No. 21-1512

IN THE SUPREME COURT OF THE UNITED STATES

SAN BERNARDINO COUNTY DISTRICT ATTORNEY, et al., Petitioners

vs.

KEVIN COOPER, et al., Respondents

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

RESPONDENT-PLAINTIFFS' JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the District Court's denial of local county prosecutors' motion to intervene in this now-dismissed action concerning California's lethal injection procedures, on the ground that California state law prohibits District Attorney participation and entrusts the drafting and implementation of execution procedures exclusively to State officials, and the defense of State officials and laws exclusively to the Attorney General?

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE 4

1. California's Legal Injection Litigation 4

2. The Motions to Intervene 6

3. The Appeal, the Governor's Reprieves, the Dismissal, and the Reinstatement Agreement 8

4. The Opinions Below 9

REASONS FOR DENYING THE PETITION 12

1. The Majority Opinion Presents no Conflict with this Court's Precedent 14

2. There is no Need to "Clarify" the Standard for Intervention as the Majority Opinion is Consistent with Settled Law on the Interest Necessary for Intervention 15

3. There is no "Misuse" of the Federal Courts that Necessitates Review 24

4. Other Difficulties with the Posture of the Case Argue against Review 26

CONCLUSION 27

TABLE OF AUTHORITIES

Abbott Laboratories v. Superior Court,
9 Cal.5th 642 (2020) 20

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 26

Baze v. Rees,
553 U.S. 35 (2008) 5

Berger v. North Carolina State Conf. of the NAACP, ___ U.S. ___, 42 S.Ct. 2191 (2022) 2, 13, 22

Blake v. Pallen,
554 F.2d 947 (9th Cir. 1977) 22

Bullen v. Superior Court,
204 Cal.App.3d 22 (1988) 20

Cameron v. EMW Women's Surgical Center,
595 U.S. __, 142 S.Ct. 1002 (2022) ..... *passim*

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 26

In re Dennis H.,
88 Cal.App.4th 94 (2001) 20

Donaldson v. United States,
400 U.S. 517 (1971) 13

Harris v. Pernsley,
820 F.2d 592 (3d Cir.), cert. denied, 484 U.S. 947 (1987) 1, 14

Hollingsworth v. Perry,
570 U.S. 693 (2013) 13, 14, 26

In re Lance W.
37 Cal.3d 873 (1985) 21

Morales v. California Dept. of Corrections & Rehabilitation,
168 Cal. App. 4th 729 (2008) 5, 21

Morales v. Cate,
623 F.3d 828 (9th Cir 2010) 5, 25

Morales v. Cate,
757 F.Supp.2d 961 (2010) 4, 5

Morales v. Hickman,
415 F. Supp. 2d 1037 (N.D. Cal. 2006) 4

Morales v. Tilton,
465 F. Supp. 2d 972 (N.D. Cal. 2006) 5, 17

Northwest Forest Resource Council v. Glickman,
82 F.3d 825 (9th Cir.1996) 23

People v. Gonzalez
2 Cal.5th 1138, 1141 (2017) 21

People v. McKale,
25 Cal. 3d 626 (1979) 20

People v. Park,
56 Cal.4th 782 (2013) 21

People v. Super. Ct. (Humberto S.),
43 Cal.4th 737 (2008) 20

Phyle v. Duffy,
334 U.S. 431 (1948) 14, 18

In re Ramirez,
94 Cal. App. 4th 549 (2001) 27

Rogers v. Board of Directors of City of Pasadena,
218 Cal. 221 (1933) 27

S. Cal. Edison Co. v. Lynch,
307 F.3d 794 (9th Cir. 2002) 23

Safer v. Superior Court
15 Cal.3d 230 (1975) ..... *passim*

Saldano v. Roach,
363 F.3d 545 (5th Cir. 2004) 1, 14

Sims v. Department of Corrections & Rehabilitation,
216 Cal. App. 4th 1059 (2013) 5

Texas v. United States,
523 U.S. 296 (1998) 27

TransUnion LLC v. Ramirez,
141 S.Ct. 2190 (2021) 26

United States v. Alisal Water Corp.
(9th Cir. 2004) 13, 16

United States v. City of Los Angeles,
288 F.3d 391 (9th Cir. 2002) 23

Virginia House of Delegates v. Bethune-Hill,
587 U. S. ___, 139 S.Ct. 1945 (2019) 3, 14, 26

