

IN THE MISSOURI SUPREME COURT

Case No. SC95049

IN THE INTEREST OF S.C.,

Appellant,

v.

Juvenile Officer,

Respondent.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF MISSOURI FOUNDATION AND
CHILDREN'S LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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AUTHORITY TO FILE

Amici file this brief with the consent of all parties.

STATEMENT OF JURISDICTION

Amici adopt the jurisdictional statement as set forth in Appellant's brief.

STATEMENT OF INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 500,000 members nationwide. The ACLU of Missouri Foundation is an affiliate of the national ACLU. The ACLU of Missouri has more than 4,500 members. In furtherance of its mission, the ACLU engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of rights guaranteed by the federal and state constitutions. In cases across the country, including before this Court, the ACLU has explained the constitutional difficulties that exist when children are treated and punished as adults. *See, e.g., State v. Nathan*, No. SC92979, 2013 WL 3984730 (Mo. July 30, 2013); *Hill v. Snyder*, No. 10-14568, 2013 WL 364198 (E.D. Mich. Jan. 30, 2013); *People v. Carp*, 828 N.W.2d 685 (Mich. Ct. App. 2012). On behalf of its members, the ACLU of Missouri files this brief addressing the constitutionality of §§ 211.425 and 589.400(6), on Eighth and Fourteenth Amendment grounds.¹

The Children's Law Center, Inc. (CLC) is a nonprofit organization committed to the protection and enhancement of the legal rights of children. CLC strives to accomplish

¹ All statutory references are to Missouri Revised Statutes (2000), as updated, unless otherwise noted.

this mission through various means, including providing legal representation for youth and advocating for systemic and societal change. For over 20 years, CLC has worked in many settings, including the fields of special education, custody, and juvenile justice, to ensure that youth are treated humanely, access services, and are represented by counsel.

STATEMENT OF FACTS

Amici adopt the statement of facts as set forth in Appellant's brief.

Argument

“Our history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults.” *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115-116 (1982) (citing examples from criminal, property, contract, and tort law). At issue in this case is a sentencing scheme, including §§ 211.425 and 589.400(6), that treats children as miniature adults in violation of their constitutional rights. In doing so, §§ 211.425 and 589.400(6) run counter to the history and purpose of Missouri’s system of juvenile justice and deprive children, such as S.C., of their Eighth and Fourteenth Amendment rights.

- 1. From its inception, the juvenile court in Missouri has recognized the diminished culpability of child offenders, distinguished itself from the adult criminal justice system, and emphasized treatment and rehabilitation over punishment.**

In the early twentieth century, Missouri established a separate judicial system for children based on the belief that children, as compared to adults, are both less culpable for their crimes and more capable of reform. *See* DOUGLAS E. ABRAMS, *A VERY SPECIAL PLACE IN LIFE: THE HISTORY OF JUVENILE JUSTICE IN MISSOURI* 45-46 (2003); Sacha M. Coupet, *What to Do with the Sheep in Wolf’s Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA L. REV. 1303, 1312 (2000). The juvenile justice system in Missouri was created through a movement at the turn of the 20th century that recognized child offenders as “less responsible than adults for antisocial behavior and more amenable to

rehabilitation.” ABRAMS, A VERY SPECIAL PLACE IN LIFE: THE HISTORY OF JUVENILE JUSTICE IN MISSOURI, at 19. The creation of Missouri’s juvenile justice system was also in response to emerging scientific and sociological thought in the early 1900s that children are “individuals with developing cognitive faculties, moral sensibilities and emotional needs,” and the “growing numbers of American[s who] no longer viewed juvenile offenders as miniature adult criminals deserving adult incarceration.” *Id.* Missouri juvenile justice legislation creating juvenile courts was ultimately passed in 1903.

The legislation’s primary purpose was to promote rehabilitation rather than to focus on punishment. *Id.* After its implementation, the Missouri Supreme Court recognized that the state had a *parens patriae* obligation to protect delinquent children that was fulfilled through the juvenile justice system, stating that children should “no longer [be] regarded as criminals to be punished without effort at reformation ... but awards to be aided, encouraged and educated, that they may ... become assets instead of liabilities.” *State ex rel. Cave v. Tincher*, 166 S.W. 1028, 1030 (Mo. 1914). In keeping with its rehabilitative purpose, Missouri juvenile court proceedings have been closed to the public, aiming to “spare children and their families stigma and the glare of publicity.” ABRAMS, A VERY SPECIAL PLACE IN LIFE: THE HISTORY OF JUVENILE JUSTICE IN MISSOURI, at 64.

