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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEVANTE KYRAN JENNINGS,

Defendant-Appellant.
_____/

Supreme Court No. 165764
Court of Appeals No. 359837
Macomb Circuit Court No. 19-1800-FH

AMICI CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED[1]

I. Can Michigan courts independently interpret the Michigan Constitution without first finding that there is a "compelling reason" to depart from federal interpretations of the United States Constitution?

Amici answer:	Yes.
Mr. Jennings answers:	Yes.
The prosecution answers:	Assumes a "compelling reason" is required.
The Court of Appeals answered:	Did not address.
The trial court answered:	Did not address.

II. Should this Court clarify its approach to interpretation of the Michigan Constitution and set out a test focused on Michigan sources?

Amici answer:	Yes.
Mr. Jennings answers:	Yes.
The prosecution answers:	Did not address.
The Court of Appeals answered:	Did not address.
The trial court answered:	Did not address.

[1] Pursuant to MCR 7.312(H)(4), amici state that no counsel for a party authored this brief in whole or in part, nor did anyone, other than amici or their counsel, make a monetary contribution intended to fund the preparation or submission of the brief.

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INTERESTS OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization dedicated to defending the civil liberties and civil rights guaranteed by the federal and state Constitutions. The ACLU of Michigan is its Michigan affiliate. Amici have an interest in this case because they work to advance state constitutionalism, including the independent interpretation of state constitutions by state courts.

The ACLU of Michigan regularly engages in advocacy before this Court, representing clients challenging the constitutionality of state laws and actions, and filing amicus briefs in cases presenting important questions regarding the interpretation of the Michigan Constitution's protections for civil rights and civil liberties. The national ACLU's State Supreme Court Initiative advocates for robust protections for individual rights under state constitutions across the country. Amici have both a strong interest in and relevant expertise on the interpretation of the Michigan Constitution specifically and state constitutions more generally.

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INTRODUCTION

The parties in this case disagree about how Michigan's constitutional prohibition on double jeopardy should be interpreted. In a prior case, this Court declined to decide whether Michigan's constitutional requirements would be satisfied under the federal double jeopardy test or whether a more rights-protective test endorsed by another state supreme court should apply.[2] This Court now asks whether there is a "compelling reason" to depart from the federal test, and if so, whether the Court should adopt a test from another state or further develop a test previously used in Michigan. *See* Order Granting Leave (April 25, 2025).

Amici take no position on which double jeopardy test the Court should adopt. Rather, because this case presents an opportunity for the Court to clarify its approach to interpreting the Michigan Constitution, amici write to urge the Court to reaffirm its commitment to independently interpret the state Constitution and make clear that courts are not required to jump over a "compelling reason" hurdle to do so. Amici first describe the confusion around whether Michigan requires a "compelling reason" to depart from federal law given Michigan's historic commitment to independent constitutional interpretation. Next, amici review the reasons why independent constitutional interpretation is necessary: it is required by the text, structure and history of Michigan's Constitution, and it promotes the principles of dual sovereignty in our federal system. Third, amici ask this Court, drawing on its own precedents and the tests used in other states, to set out the factors that courts should consider when interpreting the Michigan Constitution, focusing first and foremost on Michigan sources. Specifically, courts should look to our Constitution's text and structure; the history, contemporary understanding and purpose of constitutional provisions; preexisting and developing Michigan law; and this state's values, culture and experience. Finally,

[2] See *People v Dawson*, 431 Mich 234, 257; 427 NW2d 886 (1988).

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amici explain that under this approach, Michigan courts may, but need not, look to persuasive precedents from other jurisdictions—federal or state—to interpret the Michigan Constitution.

By clarifying that courts should prioritize Michigan sources and by disavowing any requirement to provide a "compelling reason" to depart from federal law, this Court would ensure that Michigan constitutional law does justice to Michigan's founding document: the Constitution that "we, the people" of Michigan made.

I. The "Compelling Reason" Test Has Caused Confusion, Is in Tension with This Court's Commitment to Independent Constitutional Interpretation and Should Be Replaced.

This Court's decisions have "on occasion seemed to suggest that there is some specific burden on this Court to identify a 'compelling reason' or justification for interpreting the words of the Michigan Constitution differently than the words of the United States Constitution." *People v Tanner*, 496 Mich 199, 222 & 222 n 16; 853 NW2d 653 (2014); see also *People v Reichenbach*, 459 Mich 109, 118–119; 587 NW2d 1 (1998) (suggesting a "compelling reason" may be needed); *People v Nash*, 418 Mich 196; 341 NW2d 439 (1983) (Brickley, J.) (single-judge opinion using the "compelling reason" phrasing for the first time, but actually engaging in detailed independent analysis of the Michigan Constitution). At other times, however, this Court has rejected the "compelling reason" test, explaining that "it is this Court's obligation to independently examine" the Michigan Constitution. *Tanner*, 496 Mich at 222 & 222 n 16. Finally, in some cases the Court has declined to decide whether there must be a "compelling reason" to depart from the federal Constitution, describing this as "an issue on which jurists of reason may differ." *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992) (holding that "regardless of whether it is or should be necessary to adduce a 'compelling' reason to interpret [Michigan's cruel or unusual punishment prohibition] more broadly" than its federal counterpart, there were compelling reasons to do so).

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In short, the Court's jurisprudence is unclear about whether there must be a "compelling reason" to depart from the federal Constitution when interpreting an analogous provision.

Where this Court has used the "compelling reason" test, it has implicitly recognized that this test is in tension with the Court's commitment to independent constitutional interpretation. The Court has attempted to make clear—despite the "compelling reason" label—that this approach "compels neither the acceptance of federal interpretation nor its rejection," but rather "a searching examination to discover what law the people have made." *Reichenbach*, 459 Mich at 119 (quoting *Sitz v Dep't of State Police*, 443 Mich 744, 759; 506 NW2d 209 (1993)). And the Court has described the "compelling reason" test as a "convenient formulation" of courts' responsibility to "reject unprincipled creation of state constitutional rights that exceed their federal counterparts"—a responsibility that does not displace courts' "obligat[ion] to interpret our own organic instrument of government." *Sitz*, 443 Mich at 763. This language suggests that courts in fact do not need to jump over a "compelling reasons" hurdle before they can independently interpret the Michigan Constitution; the test simply requires principled decision-making grounding state constitutional rights in our state Constitution.

