

**SUPREME COURT  
COURT OF APPEALS**

In the Matter of A.R.H., a Youth.	)	Clackamas County
	)	Circuit Court
STATE OF OREGON,	)	Case. No. 17JU01020
	)	
Respondent	)	CA A172262
Respondent on Review	)	
	)	
v.	)	S069077
	)	
A.R.H.,	)	CONFIDENTIAL BRIEF
	)	UNDER ORS 419A.255
	)	
Appellant	)	
Petitioner on Review.	)	

CONFIDENTIAL BRIEF OF *AMICI CURIAE*  
JUVENILE LAW CENTER, NATIONAL JUVENILE DEFENDER CENTER  
(N/K/A THE GAULT CENTER), AND OREGON JUSTICE RESOURCE  
CENTER IN SUPPORT OF PETITIONER ON REVIEW A.R.H.

On Review from decision of the Court of Appeals  
On Appeal from a Judgment of the Clackamas County Circuit Court  
Honorable COLLEEN F. GILMARTIN, Judge

Opinion Filed September 22, 2021  
Before Armstrong, Presiding Judge, and Tookey, Judge, and Aoyagi, Judge.  
Opinion authored by Tookey, J.

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## **IDENTITY AND INTEREST OF AMICI**

**Juvenile Law Center** fights for rights, dignity, equity, and opportunity for youth. Juvenile Law Center works to reduce the harm of the child welfare and justice systems, limit their reach, and ultimately abolish them so all young people can thrive. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center's legal and policy agenda is informed by—and often conducted in collaboration with—youth, family members, and grassroots partners. Since its founding, Juvenile Law Center has filed influential *amicus* briefs in state and federal courts across the country to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are consistent with children's unique developmental characteristics and human dignity.

**The Gault Center**, formerly known as the National Juvenile Defender Center, was created to promote justice for all children by ensuring excellence in the defense of youth in delinquency proceedings. The Gault Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs, and nonprofit law centers to ensure quality representation and justice for youth in urban, suburban, rural, and tribal areas. The Gault Center has developed national standards for the performance of youth defense attorneys; conducts assessments of states' youth defense delivery systems; and developed a

42-lesson, skills-based youth defense specialization training program. The Gault Center also provides training and technical assistance to thousands of youth defense attorneys and juvenile court stakeholders each year. The Gault Center (as the National Juvenile Defender Center) has participated as *Amicus Curiae* before the United States Supreme Court and federal and state courts across the country. The Gault Center is committed to promoting racial justice, eliminating racial and ethnic disparities, and advocating for overrepresented populations in youth court. The Gault Center advocates for the consistent use of youth affirming language, including omitting the use of the word “juvenile” when referring to young people. The organization’s 2022 decision to become the Gault Center and omit the word “juvenile” from the entity’s name is in accordance with this mission.

The **Oregon Justice Resource Center (OJRC)** is a non-profit organization in Portland, Oregon. It works to dismantle systemic discrimination in the legal system by promoting civil rights and by enhancing the quality of legal representation to historically underrepresented communities. OJRC promotes these goals in many different ways, including through the work of its Youth Justice Project, which aims to empower young people, keep them out of Oregon’s criminal system, and protect them from excessive punishments.

## ARGUMENT

*Amici* write in support of A.R.H. to emphasize the constitutional infirmity of ORS 163A.030. ORS 163A.030(7)(b) requires a child to prove by clear and convincing evidence that they are “rehabilitated” and do not “pose a threat to the safety of the public.” If the court finds that the burden has not been met, it is required to order registration as a sex offender under ORS 163A.025. This presumption of registration fails to appreciate the ample research confirming that sex offender registration does not advance public safety because young people are at an extraordinarily low risk of reoffending sexually, and that the devastating impact of registration interferes with a young person’s rehabilitation. Furthermore, the registration statute is unconstitutionally vague and is not rationally related to a legitimate state purpose, in violation of the Due Process Clause of the Fourteenth Amendment. It allows for the subjective, arbitrary, and discriminatory application of youth registration and does not provide youth with sufficient notice of what they must do to avoid registration. The arbitrary placement of youth on the registry fails to further the purported law enforcement goal of preventing future sexual offenses.

Courts should interpret statutes “to avoid any serious constitutional problems.” *Easton v. Hurita*, 290 Or 689, 694, 625 P2d 1290 (1981). Here, the juvenile court’s application of ORS 163A.030(8) and the Oregon Court of

Appeals' deference to the juvenile court exacerbate the constitutional infirmities of ORS 163A.030. The statute unconstitutionally provides vast discretion to juvenile court judges who can disregard evidence of rehabilitation and impose devastating, life-long consequences on youth, which flies in the face of decades of jurisprudence recognizing constitutionally significant differences between youth and adults.

