Case No. S284496

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OFFICE OF THE STATE PUBLIC DEFENDER, EVA PATERSON, LATINOJUSTICE PRLDEF, ELLA BAKER CENTER FOR HUMAN RIGHTS, and WITNESS TO INNOCENCE,

Petitioners,

v.

ROB BONTA,
California Attorney General, in his official capacity,

Respondent.

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INTRODUCTION

The petition for writ of mandate raises issues of extraordinary public interest that warrant this Court's exercise of original jurisdiction. The Attorney General agrees. So do former Justices of this Court, nearly twenty state Legislators, and prosecutors throughout California. This consensus reflects the compelling and disturbing nature of the empirical evidence petitioners presented in this Court: racial discrimination pervades capital charging and sentencing. (See petn. at pp. 28–41 [detailing results of four statewide and 11 county-level studies analyzing decades of data].)[1]

Though the parties agree that, on the strength of petitioners' empirical showing, appointment of a special master is appropriate (resp. at p. 20; reply at p. 9), the Court has requested further briefing on petitioners' legal theories in the first instance. Specifically, this Court directed the parties to address:

> (1) On what ground or grounds, if any, does each petitioner have standing to challenge the prosecution, imposition, and execution of all death sentences in this state?

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[1] Petitioners filed their Petition for Writ of Mandate (petn.) on April 9, 2024. On April 23, amici—including legislators, prosecutors, and former justices—submitted filings on behalf of petitioners. The Attorney General filed a Preliminary Response to Petition for Writ of Mandate (resp.) on May 6. Therein, he argued that the petition presents "a weighty constitutional question" and this Court should grant an order to show cause. (Resp. at p. 10; accord *id.* at p. 20.) Petitioners filed their Reply to Respondent's Preliminary Response to Petition for Writ of Mandate (reply) on May 16.

> (2) Have petitioners alleged facts that, if proven true, would establish a violation of the California Constitution (art. I, §§ 7, 17) and entitle them to all or part of the relief they seek, including an order prohibiting all future capital prosecutions and the enforcement or execution of any death sentence previously imposed? How, if at all, does article I, section 27 of the California Constitution affect this determination? How, if at all, does the classification of this matter as an as-applied or a facial challenge affect this determination?
>
> (3) What parties are necessary to properly consider the requested relief and effectuate it, if warranted?

The answers to these questions support granting the petition and issuing a writ of mandate. Petitioners have public interest standing to pursue, and are beneficially interested in, an action challenging the constitutionality of California's death penalty system. (Part I, *post*.) Petitioners' detailed allegations of racial disparities establish violations of the state Constitution's equal protection guarantees and prohibition against cruel or unusual punishment. (Parts II.A–II.C, *post*.) Neither article I, section 27, nor any other substantive rule of constitutional law, bars petitioners' as-applied claims. (See part II.D, *post*.) And because petitioners have named as respondent the state's chief law enforcement officer, no further parties are necessary to consider and effectuate the relief petitioners request. (Part III, *post*.)

For these reasons, the Court should bar the prosecution, imposition, and execution of death sentences in California. At the very least, it should issue an order to show cause why the writ should not be granted and appoint a referee to develop any

further evidentiary record deemed necessary. (See reply at pp. 9–11.) "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." (*Rose v. Mitchell* (1979) 443 U.S. 545, 555 (*Rose*).) And it "is [past] time" for this Court to address that scourge and "bring a greater sense of urgency to ferreting out racial discrimination in the criminal justice system." (*People v. Holmes*(2022) 12 Cal.5th 719, 844 (dis. opn. of Liu, J.), bracketed insertion in original.)

ARGUMENT

I. PETITIONERS HAVE STANDING TO CHALLENGE THE RACIALLY DISCRIMINATORY APPLICATION OF CALIFORNIA'S DEATH PENALTY STATUTES

The Attorney General "does not contest petitioners' standing to seek writ relief." (Resp. at p. 15.) For good reason: there are multiple grounds on which petitioners have standing to challenge the prosecution, imposition, and execution of death sentences in California.

First, petitioners have "public interest" standing. This Court has "long allowed petitioners to seek relief where ""the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty."""" (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1248.) In such cases, a party's interest "'in having the laws executed and the duty in question enforced'" is sufficient even absent a "'legal or special interest.'" (*Bd. of Soc. Welfare v. County of Los Angeles* (1945) 27 Cal.2d 98, 101 (*Bd. of Soc. Welfare*).) Public interest standing "give[s] citizens an opportunity to ensure the enforcement of

public rights and duties." (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 167 (*Save the Plastic Bag Coalition*); see also *Green v. Obledo* (1981) 29 Cal.3d 126, 127.)

The petition implicates the most serious public rights and duties. Petitioners ask the Court to declare California's capital sentencing scheme invalid as applied under the state Constitution and bar capital prosecutions and the execution of death sentences under the current penal statutes. As the Attorney General recognizes, the petition thus presents "a matter of the greatest public importance" because "'[d]eath is a different kind of punishment from any other, both in terms of severity and finality.'" (Resp. at p. 15.) That "the most irremediable and unfathomable of penalties" is persistently meted out in California on a racially discriminatory basis is a public concern of the highest order. (See *Ford v. Wainwright* (1986) 477 U.S. 399, 411 (plur. opn. of Marshall, J.).)

California courts have identified other factors that also support petitioners' public interest standing. All petitioners have a "continuing interest in or commitment to the public right being asserted" because they have long advocated against racial disparities in the application of the death penalty specifically and the criminal-legal system more broadly. (See *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 914.) Moreover, multiple petitioners directly represent "individuals who would be beneficially interested in this action." (*Ibid.*) In particular, as of Nov. 11, 2024, OSPD currently

represents over 65 people appealing their death sentences and has over 30 former clients awaiting the appointment of capital habeas counsel; the Ella Baker Center and LatinoJustice organize and advocate for incarcerated people on death row and their families; and Witness to Innocence is an organization led by death row exonerees that highlights systemic failures in capital sentencing. (See petn. at pp. 21–24.)

Second, for related reasons, petitioners also have standing under the ordinary "beneficially interested" test. (See Code Civ. Proc., § 1086.) They each have a "special interest to be served . . . over and above the interest held in common with the public at large." (*Save the Plastic Bag Coalition*, *supra*, 52 Cal.4th at pp. 165–166.) For example, OSPD's "primary responsibilities" are to represent indigent capital appellants and to provide training and assistance to public defender offices and appointed counsel. (Gov. Code, § 15420.) OSPD is also authorized to "perform any acts consistent with . . . carrying out the functions of [its] office"—that is, providing representation for people with death sentences. (Gov. Code, § 15425.) These statutory responsibilities implicate a far more "direct and substantial" interest in the fair and constitutional administration of California's death penalty system than that held by the public at large. (*Save the Plastic Bag Coalition*, at p. 165.)

Other petitioners likewise have interests beyond those of the general public. All advocate on behalf of or provide services to death-sentenced people whose sentences are infected by racial discrimination in the prosecution and imposition of the death

penalty in California. (See petn. at pp. 20–24 [describing petitioners' missions and activities].) And petitioners expend significant resources on these activities; those expenditures will be impacted in myriad ways depending on this Court's disposition of the petition. (Cf. *Cuenca v. Cohen* (2017) 8 Cal.App.5th 200, 219 [nonprofit devoted to low-income housing had standing to challenge redevelopment allocation]; resp. at p. 15, fn. 2 [citing "case law holding that an organization generally has standing to contest the legality of a practice or policy that requires it to divert resources away from other activities"].)

Third, the Ella Baker Center and Eva Paterson have taxpayer standing under Code of Civil Procedure section 526a. (Petn. at pp. 20–23.) As a result, they can seek relief "restraining and preventing any illegal expenditure of . . . funds" on the racially discriminatory application of the death penalty. (Code Civ. Proc., § 526a.)

In sum, each petitioner has standing, on multiple grounds, to bring their constitutional claims and to seek an order barring the prosecution, imposition, and execution of death sentences in California under the current statutory scheme.

II. PETITIONERS HAVE ALLEGED FACTS ESTABLISHING VIOLATIONS OF THE STATE CONSTITUTION AND ENTITLING PETITIONERS TO THE RELIEF THEY SEEK

Petitioners' as-applied challenge to California's current capital punishment statutes is supported by a wealth of empirical evidence establishing violations of both the state constitutional equal protection guarantee and the state constitutional

prohibition on cruel or unusual punishments. This Court should issue an order barring future capital prosecutions and enjoining enforcement of death sentences previously imposed.

A. The stark racial disparities in the application of California's current capital punishment statutes establish state constitutional equal protection violations

The empirical evidence detailed in the petition is conclusive: Racial bias infects nearly every stage of California's death-sentencing process. Fifteen studies analyzing data over more than four decades illustrate that California's capital sentencing scheme disproportionately selects defendants for capital charging and death sentencing based on the race or ethnicity of defendant and victim. (Petn. at pp. 28–41.) As the Attorney General acknowledges, "the statistical findings in the studies invoked by petitioners are profoundly disturbing." (Resp. at p. 9.)

These stark disparities demonstrate unconstitutional racial discrimination in the application of California's death penalty statutes. Thus, as currently applied, this capital punishment system violates the state Constitution's guarantee of equal protection.[2] Because petitioners broadly explain their equal

[2] The California Constitution has three provisions that guarantee equal protection: article I, section 7, subdivisions (a) and (b), and article IV, section 16, subdivision (a). They have been interpreted to provide similar protections. (*Sagaser v. McCarthy* (1986) 176 Cal.App.3d 288, 305.)

protection theory in the petition (petn. at pp. 65–91), this brief highlights three propositions critical to the Court's analysis.

1. Under the state Constitution, disparate impact is sufficient to demonstrate a violation of equal protection

"[T]he California Constitution 'is, and always has been, a document of independent force.'" (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 325.) "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." (Cal. Const., art. I, § 24.) Accordingly, this Court has consistently recognized that the state equal protection guarantee possesses "an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable." (*Serrano v. Priest* (1976) 18 Cal.3d 728, 764 (*Serrano II*).) As a result, the state equal protection guarantee may "provide broader rights than those granted by the federal constitution." (*People v. Leung* (1992) 5 Cal.App.4th 482, 494.)

