No. 18-217

In The Supreme Court of the United States

RANDALL MATHENA, WARDEN,

Petitioner,

v.

LEE BOYD MALVO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF FORMER WV DELEGATE JOHN ELLEM, FORMER HI REP. KAREN AWANA, HI REP. JOHN MIZUNO, NV ASSEMBLYMAN JOHN HAMBRICK, VT REP. BARBARA RACHELSON, UT REP. V. LOWRY SNOW, AR SEN. MISSY IRVIN, AND AR SEN. GREG LEDING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI[1]

The Amici who submit this brief are current or former state legislators who successfully sponsored or cosponsored legislation in their states that banned the use of life without parole sentences on children. Two of them, John Ellem and V. Lowry Snow, are further acting as counsel for the Amici in submitting this brief. Amici believe that their legislative perspectives and experiences may assist the Court in resolving the issues presented in this case by providing insight into how state policymakers and their constituents from around the country viewed the Court's decisions in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) concerning the use of life without parole sentences for children.

As Republican and Democratic state legislators from across the country, Amici have spent the past 5 years discussing this Court's decisions, and reviewing the research underpinning this Court's analyses with fellow lawmakers and their respective constituents. Some of the Amici would describe themselves as very conservative, embracing the philosophy of originalism in interpreting the Constitution, while others see themselves as very liberal, viewing the Constitution through a more flexible lens to account for intervening societal changes. And there are some who

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae or their counsel made a monetary contribution to its preparation or submission.

fall in-between these disparate political ideologies and views of constitutional interpretation.

The Amici include Arkansas State Senators Missy Irvin (R) and Greg Leding (D), former West Virginia Delegate John Ellem (R), Utah Representative V. Lowry Snow (R), Nevada Assemblyman John Hambrick (R), Vermont Representative Barbara Rachelson (D), Hawaii State Representative John Mizuno (D) and former Representative Karen Awana (D).

SUMMARY OF ARGUMENT

The Fourth Circuit's decision correctly concludes that "*Miller's* holding potentially applies to any case where a juvenile homicide offender was sentenced to life imprisonment without the possibility of parole."[2] As *Montgomery* made clear, "under *Miller*, the Eighth Amendment bars life-without-parole sentences for all but those rare juvenile offenders whose crimes reflect permanent incorrigibility."[3] *Montgomery* further held that the *Miller* holding established a substantive rule of law and thus must be applied retroactively.[4]

As the actions of Amici show, these legislators not only support this Court's decisions but have used them to inform their states' legislative deliberations in crafting more age-appropriate sentencing standards

[2] *Malvo v. Mathena*, 893 F.3d 265, 274 (4th Cir. 2018).

[3] *Id.*

[4] *Id.*

for children convicted of the most serious crimes. Whether it was in floor speeches, presentations in committee or legislative findings, legislators from states with both mandatory and discretionary life without parole sentencing schemes viewed *Miller* and *Montgomery*, and the reasoning underlying these decisions, as impacting how their states sentenced children and passed legislation accordingly.

Prior to 2012, eight states either already banned life without parole sentences for children or had no children serving such sentences.[5] Since then, both legislatures and courts in an additional thirty-six states and the District of Columbia have relied on *Miller* and *Montgomery* to pass laws or issue court rulings providing children sentenced to life without parole with a re-sentencing hearing, establish new sentencing procedures, and/or eliminate life without parole sentences for children, respectively.[6] The vast

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[5] Alaska Stat. §12.55.015(g); Colo. Rev. Stat. Ann. §18-1.3-401(4)(b); Kan. Stat. Ann. §21-4622; Ky. Rev. Stat. Ann. §640.040; *Shepherd v. Commonwealth*, 251 S.W.3d 309, 320-321 (Ky. 2008); Campaign for the Fair Sentencing of Youth, Montgomery Momentum, https://fairsentencingofyouth.org/wp-content/uploads/Montgomery-Anniversary-2018-Snapshot1.pdf (as visited August 14, 2019).

[6] *See* Wyo. Stat. Ann. §6-10-301(c) (2013); W.Va. Code §61-11-23 (2014); Haw. Rev. Stat. §706-656-657 (2014); Nev. Rev. Stat. §176.025 (2015); Conn. Gen. Stat. §54-125a(f) (2015); Del. Code tit. 11, §4204A (2013); Utah Code §76-3-209 (2016); 13 V.S.A. §7045 (2015); A.C.A. §5-4-108 (2017); Cal. Pen. Code §§3051 and 4801 (2017); N.D. Cent. Code §12.1-32-13.1 (2017); Tex. Pen. Code §12.31 (2013); N.J. Rev. Stat. §2C:11-3 (2017); S.D. Codified Laws §22-6-1.3 (2016); D.C. Code §24-403.03 (2017); S.B. 1008, 80th Leg., Reg. Sess. (Or. 2019); Fla. Stat. §921.1402 (2014); Ala. Code §13A-6-2 (2016); 730 Ill. Comp. Stat. §5/5-4.5-105

majority of jurisdictions in the United States, either through their legislatures or their courts, view *Miller* and *Montgomery* as applying to states with both mandatory and discretionary sentencing schemes. Only six of the fifty states have neither passed legislation nor begun the re-sentencing process for children currently serving such sentences.

Given that the overwhelming majority of both state legislatures and courts understand the *Miller* and *Montgomery* holdings as applying to both mandatory and discretionary sentencing schemes, and have taken substantive action implementing this precedent, the Court should affirm the decision below.

