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B.H., A CHILD UNDER EIGHTEEN

APPELLANT,

v.

COMMONWEALTH OF KENTUCKY,

APPELLEE.

Upon a Motion for Discretionary Review of Decision in the Woodford Circuit Court, No. 11-XX-00001

Brief of Juvenile Law Center and Children's Law Center, Inc. as *Amici Curiae* in Support of Appellant B.H.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of this brief have been served via first class U.S. mail on this 13th day of August, 2014 to the following: Clerk of the Supreme Court of Kentucky, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, KY 40601-3415. The undersigned further certifies that copies of this brief have been served via first class U.S. mail to the following: John Wampler, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601; Jack Conway and Gregory C. Fuchs, Assistant Attorneys General, Office of Criminal Appeals, Office of the Attorney General, 1024 Capital Center Drive, Frankfort, KY 4601-8204; Hon. Robert Johnson, Woodford Circuit Court, Scott County Justice Center, 119 N. Hamilton St., Georgetown, KY 40324; Hon. Vanessa Dickson, Woodford County District Court, 310 Main St., Paris, KY 40361.

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TABLE OF POINTS AND AUTHORITIES

INTEREST AND IDENTITY OF *AMICI CURIAE* 1

ARGUMENT 2

I. Criminalizing Consensual Sexual Behavior among Similarly Aged-Teens Is Inconsistent with Kentucky Law and Policy 2

Roper v. Simmons, 543 U.S. 551 (2005) 2

Johnson v. Texas, 509 U.S. 350 (1993) 2

Miller v. Alabama, 132 S. Ct. 2455 (2012) 2

Graham v. Florida, 560 U.S. 48 (2010) 2

Jennifer Woolard, *Adolescent Development, in* TOWARD DEVELOPMENTALLY APPROPRIATE PRACTICE: A JUVENILE COURT TRAINING CURRICULUM (2009) 2

M. Martinson & Gail Ryan, *Sexuality in the Context of Development from Birth to Adulthood, in* JUVENILE SEXUAL OFFENDING: CAUSES, CONSEQUENCES AND CORRECTIONS (G. Ryan, T. Leversee & S. Lane, eds., 3rd ed. 2010) 2

A. The Application of KRS § 510.140, Sexual Misconduct, to B.H. Does Not Further State Policy Interests in Youth Protection 3

KRS § 510.140 (2014) 3

Appellant's Brief 3

1. The Legislative History of Kentucky's Sexual Misconduct Statute Does Not Support Charging or Adjudicating B.H. Delinquent 3

Kentucky Crime Commission/LRC Commentary on KRS §510.140 (1974) 4

KRS § 510.140 (2014) 4, 5

Kentucky Crime Commissioner Commentary on KRS T.L, Ch. 510 (1974) 4,5

Lisa T. McElroy, *Sex on the Brain: Adolescent Psychosocial Science and Sanctions for Risky Sex*, 34 N.Y.U. REV. L. & SOC. CHANGE 708 (2010)....................5

2. Statutes and Case Law in Other Jurisdictions Disfavor Criminalization of Consensual Sex between Adolescent Peers............ 5

