IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 16 WAP 2021

MARIE SCOTT, NORMITA JACKSON, MARSHA SCAGGS, REID EVANS, WYATT EVANS, TYREEM RIVERS,
Appellants,

v.

PENNSYLVANIA BOARD OF PROBATION AND PAROLE
Appellee.

BRIEF OF *AMICI CURIAE* SCHOLARS OF EIGHTH AMENDMENT LAW IN SUPPORT OF APPELLANTS

Appeal from the Order of the Commonwealth Court of Pennsylvania dated May 28, 2021, at No. 397 M.D. 2020

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Eighth Amendment scholars at American law schools whose research addresses the law, policy, and theory of punishment. As scholars, teachers, and in some cases, litigators, *amici* have a strong interest in contributing to the development and understanding of Eighth Amendment protections and related state constitutional doctrines. While the appeal before the Court focuses on jurisdiction, *amici* share their Eighth Amendment expertise to demonstrate that the case on the merits presents significant constitutional questions that will impact hundreds of people incarcerated in Pennsylvania who did not kill or intend to kill but are effectively condemned to die in prison. Specifically at issue is whether 61 Pa. C.S. § 6137(a)—Pennsylvania's lifetime ban on parole for people serving life sentences—violates Article I § 13 of the Pennsylvania Constitution's prohibition on cruel punishments as applied to people convicted of felony murder who did not kill or intend to kill. That question implicates Eighth Amendment jurisprudence because the Cruel Punishments Clause of the Pennsylvania Constitution is, at a minimum, co-extensive with the Eighth Amendment. *Amici* demonstrate that Pennsylvania's lifetime ban on parole as applied to this class of people is categorically disproportionate and excessive, and it violates the Eighth Amendment. Accordingly,

[1] Each *amicus curiae* is listed at the end of this brief.

amici write in support of the Petitioners' claim that the Court should reverse the Commonwealth Court's denial of jurisdiction to allow consideration of these consequential and substantial issues.

RULE 531(B)(2) CERTIFICATION

Pursuant to Rule 531(b)(2), *amici* certify that no person or entity was paid in whole or in part for the preparation of this brief. Only *pro bono* counsel authored this brief.

SUMMARY OF ARGUMENT

Amici submit this brief in support of Petitioners, people serving life sentences in Pennsylvania who are effectively condemned to die in prison because Pennsylvania parole law, 61 Pa. C.S. § 6137, permanently bars them from parole eligibility. That provision applies notwithstanding that Petitioners—along with 1,100 other people convicted of felony murder in Pennsylvania—are serving life sentences for crimes in which they did not kill or intend to take a life. On May 28, 2021, the Commonwealth Court dismissed on jurisdictional grounds Petitioners' challenge to this unlawful punishment. In this appeal of that decision, *amici* write to demonstrate that the constitutional questions underlying the appeal are consequential and substantial.

Amici explain that the Eighth Amendment prohibits severe punishments like Pennsylvania's lifetime ban on parole that are disproportionate as applied to crimes

that do not reflect the worst offenses and when imposed upon categories of offenders who are not the most culpable. This categorical approach, which began exclusively in the capital context, has led to constitutional bars on the execution of children, people with intellectual disability and people who have not killed or intended to kill, including those convicted of felony murder.

Significantly, over the last decade, the Supreme Court has applied these principles to severe noncapital punishments too, eroding the previous distinction in Eighth Amendment jurisprudence between capital and noncapital sentences. In a trilogy of decisions beginning in 2010—*Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana*—the Court held that certain juvenile life-without-parole ("LWOP") sentences were categorically disproportionate and unconstitutional. Although the cases concerned juveniles, two universal principles, drawn from the Court's longstanding categorical approach to the Eighth Amendment, undergirded those decisions and apply here. *First*, the Eighth Amendment mandates that severe punishments like LWOP must be proportionate to the offense and the culpability of the class offenders punished. *Second*, people who do not kill or intend to kill are categorically less deserving of the most extreme punishments.

Accordingly, the categorical approach applies here to assess whether mandatory lifetime bans on parole for people who did not kill or intend to kill violate the Eighth Amendment. *Amici* explain that under that framework, Pennsylvania's

lifetime ban on parole as applied to this category of people is inconsistent with society's evolving standards of decency. Indeed, Pennsylvania is an outlier: most states and the international community reject this extreme and disproportionate punishment, which does not serve any valid penological objective. Accordingly, and as set forth more fully below, Pennsylvania's lifetime ban on parole as applied to people convicted of felony murder who did not kill or intend to kill is categorically disproportionate and violates the Eighth Amendment. This Court should reverse the lower court's decision on jurisdiction to allow consideration of these important issues.

ARGUMENT

I. THE EIGHTH AMENDMENT BARS SEVERE PUNISHMENTS THAT ARE CATEGORICALLY DISPROPORTIONATE AND EXCESSIVE IN RELATION TO THE CRIME AND THE CULPABILITY OF THE CLASS OF PERSONS PUNISHED.

