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Nos. 10-9646 & 10-9647

IN THE

Supreme Court of the United States

EVAN MILLER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

KUNTRELL JACKSON,

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Respondent.

On Writs of Certiorari to the Alabama Court of Criminal Appeals and the Supreme Court of Arkansas

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BRIEF OF *AMICUS CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 4

The Eighth Amendment Does Not Establish The Categorical Rule That A 14-Year-Old Convicted Of Homicide May *Never*, Under *Any* Circumstances, Be Sentenced To Life Without Parole. 4

A. There Is No Societal Consensus Against The Sentence Of Life Without Parole For 14-Year-Olds Convicted Of Homicide. 4

1. Statutes That Authorize Particular Punishments Reflect Legislative Judgments That Those Punishments Are Appropriate. 6

2. The Frequency With Which Particular Punishments Are Imposed Does Not Necessarily Reflect Societal Judgments About Those Punishments................................. 11

B. The Categorical Rule Proposed By Petitioners Would Transform The Eighth Amendment Into A National Code Of Juvenile Justice. 17

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Alabama v. Jones,
No. CC-2000-0151 (Cir. Ct. of Jefferson Cty., Ala., May 25, 2001) (unpublished) 15

Angel v. Virginia,
704 S.E.2d 386 (Va. 2011) 18

Arizona v. Kasic,
265 P.3d 410 (Ariz. Ct. App. 2011) 18

Brecht v. Abrahamson,
507 U.S. 619 (1993) 17

Douglas v. City of Jeannette,
319 U.S. 157 (1943) 20

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456 U.S. 107 (1982) 17

Graham v. Florida,
130 S. Ct. 2011 (2010) 2, 4, 10, 12, 18, 20

Gregg v. Georgia,
428 U.S. 153 (1976) 5

Harmelin v. Michigan,
501 U.S. 957 (1991) 2, 4

Kennedy v. Louisiana,
554 U.S. 407 (2008) 9

Lockyer v. Andrade,
538 U.S. 63 (2003) 18

Mistretta v. United States,
488 U.S. 361 (1989) 2

Penry v. Lynaugh,
492 U.S. 302 (1989) 5

Postelle v. Florida,
383 So. 2d 1159 (Fla. Dist. Ct. App. 1980) 18

Roper v. Simmons,
543 U.S. 551 (2005) 3, 9, 10, 20

Solem v. Helm,
463 U.S. 277 (1983) 2, 4

Thomas v. Florida,
No. 1D10-1613, __ So. 3d __, 2011
WL 6847814 (Fla. Dist. Ct. App. Dec. 30, 2011) ... 18

Torres v. Delaware,
608 A.2d 731 (Del. 1992) (unpublished) 14

United States v. Booker,
543 U.S. 220 (2005) 2

Weems v. United States,
217 U.S. 349 (1910) 4

Statutes and Rules

18 U.S.C. § 1091 12

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18 U.S.C. § 1751 12

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18 U.S.C. § 2381 12

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18 U.S.C. § 351(a) 12

Ala. Code § 12-15-203 8

Ala. Code § 12-15-203(d)(5) 16

Conn. Gen. Stat. § 46(b)-127 8

Ga. Code § 15-11-28(b)(2)(A)(i) 8

Idaho Code § 20-509(1)(a) 8

Mass. Gen. Laws ch. 119 § 74 8

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N.D. Cent. Code § 27-20-34(1)(b) 8

N.J. Stat. § 2A:4A-26(a)(2)(a) 8

Ohio Rev. Code § 2152.12 8

Okla. Stat. tit. 10A, § 2-5-101(B) 8

S.C. Code § 63-19-1210(6) 8

U.S. S. Ct. Rule 37.2 1

U.S. S. Ct. Rule 37.3 1

U.S. S. Ct. Rule 37.6 1

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Jan. 5, 2004 10

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Oct. 15, 2011 10

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Apr. 29, 2005 10

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Hunt Urges House To Pass Crime Bills,

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Mar. 9, 1994 9

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Juvenile Crime Law Signed,
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June 12, 1996 7

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Juvenile Justice: Juveniles Processed in Criminal Court and Case Dispositions (1995) 7

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Hardened Kids Doing Harder Time for Crimes,
Seattle Times,
Mar. 2, 1994 9

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Juvenile Killers Won't Get Parole,
Lincoln Journal Star,
Apr. 8, 2011 10

