

April 2019

California's Capital Crisis Continues: Voter-Initiated Time Limit on Capital Appellate Review Upheld Under Improper Directive Interpretation

Stephanie Nathaniel

Golden Gate University School of Law

Follow this and additional works at: <https://digitalcommons.law.ggu.edu/ggulrev>

Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Stephanie Nathaniel, *California's Capital Crisis Continues: Voter-Initiated Time Limit on Capital Appellate Review Upheld Under Improper Directive Interpretation*, 49 Golden Gate U. L. Rev. 169 (2019).
<https://digitalcommons.law.ggu.edu/ggulrev/vol49/iss2/7>

This Comment is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized editor of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

COMMENT

CALIFORNIA'S CAPITAL CRISIS
CONTINUES: VOTER-INITIATED TIME
LIMIT ON CAPITAL APPELLATE
REVIEW UPHELD UNDER
IMPROPER DIRECTIVE INTERPRETATION

STEPHANIE NATHANIEL*

INTRODUCTION.....	170
I. THE SEPARATION OF POWERS DOCTRINE	173
A. THE LEGISLATURE'S POWER OF STATUTORY ENACTMENT.....	174
B. THE JUDICIARY'S POWER OF STATUTORY INTERPRETATION.....	174
II. PROPOSITION 66 AND <i>BRIGGS V. BROWN</i> : REFORMS INTENDED TO FIX A "BROKEN SYSTEM" BY SHORTENING THE TIME FOR CAPITAL APPELLATE REVIEW	175
A. PROPOSITION 66	176
B. <i>BRIGGS V. BROWN</i>	177
1. <i>Overview</i>	177
2. <i>The Court's Separation of Powers Analysis</i>	181
III. CALIFORNIA'S CAPITAL CRISIS CONTINUES: THE <i>BRIGGS</i> RULING FAILED TO ACCOUNT FOR THE REALITIES FACING THE STATE'S CAPITAL SYSTEM	183
A. THE <i>BRIGGS</i> RULING'S EFFECT ON DEATH-ROW INMATES	183

* J.D. Candidate, Golden Gate University School of Law, May 2019; B.A. Psychology and Legal Studies, University of California, Santa Cruz, June 2014. Editor-in-Chief, 2018-2019, *Golden Gate University Law Review*. The author would like to express her deepest gratitude to Professor Kathleen Morris, Heather Varanini, and the entire *Golden Gate University Law Review* staff for their tireless dedication and thoughtful contributions to the preparation of this Comment. The author would also like to especially thank her family for their unwavering support.

170	GOLDEN GATE UNIVERSITY LAW REVIEW	[Vol. 49]
	B. A BRIEF HISTORY OF CALIFORNIA'S DEATH-PENALTY SYSTEM: DEATH ELIGIBILITY, VOTER INITIATIVES, AND INADEQUATE FUNDING	185
	C. THE <i>BRIGGS</i> COURT NEGLECTED ITS DUTY TO PROVIDE MEANINGFUL APPELLATE REVIEW	187
IV.	A DIRECTIVE INTERPRETATION OF THE FIVE-YEAR TIME LIMIT IS IMPROPER BECAUSE THE VOTERS INTENDED FOR IT TO BE MANDATORY	189
	A. THE VOTERS INTENDED FOR THE TIME LIMIT TO BE MANDATORY BECAUSE THE PROVISION PROVIDED FOR ENFORCEMENT BY WRIT OF MANDATE	190
	B. THE VOTERS' MANDATORY INTENT IS EVIDENT FROM THE LANGUAGE IN THE BALLOT MATERIALS AND THE TEXT OF THE PROPOSED LAW	194
	C. PRECEDENT DOES NOT SUPPORT A DIRECTIVE INTERPRETATION IN <i>BRIGGS</i>	197
V.	CONCLUSION	203

INTRODUCTION

With 739 condemned inmates currently on death row,¹ California houses the largest death-row population in the Western Hemisphere.² Facing delays of nearly twice that of the national average, the time between a death sentence and execution is longer in California than in any other death penalty state.³ As of January 2019, the states with the next two largest death-row populations after California are Florida, with 353 capital prisoners; and Texas, with 232 capital prisoners.⁴ In Florida, the average time a capital defendant spends on death row before execution is 14 years; and in Texas, the average time on death row before execution is 10 years.⁵ Although the delays in Florida and Texas appear significant, they pale in comparison to the death-row delays in California, where the

¹ *Condemned Inmate List*, CAL. DEP'T OF CORR. & REHAB. DIV. OF ADULT OPERATIONS http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateListSecure.pdf?pdf=Condemned-Inmates (last visited Feb. 9, 2019).

² *California*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/california-1#sent> (last visited Sept. 3, 2018) (citing Chris Nichols, *Truth be told: California has 'Largest Death Row in Western Hemisphere'*, S. CAL. PUB. RADIO (Aug. 12, 2016), <http://www.scpr.org/news/2016/08/12/63532/truth-be-told-california-has-largest-death-row-in>).

³ California's average lapsed time from judgment of death to execution is 20-25 years; the national average is 11-14 years. See CAL. COMM'N ON THE FAIR ADMIN. OF JUST., FINAL REPORT 123-25 n.32 (N. Cal. Innocence Project Publ'n 2008), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1000&context=ncippubs>.

⁴ *Death-Row Prisoners by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> (last visited Jan. 18, 2019).

⁵ CAL. COMM'N ON THE FAIR ADMIN. OF JUST., *supra* note 3, at 124-25 & n.32.

time from a judgment of death to execution often takes 20 to 25 years.⁶ The length of delay between sentence and disposition of appellate review gets longer each year as California's death-row population continues to grow.⁷

California's death-penalty system has placed the state in a capital crisis.⁸ Without the proper funding, California has been unable to litigate the increasingly unmanageable backlog of pending capital appeals and habeas corpus petitions.⁹ Legitimate efforts to remedy the state's capital crisis through statutory reform must account for the system's underlying problems, or they will otherwise risk causing additional delays that will further burden the system.

Proposition 66, a recently passed California initiative, is a prime example of a death-penalty reform that will only contribute to the inefficiency of California's broken capital system.¹⁰ Designed to speed up the capital appellate review process, Proposition 66 changed procedures governing state court challenges to death sentences, including setting a five-year time limit for capital appellate review.¹¹ The initiative, however, was silent as to the means of achieving this five-year time frame.¹² Without providing judicial guidance on how a significantly shorter time frame could be effectuated and funded, Proposition 66 fails to yield any realistic chance at reform.¹³

Briggs v. Brown challenged the constitutionality of Proposition 66.¹⁴ The court addressed whether Proposition 66's five-year time limit for capital appellate review violated the separation of powers doctrine by

⁶ *Id.* at 123 (“The average lapse of time between pronouncement of death and execution in California is 17.2 years, but using an ‘average’ number may be misleading since only thirteen have been executed.”). See also Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697, 707-08 (2007) (In 2007, of the 662 capital inmates on death row, 30 people had been on California's death row for more than 25 years; 119 had been on death row for more than 20 years; and 240 had been on death row for more than 15 years.).

⁷ CAL. COMM'N ON THE FAIR ADMIN. OF JUST., *supra* note 3, at 125.

⁸ The term “capital crisis” is used throughout this Comment in reference to challenges faced by the state in the processing of death-penalty cases. See, e.g., Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. (SPECIAL ISSUE) 41, 186 (2011) (“crisis confronting California in its processing of capital litigation”).

⁹ See *id.* at 46-47.

¹⁰ See CAL. SEC'Y OF STATE, *Analysis by the Legislative Analyst, in* OFFICIAL VOTER INFO. GUIDE 104, 104-07 (2016), <https://vig.cdn.sos.ca.gov/2018/general/pdf/complete-vig.pdf> [hereinafter Voter Guide].

¹¹ *Id.* at 106.

¹² See *Briggs*, 3 Cal. 5th 808, 863, 871 (Liu, J., concurring) (2017).

¹³ See *id.* (“[R]ealistic reforms must emanate from a clear understanding of the way the post-conviction death penalty process works in California. . . . [T]he five-year time limit is not grounded in the realities of California's death penalty process or in the reasonable possibilities for reform.”).

¹⁴ *Id.* at 822 (majority opinion).

materially impairing the court's core function to hear and decide cases.¹⁵ Solely to preserve the initiative's constitutionality and avoid a conceded separation of powers violation, the California Supreme Court improperly interpreted the measure in a manner that directly conflicts with the voters' intent and the initiative's primary purpose.¹⁶

Despite the provision's mandatory language and purpose, the court ruled that Proposition 66's five-year time limit for capital appellate review was merely "directive" and not mandatory.¹⁷ A directive interpretation of a judicial time limit provision allows for a court's ultimate authority in deciding the matter and does not place an actual or strict time requirement on the courts as would a mandatory interpretation.¹⁸ A directive interpretation is appropriate where it is (1) reasonable, as evidenced by the provision's language and statutory intent,¹⁹ and in the context of judicial time limits, (2) necessary to prevent an unconstitutional encroachment on the judiciary's power.²⁰ The court upheld the five-year time limit under a directive interpretation by supplying a saving construction that "saved" the provision from unconstitutionally violating the separation of powers doctrine.²¹ A "saving construction" is an exercise of judicial statutory construction whereby a court may interpret a law in a manner that avoids unconstitutionality: "If the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution."²²

By upholding Proposition 66 under a directive interpretation, the court inadvertently promoted the drafting of unworkable, unconstitutional legislation and the application of inconsistent, arbitrary capital appellate review. Once the *Briggs* decision was issued, Proposition 66 went into effect, setting new procedures and time limits for capital appellate review.²³ This Comment focuses on the court's analysis of the constitutionality of Penal Code section 190.6(d), which sets a five-year limit on the completion of the appellate and initial habeas corpus review

¹⁵ *Id.* at 845; see CAL. CONST. art. III, § 3.

¹⁶ See *Briggs*, 3 Cal. 5th at 857.

¹⁷ *Id.* at 857, 860.

¹⁸ *Id.* at 870 (Liu, J., concurring).

¹⁹ *Smith v. Trapp*, 249 Cal. App. 2d 929, 938 (1967).

²⁰ See, e.g., *Briggs*, 3 Cal. 5th at 850-55; *People v. Engram*, 50 Cal. 4th 1131, 1151 (2010); *Metromedia, Inc. v. City of San Diego*, 32 Cal. 3d 180, 186-87 (1982).

²¹ See *Briggs*, 3 Cal. 5th at 858 (holding that it is the practice of California courts to construe statutes that unduly interfere with judicial functions "so as to maintain the court's discretionary control" rather than strike them down).

²² *Metromedia*, 32 Cal. 3d at 186 (quoting *County of Los Angeles v. Legg*, 5 Cal. 2d 349, 353 (1936)).

²³ *Briggs*, 3 Cal. 5th at 862.

processes where a judgment of death has been imposed.²⁴ This Comment asserts that courts have a duty to strike down a voter-initiated time limit on capital appellate review when the will of the voters indicates an intent for the time limit to be mandatory—in violation of the separation of powers doctrine—and where the measure fails to provide courts with meaningful guidance on how to achieve the time limit. This Comment argues that the *Briggs* court neglected this duty by supplying a saving construction rather than invalidating the provision. As a result, the court's decision to uphold a time limit that is both fiscally and procedurally unrealistic threatens to exacerbate California's capital crisis.

Part I begins with an overview of the separation of powers doctrine. Part II provides an overview of Proposition 66 and the California Supreme Court case that challenged its constitutionality. This section discusses Proposition 66's statutory objective, the petitioners' claim of unconstitutionality, the respondents' claim about the initiative's purpose, and the court's separation of powers analysis. Part III discusses the state of California's capital crisis by (1) examining the *Briggs* ruling's effect on death-row inmates; (2) providing a brief background of California's death-penalty system; and (3) evaluating the *Briggs* ruling in connection with the court's duty to provide meaningful appellate review. Part IV evaluates the court's separation of powers analysis regarding the constitutionality of the five-year time limit and addresses the problems with the court's directive interpretation. To illustrate the inappropriateness of the court's directive interpretation of the time limit, this section analyzes the language and purpose of the initiative, the intent of the voters, and the court's cited case law. Finally, part V concludes that the California Supreme Court had a duty to invalidate an unworkable judicial time limit that was passed by voter initiative when it is evident that the voters intended for the time limit to place a mandatory requirement on the courts.

