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,

vs.

GEORGE GASCÓN, ET AL.,

Appellants.

After Grant of Motion for Preliminary Injunction on February 8, 2021, by the Hon. James Chalfant, Judge of the Superior Court for the County of Los Angeles,

Case No. 20STCP04250

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I. INTRODUCTION

Appellant George Gascón, on the first day of his investiture as Los Angeles County's District Attorney, issued multiple Special Directives that commanded the deputy district attorneys (the "DDAs") of the Los Angeles County District Attorney's Office to violate California's criminal laws, their oath as prosecutors, and their professional ethical obligations. In relevant part here, the Special Directives prohibited DDAs from charging mandatory criminal sentencing enhancements under the Three Strikes Law, which California enacted to protect its citizens from previously-convicted serious and violent felons. With respect to pending cases, the Special Directives unlawfully barred DDAs from exercising any case-by-case discretion as to appropriate charges to maintain or seek to dismiss by requiring them to withdraw *all* pre-existing enhancements allegations for six different types of sentencing enhancements, regardless of the circumstances of each case.

These Special Directives are part and parcel of DA Gascón's attempt to impose his vision of criminal justice through sweeping

assertions of executive power. DA Gascón effectively takes the alarming position that no one can challenge, limit, or pass judgment on his actions: the union representing the DDAs who are forced to carry out his unlawful orders cannot come to court to challenge them; neither the electorate nor the Legislature can enact laws restraining him; and, even if they could, the judiciary has no power to enforce those restraints. No temporal holder of the Office of the Los Angeles County District Attorney ought to be permitted to transgress institutional boundaries that divide power among that office, the legislature, and the courts. Our State's justice system has no place for absolute, unbounded, or unreviewable executive power, regardless of the perceived social values that such an individual officeholder purports to champion. Whatever systemic problems our State's justice system faces or may in the future encounter, all three branches of government must work to resolve it; absolute executive power is never the answer.

The Superior Court properly entered a preliminary injunction enjoining DA Gascón from enforcing Special Directives 20-08, 20-08.1, 20-08.2, and 20-14, which bar DDAs from charging prior strikes under the Three Strikes Law and categorically bars them from exercising case-by-case discretion in determining whether to dismiss enhancements. Appellants' arguments do not show otherwise.

First, appellants' arguments against standing fall flat, as workplace unions, such as the ADDA, undeniably have standing to assert their members' interests in litigation. The ADDA is the certified exclusive bargaining representative for the vast majority of deputy district attorneys (approximately over 800) employed in the Los Angeles County District Attorney's Office. Those members, in turn, are charged with implementing the Special Directives at issue in this litigation, which bar DDAs from charging statutorily-mandated enhancements, require DDAs to make unethical arguments to the courts, and bar DDAs from complying with their duty to exercise case-by-case discretion as to

appropriate charges to maintain or dismiss, among others. Being forced to follow these directives exposes the ADDA's members to the very real possibility of court sanctions and State Bar sanctions. It is unquestionably germane to the ADDA's mission to protect its members' working conditions, which includes preventing them from facing the Hobson's choice forced upon them by their employer to either comply with the Special Directives and violate the law, their oath, and their ethics, or comply with the law and risk internal discipline for violating the directives. This is more than sufficient to confer associational standing. The ADDA also has public interest standing as it is seeking enforcement of a public duty and right—to prevent this County's top law enforcement officer from himself systematically violating the law while enforcing the criminal laws within the most populous county in the United States.

Second, as they did before the Superior Court, appellants argue for an interpretation of the Three Strikes Law's "plead and prove" requirement that is squarely foreclosed by existing case

law. An unbroken line of Court of Appeals cases have held over and over that the Three Strikes Law limits prosecutorial discretion and mandates that prosecutors charge prior strikes in every case where they exist. (See, e.g., *People v. Roman* (2001) 92 Cal.App.4th 141, 145 ["[T]he Three Strikes Law limits [prosecutorial] discretion and requires the prosecutor to plead and prove each prior serious felony conviction"].) Appellants attempt to avoid the import of these cases in two wholly unavailing ways. They initially argue that the Three Strikes Law's "plead and prove" requirement is just a statutory due process right for a defendant, but they neither cite any cases adopting this interpretation nor convincingly reconcile that interpretation with the contrary holding of almost a half-dozen Court of Appeals cases. They next attempt to insulate themselves from judicial enforcement of the Three Strikes Law by purporting to distinguish between "mandatory" and "ministerial" duties, even though no meaningful distinction between these terms exists. At bottom, both the electorate and

the Legislature intended to—and did—create a mandatory, non-discretionary duty for prosecutors to plead and prove strike priors where they exist. The judiciary is not powerless to enforce that legal duty.

Third, the touchstone of prosecutorial discretion is the exercise of case-by-case discretion, which the Special Directives expressly, intentionally, and undisputedly prohibit. Those directives are thus unlawful. Appellants' contention that they exercised "discretion" by adopting those directives in the first place is unconvincing sophistry. One does not exercise case-by-case discretion with a wholesale disavowal of such discretion. Nor do appellants address the Washington and Arizona Supreme Court cases, cited in the court below, which directly hold that prosecutors cannot employ blanket prosecutorial directives that admit of no case-by-case discretion. Appellants also fail to demonstrate that judicial discretion in dismissing sentencing enhancements is irrelevant to a prosecutor's discretion in seeking such dismissals. These separate institutional checks reflect two

sides of the same coin and turn on one identical consideration: whether, in any particular case, dismissal serves the interests of justice.

Fourth, appellants do not show that the trial court "exceeded the bounds of reason or contravened the uncontradicted evidence" in finding that the balance of harms favors the ADDA. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69.) Unlike appellants, the trial court did not disregard the serious ethical and legal quandary that line prosecutors face: comply with the Special Directives or comply with the law. As a result, the ADDA's members have suffered, and will continue, to suffer significant harm as a result of having to comply with the Special Directives. By contrast, as the Superior Court properly recognized, DA Gascón will not suffer any personal harm as a result of being compelled to comply with the law. The trial court did not abuse its broad discretion in determining that the balance of harms from a preliminary injunction favors the ADDA.

In sum, the Superior Court properly granted the preliminary injunction to prevent appellants from continuing to force this county's prosecutors to violate the law, their oath, and their ethical obligations. This Court should affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. District Attorney Gascón's Special Directives

On or about December 7, 2020, DA Gascón issued Special Directive 20-08, which prohibited DDAs from filing any sentencing enhancements, including under the Three Strikes Law, in any case, and to seek dismissals of all such enhancements in all pending cases. (Special Directive 20-08, appen. A35.) On the same day, DA Gascón also issued Special Directive 20-14, which instructs DDAs on how to carry out DA Gascón's new sentencing and enhancement policies. (Special Directive 20-14, appen. A41.)

