Case No. _____

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.

PETITION FOR WRIT OF MANDATE

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Petitioners know of no entities or parties subject to disclosure under California Rules of Court, rules 8.208 and 8.488.

CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

PETITION FOR WRIT OF MANDATE

Petitioners move this Court to exercise original jurisdiction and issue a writ of mandate barring the prosecution, imposition, or execution of death sentences in California. Extensive empirical evidence demonstrates that California's capital punishment scheme is administered in a racially discriminatory manner and violates the equal protection provisions of the state Constitution.

I. INTRODUCTION

The parties agree that persistent and pervasive racial disparities infect California's death penalty system. Attorney General Rob Bonta acknowledges that "'[s]tudies show'" the death penalty has "'long had a disparate impact on defendants of color, especially when the victim is white.'"[1] Governor Gavin Newsom recognizes that "[t]he overwhelming majority of studies" have found that "the race of the defendant and the race of the victim impact whether the death penalty will be imposed."[2] Present and former District Attorneys from Contra Costa, Los Angeles, San Francisco, San Joaquin, and Santa Clara Counties admit that "the data suggests" death penalty charging decisions "are

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[1] (Egelko, *California Attorney General Rob Bonta Sees State Moving Away From Death Penalty*, S.F. Chronicle (May 17, 2021).) For readability and ease of reference, all citations containing hyperlinks appear in footnotes.

[2] (Amicus Brief of the Honorable Gavin Newsom in Support of Defendant, at p. 23, *People v. McDaniel* (2021) 12 Cal.5th 97; accord Governor's Exec. Order N-09-19 (Mar. 13, 2019) ["death sentences are unevenly and unfairly applied to people of color"].)

influenced, consciously or unconsciously, by race."[3] Last year, the California Task Force to Study and Develop Reparation Proposals for African Americans (Reparations Task Force) concluded that California's death penalty system "has unjustly, and disproportionately, targeted and killed African Americans"—especially those convicted of killing White victims.[4] And in 2021, after "review[ing] the extensive literature on California's death penalty, including new studies and data not previously available," the Committee on Revision of the Penal Code (CRPC) found that "decades of research have shown disturbing racial disparities in who is sentenced to death."[5]

A diverse range of experts using varying statistical methodologies and datasets confirm the accuracy of this consensus. Black defendants are up to 8.7 times more likely to be sentenced to death than all other defendants. Latino defendants are up to 6.2 times more likely to be sentenced to death than all

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[3] (Amicus Brief of Six Present or Former District Attorneys in Support of Defendant, at p. 31, *People v. McDaniel* (2021) 12 Cal.5th 97.)

[4] (Reparations Task Force, Final Report (June 29, 2023) p. 646 (Reparations Report); see also *People v. Hardin* (2024) 15 Cal.5th 834, 1007 (*Hardin*) (dis. opn. of Evans, J.) ["Black people are disproportionately convicted of the felony-murder special circumstance"].) The Reparations Task Force was established by statute in 2020. (Gov. Code, § 8301.1, subd. (a).)

[5] (CRPC, Death Penalty Report (2021) p. 9 (CRPC Report); see *id.* at p. 4 [death penalty is imposed "in such a discriminatory fashion . . . that it cannot be called rational, fair, or constitutional"].) CRPC was established by statute in 2020. (Gov. Code, § 8280, subd. (b).)

other defendants. And defendants of all races[6] are up to 8.8 times more likely to be condemned when at least one of the victims is White. (Petn. part III.A, *post*.) These disparities establish that California's death penalty statutes, as applied, violate the equal protection guarantee of the state Constitution. (See Pen. Code, § 190 et seq.; mem. part III, *post*.)

"[R]acial bias implicates unique historical, constitutional, and institutional concerns" and is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." (*Pena-Rodriguez v. Colorado* (2017) 580 U.S. 206, 224.)[7] Although recent cases have implicated these systemic concerns, none squarely presented state equal protection claims based on such racial disparities. (E.g. *Hardin*, *supra*, 15 Cal.5th at p. 981, fn. 8; *People v. McDaniel* (2021) 12 Cal.5th 97, 141 (*McDaniel*) [Court declined to address arguments

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[6] Petitioners use "race" to describe both race and ethnicity.

[7] California has a long "history of racial violence against people of color" which "must be considered when discussing capital punishment." (CRPC Report, *supra*, at p. 18; see *People v. Anderson* (1972) 6 Cal.3d 628, 641-642, 645 [describing California's history of "vigilante justice and public hangings"], superseded on another ground by Cal. Const., art. I, § 27; cf. *Hardin*, *supra*, 15 Cal.5th at p. 1008 (dis. opn. of Evans, J.) ["The LWOP exclusion . . . perpetuates severe racial disparities and, given its historical context, bears the taint of prejudice"]; *B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 30-35 (conc. opn. of Liu, J.) [victim's "death at the hands of law enforcement is not a singular incident unmoored from our racial history"]; *In re Edgerrin* (2020) 57 Cal.App.5th 752, 771 (conc. opn. of Dato, J.) ["we must remain mindful of the broader [racial] context in which this case arose"].)

that "link[ed] capital punishment with racism" and "sound[ed] in equal protection"].) This petition for the first time presents this Court with an opportunity to directly address the widely recognized data establishing that California's death penalty provisions are administered in a discriminatory manner. The time has come to "sp[eak] with clarity, regularity, and urgency about the . . . need to eliminate racial discrimination from our justice system." (*People v. Johnson* (2019) 8 Cal.5th 475, 535 (*Johnson*) (dis. opn. of Liu, J.).)

II. PARTIES

A. Respondent

Respondent Rob Bonta is the Attorney General of California. The Attorney General is the state's chief law enforcement officer and "has charge . . . of all legal matters in which the State is interested." (Gov. Code, § 12511.) He has direct supervisory power over all district attorneys and other law enforcement officers. (Cal. Const., art. V, § 13.) In other original writ cases before this Court, the petitioners have named similar responsible public officials as respondents. (E.g., *Briggs v. Brown* (2017) 3 Cal.5th 808, 822 (*Briggs*) [naming executive branch officials and Judicial Council]; *Strauss v. Horton* (2009) 46 Cal.4th 364, 364 (*Strauss*) [naming executive branch officials], abrogated on another ground by *Obergefell v. Hodges* (2015) 576 U.S. 644; *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 240 (*Brosnahan*) [naming public officials and courts charged with responsibility for implementing, enforcing, or applying new measure].)

B. Petitioners

Petitioners are: the Office of the State Public Defender (OSPD), a state agency charged with representing indigent capital defendants (Gov. Code, §§ 15420, 15421); Eva Paterson, a civil rights litigator and cofounder of the Equal Justice Society; LatinoJustice PRLDEF (LatinoJustice), a nonprofit civil rights organization that works to advance equity and justice for Latino communities; the Ella Baker Center for Human Rights (Ella Baker Center), an organization that mobilizes Black, Brown, and low-income people in campaigns for racial and economic justice; and Witness to Innocence, an organization that works to empower exonerated death row survivors.

Each petitioner is "beneficially interested" in the issuance of a writ of mandate. (Code Civ. Proc., § 1086; *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 165.) In addition, OSPD, Eva Paterson, and the Ella Baker Center are domiciled in California. (See Code Civ. Proc., § 526a [taxpayer standing].) Moreover, this petition presents an issue of overriding public interest and importance. (See *Bd. of Social Welfare v. Los Angeles County* (1945) 27 Cal.2d 98, 100-101 ["where the question is one of public right . . . it is sufficient that [the petitioner] is interested as a citizen in having the laws executed and the duty in question enforced"]; see, e.g., *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 29-30 (*Connerly*) [recognizing standing for a citizen who challenged statutory affirmative action programs on equal protection grounds]; *People for the Ethical Operation of Prosecutors & Law Enforcement v.*

Spitzer (2020) 53 Cal.App.5th 391, 410 [recognizing standing for a watchdog group who challenged a law enforcement confidential informant program]; *Cal. Advocates for Nursing Home Reform v. Smith* (2019) 38 Cal.App.5th 838, 854-855 [nonprofit had standing to pursue writ to prohibit enforcement of statute].)

1. Office of the State Public Defender

OSPD has represented nearly 300 death-sentenced individuals. It currently represents over 65 people appealing their death sentences to this Court. OSPD has raised issues of race discrimination in many California death penalty cases. (See, e.g., *McDaniel*, *supra*, 12 Cal.5th at p. 141; *Johnson, supra,* 8 Cal.5th at p. 528 (dis. opn. of Liu, J.); *People v. Gonzales* (2012) 54 Cal.4th 1234, 1252; *People v. Crittenden* (1994) 9 Cal.4th 83, 157.)

In 2021, based on its institutional knowledge, OSPD submitted a report to the Committee on Revision of the Penal Code that documented the dysfunction of California's death penalty system, including persistent racial inequality in its application.[8] For instance, the report emphasizes that California sentences a higher percentage of young people of color to death than any other state. (OSPD Report, *supra*, at pp. 32-33 [eighty-two percent of people sentenced to death in California for crimes committed when they were under 21 were Black or Latino,

[8] (OSPD, California's Broken Death Penalty: It's Time to Stop Tinkering with the Machinery of Death (Mar. 2021) pp. 11-23 (OSPD Report).)

compared to 73 percent nationally]; see also CRPC Report, *supra*, at p. 30 [eighty-six percent of those sentenced to death for a crime committed at age 18 were people of color].) Invalidating California's racially discriminatory death penalty scheme would have a dramatic impact on OSPD's resources and programming priorities.

2. Eva Paterson

Eva Paterson cofounded the Equal Justice Society, a California-based nonprofit which works to expand the country's understanding of race and advocates against inequities in the criminal legal system. Ms. Paterson has been a leading spokesperson on the disproportionate impact of the criminal legal system on people of color, including those facing the death penalty.[9]

3. LatinoJustice PRLDEF

LatinoJustice advocates for and defends the legal rights of Latinos, including challenging discriminatory practices in the criminal legal system. To that end, the organization facilitates a network that provides a digital space to discuss, share resources, and amplify voices concerning Latinos and the criminal legal system. Recently, LatinoJustice filed an amicus brief in the death penalty case *Cruz v. Arizona* (2023) 598 U.S. 17, explaining that the failure to inform the jury that the defendant would be

[9] (See, e.g., Paterson, *Litigating Implicit Bias* (Sept./Oct. 2011) 20 Poverty & Race 7, 7-9; Menendian et al., Structural Racism in the United States (Feb. 2008) p. 23.)

ineligible for parole if sentenced to life in prison was particularly prejudicial to the defendant, a Latino man, because of widespread negative stereotypes of Latinos as dangerous. LatinoJustice discussed how the legacy of racial violence has led to a capital sentencing scheme plagued with racial bias and emphasized the importance of constitutional protections to eliminate racial disparities.[10]

4. Ella Baker Center for Human Rights

The Ella Baker Center seeks to secure the freedom of people of color, who are the most harmed by the criminal legal system in California. The organization has led campaigns to eliminate systemic racial biases in the criminal legal system and organized efforts to ensure local and state officials uphold constitutional guarantees throughout criminal sentencing proceedings. The organization also works alongside incarcerated individuals to determine statewide policy priorities, shape reform narratives, and conduct grassroots organizing and awareness building within prison settings and the broader criminal justice movement.

5. Witness to Innocence

Witness to Innocence is an organization of and for death row exonerees that highlights systemic failures in capital sentencing. The group's Peer Organizer is Shujaa Graham, a

[10] (Brief of *Amicus Curiae* LatinoJustice in Support of Petitioner, at pp. 11-21, *Cruz v. Arizona* (2021) 598 U.S. 17.)

Black man who "know[s] that California's death penalty system is plagued by racial bias" because he "lived it [him]self."[11] In 1973 Mr. Graham was accused of killing a White correctional officer at Deuel Vocational Institute; at trial, the district attorney struck every Black potential juror—14 in total—and Mr. Graham was sent to San Quentin's death row. (*People v. Allen* (1979) 23 Cal.3d 286, 294.) This Court reversed on appeal (*id.* at p. 295), and after two subsequent trials Mr. Graham was found not guilty and released. Since his exoneration, Mr. Graham has dedicated his life to eliminating racial bias in the criminal legal system.

III. FACTS

As set forth in part I of this petition, there is widespread consensus among state actors—including the Attorney General—that stark racial disparities infect California's capital punishment system. This consensus is supported by a wealth of empirical evidence, both old and new.

A. Overwhelming evidence of racial disparities in death sentencing supports petitioners' claim

Petitioners present 15 studies spanning 44 years. The research includes four statewide studies and 11 county-level studies examining seven individual jurisdictions. Thirteen separate researchers authored the studies. Six of the studies have been peer reviewed and nine, including three statewide

[11] (Graham, *Gov. Newsom Was Right to Halt Death Penalty Last Year. Now California Must Go Further*, Sac. Bee (Mar. 11, 2020).)

studies, were independently reviewed by Professor John Donohue of Stanford Law School, a leading empirical researcher and expert in assessing racial disparities in capital sentencing.

