

IN THE SUPREME COURT OF THE STATE OF OHIO

IN RE: D.B.

A delinquent child.

:

: Case No. 10-0240

:

: On Appeal from the

: Licking County Court of Appeals

: Fifth Appellate District

:

: C.A. Case No. 2009 CA 00024

:

**BRIEF OF *AMICI CURIAE*, JUVENILE LAW CENTER, ET AL.,
IN SUPPORT OF APPELLANT, D.B.**

Jody Marksamer (CA # 229913)
Illona Turner (CA # 256219)
National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102

Nadia Seeratan (NY #4099354)
National Juvenile Defender Center
1350 Connecticut Avenue NW, Suite 304
Washington, DC 20036

Marsha L. Levick (PA #22535)
Counsel for Amici Curiae
Lourdes M. Rosado (PA #77109)
Jessica R. Feierman (PA #95114)
Riya S. Shah (PA #200644)
JUVENILE LAW CENTER
1315 Walnut Street, Suite 400
Philadelphia, PA 19107

Brooke Burns
Assistant State Public Defender
Office of the Ohio Public Defender, Juvenile
Division
250 E. Broad St., Ste. 1400
Columbus, Ohio 43215
Counsel for Appellant, D.B.

Kenneth Oswalt
Licking County Prosecuting Attorney
Administration Building
20 S. Second Street
Newark, Ohio 43055
Counsel for Appellee, State of Ohio

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IDENTITY OF *AMICI CURIAE*

Amici Curiae, Juvenile Law Center, National Juvenile Defender Center, and National Center for Lesbian Rights are joined by Barton Child Law and Policy Clinic, Emory School of Law; The Children and Family Justice Center, Bluhm Legal Clinic; The Juvenile Justice Initiative of Illinois; The Midwest Juvenile Defender Center; Tamar Birkhead, Jeffrey Fagan, Theresa Glennon, Martin Guggenheim, Barry Krisberg, Elizabeth Letourneau and Gail Ryan.¹

SUMMARY OF ARGUMENT

As Courts are increasingly relying on principles of adolescent development to reinforce their decisions that children should be held to a lesser degree of culpability than their adult counterparts, statutes that impose strict liability on children counter those principles. A strict liability rape statute like the one at issue here fails to consider the developmental incapacities of a 12-year-old and imposes severe punishments on a child who engaged in non-forcible sexual conduct with his peer in violation of fundamental fairness. Furthermore, the imposition of strict liability on any child who engages in non-forcible sexual conduct with a peer is unjust as it requires an arbitrary prosecution when both individuals could be deemed either the victim or perpetrator. Children like D.B. who are adjudicated delinquent under a strict liability rape provision are stigmatized and traumatized by the resulting mandated treatment and lifelong consequences attached to an adjudication for a sex offense. Using the statute as a sword against children rather than a shield to protect them from possible exploitation, there is also a risk that prosecutors will draw upon their own perceptions and biases to enforce strict liability upon young children who could be considered both a victim and a perpetrator under the facts. *Amici*

¹ A brief description of each organization and individual can be found in Appendix A.

submit that D.B. was adjudicated delinquent under the strict liability rape provision in Ohio in violation of his rights to fundamental fairness under the due process clauses of both the Ohio and U.S. Constitutions. This Court should overturn his adjudication and enforce the guiding principle adopted by the legislature in enacting Ohio Rev. Code § 2907(A)(1)(b)—the protection of children from harm.

ARGUMENT

First Proposition of Law of Amici Curiae.

THE CRIMINAL PROSECUTION OF A 12-YEAR-OLD CHILD UNDER A STRICT LIABILITY RAPE STATUTE VIOLATES FUNDAMENTAL FAIRNESS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The imposition of strict liability on D.B. pursuant to Ohio Rev. Code § 2907(A)(1)(b) violates his right to fundamental fairness under the Due Process Clause of the Fourteenth Amendment. Strict liability rape statutes eliminate the requirement of *mens rea* in cases where a child is a rape victim both to protect children because of their unique vulnerability, and to require that adults who engage in sexual acts with such children assume the risk of such activities. Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 Am. Univ. L. Rev. 313, 359 (2003); *Commonwealth v. Heck*, 491 A. 2d 212, 226 (Pa. Super. 1985); see also *United States v. Freed*, 401 U.S. 601, 607-09 (1971) (construing possession of hand grenades as a strict liability offense because possessor should know they are dangerous devices likely to be regulated). These rationales do not apply when the defendant is a child. While under the due process clause we may presume that an adult actor understands and assumes risk when engaging in certain highly dangerous or risky activities, Ohio simply cannot ascribe that capacity to a 12-year-old. Indeed, the very notions about children's capacities that

underpin such statutes – that children do not have the same decision-making capacity and judgment as adults and thus cannot “consent” to sexual activity – illustrates why children cannot be thought to assume the risks necessary for the imposition of strict liability.

Strict liability for violations of the criminal law eliminates the traditional burden on the prosecutor to prove *mens rea*. The prosecutor need only prove that the alleged criminal conduct occurred, without regard to whether the individual had any criminal intent. Strict liability has been defined in the criminal law as “impos[ing] criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state.” *State ex rel. W.C.P. v State*, 974 P. 2d 302, 303 (Utah Ct. App. 1999). While a central premise of our criminal justice system is that criminal responsibility may be imposed only when the defendant both did the act and had the requisite criminal intent, the idea that a crime may be committed without personal fault persists in the context of strict liability crimes.

Ohio’s strict liability rape provision proscribing sex with any person under age thirteen does not require a consideration of anything other than a determination that the act occurred.

The statute provides, in pertinent part:

No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies...(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

Ohio Rev. Code. § 2907.02(A)(1)(b) (West 2010). Because strict liability crimes, such as the statute at issue here, allow for punishment without a finding of criminal intent, their application must be carefully circumscribed. The historic foundation for strict liability rape statutes such as the provision challenged here does not support the prosecution of D.B.

The legitimacy of strict liability criminal statutes has generally rested on four factors:

(1) the risk of illegality that a defendant assumes when engaging in an activity that is subject to strict regulation; (2) the importance of protecting public and societal interests in the community; (3) the relatively small penalty involved in conviction under the offense, and; (4) the insignificance of the stigma attached to the conviction.

Carpenter, *supra*, at 359. Application of Ohio Rev. Code § 2907.02(A)(1)(b) to a child under the age of thirteen fails to satisfy any of these factors. Looking first at the third and the fourth factors, the lack of alignment is stark. As discussed in greater detail, *infra* Part D, this statute is hardly an administrative or minor regulation of undesirable conduct. To the contrary, the penalties are severe and the stigma and collateral consequences flowing from a conviction for sexual conduct with a child under thirteen are potentially life-altering and long-lasting. A close examination of the first and second factors likewise demonstrates why strict liability is inappropriate and highly problematic when the defendant is a child – and even more so when he is a child under the age of thirteen.

The statute at issue here was enacted with precisely the justifications mentioned above in mind – to punish the defendant who had assumed the risk of engaging in sexual activity with a young person, and to protect a societal interest – the well-being of our children. More specifically, the legislative justification for the enactment of subsection (A)(1)(b), was “to protect a pre-pubescent child from the sexual advances of another, presumably older person, because ‘engaging in sexual conduct with such a person indicates vicious behavior on the part of the offender.’” Committee Comment to Am. Sub. H.B. No. 511 (134 Ohio Laws, Part II, 1866). In its Memorandum in Opposition to D.B.’s request for jurisdiction, Ohio underscores this point, arguing that the rape statute under which D.B. was adjudicated is constitutional as it contains a “specific prohibition that gives a person of ordinary intelligence fair notice that his contemplated conduct was forbidden.” Memorandum in Opposition of Jurisdiction of Appellee at 5, *In re*

D.B., No. 2009-CA-00024 (Ohio Ct. App. July 6, 2009) (citing *In the Matter of Hamrick*, Franklin App. No. 87AP-1154 at *2, 1988 WL 101996 (Ohio App. 10 Dist. Sept. 29, 1988)).

Courts upholding strict liability rape laws have consistently emphasized that the legitimacy of the statutes rests on the fact that they are designed for the vital purpose of protecting vulnerable children, and that the defendant assumes the risk inherent in engaging in any type of sexual activity. For example, the Maryland Supreme Court held that the state has an overwhelming interest in protecting children from risks, including both physical and emotional trauma, which outweighs any interest an individual may have in engaging in sexual relations with children near the age of consent. *See e.g., Owens v. State*, 724 A.2d 43, 52-53 (Md. 1999). *See also United States v. Ransom*, 942 F.2d. 775, 777 (10th Cir. 1991) (justification for strict liability rape laws is that they protect children from sexual abuse by placing risk of mistake as to a child's age on an older, more mature person who chooses to engage in sexual activity with one who may be young enough to fall within the statute's purview); Carpenter, *supra*, at 333-36. Indeed, the strict liability crime of statutory rape was legislatively created in England during the 13th century in order to afford special protection to those considered too young to appreciate the consequences of their actions. Carpenter, *supra*, at 333.

The disregard for blameworthiness in strict liability criminal statutes has largely survived legal challenge because of the assumption – noted in *Owens* – that the actor can be expected to appreciate and understand that the conduct he is engaging in may be proscribed by statute. Carpenter, *supra*, at 333-34; *Owens*, 724 A.2d at 53. Thus, the traditional requirement of blameworthiness has been replaced by a different sensibility, one based more on notions that an individual assumes risk for engaging in sexual activity; the individual who engages in sexual conduct with a minor (of a certain age) will be held liable, regardless of whether there was intent

to commit the act. These statutes render criminal “a type of conduct that a reasonable person should know is subject to stringent public regulation.” *Carpenter, supra*, at 330, fn. 90. “Notice” is thus a lynchpin of strict liability statutes – it serves to shift the burden to the defendant, who should be on heightened awareness that his conduct will be subject to regulation. Without this underlying concept of notice, these statutes make little sense: if the individual charged is not aware of the risks, he or she is unlikely to be deterred by a strict liability statute, and unlikely to be properly identified as one in need of rehabilitation or reformation. *Carpenter, supra*, at 336.

