Case No. S284496

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

OFFICE OF THE STATE PUBLIC DEFENDER, ET AL.,

Petitioners,

v.

ROB BONTA, CALIFORNIA ATTORNEY GENERAL,

Respondent,

APPLICATION OF PROPOSED AMICUS-IN-THE ALTERNATIVE, AND REAL PARTY IN INTEREST, PEOPLE OF THE STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO, SUPPLEMENTAL OPPOSITION IN SUPPORT OF NEITHER PARTY (RULES 8.487(A)(1) AND 8.520(F))

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TO THE HONORABLE PATRICIA GUERRERO, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPERME COURT OF CALIFORNIA:

The San Bernardino County District Attorney's Office (SBCDA), as counsel for the People of the State of California, County of San Bernardino, hereby makes application to this Court to file the accompanying proposed supplemental opposition brief, either as Real Party in Interest under rule 8.847(a)(1) of the California Rules of Court, or as amicus curiae pursuant to rule 8.520(f) in the alternative.

SBCDA maintains the position asserted in its brief entitled, "Preliminary Opposition of the People of the State of California, County of San Bernardino" (Preliminary Opposition) (filed in this matter on May 3, 2024), that both the People, as represented by the district attorneys throughout the state, and the defendants whose cases could be impacted by this litigation are Real Parties in Interest entitled to be heard by this Court. As "person[s] or entit[ies] whose interest will directly affected by the proceeding," both the People and defendants can become a party to the action by "appearing and participating" in writ proceedings. (*People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 493 (*Becerra*).) While Petitioners may contend that SBCDA and other district attorneys are not necessary or desirable in the proceeding, (See Petitioners' Reply to Respondent's Preliminary Response to Petition for Writ of Mandate, at pp. 14 – 21, and Petitioners' Brief, at pp. 62 – 70), that position is largely based on the erroneous view that the

Attorney General has plenary command of the district attorneys.

SBCDA recognizes that this Court may agree with its reasoning and that of the Riverside County District Attorney, may disagree, or may conclude that the matter must be litigated as an intervention motion.[1] Should this Court conclude for any reason that SBCDA may *not* participate as counsel of record for a Real Party in Interest, SBCDA respectfully requests this Court to consider SBCDA's briefing as that of amicus. This request would include SBCDA's already-filed Preliminary Opposition, as well as the brief attached to this Application.

Applicant's Interest in the Proceedings (Rule 8.250(f)(3))

As described in more detail in SBCDA's Preliminary Opposition, SBCDA is the primary prosecutorial agency handling criminal cases within the County of San Bernardino. SBCDA's responsibilities include both capital cases currently in court and those cases engaged in myriad post-conviction litigation and proceedings.

Petitioners' requested relief would impact cases in both realms, and would seek to prohibit SBCDA from seeking the death penalty in future cases. SBCDA's interest in this case is

[1] *Becerra* noted than an opposed appearance by a third party in litigation still left open the question of participation. (*Becerra, supra*, 29 Cal.App.5th at p. 493.)

therefore immediate, tangible, and of great consequence to SBCDA and the community that it serves.

Purpose and Assistance of Proposed SBCDA Brief (Rule 8.250(f)(3))

Although the Attorney General addresses some of the flaws in Petitioners' position and reasoning, he also takes a conciliatory stance in numerous respects and fails to recognize the limit on his own powers in California's criminal prosecutions. SBCDA, on the other hand, has firsthand experience with capital cases currently before our trial courts, deals directly with the families of the victims of those cases, and recognizes the lengths to which Petitioners seek to step outside the rule of law to thwart punishment in the most egregious cases.

Inclusion of SBCDA and the Riverside District Attorney (as well as any other district attorney seeking to participate as a party) would ensure that the views of those most directly impacted by this litigation are fairly before this Court. While SBCDA believes those views are most properly presented as being those of counsel for Real Party in Interest, SBCDA would not want to see them silenced if this Court limits the participating parties. Participation as amicus-in-the-alternative would therefore be preferable to no participation at all, and would still allow SBCDA and the Riverside District Attorney to provide meaningful briefing otherwise missing from the proceeding.

