**DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MARCOS ESQUIVEL BARRERA,<br><br>Defendant and Appellant. | No. S103358<br><br>(Los Angeles County Superior Court No. PA029724-01)<br><br>Capital Case |

Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

The Honorable Ronald S. Coen

# APPELLANT'S SIXTH SUPPLEMENTAL REPLY BRIEF AND SUPPLEMENTAL BRIEF RE: AB 1071

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## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

### Federal Cases



### State Cases

**State Statutes**



**Constitutional Provisions**



**Other Authorities**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

| | |
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# APPELLANT'S SIXTH SUPPLEMENTAL REPLY BRIEF AND SUPPLEMENTAL BRIEF RE: AB 1071

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## I.
## THE RACIAL JUSTICE ACT, AS WRITTEN, IS IN HARMONY WITH ARTICLE VI, SECTION 13 AND PROPOSITION 7

The Attorney General agrees that the Legislature has the power to designate violations of the Racial Justice Act (RJA) miscarriages of justice that do not require a separate harmless error analysis. The Attorney General also agrees that the Legislature can make death ineligibility a remedy for racial bias notwithstanding the Briggs Initiative (Prop. 7, as approved by voters, Gen. Elec. (Nov. 7, 1978)). The Attorney General and several amici District Attorneys[1] limit their agreement, however, to "flagrant instances" of

[1] The California District Attorneys Association and the District Attorneys for the Counties of San Luis Obispo, Los Angeles,

racial bias—making a distinction between explicit and more subtle appeals to racial bias that the Legislature specifically rejected. The Attorney General and District Attorneys would have the Court rewrite the RJA so that it more closely resembles the outmoded prosecutorial misconduct paradigm that the Legislature sought to reform. Rewriting the RJA in that way is antithetical to its purpose, and the Attorney General fails to justify doing so. As written, the RJA is in harmony with article VI, section 13 of the California Constitution, and Prop. 7.

While this briefing was ongoing, the Legislature passed, and the Governor signed, Assembly Bill No. 1071 (2025-2026 Reg. Sess.) (AB 1071), which amends the RJA effective January 1, 2026. (Stats. 2025, ch. 721.) The Court then directed the parties to address the effect, if any, of AB 1071 on the issues in this case. Appellant discusses its effect on the three questions posed in the Court's previous briefing order in subsections A, B, and C, below, and its effect on the issues in his case more specifically in section II, below.

The Legislature passed AB 1071 because lower courts were failing to apply the RJA as intended, reverting instead to the failed status quo that addresses racial bias only in its most extreme and blatant forms. (Stats. 2025, ch. 721, § 1, subd. (a), citing *In re*

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and San Diego, each filed amicus briefs in response to this Court's June 12, 2025, order. (Brief of Amicus Curiae California District Attorneys Association (Sept. 29, 2025) ("CDAA"); Brief of Amicus Curiae District Attorney of County of San Luis Obispo (Oct. 2, 2025) ("SLODA"); Brief of Amicus Curiae District Attorney San Diego County (Sept. 29, 2025) ("SDDA"); Brief of Amicus Curiae District Attorney Los Angeles County (Sept. 29, 2025) ("LADA").)

*Mendoza* (2024) 2024 WL 5171483 (dis. opn. of Liu, J.) [expressing concern about the "silent evisceration of the RJA"].) AB 1071 is intended to correct course, reminding us that the RJA requires "bold, concerted, and ongoing effort" to eradicate racial bias in the criminal legal system that is the "result of centuries of historical and embedded racial injustice." (Stats. 2025, ch. 721, § 1, subd. (f).)

It falls to this Court to ensure that the RJA's promise is realized. To acknowledge that racial bias, whether flagrant or insidious, was a part of a defendant's trial, and nonetheless uphold the conviction or sentence that resulted from that trial, would contravene the Legislature's directive to eradicate bias and discrimination in the criminal justice system. (Stats. 2025, ch. 721, § 1, subd. (a) [insulating convictions and sentences tainted by racial bias is "discordant with the legislative intent of the RJA"].)

### A. The parties agree that article VI, section 13, does not require a prejudice analysis beyond that which is already inherent in Penal Code section 745, subdivision (a)(2).

Prejudice is inherent in every violation of Penal Code[2] section 745, subdivision (a)(2). The nature of the violation demonstrates its potential to affect the outcome. If an actor uses language during trial that an objective observer would see as an appeal to racial bias, there is a reasonable probability that appeal activated jurors' subconscious biases and compromised their ability to fairly evaluate the evidence. That is the science of implicit bias. The body of

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[2] All further undesignated statutory references are to the Penal Code unless otherwise specified.