However, while this rationale for imposing strict liability upon an adult who engages in sexual conduct with a minor under age thirteen may withstand constitutional scrutiny, it does not support the imposition of strict criminal liability upon a 12-year-old who engages in sexual conduct with a peer. Assigning the same level of awareness and assumption of risk to a 12-year-old is without support in the developmental and scientific research on adolescent development. A strict liability statute such as the one at issue here does not give a 12 year-old of ordinary intelligence fair notice that what he is doing is illegal, because a 12 year-old has a more limited capacity to make reasoned choices as compared to an adult or to understand the nature of his actions. Indeed, the very fact that these statutes are designed to *protect* children because of their unique developmental status and particular vulnerability underscores why children are not capable of the assumption of risk required to legitimize strict liability. Moreover, the notion of a “vicious” adult offender preying upon a vulnerable child is simply inapposite when the alleged offender is in the same age group as the alleged victim.

A. The United States Supreme Court, Relying on Developmental and Scientific Research on Adolescent Development, Has Repeatedly Recognized That a 12-Year-Old Cannot be Held to the Same Standard of Culpability as an Adult.

Since the United States Supreme Court’s decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), and more recently in *Graham v. Florida*, 130 S. Ct. 2011 (2010), it is well-established

that children and adolescents have 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 their characters are “not as well formed.” *Graham*, 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 569-70). These characteristics clearly differentiate a child’s actions from those of an adult; “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.” 130 S. Ct. at 2026 The Court in *Graham* held that based on this reasoning, a juvenile could not be reliably classified among the worst offenders for purposes of sentencing. *Id.* But the *Graham* majority was also unequivocal in its insistence that irrevocable judgments about the character of juvenile offenders are impermissible under the Constitution – at least where they deny juveniles any opportunity to prove their rehabilitation and their eligibility to re-enter society. Both *Graham* and *Roper* are explicit in their belief that a juvenile offender’s capacity to change and grow, combined with their reduced blameworthiness and inherent immaturity of judgment, set them apart from adult offenders in fundamental – and constitutionally relevant – ways. Strict liability statutes purposefully allow for no individualized determinations or considerations – it is precisely this ‘one size fits all’ feature of subsection 2907.02(A)(1)(b) that is so directly at odds with the Court’s reasoning in *Graham* and *Roper*.

Graham struck juvenile without parole sentences because “that judgment [of irredeemability] was made at the outset.” 130 S. Ct. at 2030. In a similar fashion, the application of Ohio’s strict liability statute to a child such as D.B. presumes his culpability ‘at the outset,’ based merely on the performance of an act classified as a strict liability offense. Holding an adult strictly liable for exploiting a young child is clearly within the legislature’s duty and interest in protecting children and consistent with precedent holding adult offenders accountable. However, children

cannot be categorically assumed culpable of an act without any requirement of *mens rea* in the same way an adult may be. Moreover, holding a child criminally liable who is in the same class as the children the statute is intended to protect runs directly counter to research on child and adolescent development and precedent establishing the diminished culpability of juveniles.

Graham and *Roper* confirmed that neurological science is integral to the analysis of children's constitutional rights. Research in developmental psychology and neuroscience since *Roper* "strengthens the conclusion that...juveniles—including older adolescents—are less able [than adults] to restrain their impulses and exercise self-control; less capable of considering alternative courses of action and maturely weighing risks and rewards; and less oriented to the future and thus less capable of apprehending the consequences of their often-impulsive actions." Brief of American Psychological Association, et al. as *Amici Curiae* Supporting Petitioners, *Graham v. Florida* and *Sullivan v. Florida*, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621), 2009 WL 2236778 at 3-4. Various psychosocial factors can undermine adolescent decision-making and thus result in immature judgment; immature judgment, in turn, factors into the choices that adolescents make when engaging in conduct prohibited by the criminal law. Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 37-44 (Harvard University Press 2008). These factors are more pronounced in children as young as twelve. They include:

Risk-taking and minimizing risk. Risk-taking behavior peaks in adolescence. An adolescent may pursue a different course of action than an adult when faced with the same situation because the adolescent does not consider all the possible outcomes of his or her actions. Jennifer Woolard, *Adolescent Development, in Toward Developmentally Appropriate Practice: A Juvenile Court Training Curriculum* at 6 (2009). Youth do not perceive or weigh risks accurately, and indeed, "it is statistically aberrant to refrain from such [risk-taking] behavior

during adolescence.” L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, in *Neuroscience and Biobehavioral Reviews*, 24, 417, 421 (2000). Moreover, in comparison to adults, adolescents attach a higher value to the possible benefits of risk taking. Scott & Steinberg, *supra*, at 42. Adolescents are more likely to act on impulse and less able to exercise self-control, and such impulsivity is characteristic of adolescence. APA Brief, *supra*, at 7. Just as a teenager might take off without hesitation on his skateboard down a hill which adults would consider dangerous, he might also experiment with sexual activities without regard to the consequences to himself or others. Thus it is developmentally normal for a young adolescent such as D.B. to lack the maturity to weigh the possible emotional or psychological consequences that engaging in sexual activity at such a young age may have for himself or his peers.

Sensation-seeking. Sensation-seeking is the need for varied, novel, and complex experiences and the willingness to take physical and social risks to obtain such experiences. Because adolescents value new experiences more than adults do, they may engage in risky behaviors because they are enticed by the excitement and novelty of these activities. Woolard, *supra*, at 6. The need for new experiences, combined with the sexual curiosity that naturally emerges during late childhood and early adulthood can prompt children such as D.B. and his friends to engage in sexual activity and exploration.

Present-oriented thinking. Adolescents view time differently than adults. Generally, adolescents may seem unable to think about the future (i.e., they cannot consider anything beyond the present) or they discount the future and place more consideration on the short-term risks and benefits of decisions. *Id.* Children such as D.B. should not be held to the same standard as adults who are fully capable of understanding future consequences but still choose to engage in conduct that the law proscribes.

Additionally, recent advances in imaging technology have revealed new information about the adolescent brain that confirms the findings of the developmental research described herein:

The parts of the brain controlling higher-order functions (e.g., reasoning, judgment, inhibitory control) develop after other parts of the brain controlling more basic functions (e.g., vision, movement). As a result, the prefrontal cortex—the brain’s “CEO” that controls important decision-making processes—is the last to develop. In fact, researchers believe that the prefrontal cortex does not fully develop until one’s early 20s. Because the prefrontal cortex governs so many aspects of complex reasoning and decision-making, it is possible that adolescents’ undesirable behavior may be significantly influenced by their incomplete brain development.

Id. at 19-20. *See also* APA Brief, *supra*, at 27 (noting that the part of the brain that is critical for control of impulses and emotions and mature, considered decision-making is still developing during adolescence). The frontal lobes of the brain are critical for response inhibition— i.e, the ability to control one’s impulses. Adolescents are more likely to experiment and engage in reckless, impulsive behaviors because the frontal lobes do not fully develop until young adulthood. Incomplete development of the frontal lobes is also related to poorer decision-making in adolescence. Woolard, *supra*, at 20.

“Adolescents acquire biologically driven preferences for novel stimuli and may also believe that they are ‘untouchable’ . . . Chemical changes in the brain that are a normal part of adolescent development may lead teenagers to engage in specific types of risk-taking behavior, such as drug and alcohol use.” *Id.* Thus, neuroscience has confirmed that the sensation-seeking, risk minimizing, and perceived invulnerability discussed in this section that is characteristic of adolescence is, in fact, also a biological phenomenon.

B. The Immature Thought Processes of Children and Young Adolescents, Combined with Their Emerging Sexual Curiosity, Can Lead These Children To Engage in Peer Sexual Conduct for Which They Are Unprepared and for Which They Do Not Bear the Same Level of Culpability as an Adult.

Learning to think of oneself as a sexual being and dealing with sexual feelings is an important task of adolescence; sexual experimentation is one aspect of the “trying on” of different personalities and new behaviors that is necessary to the process of identity development. *Id.* at 13, 15. At the same time, “[s]exuality is seldom treated as a strong or healthy force in the positive development of a child’s personality” and “[t]here are conflicting and contradictory expectations in American society concerning sexuality.” M. Martinson & Gail Ryan, *Sexuality in the Context of Development from Birth to Adulthood* in *Juvenile Sexual Offending: Causes, Consequences and Corrections* 31 (G. Ryan, T. Leversee & S. Lane, eds., 3rd ed. 2010). “Adults demand that adolescents develop a healthy sexual maturity without engaging in learning experiences that make that maturity possible.” *Id.* (citation omitted). However, when youth engage in sexual exploration they run the risk of finding themselves in situations that they may not be emotionally ready to navigate. *Id.* (citation omitted).

It is natural that children become more interested in sex as they enter puberty. Significantly, the average onset of puberty now occurs earlier than it did a century ago – under the age of 10 for girls and at an only slightly older age for boys, as compared to ages 14-15 in the early 1900s. *Id.* at 42. Moreover, “the combination of earlier puberty and greater sexual stimuli in the environment” has contributed to children engaging in sexualized behaviors at a younger age today than in the past. *Id.* Thus a 12-year-old such as D.B. must simultaneously deal with both an increasing and normative interest in sexuality and significant exposure to sexual images in the culture at large – at an age when he is ill-equipped to process or manage

these interests. An adult subject to prosecution under the same strict liability statute cannot claim the disabling impairments of immaturity that D.B. can, yet 12-year-old D.B. has been prosecuted and classified as a sex offender – in the same manner as an adult would be – for engaging in sexual conduct with an 11-year-old friend. Given what we know about a 12-year-old’s cognitive abilities and sexual development, it violates fundamental fairness to hold D.B. to the same strict liability standard as an adult subject to prosecution under this same statute for engaging in the proscribed sexual conduct with an 11-year-old child.

C. The Imposition of Strict Liability on a 12-Year-Old Child Will Not Deter Children from Engaging in Sexual Conduct with Their Peers.

Strict liability criminal statutes retain public support in part because of their presumed deterrent effect. As one commentator noted, “it seems reasonable to believe that the presence of strict liability offenses might have the . . . effect of keeping a relatively large class of persons from engaging in certain kinds of activity.” Richard Wasserstrom, *Strict Liability in the Criminal Law*, 12 Stan. L. Rev. 731, 737 (1960). However, youth are typically not deterred by the threat of prosecution or punishment – and often are not even cognizant of the potential of such a threat. In *Graham*, the Supreme Court noted that “the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.” *Graham*, 130 S. Ct. at 2028 (quoting *Roper*, 543 U.S. at 571). Children engage in risk-taking behaviors because of their “lack of maturity and underdeveloped sense of responsibility.” See *Johnson v. Texas*, 509 U.S. 350, 367 (1993). Sexual exploration fits into these behaviors. Children and adolescents are less likely to take possible punishment into consideration when making decisions. *Graham*, 130 S. Ct. at 2028. Therefore, holding children strictly liable for engaging in sexual conduct with a peer will not work to deter children from engaging in those behaviors. Adolescents engage in behaviors without understanding the risks or consequences

and threatening prosecution does nothing to educate them about these consequences. Peter Greenwood, *What Doesn't Work in Changing Lives: Delinquency Prevention as Crime Control Policy*, The University of Chicago Press (2006).

