Nos. 08-7412, 08-7621

In the Supreme Court of the United States

TERRANCE TAMAR GRAHAM, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT

JOE HARRIS SULLIVAN, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF FOR THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the Eighth Amendment's prohibition of "cruel and unusual punishments" bar sentencing violent juvenile offenders to life without parole?

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Sentencing a juvenile to life imprisonment without the possibility of parole is a weighty matter. Prosecutors do not seek such punishment lightly, nor do courts impose it without careful consideration and compelling reasons. But youthful offenders sometimes commit heinous crimes—rapes, kidnappings, and violent robberies and assaults that may leave the victim maimed for life, or worse. Many do so with full knowledge of the wrongfulness of their actions, and with callous disregard of both the demands of the law and the rights of their victims. And many are already repeat offenders with histories of recidivism. Such offenses cannot be chalked up to "youthful indiscretion." It is in these rare and tragic cases of heinous crimes committed by already-hardened and violent juvenile offenders that a State can and must be allowed to impose the severe sanction of life imprisonment without parole.

The crimes committed by juveniles, like those committed by adults, vary in severity. And individual juvenile offenders, like adult criminals, have different levels of maturity, culpability, and potential for rehabilitation. But petitioners would have this Court impose a categorical rule that the imposition of a life sentence without parole on a juvenile is *always* "cruel and unusual punishment"—regardless of the

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity, other than the *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. NDAA is filing its brief with the consent of all parties. Letters of consent have been lodged with the Court.

nature and severity of the crime, the individual defendant's maturity and criminal history, or the procedural safeguards the State has put in place to avoid grossly disproportionate sentences.

This one-size-fits-all approach is not mandated by the Constitution. Indeed, it runs squarely afoul of this Court's holding that for non-capital punishments, the Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate'" to the individual crime. *Harmelin* v. *Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment). As the Court has recognized, such cases are "exceedingly rare." *Rummel* v. *Estelle*, 445 U.S. 263, 272 (1980). To proportionately punish the guilty, adequately protect the public, and deter future crimes, prosecutors and judges must have the flexibility to ensure that violent crimes committed by the most dangerous juvenile offenders may be met with an appropriately severe sanction—one that, in their best judgment, protects society from further depredation at the hands of those who, young as they may be, have already demonstrated that they pose a severe risk to those around them.

Amicus National District Attorney's Association (NDAA) has an obvious, powerful interest in this Court's resolution of the question presented. NDAA is the oldest and largest professional organization representing U.S. criminal prosecutors. Its members are state and local prosecutors who, in the exercise of their prosecutorial discretion, bear the heavy burden of deciding whether to seek the most severe possible sanctions against juvenile offenders—including life imprisonment without parole—when the circumstances so warrant. The relative rarity of juvenile life-without-parole sentences is a testament that this

responsibility is not discharged lightly. Prosecutors (and courts) recognize that life without parole is a severe sanction that should be imposed on a youthful offender only in extreme circumstances, and as a consequence, the penalty is rarely imposed. But that does not mean that the Constitution bars such punishment on those rare occasions when it is necessary to protect society.

STATEMENT

These cases concern two recidivist juvenile offenders who were convicted of violent felonies and sentenced to life imprisonment without parole.

1. Petitioner Joe Harris Sullivan was thirteen years old when he was convicted of sexual battery and burglary of a dwelling in a Florida state court. Sullivan and two accomplices broke into the then-unoccupied home of an elderly woman and stole jewelry and coins. Later the same day, Sullivan and an accomplice returned to the home, which was now occupied. When the 72-year-old victim attempted to prevent Sullivan from entering her home, he forced his way in and threw a black slip over her head. Sullivan took her to the bedroom where he stripped her, beat her, and brutally raped and sodomized her. Sullivan threatened to kill the victim several times, but stated that if she couldn't identify him, he "might not have to kill her." As a result of the rape, the victim sustained bruising, a laceration to the vulva, and a vaginal tear that required surgery to repair. A police officer who was called to the scene by a neighbor saw Sullivan fleeing the house immediately after the rape.

