S238309

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

RON BRIGGS,

Petitioner,

vs.

EDMUND G. BROWN, JR., as Governor, etc., *et al.*,

Respondents,

CALIFORNIANS TO MEND, NOT END, THE DEATH PENALTY, etc.,

Intervener.

APPLICATION FOR PERMISSION TO FILE AN OVERSIZED BRIEF AND BRIEF IN REPLY TO AMICUS CURIAE BRIEFS

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NO ON PROP. 62, YES ON PROP. 66

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APPLICATION FOR PERMISSION TO FILE AN OVERSIZED BRIEF IN REPLY TO AMICUS CURIAE BRIEFS

To the Honorable Chief Justice or Acting Chief Justice of the Supreme Court:

Pursuant to Rule 8.520(c)(4), Intervener CALIFORNIANS TO MEND, NOT END, THE DEATH PENALTY– NO ON PROP. 62, YES ON PROP. 66, respectfully requests permission to file a consolidated reply to the five amicus briefs supporting the petition which is longer than the standard length limit of 8,400 words for reply briefs.

The five briefs total 148 pages of argument. Intervener could file separate replies well within the length limit, but that would needlessly increase the number of briefs in a case which already has many. It is more efficient and convenient for all concerned to file a single consolidated brief, but this requires going slightly over the standard reply brief length, given the amount of material being replied to.

The attached brief totals 10,942 words, and Intervener requests permission to file it.

Date: April 5, 2017

Respectfully Submitted,

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CALIFORNIANS TO MEND, NOT END,
THE DEATH PENALTY–
NO ON PROP. 62, YES ON PROP. 66

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IN THE SUPREME COURT

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BRIEF IN REPLY TO AMICUS CURIAE BRIEFS

Intervener Californians to Mend, Not End, the Death Penalty—No On Prop. 62, Yes On Prop. 66 submits this consolidated answer to the five amicus curiae briefs submitted in support of the Petitioner: (1) California Attorneys for Criminal Justice and Death Penalty Focus; (2) The Innocence Network, *et al.*; (3) Habeas Corpus Resource Center; (4) The Federal Public Defenders for the Central and Eastern Districts of California; and (5) the group of academics calling themselves "Constitutional Law Amici."

SUMMARY OF ARGUMENT

Amici supporting the petition have submitted a plethora of arguments on why they believe that Proposition 66 is bad policy and will have ill effects. Under a long series of precedents of this court protecting the people's precious right of initiative, these arguments are irrelevant. A policy argument cannot

be transformed into a constitutional argument simply by labeling the opposing opinion "irrational."

The law of habeas corpus is controversial because it requires hard choices. The law needs finality and it needs confidence its results are correct, but these competing concerns are in tension. Where to draw the line is a policy choice, squarely within the province of the legislative branch. Courts can makes these policy choices in the absence of legislation, but not in contradiction of it.

The Innocence Network, *et al*., recite a string of anecdotes, but curiously absent is a single case of a person sentenced to death in California in the modern era and later found demonstrably innocent, even though there have been nearly a thousand death sentences. There is no evidence that Proposition 66's rule focusing successive petitions on claims of innocence increases the risk of executing an innocent person, rather than reducing it, and in any event risk assessments and balancing are policy choices within the legislative authority.

The fact that four successive petitions have been granted in capital cases *not* involving a question of innocence or ineligibility for punishment does not render the successive petition rule unconstitutional. Proposition 66 takes an approach to defining a fundamental miscarriage of justice consistent with that of the United States Supreme Court, and this court's prior definition was not constitutionally based or immune from legislative modification.

Proposition 66 is crafted to improve the workings between state and federal habeas corpus, including important reforms proposed by Judge Arthur Alarcón. The federal public defenders' disagreement with the trade-off made is little more than a policy disagreement.

No substantial constitutional issue is presented regarding the principal habeas corpus reforms of Proposition 66. Rules of finality, including filing deadlines and limits on reopening cases, are well within the legislative power.

The equal protection argument is meritless. No suspension clause issue is before the court, and any challenge on that basis would be meritless. The codification of a rule very similar to the one made under this court's supervisory power in *Griggs v. Superior Court* is well within the legislative power. Amici have cited no authority to the effect that the legislative power cannot modify such judicially created nonconstitutional rules.

This case is a facial challenge to a statute submitted on the basis that it can be decided without fact-finding. The collection of disputed assertions, opinions, predictions, and speculation submitted by amici supporting the petition cannot form the basis of such a facial challenge.

The time limits are facially constitutional, and they should be applied in a constitutional manner. Although early cases labeled statutes of this type as "mandatory" or "directory" and treated the two types differently, more recent cases have moved away from that kind of categorical thinking. *People v. Engram* and *Saltonstall v. City of Sacramento* suggest a less polarized approach where statutes on priorities of cases and time requirements are applied and enforced when possible consistently with the constitutional obligations of the courts, but not so rigidly or absolutely as to compromise those obligations.

There is no basis for enjoining Proposition 66 as a whole. The single subject challenge is patently without merit, as enforcement of judgments in capital cases is a far narrower subject than any of the initiatives this court has upheld against single subject challenge. The unchallenged portions of Proposition 66 plus the provisions where the challenges are patently without merit form a robust package of reforms that function independently of the very few arguably invalid ones, and they will advance the cause supported by those who voted to mend rather than end the death penalty.

ARGUMENT

I. Policy disagreements should not affect this court's decision on constitutional questions.

A. The People's Right of Initiative.

Capital punishment has been a hotly contentious issue for a very long time. The opponents passionately believe in the rightness of their position that it should be abolished, and they further believe that as long as we have capital punishment every doubt must be resolved in favor of the defendant, whether it has anything to do with guilt of the offense or not, and every claim must be litigated on the merits, regardless of how long it takes, even if it means delaying cases so long that death sentences are effectively commuted to life sentences by taking longer than the murderer's natural life.

Yet the supporters of capital punishment believe just as strongly in their position that death is the just punishment for the worst murders and that an effective, enforced death penalty will have a deterrent effect and save innocent lives. The families of the victims murdered by the criminals on California's death row are close to unanimous in their desire to see the sentences carried out in a reasonable time. (See Declaration of Nina Salarno Besselman, attached to Brief Amicus Curiae of Crime Victims United of California.)

The correctional officers who must deal with convicted violent criminals every day, many of whom are life prisoners and "judgment proof" from any other sanction, believe that there is a deterrent effect and that it is a significant factor in protecting their lives. (See Application for Permission to File Amicus Curiae Brief of the California Correctional Peace Officers Association 3.) Deterrence is extremely difficult to measure empirically, and there is considerable academic debate as to how much weight we should give the studies, but there are a number of studies tending to confirm what the correctional officers believe from their "hands on" experience (see Yezer, Economics of Crime and Enforcement (2014) pp. 295-301), and certainly it cannot be credibly said that the empirical evidence disproves deterrence.

The five amicus briefs submitted in support of the petition in this matter all make abundantly clear that the amici vehemently disagree with the policy choices made by Proposition 66 regarding the importance of finality and resolution within a reasonable time. Those policy arguments are properly addressed to the legislative authority, and under California's progressive tradition of direct democracy the ultimate legislative authority is retained by the people themselves. Amicus Death Penalty Focus, in particular, has been trying to convince the people of its view for many years, and we just had an election in which the two sides went head-to-head. With the policy arguments squarely presented, the people had a clear choice between repealing the death penalty via Proposition 62, enacting the reforms in Proposition 66, or maintaining the status quo ante by rejecting both.

