IN THE SUPREME COURT
OF CALIFORNIA

OFFICE OF THE STATE PUBLIC DEFENDER, et al,
Petitioners,

v.

ROB BONTA, in his official capacity,
Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

Case No. S284496

PRELIMINARY OPPOSITION OF REAL PARTY IN INTEREST TO PETITION FOR WRIT OF MANDATE
(Exhibits separately filed)

MICHAEL A. HESTRIN
District Attorney
County of Riverside

ELAINA BENTLEY, State Bar No. 133451
Assistant District Attorney
JOHN HENRY, State Bar No. 204125
Chief Deputy District Attorney
EMILY R. HANKS, State Bar No. 230442
Managing Deputy District Attorney
*W. MATTHEW MURRAY, State Bar No. 259371
Deputy District Attorney

3960 Orange Street
Riverside, California 92501
T: (951) 955-5400 F: (951) 955-9566
appellate-unit@rivcoda.org

Counsel for Real Party in Interest
the People of the State of California, as represented by the Office
of the District Attorney, County of Riverside

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Real party in interest provides this list of interested entities and persons, limited to Riverside County, under California Rules of Court, rules 8.208 and 8.488.

All condemned inmates from prosecutions arising from Riverside County:

Roman Aldana
James Anderson
Joseph Avila
Michael Barbar
Raymond Barrera
Richard Booker
Michael Burgener
Jeffree Buettner
Albert Brown
Andrew Brown
Robert Castro
Daniel Cervantes
Carlos Contreras
David Contreras
Michael Cook
Juan Coronado
Jackson Daniels
Ronald Deere
Gregory Demetrulias
Robert Dunson
Sonny Enraca
Angel Esparza
John Felix
Miguel Felix
Eusebio Fierro
Marcus Fletcher
Jawaun Graham
Earl Green
Israel Guardado
Jessica Hann
William Hart
Tyronne Harts
Cisco Hartsch
George Hernandez
Lorraine Hunter
Bailey Jackson
Jonathan Jackson
Christopher Jasso
Albert Jones
Glen Jones
William Jones
Emrys John
Horace Kelly
Kim Kopatz
Jose Larin-Garcia
Phillian Lee
Lose Leon
Michael Lewis
Daniel Linton
Elias Lopez
Johnny Lopez
Johnathan Luther
Belinda Magana
Vincent Marples
Jesse Manzo
Romaine Martin
Omar Martinez
Crandell McKinnon
Julian Mendez
Tyrone Miller
Joseph Montes
Naresh Narine

Raymond Oyler
Jesus Penuelas
Christopher Poore
Brooke Rottiers
Cathy Sarinana
Raul Sarinana
David Scott
Christopher Self
Richard Simon
Janeen Snyder
William Suff
Kesaun Sykes
Justin Thomas
James Thompson
Michael Thornton
Jesse Torres
Javier Victorianne
Rigoberto Villanueva
Jack Williams
Lester Williams
Robert Lee Williams
Steve Woodruff
Tony Yonko
Francisco Zavala

All next of kin of the victims of the above-listed defendants.

(Cal. Const. art. 1, § 28.)

All defendants currently being prosecuted or retried for capital murder in Riverside County Superior Court:

Saul Arevalo
William Armendariz
Russell Austin
Jason Barton
Michael Bramit
Leonardo Fernandez
Dareante Fisher
Abraham Fregoso
Jacob Gamboa
Jose Garcia
Sixto Garciapena
Jordan Guzman
Googie Harris Sr.
Joaquin Leal
Anthony McCloud
Carlos Navarro-Nieves
Jesse Patino
Manuel Rios
Alexis Rosas
Adam Slater
Erik Martinez
Steve Martinez
Bryce McIntosh
Michael Mosby

All next of kin of the victims of the above-listed defendants.

(Cal. Const. art. 1, § 28.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Petitioners seek to overturn hundreds of death sentences throughout the State of California, and preclude current and future efforts to seek or impose capital punishment, on the grounds that District Attorneys and jurors are systemically racist, without identifying a single defendant sentenced to death or a single District Attorney's Office as an interested party—let alone a real party in interest. They have improperly sought the extraordinary remedy of mandate, even though there are several avenues to litigate their claims, including motions, direct appeals, and petitions for writ of habeas corpus all of which may invoke the California Racial Justice Act (RJA). Furthermore, this attempt to have capital punishment declared unconstitutional in California is directly prohibited by article I, section 27 of the California Constitution and constitutes an impermissible collateral attack on judgments of death in violation of Penal Code section 1509. The petition asks this Court to ignore the democratic process and the rule of law and overrule the will of the People by fiat.

Even if this Court ignores the procedural irregularities, deliberate exclusion of interested parties, and constitutional and statutory barriers to relief, the petition still fails on its face. The petition relies on faulty, out-of-date analyses that ignore regional differences in demographics and fail to account for the circumstances of the killings and killers for whom capital punishment is sought. Petitioners' arguments reflect a lack of understanding of California criminal law and an unwillingness to

follow it. There is nothing proper or legal about this petition. This Court should put a stop to this improper political maneuver and misuse of the judicial process.

LIST OF SUPPORTING DOCUMENTS

1. The declaration of Marisa Omori filed by defense counsel, including outside counsel Claudia Van Wyk of the ACLU, in *People v. Mosby* RIF1604905 (*Mosby v. Superior Court* (2024) 99 Cal.App.5th 106) separately attached as exhibit 1.
2. The Riverside County District Attorney's Office Special Circumstances Murder policy, separately attached as exhibit 2.

