No. S277487

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

TONY HARDIN,
Defendant and Petitioner.

Second Appellate District, Division Seven, Case No. B315434
Los Angeles County Superior Court, Case No. A893110
The Honorable Juan Carlos Dominguez, Judge

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

AND

PROPOSED BRIEF OF *AMICI CURIAE* ACLU, ACLU OF NORTHERN CALIFORNIA, ACLU OF SOUTHERN CALIFORNIA, CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, AND CONTRA COSTA PUBLIC DEFENDER OFFICE IN SUPPORT OF PETITIONER TONY HARDIN

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, proposed *amici curiae* respectfully request leave to file the accompanying Proposed *Amicus Curiae* Brief in Support of Petitioner Tony Hardin.

INTERESTS OF *AMICI CURIAE* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. The ACLU engages in litigation and advocacy throughout the country to protect the constitutional and civil rights of criminal defendants and end excessively harsh policies that result in mass incarceration and over-criminalization. The ACLU has an extensive history of advocating for the rights of juveniles facing extreme sentences resulting from the racist legacy of prior criminal law policies and practices.[2]

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[1] Pursuant to Rule 8.520(f)(4), *amici* state that no counsel for a party authored this brief in whole or in part, and no other person or entity, other than *amici curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief.

[2] (*See*, *e.g.*, ACLU, Written Submission, "Racial Disparities in Sentencing," Hear'g on Reports of Racism in the Justice System of the United States (October 27, 2014), *available at* www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf; *see also Hill v. Snyder* (6th Cir. 2017) 878 F.3d 193; *Bonilla v. Iowa Bd. of Parole* (Iowa 2019) 930 N.W.2d 751.)

The ACLU of Northern California (ACLU NorCal) and the ACLU of Southern California (ACLU SoCal) are California affiliates of the ACLU. Both affiliates are private, nonprofit, nonpartisan organizations supported, collectively, by over 100,000 individual supporters in the State of California. The purpose of these organizations is to protect the rights and liberties guaranteed to all Californians by the United States and California Constitutions in their respective geographic jurisdictions. Both organizations routinely advocate for protection of the right to equal protection of the law, particularly in the criminal law context as against racial bias in law enforcement and criminal sentencing.

The California Public Defenders Association (CPDA) has over 4,000 members and is the largest organization of criminal defense attorneys in the State of California. CPDA's members include thousands of California deputy public defenders and defense attorneys who represent nearly every indigent youthful offender facing sentences of life without the possibility of parole (LWOP) in the State. The organization has been active in furthering the rights of young people in the criminal legal system facing extreme sentences. Following the decision in *People v. Franklin* (2016) 63 Cal.4th 261, which established a procedural right to a hearing for youthful offenders to preserve evidence of the mitigating characteristics of youth in accordance with *Miller v. Alabama* (2012) 567 U.S. 460, CPDA formed a Youthful Offender Committee that visited public defender offices statewide to provide training in preparing for and conducting *Franklin*

hearings. CPDA frequently appears as *amicus* in significant criminal matters before the California Supreme Court.[3]

The Contra Costa Public Defender Office (CCPD) represents hundreds of youthful offenders. Many of CCPD's clients are similarly situated to Mr. Hardin, in that they are charged with murder and are facing special circumstances that render them ineligible for youthful offender parole. In Contra Costa County, prosecutors have historically and continuously charged special circumstances in a racially discriminatory way. There is significant available data concerning racial disparities in the prison population of youthful offenders convicted of murder with special circumstances in Contra Costa County, and the discrepancies are stark.

All *amici* seek to participate in this matter to assist the Court in resolving the critical legal issue at stake. The California

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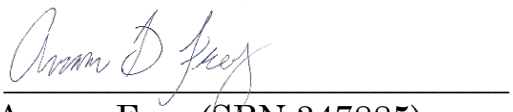
[3] (*See*, *e.g.*, *Stiavetti v. Clendenin* (2021) 65 Cal.App.5th 691 [statewide deadline for provision of competency restoration services]; *People v. Albillar* (2010) 51 Cal.4th 47 [sufficiency of the evidence in a gang-related prosecution]; *Barnett v. Superior Court* (2010) 50 Cal.4th 890 [post-trial discovery]; *Galindo v. Superior Court* (2010) 50 Cal.4th 1 [pre-preliminary hearing discovery]; *People v. Lenix* (2008) 44 Cal.4th 602 [comparative juror analysis for first time on appeal]; *People v. Nelson* (2008) 43 Cal.4th 1242 [DNA evidence in a cold-hit case]; *Chambers v. Superior Court* (2007) 42 Cal.4th 673 [Pitchess procedures]; *People v. Sanders* (2003) 31 Cal.4th 318 [search could not be a reasonable "parole search" without knowledge of the suspect's parole status]; *Manduley v. Superior Court* (2002) 27 Cal.4th 537 [no separation of powers violation by the direct filing of juvenile cases in the criminal court].)

Legislature has identified a particular group of young people for especially harsh treatment in Penal Code section 3051(h), denying this group any opportunity for parole without regard to whether their offense conduct reflected the shortcomings of youth, or whether they have since been rehabilitated. *Amici* wish to alert the Court to the racially biased underpinning of this statute and submit this brief to encourage the Court to apply the most stringent judicial scrutiny.

Dated: August 31, 2023

Respectfully submitted,



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BRIEF OF *AMICI CURIAE*

INTRODUCTION

In analyzing Petitioner Hardin's equal protection challenge, this Court should apply strict scrutiny review under *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252. Hardin was sentenced to life without the possibility of parole (LWOP) for an offense committed when he was 25 years old. In 2013, the Legislature created a new parole opportunity for individuals who committed offenses before the age of 18, in recognition of the diminished culpabilities of youth and their heightened capacity for change. (Stats.2013, ch. 312, § 1 (amending Pen. Code, § 3051). Shortly thereafter, citing findings that the mitigating characteristics of youth persist into young adulthood, the Legislature expanded the class of those eligible for youth offender parole to those who committed an offense up to the age of 23 in 2015, (Stats 2015 ch 471, § 1), then to age 25 in 2017, (Stats 2017 ch 675, § 1.) But the Legislature excluded those between 18 and 25 years of age at the time of their offense who, like Hardin, were originally sentenced to LWOP. (*Id.* at § 3051(h).) Hardin challenges this provision under the Equal Protection Clause, U.S. Const., 14th Amend.

Hardin's challenge should be reviewed using strict judicial scrutiny because the Legislature's creation of parole eligibility for individuals between the ages of 18 and 25 at the time of their offense *except* those who were sentenced to LWOP is a distinction based in part on the suspect classification of race. Under *Arlington Heights*, racial prejudice may be inferred from such

circumstantial factors as the racially disparate impact of a decision, "the historical background of the decision," "the legislative history," and "[s]ubstantive departures [from the related legal landscape] . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." (*Arlington Heights*, *supra*, 429 U.S. at p. 266-67.) As applied to Section 3051(h), these factors support an inference of intentional discrimination—specifically, an intent to trade on fear and animus of young men of color in exchange for political advantage.

First, Section 3051(h) has a significant, racially disparate impact. Black and brown people between 18 and 25 years of age are disproportionately sentenced to LWOP to an astonishing degree—approximately 86% of the population targeted by Section 3051(h) are people of color. Closer examination of one exemplary county, Contra Costa, reveals that this disparity reflects overreliance on special circumstances that facilitate discrimination against Black and brown people. Already, this data has led one Contra Costa Superior Court to strike the gang-related special circumstance, Penal Code section 190.2, subdivision (a)(22), under the Racial Justice Act, Penal Code section 745, subdivision (a), in the case of a young Black man.

Second, the historical background of Section 3051(h) reveals a legislative intent to subject Black and brown youth to Draconian prison sentences for political advantage. Three distinct policy movements created the racial disparity among those impacted by Section 3051(h), and the discriminatory intent

behind those policies sheds light on the legislative purpose here. Those movements include: (a) the dawn of "tough on crime" politics in the 1960's and early '70's, and subsequent over-policing and mass incarceration of communities of color; (b) California's 1978 enactment of the Briggs Initiative, creating an expansive list of special circumstances to maximize discretion in seeking and obtaining sentences of death and LWOP; and (c) the emergence in the 1990's of the "superpredator" myth—a discredited claim that Black and brown youth represent a new breed of irredeemable menace—as justification for overcharging and excessive sentencing of young people of color. In view of this history, the Legislature's decision to create youth offender parole but deny eligibility to the highly racially disparate population of 18- to-25-year-olds sentenced to LWOP, emerges as yet another effort to over-incarcerate Black and brown youth.

Third, pertinent legislative history reveals that the Legislature was acutely aware of the disproportionate impact of Section 3051(h). Indeed, the statutes creating youth offender parole, as well as contemporaneous enactments, evince an attempt to *redress* exactly the sort of racial harms that Section 3051(h) perpetuates. That the Legislature nonetheless denied any chance of release from prison to this population, without explanation, also suggests a default to race-based "tough on crime" politics.