The Supreme Court's categorical approach to Eighth Amendment proportionality recognizes that severe sentences may be *per se* disproportionate and cruel and unusual punishment when applied to a class of people with categorically diminished culpability. *Enmund v. Florida*, 458 U.S. 782, 788 (1982); *Graham v. Florida*, 560 U.S. 48, 61 (2010). Developments in Eighth Amendment jurisprudence over the last decade make clear that LWOP, as the "lengthiest possible incarceration," is "akin to the death penalty" and should be treated "similarly to that

most severe punishment." *Miller v. Alabama*, 567 U.S. 460, 475 (2012); *see also Graham*, 560 U.S. at 69; *Montgomery v. Louisiana*, 577 U.S. 190 (2016). Though these cases arose in the context of LWOP sentences imposed upon juveniles, they in no way undermined precedent recognizing the other reasons a class of offenders may have diminished culpability either because of the nature of the offense or the characteristics of the offenders. *See, e.g.*, *Coker v. Georgia*, 433 U.S. 584 (1977) (barring death penalty for rape); *Enmund*, 458 U.S. 782 (barring death penalty for felony murder where the person did not kill or intend to kill); *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring death penalty for people with intellectual disability). Accordingly, and as explained more fully below, the Supreme Court's categorical approach to proportionality applies when severe punishments, including LWOP, are imposed upon a class of people with diminished culpability whether they are adults or juveniles.

A. The Requirement of Proportional Punishment Is Central to the Eighth Amendment's Ban on Cruel and Unusual Punishment.

The Supreme Court has long recognized that "[t]he concept of proportionality is central to the Eighth Amendment." *Graham*, 560 U.S. at 59. That means that the Eighth Amendment bars not only cruel and unusual methods of punishment, but also punishment that is grossly disproportionate to the crime committed. *Id.*

The Supreme Court first recognized this proportionality requirement over a century ago in *Weems v. United States*, 217 U.S. 349, 367 (1910), which held that

the Eighth Amendment's ban on cruel and unusual punishments includes the requirement "that punishment for crime should be graduated and proportioned to [the] offense." This constitutional requirement mirrors deeply rooted common law principles and the English Bill of Rights. *See Solem v. Helm*, 463 U.S. 277, 285–86 (1983). The latter provided the model for the Eighth Amendment. *Id.* ("When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality."); *see also* Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1064 (2004) (tracing the principle back to the Magna Carta); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 926–27 (2011) (noting that the English Bill of Rights, Anglo-American tradition, and the text of the "Cruel and Unusual Punishments" Clause all reflect a proportionality requirement).

Today, the principle has an essential and dispositive role in Eighth Amendment jurisprudence; the Court recognizes that "protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment." *Montgomery*, 577 U.S. at 206. As set forth next, properly enforcing the requirement of proportionate punishment requires disentangling two strands of Eighth Amendment analysis.

B. The Categorical Approach to Proportionality Governs Challenges to Punishment Practices That Apply to Entire Classes of Offenders.

The Court's enforcement of the Eighth Amendment's proportionality requirement splintered into two methods for assessing whether punishments are excessive. *See Graham*, 560 U.S. at 59. The first approach utilizes a balancing of factors to assess whether a particular sentence is grossly disproportionate to the specific crime committed. *See* Alison Siegler & Barry Sullivan, *"'Death Is Different' No Longer":* Graham v. Florida *and the Future of Eighth Amendment Challenges to Noncapital Sentences*, 2010 SUP. CT. REV. 327, 331-32. The second approach, which was originally limited to capital sentences, assesses whether a punishment is excessive as applied to a category of offenses or offenders. *Graham*, 560 U.S. at 60.

In the first approach, the Court assesses whether the punishment imposed is excessive based upon a comparison between the "'gravity of the offense and the severity of the sentence.'" *Id.* If that analysis results in an "'inference of gross disproportionality'" the Court compares the defendant's sentence to those of others within and outside the jurisdiction. *Id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991)).

Commentators have long criticized this approach as a weak form of Eighth Amendment enforcement, noting that the threshold requirement of gross disproportionality has made it "virtually impossible" for people challenging

noncapital cases to show their sentences are unconstitutionally excessive. *See* Siegler & Sullivan, at 329. As Professor Rachel Barkow has explained, the Court does not infer gross proportionality unless it concludes that the state lacked a "reasonable basis for believing" that the punishment would serve any legitimate penological interest. Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1156–57 (2009). She notes that the Court's failure to analyze comparable sentences at the outset means it often misses "just how excessive" particular sentences may be. *Id.*

Not surprisingly, the Court has deemed nearly all sentences challenged under this strand of proportionality review to meet its low threshold for constitutionality. *See Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring) (recognizing it would be "the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality"). Indeed, the Court has upheld many extreme sentences, finding they were not grossly disproportionate even for relatively minor, nonviolent offenses. *See, e.g.*, *Ewing v. California*, 538 U.S. 11 (2003) (plurality opinion) (upholding a sentence of twenty-five years to life under California's recidivist statute for a person who stole three golf clubs valued at approximately $1,200); *Harmelin*, 501 U.S. 957 (upholding a mandatory life without parole sentence for a first-time offender charged with cocaine possession); *Rummel v. Estelle*, 445 U.S. 263 (1980)

