Supreme Court of California
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Jorge E. Navarrete, Clerk and Executive Officer of the Court
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October 25, 2023

The Honorable Jorge Navarette, Clerk of the Supreme Court
C/O California Supreme Court
350 McAllister St., Room 1295,
San Francisco, CA 94102

Re: People v. Hardin, Case No. S277487;
Amicus Letter and Appendix A in Support of Petitioner Tony Hardin

To the Honorable Chief and Associate Justices of the California Supreme Court,

The Santa Clara County Independent Defense Counsel Office (herein "IDO") respectfully submits this amicus letter in support of petitioner Tony Hardin in the above referenced matter. The Court has asked for supplemental briefing as to:

> 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?

The IDO's short answer is: **Yes,** the similarly situated analysis does not further the constitutional review of Penal Code section 3051 because age at the time of the controlling offense defines the universe of persons included and excluded from the benefits of youth offender parole. Justifying the opportunity for parole to only some youths sentenced to a term of years exceeding their lifetime, *i.e.*, "*de facto*" life without the possibility of parole, but not actual LWOP, based on "crime specific" facts result in the unequal denial of liberty. Youthful offenders sentenced to actual and *de facto* LWOP are equally deserving of a chance at

parole, particularly those who can demonstrate rehabilitation today, despite similar crime specific convictions in the past.

Herein, public records data from the Board of Parole Hearings illustrates how youths fitting the LWOP profile, but sentenced to *de facto* LWOP, have been released as rehabilitated, which justifies the possibility of parole for both classes of similarly aged youths.[1] Adolescent Brain Science demonstrates how youthful offenders, unlike adults, are sufficiently similar (by dint of incomplete psychological maturation) to warrant constitutional protection from total exclusion from parole under Penal Code section 3051. The IDO supports focusing the analysis on the inadequate justifications for the statutory exclusion to promote the promise of every young person standing equal before the law. (See *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 and *In re Allen* (1969) 71 Cal.2d 388, 390.)

THE INADEQUATE JUSTIFICATIONS FOR DENYING ELIGIBILITY FOR PAROLE TO REHABILITATED YOUTHFUL OFFENDERS SENTENCED TO ACTUAL, BUT NOT "*DE FACTO*" LWOP, DEMONSTRATES HOW THEY ARE NOT TREATED EQUALLY UNDER THE CALIFORNIA AND UNITED STATES CONSTITUTIONS

Analysis under the equal protection clause cannot "cut off inquiry into the core question, whether an admitted difference in treatment of two groups is justified under the law." (*Conservatorship of Eric B.* (2022) 12 Cal.5th 1085, 1116-17, concurring opn. Kruger, J.) Nor is it well-settled that the first step must inquire into whether the State has treated "two or more similarly situated groups in an unequal manner.'" (See, *Cooley v. Superior Court* (2003) 29 Cal.4th 228, 253, quoting *In re Eric J.* (1979) 25 Cal.3d 522, 530.) As demonstrated herein, comparison of public records information concerning youths sentenced to *de facto* and actual LWOP proves the inadequacy of relying on "crime-specific" facts to draw "similarly situated" comparisons between youthful offenders.

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[1] The IDO requested demographic, charging, and sentencing information for all persons who were denied Youth Offender Parole between December 2008 and January 1, 2023. (See, *infra,* Declarations of Brian C. McComas, Dr. Kathryn Albrecht, and Christopher McClure-St. Amant [Appendix A].) The BOP provided information about youth offender parole grants and denials, listing individual charges for each offender, but did not provide all the information requested. (*Ibid.*) Nor was a key provided for interpreting the public records data. (*Ibid.*)

The Board of Parole Hearings responded to California Public Records Act request by the IDO after amicus briefing was completed, but before this Court requested supplemental briefing. (See, *infra,* Declarations of Brian C. McComas, Dr. Kathryn Albrecht, and Christopher McClure-St. Amant [Appendix A].) The response reflects that 2,325 of some 8,698 persons were granted youthful offender parole in 15 years. (*Ibid*.) Sixty (60) individuals granted parole were validated as having been convicted of two or more violations of Penal Code section 187, and five were convicted of three or more murders. (*Ibid.*) Many of these persons suffered convictions very similar to the charge profiles for those individuals who received actual LWOP, yet young persons sentenced to terms exceeding their natural lifetimes were granted parole.[2] (*Ibid.*)

Particular to Santa Clara County, three individuals convicted of three homicides were released on youthful offender parole – Khoa Nguyen, Jefry Subana, and Son Nguyen – despite sentence exceeding their natural life. (See, *infra,* Declaration of Brian C. McComas [Appendix A].) One other co-defendant - Quang Tran - is also eligible for release. (*Ibid*.) Three co-defendants, including Senh Duong, are not eligible after sentence of LWOP. (*Ibid.*) All the co-defendants ranged in age between 17-20 years old at the time of the offenses - a distinction that should result in parole eligibility for all – but Mr. Duong remains in prison despite his rehabilitation as a non-leader and non-killer for offenses that have resulted in release of actual killer co-defendants.