In Petitioners' view, this litigation should take place in the abstract, without the involvement of any capital defendants or victims of crime. This Court deserves more direct involvement from those to whom the case matters the most.

Authorship of the Brief (Rule 8.520(f)(4))

SBCDA's proposed brief, as well the already-filed Preliminary Opposition, was authored by signing counsel. No party or counsel to a party in the instant case contributed to its contents in any way, either as author or through monetary support. Similarly, no person or entity other than SBCDA and its counsel for these proceedings provided any monetary contribution for preparation or submission of the brief.

Respectfully submitted this third day of December, 2024,

Respectfully submitted,

ROBERT P. BROWN,
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San Bernardino County District
Attorney's Office

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Supreme Court of the United States

Supreme Court of California

California District Courts of Appeal Cases

Constitution of the United States

Constitution of California

Statutes

Initiative and Proposition

Legislative Materials

I.

SUPPLEMENTAL OPPOSITION OF THE PEOPLE OF THE STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO, VIA COUNSEL, SAN BERNARDINO COUNTY DISTRICT ATTORNEY'S OFFICE

This Court's order of September 11, 2024, directed Petitioners and the Attorney General to brief and address three specific areas of concern. As that order did not give direction to other real parties in interest, it left the San Bernardino County District Attorney's Office (SBCDA) in a procedurally difficult position. SBCDA could double-down on our real-party-in-interest position, or accept relegation to amicus status when one of the Court's areas of concern appears to be the question of who should really be involved in this case.

The nature of this litigation underscores the need for involvement of those who are directly impacted by its potential outcomes. Consequently, SBCDA presents this supplemental brief in the alternative, dependent on this Court's ultimate view of the case. Like the Riverside District Attorney, SBCDA steadfastly believes that the prosecutors employed by independently-elected constitutional officers, who personally meet with, and advocate for, the families destroyed by the most heinous of crimes, and who actively represent the interests of the People of the State of California on capital cases pending trial, are key stakeholders in this litigation and whose standing far outstrips those of Petitioners.

It is not lost on SBCDA, however, that this Court clearly sees the implications created by Petitioners' requested relief, and must weigh the management of litigation in which

Petitioners seek to impact multitudes who could claim status as real parties in interest. To be blunt, SBCDA believes it is important for this Court to hear from prosecutors even if this Court pares down the participants. It would be better to be heard as amicus than not heard at all.

The Court's order directed briefing on Petitioners' standing, whether their relief could be granted if their claims held water, and whether other parties would be necessary in the litigation to reach an ultimate conclusion. As is often the case in the law, the answers lie within the questions themselves. Here, Petitioners ask the Court to simultaneously expand (for them) and shrink (for us) standing, so that they may direct statewide office holders to do as Petitioners wish. All that is necessary to meet those needs is for this Court to set aside Constitutional precedent pertaining to capital punishment, disregard the will of the People as expressed in the state constitution and in electorate-created statute, and do this by ignoring evidentiary rules that apply to all other cases.

SBCDA, whether acting as counsel for a real party in interest or as amicus curiae, respectfully requests this Court to reject the Petition in its entirety as fundamentally flawed.

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II.

PETITIONERS SEEK VIRTUAL ELIMINATION OF WRIT PETITION STANDING REQUIREMENTS

A.

Extraordinary Writ Relief Principles

In its order of September 11, 2024, this Court directed Petitioners and the Attorney General to first address whether each petitioner had "standing to challenge the prosecution, imposition, and execution of all death sentences in this state." In California writ of mandate proceedings, statute primarily governs standing, providing for the issuance of the writ where the "ordinary course of the law" fails to provide a remedy for a "beneficially interested" party. (Code Civ. Proc., § 1086.) The same holds true for a writ of prohibition. (Code Civ. Proc., § 1103, subd. (a).) As it is a path of extraordinary relief, California's appellate court express reluctance to grant mandamus writs. (*City of Half Moon Bay v. Superior Court* (2003) 106 Cal.App.4th 795, 803 (*Half Moon Bay*).)

