Ct. App. No. B310845

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

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

v.

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

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

BRIEF OF AMICI CURIAE 67 CURRENT AND FORMER ELECTED PROSECUTORS AND ATTORNEYS GENERAL IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI

Pursuant to Rule 8.200(c) of the California Rules of Court, Amici Curiae, 67 current and former elected prosecutors and Attorneys General, file this brief in support of the appeal by District Attorney George Gascón and the L.A. County District Attorney's Office from the Superior Court's issuance of a preliminary injunction.

As elected prosecutors and Attorneys General past and present, amici have a deep understanding of the important role that prosecutorial discretion plays in the criminal justice system, and we are extremely concerned that the Superior Court's injunction undermines, in unprecedented fashion, the longstanding constitutional authority and responsibility of elected prosecutors.

Prosecutors are elected and sworn to uphold the law and protect public safety, and the policies at issue here do just that. No prosecutor has the ability and resources to prosecute *every* case and *every* violation of the law – nor should they. As such, it is well settled that elected prosecutors make decisions about where and how limited resources are best exercised and what cases merit entry into the justice system. A prosecutor's broad discretion over whom to prosecute and what offenses to charge also encompasses the ability to determine what penalties and sentence to seek, and whether to pursue available sentencing enhancements, in order to best protect community safety and advance justice. This authority is enshrined in separation of powers principles included in most state constitutions, including

California's, and their federal counterpart. Furthermore, an elected district attorney must be able to guide the exercise of discretion by his deputies and the use of inherently limited criminal justice resources through transparent and straightforward policies. Indeed, the district attorney is elected by the community to do exactly that – and is accountable to the voters for those decisions.

Because the issues this case raises have national significance, amici come not only from California, but also from jurisdictions across the country. Although amici's views may differ as to when and if a particular sentencing enhancement should be sought, amici come together in our steadfast belief that an elected prosecutor cannot effectively carry out his or her constitutional responsibilities if he or she cannot ensure implementation by employees of officewide policies and is, instead, forced to charge offenses and seek penalties that, in the elected prosecutor's judgment, do not advance public safety or serve the interests of justice. Amici are also intimately familiar with the challenges of effectively and efficiently running an office in times of limited resources, as well as transforming office culture and conceptions of justice; these challenges require decisions and leadership by the elected office head and clear instructions that guide deputy discretion and avoid disparate results based on the views and happenstance of the individual prosecutor in the case. For all of these reasons, we are deeply troubled by the Los Angeles Association of Deputy District Attorneys' use of the court to usurp the power of the elected

district attorney and override the lawful, discretionary policy decisions of an official, chosen by the voters of Los Angeles, to transform the criminal justice system in that community.

For all these reasons, amici have an interest in preserving the proper roles and responsibilities in the criminal legal system, both between the elected official and his deputies, and between the elected official and the judiciary. We offer our views here respectfully as friends of the Court.

A full list of amici is attached as an Appendix.

ARGUMENT

Los Angeles County, which has more than 10 million residents, is home to the nation's largest local criminal justice system.[1] Over the past few years, the District Attorney in Los Angeles implemented a number of "tough-on-crime" policies, seeking harsh sentences, including the death penalty and gang enhancements, and opposed many criminal justice reform efforts.[2] As a direct result of these policies, Los Angeles County's prison incarceration rate was well above the state average, and over five times as high as that of San Francisco.[3]

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[1] Jessica Pishko, *How District Attorney Jackie Lacey Failed Los Angeles*, The Appeal (Nov. 12, 2019), https://theappeal.org/how-district-attorney-jackie-lacey-failed-los-angeles/.

[2] *Id.*

[3] In 2016, Los Angeles County's prison incarceration rate was 608 per 1,000 felony arrests. The statewide average was 446. San Francisco County's rate was 131. *See* Center on Juvenile and Criminal Justice, *2016 Los Angeles and San Francisco prison incarceration rates*, California Sentencing Institute,

In 2020, Los Angeles voters elected George Gascón, the former District Attorney of San Francisco County. Gascón has long been committed to reforming the criminal justice system, reducing incarceration, and focusing on public safety rather than punishment for its own sake. During his campaign, Gascón was open and transparent about his vision for the office and the changes to prosecutorial practices he intended to implement. These reforms included ending death penalty prosecutions, the use of money bail, and the criminalization of mental illness and homelessness,[4] as well as curtailing lengthy prison sentences and the use of sentencing enhancements[5] – all objectives consistent with the boundaries of the legal system and the sound exercise of prosecutorial discretion. The Los Angeles community elected him, over opposition by the ADDA, to carry out these promises and bring a new vision to the Los Angeles criminal legal system.[6]

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http://casi.cjcj.org/Adult/Los-Angeles and http://casi.cjcj.org/Adult/San-Francisco.

