IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN RE JACK WAYNE FRIEND, On Habeas Corpus.	No. S256914 Related to: First Appellate District, Division Three, No. A155955 Alameda County Super. Ct., No. 81254 (Hon. Don Clay) DEATH-PENALTY CASE

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INTRODUCTION

The drafters of Proposition 66 chose not to define the phrase "successive petition." The parties agree on an interpretation of the term that is faithful to the voters' intent and consonant with prior usage and constitutional principles: a "successive petition" is a term of art referring to unjustified second and subsequent petitions. This Court has used the term "successive petition" the same way.

Amicus Curiae Criminal Justice Legal Foundation (hereinafter "CJLF") disagrees with this understanding of "successive petition" and advocates a broader definition.[1] Together with the procedural hurdles enacted by Proposition 66, however, CJLF's construction would eliminate remedies for faultless and diligent condemned prisoners. Claims that do not ripen or justifiably are not discovered until after an initial round of habeas proceedings concludes—including claims for which the factual bases were suppressed—would be barred unless they establish innocence or ineligibility. (See Opening Brief on the Merits (hereinafter "OBM") 26-31.)

CJLF offers four arguments supporting their view that the voters intended a definition of "successive petition" that would

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[1] Because CJLF offers the primary and lengthiest challenge to the parties' understanding of "successive petition," Friend organizes his answer to be responsive to CJLF's brief. Two other amicus briefs have been filed, one by the Federal Public Defenders for the Central and Eastern Districts of California and one by a group of law professors. Where appropriate, Friend addresses arguments in those briefs as well.

work such a dramatic change in habeas law—based on language and usage, purpose, structure and extrinsic materials, and constitutionality. These arguments do not withstand scrutiny.

First, CJLF purports to defend an understanding of the word "successive" derived from the dictionary, and then faults the parties for advocating a technical meaning. In fact, CJLF also urges a term-of-art definition, as its invocation of federal usage illuminates. The question is not whether to adopt a plain or ordinary definition versus a technical definition, but which technical definition best serves the voters' intent, comports with prior usage, and avoids constitutional problems. CJLF's claim to a plain and non-technical understanding is inaccurate, and federal and California law support the parties' approach.

Second, CJLF asserts that the parties' definition would nullify Proposition 66. This is incorrect. Proposition 66 replaced the equitable exceptions that previously allowed the Court to examine the merits of successive petitions with the narrower statutory exceptions in Penal Code section 1509, subdivision (d) (hereinafter "section 1509(d)").[2] The parties' definition will result in California courts reaching the merits of fewer successive petitions after Proposition 66, just as the initiative intended.

Third, CJLF relies on aspects of the new statutes' structure and supporting ballot materials to further its technical definition of "successive petition." But CJLF ignores aspects of the structure and ballot materials supporting the parties' understanding. Most

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[2] Further statutory references are to the Penal Code unless otherwise indicated.

importantly, the voter information guide explained that Proposition 66 was intended to eliminate petitions raising frivolous or unnecessary claims. No voter reasonably could have expected that by frivolous and unnecessary the drafters really meant meritorious. But that would be the result of adopting CJLF's proposed construction, which would bar review even of claims that have previously warranted relief.

Fourth, CJLF dismisses the parties' concerns that a broad definition of "successive petition" would violate the U.S. and California Constitutions. One state has ruled that a similar elimination of habeas remedies unconstitutionally suspends the writ, and two others have concluded that it violates due process. That at least three of California's sister states have recognized these constitutional problems is enough to reject CJLF's view that they are not serious. They are serious, and they require accepting the parties' approach rather than CJLF's.

At bottom, CJLF creates the same situation the Court confronted in *Briggs v. Brown* (2017) 3 Cal.5th 808: the drafters of Proposition 66 understand the initiative differently than would voters who reasonably relied on its text and supporting ballot materials. In *Briggs*, the disconnect concerned the five-year deadline for ruling on capital cases, which voters reasonably perceived would be enforceable but which the proponents later stated was merely aspirational. (See *id.* at p. 862 (conc. opn. of Liu, J.); *id.* at pp. 872-74 (conc. & dis. opn. of Cuéllar, J.).) Here, the disconnect concerns the kind of claims that can no longer be included in second and subsequent petitions. The voters were told

that Proposition 66 would bar frivolous and unnecessary claims. But CJLF now advocates a definition of "successive petition" that it concedes would bar meritorious ones—an interpretation that would violate the state and federal Constitutions and thereby jeopardize the initiative's enforcement altogether. To give effect to the voters' intent rather than CJLF's, and to comply with constitutional principles, the Court should reject CJLF's proposed construction.

ARGUMENT

I. Language and usage

CJLF's textual argument against the parties' understanding of "successive petition" rests on the premise that its interpretation of the phrase is "plain" and "ordinary," flowing from a dictionary meaning of the word "successive." (Application for Permission to File Brief Amicus Curiae Supporting Neither Party and Brief Amicus Curiae of the Criminal Justice Legal Foundation (hereinafter "CJLF Brief") 3, 12, 14.) From this premise, CJLF posits that the parties are arguing for an "alternative" and "artificial" meaning and therefore "must make a strong showing." (CJLF Brief 13, 14.)

But CJLF's premise is demonstrably false. Its understanding of the phrase "successive petition" is not plain or coextensive with the dictionary definition of "successive." Like the parties, CJLF uses "successive petition" to mean something specific and technical, as discussed below. The question, therefore, is not whether the parties must make some particularly strong showing to prove the correctness of their

uniquely technical or "idiosyncratic" understanding (CJLF Brief 20, 27), but which of two technical meanings is the best fit. Further, CJLF's discussion of federal and California law is incomplete and unpersuasive. Properly understood, both bodies of law support the parties' approach.

A. Plain meaning

CJLF cites a dictionary definition of "successive" as meaning "anything after the first," and two cases from this Court—a truancy case and a quarantine case—to conclude that "[t]he straightforward meaning" of "successive petition" is "a second, third, fourth, etc. petition." (CJLF Brief 14.) CJLF expressly concludes that these examples suffice to demonstrate the "ordinary meaning" of "successive petition," and juxtaposes this with the "alternative definition" the parties advocate. (CJLF Brief 14.)

Under this dictionary definition, however, *all* habeas petitions filed after the first would be successive. This would include the first counseled petition filed after a *pro se* shell petition, an amended petition, and any subsequent petitions challenging a new or amended judgment. Indeed, if "successive petition" referred unqualifiedly to any habeas corpus petition filed after the first, then even an initial state habeas petition would be successive if the prisoner had filed first in federal rather than state court. (E.g., *In re Gallego* (1998) 18 Cal.4th 825, 831 [recounting that the prisoner filed his first habeas petition in federal court before subsequently filing a state petition].)

This dictionary definition is not really the interpretation

CJLF urges, which would find no support in federal or California practice.[3] Instead, as CJLF unpacks the phrase in its brief it becomes clear that amicus understands "successive petition" to mean something like this: any habeas petition filed in the same court system that has already adjudicated through final decision one prior collateral attack on the same judgment. (CJLF Brief 12 [explaining that "successive petition" is "ordinar[ily]" used to refer to all petitions filed "after an initial petition attacking the same judgment had been decided"]; see also CJLF Brief 14, 16, 18, 22, 27, 29, 31.) That is, to be sure, different from the parties' understanding. But it cannot credibly be considered an understanding that flows from the dictionary or cases about consecutive truancies.[4]

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[3] The Supreme Court has "often made clear that" the phrase "second or successive" in 28 U.S.C. § 2244 "does not simply refer to all habeas filings made second or successively in time, following an initial application. For example, the courts of appeals agree (as do both parties) that an amended petition, filed after the initial one but before judgment, is not second or successive. . . . Chronology here is by no means all." (*Banister v. Davis* (2020) 140 S.Ct. 1698, 1705, citations, footnote, and quotation marks omitted; accord, *In re Morgan* (2010) 50 Cal.4th 932.)

[4] The amici law professors *do* assert that the initiative used the phrase "successive petition" literally based on the American Heritage Dictionary definition of the word "successive." (*Amici Curiae* Brief of Constitutional Law *Amici* (hereinafter "Professors Brief") 14, 17-18.) But because the professors agree with Friend that prior to Proposition 66 the phrase had a technical meaning (Professors Brief 17, quoting *In re Robbins* (1998) 18 Cal.4th 770, 787, fn. 9), their resort to the dictionary is misplaced. (*Hall v. Hall* (2018) 138 S.Ct. 1118, 1128 ["[I]f a word is obviously transplanted from another legal source. . . , it

Especially because CJLF cannot lay claim to any plain meaning of the statutory language, it is not enough simply to accuse the parties of advocating a "technical" or "artificial" understanding. (CJLF Brief 29.) CJLF must demonstrate that its term of art is a better fit than the one offered by the parties. Its discussion of federal and California law fails to do so.

