *i.e.*, any "term of years up to and including life." *Id.* at 393. Petitioner and the government further agreed, pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, that if the district court accepted the plea agreement, it would be bound to impose a sentence "of no more than 30 years" of imprisonment. *Ibid.*

The district court accepted petitioner's guilty plea. C.A. Supp. ROA 330-331. During the plea colloquy, the court explained to petitioner that, as a constitutional matter, he could not be subject to a capital sentence or a mandatory life sentence due to his age at the time of

the offense, but that he could receive a sentence of any "term of years up to and including life in prison." *Id.* at 310-311; see *id.* at 319-320. Petitioner repeatedly confirmed that he understood the sentencing range that would apply to his offense. *Id.* at 312, 320. The court further explained that it would not approve the parties' agreed-upon sentence of 30 years of imprisonment until it had reviewed the presentence report and "evaluate[d] all of the facts" relevant to sentencing, and that if the court decided not to accept that sentence, petitioner would be permitted to "withdraw [his] plea of guilty and resume [his] appeal." *Id.* at 311-312.

The district court ultimately declined to approve the 30-year sentence. C.A. Supp. ROA 366. The court observed that such a sentence would be substantially lower than the 420 months of imprisonment given to petitioner's adult co-defendants (one of whom was only a few months older than petitioner), even though petitioner was, in the court's view, at "equal fault in the commission of the murder." *Id.* at 362-363.

b. In connection with its decision to reject the agreed-upon sentence, the district court issued a supplemental order regarding petitioner's transfer to adult proceedings. Pet. App. 7a-13a. The court explained that, if petitioner were ultimately convicted of first-degree murder, the court would follow the approach petitioner had agreed to in the plea agreement: The court would "excise[]" the sentencing provisions for first-degree murder that would be unconstitutional as applied to petitioner and would impose a sentence within the range specified for second-degree murder. *Id.* at 10a-11a. The court observed that first- and second-degree murder are simply "two categories of the same crime," *id.* at 10a n.3 (citation omitted), and reasoned

that "because the enhanced penalty for those who commit premeditated murder * * * is unconstitutional as applied to juveniles tried as adults, the punishment for such juveniles is limited to what is authorized for 'any other murder,'" *id.* at 11a (quoting 18 U.S.C. 1111(b)) (brackets omitted). The court observed that the sentencing range for second-degree murder "is constitutionally valid, capable of functioning independently" of the specified sentence for first-degree murder, "and consistent with Congress's obvious objectives of punishing murderers." *Ibid.* The court acknowledged that the Fourth Circuit had determined that a juvenile's transfer to adult proceedings was unconstitutional where the charged offense—murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)—required at least a life sentence. Pet. App. 9a (citing *United States* v. *Under Seal*, 819 F.3d 715, 724 (4th Cir. 2016)). The court explained, however, that the circumstances of the Fourth Circuit case were materially different because—unlike Section 1111—Section 1959(a) "provide[d] no alternative punishment for murder other than death or life imprisonment." *Ibid.*; see *id.* at 11a.

The district court "[a]dditionally" determined that petitioner's Eighth Amendment challenge was not ripe. Pet. App. 11a-13a. The court noted that the Eighth Amendment question would not arise if petitioner were acquitted at trial or found guilty of the lesser-included offense of second-degree murder. *Id.* at 12a. It further noted that a sentence less than life might also be statutorily available if petitioner provided substantial assistance to the government. *Ibid.* (citing 18 U.S.C. 3553(e)); see *id.* at 13a n.6 (noting that both of petitioner's co-defendants provided substantial assistance

and, as a result, received sentences below "the otherwise mandatory minimum of life for adults"). And it reiterated that, "[i]n any event," the only determination relevant to petitioner's transfer was "whether it is in the interest of justice to try [petitioner] as an adult" in light of the factors set forth in Section 5032, "not the fashioning of a constitutional sentence if he is convicted." *Id.* at 13a.

