

STATE OF MICHIGAN
IN THE SUPREME COURT

In re NDD, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner- Appellee,

v

NDD,

Respondent-Appellant.

Supreme Court No. 169064

Court of Appeals No. 370602

Livingston County Family Court

Juvenile Division No. 19-15969-DL

BRIEF OF AMICI CURIAE JUVENILE LAW CENTER; THE CENTER FOR CIVIL RIGHTS AND CRITICAL JUSTICE; THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY; THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; THE GAULT CENTER; THE AOKI CENTER ON CRITICAL RACE AND NATION STUDIES; THE CENTER FOR RACIAL AND ECONOMIC JUSTICE; THE CENTER ON LAW, RACE & POLICY; THE CENTER ON RACE, INEQUALITY, AND THE LAW; CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN; DETROIT JUSTICE CENTER; AND SAFE AND JUST MICHIGAN

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QUESTIONS PRESENTED

1. Whether discretionary waiver under MCL 712A.4 violates Michigan’s prohibition on cruel or unusual punishment under Const 1963, art 1, § 16 either because (a) it fundamentally alters the nature of the sanction imposed and results in the automatic imposition of severe, adult punishments for youth without sufficient consideration of their developmental maturity, rehabilitative capacity, and diminished culpability; or (b) as administered, it is racially arbitrary.

Amici answer:	Yes
The Court of Appeals answered:	Did not answer
Respondent-Appellant answers:	Did not answer
Petitioner-Appellee answers:	Did not answer

2. Did the Livingston Circuit Court Family Division reversibly err in finding that the best interests of NDD and the public would best be served by granting the prosecution’s motion to waive the court’s jurisdiction over NDD?

Amici answer:	Yes
The Court of Appeals answered:	No
Respondent-Appellant answers:	Yes
Petitioner-Appellee answers:	No

STATEMENT OF INTEREST OF AMICI CURIAE¹

Juvenile Law Center (“JLC”) fights for rights, dignity, equity, and opportunity for youth. JLC works to reduce the harm of the child welfare and justice systems, limit their reach, and ultimately abolish them so all young people can thrive. Founded in 1975, JLC is the first non-profit, public interest law firm for children in the country. JLC’s legal and policy agenda is informed by—and often conducted in collaboration with—youth, family members, and grassroots partners. Since its founding, JLC has filed influential amicus briefs in state and federal courts across the country to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are consistent with children’s unique developmental characteristics and human dignity.

The **Center for Civil Rights and Critical Justice** (“CCRCJ”) is based at Seattle University School of Law and works to achieve a legal system where both historical and present-day racism, oppression, and marginalization no longer control outcomes or otherwise contribute to inequality. CCRCJ educates future lawyers to be agents for social change and racial equality in all areas of the law, advocates for advancement of the law to achieve equal justice, and produces research to drive effective reform by revealing systems of oppression and exclusion. CCRCJ has a special interest in advancing legal rules that account for implicit bias and other forms of behavioral science that help explain the role that race places in influencing outcomes. CCRCJ also has a special interest in ensuring that the criminal legal process continues to evolve such that youth are treated in way that reflects the widely accepted body of scientific literature demonstrating that

¹ Pursuant to MCR 7.312(H)(5), amici state that no counsel for a party authored this brief in whole or in part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the amici curiae, their members, or their counsel made any such monetary contribution.

youth are less culpable and have a greater capacity for reformation. CCRCJ has participated as amicus counsel in nearly every significant juvenile sentencing case before the Washington Supreme Court in the last 15 years, as well as in cases concerning other areas of the juvenile legal process. CCRCJ has also represented clients in challenges to the constitutionality of Washington's transfer statutes. Finally, CCRCJ's amicus advocacy resulted in a published opinion recognizing the risk of adultification bias in the context of juvenile sentencing. See *In re Pers Restraint of Miller*, __ Wash App __; 505 P3d 585, 589 (2022). CCRCJ does not, in this brief or otherwise, represent the official views of Seattle University.

The **Fred T. Korematsu Center for Law and Equality** (“Korematsu Center”), is a non-profit organization based at the University of California, Irvine School of Law. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of over 120,000 Japanese Americans, the Korematsu Center works to advance social justice for all. The Korematsu Center has a special interest in ensuring that the criminal prosecution of youth considers the widely accepted body of scientific literature demonstrating that youth are less culpable and have a greater capacity for reformation. The Korematsu Center also works to understand and remedy the racial disproportionality that plagues our criminal legal system, including adultification of youth of color. The Korematsu Center does not, in this brief or otherwise, represent the official views of the University of California, Irvine School of Law.

The **American Civil Liberties Union of Michigan** (“ACLU”) is the Michigan affiliate of a nationwide, nonpartisan organization with over a million members dedicated to protecting the rights guaranteed by the United States Constitution and our state constitutions. The ACLU has long advocated against lengthy punishments for youth, including through litigation, as amicus

curiae, and through public education. See, e.g., *People v Stovall*, 510 Mich 301; 987 NW2d 85 (2022); *People v Taylor*, ___ Mich ___; ___ NW3d ___ (2025) (Docket Nos. 166428 and 166654); 2025 WL 1085247; *People v Poole*, ___ Mich ___; ___ NW3d ___ (2025) (Docket No. 166813); 2025 WL 978646; *People v Eads*, ___ Mich ___; ___ NW3d ___ (2026) (Docket No. 168205); *People v Malone*, ___ Mich App ___; NW3d ___ (2026); *Hill v Snyder*, 900 F3d 260 (CA 6, 2018); ACLU of Michigan, *Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons* (2004);² ACLU of Michigan, *Unlocking Hope: Juvenile Life Without Parole Sentences in Michigan* (2013).³

The Gault Center, formerly the National Juvenile Defender Center, was created to promote justice for all children by ensuring excellence in youth defense. The Gault Center works to ensure that the constitutional rights of young people in juvenile court are fully protected, in light of the developmental realities of children and the system’s differential treatment of youth based on race, sexual orientation, gender identity and expression, disability, and poverty. The Gault Center works with policy makers, advocates, defenders and community members to stop the harmful practice of transferring young people to the adult system, recognizing that the practice is harmful, does not increase public safety, and produces racially disparate results. The Gault Center has developed both national standards for the performance of youth defense attorneys and national standards for youth defense and juvenile court systems to ensure that all youth have access to the full range of constitutional protections guaranteed by the U.S. Constitution. The Gault Center also conducts assessments of states’ youth defense delivery systems and works with local leaders to strengthen infrastructures that allow children to meaningfully access qualified and specialized

² Available at <<https://bit.ly/45X5mRz>>.

³ Available at <<https://bit.ly/3soDt7h>>.

lawyers. The Gault Center has participated as amicus curiae before the United States Supreme Court and federal and state courts across the country.

Race and Law Centers

The **Aoki Center for Critical Race and Nation Studies** at the University of California, Davis School of Law is a research center dedicated to the study of race, migration, and citizenship in U.S. law and policy. The Center advances research and public engagement concerning race, migration, and citizenship in U.S. law and policy.

The **Center for Racial and Economic Justice** (“CREJ”) is based at the University of California College of the Law, San Francisco (“UC Law SF”). The mission of CREJ is to advance equity and justice for marginalized and subordinated groups through education, research, and academic-community partnerships. CREJ has a strong interest in ensuring the protection of the rights of children. This interest includes eliminating racially arbitrary use of statutes, rules, and policies. This view is in alignment with social science recognition that racial bias can produce disparate and harmful immediate and life course outcomes for children. CREJ does not, in this brief or otherwise, represent the official institutional views of UC Law SF.

The **Center on Law, Race & Policy** at Duke University School of Law (the “Center”) is a nonpartisan, non-profit university-based center that supports research, public engagement, teaching, and programs related to race, law, policy, and people. The Center has an ongoing commitment to fostering racial equity by promoting material change in law and public policy, focusing on education, knowledge production, and community engagement. Accordingly, the Center has an interest in promoting the fair and just administration of the discretionary waiver statute for more equitable racial outcomes. The Center does not, in this brief or otherwise, represent the official views of Duke University or Duke University School of Law.

The **Center on Race, Inequality, and the Law** (“Center”) at New York University School of Law was created to confront and upend the array of American laws, policies, and practices that lead to racial oppression and injustice. Its work includes challenging discretionary decision-making that disproportionately harms youth of color and highlighting the role racial bias plays in shaping punitive outcomes. The Center has a strong interest in ensuring that discretionary waiver practices do not expose Black children to the heightened harms of adult criminal punishment through racially arbitrary decision-making. Neither this brief nor the Center on Race, Inequality, and the Law purports to represent the views of New York University School of Law or New York University.

The **Criminal Defense Attorneys of Michigan** (“CDAM”) is a 501(c)(3) non-profit organization with a purpose of promoting expertise in criminal law, constitutional law, and procedure. CDAM sponsors seminars, training conferences, and advocates for the criminal defense bar’s views before state and legislative bodies. For more than forty years, CDAM has filed amicus briefs in the Michigan Supreme Court, the Michigan Court of Appeals, and the United States Supreme Court.

The **Detroit Justice Center** (“DJC”) works to challenge entrenched opinions that incarceration serves as a solution. In furtherance of this goal, DJC utilizes the following three-pronged approach: (1) defense (e.g., representing system-involved clients and advocating for systemic change), (2) offense (e.g., developing creative economic innovations such as co-ops and community land trusts that empower community members, with an emphasis on formerly incarcerated individuals) and (3) dreaming (e.g., envisioning, articulating and actualizing what we could “build instead” if we prioritized communities over incarceration). DJC is committed to expanding the public safety conversation to explore how we can divest from carceral structures to

invest in communities, while simultaneously protecting the constitutional rights of those impacted by the criminal punishment system.

Safe and Just Michigan (“SJM”) is a statewide nonpartisan, nonprofit criminal justice policy organization with a focus on advocating for a more just criminal justice system that balances the rights of crime victims with the rights of justice-impacted individuals to receive equitable treatment under the law. SJM believes that creating a viable pathway for justice-impacted individuals to re-enter society without having their past criminal history being used against them ultimately benefits society as a whole. The case before this court is of particular interest to SJM, as SJM has consistently advocated for a criminal justice system that treats juveniles in a manner that reflects their age group rather than one where they are treated as adults. SJM’s position is centered on evidence-based research which shows that juveniles lack the requisite brain development as their adult counterparts, and that this should be considered by courts before determining the appropriate sentence for a juvenile.