**I. EMPIRICAL RESEARCH AND THE CONSTITUTIONAL GUARANTEES AFFORDED YOUTH MANDATE A PRESUMPTION AGAINST REGISTERING YOUTH AS SEX OFFENDERS**

Unless a child can prove by clear and convincing evidence that they are “rehabilitated” and do not “pose a threat to the safety of the public,” the court must order registration as a sex offender. ORS 163A.030(7)(b), (8). This presumption of registration conflicts with ample social science research confirming the constitutionally significant developmental differences between youth and adults and, specifically, youth and adults who engage in sexual misconduct.

**A. Youth Are Amenable To Rehabilitation**

The United States Supreme Court has consistently recognized that children are fundamentally different from adults and categorically less deserving of the harshest forms of punishments. *See Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012); *Graham v. Florida*, 560 US 48, 130 S Ct 2011,

176 L Ed 2d 825 (2010); *Roper v. Simmons*, 543 US 551, 125 S Ct 1183, 161 L Ed 2d 1 (2005); see also *Montgomery v. Louisiana*, 577 US 190, 136 S Ct 718, 193 L Ed 2d 599 (2016); *Jones v. Mississippi*, 141 S Ct 1307, 1321, 209 L Ed 2d 390 (2021) (“The Court’s decision today carefully follows both *Miller* and *Montgomery*.”); *White v. Premo*, 365 Or 1, 12–15, 443 P3d 597 (2019) (adopting the reasoning of *Roper*, *Graham*, *Miller*, and *Montgomery*). In the sentencing context, the Court cited three essential characteristics that distinguish youth from adults: youth “have a ‘lack of maturity and an underdeveloped sense of responsibility’; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed.’” *Graham*, 560 US at 68 (citing *Roper*, 543 US at 569–70); see also *Miller*, 567 US at 471; *Montgomery*, 577 US at 206–07. In reaching these conclusions about youths’ reduced culpability, the Supreme Court relied upon a settled body of research confirming the distinct emotional, psychological, and neurological attributes of youth. *Graham*, 560 U.S. at 68. The Supreme Court explained in *Graham* that, since *Roper*, “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.” *Id.* For example, the ability to resist impulses and control emotions, the ability to gauge risks and benefits as an adult would, and the ability to envision the future consequences of one’s actions—even in the face of environmental or

peer pressures—are critical components of social and emotional maturity, necessary to make mature, fully considered decisions. Brief for the American Psychological Ass’n et al. as *Amici Curiae* Supporting Petitioners at 12–13, *Graham*, 560 US 48 (Nos. 08-7412, 08-7621), 2009 WL 2236778.

The developmental research demonstrating children’s immaturity, vulnerability to negative influences, and capacity to reform is supported by neuroscience research. “[A]dolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance.” *Miller*, 567 US at 472 n 5 (quoting Brief for the American Psychological Ass’n et al. as *Amici Curiae* in Support of Petitioners at 4, *Miller*, 567 US 460 (Nos. 10-9646, 10-9647), 2012 WL 174239); *see also Graham*, 560 US at 68. The frontal lobes of the brain, and especially the pre-frontal cortex, continue to develop through adolescence and into one’s twenties. *See* Brief of J. Lawrence Aber et al. as *Amici Curiae* in Support of Petitioners at 15–16, *Miller*, 567 US 460 (Nos. 10-9646, 10-9647), 2012 WL 195300; *see also* Brief for the American Psychological Ass’n, et al. at 25, *Miller*, 567 US 460 (Nos. 10-9646, 10-9647) (citing Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 *Am Psychologist* 739, 742 (2009)).



Adolescents also undergo changes “in the brain’s ‘incentive processing system’—especially the parts that process rewards and social cues.” Brief of the American Psychological Ass’n, et al. at 5, *Miller*, 567 US 460 (Nos. 10-9646, 10-9647); *see also id.* at 26–27 n 62–64 (citing numerous studies). Dopamine levels peak during adolescence in a key region of the brain, “increasing propensity to engage in risky and novelty-seeking behavior.” Brief of J. Lawrence Aber et al. at 16, *Miller*, 567 US 460 (Nos. 10-9646, 10-9647) (citing Dustin Wahlstrom et al., *Developmental Changes in Dopamine Neurotransmission in Adolescence*, 72 *Brain & Cognition* 146, 152 (2010)).

The “rapid, pubertal changes in the brain’s incentive and social processing systems outpac[e] the slower, steadier, and later-occurring changes in areas related to executive function and self-control.” Brief for the American Psychological Ass’n, et al. at 29–30, *Miller*, 567 US 460 (Nos. 10-9646, 10-9647) (citing Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 *Brain & Cognition* 160, 161 (2010)). This disjunction makes “‘middle adolescence (roughly 14-17) . . . a period of especially heightened vulnerability to risky behavior, because sensation-seeking is high and self-regulation is still immature. And in fact, many risk behaviors follow this pattern, including unprotected sex, criminal behavior, attempted suicide, and reckless driving.’” *Id.* at 30 (quoting Steinberg, *A Behavioral*

*Scientist Looks at the Science of Adolescent Brain Development, supra*, at 162).