This Court has recognized that proof of intentional discrimination is not required to advance an equal protection claim under California's Constitution. (Petn. at pp. 71–74.) Indeed, this Court has held repeatedly that a facially neutral statute's disparate impact or discriminatory effect is sufficient to demonstrate a state equal protection violation. (E.g., *Serrano v. Priest* (1971) 5 Cal.3d 584, 601–604 (*Serrano I*); *Crawford v. Bd. of Ed.* (1976) 17 Cal.3d 280, 291–293 (*Crawford*); cf. *In re Marriage Cases* (2008) 43 Cal.4th 757, 856, fn. 73 (*Marriage*

Cases) [prohibitions on same-sex marriage violate equal protection because of their "detrimental effect" regardless of whether they "were enacted with an invidious intent or purpose"].) In these cases, the Court determined that proof of discriminatory intent is unnecessary when application of a statutory scheme disproportionately harms a protected class or burdens a fundamental interest.

In *Serrano I*, *supra*, 5 Cal.3d at p. 603, fn. 18, for example, this Court explained that "[n]umerous cases involving racial classifications have rejected the contention that purposeful discrimination is a prerequisite to establishing a violation of the equal protection clause." This Court described as "simply false" the proposition that "no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan," and "firmly recognize[d] that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." (*Ibid.*) Applying these principles, the Court rejected as lacking "a solid foundation in law and logic" the state's argument that the disparate wealth-based impact on students was constitutional because there were "no allegation[s] of purposeful or intentional discrimination." (*Id.* at pp. 601–602.) The "absence of a discriminatory motivation" was immaterial, this Court reasoned, because there was a discriminatory "*result*"—and "government action" was the direct cause for the disparate "patterns" being challenged. (*Id.* at pp. 602–603.) Accordingly, the Court held that the plaintiffs had properly brought constitutional claims based on

the "substantial disparities" that resulted from the applicable school financing scheme. (*Id.* at p. 618.)

This Court's subsequent decision in *Crawford*, *supra*, 17 Cal.3d 280 is also instructive. There, the Los Angeles Unified School District argued that racial segregation in its schools did not violate state equal protection guarantees because it was not intentional. (*Id.* at p. 285.) As in *Serrano I*, *supra*, 5 Cal.3d 584, this Court squarely rejected that argument, noting that "a significant line of California decisions" had "authoritatively establish[ed]" that the "constitutional obligations" imposed by equal protection "entail more than simply the avoidance of . . . intentionally invidious conduct." (*Crawford*, at p. 290.) Rather, equal protection is directly concerned with a "policy's actual differential impact" on racial minorities. (*Id.* at p. 296.) That is because, under the state Constitution, "public officials in some circumstances bear an affirmative obligation to design programs or frame policies so as to avoid discriminatory *results*." (*Id.* at pp. 296–297, italics added.)

In rejecting the school board's constitutional theory, *Crawford*, *supra*, 17 Cal.3d at pp. 297–298 highlighted the "deleterious practical consequences that would inevitably flow" from requiring intentional discrimination. Initially, this Court noted that "disputes" existed over whether the school board's "intent" should be "judged on the basis of the objective effects of its actions or the basis of the subjective motives of its members." (*Id.* at p. 298.) Next, even putting aside this threshold question, "the factual inquiries which would inevitably arise in the judicial

application of such a definition would be unending." (*Ibid.*) This would presumably require inquiry into "[t]he most routine decisions with respect to the operation of schools" (*ibid.*) as well as, for instance, "residential [housing] patterns" that contributed to school segregation (*id.* at p. 299). Variation among courts would be "inevitable when dealing with an issue as slippery as 'intent' or 'purpose,' especially when related to hundreds of decisions made by school authorities under varying conditions over many years." (*Id.* at p. 300.) The Court determined that "the litigative task involved in such an effort would be an enormous one, imposing tremendous burdens on representatives of minorities, on school boards and on the courts." (*Ibid.*) In short, the complexities of proving discriminatory intent rendered such a requirement untenable.

And that Herculean effort would be for no gain, this Court recognized, because the "ultimate reality" was that the "isolating and debilitating effects" of school segregation on minority children did "not vary with the source of the segregation." (*Crawford*, *supra*, 17 Cal.3d at p. 301.) Accordingly, the Court held that the school district had "an obligation" under the state equal protection provisions "to undertake reasonably feasible steps to alleviate school segregation, *regardless of the cause* of such segregation." (*Id.* at pp. 301–302.)

As these cases demonstrate, "government action which without justification imposes unequal burdens" should be held "unconstitutional" under California's equal protection guarantee whether or not the disparate impact is shown to be motivated by

intentional discrimination. (*Serrano I*, *supra*, 5 Cal.3d at p. 602, fn. 18.) Of course, to establish actionable disparate impact, the plaintiffs must initially show that the challenged "policy's actual differential impact" on racial minorities or other protected groups is clear and "substantial." (*Crawford*, *supra*, 17 Cal.3d at p. 296.) And disparate impact will more likely establish an equal protection violation when certain circumstances are present, including where:

(1) state officials exercise "pervasive control over and continuing responsibility for both the daily decisions and the long range plans which in fact determine" the racial disparities (*id.* at p. 294);

(2) these officials "bear an affirmative obligation to design programs or frame policies so as to avoid discriminatory results" (*id.* at pp. 296–297); or

(3) litigants face "practical difficulties" in establishing intent, which includes defining the "intent" of a vast network of independent decisionmakers, establishing difficult chains of causality, and evaluating the effect of historical decisions on the present disparities (*id.* at pp. 297–302).

As shown below, each of these circumstances is present here.

2. The racial disparities produced by the administration of California's present capital punishment scheme are evidence of systematic racial discrimination

Under this Court's cases, the "actual differential impact," on the basis of race of defendant or victim, detailed in the petition

demonstrates that the capital punishment scheme, as currently applied, is marred by racial discrimination. (*Crawford*, *supra*, 17 Cal.3d at p. 296.) Statewide and county-specific studies analyzing different sets of data demonstrate dramatic racial disparities in capital charging and sentencing. (Petn. at pp. 28–41.) And, using multiple regression analyses, the studies found that these disparities cannot be explained by any legitimate race-neutral factors. (See petn. at pp. 25–28 [discussing methodology].) As one author concluded after considering and discounting numerous nonracial variables, "racial considerations determine who is subject to the ultimate punishment in California." (Petn. at p. 30 [quoting petn. exh. A at p. 11 (Grosso et al., The Influence of the Race of Defendant and the Race of Victim on Capital Charging and Sentencing in California)].)[3]

In addition to this evidence of stark racial disparities, all of the circumstances highlighted in *Crawford*, *supra*, 17 Cal.3d at pp. 294, 296–302 are present here. Even more than in *Crawford*, state officials exercise "pervasive control" over the present capital punishment system. (*Id.* at p. 294.) That includes not only the "daily decisions"—for instance, the initial charging of special circumstances, the jury-selection process, and the prosecutor's ultimate decision to seek a death sentence (petn. at pp. 41–48)—

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[3] Grosso and her colleagues' study had been conditionally accepted for publication at the time petitioners filed the petition. (Petn. at p. 30.) As expected, the paper was published in September 2024. (Grosso et al., *The Influence of the Race of Defendant and the Race of Victim on Capital Charging and Sentencing in California* (2024) 21 J. Empirical Legal Stud. 482.)

but also the "long range plans" as to how to operate the capital punishment scheme. (*Crawford*, at p. 294.)

At the same time, as the Attorney General acknowledges, the State has an affirmative constitutional obligation to weed out "[r]acial discrimination in the administration of our criminal justice system." (Resp. at p. 9.) Furthermore, just as may occur in the school segregation context, the practical difficulties in establishing the motivation for the racial disparities would be legion. It would require evidentiary investigation into two of the most opaque and shielded processes in our legal system: prosecutorial discretion and jury deliberations. And it would require a nearly impossible historical analysis of "hundreds of decisions"—or perhaps thousands—made by different state officials "under varying conditions over many years.'" (*Crawford*, *supra*, 17 Cal.3d at p. 300.)

Holding that the racial disparities here are evidence of systematic discrimination would not only be consistent with this Court's cases, but also with broader equal protection principles. Although the United States Supreme Court later required proof of intentional discrimination, its "early equal protection cases emphasized that systematic discrimination in the enforcement of laws violates the equal protection clause when coupled with the absence of rules to adequately guide or control the exercise of discretion." (Thaxton, *Disentangling Disparity: Exploring Racially Disparate Effect and Treatment in Capital Charging* (2018) 45 Am. J. Crim. L. 95, 119–120; see, e.g. *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 373–374.) And, even under the

federal Constitution, the high court continues to recognize that substantial racial disparities resulting from the administration of a facially neutral law or policy can be sufficient to advance a constitutional violation. (See, e.g., *Castaneda v. Partida* (1977) 430 U.S. 482, 511 [equal protection is offended when "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action"]; Ortiz, *The Myth of Intent in Equal Protection* (1989) 41 Stan. L.Rev. 1105, 1119–1134 [despite the formal requirement of purposeful discrimination, the high court requires "something close to a showing of mere disparate impact" in jury-selection, voting, and education cases].)

Recognizing that racial disparities in the capital punishment system reflect systematic discrimination would also be consistent with contemporary understanding that racial bias can take many forms. Bias and stereotypes about social groups can be "explicit, in the sense that they are both consciously accessible through introspection and endorsed as appropriate by the person who possessed them." (Kang, et al., *Implicit Bias in the Courtroom* (2012) 59 UCLA L.Rev. 1124, 1129 (Kang).) Over recent decades, empirical research has also increasingly focused on—and roundly demonstrated—the prevalence of implicit and institutional bias. As one researcher explains, "implicit racial biases pervade modern society." (Girvan, *On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law* (2015) 26 Geo. Mason U. C.R. L.J. 1, 34.) The California Legislature, for example, has recognized that most Americans "have an implicit bias that disfavors African

Americans and favors Caucasian Americans, resulting from a long history of subjugation and exploitation of people of African descent." (Stats. 2019, ch. 418, § 1(a)(3).)

These implicit biases "are large in magnitude, and have real-world effects." (Kang, *supra*, 59 UCLA L.Rev. at p. 1126.) And they intersect with and are "mutually reinforced" by structural biases and discrimination, which "can lock in past inequalities, reproduce them, and indeed exacerbate them . . . simply because of attitudes and stereotypes about the groups to which they belong." (*Id.* at pp. 1133–1134.) Research in fact suggests that "discrimination can be built into institutional structures, practices and norms—literally into the *fabric* of an institution—and that actors within these structures act according to established institutional norms and practices that may reflect discriminatory beliefs." (Paterson et al., *The Id, the Ego, and Equal Protection in the 21st Century: Building Upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine* (2008) 40 Conn. L.Rev. 1175, 1188.)

