

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Petitioners,

v.

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

Respondent.

PETITIONERS' REPLY

Office of the State Public Defender

GALIT LIPA
State Public Defender
CHRISTINA A. SPAULDING, SBN 228631
LISA ROMO, SBN 134850
*JESSICA E. OATS, SBN 266834
Jessica.Oats@ospd.ca.gov
1111 Broadway, Suite 1000
Oakland, California 94607
P: (510) 267-3300 / F: (510) 452-8712

**American Civil Liberties Union of
Northern California**

*AVRAM FREY, SBN 347885
AFrey@aclunc.org
NEIL K. SAWHNEY, SBN 300130
LAUREN M. DAVIS, SBN 357292
39 Drumm Street
San Francisco, California 94111
P: (415) 430-0125 / F: (415) 255-1478

**American Civil Liberties Union
Capital Punishment Project**

CASSANDRA STUBBS, SBN 218849
*CLAUDIA VAN WYK, *pro hac vice*

cvanwyk@aclu.org

201 W. Main Street, Suite 402
Durham, North Carolina 27701
P: (267) 971-6991 / F: (919) 682-5961

**Wilmer Cutler Pickering Hale
& Dorr LLP**

SETH P. WAXMAN, *pro hac vice*
JESSICA L. LEWIS, SBN 302467
*KATHRYN D. ZALEWSKI, SBN 263119
Kathryn.Zalewski@wilmerhale.com

LIV L. HERRIOT, SBN 267694
ANGELA S. BOETTCHER, *pro hac vice*
2600 El Camino Real, Suite 400
Palo Alto, California 94306
P: (650) 858-6000 / F: (650) 858-6100

**NAACP Legal Defense and
Educational Fund, Inc.**

*PATRICIA OKONTA, *pro hac vice*
POkonta@naacpldf.org
AMBER KOONCE, *pro hac vice*
GABRIEL DIAZ (*pro hac vice* pending)
40 Rector Street, 5th floor
New York, New York 10006
P: (212) 374-6305 / F: (202) 682-1312

ROBERT D. BACON, Attorney at Law
SBN 73297
bacon2254@aol.com
484 Lake Park Avenue, PMB 110
Oakland, California 94610
P: (510) 701-6640

Attorneys for Petitioners

Document received by the CA Supreme Court.

CONTENTS

Authorities.....	5
Citations for Filings	9
Introduction.....	10
I. Petitioners have standing under California law	11
II. Petitioners established violations of the state Constitution and are entitled to the relief they seek.....	14
A. The petition establishes equal protection violations	14
1. Petitioners demonstrated actionable disparate impact under this Court’s cases	15
2. Neither <i>Hardy</i> nor policy arguments preclude petitioners’ equal protection claim ..	19
B. The petition establishes violations of California’s cruel or unusual punishment provision.....	24
1. The Court is not writing on a clean slate	24
2. This Court’s principles of state constitutional interpretation support petitioners’ claim.....	25
C. Petitioners are entitled to the relief they seek.....	32
1. Petitioners need not meet the standard for facial challenges	32
2. Petitioners nevertheless have met the standard for facial challenges	34
3. This Court may invalidate death sentences imposed under California’s current capital punishment statutes.....	36
D. Article I, section 27 has no bearing on this Court’s determination of petitioners’ claims	39
III. Petitioners and the Attorney General are the only necessary parties	41

Conclusion	43
Certificate of Word Count.....	45
Proof of Service.....	46

AUTHORITIES

CASES

<i>Blair v. Pitchess</i> (1971) 5 Cal.3d 258.....	13
<i>Briggs v. Brown</i> (2017) 3 Cal.5th 808.....	36
<i>Butt v. State of California</i> (1992) 4 Cal.4th 668	15, 16, 20
<i>California v. Ramos</i> (1983) 463 U.S. 992.....	23
<i>Chiatello v. City and County of San Francisco</i> (2010) 189 Cal.App.4th 472	13
<i>Crawford v. Bd. of Ed.</i> (1976) 17 Cal.3d 280	passim
<i>Crawford v. Bd. of Ed.</i> (1982) 458 U.S. 527.....	24
<i>Darensburg v. Metropolitan Transportation Com.</i> (9th Cir. 2011) 636 F.3d 511.....	22
<i>Doe v. Reed</i> (2010) 561 U.S. 186	33
<i>Ford v. Wainwright</i> (1986) 477 U.S. 399	23
<i>Gardner v. App. Div.</i> (2019) 6 Cal.5th 998.....	25
<i>Gerawan Farming, Inc. v. Lyons</i> (2000) 24 Cal.4th 468.....	28
<i>Gregg v. Georgia</i> (1976) 428 U.S. 153.....	14, 18, 23
<i>Griggs v. Duke Power Co.</i> (1971) 401 U.S. 424	21
<i>Guardianship of Ann S.</i> (2009) 45 Cal.4th 1110	35
<i>Guz v. Bechtel Nat., Inc.</i> (2000) 24 Cal.4th 317.....	22
<i>In re Friend</i> (2021) 11 Cal.5th 720	36
<i>In re Smith</i> (2008) 42 Cal.4th 1251	18
<i>In re Taylor</i> (2015) 60 Cal.4th 1019.....	33
<i>In re Tellez</i> (2024) 17 Cal.5th 77.....	38
<i>Jackson v. Pasadena City School Dist.</i> (1963) 59 Cal.2d 876.....	16
<i>Los Altos Property Owners Assn. v. Hutcheon</i> (1977) 69 Cal.App.3d 22.....	13
<i>Mathews v. Becerra</i> (2019) 8 Cal.5th 756	33
<i>McCleskey v. Kemp</i> (1987) 481 U.S. 279.....	passim
<i>Miller v. American Express Co.</i> (9th Cir. 1982) 688 F.2d 1235	21

<i>Payan v. Los Angeles Community College Dist.</i> (9th Cir. 2021) 11 F.4th 729	21
<i>People v. Anderson</i> (1972) 6 Cal.3d 628	38
<i>People v. Baker</i> (2018) 20 Cal.App.5th 711.....	29
<i>People v. Bunyard</i> (1988) 45 Cal.3d 1189.....	28
<i>People v. Buza</i> (2018) 4 Cal.5th 658	26, 27
<i>People v. Hernandez</i> (1988) 47 Cal.3d 315.....	23
<i>People v. Lemcke</i> (2021) 11 Cal.5th 644.....	36
<i>People v. Martinez</i> (2023) 15 Cal.5th 326	33
<i>People v. Monge</i> (1997) 16 Cal.4th 826.....	27
<i>People v. Montes</i> (2014) 58 Cal.4th 809	12
<i>People v. Olivas</i> (1976) 17 Cal.3d 236.....	17, 18
<i>People v. Teresinski</i> (1982) 30 Cal.3d 822.....	passim
<i>People v. Wilkinson</i> (2004) 33 Cal.4th 821.....	18
<i>People v. Williams</i> (2024) 17 Cal.5th 99.....	33
<i>People v. Wilson</i> (2024) 16 Cal.5th 874	37, 38
<i>Plessy v. Ferguson</i> (1896) 163 U.S. 537.....	31
<i>Raju v. Super. Ct.</i> (2023) 92 Cal.App.5th 1222	13
<i>Raven v. Deukmejian</i> (1990) 52 Cal.3d 336	26
<i>Redd v. Guerrero et al.</i> (9th Cir. 2023) 84 F.4th 874.....	12
<i>Rialto Citizens for Responsible Growth v. City of Rialto</i> (2012) 208 Cal.App.4th 899.....	12
<i>Rockwell v. Superior Court</i> (1976) 18 Cal.3d 420	39
<i>Safer v. Super. Ct.</i> (1975) 15 Cal.3d 230	11
<i>Santa Monica Beach, Ltd. v. Super. Ct</i> (1999) 19 Cal.4th 952	33
<i>Save the Plastic Bag Coalition v. City of Manhattan Beach</i> (2011) 52 Cal.4th 155.....	12
<i>Serrano v. Priest</i> (1971) 5 Cal.3d 584.....	13, 15, 16, 21
<i>Serrano v. Priest</i> (1976) 18 Cal.3d 728.....	20

