S238309

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

RON BRIGGS AND JOHN VAN DE KAMP,

Petitioners,

vs.

JERRY BROWN, in his official capacity as the Governor of California; XAVIER BECERRA, in his official capacity as the Attorney General of California; CALIFORNIA'S JUDICIAL COUNCIL; and DOES I THROUGH XX,

Respondents,

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

Intervenor.

INTERVENOR'S RETURN TO THE ORDER TO SHOW CAUSE

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NO ON PROP. 62, YES ON PROP. 66

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INTERVENOR'S RETURN TO THE ORDER TO SHOW CAUSE

I. Introduction.

The people of California have voted affirmatively for capital punishment many times over many years, and they have rejected repeal twice in recent years. (See Intervenor's Preliminary Opposition 1-3 ("Int. Prelim. Opp.").)[1] Given that capital punishment is constitutional and the people's choice, there must be a way to carry it out. (See *Glossip v. Gross* (2015) 135 S.Ct. 2726, 2732-2733, 192 L.Ed.2d 761, 769.)

1. In order to answer the scattershot petition in this case within the word limit, it is necessary to incorporate much of the supporting material from the Preliminary Opposition. Intervenor also incorporates its Complaint in Intervention ordered filed by the court on Feb. 1, 2017.

The one thing everyone agreed on in the contentious debate last year is that the present system is dysfunctional. Given the options of mending it or ending it, the people chose to mend it. The question before this court in this proceeding is whether to honor that choice or stay with the current dysfunctional system. Well-established law, good policy, and respect for the people's right of self-government all point to honoring that choice.

II. Proposition 66 embraces a "single subject" as defined in this court's precedents.

The first, and Intervenor submits only, issue to be resolved in this case is whether Proposition 66 complies with the requirement that "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect." (Cal. Const., art. II, § 8, subd. (d).) As explained in Part III, *infra*, *none* of the Petitioners' other claims, even if valid, would result in the only relief they seek in this case, invalidation of Proposition 66 as a whole. Fortunately, the single-subject issue is not difficult. Given this court's long-standing, liberal interpretation in favor of the people's right of initiative, Proposition 66 passes the test much more easily than the criminal law initiatives previously upheld.

In order to pass scrutiny, all that is required is that the "challenged provisions meet the test of being *reasonably germane* to a common theme, purpose, or subject." (*Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735, 764.) This "reasonably germane" standard must give substantial deference to the people's right of initiative. This court has emphasized "that the initiative process occupies an important and favored status in the California constitutional scheme and that the single-subject requirement should not be interpreted in an unduly narrow or restrictive fashion that would preclude the use of the initiative process to accomplish comprehensive, broad-based reform in a particular area of public concern." (*Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 1157.) This reflects California's " 'liberal interpretative tradition . . . of sustaining

statutes and initiatives which fairly disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose.' " (*Legislature v. Eu* (1991) 54 Cal.3d 492, 512, quoting *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 253.) Indeed, the "proponents of an initiative measure are captains of the ship when it comes to deciding which provisions to take on board." (*Brown v. Superior Court* (2016) 63 Cal.4th 335, 351.)

Petitioners challenge four provisions of Proposition 66 (Petitioners' Memorandum of Points and Authorities in Support of Amended and Renewed Petition for Extraordinary Relief 46-52 ("Pet. MPA")), as supposedly not germane to a common theme: victim restitution (Pen. Code, § 2700.1), excepting execution protocols from the Administrative Procedure Act (Pen. Code, § 3604.1, subd. (a)), protecting medical professionals from disciplinary action for providing advice or drugs needed to develop or carry out lethal injection (Pen. Code, § 3604.3, subd. (c)), and reforming the governance of a government agency created for the purpose of providing the representation needed to complete habeas corpus review of capital cases. (Gov. Code, § 68664, subd. (b), as amended by Prop. 66, § 17.) All four provisions are, in fact, germane to a common theme that is quite narrow in comparison to other valid initiatives.

A. Breadth of Subject.

In its Preliminary Opposition, Intervenor described the common theme of Proposition 66 as "enforcement of judgments in capital cases" and explained how all of the challenged provisions fit easily within this theme. (See Int. Prelim. Opp. 16-24.) With no good answer to this argument, Petitioners insist that this theme is impermissibly broad and then try to substitute their own narrow theme of expediting only the appeal process, not the other impediments to enforcing judgments. (Reply in Support of Petition for Extraordinary Relief 37-39 ("Pet. RSP").) This argument fails

at its threshold. "Enforcement of judgments in capital cases" easily qualifies as sufficiently narrow under this Court's precedents.

As its title states, Proposition 66 is a reform package. This court has upheld far broader reform packages in order to preserve the people's right to enact comprehensive reforms by initiative. For example, in *Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 38, the initiative at issue embodied a broad and comprehensive reform of campaign contributions and other political practices and activities, among other things creating a new entity to regulate and oversee political campaign activity. In concluding that the measure did not violate the single-subject rule, the court in *FPPC* found that the provisions of the measure were "reasonably germane to *the subject of political practices*." (*Id.* at p. 43, italics added.) The court explained that "the voters may not be limited to brief general statements but may deal comprehensively and in detail with an area of the law." (*Id.* at p. 41.)

It cannot credibly be argued that "political practices" is a narrower subject than enforcement of capital judgments. It is vastly broader. The initiative ranges from disclosure requirements to campaign spending to lobbyist activities to ballot pamphlets to the position of candidates on the ballot, along with setting up a new agency and all that that entails. If the *FPPC* court had cut down the theme to anything like Petitioners insist is necessary, each of these topics would have to be in its own separate initiative, a proposition the court rejected. (See *id*. at p. 42 ("four or ten separate propositions").)

Legislature v. Eu, *supra*, also involved a broad reform package. The initiative imposed term limits, reduced legislative expenditures, and limited legislative pensions. Upholding the initiative against a single-subject challenge, the court could not formulate a theme any narrower than "incumbency reform," but that was sufficient. (See 54 Cal.3d at p. 512.)

This court has applied the same liberal standards to criminal law reform packages. In *Brosnahan v. Brown* (1982) 32 Cal.3d 236, the court analyzed the Victims' Bill of Rights, which included changes to the Constitution, the Penal Code, and the Evidence Code relating to restitution, safe schools, truth in evidence, bail, diminished capacity, victim statements, plea bargaining, and others. The unifying theme in these sweeping provisions was " to strengthen procedural and substantive safeguards for victims in our criminal justice system." (*Id*. at p. 247.) *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 342-345 considered an initiative with a sweeping array of both procedural and substantive criminal law provisions and upheld it as having the same broad theme as the one in *Brosnahan*. (*Id*. at 347.)

To accept Petitioners' argument that "enforcement of judgments in capital cases" is impermissibly broad and that the theme must be pruned back to "expediting death penalty appeals" (Pet. RSP 39), this court would have to clear-cut decades of single-subject jurisprudence, overruling all of these cases. The people would lose the ability to enact comprehensive reforms that this court has guarded so jealously for so long. The validity of previously approved reform packages would even be called into question. Such a wholesale rejection of established jurisprudence should not even be seriously considered.

B. The Challenged Provisions.

No more needs to be said about the victim restitution and Administrative Procedure Act provisions. Their relevance to the theme of enforcement of capital judgments was explained at the previous stage of this case (see Int. Prelim. Opp. 18-20), and Petitioners make no attempt to refute that they are germane to that theme. They merely fall back on their meritless claim that the theme is too broad (Pet. RSP 40-41), refuted in the previous section. The argument that the Administrative Procedure Act (APA) provision is invalid because it is not mentioned in the ballot

pamphlet argument, even though it is mentioned in multiple other places in the pamphlet, is refuted *infra*, at page 23.

1. Protection of Assisting Medical Professionals.

For the other two provisions, Petitioners seek to have this court take sides on disputes of fact as to whether they actually will advance the overall goal of the initiative. They claim that the threat to medical professionals assisting the Department of Corrections and Rehabilitation, thereby inhibiting its ability to carry out executions, is "hypothetical." There are multiple reasons to reject this argument out of hand. First, Petitioners promised at the threshold that this case could be decided without resolving factual disputes so as to make it appropriate for a writ proceeding. (See Amended and Renewed Petition for Extraordinary Relief 3 ("Pet.").) In a trial, Intervenor could bring in a parade of corrections officials and deputy attorneys general from all across the nation to testify how their consultants, expert witnesses, and pharmacists have been threatened and intimidated so as to impair the ability of their states to establish, defend, and carry out their execution protocols. However, Petitioners have chosen a proceeding where the decision is to be made without fact-finding, so disputed questions of fact should be assumed against them.

Second, the law is well established that courts do not judge whether a provision is *actually* needed or effective. It is sufficient that the framers of the initiative reasonably believe that the provisions will reduce the evil at which the initiative is directed. (See *Legislature v. Eu*, 54 Cal.3d at pp. 513-514.) Far from being irrelevant (see Pet. RSP 42-43), North Carolina's experience with the persecution of its experts (see Int. Prelim. Opp. 21) is sufficient standing alone to establish a reasonable basis for a belief that similar statutory protection is needed in California. Indeed, the prosecutors, peace officers, and families of murder victims who backed Proposition 66 have no other conceivable reason to include it.