Wilderness Soc. v. U.S. Forest Service,
630 F.3d 1173 (9th Cir. 2011) 12, 22, 23

Statutes

42 U.S.C. §1983 1

Cal. Bus. & Prof. Code §17204 20

Cal. Bus. & Prof. Code §17206(a) 20

Cal. Gov. Code §11040(a) 18

Cal. Gov. Code §12512 ..... 2, 9, 18

Cal. Gov. Code §26500 ..... 2, 17, 20

Cal. Gov. Code §26500.5 19

Cal. Gov. Code §§26500-26530 ..... 9, 18

Cal. Pen. Code §3600 ..... 2, 18

Cal. Pen. Code §3603 ..... 2, 18

Cal. Pen. Code §3604(a) 2, 18

Cal. Pen. Code §3604.1(c) ..... *passim*

Cal. Pen. Code §3605 ..... 2, 18

Cal. Pen. Code §3607 ..... 2, 18

Cal. Pen. Code §3700 ..... 18, 27

Other Authorities

Cal. Const. Art. I, §28(b) 19

Cal. Const. Art. V, §1 ..... 2, 8, 18

Cal. Const. Art. V, §8(a) 8, 18

Cal. Const. Art. V, §13 ..... 2, 18

Cal. Const. Art. XI §1(b) 2, 18

Fed. Rule Civ. Proc. §24(a) 1

Fed. Rule Civ. Proc. §24(a)(2) 12

Fed. Rule Civ. Proc. §24(c) 7, 27

INTRODUCTION

Three of California's 58 county District Attorneys petition for review of a Ninth Circuit ruling denying them intervention in 42 U.S.C. §1983 litigation brought against State officials that challenges California's method of execution. In denying intervention, the Ninth Circuit applied settled federal execution standards, and concluded, based on California law, that state law does not permit District Attorneys to represent the State in such litigation, and that the State procedures and defense of them are exclusively the roles of the Executive and the Attorney General. Moreover, the lawsuit in which Petitioners seek to intervene has been dismissed, subject to a stipulation permitting reinstatement should the State ever in the future seek to institute a new execution protocol and restart executions. This Court's review is not warranted.

There is no need to clarify intervention law. The majority opinion breaks no new ground and rests firmly within settled determinations that the interest to intervene required by Fed. Rule Civ. Proc. 24(a) is one that is both significant and a protectable legal interest, and the claim will impede that interest. The holding below is consistent with all other circuits that have addressed District Attorney intervention in federal litigation against state officials. *Saldano v. Roach*, 363 F.3d 545, 552 (5th Cir. 2004); *Harris v. Pernsley*, 820 F.2d 592 (3d Cir.), cert. denied, 484 U.S. 947 (1987). As the majority opinion and the concurrence in the denial of rehearing *en banc* fully spell out and describe, and Petitioners do not dispute here, California's constitutional and statutory scheme is clear – specific statutory

authority is required for District Attorney participation in civil litigation. *See Safer v. Superior Court* 15 Cal.3d 230, 236-37 (1975) (the District Attorney may "exercise the power of his office only in such civil litigation as that lawmaking body has, after careful consideration, found essential"); Cal. Const. Art. XI sec. 1(b) (Legislature creates District Attorneys); Cal. Gov. Code, §26500 (role as a prosecutor except as provided by law). Petitioners do not and cannot claim state authority to act in this litigation, as the Attorney General has exclusive authority over such representation and litigation. Cal. Const. Art. V, § 13 (see that the laws are uniformly and adequately enforced); Cal. Govt. Code §12512 (represents State and State officials in all causes where they are a party). Petitioners also do not and cannot claim any role in determining or implementing a method of execution, the only claim in the lethal injection litigation, because that role belongs exclusively the Governor and his subordinate officers. Cal. Const. Art. V, §1 (supreme executive power to see laws executed); Cal. Pen. Code §3604(a) (authority to determine method of execution); Cal. Pen. Code §§3600 (Warden designated for the execution), 3603, 3605, 3607.

This past term, the Court twice reaffirmed that federal courts must respect a State's determination about which government actors can participate in what types of federal litigation against state officials. *Cameron v. EMW Women's Surgical Center*, 595 U.S. __, 142 S.Ct. 1002 (2022)("*Cameron*"); *Berger v. North Carolina State Conf. of the NAACP,* ___ U.S. ___, ___, 42 S.Ct. 2191, 2201-2202 (2022)("*Berger*"). This deference arises from the Constitution's respect for a State's

form of government and allocation of responsibilities to protect the state interests involved in litigation against State officials. Consistent with the principle that a state has the right to decide to "speak with one voice", *Virginia House of Delegates v. Bethune-Hill,* 587 U. S. ___, ___, 139 S.Ct. 1945, 1952 (2019), the majority below analyzed state law which set forth the exclusive role of the Governor and his subordinate officers in the execution method, and exclusive authority of the Attorney General to represent the state officials involved in executions. It weighed these against the impact on Petitioner's interest in exercising their authority to move for execution dates or California Department of Corrections and Rehabilitation (CDCR) readiness in state court and found such interests incidental and insufficient for intervention. It is a straight-forward application of law.

In attempting to show error, Petitioners ignore or misstate the limitations imposed by state law and their obvious consequences; cobble together various statutes that provide no authority to participate; inaccurately invoke Proposition 66, a 2016 initiative, to claim broad state-wide powers for local officials that appear nowhere in the law; rely on generalized interests that are the business of State officials and the electorate to weigh and determine (the "will of the People"); confine other circuit precedent to their facts rather than addressing the principles they embody; rely on inapposite Ninth Circuit case law; and, accuse the Governor and Attorney General of a conspiracy to thwart state law without any analysis of the determinations they made and why, or the actual effect the decision have. Their analyses are flawed and should be rejected.

Finally, the Petition presents other difficulties that generally weigh against review. Three years ago, the Governor issued reprieves to all condemned persons, the execution protocol was withdrawn, the lawsuit was dismissed without prejudice, and the parties — Plaintiffs and the State officials, represented by the Attorney General — agreed to terms for the lawsuit's reinstatement should executions resume. Petitioners seek to intervene because they disagree with that agreement and believe that the lawsuit may affect the ability to set execution dates at some unknown future date. The reprieves have eliminated the need for review — and indeed preclude such review. Moreover, Petitioners likely lack standing and the claim for relief is unripe. And, Petitioners did not raise their "key" interest in the District Court or properly on appeal, and did not comply with the rules on intervention.

