STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,	
Plaintiff-Appellee,	Supreme Court No. 166129
v.	Court of Appeals No. 359130
EFRÉN PAREDES, JR.,	Berrien County Circuit Court No. 1989-001127-FC
Defendant-Appellant.	

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AND SAFE & JUST MICHIGAN IN SUPPORT OF DEFENDANT-APPELLANT EFRÉN PAREDES, JR.'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF INTEREST[1]

Founded in 1940 by Justice Thurgood Marshall, the NAACP Legal Defense & Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break barriers that prevent Black people from realizing their basic civil and human rights. LDF has a long history of challenging the arbitrary and pernicious influence of racial discrimination in the criminal legal system, including serving as counsel of record and *amicus curiae* urging courts to acknowledge and combat convictions and sentences plagued by such discrimination. *See, e.g.*, *Furman v Georgia*, 408 US 238; 92 S Ct 2726; 33 L Ed 2d 346 (1972); *Coker v Georgia*, 433 US 584; 97 S Ct 2861; 53 L Ed 2d 982 (1977); *McCleskey v Kemp*, 481 US 279; 107 S Ct 1756; 95 L Ed 2d 262 (1987); *Banks v Dretke*, 540 US 668; 124 S Ct 1256; 157 L Ed 2d 1166 (2004); *Buck v Davis*, 580 US 100; 137 S Ct 759; 197 L Ed 2d 1 (2017); *Reed v Goertz*, 598 US 230; 143 S Ct 955; 215 L Ed 2d 218 (2023) (as *amicus*); *United States v Flores-González*, 86 F4th 399 (CA 1, 2023) (same); *Commonwealth v Dew*, 492 Mass 254, 266 (2023) (same); *Commonwealth v Gelin*, No. SJC-13433 (Mass., argued December 4, 2023) (same).

LDF has specifically urged courts evaluating the reliability and constitutionality of extreme juvenile sentences to acknowledge and remediate the influence of race on sentencing outcomes. *See, e.g.*, *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012) (as *amicus*); *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010) (same); *People v Carp*, 496 Mich 440 (2014) (same). In addition, LDF has represented individuals in *Miller* post-conviction proceedings and before state parole boards, observing first-hand disparate outcomes for

[1] Pursuant to MCR 7.312(H)(5), *amici* state that no counsel for a party authored this brief in whole or in part, nor did anyone, other than *amici*, its members, or its counsel, make a monetary contribution intended to fund the preparation or submission of the brief.

youth of color. LDF has also assisted people whom prosecutors and courts have characterized as being "beyond rehabilitation" with the re-entry process and has witnessed them go on to live highly productive and law-abiding lives. Based on the historical and geographical breadth of its expertise in identifying and combating racial discrimination in the criminal legal system, LDF's perspective will assist the Court.

Safe & Just Michigan is a nonpartisan, nonprofit organization based in Lansing, Michigan. SJM advocates for evidence-based reforms to Michigan's criminal justice system that promote public safety while reducing the costs and harms of overcriminalization and extreme sentences. While the primary targets of SJM's advocacy are the Legislature and general public, SJM also participates in litigation that aligns with the organization's values and policy goals.

QUESTION PRESENTED

Does Article 1, § 16 of Michigan's 1963 Constitution, which forbids "cruel or unusual" punishment, prohibit life without parole sentences for people who committed crimes as children?

INTRODUCTION

The United States Supreme Court has recognized that "children are constitutionally different from adults for purposes of sentencing" because they are "less culpable than adults" and "more likely to be rehabilitated." *Miller*, 567 US at 471–72 (2012) (quotation marks and citation omitted). For those reasons, as a matter of federal law, children cannot be sentenced to death. *Roper v Simmons*, 543 US 551, 575; 125 S Ct 1183; 161 L Ed 2d 1 (2005). Thus, sentencing a person to life in prison without the possibility of parole (LWOP) for a crime they committed as a child is "the most severe sentence still available in the whole country." *People v Parks*, 510 Mich 225, 257 (2022). Indeed, because LWOP is "a forfeiture that is irrevocable," *Miller*, 567 US at 474–75

(quotation marks and citation omitted), the label of life does not capture its full severity: a child is being sentenced to die in prison.[2]

Michigan requires its trial courts to "consider the factors listed in *Miller v. Alabama*" before sentencing a child to die in prison. MCL 769.25(6). Those factors include a child's "chronological age and its hallmark features" at the time of the offense, their degree of culpability, and the " 'possibility of rehabilitation.' " *People v Taylor*, 510 Mich 112, 126 (2022) (quoting *Miller*, 567 U.S. at 477–78). The consideration of these factors is required in recognition of the fact that children are "less deserving of the most severe punishments because of their diminished culpability and increased prospects for reform." *Id*. at 124–25.[3]

While the *Miller* factors may be race-neutral, the application of those factors in a fair and equitable manner is compromised by racialized perceptions of who is dangerous, who is feared, and who is viewed as more mature than their biological age. Those biases contribute to the disproportionate criminalization of Black children and other children of color and has long led too many decisionmakers to view them as older, more culpable, and less capable of rehabilitation than white children—the precise factors that determine whether to sentence a child to die in prison.[4] This phenomenon, known as "adultification bias," continues to shape juvenile sentencing in Michigan and limits the protections of *Miller* for children of color, who are often not perceived as children.

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[2] For that reason, we use both the legal terms LWOP and JLWOP, as well as the phrases "child death in prison" or "juvenile death in prison" throughout this brief.

[3] This Court has also recognized the importance of youth by affirming that "[s]entencing courts must consider youth as a mitigating factor" even before sentencing a child to a term of years. *People v Boykin*, 510 Mich 171, 196 (2022).

[4] As discussed later in Section II(B) and III(B), this disproportionate criminalization is the result of individual decisions made by individual prosecutors and judges throughout the State—not as a result of differential levels of criminal activity.