D. A Child Under the Age of Thirteen Adjudicated Delinquent Under Ohio's Strict Liability Statute for Engaging in Sexual Conduct with a Similarly-Aged Child, Faces Harsh Collateral Consequences that Are Highly Disproportionate to the Act.

A violation of Ohio's rape statute, Ohio Rev. Code § 2907.02, carries harsh direct consequences, as well as numerous life-long tangible and intangible collateral consequences. While the severity of these consequences, when applied to adult offenders, may be an important part of Ohio's effort to prevent forcible rape and to protect children under thirteen from victimization by sexual predators, applying this same strict liability statute to D.B., a child under thirteen who engaged in sexual conduct with another child under thirteen, imposes direct and collateral consequences on D.B. that are highly disproportionate to his actions. The adjudication's grave consequences are also contrary to the last two factors traditionally cited in support of strict liability statutes: the limited penalty and minimal stigma following conviction under these statutes. A closer review of Ohio's rape statute and the long-term consequences of D.B's adjudication highlight the absurdity and unfairness of finding a twelve-year-old child guilty of rape in the case at bar.

Chapter 2907 of Ohio's Revised Code codifies the types of sexual conduct² and behaviors that are unlawful in Ohio. These offenses carry different potential penalties and range in severity from first-degree felonies to third-degree misdemeanors. Of the five offenses in this

² "Sexual conduct" means "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." Ohio Rev. Code § 2907.01(A) (West 2010).

chapter which address unlawful sexual contact or conduct with another person, Ohio’s rape statute, section 2907.02, has the harshest penalties attached to it and is the only offense in this chapter that is a first-degree felony.³ Ohio Rev. Code § 2907.02(B) (West 2010). Chapter 2907 also prohibits any sexual conduct—even that which is consensual—between an adult over the age of eighteen and a minor who is thirteen, fourteen, or fifteen years old – what is often referred to as “statutory rape.” Ohio Rev. Code § 2907.04 (West 2010). A person who violates this section is guilty of unlawful sexual conduct with a minor, which is generally a felony of the fourth degree. Ohio Rev. Code § 2907.04(B)(1) (West 2010). In recognition that sexual conduct between two people who are close in age – even if one is a legal adult and the other a child – is less serious than when there is a large age gap, section 2907.04 decreases the punishment for violating this section to a misdemeanor of the first degree when an offender is less than four years older than the minor. Ohio Rev. Code § 2907.04(B)(2) (West 2010).⁴

³ This section prohibits rape by force or threat of force, 2907.02(A)(2), as well as engaging in sexual conduct with a child under the age of thirteen, 2907.02(A)(1)(b), a person who can’t resist or consent due to mental or physical condition or advanced age, 2907.02(A)(1)(c), or a person who is impaired by drugs administered by the offender in order to prevent resistance, 2907.02(A)(1)(a). A person who commits any of these four acts is guilty of rape, a felony in the first degree and depending on the circumstances, age, and criminal history of the offender, he or she could be sentenced to prison for life without the possibility of parole. Ohio Rev. Code § 2907.02(B) (West 2010). Ohio courts treat rape very seriously and consider rape to be the most heinous offense short of murder. *See In re Frederick*, 22 N.E.2d at 763 (stating a rapist is “a perpetrator of the most heinous of all crimes save murder”); *In re Williams*, 2000 Ohio App. LEXIS 6046 (Ohio Ct. App., Hamilton County Dec. 22, 2000) (Painter, J., dissenting)(same).

⁴ In recognition of the fact that children are going through puberty earlier and engaging in sexual activity with partners of similar ages, 35 states have implemented age span provisions. Often referred to as the Romeo and Juliet laws, these allow for an exception to statutory rape where two consenting parties close in age engage in sexual conduct. *See Henry & Cunningham*, supra, at 4 n.5; Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 Emory L.J. 691, 723 (2006). The effect is to substantially decrease the legal consequences for prohibited sexual activity between similarly aged teens. *See Carolyn Cocca, Jailbait: The Politics of Statutory Rape Laws in the United States* 29, 38 (2004).

Absent from Chapter 2907 is any prohibition on minors who are between the ages of thirteen and eighteen from engaging in sexual conduct with other minors in this same age range. Accordingly, a thirteen-year-old and a seventeen-year-old can engage in sexual conduct under Ohio's statutory scheme with no legal ramifications or consequences. The same is true for two thirteen-year-olds. But inexplicably, when two twelve-year-olds engage in sexual conduct, both are subject to prosecution for rape, a felony of the first degree. Under section 2907.02(A)(1)(b), a 12-year-old boy who engages in sexual experimentation with an 11-year-old friend has committed the same offense as an adult who has had sex with an 11-year-old child.

The prosecution of children under the age of thirteen under section 2907.02(A)(1)(b) pushes these children into the juvenile justice system, needlessly exposing them to lifelong stigma and other serious collateral consequences, including a permanent juvenile record and the possibility of registration as a sex offender. Indeed, such children face many of the same serious life-long collateral consequences that an adult man convicted of rape of a child would face.

i. The Labeling of a Child as a “Sex Offender” or a “Rapist” Causes Lasting Stigma that Interferes with the Development of a Positive Self Identity.

Adjudicated delinquent for rape, twelve-year-old D.B. not only has experienced the stigma associated with being charged with a sex offense, but he was also labeled a sex offender, and ordered by the court to undergo “sex offender treatment” and to abide by the terms of “sex offender probation.” Disposition Hr'g Tr. 9-10, Apr. 17, 2008. It is a matter of common understanding that the labels of “rapist” or “sex offender” – or, even worse, “child molester” – are among the most heinous and despised in contemporary society. *Neal v. Shimoda*, 131 F.3d 818, 829 n.12 (9th Cir. 1997) (“We can hardly conceive of a state’s action bearing more

‘stigmatizing consequences’ than the labeling . . . as a sex offender” – except “[p]erhaps being labeled a ‘child molester.’”).⁵

The stigma attached to labeling a child a rapist – the most heinous offense short of murder – for engaging in non-forcible sexual conduct with a similarly aged child is difficult to measure, but it should not be underestimated. Research shows that calling a child a “sex offender” or “rapist” can have severely damaging psychological and practical consequences. See Judith V. Becker, *What We Know About the Characteristics and Treatment of Adolescents Who Have Committed Sexual Offenses*, 3 *Child Maltreatment* 317, 317 (1998); Mark Chaffin & Barbara Bonner, “*Don’t Shoot: We’re Your Children: Have We Gone Too Far in Our Response to Adolescent Sexual Abusers and Children with Sexual Behavior Problems?*,” 3 *Child Maltreatment* 314, 314-16 (1998). In providing guidance on the treatment of children ages twelve and under with sexual behavior problems, the Association for the Treatment of Sexual Abusers (ATSA) Task Force on Children with Sexual Behavior Problems cautions that “[a]dults should take every precaution against policies that label children as deviant, perverted, as sex offenders, or destined to persist in sexual harm . . . [g]iven that childhood [sexual behavior problems] may foretell little about a child’s future behavior, and that labeling risks creating a self-fulfilling prophecy and social burdens[.]” Ass’n for the Treatment of Sexual Abusers, Report

⁵ See also, *Meza v. Livingston*, 607 F.3d 392, 402 (5th Cir. 2010) (“‘We can hardly conceive of a state’s action bearing more ‘stigmatizing consequences’ than the labeling . . . as a sex offender.’”) (quoting *Neal, supra.*); *Kirby v. Siegelman*, 195 F.3d 1285, 1292 (11th Cir. 1999) (same) (quoting *Neal, supra.*); *Vega v. Lantz*, 596 F.3d 77, 81-82 (2d Cir. 2010) (classification as a sex offender has “a stigmatizing effect”); *Coleman v. Dretke*, 409 F.3d 665, 668 (5th Cir. 2005) (per curiam) (label of sex offender is stigmatizing and “can undoubtedly cause “adverse social consequences”); *Chambers v. Colorado Dep’t of Corrections*, 205 F.3d 1237, 1240 (10th Cir. 2000) (“sex offender” is a “highly stigmatizing label”); *Kirby v. Siegelman*, 195 F.3d 1285, 1292 (11th Cir. 1999) (“‘[W]e can hardly conceive of a state’s action bearing more ‘stigmatizing consequences’ than the labeling . . . as a sex offender.’”) (quoting *Neal, supra.*).

of the Task Force on Children with Sexual Behavior Problems, 26 (2006),
<http://www.atsa.com/pdfs/Report-TFCSBP.pdf>.

Unfortunately, the very programs to which courts send juvenile sex offenders for rehabilitation often contribute to their images of themselves as sex offenders, either intentionally (e.g., treatment programs that force youth to regularly recount their offenses and to label themselves as sex offenders) or unintentionally (e.g., treatment programs that go on for more than six months before termination). This long-term sex offender labeling is likely to interrupt the natural process of developing a positive, healthy self-identity and undermine the goals of rehabilitation. See Elizabeth J. Letourneau, & Michael H. Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, 17 *Sexual Abuse: A J. of Res. & Treatment* 293, 303-07 (2005); Maggie Jones, *How Can You Distinguish a Budding Pedophile From a Kid with Real Boundary Problems?*, N.Y. Times, July 22, 2007. As Human Rights Watch has explained in their extensive study on this topic, labeling children as sex offenders has little apparent benefit, but it “will, however, cause great harm to those who, while they are young, must endure the stigma of being identified as and labeled a sex offender, and who as adults will continue to bear that stigma, sometimes for the rest of their lives.” Human Rights Watch, *No Easy Answers: Sex Offender Laws in the U.S.*, 9 (2007).

In addition, rather than helping a child to develop a positive self-identity, labeling a child as a sex offender is “a negative self-fulfilling prophecy,” and children “tend to live up, or rather down, to those expectations.” Human Rights Watch, *supra*, at 65. As one leading psychologist has noted, “[Y]ou could be straight as an arrow; but the message continues to be: You are a bad person. How does that affect your self-image? How does that affect your ability to improve your behaviors?” Jones, *supra*, at 2. Indeed, evidence suggests that youth who view themselves

as outside the mainstream or as “delinquent” are less likely to change patterns of offending. *See* Letourneau & Miner, *supra*, at 307.

