IN THE SUPREME COURT OF OHIO

In the Matter of D.S.,	:	CASE NO. 2016-0907
Appellant.	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District.
	:	C.A. Case No. 15AP-487

BRIEF OF AMICUS CURIAE JUVENILE LAW CENTER IN SUPPORT OF APPELLANT D.S.

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STATEMENT OF INTEREST

Juvenile Law Center, founded in 1975, is the oldest 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 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. Juvenile Law Center works to align juvenile justice policy and practice, ensuring that definitions of juvenile delinquency reflect modern understandings of adolescent development and time-honored constitutional principles of fundamental fairness. 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 has participated on multiple occasions in appeals to this Court addressing the protections that must be afforded to youth in the juvenile justice system, including as *amicus curiae* in *In re M.W.*, 133 Ohio St.3d 309, 2012-Ohio-4538, 978 N.E.2d 164; *In re D.B.*, 129 Ohio St.3d 104, 2011-Ohio-2671, 950 N.E.2d 528; and *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177.

STATEMENT OF FACTS

Amicus adopt the Statement of Facts in the brief of Appellant.

ARGUMENT

I. First Proposition of Law of Amicus Curiae

A JUVENILE COURT'S DECISION TO UTILIZE NON-JUDICIAL COMMUNITY RESOURCES IN LIEU OF CRIMINAL PROSECUTION IS A MATTER JUV.R. 9(A) ENTRUSTS TO THE DISCRETION OF THE JUVENILE COURT; THAT DECISION MAY NOT BE OVERTURNED ON APPEAL IN THE ABSENCE OF AN ABUSE OF DISCRETION

The Rules of Juvenile Court Procedure reserve great discretion for a juvenile court to dismiss a delinquency petition before formal adjudication in order to serve the youth's and community's best interests. *In re Smith*, 80 Ohio App.3d 502, 503, 609 N.E.2d 1281 (1st Dist. 1992). This rule not only supports the underlying goals of the Juvenile Code by keeping youth in the community and avoiding formal juvenile justice involvement that can be detrimental to a youth's well-being, it also strikes the balance between formal procedure and flexibility inherent to the juvenile justice system.

The juvenile court exercised its discretion here by dismissing a complaint alleging that 12-year-old D.S. was guilty of gross sexual imposition—an offense defined in part to protect children who, like D.S., are under age 13 from "vicious behavior" of adult perpetrators. R.C. 2907.05(A)(4); Committee Comment to Am.Sub.H.B. No. 511, 134 Ohio Laws, Part II, 1866. In reaching its decision, the juvenile court recognized that D.S. was himself just 12 years old, and only 2 ½ years older than the other child involved. *In re D.S.*, 10th Dist. Franklin No. 15AP-487, 2016-Ohio-2810, ¶ 2, fn.1. Moreover, the complaint did not allege that D.S. threatened, coerced, or forced the other child. *In re D.S.*, 2016-Ohio-2810, ¶ 30 (Klatt, J., dissenting). Relying on these facts, the juvenile court found that "alternative methods [were] available to provide for the treatment needs of both children and to protect the community as a whole without the use of formal Court action," and that it was not "in the best interest of either child, given the facts of this case, to continue with the prosecution of this matter." *In re D.S.*, 2016-Ohio-2810, ¶ 6.

The juvenile court's findings and subsequent decision to avoid further penetration into the juvenile justice system are consistent with the Juvenile Code's primary goals of serving the best interests of the child, protecting the community, and avoiding the stigmatization and other consequences of a formal delinquency adjudication. The United States Supreme Court and the State of Ohio recognize that the flexibility to divert youth from the formal juvenile justice system, exercised by the juvenile court here, is a critical component of ensuring that juvenile justice is fundamentally fair to the youth it serves.

A. Ohio Law Favors Diverting Youth from Formal Adjudication

"The best interests of the child and the welfare and protection of the community are paramount considerations in every juvenile proceeding in this state." *In re M.D.*, 38 Ohio St.3d 149, 153, 527 N.E.2d 286 (1988). Juvenile courts thus "eschew[] traditional, objective criminal standards and retributive notions of justice" in favor of a civil system that rests on rehabilitation. *State v. Hand*, 2016-Ohio-5504, ¶ 14 (quoting *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 66). "Punishment is not the goal of the juvenile system, except as necessary to direct the child toward the goal of rehabilitation." *In re Caldwell*, 76 Ohio St.3d 156, 157, 666 N.E.2d 1367 (1996). Consistent with the non-punitive interests served by Ohio's juvenile justice system, Ohio courts shall interpret juvenile rules "to provide for the care, protection, and mental and physical development of children" and to "protect the public interest in removing the consequences of criminal behavior and the taint of criminality from children committing delinquent acts and to substitute therefor a program of supervision, care, and rehabilitation." *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶¶ 63, 77 (quotation omitted).

These goals are "most effectively met at the initial intake of the juvenile by the juvenile court," *In re M.D.*, 38 Ohio St.3d at 153, 527 N.E.2d 286; in other words, by diverting youth from formal adjudication. Therefore, "[t]he overriding rule upon intake of a child is that formal court

action should be a *last resort* to resolving juvenile problems." (Emphasis added.) *Id.*at 153; *see also In re Smith*, 80 Ohio App.3d at 505, 609 N.E.2d 1281 (affirming dismissal under Rule 9). Rule 9(A) of the Rules of Juvenile Court Procedure codifies this principle, providing that:

> **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.