B. Federal usage

CJLF confirms what the parties have already explained: the phrase "second or successive" in 28 U.S.C. § 2244 (hereinafter "§ 2244") is a term of art, with a meaning that is neither plain nor literal. (OBM 41-42; Answer Brief on the Merits (hereinafter "ABM") 30-31; CJLF Brief 16-19; see also *Banister v. Davis* (2020) 140 S.Ct. 1698, 1705 ["The phrase 'second or successive application'. . . is a 'term of art,' which 'is not self-defining.'"].) CJLF criticizes the parties because their understanding of the phrase "successive petition" in section 1509(d) is not coextensive with federal usage of "second or successive" in § 2244. (CJLF Brief 16, 19.) But the parties have not argued that federal usage supplies the identical meaning of "successive petition" here. Instead, the parties have explained that "second or successive" in § 2244 is a term of art, corroborating their view that "successive petition" in section 1509(d) is also a term of art.

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brings the old soil with it."]). Further, the professors' definition would change prior practice more radically than what CJLF proposes—cutting off review even of the kind of second-in-time petitions CJLF would appear to permit. As explained *infra*, the evidence does not support that the voters intended to upend habeas practice so significantly.

Federal law supports the parties' position in another way. "The phrase 'second or successive'" in § 2244 "takes its full meaning from . . . case law, including decisions predating the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)." (*Panetti v. Quarterman* (2007) 551 U.S. 930, 943-44.) Specifically, the federal courts "have interpreted the concept incorporated in this term of art as derivative of the 'abuse-of-the-writ' doctrine" predating AEDPA. (*Hill v. Alaska* (9th Cir. 2002) 297 F.3d 895, 897; see also *Banister*, *supra*, 140 S.Ct. at pp. 1705-06 [abuse-of-the-writ doctrine informs whether subsequent petition is "second or successive"]; *Magwood v. Patterson* (2010) 561 U.S. 320, 343 (conc. opn. of Breyer, J., joined by Stevens and Sotomayor, JJ.) ["[A]s the dissent correctly states, if Magwood were challenging an undisturbed state-court judgment for the second time, abuse-of-the-writ principles would apply[.]"]; *Magwood*, 561 U.S. at p. 344 (dis. opn. of Kennedy, J., joined by Roberts, C.J., and Ginsburg and Alito, JJ.).)[5] Under pre-AEDPA cases, "[a]n 'abuse-of-the-writ' occurs when a petitioner raises a habeas claim that could have been raised in an earlier petition were it not for inexcusable neglect." (*Hill*, 297 F.3d at p. 898.)

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[5] Justice Thomas wrote the lead opinion in *Magwood* and disputed that "second or successive" should be interpreted "by reference to our longstanding doctrine governing abuse of the writ." (*Magwood*, *supra*, 561 U.S. at p. 337.) But that portion of the opinion was joined only by Justice Scalia and expressly rejected by the seven Justices in the concurring and dissenting opinions, as noted above.

The parties have advocated a similar approach here: a "successive petition" for purposes of section 1509(d) is one that this Court previously treated as unjustified. The contours of federal and California law are different, and therefore the meaning of "successive" in section 1509(d) is not identical to "second or successive" in § 2244. But both phrases draw their meaning from preexisting judicial classifications about which habeas petitions were appropriate for consideration on the merits. The question of whether a petition is successive for purposes of applying a procedural bar is a legal conclusion arrived at only after examining the petition's provenance and purpose.[6]

C. California usage

California usage is similar. In *In re Robbins* (1998) 18 Cal.4th 770, 779 the Court issued an order to show cause "to address a number of general procedural issues relating to petitions for writs of habeas corpus in capital cases." The petition at issue was the second habeas petition the condemned prisoner filed in state court. (*Ibid.*) Notably, although the case divided the Court and produced four separate opinions, not a single opinion referred to the petition at issue as successive. In footnote 9 the Court explained that not all "subsequent" petitions are deemed to be "successive" for purposes of applying procedural bars. (*Id.* at p.

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[6] CJLF seems implicitly to appreciate this, describing certain permissible second-in-time federal petitions as "not deemed successive" (CJLF Brief 17, quoting *Panetti*, *supra*, 551 U.S. at p. 945) and "not successive" (CJLF Brief 19)—rather than successive-but-nonetheless-reviewable.

788, fn. 9.) Instead, only "claims presented in a 'subsequent' petition that *should have been* presented in an earlier filed petition will be barred as 'successive'"—and, even then, only when the petitioner fails to "'adequately explain[]'" the prior omission. (*Ibid.*)[7]

Robbins therefore clearly distinguishes subsequent petitions from successive ones. Further, it demonstrates that deeming a subsequent petition to be successive for purposes of considering a procedural bar is a legal conclusion that incorporates an inquiry into why the petition's claims were not presented previously. As in federal law, whether a petition is successive is not just a matter of chronology, and the inquiry incorporates rather than precedes the questions of justification and abusiveness.

The Court's most recent word on successive petitions is consistent with this understanding. In *Briggs*, *supra*, 3 Cal.5th at p. 836, fn. 14, the Court defined "successive petition," citing *Robbins* to note that before Proposition 66 the term referred "to one raising claims that could have been presented in a previous petition." This definition unambiguously draws its meaning from context rather than just counting. If CJLF were correct that the questions of successiveness and justification were separate inquiries, this definition would make no sense. The Court would

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[7] As noted *supra*, the amici law professors agree that prior to Proposition 66 *Robbins* set forth the Court's understanding of which petitions are "successive" for purposes of applying a procedural bar. (Professors Brief 17.)

have defined "successive petition" simply as any petition following the first.

Several of the Court's recent decisions confirm implicitly what *Robbins* and *Briggs* say explicitly. In *In re Richards* (2016) 63 Cal.4th 291, 293, for example, the Court considered a second-in-time habeas petition filed by a condemned prisoner trying to take advantage of amendments to section 1473. Among the three opinions the Court produced, never once is the petition at issue referred to as successive. That is unsurprising given the change in the applicable law and the definition of "successive petition" offered in *Robbins* and *Briggs*. (*Richards*, 63 Cal.4th at p. 294, fn. 2 ["Because of the change in the applicable law concerning the definition of false evidence, the petition is not subject to the procedural bar of successiveness."].)

Likewise, in *In re Bacigalupo* (2012) 55 Cal.4th 312 and *In re Miranda* (2008) 43 Cal.4th 541, the Court never refers to the operative petitions as successive despite addressing the second petition in the former case and consolidated fourth and fifth petitions in the latter. In both cases the subsequent petitions were based on new evidence that could not have been discovered earlier. (See *Bacigalupo*, 55 Cal.4th at p. 323; *Miranda*, 43 Cal.4th at pp. 544-45 & fn. 2.) As in *Richards*, the petitions at issue were justified—so nobody thought to describe them as successive, a term of art reserved for abusive petitions. (Accord, Order at p. 2, *In re Lucero* (Cal. Ct. App. Dec. 30, 2019, No. E074350 ["Lucero's current petition *is not successive* because he could not have raised his claim about flawed or false evidence in

his 2002 petition." (emphasis added)].)

CJLF asserts that even though *Robbins* expressly set the terms "subsequent" and "successive" in contradistinction, the opinion should not be read "to indicate that the term 'successive' is narrower than 'subsequent.'" (CJLF Brief 27.) But as explained *supra*, even CJLF uses the term "successive petition" in reference to a subset of all subsequent petitions. CJLF's suggestion that the parties are uniquely and implausibly reading *Robbins* to distinguish successive petitions from all subsequent ones is inapt.

CJLF further suggests that in *Robbins* the Court misread the cases on which it relied: *In re Horowitz* (1949) 33 Cal.2d 534, 546-47 and *In re Clark* (1993) 5 Cal.4th 750, 769-70. CJLF notes that the label "subsequent" does not appear in *Horowitz* (CJLF Brief 28). *Robbins* did not identify whether it was quoting from *Horowitz* rather than *Clark*, however, and the Court may well have adopted that term from *Clark* instead. (See *Clark*, *supra*, 5 Cal.4th at pp. 746, 792 [referring to "subsequent" petitions or applications].)[8]

Nor does *Horowitz*'s single reference to "successive

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[8] Or, *Robbins* may not have intended to quote either case but instead used quotation marks to emphasize and thereby distinguish the words "subsequent" and "successive." (See John McWhorter (Aug. 31, 2007) *Conveying Emphasis*, The New York Sun ["Quotations set off something, and it's a short step from setting something off to emphasizing it."]; see also *Robbins*, *supra*, 18 Cal.4th at p. 788, fn. 9 [referring to "the bar of *In re Horowitz* 'successiveness,'" although the word "successiveness" does not appear in *Horowitz* or *Clark*].)

proceedings" detract from the parties' reading of *Robbins*, contrary to CJLF's assertion. (CJLF Brief 28.) That language comes from a 100-year-old decision, *In re Drew* (1922) 188 Cal. 717, 722, and *Robbins* reasonably read *Horowitz* together with modern precedent to recognize that a petition's "successiveness" for purposes of applying procedural bars turns on whether it is abusive or justified rather than on its numerical order. (*Robbins*, *supra*, 18 Cal.4th at p. 788, fn. 9; see also *Horowitz*, *supra*, 33 Cal.2d at pp. 546-47 [declining to consider claims that were presented in a prior habeas petition absent a change in the facts or law, as well as those claims that were known to the petitioner at the time of the prior petition].)