STATEMENT OF THE CASE

1. California's Lethal Injection Litigation

Because medical records demonstrated that executed prisoners were not displaying the expected effects of the initial sedative in 64% of California's executions, the District Court, Hon. Jeremy Fogel, stayed the execution of Mr. Morales on February 22, 2006. *Morales v. Hickman*, 415 F. Supp. 2d 1037 (N.D. Cal. 2006); *Morales v. Cate*, 757 F.Supp.2d 961, 965-67 (2010). Intensive discovery and a week-long hearing resulted in a December 13, 2006, ruling finding numerus constitutional deficiencies and providing the State an opportunity to fix them.

Morales v. Tilton, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006). California issued a new protocol on May 15, 2007. App. at 97. This started review for compliance with the District Court's identified constitutional deficiencies. The District Court's review was then stayed because a state court held that the protocol violated the state's Administrative Procedures Act (APA) and enjoined it. *Morales v. Cate*, 757 F.Supp.2d 961, 967 (2010); *Morales v. California Dept. of Corrections & Rehabilitation*, 168 Cal. App. 4th 729 at 737-38 (2008). The State engaged in the administrative review process and, on August 29, 2010, issued a new protocol. *Morales v. Cate*, 757 F.Supp.2d 961, 962 (2010).

Petitioner Riverside District Attorney sought an immediate execution date. This generated a flurry of litigation in five courts over a four-week period that prompted the Ninth Circuit, Judge Fernandez, to call for an orderly determination given the record of violations. *Morales v. Cate*, 623 F.3d 828, 829, 831 (9th Cir 2010). On remand, the District Court determined that the constitutional deficiencies it identified met the standard in *Baze v. Rees,* 553 U.S. 35 (2008), and stayed Mr. Brown's execution. *Morales v. Cate*, 757 F.Supp.2d 961, 969 (2010). Respondent-Defendants then moved to dismiss the newly-amended complaint on *Baze* grounds, which the District Court denied. *Id.* at 969-71. It again set the matter for discovery and a hearing.

Shortly after CDCR obtained an execution team, the state court again enjoined the lethal injection protocol after finding an APA violation. *See Sims v. Department of Corrections & Rehabilitation*, 216 Cal. App. 4th 1059 (2013). Despite

this, several District Attorneys moved in state courts for executions. As a result, condemned persons who were eligible for execution dates sought and obtained interventions and stays of execution in the federal case, over Respondent-Defendants' multiple objections. This included the cases from Petitioners' counties. Petitioners did not seek intervention during that litigation.

With state administrative review pending in 2016, Proposition 66 was enacted. It contained statutory provisions designed to accelerate review in capital appeals and post-conviction writs. App. at 194-218. One provision also permits trial courts, District Attorneys, the Attorney General, and victims' family members to seek or issue an order from the state trial court that the CDCR perform any duty to enable it to execute. Cal. Pen. Code §3604.1(c) ("section 3604.1(c)").

2. The Motions to Intervene

After Proposition 66 took effect and regulatory review was discontinued, on March 1, 2018, the State issued a new, single-drug protocol and presented it to the District Court. Petitioners then sought to intervene in the District Court. They complained about litigation tactics employed by Respondent-Defendants and sought to dismiss the complaint as moot and contrary to the current standards for lethal injection challenges, the same challenge Respondent-Defendants had unsuccessfully brought once before. App. at 48-49. Their asserted interest was in setting execution dates. App. at 45. Respondent-Plaintiffs opposed intervention as untimely, improperly pled, contrary to state authority prohibiting Petitioners'

involvement, and that Respondent-Defendants adequately represented the asserted interest. App., at 44.[1]

The District Court denied the interventions. It held that Petitioners "have failed to show that the State's interest [in enforcing criminal judgments] 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." App. at 45. After reviewing California's statutory and constitutional scheme, and the District Attorney's role as reflected in those provisions, it held that the asserted interest in a protocol, its defense, and executions "lies with the highest officials in the State's executive branch", the Governor and the Attorney General. App. at 45-46. Petitioners' interest is shared and subsidiary. App. at 48.[2] It was adequately represented by Respondent-Defendants because Petitioners could only point to a perceived dispute as to trial tactics that was, in fact, inaccurate. App. at 49-50 & fn. 1. It denied permissive intervention as a waste of resources and impracticable given the multitude of potential intervenors (58) with potentially differing litigation efforts in what was already a highly complicated matter. App. at 51. And, it held that because Petitioners "have no involvement in the drafting or implementation of any method-of-execution protocol," they have failed to show a common question of law or fact. App. at 52.

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[1] Respondent-Petitioners also noted the absence of any complaint in intervention as required by Fed. Rule Civ. Proc. 24(c). Only Petitioner San Bernardino District Attorney responded with one.

[2] Petitioners did not raise section 3604.1(c) as a basis for their interest to intervene in the motions. As a result, it was not addressed by Respondents or the District Court.

The District Court held *amici* status sufficient for the interest Petitioners assert. App., at 49 fn 1. Petitioners never availed themselves of that opportunity.

Litigation proceeded and Respondent-Plaintiffs amended their complaint to address the new protocol. App. at 133, ¶1. After litigation over the right to discovery, the District Court stayed discovery and then set the matter for a motion to dismiss, which Respondent-Defendants filed. App. at 134, ¶5.

3. The Appeal, the Governor's Reprieves, the Dismissal, and the Reinstatement Agreement

Petitioners' appealed. They did not argue section 3604.1(c) as a basis for intervention in their Opening Brief and, thus, Respondents did not address it in their response. Petitioners then argued it in their Reply.