<i>Skinner v. State of Okl. ex rel. Williamson</i> (1942) 316 U.S. 535	18
<i>Smith v. City of Jackson</i> (2005) 544 U.S. 228	21
<i>Stanson v. Mott</i> (1976) 17 Cal.3d 206.....	13
<i>State v. Gregory</i> (Wash. 2018) 427 P.3d 621	10, 28, 41
<i>State v. Santiago</i> (Conn. 2015) 122 A.3d 1	19, 23, 28, 31
<i>Taking Offense v. State</i> (2021) 66 Cal.App.5th 696	13
<i>Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.</i> (2015) 576 U.S. 519	21
<i>T-Mobile West LLC v. City & County of San Francisco</i> (2019) 6 Cal.5th 1107.....	34
<i>Tobe v. City of Santa Ana</i> (1995) 9 Cal.4th 1069.....	33, 34
<i>Venice Town Council, Inc. v. City of Los Angeles</i> (1996) 47 Cal.App.4th 1547	12
<i>Washington v. Davis</i> (1976) 426 U.S. 229	20
<i>Weiss v. City of Los Angeles</i> (2016) 2 Cal.App.5th 194	12

STATUTES

42 U.S.C. § 18116.....	21
Gov. Code, § 11135.....	21, 22
Gov. Code, § 12511.....	42
Gov. Code, § 12513.....	42
Gov. Code, § 12955.8.....	22
Gov. Code, § 15420.....	11
Gov. Code, § 15421.....	11
Gov. Code, § 15425.....	11
Pen. Code, § 1260	38
Pen. Code, § 1509.....	36, 37
Stats. 2020, ch. 318, § 1	32
Stats. 2021, ch. 699, § 2	32

CONSTITUTIONAL PROVISIONS

Cal. Const., art. I, § 27.....	3, 39, 40
Cal. Const., art. I, § 28.....	37
Cal. Const., art. V, § 13.....	42
U.S. Const., 8th Amend.	passim

OTHER AUTHORITIES

Blume & Johnson, <i>Unholy Parallels Between McCleskey v. Kemp and Plessy v. Ferguson: Why McCleskey (Still) Matters</i> (2012) 10 Ohio St. J. Crim. L. 37	30, 31
Carle, <i>A Social Movement History of Title VII Disparate Impact Analysis</i> (2011) 63 Fla. L.Rev. 251.....	21, 22
CDCR, Condemned Inmate Summary, Dec. 3, 2024	35
Habeas Corpus Resource Center, 2023 Annual Report.....	13
Haney-López, <i>Intentional Blindness</i> (2012) 87 N.Y.U. L.Rev. 1779.....	30, 31
Krieger, <i>The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity</i> (1995) 47 Stan. L.Rev. 1161.....	22

CITATIONS FOR FILINGS

Petn.	Petition for Writ of Mandate (filed Apr. 9, 2024)
AG Resp.	Preliminary Response to Petition for Writ of Mandate (filed May 6, 2024)
Pet. Reply	Petitioners’ Reply to Respondent’s Preliminary Response to Petition for Writ of Mandate (filed May 16, 2024)
Pet. Br.	Petitioners’ Brief (filed Nov. 18, 2024)
AG Br.	Supplemental Opening Brief (filed Nov. 18, 2024)
Bazelon Br.	Brief of <i>Amici Curiae</i> the State Law Research Initiative & the University of San Francisco School of Law Racial Justice Clinic in Support of Petitioners (filed Dec. 3, 2024)
Rosen Br.	Brief of <i>Amicus Curiae</i> Jeffrey F. Rosen, District Attorney of Santa Clara County, California, in Support of Petitioners (filed Dec. 3, 2024)
Prosecutors Alliance Br.	<i>Amicus Curiae</i> Brief of Prosecutors Alliance of California (filed Dec. 3, 2024)
Chemerinsky Br.	Brief <i>Amici Curiae</i> of Constitutional Law Scholars in Support of Petitioners (filed Dec. 4, 2024)
CJLF Br.	Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Neither Party (filed Dec. 4, 2024)
Carrillo Br.	<i>Amicus Curiae</i> Brief of California Constitution Scholars Supporting Neither Party (filed Dec. 6, 2024)

INTRODUCTION

Petitioners and the Attorney General (AG) agree on the most pressing questions now before this Court. They agree that the Court should exercise original jurisdiction and issue an order to show cause. (Petn. at p. 16; AG Resp. at p. 18, 20.) And they agree that the Court should find the facts respecting racial disparities in California’s death-sentencing scheme before applying the law. (Pet. Reply at p. 13; AG Br. at pp. 35–37.) The AG acknowledges that the racial “disparities alleged in the[] petition are comparable to—and perhaps materially greater than—those alleged in *McCleskey* [*v. Kemp* (1987) 481 U.S. 279 (*McCleskey*)] and [*State v. Gregory* (Wash. 2018) 427 P.3d 621 (*Gregory*)].” (AG Br. at p. 37.)

Numerous amici likewise agree that this Court “has a duty to address” petitioners’ “mountain of evidence that racial discrimination infects the administration of California’s death penalty.” (Chemerinsky Br. at pp. 15–16.) As amici point out, if petitioners’ “allegations are true, then every day that California prosecutors pursue, seek or defend a death sentence is another day that people of color are subordinated” and “the practice must cease immediately.” (Rosen Br. at p. 4; see also Bazelon Br. at p. 14 [California’s death penalty scheme, “riven with systemic racism and produc[ing] wide racial disparities in its application,” constitutes cruel or unusual punishment]; Prosecutors Alliance Br. at p. 24 [discussing “core justification for this Court’s review”].) Nevertheless, several points of disagreement between

petitioners and the Attorney General warrant petitioners' response.

I. PETITIONERS HAVE STANDING UNDER CALIFORNIA LAW

The AG does not dispute that at least one petitioner has ordinary “beneficial[] interest” standing. (AG Br. at p. 15.) And the parties agree that this Court need only determine that one petitioner has standing, under one theory, to support jurisdiction over all claims in the petition. (*Ibid.*) Thus, this Court need not address petitioners' other standing theories to exercise its original jurisdiction here.¹

Nevertheless, petitioners also have public interest standing. (Petrn. at p. 19.) California courts have consistently held that associations or organizations, like four of the petitioners here, can invoke public interest standing. (See, e.g., *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52

¹ The Attorney General has not challenged OSPD's statutory authority to participate in this litigation. (See AG Br. at p. 23, fn. 8.) However, relying on *Safer v. Super. Ct.* (1975) 15 Cal.3d 230, 236, amicus contends that Government Code section 15425 does not permit the Office of the State Public Defender (OSPD) to petition for writ of mandate. (CJLF Br. at pp. 11–14.) But, in contrast to *Safer*, the Legislature stated specifically that the duties it “prescribed for the State Public Defender . . . are not exclusive” and authorized OSPD to “perform any acts consistent with [those duties] in carrying out the functions of the office.” (Gov. Code, § 15425.) Pursuing this writ of mandate is consistent with OSPD's statutory authority to represent the interests of indigent people sentenced to death and “to address legal claims that impact the resolution of death penalty cases.” (Gov. Code, § 15421, subd. (d); see Gov. Code, § 15420.)

Cal.4th 155, 167–169; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 912–916; *Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1563–1564.) Public interest standing is particularly appropriate where, as here, few parties could bring the same challenge. (See *Weiss v. City of Los Angeles* (2016) 2 Cal.App.5th 194, 206.) It is simply not true, as the AG asserts, that these claims could be raised by any of the defendants on death row or that “defendants routinely do raise those theories (or similar theories).” (AG Br. at p. 17.)