Puzzanchera, C. & Kang, W.,
Easy Access to the FBI's Supplementary Homicide Reports: 1980-2009 (2011) 13

Rightmer, Tracy,
Arrested Development: Juveniles' Immature Brains

Make Them Less Culpable Than Adults,
9 Quinnipiac Health L. J. 1 (2005) 19

Rossum, Ralph A.
Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System",
22 Pepp. L. Rev. 907 (1995) 7

Satter, Linda,
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Arkansas Democrat-Gazette,
June 29, 1998 9

Stimson, Charles D. & Grossman, Andrew M.,
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The News-Star (Monroe, La.),
May 18, 2010 10

The Royal Society,
Brain Waves Module 4: Neuroscience & the Law (Dec. 2011) 20

U.S. Dep't of Justice,
Office of Juvenile Justice & Delinquency Prevention,
Statistical Briefing Book (Dec. 9, 2011) 12

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Phila. Inquirer,
Aug. 14, 1996 7

Pursuant to this Court's Rule 37.2, *amicus curiae* National District Attorneys Association (NDAA) respectfully files this brief in support of respondents.*

INTEREST OF *AMICUS CURIAE*

Amicus NDAA is the oldest and largest organization representing the Nation's prosecutors. Its aim is to assist prosecutors in their mission of safeguarding the public and ensuring that justice is done. Its approximately 7,000 members are responsible for enforcing the criminal laws of every State and territory. Because this responsibility includes the prosecution of juveniles who commit homicide, NDAA's members are keenly aware of the myriad circumstances under which a juvenile can become involved in a homicide. In light of this real-world experience, *amicus* urges this Court not to adopt a categorical rule of federal constitutional law that a 14-year-old convicted of homicide may *never*, under *any* circumstances, be sentenced to life without parole.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is a constant tension in the law between a desire for bright-line legal rules, on the one hand, and a desire for flexible fact-specific standards, on the other. Perhaps nowhere is this tension more evident

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* The parties have globally consented to the filing of *amicus* briefs in these cases and, pursuant to Rule 37.3, letters evidencing such consent have been filed with the Clerk. In accordance with Rule 37.6, *amicus* NDAA hereby states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief.

than in the area of criminal sentencing, as underscored by the tortured history of the Federal Sentencing Guidelines. *See, e.g.*, *United States v. Booker*, 543 U.S. 220 (2005); *Mistretta v. United States*, 488 U.S. 361 (1989). Over the years, the idea that criminal sentences may appropriately be imposed and assessed by reference to categorical bright-line rules, as opposed to holistic consideration of individual cases, has passed in and out of vogue. *See*, *e.g.*, *Mistretta*, 488 U.S. at 363-67.

That ongoing tension is reflected in the present cases. This Court's precedents make it clear that, under the Eighth Amendment, an individual 14-year-old cannot be sentenced to life in prison without the possibility of parole, even for homicide, if that sentence is grossly disproportionate to the offense in light of all the facts and circumstances. *See generally Solem v. Helm*, 463 U.S. 277, 290 (1983); *see also Graham v. Florida*, 130 S. Ct. 2011, 2040 (2010) (Roberts, C.J., concurring in the judgment); *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring in part and concurring in the judgment). The question presented here is whether this Court should jettison that holistic approach in favor of the bright-line rule that a 14-year-old may *never*, under *any* circumstances, be sentenced to life without parole. *Amicus* respectfully submits that the Eighth Amendment provides no warrant for any such categorical rule.

Our Constitution has endured for more than two centuries precisely because it does not purport to regulate all the many and varied details of our national life. Societal views on such matters as appropriate criminal punishments change over time, and do not ineluctably evolve in a single direction. It

is ironic that petitioners, who decry determinate bright-line rules established by legislatures to *impose* criminal sentences, are asking this Court to establish a determinate bright-line rule to *review* criminal sentences. Never in our Nation's history has this Court interpreted the Eighth Amendment as a national penal code that categorically addresses the length of prison sentences that may be meted out to those convicted of homicide. This Court should not stray from that path now.

