

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Plaintiff- Appellee,	:	Case No. 2021-0794
	:	
v.	:	On Appeal from the
	:	Clermont County Court of Appeals,
AUSTIN M. FUELL,	:	Twelfth Appellate District
	:	
Defendant-Appellant.	:	Case. No. CA2020-02-008

BRIEF OF *AMICI CURIAE* JUVENILE LAW CENTER AND CHILDREN’S LAW CENTER,
INC., ET AL., IN SUPPORT OF APPELLANT AUSTIN M. FUELL

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values. Juvenile Law Center has represented hundreds of young people and filed influential amicus briefs in state and federal cases across the country.

The **Children's Law Center, Inc. (CLC)** is a non-profit legal service center committed to protecting and enhancing the rights of children and youth in Ohio and Kentucky and improving the systems that serve them. CLC engages in public policy work, training and education, impact litigation, and juvenile defender support services. CLC advocates on behalf of youth prosecuted in juvenile and adult court, including ensuring that youth receive constitutionally required protections and due process in delinquency and criminal court proceedings. For the past decade, CLC has worked on issues facing Ohio youth prosecuted in adult court, placed in adult facilities, and working towards systemic change to reduce the number of children in the adult system through various means including data collection, interviewing youth in adult court and their families as well as stakeholders, and issuing reports on this topic. The issues involved in and implications of this case are of particular concern to CLC, given the statewide reform work CLC is engaged in on behalf of juveniles exposed to the adult criminal system.

The **Cuyahoga, Franklin, Hamilton, and Montgomery** County Public Defender's Offices provide legal services to indigent adults and children charged with violations of the criminal code. These offices represent the vast majority of children accused of criminal offenses in the State of Ohio, both at bindover proceedings in juvenile court and in adult court once the children have been transferred. Accordingly, a large number of the Public Defenders' present and future clients will be directly impacted by the outcome of the present litigation.

STATEMENT OF FACTS

Amici adopt the Statement of Facts as articulated in the brief of Appellant.

ARGUMENT

Austin Fuell was only 17 years old when he was transferred from juvenile to adult court on aggravated robbery and burglary, and felony murder charges. He was eventually sentenced to a mandatory term of 15-years-to-life in adult prison. Both the probable cause hearing that resulted in Austin's adult court transfer and the sentencing procedures that lead to his life-tail sentence were devoid of appropriate due process protections that violated Austin's constitutional rights.

This brief provides context surrounding the implications of Appellant's case, illustrating why Appellant's propositions of law are necessary to effectuate the constitutional rights of young people in the justice system. Ensuring robust due process procedures before bindover to adult court and when sentencing a young person to life in prison are vital considering the significant racial disparities in Ohio's criminal justice system where a disproportionate number of Black youth are transferred to the adult system and then receive life sentences. Additional due process protections can combat the bias and other systemic deficiencies that lead to such disparities and ensure a more equitable system. As discussed further herein, this Court can preserve youth's constitutional rights and limit the racial disparities of the justice system by making clear that: (I) Transfer proceedings require due process protections to ensure youth are protected from the harms of the adult system

and to prevent racially disproportionate transfer rates, and (II) Life sentences are likewise imposed in racially disproportionate ways, and thus must be subject to the protections this Court set forth in *State v. Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952.

I. PROBABLE CAUSE HEARINGS THAT RESULT IN A YOUTH’S TRANSFER TO ADULT COURT REQUIRE DUE PROCESS PROTECTIONS, INCLUDING THE RIGHT TO CROSS EXAMINE WITNESSES, TO PROTECT YOUTH FROM THE HARMS OF THE ADULT SYSTEM AND PREVENT RACIALLY DISPROPORTIONATE TRANSFER

Austin was automatically transferred to adult court for criminal prosecution and sentencing based only on his age and a probable cause finding under Ohio’s mandatory bindover mechanism. R.C. 2151.10(A)(1)(a)(i); R.C. 2152.10(A)(1)(a). Austin’s probable cause hearing – which did not include the opportunity to cross-examine or confront crucial witnesses – ran afoul of the United States Supreme Court’s due process requirements outlined in *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966) and subjected him to the detrimental consequences that accompany adult court prosecution and placement.

A. Probable Cause Hearings That Result In Transfer Are A “Critically Important” Step Under *Kent v. United States* And Require Robust Due Process Protections

“[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Due process is a flexible concept, and the particular process required varies with the situation; generally speaking, the greater the interest at stake, and the higher the risk of an erroneous deprivation of that interest, the more stringent the procedural protections required. *Zinerman v. Burch*, 494 U.S. 113, 127-128, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *see also Goldberg v. Kelly*, 397 U.S. 254, 262-263, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (“The extent to which procedural due process must be afforded

the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss.’”, quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring)).