Fourth, and finally, Section 3051(h) is a dramatic, substantive departure from related legislative enactments. The Legislature's continual expansion of the population entitled to a

youth offender parole opportunity, repeatedly raising the age at the time of offense of those eligible, reflects the scientific consensus that youth diminishes the justification for punishment up to the age of 25. Section 3051(h) abandons this principle without a competing justification, again suggesting racialized politics.

Evidence under the *Arlington Heights* factors thus reveals a continuous thread of racial bias culminating in the enactment of Section 3051(h). Mr. Hardin, and those like him, have been sacrificed by the Legislature to a racialized politics that will further harm an already disproportionately burdened group. That is, the relevant context suggests that the Legislature knowingly harmed a politically disfavored group—young men of color—to preserve some "tough on crime" credibility in passing an otherwise ameliorative statute. For these reasons, *Amici* urge this Court to apply strict judicial scrutiny in reviewing Petitioner's Equal Protection claim.

BACKGROUND

Amici concur in the Statement of Facts and Procedural History detailed in Petitioner's Brief and adopt them as if fully set forth herein. (Resp.'s Br. at pp. 9-13.) *Amici* underscore the background pertinent to this submission.

Petitioner was convicted of felony murder in 1990 for an offense committed when he was 25. He was charged and convicted of the special circumstance of murder in the commission of a felony, Penal Code section 190.2, subdivision (a)(17), mandating a sentence of death or LWOP. He was

sentenced to LWOP, has now served 33 years in prison, and is 59 years old.

On August 18, 2021, Petitioner challenged his exclusion from youth offender parole, Penal Code section 3051(h), under the Equal Protection Clause, U.S. Const., 14th Amend. (Resp.'s Br. at pp. 14-15.) He argued that he was similarly situated to both juveniles (age 17 and under at the time of offense) sentenced to LWOP and young adults (18 to 25) sentenced to *de facto* life terms, both of whom are eligible for youth offender parole under Section 3051(b)(4), and that differential treatment of 18- to 25-year-olds sentenced to LWOP lacked any rational justification. (Resp.'s Br. at p. 15.) On September 8, 2021, the Superior Court denied Petitioner's motion, and he appealed. (*Id.* at p. 16.).

The Court of Appeal analyzed Petitioner's claim under rational basis review. It determined that Section 3051(h) served no rational purpose and held it unconstitutional. (*People v. Hardin* (Cal. Ct. App. 2022) 84 Cal.App.5th 273, 288-91.) The Court decision concluded that neither the Legislature's stated purpose in enacting Section 3051, "to recognize the diminished culpability of youthful offenders based on their stage of cognitive development," nor the hypothetical purpose of "distinguish[ing] crimes by degree of severity," could justify exclusion of 18- to 25-year-olds sentenced to LWOP from a chance for youth offender parole. (*Id.* at p. 289.) The State sought review, which this Court granted.

LEGAL STANDARD

The Equal Protection Clause forbids the states from "deny[ing] to any person within [their] jurisdiction the equal protection of the laws," U.S. Const., 14th Amend., § 2. "The central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race." (*Washington v. Davis* (1976) 426 U.S. 229, 239.) Distributing benefits and burdens in accordance with racial classifications is "by [its] very nature odious to a free people" and will "seldom provide a relevant basis for disparate treatment," (*Fisher v. Univ. of Texas at Austin* (2013) 570 U.S. 297, 309 [citations and quotation marks omitted]); as a result, "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny," (*Adarand Constructors, Inc. v. Peña* (1995) 515 U.S. 200, 227; *accord Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1* (2007) 551 U.S. 701, 720.) Under strict scrutiny, "the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.'" (*Johnson v. California* (2005) 543 U.S. 499, 505 [citation omitted]; *accord Adarand*, *supra*, at p. 226.)

To establish that a law discriminates on the basis of race, a litigant must demonstrate "a racially discriminatory purpose," but direct evidence is not required. (*Davis*, *supra*, 426 U.S. at p. 240.) "Rather, invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than

another." (*Id.* at p. 242; *accord Arlington Heights*, *supra*, 429 U.S. at p. 266)

In *Arlington Heights*, the Court identified a non-exhaustive list of factors that may provide circumstantial evidence of discriminatory purpose, including disparate impact, "[t]he historical background of the [challenged] decision," "[t]he specific sequence of events leading up to the challenged decision," "the legislative or administrative history," "departures from the normal procedural sequence," and "[s]ubstantive departures [from the related body of statutory law] . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." (*Arlington Heights*, *supra*, 429 U.S. at p. 267.) Courts may infer a discriminatory intent from a strong showing under these factors alone or in combination—proof under each is not required. (*See id.* at pp. 266-67 [citing, *e.g.*, *Yick Wo v. Hopkins* (1886) 118 U.S. 356; *Grosjean v. Am. Press Co.* (1936) 297 U.S. 233].) Further, a litigant need not "prove that the challenged action rested solely on racially discriminatory purposes. . . . or even that a particular purpose was the 'dominant' or 'primary' one." (*Id.* at p. 266.) Rather, "[w]hen there is [] proof that *a* discriminatory purpose has been a motivating factor in the decision, [] judicial deference is no longer justified" and strict scrutiny is required. (*Id.* (emphasis added).)

ARGUMENT

This Court should apply strict scrutiny in analyzing Petitioner's equal protection claim under *Arlington Heights*. Section 3051(h)'s disparate impact, historical background, legislative history, and substantive departure from related statutory law all evidence a "tough on crime" politics grounded in racial prejudice. In particular, these factors reveal a legislative embrace of stereotypes regarding young men of color as amoral, subhuman, and uniquely dangerous to free society. In this light, Section 3051(h)'s denial of a youth offender parole opportunity to 18- to-25-year-olds sentenced to LWOP is best understood as a concession to race bigotry for political gain. Such discrimination warrants the most exacting judicial review.

I. Section 3051(h) Disparately Impacts Young Black and Brown Men.

In determining whether a law neutral on its face is, in fact, motivated by racial bigotry, "the impact of the official action," and particularly "whether it 'bears more heavily on one race than another,' may provide an important starting point." (*Arlington Heights*, *supra*, 429 U.S. at p. 266 [quoting *Davis*, *supra*, 426 U.S. at p. 242].) Section 3051(h) excludes all individuals sentenced to LWOP for an offense committed between the ages of 18 and 25. As a result, 18- to 25-year-olds convicted of capital, or "special circumstance" murder, Pen. Code, section 190.2, subdivision (a)—the charge necessitating, at a minimum, an LWOP sentence—are deprived of any opportunity for youth offender parole. (*See*

Hardin, *supra*, 84 Cal.App.5th at pp. 289-90.) This population is racially disproportionate in the extreme.

Black and brown people are overrepresented in California's prisons generally,[4] but the more serious the conviction and sentence, the greater the disparity. A 2021 study by the Committee on Revision of the Penal Code found that 42% of those convicted of special circumstance murder are Black, compared to 34% of the overall-first degree murder population, and 26% of the second-degree murder population.[5] For reference, Black people make up only 6.5% of the state's population.[6] In cases of homicide in the course of a burglary or robbery, like Hardin's, Black people are twice as likely to be charged with special circumstance murder as white people.[7]

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[4] (*See* The Public Pol'y Inst. of Cal., "California's Prison Population: Fact Sheet" (July 2019) *available at* www.ppic.org/wp-content/uploads/jtf-prison-population-jtf.pdf ["In 2017, the year of most recent data, 28.5% of the state's male prisoners were African American—compared to just 5.6% of the state's adult male residents. The imprisonment rate for African American men is 4,236 per 100,000 people—ten times the imprisonment rate for white men, which is 422 per 100,000. For Latino men, the imprisonment rate is 1,016 per 100,000 [or 2.4 times the rate for white men].)

[5] (Committee on Revision of the Penal Code, "Annual Report and Recommendations," at p. 52 (2021), *available at* www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2021.pdf

[6] U.S. Census, "Quick Facts: California" (July 1, 2022), *available at* www.census.gov/quickfacts/CA.)

[7] (Catherine M. Grosso, *et al.*, "Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement" (2019) 66 UCLA L. Rev. 1394, 1441.)

