Nos. 10-9646 & 10-9647

IN THE
Supreme Court of the United States

EVAN MILLER, *Petitioner*,
v.
ALABAMA, *Respondent*.

KUNTRELL JACKSON, *Petitioner*,
v.
RAY HOBBS, Director,
Arkansas Department of Correction, *Respondent*.

On Writ of Certiorari to the
Alabama Court of Criminal Appeals
and the Supreme Court of Arkansas

BRIEF OF AMICI CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE, LATINOJUSTICE PRLDEF, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND AND LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS IN SUPPORT OF PETITIONERS

JOHN PAYTON
Director-Counsel
DEBO P. ADEGBILE
CHRISTINA A. SWARNS
JIN HEE LEE

VINCENT M. SOUTHERLAND
Counsel of Record
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Floor
New York, NY 10013
(212) 965-2200
vsoutherland@naacpldf.org

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, amici curiae NAACP Legal Defense and Educational Fund, Inc., Charles Hamilton Houston Institute for Race and Justice, LatinoJustice PRLDEF, Asian American Legal Defense and Education Fund, and Leadership Conference on Civil and Human Rights certify that each is a non-profit corporation with no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Congressional Materials

Other Authorities

STATEMENT OF INTEREST[1]

Amici curiae NAACP Legal Defense and Educational Fund, Inc., Charles Hamilton Houston Institute for Race and Justice, LatinoJustice PRLDEF, Asian American Legal Defense and Education Fund, and Leadership Conference on Civil and Human Rights are non-profit organizations dedicated to, among other goals, eradicating the impact of race in the administration of justice. More details about individual amici are included in the Addendum.

SUMMARY OF ARGUMENT

The question presented by these cases is whether the imposition of a life without parole sentence on a fourteen-year-old child convicted of a homicide offense violates the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments. As detailed by the submissions of the Petitioners and their amici curiae, the answer is "yes." As this amicus brief explains, the improper influence of race impairs the culpability analyses of children subject to life without parole sentences, which is further evidence of the unconstitutionality of this sentencing practice. Although a proper evaluation of culpability is fundamental under the Eighth and Fourteenth Amendments, history shows

---

[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to S. Ct. Rule 37.6, counsel for the amici curiae states that no counsel for a party authored this brief in whole or in part, and that no person other than the amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

that racial stereotypes propelled the implementation of the laws that led to juvenile life without parole sentences, and research establishes that children of color are sentenced to life without parole at markedly disproportionate rates. This Court declared, in *Graham v. Florida*, 560 U.S. ___, 130 S. Ct. 2011 (2010), that youth are less culpable than adults and, therefore, less deserving of life without parole sentences. Yet, it is clear that race critically and inappropriately influences the assessment of blameworthiness in the context of juvenile life without parole sentencing. Given this constitutional infirmity, as well as the severity and finality of a death-in-prison sentence, this Court should categorically exempt youth from life without parole sentences.

ARGUMENT

I. The Eighth Amendment Demands Fair Evaluation of Culpability.

In *Graham*, this Court held that children convicted of nonhomicide offenses were categorically barred from receiving life without parole sentences because, "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." 130 S. Ct. at 2027. Relying on a long line of death penalty precedents, *Graham*, for the first time, recognized that a non-death sentence was unconstitutional under the Eighth Amendment because a category of individuals – in that case, children who did not commit murder – were not sufficiently culpable for a life without parole sentence. *See id.* (citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Enmund v.*

Florida, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987); *Coker v. Georgia*, 433 U.S. 584 (1977)); *see also Roper v. Simmons*, 543 U.S. 551 (2005) (excluding children from death penalty because less culpable than adults); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (barring people with mental retardation from receiving death penalty because "the severity of the appropriate punishment necessarily depends on the culpability of the offender," and mental retardation rendered offender less culpable).

That children are less culpable than adults, regardless of their offense, has been firmly established by this Court's holdings in *Graham* and *Roper*.[2] Notwithstanding the seriousness of the crimes at issue, youth homicide offenders have diminished culpability when compared to adult homicide offenders. Moreover, racial overtones and stereotyping tainted the widespread enactment of laws that exposed youth to life without parole, thus contributing significantly to the substantially disproportionate number of minority youth sentenced to juvenile life without parole. This improper influence of race in the sentencing of children to life without parole, therefore, raises serious concerns about whether such extreme sentences are imposed after a constitutionally defensible finding of the requisite level of culpability.

---

[2] Indeed, this Court again recently recounted the stark range of differences between children and adults reflected in the lesser culpability of youth. *See J.D.B. v. North Carolina*, 564 U.S. ___, 131 S. Ct. 2394, 2403-05 (2011) (discussing well-established deficiencies of youth).

Race, of course, cannot – and should not – play any role in the imposition of criminal sanctions. Indeed, "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). Thus, this Court has consistently condemned the influence of race at all levels of the criminal justice system. *See Batson v. Kentucky*, 476 U.S. 79 (1986) (race discrimination in use of peremptory strikes); *Turner v. Murray*, 476 U.S. 28 (1986) (juror's racial bias); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (race discrimination in grand jury selection); *Whitus v. Georgia*, 385 U.S. 545 (1967) (race discrimination in grand and petit jury selection); *Hernandez v. Texas*, 347 U.S. 475 (1954) (race discrimination against Mexican-Americans in petit jury selection); *Hill v. Texas*, 316 U.S. 400, 406 (1942) (race discrimination in grand jury selection). Yet, given the racial taint on juvenile life without parole sentencing, there can be no guarantee that children will receive a fair and proper consideration of their culpability. Race inhibits the mitigating value of youth, thereby impairing the evaluation of culpability that is necessary for a juvenile life without parole sentencing scheme to fall within constitutional bounds. Accordingly, life without parole sentencing for any criminal offense cannot safely be imposed on youth offenders without violating the Eighth Amendment.

II. Race Undermines the Evaluation of Culpability in the Sentencing of Children to Life Without Parole.

Over two decades ago, the pernicious influence of race helped to shape the public, political and legal

discourse on juvenile violent crime in the United States. The media, academics and legislators portrayed youth, and in particular youth of color, as exceedingly dangerous, violent and blameworthy.[3] The consistent connection between race, youth and criminal behavior undermined the widely accepted view, expressly affirmed in *Graham*, that youth are less culpable for their crimes than adults. *Graham*, 130 S. Ct. at 2026. In turn, these stereotypes were employed to justify the use of harsh punitive measures on criminally involved youth that had previously been limited to adult offenders.

