IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DOCKET NO. 09-2144

MARYJO MILLER, individually and on behalf of her minor daughter, MARISA MILLER; JAMI DAY, individually and on behalf of her minor daughter, GRACE KELLY; JANE DOE, individually and on behalf of her minor daughter, NANCY DOE,
Appellees

v.

GEORGE SKUMANICK, Jr., in his official capacity as District Attorney of Wyoming County, Pennsylvania,
Appellants

BRIEF OF JUVENILE LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI*[1]

Juvenile Law Center[2] et al., work with, and on behalf of, adolescents in a variety of settings and at every stage of the juvenile and criminal justice process. *Amici*[3] are advocates and researchers who bring a unique perspective and a wealth of experience in providing for the care, treatment, and rehabilitation of youth in the juvenile justice systems, tying in principles of adolescent development and social science. *Amici* have a unique perspective on minors who come into contact with the juvenile justice system because of allegations of delinquent behavior. Collectively, *Amici* share a concern that the District Attorney is misapplying the law to prosecute acts that are consistent with normal adolescent behavior. Furthermore, the questions of law before this Court are closely tied to important and pressing public policy concerns related to appropriate care for children.

SUMMARY OF ARGUMENT

Courts have long recognized the utility of social science research to address youths' aberrant behavior. Research on adolescent sexual development suggests that teens often use technology to express themselves. Sexting is merely the

[1] A complete list of *amici* appears at Appendix A.

[2] The authors would like to extend their gratitude to Kristina Moon for her assistance with this brief.

[3] *Amici* file this brief with consent of Appellee and accompanying motion for leave to file pursuant to F.R.A.P. 29. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

newest form of doing this. Prosecuting these cases as child pornography misapplies the law, using it as a sword and not a shield to protect exploited child victims. By sending more youth into the juvenile delinquency system for behavior that is consistent with their normal adolescent development unnecessarily exposes youth to possible sex offender registration and further collateral consequences of adjudication. Amici argue that the United States District Court for the Middle District of Pennsylvania correctly granted Appellee's motion for temporary restraining order and held that District Attorney Skumanick was enjoined from initiating criminal charges against Appellees.

ARGUMENT

I. The Juvenile Justice System Has Traditionally Recognized That Not All Unwise Juvenile Behavior Should Be Criminalized.

Unwise juvenile behavior is not always criminal behavior, and our justice system recognizes the difference. The United States Supreme Court has acknowledged that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *Thompson v.*

Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion). For over a century, the belief that child offenders are less culpable has justified the juvenile court's discretion both to spare children the types of punishments that adult criminals receive for similar crimes, and order individualized dispositions for children to promote their rehabilitation. Courts have increasingly relied on research about adolescent behavior and brain development to underscore the importance of juvenile court discretion. In *Roper v. Simmons*, the Supreme Court highlighted recent research on adolescent behavior that supports the view that child offenders are less culpable and more capable of reform than adults who commit similar crimes. 543 U.S. 551 (2005). The *Simmons* Court declared the juvenile death penalty unconstitutional in part because child offenders, as compared to adult criminals, are less culpable and more capable of reform. In arguing that adolescent offenders are less culpable, the Court cited research demonstrating that adolescents are generally more "impetuous" than adults and are thus "overrepresented statistically in virtually every category of reckless behavior." *Simmons*, 543 U.S. at 569 (citing J. Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992)).

The *Simmons* Court also recognized that "juveniles are more vulnerable or susceptible to negative influences and outside pressures,." *id*. at 569 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982), and cited research

demonstrating "juveniles have less control, or less experience with control, over their own environment." *Id*. at 569 (citing Laurence D. Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). Research shows that adolescents are generally less aware of risks because they have less knowledge and experience than adults, and they typically discount the long-term consequences of their decisions because of a developmental difference in temporal perspective. Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, *in* Youth on Trial: A Developmental Perspective on Juvenile Justice 304 (2000).

Today, many American teenagers engage in "sexting," a practice described by the District Court for the Middle District of Pennsylvania in these proceedings as the "sending or posting [of] sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet." *Miller v. Skumanick*, No. 3:09cv540, slip op. at 1-2 (M.D. Pa. Mar. 30, 2009). A study conducted in 2008 by The National Campaign to Prevent Teen and Unplanned Pregnancy brought the phenomenon within the national spotlight and created media frenzy. *See* The National Campaign to Prevent Teen & Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults* [hereinafter *Sex and Tech Survey*] (2008), *available at*

http://www.thenationalcampaign.org; *see e.g.*, Stacey Garfinkle, *Sex + Texting = Sexting*, WashingtonPost.com, Dec. 10, 2008, http://washingtonpost.com; Ellen Goodman, *Is 'Sexting' Same as Porn?*, Boston Globe, Apr. 24, 2009, *available at* http://www.boston.com; Chana Joffe-Walt, *"Sexting": A Disturbing New Teen Trend?*, (National Public Radio: All Things Considered radio broadcast Mar. 11, 2009), *available at* http://www.npr.org. The most common scenario for sexting involves the teen subject taking a photograph of herself using a cell phone camera and sending that photo via text message to a boyfriend, who often indiscreetly shares the photo with others in the same manner. *See e.g.*, *Sex and Tech Survey* at 2 (reporting majority of teen girls and boys who have sent sexually suggestive content did so to a boyfriend or girlfriend); Garfinkle, *supra* (describing how photos were spread among classmates in high schools). It is representative of the typically short-sighted judgment of adolescents to take a digital photograph of oneself semi-nude and send it to another adolescent without considering the probability that the photograph will be shared with others not originally intended. [4]

A. Sexting Represents The Convergence Of Technology With Adolescents' Developmental Need To Experiment With Their Sexual Identity And Explore Their Sexual Relationships.

