**Case No. S238309**



**IN THE SUPREME COURT**
**OF THE STATE OF CALIFORNIA**

RON BRIGGS and JON 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*.

CALIFORNIANS TO MEND, NOT END, THE DEATH PENALTY – NO ON PROP. 62, YES ON PROP. 66
*Intervenor*.

# COMPLAINT IN INTERVENTION IN OPPOSITION TO THE PETITIONERS' PETITION FOR WRIT OF MANDATE

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Supreme Court of theState of California

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**
**California Rules of Court, rules 8.208, 8.490(i), 8.494(c), 8.496(c), or 8.498(d)**

Supreme Court Case Caption:

RON BRIGGS and JON VAN de KAMP,
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*Respondents*

Please check here if applicable:

☒ There are no interested entities or persons to list in this Certificate as defined in the California Rules of Court.

| Name of Interested Entity or Person (Alphabetical order, please.) | Nature of Interest |
|---|---|
| 1. | |
| 2. | |

*Please attach additional sheets with Entity or Person Information, if necessary.*

Date: January 6, 2017
Signature of Attorney or Unrepresented Party

Printed Name: Kent S. Scheidegger
State Bar No: 307802
Firm Name & Address: **Criminal Justice Legal Foundation**
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Party Represented: *Attorney for Intervenors*
CALIFORNIANS TO MEND, NOT END, THE DEATH PENALTY-NO ON PROP. 62, YES ON PROP. 66

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## PRELIMINARY STATEMENT

1. Intervenor is a registered California recipient campaign committee organized under the Political Reform Act of 1974, as amended, Gov. Code section 81000 et seq., which was primarily formed to support the qualification and passage of Proposition 66 at the November 8, 2016 election. Intervenor was "directly involved in drafting and sponsoring the initiative measure." (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1142.)

2. Initiative proponent Kermit Alexander is a member of the Intervenor and worked closely with the Intervenor in these activities.

3. Intervenor therefore has a direct and immediate interest in the outcome of this litigation and to assert the People's right to defend the measure in litigation challenging the measure.

4. Proposition 66 is a comprehensive reform measure intended to make the enforcement of judgments in capital cases more effective, more timely, and less expensive. The measure qualified for the ballot and was submitted to the voters at the general election held on November 8, 2016.

5. Preliminary results indicated the measure had passed. On November 9, 2016, the day after the election, petitioners RON BRIGGS and JOHN VAN DE KAMP ("Petitioners") filed the present petition asking this court to invalidate Proposition 66 in its entirety and enjoin any enforcement of it. The petition also requested an immediate injunction against enforcement of the initiative.

6. On November 17, 2016, this court denied the stay to the extent it sought to prevent certification of the initiative and otherwise denied the stay without prejudice to renewal after certification.

7. On December 16, 2016, the Secretary of State certified the general election results, finding that Proposition 66 had passed by a margin of 292,428 votes. On the same ballot, according to the Secretary's statement, the people of California rejected repeal of the death penalty by a margin of 856,837 votes.

8. On December 19, 2016, Petitioners filed a motion for leave to file an amended and renewed petition and request for immediate injunctive relief. The next day this court granted the motion for leave to file. The order further provided, "In order to provide time for further consideration of the amended petition for writ of mandate and to permit the filing and consideration of papers in opposition to the petition, the implementation of all provisions of Proposition 66, approved by the voters on November 8, 2016, as certified by the Secretary of State on December 16, 2016, is hereby stayed."

## VALIDITY OF PROPOSITION 66

9. Proposition 66 is a valid exercise of the People's constitutionally retained legislative authority in that it modifies the venue rules for habeas corpus petitions in capital cases without altering the constitutionally created jurisdiction of California courts in these cases.

10. Proposition 66 is a valid exercise of the People's "undisputed" legislative power "to regulate criminal and civil proceedings and appeals" (*People v. Engram* (2010) 50 Cal.4th 1131, 1147) in that its time limitations are capable of being interpreted and applied by the courts consistently with the need of the courts to function as an independent branch of government and to safeguard the interests of those before the court.