Such labeling can also cause other kinds of real and concrete harm to children, including social isolation and ostracism by peers. For example, one expert in sex offender treatment concluded that “labeling young children as *child rapists* . . . has the potential to . . . isolate them further from peers, adults, and potential sources of social and psychological support.”⁶ Becker, *supra*, at 317. In addition, children adjudicated as sex offenders are often unable to develop and maintain friendships, are kicked out of extracurricular activities, or even physically threatened by classmates after their peers learn of their record. *See* Jones, *supra*, at 3.

ii. A Child Under the Age of Thirteen who Violates Ohio’s Strict Liability Rape Statute Can Never Have His or Her Juvenile Record Sealed or Expunged.

In recognition of the transient nature of childhood, expungement of juvenile records is a mechanism available to children in almost every state in the country. Because children generally

⁶ D.B. has experienced similar isolation and loss of social support due to his arrest and later adjudication for a sex offense. For example, immediately upon his arrest, he was removed from his home and school and locked up for eight days in the county juvenile facility. Hr’g Tr. 8, Sept. 18, 2007. Following his release, he was on house arrest with an electronic monitoring device for nearly eight months and could not leave his home or have visitors unless approved by probation. Hr’g Tr. 9, 13, Sept. 18, 2007. In addition, the court prohibited him from having any contact with children under the age of fifteen during the pendency of his case. Hr’g Tr. 13, Sept. 18, 2007. Even after all charges alleging sexual conduct by force were dropped, and he was adjudicated delinquent for engaging in sexual conduct with a child under 13, D.B. remained under house arrest with 24-hour-a-day adult supervision for nearly six more months. Disposition Hr’g Tr. 8, Apr. 17, 2008. Because of his house arrest and the no contact order with other children, he had to be home-schooled for at least the 2007-08 school year. Pre-Dispositional Report of Probation Officer, at 2 (Apr. 16, 2008). 2. He is also permanently barred from contacting his two closest friends – the other two youths involved in the sexual conduct for which D.B. was adjudicated. Disposition Hr’g Tr. 10, Apr. 17, 2008; Pre-Dispositional Report of Probation Officer, at 2 (Apr. 16, 2008). As a result, D.B. reported to the probation officer “sadly” that he had “no” friends as of April 16, 2008, even though prior to his arrest and adjudication he had had quite a few friends through school and sports. Pre-Dispositional Report of Probation Officer, at 2 (Apr. 16, 2008). In addition, D.B. reported that he missed, “going to a ‘real’ school with ‘real’ teachers and interacting with other children.” *Id.*

grow out of delinquency, even without court interventions, they should be able to enter adulthood without their childhood mistakes following them. Accordingly, children adjudicated delinquent in Ohio who have completed their dispositions may have their records sealed and eventually expunged.⁷ Records shall be sealed if the court finds the child has been rehabilitated. Ohio Rev. Code § 2151.356 (C)(2)(e) (West 2010). After the record has been sealed, it can be expunged and any and all record of the adjudication will be erased, permitting the individual to deny having a juvenile record if asked.⁸ Ohio Rev. Code § 2151.358 (West 2010). However, in Ohio, juvenile courts are explicitly prohibited under section 212.356 from sealing or expunging the records of children adjudicated delinquent for rape.

Because D.B. is precluded from expunging his record, he will be prevented from entering adulthood clear of this mark. Neither Ohio's rape statute nor the statute governing expunging juvenile records provides for any flexibility to take into account the specific circumstances of this case – that D.B., at the age of 12 engaged in sexual conduct with an 11-year-old, which the judge specifically found did not meet the legal standard for coercion or force. Rather, under the law, D.B. is treated the same as a teenager who forcibly rapes another person or an adult who sexually molests a young child, regardless of his rehabilitation and his identified low risk of reoffending. *See* Pre-Dispositional Report of Probation Officer, at 6 (Apr. 16, 2008). Yet if D.B. had committed a different offense at the age of 12, such as theft, assault, burglary, or drug sale or

⁷ As used in sections 2151.356 to 2151.358 of the Revised Code: “Expunge” means to “destroy, delete, and erase a record, as appropriate for the record’s physical or electronic form or characteristic, so that the record is permanently irretrievable.” “Seal a record” means to “remove a record from the main file of similar records and to secure it in a separate file that contains only sealed records accessible only to the juvenile court.” Ohio Rev. Code § 2151.355 (West 2010).

⁸ All juvenile records must be expunged five years after they are sealed or when the offender turns 23, whichever comes first, except for rape and the four other excluded offenses. Ohio Rev. Code § 2151.358(A) (West 2010). If a person would like to have their juvenile records expunged prior to this time, he or she can make an application to the juvenile court requesting the court to expunge his or her sealed record. Ohio Rev. Code § 2151.358(B) (West 2010).

possession, he would be eligible to have his record expunged before turning eighteen, easing his transition to becoming a productive member of adult society.

The collateral consequences of having a sex offender adjudication on his record for the rest of his life will likely interfere with D.B.'s ability to become a productive member of society. It will limit his options for employment, education, college and financial aid, and housing, among others. *See* Robert Shepherd, Jr., *Collateral Consequences of Juvenile Proceedings: Part II*, 15 Crim. Just. 41 (2000), available at <http://www.abanet.org>; Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?* 79 N.Y.U. L. Rev. 520, 570 (2004); Michael Pinard, *The Logistical and Ethical Dilemmas of Informing Juveniles about the Collateral Consequences of Adjudication*, 6 Nev. L.J. 1111, 1114 (2006). Without the ability to expunge his rape adjudication from his record, D.B. will have to disclose his delinquency adjudication for rape of a child under the age of thirteen to every potential employer or other official who asks.⁹ Additionally, his unsealed juvenile record will come up in background checks completed by a state agency or the Federal Bureau of Investigation (FBI) for the purposes of employment, licensing, or child placement.¹⁰ *See, e.g.,*

⁹ For example, if D.B.'s parents applied to be foster parents, they would be required to notify the agency that D.B. was adjudicated delinquent for rape, *See* Ohio Rev. Code § 5103.0319 (West 2010) (stating prospective foster parents must disclose any adjudications under section 2907.02 for any member of the household ages twelve through eighteen).

¹⁰ Like in most states, many Ohio employers, both public and private, are required by law to perform background checks on new hires and individuals obtaining certain professional licenses. The Attorney General's Office's Bureau of Criminal Identification and Investigation (BCI) and the Federal Bureau of Investigations (FBI) complete these background checks by comparing fingerprints received against a database of criminal fingerprints to determine if there is a criminal record. *See* Background Check, Ohio Attorney General, <http://www.ohioattorneygeneral.gov/Services/Business/WebCheck>, Aug. 21, 2010. Some examples of the types of employment and other opportunities that require applicants to complete background checks are: all school employees, Ohio Rev. Code § 3319.39 (West 2010); all employees in day care centers, Ohio Rev. Code § 5104.012 (West 2010); applicants to become foster or adoptive parents, Ohio Rev. Code § 2151.86 (West 2010); individuals working in the

Ohio Justice and Policy Center, *Criminal Records & Expungement: A Guide for Hamilton County Service Providers* 7 (Sept. 2009)

<http://www.reentrycoalition.ohio.gov/docs/Expung+CrimRec%20Guide-sept09.pdf>. (explaining juvenile justice records are generally not public information, but offenses that cannot be expunged *will* be accessible in background checks for jobs in hospitals, schools, daycares, security, and others).

According to Human Rights Watch, “private employers are reluctant to hire sex offenders even if their offense has no bearing on the nature of the job.” Human Rights Watch, *supra*, at 81. A felony juvenile adjudication for a sex offense may also disqualify D.B. from military service. *See* Shepherd, *supra*, at 42. Thus, adjudications for sexual offenses often “equate directly with job loss and [loss of] employment opportunities, . . .and a general inability to provide for a future family through gainful employment and parental involvement (volunteering, coaching, and chaperoning) in the lives of future children.” Meredith Cohen, *No Child Left Behind Bars: The Need to Combat Cruel and Unusual Punishment of State Statutory Rape Laws*, 16 J.L. & Pol’y 717, 740-41 (2008).

iii. D.B. May Have to Register as a Sex Offender if He Moves to a State With Different Registry Requirement or if Ohio Adopts a New Retroactive Registration Statute that Requires Him to Register.

field of nursing, Ohio Rev. Code § 4723.09 (West 2010); and applicants for a license to practice medicine, surgery, or osteopathy, Ohio Rev. Code § 4731.081 (West 2010). *See* BCI Background Check Reason Codes, <http://www.ohioattorneygeneral.gov/getattachment/620773af-ea33-48d1-b6db-d923c755f164/BCI-Background-Check-Reason-Codes.aspx>. In addition, federal legislation requires a person working with or volunteering to work with children, the elderly, or persons with disability who may have unsupervised access with these individuals to undergo an FBI background check. Some examples of the types of volunteer positions affected include church volunteers, school volunteers, and boy and girl scout leaders. *See* FBI Background Check Reason Codes 7, <http://www.ohioattorneygeneral.gov/getattachment/a9dfc97e-54cb-47fa-9ff0-60453893f489/FBI-Background-Check-Reasons.aspx>

Under current Ohio and federal law D.B. is exempt from sex offender registration. *See* Human Rights Watch, *supra*, at 66 (discussing registry requirements of Adam Walsh Act can apply to juveniles 14 years of age or older); Ohio Rev. Code § 2950.01(M) (West 2010) (“Juvenile offender registrant” means a person who is adjudicated a delinquent child for committing ... a sexually oriented offense or a child-victim oriented offense, who is fourteen years of age or older at the time of committing the offense...”). However, the United States Supreme Court has held that retroactive registration requirements based on previous sex offenses are legal. *Smith v. Doe*, 538 U.S. 84 (2003). *See also State v. Ferguson*, 896 N.E.2d 110 (2008).¹¹ There is nothing to prevent Ohio from deciding five, ten, or twenty years from now that all juveniles adjudicated of a sexual offense must be listed on the state’s public registry. D.B. could also be required to register as a sex offender if he or his family moved to one of the twelve states in which juveniles who committed sexual offenses before age fourteen can be placed on public registries.¹² This could interfere with D.B. pursuing future college or employment opportunities and may prevent his family from pursuing career opportunities in these other states.

¹¹ The U.S. Supreme Court recently ruled in *Carr v. United States*, 130 S. Ct. 2229 (2010), that some registry requirements of SORNA, federal legislation governing the state sex offender registries, do not apply retroactively. *See also U.S.A. v. Juvenile Male*, 590 F.3d 924 (9th Cir. 2010), cert. granted, 130 S.Ct. 2518 (June 7, 2010) (holding that applying SORNA to juvenile convictions entered prior to SORNA’s enactment violates the Ex Post Facto clause). However, states can still make their own more restrictive laws that explicitly provide for retroactivity.