The consistency of the many studies conducted by different scholars—using a variety of methods to examine distinct points in the administration of the death penalty over different time periods and numerous geographical locations—demonstrates the accuracy and validity of their results.

1. The studies rely on well-established social science methods

The studies detailed below employ well-established social science methods for evaluating racial discrimination, addressing the possibility that differences stem from nonracial factors, and calculating the likelihood that observed differences merely result from chance.

Each of the studies uses statistical analyses to investigate the question whether nonracial factors, such as differential rates of offending, can explain the pervasive racial disparities in California's capital sentencing system.[12] The studies employ regression analysis, "the standard way to explore [whether] the difference in an outcome between racial groups" can be explained by race-neutral factors. (Measuring Racial Discrimination, *supra*,

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[12] (See generally Nat. Research Council, Measuring Racial Discrimination (2004) p. 72 (Measuring Racial Discrimination) ["Statistical models are useful for identifying associations between race and different outcomes while controlling for other factors that may explain the observed outcomes"].)

at p. 7.) Researchers commonly describe regression results in discrimination cases as comparisons between groups that are "similarly situated" in terms of the race-neutral factors included in their analyses. (See, e.g., 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].)[13] Courts regularly look to multiple-regression analyses in discrimination cases, both civil and criminal.[14]

The full body of studies described in this petition demonstrates dramatic convergent validity. "Consistent patterns of results across studies and different approaches tend to provide the strongest argument" for external validity of a result.[15] Many of the studies have the added reliability conferred by peer review, "a process of subjecting an author's scholarly work, research or

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[13] All exhibits filed with this petition are true and correct copies of documents obtained by undersigned counsel.

[14] (Rubinfeld, *Reference Guide on Multiple Regression* in Reference Manual on Scientific Evidence (3d ed. 2011) p. 306 (Rubinfeld) [collecting cases]; see, e.g., *State v. Gregory* (Wash. 2018) 427 P.3d 621, 633-635 (*Gregory*) [relying on regression analysis in striking down Washington's death penalty statute]; Beckett & Evans, *Race, Death, and Justice: Capital Sentencing in Washington State, 1981-2014* (2016) 6 Colum. J. Race & L. 77, 91-92 (Beckett & Evans) [regression analysis was used "to identify the unique impact" of defendant race and victim race "over and above the impact of other variables" that could explain disparities in death sentencing].)

[15] (Measuring Racial Discrimination, *supra*, at p. 5, italics omitted; see also Kaye & Freedman, *Reference Guide on Statistics* in Reference Manual on Scientific Evidence (3d ed. 2011) p. 221 (Kaye & Freedman).)

ideas to the scrutiny of others who are experts in the same field." (Kelly et al., *Peer Review in Scientific Publications: Benefits, Critiques, & a Survival Guide* (2014) J. Int'l Fed'n Clinical Chemistry 227, 227.)

Finally, the studies summarized below use several measures that address whether the results could have arisen by chance. The first measure, statistical significance, is "typically assessed with an index called the *p*-value." (Wasserstein & Lazar, *The ASA's Statement on p-Values: Context, Process, and Purpose* (2016) 70 Am. Statistician 129, 131.) In social science, statistical significance is most often set at a *p*-value of less than 0.05 (or a five percent chance that the result was random). (Kaye & Freedman, *supra*, at p. 251.) In the studies described below, results described as "statistically significant" had *p*-values less than .05.

Courts can also look to the results' practical significance, which has no pre-set quantifiable value and "must be evaluated in the context of a particular legal issue." (Rubinfeld, *supra*, at p. 318, fn. 40; see, e.g., *Hunter v. Underwood* (1985) 471 U.S. 222, 227 [finding discriminatory impact where Black voters were at least 1.7 times more likely than White voters to be disenfranchised due to commission of a non-prison offense]; *State v. Santiago* (Conn. 2015) 122 A.3d 1, 77-79 (*Santiago*) [court took judicial notice of statistical and historical facts]; *Gregory*, *supra*, 427 P.3d at p. 634 ["The most important consideration is whether the evidence shows that race has a meaningful impact on imposition of the death penalty"]; see generally Wasserstein et

al., *Moving to a World Beyond "p < 0.05"* (2019) 73 Am. Statistician 1, 2 [emphasizing importance of practical significance].)

All of these features combine to tell a reliable and intolerable story of the role of race in California's capital sentencing scheme.

2. Statewide studies

a. Grosso et al.

Catherine M. Grosso, Jeffrey Fagan, and Michael Laurence analyzed a sample of 1,900 California homicide convictions drawn from a universe of almost 27,500 cases that occurred between 1978 and 2002. (Exh. A at pp. 5, 23.) The authors used regression analysis to study whether nonracial factors could account for the significant racial disparities they observed in the sampled cases pertaining to (1) "the overall risk of receiving a death sentence among the universe of death-eligible cases," (2) "the decision by prosecutors to charge special circumstances," and (3) "the decision by juries to impose a death sentence." (*Id.* at p. 10.) At each point, they used two different models to take race-neutral factors into account.[16] The authors found persistent and substantial race-based disparities no matter which model they used to control for race-neutral considerations. (*Id.* at pp. 63-65.)

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[16] One model controlled for the special circumstances most predictive of a death sentence. (Exh. A at p. 11.) The other used a "defendant culpability scale" based on case-related factors such as whether the defendant factually caused the victim's death and the number of special circumstances alleged. (*Ibid.*)

First, the authors found "significant disparities" in death sentencing among death-eligible cases based on both defendant race and victim race. (Exh. A at p. 63.) Black defendants faced odds of being sentenced to death between 4.6 and 8.7 times higher than similarly situated defendants of other races. (*Id.* at pp. 11, 38-39.) Latino defendants faced odds between 3.2 and 6.2 times higher. (*Ibid.*) And cases with at least one White victim faced between 2.8 and 8.8 higher odds of ending in a death sentence than cases with no White victims. (*Id.* at pp. 11, 63.)

They also found significant disparities between different defendant/victim combinations or "dyads." Black defendants with at least one White victim faced death-sentencing odds between 3.2 and 4.4 times higher than White defendants with at least one White victim. (Exh. A at p. 11.) The disparities were even greater for Latino defendants with at least one White victim, with odds between 3.4 and 8 times higher than those of White defendants with at least one White victim. (*Ibid.*)

Second, the authors studied the decision to charge a special circumstance and found that prosecutors did so at a significantly higher rate in cases with at least one White victim. (Exh. A at p. 63.) Defendants with at least one White victim had between 1.6 and 2.3 times greater odds of having a special circumstance alleged than defendants with no White victims. (*Ibid.*)

Third, the authors looked at penalty phase decisionmaking. They found that juries were "significantly more likely to return death sentences for Black defendants (between 4.4 and 5.7 times greater odds) and Latinx defendants (between 3.7 and 5.0 greater

odds)" than for similarly situated White defendants. (Exh. A at p. 12.)

Juries were also significantly more likely to choose death in cases with defendants of color and White victims. Black defendants with White victims had odds between 2.3 and 3.1 times higher of being sentenced to death than White defendants with White victims. (Exh. A at p. 12.) For Latino defendants with White victims, the odds were between 4.1 and 5.9 times higher. (*Ibid.*)

In sum, the authors state: "Our current analysis demonstrates that, in practice, racial factors have infected California capital sentencing: whether sentencing is considered in the aggregate or as decisions made by prosecutors or juries, racial considerations determine who is subject to the ultimate punishment in California." (Exh. A at p. 65.) Their confidence in the accuracy of these results was bolstered by the fact that the two models they employed, although controlling for relevant race-neutral factors in slightly different ways, yielded similar results. (*Ibid.*)

Grosso and her colleagues submitted their study to the Journal of Empirical Legal Studies (*JELS*), where it was subjected to double-blind peer-review. On March 31, 2024, *JELS* wrote that it was "delighted to conditionally accept [the] excellent paper" for publication, subject to very minor revisions unrelated to the statistical analysis. (Exh. B at p. 71 [*JELS* letter].)

Other leading scholars reviewed an earlier version of the Grosso study and concluded that it met "the highest standards of

legal and empirical research" and was "the single most important study that has examined the death penalty in California using data collected after the California Supreme Court invalidated the state's death sentencing statute in 1972." (Exh. D at pp. 78-79 [letter from Glenn Pierce, Ph.D. and Michael L. Radelet, Ph.D.]; see also exh. C at pp. 74-76 [letter from Mona Lynch, Ph.D. stating study used "state-of-the-art research methods"].)

b. Petersen

Nick Petersen conducted two studies that considered a full population of homicide cases over a longer period. Like Grosso and her colleagues, Petersen found that homicides of White people were more likely to result in death sentences than homicides of non-White people, and Black and Latino people were more likely to be sentenced to death than similarly situated White people, especially when the victim was White. (Exh. E at p. 82 [Petersen, Racial Disparities in California Death Sentencing During the Post-*Gregg* Period, 1979 to 2018 (Oct. 30, 2022)]; exh. F at pp. 109, 126-127 [Petersen, Racial Disparities in California Death Sentencing (1987-2019) (Jan. 30, 2024)].)

In the first study, Petersen analyzed death sentencing in a population of over 55,000 homicides in California between 1979 and 2018. (Exh. E at p. 83.) He employed logistic regression models to account for the races of the victims and suspects, the presence of multiple homicide victims, and the presence of any co-occurring felony, among other factors. (*Id.* at pp. 89-93.) His models showed the persistence of significant racial disparities based on victim race and suspect race. (*Id.* at p. 82.) Black

suspects were 2.17 times more likely to receive a death sentence than White suspects, and Latino suspects were 1.52 times more likely to receive a death sentence than White suspects. (*Id.* at pp. 95-96.)

Homicides with White victims were also more likely to result in death sentences after controlling for nonracial factors. (Exh. E at p. 82.) Homicides with Black or Latino victims were 66 percent less likely to result in death sentences than homicides with White victims. (*Id.* at p. 95.) Homicides with Black or Latino suspects and White victims were the most likely to result in death sentences. (*Id.* at p. 82.)

After Petersen obtained additional data from the California Department of Justice, he conducted a second study of California homicides that occurred between 1987 and 2019. (Exh. F at pp. 111-119.) Using these data to build regression models similar to those used in his first study, Petersen again found race-based disparities. Black defendants were significantly more likely to be sentenced to death than similarly situated White defendants. (*Id.* at p. 139.) Cases with Black or Latino victims were significantly less likely to result in death sentences than cases with White victims. (*Ibid.*) Petersen emphasized that the patterns he observed were "especially pronounced in inter-racial homicides involving White victims and non-White suspects. Homicides with a Black or Hispanic suspect and a White victim are more likely to result in a death sentence than any other victim-by-suspect race dyad." (*Ibid.*)

c. Pierce and Radelet

The patterns found by the Grosso study and Petersen's studies are consistent with a previous statewide study conducted by Glenn Pierce and Michael Radelet. In 2005, they used California homicide data from 1990 through 1999 to study capital sentencing. (Exh. G at p. 143 [Pierce & Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides*, *1990-1999, The Empirical Analysis* (2005) 46 Santa Clara L.Rev. 1].) Their study revealed strong race-of-victim effects, with White-victim cases significantly more likely to end in a death sentence than cases with Latino victims (4.73 times more likely) and Black victims (3.7 times more likely). (*Id.* at p. 161.) And Black defendants prosecuted for killing White victims were more likely to be sentenced to death than were White defendants who killed White victims. (*Id.* at p. 167.)

3. County-specific studies

Relatively few counties have enough homicides or death sentences to permit logistic regression analyses of death sentencing overall.[17] Those that do, however, show patterns consistent with the statewide studies described above.

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[17] In his first statewide study, Petersen controlled individually for the 10 most populous counties. (Exh. E at pp. 90-91.) He combined cases for the other 48 counties because "they have too few homicides and/or death sentences to examine each county separately." (*Id.* at p. 91.) Calculating predicted probabilities at the county level, Petersen found "remarkably consistent" suspect/victim racial hierarchies, with White

In less populous counties (as well as in some of the more populous counties), researchers have examined discrete decision points within the capital process—primarily the charging of special circumstances but also the prosecutor's decision to seek death. In each of these studies, the authors have found significant racial disparities.

a. Death sentencing

Analyses of death sentencing in Riverside, San Diego, Santa Clara, and Alameda counties have revealed the significant impact of race.

