

**In The
Supreme Court of the United States**

—◆—
TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

—◆—
JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

—◆—
**On Writs Of Certiorari To The District Court
Of Appeal Of Florida, First District**

—◆—
**BRIEF FOR AMNESTY INTERNATIONAL, ET AL.,
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

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Treaties

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Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113, Rule 2, (Dec. 14, 1990)....	22
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United Nations Guidelines for the Prevention of Juvenile Delinquency, G.A. Res. 45/112, U.N. Doc. A/RES/45/112 (Dec. 14, 1990)	23

Other Authorities

Annino, Paolo, Rasmussen, David & Rice, Chelsea Boehme, App. II, Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation, (July 14, 2009)	27
Blackmun, Harry A. <i>The Supreme Court and the Law of Nations</i> , 104 Yale L.J. 39 (1994).....	5
Brownlie, Ian <i>Principles of Public International Law</i> , 512–13 (Oxford 1990)	11

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Cruz, Jonathan E., <i>Juvenile Waivers and the Effects of Proposition 21</i> , 1 Law & Soc'y Rev. 29 (2002).....	17
de la Vega, Connie & Brown, Jennifer, <i>Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?</i> 32 U.S.F. L. Rev. 735 (1998).....	10
de la Vega, Connie & Leighton, Michelle, <i>Sentencing our Children to Die in Prison</i> , 42 U.S.F. L. Rev. 983 (2008).....	9
Human Rights Watch/Amnesty International, <i>The Rest of Their Lives</i> (2005 & 2009)	27
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Simpson, A. W. B., Report prepared for submission to the European Court of Human Rights in	

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AMICUS BRIEF ON BEHALF OF
APPELLANTS GRAHAM AND SULLIVAN
STATEMENT OF INTEREST

Amnesty International, Amsterdam Bar Association, Bar Council of Hong Kong, Bar Human Rights Committee of England and Wales, Bar of Montreal, Center for Constitutional Rights, Columbia Law School Human Rights Clinic, Human Rights Advocates, Law Council of Australia, Law Society of England and Wales, Law Society of Ireland, Netherlands Bar Association, New Zealand Law Society, The Advocates for Human Rights, and Union Internationale des Avocats hereby request that this Court consider the present brief pursuant to Sup. Ct. Rule 37.2(a) in support of Petitioners.¹ The interests of *amici* are described in detail in the Appendix.

Amici urge the Court to consider international law and opinion when applying the Eighth Amendment's clause prohibiting cruel and unusual punishments. International standards for sentencing juvenile offenders to life in prison without the possibility of parole bears directly on domestic compliance with international legal and societal norms. Those standards also provide an

¹ Counsel of record received timely notice of the intent to file this brief. Letters from all counsel consenting to its filing are being sent with this brief to the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

important indicator of evolving standards of decency, which in turn illuminate the contours of acceptable conduct under the Eighth Amendment. The United States is the only country in the world that does not comply with the norm against imposing life without parole sentences on juveniles under the age of 18. Prohibiting the sentence challenged in these cases would bring the United States into compliance with one of the most widely accepted human rights norms and with its international treaty obligations, and it would honor the Eighth Amendment principles that led this Court to strike down the juvenile death penalty in *Roper v. Simmons*, 543 U.S. 551 (2005).

SUMMARY OF ARGUMENT

International law and opinion have informed the law of the United States from the Declaration of Independence forward. The Founders were greatly influenced by international legal and social thought; and throughout the history of this country, courts have referred to international standards in considering the permissibility of practices under the Constitution. This is particularly true with respect to the Eighth Amendment's "cruel and unusual punishments" clause. Thus, *amici* consider the history of treatment of juveniles under international law and practice with respect to life without parole sentences to be of particular interest to this Court in carrying out its role under U.S. constitutional law.

Every other country in the world has rejected the practice of giving this sentence to offenders who

were under 18 at the time they committed a crime. Although a few countries technically permit the sentence, no known persons are actually serving the sentence outside the United States. In order to comply with international law, the few countries in which juveniles reportedly received such sentences either have changed their laws or given assurances that the juvenile offenders can apply for parole. The universal prohibition against such a sentence outside of the United States reflects not just customary international law, but a peremptory, non-derogable, *jus cogens* norm of international law. In addition, because of the historical relationship between the United Kingdom and the United States, the experience of England and Wales in prohibiting juvenile life without parole sentences can provide particular guidance to this Court.

Indeed, this Court referred to the international law regarding the juvenile death penalty in holding that sentence unconstitutional under the Eighth Amendment. *Roper*, 543 U.S. at 575-79. Many of the international standards referred to in *Roper* condemn equally the death penalty and life without parole sentences when applied to juveniles. Just as those standards supported the constitutional prohibition of the juvenile death penalty, so too they support the reversal of Mr. Graham and Mr. Sullivan's sentences.²

² At a minimum, since juvenile life without parole is considered similar to the juvenile death penalty under

ARGUMENT

I. INTERNATIONAL LAW AND OPINION
FORM A BASIS OF LAW AND
GOVERNMENT IN THE UNITED STATES

From the beginning, the laws of the United States have been informed and shaped by laws and opinions of other members of the international community. Indeed, the Declaration of Independence speaks to the relevance of other nations:

When, in the course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, *a decent respect to the opinions of mankind* requires that they should declare the causes which impel them to the separation.

The Declaration of Independence, para. 1 (U.S. 1776) (emphasis added). This Court has affirmed that history and noted that:

international law, this Court should carefully consider the imposition of such a serious sentence without the protections enunciated by this Court in the context of the application of the death penalty, as occurred in the case of Mr. Graham. *See Gregg v. Georgia*, 428 U.S. 153 (1976).

For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. . . . It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

Sosa v. Alvarez-Machain, 542 U.S. 692, 729-730 (2004).

In urging courts to afford the “decent respect to the opinions of mankind” intended by the Founders, Justice Blackmun has explained that:

[T]he early architects of our Nation understood that the customs of nations – the global opinion of mankind – would be binding upon the newly forged union. John Jay, the first Chief Justice of the United States, observed . . . that the United States “had, by taking a place among the nations of the earth, become amenable to the laws of nations.”

Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39 (1994) (citation and footnotes omitted).

Thomas Jefferson, the principal drafter of the Declaration of Independence, had a keen appreciation for international opinion and law. Accordingly, the Declaration of Independence

reflects a broad understanding of eighteenth century political thought, and was greatly influenced by French, English, and Scottish Enlightenment philosophers and their understanding of ancient Greek democracy and the Roman Republic.

