

January 10, 2017

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Honorable Chief Justice Tani Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

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Re: *Briggs and Van de Kamp v. Brown, et al.*, No. S238309
Letter in Support of Petitioners' Request for Writ of Mandate

Honorable Justices:

On December 20, 2016, the Court stayed enforcement of Proposition 66 pending consideration of the amended petition for writ of mandate and preliminary opposition. The order's reference to "preliminary opposition" suggests that the Court has not yet decided whether to "exercise [its] original jurisdiction" as it has done in comparable cases. (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241.)

The Los Angeles County Bar Association, the California Academy of Appellate Lawyers, the Beverly Hills Bar Association, and the Bar Association of San Francisco urge the Court to issue an alternative writ or order to show cause on all the issues presented. We also urge the Court to keep the stay in place pending the Court's final decision on the merits. As we demonstrate below, Proposition 66 will overwhelm the judicial system throughout the State. The petitioners have raised serious questions about the measure's constitutional validity, and those questions should be resolved before the measure is allowed to go into effect. As in *Brosnahan*, there can be no question but that "the issues are of great public importance and should be resolved promptly." (*Ibid.*)

The Authors' Interest

The Los Angeles County Bar Association (LACBA) was founded in 1878 and is one of the largest voluntary metropolitan bar associations in the country. LACBA serves attorneys, judges, and other legal professionals throughout the county. Our members contribute their time, talent, and experience to better the legal profession, the judicial system, and themselves. Our members share the mission of promoting fair and equal access to the judicial system and of promoting the highest standards of representation, particularly for the poor and those who have been poorly represented.

The California Academy of Appellate Lawyers (CAAL) is a non-profit organization of highly-experienced appellate practitioners. Our members' common goals include promoting and encouraging sound appellate procedures designed to ensure proper and effective representation of appellate litigants, efficient administration of justice at the appellate level, and improvements in the law affecting appellate litigation. CAAL has appeared as an amicus curiae in this Court on many prior occasions to address issues concerning the practice of appellate law.

The Beverly Hills Bar Association (BHBA), established in 1931, is a voluntary association with approximately 5,000 members, many of whom live or practice in the Beverly Hills and Century City areas of Los Angeles County. BHBA has often appeared as an amicus curiae in this Court to address important questions concerning the practice of law, including the criteria for attorney admission (*In re Garcia* (2014) 58 Cal.4th 440) and the availability of reporter's transcripts for indigent litigants (*Jameson v. Desta*, S230899), and matters of statutory and constitutional significance such as the fundamental right to marry (*In re Marriage Cases* (2008) 43 Cal.4th 757).

The Bar Association of San Francisco (BASF) is a non-profit voluntary membership organization of attorneys, law students, and legal professionals in the San Francisco Bay Area. Founded in 1872, BASF enjoys the support of more than 7,300 individuals, law firms, corporate legal departments, and law schools. Through its board of directors, its committees, and its volunteer legal services programs and other community efforts, BASF has worked actively to promote and achieve equal justice for all and oppose discrimination in all its forms, including discrimination based on race, sex, disability, and sexual orientation. BASF provides a collective voice for public advocacy, advances professional growth and education, and attempts to elevate the standards of integrity, honor, and respect in the practice of law.

**Proposition 66 Is Far Too Important And Disruptive To Be Allowed
To Go Into Effect Without This Court's Evaluation Of Its Legality.**

Regardless of whether one believes it is appropriate to accelerate the death penalty appeal process, Proposition 66's approach threatens to deal a mortal blow to the ability of California's judicial system to handle all of its other responsibilities, both civil and criminal—responsibilities that our courts have been struggling with for years following drastic reductions of their budgets. Indeed, as the deadlines imposed by Proposition 66 approach, civil litigation of all kinds may well grind to a halt.