(2016); La. Rev. Stat. §15:574.4 (2016); Mich. Comp. Laws §769.25 (2014); Mo. Rev. Stat. §565.033-565.034 (2016); Neb. Rev. Stat. §28-105.02 (2013); N.C. Gen. Stat. §15A-1340.19B (2012); 18 Pa. Code §1102.1 (2012); *Diatchenko v. Dist. Attorney for the Suffolk Dist.*, 1 N.E.3d 270 (Mass. 2013); *State v. Bassett*, 428 P.3d 343 (Wash. 2018); *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016); *State v. Long*, 8 N.E.3d 890 (Ohio 2014); *Aiken v. Byars*, 765 S.E.2d 572 (S.C. 2014); *Windom v. State*, 398 P.3d 150 (Idaho 2017); *Luna v. State*, 387 P.3d 956 (Okla. Crim. App. 2016); *Veal v. State*, 784 S.E.2d 403 (Ga. 2016); *State v. Ali*, 855 N.W.2d 235 (Minn. 2014); *Parker v. State*, 119 So.3d 987 (Miss. 2013); *In re Petition of State*, 103 A.3d 227 (N.H. 2014); and *State v. Valencia*, 386 P.3d 392 (Ariz. 2016).

ARGUMENT

I. STATE LEGISLATORS OF DIVERSE POLITICAL IDEOLOGIES FROM ACROSS THE COUNTRY SUPPORT THIS COURT'S DECISIONS IN *MILLER* AND *MONTGOMERY* AND RELIED ON THEM IN PUTTING FORTH LEGISLATION BANNING DISCRETIONARY AND MANDATORY LIFE WITHOUT PAROLE SENTENCES FOR CHILDREN

A. THE WEST VIRGINIA EXPERIENCE

John Ellem is a Republican and former West Virginia legislator who served in the state House of Delegates from 2001 to 2014. West Virginia was the first state of those profiled in this brief to pass legislation post-*Miller*. The 2014 legislative session saw a bipartisan group of eleven members of the West Virginia House of Delegates come together to sponsor H.B. 4210.[7] At that time, West Virginia only had children serving *discretionary* life without parole sentences.[8]

H.B. 4210 eliminated life without parole as a sentencing option for children under 18, replacing it with life with parole eligibility after 15 years.[9] For all youth tried in adult criminal court, it further requires the sentencing judge to consider the mitigating factors of

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[7] Amicus John Ellem was one of the co-sponsors of the bill. Then-Delegate Ellem, was the Republican minority chairman of the Judiciary Committee.

[8] W.Va. Code §§61-2-1, 61-2-2 and 62-3-15.

[9] W.Va. Code §61-11-23.

youth set forth in *Miller*, including childhood trauma, family and community environment, and the child's role in the offense.[10] The results of a comprehensive mental health examination must also be considered.[11] The bill further requires a parole board to consider the diminished capacity of youthful offenders and their opportunities for growth and increased maturity to ensure that youth have a meaningful opportunity for release.[12] The legislation does not mandate that parole be given but establishes a framework for the parole board to provide a full and meaningful hearing.

The bill passed the West Virginia House with 91 in favor and six opposed (H.B. 4210 Roll #185 2/26/19) and then went on to pass the WV Senate 34 in favor and no opposed (H.B. 4210 Roll #26 3/8/14). It was signed into law by the Governor on March 28, 2014 (House Journal 3/28/14 pg. 2840).

Sponsor and lead proponent of the bill, Delegate Ellem later noted: "H.B. 4210 passed in West Virginia with widespread bipartisan support. This country is experiencing a wave of criminal justice reform with strong leadership from both sides of the aisle. Legislation ending life-without-parole sentences for children fits squarely into this "smart-on-crime" mentality. As a fiscal conservative, I know we are often incarcerating children long past the point when they represent a threat to public safety. We owe it to our children and

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[10] *Id.*

[11] *Id.*

[12] W.Va. Code §62-12-13b.

our communities to return these individuals to the community as the contributing citizens they all have the potential to become."[13]

The inclusion of the *Miller* factors in H.B. 4210, as well as the reference to *Roper*, *Graham*, and *Miller* in the original legislative findings, demonstrate that the legislature considered that the state was impacted by *Miller's* central holding even though it used a discretionary sentencing scheme to impose life without parole sentences on children.[14] The West Virginia Legislature recognized that the logic underlying the need for an individualized sentencing hearing as articulated in *Miller* applies to every child sentenced as an adult, thereby heeding what the Court said in *Miller*, that "a sentencer misses too much if he treats every child as an adult."[15]

There was a recognition that judges in the state should consider child status, its impact on why the child may have committed the crime, and the child's capacity for rehabilitation in the way the *Miller* Court

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[13] Amici speak directly to the Court in this Brief, and each adopts the statements attributed to him or her herein as their own.

[14] H.B. 4210, 81st Leg., Reg. Sess. (W. Va. 2014) ("The purpose of this section is to . . . establish sentencing procedures prior to the sentencing of juveniles who are tried and convicted in adult court in line with the meaning and spirit of *Roper v. Simmons*, 125 S. Ct. 1183 (2005); *Graham v. Florida*, 133 S. Ct. 1799 (2010); *J.D.B. v. North Carolina*, 131 S. Ct. 502 (2011); and *Miller v. Alabama*, 132 S. Ct. 2455 (2012))"; *see also Miller v. Alabama*, 132 S. Ct. 2455 (2012).

[15] *Id.* at 2468.

articulated.[16] Thus, the West Virginia Legislature enacted front-end reform to include the consideration of the *Miller* factors **at sentencing, as well as back-end parole review**.[17] The Court later affirmed West Virginia's parole-review approach to addressing a *Miller* violation in *Montgomery* when it cited a similar statute enacted by the Wyoming legislature providing parole eligibility to children previously sentenced to life without parole instead of resentencing them.[18]

Amicus John Ellem believes now, as he believed then, that *Miller* is relevant to states like West Virginia, and the Court's holding that "the sentence of life without parole is disproportionate for the vast majority of juvenile offenders" applies equally to children sentenced under discretionary, as well as mandatory sentencing schemes. To ensure that their intentions and feelings about the practice of sentencing children to die in prison were fully understood, the authors of H.B. 4210 included the following legislative finding when they introduced their legislation:

> "Life imprisonment without parole for juvenile offenders is a violation of human rights, international norms, and the constitutional prohibition on cruel and unusual punishment."[19]

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[16] *Id.*

[17] W.Va. Code §§61-11-23 and 62-12-13b (2014).