I. THE SEPARATION OF POWERS DOCTRINE

Article III establishes the separation of powers of the executive, legislative, and judicial branches of government, and requires that the three branches remain separate and distinct from one another.²⁵ Although each branch maintains its own distinct governmental authority, the branches

²⁴ CAL. PENAL CODE § 190.6(d) (2018) (all references hereinafter are to the penal code unless otherwise stated); *Briggs*, 3 Cal. 5th at 848-61.

²⁵ CAL. CONST. art. III, § 3 (“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.”).

are interrelated and each branch must respect the constitutional power of the others.²⁶

A. THE LEGISLATURE'S POWER OF STATUTORY ENACTMENT

The judicial and executive branches generally must yield to the legislature's power to enact statutes.²⁷ The legislature's power of statutory enactment includes the people's initiative power.²⁸ The initiative power is the right reserved to the people "to propose statutes and amendments to the Constitution and to adopt or reject them," and it must be broadly interpreted to maintain maximum power in the people.²⁹ While the legislature's power to statutorily regulate judicial proceedings and appeals is broad, it is not unlimited.³⁰ Restricted by the separation of powers doctrine, the legislature is only permitted to prescribe reasonable rules of judicial procedure that do not "defeat or materially impair" the courts' core constitutional functions.³¹

B. THE JUDICIARY'S POWER OF STATUTORY INTERPRETATION

A court may declare a legislative regulation invalid as a violation of the separation of powers doctrine when "the statutory provision[] as a whole, viewed from a realistic and practical perspective, operate[s] to defeat or materially impair" the court's exercise of its constitutional functions.³² The courts' functions may not be "so restricted by unreasonable rules as to virtually nullify them."³³ However, when a regulation may be logically and reasonably interpreted in a manner that does not divest the court of its core functions, it is within the court's judicial authority to uphold it under the non-imposing statutory construction.³⁴ This judicial statutory, or "saving," construction is appropriate only when the language and primary objective or purpose of the provision indicates a

²⁶ See *Briggs*, 3 Cal. 5th at 846 (quoting *Superior Court v. County of Mendocino*, 13 Cal. 4th 45, 52 (1996)).

²⁷ *Id.* (quoting *Brydonjack v. State Bar of Cal.*, 208 Cal. 439, 442 (1929)).

²⁸ *Indep. Energy Producers Ass'n v. McPherson*, 38 Cal. 4th 1020, 1032 (2006).

²⁹ *Briggs*, 3 Cal. 5th at 827 (quoting *Indep. Energy*, 38 Cal. 4th at 1032); CAL. CONST. art. IV § 1; CAL. CONST. art. II, § 8(a).

³⁰ See *Briggs*, 3 Cal. 5th at 846 (quoting *Brydonjack*, 208 Cal. at 442-43).

³¹ *Id.* at 846 (quoting *Brydonjack*, 208 Cal. at 444).

³² *Marine Forests Soc'y v. Cal. Coastal Comm'n*, 36 Cal. 4th 1, 15, 45 (2005); see also *Briggs*, 3 Cal. 5th at 846 (quoting *Le Francois v. Goel*, 35 Cal. 4th 1094, 1104 (2005)).

³³ *Briggs*, 3 Cal. 5th at 850 (quoting *In re Shafter-Wasco Irrigation Dist.*, 55 Cal. App. 2d 484, 487 (1942)).

³⁴ *Id.* (quoting *Garrison v. Rourke*, 32 Cal. 2d 430, 436-37 (1948)); see *People v. Engram*, 50 Cal. 4th 1131, 1151 (2010); *Thurmond v. Superior Court of S.F.*, 66 Cal. 2d 836, 839 (1967); *Lorraine v. McComb*, 220 Cal. 753, 756-57 (1934).

clear intent not to divest or impair the courts' core functions.³⁵ Such a regulation is reasonably interpreted under a saving construction because, based on the provision's language and purpose, any other interpretation would logically defeat the aims and purposes of the statute.³⁶

As James Madison acutely acknowledged in the Federalist Papers, the "interpretation of the laws is the proper and peculiar province of the courts."³⁷ However, this duty to decipher a law's meaning becomes more complicated for the judiciary when the law is passed by voter initiative.³⁸ Voter initiatives are not subject to the same process as laws proposed by the state legislature, and consequently do not include the typical legislative hearings or committee reports that are often critical to a court's determination of a law's purpose.³⁹ When the constitutionality of a voter-initiated statute is challenged, the courts are faced with the difficult task of ascertaining the voters' intent in passing the new law without the usual guidance of a legislative history.⁴⁰ The lack of a legislative history poses especially serious problems when the challenged voter initiative affects criminal justice policy or procedure.⁴¹ Because the California initiative process prohibits the legislature from amending or repealing voter-initiated legislation, it is left solely to the judiciary to strike down a voter-initiated provision that is unconstitutional and unworkable.⁴²

II. PROPOSITION 66 AND *BRIGGS V. BROWN*: REFORMS INTENDED TO FIX A "BROKEN SYSTEM" BY SHORTENING THE TIME FOR CAPITAL APPELLATE REVIEW

In an effort to address the significant backlog of capital cases awaiting the California Supreme Court's appellate review, the 2016 California ballot included two initiatives aimed at reforming the death-penalty system: Proposition 62 and Proposition 66.⁴³ Proposition 62 sought to abolish the state's death penalty but failed by a slim margin, with 53.15% of

³⁵ See *Briggs*, 3 Cal. 5th at 850 (quoting *Garrison*, 32 Cal. 2d at 436-37); see also *Ingram*, 50 Cal. 4th at 1151; *Metromedia*, 32 Cal. 3d at 186-87.

³⁶ See, e.g., *Cal. Sch. Emps. Ass'n v. Governing Bd.*, 8 Cal. 4th 333, 340 (1994) ("[T]he legislative purpose underlying [the challenged statutes] is effectuated not by a literal interpretation of the statutory language, but rather, by construing the statutory language in order to avoid capricious results unintended by the Legislature."); *Garrison*, 32 Cal. 2d at 437 ("Words otherwise generally mandatory or permissive will be given a different meaning when the provisions of the statute, properly construed, require it.")

³⁷ THE FEDERALIST NO. 78 (James Madison).

³⁸ Alarcón et al., *supra* note 8, at 121-22.

³⁹ *Id.* at 122.

⁴⁰ *Id.*

⁴¹ See *id.*

⁴² See *id.* at 124, 160.

⁴³ *Quick Reference Guide*, in VOTER GUIDE, *supra* note 10, at 8, 13, 15.

voters voting against it.⁴⁴ Proposition 66 intended to speed up the death-penalty appeals process and passed by a narrow margin of 51.1%.⁴⁵

A. PROPOSITION 66

Formally titled “The Death Penalty Reform and Savings Act of 2016,” the initiative asserted that California’s death-penalty process is ineffective due to “waste, delays, and inefficiencies.”⁴⁶ Drafted predominantly by death-penalty prosecutors,⁴⁷ the measure enacted a series of statutory reforms designed to speed up the death-penalty appeals system.⁴⁸

Proposition 66 requires that the direct appeal and initial habeas corpus proceedings are completed within five years from the imposition of the death sentence.⁴⁹ Without providing any guidance on how this time limit is to be achieved, the initiative instructs the Judicial Council to adopt rules and standards to ensure that the capital appellate review process is completed within this time frame.⁵⁰ Additionally, the Judicial Council must adopt such rules within 18 months of the effective date of the initiative, and must continuously amend the rules and standards to further guarantee that the time limit is met.⁵¹ All pending challenges are subject to the enactment and must be completed within five years of the date the Judicial Council adopts the revised rules.⁵² If the process exceeds this five-year time limit, Proposition 66 provides that “either party or any victim of the offense may seek relief by petition for writ of mandate,” which the court must act on within 60 days of filing.⁵³ Although the initiative asserts that a court order may be sought to address a delay

⁴⁴ *California Proposition 62, Repeal of the Death Penalty (2016)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_\(2016\)#cite_note-1](https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)#cite_note-1) (last visited Mar. 10, 2018).

⁴⁵ *California Proposition 66, Death Penalty Procedures (2016)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_\(2016\)#cite_note-7](https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_(2016)#cite_note-7) (last visited Mar. 10, 2018).

⁴⁶ *Text of Proposed Laws: Proposition 66*, in VOTER GUIDE, *supra* note 10, at 212, §§ 1-2 at 212-213.

⁴⁷ *California Proposition 66, Death Penalty Procedures (2016)*, *supra* note 45.

⁴⁸ *Analysis by the Legislative Analyst*, in VOTER GUIDE, *supra* note 10, at 104, 105.

⁴⁹ *Text of Proposed Laws: Proposition 66*, in VOTER GUIDE, *supra* note 10, at 212, § 3(d) at 213.

⁵⁰ *Id.*

⁵¹ *Id.* At the time this Comment was written, the Judicial Council had not yet announced any new rules to meet the five-year time limit.

⁵² *Id.*

⁵³ *Id.* § 3(e) at 213.

that exceeds the time limit, it fails to address the exact relief the courts may provide in such a situation.⁵⁴

Opponents of the initiative cautioned the California Supreme Court that Proposition 66 “threatens to deal a mortal blow” to California’s courts by dictating the judicial docket and limiting the courts’ ability to hear civil cases.⁵⁵ The impracticality of the time limit is sweeping: as of 2016, there were 337 direct appeals and 263 state habeas corpus petitions pending in the California Supreme Court.⁵⁶ Placing a five-year time limit on the court to determine all currently pending capital appeals, in addition to any new death sentences, is an unrealistic demand on the court’s limited resources.⁵⁷ Opponents asserted that the measure will overwhelm all the state’s courts with extra work, but will affect the California Supreme Court the most.⁵⁸ “Calculations based on the court’s typical annual production indicate” that adherence to the five-year time limit could result in the California Supreme Court spending 90% of its time on capital cases, causing “civil case rulings [to] decline from about 50 a year to just a handful.”⁵⁹

B. *BRIGGS V. BROWN*

1. *Overview*

On November 9, 2016, one day after Proposition 66 passed, Ron Briggs and former State Attorney General John Van de Kamp filed a petition with the California Supreme Court challenging the constitutionality of Proposition 66.⁶⁰ In their petition, Briggs and Van de Kamp ar-

⁵⁴ *Analysis by the Legislative Analyst, in VOTER GUIDE, supra* note 10, at 104, 106.

⁵⁵ See Maura Dolan, *Trying to Speed Up Executions Could Deal ‘Mortal Blow’ to California Supreme Court*, L.A. TIMES (Apr. 2, 2017, 3:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-death-penalty-appeals-measure-20170402-story.html> (asserting that the time limit is “completely unworkable” and “would require the California Supreme Court to decide virtually nothing but death penalty appeals for at least the next five years—almost no civil cases at all and no criminal cases other than capital murder”).

⁵⁶ *Proposition 66*, LEGISLATIVE ANALYST’S OFFICE (Nov. 8, 2016), <http://www.lao.ca.gov/BallotAnalysis/Proposition?number=66&year=2016>.

⁵⁷ See Bobby Lee, *Prop. 66, Which Speeds up State Death Penalty Process, is Challenged in CA Supreme Court*, DAILY CALIFORNIAN (June 12, 2017), <http://www.dailycal.org/2017/06/12/prop-66-speeds-state-death-penalty-process-challenged-ca-supreme-court/> (“The system is stuck because we don’t have the necessary resources.”).

⁵⁸ Dolan, *supra* note 55.