The other case on which *Robbins* relied was *Clark*. CJLF asserts that *Clark* used "successive petition" more broadly than the parties' understanding of *Robbins* permits. (CJLF Brief 23.) To that end, CJLF identifies instances in *Clark* in which it says "successive petition" is used to mean any second or subsequent petition. (CJLF Brief 23-28.) CJLF takes the same tack with *In re Reno* (2012) 55 Cal.4th 428, identifying passages in which it believes the Court used "successive petition" to mean any petition that follows the first. (CJLF Brief 20-23.)

CJLF overlooks, however, that in *Briggs* the Court relied on *Clark* to define "successive petition" by reference to whether it was justified, not whether it was second or subsequent in time. (*Briggs*, *supra*, 3 Cal.5th at p. 836, fn. 14, citing *Clark*, *supra*, 5 Cal.4th at pp. 769-70.) In the cited portion of *Clark*, the Court addressed successiveness in a section called "[A]buse of the writ,"

equating "abusive writ practice" and "repetitious collateral attacks" with "successive petitions." (*Clark*, 5 Cal.4th at p. 769.) Thus, the Court has already decided CJLF's reading of *Clark* is incorrect. The same conclusion must be drawn about *Reno*, which preceded *Briggs* by five years and was otherwise discussed therein. If *Clark* and *Reno* established that in California "successive petitions" and "second and subsequent petitions" are the same thing, *Briggs* could not have offered the definition it did without misreading the Court's precedents.

Furthermore, *Reno* imposed pleading and formatting requirements on *all* "second and subsequent" habeas petition filed in this Court (*Reno*, *supra*, 55 Cal.4th at pp. 443-44, 453, 515-16), including those that are deemed successive for purposes of applying a procedural bar because they are unjustified. Because the scope of the decision was so broad, the Court had no reason to distinguish which second and subsequent petitions were properly deemed successive, as in *Robbins*, and no reason to define "successive petition," as in *Briggs*.

Even if CJLF were correct that "successive petition" has sometimes been used to mean something different than the definition given in *Robbins* and *Briggs* and advocated by the parties, this suggests only that the phrase is susceptible to multiple meanings. It is "an established principle that ambiguities in penal statutes must be construed in favor of the offender, not the prosecution." (*In re Jeanice D.* (1980) 28 Cal.3d 210, 217; see also *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631 ["[T]he policy of this state [is] to construe a penal statute as

favorably to the defendant as its language and the circumstance of its application may reasonably permit."].) This canon of interpretation applies to statutes adopted through the initiative process as well as to those enacted by the Legislature, and has particular force here given the "severity of the penalty." (*People v. Weidert* (1985) 39 Cal.3d 836, 848 [construing the phrase "criminal proceeding" used in former section 190.2, which established eligibility for capital punishment].)

The parties' understanding of "successive petition" is more favorable to offenders than the one CJLF offers, which it admits would leave at least some prisoners without a remedy in California's courts. (CJLF Brief 41.) Thus, although Friend maintains that "successive petition" in section 1509 has an unambiguous meaning supplied by *Robbins*, if the Court concludes instead that the phrase is ambiguous, the result is still the same. The Court must resolve the ambiguity in favor of offenders and give "successive petition" the meaning the parties advocate.

II. Statutory purpose

CJLF next argues that the parties' definition would "nullif[y]" Proposition 66's reforms and simply codify "the status quo ante." (CJLF Brief 30, 42.) This is inaccurate. Before the initiative, a condemned prisoner could obtain merits review of an unjustified and therefore "successive petition" by coming within one of *Clark*'s four equitable exceptions designed to prevent a fundamental miscarriage of justice. (*Clark*, *supra*, 5 Cal.4th at pp. 797-98.) Respondent, the superior court in this case, and

CJLF all assert that Proposition 66 replaces these equitable exceptions with the statutory exceptions in section 1509(d). (See ABM 30; Order Den. Pet. for Writ of Habeas Corpus at p. 4 (Oct. 24, 2018, No. 81254A); CJLF Brief 38-40.)

Accepting this argument, after Proposition 66 condemned prisoners can no longer obtain merits consideration of certain successive petitions that were previously reviewable. For example, CJLF explains that a successive petition is now unreviewable even where "the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed a sentence of death." (CJLF Brief 38, 40, quoting *Clark*, *supra*, 5 Cal.4th at pp. 797-98.) Under the prior regime, such a petition would have been reviewable despite its successiveness. Replacing the equitable exceptions from *Clark* with the statutory exceptions in section 1509(d) will thereby reduce the number of capital habeas cases receiving the time and attention from courts that merits review requires, facilitating the cost savings, speed, and finality Proposition 66 was intended to promote. (*Briggs*, *supra*, 3 Cal.5th at p. 822.) The parties' understanding of the phrase "successive petition" therefore advances the voters' intent.[9]

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[9] The amici law professors assert that Proposition 66's goal of expediting habeas proceedings supports a literal definition of "successive petition." (Professors Brief 16-17.) Because the parties' approach is consistent with the voters' intent in this respect, however, the fact that the initiative's goal of expediting proceedings might be further advanced by adopting a literal definition is not an adequate basis to conclude that the voters

To support its contrary argument, CJLF explains that Proposition 66's successive petition provisions were aimed at curbing the federal stay-and-abey practice permitted by *Rhines v. Weber* (2005) 544 U.S. 269. (CJLF Brief 30-41.) Essentially, CJLF's argument is that the clearer the exceptions to California's procedural bars, the less frequently the federal courts will permit prisoners to return to state courts with unexhausted claims. (CJLF Brief 37-41.)

CJLF's discussion reflects its view of how state and federal habeas proceedings "should" work. (CJLF Brief 31.) For example, CJLF believes all prisoners should obtain only one round of federal and state habeas proceedings (CJLF Brief 31), overlooking the need to return to one forum or the other when, for example, previously suppressed evidence comes to light. (*E.g.*, *Bacigalupo*, *supra*, 55 Cal.4th 312; see also OBM 26-31 [surveying many situations in which a petitioner might need to return to state court].) Similarly, CJLF believes the federal courts too frequently find "good cause" for condemned prisoners to return to state court under *Rhines*. (CJLF Brief 35 ["Part of the problem is the failure of the federal district courts and federal court of appeals to obey the Supreme Court's directions in *Rhines*."].)

CJLF's discussion is unpersuasive for two reasons. First,

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intended *sub silentio* to abolish well-established habeas practices such as shell petitions and amendments, absent innocence or ineligibility. (E.g., *Morgan*, *supra*, 50 Cal.4th 932.)

the parties' understanding of "successive petition" facilitates rather than thwarts the proper balance between state and federal habeas proceedings, as demonstrated by the amicus brief filed jointly by the Federal Public Defenders for the Eastern and Central Districts of California. As the Federal Public Defenders explain, the parties' definition ensures that California rather than federals courts "remain the primary forum for adjudicating capital prisoners' federal constitutional claims." (Amici Curiae Brief in Support of Petitioner 7.) By contrast, CJLF would give up state-court review of federal claims (CJLF Brief 41), undermining the principles of federalism and comity animating postconviction review. (E.g., *O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 844 [recognizing that state courts should have first opportunity to review violations of federal law attending state-court judgments].)

Second, and more importantly, CJLF's particular view of how state and federal habeas proceedings should interact has no bearing on what the *voters* intended by enacting Proposition 66. The statutory language is silent about federal stay-and-abey orders under *Rhines*. And this information likewise cannot be found in the initiative's findings and declarations, which addressed "California's death penalty system," not the federal courts (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) (hereinafter "Voter Guide"), Text of Prop. 66, § 2, p. 212), and which referenced federal habeas litigation only obliquely (see *id.* at p. 213 ["A capital case can be fully and fairly reviewed by both the state and federal courts within ten years."]).

The discussion of the initiative by the Legislative Analyst likewise provides no basis to conclude that the voters enacted section 1509(d) to advance CJLF's opposition to the current interaction between federal and state postconviction litigation. Over several pages in the Voter Guide, the Legislative Analyst provided background and analysis to educate the voters on the state of the law and the effects of the changes. The Legislative Analyst explained that capital cases ordinarily involve habeas corpus proceedings in the federal courts. (Voter Guide, *supra*, Analysis by the Legislative Analyst, p. 104.) But nowhere is the interaction between state and federal habeas proceedings discussed, nor are reforms to that interaction explained. (See *id.* at pp. 104-07.) Indeed, when the Legislative Analyst informed the electorate that legal challenges in capital cases can take "decades," it offered as explanations for this delay the amount of time prisoners wait for appellate counsel and for this Court to decide direct appeals and habeas petitions. (*Id.* at p. 105.) There is no discussion of exhaustion or federal abeyance.

Nor do the Voter Guide's arguments in favor of Proposition 66 illuminate the issue. Although the proponents acknowledged that the initiative's reforms "sound[ed] complicated," they explained that the reforms were "actually quite simple. HERE'S WHAT PROPOSITION 66 DOES:"

1. All state appeals should be limited to 5 years.
2. Every murderer sentenced to death will have their special appeals lawyer assigned immediately. Currently, it can be five years or more before they are even assigned a lawyer.
3. The pool of available lawyers to handle these

appeals will be expanded.

