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 Appellant.

On review from the decision of the Court of Appeal,
Second Appellate District, Division Seven, Case No. B315434,
reversing the judgment of the Los Angeles County
Superior Court, Case No. A893110
The Honorable Juan Carlos Dominguez, Judge

APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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APPLICATION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

To the Honorable Chief Justice of the Supreme Court of the State of California

The Criminal Justice Legal Foundation (CJLF) respectfully applies for permission to file a brief amicus curiae in support of respondent pursuant to rule 8.520(f) of the California Rules of Court.[1]

Applicant's Interest

CJLF is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of

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1. No party or counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae CJLF made a monetary contribution to its preparation or submission.

victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, the Court of Appeal held that it was a violation of the equal protection clause to exclude from parole eligibility murderers between the ages of 18 and 25 who were convicted of first degree murder with special circumstances and sentenced to life in prison without the possibility of parole. Parole-eligible young adult murderers are not similarly situated to non-parole-eligible young adult murderers and it was rational for the Legislature to expressly exclude the latter group from receiving a youth offender parole suitability hearing. The Court of Appeal's erroneous interpretation of both state and federal constitutional provisions is contrary to the interests of victims of crime that CJLF was formed to protect.

Need for Further Argument

CJLF is familiar with the arguments presented on both sides of this issue and believes that further argument is necessary.

Date: August 31, 2023

Respectfully Submitted,

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Criminal Justice Legal Foundation

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

SUMMARY OF FACTS AND CASE

To understand what is at stake in this case and others like it, it is important to understand the magnitude of the crime. In 1989, 25-year-old Tony Hardin murdered his elderly neighbor, Norma Barber, in her apartment. (*People v. Hardin* (2022) 84 Cal.App.5th 273, 279.) Hardin worked as a nighttime security guard at the Casa La Paz apartment complex. (*People v. Hardin* (July 19, 1993, B051873) [nonpub. opn.] at p. 2 ("Hardin I").) Barber, who lived alone, and Hardin were "friendly" and lived only two doors down from each other at the Casa La Paz complex. (*Ibid*.) They would occasionally have drinks or dinner together with friends at Barber's apartment. (*Id*. at p. 7.)

Barber's son grew concerned for his mother's well being after he had not heard back from her in a few days. (*Id*. at p. 3.) When he went over to her apartment to check on her, he noticed that her car was not parked in its usual parking stall and she had several days worth of unread daily newspapers stacked near her

patio door. (*Ibid.*) Once inside the apartment, Barber's son discovered his mother's dead body underneath her bed. (*Ibid.*) The coroner determined that Barber had been strangled to death, with several ligature marks on her neck and wrists occurring post mortem. (*Ibid.*) Evidence at trial showed that "[h]er legs were bound with a belt. Her wrists were apparently held in handcuffs behind her back. She was manually strangled to death. After she was already dead [Hardin] wrapped a cord around her neck tightly enough to leave post mortem ligature markings." (*Id.* at p. 17.)

Before leaving the scene of the crime, Hardin, a "drug abuser ... desperate to buy drugs and had no money to do so" (*id.* at p. 17), stole jewelry off of Barber's body and took her VCR. (*Id.* at pp. 17-18.) He also took Barber's car and drove it to a pawn shop in Los Angeles where he exchanged two necklaces, two charms, and one ring for $15. (*Id.* at pp. 7-8.) Barber's son and friends later identified the pawned jewelry as that of Barber's that she "almost always wore and almost never took off." (*Id.* at p. 8.) After pawning the jewelry, Hardin continued to drive himself and his drug dealer around to pick up drugs and to purchase cocaine. (*Id.* at pp. 7-8.) Hardin, who had the keys to Barber's apartment, subsequently returned to her apartment and took her microwave that he later sold for cash. (*Id.* at pp. 8-9.) Other items reported missing, and never found, were her purse, wallet, checkbook and checks, a stun gun, her glasses, and answering machine tapes. (*Id.* at p. 18.)

A jury convicted Hardin of first degree murder (Pen. Code, § 187),[2] and found true the special circumstance allegation that the murder occurred during the commission of a robbery (Pen.

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2. Unless otherwise noted, all statutory references are to the Penal Code.

Code, § 190.2, subd. (a)(17)(A)). Hardin was further convicted of inflicting great bodily injury on a person age 60 or older (Pen. Code, § 1203.09, subd. (a)), residential robbery (Pen. Code, § 211), and grand theft of an automobile (Pen. Code, § 487, subd. (c)). (*Hardin, supra*, 84 Cal.App.5th at p. 279.) Hardin was sentenced to life without the possibility of parole (LWOP) for the special circumstance first degree murder of Barber. (*Ibid.*)

Despite being statutorily ineligible (see Pen. Code, § 3051, subd. (h)), in August 2021, Hardin filed a motion for a "*Franklin* hearing" seeking to develop a record for a future Penal Code section 3051 youth offender parole suitability hearing.[3] In his motion, Hardin argued that allowing a youth offender parole suitability hearing to inmates sentenced to 25 years to life for first degree murder committed between the ages of 18 and 25 while denying the same hearing to inmates, like him, sentenced to LWOP for first degree special circumstance murder committed between the ages of 18 and 25, violates the equal protection clause. The trial court denied Hardin's motion and rejected his argument finding that Penal Code section 3051, subdivision (h)'s exclusion was " 'not unconstitutional as applied to persons sentenced to [LWOP].' " (*Hardin*, 84 Cal.App.5th at p. 280.)

The Court of Appeal reversed, holding that there was no rational basis for the Legislature to distinguish between offenders

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3. Most youthful offenders (under age 26) who were sentenced to lengthy prison terms prior to 2016 and did not have the opportunity at that time to submit evidence relating to their youth are provided with the opportunity for a postjudgment evidence preservation hearing (called a "*Franklin* hearing") so as to generate a record of youth-related mitigating evidence to be utilized by the Board of Parole Hearings at a future youth offender parole suitability hearing. (See *People v. Cook* (2019) 7 Cal.5th 439, 447; *People v. Franklin* (2016) 63 Cal.4th 261, 284.)

between the ages of 18 and 25 sentenced to LWOP and those sentenced to 25 years to life for purposes of Penal Code section 3051. (*Id*. at pp. 287-288.) The Court of Appeal reversed and remanded with directions to the trial court to schedule a *Franklin* hearing and to conduct further proceedings consistent with the opinion. (*Id*. at p. 291.)

This Court granted the state's petition for review on January 11, 2023.