Unfortunately, despite this Court's explanatory efforts, there is still considerable confusion. Perhaps because the "compelling reason" label indicates a high bar to depart from federal jurisprudence, lower courts have struggled to reconcile the test with this Court's commitment to independent constitutional interpretation. In some cases, lower courts have invoked the test to justify lockstepping with the federal Constitution. See, e.g., *People v Purry*, 2016 WL 2731097, at *3 (Mich Ct App, 2016) (Docket No. 325613). In other cases, lower courts have ostensibly applied a "compelling reason" analysis, but have functionally engaged in independent constitutional interpretation. See, e.g., *People v Antkoviak*, 242 Mich App 424, 439; 619 NW2d 18

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(2000) (conducting a "searching examination" to "determine the law 'the people have made'" (quoting *People v Harding*, 53 Mich 481, 485; 19 NW 155 (1884))). Finally, some lower court decisions dispense with a "compelling reason" analysis altogether. See, e.g., *People v Urbanski*, 348 Mich App 90; 17 NW3d 430 (2023) (interpreting the Michigan Constitution as providing broader protection than the United States Constitution, with no reference to "compelling reasons").

Commentators likewise have trouble characterizing this Court's approach. Some have suggested that Michigan takes an independent approach to state constitutional interpretation. See Hon. Catherine R. Connors & Connor Finch, *Primacy in Theory and Application: Lessons from a Half-Century of New Judicial Federalism*, 75 Me L Rev 1, 35 (2023). Others have suggested that Michigan uses an "interstitial" approach that requires justification of any departures from federal law. See Justin R. Long, *State Constitutional Etudes: Variations on the Theme of a Contemporary State Constitutional Problem*, 60 Wayne L Rev 69, 80–81 (2014).

This Court should use the opportunity presented here to clarify its approach to interpretation of our state Constitution and conclusively reject the "compelling reason" framework. Specifically, this Court should make clear that state constitutional interpretation does not require a special justification to deviate from, or even any reference to, federal law.

II. This Court Should Reaffirm Its Commitment to Independent Constitutional Interpretation.

A. Independent Constitutional Interpretation Is Deeply Rooted in This Court's Jurisprudence and Is Required Because Michigan's Constitution Has Its Own History, Structure and Text.

Since at least the 1880s, this Court has emphasized that Michigan courts must interpret and enforce "the law which the people have made, and not some other law." *Harding*, 53 Mich at 485. The Court has recognized that independent constitutional interpretation is not just a special power

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of state courts, but a responsibility grounded in their constitutional role.[3] Accordingly, this Court has repeatedly rejected "lockstepping"—the practice of mechanically applying interpretations of the federal Constitution to state Constitutions. Instead, it has emphasized that Michigan courts "need not defer" to federal interpretations unless those interpretations are "also most faithful to the state constitutional provision." *Tanner*, 496 Mich at 222 n 16. Consistent with judicial oaths of office and American federalism, Michigan courts' "responsibility in giving meaning to the Michigan Constitution must invariably focus upon *its* particular language and history, and the specific intentions of *its* ratifiers, and not those of the federal Constitution." *Id.*[4] Principles of popular sovereignty support such independence, too: "'[W]e, the people' of the State of Michigan created Michigan's Constitution, and interpretations of this Constitution must reflect that will." *Id.* at 222 n 15. Thus, the meaning of Michigan's Constitution is not to be discovered in the federal Constitution, but rather requires "a searching examination to discover what law 'the people [of Michigan] have made.'" *Sitz*, 443 Mich at 759 (citing *Harding*, 53 Mich at 485).

Not only does Michigan's governing document reflect the will of Michiganders, it also reflects how that will has changed over time. Michigan has had four constitutions (1835, 1850, 1908, 1963), each drafted by a convention of elected delegates and approved by voters. See Legislative Service Bureau, *Michigan's Four Constitutions*, Research Brief No. 13, at 1 (Aug

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[3] See also *In re Apportionment of State Legislature—1982*, 413 Mich 96, 114; 321 NW2d 565 (1982) (it is "this Court's duty under Const 1963, art 6, § 1, providing for the exercise of the judicial power," to interpret our Constitution); *Bauserman v Unemployment Ins Agency*, 509 Mich 673, 692; 983 NW2d 855 (2022) ("This Court has not only the authority, but also the primary responsibility of interpreting and enforcing our Constitution."); *Bullock*, 440 Mich at 27 (this Court "alone is the ultimate authority with regard to the meaning and application of Michigan law").

[4] See also *People v Goldston*, 470 Mich 523, 534; 682 NW2d 479 (2004) ("In interpreting our Constitution, we are not bound by the United States Supreme Court's interpretation of the United States Constitution, even where the language is identical." (citation omitted)); *Harvey v State*, 469 Mich 1, 6 n 3; 664 NW2d 767 (2003) (similar); *Tanner*, 496 Mich at 221 (noting that justices take "separate oaths of office" to uphold both the Michigan and United States Constitutions).

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1994). Two other constitutions were drafted but rejected by voters. *Id.* Not only was each Constitution different—in some cases "strikingly" so—from its predecessor, *id.* at 2, but these Constitutions have also been repeatedly amended after their initial adoption at a constitutional convention, *id*. at 2–4. Michigan's current Constitution was adopted in 1963, and has been amended 39 times since, as recently as 2022.[5]

Some of the rights-protective provisions in Michigan's Constitution date back—often in a modified form—to the Constitution of 1835, or even to the Northwest Territory Ordinance of 1787, under which Michigan was governed prior to statehood.[6] See, e.g., Const 1835, art §§ 1–20; Northwest Territory Ordinance of 1787, arts I–VI. Others do not. The history of a particular constitutional provision—including alterations in its text—matters to understanding the will of the people of Michigan. Here, for example, Michigan's double jeopardy provision traces back to the 1835 Constitution, and has been amended several times since, most recently in 1963. See Appellants' Supp Brf, at pp 14–15. Given the evolution of that provision, it makes little sense to assume that Michigan's constitutional text should be interpreted based on a differently worded amendment to the United States Constitution that was adopted in 1791 after ratification by three-quarters of the then-states (which did not include Michigan).[7]

The structure of the Michigan Constitution also differs from the federal Constitution. The Michigan Constitution has twelve articles, while the federal Constitution has seven. Compare

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[5] *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963*, Michigan Bureau of Elections (Aug 2024), https://www.michigan.gov/-/media/%20Project/Websites/sos/01mcalpine/Initia_Ref_Under_Consti_1208.pdf.

[6] Prior to statehood, Michigan was part of the Northwest Territories, and governed under the Northwest Territory Ordinance of 1787, which included a Bill of Rights. See Northwest Territory Ordinance of 1787.

[7] National Archives, *The Bill of Rights: How Did it Happen*, https://www.archives.gov/founding-docs/bill-of-rights/how-did-it-happen.

