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.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Federal Public Defender for the Central District of California and the Federal Public Defender for the Eastern District of California ("the Federal Public Defenders") hereby apply for leave to file the accompanying Brief of Amicus Curiae in support of Petitioners in this mandamus proceeding.[1]

The Federal Public Defenders are authorized under 18 U.S.C. § 3006A, the Criminal Justice Act, to provide legal representation to persons financially unable to retain counsel in federal criminal and related proceedings. The Central District covers seven counties: Los Angeles, Orange, Ventura, Riverside, San Bernardino, Santa Barbara and San Luis Obispo. The Eastern District covers thirty-four counties, from Kern in the south to Shasta in the north.

The Federal Public Defenders have Capital Habeas Units, a staff of attorneys and support personnel who represent persons sentenced to death in California state courts whose convictions have proceeded through the state review process and are now before the federal court on claims involving federal constitutional violations. California has the largest death row in the nation, with approximately 750 persons sentenced to death.[2] According to information provided by the California Appellate Project, counties in the Central and Eastern Districts account for more than 75% of the state's death sentences. Together, the Federal Public Defenders represent more than 100 California capital petitioners. Attorneys from the

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[1] No party or counsel for a party to this action authored the proposed brief in whole or in part. Nor has any person or entity made a monetary contribution intended to fund the preparation or submission of the brief.

[2] Cal. Dep't of Corr. & Rehab., Condemned Inmate Summary List (Jan. 6, 2017), *available at* http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf (last visited Mar. 27, 2017).

Federal Public Defenders regularly appear in this Court, representing clients on both original state habeas corpus petitions and on exhaustion petitions. Our habeas practice gives us a unique perspective on the interplay between California and federal law relating to capital habeas corpus litigation. For these reasons, we respectfully request permission to file an amicus curiae brief in support of Petitioners in this proceeding.

Respectfully submitted,

DATED: March 29, 2017

HILARY POTASHNER
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PROOF OF SERVICE

I, Iliana Hernandez, declare under penalty of perjury that the following is true and correct: I am employed in Los Angeles County, California; my business address is the Office of the Federal Public Defender, 321 East 2nd Street, Los Angeles, California 90012, Telephone No. (213) 894-2854; I am over the age of eighteen years; I am not a party to the action entitled above; I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bar of the State of California, and admitted to practice in this Court, and at whose direction I served a copy of the attached **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS** on the following individuals by placing same in a sealed envelope for collection and mailing via Fed Ex, addressed as follows:

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I. INTRODUCTION

Proposition 66 restricts the ability of California state courts to grant relief from death judgments obtained in violation of the United States Constitution. Respondents attempt to justify Proposition 66's limitations by pointing to similar limitations imposed under federal law. But given that federal habeas is limited precisely because state habeas is intended to be the "main event" for protecting state prisoners' federal constitutional rights, federal limitations on habeas review cannot justify Proposition 66's curtailment of state habeas corpus review. Moreover, Proposition 66's numerous constraints—from the one-year statute of limitations to the limited availability of successive petitions—threaten to prevent this State's courts from fulfilling their responsibility to serve as the "principal forum" for vindicating the constitutional rights of capital petitioners, whose convictions and sentences demand the greatest constitutional scrutiny.

II. STATE COURTS ARE THE PRIMARY FORUM FOR CAPITAL PRISONERS TO VINDICATE FEDERAL CONSTITUTIONAL RIGHTS

Respondents and Intervenor point to examples in federal law to try to justify Proposition 66's new limitations on capital state habeas petitions. *See, e.g.*, Respondents' Return at 48 n.12; Intervenor's Return at 27-32. But the differences between state and federal courts' functions in addressing state prisoners' constitutional claims makes federal habeas law an inapt comparison for state habeas reform.