(upholding a mandatory life sentence for person who committed three low-level theft offenses that totaled no more than $230). In fact, "out of the millions upon millions of noncapital sentences imposed, the Court has found only one term of confinement to be disproportionate and that lone occurrence was more than [thirty-eighty] years ago." Barkow, *supra* at 1162.[2]

Within the second form of proportionality analysis, the Court has recognized certain categorical restrictions on disproportionate punishment. *Graham*, 560 U.S. at 60. This approach considers whether a punishment is categorically excessive when applied to a class of offenders based upon "the nature of the offense" or "the characteristics of the offender." *Id.* For example, the Court has concluded that capital punishment is categorically excessive when applied to nonhomicide offenses, including rape and felony murder where the defendant did not kill or intend to kill. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (barring death penalty for rape of a child); *Coker*, 433 U.S. 584 (barring death penalty for rape of an adult); *Enmund*, 458 U.S. 782 (barring death penalty for person convicted of felony murder where the person did not kill or intend to kill). The Court has likewise recognized categorical rules prohibiting the death penalty as disproportionate based upon the characteristics of the people convicted. *See Roper v. Simmons*, 543 U.S. 551 (2005)

[2] This outlier was *Solem v. Helm*, 463 U.S. 277 (1983), which held that a LWOP sentence for the crime of passing a worthless check was grossly disproportionate.

(barring death penalty for juveniles); *Atkins*, 536 U.S. 304 (barring death penalty for people with intellectual disabilities).

In implementing the categorical approach to proportionality, "the Court first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice,' to determine whether there is a national consensus" rejecting the punishment as excessive. *Graham*, 560 U.S. at 61 (quoting *Roper*, 543 U.S. at 563). The Court then "determine[s] in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Id.* That entails an assessment of whether the punishment is categorically disproportionate in light of the culpability of the class of offenders as compared with "the severity of the punishment in question." *Id.* The Court also evaluates whether the challenged sentencing practice serves legitimate penological justifications. *Id*.

Although the Supreme Court first recognized this categorical approach to the Eighth Amendment in the death penalty context, in the last decade, the Supreme Court has followed it with respect to severe, noncapital punishments. *See Graham*, 560 U.S. at 61; *Miller*, 567 U.S. at 470; *Montgomery*, 577 U.S. at 193. This has opened a new path for categorical challenges to other extreme sentences like LWOP that the Court had long sanctioned under the toothless gross proportionality balancing approach. *See* Douglas A. Berman, Graham *and* Miller *and the Eighth Amendment's Uncertain Future*, 27-WTR CRIM. JUST. 19, 21, 23 (2013) (noting that

Graham and *Miller* eroded the "longstanding distinction in Eighth Amendment jurisprudence between capital and noncapital sentences" by applying the Court's "broadest Eighth Amendment doctrines to noncapital sentences").

Moreover, in *Graham*, the Court cabined the balancing approach of cases like *Harmelin*, 501 U.S. at 957, and *Ewing*, 538 U.S. at 11, noting that this approach was appropriate only where there is "a gross proportionality challenge to a particular defendant's sentence." *Graham*, 560 U.S. at 61. The Court clarified that where "a sentencing practice itself is in question" thereby implicating "a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes . . . the appropriate analysis is the one used in cases that involved the categorical approach, specifically *Atkins*, *Roper*, and *Kennedy*." *Id.* at 61–62. Accordingly, and for the further reasons that follow, that categorical approach to proportionality governs in cases like this one, where LWOP is being challenged as a punishment applied to a category of adults with diminished culpability.

C. Under Recent Eighth Amendment Precedent, LWOP Is One of the Law's Most Severe Punishments and May Be Categorically Disproportionate and Excessive When Applied to a Class of Persons with Diminished Culpability.

The Court's recent juvenile LWOP decisions established a principle that is enormously important here: that LWOP is one of the law's most severe punishments and it may be categorically disproportionate and excessive when imposed upon people with diminished culpability. *Graham*, 560 U.S. at 61; *Miller*, 567 U.S. at 470;

Montgomery, 577 U.S. at 193. While the Supreme Court first recognized the categorical approach to the Eighth Amendment in the death penalty context, as commentators have long noted, neither the text of the Eight Amendment, its history, nor the principles underlying the proportionality rationale limit it to capital punishment. *See* Barkow, *supra* at 1179 (noting that the Court's "logic" that certain offenders are less culpable as compared to severe punishments is not limited "to defendants facing capital punishment"); Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 189 (2008) (noting that the "very same reasoning" regarding "reduced culpability" of certain offenders recognized in the capital context could apply to other serious punishments).

To be sure, in holding that the Eighth Amendment bars the death penalty for certain categories of offenders, the Court has acknowledged that "the Eighth Amendment applies . . . with special force" to the death penalty because it is the most severe punishment. *See Roper*, 543 U.S. at 568; *Enmund*, 458 U.S. at 797 ("[T]he death penalty [is] 'unique in its severity and irrevocability[.]'") (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)). But the rationale for the categorical approach can no longer be explained simply by the slogan that "death is different." *See Gregg*, 428 U.S. at 188. The Court has clarified that the categorical approach

governs beyond that context when there are "mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller*, 567 U.S. at 470.