That precisely describes the present state of affairs in California's death penalty system. As the petition details at pages 41–50, multiple mechanisms in the capital charging and sentencing scheme invite racial bias—whether explicit, implicit, or institutional. Prosecutors have nearly unchecked discretion to charge special circumstances, and this discretion is disproportionately wielded against Black and Latino defendants. (Petn. at pp. 41–45.) Furthermore, various jury-selection procedures, including death qualification, produce juror cohorts

who are more likely to harbor racial bias. (*Id.* at pp. 45–48.) Other aspects of the current capital punishment system, including subjective and amorphous penalty phase jury instructions, also encourage improper racial considerations in sentencing decisions. (See *id.* at pp. 48–50.) The "mutually reinforc[ing]" nature of these bias-introducing mechanisms only highlights the extent to which racial discrimination pervades the entire system. (See Kang, *supra*, 59 UCLA L.Rev. at p. 1134.)

In sum, this Court's precedent, longstanding equal protection principles, and modern social science all support the conclusion that the racial disparities identified in the petition are evidence of systematic and unconstitutional racial discrimination.[4]

3. Strict scrutiny applies to petitioners' claims

Petitioners' proffered evidence shows stark racial disparities in the application of California's current death penalty

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[4] Even if intentional discrimination were required under the state equal protection guarantee (and it is not), petitioners' equal protection claim would be viable. The "stark" and "clear pattern" of racially disproportionate impact presented in the petition is strong "circumstantial . . . evidence"—and may be entirely "determinative"—of invidious intent. (*Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 266.) Moreover, the "historical background" of the scheme is another "particularly" important "evidentiary source" because "it reveals a series of official actions taken for invidious purposes." (*Ibid.*; see petn. at pp. 18, fn. 7, 66–67 [describing history]; see generally Murray, *Discriminatory Taint* (2022) 135 Harv. L.Rev. 1190.)

statutes. (Petn. at pp. 24–41.) As such, the burden shifts to the Attorney General to show, under the highest standard the law allows—"strict and searching scrutiny"—that those disparities serve a compelling governmental interest. (*Serrano II*, *supra*, 18 Cal.3d at p. 766; see petn. at pp. 69–70, 85–86; see also *People v. Contreras* (2018) 4 Cal.5th 349, 362 ["racial classifications" are evaluated under this standard].)[5]

Under that demanding test, the Attorney General must demonstrate that the disproportionate impact created by California's capital punishment scheme is "necessary to achieve a compelling governmental interest." (*Gould v. Grubb* (1975) 14 Cal.3d 661, 672; accord *Marriage Cases*, *supra*, 43 Cal.4th at pp. 847–848.) The Attorney General cannot discharge this "heavy burden" here. (*Marriage Cases*, at p. 847.) The government's "strong" and well-established interest is in "*combating* racial discrimination in the administration of justice," not furthering it.

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[5] The Attorney General quotes *Hardy v. Stumpf* (1978) 21 Cal.3d 1, 7 to argue: "This Court has recognized that, '[s]tanding alone, disproportionate impact does not trigger . . . the strictest scrutiny' under state equal protection doctrine." (Resp. at p. 26, bracketed insertion and ellipsis in original.) The Attorney General's characterization is inaccurate. In *Hardy*, at p. 7, this Court noted that in *Washington*, *supra*, 426 U.S. 229, "[t]he United States Supreme Court . . . held a personnel test which excluded . . . disproportionately large numbers of black applicants did not offend equal protection" under the *federal* Constitution; the high court then included the quoted statement. The *Hardy* Court did not recognize or impose a limitation on the application of strict scrutiny under *state* equal protection doctrine as the Attorney General represents. (Compare *Hardy*, at p. 7 with resp. at p. 26.)

(*Rose*, *supra*, 443 U.S. at p. 558, italics added; see also *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 163 (conc. opn. of Werdegar, J.) ["the elimination of racial discrimination . . . has often been found to be a governmental interest of the highest order"].)

Finally, a capital punishment system that produces such vast racial disparities engenders an extraordinary expressive harm: it signals that the state of California values White lives more than non-White lives. (See generally Anderson & Pildes, *Expressive Theories of Law: A General Restatement* (2000) 148 U.Pa. L.Rev. 1503, 1527–1545.) The system "put[s] the courts' imprimatur" on racial discrimination and "entangles the courts in a web of prejudice and stigmatization." (*State v. Cofield* (N.C. 1987) 357 S.E.2d 622, 625–626 [discussing discrimination in jury selection].) For those on California's death row, the racially discriminatory administration of the state's death penalty statutes is an acute injustice; for every Californian, it is an endorsement and perpetuation of our sordid history of violence, subordination, derision, and apathy. (See *Shaw v. Reno* (1993) 509 U.S. 630, 648, 650 [government action may send a "pernicious" message that "reinforces racial stereotypes"]; *Rose*, *supra*, 443 U.S. at p. 556 ["[t]he harm is not only to the accused" but extends to "'the community at large'" and "society as a whole"]; Reparations Task Force, Final Report (June 29, 2023) chapter 3: Racial Terror, pp. 130–164 (Reparations Report).)

B. The facts alleged in the petition regarding the application of California's current capital punishment statutes establish violations of the state Constitution's cruel or unusual punishment provision

The overwhelming evidence of racial disparities in death sentencing set forth on pages 24–50 of the petition also, independently, establishes a violation of the prohibition on cruel or unusual punishment in article I, section 17.[6] Precedent from this Court and from other courts interpreting similar constitutional provisions demonstrates that impermissible cruelty and unusualness may manifest in multiple ways. Tested against those precedents, petitioners' proffered evidence demonstrates that the death penalty as administered is both cruel and unusual in violation of section 17.

1. Cruel or unusual punishment under California law

California's constitutional provision barring cruel or unusual punishment provides broader protection than its federal

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[6] This claim was not included in the petition. Petitioners set it forth here in response to the Court's inquiry. If requested by the Court, petitioners will promptly file an amended petition including this claim. Members of this Court have recently recognized the viability of the view of section 17 explained here—that disproportionate application of a sentencing scheme violates the constitutional provision. Justice Evans's dissent from the denial of review in *People v. Powell*, review den. June 12, 2024, S284418, joined by Justice Liu, called for the Court to "consider Powell's argument that the disproportionate application of the LWOP exclusion on youth of color violates our state constitution's prohibition against cruel or unusual punishment."

counterpart. (*People v. Baker* (2018) 20 Cal.App.5th 711, 723.) Section 17, unlike the Eighth Amendment, is phrased in the disjunctive, prohibiting "cruel *or* unusual punishment." (Italics added.) Proof of either cruelty or unusualness suffices to render a punishment unconstitutional. (*Ibid.*) The petition demonstrates both.

Section 17 "provides a flexible and progressive standard." (*In re Reed* (1983) 33 Cal.3d 914, 922, overruled on another ground in *In re Alva* (2004) 33 Cal.4th 254.) Cruelty "should be evaluated in light of 'the evolving standards of decency that mark the progress of a maturing society.'" (*Id.* at p. 923; accord *In re Foss* (1974) 10 Cal.3d 910, 923 (*Foss*).)

Administration of the death penalty in a racially biased manner violates California's standards of decency in the 21st century.[7] All three branches of state government have recognized the existence of explicit, implicit, systemic, and institutional bias, as well as the critical importance of rooting it out. (Stats. 2020, ch. 317, § 2 [legislative findings in support of Racial Justice Act]; Supreme Court of California Issues Statement on Equality and Inclusion (June 11, 2020); Executive Order No. N-09-19 (Mar. 13,

[7] Although "[t]he voters defeated ballot initiatives to repeal the death penalty in 2012 and 2016" (resp. at p. 12), the electorate has never endorsed the racial disparities set forth on pages 24–50 of the petition. To the contrary, the proponents of section 27 assured the voters there were no such problems. (Petn. at p. 54; part II.D.2, *post*.)

2019) [findings in support of cessation of executions]; Reparations Report, *supra*, at pp. 411–413.)[8]

a. Cruelty

Assessment of the cruelty of a punishment requires "consideration of the penological purposes of the punishment imposed." (*Foss*, *supra*, 10 Cal.3d at p. 923.) In the absence of any penological purpose, the cruelty of the punishment is manifest. Cruelty was historically defined by reference to physical torture, but a broader definition has long been well-established. (*In re Lynch* (1972) 8 Cal.3d 410, 421–422 [citing *Weems v. United States* (1910) 217 U.S. 349].)

The Court has elsewhere described the rule of section 17: that "the measure of the constitutionality of punishment for crime is individual culpability is well established in the law of this state." (*In re Rodriguez* (1975) 14 Cal.3d 639, 653.) The race of the defendant or the victim is just as irrelevant to the defendant's individual culpability as it is irrelevant to any legitimate penological purpose.

The Supreme Court of Washington in *State v. Gregory* (Wash. 2018) 427 P.3d 621 (*Gregory*) recognized two ways the state's capital punishment system as applied could violate the bar on cruel punishments under the state Constitution:

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[8] The Reparations Task Force was established by statute in 2020. (Stats. 2020, ch. 319, enacting former Gov. Code, § 8301.1, subd. (a).) It functioned with "the administrative, technical, and legal assistance of the Department of Justice." (Gov. Code, § 8301.4, subd. (b).)

(1) The first and "most important consideration is whether the evidence shows that race has a meaningful impact on imposition of the death penalty." (*Id.* at p. 634.) A system of punishment imposed in an arbitrary and racially biased manner violates Washington's bar on cruel punishments. (*Id.* at p. 636.) The court acknowledged the need to consider both statistical patterns and other evidence. (*Id.* at p. 635.)

(2) The other question is whether "[t]he death penalty, as administered, fails to serve [the] legitimate penological goals" of retribution and deterrence. (*Id.* at p. 636, italics omitted.) The *Gregory* court noted that these questions may overlap because retribution "must be evenhanded" and deterrence requires a "'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.' [Citation.] To the extent that race distinguishes the cases, it is clearly impermissible and unconstitutional." (*Ibid.*)

As in Washington, petitioners' evidence shows that the death penalty as applied in California is predictable only on the impermissible basis of race. (See petn. at pp. 27–28, 66–67, 90–92.)

b. Unusualness

Petitioners also demonstrate that California's death penalty, as currently administered, is an "unusual" punishment forbidden by section 17.

