Ct. App. No. B310845

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS FOR LOS ANGELES COUNTY,
Petitioner and Respondent,

v.

GEORGE GASCÓN, AS DISTRICT ATTORNEY, ETC. ET AL.,
Appellants.

After Grant of Motion for Preliminary Injunction on February 8, 2021, by the Hon. James C. Chalfant, Judge of the Superior Court of California for the County of Los Angeles, Case No. 20STCP04250

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ISSUES PRESENTED FOR REVIEW

1. Whether the Association of Deputy District Attorneys for Los Angeles County—a union of the District Attorney's unelected subordinates—lacks standing to challenge the District Attorney's exercise of his prosecutorial discretion to decline to apply certain sentencing enhancements.

2. Whether the Superior Court lacked jurisdiction to issue a preliminary injunction compelling the District Attorney to exercise his prosecutorial discretion in a manner that comports with the Court's understanding of legislative preference.

3. Whether the Superior Court erred in issuing a preliminary injunction when the balance of harms does not justify that action.

INTRODUCTION

Nearly 120 years ago, the California Supreme Court explained that "the district attorney in determining whether or not, in any particular instance, he should bring an action . . . is vested with a discretion which a court cannot control by *mandamus*." (*Boyne v. Ryan* (1893) 100 Cal. 265, 267; accord, e.g., *Taliaferro v. Locke* (1960) 182 Cal.App.2d 752, 757 ["the district attorney is vested with discretionary power as to" "investigation and prosecution" "to which mandamus will not lie"].) Since then, "[a]n unbroken line of cases in California has recognized" "the principle of prosecutorial discretion" "and its insulation from control by the courts." (*Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1543, internal quotation marks omitted.) Until this case.

In a sharp departure from settled principles, the Superior Court granted the Association of Deputy District Attorney's (ADDA's) motion and preliminarily enjoined the District Attorney from carrying out a policy decision that he was elected to pursue. As part of his campaign for Los Angeles District Attorney, George Gascón promised his constituents that he would institute criminal justice reforms to reduce violent crime and to address the problems of mass incarceration and racial disparities rampant in the criminal justice system. In particular, District Attorney Gascón's platform included a plan to reduce the use of sentencing enhancements, which empirical evidence shows irrationally increase defendants' sentences without enhancing public safety. The voters were persuaded; George Gascón was elected with a decisive majority to represent the People of the State of California in Los Angeles County. True to that electoral mandate, Gascón—now the District Attorney for Los Angeles County—exercised his prosecutorial discretion to issue the Special Directives at the center of this case. These policy statements explain how the District Attorney intends to exercise his prosecutorial discretion with respect to sentencing enhancements. They require the Deputy District Attorneys in his office to refrain from pleading new sentencing enhancements in certain circumstances, to dismiss previously-pled sentencing enhancements in certain pending cases, and (where necessary) to file an amended information that omits previously-pled sentencing enhancements.

ADDA—a labor union that represents a subset of the District Attorney's unelected employees—sued to prevent the District Attorney from carrying out his Special Directives. ADDA asked the Superior Court to issue a declaration that the Special Directives are illegal and to issue a writ of mandamus compelling the District Attorney to cease enforcement of and to rescind the Special Directives. ADDA also sought preliminary relief. In other words, ADDA sought extraordinary judicial intervention—an order that would compel the District Attorney, contrary to his current policy—to plead sentencing enhancements that dramatically increase sentences served by criminal defendants. In large measure, the Superior Court granted ADDA's request.

The Superior Court's judicial mandate runs counter to the District Attorney's public responsibilities and strips the District Attorney of his constitutionally-protected discretion. For three reasons, the Superior Court was without the power to issue that injunction.

First, ADDA lacks associational standing because its challenge to the Special Directives lies outside the scope of its representation. By statute, ADDA's representation is limited to "working conditions," which excludes challenges to managerial policies. Yet ADDA has asked for a court order "commanding" the District Attorney to cease enforcing and to rescind the Special Directives. These Special Directives are not "working conditions." Because ADDA is actually challenging the District Attorney's policy choices, it lacks associational standing. Nor does ADDA have public interest standing. As ADDA's own

statements make clear, this litigation is driven by personal objectives—to protect *its members* from a special brand of harm that is unique to *its members* and arises by virtue of *their positions* as Deputy District Attorneys—not broader public concerns. Nor do any policy reasons mandate granting ADDA public interest standing. Indeed, letting this lawsuit proceed would open the floodgates to disgruntled prosecutors filing lawsuits because of policy decisions they do not like. Because ADDA lacks standing to pursue this case, the Superior Court lacked jurisdiction to issue the preliminary injunction.

Second, the Superior Court should not have granted the preliminary injunction because mandamus is not available to compel the exercise of prosecutorial discretion. The Superior Court's analysis focused exclusively on whether the Three Strikes Law creates a mandatory duty because it uses the word "shall." But the Superior Court erred by applying the wrong legal test. Whether a duty is ministerial—and therefore susceptible to mandamus—does not turn on whether the statute is phrased in mandatory terms. Whether a duty is "ministerial" turns on whether "a public officer is required to perform it in a prescribed manner when a given state of facts exists, in obedience to the mandate of legal authority and without regard to his, her, or its own opinion concerning the act's propriety." (*Hudson v. County of Los Angeles* (2014) 232 Cal.App.4th 392, 408.) Because the text of the Three Strikes Law and the other sentencing statutes at issue here show that a prosecutor must exercise discretion in their application, these laws do not create a ministerial duty.

Instead, the "plead and prove" language on which ADDA and the Superior Court fixated below merely creates a statutory due process right; it ensures that no defendant can be sentenced under the Three Strikes Law unless the prosecution's allegation that the defendant has committed prior felonies has been pled and proven beyond a reasonable doubt. Any other interpretation would risk violating the separation of powers between the branches of government. The Superior Court therefore lacked jurisdiction to issue the preliminary injunction on this basis as well.

Finally, the injunction should not have issued because the balance of harms favors the District Attorney. As the Superior Court recognized, the public interest weighs strong in the District Attorney's favor. An injunction would also gravely harm the District Attorney himself by undermining his credibility and superseding his policy judgment. On the other hand, the fact that the Deputy District Attorneys are acting at their superior's direction greatly mitigates any potential harm they might suffer. Because this balance tilts in the District Attorney's favor, it was error to issue the preliminary injunction.

This Court should reverse.

STATEMENT OF THE CASE AND FACTS

I. George Gascón's Election and the Special Directives.

Los Angeles County is home to the nation's largest local criminal justice system. In recent years, Los Angeles District Attorneys have implemented various tough-on-crime policies, resulting in one of the highest prison incarceration rates in California. (See California Sentencing Institute: Total incarceration rate (2016), http://casi.cjcj.org/.) These policies increase recidivism rates, have little-to-no deterrent effect, and keep people in prison "long after they pose any safety risk to their community." (Special Directive 28-08 at p. 1, appen. A35; *id.* at App'x 3, appen. A37; Special Directive 20-14, at p. 13, appen. A51.) They also disproportionately affect minorities—"[a]lmost 93% of people sent to prison from Los Angeles County are Black people and people of color." (Special Directive 20-14, at p. 13, appen. A51.)

George Gascón's campaign for Los Angeles District Attorney focused on reversing these trends. He promised to institute criminal justice reforms to reduce violent crime, and to address the problems of mass incarceration and racial disparities currently in the criminal justice system. This included a plan to reverse the prior administration's frequent use of sentencing enhancements. (Nichanian, *How George Gascón Wants to Reform Los Angeles and Achieve "The Lowest Level of Intervention*," The Appeal Political Report (Jan. 9, 2020), https://bit.ly/2RVJZzR.)

The voters were persuaded; District Attorney Gascón was elected with over two million votes, beating the incumbent by

more than 7%. (*LA County Election Results*, L.A. County Registrar-Recorder/County Clerk (Nov. 30, 2020), https://bit.ly/3kLGwQQ.) True to that mandate, the District Attorney exercised his prosecutorial discretion to issue several policies reversing the prior tough-on-crime approach. This case involves two of those policy changes.

First, Special Directive 20-08 addresses the charging of sentencing enhancements and allegations in criminal cases. It reflects the District Attorney's view, supported by empirical research, that "current statutory ranges for criminal offenses alone, without enhancements, are sufficient to both hold people accountable and also to protect public safety." (Special Directive 20-08, at p. 1, appen. A35.) The District Attorney accordingly directed his Deputy District Attorneys not to file "sentence enhancements or other sentencing allegations, including under the Three Strikes [L]aw" and to withdraw such sentencing enhancements and allegations in pending prosecutions. (*Ibid.*) Deputy District Attorneys may, however, file sentencing enhancements in cases involving vulnerable victims, such as cases involving hate crimes allegations or child physical abuse allegations, and in other extraordinary circumstances where the injury inflicted on the victim is "extensive" or the perpetrator's actions demonstrate "an extreme and immediate threat to human life," with approval from the Bureau Director. (Special Directive 20-08.2, at p. 2, appen. A59.)

Second, Special Directive 20-14 instructs Deputy District Attorneys to join in defense motions to strike, or to move

independently to strike, all alleged sentencing enhancements in any currently pending cases. (Special Directive 20-14, at p. 3, appen. A41.)

