IN THE FIRST DISTRICT COURT OF APPEAL
OF THE
STATE OF CALIFORNIA

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, CONGREGATIONS ORGANIZED FOR PROPHETIC ENGAGEMENT, RIVERSIDE ALL OF US OR NONE, STARTING OVER INC., AND SILICON VALLEY DE-BUG

Petitioners,

v.

SAN MATEO COUNTY DISTRICT ATTORNEY STEPHEN WAGSTAFFE, SAN BERNARDINO COUNTY DISTRICT ATTORNEY JASON ANDERSON, AND RIVERSIDE COUNTY DISTRICT ATTORNEY MICHAEL HESTRIN, IN THEIR OFFICIAL CAPACITIES

Respondents.

PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Petitioners hereby certify that they are not aware of any entity or person that Rules 8.208 and 8.488 of the California Rules of Court require to be listed in this Certificate.

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PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA FIRST DISTRICT COURT OF APPEAL

INTRODUCTION

Forty-five years ago, the California Supreme Court held that the authority of a district attorney is limited to that which the Legislature has expressly granted them, and nothing more. Numerous courts have held that this precludes a district attorney from participation in civil disputes unless participation is explicitly authorized by statute. No court has permitted district attorneys to participate in a federal civil rights lawsuit between prisoners and state authorities, let alone take positions contrary to those of the Governor (the supreme authority on executive actions) and the Attorney General (the sole legal representative of state entities). Yet, three district attorneys are doing just that, despite the absence of statutory authority to support such actions. Their efforts must be enjoined.

This Petition seeks a writ of mandate or prohibition directing three county district attorneys (the "DAs") to refrain from interfering in federal prisoner civil rights litigation between people on death row and the State of California. The attempts by the DAs to intervene exceed the scope of their statutory authority.

The DAs seek to intervene in *Morales v. Diaz* (N.D. Cal.) Case Nos. 06-0219 and 06-926 (the "Lethal Injection Litigation"[1]), a federal lawsuit brought by people on death row against the California Department of Corrections and Rehabilitation ("CDCR"), the California Governor ("Governor"), and the Warden of San Quentin Prison (collectively, the

[1] On appeal, the caption of the Lethal Injection Litigation has since been changed to *Cooper et al. v. Newsom et al.* (9th Cir.) Case No. 18-16547.

"Defendants") challenging the constitutionality of the State's lethal injection protocol. Defendants are represented by the California Attorney General. The lawsuit was filed in 2006 and dismissed without prejudice by joint stipulation in 2020 ("Stipulated Resolution"). A moratorium is presently in place by order of Governor Gavin Newsom, but this moratorium alone does not prevent the Legal Injection Litigation from being reinstated. The Stipulated Resolution establishes specific procedures to reinstate the lawsuit should executions in California resume.

Twelve years after the Lethal Injection Litigation was filed, and before the entry of the Stipulated Resolution, the DAs moved to intervene in the litigation. They argued that their interests were not adequately represented by Defendants or the California Attorney General. The District Court denied the motion to intervene in light of the DAs' failure to meet the federal standard for intervention, which requires that they establish separate interests that are insufficiently represented by Defendants and the Attorney General.

In their appeal currently before the Ninth Circuit Court of Appeals, *Cooper v. Newsom* (9th Cir.) Case No. 18-16547, the DAs continue to assert their right to intervene in the Lethal Injection Litigation despite the Stipulated Resolution. In oral argument before the Ninth Circuit, the DAs asserted—for the first time—their explicit intent to reverse the Stipulated Resolution.

At issue before the Ninth Circuit is the narrow, procedural issue of whether the DAs have satisfied the federal standard for intervention. The pending federal appeal does *not* squarely address, and thus will not resolve, the central and important question in this writ: whether the DAs can participate in the Lethal Injection Litigation despite longstanding state law establishing that district attorneys may engage in civil litigation only with

an express grant of authority from the California Legislature, a grant that does not exist here.

The intervention of the DAs is improper. The DAs are acting outside of their constitutional and statutory authority to challenge the negotiated resolution of a dispute over the constitutionality of California's method of execution. Put simply, the DAs' actions are ultra vires.

Petitioners are organizations acting in the public interest to ensure that district attorneys in California do not exceed their authority to engage in civil litigation where not statutorily authorized. The interference by the DAs also threatens the legitimate legal interests of the parties who negotiated an arms-length agreement resolving the Lethal Injection Litigation by dismissing the case and instituting procedures for litigation if the State resumes the execution process. If the DAs are permitted to intervene here, other subordinate governmental entities will be able to interfere in lawsuits, usurping the role of superior state entities, to take positions in opposition to those entities despite the absence of any legislative mandate to do so.

An order from this Court directing the DAs to cease their unlawful conduct is the only recourse available to protect the rights and interests of the Petitioners. This case is appropriate for this Court's original jurisdiction.

By this verified petition, Petitioners hereby represent the following:

PARTIES

A. Petitioners

Petitioners are five organizations dedicated to holding district attorney offices in California accountable, and ensuring that they do not abuse the power of that office. Petitioners are also engaged in efforts in

their jurisdictions and statewide to end mass incarceration and grave racial injustices in the criminal legal system. Many of their members, staff and leaders pay California state income taxes.

Petitioner American Civil Liberties Union of Northern California ("ACLU-NorCal") is dedicated to defending and promoting individual rights and liberties by holding the government accountable for compliance with the state and federal constitutions and our nation's civil rights laws. Petitioner ACLU-NorCal was founded in 1934 and is based in San Francisco. ACLU-NorCal is one of the largest ACLU affiliates, with approximately 169,000 members.

Petitioners Congregations Organized for Prophetic Engagement ("COPE"), Riverside All of Us Or None ("RAOUON"), and Starting Over, Inc. are part of a coalition of organizations in San Bernardino and Riverside Counties which work to ensure that the district attorneys and other law enforcement authorities are accountable to the community.

Petitioner COPE is a faith-based organization established in 2000 by a group of pastors. COPE's mission is to train and develop the capacity of religious and lay leaders in congregations and across the Inland Empire to protect and revitalize the communities in which they live, work, and worship. The formation of the organization was an outgrowth of a listening campaign with African American clergy, lay, and community outreach ministries in San Bernardino and Riverside Counties who wanted to see meaningful change in their communities.

