STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Swartzle, P.J., and Servitto and Garrett, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. 167391
Court of Appeals No. 367926

v

DAREN DONELL FENDERSON,

Defendant-Appellant.

AMICI CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union Fund of Michigan ("ACLU of Michigan") is the 501(c)(3) wing of the American Civil Liberties Union of Michigan, a non-profit, non-partisan membership organization devoted to protecting civil rights and liberties for all Michiganders. The American Civil Liberties Union Foundation ("ACLU") is the 501(c)(3) wing of the American Civil Liberties Union, which has approximately 1.6 million members and is among the oldest, largest, and most active civil rights organizations in the United States. For decades, the ACLU of Michigan and the ACLU have litigated questions involving civil liberties in state and federal courts.

The ACLU of Michigan and the ACLU have substantial expertise in civil liberties issues, including issues related to the rights of the accused in custodial interrogations. Amici have addressed issues related to custodial interrogations in this Court and in courts throughout the country. See Brief of Amici Curiae American Civil Liberties Union Fund of Michigan and Criminal Defense Attorneys of Michigan, *People v Bender*, 452 Mich 594; 551 NW2d 71 (1996); Brief of Amici Curiae Criminal Defense Attorneys of Michigan and American Civil Liberties Union Fund of Michigan, *People v Tanner*, 496 Mich 199; 853 NW2d 653 (2014); Brief of Amici Curiae ACLU of Hawai'i Foundation and American Civil Liberties Union Foundation in Support of Petitioner/Defendant-Appellant, *State v Zuffante*, Supreme Court of Hawaii Docket No. SCWC-23-0000376 (April 4, 2025); Brief of Amici Curiae the American Civil Liberties Union and the American Civil Liberties Union of Texas in Support of Appellant Emanual Ochoa, *Ochoa v State*, 707 SW3d 344 (Tex Crim App, 2024).

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

Amici also have expertise in Michigan state constitutional law. See Amici Curiae Brief of the American Civil Liberties Union of Michigan, Juvenile Law Center, and Sentencing Project, *People v Taylor*, __ NW3d __ (Mich April 10, 2025); Amici Curiae Brief of the American Civil Liberties Union of Michigan, American Civil Liberties Union, and Michigan Association for Justice, *Mich Immigrant Rights Ctr v Whitmer*, Michigan Supreme Court Docket Nos. 167300, 167301 (October 8, 2024); Amicus Curiae Brief of the American Civil Liberties Union of Michigan and the National Lawyers Guild, Michigan–Detroit Chapter, *Bauserman v Unemployment Ins Agency*, 509 Mich 673; 983 NW2d 855 (2022).

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant Daren Fenderson was subject to a custodial interrogation at the Detroit Public Safety Headquarters on August 3, 2022. At the time, Mr. Fenderson had little previous involvement with law enforcement. About an hour and a half after initially waiving his *Miranda* rights, Mr. Fenderson invoked his right to counsel by asking for a lawyer. That should have ended the interrogation.

Instead, the police left Mr. Fenderson in the interrogation room for almost three hours, returned without an attorney, and told him: "You don't get one." The police then reengaged Mr. Fenderson, who was in obvious distress, about the investigation. Although Mr. Fenderson expressed at least seven times that he was confused about his rights and did not understand what was happening, the police refused to clarify his rights or explain the situation. It is no surprise, then, that when the police presented Mr. Fenderson with a form to waive his *Miranda* rights for the second time—a form that could not have made sense to Mr. Fenderson, given that the police had demonstrated through their words and actions that his invocation of a right to speak with an attorney would have no effect—he signed it while simultaneously voicing his confusion. Soon thereafter, he made inculpatory statements.

The U.S. and Michigan Constitutions each require suppression of those statements. In short, both Constitutions prohibit the police from telling a suspect that his right to talk to a lawyer does not really exist and then exploiting the suspect's subsequent confusion to persuade him to "waive" that apparently nonexistent right, succumb to renewed interrogation efforts, and confess.

On the question of federal law, the police made four errors, any one of which would justify suppression under the Fifth Amendment. First, instead of explaining how and when Mr. Fenderson could obtain a lawyer, the police falsely told him, "You don't get one," causing him to believe that any right to an attorney was illusory. Second, the police ignored Mr. Fenderson when he repeatedly

expressed confusion over what waiving his right to counsel entailed. Third, instead of ceasing questioning after Mr. Fenderson requested an attorney, as Fifth Amendment case law commands, the police reengaged him. Fourth, the totality of the circumstances indicate that Mr. Fenderson was coerced into waiving his rights. Fifth Amendment precedent is clear that, to be voluntary, a waiver must be the product of free will. But the police kept Mr. Fenderson—a young man with little prior legal system involvement—alone in custody for hours without his medication, misled him about how long it would take to get him a lawyer, and made veiled threats about what would happen if he refused to waive his rights. Even as Mr. Fenderson became visibly hysterical, the police continued ratcheting up the pressure until his free will was broken.

The first two errors rendered Mr. Fenderson's waiver of his rights unknowing. The other two errors rendered his waiver involuntary. Together, they constitute four independent grounds requiring suppression of Mr. Fenderson's statements under the Fifth Amendment.

On the question of state law, the constitutional violation is even clearer. As amici detail below, Article 1, § 17 of the Michigan Constitution confers more protection against compelled self-incrimination and overzealous investigatory tactics than its federal counterpart. The text and history of that provision, as well as case law going back more than a century, confirm that the Michigan Constitution requires the state to afford "fair and just treatment" to people it is investigating. This guarantee is plainly violated when the police mislead a defendant about his rights and apply overbearing pressure on him to answer questions without the aid of a lawyer.

This Court should address the state constitutional violation even though Mr. Fenderson's statements are also straightforwardly inadmissible under the Fifth Amendment. A state constitutional holding would ensure that Michiganders' rights are not eroded by shifting currents of federal law and, in future cases, could mean that a defendant who is subjected to unfair and

unjust interrogation methods permissible under the U.S. Constitution will nevertheless prevail under the Michigan Constitution. Such a holding would also advance this state's particular interests in the fair and equitable administration of justice, reducing the risk of false confessions, and disincentivizing law enforcement from infringing on Michiganders' rights.

BACKGROUND AND FACTS

On August 2, 2022, Mr. Fenderson was arrested and brought to Detroit Public Safety Headquarters for questioning related to a hit-and-run resulting in death. Appellant Fenderson's Appendix (App) C at 13, 22–24. It was the first time he had been questioned about an adult felony charge. App A at 1:01–1:06, 5:19. The police believed Mr. Fenderson was too intoxicated to interrogate him on August 2. App C at 23–26. The next day, the police brought Mr. Fenderson back in for questioning and informed him of his *Miranda* rights, which he initially waived. *Id*. at 28.

About an hour and a half later, however, Mr. Fenderson invoked his right to counsel. App A at 2:29 ("Can I have a lawyer first?"); App C at 34. But instead of stopping the conversation until Mr. Fenderson had an attorney, the detective continued to engage him in a back-and-forth. App A at 2:29–2:30. This was the first of three important conversations between Mr. Fenderson and the police after Mr. Fenderson requested counsel.