Juv.R. 9(A).[1]

Nothing in the language of Rule 9 purports to limit the juvenile court's discretion to dismiss a delinquency petition in any case it deems appropriate. *See id.* In *M.D.*, this Court applied Rule 9 to vacate M.D.'s delinquency adjudication arising out of her alleged complicity to rape. *In re M.D.*, 38 Ohio St.3d at 150-51, 527 N.E.2d 286. The petition alleged that M.D. caused a five-year-old to rape another five-year-old. *Id.* at 150 of the syllabus. This Court held that preadjudicatory dismissal was appropriate, because there was no rape in which M.D. was complicit—a 5-year-old could not commit rape. *Id.* at 152. Among other reasons, the Court "seriously doubt[ed]" that a child so young had the physiological or emotional capacity to engage in the proscribed sexual conduct. *Id.* However, assuming that the conduct involved *did* meet the statutory definition or rape, the Court held that prosecuting M.D. violated the underlying public policy of the Juvenile Code and the Rules of Juvenile Procedure. *Id.* at 152-53. Nothing in the record supported that filing the complaint served the "best interest of the child and the public." *Id.* at 153-54. The conduct involved reflected "childhood curiosity and exploration" rather than "sexual assault or complicity thereto."

[1] Ohio is not alone in reserving delinquency adjudications for only those youth who are in need of its services. Pennsylvania's Juvenile Act, for example, requires a delinquency determination to rest on findings that (1) the youth committed a delinquent act; *and* (2) the youth requires treatment, supervision, or rehabilitation. 42 Pa.Cons.Stat.Ann. 6302. "A determination that a child has committed a delinquent act does not, on its own, warrant an adjudication of delinquency." *Commonwealth v. M.W.*, 614 Pa. 633, 39 A.3d 958, 966 (2012); *see also* N.Y.Fam.Ct. Act 311.1(3)(j) (requiring delinquency petition to include a statement that the youth "requires supervision, treatment or confinement").

Id. at 151. Further, formal processing would not provide for the "care, protection, and mental and physical development of children." *Id.* at 154. M.D.'s profile was not consistent with that of other sex offenders, and continued system involvement would continue to saddle her with the "'taint of criminality' . . . for a felony sex offense under circumstances where 'sex' played but a minute role." *Id.*

While the *M.D.* Court ultimately found the case was inappropriately filed because no crime occurred, this Court has never *limited* judicial discretion under Rule 9. *See M.D.*, 38 Ohio St.3d at 154 ("The failure to dismiss resulted in a denial of M.D.'s constitutional rights to due process under the law.") Indeed, it recognized that children who act on ordinary sexual curiosity may not merit juvenile justice involvement, especially given the collateral consequences that system involvement carries. *Id.* Yet the Court of Appeals here reserved dismissal under Rule 9 for only instances when the trial court finds the youth did not commit a delinquent act. *In re D.S.*, 2016-Ohio-2810, ¶ 24. The appellate court reversed the express language of Rule 9(A) by construing it to allow dismissal of formal court action only upon a determination that the "case is 'inappropriate' to file in juvenile court." *Id.* But the express language of Rule 9(A) directs that formal court action should be avoided in *all* appropriate cases. Juv.R. 9(A). Cabining the trial court's authority, as the Court of Appeals did, not only contravenes the express language of Rule 9(A), but also fails to serve the important goals of diversion expressed in Rule 9 and of the juvenile justice system more broadly.

B. Diversion Plays a Critical Role in the Juvenile Justice System

Informal proceedings like the one defined in Rule 9 are the hallmark of juvenile courts, designed to foster the youth's trust and cooperation. ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 145 (1977). Eliminating such informal decision-making when it serves the youth's best interest would not only undermine the goals of Ohio's Juvenile Code, but

would require a corresponding increase in the process due to youth facing delinquency adjudications.

1. Employing Informal Procedures to Divert Youth from Formal Juvenile Justice Involvement Promotes the Goals of the Juvenile Justice System

Diversion is a critical component of serving both the youth's and the community's best interest. The collateral consequences of adjudicating a youth delinquent are harsh, both for the child and the public, despite that disposition is meant to serve the youth's best interest. *See generally* Riya Saha Shah & Jean Strout, Juvenile Law Ctr., FUTURE INTERRUPTED: THE COLLATERAL DAMAGE CAUSED BY PROLIFERATION OF JUVENILE RECORDS 9-11 (2016), available at http://jlc.org/sites/default/files/publication_pdfs/Future%20Interrupted%20-%20final%20for%20web.pdf (discussing the collateral consequences of juvenile adjudications). Processing youth through the juvenile justice system carries many potentially negative consequences, including in areas of housing, employment, immigration, and education. *Id.*; *see also* Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 96-100 (2012). For example, studies show that juvenile justice processing may change the way educational institutions treat youth, leading to immediate expulsion, higher dropout rates, and lower college attendance rates. Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1115 (2006); Akiva M. Lieberman et al., *Labeling Effects of First Juvenile Arrests: Secondary Deviance and Secondary Sanctioning*, 52 CRIMINOLOGY 345, 350 (2014). A juvenile delinquency adjudication also carries enhanced penalties for future offenses. *Id* at 351. And once adjudicated, "[t]he same actions that resulted in police turning a blind eye to misconduct may now result in an arrest." Anthony Petrosino et al., *Formal System Processing of Juveniles: Effects on Delinquency*, Crime Prevention Research Review No. 9, 6 (2013), available at https://ric-zai-inc.com/Publications/cops-p265-

pub.pdf (last visited Dec. 9, 2016). Furthermore, longitudinal studies show that youth processed through juvenile court are stigmatized by even the most minimal contact with the juvenile justice system. Tamar R. Birckhead, *Closing the Widening Net: The Rights of Juveniles at Intake*, 46 TEX. TECH L. REV. 157, 161 (2013).

These consequences are explained by "labeling theory," which rests on the premise that once a society labels a person as "deviant," that person begins to act as a "deviant" should act. Lieberman, 52 CRIMINOLOGY at 348; *see also* Sarah Stillman, *The List*, THE NEW YORKER, March 14, 2016, available at http://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes (last visited Dec. 19, 2016) ("'Your identity is you're a sex offender.'" (quoting individual undergoing sex offender treatment in the juvenile justice system for her behavior as a 10-year-old)).

