No. 18-1259

In the
Supreme Court of the United States

BRETT JONES,
Petitioner,
v.
MISSISSIPPI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Supreme Court of Mississippi

BRIEF OF *AMICUS CURIAE* AMICUS POPULI IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

Amicus Populi represents individuals who worked as prosecutors in California during the past three decades, when California and the Nation became much safer. From 1993 to 1998 alone, California's homicide rate was cut in half. From 1993 to 2014, the homicide rate dropped from 12.9 to 4.4 (per 100,000), its lowest in 50 years, and the violent crime rate dropped from 1059 to 393, so there were approximately 3,300 fewer homicides and 250,000 fewer violent crimes in that year than there would have been had crime remained at its 1993 level. The decline saved tens of thousands of lives and prevented millions of violent crimes in the last quarter-century.

Amicus Populi works to preserve this improvement, balancing the imperative of punishing offenders according to their culpability with the imperative of protecting public safety, the first duty of government. See *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 618 (Cal. 1996); *People v. Rogers*, 18 N.Y. 9 (1858).

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[1] *Amicus* files this brief with all parties' consent. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting the brief.

SUMMARY OF ARGUMENT

This case illustrates Yogi Berra's wisdom in observing "it is hard to make predictions, especially about the future." After a jury convicts a juvenile of murder, sentencers in most states must make an individualized determination about whether to sentence the defendant to life imprisonment without possibility of parole (LWOP) or some lesser sentence. An LWOP sentence denies the juvenile the chance to demonstrate growth and maturity, and alters his life with a forfeiture that is irrevocable. *Graham v. Florida*, 560 U.S. 48, 69, 73 (2010). But a juvenile murderer who is later released and repeats his crime produces the death of an innocent person. As with COVID-19, both overconfinement and underconfinement impose social costs.

Courts must therefore sort those who deserve a chance for release from those who warrant permanent confinement. This Court has described the former as juvenile offenders whose crimes reflect "transient immaturity" and the latter as those whose character reflects "irreparable corruption" or "irretrievable depravity." *Miller v. Alabama,* 567 U.S. 460, 471, 479-80 (2012). The imperative of preventing cruel and unusual punishment requires the former have an opportunity for release. The imperative of protecting human life requires the latter never again have the opportunity to prey upon the public.

The sentencer's determination concerns a prediction about the future, but must turn on facts discernible in the present. Objective factors like the "character and record of the individual offender" and the

"circumstances of the particular offense" rather than subjective ones have long informed the decision whether to impose a discretionary maximum sentence in both capital and noncapital proceedings. *Woodson v. North Carolina*, 428 U.S. 280, 302-05 (1976) (plurality opinion); *Graham*, 560 U.S. at 87 (Roberts, C.J., concurring); see also *Solem v. Helm*, 463 U.S. 277 (1983). These current, objective factors can and should govern the sentencing of juvenile murderers.

The decision in *Miller v. Alabama,* 567 U.S. 460 (2012) broke new ground as the first to diverge from the principle that "death is different." Prior cases had applied special scrutiny when the penalty was death (*Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson*, 428 U.S. 280), or when the punishment was permanent (LWOP) but the crime did not inflict death. *Graham*, 560 U.S. 48; *Solem*, 463 U.S. 277. *Miller* was the first case to apply that scrutiny to a noncapital sentence punishing a capital crime. Nonetheless, the same factors, objectively discernible to the sentencer at the time of conviction, must govern the sentencing choice.

Miller had a prescriptive component, as it held the "Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 567 U.S. at 479. It had a predictive component: "[W]e *think* appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id*, emphasis added. And there was a descriptive component, recalling the "great difficulty . . . of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity,

and the rare juvenile offender whose crime reflects irreparable corruption.' *Id*. at 479-80, quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

This latter contrast did not compel sentencers to determine before imposing an LWOP sentence whether the defendant acted out of irreparable corruption, or "irretrievable depravity." If it had, a jury, not a court, would need to make that determination. *United States v. Haymond*, 139 S. Ct. 2369, 2379 (2019). Furthermore, the contrasts between adults and juveniles concerning maturity, vulnerability, and character permanence involve differences of degree rather than kind. *Roper* concluded these general contrasts preclude categorizing juveniles among the worst offenders, who deserve death, but even if certain traits render adults more culpable generally, irretrievable depravity is not a prerequisite for imposing a death sentence on adult offenders. It is not necessary for an LWOP sentence for juveniles.