[4] It is important to note that in the instant case, these were not the facts. Appellees here deny sending the photos in question to any third party. The photographs were discovered when the Appellees' cell phones were confiscated by the school. *Miller*, No. 3:09cv540, slip op. at 2, 7-8.

"[A] vital part of adolescence is thinking and experimenting with areas of sexuality. It is through experimentation and risk-taking that adolescents develop their identity and discover who they will be." Lynn E. Ponton & Samuel Judice, *Typical Adolescent Sexual Development,* 13 Child Adolescent Psychiatric Clinics N. Am. 497, 508 (2004). As teens gradually become aware of their sexuality, they frequently feel the need to share information about their experiences with others. *Id*. at 503. Sexting is the result of a unique combination of the well-recognized adolescent need for sexual exploration and the new technology that allows teens to explore their sexual relationships via private photographs shared in real-time.

Technology allows teenagers to negotiate this important task of exploring their sexual identity while avoiding the embarrassment of doing so face-to-face. Just as teens have long used the telephone to investigate dating and sexuality because it allows interaction while concealing blushing or other body language, naturally today's youth are adept at using recent technology, including text messages, for the same purposes. *See* Linda C. Mayes & Donald J. Cohen, *The Yale Child Study Center Guide to Understanding Your Child: Healthy Development from Birth to Adolescence* 532 (2003) (explaining significance of telephone for dating teens); J. Alison Bryant, et al., *IMing, Text Messaging, and Adolescent Social Networks,* 11(2) J. Computer-Mediated Communication, http://jcmc.indiana.edu/vol11/issue2/bryant.html ("Young people's use of

technology to communicate with one another is certainly nothing new. . . . What has changed in the past decade, however, is the form that communication takes."); Peter E. Cumming, Conference Paper presented at 78th Congress of the Humanities and Social Sciences at Carleton University: *Children's Rights, Children's Voices, Children's Technology, Children's Sexuality* 8-9 (May 26, 2009) (arguing sexting is similar to other generations' sexual exploration when contextualized).

For today's adolescents, technology is an inseparable part of life. This generation, currently aged eleven to thirty-one, (born between 1977 and 1997) has been called the "Net Generation" while others refer to them as "Millenials" or "Generation Y." Don Tapscott, *Grown Up Digital: How The Net Generation Is Changing Your World* 16-17 (2009). These young people are the "first generation to be bathed in bits" – they have come to "view technology as just another part of their environment, and they soak[] it up along with everything else. . . . as natural as breathing." *Id*. at 18 (analogizing that just as Boomers do not marvel at TV, neither are today's youth fascinated by the internet – they just surf it). Teenagers are wired into multiple technologies every day, largely for the purpose of communicating and sharing with their peers. *See* Common Sense Media, *Is Social Networking Changing Childhood? A National Poll* (Aug. 10, 2009) http://www.commonsensemedia.org (reporting 22% of teenagers check social network sites like Facebook more than ten times a day, and 51% check more than

once daily); Stefanie Olsen, *Study: Tykes, Teens Outdo Adults on YouTube*, CNET News, Jun. 9, 2008, http://news.cnet.com (reporting teens aged 12-17 watched an average of 74 online video streams in one month, more than other age groups).

The cell phone is the most direct and most widely used mode of communication between young people. Seventy-one percent of teens own a cell phone (up from 63% in 2006) and 76% of teens have sent text messages – in fact, 25% of teens aged 12-14 text daily and 51% of teens aged 15-17 text daily. Pew Internet & American Life Project, *Teens and Mobile Phones Over the Past 5 Years: Pew Internet Looks Back* 5, 8 (2009). Research shows it is common for adolescents to use cell phones and text messages as a form of relationship maintenance and day-to-day communication. Bryant, *supra*.

Generally sexting occurs within and among the adolescent's own community of peers. The only survey yet conducted on the topic of sexting reported that 20% of the teens surveyed have electronically sent or posted online a nude or semi-nude picture or video of themselves. *Sex and Tech Survey*, at 1. Most teen sexting is sent between partners of a relationship (i.e. between boyfriend and girlfriend), or to someone the sender is interested in dating. Seventy-one percent of teen girls and 67% of teen boys who have sexted say they sent this content to a boyfriend or girlfriend. *Id*. at 2. Another 21% of teen girls and 39% of teen boys say they sent such content to someone they wanted to date or hook up with. *Id*. Youths'

responses highlight that the usual purpose and motivation of sexting is normal adolescent sexual exploration. Among teens that have sent nude or semi-nude text messages, 66% of girls and 60% of boys say they did so to be "fun or flirtatious," 52% of girls did so as a "sexy present" for their boyfriend," 40% of girls said they sent sexually suggestive texts as a "joke" and 34% did so to "feel sexy." [5] *Id*. at 4.

