BerkeleyLaw
UNIVERSITY OF CALIFORNIA
California Constitution Center

University of California, Berkeley
School of Law – 337B Law Building
Berkeley, CA 94720-7200
510-664-4953
carrillo@law.berkeley.edu

03 Dec 2024

VIA TRUEFILING

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

Re: supplemental letter brief from *amicus curiae* California Constitution Scholars, *OSPD v. Bonta* S284496

To the Honorable Court:

Under Rule of Court 8.847 the undersigned David A. Carrillo and Stephen M. Duvernay (collectively, *amicus curiae* California Constitution Scholars) request leave to file this letter brief responding to the Court's September 11, 2024 order directing supplemental briefing. *Amicus* certifies under Rule of Court 8.520(f)(4) that no party or counsel for any party authored this brief, participated in its drafting, or made any monetary contributions intended to fund the preparation or submission of the proposed brief.

Amicus are California constitution scholars who seek to aid this Court in resolving an issue of state constitutional interpretation presented here; we are academics affiliated with the California Constitution Center, a nonpartisan academic research center at the University of California, Berkeley, School of Law. The University of California is not party to this brief.

The proposed brief will assist the Court by addressing the second of three questions the court posed, concerning equal protection. *Amicus* is interested in this question because it raises an important issue of California constitutional law: the framework for applying standards of review for equal protection claims. *Amicus* argues that California's equal protection analysis applies strict scrutiny only to facial challenges against either textually discriminatory laws or abridgements of fundamental interests, with all other claims receiving rational basis review.

Short answers

We would answer the court's second question as follows:

Have petitioners alleged facts that, if proven true, would establish a violation of the California Constitution (art. I, §§ 7, 17) and entitle them to all or part of the relief they seek, including an order prohibiting all future capital prosecutions and the enforcement or execution of any death sentence previously imposed? Likely not, because petitioners concede that the underlying statutes are facially neutral. That means rational basis review applies, and in

that deferential analysis the statutes should withstand this factual showing. As in most equal protection claims, the standard of review is dispositive.

How, if at all, does article I, section 27 of the California Constitution affect this determination? We state no position on this issue.

How, if at all, does the classification of this matter as an as-applied or a facial challenge affect this determination? It should not matter. Petitioners style this as an "as-applied challenge to California's current capital punishment statutes," which requires showing discriminatory intent, which is impossible here. Yet as we argue below, the Attorney General is correct that this point ultimately does not matter because the Court should consider whether strict scrutiny applies regardless of how the claim is characterized. Again, we think this should be viewed as a standard-of-review question.

Analysis

The standard of review is dispositive

We suggest that the Court's two equal protection questions above can be resolved by considering the standard of review, because that will be dispositive of any remedy. California's equal protection doctrine has only two standards of review: strict scrutiny and rational basis. If petitioners can show that strict scrutiny is required, then relief might be granted. But petitioners concede that California's capital punishment statutes are facially neutral — so they should receive rational basis review, which they surely pass.[1] No one could dispute that some crimes are worse than others, or that the legislature could rationally conclude that some are so grievous that they merit the ultimate sanction.[2] Thus, the only way petitioners can prevail on a California equal protection claim here is with strict scrutiny, which requires facial discrimination against a suspect class or abridging a fundamental right.[3]

So we agree with the Attorney General's conclusion that classifying this matter as an as-applied or a facial challenge does not change the ultimate outcome — but we reach this conclusion for different reasons. All roads in the equal protection analysis here lead back to strict scrutiny, so it's either that or nothing.