In fact, *Graham*, *Miller*, and *Montgomery*, have now made eminently clear that the central rationale of this jurisprudence applies beyond the death penalty. *See Graham*, 560 U.S. at 61; *Miller*, 567 U.S. at 470; *Montgomery*, 577 U.S. at 193. In *Graham*, the Court acknowledged that it was addressing for the first time "a categorical challenge to a term-of-years sentence" and explained that the harshness of life-without-parole sentences warranted treating those punishments similarly to the death penalty. 560 U.S. at 61, 69. The Court noted that while the death penalty is "'unique in its severity and irrevocability' . . . life without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Id.* (quoting *Gregg*, 428 U.S. at 187). That is, as "the second most severe penalty permitted by law," LWOP, like the death penalty, "alters the offender's life by a forfeiture that is irrevocable" and deprives him "of the most basic liberties." *Id.* at 69–70. LWOP is especially harsh, the Court reasoned, because it denies all hope of redemption; future behavior or character improvement do not matter. *Id.* at 70.

Miller echoed this conclusion, noting that LWOP, as the "lengthiest possible incarceration," is "akin to the death penalty" and should be treated "similarly to that most severe punishment." 567 U.S. at 475. There, the Court concluded that imposing *mandatory* LWOP on children convicted of homicide offenses violated the Eighth

Amendment requirement of proportional punishment. *Id*. at 489. Four years later, in *Montgomery v. Louisiana*, the Court affirmed for the third time that mandatory life-without-parole sentences for children "'pos[e] too great a risk of disproportionate punishment.'" 577 U.S. at 208 (quoting *Miller*, 567 U.S. at 479).

Together, these decisions make clear that with respect to Eighth Amendment proportionality "'[d]eath is different' no longer." *Graham*, 560 U.S. at 103 (Thomas, J., dissenting). *Graham* crossed "the clear and previously unquestioned divide between capital and noncapital cases." William W. Berry III, *More Different Than Life, Less Different Than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After* Graham v. Florida, 71 OHIO ST. L.J. 1109, 1122–23 (2010). These developments in Eighth Amendment doctrine thus make clear that when courts assess the mismatch between severe penalties and the diminished culpability of a class of offenders, they are not limited to the capital context. *See Graham*, 560 U.S. at 61; *Miller*, 567 U.S. at 470; *Montgomery*, 577 U.S. at 193. And when applying the categorical approach, LWOP is now recognized as an extremely harsh punishment. *Graham*, 560 U.S. at 69–70; *Miller*, 567 U.S. at 475.

Although this jurisprudence addressed juveniles in particular, *Graham*, *Miller*, and *Montgomery* in no way limited earlier Eighth Amendment precedent recognizing the diminished culpability of certain classes of adults based upon their

characteristics or the nature of their offenses. *See, e.g.*, *Atkins*, 536 U.S. 304 (recognizing diminished culpability based upon intellectual disability); *Coker*, 433 U.S. 584 (recognizing diminished culpability of an offender who commits the nonhomicidal crime of rape); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (same as to child rape); *Enmund*, 458 U.S. 782 (recognizing the diminished culpability of a person convicted of felony murder where the person does not kill or intend to kill). Those decisions remain central to proportionality analysis irrespective of which severe punishment is at issue. The juvenile LWOP cases are not to the contrary.

To be sure, *Graham*, *Miller*, and *Montgomery* were partly based upon the Court's recognition that juvenile offenders are generally less culpable than adult offenders due to their "lack of maturity," "underdeveloped sense of responsibility," susceptibility "to negative influences" and because their characters are still developing. *See Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 569–70). But the decisions never suggested that this was the sole basis for finding diminished culpability when comparing a class of offenders to the harshness of LWOP. *See* Michael M. O'Hear, *Not Just Kid Stuff? Extending* Graham *and* Miller *to Adults*, 78 MO. L. REV. 1087, 1087 (2013) (suggesting *Graham* and *Miller* justify applying the categorical proportionality approach "to new cases presenting reasonably analogous considerations"). In fact, diminished culpability based upon youth was not the sole basis for *Graham*'s finding of disproportionate punishment. 560 U.S. at 69.

Graham held that the severity of LWOP was constitutionally disproportionate as compared to *both* the nature of the offense (there, a nonhomicide crime), and the characteristics of the juveniles impacted by such sentences. 560 U.S. at 69. The Court reasoned that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Id.* Because both the "age of the offender and the nature of the crime" were relevant to *Graham*'s proportionality analysis, it would profoundly misread the Court's juvenile LWOP cases to conclude that they permit categorical proportionality review beyond the death penalty only when it involves the diminished culpability of children. Rather, the juvenile LWOP cases establish that the Court now considers LWOP one of the most severe penalties such that it must evaluate whether a "mismatch" exists between that harsh punishment and "the culpability of a class of offenders" subjected to it. *See Miller*, 567 U.S. at 470.