Mass. Gen. Laws ch. 265 § 23 (2014)....................5

N.M. Stat. Ann. § 30-9-11, -13 (2014)....................5

N.M. Stat. Ann. § 30-9-13 (2014)....................5

Ariz. Rev. Stat. § 13-1405(B) (2014)....................6

Cal. Penal Code § 261.5(b)-(d) (2014)....................6

Conn. Gen. Stat. § 53a-70 (2014)....................6

Conn. Gen. Stat. § 53a-71 (2014)....................6

Del. Code Ann. tit. 11, § 768-73 (2014)....................6

Fla. Stat. § 800.04 (2014)....................6

Ga. Code Ann. § 16-6-3 (2014)....................6

Ind. Code § 35-42-4-3 (2014)....................6

Kan. Stat. Ann. §§ 21-5503 to 07 (2014)....................6

KRS § 510.140 (2014)....................6

Me. Rev. Stat. tit. 17a, § 254 (2014)....................6

Mo. Rev. Stat. § 566.032 (2014)....................6

Mo. Rev. Stat. § 566.034 (2014)....................6

Nev. Rev. Stat. § 200.368 (2014)....................6

N.C. Gen. Stat. § 14-27.2 (2014)....................6

Or. Rev. Stat. § 163.355 (2014)....................6

Or. Rev. Stat. § 163.365 (2014)....................6

Or. Rev. Stat. § 163.375 (2014) 6

S.D. Codified Laws § 22-22-7 (2014) 6

Wis. Stat. § 948.02 (2014) 6

N.Y. Penal Law § 130.55 (McKinney 2014) 6

Okla. Stat. tit. 21, § 1112 (2014) 6

Or. Rev. Stat. § 163.345 (2014) 6

S.C. Code. Ann. § 16-3-655 (2014) 6

Vt. Stat. Ann. tit. 13, § 2602(a)(2) (2014) 6

Ind. Code Ann. § 35-42-4-9(e)(2) (2014) 6

In re D.B.,
950 N.E.2d 528 (Ohio 2011) 7, 8

In re G.T.,
758 A.2d 301 (Vt. 2000) 7, 8

In Re J.M.,
575 S.E. 2d 441 (Ga. 2003) 7

In re B.A.M.,
806 A.2d 893 (Pa. Super. Ct. 2002) 8, 9

B. Prosecuting Consensual Sexting Criminalizes Adolescents' Normative Developmental Experimentation with Their Sexual Identity and Exploration of Sexual Relationships 9

KRS § 531.335 (2014) 9, 11

In re: C.S.,
No. CP-39-JV-0000447-2012 (Pa. Ct. Com. Pl. Oct. 19, 2012),
available at http://www.krautharris.com/documents/In-re-CS.pdf 10

In re: C.S.,
84 A.3d 698 (Pa. 2014) 10

National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults* (2008), *available at*
http://thenationalcampaign.org/sites/default/files/resource-primary-download/sex_and_tech_summary.pdf 10

Lynn E. Ponton & Samuel Judice, *Typical Adolescent Sexual Development*, 13 CHILD ADOLESCENT PSYCHIATRIC CLINICS N. AM. 497 (2004) 10

Andrew J. Harris, *Understanding the World of Digital Youth*, *in* ADOLESCENT SEXUAL BEHAVIOR IN THE DIGITAL AGE: CONSIDERATIONS FOR CLINICIANS, LEGAL PROFESSIONALS, AND EDUCATORS (Fabian Saleh, Albert Grudzinskas, & Abigail Judge, eds., Oxford University Press) (2014) 10

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Sameer Hinduja & Justin W. Patchin, *State Sexting Laws: A Brief Review of State Sexting Laws and Policies* (2013), *available at* http://www.cyberbullying.us/state_ sexting_laws.pdf 11

Ariz. Rev. Stat. § 8-309 (2014) 11

Conn. Gen. Stat. § 53a-196h (2014) 11

Fla. Stat. § 847.0141 (2014) 11

Haw. Rev. Stat. § 712-1215.5 (2014) 11

705 Ill. Comp. Stat. § 405/3-1 (2014) 11

La. Rev. Ann. Stat. § 14.81.1.1 (2014) 11

Neb. Rev. Stat. § 28-1463.03 (2014) 11

Nev. Stat. § 200.737 (2014) 11

N. J. Stat. § 2A:4A-71.1 (2014) 11

N. Y. Soc. Serv. Law § 458-I (McKinney's 2014) 11

N.D. Cent. Code § 12.1-27.1-03.3 (2014) 11

18 Pa. Const. Stat. § 6321 (2014). 11

R.I. Gen. Laws § 11-9-L.4 (2014) 11

S.D. Codified Laws § 26-10-33 (2014) 11

Tex. Penal Code § 43.261 (2014) 11

Utah Code § 76-10-1204 (2014) 11

Utah Code § 76-10-1206 (2014) 11

Vt. Stat. tit. 13, § 2802b (2014) 11

W. Va. Code Ann. § 49-5-13g (2014) 12

Va. Code Ann. §2802(b) (2014) 12

Miller v. Skumanick,
605 F. Supp. 2d 634 (M.D. Pa. 2009) 12

Miller v. Mitchell,
598 F.3d 139 (3d Cir. 2010) 12

U.S. Const. amend. XIV 12

U.S. Const. amend. I 12

II. Mandatory Sex Offender Treatment for Consensual Sexual Behavior Is Ineffective and Potentially Harmful to the Child 12

