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**Re: Petitioner's Letter Brief in Response to Order for Supplemental Briefing**
***People v. Tony Hardin*, Case No. S277487**

Dear Chief Justice Guerrero and Associate Justices:

Pursuant to the Court's October 4, 2023 order soliciting supplemental briefs, Petitioner Tony Hardin submits this letter brief in response to the Court's 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?

Whether the Court elects to continue with the two-step approach or collapse the two steps into one, Hardin succeeds in showing that section 3051's exclusion of youthful offenders convicted of special circumstance murder from youth offender parole hearings cannot withstand equal protection review.

If the Court is inclined to address the continued vitality of the similarly situated step, it should eliminate it as a standalone threshold inquiry in facial challenges to laws adopting categorizations between identifiable groups. Consistent with Justice Kruger's concurring opinion in *Public Guardian of Contra Costa County v. Eric B.* (2022) 12 Cal.5th 1085, 1114-1117, the Court should endorse an integrated test that does not independently require plaintiffs to establish that they are similarly situated to comparators in order to qualify for substantive equal protection review. At best, treating the similarly situated inquiry as a standalone step is redundant; at worst, it risks cutting off otherwise meritorious claims and insulating differential treatment from meaningful constitutional review.

## I. Hardin's equal protection challenge succeeds whether or not the Court eliminates the similarly situated step.

While the question of whether the similarly situated step should be eliminated is an important one that may affect the substantive rights of other equal protection claimants, this Court need not answer that question in order to decide the present appeal. In addition to demonstrating that the Legislature lacked a rational basis in excluding youthful offenders sentenced to life without parole for special circumstance murder from receiving youth offender parole hearings, Hardin has shown that he is similarly situated to other youthful offenders sentenced to *de facto* life without parole and parole-eligible life terms for first degree murder. He has, therefore, met both steps of the equal protection test. And, in any event, the government has waived any argument suggesting that Hardin has not satisfied the similarly situated step.

### A. Hardin has met both steps of the equal protection test.

*First*, Hardin meets the similarly situated step. Youthful offenders like Hardin sentenced to life without parole for special circumstance murder, on the one hand, and youthful offenders sentenced to *de facto* life without parole and parole-eligible life terms for first degree murder, on the other, are similarly situated. The only difference between these groups is the special circumstance finding. As the Court of Appeal observed, "special-circumstance allegations could have been charged in 95 percent of all first degree murder convictions" — meaning that in 95 percent of cases, but for the charging decision of the local prosecutor, the two groups are the same. (Opn. at p. 23.)

The first step does not ask "whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged." (*People v. Morales* (2016) 63 Cal.4th 399, 408, internal quotation marks omitted.) The Legislature enacted section 3051 "to account for neuroscience research that the human brain — especially those portions responsible for judgment and decisionmaking — continues to develop into a person's mid-20's." (*People v. Edwards* (2019) 34 Cal.App.5th 183, 198, citing Sen. Com. on Public Safety, Analysis of Sen. Bill No. 261 (2015-2016 Reg. Sess.) Apr. 28, 2015.) The Legislature's singular focus in enacting and then expanding section 3051 relief was on the rehabilitative potential of youthful

offenders, a principle applicable regardless of whether any individual prosecutor decided to charge a youthful offender with special circumstance murder. In fact, the Legislature explicitly endorsed the reasoning of the U.S. Supreme Court in *Miller v. Alabama* (2012) 567 U.S. 460, a case which embodies the "principle that 'the distinctive attributes of youth [that] diminish the penological justifications for imposing the harshest sentences on juvenile offenders' are not 'crime-specific.'" (Stats. 2013, ch. 312, § 1; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1381 [quoting *Miller*, *supra*, 567 U.S. at pp. 472–473].) This non-specificity principle applies equally to youthful offenders sentenced to life without parole for special circumstance murder as it does to others who are sentenced to *de facto* life without parole and parole-eligible life terms for first degree murder. Thus, for purposes of section 3051, the groups are similarly situated.