[4] George Gascón for District Attorney, *On the Issues*, https://www.georgegascon.org/on-the-issues/.

[5] Daniel Nichanian, *How George Gascón Wants to Reform Los Angeles and Achieve "The Lowest Level of Intervention,"* The Appeal Political Report (Jan. 9, 2020), https://theappeal.org/politicalreport/how-george-gascon-wants-reform-los-angeles-district-attorney-election/.

[6] *See, e.g.*, L.A. Times Editorial Board, *Endorsement: George Gascón for L.A. County District Attorney,* L.A. Times (Sept. 29, 2020), https://www.latimes.com/opinion/story/2020-09-29/endorsement-george-gascon-for-la-county-district-attorney; Kate Cagle, *Former LAPD Chiefs Split Over Endorsement for District Attorney*, Spectrum News 1 (Oct. 19, 2020), https://spectrumnews1.com/ca/la-west/politics/2020/10/19/former-lapd-chiefs-split-over-endorsement-for-district-attorney; Association of Deputy District Attorneys, *Association of Deputy*

Upon taking office, District Attorney Gascón immediately sought to reform a number of long-standing prosecutorial practices in his office – practices that research shows had not simply ballooned California's incarcerated population, but also offered little if any benefit to public safety.[7] In fact, according to the FBI's Uniform Crime Report and population data, between 2012 and 2018, violent crime rates in Los Angeles County increased by 31%.[8] Ultimately there is no research that shows sentencing enhancements improve public safety, but there is

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District Attorney's Endorses Jackie Lacey for L.A. County District Attorney, https://www.laadda.com/association-of-deputy-district-attorneys-endorses-jackie-lacey-for-l-a-county-district-attorney/.

[7] *See, e.g.*, Joshua A. Jones, *Assessing the Impact of "Three Strikes" Laws on Crime Rates and Prison Populations in California and Washington*, 4 Inquiries J. 2 (2012), http://www.inquiriesjournal.com/articles/696/2/assessing-the-impact-of-three-strikes-laws-on-crime-rates-and-prison-populations-in-california-and-washington (summarizing studies showing that three strikes laws did not have any positive impact on crime rates); University of California – Riverside, *Three-strikes law fails to reduce crime*, Phys.org (Feb. 28, 2012), https://phys.org/news/2012-02-three-strikes-law-crime.html (reporting that three strikes law has not decreased the incidence of violent crime); California Legislative Analyst's Office, *A Primer: Three Strikes - The Impact After More Than a Decade* (Oct. 2005), https://lao.ca.gov/2005/3_strikes/3_strikes_102005.htm (reporting that three strikes law increased jail and prison populations, lengthened prison terms, increased age of prisoners, increased racial disparities, and cost the state 500 million dollars per year during the first 10 years after enactment, but had no clear impact on crime rates or public safety).

[8] James Queally, *How Jackie Lacey's and George Gascón's time in office shapes the L.A. County D.A.'s race,* L.A. Times (Feb. 18, 2020), https://www.latimes.com/california/story/2020-02-18/district-attorney-election-jackie-lacey-george-gascon-race.

evidence that excessive sentences increase recidivism and therefore create more victims in the future.[9]

District Attorney Gascón was elected to reverse these trends, and his policies are based in empirical evidence and designed to advance public safety, community health, and equal justice throughout Los Angeles. Among the new policies were directives that sought to curtail the use of several sentencing enhancements, including those that are among California's most notorious, draconian, and racially disparate penalties – gang enhancements, mandatory life sentences, and "three strikes" enhancements.[10] These penalties have also shown little public

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[9] Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration,* Working Paper (2015).

