No. 16-579

IN THE

Supreme Court of the United States

AHMAD BRIGHT,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MASSACHUSETTS APPEALS COURT

BRIEF FOR AMICI CURIAE CITIZENS FOR JUVENILE JUSTICE, COMMITTEE FOR PUBLIC COUNSEL SERVICES, LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND ECONOMIC JUSTICE, MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL JUVENILE DEFENDER CENTER, AND NATIONAL JUVENILE JUSTICE NETWORK IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are various organizations dedicated to ensuring fairness and due process in the criminal jus-

tice system.[1] They share the belief that modern parole is a failed system that gives juvenile offenders sentenced to life with parole only an illusory prospect of eventual release and no safeguard against disproportionate sentencing. Given this Court's teachings about the diminished culpability and heightened capacity for rehabilitation of youth, amici urge this Court to grant the petition and hold that the Eighth Amendment forbids *any* mandatory life sentence for juvenile offenders, regardless of the availability of parole.

A list and brief description of all amici is included in the Appendix to this brief.

REASONS FOR GRANTING THE PETITION

As life experience, social science, and this Court's jurisprudence make clear, children are fundamentally different than adults. For that reason, this Court has held that the Eighth Amendment prohibits juvenile offenders from receiving mandatory sentences of life without parole. *Miller* v. *Alabama*, 132 S. Ct. 2455, 2469 (2012). Before sentencing a juvenile offender irrevocably to a lifetime in prison, the Eighth Amendment requires an individual evaluation that accounts for the diminished culpability and heightened rehabilitative capacity of youth. *Id.*

At present, this Court's precedents permit mandatory sentences of life *with* the possibility of parole for

[1] Pursuant to Rule 37.6, amici certify that no counsel for either party authored this brief, and no person or party other than named amici and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties received notice of amici's intent to file this brief at least ten days prior to its due date and have consented to its filing. Letters of consent have been filed with the Court.

juvenile offenders, but prohibit mandatory sentences of life without the possibility of parole for juvenile offenders. Amici contend, however, that no meaningful distinction exists in practice between these two types of mandatory punishments. This Court has assumed that the availability of parole mitigates the disproportionate impact of a life sentence by preserving some prospect of eventual release for juvenile offenders. *See Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016). But as amici explain here, the modern parole system provides no meaningful opportunity for rehabilitation-based release to juvenile offenders sentenced to life with parole. Consequently, for both constitutional and practical purposes, a mandatory sentence of life with parole is effectively the same punishment as a mandatory sentence of life without parole.

This Court should grant certiorari to resolve this next logical question in juvenile-sentencing jurisprudence: whether the mere availability of parole resolves the serious constitutional violation created by a state's imposition of mandatory life sentences on juvenile offenders. In light of the defects of the modern parole system, amici urge this Court to hold that the Eighth Amendment forbids the imposition of *any* mandatory life sentence, including one with the possibility of parole, on juvenile offenders.

I. THE INDIVIDUALIZED-SENTENCING REQUIREMENT FOR JUVENILE OFFENDERS FACING A LIFE SENTENCE PROTECTS AGAINST UNCONSTITUTIONAL SENTENCES

The requirement of individualized sentencing for juvenile offenders facing a life sentence without parole derives from this Court's repeated recognition that juvenile offenders differ from adult offenders in both culpability and potential for rehabilitation. *See Miller* v.

Alabama, 132 S. Ct. 2455, 2464-2465 (2012). In *Roper* v. *Simmons*, 543 U.S. 551 (2005), this Court identified three critical differences between juvenile and adult offenders. First, juvenile offenders exhibit a "'lack of maturity and an underdeveloped sense of responsibility … more often than … adults.'" *Id.* at 569. Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures." *Id.* And third, their "character … is not as well formed as that of an adult." *Id.* at 570. These critical differences between juveniles and adults have consistently informed this Court's post-*Roper* juvenile-sentencing decisions. *See, e.g.*, *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 733 (2016); *Graham* v. *Florida*, 560 U.S. 48, 68 (2010).

Based on these profound differences between juvenile and adult offenders, this Court held in *Miller* v. *Alabama* that the Eighth Amendment forbids mandatory life sentences without parole for juvenile offenders. 132 S. Ct. at 2469. As this Court observed there, sentencing a juvenile offender to life without parole precludes any possibility of release during the juvenile's lifetime. *Id.* at 2466. Such a sentence is especially harsh when imposed on juvenile offenders, this Court noted, given their lower culpability and greater rehabilitative capacity. *Id.* at 2469. Subjecting juvenile offenders to automatic life sentences without parole without considering these distinguishing attributes of youth, this Court concluded, risks "render[ing] [the] life-without-parole sentence disproportionate," and therefore unconstitutional. *Id.* at 2465-2466.