Most importantly, irretrievable depravity is not an intelligible standard for a sentencer, who can assess the present *magnitude* of depravity but not its future *duration*. Sentencing defendants based not on what they have done but on what the sentencer thinks they will do in the future inevitably entails speculation, which can implement unfair bias. *Buck v. Davis*, 137 S. Ct. 759, 776 (2017). When this Court first described the contrast between transient immaturity and irreparable corruption, it was to cite a contrast that even experts could not be expected to make. *Roper*, 543 U.S. at 573. Insofar as imprisonment seeks not to punish offenses but to reform offenders, as the 1931 Wickersham

Commission observed, it is no more possible to predict when (or if) an offender will be released from prison than to predict when a medical patient will be released from a hospital. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 893 n.62 (1990). Sentencers must therefore decide based on objective, current facts, not speculation about which defendants will mature and which will remain incorrigible forever.

The standard cannot be that anyone with any possibility of reform must receive an opportunity for parole, so that only juveniles certain to re-offend may receive an LWOP sentence; everyone poses a risk of less than one hundred percent but more than zero percent of future crime. This Court has not extended *Atkins v. Virginia*, 536 U.S. 304 (2002), to restrict LWOP sentences for mentally impaired murderers, because the same factors rendering them less culpable may also render them more dangerous in the future. Similarly, even if it is harsher punishment to permanently incarcerate a teenager than a senior citizen, it provides a greater incapacitative protection for society. Determining which juveniles should be exempt from LWOP, like determining which mentally incompetent offenders should be exempt from capital punishment, is a project for democratic self-governance rather than constitutional law. *Kahler v. Kansas*, 140 S. Ct. 1021, 1037 (2020).

States must act to prevent false positive findings (whereby offenders remain incarcerated even though they would not re-offend), and false negatives (whereby offenders are released from custody but do re-offend).

The former can wrongly take the liberty of the guilty, whereas the latter can wrongly take the lives of the innocent. Because the Constitution entrusts the state to protect people's safety in the face of uncertain danger, courts should not micromanage the decisions of elected officials in protecting human life. *South Bay United Pentacostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring in denial for injunctive relief.)

ARGUMENT

I. Neither "irretrievable depravity," "irreparable corruption," nor "permanent incorrigibility" is required for a constitutional sentence of life without possibility of parole for a juvenile offender.

The instant sentencing court did not consider petitioner Brett Jones' youth "irrelevant to its sentencing determination." *Miller*, 567 U.S. at 479. To the contrary, it expressly observed, "The Court is cognizant of the fact that children are generally different; that consideration of the *Miller* factors and others relevant to the child's culpability might well counsel against irrevocably sentencing a minor to life in prison." J. A. 149. The court observed Jones was fifteen when he murdered his grandfather, and considered Jones' background "troubled" but not "brutal." J. A. 150-51. The court deemed the homicide "particularly brutal," as Jones stabbed his grandfather eight times, using a second knife to continue the assault when the first broke. J. A. 150. The court further recalled Jones tried to conceal the murder, acted alone in committing it, and did not act under pressure from any relative or peer. J. A. 150-51. After addressing these objective, individual factors, the court concluded Jones' crime warranted a sentence of LWOP. J. A. 152. The court complied with *Miller* and imposed a constitutional sentence.

A. Objective factors guide the review of both capital and noncapital sentences.

More than four decades ago, this Court barred mandatory capital sentences. *Miller*, 567 U.S. at 470, citing *Woodson*, 428 U.S. 280, 302-05 see also *Lockett,* 438 U.S. 586. The absence of individualized consideration harmed multiple actors. It prevented defendants from presenting mitigating evidence, it prevented sentencing juries from learning relevant information, it denied courts the opportunity to check the arbitrary and capricious exercise of sentencing power, and it harmed prosecutors by inviting nullification by jurors uncomfortable with the prescribed penalty. *Woodson,* at 302-04. *Woodson* did not bar all mandatory sentencing; only the qualitatively different sentence of death required such individualization. *Id*. at 304-05.

Factors that could determine the sentence included the "character and record of the individual offender" and the "circumstances of the particular offense." *Woodson*, 428 U.S. at 304. "[O]bjective, rather than subjective" factors likewise govern the proportionality of noncapital sentences, for which the maximum sentence is LWOP. *Graham,* 560 U.S. at 87 (Roberts, C.J., concurring). These objective factors include the offender's mental state and motive in committing the crime, the harm caused to the victim and/or society by the offender's conduct, and any prior criminal history. *Id*. at 88.