It would be particularly inappropriate for this Court to adopt the proposed categorical rule that a 14-year-old convicted of homicide may *never* be sentenced to life without parole because there is absolutely no societal consensus against such punishment. To the contrary, petitioners themselves concede that a lopsided majority of States authorizes life without parole for 14-year-olds convicted of certain homicides. Indeed, this Court recently held that the Eighth Amendment does not allow the death penalty for juveniles convicted of homicide in part *because of* the availability of life without parole as an alternative punishment. *See Roper v. Simmons*, 543 U.S. 551, 572 (2005) ("To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person."). The relative rarity of such sentences speaks to the fact that, at least in today's world, few 14-year-olds are charged with, or convicted of, homicide. But that fact provides neither reason nor license for this Court to invent a new rule of constitutional law. Under current law, as noted above, the Eighth Amendment provides an avenue for

relief if a sentence of life without parole is grossly disproportionate to the offense in a particular case. But nothing in the Eighth Amendment categorically condemns such punishment. Accordingly, this Court should affirm the judgments.

ARGUMENT

The Eighth Amendment Does Not Establish The Categorical Rule That A 14-Year-Old Convicted Of Homicide May *Never*, Under *Any* Circumstances, Be Sentenced To Life Without Parole.

The Eighth Amendment has long been construed to impose a check on freakish criminal sentences that, under all of the facts and circumstances of a particular case, are grossly disproportionate to the offense. *See, e.g.*, *Solem*, 463 U.S. at 290; *Weems v. United States*, 217 U.S. 349, 373-78 (1910); *see also Graham*, 130 S. Ct. at 2040 (Roberts, C.J., concurring in the judgment); *Harmelin*, 501 U.S. at 996-97 (Kennedy, J., concurring in part and concurring in the judgment). Accordingly, the question presented here is not whether the Eighth Amendment categorically *allows* a 14-year-old convicted of homicide to be sentenced to life without parole, but instead whether the Eighth Amendment categorically *prohibits* such a sentence. The answer to that question is no.

A. There Is No Societal Consensus Against The Sentence Of Life Without Parole For 14-Year-Olds Convicted Of Homicide.

Although the Eighth Amendment prohibition on the infliction of "cruel and unusual punishments" is hardly self-defining, it does not give judges license to

invalidate whatever punishments they, as legislators, might not have favored. To the contrary, "we may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Thus, "those who would attack the judgment of the representatives of the people" bear the "heavy burden" of proving that a particular punishment duly authorized by law is utterly outside the mainstream of our societal norms. *Id.*

Petitioners cannot carry that burden here. As this Court has explained, the "most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). By petitioners' own count, no fewer than *39 States* authorize a sentence of life in prison without the possibility of parole for those convicted of certain homicides committed at age 14 or older. *See* Br. for Pet'r Kuntrell Jackson, No. 10-9647 (Pet'r Br.) Apps. A & B (listing state statutes). Under these circumstances, petitioners cannot possibly establish the existence of a societal consensus against such punishment.

Undaunted, petitioners discount the import of those statutes on two grounds. *First*, they argue that statutes authorizing a particular punishment for 14-year-olds do not reflect a considered legislative judgment that such punishment is appropriate for 14-year-olds. *See* Pet'r Br. 43-45. *Second*, they argue that, in practice, few 14-year-olds are sentenced to life without parole. *See id.* at 47-52. Both arguments are unavailing.

1. Statutes That Authorize Particular Punishments Reflect Legislative Judgments That Those Punishments Are Appropriate.

Petitioners first contend that this Court should ignore the widespread and recent legislation that "responded to concerns about the perceived inadequacy of the juvenile justice system to deal with violent youth crime" by "lowering the age at which children could be prosecuted in adult court." Pet'r Br. 43. Petitioners deride such legislation as "politically popular," *id.*, as if that were a negative and did not reflect the very societal consensus that petitioners now seek to deny. According to petitioners, these statutes are entitled to no weight in the Eighth Amendment analysis because "there is no evidence of any significant legislative consideration of the specific question whether lifelong imprisonment without parole is appropriate for young adolescents." *Id.* at 44.

Petitioners' argument is profoundly disrespectful of our federal system and of democracy itself. At issue here are not some archaic or outlier laws, but statutes passed very recently by a *majority* of States in response to a specific societal concern—a significant spike in violent crime by juveniles in the late 1980s and early 90s. *See* U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Juvenile Justice Reform Initiatives in the States 1994-1996*, at 42 (1997). As a result of that spike, many reasonable people across the country concluded that the existing juvenile justice system was too lenient. *See*, *e.g.*, Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice*

System", 22 Pepp. L. Rev. 907, 907-08 (1995). The legislative response was a "dramatic expansion" of the circumstances under which juveniles charged with violent crimes could be prosecuted as adults. *Juvenile Justice Reform Initiatives*, *supra*, at 42; *see also* U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *State Responses to Serious and Violent Juvenile Crime* at iii, xv (1996); General Accounting Office, *Juvenile Justice: Juveniles Processed in Criminal Court and Case Dispositions* 5 (1995).