On December 15, 2020, DA Gascón issued Special Directive 20-08.1, which imposed additional requirements on DDAs relative to sentencing enhancements. (Special Directive 20-08.1, appen. A55.) That Special Directive reiterated that DDAs must

move to dismiss and withdraw all pre-existing enhancement in all cases under Penal Code section 1385. (*Ibid.*) It also required DDAs to read to trial courts a script asserting that the Three Strikes Law's plead and prove requirement was unconstitutional, yet omitted any reference to binding Court of Appeals cases concluding that the requirement is constitutional. (*Ibid.*) Special Directive 20-08.1 further specified that in the event the court refused to dismiss the allegation, DDAs must seek leave to file an amended charging document—almost certainly as an attempt to eliminate the enhancement that the court had already refused to dismiss. And where the court declined to grant such leave, the Special Directive required DDAs to provide to their head deputy the "[c]ase number, date of hearing, name of the bench officer and the court's justification for denying the motion (if any)." (*Id.* at p. A56.)

The foregoing Special Directives elicited immediate backlash from the public, from prosecutors, and from judges.[1] In numerous cases where DDAs moved to withdraw sentencing enhancements, the presiding judge refused to grant the motion. In multiple cases, the presiding judge not only denied the motions, but admonished the assigned DDAs that it was unethical for them to abandon a prosecution based solely on a blanket directive issued by a new administration. (See *People v. Victor Machuca*, Case No. BA477781, appen. A241 ["I understand it came from the top. I understand why you're making the motion, but the Court will deny the motion as to each and every one of the other allegations. You have an ethical duty to do your job and proceed with prosecution. You should not be allowed to

[1] Articles addressing the concerns of the community and prosecutors in response to DA Gascón's Special Directives are available at: https://abc7.com/george-Gascón-lada-los-angeles-county-district-attorney-cash-bail/8781685/; https://abc7.com/george-Gascón-jon-hatami-attorney-lada-los-angeles-county-district/8805356/.

abandon the prosecution at this juncture."]; *People v. Thomas Helo*, Case No. PA090826; appen. A262-63.)

On December 17, 2020, in response to this backlash, DA Gascón partially backtracked, issuing Special Directive 20-08.2. (Special Directive 20-08.2, appen. A58.) Therein, DDAs may charge certain enumerated sentencing enhancements—such as hate crime enhancements, elder abuse enhancements, and others—and seek their head deputy's approval to charge certain other unenumerated enhancements. (*Ibid.*) But DA Gascón maintained that the following six enhancements "shall not be pursued in any case and shall be withdrawn in pending matters":

> (1) Any prior-strike enhancements (Penal Code section 667(d), 667(e), 1170.12(a) and 1170.12(c)) will not be used for sentencing and shall be dismissed or withdrawn from the charging document. This includes second strikes and any strikes arising from a juvenile adjudication;
>
> (2) Any Prop 8 or "5-year prior" enhancements (Penal Code section 667(a)(1)) and "three-year prior" enhancements (Penal Code section 667.5(a)) will not be used for sentencing and shall be dismissed or withdrawn from the charging document;

(3) STEP Act enhancements ("gang enhancements") (Penal Code section 186.22 et. seq.) will not be used for sentencing and shall be dismissed or withdrawn from the charging document;

(4) Special circumstances allegations resulting in an LWOP sentence shall not be filed, will not be used for sentencing, and shall be dismissed or withdrawn from the charging document;

(5) Violations of bail or O.R. release (Penal Code section 12022.1) shall not be filed as part of any new offense;

(6) Firearm allegations pursuant to Penal Code section 12022.53 shall not be filed, will not be used for sentencing, and will be dismissed or withdrawn from the charging document.

(*Ibid.*)

Special Directive 20-08 and its successor directives are but a few of the myriad executive orders issued by DA Gascón that command DDAs to take prosecutorial action in violation of statutory and Constitutional law.

B. Trial Court's Injunction Against the Unlawful Special Directives

On December 30, 2020, the ADDA filed a petition for writ of mandate in the Los Angeles Superior Court seeking to enjoin DA Gascón from enforcing Special Directives 20-08, 20-08.1, 20-08.2,

and 20-14. (Super. Ct. Verified Pet. for Writ of Mandate and/or Prohibition and Compl. for Dec. and Inj. Relief (ADDA Mandamus Pet.) 16, appen. A16-162.) Concurrent with its petition, the ADDA filed an application for a temporary restraining order and/or an order to show cause re: preliminary injunction. (ADDA Ex Pare App. for TRO, appen. A163-290). At the hearing on the application, the ADDA elected to withdraw its request for a temporary restraining order, and the court set a briefing schedule and hearing on the order to show cause re: preliminary injunction. (Minute Order, appen. A316.)

On February 8, 2021, the trial court granted the preliminary injunction in large part. (Super. Ct. Op. 1, appen. A480.) The trial court held that DA Gascón's Special Directives unlawfully abandoned the Three Strikes Law by preventing DDAs from pleading and proving strike priors; unlawfully required prosecutors to seek to dismiss or withdraw sentencing enhancements based on a blanket office policy rather than case-by-case factors; that the Special Directives required prosecutors

to act unethically by forcing them to take legal positions before trial courts without citing binding adverse precedent to those courts; and that DDAs therefore risked being sanctioned for enforcing these directives. (*Id.*, at p. 46, appen. A518, A525.)

First, in reaching this decision, the trial court found that the ADDA had established both associational standing and public interest standing. (*Id.* at pp. 17-20, appen. A496-499.) With respect to the ADDA's associational standing, the trial court held that the ADDA's purpose is to protect its members' "wages and working conditions," and that the ADDA was challenging the "working conditions" resulting from the Special Directives, as opposed to DA Gascón's managerial policies. (*Id.* at pp. 17-18, appen. A496-97.) Alternatively, the trial court found the ADDA had public interest standing because there is a strong public interest in correcting DA Gascón's statutory and constitutional violations and preventing him from forcing the DDAs to violate the law. (*Id.* at pp. 18-20, appen. A497-99.)

Second, the trial court held that the ADDA was likely to succeed on the merits of its argument that the Special Directives violate the law. (*Id.* at p. 39, appen. A518.) The trial court explained that the plain meaning of the Three Strikes Law and case law demonstrate that prosecutors have a mandatory duty to plead and prove strike priors, and that this requirement does not violate the separation of powers. (*Id.* at pp. 29-35, appen. A508-514.) In addition, the trial court found that the Special Directives unlawfully required DDAs to move to dismiss or otherwise abandon sentencing enhancements in all cases based on a blanket office policy, rather than the individual circumstances of each case as required by law. (*Id.* at pp. 36-37, appen. A515-516.) As such, the trial court found that the ADDA was likely to succeed on its argument that the Special Directives unlawfully compel DDAs to violate mandatory, non-discretionary duties, and therefore mandamus was appropriate. (*Id.* at p. 39, appen. A518.)

