

ROB BONTA
Attorney General

State of California
DEPARTMENT OF JUSTICE



600 WEST BROADWAY, SUITE 1800
SAN DIEGO, CA 92101
SAN DIEGO, CA 92186-5266

Telephone: (619) 738-9693
E-Mail: Helen.Hong@doj.ca.gov

November 14, 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, Reply to Hardin’s Supplemental Letter Brief

Dear Chief Justice Guerrero and Associate Justices:

The People submit this reply to petitioner Tony Hardin’s supplemental letter brief 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.”

Hardin acknowledges that “[i]t is not necessary for the Court to address whether to eliminate the similarly situated step in order to decide the present appeal.” (Petitioner’s SB 3; see also *id.* at p. 2 [same].) As Hardin observes, the People have not argued in this Court that “Hardin fails to meet the similarly situated step” (*id.* at p. 3), and the parties have focused instead on “whether the disparate treatment of two similarly situated groups is justified by a constitutionally sufficient state interest” (*ibid.*). While the parties disagree over whether the Legislature had a “rational basis for excluding youthful offenders to life without parole for special circumstance murder from receiving youth offender parole hearings” (*id.* at p. 3), the Court’s resolution of that disagreement would not turn on its answer to the separate question presented in the supplemental briefing order. (Cf. *Public Guardian of Contra Costa Cnty. v. Eric B.* (2022) 12 Cal.5th 1085, 1116 (conc. opn. of Kruger, J.) [“this is not the case in which to reexamine [the Court’s] equal protection framework” because the “choice of framework would not be outcome-determinative” 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”].)

The parties also appear to agree that if the Court is “inclined to answer that” separate question, the Court should expressly limit the scope of its decision to “cases like the present one that involve a facial challenge to a law adopting categorizations between identifiable groups.” (Petitioner’s SB at 2, 4, fn. 1; *id.* at p. 2 [limiting analysis to “facial challenges to laws adopting categorizations between identifiable groups”]; *id.* at p. 3 [describing “facial challenges like Hardin’s”]; *id.* at p. 6 [“facial challenges to laws adopting categorizations between identifiable groups”]; *id.* at p. 10 [same].) Any decision eliminating the similarly situated step from the

Court’s equal protection framework should thus expressly exclude “other kinds of cases,” including “class of one” or disparate impact equal protection claims. (*Id.* at p. 4, fn. 1; see also Respondent’s SB at 5-7, fns. 6, 7; *Eric B.*, *supra*, 12 Cal.5th at pp. 1112-1113.) Hardin also appears to agree that elimination of the first step would not reduce a plaintiff’s obligation to demonstrate differential treatment on the class-based lines alleged (e.g., Petitioner’s SB 10 [limiting analysis to “facial challenge to laws adopting categorizations between identifiable groups”]), or diminish a court’s obligation to carefully assess whether heightened scrutiny is warranted (e.g., *id.* at p. 5 [describing “appropriate test of equal protection”]). And Hardin broadly agrees that the way this Court has applied the similarly situated step has been “functionally equivalent to the second step of the equal protection inquiry.” (*Id.* at p. 7; see Respondent’s SB 4, 7.)

As to the merits, Hardin contends that if the Court resolves the separate question presented in the supplemental briefing order in this case, it should eliminate the similarly situated step “in cases involving facial challenges to laws creating identifiable categories.” (Petitioner’s SB 3-10.) But Hardin’s letter brief does not address *stare decisis* principles, which weigh against overturning the Court’s precedent. (See Respondent’s SB 1, 6.) Hardin instead suggests that this Court’s precedent need not be read “to create a threshold step.” (Petitioner’s SB 5.) As the concurring justices in *Eric B.* recently recognized, however, the “threshold step” has “hardened” into a “settled” aspect of this Court’s equal protection doctrine. (12 Cal.5th at p. 1112 (conc. opn. of Kruger, J.))¹ Hardin relies primarily on the risk that, in a potential future case, a reviewing court might “summarily reject an equal protection claim by narrowly defining the classifying trait in order to avoid substantive equal protection review.” (Petitioner’s SB 8.) As the People have explained, that sort of concern is not generally a sufficient basis for overruling longstanding precedent (see Respondent’s SB 6), and Hardin cites no case from this Court in which the threshold inquiry insulated a meritorious equal protection claim from heightened scrutiny. Indeed, Hardin states elsewhere in his letter brief that the “similarly situated step is redundant.” (*Id.* at 7.)

In any event, the Court need not and should not resolve that disagreement here, in a case where the parties agree that it is not necessary to “answer that question” in order “to decide the present appeal.” (Petitioner’s SB 2.)

¹ Contrary to Hardin’s assertion, a “majority of this Court” did not “reject[] the idea that equal protection requires an ‘initial constitutional inquiry’ into whether two groups are similarly situated.” (Respondent’s SB 5.) The opinion invoked by Hardin was a plurality opinion. (See *Fullerton Joint Union High School Dist. v. State Bd. of Ed.* (1982) 32 Cal.3d 779, 798, fn. 19 (plurality opn.); see also *Bd. of Supervisors v. Loc. Agency Formation Com.* (1992) 3 Cal.4th 903, 918 [“the reasoning of *Fullerton*, *supra*, 32 Cal.3d 779, was embodied in a plurality opinion” and thus “lacks authority as precedent”].)