Under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, "state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Federal habeas courts reviewing the constitutionality of state convictions and sentences are guided by rules designed to ensure state-court judgments receive the finality and respect

necessary to preserve the integrity of legal proceedings within our federal system. *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). Federal court ability to correct constitutional violations through habeas corpus is constrained by AEDPA and the numerous judicially created doctrines promoting respect for state court judgments. Congress and the courts deem these limitations on federal habeas corpus acceptable because they assume the state has already provided a defendant with "one full opportunity to resolve any constitutional issues." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

Several doctrines reflect the primacy of the state court process. Before a state prisoner may ever bring her constitutional claim to federal court, she must first present that claim in state court. 28 U.S.C. § 2254(b)(1); *Ex parte Royall*, 117 U.S. 241, 251-52 (1886). Courts developed and codified this exhaustion requirement recognizing the fact that state courts "have the duty and competence to vindicate rights secured by the Constitution in state criminal proceedings." *Williams v. Taylor*, 529 U.S. 420, 436-37 (2000). Only the "absence of available State corrective process" or circumstances "that render such process ineffective to protect the rights of the applicant" permit a habeas petitioner to seek relief in federal court without first exhausting her claims in state court. 28 U.S.C. § 2254(b)(1)(B)(i)-(ii).

AEDPA curtails federal review, prioritizing state court review, even further. Its "relitigation bar" prohibits federal courts from disturbing state-court adjudications on the merits of claims unless the federal petitioner can satisfy 28 U.S.C. § 2254(d)(1) or (d)(2). *Richter*, 562 U.S. at 100. Section 2254(d) presents a "formidable barrier" to relief in federal courts. *White v. Wheeler*, 136 S. Ct. 456, 460 (2015).

When proceeding under § 2254(d)(1), federal petitioners must show the state court decision was contrary to or based on an unreasonable application of "clearly established federal law" and they must do so solely

based on the record before the state court. 28 U.S.C. § 2254(d); *Cullen v. Pinholster*, 563 U.S. 170, 186 (2011). This constraint is three-fold. First, the federal court is limited to the United States Supreme Court's constitutional holdings existing at the time of the state court decision, and may not rely on decisions of the federal courts of appeal. *Marshall v. Rodgers*, 133 S. Ct. 1446, 1450-51 (2013) (per curiam). Second, the federal court may not consider evidence developed in federal court; § 2254(d) analysis is limited to the record in state court when the state court denied the claim. *Pinholster*, 563 U.S. at 186. Third, a federal court may not grant habeas relief unless the state court's application of federal law is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

Similarly, when proceeding under § 2254(d)(2), federal petitioners must show the state court decision was based on an unreasonable determination of fact. *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012). Under this standard, it is not enough for a petitioner to simply show the state-court fact finding was erroneous; a petitioner must show it was *objectively* unreasonable. *Id.* Again, courts conduct this inquiry only considering the evidence before the state court. *Id.*

In addition to satisfying § 2254(d), a petitioner seeking an evidentiary hearing in federal court must also demonstrate she was diligent in developing the factual basis of the claim in state court. 28 U.S.C. § 2254(e)(2); *Williams*, 529 U.S. at 437. As in state court, there is no right to discovery in federal habeas proceedings. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) ("A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course.").

Even when the state court did not decide a prisoner's claims on the merits, respect for federal-state comity has given rise to other judicially

created limitations on federal habeas corpus relief. For example, where a petitioner has procedurally defaulted her opportunity to present her claim in state court, federal consideration of the merits is typically unavailable. *Harris v. Reed*, 489 U.S. 255, 260 (1989); *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977). Nor may a federal court vacate a state conviction on the basis of a new rule of federal constitutional law recognized after a petitioner's conviction became final, with limited exceptions. *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality). Finally, a federal court has no power to correct state-law errors. 28 U.S.C. § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). These federal restraints exist because state court proceedings are presumed to be the "main event," not a "tryout on the road" before the federal habeas corpus proceedings. *Wainwright*, 433 U.S. at 90.

This Court has already rejected the idea that California should adopt the same limitations on habeas corpus relief that the federal courts have adopted. *In re Clark*, 5 Cal. 4th 750, 795-97 (1993). This Court should reach the same result regarding Proposition 66. Recognizing the differing purposes of state and federal habeas corpus mandates that the reasons supporting federal habeas corpus limitations do not justify similar limitations on state habeas corpus.

III. PROPOSITION 66 WILL IMPAIR CALIFORNIA COURTS' ABILITY TO REMEDY UNCONSTITUTIONAL CONVICTIONS AND DEATH SENTENCES

Intervenor lauds Proposition 66's restrictions on successive petitions, arguing successive petitions routinely are abusive and wasteful. Intervenor's Return at 27-28. This argument overlooks the need for a vehicle allowing petitioners to raise justifiably new claims and to exhaust those claims before proceeding to federal court. *See In re Reno*, 55 Cal. 4th 428, 443 (2012).