The AG cites just one case, *People v. Montes* (2014) 58 Cal.4th 809, in support of its position. (AG Br. at p. 17.) But *Montes* addressed an individual defendant’s challenge to charging decisions in a single county supported by a county-specific study. (*Montes*, at p. 830.) In contrast, petitioners put forth statewide evidence to challenge statewide disparities in the prosecution, imposition, and execution of death sentences. (Petr. at pp. 16–19.)

As petitioners and amici have explained, the delay and dysfunction of California’s death penalty system make it impossible for individual defendants to litigate these vital state constitutional claims in habeas proceedings or on direct appeal with any hope of resolution on the merits in the foreseeable future. (Petr. at pp. 56–58; Chemerinsky Br. at pp. 47–48 & fn. 26; see *Redd v. Guerrero et al.* (9th Cir. 2023) 84 F.4th 874, 897 [defendant “plausibly alleged that the deprivation resulting from a 26-year delay [in appointment of habeas counsel] is

significant and potentially irreversible”], reh'g. den. Dec. 11, 2024 [following death of petitioner]; Habeas Corpus Resource Center, [2023 Annual Report](#), p. 34.) If public interest standing serves principally as a “backstop” as the AG proposes, this is precisely the case—in which the public need is extraordinarily weighty and would otherwise have no viable path to resolution—where the Court must act as that backstop. (Petr. at pp. 20, 56–61.)

Finally, the AG asserts there is no taxpayer standing against state-government defendants. (AG Br. at pp. 16–17.) Although the Court is considering that question in pending cases (*Taking Offense v. State* (2021) 66 Cal.App.5th 696, review granted November 10, 2021, S270535; *Raju v. Super. Ct.* (2023) 92 Cal.App.5th 1222, review granted September 13, 2023, S281001), sound reasons support the longstanding precedents on which petitioners rely (see *Blair v. Pitchess* (1971) 5 Cal.3d 258, 268 [“taxpayers may sue State officials to enjoin such officials from illegally expending state funds”]; see also, e.g., *Stanson v. Mott* (1976) 17 Cal.3d 206, 223; *Serrano v. Priest* (1971) 5 Cal.3d 584, 618 & fn. 38 (*Serrano I*); *Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 482 [collecting cases]; *Los Altos Property Owners Assn. v. Hutcheon* (1977) 69 Cal.App.3d 22, 26–30).

II. PETITIONERS ESTABLISHED VIOLATIONS OF THE STATE CONSTITUTION AND ARE ENTITLED TO THE RELIEF THEY SEEK

A. The petition establishes equal protection violations

The AG acknowledges that California’s equal protection guarantee must be construed independently from the federal equal protection clause. (AG Br. at p. 28.) He admits that this Court has held that a facially neutral policy or practice that disproportionately impacts racial minorities may violate equal protection. (*Id.* at pp. 24–25.) And, for good reason, he does not argue that the racially discriminatory application of California’s death penalty scheme could satisfy strict scrutiny.

Nevertheless, the AG contends that petitioners’ equal protection theory “is foreclosed by this Court’s precedent.” (AG Br. at p. 24.) But the sole case he offers for that contention rested exclusively on *federal* equal protection principles, not the state Constitution. (*Ibid.* [quoting *Hardy v. Stumpf* (1978) 21 Cal.3d 1, 7 (*Hardy*)].) The AG’s “administrability” concerns are equally unpersuasive. (AG Br. at pp. 25–26.) After all, multiple California statutes already permit disparate impact claims—including laws the AG enforces. And the AG’s policy arguments pale in comparison to the constitutional harms presented here. In the equal protection context as elsewhere, “the penalty of death is different.” (See *Gregg v. Georgia* (1976) 428 U.S. 153, 188 (*Gregg*).)

1. Petitioners demonstrated actionable disparate impact under this Court’s cases

This Court has been clear: “purposeful discrimination” is not “a prerequisite to establishing a violation” of the state Constitution’s equal protection guarantee. (*Serrano I*, *supra*, 5 Cal.3d at p. 603, fn. 18; see Pet. Br. at pp. 19–23.) A state policy or practice thus violates equal protection when “the *effect* of such state action [is] to inflict a ‘racially specific’ harm on minority” groups. (*Crawford v. Bd. of Ed.* (1976) 17 Cal.3d 280, 294 (*Crawford I*), *italics added*.) Under California’s Constitution, in other words, the state “is not constitutionally free to adopt any facially neutral policy it chooses, oblivious to such policy’s actual differential impact” on racial minorities. (*Id.* at p. 296.)

The AG fails to meaningfully grapple with these settled principles. Instead, in just two sentences, he dismisses *Serrano I* and *Crawford I*—because, in his view, they apply only where the challenged policy burdens a “fundamental right.” (AG Br. at pp. 24–25.) Not only is the AG’s understanding of this precedent wrong, but petitioners satisfy his test in any event.

First, this Court’s conclusion that purposeful discrimination is not required to demonstrate an equal protection violation is not limited to “fundamental rights” cases. In *Butt v. State of California* (1992) 4 Cal.4th 668, 685–686, this Court explained that for purposes of equal protection analysis under the California Constitution, “heightened scrutiny applies to State-maintained discrimination whenever the disfavored class is suspect *or* the disparate treatment has a real and appreciable

impact on a fundamental right or interest.” (See also *id.* at p. 684 [federal rule “that only de jure racial segregation is a constitutional violation” has been “long rejected in California”].) In other words, the fact that the challenged policy disproportionately impacts a racial minority or other suspect class is sufficient to establish an equal protection violation. (See, e.g., *Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 881 [“de facto” segregation unconstitutional because “substantial r[a]cial imbalance” in schools harmed Black children even where “there is no intent by school authorities to discriminate”]; *Serrano I, supra*, 5 Cal.3d at p. 604 [school boards must “take affirmative steps to alleviate racial imbalance, however created”].)

Crawford I, supra, 17 Cal.3d 280, is particularly instructive. The Court’s application of strict scrutiny there was triggered primarily by the “actual differential impact” of the school district’s facially neutral policy on minority students. (*Id.* at p. 296.) In its equal protection analysis, the Court repeatedly expressed concerns about the “substantial racial imbalance” in schools (*id.* at p. 291; accord *id.* at pp. 292, 305) and the policy’s “racially specific” harm on students (*id.* at pp. 294, 297). To be sure, that the challenged state action burdened the fundamental right to education underscored the Court’s holding that purposeful discrimination was unnecessary. (See *id.* at p. 297.) But that holding flowed from a broader “application of state equal protection principles” concerned with the disproportionate effect of state action on suspect classes. (*Id.* at p. 298.) That rationale is equally present here. (See Pet Br. at pp. 23–24.)

Crawford I also justified its holding based on “the deleterious practical consequences that would inevitably flow from” requiring a showing of purposeful discrimination. (*Crawford I, supra*, 17 Cal.3d at p. 298; see *id.* at pp. 299–302; Pet. Br. at pp. 21–23.) These include difficulties related to (1) identifying whose “intent” matters for purposes of challenging a systemic policy or practice; (2) proving that intent when there is a complex and tangled web of decisionmakers and institutional actors; and (3) assessing the impact of historical and private discrimination on the challenged discriminatory policy. (*Crawford I*, at pp. 298–302.) Again, all these difficulties apply to this as-applied challenge to California’s death penalty statutes. (Pet. Br. at pp. 24–25.) And none of these practical consequences turn on whether the challenged policy burdens a fundamental right.

Second, the unequal administration of California’s death penalty statutes *does* burden a fundamental right. As this Court held nearly fifty years ago, “personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and United States Constitutions.” (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (*Olivas*), italics added; see also *id.* at p. 250 [“the California Constitution . . . manifests an even stronger concern for unwarranted deprivations of personal liberty by the state than can be found in the [federal Constitution], itself a strong protection against unwarranted deprivations of liberty”].) Because the death penalty “forever deprive[s]” someone of their “basic liberty,” as well as their life, unequal application of

that punishment requires “strict scrutiny.” (See *Skinner v. State of Okl. ex rel. Williamson* (1942) 316 U.S. 535, 541.)