*Second*, Hardin has also demonstrated that the Legislature lacked a rational basis for excluding youthful offenders sentenced to life without parole for special circumstance murder from receiving youth offender parole hearings. The second step asks "whether the disparate treatment of two similarly situated groups is justified by a constitutionally sufficient state interest." (*Eric B.*, *supra*, 12 Cal.5th at p. 1107.) As argued in Hardin's Answering Brief, the Legislature enacted section 3051 in order to acknowledge youthful offenders' immaturity and greater capacity for change — principles applicable categorically to all youthful offenders — by providing a meaningful opportunity to demonstrate subsequent rehabilitation and obtain release. The Legislature's decision to exclude those youthful offenders sentenced to special circumstance murder from section 3051 bears no rational relationship to that statutory objective.

### B. The government has conceded that Hardin meets the similarly situated step.

In any event, the government has conceded that Hardin meets the first step of the equal protection test. In the government's extensive briefing in this appeal, it has never argued that Hardin fails to meet the similarly situated step. Instead, in its opening brief, the government proceeded under the "assum[ption] that 'an individual serving a parole eligible life sentence' is 'similarly situated' to 'a person who committed an offense at the same age serving a sentence of life without parole.'" (Opening Br. at p. 21 [quoting Opn. at p. 18].) Even after Hardin argued in his answering brief that he satisfied the first step, Answering Brief at pp. 24-26, the government declined to rebut this argument or otherwise assert that Hardin did not meet the similarly situated step. Under these circumstances, the Court should interpret the government's failure to challenge Hardin's affirmative arguments about the similarly situated step as a waiver. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 480 [stating that the government "apparently concede[s]" a point made by the defendant to which the government did not respond].)

## II. The similarly situated step should be eliminated in cases involving facial challenges to laws creating identifiable categories.

It is not necessary for the Court to address whether to eliminate the similarly situated step in order to decide the present appeal. But if it is inclined to answer that question, the Court should conclude that the similarly situated inquiry is not a standalone, threshold step in facial

challenges like Hardin's.[1] While it is "axiomatic that persons similarly situated must receive like treatment under the law," *Johnson v. Superior Court* (1975) 15 Cal.3d 248, 265 (conc. opn. of Mosk, J.), treating the similarly situated inquiry as a standalone first step is an anomalous result standing in clear tension with this Court's earlier jurisprudence. Moreover, "it is not clear how the threshold similarly situated inquiry differs in any material way from the ultimate question in a group-based discrimination case": Both steps ultimately ask whether differences between two groups justify their differential treatment under the challenged law. (See *Eric B.*, *supra*, 12 Cal.5th at p. 1114-1115 (conc. opn. of Kruger, J.).)

This redundancy is not harmless. It carries the real risk that courts will treat the similarly situated step as a tool to insulate differential treatment from meaningful equal protection review and unnecessarily cut off otherwise meritorious equal protection claims. Accordingly, the Court should eliminate the similarly situated step for facial challenges like the one presented here.

### A. Treating the similarly situated inquiry as a standalone step is an anomalous result.

This Court's recent jurisprudence has identified the similarly situated inquiry as "[t]he first prerequisite to a meritorious [equal protection] claim." (*People v. McKee* (2010) 47 Cal.4th 1172, 1202, internal quotation marks omitted.) Yet this approach stands in tension with both this Court's prior jurisprudence and the treatment of similar equal protection claims by other courts, including the United States Supreme Court.

As Justice Kruger stated in *Eric B.*, "[t]he two-step approach is not how equal protection analysis was always done in California." (*Eric B.*, *supra*, 12 Cal.5th at p. 1109 (conc. opn. of Kruger, J.).) This Court has long recognized that equal protection demands "that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." (*Purdy & Fitzpatrick v. State* (1969) 71 Cal.2d 566, 578.) But earlier cases did not treat the similarly situated inquiry as a separate or threshold step of the equal protection analysis. (See, e.g., *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 373; *Purdy & Fitzpatrick, supra,* 71 Cal.2d at p. 578.) These cases began the substantive inquiry with evaluating the state's justification for the differential treatment. (See, e.g., *Brown v. Merlo* (1973) 8 Cal.3d 855, 864, affd. (1988) 485 U.S. 1.)

