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13 May 2024

VIA TRUEFILING

Chief Justice Patricia Guerrero and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *amicus curiae* letter brief from California Constitution Scholars in *OSPD v. Bonta* S284496

To the Honorable Court:

In this mandate proceeding, under Rule of Court 8.847 the undersigned David A. Carrillo and Stephen M. Duvernay (collectively, *amicus curiae* California Constitution Scholars) request leave to file this *amicus* letter brief in support of respondent California Attorney General Rob Bonta. *Amicus* takes no position on the petition's merits. *Amicus* certifies under Rule of Court 8.520(f)(4) that no party or counsel for any party authored this brief, participated in its drafting, or made any monetary contributions intended to fund the preparation or submission of the proposed brief.

Amicus are California constitution scholars who seek to aid this Court in resolving the state constitutional interpretation issue here; we are academics affiliated with the California Constitution Center, a nonpartisan academic research center at the University of California, Berkeley, School of Law. The University of California is not party to this brief.

The proposed brief will assist the Court by evaluating the competing constitutional law and policy imperatives implicated here, and the threshold procedural issue of how to assess the large volume of novel evidence presented for the first time in this original proceeding. *Amicus* is interested in this case because it raises an important issue of California constitutional law: the validity of California's capital punishment system. *Amicus* argues for a ruling that sends this matter down to a trial court to build a record which this Court (or the Court of Appeal) can more effectively use in considering the weighty questions of law presented.

Overview

Petitioners in this original writ petition proceeding ask this Court to bar the "prosecution, imposition, or execution of death sentences in California." Petitioners argue that California's capital punishment system violates the state constitution's equal protection guarantees based on historical and empirical evidence showing that capital punishment is applied in a racially discriminatory manner. The petition presents a good opportunity for this Court to evaluate California's modern capital punishment system on an institutional level. Yet there are weighty considerations that counsel against an aggressive ruling here that grants the requested relief in the

first instance. Better, we think, to redirect this matter to a trial court to consider the voluminous evidence of racial disparity.

Analysis

There's value in evaluating statewide death penalty data

This Court last addressed capital punishment's constitutionality in 1972, when in *People v. Anderson* it held that capital punishment violated the state constitution's prohibition against cruel or (not *and*) unusual punishment.[1] That ruling was short lived: nine months later the voters enacted Proposition 17 to make the state constitution say that the death penalty was neither cruel nor unusual. Before those events this Court often reversed capital verdicts; afterwards the pattern reversed and death verdicts are generally affirmed. Attacks on capital punishment then shifted from the courts to the ballot box, with two attempts to repeal the death penalty by initiative measure in 2012 (Proposition 34), and 2016 (Proposition 62) — both rejected by the voters. Action is now in the executive branch, where Governor Gavin Newsom has imposed an executions moratorium, dismantled San Quentin's executions chamber, and redistributed condemned inmates throughout the state prison system.

In all those battles this Court has never been presented with the arguments and evidence advanced by the petitioners here. In contrast to the facial attack considered in *People v. Anderson*, this writ petition asks the Court to declare California's death penalty unconstitutional as applied, because it is administered in a discriminatory manner. Thus, the question presented is one of equal protection, not whether capital punishment in general constitutes cruel or unusual punishment as a matter of law.

Petitioners' equal protection argument is supported by statistical and empirical data on California's capital punishment system. The petition relies on 15 studies spanning 44 years, encompassing both state and county-level analyses. The studies conclude that there are "significant disparities" in how the death penalty is applied to similarly situated individuals based on several factors, including the race of both defendants and victims. The first question then is whether, assuming this evidence proves its point, writ relief is permissible.

The California constitution provides a basis for granting this petition

If this Court accepts the factual findings presented by the petitioners' studies, it has the authority to grant relief. California constitution article VI, section 10 grants this Court original jurisdiction "in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." This petition — which asks the Court to declare the state's entire capital sentencing regime invalid as applied under the state constitution — certainly qualifies as a matter seeking "extraordinary relief."

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[1] (1972) 6 Cal.3d 628.