c. In light of the district court's decision not to accept the agreed-upon sentence, petitioner moved to withdraw his guilty plea and to proceed with his appeal. C.A. Supp. ROA 367, 436-437. The district court granted petitioner's motion. *Id.* at 439.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-6a. Petitioner argued that imposition of the specified sentences for first-degree murder would violate the Eighth Amendment and that the district court's plan to sentence him in the range for second-degree murder "would violate due process," including by depriving him of notice of the punishment for the offense. *Id.* at 4a; see Pet. C.A. Br. 9, 16-18. The court of appeals, like the district court, determined that those constitutional challenges are not ripe. Pet. App. 3a. The court explained that petitioner was effectively requesting an "advisory opinion" on whether he would be subject to an unconstitutional sentence in the future if convicted of first-degree murder. *Id.* at 6a. The court identified "a long line of intervening contingencies" that might prevent that constitutional question from ever arising: petitioner might be "acquitted or convicted only of second-degree murder"; he might "reach[ ] a plea agreement with the Government for the lesser-included offense" of second-degree murder; or he

might qualify for a sentence below the otherwise applicable statutory minimum based on his "assist[ance] in other investigations or prosecutions." *Id.* at 5a-6a. The court further observed that, in light of the government's acknowledgment that petitioner could not receive a mandatory sentence of life imprisonment, any constitutional question about such a sentence "appears unlikely to occur at all." *Id.* at 4a n.1.

Under those circumstances, the court of appeals found that petitioner's constitutional claims were "too remote and contingent upon too many factors to justify [the court's] immediate intervention." Pet. App. 4a. The court acknowledged that the Fourth Circuit had invalidated a juvenile's transfer to adult proceedings on constitutional grounds in *Under Seal*, *supra*, but it declined to use that decision "as guidance for [present] purposes" because the Fourth Circuit "never considered" ripeness. Pet. App. 6a. The court further explained that its decision did not indicate any view on the underlying merit of petitioners' claims, which it noted "may deserve a thorough review when the appropriate time comes." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 11-36) that applying 18 U.S.C. 5032 to transfer him to adult proceedings for trial on a charge of first-degree murder violates due process because the statutory punishments for that offense would be unconstitutional as applied to him, thereby allegedly depriving him of adequate notice of the penalty he will face if convicted. That contention does not warrant review. The interlocutory posture of this case and petitioner's ability to renew his claim on appeal from a final judgment (assuming he is convicted and chooses not to relinquish the claim by pleading

guilty) demonstrate that this Court's review would be premature. In any event, petitioner's factbound claim is, at bottom, an unripe challenge to a hypothetical future sentencing range; to the extent it purports to be more than that, it is meritless. The decision below does not conflict with any decision of this Court or of any other court of appeals. The petition for a writ of certiorari should be denied.

1. The Court's review is unwarranted at this time because this case is in an interlocutory posture. Petitioner's constitutional claims are predicated on the sentence he could receive if convicted of first degree murder in violation of 18 U.S.C. 1111, but he has yet to stand trial. As both the court of appeals and the district court emphasized, all that is at stake now is whether petitioner may be transferred to adult proceedings. Pet. App. 6a, 13a. The interlocutory nature of the decision alone "furnishe[s] sufficient ground for the denial" of the petition under the circumstances. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari).

Indeed, denying review because of the interlocutory posture of the case is particularly appropriate here, where a "long line of intervening contingencies" stands between transferring petitioner to adult proceedings and determining the appropriate sentence to impose on him for first-degree murder. Pet. App. 6a. Petitioner's constitutional claims could be obviated any number of ways by further proceedings in the district court—for example, petitioner "may be acquitted or convicted only

of second-degree murder," or petitioner "may be able to avoid both a trial and the first-degree sentence by reaching a plea agreement with the Government." *Id.* at 5a; see pp. 5-6, *supra* (describing petitioner's prior plea). In light of the "contingent" nature of petitioner's constitutional claims, the court of appeals found that the prudent course was "to wait" for further proceedings in the district court before deciding whether a "thorough review" of those claims is warranted. Pet. App. 4a, 6a & n.3. The same reasons weigh in favor of denying the petition.

