19-2910

UNITED STATES COURT OFAPPEALS
FOR THE EIGHTH CIRCUIT

NORMAN BROWN, et al.,

Appellees,

v.

ANNE PRECYTHE, et al.,

Appellants.

On Appeal from the United States District Court for the
Western District of Missouri,
The Honorable Nanette K. Laughrey

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

PAGE

CORPORATE DISCLOSURE STATEMENT iv

INTERESTS OF AMICUS CURIAE.. 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT...4

I. SUPREME COURT PRECEDENT REQUIRES STATES TO HAVE PROCEDURES THAT ALLOW PERSONS SERVING JUVENILE LIFE WITHOUT PAROLE SENTENCES THE OPPORTUNITY TO PRESENT EVIDENCE OF MATURITY AND REHABILITATION, WHICH THE STATE MUST CONSIDER WHEN WEIGHING RELEASE. 4

II. ROBUST PAROLE PROCEDURES ARE NECESSARY TO CORRECT THE BIAS BLACK YOUTH FACE IN THE CRIMINAL JUSTICE SYSTEM. 10

CONCLUSION 16

Appellate Case: 19-2910 Page: 2 Date Filed: 02/21/2020 Entry ID: 4883850

TABLE OF AUTHORITIES

PAGE(S)

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560 U.S. 48 (2010)....*passim*

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Appellate Case: 19-2910 Page: 5 Date Filed: 02/21/2020 Entry ID: 4883850

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. (LDF) submits the following statement of disclosure: LDF is a nonprofit 501(c)(3) corporation. It is not a publicly held corporation that issues stock, nor does it have any parent companies, subsidiaries or affiliates that have issued shares to the public.

Appellate Case: 19-2910 Page: 7 Date Filed: 02/21/2020 Entry ID: 4883850

INTERESTS OF AMICUS CURIAE

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights law organization. Since its incorporation in 1940, LDF has fought to eliminate the arbitrary role of race in the administration of the criminal justice system by challenging laws, policies, and practices that discriminate against African Americans and other communities of color. LDF has submitted amicus briefs in many of the landmark cases affecting the rights of minors in the criminal justice system before the Supreme Court, including *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); and *Roper v. Simmons*, 543 U.S. 551 (2005). And LDF successfully litigated one of the first cases in the country applying the Supreme Court's ruling in *Miller*. *See Brister v. Mississippi*, Nos. 251-11-696 CIV, 02-0-949 TTG (Hinds County Cir. Ct. July 26, 2012).[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amicus curiae states that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting this brief, and no person other than amicus curiae contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

A decade ago, the Supreme Court recognized that the United States holds the unenviable position of being the harshest punisher of children who commit crimes. *See Graham v. Florida*, 560 U.S. 48, 80 (2010). The United States is the only country that still sends people to prison for life for crimes they committed as children.[2]

The Supreme Court has held that children are less culpable than, and therefore constitutionally distinct from, adults when it comes to punishment. Children cannot be sentenced to death, *Roper v. Simmons*, 543 U.S. 551, 575, (2005), nor can they be sentence to life in prison without parole unless their crimes reflect permanent incorrigibility, *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016). Moreover, for those serving life without parole sentences for crimes committed as a juvenile, the Supreme Court has held that states must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Miller v. Alabama*, 567 U.S. 460, 479 (2012) (quoting *Graham* 560 U.S. at 75). These rulings establish that it should be rare for a person to spend their life in prison for a crime they committed as a child.

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[2] *See* Meghan Keneally, *Hundreds of inmates serving life without parole for crimes as juveniles left waiting for another look*, ABC News (Oct. 21, 2019), https://abcnews.go.com/US/despair-hundreds-inmates-serving-life-crimes-juveniles-waiting/story?id=66329947.

