**No. S277487**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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THE PEOPLE OF THE STATE OF CALIFORNIA

*Plaintiff and Respondent,*

vs.

TONY HARDIN

*Defendant and Petitioner.*

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Second Appellate District, Division Seven, Case No. B315434
Los Angeles County Superior Court, Case No. A893110
The Honorable Juan Carlos Dominguez, Judge

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# PETITIONER'S ANSWERING BRIEF

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## ISSUE PRESENTED

Does Penal Code section 3051(h) violate the equal protection clauses of the United States and California Constitutions by offering a parole opportunity based on youth-related mitigating circumstances to some young adult offenders convicted of serious crimes, while denying it to young adult offenders sentenced to life without parole, who are similarly situated in all relevant respects?

## INTRODUCTION

The California Legislature passed Penal Code section 3051 with the sole purpose of creating a meaningful opportunity for release for youthful offenders, who were 25 or younger at the time of their crimes, through demonstrated growth and rehabilitation. Yet, without any rational basis for doing so, the Legislature excluded from this opportunity youth offenders, like Petitioner Tony Hardin, who were sentenced to life without parole. The relative culpability of these individuals provides no basis for their exclusion because the purpose of the statute was ameliorative, not punitive. But even if the Legislature could rationally have relied on culpability to distinguish between these groups, the statutory structure of the bill shows that it did not. Because—as the Court of Appeal below concluded—the government has identified no rational basis to exclude Hardin or others sentenced to life without parole from section 3051 eligibility, this Court should affirm the Court of Appeal, hold the exclusion unconstitutional, and grant Hardin a *Franklin* hearing to develop evidence for a youth offender parole hearing.

The Legislature passed the bill that would become Penal Code section 3051 in 2013. As currently enacted, section 3051 requires the Board of Parole Hearings to conduct youth offender parole hearings for most people who were 25 years old or younger—"youthful offenders"—at the time they committed their crimes. At the hearing, the Board is charged with giving each youthful offender "a meaningful opportunity to obtain release." (Pen. Code, § 3051, subd. (e).) The Board must give "great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity. . . ." (*Id.*, § 4801, subd. (c).) In creating this new ameliorative program, it was "the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established." (Stats. 2013, ch. 312, § 1.)

The structure and purpose of section 3051 follow a line of cases decided in the United States Supreme Court, including *Graham v. Florida* (2011) 560 U.S. 48 and *Miller v. Alabama* (2012) 567 U.S. 460. Those cases relied "not only on common sense—on what 'any parent knows'—but on science and social science" to find that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." (*Miller, supra*, 567 U.S. at pp. 471–472.) Crucially, the high court held that these distinctions apply *categorically* to all juvenile offenders, regardless of the underlying crime: The "hallmark features" of youth—"immaturity, impetuosity, and failure to

appreciate risks and consequence," *id.* at p. 477, as well as a greater propensity for growth and rehabilitation—"are evident in the same way, and to the same degree," regardless of the crime involved, *id.* at p. 473. "[N]one of what [*Graham*] said . . . is crime-specific." (*Id.*)

The Legislature relied on this line of cases in drafting section 3051, Stats. 2013, ch. 312, § 1, and in 2017, it relied on "scientific evidence . . . and neuroscience" to extend the parole opportunity to youthful offenders, those 25 years old and younger at the time of their crime. (Assem. Com. on Public Safety, Bill Analysis, Assem. Bill No. 1308 (2017–2018 Reg. Sess.) as amended Mar. 30, 2017, p. 2.)[1] "Advances in scientific understanding have revealed that the ordinary process of neurological and cognitive development continues for several years past age 18, and our Legislature recognized as much when it extended youth offender parole eligibility to persons who committed their controlling offense at or before age 25." (*People v. Montelongo* (2020) 274 Cal.Rptr.3d 267, 290 (conc. opn. of Liu, J.).)

In 2017 the Legislature further aligned section 3051 with the teachings of *Miller* and *Montgomery* when it passed Senate Bill 394. Before 2017, section 3051 excluded four categories of youthful offenders, including as relevant here youthful offenders

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[1] This Court has held, with respect to published legislative materials, that "[a] request for judicial notice of published material is unnecessary" and that "[c]itation to the material is sufficient." (*Quelimane Co. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 45 n.9.)

sentenced to life without parole, from receiving youth offender parole hearings. Senate Bill 394 extended youth offender parole eligibility to juvenile offenders sentenced to life without parole. Extending parole eligibility to this category of juvenile offenders ensured that similarly situated groups—juvenile offenders sentenced to life without parole and those sentenced to parole-eligible terms, including de facto sentences of life without parole[2]—would be treated similarly under the law.

Yet, without any rational basis, the Legislature failed to extend that same equalizing treatment to youthful offenders between the ages of 18 and 25. Respondent Tony Hardin is one of them: Convicted of murder with a special circumstance and sentenced to life without parole for a crime committed when he was 25, Hardin is not eligible for a youth offender parole hearing—even though he does not differ in any meaningful respect from a comparable youth offender sentenced to a de facto life without parole sentence or to 25 years to life for first degree murder where a special circumstance was not charged. As *Miller* and the Legislature understood, each of those youthful offenders had the same reduced culpability at the time of their crime, owing to their incomplete brain development. Each also had the same increased capacity for growth and rehabilitation in the years that followed. And, in practical application, each had a similar level of culpability as measured by California's sentencing

[2] These include sentences where a person becomes parole-eligible only after serving a term longer than their natural life span—for example, 110 years to life.

statutes: Recent research shows that special circumstance allegations could have been charged in *95 percent* of all first degree murder convictions. (Com. on Rev. of the Pen. Code, *Annual Report and Recommendations* (2021), p. 51.)[3] Yet only those convicted of murders with special circumstances are sentenced to life without parole. There is no rational basis to exclude Hardin from the opportunity to demonstrate the growth and rehabilitation that science, law, and "common sense" say he is capable of.

## LEGAL BACKGROUND

Section 3051 is rooted in a line of United States and California Supreme Court decisions finding juvenile offenders categorically less culpable—and more capable of rehabilitation—than adults, regardless of the crime for which they were convicted. Although the Legislature initially excluded juvenile offenders sentenced to life without parole from the benefits of section 3051, it ultimately determined that the logic of these cases required extending section 3051 relief to that class of individuals as well. Following an increasing scientific consensus that these differences extend to young people 25 years old and younger, the Legislature likewise extended the benefits of its ameliorative program to youthful offenders, including youthful offenders serving de facto life without parole sentences and those convicted of first-degree murder. Only a small group of youthful

[3] Available at http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2021.pdf.

offenders—including those sentenced to life without parole, like Hardin—were excluded from those benefits. The logic of both the case law and the scientific evidence underpinning the passage of section 3051 fundamentally undermines the rationality of that exclusion.

