BROWNE GEORGE ROSS
O'BRIEN ANNAGUEY & ELLIS LLP
Eric M. George (State Bar No. 166403)
egeorge@bgrfirm.com
Thomas P. O'Brien (State Bar No. 166369)
tobrien@bgrfirm.com
David J. Carroll (State Bar No. 291665)
dcarroll@bgrfirm.com
Matthew O. Kussman (State Bar No. 313669)
mkussman@bgrfirm.com
2121 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
Telephone: (310) 274-7100
Facsimile: (310) 275-5697

Attorneys for Plaintiff and Petitioner
Association of Deputy District Attorneys for Los Angeles County

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS FOR LOS ANGELES COUNTY,

Plaintiff and Petitioner,

vs.

GEORGE GASCÓN, in his official capacity as District Attorney for the County of Los Angeles; LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE; and DOES 1 through 50, inclusive,

Defendants and Respondents.

Case No.

PETITIONER'S *EX PARTE* APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND AN ORDER TO SHOW CAUSE; DECLARATION OF ERIC M. GEORGE; DECLARATION OF MICHELE HANISEE

[*Proposed Order Filed Concurrently Herewith*]

Date: December 30, 2020
Time: 8:30 a.m.
Dept.: TBD (82 / 85 / 86)

TO THE HONORABLE COURT AND ALL PARTIES:

PLEASE TAKE NOTICE that, on December 30, 2020, at 8:30 a.m., in Department 82, 85, or 86 of the Los Angeles Superior Court, 111 North Hill Street, Los Angeles, California 90012, Plaintiff and Petitioner Association of Deputy District Attorneys for Los Angeles County will apply *ex parte* for a temporary restraining order enjoining Defendants and Respondents George Gascón and the Los Angeles County District Attorney's Office from forcing compliance by this County's Deputy District Attorneys with unlawful portions of recently-enacted Special Directives 20-08, 20-08.1, 20-08.2, and 20-14. The offending portions of these Special Directives are attached as **Exhibits 2 to 5**, and are more specifically described as follows:

1. 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);

2. 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:

   a. 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;

   b. 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));

   c. STEP Act enhancements ("gang enhancements") (Penal Code section 186.22 et. seq.);

   d. Special circumstances allegations resulting in an LWOP sentence;

   e. Violations of bail or O.R. release (Penal Code section 12022.1); and

   f. Firearm allegations pursuant to Penal Code section 12022.53;

3. 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

4. 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.

Through these Special Directives, Respondents have mandated that all Deputy District Attorneys in the Los Angeles County District Attorney's Office ("DDAs") act in a manner contrary to law, contrary to their oaths and duties as prosecutors, and contrary to their ethical responsibilities as officers of the courts. Specifically, Respondents have issued a blanket prohibition on DDAs seeking or presenting evidence supporting the application of six types of sentencing enhancements in any criminal prosecution, and requiring them to abandon any such preexisting enhancements. This prohibition violates both Respondents' and Petitioner's mandatory duties because (1) DDAs are statutorily obligated to plead and prove sentencing enhancements under California's Three Strikes Law; (2) DDAs are obligated to exercise case-by-case discretion as to what charges to seek – or to move to dismiss – rather than to rubber stamp blanket prosecutorial policies barring the wholesale enforcement of a class of criminal laws; (3) courts cannot dismiss certain special circumstances allegations that the Special Directives purport to require DDAs to move to dismiss; and (4) DDAs may not dismiss a prosecution without the Court's permission. An immediate restraining order enjoining the enforcement of the offending portions of Special Directives 20-08, 20-08.1, 20-08.2, and 20-14 is therefore necessary. Petitioner further applies for an order to show cause as to why a preliminary injunction granting the foregoing relief should not issue for the duration of this action.

This application is made pursuant to Code of Civil Procedure sections 526, 527, and 1085 et seq., as well as California Rules of Court, rule 3.1150 and 3.1200 et seq. This application is based on the attached memorandum of points and authorities, the declaration of Eric M. George and all exhibits attached thereto, the declaration of Michele Hanisee and all exhibits attached

thereto, the Verified Petition for Writ of Mandate and/or Prohibition and all exhibits thereto, all other documents and records on file in this action, and any other evidence or argument that the Court may accept at any hearing on this application.

On December 29, 2020, before 10:00 a.m., counsel for Petitioner provided notice to Respondents of their intent to file this application, the relief sought and basis for that relief, and the date, time, and place for the presentation of the application. George Decl. ¶¶ 2–3, Ex. 1. Respondents stated that they intend to appear at this hearing and to oppose the relief sought herein. *Id.* ¶ 4.

DATED: December 29, 2020

Respectfully submitted,

BROWNE GEORGE ROSS
O'BRIEN ANNAGUEY & ELLIS LLP
Eric M. George
Thomas P. O'Brien
David J. Carroll
Matthew O. Kussman

By: _____
Eric M. George
Attorneys for Plaintiff and Petitioner Association of Deputy District Attorneys for Los Angeles County

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Respondent George Gascón, within weeks of his investiture as Los Angeles County's District Attorney, has issued Special Directives that are not merely radical, but plainly unlawful. They command the deputy district attorneys (the "DDAs") of Respondent Los Angeles County District Attorney's Office to violate California's constitution and laws:

- With respect to *future* cases, the Special Directives prohibit 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; and
- With respect to *pending* cases, the Special Directives require DDAs to withdraw all pre-existing enhancement allegations for six different types of sentencing enhancements.

