In the Supreme Court of the State of California

RON BRIGGS and JOHN VAN de KAMP,

Petitioners,

v.

JERRY BROWN, in his official capacity as the Governor of California; KATHLEEN A. KENEALY, in her official capacity as the Acting Attorney General of California; and California's Judicial Council, and Does I through XX,

Respondents.

Case No. S238309

RESPONDENTS' PRELIMINARY OPPOSITION TO PETITIONERS' AMENDED AND RENEWED PETITION FOR EXTRAORDINARY RELIEF

KATHLEEN A. KENEALY
Acting Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
MARC A. LEFORESTIER
Supervising Deputy Attorney General
*JOSE A. ZELIDON-ZEPEDA
Deputy Attorney General
State Bar No. 227108
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
(415) 703-5781
Jose.ZelidonZepeda@doj.ca.gov
Attorneys for Respondents Governor E. Brown Jr., and Acting Attorney General K. Kenealy

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

Petitioners sue as taxpayers asserting that Proposition 66, the "Death Penalty Reform and Savings Act of 2016," is facially invalid on four separate grounds. First, they argue that the measure violates the California Constitution because it interferes with the grant of jurisdiction to appellate courts to handle habeas corpus petitions by requiring that these be transferred to the court which issued the judgment of conviction. But on its face, the measure does not divest the appellate courts of original jurisdiction to consider habeas petitions. It merely provides that a petition filed in a court other than the sentencing court "should" be transferred to that court unless good cause is shown, with language that courts have previously determined does not defeat jurisdiction.

Petitioners also argue that the measure violates separation of powers principles by, among other things, imposing strict deadlines for processing the habeas corpus petitions of individuals sentenced to death. But, as the petition acknowledges, the Legislature may place "reasonable restrictions upon constitutional functions of the courts," as long as these restrictions do not "defeat or materially impair the exercise of those functions." (*Brydonjack v. State Bar of Cal.* (1929) 208 Cal. 439, 444.) The challenged restrictions do not meet this threshold. And petitioners cite no case in which a court has struck down under separation of powers principles a statute governing court procedures.

Third, petitioners argue that the measure violates the single-subject rule. Focusing particularly on the provision pertaining to victim restitution, the provision exempting the Department of Corrections and Rehabilitation's execution protocol from the Administrative Procedure Act, and the provision disbanding the Habeas Corpus Resource Center's Board of Directors, they contend that these provisions do not relate to the measure's purpose. But the single-subject rule is interpreted liberally, and

courts resolve any reasonable doubts in favor of the initiative. Thus, a measure does not violate the single-subject rule if, its various effects notwithstanding, all of its components are "reasonably germane" to each other, and to the overall purpose of the measure. Here, all the provisions relate in some way to death penalty reform or cost savings, the Proposition's stated goal.

Lastly, petitioners contend that the measure violates the equal protection rights of individuals convicted of capital crimes by limiting their ability to file successive habeas petitions. As petitioners concede, this claim is subject to deferential rational basis review because there is no suspect classification at issue. Under this standard, petitioners cannot show that the measure unconstitutionally infringes upon their equal protection rights because capital defendants are not similarly situated to noncapital defendants. Ultimately, petitioners also cannot meet their burden to negate every conceivable basis underlying any disparate treatment.

For these reasons, the Court should deny the Amended Petition.[1]

STATEMENT

Proposition 66 declares that the death penalty system "is ineffective because of waste, delays, and inefficiencies." (Pets.' App. Of Exhibits, Exh. 1 at 1.) It modifies the current death penalty process through a number of measures relating to "timely justice" for murder victims, and the process by which capital defendants may raise their claims. (*Id.* at p. 2.) It concludes that, "[b]ureaucratic regulations have needlessly delayed enforcement of death penalty verdicts," and seeks to curtail repetitive challenges to death penalty proceedings. (*Ibid.*)

---

[1] Petitioners filed a motion for judicial notice, which respondents do not oppose.

Proposition 66 enacts changes to the Government Code and Penal Code, mostly affecting the process by which capital cases are adjudicated. As relevant to the claims raised in the Amended Petition, the measure enacts a number of changes, relating to (1) where habeas corpus petitions are filed; (2) expediting the resolution of filed petitions; and (3) streamlining the execution of death sentences, as explained below.

A. Under Proposition 66, Habeas Petitions Filed in Courts Other Than the Sentencing Court Should Be Transferred to That Court, Absent Good Cause.

Under the California Constitution, each of the State's courts has original habeas corpus jurisdiction. (Cal. Const., art. 6, § 10 ["The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings"].)

Proposition 66 adds section 1509 to the Penal Code, which states in part, "A petition filed in any court other than the court which imposed the sentence should be promptly transferred to that court unless good cause is shown for the petition to be heard by another court." (New Pen. Code, § 1509, subd. (a).) Relatedly, the proposition allows, but does not require, habeas petitions already pending in the Supreme Court to be transferred to the trial court for resolution. (*Ibid.*)

With respect to the appointment of counsel, the proposition requires the superior court, rather than this Court, to offer to appoint counsel to state prisoners subject to a capital sentence. (New Gov. Code, § 68662.) The proposition also allows for appellate review of superior court rulings granting or denying habeas relief. (New Pen. Code, § 1509.1, subd. (a).) Reviewable issues are limited to those presented to the superior court, except that the reviewing court could also "consider a claim of ineffective assistance of trial counsel if the failure of habeas counsel to present that claim to the superior court constituted ineffective assistance." (*Id.* at

§ 1509.1, subd. (b).) Any superior court decision granting relief on a successive petition could be appealed by the People, but a decision denying relief could not be appealed by the petitioner unless the superior court issues a certificate of appealability. (*Id.* at § 1509.1, subd. (c).) To obtain a certificate, the petitioner must show "both a substantial claim for relief, which shall be indicated in the certificate, and a substantial claim that the requirements of subdivision (d) of section 1509 [regarding actual innocence or ineligibility for death] have been met." (*Ibid.*)

B. Proposition 66 Requires Expedited Resolution of State Direct and Collateral Review.

Proposition 66 requires expedited resolution of direct and collateral review of death sentences by implementing a number of changes.