The Court's current two-step approach has its roots in a pair of cases decided in the late 1970s. In 1977, the Court relied on the U.S. Supreme Court's statement that "[t]he [U.S.] Constitution does not require things which are different in fact or opinion to be treated in law as

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[1] This letter brief addresses only whether the similarly situated step should be eliminated in cases like the present one that involve a facial challenge to a law adopting categorizations between identifiable groups. The similarly situated inquiry may have a "useful role to play in other kinds of cases," like those involving "class of one" or selective prosecution claims. (See *Eric B.*, *supra*, 12 Cal.5th at p. 1113 (conc. opn. of Kruger, J.).)

though they were the same," *Tigner v. Texas* (1940) 310 U.S. 141, 147, to conclude that "[m]inors . . . are not 'similarly situated' with adults for purposes of equal protection analysis." (*In re Roger S.* (1977) 19 Cal.3d 921, 934.) The Court therefore rejected a minor's challenge to involuntary admission to a state mental hospital without a finding that he was gravely disabled or a danger to himself or others, which would have been otherwise required for an adult. (See *id.*) A few years later, in 1979, the Court relied on *Roger S.* to articulate what would grow to be the oft-repeated framework for the two-step approach: "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530.)

While *Eric J.*'s discussion of two classes being similarly situated constituting a "prerequisite" to the equal protection analysis has been read in recent years to create a threshold step, that reading of *Eric J.* is neither necessary nor consistent with the Court's prior cases. In fact, notwithstanding the language from *Eric J.*, a majority of this Court previously rejected the idea that equal protection requires an "initial constitutional inquiry" into whether two groups are similarly situated. (See *Fullerton Joint Union High School Dist. v. State Bd. of Ed.* (1982) 32 Cal.3d 779, 798, fn.19.) "To ask whether two groups are similarly situated . . . is the same as asking whether the distinction between them can be justified under the appropriate test of equal protection." (*Id.*; see also *People v. Allen* (1986) 42 Cal.3d 1222, 1295 (conc. & dis. opn. of Bird, J.) [same].) Instead, the Court declared that "[t]he first step" in evaluating an equal protection challenge is to determine directly "the applicable level of judicial review." (*Fullerton, supra*, 32 Cal.3d at p. 798.)

Even in recent years, this Court's jurisprudence inconsistently applied the two-step approach. In a number of decisions, the Court proceeded directly to evaluate the rationale behind a challenged distinction under the appropriate level of scrutiny without first establishing that two classes of people are "similarly situated." (See, e.g., *People v. Turnage* (2012) 55 Cal.4th 62, 75 [proceeding directly to evaluate the grounds justifying certain crimes involving false bombs to be punished as felonies without proving that another person was placed in sustained fear, while requiring such a showing for felony violations of the false weapons of mass destruction statute]; *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 299 [directly evaluating the rationale behind a city ordinance treating large department stores and other retail stores differently without first establishing that those two groups were similarly situated]; *People v. Floyd* (2003) 31 Cal.4th 179, 191 [evaluating the reasons voters may have had to decline to give retroactive effect to a proposition requiring probation for certain adult drug offenders without first establishing that defendants sentenced before and after the effective date were similarly situated]; *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 482 [after concluding that rational basis review applied, proceeding directly to evaluate the Legislature's reasons for including semiautomatic firearms — as opposed to other weapons — in its list of assault weapons]; *Warden v. State Bar* (1999) 21 Cal.4th 628, 644 [proceeding directly to evaluate the rationality of the reasons supporting the existence of exemptions to the State Bar's MCLE program].)

In addition to the Court's own reservations about the similarly situated step, a number of other jurisdictions have also expressed concerns about treating the similarly situated inquiry as a separate threshold question. (See, e.g., *State v. Hibler* (2019) 302 Neb. 325, 356 (conc. opn. of Stacy, J.); *In re Welfare of Child of R.D.L.* (Minn. 2014) 853 N.W.2d 127, 132; *Varnum v. Brien* (Iowa 2009) 763 N.W.2d 862, 884, fn.9; *In re Mental Commitment of Mary F.-R*. (2013) 351 Wis.2d 273, 301; *State v. Little* (Kan. Ct. App. 2020) 58 Kan.App.2d 278, 282-283; *Puente Arizona v. Arpaio* (D. Ariz. 2015) 76 F.Supp.3d 833, 863 fn.12, revd. in part, vacated in part on other grounds (9th Cir. 2016) 821 F.3d 1098; see also, e.g., *Lewis v. Ascension Parish School Bd*. (5th Cir. 2015) 806 F.3d 344, 359, fn.19 ["[T]here is uncertainty in the law regarding the circumstances under which an equal protection plaintiff alleging racial discrimination is required to identify a similarly situated comparator group and the showing required to discharge this burden."]; *Arizona Dream Act Coalition v. Brewer* (D. Ariz. 2015) 81 F.Supp.3d 795, 802, fn.3 ["[I]dentification of a 'similarly situated class' is not always a requirement in Equal Protection cases."], affd. (9th Cir. 2016) 818 F.3d 901, and affd. (9th Cir. 2017) 855 F.3d 957.)