⁵⁹ *Id.*

⁶⁰ Amended & Renewed Petition for Extraordinary Relief at 2, *Briggs v. Brown*, 3 Cal. 5th 808 (2017) (No. S238309), <https://www.dropbox.com/sh/wisubhyoi2maz7/AAATRdd0FTZms0h-h0zKjpy8a?dl=0&preview=4.+Petitioners-amended-renewed-pet-extraordinary-relief-S238309.pdf>. John Van de Kamp died after petition was filed, leaving Ron Briggs as the sole petitioner. See *Briggs*, 3 Cal. 5th at 822 n.1.

gued, and amici agreed,⁶¹ that Proposition 66's five-year time limit violates the separation of powers doctrine by materially impairing the constitutional and inherent powers of the courts to resolve capital appeals and habeas corpus cases.⁶²

The named defendants included then-Governor Jerry Brown, then-Attorney General Kamala Harris, Secretary of State Alex Padilla, and the Judicial Council, which is the policymaking body for California's courts.⁶³ Respondents were joined by Intervenor Californians to Mend, Not End, the Death Penalty ("Intervenor"), "a campaign committee representing the proponents of the initiative."⁶⁴ Chief Justice Tani Cantil-Sakauye and Justice Ming W. Chin recused themselves from the case because they are members of the Judicial Council, one of the aforementioned named defendants.⁶⁵ In their place, California Courts of Appeal Justices Andrea Lynn Hoch and Raymond J. Ikola sat pro tempore.⁶⁶ The California Supreme Court stayed the implementation of Proposition 66 on December 20, 2016,⁶⁷ and granted review on February 1, 2017.⁶⁸

Alleging a separation of powers violation, Petitioners argued that the five-year requirement for capital review is an impracticable time limit that divests the court of its constitutionally mandated judicial discretion.⁶⁹ Petitioners asserted that the time limit failed to provide for important considerations, such as the complexity of a case, the substantiality of the legal issues presented, and the possibility of an attorney having rea-

⁶¹ Amici in support of Petitioner were: Constitutional law professors Erwin Chemerinsky (UCI), Kathryn Abrams (Berkeley), Rebecca Brown (USC), Devon Carbado (UCLA), Jennifer Chacón (UCI), Sharon Dolovich (UCLA), David Faigman (Hastings), Ian F. Haney López (Berkeley), Karl M. Manheim (Loyola), Russell Robinson (Berkeley), Betroll Ross (Berkeley), and the Brennan Center for Justice; California Appellate Defense Counsel; the Los Angeles County Bar Association, the California Academy of Appellate Lawyers, the Beverly Hills Bar Association, and the Bar Association of San Francisco; the California Appellate Project; the Habeas Corpus Resource Center; California Attorneys for Criminal Justice and Death Penalty Focus; the Innocence Network, American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California, and the American Civil Liberties Union of San Diego and Imperial Counties; and the Offices of the Federal Public Defenders for the Central and Eastern Districts of California. Petitioner's Reply to Amicus Curiae Briefs at 1-2, *Briggs v. Brown*, 3 Cal. 5th 808 (2017) (No. S238309).

⁶² Amended & Renewed Petition, *supra* note 60 at 14-15.

⁶³ Petition for Extraordinary Relief at 4-5, *Briggs v. Brown*, 3 Cal. 5th 808 (2017) (No. S238309), <http://www.courts.ca.gov/documents/1-s238309-petitioners-pet-writ-mandate-req-stay-110916.pdf>.

⁶⁴ *Briggs*, 3 Cal. 5th at 822.

⁶⁵ Order Recusing Chief Justice Cantil-Sakauye & Justice Chin, *Briggs v. Brown*, 3 Cal. 5th 808 (2017) (No. S238309), <http://www.courts.ca.gov/documents/2-s238309-orf-111616.pdf>.

⁶⁶ *Briggs*, 3 Cal. 5th at 822.

⁶⁷ Stay Order, *Briggs v. Brown*, 3 Cal. 5th 808 (2017) (No. S238309), <http://www.courts.ca.gov/documents/6-s238309-stf-122016.pdf>.

⁶⁸ Order to Show Cause, *Briggs v. Brown*, 3 Cal. 5th 808 (2017) (No. S238309).

⁶⁹ Petition for Extraordinary Relief, *supra* note 63, at 32-34.

sonable schedule limitations.⁷⁰ Petitioners argued that the voters' intent to "impose obligatory guidelines" on the courts was evident based on the following: (1) the initiative's repeated use of the word "shall" instead of "may;" (2) the consequences established by the initiative for a court's failure to meet the prescribed time limits; and (3) the fact that the ballot materials informed voters that, if enacted, "Proposition 66 *would* impose *required* time limits on the lengthy capital appeals process."⁷¹

Petitioners asserted that a saving construction of the time limit would be improper and would result in "legislation [that] would be unrecognizable to the proponents who authored it and the voters who adopted it."⁷² Petitioners argued that construing the time limit provision as directive instead of mandatory, by use of a saving construction, would disregard the basic rule of statutory interpretation when a voter initiative is challenged because such an interpretation would ignore the initiative's purpose and contradict the voters' intent in enacting it.⁷³

In response, Intervenor and Respondents conceded in their pleadings that Proposition 66's five-year time limit imposes a "required" deadline on the courts that "was intended to be" enforceable through a petition for writ of mandate.⁷⁴ However, Respondents and Intervenor argued that the required five-year time limit does not violate the separation of powers doctrine because it is both a reasonable restriction on the constitutional functions of the courts and a valid exercise of the legislature's power to regulate criminal proceedings.⁷⁵ Notably, neither Respondents nor Intervenor argued in their pleadings that a saving construction was necessary for the time limit to pass constitutional muster.⁷⁶ Rather, the proponents insisted that Proposition 66's five-year time limit is not an "absolute or inflexible rule" since it does not require an automatic issuance of a writ, but provides for writ relief only when the court does not have "extraordinary and compelling reasons justifying the delay."⁷⁷ The "time limit[]

⁷⁰ *Id.* at 34.

⁷¹ Petitioner's Reply to Amicus Curiae Briefs, *supra* note 61, at 9-10 (emphasis in original).

⁷² *Id.* at 12.

⁷³ *Id.* at 9 (quoting *Hodges v. Superior Court*, 21 Cal. 4th 109, 114 (1999)) ("In the case of a voters' initiative statute . . . [the court] may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.").

⁷⁴ Intervenor's Brief in Reply to Amicus Curiae Briefs at 36, *Briggs v. Brown*, 3 Cal. 5th 808 (2017) (No. S238309); Respondents' Preliminary Opposition to Petitioners' Amended & Renewed Petition for Extraordinary Relief at 4, *Briggs v. Brown*, 3 Cal. 5th 808 (2017) (No. S238309).

⁷⁵ Respondents' Preliminary Opposition to Amended Petition, *supra* note 74, at 12-16; Preliminary Opposition of Intervenor to Petition for Extraordinary Relief at 37-41, *Briggs v. Brown*, 3 Cal. 5th 808 (2017) (No. S238309).

⁷⁶ Respondents' Preliminary Opposition to Amended Petition, *supra* note 74, at 13, 15-16; Preliminary Opposition of Intervenor to Petition, *supra* note 75, at 40.

⁷⁷ Intervenor's Return to the Order to Show Cause at 41-42, *Briggs v. Brown*, 3 Cal. 5th 808 (2017) (No. S238309), <http://www.courts.ca.gov/documents/28-s238309-intervener-written-return>

[was] crafted with enough flexibility to preserve the judicial branch's ability 'to properly and effectively function as a separate department.'"⁷⁸ Thus, the proponents argued in their pleadings that the time limit does not rise to the level of judicial infringement that constitutionally demands a saving construction.⁷⁹

However, admitting at oral argument that a five-year deadline would "perhaps not" be constitutional, proponents argued—for the first time—that the five-year requirement was actually not required; but instead asserted it was merely a "goal" that was really just "an invitation to take up the question of how long these appeals should take."⁸⁰ Despite this revelation at oral argument, nowhere in Respondents' or Intervenor's six cumulative briefs, providing over 300 pages of argument, did either party claim that the five-year time "requirement," as it is repeatedly referred to in their pleadings, warranted or required a directive interpretation.⁸¹

The court conceded that the five-year time limit is mandatory in light of the language therein; the court also admitted that the voters believed the time limit would be "binding and enforceable."⁸² Despite the voters' clear intent and the initiative's mandatory purpose, the court agreed with the initiative's proponents that the five-year time limit may be properly construed as directive, instead of mandatory.⁸³

The California Supreme Court upheld Proposition 66 in a 5-2 ruling on August 24, 2017.⁸⁴ Finding that Petitioners' constitutional challenges did not warrant relief,⁸⁵ the court effectuated the entirety of the initiative's proposed reforms, with one exception.⁸⁶ To avoid serious separation of powers problems, the court modified the mandatory language of the time limit provision to be interpreted in a "directive manner"—that is, the time limit provisions that "appear to impose strict deadlines" on

030117.pdf; *Text of Proposed Laws: Proposition 66*, in VOTER GUIDE, *supra* note 10, at 212, § 3(e) at 213.

⁷⁸ Preliminary Opposition of Intervenor to Petition, *supra* note 75, at 40 (quoting *Engram*, 50 Cal. 4th at 1146).

⁷⁹ *Id.* (quoting *Engram*, 50 Cal. 4th at 1151); *see also* Respondents' Preliminary Opposition to Amended Petition, *supra* note 74, at 15-16.

⁸⁰ *Briggs*, 3 Cal. 5th at 874-75 (Cuéllar, J., dissenting).

⁸¹ *See* Respondents' Preliminary Opposition to Amended Petition, *supra* note 74; Intervenor's Complaint in Intervention in Opposition to Petitioner's Petition for Writ of Mandate, *Briggs v. Brown*, 3 Cal. 5th 808 (2017) (No. S238309); Intervenor's Return to Order to Show Cause, *supra* note 77; Intervenor's Brief in Reply to Amicus Curiae Briefs, *supra* note 74; Respondent's Reply to Amicus Curiae Briefs, *Briggs v. Brown*, 3 Cal. 5th 808 (2017) (No. S238309); Respondent's Return to Petition for Writ of Mandate, *Briggs v. Brown*, 3 Cal. 5th 808 (2017) (No. S238309).

⁸² *Briggs*, 3 Cal. 5th at 854; CAL. PENAL CODE § 190.6(d) (2018).

⁸³ *Briggs*, 3 Cal. 5th at 855; PENAL § 190.6(d).

⁸⁴ *Briggs*, 3 Cal. 5th at 862.

⁸⁵ *Id.* at 823.

⁸⁶ *Id.* at 860-62.

the courts do not, but instead “serve as a benchmark to guide courts, if meeting the limits is reasonably possible.”⁸⁷

2. *The Court's Separation of Powers Analysis*

In determining the constitutionality of the five-year time limit, the court held that its sole function was to evaluate the initiative “legally in light of established constitutional standards.”⁸⁸ The court did not consider “the economic or social wisdom or general propriety of the initiative”⁸⁹ nor the “possible interpretive or analytical problems that might arise from the measure in the future.”⁹⁰

In its separation of powers analysis, the court acknowledged that California has a long-established precedent for finding that fixed time limits on a court's exercise of its judicial functions raise serious separation of powers concerns.⁹¹ However, the *Briggs* court's underlying reasoning for applying a directive interpretation to the five-year time limit was that it is within a court's authority to “preserve[] jurisdiction and maintain[] the separation of powers by holding that time limits phrased in mandatory terms [are] merely directory.”⁹² The court acknowledged that many other states have established that imposing fixed deadlines on judicial decision-making is a quintessential violation of the separation of powers doctrine.⁹³ But none of the cases cited by the court upheld a clearly mandatory and unconstitutional judicial time requirement by giving it a different interpretation; where a court found a time requirement materially impaired the court's exercise of its core functions, the statute was struck down.⁹⁴

The *Briggs* court asserted that California's departure from invalidating an unconstitutional statute is preferable: “The California approach has the benefit of allowing time limits set by the legislative branch to

⁸⁷ *Id.* at 823, 860.

⁸⁸ *Id.* at 828 (quoting *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 814 (1989)).

⁸⁹ *Id.* (quoting *Calfarm*, 48 Cal. 3d at 814).

⁹⁰ *Id.* at 827 (quoting *Raven v. Deukmejian*, 52 Cal. 3d 336, 341 (1990)) (internal quotations omitted).

⁹¹ *Id.* at 849.

⁹² *Id.* at 851.

⁹³ *Id.* at 851 & n.28.