Like the Attorney General, we note that petitioners themselves characterize their constitutional claim as an "as-applied challenge" (e.g., Pet. 50, fn. 23, 53, 68, 74–75, fn. 26) and forswear any

[1] Petition at 67 ("application of a facially neutral statutory system") and 68 ("[a] facially valid statute").
[2] *People v. Chatman* (2018) 4 Cal.5th 277, 289 (a statute's classification is presumed rational until the challenger shows that no rational basis for the unequal treatment is reasonably conceivable).
[3] *Vacco v. Quill* (1997) 521 U.S. 793, 799–800; *Personnel Adm'r of Massachusetts v. Feeney* (1979) 442 U.S. 256, 271–72 (when the basic classification is rationally based "uneven effects upon particular groups within a class are ordinarily of no constitutional concern"); *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17 (strict scrutiny applied because the statute limited the fundamental right of one class of persons to pursue a lawful profession and because it classified based on suspect class); see also *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1108–1109 (no fundamental right to camp on public property; persons who do so are not a suspect classification; petitions did not claim that the ordinance was facially discriminatory).

"facial" challenge to the State's capital punishment system (see, e.g., Pet. 50, fn. 23). Petitioners confirm this in their supplemental brief (at 17), describing their "as-applied challenge to California's current capital punishment statutes." The Attorney General argues (in his supplemental brief at 47) that "regardless of the label petitioners use to describe their challenge, they must satisfy the standard for facial relief" because their requested relief reaches beyond the particular petitioners' circumstances, citing *Mathews v. Becerra* (2019) 8 Cal.5th 756, 768. That correctly states the law.

Practical reasons also compel petitioners to meet the standard for a facial challenge: that is the only way petitioners can prevail. This Court has employed such a "skip to the end" analysis in evaluating constitutional claims to see whether they would survive in the worst-case scenario for the government's position.[4] Here, regardless of how the claim is characterized, on the substance what matters is whether the laws target a suspect class or abridge a fundamental constitutional right.[5] Unless these laws do either of those impermissible things, they receive rational basis review.[6]

This is generally true in an as-applied challenge, which requires proving that the particular application of the statute violates the individual's constitutional rights.[7] In an equal protection claim specifically, that means establishing that a suspect class exists or a fundamental right is abridged. For example, in *Darces v. Woods* this Court examined whether, as applied to affected families, the law's suspect class violated their equal protection rights.[8] Similarly, the as-applied challenge in *In re Taylor* was based on fundamental liberty interests.[9] Thus, showing a suspect class or fundamental right is required for as-applied challenges, and that showing is necessary to invoke strict scrutiny.

Because either a facial or an as-applied challenge requires the same ultimate showing to invoke strict scrutiny, and because rational basis review likely requires rejecting the equal protection claim, as a practical matter this claim must be viewed from the perspective of whether strict scrutiny applies — or the equal protection claim is moot.

[4] See, e.g., *People v. Williams* (2024) 17 Cal.5th 99, 121 (resolving as-applied challenge resolves facial challenge); *People v. Martinez* (2023) 15 Cal.5th 326, 338 (characterization unimportant where challenger sought relief beyond her particular circumstances, she therefore must meet standards for a facial challenge).
[5] *Williams*, 17 Cal.5th at 123.
[6] *Vacco*, 521 U.S. at 799–800 (legislative classification that "neither burdens a fundamental right nor targets a suspect class" will be upheld if it meets rational basis review); *Hale v. Morgan* (1978) 22 Cal.3d 388, 395 (it is "well established" that where no suspect classification is involved the legislature may impose any distinction between classes which bears some "rational relationship" to a conceivably legitimate state purpose).
[7] *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084; *Hale v. Morgan* (1978) 22 Cal.3d 388, 404–405.
[8] *Darces v. Woods* (1984) 35 Cal.3d 871, 886–87 (statutorily mandated exclusion for suspect class), 895 (finding statute violated equal protection "as applied to families like appellant's").
[9] *In re Taylor* (2015) 60 Cal.4th 1019, 1039 (an as applied challenge requires showing that in the individual's particular circumstances the law has been applied to deprive them of a protected right).

