No. S284496

In the Supreme Court of the State of California

OFFICE OF THE STATE PUBLIC DEFENDER, ET AL.,
Petitioners,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

PRELIMINARY RESPONSE TO PETITION FOR WRIT OF MANDATE

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INTRODUCTION

Petitioners urge this Court to issue an extraordinary writ "barring the prosecution, imposition, or execution of sentences of death throughout the State of California." (Pet. 62.) They invoke a number of academic studies pointing to an empirical basis for concluding that racial disparities pervade California's death penalty system. They acknowledge U.S. Supreme Court precedent holding that similar studies are not a basis for invalidating the death penalty under the federal equal protection clause. But they ask this Court to exercise its original jurisdiction, interpret the California Constitution in a way that departs from that federal precedent, and recognize a violation of the state equal protection guarantee based on the statistical findings in the studies referenced in their petition. This Court directed the Attorney General, the named respondent in the writ petition, to file a preliminary response.

This petition addresses one of the most contentious issues of our time, and raises important and challenging questions for the Attorney General and the courts. The Attorney General is the chief law officer of the State, with the duty "to see that the laws of the State are uniformly and adequately enforced." (Cal. Const., art. V, § 13.) At present, those laws include the death penalty—which the voters restored after it was struck down on state constitutional grounds half a century ago. Those laws also include the guarantee that no person may be "denied equal protection of the laws." (Cal. Const., art. I, § 7, subd. (a).) The Attorney General takes seriously any allegation that this

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fundamental guarantee has been violated—especially if that allegation involves the deprivation of individuals' liberty or lives in a racially biased manner. Racial discrimination in the administration of our criminal justice system is intolerable.

In the Attorney General's view, the statistical findings in the studies invoked by petitioners are profoundly disturbing. Even before this petition was filed, the Attorney General had publicly expressed his concerns about similar empirical findings. And the current moratorium on carrying out death sentences, issued by the chief executive of our State in 2019, was grounded in part on like concerns. The Attorney General has no doubt that petitioners' arguments are entitled to careful consideration by a judicial tribunal.

An important step in any judicial inquiry into petitioners' constitutional arguments would be a fair process for the named parties, and others who might be entitled to participate in the proceedings, to develop an evidentiary record. As petitioners explain, their contention is not "that the death penalty is unconstitutional *per se*," but rather that they can make an "evidentiary showing that California's death penalty statutes *as applied* violate the state's equal protection guarantee." (Pet. 55.) Their arguments are necessarily and intensely fact-bound. They devote 25 pages of the petition to summarizing the studies and academic literature on which they rely; the petition references dozens of publications and includes more than 500 pages of exhibits. While a number of petitioners' studies "have been the subject of rigorous peer-review by leading scholars" (Pet. 50), the

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Court does not have the type of developed record it may need or prefer before considering such a weighty constitutional question: a record that is the product of "litigat[ion] in . . . court" and subject to "adversarial testing" yielding insights into "the methodology employed" and "the ultimate accuracy [and] significance of the results." (*People v. Hardin* (2024) 15 Cal.5th 834, 862.)

The ordinary procedure for developing such a record would be for petitioners to re-file the writ petition in a superior court, and this Court has sometimes denied writ petitions while expressly noting that the denial is without prejudice to the petitioners proceeding in the superior court. Petitioners point to a possible alternative procedure (Pet. 50), in which this Court would issue an order to show cause and then appoint a referee or special master to oversee the development of a record and resolve factual disputes. The Washington Supreme Court recently used a similar procedure when it considered the constitutionality of its own death penalty under that State's constitution. Given the gravity of the issues raised by this petition, in the Attorney General's view, the better approach under these unusual circumstances would be for the Court to appoint a special master. A developed and concrete record would assist the Court in assessing the merit of petitioners' claim.