Racial disparities also increase as the age of the defendant decreases. Among those sentenced to death nationally, the largest racial disparity lies with those aged between 18 and 20 at the time of offense.[8] The same holds true in California, where "[w]hile 68% of all people on death row are people of color, the percentage jumps to 77% for people who were 25 or younger at the time of their offense, and to 86% for people who were 18 at the time of their offense."[9]

The population targeted by Section 3051(h)—individuals sentenced to LWOP for offenses committed between the ages of 18 and 25—thus sits at the crossroad of two factors shown to exacerbate racial disparities in sentencing: the severity of the conviction and punishment, and the defendant's youth. A

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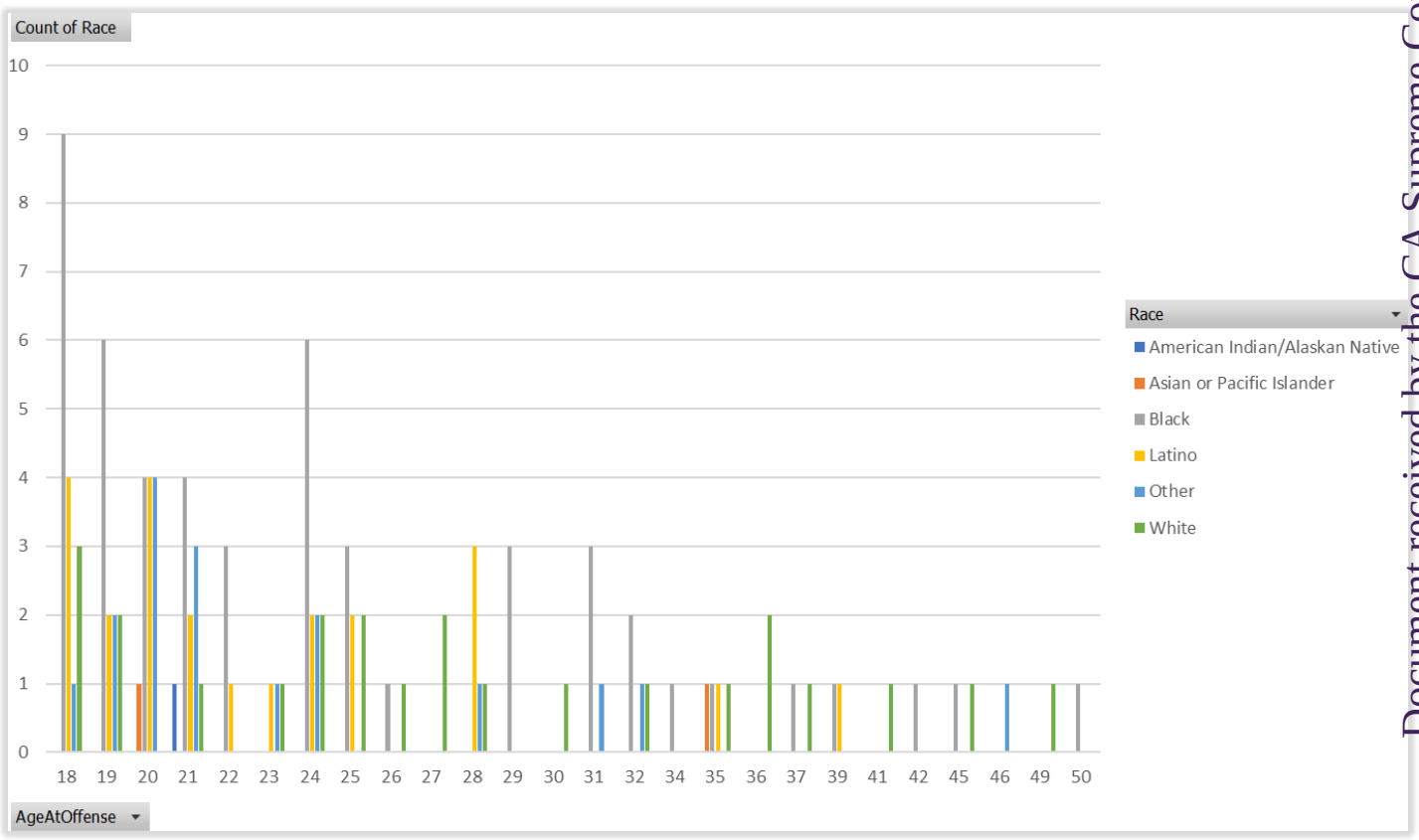
[8] (*See generally*, Frank R. Baumgartner, "Race and Age Characteristics of those Sentenced to Death before and after *Roper*," Report (2022), *available at* https://fbaum.unc.edu/papers/RaceAndAgeAfterRoper.pdf [within this age bracket, Black people make up 51% of those sentenced to death, and 25% are LatinX.]; *accord* Craig Haney, *et al.* (2023) "*Roper* and Race: The Nature and Effect of Death Penalty Exclusions for Juveniles and the 'Late Adolescent Class,'" 8 J. of Pediatric Neuropsych. 168, 175 [reviewing statistical discrepancies and positing, "[i]t seems clear that decision-makers at key stages of a capital case—prosecutors and jurors—are more likely to perceive crimes committed by young persons of Color as more heinous or otherwise more deserving of the death penalty, or to believe that young persons of Color are somehow and for some reason less likely to be rehabilitated, or are otherwise simply more culpable for their actions."].)

[9] (Comm. on Revision of the Pen. Code, "Death Penalty Report" (2021), at p. 31, *available at* www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_DPR.pdf.)

stunning 77-86% of individuals convicted of special circumstance murder and sentenced to death or LWOP in California for offenses committed between the ages of 18 and 25 are people of color.[10] Put differently, Section 3051(h) negatively impacts a population that is overwhelmingly non-white.

Data from Contra Costa County, for which detailed statistics are available, exhibits the same pattern while revealing the cause of this racial disparity: overreliance on a narrow cluster of special circumstances. Data produced by the California Department of Corrections in response to a public records request evidences significant racial disparity among individuals sentenced to LWOP in Contra Costa, with the racial discrepancy most severe among those sentenced for youthful offenses:



[10] (*Id.* at 54.)

The UCLA Special Circumstance Conviction Project (SCCP) made similar findings.[11] The SCCP collected and analyzed sentencing records from the Contra Costa District Attorney's Office, the Contra Costa County Superior Court, and the California Department of Corrections and Rehabilitation. It determined that 60.87% of all individuals sentenced to LWOP in Contra Costa County between 1978-2020 were under the age of 26 at the time of sentencing. Of that under-26 population sentenced to LWOP in Contra Costa, 57.14% were Black, while less than 12% were white.[12] Demographically, the residents of Contra Costa County are 39.8% white (non-Hispanic), 27% Latino, 20.2% Asian, and 9.5% Black.[13] Thus, SCCP's analysis revealed the same pattern of dramatic over-sentencing of people of color to LWOP, particularly for youthful offenses.

But SCCP also found that only five special circumstances were used in convictions leading to LWOP sentences in Contra Costa: Penal Code section 190.2, subdivisions (a)(3) (multiple murders); (a)(15) (lying in wait); (a)(17) (felony murder); (a)(21) (drive-by shooting); and (a)(22) (gang-related murder). Felony murder was the most used special circumstance: among

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[11] (SCCP, "Special Circumstance Sentencing in Contra Costa County," Report (Aug. 10, 2023), *available at* https://csw.ucla.edu/wp-content/uploads/2023/08/Special-Circumstance-Sentencing-in-Contra-Costa-County.pdf.)

[12] (*Id.* at p. 1.)

[13] (U.S. Census Bureau, Quick Facts: Contra Costa County, California, July 1, 2022, *available at* www.census.gov/quickfacts/fact/table/contracostacountycalifornia/PST045222 [last visited August 30, 2023].)

individuals under the age of 26 at the time of offense serving LWOP for felony murder, 61.9% were Black, while 14.29% are white.[14] This is illuminating, as felony-murder is the broadest category of homicides eligible for special circumstance prosecution, creating enormous prosecutorial discretion that serves as a conduit for racial bias.[15]

SSCP's findings evidence racial disparities across every special circumstance among youthful offenders, however: those serving LWOP for the multiple murder special circumstance were 44.44% Black, 33.33% Latino, and 0% white; those serving LWOP for the drive-by shooting special circumstance were 60% Black and 20% white, and those serving LWOP for the gang-related special circumstance were 33.33% Black, 66.67% Latino, and 0% white.[16] It bears noting that the drive-by shooting and gang-related special circumstances are themselves offenses more likely to be committed by people of color, suggesting that their inclusion among the list of special circumstances itself reflects racial bias.[17]

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[14] (SCCP, "Special Circumstance Sentencing in Contra Costa County," Report at pp. 1-3.)

[15] (*See* Nicholas Petersen & Mona Lynch, "Prosecutorial Discretion, Hidden Costs, and the Death Penalty: The Case of Los Angeles County" (2012) 102 J. Crim. L. & Criminology 1233, 1241 [noting that the California Commission on the Fair Administration of Justice, created by the Legislature in 2004, recommended removal of the felony-murder special circumstance as authorizing too much prosecutorial discretion].)

[16] (*Id.*)

[17] (*See* Catherine M. Grosso, *et al.*, "Death by Stereotype," *supra*, 66 U.C.L.A. L. Rev. at p. 1435 [noting that these special circumstances are both disproportionately available and

In short, data from Contra Costa makes manifest that the population sentenced to LWOP for youthful offenses is highly racially disparate as a result of reliance on special circumstances that alternatively afford broad prosecutorial discretion and target young people of color.