These provisions are plainly illegal. DDAs cannot be commanded to violate the very sentencing enhancements that California law mandates.

As this County's District Attorney, Respondent Gascón enjoys wide – but not limitless – discretion in exercising his prosecutorial functions. He may not ignore, but must enforce, California's mandatory sentencing enhancement laws. They were adopted by California voters or elected legislators, then signed into law by the governor, and then tested and found constitutional by the judiciary. Such democratically-enacted mandates overcome Respondent Gascón's personally-held – and legally-irrelevant – views about the wisdom or constitutionality of California's mandatory sentencing enhancement laws. By implementing Special Directives that direct DDAs to violate California law, Respondents have plainly abused their discretion.

This Court is both empowered and obligated to enjoin this abuse of discretion. Indeed, only the immediate issuance of injunctive relief will dissolve the unseemly dilemma Respondents have foisted on the DDAs. As California State Bar members who are duty-bound to uphold California's constitution and laws, are the DDAs to follow their legal and ethical obligations? Or are they to follow their employer's edict? They cannot do both. Do they risk disciplinary action by the California State Bar, or risk being terminated for noncompliance with their employer?

This Court can and must, consistent with California's separation of powers doctrine, issue

immediate relief: (i) to declare illegal and unenforceable those offending portions of the Special Directives as identified in Exhibits 2 through 5, and more thoroughly described in the proposed order attached hereto; (ii) to enjoin Respondents from commanding DDAs to enforce such offending portions; and (iii) to restore to the DDAs the *status quo ante* by which the DDAs may continue to charge – and not be compelled to move to dismiss – those sentencing enhancements mandated by California law.

II. FACTUAL BACKGROUND

On December 7, 2020, Respondent Gascón assumed the office of the Los Angeles District Attorney. Verified Petition for Writ of Mandate ("Petition") ¶ 13. That same day, Respondent Gascón issued multiple Special Directives, including Special Directives 20-08 and 20-14.

A. Special Directive 20-08

Special Directive 20-08 requires that "sentence enhancements or other sentencing allegations, including under the Three Strikes law, shall not be filed in any cases and shall be withdrawn in pending matters." Hanisee Decl. ¶ 3, Ex. 2. Respondent Gascón sought to justify this blanket prohibition as follows:

> Sentencing enhancements are a legacy of California's "tough on crime" era. (See Appendix.) It shall be the policy of the Los Angeles County District Attorney's Office that the current statutory ranges for criminal offenses alone, without enhancements, are sufficient to both hold people accountable and also to protect public safety. While initial incarceration prevents crime through incapacitation, studies show that each additional sentence year causes a 4 to 7 percent increase in recidivism that eventually outweighs the incapacitation benefit. Therefore, sentence enhancements or other sentencing allegations, including under the Three Strikes law, shall not be filed in any cases and shall be withdrawn in pending matters.

Id., Ex. 2.

B. Special Directive 20-14

On the same day that he issued Special Directive 20-08, Respondent Gascón also issued Special Directive 20-14. Hanisee Decl. ¶ 3, Ex. 5. This directive, among other things, instructs DDAs on how to apply and carry out Respondent Gascón's new sentencing and enhancements policies. In particular, Special Directive 20-14 provides as follows:

> For any case that is currently pending, meaning that judgment has not yet been entered, or where the case is pending for resentencing, or on remand from another court, the Deputy District Attorney in charge of the case shall inform the Court at

the next hearing of the following:

'At the direction of the Los Angeles County District Attorney, in accordance with Special Directive 20-08 concerning enhancements and allegations, and in the interest of justice, the People hereby

1. join in the Defendant's motion to strike all alleged enhancement(s); or

2. move to dismiss all alleged sentence enhancement(s) named in the information for all counts.[']

Id., Ex. 5.

C. Special Directive 20-08.1

On December 15, 2020, Respondent Gascón issued Special Directive 20-08.1, which imposed additional requirements on DDAs relative to sentencing enhancements. Hanisee Decl. ¶ 3, Ex. 3. That Special Directive requires DDAs to move to dismiss and withdraw all pre-existing enhancement allegations in all cases under Penal Code section 1385. The Special Directive includes a script for the DDA to follow verbatim, pursuant to which the DDA is to assert that mandatory sentencing enhancements under the Three Strikes Law unconstitutionally usurp prosecutorial discretion – even though the California Court of Appeal has rejected this position at least four times. *Id.*, Ex. 3. Nowhere does the Special Directive instruct DDAs to cite this binding adverse authority to the court in accordance with an attorney's ethical duty of candor to the tribunal.[1] In the event that the court refuses to dismiss the allegation, the Special Directive requires DDAs to seek leave to file an amended charging document, ostensibly to eliminate the enhancement allegations that the court had already refused to dismiss. *Id.*, Ex. 3. And where the court does not grant such leave, the Special Directive requires 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.*, Ex. 3.

[1] *See* Cal. Rules Prof. Conduct, rule 3.3(a)(2) ("A lawyer shall not fail 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 and not disclosed by opposing counsel.").

