Cause of ACTION:

FULFILLING THE PROMISES OF *GAULT*

THE GAULT CENTER

Defenders of Youth Rights

Executive SUMMARY

The constitutional promises of freedom, liberty, and justice are intricately tied to the protections of due process of law.[1] At the heart of due process is the right to counsel,[2] which unlocks the protections guaranteed by the United States Constitution for a fair and just trial. However, children across the country face repeated and systemic deprivations of their right to counsel and thus, their right to due process and equal protection are compromised. This practice has persisted despite the U.S. Supreme Court's ruling in *In re Gault*, which mandated states guarantee that all children facing juvenile court proceedings receive meaningful representation.[3]

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Fifty-five years after *Gault*, the need to eliminate widespread violations of children's constitutional rights is long overdue.

In 1994, Congress authorized the U.S. Department of Justice (DOJ) under 34 U.S.C § 12601 (formerly 42 U.S.C. § 14141) to fight these systemic abuses by giving the Attorney General the power to initiate civil lawsuits against governmental authorities responsible for the administration of juvenile legal systems.[4] Specifically, the DOJ has the power to investigate governmental agencies responsible for administering the juvenile legal system if they are engaging in a "pattern or practice of conduct" that violates children's constitutional rights.[5] Upon reasonable cause, the DOJ may then initiate a civil

1 *In re* Gault, 387 U.S. 1, 20 (1967) ("Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.").
2 *See id; see also* Gideon v. Wainwright, 372 U.S. 335 (1963).
3 *Gault*, 387 U.S. 1.
4 Barbara Schwabauer, *The Attorney General's Pattern-or-Practice Authority: A Critical Tool for Civil Rights Enforcement*, 70 Dep't of Just. J. Fed. L. & Prac. 5, 14-15 (2022).
5 34 U.S.C. § 12601(a).

About the language we use in this publication to discuss race and ethnicity

Throughout this publication, we use the terms Black, Latine, and Native/Indigenous to describe the largest racial and ethnic groups of youth who are disproportionately funneled into and harmed by the juvenile legal system. Youth of other racial and ethnic groups are also disparately impacted and harmed by the legal system, and our language is not meant to exclude them.

Language evolves, and the Gault Center is committed to using language that names and honors the youth and communities most harmed by the juvenile legal system. We welcome input, especially from members of impacted communities about how they self-identify.

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action against "any governmental authority" engaging in such conduct and may seek equitable and declaratory relief.[6]

States must closely examine their delivery of youth defense to ensure that it fully complies with the demands of the U.S. Constitution pursuant to § 12601.

The DOJ's pattern-or-practice authority under § 12601 not only provides a framework for evaluating whether a jurisdiction's delivery of youth defense is compliant with the demands of the U.S. Constitution, but also holds states and localities liable for engaging in a systemic practice of denying children's constitutional rights.

The cause of action under § 12601 can be broken down into three main elements:

1. Rights protected by the U.S. Constitution;
2. Pattern or practice of conduct by any governmental agency that is responsible for the administration of a juvenile legal system; and
3. The liability of any governmental authority.

Each element must be construed within the stated intent of § 12601: "to eliminate the pattern or practice" that deprives children of their rights protected by the U.S. Constitution.[7]

RIGHTS: Children have an indisputable right to effective representation by an attorney who will engage in a meaningful and adversarial fight against the state on behalf of the child.[8] At the same time, children have a fundamental right to be treated fairly and equally in the enforcement and application of laws, regardless of race.[9]

PATTERN OR PRACTICE OF CONDUCT: Inseparable from the right to counsel is the need for states to develop autonomous and specialized youth defense systems to guarantee that youth in all jurisdictions not only have counsel, but also receive consistent, competent, and zealous representation. However, many states have abdicated this duty, leaving counties to deliver youth defense how they see fit, with little to no meaningful state oversight.[10] This fragmented state of youth defense has routinely and systemically left children without meaningful representation—they have no guarantee to an attorney, they do not receive an attorney until it is too late, they are required to pay for their constitutional right to counsel, they frequently waive counsel without

6 34 U.S.C. § 12601(b).
7 *Id.*
8 *See generally Gault*, 387 U.S. 1; Gideon v. Wainwright, 372 U.S. 335 (1963); Strickland v. Washington, 466 U.S. 668 (1984); U.S. v. Cronic, 466 U.S. 648 (1984).
9 U.S. Const. amend. XIV § 1.
10 *See* Nat'l Juv. Def. Ctr., Broken Contracts: Reimagining High-Quality Representation of Youth in Contract and Appointed Counsel Systems 7 (2019).

adequate safeguards, and their access to counsel ends too early.[11] These practices contribute to the worsening of racial disparities in the juvenile legal system, harming Black, Latine, and Native/Indigenous children[12] at disproportionate rates.[13]

ANY GOVERNMENTAL AUTHORITY: Every branch of government is responsible for a portion of the administration of the juvenile legal system in each state, and thus, each branch must be held accountable to achieve the overarching purpose of § 12601 to eliminate widespread practices of constitutional violations in the system. Each governing authority within the executive, judicial, and legislative branches bears responsibility for creating and perpetuating a system that violates children's rights, subjecting them to the harms of juvenile court and disproportionately and adversely impacting Black, Latine, and Native/Indigenous children.

Protecting the fundamental right to counsel is a critical matter of civil rights. The United States is facing a crisis—children are deprived of their right to meaningful counsel every day—and these children will continue to suffer until this pattern and practice is eliminated.

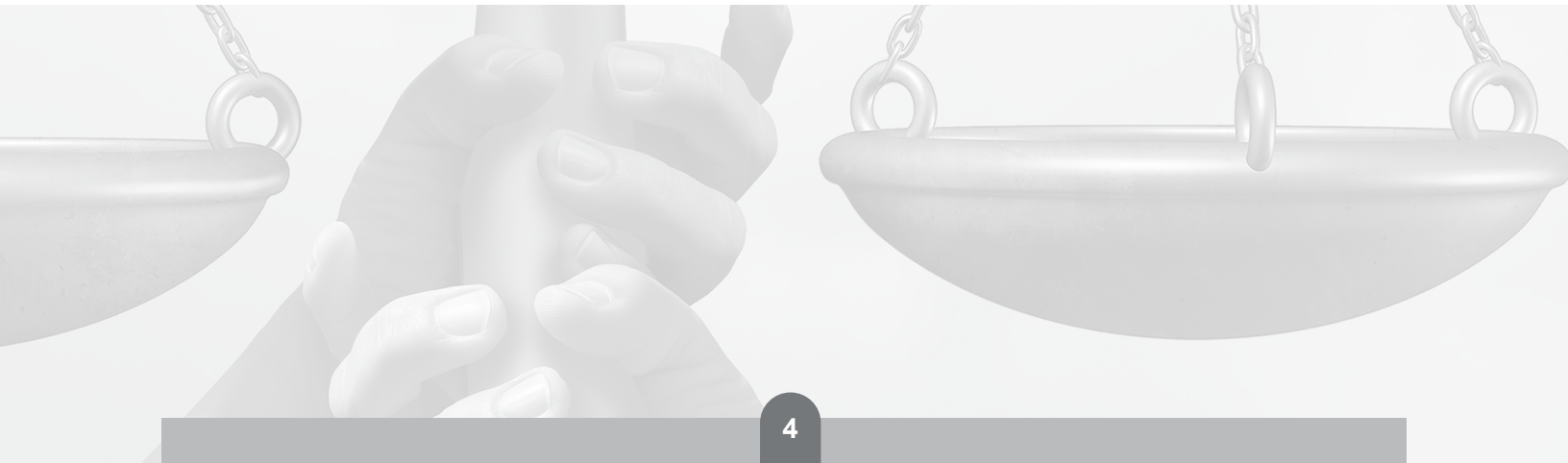
States must immediately resolve to fulfill *Gault's* promise by reforming, developing, and implementing strong youth defense systems to uniformly safeguard this essential right to effective and meaningful representation for all children.

"Protecting the fundamental right to counsel is a critical matter of civil rights."

11 Nat'l Juv. Def. Ctr., Access Denied: A National Snapshot of States' Failure to Protect Children's Right to Counsel 7 (2017).

12 Studies have demonstrated that specifically Black, Latine, and Native/Indigenous youth, as well as youth from other ethnic groups are disproportionately represented in the juvenile legal system. *See* Off. of Juv. Just. & Delinq. Prevention, U.S. Dep't of Just., Literature Review: Disproportionate Minority Contact (DMC) (2014). Accordingly, throughout this report, we will highlight Black, Latine, and Native/Indigenous youth to reflect the primary communities that are disproportionately affected by the harms of the juvenile legal system; this is not meant to exclude other racial and ethnic groups that are also uniquely disadvantaged by the juvenile legal system.

13 *Id.* at 6.



The *True* History of Juvenile Courts

Understanding the true history of juvenile courts is a critical component of evaluating the current state of the juvenile legal system. Only with full appreciation of the history of the juvenile legal system will it be possible to remedy the system's persistent failures to adequately protect children's due process rights and dismantle the racialized use of the system.

