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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION
12

13 MICHAEL ANGELO MORALES, et al.,

14 Plaintiffs,

15 v.

16 MATTHEW CATE,¹ Secretary of the
California Department of Corrections and
17 Rehabilitation, et al.,

18 Defendants.
19
20
21

Case No. 3:06-cv-219-RS
Case No. 3:06-cv-926-RS

**NOTICE OF MOTION AND MOTION
TO INTERVENE AND TO STAY
EXECUTION BY KEVIN COOPER;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Date: 7/25/2013
Time: 1:30 p.m.
Dept: 3
Judge: Seeborg
Trial Date: None Set
Date Action Filed: 1/5/2006

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28 ¹ Matthew Cate resigned on November 11, 2012. Jeffrey A. Beard was appointed as Secretary on December 27, 2012.

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1 TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on May 9, 2013, at 1:30 p.m., or as soon thereafter as
3 counsel may be heard, before the Honorable Richard Seeborg in Courtroom 3 of the United States
4 District Court for the Northern District of California, located at 450 Golden Gate Avenue, San
5 Francisco, California, Intervenor Kevin Cooper (“Mr. Cooper”) will and hereby does move this
6 Court, under Federal Rule of Civil Procedure 24, for an order granting him leave to intervene in
7 the present matter. Because he is a condemned prisoner on death row at San Quentin who has
8 exhausted his available appeals, Mr. Cooper claims an interest relating to the transaction that is
9 the subject of the action. Similar to intervenors Mitchell Carlton Sims, Stevie Lamar Fields,
10 David A. Raley, Tiequon A. Cox, and Robert Green Fairbank, Jr., Mr. Cooper is so situated that
11 disposing of the action may as a practical matter impair or impede his ability to protect that
12 interest. Furthermore, Mr. Cooper’s interests and claims share with the main action common
13 questions of law or fact.

14 Mr. Cooper also moves the Court for an order staying his execution and all preparations
15 relating thereto. There is a strong likelihood that the present matter will succeed on the merits,
16 the relative harm to the parties weighs in favor of Mr. Cooper, the equities weigh in Mr. Cooper’s
17 favor, and granting the stay will further the public’s interest in orderly review.

18 Mr. Cooper brings these motions pursuant to the United States Constitution, and all other
19 applicable statutes, case law and local rules. The motions are based on Plaintiff Morales’ and
20 Brown’s Fourth Amended Complaint for Equitable and Injunctive Relief Pursuant to 42 U.S.C.
21 § 1983, this Notice, this Memorandum of Points and Authorities, the Declaration of Norman C.
22 Hile and attached exhibits, the Request for Judicial Notice and attached exhibits, the Complaint in
23 Intervention filed in conjunction with this motion, and the Proposed Order, along with all exhibits
24 and papers filed in this action and any evidence received at the hearing.

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Dated: April 5, 2013

Respectfully submitted,

NORMAN C. HILE
KATIE C. DEWITT
LEO MONIZ
Orrick, Herrington & Sutcliffe LLP

By: /s/ Norman C. Hile

NORMAN C. HILE
Attorneys for Intervenor
KEVIN COOPER

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Kevin Cooper (“Mr. Cooper”), a condemned inmate on San Quentin’s death row who has
 3 exhausted his current appeals, seeks to intervene in this action pursuant to Rule 24(a) of the
 4 Federal Rules of Civil Procedure, because he “claims an interest relating to the . . . transaction
 5 that is the subject of the action, and is so situated that disposing of the action may as a practical
 6 matter impair or impede” his ability to protect that interest. Fed. R. Civ. P. 24(a)(2).

7 Alternatively, Mr. Cooper seeks to intervene pursuant to Rule 24(b) of the Federal Rules of Civil
 8 Procedure, because he “has a claim or defense that shares with the main action a common
 9 question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B).

10 Mr. Cooper further seeks temporary, preliminary, and permanent injunctive relief to
 11 enjoin the Defendants, their officers, agents, servants, and employees, and all persons acting in
 12 concert with them, from preparing to set or setting Mr. Cooper’s execution date or executing him
 13 by lethal injection using the lethal injection regulations promulgated as California Code of
 14 Regulations, Title 15, § 3349 and following, or any similar practices or protocol.

15 **I. ISSUES TO BE DECIDED**

16 1. Whether Mr. Cooper, like other condemned prisoners who have recently been
 17 granted leave to intervene in this action, may intervene as a plaintiff pursuant to Rule 24 of the
 18 Federal Rules of Civil Procedure, as a matter of right or permissively.

19 2. Whether Mr. Cooper should be granted a stay of execution on the same basis and
 20 to the same extent² as Plaintiffs Michael Angelo Morales, Albert Greenwood Brown, Mitchell
 21 Carlton Sims, Stevie Lamar Fields, David A. Raley, Tiequon A. Cox, and Robert Green Fairbank,
 22 Jr. (“Plaintiffs”), including, but not limited to, a stay of any preparations for the setting of an
 23 execution date for Mr. Cooper.

24 **II. SUMMARY OF RELEVANT FACTS**

25 Mr. Cooper is a condemned inmate in the custody of the California Department of
 26 Corrections and Rehabilitation (“CDCR”) as a result of a sentence of death recommended by a
 27 jury on March 1, 1985 and imposed by the San Diego Superior Court on May 15, 1985.

28 ² Mr. Cooper seeks the stay as described by the Court as applying to all Plaintiffs in its November 21, 2012 order.