Although children alleged to have committed egregious violations of law may be transferred to adult court, Missouri largely maintains discretionary transfer, allowing the court to determine whether the child is amenable to rehabilitation. § 211.071. Thus, a

child who is retained in the juvenile court through the discretionary process is deemed more appropriate for rehabilitation than punishment. § 211.071(6)(9); *see also* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court, in Youth on Trial: A Developmental Perspective on Juvenile Justice*, 9, 13-14 (Thomas Grisso & Robert G. Schwartz eds., 2000). Today, the core function of the juvenile court in Missouri remains unchanged and continues to focus on the rehabilitation of child offenders by: (i) diverting child offenders from the criminal justice system in an effort to avoid the harmful consequences of criminal sanctions; and (ii) intervening in the lives of child offenders to address the alleged causes of their delinquency. *See* FRANKLIN E. ZIMRING, *AMERICAN JUVENILE JUSTICE* 34 (OXFORD UNIVERSITY PRESS 2005).

Maintaining a child in the juvenile court through diversion from the adult criminal justice system has long been believed to promote the rehabilitation of children offenders. *See Kent v. United States*, 383 U.S. 541, 554-54 (1966). Underlying this belief is the premise that, if children are protected from the harmful features of the criminal justice system that would inhibit their development, they can “outgrow their criminal behavior” and be rehabilitated. *See* ZIMRING, *AMERICAN JUVENILE JUSTICE*, at 35-38, 62-64. Children maintained in the juvenile justice system are spared being exposed to features of the adult criminal justice system that disrupt their development and diminish their capacity to reform. *See id.*; *see also* DAVID S. TANENHAUS, *THE EVOLUTION OF JUVENILE COURTS, IN A CENTURY OF JUVENILE JUSTICE* 42-69 (ROSENHEIM, ZIMRING, TANENHAUS, & DOHRN; EDS., 2002). Examples of such features include the recognition that children are impressionable and if incarcerated with adult criminals, these

impressionable children are schooled on how to engage in more sophisticated criminal activities. *See* ZIMRING, AMERICAN JUVENILE JUSTICE, at 36. Additionally, because proceedings and records of the adult criminal court are open to the public, there is recognition that children who face the public stigma resulting from this exposure find it difficult to reintegrate into their communities after completing their sentences. *See United States v. Juvenile Male*, 590 F.3d 924, 928-29, 935 (2010); *see also United States v. Three Juveniles*, 61 F.3d 86, 88 (1st Cir. 1995). The practice in the juvenile court of shielding children from public exposure has long been considered necessary to enable children to rehabilitate and reintegrate into society as law-abiding citizens. *See* TANENHAUS, THE EVOLUTION OF JUVENILE COURTS, IN A CENTURY OF JUVENILE JUSTICE, at 42, 61.

The Missouri Supreme Court and the Supreme Court of the United States have recognized that the traditional goals related to adult sentencing of deterrence and retribution are less appropriate for children. *See Miller v. Alabama*, 132 S. Ct. 2455, 2473 (2012); *Graham v. Florida*, 130 S. Ct 2011, 2028-29 (2010); *Roper v. Simmons*, 543 U.S. 551, 571 (2005); *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 413 (Mo. banc 2003); *State ex rel. Shartel v. Trimble*, 63 S.W.2d 37, 38 (Mo. 1933). Instead, the juvenile court's core principles should be to promote individualized rehabilitation and treatment. Courts have also noted that youth, because they are still malleable and developing, are more amenable to rehabilitative interventions than adults. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *In re Gault*, 387 U.S. 1, 15-16 (1967); *State ex rel. Matacia v. Buckner*, 254 S.W. 179, 180 (Mo. banc 1923). This Court has similarly recognized that juvenile

courts were established to serve a protective function for children. *State ex rel. Cave v. Tinchler*, 166 S.W. 1028, 1030 (Mo. 1914). In fact, it has been noted repeatedly that the function of the juvenile court should be to provide social and rehabilitative services, care, protection, development, and corrective treatment of youthful offenders in the juvenile justice system. *In Interest of A.D.R.*, 603 S.W.2d 575, 580 (Mo. banc 1980) (noting that “a laudable purpose of our juvenile code is the rehabilitation of erring youths”); *State ex rel. Shartel*, 63 S.W.2d at 38 (noting that the purpose of the juvenile justice system “is not to convict minors of criminal acts, but to safeguard and reform children that may have erred and have been declared delinquent and to provide for children that may be declared neglected”); *State ex rel. Matacia*, 254 S.W. at 180 (noting that the juvenile justice act’s “principal, if not sole, purpose is not trial and punishment for crime, but the protection and support of neglected children and the reformation of delinquent children”). Sections 211.425 and 589.400(6) are based on adult principles of deterrence and retribution and do not comport with the traditional aims of the juvenile court system in Missouri.

a. By imposing public, life-long sanctions on children, §§ 211.425 and 589.400(6) violate the constitutional prohibition against cruel and unusual punishment.