Prior to the early 19th century, children were not recognized as a distinct group that necessitated their own rights.[14] They were commonly perceived by society as the property of their parents and were often expected to contribute to the workforce just like adults.[15] By the 1830s, with the rise of industrialization, urbanization, and middle-class wealth, the notions of childhood began to change.[16] Increasingly, the perspective that childhood should be reserved for development and education took hold and laid the foundation for the concept of adolescence.[17] But importantly, while white children began to benefit from this framework of adolescence through protective child labor laws and increased access to education, Black children remained enslaved.[18]

From its beginning, the concept of adolescence was a social construct, created by white middle-class parents and designed to idealize white children.[19] With adolescence came the privilege of continued learning, opportunity for self-discovery, and freedom to engage in play.[20] It was never designed to protect or prosper Black children.

It was in this context that the groundwork for the juvenile legal system was created. Responding to public concerns of poverty and perceptions of increased crime among young people, cities began to create "houses of refuge," designed to divert children away from the adult prison system into a structured, family-style environment to offer guidance, training, and discipline.[21] This early social program targeted mostly poor, white immigrant children who were deemed worthy of rehabilitation and explicitly excluded children of enslaved people and other non-white children.[22] As a result, Black children continued to be processed through the criminal legal system as adults and were jailed at disproportionate rates.[23]

14 *See* Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System* 51 DePaul L. Rev. 679, 679 (2002).
15 *Id.*; *see also* Kristin Henning, The Rage of Innocence: How America Criminalizes Black Youth 9 (2021).
16 *See* Nunn, *supra* note 14, at 680; *see also* Henning, *supra* note 15, at 9.
17 *See* Nunn, *supra* note 14, at 680.
18 *Id.*
19 *See* Henning, *supra* note 15, at 9-10.
20 *See id.*
21 Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. Rev. 379, 396-97 (2017).
22 *See id.* at 398.
23 *Id.*

In 1899, the first juvenile court was established in Chicago, Illinois, in formal recognition that children must be treated differently than adults because they are less culpable and more responsive to rehabilitation.[24] However, even in this "benevolent" system, Black children did not receive the benefits of childhood and were more often viewed as serious offenders and sent to locked state facilities, while white children frequently benefited from the court's leniency and were sent to child-friendly welfare institutions.[25] This was not new; it was merely a continuation of the legacies of slavery that dehumanized Black children in society, facets of which persist today.[26]

The juvenile court system was soon replicated in states across the country, with its stated aims of rehabilitation, individualization, and restoration perceived to outweigh the need for procedural safeguards.[27] Yet, racial disparities persisted. In the 1940s, a national study of 53 juvenile courts revealed that, compared to white children, Black children entered the juvenile court system at a younger age, were less likely to have their cases dismissed, and were more likely to be committed to an institution.[28] Effectively, the juvenile legal system operated two tracks: one for white youth that focused on rehabilitation and one for Black children that centered around punishment and control.

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In the 1950s, following World War II, public perceptions of increasing crime rates among young people garnered national attention and fixation on juvenile courts.[29] The narrative of young people threatening "domestic tranquility" following the war, further sensationalized by the media, led to public outcry that demanded a national response to reform the juvenile legal system in a manner that deprived youth of due process rights.[30] Consistent with the functioning of the juvenile system up until the point, Black, non-white, and poor children received the harshest treatment.

By the 1960s, there was growing concern about juvenile courts' systemic failure to deliver on their promise to effectively rehabilitate young people.[31] This eventually led to the U.S. Supreme Court decision, *In re Gault*, regarding a white 15-year-old boy who was adjudicated for making an

24 *See* Robin Walker Sterling, *"Children are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 Loy. L.A. L. Rev. 1019, 1023-24 (2013).
25 Birckhead, *supra* note 21, at 400.
26 *See* Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psych. 526, 527 (2014).
27 *See* Quinn Myers, *How Chicago Women Created the World's First Juvenile Justice System*, NPR (May 13, 2019), https://www.npr.org/local/309/2019/05/13/722351881/how-chicago-women-created-the-world-sfirst-juvenile-justice-system.
28 *See* Birckhead, *supra* note 21, at 401.
29 *See* Patrick N. McMillin, Comment, *From Pioneer to Punisher: America's Quest to Find its Juvenile Justice Identity,* 51 Houst. L. Rev. 1485, 1494-95 (2014).
30 *See id*. at 1494 n.77.
31 *See* Birckhead, *supra* note 21, at 404.

obscene phone call and committed to a state facility until the age of 21.[32] The child in this case did not have an attorney, was not provided with notice, was not permitted to confront his witnesses, and was denied the privilege against self-incrimination.[33]

In laying the foundation to extend constitutional due process rights to all children, the *Gault* Court cited *Haley v. Ohio*, where the U.S. Supreme Court reversed the murder conviction of a 15-year-old Black child tried in adult court, finding that his coerced confession violated due process.[34] Citing *Haley*, the *Gault* Court stated, "Age 15 is a tender and difficult age for a boy of any race."[35] The rationale being: if a Black child is entitled to the protections of due process, such a right must extend to white children in juvenile court as well.[36] Accordingly, the U.S. Supreme Court secured, for

32 *In re* Gault, 387 U.S. 1 (1967).
33 *Id.*
34 *Id.* at 12-13, 45-46.
35 *Id.* at 45 (citing Haley v. Ohio, 332 U.S. 596, 599 (1948)).
36 *See* Birckhead, *supra* note 21, at 407.

Haley v. Ohio

Haley v. Ohio was decided in 1948, nearly 20 years before *Gault* (1967) and *Miranda v. Arizona* (1966).[1] The *Haley* decision came at a time when there were very few claims made to suppress youth confessions, primarily because young people were routinely denied counsel, as that right had not yet been afforded to them.[2] Nonetheless, there were some challenges as to the voluntariness of a young person's confession when the youth was tried in adult court, as was the case in *Haley*.[3] *Haley* presented a particularly egregious set of facts—Haley and his mother had testified that he was beaten by the police during his interrogation, to the point where he was bruised and skinned, and his clothes were torn and blood-stained.[4]

Justice Douglas, writing for the plurality, noted that the fact that a 15-year-old youth was taken from his home to the precinct at midnight and interrogated by police officers until five in the morning without counsel in and of itself was sufficient to find that the young person's confession was coerced, violating due process.[5] The plurality opinion emphasized Haley's young age and lack of counsel as the central principles around the constitutional involuntariness of the confession.[6] This decision, however, failed to provide a clear framework for analyzing the voluntariness of a confession, and thus, has been easily manipulated by lower courts.[7] The *Haley* decision is an example of a case where the fact pattern was so extreme that the U.S. Supreme Court intervened in the absence of an existing practice of challenging and suppressing youth confessions at the trial level.[8]

1 *See* Haley v. Ohio, 332 U.S. 596 (1948); *In re* Gault, 387 U.S. 1, 20 (1967); Miranda v. Arizona, 384 U.S. 436 (1966).
2 *See* Martin Guggenheim & Randy Hertz, *J.D.B. and the Maturing of Juvenile Confession Suppression Law*, 38 Wash. U. J.L. & Pol'y 109, 121-22 (2012).
3 *Id.*
4 *Haley*, 332 U.S. at 597.
5 *Id.* at 598-599.
6 *Id.* at 600-01.
7 *See* Guggenheim & Hertz, *supra* note 2, at 161.
8 *Id.*

the first time, essential due process rights for all children facing juvenile delinquency proceedings, including the fundamental right to counsel.[37]

However, shortly thereafter, following high-profile cases involving young people in the late 1970s to the 1990s, nationwide efforts to dismantle children's newly recognized due process protections began, the effects of which still linger today. In 1978, in New York City, a 15-year-old child was convicted for murder and sent to a juvenile facility for five years, prompting public outrage and a demand for harsher treatment.[38] This isolated incident was sensationalized by the media and within two weeks, New York passed the Juvenile Offender Act of 1978, which created the first mechanism to waive children into adult court.[39] Other states quickly followed and to this day, every state and the District of Columbia have at least one transfer mechanism to process children in adult court.[40] Black children continue to be disproportionately transferred throughout the country compared to their white counterparts.[41]

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In 1995, John DiIulio Jr., then a professor at Princeton University, began to tout a baseless theory, now referred to as the "superpredator" myth, where he predicted a surge in crime that would be led by violent, remorseless, and brutal children.[42] The term "superpredator" was racially coded for Black children.[43] This was exploited by the media through its repeated coverage of Black youth who were handcuffed and shackled, feeding into the dehumanization of Black children and the public's fear of the fabricated image of "radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders."[44] This myth never came to fruition. In fact, crime rates among children were already falling by the time the "superpredator" myth was coined, and by 2000, the youth homicide rate dipped below the 1985 rate.[45] Nonetheless, this myth was weaponized to trigger a series of punitive reform measures that stripped away the rehabilitative