Similarly, John Adams was sensitive to, and familiar with, international opinion as it related to the Nation's laws and institutions. During his time as Minister to Great Britain, Adams wrote a multi-volume defense of the new Constitution and its form of government. In it he demonstrates his deep knowledge of various forms of governments and the necessity of selecting the best the world had to offer to create a better government. *See* John Adams, *A Defence of the Constitutions of Government of the United States of America*, Preface, Grosvenor Square (Jan. 1, 1797), http://www.constitution.org/jadams/ja1_00.htm.

Consistent with the approach of the Founders, this Court has recognized the relevance of international norms to the evolution of societal norms and to the scope and content of Constitutional rights—irrespective of the precise legal status of the norms at issue. In *Roper*, which abolished juvenile executions, the Court considered not only the evolution of international law, but also the evolution of the practice in the community of nations of referring to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." *Id.* at 575-78; *see also, e.g., Lawrence v. Texas*, 539

U.S. 558, 576-77 (2003) (holding Texas’s law prohibiting sodomy unconstitutional when other nations “have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct,” a right which “has been accepted as an integral part of human freedom in many other countries”); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsberg, J., concurring) (referencing provisions in International Convention on the Elimination of All Forms of Racial Discrimination as basis for holding law school’s affirmative action program did not violate Equal Protection Clause); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (reversing death penalty for felony murder conviction, referencing that practice was unknown, abolished or severely restricted in other countries); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (taking into account “the climate of international opinion concerning the acceptability of a particular punishment,” noting it was “not irrelevant here that out of 60 major nations in the world . . . only 3 retained the death penalty for rape where death did not ensue”).

The very constitutional provision at issue in this case—the Eighth Amendment’s prohibition on “cruel and unusual punishments inflicted”—traces its origin directly to the laws of another nation. The foundation for the phrase “cruel and unusual” stems from the “Anglo-American tradition of criminal justice.” *Trop v. Dulles*, 356 U.S. 86, 100 (1958). The phrase was taken directly from the English Declaration of Rights of 1688, and the principle came from the Magna Carta. *Id.* For this reason,

the Amendment's meaning must be drawn from the "evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

This Court has a proud history of looking to the standards of the international community, in particular in determining the contours of the Eighth Amendment's cruel and unusual punishments clause. *See, e.g., Roper*, 543 U.S., at 575-78 (noting that international law and the laws of other countries, including the United Kingdom, prohibit the juvenile death penalty); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (considering international community's rejection of death penalty for persons with mental retardation); *Trop*, 356 U.S. at 102 (noting "virtual unanimity" within international community that denationalization constitutes cruel and unusual punishment); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) (considering abolition of juvenile death penalty by leading nations in Western Europe and among countries sharing our Anglo-American heritage), *recognized in Roper*, 543 U.S. at 575; *see also Coker*, 433 U.S. at 596 (60 countries surveyed where only 3 retained death penalty for rape in non-homicide cases). To view the evolving standards of decency in an isolated and insular domestic environment would be contrary to all that the Founders considered essential to joining the ranks of nations.³

³ International law also informs state and local jurisprudence in the United States. *See* Human Rights in State Courts, Opportunity Agenda, at 10-38,

The Founders sought to elicit the very best from themselves, fellow citizens and all of humankind in creating the United States. They were not as concerned with the source of a just principle as they were with its value to a just and honorable country. Similarly, this Court should consider international standards and recognize that sentencing juvenile offenders to die in prison does not have a place in an evolved society. Surely children in the United States are not worse, less human, or less deserving than children in the rest of the world.

II. INTERNATIONAL LAW PROHIBITING LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS IS INSTRUCTIVE TO THE COURT'S EIGHTH AMENDMENT ANALYSIS

The practice of sentencing juvenile offenders to life imprisonment without the possibility of parole has been rejected by every nation in the world except the United States. Only the United States still imposes the sentence. Connie de la Vega & Michelle Leighton, *Sentencing our Children to Die in Prison*, 42 U.S.F. L. Rev. 983, 989-1007 (2008) (hereinafter “*Sentencing our Children to Die*”). Indeed, the prohibition against the sentence of life without parole for juveniles is part of customary international law, and the elevation of this norm to the status of *jus cogens* by the

<http://opportunityagenda.org/category/tags/human-rights>
(listing 35 states in which international human rights law considered persuasive in state court decisions).

worldwide condemnation of this practice and the expectation for all nations to comply, should provide guidance to this Court in interpreting the Constitution.⁴ Moreover, the consistency and uniformity of international law and opinion against the challenged sentence should weigh heavily in this Court's determination that the juvenile life sentence without parole is inconsistent with the Eighth Amendment's prohibition of cruel and unusual punishments.

A. The Prohibition Of Juvenile Life Without Parole Sentences Is *Jus Cogens*

Under article 53 of the Vienna Convention on the Law of Treaties, a *jus cogens* norm of international law is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, art. 53, 1155 U.N.T.S. 331, (May 23, 1969) (hereinafter “Vienna Convention”).⁵ The Restatement (Third) of the

⁴ As discussed below, imposition of this sentence by courts in Florida and elsewhere in the country renders the United States out of compliance with its international treaty obligations.

⁵ Although the United States has not ratified the Vienna Convention, it nonetheless accepts the treaty's principles as binding law—i.e., part of United States law. *See, e.g.*, Restatement § 102; Connie de la Vega & Jennifer Brown, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?* 32 U.S.F. L. Rev. 735, 754,

Foreign Relations Law of the United States, which explicates the content and status of international law *as United States law*, agrees with this standard. Restatement (Third) of the Foreign Relations Law of the United States § 102, cmt. k (hereinafter “Restatement”).

The doctrine of *jus cogens* focuses on the supremacy of certain international law norms in regulating state practice. Ian Brownlie, *Principles of Public International Law* 512–13 (Oxford 1990) (hereinafter “Brownlie”); *Barcelona Traction, Light and Power Company, Limited* (Belg. v. Spain), 1970 I.C.J. 4, at paras. 33–34 (Feb. 5). These are rules originally derived from treaties and/or state practice, comprising customary international law (which the Restatement describes as resulting “from a general and consistent practice of states followed by them from a sense of legal obligation” Restatement §102(2)). However, unlike general customary law, *jus cogens*, also called peremptory norms, have attained a higher status in international law such that the global community of nations expects all states to comply, and none to derogate, regardless of consent, express or implied.

