IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OFFICE OF THE STATE PUBLIC DEFENDER, EVA PATERSON, LATINOJUSTICE PRLDEF, ELLA BAKER CENTER FOR HUMAN RIGHTS, AND WITNESS TO INNOCENCE, *Petitioners*, v. ROB BONTA, CALIFORNIA ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY, *Respondent.*	CAPITAL CASE No. S284496

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND

BRIEF OF *AMICI CURIAE* THE STATE LAW RESEARCH INITIATIVE & THE UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW RACIAL JUSTICE CLINIC IN SUPPORT OF PETITIONERS

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONERS

The State Law Research Initiative ("SLRI"), a project of the Proteus Fund, Inc. and the University of San Francisco School of Law Racial Justice Clinic apply for leave to file the accompanying amici curiae brief in support of Petitioners pursuant to rule 8.520, subdivision (f) of the California Rules of Court and this Court's orders for supplemental briefing and granting an extension of time entered on September 11, 2024 and October 8, 2024, respectively.

SLRI is a legal advocacy organization dedicated to reviving and strengthening state constitutional rights that prevent extreme results in our criminal systems, with a focus on excessive sentencing and inhumane conditions of confinement. SLRI's work includes, among other things, fostering and developing legal scholarship on the history and meaning of state constitutional rights, as well as working with legal scholars and criminologists to file amicus briefs in state courts of appeal.

The Racial Justice Clinic at the University of San Francisco School of Law was founded in 2016 to address systemic racism within the criminal legal system. Among other areas of law, the Racial Justice Clinic works to implement the California Racial Justice Act (RJA), a landmark law that prohibits the state from seeking or obtaining a criminal conviction, or from imposing a sentence based upon race, ethnicity, or national origin. Working under the supervision of University of San Francisco School of Law Professor and Clinic Director Lara Bazelon and with clinic staff attorneys, clinical students consult with trial and appellate attorneys to evaluate potential RJA claims, track appeals and legal developments concerning the application of the RJA, assist in drafting motions and claims applying the new law, and work on Clinic cases.

Amici are familiar with the content of the parties' briefs and believe that additional argument and briefing on these points will be helpful to the court.

As described more fully below, this brief will specifically address the question of whether the Petitioners in this case have alleged a violation of Article 1, Section 17 of the California Constitution, which prohibits "cruel or unusual punishment." The brief provides essential context on the role of state constitutionalism in protecting individual rights, and rights against excessive punishments in particular. It also explains how, as a matter of history, text, and doctrine, allegations of racial disparities and systemic discrimination support claims of cruel and/or unusual punishment.

Pursuant to the California Rules of Court, rule 8.520, subdivision (f)(4), no party or counsel for any party in the pending appeal authored the proposed amici brief in whole or in part, and no one other than the amici has made any monetary contribution intended to fund the preparation or submission of the brief.

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Amici respectfully request that this Court grant their application and allow them to appear as amici curiae.

Dated: December 3, 2024

Respectfully submitted,

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The State Law Research Initiative

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BRIEF OF AMICI CURIAE THE STATE LAW RESEARCH INITIATIVE AND THE UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW RACIAL JUSTICE CLINIC

INTRODUCTION

We argue that, based on the allegations and evidence set forth in the Petition, California's death penalty scheme as-applied constitutes "cruel or unusual punishment" under Section 17 of California's state constitution. No one would dispute the "cruelty" or "unusualness" of intentionally imposing death or other severe criminal punishments based on race. Here, the question is whether the same conclusion follows from a death penalty scheme that, while facially neutral, is riven with systemic racism and produces wide racial disparities in its application. We argue that it does.

Our argument proceeds in two main parts. First, we provide context on the essential role of state constitutionalism in protecting individual rights, and especially rights against excessive criminal punishments. The federal constitution provides only a floor of rights protections. State courts must analyze state constitutional rights independently, even when similar or superficially identical rights exist in the federal charter. This is especially true when rights against excessive or prohibited punishments are at stake, as the overwhelming majority of criminal prosecutions occur at the state level and it is state law that dictates the charges and punishments. Indeed, there is a

growing (though not entirely new) trend of state courts invoking their own state constitutions to expand rights against excessive criminal penalties, particularly in the contexts of capital punishment and life terms for youth and emerging adults. These cases have both departed from and built upon U.S. Supreme Court Eighth Amendment precedent. Most relevant here are the California cases from this and lower appellate courts recognizing that Section 17 protects broader individual rights than the Eighth Amendment, along with holdings from other state supreme courts that severe penalties derived from systemic racism are cruel and/or unusual punishment.

This first section also discusses the many identified flaws in federal Eighth Amendment case law, including its competing doctrines on what constitutes excessive punishment. While the Supreme Court has provided some limits on capital punishment (see, e.g., *Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*) [banning capital punishment for youth under age 18], it has refused to limit its race-based use except in the most extreme circumstances (see *McCleskey v. Kemp* (1987) 481 U.S. 279 (*McCleskey*)). It has also eviscerated constitutional protections for the vast majority of people subject to criminal punishment. That includes hundreds of thousands of people serving life in prison. (See Barkow, *The Court of Mass Incarceration* (2022) 2022 Cato Sup. Ct. Rev. 11.) This is but one major criticism of a jurisprudence produced by a sharply-divided and often fractured Court—a jurisprudence that state

courts should therefore not reflexively import into their own constitutions. One of the most egregious examples is *McCleskey*, the 5-4 1987 decision in which the Supreme Court upheld a Georgia death sentence despite statistical evidence of system-wide racial disparities. (481 U.S. 279.) The startling pronouncement in *McCleskey* that "[a]pparent [racial] disparities are an inevitable part of our criminal justice system" (*id.* at 312) instantly joined the "separate but equal" language of *Plessy* as one of the Supreme Court's most egregious moral and legal failures when it comes to reckoning with the history of racism in the United States. (See *State v. Santiago* (2015) 318 Conn. 1, 163-64 (*Santiago*).)

In Part II, we turn to Section 17 and the specific allegations in this case. We argue that, assuming the Petition's allegations are true, California's death penalty as-applied constitutes both cruel and unusual punishment for three independent but related reasons: it violates California's contemporary standards of decency; it fails to serve any legitimate penological purpose; and it is applied based on discriminatory factors without any justification.

There is no divorcing modern day capital punishment from our nation's long history of racial terror—from slavery, to convict leasing, to the mass lynchings that pervaded the American south after Reconstruction. "The death penalty is," Prof. Stephen Bright wrote, "a direct descendant" of that legacy. (Bright, *Discrimination, Death, & Denial: The Tolerance of Racial*

Discrimination in Infliction of the Death Penalty (1995) 35 Santa Clara L. Rev. 433, 439.) Extrajudicial lynchings in the late 19th and early 20th centuries were not clandestine affairs. They were sometimes announced in advance, often with the approval or at least acquiescence of law enforcement, and conducted before thousands of people on well-manicured courthouse lawns. (See Ifill, *On The Courthouse Lawn* (2018).) But with the threat of federal anti-lynching legislation and enforcement by federal troops, those in power "moved the lynchings indoors, in the form of executions." (Toobin, *The Legacy of Lynching, On Death Row* (Aug. 15, 2016) The New Yorker.)

Since then, the death penalty has remained a tool of enforcing social hierarchy based on race and other pernicious factors. In 2015, when the Connecticut Supreme Court struck down the state's death penalty as cruel and unusual punishment, it remarked on this history within its own state: "Throughout every period of our state's history, the death penalty has been imposed disproportionately on those whom society has marginalized socially, politically, and economically: people of color, the poor and uneducated, and unpopular immigrant and ethnic groups," the court wrote. "It has always been easier for us to execute those we see as inferior or less intrinsically worthy." (*Santiago*, *supra*, 318 Conn. at p. 53.)

This history is reflected in the nationwide data on how states use the death penalty today. Black and other nonwhite people are far more likely to be

charged with capital murder and to receive a death sentence, particularly when prosecutors accuse them of murdering white victims. (See *Glossip v. Gross* (2015) 576 U.S. 863, 918 (diss. opn. of Breyer, J.); *State v. Gregory* (Wash. 2018) 427 P.3d 621, 630 (*Gregory*).) So too in California, a jurisdiction with more people sentenced to die than anywhere else in the Western Hemisphere. Here, a battery of studies that span decades and analyze capital prosecutions on both a statewide and county-by-county basis show that Black people are nearly nine times more likely to receive death than other defendants. The presence of a white victim has a similar effect. Prof. John Donohue wrote that in California, "[r]ace has played a substantial and significant role in determining who lives and who dies for crimes that are otherwise similar." (Petn. at p. 86.) These disparities, moreover, are inextricably intertwined with racial biases—both explicit and implicit—that have infected every stage of California's criminal legal system, from charging decisions and jury selection through verdicts and sentencing.