Riverside County, 2006-2019. Petersen examined more than 800 homicide cases using superior court data and a California Department of Justice database containing victim demographic information and incident characteristics. (Exh. H at p. 193 [Petersen, Racial Disparities in Riverside County's Death Penalty System (Sept. 21, 2021)].) He found that Black defendants were 14 times more likely, and Latino defendants almost 11 times more likely, than similarly situated White defendants to be sentenced to death. (*Id.* at p. 212.) Cases with Black and Latino victims were between 61 and 66 percent less likely to end in a death sentence than were cases with a White victim. (*Ibid.*)

San Diego County, 1979-2018. Petersen examined FBI Supplementary Homicide Report (SHR) data and court records

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defendants and White victims favored across the state. (*Id.* at p. 103.)

for 2,418 homicides. (Exh. I at p. 234 [Petersen, Racial Disparities in San Diego County's Death Penalty System (Nov. 15, 2023)].) He found that Black suspects were 3.83 times as likely, and Latino suspects 3.57 times as likely, to be sentenced to death compared to similarly situated White suspects. (*Id.* at p. 245.) Cases with Black and Latino victims were more than 75 percent less likely to end in a death sentence than cases with a White victim. (*Ibid.*)

Santa Clara County, 1976-2018. Petersen examined over 1,600 homicides using SHR data and death sentencing information from the Habeas Corpus Resource Center. (Exh. J at p. 252 [Petersen, Racial and Ethnic Disparities in Santa Clara County's Death Penalty System (Sept. 22, 2020)].) He determined that homicides with White suspects were 14 percent less likely to end in death verdicts than homicides with non-White suspects. (*Id.* at p. 256.) White-victim cases were more than twice as likely to result in death sentences than those with non-White victims. (*Id.* at p. 257.)

Alameda County, 1978-2001. Steven F. Shatz and Terry Dalton reviewed the case files of 473 first-degree murder convictions. (Exh. K at p. 264 [Shatz & Dalton, *Challenging the Death Penalty with Statistics:* Furman*,* McCleskey*, and a Single Case Study* (2013) 34 Cardozo L.Rev. 1227].) They determined that the likelihood of a death sentence for a murder that occurred in the southern part of the county, where the population was overwhelmingly White, was 3.6 times greater than for a murder that occurred in northern part of the county, where more than 30

percent of the population was Black. This difference was statistically significant. (*Id.* at p. 305.)

b. Discrete decision points

Researchers have also found that race impacted prosecutors' decisions to allege a special circumstance and to seek a death sentence.

Los Angeles County, 1990-1994. Robert Weiss, Richard Berk, Wenzhi Lee, and Margaret Farrell-Ross studied willful homicides, analyzing a data set that included a large number of variables for over 5,000 defendants. (Exh. L at p. 322 [Weiss et al., *Death Penalty Charging in Los Angeles County: An Illustrative Data Analysis Using Skeptical Priors* (1999) 28 Soc. Methods & Res. 91].) The study was peer-reviewed. The researchers found that defendants were, on average, more likely to be charged with a special circumstance in cases with White or Asian victims. (*Id.* at p. 344.) They also found that Black defendants were more likely to be charged with special circumstances than other defendants, unless the victim was Black. (*Ibid.*)

Petersen studied the same period using a different dataset, and his study was also peer-reviewed. Petersen found that compared to White-victim cases, the odds of filing special circumstances were 62 to 65 percent lower for Black-victim cases and 47 to 49 percent lower for Latino-victim cases. (Exh. M at p. 359 [Petersen, *Examining the Sources of Racial Bias in Potentially Capital Cases: A Case Study of Police and*

Prosecutorial Discretion (2016) 7 Race & Just. 1].) Again, these differences were statistically significant. (*Ibid.*)

For cases in which the prosecution alleged special circumstances, the odds of a prosecutor seeking death were 37 percent higher if the victims were White. (Exh. N at p. 384 [Petersen, *Cumulative Racial and Ethnic Inequalities in Potentially Capital Cases: A Multistage Analysis of Pretrial Disparities* (2020) 45 Crim. Just. Rev. 225].) In fact, prosecutors were 58 percent less likely to seek death against a Black defendant accused of killing Black victims than against a Black defendant accused of killing White victims; prosecutors were 78 percent less likely to seek death against a Latino defendant accused of killing Latino victims than against a Latino defendant accused of killing White victims. (*Id.* at p. 386.) These results were peer-reviewed as well.

San Diego County, 1978-1993. Shatz, Pierce, and Radelet examined all cases in which a defendant was charged with murder. (Exh. O at p. 408 [Shatz et al., *Race, Ethnicity, and the Death Penalty in San Diego County: The Predictable Consequences of Excessive Discretion* (2020) 51 Colum. Hum. Rts. L.Rev. 1072].) They controlled for a variety of factors from information in probation reports and other sources. (*Id.* at p. 414.) They found the odds that the prosecution would allege a special circumstance were more than 3.7 times greater in cases with White victims and Black defendants. (*Id.* at p. 426.) The odds that the prosecution would seek death were 6 to 7 times greater in cases with White victims and Black or Latino

defendants compared to other victim-defendant combinations. (*Id.* at p. 427.) These differences were statistically significant. (*Ibid.*)

San Francisco County, 1986-1993. Weiss, Berk, and Catherine Lee analyzed all nonvehicular homicides to assess disparities in capital charging. (Exh. P at p. 442 [Weiss et al., *Assessing the Capriciousness of Death Penalty Charging* (1996) 30 Law & Soc'y Rev. 607].) Their study was peer-reviewed. They, too, found race-of-victim disparities. (*Id.* at p. 444.) Logistic regression analyses controlling for a host of possible explanatory variables revealed that defendants with White or Asian victims were about 4 times as likely to be charged with special circumstances as were defendants with African American or Latino victims. (*Id.* at pp. 443-444.)

San Joaquin County, 1977-1986. Catherine Lee analyzed 250 non-vehicular homicides. (Exh. Q at p. 454 [Lee, *Hispanics and the Death Penalty: Discriminatory Charging Practices in San Joaquin County, California* (2007) 35 J. Crim. Just. 17].) Her study was peer-reviewed. Controlling for case information from probation reports and the Bureau of Criminal Justice Statistics, Lee found that prosecutors were one-twentieth as likely to charge special circumstances in Latino-victim cases as they were in White-victim cases. (*Id.* at p. 457.) The odds that a defendant in a Black-victim case would be charged with a special circumstance was one-fifth of the odds that a defendant in a White-victim case would be charged with a special circumstance. (*Ibid.*)

Berk also examined the charging decisions in San Joaquin homicide cases between 1977 and 1986. He identified 122 death-eligible homicides from information found in probation reports. (*Belmontes v. Brown* (9th Cir. 2005) 414 F.3d 1094, 1125, revd. on another ground in *Ayers v. Belmontes* (2006) 549 U.S. 7, 1125 & fns. 10, 11.) Using regression analysis to control for a variety of case-related factors, he found that "[a] defendant who killed a white person was five times more likely to be charged with special circumstances than a defendant who killed an African American and twenty times more likely to be charged than if the victim were Latino." (*Id.* at p. 1125.)

4. Donohue's review of the empirical evidence

Donohue is a leading Stanford Law School scholar who has empirically studied the impact of law and public policy in a wide range of areas, including criminal justice and the death penalty. (See generally Exh. R at pp. 465-494 [Donohue CV].) He evaluated three of the four statewide studies and six of the 11 county-level studies summarized above. (Exh. S at pp. 497-498 [Donohue, Evaluating the Research on the Impact of Race in the California Death Penalty Regime (May 25, 2023)].) Donohue found that these studies "collectively provide powerful and compelling evidence that racial factors have marred capital sentencing outcomes in the state." (*Id.* at p. 498.)

To start, Donohue found that the Grosso study was an "important new study" that set forth "clear factual findings that establish racial discrimination . . . in California's capital regime." (Exh. S at p. 499.) The "overall methodology" was "statistically

sound," Donohue explained, and the study was prepared with a "high quality of empirical sophistication." (*Ibid.*) The study's data collection and analysis were "at the top of the empirical literature probing racial bias in death penalty regimes." (*Id.* at p. 501.) And the study provided "abundant support" for its "overall finding of large racial disparities in death sentencing in California as well as in the decisions of prosecutors and juries in this capital process." (*Ibid.*) Donohue concluded that the Grosso study "alone would be sufficient to indict the California death penalty regime as seriously marred by racial bias." (*Ibid.*)

Next, Donohue reviewed Petersen's first study. (Exh. S at p. 501.) He found it "strongly corroborates" the findings of the Grosso study "that (1) homicides with White victims or Black defendants are more likely to result in a death sentence, and 2) victim and defendant race interact to influence death sentencing patterns, with cases involving Black/Hispanic defendant and White victims being the most likely to generate a death sentence." (*Ibid.*)

Donohue reviewed the Pierce and Radelet study as well. (Exh. S at p. 503.) He found that its logistic regression analysis showed "a strong and statistically significant negative correlation" in the imposition of death sentences in cases with non-White victims compared to White victims. (*Id.* at p. 504.) He concluded that although the Pierce and Radelet study "has a more limited set of control variables" than the Grosso or Petersen studies, it "can be taken as further support for . . . the presence of

racial and ethnic disparities in the operation of the California capital regime." (*Ibid.*)

Finally, Donohue found that the county-level studies—like the statewide studies—demonstrate that "[r]ace has played a substantial and statistically significant role in determining who lives and dies for crimes that are otherwise similar." (Exh. S at p. 513.)

B. California's death-sentencing procedures invite racial bias

The disparities outlined above are explained by California's death sentencing system, which incorporates mechanisms that invite racial bias. (See CRPC Report, *supra*, at pp. 23-24 [recognizing that these mechanisms contribute to race-based disparities].)

1. Prosecutorial discretion

California's prosecutors have a vast amount of discretion to decide who should face the death penalty. (See generally Smith & Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion* (2012) 35 Seattle U. L.Rev. 795, 805 [the prosecutor is given more latitude than any other actor in the criminal legal system].) There are few checks on this discretion, and it has been wielded by district attorneys who have been, as a group, racially and ethnically unrepresentative of the state's

population.[18] This confluence of variables opens a pathway for explicit, implicit, and institutional racial bias to enter capital charging decisions. (Cf. Smith & Levinson, at p. 806 [prosecutors are less likely to charge White people than Black people with crimes, even when taking into account factors such as prior criminal records].)[19]

With "prosecutorial freedom . . . comes the danger that invidious considerations will prompt these death penalty decision

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[18] (Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors* (1988) 83 Cornell L.Rev. 1811, 1817-1818 (Pokorak); Bies et al., Stuck in the '70's: The Demographics of California Prosecutors (2015) Stanford Criminal Justice Center, pp. 8, 10, 12 (Bies et al.).)

[19] Whereas explicit bias is "consciously accessible through introspection *and* endorsed as appropriate" by the person who expresses it, implicit bias includes attitudes and stereotypes that are not consciously accessible and may even be disavowed by the actor. (Kang et al., *Implicit Bias in the Courtroom* (2012) 59 UCLA L.Rev. 1124, 1129.) Implicit bias "can have a substantial impact on perception, judgment, decision-making, and behavior." (Girvan, *On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law* (2015) 26 Geo. Mason U. C.R. L.J. 1, 1, 34-35 (Girvan).) Indeed, it "may inject racism and unfairness into [criminal] proceedings similar to intentional bias." (Stats. 2020, ch. 317, § 2(i) [Racial Justice Act findings and declarations].) Institutional or structural bias occurs where discrimination is "built into institutional structures, practices and norms" and "actors within these structures act according[ly]." (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. 1, 12.) Structural discrimination is particularly prevalent in the criminal legal system. (Nat. Academies of Sciences, Engineering, and Medicine, Reducing Racial Inequality in Crime and Justice: Science, Practice, and Policy (2023) pp. 22, 30.)

makers."[20] Bias may result from stereotypes of Black defendants as more dangerous and violent than White defendants. It may also arise when White prosecutors identify more closely with White victims. (Pokorak, *supra*, 83 Cornell L.Rev. at pp. 1818-1819.)

Moreover, the extraordinary breadth of California's special circumstance statute creates ample room for bias to influence death penalty charging decisions. Between January 1978 and June 2002, "the rate of death eligibility among California homicide cases [was] the highest in the nation by every measure." (Baldus et al., *Furman at 45: Constitutional Challenges from California's Failure to (Again) Narrow Death Eligibility* (2019) 16 J. Empirical Legal Stud. 693, 728, 729-730 (*Furman at 45*).) Some of California's special circumstances—including felony murder, drive-by murder, and gang-related murder—are disproportionately used against Black and Latino defendants. (Grosso et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement* (2019) 66 UCLA L.Rev. 1394, 1440 ["the California statute itself invites disparate treatment of black and Latinx defendants"], 1441-1442.)

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[20] (Pokorak, *supra*, 83 Cornell L.Rev. at pp. 1813-1814; see *McCleskey v. Kemp* (1987) 481 U.S. 279, 364 (*McCleskey*) (dis. opn. of Blackmun, J.) ["discretionary authority can be discriminatory authority"]; Office of the Attorney General, Attorney General Bonta Issues Race-Blind Charging Guidelines for Prosecutors (Jan. 4, 2024) ["'charging decisions are vulnerable to . . . bias,'" and "'[t]his is a reality we cannot ignore and must work to correct'"].)

