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Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

REQUEST RE: COMMUTATION OF DEATH SENTENCES	Case No. S299513

[PROPOSED] AMICUS CURIAE BRIEF

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

REQUEST RE: COMMUTATION OF DEATH SENTENCES	Case No. S299513

To the Honorable Patricia Guerrero, Chief Justice and the Associate Justices of the California Supreme Court:

AMICUS CURIAE BRIEF

INTRODUCTION

Twice, California voters have rejected initiatives that not only would have abolished the death penalty—but would have automatically converted every existing death sentence to life without the possibility of parole. (See Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 34, § 10, subd. (b); Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 62, § 10, subd. (b).) Moreover, at the same election in which they rejected Proposition 62, the voters enacted Proposition 66—voicing discontent that California's death penalty system suffered from "waste, delays, and inefficiencies" and directing the

judiciary to adopt rules to expedite enforcement of the punishment of death. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 66, § 2, par. 1, & § 3.) The Governor now moves to achieve through clemency what the voters have resoundingly rejected by way of initiative.

The governor has made the reason for his decision both singular and clear: he disagrees with the law. In an open letter to Californians, the Governor explained that "as Governor, I have concluded the state cannot morally kill them." (Governor's Open Letter Regarding Commutation of All Death Sentences, Nov. 5, 2026, p. 1.) As further noted in his explanatory statement, the Governor is taking this action because "he believes that 'state-sanctioned killing is incompatible with California's values [and] undermines the foundations of our legal system.' " (Explanatory Statement – Proposed Death Penalty Clemency Action, p. 4, modification in original.)

For 382 of the individuals subject to the Governor's proposed clemency, the California Constitution requires the recommendation of this Court, with four justices concurring. (Cal. Const., art. V, § 8, subd. (a).) Before this Court undertakes

its solemn task, it must resolve two important questions:

1) Whether the Governor's categorical judgment that the law is unjust—i.e., that the State should never carry out a death sentence—supplies sufficient grounds for this Court to make a favorable recommendation? AND

2) Whether the Governor must submit an application and comply with the procedures set forth in Penal Code sections 4802, 4813, 4850, and 4851 before seeking the recommendation of this Court?

As to the first question, in *Burton*, Justice Liu asked what standards could guide judicial review of "the Governor's judgment as to the injustice of a particular conviction or penalty[.]" (*Burton* (*Susan H.*) *on Clemency* (Aug. 6, 2019, S255392), Separate Statement of Reasons by Justice Goodwin Liu.) Justice Liu also asked, "How do separation of powers concerns inform or constrain our role in the clemency process?" (*Ibid.*) The *Burton* case provided no occasion to answer those questions—but this case does. "[A]n examination of these and other questions may be required in the context of an appropriate application." (*Ibid.*)

Article V, section 1 of the California Constitution requires that the Governor "see that the law is faithfully executed." Article I, section 27, preserves the legitimacy of the death penalty. Section 27 states that all statutes "requiring, authorizing, imposing, or relating to the death penalty are in full force and effect" and that the "death penalty ... shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments ...." (Cal. Const., art. I, § 27.) When the Governor moves to set aside every existing death penalty judgment because of his categorical objection to the law itself, this Court must decide whether that objection amounts to faithfully executing the laws of this State. The Orange County District Attorney submits that it does not; that a blanket commutation based on a disagreement with the law violates article V, section 1 of the California Constitution. It constitutes an abuse of clemency power.

The second question concerns the process the Governor must follow before seeking this Court's recommendation. The answer to this question necessarily involves the intersection of the California Constitution and various statutory procedures.

Article V, section 8, subdivision (a), states that the Governor's clemency power is "[s]ubject to application procedures provided by statute ...." Penal Code sections 4802, 4813, 4850, and 4851 govern the process for the receipt, review, and recommendation of clemency applications for twice-convicted felons.