INTRODUCTION

This Court has asked the parties to brief three questions related to NDD's transfer to adult court under Michigan's discretionary waiver statute, MCL 712A.4. Amici write separately because this case presents fundamental questions regarding the constitutionality of Michigan's discretionary waiver scheme including whether, as Justice Welch recently suggested, there is "a constitutional right to be treated as a juvenile." *People v Williams*, 989 NW2d 246, 250 (Mich, 2023) (WELCH, J., concurring).

Amici urge the Court to grant leave on whether discretionary waiver under MCL 712A.4 also violates Michigan's prohibition on cruel or unusual punishment under Const 1963, art 1, § 16 because it fundamentally alters the nature of the sanction imposed and results in the imposition of automatic adult sentences, and because of racial arbitrariness as administered. These constitutional questions are inextricably intertwined with the questions set out in the Court's Order Granting Oral Argument on the Application.

First, this Court asked whether the Livingston Circuit Court Family Division reversibly erred in finding that the best interests of the juvenile and the public would best be served by granting the prosecution's motion to waive the court's jurisdiction over the respondent. If, as amici argue, discretionary transfer results in unconstitutionally cruel or unusual punishment, then waiver cannot have been in NDD's or the public's best interests.

Second, this Court asked whether Michigan's discretionary waiver statute, MCL 712A.4, violates *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), "because it authorizes an increase in the respondent's maximum punishment" without a jury determination. See Order Granting Oral Argument on the Application. Consideration of the *Apprendi* question necessarily implicates the threshold question of whether the transfer system itself is constitutional. Moreover, the *Apprendi* issue requires consideration of the way in which

the transfer system increases a youth’s maximum punishment—an issue that is intertwined with the question of whether that increase in punishment is constitutional.

Finally, the questions posed by this Court require consideration of whether the circuit court properly has jurisdiction over this juvenile defendant. If Michigan’s current discretionary waiver scheme is unconstitutional, then the circuit court did not have jurisdiction. Whether a circuit court properly has jurisdiction over a juvenile defendant “is a question of law” that the Court can consider regardless of whether it was preserved. *People v Oslund*, 516 Mich 49, 62-63; 33 NW3d 332 (2024) (“[T]his Court can consider an ‘unpreserved issue if it is one of law and the facts necessary for resolution of the issue have been presented.’”) (quoting *People v Washington*, 501 Mich 342, 352 n 21; 916 NW2d 477 (2018)).⁴

LEGAL FRAMEWORK

I. Michigan’s Juvenile Waiver Provisions.

Juvenile proceedings generally take place in the Family Division of the circuit court, which has “sole and exclusive jurisdiction” over youth accused of unlawful behavior, except in cases where the youth is waived into adult court. MCL 600.1021(1)(e); MCL 712A.2(a)(1). Juvenile proceedings are intended to be rehabilitative rather than punitive. See MCL 712A.1(3) (noting that the Juvenile Code is guided by the overarching goals of ensuring a youth “receives the care, guidance, and control . . . conducive to the juvenile’s welfare”). See also *People v Dunbar*, 423 Mich 380, 396; 377 NW2d 262 (1985) (noting that the “Legislature intended that the long-term protection for society is to come from the successful rehabilitation of the juvenile”); *In re Lee*, 282

⁴ See also *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011) (“the preservation requirement is not an inflexible rule; it yields to the necessity of considering additional issues when ‘necessary to a proper determination of a case’” (quoting *Prudential Ins Co of America v Cusick*, 369 Mich 269, 290; 120 NW2d 1 (1963) (internal citations omitted))).

Mich App 90, 99; 761 NW2d 432 (2009) (juvenile justice procedures should have an “emphasis on rehabilitation rather than retribution” (quoting *In re Whittaker*, 239 Mich App 26, 28-29; 607 NW2d 387 (1999))).

Despite Michigan’s emphasis on youth rehabilitation, Michigan law provides three mechanisms by which youth may be removed from ordinary juvenile proceedings and instead subjected to adult criminal proceedings. First, under automatic waiver, a youth who is alleged to have committed certain specified offenses may be transferred to adult criminal court if the prosecutor elects to charge the youth as an adult, probable cause exists to believe the youth committed the specified offense, and the youth is 14 or older.⁵ Second, in designated proceedings, a youth may be tried and convicted as an adult while still under the jurisdiction of the Family Division.⁶ Third, youth can be transferred into the adult criminal legal system through so-called “discretionary waiver,” which was the transfer mechanism used in this case.

Under discretionary waiver, a prosecutor may move to have any “juvenile 14 years of age or older [who] is accused of an act that if committed by an adult would be a felony” tried as an adult. MCL 712A.4(1). Any charge for any felony qualifies. Upon the prosecutor’s motion, the family court must first determine whether there is probable cause to believe the youth committed the offense (Phase I hearing). MCR 3.950(D)(1). The court then determines whether the prosecutor has established by a preponderance of the evidence that the best interests of the youth and the public would be served by waiver (Phase II hearing). MCR 3.950(D)(2)(c). The Michigan Rules of Evidence (except with respect to privileges) do not apply. MCR 3.950(D)(2)(b). The court must consider a series of factors set out in MCL 712A.4(4) and MCR 3.950(D)(2)(d), and must “giv[e]

⁵ See MCL 764.1f; MCL 712A.2(a)(1); *Oslund*, 516 Mich at 64; Michigan Judicial Institute, *Juvenile Justice Benchbook* (2026), Chapter 16.4.

⁶ MCL 712A.2d; MCL 712A.18(1)(o); *People v Petty*, 469 Mich 108, 113; 665 NW2d 443 (2003).

greater weight to the seriousness of the alleged offense and the juvenile’s prior record of delinquency than to the other criteria.” MCL 712A.4(4). Under current law, a youth tried as an adult under this provision must be sentenced as an adult. *People v Veling*, 443 Mich 23, 39 & n 19; 504 NW2d 456 (1993).

II. The Michigan and U.S. Constitutions Require Courts to Account for the Developmental Differences Between Youths and Adults.

It is now settled law under the Michigan and U.S. Constitutions that young people must be treated differently than adults by the criminal legal system, in recognition of the unique developmental characteristics that render them less criminally culpable and more capable of growth, change, and rehabilitation. As this Court knows, neuroscientific research demonstrates that a young person’s prefrontal cortex undergoes crucial changes during adolescence.⁷ Though a youth has “adult-like” cognitive capacity to apply in certain “cold” decision-making contexts, the youth’s sense of time, lack of future orientation, pliable emotions, calculus of risk and gain, and vulnerability to pressure will often drive them to make very different decisions than an adult would make in emotionally arousing or “hot” situations—i.e., decision-making that is often dealt with in the juvenile or criminal justice systems.⁸ Adolescents are also especially vulnerable to “negative

⁷ See *People v Parks*, 510 Mich 225, 248-252; 987 NW2d 161 (2022) (discussing research on adolescent brain development); Szczepanski & Knight, *Insights into Human Behavior from Lesions to the Prefrontal Cortex*, 83 *Neuron* 1002, 1002 (2014) (stating that the frontal lobes “play an essential role in the organization and control of goal-directed thought and behavior”); Silvers et al., *vIPFC–vmPFC–Amygdala Interactions Underlie Age-Related Differences in Cognitive Regulation of Emotion*, 27 *Cerebral Cortex* 3502, 3509-3512 (2017).

⁸ See Scott & Steinberg, *The Science of Adolescent Development and Teenagers’ Involvement in Crime, Rethinking Juvenile Justice*, p 28 (Cambridge: Harvard University Press, 2010) (hereinafter “*Adolescent Development*”); Cohen et al., *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 *Psych Sci* 549, 559 (2016); Icenogle et al., *Adolescents’ Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a “Maturity Gap” in a Multinational, Cross-Sectional Sample*, 43 *Law & Hum Behav* 69, 71 (2019).

influences and outside pressures, including peer pressure.” *Roper v Simmons*, 543 US 551, 569; 125 S Ct 1183; 161 L Ed 2d 1 (2005).⁹ Finally, there is ample evidence that in individuals who have experienced significant trauma (i.e., exposures to violence, physical abuse, neglect, living in poverty), the maturation of systems governing self-regulation and impulse control is often slower.¹⁰

These neurobiological differences—the inclination toward risky behavior, the inability to consider long-term consequences and control impulses in high-risk contexts, and the increased capacity for change—have driven this Court’s significant sentencing jurisprudence under Article 1, § 16 of the Michigan Constitution, which provides greater protections to youth facing adult criminal punishment than under the Eighth Amendment.¹¹ In *People v Boykin*, this Court held that

⁹ *Adolescent Development, supra*, at 37 (“susceptibility to peer influence and orientation toward peers” is one of the psychosocial factors most strongly linked to age differences in criminal activity).

¹⁰ See Ferrer, *Transformation Through Accommodation: Reforming Juvenile Justice by Recognizing and Responding to Trauma*, 53 Am Crim L Rev 549, 572-573 (2016); Putnam, *The Impact of Trauma on Child Development*, 57 Juv & Fam Ct J 1, 7 (2006) (history of trauma has long-term negative impacts on youth’s neurological and psychosocial development); NeMoyer, *Kent Revisited: Aligning Judicial Waiver Criteria with More Than Fifty Years of Social Science Research*, 42 Vermont L Rev 441, 468 (2018) (researchers studying the effects of trauma on youth have “consistently revealed a link between trauma exposure and delinquency . . .”) (citing Kerig & Becker, *Posttraumatic Stress Symptoms Are Associated with the Frequency and Severity of Delinquency Among Detained Boys*, 40 J Child & Adolescent Psychol 765, 768-769 (2011)).

¹¹ The U.S. Supreme Court has likewise repeatedly concluded that the Eighth Amendment prohibits the most extreme punishments for young people due to their diminished “culpability or blameworthiness” and the hallmark characteristics of youth. *Roper*, 543 US at 575 (prohibiting the imposition of the death penalty on youth under 18); see also *Graham v Florida*, 560 US 48, 82; 130 S Ct 2011; 176 L Ed 2d 825 (2010) (striking down life without parole for juveniles convicted of nonhomicide offenses); *Miller v Alabama*, 567 US 460, 465; 132 S Ct 2455; 183 L Ed 2d 407 (2012) (striking down mandatory life without parole sentences for juveniles convicted of homicide). The Court has recognized that “criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” *Graham*, 560 US at 76; see also *JDB v North Carolina*, 564 US 261, 272; 131 S Ct 2394; 180 L Ed 2d 310 (2011) (holding that a youth’s age must inform whether they were in custody for purposes of administering *Miranda* warnings); *Safford Unified School District No 1 v Redding*, 557 US 364, 377; 129 S Ct 2633; 174 L Ed 2d

when sentencing children convicted of first-degree murder, courts must “consider the defendant’s youth and must treat it as a mitigating factor.” 510 Mich 171, 189; 987 NW2d 58 (2022). In *People v Stovall*, the Court held that Article I, § 16 of the Michigan Constitution prohibits imposition of a parolable life sentence for a juvenile convicted of second-degree murder. 510 Mich 301, 322; 987 NW2d 85 (2022). And in *People v Parks*, the Court held that because there is no difference in the neurological characteristics of 18-year-olds compared to their juvenile counterparts, the Michigan Constitution prohibits mandatory life without parole sentences for 18-year-olds convicted of first-degree murder. 510 Mich 225, 265; 987 NW2d 161 (2022). This Court has since extended the protections in *Parks* to prohibit mandatory life without parole sentences for 19- and 20-year-olds under Article I, § 16. *People v Taylor*, __ Mich __; __ NW3d __ (2025); 2025 WL 1085247, at *16. Finally, in *People v Eads*, this Court held that a term of years sentence of 50-75 years imposed on a person who was “youthful” (under the age of 21) at the time of the commission of the crime of second-degree murder violates Article I, § 16. __ Mich __; __ NW3d __ (2026); 2026 WL 2208108, at *4.

