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; Xavier Becerra, in his official capacity as the Attorney General of California; California's Judicial Council; and Does I through XX

Respondents.

FURTHER REPLY IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF

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I. INTRODUCTION

To defeat Proposition 62, Intervenor worked to convince Californians that it was possible to "MEND, NOT END," the death penalty. Argument in Favor of Proposition 66. To that end, Intervenor emphasized to voters that Proposition 66 "was written to speed up the death penalty appeals system." *Id.*

But the ways in which Proposition 66 would "speed up" death penalty appeals unconstitutionally infringe the jurisdiction and inherent powers of California's courts. They also violate the equal protection rights of capital defendants.

Secondary to what Intervenor touted to the voters, Proposition 66 also includes, at the back, several unrelated provisions. Those propositions do things like: (1) eliminate the public review-and-comment process regarding how California should execute people; and (2) fire people who work *for free* to protect the rights of capital defendants. By including these unrelated provisions, Intervenor violated the rule—enacted to preserve the integrity of California's initiative process—that propositions should only encompass a "single subject."

Intervenor now argues that, even if this Court invalidates Proposition 66's provisions directed at speeding appeals, this Court should *keep alive* the provisions that Intervenor tried to sneak in the back door. The Court should reject this argument out of hand.

II. PROPOSITION 66 VIOLATES THE SINGLE-SUBJECT RULE.

"An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." Cal. Const. art. II, §8(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 State of Cal. v. Jones*, 21 Cal. 4th 1142, 1157 (1999). This single-subject requirement "serves an important role in preserving the integrity and efficacy of the initiative process." *Id.* at 1158.

Proposition 66 violates the single-subject rule by tacking various unrelated provisions onto its primary scheme aimed at expediting death penalty appeals. In order to defend its validity, Respondents characterize the initiative's object as "death penalty reform, including time reductions and cost savings." Respondents' Return at 13. Intervenor characterizes it as "enforcement of judgments in capital cases." Intervenor's Return at 11. The single-subject requirement, however, forbids "topics of excessive generality." *Brosnahan v. Brown*, 32 Cal. 3d 236, 253 (1982). In the sense used by Respondents and Intervenor—who themselves cannot agree on the single, overarching theme of the initiative—the subjects "death penalty reform" and "enforcement of judgments in capital cases" are topics of "excessive generality," covering a "virtually unlimited" number of issues. *Harbor v. Deukmejian*, 43 Cal. 3d 1078, 1100-01 (1987) ("The number and scope of topics germane to 'fiscal affairs' in this sense is virtually unlimited.

. . . This would effectively read the single subject rule out of the Constitution.").

When viewed properly, the clear purpose of Proposition 66 is expediting death penalty appeals and reducing related costs. However, at least four provisions—victim restitution, regulating medical licensing organizations, exempting execution protocols from the Administrative Procedures Act, and disbanding the Habeas Corpus Resource Center ("HCRC") board of directors—are not "reasonably germane" to that common purpose. And, if the Court finds even one of these provisions outside the scope of that common purpose, *none* of Proposition 66 can take effect. Cal. Const. art. II, §8(d).

A. The Single-Subject Rule Is Integral to the Initiative Process.

Courts are protective of the initiative process, which "occupies an important and favored status in the California constitutional scheme." *Jones*, 21 Cal. 4th at 1157. The single-subject rule, itself adopted at the ballot box, expresses "the will of the people that the process not be abused." *Chem. Specialties Mfrs. Ass'n, Inc. v. Deukmejian*, 227 Cal. App. 3d 663, 667 (1991). Thus, "proper application and enforcement of the single-subject rule is by no means inconsistent with the cherished and favored role that the initiative process occupies in our constitutional scheme, but on the contrary ***constitutes an integral safeguard against improper manipulation or abuse of that process***." *Jones*, 21 Cal. 4th at 1158 (emphasis added).

Intervenor touts its role as "captains of the ship" in deciding what provisions to include in the initiative. Intervenor's Return at 11, 16 (citing *Brown v. Superior Court*, 63 Cal. 4th 335, 351 (2016)). But a proponent's "monopol[y]" over the drafting process simply underscores the importance of the single-subject rule's safeguards. *See Brosnahan*, 32 Cal. 3d at 266 (Bird, C.J., dissenting) ("[T]he only expression left to all other interested parties who are not proponents is the 'yes' or 'no' vote they cast.") (quoting *The California Initiative Process*, 48 So. Cal. L. Rev. 922, 933 (1975)). In particular, the single-subject rule protects against "log-rolling" and voter confusion. *Harbor v. Deukmejian*, 43 Cal. 3d at 1098. Because of the single-subject rule, initiative proponents do not have "blank checks to draft measures containing unduly diverse or extensive provisions bearing no reasonable relationship to each other or to the general object which is sought to be promoted." *Brosnahan*, 32 Cal. 3d at 253.

Applying the single-subject rule, courts in this state have struck down multiple initiative measures. For example, in *California Trial Lawyers Association v. Eu*, 200 Cal. App. 3d 351 (1988) (hereinafter "*CTLA*"), the court blocked an initiative that had the general object of controlling insurance costs, but which also included a section addressing campaign contributions made by insurers. Critically, the court rejected the proponent's argument that the campaign contribution provision satisfied the "reasonably germane" test because it related to regulation of insurance industry practices: "we cannot accept the implied premise . . . 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." *Id.* at 359-60. Rather, the court viewed the campaign contribution provision as "a paradigm of the potentially deceptive combinations of unrelated provisions at which the constitutional limitation on the scope of initiatives is aimed," noting that the provision in question: (1) was buried near the middle of the initiative's text; (2) bore "no connection to what precedes or follows"; and (3) received no mention in the Attorney General's title and summary or in the initiative's introductory statement of findings and purpose. *Id.* at 360-61.

A few years later, in *Chemical Specialties*, another Court of Appeal invalidated an initiative measure directed at "public disclosure." 227 Cal. App. 3d at 670-71. The court found that "the object of providing the public with accurate information in advertising is so broad that a virtually unlimited array of provisions could be considered germane thereto and joined in this proposition, essentially obliterating the constitutional requirement." *Id.* at 671. In *Jones*, this Court cited approvingly to *CTLA* and *Chemical Specialties* in its decision to block an initiative, entitled the "Let the Voters Decide Act," which addressed the manner in which legislative districts were drawn and legislators were compensated. *Jones*, 21 Cal. 4th at 1160.

B. Under Respondents' and Intervenor's Characterizations, Proposition 66 Is Too Broad.

This Court has repeatedly stated that the single-subject rule "forbids joining disparate provisions which appear germane only to topics of excessive generality." *Brosnahan*, 32 Cal. 3d at 253. But that is precisely what Proposition 66 does. Proposition 66's purported goals of "death penalty reform" or "enforcement of judgments in capital cases" are excessively general. Indeed, Respondents' and Intervenor's application of these themes to the provisions at issue demonstrate that they are, in fact, far too broad to be upheld.

As an initial matter, the essence of the themes asserted by both Respondents and Intervenor is "reform" of statutes that touch upon the death penalty. But "reform" is not a description that meaningfully limits the scope of an initiative. The word "reform" does not express a direction or objective; it merely indicates change from the status quo. It is thus no different from the object of "statutory adjustments" that this Court rejected in *Harbor* as "too broad in scope if . . . they encompass any substantive measure which has an effect on the budget." 43 Cal. 3d at 1100-01; *see also CTLA*, 200 Cal. App. 3d at 360.

Respondents' and Intervenor's defense of the victim restitution provision illustrates the breadth of what they claim is the "general purpose" of Proposition 66. Intervenor argues that the victim restitution provision "is directly related to enforcing the imprisonment and restitution portions of the

judgment in criminal cases." Intervenor's Preliminary Opposition at 18. In other words, Intervenor considers *any* aspect of a criminal judgment—not just the death sentence—to be "reasonably germane" to "enforcement of judgments in capital cases," so long as the judgment was rendered in a capital case. By the same logic, Proposition 66 could have included any number of prison reform measures (regulating, for example, prison conditions, prison guards, or visitation), since, as Intervenor argues, "[i]mprisonment until execution is part of the judgment." *Id.* Respondents similarly defend victim restitution as an aspect of criminal justice generally, not as having any direct connection to the death penalty.[1] Respondents' Return at 29-30.

Respondents' and Intervenor's defense of the medical licensing provision shows, in a different direction, the far reach of Proposition 66's purported purpose. Respondents argue that the provision "helps ensure that executions will not be thwarted by threats from organizations that seek to dissuade their members from such participation." *Id.* at 30-31. Intervenor similarly implies that "consultants, expert witnesses, and pharmacists have been threatened and intimidated so as to impair the ability of their states to establish, defend, and carry out their execution protocols" and cites Justice Alito's comment that "there is 'a guerilla war against the death penalty'" to

[1] Both Respondent and Intervenor also point to the fact that victim restitution was included in recent death penalty repeal measures. But death penalty *repeal* is not the same as death penalty *reform*.

argue that the medical licensing provision is necessary. Intervenor's Return at 14-15. Justice Alito's comment was made during oral argument in *Glossip v. Gross*, 135 S. Ct. 2726 (2015), a case concerning lethal injection protocols—not medical licensing—and the pressure that drug companies faced to discontinue production of drugs used in lethal injections. *Id.* at 2733-34.