As the United States Supreme Court held more than fifty years ago in *Kent*, 383 U.S. at 553-554, 86 S.Ct. 1045, 16 L.Ed.2d 84, the liberty interests at stake in the transfer of a youth from juvenile to adult criminal court are “critically important,” and they call for heightened procedural protections not provided by the bindover statutes in Ohio. In *Kent*, the Supreme Court held that the transfer of a youth from juvenile court to adult criminal court imposes a significant deprivation of liberty and therefore warrants substantial due process protection. *Id.* at 554. The Court reasoned that upon transfer, the child loses the “special rights and immunities” offered by the juvenile court. *Id.* at 556. The Court also emphasized that the transfer determination might mean the difference between a few years’ confinement until the youth reaches age twenty-one, and the harshest sentences imposed upon adults. *Id.* at 556-557. In light of those circumstances, the Court found it “clear beyond dispute that the waiver of jurisdiction is a ‘critically important’ action determining vitally important statutory rights of the juvenile,” and thus it must “satisfy the basic requirements of due process and fairness.” *Id.* at 553, 556. To ensure that the youths’ interests in juvenile status and freedom from confinement are adequately protected, the probable cause hearing which precedes a child’s prosecution in adult court must allow the court to conduct a robust inquiry:

What is required before a waiver is, as we have said, ‘full investigation.’ . . . It prevents the waiver of jurisdiction as a matter of routine for the purpose of easing the docket. It prevents routine waiver in certain classes of alleged crimes. It requires a judgment in each case based on an inquiry not only into the facts of the alleged offense but also into the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case.

Id. at 553 n. 15. (Citations omitted).¹

This Court has applied *Kent* to Ohio’s mandatory bindover proceedings before. *See In re D.M.*, 140 Ohio St.3d 309, 2014-Ohio-3628, 18 N.E.3d 404, ¶ 11 (“the Supreme Court of the United States has held that the bindover hearing is a “critically important proceeding” and that the hearing “must measure up to the essentials of due process and fair treatment.”); *State v. Iacona*, 93 Ohio St.3d 83, 92, 2001-Ohio-1292, 752 N.E.2d 937 (relying on *Kent* in finding that *Brady* material and other basic discovery is required even in mandatory bindover proceedings). In *Iacona*, this Court observed that when a child is adjudicated delinquent, any institutionalization, confinement, or other accountability measure may not “exceed the child’s attainment of twenty-one years of age,” including for the most serious crimes of aggravated murder, while “the same minor bound over to the court of common pleas to face trial as an adult on a charge of murder faces a potential life term of incarceration.” *Id.*, citing former R.C. 2151.355(A)(4) and (6); R.C. 2929.02(B). This Court rightly concluded, as in *Kent*, that “the issues determined at a mandatory bindover hearing are therefore a ‘critically important’ stage in juvenile proceedings,” and that “such a hearing must ‘measure up to the essentials of due process and fair treatment.’” *Iacona* at 92, citing *Kent*, 383 U.S. at 562.

The court violated Austin’s due process rights under *Kent* and *Iacona* by failing to conduct an appropriate inquiry before his transfer to the adult court. Ohio’s bindover law requires the state to “provide credible evidence of every element of an offense” during the probable cause hearing

¹ As the Court noted in the appendix to its opinion, factors a judge should consider when determining whether a juvenile should be transferred to adult court include: 1) “the sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living” (culpability) and 2) “the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile....” (amenability to rehabilitation). *Kent* at 567.

that results in bindover to adult court. *Iacona* at 93. However, when youth such as Austin are disallowed from appropriately cross examining or confronting witnesses providing that evidence, its credibility is called into question, and youth are transferred to adult court based on proceedings that do not comport with their due process rights or Ohio's bindover statutes. As a result, Austin faces the dire consequences articulated in *Iacona*, a life sentence in adult prison and the significant consequences that accompany it.

B. Mandatory Bindover To Adult Court Exposes Youth To Severe Consequences And Developmentally Inappropriate Conditions

As noted in *Kent* and *Iacona*, mandatory bindover proceedings are particularly critical because of the severe consequences youth experience when transferred from the juvenile to the adult court. In Ohio there are stark differences in sentences between the juvenile and adult systems. While the maximum penalty in Ohio's juvenile court system, even for the most serious adjudications, may not exceed the young person's 21st birthday, R.C. 2152.16(A)(1)(a), a sentence in adult court may carry the possibility of life imprisonment. R.C. 2929.02(B). Indeed, in the present case, Austin has been given a mandatory 15-years-to-life sentence.

Youth prosecuted as adults also face numerous collateral consequences that accompany criminal justice system involvement, including the heavy burden of an adult criminal record and the resulting impediments to employment, higher education, housing options, military involvement, and voting rights. Campaign for Youth Justice, *Children in Adult Courts, Jails, and Prisons: Basic Facts* 1 (Mar. 23, 2020), campaignforyouthjustice.org/images/factsheets/BASIC_FACTS_032320.pdf (accessed Nov. 4, 2021).

Additionally, young people in adult facilities often encounter brutal conditions. Youth in adult facilities are often held in solitary confinement and are five times more likely to die from

suicide than are youth in juvenile facilities. *Id.* They are also five times more likely to be sexually assaulted and nearly twice as likely to be beaten by staff or attacked with a weapon by another inmate. Richard Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention 7 (June 2010), ojp.gov/pdffiles1/ojjdp/220595.pdf (accessed November 4, 2021).²

Further, the generally poor educational services in adult facilities set youth further behind in reaching their school and employment goals. *See, e.g.*, Mahari Simmonds, *Education behind Bars: Can Young People Be Taught in Adult Justice System?*, Juvenile Justice Information Exchange (Jan. 2, 2019), jjie.org/2019/01/02/education-behind-bars-can-young-people-be-taught-in-adult-justice-system/ (accessed Nov. 4, 2021). A 2012 Ohio survey found that youth in adult facilities are “less likely” to have access to “age-appropriate mental health services.” Children’s Law Ctr., Inc., *Falling Through the Cracks: A New Look at Ohio Youth in the Adult Criminal Justice System*, 2 (2012) available at www.prisonpolicy.org/scans/FallingThroughTheCracks.pdf (accessed Nov. 4, 2021). The survey also found that Ohio school districts are failing to provide legally mandated education services for youth in jails, including youth with disabilities. *Id.* Well over half (68 percent) of the 53 school districts that responded to the survey did not provide any educational services—including GED classes—to youth in adult jails. *Id.*

