IN THE SUPREME COURT OF THE STATE OF OREGON

STERLING RAY CUNIO, Plaintiff-Appellant, Petitioner on Review, v. JEFF PREMO, Superintendent, Oregon State Penitentiary Defendant-Respondent, Respondent on Review.	Marion County Circuit Court Case No. 13C16780 CA A155036 N006849

BRIEF IN SUPPORT OF PETITION FOR REVIEW BY *AMICI CURIAE* FAIR PUNISHMENT PROJECT AND OREGON JUSTICE RESOURCE CENTER

Petition on Review of the decision of the Court of Appeals
on an appeal from the judgment of the Circuit Court for Marion County
Honorable Thomas M. Hart, Judge

Court Decision Affirmed With Opinion: April 12
Before: Sercombe, Presiding Judge, and Hadlock, Chief Judge, and Tookey, Judge

(Counsel listed on following page.)

Amici Curiae Intend to File a Brief on the Merits If Review is Allowed.

June 2017

RYAN T. O'CONNOR #053353
O'Connor Weber LLC
522 SW Fifth Avenue, Suite 1125
Portland, OR 97204
Phone: (503) 226-0923
Email: ryan@oconnorweber.com
Attorney for Petitioner-Appellant

SHAUNA M. CURPHEY #063063
Curphey & Badger, P.A.
3519 NE 15th Avenue, #155
Portland, OR 97212
Phone: (503) 241-2848
Email: scurphey@curpheylaw.com
Attorney for *Amici Curiae*
Fair Punishment Project and
Oregon Justice Resource Center

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
PAUL L. SMITH #001870
1162 Court Street NE
Salem, OR 97301
Paul.l.Smith@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Defendant-Respondent,

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BRIEF IN SUPPORT OF PETITION FOR REVIEW BY *AMICI CURIAE* FAIR PUNISHMENT PROJECT AND OREGON JUSTICE RESOURCE CENTER

INTEREST OF *AMICI CURIAE*

The Fair Punishment Project (FPP) is a joint project of the Charles Hamilton Houston Institute for Race and Justice and the Criminal Justice Institute, both at Harvard Law School. The mission of the Fair Punishment Project is to address ways in which our laws and criminal justice system contribute to the imposition of excessive punishment. The FPP believes that punishment can be carried out in a way that holds offenders accountable and keeps communities safe, while still affirming the inherent dignity that all people possess.

The Oregon Justice Resource Center (OJRC) is a Portland-based, non-profit organization founded in 2011. The OJRC works to dismantle systemic discrimination in the administration of justice by promoting civil rights and by enhancing the quality of legal representation to traditionally underserved communities. The OJRC serves this mission by focusing on the principle that our criminal justice system should be founded on fairness, accountability, and evidence-based practices. The OJRC Amicus Committee is comprised of Oregon attorneys from multiple disciplines and practice areas.

STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

The *Amici* concur with petitioner's statement of historical and procedural facts.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

The *Amici* concur with petitioner's statement of the questions presented and proposed rules of law.

REASONS FOR ALLOWING REVIEW

In addition to the reasons raised by the petitioner, this brief in support of Mr. Cunio's petition for review focuses on the rapid shift in the legal landscape of juvenile sentencing law over the last ten years, which demonstrates that Mr. Cunio's effective life sentence violates the Eighth Amendment of the United States Constitution. Since 2005, a sea change has occurred in how the Supreme Court evaluates the constitutionality of juvenile sentences. Specifically, the Court has barred the death penalty for those under eighteen, *Roper v. Simmons,* 543 US 55, 125 S Ct 1183, 161 L Ed 2d 1 (2005), eliminated juvenile life without parole for non-homicide offenses, *Graham v. Florida*, 560 US 48, 130 S Ct 2011, 176 L Ed 2d 825 (2010), and prohibited mandatory juvenile life without parole for homicide offenses, *Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012). Additionally, in *Montgomery v. Louisana*, the Court required retroactive application of *Miller* because "*Miller*'s conclusion

that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution." *Montgomery v. Louisiana*, __ US __, 136 S Ct 718, 734, 193 L Ed 2d 599 (2016).

