SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS
No. SJC-11693

COMMONWEALTH
Plaintiff-Appellee,

v.

SHELDON MATTIS
Defendant-Appellant.

On Appeal from the Suffolk Superior Court

BRIEF OF *AMICI CURIAE* THE SENTENCING PROJECT, JUVENILE LAW CENTER AND THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER IN SUPPORT OF APPELLANT SHELDON MATTIS

Oren Nimni, BBO No. 691821
Rights Behind Bars
416 Florida Avenue NW, #26152
Washington, DC 20002
(202) 540-0029
oren@rightsbehindbars.org
Attorney for Amici Curiae *The Sentencing Project, Juvenile Law Center, and the Roderick & Solange MacArthur Justice Center*

**pro hac vice pending*

Andrea Lewis Hartung*
Roderick & Solange
MacArthur Justice Center
160 East Grand Avenue, 6th Floor
Chicago, IL 60611
(312) 503-0913
alewishartung@macarthurjustice.org
Attorney for Amici Curiae *The Sentencing Project and the Roderick & Solange MacArthur Justice Center*

Marsha L. Levick*
Juvenile Law Center
1800 John F. Kennedy Boulevard
Suite 1900B
Philadelphia, PA 19103
(215) 625-0551
mlevick@jlc.org
Attorney for Amicus Curiae *Juvenile Law Center*

December 16, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amicus curiae the Sentencing Project is a national nonprofit organization established in 1986 to engage in public policy research, education, and advocacy to promote effective and humane responses to crime. The Sentencing Project has produced a broad range of scholarship assessing the merits of extreme sentences in jurisdictions throughout the United States. Because this case concerns life sentences for individuals who, as evidenced by scientific principles, have a diminished culpability for their actions and enhanced capacity for change, it raises questions of fundamental importance to The Sentencing Project.

Amicus curiae Juvenile Law Center fights for rights, dignity, equity, and opportunity for youth. Juvenile Law Center 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, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center's legal and policy agenda is informed by—and often conducted in collaboration

[1] This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the *amici*, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief. Neither *amici*, their members, nor their counsel have represented any of the parties to the present appeal in another proceeding involving similar issues, nor have they been parties in a proceeding or legal transaction that is at issue in the present appeal.

with—youth, family members, and grassroots partners. Since its founding, Juvenile Law Center 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.

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

SUMMARY OF THE ARGUMENT[2]

This Court asks whether article 26 of the Massachusetts Declaration of Rights categorically bars mandatory life-without-parole sentences for individuals age 18 to 20 convicted of first-degree murder. The narrow answer is yes, but amici posit that this Court should hold that life-without-parole sentences for *all* late adolescents—

[2] The arguments herein apply equally to *Commonwealth v. Jason Robinson*, SJC-09265.

including those over age 20—are unconstitutional, and extend its ruling in *Diatchenko v. Dist. Att'y,* 466 Mass. 655 (2013) (*Diatchenko I*), accordingly.

(pp. 7-15) First, this Court's decision in *Diatchenko I*, consistent with other rulings addressing article 26, extended the reach of rights previously recognized under the Eighth Amendment rights. But here, where the U.S. Supreme Court drew a clear line at age 18 for sentencing protections based on outdated notions of the age of maturity, this Court must consider article 26 independently from the Eighth Amendment. In doing so, this Court should decisively rule that article 26 is substantively broader than the Eighth Amendment. Article 26, unlike the Eighth Amendment, requires sentences that are proportional to both the offense and the person facing punishment. Additionally, article 26's prohibition against cruel "or" unusual punishment is textually broader than the Eighth Amendment's prohibition against cruel "and" unusual punishment. Accordingly, all sentences should be reviewed for proportionality considering society's evolving standards of decency.

(pp. 15-31) Second, objective measures of society's standards of decency show that life-without-parole sentences are disproportionate for youth over 18 for the same reasons they are disproportionate for youth under 18. Scientific research shows that the developmental characteristics of youth that render them less blameworthy, which this Court relied upon in barring life without parole for juveniles, extend to older adolescents well beyond age 18. A clear national

consensus also is emerging—based on this research—that the line between childhood and adulthood falls well above the age of 18.

(pp. 31-33) Third, states with similar prohibitions on disproportionate punishment are beginning to address the scientific reality that life sentences for late adolescents are unconstitutionally cruel or unusual punishment. Because the justifications for life-without-parole sentences for older adolescents fail in the same way they fail for youth under 18, and neither science nor society considers 18 to be the age at which a child achieves full maturity, this Court should broaden its ruling in *Diatchenko I* to hold that article 26 bars life-without-parole sentences for youth *over* 18.

ARGUMENT

I. ARTICLE 26 OF THE MASSACHUSETTS DECLARATION OF RIGHTS CONTROLS, AND IT—UNLIKE THE EIGHTH AMENDMENT—BROADLY GUARANTEES PROPORTIONATE PUNISHMENTS.

The issue at bar requires a separate interpretation of the Massachusetts Constitution, because the answer lies beyond the U.S. Supreme Court's current interpretations of the Eighth Amendment, *see infra Part II*. This Court acknowledges that "[f]undamental to the vigor of our Federal system of government is that 'state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.'" *Goodridge v. Dept. of Public Health*, 440 Mass. 309, 328 (2003)

(quoting *Arizona v. Evans*, 514 U.S. 1, 8 (1995)). More accurately though, "state courts, as the ultimate arbiters of state law, have the . . . duty to interpret their state constitutions *independently*." Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307, 1315 (2017).