11. Proposition 66 embraces a single subject within the meaning of article II, section 8, subdivision (d) of the California Constitution—enforcement of judgments in capital cases—and all of its provisions are "reasonably germane" to that subject as that term is used in this court's precedents interpreting that provision. Execution, imprisonment pending execution, and restitution are all parts of the judgment, and every provision of Proposition 66 relates to making enforcement more effective, more timely, or less expensive.

12. Proposition 66 is consistent with the Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and article I, section 7, subdivision (a) of the California Constitution in that there is a rational basis for providing procedures for habeas corpus review of capital cases different from those for noncapital cases.

## ALLEGATIONS RE: PETITION

13. Although section 387, subdivision (a) of the Code of Civil Procedure requires an intervenor to file a "complaint," when the intervenor seeks to "resist the claims of the plaintiff" the pleading has the nature of an answer. Intervenor therefore makes the following responses to the allegation of the petition. Preliminarily, Intervenor notes that Petitioners have assured this court in paragraph 6 that their "Petition presents no questions of fact for this court to resolve in order to issue the relief sought," and therefore any disputed issues of fact must be assumed against the moving party, *i.e.*, the Petitioners.

14. Intervenor denies the allegations of Paragraph 3 of the Petition.

15. Intervenor admits the allegation in Paragraph 4 of the Petition that there is no other adequate remedy to enjoin Proposition 66 as a whole. To

the extent the Petition challenges the constitutionality of individual provisions of the initiative; Intervenor denies that other remedies are inadequate.

16. Intervenor admits the allegations of Paragraph 5 of the Petition that this court has jurisdiction and that the resolution of the question of the validity of Proposition 66 as a whole and on its face is a matter of great public importance appropriate for an original writ in this court. Intervenor also admits that Proposition 66 "will make it more likely, and more immediate, for persons sentenced to death to face their executions," *i.e.*, that Proposition 66 will effectively achieve its purpose of expediting the execution of justly deserved and legally imposed sentences. Intervenor denies all other allegations of Paragraph 5.

17. Intervenor admits the allegations of Paragraph 6 of the Petition to the extent that it asserts that the single-subject claim and the validity of the habeas corpus venue provision can be determined on the face of the initiative aided only by facts judicially noticeable and not genuinely disputable. Intervenor otherwise denies the allegations of Paragraph 6 and counter-alleges that the validity of the time limit provisions of Proposition 66 can be determined only as applied in particular circumstances.

18. Intervenor admits the material allegations of Paragraphs 7, 8, 9, 11, and 12 of the Petition.

19. Intervenor denies the allegations of Paragraph 10 of the Petition and counter-alleges that Proposition 66 does not threaten any unlawful expenditures.

20. Intervenor admits the allegations of Paragraph 13 of the Petition that the Judicial Council is the policymaking body of the California courts and that it is obligated by Proposition 66 to adopt new qualification

standards for appellate counsel. Intervenor denies the other allegations of Paragraph 13 and specifically denies that restraint by order of this court is necessary to prevent the Judicial Council from acting to enforce any provision that might be held invalid by this court. Intervenor counter-alleges that the Judicial Council, whether a party or not, can be depended upon to observe the temporary stay and observe the final decision on the merits, and therefore there is no need for the Judicial Council to be a party to this action.

21. Intervenor denies the allegations of Paragraph 14 of the Petition.

22. Intervenor admits the allegations of Paragraph 15 of the Petition.

23. Intervenor denies the allegations of Paragraph 16 of the Petition and counter-alleges that Proposition 66 makes a number of changes, as any comprehensive reform of a complex subject must, but to say that it makes "myriad changes" is hyperbole. The initiative makes no changes to the remuneration of attorneys for direct appeal or of those for state habeas corpus other than those employed by the Habeas Corpus Resource Center. Quotes from the Legislative Analyst's report are not facts. Proposition 66 includes measures designed to save money, including a dramatic reduction in the successive habeas corpus petitions that this court has found to be a major burden (see *In re Reno* (2012) 55 Cal.4th 428, 458), permitting incarceration of male death row inmates at places other than San Quentin where that makes better economic sense, eliminating the expense of Administrative Procedure Act compliance and litigation for execution protocols, and reduced incarceration and healthcare costs resulting from shorter times on death row. The Legislative Analyst says that many fiscal effects are unknown (see Petitioners' Appendix 11), but that prison savings "could potentially reach the tens of millions of dollars annually." (*Ibid.*)

Given that the Petitioners have presented this case as one to be decided without fact-finding, no claim of additional cost may be considered in the decision.