II. The Superior Court Enjoins Enforcement of the Special Directives.

Shortly after these policies were issued, ADDA asked the Superior Court to "declar[e] that the Special Directives are invalid and illegal" and to issue a writ of mandamus "commanding" the District Attorney "to cease all enforcement of" and "to rescind the Special Directives." (Super. Ct. Verified Pet. for Writ of Mandate and/or Prohibition and Compl. for Dec. and Inj. Relief (ADDA Mandamus Pet.) 16, appen. A31.) ADDA also sought injunctive relief. (*Ibid.*)

The Superior Court granted ADDA's motion in most respects and issued "a preliminary injunction enjoining" the District Attorney "from enforcing" most of the challenged aspects of the Special Directives. (Super. Ct. Op. 1, appen. A480.) First, the Superior Court concluded that ADDA had established associational standing. ADDA's purpose is to protect its members' "wages and working conditions." (*Id.* at p. 17, appen. A496.) The Superior Court recognized that ADDA's "scope of representation" does not permit it to challenge an employer's "general managerial policy decisions." (*Ibid.*, quoting *Claremont Police Officers' Ass.n v. City of Claremont* (2006) 39 Cal.4th 623, 631-632, and citing Gov. Code, § 3504.) But the court dismissed that limitation and held that ADDA was challenging the "working conditions" created by the Special Directives—not the policies they embodied. (Super. Ct. Op. 18, appen. A497.) In the

alternative, the Superior Court found that ADDA had public interest standing because ADDA is acting on the public's behalf and its "claim is driven more by public concern than personal objective." (*Id.* at p. 19, appen. A498.)

Second, the Superior Court held that ADDA was likely to succeed on the merits of its argument that the Special Directives violate the law. The court began by explaining its view of the relevant legal test: "[T]he essence of mandamus is to compel a public officer's compliance with his or her mandatory duty." (Super. Ct. Op. 24, appen. A503.) Thus, when a law "is mandatory, not discretionary," it imposes a ministerial duty and is subject to mandamus relief. (*Ibid.*)

Applying this test, the Superior Court held that the Three Strikes Law imposes a mandatory duty. The Three Strikes Law provides that prosecutors "shall plead and prove each prior serious or violent felony conviction," although they may move to dismiss or strike prior convictions in certain circumstances. (Cal. Pen. Code, §§ 667, subd. (f); 1170.12, subd. (d); see *id.* § 1385, subd. (a).) The Superior Court recognized that "shall plead and prove" was ambiguous and could mean either (1) that the legislature stripped prosecutors of their traditional charging discretion or (2) that prosecutors have a "due process duty" to provide notice "that a prior conviction is alleged as an enhancement" and to prove it "beyond a reasonable doubt." (Super. Ct. Op. 27-28, appen. A506-507.) The Superior Court adopted the first reading, despite recognizing that it raised serious separation-of-powers concerns. (See *ibid.*) In support,

the Superior Court pointed to several cases involving a prosecutor's ability to dismiss a strike after it has been pled. (*Id.* at pp. 29-35, appen. A508-514.) The Superior Court also found that Special Directive 20-08.1, which sets forth procedures for moving to dismiss or amend a strike prior, raised legal and ethical problems. Based on this, the Superior Court held that ADDA was likely to succeed on its argument that, with respect to the Three Strikes Law, the Special Directives unlawfully compelled the Deputy District Attorneys to violate mandatory duties, and therefore mandamus relief would be appropriate. (*Id.* at p. 39, appen. A518.)

With respect to the other sentencing enhancements, the Superior Court held that the District Attorney could prohibit Deputy District Attorneys from charging enhancements and "special circumstances allegations" in new cases, but could not require Deputy District Attorneys to move to dismiss a previously-charged enhancement or allegation based solely on "Office policy." (Super. Ct. Op. 39-44, appen. A518-523.)

Third, the Superior Court concluded that the balance of harms slightly favored ADDA. The court found that the "public interest strongly weighs" against preliminarily enjoining the Special Directives, and that issuing a preliminary injunction would not cause the District Attorney "any harm" or change the status quo. (Super. Ct. Op. 45, appen. A524.) On the other hand, the court found a "clear harm" to the Deputy District Attorneys in barring them from charging Three Strikes enhancements, a "less significant" harm in requiring Deputy District Attorneys to

move to dismiss other existing enhancements, and "no . . . harm" from prohibiting the filing of other enhancements in new cases. (*Ibid.*) Based on this, the Superior Court found that "the balance of harms works *somewhat* in favor of" ADDA. (*Ibid.*, italics added.)

The Superior Court accordingly enjoined the District Attorney from using the Special Directives to require Deputy District Attorneys *not* to plead and prove Three Strikes enhancements; compelling them to move to dismiss or withdraw strike priors as prohibited by sections 1385 and 1386; and compelling them not to use proven special circumstances for sentencing. (Super. Ct. Op. 46, appen. 525.)

STANDARD OF REVIEW

In evaluating whether to grant a preliminary injunction, a court must consider "the likelihood that the plaintiff will prevail on the merits" and the relative harm to the defendant from issuing a preliminary injunction. (*Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 624-625, internal quotation marks omitted.) "A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff will ultimately prevail on the merits of the claim." (*Aiuto v. City & County of San Francisco* (2011) 201 Cal.App.4th 1347, 1361.)

Although this court typically reviews the issuance of a preliminary injunction for abuse of discretion, "when the matter is solely a question of a violation of law the standard of review is not abuse of discretion but whether statutory or constitutional law was correctly interpreted and applied by the trial court."

(*Bullock v. City and County of San Francisco* (1990) 221 Cal.App.3d 1072, 1094, internal quotation marks omitted.)

ARGUMENT

I. ADDA Lacks Standing to Challenge the District Attorney's Exercise of his Prosecutorial Discretion.

Standing is a threshold jurisdictional requirement for every case, and the plaintiff bears the burden of establishing it. (*Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 810.) To prove standing, a party seeking mandamus relief must show that it is "beneficially interested," meaning it has "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." (*Associated Builders & Contractors, Inc. v. San Francisco Airports Comm'n* (1999) 21 Cal.4th 352, 361-362, internal quotation marks omitted; see Code Civ. Proc., § 1086.) An undifferentiated, "general interest common to all members of the public" is not enough. (*Chiatello v. City & County of San Francisco* (2010) 189 Cal.App.4th 472, 494-495, as modified on denial of reh'g (Nov. 16, 2010).)

The "beneficial interest" requirement is particularly important when a court is called to review the actions of a co-equal branch. To do so absent a sufficiently individualized injury "would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department," which courts "plainly . . . do not possess." (*Commonwealth of Massachusetts v. Mellon* (1923) 262 U.S. 447, 488-489; see, e.g., *Associated Builders*, *supra*, 21 Cal.4th at pp.

361-362 [explaining that the beneficial interest test is equivalent to the federal injury test].)

The Superior Court concluded that ADDA could establish either associational standing or public interest standing. That is wrong. Because ADDA cannot demonstrate that it has standing under either theory, this case cannot proceed.

A. ADDA Lacks Associational Standing

"[A]n association that does not have standing in its own right may nevertheless have standing to bring a lawsuit on behalf of its members." (*Amalgamated Transit Union, Loc. 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1003.) An organization must satisfy three criteria to establish associational standing: (1) its members must "have standing to sue in their own right"; (2) the association must seek to protect interests "germane to the organization's purpose"; and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." (*Id.* at p. 1004, quoting *Hunt v. Washington Apple Advert. Comm'n* (1977) 432 U.S. 333, 343.)

ADDA lacks associational standing because the scope of this lawsuit is beyond its purpose. According to ADDA, it "is a union organized for the purpose of protecting the *wage and working conditions*" of Deputy District Attorneys. (Super. Ct. ADDA Reply in Supp. of Order to Show Cause (ADDA Reply) 15, appen. A365, italics added.). Its bylaws confirm that: "The purpose of the ADDA is" to help negotiate "wages, hours, [and] all other terms and conditions of employment," to provide its members "a voice in" that process, to promote legislation

beneficial to ADDA, and to foster its members' careers in government service. (ADDA Reply Ex. 14, Bylaws art I, §§ 1.3.1-1.3.8, appen. A394-395; see *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock* (1986) 477 U.S. 274, 286 [looking to union's Constitution to determine union's "goals" for purposes of standing].)

But this lawsuit does not concern "wages [and] working conditions." By law, "[r]ecognized employee organizations shall have the right to represent their members in their employment relations with public agencies." (Gov. Code, § 3503). The "scope of representation *shall not include* consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (*Id.* § 3504, italics added.) This exception was intentionally added to stop the phrase "wages, hours, and working conditions" from being read "to include more general managerial policy decisions." (*Claremont Police Officers Assn.*, *supra*, 39 Cal.4th at p. 631, internal quotation marks omitted.) To require otherwise would create "an intolerable burden upon fair and efficient administration of state and local government." (*Id.* at p. 632, internal quotation marks omitted.)

The Special Directives are quintessential "managerial policy decisions" outside the scope of ADDA's representation. As the California Supreme Court explained in discussing a police union's legal challenge to a use-of-force policy, crafting such policies "is a heavy responsibility involving the delicate balancing of different interests" that is "best exercised by the appropriate legislative and executive officers." (*San Jose Peace Officer's Assn.*

v. City of San Jose (1978) 78 Cal.App.3d 935, 946, internal quotation marks omitted.) The Special Directives reflect the District Attorney's judgment about how best to balance myriad factors, including community safety; victim's rights; the need for punishment, deterrence, and rehabilitation; and concerns about recidivism and racially-disparate sentencing, to name just a few. The voters overwhelmingly vested District Attorney Gascón with the authority to balance these competing objectives. ADDA, a union representing some of the District Attorney's unelected subordinates, does not have the power to displace those policy choices simply because they dislike the fact that their "working conditions" involve following the District Attorney's policy directives.