The requirement of a "beneficially interested" party means that a petitioner must possess "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." (*Carsten v. Psychology Examining Committee* (1980) 27 Cal.3d 793, 796. (*Carsten*)) The interest must be "direct and substantial." (*Synergy Project Management, Inc. v. City and County of San Francisco* (2019) 33 Cal.App.5th 21, 30.) If the petitioner "gains no direct benefit from the writ's issuance, or

suffers no direct detriment from its denial," then writ relief is not available. (*Ibid.*)

Moreover, a petitioner with a beneficial interest must also demonstrate that irreparable harm to that petitioner would result in the absence of the writ. (*Half Moon Bay, supra,* 106 Cal.App.4th at p. 803.) Irreparable harm may be demonstrated where there is "no other adequate remedy." (*O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1439.)

As described by both Petitioners and the Attorney General, however, this Court recognizes a "public interest standing" that might relax ordinary standing requirements in writ litigation. (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166.) Thus, while in the ordinary course a petitioner must have an interest greater than the "public at large," (*Carsten, supra,* 27 Cal.3d at p. 796), the very interest of that public may substitute if the object of the writ would be "to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." (*Green v. Obledo* (1981) 29 Cal.3d 126, 144, citations omitted.)[2]

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[2] The Attorney General succinctly points out the inapplicability of "taxpayer standing." (Supplemental Opening Brief, at pp. 16 – 17.)

B.

Petitioners Lack Standing Under Any Theory

i.

Office of the State Public Defender

Curiously, Petitioners' Brief in response to this Court's order leads with the application of public interest standing, rather than pointing from the outset to a beneficial interest. (Petitioners' Brief, at pp. 14 – 16.) Perhaps in part this results from the Office of the State Public Defender's (OSPD) statutorily-defined authorization for action.

OSPD holds obligations to two primary tasks: to provide representation of those unable to financially unable to afford counsel in certain criminal cases and to assist and train local public defenders' offices. (Gov. Code, §§ 15420 & 15421.) OSPD may also administer and award grants for indigent defense, (Gov. Code, § 15421.1), step in as counsel for an accused if a county public defender cannot or will not provide representation, (Gov. Code, § 15422), and serve as amicus curiae, (Gov. Code, § 15423). None of these powers are implicated here, however, as OSPD does not appear before this Court as counsel for an accused, nor does it serve as amicus.

Statute does provide for a more open-ended view of OSPD's scope, however, with a catchall provision. "The duties prescribed for the State Public Defender by this chapter are not exclusive and they may perform any acts consistent with them in carrying out the functions of the office." (Gov. Code, §

15425). No appellate court appears to have directly examined this provision.[3] However, there has been some discussion about the limitations of a county public defender's office, in that authorization is required to engage in activity other than criminal defense. (Cf. *Littlefield v. Superior Court* (1979) 98 Cal.App.3d 652, 654 - 655 (no statutory authority in Government Code section 27706 for county public defender to represent indigent father in child support proceedings), and *In re Conservatorship of Sides* (1989) 211 Cal.App.3d 1086, 1091 (statute authorized county public defender to represent conservatee, but not the indigent parent of the conservatee).) The statute must consequently have some limitation, therefore, particularly given the language used in its drafting.

Part Seven of Division Three of Title Two of the Government Code devotes itself to defining OSPD. The first Chapter gives general provisions, including the minimum requirements for holding the office. To qualify, an attorney must have been a member of the State Bar for the preceding five years, and must have "substantial experience in the representation of accused or convicted persons in criminal or juvenile proceedings . . .." (Gov. Code, § 15400.) The second Chapter carries the title, "Duties and Powers," (Stats. 1975, ch. 1125, § 1, p. 2741), and includes Government Code sections 15420 through 15425, as described above.

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[3] Government Code section 15425 originated in 1975. (Stats. 1975, ch. 1125, § 1, p. 2741.) The only amendment to the statute effected a pronoun change in 2023. (Stats. 2022, ch. 197, § 8.)

Can OSPD define its own duties more expansively in order to empower its actions? Or does the core mission of the office focus on representation of the criminally accused, rather than initiating civil litigation in which OSPD has made itself a party and is not serving as counsel to another? Statue describes the former. It provides no basis to believe OSPD can act as a free-floating curator of the law, initiating civil suits to avoid the legislative process and do so without staying true to its role as a counsel for specific clients.