The false belief that some children are not actually children was crystallized by the "super-predator" myth, which stamped youth of color as more adult, inherently violent, and beyond rehabilitation. Those racialized fears precipitated the passage of extreme juvenile sentencing laws in Michigan that turned children into adults in the eyes of the law and contributed to significant racial disparities in the imposition of JLWOP sentences. Those disparities have not improved, and have in many ways worsened: children of color today make up approximately 34% of Michigan's children, but comprise 82% of people initially sentenced to die in prison over the last 10 years.[5] Black children make up only 16% of Michigan's children, but comprise 71% of people sentenced to die in prison since *Miller*—up from approximately 66% before *Miller*.[6]

Efrén Paredes, Jr.'s case illustrates the risk of courts failing to appropriately consider the youth of nonwhite children. Efrén was only 15 years old at the time of his crime, and he was influenced by older co-defendants who were active participants in the offense. Since entering custody, he has maintained a remarkable prison record.[7] Multiple witnesses testified on his behalf at his re-sentencing hearing, including one who described him as a "poster child of rehabilitation."[8] Yet the re-sentencing court concluded that 15-year-old Efrén was "rather mature" at the time of

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[5] Campaign for the Fair Sentencing of Youth, *Justice Delayed Fact Sheet* (2023), p 1, available at <https://cfsy.org/wp-content/uploads/Justice-Delayed-in-Michigan-Factsheet.pdf>; Children's Defense Fund, *The State of America's Children in Michigan: 2023 Factsheet* (2023), available at <https://www.childrensdefense.org/wp-content/uploads/2023/05/SOAC-2023-Fact-Sheet_Michigan.pdf.>.

[6] Campaign for the Fair Sentencing of Youth, *Juvenile Life Without Parole: Unusual. Unequal.* (2023), p 7, available at <https://cfsy.org/wp-content/uploads/Unusual-Unequal-JLWOP.pdf>; Children's Defense Fund, *supra* note 5.

[7] Efrén's accomplishments in prison include completing his GED and college classes, earning a certification as a Braille translator to help people who are blind, mentoring at-risk students in Detroit as part of the My Brother's Keeper program, and co-creating a peer enrichment program that was adopted by the Department of Corrections and administered throughout the state.

[8] Mr. Paredes' Brief Urging a Parolable Sentence at 13, *People v. Paredes*, No. 1989-001127-FH (Mich Cnty Trial Ct December 28, 2020).

his crime, was especially culpable, and had not meaningfully rehabilitated.[9] While the court acknowledged that Efrén's age should have been mitigating, it nonetheless held that his immaturity was "a neutral factor" because Efrén "was an honors student" and "was involved in teams and clubs" while in school.[10] Then, in concluding that Efrén had not rehabilitated, the re-sentencing court did not dispute his decades of accomplishments; instead, it embraced the State's extraordinary narrative that those accomplishments were "act[s] of manipulation."[11] Efrén was re-sentenced to die in prison, which was affirmed, notwithstanding a new presumption against such sentences. S*ee Taylor*, 510 Mich at 119–20.

Efrén is not alone. Michigan has the highest population of people serving JLWOP sentences in the United States, and racial disparities in the imposition of those sentences are even "starker than" the national average.[12] Such extreme and arbitrary sentencing outcomes are inconsistent with the command that punishment "be proportionate to both the offense and the offender," *Taylor*, 510 Mich at 124, and cannot be reconciled with Michigan's state constitutional prohibition against "cruel or unusual punishment," codified in Article 1, § 16.

The four-part test this Court articulated in *People v Lorentzen*, 387 Mich 167 (1972) for determining the propriety of a sentence militates in strong favor of holding that JLWOP sentences are unconstitutional.[13] Applying the *Lorentzen* factors, a sentence of life without the possibility of parole is categorically severe for children, is often imposed on the arbitrary basis of race rather

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[9] Efrén Paredes App. at 16a, 22a–23a.
[10] *Id*. at 3a.
[11] *Id*. at 22a; October 7, 2020 *Miller* Hrg. Tr. Vol. II, at 80–90.
[12] *See* Campaign for the Fair Sentencing of Youth, *Justice Delayed Fact Sheet*, *supra* note 5.
[13] The four-part test evaluates "(1) the severity of the sentence relative to the gravity of the offense; (2) sentences imposed in the same jurisdiction for other offenses; (3) sentences imposed in other jurisdictions for the same offense; and (4) the goal of rehabilitation . . . ." *People v Parks*, 510 Mich at 242 (quoting *Lorentzen*, 387 Mich at 176-81).

than individual culpability, is increasingly out of step with the rest of the country, and is antithetical to the goal of rehabilitation. Each of those factors makes clear that "evolving standards of decency that mark the progress of a maturing society" require the prohibition of LWOP sentences for children. *Parks*, 510 Mich at 241 (quotation marks and citation omitted).

This Court must "ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy." *Peña-Rodriguez v Colorado*, 580 US 206, 224; 137 S Ct 855; 197 L Ed 2d 107 (2017). Failure to do so would "poison[] public confidence" in our courts and damage "the law as an institution." *Buck*, 580 US at 124 (internal quotation marks and citations omitted). *Amici* respectfully urge this Court to grant review and hold that Article 1, § 16 of the Michigan Constitution prohibits death in prison sentences for children.

ARGUMENT

I. The Adultification and Criminalization of Black Children and Other Youth of Color Have Long Prevented Them from Being Perceived and Treated as Children.

The United States Supreme Court and this Court have recognized the "basic precept" that "punishment must be proportionate to both the offense and the offender." *Taylor*, 510 Mich at 124 (citing *Miller*, 567 US at 469). Thus, in sentencing, a person's juvenile status must be considered as mitigation because teenagers have "diminished culpability and increased prospects for reform." *Taylor*, 510 Mich at 125. As this Court has emphasized, "it would be profoundly unfair to impute full personal responsibility and moral guilt to those who are likely to be biologically incapable of full culpability." *Parks*, 510 Mich at 259 (quotation marks and citation omitted).

