No. S284496

In the Supreme Court of the State of California

OFFICE OF THE STATE PUBLIC DEFENDER, ET AL.,

Petitioners,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

SUPPLEMENTAL OPENING BRIEF

ROB BONTA (SBN 202668)
Attorney General of California
MICHAEL J. MONGAN (SBN 250374)
Solicitor General
LANCE E. WINTERS (SBN 162357)
JONATHAN L. WOLFF (SBN 193479)
Chief Assistant Attorneys General
JAMES WILLIAM BILDERBACK II (SBN 161306)
THOMAS S. PATTERSON (SBN 202890)
Senior Assistant Attorneys General
*SAMUEL T. HARBOURT (SBN 313719)
California Supreme Court Civil Coordinator & Deputy Solicitor General
MICA L. MOORE (SBN 321473)
Deputy Solicitor General

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-7004
(415) 510-3919
Samuel.Harbourt@doj.ca.gov
Attorneys for Respondent

Document received by the CA Supreme Court.

Nov. 18, 2024

TABLE OF CONTENTS

Page

Introduction 13

Argument 14

I. Issue 1: On what ground or grounds have petitioners established standing? 14

  A. Taxpayer standing statute 16

  B. Public interest standing doctrine 17

  C. Other standing doctrines 18

II. Issue 2: What relief, if any, would be appropriate if petitioners prove the facts they have alleged? 23

  A. Have petitioners alleged facts that, if proven true, would establish a violation of the California Constitution? 24

    1. State equal protection clause 24

    2. State cruel or unusual punishment clause 29

  B. Are petitioners entitled to all or part of the relief they seek if the facts alleged are proven? 38

    1. Petitioners' entitlement to relief 39

    2. Effect of article I, section 27 44

    3. Effect of this challenge being classified as facial or as-applied 47

III. Issue 3: What parties are necessary? 49

Conclusion 57

Document received by the CA Supreme Court.

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Superior Court
(2020) 9 Cal.5th 642 50

AIDS Healthcare Foundation v. Bonta
(2024) 101 Cal.App.5th 73 52

Arce v. Douglas
(9th Cir. 2015) 793 F.3d 968 25

Arizona Alliance for Retired Americans v. Mayes
(9th Cir. 2024) 117 F.4th 1165 19

Arlington Heights v. Metropolitan Housing Corp.
(1977) 429 U.S. 252 .... 26, 27

Associated Builders & Contractors, Inc. v. San Francisco Airports Com.
(1999) 21 Cal.4th 352 .... 15, 18, 19, 23

Bandini Estate Co. v. Payne
(1935) 10 Cal.App.2d 623 41

Batson v. Kentucky
(1986) 476 U.S. 79 31

Bd. of Soc. Welfare v. County of L.A.
(1945) 27 Cal.2d 98 17

Beck v. Alabama
(1980) 447 U.S. 625 30

Bianka M. v. Superior Court
(2018) 5 Cal.5th 1004 .... 52, 56

Boggs v. Jordan
(1928) 204 Cal. 207 41

Document received by the CA Supreme Court.

TABLE OF AUTHORITIES
(continued)

Page

Briggs v. Brown
(2017) 3 Cal.5th 808 .... 39, 49, 50

Brosnahan v. Brown
(1982) 32 Cal.3d 236 50

California Medical Assn. v. Aetna Health of California
(2023) 14 Cal.5th 1075 .... 18, 19, 21, 23

California v. Azar
(9th Cir. 2018) 911 F.3d 558 22

Cooper v. Aaron
(1958) 358 U.S. 1 42

Cooper v. Newsom
(9th Cir. 2021) 13 F.4th 857 40

Countrywide Home Loans, Inc. v. Superior Court
(1999) 69 Cal.App.4th 785 .... 53, 54

County of Imperial v. Superior Court
(2007) 152 Cal.App.4th 13 52

Crawford v. Board of Education
(1976) 17 Cal.3d 280 24

DaimlerChrysler Corp. v. Cuno
(2006) 547 U.S. 332 15

Dept. of Commerce v. New York
(2019) 588 U.S. 752 22

Doe v. Reed
(2010) 561 U.S. 186 47

FDA v. Alliance for Hippocratic Medicine
(2024) 602 U.S. 367 19

Document received by the CA Supreme Court.

TABLE OF AUTHORITIES
(continued)

Page

Furman v. Georgia
(1972) 408 U.S. 238 .... 30, 48

Gardner v. Florida
(1977) 430 U.S. 349 30

Godfrey v. Georgia
(1980) 446 U.S. 420 30

Greener v. Workers' Comp. Appeals Bd.
(1993) 6 Cal.4th 1028 41

Gregg v. Georgia
(1976) 428 U.S. 153 30

Habeas Corpus Res. Ctr. v. U.S. Dept. of Just.
(9th Cir. 2016) 816 F.3d 1241 22

Hardy v. Stumpf
(1978) 21 Cal.3d 1 .... 24, 25, 26

Harmelin v. Michigan
(1991) 501 U.S. 957 37

Havens Realty Corp. v. Coleman
(1982) 455 U.S. 363 19

Hayes v. State Dept. of Developmental Services
(2006) 138 Cal.App.4th 1523 52

Hunt v. Washington State Apple Advertising Commission
(1977) 432 U.S. 333 22

Hurst v. Florida
(2016) 577 U.S. 92 46

In re Marriage Cases
(2008) 43 Cal.4th 757 25

Document received by the CA Supreme Court.

TABLE OF AUTHORITIES
(continued)

Page

In re Milton
(2022) 13 Cal.5th 893 39

In re Seaton
(2004) 34 Cal.4th 193 28

Jones v. Davis
(9th Cir. 2015) 806 F.3d 538 40

Legislature v. Eu
(1991) 54 Cal.3d 492 41

Lujan v. Defenders of Wildlife
(1992) 504 U.S. 555 .... 15, 16, 23

Manduley v. Superior Court
(2002) 27 Cal.4th 537 28

Mathews v. Becerra
(2019) 8 Cal.5th 756 47

McCleskey v. Kemp
(1987) 481 U.S. 279 .... *passim*

McKeon v. Hastings College
(1986) 185 Cal.App.3d 877 15

People ex rel. Becerra v. Superior Court
(2018) 29 Cal.App.5th 486 17

People v. Anderson
(1972) 6 Cal.3d 628 .... 35, 44

People v. Arias
(1996) 13 Cal.4th 92 31

People v. Breverman
(1998) 19 Cal.4th 142 35

Document received by the CA Supreme Court.

TABLE OF AUTHORITIES
(continued)

Page

People v. Buza
(2018) 4 Cal.5th 658 .... 28, 33, 34, 35, 36

People v. Frazier
(2024) 16 Cal.5th 814 40

People v. Frierson
(1979) 25 Cal.3d 142 .... 30, 45

People v. Hardin
(2024) 15 Cal.5th 834 .... 26, 28, 35

People v. Lamoureux
(2019) 42 Cal.App.5th 241 40

People v. Marshall
(1990) 50 Cal.3d 907 28

People v. Miranda
(1987) 44 Cal.3d 57 28

People v. Montes
(2014) 58 Cal.4th 809 .... 17, 28, 37

People v. Padilla
(2022) 13 Cal.5th 152 39

People v. Seumanu
(2015) 61 Cal.4th 1293 30

People v. Suarez
(2020) 10 Cal.5th 116 43

People v. Superior Court (Engert)
(1982) 31 Cal.3d 797 .... 44, 45

People v. Teresinski
(1982) 30 Cal.3d 822 .... 33, 34

Document received by the CA Supreme Court.

TABLE OF AUTHORITIES
(continued)

Page

People v. Wilkinson
(2004) 33 Cal.4th 821 25

Personnel Administrator of Mass. v. Feeney
(1979) 442 U.S. 256 27

Proffitt v. Florida
(1976) 428 U.S. 242 31

Pulley v. Harris
(1984) 465 U.S. 37 .... 30, 42, 48

Raven v. Deukmejian
(1990) 52 Cal.3d 336 .... 41, 50

Rico v. Nasser Bros. Realty Co.
(1943) 58 Cal.App.2d 878 39

Sail'er Inn, Inc. v. Kirby
(1971) 5 Cal.3d 1 25

San Diegans for Open Government v. Public Facilities Financing Authority of City of San Diego
(2019) 8 Cal.5th 733 14

School Dist. of the City of Pontiac v. Secretary of the U.S. Dept. of Educ.
(6th Cir. 2009) 584 F.3d 253 23

Secretary of Interior v. California
(1984) 464 U.S. 312 15

Senate of the State of Cal. v. Jones
(1999) 21 Cal.4th 1142 22

Serrano v. Priest
(1976) 18 Cal.3d 728 .... 24, 52, 54, 55, 56

Document received by the CA Supreme Court.

TABLE OF AUTHORITIES
(continued)

Page

Southern Pacific Transportation Co. v. Pub. Utilities Com.
(1976) 18 Cal.3d 308 42

State v. Gregory
(2018) 192 Wash.2d 1 .... *passim*

Sumner v. Shuman
(1987) 483 U.S. 66 46

T-Mobile West LLC v. City & County of San Francisco
(2019) 6 Cal.5th 1107 .... 47, 48

Taking Offense v. State
(No. S270535, rev. granted Nov. 10, 2021) 17, 18

Tracy Press, Inc. v. Superior Court
(2008) 164 Cal.App.4th 1290 51

Van Atta v. Scott
(1980) 27 Cal.3d 424 .... 54, 55, 56

Washington v. Davis
(1976) 426 U.S. 229 .... 24, 25, 26, 29

Wayte v. United States
(1985) 470 U.S. 598 31

Weatherford v. City of San Rafael
(2017) 2 Cal.5th 1241 .... 15, 16, 17, 18

Weiss v. City of Los Angeles
(2016) 2 Cal.App.5th 194 17

Zant v. Stephens
(1983) 462 U.S. 862 30

Zolly v. City of Oakland
(2022) 13 Cal.5th 780 15

Document received by the CA Supreme Court.