1 (Declaration of Norman C. Hile (“Hile Decl.”) ¶ 2.) He is held on death row at San Quentin State
2 Prison, San Quentin, California, 94974. (*Id.*)

3 Mr. Cooper has filed numerous appeals with both the state and federal courts concerning
4 his capital conviction. (Hile Decl. ¶ 3.) His direct appeals and petitions for writ of habeas corpus
5 in state court were unsuccessful. (*Id.*) Likewise, Mr. Cooper’s federal habeas corpus petitions
6 have also failed. (*Id.*) Mr. Cooper’s last successive federal habeas petition was filed on April 1,
7 2004. The United States District Court for the Southern District of California denied Mr.
8 Cooper’s petition for writ of habeas corpus and reaffirmed the capital case judgment on May 27,
9 2005. (*Id.*) The Ninth Circuit Court of Appeals affirmed the district court’s denial of
10 Mr. Cooper’s habeas petition on December 4, 2007 and denied Mr. Cooper’s petition for
11 rehearing and petition for rehearing en banc on May 11, 2009.³ (*Id.*) In response, Mr. Cooper
12 filed a petition for writ of certiorari with the Supreme Court of the United States, which was
13 denied on November 30, 2009. (*Id.*) Therefore, Mr. Cooper has exhausted all of his state and
14 federal appeals barring any new factual developments that would allow Mr. Cooper to seek
15 another successive federal habeas petition. (*Id.*)

16 Mr. Cooper’s stance as a late stage death row inmate is evidenced by the notice received
17 from the California Governor’s Office on August 4, 2010, warning that the San Diego County
18 Superior Court would “soon schedule a date for Mr. Cooper’s execution” and requesting
19 notification of plans for a renewed application for clemency. (Hile Decl. Ex. A.) Mr. Cooper
20 filed a renewed request for clemency with then-Governor Arnold Schwarzenegger in December
21 of 2010, who passed the request to the incoming administration of Governor Edmund G. Brown,
22 Jr. (Hile Decl. ¶ 4.) Mr. Cooper then requested a stay of consideration to allow compilation of
23 further materials for Governor Brown, the process of which is still ongoing. (*Id.*) There are no
24

25 ³ Dissenting from the Ninth Circuit’s denial of rehearing en banc, Judge William Fletcher
26 declared, “[t]he State of California may be about to execute an innocent man.” *Cooper v.*
27 *Brown*, 565 F.3d 581, 581 (9th Cir. 2009) (Fletcher, J., dissenting from denial of reh’g en
28 banc, joined by Pregerson, Reinhardt, Paez, and Rawlinson, JJ.). Eleven Ninth Circuit judges
dissented in various ways from the denial of rehearing en banc. *See id.*; *id.* at 635 (Wardlaw,
J., dissenting from denial of reh’g en banc, joined by Pregerson, Reinhardt, Thomas, and
Berzon, JJ.); *id.* (Fisher, J., dissenting from denial of reh’g en banc, joined by Kozinski, C.J.,
and Pregerson, Graber, and Berzon, JJ.).

1 other actions currently pending in any court attacking Mr. Cooper's judgment and death sentence,
2 and Mr. Cooper currently does not have a stay of his execution from any court. (*Id.*)

3 On December 15, 2006, this Court issued an order finding that the "implementation of
4 California's lethal-injection protocol lacks both reliability and transparency." *Morales v. Tilton*,
5 465 F. Supp. 2d 972, 981 (N.D. Cal. 2006). The Court further determined that California's
6 actions and failures to act with respect to the implementation of its lethal-injection protocol have
7 resulted in an intolerable risk of a Constitutional violation. *Id.* To remedy this situation,
8 California would have to undergo a "meaningful" review of its processes, which "must be
9 undertaken with an openness to the idea of making significant improvements in the
10 'infrastructure' of executions." *Id.* at 983.

11 Thereafter, former Governor Arnold Schwarzenegger announced via a press release on
12 December 18, 2006 that he was "committed to doing whatever it takes to ensure that the lethal
13 injection process is constitutional." (ECF No. 291 Ex. A, at 1.) Mr. Schwarzenegger added that
14 his "administration [would] take immediate action to resolve [the] court[']s concerns." (*Id.*)

15 Then-Governor Schwarzenegger and the CDCR issued a revised Operational Procedure
16 770 ("2007 Lethal Injection Protocol") on May 15, 2007. On November 29, 2007, the Marin
17 County Superior Court declared invalid and enjoined the enforcement of California's 2007 Lethal
18 Injection Protocol. *Morales v. Cal. Dep't of Corr. & Rehab.*, No. CV 061436 (Super. Ct. Marin
19 Cnty., Cal. Nov. 29, 2007), *aff'd*, *Morales v. Cal. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 724,
20 741 (Cal. Ct. App. 2008).

21 On July 30, 2010, the California Office of Administrative Law ("OAL") promulgated
22 regulations of the Lethal Injection Protocol ("2010 Lethal Injection Protocol"), effective
23 August 29, 2010. Cal. Code Regs. tit. 15, § 3349. With the exception of a few additional
24 deficiencies, the 2010 Lethal Injection Protocol is substantially identical to the 2007 Lethal
25 Injection Protocol. The issuance of these new regulations was what triggered notice to
26 Mr. Cooper from the Governor's Office on August 4, 2010 referenced above. (Hile Decl. ¶ 4.)

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1 On August 30, 2010, the day after the 2010 Lethal Injection Protocol took effect, the
2 Riverside County Superior Court issued an execution warrant for Albert Brown. *People v.*
3 *Brown*, No. CR18104 (Super. Ct. Riverside Cnty., Cal. Aug. 30, 2010).

4 After litigation involving five different courts over a six-week period, the Ninth Circuit
5 directed this Court to reconsider its previous denial of Mr. Brown's motion to stay his execution
6 (ECF No. 420), and this Court then issued a stay (ECF No. 424). "Of particular importance" to
7 the Ninth Circuit was the fact that Mr. Brown's claims were "virtually identical" to the claims
8 that Plaintiff Morales had brought – claims that were already pending before this Court. (ECF
9 No. 420, at 8.)

10 On September 28, 2010, this Court found that the Lethal Injection Protocol "as
11 implemented in practice through and including the date of the evidentiary hearing in the 2006
12 *Morales* litigation created a 'demonstrated risk of severe pain.'" (ECF No. 424, at 4.) Based on
13 its limited opportunity to compare the 2007 Lethal Injection Protocol and the 2010 Lethal
14 Injection Protocol, the Court also found "a significant dispute" as to whether there was a
15 meaningful difference between the two protocols other than as to the physical facility in which
16 executions are to take place. (*Id.* at 5.) This Court further indicated that it "intend[ed] to
17 undertake . . . review . . . as quickly as is reasonably possible" of the claims raised by Mr.
18 Morales and Mr. Brown. (*Id.* at 8.)

