No. _____

In The Supreme Court of the United States

SAN BERNARDINO COUNTY DISTRICT ATTORNEY;
SAN MATEO COUNTY DISTRICT ATTORNEY;
RIVERSIDE COUNTY DISTRICT ATTORNEY,

Petitioners,

v.

KEVIN COOPER; ALBERT GREENWOOD BROWN;
RONALD LEE DEERE; ROBERT G. FAIRBANK;
ANTHONY J. SULLY,

Respondents and Plaintiffs,

v.

GAVIN NEWSOM, Governor of California; KATHLEEN ALLISON, Secretary of the California Department of Corrections and Rehabilitation; RONALD BROOMFIELD, Warden of San Quentin State Prison,

Respondents and Defendants.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Capital Case

1. Whether the United States Court of Appeals for the Ninth Circuit improperly denied Petitioners intervention in death penalty litigation by deviating both from this Court's precedent and that of the circuit.

2. Whether a state governor may manipulate the federal courts in order to thwart imposition of state law indefinitely, both by other state constitutional officers and by any successor in the office of governor.

PARTIES TO THE PROCEEDING

Petitioners Jason Anderson, in his official capacity as District Attorney of San Bernardino County, California, Michael A. Hestrin, in his official capacity as District Attorney of Riverside County, California, and Stephen M. Wagstaffe, in his official capacity as District Attorney of San Mateo County, California, were the proposed intervenors in the District Court and proposed intervenors-appellants in the Court of Appeals.

Respondents Kevin Cooper, Albert Greenwood Brown, Ronald Lee Deere, Robert G. Fairbank, and Anthony J. Sully (all condemned California inmates) were plaintiffs in the District Court and plaintiffs-appellees in the Court of Appeals.

Respondent Gavin Newsom, in his official capacity as Governor of California, was a defendant in the District Court and defendant-appellee in the Court of Appeals. Kathleen Allison, in her official capacity as Secretary of the California Department of Corrections and Rehabilitation, is successor-in-interest to defendant Ronald Davis in the District Court and was a defendant-appellee in the Court of Appeals. Ronald Broomfield, in his official capacity as Warden of San Quentin State Prison, is successor-in-interest to Ron Davis, who was a defendant in the District Court and a defendant-appellee in the Court of Appeals.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

Cooper, et al. v. Newsom, et al. v. San Bernardino County District Attorney, et al., 26 F.4th 1104 (9th Cir.) (memorandum opinion denying rehearing en banc entered and dissenting opinions issued March 2, 2022, mandate entering judgment issued March 10, 2022).

Cooper, et al. v. Newsom, et al. v. San Bernardino County District Attorney, et al., 13 F.4th 857 (9th Cir.) (opinion issued and judgment entered September 16, 2021).

Morales v. Kernan, Nos. 06-cv-0219 and 06-cv-0926 (N.D. Cal.) (order denying intervention entered July 18, 2018).

The following proceedings are also directly related to this case:

In re Alexander, 859 Fed.Appx. 32 (9th Cir.) (memorandum opinion and petition dismissal entered September 16, 2021).

Morales v. Kernan, No. 06-cv-0219 and 06-cv-0926; 2017 WL 8785130 (N.D. Cal.) (order granting plaintiffs' intervention motions and stays of execution entered December 4, 2017).

Sully v. Ayers, 725 F.3d 1057 (9th Cir.), *cert. denied*, 572 U.S. 1151 (opinion issued and judgment entered August 6, 2013).

STATEMENT OF RELATED PROCEEDINGS – Continued

Deere v. Cullen, 718 F.3d 1124 (9th Cir.), *cert. denied*, 574 U.S. 835 (opinion issued and judgment entered June 3, 2013).

Morales v. Cate, No. 5-6-cv-219 and 5-6-cv-926; 2012 WL 5878383 (N.D. Cal.) (order granting plaintiffs' intervention motions and stays of execution, and denying intervention to District Attorney of Los Angeles, entered November 21, 2012).

Fairbank v. Ayers, 650 F.3d 1243 (9th Cir.), *cert. denied*, 565 U.S. 1276 (opinion issued and judgment entered August 10, 2011).

Fairbank v. Ayers, 632 F.3d 612 (9th Cir.) (opinion issued and judgment entered February 15, 2011).

Morales v. Cate, 757 F.Supp.2d 961 (N.D. Cal.) (denial of defendants' motion to dismiss entered December 10, 2010).

Morales v. Cate, 623 F.3d 828 (9th Cir.) (opinion issued and judgment entered September 28, 2010).

Morales v. Cate, Nos. 5-6-cv-219 and 5-6-cv-926; 2010 WL 3835655 (N.D. Cal.) (order granting Respondent-Plaintiff Brown stay of execution following remand, entered September 28, 2010).

Morales v. Cate, Nos. C 06 219 and C 06 926; 2010 WL 3751757 (N.D. Cal.) (order granting Respondent-Plaintiff Brown's intervention motion and conditionally denying stay of execution, entered September 24, 2010).

STATEMENT OF RELATED PROCEEDINGS – Continued

Deere v. Cullen, 713 F.Supp.2d 1011 (C.D. Cal.) (opinion issued and judgment entered May 11, 2010).

