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COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Juvenile Court, City and County of Denver Case Number 01JD1407 Honorable D. Brett Woods, Judge Honorable Karen Ashby, Judge	
The People of the State of Colorado, Plaintiff-Appellee, **In the Interest of T.B.,** Juvenile-Appellant.	▲ COURT USE ONLY ▲
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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules, except that it exceeds the word limit specified in C.A.R. 28(g). The brief contains 11,334 words. It has been filed contemporaneously with a Motion for the Court to Accept Opening Brief That Exceeds Word Limit.

The brief complies with C.A.R. 28(a)(7)(A). For each issue raised, the brief contains under a separate heading before the discussion of the issue a concise statement of: (1) the applicable standard of appellate review with citation to authority; (2) whether the issue was preserved; and (3) if preserved, a citation to the precise location in the record where the issue was raised and ruled on.

I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Amy D. Trenary
Amy D. Trenary, #46148

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Whether mandatory, lifetime sex-offender registration for a juvenile offense committed by an 11-year old violates the federal and state constitutional prohibitions against cruel and unusual punishments.

STATEMENT OF THE CASE

In 2001, at age 12, T.B. pleaded guilty to one count of misdemeanor unlawful sexual contact under section 18-3-404, C.R.S., for conduct that had occurred when he was just 11 years old. (R. CF. p. 6.)

On June 17, 2016, the Denver Juvenile Court denied T.B.'s Petition to Discontinue Sex Offender Registration. (R. CF. pp. 809-11.) On July 25, 2016, the Juvenile Court amended its order and denied additional aspects of T.B.'s claim. (R. CF. pp. 815-18.)

T.B. timely filed his Notice of Appeal on August 5, 2016.

STATUTORY CONTEXT

Under the Colorado Sex Offender Registration Act (CSORA), someone adjudicated as a juvenile of two or more offenses involving unlawful sexual behavior must register as a sex offender for life and may never be removed from the registry. *See* §§ 16-22-102(3), -102(9), -103(2), -113(1)(e), -113(3)(c), C.R.S.

Colorado sex offenders required to register must do so in person annually, within five days of any change of residence or employment, and whenever they stay elsewhere for two weeks or more. *See* §§ 16-22-105(3), -108(1)(a)-(c), -108(3), C.R.S.

Law-enforcement agencies may charge up to $75 for the initial sex-offender registration and up to $25 for each subsequent annual or quarterly registration. *See* §§ 16-22-108(7), -113(7)(a), C.R.S.

Failure to register as required subjects an offender to serious criminal sanctions. *See* §§ 16-22-103(6); 18-3-412.5, -412.6, C.R.S.

STATEMENT OF THE FACTS

T.B. was only 11 years old when he was charged in this case. (R. CF. pp. 11-12.) A few days after turning 12, he pleaded guilty to misdemeanor unlawful sexual contact. (R. CF. p. 831.) He had a fifth-grade education. (R. CF. p. 6, ¶ 2.)

The five-page plea agreement explained the rights T.B. was waiving and detailed sentencing possibilities, including enhanced sentencing provisions for mandatory, repeat, violent, and aggravated juvenile offenders. (R. CF. pp. 6-10.) It notified T.B. about potential restitution and immigration consequences. (R. CF. pp. 8, 10.) But the plea agreement said nothing about sex-offender registration, nor did it warn T.B. that if he were ever adjudicated of another sex offense, he would be required to register for the rest of his life—even if the judge deemed that inappropriate and unnecessary. Likewise, at sentencing, sex-offender registration was never mentioned. (*See* R. Tr. 01/22/02.)

T.B. was sentenced to two years of probation and received treatment services from the Denver Children's Home Day Treatment Program while living with his grandmother. (R. CF. p. 5; R. Tr. 01/22/02, pp. 7:3-25, 23:19-22; R. Tr. 12/15/10, p. 12:10-17.) He attended some individual and family therapy through the Children's Home, as well as offense-specific group therapy. (R. Tr. 01/22/02, pp. 14:23-15:2.) T.B. successfully completed probation in 2004. (R. CF. p. 1.)

In 2005, at age 15, T.B. pleaded guilty in a separate case (04JD1805) to one count of sexual assault. (R. CF. pp. 31.)

In 2010, with the support of his former probation officer, Dawn Johnson, T.B. filed a pro se petition to discontinue sex-offender registration in both cases.

(R. CF. pp. 22-23.) At a hearing before then-Denver Juvenile Court Judge Karen Ashby, P.O. Johnson testified that T.B. had "changed from the person he was at eleven to the person he is today." (R. Tr. 12/15/10, p. 4:10-12.) She explained that T.B. was very young when he first started on probation, had been through "a lot of struggles," and had been living with his grandmother because his absentee parents were gang members. (R. Tr. 12/15/10, p. 3:9-16.)

P.O. Johnson testified that the treatment T.B. had received when first on probation focused on family interactions and included "very minimal" offense-specific treatment. (R. Tr. 12/15/10, p. 3:20-23.) Because the Probation Department's protocol for supervising juvenile sex offenders did not exist in 2001, they were unable to provide T.B. "with what he needed the first time around," which contributed to his second offense. (R. Tr. 12/15/10, pp. 3:23-4:5, 6:11-14.) By contrast, when placed at the Griffiths Center for Children during his probation in case 04JD1805, T.B. did a "phenomenal job" and was a "model resident." (R. Tr. 12/15/10, pp. 4:5-5:13 8:16.) P.O. Johnson confirmed that T.B. had successfully completed all aspects of offense-specific treatment. (R. Tr. 12/15/10, pp. 8:16-10:12.)

T.B.'s grandmother testified that T.B. had "matured a lot" and "grow[n] up tremendously." (R. Tr. 12/15/10, p. 12:22-23.) P.O. Johnson described him as a

"proud, black, gay man." (R. Tr. 12/15/10, p. 4:12.) T.B. expressed pride in his employment as a fast-food restaurant manager, especially considering the difficult circumstances of his upbringing. (R. Tr. 12/15/10, p. 4:14-23.) He said the only thing holding him back was the continued obligation to register as a sex offender. (R. Tr. 12/15/10, p. 4:23-24.) P.O. Johnson testified that T.B.'s sex-offender registration status had limited his ability to get a better job and an apartment. (R. Tr. 12/15/10, p. 6:6-10.)

The prosecution opposed the petition. (R. Tr. 12/15/10, pp. 11:2-12:9.)

After hearing the testimony and arguments, Judge Ashby granted T.B.'s request to discontinue sex-offender registration in case 04JD1805, finding:

- "I think [T.B.] has earned the right not to have to register."
- "It is clear to me . . . the concerns related to his prior offenses no longer exist, and he is not a risk to sexually reoffend at this point in time because of all of the work that he's done."
- (with respect to 04JD1805) "[T.B.] has established that he is not likely to reoffend sexually, and he has successfully addressed all issues related to his sexual offending behavior."
- "[I]t's been established he is not a risk to reoffend . . . ."

(R. Tr. 12/15/10, p. 13:6-11, 14:6-18; *see also* R. CF. p. 827.) But Judge Ashby was unsure whether she could grant deregistration in *this case* because of T.B.'s

subsequent sex-offense adjudication (in 04JD1805). (R. Tr. 12/15/10, pp. 13:12-15:2.)

P.O. Johnson asked whether T.B. was even required to register in this case. (R. Tr. 12/15/10, p. 15:3-8.) Noting that registration was not addressed in the sentencing order or presentence investigation report for this case, and that under section 16-22-113[(1)](e), it was unclear whether T.B. was required to register, Judge Ashby asked the parties to brief the question. (R. Tr. 12/15/10, p. 15:11-18:22; *see also* R. Tr. 01/22/01.) Neither party did so.[1]

Judge Ashby then denied T.B.'s petition, finding that although T.B. "is unlikely to reoffend, . . . he is unable to petition to discontinue sex offender registration pursuant to C.R.S. § 16-22-113(1)(e)." (R. CF. p. 31.)

In 2015, with pro bono counsel, T.B. filed another petition to discontinue registration in this case (Petition). (R. CF. p. 843.) After briefing and oral arguments (R. CF. pp. 37-814; R. Tr. 05/27/16), the juvenile court rejected the Petition, ruling that because T.B. was later adjudicated of a sexual offense, he is required to register as a sex offender for the rest of his life. (R. CF. pp. 809-19.)

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[1] Although Judge Ashby advised T.B. to seek help from the public defender (R. Tr. 12/15/10, p. 17:11-23), that office does not provide representation in sex-offender deregistration proceedings.

