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**IN THE COURT OF APPEAL OF  
THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT, DIVISION SEVEN**

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

v.

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

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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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**APPLICATION TO FILE AMICUS CURIAE BRIEF  
and  
[PROPOSED] AMICUS CURIAE BRIEF IN  
SUPPORT OF APPELLANTS**

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Summer Lacey (Bar No. 308614)  
slacey@aclusocal.org  
Tiffany M. Bailey (Bar No. 319886)  
tbailey@aclusocal.org  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION  
OF SOUTHERN CALIFORNIA  
1313 W. 8<sup>th</sup> Street  
Los Angeles, CA 90017  
Telephone: (213) 977-9500  
Facsimile: (213) 977-5297

*Attorneys for Amicus Curiae American Civil Liberties Union  
of Southern California*

**CERTIFICATE OF INTERESTED PARTIES**

Pursuant to Sections 8.208(e) and 8.488 of the California Rules of Court (“Rule”), Amicus certify that they know of no other person or entity that has a financial or other interest in this case.

Dated: December 10, 2021

By: /s/ Summer Lacey  
Summer Lacey  
Attorney for Amicus Curiae Brief  
American Civil Liberties Union of  
Southern California

Document received by the CA 2nd District Court of Appeal.

## APPLICATION TO FILE BRIEF OF AMICUS CURIAE

Pursuant to California Rules of Court, Rule 8.200(c), the American Civil Liberties Union of Southern California (“ACLU SoCal”) respectfully requests leave to file the accompanying [Proposed] Amicus Curiae Brief in Support of Appellants.

ACLU SoCal is a regional affiliate of the national American Civil Liberties Union. The core mission of ACLU SoCal is to protect the civil rights and civil liberties of people who live in Southern California. Over its more than 90-year history, ACLU SoCal has represented people in custody or filed briefs in actions challenging harsh sentencing practices. Notably, in *Lockyer v. Andrade*, 583 U.S. 63 (2003), ACLU SoCal brought the first U.S. Supreme Court challenge to the application of California’s Three Strikes Law. On behalf of its more than 100,000 members, ACLU SoCal is concerned about the Superior Court’s grant of a preliminary injunction enjoining the implementation of District Attorney George Gascón’s sentencing enhancement policy. The proposed amicus curiae brief will assist the Court in deciding the appeal of that preliminary injunction by providing public policy considerations and empirical research in support of Appellants’ appeal. No party or counsel for any party authored the proposed amicus curiae brief, nor did any outside entity fund its preparation by ACLU SoCal.

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## INTRODUCTION

Just over one year ago, more than two million Los Angeles County residents came together to elect District Attorney George Gascón. District Attorney Gascón’s campaign challenged the perpetuation of racism and oppression within the criminal legal system by advancing transformative policy ideas to address unjust sentencing practices and end mass incarceration. His victory was decisive and historic. It signaled a communal shift away from an overly punitive approach to justice that disproportionately harms Black and brown communities and jeopardizes public safety.

No county provides a more pronounced picture of the consequences of excessive sentencing practices than Los Angeles. Indeed, Los Angeles County has the nation’s highest jail population<sup>1</sup> and a prison incarceration rate that significantly surpasses that of the state.<sup>2</sup> Recognizing this crisis, District Attorney Gascón implemented Special Directive 20-08 and Special Directive 20-14 (“Special Directives”), which, respectively, halted the filing of sentencing enhancements or allegations, including those under the Three Strikes Law, and instructed prosecutors to join defense motions or independently move to

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<sup>1</sup> Vera Inst. of Just., *Care First L.A.: Tracking Jail Decarceration*, <https://www.vera.org/care-first-la-tracking-jail-decarceration> (last visited Dec. 6, 2021).

<sup>2</sup> Vera Inst. of Just., *Incarceration Trends (Los Angeles County)*, <http://trends.vera.org/rates/los-angeles-county-ca> (last visited Dec. 6, 2021) (noting Los Angeles County’s prison incarceration rate of 617 per 100,000 residents, as compared to a California prison incarceration rate of 496 per 100,000 residents for 2016).

dismiss sentencing enhancements in pending cases.<sup>3</sup> The Special Directives were predicated upon numerous studies of the detrimental effects of lengthy sentences.<sup>4</sup>

In challenging the Special Directives, the Association of Deputy District Attorneys for Los Angeles County (“ADDA”) presents this Court with two conflicting requests: (1) permit prosecutorial discretion when it is used to maximize incarceration and (2) deny that same discretion when it is used to create a new, empirically sound approach to justice that reduces racial inequities and prioritizes the safety and wellbeing of all county residents. This unlawful double standard must be prohibited.

