

COPY

1 MICHAEL ROMANO
2 DIRECTOR
3 Three Strikes Project
4 Stanford Law School
5 559 Nathan Abbott Way
6 Stanford, CA 94305
7 CA Bar No. 232182
8 mromano@stanford.edu
9 Telephone: (650) 736-8670

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ORIGINAL FILED
Superior Court of California
County of Los Angeles

JAN 15 2021

Sherri R. Carter, Executive Officer/Clerk
By Jennifer De Luna, Deputy

6 ERWIN CHEMERINSKY
7 (ADMITTED IN ILLINOIS AND
8 DISTRICT OF COLUMBIA)
9 DEAN
10 U.C. Berkeley School of Law
11 Berkeley, CA 94720-7200
12 echemerinsky@law.berkeley.edu
13 Telephone: 510-642-6483
14 Facsimile: 510-642-9893

15 Attorneys for Amici Curiae current and former
16 elected prosecutors and Attorneys General

17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
18 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

19 THE ASSOCIATION OF DEPUTY
20 DISTRICT ATTORNEYS FOR LOS
21 ANGELES COUNTY,

22 Plaintiff and Petitioner,

23 v.

24 GEORGE GASCÓN, in his official capacity
25 as District Attorney for the County of Los
26 Angeles; LOS ANGELES COUNTY
27 DISTRICT ATTORNEY'S OFFICE; and
28 DOES 1 through 50, inclusive,

Defendants and Respondents.

Case No. 20STCP04250

PROOF OF SERVICE

Date: February 2, 2021

Time: 1:30 p.m.

Dept.: 85

Judge: Hon. James C. Chalfant

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Case No. 20STCP04250

**[PROPOSED] ORDER GRANTING
APPLICATION FOR PERMISSION FOR
CURRENT AND FORMER ELECTED
PROSECUTORS AND ATTORNEYS
GENERAL TO FILE AMICUS CURIAE
BRIEF IN OPPOSITION TO
PETITIONER'S APPLICATION FOR
PRELIMINARY INJUNCTION**

Case No. 20STCP04250

[PROPOSED] ORDER

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**APPLICATION FOR PERMISSION TO
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APPLICATION FOR PRELIMINARY
INJUNCTION**

Accompanying Documents: [PROPOSED]
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1 Amici, current and former elected local prosecutors and Attorneys General, respectfully apply
2 to this Court for permission to file the enclosed brief in opposition to the application for preliminary
3 injunction filed by Petitioner Association of Deputy District Attorneys for Los Angeles
4 (“Petitioner”).¹ “[T]he superior court, in exercising its traditional broad discretion over the conduct
5 of pending litigation, retain[s] the authority to determine the manner and extent of these entities’
6 participation as amici curiae that would be of most assistance to the court.” *In re Marriage Cases*, 43
7 Cal. 4th 757, 791 (2008).

8 Amici have a deep understanding of the important role that prosecutorial discretion plays in
9 the criminal justice system, and are extremely concerned that the injunction sought by Petitioner
10 would undermine, in unprecedented fashion, the longstanding discretion, constitutional authority and
11 responsibility of elected prosecutors.

12 Because the issues this case raises have national significance, amici come not only from
13 California, but also from jurisdictions across the country. Although amici’s views on particular policy
14 choices may differ, amici come together in the steadfast belief that an elected prosecutor cannot
15 effectively carry out his or her constitutional responsibilities if he or she cannot ensure
16 implementation by employees of officewide policies and is, instead, forced to charge offenses and
17 seek penalties that, in the elected prosecutor’s judgment, do not advance public safety or serve the
18 interests of justice. Amici are also intimately familiar with the challenges of effectively and
19 efficiently running an office in times of limited resources, as well as transforming office culture and
20 conceptions of justice; these challenges require decisions and leadership by the elected office head
21 and clear instructions that guide deputy discretion and avoid disparate results based on the views and
22 happenstance of the individual prosecutor in the case.

23 For all these reasons, amici have an interest in preserving the proper roles and responsibilities
24 in the criminal legal system, both between the elected official and his deputies, and between the
25

26 ¹ Respondents’ attorneys have consented to the filing of this brief. Petitioner’s attorneys were contacted by
27 both email and telephone to seek consent to file but have not responded to this request. No counsel for a party
28 authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution
intended to fund the preparation or submission of this brief. Moreover, none of amici, nor their counsel, made
a monetary contribution to this brief’s preparation or submission. Cal. Rules of Court, rule 8.200(c).

1 elected official and the judiciary. In the amicus brief accompanying this application, amici seek to
2 offer the broad perspective of numerous current and former elected prosecutors from around the
3 nation – a perspective that is currently absent from, but critical to, this litigation.

4 For the foregoing reasons, Amici respectfully request that the Court grant permission to file
5 the enclosed amicus brief in opposition to the Petitioner’s motion for preliminary injunction.

6
7 DATED: January 15, 2021

8 /s/ Michael Romano
9 MICHAEL ROMANO

10 Attorney for *Amici Curiae*
11 CURRENT AND FORMER ELECTED
12 PROSECUTORS AND ATTORNEYS GENERAL
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8 DEAN
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echemerinsky@law.berkeley.edu
10 Telephone: 510-642-6483
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INTEREST OF AMICI.....6

ARGUMENT7

I. All prosecutors – including California District Attorneys – have well settled discretionary authority to make decisions that are fundamental to the allocation of scarce resources and the pursuit of justice.10

II. Meaningful criminal justice reform requires elected prosecutors to implement and enforce policies to supervise their line attorneys’ exercise of discretion.14

III. Second-guessing the policy decisions of the elected prosecutor undermines local control and erodes the rights of voters to community self-governance.15

IV. Conclusion16

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1 **INTEREST OF AMICI**

2 Amici curiae, current and former elected prosecutors, file this brief in opposition to
3 Petitioner’s motion for a preliminary injunction.¹

4 As elected prosecutors and Attorneys General past and present, amici have a deep
5 understanding of the important role that prosecutorial discretion plays in the criminal justice system,
6 and we are extremely concerned that the injunction sought by Petitioner would undermine, in
7 unprecedented fashion, the longstanding constitutional authority and responsibility of elected
8 prosecutors.