This Court has illustrated the objective nature of these factors. See e.g. *Solem v. Helm*, 463 U.S. 277 (1983). Violent crimes, which harm or endanger people,

are more serious than nonviolent crimes, which harm only property interests. *Id*. at 292-93. Another objective factor is the magnitude of the crime, such as the amount of property taken (or the number of victims injured or killed). *Id*. at 293. The sentencer can also measure the offender's mental state with respect to the harm, whether negligent, reckless, knowing, or intentional. *Id*. And an offender's motive is relevant; someone who kills a stranger for payment could be a greater danger to society than someone who kills due to a particular animus against the victim. *Id*. at 293-94.

These objective factors, intelligible to any sentencer, could have sufficed to preclude the maximum sentence of LWOP in *Miller*. For example, Kuttrell Jackson did not kill or intend to kill, rendering him less culpable than other defendants convicted of murder. *Miller*, 567 U.S. at 490 (Breyer, J. concurring). Evan Miller had an especially troubled background, in which his stepfather abused him, his mother abused drugs, he had been in and out of foster care, and he had attempted suicide four times. *Id*. at 468. Miller also had consumed marijuana and alcohol before committing the homicide. *Id*.

Miller itself offered multiple issues for a sentencing judge or jury to consider in deciding whether the evidence warranted the maximum sentence. *Miller*, 567 U.S. at 476-77. It objected to mandatory sentencing schemes that ignored distinctions based on age ("the 17–year–old and the 14–year–old"), participation in the murder ("the shooter and the accomplice"), and familial background ("the child from a stable household and the child from a chaotic and abusive one.") *Id*. at 477.

These objective factors all existed and were available for consideration at the time of sentencing.

Petitioner may also cite objective factors to show he is less deserving of LWOP than, for example, the defendant in the case formerly presenting the instant issue, *Mathena v. Malvo*, 18-217. Seventeen-year-old Lee Malvo, along with John Muhammad, killed twelve individuals, grievously injured six others, and terrorized people in four different states over a seven-week period, instilling a paroxysm of fear in millions of people throughout an entire metropolitan area. *Malvo v. Mathena*, 893 F.3d 265, 267-68 (4th Cir. 2018). By contrast, fifteen-year-old petitioner confined his violence to his own home, killing only one person, and not threatening any others.

B. *Miller v. Alabama* had a prescriptive, predictive, and descriptive component.

A second line of cases contributed to the *Miller* holding. In addition to prohibiting mandatory maximum punishments, the Court has categorically excluded certain offenses (nonhomicide crimes) and certain offenders (juveniles and the mentally impaired) from capital punishment. *Miller*, at 469-70, citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002). *Miller* moved further, diverging from the principle that "death is different." Whereas prior cases had applied special scrutiny when the penalty was death (*Lockett,* 438 U.S. 586; *Woodson*, 428 U.S. 280), or when the punishment imposed an irrevocable forfeiture through LWOP though the crime did not inflict the irrevocable forfeiture of death (*Graham*, 560

U.S. 48; *Solem*, 463 U.S. 277), *Miller* applied that scrutiny for a capital crime punished with a noncapital sentence.

Miller had a prescriptive, predictive, and descriptive component. Prescriptively, the Court forbade states from deeming youth "irrelevant" to a LWOP decision, and thus required them to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 479-80. "We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id*. at 479.

The Court also predicted the sentence would be "uncommon." *Miller*, 567 U.S. at 479. "[W]e *think* appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id*., emphasis added. This uncommonness was not prescriptive; the Court expected this outcome but did not insist on it, as it could have done.

And there was a descriptive component, which recalled juveniles' distinctive condition. "This is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' " *Miller*, 567 U.S. at 479-80. *Miller* also recalled *Roper*'s conclusion that a juvenile's conduct was less likely to evince "irretrievable depravity." *Miller*, at 471, citing *Roper*, 543 U.S. at 570. Juveniles

thus had an "enhanced . . . prospect" of reform. *Miller*, at 472.

Petitioner contends *Miller* established a rule that courts must find a defendant's "permanent incorrigibility," "irreparable corruption," or "irretrievable depravity" (or as the California Court of Appeal described it in *People v. Padilla*, 209 Cal.Rptr.3d 209, 220 (Cal. Ct. App. 2016), "irreparable corruption resulting in permanent incorrigibility") before sentencing him to LWOP. No such requirement exists.

