NO. 13-10648

IN THE

SUPREME COURT OF THE UNITED STATES

Chaz BUNCH, Petitioner,

v.

State of OHIO, Respondent.

On Petition for Writ of Certiorari to
The Seventh Appellate District of Ohio, Mahoning County Court of Appeals

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BRIEF OF JUVENILE LAW CENTER *ET. AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTORARI

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INTEREST OF THE *AMICI*[1]

The organizations submitting this brief work on behalf of adolescents in a variety of settings, including adolescents involved in the juvenile and criminal justice systems. *Amici* are advocates and researchers who have a wealth of experience and expertise in providing for the care, treatment, and rehabilitation of youth in the child welfare and justice systems. *Amici* know that youth who enter these systems need extra protection and special care. *Amici* understand from their collective experience that adolescent immaturity manifests itself in ways that implicate culpability, including diminished ability to assess risks, make good decisions, and control impulses. *Amici* also know that a core characteristic of adolescence is the capacity to change and mature. For these reasons, *Amici* believe that youth status separates juvenile and adult offenders in categorical and distinct ways that warrant distinct treatment under the Eighth Amendment.

In *Graham v. Florida,* 560 U.S. 48 (2010) (Kennedy, J.), this Court held that sentencing a juvenile to life without parole for a non-homicide offense violated the Eighth Amendment's prohibition

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[1] The written consent of counsel for all parties is on file with the Court. *See* enclosures delivered concurrent with brief. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici,* their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

on cruel and unusual punishment because of the unique characteristics of youth that make children less culpable, in addition to the developmental differences between children and adults that make it more likely that a child can reform. The heart of the Court's holding was that, as a result of these qualities, any sentence for a non-homicide offense that provides no "meaningful opportunity to obtain release" before the end of the child's life is unconstitutional. *Id.* at 79. Even more recently, the Court reiterated the importance of scientific and social science research that demonstrates fundamental differences between juveniles and adults and lessens a child's "'moral culpability.'" *Miller v. Alabama*, 132 S. Ct. 2455, 2464-65 (2012) (Kagan, J.) (quoting *Graham*, 560 U.S. at 69).

Despite the Court's clear and commonsense ruling, lower courts have split on how to apply *Graham* to sentences that preclude any meaningful opportunity for release, but are not labeled "life without parole." *Amici* share a deep concern that without the Court's clarification many juveniles will be subject to sentences that violate the Eighth Amendment and are at odds with this Court's jurisprudence related to children and adolescents.

For this reason, *Amici* join together to urge the Court to grant *certiorari* and hold that a sentence imposed on a juvenile for a non-homicide offense that is the functional equivalent of life without parole is inconsistent with *Graham v. Florida* and violates the Eighth Amendment of the United States Constitution.

IDENTITY OF *AMICI*

See Appendix for a list and brief description of all *Amici*.

SUMMARY OF ARGUMENT

This case raises a question of exceptional importance regarding the application of *Graham v. Florida* and *Miller v. Alabama* to the Court's Eighth Amendment jurisprudence as it relates to children. This Court ruled in *Graham* that juvenile offenders cannot be sentenced to life without parole without a meaningful and realistic opportunity to re-enter society prior to the expiration of their sentences for non-homicide offenses. *Graham*, 560 U.S. 48 (2010). The Court explained:

> The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.

Id. at 79. *Graham* held that a sentence that provides no "meaningful opportunity to obtain release" before the end of the child's life is unconstitutional. *Id.* Here, Petitioner was sentenced to remain in prison until he is approximately 105 years old for non-homicide offenses for which he was charged when he was a child.[2] Because this sentence means that

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[2] Bunch was convicted of multiple non-homicide offenses related to a single event that occurred when he was 16 years old. *See Bunch v. Ohio,* Petition for a Writ of *Certiorari* at 4-7. He

Petitioner unquestionably will die in prison, this Court should clarify that this sentence is unconstitutional under *Graham* regardless of whether it is actually labeled "life without parole." Under *Graham*, juveniles who do not kill or intend to kill must be guaranteed a "meaningful opportunity to obtain release" – even if that opportunity does not actually result in release. *Graham*, 560 U.S. at 75. Chaz Bunch was denied that opportunity when he was sentenced to a term of years that is functionally equivalent to a life sentence. As Chaz Bunch did not kill or intend to kill, he is not deserving of "this harshest possible penalty." *Miller*, 132 S. Ct. at 2469.