The harsh and developmentally inappropriate conditions of the adult justice system and facilities hamper youth rehabilitation while undermining public safety. Youth prosecuted as adults are a third more likely to commit another, more violent crime than youth treated in the juvenile

² A 2011 report revealed that 66 percent of youth 16 and 17 years old who reported being sexually abused while in prison were victimized more than once. Justice Policy Institute and Campaign for Youth Justice, *The Child Not the Charge: Transfer Laws Are Not Advancing Public Safety* 14 (2020), campaignforyouthjustice.org/images/child_not_the_charge_report5.26_2.pdf (accessed November 4, 2021).

system. *Id.*, citing Robert Hahn et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, Ctr. for Disease Control & Prevention (2007), cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm (accessed Nov. 4, 2021). Youth transfer laws around the country have also not shown to reduce crime or otherwise have a deterrent effect. Patrick Griffen et. al, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting* United States Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention 26, ncjj.org/pdf/Transfer_232434.pdf (accessed Nov. 4, 2021). Indeed, several studies, including one study conducted exclusively in Ohio, have found that overwhelming majorities of youth do not know or believe that they could be transferred to adult court. Karen Miner-Romanoff, *Juveniles Sentenced and Incarcerated as Adults: Findings from a Qualitative Analysis of Their Knowledge, Understanding, and Perceptions of Their Sentences*, 9:1 Justice Policy Journal 1, 7-8 (2012), available at cjcj.org/uploads/cjcj/documents/Juveniles_Sentenced.pdf (accessed November 4, 2021). Interviews with Ohio youth who had been bound over to adult court and sentenced to adult prison showed that youth “had no knowledge of juvenile bindover, no understanding and no certainty of application to their offenses[, making it] impossible for a law to act as a deterrent if the offending population does not know of the law, understand the law, or perceive that the law can be applied to them.” *Id.* at 21.

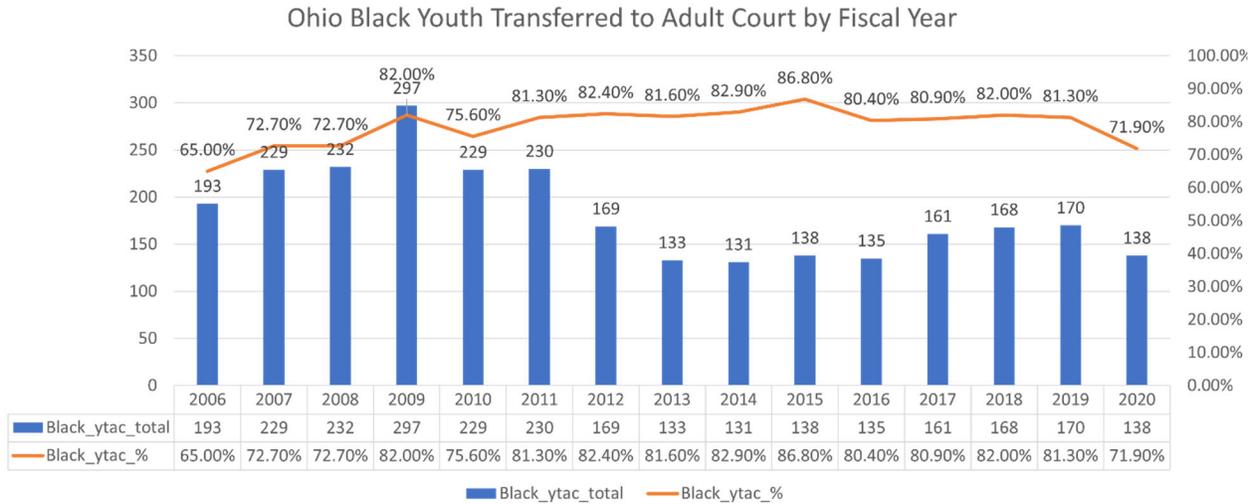
In the adult criminal justice system Austin not only faces a lengthy prison sentence but may also experience conditions and consequences with lasting physical, psychological, and financial impacts. Criminal prosecution denies him the rehabilitative services of the juvenile justice system, without any resulting safety benefits to the community.

C. Failure To Provide Robust Constitutional Protections Results In Racially Disproportionate Transfer

At every stage of the criminal justice system, from interrogation through arrest, prosecution and plea negotiation, trial, and sentencing, people of color— particularly Black males—are treated more harshly than white individuals, even when controlling for offense severity. *See, e.g.*, Marc Mauer et al., *Addressing Racial Disparities in Incarceration*, 91 *Prison J.* 87S, 91S-95S (2011); Vera Inst. of Justice, *Incarceration Trends in Ohio* 2 (2019), vera.org/downloads/pdfdownloads/state-incarceration-trends-ohio.pdf (accessed Nov. 4, 2021); Cedric Thornton, Black Enterprise, *Black Woman in Ohio Sentenced to 18 Months in Prison, White Woman Gets Probation For Similar Crime* (Aug. 10, 2021), blackenterprise.com/black-woman-in-ohio-sentenced-to-18-months-in-prison-white-woman-gets-probation-for-similar-crime (accessed Nov. 4, 2021).