research on what implicit bias is, how it works, and the harm that it causes is broadly accepted and foundational to the RJA. (Stats. 2020, ch. 317, § 2, subd. (g) ["The Legislature has acknowledged that all persons possess implicit biases . . . that these biases impact the criminal justice system . . . and that negative implicit biases tend to disfavor people of color"]; Supreme Court of California Issues Statement on Equality and Inclusion (June 11, 2020) <https://newsroom.courts.ca.gov/news/supreme-court-california-issues-statement-equality-and-inclusion> [as of Nov. 12, 2025] ["We state clearly and without equivocation that we condemn racism in all its forms: conscious, unconscious, institutional, structural, historic, and continuing"]; Brief of Amicus Curiae Fred T. Korematsu Center for Law and Equality; Six Additional Racial Justice Centers; and Undersigned Law Professors ("Korematsu Center et al."), pp. 13-30 [discussing the impact of implicit bias on decision making and the body of scientific research that "firmly supports the Legislature's conclusion that judicial integrity is compromised when implicit bias operates without an adequate remedy"]; *United States v. Ray* (6th Cir. 2015) 803 F.3d 244, 259-260 [recognizing the "proven impact of implicit biases on … behavior and decision-making"], and sources cited therein; cf. Brief of Amicus Curiae Criminal Justice Legal Foundation ("CJLF"), p. 18 ["implicit bias is often in the ear of the beholder"].)

Despite this consensus, neither the Attorney General nor amici curiae District Attorneys consider implicit bias in evaluating whether article VI, section 13, requires a separate prejudice analysis. The Attorney General instead argues that this Court's

questions on the matter were based on incorrect premises. (Respondent's Supplemental Brief on Racial Justice Act Remedy Questions ("SRB"), pp. 9-10.) The Attorney General returns to its familiar argument: that violations are already subject to the separate prejudice requirement in section 745, subdivision (k). (SRB, pp. 17-18.) But that reading of the RJA is wrong for all the reasons set forth in prior briefing; subdivision (k) does not apply to violations raised in pending appeals. It is notable that none of the subordinate law enforcement amici adopt the Attorney General's reading of subdivision (k).

The Attorney General also argues that only "flagrant" violations should be subject to reversal absent a separate prejudice analysis. The Attorney General distinguishes so-called "flagrant" violations from violations based on "minor" or "passing remarks," which he argues would be subject to the prejudice test set forth in subdivision (k). (SRB, p. 32; *id*., p. 22 [contrasting "flagrant" with "minor" or "technical" violations].) The Attorney General attempts to ground the distinction between "flagrant" and "minor" violations in the original article VI, section 4 1/2, added to the California Constitution in 1911 to avoid reversals for "unimportant errors" and "technicalities." (SRB, p. 12.) As appellant noted in his supplemental opening brief, those technical errors were along the lines of misspelling "first" in a filing, for which automatic reversal was clearly unjust. (Appellant's 6th Supplemental Opening Brief (6SAOB), pp. 22-23.) The Legislature, through AB 1071, reiterated its finding that racially discriminatory language or other exhibitions of bias during a criminal trial can never be categorized as a "minor"

or "technical" error akin to a typo in a charging document. (Stats. 2025, ch. 721, § 1, subd. (e) ["Racial bias in criminal prosecutions, in all its forms or degrees, is never minor or harmless"].)

Several District Attorney amici make a similar distinction between violations based on language they categorize as flagrantly biased – which they agree would be subject to reversal absent a separate prejudice analysis – and more subtle violations – which they argue must remain subject to a separate prejudice analysis. (SLODA, p. 12; CDAA, pp. 22-24.) One suggests that per se reversible error should be limited to gratuitous appeals to racial bias that have "no other purpose but to promote bigotry and hatred[.]" (SLODA, p. 12.) These proposals reduce the RJA to a restatement of existing due process law. (See, e.g., *Andrew v. White* (2025) 604 U.S. 86, [introduction of irrelevant and unduly prejudicial evidence violates due process and renders a trial fundamentally unfair].) But the Legislature intended the RJA to reform this law, not to restate it. It found that the legal system's failure to address racial bias except "in its most extreme and blatant forms" allowed racial bias in the criminal justice system to persist, largely unabated. (Stats. 2020, ch. 317, § 2, subd. (c).)

The RJA prohibits intentional and unintentional appeals to racial bias because both "inject racism and unfairness into proceedings." (Stats. 2020, ch. 317, § 2, subd. (i).) "The Legislature made 'abundantly clear' that its 'primary motivation for the legislation was the failure of the judicial system to afford meaningful relief to victims of unintentional but *implicit* bias' and 'to remedy the harm to the defendant's case and to the integrity of

the judicial system' that such bias causes. (*Bonds v. Superior Court* (2024) 99 Cal.App.5th 821, 828.)" (*People v. Wagstaff* (2025) 111 Cal.App.5th 1207, review den. Oct. 15, 2025 (dis. stmt. of Evans, J.).) The Legislature reaffirmed those goals in AB 1071 when it declared: "The RJA mandates that we face that racial bias exists in our criminal legal system, and that we remedy it. Racial bias in criminal prosecutions, in all its forms or degrees, is never minor or harmless." (Stats. 2025, ch. 721, § 1, subd. (e).)