[18] *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

[19] H.B. 4210, 81st Leg., Reg. Sess. Introduced version (W. Va. 2014).

B. THE HAWAII EXPERIENCE

Former Hawaii State Representative Karen Awana was a Democratic legislator who represented District 44 from 2007 to 2014. She was the lead author of H.B. 2116, which banned life without parole sentences for children during the 2014 legislative session. Hawaii State Representative John Mizuno is a Democratic legislator currently representing District 28. He previously served as Vice Speaker of the Hawaii House of Representatives and was one of the original sponsors of H.B. 2116.

Hawaii's legislation was signed into law a few months after West Virginia banned life without parole sentences for children. The bill passed the State Senate unanimously and had only one vote against it in the House of Representatives. In its findings supporting introduction of the bill, the Hawaii legislature echoed its West Virginia colleagues in citing approvingly to *Miller's rationale*:

> "Children are more vulnerable to negative influences and outside pressures, including from family and peers, they have limited control over their own environment, and they may lack the ability to extricate themselves from horrific, crime-producing settings. . . . Youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as the youth matures into an adult and neurological development occurs, the individual

> can become a contributing member of society."[20]

Hawaii, like other states, relied on this Court's decisions to craft sentencing policy for children facing both discretionary and mandatory life without parole sentences.[21] Similar to its sister-state Arkansas, Hawaii had a sentencing scheme with both mandatory and discretionary life without parole sentences for children. Prior to 2014, Hawaii's first degree murder statute stated that any person "convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment without possibility of parole."[22] Under Hawaii's enhancement provision for second degree murder, this sentence was authorized for children: "[T]he court may sentence a person who has been convicted of murder in the second degree to life imprisonment without possibility of parole . . . if the court finds that the murder was especially heinous . . . ."[23]

The Hawaii Legislature could have chosen to align the state's first degree murder statute with its enhanced second degree murder provision, thereby making life without parole a completely discretionary sanction. Amici from Hawaii and the other principal authors of H.B. 2116 believed that *Miller's* holding

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[20] H.B. 2116, 27th Leg., Reg. Sess. (Hi. 2014).

[21] *Id.*

[22] Haw. Rev. Stat. §706-656-657 (2013).

[23] *Id.*

required individualized sentencing before life without parole could be imposed on a child, and that such sentences should be rare. For children in Hawaii, however, they believed such sentences were never appropriate.

Representative Mizuno and former Representative Awana state that:

> "Life without parole sentences for children are inherently wrong. If we are to be a moral society, we must be willing to consider forgiveness for children who make mistakes and who harm others, no matter what they've done. We do not believe this idea to be a liberal or conservative one, but an American one, deserving of support from all political and judicial philosophies. We believe what the Court said in *Miller* to be an unassailable truth, that the justification for the use of life without parole sentences on children is greatly diminished even when they commit terrible crimes. We included this quote in H.B. 2116 for a reason. Regardless of whether the sentence was mandatory or discretionary, we saw the Court's words in *Miller* as holding great weight for any child facing the prospect of being sentenced to die in prison without any hope of leaving prison, except when they are carried out in a coffin. Knowing what we know now about children's brain development and their potential for rehabilitation, the idea of sentencing a child to life without parole, without the strictest of safeguards and opportunity to demonstrate they are not beyond rehabilitation is, in our view, cruel and unusual punishment."

C. THE NEVADA EXPERIENCE

Nevada Assemblyman John Hambrick is a Republican legislator currently representing Assembly District 2. He has served in the legislature since 2009 and was Speaker of the Nevada Assembly when he successfully carried A.B. 267 through the legislature – unanimously. Assemblyman Hambrick is a life-long conservative and former law enforcement officer.

In 2014, Nevada underwent a monumental political shift. For the first time since 1929 Republicans won control of both state houses and the Governor's mansion. Nevada Republicans seized control of the state Assembly for the first time since 1985, and Assemblyman Hambrick was chosen as the first Republican Speaker in nearly 30 years. With consolidated power, the newly-minted Speaker chose to champion A.B. 267 and end the use of life without parole sentences on children in Nevada – a state that had a discretionary sentencing scheme and more than 20 children serving that sentence.[24]

Although Nevada passed this legislation in 2015, the shifting legal landscape across the country the prior year helped inform the conversation in the state legislature. While Hawaii and West Virginia were deliberating their respective bills, the State Supreme Courts in Ohio and South Carolina were also considering the impact of *Miller* on their state's discretionary sentencing schemes. In Ohio, the State Supreme Court, in an opinion authored by elected-Republican Justice

[24] Nev. Rev. Stat. §200.030.

Judith Lanzinger, remanded a case for re-sentencing finding that the "sentence did not comport with the newly announced procedural strictures of *Miller v. Alabama*."[25] Similarly, the South Carolina State Supreme Court, in an opinion authored by Justice Hearn, stated: "*Miller* is clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution." It then held that children given discretionary life without parole were entitled to re-sentencing hearings.[26]

Miller's plain language, as well as its interpretation by State Supreme Courts, provides the context for understanding how legislatures in states with discretionary life without parole considered the impact of the decision. The following exchange between Assembly Judiciary Committee Chairman, Ira Hansen, and attorney-advocate James Dold, on the inclusion of the *Miller* factors in the original version of A.B. 267 is demonstrative:

> "Chairman Hansen: All of these things listed in section 1, do public defenders, judges, and juries consider this right now? These are serious capital offenses. Are these issues already being discussed prior to sentencing people in Nevada?
>
> James Dold: Not all the factors that were articulated by the Miller case are necessarily

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[25] *State v. Long*, 8 N.E.3d 890, 899 (Ohio 2014).