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

Bus. & Prof. Code, § 17204 18

Cal. Session Laws
- Stats. 2020, ch. 230 43
- Stats. 2020, ch. 317, § 2, subd. (f) 43
- Stats. 2020, ch. 318 43
- Stats. 2022, ch. 806 43

Code Civ. Proc.
- § 367 15
- § 387, subd. (d)(2) 50, 56
- § 389, subd. (a) 51, 52, 53
- § 389, subd. (a)(1) 51, 53
- § 389, subd. (a)(2) 51, 54, 55, 56
- § 526, subd. (a) 16
- § 1060 15
- § 1086 .... 15, 17, 18, 23

Gov. Code
- § 12550 40
- § 12838 40
- §§ 15400-15404 22
- § 15421 23
- § 15423 23
- § 15425 23

Pen. Code
- § 1509, subd. (a) 39, 56
- § 3600 40
- § 3604 40

Document received by the CA Supreme Court.

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

Cal. Const.
Art. I, § 7 .... *passim*
Art. I, § 17 .... *passim*
Art. I, § 27 .... 23, 38, 44, 45, 46
Art. V, § 8 40
Art. V, § 13 .... 40, 50

U.S. Const.
8th Amend. .... *passim*
14th Amend. 28
Art. III 19

COURT RULES

Cal. Rules of Court, Rule 8.487(e) 49

OTHER AUTHORITIES

22 Ops.Cal.Atty.Gen. 93 (1953) 16

Cal. Dept. of Justice, *Attorney General Bonta Issues Race-Blind Charging Guidelines for Prosecutors* (Jan. 4, 2024) <https://oag.ca.gov/news/press-releases/attorney-general-bonta-issues-race-blind-charging-guidelines-prosecutors> 43

Carter et al., Understanding Capital Punishment Law (5th ed. 2024) 30

Ella Baker Center, *Alameda County Criminal Justice Advocates' First 100 Day Agenda for the Newly Elected District Attorney* <https://ellabakercenter.org/wp-content/uploads/2023/01/Newly-Elected-DA-First-100-Community-led-Agenda.pdf> 20

Ella Baker Center, Our History <https://ellabakercenter.org/our-victories/> 20

Document received by the CA Supreme Court.

TABLE OF AUTHORITIES
(continued)

Page

Ella Baker Center, Our Work <https://ellabakercenter.org/our-work/> 21

Fallon, Jr., *Fact and Fiction About Facial Challenges* (2011) 99 Cal. L.Rev. 915 49

Liu, *Implicit Bias, Structural Bias, and Implications for Law and Policy* (2023) 25 U. Pa. J. Const. L. 1280 .... 26, 27

Pham & Dehmani, Stanford Ctr. for Racial Justice, *The California Racial Justice Act of 2020 Explained*, (Apr. 22, 2024) <https://law.stanford.edu/2024/04/22/the-california-racial-justice-act-of-2020-explained/>.................... 43

Witness to Innocence, *California Must Take the Final Step by Abolishing the Death Penalty* <https://www.witnesstoinnocence.org/single-post/2019/10/14/California-must-take-the-final-step-by-abolishing-the-death-penalty>.................................. 20

Witness to Innocence, Current Campaigns <https://www.witnesstoinnocence.org/current-state-campaigns>.. 20, 21

Witness to Innocence, *Gov. Newsom Was Right to Halt Death Penalty Last Year. Now California Must Go Further* <https://www.witnesstoinnocence.org/single-post/2020/03/11/gov-newsom-was-right-to-halt-death-penalty-last-year-now-california-must-go-further>.. 20

Document received by the CA Supreme Court.

INTRODUCTION

This petition for a writ of mandate challenges California's system for imposing capital sentences on state constitutional grounds. Petitioners allege that racial disparities pervade the current system. And they ask this Court to issue an extraordinary "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." (Pet. 62.) As the Attorney General explained in his preliminary response to the petition, petitioners' arguments are serious ones that deserve careful consideration by the judiciary through a process that allows for the development of an evidentiary record.

The Court recently ordered the parties to file supplemental briefs addressing a range of issues: petitioners' standing; whether and to what extent the facts alleged by petitioners (if proven) would establish a violation of the California Constitution and entitle petitioners to relief; and what parties are necessary to this proceeding. This supplemental brief responds to that order. But the responses presented here are necessarily preliminary—because many of the issues raised by the Court cannot be finally resolved without a developed record.

The Attorney General does not contest petitioners' standing. Although petitioners' standing allegations are rather spare, and not all petitioners have alleged sufficient facts to support standing at this stage of the case, the petition adequately alleges that at least one petitioner has the requisite injury to seek a writ of mandate. As to the merits, this Court's existing precedent

Document received by the CA Supreme Court.

forecloses petitioners' claim under the equal protection clause of the California Constitution. But the Court also asked whether the facts alleged by petitioners (if proven true) would establish a violation of the state cruel or unusual punishment clause. That question is not answered by this Court's existing precedent. While U.S. Supreme Court precedent forecloses that type of claim under the Eighth Amendment, this Court could choose to follow a different path in analyzing the state charter. Even if the Court ultimately ruled in petitioners' favor, however, petitioners would not be entitled to the full suite of relief they request—and this Court could not determine the appropriate scope of relief absent a developed factual record. Finally, while no other parties are necessary to these proceedings, district attorneys and others with an interest in the proceedings could seek to participate as amici curiae or move for leave to intervene on a permissive basis.

ARGUMENT

I. ISSUE 1: ON WHAT GROUND OR GROUNDS HAVE PETITIONERS ESTABLISHED STANDING?

The supplemental briefing order first directs the parties to address "[o]n what ground or grounds, if any, does each petitioner have standing to challenge the prosecution, imposition, and execution of all death sentences in the state?"

Unlike the federal Constitution, California's Constitution has no "case or controversy" requirement. (See, e.g., *San Diegans for Open Government v. Public Facilities Financing Authority of City of San Diego* (2019) 8 Cal.5th 733, 738, 739.) But the Legislature has imposed standing requirements on virtually all forms of civil litigation by statute, and those requirements serve

Document received by the CA Supreme Court.

important purposes within our State's system of separation of powers. (See, e.g., Code Civ. Proc., §§ 367, 1060, 1086; *Zolly v. City of Oakland* (2022) 13 Cal.5th 780, 789; see also *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247-1248.) As relevant here, the Legislature has required petitioners seeking a writ of mandate to demonstrate they are "beneficially interested." (Code Civ. Proc., § 1086.) To satisfy that requirement, petitioners must show an "'injury in fact'" that would be redressed by a favorable writ. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 362.)

This Court often consults federal standing doctrine as persuasive authority when applying standing requirements under state law. (See, e.g., *Associated Builders*, *supra*, 21 Cal.4th at p. 362 [the "beneficially interested" standard under section 1086 "is equivalent to the federal 'injury in fact' test"].) Under federal precedent, the party invoking a court's jurisdiction "must demonstrate standing for each claim he seeks to press." (*DaimlerChrysler Corp. v. Cuno* (2006) 547 U.S. 332, 352.) If multiple parties seek relief from the court, only one needs standing to support the Court's exercise of jurisdiction over each claim. (See, e.g., *McKeon v. Hastings College* (1986) 185 Cal.App.3d 877, 892, citing *Secretary of Interior v. California* (1984) 464 U.S. 312, 319, fn. 3.) "At the pleading stage, general factual allegations of injury" may suffice to establish standing. (*Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 561.) As a case proceeds beyond that stage, however, "affidavit[s] or other

Document received by the CA Supreme Court.

evidence" must set forth "specific facts" to substantiate allegations of injury. (*Ibid.*, internal quotation marks omitted.)

The Attorney General's preliminary response explained that he "does not contest petitioners' standing to seek writ relief." (Prelim. Resp. 15 & fn. 2.) This Court has now directed the parties to elaborate on the ground (or grounds) on which petitioners have standing to challenge the prosecution, imposition, and execution of all death sentences in California. The grounds that petitioners expressly invoked in their writ petition—California's taxpayer standing statute and the "public interest standing" doctrine (see Pet. 20)—do not apply here. But petitioners' factual allegations are likely sufficient to establish that at least one of the petitioners has adequately alleged standing under other standing doctrines.

A. Taxpayer standing statute

Petitioners first assert standing under California's taxpayer standing statute, Code of Civil Procedure section 526a. (See Pet. 20.) By its plain terms, section 526a authorizes suit against "local agenc[ies]" only. (Code Civ. Pro., § 526a; see 22 Ops.Cal.Atty.Gen. 93, 96 (1953).) It does not authorize suits against the State or state officials. This Court recently emphasized the importance of adhering to "the explicit statutory limits [section 526a] imposes on taxpayer standing." (*Weatherford*, *supra*, 2 Cal.5th at p. 1251.) The writ petition

Document received by the CA Supreme Court.

here, which names a state official as the sole respondent, falls outside those statutory limits.[1]

B. Public interest standing doctrine

Petitioners also invoke (Pet. 20) the doctrine of public interest standing, a "judicially recognized exception to" ordinary standing requirements imposed by section 1086 of the Code of Civil Procedure. (*Weatherford*, *supra*, 2 Cal.5th at p. 1249, internal quotation marks omitted.) That exception principally serves as a backstop—ensuring the availability of a judicial check on the legality of government policies and practices in situations where few parties would be able to bring a challenge under ordinary standing principles. (See, e.g., *People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 504; *Weiss v. City of Los Angeles* (2016) 2 Cal.App.5th 194, 206; cf. *Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, 101.)

But this is not one of those situations: Any of the hundreds of defendants subject to death sentences or capital prosecutions in California could raise the constitutional theories advanced by petitioners here. Indeed, defendants routinely *do* raise those theories (or similar theories) on direct appeal of their convictions and sentences or in habeas proceedings. (See, e.g., *People v. Montes* (2014) 58 Cal.4th 809, 830-831.) There is no need to relax ordinary standing requirements to ensure the availability of a judicial forum for those claims. And if the Court did so here, the

[1] This Court is considering related questions in *Taking Offense v. State* (No. S270535, rev. granted Nov. 10, 2021). (See OBM 43-47; State Supp. Opening Br. on Standing 18-23.)

Document received by the CA Supreme Court.

public interest "exception" would threaten to swallow the usual standing requirements that apply in typical cases. (*Weatherford*, *supra*, 2 Cal.5th at p. 1248.)[2]

C. Other standing doctrines

In the Attorney General's view, petitioners' allegations are more properly assessed under other standing doctrines.

