No. 18-1418

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HENRY HILL, JEMAL TIPTON, DAMION LAVOIAL TODD, BOBBY HINES, KEVIN BOYD, BOSIE SMITH, JENNIFER PRUITT, MATTHEW BENTLEY, KEITH MAXEY, GIOVANNI CASPER, JEAN CARLOS CINTRON, NICOLE DUPURE, DONTEZ TILLMAN, individually and on behalf of those similarly situated,

Plaintiffs-Appellees,

vs.

RICK SNYDER, in his official capacity as Governor of the State of Michigan, HEIDI E. WASHINGTON, Director of the Michigan Department of Corrections, MICHAEL EAGEN, Chair, Michigan Parole Board, and BILL SCHUETTE, Attorney General of the State of Michigan,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Michigan

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-1418 Case Name: Hill, et al v. Snyder, et al

Name of counsel: Deborah LaBelle

Pursuant to 6th Cir. R. 26.1, Henry Hill, Jemal Tipton, Damion Todd, Bobby Hines, Kevin Boyd, Bosie Smith, Jennifer Pruitt, Matthew Bentley, Keith Maxey, Giovanni Casper, Jean Cintron Nicole Dupure & Dontez Tillman

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on May 31, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Deborah LaBelle

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary because the issues in this appeal were thoroughly briefed, argued, and decided in the previous appeal, No. 17-1252.

The appeal in No. 17-1252 was argued at a special session of this Court in Nashville, Tennessee on September 14, 2017. The argument was recorded and remains available on the Court's website.[1] Argument lasted over an hour, during which time both sides had an opportunity to address Plaintiffs' Ex Post Facto claim and Defendants' abstention defense. The Ex Post Facto issue was addressed by Plaintiffs' counsel beginning at 30:50 of the argument, by Defendants' counsel beginning at 1:08:30 of the argument, and in rebuttal by Plaintiffs' counsel beginning at 1:16:50 of the argument. Abstention was addressed by Defendants' counsel for nearly 20 minutes beginning at 39:00 of the argument, and by Plaintiffs' counsel on rebuttal beginning at 1:13:00 of the argument.

In light of the extensive oral argument already presented on these matters, Plaintiffs encourage this Court to affirm without hearing oral argument on the same issues of law that were previously addressed. However, if oral argument is scheduled in this appeal, Plaintiffs' counsel would welcome the opportunity to participate and address the Court.

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[1] *See* http://www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=audio/09-14-2017%20-%20Thursday/17-1252_Henry_Hill_v_Rick_Snyder.mp3&name=17-1252_Henry_Hill_v_Rick_Snyder.

STATEMENT OF JURISDICTION

Plaintiffs agree that this Court has appellate jurisdiction, but Defendants' jurisdictional statement is incomplete.

> Typically, when a district court grants summary judgment on some but not all claims, the decision is not a final order for appellate purposes. However, under Federal Rule of Civil Procedure 54(b), the district court may certify a partial grant of summary judgment for immediate appeal "if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b).

Planned Parenthood Sw. Ohio Region v. DeWine, 696 F.3d 490, 500 (6th Cir. 2012).

In this case, the District Court invoked Rule 54(b), expressly directing the entry of a final judgment as to Count V only and expressly finding that there was no just reason to delay appellate review. (Final Partial J. as to Count V, R. 204, Pg ID 3204.) Accordingly, this Court has appellate jurisdiction under 28 U.S.C. § 1291. *See Gavitt v. Born*, 835 F.3d 623, 638-39 (6th Cir. 2016).

Alternatively, even without certification under Rule 54(b), this Court would have appellate jurisdiction under 28 U.S.C. § 1292(a)(1) because the District Court entered a permanent injunction from which Defendants timely appealed. *See Commodores Entm't Corp. v. McClary*, 879 F.3d 1114, 1127 (11th Cir. 2018).

STATEMENT OF ISSUES

I. Whether Michigan's post-*Miller* resentencing scheme for punishing youth is an unconstitutional ex post facto law because it retroactively deprives Plaintiffs of good-time and disciplinary credits that they were entitled to at the time of their offense and earned while serving their unconstitutional sentences?

The District Court said: Yes.

Defendants-Appellants said: No.

Plaintiffs-Appellees say: Yes.

II. Whether Plaintiffs may seek prospective relief in this § 1983 action, without abstention under *Younger*, when there were no ongoing state judicial proceedings at the time this action was filed, significant proceedings of substance on the merits occurred in federal court long before the state resentencing process began, and an order requiring the calculation and application of good-time and disciplinary credits by the Department of Corrections does not interfere with any ongoing judicial proceedings; and whether Plaintiffs may proceed without *Pullman* abstention or certification to the Michigan Supreme Court when these defenses were not raised until over 18 months after Plaintiffs asserted their claims and after they obtained a favorable decision in this Court, and when invoking those doctrines at this late stage would not necessarily result in additional state-court attention to questions of state law that are already clear?

The District Court said: Yes.

Defendants-Appellants said: No.

Plaintiffs-Appellees say: Yes.

STATEMENT OF THE CASE

Plaintiffs are a class of youth who were all punished with mandatory life sentences without the possibility of parole for offenses committed when they were 14 to 17 years old. As this Court has recognized: "Since 2010, Plaintiffs have sought federal court review of the punishments Michigan may constitutionally impose on individuals convicted of first-degree murder for acts they committed as children." *Hill v. Snyder* ("*Hill II*"), 878 F.3d 193, 199 (6th Cir. 2017).[2] In 2012, while Plaintiffs' case was pending, the United States Supreme Court ruled that the mandatory life without parole violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Miller v. Alabama*, 567 U.S. 460 (2012). The District Court granted partial summary judgment to Plaintiffs following the Supreme Court's decision in *Miller*, ordering Defendants to present a plan for providing Plaintiffs a meaningful opportunity for release. Defendants appealed and obtained a stay based on their argument that *Miller* should not apply retroactively. While this matter was pending on appeal, the Supreme Court issued its decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), holding *Miller* to be retroactive, thereby rendering Plaintiffs' sentences void as violative of the Eighth Amendment. The *Montgomery* decision also triggered into effect Mich. Comp. Laws § 769.25a,

[2] The factual and procedural history of this case is set forth in detail in this Court's prior decisions, *Hill v. Snyder* ("*Hill I*"), 821 F.3d 763 (6th Cir. 2016), and *Hill v. Snyder* ("*Hill II*"), 878 F.3d 193 (6th Cir. 2017).

a harsh and retroactive resentencing statute. Defendants contended that the remedial legislation fixed Michigan's unconstitutional sentencing scheme and sought dismissal of Plaintiffs' complaint. Plaintiffs argued that Michigan's treatment of youth convicted of first-degree homicide offenses remained unconstitutional. This Court, rejecting Defendants' argument that the lawsuit should be dismissed as moot, remanded the case to allow Plaintiffs to "file a second amended complaint directly challenging Michigan's 2014 legislative fixes" and "to enable the court to address remedies in the context of the new legal landscape." *Hill v. Snyder*, 821 F.3d 763, 771 (6th Cir. 2016) ("*Hill I*").

