MEMORANDUM OF LAW

CAPTION

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CPL § 720.10(1)'S AGE CLASSIFICATION FOR PURPOSES OF DETERMINING YOUTHFUL OFFENDER ELIGIBILITY VIOLATES EQUAL PROTECTION UNDER THE STATE CONSTITUTION BECAUSE, BY LIMITING ELIGIBILITY TO PEOPLE UNDER THE AGE OF 19, IT DISCRIMINATES AGAINST PEOPLE BETWEEN THE AGES OF 19 AND 26 WHO ARE NEUROLOGICALLY THE SAME AND THEREFORE EQUALLY DESERVING OF ACCESS TO THE PROTECTIONS AND BENEFITS OF A YOUTHFUL OFFENDER ADJUDICATION. N.Y. CONST, ART. I, § 11(A).

[Reminder: adapt the motion accordingly if your client is under 21]

Proposition 1 (Prop 1), passed by New York voters on November 5, 2024, amended and expanded the State Constitution's Equal Protection Clause (N.Y. Const., art. I, § 11(a)) to include "age" as an expressly protected characteristic. Because no meaningful distinction can be drawn between 18-year-olds and those between 19 and 25 (under 26),[1] this amendment requires this Court to find that CPL § 720.10(1)'s age classification limiting youthful-offender eligibility to individuals less than 19 when they committed the charged crime violates equal protection under the State Constitution by discriminating against similarly situated individuals – those older than 19 but less than 26. Accordingly, **[client name]**, who was **[ ]** years old at the time of the commission of the offense[s], and who is otherwise eligible under CPL § 720.10, must be considered for youthful-offender adjudication.

A. New York's "Old" Equal Protection Clause

[1] When the class is referred to as "under 26" or "between 19 and 25," it means emergent adults aged 19 through 25, up to their 26th birthday. [When the class is referred to as under 21 or individuals "between 19 and 20," it means late adolescents aged 19 through 20, up to their 21st birthday].

Prior to January 1, 2025,[2] the New York Constitution's Equal Protection Provision provided that:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

N.Y. Const. art. I, §11 (2002). Section 11 was added to the State Constitution in 1938. The first sentence is § 11's Equal Protection Clause. *See People v. Kern*, 75 N.Y.2d 638, 650-51 (1990). It was § 11's main substantive provision—a general, self-executing State equal protection provision that regulated all State action. *Id.* The second sentence contained §11's Civil Rights Clause. *Id.*

Although the Civil Rights Clause was technically broader than the main equal protection provision insofar as it prohibited private as well as State discrimination as to "civil rights," the Clause was of limited utility in fighting discrimination because it was deemed from inception not to be self-executing, meaning it "prohibit[ed] discrimination only as to civil rights which were 'elsewhere declared' by Constitution, statute, or common law." *Id.* at 654 (quoting 4 Rev Record of NY State Constitutional Convention, 1938, at 2626). A successful challenge was brought in *Kern*, where the Court held that the Civil Rights Clause prohibited the exercise of discriminatory peremptory challenges, whether by the prosecution or the defense, because jury service was a "civil right established by Constitution and statute," *id.* at 651, and this "privilege of citizenship" included the right to be free of racial discrimination in the qualification for jury service, *id.* at 652. In contrast, in *Dorsey v. Stuyvesant Town Corp*., 299 N.Y. 512, 531 (1949), the Court

[2] Following Prop 1's approval by the people of the State, its amendments became effective by operation of law at midnight on January 1, 2025. *See* N.Y. Const. art. XIX, § 1.

denied a Civil Rights Clause challenge to landlords who barred Black tenants because, in 1949, no right to rent existed.

Because of this difficult threshold requirement, litigants challenging State action typically invoked the functionally broader Equal Protection Clause.