The cases on which ADDA relies confirm this distinction. In *Brotherhood of Teamsters & Auto Truck Drivers v. Unemployment Insurance Appeals Board* (1987) 190 Cal.App.3d 1515, 1522, the union challenged "a wrongful denial of benefits arising from a breakdown in the collective bargaining process." *Monterey/Santa Cruz County Bldg. & Construction Trades Council v. Cypress Marina Heights LP* (2011) 191 Cal.App.4th 1500, 1504, involved a challenge to the employer's failure to uphold a covenant requiring it to pay "the prevailing wage to workers on all development of the land." And *National Weather Service Employees Organization, Branch 1-18 v. Brown* (2d Cir. 1994) 18 F.3d 986, 989, found the union had standing to seek to enjoin the employer from changing working conditions such that employees "would be forced to relocate or undergo long

commutes." Benefits, wages, and commute times are all quintessential "employment conditions," not policy determinations. (Gov. Code, § 3504.) Because ADDA is challenging the latter, it lacks associational standing.

According to the Superior Court, Government Code section 3504 "does not circumscribe [ADDA's] right to associational standing for mandamus." (Super. Ct. Op. 17, appen. A496.) That is true but irrelevant. The test for associational standing instructs courts to look to the organization's purpose, and ADDA describes its own purpose as representing its members in negotiating their wages and working conditions. Section 3504 provides that the "working conditions" on which ADDA may lawfully represent its members include wages and hours, not managerial policy decisions. That means that ADDA's standing to seek to protect interests "germane to [its] purpose" is likewise limited. (*Amalgamated Transit Union*, *supra*, 46 Cal.4th at p. 1004, quoting *Hunt*, *supra*, 432 U.S. at p. 343; cf. *Transp. Workers Union of Am., Loc. 100, AFL-CIO v. New York City Transit Auth.* (S.D.N.Y. 2004) 342 F. Supp. 2d 160, 168 [finding union had associational standing to seek to protect "the quality of working conditions and conditions of employment" because the challenged sick leave policy was "codified in an agreement [it had] collectively bargained"].)

Perhaps recognizing this, in the next breath, the Superior Court *applied* the distinction set forth in section 3504. It held that ADDA has standing because it is challenging the working conditions created by the Special Directives, not the "District

Attorney's managerial policies" themselves. (Super. Ct. Op. 18, appen. A497.)

That is wrong, as ADDA's own statements demonstrate that it is trying to change policy. ADDA is not seeking a declaration that its members can disregard the Special Directives, or a judgment that they cannot be penalized for declining to comply with them. Rather, ADDA has asked for a court order "declar[ing]" these policies "invalid and illegal," "commanding" the District Attorney "to cease all enforcement of the Special Directives," and "commanding" the District Attorney "to rescind" those policies. (ADDA Mandamus Pet. 16, appen. A31.) This is questioning policy, and nothing else. As these statements demonstrate, ADDA is not trying to protect its members from the consequences of what it has termed a "Hobson's choice" (ADDA Reply 15, appen. A365)[1]; it is seeking a court order reversing the policy judgment of an elected official—exactly the sort of action section 3504 places beyond ADDA's scope. Indeed, ADDA admitted as much, stating that it is seeking "to restrain this County's district attorney from violating the law in the enforcement of criminal laws within the County." (*Ibid.*)

Because this lawsuit is not about wages or working conditions, but instead seeks to challenge the District Attorney's managerial policies, it is not germane to ADDA's purpose. ADDA lacks associational standing.

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[1] The District Attorney disagrees with ADDA's characterization, and ADDA has no standing to challenge prosecutorial policy decisions by the elected District Attorney.

B. ADDA Lacks Public Interest Standing

ADDA likewise lacks public interest standing. "[P]ublic interest standing" is an "exception to the beneficial interest requirement . . . meant to give citizens an opportunity to ensure the enforcement of public rights and duties." (*Save the Plastic Bag Coal. v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 167.) But this exception is limited: "No party, individual or corporate, may proceed with a mandamus petition as a matter of right under the public interest exception." (*Id.* at p. 170 fn.5.) Rather, public interest standing is appropriate only where (1) "the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty"; (2) the plaintiff is acting "as a citizen in having the laws executed and the duty in question enforced"; and (3) countervailing policy considerations do not outweigh the reasons for recognizing public interest standing. (*Green v. Obledo* (1981) 29 Cal.3d 126, 144, internal quotation marks omitted; Super. Ct. Op. 18-19, appen. A497-498.) Even assuming *arguendo* that the first factor is satisfied, ADDA cannot prevail on the second or third factors.

California courts have generally declined to find public interest standing where a litigant's action "is driven by personal objectives rather than 'broader public concerns' " such that she is not acting as a citizen. (*SJJC Aviation Services, LLC v. City of San Jose* (2017) 12 Cal.App.5th 1043, 1057, quoting *Save the Plastic Bag*, *supra*, 52 Cal. 4th at p. 169.) For example, a government actor who sues to vindicate his own working "preferences" lacks public interest standing, even if a successful lawsuit would benefit the public to some extent. (*Holbrook v.*

City of Santa Monica (2006) 144 Cal.App.4th 1242, 1250.) "[A]n administrative board member" who seeks to challenge a board decision with which she disagrees lacks public interest standing. (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 798-800). And committee members lack public interest standing to challenge their appointing agency's alleged failure to comply with the law. *Laidlaw Env't Services, Inc., Loc. Assessment Comm. v. County of Kern* (1996) 44 Cal.App.4th 346; accord *Braude v. City of Los Angeles* (1990) 226 Cal.App.3d 83, 91 [holding member of city council "forfeit[s] his right to bring a lawsuit as a citizen-taxpayer against the governmental body of which he is a member"].) The same is true of a private actor, like a citizen group, that is motivated by competitive objectives, even if the lawsuit might also benefit the public to some extent. (*SJJC Aviation Services*, *supra*, 12 Cal. App. 5th at p. 1058; compare *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 915 [finding standing where nonprofit had "no commercial or competitive interests to undermine or override its public interest standing"].)

Here, ADDA's own description of this lawsuit demonstrates that it is "driven by personal objectives." (*SJJC Aviation Servs.*, *supra*, 12 Cal.App.5th at p. 1057). According to ADDA, its goal is to protect *its members* from a special brand of harm that is unique to *its members* and arises by virtue of *their positions* as Deputy District Attorneys. (See, e.g., Super. Ct. ADDA Application for a Temporary Restraining Order 7, appen. A177 [alleging the Special Directives "require[] [Deputy District

Attorneys] to violate the law, their oaths, and their ethical duties as officers of the Court"]; ADDA Reply 15, appen. A365 [claiming ADDA has associational standing because "[i]t is unquestionably germane to its mission to prevent its members from facing the Hobson's choice forced upon them by their employer"].) Because ADDA's suit is motivated by concerns specific its members and their government roles, public interest standing is inappropriate here.

People for Ethical Operation of Prosecutors and Law Enforcement v. Spitzer (2020) 53 Cal.App.5th 391, 396 (*PEOP*), as modified (Sept. 8, 2020), is instructive. There, a "watchdog group" sued to ensure certain "law enforcement agencies" were complying "with their constitutional and statutory duties." (*Ibid.*) PEOP alleged that these agencies were secretly recruiting and rewarding confidential informants in exchange for various perks, in violation of defendants' constitutional rights. (*Id.* at pp. 396-397.) The court concluded that PEOP was seeking to enforce "public rights," like the rights to due process and the right to counsel. (*Id.* at p. 410.) But the court had no occasion to address whether PEOP was motivated by "personal objectives." (See *id.* at pp. 408-410, internal quotation marks omitted.)

The Superior Court reasoned that *PEOP* supported ADDA because it showed a strong public interest in a citizen's group challenging a District Attorney's allegedly problematic policies. But the question here is whether *ADDA* has standing to seek to enforce that interest. As to that, *PEOP* demonstrates the answer is no. Unlike PEOP, an independent "watchdog group," ADDA is

a union organized to represent the very government employees subject to the challenged policies—employees who, as the Superior Court acknowledged, assert these policies have stripped them of certain powers and subjected them to potential penalties. (See Super. Ct. Op. 20, appen. A499 ["ADDA is seeking to prevent the District Attorney from forcing his deputy district attorneys from violating the law . . . ."].)

The Superior Court's entire analysis is found in one conclusory sentence: "ADDA's claim is driven more by public concern than personal objective . . . ." (Super. Ct. Op. 19, appen. A498.) The Superior Court did not explain why it believed that to be the case. It did not grapple with the caselaw explaining that governmental actors challenging a policy promulgated by the agency for which they work often fail this part of the public interest standing test. Nor did it consider how ADDA's own descriptions of this lawsuit undermine any claim to public interest standing. Had it done so, it would have been clear that ADDA is not suing as a citizen, and therefore lacks public interest standing.

Policy reasons do not mandate granting ADDA public interest standing. "This is not a situation where the issue raised by [ADDA] will be removed from judicial review if standing is denied," for both the District Attorney and ADDA acknowledge that ADDA's members could, in theory, have standing to sue in their own right. (*Sacramento County Fire Prot. Dist. v. Sacramento County Assessment Appeals Bd. II* (1999) 75

Cal.App.4th 327, 334; accord, e.g., *California Dept. of Consumer Affairs v. Superior Court* (2016) 245 Cal.App.4th 256, 264.)[2]

On the other hand, persuasive policy reasons "militate against permitting disgruntled governmental agency members to seek extraordinary writs from the courts" in general, and particularly in cases involving questions of prosecutorial discretion. (*Carsten*, *supra*, 27 Cal.3d at p. 799.) Allowing this type of suit to proceed "is certain to affect the working relationship among" the District Attorney and Deputy District Attorneys. (*Ibid.*) Such suits might become "frequent," as each incoming District Attorney is likely to issue new policy directives with which some Deputy District Attorneys will disagree. (See *ibid.*) It also risks allowing for "rerun[s]" of the political process and calls upon judges to potentially displace the views of the electorate. (See *ibid.*) Not to mention the "ominous" threat that such suits might "interfere with the prosecutor's broad discretion in criminal matters," "disrupt the orderly administration of justice," (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 453-454), and undermine "the deference [courts] ordinarily afford [prosecutors]," (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1248; see also *Mellon*, *supra*, 262 U.S. at pp. 488-489 [explaining that the beneficial interest requirement is particularly important when a court is called to review the actions of a co-equal branch].)