The Massachusetts Declaration of Rights provides expansive individual protections, providing that its people "enjoy *every* power, jurisdiction, and right, which *is not, or may not hereafter*, be by them expressly delegated to the United States of America in Congress assembled." Mass. Decl. of Rights art. 4. (emphasis added). Fittingly, this Court has interpreted the Massachusetts Declaration of Rights as extending various individual liberties beyond those available under the U.S. Constitution. *See, e.g. Goodridge*, 440 Mass. 309 (holding that the marriage statute constituted discrimination on the basis of sex in violation of article 1 of the Massachusetts Declaration of Rights, years before the Supreme Court decided *Obergefell v. Hodges*, 576 U.S. 644 (2015)). *See also Commonwealth v. Amirault*, 424 Mass. 618, 629 (1997) (holding that the text of the Sixth Amendment's confrontation clause requires a less demanding interpretation than that of Massachusetts' article 12.); Robert J. Cordy, *Criminal Procedure & the Massachusetts Constitution*, 45 New England L. Rev. 815, 820 (2011) (explaining that this Court has also expanded constitutional protections with regards to the right

to counsel, the right to production of exculpatory evidence, and privilege against self-incrimination).

Yet this Court has stopped short of ruling affirmatively that article 26 of the Declaration of Rights is substantively broader than the Eighth Amendment. *See Diatchenko I*, 466 Mass. at 667 n. 13 (citation omitted) ("This court never has decided whether ["cruel or unusual punishments"] has the same prohibitive sweep as the phrase 'nor cruel and unusual punishments inflicted' in the Eighth Amendment."); *Dist. Att'y for Suffolk Dist. v. Watson*, 381 Mass. 648, 676 (1980) (Liacos, J., concurring) ("This court has not decided whether the phrase cruel and unusual" and the phrase "cruel or unusual have the same meaning . . . ."). Instead, this Court often addresses article 26 in tandem with the Eighth Amendment, with little distinction between the two. *See, e.g. Commonwealth v. Perez*, 477 Mass. 677, 683 (2017) (describing proportionality as "[t]he touchstone of art. 26's proscription against cruel or unusual punishment", but citing federal law); *Cepulonis v. Commonwealth*, 384 Mass. 495, 496-97 (1981) (analyzing "cruel and unusual punishment"—the text of the Eighth Amendment—rather than "cruel or unusual punishment," as article 26 proscribes).

Now, this Court should heed the important call that Justice Liacos issued years ago, to "state that art. 26 stands on its own footing," and to "hold that a punishment

may not be inflicted if it be either "cruel" or "unusual." *Watson*, 381 Mass. at 676 (Liacos, J., concurring).

A. Proportional Punishment Imposed By Courts Is Central To Article 26's Ban on Cruel Or Unusual Punishment.

This Court unequivocally recognizes that inherent in article 26 is the requirement that criminal punishments be proportioned to the offense and to the convicted individual. *Perez*, 477 Mass. at 683; *see also Commonwealth v. Lustkov*, 480 Mass. 575 (2018) ("[P]roportionality requirement [is] inherent in art. 26."); Superior Ct. ruling at 18 ("Proportionality is the touchstone for analyzing cruel and [sic] unusual punishment under . . . article 26 of the Massachusetts Declaration of Rights.") (citing *Diatchenko I*, 466 Mass. at 669). This reading is consistent with article 26's explicit prohibition on cruel or unusual punishments meted out by a "magistrate or court of law"—a limitation not contained in the U.S. Constitution. The discretion of individual judges in individual sentencing hearings may require greater constitutional restriction precisely because such discretion can invite disproportionality if left unchecked.

This Court has embraced the proportionality guarantee by construing article 26 more broadly than the Eighth Amendment in circumstances where proportionate sentences could not be guaranteed. For example, after the U.S. Supreme Court ruled that the death penalty violates the Eighth Amendment if it is inflicted arbitrarily, *Furman v. Georgia*, 408 U.S. 238 (1972), this Court held that Furman's ruling

rendered the death penalty "unconstitutionally cruel" under article 26, in part because arbitrariness is inevitable. *Watson*, 381 Mass. at 665-666. Likewise, after the U.S. Supreme Court ruled that the distinctive attributes of youth under 18 rendered mandatory life-without-parole sentences unconstitutional, *Miller v. Alabama*, 567 U.S. 460 (2012), this Court ruled that discretionary life-without-parole sentences for youth under 18 violate article 26 because "a judge cannot ascertain, with any reasonable degree of certainty, whether imposition of this most severe punishment is warranted." *Diatchenko I*, 466 Mass. at 284-85.

However, the Eighth Amendment does not so clearly require proportionate punishment. Compare *Solem v. Helm*, 463 U.S. 277 (1983) ("The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.") and *Graham v. Florida*, 560 U.S. 488 (2010) ("The concept of proportionality is central to the Eighth Amendment."); with *Harmelin v. Michigan*, 501 U.S. 957 (1991) ("*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee."). Rather, the Eighth Amendment forecloses sentences that are "grossly disproportionate" to the crime itself. *Harmelin*, 501 U.S. at 961. This narrower interpretation of the Eighth Amendment reinforces the differing functions between the state and the U.S. constitutions. While a state's constitution "is an affirmative grant of rights and liberties to be effectuated to the fullest," the U.S. Constitution "is a negative restriction on the states' power to act in certain

ways." Alan B. Handler, *Expounding the State Constitution*, 35 Rutgers L. Rev. 202, 205 (1983). This Court should recognize that article 26 requires proportionate punishments *even when* the Eighth Amendment does not.

