Case No. S275478

IN THE SUPREME COURT OF CALIFORNIA

THE ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS FOR LOS ANGELES COUNTY

Plaintiff and Respondent,

vs.

GEORGE GASCÓN, AS DISTRICT ATTORNEY FOR THE COUNTY OF LOS ANGELES ET AL.

Respondents and Appellants.

After Partial Affirmance of a Grant of a Motion for Preliminary Injunction by the Court of Appeal, Second Appellate District, Division Seven, Case No. B310845

The Superior Court of California for the County of Los Angeles
Case No. 20STCP04250
The Honorable James C. Chalfant

ANSWER BRIEF ON THE MERITS

*ERIC M. GEORGE
(SBN 166403)
DAVID J. CARROLL
(SBN 291665)
ELLIS GEORGE CIPOLLONE O'BRIEN ANNAGUEY LLP
2121 Avenue of the Stars, 30/F
Los Angeles, CA 90067
Telephone: (310) 274-7100
Facsimile: (310) 275-5697
egeorge@egcfirm.com
dcarroll@egcfirm.com

CHRISTOPHER LANDAU
(admitted *pro hac vice*)
CHASE HARRINGTON
(admitted *pro hac vice*)
ELLIS GEORGE CIPOLLONE O'BRIEN ANNAGUEY LLP
1155 F Street N.W., Suite 750
Washington, DC 20004
Telephone: (202) 249-6900
Facsimile: (202) 249-6899
clandau@egcfirm.com
charrington@egcfirm.com

Attorneys for Plaintiff and Respondent
The Association of Deputy District Attorneys for Los Angeles County

January 30, 2023

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

On behalf of Plaintiff and Respondent The Association of Deputy District Attorneys for Los Angeles County, the undersigned certifies that there are no interested entities or persons that must be listed under California Rules of Court, rule 8.208.

January 30, 2023

ELLIS GEORGE CIPOLLONE
O'BRIEN & ANNAGUEY LLP

By: /s/ *Eric M. George*
Eric M. George
Attorneys for Plaintiff and Respondent The Association of Deputy District Attorneys for Los Angeles County

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INTRODUCTION

"[T]he primary purpose of the separation of powers doctrine is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government." (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 557, internal quotation omitted.) By dividing the power to make the laws (the legislative power) from the power to enforce the laws (the executive power) from the power to interpret and apply the laws (the judicial power), the California Constitution helps guarantee "the rule of law in a society that justly prides itself on being a government of laws, and not of men (or women)." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1068, internal quotation omitted; see generally Cal. Const. art. III, § 3.)

Ironically, George Gascón, the Los Angeles County District Attorney, now invokes the separation of powers to justify his attempted usurpation of both the legislative power to define the appropriate sentence for a crime and the judicial power to determine the constitutionality of legislation imposing a mandatory duty on him. California's Three Strikes law, like recidivist sentencing laws all across the country, recognizes that a relatively small number of repeat offenders commit a disproportionately large number of crimes. The law thus provides for certain criminal defendants previously convicted of one or more serious or violent felonies to receive longer sentences than first-time offenders. In order to inform the sentencing court of the defendant's qualifying prior convictions, while protecting the defendant's right to a jury trial on facts that may increase the

applicable sentence, the law requires prosecutors to "plead and prove" the fact of the defendant's qualifying prior convictions. Gascón disagrees with the law on both policy and constitutional grounds. With respect to policy, he believes that recidivists should receive the same sentence as first-time offenders. And with respect to constitutionality, he believes that the "plead and prove" requirement intrudes upon his core prosecutorial discretion. He is certainly entitled to those beliefs, and to argue against both the wisdom and the constitutionality of the law. But he is not entitled to forbid his deputies from following the law because he has deemed it unconstitutional, thereby arrogating to himself the judicial power to decide the constitutionality of state law in the first instance and the legislative power to alter California's sentencing regime for recidivist felons. As noted above, the separation of powers exists precisely to prevent a single person from unilaterally exercising these various powers. The courts below recognized that straightforward point by enjoining Gascón from directing his deputies to violate the law.