"Unusual" accurately describes a punishment not regularly inflicted across the universe of similar cases, but inflicted disproportionately in a subset of cases, particularly when, as

here, the subset is most obviously distinguishable by the forbidden fact of the race of those involved. (*Furman v. Georgia* (1972) 408 U.S. 238, 242 (*Furman*) (conc. opn. of Douglas, J.).)

A punishment not cruel or unusual in the abstract nevertheless becomes cruel and unusual when it is administered in an arbitrary manner, even if the person being punished, looked at alone, "deserves" the punishment by any objective standard. (*State v. Santiago* (Conn. 2015) 122 A.3d 1, 99–100 (*Santiago*) (conc. opn. of Norcott and McDonald, JJ.); Londono, *A Retributive Critique of Racial Bias and Arbitrariness in Capital Punishment* (2013) 44 J. Soc. Phil. 95, 96, 98–99 (Londono); Nathanson, *Does It Matter if the Death Penalty Is Arbitrarily Administered?* (1985) 14 Phil. & Pub. Aff. 149, 158 (Nathanson).)[9] This is an additional reason, besides those set forth on pages 56–60 of the petition, why litigation of the validity of a death sentence imposed on an individual defendant for a particular crime is not an adequate remedy for the claims set forth in this petition.

[9] The constitutional difficulty goes deeper than this. The identification of a person who "deserves" the punishment is itself artificial and tainted. For the reasons stated on pages 41–50 of the petition, the pervasiveness of racial bias makes it impossible to have confidence in the procedures that purport to determine which defendants do and do not deserve a death sentence under the California statutes being challenged here. (See Nathanson, *supra*, 14 Phil. & Pub. Aff. at pp. 153–155.)

2. Additional authority from other jurisdictions

Other state courts have recognized that racially biased or racially disparate enforcement may render a punishment cruel or unusual, even if it would not be cruel or unusual if fairly administered. (See, e.g., *Gregory*, *supra*, 427 P.3d at pp. 631–636; *Santiago*, *supra*, 122 A.3d at pp. 66–71; *id.* at pp. 85–103 (conc. opn, of Norcott and McDonald, JJ.); *District Attorney v. Watson* (Mass. 1980) 411 N.E.2d 1274, 1283 ["experience has shown that the death penalty will fall discriminatorily upon minorities" and thus "the death penalty is unconstitutionally cruel"], superseded by state constitutional amendment; see generally *Graham v. Collins* (1993) 506 U.S. 461, 484 (conc. opn. of Thomas, J.) [racial prejudice is "the paradigmatic capricious and irrational sentencing factor"]; *Furman*, *supra*, 408 U.S. at p. 310 (conc. opn. of Stewart, J.) ["if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race"].)

In addition to these cases directly addressing the present issue, the North Carolina Supreme Court relied on similar reasoning to resolve a similar state constitutional claim. "Our conclusion that juvenile life without parole is cruel is bolstered" by "empirical data demonstrating that an individual juvenile offender's chances of receiving a sentence of life without parole may be at least partially attributable to factors that are not salient in assessing the penological appropriateness of a sentence, such as race, socioeconomic status, and geography." (*State v. Kelliher* (N.C. 2022) 873 S.E.2d 366, 387.) The court

cited "results of regression analysis showing that juvenile life without parole sentences 'are more likely . . . in North Carolina counties with a [B]lack population that is above average (20.9%) and in counties where the poverty rate is below average (16.1%).'" (*Ibid.*, ellipsis in original.)

The Court should look for guidance to the well-reasoned decisions of sister state courts discussed in this brief. (See, e.g., *Marriage Cases, supra*, 43 Cal.4th at p. 780, fn. 3.) The proffered statistical evidence, and its historical and social context, reflects national realities and is not unique to California. "Racial bias in the administration of the death penalty has been documented in death penalty regimes across the country." (Petn. exh. S at p. 497 [Prof. John Donohue]; see Reparations Report, *supra*, at pp. 13–14, 646.) In the words of Justice Liu, "Although state constitutions vary in their language and content, the recurring cross-pollination of constitutional concepts indicates that state constitutions are both sources and products of a shared American legal tradition." (Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal* (2017) 92 N.Y.U. L.Rev. 1307, 1322.) Indeed, while the claim petitioners advance has been recognized in the courts of states with significantly more homogenous populations, California's uniquely diverse population heightens the need for scrutiny of racial or ethnic discrimination.

3. Underpinnings of the cruel or unusual analysis

Racially biased administration prevents the death penalty from serving any legitimate penological purpose, thereby demonstrating a form of cruelty inconsistent with section 17. (*Santiago*, *supra*, 122 A.3d at p. 66; *Gregory*, *supra*, 427 P.3d at p. 636.) "[I]f there are marked racial . . . disparities in how the punishment is imposed, it raises the inference that the punishment is not meaningfully serving a purpose of punishment that a less harsh sanction could not adequately fulfill." (Smith et al., *State Constitutionalism and the Crisis of Excessive Punishment* (2023) 108 Iowa L.Rev. 537, 586 [citing *Gregory,* 427 P.3d 621].)

> [T]he death penalty must be equally available for similarly culpable offenders if a capital sentencing scheme is to fulfill a valid retributive purpose. To the extent that the ultimate punishment is imposed on an offender on the basis of impermissible considerations such as his, or his victim's, race, ethnicity, or socio-economic status, rather than the severity of his crime, his execution does not restore but, rather, tarnishes the moral order.

(*Santiago,* at p. 66; accord *Gregory*, at p. 636 ["retribution . . . must be evenhanded"].)

Similarly, if a punishment nominally of general application is actually imposed, or not, based on factors divorced from the defendant's level of culpability, it is deprived of deterrent value. (See *Gregory*, *supra*, 427 P.3d at p. 636.) This, in turn, renders the punishment unconstitutionally cruel and unusual, and demonstrates that it serves no legitimate penological purpose.

(*Ibid.*) The disparate administration simultaneously deprives the punishment of both constitutional and moral legitimacy.

In striking the state's death penalty on the ground that it was cruel and unusual as administered,[10] the Supreme Court of Connecticut turned to scholars of philosophy. (*Santiago, supra*, 122 A.3d at pp. 66–67 [citing Londono, *supra*, 44 J. Soc. Phil. 95; McDermott, *A Retributivist Argument Against Capital Punishment* (2001) 32 J. Soc. Phil. 317; Nathanson, *supra*, 14 Phil. & Pub. Aff. 149].) While rarely using the language of constitutional law, these scholars lay out the logic that undergirds the constitutional prohibition on cruel or unusual punishments, giving special attention to the ways in which racial or other disparities undermine the legitimacy of the punishment and the institutions that inflict it.

All these things make a punishment cruel or unusual even if "many . . . of the documented disparities in capital charging and sentencing [do not] arise . . . from purposeful, hateful racism or racial animus." (*Santiago*, *supra*, 122 A.3d at p. 96 (conc. opn. of Norcott and McDonald, JJ.).) "[T]he arbitrariness and discrimination need not be purposeful or deliberate" in order to

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[10] The Connecticut Constitution "prohibits cruel and unusual punishments under the auspices of" its two due process clauses. (*Santiago*, *supra*, 122 A.3d at p. 14.) In turn, "whether a challenged punishment is cruel and unusual is to be judged according to the 'evolving standards of human decency'; . . . those standards are reflected not only in constitutional and legislative text, but also 'in our history and in the teachings of the jurisprudence of our sister states as well as that of the federal courts.'" (*Id.* at p. 29.)

render the punishment illegitimate. (Nathanson, *supra*, 14 Phil. & Pub. Aff. at p. 160.) "[A]lthough no one *decides* that race will be a factor, we may *predict* that it will be a factor, and this knowledge must be considered in evaluating policies and institutions." (*Ibid.*) Justice Douglas put it this way: "We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were [B]lack. Yet our task is not restricted to an effort to divine what motives impelled these death penalties." (*Furman*, *supra*, 408 U.S. at p. 253 (conc. opn. of Douglas, J.).)[11]

4. A "greater evil" than mere randomness

Racial bias is uniquely pernicious. As the Supreme Court of Connecticut explained: "[T]he eighth amendment is offended not only by the random or arbitrary imposition of the death penalty, but also by the greater evils of racial discrimination and other forms of pernicious bias in the selection of who will be executed." (*Santiago*, *supra*, 122 A.3d at p. 19; accord, Nathanson, *supra*, 14 Phil. & Pub. Aff. at pp. 158–159.) Racial disparity and randomness both cause a punishment to be cruel or unusual because they are irrelevant to any legitimate penological justification for punishment. (See Londono, *supra*, 44 J. Soc. Phil. at p. 98; Nathanson, at pp. 153, 158–159.)

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[11] This is no different than petitioners' equal protection claim, which is based on disparate impact. Proof of intentional discrimination is not required. (Petn. at pp. 71–74.)

The facts set forth in the petition demonstrate what the Connecticut court called the "greater evils" of "pernicious bias." (*Santiago*, *supra*, 122 A.3d at p. 19.) Even half a century ago, there was "increasing recognition of the fact that the basic theme of equal protection is implicit in 'cruel and unusual' punishments." (*Furman*, *supra*, 408 U.S. at p. 249 (conc. opn. of Douglas, J.).) In interpreting their state Constitutions in a way comparable to this Court's interpretation of section 17, *Gregory*, *supra*, 427 P.3d at p. 635 and *Santiago*, *supra*, 122 A.3d at p. 29 demonstrate that that principle is recognized in our time as well. The facts in the petition describe a system inconsistent with contemporary standards of decency, and inconsistent with section 17's prohibition on cruel or unusual punishment.

C. Petitioners are entitled to the relief they seek in their as-applied challenge

The constitutionally infirm application of California's capital punishment scheme requires this Court's intervention. Petitioners seek an order enjoining (1) the enforcement or execution of death sentences previously imposed and (2) future capital prosecutions under California's current capital punishment statutes. Petitioners do not contest the death penalty as a form of punishment per se. (See part II.D.1, *post*.)

Although petitioners have outlined aspects of California's current capital punishment regime that invite and perpetuate racial bias (petn. at pp. 41–50), they offer no opinion as to whether or how the Legislature might craft a death penalty scheme that cures the discrimination endemic to the

administration of its current scheme. This is not petitioners' burden. (See *Serrano I, supra*, 5 Cal.3d at p. 597; cf. *Gregory*, *supra*, 427 P.3d at pp. 636–637 [holding death penalty statute unconstitutional as applied while recognizing that "the death penalty is not per se unconstitutional" and "leav[ing] open the possibility that the legislature may enact a 'carefully drafted statute' in the future"].)

Petitioners have met the only burdens they carry: They have presented facts establishing state constitutional violations that entitle them to the relief they seek.