19 On October 8, 2010, Mr. Morales and Mr. Brown filed a Fourth Amended Complaint for
20 Equitable and Injunctive Relief ("Fourth Amended Complaint") pursuant to 42 U.S.C. § 1983 in
21 this matter. (ECF No. 428.) On October 25, 2010, Defendants moved to dismiss the Fourth
22 Amended Complaint. (ECF No. 430.) The Court denied the motion to dismiss on December 10,
23 2010. (ECF No. 461.)

24 On November 16, 2010, in response to an inquiry by the Court and after the Court
25 expressed concerns that the setting of future executions across California would result in
26 disorderly litigation such as occurred with Albert Brown, Defendants' counsel, the chief law
27 enforcement officer of the State of California, assured the Court that no execution dates would be

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1 set in California until the litigation of this matter was concluded. (ECF No. 556 Ex. C, at 3-10.)⁴
 2 In a discussion with respect to whether other death row inmates who have exhausted their appeals
 3 but who are not plaintiffs to this action were protected by this promise, Defendants' counsel
 4 affirmed that such interested parties could rely on these assurances. (*Id.* at 9-10.)

5 At a March 4, 2011 hearing, and in response to a stipulated intervention sought by David
 6 Raley (ECF No. 511), this Court reiterated that there is "an agreement which has been made by
 7 the state in this case that they will not attempt to execute anyone until after this case is concluded
 8 at the district court level. And I think that's an agreement that can be relied upon by anyone who
 9 is an interested party." (ECF No. 556 Ex. D, at 60-61.)

10 On November 22, 2010, Defendants filed a notice informing the Court and the parties,
 11 pursuant to this Court's order of October 5, 2010, that the CDCR had ordered 521 grams of
 12 sodium thiopental that would expire in 2014. (ECF No. 455.) Defendants thereafter filed another
 13 notice stating that the shipment had been delayed, and Defendants finally received the sodium
 14 thiopental on January 20, 2011. (ECF No. 474.) Defendants secured an execution team on or
 15 about October 17, 2011. (ECF No. 531.)

16 In response to this illicit importation, several death row inmates brought an action in
 17 United States District Court for the District of Columbia challenging the Food and Drug
 18 Administrations' ("FDA") non-regulation of the importation of sodium thiopental described
 19 above. (Hile Decl. ¶ 5.) Mr. Cooper eventually joined this case as a plaintiff, and on March 27,
 20 2012, the United States District Court for the District of Columbia declared that the Food and

21 _____
 22 ⁴ Defendants' counsel had previously filed a written statement on November 10, 2010, specifying
 the following:

23 Defendants address Plaintiffs' request that any stay address the possibility of execution dates
 24 being sought during the course of a stay. Under California law, the named Defendants in this
 matter are not legally responsible for setting execution dates. Rather, an execution date is set by
 a superior court following a request and appropriate showing by a district attorney.
 25 Nevertheless, the Office of the Attorney General, in its role as counsel for the People of the
 State of California and apart from its representation of the Defendants here, does coordinate the
 26 setting of execution dates and exercises a supervisory role over the district attorneys. The
 Attorney General, in his capacity as counsel for the People and because of this pending
 27 litigation, can represent that he will not advise the district attorneys to request execution dates
 until the earlier of either: (1) thirty days after the conclusion of any further evidentiary hearing
 28 in this present action, or (2) a judgment is entered by this Court in this matter.
 (ECF No. 446, at 4.)

1 Drug Administration (“FDA”) had acted improperly in permitting the importation of thiopental
2 for the purposes of executions, and it ordered the FDA to retrieve all imported thiopental. *See*
3 *Beatty v. Food & Drug Admin.*, 853 F. Supp. 2d 30, 43 (D.D.C. 2012). Pursuant to the district
4 court’s order, the FDA asked the CDCR in a letter dated April 6, 2012 to send any foreign-
5 manufactured thiopental in its possession to the FDA. (ECF No. 557 Ex. J.) To Mr. Cooper’s
6 knowledge, the CDCR has not returned the thiopental to the FDA, and the FDA and Department
7 of Health and Human Services are appealing the decision in the United States Court of Appeals
8 for the District of Columbia Circuit. (*See* ECF No. 558 Ex. K.)

9 In early 2011, Mr. Cooper filed a motion to intervene in litigation brought by Albert Sims
10 in Marin County Superior Court challenging California’s execution protocol, Cal. Code Regs.
11 tit. 15, §§ 3349 *et seq.* (Hile Decl. ¶ 6.) The Marin County Superior Court granted Mr. Cooper’s
12 motion to intervene on July 29, 2011. (*Id.*) On December 19, 2011, the Marin County Superior
13 Court held that the CDCR’s execution protocol was improperly enacted under California’s
14 Administrative Procedures Act (“APA”). (*Id.*) The Superior Court entered a judgment with an
15 injunction on February 21, 2012, permanently enjoining the CDCR “from carrying out the
16 execution of any condemned inmate by lethal injection unless and until new regulations
17 governing lethal injection executions are promulgated in compliance with the Administrative
18 Procedures Act.” (Hile Decl. Ex. C.) The CDCR appealed that judgment and in papers filed with
19 the 1st Appellate District stated that it would be reviewing the possibility of a single-drug
20 execution protocol during the appeal. (Hile Decl. Ex. D, at 2.)

21 On December 29, 2010, Plaintiffs Sims and Fields moved to intervene and for stays of
22 executions in the instant action. (ECF No. 467.) The Court found that “Sims and Fields are
23 similarly situated to Morales and Brown in that they are condemned prisoners whose executions
24 are not otherwise stayed and whose claims in their complaint in intervention are virtually
25 identical to those asserted by Morales and Brown.” (ECF No. 473, at 1-2.) The Court
26 accordingly granted their motions to intervene on January 19, 2011. (*Id.* at 2.)