One Contra Costa Superior Court recently found that this pattern evidenced racial bias under the Racial Justice Act. (*See* Court's Order Re: PC 745(a)(3) Motion, *People v. Windom et al.*, Contra Costa Superior Court Docket No. 01001976380, dated May 23, 2023, *available at* www.documentcloud.org/documents/23828698-racial-justice-act-coco-county-courts-order-re-pc-745a3-motion [last visited August 30, 2023].) The court considered evidence that in gang-related murder prosecutions between 2015-2022, Contra Costa County prosecutors were between 32% to 44% more likely to charge Black people with special circumstances that carry enhanced sentences of LWOP or death than non-Black individuals. The court credited expert testimony that the racial disparity in charging gang-related special circumstances was 92% likely to be correlated with the individual's race, and only 8% likely to be a random occurrence. Thus, the court found the racial disparity was significant for Racial Justice Act purposes and granted the defense motion to dismiss the Penal Code section 190.2, subdivision (a)(22) special circumstance (gang related murder).

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disproportionately sought in cases of young Black and brown men].)

In sum, available data, and the specific example of Contra Costa County, establish significant racial disparity among people under the age of 26 at the time of their offense who are sentenced to LWOP in California. This is precisely the population identified for denial of youth offender parole eligibility under Section 3051(h), a fact that constitutes strong evidence of purposeful discrimination. (*See Columbus Bd. of Ed. v. Penick* (1979) 443 U.S. 449, 452, 465 [where "70% of all students attended schools that were at least 80% black or 80% white," district court's finding of intentional segregation "stayed well within the requirements of *Washington v. Davis* and *Arlington Heights*"].)

II. The Historical Context of Section 3051(h) Is Marked by Intentional Over-Incarceration of People of Color, Particularly Young Black and Brown Men.

The historical context of Section 3051(h) provides further proof of intentional discrimination. Three policy movements are largely responsible for the racial disparity among individuals targeted by Section 3051(h).

First, the 1960's birthed the modern era of "tough on crime" politics in reaction to the Civil Rights Movement, spawning policies that deliberately overpoliced communities of color. Next, in the late 1970's, states, including California, created expansive death penalty statutes, granting wide discretion to prosecutors and juries to channel bias against Black and brown people. Finally, in the early 1990's, legislators and prosecutors adopted a false, pseudo-scientific stereotype of young men of color as "superpredators," *i.e.* highly dangerous, without remorse, and incapable of reform. This led to a surge in extreme sentencing of

youth, and in particular, of LWOP sentences for young Black and brown men. The backdrop to Section 3051(h) is thus a pattern of overincarceration of young people of color for political gain. Section 3051(h) is another link in this unbroken chain. (*See Arlington Heights*, *supra*, 429 U.S. at p. 267 [holding "[t]he evidentiary inquiry [into discriminatory purpose is] . . . relatively easy" when "a clear pattern [emerges], unexplainable on grounds other than race"].)

a. The Era of Mass Incarceration Began by Targeting Young People of Color.

In the 1960's, the emergence of "tough on crime" politics launched a practice of systematically overincarcerating Black and brown men.[18] The rise of the Civil Rights Movement generated a reactive, racial anxiety in white society—of dramatic social change, redistribution of resources, and reordering of social and political hierarchies.[19] At the same time, protests, civil

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[18] There is, of course, an extensive and continuous history of oppressing Black men through terror and extrajudicial means, such as lynchings, (*see generally* Equal Justice Initiative, "Lynching in America: Confronting the Legacy of Racial Terror" (2017), *available at* https://eji.org/reports/lynching-in-america/, and episodic), and racialized prosecutions, as in the infamous case of the Scottsboro Boys, (*see* Liz Ryan, "The Scottsboro Boys: Legacy of Injustice," Dep't of Justice, Off. of Juv. Justice & Delinquency Prevention (May 1, 2023), *available at* https://ojjdp.ojp.gov/blog/scottsboro-boys-legacy-injustice.)

[19] (*See* Katherine Beckett & Theodore Sasson, "The Politics of Injustice, Crime and Punishment in America" (1999), at p. 48 ["In an effort to sway public opinion against the civil rights movement, southern governors and law enforcement officials characterized its tactics as 'criminal' and indicative of the

disobedience, and uprisings responsive to anti-Black racism, particularly at the hands of law enforcement, swept across American cities, "creat[ing] an opportunity to sharpen the connection of civil rights to crime. Strategic policymakers conflated these events, defining racial [protests] as criminal, which necessitated crime control."[20] The press was complicit, indiscriminately denouncing protests as "riots" and fostering a narrative of urban collapse and Black lawlessness.[21] In this

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breakdown of 'law and order'."; *see*, *e.g.*, "Responses Coming from the Civil Rights Movement," PBS, *available at* www.pbs.org/wgbh/americanexperience/features/eyesontheprize-responses-coming-civil-rights-movement/ [detailing instances of backlash to integration efforts and the Civil Rights Movement]; *see also* Tom Wicker, "In the Nation: Frontlash and Backlash," NY Times (October 5, 1967), *available at* https://timesmachine.nytimes.com/timesmachine/1967/10/05/83149818.html?pageNumber=38.)

[20] (Vesla M. Weaver, "Frontlash: Race and the Development of Punitive Crime Policy" (2007) 2 Studies in Am. Pol. Dev. 230, 237; *see also*, Elizabeth Hinton; "A War within Our Own Boundaries: Lyndon Johnson's Great Society and the Rise of the Carceral State" (2015) 102 J. Am. History 100, 112 ["Scholars have recognized the role of the riots in mobilizing white backlash and the subsequent rise of conservatism, moving liberal sympathizers away from egalitarian policy, and precipitating the federal government's retreat from progressive social reform."].)

[21] (*See* Elizabeth Hinton and DeAnza Cook, "The Mass Criminalization of Black Americans: A Historical Overview" (2021) 4 Ann. Rev. Crim. 261, 271 [noting journalists generally referred to civil demonstrations as "riots"]; *see*, *e.g.*, "Florida Governor Backs Miami Police in Hoodlum Crackdown," Desert Sun, Volume 41 N. 124 (December 28, 1967) *available at* https://cdnc.ucr.edu/?a=d&d=DS19671228.2.19&e=-------en--20--1--txt-txIN-------- ["Gov. Claude Kirk today came to the support of Police Chief Walter Headley and his shotgun crackdown on Negro slum hoodlums."].)

environment, politicians found that "law and order rhetoric… proved highly effective in appealing to poor and working-class whites who were… frustrated by the Democratic Party's apparent support of the Civil Rights movement."[22] "[C]haracteriz[ing the Civil Rights Movement's] tactics as 'criminal' and indicative of the breakdown of 'law and order,'" politicians exploited the ensuing racial anxiety by making crime-control, and implicitly, subjugation of Black people, a central campaign issue.[23] In one prominent example, presidential candidate Barry Goldwater decried urban Black communities through allusions to "crime in the streets" and "bullies and marauders" during his acceptance of the 1964 Republican party nomination.[24]

This political strategy quickly translated into national policy. In 1965, President Lyndon Johnson declared a "War on Crime, establishing the President's Commission on Law Enforcement and Administration of Justice to study and opine on urban crime control."[25] The ensuing Commission report warned that "society must seek to prevent crime before it happens… by

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[22] (*See* Michelle Alexander, "The New Jim Crow" (2010), at p. 108.)
[23] (Hinton, "A War within Our Own Boundaries," *supra* note 12, at pp. 100-12.)
[24] (Barry Goldwater, "Acceptance Speech at the 28th Republican National Convention" (July 16, 1964) *available at* www.washingtonpost.com/wp-srv/politics/daily/may98/goldwaterspeech.htm.)
[25] (Lyndon Johnson, "Special Message to the Congress on Law Enforcement and the Administration of Justice" (March 8, 1965), *available at* https://policing.umhistorylabs.lsa.umich.edu/s/detroitunderfire/item/4536.)

strengthening law enforcement[.]"[26] Johnson then signed the Omnibus Crime Control and Safe Streets Act of 1968, creating the Law Enforcement Assistance Administration (LEAA) and allocating an initial $300 million to crime control.[27] By the time the LEAA was disbanded, it had distributed almost $10 billion to increase and arm police in American cities.[28] Significantly, in keeping with a Department of Health study concluding that "more nonwhites go on after the first offense to more offense[s], [and the] major concern should be with this racial group,"[29] federal funds were disproportionately allocated to increase policing in low-income, Black communities.[30]

President Richard Nixon expanded upon these developments. As a presidential candidate, he engineered a

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[26] (President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society" (1967), *available at* www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/42.pdf.)

[27] (Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §§ 201-406, 82 Stat. 197 (1968) (codified at 34 U.S.C. § 10101 (2017)).)

[28] (Elizabeth Hinton and DeAnza Cook, "The Mass Criminalization of Black Americans: A Historical Overview" (2021) 4 Ann. Rev. of Crim. 261, 272.)