Gascón now urges this Court to overturn those judgments by renewing his constitutional attack on the Three Strikes law's "plead and prove" requirement. As a threshold matter, however, Gascón errs in assuming that the merits of his constitutional challenge are a defense to his directive to his deputies to violate their mandatory duties. To the contrary, executive officials generally are not free to violate such duties (or direct their subordinates to do so) based solely on their own view that the underlying statute is unconstitutional. It is up to the judicial

branch, not the executive branch, to determine in the first instance whether a mandatory statutory duty is unconstitutional. If an executive official could refuse to perform a statutory duty "based solely on the official's view that the underlying statute is unconstitutional, any semblance of a uniform rule of law quickly would disappear, and constant and widespread judicial intervention would be required to permit the ordinary mechanisms of government to function." (*Lockyer*, *supra*, 33 Cal.4th at p. 1119.) No court has ever determined that the "plead and prove" requirement violates the separation of powers; to the contrary, every court to address that constitutional challenge has rejected it. (See, e.g., *People v. Gray* (1998) 66 Cal.App.4th 973, 994-95; *People v. Butler* (1996) 43 Cal.App.4th 1224, 1247; *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1332-33.) Thus, wholly independent of the merits of the constitutional issue, the courts below properly granted mandamus relief to halt Gascón's unilateral arrogation of the judicial power to nullify a mandatory statutory duty on constitutional grounds.

And even if this Court were to reach the merits of the constitutional issue, Gascón is again wrong. The prosecutorial discretion at the core of executive power, as this Court has long explained, is the discretion to decide whom to prosecute for what crime. (See, e.g., *Dix v. Superior Court* (1991) 53 Cal.3d 442, 451; *Board of Supervisors of Los Angeles County v. Simpson* (1951) 36 Cal.2d 671, 676.) The Three Strikes law leaves that discretion intact: prosecutors retain unfettered discretion whether to prosecute recidivists for felonies. But if they choose to do so, as

with any crime, they are constrained to seek the sentence specified by the Legislature.

Once it is understood that the Three Strikes law's "plead and prove" requirement does not require prosecutors to "plead and prove" any substantive crime, but instead merely a fact relating to the appropriate sentence for certain defendants convicted of certain substantive crimes, Gascón's separation-of-powers argument collapses. The power to define the appropriate sentences for crimes is a core *legislative* power, not a core *executive* power, and the Legislature may specify what facts are relevant for a court to impose an appropriate sentence. Through the Three Strikes law, the Legislature (as well as the People) decided that a prior conviction for a serious or violent felony is relevant to determine the appropriate sentence for a subsequent felony. Just as a prosecutor must prove the elements of a crime provided by law, he or she must pursue the sentence provided by law: prosecutors necessarily exercise their legitimate discretion within the legal framework of crimes and punishments established by the Legislature, and have no inherent discretion to pursue crimes or punishments beyond the boundaries established by law. It is thus no surprise that Gascón has failed to identify a single case from California or elsewhere holding or suggesting that prosecutors have inherent discretion to pursue criminal sentences other than those specified by law.

The bottom line here is that Gascón is challenging the bedrock principle that ours is "a government of laws, and not of men (or women)." (*Lockyer, supra*, 33 Cal.4th at p. 1068, internal

quotation omitted.) He has made no secret of his disdain for the Three Strikes law. But his role in our constitutional system is limited to enforcing the law, not making it or deciding its constitutionality. He can direct his deputies to prioritize (or deprioritize) prosecuting certain crimes, but cannot unilaterally nullify their mandatory statutory duties on constitutional grounds. The lower courts in this case vindicated the rule of law by enjoining Gascón's unlawful directive, and this Court should affirm the judgment.

STATEMENT OF THE CASE AND FACTS

A. Factual Background

1. The Three Strikes law

Laws that increase criminal sentences for recidivists "'have a long tradition in this country that dates back to colonial times' and currently are in effect in all 50 States." (*Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243, quoting *Parke v. Raley* (1992) 506 U.S. 20, 26.) Indeed, recidivism is "a traditional, if not the *most* traditional, basis for a sentencing court's increasing an offender's sentence." (*Ibid.*, emphasis added.)

California's Three Strikes law is an example of such a recidivist sentencing law. The law was enacted in 1994 "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of one or more serious or violent felony offenses." (Pen. Code, § 667, subd.

(b).)[1] The law received overwhelming bipartisan support: it passed the Assembly by a margin of 69 to 9 (88%) and the Senate by a margin of 29 to 7 (80%), and was adopted by almost 72% of California voters. (Assem. Final Hist. on Assem. Bill No. 971 (1993-1994 Reg. Sess.), p. 712; Cal. Sect. of State, Statement of Vote: November 8, 1994, General Election, p. 107, at <https://elections.cdn.sos.ca.gov/sov/1994-general/sov-complete.pdf> [as of Jan. 30, 2023].) As this Court has explained, the law creates an "alternative sentencing scheme" that specifies the applicable sentence for a criminal defendant previously convicted of one or more serious or violent felonies. (*Romero, supra*, 13 Cal.4th at p. 527; see also *People v. Acosta* (2002) 29 Cal.4th 105, 132.) The Three Strikes law thus displaces the sentencing schemes provided by law for first-time felons, and specifies that "[n]otwithstanding any other law," the alternative sentences specified by the law "*shall* be applied *in every case* in which a defendant has [qualifying] prior … felony convictions." (§ 667, subd. (f)(1), emphasis added.)