Justice Alito correctly noted that there is "a guerilla war against the death penalty." (Transcript of Oral Argument in *Glossip v. Gross*, U.S. Sup. Ct. No. 14-7955 (Apr. 29, 2015) p. 14, <https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/14-7955_1823.pdf>.) The framers of Proposition 66 included this provision in the genuine and fact-based belief that it was needed to counteract this anti-democratic effort, and that is sufficient to make the provision germane for the purpose of the single-subject rule.

2. HCRC Governance.

The attack on the Habeas Corpus Resource Center (HCRC) governance provisions fails for largely similar reasons. Intervenor submitted compelling evidence in the form of a declaration in court by the executive director asking for a delay in HCRC's real job of habeas corpus because he was too busy conducting civil litigation. (See Int. Prelim. Opp. 23 and Appendix A.) Petitioners do not deny that this occurred. Their response is to make the legally and factually erroneous assertion that the civil cases were authorized under the pre-Proposition version of section 68661, subdivision (a) of the Government Code by the phrase "challenging the legality of the judgment or sentence imposed against that person." (Pet. RSP 44.) This argument is legally invalid because that phrase is a description of the kind of postconviction actions HCRC is authorized to bring, not an independent type of action. The argument is factually invalid because none of the civil actions that HCRC was involved in challenged the legality of any criminal judgment. The actions described in Appendix A to the Preliminary Opposition were a challenge to a federal regulation and a public records act request. The action in which HCRC moved to intervene, as shown by Appendix B, was a suit by victims' families against CDCR to require establishment of an execution protocol.

There are plenty of other reasons to believe that, as presently governed, HCRC is part of the problem rather than part of the solution. As

with the medical provision, in a trial Intervenor could produce evidence. In this proceeding, the judicially noticeable materials are enough to establish a factual basis for a bona fide belief on the part of the framers that reform of HCRC's governance would advance the goal of the initiative. Under *Legislature v. Eu, supra*, that is enough.

3. Conclusion.

"Whether or not these various provisions are wise or sensible, and will combine *effectively* to achieve their stated purpose, is not [the court's] concern in evaluating the present single-subject challenge." (*Legislature v. Eu*, 54 Cal.3d at p. 514, original italics.) All of the challenged provisions "fairly disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose," the longstanding standard for evaluating single subject compliance as set forth in *Legislature v. Eu*, *Brosnahan v. Brown* and affirmed recently in *Brown v. Superior Court*.

Petitioners wish to take charge and captain the ship (see *ante*, at p. 11) by their challenge to Proposition 66 on single-subject grounds. However, their role is not captain of the ship—and the proponent of Proposition 66 performed his constitutional mandate as captain of the ship when it comes to deciding which provisions to take "on board" the measure.

For these reasons, Petitioners' single-subject rule challenge should be denied.

III. Given single-subject compliance, there is no basis for enjoining the implementation of Proposition 66 as a whole.

Petitioners have asked for a writ of mandate against enforcement and a declaration of voidness against Proposition 66 in its entirety, not discrete provisions of it. (See Pet. 16-17; Pet. RSP 55.) Even if their other argu-

ments had merit (which they do not, as explained *infra*), they would not warrant the relief requested.

Only in their reply at the preliminary opposition stage did Petitioners belatedly make a nonseverability argument. (Pet. RSP 50-55.) That argument is based on a gross misstatement of the law regarding functional severability, a misapplication of the law on grammatical and volitional severability, and a disregard of the importance of the initiative's severability clause.

The *first* place to look when considering this issue is the severability clause. (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 270 ("*Cal. Redevelopment*").) "The presence of such a clause establishes a *presumption* in favor of severance." (*Ibid*., italics added.) Section 21 unambiguously states that any provisions that "can be given effect" without a provision that has been held invalid "shall remain in full force and effect." The case law additionally requires grammatical, functional, and volitional separability (see *ibid*.), but these requirements are not applied severely.

A. Grammatical severability.

It is, indeed, difficult to analyze grammatical severability without knowing which provision is deemed invalid. (See Pet. RSP 52.) Yet Petitioners do not even make a serious effort at it. They list a number of provisions that cross-reference each other and make the unsupported assertion that they "depend" on each other, but they do not specifically identify a single instance of grammatical unseverability. An enactment passes this test for severability "where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words." (*In re Blaney* (1947) 30 Cal.2d 643, 655; *MHC Financing Limited Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372, 1393.) The removal must not leave what remains incoherent. (See *Cal. Redevel-*

opment, 53 Cal.4th at p. 271.) Despite two chances to brief this case, Petitioners have yet to identify a provision that fails this test.

Petitioners direct much of their fire at the five-year limit in Penal Code section 190.6, subdivision (d), but this requirement easily passes grammatical severability. It is contained in two sentences. These sentences could be stricken.[2] If they were, no other provision of the initiative would be rendered incoherent. Subdivision (e) of the same section can still apply to the unchallenged portion of subdivision (d), and the remainder of the initiative would not be affected at all.

Petitioners also direct much of their attack on the third sentence of subdivision (a) of section 1509 of the Penal Code, the habeas corpus venue provision. The attack is meritless, as discussed below, but even if the provision were invalid that sentence could be stricken without changing anything else in the initiative.

The cross-references and supposed dependencies that Petitioners identify under their grammatical severability argument (Pet. RSP 52) appear to be attempts to make functional severability arguments, but even those are weak, as we will discuss next.

B. Functional severability.

The functional severability test is often phrased as a requirement that the remainder be "complete in itself." (*Cal. Redevelopment*, 53 Cal.4th at p. 271, internal quotation marks omitted.) More specifically, this test is congruent with the wording of the severability clause of this initiative and many others that "whatever language is left after severance must be capable of being 'given effect.' " (*People's Advocate, Inc. v. Superior*

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2. Intervenor does not, of course, concede in this hypothetical discussion the invalidity of any provision of the initiative.

Court (1986) 181 Cal.App.3d 316, 332.) "The remaining provisions . . . must be capable of separate enforcement." (*Ibid*.)

Unable to make an argument under the real functional severability test, Petitioners resort to putting their own words in front of a truncated quote from *Raven v. Deukmejian* (1990) 52 Cal.3d 336 to misinform this court regarding the test: "With respect to functional severability, the invalid provision *must* touch on an area '*essentially unrelated* to any of the various remaining substantive or procedural provisions.' " (Pet. RSP 51, quoting *Raven*, *supra*, at p. 356, italics added.) But *Raven* did not say that "essentially unrelated" was a requirement that *must* be met, nor has any other opinion of this court said that. The *Raven* court was describing the initiative before it. The invalid provision was so far removed from the remainder of the initiative that it very easily qualified for functional severability. *Raven* did not say or imply that "essentially unrelated" was the minimum and that a lesser distance would be insufficient. It certainly did not overrule *sub silento* the cases that have held that related provisions capable of functioning without the invalid part pass the test for severability, and the subsequent *Cal. Redevelopment* case cannot be squared with a requirement that the valid provisions be "essentially unrelated." (See 53 Cal.4th at p. 272.) Nor can severability be defeated by identifying a handful of provisions that cease to be meaningful without the invalid part when the bulk remains independently enforceable. (See *ibid*.) The test is whether the remainder "is complete in itself *such that it can be enforced*" without the invalid part. (*Ibid*., italics added.)

In Part II of their initial memorandum, Petitioners complained about several reforms of the habeas corpus process, including specification of the appropriate venue, use of appeal rather than successive petition as the procedure for review of a denial, appointment of counsel by the superior court, and specification of the jurisdiction to consider method of execution challenges. (See Pet. MPA 20-27.) In Part III, they complain about overall time limits, modifications of the existing limits on untimely and successive

petitions, and specification of the issues which may be considered on appeal of a habeas denial. (See Pet. MPA 28-37.) In Part V, they attacked the successive petition reform by claiming that providing different procedure for capital and noncapital cases lacks a rational basis in violation of the Equal Protection Clause. (See Pet. MPA 52-55.) Completely absent from their initial memorandum was any argument at all that these provisions cannot be implemented independently of each other or that the other reforms in Proposition 66 cannot be implemented independently of the challenged ones. Yet even after Intervenor brought this issue and the governing rule to their attention, Petitioners still failed to make any argument of substance that these provisions cannot be given effect without each other, resorting instead to an irrelevant statement that various provisions are "functionally related." (See Pet. RSP 52-53.)

These reforms are obviously capable of being given effect independently of the others. For example, the venue provision specifying which court should normally hear these cases, absent good cause to hear them elsewhere (Pen. Code, § 1509, subd. (a)), can be implemented independently of the provisions regarding the timeliness and successive petition rules. (See § 1509, subds. (c), (d).) Rules imposing deadlines or giving preclusive effect to prior adjudication do not depend on which court hears the case and applies those rules.

The timeliness rule is capable of enforcement without the successive petition rule and vice versa. The fact that these rules share the actual innocence exception and a savings clause for pending cases (see Pen. Code, § 190.6, subds. (d), (g)) does not impair their functional independence. (Cf. Pet. RSP 52, ¶ A. 4.) If one were invalid, the other could be given effect with those exceptions just the same.