At their core, these statutes are procedural safeguards. But on the Governor's reading, he can dispense with these constitutionally required safeguards by skipping an application altogether and instead proposing the commutation himself. (See Explanatory Statement – Proposed Death Penalty Clemency Action, pp. 4-5.) Such an end-run around constitutionally-mandated safeguards is an abuse of power and precludes recommendation by this Court.

For the reasons discussed, *post*, the Orange County District Attorney respectfully requests this Court decline to make the requested recommendations based upon the Governor's categorical disagreement with the law and his failure to comply with constitutionally-mandated statutory procedures.

I. Categorical Opposition to a Lawful and Constitutionally-Protected Punishment is Insufficient to Support the Commutations

As discussed in the Introduction, *ante*, the governor has made the reason for his decision clear: he disagrees with the law. Categorical opposition to the constitutionally-protected punishment of death is an insufficient basis to support a commutation. It represents an abuse of power as it exceeds the restriction that article V, section 1 assigns to the Governor—that "[t]he Governor shall see that the law is faithfully executed."

Article V, section 8 provides for the Governor's commutation power. As this Court recognized in *Procedures*, the primary concern of the delegates during California's 1878-1879 constitutional convention "in adopting what is now article V, section 8, was to provide some check on the arbitrary use of the pardon power in the case of twice-convicted felons ... [they] believed the court could serve as a check on the Governor within the confines of its traditional judicial role, determining whether there exists **a legitimate basis** on which the Governor could choose to grant clemency to the applicant." (*Procedures for Considering Requests for Recommendations Concerning*

Applications for Pardon or Commutation (2018) 4 Cal.5th 897, 900, emphasis added.) In keeping with this Court's understanding of separation of powers principles and the legislative history, it concluded that article V, section 8 required the Court to determine whether "the claim [has] sufficient support that an act of executive clemency, should the Governor decide to grant it, would not represent an abuse of that power[.]" (*Procedures for Considering Requests for Recommendations Concerning Applications for Pardon or Commutation* (2018) 4 Cal.5th 897, 902.)

Thus, the basis on which the Governor chooses to propose clemency matters. Whatever basis it is—it must be a legitimate one. The Governor's stated basis for sparing every condemned inmate is that he believes the State should never carry out a death sentence. Because of his categorical opposition to the executions provided for by law, the Governor has expressly admitted that nothing about any of the particular individuals' offenses, individual circumstances, rehabilitative prospects, or public risk would change the result. (See Explanatory Statement – Proposed Death Penalty Clemency Action, pp. 4-5.)

This bears directly on the constitutional provision set forth in article I, section 27—which was added to the California Constitution by way of a voter initiative amendment. (See Gen. Elec. (Nov. 7, 1972), Prop. 17.) That provision states that all "statutes of this State in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum. The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution." Thus, article I, section 27 sanctions the constitutionality of the death penalty and limits the means by which the law may change it. **Simply put, the punishment itself is constitutionally protected.**

For the Governor to employ clemency to displace that punishment in every case on the ground that it should never be carried out exceeds the restriction imposed upon him by article V, section 1—i.e., that he is **required** to see that the law is

faithfully executed. By his own admission, he refuses to do so. This represents a clear abuse of power and is an insufficient basis for the proposed commutations.

Even more, the Governor violates the separation of powers. The bounds and limits of the powers of each branch of our government are outlined in article III, section 3, which states that the "powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Article IV, section 1 of the California Constitution states that the "legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum." Thus, the legislative power necessarily includes voter initiatives. The Governor cannot utilize his clemency powers as a means to extinguish voter-enacted legislative initiatives—whether in whole or in part. "A statute enacted by voter initiative may be changed only with the approval of the electorate unless the initiative measure itself

permits amendment or repeal without voter approval." (*People v. Cooper* (2002) 27 Cal.4th 38, 44.)

The most obvious example of a violation of the separation of powers is the Governor's utilization of the clemency power to displace the constitutional protection afforded to the death penalty on the ground that it should never be carried out—which for the reasons discussed *ante*, also constitutes a violation of the "faithful execution of the law" restriction imposed upon him by article V, section 1. There is, however, another instance in which the Governor's categorical basis for the blanket clemency action constitutes an impermissible encroachment of the executive upon the legislative branch.