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Const 1963, arts 1–12, with US Const, arts I–VII. Both Constitutions have articles on the legislative, executive and judicial branches, but the Michigan Constitution has articles without parallel in the United Staes Constitution. See, e.g., Const 1963, art 7 (local government), art 8 (education). The Michigan Constitution begins with a Declaration of Rights, which contains many of the key protections of civil rights and civil liberties. Const 1963, art 1. In fact, in "crafting our current Constitution, the Declaration of Rights was moved into the first article because it is so fundamental.'" *Bauserman*, 509 Mich at 691 (quoting 1 Official Record, Constitutional Convention 1961, p 466). In the federal Constitution, such protections are mostly set out in amendments, including the Bill of Rights. US Const, Ams I–X; see also *id.*, Ams XIII–XV, XIX, XXIV, XXVI. And even where both Constitutions address similar topics, they are organized differently and provide different protections. Compare, e.g., US Const, Am V (Bill of Rights provision providing that private property shall not "be taken for public use, without just compensation") with Const 1963, art 10 (standalone article on "Property," providing similar protection and more detailed restrictions on eminent domain in § 2, and guaranteeing additional property protections, such as for married women in § 1 and for noncitizen residents in § 6).

The text of the Michigan Constitution likewise differs significantly from its federal counterpart, and contains many rights-protective provisions not mirrored in the federal Constitution.[8] Some such provisions have analogues in the Constitutions of other states, meaning that while Michigan courts cannot look to federal law, they can consider the analysis of comparable

[8] See, e.g., Const 1963, art 1, § 3 (guaranteeing the right "to consult for the common good [and] to instruct their representatives"); *id.*, art 1, § 17 (guaranteeing the "right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations"); *id.*, art 1, § 15 (protecting access to bail); *id.*, art 1, § 16 (prohibiting the unreasonable detention of witnesses); *id.*, art 1, § 21 (barring imprisonment for debt); *id.*, art 1, § 24 (ensuring fair treatment of crime victims); *id.*, art 1, § 28 (guaranteeing reproductive freedom).

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provisions in other states.[9] And even where the federal and Michigan Constitutions contain parallel provisions, there can be significant textual differences. For example, the federal Constitution bars "cruel *and* unusual punishment," US Const, Am VIII (emphasis added), while the Michigan Constitution bars "cruel *or* unusual punishment." Const 1963, art 1, § 16 (emphasis added). Both Constitutions protect freedom of speech and of the press, but the provisions are textually quite distinct. Compare US Const, Am I ("Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."), with Const 1963, art 1, § 5 ("Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press."). In the instant case—which concerns double jeopardy—there are likewise differences in the text. Compare US Const, Am V ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"), with Const 1963, art 1, § 15 ("No person shall be subject for the same offense to be twice put in jeopardy.").

In sum, the Michigan and federal Constitutions are two quite different documents, with different history, structure and text. "As a matter of simple logic, because the texts were written at different times by different people, the protections afforded may be greater, lesser, or the same." *Sitz*, 443 Mich at 761–762. There is no reason to assume that the meaning of the Michigan

[9] See, e.g., Const 1963, art 2, §§ 1, 2 (specifying certain voting rights); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich L Rev 859, 870–871 (2021) (surveying state constitutional voting rights); Const 1963, art 4, § 24 (single-object requirement); Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 Alb L Rev 1629, 1629 (2018) (noting that 43 state constitutions include a single-subject rule); Const 1963, art 4, § 52 (conservation of natural resources); Quinn Yeargain, *State Constitutions in the Woods*, 41 Pace Env't L Rev 317, 321 n 19 (2024) (collecting environmental provisions in state constitutions); Const 1963, art 8, § 2 (free public elementary and secondary schools, and no public funding for private schools); Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 Alb L Rev 1101, 1107 (2000) (surveying education clauses in state constitutions).

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Constitution turns on the meaning of the federal Constitution.

B. Independent Constitutional Interpretation Is Most Consistent with Our Federal System of Dual Sovereignty.

In our federal system, the people of Michigan are protected by "two sets of constitutional constraints." See Hon. Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (New York: Oxford University Press, 2018), p 8. The government must abide by whichever Constitution is more protective.

That dual design is another important reason for independent interpretation of our state Constitution since state constitutions offer a "double source of protection for the rights of our citizens" in our federal system. Hon. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv L Rev 489, 503 (1977). This double protection is "[o]ne of the strengths of our federal system." *Id.* As Iowa Supreme Court Justice Brent R. Appel wrote, "[c]laims that cases under State and Federal Constitutions should come to uniform results run[] directly counter to the Tenth Amendment and Madisonian concepts of the states providing a 'double security' for liberty." *State v Baldon*, 829 NW2d 785, 830 (Iowa, 2013) (Appel, J., specially concurring); see also *51 Imperfect Solutions: States and the Making of American Constitutional Law*, p 179 ("A state-first approach to litigation over constitutional rights honors the original design of the state and federal constitutions."); *State v Wilson*, 154 Hawai'i 8, 14; 543 P3d 440 (2024) (quoting The Federalist No. 51, (James Madison) (Isaac Kramnick ed, 1987), p 321) ("State constitutions provide a 'double security' for the people's liberty.").

Indeed, state Constitutions "were the original sources of written constitutional rights" on which the federal Constitution was modeled. *State v Short*, 851 NW2d 474, 481 (Iowa, 2014). "[U]nder our federalist system, many important decisions concerning basic freedoms have traditionally inhered in the states," *Traylor v State*, 596 So 2d 957, 961 (Fla, 1992), and "the

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founders [at the federal constitutional convention] repeatedly expressed the view that they looked to *the states* for the preservation of individual rights," *Short*, 851 NW2d at 481. States are the "cradle of rights," *Wilson*, 154 Hawai'i at 14, and their "courts and constitutions have traditionally served as the prime protectors of their citizens' basic freedoms." *Traylor*, 596 So 2d at 961–62; see also *State v Larrivee*, 479 A2d 347, 349 (Me, 1984) (same).

Interpretive rules that tether state constitutional interpretation to federal law are inconsistent with this intended role for state courts and constitutions. State courts should not need to justify diverging from federal jurisprudence. If anything, they should need a compelling reason, grounded in state-centric sources, to mirror it. Otherwise, the federalist promise of "double security" could become illusory. See Hon. Scott L. Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval*, 49 Hastings Const L Q 115, 117 (2022) ("[I]f state courts do not perform this non-deferential, independent review of state constitutional law, they are not fulfilling their duties as shared guardians of American constitutional rights.").