Cooper v. Brown, 565 F.3d. 581 (9th Cir.), *cert. denied*, 558 U.S. 1049 (opinion issued and judgment entered May 11, 2009).

Sully v. Ayers, No. C 92-00829 (N.D. Cal.) (opinion issued and judgment entered May 20, 2008).

Cooper v. Brown, 510 F.3d 870 (9th Cir.) (opinion issued and judgment entered December 4, 2007).

Morales v. Tilton, Nos. 5-6-cv-219, 5-6-cv-926 and 5-6-cv-1793; 2007 WL 4180796 (N.D. Cal.) (order re: this Court's grant of certiorari in *Baze v. Rees*, 551 U.S. 1192 (2007), entered September 27, 2007).

Brown v. Ornoski, 503 F.3d 1006 (9th Cir.), *cert. denied*, 555 U.S. 837 (opinion issued and judgment entered September 19, 2007).

Morales v. Tilton, 465 F.Supp.2d 972 (N.D. Cal.) (opinion issued and judgment entered December 16, 2006).

Morales v. Ornoski, 439 F.3d 529 (9th Cir.) (opinion issued and judgment entered February 19, 2006).

Morales v. Hickman, 438 F.3d 926 (9th Cir.), *cert. denied*, 546 U.S. 1163 (opinion issued and judgment entered February 19, 2006).

STATEMENT OF RELATED PROCEEDINGS – Continued

Morales v. Hickman, 415 F. Supp.2d 1037 (N.D. Cal.) (opinion issued and judgment entered February 14, 2006).

Morales v. Woodford, 388 F.3d 1159 (9th Cir.), *cert. denied*, 546 U.S. 935 (opinion issued and judgment entered October 21, 2004).

Deere v. Woodford, 339 F.3d 1084 (9th Cir.) (opinion issued and judgment entered August 13, 2003, amended October 2, 2003).

Morales v. Woodford, 336 F.3d 1136 (9th Cir.) (opinion issued and judgment entered July 28, 2003).

Cooper v. Calderon, 255 F.3d 1104 (9th Cir.), *cert. denied*, 537 U.S. 861 (opinion issued and judgment entered July 9, 2001).

Cooper v. Calderon, 246 F.3d 673 (9th Cir) (opinion issued and judgment entered December 15, 2000).

People v. Fairbank, 16 Cal.4th 1223, *cert. denied*. 525 U.S. 861 (opinion issued and judgment entered December 22, 1997, modified February 18, 1998).

Morales v. Calderon, 85 F.3d 1387 (9th Cir.), *cert. denied*, 519 U.S. 1001 (opinion issued and judgment entered June 4, 1996).

Deere v. Calderon, 890 F.Supp. 893 (C.D. Cal.) (opinion issued and judgment entered July 28, 1995).

STATEMENT OF RELATED PROCEEDINGS – Continued

People v. Brown, 6 Cal.4th 322, *cert. denied*, 513 U.S. 845 (opinion issued and judgment entered December 2, 1993).

People v. Sully, 53 Cal.3d 1195, *cert. denied*, 503 U.S. 944 (opinion issued and judgment entered July 11, 1991).

People v. Cooper, 53 Cal.3d 771, *cert. denied*, 502 U.S. 1016 (opinion issued and judgment entered June 26, 1991).

People v. Deere, 53 Cal.3d 705, *cert. denied*, 502 U.S. 1065 (opinion issued and judgment entered May 2, 1991).

People v. Morales, 48 Cal.3d 527, *cert. denied*, 493 U.S. 984 (opinion issued and judgment entered April 6, 1989, modified June 1, 1989).

People v. Brown, 45 Cal.3d 1247 (opinion issued and judgment entered July 11, 1988).

California v. Brown, 479 U.S. 538 (opinion issued and judgment entered January 27, 1987).

California v. Brown, 475 U.S. 1301 (opinion issued and judgment entered March 27, 1986).

People v. Deere, 41 Cal.3d 353 (opinion issued and judgment entered December 31, 1985).

People v. Brown, 40 Cal.3d 512 (opinion issued and judgment entered December 5, 1985).

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BALLOT INITIATIVE

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 13 F.4th 857 and is reproduced at App. 1. The memorandum opinion denying rehearing en banc and dissenting opinions is reported at 26 F.4th 1104 and is reproduced at App. 54. The District Court's Order Denying Motions to Intervene is not published in the Federal Supplement and is not available through Westlaw. It is reproduced at App. 37.

JURISDICTION

The Court of Appeals issued its judgment on September 16, 2021. That judgment became effective on March 10, 2022, pursuant to Mandate issued by the Court of Appeals following its memorandum order denying rehearing en banc on March 2, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES

This petition addresses questions of intervention pursuant to Fed. R. Civ. P. 24, which states:

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) ***In General.*** On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) ***By a Government Officer or Agency.*** On timely motion, the court may permit a federal or state government officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administrated by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

> **(3)** ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.
>
> **(c) Notice and Pleading Required.** A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

All other state constitutional, initiative and statutory provisions pertinent to this Petition are reproduced at App. 153-218.

