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April 23, 2024

The Honorable Chief Justice and the Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Office of the State Public Defender, Eva Paterson, LatinoJustice PRLDEF, Ella Baker Center for Human Rights, and Witness to Innocence v. Bonta*, Case No. S284496
Amici Curiae Letter of Former California Jurists

To the Honorable Chief Justice and the Honorable Associate Justices of the California Supreme Court:

Amici curiae the Honorable Peter Espinoza, the Honorable Joseph Grodin, the Honorable J. Anthony Kline, and the Honorable Carlos Moreno respectfully submit this letter under California Rule of Court 8.500(g) to explain why the Court should issue an order to show cause and fully review the petition. Amici are retired members of the California judiciary who have extensive experience with California's capital punishment regime, both from their service on the California courts and from their study of capital punishment in this State. Through that experience, amici have come to understand the equal protection question that the petition raises to be critically important, and they urge this Court to review the petition fully.

I. IDENTITY AND INTERESTS OF AMICI CURIAE

Amici have extensive experience with California's capital punishment regime at every level of the judiciary. The Honorable Joseph Grodin and the Honorable Carlos Moreno served as Associate Justices of this Court and, during their tenure, voted on hundreds of capital cases. The Honorable J. Anthony Kline, the former Presiding Justice of the First District Court of Appeal, reviewed numerous writs of capital cases from the trial courts throughout his almost forty years on the bench. During decades spent on the Los Angeles County Superior Court, Judge Espinoza presided over special-circumstances murder trials. During his tenure as the Supervising Judge of the Criminal Division, numerous capital cases were tried to Los Angeles County, and Judge Espinoza reviewed and approved funds under Penal Code section 987.9 for those cases. Amici also have significant experience with the special-circumstance regime from non-capital special-circumstance cases.

In addition to their service on the courts, Justice Moreno and Judge Espinoza have served on the State Committee for the Revision of the Penal Code, established by the California State Legislature in 2020 to "simplify and rationalize criminal law." (Cal. Com. on Revision of the Penal Code, Death Penalty Report (2021), p. 35 (hereafter Death Penalty Report).) During their tenure, the Committee undertook a "thorough examination" of California's capital punishment

system, including reviewing a wide range of research and receiving testimony from a diverse group of panelists that included legal scholars, researchers, and practitioners. (*Id.* at p. 4.)

Amici do not take a position on the merits of the equal protection claim in this letter brief. Instead, amici write to explain, based on their experience as members of the California judiciary, generally, and with the State's system of capital punishment, specifically, why the Court should fully review the petition.

II. SUMMARY OF ARGUMENT

The California Constitution guarantees to all the equal protection of the laws, but the writ petition presents troubling data that this promise has gone unfulfilled. As former justices and judges of the California courts, amici have seen firsthand what recent empirical studies make clear: Extreme racial disparities plague California's capital punishment regime. California's death row is disproportionately inhabited by people of color—for instance, Black Californians comprise about 34% of the State's death row population but comprise just 6.5% of the State's overall population.

The petition presents an ideal vehicle to consider the equal protection issues raised by those troubling racial disparities. While ordinary capital appeals typically involve a multitude of case-specific factual and legal claims and take many years to reach this Court, the writ petition would allow the Court to consider exhaustive argument and data on the particular equal protection claim raised and to do so immediately. Moreover, the writ petition presents a superior way to address this systemic issue than an ordinary capital appeal, which necessarily must prioritize arguments of the individual defendant over arguments about systemic problems in the State's regime of capital punishment. And efforts to reform the death penalty from the political branches do not counsel against review: Such efforts have not stopped the Court from addressing other ongoing constitutional violations before, and they need not stop the Court now.

Indeed, granting review and addressing the equal protection violation would fit squarely into this Court's prior cases. Although the U.S. Supreme Court rejected a similar equal protection challenge under the federal Constitution in *McCleskey v. Kemp* (1987) 481 U.S. 279, this Court has often recognized that state constitutional guarantees are distinct from corresponding rights under the federal Constitution. And, in the field of equal protection in particular, this Court has a long history of being among the first judicial bodies—if not the first—to recognize a violation, and having other jurisdictions follow suit. Put simply, the Court has not hesitated to be at the forefront of important constitutional issues before, and it should not do so now.