9 Prosecutors are elected and sworn to uphold the law and protect public safety, and the policies
10 at issue here do just that. No prosecutor has the ability and resources to prosecute *every* case and
11 *every* violation of the law – nor should they. As such, it is well settled that elected prosecutors make
12 decisions about where and how limited resources are best exercised and what cases merit entry into
13 the justice system. A prosecutor’s broad discretion over whom to prosecute and what offenses to
14 charge also encompasses the ability to determine what penalties and sentence to seek, and whether to
15 pursue available sentencing enhancements, in order to best protect community safety and advance
16 justice. This authority is enshrined in separation of powers principles included in most state
17 constitutions, including California’s, and their federal counterpart. Furthermore, an elected district
18 attorney must be able to guide the exercise of discretion by his deputies and the use of inherently
19 limited criminal justice resources through transparent and straightforward policies. Indeed, the district
20 attorney is elected by the community to do exactly that – and is accountable to the voters for those
21 decisions.

22 Because the issues this case raises have national significance, amici come not only from
23 California, but also from jurisdictions across the country. Although amici’s views may differ as to
24 when and if a particular sentencing enhancement should be sought, amici come together in our
25 steadfast belief that an elected prosecutor cannot effectively carry out his or her constitutional

26 _____
27 ¹ Amicus participation in Superior Court is not uncommon, especially in writ proceedings, which routinely involve
28 complex legal issues of great public importance. *See, e.g. Padres Hacia Una Vida Mejor v. Davis*, 96 Cal.App.4th 1123,
1127-28 (2002) (amicus brief allowed in trial court mandamus proceeding); *Rosenberg v. Superior Court*, 67 Cal.App.4th
860, 864 (1998) (amicus participation allowed in Superior Court); *Coalition for Fair Rent v. Charles Abdenour*, 107
Cal.App.3d 97, 101 (1980) (noting that Superior Court had allowed amicus participation).

1 responsibilities if he or she cannot ensure implementation by employees of officewide policies and is,
2 instead, forced to charge offenses and seek penalties that, in the elected prosecutor’s judgment, do not
3 advance public safety or serve the interests of justice. Amici are also intimately familiar with the
4 challenges of effectively and efficiently running an office in times of limited resources, as well as
5 transforming office culture and conceptions of justice; these challenges require decisions and
6 leadership by the elected office head, and clear instructions that guide deputy discretion and avoid
7 disparate results based on the views and happenstance of the individual prosecutor in the case. For all
8 of these reasons, we are deeply troubled by the attempt by the Association of Deputy District
9 Attorneys for Los Angeles County to usurp the power of the elected district attorney and use the
10 courts to override the lawful, discretionary policy decisions of an official, chosen by the voters of Los
11 Angeles, to transform the criminal justice system in that community.

12 For all these reasons, amici have an interest in preserving the proper roles and responsibilities
13 in the criminal legal system, both between the elected official and his deputies, and between the
14 elected official and the judiciary. We offer our views here respectfully as friends of the Court.

15 A full list of amici is attached as Exhibit A.

16 **ARGUMENT**

17 Los Angeles County, which has more than 10 million residents, is home to the nation’s largest
18 local criminal justice system.² Over the past few years, the District Attorney in Los Angeles
19 implemented a number of “tough-on-crime” policies, seeking harsh sentences, including the death
20 penalty and gang enhancements, and opposed many criminal justice reform efforts.³ As a direct result
21 of these policies, Los Angeles County’s prison incarceration rate was well above the state average,
22 and over five times as high as that of San Francisco.⁴

23 In 2020, Los Angeles voters elected George Gascón, the former District Attorney of San
24 Francisco County. Gascón has long been committed to reforming the criminal justice system,

25 _____
26 ² Jessica Pishko, *How District Attorney Jackie Lacey Failed Los Angeles*, THE APPEAL (Nov. 12, 2019),
<https://theappeal.org/how-district-attorney-jackie-lacey-failed-los-angeles/>.

27 ³ *Id.*

28 ⁴ In 2016, Los Angeles County’s prison incarceration rate was 608 per 1,000 felony arrests. The statewide average was 446. San Francisco County’s rate was 119. *See* Center on Juvenile and Criminal Justice, *2016 Los Angeles and San Francisco prison incarceration rates*, California Sentencing Institute, <http://casi.cjcj.org/Adult/Los-Angeles> and <http://casi.cjcj.org/Adult/San-Francisco> (last visited Jan. 5, 2021).

1 reducing incarceration, and focusing on public safety rather than punishment for its own sake. During
2 his campaign, Gascón was open and transparent about his vision for the office and the changes to
3 prosecutorial practices he intended to implement. These reforms included ending death penalty
4 prosecutions, the use of money bail, and the criminalization of mental illness and homelessness,⁵ as
5 well as curtailing lengthy prison sentences and the use of sentencing enhancements⁶ – all objectives
6 consistent with the boundaries of the legal system and the sound exercise of prosecutorial discretion.
7 The Los Angeles community elected him, over opposition by the ADDA, to carry out these promises
8 and bring a new vision to the Los Angeles criminal legal system.⁷

9 Upon taking office, District Attorney Gascón immediately sought to reform a number of long-
10 standing prosecutorial practices in his office – practices that research shows had not simply ballooned
11 California’s incarcerated population, but also offered little if any benefit to public safety.⁸ In fact,
12 according to the FBI’s Uniform Crime Report and population data, between 2012 and 2018, violent
13 crime rates in Los Angeles County increased by 31%.⁹ Ultimately there is no research that shows
14 sentencing enhancements improve public safety, but there is evidence that excessive sentences
15

16 _____
17 ⁵ George Gascón for District Attorney, *On the Issues*, <https://www.georgegascon.org/on-the-issues/> (last visited Jan. 6, 2021).