The people chose Proposition 66 and rejected the policy arguments against it. "In light of the initiative power's significance in our democracy, courts have a duty ' "to jealously guard this right of the people" ' and must preserve the use of an initiative if doubts can be reasonably resolved in its favor." (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1035, quoting *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.) The court has said time and again that it is not the court's role to "pass . . . judgment on the wisdom, efficacy, or soundness of the proposal before us." (*Brown v. Superior Court* (2016) 63 Cal.4th 335, 352, fn. 11.) A writ petition in this court is not a "do over" of the election. The people are the policy makers here, and they have made their choice.

A policy argument against an initiative cannot be salvaged merely by attaching the pejorative label "irrational" to a position one disagrees with as a matter of fact or of priorities. (See Brief Amici Curiae of The Innocence Network, *et al.*, 2 ("IN Brief").) The federal public defenders make little effort to tie their policy arguments to constitutional limitations. Their only citation to the California Constitution is to a provision that the Petitioners have expressly disclaimed as the basis of their challenge to Proposition 66 (see Brief

Amici Curiae of Offices of the Federal Public Defenders for the Central and Eastern Districts of California 10 ("Fed. PD Brief"); cf. Petitioner Reply to Returns to Order to Show Cause 33 ("Pet. Reply OSC"), and they make passing references with no argument to constitutional claims made by the Petitioners. (See Fed. PD Brief 8-9, fn. 8.)

To accept or even consider these policy arguments would transform this proceeding into the kind of review this court has always renounced whenever an initiative is challenged here. Intervener believes that the reforms in Proposition 66 will improve the system, will ultimately reduce the burden on both state and federal courts, will better focus postconviction review on correcting the very few actual miscarriages of justice, will provide more timely justice in the very worst murder cases, and will ultimately reduce costs. The people who put in many long hours of work and contributed substantial sums of money to qualify this measure and to campaign for it would not have done so if they did not. But neither Intervener nor Respondents have the burden of proving any of these things as a factual matter in this proceeding. The court does not review the wisdom or efficacy of initiatives, as noted above. It does not question whether the various provisions will be effective to achieve the goals as long as the framers can believe they will. (See *Legislature v. Eu* (1991) 54 Cal.3d 492, 513-514.) So to *all* of the arguments in the amicus briefs attacking Proposition 66 by claiming it will have undesirable effects, the simple answer is that all of this is irrelevant to the present case.

B. Finality and Hard Choices.

1. In general.

The law of habeas corpus is controversial because it requires hard choices between competing values. On one hand we want the judgments of our courts to be correct, and the more important the case the more important correctness becomes. On the other, there is a strong interest in bringing litigation to an end at some point. There are many rules in law, both civil and criminal, that preclude suits without regard to the merits. They include statutes of limitation

and rules of collateral attack and res judicata. (See *Travelers Indemnity Co. v. Bailey* (2009) 557 U.S. 137, 154 (importance of res judicata).)

The balance is different in criminal cases, but the competing interests must be weighed nonetheless. "The fact that life and liberty are at stake in criminal prosecutions 'shows only that "conventional notions of finality" should not have as much place in criminal as in civil litigation, not that they should have none.' " (*Teague v. Lane* (1989) 489 U.S. 288, 309, quoting Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments (1970) 38 U.Chi. L.Rev. 142, 150.) The balance tilts in favor of criminal defendants in major ways. When finality runs in the defendant's favor, he gets greater protection for the judgment than any other litigant. The double jeopardy protection prevents retrial after an acquittal regardless of how obviously erroneous the verdict may be or how gross a miscarriage of justice results. (See, *e.g.*, *Bigelow v. Superior Court* (*People*) (1989) 208 Cal.App.3d 1127, 1129-1130.) Following a conviction and affirmance on appeal, however, the defendant is allowed collateral attacks to a greater extent than any other litigant, even to the point of allowing a federal district judge to second-guess the decision of a state supreme court.

However, the endless review of criminal convictions went too far in the 1960s. Justice Harlan sounded the alarm with his dissents in *Fay v. Noia* (1963) 372 U.S. 391, 448 and *Desist v. United States* (1969) 394 U.S. 244, 256, followed by Judge Friendly's famous article, *ante*. The Supreme Court imposed some limits in a series of cases including *Wainwright v. Sykes* (1977) 433 U.S. 72, *Teague*, *supra*, and *McCleskey v. Zant* (1991) 499 U.S. 467. Congress decided these reforms did not go far enough and pulled the reins in further in chapter 1 of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 ("AEDPA").

The defense bar fought these reforms tooth and nail every step of the way, and defense-oriented academics spun elaborate theories as to why they were unconstitutional. (See, *e.g.*, Liebman & Ryan, "Some Effectual Power": The

Quantity and Quality of Decisionmaking Required of Article III Courts (1998) 98 Colum. L.Rev. 696 (nearly 200 pages on why 28 U.S.C. § 2254(d) would be unconstitutional if it did not permit de novo review of state decisions in federal habeas corpus).) The Supreme Court rejected them. (See *Williams v. Taylor* (2000) 529 U.S. 362, 407 (federal court must deny habeas relief if state court decision was reasonable, need not agree with it).)

In California, similarly, this court handed down a series of decisions that enhanced finality compared to prior law, including *In re Clark* (1993) 5 Cal.4th 750, *In re Robbins* (1998) 18 Cal.4th 770, and *In re Reno* (2012) 55 Cal.4th 428. As with the federal situation, the legislative authority (the people) have found these reforms insufficient, particularly with regard to capital cases (cf. *Woodford v. Garceau* (2003) 538 U.S. 202, 206), and have pulled the reins in further.

Again, we have a furious attack seeking to overturn the result of the democratic process. Again, far-fetched constitutional theories are spun, addressed *infra*, but underneath lies simply a policy disagreement on where to strike the finality balance.

2. Innocence and risk.

The Innocence Network ("IN") amici stress the importance of correcting error in the cases of people who actually did not commit the crimes for which they were convicted and sentenced to death. The framers of Proposition 66 agree, and for claims of actual innocence the initiative *lowers* the successive petition bar to require showing innocence by a mere preponderance of the evidence, less than the prior California standard of "irrefutable" under *Clark*, 5 Cal.4th at p. 798, fn. 33, and less than the federal standard of "clear and convincing evidence." (See 28 U.S.C. § 2244(b)(2)(B)(ii) (state prisoners); 28 U.S.C. § 2255(h)(1) (federal prisoners).)

The IN amici's thesis, in a nutshell, is that decades-long delay in the execution of capital judgments is a virtue, not a vice, because of the possibility

that something may turn up in that time, and such delay is even constitutionally required. (See IN Brief 2.) They support their thesis with a string of anecdotes.

The most striking aspect of the IN amici's anecdotes is what is *not* there. To support the thesis that California's extended delays in capital cases are necessary to prevent the execution of actually innocent people, one would expect a list of case after case of former inmates of *California's* death row who have been affirmatively shown to be innocent. California has sentenced nearly a thousand defendants to death in the modern capital punishment era, *i.e.*, after *Gregg v. Georgia* (1976) 428 U.S. 153 and the 1977 act that restored California's death penalty after *Gregg*.[1] Out of that many cases, if California's pre-Proposition 66 system is so clearly essential to correcting factually wrongful convictions that changing it would be "irrational," surely there would be multiple examples of demonstrably innocent people wrongly convicted and sentenced to death whose innocence was discovered by this essential system.

But the IN amici offer the court precisely zero. They note cases from Oklahoma, Louisiana, North Carolina, and Mississippi. (See IN Brief 6, 10, 15, 17.) California is not Mississippi. (See, *e.g.*, *In re Reno*, 55 Cal.4th at pp.