SUMMARY OF ARGUMENT

Penal Code section 3051 was originally enacted in 2013 to fashion the youth offender parole suitability process for parole-eligible inmates who committed crimes prior to turning 18 years old and were sentenced to lengthy prison terms. Those who were sentenced to life without the possibility of parole were explicitly excluded. When a majority of California voters enacted Proposition 7 in 1978, they decided that the appropriate punishment for offenders age 18 and older who are convicted of first degree murder with special circumstances must be either death or life without the possibility of parole. The United States Supreme Court had ruled that it is neither cruel nor unusual to sentence young adult murderers to either of those two sentences.

The California Legislature has subsequently expanded Penal Code section 3051 to allow youth offender parole suitability hearings for most parole-eligible offenders under age 26 and to those under age 18 who were sentenced to life without the possibility of parole. Offenders under age 26 who were sentenced to 25 years to life are eligible for a parole hearing during their 25th year of incarceration. Offenders under age 26 who were sentenced to life without the possibility of parole, however, were expressly excluded from the statute's provisions.

The equal protection clause prohibits government action that classifies two similarly situated groups in an unequal manner. Only if these two groups are found to be similarly situated will the analysis proceed to whether the difference in treatment serves a proper governmental purpose. Youthful offenders convicted of first degree murder and sentenced to 25 years to life are not similarly situated to youthful offenders convicted of first degree murder with special circumstances and sentenced to life without the possibility of parole. Penal Code section 3051 advances parole eligibility for parole-eligible offenders and precludes parole eligibility for non-parole-eligible offenders. It was thus completely rational for the Legislature to exclude non-parole-eligible murderers from receiving a youth offender parole suitability hearing.

The California Constitution places strict limits on the Legislature's ability to amend or repeal voter enacted law without voter approval. Proposition 7 did not contain an amendment clause, and thus the Legislature is prohibited from independently amending its statutory provisions through the ordinary legislative process. Had the Legislature authorized parole eligibility for those sentenced to life without parole, it would unconstitutionally amend Proposition 7's statutory provisions by transforming life without parole sentences into life with parole sentences. Thus, it was further rational to conclude that the Legislature was aware of this constitutional limitation when they chose to expressly exclude this group of offenders from Penal Code section 3051.

The Court of Appeal held that the Legislature's exclusion of young adult offenders sentenced to life without parole from Penal Code section 3051 violates the equal protection clause and found that defendant is entitled to a youth offender parole suitability hearing in the future. The Court of Appeal's chosen remedy—to judicially reform the statute—presumed that the reformed stat-

ute is one that the Legislature had the power to enact. However, because the statutory provisions of Proposition 7 mandate either a sentence of death or life without parole, and because Proposition 7 did not contain an amendment clause, it does not matter whether the Legislature would have preferred to apply Penal Code section 3051 to young adult murderers sentenced to life without parole because the Legislature lacked the authority to include them. Thus, if the Legislature's exclusion of non-parole-eligible offenders is found to violate the equal protection clause, the proper remedy is to also exclude the group of parole-eligible offenders from the list of individuals who benefit from the statutory scheme.

ARGUMENT

I. The Legislature's exclusion of offenders 18 to 25 years old convicted of special circumstances first degree murder and sentenced to life without the possibility for parole pursuant to Penal Code section 190.2 does not violate the equal protection clause.

A. Statutory and Constitutional Framework.

1. Proposition 7.

In 1978, a majority of California voters enacted Proposition 7, the Briggs Initiative. (Voter Information Guide, Gen. Elec. (Nov. 7, 1978) text of Prop. 7, pp. 33, 41-46 ("1978 Voter Guide").) The purpose of Proposition 7 was threefold: (1) to significantly increase the punishment for first and second degree murder by amending Penal Code section 190; (2) to "expand and modify the list of special circumstances" that would require a sentence of either death or LWOP by amending Penal Code section 190.2; and (3) to clarify the procedure by which the death penalty may be imposed, and how aggravating and mitigating circumstances are to be applied, by amending Penal Code sections 190.1, 190.3,

and 190.4.[4] (*Id*., analysis of Prop. 7 by Legis. Analyst, p. 32; see also *People v. Cooper* (2002) 27 Cal.4th 38, 42; *People v. Nash* (2020) 52 Cal.App.5th 1041, 1056-1057.) Proposition 7 "broadened the class of persons subject to the most severe penalties known to our criminal law." (*Nash, supra*, at p. 1057.)

Article II, section 10, subdivision (c) of the California Constitution limits the Legislature's authority to amend initiative statutes without voter approval. An initiative statute can be amended by the Legislature only if expressly authorized to do so by the initiative itself, and it must be accomplished in strict compliance with the terms stated therein. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568.) Unlike most present day initiatives, Proposition 7 did not contain a provision that would allow the Legislature to make amendments to its statutory provisions without voter approval. (*Cooper*, 27 Cal.4th at p. 44; see also *People v. Kelly* (2010) 47 Cal.4th 1008, 1042 & fn. 59.)

2. Penal Code section 3051.

Over the past 18 years, both this court and the United States Supreme Court have issued a series of decisions involving the constitutionality of juvenile sentencing practices. (See *Roper v. Simmons* (2005) 543 U.S. 551; *Graham v. Florida* (2010) 560 U.S. 48, 74; *Miller v. Alabama* (2012) 567 U.S. 460, 467; *People v. Caballero* (2012) 55 Cal.4th 262, 268-269.) At issue was whether

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4. Proposition 7 further prohibited the imposition of the death penalty on any person under age 18 by repealing and reenacting Penal Code section 190.5. (See *People v. Cruz* (2020) 46 Cal.App.5th 740, 754, fn. 5.) In 1990, Proposition 115 added subdivision (b) to Penal Code section 190.5, which authorizes at the discretion of the court, either a sentence of LWOP or a term of 25 years to life to be imposed upon certain juvenile homicide offenders. (Voter Information Guide, Primary Elec. (June 5, 1990) text of Prop. 115, p. 67 ("1990 Voter Guide").)

these sentencing practices violated the cruel and unusual punishment clause of the Eighth Amendment. *Roper* categorically barred imposition of the death penalty for criminal offenders under age 18. (543 U.S. at pp. 570-571.) A few years later, *Graham* categorically barred LWOP for juvenile offenders convicted of nonhomicide offenses. (560 U.S. at p. 74.) In *Caballero*, this court then extended *Graham* to juveniles who receive lengthy sentences that are the "functional equivalent" of LWOP for nonhomicide offenses. (55 Cal.4th at pp. 268-269.)