The challenged reforms are similarly functionally independent of those that are not challenged outside of the single-subject claim. The provision moving appointment of habeas counsel to the trial court (Gov.

Code, § 68662) is clearly constitutional, and Petitioners effectively concede that this provision would move these cases to the superior court in practice by itself. (See Pet. MPA 24.)

The first sentence of subdivision (a) of section 3604.1 to the Penal Code simply abrogates a relatively recent Court of Appeal decision that subjected execution protocols to the Administrative Procedure Act (APA) for the first time in history (see *Morales v. California Dept. of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 729) and restores the law to what it was understood to be before that decision. (See Int. Prelim. Opp. 19-20.) Petitioners provide no argument whatever why this provision cannot stand independently of the provisions they attack. Petitioners' volitional argument on this provision is discussed below.

C. Volitional severability.

The final question in a severability analysis is whether the enacting body would have enacted the remainder without the invalid part. Petitioners pose the question as one concerning the "few remaining provisions," as if they are going to prevail on most of their challenges. (Pet. RSP 53.) For the reasons explained in the remainder of this brief, most of their challenges are patently without merit, and the bulk of Proposition 66 is valid beyond serious question, so it is not a question of "few." Further, whenever this court has reviewed a volitional severability question, it has found that provisions advancing the overall goal of the enactment go forward under that test.

In *Santa Barbara School Dist. v. Superior Court of Santa Barbara County* (1975) 13 Cal.3d 315, 327-328, a portion of an initiative to eliminate busing for school integration was held unconstitutional. However, another portion merely repealed a provision of state law that elevated racial balance in school above other considerations to a greater degree than was constitutionally required, and that provision was severable. (*Id*. at pp. 331-332.) Those who favored neighborhood schools

“would be happy to achieve at least some substantial portion of their purpose . . . .” (*Id*. at p. 332.) “*Santa Barbara* stands for the proposition that if a part to be severed reflects a ‘substantial’ portion of the electorate’s purpose, that part can and should be severed and given operative effect.” (*Gerken v. Fair Political Practices Com*. (1993) 6 Cal.4th 707, 715.)

The ultimate example of the *Santa Barbara* rule in practice is *Hotel Employees & Restaurant Employees Int. Union v. Davis* (1999) 21 Cal.4th 585. Advocates of Indian gaming sought to authorize the kinds of Indian gaming we have today by a statutory initiative, despite an express constitutional prohibition on Nevada-type casinos.[3] (See *id*. at p. 589.) Most of the initiative foundered on this rock, as provisions to implement the unsuccessful attempt at expansion were neither functionally nor volitionally severable. (See *id*. at pp. 612-614.) Yet a single sentence waiving sovereign immunity in federal court suits was volitionally severable because it advanced the overall purpose toward “class III” gaming. (*Id*. at pp. 614-615.)

Petitioners’ claim that the present case is like *Hotel Employees* as to the provisions found not severable is incorrect. That initiative’s central provision was authorizing class III gaming, and once that was gone most of the other provisions could not function separately and would not advance the enactors’ goal. (*Id*. at pp. 613-614.) There is considerable overlap between functional and volitional severability. The primary reason why enactors would not have passed a portion of a measure separately is because it would not function to advance the goal.

There is no similar central provision to Proposition 66. All of the reforms have the common purpose of facilitating the enforcement of judgments in capital cases, but they all further that purpose independently

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3. Article IV, section 19 of the California Constitution has since been amended by a constitutional initiative to permit the expanded gaming.

by attacking different parts of the problem. *Hotel Employees* and the present case are at opposite ends of the central-versus-distributed scale.

Petitioners misstate Intervenor's argument, saying that Intervenor argues that the APA provision (see *ante*, at p. 21) "is severable from the rest of initiative." (Pet. RSP 53.) Intervenor actually argued that *all* of the provisions Petitioners do not attack, of which this is just one example, can stand independently of those they do attack. The other three provisions attacked under the single-subject heading only are independently enforceable. So are the limits on the kinds of litigation HCRC can engage in (Gov. Code, § 68661.1), the requirement to reevaluate attorney qualification standards with due credit for the experience of former prosecutors (Gov. Code, § 68665), and the change to a 10-day window for executions rather than a single date. (Pen. Code, § 1227.) Along with the five-year limit that Petitioners attack with such vehemence, Penal Code section 190.6, subdivision (d) also includes a clearly valid provision that the rights of victims of crime include carrying out death sentences within a reasonable time. It further contains unobjectionable requirements that the Judicial Council adopt rules and standards to expedite the process and monitor and revise these rules as needed. These provisions, along with all of those which withstand Petitioners' attacks, easily qualify for volitional severability. They are a far larger part of the original measure than the lone provision salvaged in *Hotel Employees*.

Further, Petitioner's entire argument on the APA point is based on the premise that a provision not mentioned in the proponent's ballot argument has not been sufficiently brought to the electorate's attention. That argument was flatly rejected in *Gerken*, 6 Cal.4th at pp. 718-719. The APA provision was mentioned in the Quick-Reference Guide (Ballot Pamp., Prop. 66, General Elec. (Nov. 8, 2016) p. 15), in the Official Title and Summary (*id*. at p. 104), in the Analysis by the Legislative Analyst (*id*. at pp. 106-107), and in paragraph 9 of the Findings and Declaration in section 2 of the initiative. *Gerken* is on point. (See 6 Cal.4th at pp. 717-

718; see also *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 579-580 (AG summary and LAO analysis adequately informed voters of provision not mentioned in arguments).) Petitioners' argument has no merit.

Proposition 66's express severability clause raises a presumption of severability (see *ante*, at p. 17), and Petitioners have not come remotely close to rebutting it. Other than the single-subject challenge, Petitioners have made no challenge to any provision that is not severable from other reforms in the initiative. Therefore, if this court decides that the single-subject challenge is not valid, Petitioners are not entitled to the relief they seek regardless of the merits of their other arguments.

Given that none of the other arguments made by Petitioners could possibly justify enjoining enforcement of the entire initiative, the court can and should stop there. Even so, we will continue on to demonstrate that the other challenges lack merit.

IV. The habeas corpus reforms are well within the people's reserved legislative power.

A. Habeas Corpus Venue.

In re Roberts (2005) 36 Cal.4th 575, 582 (*Roberts*) noted that even though all three levels of California courts have statewide habeas corpus jurisdiction, there are "procedural rules governing the choice of an *appropriate venue* to entertain a petition for writ of habeas corpus." (Italics added.) Petitioners' attack on the venue provision of Proposition 66 (Pen. Code, § 1509, subd. (a)), simply ignores the distinction between venue and jurisdiction. The word "venue" was conspicuous by its absence from their original discussion. (See Pet. MPA 22.) Astonishingly, even after Intervenor described the central role of the jurisdiction/venue distinction in *Roberts* and *Griggs v. Superior Court* (1976) 16 Cal.3d 341, 346-347 (see Int. Prelim. Opp. 25-28), the word "venue" still does not appear in Petitioners' Reply. (See Pet. RSP 3-9.)

Griggs, 16 Cal.3d at p. 347 long ago adopted a venue rule that if a court is presented with a habeas corpus petition challenging a criminal judgment or sentence and stating a prima facie case, that court should transfer the petition to the original trial court. *Roberts* clarified several points from *Griggs*.

Roberts specifically addressed the language from *Griggs* that Petitioners rely on so heavily. (See Pet. RSP 4, 5-6.) "We advised [in *Griggs*] that 'unless there is substantial reason for transferring a petition it should be entertained and resolved in the court where filed.' " (*Roberts*, 36 Cal.4th at p. 584.) *Roberts* made explicit what should have been clear enough from *Griggs* itself. This language applies to habeas corpus "petitions [that] do *not* fall within either of the described categories" for which *Griggs* established a specific rule: collateral attacks on judgments and challenges to conditions of confinement. (*Id*. at pp. 583-584, italics added.) Petitioners' repeated insistence that *Griggs*'s general rule trumps its specific one is contrary to an elementary principle of interpretation, and it is flatly refuted by *Roberts*. Within the two identified categories, the *Griggs* rule defines "which court . . . properly should hear and decide such a petition" (*id*. at p. 586), the same as the Proposition 66 venue provision.

Roberts also made explicit that a habeas corpus venue rule is not limited to specifying which county's superior court is the proper court, but such a rule may also specify that the superior court and not an appellate court "should entertain in the first instance the petition." (*Id*. at p. 593.) *Roberts* notes that this court had previously made a venue rule for one aspect of capital collateral review process, requiring discovery motions under Penal Code section 1054.9 to generally be made first "in the trial court that rendered the judgment." (*In re Steele* (2004) 32 Cal.4th 682, 688.)[4] Petitioners claim that Proposition 66's provision for an appeal as of

4. The *Steele* rule provides one more reason why having the entire case resolved in that court is more efficient and good policy.

right to review the superior court's decision, rather than a successive habeas corpus petition in higher court, somehow interferes with the jurisdiction of the courts. (Pet. RSP 5-8.) They provide no explanation as to how a successive writ in the court of appeal is better for the defendant than an appeal. As for review of the court of appeal's decision in this court, it is already the law that a petition for review rather than a successive original petition is the preferred procedure. (1 Appeals and Writs in Criminal Cases (Cont.Ed.Bar 2016) § 10.30, pp. 10-20.) Under Proposition 66, the appellate courts of California retain full authority to provide appellate review.