The Eighth Amendment of the Federal Constitution, as applied to the states through the Fourteenth Amendment, and article I, section 21, of the Constitution of Missouri prohibit the infliction of cruel and unusual punishment. As the Court explained in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. This right flows from the basic

“precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” *Id.* at 311 (quoting *Weems v. United States*, 217 U. S. 349 (1910)). “The prohibition against cruel and unusual punishments, like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design.” *Roper*, 543 U.S. at 560. To implement this framework, courts have established the propriety and affirmed the necessity of referring to “the evolving standards of decency that mark the progress of a maturing society” to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). By protecting even those convicted of heinous crimes, the Eighth Amendment’s prohibition of cruel and unusual punishment reaffirms the duty of the government to respect the dignity of all persons.

The registration requirements found in §§ 211.425 and 589.400(6) are punitive when imposed on children. Sections 211.425 and 589.400(6) compel intrusive affirmative conduct on behalf of the state—conduct equivalent to that required by criminal judgments. Sections 211.425 and 589.400(6) also require broad dissemination of information without limitation. And, perhaps most importantly, §§ 211.425 and 589.400(6) do not give child offenders any opportunity to demonstrate their lack of risk, either before or after adjudication. Therefore, the effects of §§ 211.425 and 589.400(6) are aimed solely to punish child offenders, not rehabilitate them. The Eighth Amendment and article I, section 21 of the Constitution of Missouri protect such child offenders from

the imposition of cruel and unusual punishments like that imposed by §§ 211.425 and 589.400(6).

i. Sections 211.425 and 589.400.1(6) impose public and criminal sanctions on children that are disproportionate to their culpability in violation of their constitutional rights.

Put simply, children are different than adults. *See, e.g., J.D.B. v. North Carolina*, 131 S. Ct. at 2403 (2011) (finding that a child’s “irresponsible conduct is not as morally reprehensible as that of an adult” and children are “much more apt to be motivated by mere emotion or peer pressure”); *Graham*, 130 S. Ct. at 2025 (noting that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”); *Roper*, 543 U.S. at 569, 573 (indicating that, children, compared to adults, have a “lack of maturity and an underdeveloped sense of responsibility which often results in impetuous and ill-considered actions and decisions” and “the character of a juvenile is not as well formed as that of an adult ... the personality traits of juveniles are more transitory, less fixed”). Child offenders are both less culpable of their crimes and more capable of reform than adult offenders. Therefore, a fair and just system would not treat child offenders like adults. In *Miller*, *Graham*, and *Roper* the Court highlighted recent research on adolescent behavior supporting the view that child offenders are less culpable while, at the same time, more capable of reform than adults who commit similar crimes. *Graham*, 130 S. Ct. at 2025; *see also Thompson v. Oklahoma*, 487 U.S. 815, 834-835 (1988). In *Graham*, the Court held that, because of children’s lessened culpability and greater capacity for change, a child could not be

reliably classified among the worst offenders for purposes of sentencing. *Graham*, 130 S. Ct. at 2026. The *Graham* majority was unequivocal in its insistence that irrevocable judgments about the character of child offenders are impermissible under the Constitution where they deny children any opportunity to prove their rehabilitation and their eligibility to re-enter society. The Supreme Court in both cases explicitly stated its belief that the capacity of child offenders to change and grow, combined with their reduced blameworthiness and inherent immaturity of judgment sets them apart from adult offenders in fundamental and constitutionally relevant ways.

Psychological and scientific research specific to sexual offenders only solidifies the premise of *Miller*, *Graham*, and *Roper*: that children are different, less culpable, and more capable of reform. Multiple psychological and physiological assessments of sex offenders find that there are no measurable differences in sexual preferences between children adjudicated of sex-offending and other children, whereas the sexual preferences of adult sex offenders and non-offenders differ drastically. A 1994 study found that, while there is a significant difference in measurable erectile responses to “deviant” stimuli between adult sex offenders and non-sex offending adults, there is no measurable distinction in erectile responses between sex-offending and non-sex offending children to “deviant” stimuli. John A. Hunter, Jr. & Judith V. Becker, *The Role of Deviant Sexual Arousal in Juvenile Sexual Offending*, 21 CRIM. JUST. & BEHAV. 132, 137, 142-43, 146 (1994). Similarly, another study comparing attractions to visual stimuli of “children and other paraphernalia” to “normal attraction to females” found no correlation between an adolescent’s attractions and the victims of their offenses. Gilian Smith & Lane Fischer,

Assessment of Juvenile Sexual Offenders: Reliability and Validity of the Abel Assessment for Interest in Paraphilias, 11 SEXUAL ABUSE 207, 214 (1999). Another study comparing children incarcerated for serious sexual crimes to other children incarcerated in the exact same facility for nonsexual crimes was unable to establish any significant distinctions between the groups. Wendy L. Jacobs et al., *Juvenile Delinquents: A Between-Group Comparison Study of Sexual and Nonsexual Offenders*, 9 SEXUAL ABUSE: J. RES. & TREATMENT 201, 214 (1997). Psychologically, child sex offenders are different and less culpable than adult sex offenders.