### A. Scientific studies drove a series of decisions in the United States and California Supreme Courts requiring that all juvenile offenders be provided a meaningful opportunity for release.

Starting in 2005, decisions in the federal and California courts have reflected a marked shift in sentencing norms for youth. This shift began in the United States Supreme Court with the decision in *Roper v. Simmons* (2005) 543 U.S. 551, and continued with the 2010 decision in *Graham v. Florida* (2010) 560 U.S. 48, and the 2012 decision in *Miller v. Alabama* (2012) 567 U.S. 460. In a parallel line of cases, this Court took up the same set of questions—and, in a series of decisions that most recently includes *People v. Contreras* (2018) 4 Cal.5th 349, this Court applied the logic of *Miller* beyond the four corners of that case.

In *Roper v. Simmons, supra*, the high court held that the U.S. Constitution forbids the imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The high court explained that "our society views juveniles . . . as 'categorically less culpable than the average criminal," *id.* at p. 567, in part because, "as any parent knows and as . . . scientific and sociological studies . . . tend to confirm, '[a] lack of maturity and an underdeveloped sense of

responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions,'" *id.* at p. 569 [quoting *Johnson v. Texas* (1993) 509 U.S. 350, 367]. The high court also observed that juveniles are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and that their "character[s] . . . [are] not as well formed as that of an adult." (*Id.* at pp. 569–570.) In light of these considerations, *Roper* concluded without qualification that "'youth [is] a mitigating factor,'" which "'derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.'" (*Id.* at p. 570 [quoting *Johnson, supra*, 509 U.S. at p. 368].)

Five years later, in *Graham v. Florida*, the high court took its analysis a step further, holding that that the distinguishing characteristics of youth outlined in *Roper* prohibited courts from sentencing youth to life without parole for any crime except murder. (560 U.S. at p. 82.) Any state that imposed a sentence of life without parole for a non-homicide crime was further required to provide "some meaningful opportunity for release based on demonstrated maturity and rehabilitation" before the end of the life term. (*Id.* at p. 75.) As it did in *Roper*, the high court again relied on "developments in psychology and brain science" which "continue to show fundamental differences between juvenile and adult minds," including that "parts of the brain involved in behavior control continue to mature through late adolescence"

and that "[j]uveniles are more capable of change than are adults." (*Id.* at p. 68.)

Two years later, in *Miller v. Alabama*, the high court extended *Graham* to hold that the U.S. Constitution prohibits mandatory sentences of life without parole even for youth who commit murder. (567 U.S. at p. 465.) Building on *Roper* and *Graham*, the high court observed that "none of what [its line of juvenile sentencing cases] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." (*Id.* at p. 473.) Even where a youthful offender's crime includes an aggravating factor—as was the case for Hardin—the aggravating circumstance was likely affected by the young person's characteristically poor calculation of risk. (*Id.* at p. 478 [explaining that the petitioner's "age could well have affected his calculation of the risk. . . as well as his willingness to walk away . . . ."]; see also*, id.* at p. 479 [noting juveniles' categorically "heightened capacity for change"].)

In *Montgomery v. Louisiana*, the high court affirmed *Miller* and concluded that its holding applies retroactively. ((2016) 577 U.S. 190, 212.) *Montgomery* further held that the constitutionally -required opportunity for release could be satisfied by *either* resentencing or parole eligibility. (*Id.*)

Following the *Miller* decision, this Court began its own substantive reconsideration of sentencing norms for juveniles in California. In *People v. Caballero*, the Court held that sentencing a juvenile convicted of a non-homicide crime to a term of years with a parole eligibility date outside the young person's natural

life expectancy is cruel and unusual. ((2012) 55 Cal.4th 262, 268.) In *People v. Contreras*, the Court extended its analysis further, holding that under *Graham and Caballero*, even a sentence of 50 years to life was disproportionately long for a juvenile offender who committed a non-homicide crime. ((2018) 4 Cal.5th 349, 356.)

In *People v. Gutierrez*, the Court interpreted Penal Code section 190.5(b)—which permits a court to sentence juveniles convicted of special circumstance murder to life without parole—to carry no presumption in favor of life without parole over the alternative, a sentence of twenty-five years to life. ((2014) 58 Cal.4th 1354, 1360.) To the contrary, to impose a sentence of life without parole, the sentencing court must find that the juvenile is "irreparably corrupt, beyond redemption, and thus unfit ever to reenter society[.]" (*Id.* at p. 1391.)

The Court emphasized that "concerns about juveniles' lessened culpability and greater capacity for reform have force *independent* of the nature of their crimes." (*Id.* at p. 1380, emphasis added.) In doing so, this Court confirmed that the seriousness of a crime cannot be considered as separate from the lessened capacity juveniles have for judgment or impulse control, because the poor choice to commit that serious crime is itself the result of that same age-related impairment.

The *Caballero* line of cases applied the lessons of *Graham* to rigorously reevaluate California's existing sentencing scheme for youth. A key tenet of that reevaluation was the same neuroscience and social science that drove the *Roper* line of cases, which shows that youth have categorically less culpability and

greater capacity for rehabilitation, because their brains are still developing.

### B. Those same scientific studies and cases motivated the Legislature to create youth offender parole hearings and extend them to most youthful offenders.

Responding to the developing jurisprudence and evolving scientific research about the mitigating circumstances of youthful criminality, the Legislature passed a series of statutes, now codified at section 3051, that created and then expanded access to youth offender parole hearings. The Legislature, focusing on the rehabilitative potential of youthful offenders, did so because it recognized—consistent with the evolving jurisprudence from the U.S. Supreme Court and this Court—that young people have a "special capacity to turn their lives around." (Sen. Com. on Public Safety, Bill Analysis, Senate Bill No. 261 (2015–2016 Reg. Sess.) (Statement of Bill's Author), April 28, 2015, p. 3.)

In 2013, recognizing the need "to bring juvenile sentencing into conformity with *Graham*, *Miller*, and *Caballero*," *People v. Franklin* (2016) 63 Cal. 4th 261, 277, the Legislature passed Senate Bill No. 260. As did the high court in the *Miller* line of cases, the Legislature relied heavily on "'developments in psychology and brain science [that] continue to show fundamental differences between juvenile and adult minds,' including 'parts of the brain involved in behavior control.'" (Stats. 2013, ch. 312, § 1 [quoting *Miller, supra*, 567 U.S. at pp. 471–472].) The Legislature expressly "recognize[d] that youthfulness both lessens a juvenile's moral culpability and enhances the

prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society." (Stats. 2013, ch. 312, § 1.)