On remand, Plaintiffs amended their complaint to include a challenge to the constitutionality of Mich. Comp. Laws § 769.25a. (Pls.' 2d Am. Compl., R. 130, Pg ID 1577-1635.) Although *Montgomery* warned that life without parole must be an "uncommon" sentence that could be imposed on children in only the "rarest" of circumstances, Michigan's prosecutors sought to reimpose the punishment on over 250 out of the 360 cases where it had been previously imposed unconstitutionally. And despite the fact that *Montgomery* was decided over two years ago, those cases all remain on hold in state court, with Defendants providing those youth with neither rehabilitative programming nor an opportunity for resentencing or parole consideration, while the Michigan Supreme Court considers whether their

resentencing hearings should proceed before a judge or a jury. *Hill II*, 878 F.3d at 202-04 (describing such individuals as "stuck in carceral limbo").

Meanwhile, for class members who are being resentenced to term-of-years sentences, their opportunity for parole consideration was delayed by Mich. Comp. Laws § 769.25a(6), which retroactively eliminates any good-time and disciplinary credits Plaintiffs earned for good behavior in prison while serving their unconstitutional sentences. There are approximately 250 class members whose offenses occurred before December 15, 1998, the cutoff date for entitlement to earned credits for positive behavior under Michigan law. Of that number, over 50 have already been resentenced to term-of-years sentences. If the Michigan Department of Corrections ("MDOC") is not barred by Mich. Comp. Laws § 769.25a(6) from calculating and applying the credits those individuals earned and accumulated for good behavior, they will be eligible for parole consideration sooner. The court-ordered restoration of earned disciplinary and good-time credits resulted in 27 class members becoming immediately eligible for parole consideration. (Defs.' Am. Cert. of Compliance, R. 214, Pg ID 3313-3318.) Four of these individuals have received a parole decision to date, and all were granted release on parole. By taking away those credits, Mich. Comp. Laws § 769.25a(6) would force Plaintiffs who are otherwise be eligible for parole to wait years before

being considered for release despite being able to demonstrate rehabilitation and lack risk for release at an earlier date.[3]

The District Court initially dismissed Plaintiffs' second amended complaint. (Op. & Order Granting Defs.' Mot. to Dismiss, R. 174, Pg ID 2429-2443.) Plaintiffs appealed, and, with respect to the parts of the case that are relevant to this appeal, this Court reversed. *Hill II*, 878 F.3d at 204-07, 211-13.

In so doing, this Court held that *Younger* abstention would be improper. *Id*. at 204-07. This Court found that *Younger* applies only when the relief sought would interfere with state court judicial proceedings that are ongoing at the time a federal lawsuit is filed. The filing of an amended complaint, therefore, does not require that a federal court reconsider its jurisdiction under *Younger*, as though amending the complaint were equivalent to filing a new case. *Id*. at 205-06. Given that "we are seven years into the federal case," this Court held, *Younger* abstention is not justified because substantial proceedings on the merits of Plaintiffs' claims

[3] The District Court's injunction against enforcement of Mich. Comp. Laws § 769.25a(6) demonstrates how detrimental the law is for the affected class members. Plaintiffs' counsel's staff has calculated that, for the over 50 class members who have already been resentenced, Mich. Comp. Laws § 769.25a(6) retroactively took away approximately 335 years of earned good-time and disciplinary credits. That number will only increase as additional class members who are currently facing life-without-parole resentencing hearings are eventually resentenced to term-of-years sentences. It is estimated that the total amount of credit taken away by Mich. Comp. Laws § 769.25a(6) could be as high as 1195 years.

have occurred. *Id*. at 207. "Accordingly," this Court concluded, "we find *Younger* inapplicable to Plaintiffs' claims." *Id.*

This Court also reversed, on the merits, the District Court's dismissal of Plaintiffs' claim that the retroactive elimination of their credits violates the Ex Post Facto Clause of the United States Constitution. *Id.* at 211-13. This Court's Ex Post Facto analysis proceeded in two steps: "We first address whether Plaintiffs have sufficiently alleged that they were entitled to credits during their mandatory life sentences, and then consider whether the elimination of such credits disadvantaged them." *Id.* at 212. The Court answered the first inquiry by holding that Michigan case law and express statutory language supported Plaintiffs' allegation that they were legally entitled to earn credits during their initial sentences. *Id*. at 212-13. The Court then held that, to the extent Plaintiffs did earn such credits, "the retroactive elimination thereof is detrimental." *Id.* at 213. Accordingly, this Court held that Plaintiffs had stated a claim and remanded "for expeditious resolution in further proceedings consistent with [its] opinion." *Id.* at 215.

Defendants did not seek rehearing or further contest, on appeal, this Court's holdings regarding *Younger* abstention or Plaintiffs' Ex Post Facto claim.

On remand, Plaintiffs moved for summary judgment on their Ex Post Facto claim and requested expedited consideration because of the immediate and irreparable harm being suffered by all class members who would be immediately

eligible for parole consideration but for Mich. Comp. Laws § 769.25a(6). (Pls.' Mot. for Partial Summ. J., Decl. J. and Permanent Inj., R. 181, Pg ID 2515-2548; Mot. for Immediate Consideration, R. 182, Pg ID 2606-2612.) In support of their motion, Plaintiffs submitted unrebutted evidence that prisoners serving life sentences do earn credits, and that MDOC's historical and standard practice is to apply those credits if a prisoner's life sentence is ever altered to a term-of-years due to appeals, postconviction proceedings, or a change in the law. (Stapleton Aff., R. 181-6, ¶ 9, Pg ID 2568-2569.) Plaintiffs also submitted evidence that 51 class members would receive parole consideration sooner if their credits were restored, and were thus disadvantaged by the elimination of those credits caused by the statute. (Ubillus Aff., R. 181-2, Pg ID 2552; Ex. 3, R. 181-4, Pg ID 2557-2558.)