37 *Gault*, 387 U.S. 1.
38 *See* Eli Hager, *The Willie Bosket Case: How Children Became Adults in the Eyes of the Law*, The Marshall Project (Dec. 29, 2014), https://www.themarshallproject.org/2014/12/29/the-willie-bosket-case.
39 *Id.*
40 *See* Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, Nat'l Conf. State Legislatures (April 8, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx.
41 *See* The Campaign for the Fair Sent'g of Youth, The Origins of the Superpredator: The Child Study Movement to Today 5-6 (2021).
42 *The Superpredator Myth, 25 Years Later*, Equal Just. Initiative (Apr. 7, 2014), https://eji.org/news/superpredator-myth-20-years-later/.
43 Carroll Bogert & Lynnell Hancock, *Superpredator: The Media Myth that Demonized a Generation of Black Youth*, The Marshall Project (Nov. 20, 2020), https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth.
44 *See* Birckhead, *supra* note 21, at 409-10; *see also* Sterling, *supra* note 24, at 1055-56.
45 *See* Off. of Juv. Just. & Delinq. Prevention, U.S. Dep't of Just., Challenging the Myths, 1999 National Report Series: Juvenile Justice Bulletin (2000); *see also* Equal Just. Initiative, *supra* note 42.

aims of the juvenile court system and replaced them with goals of punishment, accountability, and public safety.[46]

Against this backdrop, the Gault Center[47] and other youth rights organizations conducted a national assessment of the state of youth defense in 1995.[48] This report, titled *A Call for Justice*, was the first of its kind to take a critical look at youth defense practices at all stages of representation and became a catalyst for the Gault Center's subsequent state assessments. The report emphasized the critical role of youth defense attorneys to fight against the narratives of the "superpredator" myth and the movement for harsher sanctions propelled by the myth.[49] The assessment uncovered serious, systemic deprivations of the right to counsel, rendering many children effectively defenseless in the courtroom.[50] Across the country, the report found that children faced significant delays in accessing counsel, frequently waived their right to counsel, and did not receive representation past disposition.[51] Further, the report highlighted several structural inadequacies that barred effective representation—namely, high caseloads, lack of specialized training, insufficient resources, and courtroom cultures that discouraged adversarial testing of facts.[52]

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More than 25 years later, the racialized policies that stemmed from the "superpredator" myth continue to harm children, especially Black, Latine, and Native/Indigenous children, while the systemic practices of denying children their constitutional rights still pervade the system. States are failing to fulfill their constitutional obligation under *Gault* to guarantee meaningful access to effective counsel for all children.[53] As a result, children are not guaranteed lawyers, they do not access attorneys until it is too late to fully protect their rights and interests, they are permitted to waive their right to counsel without appropriate safeguards and informed consent, and their access to counsel ends too early—all of which deeply undercuts children's fundamental right to counsel, leaving them

46 *See* Sterling, *supra* note 24, at 1059-60. In 2001, John Dilulio Jr. publicly apologized, stating "I'm sorry for any unintended consequences," while standing by what he deemed the quality of his research back in 1995. Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. Times (Feb. 9, 2001), https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html.

47 This report was published when the Gault Center, formerly the National Juvenile Defender Center, was a part of the American Bar Association in 1995. Shortly thereafter, the Gault Center established its own independent organization to respond to the critical need to build capacity in the youth defense bar and improve access to counsel and quality of representation for children in the juvenile legal system.

48 Patricia Puritz et al., A.B.A. Juv. Just. Ctr. et al., A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings (1995).

49 *See id.* at xiii.

50 *See generally id.*

51 *See id.* at 7-12.

52 *Id.*

53 See generally Access Denied, *supra* note 11; *see generally State Assessments,* Nat'l Juv. Def. Ctr., https://njdc.info/our-work/juvenile-indigent-defense-assessments/.

unprotected against a machinery designed to propel young people deeper into the juvenile legal system and exposing them to greater harms.[54]

The juvenile legal system in its current form was built on structures of racialized policies that reinforce the concept of "other people's children"—whether they are Black, Latine, and Native/Indigenous children, children living in poverty, children of immigrants, or any other status that falls outside the white, middle-class norms on which the system was founded.[55] As a result, efforts to truly reform the system in a way that would be meaningful for the children most harmed by the system must first dismantle the racialized structures upon which the system was built. Otherwise, the patterns and practices of systemically neglecting children's rights will never be eliminated, creating generations of young people who suffer irreparable harm because they were not afforded the privilege of adolescence.

"States are failing to fulfill their constitutional obligation under *Gault* to guarantee meaningful access to effective counsel for all children."

To begin, states must ensure that every child facing juvenile court involvement is assigned a zealous attorney to advocate against these injustices and uphold the rights of the child. This is a protected civil right. A state's failure to establish the necessary infrastructure to safeguard this right uniformly and meaningfully will subject a state to federal civil liability under 34 U.S.C. § 12601.

54 *See generally* Access Denied, *supra* note 11.
55 *See* Birckhead, *supra* note 21.

CAUSE OF ACTION:
Overview of DOJ's Authority under 34 U.S.C. § 12601

On March 3, 1991, a Black man named Rodney King was brutally beaten by four Los Angeles Police Department (LAPD) officers, three of whom were white.[56] This incident was captured in a 15-minute graphic video taken by a bystander and sparked national outrage.[57] Rodney King suffered permanent brain damage, broken bones, and a skull fracture as a result of the beating.[58] The LAPD officers were charged with excessive force, but were acquitted a year later, triggering protests and riots across the country and a national reckoning on racial and economic disparities and the interplay with police surveillance and the excessive use of force.[59]

In response, Congress included a provision in the 1994 Violent Crime Control and Law Enforcement Act (1994 crime bill)[60] that enabled the federal government to not only address police misconduct by law enforcement agencies, but also challenge systemic failings of the administration of youth defense systems.[61] This provision, codified at 34 U.S.C. § 12601, prohibits any governmental authority from engaging in a "pattern or practice" that deprives individuals of their constitutional or federal rights.[62] Specifically, the Attorney General is authorized to investigate governmental authorities for potential violations of this statute, initiate a civil action upon reasonable cause, and seek equitable and declaratory relief to eliminate the pattern or practice of conduct.[63] Importantly, this authority explicitly includes the conduct of "any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles."[64]

Effectively, this statute prohibits any governmental agency responsible for administering a youth defense system from engaging in a pattern or practice that deprives young people of their constitutional rights. And any responsible governmental authority is subject to investigation and civil action seeking equitable and declaratory relief for the conduct of its agencies.

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56 Anjuli Sastry Krbechek & Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots,* NPR (Apr. 26, 2017), https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots.

57 *Id.*

58 *Id.*

59 *Id.*

60 The 1994 crime bill has been widely acknowledged as one of the factors fueling mass incarceration during the late 1990s and early 2000s. Section 12601, however, has been instrumental in challenging patterns or practices that deprive individuals of their constitutional or federal rights.

61 *See* C.R. Div., U.S. Dep't of Just., The Civil Rights Division's Pattern and Practice Police Reform Work: 1994-Present 3 (2017); *see also* Schwabauer, *supra* note 4, at 14 n.61.

62 34 U.S.C. § 12601(a).

63 *Id.*; *see also* Schwabauer, *supra* note 4, at 14-15.

64 34 U.S.C. § 12601(a).

Senator Carol Moseley Braun, the sponsor of this provision, explained that the extension of the Attorney General's pattern-or-practice authority to reach the juvenile legal system was in recognition both of the likelihood that the 1994 crime bill would increase youth contact with the juvenile court system and that the existing system was already riddled with racial disparities.[65] She pointed to evidence that Black youth were more likely to be referred, formally charged, and placed in the juvenile court system, compared with similarly situated white youth.[66] Accordingly, she noted the importance of the Attorney General's authority in ensuring that the juvenile legal system is administered fairly and non-discriminatorily.[67]

The Attorney General's pattern-or-practice authority has uniquely positioned the DOJ to address and combat systemic discrimination, unlawful conduct, and constitutional violations, protecting the rights of individuals across the country. This authority first originated in the 1960s under civil rights legislation, which permitted the DOJ to investigate, litigate, and remedy widespread racial discrimination and civil rights violations, specifically related to employment, housing, and public accommodations.[68] It has been extended through subsequent federal laws, including the 1994 crime bill, authorizing the Attorney General to reach additional realms of systemic violations. These investigations and actions are designed to uproot and correct widespread violations via the Attorney General's authority to seek equitable and declaratory relief to eliminate the questioned pattern or practice of unlawful conduct.[69] Further, the Attorney General has the independent authority and discretion to initiate its own cases and pursue litigation against governmental authorities.[70]

The majority of the DOJ's work under § 12601 has been to address police misconduct, looking to patterns of unlawful use of force, stops, searches, and arrests, as well as its discriminatory impact on Black, Latine, and Native/Indigenous communities.[71] Many of these cases have resulted in significant injunctive relief, including the development of new policies, accountability systems, and trainings, as well as the appointment of independent monitors to oversee implementation of the relief ordered.[72] Several jurisdictions have drastically reformed their practice following the DOJ's use of its authority under § 12601.[73]

> "This statute prohibits any governmental agency from engaging in a pattern or practice that deprives young people of their constitutional rights"

As it relates to the juvenile legal system, the DOJ has exercised its authority under § 12601 twelve times, three times by initiating its own

65 Brief for Appellant at 22, U.S. v. Lauderdale, 914 F.3d 960 (5th Cir. 2019) (No. 17-60805).
66 *Id.*
67 *Id.*
68 *See* Schwabauer, *supra* note 4, at 6-7.
69 *Id.* at 14.
70 *Id.* at 16.
71 *Id.* at 14-15.
72 *Id.*
73 Civ. Rights Div., U.S. Dep't of Just., The Civil Rights Division's Pattern and Practice Police Reform Work: 1994-Present 3 (2017).

independent cases and nine times by intervening in private lawsuits to provide a Statement of Interest pursuant to its authority to enforce constitutional protections within the juvenile court system under the 1994 crime bill.[74] Of the nine Statements of Interests regarding the juvenile legal system,

74 *See Special Litigation Section Cases and Matters: Juvenile Justice*, U.S. Dep't of Just., C.R. Div., https://www.justice.gov/crt/special-litigation-section-cases-and-matters/download#juv.