Petitioners caricature these laws as purely technical in nature, as if they "simply regulate[d] the boundary between juvenile-court and adult-court jurisdiction." Pet'r Br. 45. But the obvious reason that States began trying juveniles in the same courts as adults was to subject juveniles to the same punishment as adults. It is fanciful to suggest that States had no clue that they would be subjecting violent juvenile offenders to adult punishment (including life without parole) by trying them as adults. Indeed, the very mantra of the juvenile-justice reform movement of the 1990s was "Adult Time for Adult Crimes." *See*, *e.g.*, Robert Zausner, *After Ridge Gets The Spotlight, Pa. Rape Victim Grips the Audience*, Phila. Inquirer, Aug. 14, 1996, at A13 ("[Governor] Ridge reiterated a point he had made in his speech: 'Do an adult crime, you will do adult time."); Scott M. Fincher, *Juvenile Crime Law Signed*, Chicago Tribune, June 12, 1996, at 3 ("Legislation requiring 'adult time' for 'adult crime' by juvenile offenders was signed into law Tuesday.").

The resulting state "transfer statutes" (*i.e.*, statutes that either authorize or require the transfer of juveniles to the adult-court system) do not

indiscriminately authorize or require all juveniles to be tried as adults. Rather, they draw careful legislative lines. Some transfer statutes authorize or require the transfer of juveniles charged with specific violent crimes, including homicide. *See, e.g.*, Conn. Gen. Stat. § 46(b)-127 (requiring transfer of "any child charged with the commission of a capital felony").[1] Other transfer statutes achieve the same result by authorizing or requiring the exclusion of certain violent crimes, including homicide, from juvenile-court jurisdiction. *See, e.g.*, Md. Cts. & Jud. Proc. Code § 3-8A-06 (excluding crimes that, "if committed by an adult, would be punishable by death or life imprisonment").[2] It defies reason to suggest that the legislatures that enacted these statutes failed to perceive that they were thereby subjecting violent juvenile offenders to adult punishment, including life without parole.

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[1] *See also* Ala. Code § 12-15-203 (authorizing transfer for murder and listing factors for court to consider); Ga. Code § 15-11-28(b)(2)(A)(i) (requiring transfer of minors age 13 to 17 charged with murder); Ohio Rev. Code § 2152.12 (authorizing transfer of juveniles charged with "aggravated murder, murder, attempted aggravated murder, or attempted murder"); S.C. Code § 63-19-1210(6) (authorizing transfer of juveniles charged with murder); Va. Code § 16-1-269.1(B), (C) (requiring hearing on transfer when juvenile is charged with murder); W. Va. Code § 49-5-10(d)(1) (requiring transfer if the court finds probable cause that juvenile committed murder).

[2] *See also* Idaho Code § 20-509(1)(a) (excluding "murder of any degree or attempted murder"); Mass. Gen. Laws ch. 119 § 74 (excluding "murder in the first or second degree"); N.J. Stat. § 2A:4A-26(a)(2)(a) (excluding "[c]riminal homicide other than death by auto"); N.D. Cent. Code § 27-20-34(1)(b) (excluding murder and attempted murder); Okla. Stat. tit. 10A, § 2-5-101(B) (excluding any person aged 13 through 17 "who is charged with murder").

In any event, contrary to petitioners' assertion, *see* Pet'r Br. 44, there is ample evidence that States were well aware that authorizing or requiring certain violent juvenile offenders to be tried as adults could lead to a sentence of life without parole. "[A]lthough state legislatures typically do not create legislative materials like those produced by Congress," *Kennedy v. Louisiana*, 554 U.S. 407, 452-53 (2008) (Alito, J., dissenting), there can be no doubt that the public (not to mention the legislators themselves) understood that this was both the intent and the effect of the expanded transfer statutes. *See*, *e.g.*, Linda Satter, *The Kids and the Courts: Lawmakers Face Tough Balance of Crime, Punishment*, Arkansas Democrat-Gazette, June 29, 1998, at A1 ("Under this proposal, a person 13 or younger could serve life in prison without parole if convicted of capital murder in adult court."); Jolayne Houtz, *Hardened Kids Doing Harder Time for Crimes*, Seattle Times, Mar. 2, 1994, at A1 (describing Washington legislative proposals that would "transfer anyone 14 or older who commits a violent offense while armed with a firearm into adult court" and noting that juvenile defendants tried as adults could be sentenced to life without parole); Jay Euban, *Hunt Urges House To Pass Crime Bills*, News & Record (Greensboro, N.C.), Mar. 9, 1994, at B1 (listing various crime bills enacted or under consideration by the North Carolina legislature, including legislation to "[t]ry violent juveniles as adults" and impose "[l]ife without parole for 1st Degree Murder").

