STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(Fort Hood, P.J., and Murray and Stephens, JJ.)

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v. JOHN ANTONIO POOLE, Defendant-Appellant.	MSC No.: 161529 COA No.: 352569 Trial Court No.: 02-000893-FC

BRIEF FOR RODERICK & SOLANGE MACARTHUR JUSTICE CENTER AS *AMICUS CURIAE* SUPPORTING DEFENDANT-APPELLANT

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STATEMENT OF INTEREST[1]

Amicus Curiae the Roderick & Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have participated in civil rights campaigns in areas that include police misconduct, compensation for the wrongfully convicted, extreme sentences, and the treatment of incarcerated people.

INTRODUCTION

This Court should hold that young adults like Mr. Poole cannot be sentenced to a mandatory sentence of life without parole. In other words, the Court should extend the rule of *Miller v Alabama*, 567 US 460 (2012), to young adults. The Court should do so under article 1, section 16 of the Michigan Constitution, which sweeps more broadly than the federal Eighth Amendment. Whereas the Eighth Amendment prohibits penalties only if they are both "cruel *and* unusual," US Const amend VIII, this state's Constitution forbids any punishment that is either "cruel *or* unusual," Mich Const 1963, art 1, § 16. As this Court repeatedly has recognized, that linguistic difference has real bite and commands a broader interpretation of the Michigan Constitution as compared to the federal Eighth Amendment. A sentence may violate the Michigan Constitution based on cruelty alone, regardless of whether the penalty is usual or unusual. That difference matters here because mandatory life-without-parole sentences for young adults are

[1] Counsel for a party did not author this brief, in whole or in part, and did not make a monetary contribution intended to fund the preparation or submission of this brief.

cruel, as the defendant's supplemental brief amply demonstrates, *see* pp 11-21, 35-36. The cruelty of such sentences means that they violate the Michigan Constitution.

While the text of the Michigan Constitution does not define "cruel," the debates at the 1850 Constitutional Convention shed light on the meaning of the term. The Constitution of 1850 adopted the current wording of article 1, section 16; every subsequent Michigan Constitution has followed suit. The 1850 debates make it clear that the delegates believed that a punishment could be cruel if it disregarded the possibility of reformation. A mandatory life without parole sentence for young people is cruel in precisely this way: Such a sentence automatically disregards the possibility of reform, even though youth increases the chance that a defendant is capable of reform.

Extending the rule of *Miller* to young adults would align this Court with the growing recognition among state high courts that they must pick up where the federal courts have left off in their interpretation of the federal Eighth Amendment, particularly when it comes to sentencing youthful defendants. State supreme courts like this one are the ultimate arbiters of their state's own foundational documents. They must not hesitate to go beyond the federal Constitution where their own constitutions demand that they do so.

ARGUMENT

I. The Michigan Constitution Commands Stricter Limitations On Criminal Punishment Than The Federal Eighth Amendment.

The stricter limitations on criminal punishment in Michigan begin with the text of its Constitution. While the federal Eighth Amendment prohibits "cruel and unusual punishments," article 1, section 16 of the Michigan Constitution prohibits either "cruel or unusual" punishment. This Court has affirmed that the Michigan Constitution offers broader protections than the federal Eighth Amendment by finding criminal sentences unconstitutional under article 1, section 16 of the Michigan Constitution, regardless of whether they violate the federal Eighth Amendment.

Support for stricter limitations on criminal punishment in Michigan can be traced back to the framers of Michigan's 1850 Constitution. The delegates to the 1850 convention repeatedly asserted that a key function of punishment is reformation—a purpose wholly negated by sentencing young people to life without parole. The text, judicial interpretation, and legislative history of article 1, section 16 of the Michigan Constitution confirm that Michigan requires stricter limitations on criminal punishment than the federal Eighth Amendment.

A. This Court Rightly Interprets Article 1, Section 16 More Broadly Than The Federal Eighth Amendment.

The plain language of the Michigan Constitution leaves no doubt that its rule against unlawful punishment sweeps more broadly than the federal Eighth Amendment.

More specifically, the Eighth Amendment to the U.S. Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

US Const amend VIII.

