IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent;* *v.* **TONY HARDIN,** *Defendant and Appellant.*	Case No. **S277487** *Ct. App. Case No. B315434* *Super. Ct. Case No. A893110* *(Los Angeles County)*

COMBINED APPLICATION TO FILE AN AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT, THE PEOPLE OF THE STATE OF CALIFORNIA

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APPLICATION FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF

Amicus Curiae, the District Attorney of the County of San Bernardino, respectfully applies to the Chief Justice for permission to file an amicus curiae brief. (Cal. Rules of Court, rule 8.520(f)(1).) The application is timely if filed by August 31, 2023.[1] (Cal. Rules of Court, rule 8.520(f)(2).) The application for permission to file and the proposed brief of amicus curiae in support of respondent have been combined. (Cal. Rules of Court, rule 8.520(f)(5).)

A. Interest of Amicus Curiae, the San Bernardino County District Attorney

The District Attorney has the primary responsibility to prosecute criminal offenses in the name of the People of the State of California in the County of San Bernardino, which stretches across more than 20,000 square miles and is home to more than two million people. (Gov. Code, § 26500.)

The rule announced in *People v. Hardin* (2022) 84 Cal.App.5th 273 has the potential to affect over a hundred convictions from San Bernardino County, where defendants between the ages of 18 and 25 at the time of their offense were sentenced to life without parole. It will also affect special circumstance murder cases going forward; for murderers aged 18 to 25, only a sentence of death will provide reasonable assurance that a future release on parole will not occur.

[1] The reply brief was filed on August 1, 2023.

B. Assistance to the Court

Amicus Curiae, the District Attorney, hopes and expects that the proposed brief will assist the Court. In addition to its equal protection analysis, arguing that Penal Code section 3051 does not violate the equal protection guarantee, the brief recounts the facts of the underlying conviction in this case and discusses what remedy would be appropriate if an equal protection violation existed. The last point, in particular, is not explored by the parties' briefs.

C. Authorship by Interested Parties

This brief was authored by Brent J. Schultze, Lead Deputy District Attorney, of the San Bernardino County District Attorney's Office. The District Attorney of San Bernardino County represents the People of the State of California, in whose name he prosecutes criminal cases.

The Attorney General also represents the People of the State of California, respondent in this case.

Neither the Attorney General nor any other party to this case, nor counsel for the Attorney General nor any other party has authored the proposed amicus curiae brief in whole or in part, nor made any monetary contribution intended to fund the preparation or submission of the brief. (Cal. Rules of Court, rule 8.520(f)(4).)

PROPOSED AMICUS CURIAE BRIEF

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PEOPLE *v.* *HARDIN*	*S277487*

INTRODUCTION

When defendant and appellant Tony Hardin was 25 years old, he robbed and murdered his senior citizen neighbor, Norma Barber. After strangling her to death, he drank her beer, smoked her cigarettes, and pawned, traded, or otherwise used some of her possessions to obtain drugs or money for drugs. Norma Barber was killed for her material possessions so that Hardin could feed his vices. After being convicted of first degree murder and the special circumstance of robbery, among other things, he was sentenced to life imprisonment without the possibility of parole.

A 25-year-old who was sentenced to prison for an offense with a lengthy but parole-eligible sentence would be considered for parole after no more than 25 years in prison, under the youthful offender parole provisions of Penal Code section 3051. The Court of Appeal in this case held that Hardin's ineligibility for parole at any time violates the equal protection guarantee, because when the Legislature extended youthful offender parole to persons up to age 25, it was animated by concerns about youthful immaturity and brain development, not the seriousness of the offense.

The Court of Appeal did not uphold a critical distinction that is woven into the law governing parole eligibility. For some offenders, although their crimes may be serious, they may be sufficiently reformed someday to be released. For such offenders who committed their crimes when young, the Legislature has determined that the evaluation of their efforts at reform will begin no later than 25 years into their sentence.

But for other offenders, their crimes are so serious that only two punishments are provided by law: death or life imprisonment without the possibility of parole. The legislative judgment is that such offenders should never be evaluated for release; their crimes, and the corresponding risk they pose, is too great. Having committed special circumstances murder, Hardin falls under this legislative policy choice.