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1. There were 1,013 defendants sentenced to death between 1973 and 2013 (U.S. Bureau of Justice Statistics, Capital Punishment, 2013—Statistical Tables (2014) Table 17, p. 20.) About 70 of these were from the pre-*Gregg* mandatory sentencing statute (see U.S. Law Enforcement Assistance Administration, Capital Punishment 1976 (1977) Table 6, p. 21), a law missing the essential safeguard of discretion to decline to seek or impose the death penalty for "residual doubt." California's death row received 12 new death row inmates in 2014 and 14 in 2015. (See Cal. Dept. of Corrections and Rehabilitation, Condemned Inmate Summary List (Mar. 30, 2017) p. 2.)

456-457 (noting greater resources provided relative to other states).) These anecdotes are irrelevant to California.[2]

They also offer up the case of William Richards and assert as a fact, not a mere possibility, "*Had* Richards been sentenced to death under the Proposition 66 regime, he *would* be dead for three reasons." (IN Brief 14, italics added.) This is unconvincing for multiple reasons. First, amici's assertion that Richards was convicted of "a crime that carried the possibility of the death penalty" (IN Brief 13) is simply false. Richards was convicted of murder in the first degree and sentenced to 25-to-life (*In re Richards* (2012) 55 Cal.4th 948, 956), which necessarily means no special circumstance was found. Second, there is no basis for making the hypothetical assumption that a case where the evidence of guilt was so weak that two juries hung (see *id*. at p. 955) is one that would have resulted in a death sentence even if eligible. California's sterling record of zero demonstrably innocent people sentenced to death in a thousand cases over four decades shows that our prosecutors are appropriately selective in not seeking the death penalty in close cases and that our juries do apply residual doubt to withhold the death penalty when they consider the case a close one.

Amici are also incorrect on the law. Proposition 66 does not bar successive petitions based on false evidence. (Cf. IN Brief 14.) A successive petition can be based on any ground allowed by general habeas corpus law, including those in Penal Code section 1473. A capital habeas petitioner need only couple his claim on the merits with a showing of a substantial claim of innocence to get a stay of execution and a preponderance of evidence to

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2. In addition, the debunked "innocence lists" maintained by partisan opponents of the death penalty provide no basis for a constitutional argument, particularly on a facial challenge submitted without factfinding. (See *Kansas v. Marsh* (2006) 548 U.S. 163, 193-198 (conc. opn. of Scalia, J.); Campbell, Exoneration Inflation (Summer 2008) IACJ Journal 49 <http://www.cjlf.org/files/CampbellExonerationInflation2008.pdf>.

prevail. (Pen. Code, § 1509, subd. (d).) Amici refer to a "lofty" standard of innocence. (See IN Brief 14 & fn. 48.) But the "unerringly" standard is now history for capital cases. The Legislature abolished it for the substantive ground (Pen. Code, § 1473, subd. (b)(3)), and Proposition 66 abolished it for the successive petition gateway in capital cases. (Pen. Code, § 1509, subd. (d).) On both the facts and the law, *Richards* provides no support for the claim that Proposition 66 increases the risk of executing an innocent person.

For an "experience based argument" involving *anyone* who was *ever* on California's death row, the IN amici can offer only the antique case of Oscar Lee Morris. (See IN Brief 12.) The murder in this case was committed barely one year after the restoration of capital punishment in California. (See *People v. Morris* (1988) 46 Cal.3d 1, 10.) On the facts of the case (see *id*. at pp. 10-13), it is difficult to see why it was charged as a capital case, but this was in the early, tumultuous days after the restoration. The case almost certainly would not be charged as capital today. In fact, this court found the evidence insufficient to establish the lone special circumstance of robbery (see *id*. at p. 19) and remanded for resentencing, not retrial. (See *id*. at p. 41.) This disposition precluded reimposition of the death penalty (or even life without parole) on remand, as the conviction was then for murder without special circumstances. The joined habeas corpus petition was denied. (*Ibid*.)

The IN amici claim, "Under Proposition 66, Oscar Morris would likely be dead." (IN Brief 12.) This statement is breathtaking in its mendacity. Morris was irrevocably taken off death row on direct appeal. His case was noncapital thereafter. We know to a certainty that Proposition 66 would have had no effect on his case whatsoever.

On top of that, Morris is not a case of known innocence. This is a case where the prosecution got a stale case back 22 years after the crime and after the defendant had already served 17 years in prison, and they decided not to retry it. Trying a case long after the fact is a difficult endeavor, and not one that produces reliable results. (See *Schriro v. Summerlin* (2004) 542 U.S. 348,

364.) For a murder without special circumstances with that much time already served, the defendant might be released immediately even if reconvicted. The district attorney's decision not to reprosecute is not by any stretch of the imagination a finding of actual innocence. The case's inclusion on innocence lists serves only to demonstrate how lax the list compilers' definitions of "innocence" and "exoneration" are.

Yet this is the best the IN amici can do. Out of nearly a thousand death sentences, a case that is *not* a demonstrated case of actual innocence and would *not* have been affected at all by Proposition 66 is their *best* example.

What experience demonstrates is that the chances of an innocent person being sentenced to death in the first place in this state is exceedingly small. Whether the changes made by Proposition 66 improve or diminish the chance of one of those exceedingly rare (if existent at all) cases being discovered is a matter of opinion. With all habeas corpus investigation and review after the first petition being focused on innocence and not other issues, it is entirely possible that any such miscarriage of justice would be discovered sooner.

The court need not, indeed must not, decide this case based on its own judgment of who has the better argument on innocence. This kind of risk assessment is the kind of policy decision squarely within the legislative authority, not the judicial.

3. Sentence-only claims.

Making a policy decision weighing finality against correction of miscarriages of justice, a policy maker must make a value judgment regarding what kinds of errors are serious enough to warrant extraordinary measures. What constitutes a "fundamental miscarriage of justice" is a value judgment on which reasonable people can and do differ. In *Sawyer v. Whitley* (1992) 505 U.S. 333, the United States Supreme Court considered the definition of "miscarriage of justice" for the purpose of permitting a successive petition under the pre-AEDPA successive petition rule established in case law. (See

id. at p. 339.) Actual innocence of the crime was obvious, but sentencing was a more difficult problem. (See *id*. at pp. 339-340.) The high court rejected the argument that a factually inaccurate sentencing profile would constitute such a miscarriage of justice (*id*. at pp. 344-345) and decided that only ineligibility for the sentence would suffice. (*Id*. at p. 347.) That is, if the defendant is actually guilty of the offense and received a sentence within the lawful range for the crime he chose to commit, the result is not an injustice of the kind that warrants reopening an otherwise final case.

This court disagreed in one direction, and Congress disagreed in the other. *In re Clark* (1993) 5 Cal.4th 750, 797-798 accepted the "grossly misleading profile" argument that *Sawyer* had rejected. Congress, on the other hand, limited its miscarriage of justice exception to guilt of the offense. (See 28 U.S.C. § 2255(h)(1).) Ineligibility claims have come in through a temporary window after the Supreme Court made a retroactive new rule (see 28 U.S.C. § 2255(h)(2); Int. Prelim. Opp. at pp. 31-32) but otherwise do not qualify for successive petitions in federal court after 1996.

The federal defender amici claim that nine successive petitions have been granted as to penalty only under the pre-Proposition 66 rules, five of which were eligibility claims based on intellectual disability (formerly mental retardation). (See Fed. PD Brief 6 & fn. 3.) Proposition 66 would allow the eligibility claims to go forward. It would do so whether they were based on a change of law or not, despite the public defenders' unsubstantiated statement to the contrary. (See *ibid*.) That leaves four cases where relief might not have been granted in state court had Proposition 66 been in effect, such that the inmates might have been granted relief in federal court, by executive clemency, or not at all.