Thus, the logic used to support Proposition 66's inclusion of a provision relating to medical licensing would also justify inclusion of provisions against other external "threats" to capital judgments, such as regulating drug companies and even death penalty protestors. "[That] approach would permit the joining of enactments so disparate as to render the constitutional single-subject limitation nugatory." *CTLA*, 200 Cal. App. 3d at 360; *see also Harbor*, 43 Cal. 3d at 1100-01.

As applied by Intervenor, the subject of "enforcing judgments in capital cases" is far broader than any subject this Court has upheld. It arguably would allow initiative proponents—in addition to reforming the penal code, judicial practices, and the scope of executive authority—to attempt to regulate every aspect of civil society that may eventually be implicated in, or stand in the way of, the proponents' desired purpose. Intervenor compares Proposition 66's purported subject to the subject of "political practices" in *Fair Political Practices Commission v. Superior Court*, 25 Cal. 3d 33 (1979). But this Court explained that the initiative in that case "concern[ed] elections and different methods for preventing

corruption and undue influence in political campaigns and governmental activities." *Id.* at 37. The description "political practices" was thus used in a narrow sense. *Cf. Jones*, 21 Cal. 4th at 1162-63 (finding term "political issues" too broad). Intervenor also cites to the subject of "incumbency reform" in *Legislature v. Eu*, 54 Cal. 3d 492 (1991), and to criminal law reforms upheld in *Brosnahan* and *Raven v. Deukmejian*, 52 Cal. 3d 336, 342-45 (1990). But the measure in *Legislature v. Eu* sought not simply to "reform" incumbency provisions but to *limit* "the powers of incumbency." 54 Cal. 3d at 513. The measures in *Brosnahan* and *Raven*, although far-ranging, were still limited to changes to procedural and substantive criminal law that strengthened safeguards for victims. *Brosnahan*, 32 Cal. 3d at 247; *Raven*, 52 Cal. 3d at 347. None of these cases permitted subjects broad enough to encompass changes to criminal procedure, regulation of medical licensing boards, prison conditions, and political activism. Unlike Intervenor's cited cases, the asserted theme of Proposition 66 is one of "excessive generality" that violates the single-subject rule.

C. Proposition 66 Impermissibly Includes Provisions Unrelated to Expediting Death Penalty Appeals.

If one is to discern a "general purpose" in Proposition 66 of constitutionally permissible scope, the logical conclusion is that Proposition 66 relates to expediting death penalty appeals and reducing related costs. Indeed, Intervenor has stated that as the "purpose and effect" of Proposition 66. Specifically, in its Preliminary Opposition, Intervenor noted that

Proposition 66 polled better when interviewees were told the "purpose and effect" of Proposition 66. Intervenor's Preliminary Opposition at 11-12 & n.1. In so doing, they cited to a blog post, written by Intervenor's counsel, noting approvingly a poll that stated that Proposition 66 would "***streamline procedures in death-penalty cases to speed up resolution of the cases***." Scheidegger, *Polls and the Importance of Question Wording*, Crime and Consequences Blog (Sept. 23, 2016) (emphasis added), *available at* http://www.crimeandconsequences.com/crimblog/2016/09/polls-and-the-importance-quest.html#more. Similarly, the official Argument in Favor of Proposition 66 listed six reforms under the heading "HERE'S WHAT PROPOSITION 66 DOES." *All* of those reforms relate to speeding appeals and reducing related costs. Voter Information Guide, p. 108.

The victim restitution, medical licensing board, Administrative Procedures Act, and HCRC governance provisions do not relate to expediting death penalty appeals or reducing related costs. Neither Respondents nor Intervenor address how the first three are "reasonably germane" to a properly-scoped purpose of Proposition 66. Plainly, none of them have any effect on the speed of a death penalty appeal. Victim restitution is collected (or not) regardless of the progress of an individual's appeal. And the medical licensing and APA provisions relate to carrying out the execution, which can only occur *after* appeals are exhausted. The inclusion of each of these provisions in Proposition 66 is a violation of the single-subject rule.

With respect to HCRC governance, Respondents and Intervenor argue that the HCRC was causing delays in death penalty review. Respondents, however, do not explain how the assertion of no "effective oversight" in the initiative text can be squared with statutes providing for HCRC oversight by a board of directors, the legislature, the governor, and this Court. Gov't Code §§68661(l) & 68664(b); *see Jones*, 21 Cal. 4th at 1163 (rejecting "legislative self-interest" as defensible single subject where the initiative text misleadingly suggested legislative salaries were subject to such self-interest). Intervenor complains that the HCRC's prior director asked to delay HCRC's "real job of habeas corpus" in favor of civil litigation. Intervenor's Return at 15. However, this ignores the fact that HCRC attorneys are also tasked with "challenging the legality of the judgment or sentence imposed against that person." Gov't Code §68661(a). Contrary to Intervenor's interpretation, the statute lists this as a separate duty (along with preparing petitions for executive clemency), not as a "kind of postconviction action[]" that HCRC may bring. *See* Intervenor's Return at 15. In addition, the civil litigation about which Intervenor complains related to review of capital judgments and establishing an execution protocol. Intervenor's Preliminary Opposition, Appx. A, at 60-61; Intervenor's Return at 15. These are some of the very same topics Intervenor argues are encompassed in "enforcement of judgments in capital cases." Intervenor cannot logically claim that these topics are both: (1) germane to that purpose; and (2) beyond the scope of HCRC's task to

"challeng[e] the legality of the judgment" against a person sentenced to death. Intervenor may not like the scope of HCRC's activities, but its argument does not show that eliminating HCRC's board of directors would speed death penalty appeals.

III. PROPOSITION 66 IMPAIRS THE JURISDICTION OF CALIFORNIA'S COURTS AND VIOLATES THE SEPARATION-OF-POWERS DOCTRINE.

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). Similarly, "[t]he legislature may put reasonable restrictions upon constitutional functions of the courts," but it may not "defeat or materially impair the exercise of those functions." *Brydonjack v. State Bar of Cal.*, 208 Cal. 439, 444 (1929). With regard to the courts' inherent power to insure the orderly administration of justice, the legislature "may at all times aid the courts and may even regulate their operation so long as their efficiency is not thereby impaired." *Millholen v. Riley*, 211 Cal. 29, 33-34 (1930). Proposition 66 violates these limitations on the legislature's power over the courts in several ways.

A. Improper Time Limits and Priorities on the Courts

Petitioners' Preliminary Reply made clear that various provisions of Proposition 66—including its requirement that the courts complete the state appeal and the initial state habeas corpus review within five years—violate the separation-of-powers doctrine by imposing impracticable or impossible

time limits on California's courts and by forcing California's courts to unduly prioritize certain matters at the expense of others. *See* Preliminary Reply at 13-32.

Intervenor does not take this argument head-on. For example, Intervenor does not dispute that Proposition 66 mandates that *all of* the following activities be squeezed into a five-year timeframe: (1) appointment of counsel for the automatic appeal; (2) briefing of the automatic appeal; (3) Supreme Court review of the automatic appeal; (4) appointment of habeas counsel; (5) filing of the initial habeas petition; (6) response to the initial habeas petition; (7) resolution of the initial habeas petition; (8) resolution in a Court of Appeal of any appeals therefrom; and (9) resolution in this Court of any appeals therefrom. *See id.* at 18-19. Intervenor also does not dispute that, in California, these various steps take much, much longer. Intervenor's Return at 38. Intervenor also does not dispute that the problems presented by Proposition 66 will be very serious in the short-term—forcing a significant backlog of cases through the system at an expedited rate. *Id.* Finally, Intervenor does not challenge Petitioners' assertion that the relevant time limitations in Proposition 66 are mandatory, not permissive.

Instead, Intervenor argues that Petitioners' challenge to Proposition 66's time limits fails as a facial challenge, and that it is too fact-intensive for this Court to address. Intervenor's Return at 37, 39. Intervenor oversimplifies Petitioners' arguments and misapplies relevant case law.

1. **Facial Versus As-Applied Challenges**

The concurring-and-dissenting opinion in *California Redevelopment Association v. Matosantos*, 53 Cal. 4th 231 (2011), includes a thorough discussion of the distinction between facial and as-applied challenges, as well as the applicable standard for facial challenges. "Generally, a facial challenge to the constitutionality of legislation 'considers only the text of the measure itself, not its application to the particular circumstances of an individual.'" *Id.* at 277 (Cantil-Sakauye, C.J., concurring and dissenting) (quoting *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1084 (1995)). "In contrast, an 'as applied' challenge to the constitutionality of legislation involves an otherwise facially valid measure that has been applied in a constitutionally impermissible manner." *Id.*

> In describing petitioners' burden, we have sometimes articulated differing standards. Under the strictest standard, "'[t]o support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute. . . . Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.'" [Citations.] Under the more lenient standard, petitioners need only demonstrate that the measure "conflicts with [the Constitution] 'in the *generality* or *great majority* of cases.'" [Citations.]

Id. at 278.

Intervenor relies on *Tobe*, 9 Cal. 4th at 1102, for the proposition that "if a challenged enactment 'is capable of constitutional application' then a

facial challenge fails." Intervenor's Return at 39. Reference to *Tobe*'s facts is necessary to give meaning to this statement. In *Tobe*, homeless persons and others challenged an ordinance that banned camping and storage of personal property in designated public areas. *Tobe*, 9 Cal. 4th at 1080-1081. Although the language of the ordinance was target-neutral, the petitioners argued that the government's "pattern of arresting, detaining, harassing and incarcerating involuntarily homeless persons" violated those persons' rights. *Id.* at 1086. The court found that such arguments were more appropriately raised in as-applied challenges: "Since the Santa Ana ordinance does not on its face reflect a discriminatory purpose, and is one which the city has the power to enact, its validity must be sustained unless it cannot be applied without trenching upon constitutionally protected rights." *Id.* at 1102.