Accordingly, SB 260 made a young person who was under the age of 18 at the time of the commission of their "controlling offense"—defined as "the offense or enhancement for which any sentencing court imposed the longest term of imprisonment," Penal Code, § 3051, subd. (a)(2)(B)—eligible for a youth offender parole hearing during their 15th year of incarceration for a determinate sentence; during their 20th year of incarceration for a sentence in which the controlling offense was less than 25 years to life; and during their 25th year of incarceration for a sentence in which the controlling offense was 25 years to life. (See SB 260 Legislative Counsel's Digest.) SB 260 "reflect[ed] the Legislature's judgment that 25 years is the maximum amount of time that a juvenile offender may serve before becoming eligible for parole." (*Franklin, supra,* 63 Cal.4th at p. 278.)

SB 260 also created new and higher substantive standards that the Board of Parole Hearings is mandated to apply in determining a youthful offender's suitability for parole. Consistent with the Legislature's conclusion that "immaturity, impetuosity, susceptibility to peer pressure or the negative influence of older individuals, and the failure to appreciate risks and consequences" are "hallmark features of youthfulness," Assem. Com. on Public Safety, Bill Analysis, Sen. Bill No. 260 (2013–2014 Reg. Sess.), as amended June 27, 2013, the Legislature instructed the Board to "give great weight to the

diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner" in determining whether to grant parole. (Pen. Code, § 4801, subd. (c).) Understanding the "fundamental differences between juveniles and adults," the Legislature ensured that the Parole Board's decisions would reflect those considerations. (Assem. Com. on Public Safety, Bill Analysis, Sen. Bill No. 260 (2013–2014 Reg. Sess.), as amended June 27, 2013.) In recognition of the categorical nature of those fundamental differences, it did so for *all* individuals who were under age 26 at the time of their crime, regardless of their crimes of conviction or sentences.

In subsequent years, the Legislature recognized that similar considerations also applied to young adults who were 18 or older at the time of their controlling offenses. In 2015, citing "[r]ecent scientific evidence" showing "that the process of brain development continues well beyond age 18," Sen. Com. on Public Safety, Bill Analysis, Sen. Bill No. 261 (2015–2016 Reg. Sess.) (Statement of the Bill's Author), April 28, 2015, p. 3, the Legislature passed Senate Bill 261, which expanded youth offender parole hearing eligibility under section 3051 to include those who were younger than 23 at the time of their crimes. The Legislature concurrently expanded the Parole Board's mandate under Penal Code section 4801(c).

Two years later, in 2017, the Legislature passed Assembly Bill 1308, further expanding youth offender parole hearing eligibility to those who were 25 or younger at the time of their

crimes (and again expanded the Parole Board's mandate under section 4801(c)). In so doing, the Legislature aimed to "align public policy with scientific research," especially research showing that "the prefrontal cortex" of young adults—which is "responsible for a variety of important functions . . . highly relevant to criminal behavior and culpability"—"doesn't have nearly the functional capacity at age 18 as it does at 25." (Assem. Com. on Public Safety, Bill Analysis, Assem. Bill No. 1308, (2017–2018 Reg. Sess.) (Statement of the Bill's Author), April 25, 2017, p. 2.)

Throughout this process, the Legislature was motivated by rehabilitative—not punitive—concerns. The Legislature was particularly driven by the developing scientific evidence about the mitigating factors of young adulthood. For example, in passing SB 260, the Legislature relied on "[r]ecent scientific evidence on adolescent development and neuroscience show[ing] that certain areas of the brain, particularly those that affect judgment and decision-making, do not fully develop until the early 20's." (Sen. Rules Com., Off. of Sen. Floor Analyses, Bill Analysis, Sen. Bill No. 260 (2013–2014 Reg. Sess.) (Statement of the Bill's Author), Sept. 6, 2013, p. 11; see also Sen. Com. on Public Safety, Bill Analysis, Sen. Bill No. 261 (2015–2016 Reg. Sess.) (Statement of the Bill's Author), April 28, 2015, p. 3 ["[A]dolescents are still developing in ways relevant to their culpability for criminal behavior and their special capacity to turn their lives around."]; Assem. Com. on Public Safety, Bill Analysis, Assem. Bill No. 1308 (2017–2018 Reg. Sess.), April 25,

2017, p. 4 ["The parts of the brain that are still developing during this process affect judgment and decision-making, and are highly relevant to criminal behavior and culpability."]; *Id.*, p. 2 ["AB 1308 would align public policy with scientific research."].)

Aligning parole eligibility with developing scientific research also reflected the Legislature's understanding that youth in particular have a "special capacity to turn their lives around." (Sen. Com. on Public Safety, Bill Analysis, Sen. Bill No. 261 (2015–2016 Reg. Sess.) (Statement of Bill's Author), April 28, 2015, p. 3.) In expanding the age for youth offender parole hearing eligibility to 25, for example, the Legislature noted an "increased" "motivation to focus on rehabilitation" of youthful offenders, noting that "[a]n offender is more likely to enroll in school, drop out of a gang, or participate in positive programs if they can sit before a parole board sooner, if at all, and have a chance of being released." (Assem. Com. on Public Safety, Bill Analysis, Assem. Bill No. 1308 (2017–2018 Reg. Sess.) (Statement of the Bill's Author), April 25, 2017, p.3.) Senator Hancock—the author of SB 260 and 261—urged the Legislature to pass the bills because "[p]eople change." (Sen. Appropriations Com., Hearing on Senate Bill No. 260 (April 22, 2013), testimony of Senator Hancock.)[4] As another legislator noted during a floor session, "Things that we did in our youth . . . doesn't [*sic.*] necessarily define who we are for the rest of our life. To say that young people aren't salvageable is a crime in and of itself." (Sen.

[4] Available at https://www.senate.ca.gov/media/20130422_118/video, at 59:18.

Debate, Assem. Bill No. 1308 (Sept. 12, 2017), testimony of Senator Bradford.)[5]

Notably absent from the legislative history are justifications for a set of exclusions to youth offender parole hearing eligibility created by section 3051 for those sentenced pursuant to the three strikes law (Pen. Code, §§ 667, subds. (b)–(i), 1170.12), the one strike law (Pen. Code, § 667.61), for those convicted of certain crimes committed after age 25, or for those "sentenced to life in prison without the possibility of parole."[6] Instead, the Legislature's stated focus was creating opportunities for young people—in light of the mitigating factors discussed in *Miller* and subsequent cases, as well as an evolving knowledge of the underdevelopment of youth cognitive skills—to "'demonstrate their rehabilitation and fitness to reenter society in the future.'" (Sen. Com. on Public Safety, Bill Analysis, Assem. Bill No. 1308 (2017–2018 Reg. Sess.), June 27, 2017, p. 3 [quoting *Caballero, supra*, 55 Cal.4th at p. 268].)

## STATEMENT OF THE CASE

In 1990, Petitioner Tony Hardin was convicted of a murder committed during the crime of robbery, in violation of Penal Code sections 187(a) and 190.2(a)(17). (*People v. Hardin* (July 19, 1993) B051873 [nonpub. opn.], at p. 4.) He was sentenced by the Los Angeles County Superior Court to life without the possibility of

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[5] Available at https://www.senate.ca.gov/media/senate-floor-session-20170912/video, at 1:17:18.

