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.	)	B310845 (LASC 20STCP04250)

APPLICATION TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

(After Grant of Motion for Preliminary Injunction February 8, 2021
Honorable James C. Chalfant, Los Angeles Superior Court)

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APPLICATION TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rules of Court Rule 8.200, subdivision (c), Ricardo Garcia, the Los Angeles County Public Defender, herewith applies for permission to file an Amicus Curiae brief in support of Appellants.

The Los Angeles County Public Defender is the largest publicly funded criminal defense law office in the United States. We represent the vast majority of criminal defendants in Los Angeles County, most of whom are prosecuted by Appellant Los Angeles County District Attorney, and his office. As such, we have a unique interest and perspective regarding how the District Attorney files and prosecutes cases.

We are concerned with the injunction issued by the lower court, which severely impacts the practices of the elected Los Angeles County District Attorney. The ruling directly impacts our clients and we believe the injunction represents an overreach by the lower court. It is our intent to assist this court by providing an "on the ground" understanding of how things are actually done in the trial courts regarding the filing and dismissal of "strikes" and enhancements. Our briefing will assist this Court as it examines and determines the critical issues presented in this appeal.

Rule of Court 8.200, subdivision (c)(3) requires amicus to identify any party or counsel for a party in the pending appeal who authored the proposed amicus brief in whole or part or made a monetary contribution intended to fund the preparation or submission of the brief. This brief was prepared solely by the Los Angeles County Public Defender, which is not a party to the underlying action. No party or counsel for any party authored this brief or any part of it. No outside entity funded the preparation or submission of this brief.

CERTIFICATE OF INTERESTED ENTITES OR PERSONS

The Los Angeles County Public Defender, the author of the proposed amicus curiae brief, is not a party to the underlying action. Pursuant to California Rules of Court rule 8.208, the Public Defender certifies that it knows of no other person or entity who has a financial or other interest in this case.

Dated December 17, 2021

By: /s/ Mark Harvis
Los Angeles County
Deputy Public Defender
SBN 110960

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PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

After Grant of Motion for Preliminary Injunction
February 8, 2021
Honorable James C. Chalfant, Los Angeles Superior Court

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SEVEN:

President Barack Obama, and others, have stated that "elections have consequences." This is particularly apt here, where the voters of Los Angeles County ousted the incumbent "status quo" District Attorney in favor of George Gascón, a man who made it clear he was a reformer. The election was not very close: Mr. Gascón received over 2 million votes, compared to approximately 1.7 million for Jackie Lacey, which is 53.53 percent to 46.47

percent. (https://results.lavote.gov/#year=2020&election=4193 as of December 17, 2021.)

The plaintiffs in the underlying action, the Association of Deputy District Attorneys (ADDA) for Los Angeles County, backed the losing candidate. (https://www.laadda.com/association-of-deputy-district-attorneys-endorses-jackie-lacey-for-l-a-county-district-attorney/ as of December 17, 2021.) They formed a political action committee to support Ms. Lacey and campaigned on her behalf.

On his first day in office, Mr. Gascón introduced a series of "special directives" that served to implement the elected District Attorney's vision of criminal justice in Los Angeles County. NBC News described Mr. Gascón's actions as sweeping criminal justice reforms aimed at permanently changing the course of California's criminal justice system. (https://www.nbcnews.com/news/us-news/los-angeles-new-district-attorney-announces-sweeping-reforms-first-day-n1250317 as of December 17, 2021.)

The ADDA was apoplectic at Mr. Gascón's reforms and sought to undercut him at every turn. When it was clear that Mr. Gascon would not be deterred by the antics of the ADDA's members, they turned to the courts to obtain that which they lost at the ballot box: control over how cases are prosecuted.

