Case No.: S238309

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; Kamala Harris, in her official capacity as the Attorney General of California; California's Judicial Council; and Does I through XX

Respondents.

REPLY IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF

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I. INTRODUCTION

Proposition 66 came before the voters as an alternative to Proposition 62. While Proposition 62 argued that "California's death penalty system has failed" and that its elimination would "save $150 million per year," Proposition 66 sought to convince Californians that the broken system could be fixed.

The primary group supporting Proposition 66 is called "Californians to Mend, Not End, the Death Penalty—No on Prop. 62, Yes on Prop. 66." They argued in support of the initiative that "[t]he solution is to MEND, NOT END, California's death penalty," and that Proposition 66 would "speed up the death penalty appeals system" and "save[] taxpayers money." They won. Proposition 66 passed with 51.1% of the vote. Proposition 62 failed.

Proposition 66 purports to "speed up the death penalty appeals system" by materially impairing the courts' constitutional jurisdiction over death penalty matters, as well as their inherent authority to control their dockets. Petitioners challenged it for those reasons, as well as on single-subject and equal-protection grounds, identifying sections that improperly: (1) limit the courts' ability to review death penalty judgments; (2) force the courts to act within impracticable time limits; and (3) force the courts to unduly prioritize death penalty judgments over other important matters.

Proposition 66's proponents now argue that the challenged sections of Proposition 66 are constitutional because they are mere suggestions not

binding on the courts. Intervenor Opp. at 27-28, 37, 38, 40-41, 42; *see also* Respondents' Prelim. Opp. at 8-9, 13. There is a logical inconsistency here. Either Proposition 66 was enacted to speed up the death penalty system—including by forcing courts to act within certain deadlines and prioritize death penalty matters—or it wasn't. And if it *wasn't*, one questions what the true purpose of the initiative was.

Respondents and Amici Deputy District Attorneys agree that this case is of "sufficient public importance" to merit this Court's exercise of its original jurisdiction. *See* Prelim. Opp. at 7; Deputy DA Brief at 2. Petitioners respectfully ask this Court to issue a writ of mandate and declare Proposition 66 null and void in its entirety. In the meantime, Petitioners respectfully request that the Court leave the pending stay in place.

II. PROPOSITION 66 IMPAIRS THE JURISDICTION OF CALIFORNIA'S COURTS.

Where "original jurisdiction has been vested in [the] courts by the California Constitution, the Legislature is not free to defeat or impair that jurisdiction." *Gerawan Farming, Inc. v. Agric. Labor Relations Bd.*, 247 Cal. App. 4th 284, 294 (2016). To the contrary, a statute may only restrict the jurisdiction of the state courts "where the Legislature's authority to enact such laws was found to be expressly or impliedly granted by other constitutional provisions." *Id.*

In this case, Proposition 66 clearly defeats or impairs: (1) the original habeas corpus jurisdiction of the California courts in capital cases; and (2)

the appellate jurisdiction of the Supreme Court over judgments of death. Because Respondents have identified no constitutional provision granting the legislature authority to so limit that jurisdiction, Proposition 66 is unconstitutional. Cal. Const. Art. I, §11; Cal. Const. Art. VI, §10.

A. Proposition 66 Impairs the Courts' Original Jurisdiction in Capital Habeas Corpus Petitions.

1. In Re Kler

In re Kler, 188 Cal. App. 4th 1399 (2010), provides an example of a rule that, like Proposition 66, improperly limited the state courts' original jurisdiction in habeas corpus proceedings. That case dealt with then-Rule of Court 8.385(c)(2), which provided:

> [A] Court of Appeal *must* deny without prejudice a petition for writ of habeas corpus that challenges the denial of parole or the petitioner's suitability for parole if the issue was not first adjudicated by the trial court that rendered the underlying judgment.

In re Kler, 188 Cal. App. 4th at 1402. The *Kler* court found that rule to be "inconsistent with the California Constitution to the extent it requires petitions for writ of habeas corpus challenging denial of parole to be first filed in the superior court." *Id.* at 1404. The court noted that a Court of Appeal—"like *all* courts in California—has original jurisdiction in writ proceedings," and that this "'original jurisdiction' means that a petition for writ of habeas corpus may be filed in the first instant in the superior court, Court of Appeal, or the California Supreme Court." *Id.* at 1403 (citing *People v. Romero*, 8 Cal. 4th 728, 737 (1994)).

The court further emphasized the difference between "[h]aving original jurisdiction and exercising it." *Id.* at 1403. The court concluded that while a Court of Appeal may decide, in its discretion, not to hear a case that was not first presented to the trial court, a rule or statute may not direct that such a court "must" refuse to hear that case. *Id.* at 1404.

2. ***Griggs* and *Roberts***

On the other side of the spectrum, *Griggs v. Super. Ct. of San Bernadino Cty.*, 16 Cal. 3d 341 (1976), and *In re Roberts*, 36 Cal. 4th 575 (2005), provide examples of Court statements that did not limit the courts' original jurisdiction in habeas corpus proceedings.

Griggs dealt with which county superior court should hear an inmate's habeas corpus petition. After a 1966 constitutional revision eliminated any "territorial limitation on the jurisdiction of superior courts to entertain petitions for and to grant relief in habeas corpus matters," the *Griggs* Court decided to "provide rules of judicial procedure to be followed by superior courts in the exercise of [their] unlimited jurisdiction." *Id.* at 343, 36-47. The Court identifed particular types of cases that a superior court "should" transfer to another superior court after accepting the petition and determining whether it states a prima facie case for relief. *Id.* at 347. The Court concluded, however, that "unless there is substantial reason for transferring a petition it should be entertained and resolved in the court where filed." *Id.* at 347.

Following on *Griggs*, *Roberts* addressed which superior court should hear an inmate's habeas corpus petition challenging a denial of parole. *Roberts* reemphasized the holding in *Griggs* that "[i]n general, a habeas corpus petition should be heard and resolved by the court in which the petition is filed." *Roberts*, 36 Cal. 4th at 585. The *Roberts* Court then noted its "inherent authority to establish 'rules of judicial procedure to be followed by superior courts'" and "direct[ed]" that: (1) a habeas corpus petition challenging the denial of parole that is filed in superior court "should" be transferred to the superior court in the county of commitment; and (2) "among the three levels of state courts, 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." *Id.* at 593.

Respondents and Intervenor argue that the language in Proposition 66 does not impair the courts' jurisdiction because new Penal Code §1509(a) is more similar to the language in *Griggs* and *Roberts* than it is to that invalidated in *Kler*. Prelim. Opp. at 9-12. Respondents are wrong. As a preliminary matter, Respondents ignore that Petitioners have challenged not only new §1509(a), but also the way in which it interacts with other portions of Proposition 66. Additionally, there are several important differences between the Court's statements in *Griggs* and *Roberts* and new §1509(a).

The statements in *Griggs* and *Roberts* upon which Respondents rely are single statements pulled from lengthy judicial opinions, and those opinions take pains to make clear both: (1) that the courts should generally

exercise their jurisdiction over the cases brought before them; and (2) that the decision to transfer is within the courts' discretion. *See, e.g.*, *Griggs*, 16 Cal. 3d at 347; *Roberts*, 36 Cal. 4th at 579-80. Those Courts emphasized those points precisely because they were aware that, without such context, their opinions risked infringing on the jurisdiction of the courts. *See Griggs*, 16 Cal. 3d at 346-47 (balancing habeas corpus jurisdiction with the Court's right to provide rules of judicial procedure); *Roberts*, 36 Cal. 4th at 593 (same). The judicial statements in *Griggs* and *Roberts* that a court "should" transfer a petition to another court are thus read within that context.

Proposition 66, on the other hand, provides no such careful context for its statutory mandate that a court "should" promptly transfer a habeas petition to the court that imposed the sentence. New Pen. Code §1509(a). To the contrary, while the force of the rulings in *Griggs* and *Roberts* is that courts should generally exercise their jurisdiction over the cases brought before them, the force of Proposition 66 is the opposite. While *Griggs* and *Roberts* state that a court should *keep* a case unless there is a good reason to *transfer*, new §1509(a) turns this presumption on its head, mandating that a receiving court *transfer* the case, unless there is a good reason to *keep* it.

There is also a marked difference in kind between Proposition 66 and *Griggs* and *Roberts*. Proposition 66 purports to severely limit review of original habeas corpus proceedings at *entire levels* of the California courts. Neither *Griggs* nor *Roberts* did that. Both *Griggs* and *Roberts* addressed situations in which it would be appropriate for one superior court to transfer

a proceeding to another superior court—they did not purport to remove such cases from superior court review altogether. Indeed, even when *Roberts* directed that a habeas petition challenging a decision of the parole board should be filed in the first instance in the superior courts (and thus not in a higher court), that directive did not have the force of removing such petitions from the purview of the higher courts. Instead, because of California's collateral review process, such petitions, if denied by the superior courts, would thereafter be filed in the Court of Appeals. The result of *Roberts* was thus that higher courts would still review original habeas corpus petitions—they would just do so later.