The AG nonetheless contends that fundamental rights play a “limited role” in criminal cases, citing *People v. Wilkinson* (2004) 33 Cal.4th 821 (*Wilkinson*) for support. (AG Br. at p. 25.) But that does not mean that a case involving criminal law can *never* implicate a fundamental right—particularly a case like this one, which is not an ordinary criminal appeal but an as-applied constitutional challenge to the state’s death penalty provisions. (See *Gregg, supra*, 428 U.S. at p. 188 [“death is different”].)² Although *Olivas, supra*, 17 Cal.3d 236 should not be “read so broadly” as “to subject all criminal classifications to strict scrutiny” (*Wilkinson*, at pp. 837–838), its core holding remains good law: At least in some circumstances, criminal statutes burdening the “fundamental” interests in “personal liberty” and “life” must satisfy strict scrutiny. (*Olivas*, at p. 251.) And “when defining fundamental interests under the California Constitution, [this Court] exercise[s] [its] inherent power as a court of last resort independent of fundamental interest determinations which may be reached by the United States Supreme Court solely on interpretations of the Federal Constitution.” (*Id.* at p. 246.)

This Court should hold that such a fundamental interest is at stake here. (See *In re Smith* (2008) 42 Cal.4th 1251, 1263 [civil commitment statute interfered with fundamental right to

² *Olivas, supra*, 17 Cal.3d 236 and *Wilkinson, supra*, 33 Cal.4th 821 were not capital cases.

“personal liberty” and thus strict scrutiny applied]; see also Carrillo Br. at pp. 19–21.) The AG offers no reason why racially disproportionate impact would trigger strict scrutiny when the fundamental interest to education or voting is burdened, but only rational-basis review when the fundamental interest in liberty and life—to not be executed by the state—is at issue. “Execution represents a complete and utter rejection of the personhood and humanity of the condemned, an irreversible banishment from the moral community.” (*State v. Santiago* (Conn. 2015) 122 A.3d 1, 99 (*Santiago*) (conc. opn. of Norcott, J.).) When the system imposing that punishment is pervaded by racial disparities as stark as those detailed in the petition, the state should be held to the most searching standard of scrutiny.

2. Neither *Hardy* nor policy arguments preclude petitioners’ equal protection claim

The AG’s primary response on equal protection is that petitioners’ claim is “foreclosed” by this Court’s decision in *Hardy*, *supra*, 21 Cal.3d 1. (AG Br. at pp. 13–14, 24, 29.) Not so.

Hardy, *supra*, 21 Cal.3d at p. 5 involved a challenge to “Oakland’s requirement that police officer applicants be able to scale a six-foot wall,” which resulted in “the disproportionate rejection of females.” The plaintiff brought claims under equal protection and the federal Civil Rights Act of 1964, arguing that the test’s “disproportionate disqualification of females invoke[d] strict scrutiny.” (*Id.* at pp. 5, 7.) In rejecting the plaintiff’s argument, this Court relied exclusively on federal equal

protection precedent. (See *id.* at pp. 7–8.) The *Hardy* Court mentioned the state Constitution only twice. (*Id.* at pp. 7 [“Classifications predicated on gender are deemed suspect in California”], 8 [“Neither the federal nor state Constitution suggests a person be employed absent the ability to satisfy job requirements”].) The quotation the AG repeatedly highlights—that “[s]tanding alone, [disproportionate impact] does not trigger . . . the strictest scrutiny”—is a direct quote from *Washington v. Davis* (1976) 426 U.S. 229, 242 that this Court introduced during its discussion of that case. (*Hardy*, at p. 7, brackets in original.) Of course, the high court’s constitutional holding does not control this Court’s interpretation of California’s equal protection guarantee. (See, e.g., *Serrano v. Priest* (1976) 18 Cal.3d 728, 764 (*Serrano II*) [state equal protection has “independent vitality”]; Petn. at pp. 70–71; Pet. Br. at pp. 19, 31–32.).³

Aside from *Hardy*, the AG’s only other argument for requiring proof of intentional discrimination is rooted in policy. (AG Br. at pp. 25–26.) In his view, allowing petitioners’ equal protection claim to proceed would “raise difficult administrability questions,” “complicate the task of legislating and regulating,” and result in “far-reaching” consequences. (*Ibid.*) However, none

³ Amici’s contention that strict scrutiny applies only when a statute imposes “facial discrimination against a suspect class” likewise relies on precedent interpreting the federal equal protection clause. (See, e.g., Carrillo Br. at pp. 8, fn. 3, 12, fn. 16.) Indeed, as amici acknowledge (see *id.* at pp. 15–16), that contention cannot be squared with this Court’s decisions analyzing the state equal protection guarantee, such as *Butt* and *Crawford I* (see part II.A.1, *ante*).

of these policy considerations are sufficiently persuasive to overcome this Court’s holdings in *Serrano I* and *Crawford I* that purposeful discrimination is not required.

To start, the AG’s administrability concerns are overstated. Disparate impact is a longstanding analytical concept that is commonly employed by both federal and state statutory civil rights schemes. By the early 1960s, for example, “structural or effects-based conceptions of employment discrimination were well entrenched in the public discourse.” (Carle, *A Social Movement History of Title VII Disparate Impact Analysis* (2011) 63 Fla. L.Rev. 251, 287 (Carle).) Soon thereafter, in *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, the high court approved disparate-impact analysis in the Title VII context unanimously, “quite readily and without analytic trouble.” (Carle, at pp. 256–257.)

Many other federal statutes—including the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Fair Housing Act, the Equal Credit Opportunity Act, and the Affordable Care Act—also permit disparate impact theories of liability. (See, e.g., 42 U.S.C. § 18116; *Smith v. City of Jackson* (2005) 544 U.S. 228, 240; *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 576 U.S. 519, 534; *Payan v. Los Angeles Community College Dist.* (9th Cir. 2021) 11 F.4th 729, 738; *Miller v. American Express Co.* (9th Cir. 1982) 688 F.2d 1235, 1240.) California civil rights laws like the Fair Employment and Housing Act and Government Code section 11135—which the

AG plays a role in enforcing—also permit claims based on disproportionate impact. (See, e.g., Gov. Code, §§ 11135, subd. (a), 12955.8, subd. (b); *Guz v. Bechtel Nat., Inc.* (2000) 24 Cal.4th 317, 354, fn. 20; *Darensburg v. Metropolitan Transportation Com.* (9th Cir. 2011) 636 F.3d 511, 519.)

Next, permitting petitioners’ equal protection claim to move forward will not open the floodgates to wide-ranging constitutional challenges. “[V]irtually all commentators agree” that “the disparate impact test remains difficult for plaintiffs” and disparate-impact claims “rarely succeed.” (Carle, *supra*, 63 Fla. L.Rev. at p. 257.) That’s because “[p]roving a disparate impact case requires both sophisticated statistical analysis to show disparate effects and identification of the precise practice causing these effects.” (*Ibid.*; see Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity* (1995) 47 Stan. L.Rev. 1161, 1162, fn. 3 [discussing “common misperception about Title VII . . . that a plaintiff can prevail in virtually any type of case by making an unrebutted showing of disparate impact on a [protected] group” and highlighting that disparate impact cases comprised less than two percent all employment-related civil rights cases in the federal docket].)

This is the exceedingly rare case where petitioners *have* assembled such a sophisticated statistical analysis—15 statewide and local empirical studies analyzing decades of charging and sentencing data, all of which conclude that race plays a determinative role in California’s current death penalty scheme.

(Petr. at pp. 28–41.) There is little reason to believe that petitioners’ claim will throw into question a “whole range of tax, welfare, public service, regulatory, and licensing statutes.” (AG Br. at p. 26.)

