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.

APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

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To the Honorable Chief Justice of the Supreme Court of the State of California

The Criminal Justice Legal Foundation (CJLF) respectfully applies for permission to file a brief amicus curiae in support of neither party pursuant to this court's orders of September 11 and October 8, 2024, in this matter.[1]

1. No party or counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae CJLF made a monetary contribution to its preparation or submission.

Applicant's Interest

CJLF is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

To a greater degree than any other issue in all of law, capital punishment is the one in which the people's right of self-government has been thwarted by the fabrication of pseudo-constitutional restrictions never imagined, much less intended, by the people who ratified the provisions being misinterpreted. For this reason, it has been a large part of CJLF's efforts since its formation. In this case, the State Public Defender and others ask this court to once again effectively abolish capital punishment, blocking a decision that the people have made and reinforced repeatedly and that only they can legitimately reverse. Such a step would be contrary to the purposes for which CJLF was formed and to the rights of victims of crime which it represents. CJLF therefore has an interest in this case.

Need for Further Argument

CJLF is familiar with the arguments presented by the named parties on the questions in the September 11 order and believes that further argument is necessary.

Date: December 3, 2024

Respectfully Submitted,

KENT S. SCHEIDEGGER
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INTRODUCTION

In this case, the State Public Defender and others seek to wipe out all existing death sentences and effectively abolish capital punishment in California, despite the people's repeated votes in favor of it *eleven* times over a span of over four decades. (See Intervenor's Preliminary Opposition in *Briggs v. Brown*, No. S238309 (2017) pp. 10-12, https://www.cjlf.org/files/BriggsIntvPrelimOpp.pdf.) No other issue in California law has been reaffirmed by so many direct votes of the people. In no other area of law has this court's past efforts to frustrate the people's will brought it into greater disrepute or done more to damage public confidence in the judiciary.

On April 9, 2024, a petition for a writ of mandate under this court's original jurisdiction was filed by the Office of the State Public Defender in its own name, not representing any capital

defendant, joined by one individual and three organizations opposed to capital punishment. (Petition for Writ of Mandate 20-24 (Pet.).) The sole named respondent is Attorney General Rob Bonta, who is also a well-known opponent of capital punishment. (See, e.g., Death Penalty Information Center, *Newsom Appoints Legislator Who Co-Authored Constitutional Amendment Against Death Penalty to be California's Attorney General* (Apr. 1, 2021), <https://deathpenaltyinfo.org/newsom-appoints-legislator-who-co-authored-constitutional-amendment-against-death-penalty-to-be-californias-attorney-general> [as of Nov. 25, 2024].)

On May 3 and May 6, 2024, respectively, the District Attorneys of San Bernardino and Riverside Counties filed preliminary oppositions on behalf of the People of the State of California as real party in interest. To date, no order of this court has determined whether either or both will be allowed to participate in this case as parties.

On September 11, 2024, this court ordered further briefing on (1) standing of the petitioners, (2) whether the facts alleged in the petition state a cause of action, and (3) "[w]hat parties are necessary to properly consider the requested relief and effectuate it, if warranted?" A further order on October 8, 2024, gave the petitioners and the Attorney General until November 18, 2024, to file briefs, with amicus applications (accompanied by the briefs) due December 3, 2024.

Amicus CJLF submits this brief in answer to questions (1) and (3). The answer to question (2) under existing precedent is "no" (see *People v. Miranda* (1987) 44 Cal.3d 57, 119, fn. 37), and the question of whether to depart from this decades-long understanding is not properly decided in advance of any necessity to decide it. (See *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230-231.) A robust opposition on the merits would likely show that petitioners' evidence is

a house of cards, as explained in Part IV, *infra*, so that necessity is unlikely to arise.

SUMMARY OF ARGUMENT

The Office of the State Public Defender cannot conduct this civil litigation under the rules of *Safer v. Superior Court* (1975) 15 Cal.3d 230, *Wells v. Municipal Court* (1981) 126 Cal.App.3d 808, and *People v. Board of Parole Hearings* (2022) 83 Cal.App.5th 432. The cases which that office is authorized to conduct are specified and limited by statute in the same way that district attorneys and county public defenders are. They do not include civil litigation in the office's own name, which this case is.

