FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

GAVIN NEWSOM; SCOTT KERNAN, Secretary of the California Department of Corrections and Rehabilitation; RONALD DAVIS, Warden of San Quentin State Prison,

Defendants-Appellees,

v.

SAN BERNARDINO COUNTY DISTRICT ATTORNEY; SAN MATEO COUNTY DISTRICT ATTORNEY; RIVERSIDE COUNTY DISTRICT ATTORNEY, Applicants in Intervention; Proposed Intervenors, Movants-Appellants.

No. 18-16547

D.C. Nos.
3:06-cv-00219-RS
3:06-cv-00926-RS

OPINION

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, District Judge, Presiding

Argued and Submitted September 16, 2020
San Francisco, California

App. 2

Filed September 16, 2021

Before: William A. Fletcher, Danielle J. Forrest*,and Lawrence VanDyke, Circuit Judges.

Opinion by Judge W. Fletcher;
Partial Concurrence by Judge Forrest;
Dissent by Judge VanDyke

OPINION

W. FLETCHER, Circuit Judge:

In 2006, California death row inmate Michael Morales brought suit in federal district court against the Governor of California, the Secretary of the California Department of Corrections and Rehabilitation ("CDCR"), and the Warden of San Quentin State Prison. Morales sought a stay of execution on the ground that California's execution protocol violated the Eighth Amendment. The district court stayed the execution, and numerous death row inmates subsequently intervened as plaintiffs. After the State promulgated a new execution protocol in 2018, the District Attorneys of San Bernardino, San Mateo, and Riverside Counties sought to intervene as defendants. The district court denied intervention, and the District Attorneys timely appealed.

While the District Attorneys' appeal was pending, newly elected Governor Newsom withdrew California's new execution protocol, placed a moratorium on executions, and closed the execution chamber at San Quentin. Pursuant to a settlement among the parties,

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* Formerly known as Danielle J. Hunsaker.

plaintiffs voluntarily dismissed their suit subject to specified conditions. The parties contend that the Governor's actions, or in the alternative plaintiffs' voluntary dismissal of their suit, render the District Attorneys' appeal moot.

We disagree with the parties and hold that the appeal is not moot. On the merits of the appeal, we affirm the district court's denial of intervention.

I. Background

In 2006, condemned prisoner Morales brought an Eighth Amendment challenge in district court to California's lethal injection protocol. After finding "critical deficiencies" in the protocol, the court held that the protocol violated the Eighth Amendment. *Morales v. Tilton*, 465 F. Supp. 2d 972, 979 (N.D. Cal. 2006). The court's holding resulted in a sustained de facto moratorium on executions in California. *See Morales v. Cate*, 623 F.3d 828, 830 (9th Cir. 2010).

In 2010, the CDCR promulgated a new lethal injection protocol. A California Court of Appeal held the new procedure presumptively valid and authorized the resumption of executions. *See CDCR v. Superior Court*, 2010 WL 3621873, at *4–5 (Cal. Ct. App. Sept. 20, 2010). The State then scheduled the execution of Albert Brown. Brown moved to intervene in the *Morales* litigation in federal district court and sought a stay of execution. The court granted intervention but denied the stay. Brown appealed the denial of the stay. *Morales*, 623 F.3d at 829. We remanded to the district

court under *Baze v. Rees*, 553 U.S. 35 (2008). *Id.* at 831. On remand, the court stayed Brown's execution. In the years following, an additional twenty-two plaintiffs intervened in the *Morales* litigation and obtained stays of execution.

The 2010 lethal injection protocol was challenged by condemned inmate Mitchell Sims in a suit in Marin County Superior Court. Sims argued that the CDCR's adoption of the 2010 protocol did not comply with the California Administrative Procedure Act ("Cal-APA"). *Sims v. CDCR*, 157 Cal. Rptr. 3d 409, 413 (2013). The Superior Court enjoined the CDCR from carrying out executions "unless and until" it promulgated a new protocol that complied with the Cal-APA. *Id.* at 427. The California Court of Appeal affirmed. *Id.* at 428–29.

In November 2016, California voters passed Proposition 66, exempting certain lethal injection protocols from the Cal-APA. The Attorney General successfully defended Proposition 66 in the California Supreme Court. *See Briggs v. Brown*, 400 P.3d 29 (Cal. 2017). In March 2018, the CDCR promulgated a new lethal injection execution protocol. The Attorney General, representing the CDCR, joined a motion asking the Marin County Superior Court to vacate its injunction, on the ground that the new protocol was not subject to the Cal-APA requirements. The Superior Court granted the motion. We grant the parties' motion to take judicial notice of the documents in the case (Docket Nos. 38, 93). *See In re Korean Air Lines Co., Ltd., Antitrust Litig.*, 642 F.3d 685, 689 n.1 (9th Cir. 2011).

After the state court rulings, the sole issue remaining in the federal *Morales* litigation was the constitutionality of California's new 2018 execution protocol. In June and July 2018, the District Attorneys of San Bernardino, San Mateo and Riverside Counties moved to intervene in the *Morales* litigation under Federal Rule of Civil Procedure 24 and moved to vacate the stays of execution of the plaintiffs who had been convicted and sentenced in their counties.

The district court denied the motion to intervene as of right under Rule 24(a), holding that the District Attorneys did not have a significant protectable interest relating to the issue in the litigation, and that to the degree that they had such an interest it was adequately represented by the existing parties. The court also denied the motion for permissive intervention under Rule 24(b) on the grounds that the District Attorneys had failed to show a "common question of law and fact between [their] claim or defense and the main action," given that they had "no involvement in the drafting or implementation of any method-of-execution protocol," and that additional delays would likely result if they were allowed to intervene. The District Attorneys timely appealed the denial of intervention.

In 2019, after the District Attorneys filed their notice of appeal, newly elected Governor Newsom was substituted as a Defendant-Appellee in place of Governor Brown. In February 2019, plaintiffs filed a Fifth Amended Complaint challenging the constitutionality of the 2018 protocol. In March, Governor Newsom issued Executive Order N-09-19 ("the Executive Order"),

withdrawing the lethal injection protocols, imposing a moratorium on all executions in California, and closing the execution chamber at San Quentin.

The parties moved twice in our court to dismiss the District Attorneys' appeal as moot. Defendants first moved to dismiss the District Attorneys' appeal on the ground that the Governor's Executive Order mooted the appeal. A motions panel of this court referred the motion to a merits panel. Following court-assisted mediation, the parties reached a settlement under which, pursuant to two stipulations, plaintiffs voluntarily dismissed their suit without prejudice. *See* "Stipulation Regarding Procedural Reinstatement of Fifth Amended Complaint" ("Reinstatement Stipulation") and "Stipulation for Voluntary Dismissal Without Prejudice." Defendants then filed a second motion to dismiss the District Attorneys' appeal, arguing that the dismissal of the underlying suit rendered the appeal moot. We grant plaintiffs' motion to join defendants' second motion to dismiss (Docket No. 92). Both motions are before us.

We first address mootness. We then address the merits of the appeal.

II. Discussion

A. Mootness on Appeal

We deny both motions to dismiss the appeal as moot. We address each in turn.

In their first motion to dismiss, defendants argue that because the Executive Order withdrew California's lethal injection protocol, placed a moratorium on all executions, and closed the execution chamber, the District Attorneys' interest in the litigation—whatever that interest might have been—no longer exists, and the appeal must therefore be dismissed as moot.

Parties seeking a dismissal based on mootness due to voluntary cessation bear "the heavy burden" of demonstrating that "the challenged conduct cannot reasonably be expected to start up again." *Bell v. City of Boise*, 709 F.3d 890, 898 (9th Cir. 2013) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Defendants have failed to carry that burden.

Here, the "challenged conduct" is California's allegedly unconstitutional method of execution. The Reinstatement Stipulation provides that defendants will give plaintiffs' counsel and the district court "written notice" of the Governor's intention to withdraw the Executive Order and "written notice prior to (1) adopting an execution protocol and procedures, or (2) beginning any reassembly of a Lethal Injection Facility or Gas Chamber to conduct executions." Nothing prevents Governor Newsom, or a future Governor, from withdrawing the Executive Order and proceeding with preparations for executions. It is thus entirely possible that in the future, defendants will seek to resume executions in California, and will seek to do so under the current or a successor protocol. This is not a case where

"the challenged conduct cannot reasonably be expected to start up again." *Bell*, 709 F.3d at 898.

We therefore deny the first motion to dismiss.

The parties' second motion to dismiss is based on their stipulated dismissal of the underlying suit. The parties argue that because there is no longer any suit into which the District Attorneys can intervene, we cannot provide any meaningful relief. They argue further that the District Attorneys' stated aim—vacating plaintiffs' stays of execution—was accomplished when the stays were dissolved by the stipulated voluntary dismissal.

We recently wrote that "the parties' settlement and dismissal of a case after the denial of a motion to intervene does not as a rule moot a putative-intervenor's appeal." *United States v. Sprint Commc'ns, Inc.*, 855 F.3d 985, 990 (9th Cir. 2017). The question presented in *Sprint* was whether the settlement and dismissal of the underlying suit made it impossible for us to grant "'any effectual relief whatever'" to the putative intervenor if "we were to determine that the district court erred in denying his intervention." *Sprint*, 855 F.3d at 990 (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)); *see also W. Coast Seafood Processors Ass'n v. Nat. Res. Def. Council, Inc.*, 643 F.3d 701, 704 (9th Cir. 2011) ("An appeal is moot if there exists no present controversy as to which effective relief can be granted." (quotation marks and citation omitted)). Because some relief was possible, we held that the appeal was not moot.

Like *Sprint*, this case involves a settlement agreement reached after the denial of intervention. But, unlike *Sprint*, the settlement agreement in this case did not resolve the underlying ligation, which makes an even stronger argument against finding that this appeal is moot. The Reinstatement Stipulation provides that the underlying litigation will reactivate upon the occurrence of any of three specified events. The Stipulation provides, in relevant part:

> Following entry of the voluntary dismissal without prejudice, the action will terminate. The Parties agree that this Court shall retain jurisdiction over this matter solely for the purpose of allowing: (1) any Party to enforce the terms of this Stipulation; (2) Plaintiffs the right to reinstate their Fifth Amended Complaint; and (3) the Court to reinstate the individual stays of execution as specified herein.
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> . . . .
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> The Fifth Amended Complaint will be immediately operative upon Plaintiffs providing written notice to Defendants and the Court should any of the following occur: (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.

The conditions in the Reinstatement Stipulation distinguish this case from cases where we have held an

appeal by would-be intervenors moot after termination of the underlying litigation. For example, we held moot the appeal of would-be intervenors in *West Coast Seafood*. The underlying suit challenged a National Marine Fisheries Service program to preserve groundfish species off the west coast of the United States. The district court denied the motion of West Coast Seafood Processors Association ("WCSPA") to intervene, and WCSPA appealed the denial. While the appeal was pending, the underlying suit was resolved on summary judgment, and the district court entered final judgment. Because the underlying litigation was entirely resolved, we held the appeal moot. *W. Coast Seafood*, 643 F.3d at 704–05.

On two independently sufficient grounds, the parties' stipulation does not render the appeal moot. First, in contrast to *West Coast Seafood*, where all of the issues had been resolved and the suit could not be revived, this suit may be revived upon the occurrence of any of the three events specified in the Reinstatement Stipulation. The stipulated voluntary dismissal thus effectively functions as a stay. The district court contemplated a possible revival when it agreed to retain post-dismissal jurisdiction on the above terms. Because the case is functionally stayed, if we reverse the district court's denial of intervention, the District Attorneys can obtain the relief they seek by intervening if and when the suit is revived.

Second, even if the suit is not revived upon the occurrence of any of the three events, if we hear the current appeal and reverse the district court's denial of

intervention, the District Attorneys can move in the district court under Federal Rule of Civil Procedure 60(b) to seek relief from the order of dismissal that was entered pursuant to the stipulation. *See In re Hunter*, 66 F.3d 1002, 1004–05 (9th Cir. 1995); *see also Yesh Music v. Lakewood Church*, 727 F.3d 356, 362–63 (5th Cir. 2013); *Nelson v. Napolitano*, 657 F.3d 586, 589 (7th Cir. 2011). If the district court denies their Rule 60(b) motion, the District Attorneys can appeal that denial. *See Lal v. California*, 610 F.3d 518, 523 (9th Cir. 2010).

We therefore deny the second motion to dismiss.

B. Intervention

The District Attorneys moved in the district court to intervene as of right under Rule 24(a) and permissively under Rule 24(b).

1. Intervention as of Right under Rule 24(a)

"A district court's denial of a motion for intervention as of right is an appealable 'final decision.'" *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). We review *de novo* the merits of a district court's denial of intervention as of right. *Id.* When analyzing a motion to intervene of right under Rule 24(a)(2), we apply a four-part test:

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest 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'y v. U.S. Forest Serv., 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc) (quoting *Sierra Club v. U.S. Env't. Prot. Agency*, 995 F.2d 1478, 1481 (9th Cir. 1993)); *see also United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) (referring to "significant protectable interest").

The four parts of the test "often are very interrelated and the ultimate conclusion reached as to whether intervention is of right may reflect that relationship." Wright & Miller, 7C Fed. Prac. & Proc. Civ. § 1908 (3d ed. 2020 update). "[I]t is incumbent on the party seeking to intervene to show that all the requirements for intervention have been met." *Chamness v. Bowen*, 722 F.3d 1110, 1121 (9th Cir. 2013) (quotation marks, citation, and alterations omitted). In determining whether intervention is appropriate, we are "guided primarily by practical and equitable considerations, and the requirements for intervention are broadly interpreted in favor of intervention." *Alisal Water Corp.*, 370 F.3d at 919.

We note at the outset the somewhat unusual nature of the District Attorneys' motion. In a typical motion to intervene, the moving entity or person is a would-be party, represented by an attorney, who alleges an interest that may be affected by the existing

litigation. In this case, however, the District Attorneys are themselves attorneys, and they seek to intervene as attorneys. They seek to intervene in order to represent interests of the State, when the state entities—the Governor, the CDCR, and the Warden of San Quentin—are already parties and are already represented by the Attorney General.

For the reasons that follow, we conclude that the District Attorneys have failed to show that they have a significant protectable interest in the litigation. Because that failure alone is a sufficient ground to deny intervention as of right, we do not reach the question of whether the District Attorneys have failed to show that their interest is inadequately represented by the existing parties. *See Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009) ("Failure to satisfy any one of the requirements is fatal to the application, and we need not reach the remaining elements if one of the elements is not satisfied.").

A would-be intervenor has a significant protectable interest if the interest is protected by law and there is a relationship between that interest and the claim or claims at issue. *Alisal Water Corp.*, 370 F.3d at 919. A significant protectable interest will be found if a legally protected interest will suffer a practical impairment in the pending litigation. *Cal. ex. Rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006).

The core of the District Attorneys' argument is that they have a duty under state law to prosecute criminal cases. They argue:

> The District Attorneys are public prosecutors, whose offices are established to "conduct on behalf of the people all prosecutions for public offenses" under California state law. Cal. Gov't Code § 26500. The office is a constitutional one under state law. Cal. Const. art. XI, § 1(b). The public prosecutor has "sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek." *Dix v. Superior Court*, 53 Cal.3d 442, 451 (1991). The District Attorneys *therefore* have a vested interest in the underlying litigation, which prevents that very punishment from being enforced.

(Emphasis added.)

The District Attorneys thus argue that because they have the "sole discretion" to charge and seek punishment, they have an interest in the plaintiffs' litigation. The flaw in their argument is that neither their ability to charge nor their ability to seek punishment is at issue in this case. The issue before the district court was not whether it was legal for the District Attorneys to charge defendants with capital crimes. Nor was the issue the legality of any capital conviction and sentence the District Attorneys have obtained. Rather, the issue was the constitutionality of California's method of execution. This important but narrow issue does not substantially affect the District Attorneys in the exercise of their "sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek." *Dix*, 53 Cal. 3d at 451.

District attorneys "enjoy[ ] neither plenary power nor unbridled discretion." *Safer v. Superior Ct. of Ventura Cty.*, 540 P.2d 14, 17 (1975). As the California Supreme Court wrote in *Safer*, "By the specificity of its enactments the [California] Legislature has manifested its concern that the district attorney exercise the power of his office only in such civil litigations as the lawmaking body has, after careful consideration, found essential. An examination of the types of civil litigation in which the Legislature has countenanced the district attorney's participation reveals both the *specificity and the narrow perimeters of these authorizations*." *Id.* (emphasis added). The California Legislature's narrow enumeration of the types of civil cases in which the district attorney may participate "expresses its general mandate that public officers not use their funds and powers to intervene in private litigation." *Id.* at 18; *see also People v. Superior Ct. (Humberto S.)*, 182 P.3d 600, 611–12 (Cal. 2008) ("[A] district attorney has no authority to prosecute civil actions absent specific legislative authorization."); Cal. Gov't Code §§ 26500–30 (detailing office of District Attorneys).

As relevant here, the District Attorneys have no authority to choose the method by which California will execute condemned inmates. That authority is assigned to the CDCR, whose Secretary is already a defendant in this case. *See* Cal. Penal Code § 3604. The District Attorneys also do not have authority to act as attorneys representing the Secretary of the CDCR or the other defendants in this case. Under California law, that authority is assigned to the Attorney General,

who has represented the defendants in this case since its inception. *See* Cal. Gov't Code § 12512 ("The Attorney General shall . . . prosecute or defend all causes to which the State, or any State officer is a party in his or her official capacity.").

The District Attorneys point to no legislative authorization granting them the authority to represent the State's interest in this case. The best the District Attorneys can do is to point to California Penal Code § 3604.1(c), which provides, in relevant part:

> If the use of a method of execution is enjoined by a federal court, the Department of Corrections and Rehabilitation [CDCR] shall adopt, within 90 days, a method that conforms to federal requirements as found by that court. If the department fails to perform any duty needed to enable it to execute the judgment, the court which rendered the judgment of death shall order it to perform that duty on its own motion, on motion of the District Attorney or Attorney General, or on motion of any victim of the crime. . . .

The current litigation is outside the scope of this statute. First, there is no pending order by any federal court that limits the execution methods California may use. Instead, it is the actions of California state officials that have limited executions. Second, the statute does not authorize District Attorneys to engage in "adversarial litigation" either on behalf of or against the CDCR. It only authorizes District Attorneys to move in the state trial court that imposed the death penalty for

an order directing the CDCR to perform its duty to carry out the court's judgment. (The Superior Court need not wait for a motion by a District Attorney; it may set an execution date on its own motion. *Id.*) The statute does not authorize District Attorneys to defend the State's execution protocols, promulgated by the CDCR, against constitutional challenges in federal court.

We recognize that the litigation in this case incidentally affects the manner in which the District Attorneys are able to perform their assigned functions. The *Morales* litigation over the constitutionality of California's proposed method of execution has effectively suspended the death penalty in California and has thereby prevented the District Attorneys from successfully moving in the Superior Court to set execution dates. But there is nothing in the District Attorneys' general interest in executing condemned inmates, nor in their more specific interest in requesting execution dates, that amounts to a significant protected interest in the *Morales* litigation, which concerns only the method by which the State may perform executions. The District Attorneys have neither the authority to choose a method of execution, nor the authority to represent the state entity that makes that choice. The ongoing *Morales* litigation thus does not impair any significant protectable interest of the District Attorneys. *See*, *e.g.*, *Alisal Water Corp.*, 370 F.3d at 920 (noting that an intervenor's claimed interest cannot be "several degrees removed from the [issues] that are the backbone of [the] litigation"); *City of Emeryville v.*

Robinson, 621 F.3d 1251, 1259 (9th Cir. 2010) (noting that a would-be intervenor cannot "rely on an interest that is wholly remote and speculative").

Finally, although the denials of intervention are not perfectly analogous to the denial in the case before us, we note that District Attorneys in States in other circuits have been denied intervention in civil suits challenging some aspect of their States' criminal justice systems. In those cases, our sister circuits have denied intervention on the ground that, while District Attorneys' duties may have been incidentally affected by the litigation, they had no significant protectable interest in the litigation.

In *Saldano v. Roach*, 363 F.3d 545 (5th Cir. 2004), a District Attorney moved to intervene in state prisoner Saldano's federal habeas corpus proceeding. After Saldano argued he was denied due process in his sentencing proceedings, the Attorney General, representing named defendant Director of the Texas Department of Criminal Justice, confessed error and waived a procedural default bar. *Id.* at 550. The District Attorney, who had prosecuted Saldano, moved to intervene to oppose Saldano's petition. *Id.* Although the District Attorney claimed authority to act as the State's representative, Texas law defining the duties and responsibilities of District Attorneys did not authorize a district attorney to represent the State in federal habeas corpus proceedings. *Id.* at 551–52 ("Texas law does not grant the District Attorney the authority to represent the State here."). As in this case, the Attorney General, rather than the District Attorney, was

authorized to represent the State. *Id.* The Fifth Circuit held that while the District Attorney would be affected by the litigation, he did not have a legally protectable interest that would merit intervention as of right. *Id.* at 556.

In *Harris v. Pernsley*, 820 F.2d 592, 597 (3d Cir. 1987), a District Attorney sought to intervene in a class action challenging conditions in Pennsylvania state prisons. After extensive litigation, the parties agreed to a consent decree limiting prison populations. *Id.* at 594. The District Attorney sought intervention to "prevent [the] settlement." *Id.* at 599. Under Pennsylvania law, District Attorneys had the authority to prosecute cases, advocate specific bail levels, appeal bail determinations, advocate sentences, and defend convictions. *Id.* at 598. The District Attorney argued on two grounds that the proposed settlement would "adversely affect his functions." *Id.* at 599. First, a cap on prison populations would result in the release of inmates who had not posted bond or who had not served their full sentences, which would hamper his ability to prosecute cases. *Id.* Second, a cap would make it difficult for city jails to admit new convicted inmates, which would "render meaningless" the District Attorney's prosecutorial duties. *Id.* The Third Circuit held that while the District Attorney would be affected by the consent decree, that effect did not confer a "right to become a party to any consent decree entered in this case." *Id.* at 602.

In sum, California law does not authorize the District Attorneys to defend the State against

constitutional challenges to execution protocols. We therefore conclude that the District Attorneys do not have a "significant protectable interest" in the *Morales* litigation.

2. Permissive Intervention

We have jurisdiction over a district court's denial of permissive intervention only if we conclude the district court abused its discretion. *City of L.A.*, 288 F.3d at 397. If the district court did not abuse its discretion, we must dismiss the appeal for lack of jurisdiction. *Glickman*, 159 F.3d at 411.

"An applicant who seeks permissive intervention must prove that it meets three threshold requirements: (1) it shares a common question of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant's claims." *Id.* at 412. "Even if an applicant satisfies those threshold requirements, the district court has discretion to deny permissive intervention." *Id.* In exercising its discretion, the district court must consider whether intervention will unduly delay the main action or will unfairly prejudice the existing parties. *Id.* (citing Fed. R. Civ. P. 24(b)(2)). "An abuse of discretion occurs if the district court bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Smith v. Marsh*, 194 F.3d 1045, 1049 (9th Cir. 1999) (citation omitted).

The district court denied permissive intervention on two grounds. First, the court found that there was

no common question of law or fact between the District Attorneys' "claim or defense and the main action" within the meaning of Rule 24(b). Fed. R. Civ. P. 24(b). The question in the "main action" was whether California's challenged execution protocol was constitutional. The District Attorneys had no role in promulgating the CDCR's execution protocol and were not authorized under California law to represent the CDCR or the other defendants in defending the constitutionality of the protocol.

Second, the court found that intervention by the District Attorneys would delay the already long-drawn-out litigation, particularly in light of the prospect that some or all of the fifty-five other District Attorneys in California might seek to intervene if intervention were granted to the three District Attorneys. *See Montgomery v. Rumsfeld*, 572 F.2d 250, 255 (9th Cir. 1978) ("The district judge acted well within his discretion when he decided that 13 additional plaintiffs would unnecessarily delay and complicate the case, and that decision is also affirmed."); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987) ("Particularly in a complex case such as this, a district judge's decision on how best to balance the rights of the parties against the need to keep the litigation from becoming unmanageable is entitled to great deference.").

We hold that the district court did not abuse its discretion in denying permissive intervention on these grounds. We therefore dismiss this portion of the District Attorneys' appeal. *Glickman*, 159 F.3d at 411.

Conclusion

We hold that the District Attorneys' appeal of the district court's denial of their motion to intervene is not mooted by Governor Newsom's Executive Order or by the stipulated voluntary dismissal. On the merits of the appeal, we hold that the District Attorneys have not shown a significant protectable interest in the litigation. We therefore hold that the district court properly denied intervention as of right under Rule 24(a). We also hold that the district court did not abuse its discretion in denying permissive intervention under Rule 24(b).

AFFIRMED in part, DISMISSED in part.

FORREST, Circuit Judge, concurring in part and concurring in the judgment:

I join the majority opinion except its alternative holding that this case is not moot because the parties' settlement and voluntary dismissal "effectively functions as a stay" because the case can revive if certain specified events occur. Maj. Op. at 15. As the majority notes, we have established that a settlement and resulting dismissal following a motion to intervene "does not as a rule moot a putative-intervenor's appeal." *United States v. Sprint Commc'ns, Inc.*, 855 F.3d 985, 990 (9th Cir. 2017). This rule recognizes that often the original parties' resolution of an action does not provide the relief sought by the would-be intervenor. *Id.* (citing *CVLR Performance Horses, Inc. v. Wynne*, 792

F.3d 469, 475 (4th Cir. 2015)). Thus, the relevant question for determining whether a settlement renders a case moot as to an intervenor is whether "the settlement and dismissal of the underlying case 'make[] it impossible . . . to grant any effectual relief whatever' to the putative intervenor" if the district court's denial of intervention were reversed. *Id.* (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)).

Equating the parties' stipulated voluntary dismissal in this case with a stay, the majority reasons that we can grant effective relief to the District Attorneys by considering their denial-of-intervention appeal because, if we reverse, "the District Attorneys can obtain the relief they seek by intervening" in the [not-yet-and-may-never-be] revived suit. Maj. Op. at 15. I disagree that granting intervention in a terminated case that may never revive is *itself* an effective remedy that gives us jurisdiction to consider the merits. First, this relief is too illusory because it depends on the occurrence of events that may never happen. Second, this is not the relief that should guide our analysis.

In determining whether we can grant "any effective relief whatever," *Church of Scientology of Cal.*, 506 U.S. at 12, we must consider the relief the putative intervenors seek in the underlying litigation—i.e., *what they want to accomplish by intervening*. *See*, *e.g.*, *id.* at 12–15 (analyzing discovery relief putative intervenor hoped to obtain); *Sprint Commc'ns, Inc.*, 855 F.3d at 990 (analyzing the statutory right to money damages and ability to object to settlement that putative intervenors sought and concluding there was a possibility

of proving effectual relief because "[i]f we were to conclude [intervenor] had a right to intervene . . . , he might be able to object to the settlement or otherwise seek his share of the proceeds"); *DBSI/TRI IV Ltd. P'ship v. United States*, 465 F.3d 1031, 1036–37 (9th Cir. 2006) (analyzing putative intervenor's requested relief of setting aside the direct parties' stipulated judgment as violative of statute and reasoning that "if it were concluded on appeal that the district court had erred in denying the intervention motion . . . then the applicant would have standing to appeal the district court's judgment"). Intervening is a means to an end, not an end in and of itself. *See*, *e.g.*, Fed. R. Civ. P. 24 (noting prerequisite of intervention for any purpose is that the intervenor have an interest in a claim or defense in the litigation); 7C Charles A. Wright, Arthur R. Miller, Mark K. Kane, Fed. Prac. & Proc. § 1901 (3d ed. 2021) (discussing one purpose of intervention is allowing "those on the outside" of a lawsuit to become a party if they "believe that a decision may have an effect on them").