In 1978, California voters enacted Proposition 7, which expanded the special circumstances under which a person convicted of first degree murder could be sentenced to death and rendered the death penalty mandatory for any trier of fact who determined the aggravating circumstances surrounding the crime outweighed the mitigating circumstances. (See Voter Information Guide, Gen. Elec. (Nov. 7, 1978) text of Prop. 7; see also *People v. Cooper*, *supra*, 27 Cal.4th 38, 41-42 [the purpose of the initiative

was to substantially increase the punishment for persons convicted of first and second degree murder].) Central to the enactment of Proposition 7 was the voters belief that the circumstances of the crime and offender matter with regard to the imposition of the death penalty. Not surprisingly, the Governor disagrees with this legislative mandate.

In his open letter, he states "I have concluded that attempting to distinguish among crimes and offenders for clemency would inadvertently create two classes of murder victims—those whose perpetrators deserve the death penalty and then the rest." (Governor's Open Letter Regarding Commutation of All Death Sentences, Nov. 5, 2026, p. 2.) On the Governor's reasoning, no circumstances of any crime or offender could ever justify carrying out the punishment of death. This flies in the face of Proposition 7 and overrides the voters' requirement that death or life be imposed based upon a consideration of the circumstances of the crime and offender. By making a conclusive and categorical objection to every existing death sentence, the Governor substitutes his opinion for the one the Constitution has left to the people in their legislative capacity: whether to impose

and carry out a death sentence.

It must be recognized that the Governor's defiance of his constitutional mandate to follow the law, and to respect the will of the voters, occurs against the backdrop that Californians have twice rejected initiatives that not only would have abolished the death penalty—but would have automatically converted every existing death sentence to life without the possibility of parole. (See Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 34, § 10, subd. (b); Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 62, § 10, subd. (b).) California voters have also asked for the death penalty process to be sped up. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 66, § 2, par. 1, & § 3.) The Governor's actions against this backdrop provide further evidence that he has abused his power.

Accordingly, the Court should decline to give the recommendations on the categorical basis presented here—which constitutes an abuse of power and violates the California Constitution and separation of powers.

On a final note, the Governor justifies his action as being rooted in firmly established instances of universal clemency. Take for instance, the Whiskey Rebellion in which President George Washington issued clemency on a universal basis to participants. (See Washington, Proclamation of Pardons in Western Pennsylvania (July 10, 1795).) While the proclamation offers historical support for collective grants of mercy, it offers no support for setting aside the punishment under law because the executive disagrees with the law itself. Indeed, the proclamation was contingent on the "assurances of submission to the laws of the United States ...." (Washington, Proclamation of Pardons in Western Pennsylvania (July 10, 1795.) In other words, while President Washington required a faithful execution of the law in granting a collective pardon—Governor Newsom repudiates a faithful execution of the law in granting his.

II. The Governor Must Submit an Application and Comply with the Procedures Set Forth in Penal Code sections 4802, 4813, 4850, and 4851

The Governor has further abused his power by dispensing with the constitutionally required statutory safeguards by proposing the commutations himself directly to this Court—declaring he need neither application nor statutory review for his action. This Court should reject such a blatant disregard for the law.

Article V, section 8, subdivision (a) of the California Constitution makes the Governor's clemency power "[s]ubject to application procedures provided by statute ...." Subdivision (b) of that section requires the governor to secure the recommendation, four justices concurring, for any person twice convicted of a felony. The Legislature has set forth specific requirements governing how the application for clemency for a person twice convicted of a felony reaches this Court.

"In the case of a person twice convicted of [a] felony, the application for pardon or commutation of sentence **shall be made** directly to the Governor, who **shall** transmit all papers and documents relied upon in support of and in opposition to the

application to the Board of Parole Hearings." (Pen. Code, § 4802, emphasis added.) The Legislature's use of the word "shall" indicates a mandatory duty; there is nothing in the statutory scheme to indicate otherwise.