N.P. v. Georgia

In *N.P. v. Georgia*,[1] the DOJ intervened in a class action lawsuit against the state of Georgia and other public individuals and entities alleging that the right to counsel for children in juvenile court proceedings in the Cordele Judicial Circuit had been "reduced to a hollow formality."[2] The complaint highlighted the structural failings of the Circuit's public defender office, including excessive caseloads, inadequate staffing, and lack of specialization and training in youth defense, all of which effectively violated children's constitutional and statutory right to meaningful representation.[3] While the DOJ did not take a position on the merits of the case, it outlined the required protections of children's right to counsel that the U.S. Constitution demands.

In its Statement of Interest, the DOJ asserted that the promise of *Gault* is threatened by a systemic deprivation of the right to counsel, as the U.S. Supreme Court had issued an explicit mandate that all children facing delinquency proceedings must have meaningful access to counsel.[4] The DOJ noted that the right to counsel is fundamental, especially for children, where the hallmarks of adolescent development heighten both their need and dependence on the "guiding hand of counsel."[5] Accordingly, the DOJ explained that young people must be zealously represented by skilled counsel—meaning that counsel must have enough time and resources, adequate training, and specialization in defending youth to provide competent representation.[6] Further, in light of children's adolescent development, the DOJ warned that allowing children to waive their right to counsel without first consulting an attorney may violate their constitutional rights under the Fourteenth Amendment.

Following this Statement of Interest, the parties in the lawsuit quickly settled. The defendants committed to increased staffing, a change in policy and practice to initiate earlier contact between detained youth and their attorney, the maintenance of a specialized division for youth defenders, and a requirement for attorney training, including specific youth defense training programs.[7] The court maintained jurisdiction on this matter for three years to monitor the county's compliance with and enforcement of the consent decree.

1 U.S. Statement of Interest, N.P. v. Georgia, No. 2014-CV-241025 (Ga. Super. Ct. Fulton Cnty. 2015).
2 Complaint at 5, N.P. v. Georgia, No. 2014-CV-241025 (Ga. Super. Ct. Fulton Cnty. 2014).
3 *Id.* at 5-11.
4 U.S. Statement of Interest in N.P. v. Georgia, *supra* note 1, at 6.
5 *Id.* at 7-10.
6 *Id.* at 11-12.
7 Consent Decree, N.P. v. Georgia, No. 2014-CV-241025 (Ga. Super. Ct. Fulton Cnty. 2015).

four pertain to conditions of confinement,[75] three pertain to the solitary confinement of youth,[76] one pertains to the discriminatory enforcement of vague school-based offenses that criminalize developmentally normative behavior, [77] and one pertains to the denial of children's constitutional right to meaningful representation in juvenile court.[78]

In addition to the Statements of Interest, to date, the DOJ has initiated three cases investigating systemic due process and equal protection violations within the administration of juvenile legal systems under its § 12601 powers. All three cases exclusively targeted practices at the county level in the following jurisdictions: Shelby County, Tennessee, Lauderdale County, Mississippi, and St. Louis County, Missouri.[79] The investigations into Shelby County and St. Louis County resolved with a Memorandum of Agreement (MOA), while the Lauderdale County investigation led to the formal filing of a complaint by the DOJ, alleging that the defendants violated § 12601 by engaging in systemic violations of the U.S. Constitution and seeking declaratory and equitable relief against the parties involved. Subsequently, the case settled as it related to the city of Meridian (within Lauderdale County) and the state of Mississippi, while the case against Lauderdale County and the Lauderdale County Youth Court Judges was dismissed by the U.S. District Court. Nonetheless, these DOJ actions triggered significant systemic reform efforts to the delivery of youth defense and have proven to be a powerful tool in uncovering and uprooting systemic violations of children's right to counsel.

Though the DOJ has only focused on county practices to date, § 12601 does not limit the DOJ from investigating statewide practices.

For more information about the three DOJ investigations, see the Appendix on page 26.

75 U.S. Statement of Interest, G.F. v. Contra Costa Cnty., No. 3:13-cv-03667-MEJ, 2015 WL 7571789 (N.D. Cal. 2015) (affirming the comprehensive protections for youth with disabilities under federal law confined at Contra Costa County Juvenile Hall); U.S. Statement of Interest, H.C. v. Bradshaw, No. 18-Civ-80810, 2019 WL 1051146 (S.D. Fla. 2019) (clarifying the protections afforded to children with disabilities under federal law and the agents responsible for the enforcement of such protections); U.S. Statement of Interest, Charles H. v. D.C., No. 1:21-cv-00997 (D.D.C. 2021) (explaining the federal protections afforded to youth with disabilities in correctional facilities during the COVID-19 pandemic); U.S. Statement of Interest, Doe v. Michigan Dep't of Corr., No. 13-14356 (E.D. Mich. 2014) (bringing to attention the scope and applicability of the Prison Rape Elimination Act of 2004 as it relates to youth confined in adult facilities).

76 U.S. Statement of Interest, Disability Rts. Vermont. v. Vermont., No. 5:19-cv-106 (E.D. Vt. 2019) (challenging isolation practices, among other policies, as applied to children with disabilities at Woodside Juvenile Rehabilitation Center); U.S. Statement of Interest, Prot. & Advoc. for People with Disabilities, Inc. v. Cannon, No. 2:20-cv-02738 (D.S.C. 2020) (addressing rights of youth in the juvenile court system to be protected from arbitrary and excessive use of isolation at the Charleston County Juvenile Detention Center); U.S. Statement of Interest, V.W. v. Conway, 236 F.Supp.3d 554 (N.D.N.Y. 2017) (No. 1:16-cv-1150) (asserting the unconstitutionality of solitary confinement practices of youth, including youth with disabilities, in the Onondaga County Justice Center).

77 U.S. Statement of Interest, Kenny v. Wilson, 885 F.3d 280 (4th Cir. 2018) (No. 2:16-2794) (challenging two South Carolina statutes—Disturbing Schools and Disorderly Conduct—on the grounds that they are constitutionally vague and disparately enforced).

78 U.S. Statement of Interest, N.P. v. Georgia, No. 2014-CV-241025 (Ga. Super. Ct. Fulton Cnty. 2015).

79 *See Special Litigation Section Cases and Matters*, *supra* note 74.

CAUSE OF ACTION: Elements

The DOJ's pattern-or-practice authority under § 12601 has broad implications for the state of youth defense across the country. It not only provides a framework for evaluating whether a jurisdiction's delivery of youth defense is compliant with the demands of the U.S. Constitution, but also holds states and localities liable for engaging in a systemic practice of denying children's constitutional rights. Essential to this framework is a child's right to meaningful and zealous representation by an attorney.[80] From the right to counsel flows the holistic protection of a child's constitutional guarantees for a fair trial. Protecting a child's constitutional right to counsel is a critical matter of civil rights.

States must look carefully at their administration of the juvenile legal system, as well as the structural safeguards around the system to protect and uphold the constitutional rights of children facing juvenile court. Children across the country are left unprotected by the promises of the U.S. Constitution and all too often face formal processing within the juvenile court system without the meaningful representation demanded by the U.S. Supreme Court.[81] In the absence of state efforts to provide uniform and meaningful access to counsel for all children in juvenile court proceedings, children will continue to suffer irreparable and lasting harm, with Black, Latine, and Native/Indigenous children bearing the brunt of such deprivations.

"The United States is facing a crisis—children are deprived of their right to meaningful counsel every day."

The cause of action under § 12601 can be broken down into three main elements: (1) rights protected by the Constitution; (2) pattern or practice of conduct by any governmental agency that is responsible for the administration of a juvenile legal system; and, (3) the liability of any governmental authority.[82] Each element must be construed within the stated intent of § 12601: "to eliminate the pattern or practice" that deprives children of their rights protected by the U.S. Constitution.[83] The following sections will take a closer look at each element to make the case that the United States is facing a crisis—children are deprived of their right to meaningful counsel every day—and these children will continue to suffer until this pattern and practice is eliminated.