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received a sentence of eighty-nine years, and is not eligible for parole. *See, e.g., Woods v. Telb*, 733 N.E.2d 1103, 1106-07 (Ohio 2000) (detailing the history of the abolition of parole for most offenses under Ohio state law). Thus, he would not be able to complete his sentence until the age of approximately 105. Due to legislation that took effect in Ohio in 2011, Bunch can petition the trial court for release ten years before the expiration of his sentence—in other words, after he has served seventy-nine years in prison. *See Bunch v. Ohio,* Petition for a Writ of *Certiorari* at 7 (citing Petitioners Appendix at 80a). Even if this legislation enabling earlier release is not overturned, Bunch would not be able to request release until after his ninety-fifth birthday. *Id.*

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION FOR *CERTIORARI* TO ENSURE A UNIFORM APPLICATION AND IMPLEMENTATION OF GRAHAM SO THAT CHILDREN ARE NOT SUBJECT TO SENTENCES THAT ARE THE FUNCTIONAL EQUIVALENT OF LIFE WITHOUT PAROLE FOR NON-HOMICIDE OFFENSES.

In *Graham v. Florida,* the United States Supreme Court held that "the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Graham*, 560 U.S. at 82. The Court's reasoning was grounded in developmental and scientific research that demonstrates that juveniles possess a greater capacity for rehabilitation, change and growth than do adults. Emphasizing these unique developmental characteristics, the Court held that juveniles who are convicted of non-homicide offenses require distinctive treatment under the Constitution. Regardless of how it is labeled, a sentence for non-homicide offenses that provides the individual no meaningful opportunity to re-enter society during his natural life is unconstitutional. Like Graham's sentence, Bunch's 89 year sentence

> guarantees he will die in prison. . . no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century

> attempting to atone for his crimes and learn from his mistakes.

Id. at 79. This Court should make clear that such a result cannot stand.

A. A Sentence That Is The Functional Equivalent Of Life Without Parole For A Juvenile Convicted Of A Non-Homicide Offense Is Contrary to Graham And Violates The Constitution.

The Court's prohibition in *Graham* is clear: the Eighth Amendment forbids states from "making the judgment at the outset that those offenders never will be fit to reenter society." *Graham*, 560 U.S. at 75. "What the State must do . . . is give defendants like [Bunch] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75. The 89 year sentence at issue here for non-homicide offenses is wholly at odds with *Graham*, as it allows Bunch no meaningful opportunity to obtain release before the end of his natural life expectancy.[3] Indeed, the sentencing court

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[3] According to actuarial data, a 16 year old African American boy can expect to only live an additional 56.8 years, to nearly age 73 Elizabeth Arias, "United States Life Tables, 2008," National Vital Statistics Reports, Vol. 61, No. 3, September 24, 2012, Centers for Disease Control and Prevention, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_03.pdf (last visited July 14, 2014). This 89 year sentence far exceeds current understandings of a "life sentence." In fact, the United States Sentencing Commission defines a life sentence as 470 months (or just over 39 years), based on average life expectancy

was clear in its judgment that the sentence imposed on Bunch should result in Bunch dying in prison with no chance of re-entering society: "I just have to make sure that you don't get out of the penitentiary. I've got to do everything I can to keep you there, because it would be a mistake to have you back in society. It would be—then I'd be the one committing the crime." (*Bunch v. Ohio,* Petition for a Writ of *Certiorari,* Resentencing Tr. Vol. V, 35, July 13, 2006 at 6). To hold as the Seventh Appellate District of Ohio, Mahoning County Court of Appeals did that such a sentence does not violate *Graham* because it was not formally labeled life without parole[4] defies commonsense; it also runs afoul of this Court's Eighth Amendment jurisprudence.

Graham prohibited sentences for non-homicide offenses provided juvenile offenders no meaningful opportunity for release. This Court's Eighth Amendment jurisprudence has clarified that it is the actual impact of the sentence upon the individual that is legally relevant to the analysis. For example, in *Rummel v. Estelle*, 445 U.S. 263 (1980), the Court examined a challenge to a "mandatory life sentence." The Court upheld the sentence based upon its view

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of those serving prison sentences. *See, e.g., United States v. Nelson*, 491 F.3d 344, 349-50 (7th Cir. 2007); U.S. Sentencing Commission Preliminary Quarterly Data Report (Through December 31, 2013) at A-7, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014-Quarter-Report-1st.pdf

4 Petitioners Appendix at 7a (*State v. Bunch*, No. 06 MA 106 (Ohio 7th Dist. Ct. App. Aug. 8, 2013)).

that

> a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that *he will not actually be imprisoned for the rest of his life*. If nothing else, the possibility of parole, however slim, serves to distinguish Rummel from a person sentenced under a recidivist statute…which provides for a sentence of life without parole …

Id. at 280-81 (emphasis added). Unlike Rummel, Bunch *will actually be imprisoned for the rest of his life,* a fact that this Court cannot ignore. The Court again took this commonsense and equitable approach in *Sumner v. Shuman,* where it noted that "there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy." *Sumner v. Shuman*, 483 U.S. 66, 83 (1987).

