No. 21-1512

In the Supreme Court of the United States

SAN BERNARDINO COUNTY DISTRICT ATTORNEY, *et al.*,
Petitioners,

v.

KEVIN COOPER, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE[1]

QUESTION PRESENTED

Whether the court of appeals properly affirmed the district court's denial of petitioners' motion to intervene.

[1] The petition describes this as a "Capital Case." Pet i. Under this Court's rules, that notation is appropriate "[i]f the petitioner or respondent is under a death sentence that may be affected by the disposition of the petition." S. Ct. R. 14.1(a). The plaintiffs in this lawsuit challenged California's three-drug lethal injection protocol and succeeded in obtaining stays of their executions; but this suit did not challenge their underlying death sentences.

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STATEMENT

1. In 2006, death row inmate Michael Morales filed a federal lawsuit against the state respondents, challenging California's three-drug lethal injection protocol. Pet. App. 3. The district court stayed Morales's execution, concluded that the protocol violated the Eighth Amendment, and retained jurisdiction to consider the constitutionality of any new injection protocol. *Id.* Over the next 12 years, 22 other condemned inmates intervened in the case (over state respondents' objections) and secured stays of execution from the district court. *Id.* at 4.

In response to the district court's order invalidating the prior injection protocol, California's Department of Corrections and Rehabilitation (CDCR) issued two new execution protocols, one in 2010 and another in 2018. Pet. App. 3-5. Both protocols were promptly challenged in separate state court proceedings and then enjoined under state law. *Id.* By the summer of 2018, the state trial court had vacated the injunction against the 2018 protocol. *Id.* at 4. As a result, the sole issue remaining in Morales's federal lawsuit involved the constitutionality of the 2018 injection protocol. *Id.* at 5.

The petitioners in this Court are the District Attorneys of San Bernardino, San Mateo, and Riverside Counties. In June and July 2018, they moved under Federal Rule of Civil Procedure 24 to intervene in the district court litigation in order to defend the constitutionality of the State's injection protocol, and to ask the district court to vacate stays of execution regarding five inmates who had been prosecuted in petitioners' counties. Pet. App. 5. The district court denied that motion, concluding in relevant part that petitioners lacked a protectable interest relating to the issue

in litigation, *id.*, because state law did not vest district attorneys with the power to oversee how "a criminal sentence [is] implemented" or to act as the "sole representative[] of victims" in civil litigation, *id.* at 46, 47.

Petitioners timely appealed the denial of their intervention motion. D. Ct. Dkt. 677. While that appeal was pending, California's voters elected Gavin Newsom to be Governor and he was substituted into the litigation. Pet. App. 5. In March 2019, Governor Newsom issued Executive Order N-09-19. *Id.* at 5-6. That Order imposed a moratorium on all executions within California, withdrew the 2018 lethal injection protocol, and closed the execution chamber at San Quentin. *Id.*

In light of the Executive Order, the inmate plaintiffs stipulated to dismiss the underlying federal action without prejudice, contingent on a "stipulation for procedural reinstatement of [their] fifth amended complaint." Pet. App. 147-152. Under that stipulation, the district court retained jurisdiction to enforce the terms of the stipulation, and the inmate plaintiffs retained the right to seek reinstatement of their complaint and stays of execution if: (i) the Executive Order is withdrawn; (ii) any of the state respondents adopts an execution protocol; or (iii) a district attorney, court, or other state representative moves for a date to set an execution for any condemned inmate. *Id.* at 135. In August 2020, the district court issued an order entering the stipulation and dismissed the case without prejudice. *Id.* at 141, 150-152.

2. In September 2021, the court of appeals affirmed the district court's denial of petitioners' motion to intervene. Pet. App. 1-25. The court of appeals first held that neither the Executive Order nor dismissal of the underlying lawsuit mooted the appeal. *Id.* at 7-11,

25. With respect to the Executive Order, the court reasoned that "[n]othing prevents Governor Newsom, or a future Governor, from withdrawing the Executive Order" and this was "not a case where 'the challenged conduct cannot reasonably be expected to start up again.'" *Id.* at 7-8. With respect to the dismissal of the case, the court observed that the lawsuit could be revived under the terms of the stipulation, that the stipulation "function[ed] as a stay," and that petitioners could "obtain the relief they seek by intervening if and when the suit is revived." *Id.* at 10. Moreover, the court reasoned that if petitioners were authorized to intervene, they could move under Federal Rule of Civil Procedure 60(b) to seek relief from the dismissal order and from certain terms of the stipulation that could potentially revive the litigation and the stays of execution. *Id.* at 11.