Third, the trial court held that the balance of harms favored the ADDA. (*Id.* at pp. 45-46, appen. A524-25.) Specifically, the trial court found that DA Gascón failed to identify any harm that would befall him from a preliminary injunction. (*Id.* at p. 45, appen. 524.) By contrast, the trial court found that there was clear harm to DDAs from following the Special Directives for strike priors, including possible sanctions, contempt, and State Bar discipline. (*Ibid.*)

As a result, the court entered a preliminary injunction barring DA Gascón from, among other things: (1) requiring DDAs not to plead and prove strike priors under the Three Strikes Law; (2) requiring DDAs to dismiss or withdraw sentencing enhancements under Special Directives 20-08, 20-08.1, 20-08.2, and 20-14; and (3) requiring DDAs to read the statement in Special Directive 20-08.1 to trial courts without citing binding adverse precedent. (*Id.*, at p. 46., appen. A525.) DA Gascón subsequently adopted Special Directive 21-01, ostensibly to comply with the preliminary injunction. (*Ibid.*)

III. STANDARD OF REVIEW

"The law is well settled that the decision to grant a preliminary injunction rests in the sound discretion of the trial court." (*IT Corp., supra*, 35 Cal.3d at p. 69.) In determining whether to issue a preliminary injunction, the trial court considers two factors: (1) the reasonable probability that the plaintiff will prevail on the merits at trial; and (2) a balancing of the "irreparable harm" that the plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction. (See, e.g., *14859 Moorpark Homeowner's Assn. v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1402.)

Appellate review of a preliminary injunction is for abuse of discretion. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109.) Such review is confined to a consideration of whether the trial court abused its discretion in "evaluat[ing] [the] two interrelated factors when deciding whether or not to issue a preliminary injunction." (*Ibid.*) "A trial court will be found to have abused its discretion only when it has 'exceeded the bounds

of reason or contravened the uncontradicted evidence.'" (*IT Corp., supra*, 35 Cal.3d at p. 69.) To the extent the trial court's ruling rests on a legal issue, the court reviews that legal issue de novo. (*People v. Uber Techs., Inc.* (2020) 56 Cal.App.5th 266, 282–83, *as modified on denial of reh'g* (Nov. 20, 2020).) The burden is on the party challenging the injunction to make a clear showing that the trial court abused its discretion. (*Ibid.*)

IV. ARGUMENT

A. The ADDA Has Standing to Challenge the District Attorney's Unlawful Special Directives

Standing is generally a question of law that is reviewed de novo. (*Citizens for Amending Proposition L v. City of Pomona* (2018) 28 Cal.App.5th 1159, 1174.) However, where the trial court makes underlying factual findings relevant to the question of standing, the court defers to those findings and reviews them only for substantial evidence. (*Ibid.*; *United Farmers Agents Assn., Inc. v. Farmers Grp., Inc.* (2019) 32 Cal.App.5th 478, 488.)

The plaintiff bears the burden of establishing standing. (*Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th

802, 810.) To have standing to seek mandamus relief, a party must show that it is "beneficially interested" in the outcome, which means that 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, 361-62, internal quotation marks omitted; see Code Civ. Proc., § 1086.)

Here, as the trial court properly found, the ADDA has both associational standing and public interest standing.

1. ADDA Has Associational Standing

Under the doctrine of associational standing, "an 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 association has standing to bring suit on behalf of its members when: (1) its members would "have standing to sue in their own right"; (2) the association seeks 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.) The first prong of this test is met if even one member would have standing to sue. (*Prop. Owners of Whispering Palms, Inc. v. Newport Pac., Inc.*, (2005) 132 Cal. App. 4th 666, 672–73.) There is no dispute here that ADDA is authorized to file lawsuits on behalf of its members. (See Michele Hanisee Reply Decl., appen. A369.) Indeed, appellants do not appear to challenge the fact that the ADDA has satisfied both the first and third requirements for associational standing. (See Opening Br. at 26-30.) As such, only the second requirement is at issue.

The ADDA is the certified exclusive bargaining representative for Bargaining Unit 801, which consists of the vast majority (approximately 800) of DDAs employed in the Los Angeles County District Attorney's Office. (Hanisee Reply Decl., appen. A188.) The ADDA is a union organized for the purpose of

protecting the wages and working conditions of its members. (*Id.*, appen. A394.) Those members, in turn, are charged with implementing the various special directives that DA Gascón issued in December 2020, which bar DDAs from charging statutorily-mandated enhancements and from complying with their ministerial duty to exercise case-by-case discretion as to appropriate charges to maintain or dismiss. These directives are unlawful and expose the ADDA's members to court sanctions, contempt of court, and State Bar discipline. It is unquestionably germane to ADDA's mission to protect its members' working conditions by preventing them from facing the Hobson's choice of either complying with the Special Directives and violating the law, their oath, and their ethics, or complying with the law and risking internal discipline for violating the Special Directives.

Although appellants concede that associational standing exists where the organization seeks to protect interests germane to its purpose, they incorrectly suggest that Government Code section 3504 circumscribes this inquiry. (See Opening Br. at 26-

28.) Both the Supreme Court and myriad Courts of Appeals have concluded, without any reference to Section 3504, that labor unions—including public sector labor unions—have associational standing, and to the ADDA's knowledge, no California court has ever denied standing to a labor union on the basis of Section 3504. For example, in *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 284, the Supreme Court held that a firefighters' union organized under Government Code section 3500–3509 had standing to bring a mandamus action to challenge discrimination against its members as it had a "clear beneficial interest" in preventing further discrimination. Similarly, here, it is germane to ADDA's purpose to protect its members' working conditions by preventing them from being compelled to violate the law and being exposed to court sanctions and State Bar sanctions. Myriad other courts have found other similar interests sufficient to establish a union's organizational standing in litigation. (*Brotherhood of Teamsters & Auto Truck Drivers v. Unemployment Ins. Appeals Bd.*, (1987) 190 Cal. App.