STATEMENT

1. California's modern death penalty statutes were enacted in response to several state and federal decisions, including *People v. Anderson* (1972) 6 Cal.3d 628 and *Gregg v. Georgia*

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(1976) 428 U.S. 153. In *Anderson*, *supra*, at pp. 633-634, this Court struck down the death penalty under the California Constitution's prohibition of "[c]ruel or unusual punishments." (Art. I, § 17.) The voters overturned *Anderson* that same year, restoring the death penalty while preserving the courts' authority "to safeguard against arbitrary and disproportionate treatment" in its imposition. (*People v. Frierson* (1979) 25 Cal.3d 142, 187 (plur. opn.); see Cal Const., art. I, § 27.) In *Gregg*, *supra*, at pp. 206-207, the U.S. Supreme Court held that death-penalty laws satisfy the Eighth Amendment so long as they impose certain procedural safeguards "to assure against arbitrariness and discrimination in the application of the death penalty." (*Frierson*, *supra*, at p. 174.) In response to *Gregg*, the California Legislature enacted the basic framework for capital punishment that remains in place today. (See *id.* at pp. 174-175.)

That framework provides for two trial phases. At the guilt phase, a jury must determine whether the defendant is guilty of first-degree murder beyond a reasonable doubt and whether the prosecution has proven at least one special circumstance beyond a reasonable doubt. (Pen. Code, §§ 190.1, 190.4, subd. (a).) If the jury makes those determinations, the defendant is eligible for the death penalty. (*Id.*, § 190.2.) The Penal Code enumerates dozens of special circumstances, and prosecutors have discretion in deciding whether to charge one or more of them in a particular case. (*Ibid.*; see *People v. Lucas* (1995) 12 Cal.4th 415, 477.) At the penalty phase, the jury weighs aggravating and mitigating

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circumstances to determine whether to impose the death penalty or a sentence of life without parole. (Pen. Code, § 190.3.)

There are currently 640 people subject to death sentences in California. (Cal. Dept. of Corrections & Rehabilitation, Condemned Inmate Summary (Apr. 8, 2024) <https://tinyurl.com/5n884unh> [as of May 3, 2024].) In recent years, between two and five additional defendants have been sentenced to death each year. (*Ibid.*) The last execution in California occurred in 2006. (Exec. Order No. N-09-19 (Mar. 13, 2019) <https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf> [as of May 3, 2024].) The voters defeated ballot initiatives to repeal the death penalty in 2012 and 2016. (Prop. 34, Gen. Elec. (Nov. 6, 2012); Prop. 62, Gen. Elec. (Nov. 8, 2016).)

In 2019, Governor Newsom instituted "[a]n executive moratorium on the death penalty . . . in the form of a reprieve for all people sentenced to death in California." (Exec. Order, *supra*, No. N-09-19.) The Governor cited concerns about the risk of sentencing innocent people to death; "the state's bedrock responsibility to ensure equal justice under the law [as] applie[d] to all people no matter their race, mental ability, where they live, or how much money they have"; and the high cost of maintaining a system of capital punishment. (*Ibid.*) The moratorium repealed the State's lethal injection protocol and halted the scheduling of executions, but it did not vacate any convictions or alter any death sentences. (*Ibid.*)

2. The Office of the State Public Defender, joined by several individuals and advocacy organizations, now petitions this Court

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for "statewide relief: an order mandating an end to capital charging and sentencing in this state and prohibiting the Attorney General and his subordinate district attorneys from seeking, obtaining, or executing death sentences." (Pet. 60-61.) It also asks the Court to "stay all executions statewide while this petition is pending." (Pet. 61.)[1]

The factual portion of the petition alleges that empirical studies demonstrate that "racial discrimination permeates California's death penalty system." (Pet. 65.) As described by petitioners, those studies establish that Black and Latino defendants are significantly more likely to be sentenced to death than defendants of other races, and that defendants of any race found guilty of killing at least one White person are significantly more likely to be sentenced to death than defendants who did not kill any White victims. (Pet. 17-18.) Petitioners reference fifteen studies, including four statewide and eleven county-level empirical analyses. (Pet. 24.) Several of the studies were completed within the last three years. (See, e.g., Pet. Exhs. B, E, F, H, I.) Six of the studies were the subject of peer review. (Pet. 24, 30, 36-38.) Nine have not been peer reviewed, but the petition describes an independent assessment of those studies conducted at petitioners' request. (Pet. Exh. S.)

[1] Because of the current Governor's moratorium on all executions, it appears unnecessary at this time for the Court to grant such a stay. If there is a change in administration or policy while the petition remains pending, petitioners should of course be allowed to renew their request for a stay.