Despite this recognition that children are "constitutionally different," *Taylor*, 510 Mich at 124, and thus deserve special protections in sentencing, Black children and other children of color have long been denied those protections. *See, e.g.*, Sterling, *'Children are Different': Implicit Bias,*

Rehabilitation, and the 'New' Juvenile Jurisprudence, 46 Loy LA L Rev 1019, 1044 (2013) ("[T]he history of racial disparities in serious juvenile cases reveals that the 'children are different' precept has failed to include [B]lack children since its inception."). Non-white children are often excluded from this framework because "perceptions of the essential nature of children can be affected by race," which means that children of color often "lose the protection afforded by assumed childhood innocence well before they become adults."[14]

The lack of protection afforded to Black children and other children of color stems in significant part from "adultification bias," which is "the tendency of society to view Black children as older than similarly aged youths"[15] and "effectively reduces or removes the consideration of childhood as a mediating factor."[16] When "compared to their [w]hite peers, Black, Native, and Latinx children and youth are" not only "perceived as older than their actual age" but also "more adult-like, less innocent, more deviant, not deserving of leniency to make mistakes, and less in

[14] Press Release, American Psychological Association, *Black Boys Viewed as Older, Less Innocent Than Whites, Research Finds* <https://www.apa.org/news/press/releases/2014/03/black-boys-older> (accessed November 19, 2023); *see also* National Council of Juvenile and Family Court Judges et al., *Shifting the Perceptions and Treatment of Black, Native, and Latinx Youth Involved in Systems of Care*, p 8, available at <https://files.eric.ed.gov/fulltext/ED617199.pdf> (accessed November 27, 2023) ("Black, Native, and Latinx youth are more likely to be perceived by law enforcement and legal actors as older and more culpable for their actions than their [w]hite peers; thus, they are at increased risk of contact with the juvenile justice system and police violence if accused of a crime.").

[15] *In re Personal Restraint of Miller*, 21 Wash App 2d 257; 505 P3d 585 (Wash Ct App, 2022). "Although most research on adultification bias is specific to Black children, research shows that Native and Latinx children and youth are impacted, as well." National Council of Juvenile and Family Court Judges, *supra* note 14, at 7.

[16] Rebecca Epstein et al., Georgetown Law Center on Poverty and Inequality, *Girlhood Interrupted: The Erasure of Black Girls' Childhood* (2017), p 2, available at <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf> (accessed December 12, 2023).

need of nurturing, protection, comfort, and support."[17] As courts have recognized, the "historical fiction" that Black and Brown children are "not actually 'children,' meriting societal protection" is "one of the roots" of racially disparate treatment of juveniles in the justice system. *State v Belcher*, 342 Conn 1, 19 (2022); *accord In re Personal Restraint of Miller*, 21 Wash App 2d 257, 265; 505 P3d 585 (Wash Ct App, 2022) ("[I]t is well-established by empirical literature and has been acknowledged by [this court] that Black children are prejudiced by, in addition to other stereotypes, 'adultification,' or the tendency of society to view Black children as older than similarly aged youths.").

In the most comprehensive study on adultification bias completed to date, researchers demonstrated that adults perceive Black youth to be more adult, less innocent, more culpable, and less in need of protection than their white counterparts.[18] The hundreds of participants in the study, who represented a broadly representative cross-section of society, consistently perceived Black children over the age of 10 as less innocent than their peers.[19] Black children who were felony suspects were seen as more than 4.5 years older than they actually were, which is especially significant at such a young age.[20] As one of the co-authors explained, "[w]ith the average age

[17] National Council of Juvenile and Family Court Judges et al., *supra* note 14 (citing Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 Cornell L Rev 383, 405 (2012)); Epstein et al., *supra* note 16; Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J Personality & Soc Psych 526, 526–29, 539–41 (2014); National Juvenile Justice Network, *Why Implicit Bias Matters for Youth Justice*, <https://www.njjn.org/our-work/implicit-bias-snapshot> (accessed November 20, 2023). *See also accord* Henning, *The Rage of Innocence: How America Criminalizes Black Youth* (New York: Pantheon, 2021); Koch & Kozhumam, *Adultification of Black Children Negatively Impacts Their Health*, 57 Nursing F 963 (2022).

[18] Goff et al., *supra* note 17, at 529, 539–40.

[19] *Id*. at 529.

[20] *Id*. at 532.

estimation for black boys exceeding four-and-a-half years, in some cases, black children may be viewed as adults when they are just 13 years old."[21]

Adultification bias is especially consequential on Michigan's juvenile death in prison sentencing scheme, which specifically requires an evaluation of a person's youth, culpability, and capacity for rehabilitation. MCL 769.25(6). When children of color are not seen as children, there is a significant risk that the assessment of their culpability and capacity for rehabilitation will not be reliably assessed. *See, e.g.*, Sterling, 46 Loy LA L Rev at 1044 ("The historical discrimination against youths of color . . . has inculcated an implicit bias . . . [that] hinder[s] the inclusion of youths of color in the 'children are different' paradigm and imped[es] their ability to benefit from the protections mandated by the Court."); Washington State Supreme Court Gender & Justice Commission, *How Gender and Race Affect Justice Now* 453 (2021), <https://www.courts.wa.gov/subsite/gjc/documents/2021_Gender_Justice_Study_Report.pdf> (explaining that because of adultification bias "juvenile offenders of color are seen as more blameworthy and deserving of harsher punishment" than similarly situated white defendants);

[21] Press Release, American Psychological Association, *supra* note 14. For Black girls, gender stereotypes further exacerbate adultification bias. *See* Epstein et al., *supra* note 16, at 2, 4, 8. Adults perceive Black girls as being more mature and needing less protection than other groups. *Id*. at 1, 4, 7–8. Those factors can lead to a view that Black girls possess greater culpability for their actions—justifying lengthier sentences—than white girls who commit the same crimes. *Id*. at 1, 8–12; *see also* Thompson, *Just Another Fast Girl: Exploring Slavery's Continued Impact on the Loss of Black Girlhood*, 44 Harv J L & Gender 57, 67–68 (2021) (explaining that the adultification of Black girls "peaks between the ages of ten and fourteen and continues through age nineteen" which "likely impacts their treatment in several areas, including school disciplinary processes, the juvenile justice system, and the criminal justice system."); Moore & Padavic, *Racial and Ethnic Disparities in Girls' Sentencing in the Juvenile Justice System*, 5 Feminist Criminology 263, 269, 279–80 (2010) (discussing how Black girls receive more punitive dispositions than their white peers after controlling for the seriousness of the offense, prior record, and age).