The racial disparities are particularly pronounced for youth prosecuted in the adult criminal justice system. In Ohio, Black youth comprise the overwhelming majority of mandatory bindovers each year, even though white youth vastly outnumber Black youth in the general population. United States Census Bureau, *QuickFacts Ohio*, census.gov/quickfacts/geo/chart/OH/RHI225219 (accessed Nov. 4, 2021). For instance, in 2020, a startling 71.9 percent of young people transferred to adult court were Black, Ohio Dept. of Youth Services, *Statewide Reports Maintained by DYS* (May 18, 2020), dys.ohio.gov/wps/portal/gov/dys/about-us/communications/reports/statewide-reports-maintained-by-dys (accessed Nov. 4, 2021), while only approximately 13 percent of Ohio’s population is Black. United Census Bureau, *QuickFacts Ohio*, census.gov/quickfacts/fact/table/OH/PST045219 (accessed Nov. 4, 2021). Further, as the following chart shows, while there was a general downward trend in the total number of Black

youth being transferred between 2009 and 2016, the overrepresentation of Black youth versus total youth transferred has trended upwards.



See Ohio Dept. of Youth Services, *Statewide Reports Maintained by DYS* (May 18, 2020), dys.ohio.gov/wps/portal/gov/dys/about-us/communications/reports/statewide-reports-maintained-by-dys (accessed Nov. 4, 2021).

Ohio’s disproportionate rates in transfer to adult court align with national data finding racial disparities as well. Nationally, Black and Hispanic youth account for over 60 percent of cases judicially waived from juvenile to adult court, with Black youth representing 54 percent and Hispanic youth 12 percent. Sarah Hockenberry & Charles Puzanchera, Office of Juvenile Justice and Delinquency Prevention, *Characteristics of Cases Judicially Waived from Juvenile Court to Criminal Court* (2019), ojjdp.gov/ojstatbb/snapshots/DataSnapshot_Waiver2017.pdf (accessed Nov. 4, 2021). Native youth are 1.84 times more likely to receive an adult prison sentence than are white youth. Campaign for Youth Justice, *Children in Adult Courts at 1*, citing Liz Ryan, Campaign for Youth Justice, *Youth in the Adult Criminal Justice System* (2012) cfyj.org/images/policybriefs/policyreform/FR_YACJS_2012.pdf (accessed Nov. 4, 2021).

Disparities in the criminal justice system are not the product of higher crime rates, but rather stereotypes, implicit racial bias, and structural racism related to racial segregation and the over-policing of neighborhoods with high numbers of people of color. *See, e.g.,* The Sentencing Project, *Shadow Report to the United Nations on Racial Disparities in the United States Criminal Justice System* 3-6, sentencingproject.org/publications/shadow-report-to-the-united-nations-human-rights-committee-regarding-racial-disparities-in-the-united-states-criminal-justice-system/ (accessed Nov. 4, 2021), citing Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 *Law & Hum. Behav.* 483, 485 (2004); Lauren Krivo & Ruth Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 *Soc. F.* 619, 642 (1996) (discussing arrest rates); Michael Siegel et al., *The Relationship between Racial Residential Segregation and Black-White Disparities in Fatal Police Shootings at the City Level, 2013-2017*, 111 *J. Natl. Med. Ass'n* 580, 585-86 (2019) (discussing effect of neighborhood segregation on racial disparities in police shootings); Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 *Am. U. L. Rev.* 1513, 1554-56 (2018), citing Ronald Weitzer & Rod K. Brunson, *Strategic Responses to the Police among Inner-City Youth*, 50 *Socio. Q.* 235, 235-36 (2009) (Black youth often experience extensive surveillance and harmful police encounters in their communities, including constant police presence and frequent pedestrian or vehicle stops); Patricia Foxen, *Perspectives from the Latino Community on Policing and Body Worn Cameras*, *Medium* (May 4, 2017), medium.com/equal-future/perspectives-from-the-latino-community-on-policing-and-body-worn-cameras-47f150f71448 (accessed Nov. 4, 2021) (documenting reactions to the hyper-policing of Latino communities).

The now debunked “super-predator” myth has been a particularly pernicious stereotype resulting in the transfer of Black boys to the adult justice system. The discredited theory not only

shifted the legal landscape, but also “amplified the American public’s predisposition to associate adolescents of color, and in particular young black males, with violence and moral depravity.” Perry L. Moriearty and William Carson, *Cognitive Warfare and Young Black Males in America*, 15 J. Gender Race & Just. 281, 283 (2012), available at scholarship.law.umn.edu/faculty_articles/384 (accessed Nov. 4, 2021). Young Black men were dissociated from their youth, and the super-predator imagery allowed the public to “suspend our feelings of empathy towards young people of color.” *Id.*; Carroll Bogert & Lynnell Hancock, The Marshall Project, *The Media Myth That Demonized a Generation of Black Youth*, themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth (accessed Nov. 4, 2021) (quoting New York University law professor Kim Taylor-Thompson). These changing perceptions and laws had disastrous consequences, *id.*; of the thousands of youth who were incarcerated as a result of the changing transfer laws, the majority of them were Black boys.

In response to the racist misconceptions underlying the super-predator myth, nearly one-third of states enacted laws “to redefine the purpose of [the] juvenile courts to ‘emphasize public safety, certain sanctions, and/or the accountability of offenders.’” Vincent M. Southerland, *Youth Matters: The Need to Treat Children Like Children*, 27 J. Civ. Rts. & Econ. Dev. 765, 780 (2015), quoting Sara Sun Beale, *You’ve Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 Harv. C.R.-C.L. L. Rev. 511, 521 (2009). Between 1992 and 1997, almost all states broadened juvenile jurisdiction, increased sentences, and made it easier to transfer youth to adult court, subjecting them to harsher penalties, including life without parole sentences. Southerland at 780. Ohio was no different, introducing and then expanding the pool of

children subject to adult prosecution by the use of mandatory bindovers between 1987 and 2000. *Falling Through the Cracks: A New Look* at 2-3.