The categorical rule articulated in *Graham* is about outcomes and effects—not labels. The outcome this Court sought to prohibit in *Graham* is exactly the one that will result in this case if Petitioner's current sentence stands. As both *Roper* and *Graham* recognize, even for brutal and cold-blooded crimes – in fact especially for such crimes – a categorical rule must acknowledge juveniles' reduced culpability. Otherwise, "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based

on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity" should require a less severe sentence. *Graham*, 560 U.S. at 78 (citing *Roper v. Simmons*, 543 U.S. 551, 573 (2005)). Because Bunch was convicted of non-homicide crimes as a juvenile, he clearly deserves the benefit of this categorical rule. *Graham* and *Roper* make clear that juvenile offenders' capacity to change and grow, combined with their reduced blameworthiness and inherent immaturity of judgment, set them apart from adult offenders in fundamental – and constitutionally relevant – ways. *Graham* prohibits a judgment of incorrigibility to be made "at the outset," *id.* at 75, yet Bunch's 89 year sentence for a non-homicide offense makes precisely this prohibited judgment.

B. A Sentence of Eighty-Nine Years For A Non-Homicide Offense Is Unconstitutional As It Serves No Penological Purpose

According to *Graham*, a sentence "lacking any legitimate penological justification is by its nature disproportionate to the offense" and therefore unconstitutional. *Id.* at 71. The Court concluded that no penological justification warrants a sentence of life without parole as applied to juveniles convicted of non-homicide offenses. *Id.* As in *Graham*, the 89 year sentence meted out to Bunch, which ensures he will die in prison, does not serve any of the traditional penological goals—deterrence, retribution, incapacitation, or rehabilitation.

Relying on the analysis set forth in *Roper,* the

Graham Court concluded that the goal of deterrence did not justify the imposition of life without parole sentences on juveniles: "*Roper* noted that 'the same characteristics that render juveniles less culpable than adults suggest…that juveniles will be less susceptible to deterrence.' [T]hey are less likely to take a possible punishment into consideration when making decisions." *Id.* at 72 (internal citations omitted). Because youth would not likely be deterred by the fear of a life without parole sentence, this penological goal did not justify the sentence.

Graham echoed *Roper's* assessment that "the case for retribution is not as strong with a minor as with an adult" given juvenile immaturity and capacity to change. *Id.* at 71 (citing *Roper*, 543 U.S. at 571). The *Graham* Court recognized that these same considerations applied to "imposing the second most severe penalty on the less culpable juvenile." *Id.* at 71-72.

The *Graham* Court also held that incapacitation could not justify the sentence of juvenile life without parole for a non-homicide offense. To justify incapacitation for life "requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable." *Id.* at 72-73. Because adolescents' natures are transient, they must be given "a chance to demonstrate growth and maturity." *Id.* at 73. As a result, a child sent to prison should have the opportunity to rehabilitate and qualify for release after some term of years. Mechanisms such as parole boards can provide a crucial check to ensure that the purposes of

punishment are satisfied without unnecessarily incapacitating fully rehabilitated individuals and keeping youth "in prison until they die." *Naovarath v. State*, 779 P.2d 944, 948 (Nev. 1989).

Finally, *Graham* concluded that a life without parole sentence "cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal." *Graham,* 560 U.S. at 75. The Court also underscored that the denial of rehabilitation was not just theoretical: the reality of prison conditions prevented juveniles from growth and development they could otherwise achieve, making the "disproportionality of the sentence all the more evident." *Id.* at 74. During a lengthy adult sentence, youth lack an incentive to try to improve their skills or character. Indeed, many juveniles sentenced to spend the rest of their lives in prison commit suicide, or attempt to commit suicide. *See* Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev. 681, 712, nn.141-47 (1998).

Because this 89 year sentence, which is equivalent to life without parole, serves no legitimate penological purpose, it is unconstitutional.

II. THIS COURT SHOULD GRANT THE PETITION FOR *CERTIORARI* TO CLARIFY THAT SENTENCES THAT ARE THE FUNCTIONAL EQUIVALENT TO LIFE WITHOUT PAROLE FOR NON-HOMICIDE OFFENSES ARE UNCONSTITUTIONALLY DISPROPORTIONATE FOR JUVENILES

A. The Eighth Amendment Requires That Sentences Be Proportionate

Proportionality is central to the Eighth Amendment. The Court has interpreted the Eighth Amendment's ban on cruel and unusual punishment to include punishments that are "grossly disproportionate" to the crime. *See, e.g.*, *Graham*, 560 U.S. at 60 (citing *Harmelin v. Michigan,* 501 U.S. 957, 997 (1991) (Kennedy, J., concurring)). In *Graham,* the Court instructed that "to determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Id.* (citing *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). Courts apply a proportionality review to determine if a sentence meets that standard. *Id.*

The Court in *Graham* held that cases addressing the proportionality of sentences "fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty." *Id.* at

59.

Under the first classification the court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive. A court must begin by comparing the gravity of the offense and the severity of the sentence. In the rare case where this "threshold comparison . . . leads to an inference of gross disproportionality," the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Id.* at 60 (internal citations omitted). If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate, the sentence is cruel and unusual." *Id.* at 60 (internal citations omitted).