The Legislature has never indicated that the youthful offender parole provisions were intended to upset this clear distinction between those offenders who are eligible for parole and those who are not. Given the factual differences between the crimes committed by the two groups, the distinction is reasonable and does not violate equal protection.

Finally, the legislative policy that special circumstance murderers should never be considered for parole was made by the electorate. If youth offender parole provisions do create an equal protection violation, that benefit should be withdrawn from young adult offenders, not extended to the ineligible.

QUESTION PRESENTED

The Court has granted review to determine:

> Does Penal Code section 3051, subdivision (h), violate the Equal Protection Clause of the Fourteenth Amendment by excluding young adults sentenced to life without the possibility of parole from youth offender parole consideration, while young adults sentenced to parole-eligible terms are entitled to such consideration?

BRIEF ANSWER

Subdivision (h) of Penal Code[2] section 3051 does not violate the Equal Protection Clause of the Fourteenth Amendment. The subdivision at issue makes most incarcerated young adults aged 18–25 eligible for parole after serving no more than 25 years but denies such eligibility to same-aged young adults sentenced to life imprisonment without the possibility of parole. Due to the *additional facts* required for a life-without-parole sentence, the two groups are not similarly situated; equal protection jurisprudence has long held that things that are factually different need not be treated as if they were the same. Even if they were similarly situated, however, any disparity is reasonable, given the greater culpability of the latter group—a matter of state policy that has been set by the Legislature and the electorate; it is reasonable

[2] Further statutory references are to the Penal Code, unless otherwise designated.

to reserve life-without-parole sentences for those who have committed crimes with extra facts that merit additional condemnation and punishment.

Special circumstance murder *must* be punished by death or life imprisonment without parole—no other penalty exists. (§ 190.2, subd. (a).) Because this choice was made by the People via initiative, the Legislature's power to change it is limited. If the Court determines that section 3051 violates the equal protection guarantee, then the remedy is to limit the reach of the statute to juveniles, not to extend its benefits to all young adults.

FACTUAL AND PROCEDURAL BACKGROUND

The Robbery and Murder of Norma Barber

Norma Barber lived alone in an apartment in the complex where Tony Hardin was a night security guard; he lived two doors down from her. (*People v. Hardin* (July 19, 1993, B051873) nonpub. opn., p. 2[3] (*Hardin I*).) After she was not heard from for a few days, her son came looking for her. (*Id.* at pp. 2–3.) He discovered that her car was gone, there were newspapers stacked by her door, and the deadbolt was not locked, even though it was her habit to lock it. (*Id.* at pp. 3, 6.) Inside the apartment, Ms. Barber's microwave and VCR were missing. (*Id.* at p. 3.) Worst of all, he found her body under the bed; she had bruises on her head and chest, ligature marks on

[3] Citations to *Hardin I* use the pagination of the slip opinion.

her neck and wrists, a belt binding her legs, her shorts and pantyhose pulled down to her knees, and her tee shirt and robe pulled up to her breasts. (*Ibid.*) Ms. Barber had been murdered by strangulation. (*Ibid.*) The marks on her wrists were made by a hard surface with a serrated edge. (*Id.* at p. 11.)

Ms. Barber had been a security-conscious woman, who only allowed people she recognized into her apartment. (*Hardin I*, *supra*, B051873, p. 7.) Hardin was one of her friends and had been in her apartment for social activities such as dinner or drinks. (*Ibid.*) It was discovered that he had a key to her apartment, although he was not authorized to have keys to any apartment other than his own. (*Id.* at p. 11.)

Ms. Barber's car was found a few blocks away, with Hardin's fingerprint on the inside of the driver's side window, even though he claimed he had never been inside it. (*Hardin I*, *supra*, B051873, pp. 4, 10.) There was no obvious damage that would suggest that it had been driven without the key. (*Id.* at pp. 10–11.) Ms. Barber was possessive of her vehicle and did not allow others to drive it. (*Id.* at p. 12.)