Elizabeth Letourneau & Charles M. Borduin, *The Effective Treatment of Juveniles Who Sexually Offend: An Ethical Imperative*, 18 ETHICS & BEHAVIOR 286 (2008), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2922753/ 12, 14

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Elizabeth Letourneau & M.H. Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT ABUSE 293 (2005) 13

Robert McGrath, *et al.*, *Current Practices and Emerging Trends in Sexual Abuser Management: the Safer Society 2009 North American Survey* (2010), *available at* http://www.safersociety.org/uploads/WP141-Current_Practices_Emerging_Trends.pdf. 13

Mark Chaffin, *Our Minds Are Made Up: Don't Confuse Us with the Facts,* 13 CHILD MALTREATMENT 110 (2008) 14

Michael Caldwell, *What We Do Not Know About Juvenile Sexual Reoffense Risk*, 7 CHILD MALTREATMENT 291 (2002)..14

Franklin Zimring, AN AMERICAN TRAVESTY: LEGAL RESPONSE TO ADOLESCENT SEXUAL OFFENDING (2004) 14

Maggie Jones, *How Can You Distinguish a Budding Pedophile From a Kid with Real Boundary Problems?*, N.Y. TIMES, July 22, 2007 14

Appellant's Brief..14

CONCLUSION **14**

KRS § 510.140 (2014) 15

KRS § 531.335 (2014) 15

INTEREST AND IDENTITY OF *AMICI CURIAE*

Amicus Curiae **Juvenile Law Center** is the oldest public interest law firm for children in the United States, founded in 1975 to advance the rights and well-being of children in jeopardy. Juvenile Law Center pays particular attention to the needs of children who come within the purview of public agencies—for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized service needs. Juvenile Law Center works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. Juvenile Law Center also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

The **Children's Law Center, Inc.** in Covington, Kentucky has been a legal service center for children's rights since 1989, protecting the rights of youth through direct representation, research and policy development and training and education. The Center provides services in Kentucky and Ohio, and has been a leading force on issues such as access to and quality of representation for children, conditions of confinement, special education and zero tolerance issues within schools, and child protection issues. It has produced several major publications on children's rights, and utilizes these to train attorneys, judges and other professionals working with children.

ARGUMENT

I. Criminalizing Consensual Sexual Behavior among Similarly Aged-Teens Is Inconsistent with Kentucky Law and Policy

Children engage in risk-taking behaviors because of their "lack of maturity and underdeveloped sense of responsibility." *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (quoting *Johnson v. Texas,* 509 U.S. 350, 367 (1993)); *see also Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (noting that children's "lack of maturity and underdeveloped sense of responsibility lead to recklessness, impulsivity, and heedless risk-taking" (internal citations omitted)); *Graham v. Florida,* 560 U.S. 48, 50-51 (2010). Sexual exploration fits into these behaviors. Learning to think of oneself as a sexual being and dealing with sexual feelings is an important task of adolescence; sexual experimentation is one aspect of the "trying on" of different personalities and new behaviors that is necessary to the process of identity development. Jennifer Woolard, *Adolescent Development, in* TOWARD DEVELOPMENTALLY APPROPRIATE PRACTICE: A JUVENILE COURT TRAINING CURRICULUM (2009) at 13, 15. At the same time, "[t]here are conflicting and contradictory expectations in American society concerning sexuality." M. Martinson & Gail Ryan, *Sexuality in the Context of Development from Birth to Adulthood*, *in* JUVENILE SEXUAL OFFENDING: CAUSES, CONSEQUENCES AND CORRECTIONS (G. Ryan, T. Leversee & S. Lane, eds., 3rd ed. 2010) at 31. "Adults demand that adolescents develop a healthy sexual maturity without engaging in learning experiences that make that maturity possible." *Id.* (citation omitted). However, when youth engage in sexual exploration, they run the risk of finding themselves in situations that they may not be emotionally ready to navigate. *Id.* (citation omitted). Criminalizing these sexual explorations among consenting teens conflicts with youths' sexual development. Moreover, it is inconsistent with the law.