Might or might not. Many successive petitions at present are brought back to this court after the case has been to federal court. As an appellate court, this court's processes are not well suited to exploring facts, and this is why Proposition 66 moves the initial habeas corpus proceeding to the superior

court. It is quite possible that some of these inmates would have been granted relief on their initial petitions, years earlier, if Proposition 66 had been in effect.

Even assuming that all four of the inmates granted relief on sentence-only claims would have been denied state court relief under Proposition 66, it is a policy question well within the people's legislative authority to decide that this is an appropriate place to draw the line. Easing the massive burden on the courts and the long delays that have been caused by pre-Proposition 66 practices (see Int. Prelim. Opp. at p. 28) may be worth denying relief to people who are, in fact, guilty of a crime punishable by the sentence they received.

None of the many briefs filed in this case have made an argument of any substance that the rule of *Clark* is somehow constitutionally based and immune from legislative revision. Indeed, SB 1134, which Petitioners relied on so heavily in their initial arguments, abrogated a case-law standard for habeas corpus and substituted a different one based on the Legislature's different value judgment. (See Int. Prelim. Opp. at pp. 43-45.) No credible argument can be made that nonconstitutional case-law standards can be changed by the Legislature but not by the people or that they can be changed in one direction but not the other. If a standard is not required by the Constitution, the people can change it by initiative.

4. Time needed.

The brief submitted by the Habeas Corpus Resource Center ("HCRC Brief") is mostly policy argument. They argue at some length that the time for filing and adjudicating habeas corpus petitions is insufficient. But numerous other jurisdictions have similar or shorter filing deadlines (see 28 U.S.C. § 2255(h); Tex. Code Crim. Proc., art. 11.071(4)(a)), and this judgment is within the legislative authority to make.

5. Relation to federal proceedings and "exhaustion petitions."

The federal defender amici object to Proposition 66 based on the relation between state and federal habeas procedures. Intervener disagrees with much of their description but is not able to write a comprehensive refutation in this complex area of law in the short time permitted to respond. However, a short and complete answer is that none of this states a substantial constitutional objection that would warrant declaring any portion of Proposition 66 unconstitutional. This is a policy argument.

We will, however, note a few points. First, the federal defenders represent to this court that Congress's decision to impose a one-year statute of limitations is distinguishable because it applies to state prisoners whose cases have already been through one round of collateral review. (See Fed. PD Brief 12.) As the federal defenders certainly know, Congress imposed substantially the same one-year limit in federal cases. (See 28 U.S.C. § 2255(h).)

Second, it is peculiar, to say the least, to read federal defenders making a dire warning that some defaulted claims in some California cases might end up being litigated on the merits in federal court under the "cause and prejudice" exception to the federal procedural default rule. (See Fed. PD Brief 14.) Until fairly recently, federal district courts had to litigate nearly *all* defaulted claims because the Ninth Circuit had wrongly declared the primary California default rules "inadequate." The Supreme Court unanimously reversed on the timeliness bar six years ago (see *Walker v. Martin* (2011) 562 U.S. 307, 321), but the Ninth persisted in treating California's other default rules as "inadequate" via a cramped reading of *Martin*. The Supreme Court reversed unanimously again last term, this time summarily. (See *Johnson v. Lee* (2016) 136 S.Ct. 1802, 1806-1807, 195 L.Ed.2d 92, 97-98.) However much leakage to federal habeas of claims defaulted in California courts there may be in the future, it will never equal the wholesale disregard of our rules that was required by the Ninth Circuit before *Martin* and *Lee*.

Third, Proposition 66 was, in fact, drafted with the relationship between state and federal habeas corpus very much in mind. The status quo ante is completely unacceptable.

In *Rhines v. Weber* (2005) 544 U.S. 269, the Supreme Court approved the practice of a federal court on habeas corpus granting a stay of execution and placing its own case in abeyance to allow the petitioner to return to state court to exhaust his claims. However, the high court most definitely did not sanction the use of this procedure routinely. *Rhines* noted that routine use of "stay and abeyance" would undermine the purposes of AEDPA, and therefore it "should be available only in limited circumstances." (*Id*. at p. 277.) These admonitions are routinely ignored in California, and the purposes of AEDPA are regularly undermined. Petitioners get their "stay and abeyance" orders and return to this court to dump the massive, meritless petitions denounced in *In re Reno*, 55 Cal.4th at p. 428, adding years of delay and wasting enormous resources. *Rhines* foresaw that "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death" (544 U.S. at pp. 277-278), and that is exactly what created the situation described in *Reno*.

Habeas corpus claims are not "unexhausted" if they are defaulted. (See *Woodford v. Ngo* (2006) 548 U.S. 81, 92-93.) A federal court need not and should not put its own case on ice for a return to state court if the claims are clearly defaulted. However, fuzzy exceptions that require subjective judgments make it more difficult for the federal judge to say that a claim is clearly defaulted. *Reno* emphasized that the adverbs in the *Clark* exceptions, "*fundamentally* unfair" and "*grossly* misleading profile" (55 Cal.4th at p. 472, italics in original), create a high bar to "*successfully* invoking these narrow exceptions" (*ibid*., italics added), but the indistinct adverbial boundaries strengthen the case for letting the petitioner return to state court to try.

Under Proposition 66, when a death-sentenced inmate who is clearly guilty and clearly eligible for the penalty has completed his direct appeal and

initial state habeas proceeding, all remaining claims are defaulted. They are not unexhausted, and there is no reason for "stay and abeyance" in federal court. If the district judge invokes that procedure anyway, the case comes to superior court to a judge already familiar with the case who can rule in short order that the petitioner does not qualify and deny a certificate of appealability. The federal proceedings will therefore not be placed in abeyance at all or not remain there for anything like the multiple years now being wasted on these largely useless proceedings. The enormous burden that these "exhaustion petitions" place on California courts will be lifted.

Far from shifting primary responsibility for habeas corpus to the federal courts (see Fed. PD Brief 15), Proposition 66 corrects a major deficiency in that regard. In the pre-Proposition 66 system, most habeas corpus petitions are decided by this court without a referral for fact-finding and without a reasoned explanation of the decision. (See Alarcón, Remedies for California's Death Row Deadlock (2007) 80 So.Cal. L.Rev. 697, 741-742.) "The absence of a developed factual record and an articulated analysis from the California Supreme Court regarding the reasons for denying relief can contribute to lengthier delays when the prisoner seeks relief in federal court or in subsequent state habeas proceedings."

Judge Alarcón's recommended solution had four components: (1) direct the original petitions to the superior court; (2) have the superior court appoint counsel; (3) require a written decision by that court; and (4) provide for review by appeal to the Court of Appeal. (*Id*. at pp. 743-744.) Proposition 66's reforms incorporate all four components of Judge Alarcón's proposal in practical effect.[3]

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3. A minor departure from Judge Alarcón's proposal relates to his suggestion that the California Constitution be amended to require all habeas corpus petitions to be filed in the original trial court. (See *id*. at p. 743.) After reviewing the *Griggs* case, the framers of Proposition 66 decided that a statutory *Griggs*-type rule directing most of the cases to superior court but allowing a few to be filed elsewhere on a showing of

No system is perfect, but the framers of Proposition 66 believed that the benefits of these reforms far outweigh the negatives. They had very substantial reasons for that belief. The people had the arguments before them and made the policy choice to adopt Proposition 66 and reject Proposition 62. The attempt of the amici supporting the petition to get this court to second-guess the people on policy grounds should be rejected out of hand.

