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October 25, 2023

Chief Justice Patricia Guerrero and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Amicus Curiae Letter Re: Request for Supplemental Briefing in *People v. Hardin*, Case No. S277487

Dear Chief Justice Guerrero and Associate Justices:

Pursuant to the Court's order soliciting supplemental briefs, amici curiae neuroscience, psychology, and juvenile justice scholars and nonprofits ("amici") respectfully submit this letter brief in support of streamlining this Court's two-step equal protection doctrine into a single holistic inquiry.[1] In alignment with the reasoning in Justice Kruger's concurrence in *Conservatorship of Eric B.* (2022) 12 Cal.5th 1085 (*Eric B.*) (conc. opn. of Kruger, J.), amici submit that a single, holistic equal protection inquiry is especially appropriate here, where contemporary brain science and the Legislature's undisputed intent—to harmonize the youthful offender parole program with that science—establish that Penal Code, section 3051(h)'s disparate treatment of late adolescents sentenced to LWOP is irrational and unconstitutional.

Applying the existing two-step test, amici's brief explained how brain science necessarily informs both doctrinal steps in support of the conclusion that section 3051(h) contravenes equal protection. (See Amicus Brief of Neuroscience, Psychology, and Juvenile Justice Scholars and Nonprofits ("Amicus Br."), at pp. 39–44.) First, given the Legislature's express recognition of late adolescents' incomplete neurological maturation, late adolescents sentenced to LWOP are similarly situated to (1) adolescents under 18, and (2) other late adolescents. (*Id.* at pp. 40–41; see *People v. Montelongo* (2021) 274 Cal.Rptr.3d 267, 289 (conc. stmt. of Liu, J.) ["The Legislature has recognized that *Miller*'s observations about juveniles also apply to young adults up to age 25."].) Second, section 3051(h) irrationally differentiates between late adolescents sentenced to LWOP and those similarly situated groups, even though the Legislature specifically amended section 3051 to effectuate the scientific consensus that the mitigating attributes of adolescence apply with compelling force to all late adolescents. (Amicus Br. at pp. 41–44.) In short, "section 3051's parole eligibility scheme is in tension with equal protection of the laws." (*People v. Jackson* (2021) 279 Cal.Rptr.3d 396, 406 (*Jackson*) (conc. stmt. of Liu, J.).) At the same time, given the applicability of brain science to both doctrinal steps, amici's briefing ultimately confirms Justice Kruger's observation that whether "two groups are similarly situated, . . . with respect to the purposes of a law is a conclusion one can only reach after considering the law's aims and how the differential treatment relates to those aims." (*Eric B.* at p. 1115 (conc. opn. of Kruger, J.).)

[1] No party, counsel for a party, or any person other than counsel for amici authored the letter brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. (Cal. Rules of Court, rule 8.520, subd. (f)(3)(A).)

As Justice Kruger has pointed out, "[e]mploying a framework that contains a potentially duplicative step carries more risks than just the possibility of wasted effort or seeming inconsistencies in the analysis. By adding a step not directly focused on the ultimate question of justification, we run the risk of mistakenly cutting off potentially meritorious equal protection claims." (*Eric B.* at p. 1115 (conc. opn. of Kruger, J.); see also *Jackson* at p. 405 (conc. opn. of Dato, J.) ["where a facial classification is challenged there will always be differences between two groups, and to state that the relevant groups are not 'similarly situated' is in many respects announcing the conclusion before performing the analysis."].) Amici respectfully submit that this may well be what led several Courts of Appeal astray in evaluating the constitutional question presented here.

Specifically, some Courts of Appeal failed to focus on the operative comparator underlying the purpose of the youthful offender parole program as amended—namely, the mitigating attributes of late adolescents in light of incomplete brain and personality development. Instead, those courts short-circuited their analysis by resting on a special circumstance finding or age to adjudge late adolescents sentenced to LWOP not similarly situated to their peers. In doing so, these courts largely overlooked the Legislature's clear statement that *all* late adolescents are, in fact, similarly situated to one another and to adolescents under 18. For instance, in *In re Williams* (2020) 57 Cal.App.5th 427 (*Williams*), the Court of Appeal dismissed the Assembly Committee's finding that "[s]cientific evidence on adolescence and young adult development and neuroscience shows that certain areas of the brain, particularly those affecting judgment and decision-making, do not develop until the early-to-mid-20s." (*Id.* at pp. 434–435, quoting Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1308 (2017-2018 Reg. Sess.) as amended Mar. 30, 2017, p. 2.) Instead, the *Williams* court reasoned that a "special circumstance" finding alone renders late adolescents sentenced to LWOP not similarly situated to other late adolescents who committed the same offense without the same special circumstance finding. (*Id.* at p. 435.) Similarly, the Court of Appeal in *Jackson* ignored late adolescent brain and behavioral development altogether in the majority opinion and held, like *Williams*, that a "special circumstances" finding alone renders late adolescents sentenced to LWOP "not similarly situated" to other late adolescents who committed the same offense without that finding. (*Jackson*, at pp. 404.)