The other petitioners do not have standing. None has the standard beneficial interest for writ petitions. None have representative standing, as none have alleged they have members with standing. None have organizational standing on the diversion of resources theory, as that theory does not extend to resources spent for advocacy. Public interest standing ought not extend to a case where every person with a direct interest has a right to government-paid counsel and can make the claim themselves, which is the situation in this unique case. It is unclear whether the taxpayer action statute applies to petitions for writ of mandate. CJLF suggests that it should not, at least as to original writ petitions in appellate courts, a jurisdiction which should be sparingly exercised.

A genuine opponent with the motivation and resources to challenge petitioners' claims is required as a prudential matter, if not a jurisdictional one. If a government official who opposes a statute is the only opponent, the statute may be sabotaged by merely "taking a dive" and mounting an inadequate defense. The question of whether a study actually shows what its author

claims is complex and fact-intense, and it requires expert testimony. Studies of this type can easily be manipulated to produce whatever result the researcher favors. Reviews of studies are no check at all when the reviewers favor the same result.

For these reasons, it would be best not to consider these questions on an original writ petition at all but leave it to trial courts in the first instance. But if this case does go forward, a genuinely opposed opponent is essential. Collusive litigation would produce well-founded skepticism and undermine public confidence.

ARGUMENT

I. The State Public Defender does not have standing and cannot conduct this litigation.

In *People v. Board of Parole Hearings* (2022) 83 Cal.App.5th 432, 438 (*BPH*), the court of appeal held that a district attorney does not have standing to bring a petition for a writ of mandate to restrain enforcement of a parole statute on the ground that it is unconstitutional, based on the precedent of *Safer v. Superior Court* (1975) 15 Cal.3d 230. The *Safer* rule was also applied to deny standing to a county public defender in a similar case in *Wells v. Municipal Court* (1981) 126 Cal.App.3d 808, 813.

If the State Public Defender (SPD) is subject to the same rule, then this case cannot go forward. Amicus CJLF submits that the *Safer/BPH* rule necessarily applies equally to the SPD.[2]

In *Safer*, the limit on the kinds of civil cases the district attorney could bring were inferred from the statutory specifica-

2. This court denied the district attorney's petition for review in *BPH* and amicus CJLF's depublication request on December 28, 2022, in case No. S277014. Our depublication request was based on an aspect of the opinion not pertinent to this case.

tion of the kinds the district attorney can bring. The Legislature had enacted specific authorizations for a number of types of civil litigation, many of which do not apply when the county has a county counsel. (*Safer*, *supra*, 15 Cal.3d at pp. 236-237.) "We find, then, that the Legislature's narrow enumeration of the types of civil cases in which the district attorney may participate expresses its general mandate that the public officers not use their funds and powers to intervene in private litigation." (*Id*. at p. 237.) "[A] court acts in excess of its jurisdiction when it permits" such an action. (*Id*. at p. 233.)

The *Wells* court similarly noted that the county ordinance and section 27706 of the Government Code specified the cases in which the county public defender could act, "limited to acting on behalf of a specific individual in a particular matter." (*Wells*, *supra*, 126 Cal.App.3d at pp. 809-810.) Most of these are criminal matters, but there are a few instances where the public defender can represent a person in a civil matter. (See Gov. Code, § 27706, subds. (b) [wages], (c) [indigent defendant "persecuted" or "unjustly harassed"], (d) [guardianship, conservatorship, commitment].) None of this authorized a public defender to petition for a writ of prohibition challenging sentencing guidelines, detached from any particular criminal case. (*Wells*, at pp. 809, 813.) "For the same reason we would be acting in excess of our jurisdiction were we to grant this petition." (*Id*. at p. 813, citing *Safer*, *supra,* - 15 Cal.3d at p. 233.)

The SPD's participation in litigation is restricted even more tightly than the limits in *Safer* and *Wells*. Sections 15420 and 15421 of the Government Code both permit the SPD to represent persons in specific cases. There is no authorization for the SPD to file suits on its own behalf. The usual work is representing inmates sentenced to death on automatic appeals to this court and certiorari petitions to the United States Supreme Court. (Gov.

Code, § 15421, subds. (a), (b).) Occasional representation of noncapital defendants on appeal is also authorized. Then there is this additional provision: "The State Public Defender is authorized *to represent any person* who is not financially able to employ counsel in the following matters: ... (d) Any other proceeding in which a person is *entitled to representation at public expense* where providing this representation is in furtherance of the State Public Defender's primary responsibilities, as set forth in Section 15420, or to address legal claims that impact the resolution of death penalty cases." (Gov. Code, § 15421, italics added.) While this case does "impact the resolution of death penalty cases," the SPD is not representing a party "entitled to representation at public expense" or for that matter any "person" at all.

