NO. 11-8143

IN THE

SUPREME COURT OF THE UNITED STATES

G.A.W., Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent

On Petition for Writ of Certiorari to the Illinois Appellate Court, Fourth District

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BRIEF OF JUVENILE LAW CENTER AND NATIONAL JUVENILE DEFENDER CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTORARI

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INTEREST OF THE *AMICI*[1]

Amici Juvenile Law Center and National Juvenile Defender Center work on issues of juvenile justice and children's rights. *Amici* have a particular expertise on the history and current operation of juvenile justice systems, and of the interplay between the rights of children and social science research on adolescent development. We write to urge the Court to grant certiorari in the case of G.A.W., and in the case of his co-defendant J.C.B.[2]

Since this Court last addressed the issue of the right to a jury trial for juveniles over forty years ago, the juvenile justice system has undergone profound change; today, the system more closely mirrors the criminal justice system than at any time in its history. *Amici* share a deep concern that the failure to provide a jury right to youth charged with sex offenses in juvenile court leaves them exposed to the same harsh penalties adults face without comparable adult procedural protections.

For this reason, *Amici* join together to urge the Court to grant *certiorari* and afford juveniles a right to a jury trial in the juvenile system when they face serious, adult-like punishments.

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[1] The consent of counsel for all parties is on file with the Court. 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. A brief description of the *Amici* appears in the Appendix.

[2] Supreme Court of Illinois Case No. 107750.

SUMMARY OF ARGUMENT

This case raises a question of exceptional and growing importance regarding the constitutionality of Section 5-101(3) of the Illinois Juvenile Court Act, prohibiting jury trials in delinquency proceedings,[3] under the Sixth and Fourteenth Amendments. The jury trial right provides a fundamental protection to ensure that the trial is fair, and to provide a check on the power of the judiciary. In 1971, in *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971), this Court, in a plurality decision, held that juveniles have no Constitutional right to a jury trial. While no single rationale animated the decision, the Court noted generally the need to protect the informal and protective nature of the juvenile system. In the decades since *McKeiver,* the juvenile justice system has undergone significant transformation –in Illinois and nationwide. Juvenile court hearings resemble criminal trials, and juvenile sanctions increasingly resemble adult sanctions. On behalf of Petitioners G.A.W. and J.C.B.[4], *Amici* submit that all juveniles who face severe, adult-like consequences in the juvenile court system must be afforded the right to jury trials.

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[3] Although Illinois law grants a jury right to juveniles in a few limited situations, 705 ILL. COMP. STAT. ANN. 405/5-810(3) (West 2007); 705 ILL. COMP. STAT. ANN. 405/5-815(d) (West 2006); 705 ILL. COMP. STAT. ANN. 405/5-820 (West 2006), it is not sufficient because it fails to protect youth like G.A.W. and J.C.B. who also face severe adult-like consequences. *See* 705 ILL. COMP. STAT. ANN. 405/5-101(3) (West 2011); *People ex rel. Carey v. Chrastka,* 413 N.E.2d 1269, 1273 (Ill. 1980).,

[4] J.C.B.'s petition is forthcoming. Supreme Court of Illinois Case No. 107750.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION FOR CERTIORARI TO ENSURE THAT JUVENILES ARE NOT DEPRIVED OF THEIR DUE PROCESS RIGHT TO A JURY TRIAL IN JUVENILE PROCEEDINGS IN WHICH THEY FACE ADULT-LIKE CONSEQUENCES.

A. Both The United States And Illinois Constitutions Require A Right To A Jury Trial When Defendants Face Serious Punishments.

The United States Constitution guarantees criminal defendants facing serious punishments the right to trial by jury, as well as other procedural due process protections. U.S. Const. amend. VI; U.S. Const. amend. XIV, § 1. In *Duncan v. Louisiana*, the United States Supreme Court held that the Fourteenth Amendment extended the right to a trial by jury to defendants facing prosecutions under state law if they faced a punishment that was "serious." 391 U.S. 145, 154 (1968). The Court declared that fundamental fairness in criminal proceedings requires a buffer against arbitrary government action, and found that juries furthered this goal. *Id.* at 155-56. The Court underscored the historical importance of the right to a jury trial, explaining:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Providing an accused

