

IN THE SUPREME COURT OF CALIFORNIA

RON BRIGGS AND JOHN VAN DE KAMP,
Petitioners

S238309

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.

SUPREME COURT
FILED

APR 06 2017

Jorge Navarrete Clerk

Deputy

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF BY PROPOSED AMICUS
CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW
JUDGES AND HEARING OFFICERS IN STATE EMPLOYMENT
("CASE")**

Filed in Support of Neither Party

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Applicant CASE

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SUPREME COURT OF CALIFORNIA

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(California Rules of Court, rules 8.208, 8.488)

Initial Certificate Supplemental Certificate

Case Caption

Ron Briggs & John Van de Kamp, Petitioners

v.

Jerry Brown, in his official capacity as the Governor of California, et al., Respondents.

This certificate is being submitted on behalf of proposed amicus California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (“CASE”)

There are no interested entities or persons that must be listed in this certificate under rule 8.208.

/s Patrick Whalen

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**APPLICATION FOR PERMISSION TO FILE AMICUS
CURIAE BRIEF AND STATEMENT OF INTEREST OF
AMICUS CURIAE**

Application

This Court issued an order to show cause in the above-entitled case on February 1, 2017. That order directed, inter alia, that “[a]ny application to file an amicus curiae brief, accompanied by the proposed brief, must be served and filed on or before March 30, 2017.” Pursuant to that order, and consistent with California Rule of Court 8.487(e), proposed amicus respectfully applies for permission to file the amicus brief, which accompanies this request.

Applicant’s Interest and How Applicant’s Brief Will Assist the
Court

Proposed amicus California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (“CASE”) is the exclusive collective bargaining representative of legal professionals in State Bargaining Unit 2 pursuant to Government Code section 3520.5. CASE represents approximately 3800 legal professionals in more than 90 different state departments, boards, and commissions. Of particular note to this matter, CASE represents approximately 30 attorneys employed at the Office of the State Public Defender who represent convicted inmates in capital appeals and, occasionally, capital habeas proceedings. In addition, CASE represents approximately 1025 Deputy Attorneys General (DAGs) employed at the Department of Justice, many of whom represent the State in defending direct and collateral postconviction challenges in capital cases. Accordingly, hundreds of CASE members have a direct, professional interest in how this Court resolves the challenge to Proposition 66. Additionally, these CASE members have a direct, financial interest in how this Court interprets Section 17 of Proposition 66 because the parties—including Governor Brown and Attorney General Becerra—agree that Proposition 66, if lawful, would change state law regarding the “requirements for and remuneration for counsel in direct appeal and state habeas corpus proceedings.” (Amended Pet. at p. 6, ¶16; Return at p. 16, ¶16.)

The proposed amicus brief addresses a narrow issue of statutory interpretation in the event this Court upholds Proposition 66. CASE takes no position on the jurisdictional, separation of powers, single subject rule or other challenges raised by petitioners or intervenors. However, if this Court determines that Proposition 66 withstands those challenges, then CASE urges this Court to construe an ambiguous provision in the new law that directly impacts CASE members. Section 17 of the initiative governs the administration of the Habeas Corpus Resource Center. (See, Amended Petition at p. 9-10, ¶26; Return at 17, ¶26.) Specifically, section 17 of the new initiative statute would amend Government Code section 68664, subdivision (e) as follows:

(e) The executive director shall receive the salary that shall be specified for the ~~executive director~~ *State Public Defender* in Chapter 6 (commencing with Section 11550) of Part 1 of Division 3 of Title 2. *All other attorneys employed by the center shall be compensated at the same level as comparable positions in the Office of the State Public Defender.*

The amended language creates uncertainty regarding the mandatory salary level of CASE members employed at the Office of the State Public Defender (OSPD). Currently, salaries for attorneys employed at OSPD lag behind the salaries of attorneys of comparable experience employed by Habeas Corpus Resource Center (HCRC) by as much as 15%. By merely mandating that the attorneys employed by the center (HCRC) shall be compensated at the same level as comparable positions at OSPD, the statute is silent as to whether that directive is to be implemented by raising the salaries of attorneys at the OSPD, lowering the salaries of the attorneys at HCRC, or some combination of both. In other words, the statutory directive is to equalize the salaries, but it provides no express guidance on how to achieve that equalization.