A. Race Influenced the Implementation of Laws Allowing Children to be Sentenced to Life Without Parole.

For much of the 20th century, youthful offenders were subject to the jurisdiction of the juvenile court, a court that recognized that fundamental differences between children and adults warranted lesser punishments.

> The early reformers were appalled . . . by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. . . . The child – essentially good, as they saw it – was to be made 'to feel that he is the object of [the state's] care and solicitude,' not that he was under arrest or on trial. . . .

---

[3] This Court has recognized the role that false stereotypes about people of color can play in sentencing determinations in capital cases. *See Turner*, 476 U.S. at 35 (noting that "[m]ore subtle, less consciously held racial attitudes" such as fear of a particular racial group "could also influence" sentencing decisions).

> The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.

In re Gault, 387 U.S. 1, 15-16 (1967) (alteration in original) (citations omitted).[4] Thus, "[t]he juvenile court combined the . . . conception of childhood with the . . . strategies of positive criminology to create a judicial-welfare alternative to the adult criminal process for juveniles." Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 Minn. L. Rev. 1447, 1458 (2003) [hereinafter Feld, *Race, Politics, and Juvenile Justice*]. Recognized as lacking maturity and fully formed personalities, children were removed from the adult process and subjected to intervention strategies to serve their best interests and prevent further criminal involvement. Barry C. Feld, *The Honest Politician's Guide to Juvenile Justice in the Twenty-First Century*, 564 Annals Am. Acad. Pol. & Soc. Sci. 10, 12 (1999). The state acted as *parens patriae* to ensure a youth's well-being. Distinctive terminology was employed in an "attempt to reduce the stigma attached to juvenile

---

[4] *See also Kent v. United States*, 383 U.S. 541, 554-55 (1966) (describing juvenile court as "engaged in determining the needs of the child and of society rather than adjudicating criminal conduct"); *McKiever v. Pennsylvania*, 403 U.S. 528, 551-52 (1971) (White, J., concurring) (highlighting the difference between the adult criminal system that accounts for adult culpability and punishes them accordingly, and the juvenile system that recognizes the lesser culpability of youth and works to rehabilitate young offenders).

court adjudications." Michele Benedetto Neitz, *A Unique Bench, a Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 Geo. J. Legal Ethics 97, 110 (2011).[5] This Court secured children's constitutional protections in the juvenile court.[6]

The nature of the juvenile justice system changed significantly in the late 1980s and early to mid-1990s when our public discourse became "consumed by [a] looming threat posed by America's youth" and a predicted increase in violent juvenile crime. Perry L. Moriearty, *Framing Justice: Media, Bias and Legal Decisionmaking*, 69 Md. L. Rev. 849, 850-51 (2011). The rehabilitative norms that had characterized the juvenile justice system since its inception were dismantled through "the broadest and most sustained legislative crackdown ever on serious offenses committed by youth within the jurisdictional ages of American Juvenile Courts." Franklin E. Zimring, *The 1990s Assault on Juvenile Justice: Notes from and Ideological Battleground*, 11 Fed. Sent'g Rep. 260 (1999). "Inherent in many of the changes [was] the belief that serious and violent juvenile offenders must be held more accountable for their actions. Accountability [was] . . . defined as

---

[5] Specifically, "[c]harges are brought as 'petitions' instead of 'complaints' or 'indictments,' and 'trials' are called 'jurisdictional hearings.' Young offenders are referred to as 'minors' or 'delinquents,' not 'defendants' or 'criminals,' and convicted juvenile offenders receive 'dispositions,' rather than 'sentences.'" *Id.* (citations omitted).

[6] *See, e.g., McKiever*, 403 U.S. 528; *In re Gault,* 387 U.S. 1; *Kent,* 383 U.S. 541.

punishment or a period of incarceration . . . ."[7] Rather than dispositions based on the needs of a juvenile and rehabilitation, states focused on punitive sanctions for particular offenses.[8] "[P]unitive segregation – strategies to incapacitate and exclude young offenders rather than to change and reintegrate them" – were enacted. Feld, *Race, Politics and Juvenile Justice*, *supra*, at 1559.

This ideological shift was, in part, the product of a widespread legislative response to fluctuating crime rates among youth.[9] Critically, the response

---

[7] Patricia Torbet, et al., U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *State Responses to Serious and Violent Juvenile Crime* xi (1996), *available at* http:// www. ncjrs. gov/ pdffiles / statresp.pdf.

[8] Sara Sun Beale, *You've Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 Harv. C.R.-C.L. L. Rev. 511, 521 (2009) [hereinafter Beale, *Two Waves of Juvenile Justice*]; s*ee also* Jane Rutherford, *Juvenile Justice Caught Between the Exorcist and a Clockwork Orange*, 51 DePaul L. Rev. 715, 721 (2002).

[9] Juvenile arrests for violence and homicide rose sharply at points between 1986 and 1994. Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & Fam. Stud. 11, 29 (2007) [hereinafter Feld, *Unmitigated Punishment*]. However, those rates eventually fell in a consistently downward slope to the present day. *See* Alexia Cooper & Erica L. Smith, U.S. Dep't of Justice, Bureau of Justice Statistics, *Homicide Trends in the United States, 1980-2008* 4 (Nov. 2011), *available at* http://bjs.ojp.usdoj.gov/ content/pub/pdf/htus8008.pdf (noting that "[a]fter 1993, the [homicide offending] rate fell so much that by 2000, the offending rate for teens was near its 1985 level"). A close examination of the statistics reveals that "there never was a general pattern of increasing adolescent violence in the 1980s and 1990s." Franklin E. Zimring, *The Youth Violence*

coincided with the deliberate reinforcement of a perceived link between race and teen crime. Throughout the late 1980s and early to mid-1990s, the media, academics and politicians consistently characterized teen crime in racially coded terms.[10] Efforts to explain teen crime conflated race, youth and criminal behavior. Youthful offenders, and in particular youth of color, were thought to pose a higher threat of violent criminal activity because of

---

Epidemic: Myth or Reality, 33 Wake Forest L. Rev. 727, 728 (1998) [hereinafter Zimring, *Youth Violence Epidemic*]. Instead, the variations in the juvenile crime rates which occurred over short periods of time are explained by "narrower bands of behavior," specifically "a thin band of highly lethal gun attacks . . . and garden variety assaults. . . ." *Id.*