The second, "categorical," classification of cases assesses the proportionality of a sentence as compared to the nature of the offense or the *characteristics of the offender*. *Id.* at 60-61 (emphasis added). In this line of cases, holding a particular sentence unconstitutional for an entire class of offenders, the Court has found that some offenders have characteristics that make them categorically less culpable than others who commit similar or identical crimes. *See, e.g., Roper,* 543 U.S. 551 (applying a categorical approach to ban the death penalty for defendants who committed crimes before turning 18); *Atkins v. Virginia*, 536 U.S. 304 (2002) (applying the approach to ban the death penalty for defendants who are mentally retarded); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (applying the

approach for defendants convicted of rape where the crime was not intended to and did not result in the victim's death); *Graham*, 560 U.S. 48, 60-61 (applying the approach to a juvenile sentences to life without parole for a non-homicide offense).

In discussing proportionality, the *Graham* Court further explained that "a sentence lacking any legitimate penological justification is by its nature disproportionate to the offense" and therefore unconstitutional. *Graham*, 560 U.S. at 71. Relying on developmental and scientific research that demonstrated that juveniles possess a greater capacity for rehabilitation, change and growth than do adults, the *Graham* Court held that the four accepted rationales for the imposition of criminal sanctions – incapacitation, deterrence, retribution and rehabilitation – were not served by imposing a life without parole sentence on a juvenile. *Id.* at 74. *Graham* established that the developmental characteristics of children and adolescents are relevant to the Eighth Amendment proportionality analysis, even in noncapital cases.

B. This Court Has Articulated A Separate Eighth Amendment Analysis For Children And Adolescents

Juveniles represent a special category of offenders for Eighth Amendment purposes. Recent Supreme Court precedent has applied a proportionality test to youthful offenders that distinguishes children from adults, and that has concluded that children are categorically less culpable. In *Miller v. Alabama,* 132 S. Ct. 2455, 2469

(2012), this Court held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." Acknowledging the unique status of juveniles and reaffirming its holdings in *Roper* v. *Simmons*, *Graham v. Florida*, and *J.D.B.* v. *North Carolina,* 131 S. Ct. 2394 (2011) , this Court in *Miller* held that "children are constitutionally different from adults for purposes of sentencing," *id.* at 2464, and therefore that the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* at 2466. This view of the Eighth Amendment is grounded in a recognition of the unique characteristics of youth and the "more transitory" and "less fixed" nature of these characteristics as compared to adults. *Roper*, 543 U.S. at 570.

The heightened proportionality review that was introduced in *Roper* and has been followed in *Graham* and *Miller* marks a shift in the Court's jurisprudence that had previously reserved the most rigorous level of scrutiny for death sentences, recognizing that only "death is different." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). *See also Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring), where Justice Stewart explained:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice.

> And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

See also Woodson v. North Carolina, 428 U.S. 280 (1976) (invalidating the mandatory imposition of the death penalty and requiring an individualized culpability review), *Coker v. Georgia*, 433 U.S. 584 (1977) (invalidating the death penalty for rape as grossly disproportionate under the Eighth Amendment), *Atkins v. Virginia*, 536 U.S. 304 (2002) (invalidating the death penalty for "mentally retarded criminals"), *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (invalidating the death penalty as a punishment for those convicted of raping a child).

The Court has not invalidated a non-capital sentence for adults in recent years, instead reserving that kind of proportionality analysis exclusively for cases involving children sentenced as adults. *See, e.g.*, *Solem v. Helm*, 463 U.S. 277, 299 (1983) (representing the last time the Court overturned a mandatory life sentence for a non-violent felony committed by an adult). *See also Graham,* 560 U.S. 48 (representing the first time that the Court has used the Eighth Amendment to ban a sentence other than the death penalty, and the first time the Court dealt with the sentencing of youth outside the death penalty context); *Miller*, 132 S. Ct. at 2469 (ruling that life without parole sentences cannot be mandatory for juveniles, and instead must involve an opportunity to introduce mitigation evidence). As Justice Kagan herself observed, this case law reveals that now, just as "'death [was] different,' children are different too." *Miller*, 132 S. Ct. at 2470 (quoting

Harmelin, 501 U.S. at 994).