II. No substantial constitutional issue is presented on the habeas corpus reforms.

Proposition 66 makes important reforms to the procedural law of habeas corpus. These reforms provide a greater degree of finality to judgments, direct cases to the courts most appropriate to hear them (with allowance for exceptions), and focus reviews after the first round on the cases with the greatest need for additional review. After a small mountain of briefing from Petitioners and supporting amici, there still is no constitutional issue of any substance to any challenge before the court.

A. The Legislative Power and Rules of Finality.

Two of the key reforms are the adoption of clear rules on timeliness and successive petitions (Pen. Code, § 1509, subds. (c), (d)) with an exception for actual innocence. As described in Part I, *ante*, at p. 14, rules of finality are an important part of American law, they are within the legislative power to make, and the necessary weighing of finality against error correction is policy judgment on which courts do not second-guess the legislative authority.

Petitioners' attempts to create a constitutional issue on these reforms receives remarkably little support from the supporting amici. The defense attorneys and death penalty opponents add much heat and no light. They refer to these reforms as part of a "one-sided diminution of rights of the defendants" (see Brief Amicus Curiae of California Attorneys for Criminal Justice and

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good cause would be sufficient.

Death Penalty Focus 9-10 ("CACJ Brief")), but make no constitutional argument specific to these provisions. If an initiative were invalid for being "one-sided" it is hard to imagine any initiative that would pass muster. People turn to the initiative process when they have been rebuffed by the Legislature, where CACJ regularly called for reform bills to be killed instead of working to pass something balanced. CACJ's position echoes that of Petitioners, who proclaim that these reforms are "a drastic change from current practices" (Pet. Reply 35) without any authority for the proposition that a drastic change from current practice is beyond the legislative power to enact.

The court has received an amicus brief from a group of professors and a law school affiliated, pro-defendant organization who anoint themselves "Constitutional Law *Amici*." We will address the points they do make below, but we think it worth noting that the two subdivisions containing these reforms are conspicuously absent from their table of authorities. Of course, an amicus need not address every point, but given the breadth of their attack and their insistence that the initiative be struck down in its entirety (see Brief Amicus Curiae of Constitutional Law Amici 44-49 ("CL Brief")), silence on this point seems odd if they thought the attack had any merit at all. The constitutionality of these importance reforms blows a big hole in their nonseverability argument (see CL Brief 48), and it is close to inconceivable they would let go if they thought a challenge would pass the "straight face test."

B. Equal Protection and Suspension.

A policy choice otherwise within the legislative power can, of course, be restrained by specific provisions of the Constitution, particularly those in the Declaration of Rights, Article I. Petitioners continue to insist on their equal protection claim (see Reply 38-46) even though the authority they can cite amounts to little more than a single sentence with no citation or discussion in a case decided on other grounds. (See Int. Return 50.) Again, we see CACJ with all sizzle and no steak. They include "equal protection" in an eight-line

section heading but fail to cite a single equal protection precedent in the section. Again, we hear nothing but crickets from the academics.

HCRC also makes an equal protection argument. (See HCRC Brief 20-28.) However, HCRC makes no attempt to distinguish the very large number of cases both in California and in other states that have found capital and noncapital defendants not similarly situated and different treatment of them valid. (See Int. Prelim. Opp. 47-48; Resp. Prelim. Opp. 20-24; Resp. Return 50-54; CDAA Amicus Brief 31-32; Brief of Amicus Curiae of Los Angeles Co. Professional Peace Officers Assn. 26-28; Brief Amicus Curiae of Association of Deputy District Attorneys 12-14.)

The federal defenders make a stub of an argument invoking the habeas corpus section of the California Constitution, article I, section 11. (See Fed. PD Brief 10.) Habeas corpus was originally not available at all to attack the judgment of a court of competent jurisdiction in either federal courts or California courts. (See *Ex parte Watkins* (1830) 28 U.S. 193, 209; *In re Cohen* (1855) 5 Cal. 494, 494-495.) Whether the constitutional provision limits the authority of the legislature to curtail uses of the writ that were unavailable at common law remains unresolved. We do know that the United States Supreme Court has rejected the argument that it precludes the reforms of AEPDA, which are similar to those of Proposition 66. (See *ante* at p. 16; Int. Return 28-30; Int. Prelim. Opp. 32.) That is likely why even the Petitioners, for all their vehemence against Proposition 66, disclaim any reliance on suspension of the writ. (See Pet. Reply 33.)

Proposition 66 does not violate any of the specific limits on the legislative power in Article I.

C. Directing Cases to Appropriate Courts.

Article VI, section 10 of the California Constitution gives original habeas corpus jurisdiction without territorial limitation to "[t]he Supreme Court, courts of appeal, superior courts, and their judges." Since unification, these

are all the courts of the state. Either the habeas petitioner has the unfettered choice to file his habeas corpus petition in any court in the state and have it adjudicated there, or else some law-making authority below the Constitution has authority to channel cases to the appropriate court, albeit with provision for exceptions in unusual cases.

The answer, of course, it that it is well settled that this court under its supervisory power can make rules channeling habeas corpus cases to the courts best suited to hear them. (See *Griggs v. Superior Court* (1976) 16 Cal.3d 341, 347; *In re Roberts* (2005) 36 Cal.4th 575, 586-588.) It would seem obvious that a statute making a rule similar to *Griggs* is constitutional, yet this provision of Proposition 66 has surprisingly attracted vehement opposition. The underlying reason for the vehemence, in all likelihood, is the awareness that this provision really will make a large difference in the efficiency and efficacy of California's system of review of capital cases. (See Alarcón, Remedies for California's Death Row Deadlock (2007) 80 So.Cal. L.Rev. 697, 743.)

The academic amici oddly begin their attack by claiming that the "exclusive procedure" language in the first sentence of Penal Code section 1509, subdivision (a) is somehow about limiting which courts can hear a habeas corpus petition. (See CL Brief 37.) The purpose of that sentence is to preclude the evasion of the limitations on habeas corpus in Proposition 66 by invoking some other kind of proceeding. The channeling to a particular court comes in the second sentence, which is a codification of the *Griggs* rule, except that it omits the screening for a prima facie case. In capital cases, such screening would impose a far greater burden on the receiving court than it would in the typical noncapital case.

The academic amici attempt to distinguish *Griggs* and *Roberts* from Proposition 66 by making two distinctions without a difference. First, they note that these two cases were created under this court's supervisory power and claim that "Intervenor makes no mention" of this. (CL Brief 41.) The

latter claim is false. Intervener discussed that point in the preliminary opposition because it favors our position. (Int. Prelim. Opp. 27.) We incorporated this discussion in the return at page 24 but did not see a need to repeat it.

In our constitutional system, there is a hierarchy of law sources. The Constitution is, of course, at the top. Statutes come next. Other sources are generally below statutes. When the judiciary makes rules by means other than interpreting the Constitution, its product is generally subject to legislative revision. Rules of court, for example, "shall not be inconsistent with statute." (Cal. Const., art. VI, § 6.) The same is true of rules created under this court's supervisory power, as we noted in the preliminary opposition. In *People v. Storm* (2002) 28 Cal.4th 1007, 1024-1025, fn. 7, this court distinguished rules created by interpretation of the Constitution from those "adopted under a supervisory power *subordinate to the legislative will* . . . ." (Italics added.)

A rule made under a court's supervisory power must be a rule that is consistent with the Constitution. *Griggs* and *Roberts* therefore establish that the rules of procedure they made are consistent with the Constitution. If the Constitution said that a habeas corpus petition filed in any court in the state must be decided by that court or if it said that the court receiving a petition must have unfettered discretion to decide whether to keep it, *Griggs* and *Roberts* would be unconstitutional. They are not. (See *Griggs*, 16 Cal.3d at pp. 346-347.)