[10] *Petitioner's Ex Parte Application for a Temporary Restraining Order and an Order to Show Cause*, 2 (Dec. 29, 2020) (Appellant's Appendix, Vol, 1, A163-290) (seeking a temporary restraining order enjoining George Gascón and the Los Angeles County District Attorney's Office from ordering compliance with "Any portion of the Special Directives that prohibit the Los Angeles County District Attorney's Office, or any of its Deputy District Attorneys or prosecutors, from pleading and proving prior strikes under California's Three Strikes Sentencing Initiative (Penal Code §§ 667(b)–(i), 1170.12); any portion of the Special Directives that require the Los Angeles County District Attorney's Office, or any of its Deputy District Attorneys or prosecutors, to move to dismiss from any pending criminal action any of the following: any prior-strike enhancements (Penal Code section 667(d), 667(e), 1170.12(a) and 1170.12(c)), including any second strikes and any strikes arising from a juvenile adjudication; 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)); STEP Act enhancements ("gang enhancements") (Penal Code section 186.22 et. seq.); special circumstances allegations resulting in an LWOP sentence; violations of bail or O.R. release (Penal Code section 12022.1); firearm allegations pursuant to Penal Code

safety benefit, while draining much needed legal, judicial, police, jail, and state prison resources.

Through this litigation, some of Gascón's employees have asked the courts for permission to defy their new boss.[11] But it is Gascón, as the elected District Attorney, who is responsible for policy decisions within the office and accountable to voters, not his line prosecutors. *See* Cal. 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."). By intervening on their behalf, the Superior Court scrutinized purely prosecutorial functions, interfered with administration within the District Attorney's office, invaded the well-settled discretion of elected prosecutors, threatened principles of separation of powers, and thwarted the will of the Los Angeles County electorate. This type of judicial

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section 12022.53; any portion of the Special Directives that require the Los Angeles County District Attorney's Office, or any of its Deputy District Attorneys or prosecutors, to make a post-conviction motion to dismiss from any pending criminal action special circumstances allegations under Penal Code section 190.1 to 190.5; and any portion of the Special Directives that require the Los Angeles County District Attorney's Office, or any of its Deputy District Attorneys or prosecutors, to move for leave to amend the charging document in any pending criminal action for the purpose of removing any allegations that they would otherwise be restrained and enjoined from moving to dismiss under Paragraphs 2 and 3.").

[11] Because the Association of Deputy District Attorneys for Los Angeles County filed this action, rather than any actual deputies themselves, how many of Gascón's employees support the current litigation and agree in full with its position and the many policies it challenges is unclear.

interference in the discretionary policy decisions of an elected prosecutor is unprecedented, strips the District Attorney of the inherent powers of his office, and deprives Los Angeles voters of the leadership and policy agenda they embraced at the polls. Indeed, we could not find another case in California where courts have overridden a prosecutor's decision *not* to file charges or sentence enhancements.

Amici, a group of current and former elected prosecutors from across the country, file this brief to add their voices to this important issue and to underscore how the lower court's order is intrusive, harmful, and undermines the exercise of prosecutorial discretion that is inherent in the responsibility of any elected prosecutor and critical to the functioning of our justice system.

I. All prosecutors – including California District Attorneys – have well settled discretionary authority to make decisions that are fundamental to the allocation of scarce resources and the pursuit of justice

"The capacity of prosecutorial discretion to provide individualized justice is firmly entrenched in American law." *McCleskey v. Kemp*, 481 U.S. 279, 311–12 (1987) (internal quotations omitted). Prosecutors exercise discretion on whether to charge cases, what charges and penalties to pursue, and what plea bargains to offer. As the California Supreme Court has held, district attorneys are "given complete authority" to enforce the state criminal law in their counties. *Pitts v. County of Kern*, 17 Cal. 4th 340, 358 (1998) (citation and punctuation omitted); *see*