In *Miller*, the high court held that a state sentencing scheme that *mandated* an automatic sentence of LWOP for juvenile homicide offenders upon conviction without any opportunity given to a judge or jury to impose a lesser punishment was unconstitutional. (567 U.S. at p. 465.) However, unlike the holdings of *Roper* and *Graham*, the *Miller* Court expressly declined the invitation to categorically bar all juvenile homicide offenders from being sentenced to LWOP. (*Id*. at p. 483.) In *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1387, this court determined that Penal Code section 190.5, subdivision (b), the sole avenue by which a juvenile homicide offender can be sentenced to LWOP in California, was a constitutionally sound discretionary statutory scheme that provided sufficient safeguards to satisfy *Miller*.

Beginning with *Roper*, the focus on juvenile offenders being generally less culpable than adults, more amenable to rehabilitation, and thus less deserving of severe penalties came to fruition. In direct response to these cases, the California Legislature passed, and the Governor signed, Senate Bill 260 (SB 260) into law. SB 260 added Penal Code section 3051 to create the youth offender parole suitability process for inmates who committed crimes prior to age 18 and were sentenced to lengthy parole-eligible prison terms. (Stats. 2013, ch. 312, § 4.) As originally enacted, SB 260 expressly excluded three categories of juvenile

offenders based on their sentence: (1) those sentenced under the Three Strikes Law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12); (2) those sentenced for sexually violent felonies under the One Strike Law (Pen. Code, § 667.61); and (3) those sentenced to LWOP. (Stats. 2013, ch. 312, § 4(h).) A fourth group of offenders who were also expressly excluded were those to whom the "section would otherwise apply" but who, after turning age 18, "commit[] an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison." (*Ibid*.)

In 2016, the U.S. Supreme Court was asked in *Montgomery v. Louisiana* (2016) 577 U.S. 190, if *Miller* applied retroactively to final cases on collateral review. The short answer to that question was yes. (*Id*. at p. 206.) *Miller*'s core holding was that LWOP sentencing cannot be mandatory for juvenile homicide offenders. As discussed *supra*, this court held in *Gutierrez* that California's discretionary individualized sentencing scheme for sentencing juveniles to LWOP does not run afoul of *Miller*. Despite this, in 2017, the Legislature passed Senate Bill 394 (SB 394) adding subdivision (b)(4) to Penal Code section 3051. (Stats. 2017, ch. 684, § 1.5.) SB 394 expanded youth offender parole suitability hearings to juveniles (under age 18) sentenced to LWOP.

SB 394 was introduced in direct response to *Montgomery*. (Sen. Com. on Pub. Safety, Analysis of Sen. Bill No. 394 (2017-2018 Reg. Sess.) March 21, 2017 ("Sen. Com. on Pub. Saf.") Henry Montgomery was convicted of murder in 1963 when he was 17 years old. (*Montgomery*, *supra*, 577 U.S. at p. 194.) *Miller* was decided 50 years after Montgomery was first taken into custody. (*Id*. at p. 195.) After *Miller*, Montgomery sought collateral review of his now unconstitutional, decades-old mandatory LWOP sentence. After holding *Miller* to be retroactive, the Court suggested, in dicta, that States need not relitigate sentences that were

imposed under unconstitutional mandatory sentencing schemes. States could, instead, "remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than resentencing them." (*Id.* at p. 212.)

Notwithstanding California's *Miller*-compliant and discretionary sentencing scheme, the author of SB 394 stated that the bill was "needed" because *Montgomery* "ruled that *Miller*'s prohibition on juvenile LWOP sentences applies retroactively and that every person serving such a sentence is entitled to a new sentencing hearing or an opportunity for release on parole." (Sen. Com. on Pub. Saf., *supra*, at pp. 2-3.) This statement is inconsistent with the actual holdings of *Miller* and *Montgomery*, and as to the status of California's statutory scheme as construed by *Gutierrez*. Any statement that amending the statute was necessary "to remedy the now unconstitutional juvenile sentences of [LWOP]" to comply with *Miller* and *Montgomery* (cf. *id*. at p. 3) was wrong.[5]

Because juveniles sentenced to LWOP were subsequently included amongst the categories of inmates being given the opportunity for release on parole, SB 394 further amended Penal Code section 3051, subdivision (h) to exclude those inmates who

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5. The issue of whether this provision is constitutional is presently pending in the Court of Appeal for the Third Appellate District in *Peterson v. Cal. Dept. of Corrections and Rehabilitation*, C096833, on CDCR's appeal from the grant of a writ of mandate. Counsel for amicus CJLF represents Laura Peterson in that case. (See also *People v. Board of Parole Hearings* (2022) 83 Cal.App.5th 432, 457 [not reaching the merits but noting *Peterson*, then pending in the trial court].)

committed a "controlling offense"[6] *on or after* turning 18 years old and were sentenced to LWOP.[7] (Stats. 2017, ch. 684, § 1.5.)

In 2015, the California Legislature amended Penal Code section 3051 to expand the law's reach to offenders under age 23 (Stats. 2015, ch. 471, § 1), then again in 2017 to reach offenders under age 26. (Stats. 2017, ch. 675, § 1.) As the law stands today, four categories of inmates are eligible to receive a youth offender parole suitability hearing: (1) those who commit their controlling offense at age 25 or younger and were sentenced to a determinate sentence are eligible for a hearing during their 15th year of incarceration; (2) those who commit their controlling offense at age 25 or younger and were sentenced to a term of less than 25 years to life are eligible for a hearing during their 20th year of incarceration; (3) those who commit their controlling offense at age 25 or younger and were sentenced to a term of 25 years to life are eligible for a hearing during their 25th year of incarceration; and (4) those who commit their controlling offense prior to turn-

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6. " 'Controlling offense' means the offense or enhancement for which any sentencing court imposed the longest term of imprisonment." (Pen. Code, § 3051, subd. (a)(2)(B).)

7. Penal Code section 3051, subdivision (h) continues to exclude those sentenced under the Three Strikes Law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12), those sentenced for sexually violent felonies under the One Strike Law (Pen. Code, § 667.61), and those to whom the law would otherwise apply, but "subsequent to attaining 26 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison." Two of these exclusions are also being challenged as violating the equal protection clause in other cases currently pending before this court and in the Court of Appeal, Sixth Appellate District. (See *People v. Williams* (2020) 47 Cal.App.5th 475, review granted July 22, 2020, S262229; *People v. Whitley* (H049307, app. pending, to be argued Oct. 10, 2023).)

ing age 18 and were sentenced to LWOP are eligible for a hearing during their 25th year of incarceration. (Pen. Code, § 3051, subd. (b).)