Defendants did not contest the evidence offered by Plaintiffs. Instead, Defendants persisted in arguing, contrary to the plain language of Michigan statutes and case law, that Plaintiffs were never entitled to earn credits. Defendants also repeated their argument, unequivocally rejected by this Court, *see Hill II*, 878 F.3d at 211-13, that retroactively eliminating Plaintiffs' credits did not disadvantage them. Defendants also continued to argue that Plaintiffs' claim should be dismissed under the *Younger* abstention doctrine, even though this Court rejected Defendants' *Younger* abstention defense in *Hill II*, 878 F.3d at 204-07. And Defendants argued for the first time—more than 18 months after Plaintiffs

had asserted their Ex Post Facto claim, and after the claim had been addressed on the merits in *Hill II*—that "embedded" questions of state law justified *Pullman* abstention or certification to the Michigan Supreme Court.[4]

The District Court granted Plaintiffs' motion for expedited consideration, granted their motion for summary judgment, and permanently enjoined Defendants

[4] Defendants pointed to two cases then pending in the Michigan Court of Appeals, *People v. Wiley* (No. 336898) and *People v. Rucker* (No. 338870), in which the appellants had raised an ex post facto claim regarding Mich. Comp. Laws § 769.25a(6) for the first time on direct appeal from their resentencing in state court. The appellants were not named plaintiffs in this litigation but were putative class members who would be eligible for disciplinary credits but for Mich. Comp. Laws § 769.25a(6). The Wayne County Prosecutor responded to their claims by asserting that the constitutionality of Mich. Comp. Laws § 769.25a(6) was irrelevant to the validity of their sentence as such (since sentencing courts do not address eligibility for behavior credits), and their claims would therefore "be better directed in a suit against the Department of Corrections and not in an appeal of [their] validly imposed sentence." (Pls.' Unopposed Mot. for Lv. to Supplement, R. 199, Pg ID 3006; Ex. A, R. 199-2, Pg ID 3024-3028; Ex. B, R. 199-3, Pg ID 3061-3063.) Following this Court's ruling in *Hill II*, Wiley and Rucker sought to voluntarily dismiss their appeals—precisely what the prosecutor recommended—as they anticipated classwide relief would be forthcoming in Plaintiffs' federal lawsuit against the Department of Corrections. However, in a highly unusual move, the attorney general filed an appearance in the case, opposed the appellants' motions to dismiss their own appeals, asked the Court of Appeals to address the ex post facto issue on the merits, and sought an expedited published opinion prior to the date Defendants were required to file their appeal brief to this this Court. The Court of Appeals did issue a published opinion, affirming the sentences themselves but ruling that Mich. Comp. Laws § 769.25a(6) is indeed an unconstitutional ex post facto law. *People v. Wiley*, __ N.W.2d __, 2018 WL 2089549 (Mich. Ct. App. 2018). Although Defendants say that "they are filing an application for leave to the Michigan Supreme Court and will be seeking expedited review" (Defs.' Br. at 15), at this time no such application has been filed.

from applying Mich. Comp. Laws § 769.25a(6).[5] (Order Granting Mot. to Expedite, R. 198, Pg ID 3005; Op. & Order, R. 203, Pg ID 3185-3194, 3202-3203.) Based on a thorough analysis of state statutes, case law and Plaintiffs' uncontested evidence regarding MDOC's longstanding practice, the District Court found that Plaintiffs were entitled to and did earn good-time and disciplinary credits while serving their unconstitutional life sentences. (Op. & Order, R. 203, Pg ID 3185-3194 & n.12.) Applying this Court's clear holding in *Hill II*, the District Court held that the statute's elimination of these earned credits is an "obvious disadvantage" in violation of the Ex Post Facto Clause. (*Id*., Pg ID 3194 n.12.)

The District Court denied Defendants' *Pullman* abstention and state-court certification requests, finding that state law on good-time and disciplinary credits was "unmistakably clear."[6] (*Id*., Pg ID 3177.) The District Court likewise rejected Defendants' *Younger* defense because Plaintiffs were not seeking to interfere with, or enjoin, any ongoing judicial proceedings; the relief Plaintiffs sought was directed at MDOC, not state courts or the resentencing process. (*Id*., Pg ID 3182.)

[5] The District Court also granted Plaintiffs' second renewed motion for class certification, which Defendants do not contest in this appeal. (Op. & Order, R. 203, Pg ID 3196-3202.)

[6] The "unmistakable clarity" of state law on this issue was confirmed on May 4, 2018, when the Michigan Court of Appeals issued a ruling that agreed with and adopted the District Court's analysis. *See People v. Wiley*, __ N.W.2d __, 2018 WL 2089549 (Mich. Ct. App. 2018).

Defendants appealed and sought a stay. In its April 18, 2018 order denying Defendant's emergency motion for a stay pending appeal, this Court stated:

> Upon review, we conclude that the balance of . . . factors weighs against staying the district court's order. Indeed, for the reasons set forth in *Hill II*, 878 F.3d at 211-13, Defendants appear unlikely to succeed on the merits of their appeal. The factual information submitted to the district court since *Hill II* further undermines Defendants' position on [Plaintiffs' Ex Post Facto claim]. We decline to disturb the district court's thoughtful and well-reasoned decision.

Order, *Hill v. Snyder*, No. 18-1418 (6th Cir. Apr. 18, 2018) (Dkt. 21-1).

STANDARDS OF REVIEW

The constitutionality of Mich. Comp. Laws § 769.25a(6) under the Ex Post Facto Clause, as well as the interpretation of Michigan state law regarding a prisoner's legal entitlement to earn good-time and disciplinary credits, are questions of law that this Court reviews de novo. *See Doe v. Bredeson*, 507 F.3d 998, 1002-03 (6th Cir. 2007).

Whether the District Court should have abstained from exercising jurisdiction under the *Younger* doctrine is likewise reviewed de novo. *See GTE Mobilnet of Ohio v. Johnson*, 111 F.3d 469, 481 (6th Cir. 1997). But whether the District Court should have abstained under the *Pullman* doctrine is reviewed for abuse of discretion, *see Tyler v. Collins*, 709 F.2d 1106, 1108 (6th Cir. 1983), as is the District Court's decision not to certify a question to the Michigan Supreme

Court, *see Sims Buick-GMC Truck, Inc. v. Gen. Motors LLC*, 876 F.3d 182, 190 (6th Cir. 2017).

SUMMARY OF THE ARGUMENT

Michigan's post-*Miller* statute, Mich. Comp. Laws § 769.25a, violates the Ex Post Facto Clause because it retroactively deprives Plaintiffs of good-time and disciplinary credits that they have already earned. In *Hill II*, this Court decided the questions of law necessary to resolve Plaintiffs' Ex Post Facto claim and the Court need not revisit them in this subsequent appeal. At the time Plaintiffs committed their offenses, *all* prisoners, including those serving life sentences, were entitled to earn good-time and disciplinary credits. If a prisoner serving a life sentence later had their sentence reduced or became entitled to resentencing, the Michigan Department of Corrections would apply those credits to their new sentence. Mich. Comp. Laws § 769.25a(6) retroactively disadvantages Plaintiffs by taking away the credit they earned while serving their unconstitutional sentences.

