ACLU AMERICAN CIVIL LIBERTIES UNION FOUNDATION

ACLU AMERICAN CIVIL LIBERTIES UNION FOUNDATION Northern California

CPDA
A Statewide Association of Public Defenders and Criminal Defense Counsel

August 2, 2024

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

Re: *In re Sirhan B. Sirhan*, No. S286234
Amicus Letter in Support of Petition for Review

Dear Chief Justice Patricia Guerrero and Associate Justices of the Court:

The American Civil Liberties Union Foundation of Northern California, American Civil Liberties Union Foundation, and California Public Defenders Association respectfully submit this letter in support of the petition for review in *In re Sirhan B. Sirhan,* No. S286234. This Court should grant review in this case to resolve an issue of statewide importance: the right of young people to return to society upon demonstrated maturity and rehabilitation.

"'[C]hildren who commit even heinous crimes are capable of change.'" (*People v. Contreras* (2018) 4 Cal.5th 349, 369 [citation omitted].) Scientific consensus makes clear that, as a class, young people have reduced culpability for their conduct and greater capacity for change. Reflecting that consensus, "young people" in California—those aged 25 and under at the time of offense—have a statutory and constitutional right to a "'meaningful opportunity to obtain release [on parole] based on demonstrated maturity and rehabilitation.'" (*Id.* at p. 360, quoting *Graham v. Florida* (2010) 560 U.S. 48, 75; see Pen. Code, §§ 3051, 4801.) As a corollary, young people also possess a heightened due process liberty interest in the parole process. But California allows the Governor to unilaterally reverse findings of parole suitability—one of only two states to do so—permitting the Governor to deny release for political and other arbitrary reasons.

That is what happened here. Governor Newsom vetoed 77-year-old Sirhan Sirhan's parole grant—despite decades of demonstrated rehabilitation—expressly based on political considerations and his personal admiration for Sirhan's victim, Senator Robert Kennedy. As this case illustrates, the Governor's reversal power violates young people's constitutional and statutory rights to a meaningful opportunity for release because there is a constitutionally unacceptable risk that the Governor will deny young people release for political reasons despite their demonstration of maturity and reform. Moreover, that same unacceptable likelihood

of arbitrary, politicized decision-making violates young people's heightened due process liberty interest in parole.

Accordingly, in addition to the reasons presented in the petition, this Court should grant review to ensure that young people's freedom rests on their demonstrated rehabilitation—not the Governor's political calculations.

I. Interests of *amici curiae*.

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Northern California ("ACLU NorCal") is a regional affiliate of the ACLU. ACLU and ACLU NorCal have long engaged in litigation and advocacy to protect the constitutional and civil rights of the criminally accused and to end excessively harsh criminal-sentencing policies that result in mass incarceration. ACLU NorCal and ACLU have filed litigation challenging the Governor's veto authority as applied to young people in California. (See, e.g., *Velasquez v. Campbell* (Super. Ct. Monterey County, 2024, No. 24H000004).)

The California Public Defenders Association ("CPDA") is a statewide organization of public defenders and criminal defense attorneys, including those who defend minors alleged to come under the jurisdiction of the juvenile court due to criminal acts, and associated paraprofessionals. CPDA's more than 4,000 members represent the vast majority of justice-involved adults and children who find themselves arrested and prosecuted. Many of CPDA members' clients, particularly their young clients, have entered into plea agreements that include lengthy periods of incarceration, with the possibility of release on parole. CPDA is thus deeply committed to protecting young people's right to a meaningful opportunity for release.

II. Young people who demonstrate rehabilitation in the parole process are entitled to release.

This Court, the U.S. Supreme Court, and the legislature have established limitations on the punishment of young people. These limits are grounded in scientific consensus that "children are . . . 'constitutionally different from adults' due to 'distinctive attributes of youth' that 'diminish the penological justifications for imposing the harshest sentences on [them].' " (*People v. Franklin* (2016) 63 Cal.4th 261, 283, quoting *Miller v. Alabama* (2012) 567 U.S. 460, 472.) The "'hallmark features'" of youth include "'immaturity, impetuosity, and failure to appreciate risks and consequences,' as well as the capacity for growth and change." (*Id.* at p. 283, quoting *Miller, supra*, at p. 477.)