B. Sexting Prosecutions Are An Abuse Of Prosecutorial Discretion And Are Inconsistent With The Juvenile Act's Purpose Of Providing Rehabilitation And Treatment.

Because sexting is only the most recent and technology–inspired expression of normal adolescent behavior, the prosecution of it is contrary to the purpose of the juvenile justice system. The creation of a separate juvenile court was intended to promote the reformers' rehabilitative goal in two ways—by diverting child offenders from the criminal justice system and by intervening in the lives of child offenders to address the alleged causes of their delinquency. *See* Franklin E. Zimring, *American Juvenile Justice* 34 (2005). Diversion from the criminal justice system, in and of itself, was believed to promote the rehabilitation of juvenile offenders by providing them with "room to reform." *See id*. at 35-38, 62-64. By diverting children from the criminal justice system, the juvenile court spared

[5] The opportunity for negative peer pressure is obvious, and 12% of teen girls surveyed reported feeling "pressured" to send nude or semi-nude texts. *Sex and Tech Survey* at 4. Unfortunately, this vulnerability to peer pressure is also consistent with typical adolescent sexual development, and more importantly is not dependent on sexting or other technology.

children from some of the features of the criminal justice system that would have disrupted or hampered their development. For example, the juvenile court has broad discretion to divert children from the juvenile justice system. When a child is referred to the juvenile court, an intake officer—typically a probation officer—can exercise significant discretion in deciding whether the child's case should be dropped or referred to a different system, such as the mental health system. The intake officer can choose to make this decision on the basis of a variety of factors, including the child's age, offense, attitude, and prior history. *See* Robert G. Schwartz, *Juvenile Justice and Positive Youth Development*, *in* Youth Development: Issues, Challenges and Directions, 233, 245 (Public/Private Ventures, 2000). While the criminal justice system focused on punitive responses to crime, the juvenile system was developed in large part to facilitate the opportunity for juveniles to reform and become productive citizens. *In re Gault*, 387 U.S. 1, 15-16 (1967). The court's rehabilitative focus was premised on the assumption that a juvenile's actions were primarily the function of his or her environment and therefore did not warrant a punitive response: "[r]eprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control. . . . [A juvenile delinquent's] conduct is not deemed so blameworthy that punishment is required to deter him or others." *McKeiver v. Pennsylvania*, 403

U.S. 528, 551-52 (1971) (White, J., concurring).

In our current juvenile system, there are many ways a case can be diverted out of court in order to assure the child does not penetrate deeper into the court system and thereby suffer great consequences from adjudication. One such way in Pennsylvania is by offer of an informal adjustment. Under the Juvenile Court Rules of Procedure and Juvenile Act, an informal adjustment effectively removes a child from juvenile court jurisdiction prior to filing a petition alleging delinquency. 42 Pa.C.S. § 6323 (West 2009); *Commonwealth v. J.H.B.*, 760 A.2d 27, 28 (Pa. Super. 2000). Because no charging document or petition has been filed, the proceedings have not yet commenced.[6] *See* 42 Pa.C.S. § 6323; Pa.R.J.C.P. 312.

Informal adjustments are generally offered by the Juvenile Probation Officer at the time of intake and assessment. 42 Pa.C.S. § 6323(a)(1). The Juvenile Act also allows another designated individual, upon authority of the Court, to authorize an informal adjustment. *Id*. One of the traditional features of the juvenile court system is the intake screening process, where one function of the Juvenile Probation Officer is to decline cases which would be within its jurisdiction. Stanford J. Fox, *Intake and Diversion*, *in* Juvenile Courts, chap. IV § 30, at 141 (3d ed. 1984). The intake function, essentially, has merged with the more recently

[6] Appellant's argument that this Court should not hear this case under principles of abstention is inappropriate. The petition of delinquency is the predicate act on which proceedings commence in juvenile court. Because no petition has yet been filed, there are not two ongoing proceedings in state and federal court.

developed practice of diversion. "The intake official is usually required to conduct some sort of inquiry or investigation before reaching a decision. This may include a conference with the child, his parents and the person making the complaint in order to determine if a result satisfactory to all the parties can be reached (the case "adjusted" in common parlance) without a formal petition invoking the jurisdiction of the court." *Id*. at 143-44. While the Juvenile Act does not explicitly require minors to consent to informal adjustments, the Pennsylvania Superior Court has asserted what process is undertaken "flows from the consent of the child and his parent." *J.H.B.*, 760 A.2d at 32. A consent requirement is consistent with the underlying purpose of informal adjustments, which is to "provide assistance, counseling and supervision." *Id*. Informal adjustments are not meant to be punitive in nature, but, rather, are meant to "invoke[] the court's social service and supervisory resources without implicating the court's formal and coercive powers, including the power to commit the child to custody or confinement." *Id*.

In the instant case, District Attorney Skumanick sought to deal with the Appellees through an offer of informal adjustment. While District Attorney Skumanick has claimed that he used the offer of informal adjustment to the Appellees to provide a social service, he appears to have used his coercive power as district attorney in order to do so. He did not consult with the individuals and their parents prior to determining whether the offer of informal adjustment was the

best course of action. Furthermore, he did not engage the parents in a discussion to determine what steps they may or may not be taking to address their children's behavior.[7] Moreover, by criminalizing this action, that is consistent with normal adolescent behavior, the district attorney is using the law not as a shield but a sword. As with any informal adjustment, if the Appellees do not meet all the expectations of District Attorney Skumanick's informal adjustment, or are unable to pay the costs he has determined are appropriate to complete his reeducation course, a petition will be filed and they will be prosecuted in juvenile court. If the Appellees lose their case at trial, they will be subject to all the direct and collateral consequences attendant to an adjudication of delinquency. *See infra* Part II.