Miller accordingly held that life sentences without parole may not be imposed automatically on juveniles. 132 S. Ct. at 2469. Instead, before juveniles may be sentenced to life without parole, a sentencing judge must individually evaluate the offender's culpability in

light of "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.*

This reasoning applies with equal force to mandatory life sentences *with* the possibility of parole. This Court has suggested that the availability of parole offers juveniles a meaningful opportunity to obtain release through demonstrated rehabilitation. *See Montgomery*, 136 S. Ct. at 736. On that basis, this Court has assumed that the availability of parole resolves the constitutional violation created by a state's prescription of mandatory life sentences for juvenile offenders. *See id.*

Amici contend, however, that the modern parole system in practice is, to borrow from the American Law Institute, a "failed institution." Model Penal Code: Sentencing, Tentative Draft No. 2, § 6.06 (Am. Law Inst. Mar. 25, 2011). In reality, modern parole is politicized, hampered by delays and insufficient resources, impervious to scrutiny, and disposed to reject rehabilitation as a penological goal. For these reasons, the parole system offers juvenile offenders serving mandatory life sentences with the possibility of parole—such as petitioner Ahmad Bright—virtually no realistic prospect of earning release notwithstanding any rehabilitation they achieve. As a consequence, a mandatory life sentence *with* the possibility of parole is, for all practical purposes, effectively the same punishment as a mandatory life sentence *without* the possibility of parole. Both mandatory sentences are equally unconstitutional.

Petitioner is serving a mandatory life sentence with the possibility of parole that the sentencing judge would likely not have imposed if he had been allowed to

exercise any individual discretion at sentencing. *See* Pet. 35-36. The judgment below was a clear holding on an important constitutional question that this Court can review *de novo*. *See id.* 35. Accordingly, the petition provides this Court with a well-suited vehicle to address the logical next question in its juvenile-sentencing jurisprudence: whether the mere availability of parole renders permissible an otherwise unconstitutional mandatory life sentence for juvenile offenders. If parole fails to do so—it does—then the Eighth Amendment forbids *any* mandatory life sentence for juvenile offenders, regardless of the possibility of parole. *See Miller*, 132 S. Ct. at 2469.

II. PAROLE DOES NOT RESOLVE THE CONSTITUTIONAL VIOLATION CAUSED BY MANDATORY LIFE SENTENCES FOR JUVENILE OFFENDERS

A. Parole Boards Were Originally Intended To Base Release Decisions On Demonstrated Rehabilitation

The American parole system originated between the late nineteenth and early twentieth centuries, when "rehabilitation became the dominant penal rationale of imprisonment." Simon, *How Should We Punish Murder?*, 94 Marq. L. Rev. 1241, 1269 (2010-2011); *see also* Bierschbach, *Proportionality and Parole*, 160 U. Pa. L. Rev. 1745, 1750 (2011-2012). As originally conceived, parole boards were intended to include politically independent experts in penology who would make parole determinations based on prisoners' demonstrated rehabilitation. *See* Simon, 94 Marq. L. Rev. at 1269. By 1942, every state had implemenented some version of discretionary parole. Petersilia, *Parole and Prisoner Reentry in the United States*, 26 Crime & Just. 479, 489 (1999).

For much of the twentieth century, the parole system extended early release to substantially more prisoners than is the case today. In 1977, seventy-two percent of prisoners who received early release did so through the parole system. Petersilia, 26 Crime & Just. at 489.[2]

By the 1970s, however, the rehabilitation-based model of parole began to erode as "the political and ideological pendulum" of American penal policy "sw[u]ng away from rehabilitation to retribution." Cohen, *Freedom's Road*, 35 Cardozo L. Rev. 1031, 1067 (2013-2014). During the 1980s and 1990s, policymakers came to accept incapacitation and retribution almost exclusively as penological goals while largely rejecting rehabilitation. *See* Medwed, *The Innocent Prisoner's Dilemma*, 93 Iowa L. Rev. 491, 501 (2008).

This dramatic shift in penal theory extended to the parole system as well. Toward the end of the twentieth century, "parole boards began to focus their release decisions more on managing dangerousness than anything else." Bierschbach, 160 U. Pa. L. Rev. at 1751. By 1999, the percentage of early releases from prison granted through parole-board discretion fell to 24 percent. *Id.* at 1750 n.14. In part because of this ideological shift, the historical, rehabilitation-centered model of parole is almost unrecognizable in the modern parole system.

