No. 16-5579

IN THE
SUPREME COURT OF THE UNITED STATES

DARIEN VASQUEZ, BRANDON VALENTIN,
Petitioners,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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RESTATED QUESTIONS PRESENTED

When they were 16 years old, Petitioners broke into the home of a college student and repeatedly raped and sexually abused her at knifepoint. Petitioner Vasquez was sentenced on 18 felony convictions to an active incarceration time of 133 years; Petitioner Valentin was sentenced on 12 felony convictions to an active incarceration time of 68 years. Even though the active time on any one conviction did not exceed 10 years, Petitioners claim that their aggregate sentences violate *Graham v. Florida*, 560 U.S. 48 (2010), which categorically prohibits imposing a life-without-parole sentence on a juvenile who commits a nonhomicide offense. Under Virginia law, however, each Petitioner is eligible for conditional release based on normal parole considerations when he turns 60 years old.

The questions presented are:

1. Whether *Graham v. Florida*'s categorical prohibition on a life-without-parole sentence for a juvenile nonhomicide offender applies to consecutive term-of-years sentences, none of which alone is excessive, but which, in the aggregate, exceed a person's life expectancy?

2. Whether a sentence that allows the opportunity for release at age 60, based on normal parole considerations, is a "life without parole" sentence under *Graham*?

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STATEMENT OF THE CASE

1. In 2010, this Court held in *Graham v. Florida* that the Eighth Amendment categorically forbids the imposition of a life-without-parole sentence on a juvenile offender for a nonhomicide offense.[1] "A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term."[2] The Court left it to the States, "in the first instance, to explore the means and mechanisms for compliance."[3]

In 2012, the Court held in *Miller v. Alabama* that the Eighth Amendment forbids imposing a mandatory life-without-parole sentence on a juvenile homicide offender without considering the offender's individual circumstances.[4] The Court did not "foreclose" the possibility of life without parole, but it "require[d] [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[5]

Thus, "*Graham* established one rule (a flat ban) for nonhomicide offenses, while [*Miller*] set out a different one (individualized sentencing) for homicide offenses."[6] Last term, the Court held in *Montgomery v. Louisiana* that *Miller* had announced a substantive rule of constitutional law that applies retroactively to cases on State collateral review.[7]

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[1] 560 U.S. 48, 74 (2010).

[2] *Id*. at 82.

[3] *Id*. at 75.

[4] 132 S. Ct. 2455, 2469 (2012).

[5] *Id.*

[6] *Id*. at 2466 n.6.

[7] 136 S. Ct. 718, 736 (2016).

2. Virginia has long operated a parole system administered by the Virginia Parole Board.[8] In 1994, the legislature enacted "Truth in Sentencing Reform," under which persons incarcerated for a felony offense committed on or after January 1, 1995 are not eligible for parole for that offense.[9] As part of that same reform, however, the legislature also enacted the "conditional-release" statute, Virginia Code § 53.1-40.01. Sometimes referred to as *geriatric release*, that statute provides that any person imprisoned for a felony conviction (other than for capital murder, a class 1 felony) may petition the Parole Board for "conditional release" if he has "reached the age of sixty or older and . . . has served at least ten years of the sentence."[10]

The Parole Board's regulations provide that "[a]ll factors in the parole consideration process" also "apply in the determination of conditional release."[11] The Parole Board's Policy Manual specifically defines conditional release as a form of parole.[12] The Board's written parole considerations include the offender's "history," the "facts and circumstances of the offense," and "mitigating" factors,[13] all of which can account for the offender's youth at the time of the offense. The Board addresses the offender's maturity and rehabilitation by considering "whether . . . the individual's conduct, employment, education, vocational training, and other developmental activities during incarceration, reflect the probability that the individual will lead

[8] *See* Va. Code Ann. §§ 53.1-134 to 53.1-176 (2013 & Supp. 2016).

[9] Va. Code Ann. § 53.1-165.1 (2013).

[10] Va. Code Ann. § 53.1-40.01 (2013). Conditional release is also available to a person who is sixty-five years old and who has served at least five years of his sentence. *Id.*

[11] Va. Dep't of Corr., Op. Proc. 820.1 at 2 (2011), *available at* https://vadoc.virginia.gov/about/procedures/documents/800/820-1.pdf.

[12] Va. Parole Bd., Policy Manual, Part II at 7-8 (2006), *available at* https://vpb.virginia.gov/files/1107/vpb-policy-manual.pdf.

[13] *Id.* at 1-2.

a law-abiding life in the community and live up to all conditions of parole if released."[14]

In 2011, in *Angel v. Commonwealth*, the Supreme Court of Virginia held that the conditional-release statute makes juvenile nonhomicide offenders eligible for release at age 60, using "normal parole consideration[s]," and therefore complies with *Graham* by providing the "'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' required by the Eighth Amendment."[15] Angel petitioned for a writ of certiorari on that question, which this Court denied.[16]

3. In October 2012, when they were sixteen years old, Darien Vasquez and Brandon Valentin broke into the off-campus townhouse of a college student while she lay sleeping in her bedroom. After going from room to room stealing things, Petitioners entered the victim's bedroom. She awoke to find Vasquez standing over her, holding a knife to her throat and demanding cash. When she said she had none, Vasquez replied "[W]ell you're going to die." The victim begged them to take her wallet, credit cards, and game console instead; as she moved around the bedroom handing over those things, Vasquez followed, pressing the knife to her back. Vasquez then ordered the victim to undress and to perform oral sex on him. As Valentin watched—standing in the doorway, armed with a knife and blocking any escape—Vasquez repeatedly forced the victim's head down on his penis, choking her.[17]

Vasquez then forced the victim onto the bed and raped her vaginally, continuing to hold the knife to her face. He ordered her to perform oral sex on him again, this time as Valentin tried

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[14] *Id.* at 2.

[15] 704 S.E.2d 386, 402 (Va.) (quoting *Graham*, 560 U.S. at 75), *cert. denied*, 565 U.S. 920 (2011).

[16] *Angel v. Virginia*, 565 U.S. 920.