24. Intervenor admits the allegations of Paragraph 17 of the Petition.

25. Intervenor denies the allegations of Paragraph 18 of the Petition. Intervenor counter-alleges that all laws related to court cases impose duties on judicial entities and attorneys, and calling these duties "serious burdens" without quantification adds nothing tangible. Coping with deadlines is part of a lawyer's job and not impairment of ability to represent clients. The initiative imposes a reasonable limit on successive habeas corpus petitions, based on one previously announced by a plurality of the United States Supreme Court, and calling this "suppress[ing] legitimate habeas corpus petitions" is nothing but an expression of opinion on the policy question of where to draw the line.

26. Intervenor admits the allegation of the first sentence of Paragraph 19 of the Petition and denies the remaining allegations of that paragraph. Intervenor counter-alleges that the Judicial Council does not need to take immediate action. If this Court decides the merits of the present case with the same promptness it has shown in similar cases, such as *Brown v. Superior Court* (2016) 63 Cal.4th 335, the Judicial Council will have sufficient time to comply if it gives the matter the priority it deserves.

27. Intervenor admits the allegation of the first sentence of Paragraph 20 of the Petition and denies the remaining allegations of that paragraph. Intervenor counter-alleges that five years is sufficient time to complete a direct appeal and first habeas corpus petition even in highly complex capital cases as demonstrated by cases in other jurisdictions.

28. Intervenor admits the allegations of Paragraph 21 of the Petition that Proposition 66 requires decision of pending habeas corpus petitions within 6.5 years of adoption and otherwise denies the allegations of that paragraph. Intervenor counter-alleges that Proposition 66 frees up resources for the more prompt disposition of initial habeas corpus petitions by sharply reducing the present wasteful abuse of successive petitions, such that any claim that resources will need to be diverted from other cases is speculative.

29. Intervenor denies the allegations of Paragraph 22 of the Petition and counter-alleges that Proposition 66 does not change the jurisdiction of this court regarding habeas corpus petitions. It establishes a rule of venue very similar to the one this court has established by case law for noncapital cases. The transfer provision for existing cases is expressly permissive, not mandatory. Deciding whether to transfer pending cases to the superior courts is a trivial burden in comparison to the burden of deciding those cases. In the typical case, it will simply be a matter of deciding whether the case is already so far along as to make transfer inefficient.

30. Intervenor admits the allegations of Paragraph 23 of the Petition that Proposition 66 requires appointment of counsel as soon as possible and requires the Judicial Council to adopt new standards and denies all other allegations of the paragraph. Intervenor counter-alleges that new section 1239.1 of the Penal Code, added by section 5 of the initiative, specifically requires that the attorneys required to accept appointments "meet the qualifications for capital appeals." The statement to the contrary in Paragraph 23 of the petition is false. New section 68665, subdivision (b) requires that "qualifications needed to achieve competent representation"

be considered and does not require subordinating that requirement to "the need to avoid unduly restricting the available pool of attorneys."

31. Intervenor admits the allegations of Paragraph 24 of the Petition that a significant backlog of counsel appointments currently exists and denies all other allegations of that paragraph. Intervenor counter-alleges that Paragraph 24 of the petition makes allegations that are nothing more than speculation, including higher compensation for counsel and resignation of attorneys from the appointment list. Given that the Petitioners have submitted this case for decision without fact-finding, these speculative allegations must be disregarded. It is at least equally possible that a commitment of California's judiciary to resolve these cases within a reasonable time will cause additional qualified attorneys to come forward who were previously unable or unwilling to accept a case that was likely to drag on for decades.

32. Intervenor admits the allegations of Paragraph 25 of the Petition that Proposition 66 dissolves the board of directors of the Habeas Corpus Resource Center and denies all other allegations of that paragraph, including the allegation that the initiative requires "immediate expenditure of public funds for [this] Court to establish a system of oversight for the Habeas Corpus Resource Center." Intervenor counter-alleges that the initiative only authorizes the court to appoint the Executive Director when there is a vacancy and dismiss the Executive Director should that become necessary. (See Gov. Code, § 68664, subd. (b).) There is no requirement for immediate expenditure at all and only a *de minimis* one long term.