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[2] Though the rehabilitative underpinnings of parole are well documented, whether parole ever functioned as well as intended is a matter of debate. *See, e.g.*, Model Penal Code: Sentencing, Tentative Draft No. 2, § 6.06; Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. Rev. 567, 571 (1994).

B. The Modern Parole System Does Not Provide A Meaningful Opportunity For Juvenile Offenders Serving Mandatory Life Sentences To Demonstrate Rehabilitation

The failure of the modern parole system is well documented. In its March 2011 draft of the sentencing portion of the Model Penal Code, the American Law Institute recommended abolishing parole entirely as an early-release mechanism. In reaching this conclusion, the drafters commented:

> Research, historical inquiry, and the firsthand experience of participants in the drafting process[,] support the judgment that parole boards, when acting as prison-release authorities, are failed institutions. During the drafting of the revised Code, no one has documented an example in contemporary practice, or from any historical era, of a parole-release system that has performed reasonably well in discharging its goals[.]

Model Penal Code: Sentencing, Tentative Draft No. 2, § 6.06. Such a "failed institution" cannot provide the meaningful opportunity for juvenile offenders serving mandatory life sentences to demonstrate rehabilitation and earn release that this Court has assumed to exist. *See Montgomery*, 136 S. Ct. at 736.

In particular, the modern parole system suffers from four defects that prevent it from resolving the constitutional violation created by the imposition of mandatory life sentences on juveniles: (1) the infrequency and limited value of parole board reviews; (2) the manner in which parole boards exercise their sweeping discretion; (3) the absence of transparency surrounding parole board decisions; and (4) the politici-

zation and lack of expertise that pervade modern parole boards.

1. Parole board reviews are infrequent, brief, and impersonal

Prisoners in many states must wait years before obtaining a first or successive review by the parole board. And because parole boards are often overburdened, their reviews are frequently cursory and impersonal.

Prisoners sentenced to life sentences as juveniles in many states must typically wait years—even decades—before becoming eligible for a first parole board review, much less actual release. Mehta, ACLU, *False Hope: How Parole Systems Fail Youth Serving Extreme Sentences* 32-33 (forthcoming Nov. 29, 2016) (‘*False Hope*). This lengthy delay before the first parole review can affect juvenile offenders more harshly than adult offenders. *Cf. Miller*, 132 S. Ct. at 2468 (observing that a life sentence for a juvenile offender is a "*greater* sentence" than it is for an adult offender).

In Massachusetts, where petitioner was sentenced, some juvenile offenders must wait 20 or, in some cases, 30 years before their first opportunity to be considered for parole. Mass. Gen. Laws ch. 279, § 24. That period is significantly longer in other states. Colorado, Nebraska, and Texas require some juveniles serving life sentences to wait 40 years before becoming eligible for their first parole review. Colo. Rev. Stat. § 18-1.3-401(4)(b); 2013 Neb. Laws, L.B. 44 (approved May 8, 2013); Tex. Gov't Code § 508.145(b).

Even after juvenile offenders receive a first parole hearing, parole boards can impose substantial "set offs"—a minimum period following a denial of parole

that a prisoner must wait before seeking parole again. *See False Hope* 42-43. In California, the default set off is 15 years, which parole boards can shorten only with "clear and convincing evidence" that a shorter period is justified. Cal. Penal Code § 3041.5(b)(3). In Ohio and Kentucky, the set off can last up to 10 years. Ohio Admin. Code 5120:1-1-10(B)(2); Ky. Rev. Stat. Ann. § 439.340(14). And some states, like Utah, have no limit to the length of a set off that the parole board may impose. Utah Admin. Code r. 671-316-1(3).

Lengthy set offs limit juvenile offenders in many states to only a handful of opportunities to demonstrate rehabilitation during their lifetime of incarceration. In Ohio, for example, some juvenile offenders sentenced to life without parole may have to wait 30 years before receiving their first review by the parole board. Ohio Rev. Code Ann. § 2967.13(A)(4). If the board denies parole, the board can then impose a setoff period of up to 10 years. Ohio Admin. Code 5120:1-1-10(B)(2). Thus, a prisoner sentenced at age 19 for a crime committed at age 17 may wait until age 49 for his first review, age 59 for his first subsequent review following a denial, and age 69 for his next review after that. The parole board would consider such a prisoner's application for parole only three times by the time the prisoner turned 75.

