IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RON BRIGGS AND JOHN VAN DE KAMP,
Petitioners,
vs.
JERRY BROWN, in his official capacity as Governor of California; KAMALA HARRIS, in her official Capacity as Attorney General of California[1]; CALIFORNIA'S JUDICIAL COUNCIL; and DOES 1 THROUGH XX,
Respondents.

NO. 238309

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE, CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, IN SUPPORT OF RESPONDENTS JERRY BROWN, in his official capacity as Governor of California; KAMALA HARRIS, in her official capacity as Attorney General of California; CALIFORNIA'S JUDICIAL COUNCIL; and DOES I THROUGH XX

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[1] Ms. Harris is now the junior United States Senator for California. Xavier Becerra is now the Attorney General of California.

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE JUSTICES OF THE CALIFORNIA SUPREME COURT:

The California District Attorneys Association (CDAA) as amicus curiae hereby requests permission to file the enclosed amicus curiae brief in support of respondents, Jerry Brown, in his official capacity as Governor of California; Kamala Harris, in her official capacity as Attorney General of California; California's Judicial Council; and Does I Through XX.

The California District Attorneys Association is a statewide association representing the professional and educational interests of California prosecutors. CDAA is a professional organization that has been in existence for over 90 years, and was incorporated as a nonprofit public benefit corporation in 1974. CDAA has over 2,800 members, including elected and appointed district attorneys, the Attorney General of California, city attorneys principally engaged in the prosecution of criminal cases, and the deputy and assistant attorneys employed by these officials. CDAA members bear the critical responsibility of reviewing, filing, and prosecuting criminal charges against those persons alleged to have committed criminal offenses on behalf of the People of the State of California, including special circumstance(s) murders which involve the death penalty as a possible punishment upon conviction. CDAA members shoulder the very heavy responsibility for prosecuting capital murder cases, seeking to hold those responsible accountable for what they did, and justice for the victims' families and their loved ones.

CDAA presents prosecutors' views as amicus curiae in appellate cases when it concludes that the issues raised in such cases will significantly affect the administration of criminal justice. The case before tise Court presents issues of the greatest interest to California prosecutors.

As the statewide association of these prosecutors, amicus curiae, CDAA, is familiar and experienced with the issues presented in this proceeding, specifically the provisions of the recently voter passed initiative that petitioners now challenge, Proposition 66, which seeks only to reform and amend some death penalty procedures with the aim of curbing the monetary waste, interminable delays, and inefficiencies that plague and encumber the present system.

As the statewide association of California prosecutors, amicus curiae, CDAA, submits that additional briefing and argument on behalf of California's prosecutors will assist the Court in its evaluation and resolution of this case. Such considerations are relevant to the ultimate disposition of the issues presented, which will have statewide impact.

Pursuant to California Rules of Court, rule 8.520(f)(4), applicant states that no party nor counsel for a party in this proceeding authored in whole or in part the proposed amicus curiae brief, nor made any monetary contribution to fund the preparation or submission of the proposed amicus curiae brief. Applicant further states that no person or entity made any contributions to fund the preparation or submission of the proposed amicus curiae brief other than amicus curiae and its members.

Accordingly, applicant requests that this Court permit the filing of the attached amicus curiae brief and permit CDAA to appear as amicus curiae in support of respondents.

Date: March 29, 2017

Respectfully submitted,

MARK ZAHNER
Executive Director
California District Attorneys Association

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RON BRIGGS AND JOHN VAN DE KAMP, **Petitioners,**	)	
vs.	)	
	)	**NO. 238309**
JERRY BROWN, in his official capacity as Governor of California; KAMALA HARRIS, in her official Capacity as Attorney General of California[2]; CALIFORNIA'S JUDICIAL COUNCIL; and DOES 1 THROUGH XX, **Respondents.**	)	

BRIEF OF AMICUS CURIAE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENTS JERRY BROWN, in his official capacity as Governor of California; KAMALA HARRIS, in her official capacity as Attorney General of California; CALIFORNIA'S JUDICIAL COUNCIL; and DOES I THROUGH XX

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ISSUES PRESENTED

1. Does Proposition 66 interfere with the original habeas corpus jurisdiction of the California Courts in death penalty litigation?
2. Does Proposition 66 violate the separation of powers doctrine as specified in Article 3, section 3 of the California Constitution by defeating and/or materially impairing the constitutional and inherent powers of the courts to resolve capital appeals and habeas corpus cases?
3. Does Proposition 66 violate the single subject doctrine as specified in Article 2, section 8 subdivision (d) of the California Constitution?
4. Does Proposition 66 violate the equal protection clauses of the California and United States Constitutions?

FACTS AND PROCEDURAL SUMMARY

Proposition 66 (Death Penalty Reform and Savings Act of 2016) was passed by California voters at the statewide general election on November 8, 2016. On November 9, 2016, petitioners filed a petition for writ of mandate/prohibition with a request for stay in this Court challenging the legality of Proposition 66. On November 16, 2016, because the petition for extraordinary relief names the Judicial Council of California as a party, and Chief Justice Tani Cantil-Sakauye and Associate Justice Ming Chin are members of the Judicial Council, this Court ordered them disqualified from participating in this matter and are recused. On November 17, 2016, the application for a stay pertaining to any action by the Secretary of State to certify the election results with respect to Proposition 66 was denied with leave to renew the motion if and when the election results are certified

establishing that Proposition 66 has been approved by the voters. On December 16, 2016, the Secretary of State certified the election results confirming the voters had passed Proposition 66. On December 19, 2016, petitioners filed an amended and renewed petition for extraordinary relief, including writ of mandate and request for immediate injunctive relief preventing enforcement of Proposition 66. Petitioners assert several causes of action attacking the legality of Proposition 66 and request that it be declared null and void in its entirety. On December 20, 2016, this Court issued a stay of the implementation of Proposition 66 pending further consideration and action by the Court, and set dates for further briefing of the issues by respondents and other interested parties. On February 1, 2017, this Court issued an order for respondents to show cause why the relief sought by petitioners should not be granted, and continued the stay of the implementation of Proposition 66 pending the Court's decision on this matter.