3d 1515, 1522 [union had standing in a writ petition to challenge the denial of unemployment insurance benefits to its members after collective bargaining broke down with its employer]; *Monterey/Santa Cruz etc. Trades Council v. Cypress Marina Heights LP* (2011) 191 Cal.App.4th 1500, 1521 [union had standing to seek enforcement of prevailing wage covenant]; *Nat'l Weather Serv. Emps. Org., Branch 1-18 v. Brown*, 18 F.3d 986, 989 (2d Cir. 1994) [union had standing to challenge relocation of weather forecasting station because it would force their employees to commute further]; *East Bay Mun. Employees Union v. County of Alameda* (1970) 3 Cal.App.3d 578, 580 fn.1 ["[a]n organization that qualifies under sections 3500—3509 of the Government Code has standing to sue in its own name to enforce the employment rights of its members"]; *Anaheim Elementary Education Assn. v. Board of Education* (1986) 179 Cal.App.3d 1153, 1157 ["[i]t is settled that '[a] labor union is entitled to

represent its members in an action which is inseparably founded upon its members' employment'"].)[2]

Appellants fail to recognize that the relevant inquiry to determine associational standing in all of these cases was whether the interests the unions sought to protect were germane to their organizational purpose, not whether Section 3504 was satisfied. Indeed, the case that appellants most heavily rely on (*San Jose Peace Officer's Assn. v. City of San Jose* (1978) Cal.App.3d 935, 946) does not even concern standing at all. Moreover, contrary to appellants' arguments, there is no material distinction between this case and cases concerning benefits, wages, and commute times. Being forced to violate the law in order to comply with his or her employer's directives is surely no less an employment condition than, for example, commute times, and protecting DDAs from exposure to such working conditions is

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[2] Indeed, state law on associational standing derives from, and is coextensive with, federal constitutional law on this issue, *Bhd. of Teamsters*, 190 Cal. App. 3d 1522 n.3, and thus it is unnecessary to look to a California state statute to determine the metes and bounds of such standing.

unquestionably germane to the ADDA's purpose. These are all "quintessential employment conditions."

Even assuming that Government Code section 3504 limited the ADDA's standing here (which it does not), the ADDA still would have associational standing. Section 3504 provides that the ADDA's scope of representation includes "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that 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." This latter carve-out was added to prevent "expansion of the language of 'wages, hours and working condition' to include more general managerial policy decisions." (*Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 631-32.) But the mere fact that a union's legal challenge may stem from a "managerial policy" does not prevent a union's standing per se, as the implementation of such policies

certainly impacts the employee's working conditions. The California Supreme Court in *Claremont* recognized this distinction, stating that the "reality is that practically every managerial decision has some impact on wages, hours, or other conditions of employment." (*Claremont, supra,* 39 Cal.4th at p. 635.)

Here, contrary to appellants' argument, the issues raised in this lawsuit would plainly fall within Section 3504. The ADDA is a union organized for the purpose of protecting the wages and *working conditions* of its members. (Hanisee Reply Decl., appen. A394). The ADDA is protecting its members from the working conditions that they were subjected to as a result of being forced to carry out unlawful Special Directives, which has exposed them to the very real possibility of court and State Bar sanctions. These issues would easily fall within Section 3504.

2. ADDA Has Public Interest Standing

The trial court properly found here that the ADDA also has public interest standing. "[T]he determination whether to apply public interest standing involves a judicial balancing of interests

and is reviewed for abuse of discretion." (*Citizens for Amending Proposition L v. City of Pomona* (2018) 28 Cal.App.5th 1159, 1174.) In the mandamus context, public interest standing exists "where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty." (*Save the Plastic Bag Coal. v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166.) Public interest standing "promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." (*Green v. Obledo* (1981) 29 Cal.3d 126, 144.) In determining whether public interest standing applies, the court considers: (1) whether "the public duty is sharp and the public need weighty" (*SJJC Aviation Services, LLC v. City of San Jose* ("SJJC") (2017) 12 Cal.App.5th 1043, 1058), (2) whether the policy supporting public interest standing is outweighed by competing considerations of a more urgent nature (*Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 873), and (3) whether the claim of public interest standing is driven by

personal objectives rather than broader public concerns (*SJJC*, *supra,* 12 Cal.App.5th at p. 1057). "[N]eutrality is not a necessary prerequisite for public interest standing." (*Citizens for Amending Proposition L v. City of Pomona* (2018) 28 Cal.App.5th 1159, 1177.) Rather, "a personal objective is [only] one factor the court may consider when weighing the propriety of public interest standing." (*Ibid*.) The ADDA plainly has public interest standing because all three factors are satisfied here given that it is seeking the enforcement of a public duty and right—to restrain the Los Angeles County District Attorney from violating the very criminal laws that he is seeking to enforce.

In *People for Ethical Operation of Prosecutors and Law Enforcement v. Spitzer* (2020) 53 Cal.App.5th 391, 396 (*PEOP)*, a law enforcement watchdog group and county taxpayers brought an action against the district attorney and county sheriff to prohibit an unlawful confidential informant program. The taxpayer plaintiffs were three county residents who had various interests in ensuring the integrity of the criminal justice system.

(*Id.*) The first taxpayer plaintiff included a sister of one of the victims murdered by a defendant, whose prosecution was substantially prejudiced by an illegal confidential informant program. (*Id.*) The second taxpayer plaintiff was a county resident whose son was killed by a police officer. (*Id.*) The third taxpayer plaintiff was a founder of an organization, which connects prisoners and their families with a wide array of services. (*Id.*) The plaintiff organization and taxpayers alleged that the district attorney and county sheriff conducted unlawful investigations by moving confidential jail informants near criminal defendants to elicit confessions in violation of defendants' constitutional rights. (*Id.* at p. 410). The court held that the plaintiff organization and taxpayers had public interest standing to challenge the unlawful confidential informant program, because their allegations involved constitutional violations and the systemic violations of defendants' rights to due process and the assistance of counsel. (*Id.*)

Similarly, as in *PEOP*, the public has an equally strong interest in correcting the District Attorney's statutory and constitutional violations and in ensuring the integrity of the criminal justice system. The ADDA's claim to ensure that DA Gascón complies with the law, especially one enacted by voter initiative such as the Three Strikes Law, is indeed a "sharp public duty" and "the need for enforcement of the law is 'weighty.'" (*Citizens for Amending Proposition L*, *supra*, 28 Cal.App.5th at p. 1177 ["Compliance with the law, particularly one enacted by voter initiative . . . is in our view a 'sharp' public duty. The public need for enforcement of the law is also weighty."].) While appellants suggest that an individual interest in the outcome of the case precludes public interest standing (Opening Br. at pp. 33-35), that assertion is wholly inconsistent with *PEOP*, which found that various individuals who had personal interests in the outcome of the case still had public interest standing because of their broader public concern to prevent constitutional violations. Further, "neutrality is not a

necessary prerequisite for public interest standing"; rather, it is only one factor the court considers in determining whether public standing exists. (*Citizens for Amending Proposition L, supra*, 28 Cal.App.5th at p. 1177.) The fact that the ADDA's members may have personal interests in the outcome of this case does not nullify the ADDA's public interest standing, as the public interest in ensuring that DA Gascón complies with the law outweighs any of the ADDA's individual concerns. The trial court thus did not abuse its discretion in determining that the ADDA also has public interest standing to bring the instant lawsuit.

