

SUPREME COURT OF NEW JERSEY
DOCKET NO.: 077672

State of New Jersey in the
Interest of C.K.

:
: Civil Action
:
: ON APPEAL FROM THE
: SUPERIOR COURT OF NEW JERSEY
: APPELLATE DIVISION
: DOCKET NO.: A-5469-13T1
:
: Sat Below: REISNER and WHIPPLE,
: JJ.A.D.
:
:

BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION, THE
ADVOCATES FOR CHILDREN OF NEW JERSEY, AND THE NORTHEAST JUVENILE
DEFENDER CENTER

Laura Cohen (047102006)
Criminal & Youth Justice Clinic
Rutgers, The State University
of New Jersey
S.I. Newhouse Center for Law
and Justice
123 Washington Street
Newark, NJ 07102-3026
P: 973-353-5576

Rebecca Livengood (028122012)
Edward L. Barocas
Jeanne LoCicero
American Civil Liberties Union of
New Jersey Foundation
P.O. Box 32159
Newark, NJ 07102
(973) 854-1714

BRIEF REYLING ON
EXPANDED RECORD

Peter Chen
Mary Coogan
Advocates for Children
of New Jersey
35 Halsey Street
Newark, New Jersey 07102
(973) 643-3876

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 2

ARGUMENT 2

I. MANDATORY LIFETIME REGISTRATION OF JUVENILES IS HARMFUL TO YOUTH, SERVES NO LEGITIMATE PURPOSE, AND VIOLATES THE FUNDAMENTAL TENETS OF THE JUVENILE COURT 4

 A. The Consequences of Lifetime Sex Offender Registration for Young People Are Devastating and Life-Altering 4

 B. Adolescents who commit sexual offenses are fundamentally different from their adult counterparts 11

 1. Young people’s developmental immaturity requires differential treatment 11

 2. Many young people who commit sexual offenses suffer from cognitive disabilities 16

 3. Many young people who commit sex offenses were themselves sexually abused 17

 C. Youth Who Commit Sex Offenses Do Not Pose a Threat to Public Safety Justifying Mandatory Lifetime Registration 18

 1. Most adolescent sex offenders are not predatory 18

 2. Juvenile sex offenders have low recidivism rates, including lower rates than juveniles adjudicated for other offenses .. 19

 D. Mandatory Lifetime Registration Violates the Fundamental Tenets of the Juvenile Court 23

 1. Registration is Incompatible with the Rehabilitative Purpose of the Juvenile Court. 23

 2. Registration is incompatible with the privacy protections of the juvenile court. 26

 3. Registration undermines the protections of the waiver statute as applied to eligible youth. 28

II. MANDATORY LIFETIME REGISTRATION AND NOTIFICATION FOR THOSE WHO COMMIT OFFENSES AS JUVENILES VIOLATES THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, PARAGRAPH 13 OF THE NEW JERSEY CONSTITUTION. . . 30

A. <u>Unlike the scheme considered in <i>Doe v. Poritz</i>, mandatory lifetime registration and notification for juveniles is excessive in relation to the safety need, and thus constitutes punishment.</u>	31
1. Growing evidence demonstrates that the registration and notification systems do not advance public safety goals	33
2. Youth charged with sex offenses have a very low rate of recidivism	36
3. The automatic imposition of lifetime registration lacks the narrow tailoring the Court relied on in finding the statute non-punitive in <i>Doe</i>	37
B. <u>Mandatory, lifetime registration and notification is cruel and unusual as applied to juveniles</u>	39

III. THE PUNISHMENT OF MANDATORY LIFETIME REGISTRATION AND NOTIFICATION FOR JUVENILES DEPRIVES THEM OF DUE PROCESS AND VIOLATES THEIR ELEVATED PRIVACY INTERESTS

A. <u>Notification and registration deprives a juvenile registrant of liberty and privacy interests without due process.</u>	45
1. Because lifetime mandatory registration and notification is punishment, additional procedural protections are needed.	47
2. Due Process Requires Both Ex Ante and Post-Hoc Review of Placement on the Registry.	49

CONCLUSION	50
------------------	----

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia, 536 U.S. 304 (2002) 16

In re C.P., 131 Ohio St.3d 513 (2012) 42, 28, 49

Doe v. Poritz, 142 N.J. 1 (1995) PASSIM

Graham v. Florida, 560 U.S. 48 (2010) PASSIM

Hope v. Pelzer, 536 U.S. 730 (2002) 39

In the Interest of J.B., 107 A.3d 1 (Pa. 2014) 43, 47

In the Interest of N.H., 226 N.J. 242 (2016) 47

In re Registrant J.G., 169 N.J. 304 (2001) 3, 27, 38

J.D.B. v. North Carolina 546 U.S. 261 (2011) 11, 15

Kent v. United States, 383 U.S. 541 (1966) 23

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 27, 46

Miller v. Alabama, -- U.S. --, 132 S. Ct. 2455 (2012) PASSIM

Miranda v. Arizona, 384 U.S. 436 (1966) 12, 15

Rhodes v. Chapman, 452 U.S. 337 (1981) 39

Roper v. Simmons, 543 U.S. 551 (2005) PASSIM

State ex rel. A.S., 203 N.J. 131 (2010) 47

State ex rel. C.K., 2016 N.J. Super. Unpub. LEXIS 897 (App. Div. Apr. 19, 2016)..... 2

State ex. rel. J.P.F., 368 N.J. Super. 24 (App. Div. 2004) 25

State in re A.C., 426 N.J. Super. 81 (Ch. Div. 2011) 46

State in the Interest of B.C.L., 82 N.J. 362 (1980) 28

State in the Interest of D.A., 385 N.J. 411 (2006) 24

State in the Interest of G.S., 330 N.J. Super. 383 (2000) 25

State in the Interest of L., 82 N.J. 362 (1980) 28

State v. A.G.D., 178 N.J. 56 (2003) 47

State v. Ramseur, 106 N.J. 123 (1987) 40, 41, 42

<u>State v. Williams</u> , 129 <u>Ohio St.</u> 3d 344 (2011)	48
<u>State v. Zuber</u> , -- N.J. --, 2017 <u>N.J. LEXIS</u> 5 (Jan. 11, 2007)	PASSIM
<u>Whitley v. Albers</u> , 475 <u>U.S.</u> 312 (1986)	39

Statutes

24 <u>C.F.R.</u> 5.856, 960.204(a)(4), 982.553(a)(2)	6
<u>N.J.S.A.</u> 2A:4A-21	PASSIM
<u>N.J.S.A.</u> 2A:4A-26.1	29, 30
<u>N.J.S.A.</u> 2A:4A-60	6, 27
<u>N.J.S.A.</u> 2C:7	PASSIM
<u>N.J.S.A.</u> 2C:14-2	PASSIM
<u>N.J.S.A.</u> 24:4-60(a)	28
42 <u>U.S.C.S.</u> 13633 (2004)	7

Other Authorities

Amanda Y. Agan, <u>Sex Offender Registries: Fear Without Function?</u> , 54 <u>J.L. ECON.</u> 207 (2011)	34
Bob Edward Vasquez, et al., <u>The Influence of Sex Offender Registration and Notification Laws in the United States: A Time-Series Analysis</u> , 54 <u>CRIME & DELINQUENCY</u> 175 (2008)	34
Dennis Waite et al., <u>Juvenile Sex Offender Re-arrest Rates for Sexual, Violent Nonsexual and Property Crimes: A Ten-Year Follow Up</u> , 17 <u>SEXUAL ABUSE: J. RES. & TREATMENT</u> 313 (2005)	23
Elizabeth Cauffman & Laurence Steinberg, <u>Immaturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults</u> , 18 <u>Behav. Sci & L.</u> 741 (2000)	PASSIM
Elizabeth J. Letourneau and Kevin S. Armstrong, <u>Recidivism Rates for Registered and Nonregistered Juvenile Sexual Offenders</u> , 20 <u>SEXUAL ABUSE: J. RES. & TREATMENT</u> 393 (2008)	21, 22
Franklin Zimring et al., <u>Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?</u> , 6 <u>Criminology & Pub. Pol'y</u> 507 (2007) ...	PASSIM