The District Court was not required to abstain under *Younger*. As with the Ex Post Facto claim, in *Hill II* this Court decided the question of law involved in Defendants' *Younger* defense. *Younger* applies only if a plaintiff's claim would interfere with state judicial proceedings that are ongoing at the time the action is initially filed in federal court. Plaintiffs filed this action in 2010, and proceedings of substance on the merits occurred in federal court long before the state

resentencing process began. Additionally, the District Court's injunction does not interfere with resentencing proceedings because good-time and disciplinary credits are not calculated by sentencing courts; the relief sought is directed at the Michigan Department of Corrections, an executive department.

Pullman abstention and certification to the Michigan Supreme Court are likewise inappropriate. Defendants failed to raise *Pullman* or certification until over 18 months after Plaintiffs asserted their claims and after Plaintiffs obtained a favorable decision in this Court. Invoking those doctrines at this late stage would cause additional harmful delay for Plaintiffs and would not necessarily result in additional state-court attention to questions of state law that are crystal clear.

ARGUMENT

I. MICHIGAN'S POST-*MILLER* STATUTE VIOLATES THE EX POST FACTO CLAUSE BECAUSE IT RETROACTIVELY ELIMINATES THE GOOD-BEHAVIOR CREDITS THAT PLAINTIFFS EARNED WHEN SERVING THEIR UNCONSTITUTIONAL SENTENCES.

A. This Court Should Not Revisit Legal Issues That Were Decided in *Hill II*.

On appeal, Defendants continue their attempt to relitigate legal issues that this Court has already decided in Plaintiffs' favor—principally, whether the Ex Post Facto Clause bars retroactive legislation depriving Plaintiffs of good-behavior credits that they earned while serving their unconstitutional life-without-parole sentences. In *Hill II*, this Court held that Plaintiffs stated a claim for an Ex Post

Facto violation, as state law clearly supported Plaintiffs' allegations that they had earned such credits, and as a matter of federal constitutional law the retroactive deprivation of such credits clearly disadvantaged them. *Hill II*, 878 F.3d at 211-13. On remand, Plaintiffs submitted uncontested evidence supporting their factual allegations and legal claims, and the District Court entered judgment in their favor. Defendants now seek to make the same arguments they made or could have made in *Hill II*, essentially inviting this Court to reverse itself and come to the opposite conclusion on the legal issues that it properly resolved in a previous appeal.

This Court need not, and should not, give the state successive opportunities to re-argue the same points of law. Under the law-of-the-case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Westside Mothers v. Olszewski*, 454 F.3d 532, 538 (6th Cir. 2006) (internal quotation marks omitted). "It is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand." *Nw. Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989). And, because *Hill II* is published in the Federal Reporter, its holdings are also binding precedent. *Valentine v. Francis*, 270 F.3d 1032, 1035 (6th Cir. 2001). Defendants flout these rules when they "ask this Court to view with fresh eyes" their recycled arguments

against the very same Ex Post Facto claim that was presented in the previous appeal. (Defs.' Br. at 18.) This Court should decline that invitation and affirm.

B. Plaintiffs Proved They Earned Credits and Proved the Retroactive Elimination of Those Credits Disadvantaged Them.

This Court in *Hill II* explained that Plaintiffs' Ex Post Facto claim requires a two-step analysis. The first question is whether Plaintiffs were entitled to earn good-time and/or disciplinary credits when they were serving their unconstitutional life-without-parole sentences. The second question is whether retroactively eliminating those credits disadvantaged them. *See Hill II*, 878 F.3d at 211-12.[7]

Beginning with the first question, this Court concluded that Michigan statutes and case law support Plaintiffs' position that prisoners serving life sentences (for offenses committed before December 15, 1998) are entitled to earn credits for good behavior. *Id.* at 212-13. Then, proceeding to the second question, this Court held that to the extent Plaintiffs did earn such credits, "the retroactive elimination thereof is detrimental." *Id*. at 213. Accordingly, Plaintiffs properly pleaded an Ex Post Facto claim.

[7] As this Court observed in *Hill II*, "No one disputes that this provision applies retroactively." *Hill II*, 878 F.3d at 212. The sole purpose of Mich. Comp. Laws § 769.25a was to set a punishment for individuals whose offenses had already occurred. *See Weaver v. Graham*, 450 U.S. 24, 31 (1981) (law altering the availability of gain time is retroactive because it "applies to prisoners convicted for acts committed before the provision's effective date"). Michigan's law was enacted in 2014, and its elimination of credits in subsection (6) applies to class members who committed their offenses before December 15, 1998.

On remand, Plaintiffs submitted uncontested evidence proving both prongs of their Ex Post Facto claim. On the first element, Plaintiffs proved that prisoners serving life sentences do earn good-time and disciplinary credits. (Pls.' Mot. for Partial Summ. J., Decl. J. and Perm. Inj., R. 181, Pg ID 2529.) As explained in the affidavit of Richard Stapleton, MDOC's legal affairs administrator for 34 years, MDOC calculates a prisoner's parole review date by applying good time and/or disciplinary credits based on the date of the prisoner's offense. (Stapleton Aff., R. 181-6, ¶ 9, Pg ID 2568-2569.) It has long been the Department's practice to do so when a prisoner serving a life sentence subsequently has that sentence altered to a term-of-years sentence, at which time the previously earned credits are applied to the new sentence. (*Id*.) Plaintiffs also proved, with uncontested evidence, that there were at least 51 class members who committed their offenses before December 15, 1998 and had been resentenced to a term of years; thus, eliminating the good-time and/or disciplinary credits they earned during their life sentences disadvantaged them because it delayed their opportunity for parole consideration. (Ubillus Aff., R. 181-2, Pg ID 2552; Ex. 3, R. 181-4, Pg ID 2557-2558.) As none of this evidence was contested by Defendants, the District Court properly granted summary judgment.