⁹⁴ See *State v. Buser*, 302 Kan. 1, 8-9 (2015); *In re Grady*, 348 N.W.2d 559, 570 (Wis. 1984); *Coate v. Omholt*, 662 P.2d 591, 593 (Mont. 1983); *Sands v. Albert Pike Motor Hotel*, 434 S.W.2d 288, 291-92 (Ark. 1968); *State ex rel. Kostas v. Johnson*, 69 N.E.2d 592, 595 (Ind. 1946); *Atchinson Topeka & Santa Fe Ry. Co. v. Long*, 251 P. 486, 489 (Okla. 1926); *Schario v. State*, 138 N.E. 63, 64 (Ohio 1922); *Resolute Ins. Co. v. Seventh Judicial Dist. Court of Okla. Cty.*, 336 F. Supp. 497, 503 (W.D. Okla. 1971); *United States v. Brainer*, 515 F. Supp. 627, 636 (D. Md. 1981); *Cf. State ex rel. Emerald People's Util. v. Joseph*, 640 P.2d 1011, 1014 (Or. 1982).

function as nonbinding guidelines, when reasonably possible.”⁹⁵ The court cited *Garrison*, *Engram*, *Thurmond*, *Shafter-Wasco*, *Lorraine*, and *Verio* as examples of a directive interpretation applied to an otherwise mandatory statute to avoid a separation of powers violation.⁹⁶ The court asserted that these cases created nearly a century of precedent that a court must “decline to infer that lawmakers intended strict adherence to a fixed deadline that would undermine the courts’ authority as a separate branch of government.”⁹⁷

The court proffered two justifications for its directive interpretation of the five-year time limit.⁹⁸ First, the court claimed that the time limit provision “provides no effective mechanism” of enforcement.⁹⁹ Second, the court refused to interpret the time limit provision “to conform with the voters’ probable intent” because the voters were not “informed of the details of an enforcement mechanism” or “how such an order could effectively result in compliance.”¹⁰⁰

The first justification derives from the court’s reading of section 190.6(e). This provision establishes: “If a court fails to comply without extraordinary and compelling reasons justifying the delay, either party or any victim of the offense may seek relief by petition for writ of mandate.”¹⁰¹ The court interpreted this provision as providing relief only for a delay in filing the opening appellate brief, discussed in section 190.6(b), and not for a delay exceeding the five-year time limit, discussed in section 190.6(d).¹⁰² Those defending the initiative expressly informed the court that subdivision (e) was intended to reference subdivision (d), and that the reference to subdivision (b) was a drafting error, but the court dismissed these assertions.¹⁰³

The court held that even if it did interpret the provision as the parties intended, a directive interpretation was nevertheless appropriate because the provision did not provide a “workable” means of enforcement.¹⁰⁴ Focusing on the plausibility of writ relief to enforce the time limit, the court

⁹⁵ *Briggs*, 3 Cal. 5th at 851 & n.28.

⁹⁶ *Id.* at 849-51, 853-54 (2017) (citing *Garrison*, 32 Cal. 2d 430; *Engram*, 50 Cal. 4th 1131; *Thurmond*, 66 Cal. 2d 836; *Shafter-Wasco*, 55 Cal. App. 2d 484; *Lorraine*, 220 Cal. 753; *Verio Healthcare, Inc. v. Superior Court*, 3 Cal. App. 5th 1315 (2016)).

⁹⁷ *Briggs*, 3 Cal. 5th at 858.

⁹⁸ *Id.* at 855.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 857.

¹⁰¹ *Text of Proposed Laws: Proposition 66*, in VOTER GUIDE, *supra* note 10, at 212, § 3(e) at 213.

¹⁰² *Briggs*, 3 Cal. 5th at 855; *Text of Proposed Laws: Proposition 66*, in VOTER GUIDE, *supra* note 10, at 212, § 3(b), (d)-(e) at 213.

¹⁰³ *Briggs*, 3 Cal. 5th at 855.

¹⁰⁴ *Id.* at 857.

found that adherence to such a deadline is impractical because it would require a “coordination of efforts by multiple courts and other actors” in addition to substantial additional funding by the legislature.¹⁰⁵ The court also noted that writ relief requiring the California Supreme Court, the state’s highest court, to comply with the deadline is not possible because a writ must be issued to an inferior tribunal.¹⁰⁶

The court’s second justification for upholding the time limit under a directive interpretation goes to the heart of the issue: the intent of the voters. The court found the voters intended to impose a mandatory and enforceable judicial time limit, but the court declined to interpret the statute in a way that would accurately reflect the voters’ intent when such an interpretation would render the provision unconstitutional as a violation of the separation of powers.¹⁰⁷ The court did not disagree that it was the intention of the voters to have a mandatory five-year time limit, but the court nevertheless refused to interpret it that way, holding that “[i]t has never been our practice to rewrite a statute only to strike it down as unconstitutional.”¹⁰⁸ Because the voters were not “informed of the details of an enforcement mechanism” and how a writ of mandate “could effectively result in compliance,” the court held that the voters did not intend to “intrude on the right of the courts.”¹⁰⁹

For the foregoing reasons, the court declined to conform with voter intent by giving the time limit’s mandatory language effect.¹¹⁰ Instead, the court held that the time limit is properly construed under a directive interpretation “as an exhortation to the parties and the courts to handle cases as expeditiously as is consistent with the fair and principled administration of justice.”¹¹¹

III. CALIFORNIA’S CAPITAL CRISIS CONTINUES: THE *BRIGGS* RULING FAILED TO ACCOUNT FOR THE REALITIES FACING THE STATE’S CAPITAL SYSTEM

A. THE *BRIGGS* RULING’S EFFECT ON DEATH-ROW INMATES

Underlying the legal arguments proffered by both sides and the court is the human reality: the initiative risks the execution of innocent people.

¹⁰⁵ *Id.* at 856.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 857.

¹⁰⁸ *Id.* (claiming that the drafting error would require the court to “rewrite” the provision).

¹⁰⁹ *Id.* at 857-58.

¹¹⁰ *Id.* at 858.

¹¹¹ *Id.* at 858-59 (citing *Garrison*, 32 Cal. 2d at 435-36; *Shafter-Wasco*, 55 Cal. App. 2d at 489).

There is ample evidence to show that five years is not enough time for inmates to prove their innocence on appeal. First, certain evidence may not be available to the defendant until years later. “For every ten prisoners executed in the United States since 1976, one has been set free because of advances in DNA and other forensics.”¹¹² Typically, it takes a great deal of time for this evidence to be discovered. Second, reaching a determination in a capital appeal is a tedious process, and the judiciary must be afforded the necessary time to evaluate the voluminous records inherent to a capital case. For all capital cases from 2000 to 2015, the California Supreme Court overturned the death penalty in 8.46% of cases, including 3.32% of cases where the verdict was reversed or the judgment vacated.¹¹³ In cases where the court reversed a death sentence, the average time under submission was 100 days; and in cases where a death sentence was affirmed, the average time under submission was typically one-third shorter.¹¹⁴ This evidence demonstrates that it takes longer for the court to determine a death-row inmate’s innocence. Despite its exceedingly large death-row population, California “has carried out only 13 of the [total] 1,242 executions that have occurred” in the United States since 1976.¹¹⁵ Notably, of the 13 capital inmates executed in California, 2 were “volunteers” who requested execution after voluntarily withdrawing their appeals and habeas corpus petitions; thereby, California has executed only 11 death-row inmates after completion of the capital appellate review process.¹¹⁶

Accelerating the capital process threatens to create a criminal justice structure that executes individuals before their guilt has been fully established by the judicial appellate system. Specifically, the five-year time limit fosters a system that is susceptible of executing an innocent person because it demands that the courts “go faster” while failing to address the major causes for the long delays in California death-penalty cases.

¹¹² Mercury News Editorial Board, *Prop. 66 Unfair to Death Row Inmates*, MERCURY NEWS (June 8, 2017, 1:31 PM), <http://www.mercurynews.com/2017/06/08/editorial-prop-66-unfair-to-death-row-inmates-and-bad-for-california>; see also Samuel R. Gross et al., *Innocence in Capital Sentencing: Article: Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 529 (2005) (there were 74 death sentence exonerations in the country between 1989 and 2003).

¹¹³ Kirk Jenkins, *What is the Supreme Court’s Reversal Rate for Death Penalty Appeals?*, CAL. SUP. CT. REV. (Jan. 27, 2017), <https://www.californiasupremecourtreview.com/2017/01/what-is-the-supreme-courts-reversal-rate-for-death-penalty-appeals>.

¹¹⁴ Kirk Jenkins, *How Long Does the Typical Death Penalty Appeal Take to Decide Following the Oral Argument?*, CAL. SUP. CT. REV. (Feb. 3, 2017), <https://www.californiasupremecourtreview.com/2017/02/how-long-does-the-typical-death-penalty-appeal-take-to-decide-following-the-oral-argument>.

¹¹⁵ As of May 2011, 1,242 executions have been carried out in the country since 1976. See Alarcón et al., *supra* note 8, at 51.

¹¹⁶ See CAL. COMM’N ON THE FAIR ADMIN. OF JUST., *supra* note 3, at 122 n.25.

Merely telling the courts to “go faster” in their review of capital cases without proper guidance or a means to achieve such a goal is an unworkable approach that does nothing to further justice, especially in a system that is vulnerable to prejudice and discrimination.¹¹⁷ Capital cases are lengthy in their appeals process because of the enormity, complexity, and multitude of problems intrinsic to the nature of a death-penalty case, which Proposition 66 fails to address or cure.¹¹⁸ Erwin Chemerinsky, Dean of the University of California, Berkeley, School of Law, observed Proposition 66’s failure to address the realities of California’s capital system: “The courts are proceeding with these cases as expeditiously as possible under the circumstances, and imposing deadlines on the courts will not address the shortage of lawyers to argue them or judges to hear them.”¹¹⁹

B. A BRIEF HISTORY OF CALIFORNIA’S DEATH-PENALTY SYSTEM:
DEATH ELIGIBILITY, VOTER INITIATIVES, AND INADEQUATE
FUNDING

The history of the state’s current death-penalty system is critical to understanding the cause of its substantial death-row population. Strikingly, California’s current death-penalty system has been adopted entirely through voter initiatives.¹²⁰ There are only 17 states that allow constitutional amendment by voter initiative and of these 17 states, California’s initiative process is deemed the most “extreme” for providing a nearly unrestricted opportunity to amend the state’s constitution.¹²¹ Although the death penalty was repealed in 1972 when the California Supreme Court ruled that the state’s capital-punishment system was unconstitutional,¹²² California voters nullified the California Supreme Court’s ruling by passing Proposition 17 only nine months later.¹²³ Proposition 17 amended California’s Constitution to provide that the death

¹¹⁷ See generally Steven F. Shatz, *The Meaning of “Meaningful Appellate Review” in Capital Cases: Lessons from California*, 56 SANTA CLARA L. REV. 79, 130 (2016) (“On a national level, numerous studies have found race, gender and geographic disparities in the administration of the death penalty, the same disparities have been found in California.”).

¹¹⁸ See *Briggs*, 3 Cal. 5th at 867 (Liu, J., concurring).

¹¹⁹ Erwin Chemerinsky, *Voters’ Attempt to Speed Executions Should be Quickly Nullified*, L.A. DAILY NEWS (Apr. 5, 2017, 12:25 PM), <http://www.dailynews.com/2017/04/05/voters-attempt-to-speed-executions-should-be-quickly-nullified-erwin-chemerinsky>.

¹²⁰ Shatz, *supra* note 117, at 94.

¹²¹ Alarcón et al., *supra* note 8, at 115, 118; Ronald M. George, *State Constitution*, 62 STAN. L. REV. 1515, 1516 (2010).

¹²² *People v. Anderson*, 6 Cal. 3d 628, 656-57 (1972).

¹²³ Alarcón et al., *supra* note 8, at 131-32.

penalty is not cruel and unusual punishment, which effectively reinstated the death penalty.¹²⁴

Several years later, voters passed Proposition 7, also known as the 1978 Briggs Death Penalty Initiative, which broadened the list of crimes that qualify a defendant for capital punishment.¹²⁵ The Briggs Initiative¹²⁶ was intended to give “Californians the toughest death-penalty law in the country” by creating a capital system “which threatens to inflict the penalty on the maximum number of defendants.”¹²⁷ And that it has done. In 2010, the largest and most comprehensive study ever conducted of death-sentence rates in California evaluated 27,453 homicide cases from 1978 to 2002 and found that California has “the highest [rate] in the nation by every measure” with a 95% death-eligibility rate.¹²⁸ This study, performed by David C. Baldus and his colleagues, confirmed that the scope of California’s death-penalty system is the largest in the country¹²⁹ because there is a broader category of crimes that qualify a criminal defendant for the death penalty in California than in any other state.