SUMMARY OF ARGUMENT

Although this Court has repeatedly held that Michigan’s constitutional prohibition on cruel or unusual punishment under Article 1, § 16 affords robust protections for youth facing severe penalties, it has never squarely addressed whether a child’s waiver to adult court to face adult criminal sanctions under MCL 712A.4 violates this clause. The neurobiological differences relevant to sentencing are also relevant to the constitutionality of waiver under MCL 712A.4(4). The waiver process fails to adequately account for youth’s lesser culpability because under

354 (2009) (holding the Fourth Amendment precludes subjecting a 13-year-old to a strip search without a reasonable suspicion of danger).

discretionary waiver, “once a juvenile is tried as an adult, he must be sentenced as an adult—the circuit judge has no discretion in this respect.” *Velting*, 443 Mich at 39 & n 19 (“The postconviction sentencing hearing does not apply to jurisdiction of minors that is waived to circuit court under the traditional procedures”).¹² Thus, the discretionary waiver statute exposes youth to mandatory adult punishment once waived. Nor do the transfer factors—both those applied to NDD at his transfer hearing as well as the current factors as amended effective October 1, 2024¹³—sufficiently account for neurobiological differences or protect against unconstitutionally cruel or unusual punishments. Because the statute mandates the family court to “giv[e] greater weight to the seriousness of the alleged offense and the juvenile’s prior record of delinquency than to the other criteria,” there is a significant risk that consideration of these neurobiological differences is reduced to a formality, with the crime-related factors driving outcomes. MCL 712A.4(4)

This Court should now recognize that the discretionary waiver statute fundamentally alters the nature and severity of the consequence imposed—transforming what would otherwise be a rehabilitation-centered juvenile disposition into an automatic adult criminal punishment. That punishment is cruel or unusual in violation of Article 1, § 16 of the Michigan Constitution both on its face and as applied to NDD, whose offense was stealing and riding a go-cart. The discretionary waiver statute also produces racially arbitrary outcomes, rendering the statute cruel or unusual as administered. Finally, because discretionary waiver to adult court is cruel or unusual punishment,

¹² See also *People v Cosby*, 189 Mich App 461, 464-465; 473 NW2d 746 (1991) (“We are persuaded . . . that the Legislature intended that the dispositional hearing requirements” of MCL 769.1(3) “apply only in cases where a circuit court . . . obtains jurisdiction over a juvenile under the . . . ‘automatic waiver’ rules set forth” in MCL 600.606”); *People v Williams*, 245 Mich App 427, 433; 628 NW2d 80 (2001) (“MCR 6.901(B) makes it clear that this sort of sentencing hearing leaving open the possibility of an adult *or* juvenile sentence does not apply in cases in which the circuit court acquires jurisdiction pursuant to a traditional waiver process.”).

¹³ See *infra* notes 23-24.

the Livingston Circuit Court Family Division reversibly erred in finding that the best interests of the juvenile and the public would best be served by granting the prosecution's motion to waive the court's jurisdiction over NDD.

ARGUMENT

I. This Court Should Grant Leave on the Question of Whether Michigan's Discretionary Waiver Scheme Violates Article I, § 16 of the Michigan Constitution.

A. Discretionary Waiver to Adult Criminal Court Is Punitive.

1. The Purpose of Waiver to the Adult System Is Punishment.

The stated purpose of adjudicating a youth in juvenile court is to secure to the youth the rehabilitative purpose and function of the juvenile legal system. See *In re Diehl*, 329 Mich App 671, 691; 944 NW2d 180 (2019) (“the purpose of juvenile-justice procedure is not to punish the offender, but to ensure the juvenile receives the care, guidance, and control necessary to serve his or her welfare”); *In re Lee*, 282 Mich App at 99 (Michigan juvenile justice procedures should have an “emphasis on rehabilitation rather than retribution”) (quoting *In re Whittaker*, 239 Mich App at 28-29); *Artibee v Cheboygan Circuit Judge*, 54 Mich App 433, 441-442; 221 NW2d 225 (1974), rev'd on other grounds, 397 Mich 54 (1976) (noting that the “overriding purpose of our juvenile courts” is not “to deter[,] . . . restrain, or to find a child ‘guilty’” but rather to “cure”).

By contrast, the purpose of waiving a youth for prosecution in the adult criminal system is to subject the youth upon conviction to the punitive purposes of retribution and deterrence. See *Boykin*, 510 Mich at 183 (recognizing “disciplin[ing] of the offender,” and “deterrence” as some of the principal aims of adult criminal sentencing); *People v Hana*, 443 Mich 202, 228; 504 NW2d 166 (1993) (CAVANAGH, C.J., dissenting) (noting that “[i]n reality, the decision to waive juvenile court jurisdiction is not a decision to *rehabilitate*, but, rather, a decision to *punish* the juvenile upon conviction”); *Velting*, 443 Mich at 27, 38-39 (recognizing that the imposition of adult

penalties onto juvenile offenders suggests an intent “to treat juvenile offenders . . . more harshly and more like adults”); Vandervort, *When Minors Face Major Consequences: What Attorneys Representing Children in Delinquency, Designation, and Waiver Proceedings Need to Know*, 80 Mich Bar J 36, 36 (2001) (concluding that Michigan’s discretionary waiver statute “makes clear that one purpose” of such proceedings “is to punish rather than to rehabilitate”).

Indeed, multiple courts and scholars have recognized that the waiver decision is, in effect, a decision to subject a youth to punishment. See *State v Saenz*, 175 Wash 2d 167, 174; 283 P3d 1094 (2012) (noting that when a youth is waived out of “juvenile court jurisdiction,” the youth “exit[s] a system designed to rehabilitate and enter[s] a system designed to punish”); *Matter of Seven Minors*, 99 Nev 427, 433; 664 P2d 947 (1983) (explaining that “the reason for transfer” is to subject some youth to “punishment, deterrence and retribution found only in the adult criminal justice system”); *Hidalgo v State*, 983 SW2d 746, 755 (Tex Crim App, 1999) (“Once transferred, a child will be subject to the retributive punishment of the criminal justice system instead of the rehabilitative goal of the juvenile justice system.”); *United States v Juvenile Male*, 590 F3d 924, 937 (CA 9, 2009), vacated on other grounds by 564 US 932 (2011) (acknowledging that juvenile transfer “shift[s] the juvenile out of a rehabilitative system entirely and into a punitive one”); Loughran et al., *Differential Effects of Adult Court Transfer on Juvenile Offender Recidivism*, 34 Law & Hum Behav 476, 477 (2010) (identifying “retribution” and “deterrence” as the goals of transfer provisions); Podkopacz & Feld, *The Back-Door to Prison: Waiver Reform, “Blended Sentencing,” and the Law of Unintended Consequences*, 91 J Crim L & Criminology 997, 1000 (2001) (characterizing waiver as a decision between “treat[ing] a youth as a juvenile or punish[ing] him as an adult”).

Because discretionary waiver affirmatively moves youth out of a system with an explicit purpose of rehabilitation into one more focused on punishment, retribution, and deterrence, it constitutes a decision to prioritize punishment over rehabilitation.

2. Discretionary Waiver of Youth to the Adult System Functions as a Sentencing Mechanism Because It Triggers Automatic Adult Sentencing.

Waiver is punitive because it functions as a sentencing mechanism. When a youth is tried in juvenile court and adjudicated delinquent of a charged offense, the court may impose a wide array of dispositional options and must consider the goals of rehabilitation and the placement of a young person in the least restrictive environment. Michigan Judicial Institute, *Juvenile Justice Benchbook* (2026), Chapter 10 (hereinafter “*Juvenile Justice Benchbook*”). By contrast, when a youth is transferred to the adult system through discretionary waiver, that youth is automatically subject to a mandatory adult sentence.¹⁴ See *Velting*, 443 Mich at 39.¹⁵ As a result, youth whose

¹⁴ However, a sentence of life imprisonment without the possibility of parole may not be mandatorily imposed. *Taylor*, 2025 WL 1085247, at *16. Additionally, life imprisonment with the possibility of parole and extreme-term-of-year sentences have been deemed cruel and unusual for youth convicted of second-degree murder. *Stovall*, 510 Mich 301 (2022); *Eads*, 2026 WL 2208108.

¹⁵ Importantly, *Velting* did not grapple with whether mandatory adult sentencing after discretionary waiver is constitutionally permissible. Rather, *Velting* held that a circuit court has jurisdiction to sentence a youth who is tried under the automatic waiver statute but convicted only of an offense that is not subject to automatic waiver. 443 Mich at 27. Among numerous reasons for reaching that conclusion, the Court suggested that it would avoid the “anomalous result” of subjecting youth to harsher adult sentences under the discretionary waiver statute—which the Court said requires adult sentencing—than would be imposed under the automatic waiver statute, which allows for a juvenile disposition. *Id.* at 39. The Court cited *People v Cosby*, 189 Mich App 461; 473 NW2d 746 (1991), and MCR 6.901(B) for the proposition that adult sentencing is mandatory after discretionary waiver. *Velting*, 443 Mich at 39 n 19. *Cosby*, in turn, concluded without much analysis that the requirement for the circuit court to hold a juvenile sentencing hearing applies only in cases of automatic waiver, not discretionary waiver. 189 Mich App at 465. However, the statute providing for juvenile sentencing hearings does not on its face suggest any such limitation:

Unless a juvenile is required to be sentenced in the same manner as an adult under subsection (1), a judge of a court having jurisdiction over a juvenile shall conduct a hearing at the juvenile's sentencing to determine if the best interests of the public would be served by placing the juvenile on probation and committing the juvenile

cases are waived into adult court under MCL 712A.4 are subject to harsher and more punitive sentences.