III. REASONS TO ISSUE AN ORDER TO SHOW CAUSE AND FULLY REVIEW THE PETITION

A. There are growing data of racial disparities in the death penalty's application.

The "overwhelming" data of racial disparities in the application of California's death penalty that the writ petition lays out is familiar to amici, both from their work on the bench and on the California Committee on the Revision of the Penal Code. (Writ Petn., at p. 86; see also *id.* at pp. 28-41.) Study after study has found that race is a significant factor in how the death penalty is administered in this State, and certain elements of California's death penalty regime are likely responsible for aggravating those disparities. Reviewing that data, the Committee on the Revision of the Penal Code concluded that "the death penalty as created and enforced in California has not and cannot ensure justice and fairness for all Californians." (Death Penalty Report, at p. 4.) A group of county prosecutors and the Governor have reached similar conclusions. (See Brief Amici Curiae of Six Present or Former District Attorneys in *People v. McDaniel*, No. S171393, (2020), at pp. 48-49 (hereafter District Attorneys Amici Curiae Brief); Proposed Brief of Amicus Curiae The Honorable Gavin Newsom in *People v. McDaniel*, No. S171393, at pp. 23-24 (hereafter Governor Newsom Amicus Brief).) The petition presents an opportunity for this Court to review that data and reach its own conclusion under the State's Constitution.

1. *A growing body of data demonstrate extreme racial disparities in the administration of the death penalty.*

As the California Committee on Revision of the Penal Code summarized in 2021, "studies about racial bias in the administration of the death penalty are remarkably consistent across time periods and research designs and show a consistent theme: race often determines when the death penalty is sought and when it is imposed." (Death Penalty Report, at p. 19.)

In California specifically, extensive studies have revealed stark racial disparities in the death penalty's application in the State. Most notably, California's death row is disproportionately made up of people of color. For example, Black Californians make up about 34% of California's death row population but are only 6.5% of the state population. (California Department of Corrections and Rehabilitation, Condemned Inmate Summary <https://www.cdcr.ca.gov/capital-punishment/condemned-inmate-summary-report/> [as of Apr. 11, 2024]; U.S. Census Bureau, Quick Facts California (2019) <https://www.census.gov/quickfacts/CA> [as of Apr. 11, 2024].)

Studies demonstrate that the race of the victim also greatly impacts the probability that a defendant is charged with, and receives, the death penalty. For example, a 2005 statewide study found that defendants charged with homicides involving non-Hispanic white victims were 3.7 times more likely to be sentenced to death than defendants charged with homicides involving non-Hispanic Black victims and 4.73 times more likely to be sentenced to death than

defendants charged with homicides involving Hispanic victims. (Pierce & Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999* (2005) 46 Santa Clara L.Rev. 1, 19-20.)

Racial disparities are often even starker at the county level. In recent years in Los Angeles County, for example, 95% of people sentenced to death were people of color. (Death Penalty Report, at p. 20; see also Governor Newsom Amicus Brief, Attachment A, p. 79.) Similarly, in Orange County, 89% of defendants sentenced to death from 2010 to 2015 were people of color. (Fair Punishment Project, Too Broken to Fix Part II: An In-depth Look at America's Outlier Death Penalty Counties (2016), p. 43 [finding that 44% of those sentenced to death were Black, although Black residents only made up 2% of the county's population].)

2. *Certain aspects of the California criminal legal system appear to aggravate racial disparities.*

In studying this data, the Committee on Revision of the Penal Code concluded that "many sources contribute to racially biased practices and outcomes in the context of the death penalty." (Death Penalty Report, at p. 23.) Two factors may make the racial disparities in California particularly pronounced.

First, the California Penal Code gives prosecutors extremely broad discretion in making charging decisions, which can allow preexisting biases—including implicit racial biases—to potentially influence those decisions. As in many states, a defendant is eligible for the death penalty in California when a prosecutor charges an aggravating factor (in California, called a "special circumstance") in a case involving first-degree murder—which requires a jury, upon a finding of guilt, to sentence a defendant to either life without parole or death. (See, e.g., Pen. Code, §§ 190.2-190.3.) But the California Penal Code lists *32* special circumstances, making California's death penalty regime one of the broadest in the country. (See Pen. Code, § 190.2; Grosso et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement* Furman*'s Narrowing Requirement* (2019) 66 UCLA L.Rev. 1394, 1404 [explaining that the "Briggs Initiative's sponsors promised California voters in campaign and ballot materials that the statute would expand the applicability of the death penalty to 'every murderer'"]; Baldus et al., Furman *at 45: Constitutional Challenges from California's Failure to (Again) Narrow Death Eligibility* (2019) 16(4) J. Empirical Legal Studies 693, 703, fn. 54 [discussing number of special circumstances]; Death Penalty Information Center, Aggravating Factors By State <https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/aggravating-factors-by-state> [as of Apr. 11, 2024].) Despite that broad charging authority, prosecutors generally lack uniform guidelines or written policies for seeking the death penalty, and so there is "great variation in the practices for charging special circumstances." (See Cal. Com. on the Fair Administration of Justice, Final Report, Death Penalty (2008), at pp. 152-155; see also Death Penalty Report, at p. 23, fn. 171 [noting that "Committee staff have been unable to find published practices or policies on the death penalty from any District Attorney office throughout the state"].) The end result is a system of tremendous discretion, and little to guide that