During this first conversation, Mr. Fenderson asked the detective if, given the invocation of his right to counsel, the state was going to appoint him a lawyer. *Id*. at 2:30. But the detective, instead of answering in the affirmative, asked Mr. Fenderson "[w]ho retained [him] last time." *Id*. After Mr. Fenderson expressed confusion, the detective said he would try to find Mr. Fenderson a lawyer, and quickly. *Id*. He planned to "make a couple phone calls." *Id*.

Mr. Fenderson was subsequently left handcuffed and mostly alone in the interrogation room for nearly three hours. About 40 minutes into that period, someone entered the room to tell

Mr. Fenderson that they were trying to find him an attorney, and Mr. Fenderson mentioned that he had not yet taken his medications. *Id*. at 3:11. For the next two hours, Mr. Fenderson received no more updates, nor was he given medication. *Id*. at 3:13–5:14.

The second important conversation occurred after this lengthy wait when the detective returned. Mr. Fenderson asked where his lawyer was. The detective responded: "You don't get one." *Id*. at 5:15. Mr. Fenderson stated his confusion. *Id*. After confirming that Mr. Fenderson lacked money to pay a lawyer, the detective first stated that "[he] c[ould]n't talk to [Fenderson] no more without an attorney." He then reopened the conversation about the investigation by stating that "the story [Fenderson] gave [after he waived his rights the first time] is the story they'll go with." *Id*. at 5:16. Mr. Fenderson again voiced his confusion: "I don't know what's going on from this point. You ain't told me nothing." *Id*. The detective told Mr. Fenderson they were going to take him back to the detention center and "submit a warrant and the prosecutor will review it." *Id*. Mr. Fenderson, still confused, said he was "not sure what all that means." *Id*. The detective indicated he could not say anything more because Mr. Fenderson had requested an attorney and added that if Mr. Fenderson wanted to talk to him, he should "say [he] want[ed] to talk without an attorney." *Id*. Mr. Fenderson responded: "If you're trying to talk, we can talk. I just want to get this over with!" *Id*. at 5:17. The detective then left Mr. Fenderson alone in the interrogation room again, at which point Mr. Fenderson began crying. *Id*. at 5:18.

Soon thereafter, a different officer entered the interrogation room and sought to secure a new *Miranda* waiver from Mr. Fenderson. This was the third pre-waiver conversation. Immediately after the officer entered the room, Mr. Fenderson yet again expressed confusion over what was happening. *Id*. at 5:19 ("I don't understand."). The officer refused to clarify what was going on and told Mr. Fenderson to "talk with the detectives about that" after signing the waiver.

Id. The officer then walked Mr. Fenderson through his *Miranda* rights, but Mr. Fenderson did not immediately affirm that he understood them. Instead, he said: "See, that's why I don't understand what's going . . . ." *Id*. at 5:20. The officer responded that he was talking about the waiver and asked Mr. Fenderson if he wanted to talk to the police. *Id*. Mr. Fenderson said yes. *Id*. After signing the form, Mr. Fenderson said: "This is bullshit. I swear . . . I don't know . . . ." *Id.* at 5:21–5:22.

Mr. Fenderson continued crying after signing the waiver form, and the detectives reentered the room to restart the interrogation. *Id*. at 5:23; App C at 57. The detectives began cursing at Mr. Fenderson and adopted an aggressive tone. App A at 5:27–5:30; App C at 59–60. Eventually, Mr. Fenderson made inculpatory statements. App A at 5:30; App C at 57–58.

ARGUMENT

Mr. Fenderson's statements are inadmissible under both the U.S. and Michigan Constitutions because his waiver of his *Miranda* rights was neither knowing nor voluntary. And although Mr. Fenderson's statements should be suppressed under straightforward federal constitutional principles, this Court should also reach the state constitutional question because a ruling grounded in Article 1, § 17 will ensure that Michiganders' rights are not eroded by federal courts' shifting interpretations of the federal Constitution.

I. Mr. Fenderson's statements were not given pursuant to a knowing and voluntary waiver of his right to counsel and must be suppressed under the U.S. Constitution.

The Self-Incrimination Clause of the Fifth Amendment to the U.S. Constitution, applicable to the states via the Fourteenth Amendment, requires the suppression of Mr. Fenderson's statements because they were extracted following a waiver of his right to counsel that was neither knowing nor voluntary. See *Berghuis v Thompkins*, 560 US 370, 382–383; 130 S Ct 2250; 176 L Ed 2d 1098 (2010) (noting that waiver must be both voluntary and knowing). Mr. Fenderson's waiver was unknowing for two independent reasons: (a) the police wrongly told Mr. Fenderson

that he could not get an appointed lawyer, and (b) the police ignored clear signs that Mr. Fenderson did not understand his rights. Additionally, Mr. Fenderson's waiver was involuntary for two independent reasons: (a) the police reinitiated the interrogation after Mr. Fenderson invoked his right to counsel, and (b) the police exerted persistent and severe pressure on Mr. Fenderson to make incriminating statements without the aid of an attorney. In short, there are four separate bases under federal law to suppress Mr. Fenderson's statements.

A. The government bears the burden of showing that that a defendant has both knowingly and voluntarily waived his *Miranda* rights.

More than half a century ago, the U.S. Supreme Court made clear "that where . . . the suspect has requested and been denied an opportunity to consult with his lawyer" during custodial interrogation, his constitutional rights are violated. *Escobedo v Illinois*, 378 US 478, 490–491; 84 S Ct 1758; 12 L Ed 2d 977 (1964). Then, in *Miranda v Arizona*, the Court clarified that the right to consult a lawyer during custodial interrogation is grounded in the Fifth Amendment's Self-Incrimination Clause and affirmed that the denial of that right requires suppression of a resulting confession. See 384 US 436, 465–466; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

As the *Miranda* Court explained, "the privilege [against self-incrimination] is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" *Id.* at 460, quoting *Malloy v Hogan*, 378 US 1, 8; 84 S Ct 1489; 12 L Ed 2d 653 (1964). To protect defendants against the "inherently compelling pressures" of custodial interrogation, the Court mandated strict procedures to ensure that any statement given is "truly . . . the product of . . . free choice":

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he

> wants one before speaking to police, they must respect his decision to remain silent. [*Id*. at 457–458, 467, 474.]

These "procedural safeguards" were designed not only "to inform accused persons of their right of silence" but also "to assure a continuous opportunity to exercise it." *Id*. at 444.

Although these rights may be waived, "a heavy burden rests on the government" to establish a defendant's waiver. *Id*. at 475. The waiver inquiry has two necessary components. *Berghuis*, 560 US at 382. First, the waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id*. (internal quotation marks omitted). And second, it must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id*. at 382–383 (citation and internal quotation marks omitted). If the government fails to establish either of these elements, the waiver is invalid. *Id*.; see also *Oregon v Elstad*, 470 US 298, 307; 105 S Ct 1285; 84 L Ed 2d 222 (1985).