Proposition 66, as interpreted by the parties to this action, bars all second-in-time habeas petitions, except for those petitions raising actual innocence claims or claims that the petitioner is categorically ineligible for the death penalty. Amended Pet. at 36-40, 52-55; Respondents' Return at 22. If their interpretation of Proposition 66 is correct, Proposition 66 will subvert the careful balance this Court developed over the decades to "accommodate the tension between the invocation of a procedural bar to habeas corpus relief and the function of the writ as the means by which a prisoner may obtain relief from an unwarranted conviction and/or sentence." *Clark*, 5 Cal. 4th at 787. Respondents argue voters can codify "judicially-created limits on late and successive petitions" (Respondents' Return at 48), but Proposition 66 goes well beyond codifying this Court's judicially created limitations on successive petitions.

The present capital habeas regime properly balances California's interest in vindicating both state and federal constitutional rights and its interest in judgment finality by requiring habeas corpus petitioners to file claims within a reasonable time, and concurrently providing various safety valves when good cause justifies later presentation. *See Reno*, 55 Cal. 4th at 452 (discussing the various procedural bars and their exceptions guiding this Court's consideration of capital petitions); *see also In re Robbins*, 18 Cal. 4th 770, 780-81 (1998); *Clark*, 5 Cal. 4th at 775. These rules provide the necessary flexibility to grant habeas corpus relief for meritorious claims presented in successive capital petitions. *See, e.g., In re Bacigalupo*, 55 Cal. 4th 312 (2012) (granting penalty relief on a prosecutorial misconduct claim raised in a second habeas petition); *In re Miranda,* 43 Cal. 4th 541 (2008) (granting habeas relief on a prosecutorial misconduct claim raised in a fourth habeas petition); *In re Hardy*, 41 Cal. 4th 977 (2007) (granting penalty relief on a second habeas petition, which was filed based on facts that emerged at an evidentiary hearing on the first habeas petition); *In re*

Brown, 17 Cal. 4th 873 (1998) (granting habeas relief on a prosecutorial misconduct claim raised in a second habeas petition). According to information provided by the California Appellate Project, there have been fourteen habeas grants in capital cases since 2000[1]; nine[2] of these were successive petitions.[3] These petitions can hardly be described as "worthless paper." Intervenor's Return at 27.

Proposition 66 purports to displace the safety valve this Court created, limiting successive petitions to capital inmates who can

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[1] *In re Jackson*, Case No. S129989 (petition granted Dec. 16, 2016); *In re Griffin*, Case No. S118650 (petition granted Nov. 12, 2015); *In re Ray*, Case No. S110219 (petition granted July 23, 2015); *In re Cook*, Case No. S136687 (petition granted Nov. 7, 2014); *In re Bacigalupo*, Case No. S079656 (petition granted Aug. 27, 2012); *In re Young*, Case No. S115318 (petition granted Oct. 8, 2010); *In re Fierro*, Case No. S116793 (petition granted July 21, 2010); *In re Rodrigues*, Case No. S113554 (petition granted Feb. 8, 2010); *In re Coleman*, Case No. S133438 (petition granted Aug. 27, 2008); *In re Miranda*, Case No. S058528 (petition granted May 5, 2008); *In re Miranda*, Case No. S060781 (petition granted May 5, 2008); *In re Hardy*, Case No. S093694 (petition granted July 26, 2007); *In re Sakarias*, Case No. S082299 (petition granted March 3, 2005); *In re Lucas*, Case No. S050142 (petition granted July, 26, 2004).

[2] *Jackson*, Case No. S129989; *Griffin*, Case No. S118650; *Bacigalupo*, Case No. S079656; *Fierro*, Case No. S116793; *Rodrigues*, Case No. S113554; *Coleman*, Case No. S133438; *Miranda*, Case No. S058528; *Miranda*, Case No. S060781; *Hardy*, Case No. S093694.