Indeed, in the years before *Roper*, legislative debates about the death penalty for juveniles often focused on the availability of life without parole as an alternative sentence. *See*, *e.g.*, Anjeanette Damon,

Senate Vote Abolishes Juvenile Death Penalty, Reno Gazette-Journal, Apr. 29, 2005, at A1 (describing proposed Nevada legislation to replace juvenile death penalty with life without parole); Associated Press, *Juvenile Death Penalty Bill Heads to Legislature*, Jan. 5, 2004 (quoting Wyoming legislator sponsoring bill to replace juvenile death penalty with life without parole: "We're not taking away prisons or life without parole."). Petitioners themselves, as they must, concede this linkage. *See* Pet'r Br. 46 n.54 (citing statutes that replaced the juvenile death penalty with life without parole).

The absence of a societal consensus against the punishment of life without parole for juveniles convicted of homicide is equally illustrated by unsuccessful efforts to repeal that penalty. Thus, in recent years, the Florida, Nebraska, and Louisiana legislatures have expressly considered, and rejected, bills to allow parole for juveniles sentenced to life for homicide. *See*, *e.g.*, Gary Blankenship, *Criminal Law Section Supports Review of Death Penalty Process*, Florida Bar News, Oct. 15, 2011, at 1 ("Lawmakers earlier this year considered a bill that would provide parole review for life-sentenced juveniles, but it failed."); Kevin O'Hanlon, *Juvenile Killers Won't Get Parole*, Lincoln Journal Star, Apr. 8, 2011 (reporting on failure of bill that would have allowed parole for juveniles convicted of homicide despite sponsor's argument that "the rationale" behind *Graham* and *Roper* requires the possibility of parole in such cases); *Supreme Court Decision Could Affect Louisiana Inmates*, The News-Star (Monroe, La.), May 18, 2010 ("Coinciding with the court's decision [in *Graham*], is a bill making its way through the state Legislature to revisit life without parole for any juvenile, including

those found guilty of a homicide."); SB494-2010 Regular Session, *available at http://legis.la.gov/billdata/History.asp?sessionid=10RS&billid=SB494* (last visited Feb. 21, 2012) (reporting failure of Louisiana bill). Needless to say, if there truly were a societal consensus against life without parole for juveniles convicted of homicide, the failure of these bills would be inexplicable, as would the United States' staunch opposition to "a resolution in the United Nations General Assembly calling on all states to abolish life sentences without parole for juveniles." Pet'r Br. 51. Let there be no mistake about what is really going on here: petitioners are trying to achieve by federal judicial fiat what they have failed to achieve through the democratic process.

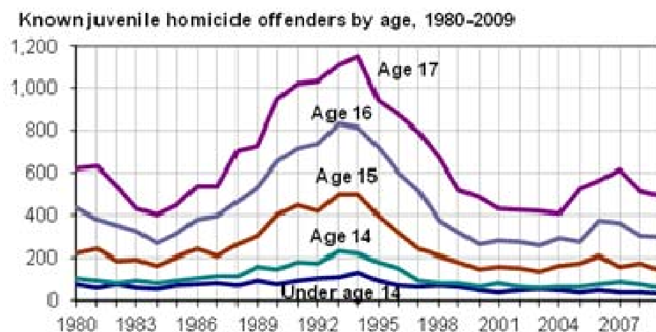
2. The Frequency With Which Particular Punishments Are Imposed Does Not Necessarily Reflect Societal Judgments About Those Punishments.