B. Mr. Fenderson's statements must be suppressed because he did not knowingly waive his right to counsel.

Mr. Fenderson's statements are inadmissible because he did not knowingly waive his *Miranda* rights. After he requested a lawyer, the police did not affirm that he had the right to an appointed lawyer and to consult that lawyer before answering any questions. Instead, after initially suggesting they would secure him an attorney in short order, the police returned hours later and said, "You don't get one." And although Mr. Fenderson repeatedly expressed confusion about his rights upon being told he "d[oesn't] get" a lawyer, the police clarified nothing. Therefore, Mr. Fenderson's eventual statements were not "made with a full awareness . . . of the right[s] being abandoned" or "the consequences" of relinquishing them. *Berghuis*, 560 US at 382–383.

1. A defendant's Miranda *waiver is not knowing when he receives misleading or contradictory information regarding his rights.*

Officials "must make known to [a suspect] that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him *prior to* any interrogation." *Miranda*, 384 US at 474 (emphasis added). If the officials cannot "provide [appointed] counsel during a reasonable period of time," they cannot "question [the suspect] during that time." *Id*. They also "cannot directly contradict, out of one side of his mouth, the *Miranda* warnings just given out of the other." *State v Pillar*, 359 NJ Super 249, 268; 820 A2d 1 (2003). For instance, officials may not "suggest[] any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general." *California v Prysock*, 453 US 355, 360–361; 101 S Ct 2806; 69 L Ed 2d 696 (1981).

Following these principles, this Court has long held that statements must be suppressed when extracted from defendants who were obstructed from exercising their right to appointed counsel or given contradictory information about that right. See *People v Ranes*, 385 Mich 234; 188 NW2d 568 (1971). In *Ranes*, the defendant invoked his right to counsel before a psychiatric examination at the police station. *Id*. at 236–237. The prosecuting attorney "denied his request, stating that no magistrate would be available until 9:30 a.m. to appoint an attorney." *Id*. at 237. The defendant therefore underwent the examination without an attorney. *Id*. This Court held that, under *Escobedo*, "the admission of the testimony by the psychiatrists was prejudicial error and violated defendant's constitutional right to counsel."[2] *Id*. at 241. As the Court explained, honoring

[2] This Court resolved *Ranes* under *Escobedo* rather than *Miranda* because the defendant's examination took place before the latter case was decided. See *Ranes*, 385 Mich at 236. But this Court noted that the admission of the psychiatrists' testimony would also have been unlawful under *Miranda* because "defendant's request for a lawyer would terminate the State's right to interrogate him until he had a lawyer appointed to advise him." *Id*. at 238.

the defendant's request for counsel, even if it could not be fulfilled immediately, was necessary "to guarantee the fairness of the ensuing proceeding." *Id*. at 242.

The Michigan Court of Appeals has similarly suppressed confessions obtained from defendants who were told that no attorney was presently available without a further explanation that an attorney could be made available later. See *People v Lewis*, 47 Mich App 450, 451–453; 209 NW2d 450 (1973) (holding that even if an attorney was not available when the defendant requested one, "questioning should have ceased until such time as counsel could have been secured"); *People v Stanis*, 41 Mich App 565, 577–578; 200 NW2d 473 (1972) (suppressing a confession given after officials told suspect they "would merely *[t]ry* to make arrangements to get an attorney appointed" (emphasis added)).

Other state supreme courts have reached similar conclusions. See, e.g., *State v Mayer*, 184 Wash 2d 548, 560, 565; 362 P3d 745 (2015); *Commonwealth v Libby*, 472 Mass 37, 51, 54–55; 32 NE3d 890 (2015); *State v Climer*, 400 SW3d 537, 566 (Tenn, 2013); *Giacomazzi v State*, 633 P2d 218, 223 n 6 (Alas, 1981); *State v Arpan*, 277 NW2d 597, 601 (SD, 1979); *State v McNitt*, 207 Neb 296, 297–300; 298 NW2d 465 (1980); *People v Grant*, 45 NY2d 366, 376; 380 NE2d 257 (1978).

So have federal courts. See *United States v Smith*, unpublished opinion of the United States District Court for the Western District of Missouri, issued August 31, 2021 (Docket No. 19-00035-01), 2021 WL 3892675 at *17 (Ex A) (collecting cases), *report and recommendation adopted*, 2021 WL 3909669 (WD Mo Aug 31, 2021); see also, e.g., *United States v Perez-Lopez*, 348 F3d 839, 848 (CA 9, 2003); *Hart v Attorney General of Florida*, 323 F3d 884, 893–895 (CA 11, 2003).

These cases illustrate the basic principle that, if "the police respond that counsel is *not* available, without making any indication that counsel will be available in the immediate future,

any additional statements by defendant do *not* constitute a waiver." *People v Myers*, 158 Mich App 1, 11–12; 404 NW2d 677 (1987) (emphases in original) (citation omitted); see also *People v Brand*, 106 Mich App 574, 575–576; 308 NW2d 288 (1981) (noting the trial court's application of this principle). That is because "[a] simple reply that counsel is unavailable . . . may emphasize the officer's power over the suspect, rather than the constitution's power over both." *Myers*, 158 Mich App at 12. And "[a] defendant cannot knowingly and intelligently waive his rights unless he is certain that those rights will be respected." *Id*.

2. *A defendant's* Miranda *waiver is not knowing when he makes it clear that he does not understand his rights and officials do not remedy his confusion.*

A defendant's *Miranda* waiver is likewise invalid when he makes clear that he does not understand his *Miranda* rights and the authorities do not remedy his lack of understanding. That is, the state must "show[] that the accused *understood* [their] rights." *Berghuis*, 560 US at 384 (emphasis added). The state cannot satisfy this showing unless it demonstrates that the accused was "cognizant at all times of the State's intention to use one's statements to secure a conviction and of the fact that one can stand mute and request a lawyer." *People v Daoud*, 462 Mich 621, 640–641; 614 NW2d 152 (2000), quoting *In re W.C.*, 167 Ill 2d 307, 328; 657 NE2d 908 (1995).

Courts have therefore held that defendants cannot knowingly and intelligently waive their *Miranda* rights if they have stated that they do not understand some aspect of those rights. A federal district court so ruled in a case with remarkably similar facts to this one. There, the defendant was read his *Miranda* rights and completed a waiver form, but then asked, "You said a lawyer will be appointed for me or I have to pay for a lawyer?" *United States v Lewis*, unpublished opinion of the United States District Court for the Southern District of Florida, issued December 17, 2012 (Docket No. 11-20745-CR), 2012 WL 6569373 at *2 (Ex B). Rather than address the defendant's confusion, the interrogating officers said, "The [C]onstitution affords you to have an attorney

present. It could be now or later or whatever is going on, but I cannot talk to you about your case until you sign this form." *Id*. They then told the defendant that "no lawyer was present at the police station, and that [he] could choose to talk without a lawyer, or go to jail and 'deal with it' on his own." *Id* at *6. The court determined that the defendant "did not actually understand . . . the right to appointed counsel" given that he "clearly expressed confusion on this point." *Id*. And the officers' statements were constitutionally deficient because they were not responsive to the defendant's point of confusion; he "easily could have understood the officer's unresponsive answers to mean that no lawyer could be appointed prior to questioning." *Id*. at *6–7; see also *People v Sikorski*, unpublished per curiam opinion of the Michigan Court of Appeals, issued October 20, 2015 (Docket No. 327393), 2015 WL 6167674 at *3 (suppressing statements from defendant who expressed misunderstanding about *Miranda* rights and detective "never answered defendant's question or clarified this misunderstanding") (Ex C).