As this Court has recognized, whether a punishment practice is unconstitutionally excessive involves more than merely comparing a punishment to the offense. (See, e.g., *In re Lynch* (1972) 8 Cal.3d 410.) Instead, the "basic concept underlying" prohibitions on cruel and/or unusual punishments "is nothing less than the dignity of man," and in imposing punishment the state "must treat its members with respect for their intrinsic

worth as human beings[.]" (*In re Nunez* (2009) 173 Cal.App.4th 709, 724 (*Nunez*), quoting *Trop v. Dulles* (1958) 356 U.S. 86, 100.) To that end, this Court should hold that all excessive punishment claims are reviewed under a standard that both accounts for evolving standards of decency and thoroughly scrutinizes the fit between a challenged punishment and its ostensible purpose, accounting for empirical evidence about the efficacy of criminal punishments, mitigating facts about the offense and the offender, and whether the punishment is based on arbitrary or improper factors. This doctrinal framework, alternately referred to as the "categorical" or "evolving standards of decency" test, has allowed both state and federal courts to meaningfully enforce anti-punishment rights and "is the approach that best fits with the power and responsibility of state courts interpreting their own constitution." (Smith et al., *State Constitutionalism & the Crisis of Excessive Punishment* (2023) 108 Iowa L. Rev. 537, 578 (hereafter *State Constitutionalism*).)

Applying such factors here, we explain how California's standards of decency have evolved to prohibit criminal punishments that are the product of systemic discrimination in both state and county-level policy. Through the enactment of the Racial Justice Act and other legislative reforms, the state has committed to breaking from its history of discriminatory prosecutions and remedying its legacy of discrimination. This legislative arc provides ample evidence for this Court to conclude that a racially disparate death penalty

scheme that consistently produces racially disparate results, while neutral on its face, is cruel and cannot stand. We then argue, as did the Washington Supreme Court in 2018, that since "the death penalty is imposed in an arbitrary and racially biased manner, it logically follows that the death penalty fails to serve any legitimate penological goals." (*Gregory*, *supra*, 427 P.3d at p. 636.) Finally, we conclude that the discrimination alleged in this case, standing alone, shows that California's death penalty is "unusual" as applied, and therefore violates Section 17.

ARGUMENT

I. California's Ban on "Cruel or Unusual" Punishment is Independent From and Broader than the Federal Eighth Amendment

A. State Supreme Courts should not march in lockstep with the U.S. Supreme Court or view state law as a mere analog to federal law

When applying their own constitutional provisions, state courts are not bound by the holdings, doctrinal rules, or methods of interpretation found in federal cases applying similar federal provisions. "As a number of recent State Supreme Court decisions demonstrate, a state court is entirely free to read its own State's constitution more broadly than [the Supreme Court] reads the federal Constitution, or to reject the mode of analysis used by [the Supreme

Court] in favor of a different analysis of its corresponding constitutional guarantee." (*City of Mesquite v. Aladdin's Castle, Inc*. (1982) 455 U.S. 283, 293.)

Federal rights provide a floor, not a ceiling, of individual rights protections. As this Court has made clear:

> [I]n the area of fundamental civil liberties—which includes . . . all protections of the California Declaration of Rights—we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter. In such constitutional adjudication, our first referent is California law and the full panoply of rights Californians have come to expect as their due.

(*Serrano v. Priest* (1976) 18 Cal.3d 728, 764–765, quoting *People v. Longwill* (1975) 14 Cal.3d 943, 951, fn. 4.)

Principles of comity and federalism dictate that it is the province of California's highest court to say what the California Constitution and its state laws mean; that necessarily includes interpretations that are more protective of individual rights than what federal law provides, construed in accordance with their plain language and the intent of the legislature. "[W]e begin with the unquestioned proposition that the California Constitution is an independent document and its constitutional protections are separate from and not dependent upon the federal Constitution, even when the language of the two charters is the same." (*Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 365; see also Cal. Const., art. I, § 24 ["Rights

guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution"].)

In some cases, this Court has reasoned that Supreme Court opinions analyzing similar federal provisions nonetheless "ought to be followed unless persuasive reasons are presented for taking a different course." (*People v. Teresinski* (1982) 30 Cal.3d 822, 835-36 (*Teresinski*).) Whether *Teresinski* applies here should be immaterial since, as explained below and in the Petition, there are numerous "persuasive reasons" to interpret Section 17 independently, particularly in light of California's commitment to eradicating systemic racism in criminal punishments.[1] But more to the point, even this degree of deference to federal precedent improperly denigrates state constitutional law, and *Teresinski* should be overruled. An "approach [that] treats federal precedent with a presumption of correctness [] has no sound basis in our federal system." (Hon. Liu, *Brennan Lecture State Constitutions & The Protection of Individual Rights: A Reappraisal* (2017) 92 N.Y.U. L. Rev. 1307, 1315 (Hon. Liu, *State Constitutions & The Protection of Individual*

[1] In *Teresinski*, this Court identified four circumstances that weigh against following a particular federal precedent, any one of which can justify declining to adopt federal law: (1) where the language or history of the California Constitution suggests a different resolution; (2) where the federal opinion is a departure from federal precedent; (3) where the federal opinion was issued by a divided court and has attracted academic criticism; and (4) where the federal opinion is inconsistent with California precedent. (*Teresinski*, *supra*, 30 Cal.3d at pp. 835-837.)

Rights).) As Justice William Brennan implored a half century ago, the "legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for with it, the full realization of our liberties cannot be guaranteed." (Hon. Brennan, *State Constitutions & The Protection of Individual Rights* (1977) 90 Harv. L. Rev. 489, 491.)

Unlike federal appellate and trial courts, state supreme courts are not courts of inferior jurisdiction. Instead, they have the final say over state laws and the concomitant duty to interpret their state constitutions independently. (Hon. Liu, *State Constitutions & The Protection of Individual Rights*, *supra*, 92 N.Y.U. L. Rev. at pp. 1314-15.) Accordingly, this Court has repeatedly recognized that California's constitution offers broader protections than its federal counterpart. (See, e.g., *Beeman v. Anthem Prescription Mgmt, LLC* (2013) 58 Cal.4th 329, 341 ["The state Constitution's free speech provision is 'at least as broad' as [citation] and in some ways is broader than [citations] the comparable provision of the federal Constitution's First Amendment."]; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326–327 ["past California cases establish that, in many contexts, the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts"]; *People v. Brisendine* (1975) 13 Cal.3d 528,

545 [although search would be authorized under federal Constitution, under California Constitution officers' legitimate search of arrestee's knapsack for weapons did not justify looking into opaque bottle and envelopes containing drugs].)[2]

B. Eighth Amendment excessive punishment jurisprudence is an especially poor fit for automatic state constitutional deference

At the outset it is important to note that California's prohibition on cruel or unusual punishment is worded differently than its federal counterpart. That difference is significant and provides an additional text-based reason for a state-specific interpretation. But even in states with a constitutional anti-punishment clause that is identical to the Eighth Amendment's prohibition on "cruel and unusual punishments," courts should not reflexively import the holdings and doctrines of Eighth Amendment case law without first conducting an independent, state-based analysis.

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[2] Lower courts have reached similar conclusions. (See, e.g., *People v. Bedrossian* (2018) 20 Cal.App.5th 1070, 1074 ["procedural due process under the California Constitution is 'much more inclusive' and protects a broader range of interests than under the federal Constitution"]; *People v. Craig* (1998) 66 Cal.App.4th 1444, 1447 ["As will become clear in our discussion of California's application of its double jeopardy provision set out below the protections afforded by our state constitution are broader than those afforded by the federal constitution."]; *People v. Leung* (1992) 5 Cal.App.4th 482, 494 ["The equal protection guarantee of Article I, Section 7 of the California Constitution, while substantially similar to that of the Fourteenth Amendment, has independent meaning and may, in some cases, provide broader rights than those granted by the federal constitution."].)

The principle that animates the deviation from federal dictates makes intuitive sense: state courts interpreting state constitutions are structurally better positioned to shape and enforce anti-punishment rights because the vast majority of criminal cases are adjudicated in state courthouses. Ninety percent of people in U.S. prisons are confined pursuant to laws, procedures, and norms that are made and administered at the state and local level. Assessing the constitutional limits of such systems is therefore a state-specific task for which state courts have greater legitimacy and responsibility. (See *State Constitutionalism, supra,* 108 Iowa L. Rev. at pp. 541-42.) As one scholar recently observed, "with respect to criminal law and punishment, one would presume that the protections against cruel or unusual punishments from state courts would be much greater than the protections needed in federal courts[,]" as "[s]tates have historically, and even currently, administered the vast majority of criminal sanctions." (Berry, *Unlocking State Punishment Clauses* (2025) forthcoming Rutgers Law Review[3] (hereafter *Unlocking State Punishment Clauses*.) Eighth Amendment jurisprudence is, by its own terms, federal-specific and constrained by concerns about unduly intruding into state legal systems. This approach necessarily ignores crucial state-specific factors such as unique state history and evolving norms that develop county-by-county

[3] Available via SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5017494.

rather than state-by-state.[4] Indeed, the Supreme Court has cited this inherent limitation when explicitly inviting a different state constitutional approach to similar questions.