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[1] The Three Strikes law actually "consists of two, nearly identical statutory schemes designed to increase the prison terms of repeat felons." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504.) One was enacted by the Legislature and took effect in March 1994 (see Pen. Code, § 667, subd. (b)-(i)), while the other was adopted by the People through an initiative and took effect in November 1994 (*id.* § 1170.12). For present purposes there is no material difference between the two statutes, and for convenience this brief will refer only to § 667. Unless otherwise indicated, all statutory references in this brief are to the Penal Code.

A recidivist sentencing scheme cannot work, of course, without some mechanism to establish the qualifying prior convictions. Under longstanding California law predating the Three Strikes law, a prior conviction used to lengthen a criminal sentence must—unless admitted by the defendant—be proved to a jury. (See, e.g., §§ 969, 1025, 1158; *People v. Epps* (2001) 25 Cal.4th 19, 29; *People v. Wiley* (1995) 9 Cal.4th 580, 589; *Pollack v. Dept. of Motor Vehicles* (1985) 38 Cal.3d 367, 372-73; *People v. LoCicero* (1969) 71 Cal.2d 1186, 1192; *Cavassa v. Off* (1929) 206 Cal. 307, 313.) Thus, at the heart of the Three Strikes law is the requirement that "[t]he prosecuting attorney *shall* plead and prove each prior serious or violent felony conviction." (§ 667, subd. (f)(1), emphasis added.)[2] The prosecutor need not plead or prove the evidentiary basis for the underlying felony that resulted in the qualifying prior conviction; rather, he or she need only plead and prove the *fact* of that conviction. The Three Strikes law thus protects a criminal defendant's jury-trial right

[2] Although this requirement is absolute, the law nonetheless provides that "[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." (§ 667, subd. (f)(2).) Such a motion to dismiss or strike, however, requires judicial approval. (See *ibid.* ["If upon the satisfaction of the court that there is insufficient evidence to prove the prior serious or violent felony conviction, the court may dismiss or strike the allegation."]; see generally *People v. Williams* (1998) 17 Cal.4th 148, 158-61 [clarifying standard for court to strike a prior serious or violent felony conviction "in furtherance of justice" under § 1385].)

while giving the defendant notice, and an opportunity to challenge the applicability, of its alternative sentencing provisions, and informing the court of facts necessary to impose the appropriate sentence. Precisely because the law requires the fact of a qualifying prior conviction to be proven to a jury (the requirement now being challenged here), it provides a defendant with *greater* protection than required by the federal Constitution; the U.S. Supreme Court has held that the Sixth Amendment to the federal Constitution does not require the fact of a prior conviction, when used as a recidivist sentencing factor, to be proven to a jury. (See *Almendarez-Torres*, *supra*, 523 U.S. at 239-47.)

2. Special Directive 20-08

Gascón was elected District Attorney for Los Angeles County on November 3, 2020, and took office on December 7, 2020. On that very day, he issued Special Directive 20-08 to his office regarding "Sentencing Enhancements/Allegations." (Appellants' Ct. App. appen. ["App."] A35-38.) That Special Directive took direct aim at California sentencing law, declaring that "[s]entencing enhancements are a legacy of California's 'tough on crime' era," and that "[i]t 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." (App. A35.) The Special Directive cited an academic study for the proposition that incarceration actually increases recidivism, so that the cost of lengthy

incarceration "eventually outweighs the incapacitation benefit." (*Ibid.*) Based solely on these policy considerations, and without any discussion of the constitutionality of any particular sentencing provision, the Special Directive then specified 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." (*Ibid.*, emphasis added.)

The following week, Gascón issued Special Directive 20-08.1, to provide "Further Clarification of Special Directive 20-08." (App. A55-56.) The new Special Directive reaffirmed Gascón's intent "to put an end to the practice of alleging strike priors and all other special allegations," and for the first time purported to ground that policy in "the constitutional authority granted solely to prosecutors across the state of California." (App. A55.) The new Special Directive also reaffirmed Gascón's policy requiring deputies to move to dismiss qualifying prior convictions already pleaded in pending cases, and directed those deputies to read the trial courts in such cases a written statement providing in part:

> The California Constitution and State Supreme Court precedent … vest the District Attorney with sole authority to determine whom to charge, what charges to file and pursue, and *what punishment to seek*. That power cannot be stripped from the District Attorney by the Legislature, Judiciary, or voter initiative without amending the California Constitution. It is the position of this office that Penal Code section 1170.12(d)(2) and Penal Code

> 667(f)(1) are unconstitutional and infringe on this authority.

