No. 21-1512

In The Supreme Court of the United States

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

Petitioners,

v.

KEVIN COOPER, et al.,

Respondents-Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Respondents-Defendants.

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

BRIEF IN REPLY TO OPPOSITIONS

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ARGUMENT

Introduction.

By denying intervention to the California District Attorneys of San Bernardino, Riverside and San Mateo Counties (Petitioners), both the Court of Appeals for the Ninth Circuit and the District Court for the Northern District of California sanctioned an indefinite blockade against capital punishment in the state's justice system. Claiming that prosecutors in the state have no basis upon which to participate in litigation that speaks directly to the most serious of criminal punishments, Respondents in the matter misapply both federal and state law in an attempt to hush the only voices speaking for the victims of crime and their families.

California's Governor, Secretary for the Department of Corrections and Rehabilitation ("CDCR"), and Warden of San Quentin State Prison (Respondents-Defendants) and the participating California death row inmates from Petitioners' home counties (Respondents-Plaintiffs) both attempt to incorrectly define Petitioners' interests in the litigation to give the appearance of satisfactory representation of State interests in the courts below. Both downplay the apparent shifting standard for intervention used by the Court of Appeals based on the subject matter of the litigation. And both point to an inapposite California case, *Safer v. Superior Court*, 15 Cal.3d 230 (1975), in an effort to portray Petitioners as hamstrung in the ability to effect representation of California's otherwise absent penal interest.

Respondents-Plaintiffs go farther, with the suggestion that the District Court action creates no significant impairment to Petitioners' duties. Petitioners must be satisfied with hollow judgments while the specter of the "dismissed" suit effectively blocks execution of those judgments. In the absence of Petitioners' intervention, the District Court's shadow completely frustrates State law as contemplated by Proposition 66. Arguments minimizing that impact strain credulity.

Petitioners' Interests and the Rule 24 Standard.

Contrary to that which is portrayed by both sets of Respondents, Petitioners' interests in the underlying litigation do not flow from a desire to defend other state executives in their official capacities, nor do Petitioners wish to step into Respondents-Defendants' shoes to defend a now-defunct method of execution.[1] Respondents-Defendants argue that Petitioners "have no authority to represent the Secretary of CDCR (or any other defendant in the case)." Respondents-Defendants Brief in Opposition (R-D BIO) at 8. Respondents-Plaintiffs take a similar tack, arguing that "the District Attorneys have no authority to participate in civil litigation against state officials." Respondents-Plaintiffs Brief in Opposition (R-P BIO)

[1] Defunct in the sense that Respondents-Plaintiffs challenged an execution protocol that was obviated by the State's adoption of Proposition 66. The subsequent protocol was abandoned at the behest of Respondents-Defendants.

at 18. Both arguments miss the mark, for Petitioners represent the interests of the People of the State of California and seek to put the functional bars against the People's penal interest to rest.

Petitioners serve as criminal prosecutors acting on behalf of the People by State law. Cal. Gov. Code § 26500. And while Petitioners *can* play a role in civil litigation, it is always as an advocate for the People and not as counsel for another State officer. *See*, *e.g.*, *People v. Superior Court* (*Humberto S.*), 43 Cal.4th 737, 748 (2008). Thus, in contrast to the California Attorney General's conflicted role as civil counsel to multiple defendants in the litigation, Petitioners seek only to represent the interests of the People to ensure that the electorate's will is not obstructed by clever federal litigation roadblocks.

Attempts to cloud Petitioners' role notwithstanding, all Respondents further point to *Safer*, *supra*, to argue that Petitioners are not permitted intervention here. R-D BIO at 7-8; R-P BIO at 19. A closer look at *Safer* shows that the narrow scenario of the case offers no informative guidance.

Safer addressed a district attorney's attempt to dismiss a criminal action in favor of pursuit of civil contempt proceedings arising from labor protests. *Safer*, 15 Cal.3d at 233. To determine whether the district attorney possessed the authorization to pursue civil contempt (and thus bypassing a criminal defendant's protections), the Supreme Court of California

canvassed "illustrative statutes which specifically empower a district attorney to bring a civil action. . . ." *Id.* at 236. More significantly, *Safer* concluded that statutory authorization does not "empower a district attorney to intervene at will in a civil case involving private parties in an economic dispute." *Id.*

California's Supreme Court later emphasized the limited nature of its *Safer* holding. "In *Safer* we held only that the People may not intervene in an otherwise private dispute, and prosecute a private party under [a contempt proceeding], absent express legislative authority to do so." *Mitchell v. Superior Court*, 49 Cal.3d 1230, 1251, fn. 15 (1989). This case is clearly no economic dispute amongst private parties. At stake here is the People of the State of California's ability to execute capital judgments against those convicted of the most pernicious crimes.

