No. S238309

IN THE SUPREME COURT 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.

Original Writ Proceeding

APPLICATION FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF CONSTITUTIONAL LAW *AMICI* IN SUPPORT OF PETITIONERS

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APPLICATION TO FILE *AMICI CURIAE* BRIEF

Pursuant to rule 8.487(e) of the California Rules of Court and this Court's February 1, 2017 order to show cause, Dean Erwin Chemerinksy, Professor Kathryn Abrams, Professor Rebecca Brown, Professor Devon Carbado, Professor Jennifer Chacón, Professor Sharon Dolovich, Chancellor David L. Faigman, Professor Ian F. Haney López, Professor Karl M. Manheim, Professor Russell Robinson, Professor Bertrall Ross, and the Brennan Center for Justice request permission to file the attached *amici curiae* brief in support of petitioners Ron Briggs and John Van de Kamp.[1]

Amici are a group of law professors specializing in constitutional law at universities throughout California and the Brennan Center for Justice at NYU School of Law[2] ("Constitutional Law *Amici*"). The issues addressed in the Amended Petition lie at the heart of California's constitutional structure and implicate the carefully calibrated separation of powers among the state's legislative, executive, and judicial branches. Preserving the separation of powers among the Judiciary, the Legislature, and the People through the initiative process is of particular interest to Constitutional Law *Amici*, who have extensive experience teaching, writing, and litigating about fundamental constitutional issues related to those addressed in the Amended Petition.[3] Accordingly, Constitutional Law *Amici* request leave to file the

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[1] No party or counsel for party in this case authored the proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief.

[2] The brief does not purport to convey the position of NYU School of Law.

[3] Additional information regarding *amici* is included in the attached Appendix of Signatories.

attached *amici curiae* brief, which argues that the Court should strike down Proposition 66 as violating the California Constitution.

For the aforementioned reasons, proposed *amici curiae* respectfully request that the Court accept the enclosed brief for filing and consideration.

DATED: March 30, 2017

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: Theane Evangelis /RMS
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Attorneys for Constitutional Law Amici

AMICI CURIAE BRIEF

INTRODUCTION

The California Constitution has evolved considerably since its adoption in 1849. Two core principles critical to democracy and judicial independence, however, remain constant—constitutionally guaranteed separation of powers and constitutionally defined jurisdiction. In all its iterations, the California Constitution has preserved these principles, and California courts have steadfastly protected them.

Proposition 66—also called the "Death Penalty Reform and Savings Act of 2016" (see Prop. 66, Gen. Elec. (Nov. 8, 2016) § 1)—is a direct affront to these principles. In a reckless and ham-handed attempt to expedite the death-penalty appeals process no matter the constitutional, institutional, or human costs, Intervenor drafted a statutory initiative that threatens to throw California's constitutional democracy into disarray and grind the gears of justice to a halt. Because Proposition 66 violates Articles III and VI of the California Constitution, and because its unlawful provisions cannot be severed, this Court should invalidate the measure in its entirety.

First, Proposition 66 violates the separation-of-powers principles enshrined in Article III, section 3. Proposition 66 not only requires courts to expedite direct and collateral review of death penalty judgments, it obliges them to resolve such cases within an impossibly short period of time and drastically curbs their discretion in doing so. Because these provisions severely abridge courts' inherent authority to administer their dockets and their ability to fulfill their other constitutional obligations, Proposition 66 unconstitutionally impairs the judiciary's core functions.

Second, Proposition 66 violates the fixed allocation of original jurisdiction in Article VI, section 10. Proposition 66 establishes an "exclusive" procedure for condemned inmates to seek collateral review of

death judgments and establishes a heavy presumption that all habeas corpus petitions must be adjudicated in the superior court that issued the death sentence. As a result, Proposition 66 unlawfully strips this Court, the courts of appeal, and all superior courts except the sentencing court of their constitutionally vested original jurisdiction over habeas corpus proceedings.

Third, Proposition 66's provisions are facially invalid under any standard for resolving a facial challenge because they inevitably (let alone in the generality of cases) intrude on fundamental, structural constitutional principles. Furthermore, the initiative's unconstitutional provisions are neither functionally nor volitionally severable from its remaining provisions because Proposition 66 was intended to be "comprehensive" and relies on a complex and interdependent series of statutory amendments to overhaul the state's death penalty process.

For these and the following reasons, *Amici* respectfully urge this Court to invalidate Proposition 66 before its implementation erodes the independence of California's courts and paralyzes their ability to dispense justice to all.

LEGAL ARGUMENT

I. Proposition 66 Violates Separation Of Powers Because It Defeats Or Materially Impairs The Judiciary's Ability To Fulfill Its Core Constitutional Functions.

Separation of powers is enshrined in the California Constitution. Article III, section 3 provides that "[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) This provision "limit[s] the authority of one of the three branches of government to arrogate to itself the core functions of another branch" and "is violated when the actions of one

branch defeat or materially impair the inherent functions of another." (*Steen v. Appellate Div., Superior Court* (2014) 59 Cal.4th 1045, 1053 (*Steen*).)

Proposition 66 does exactly that. The obligatory[4] duties it imposes on the judiciary materially impair—and, indeed, threaten to defeat—courts' inherent authority to administer their dockets and fulfill their constitutional obligations. Numerous California cases recognize that obligatory and invasive commands like those in Proposition 66 violate this constitutional principle. And other jurisdictions with similar constitutional provisions safeguarding the separation of powers have struck down legislative encroachments like Proposition 66 to preserve the careful calibration of power between equal branches of government. For these and the following reasons, this Court should hold that Proposition 66 violates Article III of the California Constitution.

A. Proposition 66's Nondiscretionary Obligations Defeat Or Materially Impair California Courts' Core Judicial Functions.

Statutory ballot measures like Proposition 66 must not violate separation of powers because "[a] statutory initiative is subject to the same state and federal constitutional limitations" as any other legislative enactment. (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 674; see also *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 552, as modified (Apr. 17, 2002) [considering separation-of-powers challenge to statutory voter

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[4] As this Court recently observed, some inconsistency persists in the use of the terms "obligatory," "permissive," "mandatory," and "directory." (See *Kabran v. Sharp Memorial Hosp.* (2017) 2 Cal.5th 330, 340 (*Kabran*); *People v. Engram* (2010) 50 Cal.4th 1131, 1148 & fn. 7.) Adopting this Court's definitions in *Kabran*, this brief labels Proposition 66's provisions "obligatory," rather than "mandatory," because the remedy for a court's noncompliance with Proposition 66 is not the invalidation of the court's action.

initiative].) In evaluating whether a legislative enactment violates separation-of-powers principles, California courts ask whether the statute imposes obligatory duties on a coordinate branch that defeat or materially impair its core functions, or whether the statute is merely permissive. (See, e.g., *People v. Engram* (2010) 50 Cal.4th 1131, 1148 & fn. 7 (*Engram*).) Here, Proposition 66's extreme, obligatory curtailment of courts' ability to adjudicate capital appeals and habeas petitions—and the resulting impact on other cases—defeats, or at least materially impairs, courts' constitutional functions.

1. The California Constitution Establishes and Carefully Calibrates Courts' Judicial Functions.

Article VI, section 1 of the California Constitution provides that "[t]he judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." The remainder of Article VI sets forth the powers and duties of the California courts in painstaking detail, the most important of which are discussed below.

First, the Constitution assigns the courts original jurisdiction for various causes. Under Article VI, section 10, this Court, the "courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings" and "proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." (Cal. Const., art. VI, § 10.) In "all other causes," "[s]uperior courts have original jurisdiction." (*Ibid.*) This is a fundamental aspect of how courts adjudicate cases and controversies before them, as it is "the basic duty of a court to consider and determine on the merits, all causes of action properly before it and of which it has jurisdiction." (*Gering v. Superior Court* (1951) 37 Cal.2d 29, 31-32.)

Second, the Constitution assigns certain courts appellate jurisdiction for specific causes. Article VI, section 11 provides that this Court has appellate jurisdiction over judgments of death and that the courts of appeal

generally have appellate jurisdiction over the superior courts.[5] (Cal. Const., art. VI, § 11.) Article VI, section 12, subdivision (b) provides this Court with jurisdiction to review the decisions of the courts of appeal. (*Id.*, § 12.)

Third, the Constitution requires prompt publication of decisions. Article VI, section 14 requires the Legislature to "provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate" and that "[d]ecisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." This "requirement [to publish a written opinion] is designed to insure that the reviewing court gives careful thought and consideration to the case and that the statement of reasons indicate that appellant's contentions have been reviewed and consciously, as distinguished from inadvertently, rejected." (*People v. Rojas* (1981) 118 Cal.App.3d 278, 288-289.)

Fourth, in order to carry out the judicial functions and duties described above and fairly adjudicate the disputes presented to them, courts also have the inherent power to control their dockets. As this Court said in *Engram*, *supra*, 50 Cal.4th 1131:

> It is well established, in California and elsewhere, that a court has both the inherent authority and responsibility to fairly and efficiently administer all of the judicial proceedings that are pending before it, and that one important element of a court's inherent judicial authority in this regard is "the power . . . to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of

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[5] Article VI, section 11 specifically permits the Legislature to modify the appellate jurisdiction of the courts of appeal. (Cal. Const., art. VI, § 11.) No such provision exists in Article VI, section 10, regarding the courts' original habeas jurisdiction. (See *id.*, § 10.)

> judgment, which must weigh competing interests and maintain an even balance."

(*Id.* at p. 1146 [quoting *Landis v. N. American Co.* (1936) 299 U.S. 248, 254-255]; see also *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1104 [""exercising [] discretion to rule upon controversies between the parties and ensuring the orderly administration of justice"" is one of the judiciary's ""most basic functions""], quoting with approval *Case v. Lazben Financial Co.* (2002) 99 Cal.App.4th 172, 185.)

As this discussion makes clear, California courts have the power—and the duty—to fairly and thoughtfully consider each matter before them. And courts must be able to manage their own dockets in order to perform their constitutional obligations.

2. Proposition 66 Unconstitutionally Interferes With Courts' Ability To Control Their Dockets As Required To Fulfill Their Constitutional Obligations.