Similarly, the text does not explain whether a salary equalization must or may be limited to defense-side counsel employed by HCRC and OSPD as suggested by Petitioner at page 2-3, ¶5, of the Amended Petition, or whether the salary equalization must or may also include prosecutors in the Department of Justice, many of whom, as this Court well knows, work as “counsel in direct appeal and state habeas corpus proceedings.” (See,

Amended Pet. at p. 6, ¶16; Return at p. 16, ¶16.) The proposed brief offers arguments to help this Court resolve the ambiguity in the statute.

In addition, should this Court conclude that the salaries of the attorneys at OSPD must be raised, then this Court needs to decide the import of that conclusion in light of Government Code section 19826, subdivision (a), which provides, in pertinent part:

The department shall establish and adjust salary ranges for each class of position in the state civil service subject to any merit limits contained in Article VII of the California Constitution. *The salary range shall be based on the principle that like salaries shall be paid for comparable duties and responsibilities.*

(Emphasis added.) This “like work for like pay” command means that the salaries of DAGs, who perform legal work comparable to those of OSPD attorneys on the very same capital cases, will have to increase to be commensurate with the new salaries of the attorneys at OSPD.

If Proposition 66 is upheld, the proposed amicus brief offers this Court an opportunity to clarify – at the outset of implementing the new provisions – the meaning of the compensation provisions in Government Code section 68664 and the implications for the salaries of hundreds of state attorneys who litigate capital cases. Amicus can help the Court understand the realities of capital case litigation from the perspective of both OSPD attorneys and DAGs, which can inform this Court’s interpretation of Government Code section 68664, subdivision (e), in light of not only the text of the statute, but also the ballot arguments, the title and summary, and relevant civil service rules and statutes.

Both this application and the accompanying brief was prepared by counsel for CASE at the direction of the CASE Board of Directors, but not for the benefit or at the direction of any party or intervenor. See California Rule of Court 8.200(c). No party or counsel for any party to this matter authored any part of the brief nor did they make any financial contribution toward the preparation or submission of the brief.

For these reasons, CASE respectfully requests leave to file the amicus curiae brief submitted with this application.

Dated: March 29, 2017

Patrick Whalen
CASE General Counsel

AMICUS CURIAE BRIEF

I. INTRODUCTION

Amicus California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (“CASE”) is the exclusive collective bargaining representative of legal professionals in State Bargaining Unit 2 pursuant to Government Code section 3520.5. CASE represents approximately 3800 legal professionals in more than 90 different state departments, boards, and commissions. Of particular note to this matter, CASE represents approximately 30 attorneys employed at the Office of the State Public Defender who represent convicted inmates in capital appeals and, occasionally, capital habeas proceedings. In addition, CASE represents approximately 1025 Deputy Attorneys General (DAGs) employed at the Department of Justice, many of whom represent the State in defending direct and collateral postconviction challenges in capital cases. Accordingly, hundreds of CASE members have a direct, professional interest in how this Court resolves the challenge to Proposition 66.

CASE takes no position on the jurisdictional, separation of powers, single subject rule or other challenges raised by petitioners or intervenors. Consistent with Government Code section 3516, CASE’s interest in this matter on behalf of its members is limited to “wages, hours, and other terms and conditions of employment.”

II. IF THIS COURT FINDS THAT SECTION 17 OF PROPOSITION 66 IS LAWFUL, ITS MEANING MUST BE CLARIFIED

Section 17 of Proposition 66 amends Government Code section 68664 in several respects. Prior to the passage of Proposition 66, section 68664 established a board of directors for HCRC, established the position of executive director of HCRC, and set forth the term of the board and their means of appointment. Subdivision (e) read as follows:

- (e) The executive director shall receive the salary that shall be specified for the executive director in Chapter 6

(commencing with Section 11550) of Part 1 of Division 3 of Title 2.¹

Proposition 66 amended various provisions of section 68664, including eliminating the board of directors. As relevant here, subdivision (e) was amended as follows:

(e) The executive director shall receive the salary that shall be specified for the ~~executive director~~ *State Public Defender* in Chapter 6 (commencing with Section 11550) of Part 1 of Division 3 of Title 2. *All other attorneys employed by the center shall be compensated at the same level as comparable positions in the Office of the State Public Defender.*

These amendments do two things. First, they seek to equalize the salaries between the HCRC executive director and the State Public Defender. Second, they seek to equalize the compensation of the attorneys at HCRC with comparable positions at OSPD.

As to the first amendment, equalizing the salaries between the heads of each respective entity, the legislation is not ambiguous. It clearly identifies the relevant benchmark, i.e. the statutory salary for the State Public Defender which appears in Government Code section 11552, subdivision (a)(18). As to the second amendment relating to the compensation of the lower level attorneys at each respective entity, the legislation is ambiguous, because while it mandates equalization, it does not set a benchmark. It is unclear whether the salaries of the HCRC attorneys should be changed to match those of the attorneys at OSPD, or if the salaries of the attorneys at OSPD should be changed to match those of the attorneys at HCRC, or some combination of the two.