Superior Court v. County of Mendocino, 13 Cal. 4th 45 (1996), on which Intervenor also relies, is similar. That case addressed the facial validity of a statute that authorized a county to designate days on which the trial courts of the county would not be in session. *Id.* at 48. The question was whether that statute, on its face, defeated or materially impaired the constitutional functions of the courts. *Id.* at 59. This Court answered no, because it could not predict how many "unpaid furlough days" the counties would designate, or under what circumstances. *Id.* at 60-61 ("It is possible, for example, that the caseload of a superior or municipal court at a particular time might permit closing the court on one or more furlough days without a

serious debilitating effect upon the court's ability to fulfill its constitutional functions.").

Thus, in both *Tobe* and *Mendocino*, there existed significant factual questions that the Court was not in a position to answer. In *Tobe*, evidence would be required to show that the statute, neutral on its face, was being enforced in a discriminatory way. In *Mendocino*, evidence would be required to show how many unpaid furlough days the counties *did* designate, and whether that number of unpaid furlough days impaired the courts' functioning.

On the other side of the coin lies *Matosantos*, 53 Cal. 4th 231. That case dealt with a statute that conditioned further operations of redevelopment agencies on payments by those agencies' community sponsors to state funds benefiting schools and special districts. *Id.* at 242. The Court found that statute facially unconstitutional in light of a constitutional prohibition against requiring "a community redevelopment agency (A) to . . . transfer, directly or indirectly, taxes . . . allocated to the agency . . . to or for the benefit of the State, any agency of the State, or any jurisdiction." *Id.* at 264. A concurring-and-dissenting opinion disagreed that the statute was *facially* unconstitutional, reasoning that it left open the possibility that an agency's community sponsors could make payments, not from tax increment funds, but from other sources of funding. *Id.* at 287. The majority opinion disregarded this argument.

Notably, although *Matosantos* involved an original writ in this Court, both the majority opinion and the concurring-and-dissenting opinion relied on law review articles and evidence to describe the context in which the statute at issue would operate. *See, e.g., id.* at n.5 ("According to the Association's evidence, more than 98 percent of all redevelopment agencies are governed by a board consisting of the county board of supervisors or the city council that created the agency."); *id.* at 293 (referencing declarations provided on behalf of California's cities and counties). *Matosantos* thus stands for the propositions that: (1) consideration of the general context in which a statute will operate is not inappropriate for a facial challenge; and (2) a statute that creates an overarchingly unconstitutional system cannot be saved by limited hypotheticals about how the unconstitutionality might be avoided. *See also Cal. Teachers Ass'n v. California*, 20 Cal. 4th 327, 347 (1999) ("[A]lthough we may not invalidate a statute simply because in some future hypothetical situation constitutional problems may arise, neither may we ignore the actual standards contained in a procedural scheme and uphold the law simply because in some hypothetical situation it might lead to a permissible result.") (citation omitted); *Larson v. City and County of San Francisco*, 192 Cal. App. 4th 1263, 1282 (2011) (finding a statute facially invalid under the judicial powers clause despite "hypothetical instances" in which it could be applied constitutionally); *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 343 (1997) ("[A] facial challenge to a statutory provision that broadly impinges upon fundamental constitutional rights may

not be defeated simply by showing that there may be some circumstances in which the statute constitutionally could be applied . . . ."); *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259, 272 (1970) ("When, as here, a statute contains unconstitutionally broad restrictions and its language is such that a court cannot reasonably undertake to eliminate its invalid operation by severance or construction, the statute is void in its entirety regardless of whether it could be narrowly applied to the facts of the particular case before the court."); *Blair v. Pitchess*, 5 Cal. 3d 258, 282 (1971) ("[A] statute cannot be upheld merely because a particular factual situation to which it is applicable may not involve the objections giving rise to its invalidity.") (quoting *People v. Stevenson*, 58 Cal. 2d 794, 798 (1962)).

2. **Petitioners' Facial Challenge Has Merit.**

In line with this precedent, Petitioners have shown that Proposition 66's timing provisions "inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." *Matosantos*, 53 Cal. 4th at 278. The time limits and other directives in Proposition 66 are impracticable or impossible and will force California's courts to unduly prioritize capital matters at the expense of other matters. Further, implementation of Proposition 66 will immediately throw this Court and the lower courts into chaos by forcing a significant and immediate departure from current procedures and timelines, thereby unconstitutionally interfering with the functioning and efficiency of the courts. *See Oppenheimer v. Ashburn*, 173 Cal. App. 2d 624, 632-633 (1959) (holding a law facially invalid for

interfering with "the judicial prerogative"); *Austin v. Lambert*, 11 Cal. 2d 73, 79 (1938) (holding a law facially invalid as an "unwarranted and unlawful interference with the constitutional and orderly processes of the courts."). The victims of this chaos will be the courts themselves, inmates on death row, the attorneys who represent them, and *all other litigants* seeking to be heard by the courts.[2]

Intervernor's arguments to the contrary all fail. Unlike *Tobe* and *Mendocino*, there is in this case no open question of fact that this Court is unable to address. Instead, as in *Matosantos*, this Court need only consider Proposition 66 and the broader context in which it will operate to determine that its time limits and other directives unreasonably invade the California courts' inherent authority to administer their cases. There is no better authority on the current context surrounding capital appeals and capital habeas corpus petitions than this Court.

Intervenor argues that *People v. Engram*, 50 Cal. 4th 1131 (2010), stands for the proposition that statutes "such as this" should be evaluated only on an as-applied basis. Intervenor's Return at 40. But the statute in *Engram* is very different from the time limitations at issue here, in that it left room for the courts to exercise their discretion. Specifically, the statute in *Engram* required only that criminal cases be given precedence over civil

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[2] Proposition 66's time limitations on the Courts thus implicate the fundamental due process rights of both inmates on death row and all other litigants.

matters "to the greatest degree that is consistent with the ends of justice." *Engram*, 50 Cal. 4th at 1150. Because that statute was not of "an absolute and overriding character," *id.* at 1137, it was appropriate to evaluate, on a case-by-case basis, the way in which the courts applied it. The same is not true with respect to Proposition 66. The time limitations set forth in Proposition 66 *are* of an absolute and overriding character—enforced by means of mandamus and leaving no channel open for the exercise of the courts' discretion. For that reason, they are facially unconstitutional.

With respect to the five-year time limit in particular, Intervenor argues that "courts can and should undertake determined efforts . . . to complete these cases within the stated time or as soon as possible thereafter consistently with their constitutional responsibilities," and that "[w]hether compliance with the limit was feasible and whether a court's delay failed to give sufficient weight to the Proposition 66 requirement" can be decided later. Intervenor's Return at 42. This argument fails for the same reason. While such a solution was appropriate in *Engram*, where the statute allowed for the exercise of the court's discretion, that solution is not appropriate where, as here, the statute is mandatory and uncompromising. Intervenor cannot reasonably suggest that a facial challenge to Proposition 66 is inappropriate because the courts can simply choose to violate the statute's clear terms. *If* this Court can save Proposition 66 by construing its terms to restore discretion to the courts, the time to do so is now.

Intervenor also suggests that Petitioners' facial challenge fails because at least some cases can likely be completed within five years, or because the five-year time limit may be achievable once the present backlog has been eliminated. Intervenor's Return at 38. That is not the point. Petitioners have shown that Proposition 66's deadlines, imposed across all capital cases, will immediately create an impracticable, inefficient system that will force the courts to unduly prioritize capital cases at the expense of other types of matters. Intervenor's limited "hypothetical instances" cannot change the unconstitutionality of the overarching scheme. *Larson*, 192 Cal. App. 4th at 1282; *cf. Matosantos*, 53 Cal. 4th 231 (1996) (ignoring such hypotheticals raised by the dissent).

Intervenor also tries to create disputes of facts where there are none. For example, Intervenor criticizes Petitioners for citing to a law review article for the proposition that Timothy McVeigh volunteered for execution, claiming that "neither Intervenor nor the court has any way of determining if it is true." Intervenor's Return at 38. This "disputed" fact is immaterial. Petitioners' argument, in criticizing *Intervenor's* citation to the McVeigh case, was that citing to a high-profile *federal* case as proof that *all California cases* can be processed within a fixed time period is nonsensical. Preliminary Reply at n.4. For the same reason, Intervenor's claim that it has a "systematic data set" evaluating *federal* court of appeals resolutions of capital direct appeals, Intervenor's Return at 38, is irrelevant. Federal courts

have different burdens and different resources available to them. Their experience does not govern this case.