Child sexual offenders are also different from adult sexual offenders because they are far less likely to reoffend, further supporting the accepted notion that children are more capable of change. Moreover, even adult sex offender recidivism rates are extremely low, around 13%, which much lower than for any other crime except murder. Recidivism rates for child sexual offenders are even lower. A recent study found that child sexual offenders had a recidivism rate of 7.5%, almost half that of adult sexual offenders. Robert Prentsky et al., *An Actuarial Procedure for Assessing Risk with Juvenile Sex Offenders*, 12 SEXUAL ABUSE: J. RES. & TREATMENT 71, 73 (2000). Another study found that, out of a group of 108 child sexual offenders and over a period of six years, only two of the child offenders reoffended, showing a study-specific recidivism rate of less than 2%. Glen E. Davis & Harold Leitenberg, *Adolescent Sex Offenders*, 101 PSYCHOL. BULL. 417, 419 (1987).

Research also indicates that children are “categorically less culpable” than adults when they commit offenses. *Roper*, 543 U.S. at 570. Studies have shown that adolescent

thinking is present-oriented and tends to discount, ignore, or not fully understand future outcomes and implications. *See, e.g.,* WILLIAM GARDNER ET. AL., ADOLESCENTS IN THE AIDS EPIDEMIC 17, 25-26 (1990); Marty Breyer, *Recognizing the Child in Delinquent*, KY. CHILD RTS. J., vol. 7, 16-17 (Summer 1999). Additionally, children have a far greater tendency to make decisions based on emotions rather than logic or reason. *See* Steinberg, *et al., Are Adolescents Less Mature Than Adults? Minors Access to Abortion, the Juvenile Death Penalty, and the Alleged APA Flip Flop*, 64 AM. PSYCHOLOGIST 583, 587 (2009); THOMAS GRISSO AND ROBERT G. SCHWARTZ, YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 267-69 (2000);. Children not only differ from adults cognitively but they also differ in “maturity of judgment” stemming from a complex combination of the ability to make good decisions and social and emotional capability. Elizabeth Cauffman & Laurence Steinberg, *Immaturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, BEHAV. SCIENCES AND THE LAW, vol. 18, 741 (2000). Notably, research using MRI images studying the function of the brain at different ages, has physiologically confirmed years of psychological research indicating that children are less culpable. Jay N. Giedd, et. al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, NATURE NEUROSCIENCE, vol. 2, 861 (1999) (showing physical and physiological immaturity in the portions of children’s brain associated with reasoning and emotion equilibrium).

Because children do not fully understand the consequences of their actions, they are less affected by the threat of sanctions and harsher sentences do not serve as a

deterrent. *Roper*, 543 U.S. at 571-72. In light of the research indicating significant physiological differences in the teenage brain, it is necessary to rethink questions about a child's culpability and punishment. *Graham*, 130 S. Ct. at 2028-29. An adolescent's inability to perceive and understand the long-term consequences of his or her actions means that he or she looks only to the immediate future, one to three days ahead, when assessing choices. The International Justice Project, *Brain Development, Culpability and the Death Penalty*, available at <http://www.internationaljusticeproject.org/pdfs/juvbraindev.pdf>. While these limitations do not negate knowledge of right and wrong, they do demonstrate that adolescents are not just miniature adults and should not be treated as such. *Id.* Even public opinion recognizes that children should be treated differently than adults because of their lessened culpability and greater capacity for change. In a 2014 survey, 65% of Americans, across ideologies and party lines, said that they believed that the justice system should treat adult offenders and child offenders differently. *Public Opinion on Juvenile Justice*, A brief from: The Pew Charitable Trusts 2 (Nov. 2014), available at http://www.pewtrusts.org/~media/Assets/2014/12/PSPP_juvenile_poll_web.pdf.