On the other hand, the “very immaturity and plasticity” of the adolescent brain makes children open to change and reform. Brief of J. Lawrence Aber et al. at 10–11, *Miller*, 567 US 460 (Nos. 10-9646, 10-9647).

The Supreme Court’s holding in *Graham* rested largely on the incongruity of imposing a penalty that afforded no opportunity for release on an adolescent who had capacity to change and grow. *See* 560 US at 75. The Court further explained that:

Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of “irretrievably depraved character” than are the actions of adults. *Roper*, 543 U.S. at 570, 125 S.Ct. 1183. It remains true that “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed. *Ibid.*”

*Id.* at 68. *Graham* acknowledged that the salient characteristics of youth—the lack of maturity, evolving character, vulnerability and susceptibility to negative influences and external pressure—make it “difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Id.* at 73 (quoting *Roper*, 543 US at 572). Accordingly, the Court recognized that “juvenile offenders cannot with reliability be classified among the worst offenders,” *id.* at 68 (citing *Roper*, 543 US at 569),

and that although “[a] juvenile is not absolved of responsibility for his actions . . . his transgression ‘is not as morally reprehensible as that of an adult.’” *Id.* (quoting *Thompson v. Oklahoma*, 487 US 815, 835, 108 S Ct 2687, 101 L Ed 2d 702 (1988) (plurality opinion)); *see also Jones*, 141 S Ct at 1314 (citing *Miller*, 567 US at 476 (noting that the distinctive attributes of youth are always mitigating)).

The research on adolescent brain development, which confirms that youth are less culpable than their adult counterparts, applies with equal force to youth who commit sexual offenses. The belief that “sex offenders are a very unique type of criminal” is not supported with respect to youth. *See Elizabeth J. Letourneau & Michael H. Miner, Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, 17 Sexual Abuse 293, 296–300 (2005). Research instead demonstrates that youth who commit sexual offenses are similar to youth who commit non-sexual offenses. *See id.* at 297 (“[E]mpirical literature supports the view that juvenile sex offenders, as a group, are similar in their characteristics to other juvenile delinquents and do not represent a distinct or unique type of offender.”); Michael F. Caldwell, *What We Do Not Know About Juvenile Sexual Re-offense Risk*, 7 Child Maltreatment 291, 294–95 (2002) (“The observation that juvenile sex offenders are more likely to reoffend with nonsexual delinquency than sexual delinquency lends support to those who question whether juvenile

sex offenders constitute a distinct group.”); Franklin E. Zimring et al., *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort*, 26 Just Q 58, 70 (2009) (“The best prediction of an adult sex offense was a high-frequency juvenile police contact record, whether or not any of the youthful contacts involved a sex offense.”).

As is true of youth who commit non-sexual offenses, sexual offending during adolescence is generally a reflection of developmental factors and transient immaturity, not irreparable corruption.

The[ study] findings . . . underline the importance of treating adolescent sex offenders in developmentally sensitive ways. Cognitive changes related to brain development, hormonal changes related to the onset of puberty, the role of family and peer relationships, judgment, impulse control, bonds to school and other prosocial groups, and the response to social stressors such as child abuse could all play an important role in repeated adolescent sexual misconduct but may have little influence on persistent adult sexual offending.

Michael Caldwell et al., *Study Characteristics & Recidivism Base Rates in Juvenile Sex Offender Recidivism*, 54 Int’l J Offender Therapy & Comp Criminology 197, 207 (2010); *see also* Elizabeth J. Letourneau & Charles M. Borduin, *The Effective Treatment of Juveniles Who Sexually Offend: An Ethical Imperative*, 18 Ethics & Behavior 286, 290 (2008) (“Another problem with the predominant approaches to treatment is the fact that many sexually offending youths desist from future offending (even in the absence of intervention).”).

Further, youth who commit sexual offenses are amenable to treatment and rehabilitation. See R. Karl Hanson et al., *The Principles of Effective Correctional Treatment Also Apply to Sexual Offenders*, 36 Crim Just & Behavior 865, 881 (2009) (noting results of meta-analysis of studies on treatment effectiveness, finding that individuals with sex offense histories who went through treatment, especially high-quality treatment, had lower sexual and nonsexual recidivism rates than individuals with sex offense histories who did not go through treatment).