C. A court need not find irretrievable depravity before sentencing a juvenile murderer to LWOP.

1. No finding is necessary to impose an LWOP sentence because if one were required, a jury would need to make it.

Most specifically, this Court has denied any finding is necessary. *Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016). If one were a prerequisite for the maximum LWOP sentence, it would require a jury to make the finding beyond a reasonable doubt. *United States v. Haymond*, 139 S. Ct. 2369, 2379 (2019), citing *Ring v. Arizona*, 536 U.S. 584, 602 (2002). *Miller*, however, invited either a "judge or jury" to determine the sentence. *Miller*, 567 U.S. at 489.

2. Irretrievable depravity, irreparable corruption, or permanent incorrigibility are not prescriptive elements of a maximum sentence but descriptions of maximally culpable offenders.

Other evidence supports the conclusion that irretrievable depravity describes the condition of maximally culpable offenders but is not a prescribed element. *Roper* cited three disparities between juveniles and adults, which concern differences of degree rather than kind. First, immaturity and irresponsibility are "found in youth more often than in adults." *Roper*, 543 U.S. at 569. Second, juveniles are "more vulnerable" and exercise "less control" over their environment than adults. *Id.* Finally, *Roper* observed "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* at 569-70. Because juveniles had more of the characteristics reducing culpability and fewer of the ones enhancing it, *Roper* denied juveniles belonged "among the worst offenders," who warrant the death penalty. *Id.* at 570.

Roper's referred to irretrievable depravity as signifying maximum culpability: Juveniles' ongoing struggle to define their identity makes it "less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Roper*, 543 U.S. at 570. The import of this characteristic was that sentencing a juvenile *to death* violated the Eighth Amendment.

Irretrievable depravity, however, was a description, not prescription. *Roper* observed juveniles have a

"greater probability" of reform, and juveniles' criminality tends to decline as they age, because "the impetuousness and recklessness that *may* dominate in younger years *can* subside." *Roper*, 543 U.S. at 570, citing *Johnson v. Texas*, 509 U.S. 350, 368 (1993), emphasis added. Irretrievable depravity (or irreparable corruption, or permanent incorrigibility) might be more common among adults, but some juveniles murderers are irretrievably depraved, and some adult murderers are not. Though the term signifies a maximum culpability, no jury (or court) has ever been charged with finding it as a necessary element for a sentence of death (or LWOP) for an adult. Irretrievable depravity, therefore, characterizes a maximally culpable offender; it is not a condition that must be found to render an LWOP sentence constitutional.

3. Irretrievable depravity is not an intelligible standard for a sentencer, who can assess the present *magnitude* of depravity but not its future *duration*.

The most important ground for rejecting irretrievable depravity as a necessary element for LWOP sentences is the impossibility of applying it correctly. *Roper* shielded juveniles from sentences of death due to their "objective immaturity, vulnerability, and lack of true depravity." *Roper*, 543 U.S. at 573. A judge or jury could assess all these factors at the time of sentencing. But the *irretrievability* of one's depravity (or the *irreparabilty* of one's corruption or the *permanence* of one's incorrigibilty) is not something a sentencer can meaningfully evaluate at the time of sentencing. A court or jury can evaluate the facts

before it, but neither can have the "perfect foresight" needed to evaluate how long the offender's depravity will endure into the future. *Graham*, 560 U.S. at 95 (Roberts, C.J. concurring).

The Court first contrasted "transient immaturity" and "irreparable corruption" to describe a distinction the sentencer *could not be expected to make*. "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U.S. at 573. These are not binary, exclusive options; not all immaturity is transient, not all corruption is irreparable, and not all criminal behavior is attributable to either immaturity or corruption, let alone that of the transient or irreparable variety. The Court even cited a *medical policy* not to diagnose juveniles as having antisocial personality disorder, i.e. irreparable corruption. *Id*. But unless the Court was formally delegating Eighth Amendment determinations to medical professionals, their reluctance to distinguish "transient immaturity" from "irreparable corruption" did not create a constitutional hurdle. "[J]udges, not clinicians, should determine the content of the Eighth Amendment." *Moore v. Texas* 137 S. Ct. 1039, 1054 (2017) (Roberts, C.J., dissenting); see also C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 Res Judicatae 224, 225-26 (1953) [therapeutic punishment "removes sentences from the hands of jurists whom the public conscience is entitled to criticize and places them in the hands of technical experts whose social sciences do not even employ such categories as rights and justice."]