Sentences in adult court are often significantly more severe than sentences in the juvenile system. For example, a 14-year-old who pickpockets a passerby's wallet may be subject to 10 years imprisonment if waived into adult court and convicted. MCL 750.357. And if the 14-year-old shoves the passerby in the course of pickpocketing, he may instead be charged with unarmed robbery and subject to 15 years imprisonment—longer than the youth has even been alive. MCL 750.530. See generally Michigan Judicial Institute, *State of Michigan Sentencing Guidelines Manual* (updated May 20, 2026), p 11¹⁶ (showing maximum adult sentences ranging from 5 years for Class E offenses like unlawful driving, up to a maximum of life imprisonment for Class A offenses). But were that same 14-year-old adjudicated delinquent in juvenile court, he would be subject to any of a series of dispositional, rehabilitation-focused options that the juvenile court found appropriate, including in-home probation, community service, foster care, residential treatment, placement with a licensed Department of Health and Human Services agency, or

to an institution or agency described in the youth rehabilitation services act, 1974 PA 150, MCL 803.301 to 803.309, or by imposing any other sentence provided by law for an adult offender . . . [MCL 769.1(3).]

Cosby looked to MCL 6.901(B), which provides that the subchapter of the Court Rules Applicable to Juveniles Charged With Specified Offenses does “not apply to a person charged solely with an offense in which the family division has waived jurisdiction pursuant to MCL 712A.4.” This means that MCR 6.931, which sets out the process for juvenile sentencing hearings, does not apply in cases of discretionary waiver. But that is a different question from whether (1) *Cosby* (on which *Velting* relied) correctly held that the MCL 769.1(3)'s requirement for a juvenile sentencing hearing is inapplicable in discretionary waiver cases; and (2) whether mandatory adult sentencing after discretionary waiver is constitutional. The Court may wish to directly address the statutory interpretation question and, if it reaches a different conclusion on the meaning of MCL 769.1(3), amend the Court Rules accordingly.

¹⁶ Available at <<https://www.courts.michigan.gov/49ddcf/siteassets/offices/mji/felony-sentencing-online-resources/sgm.pdf>>

placement in a secure facility. See *Juvenile Justice Benchbook*, Chapter 10. The juvenile court's jurisdiction lasts only until the youth is 20, MCL 712A.2a(1), or in some cases 21, MCL 712A.2a(5).

Because adult sentences are mandatorily imposed on youth transferred to adult court via discretionary waiver, such youth often face long prison terms. In the most severe cases, these may include lengthy term of year sentences, or even lifetime sentences. See, e.g., Carley, Senate Fiscal Agency, *A Comparison of Michigan's Residential Placement Options for Juvenile Delinquency Cases* (May 2012), p 12¹⁷ (noting that sentences for youth waived into the adult criminal system can be as long as 75 years, not including life sentences). Even setting aside the most severe cases, youth transferred to adult court via discretionary waiver may still receive unacceptably long adult sentences. See e.g., *People v Williams*, 245 Mich App 427 (youth subject to traditional waiver sentenced to up to 15 years); *People v Greer*, unpublished per curiam opinion of the Court of Appeals, issued February 25, 2000 (Docket No. 215236) (youth subject to traditional waiver sentenced to up to 20 years); *People v Ingram*, unpublished per curiam opinion of the Court of Appeals, issued October 28, 2010 (Docket No. 293872) (youth subject to traditional waiver sentenced to up to 30 years). Indeed, data from 2012 reveals that the average sentence length for Michigan youth waived into the adult system was 11.3 years. See *A Comparison of Michigan's Residential Placement Options*, p 5.

For children charged with sexual offenses, waiver into the adult system can result in the automatic imposition of sex offender registration requirements that would not be imposed if they were adjudicated as juveniles. See *People v Kardasz*, __ NW3d __ (Mich, 2025); 2025 WL

¹⁷ Available at <<https://sfa.senate.michigan.gov/Publications/Issues/ResidentialJuvenileCases/ResidentialJuvenileCases.pdf>>.

3691966, at *14 (holding that sex offender registration is punishment). For example, a youth convicted as an adult of a Tier I or II offense will be subject to mandatory sex offender registration, even though those offenses cannot trigger registration for youth adjudicated as juveniles. See MCL 28.722(a)(i), (iii). See also MCL 28.728(4)(a) (providing that only youth convicted as adults are included in the public sex offender registry website).

Because discretionary waiver automatically triggers mandatory adult sentencing and significantly increases the allowable punishment to which youth can be subjected, waiver is best understood as a sentencing decision rather than a purely jurisdictional decision. Indeed, scholars have explained that “transferring juveniles to criminal courts is the most consequential sentencing decision juvenile courts make.” Podkopacz & Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 Law & Ineq 73, 79 (1996); see also Kennedy, *Juries for Juveniles*, 46 Tex Tech L Rev 291, 292 (2013) (describing waiver as “a threshold sentencing decision”); Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 Minn L Rev 141, 269 (1984) (describing transfer as “a sentencing decision that represents a choice between the punitive disposition of adult criminal court and the ‘rehabilitative’ disposition of the juvenile court”).

Numerous other courts have affirmed this same view. See *State in Interest of JF*, 446 NJ Super 39, 58; 140 A3d 564 (App Div, 2016) (“a waiver to adult court is part of the extended process of determining the severity of the sentence that will be doled out” to “the juvenile”); *Gonzales v Tafoya*, 515 F3d 1097, 1111 (CA 10, 2008) (endorsing the view that “[w]aiver of juveniles to criminal court for adult prosecution represents the single most important sentencing decision that juvenile court judges make”) (internal citation omitted); *Kemplen v State of Maryland*, 428 F2d 169, 174-175 (CA 4, 1970) (“By deciding the waiver issue, the juvenile court determines whether

the [youth], if found guilty, will receive nonpunitive rehabilitation as a juvenile . . . or will be sentenced as an adult.”); *In Interest of MDN*, 493 NW2d 680, 682 (ND, 1992) (“Relinquishing juvenile court jurisdiction . . . to an adult criminal court represents a choice between sentencing in rehabilitative juvenile courts or sentencing in essentially punitive adult criminal courts.”).

This Court’s decision in *People v Hana*, 443 Mich 202, does not foreclose this Court from holding that, under Article I, § 16, waiver constitutes punishment. In *Hana*, this Court previously concluded that a child transferred from juvenile court to adult criminal court is “not truly subjected to a harsher penalty, *because guilt has not yet been established*,” and added that “we are unaware of a constitutional right to be treated as juvenile.” 443 Mich at 221-222 (emphasis in original). *Hana*’s observation that it was unaware of a constitutional right to be treated as a child “has been significantly undermined by this Court’s and the United States Supreme Court’s explicit constitutional findings that juveniles are different from adults.” *Williams*, 989 NW2d at 250 (WELCH, J., concurring). Moreover, the brain science that drove those constitutional findings did not yet exist when *Hana* was decided. Cf. *State v Mann-Tate*, 420 Wis 2d 178, 205; 2026 WI App 17; 33 NW3d 836 (2026) (finding the State’s “reliance” on the argument that “there exists no fundamental right to be treated as a juvenile . . . misplaced” because the Wisconsin Supreme Court’s holding articulating this view “predate[d] the United States Supreme Court’s cases . . . establishing the important and fundamental differences between juvenile and adults”).

Nor did *Hana* directly address Article 1, § 16; instead, it concerned the evidentiary standards applicable to the dispositional phase of waiver hearings. And *Hana*’s holding—that the full panoply of Fifth and Sixth Amendment constitutional protections do not apply to this second phase of traditional waiver hearings—failed to account for the significant body of scholarship and caselaw, described above, recognizing waiver as tantamount to a sentencing decision. For this

reason, *Hana* now represents the “minority view” regarding the scope of Fifth Amendment protections afforded to youth during juvenile transfer hearings; the “majority view” embraces broader application of the Fifth Amendment because “a transfer hearing is ‘comparable in seriousness to criminal prosecution’” and not just a jurisdictional hearing to “determine[] the venue of the proceedings.” *Commonwealth v Brown*, 26 A3d 485, 495; 2011 PA Super 47 (2011) (internal citations omitted).

Finally, *Hana* is inconsistent with the decisions of multiple courts that have highlighted the extremely consequential and punitive nature of waiver. See, e.g., *Saucedo v Superior Court In and For County of La Paz*, 190 Ariz 226, 228-229; 946 P2d 908 (App, 1997) (“The punitive effect of . . . transfer . . . is clear; it greatly elevates the minimum punitive exposure of a juvenile” and “substantially alter[s] his range of punishment, depriving him of eligibility for probation and raising his potential length of confinement.”); *State v Smagula*, 117 NH 663, 667; 377 A2d 608 (1977) (noting that “authorities in the field” have found “convincing evidence that most juvenile court personnel, and the judges themselves, regard the waiver of jurisdiction as the most severe sanction which may be imposed by the juvenile court”) (quoting Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 Ind L J 583, 586 (1968)); *JTP v State*, 544 P2d 1270, 1275 (Okla Crim App, 1975) (a juvenile court certification hearing is “comparable in seriousness to a felony prosecution”); cf. *Hana*, 443 Mich at 233 (CAVANAGH, C.J., dissenting) (“There can . . . be no question regarding the punitive nature of the decision to waive juvenile jurisdiction over [a minor].”).

And as numerous courts have highlighted, the fact that waiver is not a final adjudication of guilt does not diminish its punitive character. See, e.g., *Ramona R v Superior Court*, 37 Cal 3d 802, 810; 693 P2d 789 (1985) (noting that the result of a waiver hearing “is not a final adjudication

of guilt[] but the certification of a juvenile offender to an adult court has been accurately characterized as the worst punishment the juvenile system is empowered to inflict”) (internal quotations omitted); *Kemplen*, 428 F2d at 174 (“[I]t seems to us nothing can be more critical to the accused than determining whether there will be a guilt determining process in an adult-type criminal trial” as the “waiver proceeding can result in dire consequences . . . for the guilty accused.”); *RH v State*, 777 P2d 204, 210 (Alas App, 1989) (“Nor can juvenile waiver proceedings realistically be said to affect only the forum where the issue of guilt will be adjudicated” because a “waiver proceeding is the only available avenue by which the state may seek to prosecute a child as an adult” and “the waiver hearing can mean the difference between a limited period of confinement and a lengthy term of imprisonment.”) (internal quotations omitted); *United States v Juvenile Male*, 819 F2d 468, 471 (CA 4, 1987) (noting that waiver is “‘procedural’ only in the most superficial . . . sense” as it is “no mere change in venue” but “instead a means by which to impose on certain juveniles the harsher sentences applicable to adults” and “much more severe punishment”).