California's equal protection analysis

That said, strict scrutiny is unavailable here. Just two standards govern California equal protection claims: strict scrutiny and rational basis review.[10] Strict scrutiny applies only when a law's application turns on race or when a fundamental interest is at stake.[11] "[B]oth federal and California decisions make clear that heightened scrutiny applies to State-maintained discrimination whenever the disfavored class is suspect or the disparate treatment has a real and appreciable impact on a fundamental right or interest."[12] In California, all other equal protection claims receive rational basis review.[13] But strict scrutiny does not apply here because the challenged statutes facially implicate neither a suspect classification nor burden a fundamental interest. As a result, rational-basis review must apply.

No suspect classification appears on the face of the challenged statutes, nor do petitioners argue that one should be found there. A statute that invokes a suspect classification receives strict scrutiny.[14] Both the United States Supreme Court and this Court have identified just a few suspect classes: race, alienage, or national origin, and (in California) sexual orientation and wealth.[15] It is undisputed that none appear in the text of the challenged statutes. Although petitioners argue that their evidence proves that the laws cause disparate effects based on race, as discussed below that is inadequate — for strict scrutiny to apply the law's classification itself must be suspect or implicate a fundamental right.[16] Because no recognized suspect class appears, strict scrutiny is unavailable on that basis.

---

[10] *In re Marriage Cases* (2008) 43 Cal.4th 757, 832. Federal courts, by contrast, subject certain classifications to intermediate scrutiny. *Clark v. Jeter* (1988) 486 U.S. 456, 461 (sex or illegitimacy); *Plyler v. Doe* (1982) 457 U.S. 202, 224 (alienage). California courts will use intermediate scrutiny in evaluating federal claims. See, e.g., *People v. Martinez* (2023) 15 Cal.5th 326, 343 (applying intermediate scrutiny in federal constitutional challenge to commercial speech restrictions). And intermediate scrutiny exists for California constitutional speech claims. *Los Angeles Alliance For Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 357.

[11] *Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 659.

[12] *Butt v. State of California* (1992) 4 Cal.4th 668, 685–686; *Massachusetts Bd. of Retirement v. Murgia* (1976) 427 U.S. 307, 312 (under the federal equal protection clause strict scrutiny only applies where the challenged regulation involves a fundamental right or a suspect classification).

[13] *People v. Chatman* (2018) 4 Cal.5th 277, 288–89 (where the challenged law neither draws a suspect classification nor burdens fundamental rights, equal protection is denied only if there is no rational relationship between a disparity in treatment and some legitimate government purpose).

[14] *People v. Hardin* (2024) 15 Cal.5th 834, 847.

[15] *Grutter v. Bollinger* (2003) 539 U.S. 306, 326 (race and national origin); *City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 440 (suspect classes are those identified by race, alienage, or national origin); *Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 579 (alienage); *Strauss v. Horton* (2009) 46 Cal.4th 364, 411 (sexual orientation), abrogated on other grounds by *Obergefell v. Hodges* (2015) 576 U.S. 644; *Charles S. v. Superior Court* (1982) 32 Cal.3d 741, 750 and *Serrano v. Priest II* (1976) 18 Cal.3d 728, 765 (wealth). Wealth is not a suspect class under federal law. *San Antonio Independent School Dist. v. Rodriguez* (1973) 411 U.S. 1, 33.

[16] *Massachusetts v. Feeney* (1979) 442 U.S. 256, 271–72 ("Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law."); *Department of Agriculture v. Moreno* (1973) 413 U.S. 528, 533; *Vacco*, 521 U.S. at 799–800; *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd*. (1991) 502 U.S. 105, 122 n.* (speech; content neutral statutes avoid strict scrutiny); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos* (1987) 483 U.S. 327, 339 (religion; no justification for applying strict scrutiny to facially neutral statute); *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881 (rational basis applies where a disputed statutory disparity implicates no suspect class or fundamental right).