Yet California has no uniform criteria to guide prosecutors in deciding when to seek death in eligible cases. In 2008, the California Commission on the Fair Administration of Justice (CCFAJ) found that few prosecuting offices had written policies or guidelines about when to file a death notice, and there was "great variation in the practices of charging special circumstances."[21]

The CCFAJ also expressed concern about the lack of diversity among prosecutors. (CCFAJ Final Report, *supra*, at p. 155.) The state's elected district attorneys have been overwhelmingly White. (Pokorak, *supra*, 83 Cornell L.Rev. at pp. 1817-1818 [a 1998 survey found 95 percent of elected California district attorneys were White]; Bies et al., *supra*, at pp. 8, 12 [in 2015, 85 percent were White].) Line prosecutors were only slightly more diverse. (Bies et al., at p. 10 [seventy percent of about 3,800 deputy district attorneys were White].) And studies show that lack of diversity among prosecutors matters, because "racial and ethnic diversity in the legal profession significantly attenuates racial disparities in sentencing." (King et al., *Demography of the Legal Profession and Racial Disparities in Sentencing* (2010) 44 Law & Soc'y Rev. 1, 25; see also Ward et al., *Does Racial Balance in Workforce Representation Yield Equal Justice?: Race Relations of Sentencing in Federal Court Organizations* (2009) 43 Law & Soc'y Rev. 757, 788 [disparities in

[21] (CCFAJ Final Report (2008) at pp. 152-153, 155.)

federal sentences for Black and White defendants were reduced in districts with greater percentages of Black prosecutors].)

2. Jury selection procedures

Death qualification and the exercise of peremptory challenges disproportionately remove non-White—and especially Black—people from capital juries. Moreover, the White jurors who remain tend to harbor more bias than their peers.

Before death qualification even begins, people of color are underrepresented among those summoned for jury duty in California courts.[22] For-cause challenges also skew the composition of juries, resulting in significant racial disparities. (Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury* (2020) 118 Mich. L.Rev. 785, 785.)

Over and above jury selection in noncapital cases, however, the death qualification process in California culls non-White jurors. Black jurors have long opposed capital punishment in greater percentages than their White counterparts. (Unnever et al., *Race, Racism, and Support for Capital Punishment* (2008) 37 Crime & Just. 45, 54 (Unnever et al.).) Black opposition to the death penalty remains high even when factors such as income, religious views, and political views are considered. (*Id.* at pp. 60-62.) The death qualification process thus "systematically 'whitewashes' the capital eligible pool." (Lynch & Haney, *Death*

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[22] (Semel et al., Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors (June 2020) Berkeley Law Death Penalty Clinic, pp. 3-5 & fn. 52 (Semel et al.) [summarizing research].)

Qualification in Black and White: Racialized Decision Making and Death-Qualified Jurors (2018) 40 Law & Pol'y 148, 165 (*Death Qualification in Black and White*).)

Death qualification also produces a group of White jurors who are more likely to harbor bias. This is because racial animus is "one of the most consistent and robust predictors of support for the death penalty." (Unnever et al., *supra*, 37 Crime & Just. at p. 66 [citing studies].) Support for the death penalty among White people "is closely tied to both explicit and implicit racial animus towards African Americans." (*Death Qualification in Black and White*, *supra*, 40 Law & Pol'y at p. 151 [citing studies].)

Following death qualification, prosecutors are permitted to further "whitewash" juries by using peremptory challenges to remove Black prospective jurors who have reservations or ambivalence about capital punishment. (*Death Qualification in Black and White*, *supra*, 40 Law & Pol'y at pp. 165-166.) Thus, "death qualification helps to facilitate the targeted use of peremptory challenges in ways that can exacerbate the racial homogenization of the capital jury." (*Id.* at p. 166.)

These jury selection procedures have significant consequences. The Capital Jury Project—which interviewed more than 1,200 former jurors from more than 350 capital trials in 14 states, including California—found that in cases with a Black defendant and White victim, White men exercised outsized influence in the capital sentencing process. (Lynch & Haney, *Looking Across the Empathic Divide: Racialized Decision Making and Death-Qualified Jurors* (2011) 2011 Mich. State L.Rev. 573,

579-580.) On the other hand, Black men "reported being more empathetic toward the defendants . . . than any other category or group of juror" and "substantially reduce[d] the chances of a death verdict." (*Id.* at p. 580.)

Additionally, White and Black jurors tended to analyze aggravating evidence and mitigating evidence differently. (*Death Qualification in Black and White*, *supra*, 40 Law & Pol'y at p. 152 [citing studies].) In social science experiments, White male mock jurors viewed a Black defendant, when compared to an otherwise identical White defendant, as more cold-hearted, less redeemable, and more likely to commit another crime. (Lynch & Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the 'Empathic Divide'* (2011) 45 Law & Soc'y Rev. 69, 91-92 (*Mapping the Racial Bias*).) White male jurors also weighed victim impact evidence more heavily when the victim was White. (Lynch & Haney*, Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination* (2009) 33 Law & Hum. Behav. 481, 489 (*Capital Jury Deliberation*).) While White male jurors were significantly more likely to undervalue, disregard, or improperly use mitigation when they sentenced Black defendants (Lynch & Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty* (2000) 24 Law & Hum. Behav. 337, 353 (*Discrimination and Instructional Comprehension*), they were "significantly more generous" in their evaluation of mitigating evidence for White defendants (*Mapping the Racial Bias*, at p. 94).

And while mock jurors who watched videos based on a real penalty phase trial were more likely to return a death verdict when the defendant was Black rather than White, the difference was even greater when jurors viewed videos with a Black defendant and White victim. (*Capital Jury Deliberation*, *supra*, 33 Law & Hum. Behav. at pp. 483-484.) Thus, the proportion of White people on the juries was a "significant predictor of death verdicts," with a larger number of White mock jurors leading to more death verdicts for Black defendants. (*Ibid.*)

3. Penalty phase arguments

Prosecutors have often used their "wide latitude" in penalty phase argument to dehumanize and disparage defendants of color. (*People v. Spencer* (2018) 5 Cal.5th 642, 688.) In numerous death penalty cases, for example, prosecutors have likened defendants to predatory animals such as Bengal tigers. (E.g., *People v. Duncan* (1991) 53 Cal.3d 955, 977; *People v. Powell* (2018) 6 Cal.5th 136, 182-183; *Spencer*, at 687-688; *People v. Brady* (2010) 50 Cal.4th 547, 585.) Such dehumanizing characterizations may intentionally or unintentionally evoke race-based stereotypes in the minds of the jurors. (See Stats. 2020, ch. 317, § 2(e) [findings and declarations in Racial Justice Act emphasizing that the "use of animal imagery is historically associated with racism" and criticizing courts' historical "tolera[nce of] the use of racially incendiary or racially coded language, images, and racial stereotypes"].)

4. Penalty phase instructions

Implicit bias is particularly likely to affect "judgments that are inherently difficult, subjective, or ambiguous." (Girvan, *supra*, 26 Geo. Mason U. C.R. L.J. at p. 33.) In contrast to the guilt phase of a capital trial, in the penalty phase, jurors are asked to assess amorphous moral concepts such as heinousness and blameworthiness. (*Discrimination and Instructional Comprehension*, *supra*, 24 Law & Hum. Behav. at p. 340.) This is precisely when jurors are apt to fall back on ethnic or racial biases. (*Ibid.*) "[W]hen people are faced with an especially 'complex judgmental situation'—which death sentencing certainly represents—they rely more heavily on their pre-existing social stereotypes . . . ." (*Capital Jury Deliberation*, *supra*, 33 Law & Hum. Behav. at p. 493 [citing studies].)

In addition, penalty phase instructions "are notoriously difficult for jurors to understand and apply . . . which increases the likelihood that their judgments will be shaped by pre-existing biases." (*Mapping the Racial Bias*, *supra*, 45 Law & Soc'y Rev. at p. 74 [citing studies].) Researchers found that mock jurors with a poor understanding of penalty instructions were significantly more likely than their higher-comprehension counterparts to sentence Black defendants to death—but were no more likely to sentence White defendants to death. (*Discrimination and Instructional Comprehension*, *supra*, 24 Law & Hum. Behav. at pp. 346-347.) Jurors with low instructional comprehension also tended to misuse penalty phase evidence, especially mitigating evidence. (*Id.* at pp. 347-348.) This confusion more negatively

impacted Black defendants than White defendants; mock jurors assessed mitigating circumstances as significantly less mitigating when applied to Black defendants compared to White defendants. (*Id.* at p. 352.)

C. The Court has the authority to order any adversarial testing it deems necessary

The empirical evidence detailed above provides a sufficient basis for this Court to issue a writ of mandate. Many of the studies petitioners rely on have been the subject of rigorous peer-review by leading scholars and independent assessment by Donohue, affording this Court ample "insight into . . . the methodology employed [and] the ultimate accuracy [and] significance of the results." (*Hardin*, *supra*, 15 Cal.5th at p. 979; see petn. part III.A, *ante*.)[23] However, should this Court desire further testing, it has the authority to appoint a referee to resolve any perceived factual issues while retaining the important statewide legal issue for review. (*People v. Super. Ct.* (*Laff*)

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[23] This Court's recent decision in *Hardin*, *supra*, 15 Cal.5th 834, does not foreclose reliance on petitioners' studies. Unlike in *Hardin*, this case is not an appeal, and the Court is not constrained by a lower court record. Moreover, *Hardin* presented a facial federal equal protection challenge that the parties agreed was subject to rational basis review; it therefore did not require the underlying rationale for the statutory classification to be either "'actually articulated'" or "'empirically substantiated.'" (*Id.* at p. 528.) This petition, by contrast, presents an as-applied challenge under the state equal protection guarantee based on racially disparate impact and is therefore subject to strict scrutiny, which demands more. (See mem. part II.B, *post*; c.f. *Hardin*, at p. 1010, fn. 8.)

(2001) 25 Cal.4th 703, 730 [recognizing utility of referee "when the determination of controverted issues of fact becomes necessary in an original proceeding"]; see also Code Civ. Proc., §§ 638 [outlining procedure for appointment of referee(s)], 639 [same], 640 [same].)

IV. CLAIM ASSERTED

California's capital sentencing provisions, as administered, violate the equal protection guarantee of the state Constitution. (See mem. part III, *post*.)

V. JURISDICTIONAL STATEMENT

This Court possesses original jurisdiction under article I, section 7, and article VI, section 10 of the California Constitution to issue extraordinary writs in matters of public importance. This petition—in which Petitioners ask the Court to declare California's capital sentencing scheme invalid as applied under the state Constitution and bar future capital prosecutions and trials and the execution of death sentences under those statutes—qualifies as a matter of extraordinary public interest. (See Pen. Code, § 190 et seq. [capital sentencing scheme]; see also *Wenke v. Hitchcock* (1972) 6 Cal.3d 746, 751 [mandamus is "'appropriate for challenging the constitutionality or validity of statutes or official acts'"]; accord *Connerly*, *supra*, 92 Cal.App.4th at p. 30 ["mandate can be used to test the constitutional validity of a legislative enactment"].)

As this Court has held, the exercise of mandamus jurisdiction is especially appropriate in cases where the issues

presented "should be resolved promptly." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 500; see also *Patterson v. Padilla* (2019) 8 Cal.5th 220, 223; *Briggs*, *supra*, 3 Cal.5th at p. 822; *Vandermost v. Bowen* (2012) 53 Cal.4th 421, 451; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 340 (*Raven*); *Brosnahan*, *supra*, 32 Cal.3d at p. 241; *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 219.) If the Court does not act on this petition, capital defendants will suffer irremediable harm. Trials will go forward under unconstitutionally applied statutes before death-qualified jurors—who "are, on the whole, uncommonly conviction- and death-prone, as well as disproportionately punitive and inclined toward believing the prosecution." (Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency* (2016) 92 Ind. L.J. 113, 121; see *People v. Suarez* (2020) 10 Cal.5th 116, 192 (conc. opn. of Liu, J.) ["Death-qualified jurors are quite different from non-death-qualified jurors"].)

This Court has repeatedly exercised its original jurisdiction in similar cases involving systemic challenges to sentencing and prosecution procedures. (E.g. *Briggs*, *supra*, 3 Cal.5th at pp. 822-823 [Court entertained and ruled on merits of original petition for writ of mandate challenging changes to procedures for litigating death sentences]; *Brosnahan*, *supra*, 32 Cal.3d at p. 241 [Court gave plenary consideration to original writ challenging omnibus criminal justice initiative]; *Raven*, *supra*, 52 Cal.3d at p. 340 [exercising original jurisdiction to address merits of petition for writ of mandate challenging initiative proposing a Crime Victims

Justice Reform Act]; see also 8 Witkin, Cal. Procedure (6th ed. 2023) Writs, § 146 [collecting cases].)