**B. Youth Registration Imposes Insurmountable Burdens That Impede Rehabilitation**

Registering youth as sex offenders, even when they are legally permitted to seek relief from registration after a short time, subjects them to lifelong consequences and unconstitutional burdens. Research shows that calling a child a “sex offender” can have devastating psychological and practical consequences. See Ass’n for the Treatment of Sexual Abusers, *Report of the Task Force on Children with Sexual Behavior Problems* 24 (2006), <https://www.atsa.com/pdfs/Report-TFCSBP.pdf> (accessed May 28, 2022) (noting that labeling children as sex offenders who are likely to persist in sexual harm creates a risk of self-fulfilling prophecy and social burdens). Such labeling will likely interrupt a child’s natural process of developing a positive, healthy self-identity and will undermine the goals of rehabilitation. See Letourneau &

Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, *supra*, at 307.

There is little dispute about what the term “sex offender” means: “sex offenders [are viewed] as irredeemable monsters” in modern society. David Van Biema, *Burn Thy Neighbor: Where Can a Child Molester Go After Serving Time? Not Home*, *Time* (July 26, 1993), <http://content.time.com/time/subscriber/article/0,33009,978924-1,00.html> (accessed May 28, 2022). “[T]he common view of registered sexual offenders is that they are particularly dangerous and more likely to reoffend than other criminals,” *In re J.B.*, 630 Pa 408, 433, 107 A3d 1 (2014), a fact unsupported by data. *See infra* Part II.B. Therefore, the label “sex offender” carries demonstrably false connotations and irreparably damages youths’ reputations.<sup>1</sup> Youth who are placed on sex offender registries face ostracism, causing shame and isolation, and depriving them of support. *See* Elizabeth J. Letourneau & Michael F. Caldwell, *Expensive, Harmful Policies that Don’t Work or How Juvenile Sexual Offending is Addressed in the U.S.*, 8(3-4) *Int’l Behav Consultation & Therapy* 23, 27 (2013), <http://psycnet.apa.org/fulltext/2014-12592-006.pdf> (accessed May 28, 2022).

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<sup>1</sup> *See* Or Const art I, § 10, which protects a reputational interest, among other interests.

Children who must register as sex offenders struggle to develop and maintain friendships, are excluded from extracurricular activities, and are physically threatened by classmates who learn of their status. See Maggie Jones, *How Can You Distinguish a Budding Pedophile From a Kid with Real Boundary Problems?*, NY Times Magazine (July 22, 2007), <https://www.nytimes.com/2007/07/22/magazine/22juvenile-t.html> (accessed May 28, 2022); see also Sarah Stillman, *The List: When Juveniles Are Found Guilty of Sexual Misconduct, the Sex-offender Registry Can Be a Life Sentence*, New Yorker (March 14, 2016), <http://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes> (accessed May 28, 2022); Human Rights Watch, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US* 50–58 (2013), [hereinafter “*Raised on the Registry*”] [https://www.hrw.org/sites/default/files/reports/us0513\\_ForUpload\\_1.pdf](https://www.hrw.org/sites/default/files/reports/us0513_ForUpload_1.pdf) (accessed May 28, 2022).

Children on sex offender registries are also four times more likely to report a recent suicide attempt than non-registered children who have engaged in harmful or illegal sexual behavior. Elizabeth J. Letourneau et al., *Effects of Juvenile Sex Offender Registration on Adolescent Well-Being: An Empirical Examination*, 24 Psychol Pub Pol’y & L 105, 114 (2018). One young person



stated, “I live in a general sense of hopelessness, and combat suicidal thoughts almost daily due to the life sentence [registration] and punishment of being a registrant.” *Raised on the Registry, supra*, at 51 (alteration in original). Another former registrant took his own life after several years living on the registry because he knew the stigma associated with the sex offender label would continue to jeopardize him in adulthood. *Id.* at 53.

By placing obstacles between youth and the most routine aspects of daily life, registration impedes successful rehabilitation and reintegration into society. As a result of the restrictions and stigma of registration, over 44% of a sample group of registered youth experienced at least one period of homelessness. *Raised on the Registry, supra*, at 65. In a survey of 296 youth registrants, over 50% reported that they had been denied access to or experienced severe interruptions in their education due to registration. *Id.* at 72. When registered as sex offenders, individuals can be categorically barred from working in certain professions, or risk losing their jobs when their employers learn of their sex offender status. *Id.* at 73–74.

In contrast to the stated aims of registration—to assist law enforcement in preventing future sexual offenses—registration impedes public safety by harming registered children, like A.R.H., and placing limitations on their everyday life. If A.R.H. wants to travel out of state, he must navigate the

inconsistent and ever-changing requirements of the federal government and each of the 50 states; this task is daunting for attorneys, and nearly impossible for registrants. *See generally* Catherine L. Carpenter & Amy Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings LJ 1071, 1076–1100 (2012) (surveying various registration requirements).<sup>2</sup> If he travels to a state that requires public notification, A.R.H. will be forced to broadcast his registration status even if he is not placed on Oregon's public registry. *See, e.g.*, Fla Stat § 985.4815(1)(h)(2), (4) (requiring registration and public notification of out-of-state registrants).