SUMMARY OF THE ARGUMENT

Under CSORA, because T.B. was later adjudicated of a second sexual offense at age 15, he is required to register as a sex offender *for the rest of his life* based on his juvenile adjudication in this case for a misdemeanor offense committed when he was only 11. *See* §§ 16-22-102(3), -113(1)(e), -113(3)(c). Even though the juvenile-court judge expressly found that because of T.B.'s treatment and overall rehabilitation, he no longer poses a risk of sexually reoffending, no relief from registration will ever be available to him. This appeal presents two weighty constitutional questions of first impression in Colorado: whether this legislative mandate for lifetime sex-offender registration—and its application to T.B.—violates due process and the prohibition on cruel and unusual punishments under the federal and state constitutions.

This mandate violates due process because it constitutes an irrebuttable presumption that all juveniles adjudicated of more than one sexual offense are incapable of ever being rehabilitated. Irrebuttable presumptions that are neither necessarily nor universally true and that sidestep reasonable alternative means for making the determination at issue violate due process. Empirical research demonstrates that juveniles in this category generally do not pose such a risk of sexually reoffending that lifetime registration would be warranted. And readily

available alternative means exist: allowing for judicial discretion, exercised based on individualized risk assessments that take into account many factors ignored by the statute, including age, severity and circumstances of the offense, efforts in treatment, and demonstrated rehabilitation. Had such judicial discretion and individualized assessment been allowed here, T.B.'s petition for removal from the sex-offender registry would have been granted. The legislative mandate also violates due process because it is fundamentally unfair.

Second, this provision of CSORA is a cruel and unusual punishment. The evolving standards of decency of our maturing society indicate an overwhelming national consensus against mandatory, lifetime sex-offender registration for a juvenile misdemeanor offense committed by an 11-year-old child. Although Colorado law mandates this result for T.B., it would not be allowed in 43 other jurisdictions nationwide (41 states, the District of Columbia, and under federal law). The mandatory registration requirement applied to an 11-year old child also violates the protections of international human-rights law.

For either or both these reasons, this Court should declare this provision of CSORNA unconstitutional and remand this case for the juvenile court to grant T.B.'s petition for removal from the registry.

ARGUMENT

I. Mandatory, lifetime juvenile registration under CSORA violates due process under the federal and state constitutions.

A. Preservation and standard of review.

This issue was raised in the Petition and ruled on by the juvenile court. (R. CF. pp. 166-81, 724-28, 817.) The constitutionality of a statute is reviewed de novo. *Dean v. People*, 2016 CO 14, ¶ 8.

B. Legal discussion.

1. CSORA triggers due-process protections because it implicates liberty and property interests.

Juveniles who are adjudicated delinquent have the right to due process under the federal and state constitutions. U.S. Const. amend. XIV; *In re Winship*, 397 U.S. 358, 359 (1970); *In re Gault*, 387 U.S. 1, 20 (1967); *People v. M.A.W.*, 651 P.2d 433, 436 (Colo. App. 1982).

CSORA implicates a liberty interest because it harms the reputation of juvenile registrants by branding them as sex offenders and making public juvenile offenses that otherwise would be kept private. *See Goss v. Lopez*, 419 U.S. 565 (1975) ("'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the [Due Process] Clause must be satisfied.") (citation omitted)).

CSORA also implicates property interests by authorizing law-enforcement agencies to charge $75 for initial registration and $25 for subsequent registrations. § 16-22-108, C.R.S. Every year, T.B. pays $25 to register. (R. CF. p. 791.)

2. CSORA violates federal and state due process because it relies on a permanent, irrebuttable presumption of sexual recidivism that is not universally true and is subject to determination by reasonable alternative means.

"Statutes creating permanent irrebuttable presumptions have long been disfavored under the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution." *Vlandis v. Kline*, 412 U.S. 441, 446 (1973); *accord People in Interest of S.P.B.*, 651 P.2d 1213, 1217 (Colo. 1982)). The Colorado Supreme Court has extended enhanced due-process protections under the Colorado Constitution to laws relying on conclusive presumptions that are irrational, unreasonable, or arbitrary. *See City & Cty. of Denver v. Nielson*, 572 P.2d 484, 485-86 (Colo. 1977) (Colorado Constitution provides greater due-process protections than federal counterpart).

A statutory presumption is invalid when it is not necessarily or universally true and when the state has reasonable alternative means of making the crucial determination. *Vlandis*, 412 U.S. at 452; *S.P.B.*, 651 P.2d at 1217; *see*, *e.g.*, *Nielson*, 572 P.2d at 485-86 (ordinance violated state due-process protections by

creating "irrational conclusive presumption" that all opposite-sex massage providers would commit illicit sexual acts).

Because CSORA's mandatory, lifetime registration requirement relies on an unreasonable, irrebuttable presumption, it violates the federal and state due process clauses. U.S. Const. amend. XIV.

a. CSORA's irrebuttable presumption of permanent future dangerousness and sexual recidivism by juveniles adjudicated of more than one sexual offense is not universally true.

While CSORA relies on the irrebuttable presumption that juveniles adjudicated for a second sexual offense will be dangerous in the future and likely to sexually recidivate, those characteristics are not universally true. Indeed, this presumption is contradicted by scientific evidence demonstrating that youthful sexual offenses do not predict adult sexual recidivism:

- A study of 6,000+ juveniles found that juvenile sex offending did not predict adult sex offending, because juvenile sex offenders were not more likely than juvenile non-sex offenders to commit an adult sex offense.
- A study of 27,000+ juveniles and young adults demonstrated that neither having committed a sex offense as a juvenile *nor the frequency of juvenile sex offending* significantly increased the likelihood someone would commit an adult sex offense.
- Statistically, only 5-14% of juvenile sex offenders will sexually recidivate. This is substantially lower than the ~40% sexual recidivism rate for adults and the 8-58% recidivism rates for other delinquent behavior. One study of 2,000+ juveniles found a 6.8% recidivism rate for juvenile sexual offenders.

- In studies trying to compare registered to non-registered juvenile sex offenders, the rate of sexual recidivism during a four-year period was <1%, and during a nine-year period was <3%.

See Amy E. Halbrook, *Juvenile Pariahs*, 65 Hastings L.J. 1, 13-16 (2013); National Center on Sexual Behavior of Youth, NCSBY Fact Sheet, *Adolescent Sex Offenders: Common Misconceptions vs. Current Evidence* at 2 (R. CF. pp. 463-66, 511.) "This research shows that juveniles adjudicated delinquent for sex offenses have extremely low rates of recidivism generally and even lower rates of sexual re-offense." *Juvenile Pariahs* at 13. (R. CF. p. 463.) Hence, "if a history of child sexual offending is used to predict a person's likelihood of future sex offending, that prediction would be wrong more than nine times out of ten." Human Rights Watch, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the U.S.* at 28 (2013). (R. CF. p. 275.)

The Pennsylvania Supreme Court recently held that its juvenile sex-offender registration statute violated due process for similarly relying on an irrebuttable presumption of sexual recidivism. *In re J.B.*, 107 A.3d 1, 17-20 (Pa. 2014) (noting that, in contrast to adult sex offenders, "studies suggest that many of those who commit sexual offenses as juveniles do so as a result of impulsivity and sexual curiosity, which diminish with rehabilitation and general maturity.") (citations omitted). Thus, the *J.B.* court concluded that Pennsylvania's juvenile registration

requirements "improperly brand[ed] all juvenile offenders' reputations with an indelible mark of a dangerous recidivist," even though the irrebuttable presumption of recidivism the statute relied upon is not universally true. *Id*. at 19.

Under CSORA, the circumstance triggering the irrebuttable presumption is a second adjudication for a sexual offense. *See* §§ 16-22-113(1)(e), -113(3)(c). But again, research refutes any contention that a twice-adjudicated juvenile is universally likely to sexually recidivate and pose a danger to the community. Statistical analysis of data about 27,000+ juveniles has demonstrated that "the history *or frequency* of juvenile sex offending did little to assist in predicting adult sex offending . . . ." Franklin E. Zimring et al., *Investigating the Continuity of Sex Offending*, 26 Just. Q. 58, 72 (2009). (R. CF. p. 682.)

b. The State has reasonable alternative means of determining whether a particular juvenile presents a lifelong risk of sexual recidivism.

Reasonable alternative means exist for determining whether a juvenile's adjudication and subsequent offense create a lifelong risk of sexual recidivism: judicial discretion informed by individualized risk assessment. As the Ohio Supreme Court has held, mandatory long-term sex-offender registration for a juvenile offense "undercuts the rehabilitative purpose of [the] juvenile system and eliminates the important role of the juvenile court's discretion in the disposition of

juvenile offenders and thus fails to meet the due process requirement of fundamental fairness." *In re C.P.*, 967 N.E.2d 729, 748 (Ohio 2012).

