No. S256914

IN THE SUPREME COURT OF CALIFORNIA

IN RE JACK WAYNE FRIEND,

On Habeas Corpus.

After a Decision by the Court of Appeal,
First Appellate District, Division Three, Case No. A155955
Alameda County Superior Court, Case No. 81254 (Hon. Don Clay)

APPLICATION FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF CONSTITUTIONAL LAW *AMICI*

KELSEY JOHN HELLAND (SBN 298888)
VIOLA H. LI (SBN 327783)
ZHEN HE TAN (SBN 329303)
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921

*THEANE EVANGELIS (SBN 243570)
ILISSA SAMPLIN (SBN 314018)
MICHAEL HOLECEK (SBN 281034)
SHAUN MATHUR (SBN 311029)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Tel: (213) 229-7000
Fax: (213) 229-7520
tevangelis@gibsondunn.com

Attorneys for Constitutional Law Amici

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APPLICATION TO FILE *AMICI CURIAE* BRIEF

Pursuant to rule 8.520(f) of the California Rules of Court, Dean Erwin Chemerinsky, Dean David L. Faigman, Professor Hadar Aviram, Professor Lara Bazelon, Professor Jennifer Chacón, Professor Sharon Dolovich, Professor Karl M. Manheim, and Professor Alison Dundes Renteln request permission to file the attached *amici curiae* brief.[1]

Amici are a group of the nation's leading scholars of constitutional and criminal law ("Constitutional Law *Amici*"). The issue addressed in the Petition and related briefing regarding the meaning of a "successive" habeas petition in Penal Code section 1509, subdivision (d) directly implicates federal and state due process principles and the California Constitution's Suspension Clause. Ensuring the constitutionality of enacted statutes through the initiative process is of particular interest to Constitutional Law *Amici*, who have extensive experience litigating, teaching, lecturing, and writing about fundamental constitutional issues like those addressed in the Petition.[2] Accordingly, Constitutional Law *Amici* request leave to file the attached *amici curiae* brief, which argues that the Court should strike down Penal Code section 1509, subdivision (d) and the other provisions of the Penal Code which depend on it.

For the aforementioned reasons, proposed *amici curiae* respectfully request that the Court accept the enclosed brief for filing and consideration.

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[1] No party or counsel for party in this case authored the proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief.

[2] Additional information regarding Constitutional Law *Amici* is included in the attached Appendix of Signatories.

DATED: August 10, 2020

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ *Theane Evangelis*
Theane Evangelis

Attorneys for Constitutional Law Amici

AMICI CURIAE BRIEF

INTRODUCTION

The writ of habeas corpus is one of the most sacred guarantees of liberty, justice, and the rule of law known to the American legal system. "Indeed, the writ has been aptly termed 'the safe-guard and the palladium of our liberties[,]' and is 'regarded as the greatest remedy known to the law whereby one unlawfully restrained of his liberty can secure his release.'" (*In re Clark* (1993) 5 Cal.4th 750, 764, citations omitted.) Although procedural and substantive rules exist to ensure the fundamental fairness and accuracy of criminal proceedings, "mistakes in the criminal justice system are sometimes made." (*In re Sanders* (1999) 21 Cal.4th 697, 703.) Through habeas corpus proceedings, "the basic charters governing our society" therefore "wisely hold open a final possibility for prisoners to prove their convictions were obtained unjustly." (*Ibid.*)

In recognition of these principles, for over 150 years, the California Constitution has afforded anyone who is in prison, or otherwise restrained by the criminal justice system, an opportunity to seek habeas relief. But in 2016, California voters enacted Proposition 66, constraining the available grounds for relief in the most serious category of habeas cases: those where the petitioner has been sentenced to death. Proposition 66 provides that an "initial petition must be filed within one year" of the appointment of habeas counsel, and that any "successive petition whenever filed shall be dismissed unless the court finds . . . that the defendant is actually innocent . . . or is ineligible for the sentence" of death. (Pen. Code, § 1509, subds. (c), (d).) Proposition 66 thus imposes a complete bar on successive petitions raising constitutional claims that could not have been raised in an initial petition, unless the petitioner is innocent or ineligible for the death sentence.

This Court previously held that Proposition 66's enactment did not violate California's election laws, and that certain of its changes to the State's habeas procedures did not facially violate equal protection or separation-of-powers principles, in light of the "distinct" issues raised by capital habeas petitions and the possibility of interpreting Proposition 66's changes as "directory" instead of "mandatory." (*Briggs v. Brown* (2017) 3 Cal.5th 808, 823, 845.) But this Court also made clear that its "holding on the equal protection claim raised [in *Briggs*] poses no bar to other constitutional challenges," and that it "express[ed] no view on claims that may be presented by individual prisoners based on their own circumstances." (*Id.* at pp. 827, 845; see also *id.* at pp. 848, 859.) "Such claims remain open." (*Id.* at p. 859.)

The Court is now presented with such an "individual" claim. Petitioner Jack Wayne Friend argues that his conviction and sentence were infected by constitutional errors, including the prosecutor's discriminatory selection of the jury and the ineffective assistance of Mr. Friend's trial and appellate counsel. The lower court dismissed these and other claims without considering them on the merits, reasoning that Proposition 66 precluded review because the claims were presented in a "successive petition." Before the enactment of Proposition 66, Mr. Friend would have been permitted an opportunity to justify his failure to include these claims in his initial petition—for example, based on a showing that initial habeas counsel provided ineffective assistance (see Petitioner's Opening Brief ("OB") 43). Proposition 66's "successive petition" bar precluded him from doing so here.

This Court granted review, asking, among other things, "What is the meaning of the term 'successive petition' in Penal Code section 1509, subdivision (d)"? (Grant of Review.) Mr. Friend argues that "successive petition" continues to be a common-law term of art, and therefore excludes claims for which there is an adequate explanation for the failure to raise them earlier. (OB 21-43.) The State, for its part, concedes that the literal and most

natural reading of "successive petition" means *any* habeas petition after the first one, but urges the Court not to adopt that meaning so as to avoid the serious constitutional problems that would result if condemned inmates were barred "from litigating certain potentially meritorious claims that they could not have raised earlier." (People's Answering Brief ("AB") 21-36.)

Amici, a group of the nation's leading scholars of constitutional and criminal law, respectfully submit that the answer to the Court's question is clear, and that the Court should not shy away from the constitutional ramifications that result. As used in Proposition 66, the term "successive petition" plainly means any habeas petition filed after the initial petition. And because Proposition 66 bars *all* "successive petitions" (with two narrow exceptions not relevant here), including petitions raising meritorious claims based on constitutional errors in the trial and sentencing processes, its limitations are unconstitutional under the federal and state Due Process Clauses and the California Constitution's Suspension Clause. The Court should strike the unconstitutional language of Penal Code section 1509, subdivision (d), and the other Penal Code provisions which depend on it.

LEGAL ARGUMENT

I. Penal Code Section 1509(d) Unambiguously Prohibits Traditionally Proper and Meritorious Habeas Petitions on Purely Procedural Grounds.