Petitioner RAOUON is an organizing initiative of incarcerated and formerly incarcerated people, loved ones, and allies who work to address the discrimination and harm directed towards system-impacted people and their families through organizing, civic engagement, mobilization, education, policy changes, and litigation. RAOUON is centered and led by those in closest proximity to the harm.

Petitioner Starting Over, Inc. specializes in providing transitional housing and re-entry services for formerly incarcerated people while helping to build strong communities through recovery, civic engagement, and leadership development.

Petitioner Silicon Valley De-Bug is a story-telling, community-organizing, and advocacy organization based in San Jose. Founded in 2001, Silicon Valley De-Bug has focused the Silicon Valley's communities on political, cultural and social issues, and became a nationally-recognized model for community-based justice work. Silicon Valley De-Bug has worked to hold the district attorney in San Mateo County accountable to the community and has been organizing in San Mateo County since 2016.

B. Respondents

Respondents are three locally elected district attorneys in California—San Mateo County District Attorney Stephen Wagstaffe, San Bernardino County District Attorney Jason Anderson, and Riverside County District Attorney Michael Hestrin, in their official capacities (collectively, the "DAs"). The DAs have sought to intervene in the Lethal Injection Litigation on the ground that five of the then-plaintiffs in the Lethal Injection Litigation received death verdicts from their offices, and the Attorney General was allegedly not adequately representing the DAs' interests or the interests of "the People." Now, even after a district court denied their motion to intervene and the parties to the suit reached a Stipulated Resolution resulting in the lawsuit's dismissal, the DAs continue to appeal the denial of their intervention motion, expressly seeking to undo provisions of the Stipulated Resolution.

FACTS

A. History of the Lethal Injection Litigation.

On January 13, 2006, Michael Morales, a person on death row scheduled for execution, filed a Section 1983 civil rights lawsuit in the United States District Court for the Northern District of California against the Secretary of the CDCR and the Warden of San Quentin State Prison, with the Governor added as a defendant soon after. In his complaint, Mr. Morales challenged the constitutionality of the protocol that CDCR employed to carry out executions in California, specifically contending that the protocol violated the Eighth Amendment's prohibition on cruel and unusual punishment.

The case proceeded through discovery, evidentiary hearing, and preliminary injunction. (See *Morales v. Tilton* (N.D. Cal. 2006) 465 F.Supp.2d 972, 977 [finding a multitude of deficiencies in how executions were effectuated in California].) Thereafter, Defendants attempted several times to revise and institute new execution procedures. During this time, people on death row in California also brought two state court actions alleging that CDCR's amended protocols were adopted without compliance with California's Administrative Procedure Act. In both cases, the Superior Court ruled in the plaintiffs' favor and the Court of Appeal affirmed. (See *Morales v. California Dept. of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 729, 732; *Sims v. Department of Corrections & Rehabilitation* (2013) 216 Cal.App.4th 1059, 1083–1084.)

Throughout the litigation, the DAs have tried to undermine the federal court proceedings. For instance, after a new procedure was adopted in 2010, the Riverside District Attorney obtained an immediate execution date before federal review of the constitutionality of that procedure, asserting in the Superior Court that further review was of no consequence.

(See *Morales v. Cate*, 06-cv-219-RS (N.D. Cal.) ("*Morales*"), Dkt. 401, at 3.) The Ninth Circuit prohibited the execution from going forward. (See, e.g., *Morales v. Cate* (9th Cir. 2010) 623 F.3d 828, 831, *as amended* (Sept. 28, 2010); *Morales*, Dkt. No. 424 [staying the execution on remand].) Later, while a state court enjoined executions in *Sims*, the San Mateo District Attorney (and two other district attorneys) moved at the state level for an order to set an execution date for two persons on death row. The Superior Courts denied the motions, but these efforts set off a series of interventions by people on death row in the Lethal Injection Litigation, where stays of execution were obtained over the Attorney General's objections. (See, e.g., *Morales*, Dkt. No 563.) Twenty-three additional people on death row have been added as plaintiffs (the "Plaintiffs") in that lawsuit and moved to stay their respective executions.

On March 1, 2018, California finalized its first single-drug lethal injection protocol, prompting an amended complaint and a new motion to dismiss. (See *Morales*, Dkt. Nos. 635, 720, 723.)

B. Three Local District Attorneys Seek to Intervene in the Lethal Injection Litigation.

In June and July 2018—more than a decade into the litigation challenging the legality of the California's protocol for executions—the DAs moved to intervene in the Lethal Injection Litigation. They argued that the interests of the "People" in ensuring that criminal judgments are satisfied were unrepresented before the District Court, and that they (without pointing to statutory authority) uniquely served that role; they also sought to lift stays of execution entered in the case and to dismiss the complaint. (*Morales*, Dkt. Nos. 660, 663.) Both the Defendants and Plaintiffs in the Lethal Injection Litigation opposed the DAs' interventions; the Plaintiffs also opposed lifting the stays. (*Id*., Dkt. Nos. 669, 670.)

The District Court denied the intervention motions. (*Morales*, Dkt. No. 676.) The court found that the DAs' stated interest did not support intervention as of right because the State's interest in seeing a criminal sentence implemented does not solely belong to the DAs, because the DAs' interest was subordinate to the Attorney General's and the Governor's, and because the Attorney General adequately represented the DAs' interest in the resolution of criminal sentences. (*Id*. at pp. 6–9.) The court further rejected permissive intervention by the DAs, "whose interest is marginal to the subject matter of the complaint," as such intervention "would be unwieldy and prejudicial"; and because the case concerns the limited issue of the "method and implementation of the death penalty." (*Id*. at pp. 9–10.)

The briefing and the District Court's subsequent decision focused on the relevant federal standard—whether the DAs satisfied the tests for intervention by right or for permissive intervention under Federal Rule of Civil Procedure 24. The Plaintiffs noted that state law prohibits the DAs from such intervention. (*Morales v. Kernan* (N.D. Cal. July 10, 2018) Case No. 06-cv-219-RS, Dkt. No. 669 at 8–9.) The DAs relied on Penal Code section 1227, which allows them to seek execution dates. The District Court held that the DAs' role in filing for a death warrant is "ministerial." (*Id*. at Dkt. No. 676 at 5–6 ["Would be intervenors . . . 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 DAs appealed the order denying their interventions to the Ninth Circuit, continuing to argue that "the People's interests in ensuring the criminal judgments are satisfied remain unrepresented in the underlying litigation." (*Cooper v. Brown* (9th Cir. 2018) 2018 WL 6200616, at 24–25 [Appellants' Opening Brief].) All parties in the Lethal Injection Litigation

continued to oppose the DAs' intervention. As the State Defendants argued:

> Not only were the State's interests—including the prosecutorial interests asserted by the District Attorneys—properly represented in the federal litigation, but the development of constitutional lethal injection protocols is a matter of statewide concern. It affects far more than the three individual counties that the district attorneys represent or the particular criminal defendants whose cases their offices prosecuted. Furthermore, as the district court correctly observed, the prospect of additional delay and disruption in the already complex and protracted proceedings weighed heavily against allowing these (or other) defensive interventions.