Nor is the similarly situated inquiry required by the U.S. Supreme Court in cases involving facial challenges to laws adopting categorizations between identifiable groups. (See, e.g., *U.S. v. Virginia* (1996) 518 U.S. 515; *City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432; *Personnel Administrator of Mass. v. Feeney* (1979) 442 U.S. 256.) Quite the opposite, the high court "has neither required nor applied any similar gatekeeping test" in facial equal protection challenges.[2] (*Eric B., supra*, 12 Cal.5th at p. 1112 (conc. opn. of Kruger, J.); accord Shay, *Similarly Situated* (2011) 18 Geo. Mason L. Rev. 581, 598 [concluding that the similarly situated inquiry "has never been viewed by the U.S. Supreme Court as a threshold hurdle to obtaining equal protection review on the merits"].) And while Amicus CJLF argues that "all" federal circuits "have sometimes applied some version of a threshold similarly situated inquiry," CJLF Letter, at 2, most of the cases it cites involve some version of as-applied or selective treatment claims, and not facial challenges to laws endorsing categorizations.[3]

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[2] Amicus the Criminal Justice Legal Foundation ("CJLF") cites the high court's decisions in the selective prosecution line of cases to argue that the similarly situated inquiry is "clearly required" in certain equal protection claims. (CJLF Letter, at 4.) Selective prosecution — which "draw[s] on" equal protection principles — is "an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." (*United States v. Armstrong* (1996) 517 U.S. 456, 463, internal quotation marks omitted.) Selective prosecution cases are not facial equal protection challenges to laws adopting categorizations between identifiable groups. Thus, while the similarly situated inquiry may have a "useful role to play in other kinds of cases," *Eric B.*, *supra*, 12 Cal.5th at p. 1113 (conc. opn. of Kruger, J.), CJLF's reliance on the selective prosecution cases is inapposite.

[3] In particular, *Alston v. Town of Brookline* (1st Cir. 2021) 997 F.3d 23, 41; *Church of Am. Knights of the KKK v. Kerik* (2d Cir. 2004) 356 F.3d 197, 210; *Shuman v. Penn Manor School*

### B. The similarly situated step is redundant.

Treating the similarly situated inquiry as a threshold to pass in order to move on to the substantive equal protection scrutiny is fundamentally circular. As the Court recognized more than four decades ago, "[t]o ask whether two groups are similarly situated . . . is the same as asking whether the distinction between them can be justified under the appropriate test of equal protection." (*Fullerton, supra*, 32 Cal.3d at p. 798, fn. 19.) This is because "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." (*People v. Jackson* (2021) 61 Cal.App.5th 189, 201 (conc. opn of Dato, J.).)

The Court has often stated that the similarly situated test examines "not whether persons are similarly situated for *all* purposes, but whether they are similarly situated *for purposes of the law challenged*." (*Eric B., supra*, 12 Cal.5th at p. 1102 [quoting *People v. McKee* (2010) 47 Cal.4th 1172, 1202].) But determining whether two classes are sufficiently similar "for purposes of the law challenged" requires a court to determine (i) what the "law's aims" are, and (ii) "how the differential treatment relates to those aims." (See *id.* at p. 1115 (conc. opn. of Kruger, J.).) In other words, the similarly situated inquiry asks, at bottom, whether the differences between the two groups justify their differential treatment under the challenged law. This is functionally equivalent to the second step of the equal protection inquiry: "application of some level of scrutiny to determine whether distinctions between the two groups justify the unequal treatment." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200, internal quotation marks omitted.) For example, "[s]aying that two groups are not similarly situated for purposes of the law is basically the same as saying that the distinction between the two groups is reasonably related to the purposes of the law." (*People v. Super. Ct.* (Cal. Ct. App., Feb. 18, 2015, No. E060023) 2015 WL 686550, at *10, unpublished (conc. & dis. in part of Richli, J.).)