In contrast, article 1, section 16 of the Michigan Constitution provides:

> Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained.

Mich Const 1963, art 1, § 16.

Correctly interpreting the textual distinction between a rule against "cruel and unusual" punishment and a rule against "cruel or unusual punishment," this Court recognizes that the Michigan Constitution commands a broader interpretation than the federal Eighth Amendment. Almost half a century ago, this Court highlighted the contrast by capitalizing the conjunctions "and" and "or" when it recited the differing provisions: "The United States Constitution prohibits cruel And unusual punishments. The Michigan Constitution prohibits cruel Or unusual

punishment." *People v Lorentzen*, 387 Mich 167, 171-72 (Mich 1972) (citations omitted). This Court explained: "The prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition." *Id.* In *Lorentzen*, this Court ultimately held that a mandatory minimum sentence of 20 years in prison for the sale of marijuana violates both the Eighth Amendment and the Michigan Constitution. *Id.* at 181.

In *People v Bullock*, this Court explicitly relied on the disjunctive language of the Michigan Constitution to go beyond what the U.S. Supreme Court had proscribed in restricting harsh criminal punishments. 440 Mich 15 (Mich 1992). This Court decided *Bullock* against the backdrop of the U.S. Supreme Court's decision one year earlier in *Harmelin v Michigan*, which reviewed a sentencing judgment of the Michigan Court of Appeals. 501 US 957, 965 (1991). Writing for himself and Chief Justice Rehnquist in *Harmelin*, Justice Scalia flatly concluded: "[T]he Eighth Amendment contains no proportionality guarantee." *Id.* This Court, however, refused to apply Justice Scalia's understanding of the federal Eighth Amendment to article 1, section 16 and instead held that the Michigan Constitution *does* recognize a proportionality constraint on criminal punishment. *Bullock*, 440 Mich at 37. Ultimately, this Court held that a mandatory sentence of life without parole for possession of 650 grams or more of cocaine constituted cruel or unusual punishment under the Michigan Constitution. *Id.* at 21, 37. In adopting a broader analysis under Michigan's "cruel or unusual" punishment clause, this Court found it "self-evident that any adjectival phrase in the form 'A *or* B' necessarily encompasses a broader sweep than a phrase in the form 'A *and* B.'" *Id.* at 30 n11. Therefore, "the set of punishments which are *either* 'cruel' *or* 'unusual' would seem necessarily broader than the set of punishments which are *both* 'cruel' *and* 'unusual.'" *Id.*

B. Courts And Scholars Widely Recognize That A Rule Against "Cruel Or Unusual Punishment" Is Broader Than A Rule Against "Cruel And Unusual Punishment."

Consistent with this Court's settled interpretation of Michigan's rule against "cruel or unusual" punishment, courts and scholars widely interpret the term "cruel or unusual" more broadly than the Eighth Amendment's prohibition on "cruel and unusual" punishment. *See, e.g.*, *Hale v State*, 630 So2d 521, 526 (Fla. 1993) ("The federal constitution protects against sentences that are *both* cruel and unusual. The Florida Constitution, arguably a broader constitutional provision, protects against sentences that are *either* cruel or unusual."); *State v Vang*, 847 NW2d 248, 263 (Minn 2014) ("This difference in wording is 'not trivial' because the 'United States Supreme Court has upheld punishments that, although they may be cruel, are not unusual.'") (citation omitted); *People v Anderson*, 493 P2d 880, 882 (Cal 1972) ("[I]t is instructive to note that article I, section 6, of the California Constitution, unlike the Eighth Amendment to the United States Constitution, prohibits the infliction of cruel Or unusual punishments. Thus, the California Constitution prohibits imposition of the death penalty if, judged by contemporary standards, it is either cruel or has become an unusual punishment.") (footnotes omitted); *State v Fain*, 617 P2d 720, 723 (Wash 1980) (discussing the Washington Constitution's prohibition on "cruel punishment" and stating, "[e]specially where the language of our constitution is different from the analogous federal provision, we are not bound to assume the framers intended an identical interpretation.").