(*Cooper et al. v. Newsom et al.* (9th Cir. 2019) 2019 WL 1960935, at 2–3 [Defendants-Appellees' Answer Brief].)

Defendants' briefing on appeal did not discuss the California state law question central to the instant writ—whether the DAs exceeded the authority the Legislature has granted them in limited circumstances to engage in civil litigation. (*Id.*) Plaintiffs' answering briefs addressed the question briefly, and only in the context of whether the DAs had standing under federal law, and whether they could demonstrate a sufficient interest to satisfy the four-factor test for intervention as of right under the federal rules—in particular, the requirement of an adequate interest in the litigation. (*Cooper et al. v. Brown et al.* (9th Cir. 2019) 2019 WL 413088, 37–38 [Plaintiffs-Appellees' Answer Brief]; *Cooper et al. v. Brown et al.* (9th Cir. 2019) 2019 WL 412999, at 34, 37–39 [Plaintiffs-Appellees' Second Answer Brief].) Plaintiffs in oral argument cited the lack of state authority as a basis to deny federal standing. Defendants in turn described the issue of whether the Attorney General had the authority to stop the intervention of the DAs under state law as a "delicate matter of the

allocation of power between states and local elected officials" that is "***really a matter for*** [] ***California state courts***." (*Cooper* (9th Cir. 2020) 2020 WL 6680722 at 24–25 [oral argument transcript], emphasis added.)

C. The Parties Voluntarily Dismiss the Lethal Injection Litigation Pursuant to a Stipulated Resolution.

While the DAs' Ninth Circuit appeal was pending, on August 14, 2020, the parties to the Lethal Injection Litigation entered into a Stipulated Resolution voluntarily dismissing the litigation without prejudice while establishing terms for reinstatement should circumstances warrant. (*Morales v. Kernan* (N.D. Cal.) Case No. 06-cv-219-RS, Dkt. Nos. 755, 757.) These terms included staying executions during any subsequent litigation.

The agreement was motivated by Governor Newsom's March 13, 2019 Executive Order rescinding the State's execution protocol as illegal, placing a reprieve on all executions, and closing the execution chambers at San Quentin State Prison. (Exec. Order No. N-09-19.) The Governor's Executive Order cited the "unfair" and "unjust" administration of the death penalty in California, as well as its extraordinary financial costs—with five billion taxpayer dollars spent since 1978 to implement the execution of thirteen individuals. (*Ibid*.) In the Stipulated Resolution, the parties agreed that the lawsuit and stays of execution could be reinstated if any of the following conditions occurs: (1) Governor Newsom withdraws his Executive Order or it is no longer in effect; (2) Defendants adopt an execution protocol and procedure; or (3) Defendants begin reopening execution chambers. The reinstatement provisions provided a litigation schedule that would allow the federal court to take the necessary time to review the constitutionality of any new procedure, as had been ordered by the Ninth Circuit in 2010. (*Morales*, Dkt. No. 755.)

The Ninth Circuit ordered additional briefing on whether the DAs' appeal was moot due to the Stipulated Resolution. The DAs took the position that the appeal was not moot because the Stipulated Resolution frustrated their interests; they instead desired to vacate the voluntary dismissal and reinstatement provisions, and then move to dismiss the case completely. (*Cooper v. Brown* (9th Cir. 2020) 2020 WL 6680722, at 24–25 [oral argument transcript] [DAs as intervenors would "argue that the stipulation is ineffective and . . . should be vacated"].) They took this position for the first time in oral argument before the Ninth Circuit, on September 16, 2020.

While the Ninth Circuit has not yet issued a decision, this Court need not wait for a resolution because the limits that state statutes impose on the DAs must bind them regardless of how their federal appeal is resolved, *i.e.*, regardless of whether they satisfy the federal rules of intervention.

ISSUE PRESENTED

Whether, as a matter of state law, three of California's fifty-eight elected county district attorneys lack the authority to seek to intervene on behalf of "the People" in a federal civil rights lawsuit between people on death row and California State officials when no state statute expressly or impliedly grants such authority and when the State and public interests are represented by the California Attorney General. (See *Safer v. Superior Court* (1975) 15 Cal.3d 230.)

RELIEF SOUGHT

Wherefore, Petitioners respectfully request that this Court issue a writ of mandamus or prohibition (or any relief it deems appropriate) enjoining Respondent DAs from continuing to seek intervention as a party in the Lethal Injection Litigation, any appeals thereafter, and any separately-filed related cases.

JURISDICTION

Mandamus and prohibition are extraordinary remedies to compel an inferior tribunal, body, or person to perform, or cease from performing, an act. (Code Civ. Proc., §§ 1085, 1102–1104; *Harris Transportation Co. v. Air Resources Board* (1995) 32 Cal.App.4th 1472, 1481.) Writs of mandate or prohibition issue where there is no plain, speedy, and adequate remedy in the ordinary course of law. (Code Civ. Proc., §§ 1086, 1103, subd. (a).)

The Court of Appeal may exercise original jurisdiction over extraordinary writ petitions when "the matters to be decided are of sufficiently great importance and require immediate resolution." (Cal. Const. art., VI, § 10; Cal. Rules of Court, rule 8.486, subd. (a)(1); *Cohen v. Superior Court* (1968) 267 Cal.App.2d 268, 270–272; *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 253.) Ultimately, a decision to grant mandamus should promote justice. (*Betty v. Superior Court of Los Angeles County* (1941) 18 Cal.2d 619, 622.)

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I, Abdi Soltani, a citizen of the United States and a resident of the State of California, am a Petitioner in the above-captioned action. I have read the foregoing Petition and know the contents thereof. I am informed, believe, and allege based on that information and belief that the contents of the foregoing Petition are true.

Executed on March 5, 2021, at San Francisco, California.