In California, the legislative power generally includes broad power to regulate the procedure of courts. (See *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 54.) The academics cite no authority for the proposition that this particular regulation of procedure does not come within the legislative power but does somehow come within this court's supervisory power. By what authority can this court establish a rule on when a court of appeal or superior court should transfer a case when the legislative authority cannot?

Such a remarkable assertion would require strong support, but the academics provide none.

The academics then try to distinguish the *Griggs* rule, as explained in *Roberts*, by misconstruing the "in general" language of *Roberts*. To be sure, *Roberts* reiterates the principle from *Griggs*, that "generally speaking a petition for writ of habeas corpus should not be transferred to another court unless a substantial reason exists for such transfer. In general, a habeas corpus petition should be heard and resolved by the court in which the petition is filed." (36 Cal.4th at p. 585.)

That statement of the general principle is immediately followed by a big "[n]onetheless." (*Ibid*.) The court then proceeds to make a specific rule that controls the general, just as *Griggs* did. After considering a host of policy considerations, the court *directs* that a particular type of habeas corpus petition be filed in a particular county's superior court, not another county or a court of appeal and transferred there if it is filed elsewhere. (See *id*. at p. 593.) As we have explained previously, the requirement of *In re Kler* (2010) 188 Cal.App.4th 1399, 1403-1404, that a *Griggs-Roberts* type rule must allow another court to keep the case where an "extraordinary reason" exists, is easily accommodated by Proposition 66's "good cause" standard.

The claim that the people's power to legislate by initiative does not include the power to make a *Griggs*-type rule is utterly without merit. The principal habeas corpus reforms of Proposition 66 are constitutional, and very clearly so.

III. Disputed assertions, opinions, predictions, and speculation cannot form the basis of a facial challenge to a statute.

The greatest amount of flak is directed at two sentences of Proposition 66. The first is contained within section 190.6, subdivision (d) of the Penal Code: "Within five years of the adoption of the initial rules or the entry of judgment, whichever is later, the state courts shall complete the state appeal and the

initial state habeas corpus review in capital cases." The other provisions of that subdivision, that victims have a right to see judgments carried out in a reasonable time, that the Judicial Council establish rules to expedite the cases, and that the Council continuously monitor and adjust as needed, have attracted little opposition.

The second target is the requirement to resolve the initial habeas corpus petition within one year of filing. (Pen. Code, § 1509, subd. (f).) The requirement of the same section that "[p]roceedings . . . shall be conducted as expeditiously as possible, consistent with a fair adjudication" does not draw fire.

The academic amici warn in ominous tones that Proposition 66 threatens to "grind the gears of justice to a halt." (CL Brief 3.) They do not know that it will and cannot know until we see how it is implemented. The Judicial Council is tasked with developing rules to expedite these cases, a task it has performed before in response to legislative direction. (See Cal. Rules of Court, rules 3.2220-3.2237.) The proposition provides for an 18-month deliberative process. It is quite likely that this process will produce methods to expedite the cases without loss of quality.

For example, it presently takes years to certify the record. It does not need to take years. When California's capital prosecutors go to national conventions, those from other states laugh out loud when told how long it takes to certify a record in California. An improved process could save substantial time.

Amici rely on the conclusions of the California Commission on the Fair Administration of Justice to support their assertions regarding availability of counsel (see, *e.g.*, IN Brief 19), but the report of this peculiar institution is opinion, not revealed truth, and cannot be a basis for decision in this case. Instead of being created by a statute passed by both houses and signed by the governor, this organization was called for by a resolution of a single house, sponsored by Senator John Burton, a well-known and vehement opponent of

the death penalty. (See Sen. Res. No. 44 (2003-2004 Reg. Sess.).) The measure provided for private funding so that the concurrence of other branches of the government would not be required. Further, appointment of the membership was kept under tight control of the Senate Rules Committee. The obvious purpose was to ensure that opponents of the death penalty were in the majority. One of the commission's first actions was to choose Gerald Uelmen, a strident, partisan opponent of the death penalty, as executive director. The commission on "fair administration" was about as fair as a divorce case with one spouse's paramour as the judge. The minority of supporters of the death penalty issued a sharp dissent noting "the report's obvious bias against the death penalty" and called it a "fundamentally flawed effort." (See California Commission on the Fair Administration of Justice (2008) Final Report, p. 167.) A balanced and even-handed examination of California's death penalty would have been useful, but regrettably the opportunity was squandered.

We are told that shortening the cases will reduce the number of attorneys willing to take them. It may discourage some lawyers and encourage others. A common reason stated for not taking capital cases at present is that many lawyers cannot commit to a case that may take a decade. (See Brief Amicus Curiae of Habeas Corpus Resource Center, Appendix A, p. 6; Declaration of David H. Goodwin, Appendix A to this brief.)

Another unknown is how the mandated changes in counsel qualifications will affect the supply of counsel. The present qualifications in California Rules of Court, rule 8.605(d) seem arbitrary. The American Bar Association has deemphasized the kind of quantitative experience measures presently in the rule (see American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) 31 Hofstra L.Rev. 913, 962), and it recognizes that criminal defense work is not the only way to acquire relevant experience, specifically noting former prosecutors. (See *id*. at p. 964.) Proposition 66 requires reexamination but wisely does not cast new standards in statutory concrete. (See Gov. Code, § 68665.) It does,

however, forbid the present rule's invidious discrimination against former prosecutors.

With particular regard to this court's workload, the academic amici confidently assert that Proposition 66 "will in practice transmute this Court into a death penalty court and relegate 99% of its caseload to the Court of Appeal." (CL Brief 11.) They do not and cannot know that at this time. First, the effect of the transfer of habeas corpus cases to the superior courts cannot be quantified but is surely large. They quote the Chief Justice saying that the appeals *and habeas corpus petitions* presently consume 25% of the court's resources (CL Brief 13), but the latter will largely be lifted.

The academic amici note that capital appeal briefs run 250-300 pages with 30-40 issues (CL Brief 12), but not all issues are equal. Capital appeals lawyers persist in briefing large numbers of weak or even frivolous arguments despite judicial admonitions. (See *Smith v. Murray* (1986) 477 U.S. 527, 536; *In re Reno* (2012) 55 Cal.4th 428, 466.) Innovative methods may be developed to dispose of the insubstantial claims early in the process so as to focus the case and expedite its resolution.

Most importantly, Petitioners have brought this case to this court as a facial challenge. They did so on the promise that no question of fact need be resolved. (Renewed Petition 3.) The claims of horrific impacts on California's judiciary are disputed, and the answers depend in large part on how this court, the lower courts, and the Judicial Council implement the initiative. Given the mandate to interpret and apply statutes in a manner consistent with the Constitution, discussed in the next part, the parade of horribles is not only not certain, it is highly unlikely.

Superior Court v. County of Mendocino (1996) 13 Cal.4th 45 is on point. In a facial challenge, considerations of workload of particular courts (*id*. at p. 59) or statewide (*id*. at p. 60, fn. 7) are irrelevant. These matters can be considered when the statutes are reviewed as applied, which necessarily means they must be applied first.

IV. Time limits are facially constitutional, and they can and should be applied in a constitutional manner.

In their legal argument against the time limits,[4] the academic amici rely on many of the same authorities cited by Petitioners, which we have already explained actually support the facial validity of these provisions. (See Int. Return 39-42.) They also cite *Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837. (See CL Brief 20, 23.) As with the others, this case confirms that the challenge in this case is a facial one and that the statutes in question survive the challenge.