18 ⁶ Daniel Nichanian, *How George Gascón Wants to Reform Los Angeles and Achieve “The Lowest Level of Intervention,”* THE APPEAL POLITICAL REPORT (Jan. 9, 2020),
19 <https://theappeal.org/politicalreport/how-george-gascon-wants-reform-los-angeles-district-attorney-election/>

20 ⁷ See, e.g., L.A. Times Editorial Board, *Endorsement: George Gascón for L.A. County District Attorney*, L.A. TIMES (Sept. 29, 2020) <https://www.latimes.com/opinion/story/2020-09-29/endorsement-george-gascon-for-la-county-district-attorney>;
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23 ⁸ See, e.g., Joshua A. Jones, *Assessing the Impact of “Three Strikes” Laws on Crime Rates and Prison Populations in California and Washington*, 4 INQUIRIES J. 2 (2012),
24 <http://www.inquiriesjournal.com/articles/696/2/assessing-the-impact-of-three-strikes-laws-on-crime-rates-and-prison-populations-in-california-and-washington> (summarizing studies showing that three strikes laws did not have any positive impact on crime rates); University of California – Riverside, *Three-strikes law fails to reduce crime*, Phys.org (Feb. 28, 2012), <https://phys.org/news/2012-02-three-strikes-law-crime.html> (reporting that three strikes law has not decreased the incidence of violent crime); California Legislative Analyst’s Office, *A Primer: Three Strikes - The Impact After More Than a Decade* (Oct. 2005), https://lao.ca.gov/2005/3_strikes/3_strikes_102005.htm (reporting that 3 strikes law increased jail and prison populations, lengthened prison terms, increased age of prisoners, increased racial disparities and cost the state 500 million dollars per year during the first 10 years after enactment but had no clear impact on crime rates or public safety).

25 ⁹ James Queally, *How Jackie Lacey’s and George Gascón’s time in office shapes the L.A. County D.A.’s race*, L.A. TIMES (Feb. 18, 2020) <https://www.latimes.com/california/story/2020-02-18/district-attorney-election-jackie-lacey-george-gascon-race>.

1 increase recidivism and therefore create more victims in the future.¹⁰

2 District Attorney Gascón was elected to reverse these trends, and his policies are based in
3 empirical evidence and designed to advance public safety, community health, and equal justice
4 throughout Los Angeles. Among the new policies were directives that sought to curtail the use of
5 several sentencing enhancements, including those that are among California’s most notorious,
6 draconian, and racially disparate penalties – gang enhancements, mandatory life sentences, and “three
7 strikes” enhancements.¹¹ These penalties have also shown little public safety benefit, while draining
8 much needed legal, judicial, police, jail, and state prison resources.

9 Now, some of Gascón’s employees are asking the court for permission to defy their new
10 boss.¹² But it is Gascón, as the elected District Attorney, who is responsible for policy decisions
11 within the office and accountable to voters, not his line prosecutors. *See* Cal. Gov. Code § 26500
12 (“The public prosecutor shall attend the courts, and within his or her discretion shall initiate and
13 conduct on behalf of the people all prosecutions for public offenses.”). To intervene on their behalf,
14 the court would necessarily need to intensely scrutinize purely prosecutorial functions, interfere with
15 administration within the District Attorney’s office, invade the well-settled discretion of elected
16 prosecutors, threaten principles of separation of powers, and thwart the will of the Los Angeles

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18 ¹⁰ Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration*, University of Michigan Working
Paper (August 18, 2015), <https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf>.

19 ¹¹ *Petitioner’s Ex Parte Application for a Temporary Restraining Order and an Order to Show Cause* (Dec. 30, 2020) at 2
20 (seeking a temporary restraining order enjoining George Gascón and the Los Angeles County District Attorney’s Office
21 from ordering compliance with “Any portion of the Special Directives that prohibit the Los Angeles County District
22 Attorney’s Office, or any of its Deputy District Attorneys or prosecutors, from pleading and proving prior strikes under
23 California’s Three Strikes Sentencing Initiative (Penal Code §§ 667(b)–(i), 1170.12); any portion of the Special
24 Directives that require the Los Angeles County District Attorney’s Office, or any of its Deputy District Attorneys or
25 prosecutors, to move to dismiss from any pending criminal action any of the following: any prior-strike enhancements
26 (Penal Code section 667(d), 667(e), 1170.12(a) and 1170.12(c)), including any second strikes and any strikes arising from
27 a juvenile adjudication; Any Prop 8 or “5-year prior” enhancements (Penal Code section 667(a)(1)) and “three-year prior”
28 enhancements (Penal Code section 667.5(a)); STEP Act enhancements (“gang enhancements”) (Penal Code section
186.22 et. seq.); special circumstances allegations resulting in an LWOP sentence; violations of bail or O.R. release
(Penal Code section 12022.1); firearm allegations pursuant to Penal Code section 12022.53; any portion of the Special
Directives that require the Los Angeles County District Attorney’s Office, or any of its Deputy District Attorneys or
prosecutors, to make a post-conviction motion to dismiss from any pending criminal action special circumstances
allegations under Penal Code section 190.1 to 190.5; and any portion of the Special Directives that require the Los
Angeles County District Attorney’s Office, or any of its Deputy District Attorneys or prosecutors, to move for leave to
amend the charging document in any pending criminal action for the purpose of removing any allegations that they would
otherwise be restrained and enjoined from moving to dismiss under Paragraphs 2 and 3.”)