3. Mr. Fenderson's waiver was not knowing because the police contradicted the Miranda *warning and ignored Mr. Fenderson's manifest confusion.*

Under the principles and precedent discussed above, Mr. Fenderson's waiver was plainly unknowing and therefore invalid for two independent reasons: (1) he was given objectively misleading and conflicting information, and (2) he in fact demonstrated subjective confusion about his rights that the police did not remedy.

The facts bear repeating. Mr. Fenderson invoked his right to counsel and asked whether the state was going to appoint him a lawyer. App A at 2:29–2:30. Instead of confirming Mr. Fenderson had a right to appointed counsel, the detective asked whom he had previously retained, prompting Mr. Fenderson to express confusion. *Id*. at 2:30. Then, after leaving Mr. Fenderson in the interrogation room for nearly three hours, the detective returned without a lawyer and told him: "You don't get one." *Id*. at 5:15. Mr. Fenderson expressed confusion again. No reasonable person

would think that, instead of seeking clarification as to why he was not getting a lawyer, he was signaling that he wanted to reinitiate the interrogation. *Id*. At no point did the officers say that Mr. Fenderson would be appointed a lawyer once one became available. Nor did they explain that Mr. Fenderson retained the absolute right to consult that lawyer before answering any questions. Five more times Mr. Fenderson stated that he did not understand what was happening. *Id*. at 5:16, 5:19, 5:20–5:22. Not once did the officers attempt to cure his confusion.

Instead, the officers objectively "contradict[ed], out of one side of [their] mouth[s], the *Miranda* warnings just given out of the other." *Pillar*, 359 NJ Super at 268. They told Mr. Fenderson, definitively, "You don't get [a lawyer]." The officers thus imposed a "limitation on the right to the presence of appointed counsel," and made it impossible for Mr. Fenderson to believe that he truly had a "right to have a lawyer appointed." *Prysock*, 453 US at 360–361. By withholding from Mr. Fenderson the information that his right to appointed counsel was absolute and concrete, the officers rendered it impossible for him to waive that right "with a full awareness of both [its] nature" and "the consequences of the decision to abandon it." *Berghuis*, 560 US at 382–383; see, e.g., *Ranes*, 385 Mich at 241–242; *Lewis*, 47 Mich App at 451; *Stanis*, 41 Mich App at 577–578; *Mayer*, 184 Wash 2d at 556–557; *Libby*, 472 Mass at 54–55.

To make matters worse, the officers made no effort to explain the situation to Mr. Fenderson even though he expressed confusion about his rights *seven times* after being told, "You don't get [a lawyer]." Mr. Fenderson's repeated exclamations of confusion and frustration evidenced that he "did not fully understand . . . [his] right to appointed counsel." *Lewis*, 2012 WL 6569373 at *6. Nor could he. How could anyone believe they truly have a right to something after their attempt to invoke that supposed right goes nowhere?

Each of the officers' errors—misleading Mr. Fenderson and ignoring his stated confusion about his rights—rendered Mr. Fenderson's statements inadmissible.

C. Mr. Fenderson's statements must be suppressed because he did not voluntarily waive his right to counsel.

In addition to being unknowing, Mr. Fenderson's waiver of his *Miranda* rights was also involuntary for two independent reasons. First, after Mr. Fenderson requested counsel, the police reinitiated the conversation that led to the waiver. And second, during the ensuing interactions, the police coerced an increasingly distressed Mr. Fenderson into signing the waiver.

1. A defendant's Miranda *waiver is not voluntary when it results from the police reinitiating conversation after the defendant invokes his right to counsel.*

Once the accused requests counsel, he "is not subject to further interrogation" except in two circumstances: "counsel has been made available to him," or "the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v Arizona*, 451 US 477, 484–485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). If the police reinitiate the interrogation, any subsequent waiver is "presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards." *McNeil v Wisconsin*, 501 US 171, 177; 111 S Ct 2204; 115 L Ed 2d 158 (1991); see also *Maryland v Shatzer*, 559 US 98, 104–105; 130 S Ct 1213; 175 L Ed 2d 1045 (2010); *Minnick v Mississippi*, 498 US 146, 153; 111 S Ct 486; 112 L Ed 2d 489 (1990).

If the accused restarts the conversation, that does not necessarily authorize the police to resume questioning. A suspect's "necessary inquiry arising out of the incidents of the custodial relationship" is not voluntary initiation that allows officers to restart the interrogation. *Oregon v Bradshaw*, 462 US 1039, 1046; 103 S Ct 2830; 77 L Ed 2d 405 (1983) (plurality opinion); see also *People v McRae*, 469 Mich 704, 716–717; 678 NW2d 425 (2004) ("Pursuant to *Bradshaw,* the

defendant must initiate communication *concerning the investigation* in order to avoid running afoul of the rule articulated in *Edwards*." (emphasis added)); *People v Sims*, 5 Cal 4th 405, 441–442; 853 P2d 992 (1993) ("[A]sking the police officers what was going to happen to him with reference to extradition . . . cannot, in itself, properly be construed as constituting a waiver of previously invoked rights."). Instead, a defendant opens the door to further interrogation only if his comments demonstrate a desire to resume a "generalized discussion relating . . . to the investigation." *Bradshaw*, 462 US at 1045 (plurality opinion). Importantly, courts have held that conversations about access to attorneys do not open the door to further interrogation. See, e.g., *Lewis*, 47 Mich App at 452–453; *Myers*, 158 Mich App at 11; *McDougal v State*, 277 Ga 493, 500; 591 SE2d 788 (2004) (noting that an inquiry about when a defendant "would be allowed to contact his . . . attorney" would not qualify as a discussion about the investigation).

2. A defendant's Miranda *waiver is not voluntary when it results from police coercion or deception.*

Even if the accused reinitiates conversation about the investigation, his subsequent waiver is still involuntary if, based on the "totality of the circumstances surrounding the interrogation," *Fare v Michael C.*, 442 US 707, 724–725; 99 S Ct 2560; 61 L Ed 2d 197 (1979), it is the product of "intimidation, coercion, or deception," *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135 89 L Ed 2d 410; see also *Edwards*, 451 US at 486 n 9. To determine whether a waiver is involuntary in this manner, courts consider the following non-exhaustive list of factors:

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

In *People v Stewart*, this Court explained how certain factors—the suspect's age, the timing of interrogation, the suspect's mental and physical health, and the police's threats, language, and tone—may indicate involuntariness. 512 Mich 472, 490–491, 493–495, 499–501; 999 NW2d 717 (2023).