[3] Five of these nine successive petitions alleged claims of ineligibility for the death penalty based on mental retardation, under the new law announced in *Atkins v. Virginia*, 536 U.S. 304 (2002), a decision revisiting *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), decided only a little over a decade before, based upon newer scientific mental retardation studies and changes in state and societal attitudes on mental retardation. Petitioners were able to file *Atkins* claims as successive petitions because they were based on changes in the law. *See Reno*, 55 Cal. 4th at 466. Although Proposition 66 continues to allow successive petitions alleging *Atkins* claims, it prohibits successive petitions based on new law, no matter the reason.

demonstrate actual innocence or sentence ineligibility. Cal. Penal Code § 1509(d); Amended Pet. at 37-38.[4] In doing so, Proposition 66 annuls this Court's informed judgment that the "magnitude and gravity of the penalty of death" justifies "the need to leave open this avenue of relief" for claims that could not reasonably have been raised at an earlier time.[5] *Reno*, 55 Cal. 4th at 472.

Recent headlines illustrate the wisdom of that judgment. The Orange County District Attorney's Office was disqualified from prosecuting a capital trial due to its "intentional or negligent participation in a covert [confidential informant] program to obtain statements from represented defendants in violation of their constitutional rights, and to withhold that information from those defendants in violation of their constitutional and statutory rights." *People v. Dekraai*, 5 Cal. App. 5th 1110, 1148 (2016). Although information began surfacing in 2013, through

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[4] Contrary to Respondents' argument, Proposition 66 does not limit successive petitions "in ways analogous to what the case law already provides." Respondents' Return at 25.

[5] Permitting successive petitions for claims that could not reasonably have been raised at an earlier time, either because they are based on newly discovered evidence or new rules of constitutional law, is consonant with the practice of the majority of states with capital habeas regimes. *See* Ariz. R. Crim. P. 32.2(a), (b); Colo. R. Crim. P. 35(c)(3)(VI); Fla. R. Crim. P. 3.851(d)(2); Ga. Code Ann. § 9-14-51; Idaho Code Ann. § 19-2719(5)(a); Ky. R. Crim. P. 11.42(1); La. Code Cr. Proc. Ann. art. 930.4; Miss. Code Ann. § 99-39-23(6); Mont. Code Ann. § 46-21-105; *State v. Ortiz*, 670 N.W.2d 788, 792 (Neb. 2003); Nev. Rev. Stat. § 34.810(2); *La. Belle v. Hancock*, 108 A.2d 545, 546 (N.H. 1954); N.C. Gen. Stat. Ann. § 15A-1419; Ohio Rev. Code Ann. § 2953.23(A)(1); Okla. Stat. Ann. tit. 22, § 1089(D)(8); Or. Rev. Stat. Ann. § 138.550(3); 42 Pa. Cons. Stat. Ann. § 9545(b); S.C. Code Ann. § 17-27-90; Tenn. Code Ann. § 40-30-117(a); Tex. Crim. Proc. Code Ann. art. 11.071(5)(a); Utah Code Ann. § 78B-9-106(1)(d); Va. Code Ann. § 8.01-654(B)(2); Wash. Rev. Code Ann. § 10.73.100; Wyo. Stat. Ann. § 7-14-103(b).

extensive discovery litigation and six months of evidentiary hearings it is now clear that sheriff's deputies hid documents "for decades." Tony Saavedra & Kelly Puente, *O.C. Deputies' Logs Reveal Details of Informant Use, Recordings in County Jail*, THE ORANGE COUNTY REGISTER, Dec. 5, 2016. Facts like these, which may support *Massiah*[6] and *Brady*[7] claims for capital petitioners who already filed initial petitions, do not necessarily involve affirmative evidence of actual innocence or sentence ineligibility, but present precisely "those rare or unusual claims that could not reasonably have been raised at an earlier time." *Reno*, 55 Cal. 4th at 452.

The same may be true for claims brought under *Ford v. Wainwright*, 477 U.S. 399 (1986). These claims—raising incompetency to be executed—are "not ripe until after the time has run to file a first federal habeas petition." *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007). As such, they are equally unripe during the one-year window Proposition 66 provides for original state petitions. Yet, a straightforward interpretation of the exceptions to Proposition 66's successor bar suggests a *Ford* claim would not satisfy them, because it neither touches on innocence nor places the death sentence "outside the range of the sentencer's discretion." Cal. Penal Code § 1509(d). *Ford* thus represents an instance when Proposition 66 might prevent California courts from hearing an entire category of federal constitutional claims.