INTRODUCTION

Lifting the cloak of the procedural question of intervention in this case reveals a struggle over capital punishment in California and the use of the federal courts as a mechanism to frustrate California law. Noting that a state has "a legitimate interest in the continued enforceability of its own statutes," this Court recently recognized that states may empower "multiple officials to defend its sovereign interests in federal court." *Cameron v. EMW Women's Surgical Center*, 595 U.S. __, 142 S.Ct. 1002, 1011 (2022) (citing *Maine v. Taylor*, 477 U.S. 131, 137 (1986) and *Virginia House of Delegates v. Bethune-Hill*, 587 U.S. __, 139 S.Ct. 1945, 1951-1952 (2019)). It stands to reason, then, that

prosecutors, specifically empowered by the California electorate to enforce the state's capital punishment structure, should be permitted federal intervention to address the federal litigation knot deliberately crafted by the state's Governor and Attorney General to prevent the enforcement of California law.

Respondents-Plaintiffs are the condemned inmates who collectively murdered 15 victims in San Bernardino, Riverside and San Mateo Counties.[1] They, along with more than 20 other death row inmates, pursued an action under 42 U.S.C. § 1983 dating back to 2006, when death row inmate Michael Morales filed suit with a claim that California's then-existing death penalty, three-drug protocol created an unnecessary risk of pain and suffering. Ultimately, each

[1] Although the questions presented by this petition are not criminal in nature, Petitioners would be remiss if we did not include mention of the victims, whose names we do not forget and who compel us to seek relief from this Court. Respondent Brown raped and murdered 15 year-old Susan Jordan in 1980. *Brown v. Ornoski*, 503 F.3d 1006, 1008 (9th Cir. 2007). Respondent Cooper murdered Douglas and Peggy Ryen, their 10 year-old daughter Jessica Ryen, and 11 year-old neighbor Christopher Hughes, and attempted to murder the Ryens' eight year-old son Joshua, in 1983. *People v. Cooper*, 53 Cal.3d 771, 794 (1991). Respondent Deere murdered Don Davis and his two children, seven year-old Michelle and two year-old Melissa, in 1982. *Deere v. Cullen*, 718 F.3d 1124, 1125-1127 (9th Cir. 2013). Respondent Fairbank tortured and murdered Wendy Cheek in 1985. *People v. Fairbank*, 16 Cal.4th 1223, 1232-1233 (1997). Respondent Sully murdered Gloria Fravel, Brenda Oakden, Michael Thomas, Phyllis Melendrez, Barbara Searcy and Kathryn Barrett in 1982. *People v. Sully*, 53 Cal.3d 1195, 1210-1215 (1991). Petitioners regret that procedural requirements limit mention of the victims to a footnote. They deserve more.

successively intervening condemned inmate obtained a stay of his death sentence as part of his participation in the action.

In November 2016, the People of the State of California passed Proposition 66, which was entitled *The Death Penalty Reform and Savings Act of 2016*. *Briggs v. Brown*, 3 Cal.5th 808 (2017). Going into effect in 2017 following the Supreme Court of California's review of the initiative in *Briggs*, Proposition 66 revamped the structure of the death penalty in the state in order to make the procedure more efficient and effective, and paving the way for a single-drug protocol.

Proposition 66 also significantly changed the procedure and the role of the county district attorneys in execution of death sentences. For example, Proposition 66 redirected the origination of state habeas corpus proceedings from the state Supreme Court to the trial court level. App. 200-202 (Cal. Penal Code § 1509). But the key to understanding the role of Petitioners' interest in the litigation below is best demonstrated in Proposition 66's creation of Cal. Penal Code § 3604.1(c), in which the district attorneys are given explicit power to enforce the mechanisms of execution when other branches of the executive fail in their mandated duties. App. 209-210.

With the new authority granted to the district attorneys by the electorate, combined with Respondents-Defendants' passive approach to the impact of Proposition 66 and *Glossip v. Gross*, 576 U.S. 863 (2015) on the litigation, Petitioners sought intervention with an

aim to seeking outright dismissal of the case based on Proposition 66's mooting of the issues. Although the District Court recognized that Petitioners possess a significant interest in the litigation, App. at 42-48 (*Morales v. Kernan*, Nos. 06-cv-0219 and 06-cv-0926 (N.D. Cal. July 18, 2018) (order denying motions to intervene)), and acknowledged Petitioners' timely motion for intervention, App. at 42, it concluded that Respondents-Defendants adequately represented the interests of the People of the State of California in the proceedings.

Following Petitioners' timely appeal to the Ninth Circuit, California Governor Gavin Newsom issued a so-called moratorium on capital punishment in the state despite Proposition 66's clear mandate on its continued use. App. at 2 (*Cooper v. Newsom*, 13 F.4th 857, 861 (9th Cir. 2021)). With the appeal still pending, Respondents-Plaintiffs and Respondents-Defendants ostensibly stipulated to dismissal of the underlying District Court case, but did so conditionally in a way that ensured the District Court's authority could be used to perpetually thwart imposition of sentence on any of the involved inmates, or any other condemned inmate in California. App. at 2-3.