[29] (*See* Marvin E. Wolfgang, University of Pennsylvania, "Youth and Violence," HEW Report (1981).)

[30] (Hinton, "War within Our Own Boundaries," *supra* at pp 103, ["this act created direct funding channels between the federal government and the criminal justice system at large, and it emphasized training and experimental programs for urban police forces serving low-income communities. Johnson intended police departments to be the primary beneficiaries of the newly available funds because he saw urban policemen as the "frontline soldier" of the national law enforcement program."].)

"Southern strategy," emphasizing "'crime in the streets' . . . and 'law and order' . . . as an indirect appeal to white voters threatened by the civil rights movement[.]"[31] By Nixon's own admission, the crime issue was a mere pretext for capitalizing on racial fear and animus. As he told Chief of Staff H.R. Haldeman, "the whole problem is really the [B]lacks . . . . [T]he key is to devise a system that recognizes this while not appearing to."[32] As President, Nixon furthered Johnson's funding initiative, increasing money for policing at all levels of government with a special focus on communities of color.[33] In 1971, Nixon declared a "War on Drugs," a purported public safety campaign that, in truth, was mere pretext for criminalizing Nixon's political enemies, "the antiwar left and [B]lack people."[34]

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[31] (Michael Tonry, "Sentencing in America: 1975-2025" (2013) 42 Crime & Just. 141, 146-47.)

[32] (H.R. Haldeman Diaries Collection (April 28, 1969).)

[33] The Nixon administration also targeted public housing for increased law enforcement funding. In Pittsburgh, for example, this led to a sharp increase in policing of the city's 40,000 residents of housing projects, of whom 70% were Black. ("Housing Authority Sets Up Own 72-Man Security Force," New Pittsburgh Courier, (Jan. 29 1972) 1.) In another example, the LEAA funded Detroit's "Stop the Robberies, Enjoy Safe Streets" (STRESS) squad, assigned to patrol low-income, predominantly Black neighborhoods identified as the "epicenter of deviance." (House Select Committee on Crime, "Street Crime in America: The Police Response: Hearings before the House Select Committee on Crime," 93rd Cong., 1st sess. (April 12, 1967), 392 (Statement of James Bannon).))

[34] (Dan Baum, "Legalize It All," Harper's (Apr. 2016) [top Nixon aide John Ehrlichman said, "We knew we couldn't make it illegal to be . . . black, but by getting the public to associate . . . blacks

Overpolicing of communities of color in response to "tough on crime" politics in turn sparked the modern era of mass incarceration.[35] "Since 1970, [the] incarcerated population has increased by 500%—2 million people in jail and prison today," with racial disparities in the incarcerated population reaching "record highs."[36] As a result of these policies, for the period

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with heroin, and then criminalizing [] heavily, we could disrupt those communities."].)

[35] This trend accelerated significantly in the 80s and 90s, when crime became a truly "galvanizing issue in partisan politics," a period in which evidence of what policies worked "ceased to matter" as politicians advanced harsh sentencing laws "to win elections and gain political power." (Tonry "Sentencing in America," *supra,* at p. 186.) There is perhaps no greater example than the "Willie" Horton incident. William Horton, a Black man, committed rape and murder while on furlough from prison in Massachusetts. In the presidential election of 1988, the Bush campaign released a highly racialized ad depicting Horton and blaming Dukakis for his offenses as the Governor presiding over the furlough program. Dukakis held a 17-point lead at the time the ad first ran but ultimately lost the election, with many citing the Horton commercial as a critical causative factor. (Peter Baker, "Bush Made Willie Horton an Issue in 1988, and the Racial Scars are Still Fresh," NY Times (December 3, 2018).)

[36] (ACLU, Webpage, "Mass Incarceration," *available at* www.aclu.org/issues/smart-justice/mass-incarceration; accord Nat'l Research Council of the Nat'l Acad. of Sciences, "The Growth of Incarceration Rates in the United States: Exploring Causes and Consequences" (2014) 34-36 ["[T]he growth in the size of the penal population has been extraordinary: in 2012, the total of 2.23 million people held in prison and jails was nearly seven times the number in 1972."].) Following the over-policing initiated with the War on Crime and the invention of the War on Drugs, "[t]he principle mechanisms [of mass incarceration]. . . were mandatory minimum sentence, three strikes, truth-in-sentencing, and life without possibility of parole laws," all of

between 1980 and 2006, "the increase in African-American rates of imprisonment was nearly four times the increase in white rates," with Black men having a likelihood of imprisonment during their lifetime between 20-33%.[37] Thus, fear of and animus towards communities of color engendered over-incarceration of Black and brown people beginning in the late 1960's and early 1970's.[38] These developments form the bedrock of the present disparity within the population targeted by Section 3051(h).

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which emerged from "tough on crime" politics. (Nat'l Research Council, "Growth of Incarceration," *supra,* at p. 73; accord Rachel Barkow, "Federalism and the Politics of Sentencing" (2005) 105 Columb. L. Rev. 1276, 1278-79 ["For roughly four decades, the politics of sentencing at the federal and state levels have been dominated by 'get-tough' rhetoric and ever harsher sentences."].)

[37] (Perry L. Moriearty and William Carson, "Cognitive Warfare and Young Black Males in America" (2012) 15 J. Gender, Race & Justice 281, 292-93; *see also* Ashley Nellis, "The Color of Justice: Racial and Ethnic Disparity in State Prisons," The Sentencing Project (2021), *available at* www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [detailing massive disparities among Black and Latinx people imprisoned in state prisons relative to their percentage of the general population].)

[38] (*See* Ruth Delaney, *et al.*, "American History, Race, and Prison," Report, Vera Institute, *available at* www.vera.org/reimagining-prison-web-report/american-history-race-and-prison [tracing dog-whistle rhetoric from the 1960s and 1970s to stricter sentencing laws and tough-on-crime legislation, and ultimately to mass incarceration].)

b. Modern Death Penalty Statutes, Including California's, Exploited Racial Fear and Animus for "Tough on Crime" Political Gain.

A further historical reason for the racial disparity among those impacted by Section 3051(h) is California's enactment of an expansive death penalty statute. In California, a sentence of LWOP is only possible following a conviction of special circumstance, or capital, murder; life without the possibility of parole is the lesser alternative to death following a conviction under the special circumstance statute. (Pen. Code, § 190.2, subd. (a); *see*, *e.g.*, *People v. Ledesma* (2006) 39 Cal.4th 641, 745.) As a result, the racial demographics of those sentenced to LWOP for offenses between the ages of 18 and 25 is substantially intertwined with the history of capital punishment in the state.

The legacy of the death penalty in the United States generally is one of racial terror and subjugation. Capital punishment grew out of lynchings: "violent and public acts of torture that traumatized Black people . . . . [and] created a fearful environment where racial subordination and segregation was maintained."[39] In essence, "lynchings were terrorism" designed to "reinforce[] a legacy of racial inequality."[40] As lynchings garnered increasingly "bad press" over the decades post-Reconstruction, capital punishment emerged as a more sanitized and palatable

[39] (Equal Justice Initiative, "Lynching in America," *supra, available at* https://lynchinginamerica.eji.org/report/.)
[40] (*Id.*)

means of achieving the same end.[41] Further, because Black people were politically disenfranchised, there was no need to resort to extra-legal measures—white legislatures and prosecutors could enact death penalty schemes to maintain racial hierarchies with the imprimatur of the rule of law.[42] As a result, by the 1920's, "Southern legislatures shifted to capital punishment" in reliance on "legal and ostensibly unbiased court proceedings."[43]

Modern death penalty statutes trace their roots to the U.S. Supreme Court's 1972 decision in *Furman v. Georgia*. There, the Court invalidated capital punishment under the Eighth Amendment, setting off a cascade of state legislative enactments seeking to remedy the problem *Furman* identified of "unguided" discretion. (*Id.* at p. 309.) Four years later, the Court resurrected capital punishment in *Gregg v. Georgia*. ((1976) 428 U.S. 153, 199.) A decade into the new era of "tough on crime" politics, legislators raced to respond with new death penalty schemes to appease an eager electorate.[44]

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[41] (Stephen B. Bright, "Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty" (1995) 35 Santa Clara L. Rev. 433, 440.)
[42] (Charles David Phillips, "Exploring Relations Among Forms of Social Control: The Lynching and Execution of Blacks in North Carolina, 1889-1918" (1987) 21 L. & Soc. Rev. 361, 372-73.)
[43] (*See* Equal Justice Initiative, "Lynching in America," *supra*.)
[44] (Samuel R. Gross, "The Death Penalty, Public Opinion, and Politics in the United States" (2018) 62 St. Louis U. L.J. 763 ["[In] those four years [between *Furman* and *Gregg*], thirty-five states had enacted new death penalty laws to replace the ones

California enacted several death penalty statutes in the 1970's, responding to the shifting landscape created by state and U.S. Supreme Court decisions.[45] The state's post-*Gregg* enactment, and the basis for the law in effect today, was passed in 1978 by voter approval of Proposition 7, the Briggs Initiative. This statute dramatically expanded eligibility for the death penalty in California by increasing the number of special circumstances to 28, while at the same time broadening the definitions of existing special circumstances to cover a greater number of fact patterns.[46] The purpose of the Briggs Initiative, as expressed in the ballot materials provided to the voters, was to make capital punishment available in the case of *all* murders,[47] thereby creating a "powerful weapon. . . in [the] war on [] crime."[48] Since passage of the initiative, California's death penalty is "arguably the broadest such scheme in the country."[49]

The Briggs Initiative was presented to the voters and ultimately enacted as a demonstration of "tough on crime" bona

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that had been struck down in Furman. And at least 460 defendants had been sentenced to death under those new laws."].)