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[2] Although the District Attorney acknowledges that such a claim is sufficiently plausible to satisfy the first prong of *Hunt*'s associational standing test, he reserves the right to later contest any individual prosecutor's standing.

Because ADDA's suit is motivated by personal concerns and no countervailing policy considerations require a different outcome, ADDA lacks public interest standing.

II. Mandamus Is Not Available to Compel the Exercise of Prosecutorial Discretion.

A. Courts Lack The Power to Dictate How Executive Branch Officials Should Exercise Prosecutorial Discretion.

The Superior Court erred when it granted ADDA's request for a preliminary injunction based only on the Superior Court's conclusion that the Three Strikes Law creates certain mandatory duties for prosecutors. That was error for two reasons.

First, whether a duty is ministerial—and therefore susceptible to mandamus—does not turn on whether a statute is phrased in mandatory terms. Whether a duty is "ministerial" turns on whether "a public officer is required to perform it in a prescribed manner when a given state of facts exists, in obedience to the mandate of legal authority and without regard to his, her, or its own opinion concerning the act's propriety." (*Hudson*, *supra*, 232 Cal.App.4th at p. 408.) "If the act sought to be ordered involves the exercise of judgment and discretion, performance of the act is not a ministerial duty," even if the Legislature phrased the duty in mandatory terms. (*Orange County Employees Assn. v. County of Orange* (1991) 234 Cal.App.3d 833, 845.) Because the Superior Court failed to recognize and apply this legal standard, this Court should vacate the Superior Court's order. (See *Bullock*, *supra*, 221 Cal.App.3d at p. 1094.)

Second, if a statute is susceptible to multiple interpretations, one of which "would raise serious constitutional problems," the court should "construe the statute to avoid such problems." (*People v. Garcia* (2017), 2 Cal.5th 792, 804, internal quotation marks omitted.) Courts presume the Legislature understands the limits on its powers and does not intend to "usurp power constitutionally forbidden it." (*Ibid.*, internal quotation marks omitted.) As the Superior Court acknowledged, the Three Strikes Law's statement that "[t]he prosecuting attorney shall plead and prove each prior serious or violent felony conviction" is "ambigu[ous]" at best because of the "obvious fact that a prosecutor cannot be compelled to actually prove a strike prior; he or she can only be compelled to attempt to prove the prior conviction." (Super. Ct. Op. 25-28, appen. A504-507.) The Superior Court nevertheless declined to apply the canon of constitutional avoidance. (*Id.* at p. 28, appen. A507.) That, too, was error sufficient to warrant reversal. (*See Bullock*, *supra*, 221 Cal.App.3d at p. 1094.)

1. Because Compelling a Discretionary Duty Violates The Separation of Powers, Mandamus Is Appropriate Only Where the Duty Is Ministerial.

When a writ of mandamus is sought to compel action by a government body, "it is essential that the court determine whether the act the writ seeks to compel . . . involv[es] the exercise of discretion, or [is] purely ministerial." (*United Assn. of Journeymen v. City & County of San Francisco* (1995) 32 Cal.App.4th 751, 759.) If the duty is discretionary, mandamus is generally not appropriate. (*Los Angeles City and County*

Employees Union v. Los Angeles City Bd. of Education (1974) 12 Cal.3d 851, 856 [explaining mandamus is available to compel the exercise of a discretionary duty only where the exercise of discretion is "so palpably unreasonable and arbitrary as to indicate an abuse of the discretion as a matter of law" (internal quotation marks omitted)].)

"The reason for this is a fundamental one": if a court were to compel an executive branch official to perform a discretionary duty, "it would violate the basic constitutional concept of the separation of powers among the three coequal branches of the government." (*Monarch Cablevision, Inc. v. City Council of City of Pacific Grove* (1966) 239 Cal.App.2d 206, 211.) Prosecutorial power—and thus, prosecutorial discretion—belongs exclusively to the executive branch. The Attorney General is the "chief law officer of the State." (Cal. Const., art. V, § 13.) The Constitution further delegates to district attorneys the power to decide whether to institute criminal proceedings within their respective jurisdictions. (*People v. Shults* (1978) 87 Cal.App.3d 101, 106; *Hicks v. Bd. of Supervisors* (1977) 69 Cal.App.3d 228, 240-241.) A district attorney "ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek." (*Dix*, *supra*, 53 Cal.3d at p. 451.)

Prosecutors accordingly "have a great deal of discretion in [the] crime-charging function." (*People v. Wallace* (1985) 169 Cal.App.3d 406, 409, internal quotation marks omitted.) This includes the power to determine "what charges to bring (or not to bring)" and "which sentencing enhancements to allege (or not to

allege)." (*People v. Garcia* (2020) 46 Cal.App.5th 786, 791.) Prosecutors necessarily exercise this discretion on a case-by-case basis. (See, e.g., *People v. Tirado* (2019) 38 Cal.App.5th 637, 644 [noting that prosecution exercised its discretion in charging fewer enhancements than were available].)

Prosecutors also exercise discretion through office-wide policies. For example, under the U.S. Department of Justice's "firmly established" "*Petite* policy," "United States Attorneys are *forbidden* to prosecute any person" who has already been subject to state prosecution for the same behavior, absent a compelling federal interest and supervisory approval. (*Thompson v. United States* (1980) 444 U.S. 248, 248 (per curiam), italics added and internal quotation marks omitted; see U.S. Dep't of Justice Manual § 9-2.031 (updated Jan. 2020).) U.S. Attorney General Holder instituted a policy that prosecutors should not charge mandatory minimum sentences based on drug quantity unless the defendant's crime was violent, the defendant was the leader of a criminal organization or connected with a large-scale drug trafficking organization, or the defendant had a significant criminal history.[3] This policy also instructed prosecutors to generally avoid charging "[r]ecidivist [e]nhancements."[4] U.S. Attorney General Sessions, by contrast, instructed prosecutors to always "charge and pursue the most serious, readily provable

[3] Memorandum from the Attorney General to the United States Attorneys and Assistant Attorney General For the Criminal Division 2 (Aug. 12, 2013), available at https://bit.ly/3AdAKff.
[4] (*Id.* at p. 3.)

offense . . . . including mandatory minimum sentences."[5] This "policy-based approach to prosecution rests firmly on the foundation of prosecutorial discretion." (Sandoval, *Ethical Considerations for Prosecutors: How Recent Advancements Have Changed the Face of Prosecution* (2019) 10 St. Mary's J. Legal Mal. & Ethics 60, 100; see *id.* at 92 & fns.151-152 [collecting examples of non-prosecution policies in various jurisdictions].)

Prosecutorial discretion is subject to the supervision of the electorate and the Attorney General, not the judicial branch. The electorate may exercise that supervisory power by evaluating the platform on which a district attorney is running and either (re)electing him or removing him from office.[6] The Attorney General has "direct supervision over every district attorney . . . in all matters pertaining to the duties of their respective offices." (Cal. Const., art. V, § 13.) But because district attorneys are not "mere employees" of the Attorney General, (*People v. Brophy* (1942) 49 Cal.App.2d 15, 28), he cannot "dictate policy to district attorneys statewide." (*Goldstein v. City of Long Beach* (9th Cir. 2013) 715 F.3d 750, 756.) If, however, the Attorney General believes that a district attorney is not "adequately enforc[ing]" the law, "it shall be [his] duty" to assume "all the powers of a district attorney" and "to prosecute any violations of law" occurring in that jurisdiction. (Cal. Const., art. V, § 13; accord

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[5] Memorandum from the Attorney General to All Federal Prosecutors 1 (May 10, 2017), available at https://bit.ly/3yqDVQ5.

[6] A county charter may also authorize the board of supervisors to remove a district attorney for cause. (See 84 Ops.Cal.Atty.Gen. 88 (2001).) The Los Angeles county charter does not contain such a provision. (See L.A. County Charter, art. IV, § 13.)

Gov. Code, § 12550; see also Pen. Code, § 923, subd. (a) [authorizing Attorney General to convene grand jury "without the concurrence of the district attorney"].)

But the Constitution's grant of this power to the Attorney General, an Executive Branch official, does not mean courts can do the same thing. "Nothing in the Constitution or statute law of this state gives to any court a similar power of supervision or control over the official conduct of the district attorney." (*People v. Municipal Court* (1972) 27 Cal.App.3d 193, 208.) In other words, just as "[t]he Attorney General and the various district attorneys . . . may *not* exercise judicial power," the judiciary may not exercise or control the executive's prosecutorial discretion. (*Bryce v. Superior Court* (1988), 205 Cal.App.3d 671, 677.) "[M]andate cannot be used to compel a district attorney to exercise his or her prosecutorial discretion in any particular way." (*People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 504.)

2. The Superior Court Erroneously Assumed that It Could Grant Mandamus Based Only on a Finding that the Statutory Duty Is Mandatory.

a. The Superior Court's analysis focused exclusively on whether the Three Strikes Law and other sentencing enhancements create a mandatory duty. (Compare Super. Ct. Op. 24, appen. A503 ["As ADDA correctly argues, the essence of mandamus is to compel a public officer's compliance with his or her *mandatory* duty." (italics added)] with *Hudson*, *supra*, 232 Cal.App.4th at p. 408 [in addition to considering whether the statute includes a "mandate," the court must also consider

whether "a public officer is required to perform" that mandatory duty "in a prescribed manner when a given state of facts exists" and "without regard to his, her, or its own opinion concerning the act's propriety," such that the duty is ministerial].)