The District Attorneys make an efficiency argument for why we should address the merits of intervention—resolving this procedural issue now prevents them from having to re-raise it if the case ever revives in the future. But what they really want is to pursue a more aggressive litigation strategy than what the Attorney General has pursued—a strategy that "allows the voice of the People who obtained death judgments" to be heard. This larger strategy goal assuredly includes seeking to have the stipulated voluntary

dismissal, which occurred after the District Attorneys appealed their failed attempt to intervene, set aside. While intervening is necessary for the District Attorneys to achieve their larger strategy goal, intervention does not itself dictate whether there is "any effectual relief whatever" that we could grant sufficient to maintain our jurisdiction over the case. *Church of Scientology of Cal.*, 506 U.S. at 12. Rather, the relevant effectual relief for purposes of the mootness analysis is the District Attorneys' ability to seek relief from the voluntary dismissal if allowed to intervene, regardless of whether any of the triggering events for reviving the case ever occur. Therefore, I agree with the majority that this case is not moot, but only for the second reason on which the majority relies.

VANDYKE, Circuit Judge, dissenting:

I agree with the majority's conclusion that California District Attorneys' appeal is not moot. But because I conclude the district court should have granted them intervention, I respectfully dissent.[1]

Even the casual observer would recognize that the District Attorneys seeking to intervene in this suit and the California Attorney General have very different ultimate objectives. The District Attorneys would uphold and seek to help enforce Proposition 66 to retain the

[1] Because I conclude the District Attorneys should have been granted intervention as of right, I would not reach the arguments for permissive intervention.

death penalty—on which a majority of the voters of California voted "Yes"—while the Attorney General must defend the Governor's contrary executive order instituting a moratorium on death penalty executions. Based on these divergent—indeed, opposed—interests and the applicable law, I would reverse the denial of the District Attorneys' intervention in this case.

Federal Rule of Civil Procedure 24(a)(2) governing intervention is interpreted "broadly in favor of proposed intervenors," *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th. Cir. 2011) (citation omitted), and because "courts are guided primarily by practical and equitable considerations," there is a presumption "in favor of intervention." *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). That presumption, combined with the inadequacy of the Attorney General's current representation and the District Attorneys' significantly protectable statutory interests in preserving the sentenced method of punishment, leads me to conclude that the District Attorneys should be allowed to intervene as of right.

1. Inadequate Representation by Current Parties

The District Attorneys and the Governor (through his counsel, the Attorney General) pursue diametrically opposed objectives in this case, and no presumption of adequate representation arises from any shared goals. *Compare Perry v. Proposition 8 Off. Proponents*, 587 F.3d 947, 950–51 (9th Cir. 2009) (noting that the

ultimate objectives of the Campaign and the Proponents were identical and finding that the Campaign's interest was adequately represented). The Attorney General entered a settlement to lift the stays of execution for the plaintiffs in *Morales v. Kernan*, Nos. 06-cv-0219; 06-cv-0926, 2017 WL 8785130 (N.D. Cal. Dec. 4, 2017), because his client, Governor Newsom, issued Executive Order N-09-19 "grant[ing] reprieves . . . to all . . . people sentenced to death in California." The stays in the underlying litigation were no longer necessary to achieve the Governor and Attorney General's objective: to prevent the imposition of the death penalty.[2]

But obviously this is not the aim of the District Attorneys, who argue they represent "the voice of the People who obtained the death judgments," which the District Attorneys intend to see through to completion. As they correctly argue, "the governor's issuance of the order strengthens the District Attorneys' position that the Attorney General is not involved in this case to represent the interests of the People" who passed Proposition 66 to "give[] crime victims the right to timely justice" through an effective and efficient death penalty system. *See* Death Penalty Reform and Savings Act, 2016 Cal. Legis. Serv. Prop. 66 § 2 ¶ 10.

It's flirting with absurdity to characterize, as the district court did in denying intervention, the

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[2] The majority acknowledges that, far from being adversarial to the plaintiffs' desire to suspend their executions, "it is the actions of California state officials that have limited executions."

disagreement between the District Attorneys and the Attorney General as "mere differences in litigation strategy." *Proposition 8 Off. Proponents*, 587 F.3d at 954 (cleaned up). The Attorney General's entire litigation strategy for the past few years has operated to block the District Attorneys' involvement in the case, precisely because they have very divergent interests. The Attorney General entered a settlement to dismiss the stays during the pendency of the Governor's moratorium on executions, but stipulated that the case and its stays would spring back into place if the moratorium were lifted. This ensures that, contrary to the District Attorneys' stated goal, no executions will occur. It is precisely because of these competing interests—rather than mere differences of opinion about the pace of the case or how an argument should be made—that the Attorney General opposes the District Attorneys' intervention.[3]

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[3] The State Defendants argue that where the Attorney General appears on behalf of the state "there is no ground for allowing intervention by any other public officer." But the District Attorneys are correct in claiming that the Attorney General's involvement in this case "is as counsel to various state executive officers related to their ministerial roles, rather than as California's top prosecutor." In executing his "multiple roles," the Attorney General may support new policies from the Governor that conflict with current law, which is the case here: Proposition 66 enshrines in statute the will of the People to continue executions, while the Governor's executive order is explicitly opposed to any executions in California. *See* Death Penalty Reform and Savings Act, 2016 Cal. Legis. Serv. Prop. 66; Cal. Penal Code § 3604.1(b); *see also* Exec. Order N-09-19 (Mar. 13, 2019), https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf. That these two positions conflict is evident without an official acknowledgment

The Fifth Circuit's *Saldano v. Roach* decision highlights the significant conflicting interests in this case. 363 F.3d 545 (5th Cir. 2004). In *Saldano*, the Fifth Circuit ultimately denied a district attorney's attempt to intervene in a federal habeas appeal, but it never pretended that the Attorney General and the district attorney shared similar litigation goals. The Attorney General in *Saldano* sought to admit error in the state habeas proceedings, *id.* at 549, while the district attorney pursued intervention to defend the judgment he earned in the underlying state habeas proceedings, *id.* at 549 n.1. They sought to advance conflicting arguments. But in denying intervention the court acknowledged and relied on the unique structure of habeas appeals under Texas "state law, which has chosen the Attorney General, rather than the various district attorneys, to represent the State in federal habeas

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from the Attorney General, and any presumption that he represents *both* positions is easily rebutted here.

Nor does the Attorney General's supervisory role over District Attorneys in the California Constitution indicate unity of purpose in this case. Such supervision "does not contemplate control, . . . and district attorneys cannot avoid or evade the duties and responsibilities of their . . . offices by permitting a substitution of judgment." *People v. Brophy*, 49 Cal. App. 2d 15, 28, 120 P.2d 946 (Dist. Ct. App. 1942). The structure of this supervision reflects the "goal [of] efficiency and horizontal coordination, rather than a desire to weaken district attorneys or give the Attorney General additional power." *Goldstein v. City of Long Beach*, 715 F.3d 750, 756–57 (9th. Cir. 2013). Furthermore, the supervisory constitutional provision does not permit the Attorney General to dictate policy to a district attorney. *See id.* at 756. The Attorney General's supervisory role has no bearing on whether he represents the interests of the District Attorneys in this litigation.

corpus suits." *Id.* at 553. While the court in *Saldano* stated in passing dicta that both the Attorney General and the district attorney in that case shared the "identical interest . . . [of] see[ing] that justice is done," that bromide is always true and never particularly helpful. One party's view of "justice" can demand precisely the opposite result required by another's view, and the fact that both parties seek "justice" does not somehow reconcile their positions.

Concluding that both the Attorney General and the District Attorneys seek the same outcome in this case completely ignores the "practical and equitable considerations" that normally drive our intervention analysis. *Alisal*, 370 F.3d at 919. Sure, they both seek their version of "justice." But they viscerally disagree as to whether applying the death penalty achieves that goal. I find that the District Attorneys satisfied this prong of the analysis under Rule 24(a)(2), which counsels toward granting their motion to intervene.

2. Significantly Protectable Interest

Given the "room for disagreement . . . over the meaning of the term . . . significantly protectable interest," *Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003) (citation omitted), and the persistent "broad[] interpret[ation] in favor of intervention," *Alisal*, 370 F.3d at 919, I conclude that the District Attorneys provided sufficient evidence of a protectable interest. The District Attorneys demonstrated their statutorily mandated interest in the completion of death penalty

judgments, obtaining such judgments, and scheduling executions.

The District Attorneys rely on *Blake v. Pallan* to argue that as "state official[s] [they have] a sufficient interest in adjudications which will directly affect [their] own duties and powers under the state laws." 554 F.2d 947, 953 (9th Cir. 1977). The strongest evidence of the District Attorneys' protectable interests is provided in California Penal Code section 3604.1(c), which explicitly empowers district attorneys to file a motion if necessary to order the California Department of Corrections and Rehabilitation (CDCR) to perform "any duty needed to enable it to execute the judgment [of death]." This statute codifies the District Attorneys' specific interest in ensuring that death penalty judgments are carried out.

Notwithstanding the majority opinion's litany of actions it believes section 3604.1(c) does *not* authorize, section 3604.1(c)'s directive to file a motion to "order [CDCR] to perform [its] duty" is a civil, not criminal function—making it clear that District Attorneys are empowered to represent the State and the People in *civil* litigation involving the legality of state agency procedures. True, the statute does not contemplate all the ways another state official might contrive to subvert CDCR's duties, so this exact intervention process is not explicated in the statute. But section 3604.1 affirmatively authorizes the District Attorneys to take civil action to enforce sentences. Section 3604.1(c) demonstrates the District Attorneys' significantly protectable statutory interest in the enforcement of death

penalty convictions, and that interest—demonstrated by statute—alone satisfies the last prong required in the intervention-by-right analysis.[4]

Even beyond the clear statutory interest created through Proposition 66 in section 3604.1(c), the majority *admits* that preventing the District Attorneys from intervening in this case affects the District Attorneys' ability to carry out their general statutory duty to enforce punishments imposed by the state court. But the majority insists that denying intervention only "incidentally affects the manner in which the District Attorneys are able to perform their assigned functions," because the underlying stays in the *Morales* litigation only "prevent[] the District Attorneys from successfully moving in the Superior Court to set execution dates."[5]

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[4] If not the District Attorneys, then who else? The victims of the murders perpetrated by the inmates in the underlying litigation would likely not have standing to enforce the executions and the District Attorneys are the only entities pursuing those victims' interests.

[5] While the majority relies on the fact that "there is no pending order by a federal court" directly limiting the available methods of punishment, that is *exactly* the object of the *Morales* litigation. As the majority notes, "the sole issue remaining in the federal *Morales* litigation [is] the constitutionality of California's new 2018 execution protocol." Thus, if the *Morales* litigation reopens, which the majority acknowledges could happen, and the District Attorneys are not allowed to intervene, an order barring the state's use of its execution protocol is very possible—perhaps likely. And it is not clear what the majority means in relying on the lack of a "pending order." If the majority means to suggest that the District Attorneys cannot intervene until after the district court actually issues an unfavorable order, then what is the

That's a little like saying that a statute only "incidentally affects" car dealers because all it does is prevent them from selling cars. Ensuring that death sentences are carried out is an obviously important and weighty duty—one that the People of California recently reinforced by passing Proposition 66. I cannot agree with the majority's minimization of both the legal and public duties of the District Attorneys. In California, district attorneys "ordinarily [have] sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek." *Dix v. Superior Court*, 53 Cal. 3d 442, 451 (1991). The majority asserts that this interest is not "significantly protectable" in this case because it does not precisely mirror the *Morales* litigation's concerns with the method of execution. But the Supreme Court has long recognized a "State's *significant interest* in enforcing its criminal judgments," *Nelson v. Campbell*, 541 U.S. 637, 650 (2004) (emphasis added), which is exactly what the District Attorneys contend is being stymied. In fact, particularly in this case where only the District Attorneys are attempting to effectuate the intent of the People of California as enshrined in Proposition 66, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of *irreparable injury*." *Maryland v. King*,

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point of creating a process by which parties may intervene to make their case *before* an adverse order is issued? Indeed, if the District Attorneys waited to intervene until after the district court issued an order limiting California's execution methods, they might be barred from intervening because their motion would be untimely.

133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (emphasis added) (alterations and citation omitted). Given this court's presumption in favor of intervention, I find that both the specific mandate to schedule executions and the general mandate to enforce criminal judgments easily satisfy the broad definition of "significantly protectable interests." *Arakaki*, 324 F.3d at 1084.[6]

The majority's two out-of-circuit cases addressing this issue do not present a strong argument to the contrary. As noted above, the Fifth Circuit's *Saldano* opinion specifically relied on the structural separation of duties under Texas law that specifically placed federal habeas cases in the sole ambit of the Attorney General. *Saldano*, 363 F.3d at 553. In the Third Circuit case *Harris v. Pernsley*, the district attorney sought to intervene arguing that his prosecutorial power would be hampered by the prison population cap determined by a settlement agreement between the city and the plaintiffs. 820 F.2d 592, 599 (3d Cir. 1987). The court determined the district attorney had "no legal duties or powers with regard to the conditions in the Philadelphia prison system," and the settlement did "not alter any of [the district attorney's] duties." *Id.* at 600.

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[6] There are examples in other circuits where district attorneys were allowed to intervene and participate in cases regarding petitioners' method of punishment. *See*, *e.g.*, *Carmona v. Ward*, 576 F.2d 405, 408 (2d Cir. 1978) (demonstrating that the Albany County District Attorney intervened on behalf of the state to participate in a case regarding "whether the mandatory maximum sentence of life imprisonment imposed on appellees is unconstitutional under the Eighth Amendment").

The district attorney in *Harris*, unlike the District Attorneys in this case, could not point to specific statutory duties affected by the settlement. *See id.*

Harris resurfaced in the Third Circuit after the Pennsylvania legislature passed a statute "purporting to confer automatic standing on the district attorney in prison litigation under which prisoners might be released." *Harris v. Reeves (Harris II)*, 946 F.2d 214, 217 (3d Cir. 1991). This second iteration is more similar to the present facts because the Pennsylvania District Attorney could point to specific statutory authority to argue he had "significant protectable interests." But the Third Circuit again found, despite the language of the new statute, that "[s]imply stating that the district attorney has a legal interest does not make it so," and argued the other substantive duties of the district attorney had not changed. *Id.* at 222. The dissent in that case "totally disagree[d]," and "conclude[d] that the Pennsylvania legislature . . . conferred the necessary legal interest upon the District Attorney of Philadelphia to intervene." *Id.* at 225 (Aldisert, J., dissenting). The law of the case dictated that the district attorney's duties must be enshrined in Pennsylvania law to present a sufficient interest to intervene, and the legislature did exactly that. *Id.* at 226-28 (Aldisert, J., dissenting). The dissent emphasized that "when the Commonwealth has by statute assigned the District Attorney a legal interest in proceedings, we must recognize that interest as surely as we must follow any state statute." *Id.* at 229 (Aldisert, J., dissenting).

I agree with the dissent in *Harris II*. States enact laws to represent the will of the people and may confer legal duties on state officers. The majority in *Harris II* could not articulate a substantive reason for its continued denial after the legislature explicitly followed the instructions from *Harris* and changed the law to ensure the district attorney could intervene. The present case and *Harris II* both concern district attorneys with enumerated statutory duties that constitute significantly protectable interests justifying intervention, and I conclude that this requirement of Rule 24(a)(2) is met by the District Attorneys seeking to intervene in this case, who have multiple statutory interests at stake.

* * *

Allowing intervention would ensure the District Attorneys could represent their (and the People's) interests in effectuating Proposition 66. The District Attorneys' motion to intervene is meritorious because it satisfies the Rule 24(a)(2) four-part test's requirements that the Governor and his counsel do not adequately represent the District Attorneys' interest in commencing executions, and the District Attorneys have multiple significantly protectable statutory interests in carrying out death penalty sentences. I would reverse the district court's denial of the District Attorneys' motion to intervene as of right.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ANGELO MORALES, et al., Plaintiffs, v. SCOTT KERNAN, Secretary of the California Department of Corrections and Rehabilitation, et. al., Defendants.	Case No. 06-cv-0219 RS 06-cv-0926 RS DEATH PENALTY CASE **ORDER DENYING MOTIONS TO INTERVENE AND DENYING REQUEST FOR JUDICIAL NOTICE** (Filed Jul. 18, 2018) Re: Doc. No. 660, 663, 671

INTRODUCTION

The District Attorneys from San Bernardino, San Mateo, and Riverside Counties seek to intervene in the pending action, arguing that the current defendants do not adequately represent the would-be intervenors' interests. The would-be intervenors also seek a lift of the stays of execution issued for each plaintiff, or in the alternative, specifically for plaintiffs Kevin Cooper, Albert Greenwood Brown, Ronald Lee Deere, Robert Fairbank, Jr., and Anthony John Sully. Plaintiffs and defendants oppose intervention and plaintiffs oppose a lift of the stays of execution. Plaintiff Kevin Cooper filed a separate opposition, to which he attached a request for judicial notice of approximately eighty pages of media articles and government web site pages

regarding the recent San Bernardino County election in which voters elected a new district attorney.

The motions are appropriate for decision without oral argument, as permitted by Civil Local Rule 7-1(b) and Federal Rule of Civil Procedure 78. *See also Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Dev. Corp.*, 933 F.2d 724, 729 (9th Cir.1991) (court's consideration of moving and opposition papers is deemed adequate substitute for formal hearing), *cert. denied*, 503 U.S. 920 (1992). For the following reasons, all three motions are denied.

BACKGROUND

When condemned prisoner Michael Angelo Morales initiated this litigation, the prior assigned district judge conditionally denied his request to stay his execution. *Morales v. Hickman*, 415 F. Supp. 2d 1037 (N.D. Cal. 2006). Defendants did not execute Morales as scheduled, and a stay of execution issued pursuant to a conditional order. Discovery and an evidentiary hearing followed, after which an order issued concluding that the lethal-injection protocol, as implemented, violated the Eighth Amendment. *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006). The Court then acceded to a joint request by Morales and defendants to stay the present litigation until related state-court and administrative processes were completed.

Following certain state proceedings, defendants scheduled Albert Greenwood Brown's execution. Brown moved to intervene and for a stay of execution.

Recognizing that "Brown's federal claims are virtually identical to those asserted by . . . Morales," (Doc. No. 401 at 1), Brown was permitted to intervene, but his stay application was conditionally denied. Brown appealed to the Court of Appeals for the Ninth Circuit. *Morales v. Cate*, 623 F.3d 828, 829 (9th Cir. 2010). On remand, pursuant to guidance from the Ninth Circuit, this Court stayed Brown's execution. In the years following, an additional twenty-two plaintiffs sought and obtained intervention.

In November 2016, California voters passed Proposition 66 ("Prop 66"). One of the major functions of Prop 66 was to exempt certain portions of the lethal injection protocol from the state's Administrative Procedures Act ("APA"). Defendants' failure to comply with the APA had been the subject of prior state litigation that resulted in the stay entered in this case. The State of California finalized and filed defendants' new lethal injection protocol on March 1, 2018. *See* Doc. No. 635. On March 12, plaintiffs filed an update on pending state challenges to the lethal injection protocol. On March 28, the Marin County Superior Court lifted its injunction of defendants' protocol and defendants filed a proposed litigation schedule two days later. Plaintiffs opposed defendants' proposed schedule and the parties were ordered to meet and confer on a litigation schedule. On June 11, the parties submitted a joint case statement and a case management conference was scheduled for October 15.

Prior to the scheduled case management conference, the District Attorneys office from San Bernardino

County filed a motion to intervene as a defendant. Nine days later, the District Attorneys Offices from San Mateo and Riverside Counties filed a substantively identical motion.

DISCUSSION

The District Attorneys offices from San Bernardino, San Mateo, and Riverside Counties seek intervention as a matter of right or, in the alternative, permissive intervention. Additionally, the would-be intervenors seek an order vacating the stays of execution either for all prisoners or for the prisoners whose convictions occurred in their counties and for whom they intend to seek death warrants. Alternatively, they seek a statement confirming that the stays of execution expired ninety days after entry pursuant to the Prison Litigation Reform Act, 18 U.S.C. section 3626(a)(2). Finally, in the event the above requests for relief are not granted, they ask for an order that would enjoin only the use of the three-drug protocol that was found previously to meet the requirements for a stay pursuant to *Raze v. Rees*, 553 U.S. 35 (2008).

I. Intervention

Intervention is a procedure by which a nonparty can gain party status without the consent of the original parties. *United States ex rel. Eisenstein v. City of N. Y.*, 556 U.S. 928, 933 (2009) ("Intervention is the requisite method for a nonparty to become a party to a lawsuit." (citation omitted). There are two types of

intervention: (1) intervention of right, and (2) permissive intervention. *See* Fed. R. Civ. P. 24(a)-(b).

The District Attorneys argue they have the right to intervene pursuant to Federal Rule of Civil Procedure ("FRCP") 24(a)(2). In the alternative, they seek permissive intervention under FRCP 24(b)(2). Plaintiffs oppose this motion, insisting the District Attorneys are not entitled to intervene either as a matter of right or permissively because their motion is untimely, they fail to present a significantly protectable interest, and the defendants sufficiently represent their interests in this matter. Defendants oppose intervention because they argue they can adequately represent would-be intervenors' interests.

a. Intervention as a Matter of Right

Intervention exists as a matter of right when a federal statute confers the right to intervene or the applicant has a legally protected interest that may be impaired by disposition of the pending action and existing parties do not adequately represent that interest. Fed. R. Civ. P. 24(a). A court must permit an applicant to intervene as a matter of right when: "(1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest." *Chamness v. Bowen*, 722 F.3d 1110,

1121 (9th Cir. 2013) (citation and internal quotation omitted). "Each of these four requirements must be satisfied to support a right to intervene. While FRCP 24 traditionally receives liberal construction in favor of applicants for intervention, it is incumbent on the party seeking to intervene to show that all the requirements for intervention have been met." *Id.* (internal citation, quotation, and alterations omitted). Failure to satisfy any one of the requirements is fatal to the application. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).

Plaintiffs argue that the motions are untimely and that they come at a late stage in the litigation. Defendants agree with would-be intervenors that the motions are timely in light of changed circumstances. In light of the recent developments in this protracted controversy, the motions to intervene are timely. Therefore, only the remaining factors need be addressed.

1. "Significantly protectable" interest

To determine whether an applicant has a "significantly protectable" interest necessary for intervention, the Court must consider (a) whether the interest is protectable under some law, and (b) whether there is a relationship between the legally protected interest and the claims at issue. *Wilderness Soc. v. United States Forest Service*, 630 F.3d 1173, 1179 (9th Cir.2011). A would-be intervenor will generally demonstrate it "has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a

result of the pending litigation." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir.2006). "Although the intervenor cannot rely on an interest that is wholly remote and speculative, the intervention may be based on an interest that is contingent upon the outcome of the litigation." *United States v. Union Elec. Co.*, 64 F.3d 1152, 1162 (8th Cir.1995) (cited in *United States v. Aerojet General Corp.*, 606 F.3d 1142, 1150 (9th Cir.2010)). When "the injunctive relief sought by plaintiffs will have direct, immediate, and harmful effects upon a third party's legally protectable interests, that party satisfies the 'interest' test." *Forest Conservation Council v. United States Forest Service*, 66 F.3d 1489, 1494 (9th Cir.1995) abrogated by *Wilderness Soc.*, *supra*, 630 F.3d 1173.

Would-be intervenors argue that their duties as district attorneys in enforcing the judgment obtained in capital convictions constitutes a "significantly protectable" interest. San Bernardino County District Attorney's Motion to Intervene ("Mot. to Intervene I") at 15, Riverside and San Mateo Counties District Attorneys' Motion to Intervene ("Mot. to Intervene II") at 18. Would-be intervenors say that they are tasked with vindicating the "interests of the state and victims," that the District Attorneys and not the Attorney General "hold the interest in the judgment in the final stage of a capital case," and that the stays of execution entered in this case prevent them from fulfilling their duties. Mot. to Intervene I at 15; Mot. to Intervene II at 18. The San Bernardino County District Attorney makes a stronger declaration in his reply claiming that

the interest in Plaintiff Kevin Cooper's death judgment is ascribable only to the District Attorney. Reply at 1.

Plaintiffs argue that would-be intervenors do not have a protectable interest "under some law" because California law prohibits district attorneys from engaging in civil litigation absent express statutory authority. Opp. at 8. Even if would-be intervenors were permitted to enter the suit, plaintiffs argue, the enforcement of a capital judgment is not related sufficiently to the method of execution to warrant intervention as a matter of right. *Id.* at 9. Defendants do not address this factor.

The United States Supreme Court repeatedly has addressed the importance of a "State's significant interest in enforcing its criminal judgments." *Nelson v. Campbell*, 541 U.S. at 637, 650 (2004). *See also In re Blodgett*, 502 U.S. 236, 239 (1992) ("None of the reasons offered in response dispels our concern that the State of Washington has sustained severe prejudice by the $2^{1/2}$-year stay of execution. The stay has prevented Washington from exercising its sovereign power to enforce criminal law. . . ."); *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992) ("Equity must take into consideration the State's strong interest in proceeding with its judgment. . . ."); *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them."); *Engle*

v. Isaac, 456 U.S. 107, 128 ("The States possess primary authority for defining and enforcing the criminal law. . . . Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."). There is no doubt that the interest is "protectable under some law." *Wilderness Soc.*, 630 F.3d at 1179. Would-be intervenors, however, have failed to show that the State's interest belongs to them or that their role in filing for a death warrant rises above a ministerial action in service to the State's interest.

The United States Supreme Court determined based on California law that the Attorney General is the "highest non-judicial legal officer of California, and is particularly charged with the duty of supervising administration of the criminal laws." *Phyle v. Duffy*, 334 U.S. 431, 441 (1948). The California Constitution provides that the Attorney General shall "see that the laws of the State are uniformly and adequately enforced." Cal. Const. Art. V, § 13. To that end, the Attorney General maintains "direct supervision over every district attorney" and whenever deemed necessary by the Attorney General or, "when directed to do so by the Governor," that officer may step in and assist district attorneys in the discharge of their duties or "take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction." Cal. Gov't Code § 12550. While, as noted by would-be intervenors, the Attorney General has not been named as a party to this lawsuit, his supervisor, the Governor

has been. *See* Cal. Const. Art. V, § 1 ("The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed."); Cal. Const. Art. V, § 13 ("*Subject to the powers of the Governor*, the Attorney General shall be the chief law officer of the State." (emphasis added)). The "State's interest," therefore, lies with the highest officials in the State's executive branch.

The state law provision on which would-be intervenors rely to support their interest in the final stage of a capital judgment does not contradict this interpretation, as it explicitly does not designate would-be intervenors exclusively. It also invests the trial court with the same interest. California Penal Code section 1227(a) provides that "the court in which the conviction was had shall, on application of the district attorney, *or may upon its own motion*, make and cause to be entered an order specifying a period of 10 days during which the judgment shall be executed" (emphasis added).