While there may be a semantic difference between language that is expressly racist and language that implicitly appeals to racial bias, the difference does not support the distinction the Attorney General now proposes. Implicit appeals to racial bias result in equal or greater harm than flagrant violations. Code words, metaphors, and other implicit appeals activate jurors' subconscious biases without their awareness. (Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response* (2018) 86 Fordham L.Rev. 3091, 3101 ["Researchers have found that even the 'simplest of racial cues' can automatically evoke racial stereotypes and affect the way jurors evaluate evidence"].) The Legislature recognized the harm inherent in any appeal to racial bias when it prohibited both explicit and implicit appeals to racial bias. (§ 745, subd. (h)(4).)

The Attorney General does not locate "flagrant" within the statutory language of the RJA. There is no principled reason to treat "flagrant" exhibitions of explicit bias differently than more subtle appeals that prime implicit bias. The Attorney General's contrary

argument disregards the impact of implicit bias.[3] The District Attorney amici also ignore the impact of implicit bias in arguing that the RJA is excessive.[4] Implicit bias explains how a subtle appeal to racial bias can cause jurors to evaluate the evidence through a slanted lens. (Korematsu Center et al., pp. 17-18.) When errors arise that distort factfinding at that level, courts have never hesitated to identify them as miscarriages of justice. (See, e.g., *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 [finding defective reasonable doubt instruction required reversal absent separate prejudice analysis because it "vitiates *all* the jury's findings"].)

The Attorney General agrees that a separate prejudice analysis is not required for "flagrant" language because it resembles the types of errors which this Court has subjected to automatic reversal as not susceptible to a separate, ordinary, harmless error test. (SRB, pp. 22-23.) District Attorney amici agree that courts may reverse for flagrant language absent a separate prejudice analysis. (See SLODA, p. 12; CDAA, pp. 22-24.) The Attorney General ultimately concedes that "many applications of the RJA will involve errors whose characteristics made it sensible for the Legislature to

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[3] The Attorney General suggests that its reading avoids a constitutional conflict that theoretically would be created if a conviction were reversed because of "minor or passing remarks[.]" (SRB, p. 31.) But the RJA does not prohibit minor or passing remarks. It prohibits appeals to racial bias by significant trial actors. (§ 745, subds. (a)(2) & (h)(4).) Nor does the RJA require a court, employing the objective observer standard, to interpret a minor or passing remark as an appeal to racial bias.

[4] The District Attorney amici do not acknowledge "implicit bias" in their briefing.

have determined that a case-specific prejudice inquiry was not needed." (SRB, pp. 10, 22-23, 33-34). Yet subtle language shares the same characteristics.

Subtle appeals are just as harmful to juror decision making. (*State v. Zamora* (Wash. 2022) 512 P.3d 512, 524 [finding subtle references "are 'just as insidious' and 'perhaps more effective'"], quoting *State v. Monday* (Wash. 2011) 257 P.3d 551, 557; Korematsu Center et al., pp. 14-15, 18, 23; Bilotta et al., *How Subtle Bias Infects the Law* (2019) 15 Ann. Rev. L. & Soc. Sci. 227, 229 ["It is important to note that the subtle discrimination that emerges as a result of implicit biases is just as harmful as overt discrimination, if not more so, because the target is more likely to internalize the experience than to discount it as discrimination"]; *Prasad*, *Implicit Racial Biases in Prosecutorial Summations*, *supra*, 86 Fordham L.Rev. at p. 3101 ["'subtle manipulations' of a defendant's background affect juror decision-making to a greater extent than explicit references to race"]; Bowman, *Seeking Justice: Prosecution Strategies for Avoiding Racially Biased Convictions* (2023) 32 So. Cal. Interdisc. L.J. 515, 527 ["Coded language . . . allows our minds to quickly grasp complex concepts and the associated cultural values, while obscuring the racial stereotypes underlying these cultural values"]; see also *Buck v. Davis* (2017) 580 U.S. 100, 122 ["Some toxins can be deadly in small doses"]; *Peña-Rodriguez v. Colorado* (2017) 580 U.S. 206, 224 [describing racial bias as "a

familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice"].)[5]

The precise harm of a subtle appeal is also equally unquantifiable. Jurors can't be asked whether their unconscious biases were activated by flagrant or non-flagrant language and yet we know, by looking at studies and aggregate data, that they often are, and that once activated, those biases color how jurors view and weigh evidence. "Like a metastatic cancer, racial bias in one part of a criminal prosecution infects the whole and cannot be remedied by removing a single diseased cell." (Stats. 2025, ch. 721, § 1, subd. (e); Korematsu Center et al., pp. 26-28.)