Use of individualized risk-assessment tools is common in Colorado. *See, e.g.*, § 19-2-601(8)(a)(II), C.R.S. (for determining whether juvenile poses danger to self and others relating to aggravated-juvenile-offender classification); § 19-2-922(1)(c), C.R.S. (for identifying juvenile treatment services); § 19-2-1002(2)(b), C.R.S. (for making juvenile parole decisions). Here, as in *J.B.*, an individualized risk assessment is "a reasonable alternative means of determining which juvenile offenders pose a high risk of recidivating." 107 A.3d at 19.

While it is may be easier to apply a blanket rule, "[t]he State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised." *Vlandis*, 412 U.S. at 451; *see also Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("the Constitution recognizes higher values than speed and efficiency"); U.S. Const. amend. XIV; Colo. Const. art. II, § 25.

3. CSORA is unconstitutional as applied to T.B. because the juvenile court found he does not present a risk of sexual recidivism.

As applied to T.B., the mandatory, lifetime registration requirement violates federal and state due-process guarantees. Judge Ashby found that "the concerns related to [T.B.'s] prior offenses no longer exist, and he is not a risk to sexually reoffend at this point in time . . . ." (R. Tr. 12/15/10, p. 13:6-11.) This Court should conclude that as applied to T.B., CSORA violates due process. U.S. Const. amend. XIV; Colo. Const. art. II, § 25.

4. CSORA violates due process under the federal and state constitutions because mandatory, lifetime juvenile sex-offender registration is fundamentally unfair.

"[T]he applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship*, is fundamental fairness." *McKiever v. Pennsylvania*, 403 U.S. 528, 543 (1971); *accord People in Interest of T.M.*, 742 P.2d 905, 908 (Colo. 1987). For three reasons, mandatory, lifetime juvenile sex-offender registration is fundamentally unfair in violation of federal and state due-process guarantees. U.S. Const. amend. XIV; Colo. Const. art. II, § 25.

a. Mandatory, lifetime juvenile registration inhibits the fact-finding process by failing to accurately identify juveniles who are likely to sexually recidivate.

The U.S. Supreme Court's fundamental fairness due-process analysis has emphasized protecting the portions of the juvenile-justice system that are "necessary component[s] of accurate factfinding." *McKiever*, 403 U.S. at 543; *see also Winship*, 397 U.S. at 365 ("The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child."); *Gault*, 387 U.S. at 19-20 ("Failure to observe the fundamental requirements of due process has resulted in instances . . . of unfairness to individuals and inadequate or inaccurate findings of fact . . . .").

Here, the relevant fundamental-fairness question is whether applying mandatory, lifetime registration to juveniles aids the fact-finding process by accurately identifying juveniles who are likely to sexually recidivate. *See People v. Carbajal*, 2012 COA 107, ¶ 37 (purpose of registration is to protect the community and aid law enforcement in investigating future sex crimes). Mandating lifetime registration for twice-adjudicated juveniles inhibits such fact-finding by eliminating any individualized consideration of risk. And it is over-inclusive because it impacts many juveniles—such as T.B.—who are unlikely to sexually offend as adults. Research consistently demonstrates that juveniles

adjudicated for sex offenses (even multiple sex offenses) are not likely to sexually reoffend as adults. *See supra*, § I.B.2.a.

Because CSORA unreliably measures the risk of sexual recidivism while eliminating the role of experienced juvenile judges in fact-finding based on individualized assessments, it is fundamentally unfair and violates federal and state due process.

b. Mandatory, lifetime juvenile registration conflicts with the juvenile-justice system's rehabilitative purpose.

The primary goal of our juvenile-justice system is to provide "guidance, rehabilitation, and restoration enabling a youthful offender to become a productive member of society . . . ." *Bostelman v. People*, 162 P.3d 686, 692 (Colo. 2007); *see also* § 19-2-102, C.R.S. (one goal is "to assist the juvenile in becoming a productive member of society").

Juvenile sex-offender registration is fundamentally unfair because it "contradicts the historical rehabilitative intention of the juvenile court by violating confidentiality and creating stigmatization." Ashley B. Batastini et al., *Federal Standards for Community Registration of Juvenile Sex Offenders*, 17 Psychology, Pub. Pol'y & L. 451, 454 (2011) (R. CF. p. 539). "Many mental health professionals argue that public registration will greatly hinder intervention efforts,

and some evidence even suggests an increased likelihood of sexual and general recidivism by creating barriers to the successful reintegration of youth offenders." *Id*. (citing E.J. Letourneau & K.S. Armstrong, *Recidivism Rates for Registered and Nonregistered Juvenile Sexual Offenders*, 20 Sexual Abuse 393 (2008)).

Stigmatization is counterproductive to rehabilitation. "Labels stick and can last a lifetime." *Raised on the Registry* at 50 (R. CF. p. 297). Labeling a child as a sex offender "can cause profound damage to a child's development and self-esteem." *Id*. Stigmatization may "lead to fear or mistrust by others, suspicion, rejection, or isolation from family and friends." *Id*. Registration exacerbates the difficulty youth already experience in navigating close interpersonal relationships, placing such relationships "in grave jeopardy." *Id*. at 52 (R. CF. p. 299.) The stigmatization and alienation resulting from juvenile sex-offender registration defeat rehabilitation by "thwart[ing] healthy development in young people." *Id*.

Sex-offender registration also hinders access to education and employment. *Id.* at 71-72 (R. CF. pp. 318-19.) Registered youth have reported denial or interruption of educational opportunities as a result of their registration requirement. *Id*. at 72 (R. CF. p. 319.) "Others had difficulty in school because of the public nature of their registration status." *Id*. Registration can impede access to higher education due to reporting requirements that do not apply to non-sex

offense adjudications. *Id*. Registrants commonly have difficulty finding and maintaining employment, which can persist for decades after a child is adjudicated for a sexual offense. *Id*. at 73 (R. CF. p. 320.) They may be prohibited from obtaining certain types of professional licenses and certifications. *Id*.

Ultimately, "subjecting alienated and confused youth sex offenders to long-term public humiliation, stigmatization, and barriers to education and employment exacerbates the psychological difficulties they already experience." *Id*. at 51 (R. CF. p. 298.) CSORA's juvenile-registration requirements are fundamentally unfair because they contradict the rehabilitative aim of the juvenile system by eliminating the critical role of judicial discretion and erecting barriers to children growing up to become productive, integrated members of society.

As the Ohio Supreme Court has recognized, mandating lifetime registration "without benefit of a juvenile judge weighing its appropriateness" is "contrary to the juvenile system's core emphasis on individual, corrective treatment and rehabilitation." *C.P.*, 967 N.E.2d at 748-50. Like the Ohio statute invalidated in *C.P.*, CSORA effectively "removes the juvenile court's ability to exercise its most important role in rehabilitation" with respect to twice adjudicated juveniles. *Id*. at 748-49. "Fundamental fairness requires that the judge decide the appropriateness of any such penalty" and that "a juvenile who is amenable to rehabilitation" should

not be subjected to the irrevocable adult consequences of lifelong sex-offender registration. *Id*. at 749.

c. Mandatory, lifetime juvenile registration treats juveniles like adults.

CSORA's mandatory, lifetime juvenile registration requirement fails to take account of the special qualities of juvenile offenders repeatedly recognized by the U.S. Supreme Court—immaturity, irresponsibility, underdeveloped character, and increased likelihood of rehabilitation. *See Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012); *Graham v. Florida*, 560 U.S. 48, 79 (2010); *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005). By ignoring these distinctions and treating children like adults, CSORA violates fundamental fairness and due process.

II. When applied to juveniles, mandatory, lifetime registration under CSORA violates the federal and state constitutional prohibitions against cruel and unusual punishments.

A. Preservation and standard of review.

This issue was raised in the Petition and ruled on by the juvenile court. (R. CF. pp. 152-65, 710-23, 810-17.) The constitutionality of a statute is reviewed de novo. *Dean*, ¶ 8.

B. Discussion.

1. Introduction.

The Eighth Amendment prohibits "cruel and unusual punishments," U.S. Const. amends. VIII, XIV, and "guarantees individuals the right not to be subjected to excessive sanctions." *Roper*, 543 U.S. at 560. This right "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller*, 132 S. Ct. at 2463 (internal quotation omitted). The Colorado Constitution likewise prohibits the infliction of cruel and unusual punishments. Colo. Const. art. II, § 20.

Certain punishments that are constitutionally permissible for adults violate the Eighth Amendment when imposed on juveniles. *See*, *e.g.*, *Miller*, 132 S. Ct. at 2475 (mandatory life without parole is cruel and unusual when applied to juveniles); *Graham*, 560 U.S. at 82 (same regarding life without parole for non-homicide offense); *Roper*, 543 U.S. at 578 (same regarding death penalty). Juveniles "are different from adults in their 'diminished culpability and greater prospects for reform'" and "are therefore 'less deserving of the most severe punishments.'" *People v. Tate*, 2015 CO 42, ¶ 28 (citation omitted).

