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October 25, 2023

Mr. Jorge E. Navarrete
Clerk of the Supreme Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *People v. Hardin*, No. S277487

Honorable Justices of the California Supreme Court:

Per the court's order of October 4, 2023, *amicus curiae* Criminal Justice Legal Foundation submits this supplemental letter brief.

The question: "Whether the first step of the two-part inquiry used to evaluate equal protection claims, which asks whether two or more groups are similarly situated for the purposes of the law challenged, should be eliminated in cases concerning disparate treatment of classes or groups of persons, such that the only inquiry is whether the challenged classification is adequately justified under the applicable standard of scrutiny?"

Short answer: Similar situation of the two groups remains an essential element of an equal protection claim. A threshold showing remains necessary in many types of equal protection claims, including claims of discriminatory application of facially neutral statutes. For challenges to statutes which on their face apply unequally to groups defined in the statute, the question of similarity of situation may be congruent to the question of a rational basis for the classification so as to make a two-step inquiry unnecessary. Any exception to the existing procedure should be carefully limited to those situations where the two questions are necessarily congruent.

If and when the separate "similarly situated" inquiry is retained, there need not be a "rigid order of battle." As with most other claims, elements can be taken in any order, and once an essential element is found lacking there is usually no need to decide the others.

The *Eric B.* Concurrence

The court's question appears to be prompted by the concerns expressed in Justice Kruger's concurring opinion in *Conservatorship of Eric B.* (2022) 12 Cal.5th 1085, 1108-1117. We will address the substantive arguments in this opinion in the sections below, but first a couple of notes regarding the opinion's discussion of precedents are in order.

First, the opinion states that only a "handful of other jurisdictions have also sometimes applied some version of a threshold similarly situated inquiry," citing cases from the federal Fourth Circuit and Eleventh Circuit along with some state cases. (*Id*. at p. 1113, fn. 1.) It is more than a handful. Among the federal circuits, *all* have "sometimes applied some version of a threshold similarly situated inquiry" to equal protection claims. (See *Alston v. Town of Brookline* (1st Cir. 2021) 997 F.3d 23, 41; *Church of the Am. Knights of the KKK v. Kerik* (2d Cir. 2004) 356 F.3d 197, 210; *Shuman v. Penn Manor Sch. Dist*. (3d Cir. 2005) 422 F.3d 141, 151; *Duarte v. City of Lewisville* (5th Cir. 2017) 858 F.3d 348, 353-354; *Scarbrough v. Morgan County Bd. of Educ.* (6th Cir. 2006) 470 F.3d 250, 260; *Desris v. City of Kenosha* (7th Cir. 1982) 687 F.2d 1117, 1119; *Klinger v. Department of Corrections* (8th Cir. 1994) 31 F.3d 727, 731; *Pimentel v. Dreyfus* (9th Cir. 2012) 670 F.3d 1096, 1106; *Dalton v. Reynolds* (10th Cir. 2021) 2 F.4th 1300, 1308; *Women Prisoners of the D.C. Dep't of Corrections v. District of Columbia* (D.C. Cir. 1996) 93 F.3d 910, 924.) The limited time allowed for this supplemental brief does not permit a canvas of all the sister states, but the unanimity of the federal courts of appeals is sufficient to demonstrate that a complete abandonment of the "similarly situated" requirement is not in order.

Second, there is less than meets the eye in the purported "oddities" in this court's precedents. *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 875 overruled *People v. Hofsheier* (2006) 37 Cal.4th 1185, which had held that different sex offender registration requirements for persons convicted of different sex crimes violated the Equal Protection Clause. The *Eric B.* concurrence says that *Johnson* "purported to accept the similarly situated half of *Hofsheier*'s analysis." (12 Cal.5th at p. 1115.) *Johnson* actually says, "We need not reconsider this conclusion, because, in any event, we find *Hofsheier* erroneous in its rational basis analysis." (60 Cal.4th at p. 882.) In the context of deciding whether to overrule a precedent, *Johnson* merely decided that it need not take the elements in

order, and after finding one lacking it need not decide the other, a point discussed below.

In re C.B. (2018) 6 Cal.5th 118, 134, is similar. The court "assume[d], without deciding," that the groups were similarly situated before finding that there was a rational basis for treating them differently. Again, this only means that the two prongs may be taken in either order, as discussed below.