Such is not the case with Proposition 66. As this Court knows, *capital* habeas corpus petitions are regularly filed in this Court in the first instance. The impact of new §1509(a) is thus that the Supreme Court should transfer an original capital habeas petition to the superior court that imposed the sentence. But, unlike in *Roberts*, under Proposition 66 there is no procedure for the Supreme Court to ever get that original case back. To the contrary, Proposition 66 both: (1) directs that the Supreme Court should transfer those cases away; *and* (2) eliminates California's collateral review system. *See* New Pen. Code §1509.1(a) ("A successive petition shall not be used as a means of reviewing a denial of habeas relief."); New Pen. Code §1509(a) ("A writ of habeas corpus pursuant to this section is the exclusive procedure for collateral attack on a judgment of death."). The combined effect of new §§1509(a) and 1 is thus to severely constrain, if not eliminate,

Supreme Court review of original habeas corpus petitions. This effect is a far cry from the holdings of *Griggs* and *Roberts*. *Cf. People v. Frierson*, 25 Cal. 3d 142, 186-187 (1979) (upholding a death penalty statute enacted by initiative *only* because the Supreme Court "retain[ed] broad powers of judicial review of death sentences to assure that each sentence has been properly and legally imposed").

Section 1509(a)'s requirement that the Supreme Court transfer an original habeas corpus proceeding "unless good cause is shown" also merits scrutiny. *Griggs* and *Roberts* provided examples of good cause for transferring a habeas corpus petition to: (1) the superior court that rendered judgement; *Griggs*, 16 Cal. 3d at 347; (2) the superior court of the county where the inmate is confined, *id.*; and (3) the superior court of the county of commitment, *Roberts*, 36 Cal. 4th at 593. None of these examples of "good cause apply to the Supreme Court. The Supreme Court will never be the court that rendered the judgment, nor will it be the superior court of the county where the inmate is confined. To evaluate the impact of Proposition 66, then, it is necessary to evaluate what *could* constitute "good cause" to keep the case in the Supreme Court. To be sure, this Court could say that, because of its deep experience in capital habeas matters and death penalty appeals, there is always "good cause" to keep the case in the Supreme Court. Short of such a statement, it is difficult to imagine what meaning the Supreme Court could give "good cause" that would not result in the large bulk of original habeas petitions being transferred away.

Further, the impact of the revisions to §68662 cannot be ignored. Proposition 66 revises §68662 to mandate that the superior court, not the Supreme Court, appoint counsel to represent capital defendants in state postconviction proceedings. It is thus yet another component of a broader scheme to transfer jurisdiction over original habeas corpus matters away from the Supreme Court.[1]

3. Proposition 66 Is Comparable to the Statute Invalidated in *Kler*.

Respondents and Intervenor argue that new §1509(a) is unlike the statute found unconstitutional in *Kler* because new §1509(a) uses the word "should" instead of "must." They argue that this "permissive" language does not infringe upon the jurisdiction of the courts. This argument elevates form over function.

As set forth above, the "should" in new §1509(a), when read in the broader context of Proposition 66, is far more mandatory, and does far more

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[1] The Petition expressed a concern that counsel appointed in the superior court pursuant to new §68662 would only be available to assist inmates in proceedings before the superior court. The Petition based that concern on *In re Anderson*, 69 Cal. 2d 613, 632-34 (1968), which provided that the Supreme Court would appoint counsel for indigent defendants in capital cases in proceedings before the Supreme Court and in certain other proceedings, but that "[a]ny request for the appointment of counsel in any other proceeding should be addressed to the court in which the proceeding is brought." (*Abrogated on other grounds as recognized in People v. Trinh*, 59 Cal. 4th 216 (2014)). Applying the same reasoning to new §68662 results in the conclusion that counsel appointed before the superior court would only be available to assist inmates in that court. Amici Deputy District Attorneys question that reasoning, but provide no counter argument or authority. Deputy DA Brief at 20.

to infringe on the Court's jurisdiction, than the "shoulds" in *Griggs* and *Roberts*. When read in context, the "should" in new §1509(a) operates like the "must" in *Kler*, and thus must be struck down.[2] *See In re Estate of Chadbourne*, 15 Cal. App. 363, 368-369 (1911) ("[T]his doctrine of literalism which clings to the letter of a statute and ignores its purpose is not well calculated to promote the ends of justice. . . . [I]f careful attention is paid to all the provisions of a statute as well as to the conditions which led to its enactment, little difficulty will generally be experienced in ascertaining what was intended. . . . In accordance with this primary rule of interpretation courts have construed 'may' as mandatory, giving it the meaning of 'shall' or 'must.'") (citations omitted).

B. Proposition 66 Impairs the Courts' Jurisdiction Over Method-of-Execution Claims.

New §3604.1(c) impairs the jurisdiction of all levels of the California courts over original habeas petitions by providing that "[t]he court which rendered the judgment of death ***has exclusive jurisdiction*** to hear any claim by the condemned inmate that the method of execution is unconstitutional or otherwise invalid." (Emphasis added). Intervenor argues that this section does not impair the courts' jurisdiction because habeas corpus is not the "appropriate vehicle for method of execution challenges." Intervenor Opp. at 41. Intervenor is wrong. *See In re Anderson*, 69 Cal. 2d at 631-632

[2] This is especially so when one considers that the rule in *Kler* related only to the small portion of the Courts of Appeal's habeas jurisdiction related to parole decisions, while the rule in new §1509(a) is far more sweeping.

(rejecting on substantive grounds a method-of-execution argument raised on habeas); *In re Reno*, 55 Cal. 4th 428, 463 n.17 (2012) (finding method-of-execution argument raised on habeas to be premature—not improper); *Hill v. McDonough*, 547 U.S. 573, 582-583 (2006) (reasoning that method-of-execution challenge could be raised either as a 42 U.S.C. §1983 suit, or in habeas proceedings, depending on the details of the challenge).

C. Proposition 66 Impairs This Court's Appellate Jurisdiction Over Judgments of Death.

Proposition 66 also defeats and impairs the Supreme Court's constitutional appellate jurisdiction over judgments of death. To replace California's collateral review system for capital habeas matters, Proposition 66 creates a right to appeal initial habeas petitions in the Courts of Appeal. *See, e.g.*, New Pen. Code §1509.1(a)-(c). But according to Article 6, Section 11 of the Constitution, the Supreme Court—not the Courts of Appeal—"has appellate jurisdiction when judgment of death has been pronounced." Any appellate jurisdiction that lies with the Courts of Appeal is subject to "that exception." *Id.*; *see also In re Carpenter*, 9 Cal. 4th 634, 645-46 (1995) (holding superior court's subject matter jurisdiction over habeas corpus proceedings could not interfere with this Court's exclusive appellate jurisdiction under Art. VI, § 10). Penal Code §1506, which Proposition 66 does not amend and which would directly conflict with new Penal Code §1509.1(a), recognizes this Court's exclusive appellate

jurisdiction over capital habeas petitions. Proposition 66 thus impairs the Supreme Court's appellate jurisdiction over judgments of death.

III. PROPOSITION 66 VIOLATES THE SEPARATION-OF-POWERS DOCTRINE.

"The legislature may put reasonable restrictions upon constitutional functions of the courts," but they may not "defeat or materially impair the exercise of those functions." *Brydonjack v. State Bar of Cal.*, 208 Cal. 439, 444 (1929). Important here, a key element of a court's inherent authority "to fairly and efficiently administer all of the judicial proceedings that are pending before it . . . is 'the power . . . to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *People v. Engram*, 50 Cal. 4th 1131, 1146 (2010) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936)). Multiple provisions of Proposition 66 unreasonably restrict this power, and thus violate the separation-of-powers doctrine.

A. The Portions of Proposition 66 That Impair the Courts' Jurisdiction Also Violate the Separation-of-Powers Doctrine.

The provisions identified in Section II above as impairing the courts' jurisdiction also violate the separation-of-powers doctrine. For example, new §1509(a) directs that the Supreme Court transfer its habeas proceedings to the superior courts. New §1509(a) even sets forth the standard the Supreme Court should apply in deciding whether to transfer those proceedings. In so doing, that section materially impairs the power of the

Supreme Court to act in fairness to the litigants before it. The same is true for new §1509.1(a), which eliminates California's collateral review system, and thus further impairs the power of the Supreme Court to address the needs of litigants before it. *See also* New Pen. Code §1509.1(c); New Pen. Code §3604.1(c).

B. Several Additional Provisions Violate the Separation-of-Powers Doctrine.

The stated purpose of Proposition 66 is to eliminate "waste, delays, and inefficiencies" in California's death penalty system. Prop. 66, §2.1. According to Proposition 66, "[f]amilies of murder victims should not have to wait decades for justice," *id.* §2.3, and "[a] capital case can be fully and fairly reviewed by both the state and federal courts within ten years." *Id.* §2.10. According to Proposition 66, "[i]t is the duty of the Supreme Court in a capital case to expedite the review of the case." New Pen. Code §1239.1(a).

In accordance with these stated goals, Proposition 66 sets forth several provisions intended to force the California courts to process capital cases more expeditiously. Both independently and together, these provisions unreasonably invade the California courts' inherent authority to administer their cases:

1. Pen. Code §190.6(d): "***Within five years*** of the adoption of the [Judicial Council's rules designed to expedite the processing of capital appeals and state habeas corpus review] 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.***"

2. Pen. Code §190.6(d): "The Judicial Council shall continuously monitor the timeliness of review of capital cases and shall amend the rules and standards as necessary to complete the state appeal and initial state habeas corpus proceedings within the five-year period provided in this subdivision."
3. Pen. Code §190.6(e): "***If a court fails to comply*** [with the time limit in subdivision (b)] without extraordinary and compelling reasons justifying the delay, ***either party or any victim of the offence may seek relief by petition for writ of mandate.***"
4. Pen. Code §190.6(e): "***The court in which the petition [for writ of mandate] is filed shall act on it within 60 days of filing.***"
5. Pen. Code §1239.1(a): "It is the duty of the Supreme Court in a capital case to expedite the review of the case."[3]
6. Pen. Code §1239.1(a): "The court shall appoint counsel for an indigent appellant as soon as possible."
7. Pen. Code §1239.1(a): "The court shall only grant extensions of time for briefing for compelling or extraordinary reasons."
8. Pen. Code §1239.1(b): "When necessary to remove a substantial backlog in appointment of counsel for capital cases, the Supreme Court shall require attorneys who are qualified for appointment to the most serious non-capital appeals and who meet the qualifications for capital appeals to accept appointment in capital cases as a condition for remaining on the court's appointment list."
9. Pen. Code §1509(c): "Except as provided in subdivisions (d) and (g), the initial petition must be filed within one year of the order entered under Section 68662 of the Government Code."
10. Pen. Code §1509(d): "An initial petition which is untimely under subdivision (c) or a successive petition whenever filed shall be dismissed unless the court finds, by the preponderance of all available evidence, whether or not admissible at trial, that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence. A stay of execution shall not be granted for the purpose of considering a successive or untimely petition unless the court

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[3] Respondents claim that an amicus curiae letter raised new arguments with respect to the separation of powers. *See* Prelim. Opp. at n.2, n.3 (identifying new §§1239.1(a) and (b) as not having been challenged by Petitioners). Wrong. *See* Amended Petition at 31-32.

finds that the petitioner has a substantial claim of actual innocence or ineligibility."