C. Child Pornography Laws Are Intended To Protect Victims And Prosecuting Sexting As Child Pornography Is Inconsistent With The Stated Purpose And Legislative Intent Of These Laws.

Child pornography laws are meant to prevent the sexual abuse of children necessarily present in the making of child pornography. In Pennsylvania, the relevant 'child pornography' statute, 18 Pa.C.S. § 6312, is titled "Sexual Abuse of

[7] The Fourteenth Amendment guarantees parents the right to control the care and upbringing of their children. *See Troxel v. Granville*, 530 U.S. 57, 65-67 (2000) (plurality) (recognizing substantive due process right of parents to the primary care and control of their children); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (same); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (same); *Anspach ex rel. Anspach v. City of Phila. Dep't of Pub. Health*, 503 F.3d 256, 261 (3d Cir. 2007) (same); *Gruenke v. Seip*, 225 F.3d 290, 303-04 (3d Cir. 2000) (same). By offering an informal adjustment as a mechanism to deal with normal adolescent behavior, District Attorney Skumanick interfered with this right.

Children." Sexting, in comparison, generally involves only normal adolescent self expression without the exploitative circumstances that are implicit in the production of conventional child pornography. Sexting usually entails the subject taking a photograph of herself, or voluntarily asking a friend to take the photograph for her, and therefore lacks the exploitative element implicit in the laws prohibiting child pornography. To charge sexting as child pornography, a prosecutor must blatantly disregard the obvious purpose and intent of the laws enacted to protect children from those who would exploit them.

1. Sexting Does Not Implicate The Compelling Child Protection Justification Prompting Criminalization Of Child Pornography.

Legislatures and courts stress the harm that minors suffer when they are used in the creation of pornographic material, yet it is precisely this exploitative harm that is absent from the usual sexting scenario in which an adolescent voluntarily takes a photograph of herself (or asks another to do so) and shares the photograph with a boyfriend or girlfriend.[8] The United States Supreme Court emphasized the harm to the "physiological, emotional, and mental health of the child" when categorically exempting child pornography from the First Amendment protection

[8] This case does not implicate the possible prosecution of one who widely disseminates a sext-message that was received from the subject or a third party. District Attorney Skumanick threatened felony charges of the Appellees who are subjects-only of the alleged pornographic images, and did not disseminate the material themselves.

that adult pornography receives. *New York v. Ferber*, 458 U.S. 747, 758 (1982); *U.S. v. Goff*, 501 F.3d 250, 259 (3d Cir. 2007)(citing *Ferber* for the harm caused to children in child pornography). The Court has stated the reason possession of child pornography is prohibited is to "protect the *victims* of child pornography . . . to destroy [the] market for the *exploitative* use of children." *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (emphasis added); *Commonwealth v. Davidson*, 938 A.2d 198, 215 (Pa. Super. 2007) (finding the purpose of § 6312 is "plainly to protect children, end the abuse and exploitation of children, and eradicate the production and supply of child pornography").

Recently, in *Ashcroft v. Free Speech Coalition*, the Court reaffirmed that it is the harm to children used in the production of child pornography that is the root of the *Ferber* exception. 535 U.S. 234, 241-42 (2002); *see* Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 Va. J. Soc. Pol'y & L. 505, 519 (2008). In *Free Speech Coalition*, the Court rejected arguments supporting the prohibition of pornography that uses "virtual" children or adults who appear to be minors, as inconsistent with *Ferber*'s child protection justification. *Free Speech Coalition*, 535 U.S. at 249. The government argued that though no children were sexually abused in the making of the images, there remained a potential harm to children based on the possibility that the images might cause pedophiles to molest children or be used by pedophiles to groom

children. *Id*. at 251-52. The Court dismissed this as "indirect" because the harm "does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." *Id*. at 250, 253. The Court characterized the interests in prohibiting child pornography as "anchored . . . in the concern for the participants [in the production], . . . the '*victims* of child pornography.'" *Id.* at 250 (quoting *Osborne*, 495 U.S. at 110)(emphasis added).

In the practice of sexting, there are often no exploited *victims*[9] as there are in conventional child pornography – the youth voluntarily take and share text message photographs of themselves with their peers – and any prospective harm to youth would be "indirect" injury and dependent on "unquantified potential for subsequent criminal acts," and therefore squarely outside the *Ferber* exception to First Amendment protection.

2. Even If Sexting Did Qualify As Child Pornography, The Photographs In Question Do Not Rise To The Level Of Child Pornography Defined By The Statute.

In relevant part, Pennsylvania's child pornography statute prohibits photographing, disseminating photographs or other images, and possessing material that depicts a child engaged in a "prohibited sexual act." 18 Pa.C.S. §

[9] Given the facts of the instant case, there appears to be no basis for concern about the exploitation of minor Appellees that drives and animates child pornography laws. When children who send sext-messages are then later exploited by having their messages and photographs widely disseminated, there is no question that they then become victims of exploitation.