(*Ibid.*, emphasis added.) This statement failed to note that this Court had expressly *declined* to decide whether the Three Strikes law's "plead and prove" requirement unconstitutionally usurps prosecutorial discretion (see *Romero, supra,* 13 Cal.4th at p. 515 & fn. 7), and omitted any reference to binding case law holding that it does not (e.g., *Gray*, *supra,* 66 Cal.App.4th at pp. 994-95; *Butler*, *supra*, 43 Cal.App.4th at p. 1247; *Kilborn*, *supra*, 41 Cal.App.4th at pp. 1332-33.)

B. Procedural Background

Because, as noted above, the Three Strikes law requires prosecutors to "plead and prove" qualifying prior convictions as part of the felony sentencing process, these Special Directives placed Gascón's deputies in a legal and ethical bind: they could either follow Gascón's Special Directives or the law. (See generally Bus. & Prof. Code, § 6068, subd. (a) ["It is the duty of an attorney … [t]o support the Constitution and laws of the United States and of this state."].) Indeed, judges wasted no time in chastising line prosecutors for following the Special Directives rather than the law, and reminding them of their ethical obligations. (App. A28.)

Accordingly, on December 30, 2020, the Association of Deputy District Attorneys of Los Angeles County ("ADDA") filed a petition in Superior Court seeking a writ of mandate and/or prohibition, as well as injunctive and declaratory relief, to prevent Gascón from enforcing the challenged Special Directives.

(See App. A16-162.) Concurrently, ADDA filed an *ex parte* application for a temporary restraining order and an order to show cause. (See App. A163-93.) Gascón opposed the application (see App. A297-303), and at an emergency hearing, ADDA elected to withdraw its application for a TRO and move instead for a preliminary injunction (see App. A316).

After plenary briefing and a hearing, the Superior Court (Chalfant, J.) granted the requested preliminary injunction in pertinent part. (See App. A480-525.) As relevant here, the court concluded that the Three Strikes law requires prosecutors to plead and prove qualifying prior convictions, and that this requirement does not violate the constitutional separation of powers. (See App. A503-18.) In rejecting Gascón's constitutional defense, the court noted that "Gascón cannot unilaterally decide that the plead and prove requirement for strike priors in the Three Strikes law is unconstitutional as a reason to direct deputy district attorney action." (App. A515-16.) To the contrary, "'[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.'" (App. A516, quoting *Lockyer, supra*, 33 Cal.4th at p. 1086.) Thus, the court preliminarily enjoined Gascón from, among other things, "requiring deputy district attorneys not to plead and prove strike priors under the Three Strikes law." (App. A525.) Gascón appealed.

A unanimous panel of the Court of Appeal affirmed in relevant part. (See *Association of Deputy District Attorneys for*

Los Angeles County v. Gascon (ADDA) (2022) 79 Cal.App.5th 503, review granted Aug. 31, 2022, S275478.) The court agreed with the Superior Court that the Three Strikes law imposes a mandatory and non-discretionary duty upon prosecutors to plead qualifying prior convictions in felony cases (see *id.* at pp. 531-39), and that this duty does not violate the constitutional separation of powers (see *id.* at pp. 539-46). Accordingly, the Court of Appeal affirmed the trial court's order insofar as it "enjoin[ed] the district attorney's direction to deputy district attorneys not to plead prior serious or violent felony convictions under the three strikes law." (*Id.* at p. 555.) The court further held that mandamus could not be used to compel prosecutors to "prove" such qualifying prior convictions, although the court noted that prosecutors would still have an ethical obligation to "endeavor to prove [prior strikes] or move to dismiss [them]." (*Id.* at pp. 546-48.)

Gascón sought review of that ruling. This Court granted the petition for review on August 31, 2022.

STANDARD OF REVIEW

This Court reviews for abuse of discretion the Superior Court's decision to preliminarily enjoin Gascón from directing his deputies to violate the law. (See, e.g., *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109.) Insofar as the Superior Court's exercise of that discretion was based on a legal determination, this Court reviews that determination *de novo.* (See, e.g., *Strategix, Ltd. v. Infocrossing West, Inc.* (2006) 142 Cal.App.4th 1068, 1072.)