[17] Pet. App. A at 2.

to rape her from behind. As Valentin attempted to enter her vagina and anus, he threatened: "[D]on't turn around, I'll kill you if you turn around."[18]

After Vasquez left the bedroom, Valentin raped the victim on her bed, holding a knife to her as he did so. Vasquez returned and ordered the victim into the bathroom, where he made her perform fellatio a third time. As she complied, Vasquez repeatedly struck her in the head with the blunt end of his knife while slapping her face with his hand. Vasquez then demanded anal sex. He first dragged his knife across her back and flank area. But he could not penetrate with his penis. Again, Valentin watched from the doorway, blocking any escape.[19]

The petitioners marched the naked victim through the townhouse, finding more things to steal. Then, as Valentin moved the stolen property out through a window, Vasquez forced the victim to perform fellatio on him a fourth time, again pressing her head down to the point of choking her. Vasquez then raped her anally, first with his penis, and then with an inanimate object.[20] Vasquez pulled the victim towards the open window and said he was taking her along with them, but Valentin dissuaded him. Before leaving, however, Vasquez jabbed the knife at the victim's stomach, threatening to "come back with thirty guys and kill [her]" if she called the police.[21]

Petitioners were apprehended a short time later in possession of the stolen property, and each confessed to the police.[22] They also made incriminating statements to one another while in custody. Valentin said, "What fun is raping a bitch . . . and running?" He said he expected to be

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[18] *Id*.

[19] *Id*. at 3.

[20] *Id*.

[21] *Id.*

[22] *Id*.

tried as an adult and that they "[s]hould have killed that bitch." Vasquez said that he expected to be convicted, but he would simply "apologize for it."[23]

4. The juvenile court transferred the prosecution of Petitioners to the circuit court, where the grand jury returned 22 felony indictments against Vasquez and seventeen against Valentin. Following a bench trial, the trial court found Vasquez guilty on 18 indictments and Valentin guilty on 12.[24]

The trial court ordered the preparation of a presentence report.[25] Under Virginia law, the probation officer charged with preparing the presentence report must

> thoroughly investigate and report upon the history of the accused, including a report of the accused's criminal record as an adult and available juvenile court records, any information regarding the accused's participation or membership in a criminal street gang . . . , and all other relevant facts, to fully advise the court so the court may determine the appropriate sentence to be imposed.[26]

The report is made available to the accused and his counsel, who may cross-examine the probation officer and present any additional facts bearing on the matter.[27]

Before sentencing, Vasquez also filed a "Memorandum on Juvenile Sentencing," which Valentin joined. Petitioners argued that Virginia's conditional-release statute violates *Graham*'s requirement that a State provide a juvenile nonhomicide offender a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" before the end of his

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[23] *Id*. at 3-4.

[24] *Id*. at 4.

[25] *Id*.

[26] Va. Code Ann. § 19.2-299(A) (2015).

[27] *Id*.; *see* Pet. App. A at 4.

lifetime.[28] Petitioners also argued that statistics for the period 2010 through 2012 showed that the number of prisoners actually freed under that statute was so low that it provided no meaningful opportunity for release.[29] They asserted that a sentence of "greater than 47 years would violate the Eighth Amendment."[30] They also claimed that, under Virginia's statutory life-expectancy table, "[f]or a 16 year old, the life expectancy would be 59.6 years, or age 75.6."[31] They urged that a lower life-expectancy figure be used on the ground that "prison shortens life expectancy."[32]

At the sentencing hearing, their counsel agreed to the accuracy of the presentence reports and called the defendants' mothers to testify in mitigation. The trial court also received extensive information about the brutality of the crimes and their effect on the victim.[33] The court learned that Vasquez was on juvenile probation at the time of his crimes and that Valentin had committed multiple prior break-ins of occupied homes at nighttime.[34]

Before imposing sentence, the trial judge made clear that he had carefully considered each presentence report and the mitigating evidence.[35] He also observed that, no matter how many years he imposed, the defendants would be eligible for release at age 60 under Virginia's conditional-release statute.[36]

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[28] Pet. App. L at 1 (quoting *Graham*, 560 U.S. at 75).

[29] *Id.* at 2-3.

[30] *Id*. at 4.

[31] *Id*. at 5.

[32] *Id*.

[33] Pet. App. A at 4.

[34] *Id*.

[35] Pet. App. M at 121:20-25.

[36] *Id*. at 124:1-18, 134:17-19.

The judge then sentenced Vasquez on his 18 felony convictions to a cumulative 283 years in prison, with 150 years suspended, for an active incarceration time of 133 years; Valentin was sentenced on his 12 felony convictions to a cumulative 148 years in prison, with 80 years suspended, for an active incarceration time of 68 years.[37] The *longest* active sentence imposed for any one conviction was only 10 years; the *average* active sentence was 6.7 years per conviction.[38]

5. The Virginia Court of Appeals held that Petitioners' *Graham* claims were foreclosed by *Angel*, which had held that Virginia's conditional-release statute satisfied *Graham*.[39]

The Supreme Court of Virginia affirmed, although the court divided 5-2 on the rationale.[40] The majority held that *Graham*'s categorical rule barring a single life-without-parole sentence for a single offense should not be extended to aggregate term-of-years sentences for multiple offenses.[41] The majority noted two types of Eighth Amendment challenges: a "categorical" approach, like the one in *Graham*, that "fix[es] bright lines that limit criminal sentences 'based on mismatches between the culpability of a class of offenders and the severity of a penalty'";[42] and a "'case-by-case approach' . . . that focuses specifically on 'all the circumstances in a particular case.'"[43] The court identified Chief Justice Roberts's concurrence

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[37] Pet. App. A at 5.

[38] *Id*.; *see also* Pet. App. F & G.

[39] Pet. App. H at 1-2, I at 2-3.

[40] *Vasquez v. Commonwealth*, 781 S.E.2d 920 (Va. 2016). *See* Pet. App. A. (opinion).

[41] Pet. App. A at 6-14.

[42] *Id*. at 6 (quoting *Miller*, 132 S. Ct. at 2463).