The Superior Court thrice concluded that a mandatory duty existed, and thus ADDA was likely to succeed in demonstrating that mandamus was appropriate. First, the Superior Court concluded that the Three Strikes Law creates a mandatory duty to plead and prove sentencing enhancements because, among other things, the statute uses the word "shall." (Super. Ct. Op. 25-35, appen. A504-514.) Second, the Superior Court concluded that the Three Strikes Law and Penal Code section 1385 prohibit a prosecutor from filing an amended criminal information without previously pled strikes because that process creates an end-run around the mandatory pleading language in the Three Strikes Law. (*Id.* at 36-37, appen. A515-516.) And third, the Superior Court concluded that section 1385 prohibits a prosecutor from seeking dismissal of certain other sentencing enhancements based on a policy choice because, in the Superior Court's view, section 1385 imposes on prosecutors a mandatory duty to enforce the law without regard to policy considerations. (*Id.* at 39-41, 43-44, appen. A518-520, A522-523.)

Even assuming that the Superior Court is correct that these statutes create mandatory duties (they do not, see *infra*, at pp. 51-60 [addressing the Three Strikes Law], 60-66 [addressing dismissal of previously pled strikes, sentencing enhancements, and special circumstances]), a *mandatory* duty is not necessarily

ministerial. A mandatory duty is a duty that a public official is required to perform. A ministerial duty is a duty that a public officer is required to perform in a prescribed manner without any regard to his own judgment or discretion. (*Hudson*, *supra*, 232 Cal.App.4th at p. 408.) In other words, a mandatory duty can still involve an exercise of discretion; a ministerial duty cannot.

Thus, for example, a court *cannot* grant mandamus to compel an executive official to charge a particular fee where a Board of Supervisors is required by statute to "charge and set" fees, but the statute does not set the amount. (*California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal.App.5th 150, 178 [explaining that deciding on the appropriate fee "necessarily requires the exercise of significant discretion"].) By contrast, a court *can* grant mandamus to compel an executive official to pay a particular salary where a statute mandates that amount. (*A.B.C. Federation of Teachers v. A.B.C. Unified School Dist.* (1977) 75 Cal.App.3d 332, 341 [reasoning that because "the amount of the claim is fixed by law," "the act of drawing and paying the warrant is a ministerial duty, [and] mandamus will lie to compel it" (italics and internal quotation marks omitted)].)

Similarly, a court *cannot* grant mandamus to compel an executive official to comply with a mandatory statutory duty where a statute requires that a public official "shall take measures" to prevent the spread of communicable diseases, but does not dictate what precise steps that action entails. (*AIDS Healthcare Found. v. Los Angeles County Dep't of Pub. Health* (2011) 197 Cal.App.4th 693, 701-704, internal quotation marks

omitted.) But a court *can* grant mandamus to compel the Governor to perform his constitutional duty to call an election to fill a vacancy in the Legislature where the Constitution and statutes provide that he "shall issue writs of election to fill such vacancies" "at once." (*Jenkins v. Knight* (1956) 46 Cal.2d 220, 222-225, internal quotation marks omitted [explaining that the "Governor has no discretion to determine whether an election should be called; he is commanded by the Constitution to issue a proclamation" and although "no time is fixed in the Constitution within which the Governor must act after a vacancy occurs," California law "provides that, when vacancies occur, the Governor shall issue writs of election 'at once'"].)

In each of these examples, there is a *mandatory* duty (charge and set fees, pay a salary, act to stop the spread of disease, and call a special election). But mandamus is only appropriate where that mandatory duty is *ministerial*, such that the executive branch official called upon to execute the mandatory duty has no discretion in how to carry it out (pay a *particular* salary rate; call a special election *by issuing writs* of election *at once*).

b. As the term "prosecutorial discretion" suggests, a prosecutor's decision whether to bring criminal charges and plead sentencing enhancements is the archetypal discretionary duty. Even where a statute is phrased in mandatory terms, "mandate cannot be used to compel a district attorney to exercise his or her prosecutorial discretion in any particular way." (*People ex rel. Becerra*, *supra*, 29 Cal.App.5th at p. 504.)

Mandamus is therefore unavailable to compel action under a statute providing that the district attorney "shall expeditiously pursue the investigation and prosecution of any violation of law associated with the expenditure" of voter-approved school bond funds. (*Gananian*, *supra*, 199 Cal.App.4th at pp. 1538, 1546.) Nor is mandamus available under a statute providing that the "district attorney shall file a complaint for forfeiture . . . within 30 days of the receipt of the claim." (*Nasir v. Sacramento County Off. of the Dist. Att'y* (1992) 11 Cal.App.4th 976, 988-990 & fn.8, internal quotation marks omitted.) Nor is mandamus available under a statute making it the district attorney's "duty[]to institute suit" to recover money damages in a particular circumstance. (*Boyne v. Ryan* (1893) 100 Cal. 265).

The bottom line is this: the District Attorney is not aware of *any* other California case in which a court has used its mandamus power to compel a district attorney to plead a criminal charge or sentencing enhancement. None were cited by the Superior Court or ADDA below. This Court should not permit the Superior Court to be the first.

The few cases in which courts have applied the mandamus power over a district attorney involve noncriminal proceedings in which the district attorney was required by statute to commence an action based on the directive of another entity. In other words, in the rare case in which the district attorney lacks discretion, it is because the legislature has reallocated that discretion to another party, not eliminated it entirely. For example, the statute at issue in *Board of Supervisors v. Simpson*

(1951) 36 Cal.2d 671, permitted the "board of supervisors" to compel the district attorney to institute public nuisance proceedings. The Supreme Court recognized that it could not "[o]rdinarily" compel a district attorney "to prosecute a criminal case"; indeed the district attorney "may well" have "some discretion" "where he is not directed by the board." (*Id.* at p. 676.) Similarly, in *Bradley v. Lacy* (1997) 53 Cal.App.4th 883, the court held that the district attorney had a non-discretionary duty to serve an accusation on a defendant, "thereby commencing" a non-criminal proceeding, where the grand jury has independent authority to "investigate and indict" such violations, and "[t]he decision whether or not to indict . . . resides entirely with the grand jury." (*Id.* at pp. 888, 892.)

c. The Superior Court never asked—and therefore never answered—the question whether the statutes at issue here "impose a *ministerial* duty, for which mandamus will lie, or a mere obligation to perform a discretionary function," for which mandamus is inappropriate. (*California Public Records Research, Inc.*, *supra*, 4 Cal.App.5th at p. 178, italics added.) Instead, the Superior Court merely concluded that the Three Strikes Law and the other sentencing enhancement statutes create a *mandatory* duty, and left it at that. This Court should vacate the Superior Court's order on that basis alone. (*See Bullock*, *supra*, 221 Cal.App.3d at p. 1094.)

3. The Superior Court Failed to Recognize that, Where the Text of a Statute Is Ambiguous, Courts Must Interpret the Statute to Avoid Constitutional Problems.

Even if the Superior Court were correct that mandamus is appropriate wherever the legislature creates a mandatory duty, the Superior Court's analysis was still flawed because it failed to apply the doctrine of constitutional avoidance. Under that doctrine, if a statute is susceptible to multiple interpretations, one of which "would raise serious constitutional problems," the court should "construe the statute to avoid such problems." (*Garcia*, *supra*, 2 Cal.5th at p. 804, internal quotation marks omitted.) That is because courts presume the Legislature understands the limits on its powers and does not intend to "usurp power constitutionally forbidden it." (*Ibid.*, internal quotation marks omitted.)

Applying this rule, the California Supreme Court read a statute to avoid impinging on prosecutorial discretion in *Steen v. Appellate Division of Superior Court* (2014) 59 Cal.4th 1045. Penal Code section 959.1 provides that "a criminal prosecution may be commenced by filing an accusatory pleading" issued by "a clerk of the court." (Pen. Code, § 959.1, subds. (a), (c)(1).) This provision was susceptible to two readings: the Legislature could have intended to allow a clerk to validate a criminal complaint with or without prosecutorial approval. (*Steen*, *supra*, 59 Cal.4th at p. 1054.) But allowing a clerk to issue a complaint *without* prosecutorial approval would make it "difficult or impossible to reconcile [the statute] with the separation of powers," for "initiation of criminal proceedings is a core, inherent function of

the executive branch." (*Id.* at pp. 1053-54.) Because that construction would "raise[] serious constitutional questions," the Court adopted the other reading. (*Id.* at p. 1054.) Out of respect for the separation of powers, courts should therefore avoid interpreting statutes in a manner that might invade the executive's right to prosecutorial discretion, unless no other possible construction exists.

Here, there are three possible interpretations of the Three Strikes Law—only one of which (ADDA's) impinges upon the separation of powers. The mandatory duty in the Three Strikes Law could refer to the due process requirement to plead and prove a prior conviction beyond a reasonable doubt. (This is the clear import of the text, *see infra*, at pp. 55-57). Another plausible reading is that, although the legislature believes a prosecutor *should* plead and prove all prior strikes, the prosecutor retains discretion to make that choice. (*Infra*, at p. 60). Or, the law could mean—as the Superior Court interpreted it—that the legislature, in a stark departure from the separation of powers mandated by the California Constitution, implicitly eliminated *all* prosecutorial discretion over Three Strikes enhancements. As the Superior Court acknowledged, the statute is "ambigu[ous]" in this respect. (Super. Ct. Op. 27, appen. A506.) It was therefore error for that court to decline to apply the canon of constitutional avoidance, and to adopt the only interpretation that could even plausibly give rise to a ministerial duty.