In reaching these decisions, the Court has repeatedly highlighted the important ways that juveniles differ from adults. Juveniles exhibit a "lack of maturity and an underdeveloped sense of responsibility," are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and are "more capable of change." *Graham*, 560 US at 68 (citing *Roper*, 543 US at 569-70). Because of these differences, juveniles are less culpable than adults; they are more likely to be rehabilitated and reintegrated into society; and, as a result, rarely deserve the most serious punishments. *Montgomery*, __ US __, 136 Sup Ct at 733.

Movement on the state level mirrors the Supreme Court jurisprudence on this issue. State courts are nearly unanimous that juvenile life without parole in all forms is unconstitutional, and many state legislatures have outlawed it. Even fewer states use it in practice.

In light of this jurisprudence, Mr. Cunio's sentence is unconstitutional. Mr. Cunio is serving two consecutive life sentences, which carry a term of thirty years each, followed by 280 months in prison, for a crime he committed

when he was 16 years old. *Cunio v. Premo*, 284 Or App 698, 700-01, __ P3d __ (2017). This sentence deprives him of the opportunity to rejoin society, regardless of maturation and rehabilitation, and is therefore the functional equivalent of life without parole. Nearly every state court evaluating sentences that deprive a juvenile of a meaningful opportunity for release has recognized that these terms of years are no different than juvenile life without parole, and therefore violate the Eighth Amendment in all but the rarest of circumstances.

The Oregon Court of Appeals, however, ruled that, despite the rulings in *Miller* and *Montgomery*, because Mr. Cunio previously argued the unconstitutionality of his sentence under the Eighth Amendment, he was barred from filing a successive petition and did not fall within the "escape clause" in ORS 138.550(3). Not only is this interpretation fundamentally unfair, it violates the Supreme Court's ruling in *Montgomery*.

The Oregon Court of Appeal's ruling therefore raises serious constitutional concerns. This Court should hear this case and rule that the "escape clause" in ORS 138.550(3) applies, so that Mr. Cunio is entitled to a chance at release, as required by the Supreme Court's ruling in *Montgomery*. Failure to grant this petition will render Oregon an outlier among the states that have considered this issue and have rejected such severe penalties for children.

Thus, this Court should allow the Petition for Review for the following reasons:

- The case presents a significant issue of state law, which involves the interpretation of a statute and implicates fundamental constitutional rights. ORAP 9.07(1), (4).
- The consequence of the decision is important to the public, as it implicates the constitutional rights of children in Oregon's criminal justice system. ORAP 9.07(3).
- Although a case raising similar issues is currently pending before the Court, the parties did not present in-depth briefing on the federal constitutional questions raised here. ORAP 9.07(5), (6).
- The issue is preserved, it is clearly presented by the facts of this case, and it is fully argued in the briefs. ORAP 9.07(7), (8), (15).
- The Court of Appeals published a written opinion. ORAP 9.07(11).
- The FPP and the OJRC will appear as *amici curiae* and be available to advise the court. ORAP 9.07(16).
- Finally, the Court of Appeals' decision appears to be wrong, as set forth more fully below. ORAP 9.07(14).

ARGUMENT

I. THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION NOW CATEGORICALLY PROHIBITS SENTENCING A JUVENILE TO LIFE WITHOUT PAROLE.

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." US Const, Amend VIII. This "standard of extreme cruelty" remains stable over time; yet, "its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 US 407, 419, 128 S Ct 2641, 171 L Ed 2d 525 (2007) (quoting *Furman v. Georgia,* 408 US 238, 382, 92 S Ct 2726, 33 L Ed 2d 346 (1972) (Burger, J., dissenting)). Therefore, the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 US 86, 101, 78 S Ct 590, 2 L Ed 2d 630 (1958).

In recent years, the Supreme Court has found that certain extreme sentences for juveniles violate the Eighth Amendment, including the death penalty, *Roper*, 543 US at 575, juvenile life without parole for non-homicide offenses, *Graham*, 560 US at 74, and mandatory juvenile life without parole for homicide offenses, *Miller*, 567 US at 479. In each opinion, it relied on the unique developmental attributes of juveniles. *See Montgomery*, 136 S Ct at 733 (citing and discussing *Roper, Graham* and *Miller*). A national trend has likewise emerged rejecting the imposition of life without the possibility of

parole for juveniles – for any crime, even murder, as discussed more fully below.