11. Pen. Code §1509(f): "Proceedings under this section shall be conducted as expeditiously as possible, consistent with a fair adjudication."

12. Pen. Code §1509(f): "***The superior court shall 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***."

13. Pen. Code §1509.1(c): "***The court of appeal shall grant or deny a request for a certificate of appealability within 10 days of an application for a certificate.***"

14. Pen. Code §1509.1(c): "***An appeal under this subdivision shall have priority over all other matters and be decided as expeditiously as possible***."

15. Pen. Code §3604.1(c): "The court which rendered the judgment of death has exclusive jurisdiction to hear any claim by the condemned inmate that the method of execution is unconstitutional or otherwise invalid. Such a claim shall be dismissed if the court finds its presentation was delayed without good cause.

16. Gov't Code §68660.5: "The purposes of this chapter are . . . to expedite the completion of state habeas corpus proceedings in capital cases . . . . This chapter shall be construed and administered consistently with those purposes."

(Emphasis added). These sections all impose impracticable time limits and priorities on the courts and otherwise invade the inherent power of the courts to fairly and effectively address the matters before them. *See In re Shafter-Wasco Irrigation Dist.*, 55 Cal. App. 2d 484 (1942) (impracticable time limits on the determination of a case can violate the separation-of-powers doctrine); *Engram*, 50 Cal. 4th at 1148-1150 (statute requiring a trial court to give complete priority to criminal over civil cases would violate the separation-of-powers doctrine); *Lorraine v. McComb*, 220 Cal. 753 (1934)

(statute requiring a trial court to postpone trial if all attorneys of record agree to such postponement would violate the separation-of-powers doctrine); *Thurmond v. Super. Ct. of the City and Cty. of S.F.*, 66 Cal. 2d 836 (1967) (statute requiring a court to postpone any proceeding when an attorney of record is a member of the Legislature and the Legislature is in session would violate the separation-of-powers doctrine); *Garrison v. Rourke*, 32 Cal. 2d 430, 435-37 (1948) (*overruled in part on other grounds by Keane v. Smith*, 4 Cal. 3d 932 (1971)) (statute requiring courts to hear certain types of election law cases to issue findings of fact and conclusions of law within 10 days would raise "serious constitutional questions"); *Brydonjack*, 208 Cal. 439 (construing statute narrowly to avoid separation-of-powers issue); *Millholen v. Riley*, 211 Cal. 29 (1930) (same).

C. Proposition 66 Imposes Improper Time Limits and Priorities on the Courts.

1. *Shafter-Wasco* and *Engram*

Intervenor argues that the many time limits that Proposition 66 imposes on the courts are proper exercises of the legislative power. But Intervenor does not once mention *Shafter-Wasco*, which dealt with precisely this question. In that case, the court stated the question as follows:

> May the Legislature divest this court of its constitutional jurisdiction over the case and its duty to decide it by limiting the time in which a decision must be rendered, to a period within which it is impracticable, if not impossible, to decide the issues?

Shafter-Wasco, 55 Cal. App. 2d at 487. The court determined that the answer was "no."

The statute at issue in *Shafter-Wasco* provided that a certain type of appeal "must be heard and determined within three months after the taking of such appeal." *Id.* at 486. In considering the statute, the *Shafter-Wasco* court acknowledged that "[o]f course it is within the power of the Legislature to impose reasonable rules and regulations governing the exercise of a constitutional power." *Id.* at 487. But, the court cautioned, "[i]t is equally true that those constitutional powers may not be so restricted by unreasonable rules as to virtually nullify them." *Id.* The court decided the statute, as worded, would constitute an impermissible violation of the separation-of-powers doctrine, and construed the statute as permissive rather than mandatory to avoid that problem. *Id.* at 489.

Engram is similar. In that case, the Court addressed a statute providing that "[i]n accordance" with its stated goal of expediting proceedings to the greatest degree that is consistent with the ends of justice, "criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings." *Id.* at 1150. The *Engram* Court found that, to the extent that statute were read to compel "a trial court to devote all of its resources exclusively to the resolution of criminal cases and to abandon entirely its responsibility to provide for the fair administration of civil as well as criminal matters," that statute would be "unconstitutional under the separation-of-powers doctrine."

Id. at 1161. The *Engram* Court emphasized the courts' "inherent authority and responsibility to fairly and efficiently administer all of the judicial proceedings that are pending before it," and that "[h]ow this can best be done calls for the [courts'] exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 1146 (collecting cases).

2. The Time Limits Are Either Impossible to Meet or Would Improperly Force Courts to Prioritize Capital Matters Over Other Matters.

Pursuant to *Shafter-Wasco* and *Engram*, a statute violates the separation-of-powers doctrine if it imposes impracticable or impossible time limits on a court, or forces a court to unduly prioritize certain types of matters at the expense of other types of matters. Under this precedent, new §1509.1(c), which mandates that certain appeals in capital habeas proceedings "shall have priority over all other matters," unquestionably violates the separation-of-powers doctrine.

With regard to the other time limits set forth above, no entity is in a better position than this Court to understand the extent to which they are impracticable. For example, new §190.6(d) provides that "[w]ithin 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." Under Proposition 66, this means that the following things all have to happen within five years after a trial court enters a judgment of death: (1) counsel must be appointed for purposes

of the automatic appeal before the Supreme Court; (2) counsel must brief the automatic appeal before the Supreme Court; (3) the Supreme Court must complete its review of the inmate's automatic appeal; (4) the superior court must appoint habeas counsel; (5) habeas counsel must file the initial petition; (6) the Attorney General must respond to the initial petition in some way; (7) the superior court must resolve the initial petition; (8) the Courts of Appeal must resolve any appeals from the superior court's decision; and (9) this Court must resolve any appeals therefrom. Steps (1) through (3) are naturally dependent on one another, as are steps (4) through (9).

a. Automatic Appeals in the Supreme Court

With respect to steps (1) through (3), requiring the Supreme Court to complete its review of all automatic appeals from judgments of death within five years is impracticable, if not impossible. Opinions in automatic appeals are issued after an average delay of 15.3 years from the imposition of death sentence. Paula M. Mitchell & Nancy Haydt, *California Votes 2016: An Analysis of the Competing Death Penalty Ballot Initiatives* ("California Votes 2016 Analysis"), Alarcón Advocacy Center, Loyola Law School, July 20, 2016, at 16, *available at* http://www.lls.edu/media/loyolalawschool/newsroom/newsitems/FINAL%20Alarcon%20Advocacy%20Center%20Report%20Competing%20DP%20Initiatives.pdf (citing Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. Cal. L. Rev. 697, 731 (2007)). This time period includes an

average of three-to-five years for appellate counsel to be appointed and an average of 2.74 years for appellate counsel to file the opening brief. *See* California Commission on the Fair Administration of Justice, Final Report ("California Commission Final Report") at 131 (2008), *available at* http://digitalcommons.law.scu.edu/ncippubs/1.

Proposition 66 purports to require this Court to speed resolutions of automatic appeals from judgments of death *by a factor of three*. There is no suggestion of how the Court might be able to accomplish such a feat while continuing to give fair consideration to such appeals and continuing to honor its other constitutional obligations. Instead, Intervenor assumes that the Court can reduce its backlogs by giving capital cases the right "priority."[4] Intervenor Opp. at 38.