B. The Court Properly Granted ADDA's Request for a Preliminary Injunction Enjoining DA Gascón's Unlawful Special Directives

This proceeding implicates two mandatory duties that support the trial court's ruling granting ADDA's request for mandamus relief: (1) DA Gascón's mandatory obligation to plead and prove prior strikes; and (2) DA Gascón's mandatory duty to otherwise exercise case-by-case discretion in deciding what sentencing enhancements to dismiss. The ADDA does not seek to compel DA Gascón to exercise his discretion in a particular

manner, such as to prosecute a particular individual or file a particular charge, as appellants incorrectly suggest. Rather, the ADDA seeks to prevent DA Gascón from enforcing policies that (1) unlawfully bar prosecutors from complying with their mandatory, non-discretionary obligations to plead and prove prior strikes; and (2) unlawfully bar prosecutors from exercising any discretion in moving to dismiss six enumerated sentencing enhancements. Such relief fits squarely within the very essence of mandamus, which is to compel a public officer's compliance with his or her mandatory or ministerial duty. (See, e.g., *Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 914.)

Appellants spend significant time attempting to manufacture a distinction between "ministerial" and "mandatory" duties where no meaningful distinction exists. Appellants argue mandamus is appropriate only where that mandatory duty is *also* ministerial, such that the public officer called upon to execute the mandatory duty has no discretion in how to carry it out. (See Opening Br. at pp. 36-38.) Appellants' persistent emphasis on

the word "ministerial" is nothing more than semantics. A "ministerial" duty is simply a legal duty that admits of no discretion, which is what is at issue here. (See *Cal. Assn. of Prof'l Scientists v. Dep't of Fin.* (2011) 195 Cal.App.4th 1228, 1236.)

1. The Three Strikes Law Imposes a Mandatory, Non-Discretionary Duty to Plead and Prove Prior Strikes

DA Gascón's Special Directives violate the Three Strikes Law by prohibiting prosecutors from pleading and proving strike priors in *any* criminal case. In adopting the Three Strikes Law in 1994 by a 71.85% majority, the People of California determined that increased punishment for repeat offenders was vital to effectuate the goals of sentencing and to protect the public from violent criminals. The Three Strikes Law provides in pertinent part:

> Notwithstanding any other law . . . [the Three Strikes provisions] *shall be applied in every case* in which a defendant has one or more prior serious or violent felony convictions. The prosecuting attorney *shall plead and prove* each prior serious or violent felony conviction except as provided in paragraph (2).
>
> The prosecuting attorney may move to dismiss or strike a serious or violent felony conviction allegation in

> the furtherance of justice pursuant to Section 1385, or if there is sufficient evidence to prove the prior serious or violent felony conviction …

(Penal Code, §§ 667, subd. (f)(1), (2), 1170.12, subd. (d)(1), (2) [emphasis added].) The plain language of the Three Strikes Law obligates the prosecuting attorney to plead and prove prior strikes. "It is a well-settled principle of statutory construction that the word . . . 'shall' is ordinarily construed as mandatory." (*Doe v. Albany Unified Sch. Dist.* (2010) 190 Cal.App.4th 668, 676.) The mandatory requirement that prosecutors "shall plead and prove" each prior serious or violent felony conviction in *every* case in which a defendant has one or more prior serious or violent felony convictions reinforces the fact this duty is also "ministerial," as it requires action by DA Gascón "in obedience to the mandate of legal authority and without regard to his . . . own opinion concerning the act's propriety." (*Hudson v. County of Los Angeles* (2014) 232 Cal.App.4th 392, 408.)

Courts of Appeals in this state have repeatedly and uniformly held that in cases where strike priors exist, the Three

Strikes Law requires that the prosecutor charge and prosecute the relevant enhancements. In *People v. Roman, supra,* 92 Cal.App.4th at p. 141, the court held that while "the selection of criminal charges is [generally] a matter subject to prosecutorial discretion[,] the Three Strikes Law limits that discretion and requires the prosecutors to plead and prove each prior serious felony conviction." (*Id.* at p. 145.)

Likewise, in *People v. Laanui* (2021) 59 Cal.App.5th 803, 821, the court rejected the defendant's argument that because the prosecutor alleged prior strikes only as to counts 1 through 3, but not as to count 6, due process prohibited the prosecutor from seeking an enhanced sentence as to count 6. (*Id.* at pp. 815-16.) In rejecting that argument, the court again observed that the Three Strikes Law "'limits [prosecutorial] discretion and requires the prosecutor to plead and prove each prior serious felony conviction.'" (*Id.* at p. 816, quoting *Roman*, *supra*, 92 Cal.App.4th at p. 145.) As a result, the court reasoned, the Three Strikes Law itself would have put the defendant on notice that the prior strike

allegations applied to count 6 even if they were not specifically pleaded as to that count, because "the plain language of the Three Strikes Law makes clear that the prosecution lacks discretion to allege prior strikes on some counts but not others." (*Id*. at p. 818.)

Laanui makes especially clear that whatever theoretical distinction appellants believe exists between a "mandatory" duty and a "ministerial" duty, the Three Strikes Law easily bridges that gap. Under *Laanui*, the absence of prosecutorial discretion in charging prior strikes is so absolute that it does not even matter if the charging document omits the enhancement as to an eligible count; the court will still apply the enhancement on that count simply because the prosecutor had no discretion whatsoever not to charge the enhancement as to that count. This heavily reinforces the conclusion that the obligation to charge prior strikes under the Three Strikes Law is purely ministerial: if it applies, it must be charged – period. A mandatory obligation does not get more ministerial than this.

Multiple other Courts of Appeals have also interpreted the Three Strikes Law to limit prosecutorial discretion by imposing a mandatory and non-discretionary duty on prosecutors to charge prior strikes. (See, e.g., *People v. Vera* (2004) 122 Cal.App.4th 970, 982 ["The Three Strikes statutes, enacted in 1994, require prosecutors to plead and prove each prior felony conviction."]; *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1332 ["The Three Strikes law requires the prosecutor to plead and prove all prior serious and violent felony convictions."]; *People v. Andrews* (1998) 65 Cal.App.4th 1098, 1102 ["The drafters of the three strikes law appear to have intended to limit to some extent the exercise of discretion by prosecutors when it comes to dealing with persons who come within the reach of the new law. Section 667, subdivisions (f) through (g) appears to contain legislative direction to prosecutors to file and prove the necessary prior convictions to bring a person within the statute."].) Indeed, even the California Supreme Court in *People v. Romero* (1996) 13 Cal.4th 497, 523 relied on this interpretation of the "plead and

prove" requirement of section 667(f)(1) in upholding a trial court's authority to strike priors without the prosecution's approval.[3] Accordingly, prosecutors have a ministerial duty to allege all prior serious or violent felony convictions under the Three Strikes Law. The trial court thus properly found mandamus relief was warranted here to compel DA Gascón to comply with his mandatory, non-discretionary duty to "plead and prove" strike priors under the Three Strikes Law.