ARGUMENT

I. INTRODUCTION

The November 8, 2016 general election provided California voters a direct, head-to-head, choice on the question of the death penalty, as two opposing initiatives were presented for the voters to choose. Proposition 62 ("Death Penalty Initiative Statute"), proposed to repeal the death penalty and replace it with life imprisonment without parole. Proposition 66 ("Death Penalty Reform and Saving Act of 2016"), proposed to implement certain specified reforms and adjustments to the death penalty process and litigation. The voters rejected Proposition 62 by a margin of 53.2% to 46.8%. The voters passed Proposition 66 by a margin of 51.1% to 48.9%. (See Cal. Secretary of State, Statement of Vote, Gen. Elec. (Nov. 8, 2016),

pp. 12, 73, 76.) Thus, when given a direct choice, the majority of voters expressed their desire that "No, we do not want to abolish the death penalty in California," but "Yes, we want to see the death penalty system reformed, made more efficient, predictable, and less costly."

Since the reinstatement of the death penalty with passage of statutes by the legislature in 1977 (Statutes 1977, chapter 316) and the people in 1978 (Proposition 7), death penalty opponents have failed to have it declared unconstitutional in the courts. (*People v. Frierson* (1979) 25 Cal. 3d 142, 185-186; *People v. Wallace* (2008) 44 Cal. 4th 1032, 1097-1098); they have also failed in attempts to abolish it at the ballot box;[3] but they have turned to other avenues to thwart implementation of death penalty judgments in California. Efforts have focused on repeated challenges to the methods employed in the proposed execution of lawfully convicted and sentenced defendants as an alleged violation of the Eighth Amendment's ban on cruel and unusual punishment, as well as the prolongation of the entire death penalty review process through protracted postconviction litigation, motions, petitions, and writs of habeas corpus. The result has become what most everyone connected to the process agrees is a dysfunctional, expensive, and inefficient system beset by seemingly endless delays. (See *In re Reno* (2012) 55 Cal. 4th 428, for extensive discussion concerning the delay issue.) For the families and loved ones of murdered victims, as well as the condemned inmates, the final resolution of a death penalty case in California has become like waiting for Godot.[4]

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[3] Proposition 34, November 2012 general election; defeated by a margin of 52% to 48% (See Cal. Secretary of State, Statement of Vote, Gen. Elec. (November 6, 2012) p. 69; Proposition 62, November 2016 general election; defeated by a margin of 53.2% to 46.8% (See Cal. Secretary of State, Statement of Vote, Gen. Elec. (November 8, 2016) p. 12.

[4] Samuel Beckett, *Waiting for Godot* (1953).

Considering the impact of these delays, the numbers are staggering. According to data provided by the California Department of Corrections and Rehabilitation (CDCR), as of February 2017, there are 749 inmates on the CDCR condemned inmate list awaiting execution. Of this number, 342 (45%) have been on death row for more than twenty years, and 147 others have been on death row between fifteen and nineteen years. Thus, of the 749 inmates currently on the CDCR condemned inmate list, 65% (489) have been on death row fifteen years or more. Furthermore, of the overall total on the CDCR inmate condemned list, eighty have been on death row for more than thirty years, and 25% of death row is age sixty years and older. (See California Department of Corrections and Rehabilitation, Division of Adult Operations, Death Row Tracking System, Condemned-Inmate List (Secure), and Condemned Inmate Summary List.)

A related issue that continues to lurk with the paralyzing delays in the current death penalty system came to the forefront not long ago in a federal habeas corpus proceeding, when a federal district court judge ruled that the systemic delays in California's dysfunctional death penalty system has rendered the system so arbitrary in its implementation (or lack thereof) that the system is unconstitutional as a violation of the Eighth Amendment's ban on cruel and unusual punishment. (*Jones v. Chappell* (2014) 31 F. Supp. 3d 1050; decision reversed in *Jones v. Davis* (9th Cir. 2015) 806 Fed. 3d 538.) While the district court decision was reversed by the Ninth Circuit Court of Appeal, and this Court has continued, so far, to reject the claim that continued delays in the postconviction death penalty review process are a valid basis for finding a violation of the Eighth Amendment (*People v. Anderson* (2001) 25 Cal. 4th 543, 606; *People v. Wallace* (2008) 44 Cal. 4th 1032, 1097-1098; *People v. McDowell* (2012) 54 Cal. 4th 395, 412), the issue remains as an one more point for the defense to add to its arsenal of delaying tactics for capital cases.