In addition to arguing that there is a difference between flagrant and subtle language and that the latter remains subject to a separate prejudice analysis under subdivision (k), the Attorney General also proposes a rewriting of subdivision (e) which it claims would avoid all tension with article VI, section 13. The Attorney General asks the Court to read subdivision (e)(2)(A)'s command that

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[5] CDAA argues that article VI, section 13, does not require a separate prejudice analysis for flagrant violations, but only if committed by the court or prosecutor. (CDAA, pp. 22-24.) This is another distinction without a difference. The risk that language activated jurors' biases does not depend on whether the bias being exhibited was flagrant or subtle because a subtle appeal can be just as effective, if not more so, than a flagrant one. Nor does the risk change based on the person who made the appeal. It is hearing the language – not the identity of the speaker – that activates jurors' subconscious biases. To the extent amici and the Attorney General are concerned with "strategic" violations of the RJA by the defense, that issue is not presented in this case, which arose before the conception of, let alone the passage of, the RJA.

a court "shall vacate" the conviction and sentence when an RJA violation is found after judgment as permissive because a separate subdivision, (e)(1), identifies permissive remedies the court "may impose" for RJA violations identified pre-judgment. (SRB, pp. 26-28.) But the case the Attorney General cites for support, *Tarrant Bell Property v. Superior Court* (2011) 51 Cal.4th 538, cautions *against* the Attorney General's proposed reading because "[u]nder 'well-settled principle[s] of statutory construction,' we 'ordinarily' construe the word 'may' as permissive and the word 'shall' as mandatory, 'particularly' when a single statute uses both terms. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443.)" (*Tarrant Bell Property, supra*, at p. 542.) This is especially true with the RJA because "'[w]hen the Legislature has, as here, used both 'shall' and 'may' in close proximity in a particular context, we may fairly infer the Legislature intended mandatory and discretionary meanings, respectively.' (*In re Richard E.* (1978) 21 Cal.3d 349, 353–354.)" (*Tarrant Bell Property, supra*, at p. 542.)

The Legislature expressly provided for separate remedies for racial bias that is detected before it contaminates the jury, and for racial bias that goes undetected. Having separate remedies for errors identified during trial and for errors identified on appeal is a typical feature of criminal procedure. (See, e.g., § 1260.) And in the context of the RJA, it is based on the science of implicit bias, specifically, the probability that an appeal to bias has interfered with juror decision making.

In any event, the enactment of AB 1071 renders the Attorney General's argument moot because subdivision (e)(1) now directs that

courts "shall impose" a remedy for pre- as well as post-judgment RJA violations. (Stats. 2025, ch. 721, § 2.)

At their core, the arguments proffered by the Attorney General and District Attorneys would reduce the RJA to the inadequate prosecutorial misconduct jurisprudence it sought to replace.[6] In AB 1071, the Legislature declared that "[t]he dissenting statement in *In re Mendoza, supra,* 2024 WL 5171483 articulates the Legislature's intent in passing the RJA and concern about its silent evisceration." (Stats. 2025, ch. 721, § 1, subd. (a).) The Legislature put its faith in this Court to correct course.

There is no gap between what this Court and the Legislature consider a miscarriage of justice. If an objective observer sees language used during a trial as appealing to racial bias, it is a miscarriage of justice. The science of implicit bias explains why it is reasonably probable that such language affected the outcome. A separate prejudice assessment, beyond the one inherent in violations of section 745, subdivision (a)(2), is neither practicable nor required.

### B. The parties agree that the Racial Justice Act is consistent with article VI, section 13.

The Attorney General agrees with appellant that the Legislature has the power to designate a prejudice standard beyond

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[6] For example, the District Attorney of San Luis Obispo County argues that exhibitions of racial bias that are "tied to a theory of the case" should be analyzed as prosecutorial misconduct. (SLODA, pp. 12-13.)

the traditional *Watson*[7] test, be that *Chapman*[8] review (SRB, pp. 20-21) or automatic reversal: "The Legislature thus has the authority, consistent with section 13, to require reversal when errors at trial approximate a 'miscarriage of justice.'" (SRB, p. 34; see *id.*, pp. 12-15 [Attorney General acknowledges that "miscarriage of justice" is a general term susceptible to varying tests ranging from *Watson* to automatic reversal].)

Article VI, section 13, is not a grant of power to the judiciary. The history of the provision reflects that it was meant as a limitation on the judiciary, not its opposite. The Legislature created the limitation first by statute (§ 1258) and then by authorizing the initiative that put it on the ballot. Amici District Attorneys frame article VI, section 13, differently. They call it a "power" that has been "vested" in the judiciary and describe the Legislature's requirement of automatic reversal for RJA violations as "usurping" that authority. (LADA, pp. 8, 22-23; SDDA, pp. 14, 17, 35; CDAA, pp. 9, 13, 20.) The District Attorneys ascribe to the voters an intent to make the judiciary (the branch voters were limiting) the sole arbiter of the correct interpretation of its own limitation. Their argument is constructed on the false premise that the Legislature has no power to act in this sphere.

The Legislature has the power to create laws defining and punishing crime. It has the power to remove error from the Court's jurisdiction. (Evid. Code, § 353.) It has the power to limit the

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[7] *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

[8] *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).

remedies available to the Court. (§ 1260.) It has power over the court's exercise of discretion. (§ 1385.) It has the power to change the law and to make those changes retroactive to all criminal cases, which necessarily results in the reversal of judgments. (*In re Estrada* (1965) 63 Cal.2d 740.)