There are special problems in judging defendants based not on *what they have done* but on what the sentencer thinks *they will do in the future*. The potential for bias increases where the inquiry concerns not a historical fact concerning the defendant's conduct but a "predictive judgment inevitably entailing a degree of speculation." *Buck v. Davis*, 137 S. Ct. 759, 776.

Sentencing based on projections regarding future behavior contradicts the very premise of rehabilitative punishment, which developed with special focus on the juvenile offender. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, *supra*, at 893 n.62. An indispensable component of rehabilitation is the indeterminate sentence, whereby the ultimate term of imprisonment is decided not by judges or juries, at the time of conviction, but correctional officers, upon successful *completion* of the rehabilitation process.

> Physicians, upon discovering disease, cannot name the day upon which the patient will be healed. No more can judges intelligently set the day of release from prison at the time of trial. . . .
> . . . .
> . . . Boards of parole [on the other hand] can study the prisoner during his confinement . . . . Within their discretion they can grant a comparatively early release to youths, to first offenders, to particularly worthy cases who give high promise of leading a new life. . . . [And they can] keep vicious criminals in confinement as long as the law allows.

Id., citing National Commission on Law Observance and Enforcement (Wickersham Commission), Report on Penal Institutions, Probation and Parole 142-43 (1931).

Rehabilitation theory posits the inmate, through years, or, for serious cases like murder, perhaps decades, of reformative programming, can become a new person, not the same one who committed the offense. *Briscoe v. Reader's Digest Assn., Inc.*, 483 P.2d 34, 41 (Cal. 1971), overruled in *Gates v. Discovery Comms., Inc.*, 101 P.3d 552 (Cal. 2004), cited in Mitchell Keiter, *Criminal Law Principles in California: Balancing a "Right to be Forgotten" with a Right to Remember*, 13 Cal. Legal Hist. 421, 433-437 (2018). This is precisely what Jones asserted below: "I'm not the same person I was when I was 15. [¶.] "I'm a completely different person today." J. A. 152-53. Under this theory, the duration of imprisonment depends on how much the offender changes while in prison. Accordingly, no one convicted of murder warrants a mitigated sentence *at the time of conviction*; not unless and until rehabilitation succeeds should the inmate be guaranteed release.

The effect of rehabilitative efforts cannot be determined before they begin; *Graham* faulted the sentencer for finding the defendant "incorrigible" at the "outset." *Graham*, 560 U.S. at 73. Graham "may turn out to be irredeemable," but that was not a determination that could be made at the outset. *Id*. at 75. If irredeemability is what a sentencer must find, and that finding can not be made at the time of sentencing but must await further developments, then every defendant essentially has the opportunity to

show "redemption" in the future, and the sentence of LWOP ceases to exist. Several amici expressly urge this conclusion (see e.g. Brief of ACLU et al. at 14, citing *State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016)), but *Roper* and *Miller* contemplate and authorize the sentence, so there must be an effective way to determine which defendants warrant it.

Both *Montgomery* and the instant case present anomalous circumstances, so neither should shape the law on this subject. Henry Montgomery committed a murder in 1963; he sought collateral review a half-century later after *Miller* invalidated mandatory LWOP sentences. *Montgomery*, 136 S. Ct. at 725-26. Montgomery could thus present evidence suggesting he had reformed over the fifty years since his conviction, including his formation of a prison boxing team and his contribution to the prison's silkscreen department. *Id.* at 736. Jones likewise has cited *Miller* in challenging his sentence for a murder committed sixteen years ago, and can thus adduce evidence regarding his post-conviction behavior. But future defendants will have no such evidence available; judges and juries will need to evaluate them on the basis of the record at the time of conviction and sentencing.

It is not as if there even can be perfect foresight at the time of a future parole hearing. The Pennsylvania Supreme Court held that rejecting an LWOP sentence presents "minimal risk" because if the inmate failed to rehabilitate, the authorities would deny future parole requests. *Commonwealth v. Batts*, 163 A.3d 410, 475 (Pa. 2017). That presupposes that measuring an inmate's rehabilitation progress is as easy and certain

as measuring his height. But one can announce remorse and volunteer for silkscreening yet still present a danger to society if released. Though one amicus brief recalls how a Mississippi court imposed LWOP despite the absence of "data" suggesting recidivism, no "data" can disprove this prospect either. *Cook v. State*, 242 So.3d 865, 875 (Miss. Ct. App. 2017). There will always be uncertainty, so the question is how states may act in the face of it.