D. Longstanding Eighth Amendment Precedent Recognizes That People Who Do Not Kill or Intend to Kill Are Categorically Less Deserving of the Most Extreme Punishments.

The Supreme Court reaffirmed in *Graham* that people who do not kill, intend to kill, or act with reckless disregard to the risk that a life will be taken are categorically less deserving of the most severe punishments than people convicted of killing. 560 U.S. at 69 (citing *Kennedy*, 554 U.S. 407; *Enmund*, 458 U.S. 728; *Tison v. Arizona*, 481 U.S. 137, 158 (1987); *Coker*, 433 U.S. 584). The Supreme Court established this principle long before its juvenile LWOP cases in a line of

decisions recognizing "diminished culpability, not as a function of the defendant's class or status, but rather his offense." *See* Perry L. Moriearty, *Implementing Proportionality*, 50 U.C. DAVIS L. REV. 961, 979 (2012); *Graham*, 560 U.S. at 60 (noting that categorical rules fall into two subsets: the "nature of the offense" and "the characteristics of the offender").

Indeed, the Supreme Court has long held that the Eighth Amendment prohibits the death penalty for nonhomicide crimes because the most severe punishments must be reserved for the worst offenses, which involve killing. *See Kennedy*, 554 U.S. at 446–47; *Coker*, 433 U.S. at 598 (plurality opinion); *Enmund*, 458 U.S. at 797. In *Kennedy v. Louisiana*, the Court explained that this line exists "between homicide and other serious violent offenses" because though serious nonhomicide crimes "may be devastating in their harm," they differ from murder "'in terms of moral depravity and of the injury to the person and to the public.'" 554 U.S. at 438 (quoting *Coker*, 433 U.S. at 598 (plurality opinion)); *Enmund*, 458 U.S. at 797 (robbery was not "'so grievous an affront to humanity that the only adequate response may be . . . death'") (quoting *Gregg*, 428 U.S. at 184). In *Graham*, the Court applied this rationale to LWOP, stating that though offenses like robbery and rape are serious crimes, they "differ from homicide crimes in a moral sense." 560 U.S. at 69.

The Court's 1982 decision in *Enmund v. Florida*, 458 U.S. 782, further explained why people who do not kill or intend to kill are categorically less

deserving of the most extreme punishments. In *Enmund*, the Court addressed whether the Eighth Amendment prohibited the death penalty for a man convicted of felony murder where he drove the getaway car for friends who robbed and killed two victims. *Id.* at 784. In concluding that the death penalty was categorically disproportionate, the Court emphasized that the "focus must be on *his* culpability, not that of those who committed the robbery and shot the victims." *Id.* at 798 (emphasis in original). The Court reasoned that the Eighth Amendment bars the most severe punishments for someone who, though involved in a felony resulting in death, "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.* at 797.

Graham relied upon *Enmund* to reaffirm in the context of LWOP that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." 560 U.S. at 69 (citing *Enmund*, 458 U.S. 728 and other decisions).[3] *Graham* thus makes clear that the diminished culpability of people who do not kill

[3] *Graham* cited *Tison v. Arizona*, 481 U.S. 137, as consistent with this principle. There, the Court affirmed the death penalty for felony murder where defendants helped their father and his cellmate escape from prison and later kidnap a family. *Id.* The sons were "actively involved in every element of the kidnaping-robbery" and were "physically present during the entire sequence of criminal activity culminating in the murder." *Id.* at 158. The Court reasoned that "knowingly engaging in criminal activities known to carry a grave risk of death represent[ed] a highly culpable mental state" that contrasted with the defendant in *Enmund*. *Id.* at 157.

or intend to kill is central to the proportionality analysis under the Eighth Amendment whether the penalty is death or LWOP. *Id.*

II. PENNSYLVANIA'S LIFETIME BAN ON PAROLE FOR PEOPLE SERVING LIFE SENTENCES WHO DID NOT KILL OR INTEND TO KILL VIOLATES THE EIGHTH AMENDMENT REQUIREMENT OF PROPORTIONAL PUNISHMENT.

For all the reasons set forth above, the Supreme Court's categorical approach to proportional punishment governs the assessment of the extreme punishment at issue here: a lifetime ban on parole imposed by a Pennsylvania statute that condemns all people serving life sentences to die in prison. 61 Pa. C.S. § 6137. That law applies to people like Petitioners who were convicted of felony murder but neither killed nor had the intent to kill. Petition ¶¶ 2–7.[4]

As outlined above, under the Court's long-standing proportionality framework, a punishment is categorically disproportionate to the offense if there are "mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller*, 567 U.S. at 470. To assess that question, courts must first consider whether there are "objective indicia of national consensus" against the punishment. *Graham*, 560 U.S. at 62. Then they must exercise "independent judgment" to

[4] Pennsylvania treats felony murder as second-degree murder. 18 Pa. C.S. §2502(b). A person can be charged with felony murder if a death occurs during the commission or attempted commission of a felony even if the person was an accomplice and even if they did not cause the death or intend to cause it. *Id.* All people convicted of second-degree murder in Pennsylvania receive mandatory life sentences. 18 Pa. C.S. § 1102(b) ("[A] person who has been convicted of murder of the second degree . . . shall be sentenced to a term of life imprisonment.").

determine whether the punishment is categorically disproportionate in light of the culpability of the class of offenders as compared with "the severity of the punishment in question." *Id*. at 67. This analysis further requires the Court to consider "whether the challenged sentencing practice serves legitimate penological goals." *Id*.