also Cal. Gov. Code § 26500. Because a district attorney has discretion on whom to charge in the first instance, the district attorney's authority "is even stronger" when choosing among various punishments to seek: "The decision of what charges to bring (or not to bring) – and, more to the point here, which sentencing enhancement to allege (or not to allege) – belongs to the prosecutors who are charged with executing our state's criminal law." *People v. Garcia*, 46 Cal. App. 5th 786, 791 (2020); *see also People v. Birks*, 19 Cal. 4th 108, 129 (1998) ("the prosecution, the traditional charging authority, has broad discretion to base its charging decisions on all the complex considerations pertinent to its law enforcement duties."). Further, "the prosecutor's decision not to charge a particular enhancement 'generally is not subject to supervision'[.]" *Id*. The independence of the prosecutor is inherent in the separation of powers enshrined in both the United States and California Constitutions, and dates back to the founding of our country. U.S. Const. art. I, § 1, art. II, § 1, art. III, § 1; Ca. Const. art. III, § 3; *see also* J. Madison, Federalist No. 51.

An elected prosecutor's duty is to utilize this discretion to pursue justice and protect public safety. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (A 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.").[12] In individual cases, the prosecutor has "a heightened duty to ensure the fairness of the outcome of a criminal proceeding from a substantive perspective – to ensure both that innocent people are not punished and that the guilty are not punished with undue harshness."[13] But seeking justice requires much more than fair play or a proportionate outcome in the context of a single case or trial. An elected prosecutor also has a duty as a "'minister[] of justice' to go beyond seeking convictions and legislatively authorized sentences in individual cases, and to think about the delivery of criminal justice on a systemic level, promoting criminal justice policies that further broader societal ends."[14]

Inherent in this larger duty to the public is the prosecutor's obligation to spend limited criminal justice resources efficiently to protect the safety and well-being of the community.[15] No

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[12] *See also* Marc. L. Miller & Ronald F. Wright, *The Black Box*, 94 Iowa L. Rev. 125, 148 (2008), https://www.researchgate.net/publication/228298923_The_black_box (noting that elected prosecutors must make charging and sentencing decisions that respond to the evolving public conceptions of justice. "Current public opinion constantly rewrites the terms of a criminal code drafted by legislatures over many decades.").

[13] Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 Fordham Urb. L.J. 607, 636 (1999), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1739&context=ulj.

[14] R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform,* 45 Loyola Univ. of Chicago L.J. 981, 983 (2014), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1723&context=lsfp.

[15] *Id*. at 996.

prosecutor has the resources and ability to prosecute every violation of the law – nor would doing so promote public safety or be an effective use of public resources. Instead, elected prosecutors – empowered by their community with carrying out the duties of that job – make decisions every day about where and how limited resources are best expended, what cases merit entry into the justice system, and what charges and penalties to seek when the case does warrant criminal prosecution.

Considerations about justice, promoting the best interests of individuals and the community, and resource allocation necessarily impact decisions regarding policy, charging, and plea bargaining. Prosecutors may, for example, choose to charge crimes with lesser penalties if those offenses are easier to prove or are more equitable given dispositions offered to other co-defendants. At other times, they may charge lesser crimes because of mitigating circumstances or trial challenges unique to the case, or because the conduct, though it may meet the technical requirements of a more serious charge, is less blameworthy than is typical. The same is true with sentencing enhancements or mandatory prison terms. A prosecutor may decide an extreme punishment is counterproductive, unnecessary, or unjust. Or she may choose to focus her office's energies elsewhere – more severe penalties often carry additional burdens of proof and an additional workload that a prosecutor may determine is not an effective use of resources.

In the 1990s and 2000s, our nation witnessed a proliferation of sentencing schemes authorizing extreme and

severe penalties for a range of offenses and individuals.[16] These laws played an oversized role in dramatically expanding the number of people we imprison and the length of time we hold them.[17] As with charging decisions in general, however, different prosecutors utilized these tools in divergent ways.[18] Some sought enhanced penalties and mandatory minimum terms with enthusiasm, using their discretion to broaden the impact of harsh and punitive legislation.[19] Others leveraged these severe

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[16] Urban Institute, *A Matter of Time: The Causes and Consequences of Rising Time Served in America's Prisons* (2017), http://apps.urban.org/features/long-prison-terms/about.html.

[17] *Id.*; Caitlin J. Taylor, *Ending the Punishment Cycle by Reducing Sentence Length and Reconsidering Evidence-Based Reentry Practices*, 89 Temp. L. Rev. 747, 750 (2017), https://www.templelawreview.org/lawreview/assets/uploads/2017/08/Taylor-89-Temp-L.-Rev.-747.pdf.