II. Balancing the costs of overconfinement and underconfinement is a task for the democratic process, not litigation.

Roper and *Atkins* addressed the punishment justifications of retribution and deterrence, but not incapacitation. *Roper*, 543 U.S. at 571-72; *Atkins*, 536 U.S. 304, 318-20. This was understandable, insofar as LWOP provides almost as much incapacitative protection for society as the death penalty. But a sentence with the possibility (if not probability) of parole may provide substantially less, so the Court addressed the subject in *Graham*, 560 U.S. at 71-74. The Court recognized incapacitation might be necessary "for some time," but questioned whether Graham's past crimes meant "he would be a risk to society for the rest of his life." *Id*. at 73. This analysis presented the issue in binary terms; Graham either would or would not be a "risk to society." But it is not an either-or determination; every convicted murderer, every convicted criminal, even everyone who has never committed a crime, presents *some* risk to others. No one has a one hundred percent probability of future criminality, but no one has a zero percent probability either. If an LWOP sentence is unconstitutional unless the court finds a certainty of recidivism upon release, so there is "*no possibility* that the offender could be rehabilitated at any point," the sentence will become a nullity. See *Batts*, 163 A.3d at 435, emphasis added. This Court should not construe the requisite risk so narrowly, especially as true recidivism in an LWOP case would involve another murder, not just a robbery as in *Graham*.

A. Both overconfinement and underconfinement impose costs on the public.

Courts have long recognized the tension between the competing imperatives of punishing offenders according to their moral culpability and protecting society from harm. *People v. Rogers*, 18 N.Y. 9 (1858). Though *Atkins* preceded *Roper* by three years, this Court has never restricted LWOP sentences on mentally impaired offenders, due to this latter imperative. See *Penry v. Lynaugh*, 492 U.S. 302, 324 (1989), emphasis added, overruled in *Atkins*, 536 U.S. 304: "Penry's mental retardation . . . is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be *dangerous in the future*." The Model Penal Code also acknowledges that for impaired offenders, "the factors that call for mitigation . . . are the very factors of an individual's personality that make us most fearful of his future conduct." Model Penal Code, § 210.3 comm., at 71-72 (1962). So while an LWOP sentence does impose a greater cost on a 16-year-old offender than a 75-year-old (*Graham*, 560 U.S. at 70), it also provides greater protection for the public, especially considering the higher crime rates of even transiently immature teenagers as opposed to septuagenarians'.

Experts can accurately predict the proportion of individuals in a given pool who will recidivate, but cannot identify the particular individuals within that pool who will, so they do not know whose confinement is unnecessary and whose release will endanger the public. Erin Collins, *Punishing Risk*, 107 Geo. L. J. 57,

97 (2018); Christopher Slobogin, *The Civilization of the Criminal Law*, 58 Vand. L. Rev. 121, 145 (2005). Sentencers must balance the risk of false positives (offenders who are incorrectly deemed likely to recidivate) with the risk of false negatives (offenders who are incorrectly deemed unlikely to inflict future harms). Jessica Eaglin, *Constructing Recidivism Risk*, 67 Emory L.J. 59, 91-92 (2017). It might be, as amicus National Association of Criminal Defense Lawyers et al. contends, that a required finding of permanent incorrigibility would reduce the risk of unconstitutional sentences, as it would limit false positives. Brief of NACDL et al. 23. But that would also increase the risk of false negatives, and of future homicides by offenders thereby released.

The unavoidable uncertainty regarding projections of future behavior creates the policy question of how much risk society must tolerate. "Is it better to err on the side of over predicting arrest [which potentially could result in correctional overcrowding] or under predicting arrest [which potentially could result in more crime] [?] How much better? That is, *how many false positives equal one false negative . . .* ?" *Punishing Risk,* at 97, citing Pa. Comm. on Sentencing Risk/needs Assessment Project, Interim Report 5: Developing Categories of Risk (2012) 15, emphasis added. Should the law aim to prevent false positives and false negatives equally, so for every recidivist there is one successfully released inmate? Two successful releases? Five? There is no objective answer; reasonable minds may differ on how to balance the competing concerns. *Punishing Risk,* at 92. Accordingly, all reasonable

minds, not only those in the judiciary, should participate in shaping these policies.