As the Court has aptly noted, "retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. Scientific research, which has been accepted and applied by the Court, requires that state courts discontinue the practice of holding children to the same degree of responsibility as adults who commit similar offenses. *Id.* The recognition that children are less culpable

than adults is fundamental to determining the constitutionality of particular forms of punishment because “the judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.” *Graham*, 130 S. Ct. at 2026 (interpreting the application of the Eighth Amendment). The State must be wary, therefore, of implementing the harshest available penalties on child offenders, offenders who are less culpable of the crimes they are accused of committing. *See, e.g., Roper*, 543 U.S. at 571-572.

The Court’s Eighth Amendment jurisprudence as it relates to children has evolved over the last twenty-two years to recognize that punishments reserved for the worst offenders should not be imposed on children, who, because they are still developing mentally, physically, and emotionally, are more responsive to rehabilitation and less responsive to deterrence. In *Thompson v. Oklahoma*, the Court explained that the fundamental differences between adult and child offenders begs for greater protection of children when assessing penalties associated with that youth’s actions. 487 U.S. at 835 (barring the imposition of the death penalty on anyone less than sixteen years of age); *see also Miller*, 132 S. Ct. 2455 (barring the imposition of a mandatory sentence of life without the possibility of parole for children under the age of eighteen); *Graham* 130 S. Ct 2011 (barring the imposition of a sentence of life without the possibility of parole for non-homicide crimes for children under the age of eighteen); *Roper*, 543 U.S. 551 (abolishing the death penalty for any child under the age of eighteen) *see also*. The Court understands that it does not have the expertise to “distinguish the few incorrigible

juvenile offenders from the many that have the capacity for change.” *Graham*, 130 S. Ct. at 2032. States, therefore, should not impose the harshest available punishment, punishment reserved for the worst adult sex offenders, on children.

Sections 211.425 and 589.400.1(6) have drastically changed the penalties associated with delinquency adjudications for sexually oriented child offenders in Missouri. Sections 211.425 and 589.400.1(6) impose burdens on child offenders that have historically been regarded as punishment only fit for adults, and operate as affirmative disabilities and restraints. The burdens of §§ 211.425 and 589.400.1(6) impose criminal punishments that are greater than the culpability of children through both public disclosure and adult criminal sanctions.

ii. The public disclosure requirement in §§ 211.425 and 589.400.1(6) is punitive in effect and disproportionate to the culpability of child sex offenders.

There are numerous requirements regarding public disclosure that §§ 211.425 and 589.400.1(6) place on a child. Children, including S.C., and their families are restricted in their movements as they cannot leave their county of residence for a period that exceeds three days without giving prior notice to the chief law enforcement officer in the county to which they are traveling. § 589.414. Moreover, children, like S.C., who are less mobile and less capable than adults, are held to the same level of responsibility for reporting information and updating details as adults. Children who fail to make a timely appearance at the county sheriff’s office with their information face serious felonies. § 589.425. The law also requires the chief law enforcement officer to publicly disclose the child’s status

as a sex offender and their address on a web page or in the local newspaper. § 589.402. Publishing this information necessarily disseminates the child's status as a sex offender into his community.

Public notification obstructs a child's normal development by hurting their ability to form new friendships and damaging their self-esteem. It is also "contrary to the fundamental underpinnings of the juvenile justice system ... which seeks to correct the course of juvenile offenders by rehabilitation and oversight." Timothy E. Wind, *The Quandary of Megan's Law: When the Child Sex Offender is a Child*, 37 J. MARSHALL L. REV. 73, 116 (2003). Public notification further damages a child's self-esteem by exposing them to the unnecessary stress of "scrutiny and ridicule in the community, further harming their efforts at rehabilitation and increasing the likelihood of recidivism." *Id.* This scrutiny and ridicule "may particularly hamper the rehabilitation of juvenile offenders because the public stigma and rejection they suffer will prevent them from developing normal social and interpersonal skills—the lack of these traits have been found to contribute to future sexual offenses." Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 855-56 (1996).

Community notification can also subject children to "false labels of sexual dysfunction," leading to "ostracism, reduced life chances, and harassment." Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163, 204 (2003). It is a

matter of common understanding that the labels of “rapist” or “sex offender”—or, even worse, “child molester”—are among the most heinous and despised in contemporary society. *Neal v. Shimoda*, 131 F.3d 818, 829 n.12 (9th Cir. 1997) (“We can hardly conceive of a state's action bearing more 'stigmatizing consequences' than the labeling . . . as a sex offender”—except “[p]erhaps being labeled a ‘child molester.’”). Research shows that calling a child a “sex offender” or “rapist” can have severely damaging psychological and practical consequences. See Judith V. Becker, *What We Know About the Characteristics and Treatment of Adolescents Who Have Committed Sexual Offenses*, 3 CHILD MALTREATMENT 317, 317 (1998); Mark Chaffin & Barbara Bonner, *Don't Shoot: We're Your Children: Have We Gone Too Far in Our Response to Adolescent Sexual Abusers and Children with Sexual Behavior Problems?*, 3 CHILD MALTREATMENT 314 (1998).