> with the right to be tried by a jury gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge . . . Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. *Id.*

The Court concluded that "a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Id.* at 157-58. According to *Duncan*, "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not" *Id.* at 159. Subsequent to *Duncan*, this Court further held that an offense carrying a maximum prison term of more than six months is deemed sufficiently serious that the right to a jury trial attaches. *Lewis v. United States*, 518 U.S. 322, 326 (1996). Crimes with such penalties are "deemed by the community's social and ethical judgments to be serious. . . .Opprobrium attaches to conviction of those crimes regardless of the length of the actual sentence imposed, and the stigma itself is enough to entitle the defendant to a jury." *Id.* at 334 (Kennedy, J., concurring). *See also Duncan*, 391 U.S. at 160 ("The penalty authorized by the law of the locality may be taken as a gauge of its social and ethical judgments.") (internal quotations omitted). While these cases address adult criminal defendants, as described below, the rationale is equally applicable to juveniles facing equivalently serious sentences.

The Illinois State Constitution also requires that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury." Ill. Const. 1970, art. I, § 8. *See also* Ill. Const. 1970, art. I, § 13 ("The right of trial by jury as heretofore enjoyed shall remain inviolate"). Almost every state has a similar constitutional provision. *See, e.g.*, Conn. Const. art. 1, § 19; Del. Const. art. 1, § 4, 7; Kan. Const. Bill of Rights § 10; Pa. Const. art. 1, § 6; N.Y. Const. art. 1, §2; W.Va. Const. Art. 3, § 14.

B. The Criminal Consequences Associated With A Delinquency Adjudication For A Felony Sex Offense Constitute Serious Punishment Entitling The Defendant To Trial By Jury.

1. The Disposition Imposed On Petitioners, Including Sex Offender Registration and Disclosure, are Serious and Potentially Indefinite.

G.A.W. and J.C.B. were both sentenced to 15-year indeterminate terms of imprisonment, not to extend beyond their 21st birthdays. Both boys were 16 at the time of the offenses, which meant they each faced potential 5 year sentences. *In re C.B.*, 898 N.E.2d 252, 254 (Ill. App. 2008). This extensive period of imprisonment alone constitutes "serious" punishment warranting the protection of the jury right. In addition, however, both boys were also required to register as sex offenders for the rest of their lives, *see In re G.A.W.*, (4-06-1017, March 3,

2009) at 1; *In re Jonathon C.B.*, 958 N.E.2d 227, 230 (Ill. 2011), compounding the serious nature of their punishment.

Historically, juvenile court records were kept confidential, acknowledging youths' capacity for rehabilitation. *See* Alan Sussman, *The Confidentiality of Family Court Records*, Social Service Review, vol. 45 (1971), p. 445. In contrast, under Illinois law, in cases in which minors, like G.A.W. and J.C.B., are adjudicated delinquent based on the commission of criminal sexual assault, courts are required to "allow the general public to have access to the [minor's] name, address, and offense." 705 ILL. COMP. STAT. 405/5-901(5)(a)(i) (West 2006).. Such notification, which undermines the rehabilitiative and protective nature of juvenile proceedings, is inherently punitive. Moreover, failure to comply with registration is itself a felony. 730 ILL. COMP. STAT. ANN. 150/10 (West 2012). The failure to provide a jury right is thus out of keeping with the punitive, and potentially criminal, consequences that attach.

The extensive requirements of the notification laws further heighten their punitive nature.[5] G.A.W.

[5] Long-term punishments which impose stigma are particularly punitive. As Justice Kennedy's concurrence in *U.S. v. Lewis* explained, "Opprobrium attaches to conviction of those crimes regardless of the length of the actual sentence imposed, and the stigma itself is enough to entitle the defendant to a jury."518 U.S. 322, 326 (1996) (internal citations omitted). Labeling a child as a sex-offender certainly creates a stigma. The labels of "rapist" or "sex offender" - or, even worse, "child molester" - are among the most heinous and despised in contemporary society. *Neal v. Shimoda*, 131 F.3d 818, 829 n.12 (9th Cir. 1997) ("We can hardly conceive of a

and J.C.B. may be required to to register with law enforcement for the rest of their lives. *See* 730 ILL. COMP. STAT. ANN. 150/3 (West 2012).[6] G.A.W. and J.C.B. would have to register with the local enforcement agency each time they moved to a new municipality for a period of more than three days. 730 ILL. COMP. STAT. ANN. 150/3(a) (West 2012). They would also have to register "with the public safety or security director of the institution of higher education which [they attend]." *Id.* Other courts have recognized that such registration and notification requirements are necessarily punitive and impose disabilities on individuals' livelihood. In *State v. Myers*, 923 P.2d 1024, 1041 (Kan.1996), the Kansas Supreme Court concluded that "[t]he practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or