Petitioner argues (Pet. 21) that review of his due-process challenge cannot await final judgment because "due process demands notice *now*—at the outset of [the] prosecution against him—of what punishments can legally be imposed on him if he is convicted." But the district court has already notified petitioner that, if petitioner is convicted of first-degree murder, the court will sentence him within the statutory range applicable to the lesser-included offense of second-degree murder, which a conviction for first-degree murder would necessarily encompass. Pet. App. 10a-11a, 27a; see *Schmuck* v. *United States*, 489 U.S. 705, 716 (1989); *Brown* v. *Ohio*, 432 U.S. 161, 168-169 (1977); see also, *e.g.*, *United States* v. *Stracener*, 959 F.2d 31, 33 (5th Cir. 1992) (noting that defendant's convictions for "aggravated offenses * * * of necessity encompassed any lesser-included offenses"). The district court's order provides petitioner with notice of the sentencing range to which he will be subject if convicted of first-degree murder and ensures that petitioner will not receive a sentence that exceeds constitutional limits. Pet. App. 10a-11a, 27a. What petitioner seeks, then, is not any special form of "notice," but ra-

ther a determination whether a non-final ruling is correct. That does not distinguish this case from typical interlocutory review.

Petitioner's desire to avoid the commencement of trial as an adult on the first-degree murder charge is not itself a valid basis to depart from this Court's usual practice of declining interlocutory review. No statute authorizes a direct appeal from a transfer order under Section 5032. As petitioner notes (Pet. 9 n.6), most courts of appeals have determined that the collateral-order doctrine provides jurisdiction to review interlocutory challenges to transfer decisions under the FJDA. See, *e.g.*, *United States* v. *J.J.K.*, 76 F.3d 870, 871-872 (7th Cir. 1996) (citing cases); cf. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978) (collateral-order doctrine). But this Court has cautioned that "[e]ven when the vindication of the defendant's rights requires dismissal of charges altogether, the conditions justifying an interlocutory appeal are not necessarily satisfied"; instead, the question is whether the right is "one that must be upheld prior to trial if it is to be enjoyed at all." *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 269-270 (1982) (per curiam). Courts have thus based the application of the collateral-order doctrine in this context on the fact that certain statutory protections afforded to juveniles—including a right to pretrial detention "in a juvenile detention center" and a right to confidentiality—may be "irrevocably impaired" by a juvenile's transfer to adult proceedings. *J.J.K.*, 76 F.3d at 871. Petitioner's claim here—which, at its core, is about his potential *sentencing* if certain contingent events occur—implicates neither his right to be tried nor any of those FJDA protections. If further proceedings in the district court do not lead to an outcome that

obviates petitioner's due-process challenge to his transfer, he may raise that challenge in a future appeal and, if necessary, a petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting this Court's "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

2. In any event, petitioner's contention (Pet. 21) that his transfer to adult proceedings violates due process because it deprives him of "notice * * * of what punishments can legally be imposed on him if he is convicted" lacks merit.

a. The federal murder statute, 18 U.S.C. 1111, defines murder as "the unlawful killing of a human being with malice aforethought." 18 U.S.C. 1111(a). Certain murders, including those involving "willful, deliberate, malicious, and premeditated killing," are classified as first-degree murder. *Ibid.* "Any other murder" is classified as second-degree murder. *Ibid.* "Within the special maritime and territorial jurisdiction of the United States," first-degree murder is punishable "by death or by imprisonment for life," while second-degree murder is punishable by imprisonment "for any term of years or for life." 18 U.S.C. 1111(b).[1]

The Eighth Amendment prohibits imposing a capital sentence or a mandatory term of life imprisonment without parole on an offender who commits homicide before the age of 18. See *Miller* v. *Alabama*, 567 U.S.

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[1] A sentence of imprisonment for life under federal law means life without the possibility of parole, because federal law precludes parole or early release from a term of life imprisonment. See 18 U.S.C. 3624(a)-(b).

460, 465 (2012) (mandatory sentence of life imprisonment); *Roper* v. *Simmons*, 543 U.S. 551, 578 (2005) (death sentence). No similar constitutional concern arises, however, when a court sentences such an offender to life imprisonment as an exercise of its sentencing discretion. See *Miller*, 567 U.S. at 480 (noting that a court is not "foreclose[d]" from sentencing a juvenile to life imprisonment for a homicide as long as it "take[s] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," before imposing that sentence); see also *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 734 (2016) (noting that *Miller* does not "bar life without parole" for juvenile homicide offenders "whose crimes reflect permanent incorrigibility"). Sentences of imprisonment for terms of years less than life likewise present no constitutional concern. See *Miller*, 567 U.S. at 479 (citing *Graham* v. *Florida*, 560 U.S. 48, 75 (2010)).