Nor is a fundamental interest facially implicated in the challenged statutes or necessarily burdened — at least no such interest that has already been recognized by this Court. Strict scrutiny applies when a challenged law abridges a fundamental right such as petitioning, speech, voting, education, or marrying.[17] The whole category of civil commitment receives strict scrutiny because fundamental liberty interests are at stake.[18] Strict scrutiny is required only where a classification has a "real and appreciable impact" on a fundamental right; the mere fact that a law touches on such an interest is inadequate.[19] The laws challenged here affect no established fundamental interest in distinguishing between capital and noncapital defendants. These instead are sentencing statutes that turn on the severity of crimes committed, and a defendant does not have a fundamental interest in the punishment a particular crime receives.[20] Because no established fundamental right is abridged, strict scrutiny is unavailable.

Leaving aside suspect classes and fundamental rights, rational basis applies to everything else.[21] To pass the equal protection rational basis test under the California constitution, legislative classifications must bear a "substantial and rational" relation to a legitimate state purpose.[22] In determining the purpose of the statute, a reviewing court decides whether the asserted goal is realistically conceivable.[23] And the court must conduct "*a serious and genuine judicial inquiry* into the correspondence between the classification and the legislative goals."[24] But this is the most lenient of reviews: "Any reasonably conceivable basis for the disparity that is rooted in a legitimate government purpose, whether or not expressly articulated by the voters, is sufficient."[25] Because it is eminently reasonable to conceive that the voters and the legislature could have had in mind for these laws the legitimate government purpose of protecting society from its most dangerous members, these laws must pass muster on rational basis review.

[17] *Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 48–49 (petition); *People v. Glaze* (1980) 27 Cal.3d 841, 845–46 (speech); *People v. Hardin* (2024) 15 Cal.5th 834, 847 (voting); *Serrano v. Priest II* (1976) 18 Cal.3d 728, 767–68 (education); *Obergefell v. Hodges* (2015) 576 U.S. 644, 675 (marrying).
[18] *Public Guardian of Contra Costa County v. Eric B.* (2022) 12 Cal.5th 1085, 1102.
[19] *Board of Supervisors v. Local Agency Formation Com*. (1992) 3 Cal.4th 903, 914.
[20] *People v. Wilkinson* (2004) 33 Cal.4th 821, 838 (applying strict scrutiny standard in that context is incompatible with the legislature's broad discretion in defining crimes and specifying punishment).
[21] *Gregory v. Ashcroft* (1991) 501 U.S. 452, 471; *In re C.B.* (2018) 6 Cal.5th 118, 134 (absent any demonstration of a suspect classification or a distinction that impacts a fundamental right the challenged disparity need only survive rational basis review).
[22] *Brown v. Merlo* (1973) 8 Cal.3d 855, 872–873, 882.
[23] *Cooper v. Bray* (1978) 21 Cal.3d 841, 848.
[24] *Ibid*. (emphasis in original); *Newland v. Board of Governors* (1977) 19 Cal.3d 705, 711.
[25] *In re C.B.* (2018) 6 Cal.5th 118, 134.

Disparate treatment is different from disparate impact

Disparate impact, standing alone, is insufficient to establish an equal protection violation from a facially neutral statute; a challenger must show discriminatory intent.[26] Cases such as *Tobe v. City of Santa Ana*, which did not involve equal protection claims, are inapposite on this point.[27] Petitioners also identify cases that relied on a fundamental right to find an equal protection violation to argue that strict scrutiny can apply here, even though no such right is implicated. For example, *Serrano v. Priest I* found an equal protection violation based on disparate impacts, but only because the law discriminated based on a suspect class (wealth) and a fundamental interest (education).[28] And *Serrano II* applied strict scrutiny based on geographic "disparity" because education is a fundamental interest when considered with California's equal protection guarantees.[29] Nor were the disparate effects for mentally disordered sex offenders the key factor in *In re Huffman* — rather, it was the fact that involuntary hospital commitments affected a fundamental liberty interest that required strict scrutiny review of treatment disparities.[30]

Requiring school boards to alleviate school segregation "regardless of its cause" in *Crawford* and other school segregation cases is distinguishable because they similarly implicate the fundamental right to education and wealth as a suspect class.[31] Although *Crawford* held that a facially neutral governmental action violated California's equal protection provisions even in the absence of any intentional discrimination by the government, this Court has never applied *Crawford* outside the school segregation context. And California's voters blunted that decision's impact by amending the California constitution to bar its remedies absent a federal constitutional violation.[32] *Crawford* appears to be an outlier limited to its facts.