T.B. acknowledges that a division of this Court recently held that juvenile sex-offender registration is generally not a form of punishment subject to Eighth-

Amendment scrutiny. *People in Interest of J.O.*, 2015 COA 119, ¶¶ 21-30 (declining to address whether such registration is cruel and unusual). But in reaching this conclusion, the Court relied on J.O.'s right to petition for deregistration to distinguish the Ohio Supreme Court's holding in *C.P.* that *mandatory, lifetime* juvenile registration violates that state's constitutional prohibition against cruel and unusual punishment. *Id.* at ¶ 29 (citing *C.P.*, 967 N.E.2d at 759). It appears to be a matter of first impression in Colorado whether *mandatory, lifetime* registration for a juvenile offense—here, committed at age 11—constitutes cruel and unusual punishment under the Eighth Amendment and article II, section 20 of the Colorado Constitution.

2. Mandatory, lifetime sex-offender registration for a juvenile offense constitutes punishment.

To determine whether a statutory requirement is punishment rather than a civil regulatory scheme, courts must first look to legislative intent. *Smith v. Doe*, 538 U.S. 84, 92 (2003). But even where the legislature's intention was to enact a regulatory scheme that is civil and nonpunitive, courts must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Id.* (citation omitted).

a. Colorado's General Assembly expressly recognized that sex-offender registration for a juvenile offense can be "unfairly punitive."

This Court has held that the legislature's intent in enacting sex-offender registration was not to punish the sex offender but to protect the community. *J.O.*, ¶ 22; *Carbajal*, ¶ 37. But it does not appear that the Court has been asked to address the fact that the statute itself recognizes that sex-offender registration for a juvenile offense may be "unfairly punitive." § 16-22-103(5)(a), C.R.S. Given the plain language of the statute, T.B. asks this Court to reconsider its prior case law.

b. In the alternative, the *effects* of mandatory, lifetime sex-offender registration for a juvenile offense render such registration punitive.

To assess whether the effects of a sex-offender registration statute are punitive, courts should consider the following factors:

(1) "[w]hether the sanction involves an affirmative disability or restraint";

(2) "whether it has historically been regarded as a punishment";

(3) "whether it comes into play only on a finding of scienter";

(4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence";

(5) "whether the behavior to which it applies is already a crime";

(6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and

(7) "whether it appears excessive in relation to the alternative purpose assigned."

Kennedy v. Mendoza-Martinez, 327 U.S. 144 (1963); *Smith*, 538 U.S. at 97.

Whether a sex-offender registration statute is punitive for purposes of the Eighth Amendment and parallel state prohibitions on cruel and unusual punishments is analogous to whether such statutes are punitive for purposes of federal and state protections against ex-post-facto laws. Following *Smith*'s holding that sex-offender registration is not punitive for purposes of ex post facto analysis, 538 U.S. at 105-06, many state appellate courts have held their sex-offender registration statutes were punitive and violated ex-post-facto protections. *See*, *e.g.*, *Doe v. State*, 111 A.3d 1077 (N.H. 2015) (retroactive application of statute violated state constitutional ex-post-facto clause); *Starkey v. Okla. Dept. of Corr.*, 305 P.3d 1004 (Okla. 2013) (same); *State v. Williams*, 952 N.E.2d 1108 (Ohio 2011) (same, as applied); *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009) (same); *State v. Letalien*, 985 A.2d 4 (Me. 2009) (same, and federal ex-post-facto clause); *Doe v. State*, 189 P.3d 999 (Alaska 2008) (same).

Similarly here, analysis of the seven *Mendoza-Martinez* factors demonstrates that, when applied to adjudicated juveniles, the effects of mandatory, lifetime sex-offender registration are punitive and therefore implicate the Eighth Amendment.

i. Involves an affirmative disability or restraint.

CSORA's registration requirements are extensive and burdensome, and failure to abide by the letter of the law can result in criminal conviction and punishment (including imprisonment). *See supra*, STATUTORY CONTEXT.

Sex-offender registration places an immense, lifelong burden on T.B., including difficulty obtaining employment and housing, interference with education, social harassment and rejection, increased risk of suicide and being victimized by vigilante violence, and disruption of family and support systems. *See Raised on the Registry* at 50-79 (R. CF. pp. 297-326); Andrew J. Harris et al., *Collateral Consequences of Juvenile Sex Offender Registration and Notification*, 28 Sexual Abuse 1, 14-16 (2015 (R. CF. pp. 373-75). Josh Gravens, counselor to youth registrants (and himself required to register at age 14), has explained adverse consequences routinely experienced:

> Homelessness; getting fired from jobs; taking jobs below minimum wage, with predatory employers; not being able to provide for your kids; losing your kids; relationship problems; deep inner problems connecting with people; deep depression and hopelessness; this fear of your own name; the terror of being Googled.

Sarah Stillman, *The List: When Juveniles Are Found Guilty of Sexual Misconduct, The Sex-Offender Registry Can Be a Life Sentence*, THE NEW YORKER (Mar. 14, 2016).[2]

Many states have found that the first *Mendoza-Martinez* factor indicates that their sex-offender registration statute is punitive. *See Doe*, 111 A.3d at 1094-96; *Starkey*, 305 P.3d at 1025; *Wallace*, 905 N.E.2d at 380; *Letalien*, 985 A.2d at 18; *Doe*, 189 P.3d at 1008-12.

Mandatory, lifetime juvenile registration also restricts liberty in a manner that resembles the punishments of parole and probation. *See United States v. Knights*, 534 U.S. 112, 119 (2001) (acknowledging probation is punishment). Like probationers and parolees, registrants must submit to official monitoring to remain in compliance. They must supply a wide range of personal information, including their home and work addresses, email addresses and phone numbers, and information about their vehicles. Registrants must appear in person and report to law enforcement annually. Failure to comply with any registration requirement can be punished by imprisonment, not unlike revocation of probation or parole. *See supra*, STATUTORY CONTEXT. Many appellate courts have now recognized that

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[2] *Available at* http://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes.

sex-offender registration is akin to being on probation or parole. *See, e.g.*, *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 62 A.3d 123, 139 (Md. App. 2013) (requiring registrant, as a result of his conviction, to "regularly report in person to the State and abide by conditions established by the State" or face re-incarceration "is the same circumstance a person faces when on probation or parole"); *Does #1-5 v. Snyder*, 834 F.3d 696, 703 (6th Cir. 2016); *Doe*, 189 P.3d at 1009.

Thus, the first factor supports a finding that CSORA is punitive.

ii. Historically regarded as punishment.

A "widely accepted definition of punishment" is one that: (1) involves pain or other consequences typically considered unpleasant; (2) follows from an offense against legal rules; (3) applies to the offender; (4) is intentionally administered by people other than the offender; and (5) is imposed and administered by an authority constituted by a legal system against which the offense was committed. *Snyder*, 834 F.3d at 701 (citing H.L.A. Hart, *Punishment and Responsibility* 4-5 (1968)). Mandatory, lifetime juvenile sex-offender registration meets all five prongs of this definition. *See Letalien*, 985 A.2d at 19-21 (mandatory nature of the lifetime-registration requirement supported finding that registration was part of the sentence, and this second factor indicates punitiveness).

Sex-offender registration is akin to banishment and traditional shaming punishments. Some colonial punishments imposed humiliation by requiring offenders to hold signs publicly disclosing their crimes, and some offenders were branded with permanent labels that served to impose an enduring stigma and cast the person out of the community. *Smith*, 538 U.S. at 97-98. (*See also* R. CF. pp. 384-443, detailing historical shaming punishments.)

Distinguishing adult sex-offender registration from these traditional punishments, *Smith* reasoned that the stigma "results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public." 538 U.S. at 98. But this rationale does not extend to juveniles, because records of juvenile adjudications are kept private. § 19-1-304, C.R.S. (juvenile records are generally confidential and unavailable to the public absent court order); *see also* § 19-1-302, C.R.S. (declaring that "certain information obtained in the course of the implementation of [the Children's Code] is highly sensitive and has an impact on the privacy of children and members of their families").

By disseminating information to the public about juvenile adjudications that would otherwise remain confidential and inaccessible, sex-offender registration for juveniles indefinitely shames and humiliates them. Therefore, unlike in the adult

context, juvenile registration resembles traditional shaming punishments because it brands juvenile offenders with permanent, stigmatizing labels. Like shaming, CSORA "brands registrants as moral lepers" solely due to their prior adjudications and consigns them to living on the margins of society. *Snyder*, 834 F.3d at 705.