Beer cans and cigarette butts of the brands that she kept and smoked[4] were found inside Hardin's apartment, as were handcuffs. (*Hardin I*, *supra*, B051873, p. 4.) Given that Ms. Barber smoked two packs a day and kept a supply at home, it was odd that no unsmoked cigarettes were found in her own apartment. (*Id.* at p. 9.) She was not much of a beer drinker,

[4] Ms. Barber smoked Vantage cigarettes while Hardin was partial to Kool. (*Hardin I*, *supra*, B051873, pp. 4, 9, 10.)

keeping it on hand for visitors; of the ten cans that had been in her refrigerator, only two remained. (*Ibid.*)

The morning after the most likely night of the murder, Hardin had some of Ms. Barber's things. (*Hardin I*, *supra*, B051873, p. 7.) He tried to trade one of her necklaces for rock cocaine, but the dealer wanted cash. (*Ibid.*) Instead, Hardin chauffeured the dealer in exchange for drugs, using Ms. Barber's car. (*Ibid.*) Hardin managed to get $15 from a pawn shop (where the car received a parking ticket) for two necklaces, two charms, and one ring that belonged to Ms. Barber, and used the money to buy drugs. (*Id.* at pp. 7–8.) One of the drug dealer's customers bought cocaine from him out of Ms. Barber's car while Hardin drove. (*Id.* at p. 8.) Hardin later traded Ms. Barber's VCR and microwave for more cocaine and lent his dealer her car—again for more drugs. (*Id.* at pp. 8–9.)

Conviction and Direct Appeal

Hardin was convicted of first degree murder (§ 187, subd. (a)). (*Hardin I*, *supra*, B051873, p. 4.) The jury also convicted him of residential robbery (§ 211) and grand theft of an automobile (§ 487, subd. (c)) and found that the murder occurred during a robbery (§ 190.2, subd. (a)(17)). (*Hardin I*, p. 4). It further found that he inflicted great bodily injury on a person 60 years old or older (former § 1203.9, subd. (a)). (*Hardin I*, p. 4.)

The jury elected to sentence Hardin to life in prison without the possibility of parole. (*Hardin I*, *supra*, B051873, pp. 2, 4–5.) On direct appeal, the Court of Appeal concluded

that the evidence was sufficient to find beyond a reasonable doubt that Hardin murdered Norma Barber. (*Id.* at pp. 2, 5–12.) The appellate court similarly found that there was sufficient evidence of premeditation and that the murder was committed in the course of a robbery. (*Id.* at pp. 13–19 [premeditation], 19–22 [robbery].)

Subsequent Proceedings

In 2021, Hardin filed a motion asking to develop the record for a youth offender parole hearing,[5] even though he had been sentenced to life imprisonment without the possibility of parole. (*People v. Hardin*, *supra*, 84 Cal.App.5th at p. 280 (*Hardin II*).) The trial court denied his request, due to his statutory ineligibility for parole. (*Ibid.*)

The Court of Appeal held that because he had been 25 years old when he murdered Norma Barber, Hardin's ineligibility violated the equal protection guarantee. (*Hardin II*, *supra*, 84 Cal.App.5th at pp. 284–291.) The court acknowledged that there would be a rational basis for disparate treatment between adults and juveniles. (*Id.* at p. 285.) Agreeing with *People v. Sands* (2021) 70 Cal.App.5th 193 (*Sands*), the court noted that life without parole sentences for young adults do not violate the Eighth Amendment; rather, it was the disparate treatment of different categories of young adults that created the problem the Court of Appeal perceived. (*Hardin II*, at pp. 285–286.)

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[5] Pursuant to *People v. Franklin* (2016) 63 Cal.4th 261.

ANALYSIS

I.