discretion—all of which invites the possibility of bias, including racial bias, influencing charging decisions. As a group of California county prosecutors themselves recognized, this system "raises the disturbing possibility that [charging] decisions are influenced by racial and ethnic discrimination" and "the data suggests that, unfortunately, these decisions are influenced, consciously or unconsciously, by race." (District Attorneys Amici Curiae Brief, at p. 31.)

Second, as the Committee on Revision of the Penal Code noted, "the jury selection process for capital offenses deserves special consideration" when considering sources of racial disparities in the death penalty. (Death Penalty Report, at p. 23.) To start, juries in California are "disproportionately white," and "[t]his is especially true in capital cases because of the process of 'death qualification,' where potential jurors can be dismissed if they express reservations about the death penalty." (*Ibid*.) Whiter juries may, in turn, lead to disparate outcomes as studies have shown that white jurors are more likely to vote for the death penalty in cases when the defendant is not white and in cases where the victim is white. (Lynch & Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination* (2009) 33 Law & Hum. Behav. 481, 489-491.) Put more simply, the proportion of white jurors is a "significant predictor of death verdicts." (*Id*. at p. 485.)

The consensus of the studies is clear and consistent with amici's own experience and study: There are extreme racial disparities in the administration of California's death penalty, which are likely compounded by systemic issues in that system.

B. This writ petition is the appropriate mechanism to examine the constitutionality of the death penalty in light of the growing body of data of racial disparities.

As the writ petition explains, these troubling racial disparities implicate a serious equal protection question. (Writ Petn., at pp. 85-90.) The Court should review the petition fully to address that question. The writ petition provides a superior vehicle to the ordinary automatic appeal process for considering this weighty question. And potential reform efforts among the political branches do not provide a reason for this Court to stay its hand.

1. *The writ petition provides an ideal vehicle to address the equal protection question.*

The writ petition presents a paradigmatic legal question of California's equal protection doctrine. This Court "bears the ultimate judicial responsibility for resolving questions of state law, including the proper interpretation of provisions of the state Constitution." (*People v. Chavez* (1980) 26 Cal.3d 334, 352; cf. Cal. Const., art. I, § 24 ["Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."].) In doing so, the Court "must recognize [its] personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions." (*Chavez*, at p. 352.) This obligation is the Court's alone: "it cannot be delegated to . . . any other person or body." (*Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 903 (conc. opn.

of Lucas, C.J.).) The increasing—and increasingly severe—racial disparities identified above (part III.A, *ante*) raise weighty issues concerning the California Constitution's guarantee of equal protection, and such issues lie at the heart of the Court's authority and responsibility to interpret and apply California's laws.

While the Court sometimes encounters issues concerning the California Constitution's guarantee of equal protection elsewhere, particularly in automatic appeals from judgments of death (e.g., *People v. Tran* (2022) 13 Cal.5th 1169, 1235-1236), the petition presents a superior vehicle to an ordinary automatic appeal to address these issues for four separate reasons.

First, unlike the Court's discretionary-review process, its ordinary capital appellate process incentivizes capital defendants to devote attention to as many potentially meritorious claims as possible—leaving the Court without exhaustive argument on key claims. Capital defendants must raise every potentially meritorious claim on automatic appeal or risk forfeiture, both on direct appeal and in collateral review. (See *Tran*, *supra*, 13 Cal.5th at p. 1210 [holding forfeiture occurs by not raising a claim either in the trial court or in briefs in the Supreme Court]; *In re Dixon* (1953) 41 Cal.2d 756, 762 [holding defendants cannot raise claims in state habeas proceedings that they could have raised on direct appeal but did not]; *Johnson v. Lee* (2016) 578 U.S. 605, 606 [same for federal habeas].) What's more, capital cases "raise complex additional legal and factual issues beyond those raised" in typical criminal cases. (*People v. Bigelow* (1984) 37 Cal.3d 731, 743; see also Cal. Rules of Court, rule 8.631(b)(1) [recognizing "the number, significance, and complexity of the issues generally presented in appeals from judgments of death"].) The pressure to raise all potentially meritorious claims at the outset coupled with the inherent complexity of capital cases frequently results in automatic appeals featuring copious legal issues. (E.g., *Tran*, at pp. 1236-1237 [noting over 20 claims in automatic appeal].) All of this invariably means that the typical capital appeal cannot provide the Court with exhaustive argument on a handful of key issues in a way that this case could. (Cf. *In re Lopez* (2023) 14 Cal.5th 562, 592 [deciding against resolving certain issues "given the size and complexity of the underlying trial record"]; Cal. Rules of Court, rule 8.516(b)(3) ["The court need not decide every issue the parties raise or the court specifies."].)