As discussed more thoroughly below, excessive sentences and corresponding sentencing practices reduce public safety, ignore support for community restoration alternatives, and further the oppression of Black and brown communities. Ultimately, the Special Directives represent a lawful course correction that Angelenos overwhelmingly supported and desperately need.

## ARGUMENT

### I. Prosecutorial Discretion Applies to Declining to Plead Sentencing Enhancements.

Prosecutorial discretion is “basic to the framework of the

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<sup>3</sup> Special Directive 20-08 at pp.1-2, <https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-08.pdf>; Special Directive 20-14 at p. 3, <https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-14.pdf>

<sup>4</sup> Special Directive 20-08, *supra*, note 3 at pp. 3-4; Special Directive 20-14 *supra*, note 3 at pp. 13-15.

California criminal justice system.” *Gananian v. Wagstaffe*, 199 Cal. App. 4th 1532, 1543 (2011) (quoting *People v. Valli*, 187 Cal. App. 4th 786, 801 (2010)) (italics omitted). Deriving from the doctrine of separation of powers, prosecutorial discretion has been codified in the California Constitution and laws of the state. *See* Cal. Const. Art. III, Sec. 3; Gov. Code §§ 26500, 26501. Courts have “uniformly recognized” the “unlimited discretion in the crime-charging function” as the province of the prosecutor. *People v. Wallace*, 169 Cal. App. 3d 406, 409 (1985).

There are two core inflection points for the exercise of prosecutorial discretion in relation to charging decisions: the charging of the instant offense and the pleading of sentencing enhancements. Courts have long upheld prosecutorial discretion at each inflection point. *See, e.g., People v. Birks*, 19 Cal. 4th 108, 134 (1998) (citing *People v. Eubanks*, 14 Cal. 4th 580, 588-589 (1996) (explaining that the prosecutor “ordinarily [has] the sole discretion to determine whom to charge with public offenses and what charges to bring”); *Dix v. Superior Court*, 53 Cal. 3d 442, 451 (1991) (same); *People v. Tirado*, 38 Cal. App. 5th 637, 644 (2019) (noting that the prosecution exercised its discretion in charging fewer enhancements than those available); *People v. Garcia*, 46 Cal. App. 5th 786, 791 (2020) (citing *Birks*) (“The decision of what charges to bring (or not to bring)—and . . . which sentencing enhancement to allege (or not to allege)—ordinarily belongs to the prosecutors.”).

While each inflection point for prosecutorial charging discretion holds significance, courts have reiterated the special

importance of prosecutorial discretion in pleading sentencing enhancements. In *People v. Garcia*, the Second District Court of Appeal recently emphasized that prosecutorial discretion in charging the instant offense is great, but a prosecutor’s authority is “even greater when it comes to alleging sentencing enhancements.” *Id.* at 792. More specifically, it explained that prosecutorial discretion in charging the instant offenses can be curtailed by the judicial duty to instruct for lesser included offenses but that no such obligation exists for lesser included sentencing enhancements. *Id.* The Court concluded that a “prosecutor’s decision not to charge a particular enhancement ‘generally is not subject to supervision’—or second guessing—by the judicial branch.” *Id.* at 792 (quoting *People v. Mancebo*, 27 Cal. 4th 735, 749 (2002)). Consequently, prosecutorial discretion applies with great force to the decision not to plead sentencing enhancements.

