Case No.: S238309

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Ron Briggs,

Petitioner,

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.

REPLY TO AMICUS BRIEFS

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I. INTRODUCTION

The amicus briefs filed in support of Respondents do not move the needle. For the most part, amici in support of Respondents—Crime Victims United and various associations of district attorneys, deputy district attorneys, and peace officers—raise two types of arguments. First, they raise policy arguments about the importance of having an effective death penalty system. These arguments are beside the point. A voter initiative simply cannot make California's death penalty system more "effective" by violating the constitution. Second, amici in support of Respondents raise the same legal arguments raised by Respondents and Intervenors. Petitioner has rebutted these arguments.

In contrast, the amicus briefs filed in support of Petitioner, as well as one filed in support of neither side, highlight that Proposition 66 is a poorly conceived, poorly written, unfunded, unconstitutional initiative that will sow chaos in California's courts and among defense counsel while substantially raising the risk that California executes an innocent person. Amici in support of Petitioner are:

- Constitutional law professors Erwin Chemerinsky (UCI), Kathryn Abrams (Berkeley), Rebecca Brown (USC), Devon Carbado (UCLA), Jennifer Chacón (UCI), Sharon Dolovich (UCLA), David Faigman (Hastings), Ian F. Haney López (Berkeley), Karl M. Manheim (Loyola), Russell Robinson (Berkeley), Betrall Ross (Berkeley), and the Brennan Center for Justice (collectively, "Constitutional Law Professors");
- California Appellate Defense Counsel ("CADC");
- The Los Angeles County Bar Association, the California Academy of Appellate Lawyers, the Beverly Hills Bar

Association, and the Bar Association of San Francisco ("LACBA amici");

- The California Appellate Project ("CAP");
- The Habeas Corpus Resource Center ("HCRC");
- California Attorneys for Criminal Justice and Death Penalty Focus;
- The Innocence Network, American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California, and American Civil Liberties Union of San Diego and Imperial Counties; and
- The Offices of the Federal Public Defenders for the Central and Eastern Districts of California.

This varied, illustrious group has deep experience in the relevant issues and presents well-reasoned arguments from multiple perspectives regarding the unconstitutional nature of Proposition 66.

Petitioner's briefs and the many amicus briefs filed in support thereof soundly demonstrate that Proposition 66 unconstitutionally impairs the jurisdiction of California's courts, violates the separation-of-powers doctrine, violates the equal protection clause, and violates the single-subject rule. They further demonstrate that the unchallenged provisions of Proposition 66 are not severable from the challenged provisions. Initiative proponents may well be the "captains of the ship when it comes to deciding which provisions to take on board," *see* Intervenors' Preliminary Opposition at 15 (quoting *Brown v. Superior Court*, 63 Cal.4th 335, 350 (2016)), but Intervenors in this case have clearly run their ship aground.

II. PROPOSITION 66 VIOLATES THE SEPARATION-OF-POWERS DOCTRINE.

With regard to Petitioner's argument that Proposition 66 violates the separation-of-powers doctrine by imposing unreasonable time limits and other restrictions on the California courts, amici raise two main responses. First, they argue that the time limits and other restrictions will not impair the functioning of California's courts. *See* 3/29/2017 Amicus Br. of Association of Deputy District Attorneys ("DDAs") at 11. Second, they argue that, to the extent such restrictions *do* impair the courts' functioning, this Court should interpret them as permissive, not obligatory. *See* 1/6/2017 DDAs Amicus Br. at 21; *see also* Amicus Brief of Los Angeles County Professional Peace Officers Association ("LA PPOs") at 15. Neither argument succeeds.