The Eighth Amendment therefore precludes a court from imposing either of the punishments specified in Section 1111(b)—death or a mandatory term of life imprisonment—on an offender convicted of committing first-degree murder before the age of 18. But the Eighth Amendment does not preclude a court from imposing a punishment within the range applicable to second-degree murder, up to and including a discretionary sentence of life imprisonment.

b. Petitioner has been charged with committing murder "willfully, deliberately, maliciously, and with premeditation," which (if proved) would be sufficient to establish that he committed first-degree murder. C.A. ROA 43; see C.A. Supp. ROA 386. He contends (Pet. 2) that he lacks notice of the "potential punishment" he

will face if convicted of that offense because the penalties specified in the statute would be unconstitutional as applied to him. That claim, at its core, is a challenge to a hypothetical future sentencing proceeding that may not occur as anticipated. The court of appeals correctly determined that, as such, it would be unripe. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas* v. *United States*, 523 U.S. 296, 300 (1998) (citation and internal quotation marks omitted). As the court explained, petitioner's transfer to adult proceedings to stand trial for first-degree murder does not guarantee that he will ever be sentenced for first-degree murder. Pet. App. 5a-6a.

Numerous contingencies may prevent petitioner from ever being sentenced under the penalty scheme as to which he claims he lacks adequate notice. Petitioner may, for example, be convicted at trial only of the lesser-included offense of second-degree murder. Cf. *Sansone* v. *United States*, 380 U.S. 343, 350 (1965) ("A lesser-included offense instruction is * * * proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense."). Petitioner has never asserted that he lacks notice of the possible sentences for second-degree murder, which is punishable by imprisonment "for any term of years or for life." 18 U.S.C. 1111(b). Like an acquittal, a conviction for that lesser-included offense would render any due-process challenge moot. See Pet. App. 5a.

Alternatively, petitioner may again agree to plead guilty on terms that would require the district court to impose a constitutionally permissible sentence. See Pet. App. 5a. Petitioner contends (Pet. 24) that it

would be "impossible" for him to "intelligently" consider such a plea because he cannot know what sentence he might receive if he went to trial. Petitioner's contention is difficult to square with *Brady* v. *United States*, 397 U.S. 742 (1970), which held that a plea can be intelligently made even when the defendant's understanding of the possible penalties (there, a belief that a trial could result in the death penalty) turns out to be mistaken. See *id.* at 756-758. And it is inconsistent with his representations to the district court. As explained, petitioner previously entered a guilty plea in this case in which he specifically acknowledged that the district court could resolve any constitutional concern by excising "the 'death' or mandatory 'for life' language in the first-degree murder penalty provision of Section 1111(b)" and imposing a sentence within the statutory sentencing range for second-degree murder. C.A. Supp. ROA 393. Petitioner further agreed, pursuant to Rule 11(c)(1)(C), to accept a sentence of up to 30 years of imprisonment as a condition of his plea. *Ibid.* Petitioner repeatedly confirmed during his plea colloquy that he understood the sentencing range he would face if he went to trial and that he knowingly and voluntarily wished to enter a guilty plea, which the court accepted. See *id.* at 312, 320, 330-331. Petitioner identifies no reason why he would be incapable of forming the same legally sufficient understanding of the applicable sentencing range in future proceedings.[2]

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[2] Nor can petitioner plausibly assert that he lacked information concerning the possible sentence he faced at the time he committed his offense. Even if petitioner "ma[de] important decisions" (Pet. 12) about whether to murder Guevara believing that the statutory punishments for first-degree murder would be unconstitutional as applied to him, Section 1111 placed him on notice that his offense