## **II. Excessive Sentences Conflict with the Prosecutor’s Duty to Seek Justice for All Members of the Community.**

The prosecutor’s mission is to seek justice for the community as a whole.<sup>5</sup> See Respondent’s Answering Brief, p. 60 (“Indeed, it is axiomatic that prosecutors in particular are obligated [to] seek justice. . . .”). To effectuate this purpose, “[p]rosecutors enjoy more unreviewable discretion than any other

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<sup>5</sup> Griffin & Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 *Geo. J. Legal Ethics* 301, 304 (2017), [https://scholarlycommons.law.hofstra.edu/faculty\\_scholarship/1230](https://scholarlycommons.law.hofstra.edu/faculty_scholarship/1230) (discussing the prosecutors role as a minister of justice for “the sovereign and must make decisions for society at large”).

actor in the criminal legal system” and wield that immense discretion at all stages of the criminal legal process, from charging decisions to bail recommendations to plea offers.<sup>6</sup> When that discretion is used to effectuate excessive sentences, society at large is harmed.

**A. Excessive Sentences Put the Greater Community at Risk.**

Mass incarceration jeopardizes public safety.<sup>7</sup> Studies have shown that in states with high incarceration rates, like California, an increase in incarceration is associated with higher resulting crime rates.<sup>8</sup> This phenomenon, known to academics as the “tipping point,” highlights some of the most lasting effects of incarceration, including the breakdown of social and family bonds that guide individuals away from crime, the removal of adults who would otherwise nurture children, the deprivation of income, and the reduction of future income potential.<sup>9</sup> Excessive sentences, in particular, do little to deter crime and extract lofty social and economic costs.<sup>10</sup> It has been found that the severity of

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<sup>6</sup> Smith & Levinson, *The Impact of Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle Univ. L. Rev. 795, 805 (2012), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2082&context=sulr>

<sup>7</sup> Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, Vera Inst. of Just. Evidence Brief (July 2017) at 2, [https://www.vera.org/downloads/publications/for-the-record-prison-paradox\\_02.pdf](https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf)

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> National Institute of Justice, Five Things About Deterrence, U.S. Dep’t of Just., Off. of Just. Programs 1-2 (2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf>

a potential punishment has no significant impact on an individual's decision to engage in criminal activity.<sup>11</sup> Excessive sentences have also been deemed counterproductive because individuals often “age out” of criminal behavior and the cost necessary to incarcerate someone year after year diverts resources from restorative programs and initiatives that are more likely to increase public safety.<sup>12</sup> In effect, excessive sentences not only destabilize and economically debilitate the lives of those most impacted, they hinder the safety of all residents.

Despite research showing that lengthy incarceration *decreases* public safety, in 2020, California had the highest number of individuals serving life sentences than any other state.<sup>13</sup> Of that population, 72% are Black or brown.<sup>14</sup> Defenders

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<sup>11</sup> Nellis, Ph.D., *No End in Sight: America's Enduring Reliance on Life Imprisonment* 8, The Sentencing Project (2021)

<https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/>

<sup>12</sup> Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC Law Review 113, 121-125 (2018),

<https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/> (discussing literature showing that people “age out” of crime, there is a limited deterrent effect of lengthy sentences, and the erroneous nature of diverting resources to imprisonment and away from other social interventions that have been proven to improve public safety); Petrich et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, The Univ. of Chi. Press (2021), <https://www.journals.uchicago.edu/doi/pdf/10.1086/715100> (finding that “custodial sanctions have no effect on reoffending or slightly increase it when compared with the effects of noncustodial sanctions such as probation”).

<sup>13</sup> Nellis, *supra*, note 11 at 10.

<sup>14</sup> *Id.* at 19.

of excessive sentencing practices espouse the notion that habitual offender statutes, like the Three Strikes Law, keep the community safe. Research on the efficacy of the Three Strikes Law suggests the contrary. A study analyzing California's crime rate before and after the passage of the law found that crime rates were already declining before the Three Strikes Law was passed and that the rate of decline continued at the same rate after its passage.<sup>15</sup>

Where excessive sentencing, and specifically the Three Strikes Law have failed, community-based alternatives have succeeded. Research has shown that community-based alternatives to incarceration, such as community service, housing support, and treatment or training, are more effective than incarceration. For instance, a systematic review of hundreds of studies on community-based alternatives found that the “rate of re-offending after a non-custodial sanction is lower than after a custodial sanction in most comparisons.”<sup>16</sup>

**B. Many Survivors of Crime Favor Restorative Community Alternatives to Incarceration.**

Research has also shown that many crime victims, including victims of serious violent crime, would prefer a criminal system that gives shorter sentences and invests more in

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<sup>15</sup> Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California* (2001).