First, it requires state courts to complete the state appeal and the initial state habeas corpus review in capital cases in five years. The Judicial Council must, within 18 months of the effective date of the Proposition, adopt initial rules and standards of administration to expedite the processing of capital appeals and state habeas review. (New Pen. Code, § 190.6, subd. (d).) "Within five years of the adoption of the initial rules or the entry of judgment, whichever is later, the state courts shall complete the state appeal and the initial state habeas corpus review in capital cases." (*Ibid.*)

Second, the measure imposes a deadline for filing and for resolving habeas petitions. It requires that capital habeas petitions generally be filed in the trial court within one year following that court's order appointing habeas counsel or the effective date of the proposition, whichever is later. (New Pen. Code, § 1509, subd. (c).) Under new Penal Code section 1509, subdivision (f), the superior court must resolve the initial petition within one year of filing "unless the court finds that a delay is necessary to resolve

a substantial claim of actual innocence, but in no instance shall the court take longer than two years to resolve the petition."

Proposition 66 also restricts successive and untimely petitions. Previously, untimely and successive petitions were barred, subject to a variety of exceptions. (*In re Clark* (1993) 5 Cal.4th 750, 797 [noting that, absent allegations of fact that would establish "a fundamental miscarriage of justice" in the conviction or sentence, the general rule is that successive or untimely petitions should be summarily denied].) Under Proposition 66, any untimely petition must be dismissed unless the petitioner can demonstrate by "the preponderance of all evidence, whether or not admissible at trial," that he is factually innocent or ineligible for death. (New Pen. Code, § 1509, subd. (d).) The proposition also (1) requires any petitioner attempting to pass through this "gateway" for considering a successive or untimely petition to "disclose all material information relating to guilt or eligibility in the possession of the petitioner or present or former counsel for petitioner," and (2) authorizes (but does not require) dismissal of a successive or untimely petition for any "willful failure" to make or facilitate the required disclosure. (*Id.* at § 1509, subd. (e).)

C. The Measure Directs Streamlined Execution of Death Sentences.

Under Proposition 66, the Department of Corrections and Rehabilitation is required to "maintain at all times the ability to execute such judgments." (New Pen. Code, § 3604, subd. (e).) If the Department "fails to perform any duty needed to enable it to execute the judgment, the court which rendered the judgment of death shall order it to perform that duty on its own motion, on motion of the District Attorney or Attorney General, or on motion of any victim of the crime . . . ." (*Id.* at § 3604.1, subd. (c).)

Under state law, the Department is tasked with developing standards for implementing the death penalty. (Pen. Code, § 3604, subd. (a).) These standards have in the past been deemed a "rule of general application," and thus a "regulation" that must be promulgated in accordance with the Administrative Procedure Act (APA). (*Morales v. California Department of Corrections and Rehabilitation* (2008) 168 Cal.App.3d 729, 739-740.) Proposition 66 exempts the Department's execution protocols from the Administrative Procedure Act. (New Pen. Code, § 3604.1, subd. (a).)

Finally, the measure states that the trial court is the forum for resolving method-of-execution challenges. Under the Proposition, "the court which rendered the judgment of death" has the "exclusive jurisdiction" for method-of-execution challenges. (New Pen. Code, § 3604.1, subd. (c).)

LEGAL STANDARD

Petitioners bring a facial taxpayer challenge to Proposition 66. This Court has not articulated a single test for facial challenges. (*In re Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126.) Under the strictest formulation, a challenged statute must be upheld unless the party establishes that the statute "inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions." (*Ibid.*, citation omitted.) Under the more lenient standard, petitioners must establish at a minimum that Proposition 66 is unconstitutional "in the *generality* or *great majority* of cases." (*Ibid.*, citation omitted; *Coffman Specialities, Inc. v. Dep't of Transportation* (2009) 176 Cal.App.4th 1135, 1145.) Such a challenge "considers only the text of the measure itself, not its application to the particular circumstances of the individual." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.)

When assessing a challenge to an initiative, this Court applies a presumption in favor of its validity. (*Calfarm Ins. Co. v. Deukmejian*

(1989) 48 Cal.3d 805, 814 [in case challenging initiative measure, noting that "Statutes must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears"].) "If the validity of the measure is 'fairly debatable,' it must be sustained." (*Ibid.*, citation omitted.)

JURISDICTION

This Court has exercised its original jurisdiction to decide cases when the issues presented are of great public importance and required prompt resolution. (See, e.g., *California Redevelopment Association v. Matosantos* (2011) 53 Cal.4th 231, 253; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 219 [assertion of original jurisdiction in constitutional challenge to Proposition 13]; *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241 [assertion of original jurisdiction in constitutional challenge to Proposition 8].) Petitioners argue that the validity of Proposition 66 is a question of "sufficient public importance." (Am. Pet. at 2.) Respondents agree.