As discussed in the return, the present case involves a claim that the provisions are completely void, not just in conflict with the Constitution as applied to particular cases. In such a case, the challenger "must show the section *inevitably* violates the separation of powers doctrine of the California Constitution." (*Saltonstall*, 231 Cal.App.4th at pp. 852-853, italics added.)

Saltonstall involved a statute that required the Judicial Council to adopt rules to complete environmental review of a particular project within 270 days because important interests would be harmed by an extended review period. (See *id*. at pp. 843-844, 847; cf. Cal. Const., art. I, § 28, subd. (b)(9) (constitutional right of victims to prompt completion of post-conviction review).) The court notes that the statute at issue "does not impose any penalty for review that exceeds the 270 days." (231 Cal.App.4th at p. 856.) The court then explains the kinds of penalties it has in mind. "For example, the statute does not declare the case to be moot, deprive any court of jurisdiction, or declare a particular winner on a certain date." Not only does Proposition 66 not contain

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4. That is, Penal Code section 190.6, subdivision (d), third sentence (five years overall) and Penal Code section 1509, subdivision (f), second sentence (resolution of habeas corpus petition in superior court after filing).

any of these penalties, it expressly disclaims them. (See Pen. Code, § 190.6, subd. (e).)[5]

Section 190.6, subdivision (e) does authorize relief from delay by writ of mandate, but it does not authorize such relief for going over the line alone. A higher court considering such a petition is directed to consider the reasons for the delay. In *Saltonstall*, the court noted that the statute expressly conditioned its time limit with the phrase "to the extent feasible." (See 231 Cal.App.4th at p. 856.) Proposition 66 similarly reflects an intent to avoid demanding the impossible by considering reasons for delay and by requiring the initial habeas proceedings to be "conducted as expeditiously as possible, consistent with a fair adjudication." (See Pen. Code, § 1509, subd. (f).)

In the older cases, statutes such as these are typically approached by asking whether they are "mandatory" or "directory" and then proceeding on a different path according to which label is applied. The academic amici rely on two such older cases, *County of Kern v. Superior Court* (1978) 82 Cal.App.3d 396 and *Rice v. Superior Court* (1982) 136 Cal.App.3d 81. (See CL Brief 20-21.) More recent cases have tended away from this kind of categorical label thinking. The words "mandatory" and "directory" are nowhere to be found in the pertinent portion of *Saltonstall*. *People v. Engram* (2010) 50 Cal.4th 1131, 1148-1151 discusses at some length the prior cases describing the statute in question as "directory" but ultimately decides that the label does not resolve the question presented in the case. (See *id*. at p. 1151, fn. 8.) Instead, the court concludes without the aid of labels or rigid categories that "[t]here is no sound basis for construing the statute in a manner that impedes the flexibility needed to facilitate the fair, effective, and efficient administration of justice of all matters pending before the court." As Intervener previously explained,

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5. The reference to "failure of . . . a court to comply with the time limit in subdivision (b)" in subdivision (e) is obviously an error as there is no time limit on a court in that subdivision to which it could refer. It was intended to refer to subdivision (d).

Engram illustrates that courts are not limited to the polar extremes of absolutely rigid versus mere suggestions, and that decision noted with approval a number of cases where courts were required to follow the statute. (See *id*. at pp. 1156-1157; Int. Return 40-41.)

The same approach is appropriate with Proposition 66. The time limits should be complied with to the extent consistent with the constitutional responsibilities of the court. That does not reduce them to mere suggestions. A prime example is the case of Lawrence Bittaker, one of the most notorious serial killers in California. It is the kind of case that cries out for the maximum penalty available under the law. (See *People v. Bittaker* (1989) 48 Cal.3d 1046, 1063-1070.) After review in state court, the case moved to federal habeas corpus. According to the 2014 status report by the Attorney General, attached as Appendix B, the case was fully briefed on the respondent's motions for summary judgment and the petitioner's motion for an evidentiary hearing in July 2005. As of the date of the status report, the judge had *simply been sitting on the case for over nine years*. Checking the docket, we see no further action as of April 3, 2017. Gross, inexcusable abuses such as this, if they occur in a California state court in a capital case in the future, would require application of the time limits in Proposition 66 and the writ of mandate remedy.

There is good reason to believe that completion in five years is an achievable goal. In federal capital cases, direct appeal is resolved in an average of two and a half years. (See Alarcón, 80 So.Cal. L.Rev. at p. 730.) Judge Alarcón also noted the McVeigh case as an example in which the collateral review petition was filed in district court and decided within the same calendar year, and he notes that "Timothy McVeigh's case is by no means an exception." (*Id*. at p. 729; see also Int. Prelim. Opp. 38 (D.C. Sniper case).) Even if not achievable immediately and even if not in every case, that is sufficient to withstand a facial challenge. (See *Saltonstall*, 231 Cal.App.4th at p. 852, citing *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.)

V. There is no basis for enjoining Proposition 66 as a whole.

Coming full circle, we return to the remedy that Petitioners sought in their petition. The question is whether this court should issue a writ of mandate against enforcement and a declaration of voidness against Proposition 66 in its entirety, not discrete portions of it. The answer to that question was clearly "no" when we started (Int. Prelim. Opp. 12-25), and after a stack of briefing it remains clearly "no."

A. Single Subject.

The academic amici argue passionately that the court should invalidate Proposition 66 in its entirety. Yet as adamantly against the proposition as they are, they conspicuously omit from this argument the only claim the Petitioners make that would achieve this result standing alone, the single-subject claim. (See CL Brief 44-49.) As noted previously, an amicus need not brief every issue, but the lack of even a one-line adoption of Petitioners' argument on a point where success would win the whole ball game indicates that they conclude the argument drops beneath the threshold of respectability.

The CACJ/DPF amici rush in, but they fail to add anything of substance. Amici claim that "speeding up executions" is the single subject and list a number of provisions that they claim are outside that subject. (See CACJ Brief 15-16.) Whether the provisions fall within amici's narrowed view of the subject is irrelevant, though, because this court's precedents make clear that vastly broader subjects are permitted.

This court has previously approved "real property tax relief," "political practices," "promoting the rights of actual or potential crime victims," "problems caused by tobacco use," and "incumbency reform" as subjects that are not excessively broad. (See Int. Prelim. Opp. 17.) If the subject of Proposition 66 were simply "capital cases," that would be narrower than *any* of the initiatives this court has upheld against single subject challenge.

But Proposition 66 is even narrower than that. The initiative makes no change to anything that happens before judgment in capital cases. That is, it does not affect substantive criminal law or trial procedure. The initiative is concerned entirely with enforcement of the judgments. Every provision in it is geared toward making enforcement of the judgments more timely, more effective, and less expensive. (See Int. Prelim. Opp. 18-25.)

B. Severability.

The academic amici put all of their eggs in the severability basket (CL Brief 46-49), doubtless because the single subject basket has no bottom and no handle. They also wisely refrain from making a grammatical nonseverability argument (CL Brief 47), as Petitioners' argument on this point is clearly meritless. (See Brief Amicus Curiae of Orange County District Attorney 12-17 ("OC Brief").) They claim functional and volitional nonseverability, but these arguments also fail.

Amici base their functional severability argument on a short statement in *Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 613 that functional separability means that the invalid portion "is not necessary to the measure's operation and purpose." *Hotel Employees* cites *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821-822, for this standard and from there we see that this simply means that the remainder of the measure is capable of operation without the severed portion. *Calfarm* checked off functional severability with the simple observation that severance "permit[s] [the remainder] to operate from the effective date of the initiative." (*Id*. at p. 822.) *Calfarm* also refers to *People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 332, which states the test as whether the remaining provisions "are capable of separate enforcement."