27 On March 4, 2011, a stipulation allowing the intervention and stay of execution in the
28 instant action for Plaintiff Raley was filed with this Court. (ECF No. 511.)

1 On May 1, 2012, the District Attorney for the County of Los Angeles (“L.A. County
2 District Attorney”) moved the Los Angeles County Superior Court for an order requiring the
3 CDCR to develop a single-drug execution protocol without APA approval and to set execution
4 dates for Mitchell Sims and Tiequon Cox under a one-drug method, notwithstanding this Court’s
5 prior stay as to Mr. Sims. (ECF No. 559 Ex. L.)

6 On May 16, 2012, Mr. Cox moved to intervene in the instant litigation and requested that
7 this Court stay his execution. (ECF No. 535.)

8 On July 6, 2012, the San Mateo County District Attorney filed a motion in San Mateo
9 County Superior Court seeking to compel the CDCR to execute Plaintiff Fairbank by a one-drug
10 lethal injection or show cause why such execution cannot be performed.⁵ (ECF No. 556 Ex. A.)

11 On August 23, 2012, Mr. Fairbank moved to intervene and sought a stay of execution in
12 the instant action. (ECF No. 555.) Defendants opposed Mr. Fairbank’s motion. (ECF No. 561.)

13 On August 10, 2012, this Court adopted the parties’ joint proposed schedule, vacating the
14 stipulated schedule and ordering that “[t]he parties shall submit a new proposed schedule within
15 thirty days after (1) viable lethal-injection regulations are in place or (2) the Marin Superior
16 Court’s decision invalidating the regulations, *Sims v. Cal. Dep’t of Corr. & Rehab*, No.
17 CIV 1004019 (Cal. Super. Ct. Marin Cnty. Feb. 21, 2012), is overturned on appellate review,
18 whichever occurs first.” (ECF No. 554.)

19 On November 6, 2012, the voters of California rejected Proposition 34, a ballot initiative
20 that would have repealed the death penalty in California and replaced it with life without the
21 possibility of parole. (See Cooper’s RJN, Ex. B [California Secretary of State Debra Bowen,
22 *Statement of Vote Summary Pages 13* (2012), available at
23 <http://www.sos.ca.gov/elections/sov/2012-general/06-sov-summary.pdf>].)

24 On November 21, 2012, this Court issued an order approving the stipulation to intervene
25 and for a stay by Plaintiff Raley, and granting the motions of Plaintiffs Cox, and Fairbank to

26 ⁵ The San Mateo County Superior Court denied the motion on November 19, 2012. (See
27 Cooper’s Request for Judicial Notice (“Cooper’s RJN”), Ex. A [Howard Mintz, *San Mateo*
28 *judge refuses to set execution date for condemned killer*, MercuryNews.com (Nov. 19, 2012,
12:39 p.m.), http://www.mercurynews.com/crime-courts/ci_22026806/san-mateo-judge-refuses-set-execution-date-condemned].)

1 intervene in this action and staying their executions. (ECF No. 563.) With respect to Mr. Raley,
2 the Court noted that it had deferred ruling on his stipulated intervention because judicial action
3 “appeared unnecessary in light of Defendants’ representations that they would not schedule
4 executions until the Court has had the opportunity to conduct an evidentiary hearing and to
5 review an operative revised lethal-injection regulation.” (*Id.* at 4.) However, recognizing that
6 county district attorneys are not bound by Defendants’ representations and could seek orders
7 allowing them to conduct executions, the Court deemed it appropriate to act on the pending
8 motions. (*See id.*) The Court concluded that Mr. Raley, Mr. Cox, and Mr. Fairbank were, “for
9 purposes of the present litigation, identically situated” to Plaintiffs Morales, Brown, Sims, and
10 Fields, and therefore granted their motions to intervene and stayed their executions. (*Id.*)

11 In its ruling, the Court observed that although Defendants had stipulated to Mr. Raley’s
12 intervention and stay of execution, Defendants nevertheless opposed the motions of the
13 “identically situated” Mr. Cox and Mr. Fairbank. (*Id.*) The Court was unimpressed by
14 Defendants’ assertions that Mr. Cox and Mr. Fairbank were adequately represented by the
15 existing Plaintiffs and that their motions were premature, noting that “Defendants could have
16 made these arguments in connection with Sims, Fields, and Raley, and there is no explanation for
17 Defendants’ shift to this seemingly inconsistent position.” (*Id.* at 5.) Furthermore, in light of “the
18 course of the present litigation—particularly in regards to Brown nearly being executed,” the
19 Court concluded that Defendants’ position was “wrong on the merits.” (*Id.*)

20 Following the Court’s ruling and given the failure of Proposition 34 and the reactivation
21 of this case, Mr. Cooper decided it was necessary for him to seek intervention in the instant
22 action. (Hile Decl. ¶ 8.) Thereafter, counsel for Mr. Cooper sought a stipulation from counsel for
23 Defendants in this case to intervene and for a stay of execution identical to that which Defendants
24 stipulated to and submitted to this Court for Mr. Raley. (Hile Decl. ¶ 8; *see* ECF No. 511.) On
25 December 11, 2012, Deputy Attorney General Michael J. Quinn notified Mr. Cooper’s counsel
26 that Defendants refused to so stipulate. (Hile Decl. ¶ 8.)

27 Since nothing now prevents the San Bernardino County District Attorney from seeking a
28 date of execution for Mr. Cooper, as the L.A. County District Attorney has done with respect to

1 Plaintiffs Sims and Cox, and as the San Mateo County District Attorney has done with respect to
 2 Plaintiff Fairbank, Mr. Cooper seeks permission to intervene in this case and a stay of execution.
 3 Mr. Cooper is intimately aware of the importance of obtaining this relief, as he came within hours
 4 of execution on February 10, 2004, before the Ninth Circuit Court of Appeals, acting en banc,
 5 granting his relief for an emergency stay. (Hile Decl. ¶ 11.) By this motion, Mr. Cooper also
 6 seeks to preclude any future objection by Defendants that Mr. Cooper is not entitled to intervene
 7 or to a stay of execution due to “inexcusable delay.”⁶

8 **III. ARGUMENT**

9 **A. Mr. Cooper’s Motion To Intervene Should Be Granted.**

10 Plaintiffs Morales and Brown’s Fourth Amended Complaint for Equitable and Injunctive
 11 Relief is incorporated herein by reference. (See Hile Decl. Ex. E.) Mr. Cooper joins in the Fourth
 12 Amended Complaint in all its particulars as it currently is set forth.