The term "successive petition" in section 1509, subdivision (d) (hereafter, "section 1509(d)") is clear and unambiguous, and this Court need look no further than the statute's text to discern its meaning.[3]

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[3] Section 1509(d) states, in relevant part: "An initial petition which is untimely under subdivision (c) or a successive petition whenever filed shall be dismissed unless the court finds, by the preponderance of all available evidence, whether or not admissible at trial, that the defendant

"The first principle of statutory interpretation is that, to ascertain the Legislature's intent, we turn initially to the words of the statute," giving them "their ordinary and usual meaning" and construing them in their "statutory context." (*People v. Johnson* (2006) 38 Cal.4th 717, 723-724; *Holland v. Assessment Appeals Bd. No. 1* (2014) 58 Cal.4th 482, 490 [quoting *Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818].) "[I]f 'the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it.'" (*Johnson*, *supra*, 38 Cal.4th at pp. 723-724 [quoting *People v. Statum* (2002) 28 Cal.4th 682, 689-690]; see also *In re Lance W.* (1985) 37 Cal.3d 873, 886.) Only if ambiguity remains after considering the statute's text and structure may the court "look to various extrinsic sources, such as legislative history, to assist [it] in gleaning the Legislature's intended purpose." (*Larkin v. Workers' Comp. Appeals Bd.* (2015) 62 Cal.4th 152, 158; see also *Holland*, *supra*, 58 Cal.4th at p. 490.)

To determine the meaning of section 1509(d), including the term "successive petition," this Court must "give the words of the statute 'a plain and commonsense meaning' unless the statute specifically defines the words to give them a special meaning." (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1083; see also *People v. Valladoli* (1996) 13 Cal.4th 590, 597.) The "plain and commonsense meaning" of "successive petition" is any petition that is not the first petition, and the statute does not provide any contrary definition. (See American Heritage Dict. (4th ed. 2007) p. 1378 [defining "successive" as "following in uninterrupted order; consecutive"].) Thus, section 1509(d) bars untimely initial petitions and *all* subsequent, or "successive," petitions,

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is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence." (Pen. Code, § 1509, subd. (d).)

unless the court finds that the defendant is innocent or is ineligible for his or her sentence.[4]

Examining the statute as a whole confirms this interpretation of section 1509(d). (*West Pico Furniture Co. v. Pacific Finance Loans* (1970) 2 Cal.3d 594, 608 ["it is a cardinal rule that the entire substance of the statute or that portion relating to the subject under review should be examined in order to determine the scope and purpose of the provision containing such words, phrases, or clauses"].) Section 1509 "applies to *any* petition for writ of habeas corpus filed by a person in custody pursuant to a judgment of death." (Pen. Code, § 1509, subd. (a), italics added.) Sections 1509 and 1509.1, both implemented under Proposition 66, refer only to "initial" and "successive" petitions. (See *id.*, §§ 1509, 1509.1.) For instance, section 1509.1, subdivision (a) states that either party may appeal the superior court's decision on "an initial petition" to the court of appeal, and "successive petition(s) shall not be used as a means of reviewing a denial of habeas

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[4] As discussed further in the text (see *infra* at pp. 18-19), this plain-language interpretation of "successive petition" differs from the interpretation advanced by the parties. Mr. Friend argues that "'successive petition' continues to have the definition the Court established in its decisional law," which is "one presenting claims, without an adequate explanation, that could have been raised in a prior collateral attack." (See OB 21-43.) For its part, the State concedes that a "literal reading" of the term means any petition filed after the first petition, but, like Mr. Friend, argues that the Court should construe the term to preserve the ability to raise claims that could not have been brought earlier. (See AB 21-36.) The parties agree that adopting a literal interpretation of the term would render section 1509(d) unconstitutional, and thus urge the Court to invoke the canon that statutes should be interpreted to avoid serious constitutional questions. (See OB 25; AB 27.) But that canon applies only where the statutory language is ambiguous—not where, as here, the statutory language lends itself to only one reasonable (but unconstitutional) interpretation. (See *infra* at pp. 18-19.)

relief." (See *id.*, § 1509.1, subd. (a).) Interpreting a "successive petition" as any petition after the "initial" one thus aligns with both sections' dichotomous approach to addressing *all* petitions for writ of habeas corpus: A petition is either "initial" or "successive"; there is no third category. Indeed, this Court has already endorsed this interpretation of "successive petition" in section 1509.1, subdivision (a). (See *Briggs v. Brown* (2017) 3 Cal.5th 808, 836, fn. 14 [stating that section 1509.1, subdivision (a)'s use of the term "successive petition" is "inconsistent" with this Court's prior use of "successive petition" "to refer to one raising claims that could have been presented in a previous petition"].) This Court should presume that "successive petition" "carr[ies] the same meaning when it arises elsewhere in th[e] statutory scheme," such as in section 1509(d). (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 161.)

Section 1509's "nature and obvious purpose" of expediting review of habeas proceedings further corroborates this interpretation. (*West Pico Furniture*, *supra*, 2 Cal.3d at p. 608 ["The words in question 'must be construed in context, keeping in mind the nature and obvious purpose of the statute.'" [quoting *Johnstone v. Richardson* (1951) 103 Cal.App.2d 41, 46]]; *Briggs*, *supra*, 3 Cal.5th at pp. 823-825 [discussing section 1509 as a "provision[] to expedite review in capital appeals and habeas corpus proceedings"].) The statute's goal of judicial expedition and efficiency is clear from its text. For instance, subdivision (a) limits a defendant's options for collaterally attacking a death sentence. (Pen. Code, § 1509, subd. (a) [declaring that a writ "pursuant to this section is the exclusive procedure for collateral attack on a judgment of death"].) Petitions must be "promptly transferred" to the sentencing court and assigned to the original trial judge if available, absent good cause otherwise. (*Ibid.*) Under subdivisions (c) and (f), all initial petitions must be filed within one year of a court's order under Government Code section 68662, and "in no instance shall [a superior court]

take longer than two years to resolve the [initial] petition." (*Id.*, § 1509, subds. (c), (f).) Proceedings under section 1509 "shall be conducted as expeditiously as possible, consistent with fair adjudication." (*Id.*, § 1509, subd. (f).) Giving the term "successive petition" its ordinary meaning likewise serves the purpose of judicial expedition and efficiency by barring most subsequent petitions (i.e., unless one of two circumstances are met: the defendant is either innocent or ineligible for the sentence received). (*Id.*, § 1509, subd. (d).)

Finally, although consideration of extrinsic sources is unnecessary given the unambiguous nature of the statute, Proposition 66 ballot materials confirm that voters intended to enact the plain meaning of section 1509(d). (See *Robert L. v. Super. Ct.* (2003) 30 Cal.4th 894, 905 [looking to "materials that were before the voters"].) Before Proposition 66's enactment, this Court held that "[c]laims presented in a 'subsequent' petition that should have been presented in an earlier petition will be barred as 'successive.'" (OB 23-25 [quoting *In re Robbins* (1998) 18 Cal.4th 770, 787, fn. 9].) In other words, not all subsequent petitions were previously barred as "successive," but in passing Proposition 66, the voters clearly intended to expand the bar. The Legislative Analyst described Proposition 66 as "seek[ing] to shorten the time that the legal challenges to death sentences take." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016), analysis of Prop. 66 by Legis. Analyst, p. 105 (2016 Voter Guide).) The Legislative Analyst also explained that Proposition 66 "*places* other limits on legal challenges to death sentences," such as "not allow[ing] *additional* habeas corpus petitions to be filed *after the first petition* is filed, except in those cases where the court finds that the defendant is likely either innocent or not eligible for the death sentence." (*Id.* at p. 106, italics added.) These ballot materials make clear that the term "successive petitions" was intended to capture *any* petition filed after the first—with exception only upon a finding that the defendant is innocent or

ineligible for the sentence received, and without regard to any other exceptions that may have existed prior to the enactment of Proposition 66.