The Legislature also has the power to interpret provisions of the California Constitution, and its interpretation is subject to weight and deference. The Attorney General concedes that this is true even when the Legislature's interpretation is in "honest disagreement" with this Court's interpretation. (SRB, p. 21, citing *California Hous. Fin. Agency v. Patitucci* (1978) 22 Cal.3d 171, 176.) The Attorney General identifies this power as the authority to subject RJA violations raised in pending appeals to the prejudice test set forth in subdivision (k) instead of the test set forth in *Watson*. (SRB, p. 21.) While its understanding of subdivision (k) is wrong, its understanding of the Legislature's power to interpret "miscarriage of justice" is correct.

The Attorney General and District Attorney amici also construct a hypothetical in which a reviewing court finds an RJA violation for a trivial or unimportant error, or for "strategic" violations by the defense. (SRB, pp. 12, 32, 40-41; LADA, pp. 8, 17, 23.) The Attorney General claims that requiring reversal for so-called trivial and unimportant violations creates a constitutional dilemma. (SRB, pp. 31-32.) It proposes to avoid this hypothetical dilemma by rewriting the RJA to collapse the remedies for violations in cases that have not yet proceeded to a judgment (subd. (e)(1)) with the remedies available in cases that already have (subd. (e)(2)).

(SRB, pp. 23-30.) But the constitutional dilemma it posits is unlikely ever to occur given the nature of implicit bias and what must be proven to make out a violation.

Even in an unlikely scenario in which a court were to reverse based on a trivial or strategic violation, such a violation would, at most, pose an "as applied" problem with the RJA and would not facially invalidate the paradigm. (See *In re Taylor* (2015) 60 Cal.4th 1019, 1039 ["consideration of as-applied challenges, as opposed to broad facial challenges, is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments"], internal quotations omitted.) The Attorney General concedes that "[f]or present purposes, it is enough to note that a requirement under the statute to reverse judgments that would not be reversed under this Court's precedent would not necessarily violate section 13." (SRB, p. 33.)

There is no category of appeals to racial bias capable of being characterized as "insignificant." For an objective observer to see language as an appeal to racial bias, there must be a cultural context in which the language appeals to or activates racial bias. Reviewing courts conduct this objective observer analysis with a knowledge of the history of racial and ethnic discrimination, stereotypes and tropes, in old and new manifestations. (See Stats. 2025, ch. 721, § 1, subd. (d) ["The Legislature intends that in applying the RJA, courts consider evidence of racism's origins, insidious shifts, and current manifestations"].) Once the Court has concluded that there is a violation it could only be deemed "insignificant" by ignoring the reality of implicit bias. Hearing an

appeal to racial bias activates racial bias, even in well-intentioned people, and it does so in a way that influences their decision making on a subconscious level. (Korematsu Center et al., pp. 17-19, 23-24.)

The errors in the case now before the Court demonstrate that it is not being asked to reverse judgments for trivial or unimportant errors.

The Legislature has not interpreted miscarriage of justice in a way that is different than the Court. The Attorney General concedes, and this Court has found, that miscarriage of justice is a "general" phrase that lacks a "precise meaning[.]" (SRB, p. 12, citing *People v. O'Bryan* (1913) 165 Cal. 55, 65.) The Legislature has called an appeal to racial bias during a criminal trial what it is – a miscarriage of justice. Even if there were an honest disagreement over the reach of the term and whether it captures the use of "non-flagrant" language that alters outcomes through the operation of implicit bias, the Legislature acted within its power to resolve it. Justice Traynor's prescient warning not to "shield wooden precedents" from the "radiations of forward-looking statutes" applies to the RJA. (Traynor, *Statutes Revolving in Common-Law Orbits* (1968) 17 Cath. U. L.Rev. 401, 402.) The RJA recognized a "gap or aberration" in the law that undermines the promise of equal justice and the legitimacy of the justice system. (*Ibid.*) The RJA, as enacted by the Legislature, "affords a basis for judicial correction[.]" (*Ibid.*) Several of our sister states have reached the same conclusion. (6SAOB, pp. 35-37; Brief of Amicus Curiae Center for Juvenile Law & Policy and the Loyola Anti-Racism Center (Oct. 2, 2025), pp. 14-15.) It is well past time for California to join them.