D. Special Directive 20-08.02

The foregoing Special Directives elicited an immediate backlash from the public, from prosecutors, and from judges. Petition ¶ 18. In numerous cases where DDAs moved to withdraw sentencing enhancements, the presiding judge refused to grant the motion. *See, e.g.*, Hanisee Decl. ¶¶ 6–9, Exs. 6–9. In at least two 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. *Id.*, Exs. 6, 8.

On December 17, 2020, Respondent Gascón partially backtracked, issuing Special Directive 20-08.2. Therein, DDAs may assert certain enumerated sentencing enhancements—such as hate crime enhancements, elder abuse enhancements, and others—and seek their head deputy's approval to assert any other unenumerated enhancement. Hanisee Decl. ¶ 3, Ex. 4. But Respondent Gascón maintained that the following six enhancements "shall not be pursued in any case and shall be withdrawn in pending matters" (a compendium of those Penal Code sections flouted by the Special Directives is set forth in Exhibit J, attached to the accompanying Petition):

> (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.

Hanisee Decl. ¶ 3, Ex. 4.

III. LEGAL STANDARD

Petitioner seeks to temporarily restrain Respondents from enforcing the offending portions of Special Directives 20-08, 20-08.1, 20-08.2, and 20-14 while Petitioner's Petition for Writ of Mandate is pending. In ruling on an application for a temporary restraining order, the Court must consider and balance two interrelated factors: (1) the balance of interim harms, *Smith v. Adventist Health System/West*, 182 Cal. App. 4th 729, 749 (2010); and (2) whether there is "some possibility" that plaintiff will ultimately prevail on the merits of the claim. *Jamison v. Dep't of Trans.*, 4 Cal. App. 5th 356, 362 (2016). A greater showing on one of the factors requires less of a showing on the other. *Butt v. State of California*, 4 Cal.4th 668, 678 (1992).

IV. ARGUMENT

A. Mandamus and Prohibition Are Appropriate Remedies to Prevent Irreparable Harm to Petitioner

"A traditional writ of mandate under Code of Civil Procedure section 1085 is a method for compelling a public entity to perform a legal and usually ministerial duty." *Am. Fed'n of State, Cty. & Mun. Employees v. Metro. Water Dist.*, 126 Cal. App. 4th 247, 261 (2005). Generally, "[t]he petitioner must demonstrate the public official or entity had a ministerial duty to perform, and the petitioner had a clear and beneficial right to performance." *AIDS Healthcare Found. v. Los Angeles Cty. Dep't of Pub. Health*, 197 Cal. App. 4th 693, 700 (2011). Mandamus is appropriate where the agency's action is "arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful, procedurally unfair, or [where] the agency failed to follow the procedure and give the notices the law requires." *Am. Fed'n of State, Cty.*, 126 Cal. App. 4th at 261. Similarly, while "[m]andamus does not lie to compel a public agency to exercise discretionary powers in a particular manner," it may be used "to compel it to exercise its discretion in some manner." *AIDS Healthcare Found.*, 197 Cal. App. 4th at 700–01. Thus, as the Court of Appeal has observed, while "mandate cannot be used to compel a district attorney to exercise his or her prosecutorial discretion in any particular way," it would be proper where "a district attorney failed and refused to prosecute any crimes whatsoever." *People ex rel. Becerra v. Superior Court*, 29 Cal. App. 5th 486 (2018).

As outlined below, issuance of mandamus or a writ of prohibition is appropriate because, under the Special Directives, Respondent Gascón has purported to prohibit this County's DDAs from complying with certain of their ministerial prosecutorial duties in violation of the law, their oaths of office, and their ethical responsibilities as officers of the Court.[2] The unlawful directive purports to bar DDAs from charging statutorily-mandated enhancements, and, in other instances, from complying with their ministerial duty to exercise case-by-case discretion as to appropriate charges to maintain or dismiss. Hanisee Decl. ¶¶ 4-5.

The necessity of the relief sought by this proceeding is underscored by the crisis now unfolding in this County's criminal courts. Judges have scolded DDAs for following Respondent Gascón's Special Directives instead of their obligations under the law. *See* Hanisee Decl. ¶ 6, Ex. 6 (Hon. Judge Laura F. Priver stating to prosecutor: "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 abandon the prosecution at this juncture."). DDAs now risk being held in contempt of court, or being disciplined by the State Bar, for following the orders given to them by their employer. *Id.* ¶¶ 4-5. This harm is immediate and irreparable.[3]

No permissible justification exists for the unlawful directives. It is no answer for Respondent Gascón to claim publicly – as he has been quoted – that "[p]rosecutors are sworn to follow the directives of the elected D.A." *See* Hanisee Decl. ¶ 10, Ex. 10. Nonsense! Los Angeles County has not vested its district attorney with such power. DDAs – like all county

[2] Petitioner is the certified exclusive bargaining representative for Bargaining Unit 801, which consists of Deputy District Attorneys I, II, III, and IV in Los Angeles County, pursuant to Employee Relations Ordinance of the County of Los Angeles. Bargaining Unit 801 consists of approximately 800 DDAs. Petitioner therefore has organizational standing to assert the interests of its members in this action. *See, e.g., Prop. Owners of Whispering Palms, Inc. v. Newport Pac., Inc.*, 132 Cal. App. 4th 666, 672–73 (2005).