Belcher, 342 Conn at 18 n 12 ("Black children always have been seen as less capable of rehabilitation than white children.") (citation omitted).

Though the study of adultification bias is new, its consequences are not: "throughout the history of our country, our policies have reflected that only some children—white ones—have deserved societal protection." *Belcher*, 342 Conn at 18 (citing Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DePaul L Rev 679, 679–82 (2002)). From our country's early days, when "adolescence was being recognized as a distinct developmental stage for white children, many Black children remained enslaved and were viewed as subhuman." *Id*. at 19. Reduced to the legal status of property, Black children were bought and sold as chattel and routinely separated from their parents. "The nascent concept of adolescence, therefore, did not apply to them." *Id*.

The different perceptions of who was a child and who was not led to significant differences in how Black and white children were treated by the legal system.[22] A meta-analysis of convictions of children over the nineteenth century concluded that "the criminal law recognized that children under fourteen years old were not to be held as responsible for their actions as adults. Yet, Black children apparently were not granted the same immunities as white children."[23] In fact, Black children were routinely sentenced to incarceration—even execution—due to "a lack of confidence

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[22] *See, e.g.*, Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 BCL Rev 379, 395–96 (2017).

[23] Platt, *The Child Savers: The Invention of Delinquency* (New Brunswick: Rutgers University Press, 40th anniversary ed., 2009), p 262; *accord* Shelden, *Delinquency and Juvenile Justice in American Society* (Long Grove: Waveland Press, 2006), p 19 (quoting Platt's study to assert that "criminal law recognized at that time that some children under 14, particularly children of color, were held as responsible for their actions as adults"). As another scholar explained, since the meta-analysis examined cases that featured discussions of young children, "they provide an opportunity to examine whether youth as a mitigating factor held equal force for black and white juveniles accused of serious crimes." Sterling, *supra*, at 1044.

in their rehabilitative potential."[24] In one representative case involving a child "under fourteen years of age," the Alabama Supreme Court held that although such a young child is "presumed not to have such knowledge and discretion, as would make him accountable for the felony committed," this young child was "a negro and a slave [and] he knew fully the nature of the act done, and its consequences."[25] In another, the Supreme Court of New Jersey affirmed the conviction of a 12-year-old Black child who was found to be criminally responsible—despite the presumption against such a finding— because he was "cunning" like an adult and possessed "mischievous discretion."[26]

Black youth continued to be denied legal protections through the next century; a national study in 1940 found that there were still "in essence two juvenile justice systems operating under the guise of one: Black youths entered the system at younger ages than whites, their cases were less frequently dismissed, and they were more likely to be committed to institutions."[27] Modern observers have highlighted these findings as a "precursor to the even larger disparities of today."[28]

In sum, the emerging consensus about adultification bias, and the history from which it arises, helps explain how key decisionmakers—including prosecutors, judges, juries, probation officers, and defense attorneys—risk perceiving youth of color to be much older than they are, more culpable for their actions, and less likely to be rehabilitated.[29]

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[24] *See, e.g.*, Birckhead, *supra* note 22, at 398–400.
[25] *Godfrey v State*, 31 Ala 323, 327 (1885).
[26] *State v Guild*, 10 NJL 163, 167, 189 (1828); *see also* Platt, *supra* note 23, at 254–56.
[27] Birckhead, *supra* note 22, at 402 (citing Diggs, *The Problems and Needs of Negro Youth as Revealed by Delinquency and Crime Statistics*, 9 J Negro Educ 311, 313 (1940)).
[28] Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color*, *supra* note 17, at 407, 415–26, 443; *accord* Prisco, *When the Cure Makes You III: Seven Core Principles to Change the Course of Youth Justice*, 56 NYL Sch L Rev 1433, 1449–50 (2012) (comparing modern statistics to this study and concluding that they are "eerily similar").
[29] Birckhead, *supra* note 22, at 410; Equal Justice Initiative, *All Children Are Children* (2017), <https://eji.org/wp-content/uploads/2019/10/AllChildrenAreChildren-2017-sm2.pdf> (accessed

II. The Now-Discredited Super-Predator Myth Amplified Adultification Bias and Precipitated the Passage of Extreme Juvenile Sentencing Laws Throughout the Country and in Michigan.

Nowhere in recent history is the evidence of adultification bias more prevalent than in the national panic over the "super-predator"—the baseless classification of youthful offenders considered to be amoral and capable of the most heinous crimes.[30] Across the country, policymakers and public figures drummed up fears of a new generation of Black and Latino children born with no morals and undeserving of the grace and protections afforded to their white counterparts. That panic led to the passage of some of the harshest juvenile sentencing laws this country has ever seen, the effects of which are still felt today.

Michigan was a leader in this national movement. In often explicitly racialized terms, Michigan lawmakers passed some of the most punitive measures in the country, driving up the juvenile incarceration rate and fueling further disparities in the juvenile and criminal legal systems.

A. The construction of Black and Latino "Super-predators" created a national panic.

In 1995, John J. Dilulio, Jr., then a professor of criminology at Princeton University, coined the term "super-predator," to describe "tens of thousands of severely morally impoverished" and "super crime-prone young males . . . [o]n the horizon."[31] According to Dilulio, committing acts like "murder, rape, rob[bery], [and] assault" came "naturally" to these "violent" youthful offenders.[32] Dilulio warned that by the year 2000, 30,000 young "murderers, rapists, and

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December 12, 2023); Equal Justice Initiative, *Presumption of Guilt* <https://eji.org/issues/presumption-of-guilt/> (accessed November 18, 2023).

