Supreme Court of California
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November 9, 2023

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

RE: *People v. Hardin*, No. S277487, Supplemental Letter Brief

Dear Chief Justice Guerrero and Associate Justices:

The Court ordered the parties to file simultaneous supplemental letter briefs addressing "[w]hether the first step of the two-part inquiry used to evaluate equal protection claims . . . 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."

In the People's view, "this is not the case in which to reexamine [the Court's] equal protection framework" or to eliminate the first step of the two-part inquiry. (*Public Guardian of Contra Costa Cnty. v. Eric B.* (2022) 12 Cal.5th 1085, 1116 (conc. opn. of Kruger, J.).) The Court did not grant review on that particular question; it was not contested in the parties' principal merits briefs; the "choice of framework would not be outcome-determinative" in this case; the People have "come forward with a sufficient justification" for the differential treatment of young adult offenders sentenced to life without the possibility of parole; and the "threshold similarly situated test" has not "cut off inquiry into the core question, whether an admitted difference in treatment of two groups is justified under the law." (*Ibid.*) The question presented in the supplemental briefing order is an important one, but it would be better answered in a case where the outcome might be affected by the application of the threshold inquiry and where the question is fully addressed in the parties' principal merits briefing.

As to the merits of that question, the State and other litigants have relied on this Court's precedent regarding the first step of the two-part inquiry for decades. The State has invoked that precedent repeatedly before the lower courts and this Court. No doubt, there are some legitimate grounds for criticizing that precedent. (See, e.g., *Eric B.*, *supra*, 12 Cal.5th at pp. 1109-1116 (conc. opn. of Kruger, J.).) But this Court follows "'a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices.'" (E.g., *Tansavatdi v. City of Rancho Palos Verdes* (2023) 14 Cal.5th 639, 666.) In the State's view, that policy weighs against overturning the Court's precedent; at a minimum, it counsels against reaching that question in the context of this particular case.

If the Court nonetheless decides to depart from the two-part framework in this case, it should make clear that its holding is limited to claims challenging intentional "group-based difference in treatment," and not other equal protection claims, such as those raising "class of one" equal protection theories. (*Eric B.*, *supra*, 12 Cal.5th at p. 1113 (conc. opn. of Kruger, J.).) It would also be important for the Court to underscore that a plaintiff must establish disparate treatment to proceed on an equal protection claim, and for the Court to stress that lower courts must carefully assess whether heightened scrutiny applies in any context. And because litigants have relied for decades on this Court's precedents establishing a formal two-step inquiry for equal protection claims, the Court should emphasize that its holding does not call into question its prior precedents disposing of equal protection claims at the first step. In those cases, the threshold analysis has not "differ[ed] in any material way from the ultimate question in a group-based discrimination case," and any decision by this Court to formally modify the standard should not be construed to cast doubt on the Court's holdings in those prior cases. (*Id.* at pp. 1112, 1114-1115 (conc. opn. of Kruger, J.).)

A. The State has relied on the two-part inquiry in litigating equal protection claims

For decades, this Court has instructed that "[a]n equal protection analysis has two steps." (*Eric B.*, *supra*, 12 Cal.5th at p. 1102; see also *id.* at p. 1111-1112 (conc. opn. of Kruger, J.).) Under that two-step framework, the "'first prerequisite . . . is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.'" (*Id.* at p. 1102, quoting *People v. McKee* (2010) 47 Cal.4th 1172, 1202.) As the Court has explained it, the "initial inquiry is not whether persons are similarly situated for *all* purposes, but 'whether they are similarly situated *for purposes of the law challenged.*'" (*Ibid*.) That analysis "typically focuses on the practical consequences of a challenged law to the groups in question." (*Id.* at p. 1103.) The purpose of asking the "threshold" question of whether two classes "are sufficiently similar with respect to the laws in question" is to determine whether "to require the government to justify its differential treatment of these classes under those laws." (*Id.* at p. 1105.) "If the groups are similarly situated, the next question is whether the disparate treatment can be justified by a constitutionally sufficient state interest" under the appropriate level of scrutiny. (*Id.* at p. 1102.)