[3] By contrast, any interim harm to Respondents from granting a temporary restraining order would be slight. If it later appears that a preliminary injunction should not issue, the only interim harm to Respondents would be a short delay in, for example, dismissing preexisting enhancements.

prosecutors within the State – swear an oath only to defend and uphold the Constitution. Cal. Const. Art. XX, § 3.

For these reasons, only the issuance of immediate relief by this Court will stem the unlawful and indelible consequences flowing from unrestrained enforcement of the Special Directives.

B. The Special Directives Require DDAs to Violate a Plain Statutory Directive to Plead and Prove Sentencing Enhancements Under the Three Strikes Law

1. Pleading and Proving Strikes is Mandatory

In adopting the Three Strikes Law, the People of California mandated increased punishment for repeat offenders to effectuate the goals of sentencing and to protect the public from violent criminals. Respondent Gascón, by prohibiting DDAs from seeking Three Strike enhancements, has by fiat required DDAs to violate the law, their oaths, and their ethical duties as officers of the Court.

Under California law, a prosecutor's implementation of the Three Strikes Law involves a two-step process: First, "[t]he prosecuting attorney *shall* plead and prove each prior serious or violent felony conviction." Penal Code §§ 667(f)(1), 1170.12(d)(1) (emphasis added). Second, "[t]he prosecuting attorney may move to dismiss or strike a prior serious or violent felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior serious or violent felony conviction." *Id.* §§ 667(f)(2), 1170.12(d)(2); *see also id.* § 1385(a) ("The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.").[4]

The first step of the Three Strikes Law, therefore, obligates the prosecuting attorney to "plead and prove" prior felonies: "Notwithstanding any other law, subdivisions (b) to (i),

[4] As explained in Section IV.C.1, dismissals under this second step are not left to the unbridled discretion of the district attorney or even the court. Rather, as with dismissals of all charges or enhancements, they require an assessment of each defendant's individual circumstances, which Respondents' Special Directives expressly prohibit. Respondents' blanket directive to dismiss *all* three-strike enhancements under this second step is thus unlawful as well.

inclusive, *shall* be applied in every case in which a defendant has one or more prior serious or violent felony convictions as defined in subdivision (d). The prosecuting attorney *shall* plead and prove each prior serious or violent felony conviction except as provided in paragraph (2)." Penal Code §§ 667(f)(1), 1170.12(d)(1) (emphasis added); *see also Doe v. Albany Unified Sch. Dist.*, 190 Cal. App. 4th 668, 676 (2010) ("It is a well-settled principle of statutory construction that the word . . . 'shall' is ordinarily construed as mandatory."). Thus, while "the selection of criminal charges is [generally] a matter subject to prosecutorial discretion[,] the Three Strikes Law limits that discretion and requires the prosecutor to plead and prove each prior serious felony conviction." *People v. Roman*, 92 Cal. App. 4th 141, 145 (2001); *see also, e.g.*, *People v. Vera*, 122 Cal. App. 4th 970, 982 (2004) ("The Three Strikes statutes, enacted in 1994, require prosecutors to plead and prove each prior felony conviction."); *People v. Kilborn*, 41 Cal. App. 4th 1325, 1332 (1996) ("The Three Strikes law requires the prosecutor to plead and prove all prior serious and violent felony convictions.").

Notwithstanding this plain requirement of California law, the Special Directives purport to mandate that DDAs – regardless of the evidence or other considerations – "shall not . . . pursue in any case" any sentencing enhancements under the Three Strikes Law, even though DDAs are in fact statutorily required to do so. By forcing DDAs not to pursue these sentencing enhancements, Respondent Gascón is not only forcing them to violate the law, but to violate the solemn oath required of all prosecutors to "bear true faith and allegiance to the Constitution of the United States and of the State of California," and to "well and faithfully discharge the duties" of their office. Cal. Const. Art. XX, § 3. California statutes, too, provide that "[i]t is the duty of an attorney to . . . support the Constitution and laws of the United States and of this state." Bus. & Prof. Code § 6068(a). The Special Directives would have the DDAs violate both of these provisions.

2. The Court of Appeal Has Repeatedly Rejected Respondents' Position that the Three Strikes Law is Unconstitutional

Special Directive 20-08.1 requires DDAs to spurn their mandatory obligation to plead and prove strikes. In purporting to do so on the theory that pleading and proving prior strikes is

unconstitutional, the Special Directives ignore binding precedent that rejects separation of powers challenges to the law's limitation on discretion. *See, e.g.*, *Kilborn*, 41 Cal. App. 4th at 1333 ("We conclude that the enactment of the Three Strikes initiative did not violate the separation of powers provision of the State Constitution."); *Roman*, 92 Cal. App. 4th at 145 n.2 ("This limitation on prosecutorial discretion does not violate the separation of powers doctrine."); *People v. Gray*, 66 Cal. App. 4th 973, 995 (1998) ("We . . . conclude that the section 1170.12, subdivision (d)(1) does not violate the separation of powers doctrine enactment of the three strikes law."); *People v. Butler*, 43 Cal. App. 4th 1224, 1247–48 (1996) ("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."). Hence, DDAs have a ministerial duty – held four times by binding authority to be constitutional – to plead and prove prior strikes.