The District Attorneys play a vital role in assisting the State in enforcing its criminal law, but that role is a subsidiary one. They act as representatives of the State when initiating a prosecution, *Weiner v. County of San Diego*, 210 F.3d 1025, 1031 (2000). However, they are not State officers for all purposes. *Id.* Given the subordinate and mixed nature of their roles, the District Attorneys cannot be the sole or primary holders of the State's interest in seeing a criminal sentence implemented.

The District Attorneys' arguments that they are the sole representatives of victims also fail. They rely on *Blake v. Pallen*, 554 F.2d 947 (9th Cir. 1977), for the proposition that an official has a sufficient "interest in adjudications that will directly affect his own duties and powers under state laws." Mot. to Intervene I at 13, Mot. to Intervene II at 16, both citing *Blake*, 554 F.2d at 953. *Blake*, however, holds that the "public interest" is not enough to warrant intervention as a matter of right.

In *Blake*, the California Commissioner of Corporations sought intervention in a class-action suit alleging "causes of action grounded on Federal Securities Law violations and three pendent counts based on California State Securities and Civil Fraud Laws." 554 F.2d at 950. The Commissioner alleged a right to intervention on the grounds that the court may interpret federal securities law in a way that impacted California securities law, the action in which he sought to intervene contained three claims based on state securities law, California statutes authorized him in his official capacity to seek economic redress for securities fraud violations, and the court should allow government intervention to "represent the public interest." *Id.* at 952-953. The Ninth Circuit ultimately upheld the district court's determination that the commissioner was not entitled to intervention as a matter of right, finding that California and federal securities law schemes were separate autonomous systems; the commissioner did not have an interest in every case arising under securities laws; and the commissioner had other

means by which he could vindicate consumers' rights. *Id.* The court specifically noted that "it would be impractical to base a finding of sufficient interest for purposes of establishing intervention of right solely on public interest grounds." *Id.* at 953.

Under the California Constitution, the State's interest in enforcing its own laws lies with the Governor, which is then delegated to the Attorney General, and through the Attorney General, down to county District Attorneys. Would-be intervenors have failed to substantiate their assertion that the interest is theirs alone. That basis by itself, therefore, warrants denial of intervention. *Perry*, 587 F.3d at 950.

2. Adequacy of Representation by Current Defendants

Would-be intervenors also have failed to show that the current defendants do not adequately represent their interests. "Where the party and the proposed intervenor share the same 'ultimate objective,' a presumption of adequacy of representation applies." *Perry*, 587 F.3d at 951 (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir.2003)). As noted above, both the Governor, who is a current defendant, and the would-be intervenors share an interest in the resolution of criminal sentences, though the current defendant possesses the greater interest.

Moreover, the would-be intervenors' primary objection is to the current defendants' failure to seek reconsideration or interlocutory appeals for orders that

rejected defendants' arguments. Mot. to Intervene I at 17, Mot. to Intervene II at 20. As defendants note, "mere [ ] differences in [litigation] strategy . . . are not enough to justify intervention as a matter of right." *Perry*, 587 F.3d at 954, *quoting United States v. City of Los Angeles*, 288 F.3d 391, 402-403 (9th Cir. 2002). The would-be intervenors do suggest that current defendants have not made all arguments available; however, they concede that defendants have raised arguments about the stays of execution pursuant to the Prison Litigation Reform Act and have made arguments that the complaint is both moot and fails to meet current pleading standards under the most recent Supreme Court cases addressing the issue.[1] Mot. to Intervene I at 17, Mot. to Intervene II at 19.

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[1] In his reply, the San Bernardino County District Attorney argues that current defendants failed to make any arguments that the stays of execution have expired pursuant to the PLRA. Reply at 6. As part of the adequacy of representation evaluation, a court must consider the extent to which the interest of the current parties to the suit are such that those parties will make all of the would-be intervenors' arguments and the extent to which said parties are willing and able to make such arguments. *Arakaki*, 324 F.3d at 1086. However, the most important factor to evaluate is the nature of the would-be intervenor's interest as compared to the existing parties' interests, which is discussed in great detail below. The Court finds that the current defendants have made nearly every argument the would-be intervenors raise. Current defendants repeatedly have argued against the stays under multiple legal theories. This difference between would-be intervenors' position and the arguments made by current defendants amounts to trial strategy. There is no reason the would-be intervenors could not have raised this issue in an *amicus curiae* brief.

Because a dispute about trial tactics is an insufficient basis on which to support a finding that the current defendants cannot adequately represent the interests of the would-be intervenors and because the law presumes that the current defendant provides adequate representation, the District Attorneys also have not met their burden under this prong of the evaluation.

b. Permissive Intervention

If a would-be intervenor cannot show a right to intervene, under FRCP 24(b), a court may also permit anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Unlike intervention as of right, permissive intervention focuses on possible prejudice to the original parties to the litigation, not the intervenor. *Donnelly v. Glickman*, 159 F.3d 405, 411 (9th Cir. 1998). Thus, "in exercising its discretion, the court is to consider 'whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.'" *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1128 n.10 (9th Cir. 2002), abrogated on other grounds by *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (quoting Fed. R. Civ. P. 24(b)(2)). "[P]ermissive intervention 'requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action.'" *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011) (quoting

Beckman Indus., Inc. v. Intl Ins. Co., 966 F.2d 470, 473 (9th Cir. 1992)). "Even if an applicant satisfies those threshold requirements, the district court has discretion to deny permissive intervention." *Donnelly*, 159 F.3d at 412. In ruling on a motion to intervene, the Court must accept as true the nonconclusory allegations of the motion and proposed pleading. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001).

Allowing the District Attorneys to intervene in this case would exacerbate the delay about which they complain. The would-be intervenors noted their disagreement with defendants' litigation tactics, believing instead that defendants should have pursued motions for reconsideration or interlocutory appeals, which could delay matters up to several months.

Moreover, California has fifty-eight counties. Should permissive intervention be granted here, the prospect arises that an additional fifty-five District Attorney offices would seek to intervene. Requiring the plaintiffs and primary defendants to confer with so many intervenors, each of whom is under the supervision of one current defendant, and whose interest is marginal to the subject matter of the complaint would be unwieldy and prejudicial. That is to say nothing of the detrimental impact of litigating such complex and wide-reaching issues on a plaintiff-by-plaintiff basis, as counties seek to lift the stays of the execution for plaintiffs for whom they seek a death warrant.

Finally, as this Court has noted before, this case focuses solely on the method and implementation of the death penalty. It does not concern whether California should maintain capital punishment or the wisdom of the death penalty in the first instance. (Doc. No. 424 at 8.) The District Attorneys have no involvement in the drafting or implementation of any method-of-execution protocol and are not entitled to an unconstitutional resolution of any case that their office prosecuted. As such, they have failed to show "a common question of law and fact between the movant's claim or defense and the main action." *Freedom from Religion Found., Inc.*, 644 F.3d at 843. Accordingly, permissive intervention is denied.

II. Stays of Execution

Because the District Attorneys have been denied intervention, they lack standing to challenge the orders previously issued in this case. Accordingly, their arguments regarding the expiration or lifting of the stays of execution will not be addressed.

III. Plaintiff Cooper's Request for Judicial Notice

Plaintiff Kevin Cooper filed a separate opposition to the San Bernardino County District Attorney's motion to intervene to "provide the Court [with] pertinent additional information concerning DA Ramos' motive to seek to intervene. . . ." Cooper Opp. at 1. Cooper's opposition focuses on the fact that that District Attorney

Ramos was voted out of office in June by San Bernardino County voters. Cooper attached to his opposition a request for judicial notice of eight exhibits totaling approximately eighty pages of news articles and government web site documents concerning the recent San Bernardino County election.

While in the right circumstances a court may take judicial notice of both publicly available media articles, *Ritter v. Hughes Aircraft, Co.*, 58 F.3d 454, 458-59, and government web site documents, *Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010), it is not appropriate to do so in this instance. Whatever motivation District Attorney Ramos may have in filing a motion to intervene is irrelevant to the legal standard that must be considered in determining whether to grant his motion. Accordingly, the request for judicial notice is denied.

CONCLUSION

For the foregoing reasons, both of the motions to intervene and Plaintiff Cooper's request for judicial notice are denied. The scheduled hearing date of August 9, 2018, shall be taken off calendar.

IT IS SO ORDERED.

Dated: July 18, 2018

/s/ Richard Seebo
RICHARD SEEBO
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

GAVIN NEWSOM; SCOTT KERNAN, Secretary of the California Department of Corrections and Rehabilitation; RONALD DAVIS, Warden of San Quentin State Prison,

Defendants-Appellees,

v.

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

Movants-Appellants.

No. 18-16547

D.C. Nos.
3:06-cv-00219-RS
3:06-cv-00926-RS

ORDER

Filed March 2, 2022

Before: William A. Fletcher, Danielle J. Forrest, and Lawrence VanDyke, Circuit Judges.

App. 55

Order;
Concurrence by Judges W. Fletcher and Forrest,
Dissent by Judge Bumatay,
Dissent by Judge Callahan,
Dissent by Judge VanDyke

COUNSEL

Robert P. Brown (argued), Chief Deputy District Attorney; James R. Second, Deputy District Attorney; Jason Anderson, District Attorney; District Attorney's Office, San Bernardino, California; Michael A. Hestrin, District Attorney; Ivy B. Fitzpatrick, Managing Deputy District Attorney; Office of the District Attorney, Riverside, California; Stephen M. Wagstaffe, San Mateo County District Attorney's Office, Redwood City, California; for Movants-Appellants.

John R. Grele (argued), Law Office of John R. Grele, San Francisco, California; David A. Senior, Sara Cobbra, and Ann K. Tria, McBreen & Senior, Los Angeles, California; Norman C. Hile, Orrick Herrington & Sutcliffe LLP, Sacramento, California; Richard P. Steinken, Jenner & Block, Chicago, Illinois; Margo Rocconi and Elizabeth Dahlstrom, Federal Public Defender's Office, Los Angeles, California; for Plaintiffs-Appellees.

Misha D. Igra (argued), Supervising Deputy Attorney General; Monica N. Anderson, Senior Assistant Attorney General; Rob Bonta, Attorney General; Attorney General's Office, Sacramento, California; for Defendants-Appellees.

ORDER

A judge sua sponte called for a vote on whether to rehear this case en banc. The matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35(f). Judge Lee and Judge Koh did not participate in the deliberations or vote in this case. Rehearing en banc is **DENIED**.

Filed concurrently with this order are Judge W. Fletcher and Judge Forrest's concurrence in and Judge Bumatay's, Judge Callahan's, and Judge VanDyke's separate dissents from the denial of rehearing en banc.

W. FLETCHER and FORREST, Circuit Judges, concurring in the denial of rehearing en banc:

The question in this appeal is whether the District. Attorneys of California's San Bernardino, San Mateo, and Riverside counties may intervene in litigation challenging the constitutionality of California's chosen method of execution. We held that because the District Attorneys have no authority under California law to participate in choosing the method by which California executes condemned prisoners, or to represent in court those who do have that authority, the district court properly denied intervention. *Cooper v. Newsom*, 13 F.4th 857, 864-69 (9th Cir. 2021).

The District Attorneys did not seek panel or en banc rehearing of our decision. Instead, one of our colleagues sua sponte called for rehearing en banc, contending that the District Attorneys are entitled to intervene as of right under Federal Rule of Civil Procedure 24(a)(2). A majority of our court voted not to rehear the case. Several of our colleagues now dissent from that decision.

The voters of California approved the Death Penalty Procedures Initiative of 2016, otherwise known as Proposition 66, retaining the death penalty. *Inter alia*, Proposition 66 created a mechanism allowing District Attorneys to move in the state court that imposed the death penalty for an order directing the California Department of Corrections and Rehabilitation ("CDCR") to "perform any duty needed to enable it to execute the judgment." Cal. Penal Code § 3604.1(c). But neither Proposition 66, nor any other provision of California law, gives District Attorneys authority to participate in choosing the method by which California executes condemned prisoners, or to represent in court those who have the authority to make that choice.

California law is clear that the responsibility to formulate, promulgate, and effectuate California's execution protocols is assigned to the defendants in this action—the Governor, the Secretary of the CDCR, and the Warden of San Quentin Prison. Cal. Const. art. V, § 1; Cal. Penal Code § 3604; Cal. Penal Code §§ 3603, 3605, 3607. California law is also clear that the Attorney General, rather than a District Attorney, has the responsibility to represent these defendants. Cal. Gov't

Code § 12512. The California Supreme Court has held that the authority of District Attorneys to participate in civil litigation is "narrow and specific," as expressly defined by statute. *Safer v. Superior Ct. of Ventura Cnty.*, 15 Cal.3d 230, 237 (1975). Because the District Attorneys have no statutory authority to participate in this litigation, they have no right to intervene under Rule 24(a)(2).

Our dissenting colleagues contend that our panel's decision "cast[s] aside the will of the people" and "seriously mangle[s] our Rule 24 caselaw." Judge Bumatay Dissent at 18. They are mistaken on both counts. Our opinion faithfully follows California law; correctly applies Rule 24(a)(2); and is consistent with two analogous cases decided by our sister circuits.

I. Rule 24(a)(2)

Rule 24(a)(2) allows intervention as of right if a party "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 [party's] ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). We apply a four-part test:

> (1) the motion must be timely; (2) the applicant must claim a 'significantly protectable' interest 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'y v. U.S. Forest Serv., 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc) (citations omitted).

"An applicant for intervention has a significantly protectable interest if the interest is protected by law and there is a relationship between the legally protected interest and the plaintiff's claims." *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). The legally protected interest need not be protected under the statute under which the litigation is brought; it is sufficient for the interest to be "protectable under any statute." *Id.* As we noted in our opinion, *Cooper*, 13 F.4th at 865, we weigh both practical and equitable concerns, and we interpret the Rule's requirements broadly in favor of intervention. *Alisal Water Corp.*, 370 F.3d at 919.

The suit into which the District Attorneys seek to intervene was brought by condemned prisoners against the Governor, the Secretary of the CDCR, and the Warden of San Quentin, challenging the constitutionality of California's chosen method of execution. This case has a long history, which we recount in our opinion. *See Cooper*, 13 F.4th at 860-62. The suit was filed in 2006 by death row inmate Michael Morales, challenging California's then-existing execution protocol. The District Attorneys moved to intervene in June and July 2018.

Our dissenting colleagues argue that the District Attorneys are entitled to intervene on the ground that they have significant interest in enforcing the capital sentences in their counties. We agree that the District Attorneys have the authority to conduct all prosecutions for public offenses, including capital offenses. Cal. Const. art. XI, § 1(b); Cal. Gov't Code § 26500. California law gives its District Attorneys "sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek." *Dix v. Superior Ct.*, 53 Cal.3d 442, 451 (1991). We also agree that the District Attorneys have the authority to seek orders directing the CDCR to carry out judgments of execution entered in their counties. Cal. Penal Code § 3604.1(c). However, the District Attorneys' statutory authority does not include the authority to choose *the method* by which California executes condemned inmates, or to defend in court those who do have the authority to make that choice.

Our colleagues disagree and contend that California Penal Code § 3604.1(c), enacted pursuant to Proposition 66, gives the District Attorneys a significant protectable interest in the litigation over the constitutionality of California's chosen method of execution. Judge Bumatay Dissent at 17, 23-24; Judge Callahan Dissent at 30; Judge VanDyke Dissent at 36. Section 3604.1(c) provides:

> The court which rendered the judgment of death has exclusive jurisdiction to hear any claim by the condemned inmate that the method of execution is unconstitutional or

> otherwise invalid. Such a claim shall be dismissed if the court finds its presentation was delayed without good cause. If the method is found invalid, the court shall order the use of a valid method of execution. If the use of a method of execution is enjoined by a federal court, the Department of Corrections and Rehabilitation shall adopt, within 90 days, a method that conforms to federal requirements as found by that court. If the department fails to perform any duty needed to enable it to execute the judgment, the court which rendered the judgment of death shall order it to perform that duty on its own motion, on motion of the District Attorney or Attorney General, or on motion of any victim of the crime as defined in subdivision (e) of. Section 28 of Article I of the California Constitution.

As we wrote in our opinion, the plain language of § 3604.1(c) "only authorizes District Attorneys to move in the state trial court that imposed the death penalty for an order directing the CDCR to perform its duty to carry out the court's judgment." *Cooper*, 13 F.4th at 867. It does not authorize the District Attorneys to participate in choosing the method of execution, or to participate in civil litigation challenging the method of execution.

Our colleagues contend that our application of Rule 24(a)(2) is inconsistent with our precedent. They rely on a line of cases in which we have held that an intervenor had a significant protectable interest under Rule 24(a)(2) deriving neither from an express

statutory interest nor from a real property right. Judge Bumatay Dissent at 21-23 (citing *Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980); *Washington State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 629-30 (9th Cir. 1982); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-28 (9th Cir. 1983); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995)).

In *Idaho v. Freeman*, we held that the National. Organization for Women, a leading national advocate of the Equal Rights Amendment to the U.S. Constitution, had a right to intervene in a suit challenging procedures for the ratification of the proposed Amendment. 625 F.2d at 887. In *Washington State Bldg. & Const. Trades Council, AFL-CIO*, we held that a public interest organization, Don't Waste Washington, had a right to intervene in litigation challenging the constitutionality of a successful ballot initiative that they had sponsored. 684 F.2d at 629-30. In *Sagebrush Rebellion*, we held that a group of would-be intervenors—including the National Audubon Society, five environmental Idaho nonprofit organizations, and four Idaho residents—had a right to intervene in a suit challenging the legality of the Secretary of the Interior's actions surrounding the creation of the Snake River Birds of Prey National Conservation Area because of their active role in the administrative establishment of the conservation area and their interest in the preservation of the birds and the birds' habitat. 713 F.2d at 526-28. Finally, in *Idaho Farm Bureau Federation*, we held that the Idaho Conservation League and

the Committee for Idaho's High Desert had a right to intervene in litigation challenging the U.S. Fish and Wildlife Service's listing of an endangered species because they advocated for the listing throughout the administrative process. 58 F.3d at 1397-98.

These cases are inapposite. Each of them addresses intervention by non-governmental organizations in actions challenging the legality of measures they sponsored through legislative processes or sought in formal administrative rulemaking proceedings. None of them supports intervention as of right by government officials who lack statutory authority to participate in the formulation of the policy at issue, or to represent the government entity or official who does have that authority. In the case before us, the state officials responsible under state law for choosing the appropriate method or execution have been sued, and they are represented by the state Attorney General, the state official responsible under state law for defending them.

Judge Bumatay contends that the District Attorneys' role as public officials gives them at least as valid an interest in civil litigation affecting their interest in seeing death judgments carried out as the interests the non-governmental organizations and individuals had in the above cases. Judge Bumatay Dissent at 23. In fact, the opposite is true. It is *because* the District Attorneys are public officials, and because their authority to pursue civil litigation is limited by state law, that they do not have an interest sufficient to support intervention under Rule 24(a)(2). *Cooper*, 13 F.4th at

866-67; *cf. United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002) (granting intervention to police officers' union in suit challenging the constitutionality of policing procedures based on its right to negotiate terms and conditions of its members' employment).

Judge Bumatay further contends that "[w]hile California courts have recognized some limits to district attorneys' authority to pursue civil *prosecutions*, no California court has said that district attorneys are prohibited from *defending* the constitutionality of state laws, such as the State's death-penalty protocol." Judge Bumatay Dissent at 25 (emphasis in original). This is incorrect. The foundation California case is *Safer*, decided by the California Supreme Court almost fifty years ago. The Court wrote, "By the specificity of its enactments the Legislature has manifested its concern that the district attorney exercise the power of his office only in such civil litigation as that lawmaking body has, after careful consideration, found essential. An examination of the types of civil litigation in which the Legislature has countenanced the district attorney's participation reveals both the specificity and the narrow perimeters of these authorizations." *Safer*, 15 Cal.3d at 235. *Safer* requires statutory authorization not only for prosecution by District Attorneys, but also for "interven[tion]," "appearance," "defen[se]," "represent[ation]," and "participation" by District Attorneys. *Id.* at 235-37.

The two cases cited by Judge Bumatay in support of this contention are also inapposite. Judge Bumatay

Dissent at 25-26. District Attorneys are statutorily authorized to bring civil suits to enforce California's Unfair Competition Law ("UCL"). *See* Cal. Bus. & Prof. Code §§ 17204, 17206(a). In *Abbott Laboratories v. Superior Court*, 9 Cal.5th 642, 663-664 (2020), the Court held that a District Attorney may seek a state-wide injunction under the UCL. In *People v. McKale*, 25 Cal.3d 626, 633-634 (1979), the Court held that a District Attorney may sue under the UCL to enforce California's Mobilehome Parks Act.

II. Our Sister Circuits.

In analogous cases, our sister circuits have recognized similar limits on district attorneys' interest in civil litigation. As we discussed in our opinion, *Cooper*, 13 F.4th at 867-88, the Fifth Circuit in *Saldano v. Roach*, 363 F.3d 545, 551-56 (5th Cir. 2004), denied a district attorney intervention as of right in a Texas prisoners' habeas corpus proceeding. The court held that Texas law did not grant district attorneys the authority to represent state officials or the State in federal habeas corpus proceedings; that authority was delegated to the Attorney General. *Id.* at 552. Similarly, the Third Circuit in *Harris v. Pernsley*, 820 F.2d 592, 600 (3rd Cir. 1987), denied a district attorney the right to intervene in constitutional litigation challenging the conditions in Pennsylvania state prisons. The court held that the scope of the district attorneys' interest was "defined by the scope of his legal duties under Pennsylvania law" and they had "no legal duties or

powers with regard to the conditions in the Philadelphia prison system." *Id.* at 597, 600.

In both cases, the Fifth and Third Circuits recognized that state law gave the district attorneys an interest in prosecuting criminal cases. Those courts also recognized that the district attorneys' interest in prosecuting cases and seeing the resulting judgments of conviction and punishments carried out would be affected as a practical matter by the litigation. But those courts nevertheless held that the district attorneys' role was limited by state law, and that they therefore did not have a legally protectable interest that would merit intervention as of right. *Saldano*, 363 F.3d at 553; *Harris*, 820 F.2d at 601-02.

* * *

While the people of California chose in Proposition 66 to retain the death penalty and to give District Attorneys an additional mechanism to pursue enforcement of a death sentence, they did not give District Attorneys authority to participate in the State's choice of execution methods or in the legal defense of those methods. Cal. Penal Code § 3604.1(c). The people of California, through their chosen representatives, assigned the ultimate duty to execute state laws to the Governor, Cal. Const. art. V, § 1; the duty to oversee execution procedures to the Secretary of the CDCR, Cal. Penal Code § 3604; the duty to implement execution to the Warden of San Quentin, Cal. Penal Code §§ 3603, 3605, 3607; and the duty to defend state laws and officers to the Attorney General, Cal. Gov't Code § 12512.

Our dissenting colleagues gloss over these facts, suggesting that Californians have spoken in a singular voice in favor of the death penalty and the expansion of the District Attorneys' authority into areas statutorily delegated to other state officials. We cannot agree. Our opinion respects the will of California voters by considering not only Proposition 66, but also the statutory roles assigned to California's respective state officials by the people's elected representatives.

BUMATAY, Circuit Judge, with whom GOULD, CALLAHAN, IKUTA, BENNETT, and VANDYKE, Circuit Judges, join, dissenting from the denial of rehearing en banc:

With the passage of Proposition 66 in 2016, the people of. California unambiguously expressed a desire to retain the death penalty and to remove obstacles to carrying-out death judgments. *See Briggs v. Brown*, 3 Cal. 5th 808 (2017). Through Proposition 66, the people empowered California's elected district attorneys to ensure that the California Department of Corrections and Rehabilitation, the agency tasked with administering the death penalty, performs "any duty needed to enable it to execute the judgment [of death]." Cal. Penal Code § 3604.1(c). California law also charges district attorneys with seeking the death penalty on "behalf of the people." *See* Cal. Gov't Code § 26500.

Despite the continued support of the people of California, the death penalty remained tied-up in the

federal courts. In 2006, a California death-row inmate challenged California's then-existing death penalty protocol as violating the U.S. Constitution. The inmate sued the Governor of California, the Secretary of the California Department of Corrections and Rehabilitation, and the Warden of San Quentin State Prison. The California Attorney General defended the action in federal court. Over the ensuing years, about two dozen other condemned inmates successfully intervened in the 42 U.S.C. § 1983 action and received a stay of execution. Because of this litigation, there was "a de facto moratorium on all executions in California." *Morales v. Cate*, 623 F.3d 828, 830 (9th Cir. 2010) (per curiam).

In 2018, the District Attorneys of San Bernardino, Riverside, and San Mateo, who each obtained death judgments against various plaintiff inmates, sought to intervene as of right under Federal Rule of Civil Procedure 24(a)(2). The District Attorneys contended that the Attorney General represented the interest of California's executive officers in the litigation—not the interest of the people. The District Attorneys argued that the voice of the people, for whom the death penalty was sought, must be permitted to participate. The district court denied the motion, and soon after, the Governor of California unilaterally imposed a moratorium on all executions. The District Attorneys appealed the denial of intervention. And a divided panel of our court affirmed, holding that the District Attorneys had no "significant protectable" interest in the death penalty litigation. *Cooper v. Newsom*, 13 F.4th 857, 865 (9th Cir. 2021).

In denying the District Attorneys' intervention in this case, not only do we cast aside the will of the people, but we seriously mangle our Rule 24 caselaw. As a court, we've set a rather low bar for what constitutes a "significantly protectable" interest. We are not to conduct an exacting and penetrating review of the claimed interest since the whole point of intervention is to provide "both efficient resolution of issues and broadened access to the courts." *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (en banc) (simplified). And it does not require the interest to be conferred by a directly on-point statute. *See*, *e.g.*, *Kalbers v. U.S. Dep't of Just.*, ___ F.4th ___, 2021 WL 6123196, at *9 (9th Cir. 2021) (holding that FOIA, which allows the *government* to claim exemptions from disclosure, created a protectable interest for a third-party intervenor). Instead, we are guided by "practical and equitable considerations and construe the Rule broadly in favor of proposed intervenors." *Wilderness Soc.*, 630 F.3d at 1179 (simplified); *see also W. Watersheds Project v. Haaland*, ___ F.4th ___, 2022 WL 39845, at *5 (9th Cir. 2022) ("In addition to mandating broad construction, our review is guided primarily by practical considerations, not technical distinctions." (simplified)).

While this case is about interpreting Rule 24, at its core, it is about the will of the people of California and our duty to respect it. The State of California and her people have vested the District Attorneys with an interest in enforcing death judgments. And in case after case, we've broadly construed the scope of a

protectable interest. But, for some reason, we have decided to nickel-and-dime the District Attorneys here. Perhaps it's because this case involves the death penalty. But the panel's decision has nothing to do with the merits of the death penalty. And we shouldn't manipulate our intervention doctrine simply because a case touches on disfavored policy. What's more, the panel's decision will likely have far-reaching effects on other areas of the law—like civil rights and environmental rights. So we should not have been so quick to decline to rehear en banc the panel's decision.

For these reasons, I respectfully dissent from the denial of rehearing en banc.

I.

Under Rule 24(a)(2), we must permit anyone to intervene in a federal action if the person "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." Fed. R. Civ. P. 24(a)(2). We use a four-part test in evaluating a Rule 24 motion:

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the 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., 630 F.3d at 1177 (simplified).