In *People v. Seumanu* (2015) 61 Cal. 4th 1293, this Court declined to rule on the viability or legitimacy of what it termed a "Jones claim,"[5] for want of proof in the appellate record before it, suggesting that such a claim is more appropriately presented in a petition for a writ of habeas corpus where necessary evidence outside the appellate record can be presented. (Id. p. 1375.) Notwithstanding the rejection of the defendant's claim, this Court did not dismiss the "Jones claim" concept out of hand, and, instead, noted, "But, although we have consistently, and recently, rejected the Eighth Amendment delay claim, *doctrine can evolve.*" (ID. p. 1369, emphasis added.) While it does not say so explicitly, the language in *Seumanu* suggest that if the death penalty system in California continues to move as ponderously as it has for so long, there may come a day when the courts will seriously entertain a "Jones claim" or a "Lackey claim"[6] (*Lackey v. Texas* (1995) 514 U.S. 1045.)

Among its reform measures, Proposition 66 seeks to address this issue of paralyzing delay, and prevent any future legal calamity, by providing reasonable, common sense procedures to make the system of capital punishment more efficient, reliable, and less time consuming. The reform measures contained in Proposition 66 are logical, practical, not intrusive in their scope, and should be upheld as the express will of the people who voted to pass it.

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[5] "A claim that systemic delay in resolving postconviction challenges to death penalty judgments has led to a constitutionally intolerable level of arbitrariness in the implementation of the penalty." (ID. p. 1368.)

[6] As explained in *Seumanu*, 61 Cal. 4th at p. 1372, a "Lackey claim" deals with how long a postconviction delay affects the state's interest in retribution and deterrence, as well as the psychologically brutalizing effect on the condemned inmate. A "Jones claim" examines whether a long postconviction delay leads to the infliction of a criminal sanction in a manner that is so arbitrary that its imposition can be characterized as cruel and unusual.

Amicus concurs with the points made in the excellent briefing already presented by Intervenor, Californians to Mend, Not End, the Death Penalty; the Attorney General; and the Association of Deputy District Attorneys for Los Angeles County and Nine Other Associations Representing District Attorneys in this matter. Amicus submits this brief to provide the Court additional arguments in support of Proposition 66, and in opposition to Petitioners' facial challenge to the constitutional validity of this initiative.[7]

II. THE SIGNIFICANCE AND PROTECTION OF THE INITIATIVE PROCESS

This Court has long recognized the significance of the initiative process in California and recognized its duty to protect this process. This Court recently restated the principle that "the initiative process occupies an important and favored status in the California constitutional scheme...." (*Brown v. Superior Court* (2016) 63 Cal. 4th 335, at 351.) As this Court said in *Raven v. Deukmejian* (1990) 52 Cal. 3d 336:

> ... we stress that it is a fundamental precept of our law that, although the legislative power under our constitutional framework is firmly vested in the Legislature, 'the people reserve to themselves the powers of initiative and referendum.' It follows that the power of the initiative must be liberally construed...to promote the democratic process. Indeed ... it is our solemn duty jealously to guard the sovereign people's initiative power, it being one of the most precious rights of our democratic process. Consistent with prior precedent, we are required to resolve any reasonable doubts in favor of the exercise of this precious right. 52 Cal. 3d at 341.

[7] A facial challenge to the constitutional validity of a statute, initiative, or ordinance considers only the text of the measure itself. (*Tobe v. City of Snata Anna* (1995) 9 Cal. 4th 1069, 1084.)

III. PROPOSITION 66 DOES NOT INTERFERE WITH THE ORIGINAL HABEAS CORPUS JURISDICITION OF THE CALIFORNIA COURTS

Petitioners claim that Proposition 66 attempts to strip the state courts of their authority to hear and decide habeas corpus petitions. They contend "Article 6, section 10 of the California Constitution vests, without limitation, original habeas corpus jurisdiction in each of California's state courts: The Supreme Court, courts of appeal, and superior courts, and their judges have original jurisdiction in habeas corpus proceedings." (See Amended and Renewed Petition for Extraordinary Relief, Memorandum Points and Authorities, p. 20, 21.) As further argued, petitioners maintain that Proposition 66, through the addition of Penal Code section 1509, unlawfully revokes the original jurisdiction of the Supreme Court and the courts of appeal by mandating that "if a petitioner attempts to challenge his or her incarceration in an original proceeding in the Court of Appeals or the Supreme Court, that court must transfer the petitioner's case to the Superior Court in which the defendant was convicted unless the petitioner can show good cause hearing the case elsewhere." (Ibid. p. 23, 24.)

Petitioners are mistaken, and their arguments misdirected. They confuse venue with jurisdiction. Article 6, section 10 of the California Constitution does give original jurisdiction in habeas corpus proceedings to all three levels of the state's courts. However, Article 6, section 10 does not specify or dictate that one level has priority over the other, nor that the original jurisdiction of the courts is without some limitation. It is well established that in the exercise of this original jurisdiction in habeas corpus proceedings, courts are not free to do whatever they wish, but must abide by the procedures set forth in the Penal Code. (*People v. Romero* (1994) 8 Cal. 4th 728, 737; *Adoption of Alexander S.* (1988) 44 Cal. 3d 857, 865.)

Furthermore, the legislature, or the people, through the initiative process (California Constitution, Article 2, sections 1 and 8) "may put reasonable restrictions upon the constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions. ...the mere procedure by which jurisdiction is to be exercised may be prescribed by the legislature, unless such regulations should be found to substantially impair the constitutional powers of the courts, or practically defeat their exercise." *Brydonjack v. The State Bar of California* (1929) 208 Cal. 439, 444; *Sacramento & San Joaquin Drainage Dist. v. Superior Court* (1925) 196 Cal. 414, 432.)