Moreover, the hearings that do take place are often short and impersonal, precluding adequate consideration of each offender's rehabilitation. According to the Marshall Project, a 2008 survey of parole boards "revealed that the average state board considered 8,355 inmates for release each year. That's about 35 decisions per workday for a board that usually has other responsibilities." Schwartzapfel, The Marshall Project, *Life Without Parole* (2015) ('*Life Without Parole*'). This heavy workload forces parole boards to make highly

consequential release decisions in a matter of minutes. "Studies of actual parole-release practices have found decision-making times of 3 to 20 minutes per case." Rhine et al., *Improving Parole Release in America*, 28 Fed. Sentencing Rep. 96, 99 (2015). As one former Georgia parole board member recounted, "I typically voted 100 cases a day.[] You're just talking about two to three minutes to make a decision." *Life Without Parole.*

The overburdening of parole boards also hampers the ability of prisoners to make an individual case to the board. A national study of parole practices found that in at least 11 states, at least some prisoners have no opportunity to meet with the actual parole decision-makers. Russell, *Review for Release*, 89 Ind. L. J. 373, 401 (2014). In Florida, inmates are interviewed by a parole-board agent, not by the parole board itself. *Id.* In Alabama and North Carolina, inmates cannot interact with the parole board at all. *Id.* at 400. And even in states that allow prisoners to appear before the parole board, the average parole hearing lasts between five and ten minutes. Cohen, 35 Cardozo L. Rev. at 1061.

2. Parole boards exercise their discretion in ways that defeat, rather than promote, the genuine evaluation of rehabilitation

Parole boards enjoy virtually absolute discretion to grant or deny parole. As the Marshall Project has explained, "[p]arole boards are vested with almost unlimited discretion to make decisions on almost any basis. Hearsay, rumor and instinct are all fair game." *Life Without Parole*. State courts uniformly share this view as well. *See, e.g., Mangum* v. *Mississippi Parole Bd.*, 76 So. 3d 762, 768 (Miss. Ct. App. 2011) ("In Mississippi,

the Board is given absolute discretion to determine who is entitled to parole.").

Originally, parole boards were given such sweeping discretion in order to enable them to comprehensively evaluate a prisoner's rehabilitation. *See* Petersilia, 26 Crime & Just. at 491. In modern practice, however, parole boards often exercise this discretion in two ways that frustrate the meaningful evaluation of rehabilitation.

First, parole boards often base parole decisions on factors related to retribution, not rehabilitation, such as the nature and severity of the crime. In this way, parole boards act as successive sentencing authorities rather than evaluators of rehabilitation. This practice defeats the rehabilitative purpose of parole and leaves the Eighth Amendment's juvenile-sentencing requirement unfulfilled. *See Montgomery*, 136 S. Ct. at 736 (consideration for parole "ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment").

In particular, "[t]he nature of the [prisoner's] crime of conviction is often the driving force in parole decisions," regardless of any rehabilitation shown by the prisoner. Russell, 89 Ind. L. J. at 397. According to the Marshall Project, "[o]f the 10 factors parole board members weigh most heavily … five are related to the crime itself, according to a nationwide survey of parole boards in 2008. The top two are 'crime severity' and 'crime type.'" *Life Without Parole*. In Missouri, for example, the parole board routinely denies parole with the standard notation that "[r]elease at this time would depreciate the seriousness of the present offense," an

explanation grounded entirely in retributivism, not rehabilitation. *Id.*

Of course, the nature of a prisoner's underlying offense will almost always bear on the evaluation of that prisoner's rehabilitation. But modern parole boards frequently use the nature of the offense to justify continued incarceration regardless of any genuine rehabilitation shown by the prisoner. *Life Without Parole.* If the nature of the prisoner's offense "is used as the exclusive reason to deny parole or sentencing modification, then there is no opportunity for 'demonstrated maturity and rehabilitation'"—and, accordingly, no protection against juvenile offenders serving disproportionate sentences. Annitto, Graham*'s Gatekeeper and Beyond*, 80 Brook. L. Rev. 119, 163 (2014-2015) (quoting *Graham*, 560 U.S. at 76).

Second, parole boards often treat youth at the time of the offense as an aggravating, rather than mitigating, factor in parole decisions. *False Hope* 50-51. That practice contradicts this Court's juvenile-sentencing precedents. *See Miller*, 132 S. Ct. at 2469 (acknowledging "diminished culpability" and "heightened capacity for change" of juvenile offenders).

In Texas, for example, an offender's risk score—which the parole board consults when making release decisions—*increases* if the offender was a juvenile when first incarcerated. *False Hope* 51 n.387. Similarly, Nevada prescribes a two-point *increase* in the risk score of offenders incarcerated for crimes committed before turning 19. Annitto, 80 Brook. L. Rev. at 160. In a recent national survey of parole-release administrators, "age … at time of the crime" was ranked as an important factor in release decisions, usually to the detriment of juvenile offenders. *Id.* at 159 &159 n.296.