[6] In 2017, alongside AB 1308, the Legislature also passed Senate Bill 394, which affords youth offender parole hearing eligibility to juvenile offenders sentenced to life without parole.

parole.[7] (*Id.* at 4–5.) Hardin was 25 years old at the time of the murder. On direct appeal, the Court of Appeal affirmed the conviction, *id.* at 37, and this Court denied Hardin's petition for review, see *People v. Hardin*, No. S034590 (Oct. 21, 1993).

In August 2021, Hardin—who by then had served more than 30 years in prison—filed a *pro se* motion in the Los Angeles County Superior Court seeking a hearing to preserve evidence for use in an eventual youth offender parole hearing. (CT[8] 26–29; see also *Franklin, supra*, 63 Cal.4th at p. 269 [holding that a defendant eligible for a youth offender parole hearing must have an "adequate opportunity at sentencing to make a record of mitigating evidence tied to his youth"].) The Superior Court denied Hardin's motion on the basis that he was statutorily ineligible for a youth offender parole hearing, holding that the statutory exclusion was constitutional. (CT 31.)

The Second Appellate District Court of Appeal reversed, holding that section 3051(h)'s exclusion of youthful offenders sentenced to life without parole did not withstand equal protection scrutiny. (*People v. Hardin* (2022) 84 Cal.App.5th 273, 290 ("Opn.").) The Court of Appeal reasoned that because the Legislature's stated "goal . . . was to apply the *Miller* youth-related mitigating factors to young adults up to the age of 26 in light of neuroscience research that demonstrated the human

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[7] Hardin was also convicted of first-degree residential robbery, in violation of Penal Code section 211, and grand theft auto, in violation of Penal Code section 487. (*Id.* at 4.)

[8] "CT" refers to the Clerk's Transcript filed in the Court of Appeal.

brain continues to develop into a person's mid-20's, and thus to permit youth offenders a meaningful opportunity for parole if they demonstrate increased maturity and impulse control, then for that purpose there is no plausible basis for distinguishing between same-age offenders based solely on the crime they committed." (*Id.* at p. 288.) Because the Legislature lacked any reasonable basis to exclude youthful offenders like Hardin from receiving the benefits of section 3051, Hardin was entitled to a youth offender parole hearing, and consequently, to a hearing to preserve evidence of his youth-related mitigating factors. (*Id.* at p. 279.)

Respondent filed a timely petition for review before this Court, which the Court granted on January 11, 2023.

## ARGUMENT

### I. YOUTHFUL OFFENDERS SENTENCED TO LIFE WITHOUT PAROLE FOR SPECIAL CIRCUMSTANCE MURDER ARE SIMILARLY SITUATED TO YOUNG ADULTS SENTENCED TO DE FACTO LIFE WITHOUT PAROLE AND PAROLE-ELIGIBLE TERMS FOR FIRST-DEGREE MURDER.

"The concept of equal treatment under the laws means that persons similarly situated regarding the legitimate purpose of the law should receive like treatment." (*People v. Morales* (2016) 63 Cal.4th 399, 408 [quoting *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253].) The requirement of equal protection, "[a]t core . . . ensures that the government does not treat a group of people unequally without some justification." (*People v. Chatman* (2018) 4 Cal.5th 277, 288.)

In California, equal protection analysis typically proceeds in two steps.[9] "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. 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." (*Morales, supra*, 63 Cal.4th at p. 408, internal quotation marks omitted.)

The government effectively concedes that Hardin has met this requirement. (Opening Brief ("Br.") at 21 ["[a]ssuming" 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,' as the Court of Appeal held"].) That is because, for all practical purposes, the two groups at issue here are the same. The only difference between 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, is the special circumstance finding.[10] And, as the Court of Appeal observed,

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[9] But see *Pub. Guardian of Contra Costa County. v. Eric B.* (2022) 12 Cal.5th 1085, 1114–1117 (conc. opn. of Kruger, J.) [arguing that the two-step framework creates unnecessary confusion and suggesting that the Court consider letting the first step—whether the parties are similarly situated—go].)

[10] Special circumstance murder is not the only offense that can support a sentence of life without parole. (See, e.g., Pen. Code

"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. 290.) As will be discussed in more detail below, the government fails to identify any rational basis for distinguishing between these two factually near-identical groups with respect to the ameliorative purpose of the statute.

## II. THE CALIFORNIA LEGISLATURE LACKED A RATIONAL BASIS TO EXCLUDE YOUTHFUL OFFENDERS SENTENCED TO LIFE WITHOUT PAROLE FOR SPECIAL CIRCUMSTANCE MURDER FROM RECEIVING YOUTH OFFENDER PAROLE HEARINGS.

"The next step of an equal protection analysis asks whether the disparate treatment of two similarly situated groups is justified by a constitutionally sufficient state interest." (*Pub. Guardian of Contra Costa County, supra*, 12 Cal.5th at p. 1107.) The question before this Court is whether, for purposes of eligibility for a youth offender parole hearing under section 3051,

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§§ 209, subd. (a); 667.61, subds. (j)(1), (l); 667.7, subd. (a)(2).) The government contends that the list of other life without parole eligible crimes shows that the sentence is reserved for "the most heinous" crimes. (Br. at 31–32.) The list of special circumstances undermines this point: It has expanded to include "lying in wait," as well as any murder committed while the defendant was engaged in robbery, kidnapping, burglary, mayhem, or carjacking. (Pen. Code, § 190.2, subds. (a)(15), (17).) As discussed below, the list has become so broad that the criteria for the prosecution to allege a special circumstance have essentially merged with first degree murder.

the Legislature had a rational basis for granting parole eligibility on the basis of youth-related mitigating circumstances to those youthful offenders sentenced to life for first degree murder, while depriving that youth-based eligibility for youthful offenders sentenced to life without parole for special circumstance murder. Demonstrably, it did not.

### A. Because the Legislature's purpose in passing Penal Code section 3051 was rehabilitative, not punitive, there is no rational basis for distinguishing between youthful offenders based on relative culpability.

"The Equal Protection Clause . . . den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (*Brown v. Merlo* (1973) 8 Cal.3d 855, 861–862, italics omitted [quoting *Reed v. Reed* (1971) 404 U.S. 71, 75–76].) "The equal protection clause of the California Constitution (Cal. Const., art. I, § 7) also requires some rational relationship between the legislative goal and the class singled out for unfavorable treatment." (*Young v. Haines* (1986) 41 Cal.3d 883, 900.) In light of the rehabilitative legislative goals of section 3051, the Legislature had no rational basis for excluding youthful offenders sentenced to life without parole from youth offender parole hearing eligibility.

### 1. The mitigating factors of youth are not crime-specific and apply equally to all youthful offenders, regardless of their sentence.