13 A federal court must permit intervention as of right by anyone who files a timely motion
 14 and who “claims an interest relating to the . . . transaction that is the subject of the action, and is
 15 so situated that disposing of the action may as a practical matter impair or impede the movant’s
 16 ability to protect its interest, unless existing parties adequately represent that interest.” Fed. R.
 17 Civ. P. 24(a)(2). Alternatively, “a court may grant permissive intervention where the applicant
 18 for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and
 19 (3) the applicant’s claim or defense, and the main action, have a question of law or a question of
 20 fact in common.” *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996); see
 21 also Fed. R. Civ. P. 24(b).

22 Here, Mr. Cooper satisfies the standards both for intervention as of right and for
 23 permissive intervention.

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 27 ⁶ Although Defendants did not raise this objection to Mr. Brown’s motion for intervention and
 28 for a stay of execution in this Court, Defendants did untimely raise it in their later-withdrawn
 Petition for Writ of Mandamus to the Ninth Circuit in *Cate v. United States District Court*
 (*Morales & Brown*), Case No. 10-72977.

1 **1. Mr. Cooper's Motion To Intervene Is Timely.**

2 Mr. Cooper's motion to intervene is timely under the standards applicable to intervention
3 as of right and to permissive intervention. In determining whether a motion to intervene is
4 timely, courts consider three factors: "the stage of the proceedings, the prejudice to existing
5 parties, and the length of and reason for the delay." *League of United Latin Am. Citizens v.*
6 *Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997); *see also* Fed. R. Civ. P. 24(b)(3). All three factors
7 weigh in favor of granting Mr. Cooper's motion to intervene.

8 **a. An Analysis Of The Stage Of The Proceedings Favors**
9 **Mr. Cooper's Intervention Request.**

10 First, despite the passage of time since the origination of this action, this matter is still in
11 its initial stages of review, as evidenced by numerous court orders. For example, on August 10,
12 2012, the Court adopted the parties' request that the then-current scheduling order be vacated and
13 that a new scheduling order not be proposed until thirty days after either viable lethal-injection
14 regulations are in place or the Marin County Superior Court's decision invalidating the
15 regulations is overturned on appeal. (ECF No. 554.) Discovery, too, remains stayed. (ECF No.
16 534.) Moreover, the propriety of allowing intervention at this procedural junction is further
17 demonstrated by the Court's recent grant of the motions to intervene of three other inmates,
18 David A. Raley, Tiequon A. Cox, and Robert Green Fairbank, Jr. (ECF No. 563.) Given the
19 stage of this litigation, there will be no additional delay to existing parties as a result of
20 Mr. Cooper's intervention. *See Martinez v. City of Oxnard*, 229 F.R.D. 159, 163 (C.D. Cal.
21 2005) (permitting intervention while discovery was ongoing).

22 **b. Mr. Cooper's Intervention Will Not Prejudice The Existing**
23 **Parties.**

24 Further, allowing Mr. Cooper's intervention at this time is appropriate as the existing
25 parties will not otherwise be prejudiced by Mr. Cooper's intervention, because Mr. Cooper does
26 not seek to "relitigate matters which have previously been litigated," raise any claims other than
27 those raised by existing Plaintiffs, or assert any claims against them. *United States v. Oregon*,
28 745 F.2d 550, 553 (9th Cir. 1984) (holding that the state of Idaho could intervene in litigation

1 concerning fishing on the Columbia River when “Idaho has disclaimed any intent to relitigate
2 matters which have previously been litigated, to raise any claims unrelated to the Tribes’ treaty
3 fishing rights, or to assert any claims against the other states”). Moreover, Mr. Cooper’s claims
4 are identical in all material aspects to those claims already asserted in the Fourth Amended
5 Complaint, and Mr. Cooper intends to work cooperatively with counsel for the existing Plaintiffs
6 in prosecuting the instant action. (Hile Decl. ¶¶ 9-10.) This intended cooperation with existing
7 Plaintiffs further prevents any prejudice to the existing parties.

8 c. **Mr. Cooper Did Not Unreasonably Delay In Bringing His**
9 **Intervention Motion.**

10 Finally, Mr. Cooper has not unreasonably delayed in bringing his motion to intervene. On
11 the contrary, a brief review of Mr. Cooper’s litigation history makes clear that, far from sitting on
12 his rights, Mr. Cooper has been actively engaging in litigation to protect those rights. As such,
13 Mr. Cooper’s motion to intervene in the instant action once it was determined that the California
14 public would not invalidate the death penalty under Proposition 34 and that intervention in the
15 case would be possible due to the reactivation of the case pursuant to the Court’s November 21,
16 2012 order, is timely.

17 First, the State of California’s current execution protocol that is the subject of the instant
18 litigation did not become effective until August 29, 2010. Cal. Code Regs. tit. 15, § 3349. In
19 response, Mr. Cooper subsequently intervened in a state case in Marin County Superior Court
20 challenging the execution protocol under the state Administrative Procedures Act. (Hile Decl.
21 ¶ 6.) This Court has recognized that the validity of the promulgation of the execution protocol is
22 a prerequisite to its evaluation of the constitutionality of the implementation of that protocol, such
23 that Mr. Cooper should not be penalized for first pursuing the Administrative Procedures Act
24 litigation. (See ECF No. 554.) The Marin County Superior Court declared the state’s failure to
25 comply with the Administrative Procedure Act in promulgating its execution protocol on
26 February 21, 2012, a judgment which the Attorney General is in the process of appealing. (See
27 Hile Decl. Exs. C, D.)

