

**Proposition 66:  
Death Penalty. Procedures.  
“Death Penalty Reform and Savings Act of 2016”**

Initiative Statute

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## I. EXECUTIVE SUMMARY

Proposition 66 would change existing death penalty procedures to shorten legal challenges of death penalty sentences and convictions. Proposition 66's changes include the following: (1) changes the procedures governing state court appeals and petitions challenging death penalty convictions and sentences; (2) designates superior courts to review initial petitions; (3) limits successive petitions; (4) establishes a timeframe for state courts to review petitions; (5) appoints attorneys to accept non-capital cases and requires them to accept death penalty appeals; (6) exempts prison officials from existing regulation for development of execution methods; (7) authorizes the transfer of condemned inmates among California prisons; (8) increases portions of condemned inmates' wages that may be applied to victim restitution; and (9) voids any other measure related to the death penalty if Proposition 66 receives more affirmative votes.<sup>1</sup>

“A “yes” vote on Proposition 66 would mean court procedures for legal challenges to death sentences would be subject to various changes, such as time limits on those challenges and revised rules to increase the number of available attorneys for those challenges. Condemned inmates could be housed at any state prison.”<sup>2</sup>

“A “no” vote on Proposition 66 would mean there would be no changes to the state's current court procedures for legal challenges to death sentences. The state would still be limited to housing condemned inmates only at certain prisons.”<sup>3</sup>

## II. THE LAW

### A. Current Law

#### 1. Court Jurisdiction and Review of Death Penalty Cases

##### a. Death Penalty Trials: Superior Courts

Under current law, death penalty cases are prosecuted in superior courts, generally in the counties where the crimes took place.<sup>4</sup> Within death penalty cases, there are two trials: (1) guilt phase trial and (2) the punishment phase trial.<sup>5</sup> Elected District Attorneys have discretion to prosecute death penalty cases.<sup>6</sup>

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<sup>1</sup> CAL. SEC'Y OF STATE, Official Voter Information Guide: California General Election, Tuesday November 8, 2016, at 104, available at <http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf> [“NOVEMBER 2016 TITLE SUMMARY ANALYSIS”].

<sup>2</sup> CAL. SEC'Y OF STATE, Prop 66, Official Voter Information Guide, <http://voterguide.sos.ca.gov/en/propositions/66/> (last visited Sept. 20, 2016).

<sup>3</sup> NOVEMBER 2016 TITLE SUMMARY ANALYSIS, *supra* note 1, at 104.

<sup>4</sup> PAULA A. MITCHELL & NANCY HAYDT, CALIFORNIA VOTES 2016: AN ANALYSIS OF THE COMPETING DEATH PENALTY BALLOT INITIATIVES, ALARCÓN ADVOCACY CENTER SPECIAL REPORT, VOL. 1, at 9 (2016).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 10.

b. *Death Penalty Impact on Superior Court Judges*

California counties do not evenly distribute death penalty cases. Nearly half (47.95 percent) of all death sentences come from just three counties: Los Angeles County (233 death sentences for 30.86 percent of the statewide total), Riverside County (89 death sentences for 11.79 percent of the statewide total), and San Bernardino County (40 death sentences for 5.30 percent of the statewide total).<sup>7</sup> The busy death penalty counties are experiencing a “judicial crisis” from the shortages of judges and staff juxtaposed against higher caseloads.<sup>8</sup> For example, “Riverside County has one of the highest caseloads per judge in the state...Each of Riverside County’s superior court judges has a caseload of over 5,570 filings.”<sup>9</sup> The shortage of judges even affects the opportunity for cases to be heard in front of a judge.<sup>10</sup> In particular, between January 2007 and June 2009, “350 criminal cases in Riverside County were thrown out because no judge was available to hear them.”<sup>11</sup>

c. *California Courts of Appeal*

Under current law, Courts of Appeal have appellate jurisdiction.<sup>12</sup> There are currently 105 full-time justices on the California Courts of Appeal.<sup>13</sup> Courts of Appeal use a three-judge panel that reviews cases subject to non-capital habeas corpus, mandamus, certiorari, and prohibition proceedings, meaning it does not review capital habeas corpus petitions.<sup>14</sup> The Courts of Appeal will file opinions within three years or less from the filing of the notice of appeal that challenge the defendant’s sentence to life imprisonment without parole.<sup>15</sup> The Courts of Appeal will also consider death penalty cases only when the jury returns a verdict that declines a death sentence and instead imposes a sentence of life imprisonment without the possibility of parole.<sup>16</sup> All opinions of the Courts of Appeal are reviewable by the California Supreme Court.<sup>17</sup>

d. *California Supreme Court*

Currently, the California Constitution requires all death penalty cases to directly go to the California Supreme Court for review, which cannot be changed without a constitutional amendment.<sup>18</sup> Thus, the seven justices on the California Supreme Court carry the weight of review on death penalty cases.<sup>19</sup> In 2007, the California Supreme Court unanimously endorsed a proposal that would amend article VI, section 12, of the

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<sup>7</sup> *Id.* at 11.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 13.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 15.

<sup>19</sup> *Id.*

California State Constitution, which would have permitted the transfer of death penalty cases to the California Courts of Appeal.<sup>20</sup> However, in 2008, the California Supreme Court deferred the proposal, citing the California's state budget situation.<sup>21</sup> In 2014, a constitutional ballot initiative to amend the California State Constitution was proposed.<sup>22</sup> However, it did not qualify for the election ballot due to the failure to obtain the required signatures needed to make it on the ballot.<sup>23</sup>

The California Supreme Court has original jurisdiction in capital habeas corpus proceedings and also has the power to review all state Court of Appeal decisions.<sup>24</sup> The California Supreme Court also has the sole authority to appoint attorneys to represent clients in both capital habeas corpus and capital direct appeals.<sup>25</sup>

Under current law, the California Supreme Court typically takes fifteen years to review death penalty cases and up to twenty-five years to render a decision on these cases.<sup>26</sup> The review and decision process is based on the fact that death penalty cases are much lengthier and takes a longer time period to review than non-capital murder cases.<sup>27</sup> Briefs in death penalty cases are typically several hundreds of pages.<sup>28</sup> Trial records will be much longer as well, based on the length of time in the jury selection process because it requires determining whether jurors can set aside their death penalty views when considering the trial verdict.<sup>29</sup> Additionally, the punishment phase of the record includes possibly thousands of pages of testimony by expert witnesses for the purpose of persuading the jury to sentence the defendant to life imprisonment without parole.<sup>30</sup>

## 2. *Current Legal Pathways to Challenge Death Sentences*

### a. *Direct Appeals*

Under current law, the defendant may argue in direct appeal that there has been a state law or a federal constitutional violation, or both.<sup>31</sup> For example, an attorney may argue the trial judge's decision to exclude evidence was proper or improper. The California Supreme Court reviewing direct appeals will focus on the trial court records and proceedings that resulted in the defendant's death penalty sentence.<sup>32</sup> If the California Supreme Court affirms the conviction and death sentence, then the defendant may ask the United States Supreme Court for review.<sup>33</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 15-16.

<sup>25</sup> *Id.* at 16.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 14.

<sup>28</sup> *Id.* at 18, fn. 59.

<sup>29</sup> *Id.* at 14.

<sup>30</sup> *Id.* at 16-17; *see also* NOVEMBER 2016 TITLE SUMMARY ANALYSIS, *supra* note 1, at 104.

<sup>31</sup> MITCHELL & HAYDT, *supra* note 4, at 16-17.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*; *see also* NOVEMBER 2016 TITLE SUMMARY ANALYSIS, *supra* note 1, at 104.