3. Equal Protection Clause.

The 14th Amendment to the U.S. Constitution and article I, section 7, subdivision (a) of the California Constitution prohibit the denial of equal protection of the laws. The equal protection guarantees of both are the same and are analyzed similarly. (8 Witkin, Summary of Cal. Law (11th ed. 2017) Constitutional Law, § 775, pp. 92-94.) The threshold question that must first be answered in the affirmative for a meritorious equal protection challenge is whether " 'the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' " (*People v. Brown* (2012) 54 Cal.4th 314, 328, quoting *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253, italics in original.) "This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' " (*Cooley, supra*, 29 Cal.4th at p. 253, quoting *People v. Gibson* (1988) 204 Cal.App.3d 1425, 1438.)

If the two groups are found to be similarly situated, then the second prong of the analysis asks whether the "difference in treatment withstands the appropriate level of scrutiny. If a statute neither implicates a fundamental right nor ... a suspect class, only a rational relationship to a legitimate state purpose is necessary to uphold the constitutional validity of the legislation." (*People v. Jeha* (2010) 187 Cal.App.4th 1063, 1073.)

> "The rational basis test sets a very high bar. The Legislature's classifications are presumed to be rational. [Citation.] A challenger must demonstrate there is no conceivable rational basis for them.... [The court] must accept any plausible rational basis without questioning its wisdom, logic, persuasiveness, or fairness, and regardless of whether the Legisla-

ture ever articulated it." (*People v. Sands* (2021) 70 Cal.App.5th 193, 204, citing *People v. Chatman* (2018) 4 Cal.5th 277, 289.)

The Court of Appeal found that young adult offenders sentenced to LWOP are similarly situated to parole-eligible young adult offenders and held that categorically excluding those sentenced to LWOP from parole consideration violates the equal protection clause. (*Hardin*, *supra*, 84 Cal.App.5th at pp. 286-291.) The Court of Appeal's holding is wrong for three independent reasons. First, 18- to 25-year-old murderers sentenced to parole-eligible life terms are not similarly situated to 18- to 25-year-old murderers sentenced to LWOP for committing first degree special circumstance murder. Second, because Penal Code section 3051 advances parole eligibility for parole-eligible inmates, it was rational for the Legislature to exclude 18- to 25-year-old inmates who are not parole-eligible. Finally, because Penal Code section 190.2 was enacted by Proposition 7, and because Proposition 7 did not contain an amendment clause, the Legislature could not independently amend its statutory provisions without violating article II, section 10, subdivision (c) of the California Constitution. Thus, because the Legislature lacked the authority to provide parole eligibility to 18- to 25-year-old inmates sentenced to LWOP, it was rational for the Legislature to expressly exclude this group of inmates from section 3051.

B. Parole-Eligible and Non-Parole-Eligible Young Adult Offenders Are Not "Similarly Situated."

As noted *supra*, the first prong of the equal protection analysis requires consideration of whether the two groups are " 'similarly situated for purposes of the law challenged.' " (*Cooley*, *supra*, 28 Cal.4th at p. 253.) In this situation, both groups involve young adult offenders convicted of first degree murder. The law being challenged here is section 3051. The statute significantly

advances parole eligibility for young adult *parole-eligible* offenders and precludes parole eligibility for young adult *non-parole-eligible* offenders.

The Attorney General does not address whether the two groups are similarly situated and proceeds to only challenge the Court of Appeal's finding that the law failed to satisfy rational basis scrutiny. (Respondent's Opening Brief 21.) It is amicus' position, however, that the two groups are not similarly situated for purposes of section 3051 for the following reasons.

The purpose of section 3051, as originally enacted, was to establish a "parole eligibility mechanism" for *parole-eligible* inmates who were sentenced to lengthy prison terms for crimes committed prior to turning 18 years old. (Stats. 2013, ch. 312, § 1.) The Legislature intended "to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established." (*Ibid.*) Inmates under age 18 who were sentenced to LWOP, however, were expressly excluded. (Ch. 312, § 4(h).) The law was subsequently amended twice to expand this "parole eligibility mechanism" to *parole-eligible* inmates under age 23, then to those under age 26. (Stats. 2015, ch. 471, § 1; Stats. 2017, ch. 675, § 1.) Similar to the law as originally enacted, the amended laws expressly excluded those inmates under age 23, and then age 26, who were sentenced to LWOP.[8] (Stats. 2015, ch. 471, § 1(h); Stats. 2017, ch. 675, § 1,

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8. As discussed *supra* at pages 17-19, SB 394 added juveniles sentenced to LWOP to the list of offenders eligible for a section 3051 youth offender parole suitability hearing. At the Court of Appeal, defendant argued that he was also similarly situated to this group of offenders. (*Hardin*, 84 Cal.App.5th at pp. 284-286.) The Court of Appeal did not address whether these two groups were similarly situated, but nonetheless held that the Legislature had a rational basis to treat the two groups differently. (*Ibid.*) Hardin does not raise this

subd. (h).) Thus, section 3051 was never designed to authorize parole for those who were not eligible for parole. Rather it was enacted to advance parole for those already eligible for parole.

The Court of Appeal held that the two groups are "similarly situated" for purposes of the statute. (*Hardin*, 84 Cal.App.5th at p. 287.) According to the Court of Appeal, when section 3051 was amended in 2017 to expand its reach to offenders under age 26, "its purpose was not to assess culpability or measure the appropriate level of punishment for various crimes," but instead was to permit "a determination whether a person who committed a serious or violent crime between the age of 18 and 25 has sufficiently matured and outgrown the youthful impulses that led to the commission of the offense ...." (*Ibid*.)

The Court of Appeal is correct to state that section 3051 is "not a sentencing statute" and does not "assess culpability or measure the appropriate level of punishment for various crimes." (*Ibid*.) These objectives were accomplished many years earlier when the inmate was found guilty of the crime(s) charged and sentenced to either a parole-eligible term or a non-parole-eligible life term. Section 3051, however, cannot be read in a vacuum. (See *Sands*, *supra*, 70 Cal.App.5th, at p. 205 ["although section 3051 may not be 'a sentencing statute per se, it nevertheless impacts the length of sentence served' "].) Because section 3051 excludes non-parole-eligible inmates, one cannot assess whether the two groups are similarly situated for purposes of the law without also examining the crime(s) they were convicted of com-

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argument in his appeal to this court. Amicus will thus limit its discussion to only the 18- to 25-year-old offender group. As the constitutionality of subdivision (b)(4) of section 3051 is doubtful and at issue in a pending case (see fn. 5, *supra*), it would not be proper to address it in the present case, where it is not at issue.

mitting and the commensurate levels of punishment they were initially given.