Given this scientific evidence, the U.S. Supreme Court held that the Eighth Amendment guarantees "juveniles"—those under 18 at the time of their offense—a "meaningful opportunity" to be released if they demonstrate rehabilitation. (*Contreras, supra,* 4 Cal.5th at p. 367, citing *Graham*, *supra*, 560 U.S. at p. 75; *People v. Caballero* (2012) 55 Cal.4th 262, 266–68, citing *Graham*, *supra*, at p. 73; *Miller*, *supra*, 567 U.S. at pp. 472–73.) An opportunity for parole can satisfy this standard only if it "*ensures* that juveniles whose crimes reflected only transient immaturity—and who have since matured—will [be released.]" (*Montgomery v. Louisiana* (2016) 577 U.S. 190, 212, italics added; see also, e.g., *Bonilla v. Iowa Bd. of Parole* (Iowa 2019) 930 N.W.2d 751, 777 ["If the Board determines that a juvenile offender has demonstrated maturity and rehabilitation, parole or work release is required as a matter of law."]; Harrington, *The Constitutionalization of Parole: Fulfilling the Promise of Meaningful Review* (2021) 106 Cornell L.Rev. 1173, 1204 ["Only release . . . upon demonstration of subsequent maturity and reform would satisfy the Court's promise that parole can cure the unconstitutionality of a life sentence."].) Because release must be "realistic" to be meaningful, the U.S. Supreme Court has held that executive clemency is too "remote" to provide a meaningful opportunity. (*Graham*, *supra*, 560 U.S. at pp. 70, 82; see also *Bonilla, supra*, 930 N.W.2d at p. 772 ["Parole authorities cannot require the camel to pass through the needle's eye. . . . [O]therwise, a recalcitrant parole authority could convert a potentially valid sentence into the functional equivalent of an unconstitutional life without possibility of parole."].)

California extended the same "meaningful opportunity" guaranteed by the Eighth Amendment to all "young people"—those aged 25 and younger at the time of offense. (Pen. Code, § 3051, subd. (e) [Parole Board must conduct "youth offender parole hearing[s]" that "provide for a meaningful opportunity to obtain release . . . consistent with relevant case law."]); *id.* § 4801, subd. (c).) In so doing, the legislature recognized "scientific evidence that brain development continues beyond age 18—specifically, that 'the prefrontal cortex doesn't have nearly the functional capacity at age 18 as it does at age 25.' " (*In re Palmer* (2019) 33 Cal.App.5th 1199, 1209–10, *revd. on other grounds* (2021) 10 Cal.5th 959.) California's Cruel or Unusual Punishment Clause—which is more protective than the Eighth Amendment—guarantees the same right. (See *People v. Haller* (2009) 174 Cal.App.4th 1080, 1092 ["California affords greater protection to criminal defendants by prohibiting cruel 'or' unusual punishment."].)

III. The Governor's veto power creates a constitutionally unacceptable risk of decision-making based on politics rather than rehabilitation.

The Governor's reversal authority is fundamentally incompatible with young people's rights to release upon demonstrated rehabilitation. The veto authority violates their statutory and constitutional right to a meaningful opportunity for

release because there is a " 'substantial risk' " (*Lockett v. Ohio* (1978) 438 U.S. 586, 601), or "unacceptable likelihood" (*Roper v. Simmons* (2005) 543 U.S. 551, 573), that the Governor will deny young people release for political reasons despite their demonstration of maturity and reform. (See, e.g., *Turner v. Murray* (1986) 476 U.S. 28, 35–36; *Ford v. Wainwright* (1986) 477 U.S. 399, 416.). Moreover, that same unacceptable likelihood of arbitrary, politicized decision-making violates young people's heightened due process liberty interest in parole because it fails to safeguard against the risk of erroneous deprivation.[1] (See *Mathews v. Eldridge* (1976) 424 U.S. 319; *People v. Ramirez* (1979) 25 Cal.3d 260; *Bonilla*, *supra*, 930 N.W.2d at pp. 777–92 [applying *Mathews* to articulate due process protections required in juvenile parole proceedings]; *Flores v. Stanford* (S.D.N.Y. 2019) 2019 WL 4572703, at *10 [similar].)

Politics are infused in both the reversal authority's placement—the Governor's office—and its subject matter—release from prison. It is well established that "placement of [a criminal-penalty] decision wholly within the executive branch" is a "striking [constitutional] defect," as the executive is the chief law enforcement officer and publicly accountable for its function. (*Ford, supra*, 477 U.S. at p. 416 [placement of competency determination within executive created an unacceptable likelihood of excessive punishment].)