Further, the Legislative Analyst's explanation of section 1509(d) as an example of a "limit" "*place[d]*" by Proposition 66 confirms that the same limit did not exist before Proposition 66. (2016 Voter Guide, *supra*, at p. 106, italics added.) Indeed, the "enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted." (*People v. Weidert* (1985) 39 Cal.3d 836, 844.) It is thus clear that voters did not intend to limit only those petitions this Court had previously barred as "successive," but instead intended to broadly limit *all* subsequently filed petitions.

Despite the foregoing, the parties ask this Court to give the statute a different interpretation—one that would save it from the serious constitutional problems discussed below. (See AB 27-36; see also OB 21-43.) But as this Court has recognized, there are "limits" to a court's ability to "save a statute through judicial construction," including the prohibition on "rewriting the statute in accord with the presumed legislative intent." (*Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, 187; *Johnson*, *supra*, 38 Cal.4th at pp. 723-724.) Although the "canon of constitutional doubt" guides courts to adopt a constitutional construction of a statute, courts may do so only if "uncertainty remains in interpreting the statutory language" and the constitutional construction is "reasonably possible." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373-1374; *People v. Cruz* (1996) 13 Cal.4th 764, 782.) To adopt a construction absent those conditions would do "violence to the reasonable meaning of the language used." (*Gutierrez*, *supra*, 58 Cal.4th at p. 1373 [quoting *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 548].) Here, there is no uncertainty regarding the meaning of "successive petition," and any other construction is not "reasonably possible" for the foregoing reasons. "Rather than redraft

the initiative while casting aside its purpose," the Court "should interpret [the statute] to mean what it says, and analyze its constitutionality fairly and fully." (*Briggs*, *supra*, 3 Cal.5th at p. 891 (conc. & dis. opn. of Cuellar, J.).) Accordingly, this Court must first evaluate the constitutionality of section 1509(d) based on its plain meaning.

II. Penal Code Section 1509(d) Is Unconstitutional.

Both parties and *Amici* agree that interpreting "successive petition" according to its plain, unambiguous language renders section 1509(d) unconstitutional under the federal and state Due Process Clauses and the California Constitution's Suspension Clause because the statute "bar[s] condemned inmates from litigating certain potentially meritorious claims that they could not have raised earlier." (AB 25; OB 25-36.)

A. Section 1509(d) Violates Due Process.

State habeas corpus procedures "must comport with due process" under the United States and California Constitutions. (*Ohio Adult Parole Authority v. Woodard* (1998) 523 U.S. 272, 293 (conc. & dis. opn. of Stevens, J.); see also *Pennsylvania v. Finley* (1987) 481 U.S. 551, 557; *Evitts v. Lucey* (1985) 469 U.S. 387, 400-401; *In re Sanders* (1999) 21 Cal.4th 697, 715-721.) A state-law procedure for protecting a state-created liberty interest in habeas relief violates federal and state due process when it "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation'"—that is, it is "fundamentally inadequate to vindicate the substantive right[]" to habeas relief under state law. (*Dist.*

Attorney's Office for Third Judicial Dist. v. Osborne (2009) 557 U.S. 52, 69 [quoting *Medina v. California* (1992) 505 U.S. 437, 446, 448].)[5]

"[S]ince the founding of the state" (*In re Clark* (1993) 5 Cal.4th 750, 764 [citing Cal. Const. of 1849, art. I, § 5]), California has permitted condemned inmates whose judgments have been affirmed on direct appeal "to further challenge the judgment by filing . . . a petition for a writ of habeas corpus" (*In re Reno* (2012) 55 Cal.4th 428, 442). The writ has been "regarded as the greatest remedy known to the law whereby one unlawfully restrained of his liberty can secure his release" (*Clark*, *supra*, 5 Cal.4th at p. 764), permitting condemned inmates "to prove that their convictions were obtained unjustly" when "the normal method of relief—i.e., direct appeal—is inadequate" (*Reno*, *supra*, 55 Cal.4th at p. 450; *Sanders*, *supra*, 21 Cal.4th at p. 703 ["the basic charters governing our society wisely hold open a final possibility for prisoners to prove their convictions were obtained unjustly"]).

Like many other jurisdictions, California has historically permitted condemned inmates to bring subsequent petitions where the petitioner is justified in belatedly raising new claims. (*Clark*, *supra*, 5 Cal.4th at p. 775; see also *In re Swain* (1949) 34 Cal.2d 300, 302 ["it is the practice of this court to require that one who belatedly presents a collateral attack . . . explain the delay in raising the question"].)[6] A petitioner is justified in bringing an

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[5] The California Constitution's Due Process Clause is broader than the federal Due Process Clause and applies to habeas proceedings. (See *In re Sanders* (1999) 21 Cal.4th 697, 716-721; *People v. Ramirez* (1979) 25 Cal.3d 260, 263-264.)

[6] Nearly all capital-sentencing jurisdictions permit second-in-time and subsequent habeas petitions where the petitioner demonstrates that the newly asserted claims could not have been raised in an initial petition. (See, e.g., Ala. Rules Crim. Proc. 32.2(b); Ariz. Rules Crim. Proc. 32.2(b); Fla. Rules Crim. Proc. 3.850(c); Ga. Code Ann. § 9-14-42(c)(4); Ky. Rules Civ. Proc. 60.02; La. Code Crim. Proc. Ann. art. 930.4; Miss.

untimely petition when, as here, prior habeas counsel provided incompetent representation and failed to timely assert the claim in an initial petition. (See *Clark*, *supra*, 5 Cal.4th at pp. 779-780; OB 43.)

Even where the untimeliness is unjustified, "[t]he magnitude and gravity of the penalty of death" has militated in favor of permitting second and subsequent petitions to avoid a "fundamental miscarriage of justice." (*Clark*, *supra*, 5 Cal.4th at p. 797.) A fundamental miscarriage of justice exists where the petitioner establishes that: (1) a constitutional error resulted in a fundamentally unfair trial such that, absent the error, no reasonable judge or jury would have convicted the petitioner; (2) the petitioner is actually innocent of the crimes of which he was convicted; (3) the death penalty was imposed by a sentencing authority with a grossly misleading profile of the petitioner such that, absent the error or omission, no reasonable judge or jury would have imposed a sentence of death; or (4) the petitioner was convicted or sentenced under an invalid statute. (*Id.* at pp. 797-798.)

By its terms, section 1509(d) violates due process by severely diminishing the substantive right to habeas relief that California law has afforded condemned inmates for nearly two centuries. It expressly bars all second-in-time petitions—irrespective of their merits—unless the petitions raise claims demonstrating that the petitioner "is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence" of

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Code Ann. § 99-39-23(6); Neb. Rev. Stat. § 29-3001(4)(b); Nev. Stat. § 34.810; S.C. Code Ann. § 17-27-90; Tenn. Code Ann. § 29-21-107(b)(3); Tex. Code Crim. Proc. Ann. art 11.071, § 5(a)(1); Utah Code Ann. § 78B-9-106(1)(d); Va. Code Ann. § 8.01-654(B)(2); *People v. Hubbard* (Colo. 1974) 519 P.2d 945, 948; *Paradis v. State* (Idaho 1996) 912 P.2d 110, 114; *Holt v. State* (Kan. 2010) 232 P.3d 848, 852-853; *State* ex rel. *Zinna v. Steele* (Mo. 2010) 301 S.W.3d 510, 516-517; *Wells v. Hudson* (Ohio 2007) 865 N.E.2d 46; *Hibbs v. Raines* (Okla. 1959) 344 P.2d 672, 674; *Lovelace v. Morrow* (Or. 2003) 64 P.3d 1201, 1205; *Com.* ex rel. *Bordner v. Russell* (Pa. 1966) 221 A.2d 177, 180.)

death. (Pen. Code, § 1509, subd. (d).) Section 1509(d) deprives condemned inmates the opportunity to justify a belated petition asserting meritorious claims, and narrows the "fundamental miscarriage of justice" exceptions from four to two. Mr. Friend, the Attorney General, and *Amici* all agree that closing the courthouse doors to meritorious claims of constitutional magnitude—including where those claims could not have been discovered earlier—violates federal and state due process by denying condemned inmates a meaningful opportunity to obtain habeas relief. (See OB at 25-38; AB at 25-26.)