Under the present regime's safety valve, newly discovered or newly ripe claims can be heard in California courts.[8] And, contrary to

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[6] *Massiah v. United States*, 377 U.S. 201 (1964).

[7] *Brady v. Maryland*, 373 U.S. 83 (1963).

[8] Because Proposition 66 only applies to capital petitions, non-capital habeas petitioners can continue to file successive petitions based on newly discovered facts or new law. *See Clark*, 5 Cal. 4th at 767. By closing an existing avenue for relief for capital petitioners, which remains

Intervenor's argument that "California's new statutory successive petition rule is far more generous to defendants than the federal statute unanimously upheld in *Felker*" (Intervenor's Return at 30), even federal habeas law allows petitioners to file subsequent petitions asserting newly discovered or newly ripe claims.

AEDPA specifically allows second or successive petitions that are based on new rules of constitutional law made retroactive on collateral review. 28 U.S.C. § 2244(b)(2)(A). Additionally, the Supreme Court explained that AEDPA's limitations on second or successive petitions do not apply when a subsequent petition asserts a claim based on facts not existing at the time of the initial petition. *Panetti*, 551 U.S. at 947; *see Gonzalez v. Wong*, 667 F.3d 965 (9th Cir. 2011) (remanding to permit exhaustion of a newly discovered *Brady* claim). This recognition—that new claims may arise after filing the initial petition (or the time for filing one has expired), through no fault of the petitioner, and that it is unjust to bar litigants from pursuing relief in such circumstances—is absent from Proposition 66. Thus, Proposition 66 creates a paradoxical system for vindicating federal constitutional rights: the state court, supposedly the primary forum for capital petitioners to assert federal constitutional claims, offers a narrower remedy than does the federal court, which is intended to serve as the "guard against extreme malfunctions in the state criminal justice systems." *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979).

Respondents attempt to justify Proposition 66's limitations on successive petitions—which go far beyond the limitations currently imposed by this Court—by again pointing to federal law as an example. Respondents note that "the United States Supreme Court has upheld similar

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open to non-capital petitioners, Proposition 66 violates equal protection. *See* Petitioners' Reply at 38-40.

limitations on federal habeas corpus petitions" enacted by Congress as part of AEDPA. Respondents' Return at 48 n.12. But Respondents fail to recognize that while AEDPA sought to eliminate delays in the federal habeas review process, it sought to do so "without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law." *Holland v. Florida*, 560 U.S. 631, 648 (2010). As the Supreme Court explained: "When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the 'writ of habeas corpus plays a vital role in protecting constitutional rights.'" *Id.* at 649 (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)).

Proposition 66, however, loses sight of this fact. "The right to habeas corpus is guaranteed by the state Constitution and 'may not be suspended unless required by public safety in cases of rebellion or invasion.' (Cal. Const., art. I, § 11.)" *Reno*, 55 Cal. 4th at 449. This Court explained that "[t]he rules governing postconviction habeas corpus relief recognize the importance of the 'Great Writ,' an importance reflected in its constitutional status, and in our past decisions. Indeed, the writ has been aptly termed 'the safe-guard and the palladium of our liberties' . . . ." *Clark*, 5 Cal. 4th at 763-64 (footnote and internal quotation marks and citations omitted). The current postconviction rules strike a balance between the importance of habeas corpus and the need to give "due consideration to the interest of the public in the orderly and reasonably prompt implementation of its laws and to the important public interest in the finality of judgments." *Reno*, 55 Cal. 4th at 451 (internal quotation marks omitted). Proposition 66, however, fails to recognize the Great Writ's importance and balance it with any interest in expediting "enforcement of judgments in capital cases." Intervenor's Return at 11.

Restrictions on successive petitions are even more problematic when considered in the context of Proposition 66's one-year statute of limitations. This Court recognizes that a habeas petition plays an important role in the adversarial process:

> In a capital case, a detailed and comprehensive first state habeas corpus petition serves an important purpose, for courts can rest assured that, between the trial, the appeal, and the habeas corpus petition, the defense has had ample opportunity to raise all meritorious claims, the adversarial process has operated correctly, and both this court and society can be confident that, before a person is put to death, the judgment that he or she is guilty of the crimes and deserves the ultimate punishment is valid and supportable. Indeed, a system of justice that does not allow for the fair and timely presentation of claims of innocence or the absence of fair procedure would lack credibility.