Section 15425 of the Government Code does provide an open-ended authorization to perform "acts" for "carrying out the functions of the office," but this cannot be read as an open-ended authorization to conduct litigation. Such an interpretation would be contrary to and effectively negate the tightly worded description of authorized cases in section 15421. Such open-ended authority would be inconsistent with the "specificity of [the Legislature's] enactments." (*Safer*, *supra*, 15 Cal.3d at p. 236.) The SPD is subject to the same limit as district attorneys and county public defenders when it comes to launching its own attacks on enactments divorced from any particular criminal case.

Although *Safer* itself involved a government intervention in a dispute between private litigants (see *id.* at p. 238), its rule has not been applied that narrowly. *BPH*, in particular, applied *Safer* to reverse a grant of a writ of mandate and direct its dismissal (see *BPH*, *supra*, 83 Cal.App.5th at p. 457) in circumstances not distinguishable from the present case. A petition for a writ of mandate to enjoin the enforcement of a statute claimed to be unconstitutional is a civil case, or more precisely a "special pro-

ceeding of a civil nature." (*Id.* at p. 446.) "Based on the civil nature of the relief sought by the Office's petition, we conclude that it is subject to the constraints described in *Safer* and its progeny." (*Ibid.*) Those constraints, equally applicable to the SPD as described above, do not permit the office to engage in civil litigation of this nature. (*Id.* at p. 450.)

II. None of the petitioners would have standing if the Attorney General's broad interpretation of *Dix* were correct, but it is not.

This is a case in which multiple petitioners, including individuals and advocacy organizations, seek a writ of mandamus to, among other things, forbid the execution of judgments already rendered and already final on direct appeal on the theory that the statute at issue is unconstitutional. Initially, the Attorney General did "not contest petitioners' standing to seek writ relief." (Preliminary Opposition 15.) This is a most curious concession, because in cases of similar constitutional challenges brought by victims of crime and victims' service organizations the Attorney General has vehemently opposed standing on the dubious theory that *Dix v. Superior Court* (1991) 53 Cal.3d 442 stands as an absolute bar to *any* citizen other than the defendant bringing *any* constitutional challenge to statutes relating to proceedings after judgment. In the supplemental brief, the Attorney General's position on standing is more nuanced (Resp. Supp. 14-23.), but the supposedly absolute rule of *Dix*, which would be dispositive if the Attorney General's interpretation were valid, remains conspicuously absent.

While no party has raised the *Dix* issue in this case, the court's order of September 11, 2024, asked an open question about standing and invited amicus briefing. The question is an important one because the Attorney General repeatedly raises it when victims or victims' organizations file a suit of this type, and

there is not yet a published court of appeal opinion on the point. The Attorney General made the argument unsuccessfully in *Criminal Justice Legal Foundation v. California Department of Corrections and Rehabilitation*, Sacramento Sup. Ct., No. 34-2022-80003807, appeal pending on other grounds, Court of Appeal, 3d Dist. No. C100274. The Attorney General has also made the argument in *Jessica M. v. Board of Parole Hearings*, Los Angeles Sup. Ct. No. 24STCP02901, which is pending as of this writing.[3] For context, an excerpt of the Attorney General's answer brief in the latter case is attached to this brief as Attachment A.

In a nutshell, the Attorney General's interpretation of *Dix* seizes upon two statements and extrapolates them far beyond the context of the case and its rationale. In a case where a citizen sought to effectively intervene in a sentencing proceeding and challenge the district attorney's discretion as to what penalties to seek, this court said, "neither a crime victim nor any other citizen has a legally enforceable interest, public or private, in the commencement, conduct, or outcome of criminal proceedings against another." (*Dix*, *supra*, 53 Cal.3d at p. 450.) Addressing public interest standing, the court noted that " 'public interest' standing must yield to paramount considerations of public policy" and "recognition of citizen standing to intervene in criminal prosecutions would have 'ominous' implications." (*Id*. at p. 453.) From this, the Attorney General extrapolates a rule that public policy forbids victims and victims' advocacy groups from mounting constitutional challenges to statutes regarding postjudgment proceedings. (See Att. A, pp. 15-16.)

3. CJLF is assisting in the representation of Jessica M., although an independent *pro bono* attorney is lead counsel.

If that were true, *Dix* would preclude the present petition. There is no basis in *Dix* for giving prisoners' advocates greater standing than victims' advocates. The present petition seeks to preclude a statutorily required postjudgment proceeding, the execution of judgment. (See Pen. Code, §§ 1217-1227.5.)