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1 Mr. Cooper has also sought to challenge the legality and efficacy of the sodium thiopental
2 imported by the CDCR in a lawsuit against the FDA filed in the District of Columbia. (Hile Decl.
3 ¶ 5.) This lawsuit, likewise, resulted in a grant of summary judgment for those challenging the
4 illicit importation, a decision that is undergoing the appellate process in the D.C. Circuit. (ECF
5 No. 558 Ex. K.)

6 Moreover, Mr. Cooper should not be punished for his reliance on Defendants'
7 representations that the Attorney General would not advise district attorneys to request execution
8 dates until the earlier of thirty days after any evidentiary hearing in this matter had concluded or a
9 judgment had been entered by the Court. (ECF No. 446 at 4; *see also* ECF No. 556 Ex. C, at 3-
10 10.) Defendants' counsel in the past gave verbal assurances that no execution dates would be set
11 in California until this litigation was concluded and specifically affirmed that other death row
12 inmates who have exhausted their appeals, but who are not plaintiffs to this action, could rely on
13 these assurances. (ECF No. 556 Ex. C, at 3-10.) The propriety of relying on these assurances has
14 been recognized by this Court. (*See* ECF No. 556 Ex. D, at 60-61 [the Court noting in response
15 to the stipulation to intervene by Mr. Raley that there was "an agreement which has been made by
16 the state in this case that they will not attempt to execute anyone until after this case is concluded
17 at the district court level and I think that's an agreement that can be relied upon by anyone who is
18 an interested party."].)

19 Therefore, although Mr. Cox, Mr. Fairbank, and Mr. Raley all filed prior papers to
20 intervene, the Court deferred ruling on these motions as unnecessary, until the immediacy of the
21 need to rule on the motions became apparent as evidenced in the Court's November 21, 2012
22 order. (*See* ECF No. 563.) Moreover, prior to the failure of Proposition 34, it was not clear that
23 the Court would ever need to rule on the proposed interventions and/or reactivate the litigation, as
24 passage of Proposition 34 would have mooted the underlying litigation. (*See* Cooper's RJN Ex. B
25 [California Secretary of State Debra Bowen, *Statement of Vote Summary Pages 13* (2012),
26 *available at* <http://www.sos.ca.gov/elections/sov/2012-general/06-sov-summary.pdf>].)

27 However, as this Court recognized in its recent order, "Defendants' representations do not
28 provide a sufficient basis for the Court to continue to defer action," since county district attorneys

1 are not bound by these statements and may seek to conduct executions of condemned inmates
 2 who are not parties to this litigation and thus lack stays of execution. (*See* ECF No. 563, at 4.)
 3 Accordingly, Mr. Cooper now promptly seeks intervention, prior to the setting of any execution
 4 date, in order to avoid putting this Court in the position in which it was placed by Mr. Brown's
 5 scheduled execution in 2010.

6 **2. This Court Must Grant Intervention To Mr. Cooper As Of Right.**

7 As set forth above, a federal court must permit intervention as of right by anyone who
 8 files a timely motion and "claims an interest relating to the . . . transaction that is the subject of
 9 the action, and is so situated that disposing of the action may as a practical matter impair or
 10 impede the movant's ability to protect its interest, unless existing parties adequately represent that
 11 interest." Fed. R. Civ. P. 24(a)(2).

12 **a. Mr. Cooper's Interests In This Matter Are Identical To Those**
 13 **Of Plaintiffs Morales, Brown, Sims, Fields, Raley, Cox, And**
 14 **Fairbank.**

15 Mr. Cooper joins in the Fourth Amended Complaint filed on behalf of Mr. Morales and
 16 Mr. Brown on October 8, 2010 and notes that all questions of law and fact related to Mr.
 17 Cooper's claims are identical in all material aspects to those in the Fourth Amended Complaint.
 18 Like Morales, Brown, Sims, Fields, Raley, Cox, and Fairbank, Mr. Cooper is a late stage inmate
 19 sentenced to death who has exhausted all his appeals. Further, like Morales, Brown, Sims, Fields,
 20 Raley, Cox, and Fairbank, Mr. Cooper is at risk of being subjected to the unconstitutional
 21 application of the execution protocols as described within the Fourth Amended Complaint and
 22 Mr. Cooper's Complaint in Intervention. Therefore, Mr. Cooper's interests in the instant
 23 litigation are identical in all material aspects to those of Plaintiffs Morales, Brown, Sims, Fields,
 24 Raley, Cox, and Fairbank, such that Mr. Cooper is properly subject to intervention as a matter of
 25 right.

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1 **Without Intervention, Mr. Cooper Is Practically Impaired And**
2 **Impeded From Protecting His Fifth, Eighth, And Fourteenth**
3 **Amendment Interests In Avoiding Execution By An**
4 **Unconstitutional And Arbitrary Procedure.**

5 Mr. Cooper must be allowed to intervene in order to protect his interests. Intervention as
6 of right must be granted where, as here, the disposition of the action would put the movant at a
7 practical disadvantage in protecting the movant's interest. *See United States v. Oregon*, 839 F.2d
8 635, 638 (9th Cir. 1988) (intervention as of right is proper when factual determinations in lawsuit
9 challenging conditions of state mental health facility would have persuasive *stare decisis* effect in
10 subsequent litigation by residents of facility); *Citizens for Balanced Use v. Mont. Wilderness*
11 *Ass'n*, 647 F.3d 893, 900-01 (9th Cir. 2011) (intervention mandated when the existing parties do
12 not adequately represent the movant's interests); *see also* Fed. R. Civ. P. 24(a)(2).