Petitioners next assert that this Court should ignore the widespread and recent legislation authorizing life without parole for 14-year-olds convicted of homicide on the ground that, "in actual practice," the imposition of such punishment "is an aberrant, exceedingly rare occurrence." Pet'r Br. 47 (capitalization modified). Petitioners base that assertion on the proposition that, by their own unofficial count, "[t]here are only about 79 persons in the United States under life-without-parole sentences for offenses committed at age 13 or 14." *Id.* According to petitioners, this alleged number—in and of itself—"evidences nationwide repudiation, not

acceptance, of the sentence for children of these young ages." *Id.*

That argument is a *non sequitur*. As this Court explained in *Graham*, discussion of the absolute number of persons subjected to a particular sentence is meaningless without consideration of the "base number of certain types of offenses." 130 S. Ct. at 2025. There are many grave offenses for which few—if any—persons have ever been convicted or punished. *See, e.g.*, 18 U.S.C. § 1751 (assassination of the President or Vice-President); 18 U.S.C. § 351(a) (assassination of a member of Congress or Justice of the Supreme Court); 18 U.S.C. § 32 (destruction of an aircraft); 18 U.S.C. § 1091 (genocide); 18 U.S.C. § 2381 (treason); 18 U.S.C. § 175 (possession or development of biological weapons); 18 U.S.C. § 229 (possession or development of chemical weapons). That does not establish a societal consensus against punishing persons who have committed, and been convicted of, such offenses; rather, it simply shows that few, if any, persons have committed, and been convicted of, such offenses in the first place.

Thus, the number of 14-year-olds who have been sentenced to life without parole for homicide reflects nothing so much as the fact that, thankfully, relatively few 14-year-olds commit homicide. According to Justice Department statistics, over the past thirty years, on average just 176 persons age 14 and younger per year have been reported as homicide offenders in our country of more than 300 million people. *See* U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Statistical Briefing Book* (Dec. 9, 2011), *available at* http://www.ojjdp.gov/ojstatbb/offenders/qa03104.asp?qaDate=2009 (last visited Feb. 21, 2012).



And, as might be expected, the numbers vary widely by region. Thus, in each of five States (Maine, New Hampshire, North Dakota, Vermont, and Wyoming) only 15 or fewer persons age 17 and younger are reported to have committed homicides over the *entire* 15-year period from 1994 to 2009 (these statistics do not break down the data for persons 14 and younger). *See* C. Puzzanchera & W. Kang, *Easy Access to the FBI's Supplementary Homicide Reports: 1980-2009* (2011), *available at* http://ojjdp.gov/ojstatbb/ezashr/ (last visited Feb. 21, 2012).

Indeed, far from showing that the current system is broken, the fact that relatively few 14-year-olds have been sentenced to life without parole only confirms that the system is working perfectly well. Prosecutors do not charge every juvenile potentially eligible for life without parole with a crime that might trigger that sentence. To the contrary, prosecutors exercise discretion in their charging decisions, taking into account such factors as the defendant's age and relative culpability. To assist prosecutors in the exercise of this responsibility, *amicus* NDAA has published guidelines addressing a variety of factors to be considered, including "[t]he juvenile's age, maturity, and mental status" as well as the seriousness of the offense, the juvenile's role in

the offense, prior criminal history, and threat to the community. National District Attorneys Association, *National Prosecution Standards* 64-68 (3d ed. 2009); *see also* National District Attorneys Association, *Resource Manual & Policy Positions on Juvenile Crime Issues* (2002) ("The primary factors" influencing charging decisions are "the seriousness of the crime, the threat to public safety, the offender's criminal history, the certainty of appropriate punishment, *and the age and maturity of the offender*.") (emphasis added).

Along with the relatively small number of 14-year-olds who commit homicide in the first place, the fact that professional prosecutors exercise restraint in their charging decisions helps explain the relatively small number of persons currently serving life without parole for homicides committed at age 14. Based on their real-world experience, prosecutors are keenly aware of the myriad circumstances under which a juvenile can become involved in a homicide, and typically charge only the most egregious juvenile offenders with crimes that could lead to such a severe sentence. Two recent examples illustrate the point.

Donald Torres.[3] One night, while his neighbors were asleep, 14-year-old Donald Torres entered their home, doused it with kerosene, and ignited it. All four members of the family, including two children aged four and one, perished in the ensuing fire. Torres planned the attack earlier in the day, when he spotted a can of kerosene on the victims' porch and selected it as the murder weapon. Torres ensured

[3] Telephone interview with Paul R. Wallace, Chief of Appeals, Delaware Department of Justice (Jan. 30, 2012); *see also Torres v. Delaware*, 608 A.2d 731 (Del. 1992) (unpublished).

that the family's only exit, a stairwell, was primed to explode in flame to prevent the victims from escaping. From outside the home, Torres watched as the flames spread and the father ran outside and then back inside in an unsuccessful attempt to save his family. Torres' actions were neither impulsive nor driven by peer pressure.