According to the Restatement, *jus cogens* “rules prevail over and invalidate international agreements and other rules of international law in conflict with them.” *Id.*, cmt. k. The Ninth Circuit has explained that:

759-62 (1998) (explaining that United States is bound by *jus cogens*).

While *jus cogens* and customary international law are related, they differ in one important respect. Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm, see Restatement § 102 Comment d, just as a state that is not party to an international agreement is not bound by the terms of that agreement In contrast, *jus cogens* “embraces customary laws considered binding on all nations” and “is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations,” [citations omitted].

Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992) (recognizing torture as *jus cogens* violation).

While commentators may disagree on the exact scope of all *jus cogens* norms, there is agreement about their existence as an established part of international law. *Id.*; see also *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 101 F.3d 239, 244-45 (2d Cir. 1996) (discussing *jus cogens* norms as they relate to states’ sovereign immunity); *Ye v. Zemin*, 383 F.3d 620, 625-27 (7th

Cir. 2004) (discussing *jus cogens* norms—“a special type of customary international law”—with regard to head of state immunity). Courts have also recognized that *jus cogens* norms may inform U.S. jurisprudence. *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 940-41 (D.C. Cir. 1988) (dicta) (“[basic norms of international law] may well restrain our government in the same way that the Constitution restrains it”). The norm is said to be established where there is acceptance and recognition by a “large majority” of states, even if over dissent by a very small number of states. Restatement §102 & rptr. n. 6 (citing Report of the Proceedings of the Committee of the Whole, at 471-72, U.N. Doc.A/Conf. 39/11 (1968)).

A *jus cogens* norm must fulfill three basic requirements: 1) it is general or customary international law; 2) it is accepted by a large majority of states as non-derogable; and 3) it has not been modified by a new norm of the same status. As discussed below, the prohibition against life without parole sentences for offenders under the age of 18 when they committed their crime satisfies these requirements. Thus, the prohibition is *jus cogens*, and the community of nations expects the United States to comply.

1. The Prohibition is General or Customary International Law

General or customary international law requires widespread, constant, and uniform state practice compelled by a sense of legal obligation over a sufficiently long time period,

notwithstanding a few uncertainties or contradictions in practice during this time. *Anglo-Norwegian Fisheries* (U.K. v. Nor.), 1951 I.C.J. 116, 138–39 (Dec. 10) (discussing general international law applicable to delimitation of Norwegian fisheries zone); *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, at 98, para. 186 (June 27) (to deduce existence of customary rules, it is “sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule”).

Furthermore, “a very widespread and representative participation in [a] convention might suffice of itself” to evidence the attainment of customary international law, provided it included participation from “States whose interests were specially affected.” *North Sea Continental Shelf Cases* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, paras. 73–74 (Feb. 20) (“although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general

recognition that a rule of law or legal obligation is involved”). This definition is accepted by most legal scholars in and outside the United States. *See, e.g.*, Restatement § 102; Henry J. Steiner, Philip Alston & Ryan Goodman, *International Human Rights in Context* 74-78 (Oxford 2008).

The prohibition against sentencing child offenders to life without parole meets these criteria. It is a treaty rule and customary practice, followed by all countries as a legal obligation, except the United States.⁶ As this Court noted in *Roper*, there is near-universal ratification of the U.N. Convention on the Rights of the Child (“CRC”) which, in article 37, expressly prohibits the sentence for juveniles along with the death penalty. This is because imposing such sentences on juvenile offenders contravenes society’s notion of fairness and the shared legal responsibility to protect and promote child development. The Committee on the Rights of the Child, the treaty body that monitors compliance with the CRC, has noted that customary international law recognizes that the special characteristics of children should be considered when imposing sentences in the criminal justice system. Committee on the Rights

⁶ The United States and Somalia are the only two countries not party to the CRC. *See* OHCHR, Status of the Principal International Human Rights Treaties, at <http://www.unhchr.ch/pdf/report.pdf>. Lacking a functioning government, Somalia could not feasibly have ratified the CRC, *see, e.g.*, U.S. Department of State report on Somalia, <http://www.state.gov/r/pa/ei/bgn/2863.htm>, leaving the United States as the only country that could have but has not ratified the treaty.

of the Child, Children's Rights in Juvenile Justice, General Comment No. 10, paras. 10-11, U.N. Doc CRC/C/GC/10 (2007). Indeed, the LWOP sentence penalizes child offenders more than adults because the child, by virtue of young age, will likely serve a longer sentence than an adult for the same crime.

Moreover, all functioning states besides the United States comply with the legal obligation, including those whose interests are specially affected. Other states that had used the sentence have abolished it. *Sentencing our Children to Die*, *supra*, at 989. The United States is now responsible for 100% of all child offenders serving this sentence.

While the CRC entered into force in 1992, very few countries have *ever* imposed life sentences on child offenders. *Sentencing our Children to Die*, *supra*, at 989-1007. For example, in Germany, the maximum sentence for youth under 18 for any crime is 10 years (Arts. 5, 17 & 18 of the Jugendgerichtsgesetz (JGG), Juvenile Justice Act, German penal code of 1923, consolidated version of 12/17/2008, www.gesetze-im-internet.de/bundesrecht/jgg/gesamt.pdf); in Italy it is 24 years (Arts. 23, 65 & 98 of the penal code, *codice penale*, <http://dbase.ipzs.it/cgi-free/db2www/notai/arti.mac/input?swpag=12E>); and in France it is 16 to 20 years for juveniles under age 16 (Arts. 2 & 20-2, *Ordonnance of 2 Feb. 1945*, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006069158&dateTexte=20090701>).

Most governments either have expressly prohibited, never allowed, or do not impose such sentences on child offenders, because it violates the principles of child development and protection established through national standards and international human rights law. *Sentencing our Children to Die, supra*, at 989-90. Of the remaining countries besides the United States that have laws that could permit the sentencing of child offenders to life without parole, in ten (Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka) there are no known cases where the sentence has been imposed. *Id.* at 990. Even in the United States, the sentence was not used on a large scale until the 1990s when crime reached record levels. *See* P. Griffin, et al., *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions*, National Center for Juvenile Justice (1998), www.ncjrs.org/pdffiles/172836.pdf. Before 1992, the sentence had rarely been imposed. Jonathan E. Cruz, *Juvenile Waivers and the Effects of Proposition 21*, 1 *Law & Soc'y Rev.* 29, 38 (2002). Thus, the norm prohibiting the juvenile life without parole sentence is widespread, constant and uniform—and it predates formal codification in the CRC.