On March 13, 2019, during briefing, the Governor issued reprieves for all condemned persons. App. at 107; *see* Cal. Const. Art. V, sec. 8(a) (authority to Reprieve). He further ordered that the execution protocol be repealed. *Ibid.*; *see* Cal. Const., art. V, sec. 1 ("supreme executive power"). CDCR then rescinded it.

The Governor's action prompted a motion to dismiss by Respondent-Defendants and a motion for summary judgment by Respondent-Plaintiffs. App., at 134. Settlement discussions ensued, resulting in Respondent-Plaintiffs agreeing to dismiss the complaint and Respondent-Defendants agreeing to reinstate the case to the same position it was in prior to the dismissal should the reprieves be removed, a

protocol issued, or executions be set. App. at 9. The complaint would be subject to a motion to dismiss.[3]

Prior to argument in the Ninth Circuit, Respondent-Defendants moved to dismiss Petitioner's appeal as moot. Respondent-Plaintiffs joined and asserted the terms of the District Court reinstatement were not judiciable.

4. The Opinions Below

The Ninth Circuit affirmed the District Court's holding. After examining state constitutional, statutory and decisional law, it determined that state law confines Petitioners to specific and narrow types of civil litigation, which does not include lethal injection litigation in federal court. App. at 15; *citing Safer,* 15 Cal.3d at 236; Cal. Gov't Code §§ 26500-30 (District Attorney enumerated actions). District Attorneys cannot choose the method of execution or represent the interests of the Defendant-Respondents in defending it. App. at 15-16 (*citing* Cal. Penal Code § 3604). Those roles belong exclusively to the Governor, his subordinate officers, and the Attorney General. App. at 16 (*citing* Cal. Gov't Code § 12512). Section 3604.1(c) is limited to moving in state court for an order directing CDCR to perform its duties and does not authorize Petitioners to determine execution methods or implementation, or defend execution protocols against constitutional challenges in federal court. App. at 17. While the lethal injection litigation may impede Petitioner's functions (i.e. seeking dates), that effect is incidental as Petitioners

[3] The reinstatement is not automatic. It requires the Plaintiffs seek to do so in the District Court. App. at 135. And it does not "perpetually thwart imposition of sentence on any of the involved inmates, or any condemned inmate in California." Pet. at 6. Rather, the stays of execution apply only to the plaintiffs in the lawsuit, and only until litigation is concluded. App. at 135-36.

have no role in designing or implementing protocols, the issue in the lethal injection case. App. at 17-18 (*citing* Circuit law that a claimed interest cannot be "several degrees removed from the litigation"). The majority also noted other circuits that addressed the issue have denied District Attorney participation in federal actions against state officials because they lacked state authority, despite the effect it would have on District Attorney functions. App. at 18-19.

In dissent, Circuit Judge VanDyke argued Petitioners have an interest sufficient to intervene and lack adequate representation of that interest because their objectives differ from those of the Attorney General because Petitioners seek to enforce the death penalty while the Attorney General must defend the Governor's reprieves. App. at 25-26. According to this dissent, section 3604.1(c) is a sufficient interest to intervene and any stays would impede Petitioners' ability to carry out their "general duty to enforce punishments" and their attempt to "effectuate the intent of the People of California as enshrined in Proposition 66." App. at 32. One Circuit judge requested *en banc* review, which was denied. Circuit Judges Fletcher and Forrest, addressing the dissenters, reiterated that Petitioners lack authority under California law to participate in choosing a method of execution or to represent those who do, citing numerous state constitutional and statutory provisions and case law that clearly establish those roles are occupied exclusively by the Governor, the Secretary of the CDCR, the Warden of San Quentin Prison, and the Attorney General, and that Petitioners lack the required specific statutory authority to proceed. App. 57-58. Nothing in section 3604.1(c) changes this. App. at

60-61. They distinguished the intervention cases cited by the dissenters because the cases did not concern state officials who were prohibited from participating in the litigation and who lacked authority to participate in the policy at issue, or to represent the entity who does. Those persons were already present in the litigation. App. at 61-63. They addressed the core holdings of other circuits that held District Attorneys without state authority lack sufficient interest to intervene even if the litigation may affect their roles in prosecutions and securing and effectuating judgments. App. at 65-66.

Six of the 29 active Circuit Judges dissented. Three of those six authored two additional dissents. App. at 67-81. The six dissenters disagreed with the majority's interpretation of state law. They claimed the majority erred by applying its interpretation and erecting too high the bars intervenors must overcome for a showing of a protectable interest sufficient to intervene and for the showing that there is a relationship between that interest and the plaintiffs' claims. App. at 71-72. The dissents argued that a broad power to intervene existed based on circuit cases involving private party intervention and statutes on prosecutorial authority in other matters that they claimed gave Petitioners the "responsibility to ensure that the judgments were enforced." App. at 69, 72-74. They relied on Judge VanDyke's characterization of section 3604.1(c) as a broad power both to intervene in civil matters and to effectuate judgments. *Id*., at 75.

Circuit Judge Callahan dissented by asserting that the Governor's constitutionally-based reprieves were contrary to a "clear legal mandate from the

voters." App. at 82. According to Judge Callahan, these actions translate into the absence of a party pursuing the electorate's "clearly-stated objectives", which were embodied in the prosecutors' and victim's families' interests. App. at 83-84. She noted that a victim/prosecutor advocate was appointed as amici in a recent case. App. at 85. Petitioners rejected *amici* participation when it was offered by the District Court.