*b. Habeas Corpus Petitions*

State habeas corpus is an additional appeal that differs from direct appeals.<sup>34</sup> Habeas corpus petitions may raise claims “based on facts outside the trial record” and “include violations in trial process and procedures and government misconduct, which violate the federal and state constitutions.”<sup>35</sup>

Under current law, in addition to direct appeals, habeas corpus challenges can first be made in the California Supreme Court and then in the federal courts.<sup>36</sup> Once a death row inmate files a direct appeal, he or she is then entitled to file a writ of habeas corpus to seek relief in the California Supreme Court, which is required to review all habeas corpus petitions.<sup>37</sup> A writ of habeas corpus involves factors that differ from those considered in direct appeals.<sup>38</sup> The factors within a habeas corpus petition may include federal and California state constitutional violations, such as ineffective counsel, violations in trial proceedings or procedures, or misconduct by the government.<sup>39</sup> Since habeas corpus petitions are extensive legal challenges, they require development of information outside the appellate record through investigation to prove the evidence caused an unfair trial.<sup>40</sup>

Capital habeas corpus petitions are voluminous because they must prove every constitutional claim with evidence.<sup>41</sup> Additionally, the California Supreme Court may order evidentiary hearings be conducted by returning any or all claims made by the petitioner to the trial court.<sup>42</sup> The trial court will then hold the ordered hearings for the specified claims and send petitions back to the California Supreme Court.<sup>43</sup> A petitioner may also contest the findings of the trial court’s evidentiary hearings by filing an appeal to the California Supreme Court.<sup>44</sup> However, the California Supreme Court rarely reverses cases on the basis of trial court findings in habeas corpus petitions.<sup>45</sup>

Under current law, the petitioner of habeas corpus may file for relief in the U.S. District Court if all state claims have been exhausted in the California Supreme Court. “Federal courts have granted habeas relief to California death row inmates in 70 percent of the cases in which review has been completed.”<sup>46</sup> If a defendant appeals to the U.S. District Courts and is denied relief, he or she may then appeal to the Ninth Circuit Court

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<sup>34</sup> Office of Victims’ Services, *A Victim’s Guide to the Capital Case Process*, OFFICE OF THE CALIFORNIA ATTORNEY GENERAL 6, <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/deathpen.pdf>.

<sup>35</sup> *Id.* at 6; MITCHELL & HAYDT, *supra* note 4, at 19.

<sup>36</sup> NOVEMBER 2016 TITLE SUMMARY ANALYSIS, *supra* note 1, at 104.

<sup>37</sup> Office of Victims’ Services, *supra* note 34, at 6; MITCHELL & HAYDT, *supra* note 4, at 19.

<sup>38</sup> MITCHELL & HAYDT, *supra* note 4, at 19.

<sup>39</sup> Office of Victims’ Services, *supra* note 34, at 6; MITCHELL & HAYDT, *supra* note 4, at 19.

<sup>40</sup> MITCHELL & HAYDT, *supra* note 4, at 19.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 20.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

of Appeals.<sup>47</sup> However, the Ninth Circuit only grants discretionary reviews.<sup>48</sup> If the petitioner does not prevail in the Ninth Circuit, then he or she may file a writ of certiorari to the Supreme Court of the United States for review.<sup>49</sup> However, the U.S. Supreme Court rarely grants review.<sup>50</sup> If the Supreme Court does grant review, it may either affirm the Circuit Court decision or overturn it in whole or part.<sup>51</sup> If the U.S. Supreme Court reverses in whole or in part, the case will then be returned to the lower courts for proceedings consistent with the Supreme Court's order.<sup>52</sup>

### 3. *Attorneys Appointed to Represent Inmates Sentenced to Death*

Under current law, individuals that receive a death sentence are entitled to an attorney during trial and appeal proceedings, as well as all stages of post-conviction review if they cannot afford a lawyer.<sup>53</sup> Attorneys are appointed to represent individuals sentenced to death that cannot afford legal representation by the California Supreme Court.<sup>54</sup> The Judicial Council, which is the governing and policymaking body of the judicial branch, establishes qualifications that attorneys must meet to represent individuals on appeal.<sup>55</sup> These attorneys may work for California state agencies, including the Office of the State Public Defender or the Habeas Corpus Resource Center, or private firms.<sup>56</sup> All private appointed attorneys are paid by the California Supreme Court.<sup>57</sup> Generally, different attorneys are appointed to represent individuals on direct appeals and habeas corpus petitions.<sup>58</sup>

### 4. *Incurred Costs to the State*

California incurs the costs for legal challenges to death sentence cases. The state pays for the following: (1) the California Supreme Court to hear death penalty challenges; (2) the attorneys to represent condemned inmates; and (3) the attorneys employed by the State Department of Justice that seek to uphold death sentences that are challenged in the courts. California currently spends annually about \$55 million on legal challenges to death sentences.<sup>59</sup>

### 5. *Housing of Inmates*

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<sup>47</sup> *Id.* at 21.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 22.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> CENTER FOR CONSTITUTIONAL RIGHTS & INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, DISCRIMINATION, TORTURE, AND EXECUTION: A HUMAN RIGHTS ANALYSIS OF THE DEATH PENALTY IN CALIFORNIA AND LOUISIANA, (2013) available at <http://ccrjustice.org/sites/default/files/assets/files/2013-Death-Penalty-Report.pdf>.

<sup>54</sup> NOVEMBER 2016 TITLE SUMMARY ANALYSIS, *supra* note 1, at 102.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

Under current law, condemned male inmates are housed at San Quentin State Prison (on death row), and condemned female inmates are housed at the Central California Women’s Facility in Chowchilla.<sup>60</sup> It costs more to house condemned inmates than the general population because of required state regulations and procedures for safety when handling the condemned inmates.<sup>61</sup> For example, death row inmates are escorted at all times in handcuffs by one or two officers while outside their cells.<sup>62</sup> Additionally, death row inmates are required to be in separate cells, unlike the general population that shares cells.<sup>63</sup>

## **B. Proposed Law**

### *1. Habeas Corpus Petitions Transferred to Superior Courts*

Proposition 66 will add Section 1509 to the California Penal Code, which will require habeas corpus petitions to be heard in superior courts in which the original trial took place instead of the California Supreme Court.<sup>64</sup> Any court, other than the trial court that imposed the death sentence, must promptly transfer a habeas corpus petition back to that court unless the petitioner has shown good cause to have the petition filed in another court.<sup>65</sup> The trial judge will be assigned to the petition once it is transferred back to the trial court, unless that judge is unavailable or the petitioner has shown good cause to have another judge assigned.<sup>66</sup>

Under Proposition 66, the initial or successive habeas corpus petition must be filed within one year from the sentence.<sup>67</sup> The superior court shall resolve the initial habeas corpus petition within one year of filing, unless it finds a delay is necessary to resolve a substantial claim of innocence.<sup>68</sup> However, the court shall not go beyond two years.<sup>69</sup> The habeas corpus petitions will be dismissed by the superior court unless it finds from a preponderance of the evidence available shows that the petitioner is actually innocent or ineligible for the death sentence through the crime through which he or she was sentenced and convicted to death.<sup>70</sup> Ineligibility for the death sentence, as defined within the proposal, means there are certain circumstances that place the petitioner outside the discretion of either the jury or judge that decided the sentence.<sup>71</sup> Examples of ineligibility claims include a defendant under the age of 18 at the time or a defendant with an intellectual disability.<sup>72</sup>

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<sup>60</sup> *Id.* at 105.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Cal. Proposition 66, § 6, *adding* Cal. Penal Code Section 1509 (2016).

<sup>65</sup> *Id.*, *adding* Cal. Penal Code Section 1509(a) (2016).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*, *adding* Cal. Penal Code Section 1509(f) (2016).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*, *adding* Cal. Penal Code Section 1509(d) (2016).