¹²Alabama (Ala. Code § 13A-11-200 (2010)), California (Cal. Penal Code § 290.45(a) (West 2010)), Connecticut (Conn. Gen. Stat. § 54-258 (2010)), Delaware (Del. Code Ann. tit.11, § 4121(e) (2010)), Indiana (Ind. Code Ann. § 36-2-13-5.5 (West 2010)), Kansas (Kan. Stat. Ann. § 22-4909 (2010)), Michigan (Mich. Comp. Laws Ann. § 28.723 (West 2010)), Montana (Mont. Code Ann. § 46-23-508 (2010)), New Jersey (N.J. Stat. Ann. §§ 2C:7-6, 2C:7-10 (West 2010)), North Dakota (N.D. Cent. Code § 12.1-32-15 (2010)), South Carolina (S.C. Code Ann. § 23-3-490 (2009)), Texas (Tex. Code Crim. Proc. Ann. art. 62.351 (Vernon 2010)).

Registering as a sex offender requires, at a minimum, that offenders regularly inform law enforcement where they live, work, and attend school, along with other identifying information.¹³ In addition, all fifty states have online sex offender registries and some form of direct community notification by law enforcement which may include sending notices to private residences, businesses, schools, and community organizations in the areas where the offender lives and works. *See* Human Rights Watch, *supra*, at 51. Many states also have specific restrictions on the activities of registered sex offenders.¹⁴

¹³ The Adam Walsh Act of 2006, 42 U.S.C.A. 16901 et seq., requires all states to maintain a public sex offender registry, 42 U.S.C.A. § 16912, and dictates how often offenders must re-register, from every three months to annually, depending on the risk tier of the offense. 42 U.S.C.A. § 16913. Offenders must register where they live, where they work, and where they attend school. *Id.* States are required to penalize noncompliance with the registry law with at least one year in prison. *Id.* Registry information is made publicly available online at the National Sex Offender Public Website, <http://www.nsopw.gov/>, with different states providing more or less information about specific offenders depending on the offender's risk tier. All registered sex offenders are required to provide to the police: 1) their full name, 2) social security number, 3) residence address, 4) work addresses, 5) school addresses, and 6) information about their car. 42 U.S.C.A. § 16914 (West 2010). The police must provide to the national registry: 1) a physical description of the registered offender, 2) text of the law defining the offense that triggered the registration, 3) the registrant's criminal history, 4) a photograph, 5) finger and palm prints, 6) a DNA sample, and 7) a photocopy of the offender's driver's license or official identification. *Id.* The first five of these items are usually published online for the public to see. States have also created their own more extensive registry requirements beyond what the federal law requires.

¹⁴ As of 2008, at least twenty-three states had enacted some form of residency restriction prohibiting sex offenders from living near (usually within 1,000 to 2,500 feet of) where children congregate, including schools and daycares. *See* Garrine P. Laney, Cong. Research Serv., RL34353, *Residence Restrictions for Released Sex Offenders*, 3, 4, 18 tbl. 3 (2008). In Michigan, registered sex offenders are banned from practicing medicine, ConnectMidMichigan, *Michigan House Legislation Targets Sex Offenders*, (July 2, 2010), <http://www.connectmidmichigan.com/news/story.aspx?id=477886>, or attending Lake Michigan College, MLive, *Benton Harbor Lake Michigan College Bans Convicted Sex Offenders* (Mar. 4, 2010), http://www.mlive.com/news/kalamazoo/index.ssf/2010/03/benton_harbor_lake_michigan_co.html. In many states, registered sex offenders are banned from giving out candy to children on Halloween. CNN.com, *Sex Offenders Locked Down, in the Dark for Halloween* (Oct. 31, 2007), <http://edition.cnn.com/2007/US/10/31/halloween.offenders/>. In some states, such as Florida, Texas, and Louisiana, registered sex offenders have been prohibited from joining their families

Application of registration and notification laws to children ignores the developmental differences between adult and juvenile offenders, ignores youth's capacity for rehabilitation, and does little to address the multiple determinants of juvenile offending in a manner that is responsive to these youths' developmental needs. *See* Letourneau & Miner, *supra*, at 301. Instead, registration, notification, and residence restrictions may aggravate rather than mitigate risk of recidivism for younger offenders. *See* Elizabeth J. Letourneau, & Jill S. Levenson, (in press). *Preventing Sexual Abuse: Community Protection Policies and Practice*, in *The APSAC Handbook on Child Maltreatment: Third Edition* (John E.B. Meyers ed. 2010). In addition, while formal surveys of registered youth have not been conducted, anecdotal reports indicate that youth publicly identified by registration and notification laws suffer physical and emotional harm, ostracism from peers and adults in their communities, and interrupted schooling, among other negative consequences *See* Human Rights Watch, *supra*, at 76, 78-79; Lisa Trivits & N. Dickon Reppucci, *Application of Megan's Law to Juveniles*, 57 *Am. Psychologist*, 690, 690-704 (2002). Residence restrictions associated with sex offender registries are especially detrimental for children who may be prevented from living with their families.

iv. Sending a Child Under the Age of Thirteen Who Engaged in Non-Forcible Sexual Activity With a Peer to Long-Term Group Sex Offender Treatment Has Not Been Proven to Be Effective and Is Potentially Harmful to the Child.

in hurricane shelters, *See* Brian Skoloff, *Sex Offenders Segregated at Shelters*, (July 14, 2006), Attorney General of Texas, *Hurricane Information Resource Page* (August 21, 2010), <http://www.oag.state.tx.us/hurricane/>; Colavecchio-Van Sickler, *Hillsborough Shelters Cut Out Sex Offenders*, *St. Petersburg Times* (June 16, 2005), *available at* http://www.sptimes.com/2005/06/16/news_pf/Hillsborough/Hillsborough_shelters.shtml; USA Today.com, *Florida Offers Prisons for Sex Offenders in Hurricanes* (Aug. 7, 2005), *available at* http://www.usatoday.com/news/nation/2005-08-07-floridasexoffenders_x.htm. In Illinois, registered sex offenders are prohibited from using all forms of social media, 730 Ill. Comp. Stat. Ann. 5/5-6-3.1(s),(t) (West 2010) (as amended by 2010 Ill. Legis. Serv. P.A. 96-1000 (S.B. 3733) (West)). These are just a handful of examples of the types of restrictions D.B. could face in other states for engaging in sexual activity with a peer at the age of twelve.

When a child is adjudicated delinquent for a strict liability sex offense without regard to his culpability, a disposition that includes mandatory enrollment in a group sex offender treatment program can be harmful for this child. Specialized treatments for juveniles who have engaged in sexually aggressive behavior have been widely available since 1985. *See* Elizabeth Letourneau & Charles M. Borduin, *The Effective Treatment of Juveniles Who Sexually Offend: An Ethical Imperative*, 18 *Ethics & Behavior* 286, 290 (2008). However, the empirical investigation of the effectiveness of these treatment programs has lagged far behind their development and proliferation, and concerns have been raised that current treatments are largely ineffective and potentially harmful and counter-productive. *See* Charles Borduin & Cindy Schaeffer, *Multisystemic Treatment of Juvenile Sexual Offenders: A Progress Report*, 13 *Journal of Psychology and Human Sexuality* 25, 27 (2001); D. Richard Laws, *The Rise and Fall of Relapse Prevention*, 38 *Australian Psychologist* 22, 22-30 (2003); Chaffin & Bonner, *supra*, at 314; *See also*, Franklin Zimring, *An American Tragedy: Legal Response to Adolescent Sexual Offending* (2004).

Early treatments for juvenile sex offenders were modeled after those designed for adult sex offenders, with few developmental adaptations for juveniles. *See* Chaffin & Bonner, *supra*, at 314. These early programs, many of which are still in wide use today, follow a cognitive-behavioral treatment model with a focus on relapse prevention. *See* Robert McGrath, et al., *Current Practices and Emerging Trends in Sexual Abuser Management: The Safer Society 2009 North American Survey*, 41-42 (2010) (more than 80% of community-based and residential juvenile sex offender treatment programs adhere to a cognitive-behavioral or relapse-prevention model). Nearly all programs include the following core treatment goals for youths: taking full responsibility for all aspects of the sexual crime, reducing or correcting mental patterns that

support sexual offending, preventing relapse, and controlling sexual arousal. These treatment goals are often addressed in separate modules that each last for several weeks or months and include specific homework assignments and group exercises. These programs are also quite lengthy, with most programs lasting from one to three years, meeting one to two hours per week or more. *Id.* at 83-89.

It is not uncommon for a juvenile sex offender program to regularly require young teens to recite daily statements like “I am a pedophile and am not fit to live in human society. . . . I can never be trusted . . . everything I say is a lie. . . . I can never be cured.” Chaffin & Bonner, *supra*, at 315. *See also, e.g.*, John A. Hunter, *The Effective Management of Juvenile Sex Offenders in the Community: Case Management Protocols 4* (Nov. 4, 2002), <http://www.csom.org/pubs/JuvProtocols.pdf> (“It is critical to the maintenance of public safety, and the rehabilitation of juvenile sexual offenders, that they fully acknowledge and assume responsibility for the sexual offenses that they have committed and understand the harm that they have caused to others.”). Treating as sex offenders children and teens who have engaged in non-violent, unforced sexual conduct with similarly-aged peers, and requiring them to hear, repeat, and ultimately accept such negative messages, harms their psychological development and increase the likelihood that they will engage in criminalized behaviors. *See* Letourneau & Miner, *supra*, at 302, 304; Borduin & Schaeffer, *supra*, at 27; Zimring, *supra*.