Parallels to the OSPD's statutory role outlined in Government Code section 15420 may be seen in statute authorizing the roles and activities of county public defenders. County public defenders are similarly charged with representing the indigent criminally accused. (Gov. Code, § 27706, subd. (a).) They may also represent the financially disadvantaged in recovering wages, (Gov. Code, § 27706, subd. (b)), *defend* someone accused in civil litigation in which the public defender believes the person is being persecuted or harassed, (Gov. Code, § 27706, subd. (c), emphases added), represent the indigent being subjected to certain guardianships or conservatorships, (Gov. Code, § 27706, subd. (d)), represent juveniles in wardship proceedings, (Gov. Code, § 27760, subd. (e)), and represent the indigent in claims arising from conditions of detention or of punishment, (Gov. Code, § 27706, subd. (g)). While there are more expansive roles for county public defenders in civil litigation than that which is statutorily afforded OSPD, all authorized activities share a commonality that also defines OSPD: the representation of an

individual, and in nearly all cases, the defense of that individual.

It is true that OSPD enjoys authorization to appear as amicus before the courts, and may appear before the legislature or administratively in furtherance of the interests of its criminal defense mission. (Gov. Code, § 15423.) This is a far cry, however, from authorizing the initiation of a civil action on its own, without even a single client's interest in play.

The matter currently before this Court runs afoul of the same defect that thwarted the Public Defender of Sacramento County when he attempted to seek a writ of prohibition against sentencing guidelines adopted by that county's municipal court in driving under the influence cases, in *Wells v. Municipal Court* (1981) 126 Cal.App.3d 808 (*Wells*). There, the court found that the public defender, "in his official capacity, lacks legal authority to file [the] action, as he is representing no particular person and essentially seeks an advisory opinion." (*Id.* at p. 809.) Statute "specif[ies] the official scope of the public defender's duties as being limited to acting on behalf of a specific individual in a particular matter. The public defender's duties arise only upon the request of the defendant or request or order of the court." (*Id.* at p. 810, citing for comparison *In re Brindle* (1979) 91 Cal.App.3d 660, 673 (rejecting a public defender's ability to unilaterally confer with those who have not asked for counsel, or who have waived that right, and analogizing to this Court's rejection of "next friend" status of an officious intermeddler in *In re Harrell* (1970) 2 Cal.3d 675, 688 – 689.))

The *Wells* court observed that the public defender in question could raise the issues he put forth in the representation of his clients, but that "no similar statutory mandate, either explicitly or impliedly, authorizes the public defender to personally petition [the] court on behalf of all potential defendants to whom the guidelines might be applied." (*Well, supra*, 126 Cal.App.3d at p. 811.) As is the case with OSPD here, "[t]he authority of the public defender is limited by law to act in a representative capacity upon request or order of the court, or request of a particular defendant under specified circumstances, and therefore he may not proceed in his official capacity, on his own initiative, to raise issues detached from the representation of a particular defendant." (*Id.* at p. 813, citing *Safer v. Superior Court* (1975) 15 Cal.3d 230, 233 (addressing a district attorney acting outside of his powers).)

If OSPD is acting outside statutory authorization here, then OSPD must also lack standing to bring the action in the first instance. To hold otherwise would effectively render statutory constraints on OSPD's authority meaningless.

OSPD claims to have a beneficial interest for standing purposes because its responsibilities include representing capital appellants, (Petitioners' Brief, at p. 16), yet none of them are parties here. And as the Attorney General points out, OSPD's argument for public interest standing also fails. (Supplemental Opening Brief, at pp. 14 – 16.) With no personal interest in the litigation, and no risk that the challenges put forth by Petitioners would be otherwise insulated from review, (see *Weiss v. City of Los Angeles* (2016) 2 Cal.App.5th 194,

206), Petitioners' prayer effectively seeks an advisory opinion. "The rendering of an advisory opinion falls within neither the functions nor the jurisdiction of [the] court." (*People ex rel. Lynch* (1970) 1 Cal.3d 910, 912.)

ii.