Pre Prop-1, when litigants in New York challenged age classifications under traditional equal protection, either as a violation of state or federal constitutions, they were rarely successful. Age, the U.S. Supreme Court repeatedly held, was not a "suspect" class akin to race or gender. *See Massachusetts Bd. Of Retirement v. Murgia,* 427 U.S. 307, 31314 (1976); *Vance v. Bradley*, 440 U.S. 93, 97, 99 (1979); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83-84 (2000). The Court of Appeals, accordingly, and, following the Supreme Court, applied the lowest level of scrutiny, rational-basis scrutiny,[3] to reject the challenges. *See Maresca v. Cuomo*, 64 N.Y.2d 242, 250-51 (1984); *Matter of Quinton A.*, 49 N.Y.2d 328, 336-37 (1980), *Lovelace v. Gross*, 80 N.Y.2d 419 (1992); *Matter of Davis'*

[3] New York Courts reviewing the constitutionality of statutory classifications under § 11 have traditionally applied the means-end tiers-of-scrutiny framework developed by the Supreme Court in its Equal Protection jurisprudence and relied on its case law. *See, e.g., People v. Aviles*, 28 N.Y.3d 497, 502 (2016); *Matter of Aliessa ex rel. Fayad v. Novello*, 96 N.Y.2d 418, 430-31 (2001). Within that doctrinal framework, there are three tiers of scrutiny: rational basis, intermediate, and strict. *See, e.g., Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 42-43 (1982). Each tier requires courts to analyze the propriety of the purported governmental interest advanced by the statute (the interest prong) and how well the classification advances that interest (the tailoring prong). *Id.* As courts move up the tiers of scrutiny, they require classifications to serve more significant governmental interests and to be increasingly correlated with achieving those interests. *See id.*

The highest tier of scrutiny is strict scrutiny, *see Aviles*, 28 N.Y.3d at 502, and requires the State to show that the law "furthers a compelling state interest by the least restrictive means practically available," *Aliessa*, 96 N.Y.2d at 431. When strict scrutiny applies, the government bears a "very heavy burden" in establishing the classification's constitutionality. *Alevy v. Downstate Med. Ctr.*, 39 N.Y.2d 326, 333 (1976). Intermediate-level scrutiny, which applies to "quasi-suspect" classifications such as those pertaining to sex and legitimacy, requires the government to show that the classification serves an "important governmental interest" and "is substantially related to that interest." *Santorelli*, 80 N.Y.2d 875,876 (1992).

Estate, 57 N.Y.2d 382 (1982); *see also In re S.*, 44 A.D.2d 352, 353 (1st Dep't 1974); *Campbell v. Baraud*, 58 A.D.2d 570, 572 (2d Dep't 1977). Rational basis scrutiny essentially rubber-stamped the classification; the challenged age-based classification would not offend equal protection as long as it was "rationally related to a legitimate state interest." *Id.* at 83. "Razorlike precision" in the relationship was not necessary; the classification was presumptively rational and could rest on imperfect or inaccurate generalizations. *Id.* A litigant could prevail only if they could prove that the government's actions were "irrational," and the facts on which the classification was based "could not reasonably be conceived to be true by the governmental decisionmaker." *Id.* at 84.

B. Prop 1

Prop 1 breathed new life into State equal protection in two ways. First, it made age an enumerated protected characteristic within the Civil Rights Clause. Second, it added a phrase to the Civil Rights Clause that transformed it from being a relatively toothless provision dependent on the violation of a separate right, to an independent, self-standing path for challenging discriminatory state action.

Believing that "the New York Constitution's Bill of Rights [did] not [] contain a comprehensive equal rights provision," Prop 1 overhauled § 11 to provide New Yorkers with "legal protections that go above and beyond the protections of the federal Constitution." Sponsor's Mem. S51002. As of January 1, 2025, § 11 reads, in relevant part, as follows:

> (a) No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, ethnicity, national origin, age, disability, creed, religion, or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy, be subjected to any discrimination in their civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state, pursuant to law.

N.Y. Const. art. I, § 11(a). Age, previously omitted from § 11, became an enumerated protected classification and thus subject to more robust protection, and, by adding the phrase "pursuant to," the drafters made the Civil Rights Clause self-executing and thus automatically applicable to all State action.

"Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply." *Romer v. Evans*, 517 U.S. 620, 628 (1996). Adding age to § 11, therefore, "provide[s] strong evidence" that Prop 1's drafters and the electorate rejected the Court of Appeals' traditional, deferential treatment of age classifications. *Cf. Hernandez v. State*, 173 A.D.3d 105, 113 (3d Dep't 2019) (citing *Pointer v. Texas*, 380 U.S. 400, 404 (1965)) (holding that New Yorkers made the right to organize fundamental by enumerating it in the State Constitution's Bill of Rights). Sponsors memos and floor debates clearly show that age was considered a category "essential for equal rights protection." *See, e.g.,* N.Y. Senate Debate on Senate Bill S51002, July 1, 2022, at 5610:8–23 ("[W]e are putting into the New York State Constitution the protection for many people which has long been neglected in our state Constitution . . . . [W]e are enumerating the categories that are essential for equal rights protection," including, "age").[4]

The added phrase "pursuant to law" converts the Civil Rights Clause provision into a self-executing one rather than, as before, dependent on the litigant showing the separate violation of a right. The phrase modifies when the Clause applies to discrimination "by the state or any

[4] *See* Sponsors' Mem S51002 (Prop 1 "expand[ed] the list of classes protected by the New York Constitution in recognition of the need for comprehensive and intersectional equality under the law"); Sponsors' Mem A41002 (explaining that Prop 1 "expands the civil rights clause of Section 11 . . . to add . . . age . . . to the existing list of protected classes for which discrimination in civil rights is prohibited"); NY Senate Debate on Senate Bill S51002, July 1, 2022, at 5610:8-23 ("[W]e are enumerating the categories that are essential for equal rights protection," including, "age"); N.Y. State Assembly Debate on Assembly Bill A41002, July 1, 2022, at 200 (arguing that § 11 "now is going to protect based upon . . . age").

agency or subdivision of the state . . ." *See* N.Y. Const. art. I, § 11[a] ("[N]o person shall, because of . . . age . . . be subjected to any discrimination in their civil rights . . . by the state or any agency or subdivision of the state, *pursuant to law*")(emphasis added). Applying the most fundamental canon of construction, for courts to "give to the language used its ordinary meaning," *Hoffman v. New York State Indep Redistricting Comm'n*, 41 N.Y.3d 341, 359 (2023), establishes the transformative effect of this language on the Clause's operation: "Pursuant to," given its ordinary meaning, means "under," as in: "[i]n compliance with," "[a]s authorized by," or "[i]n carrying out" (Pursuant To, Black's Law Dictionary [12th ed. 2024]). Plugging that definition in, the Clause prohibits the State from discriminating in civil rights *even when it is in compliance with, authorized by, or carrying out "law."* In other words, the phrase "pursuant to law" means that the Civil Rights Clause automatically bars discrimination that is blessed by other laws, on its own, without enabling statutes.

C. Prop 1's application to YO

New York's youthful-offender provisions aim to give young people a second chance by allowing them to avoid a permanent criminal record and the associated stigma. This is achieved by replacing a conviction with a confidential, non-criminal adjudication and potentially a reduced prison sentence. The purpose is to prevent negative long-term consequences like societal bias and limited employment opportunities, which can hinder rehabilitation and increase the risk of recidivism. Society's more evolved understanding of juvenile brain function and the relationship between youth and unlawful behavior is directly related to youthful-offender law. In *People v. Rudolph*, 21 N.Y.3d 497 (2013), for example, the Court of Appeals held that courts must consider youthful-offender treatment whether or not requested by the defendant. As Judge Graffeo, in concurrence, stated, "[D]evelopments in the body of knowledge concerning juvenile

development underscore the need for judicial procedures that are solicitous of the interests of vulnerable youth. . . ." *Id.* at 506; *see also id.* ("Young people who find themselves in the criminal courts are not comparable to adults in many respects—and our jurisprudence should reflect that fact.")(Graffeo, J., concurring).

Article 720 sets out the procedure courts must follow when considering whether to adjudicate a defendant a youthful offender. CPL § 720.10 contains the eligibility provisions. First and foremost, the defendant must be a "youth," which the statute defines being "at least sixteen years old and less than nineteen years old" when the defendant committed the charged crime. CPL § 720.20(1). Thus, the statute creates an age-based classification that excludes people older than 19 from youthful offender eligibility.