Graham and *Miller* reflect the Court's most recent recognition of youth as a distinct category of offenders for sentencing purposes under the Eighth Amendment. Importantly, "*Graham* is the first case ever to side with minors in their claim that they have a right to be treated as children even when the state does not agree." Martin Guggenheim, *Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing*, 47 Harv. C.R.-C.L. L. Rev. 457, 487 (2012) (arguing further that "*Graham* suggests for the first time that treating children differently from adults, even when it comes to sentences well below the most severe, is not simply something states may choose; rather, it is something to which children have a right." *Id.* at 489. In *Miller*, the Court unabashedly diverged from its previous holding that expressly limited the prohibition of mandatory sentencing to the death penalty. *See Miller*, 132 S. Ct. at 2459 (distinguishing its analysis from that in *Harmelin*, 501 U.S. at 1006). The Court specifically explained that it was deviating from its prior jurisprudence because the earlier case demarcating "the qualitative difference between death and all other penalties…had nothing to do with children" and thus does not "apply …to the sentencing of juvenile offenders." *Id.* (citing *Harmelin*, 501 U.S. at 1006). The Court further reiterated that it had "held on multiple occasions that sentencing practices that are permissible for adults may not be so for children." *Id.* (citing *Roper*, 543 U.S. 551, and *Graham*, 560 U.S. 48).

Indeed, the recent line of juvenile cases

arguably extends the Court's Eighth Amendment doctrine into new territory, requiring more stringent safeguards against excessive punishment for juvenile offenders than it has ever applied to adult offenders outside of the death penalty. When it comes to children, the Court now evaluates sentencing schemes by taking into account the developmental differences that characterize youth to achieve a more thoughtful and nuanced assessment of their appropriateness.

1. Children's Developmental Differences Are Salient To The Eighth Amendment Analysis Whenever Children Receive A Sentence Designed For Adults

Justice Kagan, writing for the majority in *Miller,* was explicit in articulating the Court's rationale for its holding: the mandatory imposition of sentences of life without parole "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' *Graham,* 560 U.S. at 68, 74, and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." *Miller*, 132 S. Ct. at 2460. The Court grounded its holding "not only on common sense...but on science and social science as well," *id.* at 2464, which demonstrate fundamental differences between juveniles and adults. The Court noted "that those [scientific] findings -of transient rashness, proclivity for risk, and inability to assess consequences -both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be

reformed.'" *Id.* at 2464-65 (quoting *Graham,* 560 U.S. at 68; *Roper,* 543 U.S. at 570). Importantly, the Court specifically found that none of what *Graham* "said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities[5] – is crime-specific." *Miller*, 132 S. Ct.

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[5] The *Graham* Court relied upon an emerging body of research confirming the distinct emotional, psychological and neurological status of youth. The Court clarified that, since *Roper*, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." 560 U.S. at 68. *Graham* explicitly recognized that imposing a life without parole sentence on an adolescent who is still in the process of maturing is contrary to this growing body of developmental and scientific research.

In addition to *Graham* and *Miller's* recognition of the mitigating factors of youth, detailed both here and in Petitioner's petition, the notion that youthful offenders should be held to a lesser degree of culpability for the same crime committed by an adult is well established in academic literature. As one expert notes, "criminal law arrays actors' culpability and blameworthiness along a continuum from a premeditated killer for hire at one end to the minimally responsible actor barely capable of discerning right from wrong at the other end, even though each caused the same harm.… Youthfulness affects the actor's abilities to reason instrumentally and freely to choose behavior, and locates an offender closer to the diminished responsibility end of the continuum than to the fully autonomous free-willed actor." Barry C. Feld, *Competence, Culpability and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 Hofstra L. Rev. 463, 500-501 (2003). Feld further argues, "[e]very other area of law recognizes that young people have limited judgment, are less competent decision-makers because of their immaturity, and require greater

protection than do adults. Applying the same principle of diminished responsibility in the criminal law requires…shorter sentences for youths than for adults convicted of the same offenses." *Id.* at 498-499. *See also* David A. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (not) to Punish Minors for Major Crimes*, 82 Tex. L. Rev. 1555, 1557-58 (2004); Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility, in* Youth On Trial: A Developmental Perspective On Juvenile Justice 271 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("[T]he criminal law needs to make sense as a language of moral desert, punishing only those who deserve condemnation, punishing the guilty only to the extent of their individual moral desert, and punishing the range of variously guilty offenders it apprehends in an order that reflects their relative blameworthiness."). Further, in the case of *State v. Kennedy*, 957 So.2d 757, 784 n.31 (La. 2007), *rev'd on other grounds*, 554 U.S. 407 (2008), the Louisiana Supreme Court likened youth to mental retardation in terms of reduced culpability and diminished capacity:

Intellectual deficits and adaptive disorders of the former, and a lack of maturity and a fully developed sense of responsibility of the latter, tend to diminish the moral culpability of the mentally retarded and juvenile offender, with important societal consequences. Retribution 'is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity[,]' *Roper,* 543 U.S. at 571, or by reason of the 'diminished capacities to understand and process information' of the mentally retarded. *Atkins,* 536 U.S. at 318-19. For the same reasons, the mentally retarded and the juvenile offender 'will be less susceptible to deterrence.' *Roper,* 543 U.S. at 571; *see also Atkins,* 536 U.S. at 320 ("[I]t is the same cognitive and behavioral impairments that make these defendants less morally culpable ... that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.").

at 2465. Accordingly, the Court emphasized "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.*

2. Courts Must Consider Mitigating Circumstances – Including the Child's Age and Disability – Whenever A Child Receives A Harsh Adult Sentence

Chaz Bunch was denied a "meaningful opportunity to obtain release" when he was sentenced to a term of years that is functionally equivalent to a life sentence. *See Graham*, 560 U.S. at 75. As Chaz Bunch did not kill or intend to kill, he is not deserving of "this harshest possible penalty." *Miller*, 132 S. Ct. at 2469.