Other Petitioners

The remaining Petitioners' standing rests on even more tenuous underpinnings than that of OSPD. Eva Paterson does not appear to actively practice law,[4] but describes herself as a spokesperson for a political cause. (Petition, at p. 22.) LatinoJustice PRLDEF alleges no clients facing capital punishment, but rather engages in amicus briefing and community discussions. (Petition, at pp. 22 – 23.) The Ella Baker Center for Human Rights similarly alleges no clients directly facing a capital sentence, but represents itself as an advocacy organization against racial bias in the criminal system and as an advocate for the incarcerated. (Petition, at. p. 23.) Witness to Innocence indicates it "is an organization of and for death row exonerees . . .." (Petition, at p. 23.) By the very definition, the organization therefore does not represent current condemned inmates.

None of these Petitioners has a tangible beneficial interest at stake. Instead, they all seek a political goal in a non-political forum. They assert no beneficial interest that would be

[4] As of this writing, Ms. Paterson is listed as Inactive with the California State Bar.

irreparably harmed. They have no greater claim to public interest standing than that of OPSD. And taxpayer standing fails pursuant to the plain language of Code of Civil Procedure section 526a, subdivision (a).

III.

EVEN ACCEPTING ALL ALLEGATIONS AS TRUE, PETITIONERS FAIL TO ESTABLISH A VIOLATION MERITING RELIEF

The second area of briefing ordered by this Court focused on the Constitution of California, and what relief, if any, could be afforded based on Petitioners' allegations if they were presumed to be true. Specifically, the Court first asked whether Petitioners' alleged facts "would establish a violation of the California Constitution," with specific focus on article I, sections 7 and 17. Next, the Court asked whether article I, section 27 affected the determination. Third, the Court the asked for briefing on whether classifying the matter as an as-applied challenge or facial challenge impacted the determination.

In their supplemental briefings, Petitioners, the Attorney General, and the Riverside District Attorney have all addressed the legal aspects of the state constitution that speak to this Court's order, although a recent equal protection case from this Court (*People v. Williams* (2024) 17 Cal.5th 99 (*Williams*)) appears to be unmentioned thus far. With some general state constitutional principles in mind, SBCDA will address the studies put forth by Petitioners as alleged facts. Ultimately,

even if put forth as competent evidence, the flawed information contained within the alleged facts provides scant insight upon which this Court might confidently craft the form of relief sought by Petitioners.

A.

General Constitutional Principals

California's equal protection protections, in pertinent part, provide that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . .." (Cal. Const., art. I, § 7, subd. (a).) By way of comparison, the federal protection from state action provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws. (U.S. Const., 14th Amend, § 1.) This Court's view has been that the equal protection provisions in the California Constitution are "substantially the equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution." (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 571, citations omitted.) This Court has historically declined to exercise its authority to construe the state equal protection differently from the federal Constitutional protection because of the "analogous claims of arbitrary prosecution."[5] (*Id.* at p. 572.) Recently, the Court has modified its own approach to equal protection analysis, however.

[5] Precisely the claim made here.

Previously, this Court made a two-part inquiry into equal protection claims. (*People v. Hardin* (2024) 15 Cal.5th 834, 848 (*Hardin*).) The first question *had* been to determine whether "the state adopted a classification affecting two or more groups that are similarly situated in an unequal manner." (*Ibid.*, citation omitted in original.) If the groups were found to be similarly situated, the Court then considered "whether the challenged classification is adequately justified." (*Ibid.*, citing *People v. Chatman* (2018) 4 Cal.5th 277, 289 (*Chatman*), quotation omitted.) With *Hardin*, however, the Court determined that a two-step analysis was not necessary, and the remaining inquiry should be "whether a facial difference in treatment is adequately justified by the purposes the law was meant to serve." (*Hardin*, *supra*, 15 Cal.5th at p. 850.) The Court then reinforced the procedure with *Williams*, reaffirming that "when plaintiffs challenge law drawing distinctions between identifiable groups or classes or persons, on the basis that the distinctions are inconsistent with equal protection, courts no longer need ask at the threshold whether the two groups are similarly situated for purposes of the law in question. (*Williams*, *supra*, 17 Cal.5th at 124, citing *Hardin*, *supra*, quotations omitted.)

Under a rational-basis view,[6] the Court

> presume[s] that a given statutory classification is valid until the challenger shows that no rational basis for the unequal treatment is reasonably

[6] The Attorney General lays out ample explanation for the use of a rational-basis test, rather than that of strict scrutiny. (Supplemental Opening Brief, at pp. 24 – 29.)