STATEMENT OF ADDITIONAL MATERIAL FACTS

1. The RJA applies prospectively and retroactively. (See Pen. Code, § 745, subds. (b) & (j).)
2. The RJA prohibits the state from seeking or obtaining a conviction or sentence "on the basis of race, ethnicity, or national origin." (Pen. Code, § 745, subd. (a).)
3. A violation of the RJA precludes eligibility for the death penalty. (Pen. Code, § 745, subd. (e)(3).)
4. The RJA is violated by exhibitions of bias or animus based on race, ethnicity, or national origin towards the defendant, whether or not it is purposeful, and whether or not it occurs in court. (Pen. Code, § 745, subds. (a)(1)&(2).)
5. The RJA is violated when, at the county level, the prosecution more frequently seeks or obtains more severe outcomes against persons of a defendant's race, ethnicity,

or national origin, than similarly situated persons who committed similar conduct than those of different races, ethnicities, or national origins. (See Pen. Code, § 745, subds. (a)(3)&(a)(4)(A).)

6. The RJA is also violated when, at the county level, the prosecution more frequently seeks or obtains more severe outcomes depending on the race, ethnicity, or national origin of victims. (Pen. Code, § 745, subd. (a)(4)(B).)

7. "It is presumed that official duty has been regularly performed." (Evid. Code, § 664.)

8. It is presumed that the law has been obeyed. (Civ. Code, § 3548.)

9. It is presumed prosecutors have and will properly perform their duties to not exhibit racial bias during a capital case, seek the death penalty based on racial bias or animus, or obtain a judgment of death on the basis of racial bias. (See *People v. Superior Court* (1935) 4 Cal.2d 136, 147 ["The district attorney who participated in the proceeding, now deceased, is presumed to have had knowledge of the law and to have acted in compliance with its requirements."]; *People v. Henderson* (1953) 121 Cal.App.2d 298, 299 ["the 'official duty' of the prosecutor is presumed to have been 'regularly performed' "].)

10. It is presumed defense trial, appellate, and habeas counsel will raise RJA claims when appropriate in capital cases. (See *People v. Rucker* (1960) 186 Cal.App.2d 342, 346 ["A

presumption exists that an attorney has performed his duty in protecting his client's interest"].)

11. It is presumed courts will grant relief if the RJA is violated. (See *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 60 ["We presume attorneys and judges obey all laws."].)

MEMORANDUM

1. THE PETITION SHOULD BE SUMMARILY DENIED BASED ON NUMEROUS PROCEDURAL DEFICIENCIES

A. The petition fails to identify any real party in interest.

The petition is facially deficient because, although seeking to invalidate hundreds of capital murder convictions and prosecutions, it fails to identify a single real party in interest. "If the petition names as respondent . . . [an] officer acting in a public capacity, it must disclose the name of any real party in interest." (Cal. Rules of Court, rule 8.486(a)(2).) The People, as represented by the Riverside County District Attorney's Office, are a party to every capital murder case currently pending in the Riverside County Superior Court and every capital murder case with a pending habeas corpus petition in the Riverside County Superior Court. The petition should have included the People as a real party in interest.

This Court has defined a real party in interest as "any person or entity whose interest will be directly affected by the proceeding." (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1178 (*Connerly*).) A real party in interest is typically the other party to the lawsuit or proceeding subject to challenge. (*Ibid.*; accord *People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486.) But it may be " 'the person or entity in whose favor the acts complained of [operate]' or 'anyone having a direct interest in the result' [citation], or 'the real adverse party ... in

whose favor the act complained of has been done.' " (*Connerly*, *supra* at p. 1178.)

As the representative of the People in the County of Riverside, actively prosecuting capital murder cases and defending habeas corpus challenges to capital murder cases, the People are a party to the cases this writ petition attacks and are beneficially interested in these proceedings. The petition even incorrectly asserts Riverside County is an example of racial disparity in capital sentencing. (See Pet. at pp. 34, 88.)

In fact, District Attorneys throughout the State are real parties in interest to this writ petition. So too are the defendants who have been sentenced to death and the defendants who are facing capital murder charges. Yet, petitioners did not include a single person or entity as a real party in interest, and instead attested that they know of **no** interested entities or parties. The petition is facially deficient due to the obviously inadequate certificate of interested entities or persons and could be struck on this basis. (See Cal. Rules of Court, rule 8.488(d)(1)(A).) Indeed, striking the petition on this basis is warranted given the gravity of attempting to invoke this Court's jurisdiction without affording the basic due process of notice to obviously interested parties or even identifying all of the interested parties so that the Justices of this Court may properly ensure their involvement would not be conflicted.

B. The petition does not sound in mandate.

Mandate may issue to compel the performance of acts which the law specially enjoins. (Code Civ. Proc., § 1085, subd. (a).) Although it ordinarily may not be used to control the exercise of discretion, mandate may lie where discretion could be exercised in only one way or where it is clear that discretion was abused. (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205.)

A petition for a writ of mandate "must be accompanied by an adequate record." (Cal. Rules of Court, rule 8.486(b)(1).) This includes the ruling from which relief is sought, moving and opposition documents and exhibits, any other documents needed to understand the case and ruling under review, and a reporter's transcript of the proceedings that resulted in the ruling under review. (*Id*., rule 8.486(b)(1)(A)–(D).)