Circuit Judge VanDyke asked whether the doctrine of standing should be applied to intervention determinations. App. at 87-88. Citing his prior dissent, he concluded Petitioners possess standing from their effort to enforce the "will of the People." App. at 88.

REASONS FOR DENYING THE PETITION

Petitioners assert intervention as of right here and do not seek review of the District Court's determination that their interest is adequately protected.

Fed. Rule Civ. P. 24(a)(2) provides that on a timely motion, a "court must permit anyone to intervene" who, (1) "[o]n timely motion," (2) "claims an interest relating to the property or transaction that is the subject of the action, (3) is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest," (4) "unless existing parties adequately represent that interest." *Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173, 1177 (9th Cir. 2011).

Any interest claimed must be a "significantly protectable interest." *Donaldson v. United States*, 400 U.S. 517, 531 (1971). Following this Court's

precedents, the Ninth Circuit holds that a significantly protectable interest exists if the interest is protected by law, there is a relationship between that interest and the claim or claims at issue, and the movant will suffer a practical impairment of that interest. *United States v. Alisal Water Corp.* (9th Cir. 2004); *See also Cameron v. EMW Women's Surgical Center*, 595 U.S. __, 142 S.Ct. 1002, 1010 (2022) ("*Cameron*") (court examines the "legal interest" that the intervenor seeks to protect). Proposed intervenors bear the burden of establishing a sufficient interest. *Alisal Water Corp.*, 370 F.3d at 919. Generalized interests are insufficient. *Id*, at 920.

A public entity's requested intervention in a suit against state officials triggers federalism concerns. *Berger*, 142 S.Ct. at 2201-2202. It is only those state officials "duly authorized" and "properly authorized" under state law who possesses an interest to intervene. *Berger,* 142 S.Ct. at 2201-2202. *See also Hollingsworth v. Perry,* 570 U.S. 693, 709-710 (2013) ("[n]o one doubts that a State has a cognizable interest in the continued enforceability of its laws that is harmed by a judicial decision declaring a state law unconstitutional. To vindicate that interest *or any other,* a State must be able to designate agents to represent it in federal court.") (emphasis added, citations omitted). As the Court recognized there, the states typically select their Attorneys General but can designate additional participants. 570 U.S. at 710. When they designate the Attorney General as the sole representative, other governmental actors lack an interest sufficient to participate. *Ibid.; see Bethune-Hill,* 139 S.Ct. at 1952 (the choice "to speak with one voice"

belongs to the state). *See also Hollingsworth*, 570 U.S. at 710 (interest in enforcement of state law requires specific authority).

Consistent with the majority opinion, the two other Circuits that have addressed District Attorney intervention interest in suits against state officials do so by determining state law on representational capacity and the proposed intervenor's role in the alleged violations. *Saldano,* 363 F.3d at 552 (denying District Attorney's motion to intervene in federal habeas matter because Texas statute does not grant District Attorney authority to intervene even though it affects the judgment); *Harris v. Pernsley*, 820 F.2d 592 (District Attorney has no interest in Philadelphia prison conditions litigation even if it would frustrate effectiveness of prosecutions).

1. The Majority Opinion Presents no Conflict with this Court's Precedent

Petitioners assert a need for review because they incorrectly claim a purported conflict with this Court's decision in *Cameron,* 142 S.Ct. 1002. Pet. at 19-20. Petitioners assert that *Cameron* holds that a state actor may intervene when another declines to defend a state law against a constitutional challenge. Pet. at 20, 24. However, several features of *Cameron* are not present here. *Cameron* involved a state actor seeking intervention, not a county official. Further, that state actor was Kentucky's Attorney General, a traditionally-recognized representative of the State's interests in federal litigation involving state law and state officials. *Phyle v. Duffy*, 334 U.S. 431, 441 (1948). Most important, Kentucky permits multiple

officials, the one who departed and the Attorney General, to defend the issue in that case. *Cameron,* 142 S.Ct. at 1011. The Court identified the relevant state law and explained that such determinations are entitled to great deference when determining sufficient interest to intervene. *Ibid.*

California has decided that the Attorney General is the one to defend state officials and state laws. Thus, the majority opinion, which focuses on the state law for the interest, is consistent with *Cameron*.

2. There is no Need to "Clarify" the Standard for Intervention as the Majority Opinion is Consistent with Settled Law on the Interest Necessary for Intervention

Petitioners' main argument is that the Court needs to "settle the proper standard for intervention" within the Ninth Circuit. Pet. at 21-25. But, the standard for intervention is well-established, was appropriately cited by the majority, and no circuit split exists. The majority followed the analysis and outcome that was adopted by the Third and Fifth Circuits. App. at 18-19.

Petitioners disagree with the Attorney General's litigation decisions in this case, made in the exercise of his statutory right and duty to defend the State, because they believe that if the State ever decides to restart executions in the future, this litigation, if reinstated, could give rise to potential federal stays of execution. But Petitioners' desire to avoid that scenario does not change the fact that they have no authority under state law to represent the State in a lawsuit challenging the *method* of execution: Petitioners have no authority over the method

of execution that the state chooses, and no authority over CDCR's implementation of its statutory responsibilities in performing executions. No court has held that a local public official whose acts may be impeded in some fashion by potential stays of execution has the right to intervene.