<sup>72</sup> *Id.*

In addition, under the Proposition, the superior court will offer to appoint counsel to the condemned individual for post-conviction challenges at the end of trial court proceedings when the death sentence is imposed.<sup>73</sup> The superior court may enter an order for one of the following: (1) an appointment of more than one attorney to represent the prisoner if he or she is indigent and accepts the judge's offer or is unsure whether to accept or reject the judge's offer of appointment; (2) a finding, after a hearing if necessary, the prisoner was fully aware of the legal consequences of his or her rejection of the appointment of counsel; or (3) a denial of appointment after finding the prisoner is not indigent.<sup>74</sup>

The Proposition also amends Section 190.6 of the California Penal Code.<sup>75</sup> It provides that the Judicial Council shall adopt initial rules and standards that will be designed to expedite the process of capital appeals and state habeas corpus review within eighteen months of the effective date of the proposition.<sup>76</sup> The Judicial Council shall have the responsibility in monitoring the timeliness of review of capital cases and it shall amend any rules and standards necessary to complete the state appeals and state habeas corpus petitions in capital cases, within five years.<sup>77</sup> Additionally, pending petitions at the time Proposition 66 is enacted may be transferred to the trial court that imposed the sentence.<sup>78</sup> For death sentences that have been imposed prior to the passage of the proposition and where no habeas corpus petition has been filed, a petition may be filed within one year of the effective date of the proposition or during time allowed under prior law.<sup>79</sup>

## 2. *Court of Appeals Review and Jurisdiction of Claims Raised by Petitioner*

Proposition 66 adds Section 1509.1 the California Penal Code, which allows for either party to appeal a superior court decision that shall be limited to claims raised in the superior court.<sup>80</sup> The changes also allows the Court of Appeal to consider a claim of ineffective assistance by trial counsel if the habeas counsel failed to present that claim to the superior court because it would constitute ineffective assistance.<sup>81</sup> Additionally, the Court of Appeal may order a limited remand to the superior court to consider the claim if additional findings of fact are required.<sup>82</sup>

Under the proposition, the state may appeal petitions that are granted relief by the superior court.<sup>83</sup> The petitioner may appeal a superior court decision that denies relief on a successive petition only if the superior court or Court of Appeals grants a certificate of

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<sup>73</sup> Cal. Proposition 66, § 16, *amending* Cal. Gov. Code Section 68662 (2016).

<sup>74</sup> *Id.*

<sup>75</sup> Cal. Proposition 66, § 3, *amending* Cal. Penal Code Section 190.6 (2016).

<sup>76</sup> *Id.*, *amending* Cal. Penal Code Section 190.6(d) (2016).

<sup>77</sup> *Id.*

<sup>78</sup> Cal. Proposition 66, § 3, *adding* Cal. Penal Code Section 1509(g) (2016).

<sup>79</sup> *Id.*

<sup>80</sup> Cal. Proposition 66, § 7, *adding* Cal. Penal Code Section 1509.1(a) (2016).

<sup>81</sup> *Id.*, *adding* Cal. Penal Code Section 1509.1(a)-(b) (2016).

<sup>82</sup> Cal. Proposition 66, § 3, *adding* Cal. Penal Code Section 1509.1(b) (2016).

<sup>83</sup> *Id.*, *adding* Cal. Penal Code Section 1509.1(c) (2016).



appealability.<sup>84</sup> The certificate of appealability may be granted if the petitioner shows a substantial claim for relief and a substantial claim that the requirements for granting a habeas corpus petition is met.<sup>85</sup> A notice of appeal must be filed in the superior court within thirty days of its decision.<sup>86</sup> When the superior court grants or denies a certificate of appealability, it will do so concurrently with a decision denying relief on the habeas corpus petition.<sup>87</sup> The Court of Appeal will either grant or deny a certificate of appealability within ten days of an application for the certificate.<sup>88</sup> If the certificate of appealability is granted, the jurisdiction of the Court of Appeal is limited to the claims made in the certificate of appealability and “any additional claims by the Court of Appeal within sixty days of the notice of appeal.”<sup>89</sup> Once the certificate of appealability is granted, the appeal shall then have priority over all other matters and be decided as expeditiously as possible.<sup>90</sup>

### 3. *Noncompliance by Court or Parties*

Under Proposition 66, Section 190.6 of the California Penal Code will be amended to provide that, for all cases where death sentences were imposed on or after January 1, 1997, the opening appellate briefs in the appeal to the California Supreme Court shall be filed no later than seven months after the trial record is certified as complete.<sup>91</sup> Even if a petitioner or court does not comply with this, the validity of the death sentence judgment shall not be affected by the non-compliance, nor require dismissal of an appeal or habeas corpus petition.<sup>92</sup> If a court fails to comply without extraordinary and compelling reasons to justify the delay, either party or the victim may seek relief by a writ of mandate by another court.<sup>93</sup>

### 4. *Supreme Court and Judicial Evaluation of Qualified Counsel*

Under Proposition 66, the Supreme Court and Judicial Council will be required to re-evaluate the standards for appointment of counsel in death penalty cases.<sup>94</sup> Experience requirements would not be limited to defense experience.<sup>95</sup> The Supreme Court and Judicial Council would have to consider quality of representation and provide timely appointments by not restricting the availability of attorneys.<sup>96</sup>

Article I, Section 28 of the California Constitution provides a right to victims of crime to have prompt and final judgments made, including a right to have death sentences

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Cal. Proposition 66, § 3, *amending* Cal. Penal Code Section 190.6(e.) (2016).

<sup>93</sup> *Id.*

<sup>94</sup> Cal. Proposition 66, § 18, *amending* Cal. Gov. Code Section 68665(b) (2016).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

carried out within a reasonable time.<sup>97</sup> Proposition 66 amends Section 190.6 of the California Penal Code to require that the Judicial Council implement rules and standards designed to expedite the habeas corpus and state appeal reviews within eighteen months of the effective date of the proposal.<sup>98</sup> The Judicial Council would be required to monitor the capital review cases, to ensure they are timely, and amend standards and rules that would be necessary to complete state appeal and habeas corpus reviews within five years.<sup>99</sup>

#### 5. *Supreme Court Attorney Appointments for Appeals Process*

Under the Proposition, the California Supreme Court would have a duty to expedite review of capital cases.<sup>100</sup> The Court shall appoint an attorney as soon as possible for an appellant who cannot afford private representation.<sup>101</sup> Only in compelling or extraordinary circumstances may the Court grant time extensions for briefs.<sup>102</sup> If a backlog of appointed attorneys to capital cases occurs, the Court shall require attorneys who are qualified for the most serious non-capital appeals to accept appointment as a condition to remain on the Court's appointment list.<sup>103</sup> This provision would force lawyers who are not expert in death penalty cases to accept appointment to these cases in order to maintain their position as appointed counsel in non-death penalty cases.<sup>104</sup>

#### 6. *Required Labor and Wages toward Victim Restitution*

Under the Proposition, every death row prisoner is required to work as many hours of each day of faithful labor, which does not include physical fitness and physical education.<sup>105</sup> If a condemned inmate refuses to work as required, the California Department of Corrections and Rehabilitation ("CDCR") may revoke his or her privileges.<sup>106</sup> If the inmate owes a restitution order or restitution fine, the Secretary of the Department of Corrections and Rehabilitation may deduct from the inmate's wages, trust account deposits, either 70 percent or the balance owed, whichever is less.<sup>107</sup> The source of the income does not matter.<sup>108</sup> The Secretary of the Department of Corrections and Rehabilitation will then take the collected funds and transfer them to the California Victim Compensation and Government Claims Board.<sup>109</sup>

#### 7. *Transfer to California Prisons*

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<sup>97</sup> Cal. Proposition 66, § 3, *amending* Cal. Penal Code Section 190.6(d) (2016).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Cal. Proposition 66, § 5, *adding* Cal. Penal Code Section 1239.1(a.) (2016).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Cal. Proposition 66, § 5, *adding* Cal. Penal Code Section 1239.1(b) (2016).