Nothing could be further from the truth. The Supreme Court has consistently placed high priority on automatic appeals from judgments of death. In the fiscal year 2014-2015, for example, the Court issued 76

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[4] Intervenor argues that five years is sufficient time because the D.C. Sniper and Timothy McVeigh were processed within those time frames. To cite two exceedingly high-profile federal cases as proof that *all California* cases can be processed within a time period is nonsensical. Additionally, as Intervenor admits, McVeigh did not appeal the judgment in his initial habeas petition. To the contrary, McVeigh "volunteered" for execution and limited his habeas counsel to a single set of post-conviction claims. J.C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending A Client Who Wishes to Volunteer for Execution*, 63 Wash. & Lee L. Rev. 147, 156-58, 205 at 313 (2006). Because of the nature of McVeigh's case, Intervenor is forced to rely, in one of the *two* cases that Intervenor cites for the proposition that the five-year time frame is possible, on an assumption that the review in that case "***could***" have been completed in five years. Intervenor Opp. at 39 (emphasis added). This observation is meaningless.

written opinions during the year, a full 19 of which (25%) disposed of automatic appeals from judgments of death. 2016 Court Statistics Report, *available at* http://www.courts.ca.gov/documents/2016-Court-Statistics-Report.pdf. During the same time period, the superior courts imposed 18 judgments of death. *Id.* Similarly, in the fiscal year 2013-2014, the Court issued 85 written opinions, 26 of which (31%) disposed of automatic appeals. 2015 Court Statistics Report, *available at* http://www.courts.ca.gov/documents/2015-Court-Statistics-Report.pdf. During the same time period, the superior courts imposed 19 death judgments. *Id.*

"The average opening brief in an automatic appeal from a judgment of death is between 250 and 350 pages long and includes 30 to 40 claimed errors." Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will Of The Voters?*, 44 Loy. L.A. L. Rev. at S187. Trial court transcripts themselves are thousands of pages long. *See, e.g.*, California Commission Final Report, p. 131 (noting that trial records average 9,000 pages). Despite this complexity, the Supreme Court has consistently, in recent years, disposed of more automatic appeals each year than those that arose. Even so, a significant backlog of automatic appeals remains. *See* California Votes 2016 Analysis, p. 16 (citing Gerald F. Uelman, *The End of an Era*, CALIFORNIA LAWYER, Sept. 2010) (77 death appeals pending in 2010). Proposition 66's requirement that the Supreme Court erase that backlog within 6.5 years, while *also* processing new automatic appeals that arise

within five years (to say nothing of the remainder of the Court's docket), is impracticable, if not impossible.[5]

b. Habeas Review in the Superior Courts.

Proposition 66's requirement that the courts process initial habeas petitions within five years (steps (4) through (9)), and that they resolve habeas petitions (step (7)) within one-or-two years from the time of filing, *see* new Pen. Code §1509(f), is no more realistic. As the California Judicial Branch has explained on behalf of the Supreme Court, the review of initial petitions for habeas corpus is an onerous task: "the preparation of internal memoranda and the related disposition of death-penalty-related habeas corpus petitions draws heavily upon the court's resources, because the petitions and records in such cases frequently are very lengthy and complex and are analyzed in internal memoranda that often exceed 75 to 100 pages in length." Supreme Court Issues Annual Report on Workload Statistics for 2014-2015, Oct. 8, 2015, *available at* www.courts.ca.gov/33297.htm. The superior courts who will bear the burden of Proposition 66 are simply not in a position to perform that task within one-or-two years from the time of filing.

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[5] Intervenor argues that this Court should not evaluate here whether the five-year time limit is practicable, arguing "[t]he place to work out the details of implementation of this question of judicial administration is the Judicial Council, and that is exactly where Proposition 66 places it." Intervenor Opp. at 39. This argument is misleading. Proposition 66 does not purport to allow the Judicial Council to evaluate the practicability of the five-year time limit. Instead, Proposition 66 mandates that the Judicial Council do whatever it takes to *implement* that time limit. New Pen. Code §190.6(d).

As discussed above, Proposition 66 directs courts to transfer initial habeas petitions to the superior court that imposed the sentence. New Pen. Code §1509(a). Nearly half (48.08%) of all death sentences come from just three counties—Los Angeles County, Riverside County, and San Bernardino County—and these courts are already overburdened. *Death Row Tracking System Condemned Inmate Summary List*, CAL. DEP'T. OF CORR. & REHAB., January 6, 2017, *available at* http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf. A recent report on the competing death penalty initiatives described the problem as follows:

> Los Angeles County is understaffed and under-authorized for judges by 7%. Riverside County has one of the highest caseloads per judge in the state, second only to San Bernardino County, a substandard ratio that has led to significant delays in court proceedings in superior courts. Each of Riverside County's superior court judges has a caseload of over 5,570 filings. To make the ratio acceptable, the state estimates an additional 51 judges must be hired in Riverside County—a 40% increase over the current 76 judges sitting in the county. San Bernardino also needs an additional 60 judges—also a 40% increase—to handle its current workload.
>
> The acute shortage of criminal court judges is not new. **Between January 2007 and June 2009, 350 criminal cases in Riverside County were thrown out simply because no judge was available to hear them.**

California Votes 2016 Analysis, p. 11 (emphasis in original) (internal quotations and citations omitted).

Engram itself describes this judicial crisis in detail. It notes that the

Superior Court of Riverside County "has been severely overburdened by the substantial number of criminal cases awaiting trial in that county." *Engram*, 50 Cal. 4th at 1136. While the presumptive time period established by state law for bringing a felony case to trial is 60 days from arraignment, a task force of experienced trial and appellate judges, established specifically to assess and assist with the criminal case backlog in Riverside County, reported in 2007 that nearly 25% of jail inmates had been awaiting trial for more than one year, with numerous others waiting even longer. *Id.* In response to that problem, the Riverside Superior Court devoted "virtually all of its resources—superior court judges and courtrooms—ordinarily intended for the trial of civil cases instead to the trial of criminal cases, an effort that, at the time, seriously compromised that court's ability to conduct civil trials." *Id.* at 1137. The Riverside Superior Court withheld from its criminal docket limited resources devoted to juvenile, probate, and family law matters, *even though the result of that withholding was dismissal of "a tremendous number of [criminal] cases*." *Id.* at 1142 (emphasis added). The Court justified its decision as follows:

> In juvenile court, that's a court where neglected and abused children as well as children who are accused of crime . . . get the attention of the court all to the aim of letting them grow up safely in decent surroundings and becoming productive citizens, rather than letting them go into the adult criminal law system. It would be an injustice to those children, to their parents[,] and to society to close down juvenile court in order to try other cases, important as these cases are.
>
> . . . .

> With respect to probate, this is where . . . we deal with guardianship situations where we decide where children are to live when both parents are in prison or strung out on drugs or dead. These are important social issues and it's important to the welfare of children to keep probate open.
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> . . . .
>
> [With regard to family law] we're dealing with child custody, child support issues of huge human and social importance. . . . [W]e will not be displa[c]ing family law or probate or juvenile.

Id. at 1142 (internal quotations and footnotes omitted). Proposition 66 purports to assign to Riverside judges—judges who are already having to make very difficult decisions about how to prioritize their workloads—an additional, critical responsibility involving issues—quite literally—of life and death. And it purports to do so while mandating a very short time frame in which they must carry out that responsibility. In so doing, Proposition 66 improperly impairs those judges' ability to balance their work in a way that is fair to all litigants.

This problem is especially glaring in the short term. As of July 2016, there were 355 inmates waiting for appointment of state habeas counsel. California Votes 2016 Analysis, p. 56. Proposition 66 thus requires the superior courts to appoint state habeas counsel for *all* of those inmates, and process *all* of their habeas petitions, quickly enough to allow the initial habeas review, including appeals, to finish within 6.5 years, *in addition* to processing any new claims that come in within five years. There is simply no way for the courts to do so, especially not while both giving fair

consideration to the habeas claims and honoring their other constitutional obligations. *See id.* at 57 (demonstrating the impact the concurrent distribution of 355 habeas matters will have on the county courts, including occupying 100% of Colusa County's current judicial resources and 107% of Riverside County's current judicial resources). Proposition 66 thus improperly invades the courts' inherent authority to balance the matters before them in a way that is fair to all litigants.

c. Appointment of Counsel

As set forth above, the five-year time frame must account for appointment of appellate counsel, a process that currently takes three-to-five years, and appointment of habeas counsel, a process that currently takes eight-to-ten years. *See* California Commission Final Report, p. 122. These appointment processes currently take lengthy periods of time because of the lack of qualified counsel willing to take these cases. *Id.* at 131. To expedite these processes, Proposition 66 directs: (1) that the Supreme Court "shall appoint counsel for an indigent appellant as soon as possible," *see* New Pen. Code §1239.1(a); (2) that, when the time period for appointment exceeds 6 months over a period of 12 consecutive months, the Supreme Court "shall require attorneys who are qualified for appointment to the most serious non-capital appeals and who meet the qualifications for capital appeals to accept appointment in capital cases as a condition for remaining on the court's appointment list," *see* New Pen. Code §1239.1(b); and (3) that the Judicial Council and the Supreme Court shall adopt competency standards for the

appointment of counsel in death penalty direct appeals and habeas corpus proceedings in a way that ensures "timely appointment" of counsel and does not limit relevant experience to defense experience only, *see* New Gov't Code §68665(b). While these provisions are phrased in a way that appears to leave some discretion to the Supreme Court with regard to appointment and qualification of counsel, they in fact interact with the mandatory five-year deadline in a manner that impairs this Court's inherent power to regulate the attorneys who appear before it.

Turning to habeas petitions specifically, Proposition 66 provides that counsel has one year to file the initial habeas petition, and the superior court has at least one year to review it. Processing appeals from the initial habeas petition in the Courts of Appeal and the Supreme Court also takes time. Thus, according to simple math, Proposition 66 mandates that the superior courts appoint habeas counsel in less than three years, *and* that the Supreme Court broaden its standards for habeas counsel enough that appointment in less than three years (rather than the eight-to-ten years currently required) is possible. Mandating that the Court broaden its standards in this way runs directly afoul of *Brydonjack*, 208 Cal. 439.