Both Petitioners and the dissenters note the lack of prior Ninth Circuit authority on the role of state law in determining intervention. Pet at 25. But, that does not render the holding here worthy of review. It instead reflects how rare it is that a local District Attorney will attempt intervention in litigation against state officials concerning the application of state law by state actors, and even rarer when their participation is not permitted under state law. Such outliers are generally inapt vehicles for settling issues.

Both Petitioners and the dissents contend the "will of the People" is being undermined because executions have not been occurring. But, California's will of the People includes the lack of District Attorney authority, the State's decisions as to who possesses that authority, the Governor's reprieves, and recent electoral determinations. App. at 67 (Fletcher, J conc.)("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."). Moreover, such generalized and indeterminate interests have never supported intervention and are specifically disapproved as a basis for District Attorney authority in California. *Alisal Water Corp*., 370 F.3d at 920; *Safer*, 15 Cal.3d at 238-39 & fn 13. Long ago, the District Court addressed the multitude of

intense public debates surrounding the death penalty and cautioned that this litigation involves only the "very narrow question" whether "California's lethal-injection protocol-as actually administered in practice" violates the Eighth Amendment. *Morales v. Tilton*, 465 F. Supp. 2d at 973-74. It is that question the majority properly examined when assessing both the sufficiency and the relatedness of Petitioners' lawful interest.

Petitioners' contention is that the majority erred by examining in the first instance the question whether a public official's interest was supported by its statutory role under state law, and argue this is contrary to the Ninth Circuit's law on intervention. Pet. at 21. They cite to cases offered by the dissenters involving private individuals intervening in lawsuits against state actors and note that statutory authority to intervene is not required for intervention in such cases. Pet. at 22-23. None of these cases involved public officials or state *proscriptions* against the purported intervenors' participation, or required the District Court to weigh the state's interest in deciding how to enforce state law, which is required here. And they involved organizations that had an interest in the law at issue because they were proponents or involved in administrative review.

Petitioners do not have a "general mandate to enforce criminal judgments." App. at 74. Their only "mandate" is to prosecute. Cal. Gov't Code § 26500. The California Constitution provides that the Attorney General is the "chief law enforcement officer of the State" who shall "see that the laws of the State are uniformly and adequately enforced." Cal. Const. Art. V, § 13. He is the sole official

chosen by the People to defend state officials in the performance of their duties. Cal. Govt. Code §12512 ("The Attorney General shall attend the Supreme Court and prosecute or defend all causes to which the state, or any state officer, is a party in the state officer's official capacity."); *see also* Gov. Code §11040(a) (authority to represent state agencies and employees). The Court has long recognized the primacy of California's Attorney General. *Phyle v. Duffy*, 334 U.S. 431, 441 & fn 9 (1948).

The powers of all executive agencies are subject to the Governor's authority. 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"). The Governor has plenary power to issue reprieves and stay executions that the Attorney General, *and every other relevant actor*, must recognize and enforce. Cal. Const. Art. V, §8(a); Cal. Pen. Code §3700 (power to suspend execution of judgments). CDCR, a subordinate executive, has authority over execution procedures. Cal. Pen. Code §3604(a). The Warden has authority over implementing them. Cal. Pen. Code §§3600, 3603, 3605, 3607.

By contrast, the District Attorneys have no authority to participate in civil litigation against state officials. While Petitioners and the dissents point to the fact that Petitioners are mentioned in the state constitution (Pet. at 23; App. at 74), they neglect to note that their authority derives from Legislative authority. Cal. Const. Art. XI sec. 1(b). Likewise, they fail to address the array of Legislative authority that has been given (Cal. Govt. Code §§26500-26530) and the fact that nowhere in

there is anything even resembling the authority they seek to exercise here. The best they can muster is section 26500.5, which allows District Attorneys to sponsor projects to help the administration of justice. Pet. at 24; App. at 74. They, and the dissenters, point to constitutional protections that provide victims' families with safety, notice of certain case-related events, and opportunity to be heard at certain venues. Cal. Const. Art. I, § 28(b). But these are not authority to participate in civil litigation adverse to state officials, nor do they permit participation in determining execution methods or implementation.

A District Attorney's authority is limited to that which the Legislature has expressly authorized. *Safer v. Superior Court,* 15 Cal.3d at 236. In *Safer*, the state Supreme Court recognized that "the Legislature has manifested its concern that the District Attorney exercise the power of his [or her] office only in such civil litigation as that lawmaking body has, after careful consideration, found essential." *Ibid.* The Court found that the Legislature has defined limited occasions where intervention is authorized with "specificity and [] narrow perimeters." *Ibid.* The "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 237. When a generalized authority to act was asserted, the court noted that "[t]he Legislature intended no such penumbra of vague and extended powers to attend that office" and that "[d]istrict attorneys hold statutory powers, not, as the dissent suggests, a roving commission to do justice". *Id.,* at 238-39 & fn 13.

The dissenters incorrectly assert *Safer* is restricted to "private litigation." App. at 76. *Safer* was codified into law when the Legislature added the phrase "except as otherwise provided by law" at the end of the first sentence of the enabling statute so the statute now reads: "The District Attorney is the public prosecutor, except as otherwise provided by law." (Cal. Gov. Code, § 26500; *see* Stats. 1980, ch. 1094, § 1, p. 3507.) *Safer* has been consistently applied even where the litigation is related to District Attorney authority. *People v. Super. Ct. (Humberto S.)*, 43 Cal.4th 737, 753 (2008); *Bullen v. Superior Court,* 204 Cal.App.3d 22, 33 (1988) (civil writ challenging criminal discovery subpoena); *In re Dennis H.*, 88 Cal.App.4th 94, 97-102 (2001)(dependency proceedings).