For the last 40 years, we've liberally construed Rule 24(a)(2) and tilted the inquiry in "favor of intervention." *See Washington State Bldg. & Const. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982). This broad view of Rule 24 is rooted in concerns of judicial efficiency and access to justice: "[b]y allowing parties with a *practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow 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) (simplified).

Our court denied the District Attorneys' intervention solely because they failed to satisfy the "significantly protectable" interest prong of Rule 24. *See Cooper*, 13 F.4th at 865. That prong has two components: whether (1) a proposed intervenor "asserts an interest that is protected under some law," and (2) "there is a 'relationship' between [the proposed intervenor's] legally protected interest and the plaintiff's claims." *City of Los Angeles*, 288 F.3d at 398 (simplified). We erred on both components. Not only did we disregard our longstanding view of what constitutes a protectable interest. But we also significantly

heightened the "relationship" requirement between the protectable interest and the plaintiff's claims in the litigation.

We should have fixed both errors on en banc review.

A.

We've set a low threshold for evaluating a prospective intervenor's claim of a "significantly protectable" interest. There's no "clear-cut or bright-line rule," because "[n]o specific legal or equitable interest need be established" to meet the test. *Id.* at 398 (simplified). Instead, the "interest" test directs courts to make a "practical, threshold inquiry," and "is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Id.* (simplified). And there's no requirement that the interest "be protected by the statute under which the litigation is brought." *Wilderness Soc.*, 630 F.3d at 1179. It is enough that the "interest is protected by *some* law." *Id.* (emphasis added) (simplified).

We've even gone so far to say that, "[i]n some contexts, . . . interests less plainly protectable by traditional legal doctrines suffice[] for intervention of right." *Sierra Club v. EPA*, 995 F.2d 1478, 1482 (9th Cir. 1993), *abrogated on other grounds by Wilderness Soc.*, 630 F.3d at 1177-81. Examples of less concrete interests giving rise to a "significantly protectable" interest abound in our caselaw:

- An environmental group had a right to intervene in a challenge to a state law prohibiting the entry of radioactive waste into Washington "as the public interest group that sponsored the initiative." *Spellman*, 684 F.2d at 629-30.

- The National Audubon Society had a protectable interest for mandatory intervention into a lawsuit involving the creation of a conservation area because "[a]n adverse decision in th[e] suit would impair the society's interest in the preservation of birds and their habitats." *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-28 (9th Cir. 1983).

- The National Organization for Women was entitled to intervene as of right in a suit litigating the procedures for ratification of the proposed Equal Rights. Amendment purely based on its "interest in the continued vitality of the ERA." *State of Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980); *see also Sagebrush Rebellion*, 713 F.2d at 527 (reading *Freeman* to require intervention because the lawsuit involved "a cause . . . that [NOW] had championed").

- A public interest group satisfied the interest requirement because it had been "active in the process [U.S. Fish and Wildlife Services] went through" to list a particular snail species as endangered. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1398 (9th Cir. 1995).

1.

Based on this precedent, it's clear we should have ruled that the District Attorneys have a "significantly protectable" interest in the litigation challenging the constitutionality of California's death penalty protocols. The District Attorneys are elected officials whose offices were created by the California Constitution. Cal. Const. art. XI, § 1(b). They are empowered by law to "conduct on behalf of the people all prosecutions for public offenses." Cal. Gov't Code § 26500. They have "sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek." *Dix v. Superior Court*, 53 Cal. 3d 442, 451 (1991). They also "may sponsor, supervise, or participate in any project or program to improve the administration of justice." Cal. Gov't Code § 26500.5. Thus, California law grants the District Attorneys the general authority to prosecute and seek the death penalty on "behalf of the people" and, along with that, the responsibility to ensure that the judgments are enforced.

While the District Attorneys' general mandate to enforce criminal judgments may be enough, Proposition 66 confirms that they have exceeded the Rule 24 protectable-interest threshold. By approving Proposition 66, the people of California both expressly voiced their will to retain the death penalty and enacted a law expanding the authority of district attorneys to carry out the punishment. Prop. 66, § 11 (approved Nov. 8, 2016, effective Oct. 25, 2017). California law now provides:

> If the use of a method of execution is enjoined by a federal court, the Department of. Corrections and Rehabilitation [CDCR] shall adopt, within 90 days, a method that conforms to federal requirements as found by that court. If the department fails to perform any duty needed to enable it to execute the judgment, the court which rendered the judgment of death shall order it to perform that duty on its own motion, on motion of the District. Attorney or Attorney General, or on motion of any victim of the crime.

Cal. Penal Code § 3604.1(c). As Judge VanDyke correctly noted, "[t]his statute codifies the District Attorneys' specific interest in ensuring that death penalty judgments are carried out." *Cooper*, 13 F.4th at 873 (VanDyke, J., dissenting). And it's clear that such authority "is a civil, not criminal function—making it clear that District Attorneys are empowered to represent the State and the People in *civil* litigation involving the legality of state agency procedures." *Id.*

The panel majority now declares that none of our prior. Rule 24(a)(2) precedent is relevant in this case because the District Attorneys are "public officials." Concurrence at 14. The panel majority maintains that to intervene, "government officials," unlike other parties, must have "statutory authority to participate in the formulation of the policy at issue, or to represent the government entity or official who does have that authority." *Id.* at 13. The panel majority cites no authority for this proposition. And nothing in our caselaw establishes such different rules for government

officials and other parties. The text of Rule 24(a)(2) surely doesn't support a distinction.

The panel majority also contends that because the District Attorneys' "authority to pursue civil litigation is limited by state law," that means "that they do not have an interest sufficient to support intervention under Rule 24(a)(2)." *Id.* at 14. Again, that is incorrect. While California courts have recognized some limits to district attorneys' authority to pursue civil *prosecutions*, no California court has said that district attorneys are prohibited from *defending* the constitutionality of state laws, such as the State's death-penalty protocol.

The panel majority draws its conclusion from *Safer v. Superior Court of Ventura County*, 15 Cal. 3d 230, 233, 234-36 (1975), a case where a district attorney dropped criminal proceedings and opted to "prosecut[e]" the case through a contempt charge in a "civil case involving private parties in an economic dispute." *Id.* at 234-36. The California Supreme Court held that the "absence of any statute empowering the district attorney to appear *in private litigation such as the instant case*" showed that the district attorney's actions did not serve the public interest. *Id.* at 238-39 (emphasis added). And so *Safer* is not as broad as the panel majority would have it.

In fact, subsequent California cases show that any requirement for statutory authority to enter civil proceedings is not stringently construed and no on-point statutory grant is necessary. *See*, *e.g.*, *Abott Lab'ys v.*

Superior Ct. of Orange Cnty., 9 Cal. 5th 642, 654-58 (2020) (allowing district attorneys to seek civil remedies under an unfair competition law even without an express statutory authority to do so); *People v. McKale*, 25 Cal. 3d 626, 633 (1979) (permitting district attorneys to civilly prosecute violations of one statute under a similar statute). And here, as stated above, California law empowers district attorneys to intervene in civil actions to force the State to effectuate its duty to carry out the death penalty. Cal. Penal Code § 3604.1(c). Thus, contrary to the panel majority's contention, California law does not block the District Attorneys from intervening under Rule 24(a)(2).

In short, if an "interest protected by law" may exist simply by "sponsoring" an activity, having an "interest" in the outcome, or by "championing" the subject of the litigation, then the District Attorneys easily exceeded that threshold here.

2.

The panel majority erred by requiring the District. Attorneys to show an on-point statutory grant to intervene in challenges to death penalty protocols. *See Cooper*, 13 F.4th at 866. It concludes that the District Attorneys have no "significant protectable" interest because they "have no authority to choose the method by which California will execute condemned inmates" and no authority "to defend the State against constitutional challenges to execution protocols." *Id.* at 866-68.

But the panel majority "mistakenly focuses on the underlying legal claim instead of the property or transaction that is the subject of the lawsuit." *Wilderness Soc.*, 630 F.3d at 1178. We don't myopically focus on "technical distinctions," *Haaland*, ___ F.4th ___, 2022 WL 39845, at *5 (simplified), nor do we require the type of direct statutory authority described by the majority, *see Kalbers*, ___ F.4th ___, 2021 WL 6123196, at *9. Rather, we simply evaluate, through a practical and generous lens, whether the proposed intervenor's interest is protected by "some law." *Wilderness Soc.*, 630 F.3d at 1179 (simplified). It thus follows that the cramped view espoused by the panel can neither be squared with precedent nor with our guiding principles favoring intervention.

For example, compare *City of Los Angeles* with this case. There, a police union sought mandatory intervention in an action that the United States brought against the City of Los Angeles and the Los Angeles Police Department over the Department's alleged pattern and practice of depriving citizens of their constitutional rights. 288 F.3d at 396. We held that the police union, which represented the LAPD's "rank and file" officers, had a protectable interest in the merits of the action because the complaint sought injunctive relief and made factual allegations against its member officers, even if no officer had an interest in the precise constitutional claims asserted. *Id.* at 398-99. There, we didn't look to see if the police officers had a statutory right to intervene or the authority to engage in adversarial litigation. We instead focused on the litigation's

impact on the officers and their job performance. We should have done the same here. Because as a practical matter, the death-penalty litigation affects the District Attorneys' ability to ensure that death judgments are carried out effectively.

B.

The "significant protectable" interest prong also requires a "relationship" between the proposed intervenors' "legally protected interest and the plaintiff's claims." *Id.* at 398 (simplified). Once again, this requirement is a low hurdle. While the litigation must not be too remote from the protected interest, only some relationship to "the underlying subject matter of the litigation" is required. *Alisal Water Corp.*, 370 F.3d at 920; *see id.* (holding that an interest "several degrees removed" from the litigation will not suffice). The relationship requirement is met "if the resolution of the plaintiff's claims actually will affect the applicant," *City of Los Angeles*, 288 F.3d at 398 (simplified), or if it *may* lead to a practical impairment of interests, *id.* at 401. We've never said that the litigation must be inextricably tied to the interest or that the litigation must infringe on the core of the protected interest. But that's what the panel majority essentially held—again using a more stringent standard than our precedent calls for.

The District Attorneys' interest in ensuring that death judgments are carried out is directly related to the litigation, which seeks to render (and has rendered) the State's execution methods invalid. As the

panel even noted, the stays in the litigation have "effectively suspended the death penalty in California and ha[ve] thereby prevented the District Attorneys from successfully moving in the Superior Court to set execution dates." *Cooper*, 13 F.4th at 867.

Yet the panel majority inexplicably held that the District Attorneys' interests didn't relate to the litigation. It did so by holding that the litigation only "incidentally affects" the way District Attorneys may carry out their duties. *Id.* at 867. The panel majority reasoned that the "District Attorneys' general interest in executing condemned inmates" and "their more specific interest in requesting execution dates" is not implicated by the litigation, "which concerns only the method by which the State may perform executions." *Id.*

The panel majority is wrong for two reasons. First, it changed the threshold for relatedness by requiring an effect on the *core* protected interest. According to the panel majority, "incidental[]" effects are not enough. But that's not what our precedent says. Instead, our cases only require that the resolution of the claims may practically impair or "actually . . . affect" the intervenor and her interest. *City of Los Angeles*, 288 F.3d at 398, 401. Second, even if the panel's standard were the law, the District Attorneys more than met it. As we have said, the litigation has led to the "de facto" (and now de jure) "moratorium" on the death penalty. *Cate*, 623 F.3d at 829-30. So the litigation wouldn't merely "incidentally affect[]" the District Attorneys' interest in effecting the death penalty, it

would (and did) completely destroy it. As Judge VanDyke observed, it's "a little like saying that a statute only 'incidentally affects' car dealers because all it does is prevent them from selling cars." *Cooper*, 13 F.4th at 873-74 (VanDyke, J., dissenting).

It's clear that the heightened standard created by the panel majority is untethered from our precedent and should have been revisited.

II.

With this case we disregard the will of the people of California and our precedent. We now sow more confusion in our law—impacting not only the administration of the death penalty, but also other areas including environmental litigation, voting rights, and civil rights. We should've reheard this case. I respectfully dissent.

CALLAHAN, Circuit Judge, joined by BUMATAY and VANDYKE, Circuit Judges, dissenting from the denial of rehearing en banc:

I fully join Judge Bumatay's dissent from the denial of rehearing en banc. I write separately to further emphasize the profound practical consequences of the panel majority's ruling.

California voters have a lengthy history of supporting the death penalty. The current version of the state's death penalty statute dates back to 1978 when

voters passed Proposition 7 with the intent to "expand and strengthen the death penalty." *People v. Solis*, 46 Cal. App. 5th 762, 772-73, 776-77 (2020). Californians subsequently rejected Proposition 34 (in 2012) and Proposition 62 (in 2016), both of which would have repealed the death penalty.[1]

In 2016 voters also approved Proposition 66, which reaffirmed the electorate's support for the death penalty and was designed "to facilitate the enforcement of judgments and achieve cost savings in capital cases." *Briggs v. Brown*, 3 Cal. 5th 808, 822 (2017). Proposition 66 also gave district attorneys the right to file a motion to compel the California Department of Corrections and Rehabilitation ("CDCR") to "perform any duty needed to enable it to execute" judgments of death. Cal. Penal Code § 3604.1(c).

Despite this clear legal mandate from voters, the Governor of California unilaterally repealed California's lethal injection protocol and instituted a moratorium on state executions. The Governor and the Secretary of the CDCR then agreed with the plaintiffs, inmates on California's death row, to voluntarily dismiss this case on terms that will resurrect the inmates' Eighth Amendment challenge to the protocol if the Governor's moratorium is ever withdrawn. *Cooper v. Newsom*, 13 F.4th 857, 863-64 (9th Cir. 2021).

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[1] History of Capital Punishment in California, Cal. Dep't Corr. & Rehab., https://www.cdcr.ca.gov/capital-punishment/history/ (last visited Jan. 16, 2022).

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 intervene 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. Cal. Penal Code § 3604.1(c); *Cooper*, 13 F.4th at 872-74 (VanDyke, J., dissenting).

The district attorneys also have a strong interest in providing justice to the families of the plaintiffs' victims. Proposition 66 included "a series of findings and declarations to the effect that California's death penalty system is inefficient, wasteful, and subject to protracted delay, *denying murder victims and their families justice and due process*." *Briggs*, 3 Cal. 5th at 823 (emphasis added).

The case of Michael Morales, the original plaintiff in this action, provides a prime example of the concerns that animated California voters. Morales's victim, seventeen-year-old Terri Winchell, disappeared on January 8, 1981, after leaving her house to pick up some food. *Morales v. Woodford*, 388 F.3d 1159, 1163 (9th Cir. 2004). A few days later,

> Terri was found naked except for a shirt and bra, which were pulled up over her breasts. She had suffered six blows to the side of her

> head and seventeen blows to the back of her head. The base of her skull had been shattered. Her skull, cheek bones, and jaw were fractured. She had been stabbed four times in the chest. Her face and body were severely bruised and much of the skin of her front side was torn up. She had multiple wounds on her hands and forearms, typical of a person defending herself.

Id. Morales was convicted of Terri's rape and murder and sentenced to death in June 1983. *People v. Morales*, 48 Cal. 3d 527, 540 (1989). After more than two decades of additional state and federal court litigation, we denied his petition for habeas relief in 2004. *Morales v. Woodford*, 388 F.3d at 1166-67, 1180.

Morales was finally scheduled to be executed in February 2006, more than 25 years after Terri's murder. *Morales v. Hickman*, 438 F.3d 926, 927 (9th Cir. 2006). But Morales then brought this case challenging California's lethal injection protocols, kicking off more than a decade of additional state and federal court litigation. *Cooper*, 13 F.4th at 861-62. California's administrative proceedings instituted in response to the litigation were so lengthy and complicated that the CDCR has an entire page on its website devoted to recounting this history.[2] Meanwhile, Terri's family—and the families of other victims—have repeatedly and unsuccessfully sought to enforce the judgments

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[2] Timeline of Lethal Injection Protocol Regulations, Cal. Dep't Corr. & Rehab., https://www.cdcr.ca.gov/capital-punishment/lethal-injection-timeline/ (last visited Jan. 16, 2022).

against Morales and other death row inmates.[3] It has now been more than 40 years since Morales raped and murdered Terri, and despite his death sentence Morales has outlived both Terri's brother and mother.[4]

This is not the first time the litigation strategies of California's governor and attorney general have effectively left district attorneys and victims' families without representation. For example, recently we were confronted with a case where the California attorney general had successfully defended a 1991 murder conviction for decades, even obtaining a favorable result before a three-judge panel of this court. *Ellis v. Harrison*, 891 F.3d 1160, 1162 (9th Cir. 2018). After the inmate petitioned for rehearing en banc, the attorney general changed positions and asked us to grant habeas relief, which we agreed to do in light of the State's concession. *Ellis v. Harrison*, 947 F.3d 555, 556 (9th Cir. 2020) (en banc). But before we considered the question, we appointed an amicus curiae to defend the judgment and represent the interests of not only the district attorney that had obtained the conviction, but also "the victims and the community that the prosecutor is charged to represent." *Ellis*, 947 F.3d at 569 (Callahan, J., dissenting). Here, the panel majority's decision

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[3] *Id.*; *see also In re Alexander*, 859 F. App'x 32, 34 (9th Cir. 2021).

[4] Obituary of Barbara Christian, Legacy.com, https://www.legacy.com/us/obituaries/recordnet/name/barbara-christian-obituary?id=10361068 (last visited Jan. 16, 2022); Obituary of Greg McCormack Winchell, Legacy.com, https://www.legacy.com/us/obituaries/recordnet/name/greg-winchell-obituary?id=22890207 (last visited Jan. 16, 2022).

ensures that there is no party with a seat at the table in this litigation to defend these interests in this case. Federal Rule of Civil Procedure 24(a)(2) should not be read in a way that ignores these interests and prevents not only this court, but the Supreme Court from considering the underlying merits of the arguments of those that wish to defend California's criminal convictions and the imposition of capital punishment.

Since 2006, California has not executed an inmate on death row. Despite the California voters' efforts to change that situation, the panel majority's refusal to allow district attorneys to play their important statutory role in enforcing the death penalty means that the specter of this federal court litigation will continue to subvert the voters' will and deny justice to victims' families even if the moratorium is at some point withdrawn. The people of California gave their district attorneys the express authority to facilitate the enforcement of the death penalty. The panel majority's decision allows the parties in this case to circumvent those rights by ensuring that no one interested in defending them is permitted to do so, effectively silencing the voices of victims, their families, and California's voters. I dissent from the decision not to rehear this case en banc.

VANDYKE, Circuit Judge, with whom CALLAHAN, IKUTA, and BUMATAY, Circuit Judges, join, dissenting from the denial of rehearing en banc:

I agree with Judge Bumatay and Judge Callahan's excellent dissents, and join both in full. I write separately to briefly make one supplemental observation about our circuit's inconsistent application of Rule 24. As Judge Bumatay describes, when surveying our circuit's cases analyzing whether a party has a "significantly protectable" interest to warrant intervention, it is hard not to come away with the impression that the level of "interest" we have required of potential intervenors has varied significantly. It is understandable that such differential treatment could lead the public to wonder whether the variance is a result of something other than rote application of the intervention standard itself. Correct or not, that perception is unfortunate and reflects badly on our court and the appearance of impartiality. We need a standard that will result in setting a more consistent threshold for intervention.

One candidate to offer more stability to our Rule 24 analysis is looking to the related doctrine of standing. The Supreme Court has already indicated that parties seeking to intervene must meet the traditional standing requirements. *See Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) ("That means that standing must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." (internal quotation marks omitted)); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65

(1997) ("An intervenor cannot step into the shoes of the original party unless the intervenor independently fulfills the requirements of Article III." (internal quotation marks omitted)). Standing is a "irreducible constitutional minimum," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), that applies with equal force to parties seeking to intervene. Linking Rule 24's "interest" inquiry to the well-established standard for standing might go a long way towards smoothing out our inconsistent intervention requirements.

As Judge Bumatay limns in his dissent, our circuit has in the past allowed intervention for parties whose Article III standing was suspect at best. So it may be that some of our past Rule 24 cases have set the intervention bar *too low.* This past watering-down of the intervention requirements by our court only makes the panel's ruling here less defensible, however, given that the District Attorneys clearly had standing to participate in this case. As I explained in my dissent from the original panel decision, "particularly in this case where only the District Attorneys are attempting to effectuate the intent of the People of California as enshrined in Proposition 66, 'any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of *irreparable injury.*'" *Cooper v. Newsom*, 13 F.4th 857, 874 (9th Cir. 2021) (VanDyke, J., dissenting) (emphasis added) (alterations and citation omitted) (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)).

Our erratic application of Rule 24 needs correction, and if our circuit had taken this case en banc it could have done so by tying Rule 24's "interest" inquiry to our well-established standing doctrine. But until something like that is done—either by our court or the Supreme Court—future parties and panels will be forced to address these issues against the backdrop of our inconsistent precedents, and the lingering appearance of unfairness they perpetuate. I respectfully dissent from our decision not to rehear this case.

History of Capital Punishment in California

Legal executions in California were authorized under the Criminal Practices Act of 1851. On February 14, 1872, capital punishment was incorporated into the Penal Code, stating:

[SEAL]

A judgment of death must be executed within the walls or yard of a jail, or some convenient private place in the county. The Sheriff of the county must be present at the execution, and must invite the presence of a physician, the District Attorney of the county, and at least twelve reputable citizens, to be selected by him; and he shall at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same.

The various counties may have some records of the executions conducted under the jurisdiction of the counties, but the department knows of no compilation of these.

State executions

Capital punishment on a county level continued until an amendment by the Legislature in 1891 provided:

A judgment of death must be executed within the walls of one of the State Prisons designated by the Court by which judgment is rendered.

In this statute, the warden replaced the sheriff as the person who must be present at the execution and invitation to the attorney general, rather than to the district attorney, was required.

Executions by hanging were conducted at both San Quentin State Prison and Folsom State Prison. There apparently was no official rule by which judges ordered men hanged at Folsom rather than San Quentin or vice versa. However, it was customary to send recidivists to Folsom.

The first state-conducted execution was held March 3, 1893, at San Quentin. The first execution at Folsom was December 13, 1895.

Lethal gas

On August 27, 1937, the California State Legislature replaced hanging as the method of capital punishment with lethal gas. The law did not affect the execution method for those already sentenced. As a result, the last execution by hanging at Folsom was conducted December 3, 1937. The last execution by hanging at San

Quentin was held May 1, 1942; the defendant had been convicted of murder in 1936.

A total of 215 inmates were hanged at San Quentin and 92 were hanged at Folsom.

The gas chamber was installed at San Quentin State Prison in 1938. On December 2, 1938, the first execution by lethal gas was conducted. From that date through 1967, 194 people – including four women – were executed by gas, all at San Quentin.

Legal challenges and changes

Beginning in 1967, as a result of various state and United States Supreme Court decisions, there were no executions in California for 25 years.

In February 1972, the California Supreme Court found that the death penalty constituted cruel and unusual punishment under the California state constitution and 107 condemned inmates were resentenced to life with the possibility of parole and removed from California's death row.

In 1973, the United States Supreme Court held that the death penalty was unconstitutional as it was being administered at that time in a number of states.

In November 1972, the California electorate amended the state constitution and in 1973, legislation was enacted making the death penalty mandatory in specified criminal cases. Among these were kidnapping if the victim dies, train wrecking if any person dies, assault

by a life prisoner if the victim dies within a year, treason against the state, and first-degree murder under specific conditions (for hire, of a peace officer, of a witness to prevent testimony, if committed during a robbery or burglary, if committed during the course of a rape by force, if committed during performance of lewd and lascivious acts upon children, by persons previously convicted of murder).

In 1976, the California Supreme Court, basing its decision on a United States Supreme Court ruling earlier that year, held that the California death penalty statute was unconstitutional under the U.S. Constitution because it did not allow mitigating circumstances to be admitted as evidence. Following this ruling, 70 inmates had their sentences changed to other than death.

Capital punishment reinstated

The California State Legislature re-enacted the death penalty statute in 1977. Under the new statute, evidence in mitigation was permitted. The death penalty was reinstated as a possible punishment for first-degree murder under certain conditions. These special circumstances include: murder for financial gain, murder by a person previously convicted of murder, murder of multiple victims, murder with torture, murder of a peace officer, murder of a witness to prevent testimony and several other murders under specified circumstances.

In 1977, the Penal Code also was revised to include the sentence of life imprisonment without the possibility of parole. At that time, the punishment for kidnapping for ransom, extortion or robbery was changed from death to life without parole. Treason, train derailing or wrecking, and securing the death of an innocent person through perjury became punishable by death or life imprisonment without parole.

California voters approved Proposition 7 in November 1978, reaffirming the death penalty in California. It superseded the 1977 statutes and is the death penalty statute under which California currently operates.

Under state law, cases in which the death penalty ha been decreed are automatically reviewed by the California Supreme Court which may:

- Affirm the conviction and the death sentence;
- Affirm the conviction but reverse the death sentence (which results in a retrial of the penalty phase only); or
- Reverse the conviction (which results in a complete new trial).

Even if the California Supreme Court affirms the death sentence, the inmate can initiate appeals on separate constitutional issues. Called Writs of Habeas Corpus, these appeals may be heard in both state and federal courts and can be used to introduce new information or evidence not presented at trial.

Although the death penalty was reinstated in 198, executions did not resume in California until April 21,

1992, when Robert Alton Harris was put to death in the San Quentin gas chamber.

Lethal injection

In January 1993, California law changed to allow condemned inmates to choose either lethal gas or lethal injection as a method of execution.

San Quentin State Prison developed lethal injection protocols based on protocols from other jurisdictions (Operations Procedure or OP 770).

On August 24, 1993, condemned inmate David Mason was executed after voluntarily waiving his federal appeals. Because Mason did not choose a method of execution, he was put to death by lethal gas, as the law then stipulated.

In October 1994, a U.S. District judge, Northern District (San Francisco), ruled the use of cyanide gas was cruel and unusual punishment and barred the state from using that method of execution. The ruling was upheld by the U.S. Ninth Circuit Court of Appeals in February 1996.

That same year, the California Penal Code was modified to state that if either manner of execution is held invalid, the punishment of death shall be imposed by the alternative means. The law further stipulated that lethal injection become the "default" method of execution should an inmate fail to choose. Serial killer William Bonin was executed on February 23, 1996, by

lethal injection, the first California execution using that method.

Legal challenges to the administration of lethal injection

On February 21, 2006, the execution of condemned inmate Michael Angelo Morales was stayed because of his claim that California's administration of its lethal injection protocol – San Quentin State Prison's OP 770 – would subject him to an unnecessary risk of excessive pain and violate the Eighth Amendment's prohibition of cruel and unusual punishment. Since June 30, 1983, Morales has been on death row for the kidnap, rape and murder of Terri Winchell.

On December 15, 2006, the U.S. District Court held that "California's lethal-injection protocol – as actually administered in practice – create[d] an undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment." The court also stated that "Defendants' implementation of lethal injection is broken, but it can be fixed."