### C. The similarly situated step can insulate differential treatment from judicial review.

Not only is the similarly situated step redundant insofar as it essentially replicates the substantive equal protection analysis, treating the similarly situated inquiry as a threshold to clear can have the practical effect of insulating differential treatment from meaningful judicial review. A reviewing court need only determine that two groups are not sufficiently similar — an inquiry it enters into without clear guidance from this Court about "[*h*]*ow* similarly situated, precisely"

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*Dist*. (3d Cir. 2005) 422 F.3d 141, 151; *Scarbrough v. Morgan County Bd. of Ed*. (6th Cir. 2006) 470 F.3d 250, 260; *Klinger v. Dept. of Corrections* (8th Cir. 1994) 31 F.3d 727, 731; *Dalton v. Reynolds* (10th Cir. 2021) 2 F.4th 1300, 1308; and *Women Prisoners of the D.C. Dept. of Corrections v. D.C.* (D.C. Cir. 1996) 93 F.3d 910, 924 all involved as-applied or selective treatment claims.

and "relative to *which* [of the challenged law's] aims," *Eric B., supra*, 12 Cal.5th at p. 1115 (conc. opn. of Kruger, J.) — to obviate the need for substantive equal protection scrutiny. In this way, a court can circumvent meaningful equal protection review by "peremptorily" concluding that a claimant is not sufficiently similarly situated to a relevant comparator. (See *Jackson, supra*, 61 Cal.App.5th at p. 201 (conc. opn. of Dato, J.).) Equal protection demands more.

This is not an abstract fear. The Court has itself warned that disposing of an equal protection challenge at the similarly situated step "in reality would insulate the challenged . . . statute from *any* meaningful equal protection review." (*In re Marriage Cases* (2008) 43 Cal.4th 757, 831, fn. 54.) In that case, a defendant argued that same-sex and opposite-sex couples were not similarly situated for purposes of the challenged statute, and that this was sufficient to foreclose any equal protection claims. (See *id.*) A majority of the Court rejected this argument, *see id.*, though separate opinions concluded that "plaintiffs are not similarly situated with [opposite-sex] spouses" because the "purpose of the statutes defining marriage is to preserve the traditional understanding of the institution," (*id.* at pp. 881-882 (conc. & dis. opn. of Corrigan, J.); see also *id.* at p. 873 (conc. & dis. opn. of Baxter, J.) [concluding that "[s]ame-sex and opposite-sex couples cannot be similarly situated . . . precisely because the traditional definition of marriage is a union of partners of the opposite sex"].) Had a majority of the Court agreed with the separate opinions, the differential treatment of same-sex and opposite-sex couples as codified in law would remain effectively insulated from equal protection review. (See also *Hibler, supra,* 302 Neb. at p. 356 (conc. opn. of Stacy, J.) ["The legal conclusion that two groups are not 'similarly situated' is not one courts should be making as a threshold matter, as doing so serves only to insulate the challenged classification from any meaningful equal protection review. If two groups are not similarly situated, the proper constitutional analysis will bear that out."].)

Treating the similarly situated inquiry as a threshold step creates a real temptation for a reviewing court to summarily reject an equal protection claim by narrowly defining the classifying trait in order to avoid substantive equal protection review. But doing so can "produce the tautological result that a law complies with equal protection if it 'applies equally to all to whom it applies.'" (*Similarly Situated, supra*, 18 Geo. Mason L. Rev. at p. 587 [quoting Joseph Tussman & Jacobus tenBroeck, *The Equal Protection of the Laws* (1949) 37 Cal. L. Rev. 341, 345].) In one case, for example, the Court of Appeal rejected an equal protection challenge to a statute that required the Law School Admissions Council ("LSAC") — and no other testing entity — to accommodate individuals with disabilities and create a process to appeal adverse accommodations decisions. LSAC objected that other testing entities did not face the same requirements. The Court of Appeal concluded that "LSAC is not similarly situated to . . . any other standardized testing entity." (*Law School Admission Council, Inc. v. State of California* (2014) 222 Cal.App.4th 1265, 1285.) "The reason is simple. No other standardized testing entity sponsors a law school admissions test." (*Ibid.*) In disposing of the equal protection claim by noting that the law only applied to *law school* admissions testing entities and that therefore no other testing entity was similarly situated, the Court of Appeal short-circuited the substantive

equal protection analysis which would have otherwise asked the state to justify its differential treatment with a sufficient state interest.