Second, ordinary litigation cannot address the systemic issues identified here as efficiently and directly as the writ petition could. The issues identified here transcend any particular capital case, because the alleged constitutional infirmities affect all capital defendants, not just some. An individual capital case cannot address these systemic issues as well as this case because capital defendants are not, for self-evident reasons, repeat litigants. Unlike a repeat litigant, which "can make choices aimed at setting favorable precedents for *future* cases," litigants like capital defendants are "only concerned with winning the case at hand." (Epps & Ortman, *The Defender General* (2020) 168 U.Pa. L.Rev. 1469, 1483.) That might mean that capital defendants make "arguments that are contrary to the interests of criminal defendants collectively." (*Id.* at p. 1471.) By contrast, this case supplies the Court with the best possible arguments concerning these systemic issues. Like the class action, the "importance" of the writ

petition "as a device to remedy systemic discrimination seems obvious." (*Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 366, fn. 15.)

Third, granting review would allow the Court to confront the issues and legal arguments the writ petition raises now instead of waiting for many more years before they appear in an ordinary capital case. Capital cases can take decades to wind through direct and collateral review. *People v. Potts* (2019) 6 Cal.5th 1012 is an exemplar. There, Justice Liu observed that the death judgment at issue "was issued in 1998," that the Court "affirm[ed] the judgment on direct appeal" twenty-one years later, and that there is "more litigation to come in the form of habeas corpus petitions in state and federal court." (*Id.* at p. 1063 (conc. opn. of Liu, J.).) As Justice Liu noted, this "timeline is typical of our capital cases." (*Ibid.*) Indeed, data from 2008 show that the time between a capital defendant's opening brief and the Court's decision was, at that time, about half a decade. (Uelmen, *Death Penalty Appeals and Habeas Proceedings: The California Experience* (2009) 93 Marquette L.Rev. 495, 499.) The glacial pace of automatic appeals means it may take many years, if not decades, for this Court to confront the contemporary data of the death penalty's racially disparate application; review "is limited to the appellate record," meaning claims "dependent upon evidence and matters not reflected on appeal" are not ordinarily considered on appeal. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1183.) By contrast, this case offers the Court contemporary data and arguments that it would lack elsewhere—and this case offers them now, not later.

Fourth, this case offers the Court a prime opportunity to subject the contemporary data marshaled here to adversarial testing, allaying concerns that the Court expressed in *People v. Hardin* (2024) 15 Cal.5th 834. In *Hardin*, the Court noted its reluctance to rely on empirical studies that had not "been the subject of any sort of adversarial testing." (*Id.* at p. 979.) This dearth of testing, the Court explained, meant that it lacked "insight into either the methodology employed or the ultimate accuracy or significance of the results." (*Ibid.*) But *Hardin*'s concerns spotlight exactly why this case is a superior vehicle to the typical capital case. In an ordinary capital case, trial provides the likeliest point for any empirical data to undergo adversarial testing. And, because capital cases take decades to wind through direct review, such empirical data that this Court might see is likely to be decades out of date. By contrast, the relevant contemporary data have already been collected and can be presented immediately if the Court grants review. That, in turn, provides parties the opportunity to challenge the studies' methodologies, findings, and significance. In short, adversarial testing of data produced at the outset for the main issues in dispute will provide the Court with the insight that it lacked in *Hardin*.

2. *Any political reform efforts do not provide a reason to decline review of the legal question that the writ petition presents.*

The Court should not decline review of this ideal vehicle because of potential or actual reform efforts among the political branches. While the Governor has issued a moratorium on executions (Governor's Exec. Order No. N-09-19 (Mar. 13, 2019)), that kind of political action

does not resolve the legal issue—whether the death penalty's racial disparities violate the constitutional guarantee of equal protection—that exists right now. Besides, courts have long recognized that capital defendants are uniquely harmed by the very fact that they have been sentenced to death. When "a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence," the U.S. Supreme Court observed over a century ago, "one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place." (*In re Medley* (1890) 134 U.S. 160, 172; see also *Glossip v. Gross* (2015) 576 U.S. 863, 926-927 (dis. opn. of Breyer, J.) [observing that the *Medley* court was "describing a delay of a mere four weeks" while "[t]oday we must describe delays measured, not in weeks, but in decades"].) As weeks have become decades in California, the anguish that capital defendants face has become ever more acute, and the moratorium is no salve for it. And minorities bear the brunt of this unique harm, considering the robust data of racial disparities.