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The legal portion of the petition argues that the empirical studies demonstrate that California's administration of the death penalty violates the state equal protection guarantee. (Pet. 65.) Emphasizing that the California Constitution is "a document of independent force" (Pet. 70, internal quotation marks omitted), petitioners ask this Court to depart from federal precedent rejecting a similar claim. (Pet. 77-85; see *McCleskey v. Kemp* (1987) 481 U.S. 279.)

ARGUMENT

1. This Court has broad discretion to exercise original jurisdiction in mandamus (see Cal. Const., art. VI, § 10), but generally does so "only in cases in which 'the issues presented are of great public importance and must be resolved promptly.'" (*San Francisco Unified Sch. Dist. v. Johnson* (1971) 3 Cal.3d 937, 944; see *Adams v. Dept. of Motor Vehicles* (1974) 11 Cal.3d 146, 150, fn. 7.) "To have standing to seek a writ of mandate, a party must be 'beneficially interested.'" (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361.) In addition, a party seeking writ relief generally must show the violation of a ministerial duty and the absence of alternative remedies. (See, e.g., *People v. Picklesimer* (2010) 48 Cal.4th 330, 340.) The Court "customarily declines to exercise [its original] jurisdiction, preferring initial disposition by the lower courts." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 500.) And the Attorney General routinely opposes petitions for original writ relief. (See, e.g., *Disability Rights California v. Newsom*, No. S278330, pet. denied Apr. 19, 2023.)

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This case presents a much closer question, however, principally because the petition raises a matter of the greatest public importance: "[D]eath is a different kind of punishment from any other, both in terms of severity and finality." (*Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430; see *Roper v. Simmons* (2005) 543 U.S. 551, 568.) And petitioners invoke studies suggesting "that persistent and pervasive racial disparities infect California's death penalty system." (Pet. 16.) On the strength of that evidence, petitioners ask this Court to depart from federal constitutional precedent and enter a decree based on the state equal protection clause "end[ing] capital charging and sentencing in this state" and barring "the execution of sentences of death throughout the State of California." (Pet. 60, 62.)

The factual and legal contentions in the petition are serious ones that carry significant consequences for the exercise of prosecutorial authority in this State and warrant careful and timely consideration by a judicial tribunal. The Attorney General does not contest petitioners' standing to seek writ relief.[2] And the Attorney General acknowledges that, in important cases demanding this Court's intervention, the Court has discretion to relax the normal requirements for petitioners to show the violation of a ministerial duty and the absence of alternative

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[2] See, e.g., *California Medical Assn. v. Aetna Health of California Inc.* (2023) 14 Cal.5th 1075, 1092-1094 (discussing case law holding that an organization generally has standing to contest the legality of a practice or policy that requires it to divert resources away from other activities); State's Supp. Opening Br. on Standing 31 & fn. 16, *Taking Offense v. State*, No. S270535, rev. granted Nov. 10, 2021 (discussing organizational standing).

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remedies. (See *Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 808.) In deciding whether to exercise that discretion here, the principal question for the Court is what is the best procedural mechanism for allowing petitioners to build the type of evidentiary record that would allow for meaningful judicial review of their legal theories, and for other interested parties to participate in the proceedings.

2. As a factual matter, petitioners' claims rest on an extensive body of empirical research that was developed outside of any adversarial process. This Court's general reluctance to exercise its original jurisdiction stems in part from the practical and procedural hurdles faced by appellate courts in resolving factual questions. (See, e.g., *Adams*, *supra*, 11 Cal.3d at p. 150, fn. 7.) A majority of the Court recently pointed to those difficulties in *Hardin*, *supra*, 15 Cal.5th at p. 862. It refused to consider an equal protection argument in the first instance because the argument turned on findings in an empirical study that had not been "litigated in the trial court" or subjected to "any sort of adversarial testing that would afford [the Court] insight into either the methodology employed or the ultimate accuracy or significance of the results." (*Ibid.*) The majority observed that "[t]o strike down an act of the Legislature . . . based on a set of untested empirical findings would be antithetical to multiple settled principles of judicial review." (*Ibid.*)

Petitioners invoke a larger and more developed body of studies here, and the conclusions of those studies generally align with concerns raised about the death penalty by a number of