In January 2007, the Governor's Office submitted a response to the court's December 15, 2006, Memorandum of Intended Decision. The court had identified five specific deficiencies in California's lethal injection protocol arising from the case of *Morales v. Tilton*. The specific deficiencies identified were:

- Inconsistent and unreliable screening of execution team members;

- A lack of meaningful training, supervision, and oversight of the execution team;
- Inconsistent and unreliable record keeping;
- Improper mixing, preparation, and administration of sodium thiopental by the execution team; and
- Inadequate lighting, overcrowded conditions, and poorly designed facilities in which the execution team must work.
- The governor immediately directed the California Department of Corrections and Rehabilitation (CDCR) to undertake a thorough review of all aspects of its lethal injection protocols. CDCR informed the court it would undertake a thorough review and submit to the Court by May 15, 2007, a revised process.
- CDCR assembled a team to conduct its review. In addition to reviewing and revising OP 770 and focusing on the deficiencies identified by the court, CDCR sought to identify other improvements to the lethal injection protocol. The team consulted with experts and visited other jurisdictions.
- On May 15, 2007, CDCR released a report to the court proposing revisions to the lethal injection protocol. In order to address the court's concerns and improve the lethal injection protocol, the state:
- Established a screening process for selection of execution team members and a periodic review process for team members.

- Established a comprehensive training program for all execution team members including supervision and oversight. The training regimen focused on custody and care of the condemned inmate, the infusion process, intravenous application and vein access, characteristics and effects of each chemical used in the process, proper preparation and mixing of chemicals, the security of the lethal injection facility, proper record keeping and other areas.
- Developed standardized record-keeping to ensure there are complete and reliable records of each execution. The state developed specific forms, processes and formats to ensure completeness, accuracy and consistency and provided specialized training.
- Developed training processes for the proper use of sodium thiopental. Training processes were developed for proper mixing, preparation and administration of sodium thiopental.
- Recommended improvements to the lethal injection facility at San Quentin State Prison, including steps to ensure adequate equipment, lighting and space. Current law requires that all executions be conducted within the walls of San Quentin State Prison. In 2007, construction of a lethal injection facility began to address the U.S. District Court's concerns. It was completed in March 2008 at a cost of $853,000.
- Proposed revisions to the lethal injection protocol (OP 770), including modifying the

> procedures used to administer the lethal injection. A one-drug protocol and a three-drug protocol were both considered. The revised protocol was created to ensure the procedure did not create an undue and unnecessary risk that an inmate would suffer extreme pain.

In November 2007, the Marin County Superior Court held that the Administrative Procedure Act required CDCR to promulgate the protocol (OP 770) as a regulation. A lethal injection protocol had been in effect since 1993. No court had required it to be promulgated as a regulation.

In April 2009, CDCR submitted draft lethal injection regulations to the Office of Administrative Law (OAL). On May 1, 2009, CDCR posted the notice of proposed regulations in the OAL Register and provided public notice on its website. The public comment period began on May 1, 2009. On June 30, 2009, CDCR held a public hearing regarding the proposed regulations. In January 2010 CDCR issued a notice of modification to the text of the proposed lethal injection regulations. The changes in the re-notice were in response to comments received regarding the originally proposed regulation text.

On April 29, 2010, CDCR submitted its final rulemaking package for the lethal injection regulations to the OAL. On June 8, 2010, the OAL notified CDCR that it was disapproving the regulations submitted on April 29. On June 11, 2010, CDCR published a second re-notice to the public addressing the issues raised by the OAL, and after accepting and responding to public

comments, re-submitted its regulations on July 6, 2010.

On July 30, 2010, the OAL notified CDCR that it had approved and certified for adoption the regulations for lethal injection. The rulemaking record was filed with the Secretary of State the same day to take effect with the force of law in 30 days. August 29, 2010, was the permanent effective date of the regulations.

The execution of condemned inmate Albert Greenwood Brown, Jr., convicted in Riverside County of first-degree murder with the special circumstance of murder committed during a rape, was set by Riverside County Court order for September 29, 2010. It was rescheduled to September 30 after the governor issued a temporary reprieve to allow inmate Brown to exhaust all appeals under the law and to allow the California Supreme Court time to review lower court decisions in the various legal challenges surrounding the scheduled execution.

On September 29, 2010, CDCR removed the scheduled execution of inmate Brown from the calendar after the California Supreme Court denied the state's request to move the execution forward as scheduled. Although the State prevailed in the Court of Appeal, it could not carry out the execution until the California Supreme Court proceedings were final. The California Supreme Court indicated that more time was needed to review legal challenges by the involved parties.

Lethal injection regulations invalidated

On February 21, 2012, The Marin County Superior Court in *Mitchell Sims v. CDCR, et al.*, issued a judgment and held that CDCR failed to comply with the Administrative Procedure Act (APA) when it promulgated its lethal injection regulations. The court issued an injunction prohibiting CDCR from executing anyone until such time as new lethal injection regulations were promulgated in compliance with the APA.

CDCR appealed the ruling and the injunction on April 26, 2012, to the First District Court of Appeal. On May 30, 2013, the appellate court affirmed the trial court's judgment in the *Sims* case and held that CDCR's lethal injection regulations were invalid for substantial failure to comply with the requirements of the APA. The court permanently enjoined CDCR from carrying out the execution of any condemned inmate by lethal injection unless and until new regulations were promulgated in compliance with the APA.

California voters retain the death penalty

Proposition 34, the Death Penalty Initiative Statute, was a ballot measure to repeal the death penalty as the maximum punishment for people found guilty of murder. On November 6, 2012, 52 percent of California voters voted against it. If the state's voters had approved it, the initiative would have replaced the death penalty with life imprisonment without the possibility of parole and the 728 people on death row at the time would

have had their sentences converted to life without parole.

California's death penalty ruled unconstitutional; ruling overturned by federal appellate court

On July 16, 2014, the U.S. District Court Central District of California ruled that California's death penalty violated the Eighth Amendment's prohibition against cruel and unusual punishment because of delays in the appeals process and vacated the death sentence of condemned inmate Ernest Dewayne Jones, the petitioner in the case. U.S. District Judge Cormac J. Carney wrote, "In California, the execution of a death sentence is so infrequent, and the delays preceding it so extraordinary, that the death penalty is deprived of any deterrent or retributive effect it might once have had. Such an outcome is antithetical to any civilized notion of just punishment." On November 12, 2015, a three-judge panel of the Ninth Circuit Court of Appeals unanimously reversed the district court's ruling in *Ernest DeWayne Jones v. Ron Davis, Warden*. The panel held that petitioner's claim sought to apply a novel constitutional rule and wrote, "Under Teague v. Lane, 489 U.S. 288 (1989), federal courts may not consider novel constitutional theories on habeas review." The panel also said, "A federal court may not grant habeas relief unless the petitioner has first exhausted the remedies available in state court."

Relatives of murder victims seek to end execution delays

On April 19, 2012, a Petition for Writ of Mandate was filed with the Third District Court of Appeal in *Winchell v. Cate* on behalf of Bradley Winchell. It asserted excessive delay in carrying out the judgment of death and asked the court to order CDCR to promulgate a single-drug lethal injection protocol for the execution of inmate Michael Morales, on death row for the kidnap, rape and murder of Terri Winchell. Bradley Winchell is the victim's brother. In June of that year, the Third District Court of Appeal denied the petition.

On November 7, 2014, Bradley Winchell and Kermit Alexander, whose mother, sister and two nephews were murdered by condemned inmate Tiequon A. Cox, filed a Petition for Writ of Mandate in Sacramento County Superior Court. *Winchell and Alexander v. Beard* asserted that CDCR had abused its discretion, failed its duty and violated their rights because of unnecessary delays. They asked the court to order CDCR to promulgate lethal injection regulations and provide specific reasons for CDCR's denial of the original petition.

CDCR filed its response to the petition in December 2014 and stated that Winchell and Alexander lacked legal standing and that the Legislature had given CDCR discretion over how and when to develop lethal injection regulations. The Sacramento County Superior Court denied in a tentative ruling in January 2015 against CDCR's position. The judge allowed a hearing

later that month and affirmed her tentative ruling on February 6, 2015.

On June 2, 2015, the State filed a stipulated settlement agreement in the *Winchell and Alexander v. Beard* case. The agreement stated that CDCR would promulgate a single-drug lethal injection regulation within 120 days after the U.S. Supreme Court issued its opinion or other disposition in *Glossip v. Gross*, a case involving Oklahoma's lethal injection protocol. The Sacramento County Superior Court signed the judgment and the case was settled.

On June 29, 2015, the U.S. Supreme Court ruled in a 5-4 vote that the sedative midazolam may be a part of a lethal injection protocol. The justices heard the *Glossip v. Gross* case on April 29, 2015. Pursuant to the settlement in the *Winchell and Alexander v. Beard* case, CDCR agreed to file with the Office of Administrative Law draft regulations of its lethal injection protocol for review pursuant to the Administrative Procedure Act within 120 days.

CDCR submitted on October 27, 2015, its notice of proposed adoption of lethal injection regulations for publication in the OAL's California Regulatory Notice Register. The OAL published it in its register on November 6, 2015.

California voters defeat Proposition 62; pass Proposition 66

Two competing initiatives appeared on the November 8, 2016, ballot. Proposition 62, the Repeal of the Death Penalty Initiative, would have repealed the death penalty and would have effectively commuted the sentences of condemned inmates from the death penalty with life imprisonment without parole. The measure also had a requirement that condemned inmates work and would have increased the portion of their wages for victim restitution from 20 to 60 percent. A "yes" vote supported repealing the death penalty; a "no" vote opposed the measure. Proposition 62 was defeated with 53.1 percent voting "no" and 46.8 percent voting "yes."

Proposition 66, the Death Penalty Reform and Savings Act, was also on the November 8, 2016, ballot in California and was approved by the voters. On December 16, 2016, the Secretary of State certified the election results for Proposition 66: 51.1 percent of California voters voted for it and 48.9 percent voted against it.

Proposition 66 kept the death penalty in place, generally required habeas corpus petitions to be filed in the court which imposed the sentence, set time limits on legal challenges, and changed the process for appointing attorneys to represent condemned inmates.

Proposition 66 also added section 3604.1 to the Penal Code, which expressly exempts standards, procedures, or regulations promulgated by the California Department of Corrections and Rehabilitation pursuant to

Penal Code 3604 from the Administrative Procedure Act (APA).

The measure also allowed physicians to attend an execution to pronounce death and to provide advice to CDCR for the purpose of developing an execution protocol to minimize risk of pain to the inmate. It also allowed identified individuals or entities to dispense drugs and supplies to the CDCR Secretary or designee without prescription, for carrying out the provisions of the chapter, and prevents licensing boards from imposing disciplinary action against any licensed health care professional for any action authorized by Penal Code section 3604.

Proposition 66 also allows prison officials to transfer condemned inmates to any state prison that provides the necessary level of security, requires that condemned inmates work as prescribed by the rules and regulations of CDCR, and increased the restitution deduction for condemned inmates to 70 percent, or the balance owing, whichever is less, from a condemned inmate's wages and trust account deposits, regardless of the source of income.

Although California voters approved Proposition 66, on November 9, 2016, plaintiffs Ron Briggs and John Van De Kamp filed a lawsuit in the Supreme Court of California entitled *Briggs et al. v. Brown et al.* challenging the constitutionality of Proposition 66.

The California Supreme Court stayed the implementation of Proposition 66 on December 20, 2016, and heard oral arguments in the *Briggs v. Brown* case on June 6,

2017. The court upheld the initiative in a 5-2 ruling on August 24, 2017. The provisions of Proposition 66 became effective on October 25, 2017.

On January 29, 2018, CDCR gave notice to the Office of Administrative Law (OAL) that it would not be proceeding with the rulemaking action published in the California Notice Register on November 6, 2015, and submitted File and Print lethal injection regulations to OAL pursuant to the exemption to the APA procedures provided by Proposition 66.

Governor Gavin Newsom issues executive order to halt to the death penalty in California

On March 13, 2019, Governor Gavin Newsom signed Executive Order N-09-19 instituting a moratorium on the death penalty in California in the form of a reprieve for all people sentenced to death. The executive order also called for repealing California's lethal injection protocol and the immediate closing of the execution chamber at San Quentin State Prison. The order did not provide for the release of any individual from prison or otherwise alter any current conviction or sentence. Pursuant to Executive Order N-09-19, no executions can take place.

Lawsuits challenged state's execution protocol

Summary of litigation:

***Michael Morales, et al., v. Gavin Newsom et al.*, United States District Court, Northern District of California**

This case, filed in 2006 by condemned inmate Michael Morales, challenged the constitutionality of CDCR's prior three-drug lethal injection protocol. Motions to intervene had been filed and granted as to an additional 21 condemned inmates. On February 27, 2019, the plaintiffs filed a Fifth Amended Complaint which challenged CDCR's then-existing one-drug regulations. On August 14, 2020, a Stipulation for Voluntary Dismissal Without Prejudice was filed based upon a Stipulation for Procedural Reinstatement of Fifth Amended Complaint, and Court order dated July 24, 2020. This stipulation allows plaintiffs to reinstate their Fifth Amended Complaint pending at the time of the dismissal under any of the following conditions: (1) Executive Order N-09-19 becomes inoperative, is no longer in effect, or is withdrawn; or (2) Defendants adopt 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.

Two actions related to the *Morales* case are still pending:

1. District attorneys for San Bernardino, San Mateo and Riverside counties filed motions to intervene in *Morales* and to lift the stays of

execution, which were denied. The DAs have appealed to the Ninth Circuit.

2. On January 22, 2019, family members of murder victims filed a Petition for Writs of Mandamus or Prohibition with the Ninth Circuit, in *Alexander v. U.S. District Court* (N.D. Cal.), *Michael Morales, et. al*. *Real Parties in Interest-Plaintiffs*, *Ralph Diaz, et al., Real Parties in Interest-Defendants*. The petition requests the Court find that all stays of execution and bars on preparations for executions in the *Morales* case are no longer in effect, or must be lifted.

***Los Angeles Times Communications LLC, et al., v. Ralph Diaz, et al.*, United States District Court, Northern District of California**

Plaintiffs Los Angeles Times, KQED, and the San Francisco Progressive Media Center alleged a First Amendment right of access to view the preparation of the lethal injection chemical, the administration of the lethal injection chemical, and provision of medical care to a condemned inmate after an execution is stopped. A stipulation for dismissal without prejudice was filed on April 16, 2019.

***Jay Jarvis Masters et al. v. Ralph Diaz et al.*, Marin County Superior Court**

This lawsuit was filed by the ACLU on behalf of plaintiff Jay Jarvis Masters, a condemned inmate, and plaintiff Witness to Innocence, a national nonprofit. The complaint alleged that portions of CDCR's file and print regulations exceeded the scope of the exemption to the Administrative Procedure Act provided for in

Penal Code Section 3604.1. This matter was dismissed without prejudice on April 18, 2019.

***Sims, ACLU et al. v. Scott Kernan et al.*, Alameda County Superior Court**

Petitioners claimed that the California Legislature improperly delegated broad authority to CDCR to develop standards for executions under Penal Code section 3604 in violation of the separation of powers. The Superior Court sustained CDCR's Demurrer to the Complaint without leave to amend. The Court of Appeal affirmed the trial court's order. It also stated that several Penal Code sections, including 3604, provide adequate direction to CDCR in developing these standards. On January 23, 2019, petitioners filed a petition for review in the Supreme Court of California. The petition for review was denied on March 27, 2019.

Timeline of Lethal Injection Protocol Regulations

February 21, 2006: Condemned inmate Michael Angelo Morales' execution is stayed because of his challenge to California's administration of its lethal injection protocol. Morales challenged the constitutionality of his execution, contending that San Quentin State Prison's operational procedure – the protocol for lethal injection – and the manner in which the California Department of Corrections and Rehabilitation (CDCR) implemented it, would subject him to unnecessary risk of excessive pain, thus violating the Eighth Amendment's prohibition of cruel and unusual punishment.

[SEAL]

December 15, 2006: The U.S. District Court held that "California's lethal-injection protocol – as actually administered in practice – create[d] an undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment." The court also stated that "Defendants' implementation of lethal injection is broken, but it can be fixed."

January 16, 2007: The Governor's Office submitted a response to the court's December 15, 2006, Memorandum of Intended Decision. The Governor immediately directed CDCR to undertake a thorough review of all aspects of its lethal injection protocols. CDCR informed the court it would undertake a thorough review and submit to the court by May 15, 2007, a revised process.

May 15, 2007: CDCR files a revised protocol with the court.

November 29, 2007: The Marin County Superior Court held that the Administrative Procedure Act (APA) required CDCR to promulgate the protocol as a regulation. A lethal injection protocol had been in effect since 1993. No court had required it to be promulgated as a regulation.

November 21, 2008: CDCR's appeal of the Superior Court order was denied.

April 17, 2009: CDCR submitted draft lethal injection regulations to the Office of Administrative Law (OAL).

May 1, 2009: CDCR posted the notice of proposed regulations in the OAL Register and provided public notice on its website. Posted documents included the full regulation text, an initial statement of reasons, forms, a notice of proposed change to regulations identifying the public comment period, public hearing date, location and time, and contact information for submitting comments to CDCR. CDCR's unique notice requirements also include posting notices of proposed regulations in all state prisons in conspicuous places accessible to inmates. This requirement is met using CDCR's special notice called a Notice of Change to Regulations that was also posted on CDCR's website.

May 1, 2009: The public comment period began.

June 30, 2009: CDCR held a public hearing regarding the proposed regulations. There were 102 speakers at

the public hearing. The public hearing was not a forum to debate the proposed regulations.

July 1, 2009: CDCR elected to accept comments until 5 p.m. because of the large volume of last-minute comments received.

January 4, 2010: CDCR issued a notice of modifications to the text of the proposed lethal injection regulations. The changes in the re-notice were in response to comments received regarding the originally proposed regulation text. The APA requires that such re-notice comment periods be no less than 15 calendar days.

January 20, 2010: End of the 15-day public comment period. CDCR decides to accept public comments through Jan. 26, 2010, because of the high volume of last-minute comments received electronically by email.

April 29, 2010: CDCR submits its final rulemaking package for the lethal injection regulations to OAL.

June 8, 2010: The OAL notified CDCR that it was disapproving the regulations submitted on April 29. The disapproval contained specific deficiencies that caused the disapproval, but which could be addressed through changes announced in a public re-notice or by further information provided by CDCR.

June 11, 2010: CDCR publishes a second re-notice to the public addressing the issues raised by OAL. The re-notice public comment period ran for 15 days – from June 11 to June 25 – as required by the Government

Code. CDCR accepted and responded to public comments arriving up to June 28.

July 6, 2010: CDCR resubmitted its regulations concerning the lethal injection process. OAL had up to 30 working days to review the regulation filing.

July 30, 2010: The OAL notified CDCR that it had approved and certified for adoption the regulations for lethal injection. The rulemaking record was filed with the Secretary of State the same day to take effect with the force of law in 30 calendar days.

August 29, 2010: The permanent effective date of the regulations.

February 21, 2012: The Marin County Superior Court in *Mitchell Sims v. CDCR, et al.* issued a judgment and held that CDCR failed to comply with the APA when it promulgated its lethal injection regulations. The court enjoined CDCR from executing anyone until such time as new lethal injection regulations were promulgated in compliance with the APA.

April 19, 2012: A Petition for Writ of Mandate was filed with the Third District Court of Appeal in *Winchell v. Cate* on behalf of Bradley Winchell. It asserted excessive delay in carrying out the judgment of death and asked the court to order CDCR to promulgate a single-drug lethal injection protocol for the execution of inmate Michael Morales, on death row for the kidnap, rape and murder of Terri Winchell. Bradley Winchell is the victim's brother.

April 26, 2012: CDCR appealed the ruling and injunction in the *Sims* case to the First District Court of Appeal. In its notice of appeal, CDCR said it "recognize[s] that the availability of the three drugs comprising the current protocol is uncertain." And the notice said that "under the Governor's direction," CDCR "will also begin the process of considering alternative regulatory protocols, including a one-drug protocol, for carrying out the death penalty."

June 14, 2012: The Third District Court of Appeal denied the petition in the matter of *Winchell v. Cate*.

May 30, 2013: The First District Court of Appeal affirmed the trial court's judgment in the *Sims* case and held that CDCR's lethal injection protocol was invalid for substantial failure to comply with the requirements of the APA. The court permanently enjoined CDCR from carrying out the execution of any condemned inmate by lethal injection unless and until new regulations are promulgated in compliance with the APA.

November 7, 2014: Bradley Winchell and Kermit Alexander, whose relatives were murdered by condemned inmates Michael Morales and Tiequon Cox respectively, filed a Petition for Writ of Mandate in Sacramento County Superior Court. *Winchell and Alexander v. Beard* asserted that CDCR had abused its discretion, failed its duty and violated their rights because of unnecessary delays. They asked the court to order CDCR to promulgate lethal injection regulations and provide specific reasons for CDCR's denial of the original petition.

December 23, 2014: CDCR filed its response to the *Winchell and Alexander* legal petition.

January 29, 2015: The Sacramento County Superior Court denied in a tentative ruling CDCR's arguments against the petition. CDCR had argued that Winchell and Alexander lacked legal standing and that the Legislature had given CDCR discretion over how and when to develop lethal injection regulations. The judge allowed a hearing on January 30, 2015, and later affirmed her tentative ruling on February 6, 2015.

June 1, 2015: The state filed a stipulated settlement agreement in the *Winchell and Alexander v. Beard* case. The agreement stated that CDCR will promulgate a single-drug lethal injection regulation within 120 days after the U.S. Supreme Court issues its opinion or other disposition in *Glossip v. Gross*, a case involving Oklahoma's lethal injection protocol.

June 4, 2015: The Sacramento County Superior Court signed the judgment and the *Winchell and Alexander v. Beard* case is settled.

June 29, 2015: The U.S. Supreme Court ruled in a 5-4 vote that the sedative midazolam may be a part of a lethal injection protocol. The justices heard the *Glossip v. Gross* case on April 29, 2015. Pursuant to the stipulated settlement in the *Winchelland Alexander v. Beard* case, CDCR agreed to file with the OAL draft regulations of its lethal injection protocol for review pursuant to the APA within 120 days.

October 27, 2015: CDCR submitted to OAL its notice of proposed adoption of lethal injection regulations for publication in the California Regulatory Notice Register.

November 6, 2015: CDCR's notice of proposed adoption of lethal injection regulations is published in the California Notice Regulatory Notice Register (Register 2015, No. 45-Z, November 6, 2015.)

January 15, 2016: As a result of court orders issued in a Public Records Act (PRA) litigation challenging the sufficiency of the rulemaking file, CDCR extended the written public comment period to February 22, 2016.

January 22, 2016: CDCR held a public hearing and received written and oral comments about the proposed regulations.

February 26, 2016: As a result of the continuing PRA litigation, CDCR provided notice that the written public comment period would be extended to April 6, 2016.

April 15, 2016: As a result of the continuing PRA litigation, CDCR extended the written public commend period to May 15, 2016.

May 13, 2016: As a result of the continuing PRA litigation, CDCR extended the written public comment period to July 11, 2016.

November 4, 2016: CDCR submitted its lethal injection rulemaking package to OAL within the one year state agencies have to comply with the requirements

of the APA. OAL has up to 30 business days to review the rulemaking file. More than 33,000 people had submitted approximately 167,000 individual comments.

December 21, 2016: OAL notified CDCR that it had disapproved its proposed regulations to implement the lethal injection process. OAL said the regulations did not meet the standards set forth in Government Code section 11349.1 and APA requirements.

December 28, 2016: OAL issued its determination detailing the reason for its disapproval of CDCR's proposed lethal injection regulations. CDCR has 120 days to remedy the issues identified by OAL and resubmit the proposed regulations.

February 28, 2017: CDCR provided notice of the changes to the proposed regulations. The amendments were made in response to OAL's reasoning in their December 28, 2016, decision of disapproval.

April 20, 2017: CDCR asked OAL for an extension of 120 days to complete its rulemaking action and resubmit the proposed lethal injection regulations. CDCR noted that over the course of an eight-month public comment period, it received comments from approximately 33,000 people and organizations. CDCR received 71 public comments from 71 people and/or organizations during the public-comment period in February 2017, some of which were highly technical in nature. CDCR said a substantive accommodation to at least one of those comments might be necessary. CDCR also noted the seriousness of the issues addressed by the

proposed regulations and the high level of public interest also warranted a time extension.

April 21, 2017: OAL found good cause to grant CDCR an extension of time to resubmit its lethal injection rulemaking package. OAL gave CDCR 120 more days. CDCR had until August 25, 2017, to resubmit its proposed lethal injection regulations.

July 24, 2017: CDCR provided notice of proposed changes made to the lethal injection regulations.

August 25, 2017: CDCR resubmitted its amended lethal injection regulations to OAL. OAL has up to 30 business days, until October 9, 2017, to review the regulations.

October 9, 2017: OAL notified CDCR that it was disapproving the amended lethal injection regulations. OAL said that within seven days, it will issue a written decision detailing the reasons for its disapproval.

October 12, 2017: OAL issued its determination (Decision of Disapproval) detailing the reasons for its disapproval of CDCR's proposed lethal injection regulations. CDCR was given up to 120 days from October 9, 2017, to remedy the issues OAL identified and resubmit the rulemaking file.

October 25, 2017: Proposition 66, the Death Penalty Reform and Savings Act, passed by California voters on November 8, 2016, became effective. Proposition 66 added Section 3604.1 subdivision (a) to the Penal Code which exempts the state's execution standards, procedures or regulations promulgated pursuant to Penal

Code section 3604, from the Administrative Procedure Act.

January 29, 2018: CDCR filed a Notice of Decision not to proceed with the Nov. 6, 2015, rulemaking action and concurrently submitted File and Print regulations to OAL, in accordance with the exemption to the Administrative Procedure Act provided for in Penal Code section 3604.1. OAL has up to 30 business days to review the File and Print regulations. The File and Print regulations will become effective upon approval by OAL and filing with the Secretary of State. There is ongoing federal court litigation – *Morales, et al., v. Kernan, et al.*, – challenging the constitutionality of CDCR's execution protocols. Inmates who have exhausted their appeals have been allowed to intervene in the action and the federal court has issued stays of execution. Currently, no executions can take place.

March 13, 2019: Governor Gavin Newsom signs an executive order repealing California's lethal injection protocol. The order also institutes a moratorium on the death penalty in California in the form of a reprieve for all people sentenced to death and directs the immediate closure of the lethal injection facility at San Quentin State Prison.

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Search by Name

Barbara Jeanne Christian

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Feb. 17, 1933 – Sept. 30, 2017

Barbara Christian, age 83 of Wilton, California passed away peacefully on September 30, 2017 in Sacramento after suffering a stroke. She was born in Long Beach, California. She enjoyed writing, photography, watching wildlife on her ranch and mostly love and devotion to her family and the Gospel of Jesus Christ. Mrs. Christian is survived by her children David Winchell of Wilton, California, Bradley (Kathy) Winchell of Stockton, California, Brian Chalk of Wilton, California, 6 Grandchildren and 7 Great-grandchildren. Mrs. Christian was preceded in death by her husband Dallas Christian, her daughter Terri Lynn Winchell and son Greg M. Winchell. Family and Friends are invited to attend services on Monday, October 9, 2017 Cherokee Memorial Park located at Hwy. 99 and East Harney Lane, Lodi California. Service is at 12:00 p.m.

Published by The Record on Oct. 4, 2017.

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To offer your sympathy during this difficult time, you can now have memorial trees planted in a National Forest in memory of your loved one.

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Offer sympathy or share a memory...

Add a Photo

Not sure what to say?