B. Article 26's Rule Against Cruel Or Unusual Punishment Is Broader Than The Eighth Amendment's Rule Against Cruel And Unusual Punishment.

Article 26 also is textually broader than the Eight Amendment. Whereas the federal Eighth Amendment limits only "cruel and unusual" punishment, U.S. Const. amend. VIII, the Massachusetts Declaration of Rights prohibits "cruel or unusual" punishment, Mass. Decl. of Rights art. 26. A state constitution that prohibits cruel *or* unusual punishment is more protective by definition, because it "bars a punishment that meets one of the parameters of cruelty and unusualness. A cruel punishment violates the state constitution irrespective of whether it is also unusual; an unusual punishment violates the state constitution irrespective of whether it is also cruel." William W. Berry III, *Unusual State Capital Punishments*, 72 Fla. L. Rev. 1, 18 (2020); *see also*, Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and "Cruel and Unusual" Punishment*, 94 N.C. L. Rev. 817, 832 n. 66 (2016) ("This difference [between 'cruel and unusual' and 'cruel or unusual'] is not insignificant, as many courts have noted.").

The textual differences between these provisions are meaningful. *See Att'y Gen. v. Colleton*, 387 Mass. 790, 800 (declining "to assume that, because of the

common source of the principles articulated in each Constitution, the two provisions must have the same meaning . . .”). Had the framers of the Massachusetts Declaration of Rights intended to prohibit both cruel *and* unusual punishment, they had several models from which to draw at the time. *See, e.g., Letter To Benjamin Rush Sept. 10, 1776*, Papers of John Adams, vol. 8 March 1779-February 1780, Gregg L. Lint et al., eds. (1989), https://www.masshist.org/publications/adams-papers/index.php/view/PJA08d104 (writing in regards to framing a Constitution, “Yet it is impossible for Us to Acquire any Honour, as so many fine Examples have been so recently set Us.”)); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 Wash. U. L. Rev. 567, 609 (2010) (“The existence of . . . various permutations of constitutional prohibitions on cruel and/or unusual punishments suggests that the Framers and Ratifiers were likely aware of the significance of using the term ‘and’ instead of ‘or’ . . .”).

For instance, Virginia adopted a Declaration of Rights in June of 1776, which closely tracked the 1689 English Declaration of Rights by prohibiting only “cruel and unusual” punishments and which was the model the framers of the federal Eighth Amendment ultimately chose. *Harmelin*, 501 U.S. at 966. In contrast, Massachusetts, along with several other states, chose to depart from the Virginia model and enact a Declaration of Rights that prohibited “cruel or unusual punishments.” *Id.* Furthermore, this language has endured, unchanged, for more than

two centuries and through scores of amendments to the state Constitution, including one that altered article 26 itself.[3]

Acknowledging the distinction between a rule against cruel "or" unusual punishment and a rule against cruel "and" unusual punishment, several state high courts have explicitly ruled that their disjunctive provisions are broader than the Eighth Amendment. *See, e.g., Hale v. State*, 630 So.2d 521, 526 (Fla. 1993) ("The federal constitution protects against sentences that are *both* cruel and unusual. The Florida Constitution, arguably a broader constitutional provision, protects against sentences that are *either* cruel or unusual."); *State v. Vang*, 847 NW.2d 248, 263 (Minn. 2014) ("This difference in wording is 'not trivial' because the 'United States Supreme Court has upheld punishments that, although they may be cruel, are not unusual.'") (citation omitted); *State v. Fain*, 617 P.2d 720, 723 (Wash. 1980) (concerning the Washington Constitution's prohibition on "cruel" punishment, "[e]specially where the language of our constitution is different from the analogous federal provision, we are not bound to assume the framers intended an identical interpretation."); *People v. Anderson*, 493 P.2d 880, 883 (Cal. 1972) ("unlike the Eighth Amendment . . . the California Constitution prohibits imposition of the death penalty if, judged by contemporary standards, it is either cruel or has become an

[3] *See* Amend. to the Mass. Const. art. 116 (amending article 26 to grant courts the authority to impose the death penalty).

unusual punishment."). This Court should reach the same conclusion regarding article 26.

To ensure protection of the broad right to proportionate punishments under article 26, this Court must review the constitutionality of sentences in line with "evolving standards of decency that mark the progress of maturing society." William W. Berry III, *Cruel & Unusual Non-Capital Punishments*, 58 American Crim. L. Rev. 1627 (2021) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)); *Diatchenko I*, 466 Mass. at 669.[4] This test, which entails measuring objective indicia of society's standards, and considering whether a penological purpose justifies the punishment, *see* Berry, *Cruel & Unusual Non-Capital Punishments* at 1631-32, makes plain that sentences of life without parole are unconstitutional for older adolescents.[5]

[4] The Superior Court loosely applied this Court's three-part proportionality test. Superior Ct. ruling at 24. That three-part test parallels the U.S. Supreme Court's Eighth Amendment gross disproportionality analysis. *See* Berry, *Cruel & Unusual Non-Capital Punishments* at 1630-35 (explaining the evolution of Eighth Amendment jurisprudence). But because of article 26 *proportionality*, the broader evolving standards of decency test is more appropriate in Massachusetts. *Cf. Commonwealth v. Upton*, 394 Mass. 363 (1985) (rejecting the U.S. Supreme Court's Fourth Amendment totality of the circumstances test in favor of a broader two-prong test, because Article 14 provides more substantive protections than the federal Fourth Amendment does).