[26] *Aiken v. Byars*, 765 S.E.2d 572, 576-77 (S.C. 2014).

> considered at the time of sentencing. At the time of transfer hearings, many of those provisions are considered; but not necessarily at the time of sentencing.
>
> Chairman Hansen: During the trial are those issues brought up?
>
> James Dold: Yes, sometimes, by the defense attorneys. They certainly could have been brought up, but they were not mandated to be brought up as the Supreme Court required in Miller. That is why, for instance, the South Carolina Supreme Court, much like Nevada, was a discretionary life without parole state. The supreme court in that state actually ruled that Miller was applicable to South Carolina because these mitigating factors were not specifically on the record and were not considered at the time of sentencing."[27]

Miller's emphasis on the importance of individualized sentencing for children facing a life without parole sentence, and the recognition that it applied to all children, was a key consideration for the Nevada Legislature weighing the merits of A.B. 267.[28] The Nevada legislators were not alone in viewing *Miller* as implicating states with discretionary sentencing schemes

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[27] The Sentencing and Parole of Juvenile Offenders: Hearing on A.B. 267 Before the Asm. Comm. on the Judiciary, 78th Leg. (2015) (Exchange between James Dold and Ira Hansen, Committee Chairman).

[28] *Id.*

as the Ohio and South Carolina Supreme Courts' decisions demonstrate. Part of the constitutional concern for states like Nevada was that the procedural protections articulated in *Miller* were not in place to ensure that only "irreparably corrupt" and "permanently incorrigible" children were subject to the harshest possible punishment. As the legislature ultimately concluded that such sentences were never appropriate for children, Nevada opted to bar life without parole sentences for children altogether.

Although *Montgomery* had not yet been decided, the majority of jurisdictions believed *Miller* to be retroactive. This weight of authority also helped the Nevada legislature reach the conclusion that fairness required A.B. 267 to apply to prior cases. As a result, most child offenders in Nevada, including those sentenced to life without parole, became parole-eligible after serving 15 or 20 years in prison.[29] Since the enactment of A.B. 267, many former juvenile lifers in Nevada have been granted parole and are living productive, law-abiding lives.

In stressing the importance of his legislation and the need to show mercy to children convicted of serious crimes, Assemblyman John Hambrick stated:

> "These are not partisan issues. We're talking about kids. Whether you are a Republican or a Democrat, a conservative or a liberal, this is about the soul of America and who we want to be as a country. As a former law enforcement

[29] Nev. Rev. Stat. §213.12135.

> officer I understand the need to protect society from dangerous people, including juvenile offenders. But there is no reason to extinguish all hope from children. We can protect public safety and still show child offenders compassion. It is what any one of us would want if it were ourselves or our own children facing the possibility of never leaving prison alive. After all, there but for the grace of God go I."

D. THE VERMONT EXPERIENCE

Vermont State Representative Barbara Rachelson is a Democratic legislator who has represented the Chittenden-6-6 District since 2013. She was the lead author of H. 62 which banned juvenile life without parole.

Prior to the 2015 legislative session, Vermont authorized the use of life without parole sentences for children convicted of first and second degree murder, and mandated the sentence for aggravated murder.[30] The propriety of such sentences for children had not been thoroughly debated previously. Fortunately, at the time the legislature took up H. 62 no child had been sentenced to life without parole in Vermont. Nevertheless, Representative Rachelson and her colleagues in the legislature wanted to make sure that never happened.

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[30] 13 V.S.A. §§2303 and 2311.

In light of *Miller*, the shifting legal and political landscape nationally, and the evolving science concerning juvenile brain and behavioral development, the Vermont Legislature overwhelmingly approved H. 62 with only six votes against it in the State Senate. The bill also received support from the Vermont Attorney General's Office.

Representative Rachelson's prepared remarks on the House Floor provide additional insight into how the Court's decision in *Miller* was understood by legislators in Vermont:

> "The United States Supreme Court, in a series of decisions during the last decade, has said that children are constitutionally different from adults and should not be subject to the nation's harshest punishments. In 2005, the Court struck down the use of the death penalty on children in *Roper v. Simmons*; in 2010, the Court struck down life without parole for non-homicide offenses in *Graham v. Florida*; and most recently, in *Miller v. Alabama* (2012), the Court struck down mandatory life without parole sentences for homicide offenses in 28 states and held that any time a child faces a potential life without parole sentence in the U.S., there must be an individualized sentencing hearing where the sentencer considers the mitigating factors of youth (including age at the time of the offense, history of traumatic abuse, and potential for rehabilitation, etc.). . . . This bill will ensure that courts in Vermont are in compliance with these Supreme Court decisions and the U.S.

> Constitution's 8th Amendment . . . by removing life without parole as a sentencing option for children."[31]

Representative Rachelson, in speaking to why H. 62 was so important stated:

> "As states were figuring out how they would respond to the Supreme Court's decision in *Miller*, I felt it was important for our state to send a strong message that life without parole is never appropriate for a child. It is cruel and unusual punishment to tell someone so young that they will die in a cage. Prohibiting the sentence from being used on children does not excuse what they've done, but rather is an expression of who we are and who we should be as a people. Love, mercy, and forgiveness must be the foundation of our society and I think this bill was the embodiment of that."

E. THE UTAH EXPERIENCE

Utah Representative V. Lowry Snow is a Republican legislator currently representing District 74. He has served in the legislature since 2012 and was the lead author of H.B. 405 which was overwhelmingly passed by the Utah General Assembly in 2016.