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state's action bearing more 'stigmatizing consequences' than the labeling . . . as a sex offender" - except "[p]erhaps being labeled a 'child molester.'"). Research shows that calling a child a "sex offender" or "rapist" can have severely damaging psychological and practical consequences. *See* Judith V. Becker, *What We Know About the Characteristics and Treatment of Adolescents Who Have Committed Sexual Offenses,* 3 Child Maltreatment 317, 317 (1998); Mark Chaffin & Barbara Bonner, *"Don't Shoot: We're Your Children:" Have We Gone Too Far in Our Response to Adolescent Sexual Abusers and Children with Sexual Behavior Problems?* 3 Child Maltreatment 314 (1998).

[6] Minors adjudicated delinquent for an offense which, if charged as an adult, would be a felony may petition for the termination of the term of registration no less than 5 years after registration is ordered. The court may terminate registration if it finds by a preponderance of the evidence that the registrant "poses no risk to the community".. 730 ILL. COMP. STAT. ANN. 150/3-5 (West 2012).

employment" and would therefore "impose an affirmative disability or restraint" on the offender.[7]

Contributing to the unduly harsh effects of the Illinois requirements is the fact that neither the court nor the law enforcement records of minors like G.A.W. and J.C.B. are eligible for expungement. *See* 705 ILL. COMP. STAT. 405/5-915(2) (West 2006). Felony sex offenses are treated the same as first degree murder for purposes of Illinois' expungement policy—neither may ever be expunged from a minor's record. Denial of the opportunity to expunge one's juvenile record is evidence of the Illinois Juvenile Court Act's abandonment of the rehabilitative ideal of juvenile court.

Finally, a minor adjudicated delinquent of a felony sex offense such as criminal sexual assault is potentially subject to classification as a "sexually violent person." 725 ILL. COMP. STAT 207/5(f) (West 2006). Such classification results in involuntary commitment of the minor under the Illinois Sexually Violent Persons Commitment Act, 725 ILL. COMP.

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[7]*See, e.g.*, Daniel Golden, *Sex-Cons*, Boston Globe Mag., April 4, 1993, at 13 (describing case of 18 year old registered sex offender evicted with his mother from their apartment, then faced eviction with his grandmother and was forced to leave and stay at a shelter); *Miami Sex Offenders Forced to Live Under Bridge*, April 5, 2007, http://www.iht.com/articles/ap/2007/04/05/america/NA-GEN-US-Sex-Offenders-Bridge.php (describing sex offenders being restricted to live under bridges in Florida); Preston Rudie, *New Policy Bans Sex Offenders From Hurricane Shelters*, 10 *News*, July 7, 2005, http://nacdl.org/public.nsf/mediasources/20050707c (explaining policy banning sex offenders from hurricane shelters).

STAT. 207/1, *et seq.* (West 2006). A child committed under this Act could be incarcerated for an indefinite number of years based on a finding of delinquency made without benefit of a jury verdict. *See* 725 ILL. COMP. STAT. 207/40(a) (West 2006).

This combination of punitive consequences effectively renders delinquency proceedings against minors charged with felony sex offenses the equivalent of criminal prosecutions.