Applying this framework, it is clear that 61 Pa. C.S. § 6137(a)'s application to the class of people at issue does not pass constitutional muster. The statute imposes one of the law's most severe punishments upon a class of people with diminished culpability because they have not killed or intended to kill. This is categorically disproportionate and violates the Eighth Amendment. *See Graham*, 560 U.S. at 68.

A. A National Consensus Rejects Lifetime Bans on Parole for People Convicted of Felony Murder Who Did Not Kill or Intend to Take a Life.

The overwhelming majority of states do not impose mandatory LWOP on those convicted of felony murder in the circumstances at issue here, demonstrating a clear national consensus against such severe punishments. *See* ANDREA LINDSAY, PHILADELPHIA LAWYERS FOR SOCIAL EQUITY, LIFE WITHOUT PAROLE FOR SECOND-DEGREE MURDER IN PENNSYLVANIA: AN OBJECTIVE ASSESSMENT OF SENTENCING 42 (2021) (noting that "Pennsylvania is a national exception") [hereinafter *PLSE Report*]. In assessing whether a sentence is disproportionate, the Court looks beyond historical views of prohibited punishments because the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a

maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). Courts assess "evolving standards of decency" by considering objective indicia of society's standards, including enacted laws, recent legislation, including the trend of legislation, the frequency with which an authorized penalty is used, and broader social and professional consensus. *See Graham*, 560 U.S. at 62–67; *Atkins*, 536 U.S. at 313–17. The practices of other countries are also relevant. *See Graham*, 560 U.S. at 80–82.

Evaluating those metrics here, a national consensus rejects mandatory life-without-parole punishment for people convicted of felony murder where the person has not killed, intended to kill, or acted with reckless disregard to the risk that a life will be taken. *See PLSE Report*, *supra* at 5. Pennsylvania is one of only two states that make LWOP mandatory for people convicted of felony murder irrespective of whether they killed or intended to kill, and notwithstanding their level of involvement in the felony. *Id.* at 6. This stands in stark contrast to nearly all other states in the country.

The overwhelming majority of states do not mandate LWOP for felony murder in these circumstances. In total, thirty states reject LWOP as a punishment for felony murder in circumstances like those at issue here: where the person has not killed, intended to kill, or acted with reckless disregard to the risk that a life will be taken. This breaks down as follows: Nineteen states do not make LWOP an

authorized sentence for felony murder.[5] Seven more states have abolished felony murder altogether. *See* PAUL H. ROBINSON & TYLER SCOT WILLIAMS, MAPPING AMERICAN CRIMINAL LAW: CH. 5 FELONY-MURDER RULE 2 (2017)[6] (listing Arkansas, Hawaii, Kentucky, Michigan, New Hampshire, New Mexico, and Vermont as states that have "effectively rejected the felony-murder rule"); Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 402, 440 (2011). Additionally, three states, Illinois, North Dakota, and California authorize LWOP for felony murder only when there is proof of "at least recklessness as to causing the death of another human being." ROBINSON & WILLIAMS, *supra* at 3–4 (listing Illinois and North Dakota); *see also* Cal. Penal Code § 189(e) (2021) (requiring person to have actually killed or to have acted with reckless indifference to human life with major participation in the felony). Iowa limits LWOP for felony murder to first degree murder where the "person kills another person while participating in a forcible felony." *See* Iowa Code § 707.2(1)(b) and *id.* § 902.1(1).

Indeed, only one other state—Louisiana—mandates LWOP for felony murder like Pennsylvania does, irrespective of whether the person killed or intended to kill

[5] Ala. Code §§ 13A-6-2; 13A-5-6; Alaska Stat. §§ 12.55.125; 11.41.110; Colo. Rev. Stat. Ann. §§ 18-3-103 & 18-1.3-40; Conn. Gen. Stat. § 53a-35a; Ind. Code Ann. § 35-42-1-1; Kan. Stat. Ann. §§ 21-5402; 21-6620; Me. Stat. tit. 17-A, §§ 202 & 1604; Minn. Stat. § 609.19; Miss. Code Ann. §§ 97-3-19 & 97-3-21; Mo. Ann. Stat. § 565.021; N.J. Stat. Ann. § 2C:11-3; N.Y. Penal Law §§ 125.25 & 70.00; Ohio Rev. Code Ann. §§ 2903.02 & 2929.02; Or. Rev. Stat. Ann. § 163.115; 11 R.I. Gen. Laws Ann. §§ 11-23-1 & 11-23-2; Tex. Penal Code Ann. §§ 19.02 & 12.32; Utah Code Ann. § 76-5-203; Va. Code Ann. §§ 18.2-10 & 18.2-32–18.2-33; Wis. Stat. Ann. § 940.03.