Although appellants appear to concede that these cases hold that the Three Strikes Law creates at least a mandatory duty, they also inconsistently argue that the word "shall" in the Three Strikes Law does not necessarily create a mandatory duty. (Opening Br. at 57-60.) In support of this assertion, appellants rely heavily on *Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1540, for the proposition that

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[3] The *Romero* court declined to consider whether interpreting the Three Strikes Law to require prosecutors to plead and prove all strike priors violates separation of powers. *Romero, supra*, 13 Cal.4th at 515 n.7. But *Kilborn*, and multiple other Court of Appeals cases, plainly held that it did not. (See *infra* pp. 51–52.)

"[n]ot every statute which uses the word 'shall' is obligatory rather than permissive." There, the court held that despite the Education Code's statement that "upon receipt of allegations of waste or misuse of bond funds authorized by the Act, appropriate law enforcement officials shall expeditiously pursue the investigation and prosecution" of such violations, the district attorney did not have a mandatory duty to investigate violations of the school bond act. (*Id.* at p. 1541.) The *Gananian* court reasoned that the Education Code provision at issue was "uniquely word[ed]" and its vagueness suggested that it should be construed as an expression of policy rather than mandate. (*Ibid.*) But *Gananian* is distinguishable on several bases. First, the *Gananian* court found significant that the language on which the petitioner relied was contained only within the portion of the statute expressing general legislative preference: that it was simply the "intent of the Legislature" that the district attorney should investigate and prosecute the relevant

violation. (*Ibid.*) Here, in contrast, the relevant mandatory language is *not* contained merely in the portion of the Three Strikes Law expressing legislative intent; it is part of the statute's operative text.

Moreover, the word "shall" is not the only word in the operative text that establishes the mandatory nature of the duty; the Three Strikes Law also contains emphatic language that unequivocally demonstrates an intent to create a mandatory, non-discretionary duty for prosecutors to plead and prove prior strikes as a specific limitation on prosecutorial discretion. Penal Code section 667(f)(1) provides that the Three Strikes Law "shall be applied in every case" in which the defendant has a prior serious or violent felony conviction, and that the prosecutor "shall plead and prove" the strike prior "except as provided in paragraph (2)." Section 667(f)(2) permits a prosecutor to move to dismiss or strike a prior serious or violent felony conviction only pursuant to Penal Code section 1385, or if there is insufficient

evidence to prove it. (*Ibid.*) When read together, Sections 667(f)(1) and (2) require that strike priors *must* be applied in every relevant case, the prosecutor must plead and prove the strike prior, and the *only* exception to pleading and proving it is where the prosecutor moves to dismiss it once filed. As the trial court correctly explained, there would be no reason for either the "shall be applied in every case" and "shall plead and prove" language or the exception in subsection (2) if the prosecutor had full discretion to ignore prior strikes under the Three Strikes Law in making initial charging decisions. This interpretation is further supported by legislative intent behind the Three Strike Law, which was 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 convictions. (Penal Code, § 667, subd. (b).) Appellants cannot override such clear legislative language and intent by falling back on generalized notions of traditional prosecutorial discretion, and it is no accident that

every appellate case addressing the plead and prove requirement of the Three Strikes Law has interpreted it as a mandatory limitation on prosecutorial discretion.

Appellants also argue that reading the Three Strikes Law to create such a duty would violate the separation of powers inherent in the Constitution, and that the court should avoid interpreting a statute in a manner that could render the statute unconstitutional. (Opening Br. at pp. 49-50.) But appellants' appeals to the constitutional avoidance doctrine are unavailing – precisely because the Court of Appeal has *already* repeatedly concluded that the Three Strikes Law's plead and prove requirement does not violate the separation of powers. In *People v. Kilborn* (1996) 41 Cal.App.4th 1325, the court rejected the defendant's argument that this requirement violates the separation of powers because it usurps prosecutorial discretion. (*Id.* at p. 1332.) *Kilborn* reasoned that the Three Strikes Law's requirement that the prosecutor plead and prove prior strikes is not unlike other statutes requiring the district attorney to act,

and the prosecutor still retains substantial authority and discretion under the Three Strikes Law, including deciding whether the defendant has suffered a qualifying conviction and moving to dismiss a prior pursuant to Section 1385. (*Id.* at p. 1333.) *Kilborn* held that while prosecutors generally have broad discretion, there is no constitutional concern in requiring a prosecutor to plead and prove strike priors because he or she has discretion to move to strike under Section 1385. (*Id.* at pp. 1333-34.)

Several other cases have also adopted *Kilborn*'s holding that the Three Strikes Law does not violate the separation of powers doctrine. (See *People v. Butler* (1996) 43 Cal.App.4th 1224, 1247–48 ["Defendant also argues that the Three Strikes Law . . . violates the princip[le] of separation of powers because it unlawfully usurps prosecutorial discretion. These arguments were rejected in . . . *Kilborn* . . . for reasons we find persuasive."]; *People v. Gray* (1998) 66 Cal.App.4th 973, 995 [adopting the "sound reasoning of *Kilborn*" and "concluding that the section

1170.12, subdivision (d)(1) does not violate the separation of powers doctrine enactment of the Three Strikes Law"].)

As such, the trial court properly found that mandamus relief was warranted to compel DA Gascón to comply with his mandatory, non-discretionary duty to plead and prove each prior serious felony conviction under the Three Strikes Law.

