

No. B310845

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,*

vs.

GEORGE GASCÓN, et al.

*Appellants.*

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Appeal from Order of the Superior Court, County of Los Angeles  
Case No. 20STCP04250  
The Honorable James C. Chalfant

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**RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEFS  
OF**

**(1) AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN  
CALIFORNIA;**

**(2) 67 CURRENT AND FORMER ELECTED  
PROSECUTORS AND ATTORNEYS GENERAL; AND**

**(3) LOS ANGELES COUNTY PUBLIC DEFENDER'S  
OFFICE**

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Respondent Association of Deputy District Attorneys for Los Angeles County (ADDA) respectfully submits this answer to the amicus curiae briefs of (1) the American Civil Liberties Union of Southern California (ACLU SoCal); (2) 67 Current and Former Prosecutors and Attorneys General; and (3) the Los Angeles County Public Defender's Office.

**I. INTRODUCTION**

The Three Strikes Law undeniably reflects a determination by the People of California that increased punishment for repeat offenders is vital to effectuate the goals of sentencing and to protect victims and the public from serious and violent felony crimes. Indeed, the People were so certain of their policy choice that they *twice* adopted the same Three Strikes statute in the same year—once through their elected representatives in the Legislature and again through a direct ballot initiative. (See generally Penal Code, §§ 667, 1170.12.) Both times, the Three Strikes Law was adopted by overwhelming margins: the

Assembly passed the law by a margin of 69 to 9 (88% majority);<sup>1</sup> the Senate passed the law by a margin of 29 to 7 (80% majority);<sup>2</sup> and 5.9 million California voters—a 71.85% electoral majority—adopted the law by ballot initiative.<sup>3</sup> Both versions of the Three Strikes Law provide that they cannot be repealed or amended except by a two-thirds supermajority of the Legislature or by a subsequent initiative. (Penal Code, § 667, subd. (j); Penal Code, § 1107.12, subd. (g).) Both versions also contain the “plead and prove” requirement at issue in this appeal. (Penal Code, § 667, subd. (f)(1); Penal Code, § 1170.12, subd. (d)(1).)

Despite this, on his first day as District Attorney, George Gascón issued multiple Special Directives that directly violated the Three Strikes Law by requiring this County’s deputy district attorneys (DDAs) not to charge any strikes in *any* cases where

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<sup>1</sup> See California Assembly Bill History, 1993–1994, A.B. 971.

<sup>2</sup> *Ibid.*

<sup>3</sup> See California Secretary of State, Statements of Vote—November 8, 1994, General Election, at p. 107 (<https://elections.cdn.sos.ca.gov/sov/1994-general/sov-complete.pdf>).



they exist. Appellants and their amici attempt to justify this outcome by emphasizing both that DA Gascón was elected as a “reform” prosecutor and the supposed wisdom of his sentencing policies. Those arguments are wholly misplaced. The Three Strikes Law was adopted both by California voters and elected legislators, signed into law by the Governor, and repeatedly found constitutional by the judiciary. DA Gascón cannot simply ignore or override such democratically-enacted mandates because he disagrees with them, regardless of the social values he is purporting to champion in the process. Likewise, that DA Gascón may have made lofty campaign promises that he could never legally live up to is not a reason to grant him the unprecedented and unbounded executive authority that he seeks in this litigation. The power to repeal the Three Strikes Law lies with the Legislature or with a voter initiative; it is not the province of a local district attorney to effect a repeal through a blanket refusal to enforce the law.

## II. ARGUMENT

While DA Gascón generally has wide discretion in exercising his prosecutorial functions, that discretion is not limitless. DA Gascón is still bound by the mandatory obligation to plead and prove prior strikes and his mandatory duty to 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 particular charge, as amici incorrectly suggest. Rather, the ADDA seeks to prevent DA Gascón from enforcing policies that unlawfully bar prosecutors from (1) complying with their mandatory, non-discretionary obligations to plead and prove prior strikes; and (2) 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 *Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 914.)

**A. The Three Strikes Law Limits DA Gascón’s Prosecutorial Discretion by Imposing a Mandatory, Non-Discretionary Duty to Plead and Prove Prior Strikes**

DA Gascón’s Special Directives violate the Three Strikes Law by barring prosecutors from pleading and proving strike priors in any criminal case. As the ADDA pointed out in its brief, the plain language of the Three Strikes Law creates a mandatory, non-discretionary duty for prosecutors to plead and prove prior strikes in all criminal cases where such prior strikes exist.