A petition may be summarily denied if the petition fails to provide the required record or "present facts sufficient to excuse the failure." (Cal. Rules of Court, rule 8.486(b)(4).) If a required transcript or document is unavailable a declaration is required to explain the unavailability or explain that it was ordered and the date when it is expected to be filed. (See *id*., rule 8.486(b)(2)&(3).)

Although petitioners seek to invalidate hundreds of convictions, they have failed to present this Court with any record from those proceedings whatsoever. Given that article VI, section 13 of the California Constitution requires an error lead to a "miscarriage of justice" before reversal and "[t]his test is not met unless it appears 'reasonably probable' the defendant would have achieved a more favorable result had the error not occurred"

(*People v. Breverman* (1998) 19 Cal.4th 142, 149), this Court cannot do the required analysis on the non-existent record provided.

It is also a statutory requirement that petitions for a writ of mandate be verified by the beneficially interested party. (Code Civ. Proc., § 1086.) It is improper to qualify a verification with "the reservation that it verifies upon personal knowledge only those facts that are not 'supported by citations to the record, exhibits or other documents.'" (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 489 [excusing requirement given sufficiency of record].) The point of a verification requirement is to require that factual allegations be set out so that perjury may be assigned to them if they are false. (See *People v. McCarthy* (1986) 176 Cal.App.3d 593, 597 [information and belief verification insufficient for statutorily required habeas verification].) "A fatally defective verification 'is treated as a failure to verify.' [Citation.]" (*Krueger v. Superior Court* (1979) 89 Cal.App.3d 934, 939.)

Here, petitioners' verification is inadequate because it purports to be "by information and belief, except for those matters which are part of the official records of the court, and as to those matters, I believe them to be true based upon my reading of those records." (Pet. at p. 64.) This verification is insufficient as it does not permit the assignment of perjury or constitute the assertion of facts. (See *Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, 203–204 [information and belief verification is defective]; *Pacific Gas & Electric Co. v. Superior*

Court (1983) 145 Cal.App.3d 253, 255 n.1, overruled on other grounds in *Hubbard v. Brown* (1990) 50 Cal.3d 189, 197 [verification on information and belief "cannot by itself serve as a basis for issuance of a writ" but review of denial of summary judgment was possible because "petitioner has otherwise supplied a sufficient record of the underlying facts and trial court proceedings"]; but see *League of Women Voters v. March Fong Eu* (1992) 7 Cal.App.4th 649, 656–657 [facts may be stated on information and belief].)

Furthermore, the verification is only signed by counsel for the Office of the State Public Defender (OSPD). None of the other five petitioners verified the petition. Thus, at a minimum, the petition should be denied as to those purported petitioners. (See Code Civ. Proc., § 1086 [writ of mandate "must be issued upon the verified petition of the party beneficially interested"]; *Krueger v. Superior Court* (1979) 89 Cal.App.3d 934, 939 [denying mandate petition due to inadequate verification because petitioners failed in their pleading burden].)

C. Petitioners have failed to show entitlement to the extraordinary remedy of mandate.

As this Court has recognized, a writ of mandate is an extraordinary remedy, meant to be invoked when there are no other adequate remedies. (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 113-114; *Department of Corrections & Rehabilitation v. Superior Court* (2023) 94 Cal.App.5th 1025, 1037 ["Because writ review is an extraordinary remedy, courts generally do not grant writ relief absent extraordinary circumstances."].) There

are numerous remedies available to defendants facing capital murder charges and defendants who stand convicted and sentenced to death. Defendants can challenge the constitutionality of their conviction and sentence on direct appeal as well as by way of a petition for writ of habeas corpus. In fact, petitioner OSPD acknowledges as much in the petition, stating that they currently represent over 65 defendants appealing death sentences to this Court and they have "raised issues of race discrimination in many California death penalty cases." (Pet. at p. 21.)

Furthermore, with regard to allegations of race discrimination, the RJA provides a mechanism to address allegations that the state has sought to obtain a criminal conviction or sentence on the basis of race, ethnicity, or national origin. (§ 745, subd. (a).) For non-final cases, defendants have the availability to bring a motion at any time. (§ 745, subd. (c).) For final judgments in cases in which the defendant was sentenced to death, as of January 1, 2023, defendants can file a petition for writ of habeas corpus asserting claims under the RJA. (§ 745, subd. (j)(2).) And the RJA specifically provides that "[w]hen the court finds there has been a violation of subdivision (a), the defendant shall not be eligible for the death penalty." (§ 745, subd. (e)(3).) Given the numerous avenues available for defendants to challenge capital murder charges, petitioners have not met the high burden of establishing extraordinary circumstances warranting review by mandate.

2. THE PETITION SHOULD BE SUMMARILY DENIED BECAUSE IT IS EXPRESSLY PROHIBITED BY THE CALIFORNIA CONSTITUTION AND CALIFORNIA PENAL CODE

A. The Petition is barred by article I, section 27 of the California Constitution.

Article I, section 27 of the California Constitution provides, "[t]he death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution." This Court has repeatedly held that article I, section 27 prohibits constitutional challenges to the death penalty as a form of punishment, and only allows courts to consider constitutionality as applied to a particular defendant's conviction and sentence. (See, e.g., *Strauss v. Horton* (2009) 46 Cal.4th 364, 430; *People v. Superior Court (Engert)* 31 Cal.3d 797, 808–809.)