2. Sex Offender Notification Is Particularly Harmful And Inappropriate for Juveniles.

Sex-offender registration in particular belies the rehabilitative goals of the juvenile court. Because it does not serve legitimate rehabilitative functions, it imposes adult-like punishment. Sex offender registration and notification laws "may have a negative impact on the normal development of the youthful offender. This is contrary to the fundamental underpinnings of the juvenile justice system and 'parens patriae,' which seeks to correct the course of juvenile offenders by rehabilitation and oversight." Timothy E. Wind, *The Quandary of Megan's Law: When the Child Sex Offender is a Child*, 37 J. Marshall L. Rev. 73, 116 (2003). Notably, juvenile sex offenders are statistically less likely to reoffend than adult sex offenders. *See* Franklin E Zimring, *An American Travesty: Legal Responses To Adolescent Sexual Offending*, Appendix C, University of Chicago (2004). The recidivism rate among children who commit sexual offenses is low: indeed one notable study in 2010 found the rate to be only one percent. *See* E.J. Letourneau et al., *Do sex*

offender registration and notification requirements deter juvenile sex crimes?, Criminal Justice and Behavior, vol. 37 (2010), pp. 553-569. *See also* Michael F. Caldwell, *Sexual Offense Adjudication and Recidivism Among Juvenile Offenders*, Sexual Abuse: A Journal of Research and Treatment, vol. 19 (2007), pp. 107-113 (comparing adolescents who were non-sex offending delinquents with adolescents adjudicated for a sexual offense and finding no statistically significant difference in five-year felony sexual recidivism rate for the two groups (5.7% for non-sex offenders versus 6.8% for sex offending adolescents)); National Center on Sexual Behavior of Youth, *NCSBY Fact Sheet: What Research Shows About Adolescent Sex Offenders* (2003). Furthermore, studies show that registration and notification fail to reduce juvenile sexual or violent recidivism rates. *See* Elizabeth J. Letourneau and Kevin S. Armstrong., *Recidivism rates for registered and nonregistered juvenile sexual offenders*, Sexual Abuse: A Journal of Research and Treatment, 20 (2008), pp. 393-408; Elizabeth J. Letourneau et al., *The influence of sex offender registration on juvenile sexual recidivism*, Criminal Justice Policy Review, 20 (2009), pp. 136-153.

The uniquely detrimental effects of notification on juveniles underscore the punitive nature of the sanction. Although juvenile rehabilitation is facilitated by "interpersonal development through positive interaction with family members, school personnel, peers, and the community," Stacey Hiller, *Note, The Problem with Juvenile Sex Offender Registration: The Detrimental Effects of Public Disclosure*, 7 B.U. Pub. Int. L.J. 271 (1998).,

notification inhibits such interactions. "Disclosure of a juvenile sex offender's past to his community may only serve to increase his or her alienation, possibly encouraging re-offending, because of the negative attitudes the public will emit toward the youth." *Id.*

Indeed, the stigmatizing consequences of notification laws have the punitive effect on children that the juvenile justice system was designed to prevent. These laws cast children as sexual predators, thereby impeding their successful rehabilitation and reintegration into their communities. Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s,* 90 NW. U. L. REV. 788, 855 (1996). "Rehabilitation is about restoring a child to a healthy stature in society. However, a child cannot restore himself in his own eyes when social stigma may inhibit his ability to get a job or even walk into a store without neighbors casting doubtful looks in his direction." Hiller, *supra,* at 293. Notification laws can interfere with a juvenile's schooling. "Juveniles are ostracized and banned from attending classes with their peers . . . [and] refused admittance to certain colleges." Patricia Coffey, *The Public Registration of Juvenile Sex Offend*ers, ATSA Forum (Ass'n for the Treatment of Sexual Abusers), Winter 2007 at *5; See al*so Lisa C. Trivits and N. Dickon Reppucci, *Application of Megan's Laws to Juveniles*, 57 Am. Psychologist 690, 694 (2002) ("Notifying schools . . . may increase the social ostracism . . . with peers likely targeting the juvenile for ridicule and possible physical assault and parents protesting the presence of a sex offender in

the school."). Registration and notification may also prevent juvenile sex offenders from seeking treatment because their fear of public humiliation will force them "to 'go underground' and hide their tendencies from others, including their therapists." Earl-Hubbard, *supra*, at 855.