Appellate Case: 19-2910 Page: 9 Date Filed: 02/21/2020 Entry ID: 4883850

The district court correctly held that Missouri's crimped parole procedures for people sentenced to juvenile life without parole (JLWOP) did not comply with Supreme Court precedent. Although Missouri offered formal hearings to individuals serving such sentences, the State did not actually provide an adequate opportunity for such persons to demonstrate maturity and rehabilitation. Instead, individuals sentenced to JWLOP in Missouri have been routinely denied parole based solely on the nature of the underlying offense. As a result, persons serving JLWOP sentences did not have a "meaningful opportunity to obtain release," *Miller*, 567 U.S. at 479, and the parole procedures did not ensure that only the "rarest of juvenile offenders" who are irretrievably corrupt spend the rest of their life in prison. *Montgomery*, 136 S. Ct. at 734. This Court should affirm the district court's ruling, as there was no way to square Missouri's parole procedures with the Supreme Court's precedent.

In fact, a closer look at the Class members in this case suggests that race, *not* redeemability, was the more salient factor when determining who spends their life in prison for crimes committed as a child. Sixty-two percent of the people serving JLWOP sentences in Missouri are Black, despite Black people comprising just 12 percent of the State's population. This staggering statistic reflects a broader national trend—that when a juvenile offender is Black, they are more likely to be sentenced to life without parole, especially when the victim is white. The persistent racial bias that permeates the juvenile justice system is often a factor when deciding who

receives the harshest punishment. The parole procedures required by Supreme Court precedent are therefore necessary to ensure that only the *worst* juvenile offenders, not the *Black* juvenile offenders, are forced to spend their lives in prison.

As explained more fully below, this Court should affirm the district court.

ARGUMENT

I. Supreme Court Precedent Requires States to Have Procedures that Allow Persons Serving Juvenile Life Without Parole Sentences the Opportunity to Present Evidence of Maturity and Rehabilitation, which the State Must Consider When Weighing Release.

Over the past 15 years, the Supreme Court has placed constitutional limits on the punishment of crimes committed by children. First, the Court held that the Eighth Amendment forbids the juvenile death penalty. *Roper*, 543 U.S. at 575. Then, the Court declared that the Eighth Amendment does not permit a juvenile to be sentenced to life in prison without the possibility of parole for nonhomicide offenses. *Graham*, 560 U.S. at 82. Finally, the Court held that *mandatory* life without parole sentences are unconstitutional for *all* crimes, including homicides, committed by juveniles. *Miller*, 567 U.S. at 489. This means that persons sentenced to life without parole for crimes committed as a juvenile must be provided with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 479. When making *Miller* retroactive a few years later, the Supreme Court underscored that only "the rarest of juvenile offenders, those whose crimes reflect

permanent incorrigibility" should spend their lives behind bars. *Montgomery*, 136 S. Ct. at 734.

The Supreme Court erected these special protections for juveniles because children are different from, and less culpable than, adults. They "lack [ ] maturity" and have "an underdeveloped sense of responsibility." *Roper*, 543 U.S. at 569. They are particularly susceptible to "negative influences and outside pressures, including peer pressure." *Id*. And broadly speaking, "the character of a juvenile is not as well formed as that of an adult." *Id.* For these reasons, the Court has made clear that a juvenile's "transgression is not as morally reprehensible as that of an adult." *Graham*, 560 U.S. at 68 (quotation marks omitted). Many crimes committed by juveniles "reflect the transient immaturity of youth." *Montgomery*, 136 S. Ct. at 734. Because children are different from adults, states must have procedures in place that allow people who committed crimes as juveniles to show their growth and gain release. *See Miller*, 567 U.S. at 479.

Missouri has one of the largest populations in the country of people serving JLWOP sentences.[3] The Class in this case is comprised of at least 94 members.[4]

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[3] According to a 2017 report by the Associated Press, only six states (Arkansas, California, Florida, Louisiana, Michigan, and Pennsylvania) have more people serving life sentences for crimes they committed as juveniles. *See* Associated Press, *A state-by-state look at juvenile life without parole* (July 31, 2017), https://apnews.com/9debc3bdc7034ad2a68e62911fba0d85/A-state-by-state-look-at-juvenile-life-without-parole.

[4] *Id.*

Appellate Case: 19-2910 Page: 12 Date Filed: 02/21/2020 Entry ID: 4883850

Thus, in Missouri, the ultimate juvenile penalty has not been reserved for "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Montgomery*, 136 S. Ct. at 733.