Finally, in direct contravention to the public safety goals of registration, more than 50% of registered youth report experiencing violence or threats of violence against them or their family members that they directly attribute to their registration. *Raised on the Registry, supra*, at 56. A 2017 study revealed that registered children are nearly twice as likely to have experienced a sexual assault in the past year when compared to nonregistered children who had also engaged

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<sup>2</sup> This difficulty unreasonably burdens a young person's constitutionally protected freedom of movement, and the right to intrastate and interstate travel. The United States Supreme Court recognizes a fundamental right to travel, stating that "[t]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro v. Thompson*, 394 US 618, 629, 89 S Ct 1332, 22 L Ed 2d 600 (1969), *overruled in part by Edelman v. Jordan*, 415 US 651, 94 S Ct 1347, 39 L Ed 2d 662 (1974).

in harmful sexual behaviors. Letourneau et al., *Effects of Juvenile Sex Offender Registration on Adolescent Well-Being: An Empirical Examination*, *supra*, at 114. They are also five times more likely to report having been approached by an adult for sex in the past year. *Id.*

The Oregon legislature intended sex offender registration to be a non-punitive, regulatory scheme. *See State v. MacNab*, 334 Or 469, 481–82, 51 P3d 1249 (2002) (examining Oregon’s 1995 sex offender registration law using the factors provided in *Kennedy v. Mendoza-Martinez*, 372 US 144, 83 S Ct 554, 9 L Ed 2d 644 (1963), to determine the legislative intent and impact of the law). However, as demonstrated above, the devastating consequences of youth registration are undeniable. Accordingly, several courts have recognized the punitive effects of registration on youth and registration’s similarity to traditional forms of punishment.<sup>3</sup>

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<sup>3</sup> *See People In Int. of T.B.*, 2021 CO 59, ¶ 58, 489 P3d 752, 768–69 (2021); *State in Int. of C.K.*, 233 NJ 44, 76, 182 A3d 917 (2018); *In re C.P.*, 2012-Ohio-1446, ¶ 85, 131 Ohio St 3d 513, 535–36, 967 NE2d 729. Several courts have also held aspects of sex offender registration punitive as applied to adults. *See Starkey v. Okla. Dep’t of Corr.*, 2013 OK 43, ¶ 77, 305 P3d 1004, 1030; *Doe v. Dep’t of Pub. Safety & Corr. Servs.*, 430 Md 535, 564–65, 62 A3d 123 (2013); *State v. Williams*, 2011-Ohio-3374, ¶ 21, 129 Ohio St 3d 344, 349, 952 NE2d 1108; *State v. Letalien*, 2009 ME 130, ¶ 162, 985 A2d 4, 26; *Gonzalez v. State*, 980 NE2d 312, 321 (Ind 2013); *Hevner v. State*, 919 NE 2d 109, 112 (Ind 2010); *Wallace v. State*, 905 NE2d 371, 384 (Ind 2009); *Doe v. State*, 189 P3d 999, 1019 (Alaska 2008).

**C. Youth Do Not Pose A Threat To Public Safety Because They Are Unlikely To Commit Another Sexual Offense**

Research consistently shows that youth who commit sexual offenses have an exceptionally low risk of sexual re-offense. *See supra* Part I.A at 9–10 (collecting research); *see also* Michael F. Caldwell, *Quantifying the Decline in Juvenile Sexual Recidivism Rates*, 22 Psychol Pub Pol’y & L 414, 419 (2016) (a meta-analysis of recent studies shows current sexual recidivism rates average less than 3%); Elizabeth J. Letourneau & Kevin S. Armstrong, *Recidivism Rates for Registered and Nonregistered Juvenile Sexual Offenders*, 20 Sexual Abuse 393, 400 (2008) (finding a sexual recidivism rate of 0.9% during 4.3 years of follow-up). The very small percentage of youth who do reoffend are only likely to do so in the few years following their adjudication, which is while they are still under juvenile court supervision. *See* Caldwell, *Quantifying the Decline in Juvenile Sexual Recidivism Rates*, *supra*, at 417 (finding no significant increase in recidivism rates beyond 36 months); Michael Caldwell, et al., *Study Characteristics & Recidivism Base Rates in Juvenile Sex Offender Recidivism*, *supra*, at 205 (2010) (finding “the risk of reoffending behavior is highest in the time frame most proximate to the last offense”). Further, registering youth as sexual offenders does not affect sexual recidivism but may increase youths’ risk for non-sexual recidivism, which decreases public safety. *See* Elizabeth Letourneau et al., *The Influence of Sex Offender Registration on Juvenile Sexual*

*Recidivism*, 20 Crim Just Pol’y Rev 136, 147–48 (2009); Molly J. Walker Wilson, *The Expansion of Criminal Registries and the Illusion of Control*, 73 La L Rev 509, 524 (2013) (collecting studies finding that collateral consequences of registration may “exacerbate existing ‘risk factors leading to recidivism’”).