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[31] H. 62, Vermont House of Representatives (2015) (Floor statement of Rep. Barbara Rachelson).

Prior to the passage of H.B. 405, on January 25, 2016, this Court decided *Montgomery v. Louisiana*. In that decision, the Court explained that:

> "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity. . . . Because *Miller* determined that sentencing a child to life without parole excessive for all but "'the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status" – that is, juvenile offenders whose crimes reflect the transient immaturity of youth."[32]

The process of legislating does not happen in a vacuum. On issues with constitutional implications, policymakers are aware of the legal landscape as they debate the proper course of action. *Montgomery* and *Miller's* holdings were both welcomed and helpful to policymakers in this respect. Both decisions provided important guidance during the legislature's deliberative process as it weighed whether such an irrevocably harsh sentence was ever appropriate for a child.

Utah came to the conclusion that it was never appropriate. H.B. 405, which passed 64-3 in the House and 23-0 in the Senate, categorically banned life without

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[32] *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016).

parole for children under 18.[33] Utah thus became the first state post-*Montgomery* to eliminate life without parole sentences for children, followed later that year by South Dakota.[34] H.B. 405's legislative history is instructive in showing how the legislature relied on this Court's decisions. As the lead author of the bill, Amicus Rep. V. Lowry Snow from Utah made the following remarks during the House Floor debate:

> "In *Roper vs. Simmons*, a 2005 case, the U.S. Supreme Court struck down the death penalty for children finding that it was in violation of the 8th amendment's prohibition [on] cruel and unusual punishment. The bill before you today, in some respects, is consistent with a line of cases that begins with that case and continues with *Graham v. Florida*, [a] 2010 U.S. Supreme Court case that struck down life without parole sentences for non-homicide offenses for youth offenders. That is, for youth offenders that committed a crime under the age of 18. The court held that states must give children a realistic opportunity to obtain release. In 2012, it issued [the] *Miller v. Alabama* case. The U.S. Supreme Court struck down mandatory life without parole sentences for homicide offenses committed by juveniles. The Court found in that case that the courts must take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison. And then the *Miller* case was

[33] H.B. 405, 61st Leg., Gen. Sess. (Ut. 2016).

[34] *Id.*; S.B. 140, 91st Leg., Gen. Sess. (S.D. 2016).

> affirmed with a case this year in *Montgomery v. Louisiana*, and the Court went a little bit further in that case and said that a sentence of life without parole is disproportionate for the vast majority of juvenile homicide offenders and raises a grave risk that many are being held [in violation of the constitution]. . . . And I believe that the law that is laid out in this bill is consistent with Supreme Court decisions."[35]

While the Utah legislature had discretion in deciding what policy choice to make, that decision was ultimately informed, in part, by this Court's child sentencing doctrine beginning with *Roper* and continuing through *Montgomery*. It also speaks to Amicus Snow's personal belief that the Court in these decisions "got it right," and that as a matter of policy and constitutional jurisprudence the law as interpreted by the Fourth Circuit should be upheld.

Amici, along with other policymakers and lower courts have taken what this Court said in *Miller* and *Montgomery* to heart and have acted accordingly. Child status matters when it comes to policymaking and what constitutional protections should be afforded to children. Representative Snow's floor statement on H.B. 405 perhaps best captures this sentiment:

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[35] H.B. 405, Utah House of Representatives (2016) (Floor remarks by Rep. V. Lowry Snow).

> "The bill before you recognizes that [age] difference, that the courts have recognized. In fact, law in most states recognize [age differences] which is why children under the age of eighteen can't vote, they can't contract, and there is a recognition that they lack the necessary mental capacity to undertake those activities. The courts in exercising sentences and the [U.S.] Supreme Court in reviewing those sentences recognizes that difference as well and that's what this bill does."[36]

F. THE ARKANSAS EXPERIENCE

Arkansas State Senator Missy Irvin is a Republican legislator currently representing Senate District 18. She has served in the legislature since 2011 and has been a life-long conservative. Arkansas State Senator Greg Leding is a Democratic legislator currently representing Senate District 4. He has served in the legislature since 2011 and previously served as Minority Leader in the Arkansas House of Representatives.

In 2017, Senator Irvin was the lead sponsor of S.B. 294, now Act 539, which implemented the *Miller* and *Montgomery* decisions and banned the use of life without parole sentences on children.[37] The law applied both prospectively and retroactively to more than 100 individuals who had been sentenced to life without

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[36] *Id.*

[37] S.B. 294, 91st Gen. Ass., Reg. Sess. (Ar. 2017).

parole for either first degree or capital murder.[38] Children convicted of first degree murder in Arkansas were serving discretionary life without parole, whereas children convicted of capital murder were serving mandatory life without parole.[39] Relying on this Court's decisions in *Miller* and *Montgomery*, the legislature applied the provisions granting parole-eligibility to all children serving life without parole regardless of whether their sentence was "mandatory" or "discretionary."

Like its sister-state Nevada, the shifting legal landscape from the previous year was instructive for the Arkansas Legislature as it considered S.B. 294. In 2016, as Utah and South Dakota were passing their bills, the Georgia Supreme Court and the Oklahoma Court of Criminal Appeals held the *Miller* rule applicable to their respective states' discretionary sentencing schemes.[40] This further solidified the belief that *Miller* and *Montgomery* applied to all children serving life without parole sentences.

After Governor Hutchinson signed S.B. 294 into law, Senator Irvin remarked:

> "No child should ever be denied hope or love from our society and there is no such thing as a throw-away child. My faith teaches that all of us, especially our children, can find

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[38] *Id.*

[39] *Id.*

[40] *Veal v. State*, 784 S.E.2d 403, (Ga. 2016); *see also Luna v. State*, 387 P.3d 956 (Okla. Crim. App. 2016).

> salvation and redemption. Our law now reflects this important biblical teaching by providing hope of a second chance to children who demonstrate that they are more than their worst act."