Finally, the concurrence asserts that there is a danger that a two-prong analysis could wrongfully cut off meritorious claims. (*Eric B.*, 12 Cal.5th at p. 1115.) But in a case where the two prongs do not meaningfully differ (see *ibid*.), it is hard to see how that could happen, and the concurrence offers no examples. In a case where the requirement does serve a useful function, discussed below, it is an essential element of an equal protection claim, and thus by definition its correct application cannot cut off a meritorious claim.

The strongest points raised by the *Eric B.* concurrence are (1) that the question of whether the groups are similarly situated and whether there is a rational basis for distinguishing them may not be materially different, at least in some cases, and (2) that a rigid requirement of always addressing one first may not be justified. We will address these points below.

The Similarly Situated Requirement

Very early in the history of the federal Equal Protection Clause, it was established that legislation does not fall with its prohibition "if within the sphere of its operation it affects alike all persons similarly situated." (*Barbier v. Connolly* (1885) 113 U.S. 27, 32.) The existence of favored and disfavored persons who are similarly situated is therefore an essential element of an equal protection claim. A classic law review article, written as the Equal Protection Clause was awakening from an 80-year slumber, explained it this way:

> "The essence of that doctrine can be stated with deceptive simplicity. The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated."

(Tussman and tenBrock, *The Equal Protection of the Laws* (1949) 37 Cal. L.Rev. 341, 344.)

The last sentence hints at the possible redundancy issue presented here. The reasonableness, as measured by the appropriate standard of review, may include the consideration of whether the groups in question are similarly situated.

There are some cases where a separate showing by the complaining party is clearly required, primarily those where a facially neutral statute is claimed to be applied in a discriminatory manner. In *United States v. Armstrong* (1996) 517 U.S. 456, 465-467, the United States Supreme Court illustrated this principle by contrasting two old California cases. In *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 357, a San Francisco ordinance required permission to operate a laundry in a wooden building. It was undisputed that hundreds of Chinese applicants were uniformly denied permission, while all but one of the non-Chinese applicants were granted permission. (*Id*. at p. 359.) On these facts, this was an equal protection violation. (*Id*. at p. 374.)

In *Ah Sin v. Wittman* (1905) 198 U.S. 500, 503, the ordinance prohibited barricading the entrance to a gambling den. Petitioner claimed that the ordinance was enforced only against Chinese people, but unlike *Yick Wo* did not allege "that there were other offenders against the ordinance than the Chinese as to whom it was not enforced." (*Id*. at pp. 507-508.) As no similarly situated but favored group was shown, the claim failed. (*Id*. at p. 508; *Armstrong*, *supra*, at pp. 466-467.)

The *Eric B.* concurrence asks "whether we might *always* do without" the two-step approach. (12 Cal.5th at p. 1114, italics added.) The answer to that broad question is no. In cases like *Armstrong*, "the similarly situated requirement is necessary." (517 U.S. at p. 466.) Indeed, the *Eric B.* concurrence notes the so-called "class of one" cases as another instance where "a similarly situated inquiry has a useful role to play." (12 Cal.5th at p. 1113.)

The court's question in the present case asks the somewhat more limited question of whether the first step "should be eliminated in cases concerning disparate treatment of classes or groups of persons." That

description of the class of cases is still overbroad. *Armstrong* could conceivably fit within that description.

A more focused class of cases would be those where a statute, regulation, or ordinance on its face defines two or more groups of people and treats them differently. The existence of the favored group is not in dispute, and a rational basis for treating them differently would necessarily mean that they are not similarly situated for the purpose of the enactment. (See *People v. McKee* (2010) 47 Cal.4th 1172, 1202.) In this limited class of cases, a single inquiry may be able to embrace all necessary considerations. However, this change should not be framed as eliminating the similar situation requirement but rather as including it in the rational basis inquiry. Unequal treatment of similarly situated people remains a foundational principle of equal protection law, and tossing it aside risks judicial encroachment of the legislative power. That danger is particularly acute when it comes to the legislative power to define crimes and set their punishments. That is a core legislative power, and courts must resist the temptation to encroach on it. (See *Harmelin v. Michigan* (1991) 501 U.S. 957, 998-999 (conc. opn. of Kennedy, J.).)

Rigid Order of Battle

While merger of the two prongs is a possibility in a limited class of cases, as discussed above, the two-prong approach is solidly established precedent and precedents ought not be lightly tossed aside. A more limited modification of precedent would be to keep the two prongs, recognizing that it is difficult to define in advance when they are redundant and when they are not, but softening the requirement that similar situation always be addressed at the threshold.