Further, sexual offending during adolescence does not predict sexual offending during adulthood. See Michael F. Caldwell, *Sexual Offense Adjudication and Sexual Recidivism Among Juvenile Offenders*, 19 Sexual Abuse 107, 112 (2007) (“These results are consistent with previous findings that the majority of juvenile sexual offenders do not sexually offend as adults, and are much more apt to commit non-sexual offenses . . . These results did not find that juvenile sex offenders tended to specialize or persist in their sexual offending.” (internal citations omitted)); Zimring et al., *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort*, *supra*, at 66 (finding that using youth sex offense records to predict adult sexual offending would be wrong 90% of the time and would miss 92.2% of adults who committed sexual offenses); Franklin E. 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, 527 (2007) (“What percentage of the adult male police contacts for sex offenses do the juvenile offenders account for? Four percent. So investigating an adult sex offense committed by a male in

the Racine data by interviewing the juvenile sex offenders would be wrong 96% of the time.”).

**II. SECTION 163A.030 IS UNCONSTITUTIONALLY VAGUE AND IS NOT RATIONALLY RELATED TO A LEGITIMATE STATE PURPOSE**

“Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.” *In re Gault*, 387 US 1, 20, 87 S Ct 1428, 18 L Ed 2d 527 (1967). ORS 163A.030 sets forth an unsupported presumption of registration and also fails to satisfy due process because the statute is vague and not rationally related to a legitimate state purpose.

**A. ORS 163A.030 Is Vague, Unconstitutionally Delegating Legislative Power To Judges And Failing To Provide Youth With Sufficient Notice Of What They Must Do To Avoid Registration**

To prevent discriminatory and arbitrary enforcement, due process requires that laws “provide explicit standards for those who apply them.” *Grayned v. City of Rockford*, 408 US 104, 108, 92 S Ct 2294, 33 L Ed 2d 222 (1972). Vague laws impermissibly delegate legislative power to “police[], judges, and juries for resolution on an ad hoc and subjective basis.” *Id.* at 108–09; *see also State v. Hodges*, 254 Or 21, 27, 457 P2d 491 (1969) (“A vague statute lends itself to an unconstitutional delegation of legislative power to the judge and jury, and, by

permitting the jury to decide what the law will be, it offends the principle, if not the rule, against Ex post facto laws.” (citing Or Const art I, § 21)).<sup>4</sup> Further, laws must be sufficiently definite such that a “person of ordinary intelligence [has] a reasonable opportunity to know what is prohibited . . . [and] act accordingly.” *Grayned*, 408 US at 108. The risk of arbitrary enforcement and failure of notice are independently sufficient grounds for a finding of unconstitutionality. *See City of Chicago v. Morales*, 527 US 41, 56, 119 S Ct 1849, 144 L Ed 2d 67 (1999).

**1. ORS 163A.030 fails to provide juvenile courts with explicit standards, resulting in arbitrary and discriminatory imposition of registration and lack of notice**

Recognizing that youth are different from adults, the Oregon legislature enacted a scheme that allows youth to avoid registration. *Compare* ORS 163A.015 (requiring registration for individuals convicted of a sex crime in criminal court), *with* ORS 163A.025 (generally requiring youth adjudicated delinquent to register only if ordered to do so following a hearing under ORS 163A.030). While ORS 163A.030 provides courts both with the standard youth must meet—“rehabilitated” and not “a threat to the safety of the public”—and a list of factors to consider, the juvenile court may apply those factors and any

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<sup>4</sup>*Hodges* concerns the void for vagueness doctrine in the context of penal statutes. The *Hodges* decision is relevant in light of the punitive effects of registration. *See supra* Part I.B.



others it deems relevant as it sees fit. *See* ORS 163A.030(7), (8). This vast authority results in arbitrary and discriminatory imposition of sex offender registration and deprives youth of sufficient notice of what they can do, if anything, to avoid registration.

In her concurring opinion, Judge Aoyagi acknowledges that different juvenile courts could come to different registration determinations based on the exact same evidence. *See Matter of A.R.H.*, 314 Or App 672, 678–79, 499 P3d 851 (Aoyagi, J., concurring). The lack of consistent standards to assess whether a child is “rehabilitated” and not “a threat to the safety of the public” means that courts can disregard evidence showing a youth successfully completed treatment and is at a low risk of re-offense. Further, because youth cannot know what factors the court will deem most important during the registration hearing, they are deprived of sufficient notice of what they must do to avoid presumptive lifetime registration.