Parole boards appear to treat youth as an aggravating factor for two reasons, neither of which comport with this Court's teachings on juvenile sentencing. The first is that offenders incarcerated at a young age tend to have fewer personal or professional connections outside prison than those who enter prison as adults. Cohen, 35 Cardozo L. Rev. at 1079. Consequently, juvenile offenders often appear before the parole board "in a high 'risk state,' unlikely candidates for release unless their circumstances are considered from an appropriate developmental perspective." *Id.* Modern parole boards, however, have generally declined to adopt this "developmental perspective" when making parole decisions involving juveniles. *See id.* Their failure to do so contradicts this Court's repeated admonitions for sentencing authorities to take a juvenile offender's youth into consideration. *See Miller*, 132 S. Ct. at 2469; *Roper*, 543 U.S. at 553.

The second reason parole boards treat youth as an aggravating factor is even more untenable. Many parole boards appear to assume that youth at the time of the offense makes it *more*, not *less*, likely that the offender will commit more crimes after being released. *See False Hope* 50-51. But that assumption contradicts this Court's conclusion, based on social science, that juvenile offenders have a greater capacity for rehabilitation than adult offenders. *See, e.g., Miller*, 132 S. Ct. at 2464 (explaining that the Court's juvenile-sentencing decisions "rested not only on common sense … but on science and social science as well"); *Graham*, 560 U.S. at 68-69; *Roper*, 543 U.S. at 569-570.

3. Parole board decisions lack transparency and are not subject to meaningful review

Parole boards may deny parole without providing any clear basis for their decisions. Without knowing what factors the parole board considered, however, prisoners cannot reasonably be expected to know which rehabilitative efforts to pursue. In some parole systems, there are no clear standards governing what parole boards should consider in making their decisions. In six states—Alaska, Arizona, Connecticut, Illinois, New Hampshire, and Washington—the board need not consider *any* legislatively prescribed factors, and instead need only determine whether release is in the best interest of the state or that the prisoner is unlikely to recidivate, a broad mandate giving the board "vast discretion" on what to assess in making that determination. *False Hope* 60.

For those states that do specify factors that parole boards must consider when making release decisions, there is often no way to verify that the boards actually heed the factors. For example, one court found that the Georgia parole board was not obligated to explain why it departed from statutory criteria in denying parole. *O'Kelley* v. *Snow*, 53 F.3d 319, 322 (11th Cir. 1995) (inmate had "no right to an explanation for departure from the parole guidelines"). According to a former Georgia parole board member, "There's not a way to go back and look at [a] file to find out why they deviated from parole decision guidelines. They don't have to answer to that. They don't have to answer to anybody." *Life Without Parole*.

The parole decision itself can likewise be shrouded in mystery. In 24 states, the parole board's files and documents upon which decisions are based are sealed;

in 19 states, some or all hearings are closed to the public; and in 18 states, prisoners cannot access their own parole files. *Life Without Parole*. In 28 states, prisoners cannot access information in their files submitted by prosecutors. Russell, 89 Ind. L. J. at 405. A prisoner's inability to review and correct information submitted about him, such as rumor or hearsay from an unknown source, can directly affect the parole decision.[3]

Moreover, many parole boards are not required to explain the basis for their decisions, and even if they are, the explanations may be cursory. In Michigan, the board can issue a decision of "no interest" in taking further action (such as advancing the case to an interview or public hearing) without providing any explanation. *Gilmore* v. *Parole Bd.*, 635 N.W.2d 345 (Mich. Ct. App. 2001).[4] In Texas,

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[3] Interviewed by the Marshall Project, Roosevelt Price, a Missouri prisoner serving a life sentence, described a parole board member telling him at his most recent hearing, "I think you've been involved in other murders that you haven't been caught for. … There's things in your file I know about that I think you don't know.'" Mr. Price did not know the basis for the board member's accusation. He was denied parole and remains incarcerated. *Life Without Parole*; *see also Ybarra* v. *Dermitt*, 657 P.2d 14, 15 (Idaho 1983) (no abuse of discretion where parole denial based partially on hearsay in police officers' letters police officers attached to prisoner's pre-sentence report).