Hardin argues that "[t]he only difference between youthful offenders like [himself] sentenced to [LWOP] for special circumstance murder ... and youthful offenders sentenced to ... parole-eligible life terms for first degree murder ... is the special circumstances finding." (Petitioner's Answering Brief 25.) According to Hardin, an individual between the ages of 18 and 25 who is convicted of first degree murder without a special circumstance finding is similarly situated to an individual between the ages of 18 and 25 convicted of first degree murder with a special circumstance finding. Hardin's argument wrongfully downplays the significance of the special circumstance charge and finding.

The United States Supreme Court draws the "bright line" of adulthood at age 18 not because of the "qualities that distinguish juveniles from adults" simply disappear on an individual's 18th birthday, but rather because a "line must be drawn" that can be broadly applied. (*Roper*, *supra*, 543 U.S. at p. 574.) Thus, when an adult (age 18+) is convicted of deliberately extinguishing the life of another human, it is neither cruel nor unusual to sentence him or her to death or LWOP. (See *Bucklew v. Precythe* (2019) 587 U.S. ___, 139 S.Ct. 1112, 1122-1123, 203 L.Ed.2d 521, 532.)

In California, the electorate decided via Proposition 7 that the appropriate punishment for those age 18+ who are convicted of first degree murder is either (1) death, (2) LWOP, or (3) 25 years to life in prison. (Pen. Code, § 190, subd. (a); see also 1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against the Person, § 118, pp. 912-913.) Of these three options, a sentence of death is "the most severe punishment" (*Roper*, 543 U.S. at p. 568), and LWOP "is 'the second most severe penalty permitted by law.' " (*Graham v. Florida* (2010) 560 U.S. 48, 69, quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 (Ken-

nedy, J., conc. in part and conc. in judgment).) Because these first two punishment options are the first and second most severe types of punishment allowed, one or more special circumstances must be charged and found to be true. (Pen. Code, §§ 190.2, 190.3, 190.4.) Thus, "when one stands convicted of first degree murder with one or more special circumstances, the 'range' of possible punishments narrows to death or [LWOP]. The defendant becomes eligible for the law's two most severe penalties *and for no others*." (*People v. Allen* (1986) 42 Cal.3d 1222, 1287, italics added.) Therefore, by default, if an individual is found guilty of first degree murder, and a special circumstance is not charged or is not found to be true, that individual will be sentenced to 25 years to life in prison. (Pen. Code, § 190, subd. (a).)

When a violent crime is committed, it is the District Attorney's job as public prosecutor to investigate and gather evidence relating to that criminal offense. (*People v. Eubanks* (1996) 14 Cal.4th 580, 589.) Deciding who to charge and what charges to bring is one of the most important and closely protected prosecutorial functions. (*Ibid.*; *People v. Birks* (1998) 19 Cal.4th 108, 134.) "[P]remeditated first degree murder (§ 189) is the most serious offense known to the law." (*In re Nunez* (2009) 173 Cal.App.4th 709, 727.) A prosecutor's decision of whether to seek a sentence of death or LWOP is not one that is taken lightly. "Many circumstances may affect the litigation of a case chargeable under the death penalty law. These include factual nuances, strength of evidence, and, in particular, the broad discretion to show leniency." (*People v. Keenan* (1988) 46 Cal.3d 478, 506; see also *People v. Arias* (1996) 13 Cal.4th 92, 132.) After a careful balance of all of the aggravating and mitigating circumstances of the case (see Pen. Code, § 190.3, subds. (a)-(k)), and after a thorough examination of all the facts and evidence, the trial prosecutor makes an initial decision of what charges should be filed and what penalty is the appropriate one to seek. (Cal. District Atty. Assn., Prosecu-

tor's Perspective on California's Death Penalty (Mar. 2003), p. iii <https://www.cjlf.org/deathpenalty/DPPaper.pdf> [as of August 29, 2023] ("CDAA").)

Some first degree murders are committed in a more aggravated manner or "reflect[] a greater risk of harm to persons other than the immediate murder victim or victims." (*People v. Jackson* (2021) 61 Cal.App.5th 189, 199.)[9] There are 22 narrow variations of "special circumstances" that qualify a defendant convicted of first degree murder for a harsher sentence of either death or LWOP. (Pen. Code, § 190.2, subd. (a)(1)-(22).) If charged, a finder of fact must also unanimously find beyond a reasonable doubt the truth of each alleged special circumstance. (Pen. Code, § 190.4, subd. (a).) If the facts of the case indicate that the murder was committed by a particular method (e.g., by a destructive device or by poison), during the commission of a specific felony (e.g., rape, burglary, or arson), in a specific manner (e.g., by torture, lying in wait, or drive-by shooting), or against a particular victim (e.g., peace officer, judge, or witness to a crime), the electorate decided that in those situations, the penalty imposed should be elevated from the minimum of 25 years to life, to instead the most se-

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9. For example, in November 1998, 9-year-old Matthew Cecci was playing at the beach in Oceanside, California with his family. (CDAA, *supra*, at p. 10) While high on LSD, 20-year-old Brandon Wilson stalked the area looking for someone to kill. Wilson then witnessed Matthew run over to the men's restroom. As Matthew's aunt waited for him outside, Wilson entered the restroom, and with Matthew's back turned, he attacked Matthew by "slamming a four-inch, double-edged hunting knife into Matthew's throat. With one left-to-right slice, Wilson cut Matthew's neck open from ear to ear ... tear[ing] open Matthew's voice box and expos[ing] a neck vertebra. Wilson held Matthew's head back as blood pumped out, spraying the walls of the bathroom." (*Ibid.*) When Matthew "collapsed to the floor ... Wilson stabbed him five or six more times in the back before fleeing ...." *(Ibid.*)

vere—death or LWOP. (See Pen. Code, § 190.2, subd. (a); 1978 Voter Guide, analysis by the Legis. Analyst, p. 32; *People v. Cruz* (2020) 46 Cal.App.5th 740, 758).)

In this case, Hardin deliberately tied up and strangled his elderly neighbor to death while robbing her of her jewelry and other personal items to further fuel his drug addiction. He was charged with first degree murder and the special circumstance that the murder was committed during the commission of a robbery. (See *supra* at pp. 9-11.) A jury found him guilty of first degree murder and they also found, beyond a reasonable doubt, the truth of the charged special circumstance, making him eligible for the death penalty. During a separate penalty phase hearing, a jury weighed both aggravating and mitigating factors, and fixed the penalty at life without parole. (*Hardin I*, *supra*, at p. 4.)