Sullivan was arrested, tried, and convicted. At sentencing, the trial court was confronted with Sulli-

van's extensive prior criminal record. In the two years before his conviction, Sullivan had been found guilty of seventeen criminal offenses comprising several serious felonies (including an assault on his juvenile counselor and a prior burglary during which Sullivan killed a dog). Based on this prior record, Sullivan far exceeded the predicate needed under Florida's sentencing guidelines to impose a life sentence. The court found that, in light of these facts and the nature of the crimes, an adult sentence was appropriate. It sentenced Sullivan to life imprisonment on the sexual battery charges and to 30 years' imprisonment (later reduced to 15 years) on the burglaries.

More than 15 years after his conviction and sentencing, Sullivan filed a state post-conviction motion, arguing that this Court's decision in *Roper* v. *Simmons*, 543 U.S. 551 (2005), had created a new constitutional right that entitled him to relief from his sentence. The trial court dismissed the motion as untimely, and the Florida District Court of Appeal affirmed.

2. Petitioner Terrence Jamar Graham was sixteen years old when he and an accomplice entered a restaurant while wearing masks and demanded that the restaurant manager give them money. When the manager refused, Graham's accomplice hit him in the head twice with a steel bar. Graham and his accomplice then fled the scene.

Graham was arrested and confessed to the crime. He was charged with attempted robbery and burglary with an assault or battery, which carried a maximum sentence of life imprisonment without parole. After a hearing, he was certified to be tried as an adult.

Graham pleaded guilty to both offenses. The court withheld adjudication and sentenced Graham to 12 months in jail and three years of probation. During his plea colloquy, Graham acknowledged that he was being sentenced as an adult and waived his right to have the court consider the imposition of juvenile sanctions. He was certified as an adult for any future criminal violations.

While on probation, Graham—who was seventeen years old by this time—was arrested on new charges of home-invasion robbery and fleeing and eluding the police. Graham and his accomplices had robbed the homeowner at gunpoint; Graham himself held a cocked gun to the victim's head while he and his accomplices entered the home and demanded money from the occupants. They stole a gold crucifix from another occupant of the home and barricaded both victims in a closet before leaving the scene. Graham was apprehended after a high-speed automobile chase. After his arrest, Graham told police that he had been involved in "[t]wo or three" other robberies before the home invasion. He also admitted fleeing and attempting to elude a law enforcement officer.

A Florida court found that Graham had violated the conditions of his probation by possessing a weapon, committing the home-invasion robbery, and fleeing from police. The court, finding that further juvenile sanctions would not be appropriate, sentenced Graham to life imprisonment without possibility of parole. The court concluded that "this is an escalating pattern of criminal conduct * * * and that we can't help you any further. We can't do anything to deter you. * * * Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your

life and that the only thing I can do now is to try to protect the community from your actions." Graham Pet. App. 3–4. Graham was nineteen at the time of sentencing.

Graham appealed, arguing that his sentence was cruel and unusual punishment under the Florida and U.S. Constitutions. The Florida District Court of Appeals rejected Graham's facial challenge, holding that this Court's decision in *Roper* did not establish that sentencing a juvenile to life imprisonment is cruel and unusual in all situations. It also rejected Graham's challenge that the sentence was grossly disproportionate as applied to him. The court took into account that "after being placed on probation—an extremely lenient sentence for the commission of a life felony—[Graham] committed at least two armed robberies and confessed to the commission of an additional three." Graham Pet. App. 17. The court noted the violent nature of the offenses, and recognized that the "offenses were not committed by a pre-teen, but a seventeen-year-old." *Ibid.* Based on these individualized circumstances, the Florida court held that Graham's sentence was not grossly disproportionate.

SUMMARY OF ARGUMENT

Petitioners would have this Court categorically declare unconstitutional the imposition of a sentence of life without parole on any juvenile offender, regardless of the severity of the crime, the individual offender's maturity and culpability, and the juvenile's criminal history. Essentially, they are asserting a facial challenge against the application of this punishment to juveniles as a class.

