County of San Bernardino

Office of the District Attorney

JASON ANDERSON, **District Attorney**
Appellate Services Unit

October 25, 2023

Supreme Court of California
350 McAllister Street
Room 1295
San Francisco, CA 94102-4797

Re: Amicus Curiae Supplemental Letter Brief
People v. Hardin; S277487
B315434, (Los Angeles County Super. Ct. No. A893110)

To the Honorable Patricia Guerrero, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of California:

The Court has requested supplemental briefing on the following 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?

Amicus curiae, the District Attorney of the County of San Bernardino, respectfully offers the following answer: the first step should not be eliminated. Under current law, it is a necessary part of the equal protection analysis and a prerequisite to a meritorious claim. It should be maintained.

The existing two-step analysis performs a useful screening function and maintains the constitutional prerogatives of the legislative branch of government. Eliminating the first step would require that courts hearing equal protection claims always consider the justification for a disparity, even when factual differences between two groups are so great that that there could not possibly be an equal protection violation.

Service on the Attorney General per Rule 8.29 of the California Rules of Court

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I. The Similarly Situated First Step of the Equal Protection Analysis Is Indispensable under Current Jurisprudence

Section 1 of the Fourteenth Amendment to the United States Constitution prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." Article I, section 7, subdivision (a) of the California Constitution provides that "[a] person may not be […] denied equal protection of the laws."

The courts have long understood that the equal protection guarantee cannot mean that things that are different must be treated as if they were the same, as that would be impossible. As the Supreme Court explained over 80 years ago:

> The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws', and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.

(*Tigner v. Texas* (1940) 310 U.S. 141, 147.)

This Court has recognized that the "first prerequisite" to a meritorious equal protection claim "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.) "This initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged." (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253, internal quotes omitted.)

Determining whether two classes of people are similarly situated is indispensable. Without it, comparison is impossible. A person who brings an equal protection claim, like Tony Hardin, must compare himself to others, if he is to show that his treatment is unconstitutionally different. The similarly situated step evaluates whether the comparison group is appropriate.

II. The Similarly Situated Step Makes the Equal Protection Analysis More Workable and Protects Separation of Powers

At its heart, a claim that the equal protection guarantee has been violated by legislation is a challenge to the legislative branch's exercise of its core constitutional power: legislating. As such, the judicial branch should only grant such claims when a breach is sufficiently severe. Considering first whether two classes are similarly situated limits the cases where the legislature's decisions are second-guessed in the justification step.

Certainly, the factual differences between classes can support both the argument that someone is not similarly situated and that a disparity in treatment is justified.[1] The greater the factual differences, the more likely that a disparity is permissible.

Here, Tony Hardin compares himself to other young adults who are convicted of first degree murder, but have received parole-eligible sentences, and thus benefit from Penal Code section 3051's eligibility timeframes. (Petitioner's Answering Brief, p. 24.) Whether he is in fact similarly situated is a matter of debate—the San Bernardino County District Attorney's Amicus Curiae brief argued otherwise. (At pp. 17–21.)

In the present case, one point of disagreement is whether the special circumstance of murder in the course of robbery is sufficient to defeat Hardin's claim that he is similarly situated to young adult first degree murderers without a special circumstance. Were Hardin to compare himself to young adult shoplifters placed on probation, the comparison would be so absurd that his claim could be denied 1) because the two groups are not similarly situated, or 2) because the different treatment of shoplifters and special-circumstance murderers is due to obvious disparities between them.[2]

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[1] This overlap has led to criticism of the current two-step framework. (See *Public Guardian of Contra Costa County v. Eric B.* (2022) 12 Cal.5th 1085, 1108–1117, conc. opn. of Kruger, J.)

[2] Although murderers and thieves enjoy the same constitutional rights to due process, to the right against self-incrimination, and more, there is a great disparity in the magnitude of their crimes, particularly the harm done to others. In contrast, an equal protection challenge to the difference in possible sentence

The benefit of the current two-step rule is that it performs a screening function: before the Legislature's judgments are challenged, it must be shown that there are grounds for a court to delve into the possible[3] reasons behind legislative decisions. When two situations are obviously different (as in the absurd shoplifter/murderer comparison referenced in the preceding paragraph and footnote 2) there should be no need to try to divine the Legislature's possible motives in treating the two groups differently. Indeed, there most likely are no motives—the differences between shoplifting and special circumstance murder are so vast that a reasonable legislature would not even pause to consider why murderers and thieves were being treated differently.

