Case No.: S238309

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Ron Briggs and John Van de Kamp,

Petitioners,

v.

Jerry Brown, in his official capacity as the Governor of California; Kamala Harris, in her official capacity as the Attorney General of California; California's Judicial Council; and Does I through XX

Respondents.

PETITIONERS' OPPOSITION TO MOTION TO INTERVENE

ORRICK, HERRINGTON & SUTCLIFFE, LLP

Christina Von der Ahe Rayburn (No. 255467)
2050 Main St., Suite 1100
Irvine, CA 92614
Telephone: (949) 567-6700
Fax: (949) 567-6710
e-mail: cvonderahe@orrick.com

Lillian Jennifer Mao (No. 267410)
1000 Marsh Rd.
Menlo Park, CA 94025
Telephone: (650) 614-7400
Fax: (650) 614-7401
e-mail: lmao@orrick.com

Attorneys for Petitioners Ron Briggs and John Van de Kamp

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

OPPOSITION TO MOTION TO INTERVENE

Petitioners oppose the motion by Californians To Mend, Not End, The Death Penalty - No On Prop. 62, Yes On Prop. 66 ("Movant") to intervene as respondents. While Petitioners do not dispute that the "official proponent" of an initiative is generally permitted to intervene in a court challenge of the measure he or she sponsored, *see Perry v. Brown*, 52 Cal. 4th 1116, 1125 (2011), particularly when named respondents have elected not to defend the measure, Movant is not the official proponent, and the Respondents in this case have vigorously opposed the petition. For these reasons, there appears to be no basis for Movant to intervene. Movant can make its arguments equally well as an amicus in this matter.

Movant acknowledges that "[a] 'proponent' must be a natural person and elector." Motion at 9 n.1 (citing Cal. Elec. Code § 342). In this case, the official proponent of Proposition 66 was Kermit Alexander, and Mr. Alexander does not seek to intervene. Instead, Movant seeks to intervene as an organization, arguing that the applicable case law regards "campaign committees and formal proponents as equivalent for [purposes of defending an initiative]." Motion at 12. Movant is wrong. *Perry*, on which Movant relies, is replete with references to Elections Code provisions that relate to official proponents, none of which apply to or bind campaign committees. *See, e.g.*, *Perry*, 52 Cal. 4th at 1141-42 (concluding "the official proponents of an initiative measure are recognized as having a distinct role—involving

both authority and responsibilities that differ from other supporters of the measure").

Perhaps recognizing that the case law does *not* view formal proponents and campaign committees as equivalent, Movant then relies on *Perry* to argue that it should be allowed to intervene as "the official campaign committee that was 'directly involved in drafting and sponsoring the initiative measure.'" Motion at 5 (quoting *Perry*, 52 Cal. 4th at 1143). The problem with this argument is that the sworn declarations filed in support of the Motion to Intervene do not adequately support this contention. For example, the declaration of Movant's chairman does not state that Movant was an "official" committee, and does not state that Movant participated in drafting the initiative measure. Instead, it states only that Movant "worked closely with the proponent" in performing a number of largely administrative tasks related to the campaign, such as printing and circulating the initiative petitions for signature. *See* Decl. of McGregor W. Scott ¶ 2. Similarly, Mr. Alexander's declaration does not state that Movant was "directly involved in drafting" the measure. *See Perry*, 52 Cal. 4th at 1143. Instead, Mr. Alexander states only that Mr. Alexander was a "member" of Movant "[t]hrough the drafting, submission . . . , [and] qualification for the ballot" of Proposition 66. Decl. of Kermit Alexander ¶ 2. Notably, the official "Rebuttal to Argument Against Proposition 66" states that "Proposition 66 was carefully written by California's leading criminal prosecutors, the Criminal Justice Legal Foundation and other top

legal experts," with no mention of Movant. *See* California General Election Tuesday November 8, 2016 Official Voter Information Guide, p. 109, *available at* http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf.