[5] Berry also suggests that measuring objective indicia of society's standards is a "proxy for unusualness," while the court's subjective comparison of the penalty to the purposes of punishment is a "proxy for cruelty." *Id.*

II. LIFE-WITHOUT-PAROLE SENTENCES FOR YOUTH OVER 18 ARE CONSTITUTIONALLY DISPROPORTIONATE, JUST AS THE *DIATCHENKO I* COURT FOUND THEM DISPROPORTIONATE FOR YOUTH UNDER 18.

Since its ruling in *Diatchenko I*, this Court has consistently rejected article 26 sentencing challenges raised by older adolescents, reasoning—in keeping with the U.S. Supreme Court's Eighth Amendment decisions—that age 18 marks the line between childhood and adulthood. *See Commonwealth v. Chukwuezi*, 475 Mass. 597, 610 (2016) (citing *Roper v. Simmons*, 543 U.S. 551, 574 (2005)); *Commonwealth v. Watt*, 484 Mass. 742, 755 (2020) (listing relevant cases). Now, science, public policy, law, and common-sense principles that have developed since *Diatchenko I* demonstrate that the very same attributes of youth that render life without parole sentences unconstitutional for youth under 18, apply to their older adolescent and young adult peers. Because the same constitutional disproportionality that the *Diatchenko I* court sought to correct is present in this case, this Court should similarly hold that sentences of life without parole for late adolescents are cruel or unusual in violation of article 26.

A. Youth Under and Above 18 Years of Age Are Developmentally Similar and Merit Similar Sentencing Considerations.

Since the U.S. Supreme Court's decision in *Roper v. Simmons*, it has been settled constitutional law that children are developmentally different from adults, and thus require individualized consideration of their youthful characteristics before

receiving harsh adult punishments. *See*, *e.g.*, *Roper*, 543 U.S. at 578 (banning the death penalty for individuals convicted of murder under the age of 18); *Graham*, 560 U.S. at 82 (banning life without parole sentences on juveniles convicted of non-homicide offenses); *Miller*, 567 U.S. at 465 (banning mandatory life without parole sentences for juveniles convicted of homicide); *Diatchenko I*, 466 Mass. at 673 (banning discretionary life without parole sentences for juveniles convicted of homicide offenses).

The U.S. Supreme Court decided to limit constitutional sentencing protections to individuals under age 18, based on its measure of society's "evolving standards of decency." *Roper*, 543 U.S. at 563. A key conclusion that the Court reached in this analysis was that the unique, natural attributes of youth "diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 U.S. at 472; *Diatchenko I*, 466 Mass. at 660. The same characteristics of youth continue past age 18, so the same reasoning applies.

Citing scientific and sociological studies, the U.S. Supreme Court relied on three key developmental characteristics of youth in reaching its conclusions: (1) youth's lack of maturity, impulsivity, and impetuosity; (2) youth's susceptibility to outside influences; and (3) youth's capacity for change. *Roper,* 543 U.S. at 569-70; *see also Montgomery v. Louisiana*, 577 U.S. 190, 206-07 (2016) (quoting *Miller,*

567 U.S. at 471). These developmental differences make youth less culpable; their "conduct is not as morally reprehensible as that of an adult," *Roper*, 543 U.S. at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)), making them "less deserving of the most severe punishments," *Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68). This Court recognized each of these differences, along with the science that illuminated them, in reaching the decision that all life-without-parole sentences for juveniles convicted of homicide offenses violate article 26. *Diatchenko I*, 466 Mass. at 659-61, 669-70.

The *Roper* Court, and this Court by extension, relied upon scholars who had linked the behavioral characteristics of youth to brain development—i.e., mounting evidence suggested that the differences between adults and adolescents had "neuropsychological and neurobiological underpinnings." Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psych. 1009, 1013 (2003). Studies on adolescent brain development indicated that important changes occur in regions of the brain "that are implicated in processes of long-term planning, the regulation of emotion, impulse control, and the evaluation of risk and reward." *Id.* (citing Linda Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neuroscience & Biobehavioral Revs. 417 (2000)). Thus, youth have diminished decision making capacity because of psychosocial

differences that are biological in origin. *Id.* In later decisions, the U.S. Supreme Court further recognized that brain science continued to develop, finding that "parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 560 U.S at 68.

In considering the differences between youth and adults, the *Roper* Court drew the line at age 18 because that was "the point where society draws the line for many purposes between childhood and adulthood." *Roper*, 543 U.S. at 574. Also, the youth in those cases were under 18 and the scientific research relied on applied to that cohort. *See Roper*, 543 U.S. at 569-74 (first citing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339, 339 (1992); then citing Steinberg & Scott, *supra,* at 1014-16; and then citing Erik Erikson, *Identity: Youth and Crisis* (1968)). Furthermore, brain maturation research that proved critical in *Graham* and *Miller* to determine reduced culpability focused predominantly on youth under 18. *See id.* at 569-72 (first citing Arnett, *supra* at 339; then citing Steinberg & Scott, *supra,* at 1014; and then citing Erikson, *supra*); *Miller*, 567 U.S. at 471-72, 472 n. 5; *Graham*, 560 U.S. at 68.