2. There is Universal Acceptance that the Prohibition is Non-Derogable and Applies to All States

Whether a rule of international law has achieved preemptory status depends on whether

nations agree that the rule is legally binding on *all* states. See Dinah Shelton, *Normative Hierarchy in International Law*, 100 Am. J. Int'l L. 291, 323 (2006); Brownlie, *supra*, at 512–13. It is therefore important to evaluate the legal expectations of the community of nations and their practice in conformity with those expectations. Treaties and UN resolutions can provide evidence of such expectations. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* 22 (Oxford 1994).

Virtually all nations have reconfirmed their expectation that every country comply with the prohibition: treaty bodies have clarified that the sentence is prohibited by law, even for the United States; the community of nations has condemned the practice and called for its abolition by any nation that would continue its use; and all other countries that had used the sentence have stopped.

In early 2007, the Committee on the Rights of the Child reiterated that CRC article 37 prohibits the death penalty and life without parole in a General Comment. General Comment No. 10, at para 27.

The prohibition has also been recognized as an obligation under the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXXI), 999 U.N.T.S. 171 (Dec. 16, 1966) (hereinafter “ICCPR”). In relation to articles 7 (cruel and unusual punishment) and 24 (treatment of children), the Human Rights Committee “is of

the view that sentencing children to life sentence without parole is of itself not in compliance with article 24 (1) of the Covenant. (articles 7 and 24).” U.N. Human Rights Comm., Comments on the United States of America, U.N. Doc. CCPR/C/SR 2395 at para 34 (2006) (hereinafter “Comments on the United States”).

Prohibition of the juvenile death penalty and juvenile sentences of life without parole is also required to ensure the rights to humane treatment, dignity and personal liberty of children that are codified in the *corpus juris* of the Organization of American States, of which the United States is a member. *See* American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, Art. VII (1948) (establishing right of “all children . . . to special protection, care and aid”); American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, art. 19 (18 July 1978) (“Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state”); *Michael Domingues v. United States*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, doc. 5 rev. 1, at 913, para. 83 (2002) (Art. 19 of American Convention and Art. VII of American Declaration reflect “the broadly-recognized international obligation of states to provide enhanced protection to children”); *Juridical Conditions and Human Rights of the Child*, Inter-Am. Ct. H.R., Advisory Opinion OC-17/02, Ser. A. No. 17, para. 37 (Aug. 2002) (“Deprivation of liberty of children shall be applied as a measure of last resort and for the

minimum necessary period, and shall be limited to strictly exceptional cases.”).

Beyond the rule’s clarity in treaty law, a near universal consensus has coalesced over the past fifteen years, even accelerated since 2006, that the sentence must be legally abolished. Myriad United Nations resolutions have passed by consensus or, upon vote, by every country represented except the United States. Every year since 2006, the United Nations General Assembly has adopted in its Rights of the Child resolution a call for the immediate abrogation of the juvenile LWOP sentence by law and practice in any country applying the penalty. For example, by a vote of 185 to one (the United States was the lone dissenter) the General Assembly adopted a resolution on December 19, 2006, calling upon nations to “abolish by law, as soon as possible, the death penalty and life imprisonment without possibility of release for those under the age of 18 years at the time of the commission of the offense.” Rights of the Child, G.A. Res. 61/146, U.N. Doc. A/Res/61/146, para. 31(a) (Dec. 19, 2006). A similar resolution was adopted by a vote of 183 countries to one in December of 2007 (only the United States voted against), G.A. Res. 62/141, U.N. Doc. A/RES/62/141, para 36(a) (Dec. 18, 2007), and again in 2008 (the United States was the only vote against). G.A. Res. 63/241, U.N. Doc. A/RES/63/241, para 43(a), (Dec. 24, 2008).

The United Nations Human Rights Council included the prohibition in its first substantive resolution on the Rights of the Child, Rights of the

Child, A/HRC/7/RES/29, para. 30(a) (2008), along with prohibition of the death penalty for offenders under the age of 18 at the time of the crime.⁷ In 2009 the Council again urged “States to ensure that, under their legislation and practice, neither capital punishment nor life imprisonment without the possibility of release is imposed for offences committed by persons under 18 years of age.” Human rights in the administration of justice, in particular of children and juvenile justice, Res. 10/2, U.N. Doc. A/HRC/10/L.11, ¶ 11 (adopted Mar. 25, 2009). In 2005, the U.N. Commission on Human Rights (predecessor to the Council) called for governments to prohibit the juvenile LWOP sentence along with the juvenile death penalty. Rights of the Child, Comm’n on Human Rights 2005/44, U.N. Doc. E/CN.4/RES/2005/44, para. 27(c) (April 20, 2005). This resolution emerged from a series of pronouncements from the Commission, from 1997 through 2004, emphasizing the need for the global community to comply with the principle that depriving juveniles of their liberty should only be a measure of last resort and for the shortest appropriate time. *Sentencing our Children to Die*, *supra*, at 1017-18, n.182.

These resolutions followed many years of other pronouncements calling for limited juvenile incarceration. In 1985, for example, the General Assembly adopted the United Nations Standard Minimum Rules for the Administration of Juvenile

⁷ The Commission on Human Rights, created in 1948, was replaced by the Human Rights Council in 2005 which began adopting thematic resolutions in 2007.

Justice, reiterating that confinement shall be imposed only after careful consideration and for the shortest period possible. Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, 40 U.N. GAOR Supp. No. 53, at 207, U.N. Doc. A/40/53, Rule 17.1(b) (Nov. 29, 1985). In 1990, the General Assembly passed two other resolutions in support. *See* U.N. Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113, Rule 2, (Dec. 14, 1990) (emphasizing imprisonment as a last resort and for the shortest time possible); United Nations Guidelines for the Prevention of Juvenile Delinquency, G.A. Res. 45/112, U.N. Doc. A/RES/45/112, para. 46, (Dec. 14, 1990).