Finally, petitioners’ claim arises in the unique context of capital punishment. As this Court has long recognized, “[o]bviously death is qualitatively different from all other punishments.” (*People v. Hernandez* (1988) 47 Cal.3d 315, 362; accord *Gregg, supra*, 428 U.S. at p. 188 [“the penalty of death is different”]; *Ford v. Wainwright* (1986) 477 U.S. 399, 411 [“execution is the most irremediable and unfathomable of penalties”].) “[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination” (*California v. Ramos* (1983) 463 U.S. 992, 998–999) and “a heightened standard of reliability” (*Ford*, at p. 411).

The Constitution requires that the death penalty “not be imposed unless we are assured that the selection between a sentence of death or life imprisonment is based solely on objective, morally defensible criteria.” (*Santiago, supra*, 122 A.3d at p. 98 (conc. opn. of Norcott, J.)) That a “[W]hite prosecutor or a [W]hite juror may be more troubled by the death of a [W]hite victim than of a [B]lack or Hispanic victim may be psychologically explicable, but it is not morally defensible. It

should not be the basis on which we decide who lives and who dies.” (*Id.* at pp. 98–99.)⁴

B. The petition establishes violations of California’s cruel or unusual punishment provision

1. The Court is not writing on a clean slate

This Court’s precedents, concerning the state Constitution’s prohibition on cruel or unusual punishments specifically and constitutional interpretation more generally, support petitioners’ claim more clearly than the AG acknowledges.⁵

The AG fails adequately to address this Court’s precedent on the appropriate interpretation of article I, section 17, which petitioners addressed in their brief. (Pet. Br. at pp. 31–35.) Rather, he focuses on federal Eighth Amendment precedent, including *McCleskey*, *supra*, 481 U.S. 279. (AG Br. at pp. 29–38.) General principles of state constitutional interpretation, discussed in part [II.B.2](#), below, demonstrate that *McCleskey* is

⁴ The substantial race-based disparities in the application of California’s death penalty statutes are also strong circumstantial evidence of invidious discrimination. (Petr. Br. at p. 28, fn. 4; see *Crawford v. Bd. of Ed.* (1982) 458 U.S. 527, 544 (*Crawford II*) [“the racially disproportionate effect of official action provides an important starting point” to demonstrating discriminatory purpose].) That evidence, in combination with the racialized historical backdrop of capital punishment in California (see Chemerinsky Br. at pp. 27–34), warrants this Court’s review even under the more restrictive federal equal protection test.

⁵ Amici opposing the petition give little or no attention to this claim.

inconsistent with the evolving standards of decency that guide this Court’s interpretation of section 17.

In addition, petitioners have proffered substantial evidence that “permissible factors” do not explain the racial disparities in the application of California’s capital punishment scheme. (See AG Br. at pp. 36–37 [“Petitioners would need to ‘control for permissible factors’—such as the severity of the offense—that may explain an apparent arbitrary pattern’ in sentencing”].) That is the purpose of the multiple regression analysis that underlies petitioners’ empirical evidence. (Petr. at pp. 25–26.) Thus, petitioners have established a violation of California’s cruel or unusual punishment provision.

Should the Court believe that further factual evaluation is necessary, the parties agree that appointment of a referee or special master under supervision of this Court is the appropriate way to do so. (Petr. at pp. 50–51; AG Resp. at p. 10.)

2. This Court’s principles of state constitutional interpretation support petitioners’ claim

a. Independence, not deference, is the starting point

The Court has not spoken uniformly as to how it conducts its independent interpretation of the state Constitution. (See, e.g., *Gardner v. App. Div.* (2019) 6 Cal.5th 998, 1004–1007 [opinion by Justice Kruger for a unanimous Court employing independent interpretation]; see generally Petr. at pp. 76–78 [discussing Court’s independence in interpreting the California Constitution]; Chemerinsky Br. at pp. 35–53; Bazelon Br. at pp.

20–37.) The AG proposes a standard more abjectly deferential to the United States Supreme Court than *any* of this Court’s precedents. Quoting *People v. Buza* (2018) 4 Cal.5th 658, 685 (*Buza*), the AG refers to a “*general* principle or policy of deference” (AG Br. at pp. 33, 35), but that phrasing does not do justice to the Court’s jurisprudence. Indeed, *Buza* took this phrasing from *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353, but *Raven* went on to affirm that “California courts ha[ve] the authority to adopt an independent interpretation of the state Constitution.” (*Id.* at p. 353.) *Raven* in fact invalidated a voter initiative purporting to compel deference to federal constitutional interpretation because the initiative “substantially alter[ed] the preexisting constitutional scheme . . . extensively and repeatedly used by courts in interpreting and enforcing state constitutional protections.” (*Id.* at p. 354.)

The separate opinions in *Buza*, *supra*, 4 Cal.5th 658 articulate the standard in several different ways: Justice Liu emphasized that, “as the ultimate arbiters of state law,” state courts have “the prerogative and duty to interpret their state constitutions *independently*.” (*Id.* at p. 702 (dis. opn. of Liu, J.); cf. *id.* at pp. 684–685 & fn. 8 [suggesting “cogent reasons” should exist before rejecting high court analyses, though Court would not “deny[] or denigrat[e its] power and duty to depart from those decisions when sufficient reasons appear”], 706 (dis. opn. of Cuéllar, J.) [while a high court case “merits ‘respectful consideration’ when its analysis is relevant, our own constitution deserves far more than that”]; see also *People v. Monge* (1997) 16

Cal.4th 826, 871 (dis. opn. of Werdegarr, J.) [“good reasons exist to rely on our state Constitution even before we consider whether the federal Constitution applies”].)

The AG undermines and minimizes the Court’s independent authority in interpreting the state Constitution. (AG Br. at p. 33.) For instance, he asserts that “[i]f 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.” (*Id.* at p. 36, italics added.) The AG cites no authority for that proposition. There is none. No member of the Court has articulated such a deferential standard. Likewise, nothing in this Court’s precedent supports the AG’s statement that “[t]he 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*.” (AG Br. at p. 35.) This Court is construing a state constitutional provision rather than the Eighth Amendment. (See part II.B.2.b.iii, *post.*)

b. The *Teresinski* circumstances provide cogent reasons to reject *McCleskey*’s flawed reasoning

Even under what appears to be the most conservative test, demanding “cogent reasons” or “adequate reasons” before interpreting the state Constitution differently than the federal Constitution (*Buza, supra*, 4 Cal.5th at pp. 685, 687), this Court should not interpret the state cruel or unusual punishment

clause in the same manner as the United States Supreme Court interpreted the Eighth Amendment in *McCleskey, supra*, 481 U.S. 279. (Cf. Petn. at pp. 77–85 [similar analysis of petitioners’ equal protection claim].)