In sum, even though a final determination of guilt does not yet exist, waiver of a youth into adult court necessarily exposes youth to a sentencing regime focused less on rehabilitation and more on punishment. Minimizing waiver as simply being about *which court* will preside rather than fundamentally altering *which punishment* will be imposed fails to recognize that waiver has “tremendous consequences.” *Kent v United States*, 383 US 541, 554; 86 S Ct 1045 (1966). That is all the more true in Michigan, where the punishment imposed after a youth is discretionarily waived must necessarily be an adult sentence.

3. Waiver into the Adult System Subjects Youth to Harm for Life by Eliminating Confidentiality Protections.

In addition to being exposed to more punitive sentences, youth waived into adult court also lose the important confidentiality protections of the juvenile system. In juvenile court, “records of a case brought before the court are not open to the general public and are open only to persons having a legitimate interest.” MCL 712A.28(3). By contrast, in criminal court, absent special circumstances, all records are “public records, subject to [public] access.” MCR 8.119(H). Thus, the waiver decision determines whether a youth’s legal system involvement will remain confidential, or whether they will be marked with a criminal record. That consequence is in direct “conflict with [Michigan Courts’] traditional reluctance to criminalize juvenile offenses” and their “commitment to keep juvenile records confidential.” *In re Wentworth*, 251 Mich App 560, 568; 651 NW2d 773 (2002).

A criminal record creates immense lifelong obstacles to education, housing, employment, and psychological wellbeing. Young people with records face both legal barriers (e.g., laws limiting access to occupations, housing, benefits, and opportunities) and extensive public and private discrimination. See *Kardasz*, 2025 WL 3691966, at *9 (considering “both state based and publicly induced collateral consequences that result from the legislation” in assessing punitiveness of statute); U.S. Commission on Civil Rights, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* (June 2019), p 1¹⁸ (identifying “more than 44,000 collateral consequences [that] exist nationwide.”). These obstacles undermine rehabilitation and impede successful reentry by making it harder for youth to maintain and retain housing, employment, and education. See U.S. Dep’t of Justice, *Roadmap to Reentry: Reducing*

¹⁸ Available at <<https://www.usccr.gov/files/pubs/2019/06-13-Collateral-Consequences.pdf>>.

Recidivism Through Reentry Reforms at the Federal Bureau of Prisons (2016), p 1;¹⁹ National Reentry Resource Center, *Michigan Snapshot of Employment-Related Collateral Consequences* (January 2021), pp 1-2.²⁰ See also *Smagula*, 117 NH at 667 (noting that when a youth is waived, “the confidentiality . . . of the juvenile proceeding is replaced by the publicity . . . of penal law” and “the child acquires a public arrest record which . . . will inhibit his rehabilitation because of the opprobrium attached”) (internal citation omitted). While these harms are significant for adults, for youth, they are even more devastating, as they impair a young person’s ability to establish a stable life during the critical transition into adulthood.

Transferring youth from a system where records are confidential to one where they will follow the child for the rest of their life increases the punishment imposed by waiver. Cf. *People v Lymon*, 515 Mich 145, 169; 29 NW3d 58 (2024) (recognizing the punitiveness of public internet access to criminal record information). See *Juvenile Male*, 590 F3d at 937 (noting that publication of a juvenile’s record is “a central feature of a punitive rather than a rehabilitative system of justice” because the decision to transfer a youth is based in part on a “court’s determination that the juvenile’s case merits punishment, rather than rehabilitation”).

In sum, because the discretionary waiver statute transfers youth from a rehabilitation-focused to a punishment-focused system, results in mandatory imposition of adult sentences, and eliminates confidentiality protections, discretionary waiver is appropriately understood as punishment.

¹⁹ Available at <<https://www.justice.gov/reentry/file/844356/dl?inline>>.

²⁰ Available at <<https://csgjusticecenter.org/wp-content/uploads/2021/02/collateral-consequences-michigan.pdf>>.

B. Discretionary Waiver Constitutes Cruel or Unusual Punishment Under the Bullock Factors.

Article 1, § 16 of the Michigan Constitution protects against punishment that is either cruel or unusual. Waiver is both. To determine whether a punishment violates Article 1, § 16, this Court considers (1) the severity of the punishment and the gravity of the offense, (2) other penalties imposed under Michigan law, (3) penalties imposed for the same offense in other states, and (4) whether the penalty promotes rehabilitation. See *People v Bullock*, 440 Mich 15, 33-34; 485 NW2d 866 (1992).

1. Waiver Results in the Automatic Imposition of Severe, Adult Punishments on Youth for Less Serious Offenses.

The first *Bullock* factor requires consideration of the severity of the punishment and the gravity of the offense. The punishment imposed as a result of waiver is by definition cruel because it is meted out through a scheme that automatically imposes adult sentences. This Court and the U.S. Supreme Court have repeatedly found youth less culpable and less deserving of extreme punishment.²¹ Due to the neurobiological differences between youth and adults, this Court has held that youthfulness is a “circumstance of the offender,” and accordingly, “consideration of youth and its attendant circumstances is . . . required . . . at sentencing.” *Boykin*, 510 Mich at 188. But when a youth is waived into adult court via discretionary waiver, a sentencing judge must impose an adult sentence regardless of such attendant circumstances; this is true for youth as young as fourteen who may be waived for any offense that may be considered a felony. MCL 712A.4(1).²² See *Velting*, 443 Mich at 39; MCR 6.901(B).

²¹ See, e.g., *Stovall*, 510 Mich at 322; *Boykin*, 510 Mich at 189; *Miller*, 567 US at 480; Legal Framework, Section II, *infra*.

²² Discretionary waiver is not used for the most serious offenses which are automatically waived to adult court. MCL 712A.2(a)(1)(A)-(I); MCL 600.606(2)(a)-(i); MCL 764.1f(2)(a)-(i); MCR 6.903(H)(1)-(19). While amici also have serious concerns about the constitutionality of the

Discretionary waiver is also cruel as applied to NDD. NDD's unauthorized driving of a go-kart is a property offense, and one that is almost stereotypically the type of offense associated with youthful impulsivity. Yet, as a result of being waived into adult court, NDD faces a five-year prison term with a public criminal record, rather than a sanction under the jurisdiction of the juvenile court. See Argument, Section I.A, *supra*. This discrepancy is not only stark, but also unjustified by any legitimate purposes.

The existence of the transfer hearing does not solve the constitutional problem presented by automatically punishing children as adults. First, structural defects with the MCL 712A.4 factors preclude a thorough and individualized consideration of the mitigating qualities of youth at the Phase II hearing. MCL 712A.4(4) requires the court to consider "the best interests of the juvenile and the public," including the seriousness of the offense and the youth's prior record, and the youth's culpability.²³ MCL 712A.4(4). But by its terms, MCL 712A.4(4) requires courts to

automatic waiver statute, that does not change the fact that under the statutory scheme, the most serious offenses are handled under automatic waiver and the discretionary waiver statute at issue here, MCL 712A.4, is used for less serious offenses.

²³ Those factors are:

- (a) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines and the use of a firearm or other dangerous weapon.
- (b) The culpability of the juvenile in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.
- (c) The juvenile's prior record of delinquency that would be a crime if committed by an adult.
- (d) The juvenile's programming history, including, but not limited to, any out-of-home placement or treatment and the juvenile's past willingness to participate meaningfully in available programming.
- (e) The adequacy of the programming available to rehabilitate and hold accountable the juvenile in the juvenile justice system and the juvenile's amenability to treatment.
- (f) The dispositional options available for the juvenile.
- (g) The juvenile's developmental maturity, emotional health, and mental health.

“giv[e] greater weight to the seriousness of the alleged offense and the juvenile’s prior record of delinquency than to the other criteria.” *Id.* This emphasis on the seriousness of offense and any prior record of delinquency, rather than youth’s mitigating qualities, creates a significant risk of disproportionate punishment, as waiver is the only point at which a judge may exercise discretion before a youth is subject to automatic adult sentencing.²⁴ See *adol, Kent Revisited: Aligning Judicial Waiver Criteria With More Than Fifty Years of Social Science Research*, 42 Vermont L Rev 441, 457 (2018) (hereinafter “*Kent Revisited*”) (explaining that placing a “focus on the offense conflicts with an individualized examination of a specific youth and his or her needs—a practice endorsed by the Supreme Court in *Miller*”). It also contravenes the very purpose of the juvenile justice system. See *Deel v Jago*, 967 F2d 1079, 1090 (CA 6, 1992) (“A rehabilitative conception of juvenile court jurisdiction . . . is inconsistent with allowing the character of the crime to overshadow salient facts about the character of the child.”).

As the U.S. Supreme Court has stated, “even a heinous crime committed by a juvenile” is not sufficient on its own as “evidence of irretrievably depraved character.” *Roper*, 543 US at 553. Focusing on the severity of an offense ignores questions about the maturity, culpability, or rehabilitative capacity of the youth. Indeed, as the developmental research affirms, the nature of the offense is a poor predictor of future recidivism, and even youth who commit the most serious

(h) If the juvenile is a member of a federally recognized Indian tribe, culturally honoring traditional values of the juvenile's tribe.

(i) The impact on any victim.

MCL 712A.4(4).

²⁴ MCL 712A.4(4) was amended in 2023 to require consideration of a youth’s “developmental maturity, emotional health, and mental health.” 291 PA 2023, § 2d(2)(g). NDD’s transfer hearing occurred before those amendments. But even if the Court were to remand for consideration under the revised statute, the problem would persist because the disproportionate weight that MCL 712A.4(4) gives to offense seriousness and prior delinquency means that the factors still fail to adequately ensure consideration of current developmental science necessary to protect against unconstitutionally severe punishment.

crimes are likely to desist naturally. See Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J Crim L & Criminology 471, 496 (1987) (“The seriousness of a first offense provides little basis for distinguishing those youths who are likely to recidivate from those who are not.”); *Kent Revisited*, *supra*, at 457-458 (“[L]ongitudinal research indicates that even youth characterized as ‘serious offenders’ will desist from such behavior over time as they progress into adulthood.”).