A. Proposition 66's Time Limits and Other Restrictions Impair the Functioning of California's Courts.

1. Automatic Appeals

Petitioner argues that Proposition 66 imposes various requirements on the courts, including time limits, transfer of habeas petitions, and bars on untimely or successive petitions, which strip this Court of its constitutionally-granted jurisdiction and violates the separation-of-powers doctrine. *See generally* Amended Petition at 20-41; Reply at 2-36; Further Reply at 12-28. In particular, Petitioner argues that Proposition 66's mandate that the Supreme Court complete its review of automatic appeals from judgments of death within five years is impracticable, including

because the same review currently takes more than three times that long. Reply at 19.

In response, amici DDAs argue that the time limits imposed by Proposition 66 are reasonable restrictions on the courts, criticizing Petitioner for using how long these cases *currently* take as a reference point for what is *possible*. 3/29/2017 DDAs Amicus Br. at 11. According to amici DDAs, the time it currently takes to review automatic appeals is not a valid data point, because "anything is possible if one tries." *Id.*

The difference between the parties is thus clear. Petitioner believes that this Court currently processes death penalty appeals as quickly as reasonably possible, while ensuring justice and fairness to capital defendants and also appropriately prioritizing other matters on its docket. *See* Reply at 20-21 (highlighting that more than 25% of this Court's written opinions each year dispose of automatic appeals from judgments of death); Uelmen, *The End of an Era* (Sept. 2010) Cal. Law., *available at* https://ww2.callawyer.com/CLstory.cfm?eid=911409 (noting that opinions disposing of automatic appeals from judgments of death constitute nearly half of this Court's written pages per year). For that reason, Petitioner believes that Proposition 66's attempt to cut *in third* the time for processing new appeals, while also forcing the Court to process *all of its existing backlog* within 6.5 years, is an unconstitutional infringement on this Court's inherent functioning. *Cf.* CAP Amicus Letter at 4 ("To comply with Proposition 66, the Court would have to begin deciding automatic appeals at

more than two and one half times [its current] rate and continue at that pace for the next five years: 64 automatic appeals a year, more than one a week without a summer recess."). In contrast, Respondents, Intervenors, and those who support them appear to believe that this Court is unduly delaying resolution of automatic appeals by a factor of three and must be forced by statute to move more quickly. This is a disagreement that only this Court can resolve.

2. **Habeas Review**

Amici DDAs further argue that if original habeas petitions were transferred to the superior courts pursuant to Proposition 66, the increased caseload for the superior courts "would be less than one-tenth of one percent." 3/29/2017 DDAs Amicus Br. at 12. Amici reach that number by dividing the number of current inmates on death row by the number of felony and misdemeanor filings between 2014 and 2015. *Id.* at 11-12. This analysis is far too simplistic, because it ignores: (1) the time-intensive nature of review of capital habeas petitions, *see* Supreme Court Issues Annual Report on Workload Statistics for 2014-2015, Oct. 8, 2015, *available at* www.courts.ca.gov/33297.htm; (2) Proposition 66's requirement that every capital habeas petition be resolved with a "statement of decision explaining the factual and legal basis for its decision," *see* Penal Code § 1509(f); (3) the fact that nearly half of all death sentences come from just three already-overburdened counties—Los Angeles, Riverside, and San Bernardino, *see* *Death Row Tracking System Condemned Inmate Summary List*, CAL. DEP'T.

OF CORR. & REHAB., January 6, 2017, *available at* http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf; and (4) the fact that capital habeas litigation differs significantly from every other case type with which the superior courts are familiar.

Indeed, as noted by Amici Constitutional Law Professors, while direct appeals and habeas corpus petitions related to death penalty cases generally take up less than 1% of the total filings each year before this Court, they consume 25% of its resources. Constitutional Law Professors Amicus Br. at 12-13. Similarly, the LACBA amici explain that "Proposition 66 will overwhelm the judicial system throughout the State," and explain in particular the immense burden that Proposition 66 would place on Los Angeles Superior Court judges and the Second District Court of Appeal. LACBA Amicus Br. at 1, 3-4. Along the same vein, CAP notes that "a high percentage" of the habeas petitions that would be transferred to the superior courts "would go to the superior courts least able to absorb a substantial increase in their workload." CAP Amicus Br. at 5; *see also* HCRC Amicus Br. at 1 ("A clear-eyed appraisal of Proposition 66 yields only one conclusion: it cannot work. That is, compliance with the timelines it proposes cannot be approached without both a tremendous infusion of money (nowhere provided for in the Proposition itself) and a profound intrusion into the ability of condemned inmates and their counsel to raise potentially meritorious habeas claims and of the courts to fairly adjudicate them."). For all these reasons, as well as those discussed in Petitioner's