This trend is critical, because the inquiry regarding whether a punishment practice comports with the Constitution looks to objective indicia of societal consensus, including legislative action, sentencing practices, and the speed with which the country is rejecting a punishment. *See Atkins v. Virginia*, 536 US 304, 312, 122 S Ct 2242, 153 L Ed 2d 335 (2002); *Graham*, 560 US at 62; *Kennedy*, 554 US at 433. The pace of the national rejection of juvenile life without parole or its equivalent for homicide strongly suggests that Mr. Cunio's sentence is unconstitutional.

A. The Supreme Court's jurisprudence on juvenile sentencing has shifted dramatically in the last decade.

In 2005, the United States Supreme Court began striking down harsh juvenile sentences based on these critical differences between children and adults. In *Roper*, the Supreme Court struck down the death penalty for juveniles, noting that they have a "lack of maturity and an underdeveloped sense of responsibility" and are more susceptible than adults to "negative influences and outside pressures;" they also have "less control, or less experience with control over their own environment." *Roper*, 543 US at 568-69 (quotations omitted). In light of the differences between adults and juveniles,

the *Roper* Court held that courts cannot impose the death penalty on juveniles "no matter how heinous the crime." *Id.* at 568.

Five years later, the Supreme Court, in *Graham,* held juvenile life without parole was unconstitutional for non-homicide offenses. *Graham*, 560 US at 81. The *Graham* Court cited *Roper's* reasoning, noting that it applied equally in the non-capital context. *Id.* at 77-79. The Court also emphasized the impossibility of distinguishing "with sufficient accuracy" "the few incorrigible juvenile offenders from the many that have the capacity for change." *Id*. at 77.

Two years later, the Supreme Court addressed the constitutionality of juvenile life without parole for homicide offenses. *Miller*, 567 US at 469. In *Miller,* the Court recognized that the principles it adhered to in *Roper* and *Graham* also applied to juvenile homicide offenders. *Id.* at 471-74. Thus, in *Miller,* as in *Graham* and *Roper*, the Court recognized the difficulty in distinguishing "between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 479-80 (internal citation omitted). While the Court stopped short of developing a categorical ban on juvenile life without parole for homicide offenses, it did find that the mandatory imposition of such a sentence violates the Eight Amendment. *Id.* at 489.

B. There is now a national consensus against juvenile sentences of life without parole.

Just as Supreme Court's approach to the Eight Amendment "has evolved substantially in recent years," *United States v. Sweet*, 879 NW 2d 811, 830 (Iowa 2016), state courts and legislatures across the country have also uniformly rejected juvenile life without parole, or its functional equivalent.

Eighteen states and the District of Columbia currently prohibit juvenile sentences of life without parole. Prior to the Supreme Court's decision in *Miller* in 2012, only four states prohibited the practice: Alaska, Colorado, Kansas, and Kentucky.[1] Following *Miller*, an additional fifteen jurisdictions prohibited the imposition of juvenile life without parole by statute or court ruling. Arkansas, Connecticut, the District of Columbia, Hawaii, Nevada, North Dakota, South Dakota, Texas, Utah, Vermont, West Virginia, and Wyoming abolished juvenile life without parole by statute.[2] Massachusetts and

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[1] Alaska Stat § 12.55.125; Colo Rev Stat §§ 17-22.5-104(d)(IV), 18-1.3-401(4)(b)(I); Kan Stat Ann § 21-6618; Ky Rev Stat 640.040(1).

[2] *See* Ark SB 294 (2017) (amending Ark Code §§ 5-4-104(b), 5-4-602(3), 5-10-101(c), 5-10-102(c), 16-93-612(e), 16-93-613, 16-93-614, 16-93-618, and enacting new sections); Conn SB 796 (2015), (amending Conn Gen Stat §§ 54-125a, 46b-127, 46b-133c, 46b-133d, 53a-46a, 53a-54b, 53a-54d, 53a-54a); B21-0683); DC Act 21-568 (2016) (amending, in relevant part, DC Code §§ 24-403 *et seq*.); Haw HB 2116 (2014) (amending Haw Rev Stat §§ 706-656(1), -657); Nev AB 267 (2015) (enacting Nev Rev Stat §§ 176, 176.025, 213, 213.107); ND HB 1195 (2017) (amending ND Cent Code § 12.1-20-03 and enacting a new section in chapter 12.1-32); SD SB 140 (2016) (amending SD Codified Laws § 22-6-1 and enacting a new section); Tex SB 2 (2013) (enacting

Iowa abolished it by court ruling. *Diatchenko v. District Attorney for Suffolk*, 466 Mass 655, 1 NE 3d 270 (2013); *Sweet*, 879 NW 2d at 839. Finally, Delaware, although nominally retaining the punishment, provides every juvenile sentenced to life without parole with the opportunity to petition for a sentence reduction after the sentence is imposed. Del SB 9 (2013) (amending Del Code Ann Title 11, §§ 4209, 4209-A, 4209-217(f), 3901(d)). In these nineteen jurisdictions, every child has a meaningful opportunity to demonstrate to a parole board or judge that he or she has rehabilitated himself in prison and should be released.