<sup>16</sup> Villettaz et al., *The Effects on Re-offending of Custodial vs. Non-custodial Sanctions: An Updated Systematic Review of the State of Knowledge*, The Campbell Collaboration 7 (2015), <https://onlinelibrary.wiley.com/doi/epdf/10.4073/csr.2015.1>

prevention and rehabilitation programs.<sup>17</sup> A 2021 survey of survivors of violent crime in Los Angeles County found that “[m]ost violent crime victims want changes to the criminal justice system that emphasize rehabilitation and crime prevention, rather than more incarceration.”<sup>18</sup> More specifically, “at least 8 in 10 support expanding alternatives to incarceration, such as diversion, mental health treatment, restorative justice, and community service, and reducing prison sentences for people who participate in rehabilitation programs.”<sup>19</sup> The vast majority also perceive the prosecutor’s principal goal as resolving neighborhood issues and preventing repeat crimes through prevention and rehabilitation, even if such methods result in less criminal convictions.<sup>20</sup>

Indeed, the sisters of Polly Klaas, the child whose kidnapping and murder contributed to the passage of California’s Three Strikes Law, have spoken out against the habitual offender

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<sup>17</sup> Alliance for Safety and Justice, *Crime Survivors Speak: The First-Ever National Survey of Victims’ Views on Safety And Justice* 5, 13 15-16, <https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf> (finding that 60% of surveyed victims preferred a criminal system that provided shorter sentences and invested more in prevention and rehabilitation programs and that “the overwhelming majority of crime victims believe that the criminal justice system relies too heavily on incarceration, and strongly prefer investments in prevention and treatment to more spending on prisons and jails.”).

<sup>18</sup> Binder, Research, *Los Angeles County Survey: Victims of Violent Crime* 1 (2021), <https://safeandjust.org/wp-content/uploads/February-2021-LA-Survivor-Survey.pdf>.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *Id.*



law. In an op-ed in the Los Angeles Times, Jess Nichol and Annie Nichol reflected on how the unjust Three Strikes Law, and other sentencing regimes, have unfortunately become their sister's legacy.<sup>21</sup> They reflect on the racial disparities inherent in the implementation of Three Strikes, noting that Black and brown people are disproportionately imprisoned pursuant to the law.<sup>22</sup> Their op-ed concludes with a call for systemic change, asking for divestment from mass incarceration and investment in prevention programs and rehabilitative services.<sup>23</sup> Just like countless other crime victims and families of those victims, they believe that prevention programs and rehabilitative services have the capacity to actually reduce crime and make the community safer.<sup>24</sup>

Victim support for the prioritization of crime preventing services over incarceration, debunks the resounding contention that the interests and experiences of “victims” and “offenders” are distinct. In truth, many people who have committed crimes are themselves victims and vice versa.<sup>25</sup> This reality is especially true

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<sup>21</sup> Nichol & Nichol, *Op-Ed: Polly Klaas was our sister. We don't want unjust laws to be her legacy*, LA Times, Oct. 18, 2020, <https://www.latimes.com/opinion/story/2020-10-18/polly-klass-legacy-unjust-laws>

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See e.g., Dichter & Osthoff, *Women's Experiences of Abuse as a Risk Factor for Incarceration: A Research Update 1*, VAWNet, [http://vawnet.org/sites/default/files/materials/files/2016-08/AR\\_IncarcerationUpdate%20%281%29.pdf](http://vawnet.org/sites/default/files/materials/files/2016-08/AR_IncarcerationUpdate%20%281%29.pdf) (finding that “women who have experienced abuse in childhood or adulthood,

for women who are incarcerated, many of whom are serving time for defending themselves from intimate partner violence.<sup>26</sup>

**C. Overly Punitive Prosecutorial Practices, Including Excessive Sentencing, Disproportionately Impact Black and Brown Communities.**

Empirical research at both the federal and state level have found that Black people are significantly more likely to be prosecuted for more severe crimes, receive less favorable plea-bargaining outcomes, and be sentenced to longer prison terms.<sup>27</sup> A 2017 report from the U.S. Sentencing Commission found that, even accounting for a defendant’s history of violence, Black males receive sentences that are “on average 19.1 percent higher than similarly situated white males.”<sup>28</sup> One study found that federal prosecutors are more likely to charge Black people with an offense that carries a higher mandatory minimum than their white counterparts.<sup>29</sup> Another study concluded that “state

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...are more likely to become incarcerated than women who have not experienced abuse”).