Just as the moratorium is no reason to deny review, reform efforts playing out in the political process are not either. The future success of these efforts—if they succeed at all—does not remedy the current legal violation. Tellingly, the Court has not wavered from answering other weighty constitutional questions in the face of reform efforts—legislative or otherwise. For instance, after the Court invalidated a statute limiting marriage to opposite-sex couples, it denied petitions for rehearing that would have stayed its ruling. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 757.) In so doing, the Court seemingly rejected the argument that it should stay its ruling "based on speculation that the voters might amend the Constitution" in an election months after its ruling. (See City and County of San Francisco's Answer to Proposition 22 Legal Defense and Education Fund's Petition for Rehearing at p. 5, *In re Marriage Cases* (2008) 43 Cal.4th 757 (S147999).) In other words, the Court remedied a current legal violation even though a political fix might have come from the ballot box. Similarly, the Court held unconstitutional the practice of setting bail at an amount that a person cannot afford to pay (*In re Humphrey* (2021) 11 Cal.5th 135, 143), even though, about three years before the decision, the Legislature enacted a law prohibiting the practice of cash bail, which had been repealed by a subsequent referendum. (McCrum, *California Bail Reform: Where Are We Now?* (May 9, 2022) Georgetown Journal on Poverty Law & Policy Online <https://www.law.georgetown.edu/poverty-journal/blog/california-bail-reform-where-are-we-now/> [as of Apr. 12, 2024].) Put differently, the Court remedied a current legal violation even as the Legislature and the voters disagreed about the proper political fix. The Court has thus heeded its obligation to address and remedy existing constitutional violations, even as reform efforts are underway or on the way, and it should do the same here.

Notably, other state supreme courts have not hesitated to confront constitutional questions about their death penalty systems in similar circumstances. For example, in 2018, the Washington Supreme Court invalidated Washington's death penalty because it was "imposed in an arbitrary and racially biased manner." (*State v. Gregory* (Wash. 2018) 427 P.3d 621, 627.) The court had invalidated Washington's death penalty scheme thrice before: in 1972, 1979, and

1981. (*Id.* at p. 626.) A moratorium on executions had existed since 2014. (*Id.* at p. 636, fn. 10.) Political efforts to abolish the death penalty were underway even before the court's decision. (Death Penalty Information Center, *Washington State Senate Passes Death Penalty Abolition Bill* (Feb. 15, 2018) <https://deathpenaltyinfo.org/news/washington-state-senate-passes-death-penalty-abolition-bill> [as of Apr. 12, 2024].)[1] Many other state supreme courts have invalidated their States' death penalty schemes—and each court has done so in the face of action from other branches or reform efforts from various advocates.[2] These examples underscore that reform efforts need not prevent this Court from addressing California's death penalty scheme.

C. This Court has long been at the forefront of articulating constitutional principles independent of those recognized by federal courts.

As the petition explains, the U.S. Supreme Court rejected an equal protection claim similar to that presented here under the federal Constitution in *McCleskey v. Kemp* (1987) 481

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[1] After the decision, the State repealed its death penalty law. (Death Penalty Information Center, *Washington's Unconstitutional Death-Penalty Law Stricken From the Books* (Apr. 24, 2023) <https://deathpenaltyinfo.org/news/washingtons-unconstitutional-death-penalty-law-stricken-from-the-books> [as of Apr. 12, 2024].)

[2] ***Connecticut.*** In 2012, the State repealed the death penalty prospectively, leaving intact death judgments that had already been rendered. (*State v. Santiago* (Conn. 2015) 122 A.3d 1, 9.) Two years later, the Connecticut Supreme Court held that applying the death penalty retroactively is unconstitutional under the state constitution's cruel and unusual punishment provision. (*Id.* at p. 12, fn. 9.)