Many states have found that this factor favors finding registration punitive. The New Hampshire Supreme Court has eloquently explained the connections between historical and contemporary shaming:

> Although the act's requirements do not exactly replicate the historical form of shaming, this factor inquires only whether the act is *analogous* to a historical punishment, not whether it is an exact replica. We must recognize that our world has changed. The purpose of colonial shaming was to punish the offender by holding the offender out to the community as someone to be shunned or ridiculed. However, shaming also served to notify the community of the crime committed and the individual who committed it, so that members of the community could protect themselves. The act does the equivalent in our modern times. Our communities have grown, and in many ways, the internet is our town square. Placing offenders' pictures and information online serves to notify the community, but also holds them out for others to shame or shun.

Doe, 111 A.3d at 1094-96; *see also Starkey*, 305 P.3d at 1025; *Doe*, 62 A.3d at 139; *Wallace*, 905 N.E.2d at 380-81; *Doe*, 189 P.3d at 1012.

This factor therefore weighs in favor of finding that mandatory, lifetime registration for a juvenile offense is punitive.

iii. Comes into play only upon a finding of scienter.

The vast majority of offenses that subject an individual to registration under CSORA—including T.B.'s adjudication for unlawful sexual contact—require scienter. This implies a punitive effect. *See Doe*, 111 A.3d at 1094-96; *Wallace*, 905 N.E.2d at 381; *Doe*, 189 P.3d at 1012-13.

iv. Promotes the traditional aims of punishment.

Lifetime juvenile registration that is mandatory promotes the traditional punishment goals of retribution and deterrence. As the Oklahoma Supreme Court has recognized, when registration requirements are "based on the statute the offender was convicted without regard to any mitigating factors," no hearing is allowed, and "there is essentially no mechanism to reduce or end registration based upon a showing the offender is no longer a threat to the community," such requirements are retributive and punitive. *Starkey*, 305 P.3d at 1025.

Many other states have likewise found this factor supports a finding of punitiveness. *See State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011) (finding registration requirements punitive in part because they "apply without regard to the future dangerousness of the sex offender" and "are based solely on the fact of a conviction."); *Commonwealth v. Baker*, 295 S.W.3d 437, 444-45 (Ky. 2009) ("By

imposing restraints based solely upon prior offenses, [Kentucky statute] promotes and furthers retribution against sex offenders for their past crimes.").

Doe, 111 A.3d at 1098 (finding statute retributive because it "requires offenders to register based only upon their past action, and not on any individualized assessment of current risk or level of dangerousness."); *Wallace*, 905 N.E.2d at 382 ("[I]t strains credulity to suppose that the Act's deterrent effect is not substantial, or that the Act does not promote community condemnation of the offender, both of which are included in the traditional aims of punishment." (citation and internal quotation omitted)); *Doe*, 189 P.3d at 1014 ("ASORA's registration and unlimited public dissemination requirements provide a deterrent and retributive effect that goes beyond any non-punitive purpose and that essentially serves the traditional goals of punishment.").

The Court should conclude that this factor favors determining that mandatory, lifetime juvenile registration is punishment.

v. Applies to behavior that is already a crime.

CSORA's mandatory juvenile-registration provisions apply to those adjudicated for certain sexual behavior that is already a crime "and does not arise based on an individualized determination of an offender's risk of recidivism." *Starkey*, 305 P.3d at 1028. "The fact that a statute applies only to behavior that is

already, and exclusively, criminal supports a conclusion that its effects are punitive." *Doe*, 189 P.3d at 1014. "[I]f recidivism, i.e., new sexual misconduct, were the only concern, the statute would apply not just to convicted sex offenders but to other individuals who may pose a threat to society even if they were not convicted." *Id.* at 1015.

This Court should therefore conclude, as these and other states have, that this fifth factor supports a finding that the registration requirement is punitive. *See Doe*, 111 A.3d at 1099; *Wallace*, 905 N.E.2d at 382; *Letalien*, 985 A.2d at 22.

vi. Rational connection to non-punitive purposes.

Concededly, CSORA has non-punitive purposes "to protect the community and to aid law enforcement officials in investigating future sex crimes." *Carbajal*, ¶ 37. But non-punitive objectives, while undeniably important, do not render an overbroad statute non-punitive. *Starkey*, 305 P.3d at 1028-29. No rational connection exists between these purposes and the requirement that juveniles register for life based solely on a second sex-offense adjudication. As described in *Roper*, *Graham*, and *Miller*, *see supra* § II.B, juveniles are more amenable to successful rehabilitation than adults. Research demonstrates that even juveniles adjudicated of multiple sexual offenses are unlikely to sexually re-offend as adults. *See Investigating the Continuity* at 69-72. (R. CF. pp. 679-82.) Because

adjudication for more than one sexual offense as a child does not predict sexual recidivism as an adult, mandating that such juveniles register for life is not rationally connected to the non-punitive goals of community safety and aiding the investigation of sex crimes. *See Smith*, 538 U.S. at 109 (Souter, J., concurring in the judgment) ("[W]hen a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.").

The lack of rational connection to non-punitive purposes is illustrated by this case. Back in 2010, Judge Ashby found that T.B. has "established that he is not likely to reoffend sexually, and he has successfully addressed all issues related to his sexually offending behavior." (R. Tr. 12/10/15, p. 14:7-9.)[3] Requiring him to continue to register as a sex offender advances neither of the identified purposes of CSORA. In the unlikely event he were ever investigated in connection with a future sex crime, information about T.B.'s juvenile adjudications would remain available to law enforcement, as it cannot be expunged. *See* § 19-1-306(7)(d), C.R.S. (expungement unavailable for any person adjudicated for an offense involving unlawful sexual behavior). Indeed, mandating that T.B. remain on the

[3] Since his second adjudication at age 15 in 2005, T.B. has not been adjudicated or convicted for any offense.

registry undermines any investigatory purpose because it diverts finite law-enforcement resources towards a supposed risk that contradicts the considered findings of the juvenile court.

This factor favors finding that mandatory, lifetime registration based on juvenile adjudications is punishment.

vii. Excessive in relation to non-punitive purposes.

Applying mandatory, lifetime registration to juveniles is excessive in relation to registration's non-punitive purposes. The effects sex-offender registration imposes on children are grossly disproportionate to registration's capacity to advance community protection and law-enforcement investigations. The Ohio Supreme Court has described the stigmatizing and debilitating effects of juvenile sex-offender registration:

> For juveniles, the length of the punishment is extraordinary, and it is imposed at an age at which the character of the offender is not yet fixed. Registration and notification necessarily involve stigmatization. For a juvenile offender, the stigma of the label of sex offender attaches at the start of his adult life and cannot be shaken. With no other offense is the juvenile's wrongdoing announced to the world. Before a juvenile can even begin his adult life, before he has the chance to live on his own, the world will know his offense. He will never have a chance to establish a good character in the community. He will be hampered in his education, in his relationships, and in his work life. His potential will be squelched before it has a chance to show itself. A

> juvenile—one who remains under the authority of the juvenile court and has thus been adjudged redeemable—who is subject to sex-offender notification will have his entire life evaluated through a prism of his juvenile adjudication. It will be a constant cloud, a . . . reminder to himself and the world that he cannot escape the mistakes of his youth. . . . [C]ommunity notification means everything to a juvenile. It will define his adult life before it has had a chance to truly begin.

C.P., 967 N.E.2d at 741-42 (holding mandatory, lifetime juvenile registration violates federal and state cruel-and-unusual-punishments clause).

Lifetime registration "is an especially harsh punishment for a juvenile" like T.B. because he will likely have to register for more years—and for a greater percentage of his life—than would a person who began lifetime registration as an adult. *Cf. Graham*, 560 U.S. at 70 ("A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.").

Many states have concluded that the excessiveness of sex-offender registration in relation to non-punitive purposes favors a finding that registration is effectively punishment. *See, e.g.*, *Wallace*, 905 N.E.2d at 383 ("[W]e think it significant for this excessiveness inquiry that the Act provides no mechanism by which a registered sex offender can petition the court for relief" from continued registration . . . .); *Doe*, 111 A.3d at 1100 (lifetime-duration registration requirement without regard to whether registrants pose a current risk to the public

"weighs heavily in favor of finding a punitive effect"); *Starkey*, 305 P.3d at 1029 (requiring lifetime registration "regardless if one could provide the clearest proof of rehabilitation" demonstrates excessive and punitive nature of statute); *Doe*, 189 P.3d at 1017 (statute's chosen means of imposing registration requirements is excessive because it "encompasses a wide array of crimes that vary greatly in severity," provides no mechanism for petitioning for relief, and is underinclusive due to applying only to convictions).

The Court should find that this factor weighs heavily towards a finding that mandatory, lifetime juvenile registration is punitive.

viii. Summary and conclusion.

Considering the *Mendoza-Martinez* factors together, this Court should conclude that mandatory, lifetime registration for juvenile offenses is punishment.

c. This Court's prior cases holding that sex-offender registration is not punishment are distinguishable.