[10] Coded language consists of "symbols or phrases that indirectly implicate racial themes" without directly speaking to race. Feld, *Race, Politics, and Juvenile Justice*, *supra*, at 1553-55. It is used to "evoke modern racist sentiments without seeming racist or discriminatory [and] allows politicians to appeal to cultural archetypes in the collective unconscious about the 'alien other' who poses a fearful and menacing threat to society." *Id.* at 1553-54. As overt racism has become unacceptable, terms and phrases like tough on crime, urban, inner-city, gangs "and welfare now widely serve as 'coded' [words] that enable politicians to exploit" racial sensitivities "without explicitly playing the 'race card.'" *Id.* at 1554-55. For example, appeals to law and order, "first mobilized in the late 1950s," were used by "Southern governors and law enforcement officials to generate and mobilize . . . opposition to the Civil Rights Movement." Michele Alexander, *The New Jim Crow*: *Mass Incarceration In the Age of Colorblindness* 40 (2010). Such rhetoric, while appearing facially neutral, carries an implicit racial meaning, given its context and connection to race. *See also City of Memphis v. Greene*, 451 U.S. 100, 135-36 (1981) (Marshall, J., dissenting) (examining historical context and connection between language and race to interpret "code phrases for racial discrimination").

deficient personal traits – immorality, inherent proclivity for violence and remorselessness – rather than external factors like substance abuse, family dysfunction or criminal associations.[11] The proposed remedy, therefore, was to control and incapacitate youth through harsh punishment.[12] The onset of life without parole sentences for youth is the manifestation of those efforts.

1. The Media.

Both television and print media helped to create and reinforce the mythic connection between youth, race and criminality.[13] As crime rates varied in the

---

[11] Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DePaul L. Rev. 679, 712 (2002); George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments in Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 Am. Soc. Rev. 554, 556 (1998).

[12] Increased punitive measures have been linked to racial typification, which is "the media's stereotypical portrayal of crime as a minority phenomenon." Sarah Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 Wm. & Mary L. Rev. 397, 458-61 (2006). In fact, "[w]hen minority offenders are stereotyped as particularly predatory or disposed to chronic criminal offending, they 'are seen as more villainous and therefore more deserving of severe penalties.'" Bridges & Steen, *supra*, at 555 (citations omitted).

[13] The news is a powerful influence that shapes public opinion. A 2000 poll found that 81% of people formed their beliefs about crime from the news, while 17% gained their beliefs through personal experience. Ernestine S. Gray, *The Media – Don't Believe the Hype*, 14 Stan. L. & Pol'y Rev. 45, 48 (2003). The news also "activate[s] and strengthen[s] linkages among certain racial categories, violent crime, and the fear and

late 1980s and early 1990s, some media began to cast youthful offenders as exceedingly violent, morally deficient and of color. Moriearty, *supra*, at 865-67. Even in the face of declining violent crime rates among juveniles,[14] media portrayals of children accused of crimes continued to carry "silent, racially charged messages," equating youthful criminal behavior with skin color. Rutherford, *supra*, at 720-21.

Thus, throughout the 1990s, youth of color were "overrepresented as perpetrators and underrepresented as victims in media crime stories." Moriearty, *supra*, at 870. The media described child offenders of that era as "'super predators,' 'youthful predators,' 'teen killers,' [and] 'young thugs,'" focusing almost exclusively on children of color. Robert E. Shepard, *How the Media Misrepresents Juvenile Policies*, 12 Crim. Just. 37, 38 (1998). In California, for example, "local news reports . . . feature[d] people of color as gang members or juvenile offenders." Beth Caldwell & Ellen C. Caldwell, "*Superpredators*" *and* "*Animals*" *– Images and California's* "*Get Tough on Crime*" *Initiatives*, 2011 J. Inst. Just. Int'l Stud. 61, 67 (2011). And "[a] survey of local television news in Los Angeles revealed that where the race of crime perpetrators was identifiable, nearly 70 percent were nonwhite males." Shepard, *supra*, at 38.

Across the country, portrayals of youth violence in visual and print media were "dominated by

---

loathing such crime invokes." Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489, 1563 (2005).

[14] *See supra* note 9.

pictures of African-American or Latino youngsters." *Id.* By 2000, a study of news broadcasts in six major U.S. cities found that "sixty-two percent of the stories involving Latino youth were about murder or attempted murder [although] . . . in 1998, minority youth accounted for only one quarter of all juvenile crime arrests and less than half of all violent juvenile crime arrests." Moriearty, *supra*, at 871. A 2001 survey revealed that in the preceding decade, the media "misrepresent[ed] crime, who suffer[ed] from crime, and the real level of involvement of young people in crime," such that whites were underrepresented and African-Americans and Latinos were overrepresented in depictions of perpetrators of violent crime. Lori Dorfman & Vincent Schiraldi, Building Blocks for Youth, *Off Balance: Youth Race & Crime in the News* 26 (2001), *available at* http://www.cclp.org/documents/BBY/offbalance.pdf. These faulty portrayals "reinforce[d] the erroneous notion that crime is rising, that it is primarily violent, that most criminals are nonwhite, and that most victims are White." *Id.*

The "Central Park Jogger" case – where five New York City teenagers were convicted of a crime they did not commit – is perhaps the most infamous example of the racialization of teen crime and its dangerous real-life consequences. In 1989, a young, white, female jogger was beaten, raped and left unconscious in Manhattan's Central Park by what police thought were as many as 12 youths. Craig Wolf, *Youths Rape and Beat Central Park Jogger*, N.Y. Times, Apr. 21, 1989, at B1. Five children, aged 14 to 16, were arrested and charged with rape, assault and attempted murder in connection with

the attack. David E. Pitt, *Jogger's Attackers Terrorized at Least 9 in 2 Hours*, N.Y. Times, Apr. 22, 1989, at 11. "All of the suspects were African-American or Latino." Moriearty, *supra*, at 862. The police attributed the attacks to "wilding," a term used by some of the young people brought in for questioning about the incident. *Id.* at 862-63; Pitt, *supra*, at 11. Although those arrested, tried and convicted for the attack were ultimately exonerated,[15] the term "wilding" captured the attention of the public and cemented the perceived link between race and teenage crime.[16]

> In New York City newspapers alone, the term "wilding" would appear 156 times in articles over the next eight years. . . . [I]ts racial connotations were unmistakable. In every one of the 156 New York newspaper articles in which the race of the perpetrator was mentioned in the text, the suspects were identified as either African-American or Latino males; conversely, with the exception

---

[15] *See* Susan Saulny, *Convictions and Charges Voided In '89 Central Park Jogger Attack*, N.Y. Times, Dec. 20, 2002, at A1 (describing exoneration).