Moreover, the discretionary factors delineated in the prior version of MCL 712A.4(4)—the version applied to NDD²⁵—predated advances in developmental science that demonstrate that all children are biologically different from adults in ways that directly impact behavior and decision-making. *Kent Revisited*, *supra*, at 442-447 (explaining outdated assumptions about children on which juvenile courts were originally based). Accordingly, the prior factors failed to appropriately account for a youth’s developmental maturity or culpability. But even as amended, the MCL 712A.4(4) factors still do not account for important youth attendant circumstances—including trauma, home environment, peer influence, and chronological age—all of which have been found to impact a young person’s behavior and decision-making, and support retaining jurisdiction of a child in juvenile court. See *Kent Revisited*, *supra*, at 472; *Miller*, 567 US at 477.

Perhaps most importantly, the primary inquiry underscoring the transfer decision does not ask, “What is the appropriate punishment for the offense, taking into account the child’s develop-

²⁵ NDD’s transfer hearing was held under a prior version of the statute that included consideration of “the effect on any victim” as part of factor (a); as part of factor (c), allowed consideration of any record of detention, police record, school record, or other evidence indicating prior delinquent behavior, without specifying that such behavior must constitute a crime if committed by an adult; required consideration of the adequacy of punishment as part of factor (e), but did not expressly include consideration of the juvenile’s amenability to treatment within that factor; and did not include the current factors (g), (h), and (i). *In re NDD*, unpublished per curiam opinion of the Court of Appeals, issued August 15, 2025 (Docket No. 370602); 2023 PA 91.

ment?” Rather, it asks, “Is it in ‘the best interests of the juvenile and the public’ to try the child as an adult,” MCL 712A.4(4), implying that transfer *can* be in the child’s best interest, despite all research to the contrary. Because the question of public interest “looks to something external to the juvenile” and may be in conflict with consideration of the youth’s culpability, amenability, and rehabilitative capacity, the Institute of Judicial Administration-American Bar Association Juvenile Justice Standards “reject[] the public interest as a justification for waiver.” Institute of Judicial Administration & American Bar Association, *Standards Relating to Transfer Between Courts* (1980), p 40.²⁶ Similarly, scholars “view the traditional goals of the juvenile court and the ‘best interests of the child’ standard as being at odds with public concerns for retribution and incapacitation of criminals.” Fagan & Deschenes, *Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J Crim L & Criminology 314, 314 (1990). See also *People v Cheeks*, 216 Mich App 470, 478; 549 NW2d 584 (1996). The statute provides no clear guidance as to how courts should reconcile these interests; thus, waiver may be granted even if the youth’s best interests counsel against it, based largely on the public’s interests.

Because Michigan’s discretionary waiver process effectively requires courts to decide transfer and sentencing simultaneously, *Velting*, 443 Mich at 39 & n 19, it precludes this constitutionally required process at sentencing. At essence, this is a question of timing. As the Supreme Court noted in *Miller*, accounting for youthfulness at the transfer stage “has limited utility” if not also considered at the point of sentencing. *Miller*, 567 US at 488. The Supreme Court rejected Alabama’s argument that discretion at transfer could substitute for individualized consideration of youthfulness at sentencing, explaining that at the transfer stage, “the decisionmaker typically will

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Available at
<https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/jj/jj-standards-transfer-between-courts.pdf>

have only partial information . . . about either the child or the circumstances of his offense.” *Id.* More importantly, “the question at transfer hearings may differ dramatically from the issue at a post-trial sentencing” because “transfer decisions often present a choice between extremes: light punishment as a child or standard sentencing as an adult.” *Id.* “It is easy to imagine a judge deciding that a minor deserves a . . . harsher sentence than he would receive in juvenile court, while still not thinking” a lengthy adult sentence appropriate. *Id.* For these reasons, the United States Supreme Court noted that “the discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court.” *Id.* at 489.²⁷ Similarly, discretionary waiver triggers automatic adult punishment, precluding the constitutionally necessary post-trial inquiry into the mitigating qualities of youth at sentencing.

In sum, because youth subject to discretionary waiver, including NDD, face sentences that are significantly more punitive than they would face in juvenile court, and because those sentences are imposed without consideration of the youth’s maturity, the first *Bullock* factor reflects unconstitutionally cruel punishment.

2. Other Penalties Imposed: Waiver Results in Harsher Penalties for the Same Underlying Offenses.

The second *Bullock* factor requires consideration of other penalties imposed under Michigan law. As explained above, youth waived to adult court face much more severe sentences

²⁷ MCL 712A.4(4) also does not protect youth who may have been previously under the jurisdiction of an adult court, as judges are required to waive jurisdiction and transfer the youth without even considering the MCL 712A.4(4) factors. See MCL 712A.4(5); *Williams*, 245 Mich App 427. This is true even if the youth is acquitted, the charges are dropped, or the circuit court grants a motion to dismiss. *Id.* at 437. This “once an adult, always an adult” loophole can be particularly devastating for Black and Brown youth, who are overrepresented in almost all aspects in the juvenile/criminal legal system, and who are more frequently waived into adult court. See Argument, Section I.C, *infra*.

and punishments than youth punished in juvenile court for the same offense. See Argument, Section I.A, *supra*.

Compared to other forms of juvenile waiver, discretionary waiver is also uniquely punitive because, as described above, it does not allow any consideration of youthfulness at sentencing. In the case of automatic waiver, judges must generally conduct juvenile sentencing hearings for non-enumerated offenses, taking into account a youth's development and maturity, when determining sentencing. MCR 6.931(A).²⁸ And when a youth is subject to designated proceedings, the family court can account for youthfulness and choose to impose either a juvenile disposition, adult sentence, or "a blended sentence that delays an adult sentence and affords the youth an opportunity to rehabilitate." Michigan Dep't of Health and Human Servs, *Juvenile Justice Field Services Manual* (October 1, 2024), p 3.²⁹ But judges may not conduct juvenile sentencing hearings or impose juvenile dispositions or blended sentences where youth have been waived via the discretionary waiver processes under MCL 712A.4. See MCR 6.901(B). Thus, discretionary waiver creates a sentencing asymmetry that insufficiently accounts for youthfulness and provides no sentencing-stage safety valves, leaving youth exposed to much more severe punishments for the same offenses. This stark discrepancy "favors a finding" that discretionary waiver and the mandatory imposition of adult sentences "without an individual assessment is constitutionally defective." *Taylor*, 2025 WL 1085247, at *11 (finding the second *Bullock* factor satisfied because under the challenged scheme, "Czarnecki and Taylor would spend more time in prison than many equally culpable . . . offenders").

²⁸ For the most serious offenses, youth subject to automatic waiver are also subject to automatic sentencing as adults. MCL 769.1(1); MCR 6.931(A). However, this Court has held that automatic imposition of sentences like life without parole is unconstitutional. See *Boykin*, 510 Mich at 189; *Parks*, 510 Mich at 265-266; *Stovall*, 510 Mich at 322; *Taylor*, 2025 WL 1085247, at *16.

²⁹ Available at <<https://mdhhs-pres-prod.michigan.gov/olmweb/ex/JJ/Public/JJM/210.pdf>>.

Discretionary waiver is also anomalous in light of Michigan's broader juvenile justice framework. The Holmes Youthful Trainee Act, for example, allows for youthful trainee status to apply to young adults up to 25 years of age based on the recognition that "the human brain doesn't fully mature until closer to the mid-20s," and young persons who offend should be given "a chance to turn their lives around without the stigma of a criminal conviction that can hinder them from employment, housing, or financial aid for college." House Legislative Analysis, HB 4069, 4135 & 4169 (March 4, 2015).³⁰ Michigan's Raise the Age legislation was likewise motivated by the abundance of "research that overwhelmingly documents that adolescent brains do not fully develop until closer to 25 years of age," and that youth "respond well to rehabilitative programs and counseling." See House Legislative Analysis, HB 4133 et al. (December 20, 2019).³¹ This same research applies to youth subject to discretionary waiver. There is no sound basis to subject only some youth and not others to much more punitive prosecution and sentencing.

NDD's waiver itself is also unusual. While Michigan's judicial waiver statute broadly allows for the discretionary waiver of any felony offense, MCL 712A.4(1), transferring an unauthorized driving case for criminal prosecution is rare. All property crimes collectively make up only 23% of waiver cases, and that number has been consistently trending downward. Hockenberry, *Delinquency Cases Waived to Criminal Court 2020* (2023), p 3 (hereinafter "*Delinquency Cases Waived to Criminal Court*")³². Further, and more importantly, based on 2018 data, juvenile courts nationally waived fewer than 1% of all vehicle theft cases that came before

³⁰ Available at <<https://legislature.mi.gov/documents/2015-2016/billanalysis/House/htm/2015-HLA-4069-45BF345E.htm>>.

³¹ Available at <<https://www.legislature.mi.gov/documents/2019-2020/billanalysis/House/pdf/2019-HLA-4133-67514053.pdf>>.

³² Available at <<https://ojjdp.ojp.gov/publications/delinquency-cases-waived-criminal-court-2020.pdf>>.

them (7 out of every 1,000 cases). Hockenberry & Puzzanchera, National Center for Juvenile Justice, *Juvenile Court Statistics 2018* (2020), p 62.³³ Of the rest, roughly 28% were dismissed either with or without a petition, 42% received probation, and just 17% were adjudicated and placed in detention. *Id.* Given how rare waiver for vehicle theft is across the country, NDD's waiver to criminal court for go-kart joyriding is unusual.

3. Penalties Imposed for the Same Offense in Other Jurisdictions: Michigan's Discretionary Waiver Scheme Is Unusually Harsh.

Under the third *Bullock* factor, Michigan courts conduct an interjurisdictional comparison “to assess the decency of a punishment and to determine if it comports with evolving standards that ‘mark the progress of a maturing society.’” *Kardasz*, 2025 WL 3691966, at *17 (quoting *People v Lorentzen*, 387 Mich 167, 179; 194 NW2d 827 (1972)). As part of this inquiry, courts may “ask whether ‘there is a clear national trend’ moving away from the punishment in question.” *Id.* (quoting *Stovall*, 510 Mich at 318).

Concededly, Michigan is not unique in allowing for discretionary waiver. However, there is a clear national trend towards minimizing the use and harms of discretionary waiver. Between 2004 and 2019, thirty states changed their transfer laws, with “many narrowing the path to criminal court” for youth offenders, including through modifications in age limits, “reductions in the offenses in transfer laws, removing transfer provisions, or adding reverse transfer provisions.” Puzzanchera et al., National Center for Juvenile Justice, *Youth and the Juvenile Justice System: 2022 National Report* (December 2022), p 100.³⁴ Similarly, from 1999 to 2019, seven states adopted blended sentencing provisions, which give criminal courts the authority to impose juvenile dispositions, while four states adopted reverse waiver provisions, allowing criminal courts to send

³³ Available at <<https://ojjdp.ojp.gov/ojstatbb/njcda/pdf/jcs2018.pdf>>.