Furthermore, as the district court held, Missouri was not in compliance with the Court's mandate requiring states to provide persons sentenced to JLWOP "some meaningful opportunity to obtain release," including the opportunity to present evidence of "maturity and rehabilitation." *Miller*, 567 U.S. at 479. While Missouri law allows persons sentenced to JLWOP a parole hearing, *see* Mo. Rev. Stat. § 558.047, those hearings did not provide the "meaningful opportunity to obtain release" required by *Miller*, 567 U.S. at 479.

Instead, at the hearing, the deck was stacked against the person serving a JLWOP sentence. Under the rules established by the State, a person was allowed only one delegate at the hearing (including an attorney) who was limited to discussing "issues related to transition to the community." *Brown v. Precythe*, No. 2:17-CV-04082-NKL, 2018 WL 4956519, at *8 (W.D. Mo. Oct. 12, 2018). And the results of the hearing failed to reflect an adequate consideration of the transience of youth, *see Montgomery*, 136 S. Ct. at 734, as all "parole decisions [had to] be attributed to one of two [ ] barebones boilerplate reasons: the seriousness of the offense or inability to live and remain at liberty without again violating the law." *Brown*, 2018 WL 4956519, at *9 (quotation marks omitted). Rather than focusing

Appellate Case: 19-2910 Page: 13 Date Filed: 02/21/2020 Entry ID: 4883850

on the *Miller* factors, the Missouri Board of Probation and Parole routinely denied people serving JLWOP sentences release based solely on the "'circumstances of the offense'—'an explanation [that] is directly at odds with the requirement that maturity and rehabilitation be considered.'" *Id.* at *9. Unsurprisingly, a substantial majority of the Class members who have had a hearing have not received a release date. *Id*. at *3. The district court was right to find that the State's "policies, practices, and customs combine to deprive those serving JLWOP sentences who receive parole hearings of a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at *8.

To correct this ongoing constitutional violation and to bring Missouri into compliance with Supreme Court case law, the district court entered an order (after first asking the State to craft a remedy), requiring a number of additional procedures to ensure JLWOP parole hearings meet constitutional requirements. *See Brown v. Precythe*, No. 17-CV-4082, 2019 WL 3752973, at *6-7 (W.D. Mo. Aug. 8, 2019); ECF No. 183 (declaratory and injunctive relief order). These procedures, many of which were proposed by the State, included: training; a prehearing interview at which a person has a right to have counsel present; a prehearing worksheet that allows evidence of maturity and rehabilitation; and a decision worksheet that requires each Parole Board Member to consider factors relating to age, maturity, and rehabilitation, both at the time of the offense and at present. *See Brown,* 2019 WL

Appellate Case: 19-2910 Page: 14 Date Filed: 02/21/2020 Entry ID: 4883850

3752973, at *7-11; ECF No. 165 (plan for compliance with applicable statutory and regulatory requirements). The district court ordered these procedures to ensure that "the opportunity for release *will* be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." ECF No. 183 at 23 (quoting *Montgomery*, 136 S. Ct. at 736) (brackets omitted) (emphasis in district court's order).

Before this Court, the State argues that "*Miller*, *Montgomery*, and *Graham* do not say anything about state parole procedures." Appellant's Br. at 25. The State's position is that it only has to extend the opportunity for parole to people sentenced to JLWOP, but that the State need not ensure special consideration of maturity and rehabilitation. *Id.* at 26-27. The State goes so far as to argue that "the district court had no authority to review Missouri's parole process" and that even if it did, the procedures Missouri had in place satisfied the Constitution. *Id.* at 27.