A LIFE WITHOUT PAROLE SENTENCE FOR YOUNG ADULT SPECIAL CIRCUMSTANCE MURDERERS DOES NOT VIOLATE THE EQUAL PROTECTION GUARANTEE

The Constitution gives states wide latitude to enact laws, which may affect some groups of citizens differently from others. (*McGowan v. State of Maryland* (1961) 366 U.S. 420, 425.) Equal protection is offended only if the classification rests on grounds that are "wholly irrelevant to the achievement of the State's objective." (*Ibid.*) The Legislature is presumed to have acted constitutionally, even if in practice some inequality may result from the law. (*Id.*, at pp. 425-426.) Such laws are not to be set aside "if any state of facts reasonably may be conceived to justify it." (*Id.*, at p. 426.) The Legislature is not required to extend a law to all possible cases; it is free to recognize degrees of harm and may choose which harms to target. (*Bd. of Education v. Watson* (1966) 63 Cal.2d 829, 833; see also *Tigner v. Texas* (1940) 310 U.S. 141 [it was lawful to criminalize industrial and commercial anti-trust conspiracies but not agricultural ones].)

For criminal law, the existence of two criminal statutes with identical elements but different punishments does not violate equal protection. (*United States v. Batchelder* (1979) 442 U.S. 114, 124–125; *People v. Wilkinson* (2004) 33 Cal.4th 821,

838–839.) Minor differences in the elements of an offense do not change this; for example, having different sentences for possessing different drugs does not violate equal protection. (See *United States v. Singleterry* (1st Cir. 1994) 29 F.3d 733, 740-741; *United States v. Thurmond* (10th Cir. 1993) 7 F.3d 947, 950-953.) An equal protection violation only occurs if there is no rational relationship between a disparity in treatment and some legitimate governmental purpose. (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881 (*Johnson*), quoting *People v. Turnage* (2012) 55 Cal.4th 62, 74.)

A. Young Adults Who Have Committed Special Circumstance Murder Are Not Similarly Situated to Young Adults Who Have Committed Murder Without a Special Circumstance or other Serious Crimes, Due to the Additional Factual Elements of the Special Circumstance

The first prerequisite to an equal protection claim is a showing that the state has adopted a classification that affects two or more similarly-situated groups in an unequal manner. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 (*Cooley*).) Although the groups do not need to be similarly situated for all purposes, they do need to be similarly situated for the purposes of the law challenged. (*Ibid.*) In *Cooley*, the Court considered people civilly committed under the Sexually Violent Predator Act (SVPA) and the Lanterman Petris Short Act (LPS). Specifically, the Court looked at the probable cause hearing

under the SVPA and compared it to LPS-specific habeas corpus proceedings. (*Id.* at p. 254.) Due to the procedural differences in the two hearings, the Court found that the SVPA and LPS committees were *not* similarly situated, even though both were being involuntarily civilly committed. (*Ibid.*)

"The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1565; quoting *Tigner v. Texas*, *supra*, 310 U.S. 141, 147.) In Hardin's case, he is not similarly situated to a like-aged offender who committed murder without a special circumstance. Although both have killed, an additional factual element was proved in Hardin's case: that the murder was carried out during a robbery. (§ 190.2, subd. (a)(17).) Robbery is one of a number of circumstances that the Legislature has identified as being particularly reprehensible, and is closely related to the special circumstance of a murder committed for some form of financial gain. (See e.g. § 190.2, subd. (a)(1).) Such murders reduce human life to dollars and cents. Other special circumstances include but are not limited to: the murders of multiple victims (§ 190.2, subd. (a)(2)); murders of victims on account of race, color, religion, nationality, or country of origin (§ 190.2, subd. (a)(16)); murders that involve rape and other sex crimes against the victim (§ 190.2, subds. (a)(17)(C)–(F), (K)); and other facts that the Legislature has determined merit extra condemnation. Such murders receive the two harshest penalties in our legal system: death and life without parole. (Pen. Code, §§ 190.2, 190.3.) A legislative

determination has been made: those who commit the most heinous murders should never be eligible for parole.

Norma Barber was murdered for beer, cigarettes, some jewelry, small appliances, and the use of her automobile. A human life was violently ended for sundries and trinkets. Her murder was fundamentally different from one that was committed without those additional facts related to the robbery.

The Court of Appeal below failed to appreciate this difference. It equated murder in the course of a robbery with a separate robbery and murder committed on different days. (*Hardin II*, *supra*, 84 Cal.App.5th at p. 288.) In this, it did not understand what the robbery-murder special circumstance condemns: killing another human being to facilitate theft—a robbery where the force or violence used is fatal. The senselessness of such a murder is what merits greater punishment—violently ending the life of another for nothing more than filthy lucre.