In other words, the trial court judge who sentenced Petitioner meted out an unconstitutional sentence. The Ohio appellate court that reviewed Bunch's sentence likewise violated this Court's holdings when it considered aggravating factors that led to his receiving the maximum allowable sentence for each offense and did not likewise consider whether he deserved a less severe sentence in light of his relatively young age, any peer pressure that may have been exerted upon him, or any other factor that would demonstrate a reduced level of culpability and capacity for rehabilitation. *See State v. Bunch*, No. 02 CA 196, 2005 WL 1523844 (Ohio Ct. App. 7th Dist., June 24, 2005); *State v. Bunch*, No. 06 MA 106, at 4 (Ohio 7th Dist. App. Aug. 8, 2013) (finding that Petitioner's sentence did not violate *Graham* or

Miller). See also Graham, 560 U.S. at 88 (Roberts, C.J., concurring) (admonishing that individualized sentencing is required because "juvenile offenders are generally. . . less morally culpable than adults who commit the same crimes."). Indeed, deeming Chaz Bunch to be "adult-like merely because of the act [he] committed violate[s]" his "right to be deprived of his . . . liberty only based on an individualized inquiry." Guggenheim, *supra*, at 499. It is also a characterization which is based not on facts, reason or science, but emotion.

Miller and *Graham* confirm that a life without parole sentence is unconstitutional for a juvenile convicted of a non-homicide crime. *Miller* found that, "given all we have said in *Roper, Graham,* and this decision about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty* [life without parole] *will be uncommon*." *Miller*, 132 S. Ct. at 2469 (emphasis added). Therefore, to the extent juvenile life without parole sentences are ever appropriate, *Miller* necessitates they be imposed only in the most extreme circumstances. Under *Miller* and *Graham,* a juvenile convicted of a non-homicide crime by definition cannot be categorized as one of the most culpable juvenile offenders for whom a life without parole sentence would be proportionate or appropriate. *See id.* at 2476 (Breyer, J., concurring) ("The dissent itself here would permit life without parole for 'juveniles who commit the worst types of murder,' but that phrase does not readily fit the culpability of one who did not himself kill or intend to kill."). Similarly, *Graham* proscribed making a

decision at the outset that a youth is irredeemable on day one; that is also what happened in Petitioner's case. *Graham*, 560 U.S. at 67-70. The 89-year sentence that Bunch received plainly ignores these essential aspects of *Graham*. It makes no sense to conclude that after *Graham* courts can now do indirectly what they can no longer do directly—impose a term of years sentence that guarantees the juvenile will die in prison. Yet, that is precisely what the lower court has done. Accordingly, Chaz Bunch's sentence is unconstitutional, and must be overturned.

CONCLUSION

This Court has acknowledged that a child's age is far "more than a chronological fact." *See J.D.B.,* 131 S. Ct. at 2397 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). The Court has also mandated an individualized sentencing analysis for children accused of serious crimes that reflects both our society's evolving standards of decency[6] and

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[6] *See e.g.*, *Roper,* 543 U.S. at 552 (explaining that in *Atkins,* the Court held that "standards of decency had evolved … and now demonstrated that the execution of the mentally retarded is cruel and unusual punishment"). The Eighth Amendment's prohibition against "cruel and unusual punishments" must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework this Court has established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be

our greater understanding of adolescent development. Accordingly, *Amici* respectfully request that this Court grant *certiorari* to ensure that its previous decisions on juvenile sentencing are being applied appropriately and that the prohibition on life without parole sentences for non-homicide offenses is not subverted by mere semantics.

Respectfully Submitted,

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"cruel and unusual.") *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). *See also Roper,* 543 U.S. at 551.

APPENDIX

Identity of *Amici* and Statements of Interest

Juvenile Law Center is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well-being of children in jeopardy. Juvenile Law Center pays particular attention to the needs of children who come within the purview of public agencies- for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized service needs. Juvenile Law Center works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. Juvenile Law Center also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

The **Campaign for the Fair Sentencing of Youth (CFSY)** is a national coalition and clearinghouse that coordinates, develops and supports efforts to implement just alternatives to the extreme sentencing of America's youth with a focus on abolishing life without parole sentences for all youth. Our vision is to help create a society that

respects the dignity and human rights of all children through a justice system that operates with consideration of the child's age, provides youth with opportunities to return to community, and bars the imposition of life without parole for people under age eighteen. We are advocates, lawyers, religious groups, mental health experts, victims, law enforcement, doctors, teachers, families, and people directly impacted by this sentence, who believe that young people deserve the opportunity to give evidence of their remorse and rehabilitation. Founded in February 2009, the CFSY uses a multi-pronged approach, which includes coalition-building, public education, strategic advocacy and collaboration with impact litigators–on both state and national levels–to accomplish our goal.