Delaware. In 2016, the Delaware Supreme Court struck down the State's death penalty on Sixth Amendment grounds. (*Rauf v. State* (Del. 2016) 145 A.3d 430, 433-434.) This decision came amid political efforts to repeal the State's death penalty. (See Offredo, *Gov. Markell: I Will Sign Delaware Death Penalty Repeal* (May 8, 2015) Delaware Online <https://www.delawareonline.com/story/firststatepolitics/2015/05/07/markell-supports-death-penalty-repeal/70966740/> [as of Apr. 12, 2024].)

New Mexico. In 2009, New Mexico repealed its death penalty prospectively. (See AP, *Death Penalty Is Repealed In New Mexico* (Mar. 18, 2009) N.Y. Times <https://www.nytimes.com/2009/03/19/us/19execute.html> [as of Apr. 12, 2024].) A decade later, the New Mexico Supreme Court held that imposing the death penalty retrospectively would violate a state statute. (*Fry v. Lopez* (N.M. 2019) 447 P.3d 1086, 1092.)

New York. In 2004, the New York Court of Appeals held the State's death penalty scheme violated the Due Process Clause of the New York Constitution. (*People v. LaValle* (2004) 3 N.Y.3d 88, 100.)

Rhode Island. In 1979, the Rhode Island Supreme Court invalidated the State's death penalty statute on Eighth Amendment grounds. (*State v. Cline* (R.I. 1979) 397 A.2d 1309, 1311.)

U.S. 279. (Writ Petn., at pp. 75-85.) While amici do not take a position in this brief on the merits of an equal protection claim under the California Constitution, amici write to emphasize two points regarding the insignificance of *McCleskey*. First, the California Constitution provides distinct and often broader protections than the federal Constitution, including in the context of equal protection. Second, this Court has a long history of issuing decisions recognizing equal protection violations that, while ahead of other courts, serve as a blueprint for the recognition of similar violations under state and federal law across the country. Put differently, *McCleskey* should not give this Court pause about granting review: a decision recognizing an equal protection violation under the California Constitution where no such violation has been recognized under federal law would fit squarely into prior precedent from this Court.

1. *This Court has played a crucial role in protecting state constitutional rights that extend beyond those recognized under the federal Constitution.*

Article I, section 24 of the California Constitution provides: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." (Cal. Const. art. I, § 24.) This Court has often understood the California Constitution "to extend more broadly than its federal counterpart." (*Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998, 1004.) In "numerous decisions," the Court has interpreted the California Constitution to grant "protection to our citizens beyond the limits imposed by the high court under the federal Constitution." (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 354.)

For example, this Court has long affirmed a broader state constitutional right to counsel than is recognized under federal law. Unlike the federal right, the state right attaches "in *all* felony and misdemeanor proceedings whether actual imprisonment is to follow or not." (*Gardner*, *supra*, 6 Cal.5th at p. 1010, quoting *Mills v. Municipal Court* (1973) 10 Cal.3d 288, 301.) In *Gardner v. Appellate Division of Superior Court*, this Court recently extended the state constitutional right to counsel to criminal defendants during pretrial appeals of suppression orders. (*Id.* at p. 1011.)

The Court also interprets state double jeopardy principles to grant broader protections. As the Court explained, the "federal test, standing alone, is insufficient to protect interests that our state Constitution's double jeopardy clause is intended to safeguard." (*People v. Batts* (2003) 30 Cal.4th 660, 689.) *People v. Aranda* (2019) 6 Cal.5th 1077 thus held that state double jeopardy principles barred retrial after a partial acquittal verdict, even though the U.S. Supreme Court held that the federal double jeopardy clause did not require a court to accept a partial verdict. (See *Blueford v. Arkansas* (2012) 566 U.S. 599, 610.) The *Aranda* Court explained that the federal Supreme Court's decision "does not end the inquiry" because the California Supreme Court "construed the state double jeopardy clause to be more protective than its federal counterpart." (*Aranda*, at pp. 1086-1087.)

The Court understands state due process rights more expansively too. In *People v. Ramos* (1984) 37 Cal.3d 136, this Court invalidated a misleading jury instruction that suggested a death sentence could not be commuted. (*Id.* at p. 159.) Although the U.S. Supreme Court had

reached the opposite conclusion under the federal Constitution, the "state constitutional . . . claim cannot be resolved by a mechanical invocation of current federal precedent." (*Id.* at p. 152, quoting *Chavez*, *supra*, 26 Cal.3d at p. 352; see *California v. Ramos* (1983) 463 U.S. 992, 1010.) As the *Ramos* Court explained, "we cannot properly relegate our task to the judicial guardians of the federal Constitution, but instead must recognize our personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions." (*Ramos*, at p. 152, quoting *Chavez*, at p. 352.) In exercising that independent judgment, this Court determined that state due process guarantees required more.