<sup>26</sup> See, e.g. Nellis, *supra*, note 11 at 30-31.

<sup>27</sup> Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Legal System* 1, 7, Vera Inst. of Just. (2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>

<sup>28</sup> Schmitt et al., *Demographic Differences in Sentencing: An Update to the 2012 Booker Report*, U.S. Sent’g Comm’n (Nov. 2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114\\_Demographics.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf)

<sup>29</sup> Starr & Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L.J. 1, 5 (2013), <https://www.yalelawjournal.org/article/mandatory-sentencing->

prosecutors are . . . more likely to charge Black rather than similar white defendants under habitual laws.”<sup>30</sup>

This racial bias in the criminal process also applies to people of color generally. Studies have found that people of color charged with criminal offenses “are more likely to be prosecuted, held in pretrial detention, and to receive other harsh treatment.”<sup>31</sup> Notably, recent analyses found that Black and brown people also receive fewer *charge reductions* throughout the span of the criminal legal process than their white counterparts, furthering racial disparities in sentencing.<sup>32</sup> Thus, absent interventions, such as the Special Directives at issue in this case, prosecutorial discretion is more likely to be exercised with leniency towards white defendants and punitively towards defendants of color.

Racial disparities in the criminal legal system become strikingly clear when evaluating the history and effect of the Three Strikes Law. Immediately upon its passage, the disparate impact of the law on Black and brown people was apparent. In 1994, the Center on Juvenile and Criminal Justice analyzed data obtained during the first six months following the

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[and-racial-disparity-assessing-the-role-of-prosecutors-and-the-effects-of-booker](#)

<sup>30</sup> The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* 8 (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>

<sup>31</sup> Hinton, *supra*, note 27 at 8.

<sup>32</sup> Johnson & Larroulet, *The “Distance Traveled”: Investigating the Downstream Consequences of Charge Reductions for Disparities in Incarceration*, 36 J. Q. 1229, 1243 (2019).

implementation of the Three Strikes law.<sup>33</sup> The data showed that Black individuals made up 57.3% of the people charged with a third strike, as compared to white individuals who accounted for just 12.6% of the same population.<sup>34</sup> Further, the report stated that Black individuals in Los Angeles County were “accused of a third ‘strike’ at 17 times the rate of their white counterparts.”<sup>35</sup> More recently, the Rose Institute conducted a study analyzing the racial composition of California’s prison population from 2001 to 2015.<sup>36</sup> The study found that over the fifteen-year period, Black individuals consistently made up a higher portion of the “strike” population, compared to other racial groups.<sup>37</sup> Indeed, in 2015, Black individuals represented 46% of the state’s third strike population, but only 29% of the total incarcerated population.<sup>38</sup> While the data related to the application of the Three Strikes Law is most troubling in relation to the disproportionate effect on the Black community, the analysis concluded that people of color overall are more likely to be convicted of a strike offense than

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<sup>33</sup> Schiraldi & Godfrey, *Racial Disparities in the Charging of Los Angeles County Three “Strike” Cases*, Ctr. on Juvenile and Crim. Just. (Oct. 1994), [http://www.cjci.org/uploads/cjci/documents/racial\\_disparities\\_in\\_the\\_charging\\_of\\_la\\_countys\\_third\\_strike\\_cases.pdf](http://www.cjci.org/uploads/cjci/documents/racial_disparities_in_the_charging_of_la_countys_third_strike_cases.pdf)

<sup>34</sup> *Id.* at 1-2.

<sup>35</sup> *Id.*

<sup>36</sup> Jin & Hidalgo-Wohlleben, *Three Strikes Analysis: Demographic Characteristics of Strike Offenders*, Rose Inst. of State & Local Gov’t- Claremont McKenna College (2016), <http://roseinstitute.org/wp-content/uploads/2016/07/Three-Strikes-Racial-and-Ethnic-Analysis.pdf>

<sup>37</sup> *Id.* at 10.