III. THE SALARIES OF ATTORNEYS AT OSPD AND HCRC

As the exclusive collective bargaining agent for Unit 2, CASE has for years collected data on the salaries of other public sector attorneys for use during bargaining with the State of California. For decades, the salaries

¹ So far as appears, no statutory salary for the Executive Director of HCRC was ever established in Government Code section 11550, et. seq.

of state attorneys in Bargaining Unit 2 have been at or near the bottom of all other public sector attorneys, including those at the city, county, UC, CSU, and HCRC. The HCRC salary scale has been identified as a particularly relevant comparison in light of the fact that the attorneys there perform work that is virtually identical to the work performed by Unit 2 members at OSPD and the Attorney General's Office. Indeed, the attorneys at HCRC often work on the exact same capital cases as Unit 2 members.

Although HCRC attorneys work for the Judicial Council, their salaries, like those of Unit 2 members, are all matters of public record. For example, the salaries, qualifications, and years of experience for all of the attorneys at HCRC is available at <http://www.courts.ca.gov/hcrc-salaries.htm>. Similarly, the salaries for attorneys in bargaining unit 2 can be found at <http://www.calhr.ca.gov/labor-relations/Documents/mou-20160701-20190701-bu02.pdf> (see Attachment A), and the qualifications and specifications for state attorneys can be found at <http://www.calhr.ca.gov/state-hr-professionals/Pages/5778.aspx>. Based on this publicly available information, CASE has compiled the following comparison of the salaries for comparable attorney positions in Unit 2 and at HCRC.

BU2 Attorneys			Habeas Corpus Resource Center			
Title	Salary Range	Number of Years of Experience	Title	Salary Range	Number of Years of Experience	Difference in Salary
Attorney						
A	\$5,130.00 - \$5,336.00	0	Staff Attorney I	\$5,541	0	\$205
B	\$5,136.00 - \$5,864.00	1	Staff Attorney II	\$5,562 - \$6,410	1	\$276
C	\$6,190.00 - \$7,785.00	2	Staff Attorney III	\$6,706 - \$8,520	2	
			Counsel I	\$7,372 - \$9,369	2	\$1,584
D	\$6,968.00 - \$8,938.00	4	Counsel II	\$8,488 - \$11,326	4	\$2,388
Attorney III	\$8,434.00 - \$10,820.00	6	Counsel III	\$9,605 - \$12,819	6	\$1,999
Attorney IV	\$9,316.00 - \$11,962.00	10				
Attorney V	\$9,841.00 - \$12,560.00	13	Senior Habeas Counsel	\$10,593 - \$14,134	6	\$1,574

The foregoing chart shows that the salaries of attorneys at HCRC outpace the salaries of attorneys in BU2 at every level. The difference in salaries is as much as 20% at some levels, and at the top of the scale, where most attorneys spend the bulk of their career, the difference is 12.5%.

Because these large salary differentials exist currently, implementation of the amendments to section 68664, subdivision (e) requires, initially, a determination of whether the salaries of HCRC attorneys must decrease, or whether the salaries of OSPD attorneys must increase.

IV. PRINCIPLES OF STATUTORY CONSTRUCTION

Because section 68664, subdivision (e) does not specify the direction of the change required to equalize the disparate salaries, this Court must resort to statutory construction.

The fundamental task of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. In order to determine this intent, we begin by examining the language of the statute.

(*People v. Cruz* (1996) 13 Cal. 4th 764, 774–75, internal citations and quotations omitted.) Additionally,

Where the words of a voter initiative are at least arguably ambiguous, we may look to various canons of statutory construction, compare the provision to the construction given other similar statutes, and examine ballot materials as aids to ascertaining the intent of the electorate.

(*Nakamura v. Superior Court* (2000) 83 Cal. App. 4th 825, 834.) The ballot analyses and arguments are relevant in ascertaining the voters' intent. (*People v. Birkett* (1999) 21 Cal.4th 226,243.) In striving to ascertain legislative intent, courts “are required to construe statutes to avoid absurd consequences.” (*Choate v. Celite Corp.* (2013) 215 Cal. App. 4th 1460, 1465.)