With the passage of S.B. 294, Arkansas became the second state in the South, after Texas, to ban the use of life without parole sentences on children. Unlike on other issues, Senator Irvin and her caucus found themselves in complete agreement with Senator Leding and his Democratic colleagues. Her legislation passed with overwhelming bipartisan support. The bill passed the state Senate on a vote of 22-4 and the state House of Representatives on a vote of 86-1.

Prior to the passage of S.B. 294, then-Representative Leding worked with Senator Irvin during the 2015 General Assembly to introduce the bipartisan H.B. 1197, which also proposed to eliminate life without parole sentences for children.[41] While the bill did not pass, it sparked an important conversation around the state concerning life without parole sentences for children.

Although in 2013 the legislature had prospectively made all life sentences discretionary for children, both then-Representative Leding and Senator Irvin felt that the law did not go far enough in providing child offenders with the opportunity to obtain a second

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[41] H.B. 1197, 90th Gen. Ass., Reg. Sess. (Ar. 2015).

chance at life outside of prison walls.[42] Approximately half of the juvenile lifer population in Arkansas was, in fact, serving discretionary life without parole sentences. They thus formed a bipartisan alliance with overwhelming support, eventually leading to the enactment of Act 539, providing children serving both discretionary and mandatory life without parole sentences with a chance to have their cases reviewed by the parole board.

Senator Irvin and Senator Leding jointly remarked that:

> "The Court's decisions in *Miller* and *Montgomery* were very helpful to us as lawmakers. Arkansas was involved as one of the companion cases in *Miller* and not many of us realized that so many children had been sentenced to life without parole. We believed that the force of the decisions applied equally to children serving discretionary, as well as mandatory life without parole. We think most people view it that way. At the end of the day, we believed these decisions were good law and felt that we should not treat children differently based on whether they received a mandatory or discretionary sentence. Nor did we believe that there was anything a child could do to merit removing all hope from them, which is what life without parole does to a child. That's not to say that some children who commit serious crimes should not be incarcerated for the rest of their life. Some should. But no one is

[42] H.B. 1993, 89th Gen. Ass., Reg. Sess. (Ar. 2013).

> equipped or qualified to make that determination on a child so young and that is what our law now reflects."

As the principal authors of two separate bills, both Senator Irvin and Senator Leding incorporated the same legislative intent into their respective legislation, citing this Court's findings as follows:

> "As the United States Supreme Court held in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), 'only a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behavior,' and 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,' including 'parts of the brain involved in behavior control. . . .' The United States Supreme Court has emphasized through its cases in *Miller, Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), that 'the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.' "[43]

[43] S.B. 294, 91st Gen. Ass., Reg. Sess. (Ar. 2017); *see also* H.B. 1197, 90th Gen. Ass., Reg. Sess. (Ar. 2015).

To provide additional clarity so that everyone understood the purpose of the bill, the authors included this last sentence in the "legislative intent" section of Act 539:

> "It is the intent of the General Assembly to eliminate life without parole as a sentencing option for minors and to create more age-appropriate sentencing standards in compliance with the United States Constitution for minors who commit serious crimes."[44]

Instead of creating a distinction between children sentenced to mandatory versus discretionary life without parole, the Arkansas Legislature put children serving either sentence on equal footing by retroactively eliminating the sentence altogether. It believed that the enactment of such reforms would bring the state into "compliance with the United States Constitution for minors who commit serious crimes."[45] Amici from Arkansas saw the constitutional protections articulated in *Miller* and *Montgomery* as applying to every child serving life without parole regardless of whether "discretion" was originally afforded to the sentencer or not. Simply put, the sentencing procedures required by *Miller* and *Montgomery* had not uniformly been applied in past cases, as evidenced by the number of children released by Act 539 who had been serving

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[44] S.B. 294, 91st Gen. Ass., Reg. Sess. (Ar. 2017).

[45] *Id.*

discretionary life sentences.[46] Had sentencers in those cases got it "right" at sentencing, children serving discretionary life without parole would be, as this court stated, "rare." In Arkansas, it wasn't.

Roughly half of the entire juvenile lifer population in the state received their sentence through a discretionary sentencing scheme. Any conclusion that these children were determined to be "irreparably corrupt" or beyond rehabilitation at the time of sentencing has proven inaccurate.[47] The Arkansas Parole Board determined that many of those once thought to be "permanently incorrigible," had been successfully rehabilitated, further bolstering Amici from Arkansas' view of *Miller* and *Montgomery* as appropriately applying to children serving both discretionary and mandatory life without parole sentences.

Finally, as a matter of public policy, had *Montgomery's* remedy only been available to children serving life without parole sentences for capital murder, it would have generated absurd results: children convicted of first degree murder – a less heinous crime – would have been punished more severely simply because their life sentence was discretionary rather than mandatory.

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[46] Eighteen former juvenile lifers have been released on parole under Act 539 as of August 14, 2019.

[47] *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

II. THE ACTIONS OF THE VAST MAJORITY OF STATE LEGISLATURES AND STATE COURTS THROUGHOUT THE COUNTRY REFLECT A SOCIETAL CONSENSUS THAT THE IMPOSITION OF LIFE WITHOUT PAROLE SENTENCES ON CHILDREN, WITHOUT THE PROTECTIONS AFFORDED BY *MILLER* AND *MONTGOMERY*, IS CRUEL AND UNUSUAL PUNISHMENT

One of the landmark decisions establishing that children should be treated differently for purposes of Eighth Amendment analysis is *Thompson v. Oklahoma*, where the court held that the death penalty violated the prohibition on cruel and unusual punishment for children under sixteen.[48] In *Thompson*, and subsequently in *Roper*, this Court viewed the movement of states away from imposing the death penalty on children as evidence of the "evolving standards of decency that mark the progress of a maturing society,"[49] and, as such, inform the parameters of the Eighth Amendment's ban against cruel and unusual punishment. Today, the overwhelming majority of states, forty-four to be exact, have issued court decisions or passed laws consistent with *Miller* and *Montgomery*, that recognize the possibility of "salvation and redemption" for all children, including those convicted of murder.[50]

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[48] *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).