In *Brydonjack*, the Supreme Court considered whether it had the power to admit an attorney to practice law in California if that attorney had not been recommended for admission by a committee of bar examiners created by statute "to fix and determine the qualifications for admission to practice law in this state." *Brydonjack*, 208 Cal. at 441-42. Reasoning that

"[a]dmission to practice is almost without exception conceded everywhere to be the exercise of a judicial function," the Court found that the statute in question granted to the board only the power "to investigate and to recommend for admission," such that the Court was free to admit an attorney the board had not recommended. *Id.* at 443, 445; *see also id.* ("A body possessing only the power to investigate and make recommendations cannot for a moment be conceded the power of final control, which would enable it to do indirectly what it is forbidden to accomplish directly."). Similarly, here, mandating that the Court change its standards for appointment of counsel in order to double or triple the pool of attorneys available unreasonably interferes with this Court's inherent authority to determine the qualifications of those who practice in California's courts.[6]

3. Proposition 66's Incursions Into the Courts' Inherent Authority Are Mandatory.

Respondents and Intervenor suggest that any separation-of-powers problems with Proposition 66 should be resolved by construing the provisions at issue as permissive rather than mandatory. That is not an appropriate solution in this case. While Petitioners agree that "a statute must be construed, ***if reasonably possible***, in a manner that avoids a serious constitutional question," *see Engram*, 50 Cal. 4th at 1161 (emphasis added),

[6] This is especially so because Proposition 66 purports to cut in third the time for such attorneys to file initial petitions. Increasing the short-term burden on these attorneys will even further limit the pool of available attorneys, forcing this Court to lessen its standards even further.

Petitioners respectfully submit that it is not "reasonably possible" to read the time limits imposed by Proposition 66 as anything but mandatory.

First, the text of Proposition 66 "employs the terms 'shall' and 'may' in different portions of the same statute," leading to the conclusion that "the Legislature was aware of the different meanings of these words and intended them to denote mandatory and directory requirements, respectively." *Rice v. Super. Ct. of L.A. Cty.*, 136 Cal. App. 3d 81, 86 (1982).

Second, Proposition 66 sets several interlocking time limits, and emphasizes their importance over and over again. It also phrases its time limits using language even more mandatory than "shall." For example, new Pen. Code §1509(f) provides that the superior court "shall" resolve the initial petition within one year 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***." *Id.* (emphasis added). It is not reasonable to read these statements as anything less than mandatory. *See Kabran v. Sharp Mem'l Hosp.*, Sup. Ct., Case No. S227393, at 15 (Jan. 19, 2017), *available at* http://www.courts.ca.gov/opinions/documents/S227393.PDF ("Legislative intent that a time limit be jurisdictional may be signaled where the statute sets forth time limits in 'unusually emphatic form,' [or] by 'reiterat[ing] its limitations several times in several different ways' . . . .").

Third, this Court's precedent states that "[a]lthough imperative words are sometimes held to have only a directory meaning, this rule of

interpretation is not applicable when a consequence or penalty is provided for a failure to do the act commanded." *Thomas v. Driscoll*, 42 Cal. App. 2d 23, 27 (1940) (*overruled in part on other grounds by Broderick v. Sutherland*, 94 Cal. App. 2d 694 (1949)). Here, Proposition 66 creates a direct consequence—a writ of mandamus—for any court that fails to adhere to the five-year rule absent "extraordinary and compelling reasons justifying the delay." New Pen. Code §190.6(e).

"It is a general rule of statutory construction that the legislative intent in passing a statute is to be given effect by the courts." *Shafter-Wasco*, 55 Cal. App. 2d at 488. The legislative intent of Proposition 66 is clear—to eliminate delays in California's death penalty system. A primary way Proposition 66 sought to do that, as demonstrated by the many provisions set forth in Section III.B above, was to eliminate perceived inefficiencies in the way the courts handle death penalty matters. Thus, the very *purpose* of the initiative sections set forth above was to force the courts to expedite their handling of death penalty matters. In that context, to read those initiative sections as permissive, instead of as mandatory, would be nonsensical.

Respondents and Intervenor cite several cases in which this Court has construed mandatory-sounding statutes imposing time limits as directory. Those cases are different. As a rule, they each addressed discrete mandatory

statements. *See Engram*, 50 Cal. 4th at 1151 (construing a single "shall")[7]; *Thurmond*, 66 Cal. 2d at 838-839 (construing two related "shalls"); *Lorraine*, 220 Cal. at 757 (construing a single "shall"). In the context of each of those cases, construing a "shall" as a "may" was a "reasonably possible" construction. *Shafter-Wasco*, 55 Cal. App. 2d at 488. Proposition 66, in contrast, is a broad initiative making a self-described "comprehensive" and interlocking system of changes, all directed towards expediting executions. *See Kabran*, Case No. S227393, at 16 (statutory timing requirements can be "jurisdictional if all of the deadlines form an intricately balanced or interconnected timing scheme"). To preserve the separation-of-powers doctrine with respect to Proposition 66, this Court would have to read as directory no fewer than five "shalls" directly linked to timelines applicable to the courts, as well as several other "shalls" relating generally to the courts' "duty" to "expedite" these matters. *See, e.g.*, New Pen. Code §1239.1(a). Such an effort would not be a "reasonable" interpretation of the initiative.

4. **The Time Limits and Priorities Are Unconstitutional on Their Face.**

Respondents' attempt to distinguish cases like *Engram* and *Shafter-Wasco* as "as-applied" cases, *see* Prelim. Opp. at 13-14, is unsuccessful.

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[7] *Engram* is further distinguishable because the statute at issue explicitly stated that the "shall" therein should be implemented "to the greatest degree that is consistent with the ends of justice." *Id.* Proposition 66 provides no similar caveat.

These cases make clear what is—and what is not—an unreasonable imposition on the inherent authority of the courts to administer the cases before them. They also make clear that Proposition 66, on its face, falls on the unconstitutional side of the line.

More globally, the system Proposition 66 creates is facially unworkable, particularly for the courts. Many parties, including the courts, men on death row and their counsel, and other litigants seeking to be heard will be harmed if this Court allows Proposition 66 to go into effect and defers addressing its fundamental impossibility until an as-applied challenge arises.

D. Proposition 66 Unreasonably Impairs the Courts' Constitutional and Inherent Authority to Consider Successive and Untimely Petitions.

New Pen. Code §1509(d), which severely limits court review of untimely and successive petitions for habeas corpus, invades both: (1) the courts' constitutional jurisdiction over original habeas corpus proceedings; and (2) the courts' inherent power to "to fairly and efficiently administer all of the judicial proceedings that are pending before it." *Engram*, 50 Cal. 4th at 1146.

New Pen. Code §1509(d) provides that untimely and successive petitions for habeas corpus "***shall*** be dismissed unless the court finds, by the preponderance of all available evidence, whether or not admissible at trial, that the defendant is ***actually innocent*** of the crime of which he or she was convicted or is ***ineligible*** for the sentence." (Emphasis added). Put another

way, §1509(d) *prohibits* a court from considering an untimely or successive petition *unless* the court finds that the defendant is actually innocent or ineligible for the sentence. In so doing, §1509(d) violates the separation-of-powers doctrine.

This Court has consistently maintained for itself the ability to review the merits of a late or successive petition, as long as the late or successive nature of that petition is justified:

> [W]here the factual basis for a claim was unknown to the petitioner and he had no reason to believe that the claim might be made, or where the petitioner was unable to present his claim, the court will continue to consider the merits of the claim if asserted as promptly as reasonably possible.

In re Clark, 5 Cal. 4th 750, 774-775 (1993); *In re Robbins*, 18 Cal. 4th 770, 780 (1998); Supreme Court Policies Regarding

Cases Arising from Judgments of Death, Timeliness standard 1-1.2, *available at* http://www.courts.ca.gov/documents/PoliciesMar2012.pdf.

The Court considers untimely and successive petitions, if justified, for an important purpose—to "leav[e] open a 'safety valve' for those rare or unusual claims that could not reasonably have been raised at an earlier time." *In re Reno*, 55 Cal. 4th at 452. As the *Clark* Court put it, "[t]he magnitude and gravity of the penalty of death persuades us that the important values which justify limits on untimely and successive petitions are outweighed by the need to leave open this avenue of relief." *Clark*, 5 Cal. 4th at 797.

As set forth in the Amended Petition, Proposition 66 eliminates that "safety valve" by foreclosing judicial review (absent a showing of innocence or ineligibility) of several types of legitimate claims of federal and state constitutional magnitude. Amended Petition at 37-38. By prohibiting the courts from acting as a "safety valve" for these types of claims,[8] Proposition 66 materially impairs a crucial feature of judicial review of habeas corpus petitions in this state, and thus violates the separation-of-powers doctrine.[9]

Intervenor engages in a lengthy discussion of federal law and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to argue that new §1509(d) is proper. This argument is not well taken.

First, *Felker v. Turpin*, 518 U.S. 651 (1996), which Intervenor cites as upholding AEDPA's constitutionality, in fact supports Petitioners. In that case, the U.S. Supreme Court rejected various constitutional arguments about AEDPA's incursion into the Court's jurisdiction over habeas matters, *because AEDPA did not purport to "repeal [the U.S. Supreme Court's]*

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[8] In its effort to argue that Proposition 66's timeliness bar is not unconstitutional, Intervenor suggests that Proposition 66 may, in fact, leave open the possibility of equitable tolling, arguing that "Proposition 66 does not expressly preclude it." Intervenor Opp. at 37. Petitioners submit that the Court should closely consider whether Intervenor's argument is reasonable in light of the language and expressed legislative intent of Proposition 66.

[9] The impact of Proposition 66's elimination of untimely and successive claims is not hypothetical. Of the eighteen capital habeas cases in which relief has been granted by the California Supreme Court since 1988, four arose from successive petitions, and three of those four involved the prosecution's failure to disclose exculpatory evidence. *See In re Bacigalupo*, 55 Cal. 4th 312 (2012); *In re Brown*, 17 Cal. 4th 873 (1998); and *In re Miranda*, 43 Cal. 4th 541 (2008).

authority to entertain a petition for habeas corpus." *Id.* at 661-662 (emphasis added). Of course, the same is not true here. *See* New Pen. Code §1509(a). Additionally, the *Felker* Court refused to concede that it was bound by the restrictions AEDPA placed on successive habeas petitions. *Felker*, 518 U.S. at 662-63. Proposition 66 affords this Court no such opportunity. *Felker* thus does not stand for the proposition that Proposition 66 is constitutional, and instead suggests the contrary.