[43] *Id*. (quoting *Graham*, 560 U.S. at 59, 77).

in *Graham* as an example of how case-by-case proportionality review works.[44] But the court observed that neither Vasquez nor Valentin had "contend[ed] that their various term-of-years sentences violate the case-by-case approach to judging disproportionate sentences under the Eighth Amendment."[45]

Turning to Petitioners' categorical challenge, the majority concluded that *Graham* applies "only to 'the imposition of *a* life without parole sentence on a juvenile offender who did not commit homicide.'"[46] That is, *Graham* "'concern[ed] *only* those juvenile offenders sentenced to *life without parole* solely for *a* nonhomicide offense.'"[47] Thus, *Graham*'s categorical rule was inapplicable because "[n]either Vasquez nor Valentin was convicted of a single crime accompanied by a life-without-parole sentence."[48] Rather, each was convicted of multiple separate crimes for which "the average per-crime sentence was 6.7 years of active incarceration."[49] Thus, this case was "nothing like *Graham*, which involved a single crime resulting in a single life-without-parole sentence."[50]

The court added that its conclusion was consistent with two of the three federal circuits to have examined the question, as well as with numerous State court decisions.[51] The court found unpersuasive the contrary conclusion of the Ninth Circuit panel in *Moore v. Biter*[52] because that

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[44] *Id.* at 6 n.6 (citing *Graham*, 560 U.S. at 86-96 (Roberts, C.J., concurring)).

[45] *Id.* at 7.

[46] *Id*. (quoting *Graham*, 560 U.S. at 82) (emphasis altered).

[47] *Id*. (quoting *Graham*, 560 U.S. at 63).

[48] *Id*. at 9.

[49] *Id.*

[50] *Id*.

[51] *Id.* at 9 & n.9 (collecting cases).

[52] 725 F.3d 1184, 1188 (9th Cir. 2013), *reh'g en banc denied*, 742 F.3d 917 (9th Cir. 2014).

court had failed to confront the distinction between single sentences for single crimes and aggregate sentences for multiple crimes.[53]

Justices Mims and Goodwyn concurred in the judgment.[54] They disagreed with the majority's conclusion that *Graham* does not apply to aggregate-sentence cases.[55] But they concluded that Petitioners were not serving life-without-parole sentences because they are eligible for "geriatric release" at age 60.[56] Virginia's conditional-release statute provided, as *Angel* had previously held, "an age-based review according to normal parole considerations including the individual's personal, social and criminal history, his conduct in prison including engagement in rehabilitative and vocational programs, the sentence and type of offense, changes in motivation, and results of psychological testing."[57] Such "considerations certainly allow the [Parole] Board to consider age, maturity and rehabilitation as *Graham* instructs."[58]

The concurring justices rejected Petitioners' statistical challenge to the number of persons actually granted conditional release. They said that Petitioners' limited data was questionable because prisoners who were convicted before 1995 could obtain release through traditional parole, thereby suppressing the number of persons successfully using the avenue of geriatric release.[59] And in any case, the as-applied claim was not yet ripe because Petitioners had not yet

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[53] Pet. App. A at 11-12.

[54] *Id*. at 19 (Mims, J., concurring, joined by Goodwyn, J.).

[55] *Id.* at 20 & n.1.

[56] *Id*. at 20, 26.

[57] *Id*. at 26 (citing Va. Parole Bd., Policy Manual 2-4 (2006)).

[58] *Id*.

[59] *Id*. at 27 n.4.

been denied release and will not even be eligible until they approach age 60.[60]

Petitioners timely petitioned for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. It is premature to consider whether the categorical rule in *Graham* should be extended to aggregate term-of-years sentences.

Two considerations make it premature to consider extending to aggregate-sentence cases *Graham*'s categorical rule against life-without-parole sentences in single-sentence cases. First, the prerequisite for a categorical approach is absent. Petitioners did not develop the necessary record to show that a "national consensus" supports the categorical rule they advocate. And second, lower courts should be permitted in the first instance to grapple with the intractable problems that will result from extending *Graham* to aggregate-sentence cases, problems that no appellate court has yet solved.

A. Petitioners failed to develop any record evidence establishing a national consensus in support of the categorical rule they advocate.

Graham explained that the "first" step in determining whether a categorical rule prohibits a particular sentencing practice is to "consider[] 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue."[61] Only after satisfying itself that a national consensus has formed does this Court then "determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution."[62]

In *Graham*, the majority found "that a national consensus ha[d] developed against"

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[60] *Id*. at 26-27.

[61] 560 U.S. at 61 (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)).

[62] *Id*.

imposing a life-without-parole sentence on a juvenile for a nonhomicide offense.[63] Although the laws of 37 States, the District of Columbia, and the United States formally allowed a life-without-parole sentence for a juvenile convicted of a nonhomicide offense, "an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute disclose[d] a consensus against its use."[64]

Unlike Petitioners in this case, however, Graham actually argued in the trial court that the requisite national consensus, though not yet clear, was then beginning to emerge.[65] And also unlike the petition in this case, Graham's petition for writ of certiorari actually cited a published study (the "Annino Study") surveying actual sentencing practices across the country.[66] This Court then relied on that same study to conclude that, "nationwide there [were] only 109 juvenile offenders serving sentences of life without parole for nonhomicide offenses."[67] Although the study's authors lacked definitive data for Nevada, Utah, and Virginia, the Court conducted its own supplemental research to obtain that information and reported that "Nevada ha[d] five juvenile nonhomicide offenders serving life without parole sentences, Utah ha[d] none, and

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[63] *Id*. at 67 (citation omitted).

[64] *Id.* at 62.

[65] Def's Mem. of Law in Supp. of Mot. to Correct Sentencing Error and Illegal Sentence, *State v. Graham*, No. 16-2003-CF-11912, 2007 WL 6600560 (2007) (Fla. Cir. Ct. Jan. 19, 2007) ("[D]espite the lack of a clear national consensus, some courts (though not all) have struck down on constitutional grounds life sentences without parole imposed on juveniles, as indicated in the footnote below. This Court should follow these decisions.").

[66] Pet. for Writ of Cert. at 59-60, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412) (discussing Paolo G. Annino, David W. Rasmussen, & Chelsea B. Rice, *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation* (2009)).

[67] 560 U.S. at 62-63 (citing Annino Study at 2).