The State's view is incompatible with what the Supreme Court has made clear throughout its cases. It is not enough for juvenile offenders to have a parole hearing if the procedures in place do not provide an opportunity to consider a youthful offender's rehabilitation. To be consistent with the Supreme Court's precedent, the procedures must be tailored to ensure that people who commit crimes as juveniles have a chance to show their growth so that only the truly irredeemable young offenders are imprisoned for life. *See Miller*, 567 U.S. at 479-80 (citing *Roper*, 543

Appellate Case: 19-2910 Page: 15 Date Filed: 02/21/2020 Entry ID: 4883850

U.S. at 573). If a state simply had to give juvenile offenders a hearing, but then had a policy of denying release based on the circumstances of the offense, that would clearly violate that the constitutional mandate that juvenile offenders be afforded a *meaningful* opportunity for release based on *evidence of rehabilitation and maturity*, and it would run counter to the admonition that juvenile life sentences should be reserved for the rarest of juvenile offenders. *Montgomery*, 136 S. Ct. at 734. The State's position frustrates the guiding principle of the Supreme Court's cases: that children are different from adults and the Constitution requires them to be treated differently. *See Graham*, 560 U.S. at 68-69.

Moreover, as the district court found, the record amply demonstrated that the Parole Board's procedures and determinations fell short of what is required by Supreme Court precedent. First, the procedures did not provide Class members an adequate opportunity to demonstrate their maturity and rehabilitation. The evidence showed that during a parole hearing, a person could only have one witness, could not take notes, and could not even discuss their maturity or rehabilitation. *Brown*, 2018 WL 4956519, at *7-8. Second, the evidence showed that the Parole Board was not fully considering rehabilitation or maturity when making release decisions, as parole was often denied based on the circumstances of the crime alone. *Id.* at *2-4.

As the district court held, the State's "[f]ailure to provide the class with a meaningful and realistic opportunity to secure release violate[d], at a minimum, the

Appellate Case: 19-2910 Page: 16 Date Filed: 02/21/2020 Entry ID: 4883850

Eighth Amendment ban on cruel and unusual punishment." *Brown*, 2019 WL 3752973, at *4. This Court should affirm that judgment.

II. Robust Parole Procedures are Necessary to Correct the Bias Black Youth Face in the Criminal Justice System.

This Court should also affirm the district court because as a practical matter, robust JLWOP parole procedures are necessary to mitigate any racial bias that may have affected sentencing.

In Missouri, JLWOP sentences have not been reserved for the rarest of cases where rehabilitation is impossible. Instead, they have been imposed against juveniles who are likely capable of reform and are disproportionately Black. Of the 94 people serving JLWOP sentences, a staggering 58 of them are African American.[5] That means *62 percent* of the people serving JWLOP sentences in Missouri are Black, when Black people comprise just *12 percent* of Missouri's population.[6] This huge disparity is strong indication that race influenced many of the Class members' sentencing decisions.

Missouri is not unique in its disparately harsh treatment of Black youth. While Black children comprise less than 14 percent of all youth under the age of 18 in the United States, Black boys make up 42 percent of the male population confined in

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[5] This data was compiled by Plaintiffs' counsel from Missouri Department of Corrections' records and official court filings.

[6] *See* United States Census Bureau, Quick Facts Missouri (2019) https://www.census.gov/quickfacts/MO.

Appellate Case: 19-2910 Page: 17 Date Filed: 02/21/2020 Entry ID: 4883850

juvenile facilities.[7] The federal government has long recognized the racial disparities in the juvenile justice system. In 1988, "in response to overwhelming evidence that minority youth were disproportionately confined in the nation's secure facilities," Congress amended the Juvenile Justice and Delinquency Prevention Act (42 U.S.C. § 5601, et seq.) to require that states address racial inequality—referred to as "Disproportionate Minority Contact" or "DMC"—in their juvenile systems.[8] In 1992, DMC was elevated to a "core requirement," with the mandate that "each state must address efforts to reduce the proportion of youth . . . confined in secure detention facilities . . . who are members of minority groups if it exceeds the proportion of such groups in the general population."[9]

Racial disparities have been especially pronounced with respect to life without parole sentences for children. Shortly before *Graham* and *Miller*, Black youth were subject to such sentences at a rate ten times higher than that of white children.[10] And

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[7] Wendy Sawyer, Prion Policy Initiative, *Youth Confinement: The Whole Pie 2019* (Dec. 19, 2019), https://www.prisonpolicy.org/reports/youth2019.html.