4. The trial courts who handled the death penalty trials and know them best will deal with the initial appeals.
5. The State Supreme Court will be empowered to oversee the system and ensure appeals are expedited while protecting the rights of the accused.
6. The State Corrections Department (Prisons) will reform death row housing; taking away special privileges from these brutal killers and saving millions.

(Voter Guide, *supra*, Argument in Favor of Prop. 66, p. 108.) Nowhere in this description of the initiative's six "simple" changes is any suggestion that it would alter the definition of "successive petition" so as to make state procedural bars easier for federal courts to interpret and thereby to achieve a reduction in federal stays.

In sum, CJLF cannot credibly argue that the voters chose the technical definition of "successive petition" it favors to clarify state procedural bars for the purpose of decreasing the frequency of *Rhines* stays. Because the voters were not educated on what CJLF calls "[t]he [p]roblem" (CJLF Brief 30), it cannot reasonably be presumed that the voters understood a broader definition of "successive petition" to be part of "[t]he [s]olution" (CJLF Brief 37). Whatever CJLF thinks the proper balance should be between federal and state habeas litigation, it has no bearing on what the electorate intended for "successive petition" to mean.

III. Structure and ballot materials

CJLF advances several arguments against the parties' agreed-on definition of "successive petition" based on the

structure of the newly enacted statutes and the ballot materials. Again, none of these arguments warrants rejecting the parties' approach.

A. Structure

CJLF first argues that the parties' approach would create a third class of habeas petitions—those that are not "initial petitions" and not "successive petitions"—which the new statutes do not mention. (CJLF Brief 42-43.)[10] This is no reason to reject the parties' approach. The analogous federal statutes facially divide petitions into "second or successive" collateral challenges and those which precede them—the first challenge. (28 U.S.C. §§ 2244, 2255.) The statutes do not refer to a third class of challenges that come after the first but that are not "second or successive" for purposes of imposing procedural bars. Nonetheless, the federal courts have no trouble acknowledging this third class of petitions, conceptually or linguistically. (E.g., *Hill*, *supra*, 297 F.3d at p. 898 ["That a prisoner has previously filed a federal habeas petition does not necessarily render a subsequent petition 'second or successive.'"]; *In re Bowen* (6th Cir. 2006) 436 F.3d 699, 704 ["[N]ot every numerically second petition is 'second or successive' for purposes of AEDPA."]; *Wentzell v. Neven* (9th Cir. 2012) 674 F.3d 1124, 1127 [observing that "second petition was not successive"]; *Carranza v. United States* (2d Cir. 2015) 794 F.3d 237, 240 [recognizing that a "second § 2255 motion was not 'successive'"].)

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[10] The amici law professors make the same point. (Professors Brief 15-16.)

CJLF perceives two problems with acknowledging a class of subsequent-but-not-successive petitions. It asserts that the timeliness requirement for "initial petition[s]" in section 1509, subdivision (c) would not apply to this third class of petitions, and therefore the parties' approach would result in some subsequent petitions being treated more favorably than initial petitions. CJLF also argues that section 1509.1 does not contemplate how such petitions would be appealed. (CJLF Brief 43.)

As discussed in the parties' briefs, any potential interpretive difficulties are small and surmountable. (ABM 32-34; Reply Brief on the Merits 9-10.) Respondent explained that subsequent-but-not-successive petitions could be treated as "initial" for purposes of the timeliness requirement in section 1509, subdivision (c), subject to equitable protections to avail diligent prisoners. (ABM 32-33.)[11] Friend offered a similar approach to address the appellate issue (OBM 76-77), and Respondent also noted that a new habeas petition could be filed in the court of appeal to review a superior court order on a subsequent-but-not-successive petition (ABM 33-34).

Similarly, CJLF asserts that the meaning of "successive petition" in 1509.1, subdivision (a) is "inconsistent with the

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[11] There are undoubtedly additional solutions consistent with the statutes. For example, if the one-year period in section 1509, subdivision (c) does not apply to subsequent-but-not-successive petitions because they are not "initial," then the superior courts can nonetheless police timeliness through application of the Court's pre–Proposition 66 standards, which can be modified to cohere with section 1509. (E.g., *Gallego*, *supra*, 18 Cal.4th 825.)

parties' proposed definition." (CJLF Brief 44.) But CJLF ignores Friend's explanation that the use of "successive petition" in 1509.1, subdivision (a) is consistent with the parties' understanding of the phrase in section 1509. (Compare OBM 38-39 with CJLF Brief 43.) CJLF offers no response to the parties' analysis and considered prescriptions.

Nor has CJLF explained why any friction among the new statutory provisions resulting from the parties' approach justifies rejecting it. In *Lindh v. Murphy* (1997) 521 U.S. 320 the Supreme Court addressed the statutes governing federal habeas corpus amended by AEDPA. The specific question was whether the statutes applied to certain cases pending when AEDPA became law, and it required harmonizing several provisions of the new legislation. (*Id.* at pp. 326-36.) From the Court's perspective, the endeavor was mostly successful, but it candidly acknowledged a "loose end" in its statutory interpretation—one cross-reference that remained a mystery after all was said and done. (*Id.* at p. 336.) Rather than reject an interpretation that accorded "more coherence" to the legislation than the alternatives, the Court instead accepted the untidy result, concluding simply that "in a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting." (*Ibid.*)

Members of this Court have likewise recognized that aspects of Proposition 66 give rise to practical and interpretive challenges. For example, Proposition 66 imposed time limits that were "not remotely close to realistic" (*Briggs*, *supra*, 3 Cal.5th at p. 871 (conc. opn. of Liu, J.)), and "provide[d] no workable means

of enforcing" those limits (*id.* at p. 857 (maj. opn.)). Proposition 66 also purported to create the illusory remedy of mandamus to enforce the time limits in *this* Court. (*Id.* at p. 856.) It used "shall" when the drafters meant should or may. (*Id.* at pp. 858-59.) It cross-referenced one provision when the drafters meant another. (*Id.* at p. 855 ["Proponents assert that section 190.6, subdivision (e)'s reference to subdivision (b) was a drafting error."].) And it enacted one section, 1509.1, that directly contravened and yet failed to mention another, section 1506. (*Id.* at p. 840.) Even if loose ends and some friction remain as the courts give effect to the statutes Proposition 66 enacted and amended, the courts are perfectly competent to work out these issues. As in *Lindh*, they are no basis to reject the statutory interpretation that is otherwise best.

B. Ballot materials

CJLF argues that the ballot materials unambiguously advance a particular definition of "successive petition," and that this unambiguous definition contravenes the parties' approach. But CJLF's review of the Voter Guide overlooks pertinent information and misinterprets how reasonable voters would likely have understood it. The ballot materials are ambiguous, and the parties' definition comports with the expectations voters reasonably formed based on those materials.

The ballot materials state that "frivolous and unnecessary claims should be restricted." (Voter Guide, *supra*, Text of Prop. 66, p. 213.) This point was emphasized in the newspaper editorial CJLF cites. (CJLF Brief 44-5, citing Scheidegger, *A Better Death*

Penalty for California, LA Times (Sept. 29, 2016), available at https://www.latimes.com/opinion/op-ed/la-oe-scheidegger-pro-prop-66-20160929-snap-story.html.) There, CJLF's legal director repeated that Proposition 66 would restrict claims that are "patently" "without merit," "abusive," and "pointless." (*Ibid*.) The Voter Guide also promised that Proposition 66 would "ensure justice for both victims *and defendants*." (Voter Guide, Text of Prop. 66, § 2, p. 213, emphasis added.)

Together, these extrinsic materials communicated to the electorate that Proposition 66 would prevent condemned prisoners from filing subsequent petitions lacking any serious purpose or value. It is unlikely that from these communications the voters would have understood "successive petition" in a way that would bar claims that are *not* frivolous. And it is inconceivable, especially given the initiative's promise to ensure justice for defendants, that they would have understood the phrase in a way that would bar claims that are actually meritorious, like the ones in *Bacigalupo* and *Miranda*, based on evidence the State suppressed.[12] But CJLF concedes this would

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[12] CJLF's approach also may have prevented the Court from granting relief on the-ineffective-assistance-of-counsel claim the Court recently remedied in *In re Gay* (2020) 8 Cal.5th 1059, which was presented in a subsequent petition. Gay asserted his innocence, but the Court did not reach that question and it is unclear that he could have satisfied the innocence exception in section 1509(d). The "central issue at trial" was whether Gay or one of his two accomplices shot the victim, but even the accomplice who the prosecution did not believe fired any shots was initially charged with special circumstances murder. (*Gay*, *supra*, 8 Cal.5th at p. 1065.) Thus, even if Gay established he was not the shooter, under CJLF's proposed definition of "successive

result if the parties' definition is incorrect. (CJLF Brief 41.) The voters were not told, and therefore could not have intended, that "successive petition" would be construed to require dismissal of meritorious claims.