³⁴ Available at <<https://ojjdp.ojp.gov/publications/2022-national-report.pdf>>.

youth back to the juvenile court system. *Delinquency Cases Waived to Criminal Court 2020, supra*, p 2. By contrast, Michigan law has been interpreted as mandating adult sentencing after discretionary waiver. *Velting*, 443 Mich at 39 & n 19.

In addition, Michigan’s discretionary waiver scheme is unusually harsh relative to other states’ schemes in several respects. Michigan is one of only two states to give greater weight to seriousness of offense and prior record of delinquency when considering whether to waive a youth under discretionary waiver. See MCL 712A.4; Minn Stat 260B.125, subd 4; *Kent Revisited, supra*, at 456 n 79. And while Michigan is one of 34 states to impose “once an adult, always an adult” rules, mandatorily requiring waiver of jurisdictional jurisdiction if a youth has been previously subject to the criminal court’s jurisdiction, *id.*, it is one of the only states to effectuate this mandatory waiver even when a youth has not actually been convicted by a criminal court. See *Youth and the Juvenile Justice System: 2022 National Report, supra*, at 95 (noting that “[n]early all” of the other 33 states “require that the youth must have been convicted of the offenses that triggered the initial criminal prosecution”). Thus, Michigan’s discretionary waiver scheme is unusually punitive.

4. Waiver Actively Undermines Rehabilitation of Youth.

Rather than deter future lawbreaking, trying youth as adults is associated with *higher* rates of recidivism than adjudication in juvenile court.³⁵ Youth transferred to the adult system “reoffend more quickly and are more likely to engage in violent crimes after release than youths processed

³⁵ This is true even when controlling for severity of offense. See Hahn et al., Centers for Disease Control, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, Morbidity and Mortality Weekly Report (November 30, 2007), p 5, available at <<https://www.cdc.gov/mmwr/PDF/rr/rr5609.pdf>>. (noting that “selection bias” may be a “methodologic concern” as transfer may be “intended for those youth who are considered to be more serious offenders,” but that the reviewed studies controlled for such bias).

in the juvenile justice system.” Washburn et al., *Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court*, 59 *Psych Services* 965, 972 (2008); see also Hahn et al., Centers for Disease Control, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, Morbidity and Mortality Weekly Report (November 30, 2007), pp 9-10 (hereinafter “*Effects on Violence*”)³⁶ (observing that “transfer policies have generally resulted in increased arrest for subsequent crimes, including violent crime, among juveniles who were transferred compared with those retained in the juvenile justice system[;]” reviewing various studies and finding that “little evidence supports the idea that transfer laws deter juveniles . . . from violent crime” and thus, “the use of transfer laws . . . is counterproductive to reducing juvenile violence and enhancing public safety”); Redding, U.S. Department of Justice, Office of Justice Partnerships, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, *Juvenile Justice Bulletin* (June 2010), pp 1, 6³⁷ (concluding from multiple studies that youth “who had been transferred to criminal court” have “higher recidivism rates . . . compared with those who were retained in the juvenile system,” and that this trend “h[olds] true even for offenders who only receive[] a sentence of probation from the criminal court”).

Scholars believe that this increase in recidivism is a result of “[t]he stigmatization and other negative effects of labeling juveniles as convicted felons,” the “sense of resentment and injustice juveniles feel about being tried and punished as adults,” the greater exposure to criminogenic behaviors when youth experience when incarcerated with adult offenders, and the “decreased focus

³⁶ Available at <<https://www.cdc.gov/mmwr/PDF/rr/rr5609.pdf>>.

³⁷ Available at <<https://www.ojp.gov/pdffiles1/ojjdp/220595.pdf>>.

on rehabilitation and family support in the adult system.” *Id.* at 7. Moreover, subjecting youth to adult prosecution, sentencing, and a public criminal record undermines access to housing, employment, education, and social supports that are key to rehabilitation. See Argument, Section I.A.3, *supra*. Thus, discretionary waiver does not promote rehabilitation.

Waiver not only fails to promote the rehabilitation of youth; it purposefully removes young people from a system centered around rehabilitation and funnels them into a system focused on punishment that is affirmatively harmful and developmentally inappropriate. For these reasons, waiver is cruel and unusual.

In sum, all four of the *Bullock* factors point to a finding that discretionary waiver is cruel or unusual punishment.

C. As Administered, Waiver into the Adult System Is Racially Arbitrary and Exposes Children to Cruel or Unusual Punishment, in Violation of Article I, § 16.

As other state high courts have recognized, racially arbitrary punishment violates state constitutional protections against cruel or unusual punishment. Much of the case law in this area arises in the context of constitutional challenges to the death penalty, where the racialized administration of that sentence makes it cruel or unusual. For example, in *State v Gregory*, the Washington Supreme Court held that the state’s capital punishment statute violated Washington’s cruel punishment provision as administered because of racial bias in the administration of the death penalty. 192 Wash 2d 1, 20-23; 427 P3d 621 (2018). Similarly, the Connecticut Supreme Court invalidated that state’s capital punishment scheme under the state cruel punishment provision, in part due to recognition that the Court could not protect against the possibility that “individualized sentencing allows in through the back door . . . caprice, . . . or worse, . . . necessarily opens the door to racial and ethnic discrimination in capital sentencing.” *State v Santiago*, 318 Conn 1, 108; 122 A3d 1 (2015).

While concededly, “death is different,” and necessitates a specific jurisprudence to protect individuals from the harshest punishment the state can ever inflict, “children are constitutionally different too”—necessitating the continued development of a jurisprudence that ensures that children are not exposed to extreme punishment on the impermissible basis of race. *Miller*, 567 US at 481. Moreover, the United States Supreme Court’s youth-sentencing jurisprudence demonstrates that principles developed in the death penalty context are relevant to assessing the constitutionality of punishments for youthful offenders. In *Graham*, for example, the Court adopted the robust categorical proportionality analysis previously used in capital punishment contexts to determine the constitutionality of life without parole for juveniles convicted of nonhomicide offenses. 560 US at 60-62. And in *Miller*, the Court applied the individualized sentencing requirements developed in capital punishment cases to apply to sentences mandating life without parole for juvenile offenders. 567 US at 475-476. As both of these cases demonstrate, capital jurisprudence can—as it previously has—inform the constitutionality of subjecting youth to severe and automatic non-capital, adult punishments.

In Michigan, the racialized history of the waiver statute, in conjunction with the significant overrepresentation of youth of color subject to waiver, raises the question of whether the waiver statute is being administered in a racially arbitrary manner. A racially arbitrary system of waiver, in turn, would be cruel or unusual punishment under Article I, § 16.

1. Michigan’s Waiver Statute Has Roots in the Racialized Idea that Black Children Do Not Merit the Same Societal Protection as White Children.

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; 268 A3d 616 (2022) (cleaned up); accord *Matter of Miller*, 21 Wash App 2d 257, 265; 505 P3d 585 (2022). Indeed, “throughout

the history of our country, our policies have reflected that only some children—white ones—have deserved societal protection.” *Belcher*, 342 Conn at 17 (citing Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DePaul L Rev 679, 679-682 (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.*

Research on convictions of children over the course of the nineteenth century similarly concluded that “some children under 14, particularly children of color, were held as responsible for their actions as adults.” Sheldon, *Delinquency and Juvenile Justice in American Society* (Long Grove: Waveland Press, 2006), p 19. In fact, Black children were routinely sentenced to incarceration—even execution—due to “a lack of confidence in their rehabilitative potential.” Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 BC L Rev 379, 395-396, 398 (2017).

In the 1980s and 1990s, these racial stereotypes culminated in the “superpredator” myth, propagated by academics and the media, that there was “a new and vicious breed of youths who would kill, rape, maim, and steal without remorse.” Sterling, “*Children Are Different*”: *Implicit Bias, Rehabilitation, and the “New” Juvenile Jurisprudence*, 46 Loy LA L Rev 1019, 1057 (2013) (cleaned up). Superpredators, the myth went, “were more likely to be African American” given the alleged “moral poverty” of their upbringings. *Id.* This myth provided a new outlet for fear and animus toward young people of color and fueled the passage of “tough on crime” policies, such as automatic transfer to adult court, mandatory minimum sentences, and life without parole for

youth.³⁸ The result was a new and harsher punishment regime that disproportionately funneled Black and Brown youth into the adult prison system and subjected them to longer and harsher sentences.³⁹

The historical development of Michigan's waiver provisions is grounded in punishment and reflects racially charged assumptions about the moral culpability of Black and Brown youth. In enacting legislative changes in the 1980s and '90s,⁴⁰ legislators explicitly focused on youth violence in Wayne County, the county with the highest Black and Brown population in Michigan at the time. MCL 600.606; MCL 712A.2(a)(1); House Legislative Analysis, HB 4037 Juvenile Justice Reform Package, Senate Bills 281 et al., Second Analysis (July 22, 1996), pp 2, 13. They 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." *Id.* They emphasized that they needed "the tools to deal with these remorseless renegades."⁴¹ They described youth as "violent animals" and "much more cold-blooded, much

³⁸ 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; see also Forman & Vinson, *The Superpredator Myth Did a Lot of Damage. Courts Are Beginning to See the Light*, New York Times (April 20, 2022) <<https://www.nytimes.com/2022/04/20/opinion/sunday/prison-sentencing-parole-justice.html>>.

³⁹ Campaign for the Fair Sentencing of Youth, *The Origins of the Superpredator* (May 2021), available at <<https://cfsy.org/wp-content/uploads/Superpredator-Origins-CFSY.pdf>> ("[The] superpredator narrative is often called out as the impetus for our nation's harmful sentencing policies for Black children."); *The Superpredator Myth Did a Lot of Damage*, *supra*.

⁴⁰ LaBelle & Addis, *Basic Decency: Protecting the Human Rights of Children: An Examination of Natural Life Sentence for Michigan Children* (2012), p 4, available at <<https://youthtoday.org/wp-content/uploads/sites/13/hotdocs/BasicDecencyReport2012.pdf>>; Shook & Sarri, *Trends in the Commitment of Juveniles to Adult Prisons: Toward and Increased Willingness to Treat Juveniles as Adults?*, 54 Wayne L Rev 1725, 1737 (2008).