Many people have continued to internalize—often unconsciously—these and other false stereotypes, and they affect treatment of these youth in the justice system. The research on “adultification bias” of Black youth is particularly well developed. Studies show that, compared to similarly situated white children, people are likely to perceive Black children as older, less innocent, and more culpable. See Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 *J. Personality & Soc. Psychol.* 526, 540 (2014). The adultification of Black youth dates back to forced child labor during slavery, and “is a form of dehumanization, robbing Black children of the very essence of what makes childhood distinct from all other developmental periods: innocence.” Rebecca Epstein et al., *Girlhood Interrupted: The Erasure of Black Girls’ Childhood* 4, 6, 12 (2017), law.georgetown.edu/poverty-inequalitycenter/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf (accessed Nov. 4, 2021) (adultification bias contributes to more punitive treatment Black girls receive in juvenile justice system). Another study found that people presented with a scenario involving a Black juvenile defendant are significantly more likely to view children to be as culpable as adults, and to favor more severe sentencing, than those presented with the same scenario involving a white juvenile defendant. See Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, 7 *PLOS ONE* 1, 2 (2012), journals.plos.org/plosone/article?id=10.1371/journal.pone.0036680 (accessed Nov. 4, 2021).

Black youth and other youth of color are transferred to the adult justice system in disproportionate rates compared to their white counterparts because of the explicit and implicit biases of the superpredator myth, the adultification of Black children, and other harmful

stereotypes that pervade the criminal justice system. Providing robust due process protections to youth throughout their time in the justice systems, especially during the “critically important” transfer stage can help combat these stereotypes by giving youth more significant opportunities to demonstrate that their case should remain in the juvenile court.

II. LIFE SENTENCES ARE IMPOSED IN RACIALLY DISPROPORTIONATE WAYS, AS SUCH, THEY MUST BE SUBJECT TO THE CONSTITUTIONAL PROTECTIONS THIS COURT HAS SET FORTH IN *STATE V. PATRICK*

A. Any Sentence With A Life Tail Is A Life Sentence And Should Be Treated Consistently With The Process Set Forth In *Patrick*

“The most important attribute of the juvenile offender is the potential for change.” *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, ¶ 42. The distinct attributes of youth have been cited by the United States Supreme Court as the defining principle for issuing categorical prohibitions against certain punishments for juveniles over the last two decades. *See Roper v. Simmons*, 543 U.S. 551, 575, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (abolishing the death penalty for juvenile offenders), *Graham v. Florida*, 560 U.S. 48, 74-75, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2011) (ruling that life without the possibility of parole sentences for non-homicide juvenile offenders violates the Eighth Amendment); *Miller v. Alabama*, 567 U.S. 460, 481, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (holding that mandatory life without parole sentences for juvenile homicide offenders violates the Eighth Amendment). *See also Montgomery v. Louisiana*, 577 U.S. 190, 211-213, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016) (holding that *Miller*’s prohibition on mandatory life without parole for juveniles should be applied retroactively because it established a new substantive constitutional rule).

Miller held that “mandatory penalties, by their nature, preclude a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it.” 567 U.S. at 476. Failing to consider the youth’s individual situation unconstitutionally

precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.

Id. at 477, 479. This Court, relying on *Miller's* ruling, held that a sentencing court must consider youth as a mitigating factor even in non-mandatory sentencing schemes. *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶ 19. Recently, this Court extended *Miller* and *Long* to juvenile life sentences, underscoring the importance of individualized considerations of youth and its attendant characteristics.

This Court held in *Patrick* that, consistent with *Long*, a “trial court must separately consider the youth of a juvenile offender as a mitigating factor before imposing a life sentence under R.C. 2929.03, even if that sentence includes eligibility for parole.” (Emphasis added.). *State v. Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952, at ¶ 1. The appellant in *Patrick* argued, as Austin asserts in this case, that based on the significant body of caselaw underscoring the difference between juveniles and adults, no constitutional difference exists between sentencing a juvenile to life—with or without parole eligibility—that would justify failing to account for youth as a mitigating factor. This Court agreed and emphasized that the distinguishing characteristics are “inherent to juveniles in all cases.” *Patrick* at ¶ 27. This Court reasoned that “[i]f, as *Miller* instructs, youth and its attendant characteristics must be considered when a court imposes its harshest penalties [. . .], then youth is also a necessary consideration when a sentencing court determines at what point parole eligibility should be available during a life sentence.” *Patrick* at ¶ 32, citing *Miller* at 477-478. Indeed, when considering the number of years spent behind bars, the

experience and extreme consequence of a young person spending life in prison even with parole eligibility is analogous to a sentence of life in prison without the possibility of parole for the purposes of the Eighth Amendment. *See Patrick* at ¶ 36. As such, any sentence where a young person faces a life tail must be treated consistently for the purposes of the Eighth Amendment with the standard set forth in *Patrick*.

Here, the trial court did not consider Austin’s youth as a mitigating factor when it sentenced him to a mandatory term of life in prison with the possibility of parole after 15 years. Such a sentence is contrary to Ohio law as it does not allow for any individualized consideration, and—to the extent it also allows for the possibility of life in prison—it contravenes the rationale of the United States Supreme Court in each of the above-cited cases. Accordingly, *amici* urge this Court to declare R.C. 2929.02(B)’s mandatory life sentencing scheme unconstitutional as applied to juveniles, consistent with *Long*, *Miller*, and *Patrick*.

