

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	CASE No. 2021-0579
RESPONDENT- APPELLEE,	:	
	:	DISCRETIONARY APPEAL FROM THE
v.	:	MAHONING COUNTY COURT OF
	:	APPEALS,
CHAZ BUNCH,	:	SEVENTH APPELLATE DISTRICT,
	:	CASE. No. 18MA22
PETITIONER-APPELLANT.	:	

BRIEF OF *AMICI CURIAE* JUVENILE LAW CENTER, NATIONAL JUVENILE DEFENDER CENTER AND CHILDREN’S LAW CENTER, INC., ET AL., IN SUPPORT OF APPELLANT CHAZ BUNCH

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STATEMENTS OF INTEREST OF *AMICI CURIAE*

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values. Juvenile Law Center has represented hundreds of young people and filed influential amicus briefs in state and federal cases across the country.

The **National Juvenile Defender Center** (NJDC) was created to ensure excellence in juvenile defense and promote justice for all children. NJDC responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. NJDC gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. NJDC provides support to public defenders, appointed counsel, child advocates, law school clinical programs, and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural, and tribal areas. NJDC also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity

building, and coordination. NJDC has participated as Amicus Curiae before the United States Supreme Court, as well as federal and state courts across the country.

The **Children's Law Center, Inc.** (CLC) is a non-profit legal service center committed to protecting and enhancing the rights of children and youth in Ohio and Kentucky and improving the systems that serve them. CLC engages in public policy work, training and education, impact litigation, and juvenile defender support services. CLC advocates on behalf of youth prosecuted in juvenile and adult court, including ensuring that youth receive constitutionally required protections and due process in delinquency and criminal court proceedings. For the past decade, CLC has worked on issues facing Ohio youth prosecuted in adult court, placed in adult facilities, and working towards systemic change to reduce the number of children in the adult system through various means including data collection, interviewing youth in adult court and their families as well as stakeholders, and issuing reports on this topic. The issues involved in and implications of this case are of particular concern to CLC, given the work CLC is engaged in to reduce unnecessary transfer of juveniles, including statewide policy reforms.

The **Cuyahoga, Franklin, Hamilton, and Montgomery County Public Defender's Offices** provide legal services to indigent adults and children charged with violations of the criminal code. These offices represent the vast majority of children accused of criminal offenses in the State of Ohio, both at bindover proceedings in juvenile court and in adult court once the children have been transferred. Accordingly, a large number of the Public Defenders' present and future clients will be directly impacted by the outcome of the present litigation.

The **Justice for Children Project** at The Ohio State University Moritz College of Law combines legal education with zealous advocacy for the rights of children across a variety of systems. A key part of the Project – the Justice for Children Clinic – provides law students with the opportunity to represent children in neglect and dependency proceedings, delinquency cases, immigration adjustments and educational issues. The students and faculty in the Clinic work to ensure that the expressed desires of their clients are heard, that juvenile rights are taken seriously, and that the juvenile system maintains its commitment to rehabilitating children and reunifying families. It is critically important to the due process rights of our youth and the credibility of the juvenile justice system that the inherent differences between youths and adults be given sufficient weight under the law.

The **National Association for Public Defense** (NAPD) engages all public defense professionals into a clear and focused voice to address the systemic failure to provide the constitutional right to counsel, and to collaborate with diverse partners for solutions that bring meaningful access to justice for poor people. NAPD includes every professional who is critical to delivering the right to counsel: lawyers, social workers, case managers, investigators, sentencing advocates, paralegals, civil legal aid providers, education advocates, expert support, information technology gurus, teachers and trainers, financial professionals, researchers, legislative advocates, communications personnel, and administrative personnel. Our collective expertise represents state, county and local systems through full-time, contract, and assigned counsel delivery mechanisms; dedicated juvenile, capital and appellate offices; and through a diversity of traditional and holistic practice models.

The **Rutgers Criminal and Youth Justice Clinic** (CYJC) is a clinical education program of Rutgers Law School. Over the last decade, the CYJC has provided legal representation to more than 700 youth involved in New Jersey's juvenile justice system, including numerous young people who have been waived to and sentenced by adult criminal courts. Through this work, clinic faculty and staff have developed extensive expertise in the policies, practices, and legal proceedings that are at issue in this matter. The CYJC frequently appears before the New Jersey Supreme Court in youth cases.

STATEMENT OF CASE AND FACTS

Amici adopt the Statement of the Case and Facts as articulated in Appellant's brief.

ARGUMENT

Introduction

When I was bound over I was really numb. I really didn't understand the ramifications of what was transpiring. I remember the judge saying that if it were two weeks prior, she would not have bound me over. I still wonder about those words. What had changed in those two weeks? – J.A.¹

*At first I didn't know that I could go to adult court. I didn't know they did that to people. *** Going into my court date, I was hopeful, but my lawyer wouldn't say what he thought would happen. When we got to the courtroom, the judge said I was a mandatory bindover. We were in court for two hours and it just seemed pointless. It was a really tough situation. – L.T.*

At age 16, Chaz Bunch was charged with a series of category two offenses with the use of a firearm. Chaz appeared before a juvenile court judge, who was required to determine only whether there was probable cause to support the charges alleged. Based on that probable cause finding alone, Chaz was automatically transferred to adult court for criminal prosecution and sentencing.

This mandatory bindover scheme set forth in Ohio Revised Code sections 2152.10(A)(2)(b) and 2152.12(A)(1)(b) violates the United States Supreme Court's jurisprudence that youth be treated differently than adults under our constitutional framework. *See Roper v. Simmons*, 543 U.S. 551, 575, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2011), *J.D.B. v. North*

¹ This quote and the quotes throughout this brief were taken from the Children's Law Center's bindover storytelling project compiling stories of youth who were mandatory bindovers to adult court and their family members. Children's Law Ctr., *In Their Own Words*, ohiobindover.wordpress.com/ (accessed September 14, 2021)

Carolina, 564 U.S. 261, 270-280, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011), *Miller v. Alabama*, 567 U.S. 460, 490-492, 132 S.Ct. 2455, 183 L.Ed.2d. 407 (2012). It further violates the due process rights of youth by denying them notice and an opportunity to be heard on their individual characteristics, history, capacity for change and amenability for rehabilitation. See *Kent v. United States*, 383 U.S. 541, 554, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). Mandatory bindover deprives youth of their critically important liberty interest in being free from the harms imposed on youth by the adult criminal system without supporting any state interest in deterring future crime and reducing recidivism. This Court previously found Ohio's mandatory bindover statutes unconstitutional. *State v. Aalim*, 150 Ohio St.3d 463, 2016-Ohio-8278, 83 N.E.3d 862, ¶ 28, *reconsideration granted, decision vacated*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 38. It should do so again.

The use of mandatory bindover in Ohio has been an utter failure. Proposed measures to alleviate the use of mandatory bindover have not been effective. Not only has the use of bindover and its alternatives failed to reduce recidivism, it has served to amplify outdated and disproven racial stereotypes of the "child super-predator" that led to the imposition of tough on crime laws, which include mandatory bindover and extreme sentencing laws throughout the country. Such laws have served to undercut the rehabilitative mission of the juvenile system while subjecting young people to increased danger, harm, and trauma in the adult system.

From its racist origins, mandatory bindover has consistently led to a disproportionate number of Black youth being bound over to adult court without evidence that Black youth offend at higher rates than white youth, and even as youth crime rates continue to decline across the board. Today, the United States Supreme Court, this Court,

stakeholders throughout the system, and members of the public confirm that youth deserve individualized assessments and rehabilitative treatment that only the juvenile court can provide. It is time for this Court to end Ohio’s failed and harmful experiment with mandatory bindover.

Appellant Chaz Bunch’s Proposition of Law No. II: A Child Cannot be Transferred to Adult Court Without a Finding that they are Not Amenable to Treatment in Juvenile Court.

- I. A Mandatory Bindover Scheme that Provides No Opportunity for Individualized Consideration Contravenes United States Supreme Court Jurisprudence.**
 - A. The United States Supreme Court has Repeatedly Held that Children are Different from Adults in Constitutionally Relevant Ways.**

The Supreme Court has repeatedly recognized that the distinctions between teenagers and adults must be taken into account in applying constitutional principles. A youth’s age “is far more than a chronological fact;” it creates commonsense conclusions about youth perceptions and behavior that are “self-evident to anyone who was a child once himself.” *J.D.B.*, 564 U.S. at 272, 131 S.Ct. 2394, 180 L.Ed.2d 310. These distinctions are “what any parent knows—indeed, what any person knows—about children generally.” *Id.* (Citations omitted). These distinctions are also supported by a significant body of developmental research and neuroscience demonstrating significant psychological and physiological differences between youth and adults. *See, e.g., Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2011) (“developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”).

Over the last two decades, the Court has reinforced the primacy of this principle in a series of decisions about the culpability of youth and the legal processes they are due. *See*

Roper v. Simmons, 543 U.S. 551, 575, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (holding that imposition of the death penalty on minors violates the Eighth Amendment), *Graham*, at 74-75 (ruling that imposition of life without possibility of parole for non-homicide crimes violates the Eighth Amendment); *J.D.B.* at 271-272 (holding that age is a significant factor in determining whether a youth is “in custody” for Miranda purposes); *Miller*, 567 U.S. at 481, 132 S.Ct. 2455, 183 L.Ed.2d 407 (holding that mandatory sentence of life without possibility of parole for minors violates the Eighth Amendment). *See also Montgomery v. Louisiana*, 577 U.S. 190, 211-213, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016) (holding that *Miller*’s prohibition on mandatory life without parole for young people should be applied retroactively because it established a new substantive constitutional rule); *Jones v. Mississippi*, __ U.S. __, 141 S.Ct. 1307, 1321, 209 L.Ed.2d 390 (2021) (upholding the central holdings of *Miller* and *Montgomery* but determining that no specific finding of permanent incorrigibility is necessary before a life without parole sentence is imposed).