<sup>38</sup> *Id.* at 11.

white individuals.<sup>39</sup>

### **III. The Special Directives Advance an Expansive View of Justice that Angelenos Want and Need.**

District Attorney Gascón ran for office on a platform that prosecutorial discretion can serve as a mechanism for restoration and societal advancement, not simply an instrument for imprisonment.<sup>40</sup> By creating the Special Directives, District Attorney Gascón took the necessary first step to address the inequity and injustice within the county’s criminal legal system. The District Attorney’s decision to alter office-wide sentencing practices in this manner represents an ameliorative approach to justice reform that appreciates the carceral effect on public safety, the community-focused desires of crime survivors, and the disparate impact of excessive sentences on Black and brown communities. Further, the Special Directives fulfill a promise that Los Angeles County voters overwhelmingly supported—to bring systemic change that reduces the county’s mass incarceration crisis.

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<sup>39</sup> *Id.* at 6.

<sup>40</sup> *See, e.g.*, George Gascón Democrat for Los Angeles District Attorney, <https://georgegascon.org/> (last visited Dec. 6, 2021).

## CONCLUSION

The ADDA's position is unsupported by law or reason and circumvents the will of Los Angeles County voters. The District Attorney's authority to implement Special Directive 20-08 and Special Directive 20-14 must be maintained.

Dated: December 10, 2021

/s/ Summer Lacey

Summer Lacey

Attorney for *Amicus Curiae Brief*

American Civil Liberties Union of  
Southern California

## CERTIFICATE OF WORD COUNT

I certify pursuant to California Rule of Court 8.204 that this Brief of Amicus Curiae contains 2,943 words, including footnotes, but excluding the cover, application, tables, signature blocks, and this certification, as calculated by the word count feature of Microsoft Word.

Dated: December 10, 2021

/s/ Summer Lacey

Summer Lacey

Attorney for *Amicus Curiae Brief*  
American Civil Liberties Union of  
Southern California

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I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 765 The City Drive, Suite 360, Orange, California 92868. I am employed in the office of a member of the bar of this court at whose direction the service was made.

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Michelle O. Castañeda

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## SERVICE LIST

**Browne George Ross  
O'Brien Annaguey & Ellis LLP**

Eric Marc George  
egeorge@bgrfirm.com  
Thomas Peter O'Brien  
tobrien@bgrfirm.com  
David Carroll  
dcarroll@bgrfirm.com  
Matthew Olaf Kussman  
mkussman@bgrfirm.com  
2121 Avenue of the Stars  
Suite 2800  
Los Angeles, CA 90067

**County of Los Angeles  
Deputy County Counsel**

Adrian Gerard Gragas  
agragas@counsel.lacounty.gov  
500 W. Temple St. Room 648  
Los Angeles, CA 90012

**Hogan Lovells**

Stephanie Yonekura  
stephanie.yonekura@hoganlovells.com  
1999 Avenue Of The Stars, Ste 1400  
Los Angeles, CA 90067

Danielle Desaulniers Stempel  
danielle.stempel@hoganlovells.com  
Jo-Ann Tamila Sagar  
jo-ann.sagar@hoganlovells.com  
Neal Kumar Katyal  
neal.katyal@hoganlovells.com  
555 Thirteenth St.,  
NWWashington, DC 20004

**Kendall Brill & Kelly LLP**

Laura W. Brill

lbrill@kbfkfirm.com

Nary Kim

nkim@kbfkfirm.com

Nicholas Frederic Daum

ndaum@kbfkfirm.com

Robert E. Dugdale

rdugdale@kbfkfirm.com

10100 Santa Monica Blvd., Suite 1725

Los Angeles, CA 90067

**L.A. County Office of the County Counsel**

Rodrigo Alejandro Castro-Silva

rcaastro-silva@counsel.lacounty.gov

1500 W. Temple St., 6th Floor

Los Angeles, CA 90012

**Office of the Attorney General-Appellate  
Coordinator**

Consumer Law Section

AppellateCoordinator@doj.ca.gov

300 South Spring Street

North Tower, 5th Floor

Los Angeles, CA 90013

**Office of the County Counsel**

General Litigation Division

Jonathan Crothers McCaverty

jmccaverty@counsel.lacounty.gov

500 W Temple St., Room 606

Los Angeles, CA 90012