What is more, Michigan has a special legacy in the jurisprudence of independent state constitutional interpretation. In *Michigan v Long*, 463 US 1032; 103 S Ct 3469; 77 L Ed 2d 1201 (1983), the United States Supreme Court found that it had jurisdiction to review a decision of this Court because that decision did not rest on adequate and independent state grounds. In doing so, however, the Court emphasized its "[r]espect for the independence of state courts" and made clear that state courts should "be left free and unfettered by us in interpreting their state constitutions." *Id.* at 1040–1041 (citation and quotation marks omitted).

Finally, independent state constitutional interpretation also promotes stability in the law by insulating states' jurisprudence from sea changes in federal law. See, e.g., *Dobbs v Jackson*

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Women's Health Org, 597 US 215; 142 S Ct 2228; 213 L Ed 2d 545 (2022); *NY State Rifle & Pistol Ass'n, Inc v Bruen*, 597 US 1; 142 S Ct 2111; 213 L Ed 2d 387 (2022). "Independent interpretation is particularly justifiable in the face of rapid, radical revision or retrenchment of federal constitutional law and fractured decision-making by the U.S. Supreme Court." *State Constitutional Law Declares Its Independence*, 49 Hastings Const L Q at 137. If, instead, state courts lockstep with federal precedents, sudden "change[s] in federal law create 'stranded' state constitutional doctrine." Hon. Elizabeth Bentley, *State Court Adherence to Decisions Incorporating Federal Constitutional Law*, 110 Iowa L Rev 1013, 1027 (2025) (quoting Jennifer Friesen, *State Constitutional Law: Litigating Individual Rights, Claims, and Defenses* § 1.06[2] & n 193 (2006)).[10] Accordingly, numerous state courts have emphasized that their Constitutions offer "safety to [the state's] people that exceeds the federal constitution's suddenly fluid protections."[11] *State v Zuffante*, 157 Hawai'i 194, 200; 576 P3d 243 (2025). "Real federalism means that state constitutions are not mere shadows cast by their federal counterparts, always subject to change at the hand of a federal court's new interpretation of the federal constitution." *Olevik v State*, 302 Ga 222, 235 n 3; 806 SE2d 505 (2017). Michigan courts likewise "may not disregard the guarantees

[10] See also *State v Barrow*, 989 NW2d 682, 689–690 (Minn, 2023) (noting that Minnesota's search and seizure protections may no longer be coextensive with federal law due in part to "[t]he creeping expansion of the automobile exception, illustrated by . . . Supreme Court precedents").

[11] See, e.g., *Allegheny Reprod Health Ctr v Pa Dep't of Hum Servs*, 309 A3d 808, 943 (Pa, 2024) ("[F]ollowing *Dobbs*, it is logical and necessary for this Court to reconsider" its lockstep approach to abortion rights "and address the unique state constitutional questions that are otherwise unanswered."); *State v Wright*, 961 NW2d 396, 411–412 (Iowa, 2021) ("Given the uncertainty and lack of clarity in federal search and seizure jurisprudence, we conclude it is no longer tenable to follow federal precedents in lockstep."), *superseded by statute on other grounds as stated in State v Amble*, 22 NW3d 265 (Iowa, 2025); *City of Golden Valley v Wiebesick*, 899 NW2d 152, 157 (Minn, 2017) (noting importance of independent state constitutional interpretation when "the United States Supreme Court has made a sharp or radical departure from its previous decisions or approach to the law" or when "the United States Supreme Court has retrenched on Bill of Rights issues.") (citation and quotation marks omitted).

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that our constitution confers on Michigan citizens merely because the United States Supreme Court has withdrawn or not extended such protection." *Sitz*, 443 Mich at 759. Indeed, as Justice Marilyn J. Kelly noted, "follow[ing] federal precedent in lockstep . . . is the functional equivalent of giving the United States Supreme Court the ability to amend the Michigan Constitution." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 109; 740 NW2d 444 (2007) (Kelly, J., dissenting).

III. This Court Should Set Out a Test Focused on Michigan Sources to Ascertain the Independent Meaning of Our Constitution.

Amici urge this Court to expressly endorse an approach to state constitutional interpretation that prioritizes Michigan sources in determining the Michigan Constitution's independent meaning. This clarified approach would not only be grounded in existing Michigan law but would also better promote this Court's goal of interpreting the law that the people of Michigan have made. Several key factors can be distilled from this Court's prior cases[12]:

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[12] See, e.g., *Tanner*, 496 Mich at 222–249 (evaluating Const 1963, art 1, § 17's protections against self-incrimination under headings "constitutional text," "constitutional convention," and "constitutional caselaw"); *Bullock*, 440 Mich at 872–874 (analyzing Const 1963, art 1, § 16's "cruel or unusual punishment" clause under headings "textual differences," "historical factors," and "long-standing Michigan precedent"). In addition, *People v Goldston* suggested consideration of six factors to determine whether a compelling reason exists to interpret parallel Michigan provisions differently from their federal counterparts:

> 1) [T]he textual language of the state constitution, 2) significant textual differences between parallel provisions of the two constitutions, 3) state constitutional and common-law history, 4) state law preexisting adoption of the relevant constitutional provision, 5) structural differences between the state and federal constitutions, and 6) matters of peculiar state or local interest.

470 Mich at 534 (quoting *People v Collins*, 438 Mich 8, 31 n 39; 475 NW2d 684 (1991)). The first, third, fourth and sixth of these factors are similar to those in the test proposed here by amici. However, the second and fifth factors—and indeed the underlying assumption that the Michigan Constitution is independently interpreted only when there is a compelling reason to do so—perpetuate the artificial linkage to the federal Constitution. As Justice Michael F. Cavanagh noted in dissent in *Goldston*, there is no reason that "Michigan must have a compelling reason to provide

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1. constitutional text and structure,
2. constitutional history, contemporary understandings and purpose,
3. preexisting and developing state law, and
4. state values, culture and experience.

These same themes run through the jurisprudence of other high courts. See, e.g., *Traylor*, 496 So 2d at 962 (setting forth factors "that inhere in [Florida's] own unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law"); *Dupuis v Roman Cath Bishop of Portland*, 331 A3d 294, 300 n 8; 2025 ME 6 (2025) ("[W]e first examine our own precedent; our own common law; our own statutes and values; and our own sociological and economic context."); *State v Misch*, 2014 Vt 309, 319; 2021 VT 10; 256 A 3d 519 (2021) ("[W]e begin with the text of the provision, understood in its historical context, and we consider our own case law, the construction of similar provisions in other state constitutions, and empirical evidence if relevant."); *Commonwealth v Molina*, 628 Pa 465, 484–485; 104 A3d 430 (2014) ("[T]he Court should consider: the text of the relevant Pennsylvania Constitutional provision; its history, including Pennsylvania case law; policy considerations, including unique issues of state and local concern and the impact on Pennsylvania jurisprudence; and relevant cases, if any, from other jurisdictions." (citation and quotation marks omitted)).