In all of these decisions, the Court has relied on three categorical distinctions between youth and adults to explain why children must be treated differently than adults under the law. “First, children have a lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” *Miller* at 471, quoting *Roper* at 569. *Accord Graham*, 560 U.S. at 67. Research demonstrates that adolescents, as compared to adults, are less capable of making reasoned decisions, particularly in stressful situations. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 *The Future of Children* 15, 20 (2008), available at pubmed.ncbi.nlm.nih.gov/21337996/ (accessed Sept. 22, 2021) (“Considerable evidence supports the conclusion that children and adolescents are less capable decision

makers than adults in ways that are relevant to their criminal choices.”). Adolescent decision-making is characterized by sensation- and reward- seeking behavior. Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 *Developmental Psychobiology* 216, 217 (2010). Greater levels of impulsivity during adolescence may stem from adolescents’ weak future orientation and their related failure to anticipate the consequences of decisions. Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 *Child. Dev.* 28, 29-30 (2009). *See also* Nat’l Research Council, *Reforming Juvenile Justice: A Developmental Approach* 91, 97 (2013) Washington, DC: The National Academies Press, <https://doi.org/10.17226/14685> (accessed Sept. 21, 2021).

Second, the Supreme Court recognized that youth are distinct from adults in their susceptibility to outside pressures. As the Court explained, “‘children are more vulnerable ... to negative influences and outside pressures,’ including from their family and peers; they have ‘limited control over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing settings.” *Miller* at 471, quoting *Roper* at 569. *Accord Graham* at 67. That teenagers are more susceptible to peer pressure is widely confirmed in social science literature. *See, e.g.*, Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1012 (2003); *Reforming Juvenile Justice* at 91 (“[A]dolescents have a heightened sensitivity to proximal external influences, such as peer pressure and immediate incentives, relative to adults.” (citations omitted)). As scientists explain:

[I]nfluence affects adolescent judgment both directly and indirectly. In some contexts, adolescents make choices in response to direct peer pressure to act in certain ways. More indirectly, adolescents' desire for peer approval – and fear of rejection – affect their choices, even without direct coercion.

Steinberg & Scott, *Less Guilty by Reason of Adolescence* at 1012.

Finally, the Supreme Court has recognized that children are different from adults because adolescence is a transitional phase. “[A] child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievabl[e] deprav[ity].” *Miller* at 471, quoting *Roper*, 545 at 570. Indeed, “[t]he personality traits of juveniles are more transitory, less fixed.” *Roper* at 570. Youth “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.” *Graham* at 68, quoting *Roper* 570. As a result, “a greater possibility exists that a minor’s character deficiencies will be reformed.” *Graham* at 68, quoting *Roper* at 570. Therefore, the Supreme Court found that youth must be given the opportunity to demonstrate their capacity for rehabilitation and change. *Miller* at 478 (finding that “mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.”). *See also Graham* at 75 (finding for sentencing purposes the State must provide youth “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”).

Developmental research reaches the same conclusions. It is well known that “[adolescence] is transitional because it is marked by rapid and dramatic change within the individual in the realms of biology, cognition, emotion, and interpersonal relationships.” Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 31 (2008). Research confirms that “many of the factors associated with antisocial, risky, or criminal behavior

lose their intensity as individuals become more developmentally mature.” Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through The Lens of Childhood and Adolescence*, 15 U. Pa. J. L. & Soc. Change 285, 297 (2012). (Citations omitted). “[T]he period of risky experimentation does not extend beyond adolescence, ceasing as identity becomes settled with maturity. Only a small percentage of youth who engage in risky experimentation persist in their problem behavior into adulthood.” *Reforming Juvenile Justice* at 90 (citations omitted). *See also* Rethinking Juvenile Justice at 53 (explaining that “[m]ost teenagers desist from criminal behavior . . . [as they] develop a stable sense of identity, a stake in their future, and mature judgment.”). As youth develop, they become less likely to engage in antisocial activities, an attribute that can be dramatically enhanced with appropriate treatment. “Contemporary psychologists universally view adolescence as a period of development distinct from either childhood or adulthood with unique and characteristic features.” Rethinking Juvenile Justice, at 31. *See also* Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Dev. Psych. 1764 (2008) (noting that rates of impulsivity are high during adolescence and early adulthood and decline thereafter). As youth grow, so do their self-management skills, long-term planning, judgment and decision-making, regulation of emotion, and evaluation of risk and reward. *See* Steinberg & Scott, *Less Guilty by Reason of Adolescence*, at 1011. As a result, “[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled.” *Id.* at 1014.

As a consequence of these unique developmental attributes, the United States Constitution requires that constitutional protections be calibrated to youth’s

developmental status. *See J.D.B.*, 564 U.S. at 272 (holding that age is relevant for the *Miranda* custody decision because “a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.”). Thus, before exposing youth to the punishments of the adult criminal justice system, the distinctive traits of children and adolescents necessitate an *individualized assessment* of “an offender’s age and the wealth of characteristics and circumstances attendant to it.” *Miller* at 476.

B. United States Supreme Court Precedent Requires Consideration of Individualized Characteristics of Youth in the Criminal System.

In *Miller*, the Court held that “mandatory penalties, by their nature, preclude a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it.” 567 U.S. at 476. Failing to consider the youth’s individual situation unconstitutionally

precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.

Id. at 477, 479 (holding mandatory life sentences for juveniles unconstitutional because they do not allow for individualized consideration). The Court specifically noted six such characteristics that should be considered during sentencing in light of the differences between children and adults: (1) the youth’s chronological age related to “immaturity,

impetuosity, and failure to appreciate risks and consequences,” (2) the juvenile’s “family and home environment that surrounds him,” (3) the circumstances of the offense, including extent of participation in the criminal conduct, (4) the impact of familial and peer pressures, (5) the effect of the offender’s youth on his ability to navigate the criminal justice process, and (6) the possibility of rehabilitation. *Id.* at 477-78. The same requirement for individual consideration of youth characteristics must apply throughout a child’s involvement in the criminal justice system. *See, e.g., J.D.B.*, 564 U.S. at 272-274 (relying on earlier findings regarding the immaturity and vulnerability of children to hold that a child’s age must be considered in determining whether they were in custody for purposes of the administration of Miranda warnings). The import of this individualized consideration at sentencing is even more pronounced when determining whether to subject children to the “harsh realities” of the adult criminal justice system. *See infra* Part II(A)(i).

C. This Court’s Prior Holdings Similarly Require Consideration of the Unique Characteristics of Youth.

This Court has likewise recognized the rehabilitative purpose of the juvenile court, as well as the need to treat youth differently than adults based on their unique characteristics. In *State v. Hanning*, this Court recognized that “[s]ince its origin, the juvenile justice system has emphasized individual assessment, the best interest of the child, treatment, and rehabilitation, with a goal of reintegrating juveniles back into society.” *State v. Hanning*, 89 Ohio St.3d 86, 88, 728 N.E.2d 1059 (2000). *See also State v. Iacona*, 93 Ohio St.3d 83, 90-91, 752 N.E.2d 937 (2001), quoting R.C. 2151.01(A) and (B), (recognizing the unique purpose of the juvenile justice system to provide for the “care, protection, and

mental and physical development of children” through a “program of supervision, care, and rehabilitation.”).

Most recently, in *State v. Patrick*, this Court recognized that the unique traits of youth and its attendant characteristics identified by the Supreme Court in *Graham* and *Miller* “were inherent to juveniles in all cases.” *State v. Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952, ¶ 27 (finding sentence of life *with* parole for a juvenile homicide offender unconstitutional because trial court failed to consider youth as a mitigating factor in the record). In *In re C.P.*, this Court found that fundamental fairness under the Fourteenth Amendment requires that the juvenile court judge decide the appropriateness of any adult penalty for juvenile acts. *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 74-80 (recognizing the juvenile court judge’s important role in rehabilitation and the need for discretion to weigh individual factors). Finally, recognizing that “children are constitutionally required to be treated differently from adults for purposes of sentencing,” and that “[t]he mandatory-transfer statutes preclude a juvenile-court judge from taking any individual circumstances into account before automatically sending a child who is 16 or older to adult court,” this Court previously concluded that only discretionary transfer satisfied due process under the Ohio Constitution. *Aalim I*, 150 Ohio St.3d 463, 2016-Ohio-8278, 83 N.E.3d 862, at ¶ 28, *reconsideration granted, decision vacated*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, at ¶ 28.

II. Ohio's Mandatory Bindover Scheme Violates Due Process.

I feel that the state should not be so willing to bound youth over. Everybody (youth) should have a equal chance to show the state of OHIO that they made a foolish decision and was just a child and was immature at the time of the decision. – K.C.

*The court started with a [] hearing to find out if he was going to be bound over as an adult, even though he had just turned 16 in 2010. The judge didn't want to hear that kids deserve a second chance. * * * The judge found probable cause that my son had committed the offense, and he was bound over to the adult system. – S.W.*

The United States Supreme Court's and this Court's rejection of procedures and practices that fail to account for youth's developmental differences or provide for individualized consideration bears just as forcefully on Ohio's statute mandating prosecution of certain classes of children as adults. In accordance with this case law, children have a right to not automatically be treated as adults. Ohio's mandatory bindover statutes violate due process by requiring that certain youth automatically be treated as adults and be exposed to the adult criminal justice system without any individualized determination of the youth's suitability for prosecution as an adult and amenability to treatment as a child.

Chaz was prosecuted in the adult criminal justice system solely because of his age and alleged offense. Ohio law prevented the juvenile court from considering his background, immaturity, rehabilitative potential, or the circumstances around his alleged actions. R.C. 2152.10(A), R.C. 2152.12(A). Ohio's mandatory transfer scheme runs afoul of the United States Supreme Court's decision in *Kent v. United States* and the basic due process principles defined by *Mathews v. Eldridge*.

A. Ohio’s Mandatory Bindover Scheme Violates the United States Supreme Court’s Holding in *Kent*.

“[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Due process is a flexible concept, and the particular process required varies with the situation; generally speaking, the greater the interest at stake, and the higher the risk of an erroneous deprivation of that interest, the more stringent the procedural protections required. *Zinermon v. Burch*, 494 U.S. 113, 127-128, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); see also *Goldberg v. Kelly*, 397 U.S. 254, 262-263, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (“The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss.’”, quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 647, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring)).