Following the 1978 Briggs Initiative, “California voters passed six additional crime initiatives, each one further broadening the scope of California’s death penalty by expanding the list of death-eligible crimes,” making it easier for a defendant to receive a death sentence.¹³⁰ As of 2019, California Penal Code section 190.2 enumerates 33 special circumstances that qualify a first-degree murder convict for the death penalty.¹³¹ This list of special circumstances qualifies almost all forms of first-degree murder for death sentence consideration.¹³² The breadth of the special circumstances creates an extraordinarily large pool of defendants who are potentially eligible to receive a death sentence, qualifying 87% of all first-degree murders committed in the state for the death penalty.¹³³ For example, California is one of only five states where “an uninten-

¹²⁴ *Id.* at 131-32.

¹²⁵ *Id.* at 138 (2011); *see also* Shatz, *supra* note 117, at 94.

¹²⁶ The 1978 Briggs Initiative was written by State Senator John Briggs, the father of the challenger of Proposition 66, Ron Briggs, in *Briggs v. Brown*, 3 Cal. 5th 808 (2017). *See* Amended & Renewed Petition, *supra* note 60, at 4.

¹²⁷ Shatz, *supra* note 117, at 94.

¹²⁸ *Id.* at 111.

¹²⁹ *Id.*

¹³⁰ Alarcón et al., *supra* note 8, at 49.

¹³¹ Under this section, there are 22 “numbered special circumstances, one of which (felony-murder) has” 12 separate sub-parts; this list of death-eligible crimes includes such circumstances as the intentional killing of a peace officer, murder committed for financial gain or to escape arrest, and murder committed (by anyone) during the defendant’s attempted first or second-degree burglary. *See* CAL. PENAL CODE § 190.2 (2018); Shatz, *supra* note 117, at 95 n.90.

¹³² Shatz, *supra* note 117, at 95; CAL. PENAL CODE § 189(a) (2018) (providing the scope of “first-degree murder” in California).

¹³³ CAL. COMM’N ON THE FAIR ADMIN. OF JUST., *supra* note 3, at 177.

tional, even wholly accidental, killing during a felony” would make a defendant death-sentence eligible.¹³⁴ California’s overbroad definition of death eligibility is arguably the very source of the state’s dysfunctional and lengthy capital-punishment system because it undermines the system’s objective to ensure that the “very worst members of our society” are put to death.¹³⁵ Since the enactment of the state’s current death-penalty law in 1978, a total of 930 individuals have received a death sentence.¹³⁶ Presently, an average of 20 individuals receives a death sentence in California annually.¹³⁷

Delays are pervasive throughout all stages of the appellate process as a result of minimal judicial resources for adjudicating these voluminous and intensive cases.¹³⁸ On average, it can take approximately three-to-five years for appointment of appellate counsel, two years before a case is heard by the California Supreme Court after filing briefs, eight-to-ten years for appointment of counsel for habeas corpus petitions, and two years for the California Supreme Court to reach a decision after a petition has been filed.¹³⁹ These lengthy delays illustrate the growing problem California faces in having both an overbroad list of death-eligible crimes and grossly inadequate funds to litigate the large pool of capital defendants.¹⁴⁰ Any attempt to systematically remedy the delays thereby requires careful consideration of these issues.

C. THE *BRIGGS* COURT NEGLECTED ITS DUTY TO PROVIDE MEANINGFUL APPELLATE REVIEW

The *Briggs* court failed to use its judicial power to strike down a law that effectively threatens to encourage arbitrary and capricious appellate review of capital cases—the very cases that justice demands a higher procedural standard for to ensure consistency in the imposition of the

¹³⁴ The other four states where an unintentional, accidental killing during a felony qualifies for the death penalty are Florida, Georgia, Idaho, and Mississippi. See Shatz, *supra* note 117, at 96 n.94 (citing *People v. Watkins*, 290 P.3d 364, 390 (2013)).

¹³⁵ Alex Kozinski & Sean Gallagher, *Canary Lecture: Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 29 (1995).

¹³⁶ *Proposition 66*, *supra* note 56.

¹³⁷ *Id.*

¹³⁸ Alarcón et al., *supra* note 8, at 49, 80. Upon receiving a death sentence, all capital defendants have the right to an automatic direct appeal, which is reviewed by the California Supreme Court to determine whether the defendant was given a fair trial. Capital defendants also have a constitutional right to file a habeas corpus petition, which has historically been reviewed by the California Supreme Court as well. See generally Alarcón, *supra* note 6, at 715.

¹³⁹ CAL. COMM’N ON THE FAIR ADMIN. OF JUST., *supra* note 3, at 122-23.

¹⁴⁰ See Alarcón et al., *supra* note 8, at 47, 184.

death sentence.¹⁴¹ When faced with a constitutional challenge to legislation, it is the responsibility of the court to render “constitutional rulings clear enough to foster meaningful deliberation” and provide proper guidance for those entrusted with the fair and efficient administration of justice.¹⁴² The importance of this principle is amplified in capital cases where the concept of “meaningful appellate review” emphasizes the necessity of “procedural protections that are intended to ensure that the death penalty [is] imposed in a consistent, rational manner.”¹⁴³

By upholding the five-year time limit under a construction that directly conflicts with the intent of the voters, as evidenced by the language of the ballot materials, the court validated the drafting of unworkable legislation and authorized the very thing that it is entrusted to protect against in capital cases: unconstitutional and arbitrary judicial rulings subject to broad and unguided discretion.¹⁴⁴ The court held that such an interpretation of the time-limit provisions does not “empty them of meaning” because it will still “serve as [a] benchmark[] to guide courts.”¹⁴⁵ But a time limit cannot serve as a meaningful benchmark when it “purports to dictate what is not ‘reasonably possible’ to achieve,” which is precisely the case with the five-year time limit in 190.6(d).¹⁴⁶ The extent of the five-year time limit’s infeasibility is unmistakable when viewed in light of the history and ramifications of California’s capital appellate process.¹⁴⁷ Reasonable direction on how to meet the five-year time limit requires much more than a mere command for the courts to “speed up” the process. It requires a drastic reorganization of the California Supreme Court’s functions, a more thorough plan for restructuring the lower courts, and a substantial increase in funding from the legislature.¹⁴⁸ Absent any such discussion or direction, the five-year time limit fails to provide meaningful guidance for the reforms now in effect.¹⁴⁹

Although it may be easier to simply hold that the five-year time limit is merely directive, the California Supreme Court has a duty to carry out its judicial function as the last resort of legislative interpretation, which

¹⁴¹ *Parker v. Dugger*, 498 U.S. 308, 321 (1991) (“We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.”).

¹⁴² *Briggs*, 3 Cal. 5th at 876 (Cuéllar, J., dissenting).

¹⁴³ *Shatz*, *supra* note 117, at 81 (citing *Barclay v. Florida*, 463 U.S. 939, 960 (1983) (Stevens, J., dissenting)).

¹⁴⁴ *See generally id.* (“meaningful appellate review” is meant to ensure that “the death penalty will be imposed in a consistent, rational manner”).

¹⁴⁵ *Briggs*, 3 Cal. 5th at 860.

¹⁴⁶ *Id.* at 871 (Liu, J., concurring).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

includes declaring laws unconstitutional when they materially impair a court's core constitutional functions by encroaching on its discretion.¹⁵⁰ Under the separation of powers doctrine, the judiciary is required to undertake the indisputably challenging task of simultaneously protecting the powers of all three branches of government while making "reasoned calls on claims of encroachment"—a "tall order, and an impossible one without a good rule of decision."¹⁵¹ This is no easy task, "but fidelity to its duty requires a measure of fortitude."¹⁵² Petitioners provided the court with an opportunity to address the issues that a poorly drafted and underfunded initiative will inevitably incite, especially when considering the vulnerability of California's overwhelmed capital system. The *Briggs* court missed this opportunity. By upholding, rather than invalidating, the time limit under an interpretation that conflicts with the provision's statutory intent, the *Briggs* court failed to perform its duty as the state's highest court and make the call that it was created to make. The so-called saving construction of Proposition 66 will "save" no one. It is unworkable for the courts who are tasked with applying it and it is unjust for the people that it will inevitably and harshly effect. Justice is, or at least it should be, a process and not a rush to the finish line.

IV. A DIRECTIVE INTERPRETATION OF THE FIVE-YEAR TIME LIMIT IS IMPROPER BECAUSE THE VOTERS INTENDED FOR IT TO BE MANDATORY

In interpreting the initiative, the court made a grave misstep by providing a directive—rather than mandatory—reading of the five-year time limit. A court's determination of the constitutionality of legislation relies solely on an evaluation of the challenged statute's language to assess the law's purpose and intent.¹⁵³ The judiciary "has no power to rewrite [a] statute so as to make it conform to a presumed intention which is not expressed."¹⁵⁴ Instead, courts are "limited to interpreting the statute, and such interpretation *must* be based on the language used" therein.¹⁵⁵

¹⁵⁰ See Alarcón et al., *supra* note 8, at 160 ("With the hands of the executive and legislators tied by an initiative process that authorizes voters to enact legislation that cannot be vetoed by the Governor or amended or repealed by the Legislature, the California courts have been called upon to assume an increasingly important role in construing the reach of the California initiative process.")

¹⁵¹ David A. Carrillo & Danny Y. Chou, *California Constitutional Law: Separation of Powers*, 45 U.S.F. L. REV. 655, 687-88 (2011).

¹⁵² *Id.* at 687 n.191 ("The preservation of a viable constitutional government is not a task for wimps." (quoting *O'Brien v. Jones*, 999 P.2d 95, 122 (2000) (Brown, J., dissenting))).

¹⁵³ See *Seaboard Acceptance Corp. v. Shay*, 214 Cal. 361, 365-66 (1931).

¹⁵⁴ *Id.* at 365.

¹⁵⁵ *Id.* (emphasis added).

The dispositive question the *Briggs* court was enlisted to consider was whether a death-penalty system that imposes mandatory time limits on the courts was what the voters intended.¹⁵⁶ The key problem with the court's ruling is that a directive interpretation does not reflect the law's purpose nor the voters' intent. Proposition 66's language demonstrates the mandatory intent and purpose of the five-year time limit because (1) it provides a method of enforcement for failure to meet the time limit, (2) it consistently used mandatory language throughout the initiative and ballot materials, and (3) precedent does not support supplying a directive interpretation of a statute that expresses a mandatory intent and provides for a method of enforcement.

A. THE VOTERS INTENDED FOR THE TIME LIMIT TO BE MANDATORY BECAUSE THE PROVISION PROVIDED FOR ENFORCEMENT BY WRIT OF MANDATE

The court's interpretation of 190.6(e), the provision that establishes relief by writ of mandate,¹⁵⁷ is misguided and unreasonable. Placing fixed time limits on the judiciary has been long understood in California to be a latent separation of powers violation because it materially impairs a court's ability to determine and manage its docket.¹⁵⁸ An intent to materially impair the courts' constitutional function to hear and decide cases by imposing time requirements may not be read into the statute, but instead must be clear from the language of the statute or otherwise clearly indicated to be the underlying purpose of the statute.¹⁵⁹ When a statute provides a penalty or consequence for the failure to meet the prescribed time requirement, it strongly suggests a legislative intent to control the court's functions.¹⁶⁰

The *Briggs* court's evaluation of the penalty provision for the time limit appears focused only on whether the relief provided by the provision was plausible, despite the importance of determining the legislative

¹⁵⁶ See Alarcón et al., *supra* note 8, at 161 (quoting *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 576 (2000) (George, J., dissenting)) ("In construing constitutional or statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration. . . . [I]n reviewing a voter initiative's validity, the Court's 'task is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent.'")

¹⁵⁷ *Text of Proposed Laws: Proposition 66*, in VOTER GUIDE, *supra* note 10, at 212, § 3(e) at 213.

¹⁵⁸ *Briggs*, 3 Cal. 5th at 849.

¹⁵⁹ *Garrison*, 32 Cal. 2d at 435.