[16] Indeed, "[f]rom the moment the teenagers . . . were reported to have confessed, the horrific attack was transmogrified in public discourse into an issue of race." N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 Cardozo L. Rev. 1315, 1348 (2004). The term "wilding" was used to connote a form of animalistic savagery reserved for criminally involved youth of color. *See id.* ("[T]he youths were alternately referred to as 'wolf packs,' 'rat packs,' 'savages,' and 'animals.'").

> of a single incident, each of the victims was described as a white female.

Moriearty, *supra*, at 863 (citations omitted). The intense media attention directed at "wilding" "contributed to a growing consensus that there was a new menace threatening society." Michael Welch et al., *Moral Panic Over Youth Violence: Wilding and the Manufacture of Menace in the Media*, 34 Youth & Soc'y 3, 10 (2002). "Wilding" was used exclusively to describe the criminal activity of African-Americans and Latinos, thus driving the connection between the race of the alleged perpetrators and their criminal behavior.

Thus, the media exaggerated representations of youth of color as perpetrators of violent crime. As detailed below, the media's racially-laden narrative about youth crime, further embraced and shaped by many academics and politicians, drove punitive measures to incapacitate youth while discounting their lesser culpability.

2. The Academics.

The media's false connection between race, crime and youth was corroborated and propelled by pseudo-scientific research documenting the impending rise of the so-called juvenile "super-predator." According to sociologists and criminologists at the time, these youth were a growing new breed of hyper-violent, morally-depraved and criminally-involved children who would terrorize society.[17] The super-predator myth,

---

[17] *See, e.g.*, Peter Annin, *'Superpredators' Arrive*, Newsweek, Jan. 22, 1996, at 57; David Gergen, Editorial,

like "wilding" and other terms associated with the moral panic[18] over youth violence, relied heavily on "racist imagery and stereotypes" and harkened back to "historic representations of African Americans [and other people of color] as violence-prone, criminal and savage." Nunn, *supra*, at 712; Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 Denv. U. L. Rev. 1081, 1083-84 (2001). Thus, to the extent that the super-predator myth contributed to the trend toward harsher sentences for young people, racial bias and stereotype were critical drivers of that momentum.

The term "super-predator" was first used by then-Princeton University Professor and criminologist John J. DiIulio, Jr. as part of his effort to explain

---

Taming Teenage Wolf Packs, U.S. News & World Rep., Mar. 25, 1996, at 68; Richard Zoglin, *Now For the Bad News: A Teenage Time Bomb*, Time, Jan. 15, 1996, at 52; Maggie Gallagher, *Juvenile Crime Wave is Just Beginning*, Long Beach Press-Telegraph, May 20, 1996, at B7.

[18] "[M]oral panic over wilding reinforces racial biases prevalent in criminal stereotypes, particularly the popular perception that young Black (and Latino) males constitute a dangerous class. Compounded by sensationalistic news coverage on wilding, along with carjacking, gang banging and other stylized forms of lawlessness associated with urban teens, minority youths remain a lightning rod for public fear, anger, and anxiety over impending social disorder, all of which contribute to additional law and order campaigns."

Welch, *supra*, at 4.

what he and other academics saw as the cause[19] and effect of variable rates of violent youth crime. DiIulio, *Super-Predators*, *supra*, at 1. As detailed by the Academic Amici, Professor DiIulio forecast an impending rash of youth crime and violence – a "demographic crime bomb." *Id.* He warned:

> On the horizon . . . are tens of thousands of severely morally impoverished juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons . . . . [A]s long as their youthful energies hold out, they will do what comes "naturally": murder, rape, rob, assault, burglarize, deal deadly drugs, and get high.

Id. at 4.

Professor DiIulio's theory was based on predictions about population trends, crime rates and overt racial stereotypes. He cloaked crime data in

---

[19] DiIulio explained that crime was rooted in what he identified as moral poverty, defined as the "poverty of being without loving, capable, responsible adult[ ]" role models and "growing up surrounded by deviant, delinquent, and criminal adults in abusive, violence-ridden, fatherless, Godless, and jobless settings." John J. DiIulio, Jr., *The Coming of the Super-Predators*, The Weekly Standard, Nov. 27, 1995, at 3, *available at* http://cooley.libarts.wsu.edu/schwartj/criminology/dilulio.pdf [hereinafter DiIulio, *Super-Predators*]. According to Professor DiIulio and his co-authors, moral poverty creates super-predators, who are more likely to be African-American children and other children of color, who have grown up in what they term "criminogenic communities." *See generally* William Bennett et. al., *Body Count: Moral Poverty . . . And How to Win America's War Against Crime and Drugs* 22, 28 (1996).

racial terms, emphasizing the racial demographics of the predicted wave of juvenile criminals:

> The surge in violent youth crime has been most acute among black inner-city males. . . . Moreover, the violent crimes experienced by young black males tended to be more serious than those experienced by young white males . . . . In Los Angeles, there are now some 400 youth street gangs organized mainly along racial and ethnic lines: 200 Latino, 150 black, the rest white or Asian. In 1994, their known members alone committed 370 murders and over 3,300 felony assaults.

Id. at 2.

Professor DiIulio placed a racialized gloss on population trends to concluding that the mere growth in the population of youth of color would ensure greater numbers of so-called super-predators. He asserted that an increase in the number of young males in the U.S. population would "put an estimated 270,000 more young predators on the streets" by 2010, resulting in what he called a probable surge in the "number of young black criminals" as the "black crime rate, both black-on-black and black-on-white, is increasing." John J. DiIulio, Jr., *My Black Crime Problem, and Ours: Why Are So Many Blacks In Prison? Is the Criminal Justice System Racist? The Answer is Disquieting.*, City Journal, Spring 1996, at 1, *available at* http://www. city-journal.org/printable.php?id=62 [hereinafter DiIulio, *My Black Crime Problem*].[20]

---

[20] Professor DiIulio was not alone in feeding the racial criminalization of youth and the public perception of an

Professor DiIulio posited that "as many as half of these juvenile super-predators could be young black males." *Id*.[21] Professor DiIulio also confined his super-predator to urban areas predominantly inhabited by people of color. He warned that "the trouble will be greatest in black inner-city neighborhoods" and that "the demographic bulge of the next 10 years will unleash an army of young male predatory street criminals who will make even

---

impending spike in juvenile crime rates. Another example was Dr. Frederick Goodwin, the Director of the Alcohol, Drug Abuse and Mental Health Administration, who in 1992:

> called for a "Violence Initiative" to study violence in the inner cities. In choosing to focus on children of the inner city, Dr. Goodwin suggested . . . that violence had a genetic component; [that] some individuals were more vulnerable to violent impulses; [that] these individuals could be identified at a young age; and [that] such vulnerability might be traced to inferior social structures, so that "maybe it isn't just careless use of the word when people call certain areas of certain cities jungles. He also referred to male monkeys who were both hyper-aggressive and hypersexual.