As one scholar recently explained, if a state constitution prohibits "cruel or unusual punishment," then it "bars a punishment that meets one of the parameters of cruelty and unusualness. A cruel punishment violates the state constitution irrespective of whether it is also unusual; an unusual punishment violates the state constitution irrespective of whether it is also cruel." William W. Berry III, *Unusual State Capital Punishments*, 72 Fla L Rev 1, 18 (2020); *see*

also, e.g., Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 Rutgers L J 929, 968 (2002) ("The Maryland drafters explicitly rejected the phrase 'cruel and unusual' in favor of the broader construction 'cruel or unusual.'); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 Wash U L Rev 567, 609 (2010) ("The existence of . . . various permutations of constitutional prohibitions on cruel and/or unusual punishments suggests that the Framers and Ratifiers were likely aware of the significance of using the term 'and' instead of 'or' . . ."); Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and "Cruel and Unusual" Punishment*, 94 NC L Rev 817, 832 n66 (2016) ("This difference [between 'cruel and unusual' and 'cruel or unusual'] is not insignificant, as many courts have noted.").

C. The Text And Drafting History Of The Michigan Constitution Make It Clear That Article I, Section 16's Rule Against "Cruel *or* Unusual Punishment" Is Broader Than The Eighth Amendment's Prohibition Of "Cruel *and* Unusual Punishment."

The language of the Michigan Constitution "is worded differently from . . . the Eighth Amendment." *Bullock*, 440 Mich at 27. Michigan adopted the current language prohibiting "cruel or unusual punishment" in its 1850 Constitution, and that language was carried forward to Michigan's current constitution, which was ratified in 1963, "more than 171 years after" the federal Eighth Amendment. *Id.* The text and drafting history of Michigan's provision leave no doubt that it provides greater protection than the federal Eighth Amendment.

A textual comparison of the two provisions makes it clear that the drafters of the 1850 Michigan Constitution had the Eighth Amendment at the forefront of their minds when they devised the current language. After all, they borrowed several phrases directly from the federal provision in drafting Michigan's analogue. *Compare* US Const amend VIII, *with* Mich Const 1963,

art 1, § 16. At the same time, the Michigan drafters broadened the federal language in two significant—and plainly deliberate—ways. First, they added a provision regarding the detention of witnesses. *Compare* US Const amend VIII, *with* Mich Const 1963, art 1, § 16. Second, they replaced the conjunctive federal prohibition on "cruel *and* unusual punishment" with a disjunctive and broader rule against "cruel *or* unusual punishment." The second difference—the rejection of a "cruel and unusual" standard and the adoption of a "cruel or unusual" standard—is relevant to cases like this one that address the constitutionality of an extremely harsh sentence.

By the time the delegates to the 1850 convention gathered in Lansing, two primary but conflicting models for proscribing punishment had taken route in the United States—a "cruel and unusual" prohibition on the one hand, and a "cruel or unusual" prohibition on the other. Indeed, Justice Scalia has underscored the textual difference between the term "cruel or unusual" in several state constitutions and the term "cruel and unusual" in the Eighth Amendment: "In 1791, five State Constitutions prohibited 'cruel or unusual punishments,'" while others, including the Virginia Declaration of Rights, prohibited only "cruel and unusual punishment" *Harmelin*, 501 US at 966. The Virginia model followed the 1689 English Declaration of Rights. *Id.*

By contrast, the Northwest Ordinance of 1787 contained a broad, disjunctive prohibition: "[N]o cruel *or* unusual punishments shall be inflicted." *Bullock*, 440 Mich at 31 (emphasis added). In 1791, the framers of the federal Bill of Rights opted for the limited formulation, prohibiting "cruel *and* unusual punishments." *See* US Const amend VIII (emphasis added); *see also Harmelin*, 501 US at 966. But Michigan took a different path—in 1850, it decisively adopted the broader formulation, "cruel or unusual" punishment. *See* Mich Const 1850, art 6, § 31.

In prohibiting "cruel or unusual" punishment, Michigan did not only depart from the text of the Eighth Amendment, the Virginia Declaration of Rights, and the English Constitution of

1689—Michigan also changed a prior version of its own Constitution to broaden the prohibition of unlawful penalties. Initially, Michigan followed neither model. This state's "first Constitution, adopted in 1835, provided that 'cruel *and unjust* punishments shall not be inflicted.'" *Bullock*, 440 Mich at 31 (citing Mich Const 1835, art 1, § 18).