While the U.S. Supreme Court struck the death penalty and mandatory life without parole sentences for youth under 18, *see Roper,* 543 U.S. at 578; *Graham*, 560 U.S. at 82; *Miller*, 567 U.S. at 465, it also recognized that "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18."

Roper, 543 U.S. at 574. Research now shows that older adolescents share these same physiological and psychological traits, making them equally less culpable and less deserving of the most serious punishments meted out for adults. Indeed, researchers have established that the regions of the brain associated with the characteristics relied on in *Graham* and *Miller* continue to develop beyond age 18. *See* Catherine Lebel & Christian Beaulieu, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 31 J. Neuroscience 10937, 10937 (2011); Adolf Pfefferbaum et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 0 to 85 Years) Measured with Atlas-Based Parcellation of MRI*, 65 NeuroImage 176, 189 (2013). Older adolescents are now understood to be more like younger adolescents than adults, in that older adolescents are "more susceptible to peer pressure, less future-oriented and more volatile in emotionally charged settings." Vincent Schiraldi & Bruce Western, *Why 21 Year-Old Offenders Should Be Tried in Family Court*, Wash. Post (Oct. 2, 2015), https://www.washingtonpost.com/opinions/time-to-raise-the-juvenile-age-limit/2015/10/02/948e317c-6862-11e5-9ef3-fde182507eac_story.html.

In the nineteen years since their 2003 article, Steinberg and Scott have also published numerous papers concluding that research now shows that the parts of the brain active in most crime situations, including those associated with characteristics of impulse control, propensity for risky behavior, vulnerability, and susceptibility to

peer pressure, are still developing well into late adolescence and even for individuals above age 20. Elizabeth S. Scott, Richard J. Bonnie & Laurence Steinberg, *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 642 (2016) ("Over the past decade, developmental psychologists and neuroscientists have found that biological and psychological development continues into the early twenties, well beyond the age of majority." (citing Laurence Steinberg, *Age of Opportunity: Lessons from the New Science of Adolescence* 5 (2014))); *see also* Laurence Steinberg, *Does Recent Research on Adolescent Brain Development Inform the Mature Minor Doctrine?*, 38 J. Med. & Phil. 256, 263 (2013). In testimony before the United States District Court for the District of Connecticut in *Cruz v. United States*, Dr. Steinberg explained that "we didn't know a great deal about brain development during late adolescence" until recently, but that now he is "absolutely confident" that the developmental characteristics underpinning *Roper*, *Miller*, and *Graham* also apply to 18-year-olds. *Cruz v. United States*, No. 11-CV-787 (JCH), 2018 WL 1541898, at *24-25 (D. Conn. Mar. 29, 2018), *vacated and remanded*, 826 F. App'x 49 (2d Cir. 2020).

Additionally, a comprehensive 2019 report from the National Academies of Sciences explains this shift in the understanding of adolescence, noting that "the unique period of brain development and heightened brain plasticity. . . continues into the mid-20s," and that "most 18–25-year-olds experience a prolonged period of

transition to independent adulthood, a worldwide trend that blurs the boundary between adolescence and 'young adulthood,' developmentally speaking." Nat'l Acads. of Scis., Eng'g & Med., *The Promise of Adolescence: Realizing Opportunity for All Youth* 22 (2019) (emphasis omitted), https://nap.nationalacademies.org/read/25388/. The report concludes it would be "arbitrary in developmental terms to draw a cut-off line at age 18." *Id.*

Key stakeholders in the Massachusetts criminal legal system agree that youth above the age of 18 are still developing and should be treated accordingly. *See* Cynthia S. Creem & Paul F. Tucker, *Emerging Adults in the Massachusetts Criminal Justice System: Report of the Task Force on Emerging Adults in the Criminal Justice System* 11 (2020), https://malegislature.gov/Reports/9250/SD2840_Emerging%20Adults%20Criminal%20Justice%20Task%20Force%20ReportFinal.pdf. These system actors and others, including legislators, law enforcement, district attorneys, and youth-focused community groups, recognize the ongoing research that shows youth above 18 are developmentally similar to their younger peers in pertinent ways, and have advocated to treat this group similarly to juveniles in the court system.

Established by the Governor in 2019, the Task Force on Emerging Adults was charged with, among other things, evaluating the inclusion of 18 to 20-year-olds in the juvenile justice system. *Id.* at 4. The Task Force confirmed that the research underpinning the U.S. Supreme Court's decisions in *Roper* and *Miller* now extends

beyond age 18, finding that the frontal lobe responsible for "executive functions (natural capacity to set, manage and attain goals), self-regulating and organizing behavior" is still underdeveloped in emerging adults (ages 18 to 26). *Id.* at 11 (citing Inst. of Med. & Nat'l Rsch. Council of the Nat'l Academies, *Investing in the Health and Well-being of Young Adults* (2015)). The report echoed the research above by noting that emerging adults tend to be more impulsive, unstable in emotionally charged settings, and more susceptible to peer pressure. *Id.* at 12 (citing Vincent Schiraldi et al., *Community-Based Responses to Justice Involved Young Adults* (2015)). They further noted that the ability to self-regulate "sensation seeking behavior" did not fully mature until ages 23-26. *Id.* at 11. Ultimately, the Task Force proposed several options for legislative consideration, each of which would keep older adolescents under juvenile court jurisdiction. *Id.* at 9-10. These options echo measures presently in force in other states[6]:

1. Raise the age to include 18, 19, and 20-year-olds in the juvenile justice system.
2. Raise the age to include 18-year-olds in the juvenile justice system.
3. Create a "young adult offender" category for individuals aged 18-20 charged with certain enumerated offenses within the jurisdiction of the Juvenile Court system.
4. Provide District Court and Boston Municipal Court judges discretion on their own or by motion of either party to refer eligible cases of youth age 18-20 to Juvenile Court.