In addition to those states that now prohibit the practice outright, several states have narrowed the availability of juvenile life without parole. Since *Miller*, five states have passed legislation that directly limits the availability of juvenile life without parole: California, Florida, North Carolina, Pennsylvania and Washington. California and Florida, both states that, prior to *Miller*, were among the jurisdictions where the sentence was the most common, have

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Tex Penal Code Ann § 12.31, Tex Code Crim Proc Ann article 37.071); Utah HB 405 (2016), (amending Laws of Utah §§ 76-3-203.6, -206, -207, -207.5, -207-.7 and enacting § 76-3-209); Vt H 62 (2015) (enacting Vt. Stat. Ann. tit. 13, § 7045); W Va 5 HB 4210 (2014) (enacting W Va Code §§ 61-2-2, -14a, 62-3-15, -22, -23, 62-12-13b); Wy HB 23, (2013) (enacting Wy Stat Ann §§ 6-2-101, 6-2-306, 6-10-201, 6-10-301, 7-13- 402).

dramatically curtailed the availability of juvenile life without parole.[3] California now allows a juvenile life without parole sentence only in two narrow categories: homicide offenses where the defendant tortured the victim, and homicide offenses where the victim was a public safety official. Cal Penal Code § 1170 (2015). Florida now allows a juvenile life without parole sentence only when a "defendant actually killed, intended to kill, or attempted to kill the victim" and was previously convicted of an enumerated violent felony. Fla Stat § 921.1402(2)(a).[4] North Carolina no longer allows juvenile life without parole for felony-murder convictions. NC SB 635 (2012) (enacting NC Gen Stat §§ 15A-1340.19A, 15A-1340.19B, 15A-1340.19C (2012)). Pennsylvania moved from mandatory life without parole for juvenile offenders convicted of second-degree murder to eliminating juvenile life without parole for that crime. Pa SB 850 (2012) (enacting Pa Cons Stat §§ 1102, 1102.1, 9122, 9123, 9401, 9402, 6301, 6302, 6303, 6307, 6336, 9711.1, 9714, 6139).

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[3] *See* Human Rights Watch, *State Distribution of Juvenile Offenders Serving Juvenile Life Without Parole* (Oct 2, 2009), *available at* https://www.hrw.org/news/2009/10/02/state-distribution-youth-offenders-serving-juvenile-life-without-parole-jlwop (accessed June 14, 2017).

[4] The enumerated felonies include: murder; manslaughter; sexual battery; armed burglary; armed robbery; armed carjacking; home-invasion robbery; human trafficking for commercial sexual activity with a child under 18 years of age; false imprisonment; or kidnapping. Fla Stat § 921.1402(2)(a).

Additionally, Washington State has abolished the penalty for defendants younger than sixteen. Wash SB 5064 (2014), (amending Wash Rev Code §§ 9.94A.510, -.540, -.6332, -.729, 9.95.425, -.430, -.435, -.440, 10.95.030).[5] Illinois and New Hampshire have both raised the jurisdictional age for adult court, limiting the availability of juvenile life without parole and other severe sentences for juveniles. *See* Ill HB 2404 (2013) (amending 705 Ill Comp Stat Ann 404/5-120 to change jurisdictional age from seventeen to eighteen); NH HB 305 (2015) (amending NH Rev Stat Ann 6230:1 (N.H. 2015) to change jurisdictional age from sixteen to seventeen).

Meanwhile, other states have provided parole eligibility to previously sentenced juveniles. The Missouri and Colorado legislatures recently passed laws granting parole eligibility to every one of their inmates previously sentenced to juvenile life without parole. Mo SB 590 (2016); Co SB 16-181 (2016). The Minnesota Supreme Court granted parole eligibility to all inmates sentenced pre-*Miller*. *Jackson v. State*, 883 NW 2d 272, 282 (Minn 2016).

