OFFICE OF COUNTY COUNSEL
Rodrigo A. Castro-Silva (185251)
RCastro-Silva@counsel.lacounty.gov
Adrian G. Gragas (150698)
AGragas@counsel.lacounty.gov
Jonathan C. McCaverty (210922)
jmccaverty@counsel.lacounty.gov
500 West Temple St., Floor 6
Los Angeles, California 90012
Telephone: 213.974.1828
Facsimile: 213.687.8822

KENDALL BRILL & KELLY LLP
Robert E. Dugdale (167258)
rdugdale@kbkfirm.com
Laura W. Brill (195889)
lbrill@kbkfirm.com
Nicholas F. Daum (236155)
ndaum@kbkfirm.com
Nary Kim (293639)
nkim@kbkfirm.com
10100 Santa Monica Blvd., Suite 1725
Los Angeles, California 90067
Telephone: 310.556.2700
Facsimile: 310.556.2705

Attorneys for Defendants and Respondents George Gascón, in his official capacity as District Attorney for the County of Los Angeles, and the Los Angeles County District Attorney's Office

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

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

RESPONDENTS' OPPOSITION TO PETITIONER'S APPLICATION FOR PRELIMINARY INJUNCTION

Filed concurrently with the Declarations of Shelan Y. Joseph, Monnica L. Thelen, Marshall Khine, and Stephan A. Munkelt; Request for Judicial Notice; Evidentiary Objections to Michele Hanisee Declaration and [Proposed] Rulings

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Dept.: 85
Judge: Hon. James C. Chalfant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

I. INTRODUCTION

The Petitioner ("Union") is the labor union for a subset of Los Angeles County Deputy District Attorneys ("DDAs"), some of whom are alleged to have views about criminal justice policy that differ from those of their supervisor and the head of their office, the recently-elected District Attorney. The Union seeks extraordinary judicial intervention—an order that would, in effect, ***compel*** the District Attorney's office, contrary to its current policy, to plead sentencing enhancements to dramatically increase sentences against certain criminal defendants. This is in spite of the fact that the District Attorney, the representative duly-elected by the People, has implemented these policies in the wake of significant research showing excessive sentencing practices yield no public safety benefit and do not promote the interests of justice. The Union asks for something no California court has ever ordered, as no California court has ever deemed itself to have the power to require, via mandamus, a District Attorney to plead any particular criminal charge or sentencing enhancement. To the contrary, courts have long held that such charging power is almost entirely unreviewable and is uniquely within the District Attorney's discretion.

The Union's basic argument is that: (a) the District Attorney has an absolute, "ministerial" duty under the "Three Strikes Law" to plead certain sentencing enhancements, including prior serious-felony "strikes," and lacks any discretionary authority to choose not to plead these "enhancements" in every case; (b) the District Attorney is forbidden from setting policies instructing his subordinate DDAs to move to dismiss certain sentencing enhancements; (c) this Court has the power to compel the District Attorney to comply with this supposed ministerial duty to plead and avoid dismissing sentencing enhancements; and (d) if the Court does not so compel the District Attorney, the DDAs would be violating their ethical obligations as attorneys, warranting a preliminary injunction. Each part of that argument is wrong.

There is no "ministerial" duty to plead the relevant sentencing enhancements under the Three Strikes Law. The Three-Strikes Law states that a prosecutor "shall plead and prove" "each" relevant prior felony that could serve as a "strike" and a sentencing enhancement, language on which the Union pins its case. Pen. Code §§ 667(f)(1) and (2), 1170.12(d)(2). But the Union's position that this provision creates an automatic, ministerial duty for a prosecutor to plead ***every*** strike, in ***every*** case, no matter what, and in a manner that may be enforceable by writ, has long been rejected by California courts. As the California Supreme Court has explained: "Under California's Three Strikes law, the sentence that is actually

imposed upon a defendant in a particular case is dependent not only upon the nature and number of the defendant's prior criminal convictions and whether he or she is convicted in the current prosecution of a felony offense, but also upon ***the prosecutor's exercise of prosecutorial discretion in determining how many prior convictions to charge in the case***." *In re Coley*, 55 Cal.4th 524, 559 (2012) (emphasis added). As shown below, no published case holds that there is an enforceable or ministerial duty that would require every District Attorney's office in California to plead each "strike" or that a court can compel a District Attorney's office to do so.

In practice, and consistent with the law, prosecutors have long exercised these avenues of discretion when alleging sentencing enhancements under the Three Strikes Law. Indeed, different District Attorneys in different California counties, as well as different prosecutors, have long had widely varying pleading practices, defeating any claim that such pleading is "ministerial."