Fifteen years later, however, Michigan decisively adopted the sweeping language of the Northwest Ordinance—a rule against "cruel or unusual punishment"—in the Constitution of 1850. *See* Mich Const 1850, art 6, § 31. The amendment was proposed at the 1850 convention by Benjamin Witherell, an experienced judge who would later serve on this Court. *See* Report of the Proceedings and Debates in the Convention to Revise the Constitution of the State of Michigan 68 (1850) (hereinafter "*Report of the Proceedings*") ("On motion of Mr. WITHERELL, [Article I, § 17] was amended by striking 'and unjust' and inserting 'or unusual.'").[2] When this state adopted new constitutions in 1908 and 1963, it maintained and reenacted Justice Witherell's broad formulation—a rule against "cruel or unusual punishment." *See Bullock*, 440 Mich at 31 (citing Mich Const 1908, art 2, § 15; Mich Const 1963, art 1, § 16).

Michigan's deliberate rejection of a rule against "cruel and unusual punishment" means that Michiganders *must* enjoy broader protections under their state Constitution than the federal Eighth Amendment provides. After all, the distinction between conjunctive and disjunctive rules is one of the most fundamental distinctions in legal drafting, and certainly one that would be elementary to a jurist like Justice Witherell. "Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives. . . . With a conjunctive list, *all . . . things are required*—while with the disjunctive list, at least one of the [things] is required, but *any one* . . .

[2] *Available at* https://babel.hathitrust.org/cgi/pt?id=mdp.39015071175213&view=1up&seq=7.

satisfies the requirement." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 12, at 116 (2002) (emphases added).

Well before the 1850s, the distinction between and "and" and "or" constructions became an elementary principle of legal drafting. When a legal document such as a statute, a contract, or a will specified a series of conditions, the "and" connector (also called the "conjunctive" or "copulative" connector) signified that each condition must be met. In contrast, the "or" connector (also called the "disjunctive" connector) signified that only one condition in the series needed to be satisfied.

For instance, Chief Justice John Marshall explained this distinction in *Hughes v Trustees of Town of Clarksville*, 31 US 369, 385-86 (1832), a U.S. Supreme Court case that interpreted a resolution issued by a board empowered to decide land claims. The resolution specified that a canal was to be used for two specified purposes, connected by the word "or." *Id.* at 385. The Court held that the "or" construction clearly signified that the canal could be used for either of the two specified purposes—it did not need to be used for both of them. *Id.* at 385-86. The Chief Justice wrote: "These two members of the resolutions are not connected by the copulative '*and*,' but by the disjunctive '*or*.' The resolution does not require that the canal should be fitted for both purposes, but is satisfied if it be fitted for either." *Id.*

In the 1850s, jurists and lawyers universally understood the critical distinction between "and" constructions and "or" constructions in legal drafting. The Missouri Supreme Court excoriated a lawyer who tried to challenge a land sale by eliding the distinction between "and" versus "or" in interpreting a statute: "[T]he plaintiffs' counsel resort to construction of the phrase, by turning the copulative into the disjunctive—the 'and' into the 'or.' . . . Why resort to this? For what practical benefits?" *Carson v Walker*, 16 Mo 68, 82 (Mo 1852). Similarly, the Pennsylvania

Supreme Court interpreted the language of a verdict to require two specified surveyors, John Engleton and William Brewster, both to assent to land boundaries in order to make the boundaries binding. *Johnston v Bingham*, 9 Watts & Serg 56, 57 (Pa 1845). The court explained that assent of only one of the two would not suffice because the verdict "use[d] the copulative instead of disjunctive conjunction, thereby clearly indicating the intention that both [surveyors] should concur in the survey . . . ." *Id.*