[49] *Id.*; *see also Roper v. Simmons*, 543 U.S. 551 (2005) (Stevens, J., concurring).

[50] *See supra* notes 5-6.

When *Miller* and *Montgomery* were announced by this Court, state legislators relied on these decisions and looked to the developing case law at the state level to better understand their reach. As previously discussed, Amici from West Virginia and Hawaii passed laws ending life without parole sentences for children in 2014, which originally included references to the Court's decisions.[51] West Virginia also required the *Miller* factors to be considered any time a child is sentenced as an adult.[52] This legislative history underscores how, as early as 2014, states with *discretionary* life without parole viewed *Miller* as having applicability to their sentencing schemes.[53]

Around the same time, State Supreme Courts began considering the applicability of *Miller* for all children sentenced to life without parole. In 2014, the South Carolina Supreme Court held that "*Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered."[54] Ohio's Supreme Court held that sentencing courts "must separately consider the youth of a juvenile offender as a

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[51] *See* H.B. 4210, 81st Leg., Reg. Sess. (W. Va. 2014); H.B. 2116, 27th Leg., Reg. Sess. (Hi. 2014).

[52] *Id.*

[53] *Id.*

[54] *Aiken v. Byars*, 765 S.E.2d 572, 577 (S.C. 2014).

mitigating factor before imposing a sentence of life without parole in light of *Miller v. Alabama*."[55]

The following year, Nevada and Vermont passed their *Miller*-compliance laws.[56] Shortly thereafter, this Court announced its decision in *Montgomery v. Louisiana* confirming the interpretation of *Miller* by the Ohio and South Carolina Courts, as well as legislators in several states, including Nevada and West Virginia.[57] Utah became the first state following the *Montgomery* decision to pass legislation, where the bill's author referenced it and the *Miller* decision during debate on the House Floor.[58]

In 2016, the high courts in two other states addressed the impact of *Miller* on discretionary life without parole sentences in the wake of *Montgomery*. In remanding a case to the lower court, the Georgia Supreme Court stated: "although *Miller* did not outlaw LWOP sentences for the category of all juvenile murderers, *Montgomery* holds that '*Miller* announced a substantive rule of constitutional law' that 'the sentence of life without parole is disproportionate for the vast majority of juvenile offenders,' with sentencing courts utilizing the process that *Miller* set forth to determine whether a particular defendant falls into this almost-all juvenile murderer category for which LWOP

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[55] *State v. Long*, 8 N.E.3d 890, 892 (Ohio 2014).

[56] A.B. 267, 91st Leg., Gen. Sess. (Nv. 2015); H. 62, 91st Leg., Gen. Sess. (Vt. 2015).

[57] *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

[58] H.B. 405, 61st Leg., Gen. Sess. (Ut. 2016).

sentences are banned."[59] Similarly, in its decision remanding the case of a child who received a discretionary life sentence, the Oklahoma Court of Criminal Appeals found that *Miller* and *Montgomery*, "rendered a life without parole sentence constitutionally impermissible . . . unless the sentencer take[s] into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.' "[60]

The next year, Amici from Arkansas championed Act 539, which granted parole-eligibility to one of the **largest populations** of juveniles serving discretionary life without parole in the country.[61]

Amici's main purpose in chronicling their actions in the wake of the *Miller* decision is to impress upon this Court that many state policymakers viewed *Miller* and its progeny, including *Montgomery*, as applying to every state in the country regardless of whether a life without parole sentence was imposed under a mandatory or discretionary sentencing scheme. Moreover, Amici and their colleagues often relied upon these decisions, and their underlying rationale, in crafting their legislative responses.

Accordingly, Amici now ask the Court to affirm the Fourth Circuit's decision as it reflects their shared understanding of this Court's decisions in both *Miller* and

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[59] *Veal v. State*, 784 S.E.2d 403, 410 (Ga. 2016).

[60] *Luna v. State*, 387 P.3d 956, 961 (Okla. Crim. App. 2016).

[61] S.B. 294, 91st Gen. Ass., Reg. Sess. (Ar. 2017).

Montgomery, that the imposition of life without parole sentences on children amounts to cruel and unusual punishment in the vast majority of cases. Amici asks the Court to maintain the law as it currently stands and as it has been, and continues to be, interpreted by state courts and state legislators across the country. The interest of the overwhelming majority of states is served by this Court following its long line of precedent beginning with *Thompson* and continuing through *Montgomery* as it reflects American society's current values. Public policy in forty-four out of the fifty states requires that before any child can be sentenced to life without parole for a homicide offense, if at all, he or she must be provided with an individualized sentencing hearing as articulated in *Miller* wherein their youth, attendant circumstances, and capacity for rehabilitation are considered.[62] The "evolving standards of decency that mark the progress of a maturing society" are reflected in Amici's state legislative efforts, as well as the response of most states over the past seven years.

What distinguishes the use of life without parole sentences on children from other Eighth Amendment issues is the broad political and geographic diversity of state legislatures that have enacted legislation in support of and in compliance with *Miller* and *Montgomery*.[63] From Arkansas and West Virginia to Utah

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[62] *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

[63] Campaign for the Fair Sentencing of Youth, Tipping Point: A Majority of States Abandon Life Without Parole Sentences for

and Nevada, and everywhere in between, states have enacted legislation at a break-neck pace to ensure that children sentenced to life in prison have the opportunity for individualized sentencing hearings or sentencing review later in life.[64] Amici are aware of no other recent Eighth Amendment issue that has garnered as much far reaching support in every corner of the nation – by conservatives and liberals alike – than this Court's child sentencing doctrine. That is the reason Amici felt compelled to submit this brief and provide a legislative policy context for state legislative enactments following *Miller* and *Montgomery*.