ARGUMENT

I. Mandamus Relief Is Appropriate To Prevent Public Officials From Violating Mandatory Duties.

Gascón ends his brief where he should be starting it: with the question whether mandamus relief is warranted in this case. (See Gascón Br. at pp. 65-68.) Gascón asserts that "mandamus is not available to compel the exercise of a duty required by an unconstitutional statute," and indeed characterizes that supposed rule as "so basic it hardly bears explaining." (*Id.* at p. 66.) According to Gascón, that rule flows inexorably from the proposition that an unconstitutional law is a legal nullity. (*Ibid.*, citing *Brandenstein v. Hoke* (1894) 101 Cal. 131, 134.) But that proposition glosses over the threshold question, presented here, of *who decides* that a statute imposing a mandatory duty is unconstitutional in the first instance: an executive official subject to that duty or the judiciary?

This Court specifically answered that question in *Lockyer*, holding that it is a core *judicial* function to determine the constitutionality of legislation, and that mandamus is warranted to prevent executive officials from violating their statutory duties based on their own assessment of a statute's constitutionality. (See *Lockyer*, *supra*, 33 Cal.4th 1055.) Like Gascón here, the executive officials in *Lockyer* argued that this Court could not grant mandamus relief without resolving the merits of their constitutional defense to noncompliance with their statutory duties, in light of "the general proposition that courts will not issue a writ of mandate to require a public official to perform an

unconstitutional act." (*Id.* at p. 1112.) But this Court squarely and unanimously rejected that argument. As the Court explained, the threshold question is "'the power of the ministerial officer to refuse to perform a statutory duty because *in his opinion* the law is unconstitutional. When we decide that, we do not get to the question of the constitutionality of the act, and it will not be decided.'" (*Ibid.*, quoting *State v. State Bd. of Equalizers* (Fla. 1922) 94 So. 681, 684, emphasis in original.)

In other words, whether the official is right or wrong on the merits of the constitutional issue is beside the point in a mandamus proceeding, because executive officials are not generally entitled to violate their statutory duties based on nothing more than their own assessment of the statute's constitutionality. (See *id.* at pp. 1082-1112.) Thus, *Lockyer* granted mandamus relief to prevent an executive official from violating mandatory statutory duties without addressing the constitutionality of the underlying statute. (See *id.* at pp. 1119-20.) Indeed, when the merits of the constitutional issue ultimately reached the Court in a proper case, the Court—in a decision penned by the author of *Lockyer*—*upheld* the position advanced by the official. (See *In re Marriage Cases* (2008) 43 Cal.4th 757, 792-857; see also *id.* at 858, Kennard, J., concurring [noting that "[t]here is no inconsistency" in the decisions because *Lockyer* decided only that executive officials lack authority to violate mandatory statutory duties based on their own assessment of their constitutionality "and instead should have submitted that question to the judiciary for resolution."]

In a society governed by the rule of law, after all, what matters is not just the *result* but the *process* by which that result is reached. That is why *Lockyer* framed the issue presented in that case as "a fundamental question that lies at the heart of our political system: the role of the rule of law in a society that justly prides itself on being a government of laws, and not of men (or women)." (*Lockyer*, *supra*, 33 Cal.4th at p. 1068.) Our system would quickly descend into chaos if executive officials, whatever their intentions, were free to pick and choose which laws to obey based on their own assessment of their constitutionality. (See *Lockyer*, 33 Cal.4th at pp. 1119-20 ["[G]ranting every public official the authority to disregard a ministerial statutory duty on the basis of the official's opinion that the statute is unconstitutional would be fundamentally inconsistent with our political system's commitment to … the rule of law."]; see also *Boyer v. County of Ventura* (2019) 33 Cal.App.5th 49, 54-55; *Voices for Rural Living v. El Doral Irrigation Dist.* (2012) 209 Cal.App.4th 1096, 1116.)

Indeed, were this Court to place its imprimatur on unilateral executive nullification of mandatory statutory duties, it would open a Pandora's Box:

> For example, we would face the same legal issue if the statute in question were among those that restrict the possession or require the registration of assault weapons, and a local official, charged with the ministerial duty of enforcing those statutes, refused to apply their provisions because of the official's view that they violate the Second Amendment of the federal Constitution. In like manner, the same legal

> issue would be presented if the statute were one of the environmental measures that impose restrictions upon a property owner's ability to obtain a building permit for a development that interferes with the public's access to the California coastline, and a local official, charged with the ministerial duty of issuing building permits, refused to apply the statutory limitations because of his or her belief that they effect an uncompensated "taking" of property in violation of the just compensation clause of the state or federal Constitution.

(*Lockyer*, *supra*, 33 Cal.4th at p. 1067.)