As the United States Supreme Court held more than fifty years ago in *Kent*, 383 U.S. at 553-554, 86 S.Ct. 1045, 16 L.Ed.2d 84, the liberty interests at stake in the transfer of a youth from juvenile to adult criminal court are “critically important,” and they call for heightened procedural protections not provided by the bindover statutes in Ohio.

In *Kent*, the Supreme Court held that the transfer of a youth from juvenile court to adult criminal court imposes a significant deprivation of liberty and therefore warrants substantial due process protection. *Id.* at 554. The Court reasoned that upon transfer, the child loses the “special rights and immunities” offered by the juvenile court. *Id.* at 556. The Court also emphasized that the transfer determination might mean the difference between

a few years' confinement until the youth reaches age twenty-one, and the harshest sentences imposed upon adults. *Id.* at 556-557. In light of those circumstances, the Court found it "clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile," and thus it must "satisfy the basic requirements of due process and fairness," including an individualized assessment of the youth's amenability to juvenile court jurisdiction. *Id.* at 553, 556. To ensure that the youths' interests in juvenile status and freedom from confinement are adequately protected, the hearing which precedes bindover must allow the court to conduct an individualized inquiry:

What is required before a waiver is, as we have said, 'full investigation.' . . . It prevents the waiver of jurisdiction as a matter of routine for the purpose of easing the docket. It prevents routine waiver in certain classes of alleged crimes. It requires a judgment in each case based on an inquiry not only into the facts of the alleged offense but also into the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case.

Id. at 553 n. 15. (Citations omitted).²

This Court has applied *Kent* to Ohio's mandatory bindover proceedings before. *See In re D.M.*, 140 Ohio St.3d 309, 2014-Ohio-3628, 18 N.E.3d 404, ¶ 11 ("the Supreme Court of the United States has held that the bindover hearing is a "critically important proceeding" and that the hearing "must measure up to the essentials of due process and fair

² As the Court noted in the appendix to its opinion, factors a judge should consider when determining whether a juvenile should be transferred to adult court include: 1) "the sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living" (culpability) and 2) "the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile...." (amenability to rehabilitation). *Kent* at 567.

treatment.”); *Iacona*, 93 Ohio St.3d at 92, 752 N.E.2d 937 (relying on *Kent* in finding that *Brady* material and other basic discovery is required even in mandatory bindover proceedings). In *Iacona*, this Court observed that when a child is adjudicated delinquent, any institutionalization, confinement, or other accountability measure may not “exceed the child’s attainment of twenty-one years of age,” including for the most serious crimes of aggravated murder, while “the same minor bound over to the court of common pleas to face trial as an adult on a charge of murder faces a potential life term of incarceration.” *Id.*, citing R.C. 2151.355(A)(4) and (6); R.C. 2929.02(B)). This Court rightly concluded, as in *Kent*, that “the issues determined at a mandatory bindover hearing are therefore a ‘critically important’ stage in juvenile proceedings,” and that “such a hearing must ‘measure up to the essentials of due process and fair treatment.’” *Iacona* 93 Ohio St.3d at 92, 752 N.E.2d 937, citing *Kent*, 383 U.S. at 562.

B. Ohio’s Mandatory Bindover Scheme Fails the Due Process Test Laid Out in *Mathews v. Eldridge*.

In *Mathews v. Eldridge*, the United States Supreme Court outlined three distinct factors to analyze the sufficiency of procedural due process: (1) “the private interest that will be affected by the official action;” (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;” and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 335, 6 S.Ct. 893, 47 L.Ed.2d 18.

1. Youth Have a Significant Interest in Remaining Out of the Adult Criminal System.

As any “kid” in my situation would have been, I felt scared and isolated. I felt like a lost lamb who was being stalked by a pack of wolves whose jowls were dripping with saliva. They had their eyes set on me, their newfound prey. I was a “child” amongst career criminals, murderers, rapists, car thieves, and other serious offenders. At times, there are “lulls” in the “warfare” here. During these times I have taken to bettering myself, both physically and mentally. I have learned to better hide my ever-present fear from the vultures who feed on it. – M.P.

*When I left the Juvenile (sic) system and entered the Adult system all of the sudden I was the Monster. I know I did some really messed up things but at least in the juvenile, there was always somebody that would say or AT LEAST TRY to say good things about me. But when I came to Adult system, every bit of sunshine in my life was over, every bit of hope for my future was gone, every bit of opportunity for my life was over. I was a nobody, a failure, no change for me. No help for me. Everything in my life was darkness.
– G.W.*

Research shows that young people are developmentally capable of change and further demonstrates that, when given a chance, youth become productive and law-abiding citizens, even without intervention. *See supra* Part I(B). In Ohio, the juvenile court’s primary goal is to provide for the child’s “care, protection, and mental and physical development” and “to protect the public interest by treating children as persons in need of supervision, care and rehabilitation.” R.C. 2152.01(A); Juv.R. 1. The rehabilitative purpose and mission of the juvenile court distinguishes it from the adult criminal justice system. *See Jeffrey Fagan, Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 *The Future of Child.* 81, 81-83 (2008), papers.ssrn.com/sol3/papers.cfm?abstract_id=1154670 (accessed Sept. 21, 2021) (describing the “sharply contrasting ideas about adolescents who break the law” reflected in the purpose and structure of juvenile versus adult criminal courts). In contrast to the purpose of juvenile courts, “[t]he purposes of felony sentencing

... ‘are to protect the public from future crime by the offender and others and to punish the offender.’” *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209 ¶ 54, quoting R.C. 2929.11(A).

“The adult system was viewed as an inadequate and inappropriate forum to adjudicate the criminal behavior of juveniles.” Vincent M. Southerland, *Youth Matters: The Need to Treat Children Like Children*, 27 J. Civ. Rts. & Econ. Dev. 765, 768 (2015). In recognition of the lack of maturity and fully formed personalities of youth, courts implemented strategies to consider the best interests of youth. *Id.* Lawmakers were “disturbed” by children being subjected to “adult penalties, lengthy prison terms, and commingling with ‘hardened criminals.’” *Id.* at 767. As such, the original juvenile courts were charged with being concerned with the child rather than the offense that brought them before the court. Amnesty International, *Betraying The Young: Human Rights Violations Against Children in the US Justice System* 9 (1998), [amnesty.org/en/documents/amr51/057/1998/en/](https://www.amnesty.org/en/documents/amr51/057/1998/en/) (accessed Sept. 20, 2021).

Indeed, outraged by the sight of children incarcerated with adults, Cleveland Ohio’s Solicitor Newton D. Baker created the state’s first Juvenile Court in 1902 in Cuyahoga County.³ The Court was established as part of Ohio’s Juvenile Court Act, which provided that children should be treated with care if detained and that incarceration should be avoided if possible. F.R. Aumann, *The Juvenile Court Movement in Ohio*, 22 Am.Inst.Crim.L. & Criminology Vol. 22, Issue 4, 561 (Nov. 1931), available at bit.ly/3CLK0xa (accessed Sept. 21, 2021).

³ Cuyahoga County Court of Common Pleas Juvenile Division History, available at <http://juvenile.cuyahogacounty.us/en-US/history.aspx> (accessed Sept. 20, 2021).

Importantly, keeping youth out of the adult criminal system spares them exposure to the harsh features of that system and taps into their unique capacity for rehabilitation. Children under 18 incarcerated in adult facilities often face brutal conditions. Youth in adult facilities, as compared to those in juvenile facilities, are five times more likely to be sexually assaulted, eight times more likely to commit suicide, and nearly twice as likely to be beaten by staff or attacked with a weapon by another inmate. Richard Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention 7 (June 2010), ojp.gov/pdffiles1/ojdp/220595.pdf (accessed Sept. 21, 2021).⁴

Youth are also often subjected to and kept in solitary confinement for long periods to purportedly protect them from victimization in prison. Human Rights Watch, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*, (Oct. 10, 2012), hrw.org/report/2012/10/10/growing-locked-down/youth-solitary-confinement-jails-and-prisons-across-united# (accessed Sept. 21, 2021). Solitary confinement, however, plays a role in the increased risk of suicide among youth in adult prisons. *Id.* These increased risks spurred the United States Congress in 2018 to update the Juvenile Justice & Delinquency Prevention Act, calling for all youth – even those charged as adults – to be removed from adult jails by 2021. *See* Coalition for Juvenile Justice, *JJDP*

⁴ A 2011 report revealed that 66 percent of youth 16 and 17 years old who reported being sexually abused while in prison were victimized more than once. Justice Policy Institute and Campaign for Youth Justice, *The Child Not the Charge: Transfer Laws Are Not Advancing Public Safety* 14 (2020), campaignforyouthjustice.org/images/child_not_the_charge_report5.26_2.pdf (accessed Sept. 21, 2021).

Reauthorization: Updated Protections to Ensure Equity for Youth (Sept. 23, 2019) juvjustice.org/blog/1138 (accessed Sept. 21, 2021).

Indeed, adult prisons were not developed to meet the needs of children.⁵ Youth who are transferred often experience harmful developmental disruption. Prisons lack the academic, vocational, and social skill building education that adolescents need. Rather, adult prisons serve as a “school for crime” where children learn and see reinforced norms of domination, exploitation, and retaliation – all while their adolescent brains are forming and developing. James C. Howell, et al., *Bulletin 5: Young Offenders and an Effective Response in the Juvenile and Adult Justice Systems: What Happens, What Should Happen, and What We Need to Know* (Study Group on the Transitions between Juvenile Delinquency and Adult Crime) 11 (2013), ojp.gov/pdffiles1/nij/grants/242935.pdf (accessed Sept. 22, 2021). The trauma children experience in the adult system “increases the likelihood and severity of a reaction to the trauma” and, in children, trauma may cause them to “act in ‘survival mode,’ causing maladaptive coping behaviors * * *.” Supreme Court of Ohio, *Juvenile Court Trauma-Informed Practices*, supremecourt.ohio.gov/JCS/CFC/resources/traumaInformedCourt.pdf (accessed Sept. 24, 2021).⁶

⁵ This is not to say that juvenile detention facilities actually meet the needs of children. They do not, but as compared to adult prisons they at least were designed for children. See Lisa Pilnik, et al., *Transforming Justice: Bringing Pennsylvania’s Young People Safely Home from Juvenile Justice Placements*, Juvenile Law Center (2019), jlc.org/resources/transforming-justice-bringing-pennsylvanias-young-people-safely-home-juvenile-justice (accessed Sept. 22, 2021).