2. The Special Directives Unlawfully Bar Prosecutors from Exercising Case-by-Case Discretion in Moving to Dismiss Sentencing Enhancements

Appellants make the sweeping assertion that there is nothing wrong with blanket policies that mandate dismissal of sentencing enhancements in all cases without any case-by-case exercise of discretion. This assertion is wholly unpersuasive. The Supreme Courts of Washington and Arizona have deemed unlawful such blanket prosecutorial policies that prohibit case-by-case discretion. In *State v. Pettitt* (1980) 93 Wash. 2d 288, 290, the prosecutor filed an information asserting that the defendant was a "habitual criminal" making him eligible for an enhanced sentence. At the time, the prosecutor had "a

mandatory policy of filing habitual criminal complaints against all defendants with three or more prior strikes." (*Id.* at p. 296.) At a hearing pursuant to the motion to dismiss the supplemental information, the prosecutor testified that he did not consider any mitigating circumstances in reaching his decision and that under the policy, "once the prior convictions were clearly established by the record, [the prosecutor] had no choice but to file the supplemental information." (*Id.* at pp. 290, 296.) In vacating defendant's criminal sentence, the Washington Supreme Court held that "this fixed formula which requires a particular action in every case upon the happening of a specific series of events constitutes an abuse of the discretionary power lodged in the prosecuting attorney." (*Id.* at p. 296.) Similarly, in *State v. City Court of City of Tucson* (1986) 150 Ariz. 99, 102, the Arizona Supreme Court held that a district attorney's blanket office policy was unlawful as it "infringed upon the obligation of each Deputy City Prosecutor to exercise his or her individual professional judgment on a case by case basis." The Washington and Arizona

Supreme Court cases strongly support the conclusion that blanket office policies, like DA Gascón's Special Directives that mandate dismissal of sentencing enhancements in all cases, are unlawful as they infringe upon the District Attorney's obligation to exercise case-by-case discretion. *Pettitt* is particularly on point, as that case concerned a district attorney's blanket policy with respect to seeking sentencing enhancements.

Moreover, appellants in any event incorrectly assert that the text of Penal Code section 1385 limits only on a judge's discretion to order dismissal, but not the prosecutor's decision to request such dismissal. (Opening Br. at 61-64.) Section 1385 states: "the judge or magistrate may, either upon his or her own motion or upon application of the prosecuting attorney, and in furtherance of justice, order an action dismissed." But contrary to appellants' contention, a prosecutor's ability to seek dismissal is also limited by section 1385 at least within the context of dismissal of strike priors, as section 667(f)(2) states that when "prosecutors seek to dismiss or strike a prior serious or violent

felony conviction," it must be done "in the furtherance of justice pursuant to section 1385" or "if there is insufficient evidence to prove the strike prior." As such, where the relevant dismissal is of a strike prior, prosecutors are indeed limited by statute to seeking dismissals only in those two narrow circumstances.

But even as to enhancement dismissals other than strike priors, the case law interpreting Section 1385 necessarily guides what dismissals the prosecuting attorney may seek "in the furtherance of justice." In determining whether a dismissal under Section 1385 is in "furtherance of justice," the prosecutor must consider "whether, in light of the nature and circumstances of [the defendant's] 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." (*People v. Williams* (1998) 17 Cal.4th 148, 161 [emphases added].) The dismissal may not be based on a prosecutor's "bare antipathy to the consequences [of not dismissing] for any given defendant." (*Ibid.*) In *People v. Dent*

(1995) 38 Cal.App.4th 1726, the court squarely distinguished between a permissible exercise of discretion – one based on individualized, case-by-case factors – and an impermissible "failure to exercise discretion as required by the law," such as dismissing an enhancement based on "a personal antipathy for the effect that the [enhancement] would have on [the] defendant." (38 Cal.App.4th at p. 1731). A dismissal, the court held, cannot simply "reason[] backwards from the sentence [the prosecutor] wishe[s] to avoid," because "[a] sentence based on such an approach constitutes a failure to exercise discretion as required by the law." (*Ibid.*) Rather, there must be a consideration of the defendant's individual circumstances. (*Ibid.*) DA Gascón's blanket office policy categorically barring the enforcement of six sentencing enhancements in all cases, and requiring their abandonment in all existing cases where they are alleged, squarely contradicts the California Supreme Court's instruction that section 1385 dismissals must account for a particular defendant's individual circumstances, and not simply "reason

backwards" from the enhanced sentence he now unilaterally wishes to eliminate.

Appellants' argument that prosecutors are exempt from the restriction that a dismissal must not be based on "antipathy of the law" is unavailing, as both prosecutors and judges are equally bound by section 1385. As the Superior Court recognized, prosecutors, like all attorneys, are obligated not to seek relief from a court that has no legal basis under existing law. (See Cal. Rules of Prof. Conduct, rule 3.1(a)(2) ["A lawyer shall not present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law."].) Appellants do not dispute that the Supreme Court has held that Section 1385 dismissals require individualized assessment. Nor do the Special Directives direct DDAs to seek a reversal of such laws. All that is left is that the Special Directives require DDAs to file motions that are squarely foreclosed by existing precedent.

Indeed, it is axiomatic that prosecutors in particular are obligated seek justice and are not simply blind advocates for a particular outcome. (See *People v. Arredondo* (2018) 21 Cal.App.5th 493, 505 ["[The Prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."]; Cal. Rules Prof. Conduct, rule 3.8 cmt. 1 ["A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."].) Part of that responsibility as a prosecutor is to follow the law and not seek legal relief that is squarely barred by existing precedent. Here, the Special Directives prohibit DDAs from exercising any case-by-case discretion to determine whether seeking a dismissal under section 1385 would be in "furtherance of justice." Rather, DA Gascón improperly requires DDAs to move to dismiss or otherwise abandon sentencing enhancements and strike priors

based on his mere antipathy towards them, which the Supreme Court has held is impermissible. (*Romero*, *supra*, 13 Cal.4th at p. 531, citing *Dent, supra,* 38 Cal.App.4th at p. 1731.) DA Gascón's blanket office policy mandating DDAs to seek dismissal of sentencing enhancements without considering the individual circumstances of each case improperly eschews case-by-case discretion in determining whether dismissal would actually serve the interests of justice.

Mandamus is also an appropriate vehicle to enforce compliance with this obligation. Although mandate cannot compel a particular exercise of discretion, mandate "does lie to command the exercise of discretion [in *some* manner]—to compel some action upon the subject involved." (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (2016) 248 Cal.App.4th 349, 370; *Ellena v. Dep't of Ins.* (2014) 230 Cal.App.4th 198, 208 [affirming writ of mandate to compel Department of Insurance to review a proposal to determine whether to accept or reject it].) Here, absent Legislative direction to the contrary, "a district attorney's

'mandatory' duty is to exercise his or her *discretion* to prosecute crimes," and a wholesale refusal to exercise that discretion can indeed be subject to mandamus relief. (*People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 504; see also Gov. Code, § 26500 ["The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses."]; *City of Merced v. Merced Cty.* (1966) 240 Cal. App. 2d 763, 766 ["[D]istrict attorneys of the state . . . have the specific duty to prosecute such violations of general laws. This duty is mandatory, and not discretionary."].) That discretion, as discussed above, refers to case-by-case discretion. (*See Pettitt, supra*, 93 Wash. 2d at p. 290; *City Court of City of Tucson, supra*, 150 Ariz. at p. 102; *Dent, supra*, 38 Cal. App. 4th at p. 1731.) DA Gascón Special Directives specifically and intentionally eliminate *any* case-by-case discretion in moving to dismiss any of six enumerated sentencing enhancements, and thus those directives are unlawful and susceptible to mandamus relief.