In *People v. Teresinski* (1982) 30 Cal.3d 822, 836–837 (*Teresinski*), this Court identified four circumstances that weigh in favor of independent state constitutional analysis: (1) the language or history of the California Constitution suggests a different resolution; (2) the federal opinion is a departure from federal precedent; (3) the federal opinion was issued by a divided court and has attracted academic criticism; or (4) the federal opinion is inconsistent with California precedent. Any one of these circumstances may serve as an “adequate” or “cogent” reason to adopt a different interpretation of the California Constitution. (See, e.g., *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 510-514 [two factors supported a more expansive reading of the California Constitution]; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1242-1243 [one factor was sufficient to reject high court’s interpretation of federal provision].)⁶

These circumstances support interpreting section 17 consistently with *Gregory, supra*, 427 P.3d at pp. 633-637, *Santiago, supra*, 122 A.3d at pp. 66-71, and Justice Brennan’s

⁶ Amici argue that *Teresinski* should not be followed because it is overly deferential to federal authority and does not comport with principles of independent state constitutional interpretation. (Bazelon Br. at p. 22.) That is an alternate approach by which the Court could reach the same result.

dissent in *McCleskey*, *supra*, 481 U.S. at pp. 321-345, not with the *McCleskey* majority.

i. Section 17 is more expansive, in text and intent, than the Eighth Amendment

The first *Teresinski* factor favors petitioners. The California Constitution’s prohibition on “cruel or unusual” punishment, phrased in the disjunctive, is intentionally more expansive than the Eighth Amendment’s prohibition on “cruel and unusual” punishment, and so provides broader protection. Proof of either cruelty or unusualness suffices to render a punishment unconstitutional. (*People v. Baker* (2018) 20 Cal.App.5th 711, 723; see Bazelon Br. at pp. 35–37.) Petitioners’ brief separately describes how disparate imposition of a punishment renders it both cruel and unusual. (Pet. Br. at pp. 33–35.) Acceptance of either proposition demonstrates a state constitutional violation. If the distinction lacks materiality it would seem to be because discriminatory application of a punishment simultaneously renders it both cruel and unusual. (Cf. AG Br. at pp. 34–35 [questioning materiality of distinction]; see also Bazelon Br. at pp. 24–30 [additional weaknesses of high court’s Eighth Amendment doctrine that have no parallels in this Court’s precedent].)

ii. *McCleskey* departs from Eighth Amendment precedent

McCleskey narrowed earlier Eighth Amendment precedent. The Court acknowledged that prior precedent recognized an

Eighth Amendment violation based on “an unacceptable risk of racial prejudice influencing capital sentencing decisions,” without the proof of discriminatory intent or case-specific bias required for a federal equal protection claim. (*McCleskey*, *supra*, 481 U.S. at p. 309; see AG Br. at p. 30; see also Haney-López, *Intentional Blindness* (2012) 87 N.Y.U. L.Rev. 1779, 1854–1855 (Haney-López); Blume & Johnson, *Unholy Parallels Between McCleskey v. Kemp and Plessy v. Ferguson: Why McCleskey (Still) Matters* (2012) 10 Ohio St. J. Crim. L. 37, 41 (Blume & Johnson).) Nevertheless, for the *McCleskey* majority, the structure of the *process* ruled out an Eighth Amendment violation, notwithstanding the evidence showing the disproportionate outcomes of that facially reasonable process. (*McCleskey*, at pp. 308–313.)

iii. A divided high court and scholarly criticism

McCleskey’s Eighth Amendment holding, like its equal protection holding, was a 5–4 decision that provoked a sharp dissent and has been the subject of strong academic criticism ever since. The reasons this Court would go astray by following *McCleskey* in the equal protection context (see Petn. at pp. 81–84) apply equally to the cruel and unusual punishment holding.

Justice Brennan spoke for the four dissenters on the Eighth Amendment issue: “The Court’s evaluation of the significance of petitioner’s evidence is fundamentally at odds with our consistent concern for rationality in capital sentencing, and the considerations that the majority invokes to discount that

evidence cannot justify ignoring its force.” (*McCleskey*, *supra*, 481 U.S. at p. 322.)

The scholarly criticism outlined on pages 83 to 84 of the petition has been equally scathing when it comes to *McCleskey*’s Eighth Amendment holding, likening that aspect of the ruling to the infamous decision in *Plessy v. Ferguson* (1896) 163 U.S. 537. (See, e.g., Haney-López, *supra*, 87 N.Y.U. L.Rev. at pp. 1854–1855; Blume & Johnson, *supra*, 10 Ohio St. J. Crim. L. at p. 41.) Two justices of the Connecticut Supreme Court added their own criticism of *McCleskey* when they expressed “serious, indeed, grave doubts” about whether the holding of *McCleskey* would be appropriate under that state’s Constitution. (*Santiago*, *supra*, 122 A.3d at pp. 96-98 (conc. opn. of Norcott and McDonald, JJ.) [finding the death penalty cruel and unusual].)

It is difficult to imagine a more “cogent” reason for independent interpretation than to avoid reasoning that evokes the willful blindness of *Plessy*.

iv. Inconsistent with established California doctrine

Following *McCleskey* would “overturn established California doctrine affording greater rights to the defendant” (*Teresinski*, *supra*, 30 Cal.3d at p. 837) even though it would not require overruling specific precedent of this Court (AG Br. at p. 33).

McCleskey concluded that the need to defer to and rely on jury (and prosecutorial) discretion is a complete answer to the claim that empirical evidence of discriminatory imposition of

punishment renders the punishment either cruel or unusual. (*McCleskey*, *supra*, 481 U.S. at pp. 311–312.) Accepting that proposition would “overturn” contemporary California standards of decency. (Pet. Br. at p. 32; Bazelon Br. at pp. 41–55; see, e.g., Stats. 2021, ch. 699, § 2 [findings about how jury consideration of gang evidence contributes to racially disparate punishment]; Stats. 2020, ch. 318, § 1 [findings concerning manner in which jury selection practices produce disproportionate harm to people of color].)

McCleskey also does not address the manner in which the concepts of cruelty and unusualness incorporate a requirement that punishment be based on individual culpability and not on factors such as race that are irrelevant to culpability and to any legitimate purpose of punishment. (See Pet. Br. at pp. 33–35, 40–41; Bazelon Br. at pp. 32–34, 57–59; Chemerinsky Br. at pp. 45–47.) These principles are more consistent with contemporary California standards than is *McCleskey*’s confidence that prosecutorial and jury discretion is the solution and not part of the constitutional problem.

This circumstance, like the others the Court articulated in *Teresinski*, supports an interpretation of section 17 that does not follow the *McCleskey* majority.

C. Petitioners are entitled to the relief they seek

1. Petitioners need not meet the standard for facial challenges

Petitioners need not meet the standard for facial challenges to prevail in this as-applied challenge. (Pet. Br. at pp. 42–44.)

The AG disagrees. He writes, “[p]etitioners’ ‘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.’”” (AG Br. at p. 47, brackets in original.) The AG is incorrect.

This Court’s longstanding and well-established precedent holds that in California, an as-applied challenge may seek (1) “relief from a specific application of a facially valid statute or ordinance to an individual *or class of individuals* who are under allegedly impermissible present restraint or disability” (*People v. Williams* (2024) 17 Cal.5th 99, 120 [quoting *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 (*Tobe*)]; accord *In re Taylor* (2015) 60 Cal.4th 1019, 1039; *Santa Monica Beach, Ltd. v. Super. Ct* (1999) 19 Cal.4th 952, 961) and (2) “an injunction against future application of the statute or ordinance *in the allegedly impermissible manner* it is shown to have been applied in the past” (*Tobe*, at p. 1084, italics added).⁷ If the AG were correct—if petitioners were required to meet the standard for facial challenges whenever their “claim[s] and requested relief “reach beyond the particular circumstances”” of the individual petitioners (AG Br. at p. 47)—no person or organization with third-party standing could ever prevail in an as-applied challenge

⁷ The isolated paragraph of *Mathews v. Becerra* (2019) 8 Cal.5th 756 from which the AG quotes—in which this Court quoted *Doe v. Reed* (2010) 561 U.S. 186—is an outlier. (AG Br. at p. 47.) To undersigned counsel’s knowledge, the passage has only been quoted in one other California case: *People v. Martinez* (2023) 15 Cal.5th 326, 338.

without meeting the standard for facial relief. (See Pet. Br. at pp. 49–51 [discussing cases in which plaintiffs prevailed after meeting the standard for as-applied challenges despite their claims and requested relief reaching beyond their individual circumstances].)

2. Petitioners nevertheless have met the standard for facial challenges

If as-applied petitioners “show a pattern of impermissible enforcement” (*Tobe, supra*, 9 Cal.4th at p. 1085), they are entitled to “an injunction against future application of the statute or ordinance in the allegedly impermissible manner it is shown to have been applied in the past” (*id.* at p. 1084). (Pet. Br. at pp. 48–49.) This Court issues broad injunctive relief in as-applied cases where, as here, such relief is warranted. (Pet. Br. at pp. 49–52.)