V. THE INTENT OF THE VOTERS

Section 1 of Proposition 66 identified the new law as the Death Penalty Reform and Savings Act of 2016. Thus, the voters had two apparent goals: reform and savings. While the bulk of other parts of Proposition 66 seek to reform procedures for capital case litigation, the ballot argument in favor of Proposition 66 identified the primary source of savings: “Prop. 66 saves taxpayers money, because heinous criminals will no longer be sitting on death row at taxpayer expense for 30+ years.” (Argument in Favor of Proposition 66,

<http://voterguide.sos.ca.gov/en/propositions/66/arguments-rebuttals.htm>.)

In addition, that same argument advised, “Proposition 66 was written to speed up the death penalty appeals system while ensuring that no innocent person is ever executed.” Thus, the voters made it clear that by speeding up executions, millions of dollars would be saved on incarceration costs for death row inmates.

The expedited processing of capital cases is accomplished through a number of reforms, including:

- Setting a deadline for the completion of the direct appeal (Pen. Code § 190.6, subd. (d));
- Expediting appointment of counsel in capital cases (Pen. Code § 1239.1);
- Setting a deadline of one year within which to file a habeas corpus petition (Pen. Code § 1509, subd. (c));
- Setting a deadline of one year for the court to resolve the petition (Pen. Code § 1509, subd. (f));
- Giving priority to appeals of denials of successive petitions over all other matters (Pen. Code § 1509.1, subd. (c));
- Exempting method of execution protocols from the Administrative Procedure Act (Pen. Code § 3604.1).

Obviously, these reforms will make the litigation of capital cases much more difficult than it already is. By imposing deadlines on both the filing and resolution of direct appeals and habeas petitions, the very labor-intensive work of reviewing the record and investigating grounds for collateral attack of a judgment will have to be compressed into very tight timeframes. As noted in section 2 of the proposition – the findings and declarations section – “Right now, capital defendants wait five years or more for appointment of their appellate lawyer.” As explained in the ballot argument in favor of Proposition 66, “[e]very murderer sentenced to death will have their special appeals lawyer assigned immediately” and “[a]ll state appeals should be limited to 5 years.” (Argument in Favor of Proposition 66, *supra*.)

Thus, the workload of the attorneys at OSPD who work primarily on direct appeals in capital cases will increase significantly. They will have to complete the briefs years earlier than they do under the current system.

Likewise, the workload of attorneys at HCRC will be similarly increased, as they will have to complete all of the investigatory work necessary to the filing of an initial petition years earlier than is currently the practice. The voters also recognized that one of the keys to expediting the processing of capital cases was that “[t]he pool of available lawyers to handle these appeals will be expanded.” (Argument in Favor of Proposition 66, *supra*.) It was argued that “these reforms will save California taxpayers over \$30,000,000 annually, according to former California Finance Director Mike Genest, while making our death penalty system work again.” (*Ibid.*)

VI. THE AMBIGUITY IN SECTION 68664 SHOULD BE RESOLVED BY INCREASING, NOT DECREASING THE SALARIES OF ATTORNEYS

In order for Proposition 66 to be effective, and to carry out the will of the voters, it should be obvious that the State will need to recruit and retain talented attorneys at the OSPD to comply with the new more burdensome deadlines in capital direct appeals. It should also be obvious that talented attorneys will be needed at HCRC to meet the increased demand of habeas cases. Proposition 66 recognizes that one problem with the current system is the small pool of lawyers willing and able to handle capital cases. Proposition 66 also recognizes that the functions of HCRC include providing advice to appointed counsel in habeas proceedings and developing a brief bank of pleadings on significant recurring issues. (See Pen. Code § 68661, subds. (g) and (h).)

Given all of the increased duties and shorter deadlines that attorneys at HCRC and OSPD will have in the event Proposition 66 is upheld, it would be completely counterproductive to decrease the salaries of the attorneys at HCRC to match the current low salaries of the attorneys at OSPD. Such a move will only lead to *fewer* attorneys willing to perform the work. And a reduced pool of attorneys who are less able to not only manage their own cases but also less able to provide effective assistance to the private appointed counsel on other cases will lead to slower processing of cases, not faster.

To effectuate the intent of the voters, it is necessary to increase the salaries of attorneys at OSPD so that they are equal with those of comparable attorneys at HCRC. Only in this manner can both entities hope to attract and retain the qualified attorneys necessary to carry out the extraordinary procedural reforms mandated by other parts of the proposition.