In a 2-1 decision, the Court of Appeals for the Ninth Circuit affirmed the District Court's ruling while simultaneously denying two motions to dismiss the appeal based on the Governor's actions. App. at 6-11, 22. However, a judge of the Court of Appeals brought a sua sponte motion for rehearing of the case en banc. App. at 56 (*Cooper v. Newsom*, 26 F.4th 1104,

1105 (9th Cir. 2022)). Although the Ninth Circuit denied rehearing en banc, six Circuit Judges dissented, with three authoring dissenting opinions. App. at 67-89. Circuit Judge Bumatay acknowledged Petitioners' significant interest in the underlying litigation and noted that the Ninth Circuit's opinion both undermined the will of the People of the State of California and cast aside Circuit precedent to create a sliding scale for intervention based on the subject matter of the suit. App. at 67-81. Circuit Judge Callahan wrote to emphasize the negative impact of the case on the victims and families of victims of some of California's most brutal murders, and the manner in which the opinion negated the electorate's enacted laws. App. at 81-86. Circuit Judge VanDyke, who authored the dissent in the case's original opinion, wrote to focus on Petitioners' significant interest in capital punishment in the state and to repeat an important question he asked in his original dissent: if Petitioners are not permitted to give voice to the victims of crime and their families in the most egregious of cases, then who will? App. at 87-89.

This Court's recent teachings provide clear guidance that states may empower more than one member of the executive to advocate and defend state law. Petitioners respectfully submit that the Ninth Circuit's controlling opinion in this case significantly undermines that concept. Further, the Court of Appeals' decision seriously muddies the waters of intervention, eroding defined bases for intervention that puts that court at odds with itself.

Moreover, and perhaps most significantly, the Court of Appeals' conclusion permits a sitting state governor to unilaterally impede the imposition of the electorate's state law through the power of the District Court. Through a threat of re-activating the litigation under certain conditions, and indeed greatly expanding its influence to every other death-row inmate, California's Governor and his executive subordinates effectively wield the District Court's power beyond their own tenures, tying the hands of their successors-in-interest indefinitely.

This Court should grant review to resolve the conflict arising out of the Ninth Circuit's holding and to prevent misuse of the federal courts as a means of negating state law.

STATEMENT

I. The Governor of California and Respondents-Defendants, Represented by the California Attorney General, Fail to Act Following Passage of Proposition 66.

Condemned California inmate Michael Morales[2] initiated the underlying District Court litigation in 2006 with the filing of a suit against the predecessors-in-interest of Respondents-Defendants under 42 U.S.C. § 1983. *Morales v. Tilton*, 465 F.Supp.2d 972 (N.D. Cal. 2006). Mr. Morales contended that the California death

[2] Mr. Morales has not been a party to the appeal of Petitioners' intervention denial.

penalty protocol of 16 years ago held an unnecessary risk of causing him undue suffering in violation of the Eighth Amendment. *Id*. at 974. California's execution protocol in effect at that time consisted of three drugs in sequence: a barbiturate sedative to render the condemned unconscious, a paralytic agent, and potassium chloride to induce cardiac arrest. *Morales v. Hickman*, 415 F.Supp.2d 1037, 1039 (N.D. Cal. 2006). At the time, this three-drug approach was the most common method of execution employed in most other states. *See Baze v. Rees*, 553 U.S. 35, 44 (2008).

By 2016 more than twenty other death row inmates had successfully intervened in the action and obtained stays of execution, including all Respondents-Plaintiffs here. App. at 2-4 (*Cooper v. Newsom*, 13 F.4th 857, 860-861 (9th Cir. 2021)). Despite this Court's ruling in 2008 that a three-drug approach similar to that described above did not render the death penalty constitutionally infirm, *Baze*, 553 U.S. at 54-56, nothing in either this case's procedural history or related ancillary litigation suggested that it would draw to a close.

In November 2016 the electorate of California passed Proposition 66. *Briggs v. Brown*, 3 Cal.5th 808, 822 (2017). The initiative sought to address "waste, delays and inefficiencies" in California's death penalty law. App. 194 (Proposition 66, *The Death Penalty Reform and Savings Act of 2016*). It noted that, "[f]amilies of murder victims should not have to wait decades for justice. These delays further victimize the families. . . ." *Id*. The proposition included several important changes to the structure of California's death

penalty, including expedited review of capital cases, App. at 199-200 (Cal. Penal Code § 1239.1), origination of state habeas corpus proceedings in the trial court that rendered the judgment, App. at 200-202 (Cal. Penal Code § 1509), charging the California Department of Corrections and Rehabilitation (CDCR) with the affirmative duty of maintaining the ability to execute death judgments, App. at 208 (Cal. Penal Code § 3604(e)), and exempting standards, procedures or regulations promulgated to effect the death penalty from California's Administrative Procedures Act, App. at 209 (Cal. Penal Code § 3604.1(a)). Additionally, the proposition granted new authority to district attorneys involved in capital cases by providing them with the ability to obtain court orders compelling CDCR to fulfill its statutory duties in the event CDCR has failed to do so on its own. App. at 209-210 (Cal. Penal Code § 3604.1(c)). Proposition 66 went into effect on October 25, 2017, when the Supreme Court of California rejected several challenges to its imposition. *Briggs*, 3 Cal.5th at 822.