However, *Dix* is nowhere near so broad. The public policy in *Dix* was the protection of the district attorney's discretion in the trial and sentencing of the criminal case. (*Dix*, *supra*, 53 Cal.3d at pp. 453-454; *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241,1248 [explaining the discretion-protection basis of *Dix*'s limitation on public interest standing].) The petition in this case does not seek to restrain the exercise of prosecutorial discretion in individual cases. As applied to the execution of existing judgments, it does not seek to control the trial of cases at all.

Dix itself recognizes that its rule does not preclude "*independent* citizen-taxpayer actions raising criminal justice issues." (*Dix*, 53 Cal.3d at p. 454, fn. 7, italics in original.) While *Dix* was referring to actions under section 526a of the Code of Civil Procedure, similar considerations apply to standing in mandamus actions. (See *Weatherford*, 2 Cal.5th at pp. 1248-1249.)

There simply is no public policy against citizens challenging the validity of criminal statutes where the challenge does not involve interference with prosecutorial discretion in the trial or sentencing of a particular case. This court has proceeded straight to the merits on such petitions many times. (See, e.g., *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 240 [Prop. 8 of 1982, "taxpayers and voters"]; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 340 [Prop. 115 of 1990, "taxpayers and voters"].) The standing question is the same as in any other case.

III. None of the other petitioners has shown standing.

A. Individual Standing.

None of the petitioners has shown individual standing in the usual sense of the kind of beneficial interest traditionally required for a writ of mandate. (Supplemental Brief of Riverside District Attorney 8 (RivDA Supp.); Resp. Supp. 21).

With respect to Witness to Innocence, it is worth noting that the sentence of its Peer Organizer Shujaa Graham (Pet. 23-24) was rendered under a completely different system with no bearing on the claims against the present system. In 1973, the California Legislature enacted a mandatory sentencing law in the well-founded belief, shared by Congress, New York, and a number of other states, that this was the only kind of capital sentencing system that would pass muster under the fractured and incomprehensible decision in *Furman v. Georgia* (1972) 408 U.S. 238. (See *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 446-449 (conc. opn. of Clark, J.); Scheidegger, Tinkering with the Machinery of Death: Lessons from a Failure of Judicial Activism (2019) 17 Ohio St. J. Crim.L. 131, 142-146). This law was struck down because it *lacked* the discretionary features of the law now under attack. (*Rockwell*, at p. 446; Scheidegger, at p. 147.) Even if Mr. Graham's experience can be attributed to his organization, which is doubtful (see Part III.B., *infra*), it has no relevance to the present controversy. The sentence followed from the conviction as a matter of law (see *People v. Allen* (1979) 23 Cal.3d 286, 289) and not from any bias by any sentencer with discretion.

B. Organizational Standing.

The most common type of organizational standing is representative standing, where an organization has members who would have standing if they were individual plaintiffs. (See, e.g., *Summers v. Earth Island Inst.* (2009) 555 U.S. 488, 494.) None of

the organizational petitioners have alleged that they even have members. They assert that they represent or advocate on behalf of people with standing (Pet. Supp. 16), but they cite no authority that this is sufficient for standing and amicus CJLF has found none.

A second type of organizational standing arises when an organization is impacted by the challenged action in that it must spend additional resources. Under federal law, a service organization has standing when the challenged action increases the cost of providing a service, but an advocacy organization does not gain standing by spending more to advocate against the action. (See *FDA v. Alliance for Hippocratic Medicine* (2024) 602 U.S. 367, 394-395, distinguishing *Havens Realty Corp. v. Coleman* (1982) 455 U. S. 363.) This court has generally followed the federal cases in this area (*California Medical Assn. v. Aetna Health of California Inc.* (2023) 14 Cal.5th 1075, 1092-1093), and *Alliance for Hippocratic Medicine* answers the question that was previously open. (See *id.* at p. 1100, fn. 10.) The Attorney General notes that no party has asked this court to follow *Alliance for Hippocratic Medicine* (Resp. Supp. 19, fn. 3), but the court has posed the question of standing, the *Havens* rule is part of the answer, this case is distinguishable from *California Medical* for the reason noted in footnote 10, and it is similar to *Alliance for Hippocratic Medicine*. The petitioners other than OSPD describe only advocacy actions and expenditures. (Pet. 22-24.)