By contrast, the parties' definition would further the voters' intent as expressed in the ballot materials, primarily by restricting frivolous petitions. If a condemned prisoner filed a second-in-time petition without adequate explanation, it would be deemed successive (see *Robbins*, *supra*, 18 Cal.4th at p. 787, fn.9), and therefore section 1509(d) would require dismissal absent a showing of innocence or ineligibility. Frivolous claims will thereby be dismissed. (Cf. *Reno*, *supra*, 55 Cal.4th at pp. 486-87 [describing as "frivolous" the refiling of a claim raised in a prior petition where the asserted justification was the incantation of "new" authorities that were actually cited in the earlier proceedings].)

CJLF relies on several other provisions of the Voter Guide, but none unambiguously supports the definition it advocates or rebuts the parties' approach. CJLF asserts that the definition of "successive petition" could not be stated "any more clearly" than in the Voter Guide's legislative analysis, which explained that Proposition 66 "does not allow additional habeas corpus petitions to be filed after the first petition is filed, except in those cases

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petition" the Court at least would have been mired in evaluating whether his evidence satisfied subdivision (d), if not completely prevented from remedying the egregious constitutional violation it found.

where the court finds that the defendant is likely either innocent or not eligible for the death sentence." (CJLF Brief 44, quoting Voter Guide, *supra*, Analysis by the Legislative Analyst, p. 106.) According to CJLF, the Legislative Analyst "nails it": the "successive petition limitation applies to all petitions after the first." (CJLF Brief 44.)

As explained in Section I, however, this is not how CJLF defines "successive petition." Rather than referring to "all petitions after the first" (CJLF Brief 44), which would include, among other pleadings, the first counseled petition following a *pro se* placeholder petition and subsequent petitions challenging an amended judgment, CJLF uses "successive petition" to refer only to *some* petitions filed after the first—those which are filed in the same court system that has already decided a prior petition attacking the same judgment. (CJLF Brief 12.) To the extent the Legislative Analyst meant to define "successive petition" at all, its interpretation does not support the definition CJLF offers. CJLF's assertion that "[t]here is no ambiguity" in the ballot materials about how to define "successive petition" is thus inaccurate. (CJLF Brief 44.)

CJLF asserts that the parties' definition is undermined by the Legislative Analyst's discussion of Proposition 66's fiscal effects, but it marshals only a single sentence, which is actually consistent with the parties' approach. (CJLF Brief 45, quoting Voter Guide, *supra*, Analysis by the Legislative Analyst, p. 107 ["[T]he limits on the number of habeas corpus petitions that can be filed[] could result in the filing of fewer, shorter legal

documents."].) Accepting that the statutory exceptions in section 1509(d) replace the equitable exceptions in *Clark*, the parties' definition of "successive petition" could likewise result in fewer and shorter pleadings—a successive petition that may have satisfied *Clark* but not section 1509(d) might not be filed, or it might be filed with limited analysis focused only on ineligibility rather than on each of the four *Clark* exceptions.

Similarly, CJLF asserts that language in the Voter Guide describing "'tactics [that] have wasted taxpayer dollars and delayed justice for decades'" somehow contravenes the parties' understanding of "successive petition." (CJLF Brief 45, quoting Voter Guide, *supra*, Text of Prop. 66, § 2, p. 213.) But, again, the goal of saving taxpayer dollars and speeding up habeas cases is fully consistent with the parties' definition, which would reduce the number of successive petitions that can be reviewed on the merits.[13]

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[13] The amici law professors make one other argument against the parties' approach based on the Voter Guide. The Legislative Analyst explained that Proposition 66 "places other limits on legal challenges to death sentences." (Voter Guide, *supra*, Analysis by the Legislative Analyst, p. 106.) According to the professors, the use of the word "places" reflects that the electorate understood section 1509 to be creating new and broader procedural barriers to subsequent petitions. (Professors Brief 18.) It is exceedingly doubtful that the voters intended the use of the single word "places" to have the import the professors give it. But even if they did, this too would be consistent with the parties' approach. Accepting that Proposition 66 replaces the equitable exceptions in *Clark* with the more stringent exceptions in section 1509(d), the initiative "places" new limitations on successive petitions even under the parties'

In sum, CJLF fails to demonstrate that the ballot materials unambiguously point to one particular definition of "successive petition." To the contrary, they suggest at least three: all petitions filed after the first (the Legislative Analyst's view, according to CJLF, and the law professors' view); some petitions filed after the first (CJLF's view); and abusive petitions filed after the first, as defined in *Clark* and *Robbins* (the parties' view). At most, the ballot materials are ambiguous and therefore do not undermine the parties' approach, which comports with the information voters were given. (See *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 175 ["Because legislative history is inconclusive on the question presented, our review of the history does not alter the conclusion we previously reached."].)

IV. Constitutionality

Finally, CJLF argues that Proposition 66's restrictions on "successive petition[s]" are "clearly constitutional" given CJLF's proposed definition of the phrase. (CJLF Brief 46-53.) It is by no means clear, however, that depriving faultless and diligent prisoners of a remedy for constitutional violations comports with the federal or California Constitutions. The likelihood that it does not militates in favor of the parties' definition.

The parties raised the likelihood that abandoning the *Robbins* approach to defining "successive petition" would violate the rights to due process, equal protection, and effective counsel guaranteed by the state and federal Constitutions, and offend

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understanding of that term.

California's Suspension Clause. (OBM 31-36; ABM 25-26.) The amici law professors likewise argue that if "successive petition" is interpreted literally, then section 1509(d) violates federal and state due process and the Suspension Clause in the California Constitution. (Professors Brief 19-31.) CJLF did not address the equal protection and effective counsel problems. Its responses to the due process and suspension concerns fail to establish that the constitutional issues raised by both parties and the amici law professors are "not serious." (CJLF Brief 46.)

A. Due process

CJLF encourages the Court to dismiss the due process question because "[w]hen a provision of the Constitution specifically governs a subject, it makes little sense to turn to the very general Due Process Clause for a different result." (CJLF Brief 50.) CJLF appears to mean that if the Suspension Clause is satisfied, limitations on state habeas proceedings cannot violate federal or state due process.

That is incorrect. "[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." (*Evitts v. Lucey* (1985) 469 U.S. 387, 401.) Thus, California's habeas proceedings must comport with federal due process. (*Ohio Adult Parole Auth. v. Woodard* (1998) 523 U.S. 272, 293 (conc. & dis. opn. of Stevens, J.) ["[I]f a State establishes postconviction proceedings, [then] these proceedings must comport with due process."].) In addition, California's habeas proceedings must

comport with the state Constitution's Due Process Clause. (See *Clark*, *supra*, 5 Cal.4th at p. 780 ["[I]f a petition attacking the validity of a judgment states a prima facie case leading to issuance of an order to show cause, the appointment of counsel is demanded by due process concerns."].)

CJLF relies on *County of Sacramento v. Lewis* (1998) 523 U.S. 833, but this reliance is misplaced. *Lewis* restates the principle articulated in *Graham v. Connor* (1989) 490 U.S. 386, 395 that federal excessive-force claims against police officers must be evaluated under the Fourth Amendment rather than substantive due process. (*Lewis*, 523 U.S. at pp. 842-43.) But CJLF does not offer any precedent extending that principle to reject a due process challenge based on a finding that the Suspension Clause is satisfied.[14] Further, the *Graham* principle is founded on longstanding "reluctan[ce] to expand the concept of substantive due process." (*Id.* at p. 842, quoting *Collins v. Harker Heights* (1992) 503 U.S. 115, 125.) CJLF offers nothing to suggest that the principle of *Graham* has any application where the question is whether, apart from suspension concerns, limitations on a state's habeas proceedings can violate procedural due process.[15]

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[14] CJLF cites only an unpublished decision from the Eighth Circuit Court of Appeals, which relied on *Lewis* in declining to address a substantive due process challenge to the federal habeas statutes after denying a Suspension Clause challenge. (*Hirning v. Dooley* (8th Cir. 2006) 209 F. App'x 614, 615 (per curiam).)

[15] CJLF's view could immunize against due process challenges all obstacles to effectuating the habeas writ that did not also

As the Supreme Court has noted, state postconviction procedures deny due process "if they are fundamentally inadequate to vindicate the substantive rights provided." (*Dist. Attorney's Office for Third Judicial Dist. v. Osborne* (2009) 557 U.S. 52, 67; accord, *Reno*, *supra*, 55 Cal.4th at p. 452 [recognizing that limitations on habeas proceedings must "ensure fairness and orderly access to the courts"].) Rejecting the parties' approach would leave some faultless and diligent prisoners with no access to the courts and therefore no way to vindicate rights California has provided—to postconviction relief generally, or more specifically to the underlying rights the petitions seek to vindicate. (OBM 26-32.)