Petitioners cite *Roberts* at page 593 for the proposition that venue rules risk infringing on jurisdiction. (See Pet. RSP 5-6.) One can only wonder if they are reading the same case. On that page, *Roberts* makes clear that policy considerations can warrant directing how discretion is to be exercised, saying "we direct" three times. The *only* indication that the direction is anything less than mandatory is the use of the word "should," exactly the word used in Proposition 66.

Despite the congruence between Proposition 66 and *Griggs* and *Roberts*, Petitioners continue to insist that Proposition 66 is more like the rule of court declared unconstitutional in *In re Kler* (2010) 188 Cal.App.4th 1399, though they offer little more than an assertion to that effect. They criticize Intervenor's argument for stressing the difference between "should" and "must" (Pet. RSP 9-10), overlooking that *Kler* itself stressed exactly that difference. (188 Cal.App.4th at pp. 1403-1404.) The California Judicial Council evidently agrees. After *Kler*, the Council amended the rule, simply changing "must" to "should." (Compare Cal. Rules of Court, rule 8.385(c)(2), with *Kler*, *supra*, at p. 1402, quoting prior version.)

At bottom, Petitioners merely disagree with the venue rule as a matter of policy. There are, however, abundant reasons to support the framers'

belief that these changes are good policy. Congress took the same step in 1948 (see 28 U.S.C. § 2255), and the United States Supreme Court upheld it. (See *United States v. Hayman* (1952) 342 U.S. 205 (unanimous in result).) Just one day before the election at which the people adopted Proposition 66, this court unanimously declared, "When the judge assigned to examine and rule on the habeas corpus petition is the same judge who presided at the petitioner's criminal trial, 'there is no judge better suited for making a determination of the issues raised in [the] petitioner's petition' . . . ." (*Maas v. Superior Court* (2016) 1 Cal.5th 962, 980, citation omitted.) In the specific context of capital cases, sending the habeas corpus workload to the superior courts will "radically reduce the Supreme Court's backlog." (Alarcon, Remedies for California's Death Row Deadlock (2007) 80 So.Cal.L.Rev. 697, 743.)

The rules established in the *Griggs-Roberts* line of cases do not come from the Constitution. They are explicitly based on this court's supervisory power over the courts of the state. (See *Roberts*, 36 Cal.4th at p. 593.) Unlike rules that are founded directly on the Constitution, supervisory power rules are "subordinate to legislative will." (*People v. Storm* (2002) 28 Cal.4th 1007, 1024, fn. 7.)

The statutory venue rule of Proposition 66 differs only slightly from the case law venue rule of *Griggs*. It allows a court other than the original trial court to make an exception and hear a habeas corpus petition when good cause is shown. This rule falls easily within the people's reserved legislative authority. The claim that it is inconsistent with article VI, section 10 of the California Constitution has no merit.

B. Successive Petitions.

Of all the steps in the review of capital cases, no step has been more wasteful and less productive than successive habeas corpus petitions. The capital defense bar has routinely abused this process to bury this court in worthless paper. Petitioners cite the standard for delayed or successive

petitions established by this court in *In re Clark* (1993) 5 Cal.4th 750 as if this were a successful and essential body of jurisprudence. (See Pet. RSP 33.) Conspicuously absent from Petitioners' discussion of *Clark* is any citation to any holding of this court that the rules established in that case or others in the line are constitutional in magnitude, immune from revision by the people through their retained legislative power. They are not.

Actually, *Clark* is a failure. Except in unusual circumstances, "such successive petitions rarely raise an issue even remotely plausible . . . . In the 18 years since *In re Clark*, . . . experience has taught that in capital cases, petitioners frequently file second, third, and even fourth habeas corpus petitions raising nothing but procedurally barred claims." (*In re Reno* (2012) 55 Cal.4th 428, 457-458.) The petition in *Reno* exemplified abusive practices. It was over 500 pages raising 143 claims, nearly all of which were either not cognizable or procedurally barred, and such abuse is common. (See *id*. at p. 443.) These petitions are a heavy burden on judicial resources (see *id*. at pp. 452-453) and a largely unnecessary one.

Even worse than the burden on the judiciary is the delay these worthless petitions cause in the completion of the case. "Exhaustion" petitions often present nothing but procedurally improper claims and the standard boilerplate, meritless, routinely rejected claims that California's death penalty is unconstitutional. (See, *e.g.*, *Reno*, 55 Cal.4th at p. 462, fn. 17.) Such a petition should be denied promptly, but instead denial takes years. (See Alarcon, *supra*, at p. 749 (average 2.8 years).) That is longer than the Ninth Circuit panels take to decide the entire case. (See *ibid*.) Victims have a constitutional right to "a prompt and final conclusion of . . . post-judgment proceedings" (Cal. Const., art. I, § 28, subd. (b)(9)), and this right is routinely violated by the existing system.

The problem of abusive habeas corpus petitions is not limited to California. In the Preliminary Opposition, Intervenor described the evolution of the federal rule for its demonstration that the legislative and

judicial branches both have roles to play in formulating an appropriate rule. As habeas corpus petitions became more abusive and less productive during the 1970s, the U.S. Supreme Court tightened the standards by case law. Then in 1996 Congress decided that the case law restrictions were insufficient in several ways and tightened them further. The U.S. Supreme Court upheld these changes against constitutional challenge. (See Pet. Prelim. Opp. 28-32.) The bottom line is that rules governing habeas corpus on such matters as timeliness of petitions, successive petitions, and mechanisms of review may be made by case law initially, but that case law may be overridden by the legislative authority, absent a specific constitutional provision. The high court specifically upheld the successive petition rule in *Felker v. Turpin* (1996) 518 U.S. 651, 664.

Petitioners attempt to brush off *Felker* by asserting that the high court rejected "various constitutional arguments" because AEDPA did not repeal the high court's original habeas corpus jurisdiction. (See Pet. RSP 34.) This is an audacious attempt at jurisprudential sleight-of-hand. The passage of *Felker* cited, in Part II A of the decision, rejected only one constitutional argument, and it involved an issue that does not arise in Proposition 66. AEDPA eliminated the Supreme Court's jurisdiction to review by writ of certiorari a court of appeals' decision on whether to allow a successive petition. The question was whether this violated the U.S. Constitution's provision on the U.S. Supreme Court's appellate jurisdiction. (See *Felker*, 518 U.S. at pp. 658-662; U.S. Const., art. III, § 2.) Proposition 66 does not limit this Court's analogous authority, the petition for review, in any way, so the work-around of an original habeas petition that the U.S. Supreme Court noted in *Felker* is unnecessary.

The high court's review of the successive petition rule is in Part III. (See *Felker*, 518 U.S. at pp. 663-664.) The *Felker* Court upheld the enactment of a more stringent successive petition rule without reservation and without reliance on its own original habeas corpus jurisdiction. The validity of the substantive requirements for a successive petition is

affirmed without a single reference to which court will be applying the rule.[5] "The new restrictions on successive petitions constitute a modified res judicata rule . . . ." (*Id*. at p. 664.) They were well within the legislative authority to decide. (*Ibid*.)

With the federal example in mind, we return to Proposition 66. California's new statutory successive petition rule is far more generous to defendants than the federal statute unanimously upheld in *Felker*. It is similar to the rule that a plurality of the U.S. Supreme Court decided was appropriate in *Kuhlmann v. Wilson* (1986) 477 U.S. 436, 455. (See Int. Prelim. Opp. 29-30.) No showing that the facts were previously undiscoverable is required. (Cf. 28 U.S.C. § 2244(b)(2)(B)(i).) To get a stay of execution in order to have his claim considered, the petitioner need only show a "substantial claim" of actual innocence. (Pen. Code, § 1509, subd. (d).) To prevail on the merits he need only make his case by the preponderance of the evidence. (*Ibid*.) Unlike the federal statute, there is no "clear and convincing" requirement. (Cf. 28 U.S.C. § 2244(b)(2)(B)(ii).) No reference to the minimum evidence that *any* reasonable factfinder might have found sufficient to convict is required. (Cf. *ibid*.) Eligibility is defined consistently with *Sawyer v. Whitley* (1992) 505 U.S. 333, 344-345, explicitly including categorical exclusions such as minority and intellectual disability. Unlike the federal statute, "innocence" is not limited to innocence of the underlying offense, *i.e.*, murder. A petitioner can be guilty of murder and still meet Proposition 66's requirement of ineligibility for the punishment.

The Petition makes no claim under the California equivalent of the Suspension Clause, article I, section 11 of the California Constitution. The

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5. *Felker* does discuss AEDPA's movement of one decision to a different court—the initial screening of successive petitions is moved from the district court to the court of appeals. (See *Felker*, 518 U.S. at p. 664.) Proposition 66 has no similar provision.