Turning to the merits of petitioners' intervention motion, the court of appeals held that petitioners were not entitled to intervene as of right under Rule 24(a). Pet. App. 11-20. The court explained that petitioners had failed to meet Rule 24(a)(2)'s requirement that they establish an adequate interest in the litigation because district attorneys are not authorized under State law "to defend the State against constitutional challenges to execution protocols." *Id.* at 19-20.[2] The court pointed to California Supreme Court precedent holding that a district attorney "'has no authority to prosecute civil actions absent specific legislative authorization'" and observed that state law allowed district attorneys to participate in civil litigation only in

[2] The court of appeals declined to reach the question whether petitioners' interests were adequately represented, reasoning that the absence of a protectable interest was a sufficient ground to deny intervention as of right. Pet. App. 13.

enumerated "narrow" and "specific[]"contexts. *Id.* at 15 (quoting *People v. Super. Ct. (Humberto S.)*, 43 Cal. 4th 737, 753 (2008), and *Safer v. Super. Ct. of Ventura Cnty.*, 15 Cal. 3d 230, 236 (1975)). Relevant here, no state law authorized petitioners to defend the State's lethal injection protocols in civil litigation. *Id.* at 15-16.

The court of appeals acknowledged that petitioners had pointed to California Penal Code Section 3604.1(c) as a purported source of such authority. Pet. App. 16. That statute was enacted by voters as part of Proposition 66. *Id.* Among other things, it provides that the state trial court "which rendered the judgment of death" may, on the court's "own motion, on motion of the District Attorney or Attorney General, or on motion of any victim of the crime," order CDCR "to perform any duty needed to enable it to execute the [death] judgment." *Id.* (quoting Cal. Penal Code § 3604.1(c)). Petitioners argued that, by authorizing them to file a motion to compel CDCR to take certain action, Section 3604.1(c) gave them an interest in defending lethal injection protocols challenged under the federal Constitution. The court of appeals disagreed, concluding that Section 3604.1(c) authorizes district attorneys only 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." *Id.* at 16-17. The statute does "not authorize District Attorneys to defend the State's execution protocols, promulgated by the CDCR, against constitutional challenges in federal court." *Id.* at 17.[3]

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[3] The court of appeals also held that the district court did not abuse its discretion by denying permissive intervention. Pet. App. 20-21. Petitioners do not challenge that ruling. *See* Pet. 20-25.

Judge VanDyke dissented. Pet. App. 25-36. He would have held that Section 3604.1(c) gave district attorneys a sufficient interest to represent the State in civil litigation involving the legality of state execution procedures. *Id.* at 31. While he acknowledged that the statute did not "explicate[]" the "exact intervention process" petitioners sought in the district court below, he would have authorized intervention to allow petitioners to represent "their (and the People's) interests in carrying out death penalty sentences." *Id.* at 31, 36.

A judge on the court of appeals sua sponte called for a vote on whether to rehear the case en banc, but the case did not receive a majority of votes in favor of rehearing en banc. Pet. App. 56. Judges Fletcher and Forrest concurred in the denial of rehearing en banc, emphasizing that petitioners "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." *Id.* Judge Bumatay, joined by five other judges, dissented. *Id.* at 67-81. In his view, the panel erred by requiring petitioners "to show an on-point statutory grant to intervene in challenges to death penalty protocols." *Id.* at 77. Judges Callahan and VanDyke joined that dissent and also wrote their own separate dissents. *See id.* at 81-89.