As this Court has consistently affirmed, "*Miller*'s principle that 'the distinctive attributes of youth [that] diminish the penological justifications for imposing the harshest sentences on juvenile offenders' are not 'crime-specific.'" (*Gutierrez, supra*, 58 Cal.4th at p. 1381 [quoting *Miller, supra*, 567 U.S. at pp. 472–473]; see also *Contreras, supra*, 4 Cal.5th at p. 380; *Franklin, supra*, 63 Cal.4th at p. 276.) The "'distinctive (and transitory) mental traits and environmental vulnerabilities'" of youth "'are evident in the same way, and to the same degree, when,'" for example, "'a botched robbery turns into a killing.'" (*Caballero, supra*, 55 Cal.4th at p. 268 [quoting *Miller, supra*, 567 U.S. at 473].) Similarly—as a matter not only of fact, but of legislative finding—whatever a youthful offender's crime, their culpability is less because of their youth.

Recognizing that the penological justifications for imposing the harshest sentences are equally lessened for *all* youthful offenders *because of* their youthfulness, the Legislature has fully endorsed the non-specificity principle of the *Miller* line of cases. Section 3051 was itself "enacted by the Legislature to bring juvenile sentencing in conformity with *Miller*" and its progeny. (*Franklin, supra*, 63 Cal.4th at p. 268.) In passing SB 260, for example, the Legislature recognized without qualification that "youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and

neurological development occurs, these individuals can become contributing members of society." (Stats. 2013, ch. 312, § 1.) The Legislature understood that those hallmark features of youth—youthful offenders' diminished culpability and greater propensity for rehabilitation, growth, and maturity—attach to *all* youthful offenders at the time of their crime, regardless of the crime committed. The Legislature expressed this not only as a moral principle, but also as a matter of basic physiological fact. (See Assem. Com. on Public Safety, Bill Analysis, Assem. Bill No. 1308 (2017–2018 Reg. Sess.) as amended Mar. 30, 2017, p. 2 ["Scientific 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."].)

Young people convicted of special circumstance murder are not exceptions to the biological rule. They, like young people convicted of other serious crimes with parole-eligible sentences, including premeditated first degree murder and sentences of de facto life without parole, exhibit inhibited judgment, greater impulsivity, and a greater capacity for rehabilitation. They are equally capable of real change, given the time, opportunity, and sufficient institutional and social support.

Thus, even crediting for the sake of argument the government's position that a "[life without parole] sentence was based on a more serious offense" than first-degree murder or a life without parole equivalent—which Petitioner disputes—that still "provides no rational basis for the distinction because the

statute is not designed to determine the degree of appropriate punishment but to determine whether the individual has outgrown his or her criminality." (*In re Jones* (2019) 42 Cal.App.5th 477, 486 (conc. opn. of Pollak, J.).) As the Legislature has expressly acknowledged, youthful offenders all share a greater capacity for rehabilitation than adults, regardless of the crime of commitment. "There is no reason to conclusively presume that one such person is more likely to have satisfactorily matured than the other." (*Id.*)

The scientific and legal principles motivating the passage of Section 3051 are fundamentally incompatible with the decision to exclude youthful offenders sentenced to life without parole. "In light of the high court's clear statement that the mitigating attributes of youth are not 'crime-specific' and our Legislature's recognition that those attributes are found in young adults up to age 25, it is questionable whether there is a rational basis for section 3051's exclusion of 18- to 25-year-olds sentenced to life without parole." (*Montelongo, supra*, 274 Cal.Rptr.3d at pp. 289–290, internal citation omitted (conc. opn. of Liu, J.) [quoting *Miller, supra*, 567 U.S. at p. 473].) Their exclusion from youth offender parole eligibility is irrational, given the Legislature's findings regarding the categorically enhanced capacity of *all* youthful offenders for rehabilitation.

**2. The Legislature enacted section 3051 to create meaningful opportunities for release.**

As this Court has repeatedly acknowledged, "the Legislature enacted Senate Bill No. 260 with 'the intent . . . to

create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.'" (*Franklin, supra*, 63 Cal.4th at p. 285 [quoting Stats. 2013, ch. 312, § 1]; see also, e.g., *In re Cook* (2019) 7 Cal.5th 439, 461 [quoting Pen. Code, § 3051, subd. (e)] ["By statute, the charge of the Board of Parole Hearings is to give each youthful offender 'a meaningful opportunity to obtain release,' according 'great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity.'"]; *id.*, § 4801, subd. (c).) The Legislature explicitly invoked this rehabilitative rationale in its enactment of AB 1308, explaining that "[s]ince the passage of SB 260 and SB 261[,] motivation to focus on rehabilitation has *increased*." (Assem. Com. on Public Safety, Bill Analysis, Assem. Bill No. 1308 (Author's Statement (Mark Stone)), April 25, 2017, p. 3, emphasis added.)

The government contends that "accounting for the mitigating aspects of youth was not the Legislature's only purpose," positing that the Legislature was also concerned with culpability and the appropriate level of punishment for certain crimes. (Br. at 27.)[11] But it is telling that the Legislature chose the parole process—rather than a recall and resentencing procedure, such as that set forth in Penal Code section 1170,

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[11] The government also contends that section 3051 reflects "penological aims," because the legislative history references "more serious crimes." (*Id.* at 27–28.) A generic reference to some crimes being more serious than others does not demonstrate that *this* statute has a penological purpose.

subsection (d)—to enact its goals. California's parole process explicitly measures rehabilitation. The Board of Parole Hearings determines an offender's suitability for release based on whether an individual *presently* poses an "unreasonable risk of danger to society if released from prison," that is, based on whether there is evidence of rehabilitation. (Cal. Code Regs., tit. 15, § 2281, subd. (a).) To the extent the crime of commitment can be taken into consideration at all, it is *only* for purposes of determining the present level of risk. Thus, like section 3051 and unlike sentencing statutes, the parole process is fundamentally forward-looking: The facts of the crime are not probative of the parole suitability determination when there is evidence of rehabilitation during the period of incarceration. (See, e.g., *In re Lawrence* (2008) 44 Cal.4th 1181, 1219 ["[W]hen there is affirmative evidence, based upon the prisoner's subsequent behavior and current mental state, that the prisoner, if released, would not currently be dangerous, his or her past offense may no longer realistically constitute a reliable or accurate indicator of the prisoner's current dangerousness."].) Consistent with the Legislature's purpose in passing section 3051, the operative question before the Parole Board is one of rehabilitation, not of culpability or punishment.