Virginia ha[d] eight."[68] The Court also tallied an additional life-without-parole sentence in Oklahoma. Adding those 14 offenders to the 109 cited in the Annino Study, the Court concluded that there were only 123 such offenders nationwide, with the majority imprisoned in Florida and the rest in only ten other States.[69] Those figures persuaded the Court that imposing a life-without-parole sentence on a juvenile for a single nonhomicide offense was so "exceedingly rare" that a national consensus had emerged against it.[70]

Graham explicitly did not tally the number of offenders, like Petitioners, who are serving lengthy aggregate term-of-years sentences for multiple offenses. Graham's life-without-parole sentence was imposed for a single nonhomicide conviction for "armed burglary," and Florida law did not allow for parole on that conviction.[71] That is why the majority said that the case "concern[ed] *only* those juvenile offenders sentenced to life without parole solely for *a* nonhomicide offense."[72] The three dissenting Justices echoed that point, noting that the Court "count[ed] only those juveniles sentenced to life without parole and exclude[d] from its analysis all juveniles sentenced to lengthy term-of-years sentences (e.g., 70 or 80 years' imprisonment)."[73]

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[68] *Id*. at 63. The eight juvenile offenders in Virginia who received life terms are, in fact, eligible for conditional release at age 60. Their eligibility for geriatric release was not requested by or supplied to the Court's librarian as part of the Court's 2010 inquiry in *Graham*. *See* Letter from Dr. Tama S. Celi, Research & Reporting Supervisor, Va. Dep't of Corr., to Supreme Court Library (Mar. 30, 2010), *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412).

[69] *Graham*, 560 U.S. at 64.

[70] *Id*. at 67.

[71] *Id.* at 57. Graham was also sentenced to 15 years' imprisonment for attempted robbery. *Id.*

[72] *Id*. at 63 (emphasis added).

[73] *Id*. at 113 n.11 (Thomas, J., dissenting, joined by Scalia and Alito, JJ.); *see also id*. at 124 (Alito, J., dissenting) ("Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole."). *See also Bunch v. Smith*, 685 F.3d 546, 552

When aggregate term-of-years sentences are imposed for multiple crimes, by contrast, the active sentence for each conviction may be relatively short—such as the average 6.7 years on Petitioners' convictions here—but the aggregate sentence may well exceed a person's life expectancy. That situation presents a very different question from the one addressed in *Graham*. To prove that such aggregate sentences categorically violate the Eighth Amendment requires proof at the first step of the analysis that a national consensus has developed against the sentencing practice.

Petitioners have completely ignored that critical first step. Unlike Graham, Petitioners have offered no survey evidence to show how many such offenders are incarcerated throughout the country, so they cannot show that a "national consensus" has emerged that the practice amounts to cruel and unusual punishment. In an Eighth Amendment challenge, "[i]t is not the burden of [a State] . . . to establish a national consensus *approving* what their citizens have voted to do; rather, it is the 'heavy burden' of petitioners to establish a national consensus *against* it."[74] Even in *Graham*, where the Court supplemented some of the national data that was missing from the petitioner's national consensus evidence, the Court agreed "in the first instance it is for the litigants to provide data to aid the Court."[75] Yet Vasquez and Valentin failed to present *any* of that required survey information here.

Lower courts routinely reject requests for new categorical rules when a claimant adduces

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(6th Cir. 2012) (*Graham* "did not analyze sentencing laws or actual sentencing practices regarding consecutive, fixed-term sentences for juvenile nonhomicide offenders"), *cert. denied sub nom. Bunch v. Bobby*, 133 S. Ct. 1996 (2013).

[74] *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989) (quoting *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (joint op. of Stewart, Powell, and Stevens, JJ.)) (first emphasis added). *See also Baze v. Rees*, 553 U.S. 35, 53 (2008) (plurality op. of Roberts, C.J.) (quoting *Gregg* in noting a petitioner's "heavy burden" to prove that the State's execution method is cruel and unusual).

[75] 560 U.S. at 63.

no evidence of the requisite national consensus.[76] Petitioners should not be rewarded for their failure to build that record by being allowed to start from scratch in this Court.

B. There is not yet a mature split of authorities on whether *Graham* should be extended to aggregate term-of-years sentences.

While a split of authorities is developing on whether *Graham*'s categorical rule for single-sentence cases should be extended to aggregate term-of-years sentences, the split remains nascent. And the relatively few courts to extend *Graham* have simply not addressed whether doing so is supported by the requisite "national consensus," whether a categorical rule is preferable to case-by-case proportionality review, or how to solve the intractable problems that would result.

The Sixth Circuit held in *Bunch v. Smith* that *Graham* does not apply to aggregate-sentence cases because the majority in *Graham* "did not analyze sentencing laws or actual sentencing practices regarding consecutive, fixed-term sentences for juvenile nonhomicide offenders."[77] It recognized that *Graham* "did not even consider the constitutionality of such sentences, let alone clearly establish that they can violate the Eighth Amendment's prohibition

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[76] *See Willbanks v. Mo. Dep't of Corr.*, No. WD77913, 2015 Mo. App. LEXIS 1100, at *35, 2015 WL 6468489, at *13 (Mo. Ct. App. Oct. 27, 2015) (rejecting argument to extend *Graham* to "de facto" life-without-parole sentences where defendant, unlike Graham, "made no effort to demonstrate that there is any national consensus"); *see also United States v. Cobler*, 748 F.3d 570, 581 (4th Cir.) (rejecting proposed categorical rule "given the complete lack of evidence in the record regarding any national consensus"), *cert. denied*, 135 S. Ct. 229 (2014); *United States v. Reingold*, 731 F.3d 204, 215 (2d Cir. 2013) (same). *Cf.* 28 U.S.C. § 2254(e)(2) (barring federal habeas courts from holding an evidentiary hearing on State prisoner's claim when "the applicant has failed to develop the factual basis of a claim in State court proceedings," with limited exceptions not applicable here); *Cullen v. Pinholster*, 563 U.S. 170, 186 (2011) (explaining that federal habeas contemplates that prisoners must present facts and issues sufficiently in State proceedings and that the "state trial on the merits [should be] the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing.") (citation and quotation marks omitted).

[77] 685 F.3d at 552.

on cruel and unusual punishments."[78] The Fifth Circuit reached the same conclusion that neither *Graham* nor *Miller* "applies to [a] discretionary federal sentence for a term of years."[79]

As the Virginia Supreme Court noted, "[t]he only federal appellate court to reach the opposite conclusion is the Ninth Circuit."[80] The panel in *Moore v. Biter* thought that *Graham* must be extended to aggregate term-of-years sentences because "a seventeen[-]year-old sentenced to life without parole and a seventeen[-]year-old sentenced to 254 years with no possibility of parole, have effectively received the same sentence."[81] Notably, seven circuit judges dissented from the Ninth Circuit's decision declining rehearing en banc.[82] They wrote that the panel erred because it "fail[ed] to confront the most meaningful distinction" between single and aggregate sentences.[83] They added that the panel "did not consider the prevalence" of lengthy aggregate sentences, the first step required in evaluating a categorical rule.[84] Nor did the panel address the numerous practical difficulties created by trying to apply a categorical rule designed for single-sentence cases to an aggregate-sentence scenario.[85]

Petitioners are correct that State courts have reached different conclusions about whether *Graham*'s categorical rule should be extended to aggregate-sentence cases. The highest courts of Louisiana and (now) Virginia have held that *Graham*'s categorical rule should not be extended,

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[78] *Id.*

[79] *United States v. Walton*, 537 F. App'x 430, 437 (5th Cir.), *cert. denied*, 134 S. Ct. 712 (2013).