This age classification is subject to challenge, and as Prop 1 makes age [5] an enumerated characteristic on par with race, ethnicity, nationality, and religion, courts must apply the same heightened scrutiny when reviewing such a challenge — strict scrutiny, or, at the least, intermediate scrutiny, *see* fn. 2, *ante*. *See, e.g., Alevy v. Downstate Med. Ctr. Of State of N.Y.,* 39 N.Y.2d 326, 332 (1976)(strict scrutiny applies to race classifications); *People v. Aviles*, 28 N.Y.3d 497, 503 (2016) (strict scrutiny applies to ethnic and national origin classifications); *Hernandez v. Robles,*, 7 N.Y.3d 338, 364 (2006) (intermediate scrutiny applies to sex

[5] Since "age" is undefined and unlimited in the provision, and Prop 1's supporters overwhelmingly advocated for the amendment's broad application, the protection extends not just to the "aged" – older persons who have traditionally experienced discrimination – but to classifications that discriminate against young people as well. *Cf. Hernandez*, 173 A.D.3d at 112 (concluding that because the right to organize belonged to "employees" and the State Constitution did not limit the term "employees," the right to organize extended to farm laborers). Cabining "age" to benefit only the "aged," would not "give [] the language used its ordinary meaning," *Matter of Sherrill v. O'Brien*, 188 N.Y. 185, 207 (1907), but would imbue a "general and unqualified word" with a "special definition[] of limited application," *cf. Hernandez*, 173 A.D.3d at 112-13 (refusing to interpret the State Constitution's use of "employee" as it had been defined in a statute).

classifications); *see also Archbishop Walsh High Sch. v. Section VI of New York State Pub. High Sch. Athletic Ass'n.*, 88 N.Y.2d 131, 136 (1996) (suggesting equal protection principles require courts to apply strict scrutiny to religious classifications); *Carolene Products*, 304 U.S. at 152 n.4 (same). Continuing to apply the lowest tier of scrutiny, rational-basis scrutiny, to age classifications but heightened scrutiny to its textual neighbors, would write into § 11 a distinction that Prop 1's drafters did not make and which New Yorkers did not vote for.

Here, to begin, **[client]** does not dispute there is sound reason for *an* age classification in Article 720: the government has an important interest in protecting young people, "who have a real likelihood of turning their lives round," *Rudolph*, 21 N.Y.3d at 501, from the bias and stigma associated with a criminal conviction, while a valid reason for not extending the tremendous benefits of YO adjudication – vacatur of convictions and reduced sentences — to every defendant. However, CPL § 720.10(1)'s age classification is discriminatory insofar as it excludes people who, like the currently protected class, should have access to the benefits of YO. The relevant question is whether CPL § 720.10(1)'s age-classification can withstand the heightened scrutiny that challenges involving the expressly protected characteristic of age demand. As discussed further below, because accepted neuroscience supports that the brains of emergent adults under 26 are the same as the brains of their younger peers, CPL § 720.10's classification cannot survive heightened scrutiny and is underinclusive in violation of state equal protection.

D. <u>The Science</u>

BELOW WE PROPOSE TWO ALTERNATIVE "SCIENCE" SECTIONS - THE FIRST IS IF YOUR CLIENT IS BETWEEN 19 AND 25, AND THE SECOND IS IF YOUR CLIENT IS UNDER 21, WHERE THERE IS EVEN MORE SUPPORT IN THE

LITERATURE AND CASELAW FOR ARGUING THAT YOUR CLIENT IS NEUROLOGICALLY NO DIFFERENT FROM A PERSON UNDER 19. IF YOUR CLIENT IS UNDER 21, REMEMBER TO ADAPT THE MOTION ACCORDINGLY.

[*Science section pertaining to a client under 26:*

Because young people are fundamentally different than adults, a different set of considerations are relevant to sentence. A crucial step in that understanding in the law was the Supreme Court's recognition that juveniles were different and thus must be subject to different sentencing rules. In a series of decisions starting in the death penalty context, *Roper v. Simmons*, 543 U.S. 551 (2005), but extending to the imposition of life sentences, *see Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court concluded that the Eighth Amendment prohibits infliction of the most serious punishments against juveniles, whose lack of maturity and potential for rehabilitation make them less culpable than other offenders. In reaching these decisions, the Court has recognized 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*, 567 U.S. at 472.