Amici believe that the proposed four-factor test would reflect both this Court's jurisprudence and sister courts' best practices for state constitutional interpretation. We discuss each factor in turn.

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greater protection to our citizens than that provided by the federal constitution." *Id.* at 558–559 (Cavanagh, J., dissenting).

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A. Constitutional Text and Structure.

The text of Michigan's Constitution is of course unique to this state. Words matter, and courts should give effect to the "plain meaning" of words in our Constitution. *Bond v Ann Arbor Sch Dist*, 383 Mich 693, 699; 178 NW2d 484 (1970). "[T]he people are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have 'ratified the instrument in the belief that that was the sense designed to be conveyed.'" *People v Nutt*, 469 Mich 565, 573–574; 677 NW2d 1 (2004) (citation omitted).

When the text is unique to our Constitution, Michigan courts of course have no choice but to interpret it independently.[13] But that responsibility should not change just because another jurisdiction—whether federal or state—has a similar or even identical provision. The methodology for interpretation should be consistent across all state constitutional provisions, irrespective of whether a Michigan provision has an analogue in another jurisdiction's Constitution. See *People v Smith*, 420 Mich 1, 7 n 2; 360 NW2d 841 (1984) ("Of course, it is not necessary that the wording of the Michigan Constitution be different from that of the United States Constitution in order for

[13] For examples of this Court's analytical approach in interpreting constitutional provisions that lack a federal analogue, see, e.g. *Federated Publications, Inc v Board of Trustees of Michigan State Univ*, 460 Mich 75; 594 NW2d 491 (1999) (interpreting Const 1963, art 8, §§ 4 and 5 to determine whether certain committees formed by the governing boards of Michigan's public universities can be made subject to the Open Meetings Act); *Studier v Michigan Public School Employees' Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005) (interpreting art 9, § 24 to determine whether health care benefits constitute "accrued financial benefits"); *Goldstone v Bloomfield Tp Public Library*, 479 Mich 554; 737 NW2d 476 (2007) (interpreting "available" as used in art 8, § 9 to determine the obligations of individual library facilities to offer book-borrowing privileges to nonresidents); *Bolt v City of Lansing*, 459 Mich 152; 597 NW2d 264 (1998) (interpreting art 9, § 31 to assess whether a city storm water service charge constitutes an unlawful tax); *Michigan Civil Rights Commission v Clark*, 390 Mich 717; 212 NW2d 912 (1973) (interpreting the Diminish-the-Right Clause of art 5, § 29).

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this Court to interpret our constitution more liberally than the United States Supreme Court interprets the language of the federal constitution.").

This Court has also emphasized the structure of our Constitution and the interplay of its provisions: "every provision must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another."[14] *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003). Because Michigan courts must interpret our Constitution as a harmonious whole,[15] it makes little sense to analyze state constitutional provisions by reference to the United States Constitution, an entirely different document; instead, they should be read in their organic context, and in light of one another. See Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 Wis L Rev 1001 (2021) (observing that when multiple state constitutional provisions protect the same underlying right, state courts frequently read them jointly in a manner that enhances the underlying protection).

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[14] See also *People v Blachura*, 390 Mich 326, 333; 212 NW2d 182 (1973) ("Every statement in a state constitution must be interpreted in the light of the whole document," and "[b]ecause fundamental constitutional principles are of equal dignity, none must be so construed as to nullify or substantially impair another."), *abrogated on other grounds by People v Cooke*, 419 Mich 420; 355 NW2d 88 (1984); *In re Request for Advisory Opinion*, 479 Mich at 35 (similar).

[15] See, e.g., *Matter of Probert*, 411 Mich 210, 232; 308 NW2d 773 (1981) (holding that Const 1963, art 6, § 4 "should be construed, if possible, to harmonize with other constitutional provisions," including art 2, § 1, and art 6, §§ 2, 8, 12, and 16); *People v Vaughn*, 491 Mich 642, 650 n 25; 821 NW2d 288 (2012) (addressing argument that right to public trial under Const 1963, art 1, § 20 should be read in light of provisions in art 6, §§ 2, 8, 22 and 16 concerning election of judges); *Federated Publications, Inc.*, 460 Mich at 90, 90 n 13 (interpreting constitutional provisions on higher education in comparison to provision on establishment of transportation and civil rights commissions); *People v Lorentzen*, 387 Mich 167, 179–180; 194 NW2d 827 (1972) (interpreting art 1, § 16's prohibition on cruel or unusual punishment in light of art 4, § 45's provision regarding indeterminate sentences); *Durant v State Bd of Educ*, 424 Mich 364, 380; 381 NW2d 662 (1985) (looking to "other constitutional provisions" to interpret Headlee Amendment).

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B. Constitutional History, Contemporary Understandings and Purpose.

Constitutional history, broadly understood, has always been part of this Court's approach to state constitutional interpretation. As this Court explained almost a century and a half ago, "[e]very constitution has a history of its own which is likely to be more or less peculiar; and unless interpreted in the light of this history is liable to be made to express purposes which were never within the minds of the people in agreeing to it." *Harding*, 53 Mich at 485. Accordingly, the then-operative 1850 Constitution had to be interpreted in light of "the tendencies of the day [which] were in the direction of enlarging individual rights, giving new privileges, and imposing new restrictions upon the powers of government in all its departments." *Id.* at 485–486.

Since then, this Court has repeatedly reaffirmed that the text must be understood in light of "common understanding" at the time of ratification. *Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971) (quoting 1 Cooley, Constitutional Limitations (6th ed), p 81). See also *Sitz*, 443 Mich at 764 ("'[W]e must take into consideration the times and circumstances under which the State Constitution was formed—the general spirit of the times and the prevailing sentiments among the people.'" (quoting *Harding*, 53 Mich at 485)).