Proposition 66 does nothing to impair the constitutional powers of the courts or defeat the exercise of such powers. It simply provides a practical and reasonable procedure to assist and accelerate the processing and disposition of habeas corpus petitions in capital cases, something that is desperately needed. Furthermore, the procedure put forth in the newly added Penal Code section 1509 (a) (having habeas petitions in capital cases heard by the court which imposed the sentence) is in step with previous decisions of this Court that a habeas petition challenging the validity of a particular judgment and sentence (which is what habeas petitions in capital cases are all about) is best heard by the superior court and trial judge where the case was initially brought and litigated. (*Griggs v. Superior Court* (1976) 16 Cal. 3d 341, 347; *People v. Roberts* (2005) 36 Cal. 4th 575, 583.) It is common sense that no court is better situated to consider such a petition; no court is more familiar with the facts and circumstances, the parties, the evidence, and the intricate details surrounding the case than the original superior court and trial judge who issued the judgment of conviction. (Compare, *In re Kler* (2010) 188 Cal. App. 4th 1399, 1404.) This fact, and the provisions in Penal Code section 1509 (b) and Government Code section 68662, calling for the trial court, after the entry

of a judgment of death, to offer to appoint counsel to represent the defendant sentenced to death for purposes of state postconviction proceedings can only serve to help expedite the postconviction litigation process and make it more efficient. Such measures can only assist this Court, and not substantially impair its powers or functions. As this Court has stated, "...the legislature may at all times aid the courts and may even regulate their operations so long as their efficiency is not thereby impaired." (*Milholen v. Riley* (1930) 211 Cal. 29, 34.) Rather than impairing the efficiency of this Court, the procedures in Proposition 66 will serve to enhance its efficiency by helping to reduce its work load in postconviction death penalty litigation.

Moreover, petitioners are mistaken when they assert that Proposition 66 mandates a habeas corpus petition in a capital case filed in this court, or the court of appeal, must be transferred to the superior court where the defendant was convicted unless the defendant can show good cause not to do so. (Amended Petition, MPA, p. 24.) Penal Code section 1509(a) does not specify this must be done; rather it provides that it "should" be done. "Should" is permissive, not mandatory; it expresses what ought to be done. Case law has defined "should" to "generally ... mean a moral obligation or recommendation." (*Lueras v. BAC* (2013) 221 Cal. App. 4th 49, 75; Cal. Rules of Court, Rule 1.5(b).)

A further indication that Proposition 66 does not strip this Court, or the courts of appeal, of the authority to entertain and decide habeas petitions in capital cases is the fact that Penal Code section 1509(a) allows for a habeas petition initially filed in any court other than the court which imposed sentence may remain where it was filed upon a showing of good cause to do so. As noted, delay has become the name of the game in postconviction death penalty litigation. Petitioners' insistence that all such petitions be filed in this Court, as opposed to the superior court where the judgment of

conviction was entered is reflective of this fact. We have one Supreme Court, with seven justices (utterly overwhelmed by the sheer number of death penalty cases it faces). We have 58 superior courts throughout the state with hundreds of judges to hear and determine these habeas petitions. Which venue provides the most efficient avenue to hear and determine these petitions in a timely manner?

The procedures presented in Proposition 66, through Penal Code section 1509 and Government Code 68662, do not interfere with the powers of the state courts and are not unconstitutional. They simply and lawfully reflect and implement long standing suggestions and recommendations to remedy the crippling delay problems that plague the capital punishment process called for by respected legal observers and even this Court. (See Alarcon, *Remedies for California's Death Row Deadlock* (2007), 80 So. Cal. L. Rev. 697, 743; Weinstein, *Court Urges Amendment to Speed Death Penalty Reviews*, Los Angeles Times, Nov. 20, 2007.[8]

IV. PROPOSITION 66 DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTIRNE

Petitioners contend that for the same reasons that Proposition 66 interferes with the jurisdiction of California Courts, it also violates the separation of powers doctrine. (See Amended Petition, MPA, p. 28) Again, Petitioners are mistaken.

"The 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., Article 3, section 3.) Article 3, section 3 establishes the separation of powers doctrine in California state government. It limits the authority of one of the three

[8] Available at: http.//articles.latimes.com./2007/nov/20/local/me-death 20

branches of government to intrude on the core functions of another branch. "The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function.... [c.o.]The executive branch, in expending public funds, may not disregard legislatively prescribed directives and limits pertaining to the use of such funds.... [c.o.] And the Legislature may not undertake to readjudicate controversies that have been litigated in the courts and resolved by final judgment." (*Superior Court v. County of Mendocino* (1996) 13 Cal. 4th 45, 53 (internal citations omitted).)

However, the doctrine is not intended, and has not been interpreted by the courts, to prohibit one branch of government from taking action that might affect the functions of another. Our government is based on a system of checks and balances, which requires each branch to be mindful of the actions of the other. While the shared powers of our government are independent in certain of their essential functions, at the same time, they are mutually dependent in others. "This truth often gives rise to occasions where the line of separation is not clear and distinct. Accordingly, repeated instances are to be found where the judicial department has submitted to the regulatory power of the legislative department. This is particularly true in matters of procedure." (*Lorraine v. McComb* (1934) 220 Cal. 753, 756.) Proposition 66 follows these lines, as its provisions are directed at procedural matters in the courts.