Consider the Court's opinion in *Jones v. Mississippi* (2021) 593 U.S. 98, which held that sentencing courts are not required to make on-the-record findings of permanent "incorrigibility" before sentencing a child to die in prison. The majority said this outcome "avoid[s] intruding more than necessary upon the States' sovereign administration of their criminal justice systems" (*id.* at p. 117, quoting *Montgomery v. Louisiana* (2016) 577 U.S. 190, 211), and stressed that "our holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18," including through "rigorous proportionality or other substantive appellate review of life-without-parole sentences." (*Id.* at pp. 120-21.)

[4] See Bilionis, *Symposium: "The Law of the Land": The North Carolina Constitution & State Constitutional Law; Essay: On the Significance of Constitutional Spirit* (1992) 70 N.C.L. Rev. 1803, 1808-09 ["the constitutionally significant facts may be different at the state and federal levels. Even when the state and Federal Constitutions contain the same language and employ the same methodology to govern the interpretation and application of that language, the ultimate constitutional decision often will turn upon a factual assessment of how society feels about certain matters or how society functions under various conditions. … [and] a sentencing practice might abridge the moral consensus that has evolved at the state but not the national level."].

This invitation for states to establish more "rigorous" proportionality review echoes Justice Anthony Kennedy's controlling opinion in *Harmelin v. Michigan*, the 1991 case in which the Court all but eliminated Eighth Amendment proportionality review of prison terms. *Harmelin*'s test, which prioritizes deference to state legislatures over individual rights, was derived from "the nature of our federal system" (501 U.S. 957, 1001 (*Harmelin*);[5] see also *Ewing v. California* (2003) 538 U.S. 11, 23)—reasoning that makes it abundantly clear that it is the responsibility of state courts applying state constitutions to conduct that proportionality analysis themselves. (See *Fletcher v. Alaska* (Alaska Ct.App. 2023) 532 P.3d 286, 308 ["the federalist concerns that led to the restrained approach adopted by *Jones* are not at issue when state courts are determining the scope and meaning of their own independent state constitutions."].)

Second, Eighth Amendment case law governing claims of excessive or disproportionate punishments has been heavily criticized as inconsistent and inadequate—a muddled "mess" of different legal tests and disparate outcomes that should not be replicated in state constitutional law.[6] For example, while

[5] Under *Harmelin's* "gross disproportionality" standard, the Eighth Amendment inquiry ends except in "the rare case" when "a threshold comparison of the crime committed and the sentence imposed" leads "to an inference of gross disproportionality." (*Harmelin*, *supra*, 501 U.S. at p. 1005.)

[6] See, e.g., Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism* (2010) 71 Ohio St. L.J. 71, 75 ["It has become

the Supreme Court has imposed some limits on the death penalty and life prison terms for youth, it has also permitted decades-long and even life without parole prison terms for relatively minor offenses. (See, e.g., *Lockyer v. Andrade* (2003) 538 U.S. 63 [upholding 50 year "third strike" prison term for stealing a few videotapes from K-Mart].) In fact, only once has the Supreme Court struck down an adult prison term as unconstitutionally excessive (*Solem v. Helm* (1983) 463 U.S. 277), and since that decision the Court further narrowed its scope of review in such cases. (*Harmelin*, *supra*, 501 U.S. at p. 1005.)

This convoluted approach is the product of a fractured court making law in closely divided rulings, sometimes with cobbled together plurality opinions. *Harmelin*, which upheld a mandatory life without parole sentence for possessing 650 grams of cocaine, was a 5-4 ruling, as were the Court's decisions upholding 50 years in prison for stealing video tapes from K-Mart (*Lockyer v. Andrade*, *supra*, 538 U.S. 63), 25 years to life for stealing golf clubs (*Ewing v. California*, *supra*, 538 U.S. 11), and life in prison for stealing about $230 over the course of 15 years (*Rummel v. Estelle* (1980) 445 U.S. 263).

Most relevant here is the Court's ruling in *McCleskey*. In that case, the Court upheld a Georgia death sentence despite statistical proof of systemic

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conventional wisdom that Eighth Amendment proportionality jurisprudence is a mess."]; Stacy, *Cleaning Up the Eighth Amendment Mess* (2005) 14 Wm. & Mary Bill Rts. J. 475, 476 ["The Court's jurisprudence under the Eighth Amendment's Cruel and Unusual Punishment Clause stands in disarray."].

racial discrimination in a 5-4 decision. The author of the majority opinion author Justice Lewis Powell later renounced it and regretted his vote. (See Jeffries, *Justice Lewis F. Powell, Jr.* (2001 Ed.), p. 451. *McCleskey* has also faced severe scholarly criticism for its reasoning and shirking the judicial role by tolerating "[a]pparent [racial] disparities [as] an inevitable part of our criminal justice system." (*McCleskey*, *supra*, 481 U.S. at p. 312.) "After the opinion's release, legal and lay commentators quickly compared *McCleskey* to infamous decisions like *Dred Scott*, *Korematsu*, and *Plessy*." (*Santiago*, *supra*, 318 Conn. at pp.163-64, quoting Sundby, *The Loss of Constitutional Faith:* McCleskey v. Kemp *and the Dark Side of Procedure* (2012) 10 Ohio St. J. Crim. L. 5.) *McCleskey* minimized if not eliminated Eighth Amendment rights in the face of undeniable racism in the administration of the death penalty. It would be a mistake and an abdication of this Court's role to reflexively follow it in this case or to presume it retained any persuasive authority after the passage of the California Racial Justice Act.

Finally, in addition to the structural limitations of and widely-acknowledged flaws in Eighth Amendment jurisprudence, deferring to Eighth Amendment law as part of state constitutional analysis impedes the proper development of federal rights. At least when the categorical framework is applied, Eighth Amendment analysis requires surveying trends in punishment laws and norms on a state-by-state basis, including state supreme court

holdings. (See, e.g., *Graham v. Florida* (2010) 560 U.S. 48, 73 (*Graham*) [citing a Kentucky Court of Appeals decision to find that the distinctive attributes of youth diminish the penological justifications for imposing life without parole sentences (*Workman v. Commonwealth* (Ky. App. 1968) 429 S.W.2d 374, 378)].) But if state courts simply import federal holdings as their own then they short circuit this crucial input. There can be no evolution of national community standards without a corresponding evolution in state law.

C. There is a growing trend of State Supreme Court rulings that expand state constitutional rights against excessive punishments, including based on racial disparities and systemic discrimination

California is among the growing number of states that apply their own state constitutional anti-punishment rights more broadly than the Eighth Amendment. (See *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*).) This trend has expanded over the last decade—particularly in the contexts of capital punishment and the rights of youth and emerging adults—but is not entirely new. For example, one year after the U.S. Supreme Court in *Harmelin* upheld Michigan's mandatory life without parole sentencing law for cocaine possession, the Michigan Supreme Court struck down the same law under its state ban on "cruel or unusual" punishment, citing the state's unique text, history, and constitutional emphasis on rehabilitation. (*People v. Bullock* (Mich. 1992) 485 N.W.2d 866.) Similarly, the Washington Supreme Court in

1980 held that a life sentence for forging about $460 worth of bad checks is unconstitutionally "cruel." (*State v. Fain* (Wash. 1980) 617 P.2d 720.) The court acknowledged that the U.S. Supreme Court's contrary holding in *Rummel v. Estelle* involved indistinguishable facts, but explained that the text and history of Washington's constitution compelled a different result. "Especially where the language of our constitution is different from the analogous federal provision," the court wrote, "we are not bound to assume the framers intended an identical interpretation." (*Id.* at p. 723.)