Reno, 55 Cal. 4th at 456 (emphasis and footnote omitted); *see In re Sanders*, 21 Cal. 4th 697, 703-04 (1999) ("[M]istakes in the criminal justice system are sometimes made. Despite the substantive and procedural protections afforded those accused of committing crimes, the basic charters governing our society wisely hold open a final possibility for prisoners to prove their convictions were obtained unjustly."). Despite the importance of a *comprehensive* first state habeas petition, Proposition 66 severely truncates the time a petitioner has to file that first petition, and then adds insult to injury by foreclosing most of the currently available avenues for filing a successive petition.

One year is insufficient time to review the voluminous record of a capital trial, conduct a thorough investigation, and draft and file an initial habeas corpus petition. *See Robbins*, 18 Cal. 4th at 789-90. [9] In fact, this

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[9] *Robbins* is illustrative. In that case, involving a capital petitioner, this Court describes the investigative efforts necessary to uncover a claim involving previously undisclosed evidence by the prosecution: (1) an investigation trip to New Jersey to "obtain access to records" that "met with

Court already made that determination. In its Policies Regarding Cases Arising from Judgments of Death, this Court provided two years from the appointment of counsel to file a habeas petition, before extending the period to three years in 2005. Policy 1-1.2 & Official Note No. 2. This time period reflects this Court's informed judgment regarding the unique complexity involved in investigating and developing habeas corpus claims in capital cases. *Clark*, 5 Cal. 4th at 784. The one-year statute of limitations applicable to federal habeas petitions does not disprove this point: federal habeas litigants benefit from the development of the record and claims that occurred during the state court post-conviction process.

Despite the inadequate one-year period to develop from scratch all potentially meritorious claims a capital case may engender, Proposition 66 limits petitioners to one year without providing time extensions, even for good cause. And, as discussed, except for claims of actual innocence or ineligibility for the death penalty as defined by Proposition 66, petitioners

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little success"; (2) a request to the prosecuting district attorney's office for "supervised access" to the case file, which was denied; (3) a request to the superior court to inspect and copy records, which was denied on procedural grounds, but without prejudice; (4) a request to the federal district court to inspect and copy records, which was granted; (5) copying and reviewing such records; and (6) based upon a lead gathered from the records, a second investigation trip to New Jersey to interview a detective regarding the scope of the evidence he had disclosed to the prosecuting district attorney and to obtain his sworn declaration. *Robbins*, 18 Cal. 4th at 789-90.

It took Robbins's habeas counsel one year and three months just to discover the existence of "triggering facts" that previously were "not known," and could not "reasonably have been known." *Id.* at 789-91. It then took an additional three months to conduct the necessary follow-up investigation, plus an additional two months to draft and file the petition, a timeline this Court deemed "reasonably prompt[]." *Id.* at 795. Yet, under Proposition 66, the statute of limitations would have run even before the triggering facts were discovered.

cannot later present claims unavailable during, or that they were unable to develop within, that one-year period.

Thus, if Proposition 66 takes effect, many diligent prisoners will be unable to discover and present all viable claims and supporting facts in their initial petitions, and will be precluded from doing so in a successive petition. Proposition 66 will inevitably result in important constitutional claims never being considered by a California state court, thus materially impairing the state courts' constitutional power and duty to safeguard the liberties of capital habeas petitioners through a writ that "has been available to secure release from unlawful restraint since the founding of the state." *Clark*, 5 Cal. 4th at 764; *see* Amended Pet. at 28-30, 36-39 and Petitioners' Reply at 12, 31-37 (arguing Proposition 66 violates the separation of powers doctrine because it materially impairs the courts' exercise of their constitutional functions).

In doing so, Proposition 66 also undermines the State's interest in ensuring finality of its criminal judgments and having the first opportunity to review claims alleging constitutional error in securing those judgments. *See Reno*, 55 Cal. 4th at 495 n.30 ("As we have explained, our procedural rules are designed to regularize the postconviction review process, upholding the finality of judgments while leaving open a safety valve for the presentation of legitimate claims."). The current rules provide an avenue for federal petitioners to exhaust their claims in state court, thus ensuring that state courts remain the primary forum for adjudicating state prisoners' federal constitutional rights. *See O'Sullivan*, 526 U.S. at 844 ("Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief.").