Applying that framework, this Court has decided many cases raising equal protection challenges at the threshold step.[1] In several others, this Court has simply rejected equal protection challenges on the basis that classes are "not similarly situated," without further

[1] See, e.g., *Briggs v. Brown* (2017) 3 Cal.5th 808 (resolving equal protection challenge at threshold inquiry by concluding that classes were not similarly situated); *People v. Valencia* (2017) 3 Cal.5th 347 (same); *People v. Brown* (2012) 54 Cal.4th 314 (same); *People v. Barrett* (2012) 54 Cal.4th 1081 (same); *In re Lemanuel C.* (2007) 41 Cal.4th 33 (same); *People v. Guzman* (2005) 35 Cal.4th 577 (same); *Cooley v. Superior Court* (2002) 29 Cal.4th 228 (same).

explanation.[2] That approach appears to be most common in this Court's decisions involving capital defendants who raised equal protection challenges regarding the denial of procedural protections offered to non-capital defendants.[3]

Relying on those precedents, the State has repeatedly defended against equal protection claims in this Court by arguing that the threshold inquiry has not been satisfied. The People most frequently raise that argument in the context of capital defendants' equal protection challenges to the denial of sentencing procedures available to non-capital defendants.[4] The People have also raised the argument in various other criminal contexts, including, for example, where defendants convicted under one Penal Code provision challenge their sentences because of less severe punishments imposed for other offenses (see, e.g., Respondent's Br. at p. 27, *People v. Grimes*, No. C096366 (Apr. 24, 2023)); where defendants challenge lifetime sex-offender registration requirements that do not apply to other defendants (Respondent's Br. at p. 38, *People v. McKenzie*, No. B319489 (Feb. 1, 2023)); and where defendants contend that their in-court testimony should be governed by the same rules governing in-court victim testimony (Respondent's Supp. Br. at p. 9, *People v. Martinez*, No. A161995 (July 12, 2022)). The State has also relied on the threshold inquiry to defend against various equal protection challenges to state laws in civil litigation, including a recent challenge to a law designed to reduce financial barriers to abortion care for individuals with private health coverage (Mem. of P.&A. in Support of Demurrer at pp. 16-17, *Bakersfield Crisis Pregnancy Ctr. v. Dept. of Managed Health*, No. BCV-22-102617-TSC (Jan. 12, 2023)); and a challenge to certain prison programs offered to inmate mothers but not to male inmates (*Woods v. Horton* (2008) 167 Cal.App.4th 658).

And the State has invoked the two-part inquiry where a challenger has not credibly alleged a claim of disparate treatment—that is, where the challenger's assertions are too generalized or implausible to make it appropriate "to require the government to justify its differential treatment of these classes under those laws." (*Eric B.*, *supra*, 12 Cal.5th at p. 1105.)

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[2] *Coleman v. Dept. of Personnel Admin*. (1991) 52 Cal.3d 1102, 1125; see also *People v. Salazar* (2016) 63 Cal.4th 214; *People v. Lewis* (2004) 33 Cal.4th 214; *People v. Wutzke* (2002) 28 Cal.4th 923; *People v. Ramos* (1997) 15 Cal.4th 1133; *People v. Fauber* (1992) 2 Cal.4th 792.

[3] See, e.g., *People v. Morelos* (2022) 13 Cal.5th 722, 768 ("Nor does California's death penalty scheme violate equal protection principles by treating capital defendants and noncapital defendants differently. 'Because capital defendants are not similarly situated to noncapital defendants, California does not deny capital defendants equal protection by providing certain procedural protections to noncapital defendants that are not provided to capital defendants.' [Citation.]."); *People v. Williams* (1988) 45 Cal.3d 1268, 1330 ("[I]n our view, persons convicted under the death penalty law are manifestly not similarly situated to persons convicted under the Determinate Sentencing Act.").

[4] See, e.g., Respondent's Br. at p. 103, *People v. Galvan*, No. S211060 (Feb. 10, 2023); Respondent's Br. at p. 133, *People v. Turner*, No. S154459 (Nov. 16, 2015); Respondent's Br. at p. 288, *People v. Nadey*, No. S087560 (Oct. 25, 2013); Respondent's Br. at pp. 127-128, *People v. Johnson*, No. S029551 (Feb. 7, 2013).