_____/s/ Abdi Soltani_____
Abdi Soltani,
Executive Director of ACLU-NorCal

MEMORANDUM OF POINTS AND AUTHORITIES

Following extensive litigation concerning the constitutionality of the methods of execution in California, Plaintiffs in the Lethal Injection Litigation entered into an agreement with the State's highest executive official, subordinate state officials, and the chief attorney for state agencies to dismiss the litigation with certain conditions. Dissatisfied with the litigation decisions of the State Defendants even before this agreement, three county district attorneys sought to intervene in the Lethal Injection Litigation. Although the District Court rejected their effort (and all parties opposed it), the DAs now forge ahead at the Ninth Circuit, continuing to seek intervention with the express aim to undo the Stipulated Resolution.

The DAs' attempted intervention lacks legal authority under California law. The authority of California district attorneys is sharply limited. Absent another express grant of statutory authority, district attorneys act only as the State's public prosecutor. (See Gov. Code, § 26500.) No law, statutory or otherwise, permits what the DAs seek to do here: involve themselves in statewide federal civil rights litigation brought by private parties against the Governor and a California state agency. Accordingly, an extraordinary writ from this Court is necessary to put an end to the DAs' extra-jurisdictional effort to usurp the role of the Governor and the Attorney General. An extraordinary writ is also necessary to protect the interests of Petitioners whose mission includes ensuring that district attorneys abide by their limited role in the state system and remain accountable to the public.

A. A California District Attorney May Not Participate in Civil Litigation Without Express Statutory Authorization, Which Is Not Present Here.

The DAs' intervention in the Lethal Injection Litigation exceeds their enumerated statutory powers. Well-established law constrains district

attorneys from intervening in civil litigation absent express authority granted by the Legislature. (*Safer v. Superior Court* (1975) 15 Cal.3d 230, 237.) The DAs' attempted intervention here is not permitted by the California Constitution or any statute. Their effort therefore must be enjoined.

1. The "*Safer* Rule" Is Dispositive.

The California Supreme Court's decision in *Safer v. Superior Court* recognized strict limits on the power of district attorneys to engage in civil litigation. ((1975) 15 Cal.3d 230, 237.) "[T]he 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." (*Ibid.*) The "*Safer* Rule" is dispositive here and requires enjoining the DAs' participation in civil litigation absent statutory authorization.

a. The *Safer* Rule Stands for the Proposition That District Attorneys May Not Participate in Civil Litigation Without Express and Specific Statutory Authorization.

In *Safer*, a group of farmworkers sought from the Supreme Court a writ of prohibition barring district attorneys from bringing a civil contempt action against them. (*Id.* at p. 233.) The farmworkers had been arrested for violating a temporary restraining order that forbid them from setting up picket lines around a farm owner's private property in Ventura County. (*Ibid*.) But rather than pursuing criminal charges against the farmworkers, the Ventura County District Attorney served them with orders to show cause in civil contempt proceedings. (*Id*. at p. 234.) The farmworkers unsuccessfully demurred to the complaints on the ground that the district attorney lacked authority to prosecute these civil contempt charges. (*Id*. at pp. 234–235.) In granting the farmworkers' subsequent petition for relief,

the Supreme Court held that a district attorney's jurisdiction is limited to that which the Legislature has expressly authorized. (*Id.* at p. 236.)

The application of this rule to the Ventura County District Attorney's pursuit of civil contempt charges against the farmworkers was straightforward: the district attorney could not pursue such litigation because of "[t]he absence of any statute empowering the district attorney to appear in private litigation." (*Id*. at p. 238.) "District attorneys hold statutory powers, not . . . a roving commission to do justice." (*Id.* at p 239 fn. 13; see also *id.* at p. 240 [the Legislature "did not rely on 'inherent' power, but passed specific legislation [granting authority to district attorneys]. Thus the district attorney's status as an officer of the court and his professed general interest in the administration of justice do not suffice as substitutes for legislative authorization."], brackets added, internal citation omitted.)

Courts of Appeal have followed. In *Bullen v. Superior Court* (1988) 204 Cal.App.3d 22, for example, the Third District Court of Appeal relied on *Safer* and other authorities to prohibit a district attorney from participating in a civil proceeding directly related to the prosecution of a criminal matter where no underlying statute provided authorization. The trial court compelled the widow of a murder victim to submit to the criminal defense team's access of her home for discovery purposes. In response, the widow sought a writ of mandamus from the Court of Appeal directing the Superior Court to vacate the discovery order. (*Ibid*.) As a threshold matter, the Court of Appeal concluded that "the district attorney may not prosecute civil actions in the absence of specific legislative authorization." (*Id*. at p. 25 [*quoting In re Marriage of Brown* (1987) 189 Cal.App.3d 491, 495].) As no statute authorized the district attorney's action in this case, the Court of Appeal granted the writ. (*Ibid*.) The California Supreme Court has endorsed this holding. (See, e.g., *People v.*

Superior Court (Humberto S.) (2008) 43 Cal.4th 737, 753, [discussing *Bullen*, "[A] district attorney has no authority to prosecute civil actions absent specific legislative authorization."].)

b. The *Safer* Rule Limits the Intervention of District Attorneys in Civil Litigation Where One Party Represents State Interests.

The *Safer* Rule also precludes a district attorney from intervening in civil litigation with State parties. This Court of Appeal in *In re Dennis H.* (2001) 88 Cal.App.4th 94, applied *Safer* to prohibit the district attorney's intervention in civil proceedings absent "express statutory authorization" despite a "general grant of authority." (*Id.* at p. 102.) During a juvenile dependency action between a father and his children, the Alameda County Social Services Agency requested that the Alameda County District Attorney represent the interests of California at the proceedings, alongside county counsel. The trial court agreed and appointed the district attorney "to represent the interest of the state." (*Id*. at p. 97.) The trial court ultimately ruled against the father seeking reunification. (*Ibid.*)

Citing to *Safer* on appeal, the father argued that the trial court erred in permitting the district attorney to represent the state in the underlying proceedings. (*Id*. at p. 98.) This Court of Appeal agreed because "no statute authorizes the district attorney's participation in juvenile dependency hearings 'to represent the interests of the state' where the minors are represented by counsel and county counsel appears on behalf of the social services agency." (*Id*. at pp. 100–101.) This Court of Appeal recognized that this case could be distinguished from *Safer* as the latter concerned "a district attorney's unauthorized intrusion into a purely private labor dispute"; acknowledged that the district attorney has a relevant role "as a public advocate against child abuse"; and recognized that some general codes authorized the district attorney to participate in dependency

proceedings. (*Id.* at p. 102.) But the Court nonetheless concluded that, in light of the "fairness concerns expressed in *Safer*, . . . the district attorney may not participate in the juvenile dependency proceedings to present state interests unless there is express statutory authorization." (*Ibid*.)