In finding that Plaintiffs were eligible to earn credits while serving their life sentences, the District Court relied not only on the uncontested Stapleton affidavit

but additionally on the Michigan statutes and case law (previously reviewed by this Court in *Hill II*) providing that credits are earned by prisoners serving life sentences for first-degree murder. (Op. & Order, R. 203, Pg ID 3185-3194.) The District Court, in further examining the statutes and case law, properly found the state law on this issue to be "unmistakably clear." (*Id.*, Pg ID 3177.) By statute, "[t]he broad language used in both the good time and the disciplinary credits statutes does not draw any distinction based on whether the prisoner is serving a life sentence." (*Id.*, Pg ID 3187.) In fact, Michigan statutes expressly provide that prisoners convicted of first-degree murder are entitled to earn disciplinary credits. Mich. Comp. Laws §§ 800.33(5), 791.233b(n). And both *Moore v. Buchko*, 154 N.W.2d 437 (Mich. 1967), and *Wayne County Prosecuting Attorney v. Michigan Department of Corrections*, No. 186106, 1997 WL 33345050 (Mich. Ct. App. June 17, 1997), recognize that individuals who were convicted of first-degree murder and later resentenced to terms of years are entitled to have the good-time credits they earned during their life sentence applied to their new sentence.

As observed in *Moore*, the legislature intended to give life-sentenced prisoners an opportunity to earn good-time credits because they knew it would encourage good behavior:

> Admittedly, the good time credit incentive is rather nebulous in the case of a convict imprisoned for life. But since hope and post conviction pleas spring eternal within the incarcerated human breast, it cannot be said

> the good time credit law is not at least some encouragement to them. At least, it appears that the legislature thought it would be so, and its policy determination is binding on this Court.

Moore, 154 N.W.2d at 457.[8] In other words, even though good-behavior credits cannot be immediately "cashed in" by someone who is presently serving a life sentence, they are valuable because they provide hope to prisoners who believe that their life sentence might one day be overturned and replaced with a term-of-years sentence, and they are a strong incentive for such prisoners to be on their best behavior should such a day ever come—as it has in this case. Thus, there is a clear policy rationale, in addition to the plain language of the statutes and holdings of Michigan case law, to support Plaintiffs' claims.

Following the decision in *Moore*, which addressed good-time credits, the Michigan Legislature confirmed and continued this policy choice when it enacted the statute on disciplinary credits. As observed in *Hill II*, 878 F.3d at 212, the relevant statute provides:

> *[A]ll* prisoners serving a sentence on December 30, 1982, or incarcerated after December 30, 1982, for the conviction of a crime enumerated in section 33b(a) to (cc) of 1953 PA 232, MCL 791.233b, are eligible to earn a disciplinary credit of 5 days per month for each month served after December 30, 1982.

[8] Although the above-quote passage comes from the opinion of Justice Brennan, the Michigan Supreme Court was unanimous in holding that the plaintiff in *Moore* was entitled to good-time credit earned when he served 20 years of a life sentence that was later altered to a term-of-years sentence.

Mich. Comp. Laws § 800.33(5) (emphasis added). In turn, Mich. Comp. Laws § 791.233b(n) specifically lists first-degree murder, Mich. Comp. Laws § 750.316, as one of the "enumerated" crimes for which disciplinary credits may be earned—even though the mandatory sentence for that offense at the time the statute was enacted was life without parole. The statute then provides: "Accumulated disciplinary credits shall be deducted from a prisoner's minimum and maximum sentence in order to determine his or her parole eligibility dates." Mich. Comp. Laws § 800.33(5). Therefore, there can be no doubt that Plaintiffs were entitled to "accumulate" credits even though they were serving life sentences, and have those credits applied should their sentences ever be converted to a term of years.

Having confirmed that Plaintiffs were able to earn credits while serving their life sentences, the District Court had no difficulty rejecting Defendants' argument that eliminating those credits is "no constitutional violation because [Plaintiffs] were not disadvantaged in any way." (Op. & Order, R. 203, Pg ID 3194 n.12.)

> The Sixth Circuit rejected this argument in *Hill II*, recognizing that Plaintiffs are clearly disadvantaged by the elimination of credits that they earned while serving their life sentences. Plaintiff Jennifer Pruitt, for example, would become immediately eligible for parole if her credits were restored; without such credits, she will be ineligible for review by the Michigan Parole Board for several more years. *Hill II*, 878 F.3d at 213. Losing the opportunity to serve the lowest sentence possible under the law is an obvious disadvantage within the meaning of the ex post facto prohibition.

(*Id*.)

On appeal, Defendants persist in pressing the very same arguments: Plaintiffs were not entitled to earn credits, and depriving Plaintiffs of credits did not disadvantage them. Not only is Plaintiffs' entitlement to accumulate credits clear from the proofs, statutes, and case law discussed above, but the Michigan Court of Appeals has now addressed this question in a published decision that explicitly agrees with and adopts the District Court's analysis. *See People v. Wiley*, __ N.W.2d __, 2018 WL 2089549 (Mich. Ct. App. 2018). "In determining a question of Michigan law, this court is bound by decisions of the state's intermediate appellate courts unless convinced that the Michigan Supreme Court would decide the question differently." *Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446, 453 (6th Cir. 2005) (internal quotation marks omitted).[9] Therefore, in light of *Wiley*, this Court must conclude, as a matter of state law, that Plaintiffs were entitled to accumulate credits for good behavior when serving their unconstitutional sentences.

As for Defendants' continuing argument that the elimination of Plaintiffs' credits does not disadvantage them, the District Court properly determined that

[9] Defendants contend that a state appellate decision is merely "persuasive." (Defs.' Br. at 41.) Although that may be true regarding questions of federal constitutional law, an intermediate appellate decision is considered "binding authority in federal courts" on matters of state law in the absence of any contrary authority from the Michigan Supreme Court. *Hampton v. United States*, 191 F.3d 695, 701-02 (6th Cir. 1999) (citing authorities).

position was unequivocally rejected by this Court in *Hill II*, 878 F.3d at 213: "To the extent that Plaintiffs earned credits during the mandatory life sentences, the retroactive elimination thereof is detrimental." Accordingly, the decision below should be affirmed.

C. Defendants' Arguments on Appeal Do Not Undermine *Hill II* or the District Court's Decision.

Although Defendants request that this Court "view with fresh eyes" their arguments for reversal, none of their arguments demonstrates error by this Court in *Hill II* or by the District Court below.

First, Defendants' argument that the credits Plaintiffs earned had no "value" is clearly wrong. Accumulated credits are valuable, even when earned by a prisoner serving a life sentence, because the credits can be applied in the event the prisoner's sentence is ever overturned and replaced with a term-of-years sentence. As stated in *Moore*, "since hope and post conviction pleas spring eternal within the incarcerated human breast, it cannot be said the good time credit law is not at least some encouragement" to prisoners with life sentences. *Moore*, 154 N.W.2d at 457. Indeed, there can be no other explanation for the Michigan Legislature's decision in 1982 to *include* first-degree murder (for which the mandatory sentence was life) in the enumerated list of crimes for which disciplinary credits can be earned. Mich. Comp. Laws § 800.33(5).