80 *See generally In re* Gault, 387 U.S. 1 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963); Strickland v. Washington, 466 U.S. 668 (1984); U.S. v. Cronic, 466 U.S. 648 (1984).
81 *See generally* Access Denied, *supra* note 11; *State Assessments, supra* note 53.
82 34 U.S.C. § 12601(a).
83 34 U.S.C. § 12601(b).

1. RIGHTS PROTECTED BY THE CONSTITUTION

Individual freedom is premised on the protections of due process.[84] And fundamental to due process is the right to counsel.[85] In 1963, the U.S. Supreme Court ruled in *Gideon v. Wainwright* that the Sixth Amendment right to counsel is so essential to a fair trial and thus, to due process of law, that states must be required under the Fourteenth Amendment to ensure this right to all persons facing criminal felony charges.[86] The Court emphasized that without the right to counsel, the principles of liberty and justice erode.[87] Overruling prior precedent, the Court stated as an "obvious truth" that "any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[88] The Court further asserted "lawyers in criminal courts are necessities, not luxuries."[89]

Four years later, in its ruling in *Gault*, the U.S. Supreme Court extended this fundamental right to counsel to children facing juvenile delinquency proceedings, mandating states to guarantee this critical right under the Fourteenth Amendment.[90] In this seminal case, the Court acknowledged that there was no material difference between an adult and juvenile proceeding with respect to the need for counsel.[91] While still upholding principles recognizing that children are different from adults, the Court distinguished procedural due process as an area that demanded equal application of the safeguards guaranteed for adults to children.[92] The Court warned that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure"[93] and emphasized the need for due process protections for children, highlighting procedural justice principles that stronger safeguards, including the right to counsel, will lead to better outcomes.[94]

"Individual freedom is premised on the protections of due process. And fundamental to due process is the right to counsel."

Essential to this right to counsel is the right to *effective* assistance of counsel.[95] The attorney is the key to ensuring that a trial is just and fair.[96] Thus, due process cannot be satisfied by appointment of counsel alone.[97] The U.S. Constitution

84 *Gault*, 387 U.S. at 20 ("Due process of law is the primary and indispensable foundation of individual freedom.").
85 *See id.*; *see also* Gideon v. Wainwright, 372 U.S. 335 (1963).
86 *Gideon*, 372 U.S. at 342-43.
87 *Id.* at 341.
88 *Id.* at 344.
89 *Id.*
90 *Gault*, 387 U.S. 1.
91 *See id.* at 36.
92 *See id.* at 21-22 ("[T]he commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issues under discussion.").
93 *Id.* at 18.
94 *See id.* at 26.
95 *See generally* Strickland v. Washington, 466 U.S. 668 (1984); U.S. v. Cronic, 466 U.S. 648 (1984).
96 *Strickland*, 466 U.S. at 685.
97 *Cronic*, 466 U.S. at 654-55.

demands that defense counsel engages in a "meaningful adversarial testing" of the prosecution's case.[98] The U.S. Supreme Court asserted, "if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated."[99] Accordingly, to comply with the constitutional protections afforded to children, states must ensure that every child facing juvenile court is not only appointed a lawyer for all critical stages of the proceeding, but also receives the effective assistance of counsel to meaningfully fight against the machinery that seeks to propel youth deeper into the juvenile court system.[100]

Though it does not violate the U.S. Constitution if a state delegates this responsibility to its localities, such delegation does not absolve a state of its responsibility of ensuring that every county is capable of providing youth with meaningful and effective counsel and, in practice, is actually delivering such representation for all youth in the juvenile legal system.

"Across the nation, states are engaging in a pattern or practice of conduct that violates children's constitutional rights on a day-to-day basis."

Furthermore, in the administration of a juvenile legal system, states must ensure that the constitutional and federal promises of equal protection are upheld in practice. The U.S. Constitution prohibits states from treating similarly situated children in the juvenile legal system differently because of their race.[101] While the U.S. Supreme Court requires discriminatory intent to establish a constitutional violation, "a clear pattern, unexplainable on grounds other than race" may satisfy discriminatory intent for purposes of establishing an equal protection violation from race-neutral procedures.[102] Intent may also be inferred from a totality of circumstances, including a showing that "the law bears more heavily on one race than another."[103] States must work proactively to address existing patterns of racial disparity and ensure that the burden of the juvenile legal system does not disproportionately fall on Black, Latine, and Native/Indigenous children.

2. PATTERN OR PRACTICE OF CONDUCT

Across the nation, states are engaging in a pattern or practice of conduct that violates children's constitutional rights on a day-to-day basis.[104] Though every child facing a juvenile court proceeding is assured of the right to meaningful representation and equal protection under the U.S. Constitution, states are failing to uniformly protect these essential rights.[105] Intricately tied to the

98 *Id.* at 656.
99 *Id.* at 656-57.
100 *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963); *Strickland*, 466 U.S. 668; *Cronic*, 466 U.S. 648.
101 *See generally* U.S. Const. amend. XIV § 1.
102 *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).
103 *See* Washington v. Davis, 426 U.S. 229, 242 (1976).
104 *See generally* Access Denied, *supra* note 11; *State Assessments, supra* note 53.
105 *See generally* Access Denied, *supra* note 11; *State Assessments, supra* note 53; Broken Contracts, *supra* note 10.

constitutional mandate that states must provide young people with effective counsel is the need for states to develop autonomous youth defense systems to guarantee that youth in all jurisdictions are not only assigned counsel but also receiving consistent, competent, and zealous representation.

However, the vast majority of states have abdicated their duty of protecting young people's constitutional right to counsel and have left counties to deliver youth defense how they see fit, without any meaningful state oversight.[106] As a result, there are extreme variations in practice, including some regions that leave a child entirely without counsel, subjecting the child to formal proceedings effectively defenseless and voiceless—a clear constitutional violation.[107] By sheer chance depending on a where a child resides, the child may or may not receive the constitutional promise of effective counsel, contributing to disparate outcomes and unnecessary harms for children by deepening their contact with the juvenile court system. This is happening in the existing context of persistent and worsening racial disparities within the juvenile legal system nationwide.[108] This fragmented state of the delivery of youth defense is a civil rights violation under § 12601 that will not be remedied until the demands of *Gault* are fulfilled evenly, for all children, regardless of where they live.

The Gault Center conducted a national study evaluating young people's access to counsel in 2017, titled *Access Denied: A National Snapshot of States' Failure to Protect Children's Right to Counsel*.[109] The Snapshot found that states are systemically falling short of their constitutional obligation to provide youth with meaningful representation, "[n]ot because it is impossible, but because ensuring access to counsel for children—and predominately children of color, who are disproportionately arrested and charged in the juvenile justice system—is, seemingly, not yet a priority for most states."[110] Across the nation, children are not guaranteed lawyers, they are not assigned an attorney until it is too late to fully protect their rights and interests, they are required to pay for their constitutional right to counsel, their right to a lawyer is not adequately safeguarded, and their access to representation ends too early.[111] These practices contribute to the worsening of racial disparities in the juvenile legal system, harming Black, Latine, and Native/Indigenous children at disproportionate rates.[112] These systemic failings necessitate strong youth defense delivery systems to safeguard the constitutional protections promised to children.

"States have abdicated their duty of protecting young people's constitutional right to counsel."

106 Broken Contracts, *supra* note 10.
107 Mary Ann Scali, *Meeting the Mandates of Gault: Automatic Appointment of Counsel in Juvenile Delinquency Proceedings,* 70 Juv. & Fam. Ct. J. 7, 10-11 (2019).
108 *See* Sarah Hockenberry, Off. of Juv. Just. & Delinq. Prevention, U.S. Dep't of Just., Delinquency Cases in Juvenile Court, 2019 2 (2022).
109 Access Denied, *supra* note 11.
110 *Id.* at 4.
111 *Id.* at 7.
112 *See id.* at 4.

In addition to this national survey, the Gault Center has also conducted on-the-ground assessments of youth defense delivery systems in 27 states and the District of Columbia, looking at the systemic and institutional barriers of children's right to counsel within each state's existing infrastructure.[113] These state assessments further demonstrate the widespread structural shortcomings of ensuring children's constitutional right to counsel and cement the need for an autonomous, centralized youth defense delivery system to adequately safeguard the due process and equal protection rights of children.

Specifically, the state assessments have revealed common themes that deprive young people of their constitutional rights: states are regularly allowing children to waive their right to counsel without first speaking with a lawyer, states are appointing counsel too late to properly represent children at all critical stages of a proceeding, and states are subjecting children to fees and drawn-out eligibility procedures to access representation.[114] Absent independent state oversight, juvenile courts are engaging in a pattern of stripping children of their meaningful right to counsel to advance a culture of judicial efficiency and/or *parens patriae* by rationalizing the exclusion of children from procedural due process protections in the name of the child's best interests—a practice that was outright denounced by the U.S. Supreme Court in *Gault.*[115]

"Juvenile courts are engaging in a pattern of stripping children of their meaningful right to counsel to advance a culture of judicial efficiency and/or *parens patriae*."