1. Petitioners challenge California's capital punishment statutes as applied

Traditionally, courts seek to divide actions challenging the constitutional validity of statutes into two categories: facial challenges and as-applied challenges. Petitioners' claim falls squarely within the as-applied classification.

In general, a constitutional claim of facial invalidity "considers only the text of the measure itself." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 (*Tobe*).) Such a claim "requires, and indeed permits, no factual determination." (*People v. Gonzalez* (1996) 12 Cal.4th 804, 824.) In other words, a facial challenge is usually one "predicated on a theory that the mere enactment of the . . . [law] worked a [constitutional violation]," such as where invidious classifications are written plainly into the text of a statute. (*Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 767.)

Therefore, a facial claim is "generally ripe the moment the challenged [law] is passed" (*Bronco Wine Co. v. Jolly* (2005) 129 Cal.App.4th 988, 1034), and facial challenges are frequently brought prior to the effective date or any enforcement of a statute with the goal of preventing application of the statute altogether (see *Moody v. NetChoice, LLC* (2024) 144 S.Ct. 2383, 2418 (conc. opn. of Thomas, J.) ["since a facial challenge may be brought before a statute has been enforced against anyone, a plaintiff often can only guess how the statute operates"]). Because "[c]laims of facial invalidity often rest on speculation" and "raise the risk of 'premature interpretation of statutes on the basis of factually barebones records,'" they are said to be "disfavored" in federal courts. (*Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, 450.)

On the other hand, an as-applied claim is not founded upon the four corners of a statute and, by definition, cannot be brought before a statute is applied. "[A]n as applied challenge assumes that the statute . . . is valid and asserts that the manner of enforcement against a particular individual or individuals or the circumstances in which the statute or ordinance is applied is unconstitutional." (*Tobe*, *supra*, 9 Cal.4th at p. 1089; see generally *People v. Wingo* (1975) 14 Cal.3d 169, 180 (*Wingo*) ["A statute valid on its face may be unconstitutionally applied"].) An as-applied challenge must be founded upon a bedrock of facts establishing that the real-life administration of the law—rather than the text of the law—offends the Constitution. (*Tobe*, at p. 1084.)

Petitioners' claim is built upon such a bedrock. Petitioners have presented a wealth of empirical evidence, based on data from actual cases, demonstrating that California's capital punishment scheme is administered in a racially discriminatory manner. (Petn. at pp. 28–41.) This Court has affirmed the facial validity of California's death penalty provisions and petitioners do not seek to revisit those holdings here. (See, e.g., *People v. McDaniel* (2021) 12 Cal.5th 97, 142–155.) Instead, petitioners present a case of first impression challenging California's capital punishment scheme as applied.

2. Petitioners are entitled to an order enjoining enforcement of death sentences and prohibiting prosecutions under California's current capital punishment statutes

Under the standards governing as-applied challenges, petitioners have proffered facts justifying an order relieving past death sentences and barring capital prosecutions under the state's current death penalty regime.[12]

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[12] Though inapplicable here, petitioners also have met the facial-challenge standard for relief. (See *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126 [facial petitioner must show statute conflicts with Constitution "'in the *generality* or *great majority* of cases"']; *Vergara v. State of California* (2016) 246 Cal.App.4th 619, 209 Cal.Rptr.3d 532, 568–569 (dis. from den. of review of Cuéllar, J.) [discussing standard in case involving facial equal protection challenge].)

a. This Court has the authority to relieve death sentences previously imposed

In *Tobe*, *supra*, 9 Cal.4th at p. 1084, this Court explained that an as-applied challenge may seek "relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied." In this case, all condemned people in California must be granted relief.

The number of people on California's death row who could even *theoretically* be untouched by race-of-defendant or race-of-victim discrimination is extraordinarily small. Petitioners submitted as exhibit A to the petition a study by Catherine Grosso and her colleagues. That study analyzed a statewide sample of 703 cases that resulted in sentence(s) of death between 1978 and 2002. Only 17 of the 703 cases—2.4 percent—involved a White defendant who was not convicted of killing at least one White victim.[13] (Petn. exh. A at p. 35, tbl. 3.)[14] And according to

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[13] Defendants accused of killing at least one White victim are 2.8 to 8.8 times more likely to be sentenced to death than defendants accused of killing exclusively non-White victims. (Petn. at p. 87.)

[14] Table 3 in petition exhibit A (page 35) shows: There were 703 cases with 557 Black or Latino defendants (357 + 200) and 146 White defendants (703 – 557). There were 239 cases with a Black defendant and at least one White victim or a Latino defendant and at least one White victim (106 + 133). There were

the California Department of Corrections and Rehabilitation (CDCR), as of November 5, 2024, 69 percent of those on California's death row—420 people—were people of color. (CDCR, Condemned Inmate Summary, Nov. 5, 2024.)[15]

Moreover, everyone under sentence of death in California, no matter their individual characteristics or the circumstances of their cases—even those 17 White defendants—are members of a "class of individuals" whose sentences were imposed in the shadow of racial discrimination. (*Tobe*, *supra*, 9 Cal.4th at p. 1084; see petn. at pp. 41–50.) Racial bias is woven into every corner of California's current capital sentencing system; there is no sub-class of defendants whose sentences are untainted. (See, e.g., petn. at pp. 45–48 [describing discriminatory effects of capital jury-selection procedures], 49–50 [describing insidious effects of penalty phase instructions]; cf. *People v. Hardin* (2024) 15 Cal.5th 834, 907 (dis. opn. of Evans, J.) [if life-without-parole

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368 cases with at least one White victim, which means there were 129 with a White defendant and at least one White victim (368 – 239). Since there were 146 White defendants and 129 were convicted of killing at least one White victim, only 17 cases (146 – 129) involved a White person who was not convicted of killing at least one White person.

[15] CDCR classified 33 percent of the condemned population as Black. (CDCR, Condemned Inmate Summary, Nov. 5, 2024).) Black defendants are between 4.6 and 8.7 times more likely to be sentenced to death than non-Black defendants. (Petn. at p. 87.) CDCR classified 27 percent of those on death row as Mexican or Hispanic. (CDCR, Condemned Inmate Summary.) Latino defendants are between 3.2 and 6.2 times more likely to be sentenced to death than non-Latino defendants. (Petn. at p. 87.)

sentences for youthful defendants are found racially discriminatory, remedy is to extend parole eligibility "to *all* youth"].) "Even those convicted of heinous crimes, if they face the death penalty, have a constitutional right to be sentenced in [a] consistent, rational manner." (*United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1444, fn. 11; see also *Santiago*, *supra*, 122 A.3d at pp. 99–100 (conc. opn. of Norcott and McDonald, JJ.).) The application of California's capital punishment scheme cannot be called either rational or consistent.

Though petitioners' claim is based squarely on state law, *Furman*, *supra*, 408 U.S. 238 provides a useful analogy. There, petitioners from Georgia and Texas brought a broad constitutional challenge to capital punishment. (*Id.* at pp. 415–416, 434–436, 443 (dis. opn. of Powell, J.).) Justices Stewart and White—whose concurring opinions were read to represent *Furman*'s holding—found "the statutes then before the Court were invalid as applied." (*Gregg v. Georgia* (1976) 428 U.S. 153, 169 (*Gregg*); accord *Maynard v. Cartwright* (1988) 486 U.S. 356, 362 [*Furman* held Georgia's "capital punishment statute was being applied in an arbitrary and capricious manner"]; *Furman*, at p. 415 (dis. opn. of Powell, J.); *Wingo*, *supra*, 14 Cal.3d at pp. 180–181.) The effect of their as-applied holding was wholesale invalidation of the capital punishment statutes in Georgia and Texas, as well as those of every other death penalty state in the country. (See *Gregg*, at pp. 179–180 [at least 35 states enacted new death penalty statutes after *Furman*].) All persons under sentence of death were granted relief; the high court effectively

overturned the death sentences of "587 men and two women who were facing execution in the United States." (Cheever, Back From the Dead: One Woman's Search for the Men Who Walked Off America's Death Row (2006) pp. 2–3.)

Petitioners are entitled to an order prohibiting the enforcement or execution of all death sentences previously imposed.

b. This Court has the authority to enjoin future capital prosecutions

This Court also explained in *Tobe*, *supra*, 9 Cal.4th at p. 1084, that "[a]n as applied challenge may seek . . . an injunction against future application of the statute or ordinance in the allegedly impermissible manner it is shown to have been applied in the past." Citing *Van Atta v. Scott* (1980) 27 Cal.3d 424 (*Van Atta*) and *Sundance v. Municipal Court* (1986) 42 Cal.3d 1101 (*Sundance*) as examples, the Court clarified that to obtain such injunctive relief, petitioners "must show a pattern of impermissible enforcement." (*Tobe*, at p. 1085.)

Petitioners have established a broad pattern of racially discriminatory enforcement of California's death penalty provisions in violation of the state Constitution. (Parts II.A and II.B, *ante*.) Petitioners therefore have met the as-applied standard for injunctive relief. (See petn. at pp. 24–41.) At the very least, they have made a prima facie showing that warrants referral for further evidentiary development. (See resp. at pp. 10, 18–21 [discussing referral]; cf. *White v. Davis* (1975) 13 Cal.3d 757, 765, 773, 776 (*White*) [finding "prima facie" and

"presumptive" violations of the state and federal Constitutions where taxpayers alleged ongoing covert police surveillance at UCLA; remanding for trial on the merits]; *Wirin v. Horrall* (1948) 85 Cal.App.2d 497, 504, 506 (*Wirin*) [reversing demurrer because "plaintiff as a taxpayer of [Los Angeles] had a right to have such illegal [police blockades] enjoined"].)[16]

In *Van Atta*, *supra*, 27 Cal.3d at p. 433, a San Francisco trial court found that, as applied, statutes providing for pretrial release violated due process under the state and federal Constitutions. The court granted taxpayers' request and enjoined *all* application of the statutes in the county "until and unless present practices and procedures are modified to provide . . . missing procedural safeguards." (*Ibid.*) This Court affirmed. (*Id.* at p. 453.)

In *Sundance*, *supra*, 42 Cal.3d at p. 1108, "[f]our public inebriates and one taxpayer[] challenge[d] California's drunk in public statute" as enforced in Los Angeles County "on numerous Eighth Amendment and due process grounds."[17] Public drunkenness was "the highest volume crime in the County"; the

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[16] This Court also cited *White*, *supra*, 13 Cal.3d 757 and *Wirin*, *supra*, 85 Cal.App.2d 497 in *Tobe*, *supra*, 9 Cal.4th at p. 1085 in support of its statement that petitioners "must show a pattern of impermissible enforcement."