C. Public Interest Standing.

California law diverges from federal law in allowing public interest standing in some cases. (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 29.) Public interest standing is not a matter of right but requires considerations of policy. (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 170, fn. 5.) The purpose is "guaranteeing citizens the

opportunity 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.) That purpose is strongest in cases where no one with the incentive and the means to mount the challenge can meet the standard beneficial interest test, and the challenged action or enactment would otherwise be immune from judicial review. (See *Board of Soc. Welfare v. County of L. A.* (1945) 27 Cal.2d 98, 100 [directly affected people financially or physically unable to make challenge]; *Farm Sanctuary, Inc. v. Department of Food & Agriculture* (1998) 63 Cal.App.4th 495, 503 [direct beneficiaries of statute were animals].)

This case is unique in that it lies at the other end of the spectrum. Every one of the people directly affected by the law in question and unable to retain private counsel is entitled to representation at public expense. (See *Gideon v. Wainwright* (1963) 372 U.S. 335 [trial]; *Douglas v. California* (1963) 372 U.S. 353 [direct appeal]; Gov. Code, § 68662 [state habeas corpus]; 18 U.S.C. § 3599, subd. (a)(2) [federal habeas corpus].) With the Office of the State Public Defender disqualified from suing in its own name for the reasons stated in Part I, it is rather strange that private individuals and organizations should be the ones to litigate this issue under public interest standing when the defendants themselves have government-paid attorneys to litigate it.

In these unique circumstances, amicus CJLF submits that the court should decline to extend public interest standing and allow the issue to be raised in the normal course of a criminal case or a habeas corpus proceeding.

D. CCP § 526a.

That leaves the taxpayer action statute, section 526a of the Code of Civil Procedure (section 526a). There are at least three

issues here: (1) state versus local officers; (2) applicability to mandate; and (3) the same public policy question discussed above.

The Attorney General objects that this statute only applies to local officials, not state. (Resp. Supp. 16-17.) By the words of the statute, he is correct, but the case law has long been to the contrary. (*Los Altos Property Owners Assn. v. Hutcheon* (1977) 69 Cal.App.3d 22, 30; *Grosz v. California Dept. of Tax & Fee Administration* (2023) 87 Cal.App.5th 428, 439.) Unless this court wishes to reconsider a half century of consistent case law, this objection does not stand.

Section 526a is usually invoked in a complaint for injunctive relief, and sometimes declaratory relief as well. (See, e.g, *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1245.) Whether it applies to a petition for writ of mandate is less clear. In *Adams v. Department of Motor Vehicles* (1974) 11 Cal.3d 146, 151, a second party joined a petition for writ of mandate as a taxpayer citing section 526a, but there is no discussion as to whether this was proper. The original petitioner clearly had standing, and the status of the second party did not affect the outcome.

For actions that originate in superior court, it really does not matter. A petition for writ of mandate can be joined with a complaint for injunctive relief. (See 1 Cal. Civil Writ Practice (Cont.Ed.Bar Dec. 2023 update) § 5.119.) The writ petition and the section 526a action can be separate causes of action in the same case, as is commonly done. (See, e.g. *People for the Ethical Operation of Prosecutors v. Spitzer* (2020) 53 Cal.App.5th 391, 397.)

This case, however, is an original petition in the Supreme Court, which has original jurisdiction for writs of mandate but not for most other complaints. (Cal. Const, art. VI, § 10.) Given

that original proceedings in appellate courts should be reserved for "truly extraordinary" situations (*Adams v. Department of Motor Vehicles*, *supra*, 11 Cal.3d at p. 150, fn. 7), it might be best to limit mandate petitions to those who can meet one of the bases for standing described in Parts III.A.-C., *supra*, and leave section 526a actions for cases initiated in the superior court.

If section 526a does apply, it is subject to the same public policy considerations as public interest standing, discussed in Part III.C., *supra*. (*Weatherford v. City of San Rafael*, 2 Cal.5th at pp. 1248-1249.) For the same reasons, taxpayer standing should not be extended to allow tangentially involved third parties to litigate issues that the directly involved persons with government-funded counsel could litigate for themselves.

IV. A genuine opponent with the motivation and resources to challenge petitioners' claims is required as a prudential matter, if not a jurisdictional one.

The third question in this court's order of September 11, 2024, asks, "What parties are necessary to properly consider the requested relief and effectuate it, if warranted?" The word "properly" implies that the question is not limited to the technical civil procedure question of indispensable parties (see Code Civ. Proc., § 389, subd. (b)) but also includes the prudential questions that accompany the question of whether to proceed to the merits of a petition for an extraordinary writ. A collusive action without a genuine, capable opponent would be widely and correctly seen as a misuse of this court's original jurisdiction, and it would cause a justified diminution in public confidence.