B. Youth Are Fundamentally Different From Adults In Constitutionally Relevant Ways, As Such, R.C. 2929.02(B) Violates The Eighth Amendment Because It Precludes Judicial Consideration Of Those Differences

The Eighth Amendment states that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” *Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, at ¶ 31. “A key component of the Constitution’s prohibition against cruel and unusual punishment is the ‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense.’” *Id.*, quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct.544, 54 L.Ed. 793 (1910). Indeed, “[p]rotection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment.” *Moore* at ¶ 31, quoting *Montgomery*, 577 U.S. at 206-207, 136 S.Ct. 718, 193 L.Ed.2d 599.

Building upon their decisions in *Roper*, *Graham*, and *Miller*, the United States Supreme Court recently confirmed that *Miller* requires “a discretionary sentencing procedure where youth

is considered,” which “allows the sentencer to consider the defendant’s youth” to ensure proportional sentences. *Jones v. Mississippi*, ___ U.S. ___, 141 S.Ct. 1307, 1321, 209 L.Ed.2d 390 (2021) (upholding the central holdings of *Miller* and *Montgomery* but determining that no specific finding of permanent incorrigibility is necessary before a life without parole sentence is imposed). In Ohio, proportionality review can involve the length of sentence given in a particular case or categorical restrictions. *Moore* at ¶ 32.

The Supreme Court’s decisions applying constitutional guarantees to youth underscore that a youth’s age “is far more than a chronological fact;” it creates commonsense conclusions about youth perceptions and behavior that are “self-evident to anyone who was a child once himself.” *J.D.B. v. North Carolina*, 564 U.S. 261, 272, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011). These conclusions mitigate a child’s culpability under the Eighth Amendment and apply to all children as a class. *Id.* The United States Supreme Court emphasized courts must consider not only a child’s age, but “the wealth of characteristics and circumstances attendant to it.” *Miller*, 567 U.S. at 476-477, 132 S.Ct. 2455, 183 L.Ed.2d 407. This Court made clear that the record must reflect that the trial court engaged in such a consideration. *Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, at ¶ 11. These distinctions are “what any parent knows—indeed, what any person knows—about children generally.” *Id.* (citations omitted).

Three key attributes demonstrate how children are fundamentally different from adults in constitutionally relevant ways. First, “‘children have a lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” *Miller* at 471, quoting *Roper*, 543 U.S. at 569, 125 S.Ct. 1183, 161 L.Ed.2d 1. *Accord Graham*, 560 U.S. at 67, 130 S.Ct. 2011, 176 L.Ed.2d 825. Second, “‘children are more vulnerable ... to negative influences and outside pressures,’ including from their family and peers; they have ‘limited control

over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing settings.” *Miller* at 471, quoting *Roper* at 569. *Accord Graham* at 67. *See, e.g.*, Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1012 (2003) (“influence affects adolescent judgment both directly and indirectly. In some contexts, adolescents make choices in response to direct peer pressure to act in certain ways. More indirectly, adolescents’ desire for peer approval – and fear of rejection – affect their choices, even without direct coercion.”). Third, “a child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievabl[e] deprav[ity].” *Miller* at 471, quoting *Roper*, 540 U.S. at 570, 125 S.Ct. 1183, 161 L.Ed.2d 1.

These distinctions are supported by a significant body of developmental research and neuroscience demonstrating significant psychological and physiological differences between youth and adults. *See, e.g.*, *Graham* at 68 (“developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”). The Court relied upon a growing body of developmental research that demonstrates “[adolescence] is transitional because it is marked by rapid and dramatic change within the individual in the realms of biology, cognition, emotion, and interpersonal relationships.” Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice*, 31 (2008). Research shows that, compared to adults, youth are less capable of making reasoned decisions, particularly in stressful situations. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 *The Future of Children* 15, 20 (2008), available at pubmed.ncbi.nlm.nih.gov/21337996/ (accessed Nov. 4, 2021).

Research confirms that “many of the factors associated with antisocial, risky, or criminal behavior lose their intensity as individuals become more developmentally mature.” Marsha Levick

et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through The Lens of Childhood and Adolescence*, 15 U. Pa. J. L. & Soc. Change 285, 297 (2012) (citations omitted). “[T]he period of risky experimentation does not extend beyond adolescence, ceasing as identity becomes settled with maturity. Only a small percentage of youth who engage in risky experimentation persist in their problem behavior into adulthood.” Natl. Research Council, *Reforming Juvenile Justice: A Developmental Approach* 90 (2013) Washington, DC: The Natl. Academies Press, available at doi.org/10.17226/14685 (accessed Nov. 4, 2021) (citations omitted). *See also Rethinking Juvenile Justice* at 53 (explaining that “[m]ost teenagers desist from criminal behavior . . . [as they] develop a stable sense of identity, a stake in their future, and mature judgment.”). Decision-making in adolescence is characterized by sensation and reward seeking behavior. Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 *Developmental Psychobiology* 216, 217 (2010). The heightened level of impulsivity in teens may result from adolescents’ weak future orientation and their inability to anticipate the consequences of decisions. Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 *Child. Dev.* 28, 29-30 (2009). *See also Rethinking Juvenile Justice* at 91, 97.