[8] Heidi Hsia, Dep't of Just., Off. of Juv. Just. & Delinq. Prevention, *Disproportionate Minority Contact Technical Assistance Manual* 1 (4th ed. 2009), https://www.sedgwickcounty.org/media/24941/ojjdp-dmc-technical-assistance-manual-july-2009.pdf.

[9] Dep't of Justice, Off. of Juv. Just. & Delinq. Prevention, A Disproportionate Minority Contact (DMC) Chronology: 1988 to Date, retrieved from https://www.ojjdp.gov/dmc/chronology.html (last visited February 19, 2020).

[10] Letter from the United States & Int'l Human Rights Orgs. to the Comm'n on the Elimination of Racial Discrimination ¶ 4 (June 4, 2009), http://www.aclu.org/files/pdfs/humanrights/jlwop_cerd_cmte.pdf.

for Black youth convicted of killing a white victim, the odds of being sentenced to life without parole are even higher, particularly when compared to a white defendant convicted of killing a Black victim.[11]

Such disparities result in part from damaging racial stereotypes. One that has plagued Black boys is the myth of the "super-predator"—an especially depraved, immoral, relentless, and dangerous class of teenage offenders, capable of the most heinous crimes.[12] In 1995, John J. DiLulio, Jr., then a professor of criminology at Princeton University, coined the term "super-predator," which he described as "tens of thousands of severely morally impoverished" and "super crime-prone young males . . . on the horizon."[13] For "super-predators," according to DiLulio, committing acts like "murder [and] rape" comes "naturally."[14] And if there were any doubt as to whom DiLulio was describing, he clarified that "the trouble will be greatest in black inner-city neighborhoods[.]"[15] The myth of the super-predator

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[11] *See* The Sentencing Project, *Shadow Report of the Sentencing Project to the Committee on the Elimination of Racial Discrimination* ¶ 13 (2014) https://www.sentencingproject.org/publications/shadow-report-of-the-sentencing-project-to-the-committee-on-the-elimination-of-racial-discrimination/.

[12] *See, e.g.*, Peter Annin, *Superpredators' Arrive*, Newsweek, Jan. 1996, at 57; David Gergen, Editorial, *Taming Teenage Wolf Packs*, U.S. News & World Rep., Mar. 17, 1996, at 68; Richard Zoglin, *Now for the Bad News: A Teenage Time Bomb*, Time, Jan. 15, 1996, at 52.

[13] John DiLuluio, *The Coming of the Super-Predators*, Weekly Standard, Nov. 27, 1995, https://www.weeklystandard.com/john-j-dilulio-jr/the-coming-of-the-super-predators.

[14] *Id.*

[15] *Id.*

spread across the country, influencing policies locally and nationally, shaping harsh juvenile justice laws and contributing to a climate that encouraged life without parole sentences for children.[16] It is therefore not a coincidence that JLWOP sentences spiked in the 1990s, when the super-predator myth was most prevalent.[17] Many of the punitive measures that arose during this period, which included laws to remove discretion from juvenile court judges and to make it easier to sentence children as adults, have continued despite the thorough discrediting of the "super-predator" myth and the sharp decline in the juvenile crime rate.[18]

Numerous studies have documented how people's behavior is affected by the pernicious stereotype that Black men and boys are "'violence prone.'" *Buck v. Davis*, 137 S. Ct. 759, 776 (2017). Perhaps one of the most famous examples of this is the "shooter bias" studies.[19] These studies involve "custom-designed video games"

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[16] The Campaign for the Fair Sentencing of Youth, *From the Desk of the Director: Black History Month* (Feb. 28, 2018), https://www.fairsentencingofyouth.org/desk-director-black-history-month/.

[17] *See* The Sentencing Project, J*uvenile Life Without Parole: Trends in Sentence Use Over Time*, https://www.sentencingproject.org/wp-content/uploads/2016/01/JLWOP-Trends-Fact-Sheet.pdf. Indeed, in 1995, President Clinton called "juvenile violence" "the number one crime problem in America." *See* William J. Clinton, *Statement on the Report on Juvenile Crime* (Nov. 11, 1995), http://www.presidency.ucsb.edu/ws/index.php?pid=50761.