[17] "Taxpayer suits and citizen suits [i.e. public interest suits] are closely related concepts of standing. [Citation.] The chief difference is a taxpayer suit seeks preventative relief, to restrain an illegal expenditure, while a citizen suit seeks affirmative relief, to compel the performance of a public duty." (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 29.)

year the complaint was filed, Los Angeles law enforcement made 60,470 arrests for the offense. (*Id.* at p. 1109.) Nevertheless, the trial court enjoined officials from incarcerating *anyone* for a violation of the provision until they rectified the constitutional infirmities in their systems of administration. (*Id.* at p. 1116–1117.) This Court upheld the injunctions and remanded with instructions for the trial court to consider *broadening* the group of people and actions enjoined. (*Id.* at pp. 1125, 1140.)

Finally, in *In re E.J.* (2010) 47 Cal.4th 1258, 1263, 1284, this Court considered a unified habeas petition, filed by four members of the sex offender registry who were on parole, that challenged the constitutionality of newly enacted residency restrictions. This Court denied petitioners' facial challenges but found their as-applied challenges "considerably more complex." (*Id.* at p. 1281.) Because the evidentiary record was insufficient and difficult to discern, this Court transferred the petition and orders to show cause to the lower courts in the counties where petitioners resided—including San Diego County—for evidentiary hearings to answer a specified list of factual questions. (*Id.* at p. 1283–1284.)

At the time of post-transfer evidentiary proceedings in San Diego, 482 members of the sex offender registry who were on active parole lived in the county. (*In re Taylor* (2015) 60 Cal.4th 1019, 1032 (*Taylor*).) The parties agreed on four petitioners to "serve as the representative cases for purposes of the evidentiary proceedings," and those four petitioners were the only individuals about whom the trial court received case- or person-specific

information, such as housing, work, or travel circumstances. (*Id.* at p. 1026.) The bulk of the evidence explored "the manner in which CDCR was enforcing the statute in San Diego County, and the general unintended and socially deleterious effects of such enforcement in that county." (*Ibid.*)

The trial court enjoined enforcement of the statute. (*Taylor*, *supra*, 60 Cal.4th at p. 1034.) This Court affirmed, holding that neutral, across-the-board enforcement of the mandatory statutory residency restrictions was unconstitutional as applied to registered sex offenders on parole in San Diego County. (*Id.* at pp. 1023, 1038.) The Court functionally invalidated the restrictions for all 482 sex offender parolees in San Diego County—although it had no individual information about 478 of them. (*Id.* at p. 1042.)

Though courts generally "prefer . . . to enjoin only the unconstitutional applications of a statute while leaving other applications in force" (*Ayotte v. Planned Parenthood of Northern New England* (2006) 546 U.S. 320, 328–329 (*Ayotte*)), systemic constitutional deprivations require systemic remedies, as *Van Atta*, *Sundance*, and *Taylor* demonstrate.[18] Where petitioners

[18] This is especially true in equal protection cases, whether facial or as-applied. (See Eyer, *As-Applied Equal Protection* (2024) 59 Harv.C.R.-C.L. L.Rev. 49, 54 ["invalidation of a rule in all its applications[] is . . . the norm across most areas of Equal Protection adjudication"]; e.g. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 524 [striking down animal sacrifice statute that targeted religious sacrifice]; *Orr v. Orr* (1979) 440 U.S. 268, 283 [invalidating statute authorizing imposition of alimony obligations on husbands but not wives].)

"show a pattern of impermissible enforcement" (*Tobe*, *supra*, 9 Cal.4th at p. 1085), this Court has long eschewed shortsighted prophylactic fixes. In petitioners' case, just as in *Taylor*, *supra*, 60 Cal.4th at p. 1026, evidence as to "the manner in which [the state is] enforcing the statute . . . and the general unintended and socially deleterious effects of such enforcement" provides a vivid and disturbing picture of constitutional malignancies that require this Court's intervention and mandate broad injunctive relief.

Even if that were not so, petitioners have identified a number of procedures integral to California's current death-sentencing scheme that beget and exacerbate racial bias. (Petn. pp. 41-51.) It is impossible to imagine how this Court could perform judicial surgery on California's capital punishment provisions and meaningfully alleviate the constitutional infirmities shown by the empirical evidence without impermissibly "'rewrit[ing] state law to conform it to constitutional requirements'" (*Ayotte*, *supra*, 546 U.S. at p. 329, bracketed insertion in original) and engaging in a "'far more serious invasion of the legislative domain' than [courts] ought to undertake" (*id.* at p. 330).

Petitioners are entitled to an order enjoining future capital prosecutions under California's capital punishment scheme unless and until the Legislature develops a nondiscriminatory alternative.

D. Article I, section 27 of the California Constitution does not preclude petitioners' claims or limit this Court's authority to effectuate the relief petitioners seek

1. Section 27 bars only challenges to the death penalty per se

Article I, section 27 of the California Constitution provides that "[t]he death penalty . . . shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments . . . nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution." Petitioners and the Attorney General agree that "the Court has narrowly construed section 27 to preclude only 'per se' challenges to death as an impermissible form of punishment." (Resp. at p. 24; accord petn. at pp. 53–55; see *People v. Superior Court* (*Engert*) (1982) 31 Cal.3d 797, 808 (*Engert*) [section 27 was "intended simply . . . to clarify that the penalty of death does not violate" the state Constitution "per se"].) For good reason: it is "clear that section 27 was not intended to insulate a death penalty statute from the general strictures of the state Constitution." (*Engert*, at p. 808; cf. *Van Atta*, *supra*, 27 Cal.3d at p. 453 ["This is not the first time this court has been required to address purported conflicts between specific constitutional provisions and the more general guarantees such as the equal protection or due process clauses of the state Constitution"].)

The question of whether an action constitutes a challenge to the death penalty per se is a question distinct from and largely unrelated to the facial versus as-applied classifications outlined

above. (See part II.C.1, *infra*.) Those classifications are judicial constructs that assign varying sets of standards, principles, and presumptions. A "per se" challenge, on the other hand, has no distinct set of rules. It differentiates itself by its underlying character. No matter how categorized, all challenges to the death penalty per se share an insistence that the death penalty be outlawed in all forms and in all circumstances, for all people and in all cases, for all time, because of the intrinsic, fundamental, and irredeemable nature and quality of the punishment itself.

Gregg, *supra*, 428 U.S. 153, provides a useful analogy to section 27. There, petitioners alleged "a *per se* violation" of the Constitution (*id.* at p. 176)—that is, they presented "the fundamental claim that the punishment of death always, regardless of the enormity of the offense *or the procedure followed in imposing the sentence*, is cruel and unusual punishment in violation of the Constitution" (*id.* at pp. 168–169, italics added). In response, the high court definitively "h[e]ld that the punishment of death does not invariably violate the Constitution." (*Id.* at p. 169.) Unquestionably, after *Gregg*, "the death penalty is not per se unconstitutional as a matter of federal law." (*State v. Ross* (Conn. 1994) 646 A.2d 1318, 1347 (*Ross*).)

Nevertheless, in the decades since the United States Supreme Court decided *Gregg*, *supra*, 428 U.S. 153, the court has "struck down as unconstitutional, on grounds including the ban against cruel and unusual punishment, a number of death penalty statutes." (*Commonwealth v. Colon-Cruz* (Mass. 1984) 470 N.E.2d 116, 121 (*Colon-Cruz*) [citing *Beck v. Alabama* (1980)

447 U.S. 625; *Lockett v. Ohio* (1978) 438 U.S. 586; *Roberts v. Louisiana* (1976) 428 U.S. 325; *Woodson v. North Carolina* (1976) 428 U.S. 280; *Coker v. Georgia* (1977) 433 U.S. 584]; see also, e.g., *Kennedy v. Louisiana* (2008) 554 U.S. 407, 413; *Roper v. Simmons* (2005) 543 U.S. 551, 560; *Atkins v. Virginia* (2002) 536 U.S. 304, 320].) The high court's subsequent caselaw does not conflict with *Gregg*, just as petitioners' challenge does not conflict with section 27: "To say that imposition of the death penalty is not cruel and unusual punishment in all circumstances is not to say . . . that the death penalty can be imposed without any constitutional constraints." (*Ross*, *supra*, 646 A.2d at p. 1357; see also *People v. Bean* (1988) 46 Cal.3d 919, 957 (*Bean*) [specifically rejecting contention that the applicability of California's cruel or unusual punishment clause to death sentences was "abolished by" section 27].)

2. Petitioners do not challenge the death penalty per se

Petitioners do not argue that the death penalty is unconstitutional per se. Their claim is based upon a robust evidentiary showing that California's death penalty statutes as applied violate the state's equal protection guarantee and its ban on cruel or unusual punishment. Moreover, the remedy petitioners seek is limited to the state's capital punishment system as presently administered. (Part II.C, *ante*.) Evidence suggesting racial bias unconstitutionally infects the selection of candidates for execution under California's current capital

sentencing regime *is not* evidence attacking the underlying validity of execution as a just sanction.

The Attorney General requests that petitioners further clarify "the extent to which their evidence and legal theories depend on inherent features of any death penalty regime." (Resp. at p. 25.) He points to death qualification as such an "inherent feature[]." (*Ibid.*) The Attorney General is incorrect. Although both death qualification and the use of peremptory challenges are constitutionally permissible, neither is constitutionally required. California could enact a death penalty statute that prohibits death qualification or reduces or eliminates the number of peremptory challenges a prosecutor may use. (See, e.g., Lynch & Haney, *Looking Across the Empathic Divide: Racialized Decision Making and Death-Qualified Jurors* (2011) 2011+ Mich. State L.Rev. 573, 600 [suggesting states could return to the historical practice of affording more peremptory challenges to the defense than the prosecution]; see also *People v. Boulerice* (1992) 5 Cal.App.4th 463, 474 ["the peremptory challenge is a statutory privilege" and "there is no constitutional right to any particular manner of conducting the voir dire and selecting a jury"].)[19]

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[19] For example, before Iowa abolished the death penalty in 1965, state law did not recognize opposition to capital punishment, no matter how strongly held, as a basis for cause removals. (See, e.g., *State v. Wilson* (Iowa 1943) 11 N.W.2d 737, 752 [finding error where jurors removed for cause in capital trial based on death penalty scruples]; *State v. Lee* (Iowa 1894) 60 N.W. 119, 121 ["the state has no right to a trial by jurors who have no objection against inflicting the death penalty"], superseded by statute.)