The Florida Supreme Court held that a similar limitation on second-in-time habeas petitions violated due process even though petitioners could file a subsequent petition to prove actual innocence. (See *Allen v. Butterworth* (Fla. 2000) 756 So.2d 52, 54.) Florida's Death Penalty Reform Act of 2000 barred "all successive capital post-conviction actions . . . unless commenced by filing a fully pled post-conviction action within 90 days after the facts giving rise to the cause of action were discovered or should have been discovered," and "the claim, if proven . . . , would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the defendant guilty of the underlying offense." (Fla. Stat. § 924.056(5).) In reviewing the Act's constitutionality, the Florida Supreme Court held that the "successive motion standard of the [Act] prohibits otherwise meritorious claims from being raised in violation of due process." (*Allen*, *supra*, 756 So.2d at p. 54.)

Section 1509(d) is no different. As Mr. Friend explains (see OB 25-38), section 1509(d)'s plain and unambiguous language deprives condemned inmates the opportunity to obtain relief on meritorious claims of constitutional magnitude even where the petitioner was justified in omitting the claims from his initial petition. For example, condemned inmates have no opportunity to obtain habeas relief where prosecutors violate *Brady v.*

Maryland (1963) 373 U.S. 83 by failing to disclose mitigating evidence bearing on the question of death until after the petitioner has filed his initial habeas petition. (See *In re Bacigalupo* (2012) 55 Cal.4th 312, 333, 336 [granting relief on a subsequent petition raising a *Brady* violation due to prosecutors' suppression of mitigating evidence]; *In re Miranda* (2008) 43 Cal.4th 541, 582 [same].) Such mitigating evidence would not establish the petitioner's actual innocence or make him ineligible for the sentence of death under section 1509(d), but could "so radically alter[] the profile of the petitioner" such that denying habeas relief would constitute a "fundamental miscarriage of justice." (*Clark*, *supra*, 5 Cal.4th at p. 797; see also *Bacigalupo*, *supra*, 55 Cal.4th at p. 335 ["we cannot be confident that had [the concealed] testimony been presented to the jury, it would have returned a penalty verdict of death"].) Yet, section 1509(d) denies a condemned inmate the opportunity to even present this claim—which could not have been raised in an initial petition—in contravention of the fundamental principle that "[a] rule . . . declaring 'prosecutors may hide, defendant must seek,'" is "[un]tenable in a system constitutionally bound to accord defendants due process." (*Banks v. Dretke* (2004) 540 U.S. 668, 696.)

Section 1509(d) also forecloses condemned inmates from pursuing second-in-time petitions raising a claim that a "change in the applicable law" (*In re Richards* (2016) 63 Cal.4th 291, 294, fn. 2; *Clark*, *supra*, 5 Cal.4th at p. 767) "affects the validity of the statute under which the prisoner was convicted or sentenced" (*Briggs*, *supra*, 3 Cal.5th at p. 848); that racial animus infected the capital trial, whether through juror, prosecutorial, or even defense-counsel biases (*Tharpe v. Sellers* (2018) 138 S.Ct. 545, 545-547 [per curiam]; *Buck v. Davis* (2017) 137 S.Ct. 759, 775-777; *Foster v. Chatman* (2016) 136 S.Ct. 1737, 1754-1755); or that new scientific developments undermine the material evidence presented at trial (*Richards*, *supra*, 63 Cal.4th at pp. 305-307)—claims that "this [C]ourt previously allowed

prisoners to pursue" in second-in-time habeas corpus petitions (*Briggs*, *supra*, 3 Cal.5th at p. 848, italics omitted). Section 1509(d) also prevents condemned inmates from asserting a claim that appellate counsel was ineffective (*In re Hampton* (2020) 48 Cal.App.5th 463, 474-482)—a claim that, in most cases, would not even ripen until well after the initial petition is filed under the time limits established in section 1509, subdivisions (b) and (c). Section 1509(d) thus renders the right to effective appellate counsel a shadow right for those sentenced to pay the ultimate price.

That capital habeas petitioners will be deprived an adequate opportunity to vindicate these and other substantive rights is not merely hypothetical. Indeed, this case demonstrates that section 1509(d) is specifically designed to do just that "in practice." (*Osborne*, *supra*, 557 U.S. at p. 71; see also *Briggs*, *supra*, 3 Cal.5th at p. 848 ["[g]oing forward, prisoners may seek to challenge [section 1509(d)'s] limitations in the context of their individual cases"].) As Mr. Friend explains in his opening brief, "[t]rial prosecutor Ted Landswick discriminated on the basis of race, ethnicity, and gender in exercising his peremptory strikes," in violation of *Batson v. Kentucky* (1986) 476 U.S. 79; Mr. Friend's trial counsel "rendered ineffective assistance in failing to object" to the discriminatory peremptory strikes, in violation of *Strickland v. Washington* (1984) 466 U.S. 668; and Mr. Friend's appellate counsel on direct appeal rendered ineffective assistance, in violation of *Strickland* and *Evitts*, *supra*, 469 U.S. at pp. 401-402. (OB at 44-54.) Mr. Friend was justified in omitting these (and other) claims from his initial petition because his initial habeas counsel provided constitutionally deficient representation (see OB 43-55; *Friend v. Davis* (N.D.Cal. Dec. 1, 2017) 2017 WL 5972593), but the Superior Court denied Mr. Friend's second petition without addressing the merits of his claims—a result that the Superior Court believed was compelled by section 1509(d) (Order Den. Pet. for Writ of Habeas Corpus (Oct. 24, 2018, No. 81254A)).

Because Mr. Friend sought habeas relief based on his new claims and has been shut out of the process under section 1509(d), this case differs substantially from *Osborne*. There, the United States Supreme Court examined Alaska's post-conviction procedures and, judging by the text of those provisions alone, held that they satisfied due process. (*Osborne*, *supra*, 557 U.S. at pp. 69-70.) The prisoner himself "ha[d] not tried to use the process provided to him by the State or attempted to vindicate the liberty interest that [was] the centerpiece of his claim." (*Id.* at pp. 70-71.) And, "without trying [the Alaska procedures at issue]," the Court explained that the prisoner "can hardly complain that they do not work *in practice*." (*Id.* at p. 71, italics added.) If the prisoner had availed himself of the available procedures, then the Court would have been required to assess whether those procedures "transgresse[d] . . . recognized principle[s] of fundamental fairness *in operation*." (*Id.* at p. 69, italics added.) Here, by contrast, Mr. Friend *has* availed himself of the limited procedures available under section 1509(d)—and, in operation, those procedures have deprived him an opportunity even to be heard on constitutional claims that could not have been brought earlier. (See *Goss v. Lopez* (1975) 419 U.S. 565, 579 ["[t]he fundamental requisite of due process of law is the opportunity to be heard"].)