In construing a statute, we give words their usual and ordinary meaning. (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.) "It is a well-settled principle of statutory construction that the word 'may' is ordinarily construed as permissive, whereas 'shall' is ordinarily construed as mandatory, particularly when both terms are used in the same statute. [Citations.]" (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443.) The Legislature employed the term "shall" in Penal Code section 4802; it is a clear indication that the procedures outlined for persons twice-convicted of a felony are mandatory. The Governor is not free to dispatch with the statutory safeguards.

Indeed, the mandatory duty of those involved in a clemency decision pervades the entirety of the statutory scheme. Before the Governor acts upon an application for commutation, written notice "**shall** be served upon the district attorney ..." wherein the

district attorney may submit a written recommendation to the Governor for or against commutation. (Pen. Code, § 4805, subds. (a) & (b), emphasis added.) Once the Governor transmits the applications and all supporting papers and documents to the Board, "the Board of Parole Hearings, after investigation, **shall** transmit its written recommendation upon such application to the Governor, together with all papers filed in connection with the application." (Pen. Code, § 4813, emphasis added.) An "application that has not received a recommendation from the Board of Parole Hearings favorable to the applicant **shall not** be forwarded to the Clerk/Executive Officer of the Supreme Court, **unless** the Governor, notwithstanding that the board has failed to make a recommendation favorable to the applicant, especially refers an application to the justices for their recommendation." (Pen. Code, § 4850, emphasis added.) In "all cases where the Board of Parole Hearings has made a recommendation favorable to the applicant and in those cases referred by the Governor, notwithstanding an adverse recommendation, the application, together with all papers and documents relied upon in support of and in opposition to the application, including prison records and

recommendation of the Board of Prison Terms, **shall** be forwarded ... for consideration of the justices." (Pen. Code, § 4851, emphasis added.) This Court has recognized the applicability of the aforementioned statutory sequence in its opinion in *Procedures for Considering Requests for Recommendations Concerning Applications for Pardon or Commutation*, *supra*, 4 Cal.5th 897, 989. This Court further noted that, by historical tradition, clemency is "a check entrusted to the executive for special cases. [Citation.]" (*Id*. at p. 898.) There is nothing special about the wholesale disregard of the aforementioned procedures—nor is there anything special about displacing a constitutionally-protected punishment in every case on the ground that it should never be carried out.

The Governor's contention that he can dispense with this constitutionally and statutorily prescribed process because he originated the proposal himself is inconsistent with the plain language of the statutory scheme—which imposes a mandatory duty requiring an application in the first instance and a robust review process in the second. (See Cal. Const, art. V, § 8 [clemency is "[s]ubject to application procedures prescribed by

statute ...."].)

The appropriate and legal avenue was for the Governor to solicit applications from or on behalf of each intended recipient—transfer those applications to the Board—and if the Board of Parole recommends against relief he may still ask this Court to recommend it. (Pen. Code, § 4850.) But what he cannot do is bypass the entire review process by submitting proposals directly to this Court while declaring that his authority to grant clemency "does not depend on the existence of an application." (Explanatory Statement – Proposed Death Penalty Clemency Action, p. 2.)

The Governor's interpretation that "there is no statute requiring Board review when the Governor proposes to act on his own initiative without application" has significant implications for this Court's review process. (See Explanatory Statement – Proposed Death Penalty Clemency Action, p. 5.) Consider the following: if a convicted person files an application for clemency, the Board investigates and this Court receives its recommendation along with all supporting documentation, but if the Governor "proposes" clemency to this Court, the Board never

reviews the matter, no record is transmitted, and this Court receives only what the Governor elects to submit. The latter is what has occurred here.

Under the Governor's interpretation, the availability of the supporting record for consideration by this Court depends on who first "proposes" clemency. Yet the constitutional requirement for this Court to have its justices **consider** and **concur** is the same in either event. (See Cal. Const, art. V, section 8; Pen. Code, § 4851.) This is an untenable double-standard—and an absurd result. This Court has repeatedly recognized that courts must construe a statute to avoid such illogical and absurd results. (*Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 142.) The Governor's interpretation of the relevant statutory scheme set forth in Penal Code section 4800, *et seq.*, necessarily leads to absurd results and must be rejected.