A. The Application of KRS § 510.140 Sexual Misconduct to B.H. Does Not Further State Policy Interests in Youth Protection

A key policy reason behind the creation of a criminal sexual misconduct statute is the desire to protect children and youth, who are presumed to be categorically vulnerable and incapable of giving meaningful consent to such conduct. This presumption is less meaningful when both the defendant and the victim are minors. Certainly, children deserve no less protection from their peers than from adults. However, criminalizing consensual sexual conduct among peers does not protect youth. The criminalization of such behavior fails to consider settled principles of adolescent development underlying our juvenile and criminal justice systems. Furthermore, juvenile strict liability statutes create a risk of arbitrary, or even discriminatory, enforcement.

The present case underscores this risk. Both B.H. and C.W. were below Kentucky's age of consent at the time of their mutual decision to have sex. Under the law, either B.H. or C.W. could have been deemed the perpetrator *or* the victim. Despite this fact, only B.H. was adjudicated delinquent for violating the statute. Holding B.H., an eighth grader, strictly liable for engaging in consensual sexual activity with his girlfriend is an example of arbitrary prosecution. (*See* Appellant's Br. at 6-7). B.H.'s adjudication of delinquency under KRS § 510.140 (2014) resulted in mandatory sex offender treatment and stigmatization by being labeled a Juvenile Sex Offender (JSO). (*See id.* at 2, 6). The long-term effects of this outcome on B.H. will be damaging and far-reaching.

1. The Legislative History of Kentucky's Sexual Misconduct Statute Does Not Support Charging or Adjudicating B.H. Delinquent

Kentucky's Sexual Misconduct statute states that "[a] person is guilty of sexual misconduct when he engages in sexual intercourse or deviate sexual intercourse with

another person without the latter's consent." The Commentary accompanying KRS § 510.140 (2014) states that the basic purpose of the statute is to "preserve the concept of statutory rape and statutory sodomy." Kentucky Crime Commission/LRC Commentary on KRS §510.140 (1974). The Commentary also posits that:

> When read in conjunction with the [state's] rape and sodomy statutes, KRS 510.140 is designed primarily to prohibit nonconsensual sexual intercourse or deviate sexual intercourse under two circumstances: (i) when the victim is 14 or 15 and the defendant is less than 21; or (ii) when the victim is 12, 13, 14, or 15 and the defendant is less than 18 years of age. In this context the ages of the defendant and the victim are critical. Force is not an element of this offense. The victim is statutorily incapable of consent. . . .

Id. The Commentary accompanying Chapter 510 of the Kentucky Penal Code also provides insight into the legislature's intent to limit application of the statute based on consent by specifying situations in which the victim's age and, in some cases, the defendant's age, will play a role in determining what kind of offense the defendant is charged with:

> The critical ages for offenses prohibited by this Chapter are 12, 14 and 16. Age 12 was chosen to protect pre-puberty victims. Sexual intercourse with a child less than 12 years of age indicates a considerable probability of aberration in the aggressor. Age 14 was chosen to protect children in the period of puberty when the child arrives at the physical capacity to engage in intercourse but remains seriously deficient in comprehension of the social, psychological, emotional and even physical significance of sexuality. It is still realistic to regard a child under 14 years of age as victimized. Age 16 was chosen to cover that period of later adolescence when the chief significance of sexual behavior is its contravention of the moral standards of the community.

Kentucky Crime Commissioner Commentary on KRS T.L, Ch. 510 (1974). Importantly, neither the statute nor the commentaries specifically contemplate the instant case in which both the alleged perpetrator and victim of the sexual misconduct are below

Kentucky's age of consent. The plain language of the statute assumes consent can only be given by individuals of a certain age but imposes liability for engaging in sexual conduct nonetheless.

Furthermore, the commentary, written during the early 1970s, plainly fails to reflect current adolescent development research. Changing cultural norms indicate that boys and girls today are likely to engage in sexual activity at an earlier age than their parents did. Lisa T. McElroy, *Sex on the Brain: Adolescent Psychosocial Science and Sanctions for Risky Sex*, 34 N.Y.U. REV. L. & SOC. CHANGE 708, 715 (2010). In addition, research has shown that adolescents have an extremely strong hormonal drive and have not developed the cognitive ability to consistently make rational decisions during moments of passion. *Id.* at 716-17. Thus, the age breaks for offenses as discussed in the 1974 Commentary to KRS § 510.140 are out of step with today's changing societal attitudes towards sex and our more nuanced understanding of adolescent cognitive and sexual development.