Since 1849, California has guaranteed prisoners the right to seek relief from their unlawful restraint. (*Clark*, *supra*, 5 Cal.4th at p. 764.) As part of that guarantee, California also has provided prisoners an opportunity to raise meritorious claims of constitutional magnitude in second-in-time petitions where the omission of those claims in an initial petition is justified. (*Id.* at p. 775; see also *Osborne*, *supra*, 557 U.S. at p. 68 ["[t]his state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right"].) This Court has recognized that such procedures are essential to ensuring that no person is sentenced to death after "a fundamentally unfair proceeding" or based on "an unreliable verdict."

(*Clark*, *supra*, 5 Cal.4th at p. 766.) Section 1509(d) casts aside this historical practice, deprives condemned inmates the basic right to be heard, and undermines confidence in the criminal justice system's check on the fairness and reliability of legal proceedings leading to sentences of death. The statute violates due process of law.

B. Section 1509(d) Violates the Suspension Clause.

Section 1509(d) likewise violates the Suspension Clause. The Clause, which has been enshrined in California's Constitution since the State's founding without modification (*Clark*, *supra*, 5 Cal.4th at p. 764, fn. 2), provides that the right to file a habeas petition in California "may not be suspended unless required by public safety in cases of rebellion or invasion." (Cal. Const., art. I, § 11.) "Although th[is] constitutional mandate[] [is] generally directed to the legislature or executive departments, . . . the protection of the fundamental right there declared has been enjoined on the court." (*Browne v. Superior Court* (1940) 16 Cal.2d 593, 608-609 (dis. opn. of Shenk, J.).) In other words, the judiciary is responsible for ensuring that the other branches of government do not go too far in restricting the right to seek habeas relief.

The Suspension Clause does more than limit the conditions for the formal and wholesale "suspension" of the writ. The Suspension Clause guarantees that a constitutionally "adequate" form of the writ must be available, unless the writ has been properly suspended in cases of rebellion or invasion. (*Boumediene v. Bush* (2008) 553 U.S. 723, 732-733, 787.)

In the landmark decision of *Boumediene*, the United States Supreme Court held that the military-commission review process Congress established for detainees in Guantanamo Bay was inadequate under the Suspension Clause of the U.S. Constitution. (*Boumediene*, *supra*, 553 U.S. at pp. 771,

792.)[7] The Court first grounded its reasoning in the history of the Suspension Clause: "That the Framers considered the writ a vital instrument for the protection of individual liberty is evident from the care taken to specify the limited grounds for its suspension." (*Id.* at p. 743.) The Court focused on "a critical exchange" "at the Virginia ratifying convention," where "Edmund Randolph referred to the Suspension Clause as an 'exception' to the 'power given to Congress to regulate courts.' [Citation.]" (*Ibid.*) The Court thus confirmed that the Suspension Clause limits a legislature's ability to restrict access to the writ of habeas corpus.

The Court then explained the policy reasons for such protections: "In our own system the Suspension Clause is designed to protect against . . . cyclical abuses [of the scope of the writ]. The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution." (*Boumediene*, *supra*, 553 U.S. at p. 745.) "It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty." (*Ibid.*)

Ultimately, the Court held that "when the judicial power to issue habeas corpus properly is invoked the judicial officer must have *adequate authority* to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release." (*Boumediene*, *supra*, 553 U.S. at p. 787, italics added.) The military-commission process in *Boumediene* fell short. The detainees faced significant barriers in presenting exculpatory evidence, challenging the legal grounds for their detention, and obtaining an

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[7] As California courts have recognized, the federal Constitution has a "similarly worded suspension clause" to that of the California Constitution. (*In re Estevez* (2008) 165 Cal.App.4th 1445, 1461; see also *Reno*, *supra*, 55 Cal.4th at p. 449, fn. 5.)

order of release. (*Id.* at pp. 787-792.) Thus, because "the Government ha[d] not established that the detainees' access to the statutory review provisions at issue is an adequate substitute for the writ of habeas corpus," the military-commission statute "effect[ed] an unconstitutional suspension of the writ." (*Id.* at p. 792.)

Boumediene is not the only example of a court invalidating habeas restrictions under the Suspension Clause. The Supreme Court of Montana held that a state statute that "procedurally barred" a petitioner from raising a constitutional issue by way of habeas corpus, when he failed to raise the issue on appeal, "unconstitutionally suspends the writ." (*Lott v. State* (Mont. 2006) 150 P.3d 337, 341-342.) In *Lott*, the petitioner's sentence violated the Double Jeopardy Clause, but he pled guilty and failed to appeal, and the authorities establishing those violations were decided after his one-year period to petition for relief ended. (*Id.* at p. 342.) The court explained that "[t]he central function of the courts is the pursuit of justice. Like all human endeavors, this pursuit is occasionally flawed. The writ of habeas corpus is designed to correct such flaws and to remedy 'extreme malfunctions in the state criminal justice systems.' [Citation.]" (*Ibid.*) To completely shut the door to postconviction relief from "a facially invalid sentence" violated Montana's Suspension Clause. (*Ibid.*)

Other courts have likewise recognized that legislative limits on habeas relief raise Suspension Clause concerns, even if the particular limits in those cases ultimately passed muster. In *Cline v. Mirandy*, the Supreme Court of West Virginia declared that "the Legislature cannot impose restrictions that would unconstitutionally remove the courts' constitutional jurisdiction over habeas corpus matters in violation of the Suspension Clause," but also approved a rule that limited habeas relief sought after the petitioner was released from incarceration. (*Cline v. Mirandy* (W.Va. 2014) 765 S.E.2d 583, 586, 589; see also *Felker v. Turpin* (1996) 518 U.S. 651, 664; *Sabisch*

v. Moyer (Md. 2019) 220 A.3d 272, 297 ["the General Assembly is limited . . . in legislating with respect to the writ. As such, . . . the General Assembly may regulate the right consistent with the Maryland Constitution, *i.e.*, without suspending the writ"].)

Under the principles recognized in the cases above, the question is whether Proposition 66's bar on successive petitions so reduces access to habeas in California that the writ is no longer adequate to its purpose and prior scope. The answer is yes—Proposition 66 clearly went too far. Proposition 66 therefore violates the Suspension Clause.

In California, the broad scope of the writ has been codified by statute since at least 1872. Penal Code section 1473, subdivision (a), provides that "[a] person unlawfully imprisoned or restrained of his or her liberty, *under any pretense*, may prosecute a writ of habeas corpus to inquire into the cause of his or her imprisonment or restraint." (Pen. Code, § 1473, subd. (a), italics added.) Subdivision (b) provides that the writ "may be prosecuted for, *but not limited to*," certain specified grounds. (*Id.*, subd. (b), italics added.) And in case there were any doubt, subdivision (d) emphasizes that "[t]his section does not limit the grounds for which a writ of habeas corpus may be prosecuted." (*Id.*, subd. (d).)