While each of the three branches of government are independent under the Constitution, "California decisions long have recognized that, in reality, the separation of powers doctrine does not mean that the three departments of our government are not in many respects mutually dependent or that the actions of one branch may not significantly affect those of another branch."

(*Superior Court v. County of Mendocino*, supra, 13 Cal. 4th, p. 52.) "Of necessity the judicial department as well as the executive must in most matters yield to the power of statutory enactments. The power of the legislature to regulate criminal and civil proceedings and appeals is undisputed. The legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions." (*Brydonjack v. State Bar*, supra, 208 Cal., p. 442-444; *People v. Engram* (2010) 50 Cal. 4th 1131, 1147.)

While there is no question that the courts are an independent branch of government, and possess broad inherent powers to properly and effectively carry out their judicial functions and manage their calendars, "It does not follow that the Legislature necessarily violates the separation of powers doctrine whenever it legislates with regard to such inherent judicial power or function." (*Superior Court v. Mendocino County*, supra, 13 Cal.4th at 57.) This Court has stated it does not believe, "that a constitutional grant of general authority to the court necessarily constitutes a restriction on the power of the Legislature to place reasonable limits upon a court's exercise of discretion in certain instances." (*People v. Standish* (2006) 38 Cal. 4th 858, 880-881.)

In *Johnson v. Superior Court* (1958) 50 Cal. 2d 693, the issue was whether Code of Civil Procedure section 170.6, permitting a party to disqualify a trial court judge upon the submission of a written declaration of prejudice, was an unconstitutional intrusion by the legislature on the power of the courts. In ruling that the statute was not unconstitutional, this Court began by noting, "There is, of course, a presumption in favor of constitutionality, and the invalidity of a legislative act must be clear before it can be declared unconstitutional." (Id. p. 696; *People v. Leiva* (2013) 56 Cal. 4th 498, 506-507.) The decision went on to state that that the

legislature may enact reasonable rules and regulations concerning procedures and operations of the courts, and determined that Code of Civil Procedure section 170.6 came within the scope of this legislative authority. (*Johnson v. Superior Court*, supra, at 697-700.)

There are many examples of various aspects of inherent judicial power being affected by legislative enactments, and upheld by this Court as not being a violation of the separation of powers. Among them are measures limiting the court's power of contempt (*In re McKinney* (1968) 70 Cal. 2d 8, 11-12); the exercise of legislative power over the appointment of certain members of the State Bar Court (*Obrien v. Jones* (2000) 23 Cal. 4th 40, 48); and legislation permitting counties to direct the superior court to remain closed on certain county furlough days (*Superior Court v. County of Mendocino*, supra, 13 Cal. 4th 60, 64; the challenge in *Mendocino* was also a facial challenge.)

This is exactly the case with Proposition 66. Proposition 66 does nothing to violate the separation of powers doctrine. It does not defeat or materially impair the inherent power or function of the courts. (*In re Lira* (2014) 58 Cal. 4th 573, 583-584) It is a valid exercise of the people's legislative power to enact reasonable procedural changes for the operation of the court system in postconviction capital litigation. Petitioners' contention that Proposition 66 violates the separation of powers is a specious argument that fails to overcome the presumption in favor of the constitutionality of this law. As such, it should be denied.

V. PROPOSITION 66 DOES NOT VIOLATE THE SINGLE SUBJECT RULE

The initiative process occupies an important and favored status in the California constitutional system, and courts have consistently deemed it

their duty to guard the people's right to exercise the initiative power. (*Brown v. Superior Court*, supra, 63 Cal. 4th at 351.) However, this right does not come without some limitation. Under the California Constitution, Article 2, section 8, subd. (d): "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." From this comes the "single subject rule," intended to provide the voters protection from measures containing unduly diverse or extensive provisions bearing no reasonable relationship to each other or to the general object which is being promoted. The single subject requirement is a constitutional safeguard to protect against improper manipulation or abuse of the initiative process. (*Senate of the State of California v. Jones* (1999) 21 Cal. 4th 1142, 1158.)

In keeping with its stated duty to "to guard the people's right to exercise the initiative power," (*Brown v. Superior Court*, supra, at 351), this Court has long recognized a simple straight-forward test to determine whether an initiative satisfies the single subject rule: "The single subject rules have been satisfied so long as challenged provisions meet the test of being reasonably germane to a common theme, purpose, or subject." (*Californians For An Open Primary v. McPherson* (2006) 38 Cal. 4th 735, 764; *Raven v. Deukmejian* (1990) 52 Cal. 3d 336, 346-347; *Brosnahan v. Brown* (1982) 32 Cal. 3d 236, 247.) In applying the "reasonably germane test," this Court has stated, "Our decisions uniformly have considered only whether each of the parts of a measure is reasonably germane to a common theme, purpose, or subject, and have not separately or additionally required that each part also be reasonably germane to one another." (*Californians For An Open Primary v. McPherson*, supra, 38 Cal. 4th p. 764, footnote 29.)