B. The democratic process should determine how to balance the risks of underconfinement and overconfinement.

The Constitution forbids executing the insane, or even the mentally impaired. *Atkins*, 536 U.S. 304; *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). But this Court has not imposed a precise test on the states for determining whether a defendant qualifies for those protected categories. *Kahler v. Kansas*, 140 S. Ct. 1021 (2020); *Hall v. Florida*, 572 U.S. 701, 718-19 (2014); *Bobby v. Bies*, 556 U.S. 825, 831 (2009). The connection between future criminal behavior and youth, like that between criminal blameworthiness and mental illness, involves the functioning of the brain, the purposes of criminal law, and ideas of free will and responsibility. *Kahler*, 140 S. Ct at 1037. It demands hard choices among values, and is thus a project for democratic governance, not constitutional law. *Id*; see also *South Bay United Pentacostal Church*, 140 S. Ct. at 1613-14 (Roberts, C.J., concurring in denial for injunctive relief.)

Nor should the balance between preventing false positives and preventing false negatives be struck by medical experts. *Moore v. Texas*, 137 S. Ct. at 1054 (Roberts, C.J., dissenting); see also Slobogin, *The Civilization of the Criminal Law*, *supra*, at 167, emphasis added: "Ultimately, the degree of risk necessary to authorize intervention, and the restraint on liberty and intrusiveness of treatment legitimated by a given degree of risk, are *moral/legal questions*

that laypeople and legal decisionmakers, not clinical experts, should decide."

Because patterns of criminal behavior tend to decline by middle age, most of the crime prevention benefits achieved by imprisoning a juvenile murderer will occur in the first thirty years after the crime, not the next thirty, so an LWOP sentence might seem like an inefficient way to suppress the "last ten percent" of danger to the public. Stephen Breyer, Breaking the Vicious Circle 11-19 (1992). The public may nevertheless be willing to spend more to prevent deaths caused by human malice than natural or other causes, because people perceive the harm created by murders exceeds that caused by accidents or other unintended deaths. *Id*. at 16. Such determinations are a proper expression of democratic self-governance.

Different states will seek (and obtain) LWOP sentences for juvenile murderers in different proportions. That is entirely appropriate in our federal system. If some states' citizens favor greater efforts to reduce false positives, because they believe overconfinement creates an inhumane society, whereas citizens of other states place more priority on reducing false negatives, because they believe underconfinement creates an unsafe society, the preferences of each should be respected.

This is so even though *Miller* predicted "appropriate occasions for sentencing juveniles [to LWOP] will be uncommon." *Miller*, 567 U.S. at 479. They *will* be uncommon, because murder is an uncommon activity for juveniles. *Roper* observed that for "most teens, [risky or antisocial] behaviors are fleeting; they cease

with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." *Roper*, 543 U.S. at 570, internal citation omitted. But for almost all teenagers, those "risky" activities do not include murder. Those who commit such depraved crimes are likely among the minority of teens whose antisocial behavior will not be so fleeting. The indiscretion of youth rarely encompasses homicide.

Impermanent confinement and eventual release of juvenile offenders will produce many successes. When "false positives" become productive citizens, many will celebrate these outcomes. But there will be failures too, as "false negatives" are released and return to terrorize their former communities by resuming their violent behavior. The costs of those failures will be borne disproportionately by those who are not members of the bench or Supreme Court bar. Especially as they will be most affected by such releases, they deserve to participate in making the hard choices among the competing values.

The voting public tends to favor more punishment than elites, who are less often victims of crime.[2] Removing the "hard choices among values" from the democratic process would leave them in the hands of

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[2] Attitudes toward the EU, Chatham House - Kantar Public Survey (2017), https://www.chathamhouse.org/publication/future-europe-comparing-public-and-elite-attitudes; Ipsos MORI Death Penalty Drama (2009), https://www.ipsos.com/ipsos-mori/en-uk/survey-channel-4-attitudes-towards-death-penalty.

decisionmakers who are far less vulnerable to the risk of homicide, and who may weigh the competing risks of overconfinement and underconfinement differently.

> [W]e federal judges live in a world apart from the vast majority of Americans. After work, we retire to homes in placid suburbia or to high-rise co-ops with guards at the door. We are not confronted with the threat of violence that is ever present in many Americans' everyday lives. The suggestion that the incremental [preventive] effect of . . . punishment does not seem "significant" reflects, it seems to me, a let-them-eat-cake obliviousness to the needs of others. Let the People decide how much incremental [prevention] is appropriate.