Allowing executive officials to violate their statutory duties on self-proclaimed constitutional grounds also conflicts with the background rule that statutes enjoy a "strong presumption of constitutionality." (*O.G. v. Superior Court* (2021) 11 Cal.5th 82, 90, internal quotation omitted; see also *Lockyer, supra,* 33 Cal.4th at p. 1086 ["[O]ne of the fundamental principles of our constitutional system of government is that a statute, once duly enacted, is presumed to be constitutional …," internal quotation omitted]; *Dittus v. Cranston* (1959) 53 Cal.2d 284, 286 ["Courts should exercise judicial restraint in passing upon the acts of co-ordinate branches of government … and the invalidity of the legislation must be clear before it can be declared unconstitutional."].) Given that presumption, an executive official generally has no basis for concluding that he or she is entitled to violate a statutory duty on constitutional grounds unless and until a court has invalidated the statute on those grounds. "When … a duly enacted statute imposes a ministerial duty upon an executive official to follow the dictates of the

statute in performing a mandated act, the official generally has no authority to disregard the statutory mandate based on the official's own determination that the statute is unconstitutional." (See *Lockyer, supra,* 33 Cal.4th at p. 1068.) That approach would invert the presumption of constitutionality and provide a recipe for anarchy. (See *id.* at pp. 1067-68, 1086, 1108-09, 1119-20.)

That point is especially compelling here, where a series of judicial decisions specifically *rejected* Gascón's theory that the Three Strikes law's "plead and prove" requirement violates the constitutional separation of powers. (See, e.g., *Gray, supra*, 66 Cal.App.4th at pp. 994-95; *Butler*, *supra,* 43 Cal.App.4th at p. 1247; *Kilborn*, *supra,* 41 Cal.App.4th at pp. 1332-33.) Indeed, no litigant has apparently believed that theory worthy of pursuing for the past quarter century.

Nonetheless, Gascón took it upon himself to direct his subordinates to violate the statutory "plead and prove" requirement on the ground that he personally concluded that it was unconstitutional. He thereby usurped a core judicial function. (See *Lockyer*, *supra*, 33 Cal.4th at pp. 1092-93 ["[U]nder California law, 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."].) "[T]his established rule does not represent any sort of broad claim of *judicial* power over the *executive* branch, but on the contrary reflects the general duty of an *executive* official, in carrying out a ministerial function authorized by statute, not to assume the

authority to supersede or contravene the directions of the *legislative* branch or to exercise the traditional function of the *judicial* branch." (*Id.* at p. 1109, fn. 36, emphasis in original.)

Mandamus relief is thus warranted here wholly independent of the merits of the constitutional issue, as Gascón exceeded his authority by directing his subordinates to violate a mandatory statutory duty based solely on his own assessment of the constitutional issue. (See, e.g., *id.* at p. 1108 ["If each official were empowered to decide whether or not to carry out each ministerial task based upon the official's own personal judgment of the constitutionality of an underlying statute, the enforcement of statutes would become haphazard, leading to confusion and chaos and thwarting the uniform statewide treatment that state statutes generally are intended to provide."].) The courts can address the merits of the constitutional issue in a case where it is properly presented—for example, in a criminal case where the defendant (perhaps even with Gascón's encouragement) challenges a sentence imposed under the Three Strikes law. (See *id.* at p. 1099 ["If the local officials charged with [a] ministerial duty … believed the state's … statutes are unconstitutional and should be tested in court, they could have [complied with their legal duties] and advised the [affected parties] to challenge the denial in superior court."].) As in *Lockyer*, Gascón "cannot plausibly claim that the desire to obtain a judicial ruling on the constitutional issue justified the wholesale defiance of the applicable statutes that occurred here." (*Ibid.*)

Gascón's remaining mandamus arguments fare no better. He cannot (and does not) deny that prohibitory mandamus relief is available to restrain a government official from violating a mandatory duty. (See, e.g., *Patterson v. Padilla* (2019) 8 Cal.5th 220, 250-51, citing *Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245, 262-63; *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 7.) Nor does he deny that injunctive relief (either preliminary or permanent) is appropriate in a mandamus action, at least insofar as such relief does not sweep more broadly than the scope of relief available in a mandamus action. (See, e.g., *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 441-42; *Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1563, fn.9.) And he does not renew his argument that mandamus relief is inappropriate based on any purported distinction between a "mandatory" duty and a "ministerial" duty, which he argued at length below and which the Court of Appeal squarely rejected. (See *ADDA*, *supra*, 79 Cal.4th at pp. 537-39.) Rather than making any argument relating specifically to the propriety of mandamus relief in this case, Gascón simply rehashes his prior merits arguments. (See Gascón Br. at pp. 66-67.) But those arguments provide no basis for denying mandamus relief.