Intervenor also challenges Petitioners' assertion that the superior courts are too overburdened to adequately handle the significant additional caseload that Proposition 66 would impose upon them. Intervenor claims that *Engram*, 50 Cal. 4th 1131, which describes in detail the overburdening of the Superior Court of Riverside County, describes facts that are too old to be relevant. Intervenor's Return at 38-39. Intervenor then complains that Petitioners provide "no evidence of the current situation." *Id.* Wrong. Petitioners quoted Paula M. Mitchell and Nancy Haydt, *California Votes 2016: An Analysis of the Competing Death Penalty Ballot Initiatives*, Alarcón Advocacy Center, Loyola Law School, July 20, 2016, at 11, for the precise proposition that California's superior courts continue to be severely overburdened. While Intervenor dismisses that analysis as "partisan," the fact is that the section that Petitioners quoted relied almost entirely on a November 2015 Fact Sheet published by California's Judicial Council. That Fact Sheet states:

> California continues to suffer from a severe shortage in the number of trial court judges. The ramifications are serious and far-reaching, and include a significant decrease in Californians' access to the courts, compromised public safety, an unstable business climate, and backlogs in some courts that inhibit fair, timely, and equitable justice.
>
> A detailed analysis of judicial workload conducted in 2014 identified a need for more than 250 additional

> judges to satisfy workload requirements in California's 58 Superior Courts.

Fact Sheet: New Judgeships, JUDICIAL COUNCIL OF CALIFORNIA, Nov. 2015, p. 1, *available at* http://www.courts.ca.gov/documents/fact-sheet-new-judgeships.pdf. Intervenor cannot reasonably dispute facts set forth by California's Judicial Council.[3] *See also* LACBA Amicus Letter (describing the severe impact that Proposition 66 will have on the courts); California Appellate Project Amicus Letter (same).

Intervenor ignores altogether Petitioners' argument that Proposition 66 impairs this Court's power to determine the qualifications of those who appear before it, *see* Preliminary Reply at 27 (citing *Brydonjack*, 208 Cal. 439), as well as Petitioners' argument that new §1509.1(c) unquestionably violates the separation-of-powers doctrine by mandating that certain appeals in capital habeas proceedings "shall have priority over all other matters." At the least, the Court should declare these portions of Proposition 66 facially invalid.

Finally, Intervenor argues that "[n]o ill effect" will follow from postponing Petitioners' challenge until an as-applied challenge can be brought. Intervenor's Return at 40. This statement is patently wrong. As Petitioners have shown, implementation of Proposition 66's time limitations will severely impact the courts, inmates on death row, their counsel, and

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[3] Petitioners are filing herewith a request for judicial notice with regard to this Fact Sheet and other similar documents relied upon in Petitioners' Preliminary Reply.

other litigants seeking to be heard. These considerations weigh strongly in favor of deciding Proposition 66's constitutionality now, as opposed to allowing it to cause disruption for an unknown period of time before being deemed unconstitutional.

B. Habeas Corpus Venue and Related Provisions

The California Constitution provides that this Court has original jurisdiction in habeas corpus proceedings. Cal. Const. art. VI, §10. In line with that, capital habeas corpus petitioners regularly file their petitions in this Court in the first instance.

New §1509(a) provides that a capital habeas corpus petition "filed in any court other than the court which imposed the sentence should be promptly transferred to [the court which imposed the sentence] unless good cause is shown for the petition to be heard by another court." New §1509(a) thus violates the Constitution by acting to remove original capital habeas corpus proceedings from this Court's purview. *See Gerawan*, 247 Cal. App. 4th at 294.

As Petitioners have argued, new §1509(a) is similar to a Rule of Court found unconstitutional in *In re Kler*, 188 Cal. App. 4th 1399 (2010). The invalidated rule 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.

Id. at 1402. The *Kler* court found that rule "inconsistent with the California Constitution to the extent it require[d] petitions for writ of habeas corpus challenging denial of parole to be first filed in the superior court." *Id.* at 1404. Put another way, the rule defeated the Court of Appeal's jurisdiction to the extent it revoked that court's ability to choose, in its discretion, to hear the case. *Id.* at 1403-1404. Because new §1509(a) similarly limits the ability of the Courts of Appeal and this Court to choose to hear capital habeas corpus petitions brought before them, new §1509(a) is similarly unconstitutional.

Intervenor argues that new §1509(a) is less restrictive of the courts' jurisdiction than the rule invalidated in *Kler*, because the *Kler* rule used the word "must," while new §1509(a) uses the word "should." Intervenor's Return at 26. This argument is too simple. While "should" generally has less force than "must," it needs to be read in context. *See In re Estate of Chadbourne*, 15 Cal. App. 363, 368-369 (1911); *see also Kler*, 188 Cal. App. 4th at 1402 (relying on Rules of Court definitions of "should" and "must" in reaching its determination).

Proposition 66 includes several signals indicating that the "should" in new §1509(a) was meant to be mandatory. For example, the ballot argument in favor of Proposition 66 argued that, under Proposition 66, "[t]he trial courts who handled the death penalty trials and know them best ***will*** deal with the initial [petitions]." Voter Information Guide, p. 108 (emphasis added). As another example, several of the provisions of Proposition 66

depend on the idea that the Supreme Court *will* transfer these petitions to the superior courts. *See, e.g.*, §1509(f) (providing a timeframe in which the superior courts will resolve initial petitions); §1509.1 (creating a system of appeals from superior court decisions on initial petitions). As yet another example, other provisions of Proposition 66 work together with new §1509(a) to move review of initial petitions from the Supreme Court to the superior courts. *See, e.g.*, §1509(b); §68662. In this context, it is clear that new §1509(a) is directed at restricting the appellate courts' jurisdiction to hear initial petitions for habeas corpus. For that reason, it is unconstitutional.

Intervenor argues that new §1509(a) is constitutional because it is similar to a rule of judicial procedure established in *In re Roberts*, 36 Cal. 4th 575 (2005). Not so. Unlike new §1509(a), the rule established in *Roberts* did nothing to impair the appellate courts' discretion to hear initial petitions for habeas corpus. Specifically, the *Roberts* rule "direct[ed] that, 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. The *Roberts* rule thus purported to govern the behavior of *petition filers* and *superior courts*—it said nothing about what an appellate court receiving such a petition should do. Instead, it simply reinforced the long-standing rule that "a reviewing court ***has discretion*** to deny without prejudice a habeas corpus petition that was not filed first in a proper lower court." *In re Steele*, 32 Cal.

4th 682, 692 (2004) (emphasis added) (cited in *Roberts*, 36 Cal. 4th at 593-594). In contrast, new §1509(a) both: (1) directs that an appellate court "should" transfer away original habeas corpus petitions; and (2) requires a showing of "good cause" before an appellate court may keep such a petition. Because new §1509(a) purports to both limit and direct the appellate courts' discretion to hear the cases before them, it is unconstitutional.

This is especially so because the meaning of "good cause" in this context is unclear. While *Kler* set forth "good cause" reasons for a Court of Appeal to keep an original petition for habeas corpus, and *Roberts* and *Griggs v. Superior Court*, 16 Cal. 3d 341 (1976) set forth "good cause" reasons for such cases to be sent to various superior courts, there is no such record with respect to this Court. It appears that any meaningful understanding of the "good cause" standard will severely restrict the Supreme Court's ability to hear original petitions for habeas corpus. Intervenor agrees. *See* Intervenor's Preliminary Opp. at 27 (stating that "[i]n almost all cases, it will be the superior court" who, under Proposition 66, will hear the initial petition).

New rule §1509(a) is more expansive than the *Roberts* rule in several additional ways. First, the *Roberts* rule dealt only with a specific type of habeas petition—those concerning parole suitability. New §1509(a), in contrast, covers *all* capital habeas petitions. Second, the invalidated *Kler* rule contemplated that the higher courts *would* address original habeas petitions—only expecting that the trial courts do so first. In contrast, new

§1509(a), in combination with new §1509.1(a), creates a system in which the Courts of Appeal or Supreme Court will *never* address the petition on an original basis.[4] Third, the *Roberts* rule, which dealt with suitability for parole, did not govern habeas petitions filed by capital prisoners (who, naturally, are not eligible for parole). As this Court has noted, it is important that it "retain broad powers of judicial review of death sentences to assure that each sentence has been properly and legally imposed and to safeguard against arbitrary or disproportionate treatment." *People v. Frierson*, 25 Cal. 3d 142, 186-187 (1979). New §1509(a) guts those powers.

Intervenor takes issue with the fact that Petitioners did not use the word "venue" in their analysis. Intervenor Return at 24. Neither did *Griggs*. Neither did *Kler*. And for good reason: "venue" is not at issue here. Questions of "venue" deal with where, *geographically*, a case should be brought. *See, e.g.*, Black's Law Dictionary (10th ed. 2014), venue ("The territory, such as a country or other political subdivision, over which a trial court has jurisdiction."); Ballentine's Law Dictionary (2010), venue ("The

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[4] Intervenor has two responses to this argument, neither of which has merit. First, Intervenor questions "how a successive writ in the court of appeal is better for the defendant than an appeal." Intervenor's Return at 26. Intervenor is well-aware that new §1509.1 places limits on the newly created appeal process that do not exist with respect to the prior successive writ system. Second, Intervenor claims that, with regard to the Supreme Court, "it is already the law that a petition for review rather than a successive original petition is the preferred procedure." *Id.* Regardless of what is the "preferred procedure," the fact is that, under the pre-Proposition 66 scheme, capital defendants can seek review of a denial of their petition in the Court of Appeal by filing an original petition in the Supreme Court. *In re Catalano*, 29 Cal. 3d 1 (1981).

county or district wherein a cause is to be tried."). The question of what *level* of court should address a case in the first instance is not a question of venue.