Although California courts have long recognized that habeas relief is subject to certain procedural restrictions "deemed necessary for institutional reasons," at least before 2016, "[t]hese rules . . . [were] of course subject to exceptions designed to ensure fairness and orderly access to the courts." (*Reno*, *supra*, 55 Cal.4th at p. 452.) "The manifest need for time limits on collateral attacks on criminal judgments . . . must be tempered with the knowledge that mistakes in the criminal justice system are sometimes made," and so "the basic charters governing our society wisely [held] open a final possibility for prisoners to prove their convictions were obtained unjustly." (*Sanders*, *supra*, 21 Cal.4th at p. 703.) Specifically, as explained above, this

Court previously recognized four "fundamental miscarriage of justice" exceptions to the procedural limits on habeas relief. (*Clark*, *supra*, 5 Cal.4th at p. 759.) As this Court explained, "[t]he magnitude and gravity of the penalty of death persuades us that the important values which justify limits on untimely and successive petitions are outweighed by the need to leave open this avenue of relief." (*Id.* at p. 797.)

Section 1509(d) eliminates prisoners' ability to invoke *Clark*'s "fundamental miscarriage of justice" exceptions in a wide range of circumstances. Although the statute leaves open the door for claims of actual innocence and "ineligib[ility] for the sentence of death," the statute otherwise took away *Clark*'s "[trial] error of constitutional magnitude," "convict[ion] under an invalid statute," and "grossly misleading profile [at sentencing]" exceptions. (Pen. Code, § 1509, subd. (d); *Clark*, *supra*, 5 Cal.4th at p. 759.) Therefore, even if petitioners have meritorious claims of, for example, ineffective assistance of counsel, *Batson* violations, or violations of any number of other constitutional safeguards, and even if petitioners can *justify* their failure to raise such claims previously, section 1509(d) nonetheless prohibits them from raising those claims in a successive petition.

Section 1509(d) thus "operates as an unconstitutional suspension of the writ." (*Boumediene*, *supra*, 553 U.S. at p. 733; see also *Lott*, *supra*, 150 P.3d at p. 342 ["the procedural bar created by [the statute] unconstitutionally suspends the writ"].) The statute eliminates capital petitioners' previously established right to seek habeas relief in a successive petition in a wide range of circumstances—circumstances this Court has described as a "fundamental miscarriage of justice." (*Clark*, *supra*, 5 Cal.4th at p. 759.) Section 1509(d) therefore unconstitutionally suspends the writ for many habeas petitioners facing the most serious penalty the State will ever carry out.

Notably, both Mr. Friend and the State agree that a literal, plain-meaning interpretation of "successive petition" would raise serious

Suspension Clause concerns. (See OB 34-36; AB 25-26.) But they urge the Court to avoid the issue by interpreting "successive petition" to mean something other than what it says. As discussed in Part I of the argument, *supra*, *Amici* respectfully submit that the statute's plain meaning cannot be ignored. "Rather than redraft the initiative while casting aside its purpose, [this Court] should interpret the [statute] to mean what it says, and analyze its constitutionality fairly and fully." (*Briggs*, *supra*, 3 Cal.5th at p. 891 (conc. & dis. opn. of Cuellar, J.).) The Court should hold that section 1509(d) violates California's Suspension Clause, and strike it from the Penal Code.

III. The Court Should Strike Penal Code Section 1509(d) and Other Provisions that Depend on It.

The plain language of section 1509(d)'s restriction on "successive petitions" violates the state and federal Due Process Clauses and California's Suspension Clause, for the reasons discussed above. That unconstitutional language therefore should be struck from the statute. (*People v. Mirmirani* (1981) 30 Cal.3d 375, 385-386 [where part of a statute is unconstitutional, the recourse is to "strike it"].) The Court also should excise from the statute all other provisions that are "inextricably connected" to section 1509(d)'s unconstitutional language. (*People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 332.) Specifically, the entirety of section 1509, subdivisions (d), (c), (e), as well as section 1509.1, must be struck to fully cure the constitutional infirmity.

A. The Court Should Strike Section 1509(d) in Its Entirety.

Section 1509(d) does not merely impose restrictions on successive petitions. Instead, it states in relevant part:

> An *initial petition which is untimely* under subdivision (c) or *a successive petition whenever filed* shall be dismissed unless the court finds, by the preponderance of all available evidence, whether or not admissible at trial, that the defendant is actually

> innocent of the crime of which he or she was convicted or is ineligible for the sentence.

(Pen. Code, § 1509, subd. (d), italics added.)

Through section 1509(d), voters for Proposition 66 chose to impose limitations on both successive and "untimely" initial petitions. These two groups—untimely initial petitions, and all successive petitions—are placed on equal footing, subject to section 1509(d)'s substantive restrictions on the available grounds for habeas relief. Removing only the part of this statutory scheme relating to successive petitions would upset the balance chosen by voters.

That Proposition 66 includes a severability clause does not militate a different result. "In determining whether the invalid portions of a statute can be severed," the presence of a severability clause merely "establishes a presumption in favor of severance." (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 270-271 [citing *Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 331].) Such a clause "does not require that [a court] salvage provisions which even though valid are not intended to be independently operative. [Citation.]" (*People's Advocate*, *supra*, 181 Cal.App.3d at p. 332.) Instead, the court must apply "three additional criteria": namely, grammatical, functional, and volitional separability. (*Matosantos*, *supra*, 53 Cal.4th at p. 271.) All three criteria must be met to warrant severance. (See, e.g., *People v. Library One, Inc.* (1991) 229 Cal.App.3d 973, 989 [failure to establish functional separability "renders moot" any argument as to the other criteria].) Here, neither functional nor volitional separability could be achieved by severing section 1509(d)'s restrictions on successive petitions, while leaving in place the same restrictions on untimely filed initial petitions.

Under the test for functional separability, the Court must determine whether other parts of the statutory scheme, absent the directly

unconstitutional one, "stand on their own, *unaided* by the invalid provisions nor rendered vague by their absence nor *inextricably connected to them by policy considerations*." (*People's Advocate*, *supra*, 181 Cal.App.3d at p. 332, italics added.) Accordingly, when "[t]he only way to enforce the [other] provisions is to draw [meaning] from" the unconstitutional language, then the provisions are "not functionally separable . . . and cannot be enforced independently." (*Library One*, *supra*, 229 Cal.App.3d at p. 989.)

Here, the Attorney General has acknowledged that "Proposition 66 describes only two types of petitions: 'initial' and 'successive.'" (AB 23.) These two terms rely on each other for logical and functional meaning. The concept of an "initial" petition gains relevance only when aided by the contrasting concept of a "successive" petition. Each term forms one conceptual half of section 1509(d), which limits the grounds for review for both untimely filed initial petitions and all successive petitions. That *some* untimely initial petitions are subject to the same limitations as *all* successive petitions is "inextricably connected . . . by policy considerations." (*People's Advocate*, *supra*, 181 Cal.App.3d at p. 332.) Accordingly, it is not tenable to remove only the limitations for "successive petitions" from section 1509(d).

Additionally, removing only the limitation for "successive petitions" would lead to an absurd imbalance in the statutory scheme, and therefore fail the test of volitional separability. This test requires that the "remainder [of the statute] would have been adopted by the legislative body had the latter forseen the partial invalidation," and considers whether it "constitutes a completely operative expression of the legislative intent." (*Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, 190, citations omitted.) In the context of ballot initiatives, the Court must be able to "sa[y] with confidence that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the

absence of the invalid portions." (*People's Advocate*, *supra*, 181 Cal.App.3d at pp. 332-333.)