This Court has previously determined that sex-offender registration is non-punitive, but has not yet considered whether *lifetime* registration imposed on adjudicated juveniles with no possibility of removal constitutes punishment. In the only prior Colorado appellate case involving the constitutionality of juvenile sex-offender registration, the appellant was not required to register for life. *See J.O.*, ¶ 29. Lifetime registration is different—and more punitive—because it deprives

juveniles of any hope for change and prevents them from ever being able to prove that they have been rehabilitated and that the conduct for which they were adjudicated reflected "transient immaturity." *See Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016).

No Colorado cases addressing sex-offender registration have conducted an in-depth analysis of the *effects* (as compared to the intent) of the registration scheme, nor addressed the *Mendoza-Martinez* factors in any detail. *See J.O.*, ¶¶ 21-30 (concluding that non-lifetime juvenile registration is not punishment, but without discussing the statute's effects or *Mendoza-Martinez*; *Carbajal*, 312 P.3d 1183, 1189 (Colo. 2012) (same as to adult sex-offender registration); *People v. Montaine*, 7 P.3d 1065, 1067 (Colo. 1999) (same); *see also People in Interest of J.T.*, 13 P.3d 321, 323 (Colo. 2000) (same). *Smith* demands more. 538 U.S. at 92 ("If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we *must* further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil.") (emphasis added; internal quotation omitted).

Applying the *Smith* and *Mendoza-Martinez* standards, this Court should hold that mandatory, lifetime juvenile sex-offender registration constitutes punishment.

3. Mandatory, lifetime sex-offender registration for a juvenile offense committed at age 11 is cruel and unusual.

When considering whether a punishment is cruel and unusual, this Court must first consider "objective indicia of society's standards" to determine whether a national consensus against the punishment has evolved. *Graham*, 560 U.S. at 61. Even if one has not, the Court must "determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Id.*

a. Objective indicia of evolving standards of decency demonstrate a national consensus against imposing mandatory, lifetime registration for a juvenile offense committed by an 11-year old.

To determine whether a punishment is cruel and unusual, courts must look to "the evolving standards of decency that mark the progress of a maturing society." *Graham*, 560 U.S. at 58 (citation omitted). The objective indicia of evolving standards of decency point to a broad-scale rejection of imposing mandatory, lifetime registration for a juvenile offense committed at age 11.

i. The vast majority of other jurisdictions would not allow the mandatory, lifetime juvenile sex-offender registration imposed on T.B.

A strong majority of at least 43 jurisdictions in the U.S. would not allow for mandatory, lifetime registration for a juvenile offense committed before age 14.

These jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and the United States (the federal government). *See* Appendix A (table summarizing and providing statutory citations for these 43 jurisdictions prohibiting mandatory, lifetime registration based on juvenile adjudication before age 14). This constitutes a resounding national consensus against this severe and excessive punishment for this vulnerable population.

The Eighth-Amendment analysis of the Supreme Court in invalidating the death penalty for the crime of child rape is instructive:

> The evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it. Thirty-seven jurisdictions—36 States plus the Federal Government—have the death penalty. As mentioned above, only six of those jurisdictions authorize the death penalty for rape of a child. Though our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation, it is of significance that, in

> 45 jurisdictions, petitioner could not be executed for child rape of any kind. That number surpasses the 30 States in *Atkins* and *Roper* and the 42 States in *Enmund* that prohibited the death penalty under the circumstances those cases considered.

Kennedy v. Louisiana, 554 U.S. 407, 426 (2008) (abolishing the death penalty for child rapists); *see also Atkins v. Virginia*, 536 U.S. 304, 313-15 (2002) (abolishing the death penalty for the intellectually disabled); *Roper*, 543 U.S. at 564 (abolishing the death penalty for juveniles); *Enmund v. Florida*, 458 U.S. 782, 789 (1982) (abolishing the death penalty for felony murder). The 43 jurisdictions here that under no circumstances would mandate lifetime registration for a very young juvenile offender such as T.B. demonstrates a national consensus against the practice and an Eighth Amendment violation under clear Supreme Court precedent.

ii. Colorado's placement of T.B. on its sex-offender registry is contrary to the protections for children and privacy under international human-rights law.

While the judgments of the international community "are not dispositive as to the meaning of the Eighth Amendment," global opinions about the acceptability of a certain punishment are relevant to whether it is cruel and unusual. *Graham*, 560 U.S. at 80; *accord Roper*, 543 U.S. at 575-76.

Human Rights Watch has explained the connection between international human rights standards and juvenile-sex-offender-registration requirements:

> International law recognizes that juvenile offenders require special protection. The Convention on the Rights of the Child (CRC) and the ICCPR [International Covenant on Civil and Political Rights] prohibit arbitrary or unlawful interference with a child's privacy. This prohibition, along with other international legal guarantees of treatment with dignity, respect, and protection from cruel, inhuman or degrading treatment, underlie the minimum standards for privacy set forth in the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules). These minimum standards require that every child's privacy be respected at all stages of the juvenile justice process, including with regard to dissemination of a child offender's criminal record, and that safeguards be taken during transport to shield children and protect them from insult, curiosity and publicity in any form.

Human Rights Watch, *No Easy Answers: Sex Offender Laws in the U.S.* 121-22 (Sept. 2007) (internal quotation omitted).[4] The U.S. helped author the CRC and has been a signatory since its creation in 1995, "and is therefore obligated to refrain from acts that would defeat the object and purpose of the treaty." *See* Carole J. Petersen & Susan M. Chandler, *Sex Offender Registration and the Convention on the Rights of the Child: Legal and Policy Implications of Registering Juvenile Sex Offenders*, 3 Wm. & Mary Policy Rev. 1, 4-5 (2011) (internal quotation omitted) (providing analysis and arguments to support the

[4] Available at https://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf

conclusion that, under international human-rights standards, "no child should be required to register as a sex offender unless and individualized assessment determines that the juvenile poses a significant risk to the community").

"[T]he CRC contains numerous rights that may be violated by laws requiring registration and community notification of juvenile sex offenders, particularly if the legislation is applied in an overly broad manner without sufficient consideration for individual circumstances." *Id*. at 20. In order to comply with the CRC's requirement for "age-appropriate proceedings for children accused of criminal acts," governments must treat children "in a manner that promotes their sense of dignity, worth, and reintegration into society" and "adopt laws, procedures, and dispositions that specifically apply to juvenile defendants and offenders." *Id*. at 21. "The overall goal is to ensure that children are dealt with in a manner that is appropriate to their well-being and proportionate to their circumstances and the offense." Id. "Under this framework, a child should only be placed on a sex offender registry in extreme cases (for example, when an individual risk assessment demonstrates that the child offender poses a danger to the community)." *Id*.

In a 2007 General Comment on Article 40 of CRC, the U.N. Committee on the Rights of the Child "reminded governments that no information shall be

published that may lead to the identification of a child offender because it leads to stigmatization and will impair the child's right to obtain education, work, and housing." *Id*. at 22 (internal quotation omitted). Thus, according to international human rights standards, registration laws "should provide that child offenders may not be subject to community notification laws except where a judge determines, after an assessment and a hearing, that the child actually does pose a danger to the community and that public disclosure is warranted." *Id*. at 22-23.

The Supreme Court of the United Kingdom has similarly held that placing offenders on a sex-offender registry for life (including one who was only 11 years old) with no opportunity for review "violates the right to private and family life, as protected by Article 7 of the European Convention on Human Rights." *Id*. at 24 (citing *R and Thompson v. Sec. of State for the Home Dept.*, [2010] UKSC 17, *available at* https://www.supremecourt.uk/cases/docs/uksc-2009-0144-judgment.pdf). And while that judgment was not confined to adjudicated juveniles, the court agreed that a person's right to status review is "even stronger in the case of child offenders because of the fact that children change as they mature." *R and Thompson*, ¶ 40.

b. This Court should exercise its independent judgment to conclude that mandatory, lifetime registration for a juvenile offense committed at age 11 is cruel and unusual.

Community consensus, while entitled to great weight, does not itself determine whether a punishment is cruel and unusual. *Graham*, 560 U.S. at 67. "The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question, . . . [and] whether the challenged sentencing practice serves legitimate penological goals." *Id*.

i. Mandatory, lifelong punishments that may constitutionally be applied to adults are cruel and unusual when imposed on children, who are less culpable and have greater potential for reform than adults.

The U.S. Supreme Court has long recognized that "juvenile offenders constitutionally may be treated differently from adults . . . to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention." *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (citation omitted). The Court explained this "self-evident principle," *C.P.*, 967 N.E.2d at 740, in *Graham*:

> *Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments. As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to

> negative influences and outside pressures, including peer pressure; and their characters are not as well formed. These salient characteristics mean that it is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. Accordingly, juvenile offenders cannot with reliability be classified among the worst offenders. A juvenile is not absolved of responsibility for his actions, but his transgression is not as morally reprehensible as that of an adult.