Erroneously distinguishing between youthful offenders based on "crime-specific" reasons for the supposed lack of case "similarities" fails to justify the exclusion of rehabilitated youth from a chance at parole, while precluding the possibility of equal treatment. Youth offenders, like Mr. Duong and Mr. Hardin, are sufficiently similar to those granted release after similar offenses because "the mitigating attributes of youth are not 'crime-specific' [*Miller v. Alabama* (2012) 567 U.S. 460, 473] and statutory recognition that those attributes are found in young adults up to age 25, [as] it is questionable whether there is a rational basis for section 3051's exclusion of 18 to 25 year olds sentenced to life without parole." (*People v. Montelongo* (2020) 55 Cal.App.5th 1016, 1041b, conc. stmt. of Liu, J. added after denial of petition for review.) The statutory disparities facing

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[2] Inconsistencies in the data makes deeper analysis difficult without additional information pursuant to the CPRA. (See, *infra,* Declarations of Brian C. McComas, Dr. Kathryn Albrecht, and Christopher McClure-St. Amant [Appendix A].) In the meantime, the evaluation could be conducted by the Committee on the Revision of the Penal Code, which has more direct access to public records data and mechanisms for validating that data. (*Ibid*.)

only some youthful persons cannot withstand constitutional scrutiny based on the inadequate, "crime-specific" justifications offered by the State. (See *People v. Hardin* (2022) 84 Cal.App.5th 273 and *In re Jones* (2019) 42 Cal.App.5th 477, 486, conc. opn. of Pollak, J.)

THE SIMILARLY SITUATED STANDARD CANNOT PREVENT REVIEW OF THE LACK OF JUSTIFICATIONS FOR EXCLUDING REHABILITATED YOUTHFUL OFFENDERS FROM ELIGIBILITY FOR PAROLE IN LINE WITH THE PRINCIPLES OF ADOLESCENT BRAIN SCIENCE

The principles of Adolescent Brain Science provide an analytical framework for Penal Code section 3051 that applies generally to all youthful offenders, while also establishing a complimentary admissibility framework for expert evidence applicable to specific cases. (See Faigman, Mohanan, and Slobogin (September 2013) *Group to Individual (G2i) Inference in Scientific Expert Testimony*, University of Virginia School of Law Public Law and Legal Theory Research Paper Series 2013-34, at p. 7, available at: http://ssrn.com/abstract =2298909 [last accessed October 16, 2023].) However, the large differences in the timing of maturational processes between individuals logically obviate the use of chronological sub-categories within the full span of adolescence. (See, *infra,* Declarations of Drs. Rahn Minagawa, Carl Osborn, and Francesca Lehman [Appendix A].) Recognizing this fact, the Legislature has concluded that the legal cutoff should coincide with the age at which brain imaging studies have documented more complete development. (*Ibid*.)

Youth who commit offenses before 26 years old are subject to measurable changes in the various physical aspects of the neurological system that cannot be reliably correlated with changes in their ability to form social judgments or control emotionally driven impulses. (See, *infra,* Declarations of Drs. Rahn Minagawa, Carl Osborn, and Francesca Lehman [Appendix A].) Analysis of the supposed lack of similarities based on "crime-specific" reasons fails to account for these maturational changes, which all youth are subject to over time. (*Ibid*.) Considering these scientific facts, the judicial inquiry must focus on the justifications for the challenged legal classification to maintain equal protection for all youths. (*Ibid*.)

Some 115 years ago, the Court did not consider scientific principles while upholding the death sentence for an assault in prison by a life prisoner.[3] (See *People v. Finley* (1908) 153 Cal. 59, 60.) The question presented was whether there was "no reasonable distinction to be drawn between the case of a convict undergoing a life sentence as such, and one undergoing a sentence for a period of years which in all human probability will exceed the term of natural life." (*Id.* at p. 62.) Employing an early version of the similarly situated standard, the Court found that "the crimes for which convicts suffer life sentences are graver in their nature and give evidence of more abandoned and malignant hearts than do the crimes of those undergoing sentence for years." (*Ibid.*) The Court held that "we cannot perceive that appellant was denied the equal protection of the laws for every other person in like cases with him and convicted as he has been[,] would be subjected to like punishment." (*Id.* at p. 62-63.) The subsequent development of Adolescent Brain Science demonstrates how Penal Code section 3051 protects young people from a similar fate as Mr. Finley.