Further, rehabilitation for child sex offenders is facilitated by “interpersonal development through positive interaction with family members, school personnel, peers, and the community.” Stacey Hiller, Note, *The Problem with Juvenile Sex Offender Registration: The Detrimental Effects of Public Disclosure*, 7 B.U. PUB. INT. L.J. 271, 292 (1998). However, notification inhibits these positive interactions by compromising a child’s ability to interact with their community “in a healthy and safe way.” Robert E. Freeman-Longo, *Revisiting Megan’s Law Sex Offender Registration: Prevention or Problem*, AMERICAN PROBATION AND PAROLE ASS’N, at 12, available at <http://www.ccoso.org/library/articles/revisitingmegan.pdf>. For example, “social stigma may inhibit [a child’s] ability to get a job or even walk into a store without neighbors

casting doubtful looks in his direction.” Hiller, 7 B.U. PUB. INT. L.J. at 293. While the goal of rehabilitation is to restore “a child to a healthy stature in society,” one must ask themselves how can a child even “restore himself in his own eyes” in the face of these negative attitudes. *Id.* Disclosure of a child sex offender’s status to his community “may only serve to increase his or her alienation, possibly encouraging re-offending, because of the negative attitudes the public will emit toward the youth.” *Id.* at 292.

Children also suffer when their schools are notified of their status as sex offenders. Patricia Coffey, *The Public Registration of Juvenile Sex Offenders*, ATSA Forum (Ass’n for the Treatment of Sexual Abusers), Winter 2007 at 5 (noting that “juveniles are ostracized and banned from attending classes with their peers . . . [and] refused admittance to certain colleges.”); *see also* Lisa C. Trivits & N. Dickon Reppucci, *Application of Megan's Laws to Juveniles*, 57 AM. PSYCHOLOGIST 690, 694 (2002) (“Notifying schools ... may increase the social ostracism ... with peers likely targeting the juvenile for ridicule and possible physical assault and parents protesting the presence of a sex offender in the school.”). This could severely impede the child’s education options. The requirements may also prevent sex offenders from seeking treatment because their fear of public humiliation will force them “to ‘go underground’ and hide their tendencies from others, including their therapists.” Michele L. Earl-Hubbard, *The Child sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 855 (1996). Indeed, notification laws “subject children to the exact sort of debilitating consequences that the juvenile justice system was designed to eliminate.” Garfinkle, 91 CAL. L. REV.

163 at 194. “[They] mark children as sexual predators, subjecting them to stigma, prejudice, and denied opportunities.” *Id.*

iii. The threat of criminal sanctions into adulthood constitutes punishment disproportionate to the culpability of child sex offenders.

Sections 211.425 and 589.400.1(6) were intended to be, and are in fact, punitive because failure to register can result in prosecution. § 589.425. Lack of compliance with §§ 211.425 and 589.400.1(6) can lead to a felony conviction and punishment of up to seven years in prison. § 589.425. These consequences are historically, traditionally, and currently regarded as punishment. *See Cory Rayburn Yung, One of These Laws is not Like the Others*, 46 HARV. J. ON LEGIS. 369, 398 (2009). Imposing adult, criminal punishments on child sex offenders exceeds the diminished culpability of children.

A fundamental disconnect lies between the view of children that animates policy in juvenile courts and the view of sex offenders that underlies the assumptions and policy choices of the federal Sex Offender Registration and Notification Act (SORNA) and §§ 211.425 and 589.400.1(6). The juvenile court regards the child as neither fully mature nor set in his ways, but rather as a malleable entity. By contrast, the image of the adult sex offender subject to registration and notification laws is that of a person who poses a sexual threat to the community, who has fixed preferences of victims, who is driven by all but-inevitable urges to recidivate, and who is unable to rehabilitate. *See Phoebe Geer, Justice Served? The High Cost of Juvenile Sex Offender Registration*, 27 DEV. MENTAL HEALTH L. 34, 38-39 (2008).

The two views are in conflict: imposing severe punishments in juvenile court where offenders are necessarily less culpable, as if dealing with the sex offender imagined by SORNA, violates basic concepts of human dignity at the core of the constitutional amendments banning cruel and unusual punishment “because [they are] disproportionate to the moral culpability of the offender.” *Gregg v. Georgia*, 428 U.S. 153, 182 (1976). Sections 211.425 and 589.400.1(6), by imposing, public, long-term, and adult sanctions on child offenders, violate the prohibition against cruel and unusual punishment as guaranteed by the Eighth Amendment and the state constitution.

b. By conferring adult consequences on child offenders, and placing them on a public registry without juvenile court discretion, §§ 211.425 and 589.400.1(6) exceed the bounds of fundamental fairness in violation of the Fourteenth Amendment’s due process guarantee.