[18] Cassidy, *supra* note 14, at 988 (noting that mandatory sentencing laws have not achieved uniformity in sentencing, but instead shifted sentencing discretion and authority to prosecutors who can reduce or dismiss the charge or penalty); Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, in Michael Tonry, ed., Crime and Justice: A Review of Research, vol. 38 (2009) at 67-68, https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1510&context=faculty_articles (mandatory minimum sentencing schemes did not produce uniform results because prosecutors sidestepped severe penalties in some but not all cases); David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & Econ. 591, 594 (2005).

[19] *See* David Schultz, *No Joy in Mudville Tonight: The Impact of "Three Strike" Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 Cornell J.L. & Pub. Pol'y 557, 575 (2000), https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1271&context=cjlpp (in general, prosecutors in more populous

punishments only in rare cases, if at all.[20] The use of the three strikes law by California's District Attorney's offices has been no different.[21]

Perhaps most troubling, marginalized and underserved communities have been disproportionately affected by sentencing enhancements in California. For instance, over 80 percent of prisoners serving certain sentence enhancements are people of color.[22] Over 90 percent of people serving a gang enhancement in California are Black or Latino.[23] The Three Strikes law in

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California counties were less likely to pursue strikes, while smaller counties filed them more often).

[20] *Id.*; *see also* Peter W. Greenwood, et al., *Three Strikes Revisited: An Early Assessment of Implementation and Effects*, DRR-2 905-NIJ (Aug. 1998), vi, https://www.ncjrs.gov/pdffiles1/nij/grants/194106.pdf (noting that different counties utilized three strikes law differently and that, for example, under the original version of the three strikes law, in Alameda County "only serious felonies are prosecuted under the three-strikes law. Other counties apply the law less selectively.").

[21] *Id.*; *see also County of Los Angeles District Attorney's Legal Policies Manual*, §3.02.01 (March 12, 2020) ("In all instances in which a third strike case is pursued as a second strike case, Penal Code § 667.5(b) priors shall be plead and proved or admitted only when the priors are for sexually violent offenses as defined in Welfare and Institution Code § 6600(b).").

[22] *See* California Committee on the Revision of the Penal Code, Staff Memo (Sept. 10, 2020), at 7, http://www.clrc.ca.gov/CRPC/Pub/Memos/CRPC20-11.pdf.

[23] Abené Clayton, *92% black or Latino: the California laws that keep minorities in prison,* The Guardian (Nov. 26, 2019), https://www.theguardian.com/us-news/2019/nov/26/california-gang-enhancements-laws-black-latinos.

particular has been applied disproportionately against Black defendants and people experiencing mental illness.[24]

Furthermore, the most robust empirical evidence concerning criminal punishment, including research from the National Research Council and National Academy of Sciences, reveals quickly diminishing public safety returns from long prison sentences, such as those imposed under Three Strikes and other sentencing enhancement laws.[25]

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[24] *See* Letter from California Legislative Black Caucus to CDCR Secretary Scott Kernan (July 17, 2019); *see also* Stanford Three Strikes Project, *Mental Illness Reduces Chances Of Three Strikes Sentence Reduction* (2014), https://law.stanford.edu/press/mental-illness-reduces-chances-of-three-strikes-sentence-reduction/.

[25] National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, The National Academies Press (2014), https://academicworks.cuny.edu/jj_pubs/27/; Alex R. Piquero, J. David Hawkins, Lila Kazemian, and David Petechuk, *Bulletin 2: Criminal Career Patterns (Study Group on the Transitions between Juvenile Delinquency and Adult Crime)* (July 2013), https://www.ncjrs.gov/pdffiles1/nij/grants/242932.pdf; William Rhodes, Gerald G. Gaes, Ryan Kling, and Christopher Cutler, *Relationship Between Prison Length of Stay and Recidivism: A Study Using Regression Discontinuity and Instrumental Variables With Multiple Break Points*, Criminology & Pub. Pol'y, Vol. 17 Issue 3 (2018), https://onlinelibrary.wiley.com/doi/abs/10.1111/1745-9133.12382; Jordan D. Segall, Robert Weisberg, and Debbie Mukamal, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California*, Stanford Criminal Justice Center (Sept. 2011), https://law.stanford.edu/publications/life-in-limbo-an-examination-of-parole-release-for-prisoners-serving-life-sentences-with-the-possibility-of-parole-in-california/; *see also In re Stoneroad*, 215 Cal. App. 4th 596, 634 (2013) ("criminality . . . declines drastically after age 40 and even more so after age 50.").