Roper identified three areas of difference between juveniles under 18 and adults: (1) a lack of maturity and underdeveloped sense of responsibility that often result in impetuous and ill-considered actions and decisions; (2) juveniles are more vulnerable or susceptible to negative influences and outside pressures, "including peer pressure;" and (3) the character of a juvenile is not as well formed as that of an adult and their personality traits "more transitory," making it "misguided to equate the failings of a minor with those of an adult," 543 U.S. at 569-70. Central to the Court's reasoning was that capacity of juveniles to change and grow. *See, e.g., Miller*, 567

U.S. at 472 (finding an "enhanced . . . prospect that as the years go by and neurological development occurs, [a juvenile's] deficiencies will be reformed").

Advances in neuroscience show these same considerations apply equally to older adolescents and emergent adults. Areas of the brain— particularly the prefrontal cortex, which is the area of the frontal lobe that "executes cognitive control"— continue to develop into the mid- to late-20s. *See* Barkin, R., *Hot and Cold Cognition: Understanding Emerging Adults' Cognitive Reasoning*, Dec. 2021; *see also* Lindell, K. & Goodjoint, K., *Rethinking Justice for Emerging Adults*, Juvenile Law Center, 2020 (A longitudinal study of brain development in 5,000 children "demonstrated that their brains were not fully mature until at least 25 years of age.") (citing Nico U. F. Dosenbach et al., Prediction of Individual Brain Maturity Using fMRI, 329 Sci. 1358, 1358-59 (2010)). That "the prefrontal cortex is among the last to develop . . . is important because it is like the CEO of the company. It is responsible for the evaluation of future consequences, the ability to weigh risks and rewards, and general decision-making processes. . . [it] is also essential for controlling emotions and inhibiting impulses." Caufmann, E. & Baskin-Sommers, A., *Adolescents Engage in More Risky Decision Making*, Yale University (internal citations omitted).

Numerous studies support these findings, including one that reveals that two of the key attributes prevalent in juveniles that justified the decisions in *Roper*, *Miller*, and *Graham*—an increase in sensation seeking and reduction in self-regulation— are also applicable to emergent adults into their 20s. This study reported that "sensation seeking" increased through adolescence, peaking at age 19, before declining thereafter, while improvements in "self-regulation" did not plateau until somewhere between the ages of 23 and 26. Steinberg, L., et. al., *Around the World, Adolescence Is a Time of Heightened Sensation Seeking and Immature Self-*

Regulation, 21 Dev. Sci. 1, 1-2 (2017). As academics have said, "studies that track development beyond" 18 "show that, in many respects, age 18 often aligns with the beginning of a particularly problematic developmental phase marking the transition from adolescence to adulthood," not the end. Cauffman, E., Aligning Justice System Processing with Developmental Science, Criminology & Public Policy 11, 751 (2012).

Most significantly, science shows that emergent adults, as much as juveniles, "struggle with the brain functions that operate under hot cognition"— defined as "decision-making in an emotionally charged situation that can result in an outcome with a high risk or a high reward." Barkin, R., *Hot and Cold Cognition: Understanding Emerging Adults' Cognitive Reasoning*, Dec. 2021. In these scenarios-which almost uniformly represent the situations in which young people commit crimes **[and certainly the crime at issue in [client's] case]** — an individual well into his or her 20's is less able to "respond[] to high-stress events and inhibit[] impulsive decisions." *Id.* It is only after the "orbitofrontal cortex has developed after puberty, typically around the late twenties, [that] a person's cognitive control system can more effectively regulate emotions, manage stress, and withstand peer pressure." *Id.*

Therefore, like juveniles, emergent adults have less control over their responses to emotional and risky situations, and more potential for change as their capacity to consider consequences and self-regulate improves with maturity.