⁶ Children treated in the adult system also face substantial mental health challenges. Jason J. Washburn et al., *Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court*, 59 *Psychiatric Services* 965 (2008) (study found that the prevalence of mental illness among youth who were transferred and subsequently detained in adult facilities (66 percent) is nearly *double* that of detained

Finally, upon release from prison, the child will face crushing collateral consequences that accompany a criminal record. Beyond the trauma experienced within prison, their conviction can adversely affect education, housing, welfare, immigration, employment, professional licensure, property rights, mobility, and other opportunities which hinder successful reintegration into society. American Bar Association, *Collateral Consequences of Criminal Convictions: Judicial Bench Book* (2018), ojp.gov/pdffiles1/nij/grants/251583.pdf (accessed Sept. 22, 2021).

2. The State's Interest in Mandatory Bindover is Without Support Because Mandatory Bindover Fails to Reduce Recidivism or Serve as a Deterrent to Crime.

*People get killed or raped. They become victims in prison. It's tough, especially at a young age because the older prisoners try to take advantage of you. And when you're doing * * * 15 or 30 years, you don't know how to live on the streets and all you know in prison is becoming institutionalized. – M.M.*

Juvenile institutions strive to prepare us for freedom and the future by reforming us through rehabilitation while the adult institutions only seem to make us better criminals. This is my opinion. – E.C.

Proponents of transfer laws rely on deterrence as a key justification for the prosecution of children as adults. *See* Redding, *Juvenile Transfer Laws* at 1. Yet research fails to support this policy goal. *Id.* Nationally, there is no correlation, let alone causation, between transfer laws and reductions in juvenile violent crime rates. Justice Policy Institute and Campaign for Youth Justice, *The Child Not the Charge* at 12.⁷

adults (35 percent); *See also* Linda A. Teplin, PhD, *Psychiatric and Substance Abuse Disorders Among Male Urban Jail Detainees*, 84 *Am. J. of Pub. Health* 290 (1994).

⁷ A study compared Tennessee and Texas and found vastly different transfer rates for violent offenses (54 percent and 80 percent, respectively), yet nearly identical juvenile arrest rates for violent crimes (7.2 percent and 7.1 percent, respectively).

In fact, research has shown that transferring youth to adult court actually increases the likelihood of re-offense. *See, e.g.,* Redding, *Juvenile Transfer Laws* at 6. Studies consistently showed higher recidivism rates for transferred youth compared to peers retained in the juvenile system.⁸ This finding is true even for transferred youth who were sentenced to adult probation. Redding, *Juvenile Transfer Laws* at 6. Another report concluded that among youth who did not experience any incarceration for their crimes, transferred youth were three percent more likely to be arrested again later for a violent offense than youth retained in the juvenile court system. Centers for Disease Control and Prevention, *Effects on Violence and Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, MMWR 2007, Vol 56, No. RR-9, 6, n. 7 (2007), cdc.gov/mmwr/pdf/rr/rr5609.pdf (accessed Sept. 22, 2021). Thus, merely *processing* a child in the adult criminal system can result in an increase in recidivism.

This research has been bolstered by a recent analysis in Washington State, which has similar mandatory transfer laws to Ohio, finding that youth who are automatically transferred to adult court are more likely to recidivate than youth who were not transferred to adult court. Washington State Inst. for Pub. Policy, *The Effectiveness of Declining Juvenile Court Jurisdiction of Youth* 6 (Dec. 2013), wsipp.wa.gov/ReportFile/1544/Wsipp_The-Effectiveness-of-Declining-Juvenile-Court-

⁸ The results of these six large-scale studies funded by the Office of Juvenile Justice and Delinquency Prevention are particularly compelling given the varying methodologies (natural experiments across two jurisdictions, matched groups within the same jurisdictions, and statistical controls), sample sizes (between 494 and 5,476 participants), and across jurisdictions (Florida, New Jersey, New York, Minnesota, Pennsylvania) with varying types of transfer laws (automatic, prosecutorial, or judicial).

Jurisdiction-of-Youth_Final-Report.pdf (accessed Sept. 22, 2021). In addition, the study found that overall this increase in recidivism cost a total of over \$10,000 per youth to taxpayers and crime victims. *Id.* at 11-12.

The deterrence theory is “based on a rational choice model of decision-making: that is, prior to commission of a crime, an individual consciously weighs the risks and rewards of commission.” Karen Miner-Romanoff, *Juveniles Sentenced and Incarcerated as Adults: Findings from a Qualitative Analysis of Their Knowledge, Understanding, and Perceptions of Their Sentences*, 9:1 Justice Policy Journal 1, 5 (2012), available at cjcj.org/uploads/cjcj/documents/Juveniles_Sentenced.pdf (accessed Sept. 13, 2021). This model also “assumes that youths’ perceptions and understandings of such punishment must be thorough enough and abhorrent enough to them to deter them from committing the crime. Ohio’s mandatory bindover law theoretically creates such a harsh punishment that youth will be prevented, or deterred from, engaging in criminal activity. Research suggests, however, that young people may not engage in such a deliberate cost/benefit analysis” due in no small part to the developmental differences between adolescents and adults. *Id.* at 12. *See* Part I.A, *supra*.

Several studies, including one study conducted exclusively in Ohio, have found that overwhelming majorities of youth do not know or believe that they could be transferred to adult court. Miller-Romanoff at 7-8. Interviews with Ohio youth who had been bound over to adult court and sentenced to adult prison showed that youth “had no knowledge of juvenile bindover, no understanding and no certainty of application to their offenses [, making it] impossible for a law to act as a deterrent if the offending population does not

know of the law, understand the law, or perceive that the law can be applied to them.” *Id.* at 21.

3. Mandatory Bindover Erroneously Deprives Youth of their Interest in Remaining in the Juvenile Justice System Without Providing them any Procedural Protections Before Subjecting them to Adult Prosecution.

By denying young people important procedural protections under Ohio law, *see* R.C. 2152.10(A) & R.C. 2152.12(A), the risk of erroneously removing a child to the adult criminal justice system is manifest.

Indeed, “the root requirement” of the Due Process Clause is “that an individual be given an opportunity for a hearing” before he is deprived of a significant liberty or property interest. *Loudermill*, 470 U.S. at 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, quoting *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *see also Board of Regents v. Roth*, 408 U.S. 564, 569-71, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (“When protected interests are implicated, the right to some kind of prior hearing is paramount.”). Pre-deprivation hearings are constitutionally required in numerous contexts where there is no liberty interest at stake at all, such as when “an employee who has a constitutionally protected property interest in his employment” is terminated, *see Loudermill*, 470 U.S. at 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, or when certain governmental benefits may be discontinued, *see Kelly*, 397 U.S. at 263-64, 90 S.Ct. 1011, 25 L.Ed.2d 287.

Ohio’s bindover statute provides no process prior to prosecution in criminal court, affording youth no pre-deprivation due process at all. As such, it is indisputably neither fair nor reliable. An essential procedure required before deprivation of a significant interest is “notice and opportunity for hearing appropriate to the nature of the case.” *Loudermill*, 470

U.S. at 542, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

In its Judicial Impact Statement on changes proposed to the bindover statute in 2000, the Ohio Judicial Conference expressed its concerns about the legislation: “Many judges and prosecuting attorneys have stated that mandatory transfers under * * * [the 1995 changes] result in inappropriate transfer to adult court and the adult penal system.” Ohio Judicial Conference, *Judicial Impact Statement: Senate Bill 179*, 3 (May 15, 2000). In particular, the judges expressed concern that mandatory bindover “could include transfer of a case that is not appropriate for the adult court (based on a review of all of the facts of the case). Worse, it also can include inappropriate placement of a young, unsophisticated person in a penal institution with older, stronger, and more worldly adult inmates.” *Id.* Finally, the judges expressed that “[r]etaining and expanding the current mandatory bindover statute nullifies most benefits of the proposed Serious Youthful Offender law, and therefore diminishes the Ohio court system’s ability to best address the problems presented by juveniles to the court.” *Id.* at 4.

Notably, during consideration of HB 86 in 2012, the Ohio Judicial Conference stated it favors “additional judicial discretion to do what they think is best based on the individual circumstances of each case.” Ohio Judicial Conference, *Judicial Impact Statement: Felony Sentencing and Juvenile Justice Reform – 129th General Assembly* 16 (2011), ohiojudges.org/Document.ashx?DocGuid=d71deb56-9a3e-4ada-94fe-527b9600e340 (accessed Sept. 22, 2021). Ohio judges in county level interviews, conducted in 2012-2013, reiterated this position—several juvenile court judges recommended eliminating mandatory bindover, reasoning that (1) juvenile court judges should be able to engage in

an amenability determination for all youth prior to transfer, (2) juvenile court judges are best equipped and trained to make individualized decisions about youth that accounts for their unique developmental characteristics, and (3) eliminating mandatory bindover would dispense with the reverse waiver process, which, they indicated, adult courts may be neglecting to comply with. Children’s Law Ctr., *Falling Through the Cracks: Update 14* (Dec. 2013), available at njdc.info/wp-content/uploads/2013/12/Falling-Through-the-Cracks-Update-Report-12-12-13.pdf (accessed Sept. 20, 2021).⁹

Notwithstanding the shifts that started in the 1990s, virtually all states have maintained some statutory allegiance to the juvenile court’s rehabilitative mission. But in the absence of clear guidance on the standard of proof, a requirement for the state to bear