### C. Death ineligibility as a remedy for racial bias does not unconstitutionally amend Prop. 7.

The Legislature has the power to prescribe remedies for a trial infected by racial bias, including ineligibility for the death penalty; it did not unconstitutionally amend Prop. 7 by doing so. The Attorney General agrees, in part. He argues the Legislature did not unconstitutionally amend Prop. 7 by making death ineligibility a remedy, though he attempts to limit the concession to cases in which there has been a "flagrant" RJA violation. (SRB, p. 40.)[9] The Attorney General claims that "wholesale" elimination of death eligibility for "insignificant" violations "would present a substantial issue of whether the RJA amends the Briggs Initiative . . . ." (SRB, pp. 36-41.) He asks the Court to rewrite the RJA so a lesser remedy may be imposed for those violations. (SRB, pp. 37-41.) Specifically, he asks the Court to read subdivision (e) as authorizing it to impose any of the remedies listed in subdivisions (e)(1) and (e)(2) instead of death ineligibility. But the language in subdivision (e)(3) is unambiguous. Death ineligibility is a remedy any time there has been a violation: "When the court finds there has been a violation of subdivision (a), the defendant shall not be eligible for the death penalty."

Effective January 1, 2026, death ineligibility is no longer one of the remedies contained in subdivision (e) of section 745. Death ineligibility remains a remedy, but it has been moved from

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[9] Similarly, the San Luis Obispo District Attorney agrees that the death ineligibility does not unconstitutionally amend Prop. 7 if used as a remedy for "abject racism." (SLODA, pp. 23-24.)

subdivision (e) to its own subdivision – (l). (Stats. 2025, ch. 721, § 2.) The Legislature explained that it moved the death ineligibility remedy to its own subdivision to clarify that the court must impose a remedy from subdivision (e) *and* death ineligibility.

> Further, this bill clarifies that the prohibition on death sentences for cases in which an RJA violation occurs in categorical, and not a remedy in itself. This is because the racially disproportionate application of the death penalty is "in historical continuity with the long and sordid history of lynching in this country." (Ogletree, "Black Man's Burden: Race and the Death Penalty in America" (2002) 81 Or. L.Rev. 15.) Thus, in addition to the categorical prohibition, courts must impose a remedy commensurate with the violation(s) in the case.

(Stats. 2025, ch. 721, § 1, subd. (e).)

Moreover, the artificial distinction the Attorney General would have the Court draw between "flagrant" and "insignificant" violations is the same one it uses to sow tension between the RJA and article VI, section 13. (SRB, p. 22.) The distinction fails here for the same reason it fails there. There is no "insignificant" appeal to racial bias. The Attorney General's analysis presumes the existence of a species of RJA violation that cannot exist: an objective observer who saw an appeal to bias that really wouldn't have appealed to bias.

The distinction is also irrelevant to the analysis. How flagrant a violation is and the identity of the party who committed it does not determine whether there has been an unconstitutional amendment of an initiative. What matters is whether death ineligibility addresses a related but distinct area that Prop. 7 did not specifically authorize or prohibit. (See *People v. Pearson* (2010) 48 Cal.4th 564, 571.) It does. As the Attorney General explains, the death

ineligibility provision does not change anything about the class of people convicted of murder who are eligible for the death penalty in the first instance, it only removes the opportunity to seek death a second time when a first trial was infected by racial bias. (SRB, p. 40 [concluding, "nothing in the Briggs Initiative reflects an intent on part of the electorate to override such remedies"].) The limits the Attorney General places on its agreement – the RJA violation that gives rise to death ineligibility must be flagrant and must be committed by the prosecutor, court, or a key prosecution witness – are ones of its own creation; they are not ones the voters contemplated.

The California District Attorneys Association and Los Angeles District Attorney see death ineligibility as an unconstitutional amendment of Prop. 7 because it takes away from the class of murderers otherwise eligible for the death penalty. (CDAA, pp. 28-32; LADA, pp. 30-36.) But the fact that ameliorative legislation removes a class of murderers from eligibility for the death penalty does not render it an unconstitutional amendment of Prop. 7. (*People v. Superior Court* (*Gooden*) (2019) 42 Cal.App.5th 270, 279-289.) Prop. 7's scope was limited. It increased the minimum punishment for first and second degree murder and expanded the special circumstances that render individuals eligible for certain minimum punishments. The RJA leaves that scheme intact. The minimum punishments for murder remain unchanged. Subdivision (e)(3) of section 745 (soon to be subd. (l)) provides a remedy for racial bias but does not change the general sentencing scheme that continues to apply in every case.

Death ineligibility may operate as a limitation on the maximum punishment for murder, but the voters who enacted Prop. 7 were concerned with the minimum, not maximum, punishment for murder. (*People v. Jenkins* (1995) 10 Cal.4th 234, 245, fn. 7.) Indeed, they left discretion to seek and impose the death penalty fully intact. Juries still have discretion to impose it (§ 190.3), courts still have discretion to modify it (§ 190.4) and strike the special circumstances underlying it (§ 1385), and prosecutors still have the discretion to not even seek it (*People v. Visciotti* (1992) 2 Cal.4th 1, 78). The District Attorneys' argument stands in contrast to this reality. Prop. 7 does not demand that the state seek, the jury select, or the court impose a second death sentence after the first has been overturned for racial bias.