An 1826 treatise on estate law explained that the distinction between "and" and "or" was so established that it had "even been said, that the word 'or' is a disjunctive, and not to be taken as a copulative, but where it would make the whole clause nonsense to construe it otherwise, and where there is an absolute necessity for doing so." William Ward, A Treatise on Legacies Or Bequests of Personal Property 224 (J.S. Littell 1826).[3] In fact, even schoolchildren learned these principles of construction. A grammar textbook used the example "Belladonna *or* arsenic will kill a man" to show that "the *or* shows that *one* will do it; it is not necessary to join them. Hence these words may be called *Disjunctive Conjunctions.*" William C. Goldthwait, A Treatise Upon Some Topics on English Grammar, with Selections for Analysis, Recitation & Reading: Designed for Schools (H.S. Taylor 1850).[4]

In sum, the text and the drafting history of the Michigan Constitution make it clear that the delegates intentionally departed from the Eighth Amendment's prohibition of "cruel and unusual" punishment. By adopting the disjunctive formulation "cruel or unusual," Michigan independently banned both unusual punishments and cruel punishments.

[3] *Available at* tinyurl.com/5a6dcpzt .
[4] *Available at* tinyurl.com/4rds365b .

D. The State Incorrectly Discounts The Difference Between A Rule Against "Cruel And Unusual" Punishment And A Rule Against "Cruel Or Unusual" Punishment.

The State denies any distinction between "cruel and unusual" punishment and "cruel or unusual" punishment. The State's position fails for several reasons. First, it contradicts this Court's precedent and conflicts with the views of many other courts and scholars. Second, the State misunderstands the academic papers that it cites in support of its position. Third, the State ignores the fact that the 1850 Convention rescinded a conjunctive rule and intentionally replaced it with a disjunctive rule. Fourth, the State's position fails to account for Michigan's repeated reenactment of the disjunctive rule in 1908 and 1963.

First, the State's attempt to erase the difference between "and" and "or" directly contradicts the clear statements of this Court in *Lorentzen* and *Bullock. See Lorentzen*, 387 Mich at 171-72 (explaining that the Michigan Constitution prohibits "punishment that is unusual but not necessarily cruel"); *Bullock*, 440 Mich at 30 n11 ("[T]he set of punishments which are *either* 'cruel' or 'unusual' would seem necessarily broader than the set of punishments which are *both* 'cruel' and 'unusual.'"). This view also contradicts the views of many other courts and scholars, as detailed above. *See, supra*, p 5-6.

Second, the State quotes a selection of law review articles, but the State misunderstands and oversimplifies this scholarship. The State cites authors who argue that "cruel and unusual" and "cruel or unusual" were intended to have similar meanings in the 1790s, but not even these authors contend that "cruel" and "unusual" are wholly separate requirements that a defendant must satisfy independently. Rather, these scholars argue that the term "cruel and unusual" and the term "cruel or unusual" *both* have a broader meaning than the U.S. Supreme Court's current interpretation of the federal Eighth Amendment. Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 Wm & Mary Bill Rts J 475, 491 & n81, 504 (2005) (rejecting the U.S. Supreme Court's position in

Harmelin that "an unconstitutional punishment must be both cruel and unusual, just as the literal text [of the federal Eighth Amendment] provides," and instead asserting that "the Founders did not understand the Cruel and Unusual Punishment Clause in a literal fashion and did not mean for a punishment's unusual nature to be an invariable requirement of unconstitutionality."); Robert Casale & Johanna Katz, *Would Executing Death-Sentenced Prisoners After the Repeal of the Death Penalty Be Unusually Cruel Under the Eighth Amendment?*, 86 Conn BJ 329, 336-38 (2012) (rejecting as "historically inaccurate" Justice Scalia's view that the federal Eighth Amendment prohibits a punishment only if it both cruel and unusual).

Third, the State's argument focuses almost entirely on the late 1700s and offers no credible explanation for Michigan's much later replacement of a conjunctive prohibition with a disjunctive prohibition in the 1850 Constitution. In effect, the State would have this Court believe that a learned jurist like Justice Witherell would move to replace a disjunctive rule with a conjunctive rule while failing to appreciate the difference between an "and" rule and "or" rule. *See Report of the Proceedings* at 68 ("On motion of Mr. WITHERELL, [Article I, § 17] was amended by striking 'and unjust' and inserting 'or unusual.'"). That makes absolutely no sense: The clear distinction between an "and" rule and an "or" rule in legal drafting was well-established by the middle of the Nineteenth Century. *See supra* p 9.