The bottom line here is that the Superior Court properly enjoined Gascón from directing his deputies to violate the Three Strikes law's "plead and prove" requirement based on his own assessment of the statute's constitutionality. That point alone resolves this appeal, and the Court can and should affirm the

judgment without reaching the merits of the constitutional question. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1102 ["Our jurisprudence directs that we avoid resolving constitutional questions if the issue may be resolved on narrower grounds …."].)

II. The Three Strikes Law Is A Valid Exercise Of Legislative Power To Define Criminal Sentences.

If this Court were to reach the merits of the constitutional question, it should also affirm the judgment. That question turns on the simple and straightforward principle that "[i]t is the function of the *legislative* branch to define crimes and prescribe punishments." (*People v. Anderson* (2009) 47 Cal.4th 92, 118-19, emphasis added; see also *Manduley, supra*, 27 Cal.4th at p. 552 ["'[T]he power to define crimes and fix penalties is vested exclusively in the legislative branch,'" quoting *Romero, supra*, 13 Cal.4th at p. 516]; *People v. Navarro* (1972) 7 Cal.3d 248, 258 ["Defining offenses and prescribing punishments (mandatory or alternative choices) are legislative functions …."]; *People v. Knowles* (1950) 35 Cal.2d 175, 181 ["[T]he Legislature may define and punish offenses as it sees fit."].) Indeed, Gascón himself admits that "[e]ncompassed within the Legislature's core function of passing laws is the responsibility of defining crimes and prescribing punishments." (Gascón Br. at p. 28, quoting *People v. Lamoreux* (2019) 42 Cal.App.5th 241, 252.) Through the Three Strikes law, the Legislature (and the People) specified the sentences warranted for convicted felons previously convicted of

one or more serious or violent felonies. (See § 667.)[3] In a society governed by the rule of law, prosecutors have no "discretion" to pursue a criminal sentence other than the one provided by law.

It is thus manifestly untrue, as Gascón directed his deputies to inform the courts, that "[t]he California Constitution and State Supreme Court precedent … vest the District Attorney with sole authority to determine … *what punishment to seek*." (Special Directive 20-08.1, App. A55, emphasis added.) Nothing in the California Constitution or this Court's precedents remotely purports to give District Attorneys "sole authority to determine … what punishment to seek" for particular crimes; to the contrary, as noted above, establishing crimes and their punishments is a quintessentially *legislative* function. A prosecutor only has discretion over "what punishment to seek" within the parameters set by the Legislature: if a law provides for a range of punishment, a prosecutor may exercise discretion to seek a particular sentence within that range (just as a judge may exercise discretion to impose a particular sentence within that range). But where, as here, a particular criminal sentence is mandatory, a prosecutor (or a judge) enjoys no such discretion. Gascón's blanket claim to have "sole discretion" over what

[3] As this Court has explained, "[t]he power of the people through the statutory initiative is coextensive with the power of the Legislature." (*Manduley*, *supra*, 27 Cal.4th at p. 552, internal quotation omitted.) Accordingly, whenever this brief refers to legislative power, it also refers to the People's power to make law through the initiative process.

sentences to pursue in criminal cases, and that "the Legislature, Judiciary, or voter initiative" cannot constrain the exercise of that discretion (*ibid.*), has no basis in—and represents a frontal attack on—the separation of powers.[4] As the Court of Appeal put it, "[Gascón] overstates his authority. He is an elected official who must comply with the law, not a sovereign with absolute, unreviewable discretion." (*ADDA*, *supra*, 79 Cal.4th at p. 521.)

Gascón insists, however, that the Three Strikes law violates the separation of powers by requiring prosecutors to "plead and prove" the prior convictions necessary to sentence a recidivist felon. (See Gascón Br. at pp. 40-47.) According to Gascón, this requirement intrudes upon prosecutors' "'sole discretion to determine whom to charge with public offenses and what charges to bring.'" (*Id.* at p. 40, quoting *People v. Birks* (1998) 19 Cal.4th 108, 134.) But it does nothing of the sort: the Three Strikes law leaves prosecutors with unfettered discretion to determine whom to charge with a crime and what charges to

[4] Gascón bases his contrary argument on a snippet of dicta from *Dix*, *supra*, 53 Cal.3d at p. 451: "The prosecutor ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek." The Court made that statement in the context of holding that a crime victim lacks standing to participate as a party in a criminal sentencing proceeding. (See *ibid.*) The Court in no way held or suggested that prosecutorial discretion over crime and punishment cannot be bound by law. To the contrary, as noted in the text, prosecutors must exercise their discretion within the legal framework established by the Legislature, and may pursue only those crimes and punishments authorized by the Legislature.