Petitioners seek to end-run this Court's lengthy and consistent jurisprudence by claiming their petition constitutes an "as applied challenge." As applied to whom? There is no named defendant or case. This Court is not being asked to determine whether a particular defendant's prosecution was unconstitutional. Although petitioner alleges that the system discriminates against Black and Hispanic defendants, particularly when the murder victim is Caucasian, they ask this Court to invalidate *every* capital case, pre- and post-trial, including defendants who murder Black and Hispanic victims

and including Caucasian defendants. Petitioners don't even attempt to explain how alleged racial discrimination against Black and Hispanic defendants by prosecutors and juries renders a Caucasian defendant's death sentence unconstitutional. That's because this is not an as-applied challenge. Rather, petitioners ask for exactly what is prohibited by article 1, section 27—a blanket finding that the death penalty is unconstitutional in all cases in the State.

B. The Petition is barred by Penal Code section 1509.

In 2016, Proposition 66 added section 1509 to the Penal Code. Section 1509 expressly states, "[a] writ of habeas corpus pursuant to this section is the **exclusive procedure** for collateral attack on a judgment of death." (§ 1509, subd. (a), emphasis added.) And the RJA particularly allows for a habeas corpus petition for a defendant sentenced to death raising claims that race illegally played a role in his or her prosecution. (§ 745, subd. (j)(2).) Petitioners ask this Court to issue an order to the attorney general and "every district attorney and law enforcement officer in the state" restraining and prohibiting them "from initiating, pursuing, or defending capital prosecutions and from executing death sentences." (Pet. at p. 56.) But this is not a petition for writ of habeas corpus. This is a petition for a writ of mandate seeking to collaterally attack hundreds of death judgments. The law does not allow this.

C. The Petition improperly seeks to do what can only be accomplished by the electorate.

Having failed to convince the voters in previous elections, the OSPD and a group of out-of-state lawyers from the American Civil Liberties Union (ACLU) are now attempting to use this Court to avoid the ballot box altogether. The petition is nothing more than a political maneuver designed to subvert the will of California voters. This Court should not indulge this type of improper petition.

The electorate acts as a legislative body when it enacts laws via initiative. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1045.) "The Legislature is charged, among other things, with 'mak[ing] law ... by statute.' (Cal. Const., art. IV, § 8, subd. (b).) This essential function embraces the far-reaching power to weigh competing interests and determine social policy. [Citations]." (*People v. Bunn* (2002) 27 Cal.4th 1, 14–15.)

> Courts have nothing to do with the wisdom of laws or regulations, and the legislative power must be upheld unless manifestly abused so as to infringe on constitutional guaranties. The duty to uphold the legislative power is as much the duty of appellate courts as it is of trial courts, and under the doctrine of separation of powers neither the trial nor appellate courts are authorized to 'review' legislative determinations. The only function of the court is to determine whether the exercise of legislative power has exceeded constitutional limitations.

(*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 962.)

"[I]t is not our concern whether the Legislature has adopted what

we might think to be the wisest and most suitable means of accomplishing its objects." (*Dribin v. Superior Court In and For Los Angeles County* (1951) 37 Cal.2d 345, 352.)

> It is not the province of this court to consider the arguments of social policy which have been urged upon it by each side; these are matters which must be, and no doubt were, addressed to the legislature. We have no authority to question the wisdom or unwisdom of the scheme set up by the statute…

(*Bodinson Mfg. Co. v. California Employment Commission* (1941) 17 Cal.2d 321, 325.)

The ACLU's publicly stated goal is to abolish the death penalty. (Capital Punishment, ACLU, https://www.aclu.org/issues/capital-punishment [as of May 2, 2024].) But California voters support capital punishment. The voters reaffirmed their support as recently as 2016. Proposition 62 sought to repeal the death penalty; that initiative failed by about 7 percentage points, or nearly 1 million votes. (See *Statement of Vote*, November 8, 2016 General Election, p. 12, https://elections.cdn.sos.ca.gov/sov/2016-general/sov/2016-complete-sov.pdf [as of April 26, 2024].) Not only did voters choose to keep the death penalty—they sought to increase the speed by which capital punishment is carried out. Proposition 66, which also appeared on the 2016 ballot, sought to shorten habeas corpus challenges in capital cases, appoint more attorneys for condemned prisoners, and otherwise increase the speed by which capital cases reach their final resolution. The voters passed Proposition 66 while rejecting Proposition 62. (*Ibid.*) In the nearly eight years since the passage of Proposition 66 and the

rejection of Proposition 62, no death penalty initiatives have made the ballot in California.

Petitioners could lobby the Legislature to change the California capital punishment system. (Cal. Const., art. IV, § 8, subd. (b).) They could also attempt to convince the Governor to commute all pending death penalty defendants to life-without-parole sentences. (Cal. Const., art V, § 8, subd. (a); Pen. Code §§ 4800–4813.)

Instead, petitioners are improperly seeking extraordinary relief directly from California's highest court, rather than using the normal and required rules of democracy. Because it is not this Court's role to make policy, nor to evaluate the wisdom of the capital punishment system in California, this Court should deny the petition without indulging this thinly veiled attempt to subvert the will of the voters.

3. THE PETITION SHOULD BE SUMMARILY DENIED BECAUSE THE DATA SUPPORTING IT IS UNRELIABLE AND OUT OF DATE

A. The data underlying petitioners' claims is unreliable.

The statistical analysis provided by petitioners is unreliable, and a careful reading of their exhibits demonstrates it does not stand for the proposition claimed by petitioners.