As the petition explains, the reversal authority's origin demonstrates that it has been political from its inception. (Pet. at pp. 14-16.) Following "unprecedented" public outrage over a controversial parole-grant (*In re Fain* (1983) 139 Cal.App.3d 295, 299), then-Governor George Deukmejian launched a "tough on crime" ballot initiative—Proposition 89—to create the reversal authority. (See Hurst, *Prop. 89, Plan to Give Governor Parole Veto Power, Expected to Win,* L.A. Times (Oct. 28, 1988); see also Campbell, *The Emergence of Penal Extremism in California: A Dynamic View of Institutional Structures and Political Processes* (2014) 48 Law & Soc'y Rev. 377, 395–397). Although the initiative allowed the Governor to reverse parole decisions in either direction, "the Governor always had 'the power to grant reprieves, pardons and commutations,' " demonstrating the proposition's real purpose to give " 'the Governor, for the first time, . . . the power to *block the parole* of convicted murderers' " in unpopular cases. (*Rosenkrantz, supra*, 29 Cal.4th at p. 691 (dis. opn. Of Chin, J.) [quoting Ballot Pamp., Gen. Elec., at 46 (Nov. 8, 1988)].) The animating purpose of the reversal power since its origin has thus been to provide an outlet for political outrage. (See *Gilman v. Brown* (E.D. Cal. 2014) 110 F.Supp.3d 989, 1016, revd. (9th Cir. 2016) 814 F.3d 1007.)

[1] This heightened interest is significantly stronger than the "limited" liberty interest that all parole applicants possess in a non-arbitrary decision. (See *In re Rosenkrantz* (2002) 29 Cal.4th 616, 665 [discussing minimal liberty interest of parole applicants generally].)

Historical use of the reversal power evidences that it has served its intended purpose. While the Constitution authorizes reversal to either a grant or denial of parole (Cal. Const., art. V, § 8, subd. (b)), no Governor has *ever* reversed a Board denial. Rather, Governors have only exercised the reversal power—and they have done so many hundreds of times—to keep someone in prison. (See California Governors' Executive Reports on Parole Review Decisions for 2011 through 2023 [between 2011 and 2023, the Governor reversed 830 parole grants and zero parole denials][2]; see also *Gilman, supra*, 110 F.Supp.3d at p. 1015 ["[Governors] appear to have no [] concern about decisions that deny parole."]; *Rosenkrantz, supra*, 29 Cal.4th at p. 691 (dis. opn. of Chin, J.) ["The record shows that the current Governor has never exercised this power to reverse the denial of parole, but only to reverse the grant of parole."].) Indeed, "for the 21-year period from 1991 through 2011, the Governor reported *reviewing* only three decisions denying parole, affirming all three denials." (*Gilman, supra*, 110 F.Supp.3d at p. 1014, italics added.) That Governors are not even looking at most denials shows that the reversal is not a backstop to the Board but a political check on unpopular releases.[3]

Politics is also evident from the differential reversal rates across Governors. (See Sarosy, *Parole Denial Habeas Corpus Petitions: Why the California Supreme Court Needs to Provide More Clarity on the Scope of Judicial Review* (2014) 61 UCLA L.Rev. 1134, 1147; Pet. at pp. 16-17.) Governor Davis, who reversed all but two findings of suitability in his tenure, stated, " 'if you take someone else's life, forget it.' " (Egelko, *Brown Paroles More Lifers Than Did Predecessors*, S.F. Gate (Apr. 28, 2011). The Legal Affairs Secretary for Governor Schwarzenegger, who reversed nearly two-thirds of all parole grants, was candid about the role of politics: "The fact that the Governor thinks a lot of people would be upset if this person got out of prison, it is [*sic*] a Governor paying attention to the preference of a large constituency of California. And that's what Governors do." (Liotta, *Double Victims: Ending the Incarceration of California's Battered Women* (2011) 26 Berkeley J. Gender L. & Justice 253, 267, fn.98 [citation omitted].) Meanwhile, Governor Brown—whose "age and lack of interest in pursuing further political office" made him less susceptible to

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[2] Reports for Governor Newsom are available at https://www.gov.ca.gov/clemency/. Reports for past Governors are available at https://www.ca.gov/archive/gov39/. Data analysis of reports is on file with the author.