2. Statutes and Case Law in Other Jurisdictions Disfavor Criminalization of Consensual Sex between Adolescent Peers

The vast majority of states allow for either the mitigation of punishment or no punishment at all for consensual sex based on the ages of the two parties. In fact, only two states, New Mexico and Massachusetts, do not allow for any mitigation of punishment based on the ages of the two parties involved. *See* Mass. Gen. Laws ch. 265 § 23 (2014); N.M. Stat. Ann. §§ 30-9-11, -13 (2014). Many states, including Kentucky, explicitly provide separate "gradations of punishment," such as the crimes of first, second and third degree rape, determined by the age of the victim. *See, e.g.*, Ariz. Rev. Stat. § 13-1405(B) (2014); Cal. Penal Code § 261.5(b)-(d) (2014); Conn. Gen. Stat. §§ 53a-70, -

71 (2014); Del. Code Ann. tit. 11, § 768-73 (2014); Fla. Stat. § 800.04 (2014); Ga. Code Ann. § 16-6-3 (2014); Ind. Code § 35-42-4-3 (2014); Kan. Stat. Ann. §§ 21-5503 to 07 (2014); KRS § 510.140 (2014); Me. Rev. Stat. tit. 17a, § 254 (2014); Mo. Rev. Stat. §§ 566.032, .034 (2014); Nev. Rev. Stat. § 200.368 (2014), N.C. Gen. Stat. § 14-27.2 (2014); Or. Rev. Stat. §§ 163.355, .365, .375 (2014); S.D. Codified Laws § 22-22-7 (2014); Wis. Stat. § 948.02 (2014). Importantly, several other states have gone beyond these gradations and enacted "Romeo and Juliet" statutory provisions that exclude from prosecution sexual contact between individuals who would otherwise fall under the statute but are close in age to one another. Romeo and Juliet provisions appear as either affirmative defenses, or separate statutory exceptions, which either eliminate or reduce punishment for juvenile defendants who are close in age to the victim. Only five states provide for a consent defense within the context of a Romeo and Juliet exception. *See* N.Y. Penal Law § 130.55 (McKinney 2014); Okla. Stat. tit. 21, § 1112 (2014); Or. Rev. Stat. § 163.345 (2014); S.C. Code. Ann. § 16-3-655 (2014); Vt. Stat. Ann. tit. 13, § 2602(a)(2) (2014). Indiana's statute provides an affirmative defense if the defendant can prove that he had an "ongoing or dating relationship" with the victim. *See* Ind. Code Ann. § 35-42-4-9(e)(2) (2014). By specifically addressing the age of both the victim and the defendant or the existence of a dating relationship between them, such provisions strike a balance between preserving the protective impulse underlying these provisions and the acknowledgement that teens engage in consensual sex with one another.

Additionally, state courts have ruled that it is unconstitutional to apply the same degree of punishment to juvenile offenders as adult offenders under statutory rape statutes. These rulings rely upon claims of vagueness, *see, e.g*, *In re D.B.*, 950 N.E.2d

528, 534 (Ohio 2011), arbitrary and discriminatory enforcement and a violation of the constitutional mandate of equal protection, *see id.*, and violations of the minors' right to privacy, *see, e.g., In re G.T.*, 758 A.2d 301, 302 (Vt. 2000); *In Re J.M.*, 575 S.E. 2d 441, 442 (Ga. 2003).

For example, in *In re G.T.*, 758 A.2d 301, 302 (Vt. 2000), the Supreme Court of Vermont held that an individual could not be charged with statutory rape if he himself could not consent to the conduct. Fourteen-year-old G.T. and twelve-year-old M.N. were neighbors who engaged in consensual sexual conduct. G.T. was charged under a Vermont statutory provision which imposed criminal liability on "[a] person who engages in a sexual act with another person and . . . (3) The other person is under the age of 16, except where the persons are married to each other and the sexual act is consensual . . . ." *Id.* G.T. was adjudicated delinquent. On appeal, G.T. argued that he could not be both a victim and a perpetrator; if he fell within the protected class of juveniles under the statute, he could not be charged with violating the statute. *Id.* The Vermont Supreme Court held that the statutory rape statute did not apply to cases where the alleged perpetrator is also below the age of consent. *Id.* at 309. The court also found that other provisions within the Vermont code, namely the child abuse reporting statute and provisions approving family planning services for minors, were inconsistent with the statutory rape statute. *Id.* at 304. Finally, the Court held that there was a possibility of discriminatory enforcement and interference with privacy rights of the minor child and asserted victim. *Id.* at 306. The court noted the inherent tension in mandating the confidentiality of juvenile delinquency records while simultaneously disseminating information about the same minor within the

child abuse registry, and expressed doubt that the Vermont legislature intended for a child younger than sixteen years to receive the label of "child abuser" for life. *Id.* at 305.