The successive petition rule and the timeliness rule are fully operational without the time limits, and they will make the total time to complete state court review of capital cases shorter than it is now. Amending the current statute on appointment of habeas counsel to simply change the appointment

authority from this court to the superior court is constitutional beyond question, and its operation does not depend on the *Griggs*-based venue rule. By itself, it will have the effect of moving most capital habeas corpus cases to the superior court just as the present statute effectively results in most, though not all, original capital habeas corpus petitions being filed in this court. The exception from the Administrative Procedure Act is completely functionally independent from the remainder of the initiative. Far from being "inoperable" (CL Brief 48), Proposition 66 would be a robust reform even if the academic amici actually succeeded in convincing this court to strike all the provisions they attack.

Arguing volitional severability, amici seem to be proceeding on a premise that most of the initiative will be struck down and only a few provisions will remain to be considered. (CL Brief 48.) The question is not whether the people would have enacted the unchallenged provisions alone but whether they would have enacted all the provisions that are unchallenged or survive the challenges.

As discussed in Part II, *ante*, the challenges to the primary habeas corpus reforms are insubstantial. Intervener believes that *all* of the challenges are without merit and should be rejected, and of course that would moot the severability issue. So to discuss severability, we must posit a hypothetical "worst case scenario" from among the reasonable possibilities.

Let us assume for the sake of this argument that the court decided to strike the primary objects of amici's wrath, the time limits. So we picture the third sentence of Penal Code section 190.6, subdivision (d) (five years overall) and the second sentence of section 1509, subdivision (f) (one year for superior court habeas) in strikeout type. (See *Legislature v. Eu*, 54 Cal.3d at p. 535.) Although the challenge to the third sentence of section 1509, subdivision (a) is insubstantial, we can add this to the hypothetical strikeout list because it makes little difference to the final analysis. None of the findings and declarations strictly need to be stricken because none refer specifically to these

provisions, but the second sentence of paragraph 10 does refer to time frame, so we will err on the side of caution and strike this as well.

If the initiative of nearly 6000 words had gone to the people without these four sentences, would those who voted to "mend, not end" the death penalty have voted for it anyway? Of course they would. Without these provisions, Proposition 66 would remain a robust reform that would:

(1) eliminate the obstruction of execution protocols through the Administrative Procedure Act, restoring the law on this point to what it was understood to be before 2008 and allowing the judgments already fully reviewed to be carried out;

(2) shorten California's uniquely long time limit for filing habeas corpus petitions to one similar to other jurisdictions;

(3) via the appointment of habeas counsel provision, move most initial habeas corpus petitions to the trial court—where they belong and where the federal courts and most states direct them—providing hearings, findings of fact, and reasoned decisions early in the process in state court, with the benefits noted by Judge Alarcón;

(4) eliminate successive petitions in cases with no claim of a fundamental miscarriage of justice, thereby eliminating the atrocious waste and delay described in *In re Reno*;

(5) provide some small measure of restitution to victims' families;

(6) reduce unnecessary expense in the housing of death row inmates; and

(7) bring some accountability to a rogue government agency that has become part of the problem of capital punishment delay rather than part of the solution, and require that agency's budget to be devoted to habeas corpus cases and not ultra vires civil litigation.

All of these provisions advance the goal that Proposition 66 was put on the ballot to advance and that its supporters argued for. They might not advance it as far as the entire initiative, but half a loaf is better than none, and this is more like 7/8 of a loaf.

The remainder of Proposition 66 is grammatically, functionally, and volitionally severable from any portions with even a substantial argument of invalidity. There is no basis for striking down the entire initiative.

CONCLUSION

The petition should be denied in its entirety.

April 5, 2017

Respectfully Submitted,

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CALIFORNIANS TO MEND, NOT END,
THE DEATH PENALTY–
NO ON PROP. 62, YES ON PROP. 66

APPENDIX A

Declaration of David H. Goodwin

1. I am an attorney licensed to practice in California.

2. For the last 30 years I have been a criminal appellate defense attorney and have accepted court-appointed cases on the indigent panels in the Second, Third, Fourth, and Fifth Districts.

I have handled several hundred cases during that time. For the last 20 years, most of those cases have been murder, sex offense, or large-record cases, as well as some less serious cases of a high profile nature.

3. I have appointed by the Supreme Court in four capital cases: People v. Bryant (S049596) for appellant Smith, People v. Satelle (S091915) People,v. Daveggio (S110294), and People v. Flores (S133660).

4. People v. Flores was the last capital case to which I was appointed. I accepted appointment on that case in 2010, and I filed the Opening Brief in 2012. Since filing that brief I have been offered other capital cases on at least two occasions.

5. At that time I filed the Opening Brief Flores I was 62 years and I looked at the time line that the other cases had and were taking and decided that I did not want to make a commitment that had the potential of lasting such a long time.

As a result, I have not taken any more capital cases since that time.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Los Angeles, California on April 2, 2017.

David H. Goodwin

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

LAWRENCE S. BITTAKER, Petitioner, **v.** **JEANNE WOODFORD, et al,** Respondent.	**CAPITAL CASE** CV 91-1643-TJH **RESPONDENT'S STATUS REPORT**

Pursuant to this Court's order of August 15, 2014, Respondent hereby submits the following case status report.

Presently, this Court has before it Respondent's Motion for Summary Judgment on every claim in the Amended Petition, as well as Petitioner's Motion for Evidentiary hearing. Both motions are fully briefed (and have been since July 2005), and the originally scheduled hearing dates were taken off calendar, with an indication that argument would be scheduled if the court found that to be necessary in order to rule on the motions. Accordingly, the parties are awaiting either a

hearing date, or rulings on the motions. The timeline as to the relevant filings is as follows:

September 2002:	Respondent's Motion for Summary Judgment filed;
July 2003:	Petitioner's Opposition to the Motion for Summary Judgment filed; Petitioner's Motion for Evidentiary Hearing filed;
November 2003:	Respondent's Reply to the Opposition to the Motion for Summary Judgment / Opposition to the Motion for Evidentiary Hearing filed;
May 2005:	Petitioner's Supplemental Reply to the Opposition to the Motion for Evidentiary Hearing filed;
June 2005:	Stipulation of the Parties Re: Objections to Portions of Declarations Submitted in Support of the Motion for Summary Judgment filed;
July 2005:	Respondent's Response to Petitioner's Supplemental Reply to the Opposition to the Motion for Evidentiary Hearing filed.
August 2011:	Status Report filed by parties indicating the foregoing procedural posture.

Again, as stated above, both pending motions have been fully briefed for over

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nine years. The motions are ripe to be argued or decided without argument, depending on this Court's decision in that regard.

Dated: September 8, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
LANCE E. WINTERS
Senior Assistant Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General

/s/ A. Scott Hayward

A. SCOTT HAYWARD
Deputy Attorney General
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court,
Rule 8.520, subd. (c)(1)

I, Kent S. Scheidegger, hereby certify that the attached reply to amicus briefs of intervener contains 10,942 words, as indicated by the computer program, WordPerfect, used to prepare the brief.

Date: April 5, 2017

Respectfully Submitted,

KENT S. SCHEIDEGGER
Attorney for Intervener
CALIFORNIANS TO MEND, NOT END,
THE DEATH PENALTY–
NO ON PROP. 62, YES ON PROP. 66

DECLARATION OF SERVICE BY U.S. MAIL

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816. On the date below I served the attached document by depositing true copies of it enclosed in sealed envelopes with postage fully prepaid, in the United States mail in the County of Sacramento, California, addressed as listed below. Electronic copies were also sent to counsel for both parties by electronic mail.

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Executed on April 5, 2017, at Sacramento, California.

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Irma H. Abella