As we demonstrate below in Part I, petitioners' approach is foreclosed by this Court's holding that a

law may not be declared facially unconstitutional unless there is no set of circumstances under which the challenged law would be valid. See *United States* v. *Salerno*, 481 U.S. 739 (1987). Here, petitioners bear the burden of showing that there is no case in which the imposition of a life-without-parole sentence would be constitutionally valid against a juvenile. They cannot carry this burden.

Petitioners' reliance on the categorical exclusions set forth in *Roper* v. *Simmons*, 543 U.S. 551 (2005), is inapposite. *Roper* was a death penalty case and, as this Court has held time and again, "death is different." Given both the irrevocability and the ultimate severity of the death penalty, its imposition implicates prophylactic rules that do not apply to sentences of imprisonment—even imprisonment for life. Outside of capital punishment, this Court has *never* exempted a whole class of offenders from a particular category of punishment on the ground that it would be cruel and unusual. Because life imprisonment does not raise the same issues as a sentence of death, the Court should decline petitioners' invitation to do so now.

Rather, this Court should apply its long-standing and well-established methodology for judging the constitutionality of a prison term: whether the sentence is "grossly disproportionate" to the individual crime. See *Lockyer* v. *Andrade*, 538 U.S. 63, 72 (2003). This methodology shuns categorical distinctions; rather, it looks to case-specific factors like the severity of the crime and the offender's criminal history. While a court reviewing the proportionality of a non-capital sentence is under no constitutional obligation to take into consideration mitigating factors like the offender's age, if youth has any place in the

calculus, it is as one of many factors to be weighed, not as the source of an independently determinative bright-line rule.

Applying these principles to Graham's and Sullivan's sentences, it is clear, as we show in Part II, that the imposition of life without parole was not grossly disproportionate in those cases. Both petitioners engaged in serious crimes of violence that posed a great threat to public safety. Each had a long record of prior offenses that suggested that rehabilitation was not an option. And each continued to commit violent crimes after receiving relatively lenient treatment for their prior offenses. Under these circumstances, a sentence of life without parole is not cruel and unusual punishment. And Graham's and Sullivan's cases well illustrate the wisdom of *avoiding* the categorical bar they seek.

I. The Eighth Amendment Does Not Categorically Bar The Imposition Of A Sentence Of Life Without Parole For All Juvenile Offenders.

A. To succeed in their facial challenge, petitioners must show that there is no set of circumstances under which a life- without-parole sentence would be constitutionally valid against a juvenile.

As noted, petitioners do not merely argue that the imposition of a life sentence without parole was grossly disproportionate *in their particular cases*. Rather, they ask this Court to rule categorically that such a sentence is *always* cruel and unusual when imposed on a juvenile—regardless of the nature of the crime, the age and maturity of the offender, the

offender's prior criminal history, or the individualized determinations made by the sentencing court.[2] This argument runs counter to both this Court's jurisprudence about facial challenges and its general Eighth Amendment precedent, which holds that a punishment must be "grossly disproportionate" to the specific offense in order to be deemed "cruel and unusual."

To mount a successful facial challenge outside of the First Amendment context, a petitioner "must establish that no set of circumstances exists under which the [challenged law] would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). The fact that a statute "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Ibid.*

Salerno is illustrative. The petitioner there argued that the federal Bail Reform Act was facially unconstitutional under both the Due Process Clause and the Excessive Bail Clause of the Eighth Amendment, because it permitted pretrial detention without bail upon a judicial officer's determination that alter-

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[2] See Graham Br. 32 ("juvenile defendants *as a class* possess certain characteristics, in particular diminished culpability and capacity for change, that render unconstitutional their sentences") (emphasis added); *ibid.* at 36 ("no contemporaneous sentencing procedure, even those related to Graham's individual characteristics, could make the sentence imposed constitutional"); *ibid.* at 50 ("[H]ere, this Court should categorically reject the proposition that the Eighth Amendment permits a sentencing judge to determine, on a case-by-case basis, when a life-without-parole sentence is appropriate for a juvenile offender who commits a non-homicide."); Sullivan Br. 57 ("a categorical rule barring the infliction of a life-without-parole sentence on any offender under a certain age is necessary").

native procedures would not "reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3141(e) (1982 & Supp. III 1993); see also *Salerno*, 481 U.S. at 745. The Court disagreed, concluding that "whether or not [the procedures of the Act] might be insufficient in some particular circumstances," they survived facial challenge because they were "'adequate to authorize the pretrial detention of at least some [persons] charged with crimes.'" *Ibid.* at 751 (quoting *Schall* v. *Martin*, 467 U.S. 253, 264 (1984)).