Not all statutes imposing nondiscretionary obligations on courts violate separation of powers. (See, e.g., *Rice v. Superior Court* (1982) 136 Cal.App.3d 81, 89-93 (*Rice*) [holding that obligatory provision giving trial preference to parties over age 70 did not violate separation of powers].) Indeed, "the cases recognize that the Legislature generally may adopt reasonable regulations affecting a court's inherent powers or functions, so long as the legislation does not 'defeat' or 'materially impair' a court's exercise of its constitutional power or the fulfillment of its constitutional function." (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 58-59 (*Mendocino County*).) But here, the unprecedented burdens Proposition 66 places on the courts are so great that they defeat, or materially impair, their ability to control their docket as necessary to fairly adjudicate cases before them.

a. Obligatory Regulations That Obstruct Courts From Performing Core Functions Are Unconstitutional.

An obligatory statutory command defeats or materially impairs the judiciary's functions when it prevents courts from prioritizing cases or devoting time and resources as necessary to fairly adjudicate disputes and award relief. (See *Engram*, *supra*, 50 Cal.4th at p. 1161; *In re Shafter-Wasco Irrigation Dist.* (1942) 55 Cal.App.2d 484, 487 (*Shafter-Wasco*).) In *Engram*, this Court recognized that, if a statute giving preference to criminal trials at the expense of civil ones were construed to be absolute and obligatory, "the statute clearly would defeat or at the very least materially impair the court's fulfillment of its constitutional obligation to provide for fair administration of justice for *all* cases pending in the court, civil as well as criminal, and thus would be unconstitutional." (50 Cal.4th at p. 1161.) Rather than adopt this constitutionally problematic interpretation, the Court looked to the statute's text and purpose to determine that it was permissive, not obligatory. (*Id.* at p. 1162.)

The Court of Appeal reached a similar conclusion in *Shafter-Wasco*. There, the court confronted a statute that required it to decide appeals of superior court decisions regarding the dissolution of irrigation districts within three months. (*Shafter-Wasco*, *supra*, 55 Cal.App.2d at p. 486.) The court explained that such a requirement, if obligatory, would be an "unreasonable" "limitation on [its] constitutional power to decide the case":

> While the record is not formidable it is not inconsiderable. While we have not examined it, there may be presented serious questions for decision that might require careful consideration which could not be given within the time provided by the statute.
>
> . . .

> [W]e are required to so construe the last sentence of section 4 of the act so that it may be held to be constitutional rather than to construe it literally and thereby have to hold it an unreasonable limitation on the constitutional powers of the appellate and supreme courts.

(*Id.* at pp. 487-488.)

Conversely, an obligatory command does *not* defeat or materially impair the judiciary's functions if it merely inconveniences or burdens the courts, without affecting their ability to fairly prioritize and resolve disputes. Thus, in *Mendocino County*, this Court held that a statute authorizing counties to close their courts on particular days for budgetary reasons did not defeat or materially impair the courts' functions, because closing courts for an unspecified number of days would not materially impede their ability to adjudicate disputes. (*Mendocino County*, *supra*, 13 Cal.4th at pp. 60-61.)

Similarly, obligatory commands that *protect* litigants' rights are less likely to violate the separation-of-powers doctrine. For example, the Court of Appeal held in *Rice*, *supra*, that a statute giving preference to civil matters where at least one of the parties is aged 70 years or older was both obligatory and did not violate the separation-of-powers doctrine. (136 Cal.App.3d at pp. 88, 93.)

Proposition 66, by contrast, imposes enormous nondiscretionary burdens on the courts, frustrating their ability to fairly prioritize and adjudicate the cases before them. Proposition 66 imposes these burdens not to protect litigants' rights, but to expedite judicial review, regardless of the consequences. As a result, Proposition 66 defeats or materially impairs courts' constitutional judicial functions.

b. Proposition 66 Severely Disrupts Overburdened Courts' Dockets.

First, Proposition 66 imposes unreasonably short timelines for deciding capital appeals and habeas petitions that, because of the realities of

the capital and habeas docket, will in practice transmute this Court into a death penalty court and relegate 99% of its caseload to the Court of Appeal. Amended Penal Code section 190.6, subdivision (d), requires state courts to complete *both* the state appeal process *and* initial habeas review within five years of the entry of judgment.[6] But as this Court is well aware, the backlog of death penalty cases in California is staggering. As of July 17, 2016, 747 inmates were on California's death row. (Alarcón Advocacy Center, Loyola Law School, California Votes 2016: An Analysis of the Competing Death Penalty Ballot Initiatives (2016) p. 16 (hereafter *California Votes 2016: An Analysis*).)[7] These inmates' appeals take, on average, 15.3 years for their direct appeals to be fully resolved, and additional time on top of that for their habeas petitions to be fully resolved. (*Ibid.*) By contrast, direct appeals from non-capital cases involving first-degree murder take less than three years on average to be resolved. (*Id.* at pp. 13-14.) Even worse, the average time for a direct death penalty appeal has steadily increased over time—from 6.6

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[6] Statutory references are to the Penal Code as revised by Proposition 66, unless otherwise noted.

[7] Pursuant to Evidence Code section 452, *amici* respectfully request the Court take judicial notice of the state-provided data and accompanying information in the sources cited herein. (See *St. John's Well Child and Family Center v. Schwarzenegger* (2010) 50 Cal.4th 960, 967, fn. 5 [taking judicial notice of ballot initiative materials in review of original writ proceeding]; *Board of Ed. of City of Los Angeles v. Watson* (1966) 63 Cal.2d 829, 836, fn. 3 [taking judicial notice of data in a report prepared by a state agency].) Because this evidence is properly noticeable, and because this Court "may not overlook [the] probable impact" of the challenged statute, *Parr v. Mun. Ct. for the Monterey-Carmel Jud. Dist. of Monterey County* (1971) 3 Cal.3d 861, 868, the Court should reject Intervenor's suggestion that disputed questions of fact preclude this Court's review. (See Intervenor's Return (Mar. 1, 2017) at pp. 37-39.)

years between 1978-1989, to 10.7 years between 1990-1996, to over 12 years in 2006, to the current average of over 15 years. (*Id.* at p. 58.)

The complexity of death penalty cases is a major cause of the backlog. A 2008 report by the legislatively created California Commission on the Fair Administration of Justice found an average period of 2.74 years between appointment of counsel and the filing of the opening brief in a direct appeal, due largely to the fact that records in these cases averaged over 9,000 pages. (California Commission on the Fair Administration of Justice, Final Report (2008) p. 131 (hereafter *Commission Final Report*).) Briefs in direct appeals generally are "between 250 and 350 pages long and include[] 30 to 40 claimed errors." (Alarcón & Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle* (2011) 44 Loyola L.A. L.Rev. S41, S187 (hereafter *Executing the Will of the Voters?*).)

Once the appeals are fully briefed, inmates encounter the backlog before this Court. In 2010, there were 356 direct appeals of capital sentences pending, 80 of which had been fully briefed; 89 fully briefed habeas corpus petitions were also pending. (*Executing the Will of the Voters?*, *supra*, 44 Loyola L.A. L.Rev. at p. S82.) Inmates frequently wait more than two to three years before their direct appeal is scheduled for oral argument. (*Commission Final Report*, *supra*, at p. 122.). Likewise, habeas petitioners waited an average of 22 months between the filing of a habeas corpus petition and a decision from this Court. (*Id.* at p. 123.)

This backlog already dramatically affects this Court's ability to address its non-capital caseload, even without Proposition 66's implausible time limitations. According to the Judicial Council of California's statistical reports, direct appeals and habeas corpus petitions related to death penalty cases generally take up *less than 1%* of the total filings each year before the Supreme Court. (See Judicial Council of California, 2016 Court Statistics

Report (2016) p. 5 (hereafter *2016 Court Statistics Report*).) Yet the Chief Justice has estimated that the Court "devotes 25 percent of its resources" to death penalty appeals and habeas corpus petitions. (Editorial Board, *Chief Justice Tani Canil-Sakauye* [sic] *holds court*, Sac. Bee (Mar. 12, 2016) <http://www.sacbee.com/opinion/editorials/article65372312.html> [as of Jan. 11, 2017]; see also Bob Egelko, *Teacher tenure laws are lawmakers' responsibility, justice says*, S.F. Chronicle (Jan. 11, 2017) <http://www.sfgate.com/news/article/Teacher-tenure-laws-are-lawmakers-10851797.php> [as of Jan. 27, 2017] ["[Proposition 66], if it took effect, 'would take a substantial portion of our resources' for death penalty cases, the chief justice said"].)

Despite devoting a substantial portion of its resources to resolving death penalty appeals, this Court struggles to keep pace. And understandably so. In the 2009-2010 term, nearly half of the pages of opinions published by the Court (1,369 out of 2,957 pages) were dedicated to resolving 22 capital cases. (Uelmen, *The End of an Era* (Sept. 2010) Cal. Law. <https://ww2.callawyer.com/Clstory.cfm?eid=911409> [as of Jan. 3, 2017].) In the same time period, however, 29 additional capital sentences were imposed. (*Ibid.*) Similarly, in 2014-2015, the Court disposed of 19 direct appeals from capital cases and 17 habeas corpus petitions related to capital cases, but received 18 more direct appeals and 47 more habeas petitions in the same period.[8] (*2016 Court Statistics Report*, *supra*, at p. xiv.) If even these efforts by this Court cannot reduce the backlog, it is unclear how the Court is expected to meet Proposition 66's time limits without neglecting the remaining 99% of its caseload.

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[8] Indeed, in eight of the last ten fiscal years, the number of incoming death penalty appeals and habeas petitions exceeded the number the Court was able to resolve. (Judicial Council of California, 2016 Court Statistics Report (2016) p. 5.)

In addition, Proposition 66 shifts the judicial backlog by requiring all initial habeas petitions to be filed in the same superior court that imposed the death sentence, but fails to account for the fact that nearly half of California's capital cases come from just three counties—San Bernardino, Riverside, and Los Angeles—that already struggle with their current non-death-penalty caseloads. (*California Votes 2016: An Analysis*, *supra*, at p. 11.) San Bernardino, for example, would need an additional 60 judges—a 40% increase over current seats in the county—to handle its current workload. (Michael P. Neufeld, *Critical Judicial Shortage in San Bernardino County: Obernolte Introduces A.B. 2341*, ROTWNews (May 27, 2016) http://rotwnews.com/2016/05/27/critical-judicial-shortage-in-san-bernardino-county-obernolte-introduces-a-b-2341/.) And Riverside's backlog is so severe that between 2007 and 2009, 350 criminal cases *were thrown out* because no judge was available to hear them (see Richard K. De Atley *Riverside County: Not all courts for criminal cases*, The Press-Enterprise (Oct. 26, 2010)), while in 2005, "[a]ll civil cases in Riverside Superior Court were suspended for more than a month . . . while overtaxed judges worked to chip away at the backlog of criminal cases." (Rumer, *Indio highlights Riverside County judge shortage*, Desert Sun (Mar. 17, 2016).) Yet Proposition 66 ignores this reality and arbitrarily requires the superior courts to decide the initial habeas petition in *one year*, "unless the court finds that a delay is necessary to resolve a substantial claim of actual innocence"—but no other claim—and "in no instance shall the court take longer than two years to resolve the petition." (Pen. Code, § 1509, subd. (f).)