¹² Because the Association of Deputy District Attorneys for Los Angeles County filed this action, rather than any actual
deputies themselves, how many of Gascón’s employees support the current litigation and agree in full with its position
and the many policies it challenges is unclear.

1 County electorate. This type of judicial interference in the discretionary policy decisions of an elected
2 prosecutor would be unprecedented, would strip the District Attorney of the inherent powers of his
3 office, and would deprive Los Angeles voters of the leadership and policy agenda they embraced at
4 the polls. Indeed, we could not find a single case in California where courts have overridden a
5 prosecutor’s decision *not* to file charges or sentence enhancements.

6 Amici, a group of current and former elected prosecutors from across the country, file this
7 brief to add their voices to this important issue and to underscore how the plaintiffs’ requested relief
8 is intrusive, harmful, and would undermine the exercise of prosecutorial discretion that is inherent in
9 the responsibility of any elected prosecutor and critical to the functioning of our justice system.

10 **I. All prosecutors – including California District Attorneys – have well settled**
11 **discretionary authority to make decisions that are fundamental to the allocation of**
12 **scarce resources and the pursuit of justice.**

13 “The capacity of prosecutorial discretion to provide individualized justice is firmly entrenched
14 in American law.” *McCleskey v. Kemp*, 481 U.S. 279, 311–12 (1987) (internal quotations omitted).
15 Prosecutors exercise discretion on whether to charge cases, what charges and penalties to pursue, and
16 what plea bargains to offer. As the California Supreme Court has held, district attorneys are “given
17 complete authority” to enforce the state criminal law in their counties. *Pitts v. County of Kern*, 17
18 Cal. 4th 340, 358 (1998); *see also* Cal. Gov. Code § 26500. Because a district attorney has discretion
19 on whom to charge in the first instance, the district attorney’s authority “is even stronger” when
20 choosing among various punishments to seek: “The decision of what charges to bring (or not to
21 bring) – and, more to the point here, which sentencing enhancement to allege (or not to allege) –
22 belongs to the prosecutors who are charged with executing our state’s criminal law.” *People v.*
23 *Garcia*, 46 Cal. App. 5th 786, 791 (2020); *see also* *People v. Birks*, 19 Cal. 4th 108, 129 (1998) (“the
24 prosecution, the traditional charging authority, has broad discretion to base its charging decisions on
25 all the complex considerations pertinent to its law enforcement duties.”). Further, “the prosecutor’s
26 decision not to charge a particular enhancement ‘generally is not subject to supervision[.]’” *Id.* The
27 independence of the prosecutor is inherent in the separation of powers enshrined in both the United
28 States and California Constitutions, and dates back to the founding of our country.

1 An elected prosecutor’s duty is to utilize this discretion to pursue justice and protect public
2 safety. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (A prosecutor “is the representative not of
3 an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as
4 compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution
5 is not that it shall win a case, but that justice shall be done.”).¹³ In individual cases, the prosecutor has
6 “a heightened duty to ensure the fairness of the outcome of a criminal proceeding from a substantive
7 perspective – to ensure both that innocent people are not punished and that the guilty are not punished
8 with undue harshness.”¹⁴ But seeking justice requires much more than fair play or a proportionate
9 outcome in the context of a single case or trial. An elected prosecutor also has a duty as a “‘minister[]
10 of justice’ to go beyond seeking convictions and legislatively authorized sentences in individual
11 cases, and to think about the delivery of criminal justice on a systemic level, promoting criminal
12 justice policies that further broader societal ends.”¹⁵

13 Inherent in this larger duty to the public is the prosecutor’s obligation to spend limited
14 criminal justice resources efficiently to protect the safety and well-being of the community.¹⁶ No
15 prosecutor has the resources and ability to prosecute every violation of the law – nor would doing so
16 promote public safety or be an effective use of public resources. Instead, elected prosecutors –
17 empowered by their community with carrying out the duties of that job – make decisions every day
18 about where and how limited resources are best expended, what cases merit entry into the justice
19 system, and what charges and penalties to seek when the case does warrant criminal prosecution.

20 Considerations about justice, promoting the best interests of individuals and the community,
21 and resource allocation necessarily impact decisions regarding policy, charging, and plea bargaining.
22 Prosecutors may, for example, choose to charge crimes with lesser penalties if those offenses are
23 easier to prove or are more equitable given dispositions offered to other co-defendants. At other
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25 ¹³See also Marc. L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. R. 125, 148 (2008) (noting that elected
26 prosecutors must make charging and sentencing decisions that respond to the evolving public conceptions of justice.
27 “Current public opinion constantly rewrites the terms of a criminal code drafted by legislatures over many decades.”).

¹⁴ Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 636 (1999).

¹⁵ R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOYOLA
UNIV. OF CHICAGO L.J. 981, 983 (2014),

<https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1723&context=lsfp>.

¹⁶ *Id.* at 996.

1 times, they may charge lesser crimes because of mitigating circumstances or trial challenges unique
2 to the case, or because the conduct, though it may meet the technical requirements of a more serious
3 charge, is less blameworthy than is typical. The same is true with sentencing enhancements or
4 mandatory prison terms. A prosecutor may decide an extreme punishment is counterproductive,
5 unnecessary, or unjust. Or she may choose to focus her office’s energies elsewhere – more severe
6 penalties often carry additional burdens of proof and an additional workload that a prosecutor may
7 determine is not an effective use of resources.