At the center of these failings are the young people who are directly involved in juvenile legal systems across the country. They not only deserve to have their voices heard in a meaningful way in court, but also are entitled to protections under the U.S. Constitution. Yet, too often, they are processed in a system that fails to acknowledge their differences from adults and seeks to punish, rather than rehabilitate. And most importantly, they are left alone without the guiding hand of counsel to push back against this machinery and to serve as the check and balance that justice demands in these adversarial proceedings. Youth who were involved in the juvenile court system reported that they were not given the opportunity to be a part of their proceedings, their voices were not heard, their attorneys did not fight for their interests, and they did not understand what was going on in court.[116]

These reports are particularly troubling when considering the unique vulnerabilities of children, as well as the harms of the juvenile legal system. The U.S. Supreme Court has recognized a growing body of scientific and sociological research that children possess distinctive vulnerabilities attributed

113 *State Assessments, supra* note 53.
114 *See id.*; *see also* Scali, *supra* note 107, at 9-14.
115 *See* Scali, *supra* note 107, at 14; *see In re* Gault, 387 U.S. 1, 16 (1967) ("The Latin phrase [*parens patriae*] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance.").
116 *See* Nat'l Juv. Def. Ctr., What Young People Are Saying About Juvenile Defense (2020).

to their adolescence that require heightened constitutional protections.[117] However, the widespread practices of leaving children effectively defenseless without meaningful representation in juvenile court proceedings cause significant harm in a young person's life. Studies demonstrate that the formal processing of youth in juvenile court leads to worse outcomes—youth are less likely to graduate high school, are more likely to be re-arrested, and have less access to positive opportunities.[118] This is in the context of a growing mental health crisis among young people, particularly Black, Latine, and Native/Indigenous youth, who are funneled into the juvenile court system.[119] Without a zealous advocate protecting the expressed interests of children and a state infrastructure that guarantees equal provision of effective representation, children will continue to suffer irreparable and lasting harm. States must create a working structure that uniformly safeguards all children's right to counsel such that all children have timely access to their lawyers and that their lawyers have the capacity, skillset, and specialized knowledge to fiercely fight for their client's rights and interests.

3. LIABILITY OF ANY GOVERNMENTAL AUTHORITY

Any governmental authority is liable under § 12601 for the actions by its agencies or officials that create a pattern or practice of conduct that violates the U.S. Constitution or federal law.[120] The statute states in pertinent part, "It shall be unlawful for any governmental *authority . . .* to engage in a pattern or practice of conduct by . . . officials or employees of any governmental *agency* with responsibility for the administration of juvenile justice . . . ."[121]

As part of its civil litigation pertaining to Lauderdale County and its juvenile court judges,[122] the DOJ clarified its authority to sue under § 12601 by distinguishing "any governmental *authority*" with "any governmental *agency.*"[123] The DOJ explained that the first clause of the statute defines who may be sued—i.e., any governmental authority—while the second clause of the statute defines whose conduct may constitute as a pattern or practice—i.e., any governmental agency.[124] Relying not only on a plain language reading of the statute, but also on the stated intent of the statute to eliminate systemic unconstitutional practices and the legislative history of the statute to ensure that the juvenile legal system is administered in a fair and non-discriminatory manner, the DOJ asserted that § 12601 holds any governmental authority liable for the unconstitutional practices committed by

117 *See* Scali, *supra* note 107, at 17.
118 Elizabeth Cauffman et al., *Crossroads in Juvenile Justice: The Impact of Initial Processing Decision on Youth 5 Years After Arrest*, 33 Dev. & Psychopathology 700 (2021).
119 *See* Nat'l Juv. Just. Network, Keep Children with Mental Health Challenges Out of the Youth Legal System 3-4 (2021).
120 34 U.S.C. § 12601(a).
121 *Id.* (emphasis added).
122 To note, the Fifth Circuit in *U.S. v. Lauderdale* relied on the phrase "governmental agency" to ultimately rule that judges are not covered under the term "agency" based on statutory interpretation principles. However, the DOJ, which is the entity that holds the power to initiate lawsuits, maintains that they are authorized to sue "any governmental authority," which includes judges, under § 12601. Moreover, the *Lauderdale* Court's ruling is only binding on the three states in the jurisdiction of the federal Fifth Circuit—Louisiana, Mississippi, and Texas.
123 Supplemental Letter Brief from Tovah R. Calderon, Deputy Chief, C.R. Div., to Lyle W. Cayce, Clerk of the Ct., U.S. Ct. of Appeals for the Fifth Cir. (Nov. 19, 2018).
124 *Id.*

its agencies.[125] Accordingly, the DOJ is authorized to identify and sue any governmental authority if any of its agencies responsible for the juvenile legal system systemically violates children's constitutional rights. This allows the DOJ to hold as many parties accountable as needed to eradicate unconstitutional patterns in the juvenile legal system.[126]

The capacity to be sued is dependent on state law.[127] Accordingly, the precise authorities that may be sued under § 12601 will vary by each state. Nonetheless, the expansive scope to sue "any" governmental authority does not restrict liability to one branch of the government.[128] Rather, all three branches of the state government—the executive, legislative, and judicial—are subject to liability under § 12601. All three branches are responsible for administering a juvenile legal system compliant with the constitutional framework of due process and equal protection. The DOJ explained, "Congress manifested an intent that Section 12601's protections would extend to all governmental entities bearing responsibility for the administration of juvenile justice and the incarceration of juveniles, regardless of which branch of government they fall into."[129] Thus, if a state exhibits a pattern or practice of conduct that violates children's constitutional rights, the executive, legislative, and judicial bodies are exposed to liability under § 12601. Such breadth of scope in the DOJ's power is necessary to achieve the stated purpose of the statute: to eliminate systemic violations of children's constitutional rights in the juvenile legal system.[130]

"The DOJ is authorized to identify and sue any governmental authority if any of its agencies responsible for the juvenile legal system systemically violates children's constitutional rights."

Fundamentally, since states are obligated to provide the constitutional right to meaningful counsel for all children facing delinquency proceedings under the Fourteenth Amendment, the responsibility to execute this right lies within the official capacity of the state governor. As the chief executive of the state, the governor is responsible for ensuring that laws are faithfully executed. While the governor may delegate the responsibility of providing effective counsel to local jurisdictions, the overarching obligation to ensure that young people across the state are uniformly receiving meaningful representation remains with the state governor. Accordingly, a state's pattern or practice of failing to provide consistent and zealous counsel for children in juvenile court violates § 12601 and subjects a state governor to a lawsuit by the DOJ.

The state legislative body also plays a role in administering a juvenile legal system by ensuring that the system is adequately and appropriately funded and monitored to meet the constitutional demands of due process for children. Youth defense is a complex area of law that requires regular and specialized training on youth-specific matters, as well as resources and manageable workloads

125 *See id.*; *see also* Brief for Appellant at 22, U.S. v. Lauderdale, 914 F.3d 960 (5th Cir. 2019) (No. 17-60805).
126 Supplemental Letter Brief, *supra* note 123.
127 Fed. R. Civ. P. 17(b)(3).
128 *See* Brief for Appellant at 16-18, U.S. v. Lauderdale, 914 F.3d 960 (5th Cir. 2019) (No. 17-60805).
129 *Id.* at 18.
130 34 U.S.C. § 12601(b).

for youth defenders, to adequately safeguard children's constitutional right to counsel. Accordingly, to eliminate systemic violations of children's right to effective counsel, state legislatures, as officials of a governmental authority, are obligated to sufficiently fund the provision of youth defense across the state. The state legislative body also has the power to create a statewide youth defense delivery system that mandates youth-specific practice standards, specialized training, and sufficient resources to fulfill *Gault*'s demands of ensuring that every child facing delinquency charges will have the guiding hand of counsel at all critical stages of the proceeding. The state legislative body is a powerful governmental authority with the capacity to effectuate reform in the juvenile legal system in a manner that would eliminate constitutional violations deeply ingrained within the system. Thus, its deliberate failure to fund and effectuate such reforms, leading to the perpetuation of a state's widespread constitutional failings, subjects a legislative body to liability under § 12601.

Lastly, the judicial branch is responsible for administering the juvenile legal system by presiding over a young person's judicial proceeding from arrest to disposition. Either juvenile court judges or the state's chief judge responsible for the administration of court policies and standards may be held liable in their official capacities under § 12601 if juvenile courts engage in a pattern or practice of violating children's rights to due process and equal protection. Though the Fifth Circuit ruled that judges did not fall within § 12601, the Court premised its holding based upon the statutory interpretation that judges were not commonly included within the word "agency."[131] However, the Court instead should have looked to the question of whether judges are encompassed within the word "authority," as the liability of § 12601 is applied to "any governmental authority" and not constrained to a "governmental agency."[132]

Under a plain language reading of the word "authority," judges cannot be excluded from liability under § 12601. Further, in analyzing the broader context of this statute—that it was created with the stated purpose of eliminating systemic violations of children's rights and with the legislative intent of protecting young people from discriminatory practices within the juvenile court system, judges cannot be taken out of the equation of remedying constitutional misgivings. Judges are the locus of the administration of the juvenile legal system and an official of a governmental authority (i.e., the court system), and thus if they engage in a pattern or practice of depriving young people of their constitutional rights, they must be held responsible under § 12601.