Petitioners' original supporting memorandum does not mention it, and even in their reply at the preliminary stage Petitioners include only an irrelevant citation to it in a discussion about jurisdiction (see Pet. RSP 3) and a brief reference to a Montana decision regarding that state's habeas corpus constitutional provision. These brief references are not sufficient to amend the petition to state a new claim.

Instead of the Suspension Clause claim that the high court rejected in *Felker*, Petitioners in this case oddly claim that because Proposition 66 makes a different value judgment about what amounts to a "fundamental miscarriage of justice" it somehow places "undue restrictions on the courts' constitutional power to adjudicate habeas corpus proceedings . . . ." (See Pet. MPA 39; see also Pet. MPA 27.) In their reply, Petitioners seem to be claiming that jurisdiction to decide a type of claim necessarily includes a power to decide untimely and successive claims and that any restriction therefore violates the separation of powers. (See Pet. RSP 32-35.) If this were generally true, all statutes of limitation and res judicata rules would be unconstitutional.

Such an argument would require far more support than Petitioners have provided, if indeed such an argument could be made at all. Establishing the rules of law by which courts will decide cases in the future is the very essence of the legislative power. "The essential balance created by this allocation of authority was a simple one. The Legislature would be possessed of power to 'prescribe the rules by which the duties and rights of every citizen are to be regulated,' but the power of 'the interpretation of the laws' would be 'the proper and peculiar province of the courts.' " (*Plaut v. Spendthrift Farm* (1995) 514 U.S. 211, 222, quoting Federalist No. 78.)

Generally speaking, the legislative authority (including the people by direct vote) has plenary authority to determine the rules of law, both substantive and procedural, by which causes of action will be decided by

the courts. As the U.S. Supreme Court noted in *Felker*, *supra*, habeas corpus is not an exception to this principle. There are, of course, limitations. The constitutional requirement of due process forbids some grossly unfair procedures. (See, *e.g.*, *Mullane v. Central Hanover Bank* (1950) 339 U.S. 306, 314 (notice reasonably calculated to apprise parties of action).) There are also constitutional limitations on substantive law. (See Cal. Const., art. I, §§ 17, 27 (cruel or unusual punishment, specifically excluding the death penalty).)

Yet Petitioners do not invoke any of these limitations. They simply characterize Proposition 66's reforms as "extreme" (Pet. MPA 37), despite the fact that they are more generous to habeas petitioners than the limits that Congress has deemed appropriate for federal courts and the U.S. Supreme Court has upheld, as well as more generous for petitioners claiming actual innocence than the existing California successive petition rule.[6] Petitioners are entitled to that opinion, of course. They were entitled to make that case to the people, and they did. The people decided against them. Absent any specific provision of the Constitution removing the decision of these questions of policy from the legislative authority, and Petitioners have cited none, it is not for this court to decide otherwise.

Petitioners cite *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45 for their claim that Proposition 66's limits on habeas corpus violate the separation of powers (see Pet. MPA 39), but that case is actually strong authority to the contrary. That opinion notes that a statute is not unconstitutional merely because it "increases a court's burden" or "restrict[s] the authority previously exercised by the court." (*Id*. at p. 59, fn. 6.) The separation of powers doctrine points in the other direction.

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6. Petitioners' claim that Proposition 66 makes execution of an innocent person more likely (Pet. MPA 39) is completely wrong. The initiative *lowers* the bar for actual innocence claims. There are, of course, very few such claims of any substance in California capital cases.

"The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function." (*Id*. at p. 53.)

In *County of Mendocino*, this court rejected a facial separation-of-powers attack on a statute that directed that a court not be in session on designated unpaid furlough days. The claim was "untenable," and the statute did not impair any function reserved to the judicial branch. (See *id*. at p. 61.) The statute in this case is even further removed from interference in the judiciary's performance of its functions. Proposition 66's successive petition rule does not prevent a court from deciding a successive petition; it prescribes a rule of law by which the decision is to be made. Petitioners are the ones who seek a violation of the separation of powers by asking this court to supplant the policy judgment of the people on a matter within their retained legislative power.

Petitioners also get no help from the little sister-state authority they can find. They cite the decision of the Florida Supreme Court in *Allen v. Butterworth* (Fla. 2000) 756 So.2d 52 for their separation of powers argument, but that case was decided under a constitutional provision far different from California's. The Florida Constitution gives rulemaking power in matters of procedure to the Supreme Court. "The Legislature has the authority to repeal judicial rules by a two-thirds vote, but the authority to initiate rules rests with the [Florida Supreme] Court." (*Id*. at p. 59; Fla. Const., art. V, § 2.) California's separation of powers on this point is very different from Florida's and much more like the federal system. Legislative supremacy is maintained in the field of procedure by an express requirement that judicially promulgated rules "shall not be inconsistent with statute." (Cal. Const., art. VI, § 6.) *Allen* is therefore irrelevant to separation-of-powers analysis under the California Constitution.

Petitioners also cite the Montana Supreme Court's decision in *Lott v. State* (2006) 334 Mont. 270, 150 P.3d 337. This case is inapposite. *Lott* is a Suspension Clause case, not a separation-of-powers case. It has nothing to do with the proposition for which it is cited, and, as noted previously, Petitioners have not made a Suspension Clause claim in this case.[7]

Petitioners have not claimed or shown that the successive petition rule is contrary to any provision of the California Constitution that requires a different rule of procedure. They simply disagree with the policy choices made by Proposition 66's new successive habeas corpus rule, and they try to pound the round peg of successive petition policy into the square hole of a jurisdictional grant. The argument does not wash. The jurisdiction of a court to decide a case is different in kind from the rules of law by which it is to be decided. The successive petition rule is valid on its face. Details of its implementation can and should await concrete cases.

C. Untimely Petitions.

Similar considerations apply to the new timeliness requirement. Petitioners describe the preexisting rule on timeliness, with its vague and broadly worded language, as if it were a successful and essential body of jurisprudence. (See Pet. MPA 36-37.) Intervenor has explained how California's open-ended timeliness rule, combined with its quirky system of using successive writs instead of appeals to review habeas denials, causes serious problems for the federal courts to the point that the U.S. Supreme Court has asked California to change it. (See Int. Prelim. Opp. 36-37; *Evans v. Chavis* (2006) 546 U.S. 189, 199.)

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7. If a Suspension Clause claim were before the court, Intervenor would brief the point that *Lott* is an outlier in Suspension Clause jurisprudence. If any death row inmate wishes to raise a Suspension Clause argument against section 1509, the court can consider the point in that case with the benefit of full briefing on it.

Proposition 66 holds the door wide open in the clearest case of unjust application, the untimely petition by the demonstrably innocent prisoner. (See Pen. Code, § 1509, subd. (d).) Whether other extreme cases might justify use of equitable tolling (see *Holland v. Florida* (2010) 560 U.S. 631, 652) is a question that should be resolved with a concrete case before the court. Petitioners' only response to this point is to drop a cryptic footnote asking the court to evaluate the argument "in light of the language and expressed legislative intent of Proposition 66." (Pet. RSP 34, fn. 8.) If this means that the court should not authorize equitable tolling so routinely as to defeat the purpose of the initiative, then Intervenor agrees. Equitable tolling, if available at all, must be reserved for exceptional situations, or else it would defeat the purpose of the rule.

Given that tools are available to deal with those exceptional situations, there is no basis for a facial attack on this important and overdue reform.

D. Method of Execution Challenges.

Petitioners imply in their initial memorandum and say explicitly in their reply that Penal Code section 3601.4, subdivision (c), placing jurisdiction for method of execution challenges in the original trial court, impairs the appellate courts' original habeas corpus jurisdiction over such cases. The fact is that nearly all modern method-of-execution litigation is conducted in civil suits and not in habeas corpus. (See *Hill v. McDonough* (2006) 547 U.S. 573, 583; *Glossip v. Gross* (2015) 135 S.Ct. 2726, 2729, 192 L.Ed.2d 761, 765; *Morales v. Hickman* (9th Cir. 2006) 438 F.3d 926, 927 (*per curiam*); *Morales v. California Dept. of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 729; *Sims v. California Dept. of Corrections & Rehabilitation* (2013) 216 Cal.App.4th 1059.) The primary application of this provision, therefore, is in civil cases. This section is constitutional beyond question in its primary application, and that is sufficient by itself to reject a facial attack on it. (See *infra*, at p. 39.)

Petitioners must go back to 1968 to find a case of a California court considering a method-of-execution challenge in a capital case, and that is a single sentence in a sweeping opinion rejecting a wide range of attacks on the constitutionality of capital punishment generally. (See *In re Anderson* (1968) 69 Cal.2d 613, 631-632; Pet. RSP 10-11.) The summary statement of *In re Reno*, 55 Cal.4th at p. 462, fn. 17 that the method-of-execution claim was premature does not resolve the questions of what nature of suit and what venue would be appropriate when the claim is ripe. That issue was not presented.

Hill v. McDonough did indicate that habeas corpus could be the appropriate vehicle for a method-of-execution challenge where the claim went to the validity of the sentence and not just the particular means of carrying it out, such as a claim that lethal injection generally should be permanently enjoined and not just a particular procedure. (See 547 U.S. at p. 579.) Claims that, if successful, "would . . . necessarily foreclose the State from implementing the lethal injection sentence under present law" (*id*. at p. 583), and thus appropriate for habeas corpus, are rare to nonexistent today. Indeed, after *Glossip* imposed the requirement that the inmate must identify "a known and available alternative method" (135 S.Ct. at p. 2731, 192 L.Ed.2d at p. 767), this subspecies of method-of-execution claims may be extinct.