13 Here, although Mr. Cooper shares identical interests in the legal claims propounded by
14 Plaintiffs Morales, Brown, Sims, Fields, Raley, Cox, and Fairbank, his specific interest in
15 avoiding execution by an unconstitutional protocol – a protocol involving a demonstrated risk of
16 severe pain – remains inadequately represented by the existing plaintiffs. *See Citizens for*
17 *Balanced Use*, 647 F.3d at 900-01; Fed. R. Civ. P. 24(a)(2). As is clear from the treatment of the
18 various Plaintiffs already admitted to this action, Mr. Cooper must be allowed to intervene in
19 order to assure that his individual challenge to the lethal injection regulations will be heard and
20 that he individually will not be subjected to the unconstitutional application of the challenged
21 regulations. (*See* ECF No. 563, at 5:7-9.)

22 Unless Mr. Cooper is permitted to intervene, the State of California may well set an
23 execution date and may execute him while this lawsuit is pending. The likelihood that the State
24 of California will take such an action is demonstrated by similar actions it has undertaken in the
25 past with regard to Mr. Brown, Mr. Fairbanks, and Mr. Cox, all of whom were subject to attempts
26 to execute them prior to this Court's order allowing their intervention and staying their individual
27 executions. Therefore, Mr. Cooper has demonstrated that he meets the requirements for
28 intervention as a matter of right and this Court should grant his request accordingly.

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1 **3. Mr. Cooper Meets The Standards For Permissive Intervention.**

2 “[A] court may grant permissive intervention where the applicant for intervention shows
3 (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant’s claim or
4 defense, and the main action, have a question of law or a question of fact in common.” *Glickman*,
5 82 F.3d at 839; *see also* Fed. R. Civ. P. 24(b).

6 **a. This Court Has Independent Grounds For Jurisdiction.**

7 Mr. Cooper’s claims arise under the Eighth and Fourteenth Amendments to the United
8 States Constitution and 42 U.S.C. § 1983. This Court has independent grounds for jurisdiction
9 pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343 (civil rights).

10 **b. Mr. Cooper’s Motion Is Timely.**

11 As explained above, Mr. Cooper’s motion to intervene is timely.

12 **c. Mr. Cooper’s Claims Have Common Questions Of Law Or Fact**
13 **With Those Of The Main Action.**

14 Mr. Cooper’s claims and those of Plaintiffs in the Fourth Amended Complaint have the
15 requisite common questions of law and/or fact needed for this Court to properly grant permissive
16 intervention. In fact, Mr. Cooper’s Claims and those set forth in the Fourth Amended Complaint
17 are identical in all material aspects and share the following common questions of law and fact:

- 18 • Whether the lethal injection regulations violate the Eighth and Fourteenth
19 Amendments to the United States Constitution by creating a substantial risk that
20 condemned inmates will experience severe pain and suffering during executions.
21 (Hile Decl. Ex. E [Fourth Amended Complaint], at ¶¶ 22-23.)
- 22 • Whether the procedure for the remote administration of chemical substances, the
23 absence of standardized procedures for administration of the chemicals, the lack of
24 adequate training, screening and qualifications of the personnel on the execution
25 team, and the combination and amounts of the chemicals used in executions create
26 a grave, substantial and demonstrated risk that condemned prisoners will be
27 conscious during the execution process and, as a result, experience an
28 excruciatingly painful and protracted death. (*Id.* at ¶¶ 24-25, 27-31, 33-40.)

- 1 • Whether the lethal injection regulations fail to require the minimum expertise of
2 the execution team personnel necessary to ensure their proper performance. (*Id.* at
3 ¶¶ 26, 32.)
- 4 • Whether Defendants have deliberately chosen to conduct executions in a manner
5 that is not constitutionally compliant by selecting chemicals that cause
6 excruciating pain and therefore carry a substantial risk of serious harm to a
7 condemned inmate and by failing to take precautions to ensure that the personnel
8 involved in the execution process possess the training, experience, and expertise
9 necessary to administer the chemicals properly. (*Id.* at ¶ 120.)
- 10 • Whether Defendants have deliberately chosen to conduct executions by a
11 combination of chemicals and a procedure that carries a substantial risk of serious
12 harm when a feasible, readily implemented alternative method of execution is
13 available. (*Id.* at ¶¶ 5, 105(f), 106-109.)
- 14 • Whether the Lethal Injection Protocol provides “specific guidelines for the
15 administration of the three separate chemicals.” (*Id.* at ¶ 113.)
- 16 • Whether the Protocol contains adequate guidelines to ensure that the inmate is
17 “deeply anesthetized prior to injecting the second two drugs, or establish
18 procedures for determining if or when an additional dose of sodium pentothal
19 should be administered.” (*Id.* at ¶ 116.)
- 20 • Whether Mr. Cooper, like Plaintiffs Morales, Brown, Sims, Fields, Raley, Cox,
21 and Fairbank, is entitled to injunctive relief. (*Id.* at ¶ 7.)

22 If Mr. Cooper is not permitted to intervene in this action, an execution date could be set
23 for him and carried out pursuant to the current, flawed lethal injection protocol. Federal Rule of
24 Civil Procedure 24(b) permits this Court to grant a motion for intervention to avoid such an
25 unconstitutional state action. *See Hill v. W. Elec. Co., Inc.*, 672 F.2d 381, 390-92 (4th Cir. 1982)
26 (permitting intervention where the interests of the unnamed class members would no longer be
27 protected by the named class representatives). Therefore, having demonstrated compliance with

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1 the rule 24(b) requirements for permissive intervention, it is appropriate for this Court to grant
2 Mr. Cooper's request for permissive intervention.

3 **B. Mr. Cooper's Motion To Stay His Execution Should Be Granted.**

4 This Court should stay Mr. Cooper's execution and all preparations relating thereto by
5 extending to him the exact stay already in place for Plaintiffs Morales, Brown, Sims, Fields,
6 Raley, Cox, and Fairbank as evidenced by the Court's November 21, 2012 Order. Such a stay
7 will secure the orderly review in this Court that was ordered by the Ninth Circuit Court of
8 Appeals and will ensure that other state actors not bound by the representations made to the Court
9 by the California Attorney General's Office cannot seek Mr. Cooper's execution prior to the
10 completion of this litigation.