This flawed reasoning in *Williams* and *Jackson* deviates from the Legislature's explicit intent and reinforces Justice Kruger's concern that the two-step test's piecemeal approach risks obscuring the dispositive comparator underlying the Legislature's purpose and thus overweighing less relevant comparative factors in a way that undermines meritorious equal protection claims. Through their reflexive adherence to the prosecutor's charging discretion, *Williams* and *Jackson* exemplify unjustified and "unnecessary gatekeeping" at the first step (*Eric. B.* at p. 1119 (conc. opn. of Kruger, J.); see *Jackson*, at p. 405 (conc. opn. of Dato, J.) ["Some courts seem willing to peremptorily reject any equal protection challenge by concluding that these groups of youthful offenders are not 'similarly situated.' "). This short-circuiting approach stands in sharp tension with precedents of the U.S. Supreme Court (*Roper*, *Graham*, *Miller*, and *Montgomery*) and this Court (*Caballero*, *Gutierrez*, and *Franklin*), which universally credited the mitigating attributes of adolescence without undue deference to the formalistic charge and sentence (see *People v. Montelongo* (2021) 274 Cal.Rptr.3d 267, 286–290 (conc. stmt. of Liu, J., & conc. opn. of Segal, J.)).

Other Courts of Appeal opted to bypass the first step altogether by simply assuming without deciding that late adolescents "sentenced to life without parole are similarly situated to both juvenile offenders sentenced to life without parole and[/or] to [late

adolescents] sentenced to de facto life without parole." (*People v. Sands* (2021) 70 Cal.App.5th 193, 203; see *People v. Ngo* (2023) 89 Cal.App.5th 116, 123 ["we assume, without deciding, that the two classes are similarly situated"]; In *re Murray* (2021) 68 Cal.App.5th 456, 463 [same]; *People v. Morales* (2021) 67 Cal.App.5th 326, 347 [same]; *People v. Bolanos* (2023) 87 Cal.App.5th 1069, 1078 ["we are willing to assume people sentenced under the One Strike law are similarly situated to all offenders eligible for youthful offender parole."].) Here in *Hardin*, however, while the Court of Appeal correctly determined that late adolescents sentenced to LWOP "and those of identical age sentenced to a parole-eligible life term" are similarly situated for the purposes of section 3051, the Court of Appeal expressly declined to decide at the first step whether late adolescents are similarly situated to adolescents under 18 who committed the same controlling offense. (*People v. Hardin* (2022) 84 Cal.App.5th 273, 285-286.) This was error: As amici's brief clarifies, prevailing brain science casts profound doubt on any attempts to draw scientifically valid distinctions between late adolescents and adolescents under 18 with respect to *Miller*'s mitigating attributes. (Amicus Br. at pp. 13–17; see *In re Jones* (2019) 42 Cal.App.5th 477, 481 [erroneously holding that late adolescents are "not similarly situated" to adolescents under 18 simply by virtue of their age].)

These disparate holdings across the Courts of Appeal confirm that the first step of this Court's current equal protection framework is, at best, duplicative and, at worst, harmful to assessing equal protection claims. Amici reiterate their view that, regardless of the test applied, section 3051(h)'s "disparate treatment" of late adolescents sentenced to LWOP is not "justified by a constitutionally sufficient state interest" because it unequivocally thwarts the Legislature's intent to align the youthful offender parole program with the contemporary scientific consensus on the mitigating attributes of late adolescence. (*Hardin*, at p. 283.) Accordingly, amici respectfully request that the Court (1) adopt the single holistic inquiry for equal protection claims, and (2) regardless of whether a one-step or two-step equal protection analysis applies, determine that section 3051(h) violates equal protection by irrationally barring late adolescents like Hardin from youthful offender parole eligibility made available to other late adolescents and adolescents under 18.

Sincerely,

/s/ Kathleen Hartnett
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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Amicus Curiae Letter Re: Request for Supplemental Briefing in *People v. Hardin*, Case No. S277487 does not exceed 10 pages pursuant to this Court's order for supplemental letter briefing.

Respectfully submitted,

By: /s/ *Kathleen Hartnett*
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Counsel for Amici Curiae

October 25, 2023

DECLARATION OF ELECTRONIC SERVICE

Case Name: **The People v. Tony Hardin**
No.: **S277487**

I declare:

I am employed in the County of Reston, Virginia. I am over the age of 18 years old and not a party to this matter. My business address is Cooley, LLP, 11951 Freedom Drive, Reston, Virginia 20190. My email address is droelofs@cooley.com.

On October 25, 2023, I electronically served the foregoing Amicus Curiae Letter Re: Request for Supplemental Briefing in *People v. Hardin*, Case No. S277487 by transmitting a true copy via this Court's TrueFiling system. True Filing system will forward a copy to all parties registered to receive such service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on October 25, 2023, at Ashburn, Virginia.

Dawn Roelofs	/s/ *Dawn Roelofs*
Declarant	Signature