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public officials. (See Pet. 16-17.) But the studies nonetheless implicate the same considerations addressed in *Hardin*. The study invoked there reported "that, because of the expansion of the special circumstances over the years, at least one special circumstance could be alleged in many if not most first degree murder cases." (*Hardin*, *supra*, 15 Cal.5th at p. 860.) That study relied on similar statistical techniques as the studies invoked by petitioners here. Indeed, several of the researchers who prepared the studies here were co-authors of the study at issue in *Hardin*, and they have described the analyses invoked by petitioners as a continuation of that prior work.[3] Although petitioners point to an independent assessment of a subset of the studies prepared by Professor John Donohue of Stanford Law School (see Pet. 50; Pet. Exh. S), that assessment is no substitute for judicial testing of the "methodology employed" or "the ultimate accuracy or significance of the results" (*Hardin*, *supra*, at p. 862).[4]

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[3] See Pet. Exh. A at pp. 8-10; Br. of Amicus Curiae Catherine M. Grosso 10-18, *People v. Hardin* (2024) 15 Cal.5th 834; see generally Grosso et al., *Death by Stereotype* (2019) 66 UCLA L.Rev. 1394.

[4] Petitioners attempt to distinguish *Hardin* on the ground that it involved rational basis review, which does not require empirical proof of the rationale for a classification. (Pet. 50, fn. 23.) But that is not the reason the Court gave for declining to consider the statistical analyses presented there. (See *Hardin*, *supra*, 15 Cal.5th at p. 862.) The Court instead emphasized the need for adversarial testing, which is all the more important in a case (like this one) where challengers ask the Court to apply heightened judicial scrutiny.

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One common procedural approach that would provide petitioners and other interested parties an opportunity to develop a factual record would be for the Court to deny the petition while expressly noting that the denial is without prejudice to petitioners re-filing the petition in superior court. (See, e.g., *California Attorneys for Crim. Justice v. Newsom* (May 13, 2020) No. S261829, 2020 WL 2568388.) An alternative approach, suggested by petitioners (see Pet. 50-51), would be for the Court to issue an order to show cause and then appoint a special master or referee to evaluate the studies, resolve any factual issues identified by the current parties (or other interested participants), and report back to the Court.

The special-master approach would be within the Court's jurisdiction to issue a writ of mandate, which includes "the authority to ascertain and determine whether or not the facts exist upon which its issuance is to be predicated." (*Felt v. Waughop* (1924) 193 Cal. 498, 504.) And the Court has sometimes appointed special masters to assist in the development of a factual record before reaching the merits of original writ petitions. (See, e.g., *Wilson v. Eu* (1991) 54 Cal.3d 471, 473; *Legislature v. Reinecke* (1973) 9 Cal.3d 166, 167.) Similarly, when an original habeas petition turns on factual questions, the Court sometimes issues an order to show cause and appoints a referee to review the evidence and report back to the Court with factual findings. (See, e.g., *In re Boyette* (2013) 56 Cal.4th 866, 870; *In re Bacigalupo* (2012) 55 Cal.4th 312, 333; *In re Scott* (2003) 29 Cal.4th 783, 792.)

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In this context, the Court could instruct a special master "to answer specific factual questions" regarding the empirical validity of petitioners' studies. (*In re Boyette*, *supra*, 56 Cal.4th at p. 872.) Consistent with that instruction, the special master could then invite and review submissions by interested parties that offer supporting or countervailing evidence or contest the studies' methodology and findings. (Cf. Br. of Amicus Curiae Cal. District Attys. Assn. 12-22, *People v. McDaniel* (2021) 12 Cal.5th 97 [2020 WL 10055422].) With the Court's approval, the special master could also retain an independent statistical expert to assist in evaluating the studies.[5] After the culmination of proceedings before a special master, the Court could order briefing and argument on the constitutional relevance of the special master's findings.

The Washington Supreme Court recently used a similar procedure to consider a claim alleging racial bias in the administration of that State's death penalty. (See *State v. Gregory* (2018) 192 Wash.2d 1, 12-13.) A criminal defendant invoked "a study on the effect of race and county on the imposition of the death penalty" across Washington. (*Id.* at p. 12.) To allow for a full airing of concerns about the "overall reliability" of the study, the State of Washington (represented by a county prosecutor's office) proposed that the court order an

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[5] Cf. *Wilson*, *supra*, 54 Cal.3d at p. 473 (noting that special master would have authority, "[s]ubject to this Court's approval," "to employ counsel, independent experts in the field of reapportionment and computer technology, and other necessary personnel to assist them in their work").