CJLF admits that certain prisoners would have no judicial remedy in California courts. (CJLF Brief 41.) In fact, certain prisoners would have no judicial remedy *at all*. "[F]ederal habeas corpus relief does not lie for errors of state law." (*Lewis v. Jeffers* (1990) 497 U.S. 764, 780.) Thus, if California's courts are shuttered, prisoners with state-law claims will have no judicial forum in which to raise them. CJLF perceives that "[m]ost substantial questions of criminal procedure can be 'federalized,'" and therefore raised in federal habeas. (CJLF 41, fn. 7.) But CJLF overlooks the need to raise substantial questions of California law in second-in-time petitions (e.g., *Richards*, *supra*,

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violate the Suspension Clause. For example, a judge with a personal interest in the outcome, such as the former prosecutor responsible for the prisoner's incarceration, could preside over the habeas proceedings and the prisoner would have no ability to challenge the conflict on due process grounds.

63 Cal.4th 291) and the fact that federal courts routinely deny habeas petitions because alleged errors of state law do not amount to violations of federal rights (e.g., *Estelle v. McGuire* (1991) 502 U.S. 62, 70). As Friend and the amici law professors explained, these limitations on California's habeas proceedings would at least call into serious question whether certain prisoners would be deprived of due process. (OBM 31-32 & fn. 8; Professors Brief 19-26.)

This conclusion finds support in *Allen v. Butterworth* (Fla. 2000) 756 So.2d 52, 54. (OBM 32; Professors Brief 22.) CJLF dismisses *Allen*'s due process conclusion, arguing that the Florida Supreme Court retreated from it in *Abdool v. Bondi* (Fla. 2014) 141 So.3d 529, 546 and that this Court dismissed it as "dictum" in *Briggs*, *supra*, 3 Cal.5th at p. 844. (CJLF Brief 50-51.) But CJLF's discussion is misleading. In *Abdool*, the Florida Supreme Court distinguished the law under review in that case from the law reviewed in *Allen*, expressly noting that, unlike the latter, the former did "not unconstitutionally limit the number or type of postconviction motions that a capital defendant may file." (*Abdool*, 141 So.3d at p. 546.) The court did not retreat from its due process analysis in *Allen*. And while *Abdool* noted that "*Allen* was decided on separation of power grounds," that observation came in the court's discussion of an equal protection challenge, not the due process challenge that was also made. (*Ibid.*) Thus, when this Court noted in *Briggs* that *Allen* included dictum, it

was referring to *Allen*'s analysis of equal protection, not due process.[16] (*Briggs*, *supra*, 3 Cal.5th at p. 844.)

The Colorado Supreme Court's decision in *People v. Germany* (1983) 674 P.2d 345 further undermines CJLF's position. In *Germany*, the court addressed attacks on legislative time limits for challenging prior convictions, with limited exceptions. (*Id.* at p. 351.) The consolidated petitioners sought to challenge old convictions that the prosecution sought to use to support guilt or enhance punishment in pending criminal cases. The attempts were foreclosed, however, by a statute that "bar[red] all collateral challenges commenced beyond the period of limitation, without regard to the cause or circumstance underlying the failure to raise an earlier challenge, as long as the adjudicating court had jurisdiction over both the subject matter and the defendant and the failure to seek earlier relief was not the result of an incompetency adjudication or a commitment to an institution for mental treatment." (*Id.* at p. 352.)

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[16] Even if the Florida Supreme Court's due process conclusion in *Allen* was dictum, that does not diminish its persuasive value. "A statement which does not possess the force of a square holding may nevertheless be considered highly persuasive, particularly"—but not only—"when made by an able court after careful consideration, or in the course of an elaborate review of the authorities." (*Bunch v. Coachella Valley Water Dist.* (1989) 214 Cal.App.3d 203, 212, quoting 9 Witkin, Cal. Proc. (3d ed. 1985) Appeal, § 785, p. 756.) Precedential or not, the Florida Supreme Court's conclusion that similar habeas restrictions violated due process undermines CJLF's argument that section 1509 "clearly" comports with it. (CJLF Brief 46.)

The Colorado Supreme Court concluded that the statute violated federal and state guarantees to due process, noting that the statute made "no attempt to distinguish between those constitutional challenges which could and should have been asserted in a timely manner and those which, due to special circumstances or causes, could not have been raised within the applicable period of limitation." (*Germany*, *supra*, 674 P.2d at p. 353.) As an example of the "arbitrary" and "capricious" procedural bar, the court observed that the statute would "preclude a defendant from collaterally challenging a felony conviction based upon prosecutorial evidence which, more than three years after the conviction, is first determined to be constitutionally tainted or even perjured." (*Id.* at pp. 352-53; see also *People v. Wiedemer* (Colo. 1993) 852 P.2d 424, 437 [upholding the same time limit against due process challenge raised in postconviction review after the legislature amended the statute challenged in *Germany* to allow petitioners to justify procedural default].)

Proposition 66 similarly bars "the vindication of constitutional claims even when the failure to assert an earlier claim was the result of circumstances other than culpable neglect." (*Germany*, *supra*, 674 P.2d at p. 353.) As reflected in *Germany* and *Allen*, and for the reasons in the parties' and the amici law professors' briefs, that result raises serious concern that the initiative violates state and federal due process.

B. Suspension

CJLF fails to demonstrate by reference to history, to *Felker*

v. Turpin (1996) 518 U.S. 651, or to the holdings of other state courts that the Suspension Clause question is "not even close." (CJLF Brief 53.)

1. History

Initially, CJLF argues that the parties' concern about the Suspension Clause is not supported by the historical record or the development of habeas law.[17] CJLF argues that the Suspension Clauses in the federal and California Constitutions were originally understood to protect only the right on habeas review to test the jurisdiction of the convicting court. (CJLF Brief 46-47.) Therefore, according to CJLF, any argument that legislative restrictions on the use of habeas beyond that very limited purpose are unconstitutional "must rest on a premise that the Suspension Clause has somehow expanded" since its adoption. (CJLF Brief 47.) CJLF says the U.S. Supreme Court "has neither embraced nor ruled out" the possibility that the federal Suspension Clause has expanded since the founding. (CJLF Brief 47, citing *Felker*, *supra*, 518 U.S. 651 and *Dep't of Homeland*

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[17] The Supreme Court has not adopted CJLF's understanding of the clause or the writ of habeas corpus, even when CJLF invited it to do so. (See *Dep't of Homeland Sec. v. Thuraissigiam* (2020) 140 S.Ct. 1959, 1969, fn. 12; Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Petitioners, *Thuraissigiam* (U.S. 2019) 2019 WL 7168611, at *7, 13-17 [criticizing the high court's decisions in *INS v. St. Cyr* (2001) 533 U.S. 289 and *Boumediene v. Bush* (2008) 553 U.S. 723 regarding the scope of the Suspension Clause]; see also Brief of Legal Historians as Amici Curiae in Support of Respondent, *Thuraissigiam* (U.S. 2020) 2020 WL 416674, at *14-15 & fn. 7 [criticizing CJLF's review of the historical record].)

Security v. Thuraissigiam (2020) 140 S.Ct. 1959.)

Perhaps the Supreme Court has not *held* that the Suspension Clause guarantees a writ of habeas corpus that is broader than its use at the founding, but it is difficult to review the Court's precedents and conclude that it has not "embraced" this conclusion.[18] In *Boumediene v. Bush*, the Supreme Court observed that a constitutionally adequate substitute for habeas corpus "entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law," not only to demonstrate that he is being held pursuant to a judgment from a court without adequate jurisdiction. (*Boumediene v. Bush* (2008) 553 U.S. 723, 779, quoting *INS v. St. Cyr* (2001) 533 U.S. 289, 302.)

Further, in *Boumediene* the Court "used fragments of eighteenth- and nineteenth-century habeas law to motivate a modern-style balancing methodology for evaluating the adequacy of court review on issues of fact. To that degree, at least, the mandate of the Suspension Clause does go beyond the floor of 1789." (Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush (2010) 110 Colum. L. Rev. 537, 544-45; see also 1 Hertz & Liebman, Federal Habeas Corpus Practice and Procedure (7th ed. Matthew Bender 2019) § 7.2 (hereinafter "Hertz & Liebman") [describing *St. Cyr* and two other

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[18] Like CJLF and the law professors, Friend addresses federal practice insofar as it illuminates the meaning of the Suspension Clause in the California Constitution.

immigration-related habeas decisions predating *Boumediene* as "testimonials to the Court majority's conception of the writ (and its guarantor, the Suspension Clause) as requiring courts to look beyond the limited question of the custodial entity's facially apparent legal authority (whether by means of statute, court adjudication, or other form of authorization) and to scrutinize the underlying adjudication or determination to ensure that it actually is lawful"].) As Justice Thomas observed, the high court's "precedents have departed from the original understanding of the Suspension Clause." (*Thuraissigiam*, *supra*, 140 S.Ct. at p. 1988 (conc. opn.); see also *Martinez-Villareal v. Stewart* (9th Cir. 1997) 118 F.3d 628, 632 (per curiam) [observing "patent" and "difficult" problems under the Suspension Clause if § 2244 were interpreted to bar newly ripened incompetency claims presented in second-in-time petitions], affirmed on other grounds in *Stewart v. Martinez-Villareal* (1998) 523 U.S. 637; 1 Hertz & Liebman, § 7.2 ["There is good reason to view 'the Suspension Clause of the Constitution [as] refer[ing] to the writ as it exists today, rather than as it existed in 1789.'"].)