Glossip v. Gross, 135 S. Ct. 2726, 2749 (2015) (Scalia, J, concurring); see also *Bonanno v. Central Contra Costa Trans. Auth.*, 65 P.3d 807, 166 (Cal. 2002) (Brown, J. dissenting): "Where you stand can depend on where you sit, and, let us be frank, Supreme Court justices don't sit on buses very often."

Sentencing policy involves challenging questions of morality and social policy. *Miller*, 567 U.S. at 493 (Roberts, C.J. dissenting). Erroneous decisions impose costs in both directions. An LWOP sentence deprives the convict of basic liberties without hope of restoration, and effects an irrevocable forfeiture. *Graham*, 560 U.S. at 69-70. Murder imposes an even more irrevocable forfeiture, because "life is over for the victim of the murderer." *Id.* at 69, internal citation omitted. But even if the forfeitures were of equal irrevocability, there would still be reason to weigh the

harms of false negatives more heavily than the harms of false positives. "For by the Fundamental Law of Nature, Man being to be preserved, as much as possible, *when all cannot be preserved, the safety of the Innocent is to be preferred* . . . ." John Locke, Two Treatises of Government 123 (Mark Goldie ed. 1993). Sentencing policy should seek to limit harms and forfeitures for all, but can reasonably resolve uncertainties to favor victims over victimizers.

Both *Roper* and *Graham* contrasted American sentencing policy with that of other nations. *Graham*, 560 U.S. at 80-81; *Roper*, 543 U.S. at 575-78. *Roper* promised juveniles could be deterred by LWOP (*Roper*, 543 U.S. at 572), though Justice Scalia presciently warned that the international community opposed LWOP as well as death for juvenile murderers. *Id.* at 623, (Scalia, J. dissenting). Since *Miller*, the Council of Europe has abolished LWOP for *adults*, including a quintuple-murderer. *Case of Vinter and Others v. United Kingdom* [Eur. Ct. H.R.] 66069/09 (2013). This is not because the European people oppose the practice; more than 85 percent of respondents in the surveyed countries of France, Germany, Italy, Spain, and the United Kingdom want LWOP to be an available sentence for aggravated murderers.[3] It is because these Europeans lack the capacity to shape public policy. "C]riminal justice bureaucrats and national parties in Europe—once they became motivated to do so—imposed abolition *despite popular opposition*. In the United States, abolitionists found the more

[3] IpsosMORI Death Penalty International Poll (https://www.ipsos.com/ipsos-mori/en-uk/death-penalty-international-poll.)

politicized bureaucracy and the relatively weak national parties inadequate to the task of *overriding public support*." John Paul Stevens, *On the Death Sentence*, N.Y. Rev. of Books (Dec. 23, 2010) (emphasis added). See also Alexis de Tocqueville, Democracy in America, 282 (Daniel Boorstin ed. 1990): "He who punishes the criminal is therefore the real master of society."

Determining the proper formula for juvenile sentencing, to prevent both false positives and false negatives, is a project for democratic self-government, not constitutional law. *Kahler*, 140 S. Ct at 1037. Though sentencing courts must exercise discretion, a noncapital sentence is not disproportionate punishment for a capital crime.

CONCLUSION

As a matter of practice, the determination of whether to sentence a juvenile murderer to LWOP must turn on objective factors, discernible at the time of sentencing. These factors may include the offender's mental state and motive in committing the crime, the harm caused to the victim and/or society by the offender's conduct, and any prior criminal history. *Graham,* 560 U.S. 48, 88 (Roberts, C.J., concurring). Sentencers can measure the offender's age, to distinguish 17-year-olds from 14-year-olds; participation in the murder, to distinguish shooters from accomplices; and family background, to distinguish offenders reared in a stable household from those reared in a chaotic and abusive one. *Miller*, 567 U.S. at 477. But they should not have to choose a sentence based on a speculative predictive judgment about whether the juvenile's depravity will be retrievable, or his incorrigibility will be permanent.

As a matter of justice, members of the public most vulnerable to the consequences of erroneous sentencing judgments should have a voice in setting policy. States should try to prevent false positives, which deprive the guilty of liberty, but may place a higher priority on preventing false negatives, which deprive the innocent of life.

Respectfully submitted,

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