For example, the study by Catherine Grosso, et al. and the analysis by Dr. Nick Petersen both falsely inflate the number of White victim cases. Both studies count multiple-victim cases as a "White victim" case when there is at least one White victim, regardless of the race of the other victims. Petitioners use these

studies to allege prosecutors are more likely to seek the death penalty where the victim in the case is White. But there is no rational, empirical reason to inflate capital punishment numbers by lumping multiple victim race cases in with cases with only White victims. Indeed, if the multiple victim cases with mixed race victims were assigned to any non-White grouping, then the same data would show a greater likelihood of seeking the death penalty when the victims are not White. This Court long ago cautioned that these kinds of statistical assertions should be critically examined to avoid being "unduly impressed by the mystique of the mathematical demonstration" without assessing "its relevancy or value." (*People v. Collins* (1968) 68 Cal.2d 319, 332.)

Furthermore, grouping all capital cases statewide is illogical because the decision to seek the death penalty is not made statewide. It is made by discrete, separate groups of prosecutors on behalf of each of California's 58 counties. Petitioners want this Court to look at statewide patterns to avoid a serious problem with their math: small sample size. When a small set of data is analyzed, tiny changes to that data can result in enormous changes to the results. Petitioners' own witness, Dr. Petersen, explains this fundamental weakness in his own analysis: "Analyses with a smaller number of cases will necessarily have greater sampling variability." (Pet. Exh. H at p. 200.)

The Riverside-County specific evidence filed by petitioners closely mirrors that filed in *Mosby v. Superior Court* (2024) 99

Cal.App.5th 106. However, petitioners here declined to provide any documentation authored by Dr. Marisa Omori. In her analysis, Dr. Omori observed that the Riverside County District Attorney sought the death penalty 22 times between January 1, 2016 (the date that the current Riverside County District Attorney began his term), and January 1, 2022. Dr. Omori then conceded that the sample size was too small to be significant. (Exh. 1.)[1]

The issue is obvious. Criminal prosecutions come in an infinite array of fact patterns, criminal history, aggravating and mitigating evidence, and racial composition of defendants, victims, and witnesses. A change in filing decision in just two or three of the 22 death penalty cases filed in Riverside County during the District Attorney's administration would have an enormous impact on the overall results of any statistical analysis.

Other studies, ignored by petitioners, support the idea that case complexity, rather than race, drives the decision to seek the death penalty, and also demonstrate that differing mathematical methodologies create different results. For example, in 2006 the RAND Corporation commissioned a study of the federal death penalty, examining the effect of race on the decision to seek capital punishment. The study was conducted by three independent teams using three different methodologies. At first, the study came to the same conclusion as the petitioners: that

[1] To be clear, real party in interest takes issue with several of Dr. Omori's conclusions and methodology, but merely note that she correctly flagged the issue with small datasets.

race was a significant predictor of the Attorney General's decision to seek the death penalty. However, unlike petitioners, RAND chose to dive deeper, seeking the most important factor in any prosecution: the facts of the case. The results speak for themselves.

> [Racial] disparities disappear when data in the AG's case files are used to adjust for the heinousness of the crime. Berk and He concluded: 'On balance, there seems to be no evidence in these data of systematic racial effects that apply on the average to the full set of cases we studied' (see Chapter Five, p. 58). The other two teams reached the same conclusion.

(Klein, Stephen P., Berk, Richard A., Hickman, Laura J.; *Race and the Decision to Seek the Death Penalty in Federal Cases*, (2006) p. 125 https://www.rand.org/pubs/technical_reports/TR389.html [as of May 1, 2024].)

No two criminal cases are alike. Even cases with the same charges and the same basic fact pattern may differ wildly in criminal histories, mitigation, aggravation, and other details. When one takes the time to examine individual cases, as real-life prosecutors do, petitioners' claims fail. This is why this Court has rejected individual challenges and why petitioners are making this broadside attack on the death penalty scheme now, before the RJA becomes a routine part of every capital case.

The problems with petitioners' factual assertions do not end there. Dr. Petersen, a non-lawyer, draws facially irrational legal conclusions. Dr. Petersen admits that he lacked access to criminal history information of the charged defendants but used charged priors as a proxy to guess at a defendant's criminal

history—a practice that is obviously deeply unreliable. This point is particularly important because criminal history is a critical piece of information for a prosecutor deciding whether to seek the death penalty.

More broadly, petitioners' analysis erroneously compares filing rates with general population statistics. This premise fundamentally misunderstands how criminal prosecutions begin. Prosecutors cannot create criminal cases out of thin air. They do not simply go into the community and select defendants to prosecute from the general public.

The above-listed examples merely scratch the surface of the legal, mathematical, and logical problems with the petitioners' "evidence." This Court should flatly reject petitioners' unsupported contentions and deny the petition.

B. The data presented by petitioners is irrelevant due to significant recent changes in California law.

Even putting aside inadequacies in the data, petitioners' statistical analyses are irrelevant due to changes in California law. Petitioners present data reaching as far back as the 1970s. Even if the data were accurate, it is irrelevant because California law has undergone a sea change in recent years, specifically related to the role of race in criminal prosecutions. Data gathered from cases prosecuted under outdated laws and by District Attorneys from 50 years ago is useless for analyzing a request that broadly extends from past cases into prohibiting future use of capital punishment.