The voters who approved section 27 were promised that defendants uniformly are "'[e]nsure[d] a fair trial . . . regardless of . . . race'"—and thus section 27 prohibits challenges to the constitutionality of extinguishing a defendant's life *after* they have been ensured such a fair trial. (*Engert*, *supra*, 31 Cal.3d at p. 809, quoting Ballot Pamp., Primary Elec. (Nov. 7, 1972) argument in favor of Prop. 17, p. 43.)[20] Proponents' final election-brochure argument also reassured voters that "[t]he facts prove that in California there is no racist component in the unanimous decision by a jury to impose death." (Ballot Pamp., Primary Elec. (Nov. 7, 1972) argument in favor of Prop. 17, p. 44.) This has proven not to be so. Section 27 does not preclude evidence or arguments suggesting the state's current capital punishment scheme does not guarantee the fair process pledged to voters.

Because petitioners do not challenge the death penalty per se, section 27 poses no impediment to effectuating the writ relief they request. This is true for petitioners' claims under both article I, section 7 and article I, section 17 of the state Constitution.

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[20] "California decisions have long recognized the propriety of resorting to such election brochure arguments as an aid in construing legislative measures and constitutional amendments adopted pursuant to a vote of the people." (*White*, *supra*, 13 Cal.3d at p. 775, fn. 11.)

3. California, Massachusetts, and Oregon decisions demonstrate that section 27 is no impediment

Several decisions of this Court establish that state constitutional claims of many different types are cognizable notwithstanding section 27. *Engert*, *supra*, 31 Cal.3d at p. 806–809 and *People v. Ramos* (1984) 37 Cal.3d 136, 152, fn. 6, held that section 27 does not bar a state constitutional due process claim. *People v. Murphy* (1972) 8 Cal.3d 349, 352, fn. 2, and several other similar decisions, held that section 27 does not bar a claim under the ex post facto clause. And *Bean*, *supra*, 46 Cal.3d at p. 957 specifically held that section 27 does not prohibit a claim that a death sentence violates California's cruel or unusual punishment clause.

Decisions of the highest courts of Massachusetts and Oregon also support the inapplicability of section 27 to this case. The Massachusetts and Oregon Constitutions include clauses that similarly purport to entrench the death penalty and render it immune to some state constitutional challenges.[21] The highest courts of both states nevertheless sustained as-applied state constitutional challenges to their death penalty statutes in decisions that were far more expansive in their effect than

[21] Petitioners use "entrenchment clause" to refer to clauses, like section 27, that purport to immunize the death penalty from some state constitutional challenges.

Engert. These decisions point the way for this Court to do likewise.

Colon-Cruz, *supra*, 470 N.E.2d at p. 123 is especially instructive because it cites *Engert*, *supra*, 31 Cal.3d 797 in discussing racial discrimination. There, the Massachusetts Supreme Judicial Court held that the state's entrenchment clause did not bar claims under the state Constitution's jury-trial and self-incrimination clauses. (*Colon-Cruz*, at p. 123.) Citing *Engert*, it said the entrenchment clause would not bar what appears to be a state equal protection claim.

> The construction of [the entrenchment clause] which the Commonwealth urges us to adopt would mean that a statute establishing the death penalty for members of one particular race only or providing for the imposition of the death penalty without trial would be valid under the Massachusetts Constitution. In the absence of any indication to the contrary . . . , we cannot accept the Commonwealth's radical construction of art. 116 as carrying into effect the reasonable purpose of the people.

(*Ibid.*)[22]

The Oregon Supreme Court granted relief (a) on a claim much like petitioners' cruel or unusual punishment claim and (b) in the face of an entrenchment clause even more like California's section 27 than the Massachusetts clause. (*State v. Bartol* (Or. 2021) 496 P.3d 1013, 1029 (*Bartol*).) The Oregon

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[22] The Massachusetts court called the contrary view "radical." (*Colon-Cruz*, *supra*, 470 N.E.2d at p. 123.) This Court chose the word "absurd" to describe the same proposition. (*Engert*, *supra*, 31 Cal.3d at p. 809.)

entrenchment clause, article I, section 40, reads, "Notwithstanding [two state constitutional provisions, including Oregon's cruel and unusual punishment clause], the penalty for aggravated murder as defined by law shall be death upon unanimous affirmative jury findings as provided by law and otherwise shall be life imprisonment with minimum sentence as provided by law." Thus, Oregon's entrenchment clause, like California's section 27, singled out the cruel and/or unusual clause by specific reference.

But in *Bartol*, *supra*, 496 P.3d at pp. 1020–1022, 1029, the Oregon Supreme Court granted relief on a disproportionality claim based on the same cruel and unusual punishment clause, rejecting the state's argument that section 40 barred the claim. Specifically, the court determined that though the legislature had not made retroactive a statute narrowing death-eligibility factors such that it would directly apply to the defendant's sentence, the legislature's decision to narrow the factors implicated the state Constitution's proportionality clause. (*Id.* at p. 1028.) In sum, the court held that the statute narrowing the death-eligibility factors indicated a change in societal standards such that the defendant's death sentence violated the state Constitution's cruel and unusual punishment clause. (*Id.* at pp. 1028–1029.) In practical effect, the decision called into question every death sentence then in effect in the state. (Death Penalty Information Center, *Oregon Supreme Court Overturns Death Sentence in Decision That Could Clear the State's Entire Death Row* (Oct. 8, 2021).)

To reach this result, the Oregon court applied a narrow interpretation of section 40 similar to this Court's interpretation of section 27 in *Engert*, *supra*, 31 Cal.3d at p. 807–809.

> [T]he only challenges to the death penalty that Article I, section 40, bars are those that are entirely incompatible with the death penalty as a punishment for aggravated murder as a general matter. For example, because a voter could not simultaneously take a position supporting the reinstatement of the death penalty and a position that the death penalty is cruel and unusual in all circumstances, Article I, section 40, precludes a[] . . . challenge to the death penalty on the ground that it is cruel and unusual in all circumstances. But, because a voter could simultaneously take a position supporting the reinstatement of the death penalty and a position that the death penalty is cruel and unusual a[s] punishment for certain categories of offenders, Article I, section 40, does not preclude a[] . . . challenge to the death penalty on the ground that it is a cruel and unusual punishment for those offenders.

(*Bartol*, *supra*, 496 P.3d at pp. 1021–1022.) The court concluded that the state's entrenchment clause "does not preclude all . . . challenges to the death penalty," even under the specific provisions named therein. (*Id.* at p. 1022.) Indeed, after the clause was adopted, "the court 'actually considered, and rejected *on the merits*, certain challenges based on the "cruel and unusual" and "proportionate penalty" provisions.'" (*Ibid.*) In *Bean*, *supra*, 46 Cal.3d at p. 958, this Court similarly noted that it had "several times entertained and considered [cruel or unusual punishment] claims on their merits since the adoption of article I, section 27."

That interpretation of Oregon's entrenchment clause paved the way for the Oregon Supreme Court to grant relief under the state's cruel and unusual punishment clause on a disproportionality claim based on evolving standards, even though the clause specifically says that the penalty for aggravated murder is death "notwithstanding" the same clause. (Or. Const., art. I, § 40.)

This Court's rationale in *Engert*, *supra*, 31 Cal.3d 797 and subsequent decisions similarly permit this Court to grant petitioners' claims under both the equal protection provisions and cruel or unusual punishment clause of the California Constitution. Section 27 is no impediment.

III. ALL NECESSARY PARTIES ARE JOINED IN THE PETITION

The petitioners and the Attorney General are the only necessary parties. No other party is necessary to consider and effectuate the petitioners' requested relief.

A. There are no other necessary petitioners

As explained above, petitioners have standing (in the public interest, as beneficially interested parties, and/or as taxpayers) to seek a statewide writ enjoining the Attorney General from prosecuting capital cases and sentences. (See part I, *ante*.) It necessarily follows that no other petitioner is *necessary* to grant that relief: one petitioner with standing is sufficient. (See *McKeon v. Hastings College* (1986) 185 Cal.App.3d 877, 892; cf. *Town of Chester, N.Y. v. Laroe Estates, Inc.* (2017) 581 U.S. 433,

439). There are certainly other persons or entities that would have standing to challenge the constitutionality of California's death penalty scheme. There may well be many. But no principle of law or logic requires all parties with standing to join a single action or petition.

Nor would any such rule be workable. Any unconstitutional program will necessarily injure (and thus confer standing upon) multiple potential plaintiffs and petitioners. Redundantly requiring more than one of those plaintiffs to join a single suit—or, worse, requiring *all* potential plaintiffs to join a single suit—would serve only to shield unlawful programs from scrutiny through a potentially insurmountable procedural hurdle. There is no practical justification for that perverse result. Here, "the [government] has already been made aware of the alleged unconstitutionality of the program," and "identifying a[n additional] specific person or persons . . . would serve little practical purpose." (*Thompson v. Spitzer* (2023) 90 Cal.App.5th 436, 455.)

B. There are no other necessary respondents

Code of Civil Procedure section 389, subdivision (a), states that a person "shall be joined as a party in the action if":

> (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or

> otherwise inconsistent obligations by reason of his claimed interest.

Here, the Attorney General is the only necessary party. Indeed, he is the only appropriate respondent to this petition requesting uniform statewide relief. This is true for at least two reasons.

First, the Attorney General is the only person from whom the petition seeks relief—and so is the only person or entity who must be named. Second, the Attorney General is the only person capable of effecting "complete relief." (Code Civ. Proc., § 389.) The Attorney General is the state's chief law enforcement officer and represents the whole of California's criminal justice interests. Only he can speak with one voice on issues of statewide concern, and only he can efficiently affect statewide relief while avoiding the waste and confusion that would stem from balkanized approaches to the death penalty scheme. Moreover, district attorneys have no interest independent of the Attorney General because they are constitutionally and statutorily subordinate to the Attorney General, and their interests are necessarily and adequately represented by him.

1. The petition seeks relief only against the Attorney General

Because the petition seeks relief only against the Attorney General, "complete relief" can necessarily be afforded in a proceeding that names only him. (Code Civ. Proc. § 389). Other parties, like district attorneys, may be "interested" in or affected by the outcome of these proceedings, but that does not make them "necessary" or require their joinder. The decision in *Doe v. Regents of Univ. of California* (2022) 80 Cal.App.5th 282 (*Doe*) is

instructive. There, in the context of a case between a John Doe and his university, the court considered whether Jane Doe was a "real party in interest" or "necessary and indispensable" because she was the original complainant and had a strong interest in preserving the university's judgment against John. (*Id.* at p. 297.) The court rejected both arguments with reasoning applicable here.