Here, there no evidence that the voters considered the limitation on successive petitions separately, and a narrow severance would lead to a bizarre imbalance in the statutory scheme—and one that was never presented to the voters. In particular, whereas the original statute placed successive petitions "whenever filed" on equal footing with untimely filed initial petitions, striking just the limits on successive petitions would put initial petitions on a *lesser* footing. In this scenario, initial petitions would be subject to both timing and substantive limitations no longer imposed on successive petitions. Such a proposed construction would be of "strange form" and leave the State "with an ordinance different than it intended, one less effective in achieving the [intended] goals, and one which would invite [its own] constitutional difficulties." (*Metromedia*, *supra*, 32 Cal.3d at pp. 190-191.) Accordingly, section 1509(d) must be struck in its entirety.[8]

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[8] The remainder of section 1509(d) merely builds on the limitations for initial and successive petitions discussed above, and would make no sense with that language struck from the statute. Specifically, section 1509(d)'s second sentence provides that a "stay of execution shall not be granted for the purposes of considering a successive or untimely petition unless the court finds that the petitioner has a substantial claim of actual innocence or ineligibility." (Pen. Code, § 1509, subd. (d).) The third sentence then defines "[i]neligible for the sentence of death" as relating to circumstances "placing that sentence outside the range of the sentencer's discretion." (*Ibid.*) The last two sentences then illustrate examples of such circumstances by reference to other provisions of the Penal Code, namely sections 190.2 and 190.3. Accordingly, because none of this language can be enforced independently from the limitations on initial and successive petitions in the first sentence, it must be struck as well. (*Library One, supra,* 229 Cal.App.3d at p. 989.)

B. The Court Should Also Strike Sections 1509(c) and (e) and Section 1509.1 Because They Depend on Section 1509(d)

Once section 1509(d) is struck in its entirety, other related provisions—namely, section 1509, subdivisions (c) and (e), and section 1509.1—must also be excised to achieve functional and volitional separability.

Section 1509, subdivision (e): This provision would lose all meaning if subdivision (d) were excised. Subdivision (e) imposes an obligation for petitioners "claiming innocence or ineligibility under subdivision (d)" to "disclose all material information relating to guilt or eligibility." (Pen. Code, § 1509, subd. (e).) The disclosure requirement is premised on a petitioner claiming the limited (and unconstitutional) exceptions in section 1509(d). It cannot be enforced independently of the unconstitutional provision, and must likewise be struck. (*Library One*, *supra*, 229 Cal.App.3d at p. 989.)

Section 1509, subdivision (c): This provision is similarly defective without subdivision (d), and keeping it would violate the tests for both functional and volitional separability.

On its own, section 1509, subdivision (c) requires that an "initial petition must be filed within one year," except as provided in subdivisions (d) and (g). While it is technically possible to keep in place the one-year deadline *without* the limited exceptions provided in section 1509(d), doing so would lead to an absurd result: the removal of section 1509(d)'s exceptions would impose even more severe requirements on initial petitions, because the time limit would now be absolute. At the same time, without subdivision (d), petitioners could easily circumvent the one-year requirement for initial petitions by filing successive petitions thereafter. This inconsistent result shows that section 1509, subdivision (c) would be toothless—indeed, nonsensical—without subdivision (d)'s limitation on successive petitions. And again, there is no third category of petitions that could solve this

problem—"Proposition 66 describes only two types of petitions: 'initial' and 'successive.'" (AB 23.) Once section 1509(d) is properly struck, subdivision (c) cannot be "enforced independently," and therefore fails the test of functional separability. (*Library One*, *supra*, 229 Cal.App.3d at p. 989.)

For similar reasons, keeping section 1509, subdivision (c) in place would fail the test of volitional separability. Voters who decided to impose a deadline on initial petitions *and* a related bar on successive petitions intended for these complementary limitations to "expedite review in . . . habeas corpus proceedings" and to remedy what they believed was an "inefficient" system that was "subject to protracted delay." (*Briggs*, *supra*, 3 Cal.5th at p. 823.) Leaving subdivision (c) in place would not only be a "less effective" statutory scheme (*Metromedia*, *supra*, 32 Cal.3d at p. 191), but would result in a provision that serves no real purpose. Because it cannot be said—and certainly not said "with confidence"—that voters would have approved such an ineffective scheme, section 1509, subdivision (c) must be struck as well. (*People's Advocate*, *supra*, 181 Cal.App.3d at pp. 332-333.)

Section 1509.1: Section 1509.1, which immediately follows section 1509, must also be struck. Section 1509.1 outlines the appellate procedures for the grant or denial of relief for both initial and successive petitions. It is inextricably tied to section 1509(d)'s unconstitutional dictates.

Subdivision (c): Section 1509.1, subdivision (c), which establishes the appellate procedures for *successive* petitions, cannot be enforced independently of section 1509(d). Section 1509.1, subdivision (c) limits a petitioner's ability to appeal a superior court's denial of relief to situations where a court "grants a certificate of appealability." (Pen. Code § 1509.1, subd. (c).) In turn, a certificate of appealability may be issued only if the petitioner shows, among other things, that the (unconstitutional) criteria "of subdivision (d) of Section 1509 have been met." (*Ibid.*) But with section 1509(d) struck from the code, there is no provision from which section

1509.1, subdivision (c) can draw meaning. (*Library One*, *supra*, 229 Cal.App.3d at p. 989.)

Subdivisions (a) and (b): In turn, section 1509.1, subdivision (a), which restricts the use of *successive* petitions as a means of review, and outlines appeals for *initial* petitions, and subdivision (b), which discusses the issues to be considered on an appeal under subdivision (a), must be struck as well.

Restriction on successive petitions: Without section 1509.1, subdivision (c)'s procedures for appeal of successive petitions, section 1509.1, subdivision (a)'s express bar on the use of successive petitions "as a means of reviewing a denial of habeas relief" would then operate as a categorical bar to any review of a denial of a successive petition. (Pen. Code § 1509.1, subd. (a).) Petitioners would have no recourse to the appeal procedures in the stricken section 1509.1, subdivision (c), and would concurrently be precluded from seeking review of a court's decision by filing a successive petition in a higher court. Because "[n]othing in the text of Proposition 66, its structure, or its history reveals a purpose to preclude appellate courts altogether from reviewing a sentencing court's ruling on a habeas corpus petition," and "[t]he switch from one avenue (filing a new petition) to the other (appeal) plainly was dependent on the assumption that the latter offered an available means of review," (*Briggs*, *supra*, 3 Cal.5th at 900 (conc. & dis. opn. of Cuellar, J.).), section 1509.1, subdivision (a)'s bar on the use of successive petitions as a means of review cannot remain absent Proposition 66's appeals procedure, and must be struck as well.

Appeal procedures for initial petitions: Finally, the rest of section 1509.1, subdivision (a), which outlines the appellate procedures for *initial* petitions, and subdivision (b), which discusses the issues to be considered on an appeal under subdivision (a), must also be excised. As this Court described in *Briggs*, section 1509.1, subdivision (a) represents a "significant

departure from . . . existing procedure" by requiring "appeals to be taken to the courts of appeal" and imposing a 30-day deadline. (*Briggs*, *supra*, 3 Cal.5th at p. 836.) Subjecting only initial petitions to this procedure, as further outlined in subdivision (b), would disrupt the balance between initial and successive petitions that was presented to the voters through Proposition 66. Again, there is no evidence that the voters, who were only provided the option of imposing new appellate requirements on *both* initial and successive petitions, had considered this partial invalidation. Because this leads to the same "strange form" that is "different than . . . intended" and "less effective in achieving [Proposition 66's] goals" (*Metromedia*, *supra*, 32 Cal.3d at pp. 190-191), this Court should strike section 1509.1 in its entirety, thereby allowing the people to decide, on a clean slate, how to properly impose a constitutional habeas appellate procedure should they desire to do so.[9]

Striking the aforementioned provisions would remove the other parts of the Penal Code that are logically and functionally related to the unconstitutional limitation on successive petitions in section 1509(d). What remains of sections 1509 and 1509.1 would be the transfer provision in section 1509, subdivision (a) and the one-year directive in section 1509, subdivision (f), both held to be constitutional in *Briggs*, thereby leaving in place a statutory scheme that gives Proposition 66 its fullest possible effect under this Court's existing jurisprudence and the requirements of the Constitution.