8 Entries

I miss you sweet Barbara, our times together and all of your kind posts about my photography and grandchildren.. and about Jesus

Dodie Larsen
Friend **September 29, 2021**

Even though I'm in Atlanta and will be unable to attend Barbara's memorial today, I'm with her in spirit from Atlanta!! Barbara, thank you again for being my life-line over the last year. I'm grateful for your friendship!! Love, L.

Lynn Bettencourt **October 9, 2017**

((((((Barbara))))))

Peggy O'Neill **October 8, 2017**

Barbara . . . you were such a dear friend and I am so glad for the opportunity that we had to meet in this lifetime . . . and will look forward to the day when we can have a Heavenly meeting. I will miss you so very Much . . . Love Dodie and my Little Lucy who loved you also!

Dodie Larsen **October 8, 2017**

Dodie Larsen **October 8, 2017**

You have been an inspiration and loving aunt. I have learned how to walk with God when you don't understand as well as many other spiritual principles from you. I am blessed to have had you as a leader and example. I will always cherish you. – I love you.

tonda pratt x

Family **October 5, 2017**

Barbara; Dodie cherished your life-long friendship!!! May you rest in peace.

Gordon Bettencourt **October 5, 2017**

I'm broken hearted over Barbara's passing. She was a constant life-line following my mother's tragic accident a little over a year ago. I feel like I've lost my mom all over again. Barbara, you will be missed. Thank you for the comfort, support and words of god you passed along to me during my time of sorrow and grief – I'll never forget you and am sure you are now at peace with your husband, daughter and son who went before you. Thanks again for your love and support!!! Love, Lynn

Lynn Bettencourt **October 4, 2017**

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News worth sharing online

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Greg McCormack Winchell

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Stockton, CA

Greg McCormack Winchell

Apr. 18, 1951 – Apr. 2, 2009

Greg passed away unexpectedly at home at age 57. He is survived by his parents Mack Winchell of Stockton, Barbara Christian of Wilton. Brothers David Winchell, Bradley Winchell, Brian Chalk, son Eric Hoffman and dog Mekka.

Decorated Vietnam Veteran, including Bronze Star and two Purple Heart Medals. Member of V.F.W. Post 52 & 1267, D.A.V. and MCOC Member "Goon". He was a master artist in leather work. Greg was loved and will be greatly missed. Arrangements are Private.

Published by The Record on Apr. 5, 2009.

To plant trees in memory, please visit the Sympathy Store.

MEMORIAL EVENTS

To offer your sympathy during this difficult time, you can now have memorial trees planted in a National Forest in memory of your loved one.

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Search for a nonprofit organization

Suggested nonprofits

ASPCA

MEMORIES & CONDOLENCES

Add a Message

From

Your Name

Your Message

Offer sympathy or share a memory...

Add a Photo

Not sure what to say?

7 Entries

Greg, my firstborn son~ I thank the Lord for the love you have always shown me, for your thoughtfulness, caring, and the lovely flowers you always brought me. Life handed you a rough road but you never lost your tender heart. You were buried with great honor for the heroic service you gave your country in Vietnam. You now rest with your fellow patriots in the Vietnam/Purple Heart Memorial Wall near your only beloved sister, Terri. Your dog, Mekka,also mourns for you. Your brothers, Dad and I look forward to the Resurrection when we will see you again. We cherish your memory and will always love you. From a broken hearted, grieving mother . . . with love and precious memories,

"Mom"~

Barbara Christian **April 21, 2009**

Service for Greg at the Veterans Wall. Friday Apirl 10, 2009 @ 1:00 p.m. Cherokee Memorial, Hwy. 99 and Harney Lane. Family and friends welcome.

Barbara Christian **April 7, 2009**

My Deepest sympathy for all of Greg's family . . . May you find peace in your memories of Greg, he will always be in your hearts. He will be missed by many and always loved by all..

Suzanne Harrick **April 6, 2009**

To The Winchell Family. I'am so sorry to hear about a member of your family. Keep the good memories and remember the good times with him. You have been good friends to me and my family. Your friend Elvira.

elvira portillo **April 6, 2009**

Mack: Sorry to hear of your son's passing, and I offer my deepest sympathy. I believe you are the brother of a special friend of mine at Stockton High – many years ago. Her maiden name was Eileen Winchell, and she (and probably you) lived on North California Street – about a block or so north of Harding Way. I graduated from Stockton High in 1942. I remember going to her wedding in about 1957. Although I live in Sacramento, I read the obits online – that's when I recognized the name. I would love to made contact with Eileen, if it's possible.

With deepest sympathy,

Florence (Lewis) Nuss

April 5, 2009

You were and always will be my big brother. Thank you for sharing your life with us. It has been a long walk in such a short time. You will not be forgotten brother. Until we meet agian,

Bradley Winchell **April 5, 2009**

Thank You for serving your country!

JM **April 5, 2009**

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Supervising Deputy Attorney General
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MICHAEL ANGELO MORALES, et al., Plaintiffs, v. **RALPH DIAZ, Secretary of the California Department of Corrections and Rehabilitation, et al.**, Defendants.	3:06-cv-00219-RS 3:06-cv-00926-RS **STIPULATION REGARDING PROCEDURAL REINSTATEMENT OF FIFTH AMENDED COMPLAINT; ORDER**

IT IS HEREBY STIPULATED by and between Plaintiffs, who are Michael Morales, Hector Ayala, Ronaldo Ayala, Albert Brown, Richard Boyer, Tracy Cain, Kevin Cooper, Tiequon Cox, Raynard Cummings, Albert Cunningham, Ronald Deere, Robert Fairbank, Harvey Heishman, Douglas Mickey, William Payton, Scott Pinholster, David Raley, Guy Rowland, Richard Samayoa, Ricardo Sanders, Mitchell Sims, Anthony Sully, John Visciotti, and Conrad Zapian, and Defendants, who are Governor Gavin Newsom, Secretary of the California Department of Corrections and Rehabilitation ("CDCR") Ralph Diaz, and San Quentin State Prison Warden Ronald Davis, (collectively "Parties"), by and through their respective attorneys of record that:

1. On February 27, 2019, Plaintiffs filed a Fifth Amended Complaint for Equitable and Injunctive Relief [42 U.S.C. § 1983]. (ECF No. 710.)

2. On March 13, 2019, Governor Gavin Newsom issued Executive Order N-09-19, which mandated a moratorium on the death penalty in California in the form of a reprieve for all people sentenced to death in California, the repeal of California's lethal injection protocol, and the closure of the Death Chambers at San Quentin State Prison. As a result, executions cannot be carried out in California while the Executive Order remains in effect.

3. Effective March 18, 2019, CDCR's regulations for the Administration of the Death Penalty were repealed and are no longer in force.

4. Equipment in CDCR's Gas Chamber and Lethal Injection Facility at San Quentin State Prison was removed and the facilities closed.

5. Defendants filed a Motion to Dismiss the Fifth Amended Complaint on June 28, 2019. (ECF No. 720.)

6. Plaintiffs filed a Motion for Summary Judgment on September 11, 2019. (ECF No. 723).

7. The Parties intend to file a stipulation of voluntary dismissal without prejudice, under Federal Rule of Civil Procedure 41(a)(1)(A)(ii) (a copy is attached as Exhibit 1).

8. Following entry of the voluntary dismissal without prejudice, the action will terminate. The Parties agree that this Court shall retain jurisdiction over this matter solely for the purpose of allowing: 1) any Party to enforce the terms of this Stipulation; 2) Plaintiffs the right to reinstate their Fifth Amended Complaint; and 3) the Court to reinstate the individual stays of execution as specified herein.

9. Defendants will give Plaintiffs' counsel and this Court three court days' written notice of the Governor's intention to withdraw Executive Order N-09-19. Defendants will give Plaintiffs' counsel and this Court at least seven court days' written notice prior to (1) adopting an execution protocol and procedures, or (2) beginning any reassembly of a Lethal Injection Facility or Gas Chamber to conduct executions. Defendants will provide Plaintiffs' counsel with a copy of the execution protocol with the notice. Defendants will

provide written notice to Plaintiffs' counsel within one court day after any Defendant advises a Court or District Attorney of an available execution date or receives notice that an execution has been ordered by a Court.

10. Should CDCR adopt any execution protocol, CDCR will not begin to implement the terms of that protocol until fourteen (14) court days after it has given Plaintiffs' counsel written notice that it is adopting an execution protocol.

11. The Fifth Amended Complaint will be immediately operative upon Plaintiffs providing written notice to Defendants and the Court should any of the following occur: (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.

12. Defendants will have 90 days from the date of notice of reinstatement of the Fifth Amended Complaint to respond to that complaint; Plaintiffs will have 60 days to oppose any response; and Defendants will have 30 days to reply to the opposition, if any. Plaintiffs reserve the right to seek to leave to amend the Fifth Amended Complaint.

13. The Parties agree that discovery will not commence until such time, if any, as the Court approves. The Parties also agree that, if Plaintiffs reinstate their Fifth Amended Complaint pursuant to this Stipulation, individual stays of execution in effect on

the date of dismissal of the case, shall be reinstated. Also, the Parties stipulate that upon reinstatement of the Fifth Amended Complaint inmates Cain, Rowland, and Sanders shall also have temporary stays of execution, on the same terms applicable to the other Plaintiffs in this case. Upon reinstatement of the Fifth Amended Complaint the Parties further stipulate to the requested intervention of any death-sentenced prisoner under the supervision of CDCR who has exhausted full state court appellate and habeas review and federal post-conviction habeas proceedings, and is subject to the imposition of a date for execution under California law, who may then move for stays of execution.

14. This Stipulation does not require or permit government officials to exceed their authority under State or local law or otherwise violate State or local law. The Parties agree that nothing herein prevents Defendants from engaging in preparations for executions consistent with the terms of any newly-adopted execution protocol, their obligations under California law, and any orders of the Court entered in this matter, so long as Defendants comply with the notice obligations set forth in this Stipulation.

15. If the reinstated Fifth Amended Complaint or any amended complaint thereto is not disposed of by way of a motion, the Court will be afforded an opportunity during an evidentiary hearing to conduct a complete review of the Parties' admissible evidence regarding Defendants' execution protocol and intended

procedures for implementation of the execution protocol.

16. The names, identities, or any identifying characteristics of any execution team members, or medical or pharmacological personnel participating in the preparation or carrying out of an execution, shall be confidential. Accordingly, any and all records, including deposition transcripts will be redacted to ensure confidentiality.

17. If Plaintiffs reinstate the Fifth Amended Complaint, Defendants agree that upon the reassembly of a Lethal Injection Facility, Plaintiffs and the Court will be afforded the opportunity to inspect the reassembled Lethal Injection Facility prior to entry of judgment or any use of the Facility to conduct an execution, whichever comes earlier.

18. Any and all statutes of limitations applicable to any and all claims regarding the implementation of the lethal injection protocol, pending in the Fifth Amended Complaint or related thereto are hereby tolled for the purpose of reinstating Plaintiffs' claims.

19. No term in this Stipulation, or in the Stipulation For Voluntary Dismissal Without Prejudice, shall be construed or implied to mean that any party has waived its right to file a motion to dismiss, motion for judgment on the pleadings, motion to strike, motion for summary judgment, or other pre-trial motions or responsive pleadings. Nothing in this Stipulation waives a party's right to appeal or otherwise challenge a court order.

20. No term in this Stipulation, or in the Stipulation For Voluntary Dismissal Without Prejudice, shall be construed or implied to mean that any party has waived, or agreed to shift, the burden of proof as provided by applicable law. The Parties reserve all rights, and neither party waives nor concedes any legal arguments, rights, or defenses. The Parties agree that this Stipulation and proposed order, and the Stipulation for Voluntary Dismissal Without Prejudice (Dismissal) is not to be construed as a basis for determining prevailing party status, and may not serve as a basis in whole or in part for an award or denial of reasonable attorneys' fees and costs under the law.

21. This Stipulation shall not be treated as an admission of liability by any of the Parties for any purpose. The signature of or on behalf of the respective Parties does not indicate or acknowledge the validity or merits of any claim or demand of the other party.

22. No party shall contend that any term or provision, or any uncertainty or ambiguity as to any term or provision herein, should be construed against another party solely by reason of one party having drafted the same, as a result of the manner of the preparation of this Stipulation, or otherwise. This Stipulation and proposed order, and the Stipulation For Voluntary Dismissal Without Prejudice, constitute a single, integrated Stipulation by the Parties expressing the entire Stipulation of the Parties, and shall be interpreted together to give full meaning and effect to all terms. There are no other terms, written or oral,

express or implied, between the Parties, except as set forth in this Stipulation and the Stipulation For Voluntary Dismissal Without Prejudice.

23. Plaintiffs' counsel may substitute or add counsel for any notices required under this Stipulation by giving written notice to Defendants of the names and addresses of such additional notice counsel.

SO STIPULATED AND AGREED.

Dated: July 16, 2020 By: */s/ Jay M. Goldman*
Jay M. Goldman
SUPERVISING DEPUTY ATTORNEY GENERAL
Attorneys for Defendants Gavin Newsom, Ronald Davis, and Ralph Diaz

Dated: July 16, 2020 By: */s/ David A. Senior*
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MCBREEN & SENIOR

Richard P. Steinken
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Attorneys for Plaintiffs Hector Ayala, Ron Aldo Ayala, Albert Brown, Richard Boyer, Tiequon Cox, Albert Cunningham, Ronald Deere, Harvey Heishman, Douglas Mickey, Michael Morales, David

Raley, Richard Samayoa, Anthony Sully, and Conrad Zapien

Dated: July 16, 2020 By: */s/ Susan Garvey*
Susan Elizabeth Garvey
HABEAS CORPUS RESOURCE CENTER
Attorneys for Plaintiff Mitchell Sims

Dated: July 16, 2020 By: */s/ Margo Ann Rocconi*
Margo Ann Rocconi
DEPUTY FEDERAL PUBLIC DEFENDER
Attorneys for Plaintiffs Tracy Cain, Raynard Cummings, Robert Fairbank, William Payton, Scott Pinholster, and John Visciotti

Dated: July 16, 2020 By: */s/ Norm C. Hile*
Norm C. Hile
ORRICK HERRINGTON & SUTCLIFFE LLP
Attorneys for Plaintiff Kevin Cooper

CIVIL LOCAL RULE 5-1(A) ATTESTATION

As required by Local Rule 5-1, I, Jay M. Goldman, attest that I obtained concurrence in the filing of this document from all signatories and that I have maintained records to support this concurrence.

Dated: July 16, 2020 */s/ Jay M. Goldman*
Jay M. Goldman

ORDER

Good cause appearing, it is so ordered. The Court will retain post-dismissal jurisdiction as to the above terms.

Dated: July 24, 2020 By: /s/ Richard Seeborg
Hon. Richard Seeborg
UNITED STATES
DISTRICT COURT
JUDGE

EXHIBIT 1

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ANGELO MORALES, et al., Plaintiffs, vs. RALPH DIAZ, Secretary of the California Department of Corrections and Rehabilitation, et al., Defendants.	CASE NO. C-06-cv-0219-RS CASE NO. C-06-cv-00926-RS STIPULATION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE (Fed. R. Civ. P. 41(a)(1)(A)(ii))

IT IS HEREBY STIPULATED by and between Plaintiffs, who are Michael Morales, Hector Ayala, Ronaldo Ayala, Albert Brown, Richard Boyer, Tracy Cain, Kevin Cooper, Tiequon Cox, Raynard Cummings, Albert Cunningham, Ronald Deere, Robert Fairbank, Harvey Heishman, Douglas Mickey, William Payton, Scott Pinholster, David Raley, Guy Rowland, Richard Samayoa, Ricardo Sanders, Mitchell Sims, Anthony Sully, John Visciotti, and Conrad Zapian, and Defendants, who are

Governor Gavin Newsom, Secretary of the California Department of Corrections and Rehabilitation (CDCR) Ralph Diaz, and San Quentin State Prison Warden Ronald Davis, by and through their respective attorneys of record that:

1. On March 13, 2019, Governor Gavin Newsom issued Executive Order N-09-19, which mandated a moratorium on the death penalty in California in the form of a reprieve for all people sentenced to death in California, the repeal of California's lethal injection protocol, and the closure of the Death Chambers at San Quentin State Prison. As a result, executions cannot be carried out in California while the Executive Order remains in effect.

2. Effective March 18, 2019, CDCR's regulations for Administration of the Death Penalty were repealed and are no longer in force.

3. Equipment in CDCR's Gas Chamber and Lethal Injection Facility at San Quentin State Prison has been removed and the facilities closed.

4. The parties file this Stipulation of Voluntary Dismissal Without Prejudice, under Federal Rule of Civil Procedure 41(a)(1)(A)(ii). This stipulation follows a Stipulation for Procedural Reinstatement of Fifth Amended Complaint (Reinstatement Terms) and the signing of an Order by the Court on , entering that Stipulation, the terms of which are incorporated herein by reference. The parties do not stipulate to dismiss this matter if the Reinstatement Terms have not been previously adopted and ordered by the Court

exactly as they were submitted to the Court, or if the terms of this Stipulation for Voluntary Dismissal have been altered in any way.

5. Following entry of the voluntary dismissal without prejudice, this action will terminate. The Parties and the Court have also agreed that the Court shall retain jurisdiction over this matter for the purposes of allowing: 1) any Party to enforce the terms of the Stipulation Regarding Procedural Reinstatement of the Fifth Amended Complaint; 2) Plaintiffs the right to reinstate their Fifth Amended Complaint; and 3) the Court to reinstate the individual stays of execution as specified in the Stipulation Regarding Procedural Reinstatement of the Fifth Amended Complaint.

6. The Parties stipulate that the voluntary dismissal of this matter is not to be construed as a basis for determining prevailing party status or any rights to obtain fees and costs, and may not serve as a basis in whole or in part for an award or denial of attorneys' fees and costs. Any fees and costs matters remaining to be resolved shall be heard pursuant to the procedures for a motion for fees and costs found in Federal Rule of Civil Procedure 54 and Civil Local Rule 54.

7. THEREFORE, the parties stipulate that this matter be dismissed without prejudice.

SO STIPULATED AND AGREED.

Dated: July , 2020 By: _____

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Michael Morales, David
Raley, Richard Samayoa,
Anthony Sully, and
Conrad Zapien

Dated: July , 2020 By: _____

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Dated: July , 2020 By: _____
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ORRICK HERRINGTON
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Kevin Cooper

Dated: July __, 2020 By: _____
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SUPERVISING DEPUTY
ATTORNEY GENERAL
Attorneys for Defendants
Gavin Newsom, Ronald
Davis, and Ralph Diaz

I hereby attest that the concurrence in the filing of this document has been obtained from all signatories whose electronic signature is accompanied by "*".

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ANGELO MORALES, et al.,	)	CASE NO. C-06-cv-0219-RS
Plaintiffs,	)	CASE NO. C-06-cv-00926-RS
vs.	)	

RALPH DIAZ, Secretary of the California Department of Corrections and Rehabilitation, et al., Defendants.	)	STIPULATION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE (Fed. R. Civ. P. 41(a)(1)(A)(ii))

IT IS HEREBY STIPULATED by and between Plaintiffs, who are Michael Morales, Hector Ayala, Ronaldo Ayala, Albert Brown, Richard Boyer, Tracy Cain, Kevin Cooper, Tiequon Cox, Raynard Cummings, Albert Cunningham, Ronald Deere, Robert Fairbank, Harvey Heishman, Douglas Mickey, William Payton, Scott Pinholster, David Raley, Guy Rowland, Richard Samayoa, Ricardo Sanders, Mitchell Sims, Anthony Sully, John Visciotti, and Conrad Zapien, and Defendants, who are Governor Gavin Newsom, Secretary of the California Department of Corrections and Rehabilitation (CDCR) Ralph Diaz, and San Quentin State Prison Warden Ronald Davis, by and through their respective attorneys of record that:

1. On March 13, 2019, Governor Gavin Newsom issued Executive Order N-09-19, which mandated a moratorium on the death penalty in California in the form of a reprieve for all people sentenced to death in California, the repeal of California's lethal injection protocol, and the closure of the Death Chambers at San Quentin State Prison. As a result, executions cannot be carried out in California while the Executive Order remains in effect.

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5. Following entry of the voluntary dismissal without prejudice, this action will terminate. The Parties and the Court have also agreed that the Court shall retain jurisdiction over this matter for the purposes of allowing: 1) any Party to enforce the terms of the Stipulation Regarding Procedural Reinstatement of the Fifth Amended Complaint; 2) Plaintiffs the right to reinstate their Fifth Amended Complaint; and 3) the Court to reinstate the individual stays of execution as specified in the Stipulation Regarding Procedural Reinstatement of the Fifth Amended Complaint.

6. The Parties stipulate that the voluntary dismissal of this matter is not to be construed as a basis for determining prevailing party status or any rights to obtain fees and costs, and may not serve as a basis in whole or in part for an award or denial of attorneys' fees and costs. Any fees and costs matters remaining to be resolved shall be heard pursuant to the procedures for a motion for fees and costs found in Federal Rule of Civil Procedure 54 and Civil Local Rule 54.

7. THEREFORE, the parties stipulate that this matter be dismissed without prejudice.

SO STIPULATED AND AGREED.

Dated: August 14, 2020 By: */s/*

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Supervising Deputy
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ATTESTATION REGARDING SIGNATURES

I hereby attest that the concurrence in the filing of this document has been obtained from all signatories whose electronic signature is accompanied by "*".

/s/ David A. Senior
David A. Senior

West's Ann.Cal.Const. Art. 1, § 28

§ 28. Findings and declarations; rights of victims; enforcement

Effective: November 5, 2008

<For Executive Order N-49-20 (2019 CA EO 49-20), relating to changes in the discharge and re-entry process at the Division of Juvenile Justice due to the COVID-19 pandemic, see Historical and Statutory Notes under Welfare and Institutions Code § 1766.>

Sec. 28. (a) The People of the State of California find and declare all of the following:

(1) Criminal activity has a serious impact on the citizens of California. The rights of victims of crime and their families in criminal prosecutions are a subject of grave statewide concern.

(2) Victims of crime are entitled to have the criminal justice system view criminal acts as serious threats to the safety and welfare of the people of California. The enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system fully protecting those rights and ensuring that crime victims are treated with respect and dignity, is a matter of high public importance. California's victims of crime are largely dependent upon the proper functioning of government, upon the criminal justice system and upon the expeditious enforcement of the rights of victims of crime described herein, in order to protect the public safety and to secure justice when the public safety has been compromised by criminal activity.

(3) The rights of victims pervade the criminal justice system. These rights include personally held and enforceable rights described in paragraphs (1) through (17) of subdivision (b).

(4) The rights of victims also include broader shared collective rights that are held in common with all of the People of the State of California and that are enforceable through the enactment of laws and through good-faith efforts and actions of California's elected, appointed, and publicly employed officials. These rights encompass the expectation shared with all of the people of California that persons who commit felonious acts causing injury to innocent victims will be appropriately and thoroughly investigated, appropriately detained in custody, brought before the courts of California even if arrested outside the State, tried by the courts in a timely manner, sentenced, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance.

(5) Victims of crime have a collectively shared right to expect that persons convicted of committing criminal acts are sufficiently punished in both the manner and the length of the sentences imposed by the courts of the State of California. This right includes the right to expect that the punitive and deterrent effect of custodial sentences imposed by the courts will not be undercut or diminished by the granting of rights and privileges to prisoners that are not required by any provision of the United States Constitution or by the laws of this State to be granted to any person incarcerated in a penal or other custodial facility in this State

as a punishment or correction for the commission of a crime.

(6) Victims of crime are entitled to finality in their criminal cases. Lengthy appeals and other post-judgment proceedings that challenge criminal convictions, frequent and difficult parole hearings that threaten to release criminal offenders, and the ongoing threat that the sentences of criminal wrongdoers will be reduced, prolong the suffering of crime victims for many years after the crimes themselves have been perpetrated. This prolonged suffering of crime victims and their families must come to an end.

(7) Finally, the People find and declare that the right to public safety extends to public and private primary, elementary, junior high, and senior high school, and community college, California State University, University of California, and private college and university campuses, where students and staff have the right to be safe and secure in their persons.

(8) To accomplish the goals it is necessary that the laws of California relating to the criminal justice process be amended in order to protect the legitimate rights of victims of crime.

(b) In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to the following rights:

(1) To be treated with fairness and respect for his or her privacy and dignity, and to be free from

intimidation, harassment, and abuse, throughout the criminal or juvenile justice process.

(2) To be reasonably protected from the defendant and persons acting on behalf of the defendant.

(3) To have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant.

(4) To prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, which could be used to locate or harass the victim or the victim's family or which disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law.

(5) To refuse an interview, deposition, or discovery request by the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, and to set reasonable conditions on the conduct of any such interview to which the victim consents.

(6) To reasonable notice of and to reasonably confer with the prosecuting agency, upon request, regarding, the arrest of the defendant if known by the prosecutor, the charges filed, the determination whether to extradite the defendant, and, upon request, to be notified of and informed before any pretrial disposition of the case.

(7) To reasonable notice of all public proceedings, including delinquency proceedings, upon request, at

which the defendant and the prosecutor are entitled to be present and of all parole or other post-conviction release proceedings, and to be present at all such proceedings.

(8) To be heard, upon request, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue.

(9) To a speedy trial and a prompt and final conclusion of the case and any related post-judgment proceedings.

(10) To provide information to a probation department official conducting a pre-sentence investigation concerning the impact of the offense on the victim and the victim's family and any sentencing recommendations before the sentencing of the defendant.

(11) To receive, upon request, the pre-sentence report when available to the defendant, except for those portions made confidential by law.

(12) To be informed, upon request, of the conviction, sentence, place and time of incarceration, or other disposition of the defendant, the scheduled release date of the defendant, and the release of or the escape by the defendant from custody.

(13) To restitution.

(A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as

a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.

(B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.

(C) All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim.

(14) To the prompt return of property when no longer needed as evidence.

(15) To be informed of all parole procedures, to participate in the parole process, to provide information to the parole authority to be considered before the parole of the offender, and to be notified, upon request, of the parole or other release of the offender.

(16) To have the safety of the victim, the victim's family, and the general public considered before any parole or other post-judgment release decision is made.

(17) To be informed of the rights enumerated in paragraphs (1) through (16).

(c)(1) A victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may enforce the rights enumerated in subdivision (b) in any trial or

appellate court with jurisdiction over the case as a matter of right. The court shall act promptly on such a request.

(2) This section does not create any cause of action for compensation or damages against the State, any political subdivision of the State, any officer, employee, or agent of the State or of any of its political subdivisions, or any officer or employee of the court.

(d) The granting of these rights to victims shall not be construed to deny or disparage other rights possessed by victims The court in its discretion may extend the right to be heard at sentencing to any person harmed by the defendant. The parole authority shall extend the right to be heard at a parole hearing to any person harmed by the offender.

(e) As used in this section, a "victim" is a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act. The term "victim" also includes the person's spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated. The term "victim" does not include a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim.

(f) In addition to the enumerated rights provided in subdivision (b) that are personally enforceable by victims as provided in subdivision (c), victims of crime

have additional rights that are shared with all of the People of the State of California. These collectively held rights include, but are not limited to, the following:

(1) Right to Safe Schools. All students and staff of public primary, elementary, junior high, and senior high schools, and community colleges, colleges, and universities have the inalienable right to attend campuses which are safe, secure and peaceful.