Moreover, while Penal Code section 4850 permits the Governor to make a special referral to this Court when the Board fails to make a favorable recommendation, the statute still requires "an **application** to the justices for their recommendation." (Pen. Code, § 4850, emphasis added.) Here,

the Governor has deliberately omitted an application and failed to comply with the statutory process.

The Governor provides this Court justification for his failure to submit an application—claiming that "because none of the intended recipients will be released from custody as a result of this proposed clemency action, the Board's expertise in assessing current safety risk for possible release is not implicated by this action." (Explanatory Statement – Proposed Death Penalty Clemency Action, p. 5.) But we know this to not be true. This Court need look no further than the recent published decision of *People v. Frederickson* (2025) 116 Cal.App.5th 910 (*Frederickson*), which holds that a defendant sentenced to life without the possibility of parole is eligible for discretionary recall and resentencing under Penal Code section 1172.1, including the vacating of their first-degree murder conviction and the imposition of a lesser parole-eligible offense. (*Id.* at pp. 914-916.) **Simply put, the line between life without parole and a life with parole has become incredibly thin.**

Accordingly, while the Governor may submit applications and even seek this Court' recommendation despite the Board of Parole's opposition, he cannot decide whether the board participates at all—and thus deprive this Court of the record the Legislature directed it to consider. (See Pen. Code, §§ 4802, 4813, 4851.)

CONCLUSION

The Orange County District Attorney respectfully requests that this Court decline to recommend the proposed commutations. The Governor's utilization of clemency to displace the constitutionally-protected penalty of death on the ground that it should never be carried out exceeds the restriction imposed upon him by article V, section 1 of the California Constitution—i.e., that he is **required** to see that the law is faithfully executed. Even assuming the Governor has supplied a legitimate basis for the proposed commutations, at a minimum, this Court should defer its recommendations until the Governor submits applications and complies with the statutory review procedures.

Dated this 13th day of November, 2026.

Respectfully submitted,

By: /s/ *Todd Spitzer*
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CERTIFICATE OF WORD COUNT

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

The text of Answer Brief on the Merits consists of 3,580 words as counted by the word-processing program used to generate this brief.

Dated this 13th day of November, 2026.

Respectfully submitted,

By: /s/ *Todd Spitzer*
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Senior Deputy District Attorney

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
)
COUNTY OF ORANGE)

RE: *Request Re: Commutation of Death Sentences*
Case No. S299513

I am a citizen of the United States; I am over the age of 18 years and not a party to the within entitled action; my business address is: Office of the District Attorney, County of Orange, 300 North Flower Street, Santa Ana, CA 92703.

On November 13, 2026, I served the [PROPOSED] AMICUS CURIAE BRIEF on the interested parties in said action by placing a true copy thereof enclosed in a sealed envelope, in the United States mail at Santa Ana, California, that same day, in the ordinary course of business, postage thereon fully prepaid, addressed as follows:

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Fourth Appellate District, Division Three
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 13, 2026, at Santa Ana, California.

/s/ *Hang Bui*
Hang Bui
Attorney Clerk II

PROOF OF ELECTRONIC SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF ORANGE)

RE: *Request Re: Commutation of Death Sentences*
Case No. S299513

I am a citizen of the United States; I am over the age of 18 years and not a party to the within entitled action; my electronic service address is: appellate@ocdistrictattorney.gov; my business address is: Office of the District Attorney, County of Orange, 300 North Flower Street, Santa Ana, CA 92703.

On November 13, 2026, I electronically served the [PROPOSED] AMICUS CURIAE BRIEF on the interested parties in said action by transmitting a true copy via electronic mail as follows:

Office of State Attorney General
sdag.docketing@doj.ca.gov

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

Executed on November 13, 2026, at Santa Ana, California.

/s/ *Hang Bui*
Hang Bui
Attorney Clerk II