Roberts is not to the contrary. *Roberts* used the word "venue" only when discussing the geographical location in which a habeas petition should be heard. *See, e.g.*, *Roberts*, 36 Cal. 4th at 579-580 ("Under the procedure generally applicable to habeas corpus petitions, the court in which such a petition initially is filed . . . has discretion to adjudicate the case or, in the event the court determines that ***resolution is more appropriate in another venue***, to transfer the case for resolution ***to a court in another county***."); *id.* at 586 ("We therefore believe that considerations of judicial economy and efficiency weigh against a case-by-case approach and in favor of our making the determination ***which venue is proper*** in all such cases . . . . Accordingly, we begin by examining . . . which court—***that located in the county of sentencing or that in the county of incarceration***—properly should hear and decide such a petition."); *id.* at 593 ("[W]e direct that a petitioner who seeks to challenge by means of habeas corpus the denial of parole . . . should file the petition ***in the superior court located in the county*** in which the conviction and sentence arose, and that the petition should be adjudicated in ***that venue***.") (all emphasis added). Once *Roberts* dealt with the venue question, it *additionally* set forth a rule of judicial procedure as to which *level* of court should hear, in the first instance, a

habeas petition related to parole suitability. Nothing in *Roberts* indicates that that secondary rule was a question of venue.

Intervenor also argues that the rules established in the *Griggs-Roberts* line of cases are based on the Supreme Court's supervisory power, and so are "subordinate to legislative will." Intervenor's Return at 27. It is not clear what this argument accomplishes. The crux of Petitioners' argument is not that new §1509(a) violates the *Griggs-Roberts* line of cases.[5] Instead, the crux of Petitioners' argument is that new §§1509(a) and 1509.1 unconstitutionally impair the courts' jurisdiction by constraining the appellate courts' discretion to hear cases that the California Constitution places within their original jurisdiction. For the same reason, new §§1509(a) and 1509.1 also violate the separation-of-powers doctrine.

C. Habeas Appeals to the Courts of Appeal

Petitioners argued in their Preliminary Reply that Proposition 66 impairs this Court's constitutional appellate jurisdiction over judgments of death by creating a right to appeal initial habeas petitions in the Courts of Appeal. *See, e.g.*, New Pen. Code §1509.1(a)-(c). Intervenor responds, based on irrelevant case law, that the Supreme Court's constitutional appellate jurisdiction "when judgment of death has been pronounced" does

[5] Although new §1509(a) *does* violate *Griggs*' "general rule" that "the court wherein the petition is presented must, if the petitioner has otherwise complied with pertinent rules, file the petition and determine whether it states a prima facie case for relief." *Griggs v. Superior Court*, 16 Cal. 3d at 344-347.

not apply to capital habeas cases. Intervenor's Return at 43. This argument, lacking any basis, completely ignores Penal Code §1506, which provides—consistent with the Constitution—that appeals in habeas cases "where judgment of death has been rendered" should go to the Supreme Court. That the language used in both the Constitution and the Penal Code is so similar indicates that it has the same meaning, and that capital habeas cases are considered cases where "judgment of death has been pronounced."

Intervenor's only real response to this argument is that Petitioners did not raise it in their initial Petition. But this Court "is empowered to decide a case on any proper points or theories, whether urged by counsel or not." *Tan v. Cal. Fed. Sav. & Loan Ass'n.*, 140 Cal. App. 3d 800, 811 (1983) (citations omitted); *see also Burns v. Ross*, 190 Cal. 269, 275-76 (1923) ("[T]his court is undoubtedly at liberty to decide a case upon any points that its proper disposition may seem to require, whether taken by counsel or not.") (internal quotation and citation omitted). Here, because the argument was raised in Petitioners' Preliminary Reply, Respondents and Intervenor had an opportunity to respond. Thus, Respondents and Intervenor cannot argue that they have been prejudiced by the timing of Petitioners' argument.

D. Successive and Untimely Petitions

Petitioners have argued that new Penal Code §1509(d), which severely limits court review of successive and "untimely" petitions for habeas corpus, invades both: (1) the courts' constitutional jurisdiction over original habeas corpus proceedings; and (2) the courts' inherent power "to

fairly and efficiently administer all of the judicial proceedings that are pending before it." *Engram*, 50 Cal. 4th at 1146. In response, Intervenor makes policy arguments about how successive and "untimely" habeas corpus petitions are a burden on the system. Intervenor's Return at 27-28, 34. These policy arguments are beside the point. The point is that new §1509(d) purports to eliminate this Court's discretion to review "those rare or unusual claims that could not reasonably have been raised at an earlier time." *See In re Reno*, 55 Cal. 4th 428, 452 (2012). In so doing, it both impairs this Court's jurisdiction and violates the separation-of-powers doctrine.

1. **Successive Petition Bar**

In their Preliminary Reply, Petitioners showed that Proposition 66's limitation on court review of successive petitions was a sharp departure from prior practice, and would close a "safety valve" that the courts had long found necessary in light of "[t]he magnitude and gravity of the penalty of death." *See* Preliminary Reply at 33-34 (quoting *In re Clark*, 5 Cal. 4th 750, 797 (1993)).

In response, Intervenor continues to argue that *Felker v. Turpin*, 518 U.S. 651 (1996), supports the constitutionality of new §1509(d). Intervenor's Return at 29. It does not. With respect to the standard for hearing successive petitions, *Felker* determined that AEDPA's limitations did not constitute an unconstitutional suspension of the writ of habeas corpus because those limitations were generally in line with prior federal

judicial decisions and statutory rules governing successive petitions. *Felker*, 518 U.S. at 664. Noting that "the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions," the Court concluded that "[t[he added restrictions which [AEDPA] places on second habeas [corpus] petitions are well within the compass of this evolutionary process." *Id.*; *see also Lonchar v. Thomas*, 517 U.S. 314, 322 (1996) ("[T]he history of the Great Writ of Habeas Corpus reveals . . . the gradual evolution of more formal judicial, statutory, or rules-based doctrines of law."). *Felker* is thus distinguishable for three reasons. First, Proposition 66's ban on successive and "untimely" habeas corpus petitions is *not* in line with any such evolutionary process occurring in California. *See Allen v. Butterworth*, 756 So. 2d 52, 63 (Fla. 2000) (federal and state law are different in this area); *Lott v. State*, 334 Mont. 270, 275 (2006) (same). Intervenor agrees. *See* Intervenor's Preliminary Opposition at 35 ("Petitioners bemoan the fact that Proposition 66 disrupts existing law by making a different rule from the rule of *In re Clark* and *In re Robbins* [citations.] ***Of course it does. Major reforms are supposed to be disruptive***.") (emphasis added). Second, the legal challenge does not allege suspension of the writ. Third, AEDPA "leaves primary responsibility with the state courts for [death] judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable." *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002). In other words, the federal

courts, at some level, rely on the state courts to get it right. *See Curiel v. Miller*, 830 F.3d 864, 872-873 (9th Cir. 2016) (Reinhardt, J., concurring) ("Hamstrung as the federal courts now are as a result of these post-AEDPA decisions, state supreme courts have become, at least for the time being, the last safeguard of the United States Constitution in the vast majority of criminal cases, and the last guardian against constitutional violations resulting from deliberate actions of state and local law enforcement and other officials.") In this context, procedures constraining judicial review that may be appropriate in federal court are not appropriate in California's state courts.

More generally, the *Felker* Court took pains to separate its own powers of review from AEDPA's mandates. Despite the fact that a Court of Appeals had denied Felker's motion for leave to file a successive habeas application, and despite the fact that AEDPA provided for no appellate review of such a denial, the Supreme Court considered Felker's petition. In so doing, the Supreme Court reasoned that "[a]lthough § 2244(b)(3)(E) precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court." *Felker*, 518 U.S. at 661. Similarly, when discussing certain restrictions on second or successive habeas corpus petitions, the Supreme Court left open the question of "[w]hether or not [it is] bound by these restrictions." *Id.* at 663. Finally, the Supreme Court relied on its own

rule of procedure—not on AEDPA—in deciding not to issue the writ. *Id.* at 665. Because Proposition 66 does not leave open to this Court the avenues that AEDPA left open to the Supreme Court, *Felker* is not on point.

Intervenor also relies on *Mendocino*, 13 Cal. 4th 45, to argue that Proposition 66's limitation on court review of successive petitions does not violate the separation of powers. As discussed above in Section 3.A.1, that case made the limited ruling that a statute was not *facially* unconstitutional because it could not "reasonably be suggested that, *under any and all circumstances*, a county's designation of one or more unpaid furlough days pursuant to section 68108 *necessarily* will 'defeat' or 'materially impair' a court's fulfillment of its constitutional duties." *Id.* at 60. Important here, *Mendocino* also emphasized that the statute at issue—which merely gave counties an option to limit the days when the courts were open—was "unlikely to affect the resolution of a particular controversy" and that it did "not intrude upon the judge's decisionmaking process." *Id.* at 65. The opposite is true here.

2. **Untimely Petition Bar**

New §1509(d) provides that "[a]n initial petition which is untimely under subdivision (c) . . . shall be dismissed" unless the court finds the defendant innocent or ineligible for the death penalty. Subdivision (c), for its part, provides that "the initial petition must be filed within one year" of when a trial court appoints counsel for the defendant. As with the successive petition rule, this rule is a drastic change from current practices in

California, because (1) it severely limits the time in which petitioners may file, *see* Supreme Court Policies Regarding Cases Arising From Judgments of Death at 1-1.1, *available at* http://www.courts.ca.gov/documents/PoliciesMar2012.pdf ("A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 180 days after the final due date for the filing of appellant's reply brief on the direct appeal or within 36 months after appointment of habeas corpus counsel, whichever is later."); and (2) it eliminates the courts' ability to consider whether there exists a legitimate reason for delay, *see Robbins*, 18 Cal. 4th 770, 780-781 (1998). Indeed, it is far more draconian even than the federal timeliness requirement. *See* 28 U.S.C. §2244(d) (expressly allowing delayed filings where, for example, a petitioner could not have, in the exercise of due diligence, earlier discovered the factual predicate of his claim).