Proposition 66 seeks to accelerate the state review process for capital habeas corpus proceedings by:

- a) Giving exclusive original jurisdiction over habeas corpus proceedings to the sentencing court for capital defendants and requiring that habeas corpus proceedings be returned to the original trial court, instead of the current practice of capital habeas petitions being filed in the California Supreme Court. (Pen. Code, § 1509, subd. (a).) The state courts must complete the state direct appeal and state habeas corpus review within five years. (Pen. Code, § 190.6, subd. (d).)
- b) Giving the Courts of Appeal appellate jurisdiction over capital habeas corpus proceedings. (Pen. Code., § 1509.1, subd. (a).)
- c) Expanding the pool of capital direct appeal practitioners to include attorneys with little or no capital post-conviction experience and conditioning appointment to other appellate cases on acceptance of appointment to capital habeas corpus cases. (Pen. Code, § 1239.1, subd. (b).)

Implementation of Proposition 66 will flood courts throughout the state at all levels—the trial courts, Courts of Appeal, and this Court—with capital habeas corpus and direct appeal cases. The inevitable result will be to severely restrict judicial access for all other purposes, both civil and criminal.

We will demonstrate the impact through some statistics from Los Angeles. Although Los Angeles has the largest court system in the state, there can be no doubt that the problems Los Angeles will face under Proposition 66 will affect other counties proportionately. Indeed, given the disproportionately large number of capital cases in the

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Riverside and San Bernardino Superior Courts, the problems may well be greater in those counties.

There are 234 death row inmates from the county of Los Angeles who comprise 30.99 percent of California's condemned inmates. There are 133 capital post-conviction cases from Los Angeles County that are not yet final in state court.¹ Of those, approximately 110 defendants need appointment of capital habeas corpus counsel within one year. We are not aware of there being 110 qualified capital habeas corpus practitioners within the Los Angeles County area. These skills are particular and difficult to acquire, and the case-handling burden on those who have them is great. Attracting competent counsel has been the subject of persistent and largely unsuccessful efforts by this Court and other actors in our justice system.

Capital habeas corpus petitions are typically hundreds of pages long, with supporting documents and transcripts totaling thousands of pages. It is not unusual for a petition to raise 30 or more claims. Yet Proposition 66 requires that habeas petitions be filed in the sentencing court within one year of certification of the record, and that the Superior Court resolve such petitions within one year of filing (or within two years if "a delay is necessary to resolve a substantial claim of actual innocence . . .," Pen. Code, § 1509, subd. (f)). And the Superior Court opinion produced under this tight deadline must include written factual findings.

There were 482 Superior Court judge positions in Los Angeles County as of 2014-2015. If qualified practitioners were available to write habeas corpus petitions for the 110 defendants needing appointment of counsel within one year (as Proposition 66 requires), and if each of those petitions were filed within a year (as Proposition 66 requires), Los Angeles Superior Court judges would have one year to resolve 110 new, voluminous habeas corpus petitions, in opinions that include written factual findings. By comparison, the California Supreme Court—which has attorneys and law clerks who have worked on capital habeas for decades—disposed of just 28 capital habeas petitions, issuing a written opinion in only 5 cases, in 2013-2014. That rate indicates that adjudicating 110 petitions within the timeline and with the written findings that Proposition 66 requires could well be a full-time endeavor for a large swath of Los

¹ From the California Department of Corrections and Rehabilitation website on January 6, 2017.

Angeles Superior Court's 482 judges in the coming years, leaving little time to address the judges' existing caseloads, let alone the new civil and criminal cases filed every day.

In addition, Proposition 66 requires that appeals of the Los Angeles County Superior Court's habeas corpus opinions be filed in the Second District Court of Appeal. There are 29 justices and three vacancies on the Second District bench. Proposition 66 mandates the same schedule for all capital habeas corpus matters. In the second and third year of implementation of Proposition 66, *all* Second District Court Justices could be fully occupied with capital habeas corpus proceedings—effectively abrogating the civil right to appeal. Proposition 66, relying on existing law deadlines, requires that Court of Appeal opinions be filed within 210 days of briefing. (Pen. Code, § 190.6, subd. (c).) This deadline is unrealistic for the procedures outlined in Proposition 66. The Second District Court of Appeal averages 412 days from notice of appeal to filing an opinion, with ten percent of appellate cases unresolved after 635 days.