Franklin Zimring et al., <u>Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort Study</u> , 26 JUST. Q. 58 (2009)	39
Elizabeth Reiner Platt, <u>Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration</u> , 37 N.Y.U. L. REV. & SOC. CHANGE 727 (2013)	35
Human Rights Watch, <u>Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US</u> , May 2013, available at https://impactjustice.files.wordpress.com/2016/01/raised-registry-20130501.pdf	5, 10
J.A. Shaw, <u>Practice Parameters for the Assessment and Treatment of Children and Adolescents Who Are Sexually Abusive of Others; Statistical Data Included</u> , 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 12 (1999)	19
J.J. Prescott, et al., <u>Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?</u> , 54 J.L. & ECON. 161 (2011)	35
Janis F. Bremer, <u>Juveniles Who Engage in Sexually Harming Behavior--A Restorative Justice System</u> , 32 WM. MITCHELL L. REV. 1085 (2006)	23
Jill S. Levenson & Leo P. Cotter, <u>The Effect of Megan's Law on Sex Offender Reintegration</u> , 21 J. CONTEMPORARY CRIM. JUST. 49 (2005)	7
Jill S. Levenson, et al., <u>Megan's Law and its Impact on Community Re-Entry for Sex Offenders</u> , 25 BEHAV. SCI. & L. 587 (2007)	35
Kristen Zgoba, et al., <u>Megan's Law: Assessing the Practical and Monetary Effect</u> (2008), available at https://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf	33
Laurence Steinberg and Elizabeth Cauffman, <u>Less Guilty by Reason of Adolescence</u> , 58 Am. Psychol. 12 (2003).....	13, 14
Laurence Steinberg et al., <u>Psycho-social Maturity and Desistance from Crime in a Sample of Serious Juvenile Offenders</u> , <u>Juvenile Justice Bulletin</u> , 3 (Office of Juvenile Justice and Delinquency Prevention, March 2015), available at https://www.ojjdp.gov/pubs/248391.pdf	13

Lorig Charkoudian, Bonita Cosgrave, Dennis Ferrell, Shawn Flower, The Role of Family and Pro-Social Relationships in Reducing Recidivism, Corrections Today, August 1, 2012. 11

Maude Beaudry-Cyr, Examining the Continuity of Juvenile Sex Offending Into Adulthood and Subsequent Patterns of Sex and General Recidivism, 61 INT'L J. OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 251 (2015) 22

Michael F. Caldwell, Juvenile Sex Offenders, Choosing the Future for American Juvenile Justice 23

Michael F. Caldwell, et al., An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism, 14 PSYCHOL. PUB. POL'Y & L. 89 (2008) 22

Nicole Pittman, Youth Registration Leaves Lifelong Stain, The Crime Report, 04/18/2016, available at <http://impactjustice.org/2016/04/18/end-youth-registration/> 9

Paul Okami, et al., Sexual Experiences in Early Childhood: 18-Year Longitudinal Data from the UCLA Family Lifestyles Project, 34 J. of Sex Research 339 (1997) 21

Robin Walker Sterling, Juvenile Sex Offender Registration: An Impermissible Life Sentence, 82 U.CHICAGO L. REV. 295 (2015) 31

Sarah Stillman, The List, The New Yorker, March 14, 2016, available at <http://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes> 10, 43

Shannon C. Parker, Branded for Life: The Unconstitutionality of Mandatory and Lifetime Juvenile Sex Offender Registration and Notification, 21 VA. J. Soc. POL'Y & L. 167 (2014) 19

Sue Righthand & Carlann Welch, Office of Juvenile Justice & Delinquency Prevention, Juveniles Who Have Sexually Offended: A Review of the Professional Literature 57 (2001) 20

The Center on Impact Justice, Youth Registration: A Misguided Approach to Addressing Sexual Harm, Impact Justice (Jan. 2016), available at https://impactjustice.files.wordpress.com/2016/01/cyrr-one-page-fact-sheet-latest-draft_jan2016.pdf 5, 22

U.S. Department of Housing and Urban Development, Guidance on State Registered Lifetime Sex Offenders in Federally Assisted Housing, June 11, 2012 available at

<https://portal.hud.gov/hudportal/documents/huddoc?id=12-28pihn12-11hsgn.pdf> 7

U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010, Supplemental Tables (December 2016), available at https://www.bjs.gov/content/pub/pdf/rprts05p0510_st.pdf 37

PRELIMINARY STATEMENT

New Jersey's juvenile sex offender registration and notification experiment sits at a crossroads. During the last two decades, the penalties imposed on young people found to have committed sex offenses have become more rigid, more expansive, and more punitive. At the same time, an enormous and still emerging body of neuro- and social science has increased our understanding of adolescent development and culpability, leading courts to recognize in other contexts -- including the death penalty, juvenile life without parole, and custodial interrogations, among others -- that that the justice system must be more sensitive to young people's developmental immaturity, more individualized, and more flexible.

The mandatory imposition of lifetime registration and notification requirements on young people contradicts this evolving jurisprudential framework. It applies an adult punishment to youth, without regard for their developmental status, lesser culpability, or elevated privacy and procedural rights. It also ignores the wealth of irrefutable empirical evidence establishing that registration and notification schemes fail to advance any public safety interest. Such a system does not comport with the current legal or scientific consensus on child development, and it undermines public policy, state and federal constitutional protections, and the purposes of the

juvenile court. Accordingly, this Court must rule that mandatory lifetime registration and notification as applied to young people ages 14 - 18 at the time of an offense is unconstitutional.

STATEMENT OF FACTS

Amici adopt and rely on the facts developed in the evidentiary hearing on C.K.'s November 16, 2012 post-conviction relief petition, including the expert evidence, which the trial court found "credible and persuasive," and which the Appellate Division credited. See State ex rel. C.K., 2016 N.J. Super. Unpub. LEXIS 897, at *7 (App. Div. Apr. 19, 2016). We further supplement the record with facts set forth in the certification of Eliza Nagel, attached as Appendix A to this brief (hereinafter "Nagel Cert.").

ARGUMENT

Although California created a sex offender registry as early as 1947, most states did not follow suit until the 1990's, when several high-profile crimes committed by people with prior convictions for sex offenses led to passage of registration laws in Congress and every state. New Jersey's statute was enacted in 1994 and is known colloquially as "Megan's Law," in memory of seven-year-old Megan Kanka, who was abducted and killed by neighbor with two prior sex convictions. N.J.S.A. 2C:7-1 et seq.

From its inception, Megan's Law has applied with full force to youth, regardless of whether they are prosecuted in adult or juvenile court. See N.J.S.A. 2C:7-2(a)(1). Soon after its passage, this Court considered and upheld the constitutionality of Megan's Law for the first time in Doe v. Poritz, 142 N.J. 1 (1995). Six years later, in In re Registrant J.G., 169 N.J. 304 (2001), the Court modified its prior ruling with regard to children under the age of 14. In an effort to reconcile mandatory sex offender registration with the rehabilitative philosophy of the Juvenile Code, the Court held that youth who are placed on the registry due to offenses committed before their fourteenth birthdays must be permitted to petition for removal when they reach the age of eighteen. Id. at 912.

At the time Doe and J.G. were decided, anyone subject to registration was able to petition for removal from the registry after fifteen years. See, e.g., Doe, 142 N.J. at 21; J.G., 169 N.J. at 319. This possibility was a significant factor in both decisions upholding the statute. See ibid. On January 8, 2002, however, the legislature amended N.J.S.A. 2C:7 by adding subsection 2C:7(g), which prohibits removal from the registry of anyone convicted or adjudicated delinquent on the basis of, inter alia, aggravated sexual assault.

As a result, this Court is now presented with a question it has not faced before: whether a statute that provides for

lifetime registration without the possibility of termination for young people who were between the ages of 14 and 18 at the time of their offenses and who were adjudicated delinquent of aggravated sexual assault in juvenile court is constitutional.

For a host of reasons, including the "defining characteristics of youth" and developmental immaturity recognized in State v. Zuber, No. A-54-15 (N.J. Jan. 11, 2017) and Miller v. Alabama, -- U.S. --, 132 S. Ct. 2455 (2012); the absence of a nexus to public safety; the nature of juvenile sex offenses; young people's heightened privacy protections; and the extraordinary, disproportionate harms suffered by youth placed on the registry, categorical juvenile lifetime registration does not comport with the principles of the Juvenile Code and violates young people's rights under the Fourteenth and Eighth Amendments of the United States Constitution and Article I, Paragraphs 1 and 12 of the New Jersey Constitution.

I. MANDATORY LIFETIME REGISTRATION OF JUVENILES IS HARMFUL TO YOUTH, SERVES NO LEGITIMATE PURPOSE, AND VIOLATES THE FUNDAMENTAL TENETS OF THE JUVENILE COURT.

A. The Consequences of Lifetime Sex Offender Registration for Young People Are Devastating and Life-Altering.

Sex offender registration and notification ("SORN") laws have a devastating impact on youth placed on the registry. Registration has lifelong repercussions on every aspect of a young person's life, including housing, education, employment,

and family and social relationships. "As a result of placement on the registry, 85% of youth . . . reported a mental illness, over 44% of this population experienced homelessness as children, 63% faced serious employment and financial challenges, and 52% of them experienced violence" Center on Youth Registration Reform, Youth Registration: A Misguided Approach to Addressing Sexual Harm, Impact Justice, available at https://impactjustice.files.wordpress.com/2016/01/cyrr-one-page-fact-sheet-latest-draft_jan2016.pdf); see also Human Rights Watch, Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US, May 2013, available at <https://impactjustice.files.wordpress.com/2016/01/raised-registry-20130501.pdf>. (hereinafter "Raised on the Registry"). The public disclosure of young people's identities, furthermore, exposes them to the public scrutiny that the fundamental precepts of juvenile court are intended to prevent. See N.J.S.A. 2A:4A-60, infra. According to Eliza Nagel, Esq., who provided legal representation to scores of youth committed to the New Jersey Juvenile Justice Commission ("JJJC") from 2014 until earlier this year,

I witnessed firsthand the law's uniquely devastating impact on young people. They are unable to return home to their families, find employment, or attend school. They often become homeless unnecessarily, suffer

serious mental health and medical problems, and quickly plunge into a downward spiral as a result of being placed on the registry.