Nor would Respondent Gascón – even were the constitutionality of the Three Strikes Law untested – be empowered to preclude DDAs from complying with their ministerial duties to plead and prove strikes. "[A] local executive official, charged with a ministerial duty, generally lacks authority to determine that a statute is unconstitutional and on that basis refuse to apply the statute." *Lockyer v. City & Cty. of San Francisco*, 33 Cal. 4th 1055, 1086 (2004). Instead, "the determination whether a statute is unconstitutional and need not be obeyed is an exercise of judicial power and thus is reserved to those officials or entities that have been granted such power by the California Constitution," *id.* at 1092-93; "[a] public official does not honor his or her oath to defend the Constitution by taking action in contravention of the restrictions of his or her office or authority and justifying such action by reference to his or her personal constitutional views," *id.* at 1119. Respondent Gascón, a local executive branch official who does not wield any judicial power, cannot excuse enforcement of those ministerial duties that the law imposes on DDAs. His personal views of what is or is not constitutional – let alone his views on what is or is not good policy – are legally irrelevant.

An immediate injunction against Respondents' directives is therefore necessary to enjoin their unlawful directives to DDAs to violate their mandatory and ministerial prosecutorial duties.

C. The Special Directives Impermissibly Mandate That DDAs Indiscriminately Abandon All Preexisting Enhancement Allegations

1. The Special Directives Impermissibly Bar DDAs From Exercising Prosecutorial Discretion in Considering Whether To Move To Dismiss Preexisting Enhancement Allegations

The Special Directives purport to require DDAs to seek dismissals of *all* preexisting enhancement allegations in *every* pending case (including those alleged under the Three Strikes Law), notwithstanding that such dismissals by law may only be effectuated when "in the furtherance of justice." Penal Code § 1385(a). Respondents' blanket prosecutorial policy, by eschewing any case-by-case assessment, impermissibly prevents DDAs from exercising any discretion. Since DDAs are duty bound to in fact exercise their discretion in such circumstances, Respondents' Special Directives contravene California law.

While the scope of prosecutorial discretion is broad,[5] a DDA must perform certain ministerial and mandatory duties in exercising their discretion. "The district attorney is the public prosecutor, except as otherwise provided by law. 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." Gov. Code § 26500 (emphasis added). For example, "a district attorney's 'mandatory' duty is to exercise his or her *discretion* to prosecute crimes." *People ex rel. Becerra v. Superior Court*, 29 Cal. App. 5th 486, 504 (2018) (emphasis in original). Thus, while the court held that "mandate cannot be used to compel a district attorney to exercise his or her prosecutorial discretion in any particular way," mandate could be employed to compel the district attorney to take certain action "if a district attorney failed and refused to prosecute any crimes whatsoever." *Id.* Simply stated, under Government Code section 26500, "district attorneys of the state . . . have the specific duty to prosecute such violations of general laws. This duty is mandatory, and not discretionary." *City of Merced v. Merced Cty.*, 240 Cal. App. 2d 763, 766 (1966).

Other courts, too, have concluded that blanket prosecutorial policies that do not allow for

[5] For example, "the prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring." *Manduley v. Superior Court*, 27 Cal. 4th 537, 552 (2002).

the exercise of case-by-case discretion are unlawful. In *State v. Pettitt*, 93 Wash. 2d 288 (1980), the prosecutor filed an information asserting that the defendant was a "habitual criminal," which made him eligible for an enhanced sentence. *Id.* at 296. At the time, "the Lewis County prosecuting attorney had a mandatory policy of filing habitual criminal complaints against all defendants with three or more prior felonies." *Id.* at 290. Under the policy, "once the prior convictions were clearly established by the record, [the prosecutor] had no choice but to file a supplemental information." *Id.* The prosecuting attorney further testified that, in this particular case, "he did not consider any mitigating circumstances in reaching his decision, and that he could imagine no situation which would provide for an exception to the mandatory policy." *Id.* In vacating the 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.* Similarly, in *State v. City Court of City of Tucson*, 150 Ariz. 99 (1986), the Arizona Supreme Court concluded that such blanket prosecutorial policies were unlawful. *Id.* at 102. There, the city attorney had instituted a policy requiring that all prosecutors file a peremptory challenge in every case against a particular judge. Citing *Pettitt*, the Arizona Supreme Court held that this was impermissible, reasoning that the policy "infringed upon the obligation of each Deputy City Prosecutor to exercise his or her individual professional judgment on a case by case basis." *Id.*

California has also held impermissible similar blanket refusals to exercise discretion conferred on executive branch officials. In *In re Morrall*, 102 Cal. App. 4th 280 (2002), the Court of Appeal considered a challenge to the Governor's refusal to grant an inmate parole. The court recited the well-established rule that there is no right to parole before the expiration of the defendant's sentence; that "[t]he decision [whether to grant parole], and the discretion implicit in it, are expressly committed to the executive branch"; and that, "[i]n this respect, the discretion of the parole authority has been described as 'great' and 'almost unlimited.'" *Id.* at 287. Nonetheless, the court squarely held that "[i]t is without doubt that a blanket no-parole policy would be contrary to the law," because the Governor is required to make an "individualized [determination] of an inmate's suitability for parole." *Id.* at 291 (citing *Roberts v. Duffy*, 167 Cal.

629, 640–41 (1914) and *In re Minnis*, 7 Cal. 3d 639, 642 (1972)). Thus, "[a] refusal to consider the particular circumstances relevant to an inmate's individual suitability for parole would be contrary to the law." *Id.* at 292.