Within each branch of government, the DOJ is entitled to specifically name additional entities as necessary to further hold parties accountable for systemic violations and to uproot such practices within the system. Depending on the structure of the juvenile legal system in the state, these entities may include indigent defense commissions responsible for the oversight of the youth defense system, state public defender agencies, and nonprofits that receive state funding to deliver youth defense. While indigent defense commissions and public defender offices have generally fought tirelessly for the rights of young people, in certain situations, they may need to be held liable to

131 U.S. v. Lauderdale, 914 F.3d 960 (5th Cir. 2019).
132 Supplemental Letter Brief, *supra* note 123.

provide an effective remedy for young people. Indigent defense commissions may be held liable for their failure to enforce appropriate standards of practice in youth defense, contributing to the perpetuation of children's lack of meaningful counsel. Public defender organizations, whether they are state-based or nonprofits receiving state funding, serve as fiscal officers of state appropriations to effectively deliver youth defense. Accordingly, if these agencies fail to appropriately allocate and utilize their funding for the specialization of youth defense by ensuring suitable workloads, sufficient resources, and youth-specific training, they may also be liable for playing a role in the systematic denial of meaningful counsel under § 12601.

The DOJ has the power to hold all necessary parties accountable for engaging in a pattern or practice of violating a young person's right to equal protection and due process, including the fundamental right to counsel. Every branch of government is responsible for a portion of the administration of the juvenile legal system in each state. Excluding any one of the branches of government from § 12601 would frustrate the overarching purpose of the statute to hold governmental authorities accountable and to eliminate widespread practices of constitutional violations in the juvenile legal system.

For too long, children have been systematically denied their right to meaningful counsel across the country, without sufficient safeguards to ensure the uniform delivery of effective counsel for all children in the United States. Without a clear single body that could be held responsible for this pattern of deprivation due to the fragmented state of youth defense, all branches of the government have enjoyed the convenience of blame shifting. All the while, children are suffering from the harms of these constitutional violations each and every day. This practice must stop. Each governing authority must take responsibility for creating and perpetuating a system that violates children's rights, subjecting children to the harms of juvenile court without a zealous advocate fighting against the structure designed to try, supervise, and incarcerate them.

"Each governing authority must take responsibility for creating and perpetuating a system that violates children's rights."

Congress gave the DOJ the authority to catalyze reform by holding any governmental authority accountable for its violative practices in the juvenile legal system. This broad authority given to the DOJ signals the need for comprehensive reform to satisfy the demands of the U.S. Constitution and to protect the rights of children facing the juvenile legal system. Each governing authority must play their part in remedying these widespread violations.

Conclusion

For states to satisfy the constitutional mandate of providing effective representation for all children in juvenile court proceedings, regardless of where they reside, states must implement autonomous and specialized youth defense systems to protect young people from the constructive denial of counsel.[133] The DOJ analyzed a constructive denial of counsel claim in its Statement of Interest in *Hurrell-Harring v. New York*, a case regarding the structural flaws of five New York counties' indigent defense systems.[134] The DOJ noted that based upon the jurisprudence of the right to counsel, constructive denial of counsel may occur if one or both of the following conditions apply: (1) structural limitations of public defender offices, including lack of resources, high workloads, and understaffing, and/or (2) the inability of defenders to provide the "traditional markers of representation," including timely and confidential meetings with clients, investigations, and adversarial testing of the prosecution's case.[135] This framework equally applies to the delivery of youth defense, as asserted by the DOJ.[136]

Accordingly, to ensure constitutional compliance, states must first establish a structure for the delivery of youth defense. This system must be well-resourced, specialized, and independent to ensure that all youth defense counsel have the structural support to zealously advocate for children's rights and to engage in a meaningful testing of the prosecution's case, as assured by the U.S. Constitution.[137] In addition, it is fundamentally critical to the right to counsel for the juvenile legal system to ensure early appointment of counsel, presume all children indigent and eligible for counsel, safeguard against waivers of counsel, and continue legal representation until a court terminates supervision or control.[138] States must be urgently proactive in addressing and eliminating persistent racial disparities and protecting vulnerable groups that are harmed disproportionately by the juvenile legal system.[139]

"States must be urgently proactive in addressing and eliminating persistent racial disparities."

133 *See generally* Nat'l Juv. Def. Ctr., Defend Children: A Blueprint for Effective Juvenile Defender Services (2016) [hereinafter Blueprint].
134 U.S. Statement of Interest, Hurrell-Harring v. New York, 930 N.E.2d 217 (N.Y. 2010) (No. 8866-07).
135 *Id.* at 1.
136 *See* U.S. Statement of Interest in N.P. v. Georgia, *supra* note 78, at 6.
137 *See id.*; U.S. Statement of Interest in Hurrell-Harring, *supra* note 134; Blueprint, *supra* note 133; Broken Contracts, *supra* note 10.
138 *See* Access Denied, *supra* note 11.
139 *See* Blueprint, *supra* note 133.

Fifty-five years after *Gault's* mandate to states to protect children's right to counsel, children are still suffering the consequences of states' neglect to prioritize and safeguard their right to due process and equal protection. Children, like adults, are entitled to enjoy the fundamental principles of individual freedom, liberty, and justice—all of which erode without the guarantee of due process.[140] However, over half a million children each year are subject to the juvenile court system and face a harrowing array of representation across the country.[141] Many facing the loss of liberty stand in juvenile court without the presence of counsel entirely or without a fierce advocate envisioned by the U.S. Constitution to push back on narratives designed to dehumanize and incarcerate children, especially those who do not fall within the white middle-class norms upon which the juvenile court was built.[142]

Protecting this fundamental right to counsel is an essential matter of civil rights and the key to unlocking all of a child's constitutional and legal rights triggered by a juvenile court proceeding. States must immediately resolve to fulfill *Gault*'s promise by reforming, developing, and implementing strong youth defense systems to uniformly safeguard this essential right to effective and meaningful representation for all children.

DOJ Contact Information

Individuals may submit complaints or information about systemic practices that violate children's constitutional rights to the DOJ by contacting the DOJ Civil Rights Division at CivilRightsDivision@usdoj.gov or (202) 514-3847.

140 *See In re* Gault, 387 U.S. 1, 20 (1967).
141 Charles Puzzanchera, Off. of Juv. Just. & Delinq. Prevention, U.S. Dep't of Just., Juvenile Arrests, 2019 (2021); *see also State Assessments, supra* note 53.
142 *See* Access Denied, *supra* note 11; *State Assessments, supra* note 53.

APPENDIX: DOJ Investigations

SHELBY COUNTY, TENNESSEE

On April 26, 2012, the DOJ released its findings after nearly three years of investigation into the patterns and practices of Shelby County's administration of youth defense.[1] The investigation focused on the Juvenile Court of Memphis and Shelby County (JCMSC). The DOJ called out specific ways in which JCMSC violated children's procedural due process rights, including untimely and inadequate notice, lack of safeguards for self-incrimination during probation conferences, delayed probable cause hearings, and inadequate protections for children facing transfer to adult court.[2] The investigation highlighted substantive due process concerns as it related to the conditions of confinement for detained youth in Shelby County.

The DOJ also highlighted that Black children were disproportionately represented at nearly every stage of a juvenile court proceeding in Shelby County, with data showing that race, in and of itself, played a significant contributing factor in the disparate treatment of Black children, in violation of Equal Protection and federal laws prohibiting racial discrimination.[3] Data revealed that Black children were less likely to be diverted, more likely to be detained, and more likely to be transferred to adult court compared to white children, even after adjusting for other legal and social factors.[4]

When evaluating the reasons behind Shelby County's widespread violations of children's due process and equal protection rights, the DOJ noted several factors, including cultural challenges, practices of youth defenders, and structural concerns around the lack of independence of the Juvenile Defender's Office in Shelby County.[5] The DOJ warned that without reforming these factors, constitutional violations would persist.[6] The DOJ also recognized the central role youth defense attorneys must play in delinquency proceedings and unequivocally pushed for "vigorous advocacy" by defense counsel to uphold the constitutional rights of children.[7]

On December 18, 2012, the DOJ entered an MOA with Shelby County to remedy the due process and equal protection violations raised in the investigation, marking the first time the DOJ utilized its authority under § 12601 to work toward the elimination of systemic constitutional violations embedded within a juvenile legal system.[8] The MOA required and achieved significant reform in the delivery of youth defense in Shelby County. It led to the creation of a specialized youth defense unit within the public defender's office and secured sufficient resources, administrative support, and reasonable caseloads for competent and zealous representation of children in delinquency proceedings.[9] The MOA also supported tailored

1 C.R. Div., U.S. Dep't of Just., Investigation of the Shelby County Juvenile Court (2012).
2 *Id.* at 1-2.
3 *Id.* at 3.
4 *Id.*
5 *Id.* at 46-50.
6 *Id.* at 46.
7 *Id.*
8 *See* Press Release, Dep't of Just., Department of Justice Enters into Agreement to Reform the Juvenile Court of Memphis and Shelby County, Tennessee (Dec. 18, 2012), https://www.justice.gov/opa/pr/department-justice-enters-agreement-reform-juvenile-court-memphis-and-shelby-county-tennessee.
9 *See* Memorandum from Sandra Simkins, Due Process Monitor, to Winsome Gayle, U.S. Dep't of Just. et al. (June 6, 2018).