A murder committed to facilitate a robbery is factually different from a regular murder. The two crimes are not the same.

The Court of Appeal attempted to sidestep the factual difference between murders with and without a special circumstance. It cited the Committee on the Revision of the Penal Code's 2021 Annual Report and Recommendations' (Report) assertion that a special circumstance could have been charged in 95 percent of all first degree murder cases. (*Hardin II*, *supra*, 84 Cal.App.5th at p. 290.) The relevance of this

proffered statistic to the equal protection inquiry is scant; whether five percent or 95 percent of murders have a special circumstance, they are still factually different from those that do not. But the Report relied on a questionable source for this assertion, specifically Baldus et al., *Furman at 45: Constitutional Challenges from California's Failure to (Again) Narrow Death Eligibility* (2019) 16 J. Empirical Legal Stud. 693 (Baldus).

The journal article was based on a review of probation reports from homicide cases from January 1, 1978 through June 30, 2002. (Baldus, at p. 707.) They considered 1,900 cases—6.9 percent of eligible cases. (*Ibid.*) The probation reports were reviewed and coded by law students or recent graduates, who determined whether the case could have been eligible for the death penalty, even when a special circumstance had not been charged or when the charge was not even first degree murder. (*Id.* at pp. 710–712.)

One must question the reliability of data produced by inexperienced law students and recent graduates reading probation reports.[6] This process produced strange results,

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[6] In addition, probation reports generally summarize the police reports. This raises two problems with the article's approach. First, the factual summary in a probation report is generally *significantly* shorter than the police reports and necessarily omits numerous details—including some that can be critical to charging decisions. Second, probation reports almost never take into account the evidence that was produced at a preliminary hearing or trial—evidence which may be different from what was in the police reports. The preliminary hearing in particular can greatly affect the ultimate charges in a case.

concluding that 95 percent of first degree murder convictions would have been "death eligible" under 2008[7] law, that 38 percent of second degree murders and 47 percent of voluntary manslaughters would have been death eligible. (Baldus, at p. 714, table 2.) That manslaughter had a higher "death eligible" rate than second degree murder is incongruous and unexpected, to say the least. It highlights the reality that the facts in a probation report, as interpreted by a law student or graduate, may be very different from the facts on the ground that lead to either an admission of guilt or a trial verdict.

Special circumstances are additional facts that make murderers eligible for the two most serious punishments that the law recognizes: death and life imprisonment without parole. Young adults who have committed murder with one or more special circumstances are fundamentally different from young adults who have committed murder without a special circumstance. The two groups of offenders are not similarly situated, as other Courts of Appeal have recognized. (*People v. Jackson* (2021) 61 Cal.App.5th 189, 199 (*Jackson*); *In re Williams* (2020) 57 Cal.App.5th 427, 435.)

[7] A separate weakness of the article's approach was applying 2008 law to cases from 1978–2002. It is difficult to conceive how a probation officer could have written a report that would take into account the state of the law between six and thirty years later.

B. Even if the Groups Were Similarly Situated, there Is a Rational Basis for Denying Parole Eligibility to Young Adults Who Have Committed Special Circumstance Murders, Which Are More Serious than Murders Lacking a Special Circumstance

Even assuming that young adult offenders who committed murder with one or more special circumstances were deemed similarly situated to those who committed murder without a special circumstance, any disparity in treatment at sentencing would be reasonable.

The Legislature's classifications are presumed to be rational; any plausible rational basis must be accepted, without questioning its wisdom, logic, persuasiveness, or fairness, even if the Legislature never articulated it. (*Sands*, *supra*, 70 Cal.App.5th at p. 204, citing *People v. Chatman* (2018) 4 Cal.5th 277, 289.)