Prior to *Miller*, forty-six states authorized mandatory or discretionary life without parole sentences for children without an individualized sentencing hearing where child status and attendant circumstances were thoroughly considered.[65] At that time, only four states had banned life without parole sentences entirely for children, while another four had no children serving the sentence.[66] After *Miller*, eighteen states and the District of Columbia changed their policies to prohibit life without parole sentences for children, eleven of which were states that had discretionary sentencing

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Children, https://www.fairsentencingofyouth.org/wp-content/uploads/Tipping-Point.pdf (as visited August 14, 2019).

[64] *Id.*

[65] *Id.*

[66] *Id.*

schemes or a mixture of both mandatory and discretionary sentences.[67]

In addition, as a result of rulings from courts at the state level, *Miller* and *Montgomery* have been applied to five additional states with discretionary life without parole sentencing schemes.[68] Individuals entitled to relief in those states have either been re-sentenced or are in the process of being re-sentenced.

Nine states with mandatory life without parole sentences passed laws making the sentence discretionary for children and providing for individualized sentencing hearings that focus on the distinctive characteristics of youth including potential for rehabilitation.[69] Four of the remaining ten states that have not

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[67] *See* Wyo. Stat. Ann. §6-10-301(c) (2013); W.Va. Code §61-11-23 (2014); Haw. Rev. Stat. §706-656-657 (2014); Nev. Rev. Stat. §176.025 (2015); Conn. Gen. Stat. §54-125a(f) (2015); Del. Code tit. 11, §4204A (2013); Utah Code §76-3-209 (2016); 13 V.S.A. §7045 (2015); A.C.A. §5-4-108 (2017); Cal. Pen. Code §§3051 and 4801 (2017); N.D. Cent. Code §12.1-32-13.1 (2017); Tex. Pen. Code §12.31 (2013); N.J. Rev. Stat. §2C:11-3 (2017); S.D. Codified Laws §22-6-1.3 (2016); D.C. Code §24-403.03 (2017); S.B. 1008, 80th Leg., Reg. Sess. (Or. 2019); *Diatchenko v. Dist. Attorney for the Suffolk Dist.*, 1 N.E.3d 270 (Mass. 2013); *State v. Bassett*, 428 P.3d 343 (Wash. 2018); and *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016).

[68] *State v. Long*, 8 N.E.3d 890 (Ohio 2014); *Aiken v. Byars*, 765 S.E.2d 572 (S.C. 2014); *Luna v. State*, 387 P.3d 956 (Okla. Crim. App. 2016); *Veal v. State*, 784 S.E.2d 403 (Ga. 2016); and *Windom v. State*, 398 P.3d 150 (Idaho 2017).

[69] Fla. Stat. §921.1402 (2014); Ala. Code §13A-6-2 (2016); 730 Ill. Comp. Stat. §5/5-4.5-105 (2016); La. Rev. Stat. §15:574.4 (2016); Mich. Comp. Laws §769.25 (2014); Mo. Rev. Stat.

passed legislation post-*Miller*, have been in the process of re-sentencing those offenders impacted by *Miller* and *Montgomery*.[70] Only six states that were impacted by *Miller* and *Montgomery* have not yet passed legislation or been directed by their courts to begin the re-sentencing process for children sentenced to life without parole.[71]

Not including the states that had banned life without parole for children prior to *Miller*, or have no individuals serving the sentence, thirty-six states and the District of Columbia have relied on *Miller* and *Montgomery* to either: pass laws or issue court rulings providing children sentenced to life without parole with a re-sentencing hearing, establish new sentencing procedures, and/or eliminate life without parole sentences for children.[72] Amici were duly elected representatives from six of the eleven states that previously authorized discretionary life without parole sentences, but have since banned them entirely. They understood *Miller* and *Montgomery* to apply to all children facing life without parole sentences, regardless of the crimes they've committed.

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§565.033-565.034 (2016); Neb. Rev. Stat. §28-105.02 (2013); N.C. Gen. Stat. §15A-1340.19B (2012); 18 Pa. Code §1102.1 (2012).

[70] *State v. Ali*, 855 N.W.2d 235 (Minn. 2014); *Parker v. State*, 119 So.3d 987 (Miss. 2013); *In re Petition of State*, 103 A.3d 227 (N.H. 2014); and *State v. Valencia*, 386 P.3d 392 (Ariz. 2016).

[71] MT, WI, TN, IN, MD, and VA.

[72] *See supra* note 6.

Stability in the law and the practical ramifications in the vast majority of states that had discretionary life without parole where *Miller* re-sentencing hearings are ongoing or where legislative changes have been implemented is of great concern for Amici. In the seven years since *Miller* was announced, our country's understanding and response to children convicted of the worst crimes has drastically changed. *Miller, Montgomery* and the various state responses as described above, bring the Eighth Amendment to its fullness and demonstrate, as the great Nelson Mandela once said, that "There is no keener revelation of our nation's soul than the way in which we treat our children." The vast majority of the nation views the imposition of life without parole sentences on children, without the individualized sentencing hearing envisioned by *Miller*, and a determination that a child is beyond rehabilitation, as cruel and unusual punishment. Amici believed at the time they helped pass their respective states' legislation, and continue to believe today, that this is the minimum Constitutional requirement when it comes to sentencing our children. Anything less removes the ability of a child to demonstrate his or her potential for rehabilitation, and denies them hope and love, which Amici believe the Constitution does not, and should not, permit.

CONCLUSION

For the foregoing reasons the Court should affirm the decision below.

Respectfully submitted,

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