Compounding the obligatory deadlines, Proposition 66 also requires courts to resolve petitions for a writ of mandate to force judicial action within *60 days* (Pen. Code, § 190.6, subd. (e)), and requires the courts of appeal to act on requests for certificates of appealability regarding successive petitions

within *10 days* and to give such appeals "priority over all other matters." (*Id.*, § 1509.1, subd. (c).)

c. Proposition 66 Throws The System For Appointing Counsel Into Disarray.

Second, Proposition 66's timelines also impose unreasonable obligations on the courts regarding the appointment of counsel. Under Proposition 66, both the appellate and initial habeas proceedings must be *completed* within five years of the entry of judgment. (Pen. Code, § 190.6, subd. (d).) To this end, section 1239.1 requires this Court to appoint capital appellate counsel "as soon as possible." Section 1509, in turn, requires that trial courts offer habeas counsel to capital defendants, and that "the initial petition must be filed within one year" of the appointment of counsel.

Again, these deadlines ignore reality. The 2008 Commission Report found that 79 defendants on death row were waiting for appointment of qualified appellate counsel—a delay that averaged three to five years. (*Commission Final Report*, *supra*, at p. 122.) As for habeas petitions, the Commission identified 291 inmates—over 40 percent of the total death row population at the time—who had not been appointed habeas counsel, and estimated that the wait for appointment of qualified counsel would average eight to ten years. (*Id.* at p. 134.) Proposition 66 therefore requires courts to complete the appellate and initial habeas process in less time than it currently takes to even appoint counsel.

Proposition 66 attempts to address the backlog for appointed counsel, but again misses the mark. As this Court has noted, there simply are not enough attorneys qualified to represent capital defendants because "work on a capital habeas petition demands a unique combination of skills." (*In re Morgan* (2010) 50 Cal.4th 932, 938.) "The tasks of investigating potential claims and interviewing potential witnesses require the skills of a trial attorney, but the task of writing the petition, supported by points and

authorities, requires the skills of an appellate attorney. Many criminal law practitioners possess one of these skills, but few have both." (*Ibid.*) The California Commission on the Fair Administration of Justice reached this same conclusion in 2008 when it offered numerous recommendations for dealing with the shortage of qualified attorneys, including expanding the Office of the State Public Defender, expanding the California Habeas Corpus Resource Center, and addressing a compensation rate that lags far behind rates for other work that qualified attorneys could obtain.[9] (*Commission Final Report, supra*, at pp. 116-117, 133.)

Proposition 66 adopts none of these; instead, it merely conscripts more attorneys into representing death row defendants and hopes they will be up to the task. At best, this will push inexperienced and unprepared attorneys into multi-year cases that determine whether their clients live or die; at worst (and more likely), it will increase the Court's backlog by leading to the complete withdrawal of attorneys from the Court's already limited pool for appointed counsel. (See *Props 62 and 66: California voters should end the death penalty, not speed it up*, L.A. Times (Sept. 3, 2016) <http://www.latimes.com/opinion/editorials/la-ed-prop-62-prop-66-20160826-snap-story.html> [as of Dec. 13, 2016] ["Proposition 66 opponents say most lawyers would forego appellate work rather than take on a long, arduous and poorly remunerated death penalty appeal assignment"]; *Fight crime, not futility: Abolish death penalty*, S.F. Chronicle (Sept. 1, 2016)

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[9] As Judge Arthur Alarcón wrote: "I would be hard-pressed to explain to a bartender or a nonlawyer acquaintance how it is appropriate that an appellate lawyer who is attempting to save a human being's life is compensated at the rate of $140 per hour, while the same lawyer could receive as much as $540 per hour to represent an insolvent corporation in bankruptcy proceedings." (Alarcón, *Remedies for California's Death Row Deadlock* (2007) 80 So.Cal. L.Rev. 697, 720.) The rate has since increased to $145 per hour.

<http://www.sfchronicle.com/opinion/editorials/article/Fight-crime-not-futility-Abolish-death-penalty-9185804.php> [as of Dec. 13, 2016] [Proposition 66 "raises two serious concerns: One is the prospect that attorneys less steeped in the fine points of capital appeals—and it *is* a specialized part of the law—will be representing inmates with lives on the line. The other is the possibility of attorneys enlisted against their free will in these appeals. Neither scenario would suggest a path toward greater justice"].)

Moreover, Proposition 66 leaves counties to shoulder the burden of appointing attorneys in the superior courts. (See Pen. Code, § 987.6, subd. (a) [limiting state reimbursements to counties for costs of indigent representation to 10%]; *California Votes 2016: An Analysis*, *supra*, at p. 62 [estimating that Los Angeles, Riverside, and San Bernardino alone would need to spend over $60 million on appointed counsel for the habeas petitions to be filed in their courts].) By shifting the appointment of habeas counsel to the trial courts and imposing unreasonable timelines, Proposition 66 places a substantial burden on the superior courts, many of which lack the resources to perform the task.

d. Proposition 66 Improperly Divests Courts Of Original Jurisdiction.

Third, Proposition 66 effectively destroys this Court's ability to exercise its constitutionally granted original jurisdiction over habeas petitions. As discussed more fully below in Section II.B, *post*, Proposition 66 provides that initial habeas petitions should be filed in the superior courts, requires a finding of good cause to deviate from that rule, and imposes on superior courts the burden of seeking and appointing habeas counsel.

e. Proposition 66 Violates The Separation Of Powers Doctrine.

These three requirements will defeat or materially impair the courts' constitutional functions. Like the statutory priorities and deadlines in *Engram* and *Shafter-Wasco*, Proposition 66 will frustrate the courts' ability to prioritize cases and spend the time necessary to fairly resolve disputes. And Proposition 66's impact on the courts' functions will be far greater than the furlough days at issue in *Mendocino County*. (Cf. *Mendocino County*, *supra*, 13 Cal.4th at pp. 60-61.) As the current backlogs in the capital appeal and habeas processes show, capital cases demand enormous resources. Compliance with Proposition 66's exceedingly brief timelines and onerous appointment obligations will necessarily force courts to give short shrift to capital and non-capital cases alike.[10]

Nor can Proposition 66 be saved as a measure that protects litigants' rights. (Cf. *Rice*, *supra*, 136 Cal.App.3d at pp. 90-94.) In *Rice*, the court upheld an obligatory statute that gave scheduling preference to the elderly to ensure that those approaching the end of life could have their disputes heard. (*Ibid.*) Proposition 66 does the exact opposite: it *accelerates* litigants' deaths and *prevents* their claims from being heard. Indeed, Proposition 66's explicit

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[10] The State argues that these "predicted dire consequences" "do not suffice, without more, to invalidate a measure approved by the voters," citing *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349, and *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 261. (State's Return at p. 50, fn. 15.) However, the predictions of dire consequences in those cases were "wholly conjectural," *e.g.*, *Brosnahan*, *supra*, at p. 261, whereas here, the backlog of, and limited resources available for, processing capital habeas cases is well-established. (See discussion at pages 11-18, *ante*.) Moreover, neither *Raven* nor *Brosnahan* considered whether the propositions at issue "defeat[ed] or materially impair[ed]" the judiciary's functions. (See *Raven*, *supra*, at p. 349; *Brosnahan*, *supra*, at pp. 258-261.)

findings and purpose omit any reference to fairness to defendants apart from expediting the resolution of their cases. (See Prop. 66, § 2, subds. (1)-(11).)

Proposition 66 fundamentally limits judicial review of death sentences by imposing nondiscretionary statutory obligations that prevent courts from spending the time and resources required to fairly adjudicate cases. It defeats or materially impairs one of the courts' most serious and important functions—the review of a death sentence. And by forcing the courts to prioritize capital cases at the expense of all others, Proposition 66 also defeats or materially impairs the courts' duty to fairly and promptly adjudicate *all* of the causes before them.[11] Proposition 66 violates the separation of powers guaranteed by the California Constitution.

3. Proposition 66 Imposes Obligatory Duties On California Courts.

Faced with the inevitable havoc that Proposition 66 will wreak on California's judicial system, the State urges this Court to apply the constitutional avoidance canon and construe Proposition 66's obligatory deadlines as merely suggestive. (See State's Return (February 27, 2017) at pp. 44-45 & fn. 10, citing *Shafter-Wasco*, *supra*, 55 Cal.App.2d at p. 488, and *Engram*, *supra*, 50 Cal.4th at pp. 1152-1153.)[12] But unlike the measures in *Engram* and *Shafter-Wasco*, Proposition 66 cannot be salvaged without "doing violence to the reasonable meaning of [its] language" and frustrating

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[11] Proposition 66 also blurs the lines of political accountability by increasing the risk that the public will mistakenly blame the courts for the inevitable problems Proposition 66 itself creates. (See *Steen*, *supra*, 59 Cal.4th at p. 1060 (conc. opn. of Liu, J.) ["Separation of powers protects liberty not only by creating checks and balances, but also by maintaining clear lines of political accountability"].)

[12] Intervenor appears to advance a similar argument. (See Intervenor's Return at p. 42, citing *Engram*, *supra*, 50 Cal.4th at p. 1156.)

its purpose. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373; cf. *People v. Garcia (Ignacio)* (Mar. 20, 2017, S218197) ___ Cal.5th ___ [2017 WL 1046457, at pp. *6-7] ["purpose and context" of assertedly unconstitutional statute must be considered to avoid an interpretation that "would frustrate the [statute's] purpose"].)

To determine if a statute is obligatory, courts look to its language, to whether it provides a remedy for failure to comply, and to its intended purpose. (See *Engram*, *supra*, 50 Cal.4th at pp. 1150-1151, 1155; *Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 856 (*Saltonstall*); *Rice*, *supra*, 136 Cal.App.3d at p. 86; *Shafter-Wasco*, *supra*, 55 Cal.App.2d at p. 488.) Here, Proposition 66's text, mechanism of enforcement, and intended purpose all show that Proposition 66 imposes obligatory, nondiscretionary duties on the courts.

a. Proposition 66 Uses Obligatory Language.