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evidentiary proceeding. (*Id.* at pp. 12-13.) The state supreme court agreed, directing that proceedings be held before an independent commissioner. (*Id.* at p. 13.) The parties then "agreed on the procedures and [the commissioner] was able to solicit . . . information through interrogatories." (*Ibid.*) The commissioner "reviewed [the] filings and . . . posed follow-up questions in interrogatory form." (*Ibid.*) In her final report, the commissioner "provided [the court] with an overview of the disagreements between the experts and the overall strength and weakness of [the study's] analysis"; the commissioner "did not make legal conclusions." (*Ibid.*) Through that "fact-finding process, [the expert's] analysis became only more refined, more accurate, and ultimately, more reliable." (*Id.* at p. 19.) The commissioner's report then played a major role in the court's decision to invalidate the death penalty. (See *id.* at pp. 18-24; *id.* at p. 35 ["we hold that Washington's death penalty is unconstitutional, as administered, because it is imposed in an arbitrary and racially biased manner"].)

To be sure, this Court does not frequently invoke the special-master mechanism in response to petitions for writs of mandate, the great majority of which can and should be resolved by other means. But in light of the unique circumstances of this case—including the consequential nature of the issues raised by the petition and the complexity of the statistical studies invoked by petitioners—the Attorney General agrees that the special-master approach would be preferable to denying the petition without prejudice to petitioners re-filing in superior court.

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If the Court instead directs petitioners to seek relief from the superior court in the first instance, the Attorney General respectfully suggests that the Court consider issuing a statement accompanying its denial of the petition to help ensure "prompt and effective resolution" of petitioner's claim. (*California Attorneys for Crim. Justice*, *supra*, 2020 WL 2568388, at *2.) Any statement could make clear that an important purpose of proceedings in superior court would be to allow development of a factual record designed to facilitate this Court's ultimate review of petitioners' claim. That would signal this Court's expectation that the superior court would not simply deny petitioners' claims on purely legal grounds without first allowing for factual development. The statement could also explain that—contrary to the concern expressed by petitioners—superior courts have authority to entertain requests for "a uniform statewide remedy" if the evidence and legal claims before the court support such broad relief. (Pet. 58; see, e.g., *Serrano v. Priest* (1977) 18 Cal.3d 728, 749-750.) And the statement could encourage the superior court to "give the matter expedited consideration" to ensure that resolution of the petition is not unduly delayed. (*California Attorneys for Crim. Justice*, *supra*, 2020 WL 2568388, at *2.)

However this Court chooses to proceed, further factual development is necessary to present the constitutional issues in "'clean-cut and concrete form.'" (*Renne v. Geary* (1991) 501 U.S. 312, 321-322; see *People v. Guerra* (1984) 37 Cal.3d 385, 429.) Petitioners contend that they do "not assert that the death penalty is unconstitutional *per se*." (Pet. 55.) Instead, they argue

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that—based on an "evidentiary showing"—"California's death penalty statutes *as applied* violate the state's equal protection guarantee." (*Ibid.*) At present, however, there is no developed evidentiary record for the Court to consider. Before this Court (or any other) considers petitioners' constitutional theory, it should ensure that it has a sufficient record to understand and scrutinize the evidence underlying that theory.

3. For that reason, a detailed response to petitioners' merits arguments would be premature at this juncture. The Attorney General instead offers several preliminary observations—which underscore the importance of factual development as a precursor to any consideration of the merits.