8 In the 1990s and 2000s, our nation witnessed a proliferation of sentencing schemes
9 authorizing extreme and severe penalties for a range of offenses and individuals.¹⁷ These laws played
10 an oversized role in dramatically expanding the number of people we imprison and the length of time
11 we hold them.¹⁸ As with charging decisions in general, however, different prosecutors utilized these
12 tools in divergent ways.¹⁹ Some sought enhanced penalties and mandatory minimum terms with
13 enthusiasm, using their discretion to broaden the impact of harsh and punitive legislation.²⁰ Others
14 leveraged these severe punishments only in rare cases, if at all.²¹ The use of the three strikes law by
15 California’s District Attorney’s offices has been no different.²²

17 ¹⁷ Urban Institute, *A Matter of Time: The Causes and Consequences of Rising Time Served in America’s Prisons* (2017),
18 <http://apps.urban.org/features/long-prison-terms/about.html>.

19 ¹⁸ *Id.*; Caitlin J. Taylor, *Ending the Punishment Cycle by Reducing Sentence Length and Reconsidering Evidence-Based
20 Reentry Practices*, 89 TEMP. L. REV. 747, 750 (2017),
21 <https://www.templelawreview.org/lawreview/assets/uploads/2017/08/Taylor-89-Temp-L.-Rev.-747.pdf>.

22 ¹⁹ Cassidy, *supra* note 15, at 988 (noting that mandatory sentencing laws have not achieved uniformity in sentencing, but
23 instead shifted sentencing discretion and authority to prosecutors who can reduce or dismiss the charge or penalty);
24 Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, in
25 Michael Tonry, ed., CRIME AND JUSTICE: A REVIEW OF RESEARCH, vol. 38 (2009) at 67-68 (mandatory minimum
26 sentencing schemes did not produce uniform results because prosecutors sidestepped severe penalties in some but not all
27 cases); David Bjerck, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum
28 Sentencing*, 48 J.L. & ECON. 591, 594 (2005).

²⁰ See David Schultz, *No Joy in Mudville Tonight: The Impact of “Three Strike” Laws on State and Federal Corrections
Policy, Resources, and Crime Control*, 9 CORNELL J.L. & PUB. POL’Y 557, 575 (2000) (in general, prosecutors in more
populous California counties were less likely to pursue strikes, while smaller counties filed them more often).

²¹ *Id.*; see also Peter W. Greenwood, et al., *Three Strikes Revisited: An Early Assessment of Implementation and Effects*,
25 DRR-2 905-NIJ (Aug. 1998), vi, <https://www.ncjrs.gov/pdffiles1/nij/grants/194106.pdf> (noting that different counties
26 utilized three strikes law differently and that, for example, under the original version of the “three strikes” law, in
27 Alameda County “only serious felonies are prosecuted under the three-strikes law. Other counties apply the law less
28 selectively.”).

²² *Id.*; see also *County of Los Angeles District Attorney’s Legal Policies Manual*, §3.02.01 (March 12, 2020) (“In all
instances in which a third strike case is pursued as a second strike case, Penal Code § 667.5(b) priors shall be plead and
proved or admitted only when the priors are for sexually violent offenses as defined in Welfare and Institution Code §
6600(b).”).

1 Perhaps most troubling, marginalized and underserved communities have been
2 disproportionately affected by sentencing enhancements in California. For instance, over 80 percent
3 of prisoners serving certain sentence enhancements are people of color.²³ Over 90 percent of people
4 serving a gang enhancement in California are Black or Latino.²⁴ The Three Strikes law in particular
5 has been applied disproportionately against Black defendants, people experiencing mental illness, and
6 against people rated “low risk” to reoffend by state prison authorities.²⁵

7 Furthermore, the most robust empirical evidence concerning criminal punishment, including
8 research from the National Research Council and National Academy of Sciences, reveals quickly
9 diminishing public safety returns from long prison sentences, such as those imposed under Three
10 Strikes and other sentencing enhancement laws.²⁶

11 Today, around the country, communities are retreating from these and other “tough on crime”
12 policies that have driven mass incarceration by electing prosecutors with a new vision for our justice
13 system.²⁷ These prosecutors recognize that overly punitive approaches undermine public safety and
14 community trust. They are making evidence-based decisions around when, and if, to exercise their
15 tremendous power to pursue criminal charges or seek harsh sentences. This shift in perspective in no
16 way justifies or permits judicial interference with the will of the voters or the exercise of the

18 ²³ See California Committee on the Revision of the Penal Code, Staff Memo (Sept. 10, 2020) at 7,
19 <http://www.clrc.ca.gov/CRPC/Pub/Memos/CRPC20-11.pdf>.

20 ²⁴ Abené Clayton, *92% black or Latino: the California laws that keep minorities in prison*, THE GUARDIAN (Nov. 26,
2019), <https://www.theguardian.com/us-news/2019/nov/26/california-gang-enhancements-laws-black-latinos>.

21 ²⁵ See Letter to from California Legislative Black Caucus to CDCR Secretary Scott Kernan (July 17, 2019); see also
Stanford Three Strikes Project, *Mental Illness Reduces Chances Of Three Strikes Sentence Reduction* (2014)
22 <https://law.stanford.edu/press/mental-illness-reduces-chances-of-three-strikes-sentence-reduction/>.