Through a series of cases that began in 1966, the United States Supreme Court established the child’s right to due process protections when facing delinquency proceedings. *McKeiver*, 403 U.S. at 543; *In re Winship*, 397 U.S. 358, 359 (1970); *In re Gault*, 387 U.S. at 12; *Kent*, 383 U.S. at 553. As developed by *In re Gault* and *In re Winship*, the applicable due process standard in juvenile proceedings is fundamental fairness. *McKeiver*, 403 U.S. at 543; *see also Schall v. Martin*, 467 U.S. 253, 263 (1984); *Breed v. Jones*, 421 U.S. 519, 531 (1975). Ordering children, including S.C., to register as a sex offender pursuant to §§ 211.425 and 589.400.1(6) violates due process standards because it eliminates judicial discretion regarding the imposition of serious, adult, life-long punishments on children.

i. The juvenile court’s ability to employ discretion in making decisions regarding children’s cases safeguards their due process rights.

Sections 211.425 and 589.400.1(6) establish a comprehensive scheme for classification of sexual offenders, including child offenders, by requiring children fourteen years or older at the time of the offense, and adjudicated of a sex offense equal to or more severe than aggravated sexual abuse under 18 U.S.C. § 2241, to register on the adult sex offender registry for life, with no ability to petition for removal. The laws also require registration for child offenders certified as adults and convicted of sexual offenses equal to or more severe than aggravated sexual abuse under 18 U.S.C. § 2241. § 589.400.1(5). Classification based solely on the offense of conviction disregards the circumstances and facts surrounding the offense. It also acts in direct contradiction to the core function of the juvenile court—to promote rehabilitation of child offenders who are less culpable and more amenable to reform than adult offenders.

Unlike the scheme established by §§ 211.425 and 589.400.1(6), in other situations where a child is adjudicated delinquent, the juvenile court retains significant discretion in determining and reassessing the child’s disposition. *See* Robert G. Schwartz, *Juvenile Justice and Positive Youth Development*, Youth Development: Issues, Challenges and Directions (Public/Private Ventures, 2000) 233, 248. Juvenile courts across the country allow the review of a child’s case every six to nine months to determine if the child's disposition continues to be appropriate or should be modified. *Id.* However, under §§

211.425 and 589.400.1(6), Missouri never reviews the classification of a child offender, even if the child petitions for removal.

Because unlike criminal courts, juvenile courts remain centrally concerned with the care, protection, development, treatment, and rehabilitation of children who remain in the juvenile system, juvenile courts need the ability to exercise discretion. *See Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (A juvenile proceeding is fundamentally different from an adult criminal trial because “[t]he State has ‘a parens patriae interest in preserving and promoting the welfare of the child’”); *J.D.H. v. Juvenile Court of St. Louis Cnty.*, 508 S.W.2d 497, 500 (Mo. banc 1974). The importance of juvenile court discretion cannot be understated. It provides the backbone for fundamental fairness in a juvenile proceeding.

Removing the court's discretion in determining the appropriate classification for children who receive a serious youthful offender dispositional sentence, a sentence that results in the requirement that a child adjudicated of certain sexual offenses register on the adult sex offender registry, undercuts notions of fundamental fairness. Under §§ 211.425 and 589.400.1(6), the court has no discretion to assess what would be most appropriate for the child. The Court cannot consider individual factors about a child, cannot allow for a period under which a child can petition to be removed from the registry, cannot shape and re-examine the number of years a child must register, nor the frequency with which a child must register, the locales of registration, or the level of public exposure that a child must be subject to.

This mandatory classification provision significantly impedes a child's opportunity to benefit from the supportive, rehabilitative focus of the court and reintegrate into society successfully. The automatic requirement to register continues into adulthood, far beyond the time when an individual would normally be subject to the jurisdiction of the juvenile court. By removing the court's discretion, the child faces consequences that contravene the purpose of the juvenile justice system and violate established principles of fundamental fairness. Thus, at the age of maturity, the child loses protection from public disclosure and faces adult criminal sanctions for a juvenile adjudication of delinquency without a chance to prove rehabilitation.