[30] *See, e.g.*, Annin, *'Superpredators' Arrive*, Newsweek (January 21 1996); Gergen, Editorial, *Taming Teenage Wolf Packs*, U.S. News & World Report (March 25, 1996), p 68; Zoglin, *Now for the Bad News: A Teenage Time Bomb*, Time (January 15, 1996).

[31] Dilulio, *The Coming of the Super-Predators*, Weekly Standard (November 27, 1995).

[32] *Id*.

muggers"[33] would run America's streets. Dilulio was explicit in framing this fearmongering along racial lines by clarifying that "the trouble will be greatest in black inner-city neighborhoods," and repeatedly associating gang violence and "predatory street criminals" with "black urban youth."[34] Dilulio claimed that "as many as half of these juvenile super-predators could be young black males." Other academics agreed. Northeastern's Dean of the College of Criminal Justice, James Alan Fox, suggested that the United States would experience a "future wave of youth violence" and "teen killers," due to a population increase in the number of Black teenage males over the next century.[35]

The super-predator myth built on a particularly insidious tool of dehumanization—portraying Black and Latino children as animals.[36] The myth invoked images of packs of Black and Latino teens prowling the streets and initiating violent crimes.[37] Television programming further exaggerated the myth, repeatedly showing "young Black males . . . [handcuffed] and shackled, held down by [the] police, or led into courtrooms wearing orange jumpsuits," leaving little doubt that the "packs" were Black children.[38]

Of course, the super-predator myth was always false.[39] But relying on the false presumption that Black and Latino children had an inherent propensity for violence, lawmakers

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[33] *Id*.
[34] *Id*.
[35] *See* James Alan Fox, U.S. Department of Justice, Bureau of Justice Statistics, *Trends in Juvenile Violence: A Report to the United States Attorney General on Current and Future Rates of Juvenile Offending* (March 1996), available at <http://www.bjs.gov/content/pub/pdf/tjvfox.pdf>.
[36] *See, e.g.*, Goff et al., *supra* note 17, at 528.
[37] *Belcher*, 342 Conn at 19.
[38] *Id*. at 19–20 (quoting Birckhead, *supra* note 22, at 410).
[39] The "super-predator" myth was not supported or justified by crime statistics. Juvenile arrests for murder — and juvenile crime generally — had already started falling when Dilulio's racialized presumption was popularized. By 1994, youth violent crime arrest rates had already begun to drop,

enacted a series of "tough-on-crime" measures to police and detain Black children.[40] Between 1992 and 1997, "nearly every state changed its laws to increase penalties for juvenile offenders and facilitate the automatic transfer of children into adult custody."[41] In addition, mandatory minimums replaced discretionary review, and the United States Supreme Court determined that sentencing guidelines need not include rehabilitation measures of any sort.[42] Black children and other children of color have borne the disproportionate brunt of those punitive laws.[43]

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and through 2009 had fallen by "nearly 50% to [their] lowest level[s] since at least 1980." Charles Puzzanchera & Benjamin Adams, U.S. Department of Justice, Office of Juvenile Justice & Delinquency Prevention, *Juvenile Arrests 2009* (December 2011), available at <http://www.ojjdp.gov/pubs/236477.pdf>. Michigan was no exception; crime rates—including juvenile crime rates—were already falling by the time of the 1996 amendments. In 1994, a total of 1,968 Wayne County youth were arrested for violent crimes, compared to 413 arrests in 2004. Cooper, *Judge Says Violent Kids Need Second Chances*, Detroit Free Press (October 19, 2006), p 1B. Because juvenile crime rates and arrest rates plummeted in all areas, including in places that did not adopt harsher sentencing laws, the reduction in Michigan's juvenile crime rate is not a reflection of the efficacy of Michigan's punitive regime. *See* Richard A. Mendel, Annie E. Casey Foundation, *No Place for Kids: The Case for Reducing Juvenile Incarceration* (2011), p 26, available at <https://files.eric.ed.gov/fulltext/ED527944.pdf> (accessed December 12, 2023). Even "tough on crime" criminologists—including Dilulio himself—filed an *amicus* brief in support of the petitioner in *Miller v Alabama*, urging the Supreme Court to recognize that "legislative changes undertaken by certain states were not causally responsible for the decline in juvenile homicide rates." Brief of Jeffrey Fagan et al. as *Amici Curiae* in Support of Petitioners at 30, *Miller*, 567 US 460 (Nos. 10-9646, 10-9647), available at <https://eji.org/wp-content/uploads/2019/11/miller-amicus-jeffrey-fagan.pdf>; *accord Belcher*, 342 Conn at 16 ("We conclude that the superpredator theory was baseless when it originally was espoused and has since been thoroughly debunked and universally rejected as a myth, and it therefore constituted false and unreliable information that a sentencing court ought not consider in crafting a sentence for a juvenile offender.").

[40] Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* (New York: Oxford University Press, 1999), p 206–08.

[41] Campaign for the Fair Sentencing of Youth, *The Origins of the Superpredator: The Child Study Movement to Today* (May 2021), p 7, available at <https://cfsy.org/wp-content/uploads/Superpredator-Origins-CFSY.pdf>.

[42] Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge: Harvard University Press, 2016), p 243.

[43] *See* Forman & Vinson, *The Superpredator Myth Did a Lot of Damage. Courts Are Beginning to See the Light*, New York Times (April 20, 2022).

B. The super-predator myth in Michigan led to the creation of a harsh juvenile sentencing regime where race continues to influence outcomes.