Defendants seem to assume that the credits earned by Plaintiffs were without value because they could not be used immediately and there was never any guarantee that they could be used at all. But "a law need not impair a 'vested right' to violate the *ex post facto* prohibition." *Weaver v. Graham*, 450 U.S. 24, 29 (1981).[10] The fact that the benefit of the credit is contingent on a subsequent event of legal significance (which in this case has come to pass) does not eliminate its value at the outset.

Defendants' argument to the contrary conflates the present ability to benefit from credits with the value inherent in earning them. True, a prisoner presently serving a life sentence cannot immediately "cash in" his or her credits because there is no minimum or maximum term to which the credits can be applied. But the accumulated credits have value because the prisoner's sentence might one day be altered—which is what happened here. If that occurs, the credits will be applied and result in an earlier opportunity for release.

Second, Defendants' argument that nothing in *Miller* and *Montgomery* required the Legislature to create a sentence of a term of years is wholly irrelevant to the Ex Post Facto analysis. The Ex Post Facto Clause does not concern "an

[10] Defendants appear to be unaware of this critical holding in *Weaver*, as they argue that "a first-degree murderer – whose conviction stands – previously had no vested interest in good time credits or disciplinary credits." (Defs.' Br. at 33.) "When a court engages in ex post facto analysis . . . it is irrelevant whether the statutory change touches any vested rights." *Weaver*, 450 U.S. at 29 n.13.

individual's right to less punishment" or any specific form of punishment, it prohibits lawmakers from altering a punishment after the offense in a manner that is detrimental to the offender. *Weaver*, 450 U.S. at 30. At the time Plaintiffs committed their offenses, good-behavior credits could be earned so that they could be applied to any future term-of-years sentence should one come about. Even if Plaintiffs have no free-standing right to a term-of-years sentence, they have a right to apply their earned credits to the term-of-years sentence that they ended up receiving.

Defendants are thus mistaken in their depiction of a "perfect analogy" in which a hypothetical legislature created a life sentence with parole eligibility after 25 to 40 years. (Defs.' Br. at 26.) The analogy is flawed because, unlike parole eligibility during a life sentence, good-time and disciplinary credits are based on individualized good-behavior conduct. At the time of their offenses, Plaintiffs knew (because the law told them) that if they behaved well, and if their life sentences were later altered to a term of years, their good behavior in prison would be rewarded with an earlier opportunity for release. That is the benefit that Mich. Comp. Laws § 769.25a(6) retroactively takes away.

Third, Defendants' argument that Plaintiffs are not disadvantaged because they no longer have a life sentence misconceives the nature of the Ex Post Facto inquiry, which "looks to the challenged provision, and not to any special

circumstances that may mitigate its effect on the particular individual." *Weaver*, 450 U.S. at 33. In this case, the "challenged provision" is Mich. Comp. Laws § 769.25a(6), which eliminates good-behavior credits that Plaintiffs accumulated while serving their unconstitutional life sentences. As this Court recognized in *Hill II*, eliminating these previously earned credits now "'constricts [their] opportunity to earn early release,'" a consequence that is inherently detrimental. *Hill II*, 878 F.3d at 213 (quoting *Weaver*, 450 U.S. at 35-36).

Finally, the strained public policy rationales Defendants offer for Mich. Comp. Laws § 769.25a(6) cannot justify its unconstitutionality. For example, Defendants speculate that the Legislature eliminated credits in the interest of "uniformity." (Defs.' Br. at 36.) But a lack of uniformity doesn't violate the United States Constitution; ex post facto laws do.[11] Next, Defendants contend that "there is every reason to believe" that the Legislature would have preemptively increased Plaintiffs' punishment had it been known that their accumulated credits could be applied. (Defs.' Br. at 35.) Actually, there is *no* reason to believe that, but even if it were true, it would merely confirm an "arbitrary and potentially vindictive" legislative intent to retroactively eliminate the benefit of credits Plaintiffs had already earned. *Weaver*, 450 U.S. at 29. Lastly, Defendants warn that restoring

[11] Nor is there "uniformity" in a system that retroactively targets youth for exclusion from a benefit to which all other prisoners whose offense occurred in the same time period are entitled.

credits now is unfair to judges who "take credit availability into account when choosing a sentence." (Defs.' Br. at 37.) This argument is frivolous, as Michigan law strictly prohibits judges from considering credit availability when imposing a sentence. *People v. McCracken*, 431 N.W.2d 840, 844 (Mich. Ct. App. 1988).

II. THE DISTRICT COURT WAS NOT REQUIRED TO ABSTAIN UNDER *YOUNGER* OR *PULLMAN*, OR CERTIFY A QUESTION TO THE MICHIGAN SUPREME COURT.

A. *Younger* Abstention Is Inapplicable and Inappropriate.

This Court has held that "generally federal courts should not abstain from exercising jurisdiction on abstention grounds, for abstention is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Loch v. Watkins*, 337 F.3d 574, 578 (6th Cir. 2003). The Supreme Court has likewise admonished that, ordinarily, federal courts "should not refuse to decide a case in deference to the States," and that circumstances fitting within the *Younger* abstention doctrine are "exceptional." *Sprint Comms., Inc. v. Jacobs*, 571 U.S. 69, 73 (2013). For the reasons described by this Court in *Hill II* and by the District Court below, the requirements for *Younger* abstention do not apply here.

1. This case's long history precludes *Younger* abstention.

Younger applies only when there are ongoing state judicial proceedings at the time the federal lawsuit is initiated. *Younger* is thus inapplicable here because,

as this Court recognized in *Hill II*, "*Younger* is inextricably bound up with beginnings," and "[w]e are far from the beginning of this case, the initiation of which is barely discernible in our rearview mirror." *Hill II*, 878 F.3d at 205. Plaintiffs' filing of the Second Amended Complaint is immaterial. *Id.* As this Court warned, "if courts were to reconsider exercising their jurisdiction at every amendment, plaintiffs would risk sacrificing federal claims for fear of a late-stage *Younger* analysis." *Id.*

Defendants nonetheless insist that the District Court should have abstained because Plaintiffs' Ex Post Facto claim "is conceptually distinct" from the claims for which Defendants sought *Younger* abstention in *Hill II*. (Defs.' Br. at 62.) That is incorrect. Defendants assume that this Court intended only to address abstention with respect to Claims II, IV, and VI, rather than with respect to the entire case. There are several reasons why the Court's opinion does not support this position.