This court recognizes that "[i]n the California scheme the special circumstance is not just an aggravating factor: it is a fact or set of facts, found beyond reasonable doubt by a unanimous verdict (Pen. Code, § 190.4), which changes the crime from one punishable by imprisonment of 25 years to life to one which must be punished either by death or [LWOP]." (*People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 803; see also *People v. Homick* (2012) 55 Cal.4th 816, 845 ["factual sentencing allegations that make defendant eligible for a death sentence have, for constitutional purposes ... been viewed as functionally equivalent to elements of a greater offense"].)

In *People v. Jackson*, *supra*, 61 Cal.App.5th at page 199, Division One of the Fourth Appellate District Court of Appeal analyzed whether 18- to 25-year-old offenders convicted of first degree murder and sentenced to either LWOP or 25 years to life were "similarly situated" for purposes of the equal protection clause. The court held that they were not similarly situated because those "sentenced to LWOP have committed an aggra-

vated form of first degree murder that distinguishes them from ... [those] who have committed first degree murder but done so in the absence of any such aggravating factors." (*Ibid*.)

Division Five of the Second Appellate District Court of Appeal also addressed whether these two groups are similarly situated in *In re Williams* (2020) 57 Cal.App.5th 427. The court examined the legislative history of section 3051 and found that the Legislature was "motivated by dual concerns: that lengthy life sentences did not adequately account for, first, the diminished culpability of youth, and second, youthful offenders' greater potential for rehabilitation and maturation." (*Id*. at p. 434.) The court found that the two groups are similarly situated with respect to the second goal, but not with respect to the first goal "which is to calibrate sentences in accordance with youthful offenders' diminished culpability." (*Id*. at p. 435.) The court gave the following example: "While a 21-year-old *special circumstance* murderer may, in fact, have diminished culpability compared with a 28 year old who commits the same crime, he is nonetheless *more* culpable and has committed a more serious crime than a 21 year old convicted of a *nonspecial circumstance* murder." (*Ibid*., italics in original.)

Thus, specific to this case, for purposes of section 3051, although both groups are similar with respect to their age group (18-25) and the crime they were convicted of committing (first degree murder), the special circumstance charge and finding that resulted in an LWOP sentence sets them apart. *People v. Rhoades* (2005) 126 Cal.App.4th 1374, is instructive. In that case, the defendant was sentenced to LWOP for the second degree murder of a peace officer "while engaged in the performance of his or her duties" as required by section 190, subdivision (c). He argued that it was a violation of equal protection to punish a defendant convicted of second degree murder to LWOP while the " 'more serious

offense' " of first degree murder of a nonpeace officer or of a peace officer who was not engaged in the performance of his or her duties and without other special circumstances is given a lesser sentence of 25 years to life. (*Id*. at p. 1382)

The court rejected the defendant's argument that these two groups were "similarly situated" finding that because they were "convicted of distinctly classified homicides" the "imposition of different levels of punishment" does not render them similarly situated. (*Id*. at p. 1384.) To sentence a defendant convicted of second degree murder of a peace officer "while engaged in the performance of his or her duties" to LWOP, the prosecutor must charge, and the finder of fact must find true, one of four additional facts: " '(1) The defendant specifically intended to kill the peace officer. [¶] (2) The defendant specifically intended to inflict great bodily injury ... on a peace officer. [¶] (3) The defendant personally used a dangerous or deadly weapon in the commission of the offense ... [¶] (4) The defendant personally used a firearm in the commission of the offense ....' " (*Ibid*., quoting Pen. Code, § 190, subd. (c).) The court held that a finding of one or more of these four additional facts caused his second degree murder conviction to differ "in its essential elements from other forms and degrees of murder" and therefore the defendant was "not in a group that is similarly situated to those convicted of separate homicide offenses." (*Ibid*.)

The same is true for young adult offenders who are convicted of first degree murder as compared to young adult offenders convicted of first degree murder with special circumstances. As to the first group, either a prosecutor declined to charge special circumstances, or if charged, the trier of fact did not unanimously find beyond a reasonable doubt the truth of the charged special circumstance(s) thereby requiring parole eligibility after 25 years of incarceration. Whereas to the second group, the trier of fact

found true the special circumstance charge(s) thus elevating the crime from first degree murder, rendering the latter group of offenders more culpable and more deserving of a parole ineligible sentence. Similar to *Rhoades*, because the special circumstance allegation is "viewed as functionally equivalent to elements of a greater offense" (*Homick, supra*, 55 Cal.4th at p. 845), the finding of truth sufficiently differentiates the two groups of murderers and they are not similarly situated for purposes of the law being challenged.

C. Rational Basis is Satisfied.

As discussed *supra* at page 20, only if the two groups are found to be similarly situated will the analysis proceed to the second question of whether the "difference in treatment withstands the appropriate level of scrutiny." (*Jeha*, *supra*, 187 Cal.App.4th at p. 1073.) The Court of Appeal proceeded to address this second inquiry after finding the two groups were similarly situated. (*Hardin*, 84 Cal.App.5th at pp. 288-291.) Because section 3051 does not impinge upon a "fundamental right" nor does it involve a "suspect class," the requisite inquiry simply asks "whether there is any rational basis to support treating the groups differently." (*Sands*, *supra*, 70 Cal.App.5th at p. 202.)

> "[T]he legislation survives constitutional scrutiny as long as there is 'any reasonably conceivable state of facts that could provide a rational basis for the classification.' [Citation.] This standard of rationality does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically substantiated. [Citation.] While the realities of the subject matter cannot be completely ignored [citation], a court may engage in 'rational speculation' as to the justifications for the legislative choice. [Citation]." (*People v. Turnage* (2012) 55 Cal.4th 62, 74-75, quoting *Heller v. Doe* (1993) 509 U.S. 312, internal quotation marks omitted.)

The Court of Appeal held that this deferential standard was not met, finding no rational basis exists for distinguishing between the two groups for purposes of section 3051. (*Hardin*, 84 Cal.App.5th at p. 290.) Amicus disagrees and posits that there are at least three "reasonably conceivable state of facts that could provide a rational basis for the classification." (*Turnage*, 55 Cal.4th at p. 74.) First, as discussed *supra*, because section 3051 advances parole eligibility for parole-eligible inmates, it was rational for the Legislature to exclude inmates who are not parole-eligible. Second, it is plausible that the Legislature had victims' rights in mind when they excluded those offenders sentenced to LWOP from section 3051. And finally, because Proposition 7 did not contain an amendment clause, the Legislature could not independently amend its statutory provisions without violating article II, section 10, subdivision (c) of the California Constitution.