An examination of the limited caselaw arising from ORS 163A.030 further demonstrates the constitutional infirmity. *See, e.g., Matter of A.L.M.*, 305 Or App 389, 395–96, 469 P3d 244 (2020) (primarily relying on the seriousness of the original offense<sup>5</sup> and A.L.M.’s use of cannabis while on probation and

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<sup>5</sup> The reliance on the facts of the original offense both in *A.L.M.* and in this case raises serious concerns both regarding registration as a regulatory, rather than punitive tool, and regarding the Supreme Court’s recognition that the seriousness

disregarding the evidence that A.L.M. successfully completed treatment and probation). In the instant case, the court considered A.R.H.'s previous pornography addiction and likelihood of re-exposure to pornography at school, "diverse sexual-assault behaviors," and duration of harmful sexual behavior, and disregarded A.R.H.'s self-disclosure of harmful behaviors, active engagement and successful completion of treatment and probation, low risk of re-offense, and reintegration into his community for seven months prior to registration. *See A.R.H.*, 314 Or App at 675–77; (Pet. for Rev. of Appellant-Petitioner 3–4).

The highly discretionary application of the ORS 163A.030(8) factors is also susceptible to judges' implicit bias and is therefore likely to

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of an offense cannot overcome a youth's lessened culpability and ability to change. *See MacNab*, 334 Or at 482 (finding the intent of Oregon's sex offender registration scheme regulatory, not punitive); *Montgomery*, 577 US at 212 (recognizing "*Miller*'s central intuition—that children who commit even heinous crimes are capable of change").

disproportionately affect youth of color<sup>6</sup> and LGBTQ youth.<sup>7</sup> Oregon's youth registry may already reflect implicit judicial bias. According to data obtained from the Oregon State Police in August 2021, since Oregon adopted its current youth registration scheme in 2015, 16% of the youth placed on the registry following an Oregon adjudication were Black. However, data show that Black

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<sup>6</sup> Research shows that Black youth are viewed as older and more culpable than white youth. See Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J Personality & Soc Psych 526, 532, 539–40 (2014). Several studies show the disparate application of registration to Black youth and adults. See Impact Justice, *Ending the Abusive Practice of Placing Children on Sex Offender Registries* (2021), <https://impactjustice.org/impact/center-on-youth-registration-reform/> (accessed May 28, 2022) (finding that Black youth in California were 6.5 times more likely than white youth to be registered for the *exact same offense*); Alissa Ackerman & Meghan Sacks, *Disproportionate Minority Presence on U.S. Sex Offender Registries*, 16 Just Pol'y J 1, 14 (Fall, 2018) (in Oregon between 2012 and 2014, Black registrants were 7 times more likely to be listed on the public registry than white registrants); Bobbie Ticknor & Jessica J. Warner, *Evaluating the Accuracy of SORNA: Testing for Classification Errors and Racial Bias*, 31 Crim Just Pol'y Rev 3, 14 (2020) (under registration tiering schemes, Black people are more than 2.5 times more likely than white people to be overclassified as having a higher risk of committing another sexual offense and placed in a higher registration tier).

<sup>7</sup> See Katayoon Majd et al., *Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts* 62–63 (2009), [https://www.modelsforchange.net/publications/237/Hidden\\_Injustice\\_Lesbian\\_Gay\\_Bisexual\\_and\\_Transgender\\_Youth\\_in\\_Juvenile\\_Courts.pdf](https://www.modelsforchange.net/publications/237/Hidden_Injustice_Lesbian_Gay_Bisexual_and_Transgender_Youth_in_Juvenile_Courts.pdf) (accessed May 28, 2022) (observing that prosecutors may disproportionately charge lesbian, gay, and bisexual youth with sexual offenses for age-appropriate consensual sexual activity); Ryan T. Shields, Elizabeth J. Letourneau & Joshua C. Cochran, *Examining Bias in Judicial Outcomes for Youth Who have Sexually Offended* (unpublished manuscript) (on file with Dr. Ryan T. Shields) (finding that male youth, who may or may not be LGBTQ, who sexually offend against other males are more likely to experience the harshest penalties in the juvenile system).

youth were, on average, 5% of youth referred to the Oregon Youth Authority for sexual offenses between 2015 and 2020. (Analysis based on data available at *Statewide Youth and Referrals* for 2015 to 2020, Oregon Youth Authority: Juvenile Justice Information System, <https://www.oregon.gov/oya/jjis/pages/youthreferralsreports.aspx> (accessed May 28, 2022)).