Rutherford, *supra,* at 723 (citations omitted).

[21] Professor DiIulio's predictions were steeped in racial overtones:

> My black crime problem, and ours, is that for most Americans, especially for average white Americans, the distance is not merely great but almost unfathomable, the fear is enormous and largely justifiable, and the black kids who inspire the fear seem not merely unrecognizable but alien. . . . [S]ome of these children kill, rape, maim, and steal without remorse.

DiIulio, *My Black Crime Problem*, *supra*, at 4.

the leaders of the Bloods and Crips . . . look tame by comparison." DiIulio, *Super-Predators*, *supra*, at 1, 3.

Similarly, in a 1996 report to then-U.S. Attorney General Janet Reno, Dean James Alan Fox of Northeastern University's College of Criminal Justice warned of a "future wave of youth violence" due to a population increase in the number of 14-17 year old African-American males that would begin in 2005 and "continue to expand well into the next century, easily surpassing the population levels of twenty years ago." James Alan Fox, U.S. Dep't of Justice, Bureau of Justice Statistics, *Trends In Juvenile Violence: A Report to the United States Attorney General on Current and Future Rates of Juvenile Offending* 3 (1996). According to Fox, this demographic change alone ensured an increase in the number of "teen killers." *Id.*

These reports were widely accepted as fact despite the lack of evidentiary support, a phenomenon detailed by U.S. Surgeon General in 2001, David Satcher, who at that time wrote that:

> [O]nly a few years ago, substantial numbers of leading experts involved in the study and treatment of youth violence had come to a strikingly different conclusion [about the effectiveness of programs to curtail youth violence]. Many were convinced then nothing could be done to stem a tide of serious youth violence that had erupted. . . ."

Office of the Surgeon Gen., *Youth Violence: A Report of the Surgeon General* Preface (2001), *available at* http://www.surgeongeneral.gov/library/youthviolence/toc.html. In fact, the super-predator myth gained

widespread acceptance throughout the 1990s, and the term was popularized by politicians, law enforcement officials, media outlets and the public. Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. Crim. L. & Criminology 729, 746-749 (2011); *see also supra* note 17; Gary Marx, *Young Killers Remain Well-Publicized Rarity: "Superpredators" Fail To Grow Into Forecast Proportions*, Chi. Trib., Feb. 11, 1998, at 1; Caldwell, *supra*, at 68.

As detailed by the submission of Academic Amici, the predictions of a new wave of super-predators never came to pass. Rather than increasing, the juvenile crime rate "dropped by more than half," thus discrediting the super-predator theory and causing Professor DiIulio to concede that "he wished he had never become the 1990's intellectual pillar for putting violent juveniles in prison and condemning them as 'superpredators.'" Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. Times, Feb. 9, 2001, at A19. Surgeon General Satcher's 2001 report rejected the super-predator myth, stating that:

> "[t]here is no evidence that young people involved in violence during the peak years of the early 1990s were more frequent or more vicious offenders than youths in earlier years. The increased lethality resulted from gun use, which has since decreased dramatically. There is no scientific evidence to document the claim of increased seriousness or callousness."

Office of the Surgeon Gen., *supra*, at Chapter 1,

Myths About Youth Violence; *see also id.* at Chapter 3, Superpredators? (describing inaccuracies which wholly undermined the super-predator myth). The Surgeon General's report also repudiated the racial mythology that youth of color, and African-American and Latino youth in particular, were more likely to become involved in youth violence. *Id.* at Chapter 1, Myths About Youth Violence, Chapter 2, Prevalence of Violent Behavior (noting that while racial differences in arrest rates exist, "[t]here are essentially no differences by race in the prevalence rates for serious self-reported violent behavior."); *see also id.* at Chapter 3, Cumulative Prevalence. Thus, the predictions regarding the rise of violent crime among youth, and in particular youth of color, were proven false by a sober reflection on the actual youth crime rate. [22]

3. The Legislators.

The legislative response to the myth of rampant violence by children of color changed the course of juvenile justice and provided a framework for the treatment of children that undermined the mitigating value of youth. Indeed, significant changes to state laws were made in response to the panic around juvenile crime. Laws were enacted to

---

[22] *See also* Zimring, *Youth Violence Epidemic*, *supra*, at 728 (finding that "there never was a general pattern of increasing adolescent violence in the 1980s and 1990s" and that "there is no basis for making any projections fifteen years forward based on [then] current trends"); David Westphal, *Predicted Teenage Crime Wave Failed to Occur, Numbers Show*, Fresno Bee, Dec. 13, 1999, at A12 (detailing fact that predicted crime youth crime wave never happened); Editorial, *Children's Court: Back to the Future*, Chi. Trib., July 25, 1999, at 16 (same).

ease the prosecution of children in adult court and increase the range of harsh criminal sanctions faced by criminally involved youth, including life without parole sentences. "Racial imagery and racially biased political appeals played an important role in creating the climate that led to the enactment of this legislation." Beale, *Two Waves of Juvenile Justice*, *supra*, at 514. The racial appeals that led to exposure to harsh sentencing practices were rooted in the long-standing, widespread and faulty racial stereotypes that presume youth of color are prone to violence and criminality and pose a threat to public safety. Nunn, *supra*, at 709-710.