There is no "ministerial" duty to forego moving to dismiss already-pled sentencing enhancements as a matter of policy. The Union also argues that this Court can control the discretion that the District Attorney exercises in deciding when to move a court to dismiss sentencing allegations under the Three Strikes Law and certain other criminal statutes, after those allegations have been pled. Not so. There is nothing wrong with the elected District Attorney (as opposed to individual line prosecutors) setting policies predicated on how that District Attorney believes his office's prosecutorial discretion should be exercised when it comes to seeking the dismissal of sentencing enhancements.

The judiciary may not act by writ to compel pleading sentencing enhancements. Under basic principles of separation-of-powers, California courts have long held that a District Attorney's decision to charge crimes and sentencing enhancements is ***not*** a "ministerial" duty appropriate for writ review. The Three Strikes Law is no exception.

There is no legal-ethical issue for the DDAs. There is no "ethical" issue in having the District Attorney, not line prosecutors, set general policies that reflect the District Attorney's assessment of the interests of justice and the wise use of office resources through his exercise of prosecutorial discretion. That is the District Attorney's role, and nothing in his utilization of his prosecutorial discretion here (as noted above) is at odds with California law or legal ethics.

A preliminary injunction is inappropriate. The balance of harms strongly weighs against a

preliminary injunction, which would upset the status quo in this instance and interfere severely with the operations of the District Attorney's office, while the DDAs will suffer no irreparable, non-speculative harm from conforming to the policies enacted by the elected leader of the District Attorney's office.

The Union has not established its standing to bring its claims. Finally, the Union has not alleged proper standing to bring its petition.

II. BACKGROUND

On November 3, 2020, George Gascón (the "District Attorney") was elected as the District Attorney for the County of Los Angeles with the backing of over two million voters. The District Attorney campaigned as someone who, upon assuming office, would institute criminal justice reforms designed to reduce violent crime, while at the same time addressing the problems of mass incarceration and racial disparities currently present in the criminal justice system. True to the election mandate he received, the District Attorney issued several new office policies now challenged by some of his unelected subordinates:

Special Directive 20-08. On December 7, 2020, the District Attorney issued Special Directive 20-08, which addresses the charging of sentencing enhancements and allegations in criminal cases. It reflects the District Attorney's view that "current statutory ranges for criminal offenses alone, without enhancements, are sufficient to both hold people accountable and also to protect public safety"—a view supported by studies that show, while initial periods of incarceration prevent crime through incapacitation, each additional sentence year causes a 4 to 7 percent increase in recidivism that outweighs the benefit of such incapacitation. Pet., Ex. A at 1. Consistent with the District Attorney's judgment that public safety would be enhanced by eliminating the unreasonably lengthy sentences wrought by sentencing enhancements and allegations lumped on top of sentences otherwise available to punish individuals who commit crimes, the District Attorney, through Directive 20-08, directed his prosecutors not to file "sentence enhancements or other sentencing allegations, including under the Three Strikes law" and to withdraw such sentencing enhancements and allegations in pending matters being prosecuted. *Id*.

Special Directive 20-14. On December 7, 2020, the District Attorney also issued Special Directive 20-14, which instructed DDAs to join in defense motions to strike, or to move independently to strike, all alleged sentencing enhancements in any currently pending cases. *Id.*, Ex. B.

Special Directive 20-08.1. On December 15, 2020, the District Attorney issued Special Directive

20-08.1, to provide direction on how to seek the dismissal of alleged strikes and sentencing enhancements in pending criminal cases in which they had been alleged. *Id.*, Ex. C.

Amendment to Special Directive 20-08. On December 18, 2020, the District Attorney issued an amendment to Special Directive 20-08 permitting his prosecutors to file sentencing enhancements in various cases involving offenses committed against vulnerable victims and other cases involving extraordinary circumstances, specifically providing that sentencing enhancements and sentencing schemes different from those spelled out in Special Directive 20-08, as initially drafted, could be pursued in certain cases involving hate crimes allegations, elder and dependent abuse allegations, child physical abuse allegations, sex trafficking cases, and financial crimes. *Id.*, Ex. D. In addition, this amendment to Directive 20-08 provides that sentencing enhancements or allegations may be filed in other cases involving other extraordinary circumstances, with Bureau Director approval upon written recommendation by the Head Deputy, namely, (1) "[w]here the physical injury personally inflicted upon the victim is extensive"; or (2) "[w]here the type of weapon or manner in which a deadly or dangerous weapon including firearms is used exhibited an extreme and immediate threat to human life." *Id.* at 2.

The Union brought this writ proceeding, even as the implementation of these policies continues.