[18] *See, e.g.*, Off. of Surgeon Gen., *Youth Violence: A Report of the Surgeon General* (2001), https://www.ncbi.nlm.nih.gov/books/NBK44294/ (debunking the "super-predator" myth and repudiating the racial mythology that youth of color were more likely to become involved in youth violence).

[19] Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of*

Appellate Case: 19-2910 Page: 20 Date Filed: 02/21/2020 Entry ID: 4883850

where "participants are instructed to shoot the bad guys, regardless of race, but not to fire at the innocent bystanders."[20] The studies found that participants have a "propensity to shoot Black perpetrators more quickly and more frequently than White perpetrators and to decide not to shoot White bystanders more quickly and frequently than Black bystanders."[21] Another study demonstrated that, as compared to similarly situated white children, people are likely to perceive Black children as older, less innocent, and more culpable.[22] Yet another study found that simply bringing to mind a Black juvenile defendant as opposed to a white juvenile defendant led participants to be significantly more likely to consider a child's inherent culpability as similar to that of an adult and to favor more severe sentencing.[23]

Studies also show that judges are not immune from racial biases. In one study, researchers "found a strong white preference among white [trial] judges . . . ."[24] By

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Batson*, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 155 (2010) https://harvardlpr.com/wp-content/uploads/sites/20/2013/05/4.1_8_Bennett.pdf.

[20] *Id.*

[21] *Id.*

[22] *See* Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psychol. 526, 539-40 (2014).

[23] Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction between Juveniles and Adults*, 7 PLoS ONE 4 (May 2012) https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0036680&type=printable.

[24] Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1210 (2009).

Appellate Case: 19-2910 Page: 21 Date Filed: 02/21/2020 Entry ID: 4883850

contrast, Black judges did not show a clear racial preference.[25] Another study of trial judges found that trial judges often rely on intuitive, rather than deliberative, decision-making processes, which risks leading to reflexive, automatic judgments, such as "associat[ing] . . . African Americans with violence . . . ."[26] Yet another study found that "judges harbor the same kinds of implicit biases as others [and] that these biases can influence their judgment . . . ."[27] Judges' biases undoubtedly contribute to the fact that "at virtually every stage of the juvenile justice process, [Black youth] receive harsher treatment than white youth, even when faced with identical charges and offending histories."[28]

Robust parole procedures—where persons sentenced to JLWOP have a meaningful ability to submit evidence of maturity and rehabilitation, and where decision-makers adequately consider this evidence when deciding upon release—will help guarantee that only the permanently incorrigible, *Montgomery*, 136 S. Ct. at 734, and irreparably corrupt, *Miller*, 567 U.S. at 479-80, regardless of race, spend their lives in prison for crimes they committed as children. While race may have impermissibly led to some Class members being sentenced to life in prison, adequate

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[25] *Id.*
[26] Bennett, *supra* note 19, at 156-57.
[27] *Id.* at 157.
[28] Ellen Marrus & Nadia N. Seeratan, *What's Race Got to Do with It? Just About Everything: Challenging Implicit Bias to Reduce Minority Youth Incarceration in America*, 8 J. Marshall L. J. 437, 440 (2015).

parole procedures will ensure that those who never should have been sent to prison for life in the first place will not die behind bars. Thus, not only are the procedures recognized by the district court required by the Constitution, they are a critical guard against any influence racial bias may have had in sentencing a child to spend their life in prison.

CONCLUSION

For these reasons, LDF respectfully asks that the district court judgment be affirmed.

Dated: February 20, 2020

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Appellate Case: 19-2910 Page: 24 Date Filed: 02/21/2020 Entry ID: 4883850

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I hereby certify that on February 20, 2020 I electronically filed the foregoing BRIEF OF AMICUS CURIAE IN SUPPORT OF THE APPELLEES with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

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Appellate Case: 19-2910 Page: 26 Date Filed: 02/21/2020 Entry ID: 4883850