First, petitioners acknowledge that their equal protection theory would be foreclosed by U.S. Supreme Court precedent if it were based on the federal equal protection clause. (Pet. 76.) In *McCleskey v. Kemp* (1987) 481 U.S. 279, the U.S. Supreme Court rejected a comparable equal protection theory—based on "a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations"—over the dissent of four justices. (*Id.* at pp. 282-283; see *id.* at pp. 292-299.) This Court has cited *McCleskey* approvingly at times, but without definitively endorsing its reasoning as a matter of state equal protection doctrine. (See, e.g., *In re Seaton* (2004) 34 Cal.4th 193, 202-203; *People v. Miranda* (1987) 44 Cal.3d 57, 119, fn. 37, abrogated on other grounds as discussed in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.) Petitioners focus their present claim exclusively on "the state equal

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protection guarantee" (e.g., Pet. 50, fn. 23) and ask this Court "to depart from" *McCleskey*'s equal protection analysis as a matter of state law (Pet. 77).

The "California Constitution is, and always has been, 'a document of independent force.'" (*People v. Buza* (2018) 4 Cal.5th 658, 684; see Cal. Const., art. I, § 24.) Accordingly, "decisions of the United States Supreme Court interpreting parallel" provisions of the federal Constitution "are not binding" when this Court construes the California Constitution. (*Buza*, *supra*, at p. 684.) But "they are 'entitled to respectful consideration.'" (*Ibid.*, quoting *People v. Teresinski* (1982) 30 Cal.3d 822, 836.) In the equal protection context, state constitutional doctrine has "been generally thought . . . to be 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, internal quotation marks omitted.) At times, however, the Court has departed from federal equal protection precedent.[6] Before making a departure from federal constitutional precedent, this Court generally asks whether there are "'cogent reasons,' 'independent state interests,' or 'strong countervailing circumstances'" that might justify "construing

[6] See, e.g., *In re Marriage Cases* (2008) 43 Cal.4th 757, 843 ("Unlike decisions applying the federal equal protection clause, California cases continue to review, under strict scrutiny rather than intermediate scrutiny, those statutes that impose differential treatment on the basis of sex or gender."); *Serrano*, *supra*, 18 Cal.3d at pp. 764-766 (declining to follow federal precedent on treatment of education as a "fundamental right[]" for purposes of equal protection doctrine).

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similar state constitutional language differently." (*Buza*, *supra*, at p. 685, quoting *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353; see generally *Teresinski*, *supra*, at pp. 835-837.)

A developed factual record would assist the Court in evaluating whether petitioners have identified a sufficient basis for departing from *McCleskey*. It would, for example, give the Court greater insight into the differences between the studies invoked by petitioners here and the record before the Court in *McCleskey*. (Cf. 481 U.S. at p. 288, fn. 6 [discussing concerns about the methodology employed by the relevant study].) And it would allow the Court to better understand the relationship between the racial disparities reported by petitioners' studies and the specific features of California's capital punishment regime—features that are distinct in certain respects from the Georgia regime challenged in *McCleskey*. (See, e.g., Pet. 43 [discussing "California's special circumstance statute"].)

Second, petitioners argue that they present an "as-applied challenge[]" to the death penalty, not the type of "per se" challenge barred by article I, section 27, of the State's Constitution. (Pet. 53.) Petitioners are correct that the Court has narrowly construed section 27 to preclude only "per se" challenges to death as an impermissible form of punishment. (*People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 808.) And the Attorney General agrees that many of petitioners' critiques of California's death penalty pose no concerns under section 27. For example, petitioners' contentions that the breadth of the current special circumstances statute "creates

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ample room for bias to influence death penalty charging decisions" (Pet. 43) does not amount to an argument that capital punishment is unconstitutional per se. Nor does the argument that the State currently lacks "uniform criteria to guide prosecutors in deciding when to seek death." (Pet. 44.)

But other arguments in the petition appear to suggest a view that a system of capital punishment could *never* be administered constitutionally. Petitioners argue, for example, that "[t]he death qualification process" for jurors "'systematically "whitewashes" the capital eligible pool'" (Pet. 45) and that implicit bias leads jurors to "fall back on ethnic or racial biases" (Pet. 49; see Pet. 47 [invoking article about how "White male mock jurors viewed a Black defendant" in "social science experiments"].) Because the federal Constitution requires a jury "to make the critical findings necessary to impose the death penalty" (*Hurst v. Florida* (2016) 577 U.S. 92, 98), on petitioners' theory, those particular arguments would appear to suggest that capital punishment is impermissible as a per se matter. If the Court allows the case to proceed beyond the current threshold phase, it will be important for petitioners to clarify the extent to which their evidence and legal theories depend on inherent features of any death penalty regime—and whether the remedy they seek would be limited to the State's death penalty system as presently structured.