Where a statute uses terms such as "shall" or "must," courts often find that it imposes nondiscretionary obligations. (*Rice*, *supra*, 136 Cal.App.3d at p. 86; *County of Kern v. Superior Court* (1978) 82 Cal.App.3d 396, 400 (*Kern County*).)

For example, in *Rice*, *supra*, 136 Cal.App.3d 81, the Court of Appeal held that a statute was nondiscretionary where it provided that parties who are at least 70 years old "shall be entitled to preference" in setting civil trials. (*Id.* at p. 84.) The superior court had denied the 80-year-old plaintiff's motion for a preferential trial date under the statute. (*Id.* at pp. 84-85.) But the Court of Appeal, focusing on the statute's use of the term "shall," held that the superior court lacked discretion to deny the statutory preference and issued a writ of mandate. (*Id.* at pp. 86-87; see also *Peters v. Superior Court* (1989) 212 Cal.App.3d 218, 223-224 (*Peters*) [statute providing that certain actions involving parties under age 14 "shall be entitled to preference upon

the motion" of a minor party was obligatory].) Similarly, in *Kern County*, the Court of Appeal held that a statute providing that certain defenses in medical negligence actions "must" be tried before other issues was obligatory in part because the statute "use[d] the word 'must,' which strongly implies a mandatory duty that the statute of limitation issue is to be determined first, if a party so moves." (*Kern County*, *supra*, 82 Cal.App.3d at pp. 399-400.)

Here, as in *Rice* and *Kern County*, much of Proposition 66's language is undisputedly obligatory. Indeed, the following provisions impose nondiscretionary obligations on this Court, the lower courts, the Judicial Council, and the Department of Corrections and Rehabilitation:

> Section 190.6, subdivision (d): "Within 18 months of the effective date of this initiative, the Judicial Council ***shall*** adopt initial rules and standards . . . . Within five years of the adoption of the initial rules or the entry of judgment, whichever is later, the state courts ***shall*** complete the state appeal and the initial state habeas corpus review in capital cases. The Judicial Council ***shall*** continuously monitor the timeliness of review of capital cases and ***shall*** amend the rules and standards as necessary . . . ."
>
> Section 190.6, subdivision (e): If a party files a petition for writ of mandate to force judicial action, "[t]he court in which the petition is filed ***shall*** act on it within 60 days of filing."
>
> Section 1227, subdivision (a): Whereas courts previously had discretion in setting a date of execution, under Proposition 66 courts must specify a 10-day period, which "***shall*** begin no less than 30 days after the order is entered and ***shall*** end no more than 60 days after the order is entered."
>
> Section 1239.1, subdivision (a): "The court ***shall*** appoint counsel for an indigent appellant as soon as possible. The court ***shall*** only grant extensions of time for briefing for compelling or extraordinary reasons."
>
> Section 1509, subdivision (d): Whereas courts previously had discretion in evaluating the timeliness of a capital habeas

petition and deciding whether to hear a successive petition,[13] Proposition 66 provides that "[a]n initial petition which is untimely under subdivision (c) or a successive petition whenever filed ***shall*** be dismissed" unless the petitioner proves actual innocence or ineligibility. Moreover, "[a] stay of execution ***shall not*** be granted for the purpose of considering a successive or untimely petition unless the court finds that the petitioner has a substantial claim of actual innocence or ineligibility."

Section 1509, subdivision (f): "Proceedings under this section ***shall*** be conducted as expeditiously as possible, consistent with a fair adjudication. The superior court ***shall*** resolve the initial petition within one year of filing unless the court finds that a delay is necessary to resolve a substantial claim of actual innocence, ***but in no instance shall*** the court take longer than two years to resolve the petition. On decision of an initial petition, the court ***shall*** issue a statement of decision explaining the factual and legal basis for its decision."

Section 1509.1, subdivision (c): "The superior court ***shall*** grant or deny a certificate of appealability concurrently with a decision denying relief on the petition. The court of appeal ***shall*** grant or deny a request for a certificate of appealability within 10 days of an application for a certificate. . . . An appeal under this subdivision ***shall*** have priority over all other matters and be decided as expeditiously as possible."

Section 3604.1, subdivision (c): Regarding method of execution claims, "[s]uch a claim ***shall*** be dismissed if the court finds its presentation was delayed without good cause. If the method is found invalid, the court ***shall*** order the use of a valid method of execution. If the use of a method of execution is enjoined by a federal court, the Department of Corrections and Rehabilitation ***shall*** adopt, within 90 days, a method that conforms to federal requirements as found by that court. If the department fails to perform any duty needed to enable it to execute the judgment, the court which rendered the judgment of death ***shall*** order it to perform that duty . . . ."

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[13] (E.g., *In re Reno* (2012) 55 Cal.4th 428, 460, 515.)

(Emphases added.)

Furthermore, section 1239.1, subdivision (b), imposes a nondiscretionary obligation on this Court:

> When necessary to remove a substantial backlog in appointment of counsel for capital cases, the Supreme Court ***shall*** require attorneys who are qualified for appointment to the most serious non-capital appeals and who meet the qualifications for capital appeals to accept appointment in capital cases as a condition for remaining on the court's appointment list.

(Emphasis and italics added.)

These provisions use "shall" no less than 23 times. They can only be read as a series of nondiscretionary commands. And virtually all of these commands are unqualified; indeed, two of them are strengthened by additional, absolute terms. (See Pen. Code, § 1509, subd. (f) ["[I]n no instance shall the court take longer than two years to resolve the petition"]; *id.*, § 1509.1, subd. (c) ["An appeal under this subdivision shall have priority over all other matters and be decided as expeditiously as possible"].)

Accordingly, Proposition 66's myriad uses of "shall" show that the measure imposes nondiscretionary obligations on courts. (See *Rice*, *supra*, 136 Cal.App.3d at p. 86.)

b. Proposition 66 Provides Consequences For Judicial Noncompliance.

Courts also consider whether the statute provides an enforcement mechanism. A statute is likely to be obligatory if it imposes some consequence for noncompliance.[14] (See *Saltonstall*, *supra*, 231 Cal.App.4th

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[14] Whether a statute *provides* a penalty is relevant to whether its provisions are obligatory or permissive. (See *Saltonstall*, *supra*, 231 Cal.App.4th at p. 856.) The separate question of whether the specific penalty invalidates

at p. 856 [provision requiring appellate review of CEQA cases in 270 days not obligatory because it "does not impose any penalty for review that exceeds the 270 days" and deadline was only applicable "to the extent feasible"].)

In *Garrison v. Rourke* (1948) 32 Cal.2d 430 (*Garrison*), this Court held that a court hearing an election case did not lose jurisdiction by failing to file its decision within 10 days of the parties' submission, because the statute included no "consequence or penalty" for the court's failure to timely file its decision.[15] (*Id.* at p. 435, overruled in part on other grounds by *Keane v. Smith* (1971) 4 Cal.3d 932, 939; see also *Shafter-Wasco*, 55 Cal.App.2d at pp. 486-488 [statute did not divest court of jurisdiction where it provided that appeal "must" be heard and determined within 30 days but did not have a penalty].)

However, in *Thomas v. Driscoll*, the Court of Appeal held that a statute regarding orders granting motions for a new trial was obligatory in part because of the consequence for failing to comply with the statute. (*Thomas v. Driscoll* (1940) 42 Cal.App.2d 23 (*Thomas*), abrogated on other grounds by *Dempsey v. Market St. Ry. Co.* (1943) 23 Cal.2d 110.) The statute in *Thomas* created a conclusive presumption that any order granting a motion for a new trial was not based on the insufficiency of the evidence unless it was in writing and filed within a certain period. (*Thomas*, *supra*, at p. 26.) According to the court, that presumption weighed in favor of finding the provision to be nondiscretionary. (*Id.* at p. 27.) As the court explained, "[a]lthough imperative words are sometimes held to have only a directory

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the government action is the subject of the "mandatory"-"directory" line of cases. (See, e.g., *Kabran*, *supra*, 2 Cal.5th at p. 340.)

[15] The Court therefore declined to consider the separation-of-powers issue that would have been present if the statute carried a consequence. (See *Garrison*, *supra*, 32 Cal.2d at p. 436.)

meaning, this rule of interpretation is not applicable when a consequence or penalty is provided for a failure to do the act commanded." (*Ibid.*)

Here, the consequence for noncompliance is a mandamus action, which Proposition 66 expressly creates to force courts to abide by its obligatory time limits: "If a court fails to comply [with the time limit in subdivision (b)] without extraordinary and compelling reasons justifying the delay, either party or any victim of the offense may seek relief by petition for writ of mandate." (Pen. Code, § 190.6, subd. (e).)[16]

California's writ of mandate provides a mechanism for parties "to compel the performance of an act which the law specially enjoins." (Code Civ. Proc., § 1085, subd. (a); see also *Hagopian v. State* (2014) 223 Cal.App.4th 349, 373.) "The remedy may not be invoked to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular way." (*Ridgecrest Charter School v. Sierra Sands Unified School Dist.* (2005) 130 Cal.App.4th 986, 1002.) Accordingly, courts of appeal have repeatedly used the writ to compel superior courts to comply with their nondiscretionary statutory duties. (See, e.g., *Peters*, *supra*, 212 Cal.App.3d at p. 227; *Rice*, *supra*, 136 Cal.App.3d at p. 94.)

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[16] There is some confusion over whether the writ of mandate in section 190.6, subdivision (e), applies to the briefing timelines in subdivision (b) or the review timelines in subdivision (c) or (d). The parties appear to believe that subdivision (e)'s reference to subdivision (b) is actually intended to refer to subdivision (d). (See Amended and Renewed Petn. for Ex. Relief (Dec. 19, 2016) at p. 31; Intervenor's Prelim. Opp. (Feb. 1, 2017) at pp. 39-40; Intervenor's Return at pp. 41-42; Petitioners' Traverse (Mar. 20, 2017) at p. 50.) *Amici* similarly presume that Proposition 66 allows for mandamus relief to enforce the five-year timeline. (See *People v. Guzman* (2005) 35 Cal.4th 577, 587 ["we have previously limited ourselves to relatively minor rewriting of statutes . . . when it has been obvious that a word or number had been erroneously used"].)