Petitioners here do not challenge the constitutionality of statutes authorizing the imposition of a life sentence without parole in all circumstances; they do not, for example, challenge the constitutionality of such a statute as applied to adults. But they do seek a categorical ruling that such laws are always unconstitutional as applied to juveniles, regardless of circumstances.[3] To succeed in such a limited facial challenge under *Salerno*, petitioners must show that there is no set of circumstances under which imposition of a life-without-parole sentence would be constitutionally valid against a juvenile.

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[3] Graham contends that imposition of a life-without-parole sentence is always unconstitutional for an offense committed when the offender was younger than eighteen. Graham Br. 32. Sullivan argues that such sentences are categorically unconstitutional for "any offender under a certain age," and leaves it to the Court to draw that line somewhere between fourteen and eighteen. Sullivan Br. 58–61.

B. Outside the capital punishment context, this Court has never categorically exempted an entire class of offenders from a particular punishment.

Petitioners cannot meet this burden. Outside the death penalty context, this Court's Eighth Amendment jurisprudence holds that a sentence of imprisonment may be found unconstitutional only if it is "grossly disproportionate" to the specific offense. In making this determination, this Court has weighed factors like the severity and violence of the offense and the culpability and criminal history of the offender. The question of whether a sentence is grossly disproportionate is thus an inherently individualized and fact-specific inquiry that does not permit of categorical treatment.

Indeed, outside the death penalty context, this Court has never exempted a whole class of offenders from a specific punishment on the ground that its imposition would be categorically cruel and unusual. The only such categorical rulings have dealt solely with capital punishment. See *Thompson* v. *Oklahoma*, 487 U.S. 815 (1988) (plurality opinion) (holding that Eighth Amendment prohibits execution of persons under 16 years of age at the time of the offense); *Atkins* v. *Virginia*, 536 U.S. 304 (2002) (same for mentally retarded persons); *Roper*, *supra* (same for persons under 18 years of age at the time of the offense).

The reason for these extraordinary exemptions is clear: As this Court has stated time and again, "[d]eath is different." *Ring* v. *Arizona*, 536 U.S. 584, 605–606 (2002) (citation omitted). See also, *e.g.*, *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976) (joint

opinion of Stewart, Powell, and Stevens, JJ.) (noting that the "penalty of death is different in kind from any other punishment" and emphasizing its "uniqueness"); *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (death penalty is "qualitatively different" from other punishments); *Spaziano* v. *Florida*, 468 U.S. 447, 459 (1984) (citing Court's prior recognition of the "'qualitative difference' of the death penalty"). First, the finality of execution—unlike even the most severe sentence of imprisonment—makes the consequences of error irrevocable and irreversible. See *Rummel*, 445 U.S. at 272 ("The penalty of death * * * * is unique in its total irrevocability.") (quoting *Furman* v. *Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)); *Furman*, 408 U.S. at 290 (Brennan, J., concurring) (the "finality of death precludes relief"). And second, the death penalty is "uniqu[e] * * * [in] its extreme severity"; it is the "ultimate sanction." *Furman*, 408 U.S. at 286–290 (Brennan, J., concurring).

Given the death penalty's unique severity and irrevocability, the Court has decreed that it must be reserved for those whose "extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319). It is these unique concerns that underlie the categorical prophylactic rules announced in cases like *Atkins* and *Roper*. The *Roper* Court itself affirmed a life sentence without possibility of parole for a conviction based on juvenile conduct. *Roper*, 543 U.S. at 578–579.