3. Mr. Fenderson's waiver was not voluntary because the police both reinitiated the conversation after he invoked his right to counsel and then coerced him into signing a waiver.

Based on these principles, Mr. Fenderson's waiver of his *Miranda* rights was involuntary in two respects, either of which is sufficient to require suppression.

First, after his initial invocation of his right to counsel, the police—not Mr. Fenderson—reinitiated the conversation that led to the waiver. See *Edwards*, 451 US at 484–485. This conversation began when the police entered the interrogation room, at which point Mr. Fenderson asked where his lawyer was. App A at 5:15. This does not count as reinitiation. It was prompted not by Mr. Fenderson but by the detective's action of entering the room without a lawyer after previously telling Mr. Fenderson the police would find one for him. *Id*. at 2:29–2:30. And Mr. Fenderson's question about his lawyer did not demonstrate a desire to reopen a "generalized discussion relating . . . to the investigation." *Bradshaw*, 462 US at 1045. Asking about the whereabouts of a lawyer is quintessentially a "necessary inquiry arising out of the incidents of the custodial relationship." *Id*. at 1046; see also *McDougal*, 277 Ga at 500 (identifying a question about a lawyer as a paradigmatic example). It does not "evinc[e] a desire . . . to pursue a discussion relating directly or indirectly to the investigation." *McRae*, 469 Mich at 717. To the contrary, by asking about the availability of counsel, Mr. Fenderson demonstrated that he wanted to *avoid* discussing the investigation alone with the police.

A contrary holding would turn *Edwards* on its head. It would be nonsensical if a defendant who invoked his right to counsel to stop questioning were then deemed to have reinitiated questioning if he asked where counsel was. And it would incentivize the police to prevent defendants from actually making contact with their lawyers.

It was the detective who reinitiated a broader conversation beyond the topic of Mr. Fenderson's lawyer. The detective stated, "I can't talk to you no more without an attorney, so the story you gave is the story they'll go with." App A at 5:16. By referencing Mr. Fenderson's prior statements, the detective—not Mr. Fenderson—turned the discussion back to a "generalized discussion relating . . . to the investigation." *Bradshaw*, 462 US at 1045. Indeed, Mr. Fenderson's own subsequent comments reflect that it was the police who had re-initiated; as he grew increasingly confused, Mr. Fenderson stated: "If *you're trying to talk*, we can talk." App A at 5:17 (emphasis added).

Second, even if Mr. Fenderson had reinitiated the discussion—which he did not—his waiver was involuntary because it resulted from police coercion. Mr. Fenderson was particularly susceptible to being coerced during his interrogation. He had no experience with the criminal legal system as an adult and appeared to not understand the interrogation. See App A at 1:01–1:06, 5:19. He was not given access to his medication even though he asked about it. *Id*. at 3:11; see also *Cipriano*, 431 Mich at 334 (noting a finding that defendant is "in ill health when he gave the statement" weighs toward a finding of involuntariness).

Particularly given Mr. Fenderson's vulnerable condition, law enforcement's handling of his request for counsel amounted to deception. The deception began when, after telling Mr. Fenderson they would make "a couple phone calls" to get him a lawyer and leaving him handcuffed in an interrogation room, the police came back nearly three hours later without a lawyer and told

him, categorically and unconstitutionally, "You don't get one." App A at 2:30, 5:15. To be sure, the police later had Mr. Fenderson sign a *Miranda* waiver. But it is hard to understand how anyone can voluntarily waive his *Miranda* rights after the police tell him that they have *already* extinguished those rights. And it is especially hard to understand how someone in Mr. Fenderson's shoes could have waived those rights voluntarily given that he became increasingly upset, was visibly crying when he signed the supposed waiver, and repeatedly expressed his confusion. E.g., App A at 5:18, 5:20–5:23 ("I don't understand what's going on . . .").

Beyond giving Mr. Fenderson what amounted to an anti-*Miranda* warning—"You don't get one"—the police exacerbated their deceptive tactics by telling Mr. Fenderson that they were taking him back to the detention center to "submit a warrant and the prosecutor will review it." App A at 5:16. Mr. Fenderson asked what that meant. *Id*. But instead of clarifying, the detective said he could only explain if Mr. Fenderson said he "want[ed] to talk without an attorney." *Id*. That statement unduly coerced Mr. Fenderson to sign the waiver by suggesting that doing so was the only way to avoid going back to the detention center and to receive an explanation of what was happening.

All the while, Mr. Fenderson was crying. App A at 5:18, 5:23. And in this state, he signed the waiver. *Id*. at 5:21. As he did, he made more statements evincing his confusion and duress. *Id*. at 5:21–5:22 ("This is bullshit. I swear . . . I don't know . . . ."). He even expressed reservations when the officer asked if he had been coerced. *Id*. at 5:20 (responding to the question by stating, "See, that's why I don't understand what's going on . . . .").

Considering the totality of these circumstances, when Mr. Fenderson signed the waiver, a reasonable person in his position would have believed that the waiver was meaningless because he could not get a lawyer anyway, and signing this apparently meaningless waiver might be his

only chance to avoid further detention. Particularly given Mr. Fenderson's obvious emotional state, the waiver was involuntary.

II. Mr. Fenderson's statements must also be suppressed under Article 1, § 17 of the Michigan Constitution.

Article 1, § 17 of the Michigan Constitution independently bars the admission of Mr. Fenderson's statements. It provides:

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed. [Const 1963, art 1, § 17.]

The text and history of this provision, as well as Michigan case law preceding its adoption, show that its protections against self-incrimination are more robust than those provided by the Fifth Amendment. This Court should hold that Mr. Fenderson's statements are inadmissible under Article 1, § 17 and make clear that its holding is not based on federal precedent, even if it reaches the same conclusion under the Fifth Amendment.

Issuing an independent holding under the Michigan Constitution would "grant the proper respect to our own legal foundations and fulfill our sovereign duties" that stem "from the very nature of our federal system." *State v Coe*, 101 Wash 2d 364, 373–374; 679 P2d 353 (1984); *see also* Bolick, *Principles of State Constitutional Interpretation*, 23 Federalist Society Rev 1, 10–13 (2022) (Justice on the Arizona Supreme Court discussing the importance of "consulting the state constitution first"); Connors & Finch, *Primacy in Theory and Application: Lessons from a Half-Century of New Judicial Federalism*, 75 Me L Rev 1, 9–16 (2023) (Justice on the Maine Supreme Court making similar arguments). Indeed, "most individual rights litigation for the first 150 years of American history was premised on the state constitution and arose in the state courts." Sutton, *51 Imperfect Solutions* (New York: Oxford University Press, 2018), pp 12–13. In this case, resting

a decision on independent state grounds would insulate Michiganders from any future erosions of their Fifth Amendment rights as articulated by federal courts.