ARGUMENT

I. PROPOSITION 66 DOES NOT UNLAWFULLY INTERFERE WITH THE JURISDICTION OF CALIFORNIA'S COURTS.

Petitioners contend that Proposition 66 improperly tries to "strip the state courts of their authority to entertain and decide" habeas corpus petitions. (Am. Pet. at 20.) They argue that habeas jurisdiction is constitutionally based, and that Proposition 66 cannot invade this jurisdiction. But the measure merely enacts valid rules of judicial procedure, as explained below.

The California Constitution states that "[h]abeas corpus may not be suspended unless required by public safety in cases of rebellion or invasion." (Cal. Const., art. I, § 11.) Every level of the state courts "and their judges have original jurisdiction in habeas corpus proceedings." (*Id.*

art. VI, § 10.) In capital habeas cases, prisoners often file their original writ petition with this Court. Proposition 66, however, provides that "a petition filed in any court other than the [sentencing court] should be promptly transferred to that court," absent good cause. (New Pen. Code, § 1509, subd. (a).) Proposition 66 further provides that a "successive petition shall not be used as a means of reviewing a denial of habeas relief." (New Pen. Code, § 1509.1, subd. (a).) Petitioners argue that these provisions are an invalid encroachment on the courts' habeas jurisdiction. (Am. Pet. at 23-24.)

A. The Measure Does Not Mandate that Habeas Petitions Be Transferred to the Sentencing Court, and Thus Does Not Divest Appellate Courts of Original Jurisdiction.

Initially, Proposition 66 provides only that a petition filed in any court other than the sentencing court "should" be transferred to that court. (New Pen. Code § 1509.) On its face, this provision does not divest the appellate courts of original jurisdiction to consider habeas petitions and further does not require that a petition filed in appellate courts be transferred to the sentencing court. Rather, it tracks the language used by this Court in *In re Roberts* (2005) 36 Cal.4th 575, 579-580, which directs that "a habeas corpus petition challenging a decision of the parole board *should* be filed in the superior court, which *should* entertain in the first instance the petition." (Emphasis added.) The Fifth District Court of Appeal found that this language in *Roberts* "does not divest the courts of appeal of original jurisdiction in petitions for writ of habeas corpus, as granted by article IV [*sic*], section 10 of the California Constitution. Nor does it dictate that in all cases such habeas corpus petitions must be filed in the superior court—only that challenges to parole 'should' first be filed in the superior court." (*In re Kler* (2010) 188 Cal.App.4th 1399, 1403.)

Where a regulation appears to interfere with the exercise of a court's constitutional jurisdiction, this Court avoids constitutional conflict by construing the legislation "strictly against the impairment of constitutional jurisdiction." (See *California Redevelopment Association v. Matosantos*, *supra*, 53 Cal.4th at p. 253; see also *In re Smith* (2008) 42 Cal.4th 1251, 1270 [the common practice of the California Supreme Court is to "construe[] statutes, when reasonable, to avoid difficult constitutional questions"].) "An intent to defeat the exercise of the court's jurisdiction will not be supplied by implication." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 87.) In *Matosantos*, a statute provided that all challenges to its validity must be brought in the Sacramento County Superior Court. (*Matosantos*, *supra*, 53 Cal.4th at p. 253.) A petition challenging the statute, however, was brought directly in this Court. (*Ibid.*) This Court held that it has original jurisdiction, provided by the Constitution, "in all proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." (*Ibid.*; Cal. Const., art. VI, § 10.) This Court thus construed the challenged statute narrowly as applying only to actions over which it retains appellate jurisdiction and having no bearing over "special proceedings." (*Matosantos*, *supra*, 53 Cal.4th at p. 253.) The same considerations counsel in favor of construing Proposition 66 similarly.

B. Even if Proposition 66 Is Interpreted as Mandating Transfer of Petitions to the Sentencing Court, It Merely Codifies an Existing Procedural Rule that Directs How Habeas Petitions Should be Processed by the Courts.

As explained above, the measure does not mandate that habeas petitions be transferred to the sentencing court in all instances, and therefore does not implicate the original jurisdiction provision. But even if the measure is interpreted as mandatory, it merely codifies rules of procedure governing how habeas petitions should be handled, in accord with this Court's caselaw.

Where the California Constitution vests courts with original jurisdiction, the Legislature cannot defeat or impair that jurisdiction. (*Cal. Redevelopment Ass'n v. Matosantos*, *supra*, 53 Cal.4th at pp. 252-53.) The same limitation applies to laws passed by the initiative process. (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 674.) As noted above, every level of the state courts "and their judges have original jurisdiction in habeas corpus proceedings." (Cal. Const., art. VI, § 10.)