[Nagel Cert. at 6.]

Even juveniles as young as fourteen who are placed on the registry are prohibited from returning home if their families live in public housing or once landlords discover they are listed on the registry. See 24 C.F.R. 5.856, 960.204(a)(4), 982.553(a)(2) (prohibiting admission to federally assisted housing if any member of a household is subject to a State lifetime sex offender registration requirement); see U.S. Department of Housing and Urban Development, Guidance on State Registered Lifetime Sex Offenders in Federally Assisted Housing, June 11, 2012 available at <https://portal.hud.gov/hudportal/documents/huddoc?id=12-28pihn12-11hsgn.pdf>; 42 U.S.C.S. 13633 (2004) (reiterating that public housing agencies prohibit admission of individuals subject to lifetime registration requirement under a State sex offender registration program and directing agencies to pursue eviction and termination of those who are subject to lifetime registration); Nagel Cert. at 16 & 22 (in which two juveniles were forced to reside in homeless shelters under the federal prohibition of sex offenders residing in federally subsidized housing.). In one study, furthermore, twenty percent of registered sex offenders had experienced loss of housing after a

landlord found out that they were registered. Jill S. Levenson & Leo P. Cotter, The Effect of Megan's Law on Sex Offender Reintegration, 21 J. CONTEMPORARY CRIM. JUST. 49, 58 (2005). Thus, as a result of New Jersey's mandatory registration laws, young people discharged from JJC custody are routinely rendered homeless, even when their families have stable housing and are eager for their return. These young people have nowhere to go but the shelter system, where they are forced to live with adult offenders and in shelters that lack access to basic services and sanitary facilities. Young people find the shelters to be intimidating or even frightening environments, and the uncertainty of homelessness causes significant inner turmoil for youth, making it difficult for them to attain the stability that is essential to successful and law-abiding adulthood. See Nagel Cert. at 3-7, 17, 24.

Placement on the registry and its attendant effects further lead to unemployment and job loss, as employers may search the registry to identify registered individuals, and complications related to homelessness make it difficult to maintain employment. One of Nagel's clients, James, was forced out of the apartment he shared with his wife when law enforcement officials distributed flyers announcing his registry status throughout their housing complex. James had to enter a homeless shelter, where he could not regularly charge his ankle bracelet

electronic monitor. As a result, the bracelet frequently emitted a loud beeping noise, which caused a disturbance at his place of employment and drew attention to his juvenile history. This, in turn, led to his termination from his job and, in all likelihood, derailment from his chosen career path. See Nagel Cert. at 4.

Registry-related homelessness also affects compliance with conditions of parole release, leading to technical violations and re-incarceration. One of Nagel's clients, 16-year-old Michael, was prohibited from residing with his mother following his release from JJC custody as a result of his status on the registry. Instead, he was placed in a shelter for sex offenders. Distraught over his separation from his mother, he fled the shelter and returned to his mother's home. Because this constituted a violation of his parole conditions, he was re-incarcerated for an additional six months. Whatever rehabilitative gains Michael made while in custody were limited by his registry-related reincarceration. See Nagel Cert. at 5; see also Nicole Pittman, Youth Registration Leaves Lifelong Stain, The Crime Report, 04/18/2016, available at <http://impactjustice.org/2016/04/18/end-youth-registration/>.

Young people on the registry often cannot return to school or are forced to complete their secondary education in alternative or evening school programs. See Raised on the

Registry at 71-72. As a result, not only do they not receive the benefit of a traditional high school education, but they also cannot participate in sports or other extra-curricular activities that are essential to positive youth development, college admission, and long-term employment prospects. Ibid.

Moreover, young people on the registry often become victims of violence. Typically, juvenile delinquency adjudications are protected from the prying eye of the public so that the stigma of a criminal conviction will not jeopardize a young person's rehabilitative opportunities or subject him to public scrutiny. The public disclosure of registered 'juveniles' identities, addresses, and likeness, however, make them a target for retaliatory violence. See Sarah Stillman, The List, The New Yorker, March 14, 2016, available at <http://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes> (describing a family including two registered young people whose dog was shot to death, a Molotov cocktail thrown in their driveway, and BB guns pellets shot at their home). The stigma attached to adjudication for sexual offenses causes significant damage to a child's development and self-esteem. See Franklin E. Zimring, et al., Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?, Criminology and Public Policy, vol. 6, no.3, 507-534 (2007); Nagel Cert. at 20.

The psychological harms of registration are well-documented. A survey of juvenile offenders conducted by the Human Rights Watch found that 85% of the respondents described negative psychological impacts that they attributed to their status on the registry, such as depression, a sense of isolation, difficulty forming or maintaining relationships, and suicidal ideation. Nearly a fifth of those interviewed said they had attempted suicide and several had committed suicide. See Raised on the Registry at 51. These findings resonate in the stories of Nagel's clients Derek and Michael, both of whom have experienced depression and other mental health difficulties due to their placement on the registry and its collateral consequences.

Young people who have committed sexual offenses are not the only ones carrying the burden of registration; their families are also profoundly affected. Meaningful familial relationships have been found to reduce recidivism significantly and improve a young person's chances of successfully rehabilitating. See Lorig Charkoudian, Bonita Cosgrave, Dennis Ferrell, Shawn Flower, The Role of Family and Pro-Social Relationships in Reducing Recidivism, Corrections Today, August 1, 2012. Despite the acknowledged importance of maintaining meaningful ties with one's family, young people who have committed sexual offenses are often robbed of the chance to have

normal relationships with their families. When an offense is committed against a family member, for example, the young person is subsequently prohibited from returning to the home and must request permission from a parole officer to contact and visit his or her family. If the young person decides to start a family of her own, she will be unable to attend school functions, host her child's friends for play dates, and her own children may face alienation from classmates. See Raised on the Registry at 62-63. The lifelong impact of placement on the registry causes substantial harms to young people and undermines the core rehabilitative and privacy principles of the juvenile justice system. See N.J.S.A. 2A:4A-21.

B. Adolescents who commit sexual offenses are fundamentally different from their adult counterparts.

1. Young people's developmental immaturity requires differential treatment.

Judicial recognition of the developmental characteristics that distinguish adolescence from adulthood has, since 2005, given rise to a jurisprudence that distinguishes youth in the contexts of the juvenile death penalty, sentences of life without parole, and custodial interrogations. See, e.g., Roper v. Simmons, 543 U.S. 551 (2005) (juvenile death penalty violates the Eighth Amendment); Graham v. Florida, 560 U.S. 48 (2010) (juveniles may not receive life without parole sentences in non-homicides); J.D.B. v. North Carolina 546 U.S. 261 (2011) (age is

a factor in determining whether a young person is "in custody" for purposes of administration of Miranda warnings); Miller v. Alabama, -- U.S. --, 132 S. Ct. 2455 (2012) (mandatory life without parole unconstitutional for juveniles); State v. Zuber, -- N.J. --, 2017 N.J. LEXIS 5 (Jan. 11, 2007) (lengthy term-of-years sentences without opportunity for release violate Article I, Paragraph 12 as applied to juveniles). Similarly, mandatory lifetime registration of young people found guilty of sex offenses must be evaluated through the lenses of psycho-social and brain development.

The relevant benchmarks of psychosocial maturity include temperance, or impulse control; perspective, or the ability to evaluate decisions from both a short- and long-term point of view; and responsibility, or the ability to resist the influence of others (including peers) and take responsibility for one's actions. Laurence Steinberg et al., Psycho-social Maturity and Desistance from Crime in a Sample of Serious Juvenile Offenders, Juvenile Justice Bulletin, 3 (Office of Juvenile Justice and Delinquency Prevention, March 2015), available at <https://www.ojjdp.gov/pubs/248391.pdf>. Conversely, psychosocial immaturity is manifested in the developmental traits that define adolescence: impulsivity, differential assessment of risk, lack of future orientation, and susceptibility to peer influence.

Laurence Steinberg and Elizabeth Cauffman, Less Guilty by Reason of Adolescence, 58 Am. Psychol. 12, 1009-18 (2003).