23 ²⁶ National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*,
The National Academies Press (2014); Alex R. Piquero, J. David Hawkins, Lila Kazemian, and David Petechuk, *Bulletin*
24 *2: Criminal Career Patterns (Study Group on the Transitions between Juvenile Delinquency and Adult Crime)* (2013),
<https://www.ncjrs.gov/pdffiles1/nij/grants/242932.pdf>; William Rhodes, Gerald G. Gaes, Ryan Kling, and Christopher
25 Cutler, *Relationship Between Prison Length of Stay and Recidivism: A Study Using Regression Discontinuity and*
Instrumental Variables With Multiple Break Points, 17 CRIMINOLOGY & PUBLIC POLICY 731 (2018),
<https://onlinelibrary.wiley.com/doi/abs/10.1111/1745-9133.12382>; Jordan D. Segall, Robert Weisberg, and Debbie
26 Mukamal, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of*
Parole in California, Stanford Criminal Justice Center (Sept. 2011), [https://law.stanford.edu/publications/life-in-limbo-](https://law.stanford.edu/publications/life-in-limbo-an-examination-of-parole-release-for-prisoners-serving-life-sentences-with-the-possibility-of-parole-in-california/)
27 [an-examination-of-parole-release-for-prisoners-serving-life-sentences-with-the-possibility-of-parole-in-california/](https://law.stanford.edu/publications/life-in-limbo-an-examination-of-parole-release-for-prisoners-serving-life-sentences-with-the-possibility-of-parole-in-california/); see
also *In re Stoneroad*, 215 Cal. App. 4th 596, 634 (2013) (“criminality . . . declines drastically after age 40 and even more
so after age 50.”).

28 ²⁷ Allison Young, *The Facts on Progressive Prosecutors*, Center for American Progress (Mar. 19, 2020),
[https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/19/481939/progressive-prosecutors-reforming-](https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/19/481939/progressive-prosecutors-reforming-criminal-justice/)
[criminal-justice/](https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/19/481939/progressive-prosecutors-reforming-criminal-justice/).

1 discretion that is fundamental to the prosecutorial function.

2 **II. Meaningful criminal justice reform requires elected prosecutors to implement and**
3 **enforce policies to supervise their line attorneys’ exercise of discretion.**

4 An abundance of data and empirical evidence illustrates that the exercise of discretion across
5 offices yields startlingly different criminal justice outcomes, even between offices within the same
6 state and governed by the same laws.²⁸ These patterns are largely attributable to “prosecutors
7 responding to social norms and living up to group expectations about what it means to be a
8 prosecutor in that particular office.”²⁹ Elected prosecutors play a critical role in forming –and
9 reforming – these office norms.³⁰ Office-wide policies, enacted by the elected prosecutor and
10 consistent with the public’s sense of justice, play a critical role in communicating and changing the
11 governing culture in an office.³¹ “Policy priorities in the office... might not result from any actual
12 change in the criminal law, but they palpably change the norms that define what prosecutors are
13 expected to do.”³²

14 These policies, however, can do little to shift norms if they are not enforceable. A District
15 Attorney’s ability to ensure adherence to his vision of justice, especially when he is seeking to change
16 the culture of an office, is largely dependent on whether line prosecutors are required to comply with
17 office guidelines.³³ While some employees may feel a moral obligation to comply with a new
18 approach, others will not, particularly when those new policies conflict with previous norms in the
19 office.

21 ²⁸ See, e.g., Center on Juvenile and Criminal Justice, *supra* note 4; Vera Institute of Justice, *Incarceration Trends in Texas*
22 (Dec. 2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-texas.pdf> (reporting that “the
23 highest rates of prison admissions [in Texas] are in rural counties, and pretrial detention continues to increase in smaller
24 counties even as it is on the decline in larger counties”); Felicity Rose, et al., *An Examination of Florida’s Prison
25 Population Trends*, Crime and Justice Institute (May 2017) at 12, [https://www-
26 media.floridabar.org/uploads/2018/04/Criminal-Justice-Data-Study.pdf](https://www-media.floridabar.org/uploads/2018/04/Criminal-Justice-Data-Study.pdf) (reporting that trends in prison admissions rates
27 vary widely by jurisdiction in Florida, from a low of 55 per 100,000 residents to a high of 612.7).

28 ²⁹ Miller & Wright, *supra* note 16, at 131.

29 ³⁰ *Id.* at 178; Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 Temp. Pol. & Civ. Rts. L. Rev. 369, 373 (2010),
30 https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2428&context=faculty_scholarship.

31 ³¹ *Id.* at 374; see also Bruce Frederick and Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial
32 Decision Making*, Vera Institute of Justice (Dec. 2012) at 15, <https://www.ncjrs.gov/pdffiles1/nij/grants/240335.pdf> (a
33 study of decision-making by line prosecutors revealed that “norms and policies” limiting discretion are the “contextual
34 factor with the most direct impact on prosecutorial decision making.”).

35 ³² Miller & Wright, *supra* note 13, at 178.

36 ³³ Bibas, *supra* note 30, at 371 (elected prosecutors must “create a culture, structures, and incentives within prosecutors’
37 offices so that prosecutors use their discretion consistently and in accord with the public’s sense of justice”).

1 Here, the Association of Deputy District Attorneys is balking at the District Attorney’s efforts
2 to guide the discretion of deputy district attorneys. They challenge a range of directives addressing
3 sentencing and enhancements (not simply the DA’s new three strikes policy) and ask this court to
4 invalidate those DA-approved directives. If this argument is successful, it will substantially
5 undermine the elected DA’s ability to manage and bring meaningful change to the office. Moreover,
6 Petitioner not only is inviting this court to interfere with an internal dispute within the DA’s office,
7 but also seeks an unprecedented order that would essentially compel prosecutors, including the
8 elected DA, to seek sentences (up to life) that they view as unjust and contrary to public safety.

9 **III. Second-guessing the policy decisions of the elected prosecutor undermines local control**
10 **and erodes the rights of voters to community self-governance.**

11 It should not escape the court’s attention that, though presented as a purported issue of
12 legality and prosecutorial ethics, the instant action is, at bottom, an attempt by the Association of
13 Deputy District Attorneys to harness the authority of the court to prevent District Attorney Gascón
14 from making policy decisions that the deputies do not agree with, going so far as to characterize the
15 Special Directives as “radical.”³⁴ Court intervention here would set a dangerous precedent, allowing
16 Petitioner (who opposed Gascon’s election) and unelected line prosecutors to strip the elected District
17 Attorney of the autonomy to make decisions around the safety and well-being of the community. And
18 any such decision would also necessarily erode the rights of local voters to have a say in that vision.