Moreover, the limited available research casts significant doubt on the ability of the prevailing group cognitive-behavioral/relapse-prevention approach to improve youth outcomes. *See* Letourneau & Borduin, *supra*, at 287.¹⁵ Experts on sex offender treatment have argued that

¹⁵ *See also, e.g.*, Charles Borduin et al, *Multisystemic Treatment of Adolescent Sexual Offenders*, 34 Int’l J. Offender Therapy & Comp. Criminology 105 (1990); Charles Borduin, et al, *A Randomized Clinical Trial of Multisystemic Therapy with Juvenile Sexual Offenders: Effects on*

these group treatment approaches represent “potentially harmful practices” and can exacerbate the psychological harm and stigma that children labeled as sex offenders already experience. *See* Chaffin & Bonner, *supra*, at 315; Mark Chaffin, *Our Minds Are Made Up: Don’t Confuse Us with the Facts*, 13 *Child Maltreatment* 110, 112-21 (2008). In addition, group counseling situations often place children who engaged in non-violent, unforced sexual conduct with those who have committed serious sex offenses. Grouping children together for treatment in this way carries the risk of harmful side effects, such as making less delinquent children more delinquent. *See* Thomas Dishion & Kenneth Dodge, *Peer Contagion in Interventions for Children and Adolescents: Moving Towards an Understanding of the Ecology and Dynamics of Change*, 33 *Journal of Abnormal Child Psychology* 395, 395-400 (2005). Furthermore, subjecting children to long-term “sex offender treatment” has stigma and labeling effects that can engender depression and anxiety, interfere with achieving normative developmental and social milestones, increase each youth’s likelihood of victimization (i.e., by exposing younger children to older more serious sex offending adolescents), and subject children to an intense level of supervision that likely increases the risk for new charges (e.g., for illegal but consenting sexual conduct with peers) that would not otherwise be brought to bear. *See* Letourneau & Borduin, *supra*, at 292; Michael Caldwell, *What We Do Not Know About Juvenile Sexual Reoffense Risk*, 7 *Child Maltreatment* 291 (2002); Zimring, *supra*.

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Youth Social Ecology and Criminal Activity, 77 *J. Consulting & Clinical Psychol.* 26 (2009); Letourneau, et al, *Multisystemic Therapy for Juvenile Sexual Offenders: 1-Year Results from a Randomized Effectiveness Trial*, 23 *J. Fam. Psychol.* 89 (2009).

SELECTIVE ENFORCEMENT IS AN INHERENT RISK WHEN A STRICT LIABILITY STATUTE MAKES A CHILD BOTH A VICTIM AND A PERPETRATOR.

D.B. was adjudicated delinquent under a strict liability rape statute, which on its face defines him as both victim and perpetrator for the same act. When faced with a strict liability statute under which a child may be both a perpetrator and victim, and without guidance from the legislature, the risk of the state arbitrarily prosecuting one child over the other is inherent, including the possibility that a prosecutor's personal assumptions or biases relating to gender and sexuality may influence his or her charging decisions.

Historically, the purpose of laws that prohibit sexual activity with individuals under a certain age – often referred to as statutory rape laws¹⁶ – was to protect the chastity of young women. Matthew D. Henry & Scott Cunningham, *Do Statutory Rape Laws Work?* (May 2010) at 3. Statutory rape laws formerly criminalized sexual activity by a male of any age with a female under the age of consent to whom he was not married. Carolyn E. Cocca, *Jailbait: The Politics of Statutory Rape Laws in the United States* 9, 29 (2004); Heidi Kitrosser, *Meaningful Consent: Towards a New Generation of Statutory Rape Laws*, 4 Va. J.Soc. Pol'y & L. 287 (1997). If the

¹⁶ Statutory Rape laws adopt a strict liability standard to prohibit sexual activity with individuals under a certain age. See Matthew D. Henry & Scott Cunningham, *Do Statutory Rape Laws Work?* 2 (May 2010), <http://www.csuohio.edu/class/economics/WorkingPapers/WorksPDFs/14.pdf>; Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 Emory L.J. 691, 708 (2006). It is generally understood to mean unlawful sexual intercourse with an unmarried person under the age of consent (as defined by statute), regardless of whether it is against that person's will. See also Charles A. Phipps, *Misdirected Reform: On Regulating Consensual Sexual Activity Between Teenagers*, 12 Cornell J.L. & Pub. Pol'y 373, 433-34 (2003). In modern usage, statutory rape is both defined by statute but also described in more colloquial terms. *Id.* at 434. The term can refer to any sexual intercourse with a minor under the age of consent regardless of the age of the minor; it can also be used to describe sexual activity between an adult or older adolescent and a minor under the age of consent. Commentators typically use the term to refer to sexual activity between an adolescent female who has not reached the age of consent and a much older adolescent or adult male. *Id.* at 433.

male was the same age or even younger than the female, he would still be prosecuted for the crime. Cocca, *supra*, at 29. These early laws codified the enduring sexist idea that a female's involvement in a sexual encounter is necessarily submissive and passive, casting her as the victim, while the male's involvement is necessarily dominant or aggressive, casting him as a perpetrator. Sarah Gill, *Dismantling Gender and Race Stereotypes: Using Education to Prevent Date Rape*, 7 UCLA Women's L.J. 27, 37-38 (1996).

Today strict liability laws criminalizing sexual conduct with children under a prescribed age are gender neutral and designed to protect all children, including boys, from sexual exploitation and assault. Cocca, *supra*, at 9; Tina M. Allen, *Gender- Neutral Statutory Rape Laws: Legal Fictions Disguised as Remedies to Male Child Exploitation*, 80 U. Det. Mercy L. Rev. 111, 112,115 (2002); Kitrosser, *supra*, at 287-289. While the stated purpose behind these laws has evolved, the gendered attitudes surrounding decisions on who and whether to prosecute and the framing of the sexual conduct are often still present in prosecutions under these statutes.

Strict liability rape laws that prohibit sexual conduct between similarly aged children risk allowing individual perceptions about the morality of certain relationships to consciously, or unconsciously, guide enforcement of these laws. Cocca, *supra*, at 2. There is an inherent risk that police and prosecutors will use these laws to reinforce personal and cultural beliefs around appropriate gender roles and acceptable sexuality. Cocca, *supra*, at 10. Because most sexual conduct between similarly aged children that does not involve force does not result in prosecution, even under a strict liability scheme, *id* ; *see also* Henry & Cunningham at 2, the sporadic and unpredictable prosecutions increase the likelihood that enforcement of these laws could be based on impermissible factors. Levine, *supra*, at 692, 696. *See also* Phipps, *supra* at 413.

Prosecutors are ethically obligated not to discriminate against or in favor of a person on the basis of race, religion, sex, sexual orientation, or ethnicity in exercising their discretion regarding decisions to investigate and prosecute violations of the law. ABA Criminal Justice Section Standards: Prosecution Function, Investigative Function of Prosecutor 3-3.1(b). This obligation also extends to juvenile prosecutors who are required to take steps in their work to ensure the juvenile justice system treats all youth fairly and without discrimination. Legal Serv. for Children, et. al., *Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts* 36 (2009) (stating juvenile prosecutors have a responsibility to ensure the juvenile justice system treats all youth fairly and without discrimination. . . [e]nsure that discretionary decisions, such as whether to file a petition, transfer a case to adult court, or offer a plea deal, are not inappropriately influenced by ...impermissible factors...”). However, enforcement of modern statutory rape laws is often based on gender stereotypes that presume males to be sexual perpetrators. Allen, *supra*, at 117 (noting some judges take gender into account when sentencing and give males harsher punishment for the same crime if committed by a female). Additionally, evidence suggests that prosecutions under laws prohibiting sexual conduct between similarly aged peers may disproportionately target youth who engage in sexual conduct with youth of the same sex.¹⁷

¹⁷ For example, studies indicate that police officers and prosecutors regularly profile lesbian, gay, bisexual, or transgender (“LGBT”) youth and youth perceived to be LGBT as criminals, and selectively enforce laws relating to sexual conduct against them. See Amnesty International, *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual, and Transgender People in the U.S.* 33 (2005); *Hidden Injustice, supra*, at 3 (indicating “[LGBT] biases can cloud decisions related to arrest, charging, adjudication, and disposition, with the cumulative effect of punishing or criminalizing LGBT adolescent sexuality and gender identity.”). See also, Cocco, *supra*, at 10. See generally *Commonwealth v. Washington W.*, 457 Mass. 140, 141-42, 928 N.E.2d 908 (2010). In *Washington*, the Supreme Judicial Court of Massachusetts found that in a claim for selective prosecution based on sexual orientation involving two under age boys, the trial court judge did not abuse his discretion by granting discovery of statistical data revealing

Although most statutes criminalizing sexual conduct between teens under the age of consent make no reference to gender or sexual orientation, there is a danger of discriminatory enforcement of these laws in accordance with stereotypes surrounding gender and sexuality. Allen, *supra*, at 116-18. Such stereotypes are often implicit and in many cases, largely unconscious.¹⁸ For example, when there is male-female underage consensual sex, the male is typically viewed as the perpetrator and is thus more likely to be charged with statutory rape.¹⁹ Even in cases where both youth engaging in the sexual conduct are of the same sex, prosecutors'

the prosecution of statutory rape charges involving heterosexual conduct and those engaged in same-sex sexual conduct.

¹⁸ Federal courts have recognized that gender stereotypes are deeply ingrained and even unconscious, and consequently have held that an actor need not have gender animus or conscious malicious intent to engage in discrimination based on stereotypes. See *City of Los Angeles v. Manhart*, 435 U.S. 702, 708 n. 13 (1978) (In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668-69 (1987) (Defendant is liable for race discrimination even though there was no suggestion that defendant held any racial animus against blacks); *Price Waterhouse v. Hopkins*, 825 F.2d 458, 469 (1987), *aff'd in relevant part*, 490 U.S. 228 (1989) (The fact that an actor may be unaware of the stereotype underlying discriminatory motivation "neither alters the fact of its existence nor excuses it."). Some federal courts have observed that those who act on stereotypes may well consider those beliefs to be accurate reflections of reality, though that does not remove the taint of discrimination from actions based on those stereotypes. See *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 130 (2d Cir. 2004). Such subtle or unconscious discrimination does not make the impact less significant or unlawful: "It serves only to make the courts' task of scrutinizing attitudes and motivation, in order to determine the true reason for [the] decisions, more exacting." *Lynn v. Regents of the Univ. of Cal.*, 656 F.2d 1337, 1343 n. 5 (9th Cir. 1981).