First, the Court recognized its independent obligation to examine *Younger* abstention *sua sponte*, yet chose not to address *Younger*'s application to the Ex Post Facto claim as distinct from the rest of Plaintiffs' case. *Hill II*, 878 F.3d at 206 n.3. Instead, the Court framed the abstention issue broadly as whether "the filing of the [Second Amended Complaint], seven years into the litigation, requires the federal court system to reevaluate whether to exercise its jurisdiction," before

concluding that it did not. *Hill*, 878 F.3d at 205. The Court did not parse specific claims.

Second, after noting that Defendants failed to cite any authority explaining why or when a second amended complaint constitutes a "new case" under *Younger*, the Court rejected Defendants' position as antithetical to the Federal Rules' general presumption that "new allegations relate back to the original pleading." *Id.* at 206. The Court concluded that the presumption was especially strong in this case, explaining:

> Here, Plaintiffs' [Second Amended Complaint]—filed at our suggestion—incorporated the same thread that has tied Plaintiffs' claims together from the first: It argues that Michigan's sentencing and parole statutes deny juvenile offenders convicted of first-degree murder a meaningful opportunity for release. This coherent and consistent theme has animated every iteration of Plaintiffs' complaint, and it illustrates why we must reject the notion that amending a complaint somehow constitutes a new case.

Id.

The same thread and theme ties in the Ex Post Facto claim: success on the claim hastens parole consideration for eligible class members and the relief that Plaintiffs have consistently sought—meaningful opportunity for release. Of course Plaintiffs could not challenge any denial of their earned credits until Defendants actually denied them. That did not occur until *Montgomery* triggered Mich. Comp. Laws § 769.25a into effect, applying its *Miller* remedy retroactively. The Second

Amended Complaint was thus Plaintiffs' first chance to confront the barrier that Michigan's denial of earned credits placed before their overall effort to obtain meaningful parole consideration. That doesn't make Plaintiffs' Ex Post Facto claim a "new case," it means they properly amended their pleadings in the same case under Fed. R. Civ. P. 15. *See Hill II*, 878 F.3d at 206.

Defendants still fail to cite any authority for their "new case" theory of abstention, and the Ex Post Facto claim is part and parcel of the same challenge Plaintiffs began seven years ago, as well as Defendants' persistent effort to evade *Miller*. *See Hill II*, 878 F.3d at 199 ("Since 2010, Plaintiffs have sought federal court review of the punishments Michigan may constitutionally impose on individuals convicted of first-degree murder for acts they committed as children."); *Hill I*, 821 F.3d at 771 (noting "defendants' apparent history of refusing to apply the court's orders to anyone other than the named plaintiffs"). It therefore remains true, as this Court observed, that "to find that the filing of the [Second Amended Complaint] required the district court to reconsider its jurisdiction would both expand and warp" *Younger* abstention. *Hill II*, 878 F.3d at 207.

2. Relief does not interfere with ongoing state court resentencings.

The District Court also properly refused to exercise jurisdiction under *Younger* because "Plaintiffs are not seeking to interfere with, or enjoin, any ongoing judicial proceedings." (Op. & Order, R. 203, Pg ID 3182.) Defendants

contend that the Michigan Court of Appeals' decision in *People v. Wiley* demonstrates that the District Court's ruling interferes with "ongoing state appellate proceedings." (Defs.' Br. at 60.) Defendants are wrong.

Younger requires abstention when the relief requested "would *interfere* with pending state judicial proceedings." *O'Neill v. Coughlan*, 511 F.3d 638, 643 (6th Cir. 2008) (emphasis added), such as by "enjoining the state prosecution," *Sprint Comms*, 571 U.S. at 72. In this case, however, the Michigan Court of Appeals obviously did not consider itself enjoined or even bound by the District Court's ruling, especially since the appellate court *vindicated* the federal court's analysis by adopting it as its own. The state court specifically recognized that it was "not bound" by the District Court's decision, but "[a]fter a careful review" found it persuasive. *Wiley*, majority slip op. at 13-14, 2018 WL 2089549 at *9. One can reasonably predict that the Michigan Supreme Court will not be impeded by the District Court's ruling, any more than it would be restrained by the inferior appellate court's decision. In short, there was no "interference."[12]

Defendants suggest that the District Court's decision is undermined by the fact that the Michigan Court of Appeals was capable of addressing and deciding the same legal issues. But the District Court's *Younger* analysis was not premised

[12] Moreover, the *Wiley*/*Rucker* case concerned only disciplinary credits for two individuals, not the class-wide injunctive and declaratory relief for good-time and disciplinary credits at issue in the instant case.

on the appellate courts' likelihood of deciding the same issues. It was instead based on the fact that Michigan criminal courts do not calculate good-time and disciplinary credits at sentencing; this task is left to MDOC. (Op. & Order, R. 203, Pg ID 3182.) Irrespective of how this Court or the Michigan Supreme Court resolves the earned credits issue, state criminal courts can continue re-sentencing class members (and appellate courts can continue to affirm their sentences), completely unimpeded by the District Court's ruling.

Contrary to Defendants' suggestion, *Wiley* confirms, rather than undermines, the District Court's conclusion. The court exercised jurisdiction over the earned credits issue after concluding that it was "neither usurping or trespassing on the Parole Board's authority," but rather "analyzing the constitutionality of a law passed by the third branch, our Legislature." *Wiley*, majority slip op. at 9, 2018 WL 2089549 at *6. Critically, the court did not even suggest that its decision impugned the sentencing court's actions, or that lower courts would be required to implement the decision during criminal resentencing proceedings.[13] It is instead clear from *Wiley*, just as in this case, that the Ex Post Facto claim arises from the statute itself, not a judicial proceeding, and the requested relief is appropriately directed at the executive branch, i.e., MDOC, not a state court. The challenge simply does not

[13] In fact, although the court in *Wiley* declared Mich. Comp. Laws § 769.25a(6) unconstitutional, it *affirmed* the defendants' sentences and did *not* remand for further proceedings. *Wiley*, majority slip op. at 23, 2018 WL 2089549 at *16

implicate, let alone interfere with, the criminal courts. (Op. & Order, R. 203, Pg ID 3184 (noting that abstention is inappropriate where relief "will not require ongoing federal court oversight or interference with the daily operation of Michigan's . . . courts" (quoting *Dwayne B. v. Granholm*, No. 06-13548, 2007 WL 1140920, at *7 (E.D. Mich. Apr. 17, 2017)).)