Today, adolescent persons are not disregarded as convicts for different, or even identical offenses, whose supposedly "malignant" hearts cannot be rehabilitated. (See, *infra,* Declarations of Drs. Rahn Minagawa, Carl Osborn, and Francesca Lehman [Appendix A].) Youth offenders are more accurately viewed as complex individuals whose age at the time of offense warrants statutory protections as derived from constitutional and scientific principles. (*Ibid.*) The State's failure to adequately justify the exclusion of only some youths from parole, without consideration of their rehabilitation today, fails to justify subdivision (h) of section 3051.

THE COURT CORRECTLY QUESTIONS WHETHER THE INQUIRY INTO PENAL CODE SECTION 3051 IS SETTLED BY THE LACK OF JUSTIFICATION FOR THE EXCLUSION OF YOUTHFUL OFFENDERS OF SIMILARLY SITUATED YOUTH FROM AN OPPORTUNITY FOR PAROLE DESPITE DEMONSTRABLE REHABILITATION TODAY

In *Eric B.*, the question presented was whether the right not to testify was unfairly denied to those held in conservatorship, when granted to those held as not guilty by reason of insanity. (*Eric B., supra,* 12 Cal.5th at p. 1092.) The Court found that "for purposes of the right against compelled testimony, the groups are sufficiently similar that equal protection principles require the government to

[3] Nor would it have been possible at the time. Substantial scientific and technological progress was necessary before the principles of Adolescent Brain Science could be accurately formulated.

justify its disparate treatment of these proposed conservatees." (*Ibid.*) The Court declined to remand for further proceedings because the error in requiring *Eric B.* to testify was harmless considering other evidence introduced at the conservatorship proceeding. (*Id.* at p. 1107.) The concurring opinion by Justice Kruger agreed, but asked "whether that group-based difference in treatment comports with equal protection principles." (*Id.* at p. 1108, concurring opn., Kruger J.) The Court has posed a similar question for supplemental briefing in *Hardin*.

The analysis of Penal Code section 3051 must focus on whether "the challenged difference in treatment was justified under the applicable standard of scrutiny." (*Eric B.*, *supra*, 12 Cal.5th at p. 1109, citing *Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 578-579; see also *In re Antazo* (1970) 3 Cal.3d 100, 110-111.) In the context of youthful offenders, who are all the same age range, such analysis is appropriate because a law that differently benefits or burdens them is "- or at least ought to be - sufficient reason for us to examine whether the difference in treatment is consistent with equal protection." (*Eric B.*, *supra,* 12 Cal.5th at p. 1108, concurring opn, Kruger, J.)

The contrary focus on "similarly situatedness" arose nearly 50 years ago based on the quip that the Constitution does "not require things which are different in fact or opinion to be treated in law as though they were the same.'" (See *In re Roger S.* (1977) 19 Cal.3d 921, 934, quoting *Tigner v. Texas* (1940) 310 U.S. 141, 147.) In *Tigner*, Justice Felix Frankfurter concluded that the statutory differences in the treatment of "agriculture and other economic pursuits was within the power of the Texas legislature." (*Tigner*, *supra*, 310 U.S. at p. 147.) This reasoning and holding do not support the *parsing of young people* by crime-specific facts today, when their youth at the time of offense is central to Penal Code section 3051.

Nor has this Court always applied the similarly situated test so rigidly, as in *Perez v. Sharp* (1948) 32 Cal.2d 711, 731, where the provision forbidding interracial marriage in Los Angeles was stricken as unconstitutional. Then Associate Justice Roger J. Traynor held that the ordinance "violate[d] the equal protection of the laws clause of the United States Constitution by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups." (*Id.* at pp. 731-732.) *Perez* is "a judicial opinion whose legitimacy and constitutional soundness are by now universally recognized." (*In re Marriage Cases* (2008) 43 Cal.4th 757, 774.)

However, in 1948, this deeply divided Court could not reach consensus, with Justice John Shenk writing in dissent that "[t]he Legislature is, in the first instance, the judge of what is necessary for the public welfare." (*Perez*, *supra*, 32 Cal.2d at p. 754.) Justice Shenk held that there was no dissimilar treatment because "[e]ach petitioner has the right and the privilege of marrying within his or her own group." (*Id.* at p. 761.) The focus on the similarly situated standard shows how Justice Shenk got it wrong. (*Id.* at p. 762, quoting *Tigner*, *supra*, 310 U.S. at p. 141.) Indeed, the United States Supreme Court has not applied the similarly situated standard so absolutely, including 10 years after *Perez* in *Loving v. Virginia* (1967) 388 U.S. 1.