More recently, the state high courts in Washington, Massachusetts, and Michigan have extended age-based rights against life without parole sentences. Washington and Michigan prohibited mandatory life without parole sentences for emerging adults under 21 (*In re Pers. Restraint of Monschke* (Wash. 2021) 482 P.3d 276) and age 18 (*People v. Parks* (Mich. 2022) 987 N.W.2d 161 (*Parks*)), respectively, while this year the Massachusetts Supreme Judicial Court prohibited all life without parole sentences, mandatory or otherwise, for anyone under age 21. (*Commonwealth v. Mattis* (Mass. 2024) 224 N.E.3d 410 (*Mattis*).) The Iowa and Washington supreme courts also prohibited all youth life without parole sentences (*State v. Sweet* (Iowa 2016) 879 N.W.2d 811; *State v. Bassett* (Wash. 2018) 418 P.3d 343), with Iowa going further to ban mandatory minimum sentences of any duration for youth (*State v. Lyle* (Iowa 2014) 854 N.W.2d 378).

In Alaska, the state court of appeals last year declined to follow *Jones v. Mississippi* under its state constitution, holding instead that sentencing courts must make specific findings of "irreparable corruption" before imposing a youth life without parole sentence—a rule that also applies to terms-of-years sentences without a chance of release for 45 years or longer. (*Fletcher v. State of Alaska* (Alaska Ct.App. 2023) 532 P.3d 286; see also *State v. Kelliher* (2022) 381 N.C. 558 [holding that it violates the North Carolina constitution to sentence youth who are "neither incorrigible nor irredeemable" to life without parole]; *State v. Comer/State v. Zarate* (2022) 249 N.J. 359 [holding under the New Jersey constitution that a 30-year mandatory minimum before parole eligibility is unconstitutional as applied to children].)

Especially relevant here, several state courts have found that punishments are cruel and/or unusual if they produce racial disparities, reasoning that discriminatory punishments produced by biased legal systems do not meaningfully serve legitimate penological goals. That was true in *State v. Gregory*, *supra*, the 2018 case in which the Washington Supreme Court struck down the death penalty "because it is imposed in an arbitrary and racially biased manner" (427 P.3d at p. 627), and in the Massachusetts Supreme Judicial Court's 1980 decision that struck down the death penalty in part because "experience has shown that [it] will fall discriminatorily upon minorities, particularly [B]lacks." (*The D.A. for the Suffolk District v. Watson*

(Mass. 1980) 411 N.E.2d 1274, 1283 (*Watson*).) Unlike what the U.S. Supreme Court would later say about the Eighth Amendment in *McCleskey*, the Massachusetts high court said that its state anti-punishment clause prohibits such disparities even when produced by a death penalty "statute which meets the demands of *Furman*" *v. Georgia* (1972) 403 U.S. 238. (*Watson, supra,* 411 N.E.2d at p. 1286.)

In *Santiago*, when the Connecticut Supreme Court held that legislation prospectively eliminating the death penalty rendered existing death sentences cruel and unusual punishment, it also pointed to "strong evidence demonstrating that impermissible racial and ethnic disparities have, in fact, permeated this state's capital sentencing scheme." (*Santiago*, *supra*, 318 Conn. at p. 108, fn. 104.) Two concurring justices urged other state high courts to carefully examine "whether the legal standard articulated in *McCleskey* . . . affords adequate protection to members of minority populations who may face the ultimate punishment." (*Id*. at p. 172 (conc. opn. of Norcott, J., McDonald, J.).)

Outside the capital context, the North Carolina Supreme Court in 2022 found that "juvenile life without parole is cruel" under the state constitution in part based on "empirical data demonstrating that an individual juvenile offender's chances of receiving a sentence of life without parole may be at least partially attributable to factors that are not salient in assessing the penological

appropriateness of a sentence, such as race," with data showing that such sentences "are more likely . . . in North Carolina counties with a [B]lack population that is above average[.]" (*State v. Kelliher*, *supra*, 381 N.C. at p. 588.)

In these cases and others like them, state courts have justified their independence from Eighth Amendment cases for a combination of reasons. These include the unique text of each state's anti-punishment provisions—with some, unlike the Eighth Amendment, prohibiting merely "cruel" or "cruel *or* unusual" punishments—along with the unique constitutional history behind them, special state constitutional concerns (such as Michigan's commitment to rehabilitation), and the flawed reasoning of Eighth Amendment cases. But courts have also disclaimed any need for justification in the first place, recognizing, as discussed above, the inherent independence of state constitutions and that federal anti-punishment rights are merely a floor to be built on through state-specific analysis (see *Santiago, supra,* 318 Conn. at pp. 18-19 ["The eighth amendment to the federal constitution establishes the minimum standards for what constitutes impermissibly cruel and unusual punishment."]).

D. California's case law on "cruel or unusual" punishment aligns with this trend of more expansive state rights

Consistent with this national trend toward expanding state constitutional rights, California cases already recognize that Section 17 provides broader rights than the Eighth Amendment specifically in the context of excessive or disproportionate punishments.

First, courts have been clear that California's use of the disjunctive "cruel *or* unusual" over the conjunctive "cruel *and* unusual" is "a distinction that is purposeful and substantive rather than merely semantic." (*People v. Carmony* (2005) 127 Cal.App. 4th 1066, 1085).) Accordingly, "California affords greater protection to criminal defendants" against disproportionate and excessive punishments. (*People v. Haller* (2009) 174 Cal.App.4th 1080, 1092.) Indeed, some California decisions have been harbingers of seminal Eighth Amendment cases. In addition to striking down the state's previous death penalty before the U.S. Supreme Court decided *Furman*, California courts prohibited youth life without parole sentences for a non-homicide offense before *Graham v. Florida* (*Nunez*, *supra*, 173 Cal.App.4th at pp. 730-31; see also *People v. Mendez* (2010) 188 Cal.App.4th 47, 65), and gave special consideration in sentencing to youth convicted of homicide before *Miller v. Alabama* (see *Dillon*, *supra*, 34 Cal.3d at pp. 487-88 [vacating a teenager's life

sentence for felony murder as cruel or unusual because he was an "immature youth"]).

This more expansive reading follows from constitutional history showing that the "delegates to the Constitutional Convention of 1849, who first adopted the section which was later incorporated into the Constitution of 1879, were aware of the significance of the disjunctive form and that its use was purposeful." (*People v. Anderson* (1972) 6 Cal.3d 628, 634, superseded by statute on other grounds (*Anderson*).) Delegates to the 1849 convention were well aware that states had used varying language to signify greater rights against criminal punishments. (See Brown, *Report of the Debates in the Convention of California* (1850).)[7] The delegates had copies of every state's constitution and mentioned at least 20 of them during convention debates. (*Id.* at pp. 24, 37, 56, 69, 110, 380.) Of those, most differed from the "cruel and unusual" prohibition found in the federal constitution. Pennsylvania, Alabama, Delaware, and Rhode Island, among others, prohibited "cruel punishments," while North Carolina, Florida, Massachusetts, and New Hampshire barred "cruel or unusual punishments." Some also had separate clauses explicitly requiring that punishments be "proportionate" to the offense. (*Anderson*, *supra*, 6 Cal.3d at pp. 635-636, fn. 13-16.) With these models before

[7] Available online at https://digitalcommons.csumb.edu/hornbeck_usa_3_d/18/.

it, the Convention changed an initial proposal to ban "cruel and unusual punishment" into the disjunctive "or" that exists today. This reflected an intentional choice, this Court found, to clearly prohibit two separate categories of punishments—those that are cruel, unusual, or both—and to distinguish California from the more limited federal approach. (*Id*. at pp. 636-637.)

II. California's Death Penalty is Excessive, "Cruel" and "Unusual" Punishment Under Section 17

A. Legal standard: the evolving standards framework applies to excessive sentencing claims

A criminal punishment is cruel or unusual if, whether categorically or as applied, it meets any one of three distinct but analytically overlapping criteria: it (1) violates contemporary standards of decency, including an emerging social consensus against certain punishment practices;[8] (2) fails to meaningfully serve legitimate penological goals "more effectively than a less severe punishment" (*Furman v. Georgia*, *supra*, 408 U.S. at p. 280 (conc. opn. of Brennan, J.) in light of modern scientific and other empirical evidence;[9] or (3)

[8] See *Roper v. Simmons*, *supra*, 543 U.S. at p. 567 [finding social consensus against executing children based on trend toward abolition rather than absolute numbers of jurisdictions approving that punishment].

[9] See also *Furman*, *supra*, 408 U.S. at p. 331 (conc. opn. of Marshall, J.) ["one of the primary functions of the cruel and unusual punishments clause is to prevent excessive or unnecessary penalties"]; Hon. Kafker, *The Supreme Judicial Court of Massachusetts Provides Greater Protections Against Cruel or Unusual Punishment for Juveniles and Young Adults: A Convergence of Science And Law* (2025), forthcoming Rutgers Law Review, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4942033.

is applied arbitrarily or—worse—discriminatorily based on pernicious factors such as race.[10]

These factors are derived from the constitutional text: It is "cruel" to punish someone in conflict with contemporary standards of decency or without a legitimate penological purpose,[11] and it is both "cruel" and "unusual" to impose punishments either arbitrarily or based on discrimination.[12] In a state that explicitly and deliberately banned cruel *or* unusual punishments, then, it is clear that any one of these reasons is a sufficient basis to hold that a punishment is unconstitutional.