¹⁶⁰ See *Gowanlock v. Turner*, 42 Cal. 2d 296, 301 (1954) ("The requirements of a statute are directory, not mandatory, unless means be provided for its enforcement."); *Garrison*, 32 Cal. 2d at 435.

intent when undertaking a question of statutory interpretation.¹⁶¹ Although the question of plausibility of the stated relief is a useful factor in reaching a final determination on the legislative intent, the intent and purpose of the statute should be the ultimate question before the court—especially when the challenged statute was passed by voter initiative.¹⁶² When analyzed with the question of legislative intent in mind, it is clear that the voters who passed Proposition 66 intended to set a mandatory time limit on the courts and to enforce that time requirement by writ of mandate; the fact that writ relief in such a situation is implausible should be of minor significance considering the general voter population, although entrusted to enact important criminal law and policy, does not have exhaustive knowledge or understanding of the criminal process or judicial procedure.¹⁶³

The significance of looking to whether a provision includes an enforcement mechanism is important for determining whether a directive or mandatory reading is appropriate because it indicates that the voters intended for the law to have a binding and enforceable effect. The fact that the enforcement mechanism may not, in actuality, have a binding or enforceable effect does not diminish the voters' mandatory intent in passing the law. Thereby, the *Briggs* court's focus on the impracticality of the enforcement mechanism was improper because such an inquiry is irrelevant to the determination of the voters' intent and the purpose of the initiative.

The majority opinion acknowledged that the five-year time limit “reflect[s] the voters' will, which [the court] respect[s]” but continued that it was “presented to the voters . . . without the benefit of hearings or research exploring their feasibility or their impact on the rest of the courts' work.”¹⁶⁴ However, it was not for the court to decide whether the chosen enforcement mechanism would be effective. “In order to further the fundamental right of the electorate to enact legislation through the initiative process, [courts] must on occasion indulge in a presumption that the voters thoroughly study and understand the content of complex initiative measures.”¹⁶⁵

¹⁶¹ See *Briggs*, 3 Cal. 5th at 856-57 (holding that since “there is no tribunal to issue a writ of mandate to this court” the five-year time limit “provides no workable means of [enforcement]”).

¹⁶² See, e.g., *Hodges v. Superior Court*, 21 Cal. 4th 109, 114-18 (1999) (holding that statutory interpretation of a voter initiative requires a determination of the electorate's purpose, “as indicated in the ballot arguments and elsewhere”).

¹⁶³ See *Briggs*, 3 Cal. 5th at 887 (Cuéllar, J., dissenting) (“[the court has] never required the voters to sit through a constitutional law lecture before [it] would be willing to interpret a law as it was written”).

¹⁶⁴ *Id.* at 860-61.

¹⁶⁵ *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 51 Cal. 3d 744, 768 (1990).

Thereby, the *Briggs* court's singular task was to decide whether the voters intended to place a mandatory limitation on the court's authority to decide its cases while presuming that the voters studied and understood what they enacted. While certain judicial time limits are properly construed as directive, mandatory effect must be supplied when "the language contains negative words" or otherwise "shows that the designation of the time was intended as a limitation of power, authority or right," such as by including a method of enforcement.¹⁶⁶ It is inappropriate for a court to interpret a ballot initiative based on the electorate's knowledge of the legal process. But if it was, then perhaps it is time to reconsider the acceptable scope of legislative power afforded to the voters when there is a lack of faith in their knowledge of the processes in which they may enact legislation. "Our society being complex, the rules governing it whether adopted by legislation or initiative will necessarily be complex. Unless we are to repudiate or cripple use of the initiative, risk of confusion must be borne."¹⁶⁷

Next, in addition to the court's misguided focus on the provision's plausibility of enforcement, the court's interpretation of 190.6(e) is further undermined by its inherent unreasonableness. The provision establishes relief by writ of mandate if "a court fails to comply" with the time requirement.¹⁶⁸ If read as the court here instructs, the provision would allow relief for something that never happens: the filing of an opening brief by the court itself. How can a court fail to comply with the filing of an opening brief? The answer: it cannot. Section 190.6(e) was meant to provide an enforcement mechanism for the five-year time limit—a fact further evidenced by Proposition 66's proponent's statements at oral argument. Intervenor expressly admitted to the court that the provision's reference to subdivision (b) was merely a drafting error, and that subdivision (e) was intended to reference a delay in relation to subdivision (d), which prescribed the five-year time limit, and not to a delay in filing the opening brief found in subdivision (b).¹⁶⁹ Nevertheless, the court insisted that such an error was not clearly apparent.¹⁷⁰ Yet, taking into consideration all of the ballot materials and summaries of the law, it is distinctly evident that the writ relief provided in 190.6(e) was for a delay in excess of the five-year time limit.¹⁷¹

¹⁶⁶ *Pulcifer v. County of Alameda*, 29 Cal. 2d 258, 262 (1946).

¹⁶⁷ *Fair Political Practices Comm'n v. Superior Court of L.A. Cty.*, 25 Cal. 3d 33, 42 (1979).

¹⁶⁸ *Text of Proposed Laws: Proposition 66*, in VOTER GUIDE, *supra* note 10, at 212, § 3(e) at 213.

¹⁶⁹ *Briggs*, 3 Cal. 5th at 855.

¹⁷⁰ *Id.*

¹⁷¹ See *Text of Proposed Laws: Proposition 66*, in VOTER GUIDE, *supra* note 10, at 212, § 3 at 213 (codified at CAL. PENAL Code § 190.6(d)-(e) (2018)).

First, the court's interpretation of 190.6(e) does not provide a practical construction of the statute.¹⁷² As is reasonably understood, a court could not and does not file the opening brief for an appeal. Thus, the court could never be the cause of such a delay. Further, 190.6(e) provides relief *for* a party *against* a court.¹⁷³ Under the court's interpretation, it would provide a party the opportunity to compel a court's adherence to the briefing schedule for the opening appellate brief. This is an illogical conclusion and would imply that an appealing party would seek a court order to compel itself to file its own brief.

The penalty provision's mistaken reference to subdivision (b) and intended reference to subdivision (d) is further supported by the last sentence of 190.6(e), which states "Paragraph (1) of subdivision (c) of Section 28 of Article I of the California Constitution, regarding standing to enforce victim's rights', applies to this subdivision *and subdivision (d)*."¹⁷⁴ This language makes it apparent that writ relief was intended for a delay that exceeds the five-year time limit in subdivision (d), and not for a delay in filing the opening brief in subdivision (b).¹⁷⁵ The court's finding that subdivision (e) applies to subdivision (b) effectively renders the last sentence of subdivision (e) moot as pointless, unenforceable, excess verbiage, which is an improper exercise of judicial statutory interpretation.¹⁷⁶

Second, even if the intended reference to subdivision (d) was not facially obvious from the provision's text, it is easily discernible from the ballot materials and summaries of the law.¹⁷⁷ The ballot materials informed voters several times that the five-year time limit was "required" and was enforceable by "writ of mandate."¹⁷⁸ Additionally, under the unambiguous heading, "Requires Completion of Direct Appeal and Habeas Corpus Petition Process Within Five Years," the analysis by the Legislative Analyst expressly stated the relief available to enforce the time limit: "If the process takes more than five years, victims or their attorneys could request a court order to address the delay."¹⁷⁹

In light of the clear language of the ballot materials and proposed law expressly providing for a method of enforcement, the proponents' assertions about the intent of the provision despite the drafting error, and

¹⁷² *Id.* § 3(e) at 213.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ PENAL § 190.6(b), (d)-(e).

¹⁷⁶ *See, e.g.,* *People v. Rizo*, 22 Cal. 4th 681, 687 (2000) (the courts must avoid interpreting statutory language "in a manner that would render some part of the statute surplusage").

¹⁷⁷ *Analysis by the Legislative Analyst, in VOTER GUIDE, supra* note 10, at 104, 104-09.

¹⁷⁸ *Id.*

¹⁷⁹ *Analysis by the Legislative Analyst, in VOTER GUIDE, supra* note 10, at 104, 106.

the nonsensical meaning the provision would derive from the court's interpretation, it is evident that the court erred in finding that the provision did not provide for an enforcement mechanism.

B. THE VOTERS' MANDATORY INTENT IS EVIDENT FROM THE LANGUAGE IN THE BALLOT MATERIALS AND TEXT OF THE PROPOSED LAW

The court's second justification for applying a directive interpretation equally fails to provide an adequate basis for its ruling because the language in the ballot materials and text of the law expresses the voters' intent for the five-year time limit to be mandatory. Upholding the time limit under a directive interpretation, the court reasoned that "in the absence of clearer indications that this was the voters' intent, we will not presume they meant to hamper the courts in the conduct of their business."¹⁸⁰ As Justice Cuéllar noted in his dissenting opinion, the court's directive interpretation can at best be described as a "novel reinterpretation" of the five-year time limit that is "at odds—entirely—with what the initiative says, how it was designed to work, and how it was sold."¹⁸¹

The fundamental problem with the *Briggs* ruling is that a directive interpretation does not accurately depict the purpose and intent of the law, as reflected in the language and terms of the initiative. To "resolve questions of purpose and ambiguity, [courts] look to the materials before the voters."¹⁸² Leading up to the polls, all ballot materials and information on Proposition 66 provided to voters directly and expressly indicated that the proposed time-limit changes to the capital review process were to impose a required (i.e., mandatory) time frame for the courts to decide capital appeals.¹⁸³ These materials are often the sole source of information that a person relies on when making a decision on how to vote.¹⁸⁴

Nothing in the language of Proposition 66's voter materials stated or implied that time limits *may* be imposed; instead, it was clearly stated that time limits *will* be imposed. The ballot summary, ballot label, and ballot title are key in determining the voters' intent.¹⁸⁵ Here, the Voter's Information Guide stated that "A YES vote on this measure means" that "[c]ourt procedures for challenges to death sentences would be subject to

¹⁸⁰ *Briggs*, 3 Cal. 5th at 858.

¹⁸¹ *Id.* at 875 (Cuéllar, J., dissenting).

¹⁸² *People v. Valencia*, 3 Cal. 5th 347, 364 (2017) (quoting *Robert L. v. Superior Court of Orange Cty.*, 30 Cal. 4th 894, 905 (2003)).

¹⁸³ *Quick Reference Guide*, in VOTER GUIDE, *supra* note 10, at 8, 15.

¹⁸⁴ Alarcón et al., *supra* note 8, at 128.

¹⁸⁵ *See id.* at 161-62.

various changes, such as time limits on those challenges.”¹⁸⁶ As such, the first thing voters were told was that if they voted “yes” then time limits would be imposed.¹⁸⁷

Throughout the text of the initiative and related ballot materials, “time limits” and the need to “expedite” was referenced consistently.¹⁸⁸ The voters were expressly informed that Proposition 66 “places time limits on legal challenges to death sentences” by: (1) requiring completion of the direct appeal and habeas corpus petition process within five years; (2) requiring filing of habeas corpus petitions within one year of attorney appointment; and (3) placing other limitations “to help meet the above time frames,” such as restricting a defendant from filing more than one habeas corpus petition, with limited exceptions.¹⁸⁹ Viewed in its entirety, Proposition 66 was drafted to impose restrictive time limits on the judiciary for the purpose of “shorten[ing] the time that legal challenges to death sentences take.”¹⁹⁰ This clear intention is unambiguously communicated by the language used throughout Proposition 66’s ballot materials regarding the initiative’s purpose and objective: “places time limits on legal challenges to death sentences;” “[t]he measure requires that the direct appeal and habeas corpus petition review process be completed within five years;” “[e]stablishes time frame for state court death penalty review;” “the measure requires that [all currently pending challenges] be completed within five years from when the Judicial Council adopts revised rules;” “[i]n order to help meet the above time frames, the measure places other limits on legal challenges to death sentences.”¹⁹¹

Not only did the court ignore the clear intent and purpose of the provision, the court also failed to abide by the centuries-old precedent of statutory interpretation.¹⁹²

It is a general rule of statutory construction that the courts will interpret a measure adopted by vote of the people in such manner as to give effect to the intent of the voters adopting it. It must be held that the voters judged of the amendment they were adopting *by the meaning apparent on its face* according to the general use of the words employed.¹⁹³

¹⁸⁶ *Quick Reference Guide*, in VOTER GUIDE, *supra* note 10, at 8, 15.