Petitioners seek a writ of mandate in the original jurisdiction of this court. Such petitions are not resolved on their merits as a matter of course, but only in cases in which " 'the issues presented are of great public importance and must be resolved

promptly.' " (*Vandermost v. Bowen* (2012) 53 Cal.4th 421, 453, quoting *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 845.) While capital punishment is certainly an issue of great public importance, the urgency of considering yet again an issue that has been recurrent for four decades is less than clear. In criminal law, this court has considered on original writs questions of pure law regarding the validity of new enactments. (See, e.g., *Briggs v. Brown* (2017) 3 Cal.5th 808.) Questions that must be resolved before an imminent election are also frequent subjects of original writs (see, e.g., *Vandermost*, at p. 435), but again they typically do not involve factual determinations.

The question of what, if anything, the kinds of studies proffered by the petitioners actually show is an intensely factual one, involving questions far beyond the legal questions that appellate courts typically deal with. One need only plow through the district court's discussion of the Baldus study in *McCleskey v. Zant* (1984) 580 F.Supp. 338, 350-380 to see how thick the factual underbrush becomes.

The history of these studies also illustrates that the conclusions of the author of the study can never be taken at face value. In *McCleskey* itself, the state's expert disagreed with Baldus's conclusions, and the court ultimately found in favor of the state's position. The finding of fact, after a full trial, was that the Baldus study does *not* show what Baldus claimed. "The best models which Baldus was able to devise which account to any significant degree for the major non-racial variables, including strength of the evidence, produce no statistically significant evidence that race plays a part in either of those decisions in the State of Georgia." (*McCleskey*, 580 F.Supp. at p. 368, italics omitted.)

For a simplified explanation of why experts can disagree about what a study based on mathematical models actually shows, see Scheidegger, Rebutting the Myths About Race and the

Death Penalty (2012) 10 Ohio St. J. Crim.L. 147, 150-152[4] (by counsel for amicus CJLF). In the course of constructing a model, many judgment calls need to be made. Different researchers may make different calls and get different results from the same data. As a result, a prominent researcher who was a defense witness in *McCleskey* concluded the results from such studies are "fragile." (See *id*. at p. 161; Berk, Li, & Hickman, Statistical Difficulties in Determining the Role of Race in Capital Cases: A Re-analysis of Data from the State of Maryland (2005) 21 J. Quantitative Criminology 365, 367-368.)

On a subject as contentious as the death penalty, researcher bias must also be considered. When different methods applied to the same data can produce different conclusions, as Berk et al. demonstrated, how can we ever be confident that the methods were not chosen to produce the result that the researcher wanted from the beginning? Petitioners tout a review of nine of the studies by Professor John Donohue (Pet. 24-25), but how do we know that review is unbiased? Counsel for amicus has debated Professor Donohue on the subject of capital punishment and can state without hesitation that he is a vehement opponent of it. His reviews of research in a related area have been hotly disputed. (See, e.g., Dezhbakhsh & Rubin, From the "Econometrics of Capital Punishment" to the "Capital Punishment" of Econometrics: On the Use and Abuse of Sensitivity Analysis (2010) 43 App.Econ. 3655.)

Nor can one simply rely on a lack of published studies on the other side. Given the dogma, censorship, and cancel culture of current academia, researchers who produce results contrary to

4. This article also discusses the appellate history of *McCleskey* and the curious decision to assume the truth of allegations found to be false after a full trial. (See *id*. at pp. 156-157.)

the mandatory narrative imperil their careers. It is less hazardous to simply find some other subject to study.

Mounting a proper challenge to the studies proffered here is no small task. It will take a lot of time and a lot of resources. It will require finding experts with the courage to go against the academic dogma, which itself is no small task.[5]

These are good reasons not to consider these issues on a writ of mandate at all. But if mandate is to be the vehicle, at the very least an opponent with full party status and the necessary resources is required. Amicus appearances are not sufficient. Petitioners ask to limit the opposition to Attorney General Bonta (Pet. Supp. Brief 66-70), a well-known opponent of capital punishment. It is far too easy for a prosecutor to implement a political objective by simply "taking a dive" with an inadequate defense. (See Matthias, *DA Becton Capitulated with Bogus Racial-Bias Court Ruling* (June 30, 2023) San Jose Mercury News <https://www.mercurynews.com/2023/06/30/opinion-da-becton-capitulated-with-bogus-racial-bias-claims/> [as of Nov. 25, 2024].)