It is rational to treat special circumstance murder more harshly than murder without such an additional factual element. Such crimes are "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 re Williams*, *supra*, 57 Cal.App.5th at p. 436.) Even assuming that youth indicates decreased culpability and increased potential for rehabilitation, the Legislature could have rationally decided that such offenders are not worth the risk—that they remain "sufficiently culpable and sufficiently dangerous to justify lifetime incarceration." (*Ibid.*)

These are precisely the choices that rational-basis, equal protection review leaves to the Legislature. "It is in no way irrational, or even contradictory, that the Legislature allows parole for other youthful offenders who, in its view, committed less heinous homicides." (*Sands*, *supra*, 70 Cal.App.5th at p. 205.)

Below, the Court of Appeal acknowledged the views of *In re Williams*, *supra*, 57 Cal.App.5th 427 and *Sands*, *supra*, 70 Cal.App.5th 193, but disagreed with them. (*Hardin II*, *supra*, 84 Cal.App.5th at pp. 288–289.) The *Hardin II* court noted that there could be heinous criminals who did not commit special circumstance murder who would remain eligible for youthful offender parole consideration. (*Id.* at p. 289.) But as this Court observed in *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 487, the perfect can be the enemy of the good. The Legislature is not required to forego any legislating that does not achieve perfection. (See *ibid.*) "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." (*Ibid.*, quoting *City of Dallas v. Stanglin* (1989) 490 U.S. 19, 27 and *Metropolis Theater Co. v. City of Chicago* (1913) 228 U.S. 61, 69–70.)

In enacting section 3051, the Legislature first sought to address the sentences of juveniles tried and sentenced as adults. (See *Jackson*, *supra*, 61 Cal.App.5th at p. 194.) It then extended the benefits of youthful offender parole hearings to young adults under age 23 at the time of their crimes, and then to those under age 26. (*Ibid.*) A legislature "must be allowed

leeway to approach a perceived problem incrementally." (*F.C.C. v. Beach Communications, Inc.* (1993) 508 U.S. 307, 316.)

The problem with the *Hardin II* court's approach is that it focused only on the Legislature's reasons for making those incremental changes. (See *Hardin II*, *supra*, 84 Cal.App.5th at p. 287.) It then presumed that such reasons must apply to all choices that the Legislature made—including the unexplained decision *not* to make certain changes. But the Legislature cannot be required to provide an explanation for every action it does not take. Such a requirement would fly in the face of the principle that any rational basis must be accepted, even if it was never articulated, even if it was not empirically substantiated, and even if is not persuasive or sensible—it merely need be rational. (*People v. Chatman*, *supra*, 4 Cal.5th at p. 289.)

II.

IF SECTION 3051 WERE TO CREATE AN EQUAL PROTECTION VIOLATION, THE ONLY VIABLE REMEDY IS TO WITHDRAW SECTION 3051'S BENEFITS FROM OTHER YOUNG ADULTS

A. Where there Is an Equal Protection Violation, the Court Should Determine Whether the Offending Statute's Benefit Should Be Extended or Denied

For the reasons previously discussed, section 3051 creates no equal protection violation. But assuming that the Court were to determine that section 3051 violates the equal protection guarantee, the issue of remedy comes into play. The Court would have two options: either invalidate the statute in order to deny its benefits to the favored class or extend its benefits to the excluded class. (*Califano v. Westcott* (1979) 443 U.S. 76, 89, quoting *Welsh v. United States* (1970) 398 U.S. 333, 361, conc. opn. of Harlan, J.; see also *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1207 (*Hofsheier*), overruled on other grounds in *Johnson*, *supra*, 60 Cal.4th 871.) The Court should try to ascertain which alternative the Legislature would prefer. (*Hofsheier*, at p. 1207.) Although a severability clause in the statute might clarify things in that regard (*ibid.*), section 3051 contains no such provision.

B. Because the Penalties in Section 190.2 Were Set by the Electorate, They Must Receive a Higher Level of Deference and Protection

The Legislature declares the public policy of the state, except in matters of constitutional law. (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 71.) The electorate may act as a constitutionally empowered legislative entity by exercising its initiative power. (Cal. Const., art. II, § 8; *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1045.)

The power of the People of the state to legislate is liberally construed to avoid improper annulment. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 695; *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591 (*Associated Home Builders*), quoting *Mervynne v. Acker* (1961) 189 Cal.App.2d 558, 563–564.) The power of initiative is greater than the power of a legislative body; the latter may be bound by initiative, but not the former. (*Rossi v. Brown*, at p. 715.)