¹⁸⁷ *Id.*

¹⁸⁸ *Analysis by the Legislative Analyst*, in VOTER GUIDE, *supra* note 10, at 104, 104-09; *Text of Proposed Laws: Proposition 66*, in VOTER GUIDE, *supra* note 10, at 212, § 3(e) at 212-14.

¹⁸⁹ *Analysis by the Legislative Analyst*, in VOTER GUIDE, *supra* note 10, at 104, 106.

¹⁹⁰ *Id.* at 105.

¹⁹¹ *Id.* at 104-07.

¹⁹² See *Kaiser v. Hopkins*, 6 Cal. 2d 537, 538-39 (1936).

¹⁹³ *Id.* at 538 (emphasis added).

The initiative power of the people to enact and amend state law inherently demands that voters “get what they enacted, not more and not less.”¹⁹⁴ Giving more than what the voters passed by initiative oversteps the reach of the initiative power, while giving less undercuts the power—just as the authority of the three distinct branches of government must be balanced to maintain a just society, so too must the power of the people. Petitioners recognized that a directive interpretation of the time limit would be an improper reach because such an interpretation would not give the voters what they passed by initiative.¹⁹⁵ Thus, Petitioners urged the court to consider what a directive version of the time limits would have looked like in the ballot materials if that was, in fact, the intent and purpose of the proposition.¹⁹⁶ Petitioners advanced an example, “*Encourages Completion of Direct Appeal and Habeas Corpus Petition Process Within Five Years*,” and challenged the court to consider whether the results at the polls would have seen the same, or even a remotely similar, outcome.¹⁹⁷ When viewed holistically, it is difficult to find a basis for not agreeing with Petitioner. If the ballot materials had indicated anything but a mandatory time requirement, it cannot be asserted that the same results would have patently ensued. The question remains how the court reached its decision and upheld a time limit that was unmistakably and concededly not what the voters passed, especially when such provisions potentiate grave consequences for the courts and capital defendants.

It is impossible to construe the provision in a way that both maintains its constitutionality and accurately reflects the will of the voters because all of the language in the voter materials indicated that the time requirement is mandatory. The only valid and reasonable conclusion the court could have—and should have—reached was to declare the measure unconstitutional in violation of the doctrine of separation of powers. The court’s failure to issue a decision that accurately reflects the will of the voters who passed it is regrettable and deeply unfortunate for California’s criminal justice system.

The *Briggs* court’s exercise of its duty to “jealously guard the precious initiative power”¹⁹⁸ appears to have crossed the line from proper to inappropriate. The court did not “jealously guard” the initiative power by applying a directive interpretation to the time limit requirement in Proposition 66.¹⁹⁹ The court failed to properly rule on the constitutionality

¹⁹⁴ *Hodges v. Superior Court*, 21 Cal. 4th 109, 114 (1999).

¹⁹⁵ See Petitioner’s Reply to Amicus Curiae Briefs, *supra* note 61, at 12.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (emphasis in original).

¹⁹⁸ *Briggs*, 3 Cal. 5th at 827 (quoting *Legislature v. Eu*, 54 Cal. 3d 492, 501 (1991)).

¹⁹⁹ *Id.* (quoting *Eu*, 54 Cal. 3d at 501).

of the initiative that the voters passed and instead adopted an interpretation of the time limit provision that undermines the central objective of the initiative.²⁰⁰ A directive reading of the five-year time limit is inconsistent with the court's statutory interpretation power: "[w]hen the language of a statute is 'clear and unambiguous' and thus not reasonably susceptible of more than one meaning, 'there is no need for [judicial] construction, and courts should not indulge in it.'"²⁰¹ To construe Proposition 66's time limit as directive in order to uphold its constitutionality is to enact legislation that was not passed by the people. Such an act of judicial construction is outside the authority of the court's power of statutory interpretation, and in conflict with the purpose of the constitutional avoidance canon.

C. PRECEDENT DOES NOT SUPPORT A DIRECTIVE INTERPRETATION IN *BRIGGS*

The *Briggs* court mistakenly asserted that its holding follows "nine decades of precedent."²⁰² The saving construction the *Briggs* court implemented goes well beyond established precedent and takes a vague, blanket approach in evaluating the statute, devoid of the reasoning on which it relies. Justice Cuéllar, in his dissenting opinion, distinguished the majority's directive saving construction from the constitutional avoidance canon, arguing that the majority misused the principle when it attempted to save an unsound construction.²⁰³ "[I]t is one thing to declare a statute unconstitutional when it cannot be saved, yet quite another to pretend a statute means what it does not simply so it can be saved."²⁰⁴

The court maintained that because the ballot materials did not make clear how a court order by writ of mandate could "effectively result in compliance," it was proper to construe the mandatory provision as directive.²⁰⁵ The court reasoned that because it would be impossible to interpret 190.6 in a manner that would both "conform with the voters' probable intent" and maintain its constitutionality, it was appropriate to effectively rewrite the statute as directive to avoid a separation of powers violation and preserve judicial authority.²⁰⁶ However, the court improperly disregarded the initiative's purpose, even when a remedy was clearly

²⁰⁰ See *id.* at 857-58.

²⁰¹ *People v. Gardeley*, 14 Cal. 4th 605, 621 (1996) (quoting *Cal. Fed. Savings & Loan Ass'n v. City of Los Angeles*, 11 Cal. 4th 342, 349 (1995)) (overruled in part on separate issue).

²⁰² *Briggs*, 3 Cal. 5th at 858.

²⁰³ *Id.* at 876-77, 900-01 (Cuéllar, J., dissenting).

²⁰⁴ *Id.* at 876-77.

²⁰⁵ *Id.* at 857 (majority opinion).

²⁰⁶ *Id.* at 857-58.

articulated in the text of the law that illustrated the mandatory effect the voters intended by passing the five-year time limit.

The court cited *Garrison*, *Engram*, *Thurmond*, *Shafter-Wasco*, *Lorraine*, and *Verio* to support a directive interpretation of an otherwise mandatory statute to avoid a separation of powers violation.²⁰⁷ These cases, however, are distinguishable and do not support the *Briggs* ruling. Each of the court's cited cases advanced the legislative purpose by interpreting the law as directive, which is precisely the opposite of what a directive interpretation of the five-year time limit achieves.²⁰⁸

In *Garrison*, the statute at issue required a trial court to rule on all issues arising from a contested election within ten days of trial.²⁰⁹ The parties were opposing candidates in a local election and the initial poll results rendered the defendant, who secured two more votes than the plaintiff, the victor.²¹⁰ The plaintiff challenged the election results and the trial court entered judgment for the plaintiff, finding that the correct poll results showed that the plaintiff won the election by five votes.²¹¹ On appeal, the defendant sought reversal of the trial court's judgment, arguing that the court lost jurisdiction to decide the case because its decision was not filed within the statutorily required ten-day time frame.²¹² The California Supreme Court rejected the defendant's claim, holding that the statute's purpose would not be furthered by a mandatory application of the time limit.²¹³ Instead, the court held that a directive interpretation of the statute was appropriate despite its mandatory language because the statute's purpose was premised on the public's valid concern with the fair, accurate, and timely determination of election results.²¹⁴ The court reasoned that, while speed in deciding contested-election cases is a desirable component of the statute's primary objective, it is "not the primary statutory aim but is merely incidental to the main purpose of the law."²¹⁵ A literal application of the statute would strip the court of jurisdiction, consequently defeating the primary purpose of the statute to determine which candidate is rightfully entitled to office.²¹⁶

²⁰⁷ *Id.* at 849-54 (citing *Garrison*, 32 Cal. 2d 430; *Engram*, 50 Cal. 4th 1131; *Thurmond*, 66 Cal. 2d 836; *Shafter-Wasco*, 55 Cal. App. 2d 484; *Lorraine*, 220 Cal. 753; *Verio*, 3 Cal. App. 5th 1315).

²⁰⁸ *Briggs*, 3 Cal. 5th at 879 (Cuéllar, J., dissenting).

²⁰⁹ *Garrison*, 32 Cal. 2d at 434.

²¹⁰ *Id.* at 433.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 437.

²¹⁴ *Id.* at 436.

²¹⁵ *Id.* at 436-37.

²¹⁶ *Id.* at 437.

Despite the *Briggs* court's assertion to the contrary, the statute at issue in *Garrison* is notably inapposite from Proposition 66.²¹⁷ In *Garrison*, the court held that the statute must be construed as directive because the law's purpose was to ascertain "the will of the people at the polls, fairly, honestly, and legally expressed," which would be negated if speed in reaching a judicial decision was given priority.²¹⁸ The time limit in *Garrison* was motivated by the public's desire and right to ensure that only officials who were elected by the voters hold a seat in public office.²¹⁹ This right of the people naturally includes an importance for timeliness, secondary to its primary objective, since a judicial determination may be required before the rightful candidate can take office. In contrast, Proposition 66's five-year time limit on capital appellate review was not intended to protect a predominant public interest aside from a mere desire to shorten the time frame that death challenges take.²²⁰ Speed is not "merely incidental" to the time limit's purpose, as it was in *Garrison*,²²¹ but instead is the sole objective of the entire initiative.

Speeding up the capital appellate review process was repeatedly addressed in Proposition 66's ballot materials.²²² The ballot pamphlet's summary of the proposition began by unmistakably stating the initiative's ultimate objective: "This measure seeks to shorten the time legal challenges to death sentences take."²²³ The initiative was presented to voters as a "reform" to the death-penalty process and stated that "California's death penalty system is ineffective because of waste, delays, and inefficiencies."²²⁴ To support the reform and address the delays, the ballot materials stated that murder-victim families "should not have to wait decades" for capital appeals to be decided.²²⁵ To ensure such "timely justice" for victim's families, the findings and declarations concluded that, if enacted, capital cases "can be fully and fairly reviewed by both state and federal courts within ten years."²²⁶ The initiative expressly provided that "state courts *shall* complete" the capital appellate review pro-

²¹⁷ *Briggs*, 3 Cal. 5th at 858 (citing *Garrison*, 32 Cal. 2d 430).

²¹⁸ *Garrison*, 32 Cal. 2d at 436-37 ("[W]ords otherwise generally mandatory or permissive will be given a different meaning when the provisions of the statute, properly construed, require it.").

²¹⁹ *Garrison*, 32 Cal. 2d at 434, 436.

²²⁰ See *Analysis by the Legislative Analyst*, in VOTER GUIDE, *supra* note 10, at 104, 105 ("This measure seeks to shorten the time that the legal challenges to death sentences take.").

²²¹ *Garrison*, 32 Cal. 2d at 436-37.

²²² *Text of Proposed Laws: Proposition 66*, in VOTER GUIDE, *supra* note 10, at 212, 212-214; *Analysis by the Legislative Analyst*, in VOTER GUIDE, *supra* note 10, at 104, 104-109.

²²³ *Id.* at 105.

²²⁴ *Text of Proposed Laws: Proposition 66*, in VOTER GUIDE, *supra* note 10, at 212, §§ 1-2(1).

²²⁵ *Id.* § 2(3) at 213.

²²⁶ *Id.* § 2(10) at 213.

cess within five years of the entry of judgment.²²⁷ The legislative intent underlying Proposition 66 was similarly expressed throughout the ballot materials: the analysis by the Legislative Analyst referred to the five-year time limit in mandatory language, such as a “requirement” five times; and referenced “time limits,” “time frame” and “time lines” seven times.²²⁸

Construing the time limit in Proposition 66 as mandatory would not defeat its primary purpose as it did in *Garrison*, where prioritizing judicial speed over an accurate determination of election results would defeat the statute’s purpose.²²⁹ A mandatory interpretation of the five-year time limit would achieve the opposite outcome of what it would have in *Garrison*—a mandatory interpretation of Proposition 66 would maintain its purpose of shortening the time frame for capital appellate review.²³⁰ By construing the five-year deadline as mandatory, the purpose of the initiative is promoted, rather than defeated.