Of the five petitioners, three are private organizations. (See Pet. 22-24.) As this Court explained in *California Medical Assn. v. Aetna Health of California* (2023) 14 Cal.5th 1075, 1082, "when an organization, in furtherance of a bona fide, preexisting mission, incurs costs to respond to" a perceived threat to "that mission," it generally satisfies the "injury in fact" requirement under California's Unfair Competition Law. (See *id.* at p. 1095; Bus. & Prof. Code, § 17204.) That requirement is not materially different from the "injury in fact" requirement for writ of mandate actions under Code of Civil Procedure section 1086. (See *Associated Builders*, *supra*, 21 Cal.4th at p. 362.) In either context, the "diversion of salaried staff time and other office resources" to address the perceived threat can constitute a cognizable injury, because the organization "loses the value of" the time and resources—"which otherwise would have been used to benefit the organization in other ways." (*California Medical*, at pp. 1088, 1089; see also *id.* at pp. 1102-1103 [organizations

Document received by the CA Supreme Court.

---

[2] The doctrine of public interest standing is also at issue in *Taking Offense*. (See, e.g., OBM 35-43; RBM 19-26.)

must demonstrate that the mission implicated by the suit was "preexisting" and not "adopted as a pretext" to create standing].)[3]

Here, the "allegations on the issue of standing" advanced by the private organizations "are rather scanty." (*Associated Builders*, *supra*, 21 Cal.4th at p. 363; see Pet. 21-24.) But two of the organizations have alleged a preexisting, "articulable mission" that is directly related to the asserted threat addressed by the writ petition and "focused enough to make sense" apart from the context of this litigation. (*California Medical*, *supra*, 14 Cal.5th at p. 1102.) Witness to Innocence alleges an organizational mission centered on responding to "systemic failures in capital sentencing" and "eliminating racial bias in the criminal legal system." (Pet. 23, 24.) It was founded in 2003 and its website describes advocacy activities focused on opposing the death penalty system—including publicizing allegations of racial

---

[3] The U.S. Supreme Court's seminal case on organizational standing under Article III of the federal Constitution is *Havens Realty Corp. v. Coleman* (1982) 455 U.S. 363. A recent decision of that Court, *FDA v. Alliance for Hippocratic Medicine* (2024) 602 U.S. 367, 393-396, adopted a narrow view of *Havens*. (See *Arizona Alliance for Retired Americans v. Mayes* (9th Cir. 2024) 117 F.4th 1165, 1170 [holding that *Alliance for Hippocratic Medicine* overruled several Ninth Circuit decisions applying *Havens*].) This Court's decision in *California Medical* principally turned on the text and purposes of the relevant California statute (see 14 Cal.5th at pp. 1087-1088), and also looked to *Havens* and its progeny as "persuasive authority" (*id.* at p. 1095). No party to this proceeding has asked this Court to revisit *California Medical* in light of *Alliance for Hippocratic Medicine*.

Document received by the CA Supreme Court.

bias in California's death penalty system.[4] The Ella Baker Center alleges that it "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." (Pet. 23.) It was founded in 1996, and its website reflects that it has participated in efforts to urge a California district attorney to "[c]reate a moratorium to end the use of . . . the death penalty."[5] Both organizations also engage in work unrelated to California's death

---

[4] See, e.g., Witness to Innocence, Current Campaigns <https://www.witnesstoinnocence.org/current-state-campaigns> (as of Nov. 18, 2024) (highlighting organization's "anti-death penalty efforts"); Witness to Innocence, *Gov. Newsom Was Right to Halt Death Penalty Last Year. Now California Must Go Further* <https://www.witnesstoinnocence.org/single-post/2020/03/11/gov-newsom-was-right-to-halt-death-penalty-last-year-now-california-must-go-further> (as of Nov. 18, 2024) ("California's death penalty system is plagued by racial bias"); Witness to Innocence, *California Must Take the Final Step by Abolishing the Death Penalty* <https://www.witnesstoinnocence.org/single-post/2019/10/14/California-must-take-the-final-step-by-abolishing-the-death-penalty> (as of Nov. 18, 2024) (opinion piece discussing allegations of "racis[m]" and "inequality" in California's capital sentencing system).

[5] Ella Baker Center, *Alameda County Criminal Justice Advocates' First 100 Day Agenda for the Newly Elected District Attorney* <https://ellabakercenter.org/wp-content/uploads/2023/01/Newly-Elected-DA-First-100-Community-led-Agenda.pdf> (as of Nov. 18, 2024); see Ella Baker Center, Our History <https://ellabakercenter.org/our-victories/> (as of Nov. 18, 2024).

Document received by the CA Supreme Court.

penalty—work that they would presumably devote greater time and resources to if they prevailed in this writ proceeding.[6]

It is debatable whether the sparse factual allegations in the current writ petition (Pet. 23-24) are sufficient to establish organizational standing with respect to either organization. But the information in the public record about their activities, which petitioners could presumably substantiate with concrete evidence if the case progresses, suggests that both organizations could establish organizational standing under this Court's current precedent.[7] As to the remaining private petitioners, LatinoJustice PRLDEF and Eva Paterson, the petition does not allege facts that support standing on organizational standing grounds or any other valid theory. (Pet. 22-23.) Nor is the Attorney General aware of any other information suggesting that these petitioners could show standing if the case proceeds.

The standing allegations of the final petitioner, the Office of the State Public Defender (OSPD), pose different questions. The Attorney General is not aware of any state or federal case

---

[6] See, e.g., Witness to Innocence, *supra*, Current Campaigns (describing efforts to oppose the death penalty in other States); Ella Baker Center, Our Work <https://ellabakercenter.org/our-work/> (as of Nov. 18, 2024) (describing advocacy efforts unrelated to the death penalty).

[7] The foregoing analysis assumes that an organization can establish organizational standing "where the only threat posed by a challenged statute [is] to the . . . organization's 'pure issue-advocacy.'" (*California Medical*, *supra*, 14 Cal.5th at p. 1100, fn. 10.) If that is not correct (see *ibid.* [reserving the question]), it is unclear whether Witness to Innocence or the Ella Baker Center could establish standing.

Document received by the CA Supreme Court.

addressing whether the organizational standing doctrine may apply to a government entity, like OSPD. (See Gov. Code, §§ 15400-15404; cf. *Hunt v. Washington State Apple Advertising Commission* (1977) 432 U.S. 333, 341-345 [applying associational standing to state commission].) And OSPD's extensive work "representing . . . death-sentenced individuals" (Pet. 21) may be insufficient, on its own, to confer standing to challenge California's death penalty laws. (See *Habeas Corpus Res. Ctr. v. U.S. Dept. of Just.* (9th Cir. 2016) 816 F.3d 1241, 1250 [observing that "[a]ssisting and counseling clients . . . is the *role* of lawyers" and that two public entities providing legal assistance to capital prisoners failed to cite "any authority suggesting that lawyers suffer a legally cognizable injury in fact when they take measures to protect their clients' rights"].)

But the allegations in the petition also suggest that OSPD has expended time and resources engaging in non-litigation efforts to oppose the death penalty. (See Pet. 21-22.) In particular, the petition alleges that OSPD prepared and 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." (Pet. 21.) Both state and federal courts have held that government entities may establish injury in fact by showing that a challenged law or policy has the effect of diminishing the resources available to them. (See, e.g., *Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 1156, fn. 9; *Dept. of Commerce v. New York* (2019) 588 U.S. 752, 766-768; *California v. Azar* (9th

Document received by the CA Supreme Court.

Cir. 2018) 911 F.3d 558, 571-574; *School Dist. of the City of Pontiac v. Secretary of the U.S. Dept. of Educ.* (6th Cir. 2009) 584 F.3d 253, 261-262.) In light of that precedent, the allegations regarding OSPD appear sufficient at this stage of the proceedings to satisfy the injury in fact requirement of Code of Civil Procedure section 1086. (See *Associated Builders*, *supra*, 21 Cal.4th at p. 362.) Again, if this case proceeds beyond its current stage, OSPD will need to substantiate its allegations "by affidavit or other evidence" (*Lujan*, *supra*, 504 U.S. at p. 561), including evidence addressing how a decision in petitioners' favor would affect "OSPD's resources and programming priorities." (Pet. 22; cf. *California Medical*, *supra*, 1075 Cal.5th at pp. 1082-1083.)[8]

II. ISSUE 2: WHAT RELIEF, IF ANY, WOULD BE APPROPRIATE IF PETITIONERS PROVE THE FACTS THEY HAVE ALLEGED?

The second issue in the Court's supplemental briefing order raises questions going to the merits and petitioners' entitlement to relief if their factual allegations are ultimately proven: "Have petitioners alleged facts that, if proven true, would establish a violation of the California Constitution (art. I, §§ 7, 17) and entitle them to all or part of the relief they seek, including an order prohibiting all future capital prosecutions and the enforcement or execution of any death sentence previously imposed? How, if at all, does article I, section 27 of the California

[8] A distinct question, not raised by the Court's supplemental briefing order, is whether the Government Code authorizes OSPD to appear as a named party in an original writ proceeding of this nature before this Court. (See Gov. Code, §§ 15421, 15423; cf. *id.*, § 15425.)

Document received by the CA Supreme Court.

Constitution affect this determination? How, if at all, does the classification of this matter as an as-applied or a facial challenge affect this determination?" These are complicated questions, requiring nuanced responses.

A. Have petitioners alleged facts that, if proven true, would establish a violation of the California Constitution?

1. State equal protection clause

Article I, section 7 of the California Constitution provides that "[a] person may not be . . . denied equal protection of the laws." Petitioners allege "that persistent and pervasive racial disparities infect California's death penalty system." (Pet. 16.) Their principal legal argument is that the "disparate impact" they have alleged triggers strict scrutiny under the state equal protection clause. (See, e.g., Pet. 50 & fn. 23, 65, 67, 69, 85; see also Pet. 90-92 [arguing the State cannot satisfy strict scrutiny].) But that argument is foreclosed by this Court's precedent.