California's Office of Administrative law filed CDCR's revised regulations for implementation of the death penalty using a single-drug protocol or lethal gas on March 1, 2018. App. at 39 (*Morales v. Kernan*, Nos. 06-cv-0219 and 06-cv-0926 (N.D. Cal. July 18, 2018) (order denying motions to intervene)). While the California Attorney General (Attorney General) did initially raise arguments, on behalf of Respondents-Defendants' predecessors-in-interest, that Respondent-Plaintiffs could not meet the threshold showing required by this Court in *Glossip v. Gross*, 576 U.S. 863

(2015) or that the Prison Litigation Reform Act (18 U.S.C. § 3626) (PLRA) was inconsistent with the stays of execution in the case, the Attorney General made no effort to seek review of the District Court's summary denial of the *Glossip* contention or unresponsiveness to the PLRA argument. The action and the stays of execution continued.

II. Petitioners Move to Intervene.

In June and July 2018, Petitioners moved the District Court for intervention under Federal Rule of Civil Procedure 24.[3] App. at 5 (*Cooper v. Newsom*, 13 F.4th at 861-862). Petitioners sought both intervention by right under Rule 24(a) and permissive intervention under Rule 24(b). *Id*. The District Court denied intervention on both grounds. It ruled Petitioners were not the sole holders of the protectable interests at stake under the requirements of Rule 24(a), since the Governor of the state is the supreme executive of the state and is tasked with seeing "that the law is faithfully executed," App. at 163 (Cal. Const. Art. V, § 1), and that Respondents-Defendants adequately represented the state's interests in the proceeding. App. at 46-50.[4] The

[3] Petitioner District Attorney of San Bernardino County moved for intervention on June 26, 2018. Petitioners District Attorney of Riverside County and District Attorney of San Mateo County moved for intervention on July 5, 2018. Respondents-Defendants opposed Petitioners' motions.

[4] The District Court did recognize that, although the Attorney General is nominally California's chief law officer (citing Cal. Const. Art. V, § 13, App. at 164), the Attorney General served as counsel to Respondents-Defendants, not as a party to the action.

District Court denied permissive intervention under Rule 24(b), ruling that allowing Petitioners to join the case "would exacerbate the delay" in the then-12 year-old case. App. at 50-52.

Petitioners timely appealed.

III. Appeal and Motions to Dismiss Appeal Based on Governor's Attempts to End the Death Penalty in California.

Two actions taken by Respondents-Defendants led the Attorney General to bring two separate motions to dismiss Petitioners' appeal. First, Respondent-Defendant Governor Gavin Newsom issue a "moratorium" on California's death penalty, and ordered his executive subordinate, Respondent-Defendant Secretary for CDCR, to violate Cal. Penal Code § 3604.1(a) by withdrawing the execution protocol and closing the execution chamber at San Quentin State Prison. App. at 2 (*Cooper v. Newsom*, 13 F.4th at 861).[5] Second, Respondents-Defendants and Respondents-Plaintiffs stipulated to a "dismissal" of the District Court action, albeit with conditions that would revive the suit. App. at 2-3 (*Cooper v. Newsom*, 13 F.4th at 861). Respondents-Defendants argued either or both actions rendered Petitioners' appeal moot. *Id*.

[5] Petitioners have argued that this creates an untenable conflict of interest for the Attorney General as counsel, since one of his clients in this proceeding has ordered another client to violate California law.

The Court of Appeals disagreed and denied both motions. As to the first motion, the court held that there was nothing about the "moratorium" or withdrawal of the protocol that prevented reversal of the order or a new protocol, either from the current administration or a succeeding one. App. at 7-8 (*Cooper v. Newsom*, 13 F.4th at 862-863). Thus, reasoned the majority, Respondents-Defendants failed to meet the burden of showing that "the challenged conduct cannot be reasonably expected to start up again," as required by *Bell v. City of Boise*, 709 F.3d 890, 898 (9th Cir. 2013).

As to the second motion, the Court of Appeals noted that the "dismissal" to which all Respondents agreed provided for three conditions that would reinstate the District Court action should any of them occur. App. at 9 (*Cooper v. Newsom*, 13 F.4th at 863-864). Those conditions called for reinstatement if: "(1) the Executive Order becomes inoperative, or is no longer in effect, or is withdrawn; or (2) Defendants have adopted an execution protocol; or (3) a District Attorney, court or other state representative notices or moves for a date to set an execution for any death sentenced prisoner." *Id*.

As the majority recognized, with the imposition of the conditions, "[t]he stipulated voluntary dismissal thus effectively functions as a stay." App. at 10 (*Cooper v. Newsom*, 13 F.4th at 864). With the suit subject to

revival, Petitioners appeal was not rendered moot.[6] *Id*. at 9-11.

Turning to the merits of the appeal, the *Cooper* two-judge majority sided with Respondents. Ruling against Petitioners, the majority concluded that Petitioners "have no authority to choose the method by which California will execute condemned inmates." App. at 15 (*Cooper v. Newsom*, 13 F.4th at 866). As "[t]he District Attorneys also do not have authority to act as attorneys representing the Secretary of the CDCR or the other defendants in the case," Petitioners lack the ability to defend challenged execution protocols. *Id*. at 15-17. Although "the litigation in this case incidentally affects the manner in which the District Attorneys are able to perform their assigned functions," since "[t]he *Morales* litigation over the constitutionality of California's proposed method of execution has effectively suspended the death penalty in California . . . ," that interest, said the court, is "several degrees removed from the issues that are the backbone of the litigation." *Id*. at 17-18 (citing *City of Emeryville v. Robinson*, 621 F.3d 1251, 1259 (9th Cir. 2010)).