Petitioners' jurisdictional challenge to Proposition 66 must be assessed in the context of the legislative history of the original jurisdiction provision. This provision was revised in 1966. (*Griggs v. Superior Court* (1976) 16 Cal.3d 341, 344.) Before the revision, "it was recognized that a superior court had power to issue a writ of habeas corpus only on a petition by or on behalf of a person in custody within the same county." (*Ibid.*) The 1966 revision did away with this geographical limitation, "and imposed no express limitation on the current power of the courts to exercise 'original jurisdiction in habeas corpus proceedings.'" (*Ibid.*) Although *Griggs* did not address the grant of original jurisdiction to this Court and the Courts of Appeal, it noted that the grant of original jurisdiction to the superior courts to entertain a habeas corpus petition without territorial limitation did not preclude the Court from setting out "rules of judicial procedure to be followed by superior courts in the exercise of that unlimited jurisdiction." (*Id.* at pp. 346-47; *In re Roberts* (2005) 36 Cal.4th 575, 583 [analyzing *Griggs* and noting that "the constitutional expansion of jurisdiction to consider the issuance of writs of habeas corpus did not signify that a superior court should give such consideration in every instance"].)

Thus, although any superior court *may* adjudicate a habeas petition, it need not do so in every instance. (*In re Kler* (2010) 188 Cal.App.4th 1399, 1403 ["Having original jurisdiction and exercising it are two separate

things"].) "[B]oth trial and appellate courts have jurisdiction over habeas corpus petitions, but a reviewing court has discretion to deny without prejudice a habeas corpus petition that was not filed first in a proper lower court." (*In re Steele* (2004) 32 Cal.4th 682, 692.) And if the petition states a prima facie case for relief and a petitioner challenged a particular judgment or sentence, existing law is already that "the petition should be transferred to the court which rendered judgment if that court is a different court from the court wherein the petition was filed." (*Griggs v. Superior Court*, *supra*, 16 Cal.3d at p. 347; *In re Kler*, *supra*, 188 Cal.App.4th at p. 1403 [analyzing section 10, and noting that "while a Court of Appeal may have original jurisdiction in a habeas corpus proceeding, it has the discretion to deny a petition without prejudice if it has not been first presented to the trial court"].) Thus, even after the 1966 grant of original jurisdiction to all superior courts to entertain any habeas petitions, this Court enacted "rules of judicial procedure" to channel the petition to the court that entered the judgment challenged. (*In re Roberts* (2005) 36 Cal.4th 575, 582 ["In the wake of the constitutional amendment, this court issued several decisions providing 'rules of judicial procedure to be followed by [the] superior courts in the exercise of [their] unlimited jurisdiction'"].) Although this Court apparently has not explicitly addressed whether the same authority holds for grant of original jurisdiction to itself or the Court of Appeal, or whether that authority also inheres in connection with a law passed by the initiative process, the same rationale should apply.

Petitioners also complain about provisions which bar successive petitions seeking review of a denial of habeas relief, the provision allowing trial courts to appoint counsel to capital defendants, and the provision giving exclusive jurisdiction to the sentencing court over challenges to execution methods. (Am. Pet. at 24-25.) Notably, petitioners do not

contend that any of these provisions are somehow at odds with the original jurisdiction clause, or any other constitutional provision. (*Ibid.*) And this Court has, through caselaw, imposed limitations on successive habeas corpus petitions. (*In re Clark* (1993) 5 Cal.4th 750, 767.) Further, the provision giving exclusive jurisdiction to the sentencing court over challenges to execution methods is essentially a venue provision, and setting the appropriate venue is a legislative role. (*Alexander v. Superior Court* (2003) 114 Cal.App.4th 723, 731, citing *Caminetti v. Superior Court for the City & Cty. of S.F.* (1941) 16 Cal.2d 838, 843.) Petitioners thus cannot show an entitlement to relief for this claim.

II. PETITIONERS' SEPARATION OF POWERS CLAIM LACKS MERIT.

Petitioners argue that Proposition 66 violates the separation of powers principle by "dictat[ing] the manner in which California's courts must control their dockets and decide cases when exercising constitutionally granted jurisdiction over automatic appeals and capital habeas corpus petitions." (Am. Pet. at 30.) They specifically challenge the time limitations on courts considering habeas corpus petitions, and the provisions precluding review of certain habeas petitions, the availability of mandamus relief to remedy undue delays, and provisions governing appointment of counsel and extension of time requests. (*Id.* at 30-32.)[2] These provisions are valid regulations of judicial procedure.

---

[2] An amicus curiae letter was submitted on December 20, 2016 in support of the Amended Petition, raising new arguments that the petitioners themselves did not. (Am. Br.) For example, besides challenging Proposition 66's time limitations for completing review of capital cases, amicus also calls into question the validity of the requirement that this Court expedite review of capital cases and the provision regarding recruiting additional capital counsel. (New Pen. Code, § 1239.1, subd. (a); New Pen. Code, § 1239.1, subd. (b).) But this Court has admonished that (continued...)

The Legislature "may put reasonable restrictions upon constitutional functions of the courts," as long as these restrictions do not "defeat or materially impair the exercise of those functions." (*Brydonjack v. State Bar of Cal.* (1929) 208 Cal. 439, 444.) In this vein, courts have upheld a statute allowing a party to disqualify a trial judge merely by filing an affidavit, without a judicial determination (*Johnson v. Superior Court* (1958) 50 Cal.2d 693, 696), and a statute fixing punishment for contempt of court (*In re McKinney* (1968) 70 Cal.2d 8, 10-11). Petitioners cite no case where a court has struck down a statute on separation of powers principles for establishing court procedures. Instead, petitioners cite cases in as-applied contexts where courts expressed concerns about potential violations of this principle, and adopted a construction of the statute that would avoid constitutional friction. (Am. Pet. at 32-35.) These cases do not establish an entitlement to writ relief.