A. This Court interprets the Michigan Constitution independently of the U.S. Constitution.

The Michigan Constitution is the "preeminent law of" this state, *Mays v Snyder*, 323 Mich App 1, 33; 916 NW2d 227 (2018), and the "enduring expression of the will of 'we, the people' of [Michigan]," *People v Tanner*, 496 Mich 199, 221; 853 NW2d 653 (2014). Thus, when presented with a state constitutional question, it is "this Court's obligation to independently examine our state's Constitution to ascertain the intentions of those in whose name our Constitution was 'ordain[ed] and establish[ed].'" *Id*. at 222.

Conducting that independent examination has led this Court to hold that the Michigan Constitution provides broader rights than the U.S. Constitution for people facing criminal investigation and punishment in numerous contexts.[3] This Court has also applied protections under

[3] See, e.g., *People v Stovall*, 510 Mich 301, 313–314, 322; 987 NW2d 85 (2022) (Michigan Constitution bars imposition of life sentences with parole for juveniles even though Eighth Amendment does not); *People v Parks*, 510 Mich 225, 232; 987 NW2d 161 (2022) (Michigan Constitution bars imposition of mandatory life-without-parole sentences for 18-year-olds even though Eighth Amendment does not); *Sitz v Dep't of State Police*, 443 Mich 744, 776–779; 506 NW2d 209 (1993) (Michigan Constitution provides more protection than Fourth Amendment against suspicionless searches); *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992) (Michigan Constitution provides more protection against disproportionate punishment than the Eighth Amendment); *People v Juillet*, 439 Mich 34, 85; 475 NW2d 786 (1991) (CAVANAGH, C.J., concurring) (Michigan Constitution provides more protection than federal Due Process Clause against police entrapment).

Multiple members of this Court in recent years have further emphasized that the Michigan Constitution may provide more robust protections than the U.S. Constitution against other law enforcement practices that encroach on the rights of Michiganders. See, e.g., *People v Bearden*, 509 Mich 986; 974 NW2d 189 (2022) (CAVANAGH, J., concurring) (protections against unnecessarily suggestive identification procedures); *People v Montgomery*, 508 Mich 978; 965 NW2d 549 (2021) (WELCH, J., concurring) (protections from government searches for people on parole); *People v Pagano*, 507 Mich 26, 38–46; 967 NW2d 590 (2021) (VIVIANO, J., concurring) (protections against searches and seizures based on anonymous tips).

Article 1, § 17 that are "broader than have been afforded under" its federal counterpart. *AFT Mich v State*, 497 Mich 197, 245 n 28; 866 NW2d 782 (2015); see also, e.g., *Matter of Render*, 145 Mich App 344, 348; 377 NW2d 421 (1985) (Article 1, § 17 requires appointment of counsel at parental rights termination proceedings even though Fourteenth Amendment does not); *Charter Twp of Delta v Dinolfo*, 419 Mich 253, 265–266, 272–278; 351 NW2d 831 (1984) (Article 1, § 17 provides more protection against arbitrary zoning regulations than the federal Due Process Clause). And this Court has specifically recognized that it "may interpret our constitution to afford greater protections than those afforded by the Fifth Amendment" with respect to the right against self-incrimination. *Tanner*, 496 Mich at 237.

In determining whether the Michigan Constitution confers greater protections, the following "factors . . . may be relevant":

> 1) the 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. [*Id*. at 223 n 17 (citation omitted).]

These factors are not dispositive, and the Court's "ultimate task" is to "undertake by traditional interpretive methods to independently ascertain the meaning of the Michigan Constitution." *Id*.

Mr. Fenderson has addressed certain factors that weigh in favor of construing Article 1, § 17's protections more broadly than the Fifth Amendment's. Appellant Fenderson's Supp Br at 32–36. *Amici* supplement that analysis by detailing how the text and history of Article 1, § 17, longstanding state law, and Michigan's particular interests lend further support to that conclusion.

B. Article I, § 17 is more protective of the privilege against self-incrimination than the Fifth Amendment.

1. Text and constitutional history

The text and history of Article 1, § 17 indicate that Michiganders facing investigation are entitled to a higher standard of fair treatment than the U.S. Constitution affords. Like the Fifth Amendment, Article 1, § 17 dictates that "[n]o person shall be compelled in any criminal case to be a witness against himself." Const 1963, art 1, § 17; see US Const, Am V. But Article 1, § 17 additionally guarantees "[t]he right of all individuals . . . to fair and just treatment in the course of legislative and executive investigations and hearings." Const 1963, art 1, § 17. This guarantee was ratified as part of the 1963 Michigan Constitution, see 2 Official Record, Constitutional Convention 1961, p 3364, and the Constitutional Convention debates illustrate that it was intended to set a floor for the fairness required of the government in investigating any Michigander.

The "fair and just treatment" provision was animated by the premise that "[t]he quintessence of liberty is the protection of the individual against arbitrary application of the collective powers of the state."[4] 1 Official Record, Constitutional Convention 1961, p 545. The provision's author, esteemed civil libertarian Harold Norris,[5] explained that one dimension of liberty is that "fair and just treatment is accorded to all persons" subject to the state's investigatory powers. *Id*. This means "[w]itnesses cannot be compelled" by the state "to give evidence against themselves." *Id*.

While the new provision spoke expressly of "legislative and executive investigations," Const 1963, art 1, § 17, the debates showed that the protections it was extending to those contexts

[4] Prior to 1963, the rights now set forth in Article 1, § 17 were situated in Article 2, § 16. See 2 Official Record, Constitutional Convention 1961, p 3364.

[5] *Obituary: Harold Norris*, Oakland Co Legal News (Oct 17, 2013) <https://legalnews.com/Home/Articles?DataId=1381621>.

were already well-established in the context of criminal investigations. As Professor Norris noted, defendants in criminal cases have a panoply of rights, including the right to "decline to answer incriminating questions." 1 Official Record, Constitutional Convention 1961, p 546. But, until that point, those safeguards "ha[d] not been interpreted to apply to legislative or executive investigations." *Id*. Thus, the "fair and just treatment" provision was added to clarify that "each branch—the courts, the legislature, and the executive—should have a duty to protect and promote fair and just procedures in investigations." *Id*.; see also *id*. at 549 ("The idea here is to create a constitutional duty upon each of the coordinate branches of government to deal fairly and justly as far as investigative hearings of [sic] proceedings are concerned . . . ."). The delegates noted that the new provision was not importing the full array of due process protections from the criminal context to legislative and executive hearings, indicating that the standard of treatment the State owes to people facing criminal investigations must exceed the floor set by the "fair and just" language. *Id*. at 548.

2. State law preexisting adoption of Article 1, § 17

State law preexisting the 1963 Constitution and the historical context of Article 1, § 17's adoption provide more evidence that Michigan has long afforded robust protections against overzealous interrogation practices—protections at least as strong as under current law. See *Sitz*, 443 Mich at 765–773 (consulting pre-1963 precedent to determine the scope of constitutional language preserved in the 1963 Constitution and using that caselaw to reach a more expansive interpretation of the 1963 Constitution as compared to the federal Constitution). Thus, to give full effect to Article 1, § 17, Michigan's privilege against self-incrimination must be construed broadly.