Appellants also incorrectly assert that the right to amend the information to remove already-pled enhancements is a power that belongs exclusively to the District Attorney. (Opening Br. pp. 65-66.) While prosecutors have discretion in selecting and filing criminal charges, ultimately the court – not the prosecutor – has the authority to dismiss those charges. (See *People v. Clancey* (2013) 56 Cal.4th 562, 579–580; *Romero*, *supra*, 13 Cal. 4th at p. 514.) "[T]he separation of powers doctrine prohibits the legislative branch from granting prosecutors the authority, *after* charges have been filed, to control the legislatively specified sentencing choices available to the court." (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 553.) A prosecutor has no independent right to amend an information or indictment or file an amended information, indictment, or complaint. (*People v. Volladoli* (1996) 13 Cal.4th 590, 606 fn. 3; *People v. Lettice* (2013) 221 Cal.App.4th 139, 149.)

Special Directive 20-08.1 seeks to circumvent the court by requiring DDAs to file an amended charging document – for the

very purpose of eliminating the enhancement that the court has already refused to dismiss. This tactic runs afoul of Penal Code section 1386, which provides that once a prosecution has been initiated, "neither the Attorney General nor the district attorney can discontinue or abandon a prosecution for a public offense" without permission of the court. It also runs afoul of Penal Code section 1009, which permits amendment only to cure a "defect or insufficiency" in the charging document; it cannot be used to "change the offense charged." (*Owen v. Superior Court* (1976) 54 Cal.App.3d 928, 934.) If prosecutors can simply proceed on an amended information that excludes the enhancements that were the basis of the Section 1385 motion that the court denied, then the purpose of Section 1385 would be completely vitiated.

The Special Directives unlawfully prohibit DDAs from pleading prior strikes in violation of the Three Strikes Law; unlawfully bar DDAs from exercising case-by-case discretion by requiring them to dismiss a strike prior under section 1385 based on a blanket office policy, rather than based on the individual

circumstances of each case; and unlawfully requires them to circumvent the court by seeking leaving to amend when a trial court denies a motion to dismiss a strike prior. As such, the trial court properly found that these Special Directives violate the Three Strikes Law as well as sections 1385, 1386, and 1009.

C. The Superior Court Properly Issued the Preliminary Injunction Because the Balance of Harms Weighs In Favor of the ADDA

Appellants fail to show that the trial court abused its discretion in balancing the harm between the parties that would arise from the preliminary injunction. "In determining whether to issue a preliminary injunction, the second factor which a trial court examines is the interim harm that plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction." (*Donahue Schriber Realty Group, Inc. v. Nu Creation Outreach* (2014) 232 Cal.App.4th 1171, 1177.) This factor involves consideration of the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo. (*Ibid.*)

The preservation of the status quo supports a preliminary injunction. The relevant "status quo" is "the last actual peaceable, uncontested status which preceded the pending controversy" (*People v. Hill* (1977) 66 Cal.App.3d 320, 331) — which, here, is the status that existed before appellants adopted their Special Directives. The ADDA seeks a return to that status quo, and in doing so to both uphold the will of the 5.9 million voters—or over 70% of California's electorate—who adopted the Three Strikes Law and to prevent the DDAs from being forced to violate the law, their oaths, and their ethical obligations.

Additionally, the ADDA's members have suffered, and will continue to suffer, significant harm as a result of having to comply with the Special Directives. Violating the law in the litigation of an action is unethical, and is exactly what the Special Directives require. (See Cal. Rules of Prof. Conduct, rule 8.4(a), (e); Bus. & Prof. Code, § 6068(a).) In addition, as the Superior Court noted, Special Directive 20-08.1 requires DDAs to read verbatim a script that contests the constitutionality of the

Three Strikes Law, yet fails to cite binding adverse authority to the court. This is a plain violation of California Rules of Professional Conduct, rule 3.3, which prohibits attorneys from "fail[ing] to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client." The ADDA's own prosecutors have been admonished by judges on at least two occasions that the action that they took pursuant to the Special Directives was "unethical," and other courts have more broadly recognized that the Special Directives have no basis in law. (Hanisee Reply Decl., appen. A241, A364.) The Special Directives also force prosecutors to disregard court orders, such as by forcing them to remove a sentencing enhancement from a charging document even after the court has already denied a motion to dismiss that very enhancement—thus exposing them to the possibility of contempt. The Superior Court correctly rejected appellants' contention that injunctive relief must wait until after one of their prosecutors has

actually been disciplined by the State Bar or even held in contempt.

As the Superior Court recognized, appellants failed to identify to the Superior Court any harm that would befall *them* from a preliminary injunction. (App. A524.) Appellants now argue for the first time that a preliminary injunction enjoining DA Gascón's unlawful Special Directives will undermine his credibility. (Opening Br. at 67-68.) But appellants have waived this argument by failing to raise it before the trial court (see *Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker*, (2016) 2 Cal.App.5th 252, 264 ["[A]s a general matter, issues not raised in the trial court cannot be raised for the first time on appeal."]); appellants cannot criticize the Superior Court's weighing of harms based on information and argument that it never provided to the Superior Court. But even assuming that DA Gascón's credibility would be harmed by a preliminary injunction, he has the power to change that by instituting policies that comply with the law. By contrast, ADDA's members do not

have that luxury; instead, the choice they faced was between keeping their job and following the law, which an employee should not have to endure. (See *Haney v. Aramark Unif. Servs.* (2004) 121 Cal.App.4th 623, 643.) DA Gascón's complete disregard for the Three Strikes Law's "plead and prove" requirement and his categorical requirement that DDAs seek dismissal of pending enhancements are plainly unlawful. An injunction against a public official's unlawful actions cannot interfere with the lawful exercise of the official's duties. (*See PEOP*, *supra*, 53 Cal.App.5th at p. 405.)

Accordingly, the trial court properly found that the balance of harms weighs in favor of the ADDA's members given the significant and immediate harm that they face by having to comply with the Special Directives.

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V. CONCLUSION

For these reasons, the ADDA respectfully requests that this Court affirm the trial court's order granting the preliminary injunction.

DATED: November 15, 2021 Respectfully submitted,

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PROOF OF SERVICE

Ass'n of Deputy District Attys. for L.A. County
v. George Gascón, et al.
Court of Appeal, Second Appellate District, Div. 7
Case No. B310845

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 801 S. Figueroa Street, Suite 2000, Los Angeles, CA 90017.

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