[4] John Alexander, a Michigan prisoner who was sentenced to life at age 18, has been incarcerated for 36 years. Despite arranging post-release employment, not requiring additional programming, and presenting a low risk of recidivism, he received a "no interest" decision at his latest parole review. In 2002, his sentencing judge attempted to grant his motion that the parole board had violated his constitutional rights, stating: "'[I]n 1981, no Judge, in imposing a life sentence could see down the road … that the Parole Board would change to the extent that it … would ignore the law. [I]f I wanted to make sure [he] stayed in prison the rest of his life, I would have imposed … 80 to 150 years, but I did not do that.'"

where the board must use parole guidelines to make decisions (Texas Bd. of Pardons & Paroles, *Parole Guidelines*, http://www.tdcj.state.tx.us/bpp/parole_guidelines/parole_guidelines.html (last visited Nov. 28, 2016)), the decisions actually issued are mere boilerplate, containing a "standard" denial or approval code encompassing a variety of factors, without any further case-specific detail. *False Hope* 60-61; Texas Bd. Of Pardons & Paroles, *Parole Review Results*, http://www.tdcj.state.tx.us/bpp/faq/ParoleReviewResults.html.[5] Similarly, in Missouri, forms communicating the board decision to prisoners often provided the same reason for denial, even though, as a former parole board operations manager acknowledged, the reason stated was "not always the truth. Sometimes I'd make that [] up. The real reason [was] we don't believe in parole for people like you." *Life Without Parole*.

Compounding the opaqueness surrounding a parole board's decision-making, many denials are effectively unreviewable, allowing boards to operate without significant checks on their discretion. Only eight states provide any avenue for administrative review. *False Hope* 44.[6] And it is hardly meaningful review—it can mean that the prisoner's case is reconsidered by the

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The appellate court ruled that the sentencing court no longer had jurisdiction, and Mr. Alexander remains incarcerated. *False Hope* 116-118.

[5] According to the ACLU's survey, one common denial code is "2D," which states: "The record indicates the instant offense has elements of brutality, violence, assaultive behavior, or conscious selection of victim's vulnerability indicating a conscious disregard for the lives, safety, or property of others, such that the offender poses a continuing threat to public safety." *False Hope* 61.

[6] These states are Delaware, Florida, Idaho, Kansas, Massachusetts, Missouri, Tennessee, and Texas. *False Hope* 44 n.319.

same board that issued the original decision. *E.g.*, 120 Mass. Code Regs. 304.01(1). In other jurisdictions, administrative appeal may be taken only under limited circumstances, such as where new evidence was not available during the initial determination or where there are allegations of parole hearing misconduct. *E.g.*, Tenn. Code Ann. § 40-28-105(11); 37 Tex. Admin. Code § 145.17.

In the 42 states with no administrative review, parole denials are only reviewable through the judicial process, generally under very limited circumstances. Some states foreclose judicial appeals of parole board decisions altogether. *E.g.*, *Rogers* v. *Board of Prob. & Parole*, 724 A.2d 319, 331 (Pa. 1999) (no appellate review of parole denial); N.Y. Exec. Law § 259-i(4). Thus, prisoners in some states may only seek judicial review if alleging a constitutional or statutory violation by the parole board, raised through restrictive avenues such as habeas corpus or mandamus. *E.g.*, *Morales* v. *Michigan Parole Bd.*, 676 N.W.2d 221, 229-230 (Mich. Ct. App. 2003) (only permitting judicial review in "certain radical circumstances" through habeas corpus actions and the "extraordinary remedy" of mandamus); *Braxton* v. *Josey*, 567 F. Supp. 1479 (D. Md. 1983) (no judicial review under Maryland law and considering allegations that denial violated constitutional rights as petition for writ of habeas corpus). Even where courts have jurisdiction to review parole decisions, they apply deferential "abuse of discretion" or "arbitrary and capricious" standards of review. *E.g.*, *Comfort* v. *New York State Div. of Parole*, 890 N.Y.S.2d 700, 702 (App. Div. 2009); *McGowan* v. *New Jersey State Parole Bd.*, 790 A.2d 974, 986 (N.J. Super. Ct. 2002).

Parole boards nationwide thus operate nearly entirely on their own, with authority that goes generally

unchecked through administrative or judicial review. This "combination of highly subjective decisional standards and limited reviewability afford parole board members virtual carte blanche to deny release for almost any reason." Cohen, 35 Cardozo L. Rev. at 1077. These systemic problems are especially harmful to juveniles serving mandatory life sentences; parole boards' broad discretion exercised at the back-end cannot cure the unavailability of individualized sentencing that takes into account their youth at the front-end.

4. Parole board members often lack the expertise and independence needed to capably evaluate rehabilitation

As originally designed, parole boards were situated as administrative bodies in order to insulate them from the political process and take the "penal heat" away from governors, who are responsible for pardon and clemency decisions. Simon, 94 Marq. L. Rev. at 1269. Parole boards were also meant to be capable of assessing, based on their experience and observation of prisoners' behavior, when offenders were ready to rejoin society. *See id.* at 1271 (citing Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. Pa. L. Rev. 465, 476 (1961)); Petersilia, 26 Crime & Just. at 491 (members supposed to be "'experts' in behavioral change").[7] In practice, however, many parole board members do not have experience in criminal justice or penology and can be susceptible to political headwinds,

[7] For example, California's first-formed parole board was required to have one attorney, one member with "practical experience in handling [] prisoners," and one "sociologist in training and experience." Irwin, *The Felon* 55 n.24 (1970) (citing Cal. Penal Code § 5075 (1944)). California no longer has experience-related prerequisites.

preventing them from meaningfully evaluating rehabilitation.