Petitioners' eagerness *not* to have an opponent who is actually opposed (Pet. Supp. 63-70) is telling. Collusive litigation of this highly contentious subject would correctly be perceived by the public as a day of infamy in judicial activism. This request should be rejected.

Two large-county district attorneys have stepped up. One or both of them should be granted party status if this case goes forward.

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5. Petitioners' suggestion that the court could rely on academic peer review and a highly partisan reviewer to dispense with adversarial testing on a subject this contentious (Pet. 50) is ludicrous.

CONCLUSION

This case should be dismissed because the Office of the State Public Defender is barred from conducting it by the *Safer* rule and the other petitioners lack standing. If the case does go forward, a genuine opposing party with the resources and motivation to make a vigorous defense against the petitioners' factually and legally dubious claims should be named and given full party status.

Date: December 3, 2024

Respectfully Submitted,

KENT S. SCHEIDEGGER
Attorney for Amicus Curiae
Criminal Justice Legal Foundation

Attachment A

Excerpt of Attorney General's Brief in *Jessica M. v. Board of Parole Hearings*, Los Angeles Superior Court No. 24STCP02901 (Nov. 15, 2024)

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Exempt from filing fee
per Gov. Code § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

JESSICA M., ET AL.,

Petitioner,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION AND BOARD OF PAROLE HEARINGS,

Respondents.

Case No. 24STCP02901

RESPONDENTS' ANSWERING BRIEF

Date: December 6, 2024
Time: 10:30 a.m.
Dept: 82
Judge: The Honorable Stephen I. Goorvitch

ARGUMENT

I. THIS CASE IS NOT JUSTICIABLE.

The Court need not grapple with the validity of the youth offender parole scheme because it should dispose of this case on justiciability grounds. It is a "'well-established principle that [courts] will not decide constitutional questions where other grounds are available and dispositive of the issues of the case.'" (*Palermo v. Stockton Theaters, Inc.* (1948) 32 Cal.2d 53, 66; see also, e.g., *People v. Williams* (1976) 16 Cal.3d 663, 667 ["we do not reach constitutional questions unless absolutely required to do so to dispose the matter before us"].) Respondents request the Court dismiss the petition for writ of mandate because petitioners lack standing to challenge the youth offender parole program and fail to present a case ripe for adjudication.

A. Petitioners Lack Standing to Intervene In Postjudgment Proceedings.

As addressed in respondents' demurrer to the petition for writ of mandate, petitioners do not have standing to initiate new litigation to enjoin post-judgment proceedings related to the execution of a defendant's sentence. Because mandamus is an extraordinary remedy, the right that petitioners seek to enforce or protect must be clear, present, certain, and substantial. (Code Civ. Proc., § 1085; *American Friends Service Committee v. Procunier* (1973) 33 Cal.App.3d 252.) Marsy's Law gave victims and victim family members the right to *participate* in a parole hearing, but that does not translate to a clear, present, certain, and substantial right to challenge the constitutionality of a law establishing that hearing. (See *Dix v. Superior Court* (1991) 53 Cal.3d 442, 450 (*Dix*) [neither a crime victim nor any other citizen has a legally enforceable interest, public or private, in the commencement, conduct, or outcome of criminal proceedings of another].) A victim and victim family members have the right to "expect the appropriate detention, trial, and punishment of those who injured them," but the Legislature has not provided a remedy by which a victim or victim's family member can enforce those rights. (*Id*. at p. 452; *People v. Superior Court (Thompson)* (1984) 154 Cal.App.3d 319, 322 [sentencing upheld despite failure to notify victim of sentencing hearing; court had no authority to afford victim any relief in the absence of appropriate guidelines to enforce of victims' rights].) Respondents can find no authority for the proposition that a victim or victims' rights advocacy group has standing,

via Marsy's Law, to prevent any mechanism that alters the execution of a person's sentence, whether through the award of credits or through parole consideration. And petitioners cite none.