[80] Pet. App. A at 11.

[81] 725 F.3d at 1192.

[82] 742 F.3d 917 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc, joined by Tallman, Bybee, Callahan, Bea, Smith, and Ikuta, JJ.).

[83] *Id*. at 919.

[84] *Id*.

[85] *Id*. at 922.

while the highest courts of California, Florida, and Nevada have held that it should.[86] But like the Ninth Circuit panel in *Moore*, the State courts extending *Graham* have failed to address the critical threshold issues: whether a national-consensus has emerged; whether a categorical rule is needed beyond the case-by-case approach to proportionality review; and how to untangle the practical problems that a categorical rule presents. Nevada's highest court, for instance, acknowledged "that our holding today raises complex and difficult issues, not the least of which is *when* will aggregate sentences be determined to be the functional equivalent of a sentence of life without the possibility of parole."[87] But because the Nevada legislature had enacted a law that made the petitioner there parole-eligible, the court said that it "need not answer" those irksome questions.[88]

In short, while a split of authorities certainly is developing, it has not matured, and the few courts that have chosen to extend *Graham* have not yet addressed the obvious reasons not to.

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[86] *Compare State v. Brown*, 118 So. 3d 332, 332 (La. 2013) (holding *Graham* inapplicable to 70-year aggregate sentence, consisting of one 30-year sentence and four 10-year consecutive sentences, under which defendant would not be eligible for release until age 86), *State ex rel. Morgan v. Louisiana*, No. 2015-KH-0100, 2016 WL 6125428 (La. Oct. 19, 2016) (applying *Graham* to 99-year sentence for a single offense, distinguishing *Brown* as involving an aggregate sentence for multiple offenses), *and Vasquez*, 781 S.E.2d at 926 (refusing "to extend *Graham* beyond its holding") (Pet. App. A at 10), *with People v. Caballero*, 282 P.3d 291, 293 (Cal. 2012) (holding that consecutive sentences totaling 110 years violated *Graham*), *Henry v. State*, 175 So. 3d 675, 679-80 (Fla. 2015) (applying *Graham* to aggregate sentences totaling 90 years), *cert. denied*, 136 S. Ct. 1455 (2016), *and State v. Boston*, 363 P.3d 453, 454 (Nev. 2015) ("*Graham* applies when an aggregate sentence imposed against a juvenile [offender] convicted of more than one nonhomicide offense is the equivalent of a life-without-parole sentence."). *See also Vasquez*, 781 S.E.2d at 927 n.9 (collecting additional intermediate-appellate-court cases).

[87] *Boston*, 363 P.2d at 458 (emphasis added).

[88] *Id*.

C. The Court should let the matter percolate, allowing lower courts to grapple with the intractable problems that would be caused by extending *Graham* to aggregate term-of-years sentences.

Extending *Graham* to aggregate term-of-years sentences would open a Pandora's box of bedeviling problems that courts would be hard-pressed to resolve. Judge O'Scannlain listed a number of them in *Moore*:

- "At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number?"
- "Would gain time be taken into account?"
- "Could the number [of years] vary from offender to offender based on race, gender, socioeconomic class or other criteria?"
- "Does the number of crimes matter?"[89]
- "What if the aggregate sentences are from different cases? From different circuits? From different jurisdictions? If from different jurisdictions, which jurisdiction must modify its sentence or sentences to avoid constitutional infirmity?"[90]

The Missouri Court of Appeals in *Willbanks* found the problem *so* complex as to be "simply unworkable,"[91] adding that extending *Graham* to aggregate-sentence cases might also create perverse incentives for juvenile offenders to commit "more crimes with higher felony classifications."[92]

In addition to the myriad problems identified by Judge O'Scannlain, the *Willbanks* court was particularly troubled by the use of mortality tables that differentiated between defendants

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[89] 742 F.3d at 922 (quoting *Henry v. State*, 82 So. 3d 1084, 1089 (Fla. Dist. Ct. App. 2012), *rev'd*, 175 So. 2d 675 (Fla. 2015), *cert. denied*, 136 S. Ct. 1455 (2016)).

[90] *Id*. (citation and quotation marks omitted).

[91] *Willbanks*, 2015 Mo. App. LEXIS 1100, at *37, 2015 WL 6468489, at *13.

[92] *Id*. at *46, 2015 WL 6468489, at *16.

based on race and gender:

> [B]ecause so many different factors affect life expectancy, it may very well be that the same sentence imposed on offenders of different races or genders could have different effects. In other words, while a 30-year sentence might constitute a de facto [life-without-parole] sentence for a black male, it may not be the same for a white female.[93]

A New Jersey appellate court had the same apprehensions: "Applying such tables to juvenile offenders would mean that females would receive longer sentences than males, Hispanics would receive longer sentences than whites or blacks, and Hispanic females would receive the longest sentences of all."[94]

Similar problems arise if the relevant life expectancy must be adjusted in each case based on the earliest age at which the latest social science data might show that juvenile offenders could be rehabilitated. Petitioners' amicus shows the danger of that slippery slope, suggesting that *Graham* should be radically extended so that *all* juvenile offenders should be considered for release in their "mid-twenties," hypothesizing that most juveniles then "would no longer be a public safety risk."[95]

In this case, Justices of the Supreme Court of Virginia specifically questioned Vasquez's counsel at oral argument about how to solve the immense practical difficulties that would be created by extending *Graham* to aggregate-sentence cases. He offered no solutions: "[w]ith commendable candor, counsel conceded that no clear answers could be reliably given."[96]

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[93] *Id*. at *42-43, 2015 WL 6468489, at *15.

[94] *State v. Zuber*, 126 A.3d 335, 348 (N.J. Super. Ct. App. Div. 2015), *certif. granted*, 130 A.3d 1247 (N.J. 2016).