Two statutory changes in recent years render petitioners' data irrelevant. The first is the RJA. (Pen. Code, § 745.) Originally passed in 2020, the RJA was intended to "eliminate racial bias from California's criminal justice system." (Stats. 2020, ch. 317 (Assem. Bill No. 2542, § 2, subd. (i)).) The RJA provides a new mechanism for criminal defendants to challenge the conduct of judges, attorneys, law enforcement officers, witnesses, and jurors for race-based misconduct. (Pen. Code, § 745 subd. (a)(1)-(2).) The RJA also allows defendants to challenge their charges, convictions, and sentences for racially disparate results. (Pen. Code, § 745, subd. (a)(3)-(4).) The RJA even allows previously convicted defendants to raise a new challenge on direct appeal and via a petition for a writ of habeas corpus. (Pen. Code, § 745, subd. (b).) If the court finds a violation of the RJA, the defendant is ineligible for the death penalty. (Pen. Code, § 745, subd. (e)(3).)

Petitioners' petition for a writ of mandate is tantamount to a statement that the RJA is pointless and will not work. Despite that the full implementation of the RJA does not go into effect until 2026, petitioners have prematurely decided the Act will not remedy any instances of race discrimination in the criminal justice system. Ironically, counsel for petitioners, the ACLU, supported the RJA before the State Legislature (California State Assembly, AB 2542 (2020) Staff analysis, August 25, 2020, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB2542 [as of May 2, 2024]) and both the ACLU and petitioner Ella Baker Center for Human Rights co-sponsored

expansion of the RJA in 2022 (ACLU California Action, *Racial Justice Act for All (AB 256)*, 2022, https://aclucalaction.org/bill/ab-256/ [as of May 2, 2024].)

The second important statutory change is Code of Civil Procedure Code section 231.7 ["section 231.7"]. Enacted in 2020 and effective 2021, section 231.7 represents a ground-up rebuilding of jury selection in California. Prior to its passage, attorneys in criminal cases were bound by the *Batson/Wheeler*[2] body of law. Section 231.7 greatly expanded the *Batson/Wheeler* rule with the stated goal of "plac[ing] an effective procedure for eliminating the unfair exclusion of potential jurors based on race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, through the exercise of peremptory challenges." (Stats. 2020, ch. 318 (Assem. Bill No. 3070), § 1, subd. (a).) Section 231.7 also provides for a significantly more robust inquiry by trial courts into the reasons for the exercise of a peremptory challenge, allows trial courts to sustain challenges made via *unconscious* bias, and creates a new list of reasons that a peremptory challenge would be presumed invalid.

Put simply, jury selection post-section 231.7 is an entirely different process than pre-section 231.7. This is a critically important point because petitioners take great pains to make the deeply offensive suggestion that *all* California prosecutors

[2] (*Batson v. Kentucky* (1986) 476 U.S. 79, 89; *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277.)

"whitewash" their capital juries.[3] Like the enactment of the RJA, section 231.7 renders pre-2020 trends in jury selection obsolete.

The Legislature enacted section 231.7 and the RJA. Petitioner is asking this Court to substitute its judgment for that of the Legislature and the electorate of California. That is illegal and not the role of this Court.

4. THE PETITION SHOULD BE SUMMARILY DENIED BECAUSE IT FUNDAMENTALLY MISREPRESENTS CALIFORNIA CRIMINAL LAW

Petitioners claim, "California's death-sentencing procedures invite racial bias." (Pet. at p. 45.) However, petitioners' understanding of California criminal law contains pervasive, basic flaws that undermine their position. Their arguments also improperly combine all counties in the state of California, ignoring regional differences. On its face, petitioners' challenges fail.

A. Contrary to petitioners' claims, prosecutorial discretion is limited in death penalty cases.

Petitioners contend prosecutorial discretion invites racial discrimination because "prosecutors have a vast amount of discretion to decide who should face the death penalty." (Pet. at p. 41.) Not so.

[3] It should be noted, petitioners' use of the term "whitewash" could itself constitute a violation of the RJA were this case construed as involving the seeking, obtaining, or imposing of a sentence. (See Pen. Code, § 745, subd. (a)(2).)

First, only a small number of crimes are death-eligible in California.[4] Other than first-degree murder, death eligible crimes are rarely charged, with death sought, in California. With regard to first-degree murder, not all cases are death eligible; a defendant must have also committed at least one special circumstance listed in Penal Code section 190.2. Those special circumstances, of course, are subject to review via demurrer (Pen. Code, § 1004), preliminary hearing (Pen. Code, §§ 859b, 872), motion to dismiss (Pen. Code, § 995), motion for judgment of acquittal (Pen. Code, § 1118.1), a trial jury, and the court's determination of a motion to modify the jury's verdict. Thus, the universe of death penalty cases is extremely small; that is why despite California courts convicting tens of thousands of defendants per year[5], only 640[6] are currently on death row. Further, as this Court is aware, the law is replete with fact-based limitations on a prosecutor's ability to seek the death penalty.

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[4] The following crimes are death eligible in California: treason (Pen. Code, § 37), perjury resulting in the execution of an innocent person (Pen. Code, § 128), train sabotage resulting in death (Pen. Code, § 219), assault with a deadly weapon while serving a life sentence (Pen. Code, § 4500), intentionally interfering with preparations for war resulting in death (Mil. & Vet. Code, §§ 1670, 1671, 1672), and first-degree murder with special circumstances (Pen. Code, §§ 187, 190.2.)

[5] California Attorney General, *Crime in California,* 2021, p. 54, https://data-openjustice.doj.ca.gov/sites/default/files/2022-08/Crime%20In%20CA%202021_0.pdf [as of April 26, 2024].