The **Campaign for Youth Justice (CFYJ)** is a national organization created to provide a voice for youth prosecuted in the adult criminal justice system. The organization is dedicated to ending the practice of trying, sentencing, and incarcerating youthful offenders under the age of 18 in the adult criminal justice system and is working to improve conditions within the juvenile justice system. CFYJ creates awareness of the negative impact of prosecuting youth in the adult criminal justice system and of incarcerating youth in adult jails and prisons and promotes researched-based, developmentally-appropriate rehabilitative programs and services for youth as an alternative. CFYJ also provides research, training and technical assistance to juvenile and criminal justice system stakeholders, policymakers, researchers, nonprofit organizations, and family members interested in addressing the

unique needs of youth prosecuted in the adult system.

The **Center for Children's Law and Policy (CCLP)** is a public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems. The Center's work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation. CCLP works locally in DC, Maryland and Virginia and also across the country to reduce racial and ethnic disparities in juvenile justice systems, reduce the use of locked detention for youth and advocate safe and humane conditions of confinement for children. CCLP helps counties and states develop collaboratives that engage in data-driven strategies to identify and reduce racial and ethnic disparities in their juvenile justice systems and reduce reliance on unnecessary incarceration. CCLP staff also work with jurisdictions to identify and remediate conditions in locked facilities that are dangerous or fail to rehabilitate youth.

The **Civitas ChildLaw Center** is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and lawyers to be ethical and effective advocates for children and promote justice for children through interdisciplinary teaching, scholarship and service. Through its Child and Family Law Clinic, the ChildLaw Center also routinely provides

representation to child clients in juvenile delinquency, domestic relations, child protection, and other types of cases involving children. The ChildLaw Center maintains a particular interest in the rules and procedures regulating the legal and governmental institutions responsible for addressing the needs and interests of court-involved youth.

The **Coalition for Juvenile Justice (CJJ)** is a non-profit, non-partisan, nationwide coalition of State Advisory Groups (SAGs), allied staff, individuals, and organizations. CJJ is funded by our member organizations and through grants secured from various agencies. CJJ envisions a nation where fewer children are at risk of delinquency; and if they are at risk or involved with the justice system, they and their families receive every possible opportunity to live safe, healthy, and fulfilling lives. CJJ serves and supports SAGs that are principally responsible for monitoring and supporting their state's progress in addressing the four core requirements of the Juvenile Justice and Delinquency Prevention Act (JJDPA) and administering federal juvenile justice grants in their states. CJJ is dedicated to preventing children and youth from becoming involved in the courts and upholding the highest standards of care when youth are charged with wrongdoing and enter the justice system.

The **Colorado Juvenile Defender Coalition (CJDC)** is a non-profit organization dedicated to excellence in juvenile defense and advocacy, and justice for all children and youth in Colorado. A primary focus of CJDC is to reduce the prosecution of children in adult criminal court,

remove children from adult jails, and reform harsh prison sentencing laws through litigation, legislative advocacy, and community engagement. CJDC works to ensure all children accused of crimes receive effective assistance of counsel by providing legal trainings and resources to attorneys. CJDC also conducts nonpartisan research and educational policy campaigns to ensure children and youth are constitutionally protected and treated In developmentally appropriate procedures and settings. Our advocacy efforts include the voices of affected families and incarcerated children.

Juvenile Justice Initiative (JJI) of Illinois is a non-profit, non-partisan, inclusive statewide coalition of state and local organizations, advocacy groups, legal educators, practitioners, community service providers and child advocates supported by private donations from foundations, individuals and legal firm. JJI as a coalition establishes or joins broad-based collaborations developed around specific initiatives to act together to achieve concrete improvements and lasting changes for youth in the justice system, consistent with the JJI mission statement. Our mission is to transform the juvenile justice system in Illinois by reducing reliance on confinement, enhancing fairness for all youth, and developing a comprehensive continuum of community-based resources throughout the state. Our collaborations work in concert with other organizations, advocacy groups, concerned individuals and state and local government entities throughout Illinois to ensure that fairness and competency development are public and private priorities for youth in the justice system.

Juvenile Justice Project of Louisiana (JJPL) is the only statewide, non-profit advocacy organization focused on reform of the juvenile justice system in Louisiana. Founded in 1997 to challenge the way the state handles court involved youth, JJPL pays particular attention to the high rate of juvenile incarceration in Louisiana and the conditions under which children are incarcerated. Through direct advocacy, research and cooperation with state run agencies, JJPL works to both improve conditions of confinement and identify sensible alternatives to incarceration. JJPL also works to ensure that children's rights are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights. JJPL continues to work to build the capacity of Louisiana's juvenile public defenders by providing support, consultation and training, as well as pushing for system-wide reform and increased resources for juvenile public defenders.