[45] (*See* Stephen F. Shatz & Nina Rivkind, "The California Death Penalty Scheme: Requiem for *Furman*?" (1997) 72 N.Y.U. L. Rev. 1283, 1307-10.)

[46] (*Id.* at 1310-13.)

[47] (*Id.* at 1310.)

[48] ("Voter Information Guide for 1978 General Election," CA, at p. 34, *available at* https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1843&context=ca_ballot_props.)

[49] (Shatz & Rivkind, "The California Death Penalty Scheme," *supra*, 72 N.Y.U. L. Rev. at p. 1287.)

fides, adopting the racial bias implicit in such politics.[50] Indeed, the central feature of the initiative—the enormous discretion it affords to prosecutors and juries in meting out sentences of death and LWOP—is a powerful conduit for such bias.[51] California's particularly expansive death penalty statute thus portends especially grave racial impacts. As Governor Gavin Newsome recently stated, "California is not immune from the invidious influence of racial bias in its application of the death penalty," and its "expansion of its capital crimes thus reflects a choice that heightens the risk of racial bias."[52] Statistics bear this out: people

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[50] (*See*, *e.g.*, Nazgol Ghandnoosh, Sent'g Project, "Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies" (2014) at pp. 7-8, *available at* www.sentencingproject.org/app/uploads/2022/08/Race-and-Punishment.pdf [demonstrating that the "[s]trong support for punitive policies" that emerged in the late 1960s and grew dramatically over ensuing decades was "racially patterned"]; Frank R. Baumgartner, *et al*., "Racial Resentment and the Death Penalty" (2022) 8 J. of Race, Ethnicity, & Politics 1, 1 ["[R]acial hostility translates directly into more death sentences."].)

[51] (*See Turner v. Murray* (1986) 476 U.S. 28, 35 ["Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected."]; *see* Angela J. Davis, "Prosecution and Race: The Power and Privilege of Discretion" (1998) 67 Fordham L. Rev. 13, *available at* https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2399&context=facsch_lawrev [arguing that prosecutorial discretion is a major driver of racial disparities in the criminal justice system].)

[52] (Amicus Br. In Support of Def., *People v. McDaniel* (Oct. 26, 2020) Case No. S171393, at p.31, *available at* www.gov.ca.gov/wp-content/uploads/2020/10/10.26.20-Governor-Newsom-McDaniel-Amicus-Brief.pdf.)

of color comprise 68% of California's death row, despite representing less than half of the state population.[53]

Because the same discretion plagues all prosecutions and convictions under the special circumstance statute in California, the racial bias that infects capital punishment necessarily plagues sentences of LWOP, as well.[54] That is, the racial discrimination at the root of the death penalty is reflected in the racial disparity among those sentenced to LWOP under the same statute. Consequently, California's enactment of one of the broadest capital punishment statutes in the country is a significant cause of the starkly disproportionate sentencing of Black and brown people to LWOP in California. Insofar as Section 3051(h) targets a particularly disproportionate subcategory of this population, Section 3051(h) furthers the same racial prejudice embodied in the Briggs Initiative.

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[53] (Comm. on Revision of the Pen. Code, "Death Penalty Report," *supra* at p. 31.)

[54] (*See* Pen. Code, § 190.2, subd. (a); *see generally* Ashley Nellis, "No End in Sight: America's Enduring Reliance on Life Imprisonment." The Sentencing Project (February 2021) at p.12, *available at* www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf ["many of the problematic aspects of the death penalty are also applicable to life sentences"]; "Advocacy and Legal Groups Urge U.N. to Call for Abolition of Life Sentences in U.S." (September 15, 2022) Center for Constitutional Rights, *available at* https://ccrjustice.org/home/press-center/press-releases/advocacy-and-legal-groups-urge-un-call-abolition-life-sentences-us ["Death by Incarceration is a structural and ideological pillar of the racist criminal punishment system in this country[.]"] (quotation marks omitted).)

c. Racial Stereotypes Embodied in the "Superpredator" Myth Prompted Excessive Sentencing of Young Men of Color.

The third historical chapter in creation of the enormous racial disparity among the population targeted by Section 3051(h) occurred in the 1980s and 90s, as white society embraced a pseudo-scientific stereotype of young Black and brown men as subhuman, animalistic, and predatory. This ideology culminated in the "superpredator" myth, propagated by academics and the media, and provided a new outlet for fear and animus towards young people of color. Ultimately, elected officials used this stereotype to launch a new wave of "tough on crime" policies, resulting in extreme prison sentences for a generation of young Black and brown men.

The "superpredator" myth had its origins in the late 1970's, when crime rates across major American cities spiked simultaneously with the emergence of urban gang culture. The press, and mainstream white society, responded with fear and hostility to the young men of color presumed culpable. One 1981 Los Angeles Times article warned suburban whites of "Inner City" "marauders" and blamed "savage" young men from "ghettos and barrios" for rising crime rates.[55] Another claimed that young men of color came "from a world of crack, welfare, guns, knives, indifference and ignorance…a land with no fathers…to smash,

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[55] ("Editorial: An Examination of the Times' Failures on Race, Our Apology and a Path Forward," Op., Editorial Bd., LA Times (Sept. 27, 2020), *available at* http://www.latimes.com/opinion/story/2020-09-27/los-angeles-times-apology-racism.)

hurt, rob, stomp, rape," adding that their "enemies were rich . . . . [and] white."[56]

In the ensuing panic, in the mid 1990's, Princeton political scientist John Dilulio coined the phrase "superpredator."[57] Dilulio warned that a new breed of urban youth, "who place zero value in the lives of their victims," was imperiling society.[58] The "superpredator" myth[59] was explicitly racial.[60] Delulio

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[56] (Julia Dahl, "We Were the WolfPack: How New York City Tabloid Media Misjudged the Central Park Jogger Case," Poynter (2011), *available at* www.poynter.org/newsletters/2011/we-were-the-wolf-pack-how-new-york-city-tabloid-media-mangled-the-central-park-jogger-case/.)

[57] (John Dilulio, "The Coming of the Super Predators," Weekly Standard (Nov. 27, 1995), *available at* www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators.)

[58] (*Id.*)

[59] In 2001, the United States Office of the Surgeon General declared that the "superpredator" theory was a myth. (*See* U.S. Dept. of Health & Human Servs., "Youth Violence: A Report of the Surgeon General" (2001) c. 1, p. 5, *available at* www.ncbi.nlm.nih.gov/books/NBK44297/?report=reader.) Delulio himself would later admit that he had been wrong and express contrition for the racial harm wrought by his theory. (*See* Elizabeth Becker, "As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets," NY Times (Feb. 9, 2001), *available at* www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html.)

[60] (*See* "The Origins of the Superpredator: The Child Study Movement to Today," (May 2021) Campaign for Fair Sentencing of Youth, *available at* https://cfsy.org/wp-content/uploads/Superpredator-Origins-CFSY.pdf ["The superpredator myth reinforced and sought to legitimize longstanding fears of Black criminality, disguised as developmental science and resting on pseudo-scientific assumptions that certain children are not children at all."].)

subsequently wrote that "the number of young [B]lack criminals [is] likely to surge" and "as many as [one] half of these juvenile super-predators could be young [B]lack males."[61] Offering a purportedly academic foundation for an ascendant racial stereotype, Dilulio's terminology spread like wildfire.[62] One study identified almost 300 invocations of the phrase in 40 major news outlets in the years following Dilulio's publications.[63]

The "superpredator" myth impacted both legislation and sentencing.[64] The federal government, and many states, passed legislation authorizing prosecutors to try younger adolescents as adults and authorizing lengthier juvenile sentences:

- Between 1992 and 1995, legislatures in thirteen states and the District of Columbia adopted or modified

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[61] (John Dilulio, "My Black Crime Problem, and Ours," City Journal (1996), *available at* www.city-journal.org/html/my-black-crime-problem-and-ours-11773.html.)

[62] (*See State v. Belcher* (Conn. 2022) 268 A.3d 616, 625-627 ["The superpredator theory tapped into and amplified racial stereotypes that date back to the founding of our nation" and "triggered and amplified the fears inspired by these dehumanizing racial stereotypes, thus perpetuating the systemic racial inequities that historically have pervaded our criminal justice system."].)