Petitioner may also cooperate, as his co-defendants did. Pet. App. 5a, 12a-13a & n.6. And like his co-defendants, petitioner might receive a sentence below the otherwise applicable statutory minimum for first-degree murder as a result. See 18 U.S.C. 3553(e) (authorizing district court, "[u]pon motion of the Government," to impose a sentence below a statutory minimum "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense"). Petitioner contends (Pet. 23) that a cooperation-based sentence reduction would present him with a "Hobson's choice" because the government could require him to waive his right to appeal as a condition of filing a Section 3553(e) motion. But that possibility is not relevant to his due-process claim, which is predicated on his putative lack of notice of the penalties to which he would be subject if convicted of first-degree murder. In light of the many possible outcomes of the district court proceedings that may resolve petitioner's due-process claim, the court of appeals did not err in determining that petitioner's claim was not ripe and that the better course was to defer decision on the merits until the district court proceedings had concluded. Pet. App. 5a-6a. That factbound determination does not warrant interlocutory review by this Court.

c. To the extent petitioner's claim could be construed as implicating notice issues that are in fact ripe for adjudication, his claim is meritless. If petitioner is convicted of first-degree murder under circumstances in which he might otherwise be subject to the statutory penalties that would be unconstitutional as applied to him, the district court has already explained that it will

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would at least qualify as second-degree murder, punishable by imprisonment for "any term of years or for life," 18 U.S.C. 1111(b).

adopt the same approach that petitioner agreed to in his previous plea agreement—namely, applying the statutory sentencing range for the lesser-included offense of second-degree murder, which would authorize a sentence of imprisonment "for any term of years or for life." 18 U.S.C. 1111(b); see Pet. App. 9a-11a, 27a. Second-degree murder is a lesser-included offense of first-degree murder, and a conviction for the latter would necessarily encompass a conviction for the former. See *Schmuck*, 498 U.S. at 716; *Brown*, 432 U.S. at 168-169. Thus, as already explained (p. 11, *supra*), petitioner has received notice of the penalties to which he will be subject if convicted of first-degree murder.

Petitioner contends (Pet. 26-31) that the notice he already received of the district court's approach in the as-yet hypothetical circumstance of petitioner's conviction for first-degree murder is inadequate because "rewriting statutes with constitutional infirmities" is a job for Congress. That contention illustrates that petitioner's claim is at bottom an unripe sentencing claim, rather than a notice claim. But even if it were ripe for decision, petitioner's contention would not warrant this Court's review. To the extent petitioner now argues that applying the range for second-degree murder would be impermissible, he did not make that argument in the district court—indeed, he embraced that procedure in his plea agreement, see C.A. Supp. ROA 393—and the court of appeals did not consider it. This Court's "traditional rule * * * precludes a grant of certiorari" to decide a question that "'was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted); see *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (declining to review

a claim "without the benefit of thorough lower court opinions to guide [the Court's] analysis of the merits").

In any event, petitioner's objection to the district court's proposed approach is unsound. Petitioner would prefer that the first-degree murder statute not apply at all to him, absent further action by Congress. Pet. 31. But he identifies no constitutional provision or principle of statutory construction that would require that result. Petitioner identifies no reason to think that Congress, had it known that the statutory punishments for the aggravated offense of first-degree murder were unconstitutional as applied to juvenile offenders, would have intended that such offenders remain in juvenile proceedings—where they would be subject, at most, to a term of juvenile detention or probation until age 21, see 18 U.S.C. 5037(c)—while juveniles who commit "[a]ny other [kind of] murder" could be transferred to adult proceedings to face a sentence of up to life imprisonment. 18 U.S.C. 1111(a). Cf. *Miller*, 567 U.S. at 488 (noting that requiring a sentencer to consider the mitigating qualities of youth when sentencing a juvenile offender avoids a "choice between [the] extremes" of "light punishment" in juvenile proceedings and mandatory life imprisonment in adult proceedings).

Nor does anything in this Court's decision in *Miller* suggest that a court, upon determining that the authorized sentences for an aggravated offense would violate the Eighth Amendment, should declare the statute "inoperative" (Pet. 31) and impose *no* sentence for that offense—rather than imposing a sentence within the range specified for a lesser-included version of the same offense. Indeed, both petitioners in *Miller* were resentenced by state courts that severed unconstitutional penalties from the statutes of conviction. See *Miller* v.