Delaware prosecutors considered various charges against Torres. They knew that a conviction of first-degree murder would result in a mandatory sentence of life without parole (because Delaware has no parole). They considered Torres' age and the mandatory nature of the penalty among the many factors that informed their charging decision. They ultimately decided to charge him with first degree murder, concluding that his age did not reflect the gravity of his crime, including his careful planning, the fact that he acted alone and without provocation, and that he bragged to friends about the crime. Prosecutors also relied on a psychological evaluation finding that Torres lived in a stable home, suffered from no mental disorders, and had no history of physical or sexual abuse.

A jury convicted Torres of four counts of intentional murder and four counts of felony murder. Under Delaware law, he was sentenced to eight consecutive life sentences.

Ashley Jones.[4] Sisters Ashley Jones, age 14, and Mary Jones, age 10, lived with their grandparents,

[4] Telephone interview with Laura Poston, Assistant District Attorney, Jefferson County, Ala. (Jan. 31, 2012); telephone interview with Michael Anderton, Assistant District Attorney, Jefferson County, Ala. (Feb. 8, 2012); *see also Alabama v. Jones*, No. CC-2000-0151 (Cir. Ct. of Jefferson Cty., Ala., May 25, 2001) (unpublished).

Deroy and Mary Elizabeth Nalls. After the grandparents prohibited Ashley from seeing her boyfriend, she hatched a plan to murder them. While the family was asleep, Ashley and her boyfriend—at Ashley's direction—shot, stabbed, and burned the grandparents, an aunt who was staying in the home, and Ashley's sister Mary, whom Ashley herself insisted on stabbing. Ashley's grandmother and sister survived; her grandfather and aunt did not. When police later revealed that Mary had survived, Ashley responded, "I thought I killed that bitch."

Alabama prosecutors considered various charges they might bring against Ashley. Under Alabama law, various statutory guidelines, including "[t]he extent and nature of the physical and mental maturity of the child," Ala. Code § 12-15-203(d)(5), guide the decision to try a juvenile as an adult. Prosecutors decided to prosecute Ashley for capital murder and attempted murder after concluding that her age did not reflect the gravity of her crime, including her careful advance planning, control over an accomplice, and emotionless response. In making the charging decision, prosecutors also considered the fact that Ashley was not escaping an abusive home, and a psychological evaluation showing that she suffered from no formal disorders. A judge agreed with prosecutors that Ashley belonged in adult court facing an adult sentence.

A jury convicted Ashley of two counts of capital murder and two counts of attempted murder. She is currently serving life without parole.

These cases underscore that the categorical approach proposed by petitioners is unsound and

unwarranted.[5] Under current law, any particular 14-year-old may challenge a sentence of life without parole as grossly disproportionate under the Eighth Amendment. The categorical approach advocated by petitioners thus does nothing more than provide a windfall to the most egregious juvenile offenders, like Donald Torres and Ashley Jones, who could not possibly establish that their sentences are grossly disproportionate to their crimes under all the facts and circumstances.

B. The Categorical Rule Proposed By Petitioners Would Transform The Eighth Amendment Into A National Code Of Juvenile Justice.

Under our federal system, "'States possess primary authority for defining and enforcing the criminal law.'" *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). To accept petitioners' arguments in this case would be to transform the Eighth Amendment into nothing less than a National Code of Juvenile Justice.

The logic of petitioners' arguments sweeps far beyond the validity of sentences of life without parole for 14-year-olds convicted of homicide. Indeed, that logic calls into question *every* criminal sentence meted out to a juvenile. For one thing, there is little functional difference between a lengthy term of years

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[5] For other accounts of juveniles sentenced to life without parole for their crimes, *see* Charles D. Stimson & Andrew M. Grossman, *Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens* (2009) *available at* http://www.heritage.org/research/reports/2009/08/adult-time-for-adult-crimes-life-without-parole-for-juvenile-killers-and-violent-teens (last visited Feb. 21, 2012).

and life in prison. *See*, *e.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 79 (2003) (Souter, J., dissenting) ("[B]ecause [the defendant] was 37 years old when sentenced, the substantial 50-year period amounts to life without parole," and it would be "unrealistic" to "reject the practical equivalence of a life sentence without parole and one with parole eligibility at 87" because "an 87-year-old man released after 50 years behind bars will have no real life left, if he survives to be released at all."). Nor are such functional-equivalence arguments necessarily limited to lengthy terms of years; rather, they may also apply to shorter terms of years imposed consecutively. *See, e.g.*, *Postelle v. Florida*, 383 So. 2d 1159, 1163 (Fla. Dist. Ct. App. 1980) (affirming consecutive terms amounting to 114 years in prison for juvenile convicted of homicide).