6312 (West 2009). The statute defines "prohibited sexual act" to include sexual intercourse, masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals, or nudity, "if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction." *Id.*[10]

The photographs in question – one depicting two girls from the torso up wearing opaque bras, and one showing a girl with a towel wrapped around her waist and bare breasts (Compl. ¶ 22, 36) – are firmly outside the statutory categories as they are defined by caselaw. There is no sexual activity of any kind portrayed in either photograph. The bare breasts visible in the photograph of Doe do not qualify as "genitals" under Pennsylvania case law. *Commonwealth v. Dewalt,* 752 A.2d 915, 918 (Pa. Super. 2000) (defining "genitals" as vagina, labia, vulva). The "nudity" provision of § 6312, with its qualifier, is the only category that requires further discussion but it too fails to encompass the photographs in question.

The United States Supreme Court has said that "[d]epictions of nudity, without more, constitute protected expression." *Osborne*, 495 U.S. at 112

[10] Recently introduced legislation would add language to § 6312 narrowing the possession offense to those who "intentionally" view child pornography which is defined as "the deliberate, purposeful, voluntary viewing of material" depicting a minor engaged in a prohibited sexual act. H.B. 89, 193rd Leg. (Pa. 2009), *available at* www.legis.state.pa.us.

(1990)(citing *Ferber*, 458 U.S. at 765). Pennsylvania's statute narrowly limits "nudity" to that "depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction." 18 Pa.C.S. § 6312(a). The Pennsylvania Supreme Court has directed that this provision be applied strictly to avoid fatal overbreadth. *Davidson*, 938 A.2d at 214. The "General Assembly made clear that it did not seek to punish individuals for viewing or possessing innocent materials containing naked minors. . . . As the U.S. Supreme Court explained in *Osborne*, the purpose of such language is to allow the 'possession or viewing of material depicting nude minors where that conduct is morally innocent.'" *Id*. at 215 (quoting *Osborne*, 495 U.S. at 113 n.10).

It is clear that the only conduct prohibited by the statute is conduct which is "*not* morally innocent, i.e., the possession or viewing of the described material for prurient purposes." *Osborne*, 495 U.S. 113 n.10. The images of Miller, Kelly, and Doe do not serve any prurient purposes and would therefore be outside the statute which the Pennsylvania Supreme Court affirmed "does not reach innocent family or artistic images of minors in a state of simple nudity." *Davidson*, 938 A.2d at 214.

Pennsylvania courts have applied § 6312 in circumstances where the prurient intent of the photographer is clear, and thus radically different from the voluntary personal expressions of sexting at issue here. Section 6312 "permits the

fact-finder to distinguish between depictions such as those in [*Commonwealth v. Savich*, where defendant videotaped multiple children changing and showering nude in a public bathhouse without their knowledge] from nude depictions taken for legitimate scientific, medical or educational activities." *Savich*, 716 A.2d 1251, 1256 (Pa. Super. 1998). The lines are clear – "[n]either law enforcement authorities nor the courts have discretion to charge or convict an individual for making [images] depicting child nudity for any purpose other than sexual gratification of the viewer." *Id*. "[P]roof of [the] purpose of personal gratification may be established by the circumstances surrounding the [creation of the image]." *Id*. at 1257.[11]

In a recent case, *Commonwealth v. Tiffany*, the court affirmed that context matters in determining the prurient intent required for § 6312's "nudity" provision. 926 A.2d 503 (Pa. Super. 2007). The defendant was tried for a number of photos depicting teen boys with their genitals exposed and smiling in provocative poses while swimming with the nude 44 year old defendant. *Tiffany*, 926 A.2d at 512. The court upheld a "common sense" conviction under § 6312 for a number of images that involved nudity of the minors but no explicit sexual acts based on the fact that these images were found among others that *did* depict explicit sexual acts,

[11] There is no evidence in the record to suggest that Appellees created the photographs in question for any purpose other than their own amusement and enjoyment. Further, they did not send the messages to third parties for gratification purposes.

holding this context proved that such nudity was for the purpose of sexual stimulation and gratification. *Id*. The court stressed that there was "no other logical or rational conclusion" under the circumstances. *Id*.

Application of these principles to the sexting of images showing a semi-nude Miller, Kelly, and Doe make clear that the "nudity" provision of § 6312 does not apply. The Appellees had no prurient intent when creating the images of themselves, as is evident by the context surrounding their production – an innocent sleepover for Miller and Kelly, and a private shower for Doe. The subjective "intent of the photographer" controls, *see Savich*, 716 A.2d at 1256, and none of the Appellees intended for the images to serve for another's sexual gratification. In contrast, the photographs were taken as an expression of normal adolescent sexual exploration, using recent technology that is intimately familiar to the adolescent Appellees.

3. The Prosecution Of The Subject Of Sexting As An "Accomplice" To Child Pornography Is Not Supported By The Statute, And Would Deter Real Victims From Reporting Their Abusers.

District Attorney Skumanick threatened prosecution of Appellees for being the *subject* of the photographs at issue, effectively arguing that Appellees acted as "accomplices" to child pornography. (Compl. ¶ 41.) However, being the subject of an alleged pornographic image is not itself a crime under the child pornography statute and neither is prosecution sustained by Pennsylvania's criminal accomplice

statute. *See* 18 Pa.C.S. § 6312 (prohibiting depicting a child in a prohibited sexual act, and disseminating or possessing images of the same); 18 Pa.C.S. § 603(f) (exempting liability for "victim" of the offense and those whose "conduct is inevitably incident" to the offense).