Petition, Reply, and Further Reply, Proposition 66 violates the separation-of-powers doctrine by impairing the courts' exercise of their constitutional functions.

3. **Appointment of Counsel**

Finally, amici DDAs argue that Proposition 66's new provisions for appointment of counsel will significantly reduce the time necessary for capital post-conviction review, because "as a practical matter appointment [of qualified capital defense attorneys] will take no more time than what is needed to notify the panel coordinator of the appointment." 3/29/2017 DDAs Amicus Br. at 11. This argument exhibits a willful blindness to the current context surrounding appointment of post-conviction review counsel.

As Petitioner has shown, appointment of appellate counsel following a judgment of death currently takes three-to-five years, and appointment of capital habeas counsel currently takes eight-to-ten years. Reply at 26. Proposition 66 purports to speed that up, but several stakeholders have weighed in to make clear that Proposition 66's efforts in that area will fail. For example, CADC, an organization comprising approximately 400 lawyers who accept appointments to represent indigent appellants before the Courts of Appeal and the California Supreme Court, has informed the Court that many of its members would rather resign from indigent appellate advocacy than accept a capital appointment. CADC Amicus Letter at 2. Similarly, the LACBA amici inform us that, under Proposition 66:

> approximately 110 defendants [in Los Angeles County would] need appointment of capital habeas corpus counsel within one year. ***We are not aware of there being 110 qualified capital habeas corpus practitioners within the Los Angeles County area.*** These skills are particular and difficult to acquire, and the case-handling burden on those who have them is great. Attracting competent counsel has been the subject of persistent and largely unsuccessful efforts by this Court and other actors in our justice system.

LACBA Amicus Br. at 4 (emphasis added). CAP, for its part, explains that:

> It has been widely recognized that inadequate funds are at the root of the problems Proposition 66 was enacted to solve. [Citations.] In particular, habeas counsel must possess a "unique combination of skills" that this Court has found to be possessed by "[q]uite few" lawyers. [Citation.] The rates the Court currently offers have proven inadequate either to attract enough of these qualified lawyers to take habeas appointments, or to persuade enough additional lawyers to obtain the necessary training and experience. Basic laws of economics indicate that significantly higher rates, for both attorney fees and investigation and expert expenses, would have to be offered to persuade a sufficient number of lawyers to become qualified for, and to accept, these appointments in any court.

CAP Amicus Br. at 7. Given this context, it is amici DDAs, not Petitioner, whose arguments about the feasibility of Proposition 66 are "wishful thinking without factual support." DDAs Amicus Br. at 10.

Because the assumption that Proposition 66 will significantly speed the appointment-of-counsel process is entirely unrealistic, the fact that Proposition 66 purports to squeeze that process, along with several other time-consuming processes, into a five-year time period constitutes an

unconstitutional infringement on the courts' exercise of their constitutional functions.

B. Proposition 66's Time Limits and Other Limitations are Obligatory.

Amici in support of Respondents next argue that, to the extent Proposition 66's timelines and other restrictions *do* impair the courts' functioning, this Court should interpret them as permissive, not obligatory. *See* 1/6/2017 DDAs Amicus Br. at 21-23; *see also* LA PPOs Amicus Br. at 15. This argument ignores the basic rules of statutory construction.