Longitudinal studies using magnetic resonance imaging have established the neurological basis for these traits: the pre-frontal cortex of the brain, which controls the "executive" functions of judgment and decision-making, continues to mature until one's mid-twenties. See Sara Johnson, et. al., Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy, 45 J. ADOLESC. HEALTH 3, 216-221 (Sept. 2009) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2892678/>. As a result, young people do not achieve full decisional maturity until long past the Juvenile Court's jurisdictional age of eighteen and, therefore, are less culpable for their actions than adults. See, e.g., Cauffman, Less Guilty by Reason of Adolescence, Amy E. Halbrook, Juvenile Pariahs, 65 HASTINGS L.J. 1, 9 (2013). For this reason, furthermore, most youthful offenders will outgrow, or desist from, unlawful behavior even if they are not incarcerated or subjected to other severe sanctions. See Edward Mulvey, Highlights from Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders, Juvenile Justice Fact Sheet, 3 (Office of Juvenile Justice and Delinquency Prevention, March 2011), available at <http://www.pathwaysstudy.pitt.edu/documents/OJJDP%20Fact%20Sheet>

_Pathways.pdf. In fact, the capacity for change is another defining characteristic of adolescence, and young people undergo the "most extreme increase in psychosocial development" between the ages of sixteen and nineteen. See Elizabeth Cauffman & Laurence Steinberg, Immaturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults, 18 Behav. Sci & L. 741 (2000).

In light of young people's developmental immaturity and lesser culpability, it follows that a sentencing scheme in which adults and children are treated identically is "suspect." Roper, 543 U.S. at 570. In a remarkable quartet of cases decided since 2005, the United States Supreme Court has recognized that "juvenile offenders cannot with reliability be classified among the worst offenders." Roper, 543 U.S. at 569 (reasoning that juveniles' "vulnerability and comparative lack of control over their immediate surroundings" make their "own irresponsible conduct not as morally reprehensible as that of an adult," thus rendering the death penalty unconstitutional). In Graham, the Court struck down sentences of life without parole for juveniles adjudicated of non-homicide offenses in part because "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds" and due to the mutability of adolescents. 560 U.S. at 68-69 ("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.").

One year later, in J.D.B., the Court held for the first time that age is an essential factor in determining whether a police interrogation is "custodial," thus triggering the protections of Miranda v. Arizona, 384 U.S. 436 (1966). In Miller, the Court held that sentences of life without parole for youth convicted of homicides was cruel and unusual punishment due to the lack of individualized consideration demanded by adolescents' developmental immaturity. 132 S. Ct. at 2469-70. Most recently, in Zuber, this Court made clear that "youth matters under the Constitution" and that young people cannot be subjected to de facto sentences of life without parole unless first having been accorded the individualized consideration that Miller mandates. Zuber, 2017 N.J. LEXIS 5 at *36.

New Jersey's mandatory lifetime sex offender registration requirements assume that juveniles who commit sexual offenses do so with the same degree of intent and culpability as adults and thus pose the same risk to society as do adult offenders. Yet young people's psychosocial immaturity and capacity for change refute this assumption. See, e.g., Phoebe Geer, Justice Served? The High Cost of Juvenile Sex Offender Registration, 27 Dev. Mental Health L. 34, 52 (2008) (noting that juveniles are much more susceptible to peer influence and sometimes engage in risky

sexual activity as a group). Thus, it is false to assume that a young person will be as likely to engage in deviant behavior when he or she reaches adulthood as during adolescence. Just as crucial differences between youth and adults have played a significant role in recent jurisprudence on juvenile sentencing, so, too, should they play a role in determining whether young people should be subject to lifetime registration. See Miller, 123 S. Ct. at 2458 (emphasizing the importance of differences between juveniles and adults for sentencing purposes) (citing Roper, 543 U.S. at 569).

2. Many young people who commit sexual offenses suffer from cognitive disabilities.

In addition to general developmental immaturity, a substantial percentage of adolescents adjudicated as sex offenders also suffer from some form of intellectual disability. See U.S. Department of Justice, Center for Sex Offender Management, Understanding Juvenile Sexual Offending Behavior: Emerging Research, Treatment Approaches and Management Practices (1999) (concluding that thirty to sixty percent of juveniles adjudicated as sex offenders suffer from high rates of learning disabilities and academic dysfunction, up to eighty percent suffer from impaired impulse control or conduct disorders); see also Atkins v. Virginia, 536 U.S. 304, 318 (2002) (holding that the death penalty for mentally impaired defendants is cruel and

unusual punishment because they have "diminished capacities to understand and process information, . . . engage in logical reasoning, to control impulses, and to understand others' reactions"). Young people with intellectual disabilities often misinterpret social cues or fail to comprehend sexual boundaries, further lessening their culpability. The mandatory, categorical nature of the registration scheme in N.J.S.A. 2C:7-2(g), however, does not allow courts to account for these factors. Young people should not face the same lifelong stigma and disastrous consequences as adults without a concomitant degree of culpability.

3. Many young people who commit sex offenses were themselves sexually abused.

Empirical research has also shown that as many as half of all male adolescent sexual offenders were themselves victims of abuse. See, e.g., Michael C. Seto & Martin L. Lalumière, What Is So Special About Male Adolescent Sexual Offending? A Review and Test of Explanations Through Meta-Analysis, 136 Psych. Bulletin 526, 564-65 (2010) (summarizing decades of studies on male adolescent sexual offenders showing that adolescent sex offenders were more likely than non-sex offenders to have been sexually abused, producing a large effect size). It is perhaps unsurprising that sexual abuse at a young age can disrupt an adolescent's normal sexual development, and earlier abuse can

also affect a young person's perspective on what constitutes typical sexual behavior. Notably, the effect of sexual abuse history impacts "the onset rather than the maintenance of sexual reoffending," and the same studies demonstrated that sexual abuse history is unrelated to sexual recidivism in follow-up studies of offenders. See id. at 565; I. Lambie, et al., Resiliency in the victim-offender cycle in male sexual abuse. 14 Sexual Abuse : A Journal of Research and Treatment 1, 31-48 (2002); C.S. Widom and M.A. Ames, Criminal Consequences of Childhood Sexual Victimization, 18 Child Abuse and Neglect 4, 303-318 (1994).

C. Youth Who Commit Sex Offenses Do Not Pose a Threat to Public Safety Justifying Mandatory Lifetime Registration.

1. Most adolescent sex offenders are not predatory.

Sexual activity is, of course, central to normal adolescent development. See, e.g., J.A. Shaw, Practice Parameters for the Assessment and Treatment of Children and Adolescents Who Are Sexually Abusive of Others; Statistical Data Included, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 12 (1999); Shannon C. Parker, Branded for Life: The Unconstitutionality of Mandatory and Lifetime Juvenile Sex Offender Registration and Notification, 21 VA. J. SOC. POL'Y & L. 167, 185 (2014) ("[S]ex play is necessary for healthy sexual development. . . . It helps adolescents

create their sexual identity") (alteration in original) (citation omitted).

Even those youth who are adjudicated for sex offenses have generally engaged in broadly-defined peer-to-peer sexual activity and have not committed inherently violent sexual offenses. See Shaw at 60S. The consensus among developmental psychologists is that, unlike their adult counterparts, most adolescents who commit sex offenses are not predatory. Instead, their behavior, even when it exceeds legal boundaries, is in part the product of the developmental, cognitive, and social factors described above. Ibid. Moreover, young people typically do not victimize others for purposes of sexual gratification, but rather engage in sexual activity out of "normal" curiosity. For this reason, the behavior of youth charged with sex offenses is generally less aggressive and violent than that of adults similarly charged. See Sue Righthand & Carlann Welch, Office of Juvenile Justice & Delinquency Prevention, Juveniles Who Have Sexually Offended: A Review of the Professional Literature 57 (2001). A mandatory registration scheme that fails to take these differences into account violates the jurisprudential principles of Roper, Graham, Miller, and Zuber.

- 2. Juvenile sex offenders have low recidivism rates, including lower rates than juveniles adjudicated for other offenses.**

In the decades since registration and notification laws first passed, research has shown that juveniles who commit sex offenses pose a remarkably low risk of re-offending. Most, if not all, empirical studies examining the rate of recidivism in adolescents across large cross-sections of juvenile offenders found that not only are adolescent sex offenders unlikely to recidivate, but that their recidivism rates are among the lowest of any group of offenders. See, e.g., Franklin Zimring et al., Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?, 6 Criminology & Pub. Pol'y 507, 508 (2007) (hereinafter "Racine Study"); Paul Okami, et al., Sexual Experiences in Early Childhood: 18-Year Longitudinal Data from the UCLA Family Lifestyles Project, 34 J. of Sex Research 339, 339 (1997). In short, it is clear that deviant juvenile sexual behavior is highly unlikely to recur later in life.