California's standard for dismissal under Section 1385 directly mirrors a prosecutor's obligation to employ case-by-case discretion rather than to operate under blanket policies. Dismissals under Section 1385, which may be granted only "in the furtherance of justice," must consider "whether, in light of the nature and circumstances of *his* 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*, 17 Cal. 4th 148, 161 (1998) (emphases added). Such dismissals may not be based on "bare antipathy to the consequences [of nondismissal] for any given defendant." *Id.* Indeed, *People v. Dent*, 38 Cal. App. 4th 1726 (1995), vacated the dismissal of a prior strike precisely because the dismissal was "guided solely by a personal antipathy for the effect that the three strikes law would have on defendant." *Id.* at 1731. A dismissal, the court held, cannot simply "reason[] backwards from the sentence [the court] wishe[s] to avoid," because "[a] sentence based on such an approach constitutes a failure to exercise discretion as required by the law." *Id.* Rather, there must be a consideration of the defendant's individual circumstances. *Id.* The court therefore remanded the case so that the trial court could "resentence defendant on an individualized basis, rather than impose a sentence predicated solely upon a desire to avoid the consequences of the three strikes law." *Id.*

Here, Respondent Gascón's blanket policy barring the enforcement of six sentencing enhancements in all cases – and requiring their abandonment in all cases in which they are already alleged – is analytically indistinguishable from the same refusal to exercise discretion that multiple courts in multiple states have found unlawful. It also squarely contradicts the Supreme Court's instruction that Section 1385 dismissals *must* account for a particular defendant's individual circumstances, and not simply "reason backwards" from the very type of enhanced sentences that Respondent Gascón now unilaterally wishes to eliminate. District attorneys owe statutory and ministerial obligations to employ their discretion on a case-by-case basis, and the Special

Directives plainly violate those obligations.

2. The Special Directives Require DDAs to Seek Dismissal of Special Circumstance Allegations that Cannot Be Dismissed

Respondents' Special Directives also require that DDAs move to dismiss allegations that a judge has no discretion to dismiss. Special Directive No. 20.08-2 requires that "[s]pecial circumstances allegations resulting in an LWOP [life without possibility of parole] sentence shall not be filed, will not be used for sentencing, and shall be dismissed or withdrawn from the charging document." But while judges generally have discretion to dismiss criminal prosecutions, or portions thereof, "in the furtherance of justice," Penal Code § 1385(a), the People of California – through Proposition 115 – specifically abrogated this discretion for certain special circumstances allegations: "Notwithstanding Section 1385 or any other provision of law, a judge shall not strike or dismiss any special circumstance which is admitted by a plea of guilty or nolo contendere or is found by a jury or court as provided in Sections 190.1 to 190.5, inclusive." Penal Code § 1385.1. Section 190.1 to 190.5, in turn, relate to special circumstances allegations that would result in a sentence of LWOP. For example, section 190.2 mandates a sentence of either death or LWOP if any one of twenty-two special circumstance allegations is found to be true. Penal Code § 190.2(a), (c), (d). Similarly, section 190.5 mandates a sentence of LWOP if any of those special circumstance allegations is found to be true. Penal Code § 190.5(b).

Thus, under Penal Code section 1385.1, a judge has no discretion to dismiss post-conviction such allegations that the Special Directives require to be dismissed. By requiring DDAs to move to dismiss a special circumstance allegation where there is no basis in law to make such a motion, the Special Directives force DDAs not merely to violate California law,[6] but to violate legal ethics. Cal. Rules 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 . . . .").

[6] Indeed, even the Legislature cannot repeal a voter initiative absent a supermajority vote, let alone a local executive branch official. *See People v. Solis*, 46 Cal. App. 5th 762, 773 (2020) ("Proposition 115 specifically permitted amendment by the Legislature, but only if approved by a supermajority of both houses.").

3. The Special Directives Attempt to Force DDAs to Unlawfully Abandon Prosecutions

Finally, the Special Directives unlawfully attempt to wrest from the judiciary its legislatively-mandated role to determine whether enhancements may be dismissed "in furtherance of justice." When a prosecutor moves to strike a prior conviction, ultimately the Court – not the prosecutor – decides whether doing so would be in the interests of justice. *See People v. Roman*, 92 Cal. App. 4th 141, 148 (2001). If the Court denies a motion to dismiss an enhancement in the furtherance of justice, the Special Directives seek to circumvent the court by requiring DDAs to file an amended charging document – ostensibly to eliminate the enhancement allegation that the court has already refused to dismiss. This tactic runs afoul of 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. Penal Code § 1386. 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*, 54 Cal. App. 3d 928, 934 (1976). Respondents have a ministerial duty to proceed with a prosecution once it has been initiated unless the Court permits it to be dismissed. Respondents have failed, and are failing, to perform this duty.

V. CONCLUSION

Each day that passes, this County's prosecutors are forced either to follow the Special Directives and act unlawfully, unethically, and in violation of their oaths, or to act lawfully and ethically but in disobedience to their employer. This Hobson's choice cannot endure. Immediate relief is needed from this Court: (i) to declare illegal and unenforceable those offending portions of the Special Directives; (ii) to enjoin Respondents from commanding DDAs to enforce such offending portions; and (iii) to restore to the DDAs the *status quo ante* by which the DDAs may continue to charge – and not be compelled to abandon – those sentencing enhancements mandated by California law.