Fourth, the State ignores the fact that the Conventions of 1850 and 1908 reenacted Justice Witherell's broad prohibition. Delegates to these Twentieth-Century conventions surely recognized that the "and" versus "or" distinction is one of the most elementary principles of modern legal drafting. Delegates would not have voted for and enacted an "or" rule if they really meant to have an "and" rule—not in 1850, not in 1908, and not in 1963.

E. The Framers Of The Michigan Constitution Of 1850 Considered A Penalty Likely To Be Cruel If It Disregarded The Possibility of Reformation.

While the text of the Michigan Constitution prohibits cruel punishment, the text does not define the term "cruel." However, the current text of article 1, section 16 dates back to the Convention of 1850, which voted down a provision that would have permanently barred people convicted of infamous crimes from voting. The debate over this provision makes it clear that in the view of the delegates, a punishment is likely to be cruel if it is permanent and disregards the possibility of reform. Automatic life without parole sentences like Mr. Poole's are cruel for this precise reason—such sentences deny the possibility of reform for youthful defendants.

Specifically, the delegates considered a provision which would have stated: "Laws may be passed excluding from the right of suffrage, and from holding any office under the laws of this State, persons who may be convicted of an infamous crime, are *non compos mentis* or insane." *Report of the Proceedings* at 298. The convention ultimately adopted a much narrower provision that only excluded people who had engaged in duels. Mich Const 1850, art 7, § 8. This narrow provision likely had no practical effect; several delegates commented that duels were almost unheard of in Michigan. *Report of the Proceedings* at 189-90.

Multiple delegates criticized the broader (and ultimately rejected) provision, which would have allowed the legislature to permanently disenfranchise anyone convicted of an infamous crime, on the ground that such a punishment disregarded the capacity for rehabilitation. For instance, in these debates, Justice Witherell "said there were two reasons for inflicting punishment—warning to the community and reformation of the offender." *Id.* at 298. Delegate Joseph H. Bagg noted, "I know several persons in Detroit who have been convicted of crimes . . . They are now good citizens, and are no doubt reformed of their sins, and vote at our elections." *Id.* at 476. Similarly, Delegate DeWitt C. Walker "believed the object of punishment to be the

reformation of crime. If it does not produce that effect, we ought not to place odium upon him after he has had the wholesome lesson of instruction imparted to him." *Id.* at 352. To Delegate Ebenezer Raynale, "[i]t seemed . . . illiberal and unjust, after a man had suffered what the law required, that he should remain forever a proscribed man." *Id.* at 297. And Delegate Alfred H. Hanscom declared: "There was no reason to suppose that an individual who underwent imprisonment may not be made a good and moral citizen by the operation of the reformatory training which had been adopted in our prison." *Id*. at 476.

One of the most ardent opponents of the defeated measure, Delegate Isaac E. Crary, stated: "If a man go [*sic*] to prison, it is for the purpose of being reformed . . ." *Id.* at 476. Railing against the provision, Crary declared:

> The amendment said in effect that a man who had been guilty of a burglary, or larceny, because he had been guilty of that act, and had been punished by the law of the land, must be forever disqualified from being one of our citizens! By such a proposition in the fundamental law, we asserted that those individuals who had been sent to the penitentiary, and there reformed and made good citizens, should have a constitutional provision hanging over them during the remainder of their life, however well they might conduct themselves—however good citizens of the community they might become, yet we were to fix this stigma upon them . . . .

Id. at 475. Crary even likened permanent disenfranchisement to a mark of Cain that would stigmatize people and prevent reformation:

> After a man is convicted, he is sentenced to punishment as an example to others and to reform the individual; yet you propose to fix a mark upon him, like that of Cain, which shall follow him through life, though you may have reformed him. If a man who has committed a crime shall have been confined so long as to deter others and reform himself, you should not fix a stigma on him. The probability is that he will not reform, if the people are constantly pointing at the black mark upon him.

Id. at 298.

A mandatory life-without-parole sentence for a young adult is cruel in the exact same way. Such a sentence "follow[s] him through life, though you may have reformed him," *id.*, by

condemning a young person to grow old and die in prison with no hope of release based on genuine reform.