Moreover, to the extent that the Legislature considered culpability at all, it was only to emphasize youthful offenders' categorically *diminished* culpability, as demonstrated by the evolving science. (See, e.g., Assem. Com. On Public Safety, Bill Analysis, Assem. Bill No. 1308 (2017–2018 Reg. Sess.), April 25,

2017, p. 2 [explaining that "functions [which] are highly relevant to criminal behavior or culpability" are diminished in young people]; *Id.*, p. 3 ["[J]uveniles have lessened culpability than adults due to . . . the fundamental differences between a juvenile and adult offender"].) Even the bill's opponents characterized it in this way, "challeng[ing] the sweeping generalization embedded in the bill that holds all persons under the age of [26] to a lower standard of culpability . . . ." (Sen. Rules Com., Off. of Sen. Floor Analyses, Bill Analysis, Assem. Bill No. 1308 (2017–2018 Reg. Sess.), Sept. 4, 2017, p. 8 [statement of the San Diego County District Attorney].) The legislative history plainly reflects that providing for rehabilitation based on the personal characteristics shared by all youth offenders, not punishment for their acts, motivated the Legislature to pass section 3051.

The government also argues that the Legislature "considered the administrative and financial burdens of expanding the [section 3051] scheme" to suggest alternative rationales justifying the statutory exemptions of 3051(h). (Br. at 38–39.) Not so. The Legislature concluded that expansion of youth offender parole hearing eligibility would have only a "minimal fiscal impact" and that any "costs will be more than offset by the savings associated with the early release of youthful offenders found suitable for parole." (Assem. Com. on Appropriations, Bill Analysis, Assem. Bill No. 1308 (2017–2018 Reg. Sess.), May 10, 2017, p. 1.) If anything, administrative and financial considerations further undermine the rationality of the statutory exclusions, which would keep more youthful offenders

in prison and increase burdens both on prison administration and the public fisc.

### 3. Section 3051 is not a sentencing statute and it does not classify individuals based on culpability.

Given the Legislature's rehabilitative purpose, section 3051 "is decidedly not a sentencing statute." (Opn. at p. 287.) As discussed above, the science underlying the decision to expand youth offender parole hearings to youthful offenders 25 years old and younger applies categorically; it arises from the inherent characteristics of the offender, without regard to the crime. Indeed, the characteristics of youth mean that a young person's "actions [are] *less* likely to be evidence of irretrievable depravity." (*Franklin, supra*, 63 Cal.4th at p. 274, emphasis added [quoting *Miller, supra*, 567 U.S. at p. 471].)

The rehabilitative purpose of the statute—to acknowledge youthful offenders' immaturity and greater capacity for change by providing a meaningful opportunity to demonstrate subsequent rehabilitation and obtain release—arises from a push to acknowledge and accommodate the inherent mitigating characteristics of youth. Again, to the extent that the Legislature considered culpability at all, it was only to acknowledge the *categorically* lower culpability of offenders aged 25 and younger. There is, therefore, no rational relationship between the group left out by the Legislature—individuals sentenced to life without parole—and the broad rehabilitative purposes of the statute. Section 3051 exists to give youthful offenders a chance: a

motivation and an opportunity to prove their categorical capacity for change.

The government contends that, contrary to the structure, history, and stated purposes of the statute, section 3051 operates like a sentencing statute because its effect is to "set[] the minimum penalty for an offense committed by a young adult offender." (Br. at 30.) Having so categorized the law, the government then relies on the well-developed body of case law stating that the Legislature has the prerogative to distinguish crimes based on severity and set different punishments on that basis. (See, e.g., *id.* at 30–34.)

The government is correct that the Legislature's prerogative to impose different punishments for different crimes ordinarily does not violate equal protection. But its application of that principle here is misplaced. Section 3051 "is not designed to determine the degree of appropriate punishment but to determine whether the individual has outgrown his or her criminality." (*Jones, supra*, 42 Cal.App.5th at p. 486 (conc. opn. of Pollak, J.).) In contrast to sentencing statutes like Penal Code sections 190 and 190.2, section 3051 "is intended to permit evaluation of whether, over an extended period of incarceration, an individual who committed a serious crime while still youthful has been rehabilitated and can be released from custody without risk to the public." (*People v. Morales* (2021) 67 Cal.App.5th 326, 351–352, *review denied* (Oct. 20, 2021) (conc. & dis. opn. of Pollak, J.).) Unlike a sentencing statute, which focuses on the offender's conduct at the time of the crime, section 3051 focuses

on the youthful offender's conduct *after* the crime, in the intervening period of incarceration. It does no more than offer an opportunity to be considered for parole based on a process of growth and increased maturity that has taken place in that time.

The statute does not prescribe punishments, "assess culpability" (except to acknowledge the categorically lower culpability of youthful offenders), "or measure the appropriate level of punishment for various crimes[.]" (Opn. at p. 287.) Rather, it tests youthful offenders' actual rehabilitation at set points derived from a proxy: the longest sentence imposed by the court (the controlling offense). As this Court has explained it, "[t]he statute establishes what is, in the Legislature's view, the appropriate time to determine whether a [youthful] offender has 'rehabilitated and gained maturity' so that he or she may have 'a meaningful opportunity to obtain release.'" (*Franklin, supra*, 63 Cal.4th at p. 278, internal citations omitted.)

If the Legislature had wanted to pass a resentencing statute, it could have done so—as it in fact did when it passed Penal Code section 1170, subdivision (d). That statute expressly permits juvenile offenders sentenced to life without parole to petition for a recall of their sentence and resentencing after spending at least 15 years in prison. (Pen. Code, § 1170, subd. (d)(1)(A).) But that is *not* what the Legislature did here; rather, the Legislature developed a system by which—after a set period of time and despite their still-operative sentence—youthful offenders have the opportunity to demonstrate their rehabilitation and suitability for parole.

Eligibility for a youth offender parole hearing is based on the single "offense or enhancement for which any sentencing court imposed the longest term of imprisonment." (Pen. Code, § 3051, subd. (a)(2)(B).) That means a youthful offender sentenced to a cumulative 100+ years to life and one sentenced to 30 years to life are both eligible for a youth offender parole hearing, regardless of the circumstances or severity of their crimes. And the controlling offense is not clearly related to culpability: It may be that a 25 years to life sentence for a gun enhancement is the controlling offense for a youthful offender also sentenced to 15 years to life for attempted murder. Section 3051 sets aside questions of culpability, collapsing these disparate sentences into a single metric—the controlling offense—which then serves as a rough guideline for determining when a person might first be expected to demonstrate meaningful rehabilitation.

*When* a youth offender is entitled to their first youth offender parole hearing is also untethered from considerations of culpability and punishment. Because the timing of the first youth offender parole hearing is based on the controlling offense, the Legislature permitted significant divergences between the maximum sentence imposed and the timing of the first parole hearing. The two factors may even be inversely correlated: For example, a person sentenced to 120 years to life for multiple

offenses carrying a maximum sentence of 15 years to life,[12] would be eligible for parole in their 20th year of incarceration; whereas a person sentenced to 42 years to life for the attempted murder of a rival gang member, with a 25 years to life firearm enhancement,[13] would be eligible for parole in their 25th year of incarceration. (See Pen. Code, § 3051, subd. (b)(2)–(3).) In other words, a youthful offender who is *more* culpable from a sentencing perspective (because a longer sentence was imposed) may, under section 3051, still be entitled to a parole hearing sooner than someone who is less culpable.