[95] Juvenile Law Ctr. Am. Br. at 20.

[96] Pet. App. A at 13.

Those are clear signs that the matter should be allowed to percolate further. Percolation encourages lower courts "to examine and criticize each other's decisions, which can improve the quality of circuit court opinions and can generate solutions that are not obvious on a first or second look."[97] Percolation also provides this Court the benefit of "a number of independent analyses of legal issues" and offers "concrete information about the consequences of various options."[98] It can also allow lower courts "to resolve conflicts by themselves, without Supreme Court intervention."[99] As Justice Stevens wrote more than thirty years ago:

> The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, has the benefit of the experience of those lower courts. Irrespective of docket capacity, the Court should not be compelled to intervene to eradicate disuniformity when further percolation or experimentation is desirable.[100]

Because none of the few courts to have extended *Graham* to aggregate-sentence cases has yet grappled with the consequences of doing so, this question qualifies as what Justice Ginsburg called a "frontier legal problem" for which certiorari is premature: "when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this

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[97] Samuel Estreicher & John Sexton, *A Managerial Theory of the Supreme Court's Responsibilities*, 59 N.Y.U. L. Rev. 681, 699 n.68 (1984).

[98] *Id*.

[99] *Id*.

[100] *California v. Carney*, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting) (quoting Estreicher & Sexton, *supra* note 97, at 716).

Court."[101] Denying certiorari will "not constitute either a decision on the merits of the questions presented, or an appraisal of their importance."[102] Rather, "the likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals 'to serve as laboratories in which the issue receives further study before it is addressed by this Court.'"[103]

II. Review of Virginia's conditional-release statute is not warranted.

Petitioners are simply wrong that there is a split of authorities warranting review of Virginia's conditional-release statute, and their as-applied challenge to that statute is both without merit and unripe.

A. The relevant authorities are not split on Petitioners' claim that parole eligibility at age 60 is a "life without parole" sentence under *Graham*.

The life-expectancy table provided in the Virginia Code—for use "[w]henever . . . it is necessary to establish the expectancy of continued life of any person from any period of such person's life"—shows that the average 16-year-old can be expected to live another 62.2 years, or until age 78.[104] That mortality table is similar to tables published by the U.S. Census Bureau.[105] At age 60, then, another 18 years remain in one's average life expectancy. Indeed, Petitioners themselves argued below that their sentence should not exceed 47 years, thereby acknowledging

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[101] *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting); *see also Carney*, 471 U.S. at 398-401; Estreicher & Sexton, *supra* note 97, at 699.

[102] *Brown v. Texas*, 522 U.S. 940, 942-43 (1997) (Stevens, J., respecting denial of petition for writ of certiorari) (citations omitted).

[103] *Id.* at 943 (quoting *McCray v. New York*, 461 U.S. 961, 962-63 (1983) (opinion of Stevens, J., respecting denial of certiorari)).

[104] Va. Code Ann. § 8.01-419 (2015).

[105] *See* U.S. Census Bureau, Statistical Abstract of the United States (2012), Table 105—Life Expectancy by Sex, Age, and Race: 2008 (showing that an average 15-year old has a remaining life expectancy of 63.8 years), *available at* https://www.census.gov/prod/2011pubs/12statab/vitstat.pdf.

that release *at age 64* would comport with *Graham* by allowing for release within their lifetime.[106]

Set aside for the moment Petitioners' statistical challenge to the frequency with which current offenders actually obtain geriatric release in Virginia. And put aside as well Petitioners' claim that geriatric release somehow restricts the factors that may be considered by the Virginia Parole Board. Those as-applied challenges are refuted below.

Once those as-applied challenges are peeled away, the *facial* challenge that remains is whether, under *Graham*, parole eligibility at age 60 comes *so* late in life as to deny a "realistic opportunity to obtain release before the end" of a life sentence.[107] There is no split of relevant authorities on that question.

For starters, the petitioner in *Graham* conceded at oral argument "that a sentence of as much as 40 years without the possibility of parole 'probably' would be constitutional."[108] A 16-year-old offender in that situation would be parole-eligible at age 56. In this case, Vasquez and Valentin will each serve 44 years before becoming parole-eligible at age 60 under Virginia's conditional-release statute. The Virginia statute comes to this Court with a strong presumption of constitutionality,[109] and Petitioners have cited no case to show that parole eligibility at age 60 is *too* late in life to comport with the Eighth Amendment as construed in *Graham*.

To the contrary, two federal circuits have held that active sentences *longer* than 44 years—with parole eligibility *later* than age 60—do not constitute "life without parole"

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[106] Pet. App. L at 4.

[107] *Graham*, 560 U.S. at 82.

[108] *Id*. at 124 (Alito, J., dissenting) (citing Tr. of Oral Arg. 6-7).

[109] *E.g.*, *Baze*, 553 U.S. at 63-64 (Alito, J., concurring).

sentences.[110] State intermediate appellate courts routinely reach the same conclusion.[111] And almost all of the cases that Petitioners cite as invalidating lengthy prison terms involved active sentences *longer* than 44 years, with parole eligibility *later* than at age 60.[112] Accordingly, those authorities do not show that Virginia's selection of age 60 for parole eligibility violates any national consensus.

In fact, Petitioners have not cited a single decision from any "United States court of appeals," or any "[S]tate court of last resort,"[113] that holds that parole eligibility at age 60 comes so late in life that the punishment amounts to life without parole in violation of the Eighth Amendment. The only case that comes close is the Iowa Supreme Court's decision in *State v. Pearson*,[114] but it too falls short. *Pearson* held that a juvenile nonhomicide offender could not be

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[110] *See Starks v. Easterling*, No. 14-6230, 2016 U.S. App. Lexis 15744, at *2, 2016 WL 4437588, at *1 (6th Cir. Aug. 23, 2016) (rejecting challenge to aggregate sentence with parole eligibility at age 77); *Demirdjian v. Gipson*, 832 F.3d 1060, 1077 (9th Cir. 2016) (rejecting challenge to 50-year prison term with parole eligibility at age 66).