In one pending case, for example, the plaintiff asserts that a California labor statute is invalid insofar as it exempts "fishermen," "barbers," and "cosmetologists" (among others), but not truck drivers. (Reply Br. in Supp. of Pls.' Renewed Mot. for Prelim. Inj., *Cal. Trucking Ass'n v. Bonta*, No. 3:18-cv-02458-BEN-DEB, Dkt. No. 180 (S.D. Cal. July 21, 2023), p. 13.) The plaintiff makes virtually no effort to show that fishermen, barbers, or cosmetologists bear any of the same characteristics that led the Legislature to apply a different standard to truck drivers. (See State Defs.' Mem. of Contentions of L. and Fact, *Cal. Trucking Ass'n v. Bonta*, No. 3:18-cv-02458-BEN-DEB, Dkt. No. 190 (S.D. Cal. Sept. 29, 2023), p. 23.) In those and similar circumstances, the threshold "similarly situated" requirement may be helpful to filter out plainly meritless claims—claims that should be rejected without placing a burden on the State to justify any "differential" treatment.

B. Members of this Court have questioned whether the two-part framework is proper for equal protection claims involving disparate treatment of classes

Members of this Court have questioned whether, "[i]n an appropriate [ ] case, we ought to consider whether it is time to let the similarly situated test go." (*Eric B.*, *supra*, 12 Cal.5th at p. 1117 (conc. opn. of Kruger, J.).) In a detailed concurring opinion in *Public Guardian of Contra Costa County v. Eric B.*, Justice Kruger, joined by Justices Liu and Groban, traced the history of this Court's equal protection jurisprudence and observed that the "two-step approach is not how equal protection analysis was always done in California." (*Id.* at p. 1114.) The "two-step approach appears to have emerged from two cases decided in the late 1970's" (*Eric. B.*, *supra*, 12 Cal.5th at pp. 1109-1110), which described the "first prerequisite to a meritorious claim under the equal protection clause" to be 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, 534; see also *In re Roger S.* (1977) 19 Cal.3d 921.) Over time, the language from those cases "hardened to become the first step of the formal two-step inquiry." (*Eric B.*, *supra*, 12 Cal.5th at p. 1112.)

The concurring justices in *Eric B.* expressed the view that the "threshold inquiry doesn't serve much purpose." (*Eric B.*, *supra*, 12 Cal.5th at p. 1114.) Although the "two prongs of the analysis" have not been treated as "merely duplicative or interchangeable," the concurrence noted that "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, except that it offers substantially less guidance about how to answer." (*Id.* at pp. 1114-1115.) Given the practical similarity between the two steps, the concurrence questioned "what purpose is served by asking the same questions, in a substantially more general way, as part of a separate threshold step of the analysis." (*Id.* at p. 1115.) It also observed that "[e]mploying a framework that contains a duplicative step . . . run[s] the risk of mistakenly cutting off potentially meritorious equal protection claims." (*Ibid.*)

In the view of the concurring justices, the U.S. Supreme Court "has neither required nor applied any similar gatekeeping test." (*Eric B.*, *supra*, 12 Cal.5th at p. 1112 (conc. opn. of

Kruger, J.).) But some lower federal courts, as well as other state courts, have employed a threshold "similarly situated" requirement in equal protection cases.[5]

C. The Court should not eliminate the first part of the two-part inquiry in this case, but if it opts to do so, the Court should also emphasize three important points

The question presented in the supplemental briefing order is an important one that has generated thoughtful scholarship and debate. In the People's view, however, it would be better addressed in the context of a case where the parties have extensively briefed the question in their principal merits briefs and where the answer would be outcome determinative. Neither the People nor Mr. Hardin asked the Court in the merits briefing to eliminate the first part of the two-part inquiry governing equal protection claims in this case. (See OBM 21; ABM 25-26.) Both parties instead focused on whether the challenged exclusion of certain young adult offenders from the young adult parole statute satisfies rational basis review. (See OBM 20-40; ABM 27-47; RBM 11-21.) Just as in *Eric B.*, the "parties have not raised any question about that framework here"; "in reliance on [this Court's] current case law, they have focused entirely on the proper application" of the test; the "choice of framework would not be outcome determinative"; and the People have "come forward with a sufficient justification" to support the challenged law. (*Eric B.*, *supra*, 12 Cal.5th at p. 1116 (conc. opn. of Kruger, J.).) The similarly situated inquiry thus "makes little difference" to the proper resolution of this case. (*Ibid.*; see also *Varnum v. Brien* (Iowa 2009) 763 N.W.2d 862, 884, fn. 9 ["Because the plaintiffs here satisfy the threshold test we have followed in the past, the outcome in this case would not be affected by abandoning that test now. Therefore we leave to future parties the task of arguing the applicability of the threshold similarly situated analysis in future cases."].)[6]