As the petition explains in more detail, the California Constitution's equal protection guarantees are similar. This Court has long recognized that state guarantees "are 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 v. Priest* (1976) 18 Cal.3d 728, 764 (*Serrano II*); *People v. Barrett* (2012) 54 Cal.4th 1081, 1144 (conc. & dis. opn. of Liu, J.) [explaining that the "independent vitality of our state equal protection guarantee" demands more searching review than the federal Constitution's "less stringent standards"].) The state equal protection analysis rejects the "excessively artificial analysis" that "several federal equal protection cases have embraced." (*Brown v. Merlo* (1973) 8 Cal.3d 855, 865, fn. 7.) Because the writ petition presents a question under the state equal protection guarantee, *McCleskey*'s analysis of the federal equal protection right simply should not factor into the Court's decision about whether to fully review the petition.

2. *This Court has often recognized equal protection guarantees ahead of other courts.*

McCleskey is also of little import here because this Court has not hesitated in the past to be at the forefront of equal protection claims, issuing decisions that have transformed state and federal law across the country. For example, in *Perez v. Sharp* (1948) 32 Cal.2d 711, this Court recognized an equal protection right to interracial marriage, almost twenty years before the federal Supreme Court did so in *Loving v. Virginia* (1967) 388 U.S. 1. At the time of this Court's ruling in 1948, 38 States still prohibited interracial marriage, including six that enshrined the ban in their state constitutions. (Recognizing 40th Anniversary of Loving v. Virginia Legalizing Interracial Marriage, H.Res. No. 431, 110th Cong., 1st Sess. (2007).) In the two decades after *Perez*, despite "numerous attacks in both state and federal courts," no other court struck down a ban on interracial marriage. (*Loving v. Commonwealth* (Va. 1966) 147 S.E.2d 78, 80, revd. 388 U.S. at p. 2.) In *Loving*, however, the federal Supreme Court joined with *Perez*. *Loving* observed that the "first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the Supreme Court of California." (*Loving*, *supra*, 388 U.S. at p. 6, fn. 5.) The interpretation that this Court set forth became the national rule.

Similarly, in *Serrano v. Priest* (1971) 5 Cal.3d 584 (*Serrano I*), this Court became the first state supreme court to hold that disparities in public school spending based on district wealth violated equal protection guarantees. (*Id.* at pp. 590, 596, fn. 11.) The U.S. Supreme

Court did not follow suit. Following *Serrano I*, it upheld a school financing system based on district wealth against a federal equal protection challenge, expressing concern that the constitutional judgment in *Serrano I* would cause "an unprecedented upheaval in public education." (*San Antonio Independent School Dist. v. Rodriguez* (1973) 411 U.S. 1, 56.) Although the U.S. Supreme Court tolerated the inequality, this Court would not. Five years after its initial decision, this Court reaffirmed the equal protection violation under the California Constitution. (See *Serrano II, supra*, 18 Cal.3d at p. 768.) That "a majority of the United States Supreme Court have now chosen to contract the area of active and critical analysis . . . for federal constitutional purposes can have no effect upon the existing construction and application afforded our own constitutional provisions," this Court explained. (*Id.* at p. 765, footnote omitted.)

This Court's commitment to equal protection inspired the "unprecedented upheaval" that the U.S. Supreme Court predicted. (*Rodriguez*, *supra*, 411 U.S. at p. 56.) Since *Serrano I* and *Serrano II*, state supreme courts from Connecticut to Wyoming have invalidated school financing systems based on district wealth under their state constitutions. (Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law (2018), pp. 27-41; see, e.g., *DuPree v. Alma School Dist. No. 30 of Crawford County* (Ark. 1983) 651 S.W.2d 90, 93; *Roosevelt Elementary School Dist. No. 66 v. Bishop* (Ariz. 1994) 877 P.2d 806, 815-816 (plur. opn. of Martone, J.); *Horton v. Meskill* (Conn. 1977) 376 A.2d 359, 374-375; *Rose v. Council for Better Educ., Inc.* (Ky. 1989) 790 S.W.2d 186, 215; *McDuffy v. Secretary of Executive Office of Educ.* (Mass. 1993) 615 N.E.2d 516, 555; *Helena Elementary School Dist. No. 1 v. State* (Mont. 1989) 769 P.2d 684, 690; *Claremont School Dist. v. Governor* (N.H. 1997) 703 A.2d 1353, 1360; *Robinson v. Cahill* (N.J. 1973) 303 A.2d 273, 295; *DeRolph v. State* (Ohio 1997) 677 N.E.2d 733, 747; *Edgewood Independent School Dist. v. Kirby* (Tex. 1989) 777 S.W.2d 391, 397; *Brigham v. State* (Vt. 1997) 692 A.2d 384, 390; *Seattle School Dist. No. 1 of King County v. State* (Wash. 1978) 585 P.2d 71, 103; *Pauley v. Kelly* (W. Va. 1979) 255 S.E.2d 859, 878; *Washakie County School Dist. No. One v. Herschler* (Wyo. 1980) 606 P.2d 310, 332.) By adhering to its independent understanding of state equal protection guarantees, this Court helped reduce unconstitutional disparities in California and across the country.