33. Intervenor admits the allegation of the first sentence of Paragraph 26 of the Petition and denies all other allegations of that paragraph. Intervenor counter-alleges that the Executive Director remains responsible

for the management of the center under an unamended subdivision (see Gov. Code, § 68664, subd. (a)), and that there is no basis in the text of the initiative for the allegation that this court would have to expend its funds to determine a salary scale for attorneys in the Habeas Corpus Resource Center.

34. Intervenor does not have sufficient information to admit or deny the allegations of Paragraph 27 of the Petition and therefore denies all of the allegations of that paragraph. Intervenor counter-alleges that considering claims within the concrete context of specific cases and not as mere abstract propositions is the normal and proper way that courts function. That is why claims need to be "ripe" for review (see *Habeas Corpus Res. Ctr. v. United States DOJ* (9th Cir. 2016) 816 F.3d 1241, 1252-1254), and not all of the challenges to Proposition 66 can properly be made in this case. While Petitioners allege that deciding these claims is a "burden" on the courts, it is the burden that courts were created to bear.

35. Intervenor admits the allegations of the first two sentences of Paragraph 28 of the Petition and denies all other allegations of that paragraph. Intervenor counter-alleges that superior courts will not necessarily have to establish new systems for appointment of counsel but may rather employ systems already in place.

36. Intervenor admits the allegation of Paragraph 29 of the Petition that Proposition 66 requires superior courts to resolve capital habeas corpus petitions within one year of filing and denies all of the other allegations of that paragraph. Intervenor counter-alleges that Proposition 66 establishes a rule of habeas corpus venue, not jurisdiction, that superior courts had habeas corpus jurisdiction in these cases before Proposition 66, and that

added costs to the superior court are offset by greatly reducing the burden of original habeas corpus cases in this court.

37. Intervenor denies the allegations of Paragraph 30 of the Petition and counter-alleges that, while the system created by Proposition 66 is different from the pre-existing system, it is not necessarily more complex or burdensome to the judiciary as a whole than the one it replaces.

38. Intervenor denies the allegation of Paragraph 31 of the Petition that total costs will be greater and admits the remaining allegations of that paragraph. Intervenor counter-alleges that savings from greatly reduced successive petitions, hearing initial petitions in a more appropriate court, and reduction of federal litigation from a more complete state court record and decision will likely produce a net reduction in cost.

39. Intervenor does not have sufficient information to admit or deny the allegations of Paragraph 32 of the petition and therefore denies all of the allegations of that paragraph.

40. Intervenor denies the allegation of Paragraph 33 of the Petition that the requirement described is unfair. Intervenor counter-alleges that a requirement that qualified panel attorneys receiving appointments for noncapital indigent appeals shoulder a share of the burden of capital cases as well is a reasonable condition.

41. Intervenor admits the allegation of Paragraph 34 of the Petition that Proposition 66 limits successive habeas corpus petitions and denies all other allegations of the paragraph. Intervenor counter-alleges that the limitation is a policy choice well within the legislative authority. It is a reasonable limit similar to the one provided by Congress for federal collateral review. Proposition 66 does not restrict the ability of counsel to adequately represent death row inmates.

42. Intervenor admits the allegation of Paragraph 35 of the Petition that Proposition 66 removes the Administrative Procedure Act barrier to the use of the protocol published by the California Department of Corrections and Rehabilitation in November 2015 and denies all other allegations of the paragraph. Intervenor counter-alleges that there are 19, not 20, inmates for whom a jury has determined that death is the just punishment for their crimes and for whom both the state and federal courts have reviewed the judgments via direct appeal, state habeas corpus, and federal habeas corpus through denial of certiorari by the United States Supreme Court (or expiration of the time to petition for certiorari) and that these reviews have found the judgments free of reversible error. Further delay of a punishment which is both just and legal is not a legal right, and elimination of that delay is not a cognizable harm. Instead, the delay that has already occurred after completion of review, nearly 11 years in the oldest case, is an egregious, continuing violation of the constitutional right of the victims' families to "a prompt and final conclusion of the case in any related post-judgment proceedings." (Cal. Const., art. I, § 28, subd. (b)(9).)