While the People maintain that "this is not the case in which to reexamine [the Court's] equal protection framework" (*Eric B.*, *supra*, 12 Cal.5th at p. 1119 (conc. opn. of Kruger, J.)), if

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[5] See Shay, G., *Similarly Situated* (2011) 18 Geo. Mason L. Rev. 581, 593-594 (describing decisions from Iowa, Nebraska, Kansas, Colorado, California and Illinois); see *Eric B.*, *supra*, 12 Cal.5th at p. 1118, fn. 1 (collecting cases from Massachusetts, Montana, and Georgia and lower federal courts); *Klinger v. Dep't of Corr.* (8th Cir. 1994) 31 F.3d 727, 731 ("Thus, the first step in an equal protection case is determining whether the plaintiff has demonstrated that she was treated differently than others who were similarly situated to her."); but see, e.g., *In re Mental Commitment of Mary F.-R.* (2013) 351 Wis.2d 273, 301 ("We have purposely declined, in our decision today, to utilize a tiered equal protection analysis, in which a threshold question of whether parties are similarly situated must be answered first before reaching the question of equal protection.").

[6] Moreover, the parties have agreed that there is no difference between the state and federal equal protection analyses for purposes of resolving this case. (See, e.g., OBM 21, fn. 6; ABM 27.) For that reason, this case would not provide a suitable vehicle for addressing the ways in which the differences between state and federal law might bear on whether a threshold similarly-situated test is warranted. (Cf. *Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 895 [discussing one respect in which the federal and state equal protection doctrines differ].)

the Court were to take up that issue, it should decline to overrule its precedent applying the two-part inquiry. (See generally *Tansavatdi*, *supra*, 14 Cal.5th at p. 666 [discussing "fundamental jurisprudential policy" of *stare decisis*].) "Adherence to precedent is 'a foundation stone of the rule of law.'" (*Kisor v. Wilkie* (2019) 139 S.Ct. 2400, 2422, cited in *Tansavatdi*, *supra*, 14 Cal.5th at p. 666.) It is thus "a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices." (*Trope v. Katz* (1995) 11 Cal.4th 274, 288.) While *stare decisis* is not "an inexorable command," "departure from the doctrine demands 'special justification'—something more than 'an argument that the precedent was wrongly decided.'" (*Kisor*, *supra*, 139 S. Ct. at p. 2422.)

That "special justification" for overruling precedent is not apparent—certainly not on the record in this case. The concurring justices in *Eric B.* observed that the threshold similarly situated inquiry has not "differ[ed] in any material way from the ultimate question in a group-based discrimination case" and they did not identify any prior decision from this Court that had "mistakenly cut[ ] off potentially meritorious equal protection claims." (*Eric B.*, *supra*, 12 Cal.5th at pp. 1114-1115 (conc. opn. of Kruger, J.).) And while the concurring justices observed that the "gatekeeping inquiry always raises the possibility that the gate will slam shut" in a future case (*id.* at p. 1115), speculation about potential future harm is not generally a sufficient basis for overruling longstanding precedent (cf. *United States v. Internat. Bus. Machines Corp.* (1996) 517 U.S. 843, 856). On the other hand, the two-step framework has been settled for several decades (*supra* p. 2); this Court applied that framework just last term (*Eric B.*, *supra*, 12 Cal.5th at p. 1108); and parties have long relied on it in litigating equal protection claims. (*See supra* pp. 3-4; *see also Tansavati*, *supra*, 12 Cal.5th at p. 668-669 [considering age of precedent and absence of practical effects from application of precedent, as factors supporting *stare decisis*].).