This framework, known as the "categorical" or "evolving standards of decency" test, has been used in both state and federal cases and has allowed courts to meaningfully perform the judicial role of enforcing state constitutional rights against cruel and/or unusual punishments. It is the doctrinal test that the U.S. Supreme Court has applied in cases challenging the death penalty and life without parole sentences for certain categories of offenses and offenders. Other state supreme courts have also applied this doctrine in state-specific ways, looking to intra-state indicators of

[10] See *Santiago*, *supra*, 318 Conn. at p. 18-19 [describing "arbitrary or discriminatory punishments" as a distinct category of punishments that "may be deemed unconstitutionally cruel"].
[11] See Ryan, *Judging Cruelty* (2010) 44 U.C. Davis L. Rev. 81, 100-01.
[12] See *Furman*, *supra*, 408 U.S. at p. 242 (conc. opn. of Douglas, J.).

contemporary standards and acceptable purposes of punishment. (See, e.g., *Mattis, supra,* 224 N.E.3d at p. 418 fn. 12 [applying "the 'categorical' framework, which focuses on contemporary standards of decency," to decide that life without parole sentences are cruel when applied to people under age 21]; *Parks*, *supra*, 987 N.W.2d at p. 182 [noting that "[r]ehabilitation is a specific goal of our criminal-punishment system" and "the only penological goal enshrined in our [state constitutional] proportionality test as a criterion rooted in Michigan's legal traditions"] [internal quotation marks omitted].)

In our view, this standard should apply to all excessive punishment claims. (See *State Constitutionalism, supra,* 108 Iowa L. Rev. at p. 578.) This test captures the principles, long-recognized under both the Eighth Amendment and Section 17, that cruelty and unusualness must "draw [their] meaning from the evolving standards of decency that mark the progress of a maturing society" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1369, quoting *Trop v. Dulles*, *supra*, 356 U.S. at pp. 100-101), and that constitutional limits on criminal punishments must protect human dignity. (See *Dillon*, *supra*, 34 Cal.3d at p. 478.) And it does so while also capturing the factors included in the narrower "gross disproportionality" inquiry that courts—including this

one—have used to assess the constitutionality of particular sentences imposed in individual cases.[13]

But in any event, the evolving standards framework should apply here, where Petitioners challenge not an individual sentence but the statewide implementation of the most severe and permanent kind of punishment. Here, the question is how these cruel or unusual factors apply to a death penalty scheme that is infected with deeply-rooted racism at every stage—from jury selection, through charging decisions, jury instructions, and verdicts—and produces gaping racial disparities. As we explain below, each factor under the evolving standards framework compels a finding that California's death penalty scheme as-applied constitutes cruel or unusual punishment.

[13] When individuals challenge their particular sentence as unconstitutionally excessive under Section 17, California courts apply "the *Lynch* factors," under which a "petitioner … must demonstrate his punishment is disproportionate in light of (1) the nature of the offense and the defendant's background, (2) the punishment for more serious offenses, or (3) punishment for similar offenses in other jurisdictions." (*Nunez*, *supra*, 173 Cal.App.4th at p. 725, citing *Lynch*, *supra*, 8 Cal.3d at pp. 425, 431, 436.) Under this test, "a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts," along with "the personal characteristics of the defendant, including age, prior criminality, and mental capabilities." (*People v. Landry* (2016) 2 Cal.5th 52, 125; see also *Nunez*, *supra*, 173 Cal.App.4th at p. 726 [noting that, in a cruel or unusual proportionality analysis, "[y]outh is generally relevant to culpability" and a "diminished degree of danger"] [internal quotation marks omitted].) This test is a poor fit when, as here, "a sentencing practice itself is in question." (*Graham*, *supra*, 560 U.S. at p. 61.)

B. Racially discriminatory punishments violate California's contemporary standards of decency

A sea change in legislation and policy in recent years shows that California's contemporary standards of decency prohibit racially discriminatory sentences, including sentences that are, as alleged here, the product of systemic discrimination. From legislation explicitly aimed at eliminating racism from prosecutions and sentences, to counties announcing they will no longer seek the death penalty based on the racial disparities in death sentences, these reforms show a marked trend toward eradicating systemic racism from all levels of criminal prosecutions.

To assess contemporary standards of decency, this Court may canvass national and international sources, but the inquiry should focus on state-specific indicators of evolving norms. The Court must, in other words, assess the prevailing standard of decency in California, specifically. (See, e.g., *Mattis*, *supra*, 224 N.E.3d at p. 424 ["To determine our contemporary standards of decency, in addition to referring to our own State statutes [citation], we may look to other policies and programs in the Commonwealth, our precedent, other States' statutes, as well as other States' judicial rulings, and even international statutes and decisions, among other sources. . ."]; *Santiago*, *supra*, 318 Conn. at p. 44 ["Although regional, national, and international norms may inform our analysis [citation]; the ultimate question is whether capital punishment has

come to be excessive and disproportionate in Connecticut."]; *Fleming v. Zant* (1989) 259 Ga. 687, 690 ["The standard of decency that is relevant to the interpretation of the prohibition against cruel and unusual punishment found in the Georgia Constitution is the standard of the people of Georgia, not the national standard."]; *Watson*, *supra*, 411 N.E.2d at pp. 1281, 1283-84 [holding that the death penalty violated the state constitution on the basis of contemporary standards of decency in Massachusetts].)

In general, legislation is the "clearest and most reliable objective evidence of contemporary values." (*Graham*, *supra*, 560 U.S. at p. 61, quoting *Roper v. Simmons, supra,* 543 U.S. at p. 572.) For that reason, in adopting categorical rules prohibiting a sentence as cruel or unusual, courts "first consider[] 'objective indicia of society's standards, as expressed in legislative enactments and state practice . . . .'" (*Ibid,* quoting *Atkins v. Virginia* (2002) 536 U.S. 304, 312; *McCleskey*, *supra*, 481 U.S. at p. 300 ["In assessing contemporary values, we have eschewed subjective judgment, and instead have sought to ascertain 'objective indicia that reflect the public attitude toward a given sanction.' [citation] First among these indicia are the decisions of state legislatures, 'because the . . . legislative judgment weighs heavily in ascertaining' contemporary standards [citation]."], quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 173, 175, internal citations omitted.)

Legislative developments are particularly important in this case, where the challenge is not to a punishment *per se* but to its discriminatory application. Here, the way in which California's death penalty statute is applied is at odds with the legislature's central claim that California has committed to eradicating systemic discrimination from its criminal legal system. (*Cf. State Constitutionalism*, *supra*, 108 Iowa L. Rev. at p. 579 [explaining that sentencing legislation can be "a lagging indicator of contemporary standards of decency," and so courts should also consider actual usage, public opinion, and local policy reforms].) Indeed, over just the past four years, California's legislative enactments, including the Racial Justice Act, have demonstrated an extraordinary and unparalleled commitment to eradicating systemic racism from the criminal legal system and ensuring greater protections against racially discriminatory practices and punishments than those afforded at the federal level. These legislative actions, alongside policy changes at county levels, demonstrate that contemporary standards of decency have evolved in California to no longer accept death sentences produced by systemic racism.

Indeed, the state's commitment to these standards has been fairly summarized in statements from both this Court and California Governor Gavin Newsom. In 2020, this Court acknowledged that, "[i]t is all too clear that the legacy of past injustices inflicted on African Americans persists powerfully

and tragically to this day. . . . We state clearly and without equivocation that we condemn racism in all its forms."[14] This Court concluded that, "we must confront the injustices that have led millions to call for a justice system that works fairly for everyone. . . . As members of the legal profession sworn to uphold our fundamental constitutional values, we will not and must not rest until the promise of equal justice under law is, for all our people, a living truth."[15] Likewise, when Governor Newsom declared a moratorium on California's death penalty, he explained that, "[o]ur death penalty system has been, by all measures, a failure. It has discriminated against defendants who are mentally ill, [B]lack and brown, or can't afford expensive legal representation."[16]

1. California's Racial Justice Act

The Racial Justice Act (RJA) alone demonstrates that a racially discriminatory death penalty scheme is contrary to California's contemporary standards of decency. In enacting the RJA, the State Legislature found and declared that, "[t]here is growing awareness that *no degree or amount of racial*

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[14] Conneely, *Supreme Court of California Issues Statement on Equality and Inclusion* (Jun. 11, 2020) <https://newsroom.courts.ca.gov/news/supreme-court-california-issues-statement-equality-and-inclusion> (as of Nov. 28, 2024).
[15] *Ibid.*
[16] *Governor Gavin Newsom Orders a Halt to the Death Penalty in California* <https://www.gov.ca.gov/2019/03/13/governor-gavin-newsom-orders-a-halt-to-the-death-penalty-in-california/> (as of Nov. 28, 2024).

bias is tolerable in a fair and just criminal justice system . . . ." (Stats. 2020, ch. 317, § 2, subd. (h), italics added.)