Today, around the country, communities are retreating from these and other "tough on crime" policies that have driven mass incarceration by electing prosecutors with a new vision for our justice system.[26] These prosecutors recognize that overly punitive approaches undermine public safety and community trust. They are making evidence-based decisions around when, and if, to exercise their tremendous power to pursue criminal charges or seek harsh sentences. This shift in perspective in no way justifies or permits judicial interference with the will of the voters or the exercise of the discretion that is fundamental to the prosecutorial function.

II. Meaningful criminal justice reform requires elected prosecutors to implement and enforce policies to supervise their line attorneys' exercise of discretion

An abundance of data and empirical evidence illustrates that the exercise of discretion across offices yields startlingly different criminal justice outcomes, even between offices within the same state and governed by the same laws.[27] These patterns

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[26] Allison Young, *The Facts on Progressive Prosecutors*, Center for American Progress (Mar. 19, 2020), https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/19/481939/progressive-prosecutors-reforming-criminal-justice/.

[27] *See*, *e.g.*, Center on Juvenile and Criminal Justice, *supra* note 3; Vera Institute of Justice, *Incarceration Trends in Texas* (Dec. 2019), https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-texas.pdf (reporting that "the highest rates of prison admissions [in Texas] are in rural counties, and pretrial detention continues to increase in smaller counties even as it is on the decline in larger counties"); Felicity Rose, et al., *An*

are largely attributable to "prosecutors responding to social norms and living up to group expectations about what it means to be a prosecutor in that particular office."[28] Elected prosecutors play a critical role in forming – and reforming – these office norms.[29] Office-wide policies, enacted by the elected prosecutor and consistent with the public's sense of justice, play a critical role in communicating and changing the governing culture in an office.[30] "Policy priorities in the office… might not result from any actual change in the criminal law, but they palpably change the norms that define what prosecutors are expected to do."[31]

These policies, however, can do little to shift norms if they are not enforceable. A District Attorney's ability to ensure adherence to his vision of justice, especially when he is seeking to change the culture of an office, is largely dependent on whether

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Examination of Florida's Prison Population Trends, Crime and Justice Institute (May 2017), at 12, https://www-media.floridabar.org/uploads/2018/04/Criminal-Justice-Data-Study.pdf (reporting that trends in prison admissions rates vary widely by jurisdiction in Florida, from a low of 55 per 100,000 residents to a high of 612.7).

[28] Miller & Wright, *supra* note 12, at 131.

[29] *Id*. at 178; Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 Temp. Pol. & Civ. Rts. L. Rev. 369, 373 (2010), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2428&context=faculty_scholarship.

[30] *Id*. at 374; *see also* Bruce Frederick and Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making*, Vera Institute of Justice (Dec. 2012), at 15, https://www.ncjrs.gov/pdffiles1/nij/grants/240335.pdf (a study of decision-making by line prosecutors revealed that "norms and policies" limiting discretion are the "contextual factor with the most direct impact on prosecutorial decision making.").

[31] Miller & Wright, *supra* note 12, at 178.

line prosecutors are required to comply with office guidelines.[32] While some employees may feel a moral obligation to comply with a new approach, others will not, particularly when those new policies conflict with previous norms in the office.

Here, the Association of Deputy District Attorneys has balked at the District Attorney's efforts to guide the discretion of deputy district attorneys. The lower court intervened, invalidating a range of DA-approved directives addressing sentencing and enhancements (not simply the DA's new three strikes policy). In so doing, it substantially undermined the elected DA's ability to manage and bring meaningful change to the office.