The rationales the Superior Court offered for declining to apply that canon do not hold water. In declining to apply constitutional avoidance, the Superior Court leaned on *People v. Kilborn* (1996) 41 Cal.App.4th 1325; *People v. Roman* (2001) 92 Cal.App.4th 141; and *People v. Laanui* (2021) 59 Cal.App.5th 803. (See Super. Ct. Op. 29-35, appen. A508-514.) In each case, the Court of Appeals was faced with a claim by a defendant—whose prosecutor had charged prior strikes and continued to press the applicability of those strikes through conviction and appeal—that the Three Strikes Law is unconstitutional. And in each case, the Court of Appeals concluded that the "[T]hree [S]trikes [L]aw requires the prosecutor to plead and prove all prior serious and violent felony convictions." (*Kilborn*, *supra*, 41 Cal.App.4th at p. 1332; see also *Roman, supra*, 92 Cal.App.4th at p. 145 ["As a general rule, the selection of criminal charges is a matter subject to prosecutorial discretion. However, the Three Strikes Law limits that discretion and requires the prosecutor to plead and prove each prior serious felony conviction." (citation omitted)]; *Laanui*, *supra*, 59 Cal.App.5th at p. 815, quoting *Roman*.)[7]

But those cases do not hold that a court may, consistent with the separation of powers, issue *mandamus* to compel the District Attorney's to plead or move to dismiss a sentencing enhancement. To be sure, these cases support the Superior

[7] These decisions are not binding on this Court. (See *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409, as modified on denial of reh'g (May 9, 2001).) And the California Supreme Court has expressly declined to reach this question. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 515 fn.7, as modified on denial of reh'g (Aug. 21, 1996).)

Court's conclusion that the Three Strikes Law creates a mandatory duty for the District Attorney. (See *supra*, at pp. 41-42.) They do not, however, support the conclusion that the Three Strikes Law creates a *ministerial* duty, such that the Superior Court can issue a writ of mandamus to compel the District Attorney's action under that statute. (See *supra*, at pp.36-41.) A mandatory duty is not necessarily ministerial. (*Ibid.*) And as the *Kilborn* Court acknowledged, "the prosecutor retains substantial authority and bases for discretion under the [T]hree [S]trikes [L]aw." (*Kilborn*, *supra*, 41 Cal.App.4th at p. 1333.) *Kilborn*, *Roman*, and *Laanui* therefore do not undermine the conclusion that mandamus is inappropriate here. Regardless of what these cases say, reading the Three Strikes Law to create a ministerial duty would violate the separation of powers inherent in the Constitution. (*Gananian*, *supra*, 199 Cal.App.4th at p. 1544.)[8]

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[8] For the same reasons, the Superior Court's conclusion (Super. Ct. Op. 38, appen. A517), that the District Attorney's Special Directives would force ADDA's members to violate supposed "ethical" obligations fails. The Superior Court concluded that "*Kilborn* and other appellate cases must be cited to the court if the constitutionality of the plead[] and prove requirement" is at issue. (*Ibid.*) But, as shown above, the Court of Appeal cases on this issue deal with a separate question. In any event, even if the Superior Court had the right reading of those cases (and it does not), the Rules of Professional Conduct also permit a Deputy District Attorney 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 the existing law." Rules Prof. Conduct, rule 3.1. Thus, even if a Deputy District Attorney 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

B. The Preliminary Injunction Unlawfully Compels the Exercise of Prosecutorial Discretion.

Because the Three Strikes Law and the other sections of the Penal Code at issue here require prosecutors to exercise discretion in their application, these laws neither create a ministerial duty for prosecutors to plead and prove sentencing enhancements, nor create a ministerial duty for prosecutors to avoid moving to dismiss sentencing enhancements. (*See Hudson*, *supra*, 232 Cal.App.4th at p. 408.) The conclusion that these statutes do not create a ministerial duty is supported by the statutory text. That conclusion is also compelled by the constitutionally-mandated separation of powers under which the Legislature enacted the statutes, and pursuant to which the District Attorney sees that they are faithfully executed.

1. The Three Strikes Law Does Not Create a Ministerial Duty for Prosecutors to "Plead and Prove" Strikes.

a. California's Three Strikes Law provides that a defendant who has been convicted of certain prior felonies is subject to an increased sentence upon the conviction of any other felony. (Pen. Code, § 667, subd. (e).) "If a defendant has one prior serious or violent felony conviction . . . that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction." (*Id.* § 667, subd. (e)(1).) And if "a

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Directive's statement—and do so ethically—because there is a reasonable (in fact, correct) argument that there should be a change in the existing law.

defendant has two or more prior serious or violent felony convictions . . . that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term" of at least "25 years." (*Id.* § 667, subd. (e)(2)(A).) Subdivision (d) explains how a decisionmaker can determine "whether a prior conviction is a prior felony conviction," including by referring to a statute with a list of qualifying California offenses, and explaining that convictions from other jurisdictions should be measured against the elements of California offenses. (*Id.* § 667, subd. (d).)

In furtherance of this sentencing scheme, the statute states that "[t]he prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2)." (Pen. Code, § 667, subd. (f)(1).) Paragraph (2) then provides that "[t]he prosecuting attorney may move to dismiss or strike a prior 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." (*Id.* § 667, subd. (f)(2).) Paragraph (2) also states that "[i]f upon the satisfaction of the court that there is insufficient evidence to prove the prior serious or violent felony conviction, the court may dismiss or strike the allegation." (*Ibid.*)

In other words, California's Three Strikes Law is indistinguishable from any other law that sets out the statutory penalty for a crime. It provides that certain conduct (here, the commission of a felony) under certain circumstances (here, a criminal history that includes other felonies) is punishable by a

certain term of imprisonment (here—on the first strike—twice the term of imprisonment that would otherwise apply, or—on the second strike—a minimum of twenty-five years to life).

b. And just like any other law that sets out the statutory penalty for a crime, the Three Strikes Law requires the exercise of prosecutorial discretion. It implicates "the basic duties of a district attorney as public prosecutor," (*Taliaferro*, *supra*, 182 Cal.App.2d as 756), such as "whom to charge, what charges to file and pursue, and what punishment to seek." (*Dix*, *supra*, 53 Cal.3d at p. 451.) There are at least three discretionary decisions involved in the pleading and proving of a potential strike. (See *Kilborn*, *supra*, 41 Cal.App.4th at p. 1333 ["[T]he prosecutor retains substantial authority and bases for discretion under the [T]hree [S]trikes [L]aw."].)

First, the prosecutor must decide whether a conviction can be pleaded as a strike. The Three Strikes Law enumerates certain felonies that will count as strikes. (See Pen. Code, §§ 667, subd. (d)(1); 667.5, subd. (c); 1192.7, subd. (c).) But those aren't the only ones. A conviction will also count as a strike, even if the felony is not enumerated, if the prosecution nevertheless pled and proved that the defendant used a deadly weapon or inflicted great bodily injury. (See *People v. Equarte* (1986) 42 Cal.3d 456, 465; *People v. Nava* (1996) 47 Cal.App.4th 1732, 1738.) Moreover, a strike includes a "conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison." (See Pen. Code, § 667, subd. (d)(2).) And courts have developed a significant body of case law

around when a conviction from another jurisdiction counts as a felony. (See, e.g., *People v. Avery* (2002) 27 Cal. 4th 49, 53.)

Second, the prosecutor must choose what form of the evidence to use to prove the strike. The prosecutor may use a trial transcript from the earlier proceeding, (*People v. Bartow* (1996) 46 Cal.App.4th 1573, 1580); or an appellate opinion, (*People v. Woodell* (1998) 17 Cal.4th 448, 457); or a plea form (*People v. Guerrero* (1988) 44 Cal.3d 343, 355-356). In some circumstances, the prosecutor may even have to present the evidence supporting the strike in a separate trial. (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1334.)

Third, the prosecutor must decide whether to move to dismiss a strike. The Three Strikes Law says that a court may grant dismissal "[i]n the furtherance of justice" or if "there is insufficient evidence to prove the prior serious or violent felony conviction." (See Pen. Code, § 667, subd. (f)(2).) The prosecutor's determination of whether to seek that dismissal requires a judgment call.

For each of these reasons, pleading and proving a strike cannot be performed "in a prescribed manner when a given state of facts exists . . . and without regard to his [or] her . . . opinion concerning the act's propriety." (*Hudson*, *supra*, 232 Cal.App.4th at p. 408.) The application of the Three Strikes Law is not a rote task. (See, e.g., *Tirado*, *supra*, 38 Cal.App.5th at p. 644 [noting that prosecution did not charge all available enhancements].)[9]

[9] The District Attorney attached several declarations to his Opposition testifying to the consistent practice of prosecutors in

c. The "plead and prove" language on which ADDA and the Superior Court fixated below merely ensures that no defendant can be sentenced under the Three Strikes Law unless the prosecution's allegation that the defendant has committed prior felonies has been pled and proven beyond a reasonable doubt. The United States Constitution excepts prior convictions from the general rule that the government must prove beyond a reasonable doubt any fact that exposes the defendant to a greater punishment than that authorized by the guilty verdict or plea. (See *Alleyne v. United States* (2013) 570 U.S. 99, 111 & fn.1; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 230.) The requirement that the prosecuting attorney "plead and prove each prior felony conviction" therefore grants the defendant statutory

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exercising their prosecutorial discretion with respect to sentencing enhancement under the Three Strikes Law. For example, the declaration of Stephan Munkelt, a criminal defense lawyer in Nevada, Placer, Sacramento, Sutter, Yuba, Butte, and Plumas counties since 1978, states that "[i]n numerous felony cases where my client had one or more serious or violent prior felony convictions, the initial pleading did not allege those enhancements," and "[i]n many of them available Strike enhancements were never filed." (Munkelt Decl. ¶ 6, appen. A345.) The declaration of Marshall Khine, the Chief of the Criminal Division in the San Francisco County DA's Office, similarly explains that the "current policy of the San Francisco District Attorney is to allege status enhancements such as prior strike convictions only as warranted by extraordinary circumstances subject to the approval of the District Attorney or his designee." (Khine Decl. ¶ 4, appen. A343.) In other words, from the day of the Three Strikes Law's enactment, and for every day since then, prosecutors across California have exercised prosecutorial discretion under the statute.

rights above and beyond the constitutional minimum with respect to her prior convictions.[10] California courts have likewise held that a defendant has a statutory right to a jury trial on the question of whether the defendant's prior conviction is a felony within the meaning of the Three Strikes Law. (See *People v. Williams* (2002) 99 Cal.App.4th 696, 700 ["The right to have a jury determine factual issues relating to a prior conviction alleged for purposes of sentencing enhancements is statutory, not constitutional . . . ."].) These statutory rights mirror certain constitutional due process rights the defendant has with respect to the alleged present crime.