In addition to *Garrison*, the court cited several more cases, all of which are equally distinguishable due to the explicit mandatory intent of Proposition 66’s five-year time limit.²³¹ In *People v. Engram*, the court held that a statute required a directive interpretation because the text of the statute stated that it must be applied “in accordance with the policy of expediting criminal cases ‘to the greatest degree that is consistent with the ends of justice.’”²³² Thus, because the statute was explicitly conditioned on “justice,” the court held that the statute was not a strict rule and that a mandatory interpretation would effectively contradict the statute’s stated intent.²³³

In *Thurmond v. Superior Court*, the court provided a directive interpretation of a statute that ordered a stay of proceedings when a party or attorney is a member of the legislature.²³⁴ The court held that a mandatory reading of the statute could have serious injurious results, especially in a guardian ad litem case.²³⁵ The court found that because the legislature did not intend these injurious effects or outcomes, the statute required a directive interpretation.²³⁶ Here, a directive interpretation allowed the court to consider whether “the attorney who is a member of

²²⁷ *Id.* § 3(d) at 213 (emphasis added).

²²⁸ *Analysis by the Legislative Analyst, in VOTER GUIDE, supra* note 10, at 104, 104.

²²⁹ *Garrison*, 32 Cal. 2d at 436-37.

²³⁰ *Briggs*, 3 Cal. 5th at 881 (Cuéllar, J., dissenting); *Garrison*, 32 Cal. 2d at 436-37.

²³¹ *Briggs*, 3 Cal. 5th at 857-58.

²³² *People v. Engram*, 50 Cal. 4th 1131, 1151 (2010) (emphasis omitted).

²³³ *Id.*

²³⁴ *Thurmond v. Superior Court*, 66 Cal. 2d 836, 839 (1967).

²³⁵ *Id.*

²³⁶ *Id.*

the Legislature was employed for no other purpose than attempted delay," which furthered the statute's legislative purpose.²³⁷

Similarly, in *Lorraine v. McComb*, the court provided a directive interpretation of a statute that required a court to grant a trial continuance "for a period not to exceed thirty days" when all parties agree in writing to the continuance.²³⁸ The court ruled that the legislature did not intend for the conveniences of the parties to override judicial control if such a continuance is impracticable for the court to accommodate, especially where the only harm to the parties is a delayed trial date.²³⁹

In each case cited by the court, a directive interpretation of the laws advanced and protected the legislative purpose, which was determined by evaluating the statute in the context of its real application and the possible consequences or outcomes that could result from its strict adherence.²⁴⁰ Unlike in *Garrison*, *Engram*, *Thurmond*, *Lorraine*, and *Verio* where the courts considered the language of the regulations in ascertaining the statutory objective, the *Briggs* court failed to make the same necessary and thoughtful determination of Proposition 66's legislative intent.²⁴¹ Although the *Briggs* court asserted that *Verio Healthcare, Inc. v. Superior Court* supports construing mandatory language as directory, even when the statute does not include conditional language, as it did in *Thurmond*,²⁴² the decision in *Verio* conflicts with the *Briggs* ruling.²⁴³ In contrast to *Briggs*, the *Verio* court struck down and invalidated the portion of the revised law that included unconstitutional mandatory language that was incapable of a reasonable directive interpretation.²⁴⁴ In reaching its determination, the *Briggs* court appeared to disregard the language of the provision entirely and failed to evaluate the initiative in

²³⁷ *Id.* at 840.

²³⁸ *Lorraine v. McComb*, 220 Cal. 753, 754, 757 (1934).

²³⁹ *Id.* at 755-57.

²⁴⁰ See *Garrison*, 32 Cal. 2d at 436-37; *Engram*, 50 Cal. 4th at 1151; *Thurmond*, 66 Cal. 2d at 839; *Lorraine*, 220 Cal. at 756-57; *Verio*, 3 Cal. App. 5th at 1329-30; *Shafter-Wasco*, 55 Cal. App. 2d at 485-89 (At issue in the case was an act that "provide[d] for the dissolution of irrigation districts" by establishing that an appeal of such matter "shall be speedily tried" and "must be heard and determined within three months." The court ruled that the legislature did not intend to divest the court of jurisdiction because a corresponding constitutional provision provided that the court shall have 90 days to determine an appeal and "[the legislature] will not be presumed to have inconsistent provisions as to the same subject in the immediate context.").

²⁴¹ *Briggs*, 3 Cal. 5th at 855-61.

²⁴² *Id.* at 854 (citing *Verio*, 3 Cal. App. 5th at 1329; *Thurmond*, 66 Cal. 2d at 839).

²⁴³ See *Verio*, 3 Cal. App. 5th at 1329-30.

²⁴⁴ *Id.* at 1329-30.

the context of its real application and the consequences of such an application.²⁴⁵

The *Garrison* court recognized that a determination of legislative intent requires the judiciary to consider “the statute as a whole,” “the nature and character of the act to be done,” and “the consequences which would follow the doing or not doing of the act at the required time.”²⁴⁶ Accounting for all of these factors, Proposition 66 was intended to control the court’s timeliness in adjudicating death-penalty appeals and habeas corpus petitions. Unlike the above cases, if the five-year time limit was given literal and mandatory effect, Proposition 66’s purpose of “shorten[ing] the time that the legal challenges to death sentences take” would not be thwarted, but supported.²⁴⁷

It remains evident that the court’s rewriting of the five-year time limit as merely directive was inappropriate and inconsistent with the long-established rules of statutory interpretation. The court failed to produce a single case that supports a directive interpretation of a voter initiative where the initiative at issue (1) explicitly establishes a consequence for failure to do the act in the required timeframe, (2) includes express mandatory language, and (3) is reasonably understood to have a legislative intent to control or impair the court’s core functions in violation of the separation of powers doctrine, as determined through the basic rules of statutory interpretation.

In each case cited by the court that applied a directive interpretation to a statute with mandatory language, a directive interpretation was appropriate because it furthered the statute’s primary goal and adherence to the mandatory language would have effectively defeated that purpose.²⁴⁸ It is within a court’s authority to interpret legislation in a manner that avoids constitutional issues or a separation of powers violation, but only when the properly construed legislative purpose is furthered by a saving construction.²⁴⁹ In other words, a saving construction “saves” a statute from being struck down as unconstitutional if the statute can be reasonably understood as requiring a directive effect to promote the statute’s

²⁴⁵ *Briggs*, 3 Cal. 5th at 854 (supplying a directive interpretation despite the fact that the “statute [was] framed in mandatory terms, and the voters were told in the ballot materials that the five-year limit on the posttrial review process would be binding and enforceable”).

²⁴⁶ *Garrison*, 32 Cal. 2d at 437.

²⁴⁷ *Analysis by the Legislative Analyst, in VOTER GUIDE*, *supra* note 10, at 104, 105.

²⁴⁸ See *Garrison*, 32 Cal. 2d at 436; *Engram*, 50 Cal. 4th at 1151; *Thurmond*, 66 Cal. 2d at 839; *Shafter-Wasco*, 55 Cal. App. 2d at 488; *Lorraine*, 220 Cal. at 756-57; *Verio*, 3 Cal. App. 5th at 1329-30.

²⁴⁹ See *People v. McGee*, 19 Cal. 3d 948, 958 (1977) (“[I]n evaluating whether a provision is to be accorded mandatory or directory effect, courts look to the purpose of the procedural requirement to determine whether invalidation is necessary to promote the statutory design.”); see also *Garrison*, 32 Cal. 2d at 437.

primary objective. The cited cases allowed for a saving construction not merely because a directive interpretation avoided constitutional problems, but because a directive interpretation was necessary to support the challenged regulation's underlying purpose and objective.

Briggs provides the polarity: instead of finding that the regulation required a directive interpretation to support and maintain its underlying statutory intent, the court disregarded the initiative's intent and applied a directive interpretation that undermines the express purpose of the statutory reforms solely to avoid constitutional violations.²⁵⁰ Despite its assertion that established separation of powers precedent required a saving construction of the five-year time limit, none of the cited cases went as far as to apply a directive interpretation where the statutory language clearly expressed a contrary legislative intent. These cases are markedly dissimilar, and neither compel nor authorize the court to impose a saving construction on every statute, regardless of the legislative intent, simply to uphold its constitutionality. Such an approach would venture outside the scope of the judiciary's power.

V. CONCLUSION

The *Briggs* court had a duty to strike down Proposition 66's five-year time limit in its entirety because it was intended by the voters to place a mandatory time requirement on the court, in violation of the separation of powers doctrine. The court refused to give the time limit the appropriate, mandatory effect it required as evidenced by the initiative's purpose and the voters' intent. Instead, the court improperly supplied a directive interpretation that concededly and expressly contradicts the will of the voters. The mandatory intent of the time limit is clearly indicated from the text of the proposed law and the language of the ballot materials. Moreover, it was undisputed by the parties and the court that the initiative "required" the courts to meet the five-year time limit; it was undisputed that the initiative provided for a method of enforcement if such a time frame was not met by the courts; it was undisputed that the voters intended for the time limit to be mandatory;²⁵¹ and it was acknowledged by the court that judicial time limits imposed by legislation

²⁵⁰ *Briggs*, 3 Cal. 5th at 857-58 ("[T]he voters intended the five-year limit to be mandatory. We do not dispute that point." However, "we too decline to infer that lawmakers intended strict adherence to a fixed deadline that would undermine the courts' authority as a separate branch of government.").

²⁵¹ *Id.* at 855; Intervenor's Brief in Reply to Amicus Curiae Briefs, *supra* note 74, at 36; Respondents' Preliminary Opposition to Amended Petition, *supra* note 74, at 12.

are a prototypical example of a separation of powers violation.²⁵² Dismissing these facts, the court erred when it failed to interpret the initiative in a manner that conformed with the voters' intent.

California's appellate system is inundated with a large number of death-penalty cases,²⁵³ and the *Briggs* ruling only adds to that effect. By upholding the time limit under a directive interpretation, the court left unworkable death penalty procedural reforms in its wake that encourage arbitrary and inconsistent rulings which are likely to result in further delays and a higher volume of capital appeals. First, Proposition 66 fails to address the real problems that cause delays in California's death-penalty system, obstructing any realistic opportunity for reform. Second, the *Briggs* court's ruling that the five-year time limit is merely directive threatens to incur more delays and more inconsistency due to the lack of guidance and the inevitable issues its application will raise.

The reality of California's death-penalty system demands judicial sensitivity and caution because the state's capital system has been exclusively established through voter initiatives that cannot be "vetoed by the Governor or amended or repealed by the Legislature"—consequently, placing a heavy yet distinct burden on the judiciary.²⁵⁴ California courts must now assume the "increasingly important role [of] construing the reach of the California initiative process" and determine whether the capital-punishment system created by voter initiative infringes on fundamental constitutional policies and protections.²⁵⁵ For the judiciary to effectively assume this role, it is imperative for courts to determine an initiative's validity by plainly interpreting and applying its language "so as to effectuate the electorate's intent."²⁵⁶ Regrettably, the *Briggs* court failed to fulfill this duty because a directive interpretation of the five-year time limit does not effectuate the voters' intent. However, this Comment urges California courts to refrain from using the *Briggs* approach and instead to exercise the utmost caution when undergoing judicial interpretation and construction of a voter-initiated statute or provision. This is especially important when the initiative at issue involves changes to the capital-punishment process where what is at stake is literally a matter of life or death. When faced with a constitutional challenge to a voter-initiated judicial time limit for capital cases, a court must strike it down as an unconstitutional violation of the separation of powers doctrine

²⁵² *Briggs*, 3 Cal. 5th at 849, 852, 858 ("Deciding cases and managing dockets are quintessentially core judicial functions. . . and may not be materially impaired by statute.").

²⁵³ Shatz, *supra* note 117, at 122.

²⁵⁴ Alarcón et al., *supra* note 8, at 160.

²⁵⁵ *Id.* at 160-61.

²⁵⁶ *Id.* at 161 (quoting *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 576 (2000) (George, J., dissenting)).

where it is clearly indicated that (1) the voters intended to place a mandatory time limit on the judiciary and (2) the statutory purpose of the time limit is not promoted by a saving construction or directive interpretation.

The *Briggs* court continuously reiterated that although this is its interpretation now, individuals may challenge these new laws based on their impact and application on a particularized, individualized level.²⁵⁷ Thus, opportunities to remedy the problems with this initiative remain available to those who will inevitably and undoubtedly wish to seek redress. In the meantime, courts, capital defendants, and counsel will be forced to endure the consequences of Proposition 66.

²⁵⁷ *Briggs*, 3 Cal. 5th at 827, 841, 845, 848, 859.

206 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 49]