<sup>104</sup> *Id.*

<sup>105</sup> Cal. Proposition 66, § 8, *adding* Cal. Penal Code Section 2700.1 (2016).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

Under Proposition 66, every condemned male inmate shall be delivered to the warden of the California state prison, which will be designated by the CDCR for the execution of the death penalty.<sup>110</sup> The CDCR may transfer the condemned inmate to another prison (from the designated prison for execution) that it determines is able to provide the level of security sufficient for the inmate.<sup>111</sup> If the condemned inmate is transferred, the condemned inmate shall be returned to the initial designated prison where the execution is to occur once a date for execution is set.<sup>112</sup>

#### 8. *Methods of Execution*

The methods of executions will continue to be either by lethal gas or lethal injection based on the standards and direction of the CDCR.<sup>113</sup> The condemned inmate will have a choice between the two methods and will provide it in writing and submit it to the warden.<sup>114</sup> Condemned inmates that do not provide a choice of execution method within ten days after the warden's service of an execution warrant has been issued will be executed by lethal injection.<sup>115</sup> The prisoner will have another opportunity to choose either method if he or she is not executed on the scheduled date and a new one is set.<sup>116</sup> In a case where either method is held invalid, the remaining method will then be imposed.<sup>117</sup> The CDCR or any successor agency with the duty to execute judgments of death, shall maintain at all times the ability to execute such judgments.<sup>118</sup>

Under the Proposition, the Administrative Procedures Act (APA) will not apply to standards, procedures, or regulations of execution methods.<sup>119</sup> The standards adopted by the CDCR will be available for condemned inmates and the public.<sup>120</sup> The Attorney General, State Public Defender, and counsel for the condemned inmate whose execution date is set or has a pending motion to set the execution date, shall promptly be notified by the CDCR if there is any new adoption or amendment to the standards.<sup>121</sup> If the Department fails to provide notice, it will not be grounds for stay of an execution or injunction against carrying out the execution unless it "actually prejudiced the inmate's ability to challenge the standard," and in that event the stay shall be limited to a maximum of ten days."<sup>122</sup> In the event that intravenous lethal injections are determined by the warden to be impractical due to the condemned inmate's health, then the lethal injection may be carried out through other means of injection.<sup>123</sup>

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<sup>110</sup> Cal. Proposition 66, § 9, *amending* Cal. Penal Code Section 3600 (2016).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Cal. Proposition 66, § 10, *amending* Cal. Penal Code Section 3604(b) (2016).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Cal. Proposition 66, § 10, *amending* Cal. Penal Code Section 3604(c) (2016).

<sup>117</sup> *Id.*, *amending* Cal. Penal Code Section 3604(d) (2016).

<sup>118</sup> *Id.*, § 10, *amending* Cal. Penal Code Section 3604(e) (2016).

<sup>119</sup> Cal. Proposition 66, § 11, *adding* Cal. Penal Code Section 3604.1(a) (2016).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*, *adding* Cal. Penal Code Section 3604.1(b) (2016).

Under Proposition 66, the court that rendered the death sentence has exclusive jurisdiction to hear any claim by a condemned inmate that the method of execution is invalid or unconstitutional.<sup>124</sup> If the presentation of the claims is delayed without good cause, the claim may be dismissed.<sup>125</sup> The Court must order a valid method if it finds the one at issue invalid. If the federal court prohibits the method of execution, the Department of Corrections and Rehabilitation will have “90 days to adopt a method that conforms to the federal requirements found by that court.”<sup>126</sup> Any orders by the District Attorney or Attorney General and any motions by the victim of the crime may be made to order the CDCR to perform any duty necessary to enable it execute the death sentence if it fails to do so.<sup>127</sup>

In addition, under the Proposition’s changes, a doctor may be present at execution to advise CDCR on execution protocols, to minimize pain for the prisoner, and to pronounce the inmate’s death.<sup>128</sup> The Business and Professions Code will not apply to the purchase of drugs, medical supplies, or medical equipment that is necessary to carry out an execution.<sup>129</sup> Additionally, “any pharmacist, or supplier, compounder, or manufacturer or pharmaceuticals is authorized to dispense drugs and supplies to the secretary or secretary’s designee, without prescription” to carry out the executions.<sup>130</sup> Any licensed health care professional that takes an action authorized within the Proposition, shall not have their license or certification denied, revoked, censured, reprimanded, suspended or subjected to any other disciplinary actions by a licensing board, department, commission or accreditation agency that oversees, regulates health care, or certifies licenses.<sup>131</sup>

### 9. *Creation and Powers of the California Habeas Corpus Resource Center*

Under Proposition 66, the California Habeas Corpus Resource Center (“the Center”) is created as part of the judicial branch of the State government.<sup>132</sup> The Center will have the authority to employ up to 34 attorneys who may be appointed to represent condemned inmates that are determined to be indigent by a court of competent jurisdiction and without counsel.<sup>133</sup> These appointments are for “habeas corpus petitions in state and federal courts, challenging the legality of the judgment or sentence imposed against that person and preparing petitions for executive clemency.”<sup>134</sup> For the purposes of direct appeal, the appointment made by the Center may be concurrent with appointments of the State Public Defender or other counsel.<sup>135</sup> Compensation for representation and expenses for appointments by the Center to represent in federal court

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<sup>124</sup> Cal. Proposition 66, § 11, *adding* Cal. Penal Code Section 3604.1(c) (2016).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Cal. Proposition 66, § 12, *adding* Cal. Penal Code Section 3604.3(a) (2016).

<sup>129</sup> *Id.*, *adding* Cal. Penal Code Section 3604.3(b) (2016).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*, *adding* Cal. Penal Code Section 3604.3(c) (2016).

<sup>132</sup> *Id.*, *amending* Cal. Gov. Code Section 68661(2016).

<sup>133</sup> *Id.*, *amending* Cal. Gov. Code Section 68661(a) (2016).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

condemned inmates that are indigent are processed in the Federal Trust Fund.<sup>136</sup> These attorneys would be compensated at the same level of comparable positions of the State Public Defender Office.<sup>137</sup>

The Proposition would also require that the Center work with the courts to recruit attorneys of the private bar to accept habeas corpus appointed cases.<sup>138</sup> The Center would also recommend attorneys to the California Supreme Court for inclusion in the roster of qualified counsel in habeas corpus proceedings.<sup>139</sup> However, only the Supreme Court would make the final determination of including attorneys on the roster, not the Center. The Center may provide representation in federal habeas corpus petitions if and only if: (1) the appointment was made on state habeas corpus, (2) the appointment was made for federal habeas corpus petitions by the federal court, and (3) the executive director has determined that compensation will fully be covered by the federal court. The Center or any other entity that is funded by the State shall not use these funds to attack California court judgments in capital cases in a federal court except in review by the Supreme Court.<sup>140</sup> The Center is only authorized to provide representation in habeas corpus petitions; and it may not litigate other cases or use funds for advocacy that is not authorized by the Proposition.<sup>141</sup>

Through the Proposition's changes, the Center shall also provide a report to the people, the Governor, the State Legislature, and the California Supreme Court on its operations and status of appointments to capital habeas corpus petitions.<sup>142</sup> The report will also include cases it provides representation on and any case litigated longer than a year will have an explanation for its delay and actions to expedite completion.<sup>143</sup>

#### *10. Amendments to the Proposition*

Proposition 66 provides that the State Legislature cannot amend the initiative unless a bill is passed by three-fourths of each House passes or a subsequent initiative is approved by the voters.<sup>144</sup>

### **III. DRAFTING ISSUES**

#### **A. Severability**

Under the Proposition, if any section is held invalid or unconstitutional for any reason, the remaining sections will not be affected if those sections can still take effect

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<sup>136</sup> Cal. Proposition 66, § 14, *amending* Cal. Gov. Code Section 68661(b) (2016).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*, *amending* Cal. Gov. Code Section 68661(c) (2016).

<sup>139</sup> *Id.*, *amending* Cal. Gov. Code Section 68661(d) (2016).

<sup>140</sup> Cal. Proposition 66, § 15, *adding* Cal. Gov. Code Section 68661.1(a) (2016).

<sup>141</sup> *Id.*, *adding* Cal. Gov. Code Section 68661.1(b) (2016).

<sup>142</sup> Cal. Proposition 66, § 14, *amending* Cal. Gov. Code Section 68661(l) (2016).

<sup>143</sup> *Id.*

<sup>144</sup> Cal. Proposition 66, § 20 (2016).

without the invalid or unconstitutional provision and applications—therefore the provisions within the proposition are severable.<sup>145</sup>

*California Redevelopment Association v. Matosantos*<sup>146</sup> states that in order for invalid portions of a statute to be severed, the courts would “look first to any severability clause...” and the “presence of such a clause establishes a presumption in favor of severance.”<sup>147</sup> Therefore, if there are any drafting, constitutional, or statutory issues that may be raised, the severability clause within this measure would allow for the remaining valid portions to be unaffected. However, if this proposition violates the single-subject rule, which is the rule that an initiative may not address more than one subject and will be in a later section, the severability clause may not take effect as the entire initiative will be invalid.