Whether or not the protections afforded by the Suspension Clause in the U.S. Constitution have expanded, CJLF has not demonstrated that the protections afforded by California's Suspension Clause have remained static or limited by the original understanding of the federal clause or its state counterpart. California case law indicates the opposite.

This Court has traced the expanded use of habeas corpus in California. (E.g., *In re Harris* (1993) 5 Cal.4th 813, 838 ["[T]he

narrow view that habeas corpus addressed only strict jurisdictional issues has changed over the years."]; see also *In re Brown* (1973) 9 Cal.3d 612, 624.) Like the Supreme Court, it has not squarely held that the Suspension Clause in article 11 of the California Constitution guarantees that expanded use.

Nonetheless, as in federal practice the Court has suggested that the Suspension Clause guarantees the writ's use beyond challenging the jurisdictional competency of the convicting court. The Court has held that California's "basic charter[]"—not merely its Penal Code—guarantees habeas as a means for prisoners "to prove their convictions were obtained *unjustly*" (*In re Sanders* (1999) 21 Cal.4th 697, 703)—not merely in a trial court lacking jurisdiction. Even when the Court has described the habeas writ in terms of its narrowest function, which is a fair proxy for its constitutionally guaranteed use, it has suggested a scope broader than simply testing jurisdiction as that word was understood before the 20th century. (See *In re Cook* (2019) 7 Cal.5th 439, 452 ["'Where one restrained pursuant to legal proceedings seeks release upon habeas corpus, the function of the writ is merely to determine the legality of the detention by an inquiry into the question of jurisdiction *and* the validity of the process upon its face, *and* whether anything has transpired since the process was issued to render it invalid.'"], quoting *People v. Villa* (2009) 45 Cal.4th 1063, 1068-69 (emphasis added).)

In *Ex parte De La O* (1963) 59 Cal.2d 128, the petitioner was committed to a rehabilitation center for drug treatment on order of the superior court, and he challenged the statute

pursuant to which he was committed. (*Id.* at pp. 133-34 & fn. 1.) In reviewing the challenge, the Court observed that a drug addict could use the habeas writ to obtain judicial review of an administrative determination of whether he was rehabilitated and could be discharged. (*Id.* at pp. 141-42.) Notably, the Court clarified that the right to use habeas "to inquire into the fact of his addiction or immediate danger of addiction" derived not from statute "but from the basic constitutional guarantee that 'The privilege of the writ of habeas corpus shall not be suspended . . .'" (*Id.* at p. 142.) The conclusion that this right—to inquire through habeas into the ongoing validity of a civil commitment—flows from the Constitution strongly suggests that the Suspension Clause enshrines protections extending beyond the historical function of testing a convicting court's jurisdiction.

The court of appeal has expressly interpreted the Suspension Clause in this fashion. In *In re Estevez* (2008) 165 Cal.App.4th 1445, 1451, the court of appeal addressed a habeas claim challenging conditions of confinement brought by a petitioner in the custody of a state prison that was in federal receivership. The court concluded that appointment of a federal receiver could not withdraw from the state courts the power to review these habeas claims without violating California's Suspension Clause. (*Id.* at p. 1461, fn. 7.) Accepting *arguendo* that in 1879 California's Suspension Clause guaranteed only that a prisoner could obtain review of the convicting court's jurisdiction, *Estevez* clearly indicates that the scope of its protections have expanded.

2. *Felker v. Turpin*

CJLF argues that *Felker*, *supra*, 518 U.S. 651 "demolishes" the parties' suspension arguments. (CJLF 46.) This is an overstatement. In *Felker*, the Supreme Court held that the limitations in § 2244 on second or successive habeas petitions operated as "a modified res judicata rule" and did "not amount to a 'suspension' of the writ contrary to Article I, § 9." (*Felker*, 518 U.S. at p. 664.) Notably, if CJLF were correct that the Suspension Clause in the federal Constitution *clearly* guarantees only the right to challenge the jurisdiction of the convicting court, then in *Felker* the Supreme Court would have gone no further than confirming the Georgia trial court's jurisdiction to enter the judgment under attack. Instead, *Felker* "assume[d], for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789," and then concluded that the new restrictions in § 2244 did not offend the modern understanding of the clause. (*Felker*, *supra*, 518 U.S. at pp. 663-64.)

Felker did not address California's habeas law or Suspension Clause. This Court can and does interpret provisions of the California Constitution differently than the Supreme Court interprets its federal counterparts. (E.g., *Serrano v. Priest* (1976) 18 Cal.3d 728, 764 ["'[D]ecisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law.'"].) For at least

three reasons, *Felker* should not preclude this Court from finding that section 1509's restrictions on state habeas practice would suspend the writ guaranteed by California's Constitution if "successive petition" were given CJLF's or the law professors' definitions.

First, in deciding whether the new limitations in § 2244 went too far, *Felker* compared the statute's restrictions to preexisting procedural barriers. As the Supreme Court later explained in *Boumediene*, the Court upheld § 2244 "against a Suspension Clause challenge in *Felker* . . . . The provisions at issue in *Felker*, however, did not constitute a substantial departure from common-law habeas procedures. The provisions, for the most part, codified the longstanding abuse-of-the-writ doctrine." (*Boumediene*, *supra*, 553 U.S. at p. 774.) The Court's description reflects that it turned back the Suspension Clause challenge in *Felker* at least in part because the new restrictions on habeas in § 2244 largely codified prior practice, which allowed for judicial review of non-abusive claims.[19] (See 2 Hertz & Liebman, *supra*, § 28.4 [explaining that § 2244's "restrictions on new-claim successive petitions are consistent with this history and merely adjust and tighten up particular restrictions that applied under preexisting law"].)

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[19] The Eleventh Circuit Court of Appeals had decided that Felker's second-in-time petition "would not have satisfied pre-[AEDPA] standards for obtaining review on the merits of second or successive claims." (*Felker*, *supra*, 518 U.S. at p. 658.)

Here, by contrast, section 1509(d) works a radical departure from pre–Proposition 66 practice if "successive petition" is given CJLF's or the law professors' meanings. Claims that were previously not abusive—indeed, even claims that were previously successful—would become unreviewable. (OBM 26-31.)

Second, before reaching the Suspension Clause question, *Felker* considered what effect § 2244 had on petitions filed as original matters in the Supreme Court. (*Felker*, *supra*, 518 U.S. at pp. 658-62.) Whatever other restrictions AEDPA placed on federal habeas review, including on the Supreme Court's power to review lower court dispositions of a petition, *Felker* concluded that AEDPA did not withdraw from the Supreme Court the jurisdiction conferred by the Judiciary Act of 1789 to entertain habeas petitions filed originally in that court. (*Id.* at pp. 660-61.)

Further, *Felker* left open whether petitions filed originally in the Supreme Court must satisfy the restrictions on second or successive petitions in § 2244. (See *id.* at p. 663; *In re Davis* (2009) 557 U.S. 952, 130 S.Ct. 1, 1 (conc. opn. of Stevens, J.) [interpreting *Felker* as "expressly leaving open the question whether and to what extent the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to original petitions"]; see also *In re Medina* (11th Cir. 1997) 109 F.3d 1556, 1564 ["[T]he provisions of § 2244(b), as amended, do not restrict that Court's original habeas authority."], overruled on other grounds by *Martinez-Villareal*, *supra*, 523 U.S. 637.)

Indeed, when the Supreme Court denied the original petition presented in *Felker*, it resorted to its own rules requiring

"exceptional circumstances," not AEDPA's demands for second or successive petitions. (*Felker*, *supra*, 518 U.S. at p. 665.) Thus, even if AEDPA restricts the authority of a federal district court to review a second or successive habeas petition, *Felker* left open the possibility of a safety valve—an original petition unencumbered by the same restrictions it approved of when applied to petitions filed in the lower courts.[20]

There appears to be no similar safety valve available to condemned California prisoners after Proposition 66. Subdivision (a) of section 1509 makes a petition "pursuant to this section" the "exclusive procedure for collateral attack on a judgment of death" and then through subdivision (d) restricts "successive petition[s]." Nothing in Proposition 66 or the supporting ballot materials suggests that those restrictions apply to petitions filed in the superior courts but not to those presented in this Court supported by a showing of good cause. (See § 1509, subd. (g).) Thus, under CJLF's interpretation, a petitioner whose newly discovered claim is barred from review under section 1509 appears not to have any

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[20] The contrary conclusion—that § 2244 applies to original petitions filed in the Supreme Court and therefore foreclosed this safety valve—aggravates the Suspension Clause concerns. (See *Martinez-Villareal*, *supra*, 118 F.3d at pp. 631-32 & fns. 3-5, affirmed on other grounds in *Martinez-Villareal*, *supra*, 523 U.S. 637; see also 1 Hertz & Liebman, *supra*, § 7.2 & fn. 129 [collecting cases supporting the proposition that "some of the lower federal courts have suggested that a Suspension Clause violation might arise if a prisoner had no *postconviction* opportunity (either in the lower federal courts or on original writ to the Supreme Court, and either in an initial or numerically successive federal petition) to raise a particular claim"].)

possible avenue of review in this Court analogous to the safety valve left open in *Felker*.