[Science section pertaining to a client under 21:

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Advances in neuroscience show these same considerations apply equally to older adolescents. The science now incontrovertibly establishes that the brains of late adolescents, defined as individuals between 18 and 21, are indistinguishable from the brains of their younger peers. Center for Law, Brain & Behavior, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys and Policy Makers* 1 n.2, 2 (2022)(Since *Miller v. Alabama*, scientific research has emerged which "extends much of the science that resonated with the *Miller* court to late adolescents (ages 18-21)"). As with juveniles, "late adolescents are also

remarkably resilient, and their developing brains are poised for positive learning through interventions and rehabilitation." *Id.* at 3. "[R]esearch consistently indicates that most [late adolescents] will not continue to offend and become adult repeat offenders through their twenties, thirties, and beyond." *Id.*

The science equating the brains of late adolescents to the brains of juveniles is so undeniable and compelling, that three states have banned the mandatory imposition of life-without-parole sentences on individuals who were younger than 21 when they committed their offenses. *See Commonwealth v. Mattis*, 493 Mass. 216, 234-235 (2024) (ruling LWOP is categorically unconstitutional under State constitution when applied to individual under 21, after conducting a full evidentiary hearing directed to the adolescent neurological and psychological development after the age of 17); *Matter of Monschke*, 197 Wash. 2d 305, 326, 329 (2021) (requiring courts to consider "the mitigating qualities of youth" before sentencing a person under 21 to LWOP;"No meaningful neurological bright line exists between age 17 and age 18 or, as relevant here, between age 17 on the one hand, and ages 19 and 20 on the other hand"); *People v. Taylor*, -Mich-, -N.W.3d-, 2025 WL 1085250 (April 10, 2025)(extending to late adolescents between the ages of 18 and 21 the court's prior decision finding the imposition of LWOP on 18-year-olds cruel and unusual punishment under the State Constitution; "as a class, 19- and 20-year old late adolescents are more similar to juveniles in neurological terms than they are to older adults").]

E. CPL § 720.10(1)'s age classification cannot survive heightened scrutiny

As established above, no meaningful neurological bright line distinguishes individuals aged 16 through 18, from those aged 19 through 25. Both classes share the hallmark characteristics of youth that make young people less culpable than full-fledged adults and

capable of the same capacity for change. In light of this, CPL § 720.10(1)'s classification excluding individuals older than 19 and less than 26 cannot survive heightened scrutiny – either strict scrutiny or intermediate-level scrutiny.

Strict scrutiny analysis

Under strict scrutiny, "a State statute will withstand an equal protection challenge only when the State can show that the law 'furthers a compelling state interest by the least restrictive means practically available.'" *Matter of Aliessa ex rel Fayad v. Novello*, 96 NY2d 418, 431 (2001) (quoting *Bernal v. Fainter*, 467 U.S. 216, 227 [1984]). When strict scrutiny applies, the government bears a "very heavy burden" in establishing the classification's constitutionality. *Alevy v. Downstate Med. Ctr.*, 39 N.Y.2d 326, 333, 348 N.E.2d 537 (1976). Courts engage in "a painstaking inquiry . . . to ensure the existence of a proper governmental objective" and are "circumspect" that the classification necessarily furthers that objective. *Id.* "Administrative convenience" is never a compelling state interest. *City of Richmond v. J.A.Croson Co.*, 488 U.S. 469, 508 (1989). And a classification that "leaves appreciable damage to [a] supposedly vital interest unprohibited," is underinclusive and therefore not narrowly tailored. *Reed v Town of Gilbert*, 576 U.S. 155, 172 (2015) (quoting *Republican Party of Minn v. White*, 536 U.S. 765, 780 (2002)) (finding an ordinance fatally underinclusive because it restricted signs advertising church services more than other signs that posed the same aesthetic harms and traffic safety).

Here, § 720.10 (1)'s s age classification undoubtedly serves a compelling state interest—granting a pathway for young people to "have the opportunity for a fresh start, without a criminal record." *Rudolph*, 21 N.Y.3d at 501. Since this procedure can result in the vacatur of an otherwise valid criminal conviction as well as a reduced sentence, the State's interest in public safety justifies limiting eligibility to individuals whose youth likely contributed to their conduct

and who are most likely to profit from this benefit because of their greater capacity for change. However, this rationale cannot satisfy strict scrutiny because the statute excludes a class — emergent adults under 26—who, if covered, would only *further* the government's objective. As established above, a robust scientific consensus exists that, like the currently protected class, emergent adults into their mid-20s have brains hard-wired to take poorly planned risks in search of rewards, placate and impress peers, and learn and grow. As juveniles and individuals between 19 and 25 are virtually indistinguishable in terms of the impact of their brain development on their conduct and capacity for change, CPL § 720.10(1)'s classification excluding the latter class from access to YO is fatally underinclusive. Burdening all emergent adults between 19 and 25 with criminal convictions and potentially long sentences, but not those under 19, "leaves appreciable damage" to the State's "supposedly vital interest" in protecting young people from severe criminal liability and punishment "unprohibited." *See Reed*, 576 US at 172.