As youth develop and mature, they become less likely to engage in antisocial activities. The passage of time, paired with appropriate treatment services, dramatically decreases antisocial attributes and the likelihood of recidivism. “Contemporary psychologists universally view adolescence as a period of development distinct from either childhood or adulthood with unique and characteristic features.” *Rethinking Juvenile Justice*, at 31. *See also* Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 *Dev. Psych.* 1764 (2008) (noting that rates of impulsivity are high during adolescence and early adulthood and decline thereafter). As youth mature, so do

their self-management skills, long-term planning, judgment and decision-making, regulation of emotion, and evaluation of risk and reward. *See* Steinberg & Scott, *Less Guilty by Reason of Adolescence*, at 1011. As a result, “[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled.” *Id.* at 1014.

Law and science recognize that children possess a heightened capacity for change. Studies show that even the most serious young offenders report a decrease in criminal activity over time. Edward P. Mulvey, *Highlights From Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders*, Office of Juvenile Justice and Delinquency Prevention Juvenile Justice Fact Sheet, March 2011, ojp.gov/ncjrs/virtual-library/abstracts/highlights-pathways-desistance-longitudinal-study-serious (accessed Nov. 4, 2021). The “age-crime curve,” wherein 40 to 60 percent of youth stop offending by early adulthood, is universal in Western populations. Natl. Inst. of Justice, *From Juvenile Delinquency to Young Adult Offending*, March 2014, nij.ojp.gov/topics/articles/juvenile-delinquency-young-adult-offending (accessed Nov. 4, 2021).³ It is only “the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible.” *Montgomery*, 577 U.S. at 208, 136 S.Ct. 718, 193 L.Ed. 2d 599. A life sentence, even with the possibility of parole, is one of the harshest punishments the adult criminal justice system can impose. Accordingly, imposing such a penalty on a 17-year-old child necessarily requires judicial consideration of youth and its attendant characteristics to comport with the Supreme Court’s and this Court’s recognition that “children are constitutionally different from adults for purposes of sentencing.” *Miller*, 567 U.S. at 471, 480, 132 S.Ct. 2455, 183 L.Ed.2d. 407; *Long*,

³ Adolescent offending tends to increase from late childhood, peaks in teenage years of 15-19, and declines in early 20’s. Studies agree that justice system processing may increase recidivism that would otherwise naturally desist in early adulthood.

138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, at ¶ 11; *Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952, at ¶ 36-37.

The mandatory 15-years-to-life sentence required under R.C. 2929.02(B) categorically prohibits the consideration of youth and its attendant circumstances as discussed above, thus, it directly contravenes *Patrick*. Declaring R.C. 2929.02(B) unconstitutional as applied to juveniles will safeguard Eighth Amendment guarantees to juveniles sentenced as adults, particularly considering youth of color are vastly overrepresented within that population.

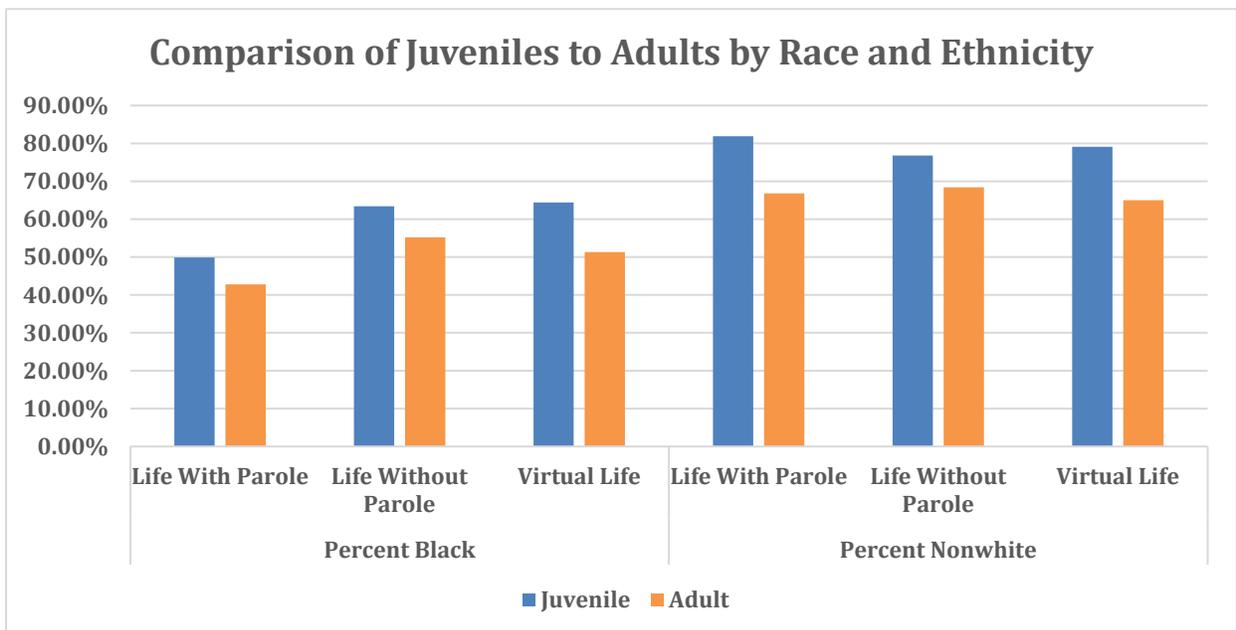
C. Life Sentences Are Imposed Disproportionately On Youth Of Color And Must Therefore Be Subject To Additional Safeguards