In another instructive case, the Ohio Supreme Court struck down the application of a strict liability statutory rape statute on a young boy who engaged in consensual sexual contact with a peer. *In re D.B.*, 950 N.E.2d 528, 534 (Ohio 2011). The statute under which D.B. was convicted stated that "[no] person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when . . . [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person." *Id.* at 531-32.

D.B. argued his prosecution under the statute violated his federal and state rights to due process and equal protection because the statute was vague and overbroad, *D.B.*, 950 N.E.2d at 529, and was enforced in an arbitrary manner. *Id.* at 532. The Ohio Supreme Court ruled the statute was unconstitutionally vague in violation of the due process clause when applied to a child under the age of thirteen who engaged in sexual conduct with another child under the age of thirteen, *id.* at 534, and that the arbitrary and discriminatory enforcement of the law against only one party under the age of thirteen violated D.B.'s right to equal protection. *Id.*

Likewise, the Pennsylvania Superior Court held that if two minors are legally incapable of consenting to sexual activity, neither of them could be held criminally liable for initiating the conduct. *In re B.A.M.*, 806 A.2d 893 (Pa. Super. Ct. 2002). In *B.A.M.*, two 11-year-olds engaged in anal sex, but only one of them was adjudicated delinquent of rape and involuntary deviate sexual intercourse. *Id.* at 894. In overturning B.A.M.'s

adjudication, the court commented on how "absurd" and "ludicrous" it was to "penalize one youngster while the other faces no sanction for precisely the same behavior." *Id.* at 895, 898. The court reasoned:

> Either both boys must be punished/counseled/treated, or neither can be; as the trial court definitively found, both boys were willingly participants and J. was not victimized by the experience. The law was not intended to render criminal per se the experimentation carried on by young children, even where the acts may evoke disapprobation or censure.

Id. at 898. The court concluded that once the legislature finds an entire class of persons unable to consent, absent some justifiable exemption and regardless of disapproval of the conduct, the same inability must hold true for each member of the class, and thus B.A.M. alone could not be prosecuted. *Id.*

Statutes designed to protect minors from unwanted and harmful sexual activity cannot simultaneously be used as tools for prosecution against minors who engage in consensual, developmentally appropriate sexual activity with a willing same-aged peer who is not prosecuted for the same conduct. As other state courts have recognized, prosecuting youth in the name of protection can lead to absurd results.

B. Prosecuting Consensual Sexting Criminalizes Adolescents' Normative Developmental Experimentation with Their Sexual Identity and Exploration of Sexual Relationships

B.H. was also adjudicated delinquent for violating KRS § 531.335. Statutes criminalizing the possession or viewing of material that depict sexual conduct of a minor are intended to protect children from exploitation and harm in the creation of pornographic material. However, extending the application of KRS § 531.335 to the private, non-exploitive and voluntary exchange of text messages between two teenagers in a monogamous relationship is not only unnecessarily harsh and punitive, it serves no

penological or public safety purpose. *See, e.g.*, *In re: C.S.*, No. CP-39-JV-0000447-2012 (Pa. Ct. Com. Pl. Oct. 19, 2012), *available at* http://www.krautharris.com/documents/In-re-CS.pdf), *rev'd on other grounds*, 84 A.3d 698 (Pa. 2014).

Engaging in sexting—sending or receiving sexual photos of oneself or one's partner—is, while arguably stupid or reckless, a normal part of modern adolescent behavior.[1] "[T]hrough experimentation and risk-taking...adolescents develop their identity and discover who they will be." Lynn E. Ponton & Samuel Judice, *Typical Adolescent Sexual Development*, 13 CHILD ADOLESCENT PSYCHIATRIC CLINICS N. AM. 497, 508 (2004). In an era in which the average teen sends approximately 60 text messages every day, *see* Andrew J. Harris, *Understanding the World of Digital Youth*, *in* ADOLESCENT SEXUAL BEHAVIOR IN THE DIGITAL AGE: CONSIDERATIONS FOR CLINICIANS, LEGAL PROFESSIONALS, AND EDUCATORS (Fabian Saleh, Albert Grudzinskas, & Abigail Judge, eds., Oxford University Press) (2014) at 28, researchers estimate that approximately twenty percent of teenagers have engaged in sexting. *See* Cox Communications, National Center for Missing and Exploited Children, & John Walsh, *Teen Online & Wireless Safety Survey: Cyberbullying, Sexting, and Parental Controls* (2009) ("Teen Online & Wireless Safety Survey") at 34, *available at* http://www.scribd.com/doc/20023365/2009-Cox-Teen-Online-Wireless-Safety-Survey-