Politicians relied on the racially-charged, super-predator narrative and what proved to be inaccurate predictions about impending juvenile crime rates to "pursue genuine get-tough law-enforcement strategies against the super-predators." DiIulio, *Super-Predators*, *supra*, at 6.[23] Many adopted the racially-laden super-predator mantle popularized by Professor DiIulio. Indeed, the misguided language became so ubiquitous that then-presidential

---

[23] For example, following the Central Park jogger incident, Manhattan Borough President and mayoral candidate David Dinkins advocated for an "antiwilding law" with enhanced penalties for anyone who committed a crime as part of a group, mayoral candidate Rudolph Giuliani called for harsh measures to "combat mindless violence perpetrated by marauding gangs on 'wilding' sprees," and Mayor Ed Koch pressed for the "death penalty in incidents of wilding." Welch, *supra*, at 10. Likewise, Professor DiIulio noted that "no one in academia is a bigger fan of incarceration than I am" and estimated that the United States would need to "incarcerate at least 150,000 juvenile criminals" in the years following his 1996 article. DiIulio, *Super-Predators*, *supra*, at 6.

candidate Senator Bob Dole proclaimed in a 1996 radio address that "[u]nless something is done soon, some of today's newborns will become tomorrow's super-predators — merciless criminals capable of committing the most vicious acts for the most trivial of reasons." *Dole Seeks to Get Tough on Young Criminals*, L.A. Times, July 7, 1996, at A16. In 1996, Senator John Ashcroft, who later became U.S. Attorney General, testified before a Senate Subcommittee on Youth Violence, that "[i]n America today, violent juvenile predators prowl our businesses, schools, neighborhoods, homes and parking lots, leaving in their wake maimed bodies, human carnage and desecrated communities." S. 1425, *The Violent and Hard-Core Juvenile Offender Reform Act*, Opening Statement of Sen. John Ashcroft before the Subcomm. on Youth Violence of the S. Comm. on the Judiciary (May 9, 1996).[24] Others spoke to the sentiments that animated the super predator narrative. As U.S. Senator from Illinois, Carol Moseley-Braun supported punitive measures for youth, noting that such tactics were

---

[24] Florida Representative William McCollum, who wrote and unsuccessfully supported the Violent Youth Predator Act of 1996, also used racially charged language to drive harsh punishments for youth. The proposed Act, in part, mandated adult federal prosecution of 13 and 14 year olds for violent crimes or major drug trafficking offenses. Representative McCollum relied exclusively on the myth of the super-predator in proposing the legislation. The Executive Summary warned of the "[c]oming [s]torm of [v]iolent [j]uvenile [c]rime" and declared that "[n]o population poses a larger threat to public safety than young adult criminals." H.R. 3565, *The Violent Youth Predator Act of 1996,* Statement of Rep. William McCollum before the Subcomm. on Crime of the H. Comm. on the Judiciary (June 27, 1996).

necessary because of "a new category of offender" she described as children "who[ ] have no respect for human life [and] are arming themselves with guns and roaming the streets."[25] President Bill Clinton called juvenile crime the "ultimate threat to our country,"[26] and described it as a top law enforcement priority, warning in 1997 that "we've got about six years to turn this juvenile-crime thing around or our country is going to be living in chaos."[27]

The state legislative response was unprecedented. In nearly one-third of the states, laws were enacted to redefine the purpose of their juvenile courts to "emphasize public safety, certain sanctions, and/or the accountability of offenders." Beale, *Two Waves of Juvenile Justice*, *supra*, at 521. Between 1992 and 1997, nearly every state changed its laws to ease the transfer of youth into adult court and subject children to exceedingly harsh penalties, including life without parole. John F. Stinneford, *Evolving Away from Evolving Standards of Decency*, 23 Fed. Sent'g. Rep. 87 (2010). Forty-seven states and the District of Columbia made substantive changes to state laws concerning juvenile justice,

---

[25] Sen. Carol Moseley-Braun, *Should 13-Year-olds Who Commit Crimes with Firearms Be Tried as Adults? Yes: Send a Message to Young Criminals,* 80 A.B.A. J. 46 (Mar. 1994).

[26] Earle Ofari Hutchinson, *Teen Crisis Not All Bad News*, Chi. Trib., Aug. 14, 1997, at 23 (internal quotation marks omitted).

[27] Jonathan Peterson, *Gangs, Youth Crimes Target of Major Effort: Clinton Says Juveniles Top Enforcement Priority*, Contra Costa Times, Feb. 20, 1997, at B1 (internal quotation marks omitted).

including changes that broadened juvenile jurisdiction and increased sentences. Torbet, *supra*, at 59. Prosecutors were granted unfettered discretion to try youth in adult courts and subject the accused to adult sanctions like life without parole. Beale, *Two Waves of Juvenile Justice*, *supra*, at 521. Critically, as detailed by the Academics Amici, these measures were not responsible for the decline in juvenile crime or homicide rates.[28]

The federal legislative response to the rise of the so-called teen super-predator provides significant insight into how the racialized criminalization of youth infected the legislative process. An analysis of 16 congressional hearings on youth violence, held between 1995 and 2001, reveals a clear distinction between discourse around racially-tainted gang violence[29] and the rash of school shootings that took place in predominantly white, suburban schools.

---

[28] *See also supra* note 9; Elizabeth Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 La. L. Rev. 35, 37, 56 (2010) (noting "that studies that have examined the impact of the adoption of punitive policies on youth crime rates yield mixed results, offering little support for the claim that the declining crime rates are largely due to the enactment of harsher laws" and that "[t]he evidence that the reforms have contributed to the decline in crime rates is weak.").

[29] Historically, criminally involved youth of color have been characterized as gang members, thereby attaching a silent racial meaning to the term. Rutherford, *supra*, at 720-21; *see also* Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 Loy. L.A. L. Rev. 747, 763 (2001) (discussing the close association between gang membership and minority youth used by politicians and commentators to deal in implicit racial terms.).

Elizabeth Brown, *Crime, Governance, and Knowledge Production: The "Two Track Common-Sense Approach" to Juvenile Criminality in the United States*, 36 Soc. Just. 102 (2009), *available at* 2009 WLNR 25016000 (Jan. 1, 2009). Gang violence prompted "'get-tough' legislation, punitive political rhetoric, and racialized media imagery that promote[d] fear of the urban [African-American and Latino] male." *Id.* Gang members "evidenced the emergence of a new class of violent children" created by the bad moral choices of single-parent families. *Id.* In response, legislators advocated for the use of juvenile justice and adult criminal sanctions as a means of social control to curb criminality. In contrast, in many cases, school violence demanded "the attention and therapeutic, disciplinary, and benevolent resources of state power" to intervene in the lives of children and prevent such incidents from happening again. *Id.*

Thus, the connections between race, crime and youth led to punitive sanctions, like life without parole, for young offenders. Sinister beliefs about race, crime and age erased the longstanding distinction between youth and adults, rendering the sentencing practice currently before this Court unconstitutional.