Internet publication is a particularly harmful type of notification. As one commentator explained, "Having one's address put on the Internet will allow a whole bunch of people who do not need to know what you have done, to know what you have done. Those who are deemed 'need to know' . . . are already informed and protected. The Internet . . . contributes to the pressures that we put on these sex offenders that make them unable to move forward with their lives, thereby continuing, and increasing, the danger to our children and other potential victims." *Symposium, Megan's Law in Cyberspace: Privacy vs. Public Saf*ety, 25 Seton Hall Legis. J. 301, 316 (2001). The stigma and pain caused by internet publication has been condemned with respect to adult offenders, but it can be even more detrimental to youth offenders trying to reintegrate into their communities. "There is even the concern that publishing youths' names on the registry may provide a public database for offenders wanting to prey sexually on juveniles." Coffey, *supra*, at 5.

The goal of protecting juvenile confidentiality should outweigh the minimal threat G.A.W. and J.C.B. may pose; otherwise a statute designed to protect children from dangerous individuals who target children is being misapplied to harm children as well. Registration and public disclosure in most instances

will far exceed the harm done, and impose grievous burdens on juvenile offenders long after the commission of their offenses and long after any possible risk of further harm has passed. This consequence underscores the inapplicability of the Court's rationale in *McKeiver*

II. THIS COURT'S HOLDING IN *MCKEIVER V. PENNSYLVANIA* IS NO LONGER APPLICABLE.

A. As The Illinois Juvenile Justice System Has Become More Punitive, The Rationale Of *McKeiver* No Longer Applies.

In *McKeiver v. Pennsylvania,* the U.S. Supreme Court held in a plurality decision that fundamental fairness under the Fourteenth Amendment did not require extension of the Constitutional right to a jury trial to juveniles in delinquency proceedings. 403 U.S. 528 (1971). While no single rationale animated the Court's ruling, the Court's holding rested on the understanding that the juvenile justice system offered rehabilitation and treatment, rather than punishment, to juveniles adjudicated delinquent. The Court wrote, "[T]the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal, protective proceeding." *Id.* at 545. In his concurrence, Justice White further reasoned, "[s]upervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his

error simply by imposing pains and penalties." *Id.* at 552. The Court was primarily concerned that jury trials would conflict with the rehabilitative focus of juvenile court and recast the juvenile proceeding as a criminal trial, obviating the need for a separate juvenile system.

The rationale of *McKeiver* is outdated. As juvenile justice systems have embraced both the punitive philosophy of the criminal justice system as well as specific adult sanctions,[8] *McKeiver* has little present relevance. As noted above in Section I.B., notification laws impose serious sanctions on young people adjudicated delinquent of felony sex offenses. Such sanctions are nearly identical to those imposed on adult offenders. *See* 730 ILL. COMP. STAT. ANN. 150/1 *et seq.*; 730 ILL. COMP. STAT. ANN. 152/1 *et seq.* Moreover, the sanctions were imposed without community participation in the determination of their guilt or innocence. *See Duncan*, 391 U.S. at 155-6. In 1998, the Illinois Juvenile Court Act's Article on Delinquent Minors was amended to include a new section clarifying the purpose and policy of the Article. 1998 Ill. Legis. Serv. P.A. 90-590 (S.B. 363)

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[8] At least ten states provide jury trials for allegedly delinquent juveniles. *See RLR v. State*, 487 P.2d 27 (Alaska 1971); MASS. GEN. LAWS ch. 119, § 55A (2010); MICH. COMP. LAWS § 712A.17 (2011): MONT. CODE ANN. § 41-5-1502 (2011); N.M. STAT. ANN. § 32A-2-16 (2011); OKLA. STAT. tit. 10, § 2-2-401 (2011); S.D. CODIFIED LAWS § 26-7A-34 (2010); TEX. FAM. CODE ANN. § 54.03 (2009); W.VA. CODE § 49-5-6 (2011); WYO. STAT. ANN. § 14-6-223 (2011); *In re L.M.*, 186 P.3d 164 (Kan. 2008). Each maintains separate juvenile and criminal justice systems even while providing jury trials to youth accused of delinquent offenses.