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[1] Among teens that have sent nude or semi-nude text messages, 66% of girls and 60% of boys say they did so to be "fun or flirtatious," and 40% of girls say they sent sexually suggestive texts as a "joke." *See* National Campaign to Prevent Teen and Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults* (2008) at 4, *available at* http://thenationalcampaign.org/sites/default/files/resource-primary-download/sex_and_tech_summary.pdf. Another study found that roughly 70% of teens that admitted to sexting had sent the image to their significant other. *See* Teen Online & Wireless Safety Survey.

Cyberbullying-Sexting-and-Parental-Controls. Because content can be directed to particular individuals while still being hidden from parents, teachers, and administrators, sexting gives teenagers the privacy to express their sexual feelings and desires to one another while avoiding the embarrassment of doing so face-to-face.

C.W. is clear in her statement that the sexual messages she and B.H. exchanged were a consensual progression of their intimate, year-long relationship and were not intended for wider public dissemination. Seventeen states have specific sexting statutes, many of which explicitly aim to ensure that consensual sharing of intimate images is not charged as child pornography or within the realm of statutes similar to KRS § 531.335. *See* Hinduja, Sameer & Justin W. Patchin, *State Sexting Laws: A Brief Review of State Sexting Laws and Policies* (2013), *available at* http://www.cyberbullying.us/state_sexting_laws.pdf (citing Ariz. Rev. Stat. § 8-309 (2014); Conn. Gen. Stat. § 53a-196h (2014); Fla. Stat. § 847.0141 (2014); Haw. Rev. Stat. § 712-1215.5 (2014); 705 Ill. Comp. Stat. § 405/3-1 (2014); La. Rev. Ann. Stat. § 14.81.1.1 (2014); Neb. Rev. Stat. § 28-1463.03 (2014); Nev. Stat. § 200.737 (2014); N. J. Stat. § 2A:4A-71.1 (2014); N. Y. Soc. Serv. Law § 458-I (McKinney's 2014); N.D. Cent. Code § 12.1-27.1-03.3 (2014); 18 Pa. Const. Stat. § 6321 (2014); R.I. Gen. Laws § 11-9-L.4 (2014); S.D. Codified Laws § 26-10-33 (2014); Tex. Penal Code § 43.261 (2014); Utah Code §§ 76-10-1204, 1206 (2014); Vt. Stat. tit. 13, § 2802b (2014).

Some states have created a lesser sexting offense that considers the immaturity and development of adolescents, while others have chosen not to criminalize it and instead address sexting through diversion programs or the child welfare system. *See, e.g.*, W. Va. Code Ann. § 49-5-13g (2014); Va. Code Ann. §2802(b) (2014). Because sexting

is a fairly recent phenomenon, few decisions address the prosecution of sexting among adolescent peers under child pornography statutes.[2]

II. Mandatory Sex Offender Treatment for Consensual Sexual Behavior Is Ineffective and Potentially Harmful to the Child

While specialized treatments for juveniles who have engaged in sexually aggressive behavior have been widely available since 1985, the empirical investigation of the effectiveness of these treatment programs has lagged far behind their development and proliferation. *See* Elizabeth Letourneau & Charles M. Borduin, *The Effective Treatment of Juveniles Who Sexually Offend: An Ethical Imperative*, 18 ETHICS & BEHAVIOR 286, 290 (2008), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2922753/. Early treatments for juvenile sex offenders were modeled after those designed for adult sex offenders, with few developmental adaptations for juveniles. *See* 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, 314-16 (1998), *available at* *h*ttps://www.knesset.gov.il/committees/heb/material/data/H07-09-2011_9-57-

[2] In a well-publicized "sexting" case, the Third Circuit affirmed a lower court's preliminary injunction against prosecution of female high school students appearing nude or semi-nude in pictures discovered on students' seized cellphones under child pornography laws. *See Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009), *aff'd sub nom. Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010). The court based its holding on arguments that the D.A.'s proposed educational and counseling program to address the students' sexting would likely infringe on their parents' Fourteenth Amendment substantive due process rights to raise their children and on the minors' First Amendment rights if they were forced to write an essay explaining why their conduct was wrong. *See Miller*, 598 F.3d at 150-52.