The statute seeks to protect minors manipulated and abused in the creation of child pornography, *supra* Part I.C.1 this purpose is not served by prosecution of an adolescent's consensual act of self expression via sexting. Rather, the threat of prosecution for appearing as a subject in alleged child pornography would serve to deter children who are real victims of exploitative sexual abuse in the production of video or photographic child pornography.

Pennsylvania's accomplice-liability statute exempts one from liability if he is "a victim of the offense," or if the offense as defined makes his conduct "inevitably incident" to the commission of the offense. 18 Pa.C.S. § 306(f). The youth depicted in child pornography is considered the "victim" of the offense, so it would be contrary to the statute to prosecute the victim-subject as an accomplice. § 306(f)(1). *See Free Speech Coalition*, 535 U.S. at 244 (recognizing child as victim in the creation of child pornography); *Osborne*, 495 U.S. at 110 (same); *Davidson*, 938 A.2d at 215(same); *infra* Part I.C.1. The United States Supreme Court has recognized that the participation of a minor subject is "inevitably incident" to the offense of child pornography in its holding that pornography made with "virtual"

minors does not qualify as child pornography. *See Free Speech Coalition*, 535 U.S. at 241. Children-subjects therefore are exempt from accomplice liability under § 6312. *See* 18 Pa.C.S. § 306(f)(2).

Further, exposing vulnerable, molested children to prosecution as accomplice to the atrocious crimes of their abusers serves no positive purpose and is instead likely to frighten children away from reporting their abuse for fear of being criminally charged themselves. Children who have suffered the terrible ordeal of sexual abuse in the creation of child pornography are often silent about the experience, and may blame themselves for the crimes of their abusers. Goodman-Brown, et al., *Why Children Tell: A Model of Children's Disclosure of Sexual Abuse*, 27(5) Child Abuse & Neglect 525, 528 (2003) (finding "[f]or many reasons, children who have been sexually abused may come to believe that they are at least partially responsible for their own abuse" and delay disclosure). Developmental factors, including the natural egocentrism of children, may cause children to assume responsibility for events in which they are involved, regardless of their role under the circumstances. *Id*.

The United States Supreme Court recently acknowledged that underreporting is already "a common problem with respect to child sexual abuse" and cited research reporting that about 88% of female rape victims under the age of 18 did not disclose their abuse to authorities. *Kennedy v. Louisiana*, 128 S.Ct.

2641, 2663 (2008) (finding death penalty violates Eighth Amendment where rape of child did not result in death of child) (citing Hanson, et al., *Factors Related to the Reporting of Childhood Rape*, 23(6) Child Abuse & Neglect 559, 564-65 (1999)(finding that 88% of female rape victims under the age of 18 do not report their abuse)). Research shows that children often weigh the consequences of their actions prior to disclosing abuse and are less likely to disclose sexual abuse if they blame themselves for the abuse. Goodman-Brown, *supra*, at 528, 537-38. A state policy of prosecuting the child exploited in the production of child pornography as an accomplice would further encourage children to blame themselves and deter disclosure.

Severe penalties for the production and distribution of child pornography are an appropriate response to the horrific abuse of children in the creation of child pornography. Significantly, the legislatures and courts that created this structure considered only 'conventional' child pornography, not 'self-produced'[12] child pornography—and they certainly did not consider the recent development of

[12] The term "self-produced child pornography" is used by Mary G. Leary to "refer to minors who produce images of themselves in sexually explicit poses or engaged in sexual conduct and display or distribute them to others." Mary G. Leary, *Self Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 Va. J. Soc. Pol'y & L. 1, 4 n.8 (2007). Leary advocates allowing prosecution of juveniles for self-produced child pornography without considering the important distinction between 'conventional' child pornography which presents a compelling child protection justification, and 'self-produced' child pornography in which minors freely choose to make pornographic images of themselves. Smith, *supra*, at 520.

sexting. *See e.g.*, Final Report of the Attorney General's Commission on Pornography 131-54 (1986) (reporting exhaustively on nature of child pornography problem in America with no mention of minors producing sexually explicit images of themselves). The distinction between 'conventional' child pornography and sexting is even more dramatic. The serious penalties designed for 'conventional' child pornography are inappropriate and disproportionate when applied to sexting.

II. The Prosecution of Sexting Cases Will Needlessly Push More Youth Into The Juvenile Justice System And Wrongfully Expose Them To Possible Collateral Consequences.

A. Juvenile Adjudications Of Delinquency Have Far-Reaching Consequences.

Although juvenile adjudications are not criminal convictions and therefore impose no civil disability stemming from convictions, records of juvenile court involvement can follow an individual through his or her adulthood. These collateral consequences hinder a juvenile's ability to productively reintegrate into society, impeding an individual's future housing, education, employment, and subsequent judicial matters. *See Juvenile Delinquency Records Handbook and Expungement Guide*, (Juvenile Court Judges' Commission 2008), *available at* www.jcjc.state.pa.us; *Juvenile Records Expungement: A Guide for Defense Attorneys in Pennsylvania*, (Juvenile Law Center 2007), *available at* www.jlc.org.