Finally, article I, section 27 of the state Constitution—enacted by voters in November 1972—does not impede this Court's jurisdiction or bar review of petitioners' challenge. Section 27 provides: "The 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."

This Court has long held that section 27 has no bearing on as-applied challenges to the death penalty. (See, e.g., *Strauss*, *supra*, 46 Cal.4th at p. 430 [section 27 "did not displace judicial review of death sentences" and this Court "would continue to review such death sentences for compliance with all currently applicable laws"]; cf. *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 960 ["Section 27 did not exempt California's death penalty statute from judicial review under the California Constitution"]; *People v. Houston* (2012) 54 Cal.4th 1186, 1232 ["we agree with *Murtishaw*"].) Instead, section 27 merely precludes a judicial determination that capital punishment is unconstitutional *per se*—that is, that death is an impermissible form of punishment *in the abstract*. (See, e.g., *People v. Super. Ct.* (*Engert*) (1982) 31 Cal.3d 797, 808 (*Engert*) ["'section 27 validates the death penalty *as a permissible type of punishment*'"]; *People v. Ramos* (1984) 37 Cal.3d 136, 152, fn. 6 [same].)

In *Engert*, *supra*, 31 Cal.3d at pp. 807-808, this Court found it "clear that section 27 was not intended to insulate a death penalty statute from the general strictures of the state Constitution" and rejected the Attorney General's contention that section 27 "insulates the death penalty against any state constitutional defect." (See also *id.* at pp. 807 ["the drafters and proponents [did not] intend[] an absolute restriction on state constitutional review of any statute that provided for the penalty of death"], 808 [provision was "intended simply . . . to clarify that the penalty of death does not violate" the state Constitution "per se"].) This Court noted that the election brochure supporting the enactment of section 27—the relevant "'legislative history'" in this context (*id.* at p. 807)—expressly "reassured the electorate that guarantees of counsel and fair trial were unaffected by the initiative: 'Our criminal legal system with its overriding concern for the rights of the accused, [e]nsures a fair trial to every person charged with murder regardless of his wealth, education or race'" (*id.* at p. 809, quoting Voter Information Guide for 1972, General Election (1972)).

Two years after *Engert*, the Supreme Judicial Court of Massachusetts adopted and applied this Court's analysis. (See *Commonwealth v. Colon-Cruz* (Mass. 1984) 470 N.E.2d 116, 120-121 (*Colon-Cruz*).) Article 116 of the Massachusetts Constitution—a voter-enacted analogue to section 27—states that "[n]o provision of th[is] Constitution . . . shall be construed as prohibiting the imposition of the punishment of death." The Commonwealth argued that article 116 "provide[d] immunity for

any capital punishment statute from invalidation." (*Colon-Cruz*, at p. 120.) But the court refused to endorse an interpretation that "would mean that a statute establishing the death penalty for members of one particular race only . . . would be valid." (*Id.* at p. 123.) Citing *Engert*, *supra*, 31 Cal.3d at pp. 806-809, the court found it could not "accept the Commonwealth's radical construction." (*Ibid.*) The Oregon Supreme Court also recently followed suit, holding that "the only types of challenges barred" by its own voter-enacted analogue to section 27 "are challenges to the death penalty *per se*." (*State v. Bartol* (Or. 2021) 496 P.3d 1013, 1020.)

Petitioners' claim here does not assert that the death penalty is unconstitutional *per se*. It is instead based upon a robust evidentiary showing that California's death penalty statutes *as applied* violate the state's equal protection guarantee. Therefore, section 27 does not affect this Court's authority to review petitioners' claim. Exercising original jurisdiction is appropriate under well-settled California law and this Court's "traditional and inherent judicial power to do whatever is necessary and appropriate, in the absence of controlling legislation, to ensure the prompt, fair, and orderly administration of justice." (*Neary v. Regents of Univ. of Cal.* (1992) 3 Cal.4th 273, 276 [discussing Code Civ. Proc., § 128]; see *Brosnahan*, *supra*, 32 Cal.3d at p. 241 ["under well settled principles, it is appropriate that we exercise our original jurisdiction"].)

VI. RELIEF SOUGHT

Petitioners seek an order restraining and prohibiting the Attorney General, in the exercise of his duties as chief law enforcement officer and his direct supervisory power over every district attorney and law enforcement officer in the state, from initiating, pursuing, or defending capital prosecutions and from executing death sentences. (See Cal. Const., art. V, § 13; Gov. Code, § 12511.) This Court "must . . . issue[]" a writ of mandate in this matter because "there is not a plain, speedy, and adequate remedy, in the ordinary course of law." (Code Civ. Proc., § 1086.) No other court can grant prompt relief for the unconstitutional application of California's capital sentencing scheme. (See *Silicon Valley Taxpayers' Assn. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 ["We ""must . . . enforce the provisions of our Constitution and "may not lightly disregard or blink at . . . a clear constitutional mandate"""], ellipses in original.) Petitioners bring this action because affected individuals have no other feasible route to relief, for several reasons.

First, systemic dysfunction will make it impossible for the issue to reach this Court in a timely manner on direct review. To preserve the issue, capital defendants would have to raise it at trial with an evidentiary hearing or proffer. Thereafter, it could take up to 20 years for this Court to resolve the issue. (See *People v. Potts* (2019) 6 Cal.5th 1012, 1063 (*Potts*) (conc. opn. of Liu, J.).) [many capital appeals are not resolved until 20 years or more after judgment].) Delays in appointment of appellate counsel

have not diminished since the Governor announced a moratorium in 2019. (See *id.* at p. 1062 [discussing moratorium].) Last year, the only appointments of appellate counsel (eight) were replacements for counsel who withdrew.[24] As of December 1, 2023, 20 people sentenced to death were awaiting appointment of counsel for direct appeal, and 126 fully briefed appeals awaited decision in this Court. (HCRC Report, *supra*, at p. 18.) Since the Governor announced a moratorium in 2019, 20 people have received death sentences, 80 percent of them people of color. (*Id.* at p. 13.)

Second, state habeas proceedings do not provide a viable alternative. Even if a defendant raised a statewide equal protection claim in state habeas and the superior court granted a hearing, the case thereafter would languish in the Court of Appeal, where capital defendants are unlikely to receive new counsel (required by statute) for decades. (See HCRC Report, *supra,* at p. 19 [because there are no funds for appointment of appellate habeas counsel, most habeas appeals are stayed indefinitely].) As of December 2023, at least 138 people—more than 22 percent of all those on California's death row—had completed their appeals and had no prospect of habeas counsel. (*Id.* at pp. 10, 18.) State courts had appointed new habeas counsel in only *one* pre-petition capital case since the 2016 effective date

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[24] (Habeas Corpus Resource Center, Annual Report (2023) pp. 17-19 (HCRC Report); see also *In re Morgan* (2010) 50 Cal.4th 932, 938 [noting shortage of qualified capital habeas counsel to keep pace with state's death sentencing]; *In re Zamudio Jimenez* (2010) 50 Cal.4th 951, 958 [same].)

of Proposition 66. (*Id.* at p. 19; see also *Briggs*, *supra*, 3 Cal.5th at p. 864 (conc. opn. of Liu, J.) [discussing delay in appointment of capital habeas counsel]; *Shorts v. Superior Court* (2018) 24 Cal.App.5th 709, 728 [noting "inordinate delay" of "more than 20 years" between sentencing and appointment of habeas counsel].)

Even for defendants who have counsel, state habeas proceedings in capital cases are effectively a legal fiction. The postconviction review process averages more than 30 years. (CRPC Report, *supra*, at pp. 9, 11; see also *Potts*, *supra*, 6 Cal.5th at p. 1063 (conc. opn. of Liu, J.) [Court decided appeal 21 years after death judgment; habeas proceedings were still "to come," and "[t]his timeline is typical of [this Court's] capital cases"].)

Third, although a pretrial writ petition in the superior court could in principle move more quickly than a direct appeal or capital habeas petition, it would not provide adequate alternative redress. Pretrial writs, like direct appeals and habeas petitions, must undergo piecemeal presentation at the local level and depend on the development of individualized records—at county expense during motion practice. But that type of fragmented development could not account adequately for the statewide inequality that pervades California's capital system. Pretrial writ litigation of this claim would yield inconsistent results around the state and ultimately require this Court's intervention to achieve a uniform statewide remedy for a statewide injustice. Furthermore, other developments in individual cases could render pretrial writ proceedings moot, and individual litigation in

pretrial cases could not promise relief for defendants already sentenced to death.

Fourth, the Racial Justice Act (RJA) (Pen. Code, § 745) does not provide a viable alternative route to challenge the capital sentencing statutes' constitutionality as applied. Although the RJA applies retroactively in death penalty cases, it allows only individual claims—and only county by county, not statewide. (*Id.* at subd. (j)(2).) But measuring disparities at the county level will be difficult, if not impossible, for many capital defendants because few counties have enough homicides and death sentences to analyze with the type of sophisticated statistical methods used in the studies presented here. (See exh. E at p. 92 [Petersen explaining the same].) Statewide analysis is simply the most scientifically valid and reliable approach to measuring the impact of race on the imposition of death.

Further, the RJA allows only comparisons of charging and sentencing rates for individuals in a defendant's racial or ethnic group with those for a more favored group. (Pen. Code, § 745, subds. (a)(3), (4).) Accordingly, at best, over the course of many years and with a burdensome expenditure of funds, individual RJA cases could present an incomplete mosaic of the overall dysfunction of California's capital sentencing scheme—without providing any avenue for inclusive relief. That approach would be a lamentably inadequate substitute for acting on the unmistakable picture the statewide evidence paints *now*: the system as presently administered violates the state Constitution.

Fifth, and finally, death-sentenced persons have no adequate remedy in the federal courts. This equal protection claim arises under the California Constitution, not the federal Constitution. As explained in part II.D of the memorandum of points and authorities, this Court has found that the state equal protection guarantee provides more expansive protections than those granted under the federal Constitution where there is proof of unequal application and harm to a protected class. Federal courts have no authority to determine petitioners' claim, no matter what the procedural posture of any given case. (See *Erie R.R. Co. v. Tompkins* (1938) 304 U.S. 64, 78 [federal courts may not determine unsettled questions of state law].) Unless this Court entertains and acts on this original writ petition, hundreds of people sentenced to death under an unconstitutionally applied statute, including present and former clients of OSPD, will have no avenue of redress.

A decision granting this petition would not be an outlier. In the past half-century, five state supreme courts have invalidated death penalty statutes under their respective state's Constitution or common law. (See *Gregory*, *supra*, 427 P.3d at p. 636; *Powell v. State* (Del. 2016) 153 A.3d 69, 72-73; *Santiago*, *supra*, 122 A.3d at p. 85-86; *People v. LaValle* (N.Y. 2004) 817 N.E.2d 341, 365; *Colon-Cruz*, *supra*, 470 N.E.2d at p. 122; *Dist. Attorney v. Watson* (Mass. 1980) 411 N.E.2d 1274, 1283.)

In sum, statewide evidence demands statewide relief: an order mandating an end to capital charging and sentencing in this state and prohibiting the Attorney General and his

subordinate district attorneys from seeking, obtaining, or executing death sentences. An extraordinary writ issued by this Court is the only feasible route to that relief.

VII. NEED FOR A STAY

Petitioners request that this Court stay all executions statewide while this petition is pending. (See Cal. Rules of Court, rule 8.486(a)(7).) Although the current Governor has implemented a moratorium on executions, there is no guarantee that it will endure beyond his term in office. It is not clear how long proceedings on this petition will continue. Defendants sentenced under an unconstitutional statute would suffer irreparable harm if the moratorium were to end and they faced execution before this Court could determine the statutes' constitutionality. (Cf. *In re Anderson & Satterfield* (1968) 69 Cal.2d 613, 616 ["We issued orders to show cause and . . . stayed all judgments of death in California"].)

Petitioners accordingly ask this Court to preserve the status quo until it can determine whether the scheme under which capital trials occur, and death sentences are executed, violates the equal protection guarantee of the California Constitution, as applied.

VIII. PRAYER FOR RELIEF

No previous petitions for extraordinary relief have been filed by or on behalf of petitioners related to the matters described above.

Wherefore, petitioners respectfully pray:

[1] That the Court order the execution of all death sentences be stayed pending final determination of this writ petition;

[2] That the Court issue a writ of mandate declaring that California's capital sentencing scheme is unconstitutional as applied and barring the prosecution, imposition, or execution of sentences of death throughout the State of California. In the alternative, petitioners pray that the Attorney General be ordered to show cause why a peremptory writ granting such relief should not issue; and

[3] That the Court grant such further and additional relief as would be consistent with the interests of justice.

Dated: April 9, 2024.