The standard of review here is well-established. A facially valid statute may be unconstitutional if it is disproportionately applied to a class of individuals.[2] Here, this Court would have to determine how California's death penalty statutes have been applied and whether they deprive the affected condemned individuals of a protected right. Because race is at issue, strict scrutiny applies.[3] The government's burden is to establish that the death penalty as applied is necessary to achieve a compelling government interest.[4]

The key question then is whether capital punishment violates the state constitution's equal protection clauses. The California constitution has three provisions that guarantee equal protection of law: article I, section 7 (a), article I, section 7 (b), and article IV, section 16(a). And while California courts have interpreted these clauses to provide protections consistent with the federal constitution's due process clauses, the California constitutional provisions have separate and independent force.[5]

The independent meaning of California's equal protection guarantees is a pivotal factor here, because the U.S. Supreme Court has rejected similar as-applied disparate-impact challenges to the death penalty under the federal constitution's equal protection clause.[6] Thus, for petitioners to prevail, this Court must find that the state constitution's equal protection clauses are broader than their federal analogs.[7] And of course the statistical evidence must be sufficient to support a constitutional violation — that is, this Court must find that a statistical racial disparity alone suffices without requiring any evidence of intentional racial discrimination.[8]

Petitioners acknowledge that they must produce some authority that permits applying California's equal protection guarantee where there is no proof of discriminatory intent. Because this Court has never before addressed capital punishment in the equal protection context, petitioners rely on equal protection disputes involving school financing, school segregation, and marriage equality. By comparison, the constitutional magnitude of the harm at issue here is arguably even greater; yet the question remains whether the fundamental barriers to granting relief can be overcome.

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[2] *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.

[3] *People v. Hardin* (2024) 15 Cal.5th 834, 847 (courts apply heightened scrutiny when a challenged statute or other regulation involves a suspect classification such as race).

[4] *Darces v. Woods* (1984) 35 Cal.3d 871, 885.

[5] *Nationwide Biweekly Administration, Inc. v. Superior Court of Alameda County* (2020) 9 Cal.5th 279, 330; *People v. Aranda* (2019) 6 Cal.5th 1077, 1087.

[6] See, e.g., *McCleskey v. Kemp* (1987) 481 U.S. 279.

[7] See SCOCAblog, David A. Carrillo and Brandon V. Stracener, *We need to clarify the cogent reasons standard*, August 29, 2022; and SCOCAblog, Nick Scheuerman, *An argument for zero-based state constitutional interpretation*, April 11, 2024.

[8] Compare *Baluyut v. Superior Court* (1996) 12 Cal.4th 826 (a facially neutral statute that merely has a disparate effect on a particular class of persons does not violate equal protection absent a showing the law was adopted for a discriminatory purpose).

Before the court reaches those difficult substantive issues (on which we take no position at this point), we think that higher-level institutional policy considerations weigh against granting the requested relief in the first instance.

Challenges to granting relief in the first instance

Addressing the petition's merits sets this Court in uncharted territory, considering a volume of data-intensive evidence with no trial court rulings on weight or admissibility, and without an appellate record. Those procedural and institutional obstacles argue in favor of using one of two procedures to develop the record for review; neither involves this Court directly in assessing the evidence. One is to appoint a special master, as respondent the Attorney General suggests. The other is to deny the petition without prejudice to permit refiling in a Superior Court, which we argue is preferable to a special master.

Remand is inappropriate when the proceeding is in this Court's original jurisdiction. And although an original writ petition is a "cause" that can be transferred "before decision" from the California Supreme Court to a Court of Appeal, a grant and transfer with instructions is also inappropriate because the Court of Appeal cannot then transfer the matter to the Superior Court.[9]

Although appellate courts do have procedures to augment the record on appeal with new evidence, as with special masters, those exceptions are of limited application and unsuited to building a record from scratch. This makes denial without prejudice the better option. The California Supreme Court has done something like relief requested request here, for example in the redistricting case *Wilson v. Eu (Wilson II)* (1992) 1 Cal.4th 707. In *Wilson II* the court exercised its original jurisdiction and issued an alternative writ of mandate concerning the court's possible adoption of suitable reapportionment maps in time for the 1992 primary and general elections. As part of the alternative writ, the court appointed three special masters to hold public hearings and hear evidence and argument regarding proposed maps. After conducting the hearings, the special masters presented to the court their report and recommendations for new electoral districts, and with some minor modifications the court approved those recommendations in its decision.