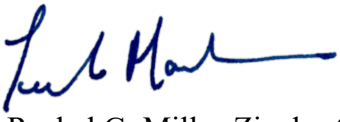
This Court prompted another overhaul of equal protection law through its efforts to remove racial bias in jury selection. In *Swain v. Alabama* (1965) 380 U.S. 202, the U.S. Supreme Court declined to subject the use of peremptory challenges "in any particular case to the demands and traditional standards of the Equal Protection Clause." (*Id.* at p. 221, overruled by *Batson v. Kentucky* (1986) 476 U.S. 79.) In *People v. Wheeler* (1978) 22 Cal.3d 258, however, this Court held that the California Constitution's right to an impartial jury prohibited the use of peremptory challenges to strike prospective jurors on the basis of race in an individual case. (*Id.* at pp. 276-277, overruled in part on other grounds by *Johnson v. California* (2005) 545 U.S. 162.) The *Wheeler* Court concluded that *Swain* was inadequate to protect state constitutional rights: "It demeans the Constitution to declare a fundamental personal right under that charter and at the same time make it virtually impossible for an aggrieved citizen to exercise that right." (*Id.* at p. 287.)

Following *Wheeler*, several state supreme courts held unconstitutional the use of peremptory challenges based on race. These courts were "especially aided in this endeavor by the California Supreme Court's recent decision in *People v. Wheeler*, which has broken much of the ground for us." (*Commonwealth v. Soares* (Mass. 1979) 387 N.E.2d 499, 510, fn. 12, overruled in part on other grounds by *Commonwealth v. Sanchez* (Mass. 2020) 151 N.E.3d 404; see, e.g., *Riley v. State* (Del. 1985) 496 A.2d 997, 1013 ["borrow[ing] heavily from *People v. Wheeler*"]; *State v. Neil* (Fla. 1984) 457 So.2d 481, 486.) Finally, in *Batson*, the federal Supreme Court overruled *Swain* and recognized an equal protection violation. (*Batson*, *supra*, 476 U.S. at 82.) The *Batson* Court acknowledged that it was "[f]ollowing the lead of a number of state courts" and cited *Wheeler* throughout. (*Id.* at pp. 82, fn. 1, 83, 84, 92, fn. 7.) Once again, this Court's interpretation of state constitutional guarantees reformed equal protection nationwide.

* * *

In short, a decision addressing the question presented in the petition would fit comfortably into this Court's prior cases. The petition raises a question about the "independent vitality" of "state equal protection provisions" that it is this Court's constitutional responsibility to answer. (*Serrano II*, *supra*, 18 Cal.3d at p. 764; see Cal. Const. art I, § 24.) While the propriety of capital punishment has been the subject of political debate, this Court's constitutional cases often involve issues with political significance. (See *Serrano II*, at p. 764 [recognizing unconstitutional wealth disparities in public education]; *Perez*, *supra*, 32 Cal.2d at p. 725 [recognizing constitutional right to interracial marriage at a time when 38 States outlawed it].) And, critically, the petition asks this Court to interpret the California Constitution—not consider or resolve those political questions. This Court should not allow political concerns outside the judicial process to interfere with its unique role in expounding on the California Constitution. Amici accordingly respectfully urge the Court to issue an order to show cause and review the petition fully.

Respectfully submitted,



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PROOF OF SERVICE
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S284496

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 350 South Grand Avenue, Fiftieth Floor, Los Angeles, CA 90071-3426.

On April 23, 2024, I served true copies of the following document(s) described as

AMICI CURIAE LETTER OF FORMER CALIFORNIA JURISTS

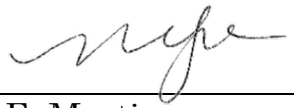
on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

I caused the document(s) to be filed with ImageSoft TrueFiling ("TrueFiling") pursuant to California Rule of Court 8.212 and to be served via TrueFiling and via mail, by placing the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on April 23, 2024, at Los Angeles, California.



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