Similarly, in *People v. Superior Court (Solus Industrial Innovations, LLC)*, the Fourth District Court of Appeal affirmed that a district attorney could not bring a civil action where not expressly authorized by law, and where the "statutory scheme . . . reflects that [a different governmental entity] is the governmental agency responsible for civil enforcement." ((2014) 224 Cal.App.4th 33, 36.) *Solus* concerned a civil action brought by the Orange County District Attorney against an employer. The district attorney brought related criminal charges separately; and the State's Division of Occupational Safety and Health filed a civil investigation per its statutory authority. The employer challenged the civil action as improper and lacking any statutory authority. The Court of Appeal agreed, finding that the fact that the district attorney had a particular responsibility for related criminal prosecutions did not translate into authority to bring civil litigation that the Legislature granted to a different governmental entity. (*Id.* at pp. 36–37.)

As both *Dennis* and *Solus* make plain, the *Safer* Rule limits the participation of district attorneys in civil litigation where the Legislature has not expressly authorized it, including in cases where, as discussed further below, a different governmental entity is statutorily authorized to represent state interests.

c. The *Safer* Rule Remains Good Law.

California's Legislature had an opportunity to redefine a district attorney's statutory jurisdiction shortly after the Supreme Court decided *Safer*. It did not. Five years after *Safer*, the Legislature amended California Government Code section 26500, the California statute defining

the district attorney's authority. The Legislature added the phrase "except as otherwise provided by law" at the end of the first sentence so the statute now reads: "The district attorney is the public prosecutor, except as otherwise provided by law." (Gov. Code, § 26500; see Stats. 1980, ch. 1094, § 1, p. 3507.) Indeed, the fact that the Legislature amended to make clear that the DAs' prosecutorial powers could be limited by other statutes supports Petitioners' position here in two ways: First, the Legislature had the opportunity to disagree with *Safer*, but did not do so; and second, the Legislature, by adding the phrase "except as otherwise provided by law," indicated the importance of statutory authority for defining the powers to litigate, whether in criminal or civil contexts. (See *Safer*, 15 Cal.3d at pp. 237–238.)

Moreover, in a recent decision, the California Supreme Court declined to undermine the core holding of *Safer* that is relevant here. (See *Abbott Laboratories v. Superior Court of Orange County* (2020) 9 Cal.5th 642, 654 [district attorney's authority to bring an Unfair Competition Law action is statutorily authorized, and is thus consistent with *Safer*].)

The *Safer* Rule provides protection against abuse of authority, including abuse that intrudes on the powers of state officials and their interests. The *Safer* line of cases stand as a bulwark against the intervention of district attorneys in civil litigation that the Legislature has not prescribed, as the DAs seek to do here.

d. Other Jurisdictions Apply Similar Rules Limiting the District Attorney From Participating in Civil Litigation.

California is not alone in confining the authority of district attorneys to intervene in this kind of civil litigation. (See, e.g., *Holmes v. Eckels* (Tex. App. 1987) 731 S.W.2d 101, 102 [dismissing action brought by district attorney because "[t]he statute contains no grant of authority to the

Harris County District Attorney allowing him to prosecute civil suits on behalf of the State."]; *Kennington-Saenger Theatres v. State ex rel. Dist. Atty.* (1944) 196 Miss. 841 [reaffirming that "a District Attorney has no authority to represent the State in any litigation in their districts where the subject matter of such litigation is of State-wide interest as distinguished from local interest,– [*sic*] save as to some express statutory exceptions not here involved."]; *In re Louisiana Riverboat Gaming Com'n* (La. Ct. App. 1995) 659 So.2d 775, 783 ("Because the Attorney General is vested by LSA-Const. Art. 4, § 8 (1974) with the [relevant] authority . . . , we find that the District Attorney of East Baton Rouge Parish is without authority to institute this action on behalf of the State of Louisiana."] [bracketed comment added]; *State v. American Sugar Refining Co*. (1915) 137 La. 407 [holding that because the district attorney of the parish of Orleans had no authority to represent the state except in criminal cases, with no additional authorization granted, he could not represent the state in the case].)

2. The *Safer* Line of Cases Forecloses the DAs' Efforts to Intervene to Undermine the Stipulated Resolution in the Lethal Injection Litigation.

The *Safer* Rule's application in the instant case is incontrovertible. Because the Legislature has not authorized the DAs' intervention in statewide civil rights litigation concerning the constitutionality of the manner of execution, this Court must issue a writ enjoining the DAs' attempt to intervene.

No express authority sanctions the involvement of the DAs who now seek intervention to resurrect the Lethal Injection Litigation and dismiss it on different terms. In particular, no statute expressly authorizes the DAs to play *any* role in determining the *methods* of execution at issue in the underlying Lethal Injection Litigation. That authority falls exclusively to CDCR under the oversight of the Governor. (Pen. Code, §§ 3604, 5054.)

Any general interest in effectuating death verdicts, or protecting victims' rights, cannot justify their intervention in the federal case. A "general grant of authority" is "tempered by more specific statutes, which take precedence." (*In re Dennis H.*, 88 Cal.App.4th at p. 102.)

Notably, California law *does* authorize district attorneys to participate in a limited set of civil matters, expressly and "narrowly enumerat[ed]" by statute. (See *Rauber v. Herman* (1991) 229 Cal.App.3d 942, 947.) For example, the district attorney "must render legal services to local public entities as requested; prosecute or defend certain actions brought by or against the county auditor or treasurer; and prosecute actions for the recovery of debts, fines, penalties, and forfeitures; among other functions." (*Ibid*; see also *Abbott*, 9 Cal.5th at p. 652 [endorsing district attorney's involvement in civil litigation where "Legislature has created a scheme of overlapping enforcement authority" such that unfair competition claims may be raised by either the district attorney or the Attorney General or by other identified local authorities].) But where no express statutory authority exists, the courts may not imply it. (*Solus*, 224 Cal.App.4th at p. 44.)

3. The Governor and Attorney General Are the Only Proper Representatives of the State Interests in the Lethal Injection Litigation.