"Standing alone, disproportionate impact does not trigger . . . the strictest scrutiny" under state equal protection doctrine. (*Hardy v. Stumpf* (1978) 21 Cal.3d 1, 7, quoting *Washington v. Davis* (1976) 426 U.S. 229, 242, internal brackets omitted.) The cases petitioners invoke to support their legal argument (see Pet. 69-74) do not hold otherwise. For example, in *Serrano v. Priest* (1976) 18 Cal.3d 728, 764-766 & fn. 45, the Court applied strict scrutiny on the ground that the challenged policies burdened a fundamental right related to education. And in *Crawford v. Board of Education* (1976) 17 Cal.3d 280, 297, the Court reasoned that the same fundamental right required school districts "to

Document received by the CA Supreme Court.

attempt to alleviate segregated education . . . even if such segregation results from the application of a facially neutral state policy." But the petitioners here do not invoke that fundamental right—or any other. (See generally *People v. Wilkinson* (2004) 33 Cal.4th 821, 836-838 [discussing the limited role of "fundamental rights" equal protection principles in criminal cases].)

Petitioners also invoke *In re Marriage Cases* (2008) 43 Cal.4th 757, 839-844. (See Pet. 71, 73-74.) But there, the Court applied strict scrutiny on the ground that statutes limiting marriage rights to opposite-sex couples did *not* "hav[e] merely a disparate impact" but rather "directly classifi[ed]" on the basis of sexual orientation. (*Id.* at p. 839.) Laws that facially discriminate on the basis of a suspect classification generally trigger strict scrutiny, regardless of their intended purpose. (*Id.* at p. 832; see, e.g., *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17.) That is why the Court had no need to "suggest that the [challenged] marriage provisions were enacted with an invidious intent or purpose." (Pet. 73, quoting *In re Marriage Cases*, at p. 856, fn. 73.) But where, as here, the challenged laws are "facially neutral" (Pet. 67), and do not burden any fundamental rights, a showing of discriminatory intent or purpose *is* necessary to require application of strict scrutiny. (See *Hardy*, *supra*, 21 Cal.3d at pp. 7-8; see also *Washington*, *supra*, 426 U.S. at p. 242; cf. *Arce v. Douglas* (9th Cir. 2015) 793 F.3d 968, 977.)

Petitioners have not asked this Court to overrule its holding in *Hardy* that disparate impact alone does not trigger strict scrutiny. Nor would there be any basis for the Court to do so.

Document received by the CA Supreme Court.

(See generally *People v. Hardin* (2024) 15 Cal.5th 834, 850 [discussing stare decisis].) The rule adopted in *Hardy* is correct and sensible. The effects of a constitutional rule like the one advanced by petitioners "would be far-reaching." (*Washington*, *supra*, 426 U.S. at p. 248.) It "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes." (*Ibid.*) It would also raise difficult administrability questions, such as how large a disparate impact must be to trigger strict scrutiny. And it would complicate the task of legislating and regulating, because legislators and regulatory agencies are rarely able to predict with precision whether and to what extent a proposed policy will have a disparate impact. (Cf. Liu, *Implicit Bias, Structural Bias, and Implications for Law and Policy* (2023) 25 U. Pa. J. Const. L. 1280, 1301 & fn. 106 [explaining that "[j]udicial restraint is . . . why" the high court declined in *Washington v. Davis* to subject disparate impact claims to heightened scrutiny].)[9]

To be sure, a disparate impact on the basis of race can provide "circumstantial . . . evidence" of a racially discriminatory purpose. (*Arlington Heights*, *supra*, 429 U.S. at p. 266.) And a

---

[9] Notably, no justice dissented from the high court's constitutional analysis in *Washington*. (See 426 U.S. at p. 257, fn. 1 (dis. opn. of Brennan, J.) [taking issue with the majority's statutory analysis but declining to address the majority's analysis of disparate impact claims for equal protection purposes]; see also *Arlington Heights v. Metropolitan Housing Corp.* (1977) 429 U.S. 252, 271 (conc. & dis. opn. of Marshall, J.) [joining portion of majority decision reaffirming *Washington*'s disparate impact analysis].)

Document received by the CA Supreme Court.

discriminatory purpose—if proven—does trigger strict scrutiny. (See, e.g., *id.* at pp. 265-266.) But the petitioners here have not alleged that racial discrimination motivated the California Legislature or the electorate when they devised California's current death penalty statutes. Nor have they otherwise alleged any form of intentional racial bias that would justify the application of heightened scrutiny. To the contrary, petitioners appear to acknowledge (see Pet. 42) that their factual allegations do not distinguish between intentional bias and implicit bias. (See, e.g., Pet. Exh. A at 13-22.) Implicit bias is "a preference for, aversion to, attitude toward, or stereotype about a group or a person based on group membership that is outside the realm of conscious awareness and not subject to direct introspection." (Liu, *supra*, 25 U. Pa. J. Const. L. at pp. 1283-1284.) By itself, implicit bias is not sufficient to trigger heightened equal protection scrutiny. (See *id.* at p. 1298, citing, e.g., *Personnel Administrator of Mass. v. Feeney* (1979) 442 U.S. 256, 279.)[10]

So even proceeding on the assumption that petitioners' alleged facts will be proven true, those facts would not be a basis for this Court to review petitioners' equal protection claim under strict scrutiny. Instead, the claim is subject to the "general rule" that the challenged policy "is presumed to be valid and will be

---

[10] See also Liu, *supra*, 25 U. Pa. J. Const. L. at p. 1301 (explaining that "the pervasiveness of implicit bias may deter courts from rendering it actionable"); *ibid.* (observing that "[c]ourts are generally careful to limit their role in our system of government" and that it would be "a tall order [for courts] to tackle discrimination in employment, housing, education, and policing, among other areas where implicit bias may operate").

Document received by the CA Supreme Court.

sustained" so long as it "is rationally related to a legitimate state interest." (*Hardin*, *supra*, 15 Cal.5th at p. 847, internal quotation marks omitted.) And petitioners have not even attempted to argue that California's death penalty system fails rational basis review. (See, e.g., Pet. 50, fn. 23.)

Finally, petitioners acknowledge that their equal protection claim would be foreclosed by *McCleskey v. Kemp* (1987) 481 U.S. 279 if the claim were based on the federal equal protection clause. (Pet. 76.) But they urge this Court "to reject *McCleskey*'s flawed reasoning" and depart from that precedent as a matter of state equal protection analysis. (Pet. 77; see Pet. 77-85.) Petitioners are correct that this Court is not bound by *McCleskey*: although California's equal protection guarantee has "been generally thought . . . to be substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution," the Court has "recognize[d] [the] authority to construe the state Constitution independently." (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 571, internal quotation marks omitted; see Prelim. Resp. pp. 22-24; *post,* pp. 33-35; see generally *People v. Buza* (2018) 4 Cal.5th 658, 684-685.)[11] As to petitioners' equal protection claim, however, the question whether "this Court should reject *McCleskey*'s analysis"

---

[11] In the past, this Court has occasionally cited *McCleskey*'s holding approvingly, but without definitively endorsing its reasoning as a matter of state equal protection doctrine. (See, e.g., *In re Seaton* (2004) 34 Cal.4th 193, 202-203; *People v. Miranda* (1987) 44 Cal.3d 57, 119, fn. 37, abrogated on other grounds as discussed in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4; cf. *Montes*, *supra*, 58 Cal.4th at pp. 829-831.)

Document received by the CA Supreme Court.

when construing the state Constitution (Pet. 77) is academic. This Court's own settled precedent construing the *state* equal protection clause forecloses petitioners' claim. (*Ante*, pp. 24-26.)

While petitioners invoke Justice Blackmun's dissenting opinion in *McCleskey* (see, e.g., Pet. 80-81), their disparate-impact theory bears little resemblance to the views espoused in that opinion. Writing for four justices, Justice Blackmun agreed with the majority that "[a] criminal defendant alleging an equal protection violation must prove the existence of purposeful discrimination." (481 U.S. at p. 351 (dis. opn. of Blackmun, J.), citing *Washington*, *supra*, 426 U.S. at pp. 239-240.) In Justice Blackmun's view, the purposeful discrimination standard was satisfied in the individual defendant's case before the Court (see *id.* at p. 349) because statistical evidence of racial disparities in Georgia's capital sentencing system—considered alongside other evidence of bias—provided an inference that "racial factors entered into the decisionmaking process that yielded McCleskey's death sentence" (*id.* at p. 359; see *id.* at pp. 353-361). Petitioners have not attempted to advance a similar claim of purposeful discrimination here. (See Pet. 71-75, 84, 85-91.)

2. State cruel or unusual punishment clause

Article I, section 17 of the California Constitution provides that "[c]ruel or unusual punishment may not be inflicted." Although petitioners did not invoke that provision in the first instance (see Pet. 10), the Court has now directed the parties to address whether petitioners alleged facts that—if proven true—would establish a violation of article I, section 17.

Document received by the CA Supreme Court.

The corresponding provision of the federal charter, the Eighth Amendment, prohibits the infliction of "cruel and unusual punishments." (U.S. Const., 8th Amend.) This Court and the U.S. Supreme Court interpret the Eighth Amendment to mean "that the death penalty cannot be imposed under sentencing procedures that create[] a substantial risk that it would be inflicted in an arbitrary and capricious manner." (*People v. Frierson* (1979) 25 Cal.3d 142, 173 (plur. opn.), internal quotation marks omitted; see, e.g., *People v. Seumanu* (2015) 61 Cal.4th 1293, 1372, fn. 23; *Pulley v. Harris* (1984) 465 U.S. 37, 44-46; *Godfrey v. Georgia* (1980) 446 U.S. 420, 427 (plur. opn.), discussing *Furman v. Georgia* (1972) 408 U.S. 238; *Gregg v. Georgia* (1976) 428 U.S. 153, 188 (plur. opn.); see also Carter et al., Understanding Capital Punishment Law (5th ed. 2024) §§ 6.01-6.02, 9.01-9.02, 10.01, pp. 85-86, 155-160, 165-166.)