University of California at Berkeley law professor Franklin Zimring has conducted multiple large-scale, community-based studies focusing on juvenile sexual offender recidivism. Racine Study; see also Zimring, et al., Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort Study, 26 JUST. Q. 58, 58 (2009) (hereinafter "Philadelphia Study"). Each followed multiple cohorts from birth until several years after they reached the age of eighteen in

order to examine whether juvenile sexual offenses had any effect on their likelihood of committing a sex crime as an adult. In his 2007 study, Zimring followed individuals from Racine, Wisconsin from birth until their twenties and thirties. Racine Study at 512. He found that a sex charge as a juvenile did not predict adult sex offending. Id. at 527. Further support for these findings can be found in Elizabeth Letourneau's 2008 study on recidivism in juvenile sex offenders. See Elizabeth J. Letourneau and Kevin S. Armstrong, Recidivism Rates for Registered and Nonregistered Juvenile Sexual Offenders, 20 SEXUAL ABUSE: J. RES. & TREATMENT 393, 396, 403 (2008) (concluding that of the 222-person sample of juveniles convicted of registry offenses, where most had committed first-degree offenses of engaging in sex with a minor, only two incidents of recidivism occurred).

Zimring's and LeTourneau's findings have been repeatedly confirmed over the course of the past decade. See, e.g., Maude Beaudry-Cyr, Examining the Continuity of Juvenile Sex Offending Into Adulthood and Subsequent Patterns of Sex and General Recidivism, 61 INT'L J. OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 251, 263 (2015) (reporting that only 28 in 495 adult sex offenders had committed juvenile offenses, a number that amounts to only 5.7% of the total sample of adult sex offenders); Michael F. Caldwell, et al., An Examination of the Sex Offender

Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism, 14 PSYCHOL. PUB. POL'Y & L. 89, 103 (2008) (reporting a four percent recidivism rate for juvenile sex offenders); The Center on Impact Justice, Youth Registration: A Misguided Approach to Addressing Sexual Harm, Impact Justice (Jan. 2016), available at https://impactjustice.files.wordpress.com/2016/01/cyrr-one-page-fact-sheet-latest-draft_jan2016.pdf (noting that "recidivism among children who commit sexual offenses is believed to be between four and five percent"). Based on this empirical data, it is apparent that juveniles who have been adjudicated as sex offenders do not pose a significant future risk to the community at large.

Juvenile sexual offenders are also less likely to reoffend than are other types of juvenile offenders. For instance, Michael Caldwell examined over 11,000 juvenile sex offenders and found that the mean sexual recidivism rate was seven percent, while the general recidivism rate was forty-three percent. See Michael F. Caldwell, Juvenile Sex Offenders, Choosing the Future for American Juvenile Justice (D. Tanenhaus & F. Zimring eds., 2014); see also Janis F. Bremer, Juveniles Who Engage in Sexually Harming Behavior--A Restorative Justice System, 32 WM. MITCHELL L. REV. 1085, 1087 (2006) (reporting a four percent recidivism rate for juvenile sex offenders compared to twenty-

two to twenty-nine percent for non-sexual crimes); Dennis Waite et al., Juvenile Sex Offender Re-arrest Rates for Sexual, Violent Nonsexual and Property Crimes: A Ten-Year Follow Up, 17 SEXUAL ABUSE: J. RES. & TREATMENT 313, 313 (2005) (reporting less than five percent recidivism for sexual offenses versus thirty-one to forty-seven percent for nonsexual offenses). In light of this data, the primary justification offered for mandatory registration schemes at their inception -- that they promote public safety by enabling people to protect themselves against serial sex offenders -- is no longer valid.

D. Mandatory Lifetime Registration Violates the Fundamental Tenets of the Juvenile Court.

1. Registration is Incompatible with the Rehabilitative Purpose of the Juvenile Court.

The juvenile court system was created for the purpose of "determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment." Kent v. United States, 383 U.S. 541, 554 (1966); see also N.J.S.A. 2A:4A-21(a). Nevertheless, as described in Part I (A), above, young people who are placed on the registry suffer consequences more akin to those that attach to adult criminal convictions than adjudications of juvenile

delinquency. Mandatory lifetime registration thus conflicts with the fundamental goals of juvenile court intervention.

Pursuant to the Juvenile Code's purpose clause, N.J.S.A. 2A:4A-21, the juvenile court's primary goal is to "preserve the unity of the family whenever possible and to provide for the care, protection, and wholesome mental and physical development" of the young people who come before it. See State in the Interest of D.A., 385 N.J. 411, 415-17 (2006). Importantly, the Code also "remove(s) from children committing delinquent acts certain statutory consequences of criminal behavior" -- in other words, the stain of a criminal conviction and adult punitive sanctions. N.J.S.A. 2A:4A-21(b). The court also must substitute for those consequences an adequate program of supervision, care and rehabilitation, as well as sanctions that "promote accountability and protect the public." N.J.S.A. 2A:4A-21(c). The statute articulates a strong preference for allowing young people to remain in their homes and, when they are removed, providing an environment that is as close as possible to that which "should have been given" by their parents. Ibid. The profoundly negative consequences of lifetime registration described in Part I(A), above, contravene each and every one of these goals.¹

¹ In its brief, amicus curiae the Attorney General of New Jersey claims that, had the legislature determined that mandatory

When the juvenile court does impose sanctions on or provide services to young people, furthermore, it must balance the protection of the community with the development of competencies to enable children to become responsible and productive members of the community. This balancing involves the exercise of discretion, yet SORN policies remove the discretion traditionally afforded to juvenile court judges. Even if a judge determines that it is not in a young person's rehabilitative interest to be placed on the registry, the young person must nevertheless register. See State ex. rel. J.P.F., 368 N.J. Super. 24, 45 (App. Div. 2004) (overturning a family court judge's decision to not place a youth, who was adjudicated for a fourth degree sexual contact, on the registry).

In addition to serving a rehabilitative function, the juvenile court is charged with safeguarding the children under its jurisdiction from neglect or injury See State in the Interest of G.S., 330 N.J. Super. 383, 389 (2000) (holding that the court had the jurisdiction to order the school district to

lifetime registration was incompatible with the Juvenile Code, it would have attempted to "harmonize" the two statutes when the Code was amended in 2015. Those amendments, however, were not intended to be a global revision of the Code but, instead, to address four specific issues: solitary confinement within JJC facilities, waiver of youth to adult court, administrative transfers of young people from juvenile to adult prisons, and data collection and publication. At no time during the drafting process, bill amendments, or legislative hearings was the issue of SORN raised or addressed. See Statement to Senate Bill S2003 (2015).

provide educational services for a youth adjudicated delinquent and whose school attendance was mandated by the juvenile court's disposition). Pursuant to N.J.S.A. 2A:4A-21(h), furthermore, the court must ensure that any action it undertakes is done with in accordance with the child's best interests. Again, for reasons set forth above, mandatory lifetime placement on the registry fails to achieve this goal and undermines the juvenile court's ability to provide for the "care, protection, and wholesome mental and physical development" of the children who come before it. N.J.S.A. 2A:4A-21(a); see Nagel Cert. at 21 and 27 (youth on the registry suffered from major depression, post-traumatic-stress disorder, and multiple suicide attempts as a result of being labeled a sex offender).

2. Registration is incompatible with the privacy protections of the juvenile court.

All proceedings in the juvenile court are closed to the public, and juvenile court records are protected from public inspection and disclosure. See N.J.S.A. 2A:4A-60 (Allowing limited disclosure to the Attorney General or county prosecutor; the parent, guardian or attorney of the juvenile; the Department of Human Services or Department of Children and Families if either of those departments are providing care or have custody of the juvenile; any institution to which the juvenile is currently committed; the Juvenile Justice Commission; and law

enforcement agencies maintaining a central registry. The following are allowed access to juvenile records upon request: the victim or victim's family and, on a confidential basis, the principal of the school where the juvenile is enrolled.). These privacy protections are consistent with the statutory goal of protecting young people adjudicated in the juvenile court from the stigma of a criminal record. See N.J.S.A. 2A:4A-21; J.G., 169 N.J. at 324. Indeed, the United States Supreme Court has held that youth charged with juvenile delinquency do not have the right to trial by jury, as the juries "would bring with [them] into that system the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial." McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971). Such public trials would contravene the goal of "not . . . stigmatiz[ing] the juvenile . . . by branding him a criminal." Id. at 552. Sex offender registration and notification policies, however, violate these traditional privacy protections of the juvenile court and cause significant harm to young people adjudicated of these offenses. Under N.J.S.A. 24:4-60(a), the statute governing disclosure of juvenile court records, a young person's social, medical, psychological, court and law enforcement records "shall be strictly safeguarded from public inspection."

Although N.J.S.A. 24:4-60(a) allows for very limited disclosure of juvenile records to those who require access to the records to effectively perform their public duties, it does not permit members of the public to access information about a youthful conviction. Even members of the press are not given unfettered access to juvenile court proceedings or to records of juvenile adjudications. See State in the Interest of L., 82 N.J. 362, 382 (1980) (holding that the prosecutor can only disclose information regarding the young person to the press when authorized by the juvenile court). In fact, both this Court and the Legislature have consistently sought to balance the rehabilitative needs of the juvenile with the need to disclose juvenile records for the purpose of maintaining public safety, and they have consistently protected juvenile privacy in doing so. State in the Interest of B.C.L., 82 N.J. 362, 375 (1980). These bedrock protections are eviscerated, however, when young people are placed on the registry. See Part I(A), supra.