Here, the proper parties are already included in the (now-dismissed) Lethal Injection Litigation. Only the Attorney General is authorized to represent the interests of the State of California in the *Morales* litigation. The DAs do not represent these California defendants, nor could they.

The DAs here are public officials entrusted solely with the prosecution and enforcement of criminal laws absent any other express authority. (Gov. Code, §§ 26500–10, 26520–30 [duties of district attorneys]; see also *id.*, § 26521 [providing district attorneys with limited

authority to defend and prosecute certain specified suits irrelevant here].) The Attorney General has the authority to "prosecute or defend all causes to which the State, or any State officer is a party in his or her official capacity." (Gov. Code, § 12512.)

The Attorney General has the sole authority to represent state agencies and employees. (*Id*., § 11040, subd. (a).) This is consistent with United States Supreme Court authority on state-entity standing, recognizing that the State attorney general is typically authorized to represent the State's interest in federal court barring contrary State law provisions. (See *Hollingsworth v. Perry* (2013) 570 U.S. 693, 709–710 [reasoning that the State is a political corporate body that can act only through agents, typically the attorney general, unless state law provides otherwise].)

District attorneys have narrowly enumerated powers tangentially related to the relevant federal civil litigation here, which powers only support the conclusion that they do not have the authority to intervene in such litigation. (See, e.g., *People v. Wright* (2002) 99 Cal.App.4th 201 [courts must examine the structure of a statute, its object, and its policy].) For example, district attorneys may seek an execution date in Superior Court (Pen. Code, § 1227) and litigate in Superior Court to require CDCR to be ready to execute. (*Id.*, § 3604.1, subd. (c).) The permission granted under these narrow provisions cannot be expanded into a general grant of authority to join lawsuits that might in some fashion be related.

Persuasive federal authorities also support the prohibition on prosecutors representing state interests in federal civil rights litigation where the Attorney General is defending the state. (See *Harris v. Pernsley* (3d Cir. 1987) 820 F.2d 592, 600 (with respect to litigation of prison overcrowding, " . . . the District Attorney has no interest entitling him to litigate the plaintiffs' contention that the conditions in the Philadelphia

prison system are overcrowded."); see also *Harris v. Reeves* (3d Cir. 1991) 946 F.2d 214, 224 [same].)

Moreover, to the extent the DAs have any interest in the relevant federal case, those interests are the same as those of the Attorney General and the Defendants, and the DAs' interest is subordinate. (Cal. Const., art. VI, §§ 1, 13; Gov. Code, § 12550 [Attorney General has supervisory authority over District Attorneys].) Any such interest is certainly subordinate to the Governor's. (Cal. Const., art. V, § 1 ["supreme executive power"].)

Courts have also roundly rejected the contention that district attorneys who otherwise *lack* express statutory authority may step in to represent the state's interests due to purported limitations in the fulsome representation of the state's interests by the entity that *does* hold statutory authority. In *Solus*, the Fourth District Court of Appeal rejected the district attorney's assertion (endorsed by the state entity expressly authorized to enforce workplace safety standards) that "the Division [of Occupational Safety and Health] is essentially incapable of enforcing these Labor Code civil penalties in serious cases." (*Solus*, 224 Cal.App.4th at p. 45.) The Court recognized this argument as "serious[ly] flaw[ed]" because "the assertion that the Division cannot be expected to enforce these most serious civil penalty provisions is simply inconsistent with [*sic*] statutory scheme"].) (*Ibid.*) The statutory scheme is controlling. District attorneys may not step in to represent the state's interests merely because they purport to lack confidence in another entity's representation of those same interests.

4. Policy Considerations Strongly Urge a Finding That the DAs Lack Authority to Intervene Here.

The DAs' intervention here would open the floodgates to intervention by district attorneys in all manner of cases typically

represented by the Attorney General, such as other civil rights litigation against the state. The Fourth District Court of Appeal considered this fact in rejecting a district attorney's initiative to bring a civil action in an arena otherwise relegated to the State's Division of Occupational Safety and Health: "the prosecutor could presumably usurp the Division's *own discretion* to determine, through its administration process" the appropriateness of civil penalties. (*Solus*, 224 Cal.App.4th at p. 44 [rejecting the district attorney's authority to bring a civil claim even where endorsed by the governmental entity with appropriate statutory authority], emphasis in original.) Relatedly, the DAs' intervention here would mean that subordinate political entities (district attorneys) would be authorized to intrude on the defense a superior entity (the Attorney General) undertakes in litigation against State entities. This is contrary to the State Constitution. (Cf. Cal. Const., art. V, § 13 [making the Attorney General the chief law enforcement officer of the state and conferring supervisory authority over district attorneys].) It is also untenable. In this case, the subordinate entities seeking to intervene comprise only three of the State's fifty-eight counties, yet seek to intervene in a statewide challenge.

Weighing these and other policy considerations, the Legislature has strictly limited the authority of district attorneys in civil litigation:

> [T]he 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 parameters of these authorizations.

(*Safer*, 15 Cal.3d at p. 236.) The Legislature has "affirmatively specif[ied] the circumstances in which a district attorney *can* pursue claims in the civil

arena, not the circumstances in which he *cannot*." (*Solus*, 224 Cal.App.4th at p. 42, emphasis in original.)

After fourteen years of complex litigation, and confronting changed circumstances, the parties in the underlying Lethal Injection Litigation collectively negotiated terms of an agreement to dismiss the litigation and established appropriate procedures if and when the litigation resumes. The legal system "depend[s] upon the self-interested actions of parties to pursue a dispute to its conclusion, or to decide, alternatively, that further time-consuming litigation serves no one's best interests." (*Safer*, 15 Cal.3d at p. 238.) The "district attorney's [attempted] intrusion into this arena . . . serves neither the public interest nor the statutory intent." (*Id.*; accord *Harris v. Pernsley* (3d Cir. 1987) 820 F.2d 592, 600 [holding that after a city engaged in extensive litigation around prison conditions, "the District Attorney, who has no role in the prison management system and cannot be held liable for any unlawful conditions, does not have the right to prevent the City from effectuating its reasoned judgment that it is best not to litigate the action."]; *Harris v. Reeves* (3d Cir. 1991) 946 F.2d 214, 227 [same].)