Our 1963 Constitution must therefore be interpreted in light of common understandings at the time of its adoption. This requires looking at the way our Constitution would have been understood *given principles of constitutional interpretation and the status of constitutional law at the time.* As Michiganders understood constitutional law in 1963, constitutional text should be interpreted in light of modern life and values. See, e.g., *People v Parks,* 510 Mich 225, 241–242; 987 NW2d 161 (2022) (recognizing that interpretation of art 1, § 16 requires an analysis of how the words "cruel" and "unusual" would have been understood in 1963, and noting that the phrase "cruel or unusual punishment" is "progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice" (quoting *Lorentzen*, 387

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Mich at 178)); *People v Stovall*, 510 Mich 301, 325–326; 987 NW2d 85 (2022) (McCormack, C.J., concurring) ("[G]iven that the 1963 ratification" of Michigan's Constitution "came after the United States Supreme Court's 'evolving standards of decency' approach to the Eighth Amendment was established," and that the ratifiers "went with the same words, with a more flexible conjunction tying them together," the "original meaning expressed by those words is precisely to consider standards of decency over time."); Hon. Robert P. Young, Jr., *A Judicial Traditionalist Confronts Unique Questions of State Constitutional Law Adjudication*, 76 Albany L Rev 1947, 1961 (2013) (noting that "in the mid-twentieth century, Michigan" embraced "the Brennan 'living constitution' approach to constitutional adjudication").

This understanding was consistent with contemporary federal jurisprudence, too. At the time the framers drafted and the people of Michigan ratified the current Constitution, the federal Constitution was being interpreted quite differently than it is today. The landmark United States Supreme Court decisions of the period looked to evolving social values and current conditions. See, e.g., *Brown v Bd of Educ*, 347 US 483, 492–493; 74 S Ct 686; 98 L Ed 2d 873 (1954) ("[W]e must consider public education in the light of its full development and its present place in American life . . . ."); *Trop v Dulles*, 356 US 86, 101; 78 S Ct 598; 2 L Ed 2d 630 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."); *Mapp v Ohio*, 367 US 643, 651–652; 81 S Ct 1684; 6 L Ed 2d 1081 (1961) (considering state trends in adopting exclusionary rule); Alex Tobin, *The Warren Court and Living Constitutionalism,* 10 Ind J L & Soc Equal 221, 223 (2022) (noting that at the time of the ratification of Michigan's 1963 Constitution, the Supreme Court was known for its living constitutionalism interpretative approach, wherein interpretation necessarily involved application of constitutional "values and provisions" to "modern contexts and meanings"). Thus, an approach

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focused on the "common understanding" of our Constitution at the time of ratification in 1963 supports an interpretive methodology that accounts for evolving conditions and modern values in Michigan today.

While Michiganders voting on the 1963 Constitution would have expected it to be interpreted in a manner consistent with interpretive norms of the 1960s that considered evolving social values, Michiganders would also have expected—at a minimum—that the constitutional protections they were adopting would reflect how rights were understood in the 1960s. As this Court explained in *Bullock*, where it rejected the notion that originalist interpretations of the federal Constitution apply to the Michigan Constitution:

> Whatever the legal terms "cruel" and "unusual" were understood to mean in 1791 when the Eighth Amendment was ratified—or in 1689 when its antecedent, the English Bill of Rights, was adopted—by 1963 those words had been interpreted and understood by the United States Supreme Court *and by this Court* for more than half a century to include a prohibition on grossly disproportionate sentences.

440 Mich at 32.

In addition to constitutional history and contemporary understandings, this Court considers the purpose behind a constitutional provision. *Traverse City School Dist*, 384 Mich at 405. Sometimes this involves looking to why a provision was adopted. See, e.g., *Bolt v City of Lansing*, 459 Mich 152, 160–161; 597 NW2d 264 (1998) (invoking "the spirit of 'tax revolt'" that motivated the Headlee Amendment). Other times, this involves examining a provision's development to understand its current meaning. See, e.g., *Federated Publications*, 60 Mich at 85–86 (looking to historical evolution of constitutional provisions on public universities to discern their purpose); *Bullock*, 440 Mich at 30–31 (holding that disjunctive language in Michigan's "cruel or unusual" punishment prohibition "does not appear to be accidental or inadvertent," given that the language was updated from "and" to "or" in 1850, signaling a deliberate shift). And sometimes it involves interpreting a historical provision in light of modern conditions and contemporary values. See

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Stovall, 510 Mich at 327 n 4 (McCormack, C.J., concurring) ("[G]enerations of Michiganders should not be prisoners of history with the breadth of their constitutional protections confined only to what the 1963 ratifiers would consider 'cruel or unusual.' . . . . Constitutions often express general principles to be applied in specific cases and context over time."). For example, to be true to the privacy-protective purposes of constitutional search and seizure protections, this Court accounts for evolving technology. See, e.g., *People v Carson*, ___Mich ___; ___NW3d ___; 2025 WL 2177501, at *11 (July 31, 2025) (finding broad search warrant "constitutionally intolerable" because "[i]n our modern age . . . cell phones carry a virtually unlimited amount of private information"); *People v Hughes*, 506 Mich 512, 542; 958 NW2d 98 (2020) (similar). As commentators have explained, "a value endures from the constitution's inception, but how it manifests itself in a changing world can affect constitutional interpretation." *Primacy in Theory and Application*, 75 Me L Rev at 29. See also Hon. Ellen A. Peters, *Federalism in the Common Law Tradition*, 84 Mich L Rev 583, 586 (1986) (arguing that state courts "should interpret their constitutions to enable the state's constitutional law to reflect modern values").

In sum, Michigan's constitutional provisions must be understood in light of their history, the sentiments at the time of their adoption and their purpose.

C. Preexisting and Developing Michigan Law.

This Court has used state law in several ways to interpret our Constitution. First, "it must be presumed that a constitutional provision has been framed and adopted mindful of prior and existing law and with reference to them." *People v Kirby*, 440 Mich 485, 492; 487 NW2d 404 (1992). Indeed, this Court often looks both to its prior precedents and to Michigan common law. See, e.g., *People v Kabongo*, 507 Mich 78, 127; 968 NW2d 264, 295–296 (2021) (reviewing common law history to determine meaning of Michigan Constitution's jury trial guarantee), *abrogated on other grounds by People v Yarbrough*, 511 Mich 252; 999 NW2d 372 (2023); *Rafaeli*,

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LLC v Oakland Co, 505 Mich 429, 472; 952 NW2d 434 (2020) (interpreting Michigan's Takings Clause in light of common law rights because "the ratifiers would have commonly understood this common-law property right to be protected under Michigan's Takings Clause at the time the ratification"); *Sitz*, 443 Mich at 776 (recounting cases evaluating what level of cause is necessary for a stop or seizure under the Michigan Constitution and concluding that "the history of our jurisprudence conclusively demonstrates that, in the context of automobile seizures, we have extended more expansive protection to our citizens" than the United States Supreme Court under the United States Constitution). Past precedents can also provide consistency in the understanding of particular constitutional provisions. Thus, in *People v Parks*, this Court declined to "overturn 50 years of precedent," rejecting a prosecutorial request to revisit decisions holding that the Michigan Constitution provides broader protection from disproportionate punishment than the federal Constitution. 510 Mich at 243 n 5.