Intervenor's only defense for Proposition 66's restrictive one-year timeliness provision is to suggest that "extreme cases might justify use of equitable tolling." Intervenor's Return at 35. Intervenor's only support for this idea is *Holland v. Florida*, 560 U.S. 631, 652 (2010), a distinguishable federal case.[6] Intervenor then argues vaguely that because the "tools are

[6] As an example, *Holland* found that AEDPA's statutory limitations period may be tolled for equitable reasons because, *inter alia*, it "does not set forth an inflexible rule requiring dismissal whenever its clock has run." *Holland*, 560 U.S. at 645 (quotations and citations omitted). But new §1509(d) *does* set forth an inflexible rule requiring dismissal after the expiration of the one-year time period.

available to deal with . . . exceptional situations, there is no basis for a facial attack." Intervenor's Return at 35. In other words, Intervenor argues that Petitioners' facial attack on new §1509(d) is inappropriate because a future court *might* determine that new §1509(d) is subject to equitable tolling. Putting aside Proposition 66's unambiguous timeliness bar, the fact that Proposition 66 was presented to the voters as speeding the death penalty postconviction review process, and the fact that Intervenor cites no California authority to support this idea, Intervenor's argument still fails. Whether new §1509(d) is subject to equitable tolling is a question of law that can be answered now, without reference to the facts of a specific case. *See Holland*, 560 U.S. at 645-649. If, indeed, the possibility of equitable tolling in extreme cases could save new §1509(d) (and it cannot), then Intervenor should have made that argument for this case, not reserved it for later.

E. Method-of-Execution Challenges

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 now concedes that habeas corpus may be an appropriate vehicle for method-of-execution challenges. Intervenor's Return at 35-36. According to that concession, §3604.1(c) *does* purport to strip the Courts of Appeal and the Supreme Court

of jurisdiction over such challenges. Intervenor argues, however, that §3604.1(c) is "constitutional beyond question in its primary application." Intervenor's Return at 35-36.

Matosantos, 53 Cal. 4th 231 (2011) is instructive here. In that case, this Court considered whether a statute providing that certain types of challenges "shall be brought in the Superior Court of the County of Sacramento" impaired this Court's jurisdiction to consider such a challenge in a petition for writ of mandate. *Id.* at 252. To avoid any such impairment, this Court construed the statute narrowly as "having no bearing on jurisdiction over 'special proceedings' such as petitions for writs of mandate." *Id.* at 252-253. If a similar solution is appropriate here, there is no reason for this Court not to engage in such construction at this time. There are no further facts that need to be considered to determine that §3604.1(c) is unconstitutional at least in its application to original habeas petitions.

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

Respondents and Intervenor fundamentally misconstrue Petitioners' equal protection challenge. Petitioners' equal protection claims are not based on an erroneous reading of SB1134—nor do they rely solely on SB1134 to succeed. Rather, SB1134 provides a recent and relevant example of the crux of Petitioners' equal protection argument: that under new §1509(d), capital defendants lose the right to pursue successive habeas

petitions via gateways other than evidence of actual innocence, such as a change in law. *See Clark*, 5 Cal. 4th at 767. Because there is no rational basis for eliminating equitable gateways to successive review for capital defendants *only*, Proposition 66 violates equal protection.

A. New §1509(d) Violates Equal Protection By Eliminating Gateways to Relief That Noncapital Defendants Enjoy.

While the language of SB1134 contains no explicit discussion of successive habeas petitions, that does not mean that SB1134 has no bearing on successive petitions. To the contrary, SB1134 serves as a gateway for capital and noncapital prisoners to file successive habeas petitions by virtue of the fact that it *changed the law* regarding the grounds for habeas relief. It has "long been the rule" that a change in the law or applicable facts may create a gateway that permits consideration of a subsequent or successive habeas petition. *See Clark*, 5 Cal. 4th at 767. Proposition 66 eliminates the currently existing gateways for capital prisoners and replaces them with a single gateway: "actual innocence."[7]

While SB1134 is an important example of how Proposition 66 violates capital defendants' equal protection rights, it is by no means the only one. Under the current scheme, any law that provides new or altered

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[7] Indeed, Intervenor *concedes* that new §1509(d) restricts access to successive habeas petitions for capital defendants only. Intervenor's Return at 46 ("In a successive petition, the petitioner must first pass through the gateway of an exception to the bar on successive petitions, which is the *Clark* standard for noncapital cases and now section 1509, subdivision (d) for capital cases.").

grounds for habeas relief, including grounds for penalty phase relief that are unrelated to a determination of guilt or innocence, could potentially serve as a gateway to file successive habeas petitions. Under Proposition 66, that gateway would be available for noncapital prisoners only. Intervenor's and Respondents' repeated efforts to show that SB1134 contains no language regarding successive petitions is nothing more than a straw man argument designed to deflect from the real issue.

Proposition 66 also purports to prevent capital prisoners from filing successive petitions that would otherwise be available based on the discovery of new material facts. Under Proposition 66, those new facts would have to be sufficient to show actual innocence, but the rule established by *Clark* is not nearly so limited. This Court's precedent recognizes that the bar on successive petitions should be set aside where the conviction or sentence constitutes a "fundamental miscarriage of justice," including error of "constitutional magnitude" that prejudiced the outcome of trial. *Clark*, 5 Cal. 4th at 797. New facts might demonstrate constitutional errors—such as prosecutorial misconduct or racial bias in jury selection—that are unrelated to the question of actual innocence and therefore would not serve as a gateway under Proposition 66. Yet they would continue to serve as a gateway for noncapital prisoners. This disparate treatment of capital and noncapital prisoners regarding the ability to pursue habeas corpus relief is the heart of the equal protection claim.

B. The Relevant Authority Supports Petitioners' Equal Protection Claim.

1. California Authority Does Not "Unambiguously" Support Respondents.

Respondents concede that the proper equal protection inquiry "is not whether persons are similarly situated for all purposes but ***whether they are similarly situated for the purpose of the law challenged***." Respondents' Return at 51 (emphasis added and internal quotations omitted). Paradoxically, in the very next sentence, Respondents claim that this Court has "previously and unambiguously determined" that capital and noncapital prisoners are not similarly situated. *Id.* But neither of the California Supreme Court decisions Respondents cite is analogous. To the contrary, those cases involve challenges to procedural laws primarily governing trial-level eligibility for the death penalty. *See People v. Manriquez,* 37 Cal. 4th 547 (2005) (multiple charges can be adjudicated in single trial even if this creates death eligibility); *People v. Jennings,* 50 Cal. 4th 616, 690 (2010) (". . . California's death penalty law does not deny capital defendants equal protection by providing certain ***procedural*** protections to noncapital defendants but not to capital defendants.") (emphasis added). Accordingly, they are not persuasive authority here.

While there may be a rational basis for treating capital and noncapital defendants differently in the context of sentencing—the very feature that distinguishes the two classes—it does not follow that capital and noncapital

prisoners are therefore dissimilarly situated for every conceivable purpose.[8] Unlike the laws at issue in *Manriquez* and *Jennings*, there is no inherent reason why capital prisoners alone should be denied access to substantive grounds on which to bring successive habeas corpus petitions. In fact, given the finality of judgment in a capital case, such distinctions are typically made *in favor* of capital defendants, not against. *See Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases.").

2. **Intervenor Misconstrues the Most Relevant Outside Authority.**

While this Court has not previously considered an equal protection claim in the context of restrictions on second and successive habeas petitions, one other court has done so, and its decisions are persuasive and remain good law. In *Allen*, 756 So. 2d 52, the Florida Supreme Court considered an equal protection challenge to the Florida Death Penalty Reform Act of 2000 ("DPRA"), a statute with striking similarities to Proposition 66. After invalidating the DPRA on separation-of-powers grounds, the *Allen* court further held that it violated equal protection

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[8] *See, e.g., State v. Noling*, No. 214-1377, 2016 WL 7386163, slip copy at 7 (Ohio Dec. 21, 2016) ("Even considering the attorney general's claims [that capital and noncapital defendants are not similarly situated], we would still find capital and noncapital offenders similarly situated here. The case law and statutes cited by the attorney general are inapposite because they are focused on imposition of a sentence.") (internal citations omitted).

principles because, like Proposition 66, it limited the ability of capital prisoners to pursue successive habeas corpus petitions without placing similar restrictions on noncapital prisoners. 756 So. 2d at 54 ("Additionally, the successive motion standard applies only to capital prisoners in violation of the principles of equal protection.").