(Respondent’s Br. at pp. 43–64.) The Court of Appeals has held at least four times over that the Three Strikes Law creates such a mandatory duty,<sup>4</sup> and no court has ever adopted Appellants’

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<sup>4</sup> *People v. Laanui* (2021) 59 Cal.App.5th 803, 821; *People v. Vera* (2004) 122 Cal.App.4th 970, 982; *People v. Roman* (2001) 92 Cal.App.4th 141; *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1332; *People v. Andrews* (1998) 65 Cal.App.4th 1098, 1102; see also *People v. Romero* (1996) 13 Cal.4th 497, 523 (“The immediately preceding subdivision purports to eliminate the prosecutor’s charging discretion in Three Strikes cases, with these words: ‘The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).’”).

interpretation of the Three Strikes Law’s “plead and prove” requirement as merely a due process protection for defendants. The Court of Appeals has likewise held that the Three Strikes Law’s limitation on prosecutorial discretion does not violate the separation of powers,<sup>5</sup> and no appellate decision has ever held otherwise.

Appellants’ amici do not address this unbroken line of cases. Instead, they suggest that because prosecutors have the general discretion not to plead sentencing enhancements, they also have the right not to plead and prove strike priors in any criminal case. In support of this assertion, amici primarily rely on *People v. Garcia* (2020) 46 Cal.App.5th 786, 791, which states 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 p. 792.) But *Garcia* is irrelevant to the issue at hand, as it concerns the trial court’s

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<sup>5</sup> *People v. Gray* (1998) 66 Cal.App.4th 973, 995; *People v. Butler* (1996) 43 Cal.App.4th 1224, 1247–48; *Kilborn, supra*, 41 Cal.App.4th at p. 1332.

discretion to substitute a *non-mandatory* firearm enhancement under Penal Code section 12022.53, and not a prosecutor's *mandatory, non-discretionary* duty to plead and prove strike priors under the Three Strikes Law. (See *id.* at pp. 791, 794.) The other cases on which amici rely are likewise inapposite, as none address a prosecutor's unique mandatory duties under the Three Strikes Law.<sup>6</sup> At bottom, Appellants and their supporting amici cannot override the clear legislative language and intent of the Three Strikes Law by falling back on generalized notions of traditional prosecutorial discretion.

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<sup>6</sup> See, e.g., *People v. Birks* (1998) 19 Cal.4th 108, 137 (holding that the trial court properly refused defendant's request for a jury instruction on trespass as a lesser-alternative offense to the burglary charge because the prosecutor generally has the discretion to decide what charge to bring); *Dix v. Superior Court* (1991) 53 Cal. 3d 442, 454 (holding that a victim does not have the right to challenge a prosecutor's discretion to seek a recall of a criminal sentence in a particular case under the Determinate Sentencing Act); *People v. Tirado* (2019) 38 Cal.App.5th 637, 644 (noting that the prosecutor has exclusive discretion in choosing which one—or more—of three non-mandatory firearm enhancements to charge in a particular case).

Outside the context of the Three Strikes Law – *i.e.*, in the context of dismissing sentencing enhancements under Penal Code section 1385 – the ADDA does not dispute amici’s arguments on the need for case-by-case discretion, which is precisely what DA Gascón eschewed by requiring the dismissal of all sentencing enhancements in all pending cases. For example, amici 67 Former Prosecutors and Attorneys General identify multiple reasons why, in any particular case, proceeding with a sentencing enhancement may not be in the interests of justice, including the existence of “mitigating circumstances,” problems with proof, other “trial challenges,” the fact that the defendant’s conduct may be atypically less blameworthy than others similarly charged, and myriad other reasons. (67 Former Prosecutors and Attorneys General Br. at p. 19.) It is these case-by-case considerations that deputy district attorneys are required to consider—and that the ADDA has no objection to its members considering—in the

context of dismissing sentencing enhancements.<sup>7</sup> That is particularly so in light of the clear case law that requires such case-by-case consideration and in fact bars dismissals sought for no reason other than a dislike of enhanced sentences. (See, e.g., *People v. Dent* (1995) 38 Cal.App.4th 1726, 1371; see also Respondent’s Br. at pp. 54–65.) But where state law restricts such discretion and requires prosecutors to seek charge a particular enhancement in all cases—as the Three Strikes Law does—deputy district attorneys are legally and ethically obligated to follow that mandate no less than the District Attorney.

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<sup>7</sup> Appellants’ suggestion that *Davis v. Municipal Court* (1988) 46 Cal.3d 64, 77, expressly permits blanket executive policies that completely abrogate case-by-case discretion is not correct. (Reply Br. at p. 33.) *Davis* makes the unremarkable observation that district attorneys may establish general standards “to guide the exercise of such [prosecutorial] discretion by all deputies under his direction.” Here, the Special Directives do not guide deputy district attorneys’ exercise of discretion, but categorically bar them from exercising *any* discretion.