These unique considerations that capital punishment invokes simply do not apply to prison terms, even life without parole. This Court has long recognized that the "penalty of death is qualitatively different from a sentence of imprisonment, however

long." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Indeed, "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Ibid.*

C. This Court's gross proportionality principle for non-capital sentences requires individual comparison, not categorical treatment.

Although this Court's non-capital Eighth Amendment jurisprudence has not always been pellucid, "one governing legal principle emerges as 'clearly established' * * * * A gross disproportionality principle is applicable to sentences for terms of years." *Lockyer* v. *Andrade*, 538 U.S. 63, 72 (2003); see also *Ewing* v. *California*, 538 U.S. 11, 20 (2003) ("The Eighth Amendment * * * contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'") (quoting *Harmelin*, 501 U.S. at 996–997 (Kennedy, J., concurring in part and concurring in the judgment)). Although "the precise contours of [this principle] are unclear," the Court has emphasized that it is "applicable only in the 'exceedingly rare' and 'extreme' case." *Lockyer*, 538 U.S. at 73 (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment)); see also *Ewing*, 538 U.S. at 21 ("federal courts should be reluctant to review legislatively mandated terms of imprisonment, and * * * successful challenges to the proportionality of particular sentences should be exceedingly rare") (quoting *Hutto* v. *Davis*, 454 U.S. 370, 374 (1982) (*per curiam*)).

In conducting proportionality review, this Court compares the nature and severity of the offense with

the sentence. That is, it evaluates the "nexus between the punishment imposed and the defendant's blameworthiness" to ensure that they are proportional. *Stanford* v. *Kentucky*, 492 U.S. 361, 382 (1988) (O'Connor, J., concurring in part and concurring in the judgment). Such review is lenient and deferential, guided as it is by the principles of "the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment).

Because proportionality review requires a court both to defer to legislative policy determinations and to evaluate the nexus between a *particular* crime and a *particular* sentence, it cannot support the kind of categorical facial attack that petitioners mount here. Indeed, this Court has already held that violent crimes may support harsher sentences than nonviolent offenses. See *Solem* v. *Helm*, 463 U.S. 277, 292–293 (1983) ("nonviolent crimes are less serious than crimes marked by violence or the threat of violence"); *ibid.* at 296 (holding life sentence without parole for issuing a bad check unconstitutional because offense was "one of the most passive felonies a person could commit").[4]

The lack of direct violence need not, however, invalidate a severe sentence where the crime otherwise

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[4] It is significant that *Solem*, which involved a passive and nonviolent financial fraud offense, is the *only* case in which this Court has invalidated a prison sentence as disproportionate. See Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1058 (2004).

poses a serious threat to society. *See Ewing*, 538 U.S. at 28 (holding that non-violent theft of golf clubs valued at $1,200 supported sentence of life imprisonment with no chance of parole for 50 years); *Harmelin*, 501 U.S. at 1002–1003 (Kennedy, J., concurring in part and concurring in the judgment) (upholding sentence of life imprisonment for cocaine possession based on the "direct nexus between illegal drugs and crimes of violence"). Petitioners' categorical approach asks the Court to ignore this precedent and to declare *all* life-without-parole sentences unconstitutional for juvenile offenders—with no consideration of how serious or horrifically violent the offense may have been.

This Court has also looked to the offender's criminal history in judging proportionality. Because "'[s]tates have a valid interest in deterring and segregating habitual criminals' * * * * [r]ecidivism has long been recognized as a legitimate basis for increased punishment." *Ewing*, 538 U.S. at 25 (quoting *Parke* v. *Raley*, 506 U.S. 20, 27 (1992)). Thus, proportionality review must take into account "the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Rummel*, 445 U.S. at 276 (upholding life sentence for third nonviolent fraud felony, where amounts at issue were $80, $23.36, and $120.75). Petitioners' categorical rule again ignores this long-standing precedent and would preclude any consideration of a juvenile's criminal history in evaluating the proportionality of a sentence of life without parole.