⁹ This principle is echoed by the vast majority of Ohioans. Seventy-one percent of individuals surveyed in 2019 supported “eliminating automatic incarceration of youth by requiring sentencing determination to be made by a youth justice agency after a hearing.” GBAO Strategies, *New Poll Results on Youth Justice Reform in Ohio: Polling Memo 2* (2019) backend.nokidsinprison.org/wp-content/uploads/2019/03/Youth-First-Ohio-Poll-Memo-March-2019.pdf (accessed Sept. 22, 2021). Ohio and National organizations likewise have supported eliminating mandatory bindover. Children’s Law Ctr., *Resolution Opposing the Placement of Ohio Youth in Adult Court and Adult Facilities* (2013), bit.ly/3nYy1Dm (accessed Sept. 22, 2021) (including a variety of organizations, including the National Alliance of Mental Illness of Ohio, the Ohio Association of Child Caring Organizations, the Ohio PTA, the Ohio Psychological Association, the League of Women Voters of Ohio, the Ohio Domestic Violence Network, and the Ohio Chapter, American Academy of Pediatrics). See also The American Academy of Adolescent Psychiatry Committee on Juvenile Justice Reform, Eds. Louis J. Kraus, M.D. & William Arroyo, M.D., *Recommendations For Juvenile Justice Reform* Second Edition 15 (Oct. 2005), aacap.org/App_Themes/AACAP/docs/clinical_practice_center/systems_of_care/JJmonograph1005.pdf (accessed Sept. 22, 2021) (finding that “current research indicates that automatic transfer does not achieve the desired goals and may be potentially harmful to the community and the involved youth”); Campaign for Youth Justice, *National Policy Statements & Resolutions*, campaignforyouthjustice.org/national-policy-statements-resolutions (accessed Sept. 22, 2021) (including statements from 31 diverse national and state-based groups, ranging from correctional organizations, policy organizations, faith-based organizations, professional associations, medical and mental health associations, and human rights organizations).

the burden of proof, and explicit enforcement of a presumption for juvenile court retention, we will continue to see far too many Ohio youth improperly sent to adult court. Without a requirement that courts must weigh all defined dispositional options, it will continue to be far too easy for prosecutors to simply request transfer and for the court to grant it. Without these standards, Ohio will continue to fail to accord these children the due process to which they are entitled.

III. Statutory Mechanisms Intended to Reduce Overreliance on Mandatory Bindover Have Not Been Successful.

The hardest thing for me has been watching [my nephew] take blow after blow in his life and still not get any grace or mercy or compassion or empathy from the system. None of what he's been through is even considered. – L.S.

Originally, all bindovers in Ohio were discretionary and based on an individualized assessment of each youth's case, including the youth's personal characteristics and particular circumstances of the offense. Sub. H.B. No. 499, 117th Gen. Assemb. (Ohio 1987); *see also* Legislative Serv. Comm'n, *Final Analysis: Am. Sub. H.B. 1, 121st General Assembly 4* (September 1, 1995). Beginning in the 1980s and continuing through 2000, Ohio's laws changed several times to require an increasing number of youth under the age of 18 to be automatically subject to the adult court's jurisdiction. *Id.*; Legislative Serv. Comm'n, *Members Only: Ohio's Juvenile Bindover Law*, Volume 122, Issue 12 (Nov. 30, 1998).

These changes dramatically affected the use of mandatory bindover. In 1987, a 16 year-old could have only been mandatorily transferred if he was charged with murder *and* had previously been adjudicated delinquent for murder. By 1995, a 16 year-old must be mandatorily transferred on his *first offense* if the court found probable cause that the youth participated in an aggravated robbery with a weapon. *See* R.C. 2152.10(A)(2)(a); R.C.

2152.12(A)(1)(b)(i). Since 1995, Ohio has made two attempts to reduce the use of mandatory bindover by adopting Serious Youthful Offender (“SYO”) and reverse waiver laws. Legislative Serv. Comm’n., *Final Analysis: Am. Sub. S.B. 179 - 123rd General Assembly 3-5* (2000), lsc.state.oh.us/analyses/00-sb179.pdf (accessed Sept. 20, 2021); R.C. 2152.121(B).

A. SYO: A Failed Alternative

In 1999, Ohio’s bindover laws were examined in a report by the Ohio Criminal Sentencing Commission. Commission. *A Plan for Juvenile Sentencing in Ohio: A Report of the Ohio Criminal Sentencing Commission* (Fall 1999), 23-28, supremecourt.ohio.gov/Boards/Sentencing/resources/sentencingRecs/juvenile_sentencing.pdf (accessed Sept. 20, 2021). The report recognized that juvenile crime was decreasing and, as such, recommended that Ohio’s juvenile court should be given more tools to deal with the most serious offenders; not abandoning or giving up on young offenders. *Id.* at 19-20. To achieve this goal, the Commission recommended introducing a narrow, “presumptive” bindover category that would reduce mandatory bindovers. *Id.* at 23, 25. Moreover, the Commission recognized that juvenile courts needed “greater flexibility in dealing with * * * serious juvenile offenders [and that * * * b]indover is not the best option for all serious offenders;” the Commission recommended creating a blended sentencing structure for youth to access treatment in juvenile court and extending the juvenile court’s age of jurisdiction. *Id.* at 28.

In response to the Commission’s report, the Ohio legislature enacted a bill intended to implement many of the Commission’s suggested reforms. LSC S.B. 179 at 3-5. However, against the Commission’s recommendations, the bill did not limit the use of mandatory

bindover. *Id.* at 34-35. Instead, the bill created Ohio’s blended sentencing – or SYO laws – for youth ages 10 and older. *Id.* at 41-47. S.B. 179, thus, actually widened the net of Ohio youth eligible for adult criminal sanctions, creating an entirely new pipeline for children as young as 10 years-old to be exposed to the adult criminal system.

In its Judicial Impact Statement on the 2000 changes, the Ohio Judicial Conference expressed its concerns about the legislation: “Many judges and prosecuting attorneys have stated that mandatory transfers under * * * [the 1995 changes] result in inappropriate transfer to adult court and the adult penal system.” Ohio Judicial Conference, *Judicial Impact Statement: Senate Bill 179*, 3 (May 15, 2000). In particular, the judges expressed concern that mandatory bindover “could include transfer of a case that is not appropriate for the adult court (based on a review of all of the facts of the case). Worse, it also can include inappropriate placement of a young, unsophisticated person in a penal institution with older, stronger, and more worldly adult inmates.” *Id.* Finally, the judges expressed that “[r]etaining and expanding the current mandatory bindover statute nullifies most benefits of the proposed Serious Youthful Offender law, and therefore diminishes the Ohio court system’s ability to best address the problems presented by juveniles to the court.” *Id.* at 4.

The judges’ predictions held true. Data since the enactment of Ohio’s SYO laws clearly shows that SYO is not serving as an alternative to bindover. *Falling Through the Cracks: Update* at 8. Between 2003 and 2012, 316 youth received SYO sentences, and 2,640 youth were transferred to adult court (DYS commitments totaled 7,575 youth, although publicly available data is limited to years 2006-2012). *Id.* Between 2016 and 2020, DHS commitments plummeted to 1,793 youth, and 178 youth received an SYO sentence—yet 1,290 youth were transferred to adult court. Ohio Department of Youth Services, *Profile of*

Youth Transferred to Adult Court, FY2016 – FY2020,

dys.ohio.gov/wps/portal/gov/dys/about-us/communications/reports/statewide-reports-maintained-by-dys (accessed Sept. 20, 2021). As the data indicates, Ohio's SYO laws have had very little impact on the number of youth bound over to adult court.

Interviews with juvenile court stakeholders in key counties throughout the state have shed light on why SYO laws are failing to operate as an alternative to mandatory bindover: the process is technical, confusing, and unfamiliar to juvenile courts; the higher procedural requirements would clog the juvenile court system, and are too onerous considering invocation of the adult sentence is speculative; juries might not convict youth of an SYO offense; and the relatively older age of SYO youth means they would serve less time in the juvenile justice system. *Falling through the Cracks: Update* at 15. Interestingly, these concerns were mirrored in a Sentencing Commission report issued in 2007, which stated that juvenile courts have been deterred "from blended sentences by the adult safeguards and related practicalities (the right to bond, a jury trial, and a speedy trial; a dearth of places to hold hearings; *etc.*). Some prosecutors complain that, after all the work, the judge can still opt for a traditional juvenile disposition rather than a blended sentence." David Diroll, *A Decade of Sentencing Reform: A Sentencing Commission Staff Report Number Seven* 27 (March 2007), supremecourt.ohio.gov/Boards/Sentencing/resources/monitorRpts/sentencingReform.pdf (accessed Sept. 20, 2021).

B. Reverse Waiver: Unintended Consequences

After the enactment of the 2000 changes, Ohio's bindover law remained relatively untouched until 2011, when the Ohio legislature adopted H.B. 86, thereby creating Ohio's reverse waiver provisions and providing a mechanism for certain mandatory bindover youth to have a chance at returning to the juvenile justice system. Legislative Serv. Comm'n, *Final Analysis: Am. Sub. H.B. 86 – 129th General Assembly 15-16* (2011), lsc.state.oh.us/analyses129/11-hb86-129.pdf (accessed Sept. 20, 2021); R.C. 2152.121. Youth transferred to adult court on a mandatory bindover – who are subsequently convicted of, or plead guilty to, an offense that does not qualify for mandatory transfer – return to juvenile court. *Id.*¹⁰

Although it is too early to know the long-term impact of Ohio's reverse waiver provisions, an analysis of data beginning in FY 2012 reveals a disconcerting trend. Since the reverse waiver provisions went into effect, youth charged with mandatory bindover offenses increasingly have been convicted in adult court for mandatory bindover offenses as opposed to lesser included or less serious offenses, meaning fewer youth are being offered plea deals that would make them eligible for reverse waiver. *Falling Through the Cracks: Update* at 6. This trend was corroborated in interviews conducted with Ohio juvenile court stakeholders, some of whom stated that the plea bargaining process was “handcuffed” by reverse waiver. *Id.* at 13. Reverse waiver may be contributing to youth being convicted of higher level offenses in adult court and receiving longer sentences

¹⁰ If the youth is convicted of an offense that qualifies for discretionary transfer, they return to juvenile court for an amenability determination. If the youth is convicted of an offense that is not eligible for discretionary transfer, they return to juvenile court for a traditional juvenile disposition. R.C. 2152.121.

because they are not receiving plea deals previously offered—certainly this cannot be what the legislature intended in expanding the category of youth eligible to return to the juvenile justice system.