For example, in *In re Shafter-Wasco Irrigation District* (1942) 55 Cal.App.2d 484, a statute required that an appeal "be heard and determined within three months" after it was filed. The court rejected a party's argument that a court's failure to meet this time limit divested the court of jurisdiction. (*Id.* at p. 488.) And this Court likewise interpreted a statute giving trial preference to criminal cases in such a way as to avoid a potential separation of powers problem. (*People v. Engram* (2010) 50 Cal.4th 1131, 1152-53.)[3]

(...continued)
"an amicus curiae accepts the case as he finds it," and may not, absent limited exceptions not applicable here, raise new contentions that the parties did not. (*E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 510; *American Indian Model Schools v. Oakland Unified School Dist.* (2014) 227 Cal.App.4th 258, 275.)

[3] Relying on *Engram*, *In re Shafter-Wasco Irrigation District*, and other like cases, amicus also urges this Court to declare Proposition 66's
(continued...)

Petitioners claim that limitations on untimely and successive habeas petitions are also "impermissible" restrictions on the ability of the courts to adjudicate habeas corpus petitions. (Am. Pet. at 35-36.) But they cite no constitutional provision at odds with these provisions. And they acknowledge that the caselaw has developed analogous limitations on habeas petitions, including procedural default and bars on repetitious petitions. (*In re Robbins* (1998) 18 Cal.4th 770, 778, fn. 1; *In re Clark*, *supra*, 5 Cal.4th at p. 767.)[4]

Moreover, because petitioners raise a *facial* challenge, they face a particularly heavy burden to establish an entitlement to relief. This Court has not articulated a single test for facial challenges, but petitioners must establish at a minimum that Proposition 66 is unconstitutional "in the *generality* or *great majority* of cases." (*In re Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126, citation omitted; *Coffman Specialities, Inc. v. Dep't of Transportation* (2009) 176 Cal.App.4th 1135, 1145.) Under either

---

(...continued)
provisions regarding expedited review and recruitment of capital counsel unconstitutional. (Am. Br. at 6-9.) As noted above, petitioners do not challenge these provisions, and amicus cannot raise new arguments. Moreover, courts in the cases cited by amicus did not declare the challenged laws unconstitutional, but instead construed them in a way to avoid constitutional problems.

[4] Notably, the United States Supreme Court has upheld similar limitations on federal habeas corpus petitions, enacted as part of the Antiterrorism and Effective Death Penalty Act. (*Felker v. Turpin* (1996) 518 U.S. 651, 664 ["The new restrictions on [federal] successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ'"]; *Crater v. Galaza* (9th Cir. 2007) 491 F.3d 1119, 1127 [rejecting challenge to AEDPA, noting that "judgments for the proper scope" of habeas relief are within the purview of the legislative branch].) Under federal law, a successive petition must be dismissed unless it relies on a new retroactive rule of constitutional law, or facts that could not have been previously discovered and that establish a petitioner's innocence. (28 U.S.C. § 2244, subd. (b)(3).)

test applied by this Court, "the plaintiff has a heavy burden to show the statute is unconstitutional in all or most cases," and cannot prevail simply by pointing out that "in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute." (*Coffman Specialities, Inc. v. Dep't of Transportation*, *supra*, 176 Cal.App.4th at p. 1145, citation omitted.) Petitioners cannot do so. (*Superior Court v. Cty. of Mendocino* (1996) 13 Cal.4th 45, 60 [rejecting facial challenge to law requiring furlough of court employees because "it cannot reasonably be suggested that, *under any and all circumstances*, a county's designation of one or more unpaid furlough days . . . *necessarily* will 'defeat' or 'materially impair' a court's fulfillment of its constitutional duties"].) Petitioners' reliance on hypothetical scenarios where Proposition 66 *might* bar certain capital defendants from raising a habeas claim does not meet their burden. (Am. Pet. at 37-38.)[5]

For these reasons, this Court should reject the separation of powers claim. While Proposition 66 imposes limitations on the scope of appeal and sets time limits for a court decision, those limitations do not "defeat" or "materially impair" the courts' exercise of their constitutional functions to resolve appeals and habeas petitions anywhere close to the examples of cases where, to date, courts have expressed concerns about separation of

---

[5] Petitioners contend that Proposition 66's provisions "make far more likely" the execution of an innocent person. (Am. Pet. at 39.) This disregards the fact that the measure explicitly preserves a safety valve for actual innocence claims. (New Pen. Code, § 1509, subd. (d) [providing for dismissal of untimely habeas petitions "unless the court finds . . . that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence"].)

powers.[6] And no constitutional provision cited prevents enactment of statutes limiting repetitive or other procedurally improper habeas petitions.

III. PROPOSITION 66 DOES NOT VIOLATE THE SINGLE-SUBJECT RULE.

Petitioners argue that Proposition 66 violates the single-subject rule because some of its provisions are allegedly unrelated to death penalty reform. (Am. Pet. at 41-52.) But courts analyze initiatives broadly, in order to preserve this right. In light of the measure's overall goal of death penalty reform and cost savings, petitioners cannot show that it is "clearly and unmistakably" unconstitutional.