Nevertheless, though it need not do so in this case, petitioners’ empirical evidence also meets this Court’s standard for facial challenges: “the standard requires challengers to establish a constitutional violation in the ‘generality or great majority of cases.’” (AG Br. at p. 48 [quoting *T-Mobile West LLC v. City & County of San Francisco* (2019) 6 Cal.5th 1107, 1117, fn. 6].) As petitioners explained in their brief, the number of people on California’s death row who could even hypothetically be untouched by race-of-victim or race-of-defendant discrimination is a mere sliver of those sentenced to death under California’s current capital punishment statutes. (Pet. Br. at pp. 45–46.)

According to the California Department of Corrections and Rehabilitation (CDCR), as of December 3, 2024, 69 percent of

those on California’s death row—415 people—were people of color. (CDCR, [Condemned Inmate Summary](#), Dec. 3, 2024.) CDCR classified 33 percent of the condemned population as Black (*ibid.*); Black defendants are between 4.6 and 8.7 times more likely to be sentenced to death than non-Black defendants (Petr. at p. 87). CDCR classified 27 percent of those on death row as Mexican or Hispanic (CDCR, [Condemned Inmate Summary](#)); Latino defendants are between 3.2 and 6.2 times more likely to be sentenced to death than non-Latino defendants (Petr. at p. 87).

Moreover, defendants accused of killing at least one White victim are 2.8 to 8.8 times more likely to be sentenced to death than defendants accused of killing exclusively non-White victims. (Petr. at p. 87.) Catherine Grosso and her colleagues analyzed a statewide sample of 703 cases that resulted in sentence(s) of death between 1978 and 2002, and only 17 of the 703 cases—2.4 percent—involved a White defendant not convicted of killing at least one White victim. (Petr. exh. A at p. 35, tbl. 3.)⁸ By any reasonable measure, petitioners have shown a constitutional conflict in the “generality or great majority of cases.” (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126.)

⁸ Should this Court determine that further factual development is warranted, undersigned counsel expects to show that the percentage of White defendants who were not convicted of killing at least one White victim remains meaningfully unchanged.

3. This Court may invalidate death sentences imposed under California’s current capital punishment statutes

State supreme courts, including this Court, routinely address the constitutionality of statutes and other legal authority and provide instructions for implementing their decisions. (See, e.g., *People v. Lemcke* (2021) 11 Cal.5th 644, 669 [issuing directions to trial courts and Judicial Counsel after identifying problems with jury instruction].) The Attorney General suggests that Proposition 66 of 2016—which enacted, among other provisions, Penal Code section 1509—deprives this Court of its authority to “invalidat[e] any existing death judgments in this writ of mandate proceeding” because Proposition 66 states that “a ‘writ of habeas corpus pursuant to [Penal Code section 1509] is the exclusive procedure for collateral attack on a judgment of death.’” (AG Br. at p. 39, brackets in original.)

The Attorney General is mistaken: Proposition 66 did not deprive this Court of its core judicial authority to adjudicate constitutional claims and order appropriate implementation. (See *In re Friend* (2021) 11 Cal.5th 720, 740 [Prop. 66 did not impair Court’s ability to hear “claim[s] of constitutional violation[s] that could not reasonably have been made . . . earlier”]; *Briggs v. Brown* (2017) 3 Cal.5th 808, 833 [addressing Prop. 66 and noting that “a statute may not substantially impair the courts’ original writ jurisdiction”].) Section 1509 begins: “This section applies to any petition for writ of habeas corpus filed by a person in custody pursuant to a judgment of death. A writ of habeas corpus pursuant to this section is the exclusive procedure for collateral

attack on a judgment of death.” (Pen. Code, § 1509, subd. (a).) By its plain terms, Penal Code section 1509, subdivision (a) limits the avenues by which *defendants* may *pursue* relief; it does not constrain this Court’s authority or jurisdiction to *issue* relief. The provision’s focus on the “person in custody” and constraint of the “procedure for collateral attack” simply does not speak to this Court’s power to grant relief.

Indeed, holding that Proposition 66 hamstrung this Court’s authority in such a manner would run contrary to “Proposition 66’s overarching aim of promoting the efficient resolution of challenges to capital sentences.” (*People v. Wilson* (2024) 16 Cal.5th 874, 958 (*Wilson*).) It would also ignore the interest of “victims’ families [and] witnesses.” (*Id.* at p. 961; see Cal. Const., art. I, § 28, subd. (b)(9) [crime victims are entitled to “a prompt and final conclusion of the case and any related post-judgment proceedings”]; Rosen Br. at p. 8 [discussing toll on victims of extending death penalty proceedings].) Any protracted process for affording relief would certainly contravene the will of the Legislature. (*Wilson*, at p. 968 (dis. opn. of Evans, J.) [expedient mechanism for relief in racial disparity cases was “‘particularly important’ for capital defendants . . . given the high stakes and the time these defendants have been waiting to vindicate their rights”]).

Even if this Court determines that it is unable to modify existing death judgments in this writ proceeding, it still may articulate expedient procedures by which individual defendants can obtain relief. *First*, pursuant to its authority under Penal

Code section 1260, this Court may “reduce . . . the punishment imposed” in all death penalty cases pending on appeal. *Second*, for capital defendants whose convictions and sentences have been affirmed and who *do not* have habeas counsel, this Court’s supervisory power enables it to direct familiar recall and resentencing procedures initiated by superior courts. (See *In re Tellez* (2024) 17 Cal.5th 77, 90 [“This Court is empowered ‘to formulate rules of procedure where justice demands it’”].)

Third, for capital defendants whose convictions and sentences have been affirmed and who *do* have habeas counsel, this Court could issue a modified directive akin to its instructions after it held the death penalty unconstitutional per se in *People v. Anderson* (1972) 6 Cal.3d 628, 656–657: “any prisoner now under a sentence of death, the judgment as to which is final, may file a petition for writ of habeas corpus in the superior court inviting that court to modify its judgment to provide for the appropriate alternative punishment” of life without the possibility of parole. (*Id.* at p. 657, fn. 45.) As this Court recently affirmed, capital appellants may file RJA-limited habeas actions without jeopardizing their ability “to raise comprehensive challenges to their convictions or death sentence on [other] bases” if capital habeas counsel is eventually appointed. (*Wilson, supra*, 16 Cal.5th at p. 958.) There is no reason the same rule should not apply here. Petitioners thus agree with the Attorney General that death-sentenced persons could “seek relief from their judgments through collateral review” (AG Br. at p. 39, fn. 13), so long as such review merely involves a simple, single-issue habeas

petition to reduce the petitioner's sentence, and that petition does not present the risk of procedural bars in later proceedings.

And *fourth*, the AG acknowledges that “the Court could issue a writ of mandate . . . ‘barring’ the Attorney General from ‘prosecut[ing]’ [citation] any capital cases until and unless the constitutionally problematic features of the scheme have been changed.” (AG Br. at p. 41, first brackets in original.) This Court could add that the AG is likewise barred from defending death judgments imposed under such a scheme. In short, this Court has ample authority to effectuate the relief petitioners seek.

D. Article I, section 27 has no bearing on this Court's determination of petitioners' claims

The parties agree that article I, section 27 narrowly precludes this Court from holding that the death penalty is unconstitutional per se. (AG Br. at p. 44; accord Petn. at pp. 53–55; AG Resp. at p. 24; Pet. Br. at pp. 53–55.) “[S]ince [petitioners’] claim is limited to an assertion that the California statutory procedures for determining who shall suffer death as a penalty for murder do not meet the constitutional criteria,” this Court does not “have before [it] the question of whether capital punishment is [unconstitutional] Per se.” (*Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 425–426.) Moreover, the remedy petitioners seek is limited to the state's capital punishment system as presently administered. (Pet. Br. at pp. 41–42, 55–57.) Section 27 thus has no bearing on this Court's determination of petitioners' claim.