Moreover, as noted above, all other countries that had maintained a JLWOP sentence have ended the practice in accordance with their treaty and international human rights obligations. *Sentencing our Children to Die, supra*, at 996-1004 (e.g., Tanzania committed to allow parole for the one person potentially serving the sentence and to clarify its laws to prohibit it; Israel clarified that parole petitions may be reviewed by its High Court; and South Africa clarified that such sentences are not permitted). That the few remaining countries besides the United States that potentially had juvenile offenders serving such a sentence clarified that they allow for parole hearings in accordance with the international legal norm is further evidence that countries agree no derogation is permitted. All nations are expected to respect the norm, regardless

of objection (even persistent) by a particular country.⁸ Restatement § 102 & cmt. k.

3. There is No Other Peremptory Norm
Modifying the Prohibition of Juvenile Life
Without Parole Sentences

“[A] peremptory norm is subject to modification only by a subsequent norm of international law having the same character.” Restatement § 102 & cmt. k. There is no other norm that contradicts the current norm. Rather, as discussed above, the trend is to the contrary, as governments call for abolition of the challenged sentence in law and deed. The prohibition against JLWOP thus satisfies the three requirements for *jus cogens* status.

The norm is international law, and it should inform this Court’s analysis of the challenged sentence under the Eighth Amendment.

⁸ *Amici* do not imply that the United States has been a persistent objector, since the doctrine requires that a state object clearly, consistently, and affirmatively both as the norm is in its formative stages and continually as it develops. Jonathan I. Charney, *Universal International Law*, 87 Am. J. Int’l L. 529, 537 (1993). The United States did not start objecting until this past decade, well past the norm’s formative stage. Moreover, in the context of *jus cogens*, there is no exception for persistent objectors.

B. The United States has been Found Out of Compliance with its Treaty Obligations in Allowing Life Without Parole Sentences

In determining whether the United States Constitution permits the challenged sentence, the Court should also consider the mandates of the Supremacy Clause, which provides that “all Treaties made ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.” U.S. Const. art. VI, cl. 2.

The United States is now out of compliance with several human rights treaties to which it is a legal party: the ICCPR, *supra*; the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 113, *entered into force*, June 26, 1987, ratified by the United States, Oct. 21, 1994, and the Convention on the Elimination of Racial Discrimination, 660 U.N.T.S. 195, *entered into force*, Jan. 4, 1969, ratified by the United States, Oct. 21, 1994 (hereinafter “CERD”).

The treaty bodies that monitor compliance with these treaties all have raised concerns about and/or found the United States specifically out of compliance with its obligations in allowing life without parole sentences for juveniles. Florida, like other states, has an obligation to ensure that its criminal punishments comply with and help the United States meet its international treaty obligations.

As Justice Stevens has stated, “[o]ne consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation,” *Medellin v. Texas*, 552 U.S. ___, 128 S. Ct. 1346, 1374 (2008) (concurring opinion), and, in a follow-up opinion emphasized the point, “I wrote separately to make clear my view that Texas retained the authority—and, indeed, the duty as a matter of international law—to remedy the potentially significant breach of the United States’ treaty obligations....” *Medellin v. Texas*, 552 U.S. ___, 129 S. Ct. 360, 362 (2008) (Stevens, J., dissenting). Compliance with international human rights standards and with treaty obligations should be of particular concern to states, as they carry a large part of the burden to implement obligations related to sentencing and detention.

The express provisions of international treaties and the findings of treaty bodies should be highly relevant to this Court’s consideration under the Eighth Amendment, much as it was in *Roper*, 543 U.S. at 576. In *Roper*, the Court examined the CRC’s express prohibition of the death penalty and the fact that “parallel prohibitions are contained in other significant international covenants.” *Id.* The case for the Court’s consideration here, however, is *even stronger* because the treaty bodies charged with overseeing the main treaties that address criminal sentencing to which the United States is a party have specifically found the United States to be out of compliance by allowing juvenile life without parole sentences.

In 2006, the Human Rights Committee, oversight authority for the ICCPR, determined that allowing the sentence contravenes article 24(1), which states that every child shall have “the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State,” and article 7, which prohibits cruel and unusual punishment. The Human Rights Committee concluded that the United States should ensure that no child offender be given the sentence. Comments on the United States, *supra*, para. 34.

The Committee noted the reservation of the United States to other articles in the treaty which states that:

The United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14.

See Office of the United Nations High Comm’r for Human Rights, ICCPR, http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm. This did not prevent the Committee from finding the United States out of compliance with article 24(1) (noted above), and from registering its concern that the application of the sentence was not imposed only in “exceptional circumstances.” *Id.*

The United States currently has more than 2,500 juvenile offenders serving the sentence.

Many of those are for convictions that could not be deemed the worst crimes: an estimated 26% of juvenile offenders are serving JLWOP for felony murder, in which the juvenile was not the person who killed the victim. Human Rights Watch/Amnesty International, *The Rest of Their Lives*, at 27 (2005), <http://www.hrw.org/en/reports/2005/10/11/rest-their-lives-0>; and 2009 Update Report, http://www.hrw.org/sites/default/files/related_material/JLWOP_Table_May_7_2009.pdf.

In 45 percent of California cases surveyed by Human Rights Watch, youth sentenced to life without parole were convicted for their role in aiding and abetting or participating in a felony. Human Rights Watch, *When I Die, They'll Send Me Home: Youth Sentenced to Life without Parole in California*, at 21 (Jan. 2008), <http://www.hrw.org/reports/2008/us0108/>. A significant number of those cases involved an attempted crime gone awry—a tragically botched robbery attempt, for example—rather than premeditated murder. Other youths were given the sentence for lesser crimes, as exemplified most poignantly by the cases of petitioners Graham and Sullivan now before this Court.

In significant contrast to the reservation's promise to try children as adults only in "exceptional cases," there are presently some 2,500 juveniles serving life without parole sentences in the United States, including approximately 302 in Florida. See Paolo Annino, David Rasmussen, Chelsea Boehme Rice, App. II, Juvenile Life

without Parole for Non-Homicide Offenses: Florida Compared to Nation, (July 14, 2009), [http://www.law.fsu.edu/faculty/profiles/annino/Report JuvenileLifeSentence.pdf](http://www.law.fsu.edu/faculty/profiles/annino/Report%20JuvenileLifeSentence.pdf).

The Committee Against Torture, the official oversight body for the Convention Against Torture, in evaluating the United States' compliance, found that life imprisonment of children "could constitute cruel, inhuman or degrading treatment or punishment," in violation of the treaty. Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, at para. 35, U.N. Doc. CAT/USA/CO/2 (July 25, 2006).