Intervenor does not challenge the similarities between the DPRA and Proposition 66, but instead argues that, because *Allen* was decided on separation-of-powers grounds, its language concerning equal protection is irrelevant. The Florida Supreme Court's treatment of its own precedent, however, suggests otherwise. In *Abdool v. Bondi*, 141 So. 3d 529 (Fla. 2014), the court relied on *Allen* to distinguish between an unconstitutional law that limited the availability of successive habeas petitions and a constitutional law that governs habeas procedure, but does not restrict the filing of such petitions:

> In *Allen,* we noted that "[t]he successive motion standard of the DPRA . . . applies only to capital prisoners ***in violation of the principles of equal protection***." . . . . Further, as previously explained, the Act is distinguishable from the unconstitutional provision in the DPRA and does not ***unconstitutionally limit the number or type of postconviction motions that a capital defendant may file***."

141 So. 3d at 546 (emphasis added and citations omitted). Rather than treat *Allen*'s equal protection language as meaningless dicta, the Florida Supreme Court cited *Allen* to reaffirm the unconstitutionality of a law limiting successive petitions and by drawing a distinction between substantive and

procedural laws. The Florida Supreme Court's treatment of its own opinions is far more persuasive than Intervenor's selective analysis. And, as discussed below, Intervenor and Respondents have failed to identify any relevant outside authority to the contrary.

3. Intervenor and Respondents Ignore the Meaningful Distinction Between Procedural Rules and Substantive Limitations on Claims.

The distinction between the laws at issue in *Allen* and *Abdool* demonstrates the precise nuance in the law that Respondents and Intervenor ignore. Intervenor provides a long string citation of outside authority to give the impression that all[9] other courts to consider the issue permit treating capital and noncapital petitioners differently. Every case Intervenor relies upon, however, is distinguishable because the law at issue in each governs the *procedure* for bringing claims, not whether the claims can be brought at all. *See Dickerson v. Attorney General*, 488 N.E.2d 757 (Mass. 1986) (law requiring appeals to be filed with single judge as an initial matter); *Dickerson v. Latessa*, 872 F.2d 1116 (1st Cir. 1989) (same); *State v. Beam*, 766 P.2d 678 (Idaho 1988) (law creating special time limits for initial petitions for capital prisoners); *Rhoades v. Henry*, 611 F.3d 1133 (9th Cir. 2010) (same); *State v. Smith*, 684 N.E.2d 668 (Ohio 1997) (law creating single-tier appellate review process for capital defendants); *Smith v.*

[9] Intervenor initially asserted that no court had found capital and noncapital prisoners to be similarly situated for equal protection purposes, but it now acknowledges *State v. Noling*. Intervenor's Return at 51.

Mitchell, 567 F.3d 246 (6th Cir. 2009) (same). A contextual analysis of equal protection claims necessitates relying on authority where meaningful parallels exist between the challenged laws. The only court to address a substantive limitation on the availability of successive petitions for habeas relief concluded that treating capital and noncapital defendants differently violates equal protection. This Court should do the same.

C. The "Rational Bases" That Respondents and Intervenor Provide Do Not Justify Dissimilar Treatment of Capital Prisoners.

Respondents' and Intervenor's offered "rational bases" for dissimilar treatment all boil down to a single argument: that because capital prisoners receive "advantages" in other areas, Intervenor's Return at 52, limiting the grounds upon which they may file a successive petition is warranted. This argument has no merit in this context.

First, if a prisoner files a successive petition because of a newly enacted law (such as SB1134), by definition that ground for relief did not exist earlier, and even the most skilled, well-resourced attorney could not have obtained relief on that basis. Second, the "new facts" gateway under *Clark* already requires that the prisoner could not have discovered such facts earlier. *Clark* at 768. If it was not possible to discover the facts earlier, then no amount of additional counsel or procedural protections would substitute for the ability to file a successive petition when the facts do become available.

Second, taking Respondents' and Intervenor's arguments to their logical conclusions, if Penal Code §1473 were modified to include a new substantive ground for habeas relief, both capital and noncapital defendants would be able to raise this claim in their *initial* habeas petitions. But, while noncapital defendants would be able to *also* raise this claim in a successive habeas petition under the "change of law" gateway, under Proposition 66, capital defendants in *otherwise the same procedural posture* would be barred. By definition, habeas relief is appropriate where there is significant ground for concern that a prisoner is imprisoned or sentenced in violation of the law. *See In re Ford*, 160 Cal. 334, 340 (1911) ("[The writ of habeas corpus is] regarded as the greatest remedy known to the law whereby one unlawfully restrained of his liberty can secure his release . . ."). There is no rational basis for eliminating this avenue of relief simply because a capital defendant had the misfortune to file an initial habeas petition before a new claim became available. Although Intervenor suggests that eliminating all but one avenue through which capital defendants may bring a successive habeas petition is necessary to expedite their "fac[ing] the punishment they so richly deserve for the horrible crimes they chose to commit," Intervenor's Return at 51, this is not a legal argument. Equal protection demands that similarly situated groups be treated equally in the context of the applicable law, and §1509(d) violates this precept on its face.

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

Petitioners' Preliminary Reply explained in detail why the challenged provisions of Proposition 66 are not severable from each other or from the remaining provisions. Preliminary Reply at 50-55. In so doing, Petitioners discussed the requirement that, to be severable, an invalid provision must be grammatically, functionally, and volitionally separable. *Id.* at 50-51 (quoting *Raven*, 52 Cal. 3d at 355-356). Intervenor's attempt to dispute these points fails.

A. Proposition 66's Severability Clause Does Not Change the Analysis.

First, Intervenor argues that Petitioners paid insufficient attention to Proposition 66's severability clause. Intervenor is wrong. Petitioners explicitly based their discussion on a case that involved a near-identical severability clause to that in Proposition 66. *Raven*, 52 Cal. 3d at 345. Most importantly, both the severability clause in Proposition 66 and that in *Raven* make severable only "provisions . . . which can be given effect without the invalid provision or application." *Id.* The *Raven* court acknowledged that clause, and then applied "three criteria for severability: the invalid provision must be grammatically, functionally, and volitionally separable." *Id.* at 355 (quoting *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 821-22 (1989). The same analysis is appropriate here.

Intervenor argues that Proposition 66's severability clause entitles the proposition to a "presumption" in favor of severance. Intervenor's Return at

17 (quoting *Matosantos*, 53 Cal. 4th 231, 270 (2011)). Reference to the full quote from *Matosantos* is useful here:

> In determining whether the invalid portions of a statute can be severed, we look first to any severability clause. The presence of such a clause establishes a presumption in favor of severance. (*Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 331, 118 Cal.Rptr. 637, 530 P.2d 605 ["'Although not conclusive, a severability clause normally calls for sustaining the valid part of the enactment. . . .'"].) We will, however, consider three additional criteria: "[T]he invalid provision must be grammatically, functionally, and volitionally separable." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821, 258 Cal.Rptr. 161, 771 P.2d 1247.)

The approach in *Matosantos* is thus similar to that in *Raven*. While the existence of a severability clause may play some role, it is "not conclusive," and the reviewing court must still evaluate the grammatical, functional, and volitional separability of the invalid provision. *See also MHC Fin. Ltd. P'ship Two v. City of Santee*, 125 Cal. App. 4th 1372, 1393 (2005) ("When the ordinance contains a severability clause, an invalid provision is severable if it is grammatically, functionally, and volitionally separable.")

B. Grammatical Severability

"Grammatical separability, also known as mechanical separability, depends on whether the invalid parts 'can be removed as a whole without affecting the wording' or coherence of what remains." *Matosantos*, 53 Cal. 4th at 271 (quoting *Calfarm*, 48 Cal. 3d at 822). In their Preliminary Reply, Petitioners demonstrated that several of the provisions of Proposition 66 cross-reference and depend upon one another in a way that would render the

remaining provisions incoherent if others were removed. Preliminary Reply at 52. Intervenor disagrees, arguing generally that an enactment is severable "where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words." Intervenor Return at 17.

Specifically with respect to new §1509(a), Intervenor argues that the third sentence can be removed from that section without affecting the wording or coherence of the remainder of Proposition 66. Not so. The third sentence of §1509(a) is the sentence that provides that this Court and the Courts of Appeal should transfer petitions for writ of habeas corpus to the superior courts. But as Petitioners argued in their Preliminary Reply, removing that sentence from Proposition 66 would render incoherent at least: (1) new §1509(f), which provides the time limit within which the superior courts should resolve those transferred petitions; and (2) new §1509.1, which sets forth an appeal process for such transferred petitions.

With respect to new §190.6(d), Intervenor argues that the two invalid sentences can be removed from that section without affecting the wording or coherence of what remains. Whether this is true depends on how the Court construes the following provision in new §190.6(e):

> The failure of the parties or of a court to comply with the time limit in subdivision (b) shall not affect the validity of the judgment or require dismissal of an appeal or habeas corpus petition. If a court fails to comply without extraordinary and compelling reasons justifying the delay, either party or any victim of the offense may seek relief by petition for writ of mandate.

Given that subdivision (b) of §190.6 does not set forth a time limit for the courts, it is arguable that this reference to "the time limit in subdivision (b)" is a typographical error, and that the reference is, in fact, a reference to the time limit set forth in subdivision (d) of §190.6. If so, this provision would be rendered incoherent by the removal of a time limit from subdivision (d).

Intervenor makes no attempt to demonstrate that the remaining challenged portions of Proposition 66 are grammatically severable. Nor can it. For example, Petitioners have challenged the validity of new §1509(d). Removal of that section from Proposition 66 would render incoherent §§1509(c) and (e). As another example, Petitioners have challenged the validity of new §1509(f). Removal of that section would render incoherent §1509.1.