Indeed, the statute's statement that a prosecutor "shall plead and prove" strikes cannot refer to anything more than a protection of defendants' rights because, the word "shall" modifies both "plead" and "prove." As the Superior Court acknowledged, "a prosecutor cannot be compelled to actually prove a strike prior; he or she can only be compelled *to attempt* to prove the prior conviction." (Super. Ct. Op. 28, appen. A507, italics added.) The ultimate decision of whether the prosecutor successfully proved the strike lies with the jury. (See *People v. Gallardo* (2017) 4 Cal.5th 120, 123-125.) Because "shall" cannot possibly require a prosecutor to "prove" something in every case, the word "shall'

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[10] The Superior Court acknowledged that this interpretation of the Three Strikes Law was "reasonabl[e]." (Super. Ct. Op. 28, appen. A507.) Despite this, and despite acknowledging that this rendered the Three Strikes Law "ambigu[ous]," the Superior Court declined to apply the canon of constitutional avoidance. That, too, was error. (*Supra*, at pp. 47-50.)

when applied to "plead" should not require a prosecutor to plead something in every case either.

d. Even if this Court disagrees, however, and concludes that "plead and prove" refers to the usual decision to charge a crime, not the requirement to plead and prove a prior strike beyond a reasonable doubt, the Three Strikes Law still does not create a ministerial duty.

The Superior Court dismissed the substantial discretion involved in pleading and proving a strike because the Three Strikes Law states that it "shall be applied in every case" in which a defendant has a prior felony conviction "except as provided in paragraph (2)." (Pen. Code, § 667, subd. (f)(1).) And paragraph (2) highlights certain circumstances in which the prosecuting attorney "may move to dismiss" a strike. (*Id.* § 667, subd. (f)(2).) The Superior Court reasoned that "[t]here would be no reason for either the 'shall be applied in every case' language or the paragraph (2) exception if the prosecutor had full discretion to ignore prior strikes under the Three Strikes Law." (Super. Ct. Op. 28, appen. A507.)

But that reasoning is flawed. Prosecutorial discretion is not an "on" or "off" switch. The Legislature can provide guidance regarding certain decisions without completely eliminating prosecutorial discretion. That was the conclusion the Court of Appeal reached in *Gananian*. There, the Court of Appeal considered Education Code section 15288, which provides that: "It is the intent of the Legislature that upon receipt of allegations of waste or misuse of bond funds authorized in this chapter,

appropriate law enforcement officials shall expeditiously pursue the investigation and prosecution of any violation of law associated with the expenditure of those funds." (Ed. Code, § 15288.) The Court of Appeal rejected the plaintiff's assertion that section 15288 "create[d] an affirmative, nondiscretionary duty on the part of district attorneys to investigate and prosecute alleged crimes" related to the expenditure of school bond funds. (*Gananian*, *supra*, 199 Cal.App.4th at p. 1539-40.)

Gananian explained: "Not every statute which uses the word 'shall' is obligatory rather than permissive. Although statutory language is, of course, a most important guide in determining legislative intent, there are unquestionably instances in which other factors will indicate that apparent obligatory language was not intended to foreclose a governmental entity's or officer's exercise of discretion." (*Id.* at p. 1540, internal quotation marks and alteration omitted.) Indeed, California courts have repeatedly held that criminal statutes that use "shall" do not create a ministerial duty for prosecutors. (See, e.g., *Wilson v. Sharp* (1954) 42 Cal.2d 675, 677-678 [holding that statute created a discretionary duty, where it provided that, if county funds are illegally paid, "the district attorney *shall* institute [a] suit" for recovery (italics added)]; *Ascherman v. Bales* (1969) 273 Cal.App.2d 707, 708 [same, where it provided that "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" (italics added and internal quotation marks omitted)].)

One factor "indicat[ing] that apparent obligatory language was not intended to foreclose a governmental entity's or officer's exercise of discretion" that *Gananian* found persuasive was the prefatory language in the statute. (*Gananian*, *supra*, 199 Cal.App.4th at p. 1540.) "Ordinarily, the Legislature imposes legal duties on government officers in direct and unequivocal terms." (*Id.* at p. 1541.) But, there, the statute began with the statement "It is *the intent of the Legislature* that . . . appropriate law enforcement officials shall expeditiously pursue the investigation and prosecution." (Ed. Code, § 15288, italics added.) *Gananian* therefore concluded that the "unique wording of Education Code section 15288 suggests it was intended as a statement of legislative policy or preference rather than as a command." (*Gananian*, *supra*, 199 Cal.App.4th at p. 1541.)

Another such factor at play in *Gananian* was the canon of constitutional avoidance: the fact that "construing Education Code section 15288 as a legislative command would clash with a basic precept of our criminal justice system—that the Constitution leaves the decision whether to pursue criminal charges against a person to the discretion of prosecutors subject only to the supervision of the Attorney General." (*Gananian*, *supra*, 199 Cal.App.4th at p. 1542.) The court was unconvinced that the Legislature could direct the prosecution of a particular category of crime. But "even assuming for the sake of analysis that the Legislature could constitutionally mandate prosecutions

for one category of alleged criminal offenses, it would be remarkable if it did so without acknowledging and clearly stating that it was making an exception to the principle of prosecutorial discretion." (*Id*. at p. 1544.)

This Court should reach the same conclusion here. Just as in *Gananian*, the Three Strikes Law begins with a statement of legislative intent: "It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of one or more serious or violent felony offenses." (Pen. Code, § 667, subd. (b).) And just as in *Gananian*, the Three Strikes Law does not include a clear statement of an intent to create an exception to the principle of prosecutorial discretion. Consequently, just as in *Gananian*, this Court should not overread the Three Strikes Law's statement that it "shall be applied in every case" in which a defendant has a prior felony conviction "except as provided in paragraph (2)." (Pen. Code, § 667, subd. (f)(1).) This is merely "a statement of legislative policy." (*Gananian*, *supra*, 199 Cal.App.4th at p. 1541.) It does not create a ministerial duty.

2. None of the Statutes Cited by the Superior Court Create a Ministerial Duty for Prosecutors to Avoid Dismissing Previously-Pled Sentencing Enhancements.

a. The Three Strikes Law provides that the "prosecuting attorney may move to dismiss or strike a prior 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,

subd. (f)(2).) Penal Code section 1385 also governs the dismissal of sentencing enhancements outside of the Three Strikes Law's provisions, including each of the sentencing enhancements at issue in this appeal: five-year prior enhancements (*id.* § 667, subd. (a)(1)), three-year prior enhancements (*id.* § 667.5, subd. (a)), gang enhancements (*id.* § 186.22), special circumstances allegations resulting in a life without parole sentence (*id.* §§ 190.1-190.5), enhancements for violations of bail or own recognizance release (*id.* § 12022.1), and use of a firearm (*id.* § 12022.53). Section 1385, in turn, provides that "[t]he judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." (*Id.* § 1385, subd. (a).) And section 1386 provides that "neither the Attorney General nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in Section 1385." (*Id.* § 1386).

Neither the text of the Three Strikes Law, nor sections 1385 and 1386, nor the Supreme Court's case law interpreting section 1385 indicate that these statutes create a ministerial duty for prosecutors to refrain from moving to dismiss previously-pled sentencing enhancements. To the contrary, the Three Strikes Law—at paragraph (f)(2)—acknowledges the discretionary nature of a decision to dismiss a previously pled sentencing enhancement through its use of the word "may," its reference to "the furtherance of justice," and its acknowledgement of the problems of proof that may arise in the prosecution of sentencing enhancement. (Pen. Code, § 667, subd. (f)(2).) Similarly, section

1385 recognizes the discretionary nature of a decision to dismiss a previously pled sentencing enhancement through its open-ended statement that a prosecutor may "appl[y]" for a dismissal and receive one "in furtherance of justice." (*Id.* § 1385.)

There is no way that a decision that a prosecutor makes in "the furtherance of justice," (see Pen. Code, §§ 667, subd. (f)(2); 1385), could be performed "in a prescribed manner when a given state of facts exists" and "without regard to his, her, or its own opinion concerning the act's propriety," (*Hudson*, *supra*, 232 Cal.App.4th at p. 408), such that the action could fairly be termed "ministerial."

b. The Superior Court's contrary conclusion was driven by two irrelevant considerations. First, the Superior Court reasoned that the Three Strikes Law and Penal Code section 1385 prohibit a prosecutor from filing an amended criminal information without previously pled strikes because that process creates an end-run around the purportedly mandatory pleading language in the Three Strikes Law. (Super. Ct. Op. 36-37, appen. A515-516; see also *id.* at p. 37, appen. A516, quoting *Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1086 ["[A] local executive official, charged with a ministerial duty, generally lacks authority to determine that a statute is unconstitutional and on that basis refuse to apply the statute."].)