Despite the legislature’s attempt to shift discretion in bindover cases back to juvenile court judges through reverse waiver – prosecutors still retain control and discretion over the plea bargaining process. This shift of discretion from judge to prosecutor was highlighted by the Ohio Judicial Conference in 2000, which noted that mandatory bindover allows the prosecutor

to wield full discretion in seeking or not seeking charges with or without the mandatory transfer... requirements. The prosecutor continues to have plea negotiating authority, which may or may not result in the reduction of charges or the deletion of enhancement language from the complaint. While the prosecuting authority has a legitimate role in attempting to seek an appropriate disposition/sentence, this role is properly and primarily the responsibility of the judge.

Ohio Judicial Conference, *Judicial Impact Statement: Senate Bill 179* (May 15, 2000).

Similar to SYO, reverse waiver has failed to achieve its intended impact of reducing the number of youth in the adult criminal system as a result of mandatory transfer. In FY 2020, 192 youth were transferred to adult court (42.3 percent mandatory; 41.7 percent discretionary; 15.2 percent type unknown), yet only *four* youth returned to juvenile court by reverse waiver—three out of these four youth received a juvenile disposition. Ohio Department of Youth Services public records request FY2020 (June 25, 2021). If juvenile court judges find the vast majority of youth returned to juvenile court on reverse waiver are appropriate to remain in juvenile court, they should be permitted to make that individualized determination *prior* to transfer. Requiring an amenability determination

prior to transfer would reduce the number of youth unnecessarily exposed to the harms of adult court, drastically reduce case processing times, length of stays in detention pending trial, and increase judicial efficiency by reducing the number of cases on adult court dockets.

C. National Trends Abandon Adultification of Youth

I strongly feel that they took my childhood away from me. Don't get me wrong I did what I did and I understand that I got to pay, but to punish me like this is inhumane. – A.R.

As I look at these young men—they are children, and as dysfunctional as they may be, they are still children. Yes, there must be penalties and perhaps punishment for crimes. But I think we focus too much [on] what happened, and apply so little interest toward why it happened. Spending every awakened hour looking over your shoulder; looking through a window which offers limited scenery; and then being forced to sit in a cell, 6-feet by 9-feet for 20-23 hours a day, seven days a week. This is not corrections, this is corrosion. So ask yourself, is this the best lawmakers and judicial representatives can come up with? – J.A.

Over the past fifteen years, four major legislative trends have emerged: 1) removing youth from adult facilities, 2) raising the age of juvenile court jurisdiction, 3) returning discretion to juvenile judges, and 4) eliminating automatic transfer to adult court. Brian Evans, Campaign for Youth Justice, *Winning the Campaign: State Trends in Fighting the Treatment of Children As Adults in the Criminal Justice System 2005-2020* 9 (2020), campaignforyouthjustice.org/cfyj-reports/item/winning-the-campaign-state-trends-in-fighting-the-treatment-of-children-as-adults-in-the-criminal (accessed Sept. 22, 2021).

By 2020, 80 percent of states changed their laws to make treating children as adults more difficult. *Id.* at 6. Many states have changed their mandatory or automatic transfer provisions – raising the requisite age, eliminating their “once an adult, always an adult” provision, or narrowing the offenses eligible for mandatory transfer – and in some cases

repealing automatic transfer provisions, despite the fact that these provisions generally involve the most serious offenses. *Id.* at 25-30. Nearly half the states (24) have passed reforms to reduce or eliminate automatic transfer to adult court, increasing judicial discretion and review in the transfer process, and 29 states, including Ohio have passed or expanded reverse waiver provisions. *Id.* at 8.¹¹

Two federal laws – the Juvenile Justice and Delinquency Prevention Act (JJDP A) and Prison Rape Elimination Act – expanded protections for youth by offering financial incentives to states that limit or remove youth from adult facilities. *Winning the Campaign* at 31. In fact, the 2018 reauthorization of JJDP A, which passed with overwhelming bipartisan support, expanded critical protections to youth transferred to adult court. Campaign of the National Juvenile Justice & Delinquency Prevention Coalition, *JJDP A Fact Sheet Series, Core Protections: Jail Removal/Sight and Sound Separation* (Feb. 2019), bit.ly/3i5enlz (accessed Sept. 22, 2021). Since 2009, 24 states have passed reforms to reduce or ban placing youth in adult jails or prisons. *Winning the Campaign* at 16.

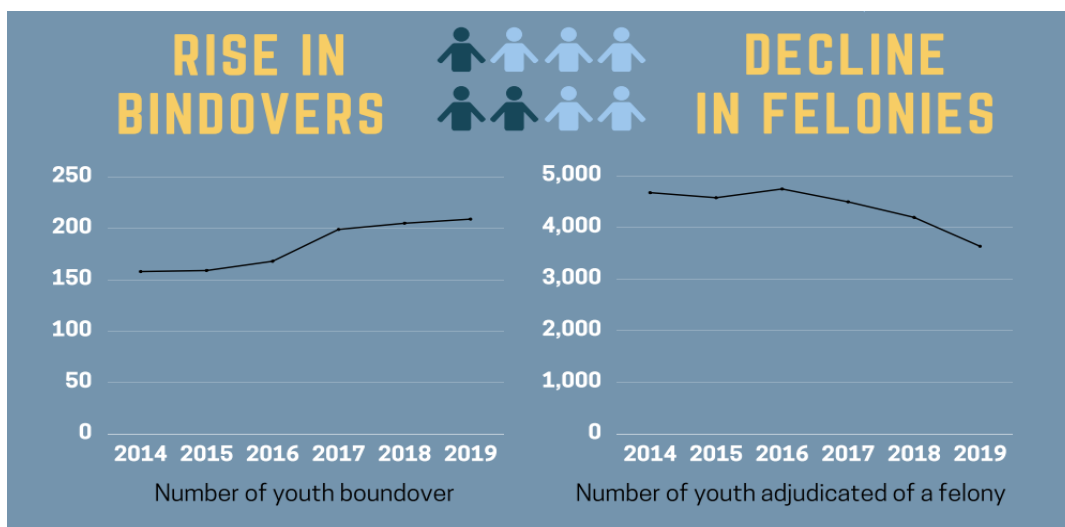
On the heels of these sweeping reforms, the U.S. reached its lowest number of juvenile arrests in 40 years. Office of Juvenile Justice and Delinquency Prevention, *The Decline in Arrests of Juveniles Continued Through 2019* (Nov. 2020),

¹¹ Additionally, since 2007, the vast majority of states that previously excluded 16- and 17-year-olds from juvenile court based solely on age have passed legislation that raises the minimum age of adult criminal responsibility to 18. *Winning the Campaign* at 14 (only three states still allow all 17-year-olds to be charged automatically in adult court, regardless of offense). States are also banning juvenile life without parole sentences, cutting down on mandatory sentencing for children tried as adults, and creating mechanisms to review youths' sentences once they reach a certain age or after serving a specified number of years on their sentence. *Id.* at 31. To date, 25 states, including Ohio and D.C., have banned juvenile life without parole. Campaign for the Fair Sentencing of Youth, thecfsy.org/ (accessed Sept. 15, 2021).

ojjdp.gov/ojstatbb/snapshots/DataSnapshot_UCR2019.pdf (accessed Sept. 22, 2021). Since the peak in the mid-1990s, juvenile violent crime has been on a general decline, and juvenile arrests for violent offenses were cut in half between 2006 and 2019. *Id.* The reforms achieved nationally demonstrate that youth can be maintained in the juvenile system without sacrificing public safety.

D. Despite Legislative Alternatives and Decreasing Youth Crime Rates, Mandatory Bindover Continues to Increase in Ohio.

While Ohio saw a 47 percent decline in the use of bindovers between 2010 and 2015 (from 235 to 124 youths transferred), the number of youth bound over to adult court in Ohio has increased steadily since 2016, and is no longer the rarity it once was. *Profile of Youth Transferred to Adult Court FY2016 – FY2020.* Despite the continuing decline in juvenile crime and juvenile commitments to ODYS, reliance on bindover persists. As demonstrated by the graph below, the rise in Ohio bindovers contrasts with the consistent decline in juvenile felony adjudications.



Children’s Law Ctr., *Ohio Bindovers FY19*, 1 (2019),

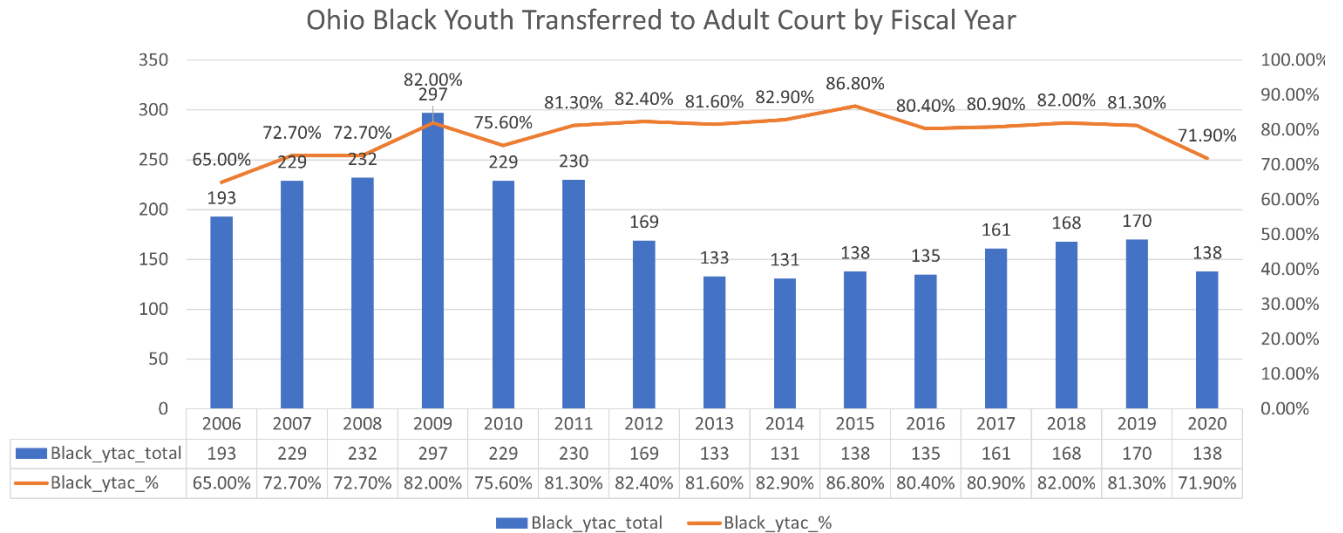
static1.squarespace.com/static/571f750f4c2f858e510aa661/t/608c00ea2e6b175146653962/1619788010788/Bindover+Fact+Sheet+FY19.pdf (accessed September 20, 2021).