A. Proposition 66's Provisions Address Death Penalty Reform and Cost Savings.

In assessing whether a challenged measure meets the single-subject test, the Court looks at the extent to which its provisions are germane to the general subject as reflected in the title and the field of legislation it suggests. (*Chemical Specialties Manufacturers Ass'n, Inc.*, *supra*, 227 Cal.App.3d at p. 667; *Brosnahan*, *supra*, 32 Cal.3d at p. 246 ["Numerous provisions, *having one general object*, if fairly indicated in the title, may be united in one act."].) "[A]n initiative measure will pass the constitutional single subject test 'so long as challenged provisions meet the test of being reasonably germane to a *common* theme, purpose, or subject.'" (*Brown v. Superior Court* (2016) 63 Cal.4th 335, 350, citation omitted.) Proposition 66's title clearly announces the following: death penalty reform and cost savings. (Pets.' App. of Exhibits, Exh. 1 at 1.) Its findings and declarations

---

[6] An argument could be made that in a particular case the strict time limits for a court decision under Proposition 66 could violate a capital defendant's due process rights. But petitioners do not raise a due process argument, and, in any event, this is the type of issue that is more properly raised by such a defendant in application, rather than by a facial challenge such as is alleged here.

state that the death penalty system "is ineffective because of waste, delays, and inefficiencies," and that it seeks to balance the rights of capital defendants and those of their victims. (*Id.* at pp. 1-2.) Its provisions relate to these broad purposes, encompassing reform in a number of areas. (*Ibid.*)

Petitioners acknowledge the measure's stated purpose, but they seek to set this aside and construe its purpose as limited to *expediting* the death penalty process. (Am. Pet. at 43.) They argue that the measure's stated goal is too general for purposes of the single-subject rule. (*Ibid.*) Although courts have struck initiatives employing inappropriately broad or general purposes to justify addressing multiple subjects, the Proposition does not run afoul of this caselaw. (See *San Joaquin Helicopters v. Dep't of Forestry & Fire Protection* (2003) 110 Cal.App.4th 1549, 1559-1560 [describing subjects of excessive generality under single-subject rule, including "government, public welfare, fiscal affairs, the business of insurance, or truth in advertising"].) The subject of this measure is death penalty reform and costs savings, a subject that is not excessively general. The Court should adopt this identification of the purpose of the measure in assessing the single-subject rule challenge.

B. The Proposition Does Not Violate the Single-Subject Rule.

"An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." (Cal. Const., art. II, § 8, subd. (d).) This rule is designed to prevent voter confusion and manipulation, which can arise when a single initiative encompasses disparate subjects. (*Senate State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 1168; *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 251.) It was "not enacted to provide means for the overthrow of legitimate legislation." (*Fair Political Practices Com. v. Sup. Ct.* (1979) 25 Cal.3d 33, 38.) "Numerous provisions, having one general object, if fairly indicated in the title, may be united in one act."

(*Ibid.*) Thus, a measure does not violate the single-subject rule if, "despite its varied collateral effects, *all of its parts are reasonably germane* to each other, and to the general purpose or object of the initiative." (*Brosnahan*, *supra*, 32 Cal.3d at p. 245, citations and quotations omitted.) An initiative's provisions need not be "interlocking" or "interdependent" so long as they fall under a single purpose or topic. (*Id.* at p. 249; *Jones*, *supra*, 21 Cal.4th at p. 1157.) As long as an initiative's provisions are "auxiliary to and promotive of its main purpose, or [have] a necessary and natural connection with such purpose," they are germane within the meaning of the single-subject rule. (*Fair Political Practices Com.*, *supra*, 25 Cal.3d at p. 39.)

Petitioners contend that a number of Proposition 66's provisions are not reasonably germane to the goal of reforming the death penalty process by expediting it. (Am. Pet. at 43-46.) As noted above, the measure's purpose is death penalty reform and cost savings, not just speeding the process. All of the challenged provisions are geared towards these goals, including increasing victim restitution from individuals sentenced to death, waiving the requirements of the Administrative Procedure Act for execution protocols, barring medical licensing organizations from disciplining individuals who assist in the death penalty process, and reforming the Habeas Corpus Resource Center. These provisions fall far short of the type of situations where courts have struck initiatives under the single-subject rule—invalidation has been reserved for only the most extreme cases. For example, in *Jones*, *supra*, 21 Cal.4th at 1142, a ballot measure was struck down where it implemented two comprehensive, yet entirely separate schemes, the first focused on reapportionment of state and federal legislative districts, the second regarding compensation and benefits of state legislators and other state officials. In another case, the law at issue failed because it amended, added, or repealed 150 sections in over 20 codes

or legislative acts. (*Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1097.) By contrast, Proposition 66 enacts modest changes to a handful of sections of the Government and Penal Codes.

In contrast, courts have generally found that laws pass muster under the "reasonably germane" test. In *Brosnahan*, *supra*, 32 Cal.3d 236, the court found that the provisions concerning (1) more severe punishment for, and more effective deterrence of, criminal acts, (2) protecting the public from the premature release into society of criminal offenders, (3) providing safety from crime to a particularly vulnerable group of victims, namely school pupils and staff, and (4) assuring restitution for the victims of criminal acts, all fell under the single subject of "promoting the rights of actual or potential crime victims." In *Evans v. Superior Court In & For Los Angeles County* (1932) 215 Cal. 58, the Court upheld a law with over 1,700 sections which dealt with the general subject of "probate law." These cases are illustrative of the "liberal interpretive tradition" surrounding the single-subject rule, and the reluctance of courts to use it as a means of striking laws down. (*Brosnahan*, *supra*, 32 Cal.3d at p. 253.) "[T]he single-subject requirement should not be interpreted in an unduly narrow or restrictive fashion that would preclude the use of the initiative process to accomplish comprehensive, broad-based reform in a particular area of public concern." (*Jones*, *supra*, 21 Cal.4th at p. 1157.) Accordingly, courts "liberally construe the initiative power and '*resolve any reasonable doubts in favor of the exercise of this precious right.*'" (*Chemical Specialties Manufacturers Ass'n, Inc. v. Deukmejian* (1991) 227 Cal.App.3d 663, 667, citation omitted.)