Intermediate scrutiny analysis

For similar reasons, even if the Court were to apply intermediate scrutiny to age classifications, § 720.10(1)'s age shield would not pass muster. Intermediate-level scrutiny is demanding, requiring the government to prove that the classification serves an "important governmental interest" and bears a "close relationship" to that interest. *People v. Santorelli*, 80 NY2d 875, 876 (1992). Administrative convenience is not an important governmental interest. *Craig v. Boren*, 429 U.S. 190, 198 (1976). And under the tailoring prong, the classification fails if an alternative would "indisputably better serves, even if only marginally," the State's objective. *People v. Liberta*, 64 N.Y.2d 152, 170 (1984). Likewise, a classification is improperly underinclusive if extending statutory protections "would only provide benefits to those [] who are in fact similarly situated" to the original benefitted class and would not undermine "the effort

to help" the original benefitted class. *Orr v. Orr*, 440 U.S. 268, 282 (1979), quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (holding that an Alabama statute that required only men to pay alimony failed intermediate scrutiny because making the statute sex-neutral would help "[n]eedy males . . . along with needy females with little if any additional burden on the State")). Here, again, the State's interest in crafting an age minimum for YO eligibility is important. But the State's reliance on under-19 (rather than [under 21]/ [under 26]) as the dividing line between those young enough and too old for YO is nothing short of "the mechanical application of traditional, often inaccurate, assumptions" about age and development. *See Anonymous v. City of Rochester*, 13 N.Y.3d 35, 48 (2009), and defies the modern scientific consensus.

In light of the neuroscience, affording YO eligibility up to age [21 or 26] would "indisputably better serve" the State's interest in protecting young people from the life-altering burden and stigma of a criminal conviction and support rehabilitative goals for a group that shares a tremendous capacity to change and grow. In other words, because extending § 720.20(1)'s reach to those between 19 and 25 would not impair the State's efforts to support the rehabilitation of those under 19, and would only "provide benefits to those . . . in fact similarly situated" to that cohort. Simply put, § 720.20(1) is underinclusive and its age limitation accordingly fails intermediate scrutiny, too.

F. Remedy

There are two ways to remedy a statute's underinclusiveness: nullifying the underinclusive statute so it applies to nobody, or extending the statute's protections to those formerly excluded. *See Liberta*, 64 N.Y.2d at 170. The correct remedy here is obvious: the Court must cure CPL § 720.10(1)'s underinclusiveness by extending YO eligibility to include "youths" under age 26. As is almost always the case, that is surely what "the Legislature would

have chosen [] if it had foreseen [the court's] conclusions as to underinclusiveness." *Id.*; *see Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 632 (2020)(collecting cases). The alternative, to nullify the statute, would end up depriving currently eligible youth from access to YO, "impos[ing] hardship on beneficiaries whom [the Legislature] plainly meant to protect." *See Califano v. Westcott,* U.S. 76, 86-90 (1979). Stripping currently eligible youth of the possibility of YO protection is plainly not a result the Legislature would have contemplated or wanted. Indeed, showing its continued commitment to freeing deserving individuals of the burden of a criminal conviction that can impede rehabilitation and stigmatize a person, the Legislature expanded YO in 2021 to allow individuals previously denied youthful offender status to again appear before a judge and have their record made confidential upon successful application. CPL § 720.20(5). Expanding the class of eligible youths to include people under 26 would be consistent with the Legislature's goal of facilitating rehabilitation.

Accordingly, this Court should find that CPL § 720.10(1)'s current age classification excluding from YO eligibility youth between the ages of 19 and [21 or 25] offends equal protection under our state constitution, and extend YO eligibility up to age [21 or 26] to rectify the equal protection violation.

Dated:

[OFFICE INFORMATION]