Labeling also leads to societal presumptions that a youth is untrustworthy or possesses other negative character traits, merits punishment, or is likely to commit crimes in the future, Lieberman, 52 CRIMINOLOGY at 349; PRESTON ELROD & R. SCOTT RYDER, JUVENILE JUSTICE: A SOCIAL, HISTORICAL, AND LEGAL PERSPECTIVE 167 (4th ed. 2014)—presumptions that the United States Supreme Court has repeatedly held are inappropriate when applied to youth who commit delinquent acts, *see, e.g., Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) ("[J]uvenile offenders cannot with reliability be classified among the worst offenders." (quoting *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005))); *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455, 2465, 183 L.Ed.2d 407 (2012) ("[I]ncorrigibility is inconsistent with youth." (quotation omitted)); *Montgomery v. Louisiana*, ___ U.S. ___, 136 S.Ct. 718, 733-36, 193 L.Ed.2d 599 (2016) (holding that the "vast majority of juvenile offenders" can be successfully rehabilitated). The Court has lamented the effect of labeling in juvenile justice

cases: despite the system's long-standing purpose "to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past," adjudication nonetheless classifies youth as "delinquent"—a "term [that] has come to involve only slightly less stigma than the term 'criminal' applied to adults." *In re Gault*, 387 U.S. 1, 23-25, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Shielding youth from the negative effects of labeling is entirely consistent with the juvenile courts' primary goal of protecting children, *see Children's Home of Marion Cty. v. Fetter*, 90 Ohio St. 110, 127, 106 N.E. 761 (1914), reintegrating youth back into society, *State v. Hanning*, 89 Ohio St.3d 86, 88-89, 2000-Ohio-436, 728 N.E.2d 1059 (2000), and shielding them from the stigma of proceedings, *id.* at 89.

Labeling is not avoided by leniency at sentencing, but rather by routing youth away from formal court processing and adjudication at the outset. S'Lee Arthur Hinshaw II, *Juvenile Diversion: An Alternative to Juvenile Court*, 1993 J. DISP. RESOL. 305, 310-11 (1993). Diversion through Rule 9 avoids the potential effect of a formal delinquent label, which could adversely affect a youth's self-image, disrupt a youth's ties with his family and community, and contribute to subsequent delinquent behavior.

Avoiding formal court processing is also associated with reduced recidivism. A meta-analysis of 29 randomized controlled trials found that formally processing youth in the juvenile justice system *increased* future delinquency, when compared to youth who were diverted from the system, regardless of whether those youth received services. Anthony Petrosino, *supra*, at 18. These results hold true even for youth who admit to having committed serious offenses. Randall G. Shelden, *Diversion Programs: an Overview* in DETENTION DIVERSION ADVOCACY: AN EVALUATION (1999), https://www.ncjrs.gov/html/ojjdp/9909-3/div.html (last visited Dec. 14, 2016). While the effects of labeling explain this difference in part, shortcomings of the juvenile

justice system itself are also responsible. Formal court processing, and subsequent disposition, disrupts education, family cohesion, and service provision. Barry Holman & Jason Ziedenberg, Justice Policy Institute, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 2-3, available at http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf (last visited Dec. 10, 2016). Grouping children with other delinquent youth for treatment results in poorer outcomes, as youth may adopt their peers' antisocial behaviors and attitudes and affiliate with deviant peers. *Id.* at 5. More fundamentally, juvenile justice facilities are ill-prepared to provide the mental health treatment, substance abuse treatment, transition support services, and treatment environment that addresses the root of much delinquent behavior. Richard A. Mendel, The Annie E. Casey Foundation, NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 24-25 (2011), available at http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf (last visited Dec. 10, 2016).

By contrast, several studies have indicated that treating youth in the community using non-justice personnel can reduce further involvement with the juvenile justice system and have positive results for the youth. Steven Patrick & Robert Marsh, *Juvenile Diversion: Results of a Three Year Experimental Study*, 16 CRIM. J. POLICY REV. 59 (2005); Steven Patrick et al., *Control Group Study of Juvenile Diversion Programs: An Experiment in Juvenile Diversion*, 41 THE SOCIAL SCI. J. 129 (2004); Lawrence J. Severy & Michael J. Whitaker, *Juvenile Diversion: An Experimental Analysis of Effectiveness*, 6 Eval. Rev. 753 (1982). Simply filing a petition and doing nothing else may also better deter future delinquent and criminal conduct than formal adjudication. Petrosino, *supra*, at 16. "The personality traits of juveniles are more transitory, less fixed" than those of adults. *Roper v. Simmons*, 543 U.S. 551, 570, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Courts can and should

expect that the "parts of the brain involved in behavior control [will] continue to mature through late adolescence," and that youth will desist from delinquent behavior as they age. *Graham*, 560 U.S. at 68, 130 S.Ct. 2011, 176 L.Ed.2d 825. Considering these mitigating factors of youth when evaluating the need for continued court intervention does not require extensive findings of fact or a formal hearing: courts must conclude that youth are possessed of these traits. *See Miller*, 132 S.Ct. at 2464, 183 L.Ed.2d 407; *Graham*, 560 U.S. at 68-69; *Roper v. Simmons*, 543 U.S. at 569.

2. Due Process Requires Informal Procedures that Divert Youth from Formal Juvenile Justice Involvement

The United States Supreme Court has long recognized the trade-offs inherent to a juvenile justice system that sometimes dispenses with procedure in order to serve a youth's best interest. *See, e.g., In re Gault*, 387 U.S. at, 22-27, 87 S.Ct. 1428, 18 L.Ed.2d 527. *Gault* acknowledged that, nearly 40 years ago, juveniles were being summarily adjudicated delinquent and sentenced to long terms of incarceration without the benefit of either due process protections on the front-end or effective rehabilitative services on the back-end. *Id.* at 18-19. The result was a forum in which youth were subject to "the worst of both worlds." *Id.* at 18, fn. 23 (quoting *Kent v. United States*, 383 U.S. 541, 556, 86 S.Ct. 1045 (1966)).