III. Consistent with Their History, Juvenile Life Without Parole Laws Are Overwhelmingly Imposed Upon Children of Color.

The pernicious influence of racial stereotypes about youth of color, and the punitive crime legislation borne from those stereotypes, is evident

from the stark racial disparities in the practice of juvenile life without parole sentencing. Based on available data, it appears that African-American youth nationwide serve life without parole sentences "at a rate that is ten times higher than white youth (the rate for black youth is 6.6 as compared with .6 for white youth)." Amnesty Int'l & Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* 39 (2005), *available at* http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf [hereinafter AI/HRW, *Rest of Their Lives*]; *see also* Connie de la Vega & Michelle Leighton, *Sentencing Our Children To Die in Prison: Global Law and Practice*, 42 U.S.F.L. Rev. 983, 993 (2008). Though African Americans comprise only 16% of the national youth population,[30] the available data reveals that African Americans make up 60% of all youth serving life without parole sentences, AI/HRW, *Rest of Their Lives*, *supra*, at 39. According to this same data, "the rate for black youth sentenced to life without parole" exceeds that of white youth in every state with juvenile life without parole. *Id.* at 42.

Racial disparities in juvenile life without parole sentences are not surprising given that these disparities exist at all levels of children's contact with the criminal justice system. *See* Feld, *Unmitigated Punishment*, *supra*, at 35-38. "When racial/ethnic disparities do occur, they can be found

---

[30] Charles Puzzanchera & Benjamin Adams, U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Juvenile Arrests 2009*, Juvenile Offenders and Victims: National Report Series, Dec. 2011, at 6, *available at* www.ojjdp.gov/pubs/236477.pdf.

at any stage of processing within the juvenile justice system. Research suggests that disparity is most pronounced at arrest, the beginning stage, and that when racial/ethnic differences exist, their effects accumulate as youth are processed through the justice system." Howard N. Snyder & Melissa Sickmund, U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Juvenile Offenders and Victims: 2006 National Report* 188 (Mar. 2006), *available at* http://www.ojjdp.gov/publications/pubabstract.asp?pubi=234394. Thus, although African Americans comprise only 16% of the youth population, they make up:

- 28% of juvenile arrests;
- 30% of referrals to juvenile court;
- 37% of the detained population;
- 34% of youth formally processed by the juvenile court;
- 30% of adjudicated youth;
- 35% of youth judicially waived to criminal court;
- 38% of youth in residential placement; [and]
- 58% of youth admitted to state adult prison.

Nat'l Council on Crime & Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System* 37 (Jan. 2007), *available at* http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf*; see also* Snyder & Sickmund, *supra*, at 176 (providing data on black youth's

"disproportionate share of cases at all stages of case processing" in 2002).

Indeed, "[t]hroughout the [criminal justice] system, youth of color – especially African American youth – receive different and harsher treatment. This is true even when White youth and youth of color are charged with similar offenses." Nat'l Council on Crime & Delinquency, *supra*, at 37; *see also* Feld, *Unmitigated Punishment*, *supra*, at 36 ("After researchers control for present offense and prior record, . . . studies consistently report additional racial disparities when judges sentence black youths."); AI/HRW, *Rest of Their Lives*, *supra*, at 39 (noting research finding that "minority youths receive harsher treatment than similarly situated white youths at every stage of the criminal justice system, from the point of arrest to sentencing").[31] In a study of youth arrested for murder in 25 states where there was available data, African Americans were found to be sentenced to juvenile life without parole at a rate that is 1.59 times higher than white youth. Human Rights Watch, *The Rest of Their*

---

[31] A study of 77,236 individuals sentenced under the federal sentencing guidelines demonstrates the severe racial disparities in sentencing people of color. *See* David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & Econ. 285 (2001). On average, African Americans in this study received sentences that were 99.6% longer than sentences for whites. *Id.* at 296. Latinos' sentences were 68.5% longer. *Id.* Even when controlling for offense level, criminal history, district of conviction, and offense type, African Americans, Latinos, and other minorities had federal criminal sentences that were, respectively, 5.5, 4.5, and 2.3 months longer than their white counterparts. *Id.* at 300.

Lives: Life without Parole for Youth Offenders in the United States in 2008 6-7 (May 2008), *available at* http://www.hrw.org/sites/default/files/reports/the_rest_of_their_lives_execsum_table.pdf.

The racial disparities with respect to juvenile life without parole for homicide offenses are especially troubling given the steady decline of murders committed by children in the past two decades. Since 1993, the juvenile arrest rate for murder "fell substantially through 2000, resting at a level that essentially remained constant for the entire decade. Compared with the prior 20 years, the juvenile murder arrest rate between 2000 and 2009 has been historically low and relatively stable." Puzzanchera & Adams, *supra*, at 9. This decline was mirrored by the juvenile murder arrest rate of African-American youth, which "fell . . . considerably more" than the rate of white youth from 1994 through 2000, though it increased 10% in the past decade. *Id.*

IV. Proper Evaluation of Culpability Has Been Undermined by the Racially Charged Criminalization of Youth of Color.

A proper evaluation of culpability is a fundamental component of a constitutional sentence under the Eighth and Fourteenth Amendments. History reveals that racial stereotypes helped to propel the implementation of the laws allowing for juvenile life without parole sentences, and research establishes that children of color are sentenced to life without parole at markedly disproportionate rates. Because it is clear that race critically and inappropriately informs the assessment of blameworthiness in the context of juvenile life

without parole sentencing, such sentences are unconstitutional.

As detailed above, the racialized criminalization of youth fostered exposure to more punitive sanctions, like life without parole, for children. These harsh punishments had previously been reserved for adult offenders in the criminal justice system. "As the blurring of the line between juvenile and criminal court increases, so does the likelihood that these trends" – like life without parole – "will disproportionately affect youth of color." Nat'l Council on Crime & Delinquency, *supra*, at 37. Adult criminal sanctions for juveniles, and the faulty link between race and crime that drives them, diminished the mitigating value of youth and, therefore, undermined an accurate consideration of culpability required in sentencing.

Youthfulness unquestionably has a bearing on culpability; this Court's precedents recognize the differences between youth and adults and the diminished culpability of juvenile offenders.[32] But the racial stereotypes animating the laws that allow

---

[32] *See Graham*, 130 S. Ct. at 2026-27; *Roper,* 543 U.S. at 569-70; *see also J.D.B.*, 131 S. Ct. at 2403-04 (detailing this Court's precedents describing differences between youth and adults); *Thompson v. Oklahoma*, 487 U.S. 815, 834-35 (1988) (O'Connor, J., concurring) ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. . . . The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.") (citations and internal quotation marks omitted); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (discussion of children less responsible than adults).

life without parole sentences for children – and the racially disproportionate implementation of these extreme sentences – demonstrate that children of color are less likely to receive the "benefit" of youth in the context of sentencing for serious crimes. The race-based, super-predator narrative itself is "the antithesis of childhood;" thus, the policies it wrought treat youth accordingly. Nunn, *supra*, at 713.