And they are profoundly incorrect that case law permits District Attorney participation in the absence of statutory authority. App. at 76-77. The cases cited stand for the contrary. *See Abbott Laboratories v. Superior Court*, 9 Cal.5th 642, 644, 663-64 (2020) (applying *Safer* and citing to specific authority under Cal. Bus. & Prof. Code §§17204, 17206(a), California's Unfair Competition Law ["UCL"]); *People v. McKale*, 25 Cal. 3d 626 (1979) (specific authority under UCL which permits it to allege violations of another state law as a basis for UCL relief).

Petitioners do not dispute the need for specific authority, and do not allege they possess it. Instead, they argue that section 3604.1(c) is a sufficient interest to intervene. Pet. at 23. Section 3604.1(c) bears no greater weight than any other state statute. *People v. Park*, 56 Cal.4th 782, 796 (2013). It is presumed voters were aware of existing law. *In re Lance W.* 37 Cal.3d 873, 890, fn. 11 (1985). A statutory

initiative is interpreted to the extent possible to harmonize it with existing law. *People v. Gonzalez* 2 Cal.5th 1138, 1141 (2017). This would include all of the authority cited above.

Contrary to the above, the dissenters interpreted section 3604.1(c) broadly as "codifying" the interest in "ensuring that death judgements are carried out" that is civil in nature, thereby empowering Petitioners to "represent the State and the People in civil litigation involving the legality of state agency procedures", which includes "enforcing sentences", a breathtaking expansion of local authority. App. at 31, 75. Petitioners are slightly more circumspect. Pet. at 23 ("explicitly granting authority to compel Respondent-Defendant Secretary of CDCR to comply with state law").

Section §3604.1(c) permits a motion (not a separate "civil" action) in the state trial court to force CDCR to undertake its duties to enable executions. It was drafted to address the decade-long state regulatory approval process. App. at 103-104.[4] It limits Petitioners to state trial court relief (in the context of a statute that otherwise discusses federal litigation). Importantly, it does not intrude upon the Warden's responsibility to execute or CDCR's authority to fashion a method of execution. It also permits CDCR the time necessary to enable its duties. It

[4] The record is that over a decade was devoted to state court litigation and regulatory review. App. at 111-120; *Morales v. California Dept. of Corrections & Rehabilitation*, 168 Cal. App. 4th 729, 737-38 (2008). For the past 3.5 years, the Governor's Reprieves have precluded executions. App. at 120.

certainly does not provide District Attorneys with "superior authority" over methods or implementation of executions. Pet., at 23.

Thus, the majority correctly examined what role the Petitioners actually play in assessing their interests, and the confines of their ability to assert it. They did not hold Petitioners have no role in the state processes (Pet at 23), only that the role was confined by state law in a manner that rendered it insufficient to create a significant protectable interest. The majority weighed the State's legal interest and the District Attorney legal interests as determined by state law and found District Attorney interests insubstantial and incidental. This is consistent with settled intervention law –the interest must be both *significant* and *protectable*, i.e. protectable under law. An interest cannot be either if the local public entity is prohibited from advancing it in federal court, it is cognizable in state court, and it does not address the issues in the litigation. *Blake v. Pallen*, 554 F.2d 947, 952-53 (9th Cir. 1977). Consistent with the necessary respect for state governmental organization expressed in *Cameron* and *Berger*, and with the analysis used by other circuits that have addressed this issue, it would be error to ignore that relevant state law.

According to Petitioners and the dissenters, the majority wrongly focused on the underlying claims in assessing Petitioners' interest. Pet. at 21; App., at 78-79. The case relied on by Petitioners and the dissenters is *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, which upheld private party defendant intervention in certain suits against the United States. The court held that traditional intervention

principles apply. *Id*., at 1178-80. Importantly, the suit was not against state officials and the statute there did not bar such participation. And, unlike in *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002), also cited by the dissenters (App. at 78-79), the lawsuit here does not assert that Petitioners engage in unconstitutional acts and does not seek to enjoin them. 288 F.3d at 398-99. Most significantly, the nature of the transaction here is not the execution itself – it is the method the state employs.

The majority properly focused on the issues raised by Plaintiffs' claims when examining whether Petitioners' asserted interest is affected by those claims. Petitioners do not possess a generalized interest in "ensuring death judgments are carried out." App. at 79. They possess an interest in the discretionary acts of obtaining dates and CDCR readiness in state court proceedings, which they share with others, including the state officials here and their counsel. They have no interest in what form of readiness CDCR adopts. The majority rightfully focuses on the transaction at issue - execution methods and implementation. *See Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 836 (9th Cir.1996) (interest in a different law insufficient – it must relate to the law at issue). Nor is it accurate that the litigation "completely destroys" Petitioners' interest. App. at 80-81. It is hard to imagine how the *resolution* of the lawsuit will affect Petitioners' interests at all. *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (relationship requires court examine how resolution will affect interests). Petitioners' error is assuming the suit is one that seeks to stop executions. It is not. Either California's

lethal injection procedures are held to be constitutional, or not. If the former, executions can proceed. If the latter, there is no lawful effect on Petitioners' interest in securing execution dates nor seeking CDCR readiness. Thus, the impact on Petitioners' interests is too remote, and incidental to the resolution of the litigation.