[111] *See Zuber*, 126 A.3d at 346 (upholding 55-year sentence with parole eligibility at age 72); *State v. Watkins*, Nos. 13AP-133, -134, 2013 Ohio App. LEXIS 5791, at *13-14, 2013 WL 6708397, at *5 (Dec. 17, 2013) (67-year aggregate sentence), *appeal pending*, 10 N.E.3d 737 (Ohio 2014) ; *State v. Merritt*, No. M2012-00829, 2013 Tenn. Crim. App. LEXIS 1082, at *16-17, 2013 WL 6505145, at *6 (Dec. 10, 2013) (50-year aggregate sentence); *see also People v. Bell*, No. B263022, 2016 Cal. App. LEXIS 802, at *17-18, 2016 WL 5462094, at *6 (Sept. 29, 2016) (upholding 43-year sentence with parole eligibility at age 55).

[112] *People v. Rainer*, No. 10CA2414, 2013 Colo. App. LEXIS 509, at *40, 2013 WL 1490107, at *12 (Apr. 11, 2013) (invalidating sentence for juvenile defendant with life expectancy of 63.8 to 72 years who would not be eligible for parole until age 75), *cert. granted*, 2014 Colo. LEXIS 1085 (Dec. 22, 2014); *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1047 (Conn. 2015) (invalidating 50-year sentence with parole eligibility in offender's "late sixties"), *cert. denied sub nom. Semple v. Casiano*, 136 S. Ct. 1364 (2016); *Henry*, 175 So. 3d at 679-80 (Fla.) (invalidating 90-year aggregate sentence with parole eligibility at age 95); *State v. Null*, 836 N.W.2d 41, 76 (Iowa 2013) (invalidating, under Iowa law only, a sentence of 52.5 years with parole eligibility at age 69); *Bear Cloud v. State*, 334 P.3d 132, 141-42 (Wyo. 2014) (requiring consideration of *Miller* factors for 45-year sentence with parole eligibility at age 61).

[113] Sup. Ct. R. 10(a), (b).

[114] 836 N.W.2d 88 (Iowa 2013).

sentenced to a 35-year prison term unless the sentencing court considers the individualized factors required by *Miller*.[115] But the Iowa court based that ruling solely on the *Iowa Constitution*, not on the Eighth Amendment.[116] And *Pearson* did not announce a categorical rule barring aggregate sentences exceeding 35 years; it simply requires an "individualized sentencing hearing" where the *Miller* factors are considered before such a sentence may be imposed—a kind of hybrid *Graham/Miller* rule.[117] (Such a hearing, in fact, occurred in this case.[118]) So *Pearson* cannot count as a contrary authority on the federal question presented here.

Petitioners also misplace their reliance on the *district court*'s decision in *LeBlanc v. Mathena*, in which the judge held on federal habeas review that a Virginia State court violated clearly established Supreme Court precedent in ruling that Virginia's geriatric-release statute satisfies *Graham*.[119] Virginia has appealed that outlier ruling to the Fourth Circuit, where the matter is awaiting decision.[120] And an outlier decision by a district court is not sufficient to show a split of the *relevant* authorities under Rule 10.

In short, there is no relevant split of authorities on the question whether parole eligibility at age 60 comes too late in life to satisfy *Graham*. Instead, every relevant authority on that question supports the validity of Virginia's sentencing laws.

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[115] *Id.* at 96.

[116] *Id.* ("As in *Null*, we independently apply article I, section 17 of the Iowa Constitution, adopt the principles underlying *Miller*, and apply them to the facts of this case.").

[117] *Id.*

[118] *See supra* at 5-6.

[119] No. 2:12-cv-340, 2015 U.S. Dist. LEXIS 86090, at *22, 2015 WL 4042175, at *9 (E.D. Va. July 1, 2015), *appeal pending*, No. 15-7151 (4th Cir. argued May 10, 2016).

[120] *Id.*

B. Petitioners' claim that Virginia's conditional-release statute does not permit consideration of their youth is foreclosed by the Virginia Supreme Court's conclusive interpretation of State law.

Petitioners mischaracterize Virginia's conditional-release statute by claiming that it is more limited than parole because it supposedly accounts for "neither a juvenile offender's age at the time of the offense nor the other inherent qualities of youth."[121] That claim is untrue. The Parole Board's regulations make clear that the *same* factors that apply in parole also apply to conditional release, and the parole manual defines conditional release as a form of parole.[122] The written parole factors include numerous considerations, for instance, that account for the offender's age at the time of the offense and his maturity and rehabilitation while incarcerated.[123]

In any case, this is not the place to debate that State-law question. The "State's highest court is unquestionably 'the ultimate exposito[r] of state law,'"[124] and the Supreme Court of Virginia squarely held in *Angel* that the geriatric-release statute makes juvenile nonhomicide offenders eligible for release at age 60 based on "the factors used in the normal parole consideration process."[125] The concurrence by Justices Mims and Goodwyn below reiterated that conclusion:

> The statute provides an age-based review according to normal parole considerations including the individual's personal, social and criminal history, his conduct in prison including engagement in rehabilitative and vocational programs, the sentence and type of offense,

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[121] Pet. 18.

[122] *See supra* at 2 & nn. 11-12.

[123] *See supra* at 2-3.

[124] *Riley v. Kennedy*, 553 U.S. 406, 425 (2008) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)); *Mullaney*, 421 U.S. at 691 ("[W]e accept as binding the Maine Supreme Judicial Court's construction of state homicide law.").

[125] 704 S.E.2d at 402.

> changes in motivation, and results of psychological testing. *These considerations certainly allow the Board to consider age, maturity and rehabilitation as Graham instructs*.[126]

Petitioners' contrary claim must fail because the Supreme Court of Virginia is the final authority on the scope and application of Virginia's parole laws.

C. Petitioners' as-applied challenges to Virginia's conditional-release statute are meritless and premature.

Neither of Petitioners' as-applied challenges to Virginia's conditional-release statute has merit. Petitioners assert for the first time in this Court that they face an "incredible lack of access to rehabilitative services" in prison, allegedly diminishing their ability to be rehabilitated sufficiently to have a meaningful chance at release when they turn 60.[127] Because that claim was not raised below—and there is no evidence in the record of the services available to Petitioners—their claim is not properly presented for review. This Court has long "adhered to the rule in reviewing state court judgments . . . that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review."[128] Because the rehabilitative-services claim was not presented or supported below, it cannot be raised now.[129]

Second, Petitioners argue that the rate at which inmates are granted geriatric release is so

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[126] Pet. App. A at 26 (Mims, J., concurring) (citation omitted; emphasis added).

[127] Pet. 24.