Moreover, Proposition 66 provides that "[t]he court in which the petition [for writ of mandate] is filed *shall act on it within 60 days of filing*." (Pen. Code, § 190.6, subd. (e), italics added.) Proposition 66 thus curtails courts' control of their dockets with an obligatory, expedited mandamus procedure. Further restricting the courts' autonomy, Proposition 66 extends this remedy not just to the parties in the case, but to *victims* of the offense as well. (See *ibid.*) Thus, in addition to its repeated use of obligatory language, Proposition 66's enforcement mechanism imposes nondiscretionary obligations. (*Thomas*, *supra*, 42 Cal.App.2d at p. 27.)

c. Proposition 66 Was Intended To Be Obligatory.

Finally, courts consider the measure's purpose. (*Rice*, *supra*, 136 Cal.App.3d at pp. 88-89 [statute's obligatory nature was consistent with purpose of protecting the rights of elderly]; *Peters*, *supra*, 212 Cal.App.3d at pp. 223-224 [same with regard to rights of minors].)

To do so, courts first look to the statute's text. In *Engram*, this Court reviewed a statute requiring superior courts to give criminal trials precedence over civil matters. (*Engram*, *supra*, 50 Cal.4th at p. 1151.) But while the text required criminal matters to be given preference, it also provided that the statute's policy was to expedite criminal trials "to the greatest degree that is consistent with the ends of justice." (*Ibid.*, italics omitted.) The Court thus determined that interpreting the statute to require superior courts to turn probate, juvenile, and supplemental civil departments into criminal departments would not be consistent with the ends of justice, and therefore would not further the statute's purpose. (*Id.* at p. 1152.) As a result, the Court held that the statute was merely permissive. (*Id.* at p. 1162.)

Where available, legislative history can shed light on whether the Legislature intended a provision to be obligatory. (See, e.g., *Engram*, *supra*, 50 Cal.4th at p. 1152, fn. 9 [consulting legislative history].) For example, in

Kern County, which considered a statute dictating the order of defenses in medical negligence cases, the court consulted a staff analysis prepared for the Senate Judiciary Committee, which it noted demonstrated the Legislature's intention to "remove discretion from the court." (*Kern County*, *supra*, 82 Cal.App.3d at p. 400.)

For popular initiatives, "the ballot summary and arguments and analysis presented to the electorate in connection with a particular measure" are evidence of legislative intent. (*Amador Valley Joint Union High School Dist. v. Bd. of Equalization* (1978) 22 Cal.3d 208, 245-246; see also *People v. Morales* (2016) 63 Cal.4th 399, 406-407 (*Morales*) [assuming "that the voters, or at least some of them, read and were guided by the ballot materials concerning the proposition"]; *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 559-562 (*Hi-Voltage*) [considering proponents' arguments in ballot pamphlet as evidence of popular intent].)

Here, Proposition 66's findings and declarations show that it was meant to be obligatory. The measure's intended purpose is to reform the death penalty by expediting judicial review of capital cases and reducing the associated costs—goals that the statute declares "will" be achieved. (See, e.g., Prop. 66, § 2, subd. (6) ["Reforming the existing inefficient appeals process for death penalty cases ***will*** ensure fairness for both defendants and victims. . . . [T]he defendants' claims ***will*** be heard sooner"], emphases and italics added; *id.*, § 2, subd. (9) ["Eliminating wasteful spending on repetitive challenges to these regulations ***will*** result in the fair and effective implementation of justice"], emphasis and italics added; *id.*, § 2, subd. (10) ["[V]ictims ***will*** receive timely justice and taxpayers ***will*** save hundreds of millions of dollars"], emphases and italics added; *id.*, § 2, subd. (11) ["This initiative ***will*** ensure justice for both victims and defendants, and ***will*** save hundreds of millions of taxpayer dollars"], emphases and italics added.)

Proposition 66's stated goals manifest a clear expectation that courts ***will*** comply with its measures to advance its purpose.

Unlike the statute in *Engram*, which this Court construed as permissive in part because of its goal of expediting criminal trials "to the greatest degree that is consistent with the ends of justice," *Engram*, *supra*, 50 Cal.4th at p. 1151, Proposition 66 includes no such limitation. Indeed, it barely mentions promoting fairness to the defendant sentenced to death. True, Proposition 66 fleetingly alludes to fairness to defendants in two places. First, section 2, subdivision (6), of Proposition 66 provides that "[r]eforming the existing inefficient appeals process for death penalty cases will ensure fairness for both defendants and victims. . . . By providing prompt appointment of attorneys, the defendants' claims will be heard sooner." But the only kind of "unfairness" to defendants that Proposition 66 aims to address is the time spent deliberating their cases.

Second, section 1509, subdivision (f), provides that initial habeas proceedings "shall be conducted as expeditiously as possible, consistent with a fair adjudication." The subdivision continues, however, that "[t]he superior court shall resolve the initial petition within one year of filing unless the court finds that a delay is necessary to resolve a substantial claim of actual innocence, but *in no instance* shall the court take longer than two years to resolve the petition." (Italics added.) And the section requiring both the appeal and initial habeas review to be completed within five years lacks any mention of a "fair adjudication." (See Pen. Code, § 190.6, subd. (d).) Proposition 66 thus has the clear goal of expediting death penalty proceedings only for its own sake. And its mechanisms for doing so ignore the practical realities that California courts face, give no heed to the chaos that would likely be visited upon an overburdened judiciary and capital defense bar, and—most importantly—discount the fact that human lives are involved.

There is little doubt that the drafters and voters intended Proposition 66 to curtail the discretion of the courts. In describing Proposition 66's time limits, the Legislative Analyst repeatedly said that Proposition 66 "requires" courts to complete death penalty proceedings by the specified times. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) analysis of Prop. 66 by Legislative Analyst, at p. 106 (hereafter Voter Information Guide).) These materials demonstrate that voters intended Proposition 66 to be obligatory. (See *Morales*, *supra*, 63 Cal.4th at p. 406; *Hi-Voltage*, *supra*, 24 Cal.4th at pp. 559-562.)

* * *

Proposition 66's text repeatedly and emphatically uses mandatory language. It includes an invasive mechanism of enforcement—the writ of mandate—that is only used to compel the performance of nondiscretionary duties. And its explicit purpose and legislative history demonstrate an intent to expedite executions by limiting judicial review. Proposition 66 is obligatory and cannot be salvaged through a saving construction or the constitutional avoidance canon. This case thus presents the separation-of-powers problem avoided by previous cases. (See *Verio Healthcare, Inc. v. Superior Court* (2016) 3 Cal.App.5th 1315, 1330 [holding that statutes providing that a trial or hearing "shall not" be had in certain cases when the Legislature is in session were "unconstitutional to the extent they purport to be" obligatory].)

B. Other Jurisdictions Have Long Recognized That Separation Of Powers Principles Limit Legislative Attempts To Interfere With Certain Judicial Prerogatives.

Substantial authority from jurisdictions with similar constitutional provisions governing separation of powers supports Petitioners. California's current separation-of-powers clause is "[s]ubstantially identical" to the one enshrined in 1849. (*Strumsky v. San Diego Cnty. Emps. Ret. Ass'n* (1974) 11

Cal.3d 28, 36, fn. 4 (*Strumsky*).) That language was implemented without debate and borrowed verbatim from the Iowa Constitution, which itself had copied the Kentucky Constitution. (See Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers* (2004) 51 UCLA L.Rev. 1079, 1102-1103.) Kentucky, in turn, had looked to the constitutions of the original thirteen states. (*Ibid.*)

Courts have defended these similar separation-of-powers provisions against legislative encroachments on the judicial power, providing further reason to invalidate Proposition 66. Although these cases' understanding of separation of powers is necessarily informed by the unique features of their respective constitutions, they generally agree that the judiciary's control over its own proceedings—whether of their own dockets and calendars, or the procedures by which matters are properly before them—belongs exclusively to the judicial branch.

New York courts, for example, have long recognized the importance of the judiciary's control over its calendar and docket. In *Riglander v. Star Co.* (N.Y.App.Div. 1904) 90 N.Y.S. 772, the Appellate Division of the New York Supreme Court considered a challenge to a statute providing an order of preference for deciding certain types of civil cases. (*Id.* at p. 773.) The court explained, "One of the powers which has always been recognized as inherent in courts . . . [is] the right to control its order of business and to so conduct the same." (*Id.* at p. 774.) By effectively fixing a time in which a court had to hear a case, the court concluded that the statute was "intended to deprive the courts of all discretion and to compel them to try these cases at the term for which they are moved, thus depriving the courts of the right to exercise that judicial discretion which has always been their prerogative." (*Id.* at p. 775.) Because courts "are not puppets of the Legislature," the court held the statute unconstitutional. (*Ibid.*)

Similarly, in *Lang v. Pataki*, the New York Supreme Court of New York County observed that a provision mandating the scheduling of an immediate trial for certain landlord-tenant disputes would violate separation-of-powers principles by usurping the judicial branch's inherent powers. (*Lang v. Pataki* (N.Y.Sup.Ct. 1998) 674 N.Y.S.2d 903.) The court explained, "[a] fundamental element of inherent judicial power is the authority to control the court's calendar exercised through the discretion to stay proceedings." (*Id.* at p. 913.) The court reasoned that the legislature's attempt to mandate the scheduling of immediate trials "strips the court of its ability to utilize its inherent power to control its calendar to serve the interests of justice." (*Id.* at p. 914.) Thus, it concluded, a court's control over when to hear its cases cannot be encroached by legislative fiat.

Just as New York courts do not tolerate legislative encroachment on the judiciary's power to oversee its calendar, so too do Rhode Island's courts protect the judiciary's control over its docket. In *Lemoine v. Martineau* (R.I. 1975) 342 A.2d 616, the Supreme Court of Rhode Island found unconstitutional a statute providing that while the legislature is in session, legislators need not appear at state civil or criminal trials as litigants, counsel, or witnesses, and voiding any process compelling a legislator's appearance. (*Id.* at p. 618.) Reasoning that courts have discretion over "the progress of a decision to be made in a pending controversy," the court quickly found the statute "blatantly unconstitutional," as it gave the courts "no discretion to act." (*Id.* at p. 620.) The statute, the court explained, effectively "transfer[red] control of the judicial dockets from the court to the whim and caprice of the legislator," who could "exercise his statutory privilege in one courtroom and then proceed to another courtroom where he can participate to the fullest in the trial of another proceeding." (*Ibid.*) Because the legislature could essentially dictate the courts' dockets, this was found to

violate the "inherent right of the judicial system to control the order of its business," thereby offending separation of powers. (*Id.* at pp. 620-621.)