Despite efforts to curb the use of mandatory bindover, juvenile court judges' hands remain tied when it comes to making individualized determinations about whether youth should proceed in juvenile or adult court.

IV. Black Youth are Disproportionately Bound Over, Which Exacerbates Racial Disparities Within the Justice System.

Ohio, like the rest of the country, fell prey to the “superpredator” myth of the 1990s. Rooted in racial stereotypes and based on sensationalized news stories of aggressive youth with wanton disregard for life and little to no prospects of rehabilitation, states began to expand the mechanisms by which youth could be tried as adults. In Ohio this led to legislation that increased the pool of children subject to adult prosecution. Children’s Law Ctr., *Falling Through the Cracks: A New Look at Ohio Youth in the Adult Criminal Justice System*, 2-3 (2012), available at www.prisonpolicy.org/scans/FallingThroughTheCracks.pdf (accessed September 20, 2021). Despite reforms in 2011, Ohio continues to deprive its Black youth of a fair juvenile justice system.

As the following chart shows, while there was a general downward trend in the total number of Black youth being transferred between 2009 and 2016, the overrepresentation of Black youth versus total youth transferred has trended upwards. Notably, most of this dataset’s highest yearly percentages of Black youth transferred to adult court occurred after 2011 legislative reforms:



See Ohio Department of Youth Services, *Statewide Reports Maintained by DYS* (May 18, 2020), dys.ohio.gov/wps/portal/gov/dys/about-us/communications/reports/statewide-reports-maintained-by-dys (accessed Sept. 22, 2021).

Black youth comprise the overwhelming majority of mandatory bindovers each year, even though white youth vastly outnumber Black youth in the general population.

*Id.*¹² United States Census Bureau, *QuickFacts, Ohio*,

[census.gov/quickfacts/geo/chart/OH/RHI225219](https://www.census.gov/quickfacts/geo/chart/OH/RHI225219) (accessed Sept. 22, 2021). For example, in Cuyahoga County, Black youth accounted for only 30.5 percent of the youth population yet comprised over 90 percent of the youth bound over in FY19. United States Census

Bureau, *QuickFacts, Cuyahoga County*,

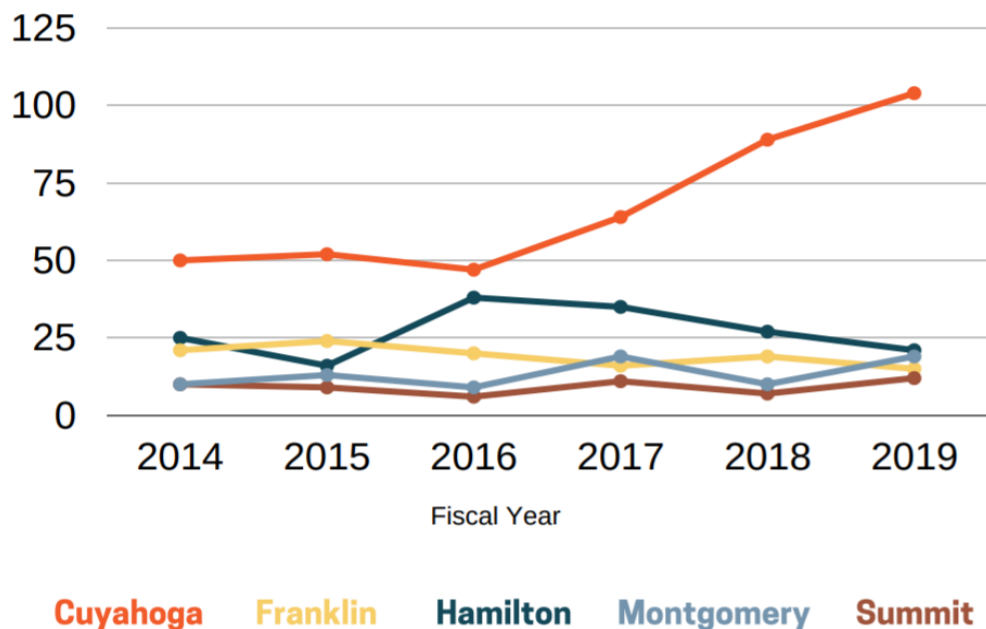
[census.gov/quickfacts/fact/table/cuyahogacountyohio,US/PST045219](https://www.census.gov/quickfacts/fact/table/cuyahogacountyohio,US/PST045219); Ohio Department of Youth Services, *Profile of Youth Transferred to Adult Court FY2020*.

¹² Black people comprise less than 15 percent of Ohio’s population. United States Census Bureau, *QuickFacts Ohio*, [census.gov/quickfacts/geo/chart/OH/RHI225219](https://www.census.gov/quickfacts/geo/chart/OH/RHI225219) (accessed September 20, 2021).

An analysis of bindover trends by county in Ohio over the past ten years shows that counties have very different ways of charging youth who commit the same offense—meaning some youth may be *charged* differently and therefore be more likely to be bound over in certain counties. *Falling Through the Cracks: Update* at 8.

For example, the likelihood that a youth will be bound over for a felony offense ranges from zero percent in certain counties to over 60 percent in others. *Id.* County prosecutors confirmed that prosecutors’ offices took varied approaches to binding youth over. *Id.* at 12-13.

Nowhere is this felt more acutely than in Cuyahoga County, which leads the state in bindover requests. And it is not because of the size of its population: compared to Hamilton and Franklin counties, which are of roughly similar size and demographics,¹³ Cuyahoga’s bindover rate is dramatically higher:



¹³ See Ohio Demographics by Cubit, *Ohio Counties by Population*, ohio-demographics.com/counties_by_population (accessed September 20, 2021).

Children's Law Ctr., *Ohio Bindovers FY19*, at 1.

The discretion in mandatory bindover proceedings rests with the unfettered discretion of the county prosecutor, free of decisional factors to consider and appellate review. The data highlights how prosecutor discretion in bindover decisions can increase the risk of adult-system involvement for Black youth and emphasizes the need for an individualized determination regarding the potential for racial bias in each Black child's case.

A. Changes in the 1990s to States' Transfer Laws, Including Ohio's Mandatory Bindover Provisions, were Driven by Racist, Discredited Academic Theories, and Media Frenzy.

In 1995, Professor John DiIulio, Jr. coined the term "Super-Predator." *See* John DiIulio, *The Coming of the Super-Predators*, *Wkly. Standard* (Nov. 27, 1995), washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators (accessed Sept. 20, 2021). DiIulio predicted an impending rash of youth crime and violence, reporting there would be a surge of violent crime among Black inner-city males. *Id.* A wave of "morally impoverished juvenile super-predators" was coming to commit "the most heinous acts of physical violence for the most trivial reasons." *Id.* To address this impending wave of crime, DiIulio called for the pursuit of "genuine get-tough law-enforcement strategies against the super-predators." *Id.*

Media headlines emerged depicting inner-city youth as "hedonistic . . . youngsters from badland neighborhoods who murder, assault, rape, rob, burglarize, deal [. . .] drugs, join [. . .] gangs and create [. . .] disorder." Elizabeth R. Jackson- Cruz, *Social Constructionism and Cultivation Theory in Development of the Juvenile "Super-Predator,"* 6 (2019) digitalcommons.usf.edu/etd/7814 (accessed September 20, 2021). (internal quotations

omitted) (second, third, and fourth alterations in original) (quoting William J. Bennett, John J. DiIulio, Jr., & John P. Walters, *Body Count: Moral Poverty—And How to Win America’s War Against Crime and Drugs* 27 (1996). Violent crime dominated the media’s coverage of youth. Lori Dorfman, Vincent Schiraldi, Berkeley Media Stud. Grp, *Off Balance: Youth Race & Crime In The News*, 17-24 (2001), bmsg.org/sites/default/files/bmsg_other_publication_off_balance.pdf (accessed Sept. 20, 2021).

The hype gave the impression that the world was more dangerous than it actually was: “[W]hen youth crime receives a far larger share of all crime coverage than youths actually commit, and when youth crime coverage dramatically increases while actual youth crime is decreasing, the public that relies on media coverage as its primary source of information about youth crime is misinformed.” *Id.* at 7. These stories created a “moral panic”¹⁴ of a looming threat. It has been shown that “moral panic” has lingering effects that “reinforce[] racial biases prevalent in criminal stereotypes, particularly the popular perception that young Black (and Latino) males constitute a dangerous class.” *Id.* This tainted picture contributed to regressive changes in the law. *See* Jackson- Cruz at 12-13, 25-27.

Meanwhile, the media’s characterization of violent young criminals was also replete with racist undertones. Southerland, *Youth Matters*, 27 J. Civ. Rts. & Econ. Dev. at 771. Youth who engaged in criminal conduct were cast as “violent, morally deficient, and of color.” *Id.*

¹⁴ The definition of “moral panic” was developed by Stanley Cohen in his first publication of “Folk Devils and Moral Panics: The Creation of the Mods and Rockers” in 1972. Michael Welch, Eric A. Price & Nana Yankey, *Moral Panic Over Youth Violence: Wilding and the Manufacture of Menace in the Media*, 34 *Youth and Soc’y* 3, 3-4 (2002).

at 770-71. This resulted in an overrepresentation and miscasting of Black and Brown youth as perpetrators of violent crimes.