Second, in *Allen v. Butterworth*, 756 So. 2d 52 (2000), the Supreme Court of Florida found that a statute very similar to Proposition 66 violated the separation-of-powers doctrine by invading the province of the courts. In so doing, the court directly rejected the AEDPA argument raised here: "The State asserts that if Congress has the authority to set a statute of limitations in this area, then the Florida Legislature should also have that authority. This argument, however, is not persuasive, as there are significant distinctions between the balance of power in the federal system and the balance of power in this state." *Id.* at 63; *see also Lott v. State*, 334 Mont. 270, 274 (2006) ("In contrast to the United States Supreme Court's deference to Congress's judgment about the proper scope of the federal writ, we conclude that Montana's guarantee of the privilege of habeas corpus embodies a fundamental, intrinsic principle: the right to challenge the cause of one's imprisonment."). Only this Court can determine whether Proposition 66 violates the separation-of powers doctrine in California, and Petitioners respectfully ask that the Court find that it does.

IV. PROPOSITION 66 VIOLATES THE CONSTITUTIONAL MANDATE THAT AN INITIATIVE MEASURE NOT EMBRACE MORE THAN ONE SUBJECT.

"An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." Cal. Const. Art. II, §8(d). An initiative embraces a single subject if all of its provisions are "reasonably germane" to each other "and to the general purpose or object of the initiative." *Senate of the State of Cal. v. Jones*, 21 Cal. 4th 1142, 1157 (1999).

This rule "has the dual purpose of avoiding log-rolling and voter confusion." *Harbor v. Deukmejian*, 43 Cal. 3d 1078, 1098 (1987). "Logrolling" refers to the legislative practice of combining several proposals in a single measure in order to aggregate favorable votes. *Id.* at 1096. Similarly, voter confusion can result when electors are "confused or misled by a maze of unrelated matters some of which are inadequately explained, purposely distorted, or intentionally concealed." *Cal. Trial Lawyers Ass'n v. Eu*, 200 Cal. App. 3d 351, 360 (1988) (quoting legislative history), *abrogated on other grounds by Lewis v. Super. Ct. of San Bernadino Cty.*, 19 Cal. 4th 1232 (1999).

The single subject rule is "an integral safeguard against improper manipulation or abuse of [the initiative] process" and is fully consistent with "the cherished and favored role that the initiative process occupies in [California's] constitutional scheme." *Jones*, 21 Cal. 4th at 1158.

Here, the various enactments of Proposition 66 cannot be united except under a subject of excessive generality. Specifically, while the bulk of Proposition 66 relates to expediting death penalty appeals, Proposition 66 also contains provisions "buried within" it that are unconnected to this general theme. *See Cal. Trial Lawyers Ass'n*, 200 Cal. App. 3d at 361.

A. Any Subject That Encompassed All of the Provisions of Proposition 66 Would Be of Excessive Generality.

In addition to changing various aspects of death penalty appeals, Proposition 66 also includes provisions concerning victim restitution, the Administrative Procedure Act, medical licensing boards, and HCRC governance. The only way to reconcile these various provisions is to ascribe to Proposition 66 such a broad purpose that it would constitute a "topic[] of excessive generality" violating the single subject rule. *Brosnahan v. Brown*, 32 Cal. 3d 236, 253. In *Jones*, the proponent tried to justify joinder of two disparate subjects by arguing that both involved "voter approval." 21 Cal. 4th at 1161-62. This Court rejected that approach:

> When the drafters of an initiative measure join separate provisions dealing with *otherwise unrelated* "political issues" in a single initiative, the initiative cannot be found to satisfy the single-subject rule simply because each provision imposes a requirement of voter approval, any more than if each provision contained a remedy of money damages or a remedy of injunctive relief.

Id. at 1162-63 (emphasis in original); *see also Cal. Trial Lawyers Ass'n*, 200 Cal. App. 3d at 369 (rejecting "implied premise of [proponent's] analysis, i.e., that any two provisions, no matter how functionally unrelated,

nevertheless comply with the constitution's single-subject requirement so long as they have in common an effect on any aspect of the business of insurance" because "[that] approach would permit the joining of enactments so disparate as to render the constitutional single-subject limitation nugatory").

Here, Respondent argues that the measure's purpose is "death penalty reform and cost savings, not just speeding the process," Prelim. Opp. at 18, while Intervenor argues that all of the measures relate to an overall theme of "enforcing judgments in capital cases," Intervenor Opp. at 16. As an initial matter, this articulation of two different purposes highlights how broad and amorphous any unifying topic would have to be. Even if "death penalty reform" or "enforcing judgments in capital cases" might sound narrower than some topics this Court has upheld, Respondent and Intervenor apply those topics with "excessive generality."

For example, Intervenor argues that "[t]he judgment in a capital case is not limited to the execution itself" but also includes imprisonment and restitution. Intervenor Opp. at 16. By this logic, however, proponents could include all manner of prison reform as relevant to an inmate's death sentence. Permitting the joining of any provision that touches upon a death row inmate's sentence would "render the constitutional single-subject limitation nugatory." *Cal. Trial Lawyers Ass'n*, 200 Cal. App. 3d at 360.

Similarly, Respondents' topic, "death penalty reform," is so broad that it can encompass a "virtually unlimited" number of issues. "Reform"

does not identify a particular goal for an initiative other than change from the status quo. In contrast, even the broad criminal reform initiatives upheld by this Court have had a more targeted purpose. *E.g.*, *Brosnahan*, 32 Cal. 3d at 247 ("Proposition 8 constitutes a reform aimed at ***certain features*** of the criminal justice system ***to protect and enhance the rights of crime victims***." (emphasis added)). Amici District Attorneys illustrate the breadth of the concept of death penalty reform:

> [T]he death penalty "system" encompasses far more than just the direct appeal and the actual execution of the condemned inmate. It involves victims who have suffered, administrative procedures that set forth an execution protocol, the medical personnel who perform executions, and other individuals and entities with a part in the process.

District Attorney Amicus Curiae Brief at 26. Respondents defend Proposition 66's inclusion of provisions that affect medical licensing boards, public commentators on government regulations, and unpaid directors of the HCRC. But the same logic could be used to defend, for example, regulating drug companies under the umbrella of Proposition 66. Such a broad topic cannot survive the single subject rule.

B. Proposition 66 Impermissibly Includes Provisions Not Reasonably Germane to Expediting Death Penalty Appeals.

Construing the subject of Proposition 66 more narrowly, the discernible general theme is expediting death penalty appeals. Indeed, the official ballot argument in favor of Proposition 66 includes a section titled "Here's What Proposition 66 Does" and lists six effects, *five* of which relate

to faster appeals. Official Voter Information Guide, Argument in Favor of Proposition 66, *available at* http://voterguide.sos.ca.gov/en/propositions/66/arguments-rebuttals.htm. . Proposition 66 improperly combines its "major structural change[s]" in death penalty appeal procedures with unrelated measures. *See Jones*, 21 Cal. 4th at 1167 (barring measure that "[sought] to combine one major structural change in the state constitutional framework with unrelated measures"). The voter confusion and vote-aggregation resulting from these unrelated provisions is precisely what the single subject rule is designed to prevent.

C. Victim Restitution Is Unrelated.

Proposition 66's victim restitution provision is entirely unrelated to expediting the death penalty appeals process. Neither Respondents nor Intervenor contend otherwise. Unless one accepts that Proposition 66 has an overbroad subject like "death penalty reform" or "enforcing judgments in capital cases," victim restitution simply is not "reasonably germane."

Intervenor argues that victim restitution must be related because it was included in two recent proposed initiatives regarding abolition of the death penalty. Intervenor Opp. at 19. But Proposition 66, which purports to "fix" the death penalty, can hardly be viewed through the same lens as initiatives that would have abolished the system altogether. A repeal measure would logically address the situation of inmates who no longer face death, while that is tangential to a measure, like Proposition 66, intended to

see those same inmates executed as soon as possible. Rather than showing that victim restitution is "reasonably germane," the fact that it was a provision included in recent repeal initiatives suggests that Proposition 66 incorporated it to attract more votes in the face of a competing repeal measure. *Cf. Jones*, 21 Cal. 4th at 1151 & n.5.

D. The Administrative Procedure Act Is Unrelated.

Proposition 66, in one brief sentence, provides that "[t]he Administrative Procedure Act shall not apply to standards, procedures, or regulations promulgated pursuant to Section 3604," New Pen. Code §3604.1(a), and thereby makes the sweeping, unexplained change of revoking the public's ability to review and comment on promulgation of execution protocols. The APA process is separate from appellate review of death sentences and has no effect on their speed.

The APA provision is also exemplary of a provision that was "inadequately explained, purposely distorted, or intentionally concealed"—a source of the voter confusion that the single subject rule guards against. *See Cal. Trial Lawyers Ass'n*, 200 Cal. App. 3d at 360. Neither the text of Proposition 66 nor the Official Voter Information Guide explained the APA, cited any of its governing statutes, or otherwise described the practical effects of the single sentence in Proposition 66, Section 11. Intervenor now claims that the APA provision was designed to abrogate *Morales v. Cal. Dept. of Corr. & Rehab.*, 168 Cal. App. 4th 729 (2008). Intervenor Opp. at 20. Nowhere was that explained or promoted to the voters. *See Cal. Trial*

Lawyers Ass'n, 200 Cal. App. 3d at 361 ("[T]he title and various descriptions of the initiative's contents give no clue that any such provisions are buried within."); *see e.g.*, Argument in Favor of Proposition 66 (making no mention of the APA or execution protocols).