**2. The Oregon Court of Appeals failed to provide sufficient guidance to juvenile courts, amplifying the unconstitutionality of ORS 163A.030**

Appellate review of trial court decisions allows for “correction of legal error [,] . . . the opportunity for ‘law making’ to develop and refine the law, and uniformity in the law’s application.” Megan Annitto, *Juvenile Justice Appeals*, 66 U Miami L Rev 671, 679 (2012). In the context of youth registration, the appellate court abdicated this responsibility, allowing juvenile courts to apply the factors in ORS 163A.030(8) arbitrarily. A vague statute “sometimes can be saved by a judicial interpretation that gives it the required definiteness. It is the court’s obligation to do so when this can be done without departing too far from what the legislature sought to accomplish or what the statute itself can convey to a reader.” *State v. Robertson*, 293 Or 402, 411, 649 P2d 569 (1982).

In the case of ORS 163A.030, however, the appellate court refused to clarify the evidence a youth must show to avoid registration, restricting its review of the juvenile court’s registration decision to, “(1) *what* facts it had to decide,

(2) which party bore the burden of persuading the juvenile court regarding those facts, and what burden of persuasion applied, (3) whether the court considered relevant factors, and (4) given the court's factual findings, what result the statute required." *A.L.M.*, 305 Or App at 397. Further, it held that the juvenile court's decision will fall "only if the record would compel *every* reasonable juvenile court to be persuaded that youth *had* met that burden." *Id.* at 399.

By allowing broad discretion by the juvenile court, and by eliminating any meaningful or substantive opportunity for review of the juvenile court's decision, the appellate court abdicated one of its primary responsibilities: ensuring uniform application of the law. In the case of youth registration, the erratic application of the factors in ORS 163A.030(8) and the appellate court's failure to make ORS 163A.030 more definite are fatal to the law's constitutionality.

**B. The Registration Of Youth As Sex Offenders Is Not Rationally Related To The State's Interest In Preventing Future Sexual Offenses**

The Fourteenth Amendment due process clause requires that a statute be rationally related to a legitimate state interest. *See Payless Drug Stores Nw., Inc v. Brown*, 80 Or App 255, 260, 722 P2d 31 (1986) (citing *Ferguson v. Scrupa*, 372 US 726, 83 S Ct 1028, 10 L Ed 2d 93 (1963); *Nebbia v. New York*, 291 US 502, 54 S Ct 505, 78 L Ed 940 (1934)). While registration arguably implicates

A.R.H.'s fundamental rights<sup>8</sup> and must therefore satisfy strict scrutiny, *see MacPherson v. Dep't of Admin. Servs.*, 340 Or 117, 140, 130 P3d 308 (2006), youth registration under ORS 163A.030 fails to satisfy even rational basis review and is therefore unconstitutional.

The Oregon legislature intended the sex offender registration scheme to “assist law enforcement agencies in preventing future sex offenses.” ORS 163A.045(1). While the prevention of sexual offenses is a legitimate state interest, registering youth, who have an extremely low risk of re-offense, *see supra* Part I.C, bears no rational relationship to the purpose of the sex offender registry.

Several courts around the country have held that mandatory registration of youth as sex offenders without an opportunity for review violates due process, in part because youth at low risk of re-offense are included on registries. *See State in Int. of C.K.*, 233 NJ 44, 77, 182 A3d 917 (2018) (subjecting youth to lifetime sex offender registration does not further a legitimate state interest); *J.B.*, 630 Pa at 438 (holding mandatory registration violated youth's substantive due process right to reputation by imposing an irrebuttable presumption that registered youth have a high risk of re-offense); *C.P.*, 967 NE2d at 750 (holding that automatic imposition of registration on youth adjudicated delinquent without an opportunity

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<sup>8</sup> *See supra* Part I for a discussion of the burdens registration places on youth.



for review by a juvenile court violated the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and the Ohio Constitution).

Although Oregon's statute provides for individualized review, low-risk youth are subjected to registration based on the arbitrary application of the factors in ORS 163A.030. *See supra*, Part II.A. Moreover, by requiring youth to prove that no reasonable juvenile court could find the youth is not rehabilitated and poses a threat to public safety, the appellate court imposes an almost insurmountable burden on the youth. This outcome bears no rational relationship to the state's interest in preventing future sexual offenses and does not satisfy the requirements of due process.

As 97% of youth who engage in sexually harmful behavior will never do so again after detection, it should be relatively easy for youth to meet the "clear and convincing" standard in ORS 163A.030(7). This standard should be especially easy for a youth to meet where, like here, assessment showed a low risk of re-offense and the youth successfully completed treatment and probation. (Pet. for Rev. of Appellant-Petitioner 3–4). Placing A.R.H. on the registry does not advance public safety and dilutes the effectiveness of the registry as a public safety tool. Accordingly, registering A.R.H. as a sex offender bears no rational relationship to preventing future sexual offenses.



## CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court reverse the juvenile court's order that youth must report as a sex offender.

Respectfully submitted this 2nd day of June, 2022.

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