The obvious flaw in that reasoning is that the Three Strikes Law does not create a ministerial duty for a prosecutor to plead and prove strikes. (*See supra*, at pp. 51-60.)

But even setting that problem aside, the Superior Court is still wrong because the Three Strikes Law's provision regarding dismissals of previously-pleaded enhancements is separate from—and actually creates an exception to—the Three Strikes Law's provision regarding pleading and proving new enhancements. Paragraph (f)(1) of section 667 provides that "[t]he prosecuting attorney shall plead and prove each prior serious or violent felony conviction *except* as provided in paragraph (2)." (Pen. Code, § 667, subd. (f)(1), italics added.) Paragraph (f)(2) *separately* provides that "[t]he prosecuting attorney may move to dismiss or strike a prior 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." (*Id*. § 667, subd. (f)(2).) So, even if the Superior Court were correct that paragraph (f)(1) of section 667 creates a ministerial duty, the reasons the Superior Court gave for that conclusion—its erroneous reasoning regarding the mandatory language in paragraph (f)(1) (*see supra*, at pp. 51-60)—would not apply to paragraph (f)(2) of section 667. Paragraph (2) includes permissive language. (Pen. Code, § 667, subd. (f)(2) ["may move to dismiss or strike"].) And the prosecutor's decision to move to dismiss is governed by paragraph (f)(2), not paragraph (f)(1).

Second, the Superior Court mistakenly concluded that the interpretive gloss the Supreme Court has placed on a Superior Court's duties under section 1385 also applies to a prosecutor's duties under that statute. (Super. Ct. Op. 39-41, 43-44, appen.

A518-520, A522-523.) The California Supreme Court has explained that section 1385's reference to "justice" requires that "the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit" and that "no weight whatsoever may be given to factors extrinsic to the scheme, such as the mere desire to ease court congestion or, a fortiori, bare antipathy to the consequences for any given defendant." (*People v. Williams* (1998) 17 Cal.4th 148, 161, as modified on denial of reh'g (Feb. 25, 1998).) The Superior Court could see "no reason why this same requirement does not apply to the District Attorney's prosecutors." (Super. Ct. Op. 41, appen. A520.)

There are at least four such reasons. (See Real Party in Interest's Brief 26-33, *Nazir v. Superior Court of Los Angeles County*, Appeal No. B310806.) One: The text of section 1385. The statute places a limit on the "judge or magistrate's" decision to order the dismissal, not on the prosecutor's request for one. (See Pen. Code, § 1385, subd. (a) ["The *judge or magistrate may*, either of his or her own motion or upon the application of the prosecuting attorney, and *in furtherance of justice, order* an action to be dismissed." (italics added)]; see also Real Party in Interest's Brief 26-31, *Nazir v. Superior Court of Los Angeles County*, Appeal No. B310806.) And courts should be reluctant to find that prosecutorial discretion has been curtailed without a

clear statement from the Legislature to that effect. (*Gananian*, *supra*, 199 Cal.App.4th at p. 1544.)

Two: The Constitution, and the political nature of the legislature and executive branches as compared to the apolitical nature of the judiciary. (See *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633 ["[T]he judicial role in a democratic society is fundamentally to interpret laws, not to write them. The latter power belongs primarily to the people and the political branches of government." (internal quotation marks omitted)].) Because a "court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed," the Legislature may lawfully, and sensibly, prohibit the courts from considering the policy consequences of a decision without prohibiting the executive from taking those same considerations into account in the exercise of prosecutorial discretion. (*Id.* at p. 629.)

Three: The Constitution (again), and the unreviewability of prosecutorial discretion. *People v. Williams*'s statement that the decision whether to dismiss a sentencing enhancement should not be motivated by "antipathy to the consequences for any given defendant" is directed to what an appellate court should consider in "reviewing" a ruling on a motion to dismiss. (See *Williams*, *supra*, 17 Cal.4th at p. 161.) But the exercise of prosecutorial discretion is unreviewable. (See *id.*; see also *Wallace*, *supra*, 169 Cal.App.3d at p. 410 ["[I]t is the district attorney who is vested with discretionary power to determine whether to prosecute.

There is no review by way of the appellate process of such a decision nor can a court control this statutory power by mandamus." (citation and internal quotation marks omitted)].)

Four: The Constitution (yes, again), and the ordinary effect of prosecutorial discretion on the court. "A statute conferring upon prosecutors the discretion to make certain decisions" "is not invalid simply because the prosecutor's exercise of such charging discretion necessarily affects the dispositional options available to the court." (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 553, as modified (Apr. 17, 2002).) "Rather, such a result generally is merely incidental to the exercise of the executive function—the traditional power of the prosecutor to charge crimes." (*Ibid.*)

In sum, the ability to move to dismiss an already-plead sentencing enhancement—or to amend the information that does not include already-pled enhancements—is in the heartland of decisions that belong exclusively to the executive. (See *Garcia*, *supra*, 46 Cal.App.5th at p. 791 [the power to determine "what charges to bring (or not to bring)" and "which sentencing enhancements to allege (or not to allege)"].) Neither the Three Strikes Law, nor the other provisions of the Penal Code cited by the Superior Court, create a ministerial duty for prosecutors to avoid dismissing previously-pled sentencing enhancements.

III. The Superior Court's Issuance of the Preliminary Injunction Was Otherwise Unwarranted.

Because ADDA is unlikely to prevail on the merits, the Superior Court erred in granting a preliminary injunction. (*Aiuto*, *supra*, 201 Cal.App.4th at p. 1361.) And even if this Court

were to disagree on the merits, the Superior Court still erred, because the balance of harms does not justify issuing a preliminary injunction. In analyzing the balance of harms, courts consider factors including "the degree of irreparable injury" to the parties, and "the public interest." (*Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, 435, internal quotation marks omitted.)

The Superior Court concluded that these factors, on balance, only "somewhat" favored ADDA. (Super. Ct. Op. 46, appen. A525.) In its view, ADDA's members could potentially be subjected to "significant" harm whereas the District Attorney would suffer no harm; enjoining the Special Directives did not alter the status quo; and the public interest strongly favored the District Attorney. (*Id.* at pp. 45-46, appen. A524-525.) That is wrong. Enjoining the Special Directives will significantly harm the District Attorney and is not in the public's interest. By contrast, on the Superior Court's own logic, Deputy District Attorneys face only some potential harm. Because this analysis favors the District Attorney on balance, the injunction should not have issued.

The Superior Court's conclusion that the District Attorney would not suffer any harm from a preliminary injunction cannot pass muster. As federal courts have explained, where an injunction would interfere with the "judgment [of] elected officials" about which policies to pursue and how best to pursue them, it should not issue. (*Tenorio-Serrano v. Driscoll* (D. Ariz. 2018) 324 F. Supp. 3d 1053, 1067.) The consequences of using an

injunction to "supersede[]" the "carefully engineered . . . policy decisions made by an elected [official]" are "severe." (*Erik V. ex rel. Catherine V. v. Causby* (E.D.N.C. 1997) 977 F. Supp. 384, 389.) Not only does it have a "disruptive effect," it undermines the elected official's "credibility" to "sudden[ly] overturn[] . . . a policy they have been enforcing." (*Ibid.*)

In addition, as the Superior Court acknowledged, "the public interest strongly weighs in [the District Attorney's] favor." (Super. Ct. Op. 45, appen. A524.) Against this grave, certain harm to the District Attorney and the public is only some speculative harm to ADDA's members. The Superior Court concluded that following Special Directive 20-08 would subject Deputy District Attorneys to "clear harm" because it requires "unlawful conduct," which could expose Deputy District Attorneys to "possible sanctions, contempt, and State Bar discipline." (*Ibid.*) But in the next breath, the court determined that, "[f]or the other sentencing enhancements, the harm is less significant" because, although the practices required are "not legal," Deputy District Attorneys would be violating the law at their "superior's direction." (*Ibid.*) "[A] superior's direction for a subordinate to act illegally does not necessarily result in harm. At most, it exposes the prosecutor to the *possibility* of sanctions, but not State Bar discipline." (*Ibid.*, italics added.)

The District Attorney contests the conclusion that following the Special Directives requires Deputy District Attorneys to violate the law. But at bottom, the Deputy District Attorneys' conduct with respect to *both* the Three Strikes Law and the other

enhancements is at the District Attorney's "direction." (Super. Ct. Op. 45, appen. A524.) It cannot be that this mitigates the harm suffered with respect to the other sentencing enhancements, but not the Three Strikes Law. The Superior Court accordingly overestimated the harm Deputy District Attorneys would suffer if required to comply with Special Directive 20-08.

In sum, there is a grave and certain prospect of harm to the District Attorney and the public from issuing an injunction. But the harm to the Deputy District Attorneys is both speculative and limited. Because the Superior Court did not properly balance the relative harms, and because that balance weighs in the District Attorney's favor, the court erred in issuing the preliminary injunction.

CONCLUSION

For these reasons, George Gascón and the Los Angeles District Attorney's Office respectfully requests that this Court reverse the Superior Court's order.

Dated: August 16, 2021 HOGAN LOVELLS US LLP

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CERTIFICATE OF WORD COUNT

The undersigned counsel certifies that pursuant to rule 8.204(c) of the California Rules of Court, the text of this brief was produced using 13-point Century Schoolbook font and contains 13,993 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: August 16, 2021 /s/ Stephanie Yonekura
Stephanie Yonekura