The Court of Appeal recognized that "it is not irrational ... for the Legislature to single out special-circumstance murder and to deny any possibility of parole to nonjuvenile offenders who commit it." (*Hardin*, *supra*, at pp. 288-289.) However, the court found "difficulty with the premise that assessing relative culpability has a proper role in a statute expressly intended to recognize the diminished culpability of youthful offenders based on their stage of cognitive development." (*Id.* at p. 289.) The court believed there is no rational reason to allow a youth offender parole hearing for young adult offenders who committed multiple violent crimes and were sentenced to parole-eligible indeterminate terms that are the functional equivalent of LWOP, but exclude those who were actually sentenced to LWOP.[10] (*Ibid.*)

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10. In the court's opinion, "[t]he crime of a 20-year-old offender who shot and killed his victim while attempting to commit robbery and was sentenced to [LWOP] ... cannot rationally be

The court further believed that the Legislature's exclusion of parole ineligible offenders from section 3051 fails rational basis scrutiny because "any purported legislatively recognized distinction in culpability between individuals serving a parole-eligible indeterminate life sentence and those sentenced to [LWOP] is illusory." (*Hardin*, 84 Cal.App.5th at pp. 289-290.) The court backed up this statement by criticizing the "expansion of factors qualifying as special circumstances" (*Id.* at p. 290 ["from the original list of seven ... to the current number in excess of 20]") and then cited to the 2021 Annual Report and Recommendations published by The Committee on Revision of the Penal Code to state that "special circumstance allegations could have been charged in 95 percent of all first degree murder convictions, leaving the decision whether a life without parole sentence may be imposed to the discretion of local prosecutors, rather than a matter of statewide policy." (*Ibid.*)

The court may be troubled by the Legislature's decision to accelerate parole hearing dates for parole-eligible offenders, and exclude parole hearings for non-parole-eligible offenders, but that does not make it irrational considering that "[e]qual protection analysis does not entitle the judiciary to second-guess the wisdom, fairness, or logic of the law." (*Turnage, supra*, 55 Cal.4th at p. 74.) Moreover, this court acknowledges that "different categories or classes of persons within a larger classification may pose varying degrees of risk of harm, and [the Legislature] properly may limit a regulation to those classes of persons as to whom the need for regulation is thought to be more crucial or imperative." (*Warden v. State Bar* (1999) 21 Cal.4th 628, 644; see also *Wil-*

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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 ...." (*Ibid.*)

liamson v. Lee Optical Co. (1955) 348 U.S. 483, 489 ["[e]vils in the same field may be of different dimensions and proportions, requiring different remedies"].)

> "The Legislature has prescribed an LWOP sentence for only a small number of crimes. These are the crimes the Legislature deems so morally depraved and so injurious as to warrant a sentence that carries no hope of release for the criminal and no threat of recidivism for society. In excluding LWOP inmates from youth offender parole hearings, the Legislature reasonably could have decided that youthful offenders who have committed such crimes—even with diminished culpability and increased potential for rehabilitation—are nonetheless still sufficiently culpable and sufficiently dangerous to justify lifetime incarceration." (*In re Williams*, *supra*, 57 Cal.App.5th at p. 436.)

Furthermore, it is irrelevant whether the list of special circumstances has grown over the years or that they "could have been charged in 95 percent of all first degree murder convictions." This court has repeatedly held that the number of special circumstances listed in section 190.2 "adequately performs its constitutionally required narrowing function" are not "over inclusive by their number or terms" and have not "been construed in an unduly expansive manner." (*People v. Burgener* (2003) 29 Cal.4th 833, 884; *Arias*, *supra*, 13 Cal.4th at p. 187; see also *People v. Kraft* (2000) 23 Cal.4th 978, 1078.) Moreover, as discussed *supra* at page 25, when a prosecutor exercises the discretion to charge a murderer with special circumstances, " 'the fact or set of facts' that undergird the special circumstances must be 'found beyond a reasonable doubt by a unanimous verdict ....' " (*People v. McDaniel* (2021) 12 Cal.5th 97, 144, quoting *Engert, supra*, 31 Cal.3d at p. 803.) Thus, even if special circumstances "could have been charged in 95 percent" of first degree murder cases, any charged special circumstance(s) that are unanimously found to be

true beyond a reasonable doubt sufficiently narrows the "less culpable" from the "more culpable" and is not "illusory."

Additionally, it is further rational to speculate that the Legislature had crime victims in mind when they made the conscious choice to exclude young adult offenders sentenced to LWOP from section 3051. The sentence of LWOP exists for good reasons, and legal finality for a murder victim's family is one of them. "Victims of crime are entitled to finality in their criminal cases," including protection against "the ongoing threat that the sentences of criminal wrongdoers will be reduced." (Cal. Const., art. I, § 28, subd. (a)(6).) Authorizing a parole hearing for offenders like Hardin who were sentenced to LWOP would effectively change the original LWOP sentence into a life *with* the possibility of parole sentence, in violation of this right.

Proposition 9, known as the "Victims' Bill of Rights Act of 2008: Marsy's Law," explicitly states that protecting all victims of crime is "a matter of high public importance." (2008 Cal. Stat. A-298; Cal. Const., art. I, § 28, subd. (a)(2).) The prefatory sections of Marsy's Law guarantee to victims that "California's elected, appointed, and publicly employed officials" will enforce their rights and will "appropriately and thoroughly" investigate crimes and bring those "persons who commit felonious acts causing injury to innocent victims" before the courts and will ensure that they are "sentenced and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance." (Cal. Const., art. I, § 28, subd. (a)(4).)

Marsy's Law gave victims a voice and it "demands a broad interpretation protective of victims' rights." (*Santos v. Brown* (2015) 238 Cal.App.4th 398, 418.) Crime victims not only have a constitutional right to a "prompt and final conclusion of the case and any post-judgment proceedings" (Cal. Const., art. I, § 28, subd. (b)(9)), but they also have a right that is "held in common

with all of the People of the State of California" that "[s]entences that are individually imposed upon convicted criminal wrongdoers based upon the facts and circumstances surrounding their cases shall be carried out in compliance with the courts' sentencing orders ...." (*Id*., subd. (f)(5).) If the Legislature were to authorize parole eligibility for non-parole-eligible offenders, it would impinge on multiple rights guaranteed to victims by Marsy's Law. Respect for these rights is an entirely rational basis for the Legislature to exclude LWOP-sentenced young adult murderers from section 3051. Indeed, it is a compelling reason.