Moreover, in 2008, the Committee on the Elimination of Racial Discrimination, the oversight body for the CERD, found the sentence incompatible with Article 5(a) of the CERD, particularly because the sentence is applied disproportionately to youth of color and the United States has done nothing to reduce what has become pervasive discrimination. The Committee referred to both the Human Rights Committee and Committee Against Torture's reports on the United States, noting the concern raised in regard to the sentence, and stated:

In light of the disproportionate imposition of life imprisonment without parole on young offenders – including children – belonging to racial, ethnic and national minorities, the Committee considers that the

persistence of such sentencing is incompatible with article 5 (a) of the Convention. The Committee therefore recommends that the State party discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences.

CERD, Concluding Observations of the United States, at para 21, U.N. Doc. CERD/C/USA/CO/6 (Feb. 6, 2008).

The disproportionate use of this sentence is well documented. In a Human Rights Watch survey of 25 states, the rate of black youth per capita serving life without parole sentences was ten times higher than that of white youth and much higher in some states, such as California where the rate of black youth per capita serving the sentence is 18 times higher than white youth. Human Rights Watch, Submission to the Committee on the Elimination of Racial Discrimination, at 21-22 (Feb. 2008), <http://www.hrw.org/en/node/62449/section/2>. Youth of color in some jurisdictions receive more than 90% of the LWOP sentences given. *Sentencing our Children to Die, supra*, at 993-95.

In light of the foregoing treaty obligations and the Constitution's Supremacy Clause, the Court should consider the views of the bodies authorized to monitor compliance with the treaties

to which the United States is a party in determining whether the sentence of life without parole for a juvenile violates the prohibition of cruel and unusual punishments under the Constitution.

C. The Uniformity and Consistency of International Law and Practice Should Inform the Court's Eighth Amendment Analysis

As enumerated above, this Court has repeatedly recognized the relevance of international law and opinion when considering whether a sentence complies with the Eighth Amendment. “It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.” *Roper*, 543 U.S. at 578 (citations omitted); *see also Enmund*, 458 U.S. at 796, n.22 (death penalty may not be imposed for felony murder, citing the experience of Commonwealth and Western European countries); *Coker*, 433 U.S. at 596 (international opinion relevant in finding death penalty for rape violates Eighth Amendment); *Trop*, 356 U.S. at 102-03 (foreign state practices deemed relevant to determination that denaturalization of military deserter constituted cruel and unusual punishment).

Generally, as this Court has noted, customary international law is “part of our law, and must be ascertained and administered by the

courts of justice of appropriate jurisdiction." *The Paquete Habana*, 175 U.S. 677, 700 (1900). In this regard, the Restatement provides that "[i]nternational law and international agreements of the United States are the law of the United States and supreme over the law of the several States" and "[c]ourts in the United States are bound to give effect to international law and to international agreements of the United States." Restatement § 111(1) & (3). The principle that customary international law is part of United States law applies with even greater force when considering a peremptory norm. *See, e.g., United States v. Mata-Ballesteros*, 71 F.3d 754, 764 n.5 (9th Cir. 1995) (torture, murder, genocide and slavery constitute *jus cogens* norms, which are "nonderogable and peremptory, [and] enjoy the highest status within customary international law"); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("The right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of *jus cogens*."); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 499 (9th Cir. 1992) ("it would be unthinkable to conclude other than that acts of official torture violate customary international law") (citation omitted); *Siderman*, 965 F.2d at 715 ("Courts seeking to determine whether a norm of customary international law has attained the status of *jus cogens* look to the same sources, but must also determine whether the international community recognizes the norm as one 'from which no

derogation is permitted”) (citation omitted); *White v. Paulson*, 997 F. Supp. 1380, 1384 (E.D. Wash. 1998) (“This Court can conceive of no adequate reason why the rationale supporting the existence of judicial authority to recognize implied remedies for constitutional rights does not apply with equal or greater force to *jus cogens* norms of international law, such as the prohibitions on genocide, torture, and slavery”).

The uniform rejection by the rest of the world of life without parole sentences for juveniles is weighty evidence that the practice is inconsistent with the Eighth Amendment.

III. THE LAW AND OPINIONS OF THE UNITED KINGDOM ARE PARTICULARLY RELEVANT TO THIS COURT’S EIGHTH AMENDMENT ANALYSIS

A majority of this Court has noted that the United Kingdom’s experience is instructive to interpreting the Eighth Amendment not just because of the “historic ties” between our two countries but because the Eighth Amendment was derived from the English Declaration of Rights of 1689. *Roper*, 543 U.S. at 577; *Lawrence*, 539 U.S. at 576. The close relationship between the United Kingdom and the United States has a long history and recent developments in world affairs have made that relationship even closer. The President has noted, “the special relationship between the United States and Great Britain is one that is not just important to me, it’s important to the American people. And it is sustained by a common language, a

common culture; our legal system is directly inherited from the English system; our system of government reflects many of these same values” Remarks of President Obama, Mar. 3, 2009, U.S. Embassy, London,

<http://www.usembassy.org.uk/gb083.html>. The United States not only shares fundamental values with the United Kingdom, but also a common law heritage, as consistently recognized by this Court. *See, e.g.*, *Roper*, 543 U.S. at 577 (“it is instructive to note that the United Kingdom abolished the juvenile death penalty” before international covenants prohibiting the practice came into being); *Browning-Ferris Industries of Vermont, Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257, 273 (1989) (discussing Magna Carta and English Bill of rights in determining scope of Eighth Amendment Excessive Fines Clause); *Ferguson v. Georgia*, 365 U.S. 570, 581-82 (1961) (considering evolution of legal competency of criminal defendants in England and United States); *United States v. Lee*, 106 U.S. 196, 205 (1882) (American legal doctrines “derived from the laws and practices of our English ancestors.”). Consequently, the experience of British law in determining penalties for juvenile offenders can provide guidance for this Court.