[6] California Department of Corrections and Rehabilitation Condemned Inmate Summary https://www.cdcr.ca.gov/capital-punishment/condemned-inmate-summary-report/ [as of April 26, 2024].

For example, juveniles are not eligible (*Roper v. Simmons* (2005) 543 U.S. 551) nor are the intellectually disabled (*Atkins v. Virginia* (2002) 536 U.S. 304).

Moreover, an enormous body of caselaw from this Court and the United States Supreme Court has held that a defendant's basic rights are not violated by prosecutorial discretion in seeking the death penalty. (See *Proffitt v. Florida* (1976) 428 U.S. 242, 254; *Gregg v. Georgia* (1976) 428 U.S. 153, 199; *People v. Vines* (2011) 51 Cal.4th 830, 889; *People v. Gutierrez* (2009) 45 Cal.4th 789, 833; *People v. Keenan* (1988) 46 Cal.3d 478, 505.) This Court has specifically held on more than one occasion that prosecutorial discretion does not violate equal protection. "Prosecutorial discretion in deciding whether to seek the death penalty does not result in a violation of equal protection, due process, or reliability in capital sentencing." (*People v. Gonzales* (2011) 51 Cal.4th 894, 958.) This Court has "repeatedly rejected substantially similar claims, concluding over 20 years ago that 'prosecutorial discretion to select those eligible cases in which the death penalty will actually be sought does not ... offend principles of equal protection, due process, or cruel and/or unusual punishment.'" (*People v. Vines* (2011) 51 Cal.4th 830, 889–890, quoting *People v. Keenan* (1988) 46 Cal.3d 478, 505.) Petitioners ask this Court to upend decades of jurisprudence; the Court should decline to do so.

B. Petitioners' arguments ignore the varied racial and ethnic identities of District Attorneys and regional differences between counties.

Prosecutorial discretion is further limited in Riverside County where only the elected District Attorney, Michael A. Hestrin, may choose to seek the death penalty. (See Exh. 2.) Prosecutors' discretion to seek the death penalty in Riverside County is severely restricted to one person who is Hispanic. Contrary to petitioners' claim that racial discrimination determines capital punishment because the decision-making is made by individuals who are "racially and ethnically unrepresentative of the state's population" (Pet. at pp. 41-42), the decision maker in Riverside County shares the same racial background as the majority of residents of Riverside County and the largest number of residents of California.

Petitioners' assertion that elected district attorneys in California are "overwhelmingly White" and "studies show that lack of diversity in the legal profession significantly attenuates racial disparities in sentencing" (Pet. at p. 44), is yet another reason petitioners' amalgamation of all counties is improper and fails to account for regional differences. If the race of the individual deciding whether to pursue death is significant, a point real party in interest vehemently opposes, that fact does not support petitioners' claim of racial discrimination in Riverside County.

In fact, two of the last three elected District Attorneys in Riverside County—Rod Pacheco and Michael A. Hestrin—are Hispanic. Despite their commonalities in heritage, death penalty

filings under District Attorney Hestrin have plummeted compared to Rod Pacheco.[7] This change is because, in contrast to petitioners' strictly race-based views, individual actors in the criminal justice system make different choices based on differing facts, changes to the law, and the mandate of their electorate. Petitioners' claim that race is the only metric by which criminal justice outcomes can be measured is both illogical and insulting.

C. The law already allows for challenges to the constitutionality of penalty phase arguments.

Petitioners also claim racial discrimination affects capital cases because of prosecutors' penalty phase arguments. For example, they complain about the historical use of the phrase "Bengal tiger" and other animal imagery by prosecutors in their closing arguments. (Pet. at p. 48.) But such imagery is no longer permissible. According to the RJA, " 'Racially discriminatory language' means language […] including […] language that compares the defendant to an animal […]." (Pen. Code, § 745 subd. (h)(4).) Thus, the problem about which the petitioners complain is no longer part of the death penalty scheme they seek to both retroactively and prospectively invalidate.

More importantly, the vast majority of their sentencing data comes from the decades in which the use of such imagery

[7] See generally Damien, Christopher, *The death penalty question: Riverside County and Gov. Newsom's execution moratorium;* Desert Sun, March 2, 2020

was legal.[8] Therefore, that data has little to no probative value here, because prosecutors now operate under a completely different set of rules. It remains to be seen whether the RJA will have the desired effect of reducing alleged racial disparity in the criminal justice system.[9] While the full effect of the RJA remains to be developed, this Court should not grant an extreme and extraordinary writ based on outdated and irrelevant evidence.

D. This Court has consistently held that capital jury qualification is constitutional.

Finally, petitioners claim capital jury selection leads to race discrimination. This Court has repeatedly held, "[t]he exclusion of those categorically opposed to the death penalty at the guilt phase of the trial does not offend either the United States Constitution [citation] or the California Constitution [citation]."

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[8] Such allusions were permissible until the RJA's enactment in 2020. (See, e.g., *People v. Tully* (2012) 54 Cal.4th 952, 1045; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1030; *People v. Krebs* (2019) 8 Cal.5th 265, 341; *People v. Garcia* (2011) 52 Cal.4th 706, 759.) In fact, the phrase "Bengal tiger" was specifically upheld by this Court on multiple occasions as recently as 2018. (See *People v. Duncan* (1991) 53 Cal.3d 955, 977; *People v. Brady* (2010) 50 Cal.4th 547, 585; *People v. Spencer* (2018) 5 Cal.5th 642, 688; *People v. Powell* (2018) 6 Cal.5th 136, 182.)