An adjudication of delinquency may hinder a juvenile's future plans to seek higher education, obtain employment, or enlist in the military. *See* Robert

Shepard, *Collateral Consequences of Juvenile Proceedings: Part II*, 15 Crim. Just. 41 (Fall 2000), *available at* http://www.abanet.org. An increasing number of college and financial aid applications inquire into juvenile adjudications, *id*. at 42, and certain drug offenses can make an individual ineligible for financial aid. Higher Education Act, Pub. L. No. 89-329, 79 Stat. 1219 (1965).

A juvenile's employment opportunities may also be limited by a delinquency adjudication. While historically juvenile adjudications have not been characterized as criminal convictions for purposes of employment applications, increasingly applications include specific references to juvenile adjudications. *See Shepard, supra*, at 42. In Pennsylvania, law enforcement records maintained by the State Police are accessible to employers. 42 Pa.C.S. § 6308. However, juvenile records may only be used for limited purposes by employers. The Crimes Code provides that felony and misdemeanor convictions may be considered by an employer only where they relate to the applicant's suitability for employment in the position for which s/he has applied. 18 Pa.C.S. § 9125(b).

Juvenile adjudications of delinquency may also preclude eligibility for enlistment in the military. Based on the U.S. Army's classification system, juvenile delinquency adjudications qualify as criminal offenses. A.R. 601-210(4-24). While each division of the military has distinct regulations governing the use of juvenile delinquency and criminal records, no division explicitly prohibits the

use of such records. A juvenile may request a moral waiver to enlist in the army; however, certain enumerated offenses render an applicant ineligible for waiver. *Id*.

In addition to creating barriers to successful future plans, juvenile adjudications also result in consequences affecting a youth's current livelihood. In Pennsylvania, juvenile adjudications can result in suspension or revocation of driving privileges. When a juvenile has been adjudicated of a felony offense where a vehicle was "essentially involved," his or her driver's license may be suspended for one year. 75 Pa.C.S. § 1532(a.1) (West 2009). Furthermore, the driver's license bureau may also suspend or revoke a juvenile's driver's license for certain acts committed on school property. 75 Pa.C.S. § 1532(c)(1). For juveniles who reside in rural communities where there is limited, if any, public transportation, the inability to drive may translate into an inability to work.

Adjudications of delinquency may also result in ineligibility for public benefits, including Temporary Assistance for Needy Families (TANF) and food stamps. Federal Welfare Reform Law, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, as amended by the Balanced Budget Act of 1987, Pub. L. No. 105-33, 111 Stat. 251. Finally, adjudication may have significant ramifications in subsequent judicial matters. A past juvenile adjudication "may affect sentencing in a future criminal proceeding." Michael Pinard, *The Logistical and Ethical Difficulties of Informing*

Juveniles about the Collateral Consequences of Adjudications, 6 NEV.L.J 1111, 1115 (2006). For example, Pennsylvania sentencing law permits calculations of a "prior record score" to include juvenile adjudications of delinquency. 204 Pa. Code § 303.7(a)(4).

B. Sexting Prosecutions May Result In Registration Under SORNA.

As demonstrated above, juvenile adjudications can have far-reaching consequences. This is especially true, however, when a juvenile is adjudicated delinquent for an offense categorized as a sexual offense or an offense that would require registration as a sex offender. Adjudications of delinquency for sex-related offenses may preclude an individual from retaining custody of his or her minor child if a dependency court finds that return of the child to the parent is not best suited for the child's safety, protection, physical, or moral welfare. 42 Pa.C.S. § 6351(f.1). Certain types of adjudications may also preclude an individual from approval as a foster or adoptive parent or from having a job that requires working with children, including jobs in education, child care, and service. *See* 23 Pa.C.S. § 6344 (West 2009) (describing grounds for denying employment as child care personnel).

In Pennsylvania, current sex offender registration laws do not require juveniles adjudicated delinquent to register as sex offenders on the statewide registry. However, the federal Adam Walsh Child Protection and Safety Act of

2006 specifically mandates juveniles be included in sex offender registries. Pub. L. No. 109-248, 120 Stat. 587, 593 (2006). According to the Adam Walsh Act, all states must "substantially comply" with the Sex Offender Registration & Notification Act (SORNA) requirements of the Walsh Act or risk forfeiting ten percent of the funds normally received from the federal Omnibus Crime Control and Safe Streets Act. 42 U.S.C. § 16925(a). Pennsylvania has introduced legislation attempting to comply, but this legislation is still pending. *See* S.B. 428, 193rd Leg. (Pa. 2009), *available at* www.legis.state.pa.us. Under SORNA, child pornography statutes would likely be placed into a Tier II or Tier III categorization of sexual offenses requiring registration. *See id*. (mandating 25 years registration for a person convicted of § 6312). Ohio, for example, which is farthest along in its substantial compliance legislation with SORNA, has several child pornography statutes comparable to Pennsylvania and would be placed in Tier II or III. Letter from Laura Rogers, Director, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) to Nancy Rogers, Ohio Attorney General (Jan. 16, 2009), *available at*, http://www.opd.ohio.gov. Under the mandate of SORNA, Tier II or Tier III classification could result in registration for 25 years to life, and require in-person "show-ups" two to three times each year, while failing to register can subject the person to a maximum term of imprisonment greater than one year. 42 U.S.C. §§ 16913(e), 16915, 16916.