Petitioners allege an emotional injury occurs when a victim or victim's family member receives notice of a pending parole consideration hearing, and when the victim or victim's family participates in that hearing. (Decl. of Jessica M.) And, as victims and victims' advocates, petitioners assert those emotional injuries evidence their "special interest to be served or some particular right to be preserved or protected." (*Carsten v. Psychological Examining Com*. (1980) 27 Cal.3d 793, 796.; Code Civ. Proc., § 1086.) There is, unfortunately, no way to repair the damage and trauma caused by criminal acts. While it is surely difficult and traumatic for victims and victim family members to participate in parole proceedings, the understandable desire not to do so does not give rise to a *legal* injury to confer standing. Marsy's Law created a right for victims and their families to participate in proceedings; it did not create a right for victims to halt them. (See *People v. Nash* (2020) 52 Cal.App.5th 1041, 1071-1072 ["Neither the plain language of the initiative nor the ballot material suggests that in enacting [Marsy's Law], voters intended to prohibit the Legislature from creating new postjudgment proceedings"].)

This is not a case where the Court should find petitioners have "public interest standing." Public interest standing, if granted, provides an exception to the general rule that a writ of mandate is only available to those who are beneficially interested in the outcome. (Code Civ. Proc., § 1086.) In such instances it is enough that the litigant is interested "as a citizen in having the laws executed and the duty in question enforced." (*Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, 100-101.) But public policy considerations can outweigh allowing this exception to the general rule. (*Green v. Obledo* (1981) 29 Cal.3d 126, 144-145.) This is exactly such a situation. As held by the California Supreme Court in *Dix,* "a private citizen has no personal legal interest in the outcome of an individual criminal prosecution against another person. Nor may the doctrine of "public interest" standing prevail over the public prosecutor's exclusive discretion in the conduct of criminal cases." (*Dix, supra,* 53 Cal.3d at p. 451.) The concept of public interest standing "must yield to paramount considerations of public policy." (*Id*. at p. 453.) Allowing victims and victims' advocacy groups to challenge criminal statutes,

sentencing, and postjudgment proceedings would wreak havoc on the criminal justice system, the separation of powers, and the state's correctional system. Simply stated, "[r]ecognition of citizen standing to intervene in criminal prosecutions would have 'ominous' implications." (*Ibid*.)

Petitioners liken their position to the taxpayers and voters who challenged "The Victims' Bill of Rights" passed in 1982 as Proposition 8 and the "Crime Victims Justice Reform Act" passed in 1990 as Proposition 115, alleging those initiatives violated the "single subject rule" contained in article II, section 8, subdivision (d) of the California Constitution. (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 240; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 340.) But neither case addressed the issue of standing since the alleged injury to taxpayers and voters was without question considering the issue to be decided was whether the initiatives were properly presented to the voters. "It is axiomatic that cases are not authority for propositions not considered." (*Riverside County Sheriff's Dept. v. Stiglitz* (2014) 60 Cal.4th 624, 641; *In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.)

Here, it is unclear exactly what public duty petitioners seek to enforce. They allege a worsening emotional harm to individual victims and a public interest in "seeing the laws on sentencing perpetrators of sex crimes enforced." (Pet'rs' Brief, pp. 10, 12.) But again, there is no public right that provides a victim, victim's family member, or victims' advocacy group the ability to intervene to enjoin CDCR and the Board's compliance with postjudgment proceedings enacted by the Legislature. If public interest standing allowed for victims to challenge any change to a person's term of incarceration, the result would be that any legislative effort or initiative aimed at criminal justice reform (i.e., Proposition 36, Proposition 47, Proposition 57, Penal Code section 3055), to address unconstitutional sentences (SB 260), to award additional credits, or to otherwise incentivize prosocial behavior would be removed from the hands of elected representatives or the majority of voters. (See *Carsten, supra,* 27 Cal.3d at p. 798 ["inevitable damage" from widespread public interest lawsuits].)[6]

[6] Under Penal Code section 3055, subdivision (a), Linares will be eligible for parole consideration in 2032 when he is 50 years old and has served 23 years in custody. Given petitioners' position that any opportunity for parole would be an unconstitutional amendment to Jessica's Law, a favorable ruling in this case would invalidate not just the youth offender parole program, but also the elderly parole program.

CERTIFICATE OF COMPLIANCE

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

I, Kent S. Scheidegger, hereby certify that the attached **BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY** contains 5015 words, excluding the items listed in Rule 8.520(c)(3), as indicated by the computer program, WordPerfect, used to prepare the brief.

Date: December 3, 2024

Respectfully Submitted,

KENT S. SCHEIDEGGER
Attorney for Amicus Curiae
Criminal Justice Legal Foundation

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816.

On the date below, I electronically filed the attached document **APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY** by transmitting a true copy using the TrueFiling system. All participants in the case are registered TrueFiling users and will be served by the TrueFiling system.

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Executed on December 3, 2024, Sacramento, California.

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