Prior to Mr. Gascón's election, individual prosecutors had (and actually still have) a great deal of power to decide how cases are to proceed. They could charge (often overcharge) every potentially available crime and enhancement, subjecting criminal defendants to decades in prison. Every criminal case has a value (in terms of disposition and sentence) but that worth would exponentially increase depending upon what enhancements individual prosecutors sought to file. Charging decisions sometimes seemed to be at the whim of the individual prosecutor – some are known to be staunch law-and-order types who seek long sentences, while others are not so rigid. Prosecutors sought specific sentences and charges because they (as individuals) believed they were acting in the interests of justice.

Mr. Gascón's election changed this dynamic. Relying upon statistics and empirical data, Mr. Gascón implemented policies that took some discretion from individual prosecutors. Mr. Gascón, as the elected District Attorney, implemented *his* vision of justice – which is exactly what the voters elected him to do.

The ADDA argues that its members are being forced to take actions that are unethical, that are contrary to the interests of justice, and even unlawful. What they are really saying, however, is that they don't want to follow directives that they don't agree

with. Certain ADDA members still carry the "lock 'em up," long-sentence mentality that Mr. Gascón has refused to continue.

When the ADDA claims that it cannot be forced to follow policies that it disagrees with, they forget that as non-elected employees of the District Attorney's office they are bound to follow many, many policies and procedures, whether they agree with them or not. The Los Angeles County District Attorney's office has a Legal Policy manual that (at least in the March 12, 2020, edition) is 434 pages long. It repeatedly uses the words "shall" and "shall not" to describe or circumscribe actions a prosecutor may or may not take. As employees, they must follow those policies. Just as they now must follow the policies implemented by Mr. Gascón.

The ADDA wraps itself in the California Constitution, victim's rights, and lawyer ethics as they argue that Mr. Gascón's policies are unlawful and properly enjoined. But their lawsuit, when it comes down to it, is about who controls the District Attorney's office and who directs its policies. Mr. Gascón has the power as the elected, progressive District Attorney and is using it to bring change – change which certain members of the ADDA do not like.

This, of course, is not the first time that change has occurred with a new District Attorney, particularly involving Three Strikes

sentencing. In 2000, District Attorney Candidate Steve Cooley criticized the implementation of the Three Strikes law, calling for it to be used less frequently and more carefully to avoid disproportionately harsh sentences for relatively minor crimes. Once elected, Mr. Cooley implemented a new Three Strikes policy, seemingly contrary to the law itself, which mandated that there be no blanket imposition of three strikes sentences. (*Editorial: Three Strikes Made Fairer,* New York Times November 9, 2012; https://www.nytimes.com/2012/11/10/opinion/a-three-strikes-law-made-fairer-in-california.html as of December 17, 2021.)

There was opposition to Mr. Cooley's new policy. The arguments made by the opposition to that policy then are virtually identical to the claims heard now about Mr. Gascón's policies. (See for example *Author of 3-Strikes Law Attacks Cooley,* Los Angeles Times November 30, 2000; https://www.latimes.com/archives/la-xpm-2000-nov-30-me-59292-story.html as of December 17, 2021.) Deputy District Attorneys implemented Mr. Cooley's policy. Did they implement the policy because they agreed with it? Perhaps. Or because they were ordered to do so? Again, perhaps. The difference between then and now is that they did not sue then, and they did not complain that their ethics and the law were being violated. Instead, they implemented the directive.

The ADDA seemed to be claiming in its pleadings to the lower court that prosecutors always file every strike and always file every enhancement. ADDA seemed to be saying that prosecutors always seek to have defendants punished and sentenced to the maximum sentence allowed for the crimes and enhancements. They seem to be arguing that 800 individual prosecutors have the power to determine what sentence is in the "interest of justice" and that they could not be forced to follow the Special Directives the District Attorney has set forth to guide the individual prosecutor's actions.

Two declarations from experienced Deputy Public Defender trial lawyers that were submitted by Mr. Gascón to the lower court show that the ADDA overstated what occurs in the trial courts. Prosecutors do not always file all potential strikes and other enhancements. Instead, they use their discretion to determine whether a case should be filed or not, whether a "wobbler" crime should be filed as a felony or misdemeanor, whether strikes should be filed, or enhancements alleged.