"It is a general rule of statutory construction that the legislative intent in passing a statute is to be given effect by the courts." *In re Shafter-Wasco Irrigation Dist.*, 55 Cal. App. 2d 484, 488 (1942). "In the case of a voters' initiative statute . . . we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." *Hodges v. Superior Court*, 21 Cal. 4th 109, 114 (1999). Accordingly, "we are obliged to interrogate the electorate's purpose, as indicated in the ballot arguments and elsewhere." *Id.*; *see also Amador Valley Joint Union High School Dist. v. Bd. of Equalization*, 22 Cal.3d 208, 245-246 (1978) ("[T]he ballot summary and arguments and analysis presented to the electorate in connection with a particular measure" are evidence of legislative intent.)

Here, as amici Constitutional Law Professors have effectively demonstrated, it was the voters' intent to impose obligatory deadlines and

other restrictions on the courts. *See* 3/30/2017 Constitutional Law Professors Amicus Br. at 26-29; *see also* Reply at 28-31. Particularly in the context of time limits, Proposition 66 repeatedly uses the word "shall" rather than "may." *See* Constitutional Law Professors Amicus Br. at 20-23. The initiative imposes consequences for courts' failure to comply with its prescribed time limits. *See id.* at 23-26. And the ballot materials related to Proposition 66 told the voters that, if enacted, Proposition 66 *would* impose *required* time limits on the lengthy capital appeals process. For example, the Official Title and Summary stated that Proposition 66 "[e]stablishes [a] time frame for state court death penalty review." Official Voter Guide, p. 104. The Analysis by the Legislative Analyst, in turn, stated that Proposition 66:

> ***Requires Completion of Direct Appeal and Habeas Corpus Petition Process Within Five Years.*** The measure requires that the direct appeal and the habeas corpus petition process be completed within five years of the death sentence. The measure also requires the Judicial Council to revise its rules to help ensure that direct appeals and habeas corpus petitions are completed within this time frame. The five-year requirement would apply to new legal challenges, as well as those currently pending in court. For challenges currently pending, the measure requires that they be completed within five years from when Judicial Council adopts revised rules. If the process takes more than five years, victims or their attorneys could request a court order to address the delay.

Id. at 106 (bold, italicized emphasis in original; underlining added).

When arguing in support of the initiative, Intervenors promised the voters that Intervenors, with their deep experience with the death penalty, knew how to end the "endless appeals":

> We agree California's current death penalty system is broken. The most heinous criminals sit on death row for 30 years, ***with endless appeals delaying justice*** and costing taxpayers hundreds of millions.
>
> It does not need to be these way.
>
> The solution is to MEND, NOT END, California's death penalty.
>
> The solution is YES on PROPOSITION 66.
>
> ***Proposition 66 was written to speed up the death penalty appeals system*** while ensuring that no innocent person is ever executed.
>
> ...
>
> Proposition 66 was written by frontline death penalty prosecutors who know the system inside and out. ***They know how the system is broken, and they know how to fix it.***

Id. at 108 (emphasis added). This was a very important point. Intervenors presented Proposition 66 to the voters as an alternative to Proposition 62. *Id.* And Proposition 62, by eliminating the death penalty altogether, would have eliminated entirely the "endless appeals delating justice and costing taxpayers hundreds of millions." *Id.* For Intervenors to present Proposition 66 as a credible alternative to Proposition 62, they had to convince the voters that they really could make the capital post-conviction review process more efficient. And they were successful.

Thus, the voters enacted Proposition 66 because they thought that it would speed up the lengthy capital appeals process by imposing "require[d]"

deadlines on the courts. Imagine, on the other hand, if the ballot materials had accurately reflected amici's current arguments about Proposition 66. Imagine if the Legislative Analyst had merely told the voters that Proposition 66 "***Encourages Completion of Direct Appeal and Habeas Corpus Petition Process Within Five Years.***" Imagine if the argument in favor of the initiative had stated:

> *We hope to* MEND, NOT END, California's death penalty, *by encouraging the courts to process these types of cases at a rate faster than they currently do. Of course, we can't order the courts to process these cases faster, but we think that, if we write down an aspirational deadline for them, they will find a way to put aside other pressing matters to process death penalty appeals more quickly.*

The results at the ballot box would have been different.

