NO. 12-558.

IN THE

SUPREME COURT OF THE UNITED STATES

Chaz BUNCH, Petitioner,

v.

David BOBBY, Warden, Respondent.

On Petition for Writ of Certiorari to
The United States Court Of Appeals For The Sixth Circuit

BRIEF OF JUVENILE LAW CENTER AND THE NATIONAL JUVENILE DEFENDER CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTORARI

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INTEREST OF THE *AMICI*[1]

Founded in 1975, *Amicus Curiae* Juvenile Law Center is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Recognizing the critical developmental differences between youth and adults, Juvenile Law Center works to align justice policy and practice—including state criminal laws on sentencing—with modern understandings of adolescent development and time-honored constitutional principles of fundamental fairness. Juvenile Law Center participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children. We write to urge the Court to grant certiorari in the case of *Bunch v. Bobby*.[2]

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

[1] The consent of counsel for all parties is on file with the Court. 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. A brief description of the *Amici* appears in the Appendix.

[2] *Bunch v. Bobby*, 685 F. 3d 546 (6th Cir. 2012).

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 National Juvenile Defender Center is helping to shape national and international law in an effort to abolish juvenile life without parole (JLWOP) sentences in the United States—the harshest sentence an individual can receive short of death, which violates international human rights standards of juvenile justice. The National Juvenile Defender Center has participated as *Amicus Curiae* before the United States Supreme Court, as well as federal and state courts across the country in support of this position. The National Juvenile Defender Center's mission is to ensure excellence in juvenile defense and promote justice for all children.

In *Graham v. Florida,* 130 S. Ct. 2011 (2010), this Court held that sentencing a juvenile to life without parole for a non-homicide offense violated

the Eight Amendment's prohibition 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 2033. Just this past year, 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*, 567 U.S. ____, 132 S. Ct. 2455, 2464-65 (2012) (quoting *Graham*, 130 S. Ct., at 2027).

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 Eight 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.

SUMMARY OF ARGUMENT

This case raises a question of exceptional importance regarding the application of *Graham v. Florida* and the importance of *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. 130 S. Ct. 2011, 2010 (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 2032. *Graham* held that a sentence that provides no "meaningful opportunity to obtain release" before the end of the child's life is unconstitutional. *Id.* at 2033. 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.[3] Because this sentence means that Petitioner

[3] Bunch was convicted of multiple non-homicide offenses related to a single event that occurred when he was 16 years old. Pet. App. 22a. He 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

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. 130 S.Ct. at 2030. 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 v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION FOR CERTIORARI TO ENSURE A UNIFORM APPLICATION AND FULL 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

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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. Bobby, Petition* for a Writ of Certiorari at 7 (citing Ohio H. 86, 129th Gen. Assembly (eff. Sept. 30, 2011). 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.*

the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 130 S.Ct. 2034, 2011 (2010). 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 2033. 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* at 2030.

"What the State must do . . . is give defendants like [Bunch] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* 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.[4] Indeed, the sentencing court 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." (Resentencing Tr. Vol. V, 35, July 13, 2006.) To hold as the Sixth Circuit did that such a sentence does not violate *Graham* because it was not formally labeled life without parole[5] defies

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[4] 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, http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_03.pdf (last visited November 26, 2012). 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 of those serving prison sentences. *See, e.g., United States v. Nelson*, 491 F.3d 344, 349-50 (7th Cir. Ill. 2007); U.S. Sentencing Commission Preliminary Quarterly Data Report (Through June 30, 2012) at A-8, *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2012_3rd_Quarter_Report.pdf.

[5] *Bunch v. Smith*, 685 F. 3d 546, 551 (6th Cir. 2012).

commonsense; it also runs afoul of this Court's Eighth Amendment jurisprudence.

Graham prohibited sentences for non-homicide offenses that had a particular impact on children. 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 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." 483 U.S. 66, 83 (1987).

The categorical rule articulated in *Graham* is about outcomes—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*, 130 S.Ct. at 2032 (citing *Roper*, 543 U.S. at 573). 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 2029, 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 2028. 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 2028-29 (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 2028 (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.*

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 2029. Because adolescents' natures are transient, they must be given "a chance to demonstrate growth and maturity." *Id.* 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 (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,* 130 S Ct. at 2030. 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.* 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 v. Florida,* 130 S. Ct. 2011, 2021 (2010) (citing *Harmelin v. Michigan* 501 U.S. 957, 997 (1991). 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 2021.