While *Gault* held that youth's rights to due process require more than a juvenile version of a "kangaroo court," *id.* at 28, youth are still not entitled to the full range of constitutional protections afforded to adults facing criminal convictions, *see, e.g., McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) (holding that the Constitution does not require a jury in the adjudicative stage of state juvenile court delinquency proceedings); *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984) (holding that pre-adjudicatory detention of accused youth without opportunity for release does not violate due process). These procedural protections are sacrificed in the name of maintaining "informality" and "flexibility" and meeting

states' "*parens patriae* interest in preserving and promoting the welfare of the child." *Id.* at 263 (quoting *Santosky v. Kramer*, 455 U.S. 745, 766, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). A juvenile court's discretion at intake, for example, is a critical reason that a jury is not constitutionally mandated in delinquency proceedings. *McKeiver*, 403 U.S. at 552 (White, J., concurring) ("To the extent that the jury is a buffer to the corrupt or overzealous prosecutor in the criminal law system, the distinctive intake policies and procedures of the juvenile court system to a great extent obviate this important function of the jury."); *accord State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 59 ("The judge . . . must assess the strengths and weaknesses of the juvenile system vis-à-vis a particular child to determine how this particular juvenile fits within the system and whether the system is equipped to deal with the child successfully.")

In a system that compromises due process in the interest of serving youth, flexibility in pretrial stages remains a critical component of ensuring that juvenile proceedings are fundamentally fair *to the child*. Hinshaw, 1993 J. DISP. RESOL. at 309; *see also In re Gault*, 387 U.S. at 24-28 (recognizing that procedural safeguards are intended to protect the accused; finding that lack of notice does not protect the accused youth); *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979). ("[T]he State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'" (quoting *McKeiver*, 403 U.S. at 550)). The Supreme Court has directed that this flexibility must, then, include judicial attention to more than just the commission of a delinquent act: juvenile courts should make "careful inquiry" into the "possibility that [a youth] could be disciplined and dealt with at home, despite his previous transgressions." *In re Gault*, 387 U.S. at 28; *see also* ABA Criminal Justice Section Standards: Discretion in the Charging Decision Standard 3-3.9 (stating

that good cause and public interest are appropriate considerations for declining to prosecute, even when evidence exists to support conviction).

Under this lens, Rule 9 serves the constitutionally-significant purpose of preserving "informal[ity] enough to permit the benefits of the juvenile system to operate." *McKeiver*, 403 U.S. at 539 (quotation omitted). Reversing the trial court's discretionary decision to avoid the harsh consequences of additional juvenile justice contact turns due process on its head by subjecting youth to a system in which neither procedural protections nor the absence of procedure "protect[s] the (juvenile) from oppression by the Government." *McKeiver*, 403 U.S. at 554 (Brennan, J., concurring) (quoting *Singer v. United States*, 380 U.S. 24, 31, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965)).

In addition to serving an important balance between due process and flexibility, pre-adjudicatory dismissal like that authorized in Rule 9 also avoids procedural shortcomings inherent to the juvenile justice system. Although youth are entitled to a panoply of constitutional protections at adjudicatory hearings, children, especially those younger than 16, rarely invoke them. Hinshaw, 1993 J. DISP. RESOL. at 317. Youth, for example, are much more likely to talk to police without consulting counsel—a decision that may lead to uncounseled confessions and affect subsequent ability to plea bargain. *See* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 AM. REV. CLIN. PSYCHOL. 47, 64 (2009) ("Significant age differences were found in responses to police interrogation . . . [Y]ouths . . . were much more likely to recommend waiving constitutional rights during an interrogation than were adults, with 55% of 11- to 13-year-olds, 40% of 14- to 15-year-olds, and 30% of 16- to 17-year-olds choosing to 'talk and admit' involvement in an alleged offense (rather than 'remaining silent'), but only 15% of the young adults making this choice.") And even when youth receive the full range of constitutional benefits to which they are entitled,

they are still at a "significant disadvantage in criminal proceedings." *Graham*, 560 U.S. at 78, 130 S.Ct. 2011, 176 L.Ed.2d 825. Youth are less able to give meaningful assistance to counsel, impairing the quality of representation, *id.*; risk being charged and convicted of greater offenses, due to the "incompetencies associated with youth," *Miller*, 132 S.Ct. at 2468, 183 L.Ed.2d 407; and are ill-equipped to deal with interrogation and self-advocacy, *J.D.B. v. North Carolina*, 564 U.S. 261, 267-69, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011) (discussing children's responses to interrogation).

In a system where procedural due process *cannot* adequately protect against disproportionality harsh treatment, Rule 9 serves the important role of preserving judicial discretion at a stage when procedural shortcomings have not yet irreversibly influenced the outcome of juvenile justice proceedings.

II. Second Proposition of Law of Amicus Curiae

R.C. 2907.05(A)(4) IS UNCONSTITUTIONAL AS APPLIED TO A CHILD UNDER THE AGE OF 13 WHO ALLEGEDLY ENGAGED IN SEXUAL CONTACT WITH ANOTHER CHILD UNDER 13

Holding D.S. liable under a statutory rape[2] statute like Section 2907.05(A)(4) of the Ohio Revenue Code violates his right to fundamental fairness under the Due Process Clause of the Fourteenth Amendment. Statutory rape statues eliminate the traditional requirement of *mens rea*, both to better protect children, and because the age difference between an adult perpetrator and a juvenile victim necessarily takes the place of the traditional requirement of coercion, force, threat, or diminished capacity to consent.