Third, CJLF's reliance on *Felker* ignores relevant differences between state and federal postconviction review. Restrictions on federal habeas review do not impair a California prisoner's right to pursue postconviction relief in state court. But the converse is not true. As noted above, federal habeas is unavailable to review errors of state law. (*Jeffers*, *supra*, 497 U.S. at p. 780.) Consequently, if a prisoner is shut out of state postconviction proceedings, he will have no opportunity to raise state-law errors in *any* postconviction review. Restrictions on state postconviction practice therefore implicate Suspension Clause concerns that do not necessarily arise when federal habeas review is limited. (Cf. 1 Hertz & Liebman, *supra*, § 7.2 ["Assuming, then—as the Supreme Court did in *Felker v. Turpin*—'that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789,' certain propositions necessarily follow with regard to state prisoners' right of access to state postconviction proceedings. First, the right of habeas corpus is lost if individuals are unable to petition at least *some* court for postconviction relief." (footnote omitted)].)

In sum, whatever limitations on federal habeas review *Felker* permits, they cannot immunize additional limitations on state habeas proceedings against a California Suspension Clause challenge. At the very least, the differences between state and federal postconviction review, and between the changes wrought

by section 1509 compared to § 2244, undermine CJLF's assertion that *Felker* indisputably resolves the question.

3. Sister states

CJLF's position is further undermined by the opinion of the Montana Supreme Court in *Lott v. State* (2006) 150 P.3d 337 that similar restrictions on second-in-time postconviction challenges violated that state's Suspension Clause. CJLF criticizes *Lott* for interpreting the Montana Constitution to "embrace a sweeping 'right to challenge the cause of one's imprisonment'" (CJLF 51, quoting *Lott*, 150 P.3d at p. 339), and asserts that "[i]f followed literally, that would make all habeas corpus reform impossible" (CJLF Brief 51).

But CJLF overlooks the rest of the Montana court's opinion. The Montana Supreme Court concluded from the right enshrined in its Constitution that "there are inherent limits on the Legislature's ability to define or restrict the scope of the writ[.]" (*Lott*, *supra*, 150 P.3d at p. 339.) It then canvassed its postconviction statutes, including limitations the state legislature had placed on the available remedies that had "become increasingly restrictive." (*Id.* at pp. 340-41.) Not all limitations to Montana's postconviction proceedings offended its Suspension Clause—only those that went too far. (See also *Wiedemer*, *supra*, 852 P.2d at pp. 434-35 [concluding that Colorado's statutory time bar on postconviction challenges did not suspend habeas corpus where it "provide[d] an exception when the failure to seek relief within the prescribed period results from justifiable excuse or excusable neglect, a provision adapted to assure that a defendant

will never be denied a constitutionally reasonable opportunity to challenge a criminal conviction"].)

CJLF argues that Montana's interpretation of its Suspension Clause means "the state courts get to pick and choose which statutory habeas corpus reforms they will enforce, [which] would involve the judicial branch in second-guessing the legislative branch on value judgments regarding how far habeas corpus should be expanded beyond its common law reach." (CJLF Brief 51-52.) As already explained, however, CJLF understates the reach of the Suspension Clauses in the U.S. and California Constitutions. (*Boumediene*, *supra*, 553 U.S. 723; *Estevez*, *supra*, 165 Cal.App.4th 1445.) And protecting those boundaries against encroachment by the political branches is precisely the role of the judiciary. (*Boumediene*, 553 U.S. at pp. 739-46 [explaining that the separation-of-powers doctrine "informs the reach and purpose of the Suspension Clause"].) Contrary to CJLF's characterization of it as "second-guessing," judicial review of habeas limitations is necessary for and designed to ensure divided power and individual liberty.

CJLF points to three opinions from Alabama, Alaska, and Virginia, and the decisions on which those three opinions rely. (CJLF Brief 51.) In each, CJLF suggests, the states "followed the federal lead" and denied suspension challenges to restrictions placed by the legislature on state postconviction proceedings. (CJLF Brief 51.)

These cases are of limited help to CJLF. One of the challenges was to a statute of limitations that included "[b]road

exceptions," including "for newly discovered evidence, convictions under unconstitutional statutes, convictions barred by double jeopardy, convictions obtained with insufficient evidence, sentences in excess of the court's jurisdiction, or significant changes in the law which will apply retroactively to the petitioner's case." (*Petition of Runyan* (Wa. 1993) 853 P.2d 424, 429.) Two others were to statutes that permitted prisoners to avoid procedural limitations by justifying untimely or subsequent petitions. (*Passanisi v. Dir., Nevada Dep't of Prisons* (Nev. 1989) 769 P.2d 72, 74 [allowing petitioners to demonstrate good cause and actual prejudice to excuse failure to meet procedural requirements for postconviction review]; *Dromiack v. Warden, Nevada State Prison* (Nev. 1981) 630 P.2d 751, 752 [similar].)

Other challenges involved state constitutions that have been construed to guarantee only the scope of habeas review available at common law—a narrower interpretation than California's Suspension Clause has been given. (See *Brown v. Booker* (Va. 2019) 826 S.E.2d 304, 305 ["[W]e look to the limited subject matter to which habeas corpus review extended when our Suspension Clause was first adopted and conclude statutory limits on Brown's ability to raise his present claims are constitutional."]; *Flanigan v. State* (Alaska Ct. App. 2000) 3 P.3d 372, 375-76 [similar][21]; *State ex rel. Glover v. State* (La. 1995) 660

[21] CJLF includes a second decision from the Alaska appellate court, which is to similar effect but is less helpful because there the prisoner had "not argued that the process" he was afforded "is or was inadequate to litigate his claims." (*Hertz v. State* (Alaska Ct. App. 2000) 8 P.3d 1144, 1147.)

So.2d 1189, 1196 [similar], *abrogated on other grounds by State ex rel. Olivieri v. State* (La. 2001) 779 So.2d 735; *Potts v. State* (Tenn. 1992) 833 S.W.2d 60, 62 [similar].[22])

Finally, in the Alabama case it is unclear that the prisoner even raised a claim under the state Constitution. (*Arthur v. State* (Ala. Crim. App. 2001) 820 So.2d 886, 890 ["Arthur further contends that the two-year limitations period in Rule 32 results in the unconstitutional suspension of his right to habeas corpus relief, a right that the United States Supreme Court has held can never be suspended."].) No mention is made of Alabama's Suspension Clause, and the court rested its conclusion partly on the proposition that the federal Constitution does not require state postconviction proceedings at all (*ibid.*)—a point that would be irrelevant to a state-law claim.

In sum, these decisions do not provide persuasive bases to dismiss the suspension concerns raised by the parties and the amici law professors, and certainly do not provide an adequate basis to conclude that the question is "not even close." (CJLF 53.) For the reasons articulated by the parties and the professors, the Court should decline to adopt an expansive interpretation of the phrase "successive petition" that would raise serious problems under California's Suspension Clause.

CONCLUSION

The Court need not definitively resolve these constitutional

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[22] *Runyan*, cited above, also suggests the Washington courts construe their Constitution narrowly in this respect. (*Petition of Runyan* (Wa. 1993) 853 P.2d 424, 430.)

questions—it is enough that they pose serious concerns. Moreover, the constitutional concerns compose only one of several reasons to adopt the parties' approach and reject CJLF's. The definition of "successive petition" advocated by both parties also furthers voter intent, comports with prior usage, avoids absurd results, and alleviates some of the retroactivity concerns attending a change in the definition—concerns that CJLF never addresses. For these reasons, Friend respectfully urges the Court to reject CJLF's arguments, adopt the parties' approach, and grant him relief.

Dated this 15th day of October, 2020.

Respectfully submitted,

Jon M. Sands
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Lindsey Layer
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s/ Stanley Molever
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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c), counsel for Jack Friend certifies based on the word count of the computer program used to prepare this brief that it contains 12,495 words, excluding the required tables and cover information, the signature block, the proof of service, and this certificate.

Dated this 15th day of October 2020.

Jon M. Sands
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PROOF OF SERVICE

I, Daniel Juarez, declare as follows:

I am employed in the County of Maricopa, State of Arizona. I am over the age of eighteen years and am not a party to this action. My business address is Office of the Federal Public for the District of Arizona, 850 W. Adams St., Suite 201, Phoenix, AZ 85007

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Additionally, I placed a true copy thereof enclosed in a sealed envelope for mailing on October 15, 2020, addressed as follows:

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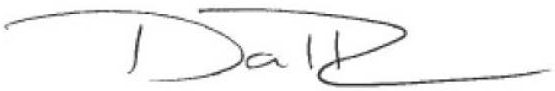
I declare under penalty of perjury and under the laws of the State of California that the foregoing is true and correct, and that I signed this document on October 15, 2020, in Phoenix, Arizona.



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Supreme Court of California

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Supreme Court of California

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Case Number: **S256914**
Lower Court Case Number: **A155955**

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Date

/s/Stan Molever

Signature

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