19 District Attorneys, not their deputies, are directly accountable to the people and community
20 they serve. These officials lay out their visions for public safety and in seeking office define their
21 enforcement priorities. Local residents and voters choose the leader that best reflects and furthers
22 their vision for the justice system in *their* community. If District Attorneys fail to adhere to promises
23 made, or if the public decides it disapproves of them, they will inevitably be voted out of office.

24 In Los Angeles, the current District Attorney was elected with more than 1.6 million votes³⁵
25 on a platform of reform-minded and less punitive approaches to a variety of conduct, including
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27 ³⁴ See *Verified Petition for Writ of Mandate and/or Prohibition and Complaint for Declaratory and Injunctive Relief*,
(Dec. 30, 2020) at 2.

28 ³⁵ Priya Krishnakumar and Iris Lee, *How George Gascón unseated L.A. County Dist. Atty. Jackie Lacey*, L.A. TIMES
(Nov. 6, 2020), <https://www.latimes.com/projects/2020-la-da-race-gascon-lacey-vote-analysis/>.

1 serious offenses previously punished with extreme prison terms. During the campaign, District
2 Attorney Gascón specifically noted his reluctance to utilize sentencing enhancements or to regularly
3 seek prison sentences in excess of fifteen years.³⁶ The voters of Los Angeles embraced those goals.
4 Now that he has taken office and implemented clear policies to further those objectives, some old
5 guard employees who do not share his vision have mutinied and asked the court to permit them to
6 disobey the will of the Los Angeles electorate. The integrity of the elections process, and the
7 prosecutorial function writ large, requires the court to reject these efforts.

8 **IV. Conclusion**

9 The order sought by the Association of Deputy District Attorneys for Los Angeles County
10 asks the court to override the will of the voters and substitute the judgment of some unelected line
11 prosecutors for that of an executive elected official when it comes to policy decisions and
12 enforcement priorities.

13 Tellingly, line prosecutors never asked the courts to interfere with prosecutorial discretion
14 when that discretion was being used to ramp up prison and jail populations and fuel “tough on crime”
15 thinking and mass incarceration. It is particularly troubling that, now, as reform-minded prosecutors
16 are being elected in cities and counties across the country, some are attempting to intervene in
17 prosecutorial decisions they perceive as too lenient.³⁷ Such intervention is not only at odds with well-
18 settled prosecutorial discretion, it also usurps local control and runs counter to the growing consensus
19 across the political spectrum about the need to reverse the course of mass incarceration. Here, the Los
20 Angeles community chose a District Attorney who promised to do exactly that – to bring a new
21 vision of how to allocate resources and promote public safety to the office. The Petitioner’s legal
22 action threatens that community vision and, in doing so, would set a dangerous precedent permitting
23 court and staff intrusion into discretion uniquely vested in our nation’s elected prosecutors.

24 DATED: January 15, 2021
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26 ³⁶ Nichanian, *supra* note 6.

27 ³⁷ For example, where a judge tried to compel Suffolk County (Boston), Massachusetts District Attorney Rachael Rollins
28 to prosecute a protester case, the Massachusetts Supreme Judicial Court promptly overruled the decision. *See* Roberto
Scalese, *Mass. High Court Sides With Suffolk DA Rollins In Battle With Judge Over Protester Charge*, WBUR.org (Sept.
9, 2019), <https://wbur.fm/2Elz1g6>.

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Respectfully submitted

/s/ Michael Romano
MICHAEL ROMANO
Attorney for Amici Curiae
CURRENT AND FORMER ELECTED
PROSECUTORS AND ATTORNEYS GENERAL

CERTIFICATE OF COUNSEL

I, MICHAEL ROMANO, am a member of the Stanford Law faculty, Director of the Stanford Law Three Strikes Project, and counsel for current and former elected prosecutors and Attorneys General in this amicus curiae brief. I directed Laila Robbins, Research and Policy Fellow at Fair and Just Prosecution, to conduct a word count of this brief using the software on the computer on which she formatted this brief. On the basis of that computer-generated word count, including footnotes, but not including the caption, table of contents, table of authorities, application, signature blocks, attachments, and this certification, I certify that this brief is 4,961 words in length.

DATED: January 15, 2021

/s/ Michael Romano
MICHAEL ROMANO

Attorney for Amici Curiae
CURRENT AND FORMER ELECTED
PROSECUTORS AND ATTORNEYS GENERAL