Prosecutors routinely seek to have charges and enhancements dismissed. They might do so because, in the exercise of discretion, the case does not merit a strike-enhanced sentence, or an enhancement cannot be proven. They might seek

to dismiss charges and enhancements in furtherance of a plea agreement. The dismissal of charges and enhancements due to a plea agreement is, in fact a common, everyday occurrence. It has been estimated that 97 per cent of all criminal prosecutions are resolved by pleas. (*The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*; National Association of Criminal Defense Lawyers (2018); as of December 17, 2021, available at:

https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf.)

In their declarations, the two Deputy Public Defenders told the lower court that that while most prosecutors exercise their discretion to charge only the appropriate charges and enhancements, some overcharge their cases. This overcharging serves to force defendants to choose between risking a very long prison sentence or taking a deal for a much-reduced sentence with the overcharged counts being dismissed. They wrote that some prosecutors routinely file gang enhancements for the most mundane crimes committed by gang members even though the truth is that the crime was not committed for the benefit of the gang.

The declarations told the court that some prosecutors seek to impose a "trial tax" when a defendant exercises his or her constitutional right to a trial. A prosecutor might extend "today and today only" offers and then bump up the exposure when the defendant chooses not to plead "today and today only."

The ADDA argues that the special directives are causing prosecutors to act unethically by forcing them to advance positions they do not believe in. Yet the declarations show that some of these same prosecutors have followed the orders of higher ups when they rejected a defendant's counter-plea offer. Prosecutors might say something like "I'd love to give you less, or I'd love to dismiss the case, I recognize my case is weak, I personally support giving less or dismissing, but hey my supervisor won't let me so the offer is the offer."

The truth is that prosecuting attorneys enjoy broader discretion in making decisions that influence criminal case outcomes than any other actors in the American justice system. (Bruce Frederick and Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making*; Vera Institute of Justice, 2012. Available at: https://www.vera.org/publications/anatomy-of-discretion as of December 17, 2021.) The ADDA, as seen by this lawsuit, is

rebelling against a District Attorney who has set forth specific guidelines limiting that prosecutorial discretion.

Mr. Gascón made it no secret during his campaign what he intended to do. No voter cast a ballot to elect a single member of the ADDA. No voter cast a ballot for the ADDA to set the District Attorney's policy. The voters made it clear they wanted George Gascón to change the District Attorney's office. He is doing that and he must be allowed to continue.

The Public Defender believes that the case law clearly prohibited the lower court from issuing the injunction forcing the District Attorney to exercise his discretion in a particular way. Plainly, courts generally do not have the power to force an elected member of the Executive Branch to exercise his or her discretionary authority in a particular manner.

> "It is well settled that the prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring. (E.g., *People v. Eubanks* (1996) 14 Cal.4th 580, 588-589; *Dix v. Superior Court* (1991) 53 Cal.3d 442, 451.) This prosecutorial discretion to choose, for each particular case, the actual charges from among those potentially available arises from 'the complex considerations necessary for the effective and efficient administration of law enforcement.' (*People v. Keenan* (1988) 46 Cal.3d 478, 506, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 860.) The prosecution's authority in this regard is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial

> branch. (*People v. Wallace* (1985) 169 Cal.App.3d 406, 409; *People v. Adams* (1974) 43 Cal.App.3d 697, 708; see also *Taliaferro v. Locke* (1960) 182 Cal.App.2d 752.)" (*People v. Birks* (1998) 19 Cal.4th 108, 134.)

The Court of Appeal in *People v. Andrews* (1998) 65 Cal.App.4th 1098 considered the discretion District Attorneys exercise when making charging decisions, specifically strikes. Although the record in the trial court was incomplete, the *Andrews* court said that although there might be a requirement to file strikes, the practice actually differed from county to county.