The structure of the statute eschews the detailed accounting that drives California's sentencing laws in favor of a simple formula. That formula reflects the statute's fundamentally forward-looking purpose, in recognition of youthful offenders' categorically greater capacity for rehabilitation.

Nor does the statute alter the sentence. "The Legislature did not envision that the original sentences of eligible youth

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[12] See *People v. Booth* (2018) 25 Cal.App.5th 450, 452 [adult defendant convicted of, *inter alia*, multiple counts of sexual penetration of a child, sentenced to a determinant term of 8 years 4 months, plus an indeterminate term of 120 years to life].

[13] See *People v. Montes* (2003) 31 Cal.4th 350, 353 (2003), internal citations omitted [adult defendant sentenced to "the midterm of seven years for attempted murder . . . plus a consecutive term of 10 years for the criminal street gang enhancement . . . plus a consecutive term of 25 years to life for the firearm enhancement"].

offenders would be vacated and that new sentences would be imposed to reflect parole eligibility during the 15th, 20th, or 25th year of incarceration." (*Franklin, supra*, 63 Cal.4th at p. 278.) In a very literal sense, a youthful offender's sentence remains the same: The abstract of judgment, which is part of the public record, does not change. Nor does the sentence change in the prison's records, which are used to calculate the youthful offender's classification score and custody level. (See Cal. Code Regs., tit. 15, § 3375.3.) Further, "[t]he continued operation of the original sentence is evident from the fact that an inmate remains bound by that sentence, with no eligibility for a youth offender parole hearing, if 'subsequent to attaining [26] years of age' the inmate 'commits an additional crime for which malice aforethought is a necessary element . . . or for which the individual is sentenced to life in prison.'" (*Franklin, supra*, 63 Cal.4th at p. 278, citations omitted.)

Indeed, the statute affects the amount of time served *only* to the extent that the youthful offender can demonstrate their rehabilitation. Someone eligible for a youth offender parole hearing after 25 years of incarceration may ultimately spend 30, 40, or 50 years in prison before demonstrating their rehabilitation to the satisfaction of the Board. Those who never demonstrate rehabilitation will serve their full sentence—and those sentenced to life or the functional equivalent of life without parole will die in prison. Rather than changing the sentence itself, "section 3051 has changed the *manner* in which the juvenile offender's original sentence operates by capping the

number of years that he or she may be imprisoned before becoming eligible for release on parole." (*Id.*, emphasis added.) Under section 3051, a youthful offender's sentence remains the same; what changes is the *opportunity* to demonstrate that they are deserving of a second chance.

The extraordinary similarity between section 3051's excluded and included classes also proves that this is no mere matter of "imperfect fit between means and ends." (See Br. at 36 [quoting *Johnson, supra*, 60 Cal. 4th at p. 887].) The "closely-related" line of cases the government cites to the contrary concerns section 190.2, indisputably a *sentencing* statute, see Br. at 36; here, as explained *supra*, section 3051 is a *parole* statute. The question is thus not whether the Legislature can rationally distinguish between punishments for different crimes, but whether the Legislature can rationally exclude from its ameliorative parole statute youthful offenders sentenced to life without parole—even though 95% of the most comparable included group, youthful offenders convicted of first degree murder, share the same characteristics. It cannot: "[A]ny purported legislatively recognized distinction in culpability between individuals serving a parole-eligible indeterminate life sentence and those sentenced to life without parole is illusory." (Opn. at pp. 289–290.)

Because the legislative history reflects that the Legislature was motivated solely by an ameliorative purpose, the Legislature cannot rationally provide unequal treatment to groups that are similarly situated with respect to that purpose. "[J]udicial review

under [the rational basis] standard . . . is not toothless. A classification scheme is invalid if it does not meet the 'constitutional demand of rationality.'" (*Young, supra*, 41 Cal.3d at p. 899.) Here, unlike in true sentencing statutes, such as sections 190 and 190.2, section 3051 affords no room for considerations of punishment or retribution; the purpose of the statute is to recognize and effectuate youthful offenders' categorically greater capacity for rehabilitation. With rehabilitation as the statute's guiding purpose, any exclusion based on purported distinctions in culpability—especially for offenders who have been recognized categorically as having reduced culpability—is so far removed from the statute's rehabilitative purpose that the constitutional demand for rationality in lawmaking is not met.

#### 4. Section 3051(h)'s other exclusions further undermine the rationality of the statutory scheme.

In addition to excluding youthful offenders sentenced to life without parole from youth offender parole hearing consideration, section 3051(h) also excludes those youthful offenders sentenced under the three strikes law (Pen. Code, §§ 667, subds. (b)–(i), 1170.12), those sentenced under the one strike law (Pen. Code, § 667.61), and those who committed an additional crime after turning 26 years old, for which malice aforethought is a necessary element, or for which a life sentence is imposed. (Pen. Code, § 3051, subd. (h).) The existence of these separate exclusions further undermines the rationality of excluding youthful offenders sentenced to life without parole from youth

offender parole eligibility, in light of *Miller*'s non-specificity principle.

When considered together, the exclusions evince no common thread of culpability justifying their differential treatment. The exclusion of one-strikers and three-strikers who have not committed murder, when parole is made available to youthful offenders convicted of first degree murder, is "at odds with the high court's observation that 'defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.'" (*Contreras, supra*, 4 Cal.5th at p. 382 [quoting *Graham, supra*, 560 U.S. at p. 69].) As *Graham* explained, "Although an offense like robbery or rape"—robbery being a predicate for a third strike conviction, and rape being a predicate for a one strike conviction—"is 'a serious crime deserving serious punishment,' those crimes differ from homicide crimes in a moral sense." (560 U.S. at p. 69 [quoting *Enmund v. Florida* (1982) 458 U.S. 782, 797].) As a number of lower courts have held, these exclusions cannot withstand even rational basis scrutiny. (See, e.g., *In re Woods* (2d Dist. 2021) 62 Cal.App.5th 740, 751; *People v. Edwards* (1st Dist. 2019) 34 Cal.App.5th 183; see also *Contreras, supra*, 4 Cal.5th at p. 382 [noting equal protection issues with the one strike offender exclusion].)[14]

[14] The issue of whether the exclusion of one strike offenders violates equal protection is currently pending before the Court in *People v. Williams*, S262229.

The exclusion of youthful offenders who committed a crime after age 26 further undermines any argument that the exclusions generally were enacted based on culpability. For that population, the youthful offender's relative culpability for their initial crime of commitment is not relevant at all; rather, it is the fact of a *later* crime, committed *after* the offender has fully matured, that motivates the exclusion. The exclusion is consistent with the overriding ameliorative purpose of section 3051—to afford youthful offenders an opportunity to demonstrate rehabilitation—and not any of the unfounded punitive purposes the government puts forth.