The Attorney General's Title and Summary of the proposition appeared to acknowledge the reality that implementing Proposition 66 would have some immediate costs, as it noted there would be "[n]ear-term increases in state court costs—potentially in the tens of millions of dollars annually—due to an acceleration of spending to address new time lines on legal challenges to death sentences." (Official Title and Summary, Proposition 66, <http://voterguide.sos.ca.gov/en/propositions/66/title-summary.htm>.) The ballot argument against Proposition 66 advised voters that "PROP. 66 COULD INCREASE TAXPAYER COSTS BY MILLIONS." (Argument Against Proposition 66, <http://voterguide.sos.ca.gov/en/propositions/66/arguments-rebuttals.htm>.)

This should not come as a surprise to anyone. It is difficult to expect attorneys (or any profession) to work harder, under tighter deadlines, and then pay them less for their efforts. Such a proposal runs counter to every aspect of the labor market, and indeed common sense. Without equalizing the pay in an upward direction, market forces will drive attorneys out of the OSPD. Affirmatively lowering the salaries at HCRC will have the same effect. And fewer attorneys means the will of the voters will be thwarted, not effectuated. Indeed, if this Court upholds Proposition 66, but allows the salaries to be equalized in a downward manner, it would be a paradoxical result because such an interpretation would frustrate rather than effectuate the intent of the voters. In keeping with the maxim that absurd results should be avoided, such a construction must be rejected. The only logical and reasonable interpretation of section 68664 subdivision (e) is to construe it to mean that the salaries of the attorneys at OSPD must be increased to match the salaries of comparable positions at HCRC.

VII. IF ATTORNEY SALARIES AT OSPD ARE INCREASED, THE SALARIES OF OTHER ATTORNEYS IN STATE BARGAINING UNIT 2 MUST ALSO BE INCREASED

Government Code section 19826, subdivision (a) requires the California Department of Human Resources to

establish and adjust salary ranges for each class of position in the state civil service subject to any merit limits contained in Article VII of the California Constitution. The salary range shall be based on the principle that like salaries shall be paid for comparable duties and responsibilities.

Courts have held that this section “imposes on DPA a mandatory duty to set salary ranges in parity with those for employees performing comparable duties and responsibilities.” (*California Assn. of Prof'l Scientists v. Dep't of Fin.* (2011) 195 Cal. App. 4th 1228, 1232.) While it is still up to the Legislature to appropriate the funding to pay for any increases that exceed existing appropriations, that fact does not change the rule that CalHR (formerly DPA) has an obligation to adjust the salaries.

In deciding whether a particular civil service position is comparable to other positions so as to invoke the like-pay-for-like-work mandate, the courts have previously accepted the notion that attorneys at the Department of Transportation do similar work to the attorneys at the Attorney General's Office. (*State Trial Attorneys' Assn. v. State of California* (1976) 63 Cal. App. 3d 298, 301.) By parity of reasoning, attorneys at the Attorney General's Office undeniably perform work comparable to the attorneys at OSPD, given that often times they are assigned to the exact same capital cases. Accordingly, it is obvious that section 19826 would require at a minimum that the salaries of DAGs would have to be raised to match the increased salaries at OSPD.

However, under the reasoning of the court in *State Trial Attorneys' Assn. v. State of California*, *supra*, it is likely that the salaries of all attorneys in Bargaining Unit 2 would have to be increased as well. In that case, the court accepted without question or discussion that the mere fact that attorneys in other state departments were making higher salary amounted to a violation of the like-pay-for-like-work principle. There was

no discussion of the requisite similarity in duties, case work, or practice areas of the attorneys at issue. In any event, the initial determination of the precise applicability of the like-pay-for-like-work salary adjustment will likely be done at a quasi-legislative hearing conducted by CalHR. (See, e.g. *Lowe v. California Res. Agency* (1991) 1 Cal. App. 4th 1140, 1151.)

CONCLUSION

For the foregoing reasons, Amicus respectfully requests this Court clarify that Government Code section 68664, subdivision (e) requires the salaries of the attorneys at OSPD be increased to match the salaries of comparable positions at HCRC, and that such increase requires similar salary adjustments for other attorneys in Bargaining Unit 2 pursuant to Government Code section 19826.

DATE

Patrick J. Whalen
Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the foregoing brief contains 3,702 words, as determined by the “word count” feature of commercial software.

Patrick J. Whalen

Date

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sacramento, California. I am over the age of eighteen (18) years and not a party to the above-entitled action. My business address is 1201 K Street, Suite 1960, Sacramento, CA 95814. On March 30, 2017, I served a true copy of the attached document entitled:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF

by placing true and correct copies thereof in sealed packages designated for priority, overnight delivery addressed as follows:

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

Executed on March 30, 2017, at Sacramento, California.

Patrick J. Whalen