## B. Conflicting Measures

Proposition 66 will be on the same election ballot as Proposition 62: Repeal of the Death Penalty. Both measures address the subject of capital punishment. Proposition 62 aims to repeal the death penalty as maximum punishment for persons found guilty of first degree murder and replaces it with life imprisonment without the possibility of parole.<sup>148</sup> Proposition 62 will apply retroactively to persons already sentenced to death.<sup>149</sup> Moreover, Proposition 62 states that persons found guilty of murder and sentenced to life without the possibility of parole must work while in prison as prescribed by the CDCR, and the initiative will increase portions of life inmates’ wages to be applied to victim restitution.<sup>150</sup>

The general purpose of Proposition 62 conflicts with Proposition 66. Proposition 62 aims to repeal the death penalty whereas Proposition 66 only aims to reform death penalty procedures. Thus, because these initiatives encompass the subject of the death penalty and the purposes of these measures are opposite of each other, there is conflict between these measures.

In situations where there are different measures that address the same subject and these measures conflict with each other, the provisions of the measure that receive the highest affirmative vote will become operative.<sup>151</sup> The California Supreme Court case *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission*<sup>152</sup> states “unless a contrary intent is apparent in competing, conflicting initiative measures which address and seek to comprehensively regulate the same subject, only the provisions of the measure receiving the highest affirmative vote become operative upon adoption.”

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<sup>145</sup> Cal. Proposition 66, § 21 (2016).

<sup>146</sup> *California Redevelopment Association v. Matosantos*, 54 Cal. 4th 231, 271 (2011).

<sup>147</sup> *Id.*

<sup>148</sup> NOVEMBER 2016 TITLE SUMMARY ANALYSIS, *supra* note 1, at 78.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> 36 CAL. JUR. 3D *Initiative and Referendum* § 45 (2016).

<sup>152</sup> *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission*, 51 Cal. 3d 744, 770–71 (1990).

As there are two death penalty initiatives on the ballot, the measure with the highest affirmative vote will be operative. Moreover, the text of Proposition 66 states that, if Proposition 66 receives a greater number of affirmative votes, it will prevail and Proposition 62 provisions will be null and void. Therefore, as the text of Proposition 66 indicates, the intent of the measure indicates that if Proposition 66 receives majority votes, it will prevail, and implicitly vice versa if Proposition 62 receives more votes.

Typically, courts will try to resolve any issues with two initiatives that address the same issue and passed by the voters by construing the measures in a way that would give the greatest possible deference to the will of the people.<sup>153</sup> Therefore, if two initiatives that aim to govern similar areas of law, courts will try to treat two initiatives as complementary or supplementary rather than conflicting in order to give deference to the affirmative votes of the people.<sup>154</sup>

However, in the case that both Propositions 62 and 66 both receive affirmative votes, the courts may try to harmonize the two initiatives and treat them as complementary or supplementary to each other. Proposition 62 only aims to eliminate the death penalty for crimes of first-degree murder and replace the death penalty with life without parole. Proposition 66 does not make distinctions as to what levels of crime that the proposed changes to death penalty procedures will affect. In the case when both initiatives pass on the ballot, the two propositions may be harmonized by enacting Proposition 62's provision of eliminating the death penalty for first-degree murder and enacting Proposition 66's changes to procedures governing death sentence and the reviews of appeals and capital habeas corpus petitions of other serious crimes. Therefore, in this way, the initiatives will be supplementing each other, with Proposition 66 providing changes to procedures to appeals and habeas corpus proceedings of serious crimes other than first-degree murder that may impose the death penalty.

#### IV. CONSTITUTIONAL AND STATUTORY ISSUES

##### Constitutional Issues

###### 1. *Single-Subject Issues*

The single-subject rule states that an initiative “embracing more than one subject ‘may not be submitted to the electors.’”<sup>155</sup> The single-subject rule uses the “reasonably germane” test. This test states that “[a]n initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, all of its parts are ‘reasonably germane’ to each other’ and to the general purpose or object of the initiative.”<sup>156</sup> In addition, the single-subject rule “precludes drafters from combining, in a single initiative, provisions that are not reasonably germane to a common theme or purpose.”<sup>157</sup>

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<sup>153</sup> 36 CAL. JUR. 3D *Initiative and Referendum* § 45.

<sup>154</sup> *Id.*

<sup>155</sup> *Senate of State of California v. Jones*, 21 Cal. 4th 1142, 1154 (1999); CAL. CONST. art. II, § 8(d).

<sup>156</sup> *Jones*, 21 Cal. 4th at 1157 (citing *Legislature v. Eu*, 54 Cal. 3d 492, 512 (1991)).

<sup>157</sup> *Id.*

This measure contains a number of changes to California’s Penal Code and Government Code. However, most of these proposed changes are “reasonably germane” to the general purpose of the initiative. The main purpose of the changes is to reform current death penalty procedures and to amend the laws in order to allow for more expedited reviews of death penalty cases with the purpose to save time and money. Most of these proposed changes are related to the general purpose of this initiative.

However, one proposed change – the required increase of wages of death row inmates to go towards victim restitution – may violate the single-subject rule. This change may seem unrelated to the main purposes of reform of procedures and savings in the death penalty process. Using the single-subject rule’s reasonably germane test, this change is evaluated by determining whether this provision is reasonably germane or related to the different parts of the proposition and the object of the measure. The case, *Senate of California v. Jones*<sup>158</sup> states that “[i]t is enough that the various provisions are reasonably related to a common theme or purpose.”<sup>159</sup> Moreover, this case also states that courts have upheld initiative measures, which “‘fairly disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose.’”<sup>160</sup> This reasonably germane test seems to indicate a low threshold in determining whether an initiative meets single-subject rule.

Because of this low threshold, the proposed change to require an increase of wages of condemned inmates on death row to go towards victim restitution may be considered reasonably germane and related to the general purpose of reforming the death penalty to increase cost savings and make it more efficient. This measure provides changes in how condemned inmates on death row are supervised and how death penalty procedures and processes are governed. Because this change involves procedures that relate to condemned inmates on death row, this change may be reasonably related to the general purpose of the initiative. Therefore, there may not be a violation of the single-subject rule.

## 2. *Timeframes on Habeas Corpus and Appeals Proceedings*

Proposition 66 states that one of its main purposes is to reform the death penalty system through expediting reviews of habeas corpus petitions. The California Constitution provides for individuals to file petitions of habeas corpus.<sup>161</sup> Individuals who may file a petition of habeas corpus are individuals who are “unlawfully imprisoned or deprived of his liberty.”<sup>162</sup> The California Supreme Court, California Courts of Appeal, and superior courts have original jurisdiction in habeas corpus proceedings.<sup>163</sup> However, even though all three levels have original jurisdiction of habeas corpus proceedings,

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> CAL. CONST. art. I, § 11.

<sup>162</sup> CAL. PENAL CODE § 1473 (2016).

<sup>163</sup> CAL. CONST. art. VI, § 10.



death penalty appeals procedures require that capital habeas corpus petitions be filed in the California Supreme Court.<sup>164</sup>

Capital habeas corpus petitions involve violations in trial proceedings and trial procedures as well as government misconduct.<sup>165</sup> These petitions require an investigation to develop information outside the appellate record and prove that the evidence caused an unfair trial.<sup>166</sup> With the changes to habeas corpus proceedings, the constitutional right to habeas corpus may be compromised due to imposed timeframes and expedited reviews petitions. It has also been argued that the changes proposed by the initiative, regarding the review of habeas corpus and appeals, will “eviscerate ‘the power of judicial review of death sentences’ reposed in the California Supreme Court by the California Constitution, by precluding the Court from fulfilling its duty to review death sentences in a manner that respects fundamental due process rights.”<sup>167</sup>

Opponents to Proposition 66 argue that due process rights will most likely be violated, and legal challenges will arise because the changes will alter the nature of California’s death penalty review process. The Office of the California Attorney General argued in its Opening Brief in *Jones v. Davis* that “‘California’s system for carefully reviewing capital convictions and sentences takes time...The time it takes to review and implement a capital sentence in California results from the interaction of legal rules, procedural protections, and practical accommodations that are designed to protect individual and government interests of surpassing importance.’”<sup>168</sup>

The “robust system” of California’s review process of capital habeas corpus and the considerable length of time in reviewing capital habeas corpus petitions provide “safeguards” to the review process in order to find any errors or overreaching that may require death sentences to be overturned.<sup>169</sup> Therefore, Proposition 66’s proposal to expedite the review process will compromise the death penalty review system. More importantly, it will likely create issues because it eliminates the safeguards that protect due process and other legal rights of death row inmates. Specifically, there are significant issues regarding the imposed time limit because the five-year time limit to review death penalty appeals and habeas corpus proceedings is counter to the rationale for having courts take their time to review cases.