Similarly, the declarations do not support the Motion's assertion that Mr. Alexander, as the official proponent of Proposition 66, "directed the participation of [Movant]" in its activities supporting Proposition 66. Motion at 5. The declarations contain no mention of Mr. Alexander directing Movant's activities or of any position or authority Mr. Alexander held with respect to Movant. Instead, they state only that Mr. Alexander "worked closely" with Movant and spoke at events on Movant's behalf. Decl. of McGregor W. Scott ¶ 2; Decl. of Kermit Alexander ¶ 2.

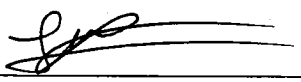
The *Perry* Court distinguished (1) organizations that were "directly involved in drafting and sponsoring the initiative measure" from (2) "other advocacy groups that ideologically support the measure," concluding that organizations in the second category generally lack standing to intervene. *Perry*, 52 Cal. 4th at 1143, 1144 n.14; *see also City & Cty. of San Francisco v. State*, 128 Cal. App. 4th 1030, 1039 (2005) (denying motion to intervene by advocacy group with only "philosophical or political" interest in defending a proposition). Given that Movant's evidence does not support its arguments that it falls into first category of organizations, Respondents have no choice but to oppose the Motion to Intervene. Because Movant is not the official proponent, has not demonstrated its direct involvement in drafting and sponsoring Proposition 66, and cannot show that the named

Respondents are not adequately defending the measure, Petitioners believe Movant should make its arguments to the Court as an amicus.

If, however, the Court chooses to grant the Motion to Intervene, Petitioners do not concede Movant's entitlement to attorneys' fees incurred in defending the measure's validity, and reserve their right to seek attorneys' fees from Movant in lieu of the State if Petitioners prevail. *Cf. Perry*, 52 Cal. 4th at 1161 (declining to decide attorney fee issues). In addition, because Respondents' and Movant's preliminary oppositions total 19,173 words, Petitioners reserve the right to seek permission to file a reply brief of similar length.

Dated: January 12, 2016

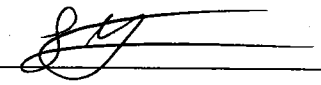
Respectfully submitted,



Christina Von der Ahe Rayburn
Lillian Mao
ORRICK, HERRINGTON & SUTCLIFFE LLP
Attorneys for Petitioners Ron Briggs and John Van de Kamp

CERTIFICATE OF COMPLIANCE

In accordance with California Rules of Court 8.204(c)(1) and 8.486(a)(6), counsel for Petitioners hereby certifies that the number of words contained in this Opposition to Motion to Intervene, including footnotes but excluding the Table of Authorities, signature blocks, and this Certificate, is 848 words as calculated using the word count feature of the computer program used to prepare the brief.

By: 

LILLIAN JENNIFER MAO

PROOF OF SERVICE BY FEDERAL EXPRESS

I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, The Orrick Building, 405 Howard Street, San Francisco, California 94105-2669. On January 12, 2017, I served a true copy of the attached document entitled:

PETITIONER'S OPPOSITION TO MOTION TO INTERVENE

by placing true and correct copies thereof in sealed packages designated by Federal Express for that purpose, with such packages addressed for delivery as follows:

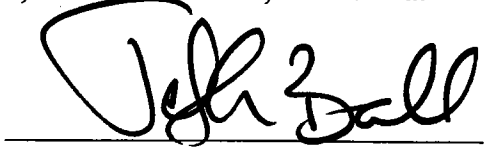
Jerry Brown
Governor of California
c/o State Capitol, Suite 1173
Sacramento, CA 95814

Kamala Harris
Attorney General of California
Office of the Attorney General
455 Golden Gate, Suite 11000
San Francisco, CA 94102-7004
(415) 703-5500

Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102-3688
415-865-4200

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

Executed on January 12, 2017, at San Francisco, California.



JEFFREY BALL