The consequences of the "super-predator" myth were especially pernicious in Michigan, even at the highest levels of government.[44] In direct response to the myth, Michigan legislators in 1988 created automatic waiver provisions that required 15- and 16-year-old children to be tried as adults for certain serious offenses if the prosecutor filed charges in adult court, replacing a prior regime in which judges were required to consider "the seriousness of the offense, the youth's maturity and life experiences, prior juvenile record, amenability to treatment in a youth facility, as well as public safety and welfare" before permitting a child to be tried in adult court.[45] Legislators believed that the 1988 legislation was necessary to respond to the threat of youth violence in Wayne County, the county with the highest Black population in Michigan at the time.[46]

Michigan expanded this automatic waiver in 1996 to include 14-year-old children, and also mandated adult sentencing for children tried and convicted as adults for certain serious offenses such as first-degree murder.[47] Consistent with the super-predator myth, supporters pointed to a "widespread public perception that there exists a growing population of juvenile offenders who are without remorse or compassion and pose an increasing threat to average citizens."[48] The then-

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[44] Former Michigan Governor John Engler, for example, called for building a "punk prison" to lock up more children. Vandervort, *Juvenile Justice Reform and the Myth of the Superpredator*, Bridge Michigan (May 17, 2016), <https://www.bridgemi.com/guest-commentary/juvenile-justice-reform-and-myth-superpredator>.

[45] Deborah LaBelle & Anlyn Addis, *Basic Decency: Protecting the Human Rights of Children: An Examination of Natural Life Sentences for Michigan's Children* (2012), p 4, available at <https://youthtoday.org/wp-content/uploads/sites/13/hotdocs/BasicDecencyReport2012.pdf> (accessed December 12, 2023).

[46] Shook & Sarri, *Trends in the Commitment of Juveniles to Adult Prisons: Toward an Increased Willingness to Treat Juveniles as Adults*?, 54 Wayne L Rev 1725, 1737 (2008).

[47] MCL 600.606; *see also* MCL 712A.2(a)(l); H. Legis. Analysis Sec., Juvenile Justice Reform Package, Senate Bills 281 et al., Second Analysis (Mich. 1996) at 13.

[48] H. Legis. Analysis Sec., Juvenile Justice Reform Package, Senate Bills 281 et al., Second Analysis (Mich. 1996), at 2.

chair of the Senate Judiciary Committee stated that the expanded law was "designed to give the system the tools to deal with these remorseless renegades."[49] He further commented that youthful offenders were "violent animals" and "much more cold-blooded, much more conscienceless than adults."[50] Driven by racist tropes and ongoing moral panic, "lawmakers in Michigan adopted one of the toughest juvenile justice laws in the nation."[51]

These punitive laws had immediate consequences: JLWOP sentences in Michigan spiked in the 1990s, when the super-predator myth was most prevalent. In fact, between 1988 and 1996 the percentage of children sentenced to die in prison for first-degree murder convictions rose from 7.5% to 18%.[52] This trend continued, rising to 23.5% from 1997 to 2001.[53] The vast majority of children impacted by this legislation were Black.[54] A study of automatic waivers in Michigan after the 1988 legislation found that Black children were disproportionately likely to be waived into adult court, comprising 84% of the teenage population being tried as legal adults.[55]

Michigan remains burdened by the consequences of those laws. Today, Michigan has the single largest population of children sentenced to die in prison nationwide—despite having just

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[49] SBT, *Juvenile Justice Reform Passes Senate with Few Amendments*, Capitol Capsule (Mich. Info. & Research Serv., Inc.), Vol. XIII, Iss. 218, Dec. 7, 1995, at 2.
[50] Flesher, *Years of Family Trauma End with Killing, Relatives Say*, Argus Press (August 3, 1997), p A7; Cohen, *Michigan Boy Who Killed at Age 11 Will Stand Trial as Adult*, St. Louis Post-Dispatch (September 19, 1999), p A5.
[51] Bradsher, *Murder Trial of 13-Year-Old Puts Focus on Michigan Law*, New York Times (October 13, 1999); Bradsher, *Michigan Boy Who Killed at 11 Is Convicted of Murder as Adult*, New York Times (November 17, 1999).
[52] Deborah LaBelle et al., ACLU of Michigan, *Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons* (2004), p 10.
[53] *Id*.
[54] *See* Burrow, *Punishing Serious Juvenile Offenders: A Case Study of Michigan's Prosecutorial Waiver Statute*, 9 UC Davis J Juv L & Pol'y 1, 42, 53 (2005).
[55] *Id*. at 43.

the tenth highest population of minors in the country.[56] Michigan is also one of five states responsible for nearly two-thirds of all life without parole sentences for children.[57] And racial disparities have continued to define this punitive sentencing regime; a 2012 report found that "73% of those youth serving life without parole are children of color, despite their only representing 29% of youth in Michigan."[58]

These disparities have persisted—and in certain respects worsened—even after the United States Supreme Court intervened to eliminate mandatory death in prison sentences for children,[59] and this Court went further to create a "presumption that [J]LWOP is disproportionate."[60] In the last ten years, children of color have made up approximately 34% of Michigan's children but comprise 82% of people initially sentenced to die in prison.[61] Black children make up only 16% of Michigan's children but comprise 71% of people sentenced by Michigan courts to LWOP since *Miller*—an even higher percentage than prior to *Miller* and its attendant protections.[62] These

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[56] Campaign for the Fair Sentencing of Youth, *States That Ban Life Without Parole for Children*, <https://cfsy.org/media-resources/states-that-ban-juvenile-life-without-parole/> (accessed November 20, 2023) (noting MI has highest JLWOP population); Children's Bureau, *Child Population Data*, <https://cwoutcomes.acf.hhs.gov/cwodatasite/population/index> (accessed December 12, 2023) (HHS data showing total minor population in each state).

[57] See Priyanka Boghani, *They Were Sentenced as "Superpredators." Who Were They Really?* PBS (May 17, 2017), <https://www.pbs.org/wgbh/frontline/article/they-were-sentenced-as-superpredators-who-were-they-really/>.

[58] LaBelle & Addis, *supra* note 45, at 25.

[59] *Miller*, 567 US at 476.

[60] *Taylor*, 510 Mich at 134.

[61] Campaign for the Fair Sentencing of Youth, *Justice Delayed Fact Sheet*, *supra* note 5; Children's Defense Fund, *supra* note 5.