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EXHIBIT A

List of Amici

Jean Peters Baker

Prosecuting Attorney, Jackson County, Missouri

Diana Becton

District Attorney, Contra Costa County, California

Wesley Bell

Prosecuting Attorney, St. Louis County, Missouri

Buta Biberaj

Commonwealth's Attorney, Loudoun County, Virginia

Sherry Boston

District Attorney, DeKalb County, Georgia

Chesa Boudin

District Attorney, City and County of San Francisco, California

Aisha Braveboy

State's Attorney, Prince George's County, Maryland

John Choi

County Attorney, Ramsey County, Minnesota

Dave Clegg

District Attorney, Ulster County, New York

Shameca Collins

District Attorney, Sixth Judicial District, Mississippi

Scott Colom

District Attorney, Sixteenth Judicial District, Mississippi

John Creuzot

District Attorney, Dallas County, Texas

Satana Deberry

District Attorney, Durham County, North Carolina

Parisa Dehghani-Tafti

Commonwealth's Attorney, Arlington County and the City of Falls Church, Virginia

Steve Descano

Commonwealth's Attorney, Fairfax County, Virginia

- 1 **Michael Dougherty**
District Attorney, Twentieth Judicial District, Colorado
- 2
- 3 **Mark Dupree**
District Attorney, Wyandotte County, Kansas
- 4
- 5 **Matthew Ellis**
District Attorney, Wasco County, Oregon
- 6
- 7 **Kimberly M. Foxx**
State's Attorney, Cook County, Illinois
- 8
- 9 **Glenn Funk**
District Attorney, Twentieth Judicial District, Tennessee
- 10
- 11 **Gil Garcetti**
Former District Attorney, Los Angeles County, California
- 12
- 13 **Kimberly Gardner**
Circuit Attorney, City of St. Louis, Missouri
- 14
- 15 **José Garza**
District Attorney, Travis County, Texas
- 16
- 17 **Sarah F. George**
State's Attorney, Chittenden County, Vermont
- 18
- 19 **Sim Gill**
District Attorney, Salt Lake County, Utah
- 20
- 21 **Joe Gonzales**
District Attorney, Bexar County, Texas
- 22
- 23 **Deborah Gonzalez**
District Attorney, Western Judicial Circuit, Georgia
- 24
- 25 **Eric Gonzalez**
District Attorney, Kings County, New York
- 26
- 27 **Mark Gonzalez**
District Attorney, Nueces County, Texas
- 28
- 29 **Christian Gossett**
District Attorney, Winnebago County, Wisconsin
- 30
- 31 **Andrea Harrington**
District Attorney, Berkshire County, Massachusetts
- 32

- 1 **Jim Hingeley**
Commonwealth's Attorney, Albemarle County, Virginia
- 2
- 3 **John Hummel**
District Attorney, Deschutes County, Oregon
- 4
- 5 **Natasha Irving**
District Attorney, Sixth Prosecutorial District, Maine
- 6
- 7 **Justin F. Kollar**
Prosecuting Attorney, Kauai County, Hawaii
- 8
- 9 **Lawrence S. Krasner**
District Attorney, Philadelphia, Pennsylvania
- 10
- 11 **Brian Mason**
District Attorney, Seventeenth Judicial Circuit, Colorado
- 12
- 13 **Beth McCann**
District Attorney, Second Judicial District, Colorado
- 14
- 15 **Karen McDonald**
Prosecuting Attorney, Oakland County, Michigan
- 16
- 17 **Ryan Mears**
Prosecuting Attorney, Marion County, Indiana
- 18
- 19 **Brian Middleton**
District Attorney, Fort Bend County, Texas
- 20
- 21 **Stephanie Morales**
Commonwealth's Attorney, City of Portsmouth, Virginia
- 22
- 23 **Marilyn J. Mosby**
State's Attorney, Baltimore City, Maryland
- 24
- 25 **Jody Owens**
District Attorney, Hinds County, Mississippi
- 26
- 27 **Alonzo Payne**
District Attorney, Twelfth Judicial District, Colorado
- 28
- 29 **Jim Petro**
Former Attorney General, Ohio
- 30
- 31 **Joseph Platania**
Commonwealth's Attorney, City of Charlottesville, Virginia
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- 1 **Karl A. Racine**
Attorney General, District of Columbia
- 2
- 3 **Ira Reiner**
Former District Attorney, Los Angeles County, California
4 Former City Attorney, Los Angeles, California
- 5 **Mimi Rocah**
District Attorney, Westchester County, New York
- 6
- 7 **Rachael Rollins**
District Attorney, Suffolk County, Massachusetts
- 8
- 9 **Stephen Rosenthal**
Former Attorney General, Virginia
- 10 **Marian T. Ryan**
District Attorney, Middlesex County, Massachusetts
- 11
- 12 **Dan Satterberg**
Prosecuting Attorney, King County, Washington
- 13
- 14 **Eli Savit**
Prosecuting Attorney, Washtenaw County, Michigan
- 15
- 16 **Mike Schmidt**
District Attorney, Multnomah County, Oregon
- 17 **Carol A. Siemon**
Prosecuting Attorney, Ingham County, Michigan
- 18
- 19 **David E. Sullivan**
District Attorney, Northwestern District, Massachusetts
- 20
- 21 **Raúl Torrez**
District Attorney, Bernalillo County, New Mexico
- 22 **Gregory Underwood**
Commonwealth's Attorney, City of Norfolk, Virginia
- 23
- 24 **Matthew Van Houten**
District Attorney, Tompkins County, New York
- 25
- 26 **Cyrus R. Vance**
District Attorney, New York County, New York
- 27
- 28 **Andrew H. Warren**
State Attorney, Thirteenth Judicial Circuit, Florida

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Lynneice Washington
District Attorney, Jefferson County, Bessemer District, Alabama

Monique Worrell
State Attorney, Ninth Judicial Circuit, Florida

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, CENTRAL DISTRICT

THE ASSOCIATION OF DEPUTY
DISTRICT ATTORNEYS FOR LOS
ANGELES COUNTY,

Plaintiff and Petitioner,

v.

GEORGE GASCÓN, in his official capacity
as District Attorney for the County of Los
Angeles; LOS ANGELES COUNTY
DISTRICT ATTORNEY'S OFFICE; and
DOES 1 through 50, inclusive,

Defendants and Respondents.

Case No. 20STCP04250

**[PROPOSED] ORDER GRANTING
APPLICATION FOR PERMISSION FOR
CURRENT AND FORMER ELECTED
PROSECUTORS AND ATTORNEYS
GENERAL TO FILE AMICUS CURIAE
BRIEF IN OPPOSITION TO
PETITIONER'S APPLICATION FOR
PRELIMINARY INJUNCTION**