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[9] *Amici* do not seek to relitigate the Court's decision upholding the constitutionality of these appellate procedures in *Briggs*. (See *Briggs*, *supra*, 3 Cal.5th 808 at pp. 836-841.) Instead, *Amici* merely argue that if section 1509(d)'s limitation on successive petitions is found unconstitutional, a question *Briggs* did not answer, then section 1509.1 must fall as a matter of severability, regardless of whether it is independently constitutional.

CONCLUSION

Amici respectfully urge this Court to strike Penal Code section 1509, subdivision (d), as well as subdivisions (c) and (e) and section 1509.1, and remand Petitioner's case with instructions that his claims be considered on the merits.

DATED: August 10, 2020

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ *Theane Evangelis*
Theane Evangelis

Attorneys for Constitutional Law Amici

CERTIFICATION OF WORD COUNT

Pursuant to rule 8.520(c) of the California Rules of Court, the undersigned hereby certifies that the foregoing proposed *Amici Curiae* Brief contains 8,920 words as counted by the word count feature of the Microsoft Word program used to generate this brief, not including the tables of contents and authorities, the cover information, the application, the signature block, and this certificate.

DATED: August 10, 2020 By: /s/ *Theane Evangelis*
Theane Evangelis

APPENDIX OF SIGNATORIES

Erwin Chemerinsky is the Dean and Distinguished Professor of Law at the University of California, Berkeley, School of Law, and he was formerly the founding Dean, Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law at the University of California, Irvine, School of Law. He has written extensively on the subject of constitutional law, including the constitutionality of several ballot measures, and he teaches courses on constitutional law, criminal procedure, and federal courts.

David L. Faigman is Chancellor and Dean of the University of California Hastings College of Law, where he is also the John F. Digardi Distinguished Professor of Law. He has written extensively on the interaction between constitutional law and science and teaches courses on constitutional law.

Hadar Aviram is a Professor of Law at the University of California Hastings College of Law. She teaches courses on criminal procedure, criminal justice, and various other criminology topics, and she has written extensively on related criminal issues, including publishing books on the American correctional landscape and the California parole process.

Lara Bazelon is a Professor of Law at the University of San Francisco School of Law. She serves as the Director of the Criminal Juvenile Justice and Racial Justice Clinical Programs and the Phillip and Muriel C. Barnett Chair in Trial Advocacy at the University of San Francisco School of Law. She teaches courses on criminal procedure and criminal justice.

Jennifer Chacón is a Professor of Law at the University of California, Los Angeles School of Law. She was previously Chancellor's Professor of Law and Senior Associate Dean of Administration at the University of California Irvine School of Law. Her research and writing focus on immigration law, constitutional law, criminal procedure, and criminal law. She teaches courses on constitutional law, the criminal legal system, and criminal procedure.

Sharon Dolovich is a Professor of Law at the University of California, Los Angeles, School of Law. She serves as Faculty Director of the Prison Law & Policy Program at the University of California, Los Angeles, School of Law. She teaches courses on the constitutional law of prisons, criminal law, and other post-conviction topics, and she has written extensively on the Eighth Amendment.

Karl M. Manheim is a Professor of Law at Loyola Law School. He has litigated cases at every level of state and federal courts, and he has argued several significant cases in the California Supreme Court, including Proposition 103. He teaches courses on intellectual property, privacy and technology, and constitutional law.

Alison Dundes Renteln is a Professor of Political Science, Anthropology, Public Policy, and Law at the University of Southern California. She has research experience in international law, human rights, comparative legal systems, legal and political theory, and constitutional law. She has also served as a member of the California Attorney General's Commission on Hate Crimes.

CERTIFICATE OF SERVICE

I, Viola Li, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 555 Mission Street, Suite 3000, San Francisco, CA 94105-0921, in said County and State.

On August 10, 2020 I served the following document(s):

APPLICATION FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF CONSTITUTIONAL LAW *AMICI*

on the parties stated below, by the following means of service:

SEE ATTACHED SERVICE LIST

Unless otherwise noted on the attached Service List, I served the above listed document(s) by transmitting a true copy via this Court's TrueFiling electronic filing system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 10, 2020 at San Francisco, California.

Viola Li

SERVICE LIST

Jon M. Sands Lindsey Layer Stanley Molever Arizona Federal Public Defender 850 West Adams Street Suite 201 Phoenix, Arizona 85007	*Counsel for Petitioner*
Gregg Zywicke Alice Lustre Office of the Attorney General 455 Golden Gate Avenue Suite 11000 San Francisco, CA 94102	*Counsel for Respondent*

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **FRIEND (JACK WAYNE) ON H.C.**
Case Number: **S256914**
Lower Court Case Number: **A155955**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **tevangelis@gibsondunn.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
APPLICATION	Application for Permission to File Amici Curiae Brief and Amici Curiae Brief of Constitutional Law Amici

Service Recipients:

Person Served	Email Address	Type	Date / Time
Kymberlee Stapleton Criminal Justice Legal Foundation 213463	kym.stapleton@cjlf.org	e-Serve	8/10/2020 9:40:00 PM
Office Office Of The Attorney General Court Added	sfagdocketing@doj.ca.gov	e-Serve	8/10/2020 9:40:00 PM
Kent Scheidegger Criminal Justice Legal Foundation 105178	kent.scheidegger@cjlf.org	e-Serve	8/10/2020 9:40:00 PM
Lindsey Layer Federal Public Defender	lindsey_layer@fd.org	e-Serve	8/10/2020 9:40:00 PM
Federal Federal Public Defender Arizona Stan Molever, Assistant Federal Public Defender 298218	stan_molever@fd.org	e-Serve	8/10/2020 9:40:00 PM
Attorney Attorney General - San Francisco Office Alice Lustre, Supv. Deputy Attorney General 241994	alice.lustre@doj.ca.gov	e-Serve	8/10/2020 9:40:00 PM
GREGG ZYWICKE California Dept of Justice, Office of the Attorney General 173163	GREGG.ZYWICKE@DOJ.CA.GOV	e-Serve	8/10/2020 9:40:00 PM
Theane Evangelis Gibson, Dunn & Crutcher, LLP 243570	tevangelis@gibsondunn.com	e-Serve	8/10/2020 9:40:00 PM
Kelsey Helland	KHelland@gibsondunn.com	e-Serve	8/10/2020 9:40:00

			PM
Viola Li 327783	vhli@gibsondunn.com	e-Serve	8/10/2020 9:40:00 PM
Zhen He Tan	ZTan@gibsondunn.com	e-Serve	8/10/2020 9:40:00 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/10/2020

Date

/s/Theane Evangelis

Signature

Evangelis, Theane (243570)

Last Name, First Name (PNum)

Gibson, Dunn & Crutcher, LLP

Law Firm