3. Registration undermines the protections of the waiver statute as applied to eligible youth.

Finally, every young person who is over the age of 14 and subject to mandatory lifetime registration was eligible to be waived to adult court but was not waived. N.J.S.A. 2A:4A-26.1. Pursuant to the statute, prosecutors considering whether to seek waiver must consider the following factors:

- (a) The nature and circumstances of the offense charged;
- (b) Whether the offense was against a person or property, allocating more weight for crimes against the person;
- (c) Degree of the juvenile's culpability;
- (d) Age and maturity of the juvenile;
- (e) Any classification that the juvenile is eligible for special education to the extent this information is provided to the prosecution by the juvenile or by the court;
- (f) Degree of criminal sophistication exhibited by the juvenile;
- (g) Nature and extent of any prior history of delinquency of the juvenile and dispositions imposed for those adjudications;
- (h) If the juvenile previously served a custodial disposition in a State juvenile facility operated by the Juvenile Justice Commission, and the response of the juvenile to the programs provided at the facility to the extent this information is provided to the prosecution by the Juvenile Justice Commission;
- (i) Current or prior involvement of the juvenile with child welfare agencies;
- (j) Evidence of mental health concerns, substance abuse, or emotional instability of the juvenile to the extent this information is provided to the prosecution by the juvenile or by the court; and
- (k) If there is an identifiable victim, the input of the victim or victim's family.

[N.J.S.A. 2A:4A-26.1.]

Presumably, when a decision is made to pursue juvenile rather than adult prosecution, it is because these factors militate against waiver. Nevertheless, the young person in question remains subject to the full force of Megan's Law and its attendant harms, and the mandatory lifetime adult punishment of registration and notification undercuts the juvenile court's carefully constructed regime.

II. MANDATORY LIFETIME REGISTRATION AND NOTIFICATION FOR THOSE WHO COMMIT OFFENSES AS JUVENILES VIOLATES THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, PARAGRAPH 13 OF THE NEW JERSEY CONSTITUTION.

In Doe, this Court determined that the registration and community notification provisions of Megan's Law, N.J.S.A. 2C:7-1-5 (registration) and N.J.S.A. 2C:7-6-11 (notification), did not constitute punishment within the meaning of the Eighth Amendment or Article I, Paragraph 12 because the purpose of these provisions was remedial rather than punitive. That decision does not control the question of whether the current version of Megan's Law, which was not considered in Doe, constitutes cruel and unusual punishment as applied to youth. Unlike the scheme considered in Doe, N.J.S.A. 2C:7-2(g) imposes mandatory lifetime registration and notification for juveniles. The mandatory nature of the scheme flies in the face of the reasoning of the United States Supreme Court in Miller and Montgomery, as adopted by this Court in Zuber, that individualized consideration is required before young people may be sentenced to the most serious punishments. The registration and notification scheme is excessive in relation to any safety need, and so constitutes punishment. Moreover, for the reasons discussed herein, mandatory lifetime registration and notification constitutes cruel and unusual punishment as applied to juveniles. See generally, Robin Walker Sterling, Juvenile Sex

U.CHICAGO L. REV. 295 (2015).

A. Unlike the scheme considered in *Doe v. Poritz*, mandatory lifetime registration and notification for juveniles is excessive in relation to the safety need, and thus constitutes punishment.

In determining that the N.J.S.A. 2C:7 registration and notification requirements were remedial rather than punitive, the Doe Court explained that the first inquiry is whether the statute, by its terms, aims to punish. See Doe, 142 N.J. at 46. The Court found that the terms of the statute were "clearly and totally remedial in purpose." Id. at 73. The Court also recognized, however, that even if a statute is not punitive on its face, it may nevertheless inflict punishment if it has a punitive impact that "comes from aspects of the law unnecessary to accomplish its regulatory purposes - that is, if the law is 'excessive,' the excess consisting of provisions that cannot be justified as regulatory, that result in a punitive impact, and that, therefore, can only be explained as evidencing a punitive intent." Id. at 46. The Court noted, "[a] statute that can fairly be characterized as remedial, both in its purpose and implementing provisions, does not constitute punishment . . . even though it may indirectly and adversely affect, potentially severely, some of those subject to its provisions." Id. at 43.

As described above, the notification and registration scheme does have more severe adverse effects on adolescents than on adults, but as Doe explained, those effects alone do not render the scheme punitive. Instead, the scheme is punitive because, according to the test the Court applied in Doe, the restrictions the scheme imposes are excessive in relation to its regulatory aim.

The Doe Court described the regulatory purposes of the registration and notification provisions as "enabl[ing] the public to protect itself from the danger posed by sex offenders, such offenders widely regarded as having the highest risk of recidivism." Id. at 73. Here, the punishment imposed is excessive in relation to that aim for three primary reasons. First, a growing body of evidence demonstrates that the registration and notification requirements do not increase public safety, and so cannot be justified as regulatory. Second, young people charged with sex offenses have extraordinarily low recidivism rates, and, so, the central justification for registration and notification - the need to protect the community from repeat offenders - is not present here. Finally, N.J.S.A. 2C:7-2(g)'s automatic imposition of lifetime registration does not reflect the narrow tailoring upon which the Doe Court relied in finding that the then-extant statutory scheme was not excessive in relation to the regulatory aims.

1. Growing evidence demonstrates that the registration and notification systems do not advance public safety goals.

In Doe, the Court echoed the legislative theory behind Megan's Law: by knowing about the presence of those who had committed sexual offenses, communities would be able to protect themselves and the rate of sexual assaults would decline. See Doe at 73. Since Doe, a growing body of literature, including a study conducted by the New Jersey Department of Corrections, shows that theory to be inaccurate. In December of 2008, the Research and Evaluation Unit of the Office of Policy and Planning at the New Jersey Department of Corrections released a study funded by the National Institute of Justice entitled Megan's Law: Assessing the Practical and Monetary Effect. See Kristen Zgoba, et al., Megan's Law: Assessing the Practical and Monetary Effect (2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf>. That study observed that with respect to registration and notification schemes, "there is virtually no evidence to support their effectiveness in reducing either new first-time sex offenses (through protective measures or general deterrence) or sex re-offenses (through protective measures and specific deterrence)." Id. at 7. It concluded, "there is little evidence to date, including this study, to support a claim that Megan's Law is effective in reducing" sexual offenses. Other studies

have also found that sex offender registries do not improve safety. As a University of Chicago study author concluded,

I find little evidence to support the effectiveness of sex offender registries, either in practice or in potential. Rates of sex offense do not decline after the introduction of a registry . . . nor do sex offenders appear to recidivate less when released into states with registries. The data from Washington, D.C., indicate that census blocks with more offenders do not experience statistically significantly higher rates of sexual abuse, which implies that there is little information one can infer from knowing that a sex offender lives on one's block.

[Amanda Y. Agan, Sex Offender Registries: Fear Without Function?, 54 J.L. ECON. 207, 208 (2011).]

See also, e.g., Bob Edward Vasquez, et al., The Influence of Sex Offender Registration and Notification Laws in the United States: A Time-Series Analysis, 54 CRIME & DELINQUENCY 175, 188 (2008) (comparing rates of sex offenses in ten states before and after passage of notification and registration laws and observing, "sex offender legislation seems to have had no uniform and observable influence on the number of rapes reported in the states analyzed."); Elizabeth Reiner Platt, Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration, 37 N.Y.U. L. REV. & SOC. CHANGE 727, 750-767 (2013) (collecting studies and identifying the problems with registries as their inability to prevent crime; their over-inclusiveness of

people who pose no risk; their under-inclusiveness of people whose crimes have not been reported, which creates a false sense of security among communities; and the direct and collateral consequences of registries on registering individuals and their families); J.J. Prescott, et al., Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?, 54 J.L. & ECON. 161, 181 (2011) (finding that registration and notification are not a deterrent for those on registries); Jill S. Levenson, et al., Megan's Law and its Impact on Community Re-Entry for Sex Offenders, 25 BEHAV. SCI. & L. 587, 598 (2007) ("Social policies that ostracize and disrupt the stability of sex offenders are unlikely to be in the best interest of public safety.").

This mountain of evidence shows that registry and notification systems fail to serve the stated regulatory aim of making communities safer. The Doe Court's determination that registration and notification were not punitive rested solely on the system's purported ability to protect the public: "That which is allegedly punitive, the knowledge of the offender's record and identity, is precisely that which is needed for the protection of the public." Id. at 73. With the passage of time, available data demonstrate that this assumption was flawed. The registration and notification regime is not "needed for the protection of the public"; in fact, evidence suggests it has no impact on public safety. In the absence of a public safety

purpose, all that remains is the scheme's true justification: punishment.

2. Youth charged with sex offenses have a very low rate of recidivism.

The core justification for the registration and notification scheme is the danger of recidivism - permanently and publicly identifying a person as having committed a crime for which he has served his prison sentence has been justified on the ground that he is likely to reoffend in the future. As the Court explained in Doe, the laws "were designed simply and solely to enable the public to protect itself from the danger posed by sex offenders, such offenders widely regarded as having the highest risk of recidivism." Doe, 142 N.J. at 73.