This Court has observed that, "[t]he Legislature passed the RJA in 2020 with a stated aim 'to eliminate racial bias from California's criminal justice system' and to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing.' " (*People v. Wilson* (2024) 16 Cal.5th 874, quoting Stats. 2020, ch. 317, § 2, subd. (i).) "To that end, the RJA prohibits the state from seeking or obtaining a criminal conviction, or seeking, obtaining, or imposing a sentence, on the basis of race, ethnicity, or national origin." (*Ibid*, citing Pen. Code, § 745, subd. (a).)

In enacting the RJA, California's Legislature made clear that statistical evidence demonstrating disparate racial impact informs whether the death penalty constitutes cruel or unusual punishment under the California Constitution. (*Mosby v. Superior Court* (2024) 99 Cal.App.5th 106, 123 [the RJA "was enacted, in part, to address *McCleskey v. Kemp* (1987) 481 U.S. 279, 295-299, 312, which found that there was 'a discrepancy that appears to correlate with race' in death penalty cases in Georgia, but the court would not intervene without proof of a discriminatory purpose" when considering an Eighth Amendment challenge]; see also Stats. 2020, ch. 317, § 2, subd. (f).)

The Legislature had in mind both the inadequacy of *McCleskey* and racial discrimination in death sentences when it enacted the RJA. According to the legislation's author:

> We can no longer accept racial bias in the criminal justice system as unfixable. The California Racial Justice Act will help us take an important step in prohibiting the use of race and ethnicity as a factor in the state's justice system across the board.
>
> The California Racial Justice Act is a countermeasure to a widely condemned 1987 legal precedent established in the case of *McCleskey v. Kemp*. Known as the *McCleskey* decision, the U.S. Supreme Court has since required defendants in criminal cases to prove intentional discrimination when challenging racial bias in their legal process.

(Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 2542 (2019-2020 Reg. Sess.) August 7, 2020, pp. 8-9.)

As the Legislature noted, the RJA was an important step, but is insufficient on its own to remedy the kind of systemic racism that the legislature sought to address and that the Petitioners are asking this Court to remedy. The RJA allows only individual claims and requires evidence of county disparities as opposed to the state-wide disparities presented by this case; it does not allow for the kind of broad examination required to truly consider and address state-wide racial disparities within California's capital sentencing scheme. Waiting for individual claims that can only present incomplete

evidence is an inadequate substitute for acting on the unmistakable picture the statewide evidence paints now: the system is so infected with racial bias as presently administered that it violates the state constitution.

While inadequate to resolve the issues presented in this case, the RJA remains important to this Court's analysis as a powerful demonstration of California's contemporary values and the evolving recognition that racism must be eradicated from our system—not only for the sake of individual defendants, but also for the integrity of California's legal system.

"Discrimination in our criminal justice system based on race . . . has a deleterious effect not only on individual criminal defendants but on our system of justice as a whole." (Stats. 2020, ch. 317, § 2, subd. (a).) The Legislature's intent in enacting the RJA was "to remedy the harm to the defendant's case *and to the integrity of the judicial system*." (*Bonds v. Superior Court* (2024) 99 Cal.App.5th 821, 828, citing Stats. 2020, ch. 317, § 2, subd. (i), italics added.)

This case provides the opportunity to examine the harm done not just to any one individual defendant in one county, but to the integrity of California's capital punishment system as a whole. The Legislature set the goal of "eliminat[ing] racism from the criminal justice system" and "ensur[ing] it plays no role in . . . sentencing." (*Wilson*, *supra*, 323 Cal.Rptr.3d at p. 848.) In this case the Court has the power and obligation to take another step toward that goal.

2. Amendments to the Racial Justice Act

The evolution of the RJA demonstrates that California's commitment to eradicating racism from its criminal legal system is ongoing and deepening. The RJA was enacted in 2020 to apply prospectively only. It was amended in 2022 to provide for phased retroactivity, and then again in 2023 to clarify that it applied to direct appeals. In the words of the Assembly Member who authored the bills to enact and then strengthen the RJA, "California's Legislature cemented the state's commitment to addressing institutionalized and implicit racial bias in our criminal courts." (Assem. Fl., Analysis of Assem. Bill No. 1118 (2022-2023 Reg. Sess) as amended May 18, 2023, p. 1.)

3. Additional legislative reforms demonstrating California's commitment to eradicating racism from the criminal legal system

In 2020, the Legislature not only addressed the ineffectiveness of *McCleskey* through the RJA, but also addressed the inadequacies of *Batson v. Kentucky* in separate legislation, Assembly Bill 3070. In *Batson*, decided in 1986, the Supreme Court held that potential jurors cannot be excluded from service based on race, but limited relief to cases of intentional discrimination. (476 U.S. 79 (*Batson*).) In the intervening decades, that standard has proven nearly impossible to meet except in the most extreme cases, and has allowed

implicit bias and racial stereotyping in jury selection to persist unchecked.[17] This reality led the Legislature in 2020 to replace *Batson's* narrow rule requiring defendants to prove intentional race discrimination. AB 3070 was designed to identify implicit racial bias and established a list of reasons for excluding jurors that are presumed to be improper proxies for racial discrimination (for example, the juror "having a negative experience with law enforcement," or "expressing a belief that law enforcement officers engage in racial profiling or that criminal laws have been enforced in a discriminatory manner."). Now, a peremptory strike is unlawful if "an objectively reasonable person" would believe that "race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation" was a factor in their use, whether intentionally or unintentionally. (See Cal. Code Civ. Proc., § 231.7.)

As with the Racial Justice Act, the purpose behind AB 3070 is clear and yet another piece of evidence pointing to how standards of decency have evolved in California. In changing the law governing the use of peremptory challenges, it was the "intent of the Legislature to put into place an effective

[17] Under *Batson*, California prosecutors have successfully excluded Black people "because they had dreadlocks, were slouching, wore a short skirt and 'blinged out' sandals, visited family members who were incarcerated … or lived in East Oakland, Los Angeles County's Compton, or San Francisco's Tenderloin[.]" (Semel et al., *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (June 2020), Berkeley Law Death Penalty Clinic at vi.)

procedure for eliminating the unfair exclusion of potential jurors based on race . . . ." (Stats. 2020, ch. 318, § 1, subd. (a) [uncodified].) The Assembly Floor Analysis confirmed that this "bill seeks to address deficiencies in the *Batson[]* procedure by outlining new procedures for identifying and evaluating unlawful discrimination in jury selection." (Assem. Fl., Analysis of Assem. Bill No. 3030 (Reg. Sess. 2019-2020) as amended August 21, 2020, at p. 2.)

The Legislature also enacted Senate Bill 592, which was intended "to remedy the fact that California's existing list of persons called for potential jury service tends to skew whiter and more affluent than the state at large." (Assem. Fl., Analysis, 3d reading of Sen. Bill No. 592 (2019-2020 Reg. Sess.) as amended August 24, 2020, p. 3.) Previously, jurors were primarily drawn from registered voters and people with a driver's license—a practice that disproportionately excluded Black and lower income residents. Under SB 592, the jury pool consists of everyone who files an income tax return. When the bill was signed into law, the author issued a press release stating that,

> In the weeks following the racist police killings of George Floyd and Breonna Taylor, Californians have responded with renewed calls to examine and overhaul our criminal justice system: from policing, to our legal system, to mass incarceration. SB 592 is an important piece of the puzzle of how we can remake our criminal justice system to be fairer and less racially and socioeconomically biased.[18]

[18] Press Release, *Senator Wiener Brings Back Racial Justice Legislation to Create Fairer, More Representative Juries*, July 20, 2020, <https://sd11.senate.ca.gov/news/senator-wiener-brings-back-racial-justice-legislation-create-fairer-more-representative-juries> (as of Nov. 28, 2024).

In another 2020 effort to address racism within the system at large and death sentences in particular, the Legislature enacted Assembly Bill 2512, which prohibits the practice of adjusting test results measuring intellectual functioning based on race. (See, Pen. Code, § 1376, subd. (g).)