[63] (Carroll Bogert and Lynn Hancock, "Superpredator: The Media Myth That Demonized a Generation of Black Youth," Marshall Project (2021), *available at* www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth/.)

[64] (*See, e.g.*, Juvenile Justice and Delinquency Prevention Act, "Hear'g Before the House Comm. on Econ. and Ed. Opportunities," Subcomm. on Childhood, Youth & Families, 104th Cong. 90 (1996) (statement of Hon. Bill McCollum, Chairman, Subcomm. on Crime, H. Judiciary Comm.) ["[B]race yourself for the coming generation of 'super-predators.'"].)

statutes that imposed mandatory minimum periods of incarceration for juveniles convicted of certain violent or serious crimes.

- Between 1992 and 1997, forty-five states adopted or modified laws that facilitated the prosecution of juveniles as adults in criminal court.
- By 1999, the majority of states had adopted provisions imposing mandatory transfer of juvenile cases to adult criminal proceedings for certain serious offenses. These changes included lowering the age of eligibility for prosecution and sentencing in criminal court to 13 years in New York, and as young as 10 elsewhere.[65]

California, for its part, enacted several "tough on crime" statutes during this period. In 1988, the Legislature passed the Street Terrorism and Enforcement Prevention (STEP) Act of 1988, punishing anyone who "willfully promoted or assisted" in any criminal activity with any gang member. In a confidential publication to law enforcement, the Attorney General instructed officers that the profile for a gang member was a Black male aged 14-40.[66] In 1994, California was among the first states to enact a

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[65] (Br. Of *Amici Curiae* Jeffrey Fagan, *et al.*, *Miller v. Alabama* (Jan. 17, 2012) Case No. 10-9646, 10-9647, at pp. 16-17 ["[T]he superpredator myth contributed to the dismantling of transfer restrictions, the lowering of the minimum age for adult prosecution of children, and it threw thousands of children into an ill-suited and excessive punishment regime." (citations omitted)], *available at* https://eji.org/wp-content/uploads/2019/11/miller-amicus-jeffrey-fagan.pdf.)

[66] (*See*, G.W. Clemons, *et al.*, "A Confidential Publication for Law Enforcement: Crips & Bloods Street Gangs," California Department of Justice, *available at* www.ojp.gov/pdffiles1/Digitization/146790NCJRS.pdf.)

Three Strikes Law.[67] Since that time, California has "lead[] the nation in the percent of the prison population serving a life sentence[.]"[68] Between 1990 and 2009, the average prison sentence in the State grew by 63%, dwarfing the 37% national average.[69] And in 2000, California passed Proposition 21, lowering the age for prosecution as an adult to 14 and giving prosecutors absolute discretion over juvenile transfers to adult court.[70]

The "superpredator" myth also pervaded criminal sentencing, subjecting a generation of young Black and brown men to excessive and often extreme prison terms.[71] The

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[67] (*See* Bob Egelko, "Panel Recommends Endings California 'Three Strikes' Law and Life-Without-Parole Sentences," S.F. Chronicle (Dec. 16, 2021), *available at* www.sfchronicle.com/bayarea/article/Panel-recommends-ending-California-s-16705752.php.)

[68] (*See* Ashley Nellis, "Still Life: America's Increasing Use of Life and Long-Term Sentences," The Sentencing Project (May 3, 2017), *available at* www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/#III.LifebytheNumbers.)

[69] (Pew, "Time Served: The High Cost, Low Returns of Long Prison Terms" (2012) 15-16, *available at* www.pewtrusts.org/-/media/assets/2012/06/06/time_served_report.pdf.)

[70] (Moriearty & Carson, *supra*, at p. 299 ["California's Proposition 21 is among the harshest of these laws. Proposition 21 requires adult trials for juveniles as young as fourteen years of age if they have been charged with a list of enumerated felonies. It also transfers absolute discretion from judges to prosecutors to determine which juveniles should be tried as adults, weakens confidentiality laws, toughens gang laws, and expands California's three-strikes law for both juveniles and adults."].)

[71] (*See* "The Origins of the Superpredator," *supra,* ["[The] superpredator narrative is often called out as the impetus for our

Connecticut Supreme Court recently recognized the prejudicial impact of this ideology, reversing a sentence imposed on a young Black man and holding, "the court's [express] reliance on the materially false superpredator myth is especially detrimental to the integrity of the sentencing procedure… . [R]eliance on that myth invoked racial stereotypes, thus calling into question whether the defendant would have received as lengthy a sentence were he not Black."[72] Even when courts did not reference the term "superpredator" explicitly, "'it was definitely in the air. You can see it in the . . . long sentences many teenagers got.'"[73] Indeed, by 2016, 2800 people nationally were serving LWOP sentences for juvenile offenses.[74] A study from 2015 found that Black youth were twice as likely to be sentenced to LWOP for homicide compared to their white peers.[75] Approximately 70% of juveniles sentenced to LWOP nationally are people of color, with

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nation's harmful sentencing policies for Black children."], *available at* https://cfsy.org/wp-content/uploads/Superpredator-Origins-CFSY.pdf.)

[72] (*Belcher*, *supra*, 268 A.3d at p. 625.) The sentencing judge had labeled the young black teenager a "charter member" of the "superpredator" category, which the judge described as "radically impulsive, brutally remorseless youngsters who assault, rape, rob and burglarize." (*Id.* at p. 622.)

[73] (*Id.*)

[74] ("*Montgomery v. Louisiana* Anniversary," Campaign for Fair Sentencing of Youth (Jan. 25, 2020), *available at* https://cfsy.org/wp-content/uploads/Montgomery-Anniversary-1.24.pdf.)

[75] ("No Hope: Reexamining Lifetime Sentences for Juvenile Offenders," Phillips Black (2015), at pp. 10-11, *available at* https://static1.squarespace.com/static/55bd511ce4b0830374d25948/t/5600cc20e4b0f36b5caabe8a/1442892832535/JLWOP+2.pdf.)

Black youth representing a full 60% standing alone.[76] As noted, that figure in California is still higher, with people of color comprising a staggering 77-86% of individuals aged 18 to 25 sentenced to LWOP or death.

Thus, the racist ideology of the superpredator myth marked a distinct chapter in the targeting of young people of color through the criminal legal system. The impact of this ideology, layered on top of the legacy of "tough on crime" politics and the expansive discretion of the Briggs Initiative, gave rise to the population identified by Section 3051(h): young people, disproportionately Black and brown, sentenced to life without the possibility of parole. That the California Legislature chose to deprive this group of a second chance in free society, against the historical backdrop that formed this racially disparate population, betrays a renewed intent to exploit public fear and animus towards young Black and brown men for political gain.

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[76] (*See* "The Origins of the Superpredator," *supra, available at* https://cfsy.org/wp-content/uploads/Superpredator-Origins-CFSY.pdf ["These sentences also bear the stain of extreme racial disparity and prejudice — of the more than 2,800 children ever sentenced to life without parole, 70 percent are children of color. More than 60 percent are Black."]; *see also Jones v. Mississippi* (2021) 141 S.Ct. 1307, 1334 (Sotomayor, J., dissenting) ["The harm from these sentences will not fall equally. The racial disparities in juvenile LWOP sentencing are stark: 70 percent of all youths sentenced to LWOP are children of color."].)

III. The Legislative History of Section 3051(h) Reveals Knowledge and Indifference Towards the Provision's Racially Disparate Impact.

When the California Legislature developed youth offender parole in the 2010's,[77] it was acutely aware of the disproportionate incarceration of young Black and brown men. In 2014, the Legislature passed the California Fair Sentencing Act to eliminate disparities in sentencing, probation, and asset forfeiture between crack and powder cocaine, acknowledging that this discrepancy fueled a pattern of racial disparities in incarceration.[78] In 2015, the Legislature passed Assembly Bill 953, The Racial and Identity Profiling Act, to gather data on racial profiling and discriminatory policing and establish an advisory board to address racial disparities.[79] In 2017, the

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[77] Section 3051(h) was passed in 2017 as part of AB 1308, which was an outgrowth of two prior bills. In 2013, the California legislature passed SB 260, creating a process by which juvenile offenders (under 18) would receive an opportunity for parole after a prescribed period based on the severity of the underlying offense. Two years later, Senate Bill 261 extended eligibility for youth offender parole hearings to those who commit a controlling offense under the age of 23. Assembly Bill 1308, enacted two years later, raised the age of those eligible for youth offender parole still higher, to 25, while at the same time carving out an exception for 18-to-25-year-olds sentenced to LWOP in Section 3051(h).

[78] (*See* "Governor Signs Historic California Fair Sentencing Act," ACLU NorCal (Sep. 28, 2014) *available at* www.aclunc.org/news/governor-signs-historic-california-fair-sentencing-act.)