III. ARGUMENT

A. General Standards

The Court weighs two factors in deciding whether to grant a preliminary injunction: "the likelihood that the plaintiff will prevail on the merits and "the relative interim harm to the parties." *SB Liberty, LLC v. Isla Verde Ass'n*, 217 Cal.App.4th 272, 280 (2013). The Union has failed to meet its burden on both.

B. A District Attorney's Discretion To Plead (Or Move To Dismiss) Sentencing Enhancements Is Not Susceptible To Judicial Supervision

California law has long held that District Attorneys may set the policies for pleading (or moving to dismiss) sentencing enhancements, and that courts may ***not***—particularly via mandamus—compel District Attorneys to plead particular sentencing enhancements. The district attorney's power to select which charges and enhancements to plead "is founded ... on the principle of separation of powers, and generally is not subject to supervision by the judicial branch." *People v. Birks*, 19 Cal.4th 108, 134 (1998); *see also Stenback v. Mun. Ct.*, 272 Cal.App.2d 27, 30 (1969) (a district attorney "is not generally subject

to judicial supervision in determining what charges to bring and how to draft accusatory pleadings"). Because the district attorney is "the people's choice of an attorney to represent them in their public affairs," he is "primarily responsible to the electorate," and "[t]here is ordinarily no review of his power to prosecute nor can a court control this statutory power by mandamus." *People v. Super. Ct. (Martin)*, 98 Cal.App.3d 515, 519 (1979) (citations and brackets omitted).

"California district attorneys 'are given complete authority to enforce the state criminal law in their counties.'" *Pitts v. Cty. of Kern*, 17 Cal.4th 340, 358 (1998). And a district attorney's authority is at its ***strongest*** "when it comes to alleging sentencing enhancements." *See People v. Garcia*, 46 Cal.App.5th 786, 792 (2020). Indeed, a district attorney's discretion in alleging sentencing enhancements is so great that "absent a constitutional violation, the prosecutor's decision not to charge a particular enhancement 'generally is not subject to supervision'—or second guessing—'by the judicial branch.'" *Id*.; *People v. Yanez*, 44 Cal.App.5th 452, 459-60 (2020) (declining "to adopt an interpretation of [sentencing law] which would vest the trial court with discretionary power").

Thus, it has long been California law that a writ of mandamus will ***not*** issue to compel a prosecutor to plead (or not plead) any charge, or to move to dismiss a particular sentencing enhancement. Generally, a writ of mandamus is ***only*** "available to compel a public agency's performance or to correct an agency's abuse of discretion ***when the action being compelled or corrected is ministerial***." *See AIDS Healthcare Found. v. Los Angeles Cty. Dep't of Public Health*, 197 Cal.App.4th 693, 700 (2011) (emphasis added). "'A ministerial duty is one that is required to be performed in a prescribed manner under the mandate of legal authority ***without the exercise of discretion or judgment***.'" *Cal. School Bds. Ass'n v. State of Cal.*, 192 Cal.App.4th 770, 797 (2011) (emphasis added). Whether a duty is "ministerial"—rather than "discretionary"—turns on whether a public officer is required to perform it in a prescribed manner without ***any*** regard at all to his own judgment or discretion. *Hudson v. Cty. of Los Angeles*, 232 Cal.App.4th 392, 408 (2014). Prosecutorial decisions to plead criminal charges and sentencing enhancements are the ***essence*** of a duty that is ***not***—because of both the level of discretion involved and separation-of-powers concerns—ministerial. *Boyne v. Ryan*, 100 Cal. 265, 267 (1893) ("we think that the district attorney in determining whether or not, in any particular instance, he should bring an action under said section, is vested with a discretion which a court cannot control by *mandamus*"); *Taliaferro v. Locke*, 182 Cal.App.2d

752, 757 (1960) ("the matters of investigation and prosecution were matters in which the district attorney is vested with discretionary power as to which mandamus will not lie"). The District Attorney is unaware of a single case, from anywhere in California at any time, in which a court has ever used its mandamus power to compel a District Attorney to plead a criminal charge or sentencing enhancement.[1]

C. The Three Strikes Law Did Not Create An Exception To The General Rule

The Union claims that the Three Strikes Law creates an exception to this general rule, and it imposes a ministerial duty on District Attorneys' offices to plead each prior-serious-felony "strike" as a sentencing enhancement every time the District Attorney's office brings a prosecution where the Three Strikes Law might apply. The Union is wrong.

1. The "shall plead" language does not create a ministerial duty

The Three Strikes Law reads in pertinent part:

> (f)(1) Notwithstanding any other law ... The prosecuting attorney shall plead and prove each prior serious or violent felony conviction except as provided in paragraph (2).
>
> (2) The prosecuting attorney may move to dismiss or strike a serious or violent felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior serious or violent felony conviction ....