The statutory provision created by Proposition 66, Cal. Penal Code § 3604.1(c), which gives district attorneys the ability to enforce the duties imposed upon CDCR in death cases, was insufficient to provide an interest specific enough to the litigation to permit

[6] Circuit Judge Forrest concurred in the judgment but would have held that Petitioners' appeal was mooted by the Governor's actions. App. at 22-23 (*Cooper v. Newsom*, 13 F.4th at 869-870 (Forrest, C.J., concurring).

intervention by right, wrote the majority. App. at 16-17. Having concluded that, despite the complete roadblock to the death penalty created by the District Court case, Petitioners lacked a significant protectable interest in the litigation. The majority declined to address the adequacy of the representation of interests by the Attorney General and Respondents-Defendants. App. at 13. Petitioners' contention that the Governor's actions during the pendency of the appeal demonstrated the insufficiency of representation of the state's interests therefore went unaddressed.

Turning to permissive intervention, the Court of Appeals found that the District Court did not abuse its discretion by pointing to the lack of district attorney involvement in promulgating execution protocols (should any exist), and the potential delay created by permitting Petitioners' intervention. App. at 21 (*Cooper v. Newsom*, 13 F.4th at 868-869).

In dissent, Circuit Judge VanDyke recognized Petitioners' goal of enforcing Proposition 66's retention of California's death penalty, and the Attorney General's role in defending the Governor's executive orders contravening state law. App. 25-26 (*Cooper v. Newsom*, 13 F.4th at 870 (Vandyke, C.J., dissenting)). Recognizing that Petitioners' position was far more than "mere differences in litigation strategy," the dissent noted that "[t]he Attorney General's entire litigation strategy for the past few years has operated to block the District Attorneys' involvement in the case." App. at 27-28. And this, in efficient summation, "ensures that . . . no executions will occur." App. at 28.

The statutory interest of Petitioners through Cal. Penal Code § 3604.1(c), created by Proposition 66, is quite clear, wrote Circuit Judge VanDyke. Concluding that the litigation only incidentally impacts Petitioners drew succinct analogy: "That's a little like saying that a statute only 'incidentally affects' car dealers because all it does is prevent them from selling cars." App. at 33. The dissent would have held that Petitioners met the four-part test for intervention, and that permitting that intervention would help effectuate the will of the California electorate as evidenced by Proposition 66. App. at 36.

IV. Call for Vote on Rehearing En Banc and Dissenting Opinions from Denial.

Following the Ninth Circuit's opinion in the case, a judge of that court sua sponte called for a vote to rehear the case en banc. App. at 56 (*Cooper v. Newsom*, 26 F.4th 1104, 1105 (9th Cir. 2022)). Although that court issued a memorandum order indicating, "[t]he matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration," six circuit judges dissented with three writing opinions.[7]

Circuit Judge Bumatay, joined by all six dissenting judges, wrote that the majority panel decision both

[7] Circuit Judge Fletcher, who authored the original opinion, and Circuit Judge Forrest, who concurred in the judgment in the original opinion, issued a concurrence with the memorandum order. Aside from their two votes, Petitioners are unaware of how many votes were cast opposing rehearing versus the number of abstentions.

"cast aside the will of the people [and] seriously mangled [Ninth Circuit] Rule 24 caselaw." App. at 69 (*Cooper v. Newsom*, 26 F.4th 1104, 1110 (Bumatay, C.J., dissenting)). The court has a duty to respect the will of the People of the State of California, he wrote. *Id*. And the "rather low bar" for that which constitutes a "significantly protectable interest" should not be manipulated because the underlying subject matter of the case deals with the death penalty. App. at 69-70.

As with any question of intervention by right under Federal Rule of Procedure 24, Circuit Judge Bumatay continued, the motion must be timely, the applicant must have a significantly protectable interest, the applicant must be situated so that the action in question must impair or impede the interest, and the applicant's interest must be inadequately represented by the parties. App. at 70-71 (citing *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc)). The first prong was the sole basis for the denial and the circuit has liberally construed in favor of intervention. App. at 71. With the panel's holding, Circuit Judge Bumatay wrote, the opinion misconstrued both parts of that prong: (1) asserting a legally protected interest; and (2) that there "is a relationship between the legally protected interest and the plaintiff's claims." *Id*. (internal quotes and brackets omitted). Further, "[i]t is enough that 'the interest is protected by *some* law.'" App. at 72 (citing *Wilderness Society*, emphasis added by quote). The dissent then listed example Ninth Circuit cases where intervention has been permitted. It then indicated that the ruling that

Proposition 66 did not provide such an interest flies in the face of precedent. App. at 73-74.

By changing the standard based on the subject matter of the underlying litigation, concluded Circuit Judge Bumatay, the opinion has confused the standard in the circuit. App. at 81. That confusion may impact other important areas of civil litigation, such as civil rights and environmental rights. App. at 70.