In *Reno*, this Court adopted successive petition rules allowing the Court to engage in more expeditious review, while at the same time allowing petitioners to present, in summary fashion, claims "raised solely for the purpose of federal exhaustion." *Reno*, 55 Cal. 4th at 516. Allowing the courthouse doors to remain open for exhaustion petitions gives state courts the first opportunity to review and adjudicate claims of constitutional error. *See id.* at 518-19. Proposition 66, however, forecloses any consideration of successive petitions not meeting its narrow exceptions; this leaves no room for exhaustion petitions, thereby making federal court the primary forum for addressing claims not raised in an initial state petition. *See Coleman v. Thompson*, 501 U.S. 722, 732 (1991) (explaining that a habeas petitioner is not required to "exhaust" his claims in state court if "there are no state remedies any longer 'available' to him" under state law).

Federal courts faced with newly discovered but successive claims by California prisoners may conclude Proposition 66's bar on successive petitions does not preclude federal merits review of the claims. *See Strickler v. Greene*, 527 U.S. 263, 282-283 & n.24 (1999) (explaining that a procedural default is excused by a showing of cause and prejudice, and that a petitioner can show cause by demonstrating the factual or legal basis for a claim was not reasonably available to counsel); *see, e.g.*, *Paradis v. Arave*, 130 F.3d 385, 393-99 (9th Cir. 1997) (holding that a prisoner was entitled to federal merits review of his *Brady* claim, which had been procedurally defaulted and was presented in a successive federal petition, because evidence supporting the claim was not previously available). Under these circumstances, federal courts would review the claims de novo. *See Frantz v. Hazey*, 533 F.3d 724 (9th Cir. 2008) (en banc) (holding a federal court reviews a habeas claim de novo when it was not adjudicated on the merits in state court).

Thus, shifting primary responsibility for habeas claims raised by state inmates from state to federal court is inconsistent with the State's interests. *See O'Sullivan*, 526 U.S. at 845 (explaining it would be unseemly for a federal district court to overturn a state court conviction without the state court first having an opportunity to correct the constitutional violation); *In re Harris*, 5 Cal. 4th 813, 831 (1993) (stating the State has a "powerful interest in the finality of its judgments").

IV. CONCLUSION

Proposition 66's restrictions simply go too far, threatening the constitutional rights of capital habeas petitioners, encroaching on the constitutional function of the state courts, and undermining the State's interests. Proposition 66 does this to expedite "enforcement of judgments in capital cases." Intervenor's Return at 11. But Proposition 66 will not resolve California's capital case backlog; it will simply shift the backlog from state to federal court.

Neither the Federal Public Defenders, nor the capital case panels in our districts, will be able to accept appointment to all of the many hundreds of backlogged capital cases which would enter California's federal courts in the next 6.5 years if Proposition 66 takes effect. *See* Amended Pet. at 7-8 (explaining that Proposition 66 requires that currently pending petitions must be resolved in 6.5 years). The lengthy wait times for the appointment of habeas counsel will simply shift from the beginning of the state court process to the beginning of the federal court process.

For the reasons discussed above, Proposition 66 should not be allowed to stand. Therefore, Amicus Curiae request this Court grant the relief Petitioners request in their Amended and Renewed Petition for Extraordinary Relief.

Respectfully submitted,

DATED: March 29, 2017

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CERTIFICATE OF COMPLIANCE

In accordance with California Rule of Court 8.204(c)(l) counsel for Amicus Curiae hereby certifies that the number of words contained in this Amicus Curiae Brief in Support of Petitioners, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 4742 words as calculated using the word count feature of the computer program used to prepare the brief.

Mary Bauer for/
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PROOF OF SERVICE

I, Iliana Hernandez, declare under penalty of perjury that the following is true and correct: I am employed in Los Angeles County, California; my business address is the Office of the Federal Public Defender, 321 East 2nd Street, Los Angeles, California 90012, Telephone No. (213) 894-2854; I am over the age of eighteen years; I am not a party to the action entitled above; I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bar of the State of California, and admitted to practice in this Court, and at whose direction I served a copy of the attached **AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS** on the following individuals by placing same in a sealed envelope for collection and mailing via Fed Ex, addressed as follows:

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