In order to save Proposition 66 from violating the separation-of-powers doctrine, this Court would have to water down its time limits and other restrictions so much that the legislation would be unrecognizable to the proponents who authored it and the voters who adopted it. There is no support for adopting such a result over the more natural conclusion that Proposition 66's provisions are obligatory, and therefore unconstitutional.

III. PROPOSITION 66 IMPAIRS THE JURISDICTION OF CALIFORNIA'S COURTS.

The California Constitution provides that courts at all three levels "have original jurisdiction in habeas corpus proceedings." Cal. Const., art. VI, § 10. Contrary to this broad grant of jurisdiction, Proposition 66 adds Penal Code § 1509(a), which provides that a petition for writ of habeas

corpus "should be promptly transferred to [the sentencing] court unless good cause is shown for the petition to be heard by another court." It further provides that a petition in accordance with § 1509(a) "is the exclusive procedure for collateral attack on a judgment of death."

A. New Penal Code § 1509(a) is Not a "Venue" Provision.

With regard to Petitioner's argument that new Penal Code § 1509(a), in combination with other provisions of Proposition 66, impairs the jurisdiction of California's Supreme Court and Courts of Appeals, several amici echo Intervenor's argument that new Penal Code § 1509(a) is merely a "venue" provision. *See* 1/6/2017 DDAs Amicus Br. at 12-14; Amicus Br. of California District Attorneys Association ("CDAA") at 16; Amicus Br. of California Correctional Peace Officers Association ("CCPOA") at 3; LA PPOs Amicus Br. at 6. But, like Intervenor, not one of these amici provides support for the idea that the concept of "venue" includes transfer of cases from one *level* of the California courts to another.

As Petitioner has shown, directives regarding which *level* of California court should hear a case are more properly considered rules of judicial procedure, which the California Supreme Court possesses the inherent authority to impose on lower courts. *In re Roberts*, 36 Cal.4th 575, 593 (2005). Where the Legislature—and not this Court—imposes similar rules on *all* California courts—and not just the lower courts—those rules must be reviewed for whether they impair the courts' jurisdiction, *see Gerawan Farming, Inc. v. Agric. Labor Relations Bd.*, 247 Cal. App. 4th

284, 294 (2016), and/or make the functioning of the courts less efficient, *see* *Millholen v. Riley*, 211 Cal. 29, 33-34 (1930). Indeed, this Court has specifically cautioned against allowing the Legislature to manipulate jurisdiction among the different levels of California's courts, for reasons very similar to those at issue here:

> 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, 3 Cal. 389, 390 (1853).

In this case, new Penal Code § 1509(a) both impairs the courts' jurisdiction and makes the functioning of the courts less efficient. As such, it is unconstitutional.

B. New Penal Code § 1509(a) is Obligatory and Strips this Court of Jurisdiction.

Amici who support Respondents make much of the fact that section 1509(a) uses the word "should" instead of a stronger command like "must" or "shall." The CDAA for example, suggests that section 1509(a) simply contains a "moral obligation or recommendation." CDAA Amicus Br. at 18 (quoting *Lueras v. BAC*, 221 Cal. App. 4th. 49, 75 (2013)). As another example, the LA PPOs argue that the combination of the word "should" and the good cause exception means that section 1509(a) "specifically acknowledges the Supreme Court and Courts of Appeal have original

jurisdiction and can choose to exercise that jurisdiction in their discretion." LA PPOs Amicus Br. at 5. These post-hoc interpretations are contrary to what proponents promised voters, which was that "[t]he trial courts who handled the death penalty trials and know them best ***will*** deal with the initial appeals." Official Voter Guide, p. 108 (emphasis added).