¹⁹ See *Commonwealth v. Bernardo B.*, 453 Mass. 158, 900 N.E.2d 834 (2009). Upon direct appellate review the Massachusetts Supreme Judicial Court allowed a motion for discovery concerning a claim of selective prosecution based on gender. In *Bernardo*, a 14-year-old male was charged with statutory rape for engaging in sexual activity with three underage girls -- two were 12 and one was 11 -- where no force was involved. The prosecutor chose not to prosecute the girls even though Massachusetts law deems it a crime for anyone of either gender under the age of 16 to have sex. The court found selective prosecution based on gender was possible and ordered the District Attorney's office turn over statistics of how many cases of statutory rape it had prosecuted in cases of consensual underage sex and how many of those cases involved prosecution of only the male participant and not the female. See also *Cocca, supra*, at 9-10, 16, 92.

decisions regarding which youth is victim and which is perpetrator tend to be based on who assumed which gender role in the sexual activity. *Cocca, supra*, at 10, 16, 92. The idea of the male as aggressor and female as victim pervades these prosecutions. This linkage is tied to the idea that there is a more masculine perpetrator who receives more or all the sexual gratification from the sexual conduct, and who is typically the one who initiated the conduct. *Id*; *See generally* Kitrosser, *supra*, at 288, 291-292 (social and legal framework deems male aggressiveness and female passivity the norm in sexual relations). Stereotypes such as these are common, which in conjunction with a lack of acceptance of same-sex sexual activity and hostile attitudes towards those who may be perceived to have a sexual orientation other than heterosexual, may infect the charging decision under a strict liability statute where both children are victim and perpetrator. *Hidden Injustice, supra*, at 3.

Third Proposition of Law of Amici Curiae.

PROSECUTING CHILDREN WHO ARE MEMBERS OF THE CLASS OF PERSONS OHIO REV. CODE § 2907.02(A)(1)(b) IS INTENDED TO PROTECT IS UNJUST AND PRODUCES AN ABSURD RESULT.

Ohio Rev. Code § 2907.02 (A)(1)(b) necessarily presumes that no person under the age of thirteen can consent to sexual conduct. When two children under the age of thirteen engage in sexual conduct with each other, neither participant can consent under the express terms of the statute. As D.B. could not legally consent to the sexual activity with which he is charged, D.B. should not have been prosecuted.

According to the terms of the statute under which he was adjudicated delinquent, D.B. could not consent to his participation in the sexual activity for which he was found delinquent. Additionally, all three boys involved in the sexual activities in this case could have been

prosecuted under the strict liability statute. Thus each boy, including D.B., is simultaneously a perpetrator and a victim.

The United States Supreme Court has held that where the plain language of a statute is clear and unambiguous but produces an absurd result, the court should not follow the literal language of the statute where it could not have been the legislature's intent. *FBI v. Abramson*, 465 U.S. 615, 638 (1982). See also *Citizen v. United States Dep't of Justice*, 491 U.S. 440, 470 (1989). While a plain language interpretation of a statute normally has a "robust presumption in its favor, it is also true that [a legislative body] cannot, in every instance, be counted on to have said what it meant or to have meant what it said." *Abramson*, 465 U.S. at 638 (O'Connor, J., dissenting)

Ohio courts have similarly held that the paramount concern in interpretation of a statute is to ascertain and give effect to the legislature's intent in enacting that statute. *State v. S.R.*, 63 Ohio St. 3d 590, 593 (1992); *Featzka v. Millcraft Paper Co.*, 62 Ohio St. 2d 245, 247 (1980). "It is an axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences." *State ex rel. Dispatch Printing Co. v. Wells*, 18 Ohio St. 3d 382, 384 (1985). Finding specifically that the application of Ohio Rev. Code § 2907.02(A)(1)(b) on its face produced an absurd result, one Ohio court declined to adjudicate a fourteen-year-old youth delinquent for engaging in a sexual relationship with a twelve-year-old girl. *In re Frederick*, 622 N.E.2d 762 (Ohio C.P. 1993).²⁰ *Amici* submit that the reasoning of the court in *Frederick*

²⁰ The *Frederick* court proposed the statutory rape and strict liability rape statutes should be read in *pari materia* because they both serve a similar purpose. *In re Frederick*, 622 N.E.2d at 764-65. As they both seek to "protect minors from corrupt sexual advances" they should be "reconciled and harmonized if reasonably possible." *Id.* at 764. The *Frederick* court stated that the General Assembly in enacting Ohio Rev. Code § 2907.04 recognized that the age difference between participants in consensual sex should have an effect on the degree of the offense and

dictates a similar result here. If no child under the age of 13 can “consent” to engage in sexual activity under Ohio law, D.B. is no less a victim than the other children involved.

Indeed, as D.B. belongs to the class of persons the statute is intended to protect, it would have been in the child’s best interest to convert the proceeding to an unruly conduct matter, consistent with Juvenile Rule 9 and with this Court’s finding in *In re M.D.* See discussion *infra* (stating it was inappropriate to file the case in juvenile court). See also *In re Frederick*, 622 N.E.2d at 768 (finding that “[t]his court has the authority to dismiss any charge which to pursue would be contrary to the child's best interest. ... This court also has the authority to amend any charge in the interest of justice. Accordingly, pursuant to Juv.R. 22, the complaint herein is amended to allege unruly conduct.”).

The juvenile justice system has traditionally recognized that not all unwise juvenile behavior should be criminalized. The U.S. Supreme Court in striking down the juvenile death penalty, and more recently, life without parole for juveniles has acknowledged that the juvenile’s diminished stage of development requires less harsh treatment than adults. *Graham*, 130 S. Ct. 2011; *Roper*, 543 U.S. 551. See also *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion). In *Thompson*, the Court stated that “[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.” *Id.* See also, *Roper*, 543 U.S. at 569. Additionally, nationally recognized standards governing prosecutorial discretion indicate that in appropriate cases, a prosecutor should consider the availability of non-criminal dispositions, particularly in the case of first time offenders. ABA Standards, *supra*, Discretion as to Noncriminal Disposition 3-3.8(a). The

recommended implementation of a similar approach in the application of Ohio Rev. Code § 2907.02(A)(1)(b) on youth.

Standards also provide that “[p]rosecutors should be familiar with resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.” *Id.* at 3-3.8(b).

Prosecutors nationwide are encouraged to consider diverting a child’s case out of juvenile court to assure the child does not penetrate deeper into the court system and thereby suffer greater consequences from adjudication. *See generally* Levine, *supra*, at 730. Diversion programs allow for a defendant to attend counseling or educational classes. Intimate peer defendants should be allowed to participate in diversion programs as felony charges should be reserved for defendants identified as predators. *Id.* at 730, n. 146. This would be appropriate even where evidence exists to support a conviction as it is within a prosecutor’s discretion to decline to prosecute for good cause consistent with the public interest. ABA Standards, *supra*, Discretion in the Charging Decision 3-3.9. It is within a prosecutor’s discretion to decline to prosecute for good cause consistent with the public interest even where evidence exists to support a conviction. ABA Standards, *supra*, Discretion in the Charging Decision 3-3.9.

Ohio is no exception to this national trend. Ohio Juvenile Rule 9 encourages prosecutors to utilize their broad procedural discretion to act in the best interests of the child and the community by electing not to prosecute a juvenile. The rule states:

(A) **Court action to be avoided.** In all appropriate cases formal court action should be avoided and other community resources utilized to ameliorate situations brought to the attention of the court.

(B) **Screening; referral.** Information that a child is within the court’s jurisdiction may be informally screened prior to the filing of a complaint to determine whether the filing of a complaint is in the best interest of the child and the public.

Juv. R. 9(A). This rule gives the juvenile court the discretion to determine whether court action is in the best interest of the child and public and whether the hearing should be formal or informal. *In re Corcoran*, 68 Ohio App. 3d 213, 216-17 (1990) (citing to a previous version of the Revised Code that called for the law “[t]o protect the public interest in removing the consequences of criminal behavior and the taint of criminality from children committing delinquent acts and to substitute therefore a program of supervision, care, and rehabilitation[.]” Ohio Rev. Code. § 2151.01(B) (1969) (amended 2000).) See also *In re Frederick* 622 N.E.2d. at 765.

The Judge and District Attorney have the authority to divert a child out of the juvenile court system prior to the filing of a petition, during the pendency of a case, or at the end of the case. *See generally*, Ohio Juv. R. 1 *et seq.* (West 2010). These three opportunities for diversion were all present in this case. The first opportunity arose at the initial charging decision, when the prosecutor considered whether to file a complaint and initiate a delinquency proceeding or not. The second opportunity arose upon reviewing the defense’s motion to dismiss. The prosecutor declined to convert the case to an unruly proceeding and instead chose to amend the complaint to include charges under Ohio Rev. Code § 2907.02(A)(1)(b). A third opportunity came at the end of the State’s case, where the judge dismissed the counts alleging force.

In *In re M.D.*, this Court dismissed the charges against a child holding that he was unjustly prosecuted for normative sexual experimentation and strongly criticized the prosecutor and lower courts for not disposing of the proceedings earlier. 38 Ohio St. 3d 149 (1988). At the onset of the proceedings below, in response to the defense motion alleging that there was no basis to proceed against D.B. on allegations of force in his interactions with M.G., the prosecutor amended his complaint to charge D.B. in the alternative under the strict liability rape provision,

section 2902.02(A)(1)(b). Tr. Hr'g 6, Jan. 30, 2008. Under this statute, simply by demonstrating that the alleged conduct had occurred (which all three boys had stated occurred), a finding of delinquency could be made. In electing to proceed against D.B. only, the prosecutor was exercising discretion – discretion to prosecute rather than discretion to divert the case. Yet the plain interpretation of the strict liability statute makes all three boys victims and perpetrators at the same time. While a prosecution against all three boys as victims and perpetrators would be absurd, it is unfair to allow the prosecutor to arbitrarily charge only D.B. as the perpetrator. No legal distinction can or should be made between or among the three boys under the facts of this case.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Juvenile Law Center, *et al.*, respectfully request that this Court overturn the delinquency adjudication of D.B. and hold that the strict liability statute as applied violated D.B.'s right to due process and fundamental fairness under the Ohio and United States Constitutions.

Respectfully Submitted,

Marsha L. Levick (PA #22535)
Counsel for Amici Curiae
Lourdes M. Rosado (PA #77109)
Jessica R. Feierman (PA #95114)
Riya S. Shah (PA #200644)
JUVENILE LAW CENTER
1315 Walnut Street, Suite 400
Philadelphia, PA 19107

Jody Marksamer (CA # 229913)
Ilona M. Turner (CA # 256219)
National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102

Nadia Seeratan (NY #4099354)
National Juvenile Defender Center
1350 Connecticut Avenue NW, Suite 304
Washington, DC 20036

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APPENDIX A

STATEMENTS OF INTEREST OF AMICI CURIAE

Organizations

Juvenile Law Center, founded in 1975, is the oldest multi-issue public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Recognizing the critical developmental differences between youth and adults, Juvenile Law Center works to ensure that the child welfare, juvenile justice, and other public systems provide vulnerable children with the protection and services they need to become healthy and productive adults. Juvenile Law Center participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children. Juvenile Law Center advocates for the protection of children's due process rights at all stages of juvenile court proceedings, from arrest through disposition and from post-disposition through appeal, and urges courts to recognize all of the constitutional guarantees that protect children's liberty interests.