B. *Pullman* Abstention and Certification Are Improper.

The District Court correctly declined to abstain under *Pullman* or to certify to the Michigan Supreme Court the state law question of whether Plaintiffs earned good-time and disciplinary credits. Both options would have inequitably delayed relief in this case, now in its eighth year. Further, abstention and certification are entirely unnecessary because state law on the issue is clear: This Court, the District Court below and the Michigan appellate court all agree that Plaintiffs did earn good-time and disciplinary credits while serving their unconstitutional life sentences, and that the State of Michigan's attempt to deprive them of these credits violated the prohibition against ex post facto laws.

Pullman abstention is first and foremost driven by equity. *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964) ("The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers."). Consequently, "where the litigation has already been long delayed," *Pullman*

abstention should be denied. *Harris Cty. Comm'rs Court v. Moore*, 420 U.S. 77, 84 (1975); *Mayor of City of Philadelphia v. Educ. Equal. League*, 415 U.S. 605, 628 (1974). Certification is also inappropriate when it would unduly delay the federal proceedings. E.D. Mich. L.R. 83.40 (allowing certification only when "certification of the issue will not cause undue delay or prejudice").

Both the abstention and certification analyses must start, then, with the fact that Defendants waited over 18 months after Plaintiffs asserted their Ex Post Facto claim in the Second Amended Complaint to suggest that there were any unsettled questions of state law that should be addressed by state courts. Defendants raised *Pullman* abstention and certification only after this Court recognized the viability of Plaintiffs' Ex Post Facto claim and remanded to the District Court. Having now repeatedly lost the ex post facto issue in the federal and state courts—because those courts all rejected Defendants' implausible reading of state law regarding earned credits—Defendants ask this Court to wait an indefinite period of time while they seek a *fourth* opinion in the Michigan Supreme Court, either through certification or Defendants' representation of a forthcoming appeal in *Wiley*.

Defendants conveniently gloss over several critical contingencies, all of which counsel against indulging Defendants' exercise in futility and attempt at further delay. First, the Michigan Supreme Court's review is discretionary; meaning not only is it impossible to predict *when* the court may decide this issue,

there is no telling *whether* it will decide at all. Second, if the Michigan Supreme Court does grant leave, it still may not reach the merits if it disagrees with the appellate court's determination that it had jurisdiction over the credits issue. Finally, even if the Michigan Supreme Court reaches the merits in *Wiley*, it will only decide whether Plaintiffs earned disciplinary credits, not the separate question of whether they earned good-time credits, as both the defendants in *Wiley* committed their offenses after good-time credits were eliminated under Michigan law. The District Court properly recognized that this highly contingent course was "hardly a prompt avenue for the definitive determination of state law." (Op. & Order, R. 203, Pg ID 3179.) It then forcefully concluded that "[c]ompelling Plaintiffs to languish in prison while an uncertain and lengthy state court process plays out—with no assurance of a definitive answer at the end of that journey—is the antithesis of the equitable principles enshrined in the abstention doctrine." (*Id.*, Pg ID 3180.)

Defendants' sole attempt to justify continued delay is to suggest that the Court should doubt the District Court's analysis because the District Court incorrectly predicted that the Michigan Court of Appeals would rule it did not have jurisdiction. (Defs.' Br. at 54.) But the District Court made no such prediction. It instead accurately noted—for purposes of evaluating *Younger* abstention—that the Michigan Department of Corrections, rather than the state courts, typically

calculates credits earned for good behavior. (Op. & Order, R. 203, Pg ID 3182-83). Regardless, even if the District Court had incorrectly assessed the appellate court's jurisdiction to decide the merits, Defendants somehow ignore the fact that the appellate court *adopted in full* the District Court's analysis of the merits. And the District Court reached its conclusion following this Court's determination that state law strongly supported Plaintiffs' Ex Post Facto claim. *Hill II*, 878 F.3d at 213 ("We find that Plaintiffs have pleaded sufficient factual information to support the reasonable inference that Section 769.25a(6) disadvantages them.").

These decisions by the state and federal courts also undermine Defendants' attempt to invoke *Pullman* abstention or to seek certification by asserting that myriad state-law questions are allegedly "unclear." Specifically, Defendants contend the Court could avoid the Ex Post Facto claim "[i]f under state law, Plaintiffs never earned credits, never earned credits of value, or could constitutionally have received other sentences." (Defs.' Br. at 49.) Of these, the first question—whether Plaintiffs earned credits—is the only state law question in this case. (Op. & Order, R. 203, Pg ID 3176 ("The crux of Plaintiffs' claim, therefore, hinges on an interpretation of the good time and disciplinary credit statutes, and whether these statutes previously afforded credit to individuals who were sentenced to life without parole.").) It is also a state law question Defendants have lost in every court they have argued it. As the District Court concluded, "state

law regarding good time and disciplinary credits is unmistakably clear and solidly supports Plaintiffs' position" that they earned credits while serving life sentences, credits they would otherwise be entitled to apply to a later term of years sentence. (*Id.*, Pg ID 3177.) This Court, in denying Defendants' stay application, determined Defendants are unlikely to prevail in their effort to upset this "thoughtful and well-reasoned" conclusion. It therefore makes little sense to allow Defendants' "Hail Mary" to the Michigan Supreme Court before deciding this case, particularly when doing so would result in Plaintiffs continuing to be incarcerated for longer periods of time than is justified.

The remaining questions—whether the credits Plaintiffs earned had any "value," and whether the Plaintiffs could have received other *Miller*-compliant sentences that would not implicate the Ex Post Facto Clause—merely repackage Defendants' arguments for why Plaintiffs have not been disadvantaged by Michigan's attempts to eliminate their credits. As such, they are federal questions that federal courts are entirely competent to decide, and those courts have all decided against Defendants.

CONCLUSION

The order and judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. This brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Rule 32(f), it contains no more than 13,000 words. This brief contains 8,655 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2018, this brief was served on all counsel of record using the Sixth Circuit's electronic case filing system.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

E.D. Mich. Case No. 10-cv-14568

Record Entry	Description	Page ID Range
130	Pls.' 2d Am. Compl.	1577-1635
174	Op. & Order Granting Defs.' Mot. to Dismiss	2429-2443
181 181-2 181-4 181-6	Pls.' Mot. for Partial Summ. J., Decl. J. and Permanent Inj. Ubillus Aff. Ex. 3 Stapleton Aff.	2515-2548 2550-2553 2556-2558 2564-2571
182	Mot. for Immediate Consideration	2606-2615
198	Order Granting Mot. to Expedite	3005
199 199-2 199-3	Pls.' Unopposed Mot. for Lv. to Supplement Ex. A Ex. B	3006-3009 3011-3046 3047-3071
203	Op. & Order	3171-3203
204	Final Partial Judgment as to Count V	3204-3205
214	Defs.' Am. Cert. of Compliance	3313-3318