**B. DA Gascón Cannot Ignore or Override the Law to Further His Policy Objectives**

As discussed above, DA Gascón's Special Directives unlawfully prohibit DDAs from pleading prior strikes in violation of the Three Strikes Law and unlawfully bar DDAs from exercising case-by-case discretion in evaluating whether to seek to dismiss sentencing enhancements. But contrary to the frequent suggestion of both Appellants and their amici, the fact that these Special Directives are driven by DA Gascón's desire to implement his vision of criminal justice reform does not justify the violation of these legal duties. Simply put, DA Gascón cannot ignore the law or his legal duties merely because he disagrees with the policies underlying them.

Nor can DA Gascón disregard the law simply because it would be the most expedient way to fulfill his campaign promises. Indeed, while Appellants and their amici frequent complain that the ADDA's attempts to comply with the Three Strikes Law thwarts the will of the 2 million voters who elected DA Gascón, they conveniently overlook the will of the 5.9 million voters—over



70% of the California electorate—who adopted the Three Strikes Law that DA Gascón is intentionally and undisputedly attempting to nullify through executive decree. Thus, as the Superior Court below observed, even if the relevant legal test here was as superficial as comparing the number of votes cast for DA Gascón versus the Three Strikes Law, it would unquestionably be DA Gascón that “is not following the will of the people”—and by a three-fold margin at that. (Appen. A471.)

Appellants and their amici further assert that DA Gascón’s Special Directives eliminating sentencing enhancements and barring the enforcement of the Three Strikes Law are warranted because there is no research showing that sentencing enhancements improve public safety, whereas there is evidence that excessive sentences increase recidivism.<sup>8</sup> This is both incorrect and irrelevant. For example, research examining over a decade of data on California’s Three Strikes Law has

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<sup>8</sup> See, e.g., Appen. A209; Brief of Amici Curiae 67 Current and Former Elected Prosecutors and Attorneys General at p. 14; Brief of Amici Curiae ACLU SoCal at pp. 13–15.

demonstrated that prior strike enhancements significantly reduced new arrests among defendants with two strikes by about twenty percent.<sup>9</sup> In addition, there is evidence demonstrating that gun enhancements deter violent crime and that the social benefits of crimes averted outweigh the cost of imposing sentencing enhancements.<sup>10</sup> As such, there is significant evidence demonstrating that sentencing enhancements improve public safety. In contrast, a key study on which DA Gascón relied in his Special Directives (appen. A209), and on which Appellants' amici continue to rely, did not in fact conclude that lengthy

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<sup>9</sup> Helland & Tabarrok, *Does Three Strikes Deter? A Non-Parametric Estimation*, *The Journal of Human Resources*, Vol. 42, no. 2 (2007), <https://mason.gmu.edu/~atabarro/ThreeStrikes.pdf>; see also Naomi Harlin Goodno, *Career Criminals Targeted: The Verdict is in, California's Three Strikes Law Proves Effective*, 37 *Golden Gate U. L. Rev.* 461, 467–71 (2007).

<sup>10</sup> See, e.g., David Abrams, *Estimating the Deterrent Effect of Incarceration Using Sentencing Enhancements*, *Am. Econ. Journal: Applied Economics*, Vol. 4, No. 4 (2012); Emily G. Owens, *More Time, Less Crime? Estimating the Incapacitative Effect of Sentence Enhancements*, *The Journal of Law & Economics*, Vol. 52, No. 3 (2009).

sentences increase recidivism among violent offenders.<sup>11</sup> The study also does not concern the effectiveness of sentencing enhancements on public safety. Indeed, Professor Mueller-Smith acknowledged this fact when he stated, “This study cannot provide any evidence regarding potential general deterrent effects of incarceration.”<sup>12</sup>

In the end, however, nothing in this appeal turns on whether the Three Strikes Law actually does deter violent crime, promote public safety, or is otherwise good policy. Those issues are solely for the Legislature, or the voters through a ballot initiative, to decide. “The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function.” (*Superior Court v.*

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<sup>11</sup> See Brief of Amici Curiae 67 Current and Former Elected Prosecutors and Attorneys General at p. 14 & fn. 9 (citing Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration*, Working Paper (2015)).

<sup>12</sup> *Id.* at p. 37.

*County of Mendocino* (1996) 13 Cal.4th 45, 53.) Nor is it the role of the Executive branch to second-guess the Legislature's policy determinations; to the contrary, the Executive branch is simply charged with enforcing the law that the Legislature and the voters adopted, which DA Gascón is refusing to do on no grounds other than his disagreement with the law. Unless and until the Three Strikes Law is repealed, DA Gascón does not have the power or authority to ignore the Three Strikes Law's statutory requirement to charge prior strikes in all cases where they exist. That is so regardless of the social utility that Appellants and their amici believe exist in defying the law.

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**The Association of Deputy District Attorneys for Los Angeles County  
vs. George Gascon, et al.  
California Court of Appeal, Second Appellate District, Div. 7,  
Case No. B310845**

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