This Court held more than a century ago that, to be admissible, a confession must be made "of [the defendant's] free will, and with full and perfect knowledge of [the confession's] nature

and consequences, free from the dictation and coercion of others." *People v Brockett*, 195 Mich 169, 179; 161 NW 991 (1917). The Court thus approved jury instructions barring the use of confessions "made under fear, compulsion, deceit, threat, or duress, or . . . upon an inducement, promise, hope, or expectation that it would be better for [the defendant] to make them."[6] *People v Biossat*, 206 Mich 334, 338; 172 NW 933 (1919).

Consistent with these instructions, this Court has emphasized that improper pressure, as distinct from coercion or violence, has no place in interrogations. Confessions "extorted by mental disquietude," including "subtle and insidious methods of intimidating and cowing" suspects that amount to "unlawful pressure," are not voluntary. *People v Cavanaugh*, 246 Mich 680, 686; 225 NW 501 (1929); see also *People v Louzon*, 338 Mich 146, 153–154; 61 NW2d 52 (1953) (recognizing that confessions are inadmissible when obtained by "cruel treatment or false promises" in addition to more blunt forms of coercion such as physical force). As this Court more recently summarized, Article 1, § 17's prohibition on "compel[ling]" testimony extends not just to explicit coercion or threats of violence, but also to situations where the police "use . . . pressure" to extract a confession. *Tanner*, 496 Mich at 225, citing, inter alia, *Webster's Third New International Dictionary* (1961).

Accordingly, this Court routinely suppressed confessions that were the product of psychological pressure, manipulative interrogation tactics, or other police conduct that undermined defendants' understanding of their rights. See, e.g., *Brockett*, 195 Mich at 172–179 (defendant did not have attorney, did not understand that his statements would be used against him, and was pressured by police to "tell what [they] wanted me to"); *People v McCullough*, 81 Mich 25, 32–

[6] This Court has moreover noted that a confession obtained in such circumstances is inadmissible even if the police acted "in good faith" and merely allowed "their zeal [to] . . . outr[un] their duty." *People v Prestige*, 182 Mich 80, 85–86; 148 NW 347 (1914).

33; 45 NW 515 (1890) (police deceived defendant and did not permit him to talk to counsel), superseded by statute on other grounds as stated in *People v Koonce*, 466 Mich 515 (2002); *People v Clarke*, 105 Mich 169, 172–173; 62 NW 1117 (1895) (prosecutor told defendant he would not get bail if he did not confess quickly, and defendant appeared confused about whether the prosecutor was his attorney).

Moreover, in the years leading up to Article 1, § 17's ratification, the U.S. Supreme Court was articulating the federal self-incrimination privilege in expansive terms. Confronted with evidence of "sophisticated modes" of coercive interrogation techniques, *Blackburn v Alabama*, 361 US 199, 206; 80 S Ct 274; 4 L Ed 2d 242 (1960); see *id*. at 206 n 6 (citing examples), the Supreme Court exhorted courts to vigorously enforce the privilege, see, e.g., *id*. at 206–207 ("[T]his Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will."); *Ullmann v United States*, 350 US 422, 426; 76 S Ct 497; 100 L Ed 511 (1956) (similar).

It was against this backdrop of a robust state and federal right against self-incrimination that Michigan adopted Article 1, § 17 in the 1963 Constitution. Since then, however, federal courts have chipped away at the federal constitutional guarantee. "Over the past four decades, the [U.S. Supreme] Court [has] limited *Miranda*'s reach in a death-by-a-thousand-cuts accretion of rulings." Garrett, *Remaining Silent After Salinas*, 80 U Chi L Rev Dialogue 116, 116–117 (2013); see generally Kamisar, *The Rise, Decline, and Fall(?) of Miranda*, 87 Wash L Rev 965 (2012). This erosion started a mere five years after *Miranda* was decided, with the Court ruling that statements obtained in violation of *Miranda* can nevertheless be used for impeachment. *Harris v New York*, 401 US 222, 226; 91 S Ct 643; 28 L Ed 2d 1 (1971). A few years later, the U.S. Supreme Court—

reversing the Michigan Court of Appeals—held that police may reinitiate questioning and re-administer *Miranda* warnings just two hours after a suspect invoked his right to remain silent. *Michigan v Mosley*, 423 US 96, 107; 96 S Ct 321; 46 L Ed 2d 313 (1975).

Since then, the U.S. Supreme Court has held that an ambiguous request for counsel does not require that an interrogation cease or that the interrogators ask clarifying questions, see *Davis v United States*, 512 US 452, 458–462; 114 S Ct 2350; 129 L Ed 2d 362 (1994); that suspects must precisely define the scope of the *Miranda* rights they are invoking, see *Connecticut v Barrett*, 479 US 523, 529–530; 107 S Ct 828; 93 L Ed 2d 920 (1987); and that even a suspect's hours-long silence after receiving *Miranda* warnings may not constitute an invocation of their rights, see *Berghuis*, 560 US at 384–386. The Court has also carved out exceptions to *Miranda*'s requirements for situations involving public safety concerns, see *New York v Quarles*, 467 US 649, 651; 104 S Ct 2626; 81 L Ed 2d 550 (1984), and questioning by undercover officers, see *Illinois v Perkins*, 496 US 292, 294; 110 S Ct 2394; 110 L Ed 2d 243 (1990). And the Court has permitted prosecutors to use physical evidence obtained in reliance on statements extracted in violation of *Miranda*, see *United States v Patane*, 542 US 630, 634; 124 S Ct 2620; 159 L Ed 2d 667 (2004) (plurality opinion), as well as a suspect's silence as evidence of guilt so long as the questioning was initiated before the suspect was placed in custody and informed of their *Miranda* rights, see *Salinas v Texas*, 570 US 178, 184; 133 S Ct 2174; 186 L Ed 2d 376 (2013) (plurality opinion).

We are now in a place where federal courts have, essentially, "turn[ed] *Miranda* upside down," resulting in a doctrine that is "inconsistent with the fair-trial principles" that federal courts used to uphold. *Berghuis*, 560 US at 412 (Sotomayor, J., dissenting).

Unsurprisingly, this federal erosion of the right against self-incrimination has, in turn, "emboldened" police officers to increasingly deploy forms of psychological coercion to deter

defendants from invoking their rights. *State v Purcell*, 331 Conn 318, 360; 203 A3d 542 (2019), citing, *inter alia* White, *Deflecting a Suspect from Requesting an Attorney*, 68 U Pitt L Rev 29, 31, 41 (2006). This has led other state supreme courts to reject recent federal jurisprudence in interpreting their own self-incrimination clauses in "[r]ecogni[tion] that the promises that dwell within *Miranda* can only be achieved by honoring the premises upon which it rests"—premises no longer rigorously honored by federal constitutional law. *Purcell*, 331 Conn at 361–362. Thus, construing Article 1, § 17 broadly is necessary to preserve the full force of the protections that Michigan's delegates and voters enshrined in the 1963 Constitution. See *People v Bender*, 452 Mich 594, 616; 551 NW2d 71 (1996) ("If these rights are to mean anything, surely we must be adamant in our protection of them."), overruled on other grounds by *Tanner*, 496 Mich 199.