A. Historically, Juvenile Offenders Were Treated with More Leniency Than Adults in the United Kingdom

Historically, juveniles were treated differently from adults in terms of sentencing. The United Kingdom abolished the juvenile death penalty for children under age 16 in 1908, Children

Act of 1908, 8 Edw. 7, c. 67 (Eng.), but death sentences for offenders under 18 had already been rarely imposed since the early 18th century because of sympathy for the young. The Children Act 1908 was “a notable piece of legislation, enshrining as it did in almost every section the principle that a young offender shall receive different treatment from an adult.” Report of the Departmental Committee on the Treatment of Young Offenders, 1927 Cmd. 2831. While Parliament could have replaced the death penalty with life imprisonment, it adopted instead the sentence of detention at Her Majesty’s pleasure (“HMP”), a “less severe form of sentence” for juveniles. *R v. Secretary of State for the Home Department Ex parte Venables*, [1998] A.C. 407 HL at 521 (per Lord Steyn) (hereinafter “*Venables*”). In particular, “[t]here is built into the sentence a measure of leniency in view of the age of the offender at the time of the offence.” *Venables*, A.C. 407 HL at 532 (per Lord Hope of Craighead).

In 1933, the Children and Young Person’s Act 1933 (Eng.) abolished the death penalty for all persons under age 21. Parliament’s Select Committee on Capital Punishment noted that the instability of young people made them less culpable:

[T]he emotional balance of young people under the age of 21 is unstable, and this instability reduces their responsibility, and that the instability of adolescents, which in some cases may even amount to a form of mental

disorder is very often a factor in the crime.

Report of the Select Committee on Capital Punishment (1930) at ¶ 189, 193.

These statutory developments formed part of an “elaborate legislative scheme which reflected a general policy of treating young offenders quite differently from older ones.” A. W. B. Simpson, Report prepared for submission to the European Court of Human Rights in *Prem Singh v. United Kingdom*, unreported, (21 Feb. 1996), cited with approval in *Venables* [1998] A.C. 407 HL at 481 (per Lord Goff). The statutory developments were intended to impose an obligation upon the courts “to have regard not only to retribution, deterrence and prevention of risk but also to the welfare of the child offender himself.” *Venables* at 498–99 (per Lord Browne-Wilkinson). In other words, historically the legal system in England and Wales has recognized that young people who commit murder or other serious offenses should be treated with greater leniency. “It is clear from the authorities which exist ...that, when dealing with a very young person, the court has to have regard to the length of sentence and the perception of the young of that length. By that we mean that a sentence which may be appropriate for someone older may be crushing for someone who is very young.” Mr Justice Collins in *R v. W* [2003] 1 Cr. App. R. (S) 95, 504.

B. Sentencing Juveniles to Life Imprisonment without Parole is Prohibited by Law

In England and Wales, juveniles who commit the most serious or heinous of crimes cannot be given an LWOP sentence; rather, the severest penalty is detention at HMP. Powers of Criminal Courts (Sentencing) Act 2000, § 90 (Eng.). This is significant because, to date, the longest sentence, or *tariff* as it is known, imposed on a juvenile for any crime or combination of crimes committed when under the age of 18 is 30 years. Email from Kevin Breame, Public Protection Casework Section, United Kingdom Ministry of Justice/Home Office (July 15, 2009) (on file with counsel).

The sentence of detention at HMP is the statutorily required sentence for murder convictions in the Crown Court where the offender was at least 10, but under the age of 18, at the time of the crime. Powers of Criminal Courts (Sentencing) Act 2000 § 90. Particularly instructive is that for juvenile offenders who commit serious non-homicide crimes, including the types of crimes committed by petitioners Graham and Sullivan, detention falls under the Powers of Criminal Courts (Sentencing) Act of 2000, § 91, which are even less severe than detention at HMP.

When passing a sentence on a juvenile, including a sentence of detention at HMP, the judge effectively must impose a tariff that is roughly half the term that an adult would be given in the same circumstance. First, *all* prisoners in England and Wales are automatically released at

the halfway point of a determinate sentence and then serve the balance on license, a form of parole, unless a threat to society.⁹ Once the term period has elapsed, the offender should be released if the Parole Board is satisfied that it is safe to do so. § 28 of the Crime (Sentences) Act 1997.¹⁰

Furthermore, for juveniles convicted of murder, the judge starts at a presumptive period of 12 years detention, and then adjusts that term based on aggravating or mitigating factors, such as premeditation or evidence of intent to injure but not kill. Criminal Justice Act 2003 (c. 44) Schedule 21, ¶¶ 7-12. However, Schedule 21, para. 9 states: “Detailed consideration of aggravating or mitigating factors may result in a minimum term of

⁹ There are two parts to a life sentence: the detention period and the license period. The minimum detention period for punitive detention is set by the trial judge, and is commonly referred to as the “tariff period,” but may also be referred to as the “minimum term” in the Criminal Justice Act 2003. After the individual has been detained for the period specified in the minimum term, they become eligible to have their release reviewed by the Parole Board. If the Parole Board determines that sufficient progress in rehabilitation during the minimum period has not been made, then the individual will remain detained, with review taking place about once a year. If the Board finds that they are no longer a threat to society, the Board can recommend release, and the offender will be released on “license,” under parole review for the remainder of their natural life.

¹⁰ The determination of the tariff or minimum term in relation to mandatory life sentences, for example, requires the trial judge to specify in the order that the early release provisions (of the Crime (Sentences) Act 1997, paras. 5-8) will apply after a minimum term of detention.

any length (whatever the starting point), or in the making of a whole life order.” But Schedule 21, para. 1, makes clear that ‘whole life order’ means an order made under §269(4) – and §269(4) does not allow for imposition of LWOP on a juvenile. Significantly, as indicated above, the longest tariff imposed on a person who committed any crime when under age 18 years is 30 years.

In sum, the laws of England and Wales legally and effectively prohibit life without parole sentences for juvenile offenders. While it is not clear that such a sentence was ever used, it clearly has been prohibited for the better part of the past seventy-five years. The prohibition emerged historically in recognition of the inherent instability and emotional imbalance of persons under age 18, which made such sentences cruel and unusual. In recognition of the special relationship between English jurisprudence and this country, and the direct roots of the Eighth Amendment in English law, this Court should follow suit and recognize that the Eighth Amendment prohibits imposition of life without parole sentences for juvenile offenders.

IV. CONCLUSION

In considering constitutional values related to the death penalty, the most severe punishment of juveniles, this Court in *Roper* observed:

It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime

reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under [eighteen] as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under [eighteen] as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty. When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity. *Roper*, 543 U.S. at 573–74 (citations omitted).

As it did in relation to the juvenile death penalty, this Court should find these same

principles, which have been applied to universally condemn in international law and practice the sentencing of juveniles to life in prison without parole, instructive in interpreting the Eighth Amendment here. For the reasons stated above, the sentences of Mr. Graham and Mr. Sullivan should be overturned.