Social science studies confirm the pernicious impact of racial stereotypes that characterize the juvenile, super-predator narrative. In one study, researchers activated negative stereotypes about juvenile offenders of color in the minds of 200 police and probation officers. Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. Hum. Behav. 483, 488-95 (2004). Ultimately, the researchers found that "unconscious biases trigger the belief that [African-American adolescent offenders] are adult-like and therefore as blameworthy as adults who commit similar crimes." *Id.* at 500. Police officers were "less likely to judge the offender as immature (by virtue of adolescence) and more likely to perceive him as culpable and deserving of punishment." *Id.* at 494. Moreover, the research demonstrated that "the more culpable an offender was perceived to be, the greater the endorsed punishment." *Id.* at 498.[33]

Another study, which examined probation

---

[33] The "automatic stereotype activation does not require perceivers to endorse the stereotype, to dislike African Americans, or to hold any explicit prejudice toward that group. Even decision makers with good intentions are susceptible." *Id.* at 499.

officers' narrative reports concerning sentencing recommendations for youth offenders, also confirmed that race undermined culpability determinations. *See* Bridges & Steen, *supra*, at 557-58. The researchers analyzed what the probation officers deemed the cause of the youth's criminal behavior and found that "officers describe[d] black and white youths differently, referring to negative personality traits for black youths and more negative environmental influences for whites." *Id.* at 561. "[B]lack youths were judged [by probation officers] to have a higher risk of reoffending than . . . white youths." *Id.* Moreover, researchers found that "[b]eing black significantly reduces the likelihood of negative *external* attributions," such as peer groups, family dysfunction and drug abuse, "and significantly increases the likelihood of negative *internal* attributions, even after adjusting for severity of the presenting offense and the youth's prior involvement in criminal behavior." *Id.* at 563-64 (emphasis in original). The perceived negative personality traits of African-American and other youth of color led officials to assess them as more culpable and dangerous than white youth and, therefore, to recommend more severe sentences for youth of color. *Id.* at 567.

In light of the preceding arguments, the possibility that race may play any role in the administration of justice is especially disturbing in the context of life without parole sentences for youth. This Court has recognized the unique severity of such sentences, which "alter[ ] the offender's life by a forfeiture that is irrevocable." *Graham*, 130 S. Ct. at 2027. At bottom, the gross racial disparities that

pervade life without parole sentencing for children demonstrate that negative perceptions of youth of color have stymied the proper evaluation of their culpability. As detailed in Section I, race cannot play any role in the imposition of criminal sanctions. The influence of race on the sentencing of youth to life without parole, therefore, invalidates and renders unconstitutional the practice of sentencing children to die in prison.

CONCLUSION

The current sentencing structure that imposes life without parole sentences on youth offenders was borne out of racially charged stereotypes about children of color. While these stereotypes have been proven false, they have nevertheless undermined the constitutionally mandated evaluation of a youth's culpability. This is demonstrated by stark racial disparities for children caught within the criminal justice system and subsequently sentenced to life without parole. Under such circumstances, the substantial risk of imposing excessive sentences on children calls into question the constitutionality of the most extreme sentence currently available to them. For these reasons, in addition to those raised by Petitioners and their supporting amici, this Court should categorically bar all children under the age of 18 from receiving life without parole sentences.

Respectfully submitted,

JOHN PAYTON
Director-Counsel
DEBO P. ADEGBILE
CHRISTINA SWARNS
VINCENT M. SOUTHERLAND
Counsel of Record
JIN HEE LEE
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson St., 16th Fl.
New York, NY 10013
(212) 965-2200
vsoutherland@naacpldf.org

January 17, 2012

ADDENDUM

The NAACP Legal Defense & Educational Fund, Inc. (LDF), is a non-profit corporation formed to assist African Americans and others who are unable, on account of poverty, to employ legal counsel to secure their rights to equal protection under the law. LDF has a long-standing concern with the impact of racial discrimination on the criminal justice system. It has served as counsel of record and/or as amicus curiae in this Court in, *inter alia*, *Graham v. Florida*, 560 U.S. __, 130 S.Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Batson v. Kentucky*, 476 U.S. 79 (1986); *McClesky v. Kemp*, 481 U.S. 279 (1987); *Ham v. South Carolina*, 409 U.S. 524 (1973); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Furman v. Georgia*, 408 U.S. 238 (1972); and *Swain v. Alabama*, 380 U.S. 202 (1965).

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (CHHIRJ) continues the unfinished work of Charles Hamilton Houston, one of the Twentieth Century's most talented legal scholars and litigators. The CHHIRJ marshals resources to advance Houston's dreams for a more equitable and just society. It brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators, and policymakers to focus on, among other things, reforming criminal justice policies.

LatinoJustice PRLDEF was founded in 1972 as the Puerto Rican Legal Defense and Education Fund and is one of the nation's leading civil rights public interest law offices that represents Latinas and Latinos throughout the Eastern seaboard and works

to increase their entry into the legal profession. LatinoJustice PRLDEF has a strong interest in addressing civil rights and human rights violations within the Latino communities of the United States and uses the courts to rectify these abuses. Accordingly, it has an interest in the juvenile justice matters presented in this litigation and their effects on Latino youth.

The Asian American Legal Defense and Education Fund (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. The racially discriminatory and barbaric treatment of juveniles by the criminal justice system threatens the rights of Asian Americans and all Americans.

The Leadership Conference on Civil and Human Rights is a diverse coalition of more than 200 national organizations charged with promoting and protecting the rights of all persons in the United States. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. The Leadership Conference works to build an America that is as good as its ideals, and towards this end, opposes the sentencing of juveniles to life without parole, a practice in violation of the Eighth Amendment's bar against cruel and unusual punishment. Fairness and equality in the administration of justice is a fundamental civil and

human right, but the extreme racial disparities that exist within the criminal justice system denies this right to the most vulnerable segments of society, including minorities and youth. In order to advance its mission, The Leadership Conference is dedicated to eliminating all forms of discrimination from our criminal justice system, and as such, has a vital interest in the outcome of this case.