B. A Writ Is Appropriate as Petitioners' Only Recourse to Restrain the DAs from Their Unauthorized Actions.

A writ of mandate or prohibition is required to prevent the DAs from depriving the parties in the Lethal Injection Litigation of the benefits of their agreement, to curb ultra vires legal action by local officials purporting to act on behalf of the entire State, and to prevent the wasteful spending of California taxpayer dollars on further litigation. To obtain a writ of mandate, a petition must show: (1) "that the respondent has failed to perform an act despite a clear, present and ministerial duty to do so"; (2) "that the petitioner has a clear, present and beneficial right to that performance"; and (3) "that there is no other plain, speedy and adequate remedy." (*Riverside Sheriff's Ass'n v. Cty. of Riverside* (2003) 106

Cal.App.4th 1285, 1289; see also *Patterson v. Padilla* (2019) 8 Cal.5th 220, 250 [peremptory writ of mandate appropriate to direct state official to refrain from acting]; see generally *Camron v. Kenfield* (1881) 57 Cal. 550, 552 [similar standards for writ of mandate and prohibition]; *City Council of City of Beverly Hills v. Superior Court* (1969) 272 Cal.App.2d 876, 881 [same].) Petitioners satisfy these requirements and a writ must issue.

First, the DAs have failed to perform an act they have a duty to perform—operating within the bounds of their statutory authority. As previously discussed, absent any other grant of statutory authority, district attorneys may only act as a public prosecutor. (See, e.g., *Safer*, 15 Cal.3d at 237; Gov. Code, § 26500.) No such statutory authority here permits the DAs to intervene in federal civil litigation brought by private parties against State Defendants.

Second, the Petitioners have a clear right to be free from the DAs' unauthorized intervention. Petitioners are organizations operating statewide or in the counties where the DAs serve as the county prosecutors. Petitioners expend resources in the public interest to ensure that district attorneys act within their constitutional and statutory constraints.

Further, California courts have authorized "public interest" standing in petitions for extraordinary relief "where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty." (*Green v. Obledo* (1981) 29 Cal.3d 126, 144.) Under such circumstances, "[w]here the question is one of public right and the object of the mandamus is to procure enforcement of a public duty, the [petitioner] need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced." (*Bd. of Social Welfare v. Los Angeles Cty.*

(1945) 27 Cal.2d 98, 100–101.)[2] Here Petitioners, as members of the public, also have a right to be free from prosecutorial overreach regardless of whether they have a beneficial interest in the outcome.

Lastly, Petitioners have no other sufficient remedy. (Code Civ. Proc., §§ 1086, 1103, subd. (a); *Dix v. Superior Court* (1991) 53 Cal.3d 442, 450.) Only state courts can definitively determine the contours of *Safer*'s proposition that "a district attorney has no authority to prosecute civil actions absent specific legislative authorization." (*Abbott*, 9 Cal.5th at p. 652, quoting *Humberto S.*, 43 Cal.4th at p. 753 & fn. 12.) The key question here is a matter of California law that the Ninth Circuit is unlikely to reach; any federal court decision on this matter is also not binding on questions of state law. (*PGA W. Residential Assn., Inc. v. Hulven Internat., Inc.* (2017) 14 Cal.App.5th 156, 171, fn 9, as modified (Aug. 23, 2017) ["Decisions of lower federal courts are not binding on us on matters of state law," internal citations omitted].) Any other mechanism to seek a remedy aside from this extraordinary writ would introduce delay and risk inconsistent outcomes. Delay will result in the DAs continuing—via authority they do not possess—to seek to upset the Stipulated Resolution in the parallel Lethal Injection Litigation.

C. <u>This Court Can and Should Exercise Original Jurisdiction Here.</u>

Original jurisdiction before the Court of Appeal is proper here where the matter to be decided is (1) of sufficiently great importance and (2) requires immediate resolution. Original jurisdiction is also appropriate

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[2] Indeed, the public interest is such a strong consideration that "where the problem presented and the principle involved are of great public interest, the courts have deemed it appropriate to entertain the [writ of mandate] proceedings rather than to dismiss the same" even where the proceedings become "moot." (*Ellena v. Department of Ins.* (2014) 230 Cal.App.4th 198, 207, 178.)

because no single Superior Court may exercise jurisdiction over the three DAs representing different counties named herein. Any alternative could lead to inconsistent resolutions on a matter of statewide concern.

1. This Matter Is of Sufficiently Great Importance.

This Petition meets the first criterion of the test for the exercise of this Court's original jurisdiction because it presents issues of tremendous importance. (See, e.g., *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 340 [statewide referendum]; *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 253 [dissolution of redevelopment agencies]; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 219 [property taxes].)[3]

First, this case concerns the limits of the authority of district attorneys. The DAs' proposed intervention runs counter to longstanding Supreme Court precedent constraining district attorneys from acting in ways that the State Constitution does not specifically enumerate or the Legislature authorize.

Second, this case concerns the Legislature's careful balance of the allocation of authority between district attorneys on the one hand, and the Governor and the Attorney General on the other. The DAs are in effect taking the position that they represent the true public interest, not the

[3] The Supreme Court has identified as relevant factors in determining whether to exercise original jurisdiction: the public interest, likely recurrence, and need for "uniform resolution throughout the state." (*Ramirez v. Brown* (1973) 9 Cal.3d 199, 203) [exercising original jurisdiction to issue a writ of mandate to compel the voter registration for people with felony convictions], overturned on other grounds by *Richardson v. Ramirez* (1974) 418 U.S. 24.) Here, a challenge to the proper boundaries of prosecutorial authority is of great public interest, will likely recur, and could cause harm if not resolved uniformly throughout the state.

Governor or the Attorney General. This untenable position cannot be endorsed by the DAs successfully intervening.

Finally, at issue is the stability and enforceability of an agreement between people on death row and State officials, and one entered into to ensure the constitutionality of methods of execution, and orderly federal review.

The Court of Appeal and Supreme Court have issued writs in cases of comparable importance. For example, in *Brown v. Fair Political Practices Commission*, the Fourth District Court of Appeal exercised original jurisdiction to issue a writ to compel the Fair Political Practices Commission to withdraw an opinion and issue another permitting the mayor's participation in decisions concerning a redevelopment project near property he owned. ((2000) 84 Cal.App.4th 137, 140 fn. 2.) The Court used its discretion to exercise original jurisdiction "because (1) the petition raises novel issues of substantial public interest involving municipal government and the PRA; (2) the public interest in proceeding with redevelopment favors minimizing delay in resolving the issues; (3) there are no disputed issues of fact; and (4) the FPPC has not objected to proceeding in this court in the first instance." (*Ibid.*) Here, too, the public interest urges this Court to exercise jurisdiction because of the substantial public interest at the root of the petition.