Respectfully submitted,

Office of the State Public Defender

By: _____

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Attorneys for Petitioners

VERIFICATION

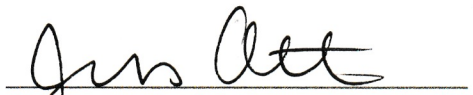
I, JESSICA E. OATS, hereby declare:

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

I have read the foregoing petition for writ of mandate and the exhibits appended thereto and declare that the contents of the petition are true of my own personal knowledge, or by information and belief, except for those matters which are part of the official records of the court, and as to those matters, I believe them to be true based upon my reading of those records.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed this 9th day of April 2024 at Charlottesville, Virginia.

Respectfully submitted,



JESSICA E. OATS
Senior Deputy State Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

An overwhelming body of empirical evidence leads to one conclusion: racial discrimination permeates California's death penalty system. As detailed in part III.A.1.a of the petition, a recent statewide study shows that Black defendants are between 4.6 and 8.7 times more likely to be sentenced to death than similarly situated non-Black defendants. Latinos are between 3.2 and 6.2 times more likely to be death-sentenced. And defendants of all races are between 2.8 and 8.8 times more likely to be condemned when at least one of the victims is White. These drastic disparities cannot be explained on nonracial grounds.

This disparate impact on members of a suspect classification—race—triggers a strict scrutiny analysis of the administration of California's death penalty scheme under California's equal protection guarantee. This scheme cannot survive strict scrutiny: there is no constitutionally compelling state interest in maintaining a racially discriminatory death sentencing scheme.

McCleskey, *supra*, 481 U.S. 279, does not compel a different result. There, the United States Supreme Court held that to establish an equal protection violation under the federal Constitution, a defendant must prove the existence of purposeful discrimination that had a discriminatory effect on their case. (*Id.* at pp. 291, 297.) The high court found that McCleskey's statistical proof of racial disparities in the application of the death penalty was insufficient to meet this test. (*Id.* at p. 292.)

But the court's faulty reasoning leaves the harm unaddressed and unredressable. This Court, however, has held that California's equal protection guarantee does not require proof of invidious intent when application of a statutory scheme disproportionately harms a protected classification or fundamental interest. (*Crawford v. Board of Education* (1976) 17 Cal.3d 280, 290-291, 301-302 (*Crawford*); *Serrano v. Priest* (1971) 5 Cal.3d 584, 601-604 (*Serrano I*).) Thus, the United States Supreme Court's construction of the federal equal protection clause does not govern.

The persistent racial disparities in death sentencing are remnants of slavery, lynchings, and White vigilantism.[25] While lynchings were extrajudicial, capital punishment became a state-sanctioned method to carry out vigilante justice. (Death Penalty Information Center, *supra*, at p. 12 [in the mid-20th century, as calls to end the practice of lynching grew, "the promise of swift officially-sanctioned" executions was offered as a compromise to deter lynch mobs]; see also *Gregg v. Georgia* (1976) 428 U.S. 153, 183 (lead opn.) [acknowledging the role of capital punishment in curtailing lynchings].) Though it is tempting to view California as removed from this sordid past, our state has a long history of

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[25] (Death Penalty Information Center, Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty (Sept. 2020) pp. 2-68 (Death Penalty Information Center); Semel et al., at p. 38 ["The administration of the criminal law is interwoven with the history of lynching"]; Steiker & Steiker, *The American Death Penalty and the (In)visibility of Race* (2015) 82 U. Chicago L.Rev. 243, 243-253.)

racial terror. (See Reparations Report, *supra*, chapter 3: Racial Terror, pp. 130-164.)

The stark disparities that continue to permeate the application of California's death penalty are the predictable result of a system that is vulnerable to racial bias at nearly every stage and demand immediate redress. (See petn. part III.B, *ante*.) For these reasons, petitioners urge this Court to grant a writ of mandate.

II. EQUAL PROTECTION ANALYSIS UNDER THE CALIFORNIA CONSTITUTION

California's death penalty statutes are unconstitutional under the equal protection guarantee of the state Constitution. 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.) Where, as here, a petitioner establishes that application of a facially neutral statutory system disparately impacts a suspect classification or a fundamental interest, that system violates the California Constitution's guarantee of equal protection unless the state can prove the discriminatory application is necessary to achieve a compelling government interest. This Court should hold here—as it has in other cases—that California's equal protection guarantee does not require proof of invidious intent where unequal application of a statutory scheme harms a protected class.

A. Facially neutral statutes may be unconstitutional as applied

A facially valid statute may be unconstitutional when disproportionally applied to a class of individuals. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 (*Tobe*).) In an "as applied" challenge, a court determines the circumstances in which a statute has been applied and "consider[s] whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right." (*Ibid.*; see generally *In re Taylor* (2015) 60 Cal.4th 1019, 1039 (*Taylor*) ["as-applied challenges are the basic building blocks of constitutional adjudication"].) As this Court has repeatedly affirmed, a party who successfully advances an as-applied challenge can obtain "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." (See *Tobe*, at p. 1084.)

Robust evidence of pervasive and persistent racial disparities demonstrates that California's capital sentencing scheme is applied in a racially discriminatory manner, depriving capital defendants of equal protection of the law. (See petn. part III.A, *ante*.) Accordingly, and in light of the severe and final nature of capital punishment, this Court must enjoin the administration of California's capital punishment statutes. (See *Tobe*, *supra*, 9 Cal.4th at p. 1084; *Taylor*, *supra*, 60 Cal.4th at p. 1023 [enjoining blanket enforcement of a statute that was unconstitutional as applied]; cf. *Gregory*, *supra*, 427 P.3d at p. 642 [finding death penalty unconstitutional as administered

because it is imposed in an arbitrary and racially biased manner; converting all death sentences to life imprisonment].)

B. This Court applies strict scrutiny when statutory systems disparately impact suspect classifications

California courts apply a rigorous standard when challenged legislation disparately impacts a suspect classification. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 832 (*Marriage Cases*) ["Here the courts adopt an attitude of active and critical analysis"]; *Serrano v. Priest* (1976) 18 Cal.3d 728, 746, 768 (*Serrano II*) [when a statute disparately affects a protected group or fundamental interest, it "must be subjected to strict judicial scrutiny in determining whether it complies with our state equal protection provisions"].) Race or ethnicity is a suspect classification. (*Marriage Cases*, at pp. 783-784.) Accordingly, when race is at issue, strict scrutiny applies.

Strict scrutiny analysis imposes a heavy burden on the state to justify the disparate impact on a protected class or fundamental interest. (See *Serrano I*, *supra*, 5 Cal.3d at p. 597; *Hawkins v. Super. Ct.* (1978) 22 Cal.3d 584, 598 (conc. opn. of Mosk, J.) [strict scrutiny burden "is almost never satisfied"].) This burden requires the state to establish "not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." (*Serrano I,* at p. 597.) An interest that can be accomplished without disproportionately burdening a suspect classification or fundamental interest does not pass muster under this standard. (See *id.* at p. 610 [the interest of local control of

public education can be accomplished without a school financing scheme that creates a suspect classification of wealth or harms the fundamental interest of a right to education].)

C. The state equal protection guarantee is broader than the federal guarantee

The California Constitution is "'a document of independent force' [citation] that sets forth rights that are in no way 'dependent on those guaranteed by the United States Constitution.'" (*People v. Buza* (2018) 4 Cal.5th 658, 684 (*Buza*), citing Cal. Const., art. I, § 24.) The state Constitution is not "some minor codicil" to the federal charter. (*Id.* at p. 707 (dis. opn. of Cuéllar, J.).)

Although this Court has sometimes characterized California's equal protection guarantee as substantially equivalent to the Fourteenth Amendment, it is "possessed of 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 II*, *supra*, 18 Cal.3d at p. 764.) In such cases, 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; see also *Warden v. State Bar of Cal.* (1999) 21 Cal.4th 628, 661 (dis. opn. of Brown, J.) ["Our state equal protection jurisprudence grew out of a recognition of the inadequacy of federal standards"].) This Court's "'first referent is California law and the full panoply of rights Californians have come to expect as their due.'" (*Serrano II*, at p. 764.) Accordingly, United States Supreme

Court decisions defining fundamental rights "are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law." (*Ibid.*)

D. Disparate impact is sufficient to prove a violation of the state equal protection guarantee

This Court has departed from federal equal protection jurisprudence in critical instances to provide greater protections under the state Constitution. For example, it has rejected the United States Supreme Court's determination that wealth is not a suspect classification and that education is not a fundamental interest for equal protection purposes. (*Serrano II, supra*, 18 Cal.3d at pp. 765-766.) It has also rejected the high court's adoption of "intermediate scrutiny" review for cases involving sex and gender discrimination. (*Marriage Cases*, *supra*, 43 Cal.4th at pp. 832, fn. 55, 843-844.)

Similarly, this Court has explicitly rejected the proposition that only intentional discrimination denies equal protection under the California Constitution and has declined to make discriminatory intent or purpose a sine qua non of state equal protection claims. (See, e.g., *Serrano I*, *supra*, 5 Cal.3d at pp. 601-604 [school funding]; *Crawford*, *supra*, 17 Cal.3d at pp. 291-293 [school segregation]; cf. *Marriage Cases*, *supra*, 43 Cal.4th at p. 856, fn. 73 [finding no invidious intent or purpose in enactment of unconstitutional statutes prohibiting same-sex marriage].)

In *Serrano I*, *supra*, 5 Cal.3d at pp. 597-598, this Court held, applying strict scrutiny, that a school financing system that disparately impacted children who lived in poor districts violated

equal protection. The defendants emphasized that there were no allegations of purposeful or intentional discrimination, but this Court rejected the claim that only de jure, and not de facto, discrimination violates equal protection. (*Id.* at pp. 601-602.) It pointed to "numerous" cases involving racial classifications in which courts "ha[d] rejected the contention that purposeful discrimination is a prerequisite" to an equal protection violation. (*Id.* at p. 602, fn. 18.) The Court approvingly quoted one such case: "'Orthodox equal protection doctrine can be encapsulated in a single rule: government action which without justification imposes unequal burdens or awards unequal benefits is unconstitutional. The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false.'" (*Ibid.*, quoting *Hobson v. Hansen* (E.D.N.Y. 1967) 269 F.Supp. 401.)

In *Crawford*, *supra*, 17 Cal.3d at p. 285, the Court reaffirmed that discrimination need not be purposeful to violate the state Constitution. There, defendant school board argued that racial segregation in Los Angeles County schools did not violate the state equal protection guarantee because it was not intentional. (*Id.* at p. 290.) The board noted that recent United States Supreme Court cases had held that school districts had no constitutional obligation to remedy de facto segregation. (*Ibid.*)

This Court explained that because a suspect classification was implicated, "a significant line of California decisions" had "authoritatively establish[ed]" that the state's obligations under the equal protection clause "entail more than simply the

avoidance of . . . intentionally invidious conduct." (*Crawford*, *supra*, 17 Cal.3d at p. 290; see also *id.* at pp. 290-293 [discussing prior cases].) Accordingly, in *Crawford*, *supra*, 17 Cal.3d at p. 297, the Court declared that equal protection under the California Constitution required school districts to try to alleviate racial segregation and its consequent harms "even if such segregation results from the application of a facially neutral state policy." It emphasized that the state simply is "not constitutionally free to adopt any facially neutral policy it chooses, oblivious to such policy's actual differential impact" on suspect classifications (*id.* at p. 296); the harmful effects of segregating children by race occurred "regardless of the cause of such segregation" (*id.* at pp. 301-302; see also, e.g., *Shaw v. Los Angeles Unified School Dist.* (2023) 95 Cal.App.5th 740, 765 [a policy that has a substantially disparate impact resulting in racial segregation violates California's equal protection clause, regardless of cause]; *Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 896-897 [same]).

This Court has focused on the harm to members of a suspect classification or to a fundamental interest in other contexts as well. In *Marriage Cases*, *supra*, 43 Cal.4th at p. 856, when holding statutes prohibiting same-sex marriage unconstitutional, the Court "emphasize[d] that in reaching this conclusion we do not suggest that the current marriage provisions were enacted with an invidious intent or purpose." (*Id.* at p. 856, fn. 73.) Instead, the Court concluded that "because of the detrimental effect that such provisions impose on gay

individuals and couples on the basis of their sexual orientation, the statutes are inconsistent with the constitutional principles embodied in the California Constitution." (*Ibid.*)

Similarly, in *Gould v. Grubb* (1975) 14 Cal.3d 661, 670-672 (*Gould*), this Court held that the practice of listing incumbents first on ballots was subject to strict scrutiny because it diluted the weight of votes supporting non-incumbent candidates. Because of this impact on the fundamental right to vote, the Court determined that the provision violated state equal protection provisions. (*Ibid.*; see also *People v. Barrett* (2012) 54 Cal.4th 1081, 1114, 1148 (conc. & dis. opn. of Liu, J.) [finding state equal protection violation where statutory scheme provided notice of the right to a jury trial to allegedly mentally ill persons but not allegedly intellectually disabled persons, although legislators were not motivated by animus toward the latter].)