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, 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,

ROB BONTA

Attorney General of California

MICHAEL J. MONGAN

Solicitor General

LANCE E. WINTERS

Chief Assistant Attorney General

SUSAN SULLIVAN PITHEY

Senior Assistant Attorney General

s/ Helen H. Hong

HELEN H. HONG

Deputy Solicitor General

IDAN IVRI

Supervising Deputy Attorney General

NIMA RAZFAR

Deputy Attorney General

Attorneys for Respondent

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Tony Hardin**

No.: **S277487**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On November 14, 2023, I electronically served the attached **Reply to Petitioner's Supplemental Letter Brief** by transmitting a true copy via this Court's TrueFiling system.

Service Via TrueFiling

Courtesy Copy Via Email

William Temko

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 14, 2023, at San Diego, California.

Helen H. Hong

/s/ Helen H. Hong

Declarant for eFiling

Signature

Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on November 14 2023, a true copy thereof enclosed in a sealed envelope has been placed in the internal mail collection system at the Office of the Attorney General at 600 West Broadway Street, Suite 1800, San Diego, CA 92101, addressed as follows:

**The Honorable Juan Carlos
Dominguez, Judge
Los Angeles County Superior Court
Pomona Courthouse South
400 Civic Center Plaza
Department H
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 14, 2023, at San Diego, California.

Helen H. Hong

/s/ H. Hong

Declarant for U.S. Mail

Signature

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**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **helen.hong@doj.ca.gov**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Hardin - CSC - Reply Letter to Supplemental Letter Brief - Final

Service Recipients:

Person Served	Email Address	Type	Date / Time
David Boyd Office of the District Attorney of Santa Clara County	dboyd@dao.sccgov.org	e-Serve	11/14/2023 4:12:44 PM
Patrick Fuster GIBSON, DUNN & CRUTCHER LLP 326789	PFuster@gibsondunn.com	e-Serve	11/14/2023 4:12:44 PM
Kathryn Parker Complex Appellate Litigation Group LLP	paralegals@calg.com	e-Serve	11/14/2023 4:12:44 PM
Diana Garrido Contra Costa County Public Defender 243343	diana.garrido@pd.cccounty.us	e-Serve	11/14/2023 4:12:44 PM
Michael Laurence Law Office of Michael Laurence 121854	mlaurence@mlaurence.org	e-Serve	11/14/2023 4:12:44 PM
BLANCA ROMERO Department of Justice, Office of the Attorney General-San Diego	blanca.romero@doj.ca.gov	e-Serve	11/14/2023 4:12:44 PM
Brian McComas Law Office of B.C. McComas 273161	mccomas.b.c@gmail.com	e-Serve	11/14/2023 4:12:44 PM
Avram Frey ACLU of Northern California 347885	afrey@aclunc.org	e-Serve	11/14/2023 4:12:44 PM
Mitchell Keiter Office of the Orange County District Attorney	mkeiter@msn.com	e-Serve	11/14/2023 4:12:44 PM
Kymerlee Stapleton Criminal Justice Legal Foundation 213463	kym.stapleton@cjlf.org	e-Serve	11/14/2023 4:12:44 PM
Heidi Rummel	hrummel@law.usc.edu	e-	11/14/2023

USC Post-Conviction Justice Project 183331		Serve	4:12:44 PM
Kent Scheidegger Criminal Justice Legal Foundation 105178	kent.scheidegger@cjlf.org	e- Serve	11/14/2023 4:12:44 PM
Nima Razfar CA Attorney General's Office - Los Angeles 253410	nima.razfar@doj.ca.gov	e- Serve	11/14/2023 4:12:44 PM
Adeel Mohammadi MUNGER, TOLLES & OLSON LLP	adeel.mohammadi@mto.com	e- Serve	11/14/2023 4:12:44 PM
Brian Mccomas Law Office of B.C. Brian McComas, LLP	mccomas.b.c@mccomasllp.com	e- Serve	11/14/2023 4:12:44 PM
Matt Nguyen Cooley LLP 329151	mnguyen@cooley.com	e- Serve	11/14/2023 4:12:44 PM
Mitchell Keiter Keiter Appellate Law 156755	Mitchell.Keiter@gmail.com	e- Serve	11/14/2023 4:12:44 PM
Sara McDermott Munger, Tolles & Olson LLP 307564	sara.mcdermott@mto.com	e- Serve	11/14/2023 4:12:44 PM
William Temko Munger, Tolles & Olson LLP	william.temko@mto.com	e- Serve	11/14/2023 4:12:44 PM
Kent Scheidegger Criminal Justice Legal Foundation	cjlf@netcom.com	e- Serve	11/14/2023 4:12:44 PM
Helen Hong Office of the Attorney General 235635	helen.hong@doj.ca.gov	e- Serve	11/14/2023 4:12:44 PM
Kathleen Hartnett Cooley LLP 31467	khartnett@cooley.com	e- Serve	11/14/2023 4:12:44 PM
Kimberly Saltz ACLU Foundation	ksaltz@aclu.org	e- Serve	11/14/2023 4:12:44 PM
Brent Schultze San Bernardino District Attorney 230837	bschultze@sbcda.org	e- Serve	11/14/2023 4:12:44 PM
Greg Wolff Complex Appellate Litigation Group LLP 78626	Greg.wolff@calg.com	e- Serve	11/14/2023 4:12:44 PM
Summer Lacey ACLU Foundation of Southern California 308614	slacey@aclusocal.org	e- Serve	11/14/2023 4:12:44 PM
Sara Cooksey American Civil Liberties Union Foundation of Northern California	scooksey@aclunc.org	e- Serve	11/14/2023 4:12:44 PM
David Boyd Santa Clara County District Attorney 184614	dboyd@da.sccgov.org	e- Serve	11/14/2023 4:12:44 PM

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.

11/14/2023

Date

/s/Helen Hong

Signature

Hong, Helen (235635)

Last Name, First Name (PNum)

California Department of Justice, Office of the Solicitor General

Law Firm