Graham, 560 U.S. at 68 (internal citations and quotation marks omitted).

The Supreme Court has also recognized that delinquent conduct by juveniles is less likely to reflect an irredeemable corruptness:

> Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults. It remains true that from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Graham, 560 U.S. at 68 (internal citations and quotation marks omitted); *see also Roper*, 543 U.S. at 570 ("The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of an irretrievably depraved character.").

Taken together, *Roper*, *Graham*, *Miller*, and *Montgomery* establish that children are constitutionally distinct from adults for purposes of sentencing, and

mandatory, lifetime punishments imposed without consideration of a child's individualized characteristics are unconstitutional. *See, e.g.*, *Miller*, 132 S. Ct. at 2469 ("mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it"); *Montgomery*, 136 S. Ct. at 726 (noting that *Miller* requires sentencing courts to consider a child's "diminished culpability and heightened capacity for change" before imposing a lifelong sanction on a juvenile) (citation omitted).

In determining who is mandated to register as a sex offender for life, CSORA treats children identically to adults. *See* § 16-22-113(1)(a)-(e). But "it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper*, 543 U.S. at 570. By precluding any consideration of T.B.'s youthfulness, diminished culpability, individual characteristics, family and social circumstances, level of participation in the crimes for which he was adjudicated, and capacity for change, CSORA denies him the right to demonstrate his maturity, rehabilitation, and suitability for full reintegration into society without being permanently labeled as a sex offender. *See Graham*, 560 U.S. at 73. In the exercise of its independent judgment, this Court should conclude that mandatory, lifetime sex-offender registration under CSORA cannot be reconciled with the constitutional prohibition

against categorically sanctioning juveniles without individualized consideration of their youthful characteristics.

ii. Mandatory, lifetime sex-offender registration is a severe adult punishment disproportionate to the reduced culpability of a juvenile.

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Punishment is constitutionally cruel and unusual if it affronts "the basic concept of human dignity at the core of the Amendment" because it is disproportionate to the moral culpability of the offender. *Gregg v. Georgia*, 428 U.S. 153, 182 (1976).

Juveniles should not be subjected to the same punishments as adults because their culpability must be measured by a lower standard. Yet CSORA's two-offense bar to deregistration applies equally to juveniles and adults. *See* § 16-22-113(1)(a)-(e). This approach conflicts with the fundamental Eighth-Amendment principle "that punishment should be directly related to the personal culpability of the criminal defendant." *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). Failing to account for juveniles' reduced culpability, CSORA subjects children to a continued, lifelong threat of criminal sanctions and adult

criminal consequences, an ongoing risk of verbal and physical assault, and an enduring isolation that permeates every part of the child's life.

An adjudicated juvenile who fails to comply with any of CSORA's registration requirements may be criminal charged with a felony offense. § 18-3-412.5(1), (2)(a). If adjudicated for failure to register, a juvenile is subject to mandatory minimum detention periods of 30 to 45 days, and out-of-home placement for at least one year is mandated for adjudication for a second felony-equivalent failure-to-register offense. § 18-3-412.5(4)(a). If convicted of failure to register after turning 18, a person adjudicated as a juvenile may acquire an adult felony record and face up to 18 months in prison, then up to 3 years in prison for any subsequent offense. §§ 18-3-412.5(2)(a)-(b); 18-1.3-401(1)(a)(V)(A). Due to the demanding nature of registration requirements, juveniles are often adjudicated for failure to register. *Raised on the Registry* at 80-87 (R. CF. pp. 327-34.)

Formerly adjudicated juveniles like T.B. also face the lifelong potential for verbal and physical abuse. People required to register as sex offenders are often ostracized and threatened. *Id*. at 50 (R. CF. p. 297.) Survey data from Human Rights Watch shows that 52% of registered youth offenders reported experiencing violence or threats of violence directly related to their sex-offender status. *Id*. at 56 (R. CF. p. 303.) While information about most juvenile delinquency cases is

guarded as private and unavailable to the public, the registration status of T.B. and others like him is easily accessible to the public through a CBI background check and public websites. (*See* R. CF. pp. 744, 746-47, 750.) The public dissemination of adjudicated juvenile's home addresses and other personal information makes them easier to target by those who wish to threaten, abuse, and harm.

Finally, it is evident that being required to register as a sex offender punishes youth to the point of causing psychological harm. Human Rights Watch has reported that 84.5% of children on the registry experienced negative psychological impacts (including depression, sense of isolation, difficulty forming and maintaining relationships, and suicidal ideation) and 19.6% had attempted suicide. *Raised on the Registry* at 51 (R. CF. p. 298.) These psychological impacts leave lasting scars, as they are inflicted at a time when adolescents' sense of self is still under development. *Id*. at 50 (R. CF. p. 297) (noting that the stigmatizing "sex offender" label "can cause profound damage to a child's development and self-esteem"). "Subjecting alienated and confused youth sex offenders to long-term public humiliation, stigmatization, and barriers to education and employment exacerbates the psychological difficulties they already experience." *Id*. at 51 (R. CF. p. 298.) As expressed by one juvenile:

> [O]ur mistake is forever available to the world to see. There is no redemption, no forgiveness. You are never

> done serving your time. There is never a chance for a fresh start. You are finished. I wish I was executed because my life is basically over.

Raised on the Registry at 52 (R. CF. p. 299.)

iii. Mandating lifetime registration for juveniles with no opportunity for redemption serves no legitimate penological goals.

"A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Graham*, 560 U.S. at 71; *accord Gregg*, 428 U.S. at 183 ("the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering"). With respect to mandatory, lifetime registration for juveniles adjudicated of more than one offense, "none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification." *Id*. at 71 (citation omitted).

Retribution does not justify imposing mandatory, lifetime registration on a juvenile offender. Mandatory registration "is retributive in that it looks back at the offense (and nothing else) in imposing its restrictions, and it marks registrants as ones who cannot be fully admitted into the community." *Snyder*, 834 F.3d at 704. But even where severe sanctions are justified as an expression of condemnation and to correct the moral imbalance caused by an offense, the "heart of the

retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Graham*, 560 U.S. at 71 (citation omitted). Therefore, "the case for retribution is not as strong with a minor as with an adult." *Roper*, 543 U.S. at 571. A premise underlying *Roper* is that "[r]etribution is not proportional if the law's most severe penalty is imposed" on a juvenile. *Id*. Even if sex-offender registration is justified, mandating that a child abide by *the most severe* registration requirement—registering *for life*—cannot be justified by retribution in light of the reduced culpability of juveniles.

Nor does deterrence justify the mandatory, lifetime registration requirement imposed on T.B. "*Roper* noted that 'the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." *Graham*, 560 U.S. at 72 (quoting *Roper*, 543 U.S. at 571). Although deterring recidivism is the "professed purpose" of sex-offender registration, "it does not in fact appear to do so." *Snyder*, 834 F.3d at 704. This is particularly true when applied to juveniles, who lack the maturity, foresight, and ability to resist peer pressure required to produce effective deterrence. *Graham*, 560 U.S. at 72.

Incapacitation is also insufficient to justify mandatory, lifetime registration. To justify a punishment "on the assumption that the juvenile offender forever will be danger to society" requires "a judgment that the juvenile is incorrigible."

Graham, 560 U.S. at 72. "The characteristics of juveniles make that judgment questionable," as even experts cannot accurately identify "the rare juvenile offender whose crime reflects irreparable corruption." *Id*. at 72-73. Rather, "incorrigibility is inconsistent with youth." *Id*. at 73 (citation omitted). Thus, even if there once existed a valid interest in incapacitating T.B. for some period by requiring him to register as a sex offender, "it does not follow that he would be a risk to society for the rest of his life." *See id*. CSORA's registration mandate "was still disproportionate because that judgment was made at the outset" and T.B. has been deprived of any "chance to demonstrate growth and maturity." *See id*.

Finally, lifetime registration is the antithesis of rehabilitation. It fails to give any credence to the reality that juveniles can, and do, change. *See Graham*, 560 U.S. at 74 (lifetime penalty "foreswears altogether the rehabilitative ideal"); *C.P.*, 967 N.E.2d at 742 ("Lifetime registration and notification requirements run contrary to [the] goals of rehabilitating the offender and aiding in his mental and physical development."). By mandating that twice-adjudicated juveniles register for life with no opportunity to petition for discretionary relief, CSORA "makes an irrevocable judgment about that person's value and place in society" that is "not appropriate in light of" a juvenile's "capacity for change and limited moral culpability." *See Graham*, 560 U.S. at 74.