State, 148 So. 3d 78, 78 (Ala. Crim. App. 2013) (citing *Ex parte Henderson*, 144 So. 3d 1262, 1284 (Ala. 2013)); *Jackson* v. *Norris*, 426 S.W.3d 906, 910-911 (Ark. 2013). And as the district court noted, numerous federal courts have likewise responded to *Miller* by resentencing juvenile homicide offenders to terms of imprisonment less that life notwithstanding the fact that life imprisonment is the statutory minimum penalty. Pet. App. 25a-26a (citing cases). The district court appropriately indicated that it would follow a similar course in this case if petitioner is convicted.[3]

3. Contrary to petitioner's contention (Pet. 12-17), the court of appeals' unpublished, nonprecedential decision does not conflict with this Court's decision in

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[3] Petitioner notes (Pet. 23-25) that a conviction for first-degree murder may affect his advisory sentencing range under the Sentencing Guidelines. The Guidelines provide base offense levels of 43 for first-degree murder and 38 for second-degree murder, see Sentencing Guidelines §§ 2A1.1(a), 2A1.2(a), which, in light of petitioner's criminal history, would likely yield advisory ranges of life imprisonment for first-degree murder and 235 to 293 months for second-degree murder, see Sentencing Guidelines Ch. 5, Pt. A (criminal history category I). The higher Guidelines sentence for first-degree murder, however, creates no notice concerns; if anything, the Guidelines mitigate petitioner's notice concerns by providing him with greater certainty regarding the actual sentence he may receive. See, *e.g.*, *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1346 (2016) ("[T]he Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar."). As explained, petitioner could validly receive a life sentence if the district court determines that such a sentence is warranted notwithstanding relevant age-related mitigating factors. See *Montgomery*, 136 S. Ct. at 734; *Miller*, 567 U.S. at 480. And if the court does not make findings sufficient to warrant a life sentence, it could appropriately impose a lesser sentence as a downward variance after considering the sentencing factors in 18 U.S.C. 3553(a). See, *e.g.*, *Chavez-Meza* v. *United States*, 138 S. Ct. 1959, 1963 (2018).

United States v. *Evans*, 333 U.S. 483 (1948), or with the Fourth Circuit's decision in *United States* v. *Under Seal*, 819 F.3d 715 (2016).

a. *Evans* concerned a statute that enumerated two offenses—smuggling unauthorized aliens into the United States and concealing or harboring them after they had arrived—but imposed a penalty only for the smuggling offense. 333 U.S. at 483-484. This Court noted that the concealing or harboring provision was vague and created "very real doubt and ambiguity concerning the scope of the acts forbidden." *Id.* at 489. That ambiguity, the Court explained, "raise[d] equal or greater doubt that Congress meant to encompass" both offenses "within the [same] penal provisions." *Ibid.*; see *id.* at 490 (observing that the two offenses "might require, in any sound legislative judgment, very different penalties"). Under those circumstances, the Court determined that applying the smuggling penalty to the concealing or harboring offense would be "outside the bounds of judicial interpretation." *Id.* at 495.

The application of Section 1111 in this case presents none of the "unusual" and "difficult" interpretive problems that plagued the statute in *Evans*. 333 U.S. at 484. Section 1111 defines two degrees of the same offense, one a lesser-included offense of the other, and prescribes punishments for both. Petitioner does not contend that the substantive murder offense described in the statute is vague or ambiguous. And the fact that the prescribed punishments for first-degree murder are unconstitutional as applied to him does not mean that "Congress has failed to legislate a punishment" at all. Pet. 13-14. As the Court explained in *Evans*, "where Congress has exhibited clearly the purpose to proscribe conduct within its power to make criminal and has not

altogether omitted provision for penalty, every reasonable presumption attaches to the proscription to require the courts to make it effective in accord with the evident purpose." 333 U.S. at 486. A conviction for first-degree murder would necessarily encompass a conviction for second-degree murder, and sentencing petitioner within the range of imprisonment that applies to that lesser-included offense would present no risk of judicial lawmaking. And petitioner's position that *no* punishment can be imposed would be wholly inconsistent "with Congress's obvious objectives of punishing murderers." Pet. App. 11a.[4]

b. The Fourth Circuit's decision in *Under Seal* is likewise inapposite. The juvenile defendant in that case was charged with murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1). *Under Seal*, 819 F.3d at 717. That statute provides that any murder committed in aid of a racketeering enterprise shall be punished "by death or life imprisonment." 18 U.S.C. 1959(a)(1). The court of appeals determined that transferring a juvenile to adult proceedings to face trial for that offense would be unconstitutional. *Under Seal*, 819 F.3d at 728. The court noted that "Congress has authorized two