Pen. Code §§ 667(f)(1) and (2), 1170.12(d)(1) and (2). The Union claims that this provision creates a "ministerial," mechanical duty to plead each and every prior serious felony conviction as a "strike," and eliminates any room for prosecutorial discretion in so pleading. Pet. ¶ 21. Specifically, the Union relies on the use of the word "shall" in the statute, and argues the word "shall" "is ordinarily construed as

[1] The few cases in which courts have applied the mandamus power to compel a District Attorney to institute proceedings all involve ***non-criminal*** proceedings in which the District Attorney was compelled by statute to commence an action based on the directives ***of another executive branch officer but failed to do so***. *Bd. of Supervisors v. Simpson*, 36 Cal.2d 671, 673, 676 (1951) (Board of Supervisors of Los Angeles County sought a writ to compel the district attorney to institute a public nuisance proceeding, based on a statute that provided that the district attorney "must bring such action whenever directed by the board of supervisors of such county....'"; Supreme Court recognized that "[o]rdinarily a district attorney cannot be compelled by mandamus to prosecute a criminal case," but found mandamus appropriate because action only involved whether nuisance actions should be brought by the County Counsel or the District Attorney); *Bradley v. Lacy*, 53 Cal.App.4th 883, 886, 887 (1997) (non-criminal statute requiring that after a ***grand jury*** has found an accusation, "'[t]he district attorney shall have a copy of the accusation served upon the defendant, and … shall require the accused to appear before the superior court of the county'"; court found that the issue was whether this statute "imposes mandatory duties on the district attorney or whether, instead, the district attorney has discretion to refuse to comply and thereby effectively abort the prosecution of an accusation found by the grand jury against a public officer").

mandatory." *Id*.

But—given the important mandamus and separation-of-powers concerns—statutory interpretation cannot end with a simple facial reading of the statute and focus on the word "shall" in a statute. The Penal Code must be construed against the Constitutional importance of the separation of powers and the backdrop of statutes—including many which use the word "shall"—that preserve prosecutorial discretion. The word "shall" does not, in and of itself, make a duty ministerial. Notwithstanding its "ordinary" connotation, "[t]he use of the word 'shall' in a statute is not dispositive of legislative intent. '[Not] every statute which uses the word "shall" is obligatory rather than permissive.'" *Gananian v. Wagstaffe*, 199 Cal.App.4th 1532, 1540 (2011). To the contrary, "'there are unquestionably instances in which other factors will indicate that apparently obligatory language was not intended to foreclose a governmental entity's or officer's exercise of discretion.'" *Id*.

Indeed, courts have consistently held that various criminal statutes that use the word "shall" do ***not*** impose on prosecutors a mandatory duty to charge a particular crime. *E.g*., *Ascherman v. Bales*, 273 Cal.App.2d 707, 708 (1969) (Gov't Code § 26501, which provides a "district attorney ***shall*** institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses when he has information that such offenses have been committed," held to be discretionary); *Wilson v. Sharp*, 42 Cal.2d 675, 678-79 (1954) (Gov't Code § 26525, which states that if county funds are illegally paid, the district attorney ***shall*** institute a suit for recovery without any order of the board of supervisors, called for consideration of law and facts and required the exercise of discretion).

Critically, no published decision has ever concluded the Three Strikes Law imposes purely "ministerial" duties on prosecutors to "plead and prove" every single potentially available prior felony conviction as a sentencing enhancement. To the contrary, several courts—including the California Supreme Court—have confirmed that the Three Strikes Law permits prosecutors to exercise their discretion in regard to a variety of critical decisions:

- **How many prior convictions to allege**. As explained by the Supreme Court, "Under California's Three Strikes law, the sentence that is actually imposed upon a defendant in a particular case is dependent not only upon the nature and number of the defendant's prior criminal convictions and whether he or she is convicted in the current prosecution of a felony offense, ***but also upon the***

prosecutor's exercise of prosecutorial discretion in determining how many prior convictions to charge in the case." *In re Coley*, 55 Cal.4th at 559 (emphasis added). In other words, there is ***no*** mandatory duty to allege every single eligible prior conviction in the charging instrument. The prosecutor has discretion to choose how many—if any—prior convictions to allege.

- **Whether to plead a prior conviction as a sentencing enhancement**. Nor is it mandatory for a prosecutor to allege a prior felony conviction as a sentencing enhancement. While "the three strikes law states that ... '[t]he prosecuting attorney shall plead and prove each prior serious and/or violent felony conviction,' ... [a]s far as our research reveals, these provisions of the three strike law have never been interpreted as requiring the prosecution to plead and prove a prior conviction ***as a prior serious felony conviction enhancement***." *People v. Nguyen*, 18 Cal.App.5th 260, 267 n.1 (2017) (italics in original). In other words, a prosecutor may make "a discretionary charging decision" to allege in the charging paper the ***fact*** of a prior conviction, but ***not*** allege it as a sentencing enhancement. *Id*. at 267-69.