In the second dissent, Circuit Judge Callahan, joined by Circuit Judges Bumatay and VanDyke, emphasized the impact of the panel ruling on voter-enacted law and crime victims and their families. App. at 81-82 (*Cooper v. Newsom*, 26 F.4th at 1116-1117 (Callahan, C.J., dissenting)). California's Governor unilaterally undermined the people of the state and structured the dismissal in this case to resurrect the action (and its stays) should any efforts be made to re-employ the death penalty. App. at 82.

> Notably absent from this litigation is any party interested in pursuing the California electorate's clearly stated objectives. Yet the panel majority rejected the district attorneys' attempt to do just that, ostensibly on the ground that the district attorneys have no legal interest in enforcing the death penalty. This position is directly contradicted by the terms of Proposition 66, which *expressly* provides California district attorneys with the right to seek to compel the CDCR to carry out the death penalty.

App. at 83 (emphasis in original, citations omitted). The panel decision frustrated California's attempts to address death penalty issues, and silenced victims as a result. App. at 86.

Circuit Judge VanDyke authored the third dissent, joined by Circuit Judges Callahan, Ikuta and Bumatay. App. at 87 (*Cooper v. Newsom*, 26 F.4th at 1118 (VanDyke, C.J., dissenting)). In addition to his original dissenting position, Circuit Judge VanDyke wrote here to point out that the different standard used in this case from all other intervention cases reflects poorly on the court and undermines public confidence in the court. *Id.* A consistent standard is needed, he argued, in order for an understandable and equitable threshold to be applied. *Id*. Past circuit "watering-down" of the intervention requirements made the panel decision here even "less defensible." App. at 88.

REASONS FOR GRANTING THE PETITION

This Court's review is needed here for two compelling reasons. The first is that the Court of Appeals' panel decision deviated from known standards of intervention when addressing a significant protectable interest, making comparison with other circuits difficult. Moreover, the panel decision cannot be reconciled with this Court's recent holding in *Cameron v. EMW Women's Surgical Center*, 595 U.S. __, 142 S.Ct. 1002, 1011 (2022), which acknowledged that a state

executive may intervene in federal litigation where another state executive declines to defend that state's law.

The second reason this Court should grant review concerns the more troubling misuse of the federal courts. Although a state's supreme executive has extraordinary powers, should that power include an agreement with condemned inmates that prevents imposition of the law as voted by the state electorate? Further, does that manipulation of a federal case allow a governor to tie the hands of other state constitutional officers to prevent them from fulfilling their duties, as well as empowering the governor to create significant and deliberate obstacles to the imposition of state law for any successive governor?

I. This Court Should Grant Review to Settle the Proper Standard for Intervention.

The test for intervention under Federal Rule of Civil Procedure 24(a)(2) in the Ninth Circuit has been expressed in four parts.

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be

> inadequately represented by the parties to the action.

Wilderness Soc. v. U.S. Forest Service, 630 F.3d 1173, 1177 (9th Cir. 2011). Further, the Ninth Circuit has historically favored intervention. "Rule 24 traditionally receives liberal construction in favor of applicants for intervention." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). This provides a practical approach where the court may "prevent or simplify future litigation involving related issues; at the same time [allowing] an additional interested party to express its views before the court." *United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002).

Here, the Court of Appeals focused almost exclusively on the second prong of the test, presumably accepting the District Court's finding that Petitioners moved to intervene in a timely fashion. "In light of the recent developments in this protracted litigation, the motions to intervene are timely." App. at 42 (*Morales v. Kernan*, Nos. 06-cv-0219 and 06-cv-0926 (N.D. Cal. July 18, 2018) (order denying motions to intervene)). More specifically, the question of whether Petitioners possess a "significantly protectable" interest consumed the bulk of the analysis in the court below, with the panel opinion summarily concluding that there was no impairment of the interest under the third prong because it rejected the existence of the interest itself, despite recognizing that the underlying litigation "has effectively suspended the death penalty in California and has thereby prevented the District Attorneys from moving in the Superior Court to set execution dates."

App. at 17 (*Cooper v. Newsom*, 13 F.4th at 867). The panel explicitly failed to address the fourth prong, finding it was unnecessary. App. at 13 (*Cooper v. Newsom*, 13 F.4th at 865).

Prior to this case, the presence of a "significantly protectable" interest has not required a consulting detective's services. As Circuit Judge Bumatay pointed out, the court simply has required the presence of an interest "protected by *some* law." App. at 72 (*Cooper v. Newsom*, 26 F.4th at 1112 (Bumatay, C.J., dissenting from denial of rehearing en banc) (citing *Wilderness Soc.*, 630 F.3d at 1179, emphasis in quote)). He then provided numerous examples where a significantly protectable interest had been found: *Washington State Bldg. and Const. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 629-630 (9th Cir. 1982) (intervention granted to an environmental group to defend a law barring the entry of radioactive waste into the state, where the group had sponsored the initiative creating the law); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-528 (9th Cir. 1983) (National Audubon Society's interest qualified to intervene in litigation concerning the creation of a conservation area); *State of Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980) (intervention of National Organization of Women proper in suit addressing ratification of the Equal Rights Amendment); and *Idaho Farm Bureau v. Babbit*, 58 F.3d 1392, 1398 (9th Cir. 1995) (intervention of an environmental group appropriate in suit involving endangered snail species). App. at 73 (*Cooper v. Newsom*, 26 F.4th at 1112).