This Court's equal protection jurisprudence provides a well-established basis for granting petitioners' claim and issuing a writ of mandate.[26]

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[26] In its small body of selective enforcement cases, this Court has either declined to differentiate the state Constitution's equal protection guarantee from the federal guarantee or has focused exclusively on the federal constitution, which requires proof of intentional discrimination. (See, e.g., *People v. Montes* (2014) 58 Cal.4th 809, 828-832 [discussing claim only under federal Constitution]; *Manduley v. Super. Ct.* (2002) 27 Cal.4th 537, 572 ["Although we recognize our authority to construe the state Constitution independently [citation], this court has not done so when considering analogous claims of arbitrary prosecution"].) But this Court has not addressed the kind of

E. *McCleskey* addressed a claim under the federal Constitution and is inapplicable here

Federal jurisprudence has taken a different tack in analyzing statistical evidence of class-based disparities. In *McCleskey*, *supra*, 481 U.S. at pp. 291, fn. 7, 292, Justice Powell, writing for a bare majority over the strenuous dissent of four justices, held that McCleskey's statistical proof of racial disparities in the application of the death penalty was insufficient to establish an equal protection violation under the federal Constitution. The court held that to prevail, a defendant must prove the discrimination was intentional and prejudicially affected their case. (*Id.* at p. 292.) While acknowledging that in other contexts it had accepted statistical evidence "as the sole proof of discriminatory intent" (*id.* at p. 293), the court nonetheless concluded that McCleskey's study, conducted by David Baldus, was "clearly insufficient" to support an inference of

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systemic, as-applied empirical challenge that petitioners present here. (See, e.g., *Manduley*, at p. 569 [petitioners did not allege that law expanding prosecutors' discretion to charge children as adults "has had any discriminatory effect" and predictions that it would lead to racial disparities were "speculati[ve]"].) And requiring intent is contrary to the Court's broad equal protection precedent, as discussed above. Moreover, this Court's selective enforcement cases have not distinguished the state equal protection jurisprudence discussed in part II.D of this memorandum and have not examined the *Teresinski* circumstances or applied the other principles of state constitutional interpretation discussed in parts II.C, II.E.1, and II.E.2 of this memorandum.

discriminatory purpose of any decision maker in the sentencing process (*id.* at p. 297).[27]

The high court's holding stands in sharp contrast to this Court's precedent that no such purpose or intent is required under the state equal protection guarantee in disparate impact cases.

1. United States Supreme Court analyses of federal constitutional provisions do not govern

Notwithstanding *McCleskey*'s narrow interpretation of the federal equal protection clause, in interpreting the state Constitution, this Court has the authority—indeed, the duty—to apply its own, broader equal protection jurisprudence. This Court has repeatedly confirmed that California law is the primary source for interpreting state constitutional provisions and that the Court may reject interpretations of similar federal provisions. United States Supreme Court cases "are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law." (*Serrano II*,

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[27] The court declared that the disparities identified in the Baldus study were an "inevitable part" of the criminal legal system. (*McCleskey*, *supra*, 481 U.S. at p. 312.) And it feared that to rule in McCleskey's favor would invite similar claims for penalties other than death. (*Id.* at p. 315.) Such a concern is irrelevant in a proper constitutional analysis and cannot provide a compelling reason to ignore the stark racial disparities demonstrated here. (Cf. *Ramos v. Louisiana* (2020) 140 S.Ct. 1390, 1402 ["When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses"].)

supra, 18 Cal.3d at p. 764.) As Justice Liu has emphasized, "'as the ultimate arbiters of state law,'" state courts have "'the prerogative and duty to interpret their state constitutions *independently*.'" (*Buza*, *supra*, 4 Cal.5th at p. 702 (dis. opn. of Liu, J.); cf. *id.* at pp. 684-685 & fn. 8 [suggesting "cogent reasons" should exist before rejecting high court analyses, though Court would not "deny[] or denigrat[e its] power and duty to depart from those decisions when sufficient reasons appear"], 706 (dis. opn. of Cuéllar, J.) [while a high court case "merits 'respectful consideration' when its analysis is relevant, our own constitution deserves far more than that"]; *People v. Monge* (1997) 16 Cal.4th 826, 871 (dis. opn. of Werdegar, J.) ["good reasons exist to rely on our state Constitution even before we consider whether the federal Constitution applies"].)

2. *Teresinski* provides cogent reasons to reject *McCleskey*'s flawed reasoning

Application of the factors outlined in *People v. Teresinski* (1982) 30 Cal.3d 822 (*Teresinski*), considered in determining when to depart from federal interpretations of federal provisions, also confirms that this Court should reject *McCleskey*'s analysis.

In *Teresinski*, *supra*, 30 Cal.3d at pp. 835-837, this Court identified four circumstances that weigh against following federal precedent: (1) where the language or history of the California Constitution suggests a different resolution; (2) where the federal opinion is a departure from federal precedent; (3) where the federal opinion was issued by a divided court and has attracted academic criticism; and (4) where the federal opinion is

inconsistent with California precedent. The existence of any one of these circumstances may counsel against adopting federal law. (See, e.g., *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 510-514 (*Gerawan Farming*) [two factors supported a more expansive reading of the California Constitution's free speech guarantee]; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1242-1243 [presence of one factor was sufficient to reject high court's interpretation of federal provision].)

Each of the *Teresinski* circumstances is present here, compelling the conclusion that this Court should not follow *McCleskey*.

a. Language and history of the California equal protection guarantee

The federal equal protection clause and article I, section 7, subdivision (a) of the California Constitution differ in important ways.

The federal clause establishes an affirmative prohibition directed toward specific actors: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., 14th Amend., § 1) Correspondingly, federal law requires a showing that the actor (the "state") affirmatively disobeyed the provision's dictate ("shall . . . [not] deny").

In contrast, the state guarantee is phrased in the passive voice: "A person may not be . . . denied equal protection of the

laws." (Cal. Const., art. I, § 7, subd. (a).)[28] This use of the passive voice indicates a broader prohibition of discriminatory conduct and greater protection for the public.

This Court has already explained that "[u]nlike the due process and equal protection clauses of the Fourteenth Amendment, which by their explicit language operate as restrictions on the actions of states, the California constitutional provision contains no such explicit 'state action' requirement." (*Gay Law Students Assn. v. Pac. Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 468, fn. omitted, superseded by Gov. Code, § 12940, subds. (a)-(d), (j); see also Cruz, *Equality's Centrality: Proposition 8 and the California Constitution* (2010) 19 Rev. L. & Soc. Justice 45, 60 & fn. 105 [noting distinction].) By focusing on the harm caused to the subject of an equal protection violation—a "person"—article I, section 7(a) of the California Constitution makes clear that the identity and intentions of a specific actor do not control. Acknowledging the difference between the texts, this Court has noted that "we do not consider ourselves bound by [federal equal protection] decisions in interpreting the reach of the safeguards of our state equal protection clause." (*Gay Law Students Assn.*, at p. 469.)

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[28] California's other two equal protection provisions also differ from the federal clause. Article I, section 7, subdivision (b) states: "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." Article IV, section 16, subdivision (a) states: "All laws of a general nature have uniform operation."

This divergence between constitutional texts provides a reason to reject application of *McCleskey*'s narrow holding that only intentional discrimination by an identified actor will deprive a person of equal protection. As the state equal protection cases discussed in part II.D of this memorandum demonstrate, only harmful impact need be shown where a suspect classification is involved.

b. Departure from federal precedent

Teresinski's second factor asks whether the federal analysis "overrule[d] past precedent or limit[ed] previously established rights under the federal charter." (*Teresinski*, *supra*, 30 Cal.3d at p. 836.) When the issue is one of first impression, this Court may look to see if the opinion conscientiously applied relevant law. (*Gerawan Farming*, *supra*, 24 Cal.4th at p. 511 [high court's analysis "did indeed do violence to the law that it took into its hands"].)

McCleskey was the first time the United States Supreme Court directly addressed the claim that a state's death penalty scheme was unconstitutional due to racial discrimination. The majority "fail[ed] to apply . . . well-established equal protection analysis" to McCleskey's case, holding statistical evidence of racial disparities, evidence that the system was "susceptible to abuse," and evidence of a history of discrimination in the Georgia system inadequate to raise an inference of discrimination. (*McCleskey*, *supra*, 481 U.S. at pp. 354-359, 361 (dis. opn. of Blackmun, J.).) The majority distinguished McCleskey's claim from those where the Court had accepted statistics in support of

discriminatory purpose because, it stated, the previous statistical proof related to "fewer entities," involved "fewer variables," and gave "the decisionmaker . . . an opportunity to explain the statistical disparity." (*Id.* at pp. 295-296.)

As commentators have repeatedly observed, these distinctions do not withstand scrutiny, and *McCleskey* dramatically departed from prior law. (See, e.g., Haney-López, *Intentional Blindness* (2012) 87 N.Y.U. L.Rev. 1779, 1785 (Haney-López) [*McCleskey's* "malicious intent" approach replaced a "contextual intent" approach that considered statistical, historical, and sociological evidence establishing patterns of entrenched racism]; see also mem. part II.E.2.c, *post* [discussing scholarly criticism].)

c. A divided high court and scholarly criticism

Third, courts may consider whether the federal opinion came from a divided court and the tenor of its reception by legal scholars: "[W]e have on occasion been influenced not to follow parallel federal decisions by the vigor of the dissenting opinions and the incisive academic criticism of those decisions." (*Teresinski*, *supra*, 30 Cal.3d at p. 836; see also *Gerawan Farming*, *supra*, 24 Cal.4th at p. 511.) This factor also favors rejecting *McCleskey*.

Four justices vigorously dissented from the majority opinion in *McCleskey*, offering 48 pages of contradictory analyses. Justices Brennan and Blackmun each argued, for instance, that the majority had inappropriately focused on whether McCleskey's

sentence was actually influenced by race, rather than on the risk of such influence. (*McCleskey*, *supra*, 481 U.S. at pp. 322-323 (dis. opn. of Brennan, J.); *id.* at p. 345 (dis opn. of Blackmun, J.).) Justice Brennan criticized the majority for its "fear of too much justice." (*Id.* at p. 339.)

Since the high court decided *McCleskey*, several former United States Supreme Court justices have questioned the opinion directly or indirectly. A few years after Justice Powell's retirement, his biographer asked him "if, given the chance, he would change his vote in any case he had presided over. 'Yes,' Powell told him. '*McCleskey v. Kemp*.'"[29] In his dissent from denial of certiorari in *Callins v. Collins* (1994) 510 U.S. 1141, 1153, Justice Blackmun declared that "race continues to play a major role in determining who shall live and who shall die." In his concurring opinion in *Baze v. Rees* (2008) 553 U.S. 35, 85, Justice Stevens explicitly criticized *McCleskey*, stating that the court had allowed "the risk of discriminatory application of the death penalty" to "continue to play an unacceptable role in capital cases." And Justice Breyer, sometimes joined by Justice Ginsburg, repeatedly emphasized—without mentioning *McCleskey* by name—that disparities correlating with race of victim, among other factors, call into question the constitutionality of the death penalty. (See *Glossip v. Gross* (2015) 576 U.S. 863, 908, 918 (*Glossip*) (dis. opn. of Breyer, J.);

[29] (Neklason, *The 'Death Penalty's Dred Scott' Lives On* (June 14, 2019) The Atlantic.)

Sireci v. Florida (2016) 137 S.Ct. 470, 471 (dis. from denial of cert.).)

The scholarly disapproval of *McCleskey* has been trenchant and enduring. (See, e.g., Williams, *The Deregulation of the Death Penalty* (2000) 40 Santa Clara L.Rev. 677, 708 ["Criticism of the *McCleskey* decision has been widespread"] and fn. 219 [citing seven articles].) As one legal scholar has observed, *McCleskey* "was widely condemned when first handed down, and the passage of time has hardly softened the critical appraisal." (Berman, McCleskey *at 25: Reexamining the "Fear of Too Much Justice"* (2012) 10 Ohio St. J. Crim. L. 1, 1; see Sundby, *The Loss of Constitutional Faith:* McCleskey v. Kemp *and the Dark Side of Procedure* (2012) 10 Ohio St. J. Crim L. 5, 5 ["legal and lay commentators quickly compared *McCleskey* to infamous decisions like *Dred Scott*, *Korematsu*, and *Plessy*," and currently "a legal scholar can invoke *McCleskey* confident that the reader will understand the case is being used as shorthand for 'cases in which the Supreme Court failed the Constitution's most basic values'"].)