[3] The most striking example of politicized release decisions, which haunts executive branch officials to this day, is the so-called "Willie Horton" affair, wherein Massachusetts Governor Michael Dukakis's presidential campaign was derailed by racist ads highlighting crimes committed by William Horton, a prison furlough recipient in Massachusetts. (See Schwartzapfel & Keller, *Willie Horton Revisited,* The Marshal Project (May 13, 2015), *available at* https://www.themarshallproject.org/2015/05/13/willie-horton-revisited ["[Politicians] learned a bad lesson: not to go out on a limb."].)

public pressure (Sarosy, *supra,* at p. 1148)—reversed only sparingly, explaining, "I'm obviously going to interfere less with the parole board than my predecessors . . . who are perhaps looking for further political pastures to wander in." (Egelko, *supra*, *Brown Paroles More Lifers*.)

The practice of other jurisdictions is also compelling evidence that California's gubernatorial-veto regime is suspect. Oklahoma is the only other state with a gubernatorial reversal, revealing near-universal consensus that prison-release decisions cannot be entrusted to the state's elected chief executive. As former Maryland Governor Parris Glendening argued in support of abolishing the practice in Maryland, "[h]ow can it not be political for a governor to hold all the power in the decision about whether to release someone who has been involved in a serious crime?" (Glendening, Opinion, *I Made a Serious Mistake As Maryland Governor. We Need Parole Reform*, Wash. Post (Mar. 1, 2021).) "[P]eoples' [*sic*] freedom is being determined not on the merits of their rehabilitation," Glendening added, "but often on the political tides of the day." (*Ibid.*) This stark politicization of the Governor's veto is particularly concerning given young people's heightened liberty interest in a meaningful opportunity for release.

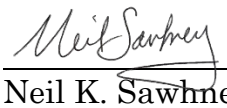
Meanwhile, judicial review does not ensure that arbitrary and politicized reversals will be vacated for young people who demonstrate rehabilitation. Under the "extremely deferential" "some evidence" standard of review (*Rosenkrantz*, supra, 29 Cal.4th at p. 679), the reviewing court must uphold the reversal if there is even "a modicum of evidence" of present dangerousness (*In re Shaputis* (2011) 53 Cal.4th 192, 214), whether or not cited by the Governor (see *In re Stevenson* (2013) 213 Cal.App.4th 841, 866–67). As a result, courts routinely sustain reversals on the thinnest of reeds. (See, e.g.*, In re Montgomery* (2012) 208 Cal.App.4th 149, 164 [possession of tobacco]; *In re Reed* (2009) 171 Cal.App.4th 1071, 1084–85 [leaving work early without permission]; *In re Hare* (2010) 189 Cal.App.4th 1278, 1294–95 [seven-year-old rule infraction for fashioning toothbrush into cleaning device].) The fact that " 'evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole' " is " 'irrelevant' " under this standard. (*In re Butler* (2014) 231 Cal.App.4th 1521, 1534.) Accordingly, "some evidence" judicial review is insufficient to protect young people's rights.

Sirhan Sirhan's case is illustrative. Governor Newsom's reversal of 77-year-old Sirhan's parole-grant has been called "low-hanging fruit from the 'tough on crime' tree." (Shure, *Sirhan Sirhan's Continued Imprisonment Flies in the Face of RFK's Ideals*, New Republic (Jan. 23, 2022).) Tellingly, Sirhan was cited in literature promoting Proposition 89 as a reason to enact the Governor's veto power. (Governor's Parole Review, CA Proposition 89 (1988).) And Governor Newsom's personal regard for Sirhan's victim, Senator Kennedy, is plain. (See Pet. at pp. 18–20.) The Governor has called Senator Kennedy his "personal hero." (Thompson, *California Governor*

Mulls RFK Assassin Sirhan Sirhan Parole, Associated Press (Dec. 28, 2021).) At the time of the reversal, he told reporters, "the only photograph [] you will see in my office is a photo of my father and Bobby Kennedy just days before Bobby Kennedy was murdered." (Hubler, *Sirhan Sirhan Is Denied Parole as Newsom Rejects Board's Recommendation*, N.Y. Times (Jan. 13, 2022).) Despite overwhelming evidence that Sirhan has rehabilitated and does not presently pose a risk to the public, the Court of Appeal upheld the Governor's reversal of his parole-grant on the "some evidence" standard. As Sirhan's case demonstrates, the Governor's reversal authority is incompatible with young people's right to a meaningful opportunity for release.

For the foregoing reasons, the Court should grant the petition for review.

Respectfully submitted,



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PROOF OF SERVICE

I, Sara Cooksey, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is scooksey@aclunc.org. On August 2, 2024, I served the attached:

Amicus Letter in Support of Petition for Review in *In re Sirhan B. Sirhan*, No. S286234

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 2, 2024, in Fresno, CA.

Sara Cooksey, Declarant