Proposition 66's title, "The Death Penalty Reform and Savings Act of 2016," succinctly presents the common theme, purpose, and subject of

this initiative, to wit, the reform of the current dysfunctional death penalty postconviction litigation system and the savings in both time and money that will come with such reform. The eleven provisions of Proposition 66's statement of findings and declarations clearly demonstrate this common theme, purpose, and subject:

1. California's death penalty system is ineffective because of waste, delays, and inefficiencies. Fixing it will save California taxpayers millions of dollars every year.
2. Murder victims and their families are entitled to justice and due process.
3. Families of murder victims should not have to wait decades for justice. These delays further victimize the families who are waiting for justice.
4. Eliminating special housing for death row killers will save tens of millions of dollars every year.
5. Death row killers should be required to work in prison and pay restitution to their victims' families consistent with the Victims' Bill of Rights
6. Reforming the existing inefficient appeals process for death penalty cases will ensure fairness for both defendants and victims.
7. A defendant's claim of innocence should not be limited, but frivolous and unnecessary claims should be restricted.
8. The state agency that is supposed to expedite secondary review of death penalty review cases is operating without any effective oversight, causing long-term delays and wasting taxpayer dollars. California Supreme Court oversight of this state agency will ensure accountability.
9. Bureaucratic regulations have needless delayed enforcement of death penalty verdicts. Eliminating wasteful spending on repetitive

challenges to these regulations will result in the fair and effective implementation of justice.

10. The California Constitution gives crime victims the right to timely justice. A capital case can be carefully and fairly reviewed by both state and federal courts within ten years.
11. The death penalty system is broken, but it can and should be fixed.

These statements encompass and clearly present Proposition 66's common theme and purpose, to seek to reform the current dysfunctional system for the enforcement of death penalty judgments in California and make the system more efficient, less time consuming, and less costly.

The statutes added and amended by Proposition 66 reflect and provide reasonably related means to implement the initiative's common theme and purpose for reform, efficiency, and cost savings.

- Section 3, amending Penal Code section 190.6, establishes procedures and time frames for the litigation of death penalty appeals and habeas corpus proceedings, and mandates the Judicial Council to adopt initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review.
- Section 4, amending Penal Code section 1227, establishes a procedure for the court in which the death penalty sentence was imposed to order the carrying out of the judgment in a specified time frame if it is being delayed for any reason other than the pendency of an appeal pursuant to Penal Code section 1239 subd. (b).
- Section 5, adding Penal Code section 1239.1, mandates the prompt appointment of counsel by the Supreme Court for indigent defendants sentenced to death, and when a substantial

backlog of death sentence cases exists, to allow for the appointment of attorneys 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.

- Section 6, adding Penal Code section 1509, establishes that for habeas corpus petitions for defendants sentenced to death should be heard by the court which imposed the death sentence unless good cause is shown for the petition to be heard by another court, and establishes procedures and time lines to implement and govern this process.
- Section 7, adding Penal Code section 1509.1, provides for a prompt and focused appeal process of the decision by the court specified in Penal Code section 1509, and establishes procedures and limitations for successive habeas corpus petitions.
- Section 8, adding Penal Code section 2700.1, mandates defendants sentenced to death and being held by the Department of Corrections and Rehabilitation be required to work in order to pay toward any victim restitution order or restitution fine (which is part of the judgment in the case), and establishes directives to carry out this objective.
- Section 9, amending Penal Code section 3600, allows for the housing of inmates sentenced to death at any California state prison that provides a level of security sufficient for that inmate.
- Section 10, amending Penal Code section 3604 specifies the means and establishes procedures for the carrying out of the death sentence.

- Section 11, adding Penal Code section 3604.1, mandates that the Administrative Procedure Act shall not apply to the standards. Procedures, or regulations promulgated pursuant to Penal Code section 3604, and that the court which rendered the judgment of death has exclusive jurisdiction to hear any claim by the condemned defendant that the method of execution is unconstitutional or otherwise invalid.
- Section 12, adding Penal Code section 3604.3, provides that a medical doctor may be present at an execution for the purpose of pronouncing death, and may provide advice for the purpose of developing an execution protocol to minimize the risk of inmate pain; that drugs, supplies, and equipment necessary to carry out a death sentence are not subject to Chapter 9, of Division 2, commencing with section 4000 of the Business and Professions Code; and that those specified to do so may provide said materials without prescription to the Department of Corrections and Rehabilitation secretary or the secretary's designee; and, further, that no licensing board or regulatory authority may sanction a party specified for participating in any action authorized by this section.
- Section 13, adding Government Code section 68660.5, provides for the qualification of California for the handling of federal habeas corpus petitions under specified federal law; and for the prompt completion of state habeas corpus proceedings in capital cases; and to provide quality legal representation for inmates sentenced to death.

- Sections 14-15-16-17,[9] establish practices and procedures to return the focus and efforts of the California Habeas Corpus Resource Center to its intended purpose and function, the representation of defendants sentenced to death in a skilled and timely manner, and gives oversight to insure this intended purpose to the California Supreme Court.
- Section 18, amending Government Code section 68665, provides for the Judicial Council and the Supreme Court to adopt, and continue to review, competency standards for the appointment of counsel in postconviction death penalty litigation, and, in doing so, avoid unduly restricting the available pool of attorneys so as to provide for timely appointment as specified and required.

Reviewing these provisions, it is clear that they meet the "reasonably germane" standard to satisfy the single subject rule. Each of the initiative's measures is pertinent to its common concern and general objective to reform the current postconviction death penalty system in order to make it more efficient and less costly.