Then in 2021, the Legislature enacted Assembly Bill 333, the "Step Forward Act," which further defined and narrowed the circumstances under which gang enhancements could be applied. In its findings and declarations, the Legislature noted that, according to the Committee on Revision of the Penal Code's 2020 report: "[t]he current statute disproportionately impacts communities of color, making the statute one of the largest disparate racial impact statutes that imposes criminal punishments." (Stats. 2021, ch. 669, § 2, subd. (d)(2) [uncodified].) The legislative history shows that the bill was intended to "advance the movements toward criminal, racial, and social justice . . . ." (Assem. Fl., Analysis of Assem. Bill 333 (2020-2021 Reg. Sess.) as amended July 13, 2021, p. 2.)

These collective legislative actions show that, as this Court noted in 2020, Californians reached "an inflection point"[19] after which they have repeatedly demonstrated that racially discriminatory prosecutions and

[19] Conneely, *Supreme Court of California Issues Statement on Equality and Inclusion* (Jun. 11, 2020) <https://newsroom.courts.ca.gov/news/supreme-court-california-issues-statement-equality-and-inclusion> (as of Nov. 28, 2024).

punishments violate contemporary standards of decency. Moreover, these reforms demonstrate that California has rejected not only *McCleskey*'s decision to tolerate "some risk of racial prejudice influencing a jury decision in a criminal case" (*McCleskey*, *supra*, 481 U.S. at pp. 309-10), but has also rejected its rationale that the U.S. Supreme Court's "safeguards designed to minimize racial bias in the process," such as *Batson*, are a sufficient check on systemic discrimination. (*Id*. at p. 314.)

4. County policy changes refusing to seek the death penalty based on its racially disparate outcomes and history of racism

Since 2020, elected district attorneys in two large California counties have announced they will no longer seek the death penalty because of the racial disparities it produces.

In 2020, the Santa Clara County District Attorney's Office, under elected District Attorney Jeff Rosen, announced 26 policy and practice changes "intended to address racial disparity and promote equity within the criminal justice system," including the decision to "no longer seek the death penalty."[20] The decision to stop seeking the death penalty was, in part, based on the fact that, "shamefully our society's most drastic and devastating law enforcement

[20] *DA Rosen announces Social Justice Reforms; will no longer seek the Death Penalty*; Jul. 22, 2020 <https://da.santaclaracounty.gov/news/news-release/da-rosen-announces-social-justice-reforms-will-no-longer-seek-death-penalty> (as of Nov. 28, 2024.)

punishment has been used disproportionately against defendants of color." (*Ibid*.)

In April 2024, following a visit to Montgomery, Alabama, Rosen filed a petition in superior court to commute the death sentences of all 15 death row prisoners from his county to life without the possibility of parole.[21] This shift was all the more remarkable because, before his 2020 policy change, Rosen had sought the death penalty four times during his tenure. But he had a transformational experience when he visited the Equal Justice Initiative's Legacy Museum in Montgomery, Alabama. The museum and associated sites, a memorial and monument sculpture, are a dramatic and unflinching look at the country's history of enslaving and violently oppressing Black people. While Rosen had previously committed to no longer seeking the death penalty, he made the momentous decision to commute the sentences of all of the prisoners on death row after this visit. "I went there supporting the death penalty," Rosen told the *Los Angeles Times*. "I left not so sure anymore."[22]

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[21] Death Penalty Information Center, *Santa Clara, California County District Attorney Requests Resentencing for County's Entire Death Row*; Apr. 9, 2024 <https://deathpenaltyinfo.org/santa-clara-california-county-district-attorney-requests-resentencing-for-countys-entire-death-row> (as of Dec. 2, 2024).

[22] Chabria, *Prosecutors put men on death row. This California D.A. wants to take them off* (Apr. 4, 2024) Los Angeles Times <https://www.latimes.com/california/story/2024-04-04/santa-clara-county-da-death-penalty-cases> (as of Dec. 2, 2024).

In Contra Costa County, Diana Becton, who was elected District Attorney in 2017, has never sought the death penalty. But she made her opposition clear in 2024 when she came out in support of the Petitioners in this case. On July 30, 2024, Becton published an op-ed in the *Sacramento Bee* titled, "California Could Finally Abolish Our Racist, Costly, Ineffective Death Penalty System." In the op-ed, Becton asked this Court to take up what she called the "historic petition" in this case and grant its request to halt the administration of the death penalty statewide. Becton's reasoning was based on the empirically demonstrated history and persistent manifestation of racist "discrimination and inequality" in the seeking and meting out of capital punishment.[23]

These are policy changes by elected District Attorneys in counties that have a collective population of more than three million people. Moreover, when courts assess contemporary standards of decency in a given jurisdiction, the question is not simply the number of states (at a national level) or counties (at a state level) that have adopted a particular policy. The "trend toward abolition" is also relevant (*Roper*, *supra*, 543 U.S. at p. 566), and these county-level changes, viewed in combination with the numerous state reforms outlined

[23] Becton, *California could finally abolish our racist, costly, ineffective death penalty system* (July 30, 2024) The Sacramento Bee <https://www.sacbee.com/opinion/op-ed/article290544219.html>(as of Dec. 2, 2024).

above, further demonstrate that a death penalty scheme that is applied in a racially discriminatory manner is contrary to California's contemporary standards of decency.

C. California's death penalty as-applied is 'cruel' because it does not serve any legitimate penological purpose

Criminal punishments are unconstitutionally cruel if they do not serve a legitimate penological purpose "more effectively than a less severe punishment" (*Lynch*, *supra*, 8 Cal.3d at p. 422, quoting *Furman*, *supra*, 403 U.S. at p. 280 (conc. opn. of Brennan, J.)), and certainly if they fail to further a proper purpose at all. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 183 (plur. opn. of Stewart, J.); see also *Furman*, *supra*, 403 U.S. at p. 279 (conc. opn. of Brennan, J. ["A punishment is excessive under this principle if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, [citations] the punishment inflicted is unnecessary and therefore excessive."].)

Accordingly, punishments that produce marked racial disparities are unconstitutionally cruel because such "disparities . . . raise[] the inference that the punishment is not meaningfully serving a purpose of punishment that a less harsh sanction could not adequately fulfill. If a punishment served a real

purpose, prosecutors, judges, and juries would use it regularly and evenly." (*State Constitutionalism*, *supra*, 108 Iowa L. Rev. at p. 586; see also Berry, *Unlocking State Punishment Clauses*, *supra*, at p. 37 ["a systemic application of punishments leading to distinctions based on improper factors is cruel"].)

As described by the Supreme Court, the only theoretically legitimate purposes of capital punishment are "retribution and deterrence of capital crimes by prospective offenders." (*Gregg*, *supra*, 428 U.S. at p. 183.) We note that numerous decisions from this Court suggest that retribution cannot be the standalone or even primary reason to secure a death sentence (see *Anderson*, *supra*, 6 Cal.3d at p. 651 ["Although vengeance or retribution has been acknowledged as a permissible purpose of punishment under the Eighth Amendment, we do not sanction punishment solely for retribution in California."] [internal citation omitted]), a view shared by Justice Thurgood Marshall in *Furman*. (*Furman*, *supra*, 403 U.S. at p. 343 (conc. Opn. of Marshall, J.) ["Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society."]; see also *People v. Love* (1960) 53 Cal.2d 843, 856-57, fn. 3 ["Whatever may have been the fact historically, retribution is no longer considered the primary objective of the criminal law and is thought by many not even to be a proper consideration."]; *People v. Floyd* (1970) 1 Cal.3d 694, 721-22 ["There is simply no place in [the death penalty] scheme for punishment for its own sake, the

product simply of vengeance or retribution."]; *People v. Krebs* (2019) 8 Cal.5th 265, 346 [finding that comments about vengeance or retribution are not prosecutorial misconduct only if they are "brief and isolated" and "do not form the principal basis for advocating the death penalty."].)

But even assuming that retribution can play some role in a death penalty scheme, it must still be evenhanded and based on culpability—that is, reliably given to those deserving the most severe punishment. Retribution cannot be inextricably linked to racial discrimination. (See *Gregory*, *supra*, 427 P.3d at 636; *Tison v. Arizona* (1987) 481 U.S. 137, 149 ["The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."].) As the Connecticut Supreme Court explained:

> [T]he death penalty must be equally available for similarly culpable offenders if a capital sentencing scheme is to fulfill a valid retributive purpose. To the extent that the ultimate punishment is imposed on an offender on the basis of impermissible considerations such as his, or his victim's, race, ethnicity, or socio-economic status, rather than the severity of his crime, his execution does not restore but, rather, tarnishes the moral order.

(*Santiago*, *supra*, 318 Conn. at p. 66.)

Likewise, as the Washington Supreme Court said in *Gregory*, when discriminatory factors rather than harmful conduct dictate the few eligible cases in which the death penalty is imposed, then there is no basis to conclude

that the death penalty effectively serves as deterrence. (*Gregory*, *supra*, 427 P.3d at p. 636.) Put another way, a criminal punishment loses deterrent value if it is based not on the conduct it is purportedly designed to deter and the culpability of those who commit it, but on arbitrary or impermissible factors such as race.