[2] Statutory rape can refer to any sexual activity between an adult or older adolescent and a minor under the age of consent. Charles A. Phipps, *Misdirected Reform: On Regulating Consensual Sexual Activity Between Teenagers*, 12 Cornell J.L. & Pub. Pol'y 373, 433 (2003).

These rationales do not apply when the alleged perpetrator is a child. While under the due process clause we may presume that an adult actor understands and assumes risk when engaging in certain activities, Ohio simply cannot ascribe that capacity to a 12-year-old. Indeed, the very notion about children's capacities that underpins 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. Yet Ohio law fails to distinguish youth who engage in sexual contact with their peers from adults who engage in sexual contact with young victims. This shortcoming in Section 2907.05 subjects the very youth whom the law aims to protect to harsh collateral consequences.

A. Criminal Prosecution of a 12-Year-Old Under Section 2907.05 Violates Fundamental Fairness

1. Section 2907.05(A)(4) Labels as Perpetrators the Same Class of Youth It Was Designed to Protect

Section 2907.05(A)(4) prohibits "sexual contact"—defined as "touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person," R.C. 2907.01(B)—with another, when the other person "is less than thirteen years of age, whether or not the offender knows the age of that person." R.C. 2907.05(A)(4). A person who violates this section is guilty of gross sexual imposition, a felony in the third degree. R.C. 2907.05(C)(2).

Section 2907.05 identifies children under age 13 as a special class of victims vulnerable to gross sexual imposition and imposes liability on any individual who engages in sexual contact with a member of the class. R.C. 2907.05(A)(4). However, the statute does not bar labeling these same youth as perpetrators. In other words, Section 2907.05(A)(4) both removes a youth's ability to consent to sexual contact and simultaneously criminalizes the same youth's engagement in sexual contact with a similarly-aged child.

The requirement that contact be "for the purpose of sexually arousing or gratifying either person," does not provide guidance for distinguishing between perpetrators and victims. *See* R.C. 2907.01(B) (defining "sexual contact"). First, as applied to so-called perpetrators under age 13, the statute ignores that such youth cannot consent to conduct that serves a sexual purpose. *See In re D.B.*, 129 Ohio St.3d 104, 2011-Ohio-2671, 950 N.E.2d 528, ¶ 27 ("[C]hildren under the age of 13 are legally incapable of consenting to sexual conduct.").

Second, assuming that youth can legally act with this intent, the statute neither dissuades prosecution nor offers guidance on whom to prosecute when all involved parties share the same intent. Unlike other conduct amounting to gross sexual imposition, the conduct proscribed by Section 2907.05(A)(4) does not require force, compulsion, threat, deception, or knowledge that the victim's capacity to consent is impaired. *See* R.C. 2907.05(A)(1), (2), (3), (5). Even if coercive elements were present, prosecutors and courts would still be unable to distinguish between victim and perpetrator, because force and coercion are not elements of the offense described in Section 2907.05(A)(4). *See generally, In re D.B.* at ¶¶ 25, 28 ("[R]ape by force . . . is incompatible with the counts alleging a violation of statutory rape because anyone who engages in sexual conduct with a minor under the age of 13 commits statutory rape regardless of whether force was used.").

Third, and most critically, it is not an individual's intent to give or receive sexual gratification that validates statutory rape laws like Section 2907.05(A)(4). Rather, it is the inherently coercive nature of sexual contact between a youth and an older individual, substituting for a separate finding of threat, force, or diminished capacity to consent, that justifies criminalizing sexual contact with children under age 13. As this Court recognized:

> When an adult engages in sexual conduct with a child under the age of 13, it is clear which party is the offender and which is the victim. But when two children under the age of 13 engage in sexual conduct

> with each other, each child is both an offender and a victim, and the distinction between those two terms breaks down.

In re D.B. at ¶ 24; *compare* R. C. 2907.05(A)(4) *with* 2907.05(A)(1).

It is this constitutionally-significant distinction between youth and adults, not found on the face of the statute, that required dismissal of the delinquency petition against D.S.

2. Twelve-Year-Olds Cannot be Held to the Same Standard of Culpability as Adults

It is well established that children are inherently less culpable than adults for the same conduct. *Miller*, 132 S.Ct. at 2464, 183 L.Ed.2d 407. Their "lack of maturity and . . . underdeveloped sense of responsibility" may lead to impulsive behavior that is less blameworthy than conduct attributed to an adult. *Roper*, 543 U.S. at 569, 125 S.Ct. 1183, 161 L.Ed.2d 1. Youth are also "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 settings that lead to criminal conduct. *Id*. These characteristics, common among all youth, diminish the gravity of a juvenile's offense. Youth are, therefore, less deserving of punishment. *Id*. Additionally, childhood conduct is "less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Graham*, 560 U.S. at 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (quoting *Roper*, 543 U.S. at 570).

The mitigating circumstances of youth take on an even more significant role in the context of punishing sexual conduct. The immature thought processes of children and young adolescents, combined with their emerging sexual curiosity, can lead youth 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 are important tasks 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. Jennifer Woolard, *Adolescent Development, in Toward Developmentally Appropriate Practice: A Juvenile Court Training Curriculum* 13, 15 (2009). 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 youth face "conflicting and contradictory expectations in American society concerning sexuality." Floyd 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). 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.S. 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 statute cannot claim the disabling impairments of immaturity that D.S. can, yet 12-year-old D.S. has been prosecuted and classified as a sex offender—in the same manner as an adult would be—for engaging in sexual contact with another child close in age.