Moreover, several additional states have moved to require that courts consider the mitigating factors of youth before entering an extreme sentence

[5] In addition, an intermediate appellate court in Washington recently held that juvenile life without parole categorically violates the Washington State constitutional prohibition of cruel punishment. *State v. Bassett*, No. 47251-1-II, 2017 WL 1469240 (Wash. Ct. App. Apr 25, 2017).

against a juvenile. *See Casiano v. Comm'r of Corrections*, 317 Conn 52, 115 A3d 1031 (2015) (holding court must consider mitigating features of youth before imposing fifty-year sentence); *People v. Sanders*, 2014 Ill App 21732-U, at *30 2014 WL 7530330 (2014) (unpublished); *State v. Null*, 836 NW 2d 41, 71 (Iowa 2013) (holding sentencing court required to consider characteristics of juvenile offenders and explaining that "[e]ven if a lesser sentence than life without parole might be less problematic, we do not regard the juvenile's potential future release in his or her late sixties after half a century of incarceration sufficient to escape the rationales of *Graham* and *Miller*").

This trend away from juvenile life without parole has been uninterrupted and rapid. Since *Miller,* more than three jurisdictions per year have abolished juvenile life without parole, while no state has passed legislation broadening its scope.

C. In most states that have not yet banned juvenile life without parole sentencing, its application is either rare or nonexistent.

"Actual sentencing practices are an important part of the Court's inquiry into consensus." *Graham,* 560 US at 64 Here, looking beyond the abolishment of juvenile life without parole as a matter of law and to its application in practice, the movement away from imposing this sentence is even more striking. In addition to the nineteen jurisdictions that have formally abandoned juvenile life without parole sentencing, six states appear to have zero

individuals serving a juvenile life without parole sentence: Indiana, Maine, New Jersey, New Mexico, New York, and Rhode Island. *See* Phillips Black Project, *Juvenile Life Without Parole After Miller v. Alabama*, 35, 44, 65, 68, 79 (July 2015) (setting out statistics provided by state Departments of Corrections and attorneys familiar with juvenile sentencing) *available at* https://static1.squarespace.com/static/55bd511ce4b0830374d25948/t/55f9d0abe4b0ab5c061abe90/1442435243965/Juvenile+Life+Without+Parole+After+Miller++.pdf (accessed June 14, 2017). Six more states have five or fewer individuals serving juvenile life-without-parole sentences: Idaho, Montana, New Hampshire, Ohio, Oregon, and Wisconsin. *Id.*

Thus, in total, 31 jurisdictions are either abolitionist, or functionally so. As the Court explained in *Graham*, "It becomes all the more clear how rare these sentences are, even within the jurisdictions that do sometimes impose them, when one considers that a juvenile sentenced to life without parole is likely to live in prison for decades." 560 US at 65. The rareness of juvenile life without parole sentences further demonstrates the mounting national consensus against the practice. *See Atkins v. Virginia*, 536 US 304, 316, 122 S Ct 2242, 153 L Ed 2d 335 (2002) (including jurisdictions where the laws "continue to authorize executions, but none have been carried out in decades" in assessment of consensus for rejecting the execution of the intellectually disabled).

Moreover, in recent years, even more states have curtailed the imposition of life sentences without parole for juveniles. Indeed, three additional states—Alabama, Maryland, and Minnesota—have sentenced no more than one juvenile to life in prison without parole over the past five years. Mills, John R. *et al*, *Juvenile Life Without Parole in Law and Practice: The End of Superpredator Era Sentencing,* 65 Amer Univ Law Rev 535 (forthcoming) *available at* https://ssrn.com/abstract=2663834 (accessed June 14, 2015).

As a result of the rapid abandonment of juvenile life without parole since *Miller*, juvenile life without parole sentencing in the United States is geographically concentrated. In *Graham*, the Court pointed to the extreme geographic concentration of the states that imposed juvenile life without parole for non-homicide offenses as evidence that the practice violated contemporary standards of decency and the Eighth Amendment. 560 US at 65. A similar concentration exists in the current use of juvenile life without parole for homicide offenses. Currently, only nine states account for over eighty percent of all juvenile life without parole sentences. Mills, *et al.* *Juvenile Life Without Parole,* 535 Amer Univ Law Rev at 571-75 . Even within those states, juvenile life without parole sentencing is concentrated within a handful of counties. *Id*. Since 2011, seven counties, making up less than five percent of the total U.S.

population, have accounted for over a quarter of all juvenile life without parole sentences. *Id.*[6]

The trend is clear: in much of the United States, sentencing children to die in prison is no longer an acceptable practice. A substantial majority of states have abandoned juvenile life without parole in law or practice, and others have acted to narrow its application. Today, the use of juvenile life without parole is sought by only a handful of prosecutors in a shrinking number of states. Our standard of decency has evolved: sentencing children to die in prison is cruel and unusual.