(WEST). The General Assembly declared the Article to have four "important purposes." 705 ILL. COMP. STAT. ANN. 405/5-101 (West 2011). Public safety is listed first, followed by holding juveniles accountable for their actions. *See* 705 ILL. COMP. STAT. ANN. 405/5-101(1)(a) (West 2011) ("To protect citizens from juvenile crime."); 705 ILL. COMP. STAT. ANN. 405/5-101(1)(b) (West 2011) ("To hold each juvenile offender directly accountable for his or her acts.").[9] Finally, the statute acknowledges the purposes rehabilitation and prevention of further delinquent behavior and the provision of due process. 705 ILL. COMP. STAT. ANN. 405/5-101(1)(c) (West 2011); 705 ILL. COMP. STAT. ANN. 405/5-101(1)(d) (West 2011).

In keeping with this express legislative intent, the Illinois Supreme Court has specifically noted the Code's dual focus on both punishment and rehabilitation. In *In re A.G.*, 746 N.E.2d 732 (Ill. 2001), the court recognized that the Juvenile Justice Reform Act amendments enacted in 1998 shifted the primary purpose of the juvenile courts from rehabilitation to accountability and public safety:

> Although proceedings under the Act are still not criminal in nature and are to be administered in a spirit of humane concern for, and to promote the welfare of, the minor, article V of the Act has been reconfigured and now contains a purpose and policy section

[9] The Illinois Supreme Court uses the terms "punishment" and "accountability" interchangeably in reference to 705 ILL. COMP. STAT. ANN. 405/5-101(1). *See In re B.L.S.*, 782 N.E.2d 217, 223 (Ill. 2002) ("Public safety and punishment are now the overriding concerns of the juvenile justice system.").

> which represents a *fundamental shift* from the singular goal of rehabilitation to include the *overriding* concerns of protecting the public and holding juvenile offenders accountable for violations of the law.

746 N.E.2d at 735 (citations omitted) (emphasis added). *See also In re Jamie P.*, 861 N.E.2d 958, 964 (Ill. 2006); *People ex rel. Devine v. Stralka*, 877 N.E.2d 416, 424 (Ill. 2007) (rejecting argument that rehabilitative goal of Act conferred authority to vacate delinquency finding and finding that "overriding concern" of accountability and public safety required delinquency finding to remain).

In *People v. Taylor*, 850 N.E.2d 134, 138 (Ill. 2006), the court acknowledged that the 1998 Juvenile Justice Reform Act amendments criminalized the delinquency adjudicatory process--"The Juvenile Court Act was radically altered . . . The amendatory changes . . . largely rewrote article V of the Act to provide more accountability for the criminal acts of juveniles and, from all appearances, *to make the juvenile delinquency adjudicatory process look more criminal in nature.*" (emphasis added)--while simultaneously reinforcing the difference between the juvenile and criminal justice systems. 850 N.E.2d at 141. *See also In re B.L.S.*, 782 N.E.2d at 223. ("Public safety and punishment are now the overriding concerns of the juvenile justice system. The incarcerated juvenile's liberty is restrained just as effectively as that of an adult offender." (citations omitted)). *In re Rodney H.*, 223 N.E.2d 623, 629-630 (Ill. 2006). Thus, while the Illinois Supreme Court stops short of equating juvenile delinquency

proceedings with criminal proceedings, it uniformly acknowledges that punishment is now the dominant animating principle behind the Illinois juvenile court. Indeed, juvenile justice experts overwhelmingly acknowledge that a finding of delinquency today is not substantially different--as measured by the degree of stigma and punishment it confers--from a finding of guilt in a criminal court. *See, e.g.*, Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 4 (1997)*; see generally*, Linda E. Frost & Robert E. Shepherd, Jr., *Mental Health Issues in Juvenile Delinquency Proc*eedings, 11 Crim. Just. 52, 59 (1996).

This shift from rehabilitation to retribution necessitates a reexamination of *McKeiver*'s holding. Juveniles who face harsh consequences following their adjudication in juvenile court must enjoy the same procedural rights as adults. Purporting to protect the informality of the juvenile court while simultaneously exposing children to adult-like sanctions yet again gives children "the worst of both worlds... neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children," *In re Gault*, 387 U.S. 1, 19 n. 23 (1967)(internal citations omitted), a trade-off this Court long ago rejected. In fact, this was precisely the holding of the Kansas Supreme Court in *In re L.M.*, where the Court found that the increasingly punitive nature of the juvenile justice system made it more like the adult system, effectively subjecting juveniles to "criminal prosecutions" and granting a jury right to youth in the juvenile justice system. *In re L.M.*, 186 P.3d at 168-170. The Kansas ruling was

not even limited to juveniles adjudicated for sex offenses but rather found the whole of the juvenile court so radically transformed that the denial of jury trials could no longer be justified. Here, Petitioners seek jury trials only in cases where juveniles face onerous, adult registration and notification requirements. These changes to the Illinois juvenile justice system require the extension of the Constitutional protection of the jury trial to juveniles facing such serious punishment.