None of these cases should be read as authority for applying strict scrutiny *solely* based on the fact that a law impacts two groups differently. If that were the case many (perhaps most) laws would receive heightened judicial review. Instead, this Court's decisions are clear that an equal protection analysis has two parts: a showing that a classification targets similarly situated groups unequally, and whether the different treatment can be justified by a constitutionally sufficient state interest. It is the second prong that determines the standard of review.[33]

And the decisions discussed above are equally clear that strict scrutiny only applies to equal protection claims that invoke a suspect class or a fundamental right. Loose phrasing in decisions

[26] *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 837, citing *Personnel Administrator of Mass. v. Feeney* (1979) 442 U.S. 256, 279, *Village of Arlington Heights v. Metropolitan Housing Development Corp*. (1977) 429 U.S. 252, 265, and *Washington v. Davis* (1976) 426 U.S. 229.
[27] *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1080 (plaintiffs claimed only right to travel, punishment for status, and vagueness).
[28] *Butt v. State of California* (1992) 4 Cal.4th 668, 682; *Serrano v. Priest I* (1971) 5 Cal.3d 584, 598.
[29] *Serrano v. Priest II* (1976) 18 Cal.3d 728, 767–68.
[30] *In re Huffman* (1986) 42 Cal.3d 552, 561.
[31] *Crawford v. Board of Education* (1976) 17 Cal.3d 280, 297.
[32] *McKinny v. Oxnard Union High School Dist. Bd. of Trustees* (1982) 31 Cal.3d 79, 92.
[33] *People v. McKee* (2010) 47 Cal.4th 1172, 1202, 1207.

using *disparate* synonymously with *distinct* or *different* is of no significance, as for example when noting that the second step "asks whether the *disparate treatment* of two similarly situated groups is justified by a constitutionally sufficient state interest."[34] Treating two similarly-situated groups differently (disparately) is the bare minimum for a colorable equal protection claim — but it is inadequate, standing alone, to set the standard of review.

A distinction between disparate treatment and disparate impact, and their distinct intent requirements, is well-established in employment discrimination cases under California's FEHA and in federal Title VII claims — neither of which requires intent, and so both permit unintended disparate impact claims.[35] But this Court has rejected unintended disparate impact claims where the underlying law contains an intent requirement.[36] And this Court appeared to resolve any confusion flowing from these terminology variations in *Koebke v. Bernardo Heights Country Club*, where it noted that both disparate treatment and disparate impact rely equally on the effects of a facially neutral policy on a particular group, and so both require courts to infer a discriminatory intent solely from such effects. Consequently, this Court concluded, the same reasons for rejecting disparate impact "would seem to apply with equal force" to disparate treatment.[37] The upshot is that where, as here, a showing of intentional acts of discrimination is required merely proving differential practical effects is inadequate.

In sum, if the petition is taken at face value as raising an as-applied disparate impact claim, that requires petitioners to show discriminatory intent. Such intent is necessary proof of an equal protection violation for the individual acts taken under these statutes.[38] And facially neutral statutes like those here, which merely have distinct effects on particular groups, do not violate equal protection absent a showing the law was adopted for a discriminatory purpose.[39] That discriminatory purpose must be more than mere awareness of consequences: the decisionmaker must have chosen a particular course of action at least in part because of, not merely in spite of, its adverse effects on an identifiable group.[40]