Relying heavily on *dicta* from *Roper*, petitioners nevertheless argue that juvenile offenders should be exempt from this Court's well-established proportionality standard because they are categorically less culpable than adults. But even if *some* juveniles may demonstrate an underdeveloped sense of responsibility or impulse control that renders them somewhat less culpable, or may be somewhat less amenable to the deterrent effect of the criminal law, that does not mean that there is *no* juvenile offense severe enough to support the imposition of life without parole. See *Stanford*, 492 U.S. at 378 ("it is not demonstrable that no 16-year-old is 'adequately responsible' or significantly deterred"). In deciding how to charge and sentence such offenders, prosecutors and courts properly take into account factors like criminal culpability. And in appropriate circumstances, so may appellate courts determining whether a particular sentence (including life without parole) is grossly disproportionate.[5]

But those same courts should also be able to take into account the other well-established factors—like severity, violence, and criminal history—that *also* bear on an offender's culpability.[6] While it may be

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[5] Unlike in the death penalty context, there is no constitutional requirement that a court conducting non-capital proportionality review take into account all mitigating factors, such as age. Compare *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (capital jury must be empowered to consider and give effect to all mitigating evidence). However, such factors may sometimes be relevant in judging the offender's culpability.

[6] The state court cases cited by petitioners involve precisely this type of fact-specific inquiry; they do not purport to apply a categorical rule against the imposition of life without parole on *all* juvenile offenders. In *People* v. *Miller*, 781 N.E.2d 300 (Ill. 2002), for example, the Illinois Supreme Court held that the im-

that "it is statistically aberrant for boys to refrain from minor criminal behavior" during adolescence, see Sullivan Br. 21, it is equally clear that the vast majority of juveniles can and do refrain from committing *repeated and serious violent felonies*—like rape and aggravated burglary. That a juvenile commits such acts says as much about his or her culpability as does chronological age.

Of course, not every juvenile offender is "irretrievably depraved or permanently flawed." Sullivan Br. 24. But a small number may be, and in those rare cases, a State should not be categorically prohib-

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position of life without parole on a 15-year-old who acted, without premeditation, as a passive lookout during murders violated state constitution's proportionate penalties clause. But it made clear that it could contemplate other situations where "a sentence of natural life imprisonment without the possibility of parole [would be] appropriate" for a more culpable juvenile offender. *Ibid.* at 309.

Similarly, in *Naovarath* v. *State*, 779 P.2d 944, 946 (Nev. 1989), the Nevada Supreme Court invalidated a life sentence imposed on a 13-year-old convicted of killing a man who had repeatedly molested him, but noted that "[w]hen a child reaches twelve or thirteen, it may not be universally agreed that a life sentence without parole should never be imposed." And in *People* v. *Dillon*, 668 P.2d 697, 726–727 (Cal. 1983), the California court overturned the imposition of a life-without-parole sentence on a minor convicted of felony murder only after a fact-specific inquiry in which it concluded that the offender was an "unusually immature youth" who "had had no prior trouble with the law" and "was not the prototype of a hardened criminal who poses a grave threat to society." See also *Phillips* v. *State*, 807 So. 2d 713, 718 (Fla. App. 2002) (upholding juvenile sentence of life without parole, but only after considering offender's age as part of proportionality determination: "[A]lthough Mr. Phillips' culpability may be diminished somewhat because of his age at the time of the commission of the crime, the factor of his age is outweighed by his heinous conduct and the ultimate harm—death—that he inflicted upon his victim.").

ited from imposing a proportionate punishment that fits the crime. Petitioners' facial challenge should be rejected.

D. The infrequency with which life without parole is imposed upon juvenile offenders demonstrates that this punishment is only being sought and imposed in the most severe cases.

Petitioners correctly note that the imposition of life without parole on juveniles is rare. But this does not mean that such sentences are cruel and unusual. To the contrary, it suggests that the most severe sentences are being reserved for the most horrific crimes and the most hardened and dangerous juvenile offenders. This is an argument not against, but in favor of, the proportionality of the penalty in those exceptional cases.