But if the Court opts to address the question in this case and decides to eliminate the threshold inquiry, it would be important for the Court's opinion to clarify the scope of that ruling in three ways. First, the Court should expressly limit the scope of its decision to cases involving equal protection challenges to the intentional, differential treatment of identifiable groups. As the concurrence in *Eric B.* acknowledges, each one of the U.S. Supreme Court's precedents that "identif[ied] the appropriate level of scrutiny . . . without separately analyzing whether the groups receiving differential treatment are otherwise similarly situated" involved such challenges. (*Eric B.*, *supra*, 12 Cal.5th at pp. 1112-1113.) But that Court has also made clear that in "other kinds of cases—particularly cases involving so-called 'class of one' equal protection claims"—a "similarly situated inquiry helps identify whether the plaintiff has suffered differential treatment that warrants scrutiny under the equal protection clause." (*Ibid.*) Relatedly, this Court should make clear that its analysis is limited to the context of the equal

protection clause; concerns of a distinct nature may arise when addressing similar questions in other constitutional contexts.[7]

Second, the Court should emphasize that the elimination of the first step does not reduce a plaintiff's obligation to demonstrate differential treatment on the class-based lines alleged. (See, e.g., *Marshall v. McMahon* (1993) 17 Cal.App.4th 1841, 1853 [observing that a challenged regulation did not "draw [the] bright line" alleged by the plaintiffs to violate equal protection standards]; *Taking Offense v. State* (2021) 66 Cal.App.5th 696, 727 ["Taking Offense fails to show that the right afforded to transgender residents by the room assignment provision . . . is any different from the right afforded to nontransgender residents."].) Nor should any new framework diminish a court's obligation to carefully assess whether heightened scrutiny is warranted. (See, e.g., *People v. Wilkinson* (2004) 33 Cal.4th 821, 838 ["Application of the strict scrutiny standard in this context would be incompatible with the broad discretion the Legislature traditionally has been understood to exercise in defining crimes and specifying punishment."]; *City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 441 ["the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices."].)

Finally, because parties have relied for decades on this Court's precedents establishing a formal two-step inquiry for equal protection claims, the Court should stress that its holding does not call into question its prior precedents disposing of equal protection claims at the first step. As members of this Court have observed, the threshold analysis conducted in those cases did not "differ[] in any material way from the ultimate question in a group-based discrimination case." (*Eric B.*, *supra*, 12 Cal.5th at pp. 1112, 1114-1115 (conc. opn. of Kruger, J.); see also *State v. Kelsey* (2015) 51 Kan.App.2d 819, 839 (conc. opn. Atcheson, J.) ["Evaluating the similarities and differences between the classes created by the government action essentially replicates much of what a court is supposed to do under traditional equal protection analysis *after* establishing the appropriate level of scrutiny."].) Any modification of the equal protection framework thus should not be construed to cast doubt on those prior decisions.

[7] Compare, e.g., *Tandon v. Newsom* (2021) 141 S.Ct. 1294, 1296 (examining "whether two activities are comparable for purposes of the Free Exercise Clause"), with, e.g., *id.* at p. 1298 (dis. opn. of Kagan, J.) (criticizing the majority's approach to that inquiry).

D. Conclusion

The judgment of the Court of Appeal should be reversed on the ground that the Legislature had a rational basis for excluding young adult offenders sentenced to life without the possibility of parole from the youth offender parole scheme (OBM 24-40; RBM 17-22), without reaching the question of whether to eliminate the first step of the two-part inquiry used to evaluate equal protection claims under this Court's longstanding precedent.

Respectfully submitted,

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On November 9, 2023, I electronically served the attached **Supplemental Letter Brief** by transmitting a true copy via this Court's TrueFiling system.

Service Via TrueFiling
William Temko, Sara McDermott
Counsel for Petitioner

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on November 9, 2023, at San Diego, California.

Helen H. Hong	/s/ Helen H. Hong
Declarant for eFiling	Signature

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Los Angeles County Superior Court
Pomona Courthouse South
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Pomona, CA 91766

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on November 9, 2023, at San Diego, California.

Helen H. Hong	/s/ H. Hong
Declarant for U.S. Mail	Signature

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 11/9/2023 by Tao Zhang, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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

11/9/2023

Date

/s/Helen Hong

Signature

Hong, Helen (235635)

Last Name, First Name (PNum)

California Department of Justice, Office of the Solicitor General

Law Firm