The **National Juvenile Defender Center** was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice.

The National Juvenile Defender Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. The National Juvenile Defender Center also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

The **National Center for Lesbian Rights (NCLR)** is a national legal organization committed to advancing the rights and safety of lesbian, gay, bisexual, and transgender (LGBT) people and their families through a program of litigation, public policy advocacy, and public education. Since 1993, NCLR's Youth Project has worked to ensure that all LGBT young people are safe and can live openly with the support they need, including youth involved in the juvenile justice system. In addition, since 2005, NCLR has partnered with Legal Services for Children and the National Juvenile Defender Center on the Equity Project, an initiative to ensure that LGBT youth and youth

perceived to be LGBT are treated with dignity, respect, and fairness, at all stages of juvenile delinquency court involvement. NCLR has a particular interest in challenging the application of strict liability or statutory rape laws to youth who engage in sexual conduct with similarly aged peers, because such statutes carry an inherent risk of abuse of prosecutorial discretion and may be used to unfairly target LGBT youth and youth who engage in sexual conduct with peers of the same sex.

The **Barton Child Law & Policy Center** is a program of Emory Law School dedicated to ensuring safety, well-being and permanency for abused and court-involved children in Georgia. These outcomes are best achieved when systems only intervene in families when absolutely necessary, treat children and families fairly, provide the services and protections they are charged to provide, and are accountable to the public and the children they serve. The mission of the clinic is to promote and protect the well-being of neglected, abused and court-involved children in the state of Georgia, to inspire excellence among the adults responsible for protecting and nurturing these children, and to prepare child advocacy professionals.

The Barton Center was founded in March 2000. Our work includes policy development and implementation, legislative advocacy, systemic reform, collaborative efforts with community groups and government agencies, training of professionals and volunteers, and representation of child clients. The Barton Center has been involved in representation of juveniles in delinquency cases since the summer of 2001. Initially, such representation occurred in collaboration with the Southern Juvenile Defender Center, which was housed in the Barton Center until 2005. The Barton Center currently houses the Barton Juvenile Defender Clinic (JDC), which was founded in 2006. The Barton Center also houses *Appeal for Youth*, a project that seeks systemic reform through the holistic appellate representation of offenders in our juvenile and criminal justice systems.

Legal services provided by the Barton Center are provided at no cost to our clients. The work of the Barton Center is funded by Emory Law School, private donations, grants from foundations, and contracts with a variety of organizations.

The Northwestern University School of Law's Bluhm Legal Clinic has represented poor children in juvenile and criminal proceedings since the Clinic's founding in 1969. The **Children and Family Justice Center** (CFJC) was established in 1992 at the Clinic as a legal service provider for children, youth and families and a research and policy center. Six clinical staff attorneys currently work at the CFJC, providing legal representation and advocacy for children in a wide variety of matters, including in the areas of juvenile delinquency, criminal justice, special education, school suspension and expulsion, immigration and political asylum, and appeals. CFJC staff attorneys are also law school faculty members who supervise second- and third-year law students in the legal and advocacy work; they are assisted in this work by the CFJC's social worker and social work students.

The **Juvenile Justice Initiative** (JJI) of Illinois is a non-profit, non-partisan, inclusive statewide coalition of state and local organizations, advocacy groups, legal

educators, practitioners, community service providers and child advocates supported by private donations from foundations, individuals and legal firm. JJI as a coalition establishes or joins broad-based collaborations developed around specific initiatives to act together to achieve concrete improvements and lasting changes for youth in the justice system, consistent with the JJI mission statement. Our initiatives seek to create a constituency for youth in the justice system with an emphasis on promoting intervention strategies, ensuring fairness for youth in the justice system, and building community resources for comprehensive continuums of services and sanctions to reduce reliance on confinement. Our collaborations work in concert with other organizations, advocacy groups, concerned individuals and state and local government entities throughout Illinois to ensure that fairness and competency development are public and private priorities for youth in the justice system

The **Midwest Juvenile Defender Center** (MJDC) is an eight state regional network of defense attorneys representing juveniles in the justice system. It was created to increase the capacity of juvenile defenders in the Midwest. MJDC gives juvenile defense attorneys a more permanent capacity to address practice issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile crime. MJDC provides support to juvenile defenders to ensure that youth are treated fairly in the justice system.

Individuals

Tamar Birckhead is an assistant professor of law at the University of North Carolina at Chapel Hill where she teaches the Juvenile Justice Clinic and the criminal lawyering process. Her research interests focus on issues related to juvenile justice policy and reform, criminal law and procedure, and indigent criminal defense. Professor Birckhead's 2008 article on raising the age of juvenile court jurisdiction in North Carolina has received significant attention at both the state and national levels. Licensed to practice in North Carolina, New York and Massachusetts, Professor Birckhead has been a frequent lecturer at continuing legal education programs across the United States as well as a faculty member at the Trial Advocacy Workshop at Harvard Law School. She is vice president of the board for the North Carolina Center on Actual Innocence and has been appointed to the executive council of the Juvenile Justice and Children's Rights Section of the North Carolina Bar Association. Professor Birckhead received her B.A. degree in English literature with honors from Yale University and her J.D. with honors from Harvard Law School, where she served as Recent Developments Editor of the Harvard Women's Law Journal. She regularly consults on matters within the scope of her scholarly expertise, including issues related to juvenile justice policy and reform, criminal law and procedure, indigent criminal defense, and clinical legal education. She is frequently asked to assist litigants, advocates, and scholars with amicus briefs, policy papers, and expert testimony, as well as specific questions relating to juvenile court and delinquency.

Professor Jeffrey Fagan is a Professor of Law and Public Health at Columbia University. He is also a member of the MacArthur Foundation Research Network on

Adolescent Development and Juvenile Justice. Professor Fagan has researched several dimensions of juvenile law and juvenile justice, including the competence and culpability of adolescents facing transfer to the criminal court. He has also conducted research suggesting that the developmental limitations of adolescents may compromise their capacity for full participation in legal proceedings when punishment is at stake, whether in criminal or juvenile court.

Theresa Glennon is the Feinberg Professor of Law at the James E. Beasley School of Law at Temple University. She conducts research and writing and teaches in the areas of education law, family law and disability. Her scholarship includes a focus on issues concerning children. She served as a staff attorney at the Education Law Center-Pennsylvania from 1985-1989, prior to entering legal academia, where she focused on the legal rights of students with disabilities. She is currently a member of the Board of Trustees of the Education Law Center of Pennsylvania, a volunteer mediator for custody disputes in the Philadelphia Family Court, and a member of the Institutional Review Board for Public/Private Ventures, which reviews research proposals for educational, afterschool and other social services programs involving teenagers and others in order to ensure the protection of human subjects.

Barry A. Krisberg is currently a Senior Fellow and Lecturer in Residence at the University of California, Berkeley School of Law and a Visiting Scholar at John Jay College in New York City. He is known nationally for his research and expertise on juvenile justice issues and is called upon as a resource for professionals, foundations, and the media. Dr. Krisberg received his master's degree in criminology and a doctorate in sociology, both from the University of Pennsylvania. Dr. Krisberg has held several educational posts. He was a faculty member in the School of Criminology at the University of California at Berkeley. He was also an adjunct professor with the Hubert Humphrey Institute of Public Affairs at the University of Minnesota and the Department of Psychiatry at the University of Hawaii. Dr. Krisberg was appointed by the legislature to serve on the California Blue Ribbon Commission on Inmate Population Management.. He is past president and fellow of the Western Society of Criminology and is the Chair of the California Attorney General's Research Advisory Committee. In 1993 he was the recipient of the August Vollmer Award, the American Society of Criminology's most prestigious award. The Jessie Ball duPont Fund named him the 1999 Grantee of the Year for his outstanding commitment and expertise in the area of juvenile justice and delinquency prevention. Dr. Krisberg was appointed to chair an Expert Panel to investigate the conditions in the California youth prisons. He has recently been named in a consent decree to help develop remedial plans and to monitor many of the mandated reforms in the California Division of Juvenile Justice. He has also assisted the Special Litigation Branch of the USDOJ on CRIPA investigations.

Martin Guggenheim is the Fiorello La Guardia Professor of Clinical Law at N.Y.U. Law School, where he has taught since 1973. He served as Director of Clinical and Advocacy Programs from 1988 to 2002 and also was the Executive Director of Washington Square Legal Services, Inc. from 1987 to 2000. He has been an active litigator in the area of children and the law and has argued leading cases on juvenile delinquency and termination of parental rights in the Supreme Court of the United States.

He is also a well-known scholar whose books include “What’s Wrong with Children’s Rights” published by Harvard University Press in 2005 and “Trial Manual for Defense Attorneys in Juvenile Court,” published by ALI-ABA in 2007 which was co-authored with Randy Hertz and Anthony G. Amsterdam. He has won numerous national awards including in 2006 the Livingston Hall Award given by the American Bar Association for his contributions to juvenile justice.

Dr. Elizabeth J. Letourneau is a leading researcher and national expert on sex offender policy and intervention. Funded research projects include multiple federally-funded examinations of sex offender registration and public notification policies and the largest randomized clinical trial to date examining treatment effectiveness for juveniles who sexually offended. Dr. Letourneau is committed to the rigorous empirical evaluation of legal and clinical policies aimed at reducing sex crimes. Ultimately, the results of this research can inform appropriate interventions aimed at preventing sex crimes. In particular, Dr. Letourneau hopes her research will facilitate the dismantling of clinical and legal policies fail to distinguish between children and adolescents vs. adults, given that such policies seem more likely to harm children and adolescents rather than achieve the community safety aims for which these policies were intended.

Gail Ryan is the Director of the Perpetration Prevention Program at the Kempe Center for the Prevention and Treatment of Child Abuse and Neglect; Assistant Clinical Professor in the Dept of Pediatrics, University of Colorado School of Medicine; and Facilitator of the National Adolescent Perpetration Network (NAPN). Since 1983, she has focused on prevention of juvenile sexual offending, studying both the initiation and continuation of abusive behaviors in childhood and adolescence. Drawing on her 26 years of networking hundreds of juvenile programs across the country, as well running a treatment program for sexually abusive youth, she is editor of the only academic textbook in the field, and is recognized as one of the leading experts on children’s sexual behaviors and juvenile sexual offending.