DATED: December 29, 2020

Respectfully submitted,

BROWNE GEORGE ROSS
O'BRIEN ANNAGUEY & ELLIS LLP
Eric M. George
Thomas P. O'Brien
David J. Carroll
Matthew O. Kussman

By: _____
Eric M. George
Attorneys for Plaintiff and Petitioner Association of Deputy District Attorneys for Los Angeles County

DECLARATION OF ERIC M. GEORGE

I, Eric M. George, declare and state as follows:

1. I am an attorney admitted to practice law in all courts of the State of California. I am a partner with Browne George Ross O'Brien Annaguey & Ellis LLP, counsel of record for Plaintiff and Petitioner Association of Deputy District Attorneys for Los Angeles County in this matter. I have personal knowledge of the facts set forth below and if called as a witness could competently testify thereto. I make this declaration in support of Petitioner's *ex parte* application for a temporary restraining order and for an order to show cause.

2. My office provided Respondents and their representatives with notice of Petitioner's intent to file this *ex parte* application as follows:

a. On Tuesday, December 29, 2020, at 9:41 a.m., my office sent a letter by e-mail to District Attorney George Gascón, Interim Chief Deputy District Attorney Jose Iniguez, and Interim Los Angeles County Counsel Rodrigo Castro-Silva stating: (1) Petitioner's intent to file this *ex parte* application; (2) the date, time, and place where the application would be presented; and (3) the specific relief sought in the application and the basis thereof. In the letter, I requested that Respondents inform my office no later than 3:30 p.m. whether or not they intended to appear and/or oppose the application. At 10:40 a.m., my office received a message indicating that the e-mail was not delivered to Mr. Iniguez due to an error in the e-mail address. At 10:50 a.m., my office resent the letter to the corrected e-mail address for Mr. Iniguez, and did not subsequently receive any further message indicating that this e-mail was not delivered. Further, my office did not receive any other message indicating that the e-mail was undelivered to any other recipient.

b. On Tuesday, December 29, 2020, before 10:00 a.m., my office left voicemail messages for both the Los Angeles County District Attorney's Office and the Los Angeles County Counsel's Office: (1) confirming that an e-mail had been sent to their offices regarding notice of an *ex parte* application for a temporary restraining order; (2) stating the date, time, and place that Petitioners would present the *ex parte* application; (3) stating the nature of the

relief that Petitioners would seek in the application; and (4) inquiring whether Respondents intended to appear and/or oppose the application.

c. On Tuesday, December 29, 2020, before 10:00 a.m., a process server attempted to personally deliver the letter identified in paragraph 2(a) above to the office of the Chief Executive Officer for the County of Los Angeles, who is the appropriate agent for service of process for the County of Los Angeles pursuant to Code of Civil Procedure 416.50(a). At that time, the process server was informed that no one was available to physically accept service of the letter, and that the server should reattempt service at approximately 1:00 p.m. The letter was personally served at 2:28 p.m.

3. Attached hereto as **Exhibit 1** is a true and correct copy of the letter, e-mails, and proof of personal service providing *ex parte* notice under Paragraph 2 above.

4. On Tuesday, December 29, 2020, Robert Dugdale of Kendall Brill & Kelly LLP e-mailed my office to inform us that they have been retained to represent Respondents in this matter. Mr. Dugdale stated that he intended to appear and oppose this *ex parte* application.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 29, 2020, at Los Angeles, California.

Eric M. George

DECLARATION OF MICHELE HANISEE

I, Michele Hanisee, declare and state as follows:

1. I am an attorney admitted to practice law in all courts of the State of California. I am a Los Angeles County Deputy District Attorney, and I am the President of Plaintiff and Petitioner Association of Deputy District Attorneys for Los Angeles County. I have personal knowledge of the facts set forth below and if called as a witness could competently testify thereto. I make this declaration in support of Petitioner's *ex parte* application for a temporary restraining order and for an order to show cause.

2. The Association of Deputy District Attorneys for Los Angeles County is the certified exclusive bargaining representative for Bargaining Unit 801, which consists of Deputy District Attorneys I, II, III, and IV in Los Angeles County, pursuant to Employee Relations Ordinance of the County of Los Angeles. Bargaining Unit 801 consists of approximately 800 deputy district attorneys in Los Angeles County ("DDAs").

3. Attached as **Exhibit 2** is a true and correct copy of Special Directive 20-08, with the portions that Petitioner is challenging in this action highlighted. Attached as **Exhibit 3** is a true and correct copy of Special Directive 20-08.1, with the portions that Petitioner is challenging in this action highlighted. Attached as **Exhibit 4** is a true and correct copy of Special Directive 20-08.2, with the portions that Petitioner is challenging in this action highlighted. Attached as **Exhibit 5** is a true and correct copy of Special Directive 20-14, with the portions that Petitioner is challenging in this action highlighted.

4. As outlined herein, DDAs whom Petitioner represents will suffer irreparable injury if this Court does not issue a writ of mandate and/or prohibition, and also enter a temporary restraining order and preliminary injunction, restraining and enjoining the unlawful portions of Special Directives 20-08, 20-08.1, 20-08.2, and 20-14. All prosecutors in California take a solemn oath to "bear true faith and allegiance to the Constitution of the United States and of the State of California," and to "well and faithfully discharge the duties" of their office. Cal. Const. Art. XX, § 3. California statutes expressly provide that "[i]t is the duty of an attorney to . . . support the Constitution and laws of the United States and of this state." Bus. & Prof. Code § 6068. And the

California Rules of Professional Conduct provide that "[a] lawyer shall not present a claim or defense in litigation that is not warranted under existing law . . . ." Cal. Rules Prof. Conduct, rule 3.1(a)(2).