Proponents of the previous death penalty initiative assured voters that the death penalty would not be exercised in a racially discriminatory fashion, that "[o]ur criminal legal system . . . insures a fair trial . . . regardless of . . . race," and that "[t]he facts prove . . . there is no racist component in the unanimous decision by a jury to impose death." (Voter Information Pamp., Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 17, pp. 43-44.) The District Attorneys read Prop. 7 as prohibiting death ineligibility even when those assurances have been broken.

## II.
## THE EFFECT OF AB 1071 ON THE OTHER ISSUES IN THIS CASE

In addition to clarifying that death ineligibility is a required, categorical, remedy for every RJA violation, AB 1071 also clarifies

the reach of section 745, subdivision (a). In prior briefing, the Attorney General conceded the prosecutor violated the RJA during her guilt and penalty phase closing arguments when she referred to Mr. Barrera as a nonhuman, insult to animals, and distinguished between "we the citizens" and others like him. But the Attorney General disputed that actors violated the RJA when they referred to immigrants from Mexico, like Mr. Barrera, as "illegal aliens" and "burdens" on society, mocked Mr. Barrera as "enterprising" and the "big boss" for street vending with his children, and testified that being "illegal" predisposed him to commit child abuse.

In the uncodified portion of AB 1071, the Legislature expressly identified "dehumanizing and othering language," "racially incendiary or coded words," "denigrat[ing] people who have immigrated to the United States," and "ma[king] gratuitous references to nationality, race, or immigration status" as language that appeals to racial bias. (Stats. 2025, ch. 721, § 1, subd. (c).) In other words, AB 1071 directly refutes the Attorney General's argument that the above language did not violate the RJA. And while the Attorney General constructs an objective observer that is unaware of language used throughout history to appeal to anti-Latiné bias, AB 1071 clarifies that courts applying the RJA should "consider evidence of racism's origins, insidious shifts, and current manifestations." (*Ibid.* at § 1, subd. (d).)

## III.
## EVEN IF RJA VIOLATIONS WERE SUBJECT TO A SEPARATE PREJUDICE ANALYSIS, THE VIOLATIONS IN THIS CASE REQUIRE REVERSAL

The Attorney General and amici District Attorneys ask the Court to analyze the prejudice of some RJA violations using ordinary prejudice analysis. The Attorney General argues that the standard in subdivision (k) applies, which is the standard set forth in *Chapman*. Amici District Attorneys claim *Watson* applies.[10]

In prior briefing, the Attorney General conflated prejudice analysis with review of the record for substantial evidence. (5SRB, at pp. 24, 32, 33.) But prejudice analysis focuses on how an error affected the outcome, while substantial evidence review asks whether the evidence, if viewed in the light most favorable to the prosecution, would prove every element of the offense beyond a reasonable doubt. This former standard is much higher than the latter. (*People v. E.H.* (2022) 75 Cal.App.5th 467, 479; see also *People v. Schuller* (2023) 15 Cal.5th 237, 261-262 [finding that the court of appeal's prejudice analysis did not comport with *Chapman* because it "focused solely on what it characterized as 'overwhelming evidence . . .'"]; see *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279 [The inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether

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[10] This Court has held there is no real difference between *Watson's* reasonable possibility standard and *Chapman's* beyond a reasonable doubt standard when it concerns a penalty trial error because both are "'the same in substance and effect.'" *People v. Pineda* (2022) 13 Cal.5th 186, 225, and authorities cited therein; see also *People v. Brown* (1988) 46 Cal.3d 432, 448.

the guilty verdict actually rendered in *this* trial was surely unattributable to the error"].)

To demonstrate that an appeal to racial bias was harmless beyond a reasonable doubt under *Chapman* the prosecution would have to prove that jurors' subconscious biases were not activated by racially discriminatory language in a way that led them to resolve facts against the defendant or affected their consideration and weighing of aggravating and mitigating evidence. Cherry-picking the record for facts that support the judgment falls short of carrying that burden and further demonstrates the impracticability of ordinary harmless error analysis.

In conflating prejudice analysis with substantial evidence review, the Attorney General also ignores critical ambiguities in the evidence concerning Mr. Barrera's mental state and the effect hearing racially discriminatory language likely had on the jury's resolution of them. The prosecutor argued Mr. Barrera premeditated the torture murder of his children based on the severity of the abuse preceding the fatal incidents, but there was also evidence that Mr. Barrera inflicted the fatal blows during "misguided, irrational and totally unjustifiable attempt[s] at discipline" or in "explosion[s] of violence." (*People v. Steger* (1976) 16 Cal.3d 539, 548-549.)

There were gaps in the prosecutor's theory that are discussed at length in prior briefing. (See AOB, Argument I, pp. 28-94.) Moreover, Mr. Barrera said and did things in the moments after inflicting the fatal blows that people generally don't say or do when they intend to kill. His daughter, Maria, testified "my dad kept

telling Lupita [Guadalupe] to put her head up, but she wouldn't . . . couldn't." (9RT 1600.) He looked "scared." (9RT 1601.) His son, Jose, testified that his father was telling Guadalupe to "stand up." (10RT 1648.) He told Maria to "come here. The girl doesn't wake up" and they tried to revive her with the smell of alcohol. (9RT 1603, 11RT 1815-1816.) He went to the pharmacy for more alcohol and Pedialyte. (11RT 1817.) When he got home, he asked "She still has not awakened?" (11RT 1817.) After inflicting the fatal blow on Ernesto, Maria found Mr. Barrera on the floor beside him telling him to get up, and they tried to revive him with alcohol. (11RT 1822.)