E. Medical Licensing Standards Are Unrelated.

Proposition 66, Section 12 prohibits medical licensing organizations from enforcing their own standards related to the participation of medical professionals in executions. This provision has no relation to the expedition of death penalty appeals. Notably, neither Respondents nor Intervenor can tie this provision to any of Proposition 66's Findings and Declarations. *Compare* Intervenor Opp. at 18, 19, 22 (alleging that other provisions implement various findings) *with id.* at 21 (identifying no relevant finding); *see also* Argument in Favor of Proposition 66 (containing no mention of medical professionals).

Even if the Court construes the purpose of Proposition 66, as urged by Intervenor, as "enforcing judgments in capital cases," any relationship between that purpose and Section 12 is entirely hypothetical. Deputy District Attorney Amici argue that "[t]he mere threat of discipline by a state medical licensing board has actually frustrated an execution in California." D.A. Amicus Brief at 31. There appears to be no basis for this argument. Rather, while Deputy District Attorney Amici point out that two anesthesiologists declined to participate in an execution, they offer no support for the idea that the anesthesiologists made that decision to avoid

disciplinary action. *Id.* at 30. Intervenor, for its part, bases its entire argument on an "extreme position" taken—irrelevantly—by the state medical board in North Carolina. Intervenor Opp. at 21.

As with the APA provision, discussed above, Intervenor buried this irrelevant provision within an initiative described to the public as something else. The hypothetical arguments now offered to justify it and tie it into the greater scheme of Proposition 66 cannot save it.

F. Disbanding Unpaid Board of Directors Is Unrelated.

Proposition 66, Section 15 purports to limit the types of cases the HCRC takes on. Petitioners have not challenged the relevance of that section to the proposition as a whole. Instead, Petitioners challenge Section *17*, the sole purpose of which is to eliminate HCRC's five-member board of directors and to mandate that the Supreme Court, rather than the board of directors, select and oversee HCRC's executive director. The purpose of Section 17 is not expediting death penalty appeals—or even enforcing judgments in capital cases. As is made abundantly clear in Intervenor's brief, Intervenor just doesn't like former HCRC executive director Michael Laurence. Intervenor Opp. at 22-23.

The Findings and Declarations claim that changes to HCRC's governance were necessary because HCRC was "operating without any effective oversight." Contrary to that assertion, HCRC is overseen by its board of directors, the legislature, the governor, and this Court. Gov't Code §§68661(l) & 68664(b). Intervenor argues that the HCRC has violated its

authorization to work only on "postconviction and clemency proceedings in capital cases," Intervenor Opp. at 23, but this is misleading: in addition to "instituting and prosecuting habeas corpus petitions," HCRC attorneys are also appointed to "challeng[e] the legality of the judgment or sentence imposed against [a convicted] person." Gov't Code §68664(a). Intervenor also argues, nonsensically, that the board was "irresponsible" because it permitted types of litigation that Section 15 now prohibits. Intervenor Opp. at 23-24. But the board can hardly be faulted for "failing" to enforce a requirement that did not yet exist. Intervenor's inaccurate and confusing arguments do not support a finding that dissolution of HCRC's unpaid board of directors is reasonably germane to Proposition 66's purpose. *See Jones*, 21 Cal. 4th at 1163 (rejecting "legislative self-interest" as a defensible single subject where the initiative text misleadingly suggested legislative salaries were subject to such self-interest).

V. PROPOSITION 66 VIOLATES THE EQUAL PROTECTION CLAUSES OF THE U.S. AND CALIFORNIA CONSTITUTIONS.

Equal protection mandates that similarly situated classes of individuals not be treated disparately under the law, unless such disparate treatment is "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-440 (1985). Proposition 66 violates this basic constitutional guarantee by irrationally limiting the grounds on which capital defendants—and capital defendants only—may file successive habeas petitions.

A. Proposition 66 Narrows the Availability of Successive Habeas Petitions for Capital Defendants Only.

1. Successive Petitions Prior to Proposition 66

As discussed above, *In re Clark*, 5 Cal. 4th 750, provides for the consideration of successive petitions relying on newly developed facts or circumstances, or an applicable change in the relevant law, so long as the petitioner promptly brings those developments to the court. *Id.* at 774-775. Even if a petitioner *cannot* show newly discovered facts or circumstances, his or her claim can be considered in a successive petition if he or she shows "a fundamental miscarriage of justice." *Id.* at 759.

Relatedly, Pen. Code §1473[10] (amended in September 2016 by Senate Bill 1134) provides:

> (b) A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:
>
> (1) False evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at a hearing or trial relating to his or her incarceration.
>
> ....
>
> (3)(A) New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial.
>
> (B) For purposes of this section, "new evidence" means evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and

[10] Petitioners erroneously cited Pen. Code §1485.55, rather than §1473, in their Amended Petition. Both Respondents and Intervenor appear to have understood that Petitioners meant to refer to §1473. Intervenor Opp. at 43; Prelim. Opp. at 21.

not merely cumulative, corroborative, collateral, or impeaching.

...

(e)(1) For purposes of this section, "false evidence" includes opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by later scientific research or technological advances.

2. New Pen. Code §1509(d) Limits Successive Habeas Review for Capital Defendants.

According to new Pen. Code §1509(d), a successive petition brought by a capital defendant "shall be dismissed" unless the court finds that the defendant is actually innocent or ineligible for the sentence of death. Clearly, in the context of *Clark* and Pen. Code §1473, this language places new substantive limitations on capital defendants' ability to seek habeas relief. But *Clark* and Pen. Code §1473 still govern with respect to *non-capital* successive habeas petitions. For that reason, Proposition 66 singles out capital defendants for worse treatment.

Intervenor admits that "Proposition 66 imposes a tighter limitation on successive petitions for capital cases than exists for noncapital cases." Intervenor Opp. at 46. Bewilderingly, Intervenor also argues the converse—that new §1509(d) is more lenient to successive petitions than *Clark* and §1437. Intervenor Opp. at 44-45. Not so. *Clark* allows a petitioner to bring a successive petition, without regard to innocence, based on newly developed facts or circumstances brought promptly before the court. *In re Clark*, 5 Cal. 4th at 774-775. In *addition*, *Clark* allows for the presentation of claims that

involve a "fundamental miscarriage of justice," and explicitly sets forth circumstances involving a "fundamental miscarriage of justice" that go beyond actual innocence. *Id.* at 759.

With regard to §1473, it allows presentation of a claim of false evidence "that is substantially material or probative on the issue of guilt." This is a lesser burden than actual innocence. Additionally, SB 1134's amendment to §1473(e)(1), which provides that scientific evidence presented at trial can constitute "false evidence" under §1473, would—absent Proposition 66—constitute a "change in the applicable law" that would justify a capital defendant's successive habeas petition. *See In Re Richards*, 63 Cal. 4th 291, 293-294 (2016) ("*Richards II*"). Proposition 66 purports to remove that avenue of relief, as well, for capital defendants only. Additionally, SB 1134 loosens the standard for the consideration of new evidence from that which "point[s] unerringly to innocence," *In Re Richards*, 55 Cal. 4th 948, 967 (2012), to that which "would have more likely than not changed the outcome at trial." Cal. Pen. Code §1473(3)(3). To the extent that a prisoner is able to show that new evidence in support of a successive writ of habeas corpus meets this lesser standard, they too would be able to benefit from this change in law.[11]

[11] Intervenor claims §1437 does not apply to successive habeas petitions. *Richards II* proves otherwise.

B. Capital and Non-Capital Prisoners Are Similarly Situated in This Context.

As Respondents correctly point out, an equal protection analysis evaluates "whether [persons in the two groups] are similarly situated for purposes of the law challenged." Prelim. Opp. at 21-22. Capital and non-capital prisoners are similarly situated in the context of available avenues of relief for successive habeas petitions, as both have equal interest in freedom from an illegal or unjust conviction or sentence. While Respondents argue that this Court has determined that capital and non-capital defendants are not similarly situated, *id.* at 22, the cases Respondents cite address laws fundamentally different from the one here. Specifically, each case Respondents cite concerns a challenge to a law or procedure governing *sentencing* for capital and non-capital defendants. The fundamental distinction between a capital and non-capital case lies in the sentence. It is thus much easier to imagine a rational basis for different sentencing procedures applying to different classes of sentences. No similar rational basis exists when the law in question governs, not the sentence, but grounds for relief from an illegal detention. *See State v. Noling,* No. 214-1377, 2016 WL 7386163, slip copy (Ohio Dec. 21, 2016) ("The case law and statutes cited by the attorney general [against an equal protection challenge to habeas law] are inapposite because they are focused on imposition of a sentence.").

C. There Is No Rational Basis Related to a Legitimate Government Interest for Dissimilar Treatment of Capital and Non-Capital Petitioners Bringing Successive Habeas Claims.