Scholars noted that in the 25 years after *McCleskey* was decided, "only one . . . racial discrimination challenge ha[d] succeeded and that was in a very idiosyncratic setting." (See Blume & Johnson, *Unholy Parallels Between* McCleskey v. Kemp *and* Plessy v. Ferguson*: Why* McCleskey *(Still) Matters* (2012) 10 Ohio St. J. Crim. L. 37, 37.) In short, *McCleskey's* insistence on proof of intent has "rendered the actual injury imposed upon vulnerable social groups extraneous to [federal] constitutional

analysis" (Haney-López, *supra*, 87 N.Y.U. L.Rev. at p. 1850) and created "an implicit imprimatur on racial discrimination" in capital sentencing (Baldus et al., *Racial Discrimination and the Death Penalty in the Post*-Furman *Era: An Empirical and Legal Overview, with Recent Findings From Philadelphia* (1998) 83 Cornell L.Rev. 1638, 1735).

d. Inconsistent with California precedent

The fourth *Teresinski* factor asks whether adopting federal law would "overturn established California doctrine affording greater rights to the defendant." (*Teresinski*, *supra*, 30 Cal.3d at p. 837.) *McCleskey's* conclusions are flatly inconsistent with longstanding state equal protection jurisprudence. As explained above, this Court has expressly declined to require proof of invidious intent to establish an equal protection violation under the California Constitution. (See mem. part II.D, *ante*.)

3. Washington declined to follow *McCleskey* in interpreting its state Constitution

In 2018, the Washington Supreme Court struck down that state's death penalty statute under the cruel punishment prohibition of the Washington Constitution "because it [was] imposed in an arbitrary and racially biased manner." (*Gregory*, *supra*, 427 P.3d at p. 627.) The court's ruling was based on a statistical analysis showing that Black defendants were between 3.5 and 4.6 times as likely to be sentenced to death by juries as non-Black defendants. (*Id.* at pp. 630, 633.) Emphasizing that it was not holding the death penalty unconstitutional per se (*id.* at

pp. 631, 636), the Washington Supreme Court looked to empirical and historical evidence and found itself "confident that the association between race and the death penalty is not attributed to random chance" (*id.* at p. 635).

Two Connecticut Supreme Court justices expressed similar views in 2015. (*Santiago*, *supra*, 122 A.3d at p. 85 (conc. opn. of Norcott & McDonald, JJ.).) After detailing statistical data demonstrating that defendants who kill White victims were disproportionately sentenced to death, they found a strong likelihood that "systemic racial biases continue[d] to infect the capital punishment system in Connecticut." (*Id.* at p. 95.) The justices urged other state high courts to carefully examine "whether the legal standard articulated in *McCleskey* . . . affords adequate protection to members of minority populations who may face the ultimate punishment." (*Id.* at p. 102.)

III. CALIFORNIA'S CAPITAL PUNISHMENT SCHEME, AS APPLIED, VIOLATES THE STATE EQUAL PROTECTION GUARANTEE

As described in detail in part II.D of this memorandum, a system that creates disparate impacts for a suspect class, such as a racial group, is unconstitutional under California's equal protection guarantee unless the state can prove the discriminatory scheme is necessary to achieve a compelling governmental interest. (See *Marriage Cases*, *supra*, 43 Cal.4th at pp. 847-848 [employing strict scrutiny analysis].) Powerful research establishes substantial statewide racial disparities in California's death sentencing. (See petn. part III.A, *ante*.) This

accumulated evidence leaves little doubt that the application of California's death penalty scheme results in persistent and substantial racial disparities. Because these disparities are not explained by legitimate race-neutral factors but are readily explained by the various bias-introducing procedures inherent to California's death penalty system (see petn. part III.B, *ante*), they violate the state Constitution's guarantee of equal protection.

A. The evidence establishes significant disparities based on defendant and victim race

As detailed in part III.A.2.a of the petition, the evidence of racial disparities in the application of California's death penalty system is overwhelming. Indeed, after reviewing nine of the studies presented above, Donohue concluded that they "collectively provide powerful and compelling evidence that racial factors have marred capital sentencing outcomes in the state." (Exh. S at p. 498.) He emphasized: "The collective strength of the evidence of racial bias in the implementation of the California death penalty that emerges from my evaluation of these . . . studies is powerful. Race has played a substantial and significant role in determining who lives and dies for crimes that are otherwise similar." (*Id.* at p. 513.)

For example, as explained above, Grosso and her colleagues found substantial disparities in sentencing outcomes as well as in the prosecutorial decision to allege a special circumstance and the jury's decision to choose death. (Exh. A at pp. 63-65.) They analyzed a sample of 1,900 California homicide convictions and

used multiple statistical models to compare similarly situated cases and defendants. (*Id.* at pp. 5, 23.) They found significant racial disparities that were not explained by legitimate race-neutral factors. (*Id.* at p. 11.)

The researchers found that Black people were between 4.6 and 8.7 times more likely and Latino people were between 3.2 and 6.2 times more likely to be sentenced to death than all others similarly situated. (Exh. A at p. 7.) Defendants of any race charged with killing at least one White person were between 2.8 and 8.8 times more likely to be sentenced to death than defendants charged with killing only non-White people. (*Id.* at pp. 11-12.) All told, the study's results, "confirmed by multiple statistical approaches, unmistakably demonstrate that race has infected the California sentencing process." (*Id.* at p. 65.)

The Grosso study was peer-reviewed by highly qualified experts who opined that the methodology was "statistically sound" (exh. T at p. 517 [Donohue letter]); the findings were "scientifically valid and reliable" (exh. C at p. 76 [Lynch letter]); and the authors had contributed a "remarkable study that [met] the highest standards of legal and empirical research" (exh. D at p. 78 [Pierce & Radelet letter]). Donohue declared: "the comprehensive analysis goes straight to the heart of the important empirical question of whether racial disparities mar California's capital regime." (Exh. T at p. 517.) He continued: "the report provides abundant support for [Grosso and colleagues'] overall findings of large racial disparities in death sentencing in California as well as in the decisions of prosecutors and juries in

this capital process." (*Ibid.*; cf. *Gregory*, *supra*, 427 P.3d at p. 634, fn. 7 [crediting results of empirical study "especially when professors and social scientist researchers across the field characterize it as a 'rigorous and thorough study'"].)

The results of the Grosso study are consistent with findings by Petersen, who examined homicides over a longer period of time but in somewhat less detail. (See exh. E at p. 83; petn. part III.A.2.b.) He too found significant race-of-defendant and race-of-victim disparities. (Exh. E at p. 82.) Moreover, the Grosso and Petersen studies confirm what Pierce and Radelet found in 2005. (See petn. part III.A.2.c.) Studying California homicide data from 1990 through 1999, they observed strong race-of-victim effects, with White-victim cases most likely to result in a death sentence, especially when the defendant was Black. (Exh. G at p. 167.)

Finally, these statewide studies are consistent with numerous county-specific studies. (Petn. part III.A.3.) Analyses of Riverside, San Diego, and Santa Clara Counties all found significant racial disparities in death sentencing. (See exh. H at p. 212; exh. I at p. 245; exh. J at pp. 256-257.) For example, in Riverside County, Black people were 14 times, and Latinos almost 11 times, more likely than similarly situated White people to be sentenced to death. (Exh. H at p. 212.) Studies of San Diego, Los Angeles, San Joaquin, and San Francisco Counties have all revealed disparities at some step along the way toward a death sentence. (See exh. L at p. 344; exh. M at p. 359, exh. N at pp. 384, 386; exh. O at pp. 426-428; exh. P at pp. 443-444; exh. Q at p. 457.)

The disparities documented by the studies discussed in part III.A of the petition are substantial and meaningful under any reasonable measure and are constitutionally unacceptable. Indeed, the magnitudes of these disparities are comparable to—or greater than—those in *Gregory*, *supra*, 427 P.3d at p. 633, where regression models showed that penalty phase juries were between 3.5 and 4.6 times as likely to sentence a Black defendant to death as a non-Black defendant. And unlike in Washington, the disparities exist at multiple stages in California's capital punishment scheme and are based on victim race as well as defendant race. (See Beckett & Evans, *supra*, 6 Colum. J. Race & L. at p. 100 [victim race did not significantly impact jury decisions; neither defendant nor victim race impacted prosecutorial decisions to seek a death sentence].) In short, petitioners' evidence "relentlessly documents the risk" that California death sentences are infected by racial discrimination. (*McCleskey*, *supra*, 481 U.S. at p. 328 (dis. opn. of Brennan, J.).)

B. Bias introduced by California's death-sentencing procedures explains the racial disparities

As explained in part III.B of the petition, California's exceptionally broad special circumstances statute provides ample opportunity for bias to permeate the state's death penalty regime. Between January 1978 and June 2002, "all the major death penalty states ha[d] substantially lower death-eligibility rates than California" (*Furman at 45*, 16 J. Empirical Legal Stud. at p. 722), yet "prosecutors [sought] a death sentence and juries impose[d] death sentences in only a small fraction of the death-

eligible cases" (*id.* at p. 729). California's special circumstances statute, combined with other core features of California's death penalty scheme—including broad prosecutorial discretion in charging special circumstances and seeking death, the capital jury selection process, improper prosecutorial penalty phase arguments, and confusing penalty phase instructions—have created a punishment system infected by racial disparities.

These features are not incidental to California's capital punishment system; they are intrinsic to the scheme's operation. As such, no remedy short of a bar on capital prosecutions under this scheme and the imposition and execution of death sentences can cure the equal protection violation proven by the overwhelming evidence of racial disparities.

C. The Attorney General cannot show that racially discriminatory enforcement of the death penalty is necessary to achieve a compelling government interest

The Attorney General bears the heavy burden of justifying the discrimination inherent to California's death penalty scheme under a strict scrutiny analysis. (See *Marriage Cases*, *supra*, 43 Cal.4th at pp. 847-848.) He must demonstrate that the classifications created by the scheme as applied "are necessary to achieve a compelling governmental interest." (*Gould*, *supra*, 14 Cal.3d at p. 672.) He cannot.

The cost of applying the state's most severe punishment in such a starkly discriminatory manner is not justified by any compelling state interest. A death sentence "represents a complete and utter rejection of the personhood and humanity of

the condemned, an irreversible banishment from the moral community." (*Santiago*, *supra*, 122 A.3d at p. 99 (conc. opn. of Norcott and McDonald, JJ.).) Defendants condemned to die—even those who are never executed—bear the weight of society's revulsion and abandonment for the rest of their lives.

The death penalty has not been reliably shown to deter crime, particularly when, as in California, there are considerable delays in carrying it out. (See *Glossip*, *supra*, 576 U.S. at pp. 930-932 (dis. opn. of Breyer, J.).) The sanction forswears rehabilitation as a penological goal, and incapacitation is achieved equally by life without parole. (*Id.* at p. 929.) Thus, the only purpose the death penalty serves is retribution. (*Id.* at p. 932; see also *Gregory, supra*, 427 P.3d at pp. 636-637 [holding state's death penalty as administered fails to serve legitimate penological goals and is invalid under state constitution]; *Santiago, supra,* 122 A.3d at p. 73 [same].) But the harm of tolerating racial discrimination in exacting the state's ultimate retribution profoundly damages communities of color, perpetuates corrosive biases, and rightly undermines confidence in the fairness of the justice system. (See Reparations Task Force Report, *supra*, at pp. 398-419.)

This Court has acknowledged that the legacy of racial discrimination "persists powerfully and tragically to this day" and has promised to "uphold our fundamental constitutional values," including "the promise of equal justice under law."[30]

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[30] (Conneely, Supreme Court of California Issues Statement on Equality and Inclusion (June 11, 2020).)

Those values far outweigh any remote, marginal value the death penalty might serve as presently administered.

IV. CONCLUSION

This Court should grant a writ of mandate and provide the relief prayed for in the petition on the ground that California's death penalty statutes, as applied, violate the fundamental guarantee of equal protection enshrined in the state Constitution.

Dated: April 9th, 2024.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

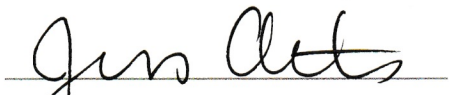
I, JESSICA E. OATS, hereby declare:

I am an attorney licensed to practice law in the State of California and a Senior Deputy State Public Defender. I am counsel 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 17,804 words, including footnotes and excluding cover information, tables, signature blocks, the certificate of interested entities or persons, the verification, 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 9th day of April 2024 at Charlottesville, Virginia.

Respectfully submitted,



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PROOF OF SERVICE

My business address is Wilmer Cutler Pickering Hale and Dorr LLP, 350 South Grand Avenue, Suite 2400, Los Angeles, California 90071. My electronic service address is Jill.Folsom@wilmerhale.com. I am not a party to the instant case, and I am over the age of eighteen years.

On April 9, 2024, I caused the following documents:

PETITION FOR WRIT OF MANDATE

EXHIBIT VOLUME 1 (PAGES 1-259)

EXHIBIT VOLUME 2 (PAGES 260-517)

to be filed with ImageSoft TrueFiling ("TrueFiling") pursuant to California Rule of Court 8.212, and to be served by email via TrueFiling and via overnight delivery by depositing a sealed envelope with Federal Express, with delivery fees provided for, on the following party:

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

Executed on April 9, 2024 at Los Angeles, California.

Jill Hallie Folsom