II. MR. CUNIO'S SENTENCE IS THE FUNCTIONAL EQUIVALENT OF JUVENILE LIFE WITHOUT PAROLE, AND THEREFORE UNCONSTITUTIONAL.

Both the trend in juvenile sentencing practices, and the principles underlying the Supreme Court's case law eliminating harsh sentences for juvenile offenders, make clear that Mr. Cunio's sentence is unconstitutional. Mr. Cunio has two consecutive life sentences which, at the time of his offense, each carried a minimum term of thirty years in prison. ORS 163.105 (1991).

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[6] Los Angeles, CA; Orleans, LA; Jefferson, LA; Miami-Dade, FL; Philadelphia, PA; Tulare, CA; and East Baton Rouge, LA accounted for 27 percent of all juvenile life without parole sentences imposed between 2011 and 2015. Mills, *et al.*, 535 Amer Univ Law Rev at 571-75.

Following that, he must serve 238 months in prison, or just over 23 years. He will serve at least 83 years, therefore, before becoming parole eligible.

There is no coherent limiting principle that would cabin the scope of Eighth Amendment protections to only "life-without-parole" sentences. Exempting long terms of years, or life sentences with lengthy periods of parole ineligibility, from the reach of *Graham, Miller* and their progeny reduces constitutional protections to form over substance, a practice that U.S. Supreme Court precedent has soundly disapproved of in a number of contexts. *See, e.g., Bd of Cnty Comm'rs v. Umbehr*, 518 US 668, 679, 116 S Ct 2342, 135 L Ed 2d 843 (1996) ("Determining constitutional claims on the basis of [] formal distinctions, which can be manipulated largely at the will of the government . . . , is an enterprise that we have consistently eschewed."). Affording Eighth Amendment protection to a juvenile sentenced to life without parole, but not one sentenced to life without parole eligibility for over 60 years, is the kind of arbitrary line-drawing the Supreme Court routinely scorns. Therefore, the Eighth Amendment's protections must apply equally to any lengthy sentence that, like a life-without-parole sentence, denies a juvenile offender the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 US at 75.

Although the *Miller* court did not establish a specific time limit on how long a juvenile can be imprisoned before its protections are implicated, it is clear from the opinions in *Graham*, *Miller*, and *Montgomery* that a juvenile who has the potential to be reformed, and later realizes that potential, must be released. *See Montgomery*, __ US __, 136 S Ct at 736 ("The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change.").

Therefore, the majority of state courts to address this question have held that, because *Graham* and *Miller* are primarily concerned with affording juveniles who rehabilitate themselves with an opportunity to rejoin society, the constitutional protections established therein must also apply to sentences, like Cunio's, that prohibit an offender's release until he is elderly or facing retirement. In *State v. Null*, the Iowa Supreme Court held that the prospect of "geriatric release" following "half a century of incarceration" was not "meaningful" and did not remove the defendant's 52-year sentence from the ambit of *Miller*. *Null*, 836 NW 2d at 71. The Wyoming Supreme Court agreed in *Bear Cloud v. State*, 2014 WY 113, 334 P3d 132, 135 (2014), holding that a life sentence with 45 years of parole ineligibility was equivalent to life-without-parole for *Miller* purposes. The Connecticut Supreme Court reached an

analogous conclusion in *Casiano*, , finding that the concept of "life imprisonment" addressed in *Miller* and *Graham* was not limited to sentences exceeding a juvenile's actual life expectancy, but applied with equal force to sentences prohibiting release until the juvenile was in his sixties:

> A juvenile offender is typically put behind bars before he has had the chance to exercise the rights and responsibilities of adulthood, such as establishing a career, marrying, raising a family, or voting. Even assuming the juvenile offender does live to be released, after a half century of incarceration, he will have irreparably lost the opportunity to engage meaningfully in many of these activities and will be left with seriously diminished prospects for his quality of life for the few years he has left. A juvenile offender's release when he is in his late sixties comes at an age when the law presumes that he no longer has productive employment prospects. Indeed, the offender will be age-qualified for Social Security benefits without ever having had the opportunity to participate in gainful employment. Any such prospects will also be diminished by the increased risk for certain diseases and disorders that arise with more advanced age, including heart disease, hypertension, stroke, asthma, chronic bronchitis, cancer, diabetes, and arthritis. The United States Supreme Court viewed the concept of "life" in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for "life" if he will have no opportunity to truly reenter society or have any meaningful life outside of prison.