The American Correctional Association, which formulates national corrections standards, has issued an "essential" standard that two-thirds of a board's membership have a minimum of three years of experience in a criminal justice-related field. *Life Without Parole*. In actuality, many states have no expertise-related requirements for eligibility to serve on a parole board. *See, e.g.*, Gaines & Miller, *Criminal Justice in Action* 319 ("Nearly half the states have no prerequisites" in either education or expertise) (8th ed. 2015); Ga. Code Ann. § 42-9-2 (no requirements); Mo. Rev. Stat. § 217.665(2) (requiring only that members "be persons of recognized integrity and honor"); Cal. Penal Code § 5075 (requirement to "reflect as nearly as possible" the state population's demographics). Without minimum requirements, parole boards are frequently composed of individuals with no prior experience in criminal justice issues, including, by way of example, farmers, company executives, car dealers, personal fitness trainers, pastors, and entertainment and event managers. *Life Without Parole*; *see generally* Schwartzapfel, 28 Fed. Sentencing Rep.

In 44 states, parole board members are appointed by the governor (typically subject to legislative consent), and only three states recruit publicly to fill board positions. *Life Without Parole*. As a result, members often have personal or political connections to the governor. For example, a New Jersey board member was formerly the governor's chief of staff, and in Louisiana, a board member previously served on the governor's Commission for Marriage and Family. *Id.* Such connections risk introducing political considerations into members' parole decisions. Cohen, 35 Cardozo L. Rev.

at 1072 n.179 (citing a former New York board chairmain's observation that release rates "often decline closer to election time"). A former New York board member acknowledged, "You generally don't get reappointed if you take a controversial stand on a media case." *Life Without Parole.*

Additionally, in Maryland, California, and Oklahoma, the governor has the power to reverse a parole board's decision to grant parole for offenders convicted of certain crimes or those serving life sentences. Cal. Penal Code § 3041.2; Okla. Stat. tit. 57, § 332; Md. Code, Correctional Services Art., § 7-301(d)(4). The chief executive's authority to appoint or approve board members, and also to veto those appointees' decisions, suggests that parole boards lack independence to make objective decisions about release.

In Maryland, from 1969 to 1995, governors paroled between 25 to 92 prisoners sentenced to life during their respective terms. Maryland Restorative Justice Initiative & ACLU of Maryland, *Still Blocking The Exit* 8 (2015) ('*Still Blocking The Exit*'). In 1995, however, Governor Parris Gledening proclaimed that "a life sentence means life." Since then, not one person serving a parole-eligible life sentences for a crime committed as a juvenile has been paroled. *See id.* at 8.[8] Maryland now has the highest percentage of juvenile lifers. *Id.* at 9.

In California, by contrast, Governor Jerry Brown has approved parole for 82% of the lifer cases presented

[8] Even those who have been repeatedly recommended for release by the parole board find no relief. For example, in 1973, Odell Newton was sentenced to life in prison at age 16. He has not incurred a single disciplinary infraction in 36 years. Although the parole board recommended his release to three different governors, parole was denied each time. *Still Blocking The Exit* 20.

to him by the parole board, releasing more prisoners serving life sentences than during the combined administrations of both his predecessors, Governors Arnold Schwarzenegger (who reversed 60% of parole grants) and Gray Davis (who reversed almost all parole grants). Zoukis, *California Lifers Paroled in Record Numbers*, Prison Legal News, Mar. 31, 2016; Weisberg et al., Stanford Criminal Justice Center, *Life in Limbo: An Examination of Parole Releases* 13 (Sept. 2011).

Inexperience, ties of patronage, and lack of insulation from public and political pressure can prevent boards from objectively evaluating release. Rhine, 28 Fed. Sentencing Rep. at 96. Modern parole boards are a far cry from expert bodies engaged in "a regular part of the rehabilitative process" where release is the "normal expectation." *See Solem* v. *Helm*, 463 U.S. 277, 300 (1983) (contrasting parole and clemency). Rather, they are "poorly constituted to withstand the pressures of an impossibly difficult job." Model Penal Code: Sentencing, Tentative Draft No. 2, App'x B.