The **National Association of Counsel for Children (NACC)** is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. Founded in 1977, the NACC is a multidisciplinary organization with approximately 2200 members representing all 50 states, DC, and several foreign countries. The NACC works to improve the delivery of legal service to children, families, and agencies; advance the rights and interests of children; and

develop the practice of law for children and families as a sophisticated legal specialty. NACC programs include training and technical assistance, the national children's law resources center, the attorney specialty certification program, the model children's law office project, policy advocacy, and the *amicus curiae* program. Through the *amicus curiae* program, NACC has filed numerous briefs involving the legal interest of children in state and federal appellate courts and the Supreme Court of the United States. Founded in 1977, the National Association of Counsel for Children (NACC) is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the well being of America's children. The NACC works to strengthen legal advocacy for children and families by promoting well resourced, high quality legal advocacy; implementing best practices; advancing systemic improvement in child serving agencies, institutions and court systems; and promoting a safe and nurturing childhood through legal and policy advocacy. NACC programs which serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, policy advocacy, and the *amicus curiae* program. Through the *amicus curiae* program, the NACC has filed numerous briefs involving the legal interests of children and their families in state and federal appellate courts and the Supreme Court of the United States. The NACC uses a highly selective process to determine participation as *amicus curiae*.

Amicus cases must pass staff and Board of Directors review using the following criteria: the request must promote and be consistent with the mission of the NACC; the case must have widespread impact in the field of children's law and not merely serve the interests of the particular litigants; the argument to be presented must be supported by existing law or good faith extension the law; there must generally be a reasonable prospect of prevailing. The NACC is a multidisciplinary organization with approximately 3000 members representing all 50 states and the District of Columbia. NACC membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented.

Amicus Curiae **National Association of Criminal Defense Lawyers (NACDL)** is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates. NACDL is dedicated to

advancing the proper, efficient, and just administration of justice including issues involving juvenile justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case because the proper administration of justice requires that age and other circumstances of youth be taken into account in order to ensure compliance with constitutional requirements and to promote fair, rational and humane sentencing practices that respect the dignity of the individual.

The **National Center for Youth Law (NCYL)** is a private, non-profit organization that uses the law to help children in need nationwide. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities they need to become self-sufficient adults. NCYL provides representation to children and youth in cases that have a broad impact. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL supports the advocacy of others around the country through its legal journal, Youth Law News, and by providing trainings and technical assistance.

One of NCYL's priorities is to reduce the number of youth subjected to harmful and unnecessary incarceration and expand effective

community based supports for youth in trouble with the law. NCYL has participated in litigation that has improved juvenile justice systems in numerous states, and engaged in advocacy at the federal, state, and local levels to reduce reliance on the justice systems to address the needs of youth, including promoting alternatives to incarceration, and improving children's access to mental health care and developmentally appropriate treatment. One of the primary goals of NCYL's juvenile justice advocacy is to ensure that youth in trouble with the law are treated as adolescents, and not as adults, and in a manner that is consistent with their developmental stage and capacity to change within the juvenile justice system.

The **National Juvenile Defender Center** was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, Improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. The National Juvenile Defender Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. The National Juvenile Defender Center also offers a wide

range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

The mission of the **National Juvenile Justice Network (NJJN)** leads and supports a movement of state and local juvenile justice coalitions and organizations to secure local, state and federal laws, policies and practices that are fair, equitable and developmentally appropriate for all children, youth and families involved in, or at risk of becoming involved in, the justice system. NJJN currently comprises forty-one members in thirty-three states, all of which seek to establish effective and appropriate juvenile justice systems. NJJN recognizes that youth are fundamentally different from adults and should be treated in a developmentally appropriate manner focused on their rehabilitation. Youth should not be transferred into the punitive adult criminal justice system where they are subject to extreme and harsh sentences such as life without the possibility of parole, and are exposed to serious, hardened criminals. NJJN supports a growing body of research that indicates the most effective means for addressing youth crime are rehabilitative, community-based programs that take a holistic approach, engage youth's family members and other key supports, and provide opportunities for positive youth development

The **Public Defender Service for the District of Columbia (PDS)** is a federally funded, independent public defender organization; for 50 years, PDS has provided quality legal representation

to indigent adults and children facing a loss of liberty in the District of Columbia justice system. PDS provides legal representation to many of the indigent children in the most serious delinquency cases, including those who have special education needs due to learning disabilities. PDS also represents classes of youth, including a class consisting of children committed to the custody of the District of Columbia through the delinquency system.

The mission of the **San Francisco Office of the Public Defenders** is to provide vigorous, effective, competent and ethical legal representation to persons who are accused of crime and cannot afford to hire an attorney. We provide representation to 25,000 individuals per year charged with offenses in criminal and juvenile court