III. Second-guessing the policy decisions of the elected prosecutor undermines local control and erodes the rights of voters to community self-governance

It should not escape the court's attention that, though presented as a purported issue of legality and prosecutorial ethics, the lower court action was, at bottom, an attempt by the Association of Deputy District Attorneys to harness the authority of the court to prevent District Attorney Gascón from making policy decisions that the deputies do not agree with, going so far

[32] Bibas, *supra* note 29, at 371 (elected prosecutors must "create a culture, structures, and incentives within prosecutors' offices so that prosecutors use their discretion consistently and in accord with the public's sense of justice").

as to characterize the Special Directives as "radical."[33] The Superior Court's intervention here set a dangerous precedent, allowing the Association (which opposed Gascon's election) and unelected line prosecutors to strip the elected District Attorney of the autonomy to make decisions around the safety and well-being of the community. The decision also necessarily eroded the rights of local voters to have a say in that vision.

District Attorneys, not their deputies, are directly accountable to the people and community they serve. These officials lay out their visions for public safety and in seeking office define their enforcement priorities. Local residents and voters choose the leader that best reflects and furthers their vision for the justice system in *their* community. If District Attorneys fail to adhere to promises made, or if the public decides it disapproves of them, they will inevitably be voted out of office.

In Los Angeles, the current District Attorney was elected with more than 1.6 million votes[34] on a platform of reform-minded and less punitive approaches to a variety of conduct, including serious offenses previously punished with extreme prison terms. During the campaign, District Attorney Gascón specifically noted his reluctance to utilize sentencing enhancements or to regularly seek prison sentences in excess of

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[33] *See Verified Petition for Writ of Mandate and/or Prohibition and Complaint for Declaratory and Injunctive Relief,* 2, Dec. 30, 2020 (Appellant's Appendix, Vol 1, A16-162).

[34] Priya Krishnakumar and Iris Lee, *How George Gascón unseated L.A. County Dist. Atty. Jackie Lacey*, L.A. Times (Nov. 6, 2020), https://www.latimes.com/projects/2020-la-da-race-gascon-lacey-vote-analysis/.

fifteen years.[35] The voters of Los Angeles embraced those goals. Once he took office and implemented clear policies to further those objectives, some old guard employees who do not share his vision mutinied and successfully asked the Superior Court to permit them to disobey the will of the Los Angeles electorate. The integrity of the elections process, and the prosecutorial function writ large, requires this Court to reverse that decision.

CONCLUSION

The lower court's order overrides the will of the voters and allows the Superior Court to substitute its judgment for that of an executive elected official when it comes to policy decisions and enforcement priorities.

Tellingly, courts never interfered with prosecutorial discretion when that discretion was being used to ramp up prison and jail populations and fuel "tough on crime" thinking and mass incarceration. It is particularly troubling that, now, as reform-minded prosecutors are being elected in cities and counties across the country, some courts are attempting to intervene in prosecutorial decisions they perceive as too lenient.[36] Such intervention is not only at odds with well-settled prosecutorial

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[35] Nichanian, *supra* note 5.

[36] For example, where a judge tried to compel Suffolk County (Boston), Massachusetts District Attorney Rachael Rollins to prosecute a protester case, the Massachusetts Supreme Judicial Court promptly overruled the decision. *See* Roberto Scalese, *Mass. High Court Sides With Suffolk DA Rollins In Battle With Judge Over Protester Charge*, WBUR.org (Sept. 9, 2019), https://wbur.fm/2Elz1g6.

discretion, it also usurps local control and runs counter to the growing consensus across the political spectrum about the need to reverse the course of mass incarceration. Here, the Los Angeles community chose a District Attorney who promised to do exactly that – to bring a new vision of how to allocate resources and promote public safety to the office. The lower court's decision threatens that community vision and sets a dangerous precedent permitting court and staff intrusion into discretion uniquely vested in our nation's elected prosecutors.

Dated: December 13, 2021

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CERTIFICATE OF WORD COUNT

The undersigned counsel certifies that pursuant to Rule 8.204(c) of the California Rules of Court, the text of this brief was produced using 13-point Century Schoolbook font and contains 4,839 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 13, 2021

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PROOF OF SERVICE

I declare that I am employed with Three Strikes Project at Stanford Law School, whose address is 559 Nathan Abbott Way, Stanford, CA, in Santa Clara County. I am not a party to this case. I am over the age of 18 years. I further declare that on this date, I served a copy of the foregoing Brief of Amici Curiae 67 Current and Former Elected Prosecutors and Attorneys General, using TrueFiling, to the following parties.

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