The arguments raised by Amicus San Bernardino County District Attorney's Office ("SBDA") in support of the continued vitality of the two-step approach actually underscore the danger that the similarly situated step can circumvent equal protection review. Amicus claims that there are certain situations in which the two classes are so "obviously different" and "simply too different to ever raise a viable equal protection claim." (SB County DA's Office Letter, at 4.) Yet the SBDA offers no criteria on how such a determination that the two groups are "obviously" dissimilar should be made. And just as members of this Court disagreed as to whether same-sex and opposite-sex couples were similarly situated for purposes of the statutes challenged in *In re Marriage Cases*, what is "obvious" to one court may be far from clear to another. There is a real risk that the similarly situated question is treated as "an empty vessel in which a court can pour whatever it wants." (*State v. Kelsey* (Kan. Ct. App. 2015) 51 Kan.App.2d 819, 839 (conc. opn. of Atcheson, J.).)

**D. The similarly situated step creates unnecessary hurdles for claimants seeking equal protection review.**

Because the similarly situated step is fundamentally redundant, it serves no practical function other than creating another hurdle for claimants to clear in order to obtain meaningful equal protection review.[4] As Justice Kruger has pointed out, "[b]y 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. Interposing an unnecessary gatekeeping inquiry always raises the possibility that the gate will slam shut, when the gate shouldn't have been there in the first place." (*Eric B., supra*, 12 Cal.5th at p. 1115 (conc. opn. of Kruger, J.).)

Without guidance from this Court on the scope of the similarly situated step, lower courts have treated the similarly situated inquiry as creating a "threshold burden" on the plaintiff and have denied equal protection claims on the grounds that a plaintiff has failed to meet his or her burden. (See, e.g., *People v. Singh* (2011) 198 Cal.App.4th 364, 371; see also *People v. Smith* (Cal. Ct. App., June 3, 2016, No. E063504) 2016 WL 3227185, at *15, unpublished (conc. opn. of Slough, J.) [concluding that a claimant failed to "me[e]t his prima facie burden of showing he is similarly situated"].) Yet because the similarly situated inquiry essentially replicates the substantive equal protection analysis, placing this burden on a claimant is inappropriate. Equal protection review "require[s] the government to justify its differential treatment of the[] classes," *McKee, supra,* 47 Cal.4th at p. 1202, and not the other way around. Because the similarly situated inquiry incorporates an analysis of the match between the classification and the state's interest, separating out the similarly situated analysis from the substantive equal protection

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[4] Amicus the SBDA effectively concedes as much when it argues that the similarly situated step's utility is in its "screening function." (SBDA Letter, at 4.)

review requires the claimant to anticipate what the state's interests are before the state is required to articulate them. This is a misallocation of the burden of persuasion in equal protection cases.

* * *

Hardin has met both steps of the equal protection test and therefore the judgment of the Court of Appeal should be affirmed. If the Court is inclined to address the propriety of the similarly situated step, it should eliminate the similarly situated step in cases involving facial challenge to laws adopting categorizations between identifiable groups.

Respectfully submitted,

*s/ Adeel Mohammadi*

Adeel Mohammadi
MUNGER, TOLLES & OLSON LLP
*Attorneys for Petitioner Tony Hardin*

## CERTIFICATE OF COMPLIANCE

I certify that the attached **Petitioner's Letter Brief in Response to Order for Supplemental Briefing** in *People v. Hardin,* Case No. S277487 does not exceed 10 pages pursuant to this Court's order for supplement letter briefing.

*/s/ Adeel Mohammadi*

Adeel Mohammadi
MUNGER, TOLLES & OLSON LLP
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Case Name: *THE PEOPLE OF THE STATE OF CALIFORNIA v. TONY HARDIN*

Case No: S277487

## PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Julia A. Muhammad, am employed in the City of Los Angeles, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 350 South Grand Avenue, Fiftieth Floor, Los Angeles, California 90071.

On November 9, 2023, I served the foregoing document(s) described as:

**Petitioner's Letter Brief in Response to Order for Supplemental Briefing**

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**CALIFORNIA SUPREME COURT CASE NO. S277487**

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