> "[H]owever, it is clear there can be vast differences in the manner of enforcement of this draconian sentencing law. It seems to be without dispute that Andrews would not have faced a life term if he had committed the current offense within the San Francisco boundaries. Undoubtedly, such vast differences in enforcement patterns, based on nothing other than differing policies within cities or counties, is a source of concern. That a person faces either probation or 25 years to life based only on geography should trouble any thinking person. (*Andrews* at p. 1102.)

The court compared the decision to file strikes with the decision to seek the death penalty, where some counties seek more death sentences than others.[1/]

1/ We note that California still has the death penalty and that in 2016 the voters defeated Proposition 62, which would have repealed it. The voters approved Proposition 66, which was intended to speed up the death penalty process. Despite this, Governor Gavin Newsom issued a moratorium on executions in March 2019. Two court challenges to this moratorium were unsuccessful. (https://deathpenaltyinfo.org/news/california-court-rejects-challenge-to-execution-moratorium and

> "The logic of the court's death penalty jurisprudence is compelling here. Such cases turned on the ability of prosecutors in the various counties to set policy on the issuance and prosecution of capital cases. *Arias* [*People v. Arias* (1996) 13 Cal. 4th 92] and the other cases recognize it is appropriate for such locally elected officials to set and enforce their policies, as long as there is no invidious or otherwise improper discrimination. Such authority compels a conclusion this court cannot and should not attempt to direct one prosecutor's office to accept or agree with the policies of another. Rather, we should look to the lawfulness of such policies and whether they comply with statutes and constitutional provisions." (*Andrews* at pp. 1103-1104.)

The lower court in the instant case wrote that the 3-Strikes plead and prove requirement was ambiguous, in that it either stripped prosecutors of their traditional charging discretion or it meant that prosecutors have a due process duty to plead and prove strikes to give defendants proper notice. (Appellant's Opening Brief, p. 22.) Given this, Mr. Gascón's special directive related to strikes is either lawful or, at worst, a reasonable interpretation of an ambiguous statute. Either way, the lower court had no legal basis to issue the injunction.

> "As long as those prosecutors faithfully follow the law and avoid any improper classification of offenders, there is no basis for the court to interfere with the policy decisions of such local officials." (*Andrews* at p. 1104.)

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https://www.courthousenews.com/ninth-circuit-denies-bid-by-california-das-to-challenge-death-penalty-moratorium/ as of December 17, 2021.)

CONCLUSION

The Public Defender thanks this court for allowing this office to appear as a Friend of The Court. We believe the lower court erred when it issued the injunction against Mr. Gascón and the District Attorney's office and request this court reverse the lower court's ruling.

Dated: December 17, 2021

/s/ Mark Harvis
Los Angeles County Deputy Public Defender
SBN 110960

CERTIFICATE OF COMPLIANCE

This brief is set using 13-point Century Schoolbook. According to the computer program used to prepare this brief, this brief contains approximately 2,933 words excluding this certificate and the Proof of Service. The undersigned certifies this brief complies with the form requirements in California Rules of Court rules 8.204 and 8.486.

Dated: December 17, 2021

By: /s/ MARK HARVIS
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PROOF OF SERVICE

I declare:

At the time of service I was at least 18 years of age and not a party to this legal action. My business address is 320 West Temple Street, Suite 590, Los Angeles, California 90012. I served the foregoing Application to File Amicus Curiae Brief and Proposed Amicus Curiae Brief in Support of Appellants, in *The Association of Deputy District Attorneys for Los Angeles County v. George Gascón, etc. et al.*, (B310845/20STCP04250) as follows:

By U.S. Mail:

I am familiar with how letters are mailed using the County of Los Angeles mail service. On December 17, 2021, I caused a copy of the documents identified above to be placed in an envelope and deposited with the County of Los Angeles mail service for deposit with the U.S. Postal Service with the postage fully prepaid,

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By TrueFiling:

On December 17, 2021, I served via TrueFiling, without an error report, copies of the document identified above on the following recipients:

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DATED: December 17, 2021

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