The intent requirement distinguishes this case from those (such as the employment laws noted above) where the underlying law lacks a threshold requirement for considering diverging

---

[34] *Public Guardian of Contra Costa County v. Eric B*. (2022) 12 Cal.5th 1085, 1107 (emphasis added).
[35] *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1170–72 (California courts apply disparate impact test in employment discrimination claims under the Fair Employment and Housing Act, California's counterpart to title VII), citing *Wards Cove Packing Co., Inc. v. Atonio* (1989) 490 U.S. 642 (in disparate impact cases a facially neutral employment practice may violate Title VII without the evidence of the employer's subjective intent to discriminate that is required in a disparate treatment case).
[36] *Harris*, 52 Cal.3d at 1172 (Unruh Act suggests that the legislation's object was intentional acts of discrimination, not disparate impact).
[37] *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 854 (evaluating a marital status discrimination claim under the Unruh Civil Rights Act).
[38] *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 264–65 (proof of racially discriminatory intent or purpose is required to show a violation of the equal protection clause; official action will not be held unconstitutional solely because it results in a racially disproportionate impact); *Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 337.
[39] *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 837.
[40] *Ibid.*

practical group effects.[41] Because petitioners make no showing of discriminatory intent, the equal protection claim must fail unless this Court finds a reasoned basis for applying some form of heightened scrutiny.

Making heightened review available here requires changing the law

The equal protection claim here only survives if heightened scrutiny applies; because it does not apply under established law, applying heightened scrutiny requires changing California's equal protection doctrine. There are two paths this Court could pursue to that end: either finding that strict scrutiny applies because the petition necessarily implicates an adult's fundamental liberty interest in not being arbitrarily killed by the state, or using this case as a vehicle to adopt a new "rational basis plus" category of review. In general (with some exceptions such as intermediate scrutiny), this Court ties its California constitutional equal protection doctrine to federal law. Pursuing either of these options likely requires breaking that bond, at least in part.[42] Given the independent vitality our state equal protection provisions possess, a different analysis is an option.[43] We outline two alternate paths but state no opinion on their wisdom.

A new fundamental rights analysis

Petitioners have not alleged that a fundamental interest is abridged, and this Court has never held that there is a liberty interest in not being sentenced to death for capital crimes. The argument for applying a fundamental liberty interest analysis here flows from statements by this Court in cases such as *People v. Olivas* that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions."[44] If life itself is the ultimate personal liberty, then there must be a fundamental right to not be deprived of life arbitrarily.[45] This Court could expand that principle here by confirming an adult's fundamental liberty interest in not being executed by the government that is reviewed with strict scrutiny. Doing so likely would be fatal to the statutory scheme, given that strict scrutiny is often described as "strict in theory, but fatal in fact."[46]

This Court could do this by expanding on a related principle established in its civil commitment cases, which apply strict scrutiny to equal protection claims based on an individual's

[41] See, e.g., *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1134 (plaintiffs not required to demonstrate discriminatory intent before proving disparate impact because relevant statute was not limited to claims of intentional discrimination).
[42] *Manduley v. Superior Court* (2002) 27 Cal.4th 887, 571 (California constitution's equal protection provisions "have been generally thought in California to be substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution."); *Dept. of Mental Hygiene v. Kirchner* (1965) 62 Cal.2d 586, 588 (same).
[43] *Serrano v. Priest II* (1976) 18 Cal.3d 728, 764.
[44] *People v. Olivas* (1976) 17 Cal.3d 236, 251.
[45] Cf. *People v. Anderson* (1987) 43 Cal.3d 1104, 1163 (Broussard, J., concurring in part) ("I can think of no more fundamental right than life itself").
[46] *Grutter v. Bollinger* (2003) 539 U.S. 306, 326 (although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it).