II. This Court Should Join The Growing Trend Among State High Courts To Hold That Their Own Constitutions Go Beyond The Federal Eighth Amendment In Limiting Harsh Sentences For Young People.

State courts have not confined the protections of *Miller v Alabama* to the applications identified by the Supreme Court under the Eighth Amendment. When interpreting state Eighth Amendment analogues, state courts have not hesitated to apply *Miller* more broadly. Indeed, the U.S. Supreme Court has affirmatively passed the baton to the state courts. This Court should rise to the occasion by extending *Miller* to young adults.

In *Jones v Mississippi*, the U.S. Supreme Court denied relief to a juvenile sentenced to life without parole. 141 S Ct 1307 (2021). While *Jones* likely heralds the end of new federal limitations on sentences for young people, the decision explicitly points to state courts as a potential source of new protections in this area: "Our decision allows [Petitioner] to present [his] arguments to the state officials authorized to act on them, such as the state legislature, state courts, or Governor." *Id.* at 1323.

Both before and after *Jones*, courts in states that have broader constitutional provisions that restrict punishment have seized the initiative to recognize new protections for young people facing extreme sentences. This Court should do the same in this case by extending its prohibition on cruel or unusual punishment to prohibit mandatory life without parole sentences for young adults.

Washington: The Washington Supreme Court recently interpreted its Eighth Amendment analogue to extend the protections of *Miller* to criminal defendants under age 21, prohibiting mandatory life-without-parole sentences for this age group. *In re Pers Restraint of Monschke* (*Matter of Monschke*), 482 P3d 276, 288 (Wash 2021). In *Monschke*, the two petitioners had

received mandatory life without parole sentences for offenses committed at ages 19 and 20. *Id.* at 277. They challenged the mandatory sentences as "unconstitutionally cruel when applied to youthful defendants like themselves." *Id.* at 308.

Like the Michigan Constitution, the Washington Constitution prohibits cruel punishments, whether or not they are unusual. *See* Wash Const art 1, § 14 ("Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."). In *Monschke*, the Washington Supreme Court noted that "the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment." *Monschke*, 482 P3d at 279 n6 (quoting *State v Bassett*, 428 P3d 343, 348 (2018)). Applying this greater protection under state constitutional law, the court concluded that the petitioners "were essentially juveniles in all but name at the time of their crimes" and were thus entitled to the protections of *Miller* under the Washington Constitution. *Monschke*, 482 P3d at 280.

Earlier, in *State v Bassett*, Basset, a sixteen year old, had received a life without the possibility of parole sentence for the aggravated first-degree murder of his mother, father, and brother. *Bassett*, 428 P3d at 345-46. Basset challenged his sentence by arguing that the Washington Constitution prohibits sentencing juveniles to life without parole. *Id.* at 347. The Court concluded that because the characteristics of youth do not align with the penological goals of life-without-parole sentences, the diminished criminal culpability of children, and the trend of states rapidly abandoning juvenile-life-without-parole sentences, such sentences are categorically unconstitutional under the Washington Constitution. *Id.* at 354.

California: Similarly, the California Supreme Court has gone beyond the protections of the federal Eighth Amendment in limiting felony murder sentences for juveniles. Like the Michigan Constitution, the California Constitution prohibits "cruel or unusual" punishment. Cal

Const art 1, §17. In *People v Dillon*, the court reasoned that because of the defendant's youth and lack of prior history with the law, a sentence of life imprisonment violates article 1, section 17 of the Constitution. 34 Cal3d 441, 488-89 (1983).

Massachusetts: The Massachusetts Supreme Judicial Court held that any juvenile life-without-parole sentence, even a discretionary one, violates the state's Eighth Amendment analogue "because it is an unconstitutionally disproportionate punishment when viewed in the context of the unique characteristics of juvenile offenders." *Diatchenko v Dist Att'y for Suffolk Dist*, 1 NE3d 270, 276 (Mass 2013). Like the Michigan Constitution, article 26 of the Massachusetts Declaration of Rights enjoins "cruel or unusual" punishment. Accordingly, the Supreme Judicial Court has "inherent authority 'to interpret [S]tate constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.'" *Id.* at 282 (alteration in original) (quoting *Libertarian Ass'n of Mass v Sec'y of the Commonwealth*, 969 NE2d 1095, 1111 (Mass 2012)). As the court noted, "We often afford criminal defendants greater protections under the Massachusetts Declaration of Rights than are available under corresponding provisions of the Federal Constitution." *Diatchenko*, 1 NE3d at 283 (citing *Dist Att'y for the Suffolk Dist v Watson*, 411 NE2d 1274 (Mass 1980)).