Registration pursuant to SORNA can result in restrictions on the individual's residency, employment, and higher education. For example, adjudications may disqualify juveniles from obtaining public housing. *See generally* Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities be Notified?*, 79 N.Y.U. L. Rev. 520 (2004). Housing authorities routinely conduct background checks for adult applicants and may "investigate whether any member of the family unit, including a juvenile member, has been convicted of specific disqualifying offenses." Pinard, *supra*, at 1114. While juvenile records are often inaccessible, "there is evidence that some housing authorities attempt to screen for juvenile records despite state laws that limit or deny access." Henning, *supra*, at 570. Juveniles adjudicated delinquent for sexual offenses who are required to register as sex offenders may have their housing options limited by community notification provisions. Sex offenders subject to community notification requirements may often find themselves with limited, undesirable housing options when community members mobilize around campaigns to prevent registered sex offenders from moving into their neighborhoods.

Furthermore, a minor trying to readjust to normal life will experience extreme hardship because registration makes their name, picture and offense available to the public, including their classmates and the press via the internet. A

minor who made semi-nude images of herself is very likely to be subject to harassment and assault by other students. Smith, *supra*, at 537-38.

Although SORNA has not yet been implemented in Pennsylvania, the Appellees in this case may still be required to register as sex offenders in other states pursuant to each state's SORNA-implementing legislation. If Appellees' acts are deemed child pornography under other state statutes, and Appellees move into one of these states, they could be required to register as sex offenders. For example, neighboring states Ohio and Delaware have already passed legislation to be "in compliance" with SORNA and require juveniles adjudicated of a sex offense in another state to register as a sex offender. 29 Ohio R.C. § 2950.01(11) (West 2009) (requiring registration for violation of law from another state substantially similar to sex offenses in Ohio); 11 Del. C. § 4120(e)(1)(West 2009) (same). This complicating risk is of particular relevance for youth because they are likely to move to neighboring states to attend college or pursue job opportunities.

CONCLUSION

For the foregoing reasons, *Amici Curiae*, Juvenile Law Center et al., respectfully request that this Court uphold the decision of the District Court for the Middle District of Pennsylvania granting the temporary restraining order against District Attorney Skumanick and enjoining him from initiating criminal prosecution.

APPENDIX A

Complete List and Descriptions of *Amici Curiae*

Juvenile Law Center (JLC), one of the oldest public interest law firms for children in the United States, was founded in 1975 to advance the rights and well-being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies: for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. Information about JLC, including downloadable versions of publications and amicus briefs, is available at www.jlc.org.

The **Juvenile Defenders Association of Pennsylvania, Inc.** was formed for the following purposes to promote quality and ethically mandated representation for all juveniles charged with acts of delinquency in the Commonwealth of Pennsylvania: to provide a forum and opportunity to be heard and to organize those persons responsible for the defense of children charged with delinquent acts, to coordinate all delinquency defense providers in the Commonwealth and to promote legislative, administrative and judicial change in the Commonwealth to enhance the ethical representation of children charged with delinquent conduct, and to

provide for the resource and training needs of the membership whenever possible to enhance the quality of representation.

The **Northeast Regional Juvenile Defender Center (NRJDC)** is dedicated to increasing access to justice for and the quality of representation afforded to children caught up in the juvenile and criminal justice systems. Housed jointly at Rutgers Law School - Newark and the Defender Association of Philadelphia, the NRJDC provides training, support, and technical assistance to juvenile defenders in Pennsylvania, New Jersey, New York, and Delaware. The NRJDC also works to promote effective and rational public policy in the areas of juvenile detention and incarceration reform, disproportionate confinement of minority children, juvenile competency and mental health, and the special needs of girls in the juvenile justice system.

The **Rutgers Urban Legal Clinic**, a clinical program of Rutgers Law School – Newark, was established over thirty years ago to assist low-income clients with legal problems that are caused or exacerbated by urban poverty. The Clinic's Criminal and Juvenile Justice section provides legal representation to individual clients and undertakes public policy research and community education projects in both the juvenile and criminal justice arenas. In recent years, ULC students and faculty have worked with the New Jersey Office of the Public Defender, the New Jersey Institute for Social Justice, the Essex County Juvenile

Detention Center, Covenant House – New Jersey, staff of the New Jersey State Legislature, and a host of national organizations on a range of juvenile justice practice and policy issues, including questions pertaining to the due process and fourth amendment rights of young people.

The **Children's Justice Clinic** at Rutgers School of Law Camden provides individual representation to Camden youth facing delinquency charges. Clinical Professor Sandra Simkins who teaches along with J.C. Lore III, help clinic students to address the underlying causes of delinquency involvement, in an effort to extricate them from destructive behavior patterns.

Sara Jacobson is an Associate Professor and the Director of Trial Advocacy at Temple University's Beasley School of Law. Before joining the Temple faculty in 2008, she worked as a Public Defender at the Defender Association of Philadelphia for nearly a decade. At the Defender Association she spent much of her time defending kids in juvenile court and served as the Assistant Chief of the Juvenile Unit. She directed statewide trainings for Juvenile Defenders in Pennsylvania and helped to organize Pennsylvania's statewide Juvenile Defender Organization.