Generally, the elements of a multi-element claim may be addressed in any order. Requirements for a "rigid order of battle" (see *Pearson v. Callahan* (2009) 555 U.S. 223, 234) are the exception, not the rule. (*Id*. at p. 241.) Such rules "sometimes result[] in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case." (*Id*. at pp. 236-237.)

One of the most commonly invoked flexible-order rules is the one for deciding ineffective assistance of counsel claims. Although the actual deficiency of defense counsel is obviously the primary requirement, courts

can skip deciding it and deny a claim on the absence of prejudice (see *Strickland v. Washington* (1984) 466 U.S. 668, 697), and they very often do. Deficient performance and prejudice are not the same, but both require assessment of counsel's decisions in the context of the case, resulting in considerable overlap. That overlap is no problem at all for claims that lack merit (the vast majority), as the other prong need not be addressed after the easier question is answered against the petitioner.

The best argument for eliminating the two-step inquiry in a class of equal protection cases is that the prongs are often redundant, and deciding both is a waste of resources. In cases where the claim has no merit (including the present case), there would be no duplication under a flexible-order approach, as the court can decide the more obvious of the two and stop there. If the claim has merit, redundancy will result in little wasted effort, as deciding one substantially resolves the other. If there is any difficulty, that necessarily means that the two prongs were not redundant, and eliminating one would not have been in order.

Application to the Present Case

In accordance with existing precedent, amicus CJLF briefed the issue of whether young adult murderers convicted of first-degree murder with special circumstances are similarly situated to those convicted of first-degree murder without special circumstances. (See Brief of the Criminal Justice Legal Foundation as Amicus Curiae 21-30 (CJLF Brief).)[1] They are not, but the reasons why they are not also establish a rational basis for the classification. Special circumstances effectively establish a higher degree of offense. (*Id*. at p. 30, citing *People v. Homick* (2012) 55 Cal.4th 816, 845.) This distinction has much more than a rational basis; it is sufficient to

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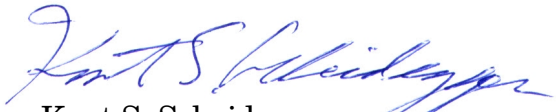
1. Petitioner objects that the court should not consider additional *arguments* raised by amici curiae but cites only cases addressing when the court should expand the *issues* presented by the case in response to an amicus brief. (Pet. Answer to Amicus Curiae Briefs 7-8.) Bringing to the court additional information, including legal arguments, relevant to deciding the issues already before the court is the very purpose of amicus curiae briefs and is recognized as a valuable contribution. (See, e.g., *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177; United States Supreme Court Rule 37.1.)

define the class of murderers subject to the death penalty under the more stringent standard of the Eighth Amendment, as this court has held many times over many years. (See, e.g., *People v. Miles* (2020) 9 Cal.5th 513, 605; CJLF Brief 33.)

In addition, the Legislature clearly had a rational basis for excluding adults sentenced to life in prison without possibility of parole because that sentence is the mandatory minimum for adults convicted of first-degree murder with special circumstances under an initiative that the Legislature cannot amend without a vote of the people. (CJLF Brief 35-36.) Petitioner concedes that Proposition 7 repealed the pre-existing section 190.2 of the Penal Code and enacted a new one (Pet. Answer Amici 12), but he tries to invoke the "technical reenactment" cases for amended statutes anyway. (*Id.* at pp. 10-14.) The attempt fails for the obvious reason that Proposition 7 did not amend the statutes, and the "quirk" introduced by the "reenact as amended" requirement of section 9 of article IV of the California Constitution is irrelevant to this statute. This was a new statute in 1978, not an amendment. Indeed, preventing undermining by the Legislature is very likely the reason why the drafters of Proposition 7 took the unusual step of repeal-and-add rather than amend. No other reason is apparent.

If the court goes directly to the rational basis test, whether by elimination of "similarly situated" step or by making the order of consideration optional, this is still a straightforward case. The same distinction that this court has repeatedly upheld under the Eighth Amendment for death sentences easily clears the rational basis hurdle for denying parole.

Respectfully submitted,



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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.

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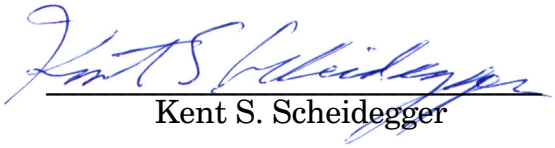

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10/25/2023

Date

/s/Kent Scheidegger

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