But, as detailed in Part I(C), supra, youth found to have committed sex offenses have a very low rate of recidivism. Indeed, the rate of recidivism among juvenile sex offenders is far lower than the rate of recidivism for many non-sex crimes among adults. Compare Zimring et al., Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort Study, 26 JUST. Q. 58, 71 (2009) (noting that rate of recidivism among juvenile sex offenders is as low as 15%) with U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to

2010, Supplemental Tables (December 2016), available at https://www.bjs.gov/content/pub/pdf/rprts05p0510_st.pdf (showing that people imprisoned for property offenses committed subsequent property offenses after release at a rate of 54%). The law does not require registration and notification for property offenses. Marking people who are less likely to reoffend and not marking people who are more likely to reoffend bears no rational relationship to the stated public safety goal of informing the public of the presence of people likely to commit offenses in their communities.

3. The automatic imposition of lifetime registration lacks the narrow tailoring the Court relied on in finding the statute non-punitive in Doe.

Finally, the law before the Court in the instant case is much broader than the law the Court considered in Doe, as it involves the mandatory imposition of lifetime registration and notification, which the version before the Court in Doe did not. The Court observed of the law at issue in Doe, "this law is so clearly remedial, its impact so carefully limited, that it can be said to be solely remedial with no need to explain anything." Doe, 142 N.J. at 74. In reaching this conclusion, the Court observed,

[F]or those who may have committed their offenses many years ago, [the law] applies only to those who were found to be repetitive and compulsive offenders, i.e., those most likely, even many years later, to

reoffend, providing a justification that strongly supports the remedial intent and nature of the law.

[Id.]

The law now before the Court is not so narrowly tailored. N.J.S.A. 2C:7-2(g), added after Doe and J.G. were decided, provides that a person can never be removed from the registry if he commits or is adjudicated delinquent of aggravated sexual assault pursuant to N.J.S.A. § 2C:14-2(a) or sexual assault involving penetration and using physical force or coercion pursuant to N.J.S.A. 2C:14-2(c)(1). This categorical, mandatory lifetime registration and notification requirement does not take into account the likelihood that a person will reoffend. Thus, "for those who . . . committed their offenses many years ago," it is not only "repetitive and compulsive offenders" who are subject to continued registration and notification requirements. Even if a registrant poses no ongoing threat, the fact of having committed one of those offenses in the past results in lifetime imposition of registration and notification conditions. In the absence of such a threat, as is likely where the person was an adolescent at the time of the offense, no regulatory safety justification exists.

The Doe Court recognized "the commonsense rule that where a provision or sanction bears no rational relationship to the remedial goal and can only be explained as evidencing an intent

to punish, it will be held to constitute punishment for constitutional purposes." Doe, 142 N.J. at 62. Because notification and registration laws have been shown to have no impact on safety, their imposition generally bears no rational relationship to a remedial goal. Moreover, because the only justification for continued registration and notification based on past offenses is the danger of re-offense, there is no safety interest in subjecting adolescents, who have very low recidivism rates, to registration and notification. Finally, the automatic imposition of lifetime registration and notification requirements is far broader than the scheme the Court considered in Doe, and so is excessive in relation to its purpose. For these reasons, registration and notification schemes for juveniles constitute punishment for constitutional purposes.

B.Mandatory, lifetime registration and notification is cruel and unusual as applied to juveniles.

The Eighth Amendment of the United States Constitution proscribes punishment that is "cruel and unusual" - punishment that involves "[t]he unnecessary and wanton infliction of pain," Hope v. Pelzer, 536 U.S. 730, 737 (2002) (citing Whitley v. Albers, 475 U.S. 312, 319 (1986)). An infliction of pain is "unnecessary and wanton" if it is "totally without penological justification." Rhodes v. Chapman, 452 U.S. 337, 346 (1981). Moreover, as the Court recognized in Miller, punishment that is

not cruel and unusual as applied to adults may nevertheless be cruel and unusual as applied to young people. See Miller, 132 S. Ct. at 2464 (“[C]hildren are constitutionally different from adults for purposes of sentencing,” and so mandatory life without parole sentencing schemes for juveniles violate the Eighth Amendment). See also Roper, 543 U.S. at 570, 573-74 (the inherent differences between juveniles and adults “render suspect any conclusion that a juvenile falls among the worst offenders,” and so subjecting juveniles to the death penalty violates the Eighth Amendment: “When a juvenile offender commits a heinous crime, the State . . . cannot extinguish his life and his potential to attain a mature understanding of his own humanity”); Graham v. Florida, 560 U.S. 48, 68, 74 (2010) (“[B]ecause juveniles have lessened culpability they are less deserving of the most severe punishments,” and as a result, “for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole.”).

Article I, Paragraph 12 of the New Jersey Constitution also prohibits cruel and unusual punishment, and “[t]he test to determine whether a punishment is cruel and unusual . . . is generally the same’ under both the Federal and State Constitutions.” State v. Zuber, 2017 N.J. LEXIS 5, at 23 (quoting State v. Ramseur, 106 N.J. 123, 169 (1987)). The New Jersey formulation involves a three-part test: “First, does the

punishment for the crime conform with contemporary standards of decency? Second, is the punishment grossly disproportionate to the offense? Third, does the punishment go beyond what is necessary to accomplish any legitimate penological objective?" Ramseur, 106 N.J. at 169.

Under either constitutional formulation, mandatory lifetime registration for juveniles adjudicated delinquent of sexual assault pursuant to N.J.S.A. 2C:14-2(a) and (c)(1) is cruel and unusual punishment. First, as the United States Supreme Court explained in Miller, "children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform . . . 'they are less deserving of the most severe punishments.'" Miller, 132 S. Ct. at 2464 (quoting Graham, 130 S. Ct. at 2026). A primary consequence of that difference is that, with regard to a state's "harshest penalties," mandatory sentencing schemes that treat children the same as adults are constitutionally suspect: "[A] sentencer misses too much if he treats every child as an adult." Miller, 132 S. Ct. at 2468. Prior to imposing such penalties, sentencing courts must afford young people "individualized consideration" that takes into account "children's diminished culpability and heightened capacity for change." Id. at 2469. Because of the harms described above, and their imposition for life without possibility of relief,

categorical, mandatory lifetime registration and notification is one of this State's harshest punishments. In keeping with the guidance of Miller, imposing this punishment without individualized consideration - as 2C:7-2(g) does - violates the Eighth Amendment and Article I, Paragraph 12.

Turning to the Ramseur factors, as recently reaffirmed in Zuber, mandatory lifetime registration and notification for juveniles adjudicated delinquent of sexual offenses does not conform to contemporary social mores. Increasingly, news coverage of lifetime registration of juvenile sexual offenders shows society's aversion to the practice. See, e.g., The List; New York Times Editorial Board: The Pointless Banishment of Sex Offenders, The New York Times, September 8, 2015, available at <https://www.nytimes.com/2015/09/08/opinion/the-pointless-banishment-of-sex-offenders.html>; Julie Bosman, Teenager's Jailing Brings a Call to Fix Sex Offender Registries, The New York Times, July 4, 2015, available at https://www.nytimes.com/2015/07/05/us/teenagers-jailing-brings-a-call-to-fix-sex-offender-registries.html?_r=0. Recognizing this, the Supreme Courts of Ohio and Pennsylvania have declared that mandatory lifetime registration schemes for juveniles violate juveniles' constitutional rights. See In re C.P., 131 Ohio St.3d 513 (2012) (automatic, lifelong registration and notification requirements violate due process and the

prohibition against cruel and unusual punishment for juvenile sex offenders tried within the juvenile system); In the Interest of J.B., 107 A.3d 1 (Pa. 2014) (holding that lifetime registration of juvenile sexual offenders violated juveniles' right to due process and so not considering whether it violated juveniles' other constitutional rights). And, in 2013, Delaware amended its once-mandatory juvenile sex offender registration law to afford courts discretion with regard to both placing a child on the registry in the first instance and subsequent petitions for release. See 11 DEL. C. 4123 (2013).

Lifetime registration and notification is also grossly disproportionate to the offense for which it is imposed. As detailed in Part I(A), young people on the registry suffer extreme harm. Moreover, it is clear from the sentences of incarceration under the Juvenile Code that this lifetime consequence is dramatically disproportionate to the punishment otherwise available for the offense. The maximum prison sentence available for juveniles adjudicated delinquent of sexual offenses under N.J.S.A. § 2C:14-2 is four years. Juveniles subjected to mandatory lifetime registration and notification typically have served time in JJC custody, rendering the lifetime registration and notification additional punishments beyond the term of incarceration. These lifetime restrictions on where a person can live; what kind of employment he can have;

and what information is made available to his friends, romantic partners, and neighbors, are grossly disproportionate to the offense, particularly when considered in addition to the punishment imposed by the Juvenile Court.