Iowa: Some state supreme courts have extended sentencing protections for young people beyond the federal minimum even where the relevant state constitution prohibits only "cruel and unusual" punishment. Iowa is one such state. Iowa Const art 1, § 17. The Iowa Supreme Court considered a juvenile offender's discretionary life-without-parole sentence in *State v Seats*, 865 NW2d 545 (Iowa 2015), *holding modified by State v Roby*, 897 NW2d 127 (Iowa 2017). The court held that the sentencing court had not considered proper factors when sentencing the juvenile to life without parole and had considered indicia of youth as an aggravating, rather than mitigating,

factor. The court explained, "The question the court must answer at the time of sentencing is whether the juvenile is irreparably corrupt, beyond rehabilitation, and thus unfit ever to reenter society, notwithstanding the juvenile's diminished responsibility and greater capacity for reform that ordinarily distinguishes juveniles from adults." *Seats*, 865 NW2d at 558. In contrast, the federal Eighth Amendment does not require such a finding. *See Jones*, 141 S Ct at 1311.

One year after *Seats*, the Iowa Supreme Court ruled that all JLWOP sentences violate the state constitution's "cruel and unusual punishment" bar. *State v Sweet*, 879 NW2d 811, 839 (Iowa 2016). The court reasoned that parole boards are better situated than courts to "discern whether the offender is irreparably corrupt after time has passed, after opportunities for maturation and rehabilitation have been provided, and after a record of success or failure in the rehabilitative process is available." *Id.* at 839.

The Iowa Supreme Court has also extended *Miller* protections under its state Eighth Amendment analogue to shorter sentences in a trilogy of cases all decided the same day: *State v Ragland*, 836 NW2d 107, 109-10 (Iowa 2013) (applying *Miller* retroactively to a mandatory JLWOP sentence after the Governor commuted the juvenile defendant's sentence to a term of years); *State v Null*, 836 NW2d 41, 71 (Iowa 2013) (extending *Miller* under the state Eighth Amendment analogue and requiring "an individualized sentencing hearing to determine the issue of parole eligibility" for juveniles sentenced to lengthy, but less than life, sentences); *State v Pearson*, 836 NW2d 88, 89 (Iowa 2013) (analyzing *Miller* and reversing imposition of consecutive sentences totaling a minimum of thirty-five years without the possibility of parole on a juvenile offender).

A year later, the Iowa Supreme Court found all mandatory minimum sentences for juveniles unconstitutional under the Eighth Amendment analogue. *State v Lyle*, 854 NW2d 378,

380 (Iowa 2014). The court noted, "we cannot ignore that over the last decade, juvenile justice has seen remarkable, perhaps watershed, change." *Id.* at 390. The court held: "Mandatory minimum sentences for juveniles are simply too punitive for what we know about juveniles." *Id.* at 400. In summary, the court explained, "Using our independent judgment under article I, section 17, we have applied the principles of the *Roper-Graham-Miller* trilogy," a group of U.S. Supreme Court cases limiting life-without-parole sentences for juveniles, "outside the narrow factual confines of those cases, including cases involving de facto life sentences, very long sentences, and relatively short sentences." *Sweet*, 879 NW2d at 834.

As shown by the above-mentioned examples, state courts commonly exceed the federal minimum and provide greater protections for young people under state Eighth Amendment analogues, particularly in the context of extreme sentences for young people. This Court should do the same by holding that mandatory life-without-parole sentences for young adults violate article 1, section 16 of the Michigan Constitution.

CONCLUSION

For these reasons, this Court should hold that article 1, section 16 of the Michigan Constitution prohibits mandatory life-without parole sentences for young adults.

Respectfully submitted,

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