[79] (*See* "Governor Brown Signs Groundbreaking Data Collection Bill to Combat Racial Profiling," ACLU NorCal (Oct. 3, 2015) *available at* www.aclunc.org/news/governor-brown-signs-groundbreaking-data-collection-bill-combat-racial-profiling.)

Legislature passed SB 620 to give sentencing courts discretion over imposition of harsh enhancements that might result in a sentence of LWOP or its functional equivalent; the bill's author explained that the corrective was necessary because the previously mandatory nature of these penalties "disproportionately increase[d] racial disparities in imprisonments."[80] And most significantly, in the lead up to passage of AB 1308, which expanded youth offender parole opportunities to include people up to age 25 at the time of their offense, the Senate Public Safety committee received comments from the National Center for Youth Law noting that, "in California, African American Youth are sentenced to life without parole at a rate that is 18 times that of white youth."[81] The legislative history of the pertinent time frame thus evidences not only awareness of racial disparities created by decades of racialized criminal law policies and practices generally, but also specific knowledge that Section 3051(h) would harm an especially racially disparate population.

Yet, the Legislature nonetheless passed Section 3051(h), a punitive provision within an otherwise ameliorative statute. The Legislature provided no explanation in doing so. That silence, particularly against the backdrop of numerous contemporaneous enactments designed to *reverse* racial injustice, suggests a

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[80] (California Assembly Committee on Public Safety, SB 620, (June 13, 2017).)

[81] (California Senate Committee on Public Safety 2017-2018 Reg. Sess., SB 394 (March 21, 2017).)

political compromise. The evidence suggests that the Legislature intentionally sacrificed the most racially disparate population—18-to-25-year olds sentenced to LWOP—to preserve a semblance of "tough on crime" credibility. At the very least, the legislative history reveals an apathy towards young Black and brown men that further supports application of strict judicial scrutiny. (*See Columbus Bd. of Ed. v. Penick* (1979) 443 U.S. 449, 464 ["[A]ctions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose."].)

IV. Section 3051(h) Represents a Significant Departure from Contemporaneous Enactments.

Section 3051(h) represents a dramatic substantive departure from contemporaneous enactments. Under *Arlington Heights*, this is further evidence of a racially discriminatory motive, "particularly [because] the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." (*Arlington Heights*, *supra*, 429 U.S. at p. 267.)

Over the past decade, the Legislature has created and expanded the opportunity for youth offender parole on the basis of an established scientific consensus: that the social and neurological development of young people is immature in ways that undermine decision-making up to the age of 25. The judicial genesis of this statutory law was the United States Supreme Court's recognition that the developmental shortcomings of youth inherently reduce their culpability. The U.S. Supreme Court

consequently held that all juveniles, save the "rare juvenile [homicide] offender whose crime reflects irreparable corruption," ((*Montgomery v. Louisiana* (2016) 577 U.S. 190, 208) (citation omitted)), are entitled to some "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Graham v. Florida* (2010) 560 U.S. 48, 74.) The Court instructed that this opportunity may be provided via an appropriate parole process. (*Montgomery*, *supra*, 577 U.S. at p. 212.) The California Supreme Court expanded upon this body of law, holding that it applies to those serving the functional equivalent of LWOP in lengthy terms of years. (*See People v. Caballero* (2012) 55 Cal.4th 262, 268 [applying *Graham* to term of 100 years]; *People v. Contreras* (2018) 4 Cal.5th 349, 380 [applying *Graham* to term of 50 years].)

The California Legislature embraced these doctrinal developments in creating youth offender parole. In 2013, the Legislature enacted SB 260, creating a new parole opportunity for individuals who were under 18 at the time of the offense. (Stats.2013, ch. 312, § 1 (alternate citations omitted).) The Legislature subsequently went much further. While the U.S. Supreme Court has held "the line at 18 years of age," (*see Roper v. Simmons* (2005) 543 U.S. 551, 574), the Legislature has twice extended youth offender parole eligibility to an older category of youthful offenders, raising the age first to 23 in 2016, then to 25 in 2018. Each time, the Legislature recognized that the same scientific literature cited by the U.S. Supreme Court in shielding juveniles from the harshest penalties in fact revealed that

"certain areas of the brain—particularly those affecting judgment and decision-making—do not fully develop until the early-to-mid-20s." (SB 261 Sen. Comm. On Public Safety (Hear'g Date April 28, 2015) Report, at p. 3; AB 1308 Sen. Comm. On Public Safety (Hear'g Date June 27, 2017) Report, at p. 3.) Thus, the California Legislature has steadfastly expanded the opportunity for young people to achieve release, and its NorthStar has been scientific consensus that young people have diminished decision-making capacities that render them less culpable for their conduct and more capable of change.

By denying an opportunity for youth offender parole to those 18-to-25-year olds sentenced to LWOP, Section 3051(h) contradicts this substantive law and its foundational principles. As the U.S. Supreme Court has held explicitly, the offense for which a young person is convicted does not change the science of adolescent and young adult brain development—the shortcomings of youth retain their mitigating force no matter the nature of a particular young person's offense. (*See Miller*, *supra*, 567 U.S. at p. 473 ["[N]one of what [the Court's prior precedents] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific."].) Thus, even if the category of young people denied the possibility of youth offender parole by Section 3051(h) have arguably committed the most serious offenses, the Legislature's primary rationale for youth offender parole still applies to the excluded group in full force.

It also bears noting, as the Court of Appeal held, that a young person's sentence to LWOP does *not* reliably signify conviction of a more serious offense than those of young people who remain eligible for youth offender parole. That is:

> The crime of a 20-year-old offender who shot and killed his victim while attempting to commit robbery and was sentenced to life without parole cannot rationally be considered more severe than those of a 20-year-old who shot and killed his victim one day, committed a robbery the next, and was sentenced to an indeterminate term of 50 years to life, or who committed multiple violent crimes . . . and received a parole-eligible indeterminate life term that far exceeded his or her life expectancy.

(*Hardin*, *supra*, 84 Cal.App.5th at p. 289 [citations omitted].) The only factual distinction between youth offenders eligible for parole and those excluded by Section 3051(h) is that the latter category was sentenced for "a single 'controlling offense,'" a distinction that "eschew[s] any attempt to assess the offenders' overall culpability, let alone his or her amenability to growth and maturity." (*Id.*)

The more significant distinction captured by Section 3051(h) is the extreme racial disparity in application of the special circumstance statute, particularly as it applies to young people like Petitioner. Thus, while Section 3051(h) reflects a significant substantive departure from the Legislature's recognition of the diminished culpability of youth and their heightened capacity for change, it is in complete accord with the targeting of young men of color for the harshest criminal law penalties. For this reason, too, the Court should treat Section

3051(h) as a classification based in part on race and apply strict judicial scrutiny.

. . . . .

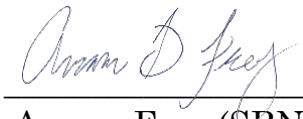
In sum, several pertinent factors enumerated by the U.S. Supreme Court in *Arlington Heights* establish that the California Legislature employed a race-based distinction in enacting Section 3051(h). Though that provision does not explicitly classify individuals on the basis of race, it overwhelmingly denies any opportunity for youth offender parole to young Black and brown men. It does so against the backdrop of historical vilification and over-incarceration of this population for political gain. The Legislature knew that this provision would harm people of color disproportionately, yet passed it without explanation. Finally, Section 3051(h) runs counter to the logic of youth offender parole generally, which reflects a recognition that all young people, no matter what their offense or conviction, are capable of reform. Abundant circumstantial evidence thus demonstrates that the Legislature intended to extend the historical pattern of scapegoating young men of color for political gain, and such race-based discrimination in enactment of Section 3051(h) requires this Court's strict judicial scrutiny.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to apply strict scrutiny to Petitioner's Equal Protection claim.

Dated: August 31, 2023

Respectfully submitted,



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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c)(1) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this Proposed *Amici Curiae* Brief, counsel certifies that the text of this brief (including footnotes) was produced using 13-point type and contains 9,981 words. This includes footnotes but excludes the tables required under Rule 8.204(a)(1), the cover information required under Rule 8.204(b)(10), the Certificate of Interested Entities or Persons required under Rule 8.208, the Application to File *Amici Curiae* Brief required under Rule 8.520(f), this certificate, and the signature blocks. *See* Rule 8.204(c)(3).

Dated: August 31, 2023

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PROOF OF SERVICE

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AND
PROPOSED BRIEF OF *AMICI CURIAE* ACLU, ACLU OF NORTHERN CALIFORNIA, ACLU OF SOUTHERN CALIFORNIA, CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, AND CONTRA COSTA PUBLIC DEFENDER OFFICE IN SUPPORT OF PETITIONER TONY HARDIN

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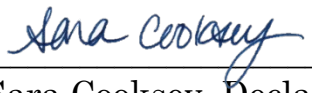
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 31, 2023 in Fresno, CA.



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