Yet the redistricting case, facing its hard election deadlines, arguably required the speed offered by special masters, and allowed this Court to retain jurisdiction throughout. Maintaining jurisdiction is unnecessary here, and no hard deadlines loom. The fact is that this petition presents novel factual evidence — a lot of it — and appellate courts are ill-suited to the trial judge's task of establishing a record through contested evidentiary hearings. Doubtless the petitioner's evidence will be contested, experts will disagree, motions will be heard, and contrary evidence will be presented. Any trial judge in a large jurisdiction could be tasked with sorting this out on an expedited basis, and the matter could return to this Court in a matter of months. In that time no one

[9] See comment to California Rule of Court 8.552: "As used in article VI, section 12(a) and the rule, the term "cause" is broadly construed to include " 'all cases, matters, and proceedings of every description' 'adjudicated by the Courts of Appeal and the Supreme Court. (*In re Rose* (2000) 22 Cal.4th 430, 540, quoting *In re Wells* (1917) 174 Cal. 467, 471.)"

is likely to be executed. Refiling best serves the interests of justice and judicial economy because accuracy, not speed, is the prime directive here.

Refiling also addresses the fact of the suboptimal optics of this Court granting relief in the first instance. This Court affirmed many of the capital verdicts that the petition questions, such that granting relief potentially implicates the Court itself in racially discriminatory death judgments. Worse, some memories are long enough to recall the debacle of *People v. Anderson*, Proposition 17, and the 1986 retention election that ejected Chief Justice Rose Bird, Justice Joseph Grodin, and Justice Cruz Reynoso. If this Court is to again abrogate capital punishment, to preserve both the ultimate decision and institutional integrity it should act with deliberation to ensure that it proceeds with clear justification.

It may be true that petitioners have no other adequate remedy at law, as required for granting writ relief.[10] Existing statutory remedies are arguably unsuited to resolving this issue. For example, the Racial Justice Act (Penal Code section 745) prohibits bias or discrimination in charging, conviction, and sentencing based on a defendant's race, ethnicity, or national origin. Although many of the petitioner's arguments resemble those raised in claims under the RJA, that statute does not allow challenges to the global application of a statutory scheme so it is not a possible basis for relief here. And the RJA only allows for claims by individual defendants. This means that the reviewing court cannot make findings on the application of the state's death penalty scheme in its entirety.

Still, the interests at stake favor proceeding judiciously. With the state's execution chamber in shambles, a moratorium in place for at least three more years, and condemned inmates already effectively serving life without parole, the case for expeditious relief is weak. This is so even though there are serious dignitary harms that flow from the deprivation of constitutional rights — and from the threat of the sort of ultimate deprivation at issue here. Whether relief is warranted on the merits is another matter, one that given California's difficult history with capital punishment deserves careful deliberation. And that care is best exercised through the ordinary procedure of having a trial court judge an evidentiary record. If inmates were lined up to be imminently executed, then the need for speed would be apparent. But absent that time pressure, the only urgency would be self-imposed. This is a serious matter that merits due consideration, which would be harmed rather than helped with quick action.

Conclusion

The petitioners ask this Court to solve a complex and weighty problem with the rare remedy of extraordinary relief in the first instance, based on novel empirical evidence, and with speed. That's

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[10] *TriCoast Builders, Inc. v. Fonnegra* (2024) 15 Cal.5th 766, 785 (a reviewing court may exercise its jurisdiction in either a direct appeal or an extraordinary writ proceeding; the writ of mandate generally lies to compel performance of a legal duty when no plain, speedy, and adequate remedy at law is available); *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 114 (writ lies where one has a substantial right to protect or enforce, and there is no other plain, speedy and adequate remedy in the ordinary course of law).

a tall order. Yet there are good reasons to discount the binary possibilities here of an outright grant or a simple denial. Denying the petition would be a missed opportunity for this Court to assess capital punishment as a whole. Granting the petition raises grave institutional concerns, even if the Court agrees on the merits. Instead, a middle ground approach of refiling in a trial court best accommodates the case posture, the lack of a record below, and the optics of granting relief. If the Court grants a hearing on the merits, it would be the first time in over 50 years that it has considered a direct challenge to capital punishment in California. That alone should give pause.

Respectfully submitted,

David A. Carrillo, J.S.D.
Executive Director
Stephen M. Duvernay
Chief Senior Research Fellow
California Constitution Center

CERTIFICATE OF SERVICE

I, Stephen M. Duvernay, hereby certify as follows:

I am an active member of the State Bar of California, and I am not a party to this action. My business address is 701 University Avenue, Suite 106, Sacramento, California 95825, and my electronic service address is steve@benbrooklawgroup.com.

On May 13, 2024, I caused the foregoing document, namely:

Amicus Curiae letter brief from California Constitution Scholars in *OSPD v. Bonta* S284496

to be electronically served on the following persons:

Jessica E. Oats State Public Defender Director of Systemic Litigation	Jessica.Oats@ospd.ca.gov
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I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Dated: May 13, 2024

s/ Stephen M. Duvernay

Stephen M. Duvernay