(2) Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

(3) Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial

or hearing of the case. Public safety and the safety of the victim shall be the primary considerations.

A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail.

Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney and the victim shall be given notice and reasonable opportunity to be heard on the matter.

When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes.

(4) Use of Prior Convictions. Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding. When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.

(5) Truth in Sentencing. Sentences that are individually imposed upon convicted criminal wrongdoers based upon the facts and circumstances surrounding their cases shall be carried out in compliance with the courts' sentencing orders, and shall not be substantially diminished by early release policies intended to alleviate overcrowding in custodial facilities. The

legislative branch shall ensure sufficient funding to adequately house inmates for the full terms of their sentences, except for statutorily authorized credits which reduce those sentences.

(6) Reform of the parole process. The current process for parole hearings is excessive, especially in cases in which the defendant has been convicted of murder. The parole hearing process must be reformed for the benefit of crime victims.

(g) As used in this article, the term "serious felony" is any crime defined in subdivision (c) of Section 1192.7 of the Penal Code, or any successor statute.

West's Ann.Cal.Const. Art. 5, § 1

§ 1. Executive power; Governor

Section 1. The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed.

West's Ann.Cal.Const. Art. 5, § 13

§ 13. Attorney General; law enforcement

Sec. 13. Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as to the Attorney General may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office.

West's Ann.Cal.Const. Art. 11, § 1

§ 1. Counties; subdivisions of state; formation, consolidation, and boundary change; removal of county seat; powers; officers and employees

Sec. 1. (a) The State is divided into counties which are legal subdivisions of the State. The Legislature shall prescribe uniform procedure for county formation, consolidation, and boundary change. Formation or consolidation requires approval by a majority of electors voting on the question in each affected county. A boundary change requires approval by the governing body of each affected county. No county seat shall be removed unless two-thirds of the qualified electors of the county, voting on the proposition at a general election, shall vote in favor of such removal. A proposition of removal shall not be submitted in the same county more than once in four years.

(b) The Legislature shall provide for county powers, an elected county sheriff, an elected district attorney, an elected assessor, and an elected governing body in each county. Except as provided in subdivision (b) of Section 4 of this article, each governing body shall prescribe by ordinance the compensation of its members, but the ordinance prescribing such compensation shall be subject to referendum. The Legislature or the governing body may provide for other officers whose compensation shall be prescribed by the governing body. The governing body shall provide for the number, compensation, tenure, and appointment of employees.

West's Ann.Cal.Gov.Code § 12511

§ 12511. Charge of legal matters; exceptions

The Attorney General has charge, as attorney, of all legal matters in which the State is interested, except the business of The Regents of the University of California and of such other boards or officers as are by law authorized to employ attorneys.

West's Ann.Cal.Gov.Code § 26500

§ 26500. Public prosecutor

The district attorney is the public prosecutor, except as otherwise provided by law.

The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses.

West's Ann.Cal.Gov.Code § 26500.5

§ 26500.5. Administration of justice; improvement; participation in projects and programs

The district attorney may sponsor, supervise, or participate in any project or program to improve the administration of justice.

West's Ann.Cal.Penal Code § 3604.1

§ 3604.1. Application of Administrative Procedure Act regarding the method of death for persons sentenced to death

(a) The Administrative Procedure Act shall not apply to standards, procedures, or regulations promulgated pursuant to Section 3604. The department shall make the standards adopted under subdivision (a) of that section available to the public and to inmates sentenced to death. The department shall promptly notify the Attorney General, the State Public Defender, and counsel for any inmate for whom an execution date has been set or for whom a motion to set an execution date is pending of any adoption or amendment of the standards. Noncompliance with this subdivision is not a ground for stay of an execution or an injunction against carrying out an execution unless the noncompliance has actually prejudiced the inmate's ability to challenge the standard, and in that event the stay shall be limited to a maximum of 10 days.

(b) Notwithstanding subdivision (a) of Section 3604, an execution by lethal injection may be carried out by means of an injection other than intravenous if the warden determines that the condition of the inmate makes intravenous injection impractical.

(c) The court which rendered the judgment of death has exclusive jurisdiction to hear any claim by the condemned inmate that the method of execution is unconstitutional or otherwise invalid. Such a claim shall be dismissed if the court finds its presentation was

delayed without good cause. If the method is found invalid, the court shall order the use of a valid method of execution. If the use of a method of execution is enjoined by a federal court, the Department of Corrections and Rehabilitation shall adopt, within 90 days, a method that conforms to federal requirements as found by that court. If the department fails to perform any duty needed to enable it to execute the judgment, the court which rendered the judgment of death shall order it to perform that duty on its own motion, on motion of the District Attorney or Attorney General, or on motion of any victim of the crime as defined in subdivision (e) of Section 28 of Article I of the California Constitution.

PROPOSITION 66 **DEATH PENALTY. PROCEDURES. INITIATIVE STATUTE.**

OFFICIAL TITLE AND SUMMARY PREPARED BY THE ATTORNEY GENERAL

- Changes procedures governing state court appeals and petitions challenging death penalty convictions and sentences.
- Designates superior court for initial petitions and limits successive petitions.
- Establishes time frame for state court death penalty review.
- Requires appointed attorneys who take noncapital appeals to accept death penalty appeals.
- Exempts prison officials from existing regulation process for developing execution methods.
- Authorizes death row inmate transfers among California prisons.
- Increases portion of condemned inmates' wages that may be applied to victim restitution.
- States other voter approved measures related to death penalty are void if this measure receives more affirmative votes.

SUMMARY OF LEGISLATIVE ANALYST'S ESTIMATE OF NET STATE AND LOCAL GOVERNMENT FISCAL IMPACT:

- Unknown ongoing fiscal impact on state court costs for processing legal challenges to death sentences.

- Near-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. Savings of similar amounts in future years.
- Potential state prison savings that could be in the tens of millions of dollars annually.

ANALYSIS BY THE LEGISLATIVE ANALYST

BACKGROUND

Death Sentences

First degree murder is generally defined as the unlawful killing of a human being that (1) is deliberate and premeditated or (2) takes place while certain other crimes are committed, such as kidnapping. It is punishable by a life sentence in state prison with the possibility of being released by the state parole board after a minimum of 25 years. However, current state law makes first degree murder punishable by death or life imprisonment without the possibility of parole when "special circumstances" of the crime have been charged and proven in court. Existing state law identifies a number of special circumstances that can be charged, such as in cases when the murder was carried out for financial gain or when more than one murder was committed. In addition to first degree murder, state law also specifies a few other crimes, such as treason against the state of California, that can also be punished by death. Since the current death penalty law was enacted in California in 1978, 930 individuals have received a death sentence. In

recent years, an average of about 20 individuals annually have received death sentences.

Legal Challenges to Death Sentences

Two Ways to Challenge Death Sentences. Following a death sentence, defendants can challenge the sentence in two ways:

- ***Direct Appeals.*** Under current state law, death penalty verdicts are automatically appealed to the California Supreme Court. In these "direct appeals," the defendants' attorneys argue that violations of state law or federal constitutional law took place during the trial, such as evidence improperly being included or excluded from the trial. These direct appeals focus on the records of the court proceedings that resulted in the defendant receiving a death sentence. If the California Supreme Court confirms the conviction and death sentence, the defendant can ask the U.S. Supreme Court to review the decision.
- ***Habeas Corpus Petitions.*** In addition to direct appeals, death penalty cases ordinarily involve extensive legal challenges—first in the California Supreme Court and then in federal courts. These challenges, which are commonly referred to as "habeas corpus" petitions, involve factors of the case that are different from those considered in direct appeals. Examples of such factors include claims that (1) the defendant's attorney was ineffective or (2) if the jury had been aware of additional information (such as biological, psychological, or social factors faced by the defendant), it would not have sentenced the defendant to death.

Attorneys Appointed to Represent Condemned Inmates in Legal Challenges. The California Supreme Court appoints attorneys to represent individuals who have been sentenced to death but cannot afford legal representation. These attorneys must meet qualifications established by the Judicial Council (the governing and policymaking body of the judicial branch). Some of these attorneys are employed by state agencies—specifically, the Office of the State Public Defender or the Habeas Corpus Resource Center. The remainder are private attorneys who are paid by the California Supreme Court. Different attorneys generally are appointed to represent individuals in direct appeals and habeas corpus petitions.

State Incurs Legal Challenge Costs. The state pays for the California Supreme Court to hear these legal challenges and for attorneys to represent condemned inmates. The state also pays for the attorneys employed by the state Department of Justice who seek to uphold death sentences while cases are being challenged in the courts. In total, the state currently spends about $55 million annually on the legal challenges to death sentences.

Legal Challenges Can Take a Couple of Decades. Of the 930 individuals who have received a death sentence since 1978, 15 have been executed, 103 have died prior to being executed, 64 have had their sentences reduced by the courts, and 748 are in state prison with death sentences. The vast majority of the 748 condemned inmates are at various stages of the direct appeal or habeas corpus petition process. These legal

challenges—measured from when the individual receives a death sentence to when the individual has completed all state and federal legal challenge proceedings—can take a couple of decades to complete in California due to various factors. For example, condemned inmates can spend significant amounts of time waiting for the California Supreme Court to appoint attorneys to represent them. As of April 2016, 49 individuals were waiting for attorneys to be appointed for their direct appeals and 360 individuals were waiting for attorneys to be appointed for their habeas corpus petitions. In addition, condemned inmates can spend a significant amount of time waiting for their cases to be heard by the courts. As of April 2016, an estimated 337 direct appeals and 263 state habeas corpus petitions were pending in the California Supreme Court.

Implementation of the Death Penalty

Housing of Condemned Inmates. Condemned male inmates generally are required to be housed at San Quentin State Prison (on death row), while condemned female inmates are housed at the Central California Women's Facility in Chowchilla. The procedures that result in increased security costs for these inmates. For example, inmates under a death sentence generally are handcuffed and escorted at all times by one or two officers while outside their cells. In addition, unlike most inmates, condemned inmates are currently required to be placed in separate cells.

Executions Currently Halted by Courts. The state uses lethal injection to execute condemned inmates.

However, because of different legal issues surrounding the state's lethal injection procedures, executions have not taken place since 2006. For example, the courts ruled that the state did not follow the administrative procedures specified in the Administrative Procedures Act when it revised its execution regulations in 2010. These procedures require state agencies to engage in certain activities to provide the public with a meaningful opportunity to participate in the process of writing state regulations. Draft lethal injection regulations have been developed and are currently undergoing public review.

PROPOSAL

This measure seeks to shorten the time that the legal challenges to death sentences take. Specifically, it (1) requires that habeas corpus petitions first be heard in the trial courts, (2) places time limits on legal challenges to death sentences, (3) changes the process for appointing attorneys to represent condemned inmates, and (4) makes various other changes. (There is another measure on this ballot—Proposition 62—that also relates to the death penalty. Proposition 62 would eliminate the death penalty for first degree murder.)

Requires Habeas Corpus Petitions First Be Heard in Trial Courts

The measure requires that habeas corpus petitions first be heard in trial courts instead of the California Supreme Court. (Direct appeals would continue to be heard in the California Supreme Court.) Specifically, these habeas corpus petitions would be heard by the judge who handled the original murder trial unless good cause is

shown for another judge or court to hear the petition. The measure requires trial courts to explain in writing their decision on each petition, which could be appealed to the Courts of Appeal. The decisions made by the Courts of Appeal could then be appealed to the California Supreme Court. The measure allows the California Supreme Court to transfer any habeas corpus petitions currently pending before it to the trial courts.

Places Time Limits on Legal Challenges to Death Sentences

Requires Completion of Direct Appeal and Habeas Corpus Petition Process Within Five Years. The measure requires that the direct appeal and the habeas corpus petition process be completed within five years of the death sentence. The measure also requires the Judicial Council to revise its rules to help ensure that direct appeals and habeas corpus petitions are completed within this time frame. The five-year requirement would apply to new legal challenges, as well as those currently pending in court. For challenges currently pending, the measure requires that they be completed within five years from when Judicial Council adopts revised rules. If the process takes more than five years, victims or their attorneys could request a court order to address the delay.

Requires Filing of Habeas Corpus Petitions Within One Year of Attorney Appointment. The measure requires that attorneys appointed to represent condemned inmates in habeas corpus petitions file the petition with the trial courts within one year of their appointment.

The trial court generally would then have one year to make a decision on the petition. If a petition is not filed within this time period, the trial court must dismiss the petition unless it determines that the defendant is likely either innocent or not eligible for the death sentence.

Places Other Limitations. In order to help meet the above time frames, the measure places other limits on legal challenges to death sentences. For example, the measure does not allow additional habeas corpus petitions to be filed after the first petition is filed, except in those cases where the court finds that the defendant is likely either innocent or not eligible for the death sentence.

Changes Process for Appointing Attorneys

The measure requires the Judicial Council and the California Supreme Court to consider changing the qualifications that attorneys representing condemned inmates must meet. According to the measure, these qualifications should (1) ensure competent representation and (2) expand the number of attorneys that can represent condemned inmates so that legal challenges to death sentences are heard in a timely manner. The measure also requires trial courts—rather than the California Supreme Court—to appoint attorneys for habeas corpus petitions.

In addition, the measure changes how attorneys are appointed for direct appeals under certain circumstances. Currently, the California Supreme Court appoints attorneys from a list of qualified attorneys it maintains. Under the measure, certain attorneys could also be

appointed from the lists of attorneys maintained by the Courts of Appeal for non-death penalty cases. Specifically, those attorneys who (1) are qualified for appointment to the most serious non-death penalty appeals and (2) meet the qualifications adopted by the Judicial Council for appointment to death penalty cases would be required to accept appointment to direct appeals if they want to remain on the Courts of Appeal's appointment lists.

Makes Other Changes

Habeas Corpus Resources Center Operations. The measure eliminates the Habeas Corpus Resources Center's five-member board of directors and requires the California Supreme Court to oversee the center. The measure also requires that the center's attorneys be paid at the same level as attorneys at the Office of the State Public Defender, as well as limits its legal activities.

Inmate Work and Payments to Victims of Crime Requirements. Current state law generally requires that inmates work while they are in prison. State prison regulations allow for some exceptions to these requirements, such as for inmates who pose too great a security risk to participate in work programs. In addition, inmates may be required by the courts to make payments to victims of crime. Up to 50 percent of any money inmates receive is used to pay these debts. This measure specifies that every person under a sentence of death must work while in state prison, subject to state regulations. Because the measure does not change state

regulations, existing prison practices related to inmate work requirements would not necessarily be changed. In addition, the measure requires that 70 percent of any money condemned inmates receive be used to pay any debts owed to victims.

Enforcement of Death Sentence. The measure allows the state to house condemned inmates in any prison. The measure also exempts the state's execution procedures from the Administrative Procedures Act. In addition, the measure makes various changes regarding the method of execution used by the state. For example, legal challenges to the method could only be heard in the court that imposed the death sentence. In addition, if such challenges were successful, the measure requires the trial court to order a valid method of execution. In cases where federal court orders prevent the state from using a given method of execution, the state prisons would be required to develop a method of execution that meets federal requirements within 90 days. Finally, the measure exempts various health care professionals that assist with executions from certain state laws and disciplinary actions by licensing agencies, if those actions are imposed as a result of assisting with executions.

FISCAL EFFECTS

State Court Costs

Impact on Cost Per Legal Challenge Uncertain. The fiscal impact of the measure on state court-related costs of each legal challenge to a death sentence is uncertain. This is because the actual cost could vary

significantly depending on four key factors: (1) the complexity of the legal challenges filed, (2) how state courts address existing and new legal challenges, (3) the availability of attorneys to represent condemned inmates, and (4) whether additional attorneys will be needed to process each legal challenge.

On the one hand, the measure could reduce the cost of each legal challenge. For example, the requirement that each challenge generally be completed in five years, as well as the limits on the number of habeas corpus petitions that can be filed, could result in the filing of fewer, shorter legal documents. Such a change could result in each legal challenge taking less time and state resources to process.

On the other hand, some of the measure's provisions could increase state costs for each legal challenge. For example, the additional layers of review required for a habeas corpus petition could result in additional time and resources for the courts to process each legal challenge. In addition, there could be additional attorney costs if the state determines that a new attorney must be appointed when a habeas corpus petition ruling by the trial courts is appealed to the Courts of Appeal.

In view of the above, the ongoing annual fiscal impact of the measure on state costs related to legal challenges to death sentences is unknown.

Near-Term Annual Cost Increases From Accelerated Spending on Existing Cases. Regardless of how the measure affects the cost of each legal challenge, the measure would accelerate the amount the state spends

on legal challenges to death sentences. This is because the state would incur annual cost increases in the near term to process hundreds of pending legal challenges within the time limits specified in the measure. The state would save similar amounts in future years as some or all of these costs would have otherwise occurred over a much longer term absent this measure. Given the significant number of pending cases that would need to be addressed, the actual amount and duration of these accelerated costs in the near term is unknown. It is possible, however, that such costs could be in the tens of millions of dollars annually for many years.

State Prisons

To the extent that the state changes the way it houses condemned inmates, the measure could result in state prison savings. For example, if male inmates were transferred to other prisons instead of being housed in single cells at San Quentin, it could reduce the cost of housing and supervising these inmates. In addition, to the extent the measure resulted in additional executions that reduced the number of condemned inmates, the state would also experience additional savings. In total, such savings could potentially reach the tens of millions of dollars annually.

Other Fiscal Effects

To the extent that the changes in this measure have an effect on the incidence of murder in California or how often prosecutors seek the death penalty in murder trials, the measure could affect state and local government

expenditures. The resulting fiscal impact, if any, is unknown and cannot be estimated.

Visit *http://www.sos.ca.gov/measure-contributions* for a list of committees primarily formed to support or oppose this measure. Visit *http://www.fppc.ca.gov/transparency/top-contributors/nov-16-gen-v2.html* to access the committee's top 10 contributors.

★ ARGUMENT IN FAVOR OF PROPOSITION 66 ★

California's elected law enforcement leaders, police officers, frontline prosecutors, and the families of murder victims ask you to REFORM the California death penalty system by voting YES ON PROPOSITION 66!

We agree California's current death penalty system is broken. The most heinous criminals sit on death row for 30 years, with endless appeals delaying justice and costing taxpayers hundreds of millions.

It does not need to be this way.

The solution is to MEND, NOT END, California's death penalty. The solution is YES on PROPOSITION 66.

Proposition 66 was written to speed up the death penalty appeals system while ensuring that no innocent person is ever executed.

Proposition 66 means the worst of the worst killers receive the strongest sentence.

Prop. 66 brings closure to the families of victims. Proposition 66 protects public safety—these brutal killers have no chance of ever being in society again.

Prop. 66 saves taxpayers money, because heinous criminals will no longer be sitting on death row at taxpayer expense for 30+ years.

Proposition 66 was written by frontline death penalty prosecutors who know the system inside and out. They know how the system is broken, and they know how to fix it. It may sound complicated, but the reforms are actually quite simple.

HERE'S WHAT PROPOSITION 66 DOES:

1. All state appeals should be limited to 5 years.
2. Every murderer sentenced to death will have their special appeals lawyer assigned immediately. Currently, it can be five years or more before they are even assigned a lawyer.
3. The pool of available lawyers to handle these appeals will be expanded.
4. The trial courts who handled the death penalty trials and know them best will deal with the initial appeals.
5. The State Supreme Court will be empowered to oversee the system and ensure appeals are expedited while protecting the rights of the accused.
6. The State Corrections Department (Prisons) will reform death row housing; taking away special privileges from these brutal killers and saving millions.

Together, 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.

WE NEED A FUNCTIONING DEATH PENALTY SYSTEM IN CALIFORNIA

Death sentences are issued rarely and judiciously, and only against the very worst murderers.

To be eligible for the death penalty in California, you have to be guilty of first-degree murder with "special circumstances." These special circumstances include, in part:

- Murderers who raped/tortured their victims.
- Child killers.
- Multiple murderers/serial killers.
- Murders committed by terrorists; as part of a hate-crime; or killing a police officer.

There are nearly 2,000 murders in California annually. Only about 15 death penalty sentences are imposed.

But when these horrible crimes occur, and a jury unanimously finds a criminal guilty and separately, unanimously recommends death, the appeals should be heard within five years, and the killer executed.

Help us protect California, provide closure to victims, and save taxpayers millions.

Visit *www.NoProp62YesProp66.com* for more information. Then join law enforcement and families of victims and vote YES ON PROPOSITION 66!

JACKIE LACEY, District Attorney of Los Angeles County

KERMIT ALEXANDER, Family Member of Multiple Homicide Victims

SHAWN WELCH, President
Contra Costa County Deputy Sheriffs Association

Arguments printed on this page are the opinions of the authors, and have not been checked for accuracy by any official agency.

★ REBUTTAL TO ARGUMENT IN FAVOR OF PROPOSITION 66 ★

Prop. 66 is a poorly-written and COSTLY EXPERIMENT that would INCREASE CALIFORNIA'S RISK OF EXECUTING AN INNOCENT PERSON, add new layers of government bureaucracy and create even more legal delays in death penalty cases.

**Read the measure for yourself: According to the state's nonpartisan Legislative Analyst's Office, this measure could cost taxpayers TENS of MILLIONS of DOLLARS.

Prop. 66 is not real reform. Here's what EXPERTS SAY Prop. 66 WOULD ACTUALLY DO:

- INCREASE the chance that California executes an innocent person

- INCREASE TAXPAYER FUNDED legal defense for death row inmates
- REQUIRE the state to hire and pay for hundreds of new lawyers
- LEAD TO CONSTRUCTION of new TAXPAYER FUNDED DEATH ROW facilities
- CLOG county courts, forcing death penalty cases on inexperienced judges
- Lead to EXPENSIVE LITIGATION by lawyers who will challenge a series of confusing provisions

Prop. 66 is a perfect example of SPECIAL INTEREST GROUPS abusing their power and pushing an agenda while claiming to seek reform. Look who's behind Prop. 66: the prison guards' union which has an interest in funneling more money into the prison system and opportunistic politicians using the initiative to advance their careers.

Experts agree: Prop. 66 is a POORLY WRITTEN, CONFUSING initiative that will only add MORE DELAY and MORE COSTS to California's death penalty.

Remember, MORE THAN 150 INNOCENT PEOPLE HAVE BEEN SENTENCED TO DEATH, and some have been executed because of poorly written laws like this.

Californians deserve real reform. Prop. 66 is not the answer.

www.NOonCAProp66.org

GIL GARCETTI, District Attorney
Los Angeles County, 1992–2000

JUDGE LADORIS CORDELL, (Retired)
Santa Clara County Superior Court

HELEN HUTCHISON, President
League of Women Voters of California

★ ARGUMENT AGAINST PROPOSITION 66 ★

Prop. 66 WASTES TENS OF MILLIONS OF TAXPAYER DOLLARS.

Evidence shows MORE THAN 150 INNOCENT PEOPLE HAVE BEEN SENTENCED TO DEATH, and some have been executed because of poorly written laws like this one.

Prop. 66 is so confusing and poorly written that we don't know all of its consequences. We do know this: it will add more layers of government bureaucracy causing more delays, cost taxpayers money, and increase California's risk of executing an innocent person.

Experts agree: Prop. 66 is DEEPLY FLAWED.

** PROP. 66 COULD INCREASE TAXPAYER COSTS BY MILLIONS.

According to nonpartisan analysis, Prop. 66 could cost "tens of millions of dollars annually" with "unknown" costs beyond that. Read the LAO's report posted at *www.NoOnCAProp66.org/cost*.

Experts say Prop. 66 will:

- INCREASE PRISON SPENDING while schools, social services, and other priorities suffer.
- INCREASE TAXPAYER-FUNDED legal defense for death row inmates, requiring the state to hire as many as 400 new taxpayer-funded attorneys.
- LEAD TO CONSTRUCTION of new TAXPAYER-FUNDED DEATH ROW facilities. This initiative authorizes the state to house death row inmates in new prisons, anywhere in California.
- Lead to EXPENSIVE LITIGATION by lawyers who will challenge a series of poorly written provisions.

"Prop. 66 is so flawed that it's impossible to know for sure all the hidden costs it will inflict on California taxpayers."—*John Van de Kamp, former Attorney General of California.*

** PROP. 66 WOULD INCREASE CALIFORNIA'S RISK OF EXECUTING AN INNOCENT PERSON.

Instead of making sure everyone gets a fair trial with all the evidence presented, this measure REMOVES IMPORTANT LEGAL SAFEGUARDS and could easily lead to fatal mistakes.

This measure is modeled after laws from states like Texas, where authorities have executed innocent people.

People like Cameron Willingham and Carlos De Luna, both executed in Texas.

Experts now say they were innocent.

Prop. 66 will:

- LIMIT the ability to present new evidence of innocence in court.
- LEAVE people who can't afford a good attorney vulnerable to mistakes.
- CLOG local courts by moving death penalty cases there, adding new layers of bureaucracy and placing high profile cases in the hands of inexperienced judges and attorneys. This would lead to costly mistakes.

"If someone's executed and later found innocent, we can't go back."—*Judge LaDoris Cordell, Santa Clara (retired).*

** A CONFUSING AND POORLY WRITTEN INITIATIVE THAT WILL ONLY CAUSE MORE DELAY.

Prop. 66 is a misguided experiment that asks taxpayers to increase the costs of our justice and prison systems by MILLIONS to enact poorly-written reforms that would put California at risk.

SF Weekly stated, "Combing through the initiative's 16 pages is like looking through the first draft of an undergraduate paper. The wording is vague, unfocused and feels tossed off."

Instead of adding new layers of government bureaucracy and increasing costs, we deserve real reform of our justice system. Prop. 66 is not the answer.

"Instead of reckless, costly changes to our prison system, we need smart investments that are proven to reduce

crime and serve victims."—*Dionne Wilson, widow of police officer killed in the line of duty.*

JEANNE WOODFORD, Warden
California's Death Row prison, 1999–2004

FRANCISCO CARRILLO JR., Innocent man wrongfully convicted in Los Angeles County

HON. ANTONIO R. VILLARAIGOSA, Mayor
City of Los Angeles, 2005–2013

★ REBUTTAL TO ARGUMENT AGAINST PROPOSITION 66 ★

Proposition 66 was carefully written by California's leading criminal prosecutors, the Criminal Justice Legal Foundation and other top legal experts—people who know from experience what's needed to MEND, NOT END our state's broken death penalty system.

The anti-death penalty extremists opposing Proposition 66 know it fixes the system, and will say anything to defeat it. Don't be fooled.

Proposition 66 reforms the death penalty so the system is fair to both defendants and the families of victims.

Defendants now wait five years just to be assigned a lawyer, delaying justice, hurting their appeals, and preventing closure for the victims' families. Proposition 66 fixes this by streamlining the process to ensure justice for all.

Under the current system, California's most brutal killers—serial killers, mass murderers, child killers, and

murderers who rape and torture their victims—linger on death row until they die of old age, with taxpayers paying for their meals, healthcare, privileges and endless legal appeals.

By reforming the system, Proposition 66 will save taxpayers over $30 million a year, according to former California Finance Director Mike Genest. Instead of dragging on for decades and costing millions, death row killers will have five to ten years to have their appeals heard, ample time to ensure justice is evenly applied while guaranteeing that no innocent person is wrongly executed.

Ensure justice by voting "YES" on Proposition 66—to MEND, NOT END the death penalty.