The litigation presently has ceased and is awaiting a protocol, which, because of the Governor's actions, cannot issue. There are no stays in place. There may never be. It is even more difficult to discern how that impairs Petitioners' interests. Moreover, Petitioners' main complaint is that the reprieves and withdrawing the protocol have hamstrung their efforts. That is an issue they need to bring before the state courts.

3. There is no "Misuse" of the Federal Courts that Necessitates Review

Petitioners claim the Reinstatement Agreement that potentially restarts the dismissed lawsuit if executions resume requires the Court grant review. Pet. 25-27. The Petition, however, presents no opportunity to review the dismissal, only the propriety of intervention. Aside from this difficulty, Petitioners identify no state or federal authority that they can intervene in a lawsuit to undo a litigation agreement approved by the Governor and the Attorney General in litigation against state officers. It is far beyond the limited authority in section 3604.1(c) and contrary to the dictates of *Safer* as well as Attorney General and Executive authority in California.

Petitioners present over-blown characterizations and vague statements about "implied" powers of the courts, and "attempts to effectuate Proposition 66." *Id*. They assert the case would be reinstated if they or "any" executive "took actions to effectuate the return of a death-penalty protocol." Pet. at 25. This in inaccurate – nothing in the Reinstatement precludes CDCR from drafting a protocol or otherwise preparing for executions. App. at 136 ("nothing herein prevents Defendants from engaging in preparations for executions consistent with the terms of any newly-adopted execution protocol"). It is true that if a protocol is actually put into place, and the state mechanisms for executions are activated, the case might be reinstated. Those provisions are designed to fulfill the Ninth Circuit's mandate for the District Court to take the time needed for its review that was frustrated by premature execution dates, *Morales v. Cate*, 623 F.3d 828, 830-31 (9th Cir. 2010), and are entirely contingent on actions in the future that may never happen.

The fact that other execution-eligible persons will be able to intervene after reinstatement is unremarkable. Petitioners cannot identify any legal impropriety with this provision. As they note, any such condemned person will need to satisfy the rigorous legal requirements for a stay. Again, Petitioners do not identify anything improper with such a scenario.

The Agreement does not bind any Governor who rescinds the reprieves and issues a protocol. It merely sets in motion the process by which the State can establish that it has addressed and rectified the serious difficulties in administration of executions found by the District Court using the appropriate

standard as required by the Ninth Circuit's remand. The Agreement is simply a practical approach to the realities of the litigation. It considers the effect of the reprieves, the nature of the prior findings and holdings, and the history of litigation difficulties brought on by premature execution dates. Petitioners' broadside ignores all of this.

4. Other Difficulties with the Posture of the Case Argue against Review

There are several difficulties with the case that argue against review. Primarily, Petitioners' acts, which are not mandated, are state court matters, as are their complaints about CDCR delays and the reprieves. Yet, Petitioners and the dissenters insist on federal court involvement. Even if Petitioners intervene, they still must prevail in their effort to undo the dismissal and reinstatement, an effort that is by no means certain. Even if they prevailed in that effort, the reprieves mean that there is no present reason to think that the CDCR will develop a new execution protocol or that any death-sentenced inmate will be subject to execution in the foreseeable future.

There would be an Article III, section 2 standing difficulty if Petitioners intervened. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). A risk of future harm must be sufficiently imminent and substantial. *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2210-11 (2021); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Moreover, the standing hurdle is even higher for government

actors representing the state's interests in its laws. *Bethune-Hill,* 139 S. Ct. at 1951-53 (2019); *Hollingsworth*, 570 U.S. at 710.

In addition to the mootness issue raised by Respondent-Defendants, a "claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). Here, Petitioners seek to intervene an action that has been dismissed and may never be reinstated so that they may seek execution dates. Because of the reprieves, state law does not allow them to do so.[5] Those reprieves may be lifted tomorrow, or may *never* be lifted. It is not an event that is "inevitable" or nearly certain.

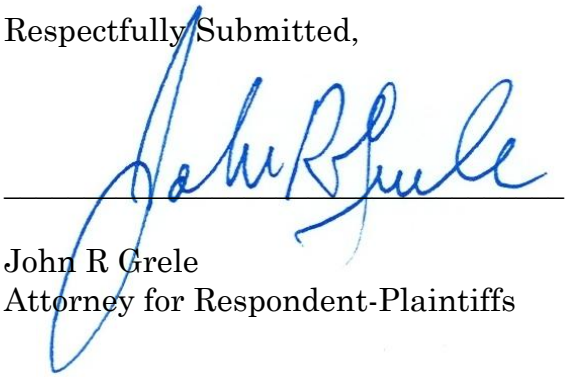
Finally, Respondent-Plaintiffs objected below to the untimely interventions given the lengthy time between the stays and Petitioner's motions. They also objected that proposed intervenors failed to comply with Fed. R. Civ. Pro. 24(c). Although the majority addressed section 3604.1(c), Petitioners failed to assert it before the District Court or in their Opening Brief. These objections will complicate any further review.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

[5] *In re Ramirez*, 94 Cal. App. 4th 549, 560 (2001) (governor's power "virtually unlimited"); Cal. Pen. Code §3700 (authority to suspend executions); *Rogers v. Board of Directors of City of Pasadena*, 218 Cal. 221, 223 (1933) (court will not mandate a useless act).

Respectfully Submitted,



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