fundamental liberty interest in not being involuntarily confined indefinitely.[47] One analytical problem with adapting that idea here is the fact that in those civil cases the purpose is treatment, while in the criminal cases at issue here the purpose is punishment.[48] Another problem is the fact that this Court appeared to foreclose this argument in *People v. Williams*, where it explained that *Olivas*'s language should not be interpreted so broadly as to require strict scrutiny "whenever one challenges upon equal protection grounds a penal statute or statutes that authorize differing sentences," because such statutes always implicate the right to personal liberty.[49] And this Court has rejected the premise that a particular sentence can implicate a fundamental right.[50]

Still, there is an argument here that an adult person must have a fundamental right to life, rooted in both the state and federal constitutions and this Court's prior decisions.[51] If such a right exists, it must be proof against arbitrary or discriminatory execution. Finding that such a right exists and is implicated here could entitle petitioners to strict scrutiny, and open the door to relief on their equal protection claim.

Rational basis "plus"

A majority of this Court has never endorsed any variation on the two-tier strict-scrutiny-or-rational-basis framework for California equal protection claims.

Yet pleas for changing it abound, with current and past justices of this Court and academics advancing various proposals. Justice Mosk critiqued the approach as "select the test, select the result" — arguing that the two-tier system's vice is that it compels either a standard that is virtually always met or one that is almost never satisfied, so that once the test is selected the result is foreordained.[52] Justice Brown similarly expressed concern that "the outcome in every case turns on how the court chooses to characterize the classification."[53] Justice Evans recently argued for a rational basis review that considers racial disparities "in classifications where the challenged classification appears to impose a substantially disproportionate burden on the very

[47] *In re Smith* (2008) 42 Cal.4th 1251, 1263 (strict scrutiny is the appropriate standard for measuring equal protection claims of disparate treatment in civil commitment because personal liberty is at stake).
[48] *In re Huffman* (1986) 42 Cal.3d 552, 557 (the purpose of imprisonment is punishment, while the primary purpose of a civil commitment is treatment as a humanitarian alternative to punishment).
[49] *People v. Williams* (2024) 17 Cal.5th 99, 123; *People v. Wilkinson* (2004) 33 Cal.4th 821, 837. See also *In re Anderson* (1968) 69 Cal.2d 613, 630 (the fixing of penalties for crime is a legislative function and what constitutes an adequate penalty is a matter of legislative judgment and discretion).
[50] *Wilkinson*, 33 Cal.4th at 838 (no fundamental interest in a specific term of imprisonment).
[51] See, e.g., U.S. Const., preamble (constitution established to "secure the blessings of liberty"), amend. V (no person shall be deprived of "life" or "liberty" without due process of law); Cal. Const. art. I § (inalienable rights include "enjoying and defending life and liberty"); *Johnson v. Zerbst* (1938) 304 U.S. 458, 462 (referring to "fundamental human rights of life and liberty"); *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 554 (referring to a conservatee's fundamental rights to privacy and life); *In re Marilyn H.* (1993) 5 Cal.4th 295, 306 (substantive due process bars unreasonable governmental interference with a person's fundamental right to life or liberty).
[52] *Hays v. Wood* (1979) 25 Cal.3d 772, 797 (Mosk, J., concurring); *Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 595 (Mosk, J., concurring).
[53] *Warden v. State Bar* (1999) 21 Cal.4th 628, 661 (Brown, J., dissenting).

class of persons whose history inspired the principles of equal protection."[54] Justice Liu has also argued for applying rational basis "more rigorously."[55]

There is some precedent supporting this idea. In a series of decisions in the 1970s, this Court found several laws unconstitutional under the rational basis test.[56] Read together, those decisions suggest that rational basis review under California's equal protection provisions is more rigorous than rational basis review under the federal equal protection clause. Twenty years then passed without this Court visiting that principle again, until in *Warden v. State Bar* this Court strongly suggested that there is no material difference between rational basis review under the California and U.S. Constitutions.[57]

Although *Warden* did not expressly foreclose divergence, since then this Court has consistently applied the U.S. Supreme Court's version of rational basis review to challenges under California's equal protection provisions.[58] Nonetheless, this Court has recognized that "some cases raising federal and state equal protection challenges may require a bifurcated analysis."[59] But it has yet to identify such a case. Thus, it is unclear whether rational basis review under the California and federal equal protection provisions is ever different.