That death-specific arbitrariness principle is premised on the "qualitative difference between death and any other permissible form of punishment," which gives rise to "a corresponding difference in the need for reliability." (*Zant v. Stephens* (1983) 462 U.S. 862, 884-885.) "From the point of view of the defendant, [death] is different in both its severity and its finality." (*Beck v. Alabama* (1980) 447 U.S. 625, 637, quoting *Gardner v. Florida* (1977) 430 U.S. 349, 357 (plur. opn.).) "From the point of view of society, the action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action." (*Ibid.*) It is "of vital importance to the defendant and to the community that any decision to impose

Document received by the CA Supreme Court.

the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Id.* at pp. 637-638.) The Eighth Amendment therefore requires States to guard against an excessive risk of arbitrariness, including through the adoption of procedures that "guide[] and channel[]" the sentencing authority's discretion by "requiring examination of specific factors that argue in favor of or against imposition of the death penalty." (*Proffitt v. Florida* (1976) 428 U.S. 242, 258 (plur. opn.); see *People v. Arias* (1996) 13 Cal.4th 92, 187.)

The U.S. Supreme Court has applied this death-specific arbitrariness principle to a statistical study (the "Baldus study") similar to the studies invoked by petitioners here. In *McCleskey*, the Court refused to treat statistical evidence of racial disparities in Georgia's system of capital punishment as an Eighth Amendment violation. (481 U.S. at pp. 306-319.) The Court acknowledged the general "risk of racial prejudice influencing a jury's decision." (*Id.* at p. 308.) But it declined to hold that the evidence before it established a "constitutionally unacceptable" level of risk. (*Id.* at p. 309, internal quotation marks omitted.) It reasoned instead that existing "safeguards designed to minimize racial bias" were constitutionally sufficient to address the risk of racial bias in capital trials. (*Id.* at p. 313.) The Court pointed, for example, to precedent directing "that prosecutorial discretion cannot be exercised on the basis of race" and that a prosecutor may not "exercise peremptory challenges on the basis of race." (*Id.* at p. 309, fn. 30, citing, e.g., *Batson v. Kentucky* (1986) 476 U.S. 79, and *Wayte v. United States* (1985) 470 U.S. 598.)

Document received by the CA Supreme Court.

Justice Brennan dissented, joined by Justices Marshall, Blackmun, and Stevens. The dissenters observed that the statistical evidence provided "a powerful demonstration of the type of risk that our Eighth Amendment jurisprudence has consistently condemned." (481 U.S. at p. 328.) The relevant constitutional concern was whether the system under which capital defendants were sentenced created "a substantial risk that" their sentences were imposed "in an arbitrary and capricious manner." (*Id.* at p. 322, internal quotation marks omitted.) In the dissenters' view, the Baldus study implicated that concern because race bears no rational connection to any legitimate penological considerations. (See *id.* at p. 323.) The study purported to show that "the odds of being sentenced to death are significantly greater than average if a defendant is black or his or her victim is white." (*Id.* at p. 338.) In light of the study's apparent "refinement and strength" (*id.* at p. 340), the dissenting justices deemed existing safeguards insufficient to guard against racial bias. (See *id.* at p. 338 [study "call[ed] into question" the "effectiveness of those safeguards"]).[12]

[12] As the dissenting justices acknowledged, further testing of the Baldus study was necessary because no court had yet confirmed its empirical validity. (See 481 U.S. at p. 367 (dis. opn. of Stevens, J.); *id.* at p. 345 & fn. 1 (dis. opn. of Blackmun, J.).) The district court had found that the study was not valid; the court of appeals merely assumed without deciding that it was valid. (See *id.* at pp. 288-291 & fns. 6-7 (majority opn.); see also *id.* at p. 345, fn. 1 (dis. opn. of Blackmun, J.) ["the proper course is to remand this case . . . for determination of the validity of the statistical evidence presented"].)

Document received by the CA Supreme Court.

No existing precedent of this Court directly addresses whether California's cruel or unusual punishment clause should be construed in the same way that the *McCleskey* majority construed the Eighth Amendment. So the central question for this Court, in deciding whether petitioners' factual allegations would establish a violation of the state cruel or unusual punishment clause, would be whether to follow *McCleskey* for purposes of state constitutional analysis. (Cf. *State v. Gregory* (2018) 192 Wash.2d 1, 19 [applying Washington Constitution's "cruel punishment" provision in a way that differed from the high court's application of the Eighth Amendment in *McCleskey*].)

In considering such questions, this Court has applied "a '*general* principle or policy of deference to United States Supreme Court decisions.'" (*Buza*, *supra*, 4 Cal.5th at p. 685; see also *People v. Teresinski* (1982) 30 Cal.3d 822, 836 [high court precedent on parallel provisions of the federal charter "ought to be followed unless persuasive reasons are presented for taking a different course" in interpreting the state charter].) But it has also recognized that the state Constitution is "'a document of independent force.'" (*Buza*, at p. 684.) While "decisions of the United States Supreme Court interpreting parallel" provisions of the federal Constitution are always "'entitled to respectful consideration,'" they "are not binding" when this Court construes the California Constitution. (*Ibid.*)

In deciding whether to follow a U.S. Supreme Court decision when construing the state Constitution, this Court generally asks whether there are "'cogent reasons,' 'independent state interests,'

Document received by the CA Supreme Court.

or ‘strong countervailing circumstances’” that might justify construing the state provision differently. (*Buza*, *supra*, 4 Cal.5th at p. 685.) That inquiry has considered, among other things: whether anything “in the language or history of the California provision suggests that the issue . . . should be resolved differently than under the federal Constitution” (*Teresinski*, *supra*, 30 Cal.3d at p. 836); whether the federal decision “limits rights established by earlier precedent” (*ibid.*); whether it was accompanied by “vigor[ous] . . . dissenting opinions” or has generated “incisive academic criticism” (*ibid.*); and whether following it would “overturn established California doctrine affording greater rights to the defendant” (*id.* at p. 837).

Sometimes that inquiry is indeterminate. Here, for example, *McCleskey* did not limit rights established by earlier precedent because it “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.” (Pet. 80.) And it did not overturn any established California doctrine because this Court had not yet addressed a state cruel or unusual punishment claim based on statistical evidence of racial disparities in California’s death penalty system. On the other hand, *McCleskey*’s Eighth Amendment holding did generate a vigorous, four-justice dissent (see 481 U.S. at pp. 320-345) and intense academic criticism (see, e.g., Pet. 83-84). And there is a textual difference between the state and federal provisions (compare U.S. Const., 8th Amend. [“cruel and unusual”], with Cal. Const., art. I, § 17 [“[c]ruel or

Document received by the CA Supreme Court.

unusual"]), although it is not clear that this difference materially bears on the relevant question here (see generally *People v. Anderson* (1972) 6 Cal.3d 628, 634-637 [discussing decision at the 1849 convention to substitute "or" for "and"]).

As "the final arbiter" of the meaning of the California Constitution, this Court is ultimately responsible for resolving that indeterminacy. (*People v. Breverman* (1998) 19 Cal.4th 142, 178, fn. 26.) The Court's general policy would be to defer to *McCleskey* when evaluating whether the petitioners here could prevail on a state cruel or unusual punishment claim. (See *Buza*, *supra*, 4 Cal.5th at p. 685.) And it is hard to see how that claim could succeed if the Court deferred to *McCleskey*.

But the circumstances here—in particular, the strength and vigor of the four-justice dissent in *McCleskey*—could provide a basis for the Court to depart from *McCleskey* for purposes of state cruel or unusual punishment analysis. The first step in evaluating whether to depart would be to ensure that petitioners' factual allegations satisfy the "remarkably stringent standard of statistical evidence" described by the dissent in *McCleskey*. (481 U.S. at p. 342 (dis. opn. of Brennan, J.).) That standard would require consideration of both "the methodology employed" by petitioners' studies and "the ultimate accuracy [and] significance of the results." (*Hardin*, *supra*, 15 Cal.5th at p. 862; see Prelim. Resp. 16-22.) Evidentiary scrutiny of that nature is particularly important in a case like this one, where the empirical methodologies and results are the subject of active debate. (See, e.g., Riverside District Attorney Br. 24-31.)

Document received by the CA Supreme Court.

The degree of any statistical disparities ultimately found by this Court—as well as the overall reliability of petitioners' studies—may inform the Court's consideration of whether there are "'independent state interests[]' or 'strong countervailing circumstances'" that justify a departure from *McCleskey*. (*Buza*, *supra*, 4 Cal.5th at p. 685.) For example, evidentiary development could shed light on differences (or similarities) between the allegations here and the study in *McCleskey*, including the relationship between the racial disparities reported by petitioners and unique features of California's capital punishment regime. (See Prelim. Resp. 24.)

If factual development ultimately leaves the Court with a firm conviction that it should not follow *McCleskey*, this Court would be free to analyze a claim under the cruel or unusual punishment clause as it sees fit. Justice Brennan's dissent in *McCleskey* offers one possible analytical approach. Under that approach, the Court would assess whether California's system of capital punishment has fallen short of the "uniquely high degree of rationality" that is "demanded . . . in imposing the death penalty." (*McCleskey*, *supra*, 481 U.S. at p. 335 (dis. opn. of Brennan, J.).) To satisfy that standard, petitioners would not need to provide evidence of intentional racial discrimination. (See *id*. at p. 323, fn. 1.) At the same time, mere racial disparities (without more) would not be sufficient to establish that death sentences violate the cruel or unusual punishment clause. Petitioners would need to "control for permissible factors"—such as the severity of the offense—"that may explain

Document received by the CA Supreme Court.

an apparent arbitrary pattern" in sentencing. (*Id.* at p. 327; see *id.* at p. 338; cf. *Montes*, *supra*, 58 Cal.4th at p. 831.)

Assuming petitioners could satisfy that requirement, this Court would next need to determine what "degree of risk" of racially biased sentencing outcomes is "sufficient to raise constitutional concern." (*McCleskey*, *supra*, 481 U.S. at p. 335 (dis. opn. of Brennan, J.).) As Justice Brennan acknowledged, that is a difficult endeavor. (See *ibid.*) "The determination of the significance of [the relevant] evidence is at its core an exercise in human moral judgment," informed by "the fact that death is irrevocable." (*Ibid.*) But given that four justices in *McCleskey* deemed the alleged risk of racial bias in that case "intolerable by any imaginable standard" (*id.* at p. 325), the Court could look to the Baldus study's reported findings as a starting point. The Court could also look to the evidentiary findings that prompted the Washington Supreme Court to strike down that State's death penalty in *Gregory*, *supra*, 192 Wash.2d at p. 25. As petitioners note, the disparities alleged in their petition are comparable to—and perhaps materially greater than—those alleged in *McCleskey* and *Gregory*. (See Pet. 89; *McCleskey*, *supra*, 481 U.S. at p. 287; *Gregory*, *supra*, 192 Wash.2d at pp. 19-21 & fn. 8.)