The two-step rule has practical and philosophical benefits, which are intertwined. Even when a rational basis analysis is employed, courts generally do not evaluate the wisdom or desirability of statutes and do not act as a "super-legislature." (*Johnson v. Department of Justice*, *supra*, 60 Cal.4th at p. 880, fn. 5.) But in some cases, there is no need to even employ the rational basis test—the factual scenarios being compared are simply too different to ever raise a viable equal protection claim. In such situations, the utility of the similarly situated step becomes apparent: because the two classes are clearly not similarly situated, there is no need to engage in any further analysis. The court considering the claim can deny it on the factual difference without needing to engage in rational speculation about possible legislative motives that likely never existed because there was no reason for the Legislature to question whether clearly different scenarios should be treated as if they were the same.

While there will undoubtedly be closer cases, where the same facts provide arguments under both prongs of the existing two-step rule, that is not a reason to dispense with the requirement that the groups be similarly situated; the screening function of the first step has value.

The current rule may be analogized to other two-step rules, such as the analysis that governs ineffective assistance of counsel claims. (*Strickland v.*

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would be absurd. The vast factual differences between the two should be sufficient to decide the issue, without relying on any further analysis.

[3] Rational speculation as to legislative motive is permitted. (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881, citing *Heller v. Doe by Doe* (1993) 509 U.S. 312, 320.)

Washington (1984) 466 U.S. 668 (*Strickland*).) Under the *Strickland* test, deficient performance and resulting prejudice are both required. (*Id.* at p. 687.) Yet if it is clear that there is no prejudice, a court may dispose of an ineffectiveness claim on that ground without needing to assess whether the performance was deficient. (*Id.* at p. 687.) In some cases, the facts that show that there was no prejudice could also show that there was no deficient performance.[4] But that is not grounds to eliminate the deficient performance portion of the analysis entirely.

Conclusion

The similarly situated step of the equal protection analysis has been part of California law for more than four decades. In that time, it has caused no great harm to equal protection jurisprudence in this state. Rather, it helps courts analyze equal protection claims by weeding out those which are clearly unmeritorious, without needing to perform any analysis about possible legislative motivations. Thus, the similarly situated step also helps maintain the balance of separation of powers by ensuring that the reasonableness of legislative decision-making is only evaluated in situations where the facts are similar enough to raise the specter of a possible equal protection violation. An alternate rule, where a court must always consider the justification for any disparity, is unnecessary and inadvisable.

Respectfully submitted,

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/s/
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[4] For example, a complaint that a particular witness was not called at trial. If that witness' testimony would not have benefited the defendant, there can be no prejudice. Relatedly however, it cannot be deficient performance when a defense attorney fails to call a witness who can offer no helpful testimony.

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COUNTY OF SAN BERNARDINO
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COUNTY OF SAN BERNARDINO

People v. Hardin
S277487

Brent J. Schultze says:

That I am a citizen of the United States and employed in San Bernardino County, over eighteen years of age and not a party to the within action; that my business address is: 303 W. Third St., Fifth Floor, San Bernardino, CA, 92415-0511.

That on October 25, 2023, I served the within:

AMICUS CURIAE SAN BERNARDINO COUNTY DISTRICT ATTORNEY'S SUPPLEMENTAL LETTER BRIEF

on interested parties by enclosing them in a fully postage prepaid envelope and depositing the envelope for collection and mailing with the United States Postal Service at 1900 W. Redlands Blvd., San Bernardino. The envelope was addressed to:

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I certify under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Bernardino, California, on October 25, 2023.

/s/ *Brent J. Schultze*
Brent J. Schultze

STATE OF CALIFORNIA
Supreme Court of California

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Lower Court Case Number: **B315434**

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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.

10/25/2023

Date

/s/Brent Schultze

Signature

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