[128] *Adams v. Robertson*, 520 U.S. 83, 86 (1997); *see also Howell v. Mississippi*, 543 U.S. 440, 441 (2005) (same; dismissing writ of certiorari as improvidently granted).

[129] The Court may also take judicial notice that the website of the Virginia Department of Corrections describes work programs and rehabilitative services offered to offenders, including programs that "provide those inmates who choose to change criminal behaviors with meaningful opportunities for positive growth." *See* Va. Dep't of Corr., Inmate Programs & Servs. (2016), https://vadoc.virginia.gov/offenders/institutions/programs/default.shtm.

"shockingly low" that it does not present a "realistic" or "meaningful" opportunity for release under *Graham*.[130] That claim is both factually unsupported and unripe. The only "evidence" Petitioners adduce in this Court is a 2010 newspaper article that is not in the record.[131] And even if that article were admissible, it would not establish the low rate Petitioners claim; it states that 15 inmates had been granted geriatric release as of 2010, but it does not report how many prisoners applied.

In the trial court, Petitioners based their statistical claim on data from 2010-2012 reflecting that, on average, 5.6% of the eligible offenders who applied for geriatric release actually received it.[132] Even if that figure were accurate, it would reflect a "meaningful opportunity" for release under *Graham*. In fact, Graham's counsel conceded at oral argument that a parole system that "grants parole to 1 out of 20 applicants"—5%—would satisfy the "meaningful opportunity" requirement.[133] Petitioners' data reflecting a 5.6% release rate is slightly better than that.

But Petitioners' data seriously understates their true opportunity for release when they turn 60. Persons who offended before 1995 are currently eligible for traditional parole and geriatric release (but not both), while those who offended in 1995 or later, like Petitioners, are eligible *only* for geriatric release.[134] So as Justice Mims pointed out, Petitioners' data underestimates actual release opportunity by failing to account for those offenders who "obtain

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[130] Pet. 22.

[131] Pet. 22 n.9 (citing Frank Green, Richmond Times-Dispatch (Mar. 1, 2010), *available at* http://www.richmond.com/news/article_4969b0fe-bdca-5361-984a-7aeb0da2f87e.html).

[132] Pet. App. L at 2-3.

[133] Tr. of Oral Arg. at 7:4-14, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412).

[134] *See* Va. Code Ann. §§ 53.1-151, 53.1-165.1 (2013).

release through traditional parole instead."[135] In other words, as the current prison population ages, more and more who offended in 1995 or later will be eligible *only* for geriatric release, thereby driving up those release statistics. Petitioners' data is also not representative of their own situation. As Justice Mims explained, "[a] hypothetical 17-year[-]old sentenced to a life sentence or a de facto life sentence in 1995 will not be eligible for geriatric release until 2038."[136] Indeed, the former head of the Parole Board explained that the geriatric-release program was created, at the same time that parole was abolished in 1994, to provide a release opportunity to persons "who were going to get very long sentences at a young age so they would have some opportunity to be released."[137] Because the current geriatric release statistics do not yet include such prisoners, Petitioners' data simply does not account for offenders like themselves.[138]

Justice Mims was also correct that Petitioners' challenge to the *current* frequency of geriatric release is unripe "because these defendants have not been denied geriatric release" and their eligibility is decades away.[139] *Texas v. United States* makes clear that "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or

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[135] Pet. App. A at 27 n.4.

[136] *Id.*

[137] Green, *supra* note 131.

[138] *See also LeBlanc v. Mathena*, No. 2:12-cv-340, 2013 U.S. Dist. LEXIS 189736, at *24, 2013 WL 10799406, at *8 (E.D. Va. July 24, 2013) (rejecting statistical challenge to geriatric release because the necessary "data does not and cannot account for nonhomicide juvenile offenders . . . who were sentenced under the truth-in-sentencing system. Such data, in fact, would not become available until around 2038"), *adopted in part, rejected in part on other grounds*, 2015 U.S. Dist. LEXIS 86090, 2015 WL 4042175 (E.D. Va. July 1, 2015), *appeal pending*, No. 15-7151 (4th Cir. argued May 10, 2016).

[139] Pet. App. A at 27.

indeed may not occur at all.'"[140] That is obviously true here. The Virginia legislature may change the law in the next several decades to provide an opportunity for release earlier than age 60. Petitioners might commit new offenses while incarcerated that make them ineligible for release. Medical advances might greatly extend average life expectancy. There are countless other possibilities that could affect whether Petitioners will seek or be entitled to conditional release when they turn 60. And each year that that contingency draws closer will bring new statistics on the frequency of geriatric release, statistics that will be less and less distorted by pre-1995 offenders, now eligible for *both* traditional parole and geriatric release, who are released through traditional parole. In the meantime, the issue of the frequency of geriatric release is plainly unripe because, as in *Texas v. United States*, it does not need to be decided now and may not need to be decided at all.

* * *

The Court's decisions in *Graham, Miller*, and *Montgomery* "have given the lower courts a good deal to digest over a relatively short period."[141] And *Graham* makes clear that "[i]t is for the State[s], in the first instance, to explore the means and mechanisms for compliance."[142] As Chief Justice Roberts wrote in a similar context, the Court should afford lower courts "some time to address the nuances of [such] precedents before adding new ones . . . . [A] plant cannot grow if you constantly yank it out of the ground to see if the roots are healthy."[143]

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[140] 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)).

[141] *Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting from summary reversal).

[142] *Graham*, 560 U.S. at 75.

[143] *Spears*, 555 U.S. at 270.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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October 28, 2016

No. 16-5579

DARIEN VASQUEZ, BRANDON VALENTIN,
Petitioners,

V.

COMMONWEALTH OF VIRGINIA,
Respondent.

AFFIDAVIT OF SERVICE

I certify that on October 28, 2016, an original and ten copies of this **BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI** were filed with the Court by overnight delivery using a third-party commercial carrier, and one copy was served, by email and first-class, postage-prepaid mail, on:

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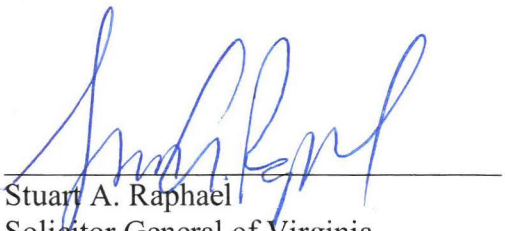

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