B. *McKeiver* Was A Plurality Opinion With No Unifying Rationale And Thus Did Not Conclusively Determine A Juvenile's Constitutional Right To A Jury Trial.

In addition to the faded view of juvenile court which appears central the *McKeiver* ruling, *McKeiver* lacked a majority rationale and therefore cannot stand as the definitive resolution of the constitutionality of denying juveniles the right to a jury trial. A plurality opinion is the narrowest ground as to which an agreement among five justices can be inferred. *Marks v. United* States, 430 U.S. 188, 193 (1977). Justice Blackmun, joined by Chief Justice Burger and Justices White and Stewart, found that extension of the jury trial right to juveniles was not required unless the Court were to equate the adjudicative phase of the juvenile proceeding with the criminal trial. *McKeiver*, 403 U.S. at 550. Justice Blackmun explained that a jury right would ignore "every aspect of fairness, of concern, of sympathy, and of paternal attention that

the juvenile court system contemplates." *Id.* at 550. As described above, this reasoning does not apply to the current Illinois juvenile justice system.

The other Justices did not share Justice Blackmun's rationale. Justice Brennan concluded that fundamental fairness does not require a jury trial "so long as some other aspect of the process adequately protects the interests that Sixth Amendment jury trials are intended to serve." *McKeiver,* 403 U.S. at 554. Justice Brennan concluded that a jury trial was only needed when juvenile court was closed to the public, with the understanding that public trials, like jury trials, allow the community to place a check on misdeeds by the courts. *Id.* at 555. Because G.A.W. and J.C.B.'s cases were closed to the public, [10] Justice Brennan would have required a jury trial in his case.

Justices Douglas, Black and Marshall, who concluded in dissent that the right to jury trial applies to juveniles, would have granted G.A.W's and J.C.B.'s claims, as would Justice Harlan, who in his

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[10] Like North Carolina, Illinois has a statutory ban on the admission of the general public to juvenile trials. 705 ILL. COMP. STAT. ANN. 405/1-5(6) (West 2011) ("The general public except for the news media and the crime victim, as defined in Section 3 of the Rights of Crime Victims and Witnesses Act, shall be excluded from any hearing and, except for the persons specified in this Section only persons, including representatives of agencies and associations, who in the opinion of the court have a direct interest in the case or in the work of the court shall be admitted to the hearing. However, the court may, for the minor's safety and protection and for good cause shown, prohibit any person or agency present in court from further disclosing the minor's identity.").

concurrence stated that if he were to accept *Duncan* as good law, which he did not, then he "did not see why . . . juveniles . . . would not be constitutionally entitled to jury trials, so long as juvenile delinquency systems are not restructured to fit their original purpose." *McKeiver*, 403 U.S. at 553. Given that *Duncan* is long-settled law, Justice Harlan's concurrence has little relevance today--except that he would now cast a vote for jury trials. Thus, as many as six of the Justices would actually support granting G.A.W. and J.C.B. a jury trial. The time has come to reexamine *McKeiver*.

CONCLUSION

Amici respectfully request that this Court grant certiorari to protect the right to a fair trial for juveniles facing serious punishments.

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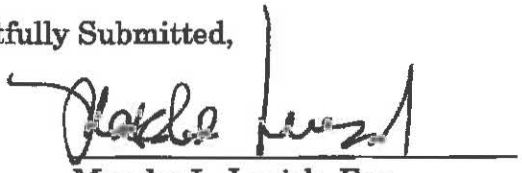
Respectfully Submitted,



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G.A.W. v. People of the State of Illinois

Identity of *Amici* and Statements of Interest

APPENDIX

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, 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. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

The **National Juvenile Defender Center** was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The

National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. The National Juvenile Defender Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. The National Juvenile Defender Center also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.