Read in context, the use of "should" does not weaken the transfer requirement in section 1509(a); it is simply an acknowledgement of the "good cause" exception. The Legislative Analyst reached the same conclusion, telling voters that Proposition 66 "***requires*** that habeas corpus petitions first be heard in trial courts . . . . Specifically, 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." *Id.*, p. 105 (emphasis added).

Contrary to LA PPOs' argument, the good cause exception is not sufficient to prevent section 1509(a) from being an impermissible impairment of this Court's habeas jurisdiction. First, requiring a showing of "good cause" already impairs courts' ability to entertain habeas petitions, in contravention of the constitution's unrestricted grant of habeas jurisdiction. Second, by making the initial habeas petition the "exclusive procedure" for collateral attack, section 1509(a) precludes this Court and the Courts of Appeal from entertaining subsequent habeas petitions, even after a first petition is decided in accordance with Proposition 66. This, among other things, distinguishes Proposition 66 from prior rules directing that petitions

"should" be first filed in certain courts—in those situations, appellate courts still retained the jurisdiction to hear a subsequent habeas petition after the trial court had considered the issues. Proposition 66's "exclusive procedure" provision forecloses such jurisdiction here. Accordingly, Proposition 66 unconstitutionally impairs the jurisdiction of this Court and the Courts of appeal over capital habeas corpus petitions.

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

A. The Legal Authority Amici Reply Upon is Inapposite.

Amici writing in support of Respondents have not pointed to any relevant authority to challenge Petitioner's equal protection claim. Instead, like Respondents and Intervenors, they point to cases discussing whether specific *procedural* differences between capital and non-capital appeals violate the principles of equal protection. This case is different. *Procedural* differences govern where and when claims are brought. This case, in contrast, presents a *substantive* difference between the processing of capital and non-capital habeas petitions—whether certain claims can be brought *at all.*

For example, amici DDAs point to three cases out of Idaho and Indiana to argue that Proposition 66's restrictions on successive petitions do not violate equal protection. DDA Amicus Br. at 13. But those cases addressed equal protection claims in the context of different time limits for

capital and non-capital appeals.[1] Time limits, of course, are a procedural issue, not a substantive one.

The only cases that address limitations on the availability of claims in successive petitions are *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000), and *Abdool v. Bondi*, 141 So.3d 529 (Fla. 2014). As discussed more fully in Petitioner's Further Reply, those decisions held that such restrictions violate equal protection. Further Reply at 42-44. The *Abdool* court explicitly distinguished: (1) procedural differences (such as timelines) for capital post-conviction proceedings, which do not violate equal protection; from (2) a law that "unconstitutionally limit[s] the number or type of postconviction motions that a capital defendant may file." *Abdool*, 141 So.3d at 540, 546. Amici's failure to address this authority or to account for the distinction between a procedural rule and a substantive limitation on claims is a fatal flaw in their arguments.

B. Amici Cannot Identify a Rational Basis for Treating Capital and Non-Capital Prisoners Differently in the Context of Successive Habeas Petitions.

Amici also fail to provide a rational basis for dissimilar treatment of capital and non-capital prisoners. Instead, they simply repeat Respondents' and Intervenor's assertions that the availability of counsel and automatic

[1] These amici and amici LA PPOs also rely on a Ninth Circuit case finding no equal protection violation under a rule that allowed non-capital prisoners to waive appeals but created an automatic appeal for capital prisoners. *See Massie v. Hennessey*, 875 F.2d 1386 (9th Cir. 1989). Since the restriction in that case provided greater, rather than fewer, protections to capital prisoners, it is also inapposite.

appeals for capital defendants provides such a rational basis. As discussed in detail in earlier briefing, the narrowness of the current gateways for successive petitions—*i.e.* a change in the law or new facts that could not have been discovered previously—make the provision of resources to capital defendants at the initial stage wholly irrelevant to the question of whether a successive petition will be needed to raise such claims. For this reason, capital and non-capital prisoners are similarly situated in their need to seek relief through successive habeas petitions, and there is no rational basis for treating them differently.