At heart, petitioners challenge the wisdom of the measure's provisions. For example, they claim that disbanding the Habeas Corpus Resource Center's Board of Directors is not related to the Proposition's purpose. (Am. Pet. at 49-50.) In this regard, they contend that the measure

was misleading because it states that the HCRC was "operating without any effective oversight." (*Id.* at 50.) Petitioners' argument about the accuracy of this statement was more properly an issue for an argument against the Proposition in the Ballot Pamphlet, not a basis for striking down the law under the single-subject rule.[7] (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 814 [in adjudicating constitutionality of an initiative, this Court "do[es] not consider or weigh the economic or social wisdom or general propriety of the initiative"].) Petitioners further claim that the "Official Voter Information Guide [for Proposition 66] provides no information as to how and whether the dissolution" of the Board would lead to savings. (Am. Pet. at 51.) Petitioners cite no caselaw to support the contention that an initiative may be struck under the single-subject rule because the information it provided did not have this level of specificity. Requiring such minute detail would be at odds with the liberal interpretation courts afford participants in the initiative process. Certainly, this does not establish "clearly and unmistakably" that Proposition 66 is unconstitutional.

IV. CAPITAL DEFENDANTS ARE NOT SIMILARLY SITUATED TO NONCAPITAL DEFENDANTS, AND THUS PETITIONERS' EQUAL PROTECTION CLAIM FAILS.

Lastly, petitioners raise an equal protection challenge to Proposition 66. They contend that the Legislature passed Senate Bill 1134 in 2016 to allow any criminal defendant, whether capital or non-capital, "to pursue a successive claim for habeas relief regarding factual innocence." (Am. Pet. at 52.) They argue that Proposition 66 violates the equal protection rights of capital defendants, because it somehow "removes [them] from the pool of persons who may pursue a successive petition" under Senate Bill 1134

---

[7] Petitioners could have challenged the accuracy of the Proposition's language before it was submitted to the voters. (Elections Code, § 9092.) They apparently did not do so.

by claiming factual innocence under Penal Code section 1485.55. (*Id.* at 52.) This argument fails.

Initially, section 1485.55 does not authorize the filing of habeas corpus petitions at all. Instead, it allows a party who has obtained habeas corpus relief to move for a finding of innocence. (Pen. Code § 1485.55, subd. (b).) It also makes such an innocence finding binding on the California Victim Compensation Board if the individual subsequently files a claim with the Board. (*Id.*, subd. (a).) As the Court of Appeal explained, "the Legislature adopted Penal Code section 1485.55, allowing any person who has prevailed in a habeas corpus proceeding to file a motion in the trial court for a finding of factual innocence, and requiring the board to accept such a finding . . . without any further hearing." (*In re Anthony* (2015) 236 Cal.App.4th 204, 206; *People v. Etheridge* (2015) 241 Cal.App.4th 800, 807.)

Moreover, although Senate Bill 1134 added provisions to the Penal Code to allow individuals to bring a habeas petition in certain situations, it did not address successive petitions. Besides amending section 1485.55 (which, as explained above, does not address habeas petitions), Senate Bill 1134 amended Penal Code section 1473. But these amendments did not make available to any criminal defendant, capital or otherwise, the ability to file *successive* habeas petitions. Petitioners' factual premise for their equal protection claim is therefore faulty.

Additionally, petitioners cannot establish that capital defendants are similarly situated to non-capital defendants for purposes of their equal protection claim. When a law is challenged under the equal protection clause, the court first ascertains whether it affords different treatment to similarly situated groups. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) "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.'" (*Ibid.*, citation omitted.) As this Court has previously and unambiguously determined, "capital and non-capital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws or due process of law." (*People v. Manriquez* (2005) 37 Cal.4th 547, 590; *People v. Virgil* (2011) 51 Cal.4th 1210, 1289-1290 [holding that the availability of intercase proportionality in noncapital cases versus capital cases does not violate equal protection].)

Further, petitioners' equal protection claim also fails because they cannot meet the high standard to show that any legislative distinction was irrational. Absent a legislative classification that treats similarly situated individuals "on the basis of race, gender, or some other criteria calling for heightened scrutiny, [courts] review the legislation to determine whether the legislative classification bears a rational relationship to a legitimate state purpose." (*People v. Moreno* (2014) 231 Cal.App.4th 934, 939.) "This standard of rationality does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically substantiated." (*Johnson v. Dep't of Justice* (2015) 60 Cal.4th 871, 881, citation omitted.) This Court may "engage in 'rational speculation' as to the justifications for the legislative choice,'" and it is immaterial whether such speculation "has a foundation in the record." (*Ibid.*, citation omitted.) Thus, under rational basis review, it is the petitioners' burden to "'negative every conceivable basis' that might support the disputed statutory disparity." (*Ibid.*) And if there is a "plausible basis" for the challenged disparity, "courts may not second-guess its 'wisdom, fairness, or logic.'" (*Ibid.*, citation omitted.)