None of the intervenors in the example cases relied upon statutory authority for the basis of intervention, instead relying upon specific interest in the subject matter of the litigation. Yet here Petitioners not only point to a specific statute, Cal. Penal Code § 3604.1(c), explicitly granting authority to compel Respondent-Defendant Secretary of CDCR to comply with state law, but do so with a statute that was created by mandate of the electorate. Clearly the bar has moved for this litigation, where the People of California actively contemplated conflict between one Respondent-Defendant and Petitioners, granting Petitioners superior authority over the matter.

The panel opinion in *Cooper* conflates Petitioners' interest by focusing on CDCR's individual role in promulgating an execution protocol. *See* App. at 170 (Cal. Penal Code § 3604.1(c)). This does not mean Petitioners have *no* interest the litigation simply because the interest in seeing that punishment is carried out is different from the role of CDCR.[8] Where there are substantial arguments to be made to obtain dismissal of the District Court suit outright, without the well-crafted conditions, then the defense of a protocol itself becomes moot even if the litigation concerned the most recent protocol. It did not.

Petitioners are state constitutional officers. App. at 165 (Cal. Const. Art. XI, § 1(b)). Petitioners' duties primarily focus around the role of prosecution. App. at

[8] Albeit a role that the Governor has ordered them to abandon.

167 (Cal. Gov. Code § 26500). But Petitioners' duties extend beyond prosecution where the administration of justice is concerned. App. at 168 (Cal. Gov. Code § 26500.5). Petitioners play an important role in giving victims of crime a voice and in enforcing their state constitutional rights. App. at 153-162 (Cal. Const. Art. I, § 28). And where another branch of the executive either fails to fulfill its obligations or actively works to frustrate state law, Petitioners must act.

"[A] State's opportunity to defend its laws in federal court should not lightly be cut off." *Cameron*, 595 U.S. __, 142 S.Ct. at 1011. Further, "Respect for state sovereignty must also take into account the authority of a State to structure its executive branch in a way that empowers multiple officials to defend its sovereign interests in federal court." *Id*. Petitioners seek to do precisely that, not by defending a specific protocol, but by pursuing an end to the District Court litigation entirely.

The panel decision here created a bar for Petitioners that was far higher than that found in its precedent. As it acknowledged, denials of intervention from other circuits are "not perfectly analogous to the case before [the court]. . . ." App. at 18 (*Cooper v. Newsom*, 13 F.4th at 867). It pointed to two cases for support. The first, *Saldano v. Roach*, 363 F.3d 545 (5th Cir. 2004) (App. at 18 (*Cooper v. Newsom*, 13 F.4th at 867)), found no legally protectable interest where a district attorney sought intervention in a federal habeas corpus proceeding. There, state law gives the Attorney General the authority to represent state officials in

federal habeas corpus proceedings. *Saldano*, 363 F.3d at 551. This, however, is not a habeas corpus proceeding, and Petitioners *have* pointed to a state law that provides an interest in penalty enforcement.

The second case cited by the panel, *Harris v. Pernsley*, 820 F.2d 592 (3d Cir. 1987) (App. at 19 (*Cooper v. Newsom*, 13 F.4th at 868)) dealt with a class action addressing prison conditions. Petitioners do not seek to defend conditions here. We seek to end the litigation *preventing* the fulfillment of death sentences based on a failure of Respondents-Plaintiffs to meet their threshold burden in the case.

It is most likely that the panel could not point to analogous authority because none exists. Cases in which a state governor actively seeks to nullify state law representing the will of the People do not come along every day.

II. The Court Should Grant Review to Prevent Misuse of the Federal Courts by a State Governor Seeking to Negate State Law.

As mentioned above, Respondents-Plaintiffs and Respondents-Defendants entered into a stipulated dismissal during the pendency of Petitioners' appeal. App. at 2-3 (*Cooper v. Newsom*, 13 F.4th at 861). They also crafted a structure whereby the case would resurrect if Petitioners, any other District Attorney, or any other branch of the executive took actions to effectuate the return of a death-penalty protocol, installation of the execution chamber, or obtained an execution order

from any court. App. at 135 (Stipulation Regarding Procedural Reinstatement of Fifth Amended Complaint; Order, Nos. 06-cv-00219 and 06-cv-00926 (August 14, 2020)).

The stipulation also created a poison pill that used the threat of the District Court's power as a means of undermining any successive Governor's ability to undo Governor Newsom's efforts to sabotage Proposition 66. In addition to reviving the action and reinstituting all stays of execution for Respondents-Plaintiffs, App. at 135, the stipulation also agrees that any *other* death-sentenced prisoner who has exhausted all review will be permitted to intervene without opposition, and that inmate may then also move for a stay of execution. App. at 135-136.

As a result, the so-called dismissal is no dismissal at all, for the implied power of the District Court continues to overshadow any attempts to effectuate the tenets of Proposition 66. The stipulation acts as a hedge should the Governor's self-styled moratorium be found ineffective. And barring Petitioners' intervention in the case, it will act as a restraint on any successive governor and on any other action by the People of the State of California to use capital punishment for the most heinous of crimes.

This issue separates this case from the throngs of federal questions annually put before this Court. This Court should grant review to address the misuse of the

federal courts as a chilling power over state government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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