In addition to striking down legislative attempts to control courts' calendars and dockets, courts have also rebuffed attempts to limit by statute the substantive matters that courts can decide. In *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.* (Ky. 2005) 163 S.W.3d 408, for example, the Supreme Court of Kentucky struck down a statute deterring discretionary review motions, thereby limiting its jurisdiction to review cases from lower courts. (*Id.* at p. 423.) In so doing, it explained that the enactment violated separation-of-powers principles by "invad[ing] the constitutional power assigned exclusively to the Kentucky Supreme Court to 'exercise appellate jurisdiction as provided by *its rules*.'" (*Id.* at p. 424, quoting Ky. Const., § 110(2)(b) [italics added by court].) Specifically, the Kentucky Constitution "undeniably delegates exclusively to [the Kentucky Supreme] Court the authority to adopt rules of practice and procedure for the Court of Justice." (*Id.* at p. 422.) As Kentucky's Supreme Court has interpreted the separation-of-powers doctrine, a legislative attempt to control the judiciary's rules of practice and procedure by limiting its discretionary review interferes with the judiciary and improperly encroaches on its power.

These cases from states sharing a common heritage for their respective separation-of-powers doctrines further illustrate how legislative encroachment on courts' inherent authority to control the timeline and the procedures for adjudicating controversies before them is a direct affront to divided government. Because Proposition 66 transgresses California's separation-of-powers doctrine in both these ways, this Court should deem it unconstitutional.

II. Proposition 66 Unlawfully Strips Courts Of Their Constitutionally Guaranteed Original Jurisdiction.

Proposition 66's constitutional infirmity stretches beyond Article III's separation of powers principles to the jurisdictional principles of Article VI, section 10, which vests the "Supreme Court, courts of appeal, superior courts, and their judges" with "original jurisdiction in habeas corpus proceedings." As this Court recognized, the "writ of habeas corpus enjoys an extremely important place in the history of this state and this nation" and "was considered by the founders of this country as the 'highest safeguard of liberty.'" (*People v. Villa* (2009) 45 Cal.4th 1063, 1068.) Proposition 66, however, wrests this safeguard from this Court's original jurisdiction by directing courts to transfer habeas corpus petitions involving death penalty judgments to the superior court that "imposed the sentence" and by making such writs "the exclusive procedure for collateral attack on a judgment of death." (Pen. Code, § 1509, subd. (a).) Contrary to Intervenor's claims, this provision is not a discretionary venue rule. Instead, it prevents certain—indeed, nearly all—courts from exercising their authority to consider habeas petitions, thereby violating the California Constitution.

A. California Courts Have Repeatedly Refused To Enforce Limitations On Judicial Review When They Interfere With Courts' Constitutionally Defined Jurisdiction.

"It is a well-recognized principle that where the judicial power of courts, either original or appellate, is fixed by constitutional provisions, the legislature cannot either limit or extend that jurisdiction." (*Chinn v. Superior Court* (1909) 156 Cal. 478, 480.) Here, the relevant provision of the California Constitution is article VI, section 10, which provides, in part:

> The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for

extraordinary relief in the nature of mandamus, certiorari, and prohibition.

Notably, prior to 1966, the Constitution limited original jurisdiction over habeas petitions—in a similar fashion to what Proposition 66 now attempts to do by statute—to the superior court of the county in which a criminal defendant was incarcerated. (*In re Roberts* (2005) 36 Cal.4th 575, 582 (*Roberts*).) Upon its revision in 1966, however, the Constitution extended original jurisdiction to all superior courts and appellate courts in the state. (*Ibid.*) "As a result, 'there is now no territorial limitation on the power of a superior court to entertain a petition for habeas corpus relief.'" (*Ibid.*, quoting *Griggs v. Superior Court* (1976) 16 Cal.3d 341, 346 (*Griggs*).)

In accordance with article VI, section 10, California courts have refused to enforce limitations on the judicial branch's original jurisdiction over petitions for habeas corpus and other writs. In *In re Kler* (2010) 188 Cal.App.4th 1399 (*Kler*), the Court of Appeal considered rule 8.385(c)(2), which stated that "'[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 p. 1402, quoting Cal. Rules of Court, rule 8.385(c)(2), italics omitted.) The court further explained that the rule was "mandatory," and "requires an appellate court to deny without prejudice a petition for writ of habeas corpus challenging a parole decision unless it was first presented to the trial court." (*Ibid.*) Such a requirement "is inconsistent with our state Constitution," the court concluded, because it interferes with the original jurisdiction held by all courts in "writ proceedings" under article VI, section 10. (*Id.* at p. 1403.)

In *Gerawan Farming, Inc. v. Agricultural Labor Relations Board* (2016) 247 Cal.App.4th 284 (*Gerawan*), the Court of Appeal considered statutory limitations on judicial challenges to decisions by the Agricultural

Labor Relations Board regarding collective bargaining agreements between agricultural employee unions and employers. (*Id.* at pp. 288-289.) The relevant provisions stated that "'[w]ithin 30 days after the order of the board takes effect, a party may petition for a writ of review in the court of appeal or the California Supreme Court'" and that "'[n]o court of this state, except the court of appeal or the Supreme Court, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the board[.]'" (*Id.* at pp. 293-294, quoting Lab. Code, §§ 1164.5, subd. (a), 1164.9.) The court explained that the statute "patently seeks to eliminate all superior court jurisdiction to review the Board's rulings or decisions," thus violating article VI, section 10, of the California Constitution. (*Id.* at p. 294.)

In *California Redevelopment Association v. Matosantos* (2011) 53 Cal.4th 231, 252 (*Matosantos*), this Court considered whether legislation governing school funding could restrict how parties could challenge the statute's provisions. According to the statute, "[n]otwithstanding any other law, any action contesting the validity of [the relevant parts of the statute] . . . or challenging acts taken pursuant to these parts shall be brought in the Superior Court of the County of Sacramento." (*Id.* at p. 252 [citation omitted].) The Court concluded that this provision "d[id] not deprive [it] of jurisdiction" because its original "jurisdiction is constitutional" and "may not be diminished by statute." (*Id.* at pp. 252-253.)

These decisions recognize that allowing the Legislature to alter courts' constitutionally granted jurisdiction carries grave consequences for judicial independence. As this Court explained just four years after the adoption of the original 1849 constitution in rejecting the Legislature's attempt to alter the appellate jurisdiction of the courts of appeal:

> [I]n this subdivision of power among the different arms of the judiciary, there was an attempt at great care and accuracy, in

> assigning to each a well-defined portion of judicial duty. In doing this, there must have been some specific object or leading motive, and no other appears so reasonable, as that it was intended to limit, as well as confer jurisdiction, in order the better to secure the independence of this department of the government. For if . . . there is no prohibition to an increase of the jurisdiction by the legislature, it may be at once conceived how readily the functions conferred by the Constitution on the Supreme or District Courts, may be impaired or subverted, by imposing on those courts a succession of new duties, which would force them into a sphere of action inconsistent with that already fixed by the fundamental law. *If the legislature can force appellate jurisdiction on the District, they can equally give original jurisdiction to the Supreme Court, and then, by a system of rules which they have unquestioned right to make, compelling the courts to give preference in hearing to certain causes, or to a particular calendar, the constitutional functions of the courts would exist only in name; for all practical purposes they would be effectually destroyed.*

(*Caulfield v. Hudson* (1853) 3 Cal. 389, 390 (*Caulfield*), italics added.)

As discussed below, Proposition 66 falls squarely within the category of provisions that California courts have consistently invalidated because it treads on the principles this Court recognized in *Caulfield*. Like the provisions in the cases above, Proposition 66 encroaches upon judicial independence and disturbs the delicate allocation of jurisdiction among California courts.

B. Proposition 66's Limitation On Judicial Review Of Habeas Petitions Violates The California Constitution.

1. Proposition 66's Text And Purpose Prove That It Is An Obligatory, Jurisdiction-Stripping Provision.

Proposition 66 amends the Penal Code to add section 1509, which directly meddles with the judiciary's constitutional authority over habeas corpus petitions. Specifically, subdivision (a) reads:

> This section applies to any petition for writ of habeas corpus filed by a person in custody pursuant to a judgment of death.

> *A writ of habeas corpus pursuant to this section is the exclusive procedure for collateral attack on a judgment of death. A petition filed in any court other than the court which imposed the sentence should be promptly transferred to that court unless good cause is shown for the petition to be heard by another court.* A petition filed in or transferred to the court which imposed the sentence shall be assigned to the original trial judge unless that judge is unavailable or there is other good cause to assign the case to a different judge.

(Pen. Code, § 1509, subd. (a), italics added.)

The effect of this section is straightforward. Absent good cause, prospective petitioners are required to have their petitions heard—whether by filing it directly or by having the petition subsequently transferred—only in a particular superior court, just as in the cases above. (See, e.g., *Matosantos, supra*, 53 Cal.4th at p. 252.) Because the section specifies the "exclusive procedure for collateral attack on a judgment of death," all other courts are effectively prevented from considering the petition—similar to the provisions struck down in prior cases. (See, e.g., *Kler, supra*, 188 Cal.App.4th at p. 1402 ["A Court of Appeal *must* deny without prejudice a petition for writ of habeas corpus . . . if the issue was not first adjudicated by the trial court that rendered the underlying judgment"], citation omitted.)

Of course, there is no "good cause" requirement in the California Constitution for courts to exercise jurisdiction over a habeas petition. (Cal. Const., art. IV, § 10.) By narrowing the class of habeas cases California courts (other than the sentencing court) can consider, Proposition 66 impermissibly constrains the courts' jurisdiction. (See *Kler, supra*, 188 Cal.App.4th at p. 1403.)