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This Court has recognized time and again that juvenile offenders' youth at the time of their offenses makes them less culpable and more capable of rehabilitation. *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. 570); *Miller*, 132 S. Ct. at 2469. In *Montgomery*, the Court assumed that parole offers a meaningful opportunity to demonstrate rehabilitation and obtain release, thereby protecting against the imposition of disproportionate sentences on juvenile offenders. *See* 136 S. Ct. at 736. In reality, parole is no antidote. Parole boards, by their composition and operation, suffer from systemic defects that have resulted in thousands of in-

dividuals who, sentenced as children, remain incarcerated for decades, if not their entire lives, the "possibility" of parole reduced to a possibility in name only. Far from guarding against the Eighth Amendment violations that result from imposing mandatory life sentences on those whose crimes reflect "only transient immaturity" (*id.*), the modern parole system only highlights the urgent need for every state to require individualized sentencing of juvenile offenders that appropriately considers their youth, and protects against disproportionate sentencing of children to life in prison.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2016

APPENDIX

APPENDIX

IDENTITY OF AMICI

Citizens for Juvenile Justice (CfJJ) is an independent, statewide nonprofit organization in Massachusetts that strives to improve the Commonwealth's juvenile justice system through advocacy, research, and public education. CfJJ's Board includes representatives from academia, child advocates, mental health clinicians, and service providers, and its membership includes more than 30 organizations working with, and on behalf of, at-risk children. Since its founding in 1994, CfJJ has worked on numerous issues concerning the juvenile justice system, and in all instances CfJJ has pressed for the adoption of thoughtful, evidence-driven practices which recognize the developmental differences between youth and adults. As advocates for policies that recognize that young people are fundamentally capable of growth and rehabilitation, CfJJ has a strong interest in ensuring that young people receive individualized sentences that appropriately consider their youthfulness, and that they also receive a meaningful opportunity to be released as they mature.

The Committee for Public Counsel Services (CPCS), the Massachusetts public defender agency, represents indigent adults and juveniles accused of committing crimes. CPCS, through its Youth Advocacy Division, protects and advances the legal and human rights of children in legal proceedings. CPCS has represented dozens of juvenile offenders in resentencing hearings following this Court's decision in *Miller* v. *Alabama*.

The Lawyers' Committee for Civil Rights and Economic Justice is a non-profit civil rights law office specializing in law reform litigation, public policy advocacy, and community education to redress race and national origin discrimination. This includes advocacy to promote a fair and equitable criminal justice system that allows for rehabilitation and successful re-entry into society. The organization has a strong interest in ensuring constitutional protections for juvenile offenders, because the negative effects of the juvenile justice system fall disproportionately on communities of color.

The Massachusetts Association of Criminal Defense Lawyers (MACDL) is an incorporated association of more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal justice system by supporting policies and procedures to ensure fairness and justice in criminal matters. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

The National Association of Criminal Defense Lawyers (NACDL)) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private

criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The National Juvenile Defender Center is a non-profit, non-partisan organization dedicated to promoting justice for all children by ensuring excellence in juvenile defense. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in the juvenile justice system. The National Juvenile Defender Center gives juvenile defense attorneys a permanent and enhanced capacity to address practice issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. The National Juvenile Defender Center provides support to public defenders, appointed counsel, private counsel, law school clinical programs, and non-profit law centers to ensure quality representation in urban, suburban, rural, and tribal areas. The National Juvenile Defender Center also offers a wide range of integrated services to juvenile defenders, including training, technical assistance, advocacy, networking, collaboration, capacity building, and coordination. The National Juvenile Defender Center has participated as amicus curiae in several cases before this

Court, as well as federal and state courts across the country, in support of this position.

The National Juvenile Justice Network (NJJN) leads a movement of state and local juvenile justice coalitions and organizations to secure local, state and federal laws, policies and practices that are fair, equitable and developmentally appropriate for all children, youth and families involved in, or at risk of becoming involved in, the justice system. NJJN currently comprises 53 member organizations across 43 states and the District of Columbia, all of which seek to establish effective and appropriate juvenile justice systems. NJJN recognizes that youth are still maturing and should be treated in a developmentally appropriate manner that holds them accountable in ways that give them the tools to make better choices in the future and become productive citizens. NJJN supports a growing body of research that indicates the most effective means for responding to youth crime is in the context of youth's families and communities with age-appropriate, rehabilitative programs that take a holistic approach, engage youth's family members and other key supports, and provide opportunities for positive youth development. In those infrequent instances in which youth must be removed from their family and community, that removal should be for as short a time as possible, and only as a last resort. NJJN further believes that youth should not be transferred into the adult criminal justice system where they are subject to harsh sentences such as life without the possibility of parole and other extreme sentences that fail to take youth's age and amenability for rehabilitation into consideration.