27_mamar4.pdf. Experts point out the lack of controlled research studies and the need for more scientifically rigorous research to determine the effectiveness of these treatments for juvenile sex offenders. *See* Elizabeth Letourneau, & M.H. Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, 17 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT ABUSE 293, 304 (2005). Most juvenile programs include the following core treatment goals for youths: taking full responsibility for all aspects of the sexual crime, reducing or correcting mental patterns that support sexual offending, preventing relapse, and controlling sexual arousal. *See* Robert McGrath, *et al.*, *Current Practices and Emerging Trends in Sexual Abuser Management: the Safer Society 2009 North American Survey* (2010) at 64-66, *available at* http://www.safersociety.org/uploads/WP141-Current_Practices_Emerging_Trends.pdf. Disturbingly, one out of four adolescent treatment programs in the United States requires full disclosure from adolescent participants for successful program completion. *See* McGrath, *et al.*, at 71. Some programs have required young teens to recite daily statements such as "'I am a pedophile and am not fit to live in human society. . . . I can never be trusted . . . everything I say is a lie. . . . I can never be cured.'" Chaffin & Bonner, *supra*, at 315. Treating teens like B.H., who have engaged in non-violent, unforced sexual conduct with a similarly-aged peer, as sex offenders may harm their psychological development and may actually increase the likelihood that they will engage in criminalized behaviors. *See* Chaffin and Bonner, supra at 315. Experts on sex offender treatment programs have argued that these group treatment approaches represent "potentially harmful practices" and can exacerbate the psychological harm and stigma that children labeled as sex offenders already experience. *See, e.g.*, Chaffin & Bonner,

supra, at 315; Mark Chaffin, *Our Minds Are Made Up: Don't Confuse Us with the Facts,* 13 CHILD MALTREATMENT 110, 112-21 (2008).

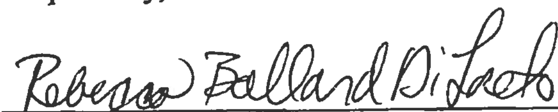
Furthermore, subjecting children to long-term "sex offender treatment" has stigma and labeling consequences that can lead to depression and anxiety, interfere with achieving normative developmental and social milestones, increase each youth's likelihood of victimization (i.e., by exposing younger children to older more serious sex offending adolescents), and subject children to an intense level of supervision that likely increases the risk for new charges (e.g., for illegal but consenting sexual conduct with peers) that would not otherwise occur. *See* Letourneau & Borduin, *supra*, at 292; Michael Caldwell, *What We Do Not Know About Juvenile Sexual Reoffense Risk*, 7 CHILD MALTREATMENT 291 (2002); Franklin Zimring, AN AMERICAN TRAVESTY: LEGAL RESPONSE TO ADOLESCENT SEXUAL OFFENDING (2004). Children adjudicated as sex offenders may struggle to develop and maintain friendships, are often excluded from extracurricular activities, and may be physically threatened by classmates once their peers learn of their record and label them as a "bad person." *See* Maggie Jones, *How Can You Distinguish a Budding Pedophile From a Kid with Real Boundary Problems?*, N.Y. TIMES, July 22, 2007.

In the instant case, B.H. was required to enter mandatory sex offender treatment for unforced, consensual conduct with a peer. (*See* Appellant's Br. at 2, 6). Treatment under these circumstances runs counter to the well-established research on the ineffectiveness of these programs for individuals who do not engage in predatory sexual offending and ignores the potential long-term harm to the youth.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Juvenile Law Center and Children's Law Center respectfully request that this Court overturn the delinquency adjudication of B.H. and hold that Kentucky's Sexual Misconduct Statute, KRS § 510.140 (2014), and Possession or Viewing of Matter Portraying a Sexual Performance by a Minor, KRS § 531.335 (2014) are unconstitutional as applied to B.H.

Respectfully,



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