⁴¹ SBT, *Juvenile Justice Reform Passes Senate with Few Amendments*, Capital Capsule (Mich Info & Research Serv Inc) (December 7, 1995), p 2.

more conscienceless than adults.”⁴² Driven by racist tropes and ongoing moral panic, “lawmakers in Michigan adopted one of the toughest juvenile justice laws in the nation.”⁴³

2. Michigan-Specific Waiver Data Demonstrates that Black and Brown Youth Are Overrepresented in Waiver into Adult Court.

Unsurprisingly, Michigan’s waiver system has particularly harmed Black and Brown youth, who are disproportionately criminalized and disproportionately waived into adult court.⁴⁴ In Michigan, severe racial disparities pervade the juvenile legal system, from initial petition through transfer to adult court. In its 2022 report, the Michigan Task Force on Juvenile Justice Reform concluded that “Black youth are disproportionately represented in all parts of the juvenile justice continuum.” Michigan Task Force on Juvenile Justice Reform, *Report and Recommendations* (July 22, 2022), p 10.⁴⁵ Racial disproportionality persists in the context of waiver into adult court. A 2005 study of automatic waivers in Michigan found that Black youth

⁴² Flesher, *Years of Family Trauma End with Killing, Relatives Say*, Argus Press (August 3, 1997), A7; Cohen, *Michigan Boy Who Killed at Age 11 Will Stand Trial as Adult*, St. Louis Post-Dispatch (September 19, 1999), A5.

⁴³ 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).

⁴⁴ *Delinquency Cases Waived to Criminal Court*, *supra*, at 4 (finding that “[a]cross offense categories, cases involving Black youth were more likely than cases involving other race groups to be waived in 2020,” and that for person offenses, black youth were over twice as likely, and Hispanic youth 1.4 times as likely, to get waived relative to white youth); McCord et al., eds, *Juvenile Crime, Juvenile Justice* (Nat’l Academy Press, 2001), p 250 available at <<https://www.nationalacademies.org/read/9747/chapter/8#250>> (finding that, in an analysis of transfer decisions in Boston, Detroit, Newark, and Phoenix, Black youth were 75% more likely than white youth to be waived to criminal court); The Sentencing Project, *Youth in Adult Courts, Jails, and Prisons 2* (December 2021), p 2, available at <<https://www.sentencingproject.org/app/uploads/2022/09/Youth-in-Adult-Courts-Jails-and-Prisons.pdf>> (reporting that Black youth comprised less than 15% of the total U.S. youth population but 63% of youth detained pending judicial waiver or awaiting criminal-court hearing in 2018).

⁴⁵ Available at <<https://micounties.org/wp-content/uploads/Michigan-Taskforce-on-Juvenile-Justice-Reform-Final-Report.pdf>>.

were disproportionately more likely to be waived into adult court, comprising 84 percent of the teenage population being tried as legal adults. Burrow, *Punishing Serious Juvenile Offenders: A Case Study of Michigan's Prosecutorial Waiver Statute*, 9 UC Davis J Juv L & Pol'y 1, 41-43, 53 (2005). Data on racial and ethnic disparities collected by the Michigan Committee on Juvenile Justice show a broader trend of Black youth disproportionately being transferred to adult court. See Appendix A (calculating relative and comparative disproportionalities based on Michigan Committee on Juvenile Justice data). Across reporting periods from January 2008 through September 2024, Black youth were consistently transferred to adult court at rates far exceeding their share of the at-risk youth population, with relative disproportionality ranging from 2.51 to 5.02, and averaging 3.33 across all years. *Id.* When compared to white youth, who were consistently transferred at rates below their population share, the gap is even starker: the comparative (Black-to-white) disproportionality ratio averaged 12.8 across all reporting periods and exceeded 30 in FY 2022-23 (60.8) and FY 2023-24 (35.0). *Id.* In other words, Black youth in Michigan have consistently been transferred to adult court at a rate dramatically higher than that of white youth, with this disparity widening in the most recent years for which data is available.⁴⁶

This racial disproportionality renders discretionary waiver, as administered, both cruel and unusual. Discretionary waiver cannot reasonably be said to channel only those youth who are the most culpable, dangerous, or least amenable to rehabilitation when the sentencing disparity created

⁴⁶ Amici recognize these figures come with important caveats. The data spans a 2015 change in reporting period (from calendar year to fiscal year), a change in how “juveniles” are defined (in light of Michigan’s Raise the Age legislation), excludes a transitional period to avoid double-counting, and does not include data for FY 2018. Moreover, because the underlying data is self-reported by counties on a voluntary basis, it is not clear which counties reported in any given year or whether all counties consistently reported complete transfer information. In addition, transfer may not be consistently defined and reported across counties. Nonetheless, the figures show a broader trend of disproportionality that cannot be discounted.

by waiver rests on such arbitrary, or worse, racially biased grounds. Because discretionary waiver arbitrarily subjects only some youth to a radically more punitive sentencing and prosecuting regime for the exact same offenses, it is unconstitutional.

3. Adultification Bias Helps Explain the Overrepresentation of Black and Brown Youth in Waiver to Adult Court.

The disproportionate waiver of children of color into adult court is based at least in part on what empirical research suggests is “adultification bias,” where Black youth are perceived to be more adult, less innocent, more culpable, and less in need of protection than their white counterparts. Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J Personality & Soc Psychol 526, 529, 539-540 (2014).⁴⁷ Black boys face adultification bias by legal decision-makers who perceive them and treat them as older and more culpable than their chronological age. In a seminal study on adultification of Black youth, researchers demonstrated that Black youth are perceived to be more adult, less innocent, more culpable, and less in need of protection than their white counterparts. *Id.* Participants in the study consistently perceived Black children over the age of 10 as less innocent than their peers, *id.* at 529, and Black boys as more culpable for their actions than any other racial group, especially when they were accused of serious crimes. *Id.* at 532, 540. Black boys suspected of felonies were seen as approximately 4.5 years older than their actual age; thus, Black boys were misperceived as legal adults at roughly the age of 13.5. *Id.* at 531-532. When primed with dehumanizing⁴⁸ associations for Black people, the

⁴⁷ Available at <<https://www.apa.org/pubs/journals/releases/psp-a0035663.pdf>>.

⁴⁸ Dehumanizing words or images associated with Black people include apes, which in previous experiments led test participants primed “with great apes (but not big cats) to [endorse] . . . police violence against Black (but not White) criminal suspects.” *Id.* at 536.

perceptions of culpability increased even further.⁴⁹ *Id.* at 533-536, 539-540. Circumstances that “provoke[] consideration of a child as an adult,” such as a waiver hearing, are more likely to be “particularly susceptible to the effects of dehumanization.” *Id.* at 528.

Courts in several jurisdictions have acknowledged the potential for adultification bias to impact legal proceedings involving youth of color. In Ohio, the Court of Appeals stated that they “are mindful” of concerns related to the adultification of Black children when reviewing psychological maturity of the youth for purposes of transfer to adult court. *State v DT*, 2024-Ohio-4482, ¶¶ 124-125 (Ohio App, 2024); 2024 WL 4164559, at *27-28, appeal allowed, 177 Ohio St 3d 1412 (2025) (reversing transfer to adult court, vacating resulting convictions, and remanding to juvenile court). The Washington Court of Appeals has recognized “that adultification is real and can lead to harsher sentences for children of color if care is not taken to consciously avoid biased outcomes.” *Miller*, 21 Wash App 2d at 267 (granting postconviction petition for resentencing to have mitigating qualities of youth considered and instructing that trial courts should consider adultification along with youthfulness when sentencing children of color). The Supreme Court of Connecticut also recognized the history of adultification as an explanation for the disparate treatment of Black youth in the legal system. *Belcher*, 268 A3d at 626-627 (reversing imposition of 60-year sentence based on debunked superpredator theory for offense committed at age 14 and noting that the “historical fiction that Black adolescents are not actually ‘children’ meriting societal protection stems from the dehumanization of Black Americans”).

The weight of the empirical and historical record demonstrates that Black youth, like NDD, and other youth of color are disproportionately subject to adult court prosecution. And data specific

⁴⁹ The perception of Black children as adults that flows from dehumanization was also a predictor of racially disparate police violence against them. *Id.* at 535-536, 540.

to Michigan raises the specter that race may be contributing to waiver outcomes more than any permissible case characteristics described under the waiver statute. This Court should grant leave on the question whether the discretionary waiver statute is unconstitutional as administered.

II. The Family Division Reversibly Erred in Finding That the Best Interests of NDD and the Public Would be Served by Waiver of the Court's Jurisdiction Over NDD.

For the reasons set out above, discretionary waiver into adult court violates Const 1963, art 1, § 16 both on its face and as applied to NDD's crime of stealing and riding in a go-kart. Imposition of unconstitutionally cruel or unusual punishment can never be in the best interests of a juvenile. See also Argument, Section I.B.1, *supra* (explaining why transfer can never be in the best interests of a juvenile). The public too has a strong interest in ensuring that any punishment imposed is constitutional. Accordingly, the Livingston Circuit Court Family Division reversibly erred in finding that the best interests of the juvenile and the public would best be served by granting the prosecution's motion to waive the court's jurisdiction over NDD.

CONCLUSION

Amici urge the Court to grant leave on the question of whether discretionary waiver under MCL 712A.4 violates Michigan's prohibition on cruel or unusual punishment under Const 1963, art 1, § 16, because it fundamentally alters the nature of the sanction imposed and results in the imposition of adult sentences without consideration of youth's diminished culpability, or because, as administered, it is racially arbitrary. The Court should also hold that because discretionary waiver is cruel and unusual punishment both on its face and as applied to NDD, the Livingston Circuit Court Family Division reversibly erred in finding that the best interests of the juvenile and the public would best be served by granting the prosecution's motion to waive the court's jurisdiction over NDD.

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WORD COUNT CERTIFICATION AND STATEMENT REGARDING AMICI'S TAX-EXEMPT STATUS

This brief contains 12,698 words in the sections covered by MCR 7.212(C)(6)-(8).

This amicus brief is submitted on behalf of Juvenile Law Center; the Center for Civil Rights and Critical Justice; the Fred T. Korematsu Center for Law and Equality; the American Civil Liberties Union of Michigan; the Gault Center; the Aoki Center on Critical Race and Nation Studies; the Center for Racial and Economic Justice; the Center on Law, Race & Policy; the Center on Race, Inequality, and the Law; Criminal Defense Attorneys of Michigan; Detroit Justice Center; and Safe and Just Michigan. Juvenile Law Center; the Center for Civil Rights and Critical Justice; the Fred T. Korematsu Center for Law and Equality; the Gault Center; the Aoki Center on Critical Race and Nation Studies; the Center for Racial and Economic Justice; Center on Race, Inequality, and the Law; Criminal Defense Attorneys of Michigan; Detroit Justice Center; and Safe and Just Michigan are 501(c)(3) tax-exempt organizations. The American Civil Liberties Union of Michigan is a 501(c)(4) organization. The American Civil Liberties Union has filed an accompanying motion for leave to file this brief on its own behalf.

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