A third, and final, reason why it was rational for the Legislature to exclude young adult offenders sentenced to LWOP is because it was the electorate who voted to expand and modify the list of special circumstances so as to "broaden[] the class of persons subject to the most severe penalties known to our criminal law"—death or LWOP—when they enacted Proposition 7. (*Nash*, *supra*, 52 Cal.App.5th at p. 1057, quoting *People v. Weidert* (1985) 39 Cal.3d 836, 844.) Article II, section 10, subdivision (c) of the California Constitution limits the Legislature's authority to amend initiative statutes without voter approval. Voters have the absolute power to decide if they want to delegate some of their law-making authority to the Legislature by allowing them to amend initiative statutes without voter approval. (*Amwest Surety Ins. v. Wilson* (1995) 11 Cal.4th 1243, 1251.) If so allowed, this absolute power also encompasses the electorate's ability to place restraints on that delegated authority. (*Ibid*. ["subject to conditions attached by the voters"].)

An initiative statute can be amended by the Legislature only if expressly authorized to do so by the initiative itself, and it must be accomplished in strict compliance with the terms stated therein. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568.) A legislative act amends an initiative statute if "it prohibits

what the initiative authorizes, or authorizes what the initiative prohibits." (*Id*. at p. 571; see also *People v. Kelly* (2010) 47 Cal.4th 1008, 1026-1027; *People v. Cooper* (2002) 27 Cal.4th 38, 44 ["An amendment is a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision"].)

When an offender is convicted of first degree murder with one or more special circumstances, Penal Code section 190.2, subdivision (a), an initiative statute, mandates a sentence of either death or LWOP. If the Legislature were to have included offenders like Hardin who were sentenced to LWOP pursuant to section 190.2, subdivision (a) to the list of offenders eligible for a youth offender parole suitability hearing pursuant to section 3051, such action would have changed all past, present, and future section 190.2, subdivision (a) LWOP sentences into life *with* the possibility of parole sentences by operation of law. (See *People v. Franklin* (2016) 63 Cal.4th 261, 281 ["Section 3051 ... effectively reforms the parole eligibility date of a juvenile offender's original [LWOP] sentence so that the longest term of incarceration before parole eligibility is 25 years"].) Thus, authorizing parole eligibility at 25 years incarceration for non-parole-eligible offenders would effectively prohibit a sentence that Proposition 7 mandated, and would thus amend the statutory provisions of Proposition 7.

Proposition 7 did not contain a provision that would allow the Legislature to make amendments to its statutory provisions without voter approval. (*Cooper, supra*, 27 Cal.4th at p. 44.) It is rational to conclude that the Legislature was aware of the constitutional limitation on their authority to include young adult LWOP offenders to the list of those entitled to a youth offender parole hearing when they chose to expressly exclude them from the statute.

II. The Court of Appeal's choice of remedy is at odds with the California Constitution.

As discussed *supra* at page 21, the Court of Appeal held that the Legislature's exclusion of young adult offenders sentenced to LWOP from section 3051 violates the equal protection clause. The court held that Hardin "is entitled to a youth offender parole hearing and a meaningful opportunity to be released on parole at some point and, as such, is also entitled to a *Franklin* hearing to assemble information concerning his youth-related mitigating factors." (*Hardin*, 84 Cal.App.5th at p. 279.) The court reversed the trial court's denial of Hardin's motion for a *Franklin* hearing, and remanded the case with directions to schedule a hearing and conduct further proceedings consistent with the court's opinion. (*Id.* at p. 291.)

The Court of Appeal's disposition of the case simply assumed, without further discussion, that the proper remedy is to add Hardin and others like him to the list of offenders who benefit from section 3051 in order to cure the equal protection violation. However, the court neglected to recognize that "[w]hen a court concludes that a statutory classification violates the constitutional guarantee of equal protection of the laws, it has a choice of remedies." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1207, citing *Califano v. Westcott* (1979) 443 U.S. 76, 89-91 ["court may either withdraw benefits ... from favored class or extend those benefits to excluded class"]; see also *Sessions v. Morales-Santana* (2016) 582 U.S. 47, 72-73 [same].)

In *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 626, this court affirmed "the propriety of judicial reformation—including 'rewriting'—of statutes to preserve constitutionality when (i) doing so closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred such a reformed version of the statute over the

invalid and unenforceable statute." Along with criteria (i) and (ii), reformation "to preserve constitutionality" presumes that the reformed statute is one that the enacting body had the power to enact, not one that would itself be unconstitutional for a different reason. Judicial reformation surely does not extend to rewriting a statute in a way that the enacting body could not have constitutionally enacted in the first instance. "When we exercise our power of reformation, we do so in order to *preserve* a statute's constitutionality, not to threaten it." (*Briggs v. Brown* (2017) 3 Cal.5th 808, 857, italics in original.)

As discussed in Part I.C., *supra*, when an offender is convicted of first degree murder with special circumstances, section 190.2, subdivision (a), an initiative statute, mandates a sentence of either death or LWOP. An initiative statute can be amended by the Legislature only if expressly authorized to do so by the initiative itself, and it must be accomplished in strict compliance with the terms stated therein. (*Pearson, supra*, 48 Cal.4th at p. 568.) Amendments are not limited to changes in the statutory sections enacted by the initiative. (See, e.g., *Kelly*, *supra*, 47 Cal.4th at pp. 1012, 1014 [new section added by Legislature invalidly amended earlier section added by initiative].) Proposition 7 did not contain an amendment clause.

The constitutionality of the judicially reformed product has priority over the perceived preferences of the enacting body. (*Briggs*, *supra*, at pp. 857-858.) In the present case, it does not matter whether the Legislature would have preferred to apply section 3051 to LWOP-sentenced young adult murderers versus denying it to 25-to-life-sentenced young adult murderers. The Legislature had no authority to choose the former option because the people had forbidden it by initiative. If the coexistence of subdivisions (b)(3) and (h) of section 3051 is found to violate the

constitutional requirement of equal protection, then (b)(3) must be stricken.

CONCLUSION

The judgment of the Court of Appeal for the Second Appellate District, Division Seven should be reversed.

Date: August 31, 2023

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court,
Rule 8.520, subd. (c)(1)

I, Kymberlee C. Stapleton, hereby certify that the attached **BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT** contains 9202 words, as indicated by the computer program, WordPerfect, used to prepare the brief.

Date: August 31, 2023

Respectfully Submitted,

KYMBERLEE C. STAPLETON
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PROOF OF SERVICE

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816.

On August 31, 2023, I served true copies of the following document described as:

APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

on the interested parties in this action as follows:

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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, Sacramento, California.

Kymberlee C. Stapleton

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