> conceivable. The underlying rationale for a statutory classification need not have been ever actually articulated by the lawmakers, nor be empirically substantiated. Evaluating potential justifications for disparate treatment, a court reviewing a statute under this standard must treat the statute's potential logic and assumptions far more permissively than with other standards of regulatory review. If a plausible basis exists for the disparity, courts may not second-guess its wisdom, fairness, or logic. The logic behind a potential justification need not be persuasive or sensible – rather than simply rational.

(*Williams*, *supra*, 17 Cal.5th at p. 124, citing *Hardin* and *Chatman*, quotations and brackets omitted.)[7]

Although this Court has streamlined its approach to measuring equal protection challenges, nothing about the parallelism with the federal equal protection provision has changed. The United States Supreme Court's holding in *McClesky v. Kemp* (1987) 481 U.S. 279, 292 (*McClesky*), requires that discriminatory *intent* be demonstrated to manifest a violation of federal equal protection. This Court, while also noting the importance of varied case characteristics of homicides that factor into prosecutorial decision-making, has declined to depart from *McClesky* when addressing a case with an actual capital defendant. (*People v. Montes* (2014) 58 Cal.4th 809, 830 – 831.) With no defendant here to make the claim, Petitioners present nothing to change that.

[7] SBCDA includes this view, as Petitioners continue to insist that theirs is an as-applied challenge of disparate impact. (Petitioners' Brief, at pp. 42 – 44.)

Turning to the measure of punishment, the Constitution of California states, "Cruel or unusual punishment may not be inflicted or excessive fines imposed." (Cal. Const., art. I, § 17.) The federal Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." (U.S. Const., 8th Amend.) Although California courts have viewed the state's use of the disjunctive as "a distinction that is purposeful and substantive, rather than merely semantic," (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085, citing *People v. Anderson* (1972) 6 Cal.3d 628, 634 – 637, 645 (*Anderson*),[8] quotations omitted), the distinction in relation to capital punishment may be clouded by article I, section 27 of the Constitution of California.

That provision reads,

> All statutes of this State in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum. The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6[9] nor shall such punishments for such offenses be deemed to contravene any other provision of this constitution.

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[8] Whose holding was overturned by an amendment to the state constitution through the enactment of article I, section 27. (*Strauss v. Horton* (2009) 46 Cal.4th 364, 429, abrogated on other ground, *Obergefell v. Hodges* (2015) 576 U.S. 644.)

[9] Now article I, section 17.

(Cal. Const., art. I, § 27.) Despite the text's reference to laws predating the reinstatement of capital punishment by the Murder – Penalty Initiative of 1978 (November 7, 1978), this Court ruled that a common sense-approach did not limit its application to pre-*Anderson* laws. (*People v. Frierson* (1979) 25 Cal.3d 142, 184 – 186 (*Frierson*).)

Based upon article I, section 27's inclusion in the California Constitution, any distinctions between the state constitution's prohibition against "cruel or unusual punishment," and the federal Constitution's prescription against "cruel and unusual punishment" may not apply to capital cases. "[P]roperly construed, section 27 validates the death penalty as a permissible type of punishment under the California Constitution." (*Frierson*, *supra*, 25 Cal.3d at p. 186.) With the state's enactment of Proposition 66, The Death Penalty Reform and Savings Act (November 8, 2016), it can hardly be said that the Electorate's meaning has changed to put the death penalty in a different light.

B.

Assuming Petitioners' Alleged Facts to Be True, They Afford No Basis for Relief

The allegations put before this Court in the Petition presented themselves as a fait accompli in evidence, despite the fact that not one line of testimony under oath was presented in any court, nor has any cross-examination or other scrutiny of any such testimony occurred. It is easy to understand why that approach would be taken, since the best

way to sanctify purported statistical methodology, whatever that may be, is to avoid confrontation and proper scrutiny. Even the Attorney General recognizes this, although his apparent desire to avoid an open court proceeding and hold evidentiary hearings with a "special master or referee" is outright puzzling. (Supplemental Opening Brief, at p. 57.)