In sum, "penological theory is not adequate to justify" the imposition of mandatory, lifetime registration on juveniles adjudicated of more than one sexual offense. *See id*. Absent such justification, CSORA "results in the gratuitous infliction of suffering," *Gregg*, 428 U.S. at 183, and therefore violates the Eighth Amendment's proscription against cruel and unusual punishments.

iv. Summary and conclusion.

Given the lack of penological justifications, the diminished culpability of juveniles, and the severity of the effects of mandatory, lifetime registration on children, this Court should hold that requiring juveniles adjudicated of more than one sexual offense to register for life is cruel and unusual punishment. *See Graham*, 560 U.S. at 74. The Eighth Amendment "prohibit[s] States from making the judgment at the outset" that certain juvenile offenders "never will be fit to reenter society." *Id*. at 75. As is true for life without parole, the government must give juveniles like T.B. "some meaningful opportunity" to discontinue registration "based on demonstrated maturity and rehabilitation." *See id*. at 75.

"The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Id*. at 79. In contrast, mandatory, lifetime registration deprives juveniles of any chance for complete reintegration into society, and therefore of any hope. *See id*.

Under CSORA, T.B. will have to live every day of the rest of his life without any meaningful opportunity to obtain relief from the many burdens of sex-offender registration, "no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes." *Graham*, 560 U.S. at 79. Based on an offense to which he pleaded guilty when he was just 11 years old, the legislature has denied him any chance to demonstrate he is fit to be fully integrated into society. This Court should hold that the mandatory-lifetime-juvenile-registration provision of CSORA violates the Eighth Amendment and article II, section 20 of the Colorado Constitution.

CONCLUSION

For all these reasons, this Court should hold that CSORA's mandatory-lifetime-registration requirement is unconstitutional when applied to juveniles.

Respectfully submitted this 23rd day of May 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2017, I electronically filed the foregoing **OPENING BRIEF** using the Colorado Courts E-Filing system, which will send notification of such filing to the Office of the Attorney General.

s/ Amy D. Trenary
Amy D. Trenary

APPENDIX A

Jurisdictions That Do Not Allow Mandatory Lifetime Registration for Adjudicated Juveniles Under Age 14

	Jurisdiction	Summary	Citations
1	Alabama	Allows for juvenile mandatory lifetime registration, but prohibits imposing it on juveniles under the age of 14.	Ala. Code § 15-20A-28(a)
2	Alaska	No registration for any adjudicated juveniles.	Alaska Stat. §§ 12.63.010(a), 12.3.100(3)
3	Arizona	Juvenile registration automatically terminates at age 25.	Ariz. Rev. Stat. § 13-3821(D)
4	Arkansas	Juvenile registration automatically terminates 10 years after the last date on which the juvenile was adjudicated delinquent or found guilty as an adult of a sex offense or until the juvenile turns 21 years of age, whichever is longer.	Ark. Code § 9-27-356(j)
5	Connecticut	No registration for any adjudicated juveniles.	Conn. Gen. Stat. §§ 54-252(a), 54-250(1)
6	Delaware	Allows for juvenile mandatory lifetime registration, but prohibits imposing it on juveniles under the age of 14.	Del. Code tit. 11, §§ 4123(c)(1)
7	District of Columbia	No registration for any adjudicated juveniles.	D.C. Code §§ 22-4001(3)(A), 22-4002
8	Florida	No registration for any adjudicated juveniles under age 14.	Fla. Stat. § 943.0435(1)(h)(1)(d)
9	Georgia	No registration for any adjudicated juveniles.	Ga. Code § 42-1-12(a)(20)(C)
10	Hawaii	No registration for any adjudicated juveniles.	Haw. Rev. Stat. §§ 846E-1, 846E-2
11	Idaho	No registration for any adjudicated juveniles under age 14.	Idaho Code § 18-8403

	Jurisdiction	Summary	Citations
12	Illinois	An adjudicated juvenile may petition for termination of registration 2 to 5 years after adjudication, subject to judicial discretion based on risk to the community.	730 Ill Comp. Stat. 150/3-5(c)-(e)
13	Indiana	No registration for any adjudicated juveniles under age 14.	Ind. Code § 11-8-8-5(b)(2)(A)
14	Kansas	Registration for adjudicated juveniles under the age of 14 automatically terminates at age 18, or 5 years after adjudication or release from confinement, whichever occurs later. Judges also have discretion to relieve juveniles under 14 from any registration requirement upon finding substantial and compelling reasons.	Kan. Stat. § 22-4906(f)
15	Kentucky	No registration for any adjudicated juveniles.	Ky. Rev. Stat. § 17-510(6)
16	Louisiana	No registration for any adjudicated juveniles under age 14.	La. Stat. § 542(A)(3)
17	Maine	No registration for any adjudicated juveniles.	Me. Rev. Stat. tit. 34-A,§ 11273(17)-(19)
18	Maryland	No registration for any adjudicated juveniles under age 13. Juvenile registration automatically terminates at age 18 or whenever the juvenile court is divested of jurisdiction.	Md. Code, Crim. Proc. §§ 11-704.1(b)
19	Michigan	No registration for any adjudicated juveniles under age 14.	Mich. Comp. Laws § 28.722(b)(iii)
20	Mississippi	No registration for any adjudicated juveniles under age 14.	Miss. Code § 45-33-25(1)(a)
21	Missouri	No registration for any adjudicated juveniles under age 14.	Mo. Stat. § 589.400(6)
22	Nebraska	No registration for any adjudicated juveniles.	Neb. Rev. Stat. § 29-4003(1)(a)-(b)
23	Nevada	No registration for any adjudicated juveniles under age 14.	Nev. Rev. Stat. § 62F.220(1)

	Jurisdiction	Summary	Citations
24	New Hampshire	Registration terminates when the juvenile court's jurisdiction ends at age 18 or (if extended) age 21.	N.H. Rev. Stat. §§ 169-B:4(IV)(d), 169-B:19(I)(k), 169-B:19(III-a)(f), (VI)
25	New Jersey	Allows for juvenile mandatory lifetime registration, but prohibits imposing it on juveniles under the age of 14.	*In re Registrant J.G.*, 777 A.2d 891, 910-12 (N.J. 2001)
26	New Mexico	No registration for any adjudicated juveniles.	N.M. Stat. § 29-11A-3(B)
27	New York	No registration for any adjudicated juveniles.	N.Y. Correct. Law §§ 168-a(1)-(2), 168-f(1)
28	North Carolina	Juvenile registration automatically terminates at age 18 or once the juvenile court's jurisdiction ends, whichever occurs first.	N.C. Gen. Stat. § 14-208.30
29	Ohio	No registration for any adjudicated juveniles under age 14.	Ohio Rev. Code § 2152.86(A)
30	Oklahoma	No registration for any adjudicated juveniles under age 14.	Okla. Stat. tit. 10A, § 2-8-102
31	Oregon	Registered juveniles may petition to end registration 30 days to 2 years after the end of the juvenile court's jurisdiction.	Or. Rev. Stat. § 163A.130(2)(a)-(b), (4), (9)(a)
32	Pennsylvania	No registration for any adjudicated juveniles under age 14.	42 Pa. Stat. § 9799.12
33	Rhode Island	Juveniles must register for 15 years unless the court exercises discretion to order an alternate period of registration based on community protection and rehabilitation of the juvenile.	R.I. Gen. Laws § 11-37.1-4(j)
34	South Dakota	No registration for any adjudicated juveniles under age 14.	S.D. Codified Laws § 22-24B-2

	Jurisdiction	Summary	Citations
35	Texas	Juvenile registration requirements end 10 years after disposition or after the juvenile competes the terms of the disposition, whichever is later.	Tex. Crim. Proc. Code § art. 101(c)(1)
36	Utah	Juveniles must register for the duration of any sentence or custody imposed and for 10 years thereafter.	Utah Code § 77-41-105(3)(a)
37	Vermont	No registration for any adjudicated juveniles.	Vt. Stat. tit. 13, § 5401(10)
38	Virginia	No registration for any adjudicated juveniles under age 14.	Va. Code § 9.1-902(G)
39	Washington	Juveniles may petition for relief from the duty to register, subject to judicial discretion.	Wash. Rev. Code. § 9A.44.143
40	West Virginia	No registration for any adjudicated juveniles.	W. Va. Code § 15-12-2(b)
41	Wisconsin	Juvenile court has discretion to exempt juveniles from registration requirements contingent on the juvenile's satisfactory compliance with conditions specified in a dispositional order.	Wis. Stat. § 938.34(16); *In re Cesar G.*, 682 N.W.2d 1, 10 (Wis. 2004)
42	Wyoming	Juveniles may petition to discontinue registration after maintaining a clean record for 10 years.	Wyo. Stat. § 7-19-304(a)(i), (d)
43	United States (federal)	No registration for any adjudicated juveniles under age 14.	42 U.S.C. § 16911(8)