Intervenor attempts to distinguish these prior cases by pointing to Proposition 66's use of "should," but as noted in Section I.A.3.c, Proposition 66's intended purpose is to impose obligatory rather than permissive

limitations on judicial review.[17] (See p. 26, *ante*; *Garcia*, *supra*, ___ Cal.5th ___ [2017 WL 1046457, at p. *6] ["Our primary task, after all, is to identify and effectuate the underlying purpose of the law we are construing"]; *ibid.* ["We consider the text in conjunction with the context and purpose of the statute even where, as here, the statutory language has a 'highly technical' meaning"].) Indeed, Proposition 66's legislative history makes clear that it was intended to strip this Court's jurisdiction over habeas petitions. (See Voter Information Guide, *supra*, at p. 105 ["The measure *requires* that habeas corpus petitions first be heard in trial courts instead of the California Supreme Court. . . . these habeas corpus petitions would be heard by the judge who handled the original murder trial unless good cause is shown for another judge or court to hear the petition"], italics added.)

Moreover, in practical operation, Proposition 66 encroaches upon courts' original jurisdiction. In addition to establishing a heavy presumption obliging courts to transfer habeas petitions to the superior court that issued the sentence, Proposition 66 also requires the sentencing court to appoint counsel, making it far more likely that counsel will come from that jurisdiction. (See Pen. Code, § 1509, subd. (b) ["After the entry of a judgment of death in the trial court, that court shall offer counsel to the prisoner as provided in Section 68662 of the Government Code"].) As counsel will naturally tend to file cases in their local jurisdiction, the appointment of counsel provision—in conjunction with the good cause requirement—will practically ensure that all petitions for habeas relief will

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[17] The State similarly argues that Proposition 66 merely establishes a "strong preference for channeling habeas claims to the court of conviction." (State's Return at p. 36.) The State's argument fails for the same reasons above. However, notably, the State argues that this Court *will retain jurisdiction* over original capital habeas petitions under Proposition 66. (*Id.* at pp. 36-39.)

be adjudicated in the sentencing court, rather than any other superior court, the courts of appeal, or this Court. These practical effects further demonstrate that Proposition 66 was designed to constrain the courts' jurisdiction. (See *Kern County*, *supra*, 82 Cal.App.3d at p. 400 [holding that the Legislature intended a medical defense statute to be obligatory in part because otherwise it would needlessly duplicate another provision].)

In short, the proposition's intended purpose and effect are to deny courts the authority to consider a habeas petition unless it complies with section 1509, subdivision (a). However, it is a statute, not a constitutional amendment. Accordingly, it is the same as other jurisdiction-stripping limitations that California courts have repeatedly found unconstitutional.

2. Proposition 66 Is Not A Venue Rule.

Intervenor tries to paint section 1509, subdivision (a), as a venue provision "fully compatible with the jurisdictional provision of the Constitution," analogizing to *Roberts*, *supra*, 36 Cal.4th at p. 593, and *Griggs*, *supra*, 16 Cal.3d at p. 347, where this Court provided guidance to the superior courts on determining proper venue for habeas petitions. (Intervenor's Prelim. Opp. at pp. 25-26.)

Proposition 66 is no mere venue rule. As discussed above, the measure imposes a heavy "good cause" burden for courts other than the sentencing court to exercise their original capital habeas jurisdiction, and also requires the sentencing court to appoint counsel. (Pen. Code, § 1509, subds. (a) & (b).) The text sets forth the "exclusive procedure" for filing capital habeas petitions, *id.*, subd. (a), and the legislative history confirms that Proposition 66 "requires" the petition to be filed in the sentencing court, absent good cause to file it elsewhere, Voter Information Guide, *supra*, at p. 105. As noted, Proposition 66's overall purpose is to impose obligatory restrictions on the courts. (See p. 26, *ante*.)

Nonetheless, Intervenor misreads *Roberts* and *Griggs* in a post-hoc attempt to portray Proposition 66's jurisdiction-stripping provision as a venue rule. *Roberts* discusses a (i) permissive and (ii) *judicially created* procedural rule that is fundamentally different from the requirements of Proposition 66, which are (i) obligatory and (ii) statutory. In *Roberts*, the need for the Court to give "guidance" arose from the fact that "various counties and appellate districts [had] not always agreed which is the most appropriate court" to adjudicate habeas corpus petitions challenging a denial of parole. (*Roberts*, *supra*, 36 Cal.4th at p. 580.) Previously, in *Griggs, supra*, 16 Cal.3d at page 347, this Court had held that "in general," a habeas corpus petition challenging "'*a particular judgment or sentence* . . . should be transferred to the court which rendered judgment,'" while a petition challenging "'*conditions of the inmate's confinement* . . . should be transferred to the superior court of the county wherein the inmate is confined.'" (*Roberts*, *supra*, 36 Cal.4th at p. 583, quoting *Griggs*, *supra*, at p. 347.) However, the Court also explained that superior courts should first determine whether the petition states a prima facie claim, and that "'unless there is substantial reason for transferring a petition it should be entertained and resolved in the court where filed.'" (*Id.* at p. 584, quoting *Griggs*, *supra*, at p. 347.) It further acknowledged that *Griggs* was simply "additional guidance," that it "did not 'attempt . . . to state a general rule or all-inclusive specific rules which direct the proper procedural disposition in each instance,'" and "that certain types of petitions do not fall within either of the described categories." (*Id.* at pp. 583-584, quoting *Griggs*, *supra*, at p. 347.)

This led to what the Court described as a "tennis match" with the ever-increasing volume of habeas petitions challenging adverse parole determinations, as courts would continually transfer such petitions to other courts without deciding them on the merits. (*Roberts*, *supra*, 36 Cal.4th at p. 586.) Because "considerations of judicial economy and efficiency"

weighed in favor of providing a single venue rule rather than allowing this case-by-case "tennis match" to continue, this Court ultimately held that a petitioner "should file [such a] 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." (*Id.* at pp. 586, 593.)

Two critical distinctions exist between the rule in *Roberts* and Proposition 66. First, *Roberts* makes clear that its holding articulates a procedural rule that arises out of *this Court's own supervisory power* over the courts:

> We properly consider all of these circumstances in establishing a procedural rule intended to more equitably and efficiently deal with this situation. As we explained in *Griggs*, *this court has inherent authority* to establish "*rules of judicial procedure* to be followed by superior courts" in exercising their *territorially unlimited jurisdiction* over habeas corpus petitions.

(*Roberts*, *supra*, 36 Cal.4th at p. 593, italics added and citation omitted.) *Roberts* then cited *Griggs* and various other decisions involving "the exercise of supervisory power over state courts." (*Ibid.*)

Intervenor makes no mention of this central aspect of the *Roberts* holding, and for good reason: Proposition 66 is a legislative statute, not a judicially created procedural rule, and does not arise from this Court's "supervisory power" over state courts. Indeed, as established in section I.A, *ante*, Proposition 66 *invades* the judicial branch's authority over its own functions and violates the California Constitution in doing so.

The second critical distinction between *Roberts* and Proposition 66 is that the venue rules discussed in *Roberts* and *Griggs* ultimately still preserve the discretion of the courts in exercising their original jurisdiction. Indeed, *Roberts* repeatedly refers to the fact that the venue rules established in *Griggs* were general rather than ironclad. (See *Roberts*, *supra*, 36 Cal.4th at p. 583

[describing *Griggs*'s holding as applying "*in general*, when a petitioner has complied with pertinent rules"]; *id.* at p. 584 ["'*unless there is substantial reason* for transferring a petition it should be entertained and resolved in the court where filed'"]; *id.* at p. 585 ["we consider which aspect of the *guidance* provided in *Griggs* is most relevant in deciding which is the proper court"]; *ibid.* ["*generally speaking* a petition for writ of habeas corpus should not be transferred"]; *ibid.* ["*In general*, a habeas corpus petition should be heard and resolved"], italics added.) It went on to explain that a more universal ruling specific to petitions challenging a parole determination was necessary only due to "considerations of judicial economy and efficiency." (*Id.* at p. 586.)

The Court of Appeal further explained this distinction in *Kler*, *supra*, 188 Cal.App.4th at p. 1403. As discussed above, *Kler* invalidated a California Rule of Court requiring courts of appeal to deny habeas petitions challenging denial of parole if not first adjudicated by the lower court that rendered the judgment because the rule violated article VI, section 10. Yet, *Kler* also noted that this rule evolved out of the decision in *Roberts*, and clarified that while the Rule of Court violated the California Constitution, the rule in *Roberts* did not. (*Id.* at pp. 1403-1404.) It explained that "the language in *Roberts* did not divest the courts of appeal of original jurisdiction in petitions for writ of habeas corpus," as it did not "dictate that in all cases such habeas corpus petitions *must* be filed in the superior court—only that challenges to parole 'should' first be filed in the superior court."[18] (*Ibid.*) The *Kler* court thus concluded that rule 8.385 "goes beyond the dictates in *Roberts*" and is unconstitutional "to the extent it requires petitions for writ of

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[18] *Kler* offered no general conclusion about the effect of using "must" instead of "shall." Rather, it simply noted this distinction as proof of the distinction between rule 8.385(c)(2) and *Roberts*'s holding.

habeas corpus challenging denial of parole to be first filed in the superior court." (*Id.* at p. 1404.)

Kler therefore confirms that *Roberts*'s holding was not intended to be mandatory and, thus, did not "divest the courts" of "original jurisdiction." This is what distinguishes *Roberts* from California Rules of Court, rule 8.385(c)(2), as well as from Proposition 66. Both rule 8.385(c)(2) and section 1509, subdivision (a), effectively leave no discretion to the courts—the former by requiring that courts "*must* deny without prejudice a petition" that does not conform to its requirements, and the latter by mandating that petitions in accordance with the section are the "*exclusive procedure*" for bringing a collateral attack and should be transferred away from a court that otherwise has jurisdiction absent "good cause." But as explained above, the constitutional grant of jurisdiction contains *no* such requirement for "good cause" in order for courts to exercise their authority to review writ petitions. Thus, by setting out this "exclusive procedure" for entertaining habeas petitions that "requires" they be filed in the sentencing court, absent good cause to file it elsewhere, Voter Information Guide, *supra*, at p. 105, Proposition 66 improperly impinges upon the province of the judiciary.

For these reasons, Proposition 66 constitutes a jurisdictional limitation entirely unlike *Roberts*. Proposition 66 in effect bars nearly all courts from considering habeas petitions altogether when they are not filed in accordance with section 1509, subdivision (a), and therefore infringes on the courts' original jurisdiction guaranteed in article VI, section 10. As with similar limitations in *Kler*, *Gerawan*, and *Matosantos*, Proposition 66 is unconstitutional and must be invalidated.