There is no question that sentencing a juvenile to life imprisonment without parole is a weighty decision. Indeed, "[t]he very considerations which induce petitioners and their supporters to believe that [such a sentence] should never be imposed on offenders under 18 cause prosecutors and juries to believe that it should rarely be imposed." *Stanford*, 492 U.S. at 374. To ensure that such a severe penalty is not imposed except in appropriate circumstances, States channel prosecutorial discretion and judicial determinations through procedures which introduce multiple checks into the process of juvenile sentencing.

In Florida, for example, the initial decision as to whether to prosecute a juvenile as an adult typically rests in the hands of the prosecutor, but is guided by statutory requirements. See Fla. Stat. § 985.557 (2007). A prosecutor may charge any 16- or 17-year

old as an adult if, in his or her judgment and discretion, "the public interest requires that adult sanctions be considered or imposed." *Ibid.* § 985.557(1)(b). But a prosecutor may charge a 14- or 15-year-old as an adult only for certain enumerated violent felonies. *Ibid.* at § 985.557(1)(a). These requirements ensure that adult penalties will only be sought in cases involving the most mature offenders and most serious violent crimes.

Even after a juvenile is prosecuted and convicted as an adult, he or she may still be sentenced as a juvenile based on various factors, including the seriousness and violence of the offense; the offender's sophistication and maturity; the offender's criminal history; and the prospects of reasonable deterrence and rehabilitation. *Ibid.* at § 985.565(1)(b) (2007). It is thus only if both the prosecutor *and* the court decide, in the exercise of their discretion, that the circumstances do not warrant juvenile sentencing that a juvenile in Florida will be sentenced as an adult.

Given these procedural safeguards, it is unsurprising that it is rare for a juvenile to receive an adult sentence of life without parole—even in Florida, the State where such sentences are the most common. This rarity simply confirms that prosecutors and courts have used their guided discretion to confine application of this severe sanction to the most severe offenses and hardened juvenile offenders.

II. Graham's And Sullivan's Sentences Are Not Grossly Disproportionate, And Their Cases Illustrate The Folly Of A Categorical Prohibition On Life Sentences For Juveniles.

The facts underlying petitioners' own sentences demonstrate that imposition of life without parole

has been confined to rare and deserving cases. Applying the principles announced by this Court to their individual offenses, neither Graham's nor Sullivan's sentence is grossly disproportionate—and the facts of their cases illustrate the absurdity of the categorical rule they seek in this Court.

1. As noted, Graham was convicted of armed burglary, a violent felony, which he committed at age sixteen. In the course of that burglary, Graham's accomplice beat the victim on the head with a steel bar. Graham received a lenient sentence of 12 months in county jail plus probation—in part by voluntarily waiving his right to be sentenced as a juvenile if he committed future offenses. Given a second chance by the courts, Graham promptly violated his probation by committing (at age seventeen) another violent robbery and burglary: a home invasion during which he held a cocked gun to the victim's head. He also confessed to having committed several other burglaries for which he was not formally charged.

While Sullivan was only thirteen when he committed his principal offenses, the details of those crimes are shocking in their violence and brutality. After burglarizing an unoccupied house, he later returned to the house and brutally raped and sodomized its elderly occupant, while beating her and repeatedly threatening to kill her. Sullivan's sexual assault was so violent that the victim suffered vaginal tears requiring surgery to repair.

Even at his young age, moreover, Sullivan was already a serial recidivist. At the time of his sentencing on the sexual assault and burglary charges, he had committed *seventeen* prior serious felonies, including burglary. He had also proven himself una-

menable to juvenile rehabilitation, having seriously assaulted one of his juvenile counselors.

Both Graham's and Sullivan's sentences were predicated on "crimes marked by violence or the threat of violence"—a factor that weighs heavily in the proportionality calculus. *Solem*, 463 U.S. at 292–293. Moreover, both Graham and Sullivan were violent recidivists. As the Florida Court of Appeals noted, these facts were "record evidence to support [Graham's] inability to rehabilitate." Graham Pet. App. 18.

Sullivan's record of prior offenses was even lengthier—with 17 prior serious felonies, most of them violent. Under these circumstances, the State's "'valid interest in deterring and segregating habitual criminals'" provides a "legitimate basis for increased punishment." *Ewing*, 538 U.S. at 25 (citation omitted).