Finally, if petitioners ultimately succeed in substantiating their alleged racial disparities, and the Court deems them constitutionally intolerable, it would be important for the Court to make clear that its analysis is limited to the death penalty and does not extend to any other forms of punishment. (See, e.g., *Harmelin v. Michigan* (1991) 501 U.S. 957, 995 [discussing "the

Document received by the CA Supreme Court.

qualitative difference between death and all other penalties"].) As Justice Brennan recognized in *McCleskey*, "the degree of arbitrariness that may be adequate to render the death penalty 'cruel and unusual' punishment" under the federal Constitution "may not be adequate to invalidate lesser penalties." (481 U.S. at p. 340.) Indeed, over 40 years have passed since the U.S. Supreme Court first established the arbitrariness principle (*ante*, p. 30), and the Attorney General is unaware of any state or federal precedent extending it beyond the death penalty context. There would be no reason for this Court to consider any such extension under the state cruel or unusual punishment clause.

B. Are petitioners entitled to all or part of the relief they seek if the facts alleged are proven?

The Court also directed the parties to address whether petitioners are entitled to all or part of the relief they seek, and whether that determination is affected by article I, section 27 or by the classification of this challenge as facial or as-applied. If this Court ultimately held that petitioners have proven a constitutional violation, petitioners would be entitled to a writ of mandate barring respondent from prosecuting capital cases using the procedures that gave rise to that violation. This Court's decision recognizing that violation would also establish constitutional precedent that state and local officials would be bound to follow. But certain aspects of petitioners' prayer for relief reach too far. And factual development would be essential to determining the scope of any appropriate relief.

Document received by the CA Supreme Court.

1. Petitioners' entitlement to relief

Petitioners seek "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." (Pet. 62.) If petitioners prove their factual allegations and this Court recognizes a violation of the state cruel or unusual punishment clause (see *ante*, pp. 29-38), that would entitle petitioners to some—but not all—of the relief they seek.

First, petitioners cannot obtain an order or judgment invalidating any existing death judgments in this writ of mandate proceeding. On petitioners' theory, hundreds of existing judgments violate the state Constitution. To the extent that petitioners ask the Court to nullify those judgments here, their petition amounts to a collateral attack: "an attempt to avoid the effect of a judgment or order made in some other proceeding." (*Rico v. Nasser Bros. Realty Co.* (1943) 58 Cal.App.2d 878, 882; see, e.g., *People v. Padilla* (2022) 13 Cal.5th 152, 163; *Briggs v. Brown* (2017) 3 Cal.5th 808, 839, fn. 17.) The Penal Code is clear that a "writ of habeas corpus pursuant to [Penal Code section 1509] is the exclusive procedure for collateral attack on a judgment of death." (Pen. Code, § 1509, subd. (a).)[13]

---

[13] That is not to say that prisoners subject to existing death judgments would be unable to obtain relief in their own cases if this Court recognized a constitutional violation in this case. It is instead to say that those prisoners would need to seek relief from their judgments through collateral review, legislative reform, or executive clemency. (See generally *In re Milton* (2022) 13 Cal.5th (continued…)

Document received by the CA Supreme Court.

Second, petitioners' choice to name the Attorney General as the only respondent (Pet. 19) will necessarily cabin any available relief. The Attorney General is "the chief law officer of the State." (Cal. Const., art. V, § 13.) He has direct involvement in "the prosecution . . . of sentences of death" (Pet. 62) in any capital prosecutions handled by the California Department of Justice (see generally Gov. Code, § 12550), and in defending capital judgments on direct appeal and in state and federal habeas proceedings (see, e.g., *People v. Frazier* (2024) 16 Cal.5th 814; *Jones v. Davis* (9th Cir. 2015) 806 F.3d 538). He also has "direct supervision over every district attorney," and "shall assist any district attorney in the discharge of the duties of that office" when such assistance is "required by the public interest or directed by the Governor." (Cal. Const., art. V, § 13.) But it is courts—not the Attorney General—that "impos[e]" (Pet. 62) capital sentences. And the Attorney General is not directly involved in the "execution" (*ibid.*) of sentences of death, which is the responsibility of the Department of Corrections and Rehabilitation (CDCR), under the supervision of the Governor. (See, e.g., Pen. Code, §§ 3600, 3604; Gov. Code, § 12838.)[14]

While it is not necessary to add parties to this case in order to litigate petitioners' constitutional claims against the Attorney

---

893, 904; *People v. Lamoureux* (2019) 42 Cal.App.5th 241, 262-263; Cal. Const., art. V, § 8.)

[14] The Attorney General frequently represents CDCR in litigation, including litigation concerning the death penalty (see, e.g., *Cooper v. Newsom* (9th Cir. 2021) 13 F.4th 857, 865), but does not have a direct role in the execution of death sentences.

Document received by the CA Supreme Court.

General (see *post*, pp. 49-56), any writ of mandate directed to the Attorney General must be tailored to the Attorney General's role and responsibilities. (See, e.g., *Boggs v. Jordan* (1928) 204 Cal. 207, 216-219.) If petitioners prevailed following the necessary evidentiary proceedings, the Court could issue a writ of mandate recognizing "that California's capital sentencing scheme is unconstitutional" and "barring" the Attorney General from "prosecut[ing]" (Pet. 62) any capital cases until and unless the constitutionally problematic features of the scheme have been changed. But a writ of mandate directing the Attorney General to refrain from imposing or executing capital sentences (see *ibid.*) would not be appropriate. (See generally *Bandini Estate Co. v. Payne* (1935) 10 Cal.App.2d 623, 625 ["A writ of mandamus will not issue to compel one officer to perform the duties imposed by law upon another officer."].)[15]

To be sure, a published opinion describing the Court's holding would be *precedent* that would control the conduct of other state and local officials. As Justice Mosk once put it, "every public official in the state takes a similar oath to uphold the

---

[15] As a formal matter, petitioners also could not obtain declaratory relief (see Pet. 62), because "the appellate courts of this state . . . do not have original jurisdiction over actions for declaratory relief" (*Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1045). In practice, however, "where the constitutional validity of a statute . . . is in issue," this Court has sometimes "entertained challenges to the legislation when brought by petition for writ of mandate," and its judgments in such proceedings can operate as, "in effect, declaratory relief." (*Ibid.*; see, e.g., *Legislature v. Eu* (1991) 54 Cal.3d 492, 535-536; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 355-356.)

Document received by the CA Supreme Court.

Constitution," and "[t]he oath of office to obey the Constitution requires obedience to the Constitution . . . as interpreted by objective judicial tribunals." (*Southern Pacific Transportation Co. v. Pub. Utilities Com.* (1976) 18 Cal.3d 308, 319 (conc. & dis. opn. of Mosk, J.); cf. *Cooper v. Aaron* (1958) 358 U.S. 1, 18-19.) Public officials throughout California could themselves be subject to a writ of mandate (and potentially other legal sanctions) if they prosecuted, imposed, or executed a capital sentence that this Court's precedent deems unconstitutional.

Third, California's cruel or unusual punishment clause would not support an order *permanently* prohibiting the prosecution (or imposition and execution) of capital sentences. No constitution requires "perfect procedure[s]." (*Pulley*, *supra*, 465 U.S. at p. 54.) Our constitution instead requires the State to employ procedures that reduce the risk of arbitrariness in capital sentencing to constitutionally acceptable levels. (See *ante*, pp. 30-31; cf. *McCleskey*, *supra*, 481 U.S. at pp. 322-323 (dis. opn. of Brennan, J.); *Gregory*, *supra*, 192 Wash.2d at p. 25.) Any relief in this case would therefore be limited to the specific procedures proven to have created an unconstitutionally high risk that defendants are sentenced to death based on race—while allowing for the possibility that death sentences could be prosecuted, imposed, and carried out under a reformed system.

Future proceedings in this case would shed additional light on the proper scope of any such remedy. For example, further evidentiary development could reveal whether certain features of the State's death penalty system have contributed more than

Document received by the CA Supreme Court.

others to the top-line statistics on racial disparities that petitioners highlight. (Cf. *McCleskey*, *supra*, 481 U.S. at p. 367 (dis. opn. of Stevens, J.).) Petitioners would also have an opportunity to address whether recent criminal justice reforms sufficiently reduce the risk of racial bias in administration of the death penalty going forward. For example, the Legislature enacted the Racial Justice Act in 2020, in part as a response to *McCleskey*. (See Stats. 2020, ch. 317, § 2, subd. (f), p. 3707.) The Act creates a new statutory mechanism for defendants to prove unlawful racial bias at various phases of the criminal justice process.[16] The Legislature also enacted reforms "to make juries more inclusive and representative of our communities." (*People v. Suarez* (2020) 10 Cal.5th 116, 194 (conc. opn. of Liu, J.); see, e.g., Stats. 2020, chs. 230, 318 [expanding the jury pool and revising the framework for objecting to peremptory strikes].) And the Attorney General promulgated guidelines for race-blind charging decisions in response to a 2022 statute. (Stats. 2022, ch. 806.)[17] All of the data underlying petitioners' studies pre-dates these reforms. (See, e.g., Pet. 28-41; Pet. Exh. A at 20.) Further

[16] See Pham & Dehmani, Stanford Ctr. for Racial Justice, *The California Racial Justice Act of 2020 Explained*, (Apr. 22, 2024) <https://law.stanford.edu/2024/04/22/the-california-racial-justice-act-of-2020-explained/> (as of Nov. 18, 2024).

[17] Cal. Dept. of Justice, *Attorney General Bonta Issues Race-Blind Charging Guidelines for Prosecutors* (Jan. 4, 2024) <https://oag.ca.gov/news/press-releases/attorney-general-bonta-issues-race-blind-charging-guidelines-prosecutors> (as of Nov. 18, 2024).