III. The Court Should Invalidate Proposition 66 In Its Entirety.

A. Proposition 66 Is Facially Unconstitutional.

Although the "standard for a facial constitutional challenge is . . . the subject of some uncertainty," *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 218, the Court should invalidate Proposition 66 under any standard because its operation will inevitably (let alone in the generality of cases) abridge fundamental constitutional principles of the utmost importance.

1. Proposition 66 Is Unconstitutional In The Generality Or Great Majority Of Cases.

The applicable standard for this facial challenge is whether Proposition 66 is unconstitutional in the "*generality* or *great majority* of cases." (*San Remo Hotel, L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643, 673, original italics.) This Court will not uphold a law that obviously and commonly violates fundamental constitutional principles simply because the law might be valid in some small number of cases. (E.g., *Cal. Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 347 (*California Teachers*) [invalidating statute requiring teachers facing discipline to pay half the cost of an administrative hearing if they do not prevail]; *Am. Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 342-343 (*American Academy*) [invalidating statute requiring pregnant minors to obtain consent before seeking an abortion, even if the statute might validly apply to minors who lack the mental capacity to give informed consent]; see also *Vergara v. State* (2016) 209 Cal.Rptr.3d 532, 568-569 (dissenting statement of Cuéllar, J.) ["In fundamental rights cases, we require a showing of unconstitutionality in only 'the vast majority of the law's applications'"], citation and brackets omitted.)

This Court has repeatedly recognized that California Constitution's separation-of-powers doctrine and allocation of jurisdiction are "fundamental." (See, e.g., *Mandel v. Myers* (1981) 29 Cal.3d 531, 547; *Strumsky*, *supra*, 11 Cal.3d at p. 33 [describing separation-of-powers as "one of our most fundamental constitutional doctrines"]; *Caulfield*, *supra*, 3 Cal. at p. 390 [holding that the Legislature could not give appellate jurisdiction to courts of appeal under the 1849 California Constitution because that would "force them into a sphere of action inconsistent with that already fixed by the fundamental law"].)

Given Proposition 66's overhaul of the judicial system and the enormous backlog of capital cases, Proposition 66 will violate fundamental separation-of-powers and jurisdictional principles of the California Constitution in the great majority of cases. Proposition 66 cannot be salvaged by suggesting that *some* courts could complete capital proceedings before Proposition 66's deadlines, or that *some* habeas petitions may still be originally filed in this Court. (See *American Academy*, *supra*, 16 Cal.4th at p. 343.)

2. Proposition 66 Inevitably Violates The California Constitution.

Even if the Court applies the higher standard, Proposition 66 still must be invalidated on its face because it "inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, internal quotation marks omitted.) By drastically cabining courts' discretion, Proposition 66 reconfigures the "sensitive balance" of powers created by the California Constitution. (See *People v. Bunn* (2002) 27 Cal.4th 1, 14; *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1086.) *All* of California's courts will bear the improper weight of Proposition 66's requirements—even those courts which can comply in particular cases. Proposition 66 creates an ever-present injury to the courts'

decisionmaking process. (Cf. *City of Chicago v. Morales* (1999) 527 U.S. 41, 71 (conc. opn. of Breyer, J.) [explaining that an ordinance was impermissibly vague and susceptible to facial challenge because, "if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications"].)

Mendocino County, *supra*, 13 Cal.4th 45, is not to the contrary. There, this Court held that a state law authorizing counties to close the superior courts on furlough days did not facially violate the separation-of-powers doctrine because granting such authority would not materially impair the courts' functions "*under any and all circumstances.*" (*Id.* at p. 60, original italics.) Unlike Proposition 66, the statute at issue in *Mendocino County* was several degrees removed from a potential separation-of-powers violation: the statute merely granted authority to the counties, which the counties could (or could not) have exercised to close the courts for an unspecified numbers of days. (See *id.* at p. 49.) By contrast, Proposition 66 directly curtails the courts' discretion in a complete overhaul of the capital review process, creating an ongoing separation-of-powers problem even for those courts that can comply with it.[19]

Proposition 66 must fall under whichever standard the Court applies to this facial challenge. (See *California Teachers*, *supra*, 20 Cal.4th at p. 347; *American Academy*, *supra*, 16 Cal.4th at p. 343.)

B. Proposition 66 Is Not Severable.

Nor, contrary to Intervenor's and Respondents' arguments, can Proposition 66's unconstitutional provisions be quarantined. Because

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[19] This Court has repeatedly applied the lower standard to evaluate facial challenges after *Mendocino County*. (E.g., *California Teachers*, *supra*, 20 Cal.4th at p. 347; *American Academy*, *supra*, 16 Cal.4th at pp. 342-343.)

Proposition 66's unlawful provisions are part-and-parcel of a "comprehensive" and interdependent scheme to overhaul the death penalty in California, they fatally infect its purportedly lawful provisions.

When part of an initiative is deemed invalid, the state may enforce the remaining portions only if the invalid part can be severed. (*Hotel Employees & Rest. Employees Int'l Union v. Davis* (1999) 21 Cal.4th 585, 613 (*Hotel Employees*).) "'Although not conclusive, a severability clause [in the initiative] normally calls for sustaining the valid part of the enactment . . . .'" (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821 (*Calfarm*), quoting *Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 331.) But the invalid part must still be "grammatically, functionally *and* volitionally separable." (*Hotel Employees*, *supra*, 21 Cal.4th at p. 613, emphasis added.) As this Court explained:

> It is grammatically separable if it is distinct and separate and, hence, can be removed as a whole without affecting the wording of any of the measure's other provisions. It is functionally separable if it is not necessary to the measure's operation and purpose. And it is volitionally separable if it was not of critical importance to the measure's enactment.

(*Ibid.*, internal citations and quotations omitted.) "[T]he measure's own declaration" that it "was intended to be comprehensive" weighs in favor of finding that the measure is neither functionally nor volitionally separable. (See *ibid.*) Here, notwithstanding its severability clause, Proposition 66 is neither functionally nor volitionally severable and should be struck in its entirety.

Proposition 66 is not functionally severable because its unconstitutional provisions are necessary to the measure's operation and purpose of implementing the death penalty "expeditiously" and in a cost-effective manner. (Prop. 66, §§ 2-3.). It purports to be comprehensive (*id.*, § 21) and Intervenor agrees that the "various components of Proposition 66

[work] in furtherance of a common purpose or purposes," i.e., "enforcement of judgments in capital cases." (Intervenor's Prelim. Opp. at pp. 17, 19.) The initiative's unreasonable deadlines for courts to decide automatic appeals and habeas petitions, as well as its unconstitutional transfer of all such petitions to the superior courts, are critical to the initiative's mechanism for, and goal of, "comprehensive[ly]" eliminating "waste, delays, and inefficiencies." (Prop. 66, §§ 2, 21.). Without them, the Proposition's scheme is inoperable.

Furthermore, the unconstitutional portions of Proposition 66 are of "critical importance" to the measure itself and its enactment, and are thus volitionally unseverable too. (*Hotel Employees*, *supra*, 21 Cal.4th at p. 613; *Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, 190 [finding no volitional severability because it was "doubtful whether the purpose of the original ordinance [was] served by a truncated version"].) Proposition 66 bills itself as a means for "[r]eforming the existing inefficient appeals process" and for "expeditiously" imposing death sentences. (Prop. 66, §§ 2-3.) It "would [not] likely have been adopted by the people had they foreseen the invalidity" of the challenged provisions here, which are specifically directed towards altering the appeals process and speeding up the route towards execution. (*Calfarm*, *supra*, 48 Cal.3d at p. 822.) Nor can one "say with confidence that the electorate's attention was sufficiently focused upon" Proposition 66's remaining portions—e.g., the requirement that condemned inmates perform work while incarcerated or provisions affecting the California Habeas Resource Center (see Prop. 66, §§ 8, 17)—such that they "would have separately considered and adopted [them] in the absence of the enjoined portions." (*Gerken v. Fair Political Practices Com.* (1993) 6 Cal.4th 707, 719, internal brackets omitted.)

* * *

Accordingly, the Court should invalidate Proposition 66's unconstitutional provisions on their face and hold that they are not severable from its remaining provisions.

CONCLUSION

Constitutional Law *Amici* respectfully urge this Court to grant the relief sought in Petitioners' Amended and Renewed Petition for Extraordinary Relief.

DATED: March 30, 2017

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

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CERTIFICATION OF WORD COUNT

Pursuant to rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that the foregoing proposed *Amici Curiae* Brief in Support of Petitioners contains 13,984 words as counted by the word count feature of the Microsoft Word program used to generate this brief, not including the tables of contents and authorities, the cover information, the signature block, and this certificate.

DATED: March 30, 2017 By: Theane Evangelis /RMS

Theane Evangelis

APPENDIX OF SIGNATORIES

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Russell Robinson is the Distinguished Chair in LGBT Equity Professor of Law at the University of California, Berkeley, School of Law. He has written on antidiscrimination law, race and sexuality, law and psychology, and constitutional law, including the constitutionality of Proposition 209.

Bertrall Ross is a Professor of Law at the University of California, Berkeley, School of Law. He teaches constitutional law, legislation and statutory interpretation, and election law and has written on administrative constitutionalism, equal protection, the First Amendment, and voting rights.

The Brennan Center for Justice at the New York University School of Law is a non-profit, nonpartisan law and public policy institute that, among other things, advocates for fair and impartial courts as guarantors of liberty in our constitutional system. The Brennan Center represented the Honorable Larry T. Solomon, the Chief Judge for the Thirtieth Judicial District in Kansas, in *Solomon v. Kansas* (Kan. Dec. 23, 2015) No. 114,573, a successful separation of powers challenge to a state law that removed the Kansas Supreme Court of administrative authority over state district courts. This submission does not purport to convey the position of NYU School of Law.

CERTIFICATE OF SERVICE

I, Teresa Motichka, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 555 Mission Street, Suite 3000, San Francisco, CA 94105-0921, in said County and State.

On March 30, 2017, I served the following document(s):

APPLICATION FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF CONSTITUTIONAL LAW *AMICI* IN SUPPORT OF PETITIONERS

on the parties stated below, by the following means of service:

SEE ATTACHED SERVICE LIST

Unless otherwise noted on the attached Service List, **BY MAIL:** I placed a true copy in a sealed envelope or package addressed as indicated above, on the above-mentioned date, and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited with the U.S. Postal Service in the ordinary course of business in a sealed envelope with postage fully prepaid. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing set forth in this declaration.

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

Executed on March 30, 2017, at San Francisco, California.

Teresa Motichka

Teresa Motichka

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