Since the provision of counsel and resources has no rational connection to the likely merits of successive claims, Proposition 66 can serve only one purpose: to ensure that capital prisoners are executed faster, regardless of the legality or constitutionality of their convictions and sentences. While this may well be Intervenor's goal, under no circumstances can it be classified as a "legitimate governmental objective[]," as required by the equal protection analysis. *See, e.g.*, *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). For this reason as well, Proposition 66 is unconstitutional.

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

A. Volitional Separability

Amicus Orange County District Attorney ("OC DA") devotes an entire brief to the issue of severability. At the end, he answers the question

of "whether the voters would have adopted this multifaceted reform without a few of its parts . . . with a resounding yes." OC DA Amicus Br. at 26. But this conclusion is based on very little analysis and no quotations or citations to the ballot materials provided to the voters along with the proposition itself. *See Amador Valley Joint Union High School Dist. v. Bd. of Equalization*, 22 Cal.3d 208, 245-246 (1978) ("[T]he ballot summary and arguments and analysis presented to the electorate in connection with a particular measure" are evidence of legislative intent.). Amicus OC DA further makes no attempt to challenge Petitioner's argument that the heart of Proposition 66 was expediting post-conviction review, and instead appears to concede that point. *Id.*

Amicus OC DA also ignores the fact that the test for volitional severability is "whether it can be said ***with confidence*** that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered ***and adopted*** them in the absence of the invalid portions." *Gerken v. Fair Political Practices Comm'n*, 6 Cal. 4th 707, 714-715 (1993) (emphasis added; internal quotation marks and emphasis omitted). It is hard to imagine any situation in which it could be said "with confidence" that an initiative that passed with only 51.1% would still have passed if significant portions were removed therefrom. Regardless, that is certainly not the situation here, where the very portions of the initiative that the ballot materials and Intervenors emphasized to the voters are the portions under challenge. *See* Further Reply at 53-57.

In contrast to Petitioner's argument that the voter's intent in passing Proposition 66 was to speed post-conviction review procedures, amicus OC DA argues that "[t]he ballot materials demonstrate the cornerstone of the initiative was a comprehensive reform of many parts." OC DA Amicus Br. at 24. Even if true, this argument supports Petitioner. If the voters passed Proposition 66 to achieve "a comprehensive reform of many parts," it is highly unlikely that they would have passed a version of it that was *not* comprehensive. *See Metromedia, Inc. v. City of San Diego*, 32 Cal. 3d 180, 190 (1982) (finding invalid portion of statute not volitionally severable because it was "doubtful whether the purpose of the original ordinance is served by a truncated version").

For the foregoing reasons, as well as the arguments discussed in Petitioner's Reply and Further Reply, the unconstitutional provisions of Proposition 66 are not severable from those that stand unchallenged. As a result, Proposition 66 must be declared null and void in its entirety.

B. Grammatical and Functional Separability

Petitioner does not wish to belabor grammatical and functional separability in the abstract. That said, it is clear that amici's arguments on these points are superficial. For example, Amicus OC DA suggests that deletion of new §1509(d) would not render incoherent any other sections of Proposition 66. OC DA Amicus Br. at 15. This argument conspicuously ignores the fact that §§1509(c) and (e) both reference and depend on that section, and therefore would be rendered incoherent by its deletion:

> (c) Except as provided in ***subdivisions (d)*** and (g), the initial petition must be filed within one year of the order entered under Section 68662.
>
> ...
>
> (e) A petitioner claiming innocence or ineligibility under ***subdivision (d)*** shall disclose all material information relating to guilt or eligibility in the possession of the petitioner or present or former counsel for petitioner. If the petitioner willfully fails to make the disclosure required by this subdivision and authorize disclosure by counsel, the petition may be dismissed.