This case could be the vehicle to make it different. The Court could adopt any of the various proposals for modifying California's review tiers in its equal protection analysis. Justice Mosk argued for adopting an intermediate level of scrutiny under California's equal protection provisions.[60] Justice Brown proposed jettisoning the two-tiered framework and instead adopting a "means scrutiny" analysis.[61] And Justice Liu has suggested that rational basis review under California's equal protection provisions should vary depending upon the classification involved, with classifications such as developmental disabilities receiving a more rigorous form of rational basis review.[62]

Finding a reasoned basis for adopting any of those proposals here could both enable consideration of petitioners' empirical showing and permit some relief to be granted. For example, this Court could find (as it did in *Crawford*) that the unique circumstance of overwhelming evidence of practical racially distinct effects that operate to abridge an adult's fundamental liberty interest in life merit some higher level of judicial examination than ordinary rational basis. Applying such a standard of review could make some relief available on the equal protection claim.

---

[54] *People v. Hardin* (2024) 15 Cal.5th 834, 898 (Evans, J., dissenting).
[55] *Id.* at 867 (Liu, J., dissenting); *People v. Williams* (2024) 17 Cal.5th 99, 151 (Liu, J., dissenting).
[56] *Hays v. Wood* (1979) 25 Cal.3d 772; *Cooper v. Bray* (1978) 21 Cal.3d 841; *Brown v. Merlo* (1973) 8 Cal.3d 855.
[57] *Warden v. State Bar* (1999) 21 Cal.4th 628.
[58] See, e.g., *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1140–46; *Johnson v. Dept. of Justice* (2015) 60 Cal.4th 871, 881–88; *People v. Barrett* (2012) 54 Cal.4th 1081, 1106–11. *People v. Hofsheier* (2006) 37 Cal.4th 1185 is a possible exception — but it was overruled in *Johnson v. Dept. of Justice* (2015) 60 Cal.4th 871.
[59] *Gerawan*, 3 Cal.5th at 1140.
[60] *Hays v. Wood* (1979) 25 Cal.3d 772, 795 (Mosk, J., concurring in part).
[61] *Warden v. State Bar* (1999) 21 Cal.4th 628, 661 (Brown, J., dissenting).
[62] *People v. Barrett* (2012) 54 Cal.4th 1081, 1134.

Conclusion

Equal protection requires, at the very least, that persons similarly situated must receive like treatment under the law.[63] That principle is undisputed here; instead, the only equal protection question presented is the standard of review. Deciding that will dictate the rest.

Respectfully submitted,

David A. Carrillo, J.S.D.
Executive Director
California Constitution Center

s/ Stephen M. Duvernay
Stephen M. Duvernay,
Chief Senior Research Fellow
California Constitution Center

[63] *In re Moye* (1978) 22 Cal.3d 457, 465–66.

CERTIFICATE OF SERVICE

I, Stephen M. Duvernay, hereby certify as follows:

I am an active member of the State Bar of California, and I am not a party to this action. My business address is 701 University Avenue, Suite 106, Sacramento, California 95825, and my electronic service address is steve@benbrooklawgroup.com.

On December 3, 2024, I caused the foregoing document:

supplemental letter brief from *amicus curiae* California Constitution Scholars, *OSPD v. Bonta* S284496

to be filed with TrueFiling and to be served by email via TrueFiling on the following:

Rob Bonta, Attorney General of California

Michael J. Mongan, Solicitor General of California

Samuel T. Harbourt, Deputy Solicitor General State of

California Department of Justice

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

Dated: December 3, 2024

s/ Stephen M. Duvernay
Stephen M. Duvernay