11 A plaintiff seeking a preliminary injunction must establish: (1) that he is likely to succeed
12 on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief;
13 (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest.
14 *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 21 (2008). Mr. Cooper meets these
15 standards to the same extent that Plaintiffs Morales, Brown, Sims, Fields, Raley, Cox, and
16 Fairbank did.

17 **1. Mr. Cooper Is Likely To Succeed On The Merits.**

18 Mr. Cooper's request for injunctive relief is likely to succeed on the merits. In its Order
19 staying Mr. Brown's execution after remand from the Ninth Circuit, this Court noted that the
20 State's prior execution protocol created a "demonstrated risk of severe pain." (*See* ECF No. 424,
21 at 4, 9.) Further, the Court found that the arguments of existing Plaintiffs as to Defendants'
22 revised protocol presented "substantial questions of fact as to whether at least some of the
23 deficiencies of O.P. 770 have been addressed *in actual practice*." (*Id.* at 7.)

24 Much like the attempt to execute Plaintiff Brown, which substantially deviated from
25 compliance with state law (*see generally* Exhibits to ECF No. 423.),⁷ Mr. Cooper faces the risk

26 ⁷ As noted during the Brown litigation, the few documents produced indicated numerous
27 deficiencies, including the complete lack of training in the mixing of the chemicals. Defendants
28 have never produced numerous training documents required to be maintained by the
regulations, such as chain of custody and sign in sheets, and have not produced any additional
training materials since January of 2011.

1 that the CDCR will again deviate from their ad hoc procedure in order to execute Mr. Cooper.
 2 The regulations suffer the deficiencies noted above and in the Complaint. Further, Mr. Cooper's
 3 claims are identical in all material aspects to the claims of Plaintiffs Morales, Brown, Sims,
 4 Fields, Raley, Cox, and Fairbanks, who have already been granted stays of execution. Therefore,
 5 it is appropriate that this Court determine that Mr. Cooper has adequately shown that he is likely
 6 to succeed on the merits.

7 **2. Absent A Stay Of Execution, Mr. Cooper Will Suffer Irreparable**
 8 **Harm.**

9 Mr. Cooper faces execution pursuant to the same – or worse – Lethal Injection Protocol
 10 that already has required constitutional review by this Court sufficient to grant stays of execution
 11 for Plaintiffs Morales, Brown, Sims, Fields, Raley, Cox, and Fairbank. Nothing has changed in
 12 this regard, and without a stay, Mr. Cooper faces the real possibility of cruel and unusual capital
 13 punishment.

14 **3. The Equities Are In Mr. Cooper's Favor And Granting The Stay**
 15 **Furtheres The Public's Interest In Orderly Review.**

16 As discussed above, Mr. Cooper brings this request for a stay promptly after this Court
 17 determined that Defendants' representations that an execution would not be sought were
 18 insufficient in light of the actions of county district attorneys in seeking to execute Mr. Sims,
 19 Mr. Cox, and Mr. Fairbank.

20 This Court granted intervention and a stay of execution for Plaintiffs Sims and Fields,
 21 stating in relevant part:

22 Both Sims and Fields are similarly situated to Morales and Brown
 23 in that they are condemned prisoners *whose executions are not*
 24 *otherwise stayed* and whose claims in their complaint in
 25 intervention are virtually identical to those asserted by Morales and
 26 Brown. Accordingly, Sims and Fields are entitled to intervene and,
 27 like Morales and Brown, to have their executions stayed until the
 28 present litigation is concluded.

(ECF No. 473 at 1-2 (emphasis added).) Like the other Plaintiffs already admitted to the instant
 action, Mr. Cooper also currently has no stay of execution in any court.

1 Furthermore, Mr. Cooper requests that this stay be entered shortly in order to prevent the
2 State of California from seeking to execute him before this Court has the opportunity to conduct
3 an orderly review of any proposed protocol. In 2006, this Court stated that a thorough review of
4 the process of executions was necessary and strongly suggested that the Governor take the lead in
5 conducting this review. In 2010, the Ninth Circuit and this Court both ruled that the review
6 process also requires independent and orderly judicial review. *See Morales v. Cate*, 623 F.3d 828,
7 829 (9th Cir. 2010) (“Timing is everything and the district court should take the time necessary to
8 address the State’s newly revised protocol in accord with Supreme Court authority.”). State
9 courts have ruled twice that the review of such protocol requires compliance with the state APA.

10 The California Attorney General has expressed twice in this Court that executions will not
11 be set until the Court’s review is completed. However, as this Court has determined, these
12 assurances are meaningless in light of the actions of individual district attorneys who are not
13 parties to these actions and not bound by Defendants’ representations. (*See* ECF No. 563 at 4.)
14 Individual district attorneys should not be permitted to circumvent the process of review that this
15 Court has determined must be conducted in order to comport with state law and the Constitution.
16 A stay of execution here will prevent such circumvention. There is no equity that favors the type
17 of “fire drill” approach to litigation that the Court saw in February 2006 and again in September
18 2010 during attempts to execute individuals who clearly have an interest in the outcome of the
19 instant litigation.

20 **IV. CONCLUSION**

21 For the foregoing reasons, Mr. Cooper respectfully requests that this Court grant his
22 motion to intervene and his motion to stay his execution and all preparations relating thereto.
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Dated: April 5, 2013

Respectfully submitted,
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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION
12

13 MICHAEL ANGELO MORALES, et al.,

14 Plaintiffs,

15 v.

16 MATTHEW CATE,¹ Secretary of the
California Department of Corrections and
17 Rehabilitation, et al.,

18 Defendants.
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Case No. 3:06-cv-219-RS
Case No. 3:06-cv-926-RS

**[PROPOSED] ORDER GRANTING
KEVIN COOPER'S MOTION TO
INTERVENE AND MOTION FOR
STAY OF EXECUTION**

Date: 7/25/2013
Time: 1:30 p.m.
Dept: 3
Judge: Seeborg
Trial Date: None Set
Date Action Filed: 1/5/2006

27 ¹ Matthew Cate resigned on November 11, 2012. Jeffrey A. Beard was appointed as Secretary
28 on December 27, 2012.