Learn more at *www.NoProp62YesProp66.com.*

ANNE MARIE SCHUBERT, District Attorney of Sacramento County

SANDY FRIEND, Mother of Murder Victim

CHUCK ALEXANDER, President
California Correctional Peace Officers Association

TEXT OF PROPOSED LAWS

PROPOSITION 66

This initiative measure is submitted to the people in accordance with the provisions of Section 8 of Article II of the California Constitution.

This initiative measure amends and adds sections to the Government Code and the Penal Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. Short Title.

This Act shall be known and may be cited as the Death Penalty Reform and Savings Act of 2016.

SEC. 2. Findings and Declarations.

1. California's death penalty system is ineffective because of waste, delays, and inefficiencies. Fixing it will save California taxpayers millions of dollars every year. These wasted taxpayer dollars would be better used for crime prevention, education, and services for the elderly and disabled.

2. Murder victims and their families are entitled to justice and due process. Death row killers have murdered over 1,000 victims, including 229 children and 43 police officers; 235 victims were raped and 90 victims were tortured.

3. Families of murder victims should not have to wait decades for justice. These delays further victimize the families who are waiting for justice. For example, serial killer Robert Rhoades, who kidnapped, raped, tortured, and murdered 8-year-old Michael Lyons and also raped

and murdered Bay Area high school student Julie Connell, has been sitting on death row for over 16 years. Hundreds of killers have sat on death row for over 20 years.

4. In 2012, the Legislative Analyst's Office found that eliminating special housing for death row killers will save tens of millions of dollars every year. These savings could be invested in our schools, law enforcement, and communities to keep us safer.

5. Death row killers should be required to work in prison and pay restitution to their victims' families consistent with the Victims' Bill of Rights (Marsy's Law). Refusal to work and pay restitution should result in loss of special privileges.

6. Reforming the existing inefficient appeals process for death penalty cases will ensure fairness for both defendants and victims. Right now, capital defendants wait five years or more for appointment of their appellate lawyer. By providing prompt appointment of attorneys, the defendants' claims will be heard sooner.

7. A defendant's claim of actual innocence should not be limited, but frivolous and unnecessary claims should be restricted. These tactics have wasted taxpayer dollars and delayed justice for decades.

8. The state agency that is supposed to expedite secondary review of death penalty cases is operating without any effective oversight, causing long-term delays and wasting taxpayer dollars. California Supreme

Court oversight of this state agency will ensure accountability.

9. Bureaucratic regulations have needlessly delayed enforcement of death penalty verdicts. Eliminating wasteful spending on repetitive challenges to these regulations will result in the fair and effective implementation of justice.

10. The California Constitution gives crime victims the right to timely justice. A capital case can be fully and fairly reviewed by both the state and federal courts within ten years. By adopting state rules and procedures, victims will receive timely justice and taxpayers will save hundreds of millions of dollars.

11. California's Death Row includes serial killers, cop killers, child killers, mass murderers, and hate crime killers. The death penalty system is broken, but it can and should be fixed. This initiative will ensure justice for both victims and defendants, and will save hundreds of millions of taxpayer dollars.

SEC. 3. Section 190.6 of the Penal Code is amended to read:

190.6. (a) The Legislature finds that the sentence in all capital cases should be imposed expeditiously.

(b) Therefore, in all cases in which a sentence of death has been imposed on or after January 1, 1997, the opening appellate brief in the appeal to the State Supreme Court shall be filed no later than seven months after the certification of the record for completeness under subdivision (d) of Section 190.8 or

receipt by the appellant's counsel of the completed record, whichever is later, except for good cause. However, in those cases where the trial transcript exceeds 10,000 pages, the briefing shall be completed within the time limits and pursuant to the procedures set by the rules of court adopted by the Judicial Council.

(c) In all cases in which a sentence of death has been imposed on or after January 1, 1997, it is the Legislature's goal that the appeal be decided and an opinion reaching the merits be filed within 210 days of the completion of the briefing. However, where the appeal and a petition for writ of habeas corpus is heard at the same time, the petition should be decided and an opinion reaching the merits should be filed within 210 days of the completion of the briefing for the petition.

(d) The right of victims of crime to a prompt and final conclusion, as provided in paragraph (9) of subdivision (b) of Section 28 of Article I of the California Constitution, includes the right to have judgments of death carried out within a reasonable time. Within 18 months of the effective date of this initiative, the Judicial Council shall adopt initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review. Within five years of the adoption of the initial rules or the entry of judgment, whichever is later, the state courts shall complete the state appeal and the initial state habeas corpus review in capital cases. The Judicial Council shall continuously monitor the timeliness of review of capital cases and shall amend the rules and standards as necessary to complete the state appeal and initial

state habeas corpus proceedings within the five-year period provided in this subdivision.

~~(d)~~ *(e)* The failure of the parties or ~~the Supreme Court to meet or comply with the time limit provided by this section shall not be a ground for granting relief from a judgment of conviction or sentence of death~~ *of a court to comply with the time limit in subdivision (b) shall not affect the validity of the judgment or require dismissal of an appeal or habeas corpus petition. If a court fails to comply without extraordinary and compelling reasons justifying the delay, either party or any victim of the offense may seek relief by petition for writ of mandate. The court in which the petition is filed shall act on it within 60 days of filing. Paragraph (1) of subdivision (c) of Section 28 of Article I of the California Constitution, regarding standing to enforce victims' rights, applies to this subdivision and subdivision (d).*

SEC. 4. Section 1227 of the Penal Code is amended to read:

1227. *(a)* If for any reason other than the pendency of an appeal pursuant to subdivision (b) of Section 1239 of this code a judgment of death has not been executed, and it remains in force, the court in which the conviction was had shall, on application of the district attorney, or may upon its own motion, make and cause to be entered an order ~~appointing a day upon~~ *specifying a period of 10 days during* which the judgment shall be executed, ~~which must not be less than 30 days nor more than 60 days from the time of making such order; and immediately thereafter~~. *The 10-day period shall*

begin no less than 30 days after the order is entered and shall end no more than 60 days after the order is entered. Immediately after the order is entered, a certified copy of ~~such~~ *the* order, attested by the clerk, under the seal of the court, shall, for the purpose of execution, be transmitted by registered mail to the warden of the state prison having the custody of the defendant; provided, that if the defendant be at large, a warrant for his apprehension may be issued, and upon being apprehended, he shall be brought before the court, whereupon the court shall make an order directing the warden of the state prison to whom the sheriff is instructed to deliver the defendant to execute the judgment ~~at a specified time~~ *within a period of 10 days*, which shall not be *begin* less than 30 days nor *end* more than 60 days from the time of making such order.

(b) From an order fixing the time for and directing the execution of such judgment as herein provided, there shall be no appeal.

SEC. 5. Section 1239.1 is added to the Penal Code, to read:

1239.1. (a) It is the duty of the Supreme Court in a capital case to expedite the review of the case. The court shall appoint counsel for an indigent appellant as soon as possible. The court shall only grant extensions of time for briefing for compelling or extraordinary reasons.

(b) When necessary to remove a substantial backlog in appointment of counsel for capital cases, the Supreme Court shall require attorneys who are qualified for

appointment to the most serious non-capital appeals and who meet the qualifications for capital appeals to accept appointment in capital cases as a condition for remaining on the court's appointment list. A "substantial backlog" exists for this purpose when the time from entry of judgment in the trial court to appointment of counsel for appeal exceeds 6 months over a period of 12 consecutive months.

SEC. 6. Section 1509 is added to the Penal Code, to read:

1509. (a) This section applies to any petition for writ of habeas corpus filed by a person in custody pursuant to a judgment of death. A writ of habeas corpus pursuant to this section is the exclusive procedure for collateral attack on a judgment of death. A petition filed in any court other than the court which imposed the sentence should be promptly transferred to that court unless good cause is shown for the petition to be heard by another court. A petition filed in or transferred to the court which imposed the sentence shall be assigned to the original trial judge unless that judge is unavailable or there is other good cause to assign the case to a different judge.

(b) After the entry of a judgment of death in the trial court, that court shall offer counsel to the prisoner as provided in Section 68662 of the Government Code.

(c) Except as provided in subdivisions (d) and (g), the initial petition must be filed within one year of the order entered under Section 68662 of the Government Code.

(d) An initial petition which is untimely under subdivision (c) or a successive petition whenever filed shall be dismissed unless the court finds, by the preponderance of all available evidence, whether or not admissible at trial, that the defendant is actually innocent of the crime of which he or she was convicted or is ineligible for the sentence. A stay of execution shall not be granted for the purpose of considering a successive or untimely petition unless the court finds that the petitioner has a substantial claim of actual innocence or ineligibility. "Ineligible for the sentence of death" means that circumstances exist placing that sentence outside the range of the sentencer's discretion. Claims of ineligibility include a claim that none of the special circumstances in subdivision (a) of Section 190.2 is true, a claim that the defendant was under the age of 18 at the time of the crime, or a claim that the defendant has an intellectual disability, as defined in Section 1376. A claim relating to the sentencing decision under Section 190.3 is not a claim of actual innocence or ineligibility for the purpose of this section.

(e) A petitioner claiming innocence or ineligibility under subdivision (d) shall disclose all material information relating to guilt or eligibility in the possession of the petitioner or present or former counsel for petitioner. If the petitioner willfully fails to make the disclosure required by this subdivision and authorize disclosure by counsel, the petition may be dismissed.

(f) Proceedings under this section shall be conducted as expeditiously as possible, consistent with a fair adjudication. The superior court shall resolve the initial

petition within one year of filing unless the court finds that a delay is necessary to resolve a substantial claim of actual innocence, but in no instance shall the court take longer than two years to resolve the petition. On decision of an initial petition, the court shall issue a statement of decision explaining the factual and legal basis for its decision.

(g) If a habeas corpus petition is pending on the effective date of this section, the court may transfer the petition to the court which imposed the sentence. In a case where a judgment of death was imposed prior to the effective date of this section, but no habeas corpus petition has been filed prior to the effective date of this section, a petition that would otherwise be barred by subdivision (c) may be filed within one year of the effective date of this section or within the time allowed under prior law, whichever is earlier.

SEC. 7. Section 1509.1 is added to the Penal Code, to read:

1509.1. (a) Either party may appeal the decision of a superior court on an initial petition under Section 1509 to the court of appeal. An appeal shall be taken by filing a notice of appeal in the superior court within 30 days of the court's decision granting or denying the habeas petition. A successive petition shall not be used as a means of reviewing a denial of habeas relief.

(b) The issues considered on an appeal under subdivision (a) shall be limited to the claims raised in the superior court, except that the court of appeal may also consider a claim of ineffective assistance of trial counsel

if the failure of habeas counsel to present that claim to the superior court constituted ineffective assistance. The court of appeal may, if additional findings of fact are required, make a limited remand to the superior court to consider the claim.

(c) The people may appeal the decision of the superior court granting relief on a successive petition. The petitioner may appeal the decision of the superior court denying relief on a successive petition only if the superior court or the court of appeal grants a certificate of appealability. A certificate of appealability may issue under this subdivision only if the petitioner has shown both a substantial claim for relief, which shall be indicated in the certificate, and a substantial claim that the requirements of subdivision (d) of Section 1509 have been met. An appeal under this subdivision shall be taken by filing a notice of appeal in the superior court within 30 days of the court's decision. The superior court shall grant or deny a certificate of appealability concurrently with a decision denying relief on the petition. The court of appeal shall grant or deny a request for a certificate of appealability within 10 days of an application for a certificate. The jurisdiction of the court of appeal is limited to the claims identified in the certificate and any additional claims added by the court of appeal within 60 days of the notice of appeal. An appeal under this subdivision shall have priority over all other matters and be decided as expeditiously as possible.

SEC. 8. Section 2700.1 is added to the Penal Code, to read:

2700.1. Section 2700 applies to inmates sentenced to death, except as otherwise provided in this section.

Every person found guilty of murder, sentenced to death, and held by the Department of Corrections and Rehabilitation pursuant to Sections 3600 to 3602 shall be required to work as many hours of faithful labor each day he or she is so held as shall be prescribed the rules and regulations of the department.

Physical education and physical fitness programs shall not qualify as work for purposes of this section. The Department of Corrections and Rehabilitation may revoke the privileges of any condemned inmate who refuses to work as required by this section.

In any case where the condemned inmate owes a restitution fine or restitution order, the Secretary of the Department of Corrections and Rehabilitation shall deduct 70 percent or the balance owing, whichever is less, from the condemned inmate's wages and trust account deposits, regardless of the source of the income, and shall transfer those funds to the California Victim Compensation and Government Claims Board according to the rules and regulations of the Department of Corrections and Rehabilitation, pursuant to Sections 2085.5 and 2717.8.

SEC. 9. Section 3600 of the Penal Code is amended to read:

3600. ~~(a)~~ Every male person, upon whom has been imposed the judgment of death, shall be delivered to the warden of the California state prison designated by the department for the execution of the death penalty~~, there to be kept until the execution of the judgment, except as provided in subdivision (b)~~. *The inmate shall be kept in a California prison until execution of the judgment. The department may transfer the inmate to another prison which it determines to provide a level of security sufficient for that inmate. The inmate shall be returned to the prison designated for execution of the death penalty after an execution date has been set.*

~~(b) Notwithstanding any other provision of law:~~

~~(1) A condemned inmate who, while in prison, commits any of the following offenses, or who, as a member of a gang or disruptive group, orders others to commit any of these offenses, may, following disciplinary sanctions and classification actions at San Quentin State Prison, pursuant to regulations established by the Department of Corrections, be housed in secure condemned housing designated by the Director of Corrections, at the California State Prison, Sacramento:~~

~~(A) Homicide.~~

~~(B) Assault with a weapon or with physical force capable of causing serious or mortal injury.~~

~~(C) Escape with force or attempted escape with force.~~

~~(D) Repeated serious rules violations that substantially threaten safety or security.~~

~~(2) The condemned housing program at California State Prison, Sacramento, shall be fully operational prior to the transfer of any condemned inmate.~~

~~(3) Specialized training protocols for supervising condemned inmates shall be provided to those line staff and supervisors at the California State Prison, Sacramento, who supervise condemned inmates on a regular basis.~~

~~(4) An inmate whose medical or mental health needs are so critical as to endanger the inmate or others may, pursuant to regulations established by the Department of Corrections, be housed at the California Medical Facility or other appropriate institution for medical or mental health treatment. The inmate shall be returned to the institution from which the inmate was transferred when the condition has been adequately treated or is in remission.~~

~~(c) When housed pursuant to subdivision (b) the following shall apply:~~

~~(1) Those local procedures relating to privileges and classification procedures provided to Grade B condemned inmates at San Quentin State Prison shall be similarly instituted at California State Prison, Sacramento, for condemned inmates housed pursuant to paragraph (1) of subdivision (b) of Section 3600. Those classification procedures shall include the right to the review of a classification no less than every 90 days~~

~~and the opportunity to petition for a return to San Quentin State Prison.~~

~~(2) Similar attorney-client access procedures that are afforded to condemned inmates housed at San Quentin State Prison shall be afforded to condemned inmates housed in secure condemned housing designated by the Director of Corrections, at the California State Prison, Sacramento. Attorney-client access for condemned inmates housed at an institution for medical or mental health treatment shall be commensurate with the institution's visiting procedures and appropriate treatment protocols.~~

~~(3) A condemned inmate housed in secure condemned housing pursuant to subdivision (b) shall be returned to San Quentin State Prison at least 60 days prior to his scheduled date of execution.~~

~~(4) No more than 15 condemned inmates may be rehoused pursuant to paragraph (1) of subdivision (b).~~

~~(d) Prior to any relocation of condemned row from San Quentin State Prison, whether proposed through legislation or any other means, all maximum security Level IV, 180-degree housing unit facilities with an electrified perimeter shall be evaluated by the Department of Corrections for suitability for the secure housing and execution of condemned inmates.~~

SEC. 10. Section 3604 of the Penal Code is amended to read:

3604. (a) The punishment of death shall be inflicted by the administration of a lethal gas or by an

intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections *and Rehabilitation*.

(b) Persons sentenced to death prior to or after the operative date of this subdivision shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection. This choice shall be made in writing and shall be submitted to the warden pursuant to regulations established by the Department of Corrections *and Rehabilitation*. If a person under sentence of death does not choose either lethal gas or lethal injection within 10 days after the warden's service upon the inmate of an execution warrant issued following the operative date of this subdivision, the penalty of death shall be imposed by lethal injection.

(c) Where the person sentenced to death is not executed on the date set for execution and a new execution date is subsequently set, the inmate again shall have the opportunity to elect to have punishment imposed by lethal gas or lethal injection, according to the procedures set forth in subdivision (b).

(d) Notwithstanding subdivision (b), if either manner of execution described in subdivision (a) is held invalid, the punishment of death shall be imposed by the alternative means specified in subdivision (a).

(e) The Department of Corrections and Rehabilitation, or any successor agency with the duty to execute judgments of death, shall maintain at all times the ability to execute such judgments.

SEC. 11. Section 3604.1 is added to the Penal Code, to read:

3604.1. (a) The Administrative Procedure Act shall not apply to standards, procedures, or regulations promulgated pursuant to Section 3604. The department shall make the standards adopted under subdivision (a) of that section available to the public and to inmates sentenced to death. The department shall promptly notify the Attorney General, the State Public Defender, and counsel for any inmate for whom an execution date has been set or for whom a motion to set an execution date is pending of any adoption or amendment of the standards. Noncompliance with this subdivision is not a ground for stay of an execution or an injunction against carrying out an execution unless the noncompliance has actually prejudiced the inmate's ability to challenge the standard, and in that event the stay shall be limited to a maximum of 10 days.

(b) Notwithstanding subdivision (a) of Section 3604, an execution by lethal injection may be carried out by means of an injection other than intravenous if the warden determines that the condition of the inmate makes intravenous injection impractical.

(c) The court which rendered the judgment of death has exclusive jurisdiction to hear any claim by the condemned inmate that the method of execution is unconstitutional or otherwise invalid. Such a claim shall be dismissed if the court finds its presentation was delayed without good cause. If the method is found invalid, the court shall order the use of a valid method of

execution. If the use of a method of execution is enjoined by a federal court, the Department of Corrections and Rehabilitation shall adopt, within 90 days, a method that conforms to federal requirements as found by that court. If the department fails to perform any duty needed to enable it to execute the judgment, the court which rendered the judgment of death shall order it to perform that duty on its own motion, on motion of the District Attorney or Attorney General, or on motion of any victim of the crime as defined in subdivision (e) of Section 28 of Article I of the California Constitution.

SEC. 12. Section 3604.3 is added to the Penal Code, to read:

3604.3. (a) A physician may attend an execution for the purpose of pronouncing death and may provide advice to the department for the purpose of developing an execution protocol to minimize the risk of pain to the inmate.

(b) The purchase of drugs, medical supplies or medical equipment necessary to carry out an execution shall not be subject to the provisions of Chapter 9 (commencing with Section 4000) of Division 2 of the Business and Professions Code, and any pharmacist, or supplier, compounder, or manufacturer of pharmaceuticals is authorized to dispense drugs and supplies to the secretary or the secretary's designee, without prescription, for carrying out the provisions of this chapter.

(c) No licensing board, department, commission, or accreditation agency that oversees or regulates the practice of health care or certifies or licenses health care

professionals may deny or revoke a license or certification, censure, reprimand, suspend, or take any other disciplinary action against any licensed health care professional for any action authorized by this section.

SEC. 13. Section 68660.5 is added to the Government Code, to read:

68660.5. The purposes of this chapter are to qualify the State of California for the handling of federal habeas corpus petitions under Chapter 154 of Title 28 of the United States Code, to expedite the completion of state habeas corpus proceedings in capital cases, and to provide quality representation in state habeas corpus for inmates sentenced to death. This chapter shall be construed and administered consistently with those purposes.

SEC. 14. Section 68661 of the Government Code is amended to read:

68661. There is hereby created in the judicial branch of state government the California Habeas Corpus Resource Center, which shall have all of the following general powers and duties:

(a) To employ up to 34 attorneys who may be appointed ~~by the Supreme Court~~ *pursuant to Section 68662* to represent any person convicted and sentenced to death in this state who is without counsel, and who is determined by a court of competent jurisdiction to be indigent, for the purpose of instituting and prosecuting ~~postconviction actions~~ *habeas corpus petitions* in the state and federal courts, challenging the legality of the

judgment or sentence imposed against that person, *subject to the limitations in Section 68661.1*, and preparing petitions for executive clemency. ~~An~~ *Any such* appointment may be concurrent with the appointment of the State Public Defender or other counsel for purposes of direct appeal under Section 11 of Article VI of the California Constitution.

(b) To seek reimbursement for representation and expenses pursuant to Section 3006A of Title 18 of the United States Code when providing representation to indigent persons in the federal courts and process those payments via the Federal Trust Fund.

(c) To work with the ~~Supreme Court~~ *courts* in recruiting members of the private bar to accept death penalty habeas corpus case appointments.

(d) To ~~establish and periodically update~~ *recommend attorneys to the Supreme Court for inclusion in* a roster of attorneys qualified as counsel in ~~postconviction~~ *habeas corpus* proceedings in capital cases, *provided that the final determination of whether to include an attorney in the roster shall be made by the Supreme Court and not delegated to the center.*

(e) To establish and periodically update a roster of experienced investigators and experts who are qualified to assist counsel in ~~postconviction~~ *habeas corpus* proceedings in capital cases.

(f) To employ investigators and experts as staff to provide services to appointed counsel upon request of counsel, provided that when the provision of those

services is to private counsel ~~under appointment by the Supreme Court~~, those services shall be pursuant to contract between appointed counsel and the center.

(g) To provide legal or other advice ~~or, to the extent not otherwise available, any other assistance~~ to appointed counsel in ~~postconviction~~ *habeas corpus* proceedings as is appropriate when not prohibited by law.

(h) To develop a brief bank of pleadings and related materials on significant, recurring issues that arise in ~~postconviction~~ *habeas corpus* proceedings in capital cases and to make those briefs available to appointed counsel.

(i) To evaluate cases and recommend assignment by the court of appropriate attorneys.

(j) To provide assistance and case progress monitoring as needed.

(k) To timely review case billings and recommend compensation of members of the private bar to the court.

(*l*) The center shall report annually to *the people*, the Legislature, the Governor, and the Supreme Court on the status of the appointment of counsel for indigent persons in ~~postconviction~~ *habeas corpus* capital cases, and on the operations of the center. ~~On or before January 1, 2000, the Legislative Analyst's Office shall evaluate the available reports.~~ *The report shall list all cases in which the center is providing representation. For each case that has been pending more than one year in any court, the report shall state the reason for the delay*

and the actions the center is taking to bring the case to completion.

SEC. 15. Section 68661.1 is added to the Government Code, to read:

68661.1. (a) The center may represent a person sentenced to death on a federal habeas corpus petition if and only if (1) the center was appointed to represent that person on state habeas corpus, (2) the center is appointed for that purpose by the federal court, and (3) the executive director determines that compensation from the federal court will fully cover the cost of representation. Neither the center nor any other person or entity receiving state funds shall spend state funds to attack in federal court any judgment of a California court in a capital case, other than review in the Supreme Court pursuant to Section 1257 of Title 28 of the United States Code.

(b) The center is not authorized to represent any person in any action other than habeas corpus which constitutes a collateral attack on the judgment or seeks to delay or prevent its execution. The center shall not engage in any other litigation or expend funds in any form of advocacy other than as expressly authorized by this section or Section 68661.

SEC. 16. Section 68662 of the Government Code is amended to read:

68662. The ~~Supreme Court~~ *superior court that imposed the sentence* shall offer to appoint counsel to represent ~~all~~ *a* state ~~prisoners~~ *prisoner* subject to a capital

sentence for purposes of state postconviction proceedings, and shall enter an order containing one of the following:

(a) The appointment of one or more counsel to represent the prisoner in ~~postconviction state~~ proceedings *pursuant to Section 1509 of the Penal Code* upon a finding that the person is indigent and has accepted the offer to appoint counsel or is unable to competently decide whether to accept or reject that offer.

(b) A finding, after a hearing if necessary, that the prisoner rejected the offer to appoint counsel and made that decision with full understanding of the legal consequences of the decision.

(c) The denial to appoint counsel upon a finding that the person is not indigent.

SEC. 17. Section 68664 of the Government Code is amended to read:

68664. (a) The center shall be managed by an executive director who shall be responsible for the day-to-day operations of the center.

(b) The executive director shall be chosen by a ~~five-member board of directors and confirmed by the Senate. Each Appellate Project shall appoint one board member, all of whom shall be attorneys. However, no attorney who is employed as a judge, prosecutor, or in a law enforcement capacity shall be eligible to serve on the board~~ *the Supreme Court*. The executive director shall serve at the will of the ~~board~~ *Supreme Court*.

(c) ~~Each member of the board shall be appointed to serve a four-year term, and vacancies shall be filled in the same manner as the original appointment. Members of the board shall receive no compensation, but shall be reimbursed for all reasonable and necessary expenses incidental to their duties. The first members of the board shall be appointed no later than February 1, 1998.~~ *The executive director shall ensure that all matters in which the center provides representation are completed as expeditiously as possible consistent with effective representation.*

(d) The executive director shall meet the appointment qualifications of the State Public Defender as specified in Section 15400.

(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.*

SEC. 18. Section 68665 of the Government Code is amended to read:

68665. *(a)* The Judicial Council and the Supreme Court shall adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings*, and they shall reevaluate the standards as needed to ensure that they meet the criteria in subdivision (b)*.

(b) In establishing and reevaluating the standards, the Judicial Council and the Supreme Court shall consider the qualifications needed to achieve competent representation, the need to avoid unduly restricting the available pool of attorneys so as to provide timely appointment, and the standards needed to qualify for Chapter 154 of Title 28 of the United States Code. Experience requirements shall not be limited to defense experience.

SEC. 19. Effective Date. Except as more specifically provided in this act, all sections of this act take effect immediately upon enactment and apply to all proceedings conducted on or after the effective date.

SEC. 20. Amendments. The statutory provisions of this act shall not be amended by the Legislature, except by a statute passed in each house by rollcall vote entered in the journal, three-fourths of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters.

SEC. 21. Severability/Conflicting Measures/Standing.

If any provision of this act, or any part of any provision, or its application to any person or circumstance is for any reason held to be invalid or unconstitutional, the remaining provisions and applications which can be given effect without the invalid or unconstitutional provision or application shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable.

This measure is intended to be comprehensive. It is the intent of the people that in the event this measure or measures relating to the subject of capital punishment shall appear on the same statewide election ballot, the provisions of the other measure or measures shall be deemed to be in conflict with this measure. In the event that this measure receives a greater number of affirmative votes, the provisions of this measure shall prevail in their entirety, and all provisions of the other measure or measures shall be null and void.

The people of the State of California declare that the proponent of this act has a direct and personal stake in defending this act and grant formal authority to the proponent to defend this act in any legal proceeding, either by intervening in such legal proceeding, or by defending the act on behalf of the people and the state in the event that the state declines to defend the act or declines to appeal an adverse judgment against the act. In the event that the proponent is defending this act in a legal proceeding because the state has declined to defend it or to appeal an adverse judgment against it, the proponent shall: act as an agent of the people and the state; be subject to all ethical, legal, and fiduciary duties applicable to such parties in such legal proceedings; take and be subject to the oath of office prescribed by Section 3 of Article XX of the California Constitution for the limited purpose of acting on behalf of the people and the state in such legal proceeding; and be entitled to recover reasonable legal fees and related costs from the state.