Respondents and Intervenor identify differences between capital and non-capital petitioners that they claim provide a rational basis for new §1509(d)'s dissimilar treatment of those two classes. None do. For example, Respondents and Intervenor argue that capital prisoners have a statutory right to counsel and investigative resources for a first capital habeas petition, making it "far less likely that a successive petition has merit." Intervenor Opp. at 46. This exact argument was advanced, and rejected, in *In re Reno*, 55 Cal. 4th at 472. This argument also ignores the fact that there are types of new evidence, such as new scientific standards or facts that have been hidden, that simply cannot be included in a first capital habeas petition. *See Richards II*, 63 Cal. 4th at 293. Finally, it ignores the fact that capital prisoners have been given those rights *because* of the severity and finality of the judgment of death. *See, e.g.*, *People v. Bigelow*, 37 Cal. 3d 731, 743 (1984). Giving capital prisoners access to counsel because "death is a different kind of punishment" cannot then be used as a justification for taking away other, similar rights. *Id.*

In *Allen*, 756 So. 2d at 57 the Florida Supreme Court rejected, on equal-protection grounds, a statute that limited successive habeas corpus petitions much like new §1509(d) does. The court reasoned that the statute was invalid because it "prohibits otherwise meritorious claims from being

raised" and "applies only to capital prisoners." *Id.* at 54. Similarly, *Noling* dealt with a statute providing that a denial of a capital defendant's application for postconviction DNA testing would be reviewed in the supreme court only on a discretionary basis, and not in the court of appeals. The Ohio Supreme Court struck down the statute on equal protection grounds. *Id.* ¶ 8.

Intervenor's argument that the state courts have uniformly rejected equal protection challenges by capital prisoners notably fails to cite *Allen* and *Noling*. But these are the cases most relevant to the question at hand. In accord with *Allen* and *Noling*, new §1509(d) violates the Equal Protection Clauses of the California and Federal Constitutions.

VI. THE CHALLENGED PROVISIONS OF PROPOSITION 66 ARE NOT SEVERABLE.

Intervenor argues that, if Petitioners' single-subject challenge fails, there is no basis for a writ of mandate against enforcement of Proposition 66 in its entirety. Intervenor Opp. at 12. According to Intervenor, the initiative sections that Petitioners challenge outside of the single-subject challenge are severable from one another and from the non-challenged portions of the initiative. Not so.

In *Raven v. Deukmejian*, cited by Intervenor, this Court explained the process for evaluating severability under a similar severability clause: "[t]he cases prescribe three criteria for severability: the invalid provision must be grammatically, functionally, and volitionally separable." *Raven v.*

Deukmejian, 52 Cal. 3d 336, 355-356 (1990) (quoting *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 821-22 (1989)). With regard to grammatical severability, the invalid proposition must be "mechanically and grammatically severable, constituting a separate and distinct provision of [the proposition] which can be removed without affecting the wording of any other provision." *Id.* With respect to functional severability, the invalid provision must touch on an area "essentially unrelated to any of the various remaining substantive or procedural provisions." *Id.*; *see also People's Advocate, Inc. v. Super. Ct. of Sacramento Cty.*, 181 Cal. App. 3d 316, 332 (1986) ("The remaining provisions must stand on their own, unaided by the invalid provisions nor rendered vague by their absence nor inextricably connected to them by policy considerations."). Finally, with respect to volitional severability, it must be found that "the remainder of the measure probably would have been adopted by the people even if they had foreseen the success of petitioners' revision challenge." *Raven*, 52 Cal. 3d at 356. In reaching that determination, the courts evaluate "whether it can be said with confidence that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the absence of the invalid portions." *Gerken v. Fair Political Practices Comm'n*, 6 Cal. 4th 707, 714-715 (1993) (internal quotation marks and emphasis omitted).

A. Grammatical Severability

It is difficult to perform this analysis absent a Court ruling regarding which sections are invalid. That said, it is clear that several of the challenged and non-challenged provisions are mechanically and grammatically dependent upon one another, including those identified as follows:

1. Pen. Code §190.6(d) is impacted by language in Pen. Code §190.6(e) that states that a certain paragraph of the Constitution applies to subdivision (d). Conversely, §190.6(e) is impacted by the fact that § 190.6(d) gives meaning to what is meant in subdivision (e) by the words "subdivision (b)."
2. Pen. Code §1239.1(a) depends on Pen. Code §1509(c) by referencing a time limit for briefing set in the latter section.
3. Pen. Code §1509(b) and Gov't Code §68662 depend upon and reference one another.
4. Subdivisions (c), (d), (e), and (g) of Pen. Code §1509 all depend upon and reference one another.
5. Subdivisions (f) and (g) of Pen. Code §1509 depend on subdivision (a) of the same section, because they reference: (1) the time frame in which "[t]he superior court shall resolve the initial petition"; and (2) transfer of pending habeas petitions to the superior court.
6. Pen. Code §1509.1, regarding appeals from the superior court decisions, depends on Pen. Code §1509(a), which provides that such decisions should happen in the superior court.
7. Gov't Code §68661(a) references Gov't Code §68661.1.
8. Gov't Code §68662(a) depends upon Pen. Code §1509.

B. Functional Severability

With respect to functional severability, Sections 5 and 18, both of which are directed to expediting appointment of counsel, are functionally related. Sections 6 and 7, which together create a system for initial habeas review in the superior court and appeal therefrom, are also functionally

related. Sections 3 and 6 relatedly purport to impose deadlines for postconviction review on the courts. Indeed, if new Pen. Code §1509(a), which provides for initial habeas review in the superior courts, were invalidated, new Pen. Code §190.6(d) would purport to impose on the Supreme Court a five-year deadline for appellate review *and* for initial habeas review. Such a result would be even more untenable than the one currently imposed by Proposition 66. Section 6 is also functionally related to new Pen. Code §3604.1(c), which relies on Section 6's system for initial habeas review in the superior court. Sections 14, 15, and 17, all of which purport to regulate the HCRC, are functionally related to one another.

C. Volitional Severability

The question for the few provisions that remain is whether they are "complete in [themselves] and would have been adopted . . . had [the people] foreseen the partial invalidity of the statute." *Calfarm Ins. Co.*, 48 Cal. 3d at 821; *see also Metromedia, Inc. v. City of San Diego*, 32 Cal. 3d 180, 190 (1982) (finding invalid portion of statute not volitionally severable because it was "doubtful whether the purpose of the original ordinance is served by a truncated version"). The answer is no. Proposition 66 barely passed. It is hard to imagine that a substantially gutted version of it would have.

Intervenor argues specifically that Section 11, relating to APA review of execution protocols, is severable from the rest of Proposition 66. But the argument that proponents submitted in favor of Proposition 66 demonstrates

that Section 11 was not a portion of the initiative that they thought would appeal to the voters. Argument in Favor of Proposition 66. The arguments focus on expediting death penalty appeals and reforming death row housing—*they make no mention of the APA or execution protocols.* *Id.* Where Proposition 66's proponents did not see fit to *mention* Section 11 in their arguments in favor of the initiative, it cannot "be said with confidence that the electorate's attention was sufficiently focused" on that section "so that it would have separately considered and adopted [it] in the absence" of the other provisions. *Gerken*, 6 Cal. 4th at 714-715 (emphasis omitted). Rather, the only reasonable conclusion is that Section 11 was one of the less attractive portions of the initiative, and it would not have passed alone. The same argument applies, at least, to Sections 4, 8, 10, 12, 14, 15, and 17.

More globally, this case is like *Hotel Emps. and Rest. Emps. Int'l Union v. Davis*, 21 Cal. 4th 585 (1999). In that case, the Court struck down portions of an initiative, and found that the remaining portions (with one limited exception) were not functionally or volitionally severable from those invalidated. *Id.* at 612. The Court reasoned that, because the stricken portions were "of critical importance to the measure's enactment," the remaining provisions could not stand alone. *Id.* at 612-613. In the case at hand, it is clear that streamlining the death penalty appeals process was the issue of "'critical' importance to the 'enactment' of the measure." *Id.* at 613; *see* Argument in Favor of Proposition 66; Prop. 66 §2. To the extent

this Court finds invalid provisions relating to streamlining the death penalty appeals, the remaining provisions of Proposition 66 should fall alongside them.

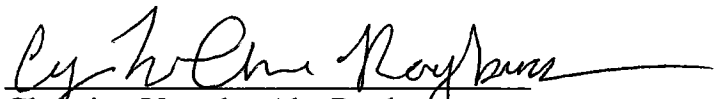
Again, this analysis is difficult to perform absent this Court's decision on which provisions of Proposition 66 are invalid. For that reason, and because of the strength of Petitioners' single-subject challenge, Petitioners respectfully request that the stay issued on December 20, 2016, remain in effect pending determination of the issues raised in the Amended Petition. As detailed in the Amended Petition, the balance of harms weighs heavily in Petitioners' favor. Intervenor's only counterargument is a vague reference to state "resources" being spent "litigating the APA compliance of the new execution protocol." Intervenor Opp. at 25. This is not enough to warrant lifting the stay.

VII. CONCLUSION

For the reasons stated above and in Petitioners' Amended and Renewed Petition for Extraordinary Relief, Petitioners respectfully urge this Court to issue a writ of mandate and issue an order declaring Proposition 66 null and void in its entirety.

Dated: January 23, 2017

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

In accordance with California Rules of Court 8.204(c)(1) and 8.486(a)(6), counsel for Petitioners hereby certifies that the number of words contained in this Reply in Support of Petition for Extraordinary Relief, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 13,997 words as calculated using the word count feature of the computer program used to prepare the brief.

By: Cy Von Rayburn

CHRISTINA VON DER AHE RAYBURN

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I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, The Orrick Building, 405 Howard Street, San Francisco, California 94105-2669. On January 23, 2017, I served a true copy of the attached document entitled:

REPLY IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF

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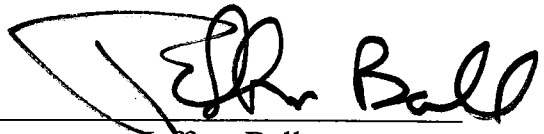
I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 23, 2017, at San Francisco, California.



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