An underlying premise of Missouri's juvenile court system is to shield child offenders from the public eye. *See J.D.H.*, 508 S.W.2d at 500; *see also* R. Habiger, *Prosecution of Children in Missouri*, 30 J. MO. B. 11, n. 7 (1974); Comment, *Juvenile Court Waiver: The Questionable Validity of Existing Statutory Standards*, 16 ST. LOUIS U. L.J. 604 (1972). Court records and proceedings are confidential in order to protect children from public stigmas associated with juvenile court involvement. This has long been considered necessary to enable children to benefit from rehabilitation and treatment and to successfully reintegrate into society as productive members. *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 107-08 (1979) (Rehnquist, J., concurring) (arguing confidentiality imperative to rehabilitation of delinquents); Andrew R. Kintzinger, *Freedom of the Press vs. Juvenile Anonymity: A Conflict Between Constitutional Priorities and Rehabilitation*, 65 IOWA L. REV. 1471, 1484 & n.106 (1980) (finding evidence supports importance of confidentiality for reform of child offenders).

In addition to the public registration and notification provisions, §§ 211.425 and 589.400.1 impose, outside of the court's discretion, adult criminal sanctions on children adjudicated in juvenile court based solely on the offense committed. § 589.425. As a result, under these sections, children receive adult penalties and sanctions without being transferred to the adult system, directly contradicting the Court's finding that penological justifications for criminal sanctions do not apply to children who are less culpable and more amenable to rehabilitation than adult defendants. *See Roper*, 531 U.S. at 571-72. Once ordered to register, the child must comply with every registration provision, including the requirement to register any change of name, residence, employment, and student status. § 589.414. This consequence attaches immediately upon disposition without an opportunity for the child to demonstrate compliance with their disposition or to benefit from treatment or rehabilitative opportunities. § 589.400. No opportunity exists for children or their counsel to present evidence demonstrating they should not be required to register publicly for the rest of their lives. The consequences for failure to comply are severe and can lead to an adult felony conviction and significant jail time. § 589.425. Felony, adult, criminal sanctions imposed without judicial discretion on children adjudicated in juvenile court are punitive, violate principles of fundamental fairness, and constitute a due process violation in contravention of the Fourteenth Amendment to the United States Constitution.

ii. Public, life-long registries for children serve no legitimate purpose and, therefore, fail the requirements of the Fourteenth Amendment.

The overarching purpose of Missouri’s current juvenile code, as explained in § 211.011, is to serve the best interests of the child. Chapter 211 specifically states that the juvenile code must “be liberally construed” so “each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control as will conduce to the child's welfare and the best interests of the state.” *Id.* The implementation of §§ 211.425 and 589.400.1(6) does not match the explicit purpose of the juvenile code. Putting a child on a public and life-long registry contravenes the rehabilitative focus and aims of the juvenile court. Social science evidence establishes: (i) the low recidivism rates among child sex offenders, and (ii) the negative consequences of public shaming and stigmatization of children that accompany public, life-long registration and notification.

The imposition of registration and notification requirements on children adjudicated for sexual offenses is disproportionate to their moral culpability and §§ 211.425 and 589.400.1 have no therapeutic or rehabilitative value. As the research proves, registration and notification requirements themselves do not reduce rates of recidivism. *See* Robert Prentsky et al., *An Actuarial Procedure for Assessing Risk with Juvenile Sex Offenders*, 12 *SEXUAL ABUSE: J. RES. & TREATMENT* 71, 73 (2000). The research indicates that registration and notification may actually increase the risk for reoffending because offenders find themselves isolated from important social, educational, and family networks. *See* Timothy E. Wind, *The Quandry of Megan’s Law*:

When the Child Sex Offender is a Child, 37 J. MARSHALL L. REV. 73, 116 (2003); Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 855-56 (1996) (citing J.V. Becker, *Adolescent Sex Offender*, 11 BEHAV. THERAPIST, 185 (1988)); Robert E. Freeman-Longo, *Revisiting Megan's Law Sex Offender Registration: Prevention or Problem*, American Probation and Parole Ass'n, at 12, available at <http://www.ccoso.org/library/articles/revisitingmegan.pdf>.

Without question, the detailed reporting requirements, limitations on movement, and potential for disseminating private information make it nearly impossible for a child offender to be rehabilitated and reintegrated into society. Sections 211.425 and 589.400.1(6) impose limitations that are inconsistent with the foundational goals of the juvenile court as set forth in history, by statute, and by court rule and, therefore, serve no legitimate purpose.

Conclusion

For the foregoing reasons, §§ 211.425 and 589.400(6) are unconstitutional as applied to children in violation of the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 21 of the Constitution of Missouri.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 6,627 words, as determined using the word-count feature of Microsoft Office Word 2013. The undersigned further certifies that the electronic file has been scanned and was found to be virus-free.

/s/ Anthony E. Rothert

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this brief was filed and served by operation of electronic filing system on all counsel of record on June 8, 2015.

/s/ Anthony E. Rothert