Document received by the CA Supreme Court.

inquiry into the effect of those policies would inform the scope of any violation and any relief to which petitioners may be entitled.

2. Effect of article I, section 27

The voters adopted article I, section 27, of the California Constitution in response to this Court's decision in *People v. Anderson* (1972) 6 Cal.3d 628. That decision struck down the death penalty under the cruel or unusual punishment provision currently housed in article I, section 17. Section 27 directs that "[a]ll statutes of this State in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum." (Cal. Const., art. I, § 27.) It further directs that "[t]he death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of [article I, section 17] nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution." (*Ibid.*)

This Court has construed article I, section 27 narrowly, to preclude only "per se" challenges to the death penalty under the state Constitution. (*People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 808.) For example, section 27 would bar a claim that, regardless of how the capital system is administered, capital punishment necessarily violates the state due process clause or the cruel or unusual punishment clause. (See *ibid.*) But section 27 preserves courts' authority to review "death sentences to assure that each sentence has been properly and legally imposed

Document received by the CA Supreme Court.

and to safeguard against *arbitrary* or disproportionate treatment." (*Frierson*, *supra*, 25 Cal.3d at p. 187 (plur. opn.), italics added.) And this Court has squarely rejected the notion that section 27 imposes "an absolute restriction on state constitutional review of any statute that provide[s] for the penalty of death." (*Engert*, at p. 807.)

At this early stage of the proceedings, it is difficult to discern the extent to which petitioners' claims implicate section 27. Petitioners acknowledge that section 27 "precludes a judicial determination that capital punishment is unconstitutional *per se*." (Pet. 53.) They contend that their "empirical evidence demonstrates that California's capital punishment scheme is administered in a racially discriminatory manner" (Pet. 16) and forswear any argument "that death is an impermissible form of punishment *in the abstract*" (Pet. 53). And many of petitioners' contentions do not appear to pose any concerns under section 27. For example, they argue that the breadth of the current special circumstances statute "creates ample room for bias to influence death penalty charging decisions." (Pet. 43.) That does not amount to an argument that capital punishment is unconstitutional per se. Nor does their argument that the State currently lacks "uniform criteria to guide prosecutors in deciding when to seek death." (Pet. 44.)

But other arguments raised by petitioners suggest that a system of capital punishment could *never* be administered constitutionally. For example, petitioners argue that implicit bias leads jurors to "fall back on ethnic or racial biases." (Pet. 49;

Document received by the CA Supreme Court.

see Pet. 47.) Petitioners also appear to criticize the individualized nature of case-by-case decisionmaking at the penalty phase of capital trials as "inherently difficult [and] subjective." (Pet. 49, internal quotation marks omitted.) Because the federal Constitution requires juror participation in capital proceedings (see *Hurst v. Florida* (2016) 577 U.S. 92, 98), and mandates the use of individualized penalty-phase procedures (see, e.g., *Sumner v. Shuman* (1987) 483 U.S. 66, 78), those arguments appear to suggest that capital punishment is impermissible per se.

This is another area where the Court would benefit from further factual development. If this case proceeds, petitioners could clarify the extent to which their legal theories and the statistical evidence they invoke arise from inherent features of any death penalty regime, as opposed to features that the Legislature and the electorate could modify. (See Prelim. Resp. 25.) At a minimum, section 27 requires that petitioners narrow their requested relief to leave open the possibility that the Legislature or the voters could enact a reformed death penalty system that would satisfy other guarantees of the state Constitution. (Cf. *Gregory*, *supra*, 192 Wash.2d at p. 25 ["the death penalty is not per se unconstitutional"]; *ibid.* ["[w]e leave open the possibility that the legislature may enact a carefully drafted statute . . . to impose capital punishment in this state," internal quotation marks and citation omitted].)

Document received by the CA Supreme Court.

3. Effect of this challenge being classified as facial or as-applied

Petitioners characterize their constitutional claim as an "as-applied challenge" (e.g., Pet. 50, fn. 23, 53, 68, 74-75, fn. 26) and appear to disavow any "facial" challenge (see, e.g., Pet. 50, fn. 23). The Court has asked the parties to address whether the classification of this matter as an as-applied or a facial challenge would affect petitioners' entitlement to relief. The answer is that, regardless of the label petitioners use to describe their challenge, they must satisfy the standard for facial relief.

Some cases have "characteristics of both" an as-applied challenge and a facial challenge. (*Mathews v. Becerra* (2019) 8 Cal.5th 756, 768, quoting *Doe v. Reed* (2010) 561 U.S. 186, 194.) This case appears to be one of them. Petitioners' claim is "as applied" in the sense that it is based on factual allegations concerning how our capital punishment system has been administered in practice. It is facial in the sense that it is not limited to any "particular case, but challenges application of the law more broadly to" everyone who has been sentenced under that system—or who might face a capital prosecution going forward. (*Ibid.*) Ultimately, "'[t]he label is not what matters.'" (*Ibid.*) Petitioners' "claim[] and requested relief 'reach beyond the particular circumstances of these [petitioners]' and 'must therefore satisfy the standards for a facial challenge to the extent of that reach.'" (*Ibid.*)

This Court has acknowledged "some uncertainty regarding the standard for facial constitutional challenges to statutes." (*T-Mobile West LLC v. City & County of San Francisco* (2019) 6

Document received by the CA Supreme Court.

Cal.5th 1107, 1117, fn. 6.) At a minimum, the standard requires challengers to establish a constitutional violation in the "generality or great majority of cases." (*Ibid.* [noting that other precedents "have articulated a stricter standard, holding that legislation is invalid only if it presents a total and fatal conflict with applicable constitutional prohibitions"].) Here, petitioners' equal protection claim would require a showing of intentional discrimination in at least the "generality or great majority of" capital cases. (*Ibid.*) For the reasons discussed above, petitioners' allegations and evidence cannot satisfy that standard. (*Ante*, pp. 24-29.)

As to the cruel or unusual punishment clause, petitioners would need to demonstrate that California's capital sentencing regime produces a constitutionally intolerable risk of sentences based on race in at least the generality or great majority of cases. As discussed above, the relevant principle under the cruel or unusual punishment clause focuses on the presence (or absence) of "major systemic defects" (*Pulley*, *supra*, 465 U.S. at p. 54), giving rise to a constitutionally unacceptable risk that defendants—system-wide—will be sentenced to death based on an impermissible consideration like race instead of legitimate penological considerations (see *ante*, p. 30). Any relief would therefore apply on a system-wide basis.[18] And petitioners can

---

[18] Cf. *Furman*, *supra*, 408 U.S. at p. 310 (opn. of Stewart, J.) (deeming "legal systems" unconstitutional to the extent they give rise to excessive arbitrariness); *McCleskey*, *supra*, 481 U.S. at p. 323 (dis. opn. of Brennan, J.) (similar); *Gregory*, *supra*, 192

(continued…)

Document received by the CA Supreme Court.

rely on statistical evidence about systemic disparities. (See *McCleskey*, *supra*, 481 U.S. at p. 325 (dis. opn. of Brennan, J.); *Gregory*, *supra*, 192 Wash.2d at p. 19.) Whether petitioners ultimately carry their burden will depend on the details of their evidentiary submissions, including the validity of the statistical methods used in the studies they invoke.

III. ISSUE 3: WHAT PARTIES ARE NECESSARY?

Finally, the Court asked the parties to address "[w]hat parties are necessary to properly consider the requested relief and effectuate it, if warranted?" In the Attorney General's view, no one other than petitioners and the Attorney General are "necessary" for this case to proceed. But the Attorney General recognizes that this is a case of tremendous public importance—of interest to a great many individuals, officials, and organizations. And the relevant rules and statutes provide mechanisms for others to seek to participate in the proceedings. The Court has already indicated that it is open to receiving applications for leave to file amicus curiae briefs addressing the issues in its supplemental briefing order. If the case proceeds, the Court will presumably entertain amicus briefs addressing the merits of petitioners' evidentiary and legal claims, as it has done in similar circumstances in the past. (See Cal. Rules of Court, rule 8.487(e); see, e.g., *Briggs*, *supra*, 3 Cal.5th at p. 822 [listing

---

Wash.2d at pp. 35-36 (similar); Fallon, Jr., *Fact and Fiction About Facial Challenges* (2011) 99 Cal. L.Rev. 915, 937-938 (describing several cases deeming statutes facially invalid "for failing to impose proper safeguards against arbitrary imposition of the death penalty").

Document received by the CA Supreme Court.

numerous amici who filed briefs after the Court's order to show cause].) And some nonparties may be able to establish good cause to intervene on a permissive basis under Code of Civil Procedure, section 387, subdivision (d)(2).[19]

At present, however, there is no basis for the Court to join additional parties or otherwise expand the list of parties to this proceeding. Two district attorney's offices have purported to file preliminary oppositions in this matter on behalf of "the People of the State of California" as real party in interest. (See Riverside District Attorney Br. 14-15; San Bernardino District Attorney Br. 35-36.) Neither of those briefs identifies any support for treating "the People" as a real party in interest in this type of writ proceeding. This Court has repeatedly considered petitions for writs of mandate challenging criminal laws that did not name the People as real party in interest. (See, e.g., *Briggs*, *supra*, 3 Cal.5th at p. 808; *Raven*, *supra*, 52 Cal.3d at p. 340; *Brosnahan v. Brown* (1982) 32 Cal.3d 236.) And the named respondent here—the Attorney General—is already responsible for representing the interests of the People in his capacity as "the chief law officer of the State." (Cal. Const., art. V, § 13; see generally *Abbott Laboratories v. Superior Court* (2020) 9 Cal.5th 642, 660-662.)

Even if it were permissible to name "the People" as a real party in interest, moreover, the fact that the pending writ

---

[19] See Code Civ. Proc., § 387, subd. (d)(2) ("The court may, upon timely application, permit a nonparty to intervene in the action or proceeding if the person has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both.").