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[4] *Evans* also provides no support for petitioner's request for interlocutory review. The district court in *Evans* had dismissed an indictment against the defendant, and the government appealed that decision directly to this Court pursuant to a statute that authorized interlocutory government appeals in criminal cases. 333 U.S. at 484; see 28 U.S.C. 345 (1940) (authorizing "direct review by the Supreme Court of an interlocutory" order dismissing an indictment "where the decision of the district court is adverse to the United States") (cross-referencing 18 U.S.C. 682 (1940)). *Evans* does not suggest that this Court would have permitted the defendant to seek interlocutory review from a decision requiring him to proceed to trial.

penalties—and only two penalties—for the crime of murder in aid of racketeering," neither of which could be imposed consistent with the Eight Amendment. *Id.* at 720. The court explained that, because no other penalty applied to murder under Section 1959(a)(1), it could not sever the unconstitutional penalty provision without creating a "vacuum" that would render the statute's substantive provision unenforceable. *Id.* at 723.

The Fourth Circuit rejected the government's proposal to import the statute's lesser penalties for kidnapping offenses to the murder provision, explaining that "combin[ing] the penalty provisions for two distinct criminal acts" would "go[] beyond the permissible boundaries of severance and tread[] into the legislative role." *Under Seal*, 819 F.3d at 723-724. The court of appeals noted, however, that its ruling would have been different if "an acceptable punishment that Congress had specifically authorized" for murder "remained intact." *Id.* at 724. In that circumstance, the court reasoned, "excising the unconstitutional * * * penalty provision and enforcing the remainder would have been an appropriate judicial action." *Ibid.*

The Fifth Circuit's decision in this case does not conflict with *Under Seal*, which arose in a different posture and concerned a different statute. In *Under Seal*, the district court had refused to transfer the defendant to adult proceedings, on constitutional grounds, and the government took an interlocutory appeal—as in *Evans*. *Under Seal*, 819 F.3d 719. Thus, no analogous "long line of intervening contingencies" (Pet. App. 6a) could have prevented the constitutional issue from ever ripening for decision—it had already been dispositive of the transfer issue. Presumably for that reason, the defendant in *Under Seal* did not dispute that the controversy

was ripe, and the Fourth Circuit did not address ripeness. Here, by contrast, the Fifth Circuit declined to address the merits of petitioner's unripe constitutional claims and instead expressly reserved them for later review, if necessary. *Ibid.*

Section 1111 provides a constitutionally valid punishment for murder. As the Fourth Circuit acknowledged in *Under Seal*, transferring a juvenile to adult proceedings for trial under a statute that provides both constitutional and unconstitutional punishments for the same underlying offense presents no constitutional concern. 819 F.3d at 724. The fact that those punishments relate to different degrees of murder under Section 1111 is irrelevant: A conviction for the aggravated offense of first-degree murder necessarily includes all the elements of the lesser-included offense of second-degree murder. Applying the penalty provision for second-degree murder to a defendant convicted of first-degree murder does not present the sort of "impermissible judicial rewriting" of the statute that concerned the Fourth Circuit in *Under Seal*. *Ibid.*

At a minimum, any distinction between the approaches adopted by the court of appeals below and the Fourth Circuit in *Under Seal* does not suggest the sort of "disarray" (Pet. 12, 17, 19) among the circuits on an important question of law that would warrant this Court's review. The decision in this case is unpublished, nonprecedential, and factbound, and it explicitly contemplates the possibility of further review after final judgment. No reason exists to presume that the Fourth Circuit would disagree with the approach the Fifth Circuit took here if presented with a similar case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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