### 3. Court Jurisdiction Regarding Habeas Corpus Proceedings

Proposition 66 includes a change in how courts hear habeas corpus petitions and appeals. Although the California Constitution provides original jurisdiction to all three levels of courts to hear habeas corpus petitions, death penalty appeals procedures require

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<sup>164</sup> Office of Victims’ Services, *supra* note 34, at 6.

<sup>165</sup> MITCHELL & HAYDT, *supra* note 4, at 19.

<sup>166</sup> *Id.* at 60.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 59.

<sup>169</sup> *Id.* at 60.

that capital habeas corpus petitions be filed in the California Supreme Court.<sup>170</sup> Thus, for capital cases, habeas corpus petitions and proceedings begin in the California Supreme Court, and then they go through federal courts.<sup>171</sup>

The proposed changes from this initiative would transfer pending capital habeas corpus petitions from the California Supreme Court to the trial courts. The California Constitution provides the California Supreme Court with original jurisdiction to hear habeas corpus petitions.<sup>172</sup> However, this change, which involves the transfer of capital habeas corpus proceedings to the trial courts to oversee and decide habeas corpus petitions and appeals, would “strip other constitutionally mandated courts of their authority to exercise original jurisdiction in habeas proceedings.”<sup>173</sup>

In order to make a change in a court’s jurisdiction, it would require at least a constitutional amendment. The proposition’s change to the courts’ jurisdiction may be considered a constitutional “revision.” There is a distinction between a constitutional “amendment” and a constitutional “revision.” Although the people of California may amend the state constitution through the initiative process, a constitutional “revision” is a “revision” of the Constitution that may be accomplished by convening a constitutional convention and obtaining popular ratification.<sup>174</sup> A constitutional revision is based on the principle that “‘comprehensive changes’ to the Constitution require more formality, discussion, and deliberation than is available through the initiative process.”<sup>175</sup> Moreover, when there are substantial changes in either quantitative or qualitative effect, changes could amount to a constitutional revision.<sup>176</sup> A quantitative effect is “‘so extensive ... as to change directly the ‘substantial entirety’ of the Constitution by the deletion or alteration of numerous existing provisions....’”<sup>177</sup> On the other hand, a qualitative effect includes “‘such far reaching changes in the nature of our basic governmental plan as to amount to a revision also....’”<sup>178</sup>

The proposed change to transfer capital habeas corpus petitions from the Supreme Court to the superior courts may have a substantial qualitative effect because it is changing the courts’ jurisdiction and procedures as to how capital habeas petitions are heard and how capital habeas corpus proceedings are conducted. These changes indicate a change the nature of governmental plans, which may indicate that Proposition 66’s changes amount to a revision and thus may be invalid to go through the initiative process because these constitutional changes that are so substantial require more deliberation than the initiative process provides.

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<sup>170</sup> Office of Victims’ Services, *supra* note 34, at 6.

<sup>171</sup> *Id.*

<sup>172</sup> CAL. CONST. art. VI, § 10.

<sup>173</sup> MITCHELL & HAYDT, *supra* note 4, at 67.

<sup>174</sup> *Raven v. Deukmejian*, 52 Cal. 3d 336, 349 (1990); CAL. CONST. art. XVIII, § 3.

<sup>175</sup> *Raven*, 52 Cal. 3d at 349–50.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 351–52.

<sup>178</sup> *Id.*

Regardless of whether the proposed change would be considered a revision or an amendment, because Proposition 66 is an initiative statute, not an initiative constitutional amendment, it is probably not permissible for it to make the change it seeks. There are distinctions between an initiative statute and an initiative constitutional amendment. The initiative constitutional amendment is a proposition that would change the state's constitution whereas the initiative statute is new state law that is adopted.<sup>179</sup> Because Proposition 66 is clearly an initiative statute that proposes new changes to the Penal Code and Government Code, it cannot amend the state constitution.

#### 4. *Separation of Powers*

Proposition 66 amends Section 1239.1 of the California Penal Code, which directs the California Supreme Court to reduce constitutional and procedural protections, which the Court has determined capital defendants are entitled to.<sup>180</sup> The rules in the California Rules of Court, which set the required qualifications of competent counsel in death penalty appeals and habeas corpus proceedings, are adopted by the Judicial Council under the authority of article VI, section 6 of California's Constitution.<sup>181</sup> These rules are not subject to revision by voter initiatives.<sup>182</sup>

Proposition 66's proposed change to the Penal Code may raise separation of powers issues because it places the determination of what is constitutional in the hands of voters rather than the judiciary.<sup>183</sup> Because the Judicial Council has the authority from the California Constitution to adopt rules regarding competent counsel, the change to provide voters the authority to set the qualifications of competent counsel indicates a conflict in authority between the judiciary and the power of the public.

However, as stated in the changes to Section 68665 of the Government Code, the Judicial Council and Supreme Court – “*shall consider the qualifications needed to achieve competent representation...*”<sup>184</sup> – it is unclear if the Judicial Council must adopt the changes. The Judicial Council and Supreme Court only are required to consider the qualifications, with no express requirement for them to adopt the changes. Moreover, the Judicial Council and California Supreme Court are given the authority to “*reevaluate the standards as needed...*”<sup>185</sup> Therefore, there may not be a separation of powers issue because the Judicial Council and Supreme Court still retain their authority to determine the standards and requirements of appointing counsel.

#### 5. *Effectiveness of Counsel*

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<sup>179</sup> *Initiated constitutional amendment*, BALLOTPEdia, [https://ballotpedia.org/Initiated\\_constitutional\\_amendment](https://ballotpedia.org/Initiated_constitutional_amendment) (last visited Oct. 19, 2016); *Initiated state statute*, BALLOTPEdia, [https://ballotpedia.org/initiated\\_state\\_statute](https://ballotpedia.org/initiated_state_statute) (last visited Oct. 19, 2016).

<sup>180</sup> MITCHELL & HAYDT, *supra* note 4, at 65.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 65–66.

<sup>184</sup> NOVEMBER 2016 TITLE SUMMARY ANALYSIS, *supra* note 1, at 217.

<sup>185</sup> *Id.*

The Sixth Amendment of the United States Constitution and the California State Constitution require that a defendant has the right to counsel.<sup>186</sup> The United States Supreme Court requires that defendants be provided with “effective assistance of counsel.”<sup>187</sup>

This initiative requires that, for attorneys to remain on the California Supreme Court’s appointment list, qualified attorneys must take on the capital appeals.<sup>188</sup> This change was proposed to expedite review of cases in order to appoint counsel for defendants as soon as possible.<sup>189</sup>

Some experts have argued that, even though the California Supreme Court established minimum standards for attorneys to represent clients in capital appeals and capital habeas corpus petitions, there are few active criminal law specialists and active appellate law specialists who would have sufficient experience with death penalty cases to provide competent and effective counsel and represent capital post-conviction clients.<sup>190</sup> Therefore, there are potential Sixth Amendment concerns regarding the providing of effective counsel to death penalty defendants in their appeals because death penalty cases and appeals are time-consuming and specialized practice. As the measure proposes, qualified attorneys are required to take on these cases as a condition to remaining on the California Supreme Court’s appointment list of counsel, regardless of experience and the attorneys’ desire to do so.

Moreover, a proposed change to Section 68665(b) of the Government Code states that “[e]xperience requirements shall not be limited to defense experience.”<sup>191</sup> This change is related to the constitutional issue of effective counsel because this proposed change will affect the minimum requirements and qualifications of attorneys who will serve as counsel in many complex capital cases and appeals. As stated by the Academy of Appellate Lawyers, capital appeal cases “take many years to resolve and require specialized expertise and demand a level of emotional commitment than even the most complex of other appeals.”<sup>192</sup> Thus, changing the minimum requirements to allow for attorneys who may not have necessary experience or expertise in these areas may be problematic because capital cases are time-consuming and complex.