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 2022. If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate, the sentence is cruel and unusual." *Id.* at 2022.

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 2022 (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 v. Simmons* 543 U.S. 551 (2005) (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 v. Florida* 130 S.Ct. 2011 (2010) at 2022 (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 that lacks any legitimate penological purpose is by its nature disproportionate to the offense and therefore unconstitutional." 130 S.Ct. at 2028. 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 2030. *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,* 567 U.S. _, 132 S. Ct.

2455, 2469 (2012), the United States Supreme 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 recent holdings in *Roper* v. *Simmons,* 543 U.S. 551 (2005), *Graham v. Florida,* 130 S. Ct. 2011 (2010), and *J.D.B.* v. *North Carolina,* 564 U.S. _, 131 S. Ct. 2394 (2011), the 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 (a propensity for hasty decision-making and reckless behavior, susceptibility to peer pressure, and lack of control over one's own environment, *Graham*, 130 S. Ct., at 2027) 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 began with *Roper* and has continued through *Miller* marks a shift in the Court's jurisprudence away from the previous line of cases that 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 under 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,* 130 S. Ct. at 2022 (representing the first and only 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 (representing the first time the Court applied a procedural protection typically reserved for death

penalty cases to a non-death sentence, by 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 v. Michigan*, 501 U.S. 957, 994, 111 S.Ct. 2680, 2701.

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 24590 (distinguishing its analysis from that in *Harmelin v. Michigan*, 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*, 130 S.Ct. 2011).

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 v. Florida,* 130 S. Ct. 2011, 2026-27, 2029-30 (2010), 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,* 130 S. Ct., at 2027, *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[6] – is crime-specific."

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[6] 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." 130 S.Ct. at 2026. *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 Appellant'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, 2005-1981, n.31 (La. 2007) (reversed on other grounds), 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, 125 S.Ct. at 1196, or by reason of the 'diminished capacities to understand and process information' of the mentally retarded. *Atkins v. Virginia,* 536 U.S. 304, 318-319, 122 S. Ct. 2242, 2251 (2002). For the same reasons, the mentally retarded and the

Miller, 132 S. Ct. 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*, 130 S.Ct. at 2030. As Chaz Bunch did not kill or intend to kill, he is not deserving of "this harshest possible penalty." *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

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

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juvenile offender 'will be less susceptible to deterrence.' *Roper,* 543 U.S. at 571, 125 S. Ct. at 1196; *see Atkins,* 536 U.S. at 320, 122 S. Ct. at 2251 ('[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.').

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 App. 7 Dist., Jun 24, 2005). *See also Graham*, 130 S. Ct. at 2038 (Roberts, C.J., concurring) (admonishing that individualized sentencing is required because "[j]uvenile 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.

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.*" 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,* 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 here. *Graham*, 130 S.Ct. at 2026-27. 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

The Supreme Court has acknowledged that a child's age is far "more than a chronological fact." *See J.D.B. v. North Carolina* 564 U. S. 1, 8 (2011). The Court has also mandated an individualized analysis for children accused of serious crimes that reflects both our society's evolving standards of decency[7] and our greater understanding of

[7] *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

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 being subverted by semantics

Respectfully Submitted,

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"cruel and unusual.") *Trop v. Dulles,* 356 U.S. 86, 100–101 (1958); *Roper,* 543 U.S. at 551.

APPENDIX

Chaz Bunch v. David Bobby, No. 12-558

Identity of *Amici* and Statements of Interest

Juvenile Law Center (JLC) is the oldest multi-issue public interest law fl.rm for children in the United States, founded in 1975 to advance the rights and well-being of children in jeopardy. JLC 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. JLC 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. JLC 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 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.

CERTIFICATION OF WORD COUNT

Pursuant to Supreme Court Rule 33.1(h), I certify that the enclosed Brief of *Amici Curiae* Juvenile Law Center and National Juvenile Defender Center, in Support of Petition For A Writ of Certorari in the case *Chaz Bunch v. David Bobby*, No. 12-558, contains 5,930 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

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Executed on December 4, 2012.

CERTIFICATE OF SERVICE

I, Marsha L. Levick, Esq., do hereby certify this 4th day of December, 2012, pursuant to Supreme Court Rule 29, that three (3) copies of the Brief of Juvenile Law Center and National Juvenile Defender Center in Support of Petition for a Writ of Certiorari in the case of *Chaz Bunch v. David Bobby*, docket number 12-558, have been served via first class mail on all counsel of record in this appeal as follows:

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