[62] Campaign for the Fair Sentencing of Youth, *Juvenile Life Without Parole*, *supra* note 6, at 7. Children's Defense Fund, *supra* note 5. In Wayne County, Black youth represent 90% of juveniles sentenced to die in prison, despite being just 41% of the overall population. Safe & Just Michigan, *Life Beyond Life* <https://www.safeandjustmi.org/life-beyond-life/#:~:text=In%20Wayne%20County%2C%20Black%20youth,JLWOP%20sentencing%20exist%20within%20Michigan> (accessed November 27, 2023).

troubling data suggest that adultification bias is curtailing the protections of *Miller* for Black children and other children of color.[63]

Behind these statistics are scores of human stories. A Black Michigan 17-year-old named Quamain Leak was involved in an armed robbery that resulted in a death, although he was not the person who shot the firearm. At his re-sentencing hearing in 2016, Quamain's sentencing judge ruled that his age was an *aggravating* factor and re-sentenced him to LWOP.[64]

Similarly, Efrén was re-sentenced to die in prison by a judge who saw him as a "rather mature" 15-year-old. The judge also dismissed evidence that, while incarcerated, Efrén completed his GED and college classes, earned a certification as a Braille translator to help people who are blind, mentored at-risk students in Detroit as part of the My Brother's Keeper program, and co-created a peer enrichment program that has been adopted by the Department of Corrections and administered throughout the State, believing that Efrén's rehabilitation was simply a series of "acts of manipulation."[65]

The totality of this evidence suggests that, despite the efforts of this Court and the Michigan legislature to implement procedural protections, racial disparities have persisted and will continue to do so. *See, e.g.*, Campaign for the Fair Sentencing of Youth, *Juvenile Life Without Parole*, *supra* note 6, at 7 ("In states that have yet to ban JLWOP and are home to the highest rates of post-*Miller* JLWOP, racial disparities have particularly worsened.").

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[63] The unreliable and arbitrary administration of sentencing children to death in prison is further demonstrated by the significant number of sentencing determinations that have gotten overturned on appeal: "In Michigan, nearly half of JLWOP reimpositions have been reversed by higher courts, and more have been remanded (sometimes multiple times) for further proceedings." Campaign for the Fair Sentencing of Youth, *Juvenile Life Without Parole*, *supra* note 6, at 8.

[64] *Id*. at 8.

[65] October 7, 2020 *Miller* Hrg. Tr. Vol. II, at 80–90; Efrén Paredes App. at 16a, 22a.

III. Juvenile Life Without the Possibility of Parole Sentences Are Unconstitutional Under the Four-Factor Test Established in *People v Lorentzen.*

Article 1, § 16 of the Michigan 1963 Constitution embodies a central promise "that punishment must be proportionate to both the offense and the offender." *Taylor*, 510 Mich at 124. Indeed, as early as 1879 and consistently thereafter, this Court has recognized proportionality as a key protection against constitutionally intolerable sentencing. *Lorentzen*, 387 Mich at 172–78 (tracing the origins of the concept as far back as precedent from 1879 through the modern era). Proportionality under the Michigan Constitution is more protective than its federal analog; "[i]t is through this heightened protective standard that [the Court] must consider" any sentence before it. *Parks*, 510 Mich at 243.

In *Lorentzen*, this Court articulated a four-factor test to determine the proportionality of a sentence: "(1) the severity of the sentence relative to the gravity of the offense; (2) sentences imposed in the same jurisdiction for other offenses; (3) sentences imposed in other jurisdictions for the same offense; and (4) the goal of rehabilitation, which is a criterion specifically 'rooted in Michigan's legal traditions . . . .'" *Parks*, 510 Mich at 242 (citing *Lorentzen*, 387 Mich 167 at 176–81). Consideration of these factors must account for the "evolving standards of decency that mark the progress of a maturing society." *Id*. at 241 (quoting *Lorentzen*, 387 Mich at 179).

Decades of experience—including the decade that has passed since this Court's decision in *People v Carp*, 496 Mich 440 (2014)—show that all four factors render JLWOP sentences inherently disproportionate. In addition to being the most severe sentence possible for a child, Michigan imposes such sentences in a racially disparate manner, concentrating their use against Black children and other children of color. *See supra*, Section II(B). Michigan is also increasingly out of step with its peer states, the majority of whom have recently moved to prohibit the practice

altogether.[66] And death in prison, by definition, denies a child the chance for rehabilitation by passing the ultimate judgment that the child is beyond redemption.

A. JLWOP sentences are inherently severe.

The United States Supreme Court has recognized that death in prison sentences "share some characteristics with death sentences" because unlike any other sentence, imprisonment without hope of release is "a forfeiture that is irrevocable." *Miller*, 567 US at 474–75 (quoting *Graham*, 560 US at 69). The severity of death in prison sentences is particularly heightened when imposed on children. It is well-settled that "children are constitutionally different from adults for purposes of sentencing." *Taylor*, 510 Mich at 124 (quoting *Miller*, 567 U.S. at 471). Because children differ from adults in their "diminished culpability," *Miller*, 567 US at 471, imposing a death in prison sentence on a minor is an even harsher penalty. As this Court recently acknowledged, "the unique characteristics of [even] 18-year-old brains make this penalty [LWOP] even more severe." *Parks*, 510 Mich at 258. Only adding to the severity is that "young persons like [Efrén] will inevitably serve more time and spend a greater percentage of their lives behind prison walls than similarly situated older adult offenders." *Id*. at 257.

In sum, as in *Parks*, "[w]hile we emphatically do not minimize the gravity and reprehensibility of [Efrén's] crime, it would be profoundly unfair to impute full personal responsibility and moral guilt" to decisions he made when "biologically incapable of full culpability." *Parks*, 510 Mich at 259.

[66] Campaign for the Fair Sentencing of Youth, *Juvenile Life Without Parole*, *supra* note 6, at 5.