And, of course, prosecutors retain complete discretion to decide whether to charge a case at all, or whether to charge a crime that triggers the Three Strikes law, facts further favoring the position that when the prosecution charges a case it has discretion as to what penalties are triggered by its charging decision.

2. Prosecutors have for decades routinely exercised discretion under the Three Strikes Law to avoid pleading strikes

Put simply, the Three Strikes Law does not preclude prosecutors from exercising their constitutional authority to avoid, for policy reasons, pleading strikes. And the law has long been so interpreted by prosecutorial offices throughout California. ***The use of prosecutorial discretion to plead sentencing enhancements—under the Three Strikes Law and otherwise—is routine throughout California and commonly directed by District Attorneys' offices***. Prosecutors throughout California—following policies set by their offices—have routinely exercised their discretion in determining (a) how many eligible prior convictions to allege in a Three Strikes case; (b) whether to plead every eligible conviction as a sentencing enhancement in a three strikes case; and (c) whether to even pursue a matter as a Three Strikes case. This fact has been attested to by counsel knowledgeable of charging practices relevant to potential Three Strikes cases in Los Angeles County and elsewhere in California;[2] it is reflected

[2] *See* Declarations of Shelan Y. Joseph, Monnica L. Thelen, Marshall Khine, and Stephan A. Munkelt.

in studies showing that prosecutors throughout California routinely exercise discretion not to allege available strikes that could be pled in a potential Three Strikes case;[3] and it is reflected in cases in which courts have noted that prosecutors declined to allege available strikes in Three Strikes cases but nevertheless found such sentences lawful.[4] Accordingly, nothing about the Directives is entirely novel.

3. The Union's Three Strikes cases do not address the issue before the Court

Faced with decades of law and practice, the Union relies on cases that do ***not*** hold that there is a ministerial "must plead" duty, enforceable by courts via mandamus, to mechanically plead strikes as sentencing enhancements in every case. Instead, these cases suggest only that the Three Strikes Law places ***some limits*** on prosecutorial discretion ***after a strike has been pled*** (e.g., on the specific procedure that should be used to dismiss a strike, or on a prosecutor's options for pleading strikes once the prosecutor has made the unreviewable decision to do so, a point that the District Attorney does not contest for purposes of this application), and hold that ***criminal defendants*** may not invoke a general separation-of-powers claim concerning the Three Strikes Law to assert a constitutional problem with their own sentence. To be clear, the proposition that the Three Strikes Law places some limits on prosecutorial discretion is uncontroversial—just as there is no doubt that many statutes, including the Three Strikes Law, limit a prosecutor's discretion as to how matters should be pled ***once the District Attorney has opted to do so***. *E.g.*, *People v. Murphy*, 52 Cal.4th 81, 86 (2011) (discussing so-called *Williamson* rule requiring prosecutors to plead violations under a special law instead of a general law when both would apply to a perpetrator's conduct). However, none of these cases suggest, let alone hold, that the District Attorney has a ministerial duty to ***opt to plead sentencing enhancements in the first place***, which is the issue here.

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[3] *See e.g.*, Chen, Elsa Y. "In Furtherance of Justice, Injustice, or Both? A Multilevel Analysis of Courtroom Context and the Implementation of Three Strikes," 31(2) Just. Q. 257 (Apr. 2014), at 4-5 (noting "the elected District Attorneys in California's counties retain the legal authority to establish internal guidelines regarding the circumstances under which the prosecutors who work under them will charge eligible cases as third or second strikes or petition the court to waive prior offenses" and citing to variances in counties in California as to how eligible strike allegations are charged depending upon how District Attorneys utilize their discretion to seek "[l]ess-than-full application of the Three Strikes Law").

[4] *See e.g.*, *People v. Porter*, 2002 WL 31840800, at * 2 (Cal. Ct. App. Dec. 19, 2002) (affirming sentence where LA DA's Office did not plead each available "strike," reasoning, "[l]ogically, if the prosecutor may plead a prior 'strike' and then move to dismiss or strike the allegation, then the prosecutor may determine at the onset that the interests of justice will be served by not pleading the prior 'strike'").