Proving the "similarly situatedness" of persons excluded from the benefits of the law is redundant when the legislative distinction cannot be "justified under the appropriate test of equal protection." (*Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 798, fn. 19.) For instance, in *Fullerton*, the Court considered burdens imposed by a school district election on an excluded group of residents. (*Ibid.*) The Court held: "Obvious dissimilarities between groups will not justify a classification which fails strict scrutiny (if that test is applicable) or lacks a rational relationship to the legislative purpose." (*Ibid.*) The analysis of the <u>people</u> subject to the burdens in *Fullerton* has far more in common with the young <u>persons</u> denied liberty in *Hardin*, who are not comparable to the interstate agricultural <u>products</u> at issue in *Tigner*.

The critical question remains whether "group-based difference in treatment comports with equal protection principles." (*Eric B.*, *supra,* 12 Cal.5th at p. 1113.) Rather than cut off judicial inquiry via "similarly situated" analysis, the Court should proceed directly to the lack of justification for excluding rehabilitated LWOP sentenced youth from a chance at parole under Penal Code section 3051, subdivision (h). The lack of compelling, important, rational, or *actual* bases for lawfully distinguishing between youthful offenders violates the equal protection promised by the Article I of the California Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution. (See, e.g., *Grutter v. Bollinger* (2003) 539 U.S. 306, 326-343; *United States v. Virginia* (1996) 518 U.S. 515, 531-534; *Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439-450; *Shelley v. Kraemer* (1948) 334 U.S. 1; *Trotman v. Hautke* (1948) 31 Cal.2d 844, 846; and *In re Kotta* (1921) 187 Cal. 27, 30.)

SUMMATION

For the foregoing reasons, Amici supports affirming the opinion in *Hardin*.

Respectfully Submitted,

/s/ B.C. McComas
BRIAN C. McCOMAS

/s/ Eric Weaver
ERIC WEAVER

Attorneys for the IDO

Enc: Appendix A (Declarations in Support of *Amici Curiae*)

APPENDIX A
DECLARATIONS IN SUPPORT OF *AMICI CURIAE*

I declare under penalty of perjury, as defined by the State of California, that the assertions at pages 2-3 are true and correct based on the public records information provided to my Office by the Board of Parole Hearings in response to California Public Records Act Request on September 28, 2023.

Dated: October 25, 2023 */s/ B.C. McComas*
BRIAN C. McCOMAS

I declare under penalty of perjury, as defined by the State of California, that the assertions at pages 2-3 are true and correct based on the public records information provided to me by the Law Office of B.C. McComas, LLP.

Dated: October 25, 2023 */s/ Dr. Kathryn Albrecht*
DR. KATHRYN ALBRECHT

I declare under penalty of perjury, as defined by the State of California, that the assertions at pages 2-3 are true and correct based on the public records information provided to me by the Law Office of B.C. McComas, LLP.

Dated: October 25, 2023 */s/ Christopher McClure-St. Amant*
CHRISTOPHER McCLURE-ST. AMANT

I declare under penalty of perjury, as defined by the State of California, that the assertions at pages 4-5 are true and correct based on my expertise and research.

Dated: October 25, 2023 */s/ Dr. Rhan Minagawa*
DR. RAHN MINAGAWA

I declare under penalty of perjury, as defined by the State of California, that the assertions at pages 4-5 are true and correct based on my expertise and research.

Dated: October 25, 2023 /s/ *Dr. Carl Osborn*
DR. CARL OSBORN

I declare under penalty of perjury, as defined by the State of California, that the assertions at pages 4-5 are true and correct based on my expertise and research.

Dated: October 25, 2023 /s/ *Dr. Francesca Lehman*
DR. FRANCESCA LEHMAN

PROOF OF SERVICE

I, Winnie Liu, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the above referenced action. My place of employment and business address is PMB 1605, 77 Van Ness Ave., Ste. 101, San Francisco, CA 94102.

On October 25, 2023, I served the attached **Amicus Letter and Appendix A in Support of Petitioner Tony Hardin** by placing a true copy thereof in an envelope addressed to the person named below at the address shown, and by sealing and depositing said envelope in the United States Mail in San Francisco, California, with postage thereon fully prepaid or by electronic filing:

The Santa Clara County Independent Defense Counsel Off. 373 W. Julian Way, Ste. 3700 San Jose, CA 95110	The Hon. Judge Juan Carlos Dominguez Pomona Courthouse South 400 Civic Center Plaza, Dept. H Pomona, CA 91766

On October 25, 2023, I served the attached **Amicus Letter and Appendix A in Support of Petitioner Tony Hardin** by transmitting a PDF version of this document by electronic mailing to each of the following:

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I declare under penalty of perjury that the foregoing is true and correct. Signed on October 25, 2023, at San Francisco, California.

/s/ Winnie Liu

WINNIE LIU

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 10/25/2023 by Tao Zhang, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. HARDIN**
Case Number: **S277487**
Lower Court Case Number: **B315434**

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

10/25/2023

Date

/s/Brian McComas

Signature

McComas, Brian (273161)

Last Name, First Name (PNum)

Law Office of B.C. McComas

Law Firm