Here, there are numerous reasons why the voters could have elected to limit the availability of successive habeas petitions for individuals convicted of capital offenses. Death penalty cases are different, and are

afforded a panoply of added protections that are not available to other defendants.[8] For example, indigent capital defendants are entitled to appointed counsel for postconviction proceedings. (New Pen. Code, § 1509(b); New Gov. Code, § 68662.) They are entitled to seek second trial counsel. (*Keenan v. Superior Court* (1982) 31 Cal.3d 424, 431.) Capital defendants also receive an automatic appeal to this Court. (Pen. Code, § 1239, subd. (b).) On appeal, capital defendants are entitled to "an examination of the record and the preparation of a formal opinion and decision from which it should appear that no miscarriage of justice has resulted." (*People v. Stanworth* (1969) 71 Cal.2d 820, 833.) Indeed, as this Court has noted in the past, "vis-à-vis other states, we authorize more money to pay postconviction counsel, authorize more money for postconviction investigation, [and] allow counsel to file habeas corpus petitions containing more pages." (*In re Reno* (2012) 55 Cal.4th 428, 456-57, footnotes omitted.) In light of these and other generous procedural and substantive protections, the voters could properly choose to apply a more stringent standard to successive petitions filed in capital cases.[9]

In applying rational basis review, courts "must accept any gross generalizations and rough accommodations that the Legislature seems to have made" in enacting the challenged classification. (*Johnson v. Dep't of*

---

[8] Paradoxically, petitioners contend that Proposition 66 violates equal protection by treating capital defendants less favorably, at the same time conceding that "those sentenced to death have historically received *more*, not *fewer*, protections." (Am. Pet. at 54.)

[9] Additionally, the voters could have reasoned that successive habeas corpus petitions rarely raise meritorious claims, a fact borne out by this Court's past observations. (*In re Reno*, *supra*, 55 Cal.4th at p. 457 ["Absent the unusual circumstance of some critical evidence that is truly 'newly discovered' under our law, or a change in the law, such successive petitions rarely raise an issue even remotely plausible, let alone state a prima facie case for actual relief"].)

Justice, *supra*, 60 Cal.4th at p. 887.) "A classification is not arbitrary or irrational simply because there is an 'imperfect fit between means and ends'" or because it may be under or over-inclusive. (*Ibid.*) "At bottom, the Legislature is afforded considerable latitude in defining and setting the consequences of criminal offenses." (*Id.* at 887.) Here, any of the aforementioned reasons are valid and rational distinctions why the voters could have decided to enact limitations on the ability of capital defendants to bring successive petitions. And the measure retains the actual-innocence safety valve. (New Pen. Code § 1509, subd. (d).) Petitioners have simply not "'negative[d] every conceivable basis' that might support the disputed statutory disparity." (*Johnson v. Dep't of Justice*, *supra*, 60 Cal.4th at p. 881.) Under the deferential rational basis review, the measure amply meets the test.[10]

CONCLUSION

Petitioners have not met their heavy burden to show that Proposition 66 is unconstitutional in all its applications, as is required for their facial challenge. Accordingly, the Court should deny the petition.

---

[10] Petitioners raise an equal protection claim under the California and federal constitutions. (Am. Pet. at 15, 53.) Both equal protection clauses are "substantially equivalent and analyzed in a similar fashion." (*People v. Cruz* (2012) 207 Cal.App.4th 664, 674.)

Dated: January 9, 2017

Respectfully submitted,

KATHLEEN A. KENEALY
Acting Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
MARC A. LEFORESTIER
Supervising Deputy Attorney General

JOSE A. ZELIDON-ZEPEDA
Deputy Attorney General
Attorneys for Respondents Governor E. Brown Jr., and Acting Attorney General K. Kenealy

SA2016104414
20932486.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENTS' PRELIMINARY OPPOSITION TO PETITIONERS' AMENDED AND RENEWED PETITION FOR EXTRAORDINARY RELIEF uses a 13 point Times New Roman font and contains 6,536 words.

Dated: January 9, 2017

KATHLEEN A. KENEALY
Acting Attorney General of California

JOSE A. ZELIDON-ZEPEDA
Deputy Attorney General
Attorneys for Respondents Governor E. Brown Jr., and Acting Attorney General K. Kenealy

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Briggs, Ron, et al. v. Jerry Brown, et al.***

No.: **S238309**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 9, 2017, I served the attached **RESPONDENTS' PRELIMINARY OPPOSITION TO PETITIONERS' AMENDED AND RENEWED PETITION FOR EXTRAORDINARY RELIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Christina Von der Ahe Rayburn
Attorney at Law
Orrick, Herringon & Sutcliffe LLP
2050 Main St., Suite 1100
Irvine, CA 92614

Kent S. Scheidegger
Attorney at Law
Criminal Justice Legal Foundation
2131 "L" Street
Sacramento, CA 95816

Lillian Jennifer Mao
Attorney at Law
Orrick, Herringon & Sutcliffe LLP
1000 Marsh Rd.
Menlo Park, CA 94025

Charles H. Bell, Jr.
Terry J. Martin
Bell McAndrews & Hiltachk, LLP
455 Capitol Mall, Suite 600
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 9, 2017, at San Francisco, California.

M. T. Otanes
Declarant

Signature

SA2016104414
Briggs_Pos.doc