Casiano, 115 A3d at 1046–47 (internal citations omitted); *see also State v. Ronquillo*, 190 Wash App 765, 361 P3d 779, 784 (2015) (defendant's sentence for first-degree murder, under which he must serve 51.3 years before becoming eligible for parole, was constitutionally equivalent to life without parole and violated *Miller*).

Most recently, the Ohio Supreme Court noted, "it is clear that the [U.S. Supreme] court intended more than to simply allow juveniles … the opportunity to breathe their last breaths as free people. The intent was not to eventually allow juvenile offenders the opportunity to leave prison in order to die but to live part of their lives in society." *State v. Moore*, 2016-Ohio-8288, ¶¶ 46-47, 2016 WL 7448751 at *10 (Dec 22, 2016).

III. THIS COURT SHOULD NOT INTERPRET A PROCEDURAL RULE TO ALLOW AN UNCONSTITUTIONAL SENTENCE.

Given the trend in Supreme Court case law and the emerging national consensus against juvenile life without parole and sentences that are its functional equivalent, Mr. Cunio's sentence violates the Eighth Amendment. And yet under the Oregon Court of Appeals' interpretation of ORS 138.550, he will sit with that illegal sentence for the rest of his life.

Not only does such an interpretation call into doubt the integrity of the justice system, it also likely violates Supreme Court case law and the Supremacy Clause. In *Montgomery v. Louisiana*, the Supreme Court ruled that *Miller* applies retroactively, emphasizing that the opposite conclusion would create an impermissible risk that juvenile offenders would languish under an unconstitutional punishment. 136 S Ct at 734 (2016). The lower court's ruling narrowly interpreting the "escape clause" creates the identical risk: Mr. Cunio

"faces a punishment that the law cannot impose upon him," a sentence that is effectively mandatory juvenile life without parole. *See id.* at 736.

Oregon's escape clause does not require such a narrow interpretation, and the lower court's ruling is almost certainly unconstitutional. Under the Supremacy Clause, a "State may not deny a controlling right asserted under the Constitution." *Id*. at 732. This court should therefore reverse the lower court's ruling and conclude that Mr. Cunio can challenge his mandatory juvenile life sentence. Otherwise, Oregon will be out of step with the Supreme Court, the nation, and the Eighth Amendment.

CONCLUSION

For the foregoing reasons, this Court should allow Mr. Cunio's petition for review and reverse the ruling by the Oregon Court of Appeals.

Respectfully submitted,

s/ *Shauna M. Curphey*

Shauna M. Curphey, #063063
Attorney for *Amici Curiae*
Fair Punishment Project
Oregon Justice Resource Center

CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 4,611 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

/s/ Shauna M. Curphey
Shauna M. Curphey, #063063

CURPHEY & BADGER, P.A.
5918 NE 15TH AVENUE, #155
PORTLAND, OR 97212

CERTIFICATE OF FILING AND SERVICE

I certify that on June 14, 2017, I filed the original of this BRIEF IN SUPPORT OF PETITION FOR REVIEW BY *AMICI CURIAE* FAIR PUNISHMENT PROJECT AND OREGON JUSTICE RESOURCE CENTER with the State Court Administrator by the eFiling system.

I further certify that on June 14, 2017, I served a copy of the BRIEF on the following parties by electronic service via the eFiling system or via conventional e-mail service:

RYAN O'CONNOR, #053353
O'Connor Weber LLC
522 SW Fifth Avenue, Suite 1125
Portland, OR 97204
Telephone: (503) 226-0923
Email: ryan@oconnorweber.com
Attorney for Petitioner on Review

PAUL L. SMITH, #001870
Department of Justice
Appellate Division
1162 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-4402
Email:
Paul.L.Smith@doj.state.or.us
Attorney for Respondent on Review

/s/ Shauna M. Curphey
Shauna M. Curphey, #063063