(Emphasis added). The same is true for §1509.1(c). There are several examples of similar cross-referencing and interdependence throughout the initiative. *See, e.g.*, Govt. Code §68662 and Pen. Code § 1509(c); *see also* Reply at 52-53; Further Reply at 48-52. Indeed, Amicus OC DA's complicated proposals for editing and striking provisions to preserve grammatical severability seem to acknowledge that very point. OC DA Amicus Br. at 12-17.

Because of the complex and interrelated nature of Proposition 66, if this Court declares certain portions of that initiative unconstitutional, principals of grammatical and functional severability will require that other portions of the initiative either be substantially edited for clarity or be stricken as well. The remainder, as discussed above, will fail the test for volitional severability.

VI. PROPOSITION 66 VIOLATES THE SINGLE-SUBJECT RULE.

Proposition 66 includes provisions unrelated to its central theme of expediting death penalty appeals and reducing related costs, thereby violating the California Constitution's prohibition on initiative measures "embracing more than one subject." Cal. Const. art. II, § 8(d); *see generally* Amended Petition at 41-51; Reply at 36-44; Further Reply at 2-12. As characterized by amici in support of Respondents, the alleged subject of Proposition 66 is broad enough to encompass all of its various provisions. But amici's formulations of Proposition 66's alleged subject fare no better than Respondents' and Intervenor's when held up against this Court's prohibition on "topics of excessive generality." *Brosnahan v. Brown*, 32 Cal. 3d 236, 253 (1982). To justify Proposition 66's inclusion of provisions affecting victim restitution, medical licensing organizations, the Administrative Procedures Act, and the HCRC board of directors, amici must characterize Proposition 66's topic so broadly that it could encompass a "virtually unlimited" number of issues. *See Harbor v. Deukmejian*, 43 Cal. 3d 1078, 1100-01 (1987) (rejecting topic with "virtually unlimited" scope because contrary result "would effectively read the single subject rule out of the Constitution"); Further Reply at 6-9 (demonstrating breadth of proponents' alleged subjects).

Disputing Petitioner's point that mere "reform" does not meaningfully limit the scope of an initiative, Further Reply at 6, amicus

CDAA argues that this Court previously upheld Proposition 115, the "Criminal Victim's Justice Reform Act." CDAA Amicus Br. at 28-29 (citing *Raven v. Deukmejian*, 52 Cal. 3d 336, 340, 346-49 (1990)). However, Proposition 115 did not purport to encompass any and all "reform" to the criminal justice system, and the Court did not so find. Instead, the Court explicitly found that "the single subject of Proposition 115 is promotion of the rights of actual and potential crime victims." *Raven*, 52 Cal. 3d at 347. Similarly, the proper subject against which to test Proposition 66's provisions is not simply "death penalty reform," but, as CDAA itself acknowledges, reforms to expedite death penalty appeals. CDAA Amicus Br. at 23-24 (describing the "common theme, purpose, and subject" of Proposition 66 as "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" (emphasis added)); *id.* at 31 (arguing Proposition 66 operates "in furtherance of its overall common objective to bring about reform . . . to the postconviction death penalty litigation process") (emphasis added).

When Proposition 66's general purpose is limited to constitutionally permissible scope, the challenged provisions are not reasonably germane. See Amended Petition at 46-52; Reply at 40-44; Further Reply at 10-12. Thus, Proposition 66 is void in its entirety for violating the single subject rule.

VII. CONCLUSION

Petitioner respectfully urges this Court to declare Proposition 66 null and void in its entirety.

Dated: April 6, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with California Rules of Court 8.204(c)(1) and 8.486(a)(6), counsel for Petitioners hereby certifies that the number of words contained in this Reply to Amicus Briefs, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 5544 words as calculated using the word count feature of the computer program used to prepare the brief.

By: Christina Von Der Ahe Rayburn

CHRISTINA VON DER AHE RAYBURN

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I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, The Orrick Building, 405 Howard Street, San Francisco, California 94105-2669. On April 6, 2017, I served a true copy of the attached document entitled:

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