## 6. Eighth Amendment Concerns

The Eighth Amendment prohibits the government from imposing “cruel and unusual punishment.” Executions by lethal injection have been halted for the last ten

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<sup>186</sup> MITCHELL AND HAYDT, *supra* note 4, at 25.

<sup>187</sup> *Id.*

<sup>188</sup> NOVEMBER 2016 TITLE SUMMARY ANALYSIS, *supra* note 1, at 216.

<sup>189</sup> *Id.*

<sup>190</sup> MITCHELL & HAYDT, *supra* note 4, at 28.

<sup>191</sup> Cal. Proposition 66, § 18, *amending* Cal. Gov. Code Section 68665(b) (2016).

<sup>192</sup> Statement of the California Academy of Appellate Lawyers in Opposing Proposition 66 at 1, available at <http://www.calappellate.org/files/07082016StatementOpposingProposition66.pdf> (last visited Oct. 19, 2016).

years because of legal challenges to the protocols.<sup>193</sup> The proposed change to Section 3604.1(a) of the California Penal Code, which exempts regulations for methods and procedures used in executions from the Administrative Procedures Act (APA), raises significant problems.<sup>194</sup> Not only will this exemption be in conflict with the APA, but it will raise constitutional issues as well because the rules and regulations regarding lethal injection protocols conflict with the Eighth Amendment prohibition of “cruel and unusual punishment.” The Eighth Amendment prohibits procedures that “create an ‘unnecessary risk’ that such pain will be inflicted.”<sup>195</sup> Thus, if the lethal injection protocols are exempt from the APA, there are less constitutional safeguards in death penalty procedures.

The Eighth Amendment concerns are also tied to the courts’ ability to determine what is constitutional and legal. The “Court—not the CDCR—has a duty to seriously consider constitutional issues raised by the lethal injection protocols.”<sup>196</sup> Exemption from the APA will allow certain death penalty protocols to be “exempt from scrutiny” of public participation that is provided through the APA.<sup>197</sup> Therefore, death penalty protocols that violate the Eighth Amendment may potentially be in place. Thus, having this exemption would create more litigation and constitutional challenges that raise these Eighth Amendment concerns.

## **Statutory Issues**

### *1. Habeas Corpus Procedures*

The California Constitution provides for the right to file habeas corpus petitions. The procedures to file these petitions are outlined in both state and federal statutes. For the state, Section 1473 of the California Penal Code provides that every person imprisoned may file a writ of habeas corpus, and section 1506 provides that capital habeas corpus petitions are appealed to the California Supreme Court.<sup>198</sup> As part of legal procedures, when all state claims are exhausted through the California Supreme Court, a federal writ of habeas corpus may be filed with the federal courts.<sup>199</sup>

Proposition 66 aims to reform the procedures of capital habeas corpus petitions and appeals, which create statutory complications. The federal courts may accept applications of writs of habeas corpus when the applicant has exhausted the remedies available in the courts of the state.<sup>200</sup> Because Proposition 66 provides changes to the state procedures of capital habeas corpus filings and proceedings, it is uncertain as to how and when capital defendants may seek to file federal writs of habeas corpus. Therefore, these new changes to the state statutes may complicate procedures how capital defendants may file federal writs of habeas corpus and raise questions as to whether an applicant for

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<sup>193</sup> MITCHELL & HAYDT, *supra* note 4, at 8.

<sup>194</sup> *Id.* at 68.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> CAL. PENAL CODE §§ 1473; 1506 (2016).

<sup>199</sup> MITCHELL & HAYDT, *supra* note 4, at 21.

<sup>200</sup> 28 U.S.C. § 2254 (2016).

habeas corpus has exhausted the remedies available in the state as specified by federal statute. Thus, these new changes create issues of statutory interpretation and may raise preemption problems.

## 2. *Exemption from the APA*

The Administrative Procedures Act (APA) is a statute that governs all administrative agencies and ensures that these agencies provide enough notice and transparency in how they operate and create rules. Generally, the APA establishes rulemaking standards for state agencies and provides the public with the opportunity to participate and ensure that rules are “necessary, clear, and legally valid.”<sup>201</sup>

The CDCR, as a state agency, is governed by the APA and must conform to the APA when promulgating its rules regarding death penalty procedures. More importantly, because of the constitutional issues surrounding lethal injection procedures, the APA provides more legal and constitutional protections for the death penalty procedures.

However, a proposed change from this initiative exempts the Department of Corrections from the APA in its promulgation of rules, procedures, and standards regarding the death penalty.<sup>202</sup> By proposing this exemption, this change comes into direct conflict with the APA and the purposes of the APA. This exemption will keep protocols secret and out of the public’s purview, which prevents the public from knowing what goes into the lethal injection “cocktails” used for the death penalty.<sup>203</sup> In addition, this exemption will eliminate the APA’s purpose of public participation in state agency rulemaking as it will remove the public from the discourse of death penalty procedures.<sup>204</sup>

Every regulation is subject to the APA’s rulemaking procedures unless the APA expressly exempts it by statute.<sup>205</sup> Specifically, under the Government Code, the APA “shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.”<sup>206</sup> Thus, agencies may not be exempt from the APA unless expressly exempt by statute.

Proposition 66’s proposal to exempt the CDCR from the APA may not be an issue statutorily because Proposition 66 is a statute— an initiative statute—that expressly states that CDCR will be exempt from the APA. Thus, this provision complies with Section 11346 of the Government Code’s requirement that regulations and rules that are to be exempt must be expressly stated within the text of the statute.

## V. PUBLIC POLICY CONSIDERATIONS

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<sup>201</sup> *Administrative Procedures Act & APA Regulations*, OFFICE OF ADMINISTRATIVE LAW, [http://www.oal.ca.gov/administrative\\_procedure\\_act.htm](http://www.oal.ca.gov/administrative_procedure_act.htm) (last visited Sept. 20, 2016).

<sup>202</sup> Cal. Proposition 66, § 11, *adding* Cal. Penal Code Section 3604.1(a) (2016).

<sup>203</sup> MITCHELL & HAYDT, *supra* note 4, at 3.

<sup>204</sup> *Id.* at 68.

<sup>205</sup> Office of Administrative Law, “*What Is a Regulation?*” at 2 (April 6, 2006), [http://www.oal.ca.gov/res/docs/pdf/What\\_Is\\_a\\_Regulation.pdf](http://www.oal.ca.gov/res/docs/pdf/What_Is_a_Regulation.pdf).

<sup>206</sup> CAL. GOV. CODE § 11346 (2016).

## A. Supporting Arguments (Yes on 66)

### 1. Financial Costs

Based on the Legislative Analyst Office's (LAO) findings, the fiscal effects of Proposition 66 "could vary considerably depending on how certain provisions in the measures are interpreted and implemented."<sup>207</sup> The main purpose of Proposition 66 is to fix a broken death penalty system, which costs taxpayers millions of dollars. Therefore, proponents of Proposition 66 argue that this measure saves money because "heinous criminals will no longer be sitting on death row at taxpayer expense for 30+ years."<sup>208</sup> These savings will come from how death row inmates are housed and supervised.<sup>209</sup> Moreover, these changes may result in additional executions and reduce the number of condemned death row inmates in prisons.<sup>210</sup>

In addition to the savings in prison costs, the proponents of this measure argue that there will be savings in litigation costs because death penalty appeals will not be dragged out for years or delayed.<sup>211</sup> It is proposed by this initiative that condemned death row inmates will have their appeals heard within five to ten years. The proponents of this initiative find that the reform in the death penalty system would total over \$30 million.<sup>212</sup>

### 2. Effects on Litigation: Fixing a Broken System

The proponents of Proposition 66 argue that the death penalty system is broken. The primary argument for those who support Proposition 66 is that the condemned criminals sit on death row for decades because of the endless appeals.<sup>213</sup> It has been without dispute that the delays are "inherent in the administration of the death penalty in California."<sup>214</sup> It has also been reported that there have been 118 inmates who have died on death row, and of the 118 inmates who have died, 48 of these inmates had direct appeal, habeas corpus petitions, or both pending in the California Supreme Court.<sup>215</sup>

The proponents of this measure believe that these endless appeals delay justice for victims and their families.<sup>216</sup> Moreover, proponents argue that the current system allows for condemned criminals to file frivolous suits, and Proposition 66 would eliminate the ability to file frivolous suits that would create backlogs in the appeals process and legal system.