Second, legislative enactments can be helpful for understanding the constitutional text. See *Smith v Auditor General*, 165 Mich 140, 144; 130 NW 557 (1911) ("[T]he contemporaneous and subsequent constructions of the legislatures of the state . . . are entitled to weight in determining the proper construction of the constitutional provisions.").[16] Sometimes state statutes help explain

[16] Other state courts likewise consider their state laws and other legal sources outside the state Constitution when interpreting their state Constitutions. See, e.g., *State v Bernier*, 246 Conn 63, 73; 717 A2d 652 (1998) ("Because '[l]egislative enactments are expressions of this state's public policy' . . . they may be relevant to the resolution of whether the defendant's expectation of privacy is one that Connecticut citizens would recognize as reasonable." (quoting *State v Miller*, 227 Conn 363, 375; 630 A2d 1315 (1993))); *State v Misch*, 214 Vt 309, 336; 2021 VT 10; 256 A3d 519 (2021) ("Our conclusion that the right to bear arms for individual self-defense is subject to limitations and regulation is consistent with Vermont's history of public-safety regulations of both the militia and individual gun ownership."); *City of Pawtucket v Sundlun*, 662 A2d 40, 45 (RI, 1995) ("In construing a constitutional provision, this court properly consults extrinsic sources, including . . . any legislation related to the constitutional provision that was enacted at or near the time of the adoption of the constitutional amendment."); *Sisler v Gannett Co*, 104 NJ 246, 256; 516 A2d 1083 (1986) ("Legislative enactments echo the Constitution, evincing a paramount

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the meaning of a word in the constitutional text. For example, in order to interpret the term "additions" in a 1994 constitutional amendment that limited annual increases in property tax assessments, this Court looked to the definition of "additions" in the General Property Tax Act. *WPW Acquisition Co v City of Troy*, 466 Mich 117, 121–122; 643 NW2d 564 (2002). Similarly, in interpreting art 5, § 29's provision that appeals from decisions of the Civil Rights Commission be "tried de novo," this Court considered both a similar provision of the Fair Employment Practices Act (which the Court had interpreted shortly before adoption of the 1963 Constitution) and "the Legislature's present interpretation of the constitutionally mandated relationship between the [Civil Rights Commission] and a reviewing court" as embodied in the Elliott-Larsen Civil Rights Act. *Walker v Wolverine Fabricating & Mfg Co*, *Inc*, 425 Mich 586, 602–606, 613; 391 NW2d 296 (1986).

Other times, Michigan statutory law illuminates a broader societal backdrop for constitutional interpretation. For example, in ruling that our Constitution does not permit mandatory sentences of life without parole for 19- and 20-year-olds, this Court considered other Michigan laws showing that "our society does not recognize these individuals as full adults until age 21."

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concern for freedom of speech and press." (citing NJSA 2A:84A-21 (Shield Law); *Maressa v New Jersey Monthly*, 89 NJ 176; 445 A2d 376 (1982))); *State v Muhammad*, 145 NJ 23, 43; 678 A2d 164 (1996) ("Beginning with the passage of the Criminal Injuries Compensation Act of 1971 (*NJSA* 52:4B-1 to -33), the people of New Jersey, speaking through the Legislature, have repeatedly expressed a very strong 'public attitude' that victims should be provided with more rights."); *Vlaming v W Point Sch Bd*, 302 Va 504, 546-547; 895 SE2d 705 (2023) ("As recently as 2016, the General Assembly reaffirmed its view that religious liberty is one of the 'natural and unalienable rights of mankind and this declaration is the policy of the Commonwealth of Virginia.' Code § 57-2."); *Griego v Oliver*, 2014-NMSC-003, ¶ 42; 316 P3d 865 (NM, 2013) (canvassing New Mexico legislation offering protection based on sexual orientation); *State v Martinez*, 2021-NMSC-002, ¶ 67; 478 P3d 880 (NM, 2020) (describing New Mexico's Accurate Eyewitness Identification Act as part of trend toward addressing problems with eyewitness-identification evidence); *State v Lien*, 364 Or 750, 762; 441 P3d 185 (2019) (stating that "[t]he common law, as well as other sources, such as statutes, administrative rules, and local ordinances, are informative concerning existing legal norms of behavior" relevant to state constitutional privacy rights).

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People v Taylor, ___ Mich ___; ___ NW3d ___; 2025 WL 1085247, at *8 (April 10, 2025). Similarly, in *People v Lorentzen*, the Court assessed whether a sentence was cruel or unusual punishment in part by looking at sentences under other Michigan statutes. 87 Mich at 176–178.

D. Michigan's Values, Culture and Experience.

This Court has long considered Michigan values, culture and experience in interpreting our Constitution, consistent with the approaches advocated by commentators.[17] See *Goldston*, 470 Mich at 534 (listing "matters of peculiar state or local interest" as a factor in constitutional interpretation (quoting *Collins*, 438 Mich at 31 n 39)). For example, in *Durant*, this Court declined to apply the Headlee Amendment to Const 1963, art 8, § 2's provision for free public schools in part because the Court was "not persuaded that the voters intended to adopt" a provision "which would cause . . . a high level of state supervision" over education, given that "[l]ocal control of education is a time-honored tradition in this state." 424 Mich at 385. Similarly, this Court considered the fact that "[i]n Michigan, title to the beds of waterways deemed navigable under common-law standards has always been held to be a qualified title subject to the right of the public to make certain uses of the waters" to find that the public's use of waterways that are private property is not a taking for purposes of Const 1963, art 10, § 2. *Bott v Commission of Natural*

[17] For commentary, see Jim Rossi, *Assessing the State of State Constitutionalism*, 109 Mich L Rev 1145, 1154 (2011) ("The predominant normative theory grounds state constitutional interpretation in the character of an individual state as a political community. Endorsed by leading state supreme court judges and scholars . . . this approach sees state constitutions as reflecting the unique character and values of a state's populace."); Hon. David Schuman, *A Failed Critique of State Constitutionalism*, 91 Mich L Rev 274, 278 (1992) (noting that even if the "words" of a state's constitution are "not particularly distinctive, their connotations[] can be" and can "give distinctive meaning to the undistinctive text"); Hon. Mark S. Coven, *The Common Law as a Guide to State Constitutional Interpretation*, 54 Suffolk Univ L Rev 279, 317 (2021) (explaining that a provision's independent meaning may depend on "the particular concerns, attitudes, and values of the state populace"); *Primacy in Theory and Application*, 75 Me L Rev at 28–30 (2023) (explaining how "changing norms," "evidence of values" and "economic and sociological consequences" should inform state constitutional interpretation, and collecting cases).