Third, petitioners repeatedly assert that the state equal protection guarantee requires the application of strict judicial scrutiny any time a state law "disparately impacts a suspect classification" like race. (Pet. 67, see Pet. 50 & fn. 23, 65, 69, 85.)

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That "statement is overbroad and in error." (*Hardy v. Stumpf* (1978) 21 Cal.3d 1, 7.) This Court has recognized that, "[s]tanding alone, disproportionate impact does not trigger . . . the strictest scrutiny" under state equal protection doctrine. (*Ibid.*, quoting *Washington v. Davis* (1976) 426 U.S. 229, 242.) The Court did not hold or suggest otherwise in the cases discussed by petitioners. (See *Serrano*, *supra*, 18 Cal.3d at pp. 764-766 [applying strict scrutiny on the ground that State's education-financing system burdened fundamental right to education]; *Crawford v. Board of Education* (1976) 17 Cal.3d 280, 297 [similar with respect to de facto segregated conditions in public schools]; *In re Marriage Cases*, *supra*, 43 Cal.4th at p. 839 [emphasizing that challenged statutes limiting marriage rights to opposite-sex couples did not "hav[e] merely a disparate impact" but "directly classifi[ed]" on the basis of sexual orientation].)

At times, petitioners suggest that studies collected in the petition demonstrate that race plays a *motivating* role in capital-charging decisions and convictions. (See, e.g., Pet. 42-43, 46, 89.) Further development and testing of plaintiffs' submissions is necessary because, if the evidentiary record ultimately supports that suggestion, some form of heightened scrutiny may well be appropriate. (See generally *Arlington Heights v. Metropolitan Housing Corp.* (1977) 429 U.S. 252, 266 [recognizing that proof of

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a racially discriminatory purpose can be established by "direct" or "circumstantial . . . evidence"].)[7]

Last, petitioners repeatedly cite the Washington Supreme Court's opinion in *State v. Gregory*, which struck down Washington's death penalty under a state prohibition on "cruel punishment." (See, e.g., Pet. 27, 68-69, 84-85, 89, 91; see 192 Wash.2d at pp. 15, 18-24.) Following fact-finding proceedings before a commissioner (*ante*, pp. 19-20), the court was satisfied that the challenger had made a statistically significant showing of racial disparities. (192 Wash.2d at pp. 20-21, fns. 7-8.) That showing rendered the death penalty, "as administered," too arbitrary to "withstand the 'evolving standards of decency that mark the progress of a maturing society.'" (*Id.* at pp. 14, 23.)[8] But that is a fundamentally different constitutional theory from the one advanced by petitioners here. To date, petitioners have

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[7] To the extent that petitioners' studies do not demonstrate purposeful discrimination—but do establish widespread implicit bias (see Pet. Exh. A at 13-21 [discussing both types of bias])—petitioners' claim could raise other novel constitutional questions. (See Remarks of Justice Liu, Owen J. Roberts Lecture in Constitutional Law, *Implicit Bias, Structural Bias, and Implications for Law and Policy* (2023) 25 U. Pa. J. Const. L. 1280, 1300 [noting that "judicial recognition of implicit bias in case law has been infrequent"].)

[8] Cf. *McCleskey*, *supra*, 481 U.S. at p. 366 (dis. opn. of Stevens, J.) ("There is a qualitative difference between death and any other permissible form of punishment, and hence, a corresponding difference in the need for reliability in the determination that death is the appropriate punishment," internal quotation marks omitted).

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not raised a claim under the California Constitution's prohibition of "[c]ruel or unusual" punishments." (Cal. Const., art. I, § 17.)

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CONCLUSION

Petitioners raise important issues that warrant consideration by the judiciary, following the development of a factual record. If this Court is inclined to exercise its original jurisdiction to consider petitioners' claim instead of directing petitioners to proceed in superior court, the Attorney General respectfully requests that the Court appoint a special master or referee to assess the empirical studies invoked by petitioners and resolve evidentiary issues.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached PRELIMINARY RESPONSE TO PETITION FOR WRIT OF MANDATE uses a 13-point Century Schoolbook font and contains 5,203 words.

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