**PETITIONERS' CAUSES OF ACTION**

43. Petitioners' first through fourth causes of action have no merit for the reasons stated under Validity of Proposition 66, *supra*.

44. Petitioners' fifth cause of action has no merit because expenditures under the valid Proposition 66 are not illegal.

45. In addition, Petitioners' first, second, and fourth causes of action have no merit because their claims, even if valid, would not justify the relief sought. The reforms made by Proposition 66 are independently enforceable, and they are severable under both general principles and the

initiative's express severability clause in section 21. The Petitioners have asked only for injunctive and declaratory relief against the initiative as a whole and not individual provisions of it. (See Petition 16-17.)

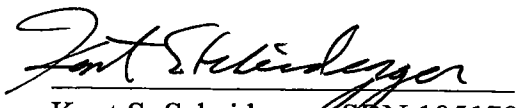
46. Petitioners allege that they "have no other plain, speedy, or adequate remedy at law. There are no administrative or other proceedings available to enjoin the enforcement of Proposition 66." That is true only for a challenge to the initiative as a whole, and only the single-subject challenge qualifies as a challenge to the initiative as a whole. While the Petitioners, who have only nominal taxpayer standing, may not have any other vehicle to challenge individual provisions of Proposition 66, the persons directly affected do. Challenges to the provisions regarding appeals and habeas corpus may be raised in those proceedings. Challenges to individual provisions should therefore not be considered under the residual "other and further relief" clause of Petitioners' prayer for relief, under any further amendments the Petitioners may seek to make to their petition, or at the behest of any other parties or amici who may appear in this court.

**RELIEF**

For these reasons, Intervenor requests that this court deny the petition in its entirety and vacate the previously entered stay.

Dated: January 6, 2017

Respectfully submitted,



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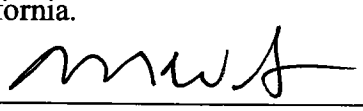
# VERIFICATION

I, McGREGOR W. SCOTT, declare:

I am the Chairman of CALIFORNIANS TO MEND, NOT END, THE DEATH PENALTY - NO ON PROP 62, YES ON PROP 66 ("Yes On Proposition 66 Committee"), a Proposed Intervenor in the above-captioned matter, RON BRIGGS, et al. v. JERRY BROWN, et al., Supreme Court Case No. S238309, and make this verification on behalf of the Proposed Intervenor.

I have read the Proposed Complaint in Intervention and the contents thereof and am informed and believe the matters stated therein are true and correct, and on that ground allege them to be true and correct.

Executed under penalty of perjury under the laws of the State of California this 4th day of January 2017 at Sacramento, California.



McGREGOR W. SCOTT

## CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to rules 8.204(c)(1) and 8.360(b)(1) of the California Rules of the Court, the enclosed Complaint In Intervention In Opposition To The Petitioners' Petition For Writ Of Mandate is produced using 13-point Times New Roman type including footnotes and contain approximately 3,300 words, which is less than the total words permitted by the rules of the court. Counsel relies on the word count of the computer program, Microsoft Word 2010, used to prepare this brief.

Dated: January 6, 2017

By: _____

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THE DEATH PENALTY- NO ON PROP. 62,
YES ON PROP. 66

## PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:
I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is 455 Capitol Mall, Suite 600, Sacramento, CA 95814. On January 6, 2017, I served the following:

**COMPLAINT IN INTERVENTION IN OPPOSITION TO THE PETITIONERS' PETITION FOR WRIT OF MANDATE**

on the following parties:

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*Attorneys for Governor Jerry Brown, Attorney General Kamala Harris and the California Judicial Council*

X **BY U.S. MAIL:** By placing said document(s) in a sealed envelope and depositing said envelope, with postage thereon fully prepaid, in the United States Postal Service mailbox in Sacramento, California, addressed to said party(ies), in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

X **BY ELECTRONIC MAIL:** By causing true copy(ies) of PDF versions of said document(s) to be sent to the e-mail address of each party listed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 6, 2017. at Sacramento, California.

KMerina
Kiersten Merina