In their most recent filing in this Court, Petitioners claim that the purpose of Proposition 66 is defective under the single subject rule, because it uses the word "reform," which according to Petitioners, "is not a description that meaningfully limits the scope of an initiative." (See Petitioner's Further Reply in Support of Petition for Extraordinary Relief, at p. 6.) Perhaps understandably, Petitioners make no attempt to reconcile this assertion with this Court's holding in *Raven*, supra, which upheld Proposition 115, the "Criminal Victim's Justice Reform Act," which had

[9] Section 14 amends Government Code section 68661. Section 15 adds Government Code section 68661. Section 16 amends Government Code section 68662. Section 17 amends Government Code section 68664.

the stated purpose to adopt " 'comprehensive reforms... needed in order to restore balance and fairness to our criminal justice system.' " (*Raven*, supra, 52 Cal.3d at 340, 346 – 349; emphasis added.)

Dispositive authority can be found in this Court's rulings on Proposition 8 in 1982 and Proposition 115 in 1990, both notable examples of similar multi-faceted criminal justice reform initiatives that were found not to violate the single subject rule because, despite their varied collateral parts, all of which were reasonably germane to their general purpose or object. (*Brosnahan v. Brown*, supra, 32 Cal. 3d 236; *Raven v. Dukemejian* supra, 52 Cal. 3d 336.)

Brosnahan considered Proposition 8, presented to the voters as, "The Victim's Bill of Rights." It included a wide variety of provisions, which dealt with:

- Restitution orders
- Right to safe schools
- "Truth in Evidence" provision, which worked significant changes in evidence rules in criminal cases, affecting both the Evidence Code and the exclusionary rule
- Public safety bail
- Use of prior convictions without limit both as evidence for impeachment, and as sentencing enhancements
- Changes in the rules for diminished mental capacity as a criminal defense
- Creation of a new five year sentencing enhancement for certain prior felony convictions
- Right of the victim to make a statement to the court at sentencing
- Limits on plea bargaining

- Prohibition of commitment to the California Youth Authority (CYA; now DJJ, or the Division of Juvenile Justice) for certain crimes

This Court upheld Proposition 8, and this varied collection of provisions, against a single subject rule attack. See *Brosnahan*, supra, 32 Cal.3d at 242 – 253.

Similarly, in *Raven*, this Court reviewed Proposition 115, presented to the voters as the "Criminal Victim's Justice Reform Act." This proposition likewise included a wide range of provisions:

- Eliminated the right to a post-indictment preliminary hearing
- Established that state constitutional provisions for criminal rights were to be interpreted in the same fashion as parallel provisions in the U.S. Constitution, limiting the doctrine of independent state constitutional grounds for rights for criminal defendants
- Established due process and speedy trial rights for the People (prosecution)
- Established new rules with respect to joinder and severance in criminal cases
- Permitted a finding of probable cause at a preliminary hearing to be made based on hearsay evidence
- Established the Criminal Discovery Act, instituting reciprocal discovery rights for both the defense and prosecution
- Established rules for jury voir dire
- Added certain felonies to the list of crimes that would trigger the felony murder rule
- Modified certain special circumstance murder rules, and added certain categories to the special circumstance murder list, to qualify

a murder defendant for penalties of life without parole, or the death penalty

- Changed the rules for the crime of torture
- Set rules of the appointment of defense counsel in a timely fashion
- Set rules governing the date of trial and the continuance of trial

Against another single subject challenge, this Court upheld the proposition, and rejected the challenge. See *Raven*, supra, 52 Cal.3d at 342 – 349.

Proposition 66, like Proposition 8 and Proposition 115, fairly discloses a reasonable and common sense relationship among its specified components in furtherance of its overall common objective to bring about reform, and thereby efficiency and cost savings, to the postconviction death penalty litigation process. Just as this Court held that *Brosnahan* was controlling precedent on the single subject challenge in *Raven* (see 52 Cal.3d at 347), so now are both *Brosnahan* and *Raven* controlling precedent for the single subject challenge in this case. The purpose and subject of Proposition 66 are no broader than those in other initiatives this Court has upheld. Petitioners have not made, and cannot make, any convincing, principled argument that the subject of Proposition 66 is more overly broad, nor that the components of Proposition 66 are any more divergent from their common theme, purpose and subject, than those upheld against single subject challenges in *Brosnahan* and *Raven*. The claim that Proposition 66 violates the single subject rule is without merit, and should be denied.

VI. PROPOSITION 66 DOES NOT VIOLATE EQUAL PROTECTION

Petitioners are also mistaken in their contention that Proposition 66 violates the equal protection clause because it deprives defendants sentenced to death of the right to pursue successive habeas corpus petitions

as provided for in Senate Bill 1134, which amended Penal Code section 1485.55. (Amended Petition, MPA, p.52.) In fact, the newly amended Penal Code section 1485.55 has nothing at all to do with successive habeas corpus petitions. What this statute does is provide a means for defendants who have had a habeas corpus petition granted and also been found factually innocent in the process to obtain financial compensation through the Victim Compensation Board and the Legislature. In addition, it allows for a defendant who has a habeas corpus petition granted but was not found factually innocent in the habeas corpus proceeding, or who has a prior judgment vacated pursuant to Penal Code section 1473.6, to move for a finding of factual innocence, and if granted, to obtain financial compensation from the Victim Compensation Board and the Legislature[10]

Also contrary to Petitioners' assertions, Proposition 66 does not newly create two classes of persons, those convicted of a capital crime and those convicted of a non-capital crime. (See Amended Petition, MPA, p. 53.) This distinction existed long before the enactment of Proposition 66, and is well recognized in the law. Capital defendants and non-capital defendants are not similarly situated, and so do not have to be treated in the same way. (See e.g. *People v. Manriquez* (2005) 37 Cal. 4th 547, 590; *People v. Johnson* (1992) 3 Cal.4th 1183, 1242-1243; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1287). *Allen* is of particular significance here, in that it recognized a legitimate basis, not violating equal protection, for treating convicted capital defendants differently than non-capital defendants for purposes of a particular type of post-sentence review.