2. This Matter Requires Immediate Resolution.

This Petition also satisfies the second criterion for exercise of this Court's original jurisdiction—the need for urgent resolution. (*San Francisco Unified School District v. Johnson* (1971) 3 Cal.3d 937, 944–945 [exercising original jurisdiction to consider school busing because of potential "delay" in compliance with desegregation order if court did not act]; *State Bd. of Equalization v. Watson* (1968) 68 Cal.2d 307, 311 [original jurisdiction to compel county assessor to make records available

to avoid "delays attendant upon first submitting the case to the lower courts"].) Prompt resolution of this issue raised herein is necessary as the underlying litigation has recently been dismissed pursuant to the Stipulated Resolution. The DAs seek to intervene for the specific purpose of undoing and renegotiating this dismissal with the aim of expediting death judgments and limiting time for judicial review of the constitutionality of the methods of execution. If the DAs are not enjoined, they would improperly use their three local offices—which, even collectively, represent a small minority of the People of California—under the guise of representing "the People" to undermine the careful bargain reached by the parties in the Lethal Injection Litigation.

The Ninth Circuit must answer whether the proposed intervention satisfies the Federal Rules of Civil Procedure—but it is not asked to determine the relative authority of state actors and county officials. And nor could it: this question is uniquely for California courts. (Cf. Fed. Rules Civ. Proc., rule 17, subd. (b) [capacity to sue or be sued is based on state law]*;* see also *Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1318, as modified (May 20, 1996) ["federal opinions . . . do not constitute binding interpretations of state law"].) In recent oral argument, the Ninth Circuit explicitly recognized the lack of clear guidance from state courts on the question of the authority of the DAs to intervene pursuant to state law. (*Cooper*, 2020 WL 6680722 at pp. 24–25 [(oral argument transcript].) Urgent action by this Court is the only way to ensure the proper constraints on the authority of district attorneys to intervene here in a matter of pressing concern.

3. This Court Should Exercise Jurisdiction Because No Individual Superior Court Can Properly Exercise Jurisdiction Over the Named Respondents.

The DAs hold office throughout local jurisdictions hundreds of miles apart across California. They are not collectively subject to the personal jurisdiction of one Superior Court. Original jurisdiction before an appellate court is therefore Petitioners' only recourse to pursue their claims without risk of inconsistent outcomes. (See, e.g., *Rivera v. Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 581 [exercising supervening jurisdiction and granting extraordinary writ to resolve "in a single, accelerated decision the controversies now split among three separate lawsuits in two separate counties and two separate appellate districts"].)

D. This Petition Is Not Barred by Laches.

This petition is not barred by laches. "The defense of laches requires unreasonable delay *plus* either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." (*Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 359, fns. omitted, emphasis added. See also *Farahani v. San Diego Cmty. Coll. Dist.* (2009) 175 Cal.App.4th 1486, 1494–1495.) "Prejudice is not presumed, it must be affirmatively demonstrated." (*Ragan v. City of Hawthorne* (1989) 212 Cal.App.3d 1361, 1368–1369.) Here there is neither unreasonable delay nor prejudice; and Petitioners have not acquiesced in the act that is subject to this writ.

First, there is no unreasonable delay as the DAs have not yet intervened, and only made clear their intention to undo the Stipulated Resolution at their Ninth Circuit oral argument in which they appealed from the denial of their intervention motion. They had not raised this issue in any prior briefing. (See *Piscioneri v. City of Ontario* (2002) 95

Cal.App.4th 1037, 1047 [recognizing laches as heavily fact-dependent].) Second, there is no prejudice. The intervention has not yet happened, and the question of whether intervention is permissible even under the Federal Rules remains outstanding. The issue is a legal issue that can only be resolved by state court, and thus any determination by the federal courts would not be binding on this question. Because it is a *legal* and not a *factual* issue, any delay does not hamper the DAs' defense of their actions. Lastly, Petitioners are organizations acting in the public interest seeking to ensure prosecutorial accountability. They have in no way acquiesced in the act at issue in this Petition. Indeed, they could not have done so as they are not parties to the underlying litigation.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue a writ ordering Respondent District Attorneys to cease their effort to intervene in the Lethal Injection Litigation.

DATED: March 5, 2021

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I, the undersigned counsel for Petitioners, relying on the word count function of Microsoft Word, the computer program used to prepare this document, certify that the foregoing Petition and Memorandum of Points and Authorities contains 10,714 words, excluding the words in the sections that California Rules of Court, rules 8.204(c)(3) and 8.486(a)(6) instruct counsel to exclude.

DATED: March 5, 2021

ACLU FOUNDATION OF NORTHERN CALIFORNIA

By: /s/ Emilou MacLean
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Attorney for Petitioners

IN THE FIRST DISTRICT COURT OF APPEAL
OF THE
STATE OF CALIFORNIA

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, CONGREGATIONS ORGANIZED FOR PROPHETIC ENGAGEMENT, RIVERSIDE ALL OF US OR NONE, STARTING OVER INC., AND SILICON VALLEY DE-BUG

Petitioners,

v.

SAN MATEO COUNTY DISTRICT ATTORNEY STEPHEN WAGSTAFFE, SAN BERNARDINO COUNTY DISTRICT ATTORNEY JASON ANDERSON, AND RIVERSIDE COUNTY DISTRICT ATTORNEY MICHAEL HESTRIN, IN THEIR OFFICIAL CAPACITIES

Respondents.

DECLARATION OF SERVICE

FOR

PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

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DECLARATION OF SERVICE

American Civil Liberties Union of Northern California, et al. v. San Mateo County District Attorney Stephen Wagstaffe, et al.

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is One Montgomery Street, Suite 3000, San Francisco, CA 94104-5500.

On March 5, 2021, I served true copies of the following document(s) described as

PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

on the interested parties in this action as follows:

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BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address kcochran@coblentzlaw.com to the persons at the e-mail addresses listed in

the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 5, 2021, at San Francisco, California.

Kate A. Cochran

American Civil Liberties Union of Northern California, et al. v. San Mateo County District Attorney Stephen Wagstaffe, et al.

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 293 8th St #3, San Francisco, CA 94103.

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BY PERSONAL SERVICE: I personally delivered the document(s) to the person at the addresses listed in the Service List. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some

person not less than 18 years of age between the hours of eight in the morning and six in the evening.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 5, 2021, at San Francisco, California.

_____

Express Network