Nevertheless, this Court asked whether relief might be had by Petitioners if their assertions were presumed to be true. A closer look at those assertions demonstrates it could not, as the statistics presented are woefully inadequate in several respects.

Petitioners presented 11 different statistical compilations designed to convince this Court to put a halt to capital punishment in California right now, both with existing cases and any future prosecutions. In their words, they ask this Court to "issue a writ of mandate barring the prosecution, imposition, or execution of death sentences in California." (Petition, at p. 16.) Of those 11 compilations, however, seven of them contain no data from cases within the last 20 years. (See Grosso, Fagan & Laurence, *The Influence of the Race of Defendant and the Race of the Victim on Capital Charging and Sentencing in California*, Petitioners' Exhibit A, (Grosso) at p. 23 (data set ended 22 year ago); Pierce & Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999, the Empirical Analysis*, Petitioners' Exhibit G (Pierce), at pp. 154 – 155 (data set ended 25 years ago); Shatz & Dalton, *Challenging the Death Penalty with Statistics: Furman, McClesky, and a Single County Case*

Study, Petitioners' Exhibit K (Shatz I), at 297 (data set ended 23 years ago); Wiess, Berk, Li & Farrell-Ross, *Death Penalty Charging in Los Angeles County*, Petitioners' Exhibit L (Weiss I), at p. 321 (data set ended 30 years ago); Shatz, Pierce & Radelet, *Race, Ethnicity, and the Death Penalty in San Diego County: the Predictable Consequences of Excessive Discretion*, Petitioners' Exhibit O (Shatz II), at p. 408 (data set ended 31 years ago); Weiss, Berk & Lee, *Assessing the Capriciousness of Death Penalty Charging*, Petitioners' Exhibit P (Weiss II), at p. 442 (data set ended 31 years ago); and Lee, *Hispanics and the Death Penalty: Discriminatory Charging Practices in San Joaquin County, California*, Petitioners' Exhibit Q (Lee), at p. 454 (data set ended 38 years ago).

All four studies that concerned more recent data originated from one author. (Petersen, *Racial Disparities in California Death Sentencing During the Post-Gregg Period, 1979 to 2018*, Petitioners' Exhibit E (Petersen I) at p. 81; Petersen, *Racial Disparities in Riverside County's Death Penalty System*, Petitioners' Exhibit H (Petersen II), at p. 192; Petersen, *Racial Disparities in San Diego County's Death Penalty System*, Petitioners' Exhibit I (Petersen III), at p. 233; and Petersen, *Racial and Ethnic Disparities in Santa Clara County's Death Penalty System*, Petitioners' Exhibit J (Petersen IV), at p. 252. But despite being from the same author, none of the four used consistent sources of data or methodologies.

One began with "55,922 homicide incidents in California," occurring from 1979 through 2018, but then combined these with death verdicts. (Petersen I, at p. 83.) This

did little to address homicides that were not murders and murders in which no special circumstances were sought or implicated, in other words, cases that would not be death eligible in the first place. The second study focused on 800 murder defendants in Riverside County from 2006 to 2019 and removed manslaughter, but then appears to have combined the data with 3,000 "homicide incidents" and "combined with a *population* of death verdicts in Riverside County from 1976 to 2018 to examine death-sentencing trends across all homicides . . .." (Petersen II, at p. 193.) While recognizing the role of special circumstances in some regard, (*Id.* at p. 194), the study then only focused on death verdicts. (*Ibid.*) This does nothing to address charging discretion.

The third study began with 2,418 "homicide incidents" in San Diego County between 1979 through 2018.[10] (Petersen III, at p. 234.) Again, the number was "combined" with death verdicts, but again appears to be irrespective of charging decision. (*Ibid.*) The fourth study used "all homicides reported to the police" in Santa Clara County from 1976 to 2018. (Petersen IV, at p. 253.) It then used "death sentencing data from the Habeas Corpus Resource Center" and "linked" the data "capital punishment outcomes." (*Ibid.*) It does not appear to address charging decisions pertaining to special circumstances, and instead directly compares 24 homicides

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[10] Presumably, the repeated use of the term, "homicide incidents," implies criminal homicide. It is unclear if this number encompasses all such homicides in the 39-year period (which seems highly unlikely), or only those in which arrests were made, or only some of the latter.