Moreover, when a law is challenged as a violation of equal protection, courts consider whether it affords different treatment to

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[10] Presumably, a defendant sentenced to death, who prevails in a habeas corpus proceeding and is found factually innocent, would be entitled to the benefit provided in Penal Code section 1485.55.

similarly situated persons, and the standard of review differs depending on the class of person allegedly being treated differently. As explained by the court in *People v. Moreno* (2014) 231 Cal. App. 4th 934, 939, "Unless the law treats similarly situated persons differently on the basis of race, gender, or some other criteria calling for heightened scrutiny, we review the legislation to determine whether the legislative classification bears a rational relationship to a legitimate state purpose."

While Proposition 66 does provide for some procedural differences and limitations for successive habeas corpus petitions for capital defendants, there is a rational basis for these differences. As Intervenor has pointed out, the procedures and resources available to persons convicted of capital crimes is quite different and more substantial than those for non-capital convicts. Also, as noted above, and as this Court observed in its unanimous opinion in *In re Reno*, supra, 55 Cal. 4th 428, postconviction death penalty litigation is plagued by almost endless delays, which "often," after the case has been affirmed on appeal, involve "... an exhaustion petition... [for habeas corpus] running several hundred pages... [that is] quite often...nothing more than a repetition of past claims and unsubstantiated assertions of ineffective assistance of counsel." (55 Cal.4th at 514 – 515.) Proposition 66's objective to reduce these delays by means of procedural rules concerning the filing of habeas claims serves a legitimate state purpose in a rational manner, and does not constitute a violation of equal protection.

VII. SEVERABILITY

Petitioners seek a writ of mandate to prevent Respondents from any act to enforce Proposition 66, and an order declaring that Proposition 66 is null and void in its entirety. (See Amended and Renewed Petition for Extraordinary Relief, p. 16-17.) However, Proposition 66, section 21

contains an express severability clause providing that, "If any provision of this act, or any part of any provision, ...is for any reason held to be invalid or unconstitutional, the remaining provisions ... which can be given effect without the invalid or unconstitutional provision...shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable." (Proposition 66, Section 21.) Therefore, should this Court determine that a provision of Proposition 66 is invalid, the remaining provisions that are valid may and should be properly implemented. (*Raven v. Deukmejian*, supra, 52 Cal. 3d, p. 341.)

VIII. CONCLUSION

Proposition 66 is valid on its face. It does not interfere with the original habeas corpus jurisdiction of the California Courts in death penalty litigation. It does not violate the separation of powers doctrine by defeating or materially impairing the constitutional and inherent powers of the courts to resolve capital appeals and habeas corpus litigation. It does not violate the single subject rule. It does not violate the equal protection doctrine. It represents the sincere desire of those who voted to pass it to bring about much needed change to the current system of death penalty litigation.

For the above stated legal and factual reasons, the amended petition to have Proposition 66 declared unconstitutional and void in its entirety should be denied.

Date: March 29, 2017

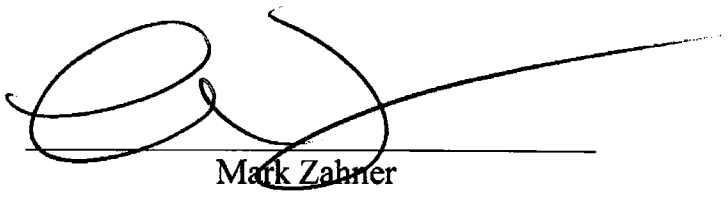
Respectfully submitted,

MARK ZAHNER
Executive Director
California District Attorneys Association

CERTIFICATE OF WORD COUNT

Pursuant to Rules of Court 8.204 and 8.520(c), I certify that this amicus curiae brief was prepared using a computer, that it is proportionally spaced, that the type is 13 point, and that the word count is 6,903 words as determined by the word count feature of the word processing system.

DATED: March 29, 2017



Mark Zahner

DECLARATION OF SERVICE

I, Laura Bell, declare:

I am 18 years of age or older and not a party to this matter. On March 29, 2017, I served the within

"APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENTS JERRY BROWN, in his official capacity as Governor of California; KAMALA HARRIS, in her official capacity as Attorney General of California; CALIFORNIA'S JUDICIAL COUNCIL; and DOES I THROUGH XX"

in this matter by placing a true and correct copy thereof in a separate sealed envelope, with postage fully prepaid, for each addressee named below, addressed as follows:

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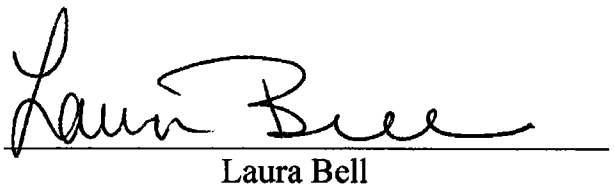
I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on March 29, 2017, at Sacramento, California.



Laura Bell