The Ohio Legislature recognizes in a parallel statute that an adult is blameworthy for engaging in sexual behavior with a minor because adults can distinguish when a person's age makes him or her an inappropriate sexual partner. The legislature's commentary on Section 2907.02, which defines rape, states that the offense includes "sexual conduct with a pre-puberty victim, regardless of whether force or drugs are used, and regardless of whether the offender has actual knowledge of the victim's age. The rationale for this is that the physical immaturity of a pre-puberty victim is not easily mistaken, and 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. This rationale applies equally to Section 2907.05, which defines gross sexual imposition in terms parallel to those used in the rape statute. The legislature itself invites this comparison, commenting that Section 2907.05 "defines an offense analogous to rape, though less serious. Its elements are identical to those of rape, except that the type of sexual activity involved is sexual contact, rather than sexual conduct." Committee Comment to Am.Sub.H.B. No. 511, 134 Ohio Laws, Part II, 1866.[3]

But assuming "vicious behavior" when a child engages in the same conduct as an adult is patently inappropriate. *In re C.P.*, 131 Ohio St.3d 513 at ¶ 39, 967 N.E.2d 729 ("A juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as

[3] In defining other sex offenses, Ohio law recognizes 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. For example, under Section 2907.04, if a twenty-five-year-old person engaged in consensual sex with a thirteen-year-old, that person could be convicted of a third degree felony. R.C. 2907.04(3). If an eighteen-year-old had consensual sex with fifteen-year-old, the eighteen-year-old could be convicted of a first degree misdemeanor. R.C. 2907.04(2). Additionally, the Committee Comment states that "[w]hen both partners are juveniles, there is no offense under the section, although the actors would be liable to being adjudged unruly children in a juvenile proceeding." Committee Comment to Am.Sub.H.B. No. 511, 134 Ohio Laws, Part II, 1866. Therefore, if a seventeen-year-old and a thirteen-year-old engaged in consensual sex, neither could be guilty of unlawful sexual conduct with a minor.

that of an adult.'" (quoting *Graham*, 560 U.S. at 68, 130 S.Ct. 2011, 176 L.Ed.2d 825)). When a youth engages in sexual contact with a peer, his conduct is more likely explained by immaturity, impulsivity, or sexual curiosity, than a criminal, predatory intent. Michael F. Caldwell, *What We Do Not Know About Juvenile Sexual Re-Offense Risk*, 7 CHILD MALTREATMENT 291 (2002); Judith Becker & Scotia Hicks, *Juvenile Sexual Offenders: Characteristics, Interventions, & Policy Issue*s, 989 ANN. NY ACAD. SCI. 397, 399-400, 406 (2003); Michael F. Caldwell, *Sexual Offense Adjudication and Sexual Recidivism among Juvenile Offenders*, 19 SEXUAL ABUSE 107, 112 (2007); Margaret A. Alexander, *Sexual Offender Treatment Efficacy Revisited*, 11 SEXUAL ABUSE 101 (1999); *see also In re J.B.*, 630 Pa. 408, 107 A.3d 1, 17 (2014). Given what we know about a 12-year-old's cognitive abilities and sexual development, it violates fundamental fairness to presume D.S.'s behavior is indicative of the same level of viciousness as an adult's.

3. A Delinquency Adjudication under Section 2907.05(A)(4) Carries Harsh Collateral Consequences

Violation of Section 2907.05(A)(4) 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 protect children under age 13 from victimization by sexual predators, applying this same statute to D.S., a child under 13 who engaged in sexual contact with another child under 13, imposes direct and collateral consequences on D.S. that are highly disproportionate to his actions. Given the reduced culpability of youthful offenders, prosecuting them under Section 2907.05(A)(4) needlessly pushes them further into the juvenile justice system, exposing them to lifelong stigma, the possibility of onerous registration requirements, and the danger of further corruption through formal involvement with the juvenile justice system.

a. Youth Adjudicated Delinquent for Sex Offenses Face Lasting Stigma that Interferes with Development and Positive Self Identity

Subjecting youth unnecessarily to any juvenile justice involvement can be counterproductive to rehabilitation and deterrence, because labeling youth as deviants can alter their self-image as well as societal views of their personal traits. *See, supra*, § I.B.1 The labels youth endure when they are adjudicated delinquent for a sex offense are among the most heinous and despised in contemporary society. *Neal v. Shimoda*, 131 F.3d 818, 829, fn. 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.'"); *accord Meza v. Livingston*, 607 F.3d 392, 402 (5th Cir.2010); *Vega v. Lantz*, 596 F.3d 77, 81-82 (2nd Cir.2010); *Chambers v. Colorado Dep't of Corrections*, 205 F.3d 1237, 1240 (10th Cir.2000); *Kirby v. Siegelman*, 195 F.3d 1285, 1292 (11th Cir.1999). 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) [hereinafter Becker, *What We Know*]; 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 of the

Task Force on Children with Sexual Behavior Problems, 1, 24 (2006), http://www.atsa.com/pdfs/Report-TFCSBP.pdf.

Subjecting D.S. and other youth like him to delinquency adjudications renders labeling inevitable. 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, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. 65 (2007) [hereinafter HRW, NO EASY ANSWERS]; *see supra* § I.B.1 (discussing the effects of labeling). Unfortunately, the very programs that courts use to rehabilitate juveniles who commit sexual offenses 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). *See generally* Stillman, *supra* ("'Your identity [when receiving sex offender treatment in the juvenile justice system] is you're a sex offender.'"). 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 293, 307 (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. HRW, NO EASY ANSWERS, *supra*, at 9. 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." *Id.*

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 perpetrators of sexual offenses "has the potential to . . . isolate them further from peers, adults, and potential sources of social and psychological support." Becker, *What We Know*, *supra*, at 317. In addition, children adjudicated for sex offenses are often unable to develop and maintain friendships, are kicked out of extracurricular activities, or are physically threatened by classmates after their peers learn of their record. *See* Jones, *supra*, at 3; Stillman, *supra* (reporting the stories of individuals labeled sex offenders as a result of childhood sexual conduct); Human Rights Watch, RAISED ON THE REGISTRY 50-58 (2013) (same) [hereinafter HRW, RAISED ON THE REGISTRY]. In short, "the stigma of the label of sex offender attaches at the start of his adult life and cannot be shaken." *In re C.P.*, 131 Ohio St.3d 513, 525, 967 N.E.2d 729.