training for youth defense counsel and youth defense practice standards.[10]

In response to the equal protection violations, Shelby County enhanced data collection, revised court procedures, refined objective decision-making tools, and developed efforts to reduce the use of detention and the number of youth entering the juvenile legal system entirely.[11] After nearly six years of monitoring compliance with the MOA, the Department of Justice closed its case against Shelby County after a determination that the County maintained continued substantial compliance with the remedial measures outlined in the MOA.[12]

LAUDERDALE COUNTY, MISSISSIPPI

On August 10, 2012, the DOJ issued findings regarding its investigation into Lauderdale County's administration of its juvenile legal system and the city of Meridian's policing practices, both of which effectively operated an illegal school-to-prison pipeline.[13] The DOJ found widespread systemic violations of children's constitutional rights—children were automatically arrested for minor infractions from school, funneled into a constitutionally deficient juvenile legal system, and regularly incarcerated for probation violations, which included any suspensions from school.[14] These constitutionally violative practices affected Black children and children with disabilities at significantly higher rates.[15]

Following the release of the DOJ's investigative findings, the responsible government agencies refused to engage in meaningful negotiation.[16] Accordingly, the DOJ filed a formal civil lawsuit on October 24, 2012 in the U.S. District Court, Southern District of Mississippi, pursuant to § 12601, alleging Fourth, Fifth, and Fourteenth Amendment violations by the parties involved.[17] The DOJ sought federal court intervention seeking relief toward the elimination of systemic constitutional violations in Lauderdale County, including the expungement of youth records as an effort to remedy past wrongs.[18] The DOJ warned that these constitutional violations had caused "serious, irreparable, and lasting harm to children" and that children would continue to suffer without the sought relief.[19]

The DOJ listed the following defendants as formal parties to the lawsuit: (1) City of Meridian for its responsibility over the Meridian Police Department; (2) County of Lauderdale for its responsibility over the Lauderdale County Youth Court; (3) two juvenile court judges in their official capacity; (4) State of Mississippi for its responsibility over the administration of the juvenile legal system via state agencies; (5) the Mississippi Department of Human Services for its oversight over the administration of juvenile probation services; and (6) the Mississippi Division of Youth Services for its administration of juvenile probation. Collectively, the defendants engaged in a pattern or practice of conduct that violated constitutional protections owed to children, causing severe and disproportionate consequences that were particularly injurious

10 C.R. Div., U.S. Dep't of Just., Memorandum of Agreement Regarding the Juvenile Court of Memphis and Shelby County 15 (2012).
11 Letter from John M. Gore, Acting Assistant Att'y Gen., C.R. Div., to Marlinee Clark Iverson, Shelby Cnty. Att'y (Oct. 19, 2018).
12 *See id.*
13 Letter from Thomas E. Perez, Assistant Att'y Gen., C.R. Div., to Phil Bryant, Governor, State of Miss. et al. (Aug. 10, 2012) [hereinafter Lauderdale Findings Letter].
14 *Id.* at 2-4.
15 *See* Lauderdale Findings Letter, *supra* note 13, at 3.
16 *See* Complaint at 4-5, U.S. v. Lauderdale, 914 F.3d 960 (5th Cir. 2019) (No. 4:12-CV-168-HTW-LRA).
17 *See generally Id.*
18 *Id.* at 35-6.
19 *Id.* at 31.

to Black children and children with disabilities, according to the complaint filed by the DOJ.[20]

Following the filing of this complaint, the city of Meridian and the state of Mississippi settled with the DOJ as pertaining to their policing and juvenile probation practices.[21] The county of Lauderdale and the juvenile court judges, however, contested, resulting in further litigation around the central question of whether judges fall within the purview of § 12601 as an official or employee of a "governmental agency."[22] Lauderdale County joined the juvenile court judges' arguments and did not offer an independent basis as to whether the county was subject to the jurisdiction of § 12601.

The DOJ disputed that both under a plain language reading of the statute and the legislative history of § 12601, the statute could not exclude judges, who as officials of juvenile courts are principally and directly responsible for the administration of the juvenile legal system. The DOJ warned that finding otherwise would frustrate the statute's purpose of eliminating systemic violations within the system.[23] Nonetheless, the U.S. Court of Appeals for the Fifth Circuit ruled that based on principles of statutory interpretation, juvenile court judges are not included within the term "governmental agency" under the statute. As a result, the Fifth Circuit dismissed the case against the juvenile court judges and Lauderdale County. The Fifth Circuit acknowledged, however, that the DOJ's authority to initiate civil lawsuits against other parties in the juvenile legal system, including counties, city councils, mayors, and youth services, remained untouched.[24]

ST. LOUIS COUNTY, MISSOURI

On July 31, 2015, the DOJ released its investigation of St. Louis County Family Court regarding its administration of the juvenile legal system.[25] The report detailed a pattern of due process and equal protection violations by the St. Louis County Family Court in its administration of the juvenile legal system.[26] In recognizing the fundamental right to counsel as a key due process protection, the DOJ highlighted systemic failures that led to inadequate and unconstitutional representation, including excessive caseloads for youth defenders, delays in appointment of counsel, and a constitutionally flawed court structure.[27] These factors, the DOJ found, led to a system devoid of an adversarial process and stripped children of their right to zealous representation by counsel.

Further, the DOJ found that Black youth were disproportionately overrepresented in the juvenile legal system and subject to more formal processing and harsher outcomes than white youth, without any explanation other than race. This practice of racial bias imbued in the juvenile legal system was evidence of the county's violation of children's right to equal protection under the U.S. Constitution.

When evaluating appropriate caseloads for defense counsel, the DOJ advised to look not only at the number of cases, but also at the complexity of the cases, the attorney's experience level, and available resources.[28] Defense counsel must also be assigned to represent youth sufficiently in advance of proceedings to ensure adequate time to prepare, and representation should continue for as long as the court maintains

20 *Id.* at 1-2.
21 *See generally* Settlement Agreement, U.S. v. Lauderdale, 914 F.3d 960 (5th Cir. 2019) (No. 3:13-CV-978-HTW-LRA).
22 *See Lauderdale*, 914 F.3d 960.
23 Brief for Appellant at 11, U.S. v. Lauderdale, 914 F.3d 960 (5th Cir. 2019) (No. 17-60805).
24 *Lauderdale*, 914 F.3d at 968.
25 C.R. Div., U.S. Dep't of Just., Investigation of the St. Louis County Family Court, St. Louis, Missouri (2015).
26 *See generally id.*
27 *Id.* at 18.
28 *Id.*

jurisdiction over a youth.[29] Further, the DOJ explained that the structural and organizational flaws in St. Louis County Family Court, where the prosecuting authority, probation officers, and administrators of *Miranda* warnings fell within the judicial arm, created an imbalance of power that disincentivized and prevented zealous advocacy by defense counsel. Though this structure may have been created with well-intentioned motivations where court personnel were engaged in efforts to divert youth, the DOJ cautioned, "The desire to help does not obviate the Constitution."[30] Without adequate resources, reasonable workloads, timely appointment of counsel, and a juvenile court structure devoid of an imbalance of power and conflicts of interest, the DOJ warned that youth defenders cannot serve as the needed check and balance that the U.S. Constitution demands.[31]

The DOJ outlined a series of significant reform measures required to remedy St. Louis County Family Court's widespread practice of violating children's constitutional rights.[32] These remedial measures included creating a specialized youth defense system where children are fully represented at all stages of a juvenile court proceeding and youth defenders have structural protections and requirements to ensure competent, zealous, and constitutionally compliant representation.[33] Youth defenders must have reduced caseloads, youth defense-specific training, and access to forensic social workers and expert witnesses, and must comply with national practice standards of youth defense.[34] Further, the DOJ called for the need to address racial disparities across all critical stages of juvenile court proceedings through data collection, policy changes, and community engagement.[35]

About a year and half later, on December 14, 2016, the DOJ and St. Louis County Family Court settled with a MOA.[36] To ensure compliance with the constitutional demands of due process, the parties agreed on assigning counsel earlier, hiring additional youth defense counsel, mandating youth defense-specific training, and ensuring single-attorney representation for as long as the court maintains jurisdiction over a young person.[37] Additionally, St. Louis County Family Court agreed to participate in training around racial disparities and disproportionate minority contact (DMC) within the juvenile court system and engage in efforts to monitor, evaluate, and minimize DMC within the system.[38] On December 16, 2019, the DOJ terminated its case against St. Louis County Family Court, noting substantial compliance with the MOA.

29 *See id.* at 21.
30 *Id.* at 34.
31 *See id.* at 18.
32 *See id.* at 53-8.
33 *Id.* at 53.
34 *See id.*
35 *See id.* at 55-58.
36 *See* C.R. Div., U.S. Dep't of Just., Memorandum of Agreement Between the United States Department of Justice and the St. Louis County Family Court (2016).
37 *Id.* at 6-9.
38 *Id.* at 10-15.

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