[6] *available at* https://scholarship.law.upenn.edu/faculty_scholarship/1719.

and notwithstanding their level of participation nor proof of recklessness as to causing death. La. Stat. Ann. § 14:30.1 (2021). Thus, the majority of states reject LWOP for felony murder where the person has not killed, intended to kill, or acted with reckless disregard to the risk that a life will be taken.

The "consistency of the direction of change" also helps demonstrate a consensus against LWOP for people convicted of felony murder. Of the seven states that have abolished felony murder altogether, six of them have done so in the last forty years, showing a trend away from this punishment. *See* ROBINSON & WILLIAMS, *supra* at 2 n.3. Even among those states that retain felony murder as a crime, some have recently reduced the mandatory sentence for it from LWOP to a maximum term of years. *See, e.g.*, Colo. Rev. Stat. § 18-3-103 (2021); S.B. 21-124, 73rd Gen. Assemb., Reg. Sess. (Colo. 2021)[7]; Laura Studley, *Bill That Would Reduce Prison Sentence for Felony Murder Convictions in Colorado Headed to Gov. Jared Polis*, DENVER POST (Apr. 16, 2021, 6:00 AM).[8] Other states like California have recently added intent elements to their felony murder rules. Jazmine Ulloa, *California Sets New Limits on Who Can Be Charged with Felony Murder*, L.A. TIMES (Sept. 30, 2018, 9:40 PM).[9] These measures further indicate a growing

[7] *available at* https://leg.colorado.gov/sites/default/files/2021a_124_signed.pdf.
[8] *available at* https://www.denverpost.com/2021/04/16/colorado-felony-murder-bill-prison-sentence/.
[9] *available at* https://www.latimes.com/politics/la-pol-ca-felony-murder-signed-jerry-brown-20180930-story.html.

recognition that harsh sentences arising out of felony murder convictions should be reserved for the worst set of crimes, rather than when someone does not kill or intend to kill.

Additionally, Pennsylvania is an outlier with respect to its aggressive and extensive use of LWOP. Petition ¶¶ 9–12. It has one of the highest populations of people serving LWOP sentences, second only to Florida, whose general and incarcerated populations are double that of Pennsylvania. ABOLITIONIST LAW CENTER, A WAY OUT: ABOLISHING DEATH BY INCARCERATION IN PENNSYLVANIA 16 (2018). Pennsylvania alone houses 10% of the country's LWOP population. *PLSE Report*, *supra* at 4. As of 2019, of the 5,436 people serving LWOP sentences in Pennsylvania, 1,166 (roughly 21%) were serving it for felony murder. *Id.* This shows that Pennsylvania's mandatory LWOP for felony murder imposes one of the law's harshest punishments at a uniquely staggering scale.

The international consensus likewise strongly rejects LWOP for felony murder. Other countries have increasingly recognized the felony murder rule to be unjust and disproportionate. *See Enmund*, 458 U.S. at 796 n.22 (showing that in 1982 the felony murder doctrine had "been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe"); *see also* Brief of The Sentencing Project as *Amicus Curiae* Supporting Petitioners at 15, *Scott v. PA Bd. of Probation and Parole*

(No. 16 WAP 2021) (confirming this trend since). Indeed, LWOP sentences "are virtually unheard of" outside of the U.S. THE SENTENCING PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 5 (2021).[10]

In sum, there is strong evidence of both a national and international consensus against mandatory LWOP for felony murder where a person does not kill or intend to kill. These objective indicia of society's standards demonstrate that Pennsylvania's lifetime ban on parole as applied to this class of people is categorically disproportionate under the Eighth Amendment. *See Graham*, 560 U.S. at 62–67; *Atkins*, 536 U.S. at 313–17.

B. Pennsylvania's Lifetime Ban on Parole Is Grossly Disproportionate as Applied to Offenders Who Have Not Killed or Intended to Kill and this Extreme Punishment Does Not Serve Legitimate Penological Interests.

Following Eighth Amendment doctrine, the Court also must exercise its independent judgment to consider whether the severity of Pennsylvania's lifetime bar on parole for those convicted of felony murder is categorically disproportionate as applied to the class of offenders at issue and whether the challenged sentencing practice serves legitimate penological interests. *Graham*, 560 U.S. at 67. Both inquiries show that Pennsylvania's lifetime ban on parole violates the Eighth Amendment.

[10] *available at* https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/.