Finally, for the reasons described in Part III (A)(1), supra, lifetime registration and notification is beyond what is necessary to accomplish any legitimate penological objective. Because the Doe Court rejected the notion that the primary purpose of the registration and notification requirements was penological, it did not consider whether lifetime registration and notification satisfied an appropriate penological purpose. The Court did note, "We find it difficult to accept the notion that the Registration and Notification Laws are designed or are likely to deter repetitive and compulsive offenders who were not previously deterred by the threat of long-term incarceration." Doe, 142 N.J. at 73. Indeed, the penological objective of punishing and deterring sexual offenses is met by the punishment of incarceration that is available under the Juvenile Code. This additional punishment of lifetime registration and notification is just that: an additional and extremely harsh punishment that serves no further penological objective.

For the reasons described herein, mandatory lifetime registration and notification for juveniles constitutes cruel

and unusual punishment within the meaning of Article I, Paragraph 12 and the Eighth Amendment.²

III. THE PUNISHMENT OF MANDATORY LIFETIME REGISTRATION AND NOTIFICATION FOR JUVENILES DEPRIVES THEM OF DUE PROCESS AND VIOLATES THEIR ELEVATED PRIVACY INTERESTS.

A. Notification and registration deprives a juvenile registrant of liberty and privacy interests without due process.

As described in Part I(D), supra, mandatory lifetime registration and notification infringe on the elevated privacy rights that attach to juvenile adjudications without providing the robust procedural protections accorded to adult criminal defendants. As a result, the registration and notification scheme violates young peoples' right to due process under the Fourteenth Amendment of the United States Constitution and Article 1, Paragraph 1 of the New Jersey Constitution.

The juvenile court provides fewer procedural protections to youth than the criminal courts afford adult defendants. The argument that these diminished procedural safeguards are sufficient rests on a simple premise: in exchange for greater

² The analysis included in this Part applies with equal force to youth adjudicated delinquent in the juvenile justice system and those waived to the adult system. Though this case involves a young person who was adjudicated in the juvenile system, Graham, Roper, Miller, Montgomery, and Zuber all recognize that the cruel and unusual punishment assessment turns not on the forum of the adjudication, but on the nature of the punishment imposed. Thus, we urge the Court to consider extending its analysis to those youth who have been waived to adult court.

confidentiality protections, non-criminal penalties, and less formal proceedings, children in the juvenile court do not enjoy the right to, most notably, trial by jury. See, McKeiver; State in re A.C., 426 N.J. Super. 81, 93-94 (Ch. Div. 2011) (dismissing constitutional challenge to a denial of a jury trial in juvenile court because "requesting jury trials in juvenile matters would effectively result in there no longer being a need for a separate process at all"). As Justice Blackmun noted in McKeiver, higher procedural protections, such as right to a jury trial, would bring with them decreased confidentiality that would end the prospect of "an intimate informal protective proceeding" and raise the specter of "the public trial." McKeiver, 403 U.S. at 545, 550.

The statute here fails because it attempts to have it both ways. If the juvenile privacy interest is so low that confidential information can be publicly disclosed, then surely all the procedural protections of adult court must also apply to the registrant. If the juvenile privacy interest is so high that it can justify the denial of trial by jury, then such information cannot and should not be made public. In short, registration and notification requirements are more harmful as applied to juveniles than similar restrictions are for adults, because children tried in juvenile court lose an additional critical protection - the guarantee of confidentiality - without

first being accorded enhanced procedural rights. In other contexts where an adult consequence looms over a minor, due process protections are elevated. See, e.g., State ex rel. A.S., 203 N.J. 131, 149 (2010) (interrogations); State v. A.G.D., 178 N.J. 56, 67-68 (2003) (waiver of constitutional rights); In the Interest of N.H., 226 N.J. 242, 256 (2016) (waiver to adult criminal justice system). When, as here, a penalty identical to an adult's is being imposed and confidentiality of juvenile records removed, the State cannot hide behind the fig leaf of the special nature of the juvenile court to justify the denial of due process.

N.J.S.A. 2C:7-2(g), moreover, neither requires nor permits fact-finding on the most salient justification for registration and notification -- the likelihood of re-offense. Without adequate opportunity to be heard on this core issue, the statutory regime does not accord due process to youth who fall within the statute. See J.B., 107 A.3d at 16-20 (determining that mandatory lifetime registration of juveniles unconstitutionally violated procedural due process by creating an irrebuttable presumption without allowing the juvenile a hearing on the relevant issue).

- 1. Because lifetime mandatory registration and notification is punishment, additional procedural protections are needed.**

The procedural justification for an automatic registration and notification scheme is that its strictures are regulatory and impose no additional punishment on registrants. See Doe, 142 at 46 (determining that the salient question for determining the validity of a registration and notification scheme depends on whether they "inflict punishment"). Yet, as demonstrated in Part II, supra, mandatory lifetime registration and notification are not only punishment, but cruel and unusual punishment when applied to youth. Once it is clear that punishment may be imposed, due process requires enhanced protections that do not exist under existing law.

Faced with a similarly onerous statute to New Jersey's, and based on a prior holding that mandatory lifetime notification and registration constituted punishment, the Ohio Supreme Court held that that state's registration scheme violated young peoples' right to due process. See In re C.P., 131 Ohio St.3d 513, ¶11 (2012) (citing State v. Williams, 129 Ohio St.3d 344, ¶16 (2011)). Like New Jersey's statute, Ohio's statute required the imposition of an "adult penalty immediately upon the adjudication" without any opportunity to complete rehabilitation. See C.P., 131 Ohio St.3d 513, ¶16. The Court detailed the incoherence of applying automatic adult punishment in a juvenile court without input from a juvenile judge, consideration of individual factors about a child or his

background, input into how often or where a child may register, or a determination as to how publication of the offense might affect rehabilitation. C.P., 131 Ohio St.3d 513, ¶78.

Importantly, the Ohio court highlighted that the purposes of the juvenile system sometimes require lower protections (as with jury trials) and sometimes require higher procedural protections: “[F]undamental fairness is not a one-way street . . . [and] may require . . . additional procedural safeguards for juveniles in order to meet the juvenile system’s goals of rehabilitation and reintegration” C.P., 131 Ohio St.3d 513, ¶85.

The instant case provides an almost exact analogue to the Ohio case -- a mandatory lifetime registration and notification requirement that constitutes an adult criminal punishment, applied to juveniles in a way that removes any discretion from a juvenile judge and undermines the purposes of juvenile court without the procedural protections of the adult adversary system. Like that statute, N.J.S.A. 2C:7-2(g) fails to accord due process to youth facing lifetime registration and, so, fails to pass constitutional muster.

2. Due Process Requires Both Ex Ante and Post-Hoc Review of Placement on the Registry.

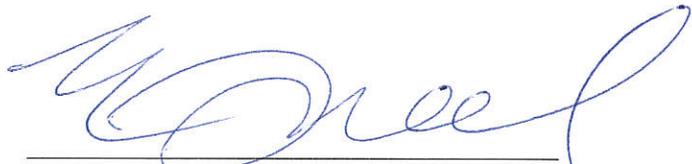
As discussed above, both Miller and Zuber affirm that young people are constitutionally different from adults for purposes

of sentencing, and that as a result of those differences, individualized consideration is needed before a court imposes the harshest punishments available. Mandatory, categorical registration is anathema to that individualized review. In order to render the statute constitutional, the categorical inclusion of juveniles adjudicated delinquent of sexual offenses and of young people adjudicated in the criminal justice system to committed offenses before turning eighteen must be excised. Before any person who was a juvenile at the time of the charged sexual offense can be required to register, he must receive an individualized judicial determination that takes into account the factors identified in Miller as well as the particular harms that he or she may suffer as a result of registration. The court must determine both whether registration is appropriate at all, and if so, for how long. After registration has been imposed, it must be subject to periodic judicial review. While the sentencing judge should set the review period, in no event should it exceed fifteen years. See, e.g., Doe v. Portiz, 142 N.J. 1 (1995) (noting that the statute allowed for review after fifteen years); State v. Zuber, -- N.J. --, 2017 N.J. LEXIS 5, at 23 (Jan. 11, 2017).

CONCLUSION

The mandatory, lifetime registration and notification requirements of N.J.S.A. 2C:7-2(g) are profoundly harmful to the young people who are subject to them and serve no legitimate public safety or regulatory purpose. Both this Court and the United States Supreme Court have held, furthermore, that the imposition of a lifelong penalty on youth requires a careful individualized assessment prior to sentencing. See Miller; Zuber. No such assessment exists under the current law. The statute thus violates state and federal constitutional prohibitions of cruel and unusual punishment, as well as the right to due process of law.

Dated:



Rebecca Livengood (028122012)
AMERICAN CIVIL LIBERTIES UNION OF
NEW JERSEY FOUNDATION
P.O. Box 32159
Newark, New Jersey 07102
(973) 854-1733
rlivengood@aclu-nj.org
Counsel for proposed *Amicus*