In any event, a conflict between a constitutional jurisdictional provision and one unusual application of an otherwise valid statutory jurisdictional provision does not warrant striking the latter from the books. If a peculiar case should arise in which resort to habeas corpus rather than the usual civil action (or perhaps a motion in the criminal case) is deemed appropriate, the court can consider whether the constitutional jurisdiction overrides the statutory limitation in those limited circumstances. In that case, the court can and should also consider whether section 1509 or the principles set forth in *In re Roberts* lead to the same result. Method of execution has at least as much relation to the sentence as parole does, and

therefore the original trial court is the appropriate venue. (See *Roberts*, 36 Cal.4th at p. 589.)

E. Conclusion.

Petitioners' challenges to the habeas corpus reforms of Proposition 66 are meritless in their entirety. They disagree with the policy, but they made their case to the people, and the people decided in favor of these reforms. The California Constitution vests the decision of these matters in the people.

V. Petitioners' challenge to the time limits involves disputes of fact inappropriate for a writ proceeding in a reviewing court.

Original writ petitions filed in a reviewing court are ordinarily rejected on the ground that the case should begin in a trial court. (See Witkin, Cal. Procedure (5th ed. 2008) Extraordinary Writs, § 144(a), p. 1040.) A primary reason for this rule is that appellate courts are unsuited to determining issues of fact. (See *id*. at pp. 1040-1041.) The procedure for factual determinations in writ cases "is singularly inappropriate for appellate courts . . . ." (*Id*. § 203, p. 1106.)

When seeking to convince this court to accept the present petition, Petitioners declared that "[t]his petition presents no questions of fact for this court to resolve in order to issue the relief sought." (Pet. 3.) Although an appellate court can appoint a referee to find facts (see Witkin, *supra*, § 203 at p. 1107), that would transform this case into one very different from the case Petitioners asked this court to accept. Yet Petitioners' argument that Proposition 66's time limits are impossible or impractical are inherently factual. The problem becomes even more fact-bound when one considers that the severability clause of Proposition 66 (§ 21) requires that a provision that is held to be invalid in its application to a particular circumstance nonetheless be applied where its application is valid. (See Part VI, *infra*.)

In the Preliminary Opposition, Intervenor provided a couple of examples of extremely complex cases that were resolved in less than five years. In their reply, Petitioners quibble with one of the examples by making a factual assertion from a law review article. (See Pet. RSP 20, fn. 4.) This is not a fact subject to judicial notice, and neither Intervenor nor the court has any way of determining if it is true. In a fact-finding proceeding, Intervenor could introduce a much more systematic data set showing that over the period studied the federal courts of appeals resolved capital direct appeals in an average of two years and three months. This study, however, is also not a fact subject to judicial notice.

Petitioners recite statistics of the current unconscionable delay in the processing of direct appeals. (Pet. RSP 19-21.) These statistics do not establish as a fact that far shorter times are not possible, particularly when this court is relieved of the enormous burden of the original habeas corpus petitions. (See Alarcon, *supra*, at p. 743.) They most certainly do not establish as a fact that the five-year standard can never be met, even after the present backlog is worked off. Ninth Circuit panels decide California capital habeas cases in an average of 2.2 years. (*Id*. at p. 749.) While these cases involve only the federal questions, most criminal procedure issues today can be "federalized." (See May, How to Get Ahead in Federalizing (2010) < http://capcentral.org/procedures/federalize/docs/federalization_100421.pdf>.)

Similar considerations apply to the habeas corpus review in the superior courts. Petitioners cite as if it were fact a partisan report by two vehement opponents of capital punishment, Paula Mitchell and Nancy Haydt. (See Pet. RSP 23.) They rely on a description of a judicial crisis in a case that was decided seven years ago (*People v. Engram* (2010) 50 Cal.4th 1131) on facts even older than that[8] with no evidence of the current

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8. The online docket for the Court of Appeal in *Engram* shows that the appeal was taken on November 6, 2008.

situation. Whether and under what circumstances the superior courts could comply with the new time limit and still discharge their constitutional responsibilities is a fact-intense question unsuited to this proceeding.

VI. Petitioners have made only a facial challenge to time limits, and the facial challenge fails.

Even if this court could resolve the factual issues regarding the validity of the time limits, it is neither necessary nor proper that it do so. Petitioners in this case have made only a facial challenge, not an as-applied challenge, and their facial challenge fails.

Tobe v. City of Santa Ana (1995) 9 Cal.4th 1069 is this Court's most thorough discussion of facial versus as-applied challenges, and it remains regularly quoted. (See, *e.g.*, *In re Taylor* (2015) 60 Cal.4th 1019.) "A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual." (*Tobe, supra*, at p. 1084.) *Tobe*, cited *Dillon v. Municipal Court* (1971) 4 Cal.3d 860, 865 for that proposition, and *Dillon* notes that it follows that a facial challenge does not call upon the court to resolve factual disputes.

Because the Petitioners seek "to enjoin *any* enforcement of the [statute] and did not demonstrate a pattern of unconstitutional enforcement,"[9] this is a facial challenge. (*Tobe*, 9 Cal.4th at p. 1089, italics in original.) To prevail in a facial challenge, "petitioners must demonstrate that the act's provisions *inevitably* pose a present *total* and fatal conflict with applicable constitutional prohibitions." (*Id*. at p. 1084, italics added, citations and internal quotation marks omitted.)

Generally, if a challenged enactment "is capable of constitutional application" then a facial challenge fails. (*Tobe*, 9 Cal.4th at p. 1102.)

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9. There is no pattern, of course, because the statute is brand new.

While there are exceptions in First Amendment overbreadth cases and possibly in the area of fundamental privacy rights (see *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 342-343 (plur. opn. of George, C.J.) no such exception applies to the kind of statutes at issue in this case. That question was squarely addressed in *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45. Considering a very similar separation-of-powers argument, this court posed the question of whether "*under any and all circumstances*" the operation of the statute "*necessarily* will 'defeat' or 'materially impair' a court's fulfillment of its constitutional duties." (*Id*. at p. 60, italics in original.)

The facts of a particular court's staffing and workload at a particular time and whether the application of the statute would impair that court at that time are irrelevant to this facial determination. That issue would "amount[] to an '*as applied*' constitutional challenge . . . [and is not] properly before [the Court] in this proceeding." (*Id*. at p. 59.) "[T]he current status of funding in the trial courts throughout the state . . . is not relevant" to a facial challenge (see *id*. at p. 59-60, fn. 7) and by the same principle this would be true of workload as well.

Tobe and *County of Mendocino* leave the Petitioners with essentially nothing to support their facial challenge to the time limits. No ill effect follows from that result because constitutional issues can be resolved if and when they arise.

People v. Engram (2010) 50 Cal.4th 1131 illustrates the importance of considering statutes such as this as applied, and it further illustrates that statutes such as this are not limited to the polar extremes of absolutely rigid versus "mere suggestions," as Petitioners seem to think. (See Pet. RSP 1-2.) *Engram* reviewed a number of applications of the statute giving criminal cases priority over civil. In some applications, noncompliance by the court was unjustified and was reversible error. (See 50 Cal.4th at pp. 1156-1157.) In others, the statute was applied to give trial courts sufficient

flexibility to organize their departments and continue their essential civil functions.

Petitioners put great stock in *In re Shafter-Wasco Irrigation Dist.* (1942) 55 Cal.App.2d 484, but that case provides more of an informative contrast than an on-point precedent. The specific question presented was whether exceeding a statutory time limit for an appeal divested the court of jurisdiction so as to require dismissal of an appeal. The answer was no. (*Id*. at pp. 485, 488.) In sharp contrast, Proposition 66 expressly rules out dismissal as a consequence. (Pen. Code, § 190.6, subd. (e).) The statute in that case involved dissolution of irrigation districts, settlement of their debts, and distribution of their property, matters of no small complexity, yet it allowed only three months for the appeal. (*In re Shafter-Wasco Irrigation Dist.*, *supra*, at pp. 485-486.) Capital appeals are no doubt even more complex, but they are not 20 times so, and Proposition 66 allows 20 times as long. While capital appellants do indeed routinely *claim* dozens of errors per brief (see Pet. RSP 21), a great many of these "errors" are easily and routinely dismissed as boilerplate recitations of previously rejected arguments. (See, *e.g.*, *People v. Mendoza* (2016) 62 Cal.4th 856, 912-917.)

In the end, *Shafter-Wasco* does not hold the statute in that case unconstitutional on its face but instead construes it to require "as early a hearing and decision as orderly procedure in this court will permit." Thus, even *if* this court could decide without any factual record that the five-year limit is unachievable both now and in the future, under *Shafter-Wasco* it would still have an operative effect.