Respectfully Submitted,

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Law Council of Australia
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Law Society of Ireland
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¹¹ Research assistance was provided by students at the University of San Francisco School of Law, Columbia Law School and the Center for Constitutional Rights; and Molly Newland at Sheppard Mullin Richter & Hampton LLP.

APPENDIX

Amnesty International is a worldwide human rights movement of more than 2.2 million members and subscribers. It works independently and impartially to promote respect for human rights. It monitors domestic law and practices in countries throughout the world for compliance with international human rights law and international humanitarian law and standards, and it works to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated. It has addressed the issue of juvenile life without parole and co-published the report *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005).

The Amsterdam Bar Association is a local Bar Association, which is an autonomous public-law body. Local Bar Associations in the Netherlands promote decent exercise of law practice and are authorized to take all measures that can contribute thereto. Pursuant to the Act on Advocates, advocates are obliged to become a member of the Bar. The Amsterdam Bar notes that the subject matter of juvenile sentences is very important from a Dutch point of view.

The Bar Human Rights Committee of England and Wales (BHRC) is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world and with defending the rule of law and internationally

recognized legal standards relating to the right to a fair trial. The BHRC regularly appears in cases where there are matters of human rights concern, and has experience of legal systems throughout the world. The BHRC has previously appeared as *amicus curiae* in cases before the United States Supreme Court, including *Roper v. Simmons*, 543 U.S. 551 (2005).

The Bar of Montreal, with over 12,500 members, is one of the largest bar associations in the world, as well as being the second largest French-speaking bar association. Its members' expertise covers all aspects of the legal practice, administration and business. Many of its members are recognized nationally and internationally in these fields. With more than 160 years of history, the Bar of Montreal is considered a model for its leadership in the pursuit of excellence in ethics and high standards of competence. The Bar of Montreal's mission is to protect the public. With this in mind, the Bar organizes a number of activities each year which inform members of the public of their legal rights and how they are to be exercised.

The Center for Constitutional Rights (CCR) is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational

organization committed to the creative use of law as a positive force for social change.

The Columbia Law School Human Rights Clinic bridges theory and practice by providing students with hands-on experience working on active human rights cases and projects. Working in partnership with experienced attorneys and institutions engaged in human rights activism, both in the United States and abroad, students contribute to effecting positive change locally and globally. In recent years, the Human Rights Clinic has worked on several matters concerning human rights issues in the United States, including *In re Juveniles Sentenced to Life Without Parole in the United States of America*, Petition P-161-06, Inter-Am. C.H.R. (2006), concerning the mandatory sentencing of juveniles in Michigan to life without the possibility of parole.

The Hong Kong Bar Association is the professional organization of Barristers in Hong Kong. Its objects are generally to consider and to take proper action on all matters affecting the legal profession and the administration of justice. It is also keen to promote the upholding of human rights and the rule of law. The Association is governed by the Bar Council, an executive committee comprising elected and co-opted members representing different standings at the Bar. All matters of policy are decided by the Bar Council and its various Special Committees. The Association is joining as a signatory to this Brief to endorse what it sees as the well-settled prevailing international standard on the relevant point in

issue, and to present it to this Court for its consideration.

Human Rights Advocates, a California non-profit corporation, founded in 1978, with national and international membership, endeavors to advance the cause of human rights to ensure that the most basic rights are afforded to everyone. Human Rights Advocates has Special Consultative Status in the United Nations and has participated in meetings of its human rights bodies for over 25 years, where it has addressed the issue of juvenile sentencing. Human Rights Advocates has participated as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal law. Cases that it has participated in include: *Roper v. Simmons*, 543 U.S. 551 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

The Law Council of Australia is the national body representing the Australian legal profession at home and overseas and maintains close relationships with legal professional bodies throughout the world. The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council speaks on issues of national and international importance. The Law Council considers this case concerning juvenile justice and human rights to be one such issue. Therefore, the Law Council supports the *amicus curiae* brief being

submitted to the Supreme Court of the United States on behalf of the petitioners Graham and Sullivan.

The Law Society of England and Wales is the professional body representing more than 138,000 solicitors in England and Wales. Its concerns include upholding the independence of the legal profession, the rule of law and human rights throughout the world. The Law Society has made submissions as *amicus curiae* to this Court on a number of previous occasions.

The Law Society of Ireland is the representative body of Ireland's 12,000 solicitors. The Law Society, through the work of its Human Rights Committee, aims to raise awareness in the profession and the public of human rights, to uphold human rights in the administration of justice, to promote and support international human rights and to promote and support lawyers working for the implementation of international human rights standards. The Law Society would like to lend its support to the *amicus curiae* brief to be submitted to the Supreme Court of the United States on this matter.

The Netherlands Bar Association is the public law based professional organization of which all 16000 Dutch lawyers (advocates) are compulsory members. The core activity is promoting and overseeing the quality and integrity of the lawyer. The Netherlands Bar does not serve the lawyers' interests but the general interests of delivering good legal aid to everyone who needs it.

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The Bar has regulatory powers and upholds a strong disciplinary system. The Bar defends and promotes the enforcement of the rule of law and human rights.

The New Zealand Law Society is a professional body which regulates all barristers and solicitors in New Zealand and represents all practitioners who hold practicing certificates as members. The Society has a current membership of over 10,600 practitioners. Aside from regulating and controlling the practice of the profession of law in New Zealand, the Society is active in assisting and promoting the reform of the law, for the purpose of upholding the rule of law and the administration of justice.

The Advocates for Human Rights is a non-governmental, non-profit organization dedicated to the promotion and protection of internationally recognized human rights. Founded in 1983, today The Advocates for Human Rights engages more than 800 active volunteers annually to document human rights abuses, advocate on behalf of individual victims of human rights violations, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates for Human Rights has a strong interest in ensuring that the United States construe its authority to detain persons in a way that is consistent with international human rights standards and to adhere to the United States' non-derogable obligations.

App. 7

The Union Internationale des Avocats (UIA) was created in 1927 by a group of French speaking European lawyers convinced of the need for lawyers to establish international contacts. Today, the UIA is an association open to all lawyers of the world, made up of both general and specialist practitioners, counting more than 200 bar associations, organizations or federations (representing nearly two million lawyers) as well as several thousand individual members from over 110 countries.