Proposition 66 also requires filing the direct appeal of the conviction and death sentence in all 110 Los Angeles County cases in this Court within 210 days of sentencing. The state courts, under Proposition 66, must complete their review of *both* the direct appeal and the state habeas corpus petition within five years from the entry of judgment. This deadline is unrealistic. The average time for briefing a capital automatic appeal is three years from appointment of counsel.² The average opening brief in an automatic appeal is between 250 and 350 pages long and includes 30 to 40 claimed errors.³

With the filing of hundreds of automatic appeals statewide in addition to review of state habeas corpus petitions—all of which require the state courts to issue an opinion within five years—this Court will likely have no time for other judicial matters. Capital cases already consume a disproportionate amount of this Court's time.

² Mitchell, P., Haydt, N., *California Votes 2016: An Analysis of the Competing Death Penalty Ballot Initiatives* (July 20, 2016) Special Report of the Alarcón Advocacy Center, Loyola Law School, pp. 16-17 & fn. 56, available at <http://www.lls.edu/resources/newsroom/election2016commentaryguide/>.

³ Alarcón, A., Mitchell, P., *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle* (2011) 44 Loyola L.A. L.Rev. S41, S187.

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Professor Gerald F. Uelmen reported that in 2010, the Court devoted nearly half of all published opinion pages to automatic appeals, and “the crushing backlog on the death docket was barely diminished: seventy-seven death appeals and 89 habeas petitions—all *fully briefed*—remain on the court calendar, where a two-year wait still separates the filing of final briefs from oral argument.”⁴

There are over 350 condemned inmates without appointed habeas corpus counsel, including 110 from Los Angeles County. The qualifications for appointment as capital habeas corpus counsel have long been established by this Court.⁵ Even now, these qualifications do not guarantee effective assistance of counsel. Further dilution of these qualifications—as Proposition 66 contemplates—will create an increase in cases returned from federal court for ineffective assistance of counsel. In the past two years, six death penalty cases have been reversed or remanded from the federal district courts and the Ninth Circuit Court of Appeals.⁶

⁴ Uelmen, G., *The End of an Era* (Sept. 2010) California LAWYER, available at <https://ww2.callawyer.com/CLstory.cfm?eid=911409>.

⁵ The qualifications for capital appointed counsel are available on this Court’s website at <https://scacs.courts.ca.gov/>.

⁶ *Cuevas Espinoza v. Spearman* (9th Cir., Sep. 21, 2016, No. 13-57167) 2016 U.S. App. LEXIS 17250; *Majors v. Warden* (E.D.Cal., May 26, 2016) 2016 U.S. Dist. LEXIS 70099; *Hedlund v. Ryan* (9th Cir. 2016) 815 F.3d 1233; *Smith v. Schriro* (9th Cir. 2016) 813 F.3d 1175; *Roybal v. Davis* (S.D.Cal. 2015) 148 F.Supp.3d 958; *Doe v. Ayers* (9th Cir. 2015) 782 F.3d 425.

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In conclusion, the Los Angeles County Bar Association, the California Academy of Appellate Lawyers, the Beverly Hills Bar Association, and the Bar Association of San Francisco urge the Court to hear the Petition on its merits and to maintain the stay on enforcement of Proposition 66 until the Court issues its final decision on the merits. Without this Court's intervention, numerous non-capital cases will be negatively affected, and the judicial function of trial courts, the Courts of Appeal, and this Court itself will be critically impaired.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Stevens', with a large circular flourish at the bottom.

Margaret P. Stevens

President

Los Angeles County Bar Association

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On **January 10, 2017**, I served the foregoing document described as **Amici Curiae Letter** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes as stated below.

BY MAIL: I mailed a copy of the document identified above as follows:

I placed the envelope(s) for collection and mailing on the date stated above, at Los Angeles, California, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope(s) with postage fully prepaid.

The envelope was or envelopes were addressed as follows:

SEE ATTACHED SERVICE LIST

Executed on **January 10, 2017**, at Los Angeles, California.

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



Rebecca E. Nieto

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