3. Peculiar state interests

Recognizing Article 1, § 17's broad protections would also advance Michigan's commitment to the fair and equitable administration of justice, reduce the risk of eliciting false confessions, and disincentivize officers from crossing the line.

"Michigan has historically been a leader" in seeking to "eliminat[e] gender, racial, and ethnic discrimination" in the administration of justice. Commission on Diversity, Equity, and Inclusion in the Michigan Judiciary, *Strategic Plan* (2023), p 5, available at <https://perma.cc/4DDY-6H9U>. This Court has long worked to address such discrimination as part of its commitment to "assuring the fair and equal application of the rule of law for all persons in the Michigan court system." Administrative Order No. 1990-3 (1990), available at <https://perma.cc/XH9R-JGZC>. That work continues today. See, e.g., Michigan Judicial Council, *Racial and Social Equity Workgroup Report and Recommendations* (2023), available at <https://perma.cc/K4QG-JFK5>. As the Michigan Judicial Council has observed, these efforts are essential to "[f]ostering a more equitable and fair justice system in Michigan." *Id*. at 14–20.

Michigan's interest in fostering a more equitable and fair justice system would be well served by strong state constitutional protections against overbearing government interrogation tactics. Because of the stark racial disparities in the criminal justice system,[7] people of color are still disproportionately likely to face criminal investigation. As a result, they and people from other marginalized groups are disproportionately harmed by coercive interrogation methods. See *Chambers v Florida*, 309 US 227, 238; 60 S Ct 472; 84 L Ed 716 (1940) ("[T]hey who have suffered most from secret and dictatorial [interrogation methods] have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless."). Exacerbating these harms is the reality that many people, especially those from vulnerable populations, do not fully understand their *Miranda* rights even after being apprised of them. See *Purcell*, 331 Conn at 354–355 (citing social science studies showing that "suspects do not have a full appreciation of either their rights or the effect of a waiver when they choose to speak to the police").

There is a particularly weighty interest in proscribing police conduct that undermines the right to counsel. Lawyers have a "unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation." *Fare*, 442 US at 719. That is why the *Miranda* Court highlighted that "the right to have counsel present at the interrogation is indispensable to the protection" promised by the Self-Incrimination Clause. 384 US at 469. But when the interrogator

[7] This is true both nationally, see generally, e.g., Nat'l Conf of State Legis, *Racial and Ethnic Disparities in the Justice System* (2022) <https://www.ncsl.org/civil-and-criminal-justice/racial-and-ethnic-disparities-in-the-criminal-justice-system> (accessed June 4, 2025); Hinton, Henderson & Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Institute of Justice (2018), available at <https://vera-institute.files.svdcdn.com/production/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>, and in Michigan, see generally, e.g., *Michigan Profile*, Prison Policy Initiative <https://www.prisonpolicy.org/profiles/MI.html> (accessed June 4, 2025); Vera Institute of Justice, *Jail Incarceration in Wayne County, Michigan, 2018–2019* (2020) <https://www.vera.org/jail-incarceration-in-wayne-county-michigan>.

fails to honor a suspect's request to speak to a lawyer, the suspect "may well see further objection as futile and confession (true or not) as the only way to end his interrogation." *Davis*, 512 US at 472–473 (Souter, J., concurring). That is, allowing interrogators to undermine or obfuscate the right to counsel not only has a coercive effect, but also leads to false confessions. See *Corley v United States*, 556 US 303, 321; 129 S Ct 1558; 173 L Ed 2d 443 (2009) (acknowledging the "mounting empirical evidence that these pressures [inherent in custodial interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed"); *Berghuis*, 560 US at 403–404 (Sotomayor, J., dissenting) ("[A] criminal law system 'which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system relying on independent investigations.'"), quoting *Withrow v Williams*, 507 US 680, 692; 113 S Ct 1745; 123 L Ed 2d 407 (1993). What is more, permitting such tactics "would encourage the police to do everything possible" to frustrate suspects' access to their attorneys, "undermin[ing] the safeguards we have established to protect the rights to remain silent and to counsel." *Bender*, 452 Mich at 615–616.

In sum, the text and history of Article 1, § 17, longstanding state law, and Michigan's weighty interests all indicate that the Michigan Constitution is more protective of suspect's rights than the U.S. Constitution.

C. Article I, § 17 requires the suppression of Mr. Fenderson's statements.

Mr. Fenderson's statements were inadmissible under Article 1, § 17. That provision, buttressed by the requirement of "fair and just treatment" for criminal suspects, forbids the use of confessions "made under fear, compulsion, deceit, threat, or duress." *Biossat*, 206 Mich at 338. Rather, a confession must be made "of [the defendant's] free will, and with full and perfect knowledge of [the] nature" of their rights and the "consequences" of confessing. *Brockett*, 195

Mich at 179. Yet Mr. Fenderson's statements were not made of his free will or with full and perfect knowledge of his rights. The police misled him about his rights by telling him he does not get an attorney and refusing to dispel his resulting confusion and distress. See *Clarke*, 105 Mich at 172–173. They also exerted persistent pressure on him to speak to them without an attorney and continued to engage him in questioning notwithstanding his invocation of the right to counsel, "so agitat[ing]" him "as to arouse his fear." *Brockett*, 195 Mich at 179. His waiver of rights was neither knowing nor voluntary.

This Court should so hold independently under Article 1, § 17, even if it also holds that Mr. Fenderson's statements were inadmissible under the Fifth Amendment. As shown above, see *supra* section II.B.2, police interrogation tactics that are out of bounds under federal law today may not remain so tomorrow. Resting a decision here only on the uncertain foundations of the Fifth Amendment could therefore "result in a major contraction of the protections against" coercive government conduct. *Pagano*, 507 Mich at 45 (VIVIANO, J., concurring) (urging the Court to consider "whether to interpret our state Constitution as providing more protection" in response to the United States Supreme Court's weakening of Fourth Amendment protections); see *Sitz*, 443 Mich at 763 ("[O]ur courts are not obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the United States Supreme Court has chosen to do so."). A ruling independently grounded in Article 1, § 17 would be a bulwark against such a contraction of Michiganders' rights.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals and affirm the circuit court's order suppressing Mr. Fenderson's statements that followed his unknowing and involuntary waiver.

Respectfully submitted,

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WORD COUNT STATEMENT AND ATTESTATION REGARDING AMICI'S TAX EXEMPT STATUS

This brief contains 9,892 words in the sections covered by MCR 7.212(C)(6)-(8). This amicus brief is also filed on behalf of two organizations, both of which are tax exempt organizations under section 501(c)(3) of the Internal Revenue Code. MCR 7.312(H)(2)(f).

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