Proposition 66 contemplates that its time limits may not be complied with in all cases. A court considering the constitutionality of the limits must consider the consequences of noncompliance as well as the bare existence of the limits. A cessation of jurisdiction such that an appeal or habeas corpus petition must be abruptly terminated would indeed raise

grave concerns, but Proposition 66 express rules out such a drastic result. (See Pen. Code, § 190.6, subd. (e).) The same subdivision authorizes relief by writ of mandate from unjustified delay, but it does not call for automatic issuance of a writ merely upon passage of the time limit.

Proposition 66 initially directs the Judicial Council to develop rules to "expedite the processing of capital appeals and state habeas corpus review." (Pen. Code, § 190.6, subd. (d).) That requirement merely directs what the judicial branch should have been doing anyway, given the continuing and egregious violation of victims' constitutional rights under Marsy's Law. (See *ante*, at p. 28.) The five-year limit only applies directly to the Judicial Council in the long-term monitoring, as that body is tasked with adjusting the rules as needed to achieve the goal. Nothing in this portion of the initiative creates any dire consequences from waiting to see how the provision is applied.

The five-year limit is directed specifically to courts. Consistently with *Engram*, courts can and should undertake determined efforts to implement the people's policy choice to complete these cases within the stated time or as soon as possible thereafter consistently with their constitutional responsibilities. (See 50 Cal.4th at p. 1156.) Failure to do so may be grounds for a writ of mandate. (See *In re Blodgett* (1992) 502 U.S. 236, 240-241 (*per curiam*).) Whether compliance with the limit was feasible and whether a court's delay failed to give sufficient weight to the Proposition 66 requirement are issues to be determined when and if a party with standing chooses to challenge a court's actions in this regard.

In summary, under the standards developed by this court, this case is purely a facial challenge, and the facial challenge to the time limits fails. The limits are not inevitably in total conflict with constitutional provisions, and Petitioners' factual assertions are irrelevant to a facial challenge. The facial challenge should be rejected, and validity as applied should be considered in due course when that question is ripe.

VII. The claim that habeas appeals to the courts of appeal is unconstitutional is not properly before the court and is without merit.

Although they made no such claim in the Petition or its supporting memorandum, Petitioners claim in their reply that Penal Code section 1509.1, subdivision (a) violates Article VI, section 11 of the Constitution. This claim is not properly before the court. In any case, it is without merit.

No one can be sentenced to death, or anything else, in habeas corpus. A habeas corpus action is not a criminal case. (*In re Scott* (2003) 29 Cal.4th 783, 815.) "Rather, it is an independent action the defendant in the earlier criminal case institutes to challenge the results of that case." (*Ibid*.) The exception to court of appeal jurisdiction for cases in which death has been pronounced is inapplicable. If, in a proper case, a court were to decide otherwise, the remedy would be to strike the words "court of appeal" from the statute.

VIII. Proposition 66's successive habeas corpus rule for capital cases has a rational basis and is consistent with the Equal Protection Clauses of the United States and California Constitutions.

In their initial memorandum, Petitioners made a claim that the successive habeas corpus provision of Proposition 66 violates equal protection because of a claimed difference with a successive petition rule that is supposedly contained in a bill enacted by the Legislature after Proposition 66 had qualified for the ballot. (See Pet. MPA 52-55.) This argument was incorrect in nearly every respect. Petitioners incorrectly described the bill they rely on, they misstated the differences between the successive habeas corpus rules for capital and noncapital prisoners after Proposition 66, and their argument of the lack of a rational basis for treating the two classes of prisoners differently had been rejected by state and federal courts throughout the nation. (See Int. Prelim. Opp. 43-48.)

In their reply, Petitioners cite the statute that actually does address grounds for habeas corpus (Pen. Code, § 1473) rather than the irrelevant one they cited previously (Pen. Code, § 1485.55), but they still fail to grasp the essential difference between grounds for habeas relief once a court reaches the merits and "gateway" requirements to reach the merits when a claim has been defaulted.

A. SB 1134, Grounds for Relief, and Gateways.

Petitioners claim that Senate Bill 1134 "permit[s] any person convicted of a crime—capital or noncapital—to pursue a *successive* claim for habeas relief regarding actual innocence." (Pet. MPA 52, italics added.) They further claim that it is a violation of equal protection to deny this permission to death-sentenced prisoners filing successive petitions when it is granted to others.

At the threshold, it is a strange argument to claim that the Legislature could undercut a pending initiative, filed but not yet voted on, by enacting ordinary legislation so as to render unconstitutional an initiative that was constitutional when it was filed. The people's precious right of initiative would be fragile indeed if the Legislature could so easily undermine it. In any event, Proposition 66 and the amendment to section 1473 of the Penal Code address different aspects of habeas corpus.

Justice Kennedy's opinion for the Supreme Court in *House v. Bell* (2006) 547 U.S. 518 explains the difference between a ground for relief and a gateway. House was convicted of murder and sentenced to death, but he claimed he was innocent and had new evidence to back that claim. There were two ways that his innocence claim could be relevant. Although Chief Justice Warren famously declared that new evidence of actual innocence was not a ground for habeas corpus relief (*Townsend v. Sain* (1963) 372 U.S. 293, 317), some justices have expressed a contrary view in individual opinions, at least as to capital cases. (See *House*, *supra*, at p. 554.) That question of whether a "freestanding claim of actual innocence"

constitutes a substantive ground for habeas corpus relief, absent a claim of procedural error in the defendant's trial, remains unresolved at the federal level. (*Id*. at p. 555; *McQuiggin v. Perkins* (2013) 133 S.Ct. 1924, 1931, 185 L.Ed.2d 1019, 1030.)

A second way that innocence can be relevant is as a "gateway," an exception to a procedural default rule that would otherwise prevent the habeas court from reaching the merits of the petition. In federal habeas corpus petitions by state prisoners, a claim that the prisoner did not raise in state court at the proper time and thereby forfeited in state court is also barred in federal court unless an exception applies. Sufficiently strong evidence of innocence is one of the exceptions, and hence a "gateway." (See *House*, 547 U.S. at pp. 536-537.)

California case law prior to SB 1134 recognized newly discovered evidence of actual innocence as both a substantive ground for relief and as a gateway to consideration of untimely or successive petitions where other claims provided the substantive grounds. For example, *In re Hall* (1981) 30 Cal.3d 408 is a straight substantive-grounds case, not a successive or untimely petition. *Hall* recites the well-established standard of "newly discovered and credible evidence which undermines the entire case of the prosecution" and proceeds to the merits. (See *id*. at p. 417.)

In re Clark (1993) 5 Cal.4th 750 is the lead case on untimely and successive petitions. *Clark* held that "absent justification for the failure to present all known claims in a single, timely petition for writ of habeas corpus, successive and/or untimely petitions will be summarily denied." (*Id*. at p. 797.) The sole exception was "fundamental miscarriage of justice." (*Ibid*.) That exception came in four varieties, one of which was "actually innocent of the crime or crimes of which the petitioner was convicted." (*Id*. at pp. 797-798.) In a footnote at that point, *Clark* stated the standard for this "gateway" showing of innocence in the same words as the standard for the substantive claim. (*Id*. at p. 798, fn. 33.) In so

doing, however, *Clark* did not merge the substantive and gateway rules. *In re Lawley* (2008) 42 Cal.4th 1231, 1239 recognized that "overcoming procedural bars to habeas corpus relief" and "deciding substantive actual innocence claims" were analytically distinct, even though at that time they employed the same standard for the petitioner's required showing.

SB 1134 added new subdivision (b)(3) to section 1473 of the Penal Code. Paragraph (A) of the new subdivision adds to the grounds for which habeas relief may be granted "[n]ew evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial." With this enactment, the California Legislature has reduced the standard of proof for substantive actual innocence claims. The purpose of the bill was to change the standard as stated in *Lawley*. (See Senate Floor Analysis for SB 1134 (Aug. 19, 2016) pp. 4-5.) *Lawley* was a straightforward case on the standard of proof for a timely initial petition. (See 42 Cal.4th at p. 1237.) Neither *Lawley* nor SB 1134 has anything to do with the standard for consideration of a successive petition. The word "successive" does not appear in the bill or the analysis. SB 1134 did not amend section 1475 of the Penal Code or purport to change this court's case law on successive petitions.

Intervenor does not claim that section 1473 "does not apply to successive petitions." (Cf. Pet. RSP 47.) In a successive petition, the petitioner must first pass through the gateway of an exception to the bar on successive petitions, which is the *Clark* standard for noncapital cases and now section 1509, subdivision (d) for capital cases. Once through, section 1473 provides the standard for deciding the merits of a substantive claim of innocence. *In re Richards* (2016) 63 Cal.4th 291 confirms rather than refutes this analysis. (Cf. Pet. RSP 47, fn. 11.) *Richards* looked to *Clark*, not section 1473, for the gateway, invoking the "change in the applicable law" exception. (See 63 Cal.4th at p. 294, fn. 2.) Section 1473 as amended is then applied to decide the merits. (*Id*. at p. 309.)