Petitioners' interest here flows directly from the California Constitution. "Criminal activity has a serious impact on the citizens of California. The rights of victims of crimes and their families in criminal prosecutions are a subject of grave statewide concern." Cal. Const. Art. I, § 28(a)(1) (Pet. App. at 153). It cannot be that the only thing a criminal defendant need do to subvert those rights is initiate a federal civil action. In a case in which the California Attorney General has abandoned his role in protecting the penal interests of the State of California, Petitioners serve as the only safeguard against clandestine arrangements to obviate State criminal law by fiat.

Twenty-three days after filing of the Petition in this case, this Court issued its decision in *Berger v. North Carolina State Conference of the NAACP*, 597 U.S. __, 142 S.Ct. 2191 (2022), where state legislators sought intervention under Rule 24 to defend a statute where the Governor opposed the legislation. *Id*. at 2198-2199. This Court began its analysis by asking "whether the legislative leaders have claimed an interest in the resolution of [the] lawsuit that may be practically impaired or impeded without their participation." *Id*. at 2201, citing *Cameron v. EMW Woman's Surgical Center*, 595 U.S. __, 142 S.Ct. 1002, 1011 (2022). While recognizing that the State of North Carolina statutorily diffused power to defend state interests among its elected officials, this Court noted that the requisite interest under Rule 24 presents only a "minimal challenge" to proposed intervenors, *Berger*, 142 S.Ct. at 2203, particularly where the state's executive opposes the challenged law in the first place. With no one standing to defend the interests of a statute, "a presumption of adequate representation is inappropriate when a duly authorized state agent seeks to intervene to defend a state law." *Id*. at 2204.

In light of *Berger*, Respondents' collective efforts to characterize Petitioners as lacking participation authorization comes as no surprise, for if there *is* a basis for Petitioners to remove the barrier to imposition of capital punishment, their arguments must fail. The Ninth Circuit and the District Court both addressed the issue of intervention well before this Court's *Berger* holding, so the already-muddied Ninth Circuit

intervention standards now stand superseded by this Court's teachings.

Petitioners described California Penal Code § 3604.1(c) and its specific authorization in the Petition.[2] Respondents seek to limit application of the statute to actions in the criminal cases themselves. R-D BIO at 8, R-P BIO at 21. But the logical conclusion here would nullify the very reason for section 3604.1(c)'s existence. Petitioners do not seek to establish a "separate civil action," as characterized by Respondents-Plaintiffs. Petitioners seek to *end* one, so that any effort to enforce the mandates found within the statute aren't rendered futile by the conditions placed upon the "dismissal." There can be no clearer unrepresented interest in the litigation. Moreover, it is an interest that the People of the State of California sought to explicitly place in the hands of Petitioners.

The Phantom Dismissal.

The Petition described the conditions placed upon the "dismissal" in the District Court. Respondents-Plaintiffs go to some length to portray that resolution

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[2] Respondent-Plaintiffs appear to take Petitioners to task for first addressing section 3604.1 during the proceedings before the Ninth Circuit. R-P BIO at 7, fn. 2, and 8. As a practical matter, the statute's influence in the case magnified over time as it was only after the Governor's ostensible "moratorium" and orders to the Secretary of CDCR to ignore state law and abandon the new, post-Proposition 66 protocol that the statute's role in the matter played a more significant part. The original motion before the District Court predated both of those actions.

as one that acts as no bar to Petitioners. "Nothing in the Reinstatement precludes CDCR from drafting a protocol or otherwise preparing for executions." R-P BIO at 25. Also, "The Agreement does not bind any Governor who rescinds the reprieves and issues a protocol." R-P BIO at 25. And, "It is hard to imagine how the *resolution* of the lawsuit will affect Petitioners' interests at all." R-P BIO at 23. Unsurprisingly, Respondents-Defendants do not make this argument.

As a practical matter, any action taken by Petitioners to effectuate the resumption of capital punishment in California will come to a swift halt with the revival of the District Court case. While Respondents-Plaintiffs claim that reinstatement is not automatic, R-P BIO at 9, fn. 9, it takes a remarkable suspension of disbelief to think that any inmate suddenly facing the prospect would not take the steps necessary to bring the stays back into place. If the conditions placed on the "dismissal" did not have the effect described by Petitioners, they would have little meaning.

CONCLUSION

Respondents in this case crafted a one-way path for capital punishment in California. The Ninth Circuit's denial of Petitioners' intervention in the case not only departed from its own standards governing Rule 24, it did so in the absence of this Court's recent holding in *Berger*. Without this Court's involvement, the power of the underlying District Court has effectively

been used by the State's executive to render electorate-enacted law ineffective.

For the reasons stated in the Petition and here, this Court should grant certiorari.

Respectfully submitted,

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