In *People v. Kilborn*, 41 Cal.App.4th 1325, 1332 (1996), the court faced a claim by a criminal defendant (who ***had*** been charged by a prosecutor with prior strikes under the Three Strikes Law) that the Three Strikes Law was unconstitutional, where the defendant noted the "shall" language in the Three Strikes Law and contended "that the charging discretion of prosecutors cannot be limited by law" without violating the constitutional separation of powers. The *Kilborn* court rejected as a general proposition the notion that a prosecutor's discretion "cannot" be limited by statute. But in doing so it relied on the existence of statutes requiring specific forms of pleading once a charge is pled (*id.* at 1333, citing Pen. Code § 969, which requires that specific prior felonies "must be" pled by the prosecutor when the prosecutor opts to rely upon those prior felonies for certain purposes) and on "provisions restricting the discretionary authority of prosecutors (and courts) to enter plea bargains." *Id.* *Kilborn* found (correctly) that the Three Strikes Law could constitutionally "limit" prosecutorial discretion, but it never addressed, at all, the issue of whether the Three Strikes Law had to be interpreted as the Union urges here, to remove ***all*** prosecutorial discretion from the decision to plead Three Strikes Law sentencing enhancements in the first place. *See id.*; *see also People v. Roman*, 92 Cal.App.4th 141, 145 & n.2 (2001) (mentioning *Kilborn* but not analyzing the effect of the Three Strikes Law on the ability of a prosecutor to opt to plead sentencing enhancements in the first place). In *People v. Laanui*, No. B297581, 2021 WL 71151, at *14 (Cal. Ct. App. Jan. 8, 2021), the Court of Appeal relied on the "shall plead" language in the Three Strikes Law to hold that a criminal defendant was put on adequate notice that strikes that were pled by the prosecutor in the information as to one count would apply to each count alleged in the information. *Id.* Again, the court noted that the Three Strikes Law could be read to imply conclusions about procedure ***once a sentencing enhancement was pled***, but it said nothing about the prosecutor's discretion to choose to allege a strike as a sentencing enhancement in the first place. *See id.* at *15.

D. The District Attorney Also Does Not Have A Ministerial Duty To Avoid Moving To Dismiss Already-Pled Sentencing Enhancements

The Union also argues that the District Attorney lacks prosecutorial discretion to move to dismiss strikes pled under the Three Strikes Law and other criminal statutes. App. at 10-13. Wrong again.

First, there is nothing whatsoever wrong with the District Attorney making a determination that it is appropriate, based on considerations of public safety and the public good, to move to dismiss such

sentencing enhancements as a matter of policy, even a so-called blanket policy. The Union concedes (as it must) that decisions to move to dismiss sentencing enhancements are in most cases discretionary, but contends a "blanket" policy set by the District Attorney, directing his line prosecutors to exercise discretion in a uniform way, transforms the discretionary act into a ministerial one. Not so. The issuance of such Directives is itself an exercise of the District Attorney's prosecutorial discretion. The California Supreme Court has held that the District Attorney's "inherent executive authority includes not only the power to authorize diversion on a case-by-case basis, but extends also to ***the establishment or approval of general eligibility standards to guide the exercise of such discretion by all deputies under his direction***." *Davis v. Mun. Ct.*, 46 Cal.3d 64, 77 (1988) (emphasis added). Any other rule—and in particular one requiring individual DDAs to make these decisions unguided and *ad hoc*—would provoke chaos and widely disparate treatment of defendants prosecuted by the District Attorney's Office.

This is not even close to a situation in which the District Attorney has "failed and refused to prosecute any crimes whatsoever." *People ex rel. Becerra v. Super. Ct.*, 29 Cal.App.5th 486, 504 (2018). Instead, the District Attorney has opted to exercise his discretion ***in prosecuting crimes*** to not seek sentencing enhancements as a policy matter in certain cases because of the District Attorney's view of the overall benefits to public safety from these enhancements, a decision at the core of prosecutorial discretion. A district attorney's decisions about how to exercise such discretion, as the Union's own cases admit, is unreviewable. *Id.*[5]

Other cases the Union cites for its "no blanket policy" argument have nothing to do with a ***District Attorney's*** decision to decide, as a matter of policy, to move for dismissal. Rather, they deal with a separate issue—whether a ***court*** can decide under Penal Code section 1385, ***after*** having received a motion or on its own decision *sua sponte*, to make a blanket decision to dismiss sentencing enhancements based a judge's "personal antipathy" to the effects of an underlying sentencing law. *People v. Williams*, 17 Cal.4th 148, 159 (1998); *People v. Dent*, 38 Cal.App.4th 1726, 1731 (1995). But prosecutors are in a fundamentally different position from judges. Prosecutors are supposed to make decisions about pleading

[5] That the Governor is prohibited by law from refusing in all cases to grant parole has nothing to do with this case. *In re Morrall*, 102 Cal.App.4th 280, 291 (2002). Parole is governed by an entirely separate legal regime, and the District Attorney has not implemented a "blanket" refusal to prosecute crimes.

or dismissing charges based on policy concerns about the administration of justice. Judges, on the other hand, are not supposed to act based on such policy concerns. Nothing suggests a District Attorney is forbidden from concluding that the interests of justice compel moving to dismiss already-pled enhancements based on policy concerns—that is the essence of prosecutorial discretion.