ARGUMENT

Petitioners argue that review is warranted because the court of appeals' decision conflicts with this Court's precedents and with various Ninth Circuit decisions. Pet. 22-23. That argument is incorrect. The court of appeals properly examined state law to assess whether district attorneys in California are authorized to represent the State's interest in civil challenges

to the constitutionality of an injection protocol. That analysis is consistent with this Court's precedents, including recent decisions on intervention. The intra-circuit conflict alleged by petitioners does not exist: the Ninth Circuit decisions cited by petitioners are inapposite because they do not involve state officials seeking to intervene to defend the State's interests in federal litigation. And petitioners do not even attempt to argue that the decision below creates any inter-circuit conflicts. Nor do they identify any other persuasive reason for further review by this Court.

1. Federal Rule of Civil Procedure 24(a)(2) provides that a "court must permit anyone to intervene" who, "(1) 'on timely motion,' (2) 'claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest,' (3) 'unless existing parties adequately represent that interest.'" *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2200-2201 (2022) (quoting Fed. R. Civ. P. 24(a)(2)). Petitioners seek review of the court of appeals' analysis of the second requirement, and specifically of its conclusion that petitioners lack the necessary interest to intervene because "California law does not authorize the District Attorneys to defend the State against constitutional challenges to execution protocols." Pet. App. 19-20; *see* Pet. 21

This Court recently explained that when a State's laws or policies are challenged in federal court, a state official's interest in the litigation—and his ability to intervene under Rule 24(a)(2)—generally turns on whether that official is authorized under state law to represent the State's interests. *Berger*, 142 S. Ct. at 2197-2203. "Within wide constitutional bounds,

States are free to structure themselves as they wish." *Id.* at 2197. Sometimes, a State may choose to defend its interests by "speak[ing] with a 'single voice,' often through an attorney general." *Id.* In other circumstances, a State may empower "multiple officials to defend [its] practical interests." *Id.* In either situation, respect for state sovereignty must "take into account the authority of a State to structure its executive branch"—whether the State elects to speak with a "single voice" or through "multiple officials to defend its sovereign interests in federal court." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1011 (2022); *see also Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1952 (2019) (explaining that "the choice" of which state agents may represent the State's interests "belongs to" the State).

Applying those principles here, the court of appeals properly concluded that petitioners are not authorized "to represent [the] interests of the State" in the underlying litigation as a matter of California law. Pet. App. 13. California's 58 district attorneys are authorized by state law to "conduct on behalf of the people all prosecutions for public offenses," *id.* at 14 (citing Cal. Gov't Code § 26500), but that authority does not give "plenary" or "unbridled" power to participate in civil litigation that might affect criminal judgments, *id.* at 15 (quoting *Safer v. Super. Ct. of Ventura Cnty.*, 15 Cal. 3d 230, 236 (1975)). To the contrary, California law authorizes the "'district attorney [to] exercise the power of his office only in such civil litigation[] as the lawmaking body has, after careful consideration, found essential.'" *Id.* (quoting *Safer*, 15 Cal. 3d at 236). And the legislature has confined the power of district attorneys to participate in civil litigation to "narrow perimeters," identified by "specific legislative authorization." *Id.* (citing *Safer*, 15 Cal. 3d at 236 and

People v. Super. Ct. (Humberto S.), 43 Cal. 4th 737, 753 (2008)).

Petitioners "point to no legislative authorization granting them the authority to represent the State's interest in this case." Pet. App. 16. As the court of appeals explained, state law assigns to CDCR the authority to choose a method of execution; the Secretary of CDCR was already a defendant in the case; and district attorneys have no authority to represent the Secretary of CDCR (or any other defendant in this case). *Id.* at 15. Rather, "[u]nder California law," such authority is assigned to the California Attorney General. *Id.* at 15-16.