Compounding the racial disparities discussed in Section I(C) regarding the disproportionate number of Black youth transferred to the adult justice system, there are also significant disparities in the sentencing of Black youth, especially those receiving life sentences. Nationally, Black offenders are incarcerated at rates five times that of white offenders. Ashley Nellis, The Sentencing Project, *Still Life: America's Increasing Use of Life and Long-Term Sentences*, 14 (2017) [sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/](https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/) (accessed Nov. 4, 2021). In 2016, data revealed that people of color comprise 67.5 percent of those serving life sentences nationally and almost half (48.3 percent) are Black. *Id.* Ohio reported 6,685 people serving a life sentence,⁴ of which 51.7 percent are Black. *Id.* at 15. Race is also a prominent factor in who receives a death penalty sentence. Studies show that when the victim was white, as compared to a person of color, defendants were more likely to receive a death sentence and, in particular, Black offenders had the greatest likelihood of receiving a death sentence. Ashley Nellis, The Sentencing Project, *The Lives of Juvenile Lifers: Findings from a*

⁴ A life sentence includes those serving life-with-parole, life-without-parole, and virtual life (sentences of 50 or more years).

National Survey, 14 (March 2012) sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf (accessed Nov. 4, 2021).

These sentencing disparities are exacerbated for youth in the adult criminal justice system. One out of every 17 persons sentenced to life were juveniles at the time of their offense—nationally, juveniles comprise 5.7 percent of those serving life sentences. The Sentencing Project, *Still Life* at 16. Further, youth of color receive life sentences at much greater rates than adults of color as illustrated by the chart below.



Id. at 17. According to national data released in 2017, there are 7,346 juveniles serving life-with-parole eligibility sentences and an additional 2,089 juveniles serving virtual life sentences (a term of 50 or more years). *Id.* These sentences are overwhelmingly imposed on youth of color (80.4 percent) with the majority of such sentences being imposed on Black youth (55.1 percent). *Id.*

The above data further emphasizes the need for individualized determinations in sentencing that consider youth, and all its attendant characteristics, as mitigating. *Miller* and *Montgomery* made clear that the harshest punishments for youth should be reserved for the “rare,” “uncommon,”

and irreparably corrupt child. Yet, the harshest punishments—mandatory life tail sentences in adult prison under R.C. 2929.02(B)—are levied disproportionately against youth of color. Such pervasive disparities create constitutional infirmities. The extensive overrepresentation of Ohio’s Black youth in adult court and receiving life sentences without individualized consideration—as to their youthfulness *and* the role racial bias may have played in the youths’ case—violates the Eighth Amendment. Indeed, safeguards at sentencing are vital to combat the bias and other systemic deficiencies that lead to Black youth facing an increased risk of erroneous deprivation of liberty based on their race. Accordingly, it is constitutionally imperative to consider youth as mitigating at sentencing.

Pervasive racial disparities erode our justice system’s commitment to equal justice. The United States Supreme Court has noted the “imperative to purge racial prejudice from the administration of justice.” *See, e.g., Peña-Rodriguez v. Colorado*, 580 U.S. ___, 137 S. Ct. 855, 867, 197 L.Ed.2d 107 (2017) (“It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons.”); *Buck v. Davis*, 580 U.S. ___, 137 S. Ct. 759, 778, 197 L.Ed.2d 1 (2017), quoting *Rose v. Mitchell*, 443 U.S. 545, 555, 9 S.Ct. 2993, 61 L.Ed.2d 739 (1979) (“Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.”). We cannot ignore that the impetus for expanding transfer and subjecting children to extreme adult prison sentences was racially motivated. The media’s characterization of violent youth as “Super Predators” in the 1990’s was replete with racist undertones that “reinforce[] racial biases prevalent in criminal stereotypes, particularly the popular perception that young Black (and Latino) males constitute a dangerous class.” Lori Dorfman, Vincent Schiraldi, Berkeley Media Stud. Grp, *Off Balance: Youth Race & Crime In The News*, 7 (2001),

bmsg.org/sites/default/files/bmsg_other_publication_off_balance.pdf (accessed Nov. 4, 2021); Southerland, *Youth Matters*, 27 J. Civ. Rts. & Econ. Dev. at 771 (describing youth who engaged in criminal conduct as “violent, morally deficient, and of color.”). Juveniles, “in particular youth of color, were thought to pose a higher threat of violent criminal activity because of deficient personal traits.... The proposed remedy, therefore, was to control and incapacitate young offenders through harsh punishments. Subjecting such youth to adult treatment and exposing them to serious penalties—like life without parole—was the manifestation of those remedial efforts.” *Id.* at 770.

This Court articulated the unique role of the judiciary in combating racial inequities:

We can recognize the inequalities and we can eliminate them when we come together to do the right thing. This is especially true with the justice system. The same courts that upheld discriminatory laws and policies have, on many occasions, also declared discriminatory practices by all branches of government to be contrary to law and unconstitutional.

Chief Justice Maureen O’Connor, Independence Day Statement on Criminal Justice Reform (July 4, 2020), supremecourt.ohio.gov/PIO/Speeches/2020/CJReform.asp (accessed Nov. 4, 2021). We have a duty to ensure safeguards at sentencing if our judicial system is to fulfil the constitutional guarantees of the Eighth Amendment for all youth, including youth of color.

CONCLUSION

For the foregoing reasons *Amici* respectfully request that this Court adopt Appellant’s Propositions of Law and reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2021, I caused copies of the foregoing Brief of *Amici Curiae* Juvenile Law Center and Children's Law Center, Inc., et al., in Support of Appellant Austin M. Fuell to be served via electronic mail on:

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