These are not idle hypotheticals. In the wake of *Graham*, the lower courts are already fielding such challenges. *See, e.g.*, *Angel v. Virginia*, 704 S.E.2d 386, 402 (Va. 2011) (addressing argument that non-homicide sentence violated *Graham* because the State does not allow parole until age 60 or 65); *Arizona v. Kasic*, 265 P.3d 410, 415 (Ariz. Ct. App. 2011) (addressing argument that consecutive sentences totaling 139.75 years contravenes *Graham*); *Thomas v. Florida*, No. 1D10-1613, __ So. 3d __, 2011 WL 6847814 (Fla. Dist. Ct. App. Dec. 30, 2011) (addressing argument that 50-year sentence is the functional equivalent of life without parole).

Moreover, petitioners' position necessarily leads to the question of when, ostensibly as a matter of federal constitutional law, an opportunity for parole must be offered to a juvenile sentenced to life. That question is particularly vexing with respect to those

States, like Delaware, that do not have parole at all. Petitioners seem to hint at an answer to this question when they request that Jackson be given access to the Arkansas parole system on the same terms as persons who did *not* commit a capital crime, allowing him a chance of release after 15 years of incarceration. Pet'r Br. 57-58.

Finally, the logic of petitioners' argument extends well beyond 14-year-olds—a fact that petitioners themselves make no effort to conceal. Thus, petitioners candidly ask this Court to declare that the sentence of life without parole is categorically unconstitutional for persons who commit homicide before "the age of 18." Pet'r Br. 61. In truth, the logic of petitioners' position goes much further still. The premise of their argument is the empirical assertion that juveniles cannot be held fully accountable for their actions because the frontal lobes of their brains are not yet fully developed. *See* Pet'r Br. 20, 40-41. But the very research on which petitioners rely asserts that the frontal lobe of the human brain is not fully developed until the mid-20s. See, *e.g.*, Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Annals N.Y. Acad. Sci. 77 (2004) (noting that human brains undergo significant development past age 20), (cited at Pet'r Br. 20, 21, 65); Tracy Rightmer, *Arrested Development: Juveniles' Immature Brains Make Them Less Culpable Than Adults*, 9 Quinnipiac Health L. J. 1, 5 (2005) (arguing "that 'juvenile' should apply to those over eighteen and up to the age of twenty-two, which research suggests is the biological age of maturity.") (cited at Pet'r Br. 21, 65); *see also Amicus* Br. of American Psychological Association, *et al.* (APA Br.) 13 ("[S]kills required for future planning continue to

develop until the early 20s."); *id.* at 28 (noting that myelination in the brain continues into "early adulthood") (internal quotation omitted). If differences between mature and immature brains warrant the conclusion that life without parole may never be imposed on a 14-year-old, there is no reason why those differences would not warrant the same conclusion for defendants well into their twenties.

The upshot of this approach is a federal constitutional regime based not on law but on ever-evolving social and natural science. *See, e.g.*, The Royal Society, *Brain Waves Module 4: Neuroscience & the Law* 1-2 (Dec. 2011) ("At present there may be relatively little neuroscience that can be directly applied to the law, but this will surely change over the next ten to twenty years."); APA Br. 4 ("research suggests a *possible* physiological basis" for certain brain differences between juveniles and adults) (emphasis added). Penological lines based on such emerging science are the sort of lines that, in a democratic society, should be drawn by elected state legislators, not unelected federal judges.

At bottom, nothing in the text or history of the Eighth Amendment or this Court's precedents supports the one-size-fits-all categorical rule of constitutional law that petitioners are proposing here. To the contrary, that rule would represent a marked extension of this Court's decisions in *Roper* and *Graham*. If nothing else, this Court should heed Justice Jackson's sage advice: "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." *Douglas v. City of Jeannette*, 319 U.S. 157, 181 (1943) (opinion concurring in the result). This Court should refuse to

add the additional story now requested by petitioners, lest the entire temple collapse of its own weight.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondents' briefs, the judgments in both cases should be affirmed.

Respectfully submitted,

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