Although petitioners argued that Penal Code Section 3604.1(c) gave them an interest in lawsuits involving execution protocols, that provision "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." Pet. App. 16-17. Section 3604.1(c) does not authorize district attorneys "to defend the State's execution protocols, promulgated by the CDCR, against constitutional challenges in federal court." *Id.* Absent such "specific legislative authorization," petitioners are not authorized as a matter of state law to defend the State's interests in this federal lawsuit. *Humberto S.*, 43 Cal. 4th at 753.[4]

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[4] One of the dissents from denial of rehearing en banc cited two California Supreme Court decisions to suggest that "any requirement for statutory authority to enter civil proceedings is not stringently construed and no on-point statutory grant is necessary." Pet. App. 76-77 (citing *Abbott Labs. v. Super. Ct. of Orange Cnty.*, 9 Cal. 5th 642 (2020), and *People v. McKale*, 25 Cal. 3d 626 (1979)). As Judges Fletcher and Forrest observed, however, both

Petitioners argue that the decision below "cannot be reconciled" with this Court's decision in *Cameron*. Pet. 19. They construe *Cameron* to hold that a "state executive may intervene in federal litigation where another state executive declines to defend that state's law." *Id.* at 19-20. But that misunderstands the Court's decision. The Court held that Kentucky's attorney general should have been allowed to intervene on appeal because Kentucky's statutes "empower[] multiple officials to defend its sovereign interests in federal court" and give the attorney general "authority to represent the Commonwealth in 'all cases.'" 142 S. Ct. at 1011. Petitioners point to no similar statute under California law that would support their intervention in this case. *Supra* pp. 7-8.

2. Petitioners contend that review is warranted because the Ninth Circuit has allowed intervention in past cases without demanding "statutory authority for the basis of intervention." Pet. 23; *see also* Pet. App. 77 ("The panel majority erred by requiring [petitioners] to show an on-point statutory grant to intervene in challenges to death penalty protocols."). But each of those decisions addresses intervention by "non-governmental organizations in actions challenging the legality of measures they sponsored through the legislative" or rulemaking process. Pet. App. 63.[5]

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of those cases involved district attorneys' authority to sue under state unfair competition laws—which specifically authorize district attorneys to bring civil suits. *Id.* at 65.

[5] *See Wash. State Bldg. & Const. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 629-630 (9th Cir. 1982); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-528 (9th Cir. 1983); *Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980); *Idaho Farm Bureau v. Babbitt*, 58 F.3d 1392, 1397-1398 (9th Cir. 1995).

None involves intervention efforts by local government officials to represent the State's interests in litigation where the State is already a party. *Id.* And "[i]t 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)." *Id.*; *see supra* pp. 7-8. In any event, allegations of intra-circuit disagreements are not a proper basis for plenary review by this Court, and petitioners do not attempt to allege any inter-circuit conflict.

3. Even if the legal question raised by petitioners were a better candidate for this Court's plenary review, this case is a poor vehicle for considering that question. The underlying litigation has been dismissed. Petitioners express a concern that the litigation might be "resurrect[ed]" under the terms of the stipulation, Pet. 25-26, but that could only occur if the Executive Order is withdrawn, a new execution protocol is issued, or the sentencing court sets (or considers a properly filed motion for) an execution date for a condemned inmate. Pet. App. 135. Petitioners do not identify any basis for concluding that any of those contingencies are sufficiently imminent that further litigation of the intervention question would be warranted at this time. And while the court of appeals concluded that the appeal was not moot, Pet. App. 7-11, if this Court were to grant the petition, its plenary review would be complicated by the need to assure itself of jurisdiction before addressing the merits of petitioners' underlying intervention arguments.[6]

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[6] The Court would also have to consider the state respondents' argument that, under the present circumstances, petitioners can-

4. Finally, petitioners also appear to seek review of legal issues related to the stipulation entered by the parties in the district court below. *See* Pet. 20 (asking whether the Governor's "power include[s] an agreement with condemned inmates that prevents imposition of the law as voted by the state electorate"); *id.* at 25-26 (similar); *see also* Pet. i. But those issues are not properly before this Court. The "refusal of the court below to permit one to intervene as a party entitles that person to seek Supreme Court review of the denial of the motion to intervene, but such a putative intervenor cannot petition for review of any other aspect of the judgment below." Shapiro, et al., Supreme Court Practice § 6.16(c), p. 6-62 (11th ed. 2019).

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not meet Rule 24(a)(2)'s requirement that they establish an interest that may be impaired by the litigation. *See, e.g*, *Wash. Elec. Co-op., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990) ("An interest . . . that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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