C. Functional Severability

People's Advocate, Inc. v. Superior Court, 181 Cal. App. 3d 316 (1986), cited by both Petitioners and Intervenor, sets forth a complete formulation of the test for functional severability:

> [T]he sections to be severed, though grammatically distinct, must be capable of independent application. [Citation.] . . . The final determination [inter alia] depends on whether 'the remainder . . . is complete in itself. . . .' [Citations.]" This might be called a functional test of severability. This too is contained in the severability clause. Section 9906 says that whatever language is left after severance must be capable of being "given effect". "[S]uch a clause does not require that we salvage provisions which even though valid are not intended to be independently operative." [Citation.]

> This means several things. The remainder must "'constitute[] a completely operative expression of the legislative intent. . . .'" [Citation.] The part to be severed must not be part of a partially invalid but unitary whole. 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. They must be capable of separate enforcement.

Id. at 331-332 (internal citations omitted). Petitioners have shown that many of the challenged portions of Proposition 66 do not meet this test.

First, the arguments that Petitioners raise above with respect to grammatical separability are equally applicable to functional separability. For example, at least §§1509(f), 1509(g), and 1509.1 do not "stand on their own, unaided" by §1509(a). To the contrary, they are "inextricably connected to [it] by policy considerations," and without it, they do not "constitute[] a completely operative expression of the legislative intent." *Id.* Section 1509(a) provides for the transfer of petitions for writ of habeas corpus from the Supreme Court and the Courts of Appeal to the superior courts. Sections 1509(f), 1509(g), and 1509.1 all depend upon and exist because of that transfer provision. So do §§1509(b) and 68662. It would not be appropriate to "salvage [these] provisions [which were] not intended to be independently operative." *Id.* The same is true for §§1509(c), (d), (e), and (g), all of which are functionally interrelated.

Second, as Petitioners argued in their Preliminary Reply, §§1509 and 190.6 are not functionally separable, because they create an interlocking system of deadlines for court postconviction review. *See* Preliminary Reply

at 53 (arguing that if §1509(a) were invalidated, §190.6(d), if left in place, would "purport to impose on the Supreme Court a five-year deadline for appellate review *and* for initial habeas review," which would be even more impracticable than the solution currently proposed by Proposition 66). Intervenor made no attempt to respond to this argument.

Finally, §§1239.1 and 68665, both of which are directed to expediting appointment of counsel, are not functionally separable from one another or from §§190.6 and 1509. These provisions all work together as parts of a "partially invalid but unitary whole" directed at speeding postconviction review in death penalty cases. *People's Advocate*, 181 Cal. App. 3d at 332.

D. Volitional Severability

The question for volitional severability is whether "the remainder of the measure probably would have been adopted by the people even if they had foreseen the success of petitioners' . . . 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) (emphasis added; internal quotation marks and emphasis omitted). Put another way, the valid portions of a statute are not volitionally severable from the invalidated portions if the invalidated portions were "of critical importance to the measure's enactment." *Jevne v. Superior Court*, 35 Cal. 4th 935

(2005) (quoting *Hotel Emps. and Rest. Emps. Int'l Union v. Davis*, 21 Cal. 4th 585, 613 (1999)). That said, if the valid and invalid portions both tend to accomplish the electorate's purpose in enacting the initiative, then courts have found that the electorate would likely have enacted the valid portions, even absent the invalid portions. *See Santa Barbara Sch. Dist. v. Superior Court*, 13 Cal. 3d 315, 331-32 (1975).

Intervenor argues that the electorate would have enacted the unchallenged portions of Proposition 66, even absent the invalid provisions, because "[a]ll of the reforms have the common purpose of facilitating the enforcement of judgments in capital cases." Intervenor's Return at 22. The Court should ignore this sleight of hand. The question is not whether the various provisions at issue relate to what *Intervenor now claims* was the purpose of the initiative. The question is whether the remaining provisions further the *electorate's* purpose in enacting the initiative.

As Petitioners argued in their Preliminary Reply, the Court should evaluate the electorate's purpose in enacting the initiative by looking at what arguments the initiative's proponents made in favor of it. The Argument in Favor of Proposition 66, drafted by Intervenor, focuses the electorate's attention on a few very specific portions of Proposition 66. Acknowledging that "[i]t may sound complicated," the Argument states that "the reforms are actually quite simple," and describes them as follows:

> HERE'S WHAT PROPOSITION 66 DOES:
>
> 1. All state appeals should be limited to 5 years.

> 2. Every murderer sentenced to death will have their special appeals lawyer assigned immediately. Currently, it can be five years or more before they are even assigned a lawyer.
>
> 3. The pool of available lawyers to handle these appeals will be expanded.
>
> 4. The trial courts who handled the death penalty trials and know them best will deal with the initial appeals.
>
> 5. The State Supreme Court will be empowered to oversee the system and ensure appeals are expedited while protecting the rights of the accused.
>
> 6. The State Corrections Department (Prisons) will reform death row housing; taking away special privileges from these brutal killers and saving millions.

The first five of these six points relate to speeding the postconviction review process. *That* is what Intervenor emphasized to the voters, and *that* is what voters sought to accomplish when they passed (by a narrow margin) Proposition 66.

The Analysis by the Legislative Analyst confirms this. Voter Information Guide, p. 108. The Legislative Analyst described Proposition 66 as follows:

> ***This measure seeks to shorten the time that the legal challenges to death sentences take.*** Specifically, it (1) requires that habeas corpus petitions first be heard in the trial courts, (2) places time limits on legal challenges to death sentences, (3) changes the process for appointing attorneys to represent condemned inmates, and (4) makes various other changes.

Id. (emphasis added). In other words, Proposition 66 was considered to have one main purpose: speeding court postconviction review in death penalty cases. It thus cannot be said "with confidence" that the electorate

would have separately adopted provisions of the initiative that do not further that purpose.[10]

Intervenor's only response is to argue, under *Gerken*, 6 Cal. 4th at 718-719, that an initiative provision need not have been mentioned in the ballot arguments to have been sufficiently before the electorate's attention.[11] That argument misses the point. Whether a provision was sufficiently before the electorate's attention is only half of the analysis. The second half of the analysis is whether the electorate would have *adopted* that provision in the absence of any invalidated provisions.

The valid provision at issue in *Gerken* satisfied the *first* half of the analysis because the Legislative Analyst emphasized it heavily, "specifically list[ing it] as one of the three main goals of the initiative" and "emphasiz[ing] the anticipated savings that would result from [it]." *Id.* at 718. No similar emphasis or analysis of the remaining provisions, such as the APA and HCRC provisions, exists in this case.

The *Gerken* provision then satisfied the *second* half of the analysis because it accomplished a purpose that *was* emphasized in the ballot arguments in favor of the initiative. Specifically, the ballot arguments placed "specific emphasis on [arguing against] committing public money to

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[10] Indeed, to the extent that the ballot materials even mention provisions directed toward other purposes, those provisions are listed at the bottom of lengthy lists. And those lists are invariably topped with provisions directed to speeding court postconviction review procedures.

[11] Intervenor also cites *Manduley v. Superior Court*, 27 Cal. 4th 537, 579-580 (2002) for this point, but that case is not about severability.

fund election campaigns." *Id.* at 719. Because the remaining provision prohibited "state and local elected officials from spending public funds on newsletters and mass mailings," *id.* at 718, it fell within that stated purpose. Thus, it was reasonable "to suppose that those who favor the proposition would be happy to achieve at least some substantial portion of their purpose." *Id.* at 719; *see also City of Woodlake v. Logan*, 230 Cal. App. 3d 1058, 1070 (1991).

Santa Barbara, cited by Intervenor, is similar. In that case, the Court concluded that the electorate would have enacted the valid portions of the proposition because the valid and invalid portions of the proposition both accomplished the precise goal that was touted to the voters in the ballot arguments. *See* 13 Cal. 3d at 323 ("The proponents of Proposition 21 in their published argument in support of the proposition . . . . asserted opposition to 'mandatory busing for the sole purpose of achieving forced integration' . . ."); *id.* at 331 ("[I]t seems that the valid and invalid portions of the proposition, while subsumed within an overall purpose to eliminate forced integration by busing without regard to the desirability of maintaining neighborhood schools, reflect separable methods of achieving this purpose."). *Hotel Employees* is also similar. In that case, the Court deemed a provision volitionally severable from the invalidated portions of the provision because it "tend[ed] to effectuate and expedite . . . one of the express goals of Proposition 5." 21 Cal. 4th at 615.

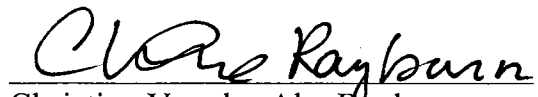
Here, in contrast, there is no correlation between the unchallenged provisions of Proposition 66 and the "express goals" of that proposition. For this reason, it cannot be said "with confidence" that the electorate would have enacted the unchallenged provisions absent the challenged ones. *See Metromedia, 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").

VI. CONCLUSION

Petitioners respectfully urge this Court to declare Proposition 66 null and void in its entirety.

Dated: March 20, 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 Further Reply in Support of Petition for Extraordinary Relief, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 13,994 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: March 20, 2017

Respectfully submitted,

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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 March 20, 2017, I served a true copy of the attached document entitled:

FURTHER REPLY IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF

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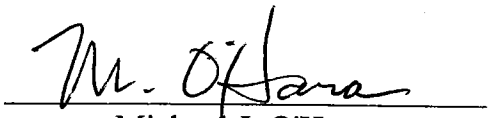

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