The AG states that although “many of petitioners’ contentions do not appear to pose any concerns under section 27,” petitioners’ arguments related to jurors’ implicit bias “suggest that a system of capital punishment could *never* be administered constitutionally.” (AG Br. at p. 45) Petitioners do not argue that jurors are so inherently flawed or ignorant—or their judgments so saturated with bias—that *no* capital punishment system could *ever* be administered constitutionally. On the contrary, petitioners argue that the architecture of California’s specific and peculiar capital punishment scheme invokes or fosters racial biases of which decisionmakers themselves may be unaware.

California’s uniquely broad special circumstances statute, combined with other central features of California’s death penalty scheme—including nearly unfettered prosecutorial discretion in charging special circumstances and seeking death, the capital jury selection process, improper prosecutorial penalty phase arguments, and confusing penalty phase instructions—have created a system infested with stark racial disparities. (See, e.g., Petn. at pp. 46 [“These jury selection procedures have significant consequences”], 48 [prosecutors’ “dehumanizing characterizations may intentionally or unintentionally evoke race-based stereotypes”], 49 [opaque penalty phase instructions increase the likelihood that jurors’ decisions will be influenced by preexisting biases]; 89–90.) Lawmakers and rulemakers have failed to erect meaningful guardrails to narrow and direct discretion in order to mitigate the resulting racial bias.

However, none of the rules, mechanisms, classifications, and allowances that have created the constitutional malignancies in the application of California’s capital punishment scheme are constitutionally mandated in death penalty proceedings. (See, e.g., Pet. Br. at p. 56 [discussing constitutional requirements for capital jury selection].) As such, petitioners’ arguments “leave open the possibility that the legislature may enact a ‘carefully drafted statute,’ [citation], to impose capital punishment in this state” in the future, though it “cannot create a system that offends constitutional rights.” (*Gregory, supra*, 427 P.3d at p. 636.)

III. PETITIONERS AND THE ATTORNEY GENERAL ARE THE ONLY NECESSARY PARTIES

Finally, the parties agree that only the Attorney General need be named as respondent. Specifically, the Attorney General appropriately corrects two subordinate district attorneys who argue otherwise, explaining that they have no interest “sufficient to require joinder,” and that (as the Constitution makes plain) he alone is “responsible for representing the interests of the People in his capacity as ‘the chief law officer of the State.’” (AG Br. at pp. 50, 55.) On this question, the Court need go no further.⁹

⁹ Certainly, the Court should give no moment to one amicus’s groundless suggestion that petitioners and the Attorney General may be engaged in “collusive litigation.” (CJLF Br. at p. 24.) Just the opposite: the parties’ many differences evince an adversarial posture and process, demonstrating that the death penalty scheme in California will be defended by the People’s

One remaining point does warrant addressing. The Attorney General appears to suggest that he could not stop executions in California if this Court ordered him to do so. (AG Br. at p. 40.) But of course he can. He is constitutionally mandated “to see that the laws of the State are uniformly and adequately enforced.” (Cal. Const., art. V, § 13.) He is statutorily “charg[ed], as attorney, of all legal matters in which the State is interested[.]” (Gov. Code, § 12511.) And the Legislature demands that he “shall direct the issuing of such process as may be necessary to carry the judgment [of this Court] into execution.” (Gov. Code, § 12513.)

It does not matter that the AG is less “directly” involved in the machinery of executions than CDCR. (AG Br. at p. 40.) Should this Court declare the state’s present death penalty scheme unconstitutional, the Attorney General will be constitutionally and statutorily obligated to ensure that no one sentenced under that unconstitutional scheme be killed. And when, at this Court’s direction, he (a constitutional officer) instructs the secretary of CDCR (a nonconstitutional officer) not to carry out unconstitutional death sentences, the structure of California’s Constitution and Government Code will demand that the secretary comply. All the parties necessary to determine whether that order should issue are present now before this Court, and this Court should proceed accordingly. (See Prosecutors Alliance Br. at pp. 8–25.)

elected chief law officer. His able advocacy needs no unsolicited assistance from local officers whom he supervises.

CONCLUSION

For the reasons outlined above and in petitioners' prior filings in this matter, petitioners request that this Court issue a writ of mandate and grant the relief prayed for in the petition. Should this Court determine that further testing of the empirical evidence is necessary, petitioners request that this Court issue an order to show cause and direct the parties to meet and confer as outlined on pages 9 through 11 of petitioners' May 16, 2024 reply.

Dated: December 17th, 2024.

Respectfully submitted,

**Office of the State Public
Defender**

Galit Lipa
State Public Defender

By: /s/ Jessica E. Oats

Jessica E. Oats

Lisa Romo

Christina A. Spaulding

**American Civil Liberties Union of
Northern California**

Avram Frey

Neil K. Sawhney

Lauren M. Davis

**American Civil Liberties Union
Capital Punishment Project**

Cassandra Stubbs

Claudia Van Wyk

**Wilmer Cutler Pickering Hale &
Dorr LLP**

Seth P. Waxman

Jessica L. Lewis

Kathryn D. Zalewski

Document received by the CA Supreme Court.

Liv L. Herriot
Angela S. Boettcher
**NAACP Legal Defense and
Educational Fund, Inc.**
Patricia Okonta
Amber Koonce
Gabriel Diaz
Robert D. Bacon
Attorney at Law

Attorneys for Petitioners

Document received by the CA Supreme Court.

CERTIFICATE OF WORD COUNT

I, CHRISTINA A. SPAULDING, hereby declare:

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

I hereby certify that this document contains 8,330 words, including footnotes and excluding cover information, tables, signature blocks, and this certificate. This document was prepared in Microsoft Word, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed this 17th day of December 2024 at Oakland, California.

Respectfully submitted,

/s/ Christina A. Spaulding

CHRISTINA A. SPAULDING
Chief Deputy State Public Defender

Document received by the CA Supreme Court.

PROOF OF SERVICE

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

On December 17, 2024, I caused the following document:

PETITIONERS' REPLY

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

Rob Bonta, Attorney General of California

Michael J. Mongan, Solicitor General of California

Samuel T. Harbourt, Deputy Solicitor General State of California Department of Justice

Samuel.Harbourt@doj.ca.gov

sacawttruefiling@doj.ca.gov

Lara Bazelon, Professor of Law & Director, Racial Justice Clinic
University of San Francisco School of Law

lbazelon@usfca.edu

Jeffrey F. Rosen, District Attorney, County of Santa Clara

David A. Angel, Assistant District Attorney, County of Santa Clara

Document received by the CA Supreme Court.

Dangel@dao.sccgov.org

Eric D. Vandavelde

Douglas Fuchs

Matt Aidan Getz

Lindsay Laird

Tom Donovan

Gibson, Dunn & Crutcher LLP

mgetz@gibsondunn.com

Elisabeth Semel, Professor and Co-Director, Death Penalty Clinic

Erwin Chemerinsky, Dean

U.C. Berkeley School of Law

esemel@law.berkeley.edu

Kent S. Scheidegger

Criminal Justice Legal Foundation

Kent.Scheidegger@cjlf.org

David A. Carrillo, California Constitution Center

Stephen M. Duvernay, Benbrook Law Group, PC

Michael A. Hestrin, District Attorney

Elaina Bentley, Assistant District Attorney

John Henry, Chief Deputy District Attorney

Emily R. Hanks, Managing Deputy District Attorney

W. Matthew Murray, Deputy District Attorney

Document received by the CA Supreme Court.

County of Riverside
appellate-unit@rivcoda.org

Jason Anderson, District Attorney
Robert P. Brown, Assistant District Attorney
San Bernadino County
rbrown@sbcda.org

John K. Haggerty
johnkhaggerty@yahoo.com

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

Executed on December 17, 2024 at Palo Alto, California.

/s/ *Kathryn D. Zalewski*

Kathryn D. Zalewski

Document received by the CA Supreme Court.