The jury ultimately resolved the ambiguity against Mr. Barrera when it convicted him of premeditated torture murder. However, the same jurors had been barraged with appeals to anti-Latiné bias. They heard Mr. Barrera was an "illegal alien" and an "enterprising" "big boss" street vendor. He was a "burden" on society, a nonhuman, and it would be an "insult" to animals to call him one. As discussed in prior briefing, using language like that has been shown to be particularly effective at activating anti-Latiné bias, which leads jurors to judge ambiguous conduct more harshly. (See 4SAOB, at pp. 21-36.) The Attorney General doesn't address that phenomenon of implicit bias; he ignores it.

The Attorney General's argument concerning the penalty judgment is flawed for similar reasons. There, the jury was also tasked with resolving an ambiguity – whether the evidence in aggravation substantially outweighed the evidence in mitigation. (17RT 2209-2210.) And it was then that the jury heard Peralta

testify that being "illegal" predisposed Mr. Barrera to commit child abuse and the prosecutor distinguish between "we the citizens" who don't torture and murder our children and people like Mr. Barrera. The Attorney General does not analyze how hearing that language may have influenced juror decision-making through fundamental principles of implicit bias. Nor does he acknowledge authority holding similar expert testimony was prejudicial. (*Buck v. Davis*, *supra*, 580 U.S. at pp. 121-122 [finding expert testimony that the defendant's race predisposed him to violence "appealed to a powerful racial stereotype" whose impact "cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses"].)

More, the language used throughout the trial was dehumanizing and cast Mr. Barrera as an "other." He was called an "illegal alien," "not a human," an "insult" to animals, and the prosecutor distinguished herself and the jurors from him when she argued "we the citizens, we don't torture and murder our children." Studies show that dehumanization erodes empathy and makes the jury more likely to sentence someone to death. (Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death* (1997) 49 Stan. L.Rev. 1447, 1454 [discussing how social psychologists recognize dehumanization as "one of the most powerful cognitive processes that can distance people from the moral implications of their actions" and improperly diminishes the jury's sense of responsibility for its sentencing decision]; Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis* (2006) 11 Mich. J.

Race & L. 325, 335 [discussing how prosecutors from the time of Cicero until the present have long used the technique of "othering" defendants as someone outside of the moral community to induce a negative emotional response towards the defendant].)

Racially discriminatory language and bias permeated every aspect of this case. By pointing to substantial evidence, the Attorney General has not carried his burden of proving, beyond a reasonable doubt, that the RJA violations in this case did not contribute to the judgment.

## CONCLUSION

Article VI, section 13 of the California Constitution and Prop. 7 are not impediments to this Court remedying racial bias during criminal trials in the manner prescribed by the Legislature. The Court must vacate Mr. Barrera's convictions and sentence, declare them legally invalid, and remand for a new trial consistent with the RJA wherein Mr. Barrera "shall not" be eligible for the death penalty.

DATED: November 17, 2025 Respectfully submitted,

GALIT LIPA
State Public Defender

/s/_____
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**CERTIFICATE OF COUNSEL**
**(Cal. Rules of Court, Rule 8.630(b)(2))**

I am the Supervising Deputy State Public Defender assigned to represent appellant, MARCOS ESQUIVEL BARRERA, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 6,699 words in length.

DATED: November 17, 2025

/s/
WILLIAM C. WHALEY
Supervising Deputy State Public Defender

## DECLARATION OF SERVICE

Case Name: ***People v. Marcos Esquivel Barrera***
Case Number: **Supreme Court Case No. S103358**
**Los Angeles County Superior Court**
**Case No. PA029724-01**

I, **Ann-Marie Doersch**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a true copy of the following document:

**APPELLANT'S SIXTH SUPPLEMENTAL REPLY BRIEF AND SUPPLEMENTAL BRIEF RE: AB 1071**

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| Los Angeles County District Attorney's Office<br>211 W. Temple St., Ste. 1200<br>Los Angeles, CA 90012 | Los Angeles Public Defender's Office<br>900 Third Street<br>San Fernando, CA 91340 |

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **November 17, 2025**, at Sacramento County, CA.

Ann-Marie Doersch

Digitally signed by Ann-Marie Doersch
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ANN-MARIE DOERSCH

**STATE OF CALIFORNIA**
Supreme Court of California

# *PROOF OF SERVICE*

**STATE OF CALIFORNIA**
Supreme Court of California

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11/17/2025
Date

/s/Ann-Marie Doersch
Signature

Whaley, William (293720)
Last Name, First Name (PNum)

Office of the State Public Defender
Law Firm