With the amended versions of sections 1473 and 1509 both in force (*i.e.*, both SB 1134 and Proposition 66), a capital defendant who can satisfy his substantive burden of proof under subdivision (b)(3)(A) of section 1473 will almost always qualify for the gateway to make that claim in a successive or untimely petition under subdivision (d) of section 1509.[10] The Proposition 66 gateway requires preponderance of the evidence, the same standard as SB 1473's substantive requirement of "more likely than not." For noncapital defendants, the successive petition requirement remains the more stringent rule of " 'irrefutable evidence of innocence of the offense or the degree of offense of which the petitioner was convicted.' " (*In re Robbins* (1998) 18 Cal.4th 770, 813, quoting *Clark*, *supra*, 5 Cal.4th at p. 798, fn. 33.) The entire premise of Petitioners' argument is incorrect. For successive petitions based on claims of actual innocence, the rule for capital cases is more *lenient* than the rule for noncapital cases.[11]

B. Differences and Rational Basis.

There are, to be sure, some differences between habeas review for capital as opposed to noncapital cases. There were differences before Proposition 66, and the initiative eliminated one difference and created some others. (See Int. Prelim. Opp. 45-47.) Procedural differences such as these are reviewed only for having a rational basis (see, *e.g.*, *Estelle v.*

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10. One possible exception is a petitioner who appears to be innocent when considering only admissible evidence but who is proved to be guilty by evidence that is reliable but suppressed under the Fourth Amendment exclusionary rule. This slim possibility need not concern the court here.

11. There is nothing inconsistent in Intervenor's position that Proposition 66 is simultaneously more lenient than *Clark* on successive petitions with credible actual innocence claims and tighter on successive petitions in cases of clear guilt. (Cf. Pet. RSP 46.) Intervenor does not claim that Proposition 66 is "more lenient" than section 1473, as that section does not address the gateway for successive petitions.

Dorrough (1975) 420 U.S. 534, 537-539), and Proposition 66 easily "withstands this relaxed scrutiny." (See *People v. Fitch* (1997) 55 Cal.App.4th 172, 184.)

As explained in Intervenor's Preliminary Opposition, the most important difference by far between capital and noncapital habeas corpus procedures is the statutory guarantee of appointed counsel as a matter of right for death row inmates (see Gov. Code, § 68662), with compensation and pre-petition investigative resources, generous relative to other states, that California provides to counsel. (See *In re Reno* (2012) 55 Cal.4th 428, 456-457, and fns. 9-10; Int. Prelim. Opp. 45.) It is no exaggeration to say that this difference is more important than all other differences combined, and it runs in favor of the death row inmate.

Given this enormous difference on the first petition, there is a more than rational basis for believing that the need to keep the door open for successive petitions on issues other than innocence is less compelling in capital cases than noncapital cases. For example, a life prisoner without counsel or investigative resources is less likely to uncover claims of undisclosed evidence in possession of law enforcement. Experience with successive habeas petitions in capital cases confirms that they are nearly uniformly worthless. "Absent . . . unusual circumstance[s] . . . such successive petitions rarely raise an issue even remotely plausible, let alone state a prima facie case for actual relief." (*In re Reno*, 55 Cal.4th at pp. 457-458.)

Petitioner makes the puzzling and unexplained assertion that *Reno* considered and rejected this argument on page 472. (Pet. RSP 49.) There was no equal protection issue. The only statement on that page even remotely relevant is a quote from *Clark* about the "magnitude and gravity of the penalty of death" requiring exceptions to avoid a "fundamental miscarriage of justice" "at least in capital cases." But of course *Clark* is not limited to capital cases, so this dictum carries little weight. The

framers of Proposition 66 were very well aware of the need to avoid a "fundamental miscarriage of justice" in capital cases, but they chose and the people ratified a different definition of that term than this court chose in *Clark*, a definition congruent with the U.S. Supreme Court's fundamental miscarriage gateway.

Respondents argued that capital and noncapital habeas corpus petitioners are not similarly situated, which is largely the same as arguing that there is a rational basis for treating them differently. (Respondent's Preliminary Opposition 21-22.) Petitioners claim that this court's precedents on the subject are limited to sentencing differences. (Pet. RSP 48.) Most of them are, for the obvious reason that sentencing is the primary difference in the two types of cases, but not all. Jury selection is also different, a difference affecting both the guilt and the sentencing phases, but this court regularly rejects equal protection attacks on "death qualification" of juries. (See, *e.g.*, *People v. Sandoval* (2015) 62 Cal.4th 394, 412.)

C. Authority in Other Jurisdictions.

In the Preliminary Opposition, Intervenor noted cases from the highest courts of Massachusetts and Idaho as well as the federal First and Ninth Circuits rejecting claims that greater restrictions on collateral review in capital cases were a denial of equal protection. Intervenor further noted other cases from the highest courts of Ohio, Florida, and Arizona and the Sixth and Eighth Circuits finding a rational basis for treating capital and noncapital cases differently in other contexts. (Int. Prelim. Opp. 47-48.) Petitioners make no attempt in their reply to distinguish or even criticize these cases. While this court is not obligated to accept these courts' view of the equal protection question, the heavy preponderance of out-of-state authority carries strong persuasive value.

Petitioners have found two cases on equal protection claims indicating an equal protection violation. (Pet. RSP 49-50.) Neither is persuasive.

Allen v. Butterworth (Fla. 2000) 756 So.2d 52 struck down that state's Death Penalty Reform Act (DPRA) in its entirety, expressly stating "our holding is based on the separation of powers claim . . . ." (*Id*. at p. 54; see also *ante*, at p. 33 (describing the Florida Constitution's very different separation of powers on matters of procedure).) The court stated that the law also violated equal protection (*ibid*.), but in contrast to the cases discussed in the Preliminary Opposition there is no discussion of the principles of equal protection, whether capital and noncapital inmates are similarly situated, what standard of scrutiny is being employed, or why the different treatment does not meet the standard. This lack of discussion on such an important issue raises a strong suspicion that this statement is obiter dictum rather than an alternative holding.

Fortunately, we do not have to guess. The Florida Supreme Court returned to the equal protection question of treating capital and noncapital prisoners differently in *Abdool v. Bondi* (Fla. 2014) 141 So.3d 529 with a much more substantive discussion. When the petitioners rely on *Allen*, the court notes that "*Allen* was decided on separation of powers grounds" (*id*. at p. 546) strongly implying that its cursory equal protection statement was dictum. The court goes on to reject the equal protection claim for several reasons. The first reason involves construction of the statute, but then *Abdool* holds in the alternative that different treatment of capital cases would not be a violation of equal protection. (*Id*. at p. 546.)

On all the key points of equal protection analysis, Florida's position as expressed in the most recent and most thorough decision of its high court supports upholding statutes such as this. Only a rational basis is required. Capital cases are different. The state's interest in carrying out the sentences justifies treating them differently. (*Ibid*.)

The only equal protection case that is still good law that Petitioners have cited for their position is the very recent opinion of the Ohio Supreme Court in *State v. Noling* (Dec. 21, 2016, No. 2014-1377) 2016-Ohio-8252, <http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2016/2016-Ohio-8252.pdf>. This case does not involve postconviction review of judgments as such but instead a statutory system for postconviction DNA testing. (See *Noling* at ¶ 2; Ohio Rev. Code, §§ 2953.71-2953.84.) The statute provided that death-sentenced inmates could appeal a denial of testing to the state supreme court only if that court granted leave to appeal, while other inmates could appeal to the court of appeals without leave. (*Noling* ¶¶ 5-6.)

The state offered as a basis for the difference the expeditious enforcement of capital judgments. The court expressed some doubt about this reason (*id*. at ¶ 22), understandably given that DNA testing is for the purpose of the kinds of actual innocence claims that Proposition 66 seeks to preserve, but it does not reject expeditious enforcement as a valid reason. Instead it finds that the additional step will take longer and therefore "is not rationally related to the governmental purpose of expeditiously enforcing final judgments . . . ." (*Id*. at ¶¶ 23-24.)

Noling is inapposite because the successive petition restriction of Proposition 66 is far more than rationally related to the goal of more expeditious justice. That is precisely why the anti-death-penalty advocates oppose it so vehemently. The Petition in this case says that Proposition 66 "will . . . make it more likely, and more immediate, for persons sentenced to death to face their executions" (Pet. 3), *i.e.*, face the punishment they so richly deserve for the horrible crimes they chose to commit. Justice is a reason to uphold this initiative, not a reason to strike it down.

California faces a problem in capital cases that it does not face in noncapital cases. Long delays in habeas corpus proceedings delay and therefore deny justice. Further, capital defendants are provided other

advantages that noncapital defendants are not, particularly appointed counsel and investigative resources as a matter of right. These two differences are far more than sufficient to provide a rational basis for Proposition 66's procedural distinctions between capital and noncapital habeas review. The overwhelming preponderance of authority so holds. Petitioners' equal protection claim is utterly without merit.

CONCLUSION

The petition for writ of mandate should be denied.

February 27, 2017

Respectfully Submitted,

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NO ON PROP. 62, YES ON PROP. 66

CERTIFICATE OF COMPLIANCE

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

I, Kent S. Scheidegger, hereby certify that the attached return of intervenor contains 13,814 words, as indicated by the computer program used to prepare the brief, WordPerfect.

Date: February 27, 2017

Respectfully Submitted,

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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 (1) by electronic mail, sending true copies of the PDFs to the addresses listed below, and (2) 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 follows:

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