Based on the well-established factors that this Court has traditionally weighed in determining the proportionality of a sentence, Graham's and Sullivan's sentences are not grossly disproportionate.

2. More important for present purposes, the facts of these two cases compellingly show the folly of any *per se* prohibition on life sentences for juvenile offenders. One of the reasons this Court has found it acceptable to limit the death penalty—and to categorically preclude it in certain kinds of cases—is that such limitations do not necessarily increase the risk to society when the alternative of life without parole is available. See*, e.g., Roper*, 543 U.S. at 572 ("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."); *O'Dell* v. *Netherland*, 521 U.S. 151, 158 (1997) ("a prosecutor's future dangerousness argument will 'necessarily [be] undercut' by 'the fact that the alternative sentence to death is life without parole.'") (quoting *Simmons* v. *South Carolina*, 512 U.S. 154, 169 (1994) (plurality op.)); *Baze* v. *Rees*, 128 S. Ct. 1520, 1547 (2008) (Stevens, J., concurring) ("the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty"); *Ring*, 536 U.S. at 615 (Breyer, J., concurring) ("As to incapacitation, few offenders sentenced to life without parole (as an alternative to death) commit further crimes."). But that is only because, until now, governments have been free to incarcerate *permanently* the most violent offenders.

If this Court were to adopt the categorical rule urged by petitioners, however, federal and state governments would no longer have that option. They would be forced, under the banner of the Eighth Amendment, to unleash on society people they sincerely and reasonably believe to pose an enormous and unacceptable risk.

Indeed, the combination of *Roper* and a categorical rule against life without parole for juveniles would mean that all governments would be required, at some point, to send even hardened murderers back into society if they were juveniles at the time of their crimes.[7] Invoking the Eighth Amendment to prevent

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[7] Petitioners seek to carve out those who commit homicide from their proposed categorical rule, but provide no justification whatsoever for this exclusion. Even if it can avoid the question

the execution of such offenders is one thing; invoking it to *guarantee* that they will eventually be sent back into society is quite another. Indeed, it is unfortunately not an overstatement to say that, if the Court were to adopt petitioners' proposed rule—even if it excluded convicted murderers—*some* citizens, somewhere, would eventually be murdered as a result. And countless others would suffer lesser injuries.

Nothing in the Eighth Amendment or this Court's case law can reasonably be read to require that result. Life without parole for a juvenile may well be "unusual"—indeed, it is, and it *should* be. But permanent incarceration for the most violent, hardened juvenile offenders is by no means "cruel"—especially by comparison to the harm such offenders could inflict on the public if the Eighth Amendment were construed, categorically, to require that they eventually be released into the general population. "The Constitution is not a suicide pact." *Kennedy* v. *Mendoza-Martin*, 372 U.S. 144, 160 (1963).

CONCLUSION

Petitioners offer no compelling argument to support a categorical rule prohibiting the imposition of life without parole upon juvenile offenders as a class. Rather, under this Court's precedents, courts must apply a test of gross proportionality based on the in-

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in these cases, this Court, if it rules in petitioners' favor, will at some point have to decide why the same protection should not be extended to juvenile murderers. See, *e.g.*, *Pittman* v. *South Carolina*, 647 S.E.2d 144 (S.C. 2007), cert. denied, 128 S. Ct. 1872 (2008) (challenging 30-year sentence for murder committed by 12-year-old as cruel and unusual under *Roper*). And it is far from obvious why the principles that petitioners espouse, if accepted by the Court, would not apply in murder cases as well.

dividual circumstances surrounding the offense. Under this test, neither Graham's nor Sullivan's sentence was grossly disproportionate. And governments cannot reasonably be required, under the banner of the Eighth Amendment, to release into the general population offenders like Graham and Sullivan—much less hardened murderers who escape execution only because of *Roper*—simply because, at the time of their offenses, they happened to have been born a bit later than some arbitrarily selected date.

For all these reasons, the Court should affirm the decisions of the Florida courts.

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