B. JLWOP sentences are imposed in an arbitrary and discriminatory manner.

The second *Lorentzen* factor asks whether a particular sentence is "reflective of culpability equally" as imposed. *Parks*, 510 Mich at 260. Part of that inquiry is whether a particular sentence is imposed in a manner that punishes similarly situated individuals equally. *Id.* at 260–62 (analyzing how people of different ages would be sentenced after being convicted of the same offense.). The fact that similarly situated individuals could receive vastly different sentences, this Court determined, heightens concerns of "arbitrary line-drawing" that "does not pass scrutiny under the second *Lorentzen* factor." *Id*. at 262.

Those concerns are particularly acute in this context because race is the quintessentially arbitrary factor that has nothing to do with individual moral culpability. As discussed above, JLWOP sentences remain disproportionately imposed on Black children and other children of color. *See supra*, Section II(B). And powerful evidence suggests that those disparities are the result of decisions made by prosecutors and judges throughout Michigan. *See, e.g.*, New York Times Editorial Board, *Michigan Prosecutors Defy the Supreme Court*, New York Times (September 10, 2016) (explaining that "[a]cross the state" prosecutors are "flouting" the "clear message" of *Miller* and *Montgomery*). Statewide, prosecutors were 22% less likely to offer plea deals to youth accused of homicide offenses involving white victims as compared with homicides involving victims of color.[67] When prosecutors made offers at all, prosecutors in counties with higher Black populations, such as Wayne, Kent, and Oakland, consistently offered reduced sentences to minors in the course of plea negotiations at a rate far lower than those in counties with higher white populations.[68] In light of the powerful research on adultification bias, the long history from which

[67] Safe & Just Michigan, *supra* note 62.
[68] *Id*.

it arises, *see supra* Sections I and II, and the data demonstrating that JLWOP sentences are disparately imposed on Black children and other children of color, there is strong evidence that such sentences are being imposed arbitrarily and discriminatorily—not as a function of individual culpability or capacity for rehabilitation.[69] A system where race, rather than culpability, shapes outcomes is an arbitrary one, and represents a "disturbing departure of a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle." *Buck*, 580 US at 123.

C. Other jurisdictions are prohibiting JLWOP sentences, leaving Michigan increasingly an outlier.

The third *Lorentzen* factor requires the Court to contemplate sentences imposed in other jurisdictions for the same offense. This Court has recently acknowledged that "there is a clear national trend toward treating juveniles less harshly than adults and extending *Miller* beyond just the mandatory LWOP context." *People v Stovall*, 510 Mich 301, 318 (2022) (collecting cases and ending use of life *with* parole sentences for children convicted of second-degree murder); *accord State v Bassett*, 192 Wash 2d 67, 86; 428 P3d 343 (2018) (noting "a clear trend of states rapidly abandoning or curtailing juvenile life without parole sentences"). Indeed, as of 2023, 28 states and the District of Columbia have banned the practice.[70] Still, another five states have ceased use of JLWOP and no longer have any individuals serving such sentences, even though it remains technically legal.[71] Thirty-three states, therefore, no longer view LWOP as an acceptable sentence

[69] *See* Campaign for the Fair Sentencing of Youth, *Juvenile Life Without Parole*, *supra* note 6, at 6.
[70] *Id*. at 2.
[71] *Id*. at 3.

for children. In 2011, by contrast, there were only five states that had either banned JLWOP sentences (two states) or had no one serving such a sentence (three states).[72] Put another way, in just over a decade, the number of states that have banned or effectively banned JLWOP sentences has increased more than six-fold. There is, without question, a "trend toward abolition." *Roper*, 543 US at 566.

The majority of states that have banned the practice "now reflect a society and a criminal-punishment system more 'enlightened by a humane justice' than Michigan's current sentencing scheme set forth in this matter." *Parks*, 510 Mich at 264 (citation omitted). Yet, Michigan has resisted this national trend. As of 2023, not only does the State permit JLWOP sentences, but it holds the ignominious distinction of housing the highest population in the country of people serving such sentences.[73] Worse still, racial disparities in Michigan's child death in prison population "are starker than they are nationally."[74]

D. JLWOP does not allow for the possibility of rehabilitation.

A sentence condemning a child to die in prison forecloses all possibility of redemption—regardless of the child's age, or their subsequent growth and development while incarcerated. Efrén's case proves the point. He remains condemned to die in prison for a crime he committed at the age of 15, despite having spent the last three-and-a-half decades working to better himself.[75] None of his self-improvement or maturation will ever matter under his current sentence. It is for this reason that this Court recently reaffirmed that "[a] sentence of life imprisonment without

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[72] *Id*. at 3.
[73] *Id*. at 5.
[74] Campaign for the Fair Sentencing of Youth, *Justice Delayed Fact Sheet*, *supra* note 5.
[75] Michelle Jokisch Polo, *Michigan Lawmakers Want to Get Rid of Life Without Parole Sentence for Juveniles*, NPR (March 3, 2023), <https://www.npr.org/2023/03/03/1161051107/michigan-lawmakers-want-to-get-rid-of-life-without-parole-sentence-for-juveniles>.

parole cannot be justified by the goal of rehabilitation." *Parks*, 510 Mich at 265 (quoting *Graham*, 560 US at 74).

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Rare is the case where all four *Lorentzen* factors point in the same direction. But here, they all lead to one conclusion: child death in prison sentences must be banned throughout the State. It is past time for Michigan to join a national trend toward a more "humane justice." *Id*. at 241 (quoting *Lorentzen*, 387 Mich at 178).

CONCLUSION

Juvenile death in prison sentences are inherently severe and, by definition, deprive children of their rehabilitative potential. And, as Efrén's case demonstrates, Michigan's administration of juvenile death in prison sentences continues to deny too many children of color the protections required by *Miller*, this Court, and the legislature. Continuing to endorse such extreme and racially disparate sentences is antithetical to the command that courts must "purge racial prejudice from the administration of justice." *Peña-Rodriguez v Colorado*, 580 US at 221. Because racial disparities have persisted, this Court should grant review to preclude the imposition of JLWOP sentences altogether and vacate Efrén's sentence.

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Respectfully submitted,

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