b. Youth Under Age 13 Who Violate Section 2907.05(A)(4) May Be Required to Register as Sex Offenders in Other States

This Court recognizes the punitive nature of sex offender registration statutes, observing that lengthy and onerous registration requirements imposed automatically based on the category of offense extend beyond mere "inconvenience" into a statutory scheme designed to punish. *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, ¶¶ 10-16. While Ohio law does not require that D.S. register as a sex offender because of his youth, not all states agree that youthful offenders should be exempt from registration. United States Dep't of Justice, *Prosecution, Transfer, and Registration of Serious Juvenile Sex Offenders*, SMART SUMMARY 14 (2015). Eighteen states require juveniles who commit sexual offenses before age 14 to be placed on public sex offender registries.[4] The threat of registration could impede children like D.S. from pursuing

[4] Ala.Code 15-20A-3; Cal.Penal Code 290.45a; Colo.Rev.Stat.Ann 16-22-112; Del.Code Ann., Title 11, 4121; 730 Ill.Comp.Stat. 150/9; Iowa Code Ann. 692A.121; Kan.Stat.Ann. 22-4909;

educational or employment opportunities out of state, or could prevent their families from making similar decisions. *See* HRW, RAISED ON THE REGISTRY, *supra*, at 69-75.

If D.S. does move out of state, he could face complicated and burdensome registration requirements. 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.[5] 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* HRW, NO EASY ANSWERS, *supra*, at 51. Many states also place specific restrictions

Mass.Gen.Laws Ann. Chapter 6, 178I; Mich.Comp.Laws Ann. 28.728; Mont.Code Ann. 46-23-508(1)(a); N.J.Stat.Ann. 2C:7-6, 2C:7-10; N.D.Cent.Code 12.1-32-15; Or.Rev.Stat.Ann. 163A.225; R.I.Gen.Laws 11-37.1-4; S.C.Code Ann. 23-3- 490; Tex.Code Crim.Proc.Ann. 62.005; Wash.Rev.Code 13.40.217; Wyo.Stat.Ann. 7-19-309.

[5] The Adam Walsh Act of 2006, 42 U.S.C. 16901 et seq., requires all states to maintain a public sex offender registry, 42 U.S.C. 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. 16916. Offenders must register where they live, where they work, and where they attend school. 42 U.S.C. 16913. 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. 16914. 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.

on the activities of registered sex offenders, limiting employment, housing, education, and even emergency shelter options.[6]

Application of registration and notification laws to children ignores the developmental differences between adult and juvenile offenders, overlooks youth's capacity for rehabilitation, and does little to address the multiple determinants of juvenile offending in a manner responsive to these youths' developmental needs. *See* Letourneau & Miner, *supra*, at 301; *see also In re C.P.*, 131 Ohio St.3d at 523-25, 967 N.E.2d 729 (discussing the punitive effect of registration laws as

[6] These restrictions include:

- Limitations on where sex offenders may live, *See* Garrine P. Laney, Cong. Research Serv., RL34353, *Residence Restrictions for Released Sex Offenders*, 3, 4, 18 tbl. 3 (2008);

- Bans on joining particular professions, including medicine, *Michigan House Legislation Targets Sex Offenders*, CONNECTMIDMICHIGAN, (July 2, 2010), available at http://www.connectmidmichigan.com/news/story.aspx?id=477886;

- Exclusion from community colleges, *Harbor Lake Michigan College Bans Convicted Sex Offenders* (Mar. 4, 2010), MLIVE, available at http://www.mlive.com/news/kalamazoo/index.ssf/2010/03/benton_harbor_lake_michigan_co.html;

- Preclusion from giving out candy 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/;

- Exclusion from hurricane shelters, even when other family members are refuged there, *see* Brian Skoloff, *Sex Offenders Segregated at Shelters*, FOX NEWS (July 14, 2006), available at http://www.foxnews.com/printer_friendly_wires/2006Jul14/0,4675,SexOffenderShelters,00.html; Shannon 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; *Florida Offers Prisons for Sex Offenders in Hurricanes*, USA TODAY (Aug. 7, 2005), *available at* http://www.usatoday.com/news/nation/2005-08-07-floridasexoffenders_x.htm; and

- Bans on all social media use, 730 Ill. Comp.Stat. 5/5-6-3.1(t).

applied to juveniles; holding automatic lifetime registration a cruel and unusual punishment in light of juveniles' diminished culpability and the nature of sexual delinquency). Instead, registration, notification, and residence restrictions may aggravate rather than mitigate risk of recidivism for younger offenders. *See* Elizabeth J. Letourneau, & Jill S. Levenson, *Preventing Sexual Abuse: Community Protection Policies and* Practice, in THE APSAC HANDBOOK ON CHILD MALTREATMENT: THIRD EDITION (John E.B. Meyers ed. 2011). 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* Stillman, *supra*; HRW, RAISED ON THE REGISTRY, *supra*, at 50-79; HRW, NO EASY ANSWERS, *supra*, at 76, 78-79; Lisa C. Trivits & N. Dickon Reppucci, *Application of Megan's Law to Juveniles*, 57 Am. Psychologist 690, 694 (2002).

c. Youth Under Age 13 Who Engage in Non-Forcible Sexual Contact with a Peer May Be Harmed by Treatment Options Available in the Juvenile Justice System

If D.S. is adjudicated delinquent, the treatment options available to him as a delinquent youth may not only be ineffective at reducing recidivism, but they may be harmful to D.S.'s well-being. "Specialized treatments for juveniles who have engaged in sexually aggressive behavior have been widely available since 1985." Elizabeth J. 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 studies raise concerns that current treatments are largely ineffective and counter-productive. *Id.* at 287 (citing Charles M. Borduin & Cindy M. Schaeffer, *Multisystemic Treatment of Juvenile Sexual Offenders: A Progress Report*, 13 J.PYSCHOL. & HUMAN SEXUALITY 25, 27 (2001); D. Richard Laws, *The*

Rise and Fall of Relapse Prevention, 38 AUSTRALIAN PSYCHOL. 22, 22-30 (2003)); *See also,* Chaffin & Bonner, *supra*, at 314; Franklin E. Zimring, AN AMERICAN TRAVESTY: LEGAL RESPONSE TO ADOLESCENT SEXUAL OFFENDING (2004).