First, the appellate court acknowledged that Jane's "actual and substantial interests were directly affected by John's writ case." (*Doe*, *supra*, 80 Cal.App.5th at p. 298.) But, the court explained, "that issue is not dispositive." (*Ibid.*) The reason: John's petition was directed only at the university—not at Jane. "It did not require her to take any action or prevent her from taking any action; it simply directed the university to set aside its disciplinary decision against John and proceed from there." (*Ibid.*) And so, with no possible order directed at Jane, Jane's absence from the petition was not error.

Second, for similar reasons, the court rejected Jane's argument that she was necessary and indispensable. Jane had argued that "she had a right to defend the favorable administrative decision that she obtained from the University," that this "right was destroyed by her exclusion from John's writ proceeding" (*Doe*, *supra*, 80 Cal.App.5th at p. 302), and that "although the mandate order was ostensibly directed at the University, as a practical matter, it impaired her rights" (*id.* at p. 305). But again, the court returned to the controlling principle: there was no "need to exercise jurisdiction over Jane in order to

adjudicate a writ petition that sought relief *solely from the University*." (*Id.* at p. 302, italics added.) The court agreed that "Jane has an interest in the finality of the University's decision," but "[t]his argument confuses Jane's interests with her rights." (*Id.* at p. 305.) It denied the motion to vacate the writ on these grounds. (*Id.* at p. 307.)

Here, like John's petition for a writ against the university, the petition seeks an order enjoining the Attorney General—no one else. Stated differently, the only party that will be bound by an order granting the petition is the only party named: the Attorney General. It is true that others may be "interested" in the outcome. It is also true that certain district attorneys may desire "to defend" results they "obtained" (*Doe*, *supra*, 80 Cal.App.5th at p. 302) or feel that "as a practical matter," an adverse order will "impair[] their rights" (*id.* at p. 305). But that "argument confuses . . . interests with . . . rights" and should be dismissed. (*Ibid.*)

2. Only the Attorney General can effectuate the requested relief

The petition seeks uniform, statewide relief from the unconstitutional application of California's death penalty scheme. The Attorney General is exclusively mandated to pursue statewide uniformity of the legal process, and only he is authorized to provide the relief sought or effectuate the judgment acting alone. In other words, no other party is "necessary" to adjudicate relief which only the Attorney General can implement.

Article V, section 13 of California's Constitution designates the Attorney General as the "chief law officer of the State" and

vests in him "the duty . . . to see that the laws of the State are uniformly and adequately enforced." He "has charge, as attorney, of all legal matters in which the State is interested." (Gov. Code, § 12511.) He "shall attend the Supreme Court and prosecute or defend all causes to which the state, or any state officer, is a party in the state officer's official capacity." (Gov. Code, § 12512.) And when this Court issues a judgment, "the Attorney General shall direct the issuing of such process as may be necessary to carry the judgment into execution." (Gov. Code. § 12513.) Accordingly, should this Court issue the writ relief sought by this petition, it is the Attorney General who is constitutionally mandated to ensure its uniform implementation—no one else.

In their preliminary responses, two locally elected district attorneys appear to suggest they enjoy coequal status with the generally elected Attorney General, such that they must be joined in any petition affecting criminal cases prosecuted by their offices. That view cannot be squared with constitutional text, statutory text, or this Court's caselaw. Article V, section 13 specifically confers on the Attorney General the power of "direct supervision over every district attorney . . . in all matters pertaining to the duties of their respective offices" and imposes on him the duty to intercede if a district attorney fails to adequately enforce the law. That power of supervision is made manifest in the Attorney General's statutory right to "call into conference the district attorneys . . . with the view of uniform and adequate enforcement of the laws." (Gov. Code., § 12524.)

And this Court, in *Pitts v. County of Kern* (1998) 17 Cal.4th 340 (*Pitts*), reaffirmed the plain meaning of these provisions.[23] There, the question was whether district attorneys act as state or county officers when prosecuting crimes for purposes of municipal liability under section 1983 of title 42 of the United States Code. (*Id.* at p. 345.) That question turned, in part, on who supervised district attorneys—the county board of supervisors or the Attorney General. (*Id.* at p. 363.)

Answering that it is the Attorney General, this Court left no doubt as to the constitutional and statutory hierarchy. "In California, each county district attorney is supervised by the Attorney General." (*Pitts*, *supra*, 17 Cal.4th at p. 356.) "'Moreover, [w]hile the [board of supervisors] . . . has no direct control over how the [district attorney] fulfills his law enforcement duty, the . . . attorney general do[es] have this kind of control.'" (*Id.* at p. 359, bracketed insertions and ellipsis in original.) Thus, "the constitutional and statutory supervisory power accorded the Attorney General is not reasonably susceptible to an interpretation that is limited to oversight of a district attorney's actions when he or she is prosecuting a particular case." (*Id.* at p. 363; *see Abbott Laboratories v. Superior Court of Orange County* (2020) 9 Cal.5th 642, 659–670 [reaffirming "the Attorney General's constitutional role as California's chief law enforcement officer" and noting that even when the Attorney General and district attorneys are both

[23] Neither the Riverside nor San Bernardino district attorneys cited or addressed *Pitts*, *supra*, 17 Cal.4th 340.

authorized to enforce a statute, "the ultimate locus and accountability . . . is the office of the Attorney General"].)

The constitutional and statutory texts and *Pitts*, *supra*, 17 Cal.4th 340 leave no room for doubt that district attorneys work *under* the supervision and control of the Attorney General. The consequence of that hierarchy is plain: a *subordinate* government officer is not a necessary party to an action against his *superior*. Just the opposite: naming the superior entity is inclusive of naming the subordinate entity, even if the subordinate entity is ultimately tasked with carrying out the superior's directives.

The decision in *Ramirez v. Workers' Comp. Appeals Bd.* (2017) 10 Cal.App.5th 205 (*Ramirez*) shows this principle in practice. There, the petitioner sought a writ declaring unconstitutional the independent medical review process for workers' compensation claims. (*Id.* at p. 213.) He named as respondents three principal agencies: the Workers' Compensation Appeals Board, State Department of Health Care Services, and State Fund. (*Id.* at p. 217.) The respondents argued that an additional subordinate official—"the administrative director of the Division of Worker's Compensation"—was "an indispensable party" because that division in practice "administers" the allegedly unconstitutional program. (*Id.* at pp. 217–218.) But the court disagreed. It explained that unlike actual "indispensable" parties—typically, unnamed parties with a concrete interest in property being dispersed—an agency "does not have similar interests in the constitutionality of the statutes it is tasked with implementing." (*Id.* at p. 219.) That reasoning alone was

sufficient, but the court further noted that the "administrative director . . . has not gone without an advocate," as the named governmental parties were able to defend the scheme. (*Ibid.*) In other words, "a party's ability to protect its interests is not impaired or impeded as a practical matter where a joined party has the same interest in the litigation." (*Deltakeeper v. Oakdale Irrigation Dist.* (2001) 94 Cal.App.4th. 1092, 1102.)

So too here. District attorneys, as subordinates to the Attorney General, may be tasked with implementing the Attorney General's directives in response to an order issuing the requested writ. But that will not constitute a sufficient "interest" to make them indispensable. And, of course, it is beyond cavil that the Attorney General is fully capable of defending the death penalty scheme in California. Indeed, it is his plenary duty. The government's position will not go "without an advocate." (*Ramirez*, *supra*, 10 Cal.App.5th at p. 219.)

CONCLUSION

The facts alleged in the petition establish that California's capital sentencing system, as applied, violates the state Constitution's guarantees of equal protection and freedom from cruel or unusual punishment. The enormous body of proffered studies converge on mutually reaffirming results:

- The stark race-based differences in capital charging and sentencing rates did not originate in a few confined parts of the state but have appeared in widely dispersed and qualitatively different places, and across the state as a whole.

- The studies, collectively, demonstrate that racially disparate outcomes under California's capital sentencing statutes have persisted for decades.
- The authors of the studies compiled their data from many sources and analyzed large data sets.
- The studies used a variety of analytical approaches and yielded robust results.
- They relied on well-established social science methods, and the majority have received peer review.

In sum, the evidence demonstrates that legitimate, race-neutral factors do not explain the large and widespread racial differences in capital charging and sentencing in California. The differences did not fade away in a bygone era; racially unequal outcomes in the capital sentencing system have persisted until our own time.

No procedural or doctrinal obstacle impedes this Court's review or grant of relief on petitioners' constitutional claims. Accordingly, petitioners are entitled to an order prohibiting future prosecutions under California's current capital punishment scheme and the enforcement or execution of death sentences previously imposed. Petitioners' requested remedy is proper and necessary to address the constitutional violations shown by the mountain of empirical evidence submitted to this Court.

Dated: November 18th, 2024.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I, CHRISTINA A. SPAULDING, hereby declare:

I am an attorney licensed to practice law in the State of California and Chief Deputy State Public Defender. I am an attorney assigned to this matter for the Office of the State Public Defender.

I hereby certify pursuant to California Rules of Court, rules 8.204(c) and 8.486(a)(6), that this document contains 14,794 words, including footnotes and excluding cover information, tables, signature blocks, and this certificate. This document was prepared in Microsoft Word, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed this 18th day of November 2024 at Oakland, California.

Respectfully submitted,

/s/ *Christina A. Spaulding*

CHRISTINA A. SPAULDING
Chief Deputy State Public Defender

PROOF OF SERVICE

My business address is Wilmer Cutler Pickering Hale and Dorr LLP, 2600 El Camino Real, Suite 400, Palo Alto, California 94306. My electronic service address is Kathryn.Zalewski@wilmerhale.com. I am not a party to the instant case, and I am over the age of eighteen years.

On November 18, 2024, I caused the following document:

PETITIONERS' BRIEF

to be filed with ImageSoft TrueFiling ("TrueFiling") pursuant to California Rule of Court 8.212, and to be served by email via TrueFiling on the following:

Rob Bonta, Attorney General of California
Michael J. Mongan, Solicitor General of California
Samuel T. Harbourt, Deputy Solicitor General State of California Department of Justice
Samuel.Harbourt@doj.ca.gov

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

Executed on November 18, 2024 at Palo Alto, California.

/s/*Kathryn D. Zalewski*
Kathryn D. Zalewski