Document received by the CA Supreme Court.

petition did not name the People would not make it "facially defective." (San Bernardino District Attorney Br. 35.) "Failing to name an individual as a real party in interest in the pleading that initiates the action is not a defect." (*Tracy Press, Inc. v. Superior Court* (2008) 164 Cal.App.4th 1290, 1296.) "[I]t merely defines the parties, leaving out the individual not named." (*Ibid.*) So the consequence of petitioners' omission of "the People" is that the Court would lack "jurisdiction to enter" a writ against "the People" in this action. (*Id.* at p. 1297.) But the Court would have jurisdiction to enter a writ against the Attorney General—who was "named as a party and duly served with notice of the action" (*ibid.*), and who typically represents the People in this Court.

The Attorney General understands the Court's question to focus instead on whether there are additional parties who must be joined under Code of Civil Procedure section 389, subdivision (a) ("section 389(a)"). (Cf. San Bernardino District Attorney Br. 35-36.) Section 389(a) requires the joinder of any person in whose "absence complete relief cannot be accorded among those already parties." (Code Civ. Proc., § 389, subd. (a)(1).) It also requires the joinder of anyone who "claims an interest relating to the subject of the action," and in whose absence "the disposition of the action . . . may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of . . . inconsistent obligations by reason of his claimed interest." (*Id.*, subd. (a)(2).)

As this Court has explained, "the determination of whether a person or entity must be joined as a party to a civil action is a

Document received by the CA Supreme Court.

case-specific inquiry that weighs factors of practical realities and other considerations." (*Bianka M. v. Superior Court* (2018) 5 Cal.5th 1004, 1018, internal quotation marks omitted.) That determination is a matter of judicial discretion. (See, e.g., *Hayes v. State Dept. of Developmental Services* (2006) 138 Cal.App.4th 1523, 1529.) In exercising that discretion, "[c]ourts must be careful to avoid converting a discretionary power or rule of fairness into an arbitrary and burdensome requirement that may thwart rather than further justice." (*County of Imperial v. Superior Court* (2007) 152 Cal.App.4th 13, 26; see also *Serrano*, *supra*, 18 Cal.3d at p. 753 [same].)

Special care is warranted in applying section 389(a) to a challenge to the constitutionality of a statewide law or policy. Such a proceeding necessarily implicates a matter of statewide concern (see, e.g., *AIDS Healthcare Foundation v. Bonta* (2024) 101 Cal.App.5th 73), and countless people will have an interest (in some sense) in its outcome. Caution is particularly appropriate where, as here, an appellate court considers a constitutional challenge to a statewide criminal law. The breadth of that challenge means that many participants in our criminal justice system could be affected by a precedential decision resolving the legal merits: defendants who are currently being prosecuted under the law; defendants who have already been convicted or sentenced under the law; victims and family members; district attorneys who are prosecuting (or plan to prosecute) a violation of that law; and so forth. And if the petitioners purport to seek expansive relief—such as a statewide

Document received by the CA Supreme Court.

prohibition on the prosecution, imposition, or execution of a particular kind of sentence (see, e.g., Pet. 62)—many people and institutions would need to be involved in effectuating that requested relief. It would entail compliance by state and local prosecutors (who prosecute criminal cases); by judges throughout the State (who impose sentences); and by state officials who run our corrections system (who carry out most sentences). A case like this one therefore presents a risk that litigants will employ artful or expansive interpretations of section 389(a) to argue for the joinder of large numbers of state officials, local officials, and private parties.

If this case continues past the current stage, a proper analysis of section 389(a) would begin by recognizing that "the 'complete relief' clause" in subdivision (a)(1) "requires joinder when nonjoinder precludes the court from effecting relief not in some overall sense, but between *extant parties*." (*Countrywide Home Loans, Inc. v. Superior Court* (1999) 69 Cal.App.4th 785, 793-794, internal quotation marks omitted.) Put differently, "joinder is required only when the absentee's nonjoinder precludes the court from rendering complete justice *among those already joined*." (*Id*. at p. 794.) The persons who are already parties here are petitioners and the Attorney General in his official capacity. (See Pet. 19-23.) So the operative question is whether joinder of any person would be necessary to effectuate the relief that petitioners could properly obtain from the Attorney General—the only respondent they chose to name. The answer is no. If petitioners prevailed, they could obtain a writ recognizing

Document received by the CA Supreme Court.

that the current capital sentencing system is unconstitutional and barring the Attorney General from prosecuting capital cases under that system. (*Ante*, p. 41; see Pet. 60-62.)[20]

As to section 389(a)(2), "[t]he only interests protected by" that provision "are personal ones which may be prejudiced in a concrete way by a judgment rendered in the absence of joinder." (*Van Atta v. Scott* (1980) 27 Cal.3d 424, 451.) "Typical" examples include the "undetermined interests [of multiple persons] in the same property, or in a particular trust fund," where one person "seeks, in an action, to recover the whole, to fix his share, or to recover a portion claimed by him." (*Serrano*, *supra*, 18 Cal.3d at p. 753.) By contrast, the general interests of state and local officials in the enforcement or administration of the law is typically insufficient to require their joinder in actions challenging the constitutionality of statutes or ordinances. (See, e.g., *Van Atta*, *supra*, 27 Cal.3d at p. 451.)

For example, the *Van Atta* Court concluded that the interests of judges responsible for "setting bail and deciding motions for own recognizance" were too "remote" to require their joinder in a challenge to San Francisco's system for pretrial release and detention. (27 Cal.3d at p. 451.) While the judges were "undoubtedly interested" in the implications of the case for

---

[20] As discussed above, petitioners could not obtain formal relief in this proceeding barring the imposition or execution of capital sentences, because the Attorney General is not responsible for imposing or carrying out capital sentences. (*Ante*, p. 41.) That is a result of how petitioners framed their petition—not a basis for requiring the joinder of other parties. (See *Countrywide Home Loans*, *supra*, 69 Cal.App.4th at pp. 793-94.)

Document received by the CA Supreme Court.

"the exercise of their discretion [and] administration of justice," that interest was "no greater . . . than in any other case which challenges the constitutionality of statutes" and did not give rise to the necessary "personal stake." (*Id.* at pp. 451-452; see *Serrano*, *supra*, 18 Cal.3d at p. 752 [interests of the Legislature and the Governor as "lawmakers concerned with the validity of statutes enacted by them . . . is not of the immediacy and directness requisite to party status"].)

Any general interest that local prosecutors have in the constitutionality of California's capital sentencing system (see, e.g., San Bernardino District Attorney Br. 8-10) is not sufficient to require joinder under section 389(a)(2). Much like the judges in *Van Atta*, *supra*, 27 Cal.3d at p. 452, local prosecutors have no "personal stake" in this writ proceeding. Their interest in seeking the death penalty and defending sentences of death is "no greater" than their interest in "any other case which challenges the constitutionality" of criminal statutes that they may wish to invoke when bringing prosecutions, seeking particular sentences, or defending criminal judgments. (*Ibid.*) Indeed, if section 389(a)(2) required joinder of all "District Attorneys throughout the State" (Riverside District Attorney Br. 15), that could effectively entitle each of the State's district attorneys to be joined as parties in *any* civil case challenging the constitutionality of *any* criminal statute. That far-reaching result would impose "burdensome requirement[s] which may thwart rather than accomplish justice." (*Serrano*, *supra*, 18

Document received by the CA Supreme Court.

Cal.3d at p. 753, internal quotation marks omitted; see also *Bianka M.*, *supra*, 5 Cal.5th at p. 1018.)

Nor is there a basis to order joinder of any other party. As for criminal defendants currently facing death sentences (see Riverside District Attorney Br. 15), they are undoubtedly interested in the issues presented in this case. But the judgments in their cases cannot be disturbed in this proceeding, for the reasons discussed above. (*Ante*, p. 39; see Pen. Code, § 1509, subd. (a).) Joining the hundreds of defendants sentenced to death would also be inconsistent with the administrability concerns that animate this Court's "doctrine of indispensable and necessary parties." (*Serrano*, *supra*, 18 Cal.3d at p. 753.) As for officials with administrative responsibility of carrying out death sentences, any general interest that those officials may have in the issues presented here does not, on its own, suffice to require joinder under section 389(a)(2). (See *Van Atta*, *supra*, 27 Cal.3d at pp. 451-452; see also *ante*, pp. 40, 54, fn. 20 [discussing limits on relief available in this proceeding].)

Again, however, anyone with an interest in these proceedings may seek leave to participate as amicus curiae or move to intervene on a permissive basis under Code of Civil Procedure, section 387, subdivision (d)(2). (See *ante*, p. 50 & fn. 19.) Nothing in this brief should be read as expressing a view on the propriety of applications for amicus status or permissive intervention that the Court might entertain in the future.

Document received by the CA Supreme Court.

CONCLUSION

As the Attorney General explained in his preliminary response—and as the discussion above illustrates—further factual development would be necessary before this Court could resolve the constitutional merits and determine what relief (if any) would be appropriate. If the Court is inclined to exercise its original jurisdiction to consider petitioners' claim instead of directing petitioners to proceed in superior court, the Attorney General respectfully requests that the Court appoint a special master or referee to assess the empirical studies invoked by petitioners and to resolve evidentiary issues.

Respectfully submitted,

ROB BONTA (SBN 202668)
Attorney General of California
MICHAEL J. MONGAN (SBN 250374)
Solicitor General
LANCE E. WINTERS (SBN 162357)
JONATHAN L. WOLFF (SBN 193479)
Chief Assistant Attorneys General
JAMES WILLIAM BILDERBACK II (SBN 161306)
THOMAS S. PATTERSON (SBN 202890)
Senior Assistant Attorneys General

s/ Samuel T. Harbourt

SAMUEL T. HARBOURT (SBN 313719)
California Supreme Court Civil Coordinator & Deputy Solicitor General
MICA L. MOORE (SBN 321473)
Deputy Solicitor General

Attorneys for Respondent

Nov. 18, 2024

Document received by the CA Supreme Court.

CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL OPENING BRIEF uses a 13 point Century Schoolbook font and contains 11,504 words.

ROB BONTA
Attorney General of California

s/ Samuel T. Harbourt

SAMUEL T. HARBOURT
Deputy Solicitor General
Attorneys for Respondent

Nov. 18, 2024

Document received by the CA Supreme Court.