that resulted in death sentences to the overall field of 1,654 homicides in which there may or may not have been an arrest. (*Id.* at p. 254.) The study attempted to compensate for cases in which no arrest was made by focusing on those cases with suspect race information. (*Ibid.*)

None of the studies factor in the quality of evidence available in each case, which this Court recognizes plays a significant role in charging decisions in capital cases. (*Montes, supra*, 58 Cal.4th at p. 831.) Nor do they factor in whether such evidence might be admissible, or the willingness of witnesses to come forward and testify. Indeed, most of the studies do little to truly filter out cases in which capital punishment is a real possibility, and appear to evince a lack of understanding of the nature of the process. One of Petitioners' studies went so far as to claim that the filing of special circumstances "means that the prosecutor is seeking the death penalty." (Weiss I, at p. 322.) With such inaccuracy and lack of precision in the methodology, all of the data presented in the Petition could be factually correct, and still be of so little value to this Court that no relief could conceivably be fashioned from it.

IV.

DISTRICT ATTORNEYS AND CAPITAL DEFENDANTS WOULD BE NECESSARY FOR THIS CASE TO PROCEED

SBCDA described why this litigation is inappropriate without the participation of Real Parties in Interest in its Preliminary Opposition. (Preliminary Opposition, at pp. 28 –

36.) Capital punishment is not an academic process whereby the victims of the worst crimes are relegated to statistics. Nor does the Attorney General have the power to order independently-elected constitutional officers to throw aside discretion and march in lock-step with pernicious ideology that has no recognition of the violence suffered by victims of crime.

SBCDA asks this Court to consider its Preliminary Opposition, and that of the Riverside District Attorney as part of its evaluation of the issues described in its order.

V.
CONCLUSION

The People of the State of California, County of San Bernardino, as Real Party in Interest, respectfully continue to request that this Court deny the Petition in its entirety.

Done this third day of December, 2024.

Respectfully submitted,

JASON ANDERSON,
District Attorney,

ROBERT P. BROWN,
Assistant District Attorney
San Bernardino County District Attorney's Office

CERTIFICATE OF COMPLIANCE

I certify that the attached **PROPOSED SUPPLEMENTAL OPPOSITION BRIEF OF REAL PARTY IN INTEREST, OR AMICUS BRIEF OF SAN BERNARDINO COUNTY DISTRICT ATTORNEY'S OFFICE IN SUPPORT OF NEITHER PARTY** uses a proportionally-spaced 13-point Bookman Old Style font and contains 4,907 words.

Done this 3rd day of December, 2024, at San Bernardino, California.

Respectfully submitted,

ROBERT P. BROWN,
Assistant District Attorney
San Bernardino County District Attorney's Office

OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF SAN BERNARDINO
PROOF OF SERVICE BY ELECTRONIC FILING

STATE OF CALIFORNIA	ss.	***Office of the State Public Defender Et Al. V. Bonta***
COUNTY OF SAN BERNARDINO		S284496

Robert P. Brown says:

That I am a citizen of the United States and employed in San Bernardino County, over eighteen years of age and not a party to the within action; that my business address is 303 W. Third Street, Sixth Floor, San Bernardino, CA, 92415.

That on December 3, 2024, I served the within:

APPLICATION OF PROPOSED AMICUS-IN-THE ALTERNATIVE, AND REAL PARTY IN INTEREST, PEOPLE OF THE STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO, SUPPLEMENTAL OPPOSITION IN SUPPORT OF NEITHER PARTY (RULES 8.487(A)(1) AND 8.520(F))

and

PROPOSED SUPPLEMENTAL OPPOSITION BRIEF OF REAL PARTY IN INTEREST, OR AMICUS BRIEF OF SAN BERNARDINO COUNTY DISTRICT ATTORNEY'S OFFICE IN SUPPORT OF NEITHER PARTY

on interested parties by electronic filing with the Court's TrueFiling System.

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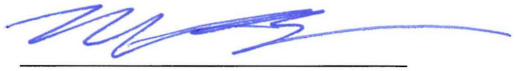
I certify under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Bernardino, California, on December 3, 2024.



Robert P. Brown