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Resources of State of Mich Dep't of Natural Resources, 415 Mich 45, 128; 327 NW2d 838 (1982). And recently in *Taylor*, this Court, in construing Const 1963, art 1, § 16, weighed the fact that "a person's potential for rehabilitation and reentry into society has long played a unique and heightened role in Michigan." 2025 WL 1085247, at *14.

Experience—which can come in the form of scientific evidence—matters, too. This Court "consider[s] objective, undisputed scientific evidence" when weighing a statute's constitutionality. *Parks*, 510 Mich at 249. For example, in *People v Lorentzen*, this Court found that a 20-year minimum mandatory sentence for selling cannabis constituted cruel or unusual punishment under Const 1963, art 1, § 16, in part because "Michigan has long recognized rehabilitative considerations in criminal punishment," and "[e]xperts on penology" find that rehabilitation can "best be reached by . . . sentences of less than five years" 387 Mich at 179–181. See also *Taylor*, 2025 WL 1085247, at *6–7 (weighing evidence on adolescent brain development in evaluating constitutionality of life without parole sentences for 19- and 20-year-olds).

Like Michigan, other states interpret their Constitutions in light of the unique attributes of their states.[18] As reflected in this Court's cases and the practices of sister states, our state's values, culture and experience are important factors for properly understanding our Constitution.

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[18] See, e.g., *Society of Separationists, Inc v Whitehead*, 870 P2d 916, 921 (Utah, 1993) (examining "the unique history of church-state relations in Utah—relations that occupied center stage in our state's social and political history for the almost fifty years preceding adoption of the 1896 constitution"); *State v Bullock*, 272 Mont 361, 384; 901 P2d 61 (1995) ("[I]n Montana a person may have an expectation of privacy in an area of land that is beyond the curtilage which the society of this State is willing to recognize as reasonable . . . ."); *State v Cordova*, 109 NM 211, 216; 784 P2d 30 (1989) (invoking "the New Mexico experience"); *State v Gomez*, 1997-NMSC-006, ¶ 20; 122 NM 777; 932 P2d 1 (1997) (citing *State v Sutton*, 112 NM 449, 455; 816 P2d 518 (1991) (describing courts' attention to the effects of a particular probable-cause test in New Mexico and, separately, the size of rural lots)); *Dupuis*, 331 A3d at 300 n 8, *supra*; *Misch*, 214 Vt at 336, *supra*.

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IV. Decisions from Other Jurisdictions, Both Federal and State, Can Be Considered for Their Persuasive Value.

In determining what the Michigan Constitution requires, Michigan courts may, but need not, consider federal precedents interpreting similar provisions in the United States Constitution. Further, Michigan courts should treat other states' constitutional precedents as potentially persuasive authorities on the same plane as those federal precedents.

As this Court has recognized, federal jurisprudence may be relevant to the interpretation of "similarly worded" Michigan provisions, "but only to the extent that we believe the Supreme Court's interpretation accurately conveys the original meaning of the Michigan Constitution." *Vaughn*, 491 Mich at 650 n 25. So too for the jurisprudence of other states, since "federal decisions . . . [are] no more binding on the Michigan Supreme Court than the decisions of the Ohio Supreme Court." *Sitz*, 443 Mich at 765. In some cases, United States Supreme Court opinions may be persuasive, but in other cases this Court may "find more persuasive, and choose to rely upon, the reasoning of the dissenting justice of that Court, and not the majority, for purposes of interpreting our own Michigan Constitution." *Bullock*, 440 Mich at 28. Sometimes, the jurisprudence of other states provides better guidance, either because another state court's reasoning is more compelling, or because the other state's constitutional text or formative history more closely parallels Michigan's.[19] See *State Constitutional Law Declares Its Independence*, Hastings Const L Q at 133

[19] See, e.g., *Bauserman*, 509 Mich at 694–695 (citing decisions of sister courts in other states in holding money damages are an available remedy for state constitutional torts); *Parks*, 510 Mich at 253–254 (citing *In re Monschke*, 197 Wash 2d 305, 306–307; 482 P3d 276 (2021)) (finding opinion of Washington Supreme Court persuasive in considering sentencing for 18-year-olds, where Washington's Constitution, like Michigan's, is more protective than the Eighth Amendment); *Blank v Dep't of Corr*, 462 Mich 103, 114–121; 611 NW2d 530 (2000) (evaluating whether certain provisions of the Administrative Procedures Act violated the separation of powers provision and the enactment and presentment provision of the Michigan Constitution by looking both to federal precedent and the decisions of ten other state supreme courts interpreting parallel provisions).

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(discussing "horizontal federalism"). And sometimes Michigan may want to look to neither, and focus instead on its own law.

Here, for example, the Court is considering several potential tests for resolving the double jeopardy question at issue: should it adopt the federal test from *Oregon v Kennedy*, 456 US 667, 675–676; 102 S Ct 2083; 72 L Ed 2d 416 (1982); adopt a test from another state such as that in *Pool v Superior Court*, 139 Ariz 98, 108–109; 677 P2d 261 (1984); or develop a test based on prior Michigan decisions in *People v Anderson*, 409 Mich 474, 485; 295 NW2d 482 (1980), and *People v Tyson*, 423 Mich 357, 371–372; 377 NW2d 738 (1985)? Again, amici take no position on what test this Court should adopt. But amici submit that as this Court considers these different sources, there is no need for it to justify departure from the *Oregon* test. Instead, this Court can look to all these (and other) sources as it independently determines what test best reflects the protections in the Constitution that "the people [of Michigan] have made." *Harding*, 53 Mich at 485.

In sum, this Court should clarify that Michigan courts are not *required* to, but *may*, refer to federal or other states' law when interpreting Michigan constitutional provisions, so as to preserve them as an independent and unique source of rights.

CONCLUSION

Amici respectfully urge this Court to reaffirm its commitment to independent interpretation of Michigan's Constitution and expressly align itself with other high courts in endorsing an approach that provides a truly independent layer of security for individual rights. The Court should clarify that there is no "compelling reason" obstacle to such independent interpretation, and should set out factors to guide constitutional interpretation, such as the text and structure of our Constitution; the history, contemporary understandings and purpose of our Constitution; preexisting and developing Michigan law; and Michigan's values, culture and experience.

Respectfully submitted,

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