As set forth in Part ID, *supra*, a long line of Eighth Amendment precedents establish that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Graham*, 560 U. S. at 69 (citing *Kennedy*, 554 U.S. 407; *Enmund*, 458 U.S. 782; *Tison*, 481 U.S. 137; *Coker*, 433 U.S. 584). After *Graham*, that precedent spans both the death penalty context and categorical challenges to LWOP. *Id.* Because the class of offenders at issue here were convicted of felony murder but did not kill or intend to kill, Petition ¶¶ 3–8, under this longstanding precedent they are "categorically less deserving of the most" extreme punishments, including LWOP. *Id.* That is particularly true where the class of people convicted of felony murder in Pennsylvania includes people like Petitioners whose role and comparative culpability was minimal. *See* Dolly Prabhu, Note, *A Lifetime for Someone Else's Crime: The Cruelty of Pennsylvania's Felony Murder Doctrine*, 81 U. PITT. L. REV. 439, 460 (2019) (noting that in Pennsylvania this includes lookouts, people who hid weapons after the fact, and others "merely in the wrong place at the wrong time").

Indeed, the Supreme Court has already acknowledged the harshness of LWOP by "likening [it] to the death penalty" in both its severity and its irrevocability. *See Mille*r, 567 U.S. at 474–76; *Graham*, 560 U.S. at 69–70; *Campbell v. Ohio*, 138 S.Ct. 1059, 1059–60 (2018) (cert. denied) (Sotomayor, J., concurring). And because only

three men have been executed by the Commonwealth since 1976,[11] today LWOP is *de facto* the most severe punishment in Pennsylvania. Accordingly, Pennsylvania's lifetime ban on parole for people convicted of felony murder who have not killed or intended to kill presents a gross "mismatch" between a severe punishment and the culpability of a class of offenders impacted. *See Miller*, 567 U.S. at 470.

Moreover, as applied to this class of offenders, 61 Pa. C.S. § 6137(a) does not serve legitimate penological justifications. As the Court recognized in *Graham*, as a penological justification, retribution requires punishment to be "'directly related to the personal culpability of the criminal offender.'" *Graham*, 560 U.S. at 71 (quoting *Tison*, 481 U.S. at 149). That goal is not met here where one of the law's most severe penalties "is imposed on one whose culpability or blameworthiness is diminished." *Roper*, 543 U.S. at 571. As *Graham* recognized, when a person does not kill or intend to kill "retribution does not justify imposing the second most severe penalty" on that less culpable person. 560 U.S. at 72. The Court has employed similar reasoning with respect to adults. *See Enmund*, 458 U.S. at 801 ("Putting [defendant] to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.").

[11] *Execution Database*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/executions/execution-database.

Similarly, as applied to this class of offenders, 61 Pa. C.S. § 6137(a) does not serve the penological goal of deterrence. As *Graham* recognized, no amount of deterrent effect can save a punishment that is "grossly disproportionate." 560 U.S. at 72. That is so because one is unlikely to be deterred from committing harms that they never intended or directly caused in the first place. *See Enmund*, 458 U.S. at 799 (doubting that threat of the death penalty for murder would "measurably deter one who does not kill and has no intention or purpose that life will be taken").

Incapacitation also fails as a penological justification for 61 Pa. C.S. § 6137(a) as applied to this class of people. In *Graham*, the Court rejected incapacitation as a justification for LWOP refusing to assume that a juvenile who committed a nonhomicide crime "forever will be a danger to society." *Graham*, 560 U.S. at 72. The class of offenders at issue here are reasonably analogous to those in *Graham* as none of them killed or intended to kill anyone, making "incorrigibility" speculative. *See id.* Moreover, most people subjected to felony murder in Pennsylvania have been imprisoned for crimes committed in their mid-twenties. Petition at 4. For example, of the six original plaintiffs,[12] three were 18 at the time of their offense, two were 19 and one was 23. Petition ¶¶ 3–8. Accordingly, *Graham*'s conclusion that incapacitation did not justify LWOP based upon the assumption that young

[12] The sentences of two of the named Petitioners have since been commuted and they are now released.

offenders "forever [would] be a danger to society" similarly applies here. *See Graham*, 560 U.S. at 72. There is no basis for assuming at the outset that a class of people incarcerated early in their life, but who never killed or intended to kill, will forever be a risk to society. *Id.*

Finally, the penological goal of rehabilitation also does not justify LWOP for felony murder given that this punishment "forswears" rehabilitation altogether. *Graham*, 560 U.S. at 74. Indeed, the concept of rehabilitation is a "moot concern" in the context of LWOP. Berry, *supra* at 1135.

In summary, no penological purposes justifies 61 Pa. C.S. § 6137(a)'s mandate of imprisonment until death for a class of people convicted of felony murder whose culpability is diminished. This lack of penological justification, the diminished culpability of this class of offenders, and the extreme harshness of LWOP all lead to the inescapable conclusion that Pennsylvania's lifetime bar on parole eligibility for people who did not kill or intend to kill is disproportionate, cruel and unusual punishment.

CONCLUSION

For all these reasons, imposing LWOP upon people convicted of felony murder who did not kill or intend to kill violates the Cruel Punishments Clause of the Pennsylvania Constitution. This Court should reverse the Commonwealth Court and remand for review on the merits.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the length of the foregoing brief complies with the 7,000-word limit set forth in Pa.R.A.P. 531(b)(3) for an *amicus curiae* brief and the typeface requirements of Pa.R.A.P. 124(a)(4). The word count as identified in the Microsoft Word word processing system is 6,996.

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