[6] Legislation on these options has not yet been proposed in Massachusetts.

5. Create an emerging adult court session in juvenile or district court for individuals charged with certain enumerated offenses between the ages of 18-25.

Id. See also infra Part II.B.2.

B. The Law and Societal Norms Have Also Extended The Line Demarcating Childhood And Adulthood Past Age 18.

In limiting federal sentencing protections to children, the *Roper* Court recognized society's "evolving standards of decency." *Roper*, 543 U.S. at 563. The Court explained that analysis should begin with "a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question." *Id; see also Graham*, 560 U.S. at 62 ("The analysis begins with objective indicia of national consensus."). Looking at the national consensus at the time around voting, jury service, and marriage, the Court recognized that youth could not independently partake in these rights before age 18. *Roper*, 543 U.S. at 569. This consensus moved the Court to rule that 18 was the point where society drew the line between childhood and adulthood. *Id.*at 574.

A review of current national legislation demonstrates that standards have evolved in the 17 years since *Roper*, and society no longer draws the line clearly at 18 when distinguishing between childhood and adulthood. Across the nation, both state and federal courts have raised the age of majority in different contexts to reflect this evolution.

1. Juvenile Court Jurisdiction

Responding to developmental research, several jurisdictions have passed legislation raising the age at which youth phase out of juvenile court jurisdiction. Vermont, beginning in 2023, extends the jurisdiction of the juvenile court to individuals aged 18, as well as youth between ages 19 and 21 if certain conditions are met, to be implemented in coming years. Vt. Stat. Ann. tit. 33, § 5103. Vermont also defines a "child" as an individual who commits a delinquent act between the ages of 10 and 22. Vt. Stat. Ann. tit. 33, § 5102(2)(C). Also noteworthy are those states who recently raised the age of juvenile court jurisdiction to 18. Even for these states, conversations surrounding the legislation incorporated the research extending adolescence beyond age 18. For instance, in 2018 New York's "Raise the Age" legislation raised the age of criminal responsibility to 18 (to be phased in over two years). *Governor Cuomo Signs Legislation Raising the Age of Criminal Responsibility to 18-Years-Old in New York*, NY.gov (Apr. 10, 2017), https://ocfs.ny.gov/main/news/article.php?idx=1486. The legislation was meant to create a system that responds in "more age-appropriate ways to the behaviors and needs of older adolescents*."* New York State Raise the Age Implementation Task Force*, Final Report* 3 (2020), https://www.ny.gov/sites/default/files/atoms/files/FINAL_Report_Raise_the_Age_Task_Force_122220.pdf. The following year, Michigan raised the age of juvenile court jurisdiction from 17 to 18 years of age.

Mich. Comp. Laws. Ann. 712A.2(a). The legislative analysis recognized that at the time Michigan was one of only four states to automatically send 17-year-olds to adult prison. House Fiscal Agency, *Legislative Analysis* 2 (2019), http://www.legislature.mi.gov/documents/20192020/billanalysis/House/pdf/2019-HLA-4133-67514053.pdf. The analysis noted that "research . . . overwhelmingly documents that adolescent brains do not fully develop until closer to 25 years of age." *Id.*

2. Youthful Offender Statutes

The emergence of youthful offender statutes also signal that states understand that late adolescents lack maturity. Through these statutes, several jurisdictions have created specialized adult courts, implemented diversion programs or limited sanctions to recognize and accommodate emerging adults. Karen U. Lindell & Katrina L. Goodjoint, Juv. L. Ctr., *Rethinking Justice for Emerging Adults: Spotlight on the Great Lakes Region* 14 (2020), https://jlc.org/sites/default/files/attachments/2020-09/JLC-Emerging-Adults-9-2.pdf. Some youthful offender statutes "carve out exceptions to standard criminal justice processes for younger offenders or create 'hybrid' approaches that blend juvenile and adult criminal processes or sanctions." *Id.* at 15. Examples include:

- South Carolina: Youthful offender statute extends protections to youth age 17-24 based on specific offenses. S.C. Code. Ann. § 24-19-10(d)(ii).
- Georgia: Male youth between age 17 and 24 who have "the potential and desire for rehabilitation," and are convicted under this statute, are subject to "treatment" which includes corrective incarceration, guidance, and training (at vocational schools, farms, hospitals, etc.). Ga. Code Ann. § 42-7-2(7); Ga. Code Ann. § 42-7-3(a).
- California: "Allows parole consideration for youth who were 25 years or younger at the time of their crimes and sentenced to a long determinate sentence or life imprisonment." Lindell & Goodjoint, *supra*, at 91; Cal. Penal Code Ann. § 3051.