To show that a challenged punishment is driven by discriminatory factors at odds with accepted purposes of punishment, statistical disparities can be strengthened by evidence that the punishment flows from systemic discrimination and a state's history of pernicious racial discrimination in criminal prosecutions. For example, when the Washington Supreme Court struck down the death penalty because of racial bias, it looked to "case law and history" for evidence of "implicit and overt racial bias against [B]lack defendants in th[e] state" that further supported statistical evidence about the death penalty's application. (*Gregory*, *supra*, 427 P.3d at p. 635.) Citing system-wide disparities and examples of racism in jury selection, evidence presentation, and prosecutor arguments, the court concluded that "the association between race and the death penalty is *not* attributed to random chance." (*Ibid*.; see also *Santiago*, *supra*, 318 Conn. at p. 53 [taking notice of fact that "throughout every period of our state's history, the death penalty has been imposed disproportionately on those whom society has marginalized

socially, politically, and economically: people of color, the poor and uneducated, and unpopular immigrant and ethnic groups."].)

As Justice William Brennan pointed out in dissent, this crucial historical context was completely absent from the Supreme Court's analysis in *McCleskey*. "Georgia's legacy of a race-conscious criminal justice system, as well as this Court's own recognition of the persistent danger that racial attitudes may affect criminal proceedings," Justice Brennan wrote, "indicates that McCleskey's claim is not a fanciful product of mere statistical artifice." (*McCleskey*, *supra*, 481 U.S. at pp. 328-29 (diss. opn. of Brennan, J.).) Yet in accepting the inevitability of disparities of all kinds in criminal sentencing, the majority ignores "the particular repugnance of racial discrimination[.]" (*Id*. at p. 340.)

Here, the Petition's allegations, supported by empirical evidence, cover all these bases. Primarily, the Petition presents statistical evidence of racial disparities in the death penalty's application that is similar to if not stronger than the evidence that compelled courts to strike down the death penalty in Washington and Massachusetts. (See *Gregory*, *supra,* 427 P.3d 621; *Watson*, *supra,* 411 N.E.2d 1274.) The Petition includes 15 studies spanning more than four decades showing that California applies its death penalty in a way that systematically values white lives over others. Specifically, Black defendants are up to 8.7 times more likely to be sentenced to death than all other

defendants, and defendants of all races are up to 8.8 times more likely to be condemned when at least one victim is white. (Petn. at 17-18.) These studies, Prof. John Donohue wrote, "collectively provide powerful and compelling evidence that racial factors have marred capital sentencing outcomes in this state," and that "[r]ace has played a substantial and significant role in determining who lives and who dies for crimes that are otherwise similar." (*Id*. at p. 86.)

Moreover, the Petition alleges that such disparities are the result not just of biased verdicts, but a system infected with racial bias at every stage—including the broad use of prosecutorial discretion in charging decisions, the process of "death qualifying" juries that "systematically 'whitewashes' the capital eligible pool," penalty phase arguments that invoke racial stereotypes, and amorphous, imprecise penalty phase instructions that invite jurors to subconsciously rely on ethnic or racial biases. (See Petn. at pp. 41-49.)

This present day reality of how capital punishment works in California is inextricably linked to the state's history of racial terror and racist prosecutions—a history the state acknowledges and has been working to break from (See Sec. II.B., *supra*), but has not fully dismantled. "The death penalty is a direct descendant of lynching and other forms of racial violence and racial oppression in America." (Bright, *Discrimination, Death, & Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty* (1995) 35

Santa Clara L. Rev. 433, 439); see also (Stevenson, *Just Mercy* (2014) at p. 299 ["The racial terrorism of lynching in many ways created the modern death penalty," with capital punishment "redirect[ing] the violent energies of lynching while assuring white southerners that [B]lack men would still pay the ultimate price."]; Semel et al., *supra*, *Whitewashing the Jury Box*, Berkeley Law Death Penalty Clinic at p. 38 ["The administration of the criminal law is interwoven with the history of lynching"]; Garland, *Peculiar Institution, America's Death Penalty In An Age Of Abolition* (2010), p. 34 ["many of the same social and political dynamics that produced lynchings in the early twentieth century continue to produce death penalties now"].)

While the Deep South was the epicenter of racial violence, California was not immune. This Court in *Anderson* noted the state's history of "vigilante justice and public hangings" (*Anderson*, *supra*, 6 Cal.3d at p. 645), which was often race-based and involved active participation by law enforcement. (Reparations Task Force, Final Report (June 29, 2023), p. 149 (Reparations Report).) And the state's Reparations Task Force Report, published in 2023, details California's history of extrajudicial lynchings, noting 352 documented lynchings of Black, Native, Chinese, and Latino Americans that occurred between 1850 and 1935 (though the actual number is certainly much higher). (*Ibid*.)

This is the context in which the overwhelming statistical evidence of racial disparities must be understood. Such disparities do not stand alone. They are the output of a discriminatory system that has been shaped by this state's, and the nation's, history of using racial violence to enforce racial hierarchy. When a death penalty scheme or any other severe criminal penalty is "imposed in [such] an arbitrary and racially biased manner, it logically follows that the death penalty fails to serve any legitimate penological goals." (*Gregory*, *supra*, 427 P.3d at p. 636.)

D. California's death penalty is 'unusual' because it is applied in an arbitrary and discriminatory manner

Finally, the foregoing analysis showing that California's death penalty is "cruel" because it violates contemporary standards of decency and does not serve a legitimate purpose also shows that it is "unusual." Criminal punishments are "unusual" if they are not regularly and reliably imposed across eligible cases, but are instead inflicted based on arbitrary or worse, pernicious discriminatory factors. (See *Furman*, *supra*, 403 U.S. at p. 242 (conc. opn. of Douglas, J.) ["It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."].) As the Connecticut Supreme Court explained in *Santiago*, while states are not permitted to impose

criminal punishment with the wanton randomness of a lightning strike, a punishment practice based on racial discrimination is an even "greater evil[]." (*Santiago*, *supra*, 38 Conn. at p. 19.) The same allegations of racial disparities discussed above, therefore, separately establish the unconstitutional "unusualness" of California's death penalty scheme.

CONCLUSION

Fundamentally, the question presented in this case is whether California's cruel or unusual clause prohibits the state from imposing the most severe criminal punishment based on racial discrimination. Of course, intentional, explicit racism in imposing a sentence, especially a death sentence, would violate both the Eighth Amendment and Section 17. But that is not the way that racism always or even most often works. As the Petition in this case details—and as American history and human experience have long made apparent—structural racism, while insidious, is no less pernicious. "While no doubt some bad actors remain," law professor Kathryn Miller wrote in a recent article on Eighth Amendment rights, "minority groups most require protection not from these individual actors but from the structural defects of the state's criminal legal system." (Miller, *No Sense of Decency* (2023) 98 Wash. L. Rev. 115, 171.) And through a series of groundbreaking reforms, Californians have made clear that they agree. The Racial Justice Act, in particular, speaks with

powerful clarity to California's commitment to dismantling the structural forces that *McCleskey*'s tolerance of racial disparities countenanced.

This expression of contemporary standards carries profound constitutional weight. In this case, Petitioners have alleged a death penalty scheme imbued with the systemic discrimination that California has rejected. To nonetheless apply and enforce that scheme is cruel and serves no legitimate government purpose.

Petitioners have therefore alleged a violation of California Constitution Article 1, Section 17.

Dated: December 3, 2024

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(California Rules of Court, rule 8.520(c)(1))

I hereby certify pursuant to California Rules of Court 8.520(c)(1) that this brief consists of 13,105 words, including footnotes and excluding cover information, tables, signature blocks, and this certificate. This brief was prepared by Microsoft Word software, and this is the word count generated by the software for this brief.

Dated: December 3, 2024

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PROOF OF SERVICE

My business address is the University of San Francisco School of Law, 2199 Fulton Street, Kendrick Hall, Suite 211, San Francisco, CA 94117-1080. My electronic service address is lbazelon@usfca.edu. I am not a party to the instant case, and I am over the age of eighteen years.

On December 3, 2024, I caused the following documents:

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND

BRIEF OF *AMICI CURIAE* THE STATE LAW RESEARCH INITIATIVE & THE UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW RACIAL JUSTICE CLINIC IN SUPPORT OF PETITIONERS

to be filed with ImageSoft TrueFiling ("TrueFiling") pursuant to California Rule of Court 8.212, and to be served via TrueFiling on the following:

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

Executed on December 3, 2024 at San Francisco, California.

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