5. The offending portions of Special Directives 20-08, 20-08.1, 20-08.2, and 20-14, prohibit this County's DDAs from complying with certain ministerial prosecutorial duties in violation of the law, their oaths of office, and their ethical responsibilities as officers of the Court. The unlawful conduct includes barring DDAs from charging enhancements that they are statutorily obligated to charge; barring DDAs from complying with their ministerial duty to exercise case-by-case discretion as to appropriate charges to maintain or move to dismiss; mandating that DDAs move to dismiss special circumstance allegations that by statute cannot be dismissed; and mandating that DDAs persist in attempting to unilaterally abandon a prosecution where a judge has previously denied a motion to dismiss. DDAs thus risk being held in contempt of court, or being disciplined by the State Bar, each time they undertake this conduct.

6. Judges have scolded DDAs for following Respondent Gascón's Special Directives instead of their obligations under the law. For example, attached hereto as **Exhibit 6** is a true and correct copy of a transcript that I received from a hearing in *People v. Machuca*, Case No. BA477781, before the Honorable Laura F. Priver. In that hearing, where an assigned DDA moved to dismiss a sentencing enhancement allegation pursuant to Special Directive 20-08, Judge Priver denied the motion and informed an assigned DDA as follows: "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 abandon the prosecution at this juncture.***"

7. Attached hereto as **Exhibit 7** is a true and correct copy of a transcript that I received from a hearing in *People v. Provencio*, Case No. KA120979-01, before the Honorable Douglas Sortino. In that hearing, Judge Sortino denied a motion to dismiss the great bodily injury enhancement from the information that was brought solely on the basis of Special Directive 20-08, stating as follows: "Mr. Gascon's directive is a blanket directive that applies to all cases and all circumstances, regardless of the defendant, or the facts and circumstances of the case. It does not

individualize the cases pursuant to their facts and circumstances, or individualize the defendant, in terms of his prior history. I think under those circumstances, it is not a sufficient basis under [Penal Code section] 1385 to articulate or support a finding of a dismissal in the interest of justice."

8. Attached hereto as **Exhibit 8** is a true and correct copy of a transcript that I received from a hearing in *People v. Helo*, Case No. PA090826, before the Honorable Laura F. Priver. In that hearing, Judge Priver denied a motion to dismiss the great bodily injury enhancement from the information that was brought solely on the basis of Special Directive 20-08, stating as follows: "The People have filed this allegation and the Court believes you cannot abandon the prosecution of this matter at this time based upon change of administration in the D.A.'s Office. . . . And I also think that although I understand you're operating under your directives, ***I think it's unethical***."

9. Attached hereto as **Exhibit 9** is a true and correct copy of a transcript that I received from a hearing in *People v. Dominguez*, Case No. BA466952-01, before the Honorable Mark S. Arnold. In that hearing, Judge Arnold denied a motion to dismiss all enhancement and special circumstances alleged in the information that was brought solely on the basis of Special Directive 20-08, stating as follows: "[I]f Courts terminated prosecutions of crimes or enhancements under Penal Code section 1385 without adequate reason, it would frustrate the orderly and effective operation of our criminal justice procedure as envisioned by the Legislature."

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10. Attached hereto as **Exhibit 10** is a true and correct copy of an article from the Los Angeles Times. Therein, Respondent Gascón publicly, but incorrectly, claimed that "[p]rosecutors are sworn to follow the directives of the elected D.A." DDAs swear an oath only to defend and uphold the California Constitution and the United States Constitution. Cal. Const. Art. XX, § 3. DDAs do not swear an oath to "follow the directives of the elected D.A."

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 29, 2020, at Los Angeles, California.

Michele Hanisee

Michele Hanisee

PROOF OF SERVICE

Ass'n of Assistant District Attorneys for Los Angeles County v. George Gascon, et al.

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.

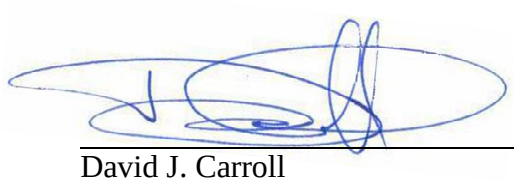
On December 29, 2020, I served true copies of the following document(s) described as **PETITIONER'S EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER; DECLARATION OF ERIC M. GEORGE; DECLARATION OF MICHELE HANISEE** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: On December 29, 2020, I caused a copy of the document(s) to be sent from e-mail address dcarroll@bgrfirm.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 29, 2020, at Los Angeles, California.



David J. Carroll

SERVICE LIST

Robert Dugdale
Kendall Brill & Kelly LLP
10100 Santa Monica Blvd., Suite 1725
Los Angeles, California 90067
Tel: (310) 556-2700
Fax: (310) 556-2705
E-mail: rdugdale@kbkfirm.com

Attorneys for Defendants and Respondents George Gascon and the Los Angeles County District Attorney's Office