[9] There is some evidence to suggest that race-based disparities in California criminal law have been narrowing for years. For example, data from the Public Policy Institute of California shows that the differences in arrests between Black and White suspects has narrowed significantly since its recorded peak in the late 1980s. (E.g., Lofstrom, Magnus et al.; *New Insights into California Arrests: Trends, Disparities, and County Differences* (Technical Appendices) https://www.ppic.org/wp-content/uploads/1218mlr-appendix.pdf [as of April 29, 2024].)

(*People v. Mills* (2010) 48 Cal.4th 158, 172; accord *Lockhart v. McCree* (1986) 476 U.S. 162, 176-177; *People v. Sandoval* (2015) 62 Cal.4th 394, 412-413; *People v. Mendoza* (2016) 62 Cal.4th 856, 913; *People v. Chism* (2014) 58 Cal.4th 1266, 1286; *People v. Taylor* (2010) 48 Cal.4th 574, 602; *People v. Davis* (2009) 46 Cal.4th 539, 626; *People v. Richardson* (2008) 43 Cal.4th 959, 987; *People v. Jackson* (1996) 13 Cal.4th 1164, 1198–1199.) The issue is not race; the issue is whether a particular potential juror can enforce the law. Prosecutors challenge all jurors, regardless of race, if they cannot follow the law.[10]

CONCLUSION

Petitioners make sweeping generalizations about individual criminal justice actors based solely on the color of their skin. Worse yet, they accuse California prosecutors who try capital cases of engaging in modern day lynching. Lynchings are, by definition, extrajudicial, whereas imposition of the death penalty follows the most heavily checked, challenged, and scrutinized legal proceeding in the State. To use such a loaded term in a blatantly attention-seeking manner is not only morally wrong, it also cheapens the trauma of generations of historically disadvantaged people.

Make no mistake: the United States as a whole and California specifically still must contend with a centuries-long history of racial oppression. However, excoriating large groups of

[10] Petitioners' argument again fails to acknowledge relevant changes to California's jury selection process, namely section 231.7.

people based solely on their race does not move those issues towards resolution; in fact, it makes things worse.

The People of the State of California, County of Riverside, as Real Party in Interest, respectfully request this Court deny the Petition.

Dated: May 6, 2024

Respectfully submitted,

MICHAEL A. HESTRIN
District Attorney
County of Riverside

/s/

EMILY R. HANKS
Managing Deputy District Attorney
W. MATTHEW MURRAY
Deputy District Attorney

CERTIFICATE OF WORD COUNT

Case No. S284496

The text of this **PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE** consists of 6,223 words as counted by the Microsoft Word program used to generate it.

Executed on May 6, 2024, in Riverside, California.

Respectfully submitted,

MICHAEL A. HESTRIN
District Attorney
County of Riverside

/s/

EMILY R. HANKS
Managing Deputy District Attorney
W. MATTHEW MURRAY
Deputy District Attorney

DECLARATION OF ELECTRONIC SERVICE

Case Name: *Office of the State Public Defender v. Bonta*
Case No(s).: S284496

I declare that I am over the age of 18, not a party to this action and my business address is 3960 Orange Street, Riverside, California. My electronic service address is Appellate-Unit@rivcoda.org.

On **May 6, 2024**, I served the within, **PRELIMINARY OPPOSITION OF REAL PARTY IN INTEREST TO PETITION FOR WRIT OF MANDATE; EXHIBITS 1-2 (Exhibits separately filed)**, by transmitting a PDF copy of this document through TrueFiling (https://tf3.truefiling.com/) to the following recipients and email notification addresses:

PLEASE SEE ATTACHED LIST

BY OVERNIGHT DELIVERY: I also served by overnight delivery via Federal Express courier one (1) copy of the above-listed document addressed as follows:

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

I certify under penalty of perjury that the foregoing is true and correct.

Executed on **May 6, 2024**, at Riverside, California.

Esperanza Garcia
DECLARANT

Office of the State Public Defender Galit Lipa Galit.Lipa@ospd.ca.gov Jessica E. Oats Jessica.Oats@ospd.ca.gov Lisa Romo Lisa.Romo@ospd.ca.gov	**American Civil Liberties Union of Northern California** Avram Frey AFrey@aclunc.org Neil K. Sawhney NSawhney@aclunc.org Pamela Quanrud pamelaquanrud@gmail.com
American Civil Liberties Union Capital Punishment Project Cassandra Stubbs cstubbs@aclu.org Claudia Van Wyk cvanwyk@aclu.org	**Wilmer Cutler Pickering Hale & Dorr LLP** Seth P. Waxman Seth.Waxman@wilmerhale.com Jessica L. Lewis Jessica.Lewis@wilmerhale.com Kathryn D. Zalewski Kathryn.Zalewski@wilmerhale.com Angela S. Boettcher Angela.Boettcher@wilmerhale.com
NAACP Legal Defense and Educational Fund, Inc. Patricia Okonta POkonta@naacpldf.org Devin McCowan DMcCowan@naacpldf.org Amber Koonce AKoonce@naacpldf.org	**San Bernardino District Attorney** Rob Brown RBrown@sbcda.org
Rob Bonta Kenneth Sokoler **State of California Department of Justice** sacawttruefiling@doj.ca.gov sdag.docketing@doj.ca.gov	