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<sup>207</sup> LEGISLATIVE ANALYST'S OFFICE, *Proposition 66: Death Penalty. Procedures. Initiative Statute 7* (2016) available at <http://www.lao.ca.gov/ballot/2016/Prop66-110816.pdf>.

<sup>208</sup> *Primary Argument in Support of Proposition 66*, NO 62 YES 66, <http://noprop62yesprop66.com/get-the-facts/ballot-arguments/#post-170> (last visited Sept. 20, 2016).

<sup>209</sup> NOVEMBER 2016 TITLE SUMMARY ANALYSIS, *supra* note 1, at 107.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 109.

<sup>212</sup> *Id.*

<sup>213</sup> *Primary Argument in Support of Proposition 66*, *supra* note 208.

<sup>214</sup> MITCHELL & HAYDT, *supra* note 4, at 22.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

To address this issue of litigation delays, this measure provides changes that would increase attorneys to take on death penalty appeals. In 2006, 156 death row inmates were without state habeas counsel.<sup>217</sup> In 2008, the number of death row inmates without counsel nearly doubled to 291, and in 2014, there were 352 death row inmates who were without counsel.<sup>218</sup> By having more attorneys to take on these cases, proponents argue that this change would allow for death penalty appeals to move faster because death row inmates will have access to attorneys who will be able to take on their cases instead of waiting for years for counsel to be appointed.

### 3. *Social Policy Arguments: Public Safety*

One of the main social policy arguments that proponents provide in support of Proposition 66 is that this measure will increase public safety. Supporters of Proposition 66 argue that this measure protects public safety because “brutal killers have no chance of ever being in society again.”<sup>219</sup> To be eligible for the death penalty, an individual must be to be guilty of first-degree murder with “special circumstances,” which include: (1) murderers who raped/tortured their victims; (2) child killers; (3) multiple murders/serial killers; (4) murders committed by terrorists; (5) murders committed as part of a hate crime; or (6) killing of a police officer.<sup>220</sup> Proponents of Proposition 66 argue that these types of “brutal killers” would not be able to file endless appeals, which would keep them imprisoned, and justice will be served and bring closure to victims.<sup>221</sup>

## **B. Opposing Arguments (No on 66)**

### 1. *Financial Costs*

Opponents of Proposition 66 find that the financial effects of this measure will increase costs for taxpayers—not save millions of dollars as the proponents argue. Because of increased litigation in a small timeframe and limited resources, the opponents find costs will increase. Moreover, former Attorney General of California, John Van Kap stated that “Prop. 66 is so flawed that it’s impossible to know for sure all the hidden costs it will inflict on California taxpayers.”<sup>222</sup>

Specifically, opponents argue that the increased costs will come from the additional litigation that will arise if this measure is passed. As the LAO states in its findings, there will be a near-term annual cost increase. The LAO statement finds that this measure will accelerate the amount the state spends on legal challenges to death sentences, which may cost tens of millions of dollars annually.

### 2. *Effects on Litigation: Increase in Workload for Attorneys and the Courts*

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<sup>217</sup> *Id.* at 21.

<sup>218</sup> *Id.*

<sup>219</sup> *Primary Argument in Support of Proposition 66, supra* note 208.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> NOVEMBER 2016 TITLE SUMMARY ANALYSIS, *supra* note 1, at 109.



Opponents argue that this initiative will increase the workload for trial courts, Courts of Appeal, and the California Supreme Court. Death penalty appeals are complex cases, and this measure would require that the courts decide appeals within five years without providing additional judges, staff, or necessary funds.<sup>223</sup> Moreover, the courts may not be able to meet the new time limit without delaying decisions in other areas of law or declining to accept cases it would otherwise accept.<sup>224</sup>

The measure will add an additional layer within the post-conviction process.<sup>225</sup> Proposition 66 will impose two additional layers of review by requiring post-conviction habeas corpus filings in the superior courts and file direct appeals of any denials of the superior court's habeas corpus petitions to the Courts of Appeal.<sup>226</sup> With these additional layers, the courts will not have additional resources and will be underfunded and under-staffed.<sup>227</sup>

In addition, Proposition 66 would require the California Supreme Court to move all death penalty cases to the top of the docket, which would dictate how the Court manages its docket. The Court currently has a backlog of capital cases, and this backlog "will not magically resolve itself with only seven justices."<sup>228</sup> It is argued that the California Supreme Court "cannot meaningfully reduce the current backlog because new death penalty cases are added to the Supreme Court every year."<sup>229</sup> In 2013, there were 748 individuals on death row and an average of 20 new judgments of death per year.<sup>230</sup>

### 3. *Social Policy Issues: Safeguards for Innocent Death Row Inmates*

For those who oppose Proposition 66, it is argued that this measure does not eliminate the risk that the state will execute an innocent person. A study showed that if all defendants on death row remained under the death sentence indefinitely, at least 4.1 percent would be exonerated.<sup>231</sup> Studies indicated that the rate of innocent criminal defendants sentenced to death is not "merely unknown but unknowable."<sup>232</sup> By expediting the processes of death penalty case and appeals reviews, there would be no safeguards or protection of those who might be innocent from a complicated review process.

## VI. CONCLUSION

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<sup>223</sup> Statement of the California Academy of Appellate Lawyers in Opposition to Proposition 66, *supra* note 192, at 1.

<sup>224</sup> *Id.*

<sup>225</sup> MITCHELL & HAYDT, *supra* note 4, at 53.

<sup>226</sup> *Id.* at 55.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 57–58.

<sup>229</sup> *Id.* at 17.

<sup>230</sup> CENTER FOR CONSTITUTIONAL RIGHTS & INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, *supra* note 53, at 16.

<sup>231</sup> Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES Vol. 111, no. 20, at 1, available at <http://www.pnas.org/content/111/20/7230.full.pdf>.

<sup>232</sup> MITCHELL & HAYDT, *supra* note 4, at 30.

The general purpose of Proposition 66 is to reform California's death penalty system. Currently, another death penalty initiative, Proposition 62, is on the ballot for the November election. Proposition 62 will eliminate the death penalty whereas Proposition 66 aims to reform the procedures of the death penalty. If this initiative is passed, it will: (1) designate the superior court for initial successive petitions; (2) establish a time frame for state court penalty review; (3) require appointed attorneys to accept death penalty appeals; (4) authorize death row inmate transfers to California prisons; and (5) increase condemned inmates' wages to go towards victim restitution.<sup>233</sup>

According to supporters of this measure, California's death penalty system is a "broken system," costing taxpayers millions of dollars and delaying justice to families of victims. This initiative is proposed to reform the process of appeals by expediting cases under review as a means to eliminate time and costs. Moreover, supporters of this proposition argue that this initiative will increase public safety as it will prevent heinous criminals from re-entering society.

However, proponents argue that these changes will actually increase costs. The increase in costs and time stems from the increase in litigation and cases that will arise because of additional layers of review from these reforms. In addition, this proposition does not provide a safeguard to protect innocent death penalty inmates from being wrongly executed.

Moreover, there are a number of constitutional and statutory issues with this initiative. Some of the statutory issues come from a significant number of changes to the California Penal Code and how the death penalty review process will affect how appeals and habeas corpus procedures will work at the state and federal levels. In addition, there are a number of constitutional issues that may arise, such as the Eighth Amendment concerns, and the compromising of the process of habeas corpus due to the imposed time frames. Most importantly, the initiative appears to alter by statute a process that is guaranteed by the California Constitution. Therefore, if this initiative passes with a majority of affirmative votes, it will likely be subject to immediate legal challenges and the resulting operation of the proposition may be different than proponents have envisioned.

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<sup>233</sup> NOVEMBER 2016 TITLE SUMMARY ANALYSIS, *supra* note 1 at 104.