Second, as to motions to dismiss "strikes," the Three Strikes Laws itself expressly states that "[t]he prosecuting attorney ***may*** move to dismiss or strike a prior felony conviction allegation in the furtherance of justice." The Union suggests that this language also creates a "ministerial and mandatory" duty of some kind. Obviously it does not. The District Attorney, as the representative of the People, is allowed to (and has) reached conclusions about what actions should be taken in "furtherance of justice."

Third, the Union's argument about Penal Code section 1385.1 is based on a false premise. Section 1385.1 prohibits courts from dismissing certain special circumstances after a jury finding of guilt or a plea of guilty or *nolo contendere*. Nothing in the Directives would require DDAs to move to dismiss special circumstances in those circumstances or when such a motion would be futile under the law.

Fourth, contrary to the Union's argument, the Directives also do nothing to interfere with the judiciary's role in the implementation of the Three Strikes Law. When the District Attorney's office moves to dismiss strike allegations, such motions to dismiss still must be approved or denied by the courts. In fact, the Union's own application cites instances of courts refusing to dismiss motions brought under the Directives. *See, e.g.*, App. at 6. To the extent the Union contends that there is something wrong with the DDAs repleading (as opposed to moving to dismiss) strikes, the judiciary never had a right to dismiss anything more than the allegations that the prosecutor put in a charging instrument. *Manduley v. Super. Ct.*, 27 Cal.4th 537, 553 (2002) (charging decisions "not invalid simply because the prosecutor's exercise of such charging discretion necessarily affects the dispositional options available to the court").

E. <u>The Directives Do Not Force DDAs To Violate Any Ethical Obligations</u>

In light of the foregoing, the Union's argument that the District Attorney's Directives would force DDAs to violate supposed "ethical" obligations fails. Acting to implement the District Attorney's view of prosecutorial discretion is not a legal ethical dilemma for a DDA—it is a DDA's ***job***. Allowing DDAs to challenge policy directives of District Attorneys under the guise of "legal ethics" complaints would substitute the policy views of line prosecutors for the view of the District Attorney, the official millions

of County residents elected to implement criminal justice policies in their community.

The Union claims Directive 20-08.1 contains "a script for the DDA to follow verbatim, pursuant to which the DDA is to assert that mandatory sentencing enhancements under the Three Strikes Law unconstitutionally usurp prosecutorial discretion – even though the California Court of Appeal has rejected this position at least four times." App. at 3. Not so. The supposedly offending portion of Directive 20-08.1 requires DDAs, when moving to dismiss or withdraw prior strike allegations, to state that the Three Strikes Law, ***if*** it were interpreted as stripping from the District Attorney discretion regarding pleading sentencing enhancements in the first place, would be unconstitutional. As shown above, the Court of Appeal cases on this issue deal with a separate question—and the statement about the constitutionality of the law in that circumstance is both likely correct and preserves the issue for appeal. Nor does anything in the policy prohibit DDAs from citing any other pertinent authority to a court.

The Rules of Professional Conduct also permit a DDA to advance a position contrary to current law, as long as it is supported by "a good faith argument for an extension, modification or reversal of existing law." Cal. R. Prof. Conduct 3.1. Thus, even if a DDA believed that the Directive's statement about the constitutionality of the Three Strikes Law did not comport with Court of Appeal decisions, he may nonetheless repeat the Directive's statement—and do so ethically—as long as there is a reasonable argument that there should be a change in the existing law. Here, there is a very clear opening for a new development in the law. The California Supreme Court has expressly reserved its view on whether interpreting the Three Strikes Law as imposing a ministerial duty to "plead and prove" every single applicable conviction as a sentencing enhancement violates the separation of powers between the legislative and executive branches. *People v. Super. Ct. (Romero)*, 13 Cal.4th 497, 515 n.7 (1996). Given that reservation (as well as the law cited above), it is certainly reasonable to believe that the California Supreme Court—or another appellate court—would conclude that an interpretation of the Three Strikes Law that makes decisions to plead sentencing enhancements mechanical and mandated would be unconstitutional if the question were presented to it (which it has not been to date).[6]

[6] The Rules of Professional Conduct also specifically provide that "[a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." Cal. R. Prof. Conduct 5.2(b). This