Early treatments for juveniles who commit sex offenses model 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 J. McGrath, et al., *Current Practices and Emerging Trends in Sexual Abuser Management: The Safer Society 2009 North American Survey*, 41-42 (2010) (reporting that 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 and meeting one to two hours per week or more. *Id.* at 83-89.

It is not uncommon for a juvenile sex offense 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 (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 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 increases the likelihood that they will engage in criminalized behaviors. *See* Letourneau & Miner, *supra,* at 302, 304; Zimring, *supra*; *see generally*, *supra*, at § I.B.1 (discussing labeling).

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. Experts on sex offender treatment have argued that 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 J. Dishion & Kenneth A. Dodge, *Peer Contagion in Interventions for Children and Adolescents: Moving Towards an Understanding of the Ecology and Dynamics of Change*, 33 J.ABNORMAL CHILD PSYCHOL. 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; Zimring, *supra*.

B. Section 2907.05 Creates an Inherent Risk of Selective Enforcement

Due process is not satisfied if a statute is unconstitutionally vague. *Skilling v. United States*, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010). A statute is impermissibly vague if it authorizes or even encourages arbitrary and discriminatory enforcement. *Chicago v. Morales*, 527 U.S. 41, 56–57, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999). *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). When the legislature fails to provide minimal guidelines, "a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *In re D.B.*, 129 Ohio St.3d at ¶ 23, 950 N.E.2d 528 (quoting *Smith v. Goguen*, 415 U.S. 566, 574, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974)).

When, as here, a statute labels a single individual both victim and perpetrator, with no legislative guidance on how to distinguish the two, *see supra* § II.A.1, the risk of arbitrary prosecution is inherent and includes the possibility that a prosecutor's personal biases relating to gender and sexuality may influence charging decisions. *See In re D.B.* at ¶ 24 ("[W]hen two children under the age of 13 engage in sexual conduct with each other, each child is both an offender and a victim, and the distinction between those two terms breaks down.").

The risk of arbitrary prosecution is heightened here, given the historic purpose of statutes like Section 2907.05(A)(4) that prohibit sexual activity with individuals under a certain age. These laws—often referred to as statutory rape laws—aimed to protect the chastity of young women. Matthew D. Henry & Scott Cunnigham, *Do Statutory Rape Laws Work?* 3 in CELS 2009 4th Annual Conference on Empirical Legal Studies Paper (2010), available at https://www.csuohio.edu/class/sites/csuohio.edu.class/files/media/economics/documents/14.pdf

(last visited Dec. 12, 2016). 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, 287 (1997). If the 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).

Modern statutory rape laws criminalizing sexual contact 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. But gendered attitudes that influence decisions on who and whether to prosecute still pervade prosecutions under these statutes for three independent reasons. Federal courts frequently recognize that gender stereotypes are both subconscious and deeply ingrained, and therefore an actor may engage in gender-based discrimination without malicious intent. *See City of Los Angeles. v. Manhart*, 435 U.S. 702, 708, fn. 13, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (holding that, in forbidding employers to discriminate against individuals based on 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, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987) (holding defendant liable for race discrimination, even when

no evidence suggested that defendant held any racial animus); *Price Waterhouse v. Hopkins*, 825 F.2d 458, 469 (D.C.Cir.1987) (The fact that an actor may be unaware of the stereotype underlying discriminatory motivation "neither alters the fact of its existence nor excuses it."), *aff'd in relevant part*, 490 U.S. 228 (1989). Indeed, data shows that judges take gender into account when sentencing and bestow harsher punishment on males than females for the same crime. Allen, *supra*, at 117.

Evidence also suggests that prosecution may disproportionately target youth who engage in sexual contact with youth of the same sex. 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); Katayoon Majd et al., HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS 3 (2009), available at http://www.nclrights.org/wp-content/uploads/2014/06/hidden_injustice.pdf ("[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*, Cocca, *supra*, at 10; *Commonwealth v. Washington W.*, 457 Mass. 140, 141-42, 928 N.E.2d 908 (2010) (recognizing that Equal Protection Clause protects LGBT youth from selective prosecution based on sexual orientation).

Laws like Section 2907.05 that prohibit sexual contact between similarly aged children, without requiring force or compulsion or non-consensual contact, risk allowing individual perceptions about the morality of certain relationships to consciously, or unconsciously, guide enforcement of these laws. Cocca, *supra*, at 2. They carry 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. Further, sexual contact between similarly aged children that does not involve force rarely results in prosecution. *Id*; *see also* Henry & Cunningham, *supra*, at 2. The sporadic nature of these prosecutions increases the likelihood that enforcement of these laws will be based on impermissible factors. Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 692, 692 (2006); *see also* Phipps, *supra* fn.2, at 413.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Juvenile Law Center respectfully request that this Court reverse the decision of the court of appeals and affirm the juvenile court's decision to dismiss the delinquency petition under Rule 9 of the Rules of Juvenile Court Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2016, I caused copies of the foregoing Brief of *Amicus Curiae* Juvenile Law Center on Behalf of Appellant and Motion of Attorney Riya S. Shah for Permission to Appear Pro Hac Vice to be served via electronic mail on:

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