### B. Even if the Legislature could have rationally taken culpability into account for youthful offenders sentenced to life without parole, it did not.

There is nothing to indicate that the Legislature sought to distinguish youthful offenders' eligibility for parole on the basis of culpability. Indeed, as discussed above, because the purpose of section 3051 is exclusively rehabilitative, the Legislature could not have rationally distinguished between youthful offenders on the basis of the perceived culpability attaching to their sentence. But even if the Legislature did have some non-rehabilitative purpose in enacting section 3051 (it did not), it would have had no rational basis to distinguish between youthful offenders sentenced to life without parole for special circumstance murder and youthful offenders sentenced either to the functional equivalent of life without parole or to indeterminate life terms for

first degree murder. That is because, from a culpability standpoint, these groups cannot rationally be distinguished.

Take, first, youthful offenders sentenced to the functional equivalent of life without parole. This category would include, for example, a youthful offender bearing the same sentence as the defendant in *Caballero*, who was sentenced to serve an aggregate 110 years to life for three attempted murder convictions, each carrying a sentence of 15 years to life, plus three firearm enhancements, carrying sentences of 20 and 25 years. (*Caballero, supra*, 55 Cal.4th at p. 265.) This is, as the *Caballero* court concluded, the functional equivalent of life without parole. (*Id.* at p. 268.) But under section 3051, a youthful offender's eligibility for a youth offender parole hearing is determined by the "controlling offense"—that is, "the offense or enhancement for which any sentencing court imposed the longest term of imprisonment." (Pen. Code, § 3051, subd. (a)(2)(B).) In the case of a youthful offender with Caballero's sentence, each of the attempted murder sentences is the longest term of imprisonment; and, thus, under section 3051, he would be entitled to a youth offender parole hearing during his 20th year of incarceration. (*Id.*, § 3051, subd. (b)(2).)[15]

Despite having a functionally equivalent sentence, this youthful offender would have been eligible for parole consideration—after only *20* years—where Hardin is not.

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[15] If one of Caballero's victims had not survived his attack, he could have received a sentence of 25 years to life for that offense, which would have made him eligible for parole in his 25th year of incarceration. (*Id.,* § 3051, subd. (b)(3).)

Culpability, as measured by the length of the original sentence, is no rational basis on which to distinguish these two groups: "By defining the youth parole eligible date in terms of a single 'controlling offense,' rather than by the offender's aggregate sentence, the Legislature has eschewed any attempt to assess the offender['s] overall culpability, let alone his or her amenability to growth and maturity." (Opn. at p. 289.) The distinction between aggregate sentences that are the functional equivalent of life without parole and life without parole sentences themselves cannot withstand even rational basis scrutiny.

Nor can the distinction between those who are sentenced to life without parole for special circumstance murder and those who are sentenced to 25 years to life for first degree murder stand. As the court below explained, the Committee on Revision of the Penal Code's 2021 Annual Report and Recommendations recognizes that there are now more than 20 factors qualifying as special circumstances under Penal Code section 190.2—as compared with just 7 on the original list in the 1970s. (*Id.* at p. 290.) The list of special circumstances has expanded to include "lying in wait," as well as any murder committed while the defendant was engaged in robbery, kidnapping, burglary, mayhem, or carjacking, Pen. Code, § 190.2, subds. (a)(15), (17)—circumstances that this Court and the high court have acknowledged are implicated by youthful offenders' characteristically poor calculation of risk. (*Miller, supra*, 567 U.S. at p. 478.) As a matter of statutory definition, there is no longer a clear distinction between the culpability of those who are or are

not charged with a special circumstance. And that statutory blurring has had predictable consequences in practice: Special circumstance allegations could have been charged in *95 percent* of all first degree murder convictions. (*Id.*) Given what the Legislature and the Court know about youthful offenders' brain development, there is *no* rational distinction in culpability between those sentenced to life without parole for a special circumstance murder and those sentenced to 25 years to life for first degree murder. "The practice thus has no relation to the statutory objective." (*Photias v. Doerfler* (1996) 45 Cal.App.4th 1014, 1020.)

To be clear, Hardin does not challenge prosecutors' exercise of their charging discretion in this appeal. That is a question for another day. Rather, Hardin challenges the *Legislature's* ability to rely on a distinction between two groups—youthful offenders convicted of special circumstance murders and youthful offenders convicted of first degree murders—that collapses on further scrutiny. The Legislature cannot rationally claim to distinguish between the culpability of special circumstance murderers and first degree murderers where, as a matter of statutory definition viewed in light of the scientific consensus, the conduct of the two groups is essentially the same.

The government also attempts to excuse the Legislature's unsupportable distinction by arguing that the Legislature may take an incremental approach to achieving its purpose. (Br. at 39–40 [quoting *F.C.C. v. Beach Communications, Inc.* (1993) 508 U.S. 307, 316; *People v. Barrett* (2012) 54 Cal.4th 1081, 1110].)

Even an incremental approach, however, must be rationally tied to the purpose of the statute. (*People v. Miranda* (2021) 62 Cal.App.5th 162, 186 ["an incremental approach may be constitutionally sufficient, *at least where there is a rational basis* for the manner in which the Legislature has proceeded to address different dimensions or proportions of a problem"].) Here, for all the reasons discussed above, it is not.

"A statutory classification 'must involve something more than mere characteristics which will serve to divide or identify the class. There must be inherent differences in situation related to the subject-matter of the legislation.'" (*Young, supra*, 41 Cal.3d at p. 900.) Section 3051's distinction between youthful offenders who received a sentence of life without parole for special circumstance murder and those who did not is fundamentally incompatible with the statute's structure and purpose, and unconstitutionally burdens the disfavored group with no rational justification.

## CONCLUSION

The judgment of the Court of Appeal should be affirmed. The exclusion of youthful offenders sentenced to life without parole from section 3051 should be held unconstitutional and Hardin afforded a *Franklin* hearing to develop evidence for his youth offender parole hearing.

Dated: June 12, 2023

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## CERTIFICATE OF COMPLIANCE

I certify that the attached Opening Brief uses a 13 point Century Schoolbook font and contains 9,986 words.

*/s/ Sara A. McDermott*
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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, Sara A. McDermott, 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 June 12, 2023, I served the foregoing document(s) described as:

**PETITIONER'S ANSWERING BRIEF**

on the interested parties in the manner indicated below:

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X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 12, 2023, at Los Angeles, California.

*/s/ Sara A. McDermott*
Sara A. McDermott

**SERVICE LIST FOR *THE PEOPLE OF THE STATE OF CALIFORNIA v. TONY HARDIN***

**CALIFORNIA SUPREME COURT CASE NO. S277487**

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