F. In No Event Is A Preliminary Injunction Warranted

There also is no reason for a ***preliminary*** injunction to issue. The balance of interim harms favors the District Attorney, not the Union. Balancing relative harms in a preliminary injunction proceeding involves consideration of "the status quo," "the degree of irreparable injury the denial of the injunction will cause," and "the degree of adverse effect on the public interest or interests of third parties." *Vo v. City of Garden Grove*, 115 Cal.App.4th 425, 435 (2004). Here, the Union fails all three prongs. As shown above, a preliminary injunction would upset the status quo, since under long-standing law and practice, the District Attorney and other district attorneys throughout California have exercised enormous discretion in charging or not charging sentencing enhancements, including under the Three Strikes Law.

Nor can the Union show that complying with the Directives is likely to cause an irreparable injury. The Union claims DDAs will suffer "irreparable" harm because a few DDAs have been "scolded" by courts for moving to dismiss strike allegations and speculates this supposed "scolding" by courts portends a future risk DDAs may be held in contempt or subject to State Bar discipline. App. at 6. This is both incorrect and entirely speculative. *See* Decl. of Michele Hanisee ¶¶ 6-9 (describing "scolding" by courts but not suggesting any court has held a prosecutor in contempt or there has been any threat or action by the State Bar); *Keel v. Hedgpeth*, 2009 WL 4052707, at *1 (E.D. Cal. Nov. 19, 2009) ("Plaintiff is not entitled to a preliminary injunction based on a hypothetical future injury"). In any event, enduring such "scolding" is not an irreparable injury, as judges disagreeing with positions taken by a District Attorney's office is an ordinary circumstance of a prosecutor's job—not a cognizable "irreparable" injury.

A preliminary injunction further would not be in the public interest, since it would interfere with the will of the more than two million County voters who recently elected the District Attorney, and it would impose undue and unwarranted costs on the administration of justice and criminal defendants.

G. The Union Has Not Established It Has Standing To Bring Its Claim

Finally, the party bringing a mandamus petition has the burden of establishing it has standing to do so. *Am. Fed. of State, Country & Mun. Employees v. Metro. Water Dist.*, 126 Cal.App.4th 247, 262 (2005). Here, the Union fails to allege any basis for standing, asserting only that it is the "bargaining unit" for the

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also resolves any purported ethical dilemma some DDAs supposedly feel about following the Directives.

DDAs and thus has "organizational" standing. But the Union neither identities the requirements for organizational standing nor provides any evidence or argument about the scope of its "bargaining" authority. *See* App. at 6 n.2 & Pet. ¶ 5. Associational standing does not exist unless "the interests [the association] seeks to protect are germane to the organization's purpose." *Amalgamated Transit Union, Local 1756, AFL-CIO v. Super. Ct.*, 46 Cal.4th 993, 1004 (2009). That a union may have the status of a "bargaining unit" does ***not*** mean it may challenge policy determinations like the Directives. By law, the Union's scope of representation is limited to matters such as wages, hours, and terms and conditions of employment—***not*** policies. Gov't Code § 3504.[7] The Union's collective-bargaining agreement (the "MOU") recognizes this. RJN, Ex. 1 at p. 41 (MOU, Art. 15 (Mgmt. Rights)). Nothing in the MOU suggests the Union represents DDAs for purpose of challenging policy decisions like the Directives. Thus, by law and under the collective bargaining agreement, this Petition is not "germane" to the Union's representation of DDAs.

Indeed, if this writ petition ***did*** fall within the union's scope of representation, it would fail for a different reason, as the Union's MOU contains a grievance procedure, *id.*, Ex. 1 at p. 10 (Art. 9, § 2), requiring a grievance to be initiated within 10 days of occurrence, but no grievance was pursued here. The failure of County employees exhaust this administrative remedy before filing a lawsuit, including lawsuits that raise "questions of law," divests a court of its subject-matter jurisdiction. *See Morton v. Super. Ct.*, 9 Cal.App.3d 977, 982-84 (1970). Thus, the Union has not shown it may pursue its petition.

IV. CONCLUSION

For each of the foregoing reasons, the application for a preliminary injunction should be denied.

DATED: January 15, 2021

KENDALL BRILL & KELLY LLP

By: _____

Robert E. Dugdale
Attorneys for Defendants and Respondents George Gascón, in his official capacity as District Attorney for the County of Los Angeles, and the Los Angeles County District Attorney's Office

[7] This "exclusionary language" was added to prevent "expansion of the language of 'wages, hours and working condition' to include more general managerial policy decisions.'" *Claremont Police Officers' Ass'n v. City of Claremont*, 39 Cal.4th 623, 631-32 (2006).