3. Healthcare Benefits

With the imposition of the Affordable Care Act of 2010, healthcare plans and issuers that offered dependent child coverage were required to make coverage available to dependents between the ages of 19 and 26. 45 C.F.R. § 147.120. This expansion "highlight[ed] the ongoing dependence that now characterizes the early years of adulthood." Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 Tul. L. Rev. 55, 59 (2016). This change extended a benefit "long associated with minor and

dependent status" to individuals up to age 26, suggesting that they "lack the independence that is one of the characteristic markers of adulthood." *Id.* at 80.

Prior to the enactment of the Affordable Care Act, thirty-four states had already implemented plans that in some way extended coverage to dependents beyond age 18. Sara Rosenbaum et al., *Implementing Health Reform in an Era of Semi-Cooperative Federalism: Lessons from the Age 26 Expansion*, 10 J. Health & Biomedical L. 327, 334-335 (2015) (citing Alexander B. Blum et al., *Impact of State Laws That Extend Eligibility for Parents' Health Insurance Coverage to Young Adults*. 129 Pediatrics 426, 426-32 (2012)). Some of this coverage was based on qualifiers such as student status, financial dependency, and marital status, all of which suggest the retention of youth and dependency beyond age 18. *See id.* For example, New York extended coverage to dependents from age 23-29 based on qualifiers such as marital status, enrollment in an accredited institution, by way of mental illness and physical handicap, and/or residence. N.Y. Ins. Law § 3216 (McKinney 2010). Similarly, Louisiana extended coverage to dependents up to age 24 if they were unmarried, enrolled as full-time students and dependent on the insured. La. Stat. Ann. § 22:1003 (2009).

4. Alcohol and Tobacco

In Massachusetts it is illegal for anyone under age 21 to possess or buy alcohol. G. L. c. 138, § 34A. This mirrors the national minimum drinking age for

alcohol. 23 U.S.C. § 158. Resources on drinking in Massachusetts presented by the Bureau of Substance Addiction Services states that there are no safe limits of alcohol use for youth, right before re-affirming that consumption is illegal for individuals under age 21. Bureau of Substance Addiction Servs., *Moderate Drinking*, Mass.gov, https://www.mass.gov/service-details/moderate-drinking (last visited November 21, 2022).

Furthermore, Massachusetts prohibited tobacco sales to individuals under 21—not 18—long before federal regulations changed to raise the national age for purchasing that substance. In 1992, the Synar Amendment required states to restrict the lawful sale of tobacco to any person younger than 18 years of age. ADAMHA Reorganization Act, Pub. L. No. 102-321, § 1926, 106 Stat. 323, 394-95 (1992). The regulations required state compliance to restrict youth access. *See* Tobacco Regulation for Substance Abuse Prevention and Treatment Block Grants, 61 Fed. Reg. 1492 (Jan. 19, 1996), https://www.govinfo.gov/content/pkg/FR-1996-01-19/pdf/96-467.pdf. Yet 19 states, including Massachusetts, raised that age of their own accord. *See* Campaign for Tobacco-Free Kids*, States and Localities that Have Raised the Minimum Legal Sale Age for Tobacco Products to 21* 1, https://www.tobaccofreekids.org/assets/content/what_we_do/state_local_issues/sales_21/states_localities_MLSA_21.pdf (last visited Nov. 22, 2022).

In 2015, the National Academies of Sciences concluded that raising the national minimum tobacco purchase age from 18 to 21 would be beneficial because "the parts of the brain most responsible for decision making, impulse control, sensation seeking, future perspective taking, and peer susceptibility and conformity continue to develop and change through young adulthood." Inst. of Med. of the Nat'l Academies, *Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products* 3, 7 (2015), https://www.nap.edu/read/18997/chapter/2. Following these conclusions, federal legislation was passed in 2019 restricting the lawful sale of tobacco to any person younger than 21 years of age. 21 U.S.C. § 387f(d)(5); Further Consolidated Appropriations Act, Pub. L. No. 116-94, § 603, 133 Stat. 2534, 3123 (2019).

5. Foster Care

In recognition of the lack of independence for most youth at age 18, the foster care system extends benefits to older youth. With the passing of the Federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (Pub. L. No. 110-351), states have the option to allow youth to remain in foster care after age 18. U.S. Dep't of Health & Hum. Servs., *Extension of Foster Care Beyond Age 18* 1 (2017), https://www.childwelfare.gov/pubPDFs/extensionfc.pdf. Massachusetts is among these states and extends care to youth until age 22. *Id.* at 2 n.2; G. L. c. 119, § 23. The near universal extension of foster care beyond age 18 reflects researchers'

conclusions that there is "nothing magical about age 18 or even age 21 as a marker of adulthood, and few children outside the child welfare system are expected to be 'independent' once they reach the age of majority." Nat'l Acads. of Scis., Eng'g & Med., *The Promise of Adolescence*, *supra*, at 267.

It is arbitrary to draw a clear line for the age of majority as individuals "acquire different capabilities across the course of their development and exercise them with varying levels of competence in different contexts." *See* Hamilton, *supra*, at 57-58; Alexandra O. Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 Temp. L. Rev. 769, 776 (2016). It logically follows, then, that criminal courts should likewise recognize how brain development affects the actions of older adolescents beyond the age of 18 and extend constitutionally protected rights to this age group.