Section 190.2 was enacted[8] in 1978 when the electorate passed Proposition 7. (Gen. Elec. (Nov. 7, 1978) § 6.) The penalties for special circumstance murder—death or life in prison without parole—were set at that time. The People of California have amended the statute several times since but have never changed the penalty found in subdivision (a)(1) of

[8] A prior version of section 190.2 was repealed at the same time. (Prop. 7, Gen. Elec. (Nov. 7, 1978) § 5.)

section 190.2. Similarly, the Legislature has never disturbed[9] the punishments for special circumstance murder that the electorate established 45 years ago.

C. If Section 3051 Creates an Equal Protection Violation, Withdrawing its Benefits from Young Adult Offenders Is the Constitutional Remedy

The electorate has made its preference clear: special circumstance murder shall be punished by death or life imprisonment without parole. (§ 190.2, subd. (a)(1).) The Legislature has not indicated that its creation of section 3051 was intended to abrogate or alter this in any way.

The Court's duty is to ensure that the People's power of initiative is not improperly annulled and to jealously guard the right of the people to legislate. (*Rossi v. Brown*, *supra*, 9 Cal.4th at p. 695; *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776, quoting *Associated Home Builders*, *supra*, 18 Cal.3d at p. 591; see also *Legislature v. Eu* (1991) 54 Cal.3d 492, 501.)

Should the Court determine that section 3051 creates an equal protection problem, the remedy is to withdraw youthful offender parole hearings from young adults, as that would preserve all of what the electorate has enacted in section 190.2,

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[9] For example, the most recent legislative amendment to section 190.2 updated the change to the numbering of the code section for oral copulation. (Sen. Bill No. 1494 (2017–2018 Reg. Sess.) § 43.)

rather than carving out an exception for a large number of offenders.[10]

CONCLUSION

Murder with a special circumstance is factually different from murder without one. As such, the two groups of murderers are not similarly situated; the factual difference is sufficient to justify disparate treatment. Even if it were not, however, it is rational for the Legislature to treat the two groups differently, providing the possibility of parole to offenders who commit the second crime but not the first.

Most young adult offenders are eligible for parole under existing law. The Legislature may tinker with their parole eligibility dates without worry that in the process, they will inadvertently open the prison door to those who previously were never eligible for parole—special circumstance murderers who have committed the most serious crimes under criminal law. The Equal Protection Clause does not force such an all-or-nothing choice upon the Legislature.

But if section 3051 did create an equal protection problem, the remedy would be to deny its benefits to all young adult offenders. That would preserve what the electorate enacted in section 190.2, rather than cutting out portions of

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[10] The issue of juveniles tried as adults is not squarely presented by this case. However, given that *Miller v. Alabama* (2012) 567 U.S. 460 makes mandatory life-without-parole sentences unconstitutional, the portion of section 3051 that applies to juveniles sentenced as adults would remain intact.

the voter-enacted statute. This is the only rational choice, given that nothing in section 3051 suggests that the Legislature was even contemplating making special circumstance murderers eligible for parole.

The question of remedy would only arise if there were a bona fide equal protection violation created by section 3051; there is not. The two groups are not similarly situated, and if they were, any disparity in treatment is eminently rational, as most Courts of Appeal that have examined the issue have found.

We respectfully urge the court to find that section 3051 does not violate equal protection.

Done this thirty-first day of August, 2023, at San Bernardino, California.

Respectfully submitted,

JASON ANDERSON
District Attorney
County of San Bernardino

/s/
BRENT J. SCHULTZE
Lead Deputy
District Attorney
Appellate Services Unit

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached **Combined Application to File an Amicus Curiae Brief and Proposed Amicus Curiae Brief in Support of Respondent, the People of The State of California** consists of **5,163** words in a 13-point, Bookman Old Style typeface.

Done this thirty-first day of August, 2023, at San Bernardino, California.

Respectfully submitted,

JASON ANDERSON
District Attorney
County of San Bernardino

/s/
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Lead Deputy
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