A 2001 survey revealed that in the preceding decade, the media “misrepresent[ed] crime, who suffer[ed] from crime, and the real level of involvement of young people in crime,” such that white people were underrepresented and Black and Brown people were overrepresented in depictions of perpetrators of violent crime. *Id.* at 771-772. These faulty portrayals “reinforce[d] the erroneous notion that crime is rising, that it is primarily violent, that most criminals are nonwhite, and that most victims are [w]hite.” *Id.*, quoting Dorfman, *Off Balance: Youth Race & Crime In The News* at 26.

Juvenile violent crime and homicide rates rose sharply between 1986 and 1994. Southerland at 769 n.27, citing Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. Fam. Stud. 11, 29 (2007). In response, state legislatures shifted away from rehabilitative norms toward punishment, requiring juvenile accountability, reducing juvenile court protections, and increasing punitive attitudes. Jackson-Cruz at 12-13.

In nearly one-third of states, laws were enacted “to redefine the purpose of [the] juvenile courts to ‘emphasize public safety, certain sanctions, and/or the accountability of offenders.’” Southerland, 27 J. Civ. Rts. & Econ. Dev. at 780, quoting Sara Sun Beale, *You’ve Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 Harv. C.R.-C.L. L. Rev. 511, 521 (2009). Between 1992 and 1997, almost all states broadened juvenile jurisdiction, increased sentences, and made it easier to transfer youth to adult court, subjecting them to harsher penalties, including life without parole sentences. Southerland, 27 J. Civ. Rts. & Econ. Dev. at 780. Ohio was no different, introducing and then

expanding the pool of children subject to adult prosecution by the use of mandatory bindovers between 1987 and 2000. *Falling Through the Cracks: A New Look at 2-3*.

The aftermath of this punitive shift was extremely detrimental for youth ensnared in these legislative “reforms.” Youth subject to automatic transfer were deprived of juvenile court hearings to consider factors such as family history, trauma, mental illness, and other mitigating circumstances. Eli Hager, *The Willie Bosket Case: How Children Became Adults in the Eyes of the Law*, The Marshall Project (Dec. 29, 2014), themarshallproject.org/2014/12/29/the-willie-bosket-case (accessed Sept. 20, 2021). Youth were deprived of funding for education and rehabilitative services while incarcerated and were subjected to the possibility of life in prison. *Id.* As Ohio shifted towards mandatory prosecution of certain youth in adult court, Ohio’s Black youth suffered disproportionately.

DiIulio’s super-predator theory was wholly discredited – instead of rising, the rate of youth crime dropped by more than half – and just five years after fueling a media frenzy, he distanced himself from his tough-on-crime recommendations: “If I knew then what I know now, I would have shouted for prevention of crimes.” Elizabeth Becker, *As Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets*, New York Times (Feb. 9, 2001), nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html (accessed Sept. 22, 2021).

But it was far too little and far too late for the children of this country, particularly Black and Brown children who were subject to racist media portrayals and the accompanying harsh penalties created by state legislatures who had already heeded DiIulio’s warning and made good on his “get-tough” suggestions.

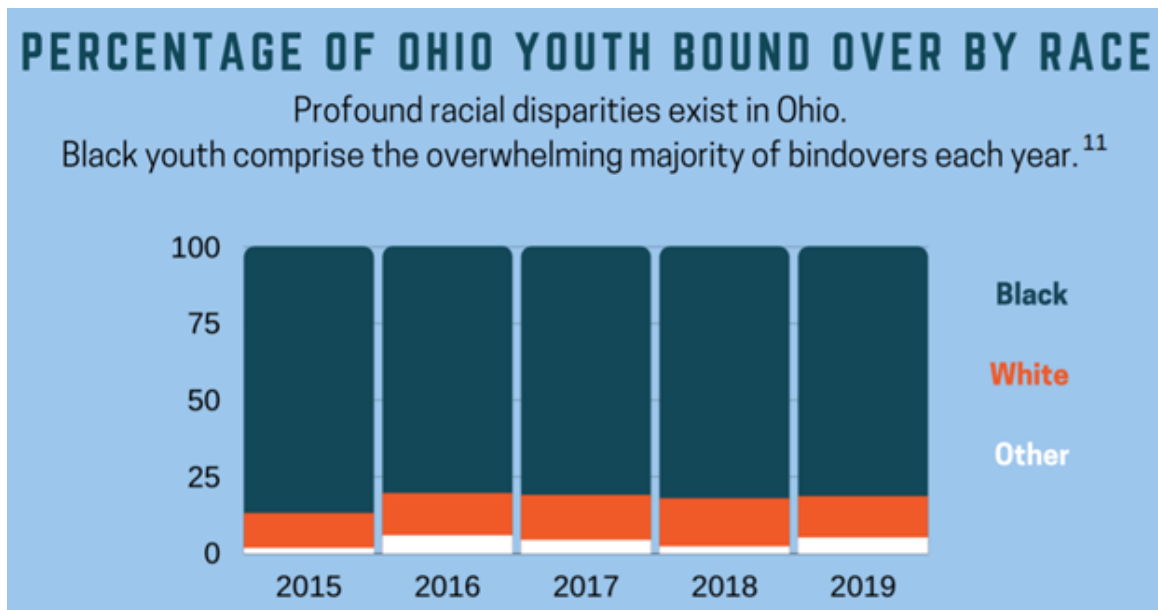
B. The United States and Ohio Supreme Courts have Committed to Recognizing the Unique Aspects of Youth and Eliminating Racial Discrimination in the Court System.

Miller and *Montgomery* made clear that the harshest punishments for youth should be reserved for the “rare,” “uncommon” and irreparably corrupt child. Instead, the harshest punishments – those mandatorily applied in the adult criminal justice system – are levied disproportionately against youth of color. Nationally, 47.3 percent of youth who are transferred to adult court are Black, despite Black youth making up only 14 percent of the total youth population. See Nat’l Ass’n Of Social Workers, *The Color Of Youth Transferred To The Adult Criminal Justice System: Policy & Practice Recommendations*, 1 (2017), http://www.campaignforyouthjustice.org/images/pdf/Social_Justice_Brief_Youth_Transfers.Revised_copy_09-18-2018.pdf (accessed Sept. 20, 2021).

This disproportionate targeting is the entry point for individuals from communities that have been historically and continuously marginalized. Over-policing of Black and Brown communities and racially motivated targeting is one of the greatest drivers of the racial disparity in this nation’s mass incarceration system. These increased interactions with police result in those same community members being subject to harsh punishments without evaluating the impacts of racial profiling. While mandatory sentencing and transfer schemes seemingly eliminate the possibility of individual bias creeping into decision-making by removing discretion and individualized decision making, racial disparities still persist.

The vast majority of youth bound over in Ohio are Black, comprising around 80 percent of youth bound over from 2015-2019. Children’s Law Ctr., *Ohio Bindovers FY19* at

3, although Black people comprise less than 15 percent of Ohio’s population. United States Census Bureau, *QuickFacts Ohio*.



Children’s Law Ctr., *Ohio Bindovers FY19* at 3, citing *Profile of Youth Transferred to Adult Court, Fiscal Year 2019*.

These persistent disparities create constitutional infirmities. As set forth above, Ohio’s mandatory bindover provisions violate Due Process because youth are denied individualized determinations. *Supra* Part II. But the extensive overinclusion of Ohio’s Black youth in bindover proceedings without individualized consideration – not only about their youthfulness but also about the role racial bias may have played in a Black youth’s case – also violates Due Process. Because Black youth are at increased risk of erroneous deprivation of liberty based on their race, the Supreme Court’s Due Process analysis under *Mathews* suggests more process is required specifically for Black youth. *See Mathews v. Eldridge*, 424 U.S. at 335, 6 S.Ct. 893, 47 L.Ed.2d 18.

In addition, although race-neutral on its face, the application of R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) also violates children's right to equal protection under the law because its application discriminates against Black children. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

Racial disparity casts a long shadow over this nation's commitment to equal justice. The United States Supreme Court has expressed concern about the role of race in our criminal justice system, noting the "imperative to purge racial prejudice from the administration of justice." *See, e.g., Pena-Rodriguez v. Colorado*, __ U.S. __, 137 S. Ct. 855, 867, 197 L.Ed.2d 107 (2017) ("It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons."); *Buck v. Davis*, __ U.S. __, 137 S. Ct. 759, 778, 197 L.Ed.2d 1 (2017), quoting *Rose v. Mitchell*, 443 U.S. 545, 555, 9 S.Ct. 2993, 61 L.Ed.2d 739 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.").

On Independence Day 2020, this Court acknowledged the role it must play in combating racial injustice:

We can recognize the inequalities and we can eliminate them when we come together to do the right thing. This is especially true with the justice system. The same courts that upheld discriminatory laws and policies have, on many occasions, also declared discriminatory practices by all branches of government to be contrary to law and unconstitutional.

Chief Justice Maureen O'Connor, *Independence Day Statement on Criminal Justice Reform* (July 4, 2020), supremecourt.ohio.gov/PIO/Speeches/2020/CJReform.asp (accessed Sept. 20, 2021).

Today, this Court must take action as Chief Justice O'Connor's Statement on Criminal Justice Reform promises. Data collection and analysis was touted as "the path forward." *Id.* Ohio's data, collected by its own Department of Youth Services, evidences a path of racial disparity paved over the rights of young Black Ohioans. The time to dismantle the racist machine of Ohio mandatory bindover is now.

CONCLUSION

For the foregoing reasons *Amici* respectfully request that this Court find Ohio's mandatory bindover statutes unconstitutional for depriving youth of their due process rights to an amenability hearing before the juvenile court.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September 2021, the foregoing Brief of *Amici Curiae* Juvenile Law Center, National Juvenile Defender Center, and Children’s Law Center, Inc., et al., in Support of Appellant Chaz Bunch was served by email to Stephen P. Hardwick and Charlyn Bohland, Counsel for Appellant Chaz Bunch; Ralph Rivera, Counsel for Appellee; and all other listed *Amici* in this matter.

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