III. THIS COURT SHOULD JOIN OTHER STATE HIGH COURTS THAT HOLD THEIR OWN CONSTITUTIONS GO BEYOND THE FEDERAL EIGHTH AMENDMENT IN LIMITING HARSH SENTENCES FOR LATE ADOLESCENTS.

This Court would not be the first to hold that its state constitution limits life sentences for late adolescents. The reasoning of those courts, which relied on both the interpretation of state constitutional protections against cruel or unusual punishment as well as developmental science, is instructive here.

The Michigan Supreme Court has held that mandatory life without parole for 18-year-olds violates the Michigan Constitution's bar on "cruel or unusual

punishment." *People v Parks*, ___N.W.2d ___, 2022 WL 3008548 (Mich. 2022).[7] Like article 26, Michigan's Eighth Amendment analogue has been interpreted more broadly than the Eighth Amendment. *Parks*, 2022 WL 3008548, at *9. Further, like this Court, the Michigan Supreme Court holds that its Eighth Amendment cognate guarantees proportionate punishment. *Id.* Thus, the *Parks* court looked to "evolving standards of decency that mark the progress of a maturing society." *Id.* (quoting *People v. Lorentzen*, 387 Mich. 167, 179 (1972)). The *Parks* court reviewed research in neurological and psychological development and determined that "there is no meaningful distinction between those who are 17 years old and those who are 18 years old." *Id.* at 14. The *Parks* court also found that Michigan laws reflected an evolving understanding that no bright line exists between ages 17 and 18, which favored the holding that "mandatory life without parole is unconstitutional as applied to 18-year-old offenders." *Id.* at 14.

The Washington Supreme Court has similarly held that a mandatory life-without-parole sentence for any individual ages 18 to 20 at the time of the crime violates its state constitution. *In re Monschke*, 197 Wash. 2d 305, 325-26 (2021). In doing so, the court found that "no meaningful neurological bright line exists between

[7] The Court's holding was limited to the ages of the individuals who appeared before it. *See id*, * 10 ("We need not address the Michigan constitutional requirements for sentencing offenders who were over eighteen years old at the time of the offense.").

. . . age 17 on the one hand, and ages 19 and 20 on the other hand." *Monschke*, 197 Wash. 2d at 326. Therefore, the court explained that sentencing courts must have discretion to consider the mitigating qualities of youth mentioned in *Miller* and other watershed cases prior to imposing punishment on youth older than 18. *Id.* at 326-28. Although Washington's Constitution only bans "cruel punishment," Wash. Const., art. I, § 14, this textual difference makes little difference for Massachusetts where article 26 bars a sentence that is cruel, even if it is not unusual. *See* William W. Berry III, *Cruel State Punishments*, 98 N.C. L. Rev. 1201, 1246 (2020) ("Given that there is no requirement that a punishment must be unusual to be unconstitutional under a state constitution with disjunctive language, such states should engage in analysis of whether a particular punishment is indeed cruel"); *Watson*, 381 Mass. at 676 (Mass 1980) (holding that the death penalty was unconstitutionally "cruel").

The same calculus applies here. With no meaningful developmental line between youth under 18 and their adolescent peers over 18, this Court should hold that its ruling in *Diatchenko I* applies with equal force to late adolescents above age 18.

CONCLUSION

For these reasons, this Court should hold that article 26 of the Massachusetts Declaration of Rights is more extensive than the Eighth Amendment, and it prohibits life-without-parole sentences for youth over age 18. Furthermore, this Court should

remand the cases of Mr. Mattis and Mr. Robinson for resentencing, consistent with its prior decision in *Diatchenko I*.

Dated: December 16, 2022 Respectfully submitted,

/s/ Oren Nimni

Oren Nimni, BBO No. 691821
Rights Behind Bars
416 Florida Avenue NW, #26152
Washington, DC 20002
(202) 540-0029
oren@rightsbehindbars.org

Andrea Lewis Hartung*
Roderick & Solange
MacArthur Justice Center
160 East Grand Avenue, 6th Floor
Chicago, IL 60611
(312) 503-0913
alewishartung@macarthurjustice.org

Marsha L. Levick*
Juvenile Law Center
1800 JFK Boulevard
Suite 1900B
Philadelphia, PA 19103
(215) 625-0551
mlevick@jlc.org

**pro hac vice pending*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, I hereby certify that the foregoing brief complies with the rules of Court that pertain to the filing of briefs, including Mass. R. App. P. 20. I further certify that the foregoing brief complies with the applicable length limitations in Mass. R. App. P. 20 and Mass. R. App. P. 27.1(b) because it was prepared using Microsoft Word 2020 in Times New Roman 14-point font, a proportionally spaced typeface, with 1-inch margins, and contains 6,869 non-excluded words.

Dated: December 16, 2022

/s/ Oren Nimni
Oren Nimni, BBO No. 691821
Rights Behind Bars
416 Florida Avenue NW, #26152
Washington, DC 20002
(202) 540-0029
oren@rightsbehindbars.org

CERTIFICATE OF SERVICE

Pursuant to Massachusetts Rule of Appellate Procedure 13(d), I the undersigned, certify under the penalties of perjury, that a copy of the foregoing document has been served electronically on all parties or their representatives in this action on this 16th day of December, 2022.

/s/ Oren Nimni

Oren Nimni, BBO No. 691821
Rights Behind Bars
416 Florida Avenue NW, #26152
Washington, DC 20002
(202) 540-0029
oren@rightsbehindbars.org