bring. (See, e.g., *ADDA*, *supra*, 79 Cal.App.5th at p. 544, fn. 18 ["[T]he three strikes law does not limit a prosecutor's discretion to initiate an action or to select from among available charges."].)[5]

Rather, the Three Strikes law simply specifies the appropriate sentence *if* prosecutors choose to charge a particular defendant with a felony, *if* that defendant is convicted, and *if* that defendant has one or more qualifying prior convictions. (See § 667; see generally *ADDA, supra,* 79 Cal.App.4th at p. 539 ["[T]he three strikes law does not require a prosecutor to initiate a prosecution; it dictates the punishment repeat felons receive upon conviction of charges chosen and proven by the

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[5] Because the Three Strikes law does not restrict a prosecutor's discretion to initiate or seek to terminate any criminal proceeding, this case does not call for the Court to address the extent, if any, to which the Legislature may constitutionally restrict such discretion. But this Court has previously upheld a "mandatory duty to prosecute" an action to abate a public nuisance at the direction of the Board of Supervisors where "the statute leaves [the District Attorney] no discretion to exercise." (*Simpson*, *supra*, 36 Cal.2d at p. 676.) Similarly, this Court has held that the Legislature may constitutionally prevent a prosecutor from unilaterally abandoning a prosecution once initiated. (See §§ 1385, 1386; *Steen v. Appellate Division, Superior Court* (2014) 59 Cal.4th 1045, 1055; *Romero, supra*, 13 Cal.4th at pp. 509-16; *People v. Tenorio* (1970) 3 Cal.3d 89, 94.) "[S]ections 1385 and 1386, enacted in 1872, codify California's rejection of the English rule of *nolle prosequi*, under which the prosecutor alone had authority to discontinue a prosecution, in favor of granting sole authority to the courts to dismiss actions in furtherance of justice." (*People v. Bonnetta* (2009) 46 Cal.4th 143, 148-49.)

prosecutor."]; *id.* at p. 542 ["[T]he three strikes law establishes the punishment for persons convicted of charges a prosecutor chooses to bring."]; *id.* at p. 542, fn.16 ["ADDA does not seek to compel the district attorney to commence an action or even to charge a defendant with an offense. It seeks instead to compel the district attorney to plead the conditions required to sentence a defendant under the alternative sentencing scheme created by the three strikes law."].) The prosecutor, in other words, retains complete and unfettered discretion over whether to charge the new crime that triggers the Three Strikes law's alternative sentencing scheme in the first place. But when the prosecutor chooses to charge such a crime, he or she must seek the sentence specified by law. And when that sentence requires consideration of recidivism, the prosecutor must cooperate.

In this respect, the Three Strikes law is nothing new. For example, Section 969—adopted nearly a century ago—provides: "If more than one previous conviction is charged, the date of the judgment upon each conviction may be stated, and *all known previous convictions, whether in this State or elsewhere, must be charged*." (§ 969, emphasis added.) Thus, where another statute imposes a duty to plead prior convictions, Section 969 requires that the prosecutor charge *all* such prior convictions known. (*In re Varnell* (2003) 30 Cal.4th 1132, 1141, fn. 6; see also *People v. Dunbar* (1957) 153 Cal.App.2d 478, 479 ["Section 969 of the Penal Code provides that 'all known previous convictions, whether in this State or elsewhere, must be charged.' It was therefore imperative that the People allege the prior Illinois conviction."]; 3

Witkin, Cal. Crim. Law (4th ed. 2022) Punishment, § 444 ["[Penal Code section] 969 requires 'all known previous convictions' to be charged."].) Just like the Three Strikes law, Section 969 provides "the information [to] the court [needed] in determining the punishment to be imposed in case of conviction." (*People v. Cole* (1957) 148 Cal.App.2d 25, 29; *People v. Jeffries* (1941) 47 Cal.App.2d 801, 806 ["It must be remembered that the object in view in charging a previous conviction is ... for the information of the court in determining the punishment to be imposed in case of conviction."]; *People v. DiMichele* (1957) 149 Cal.App.2d 277, 280 ["The purpose of alleging a prior conviction is not to try the defendant again for the former offense but rather to advise the 'Board of Prison Terms and Paroles' of the fact to enable them to determine the proper term of punishment in the event of conviction," internal quotation omitted].)

Thus, Gascón misses the mark by arguing that the lower courts' decisions in this case upend "'[a]n unbroken line of cases in California'" recognizing "'the principle of prosecutorial discretion' 'and its insulation from control by the courts.'" (Gascón Br. at pp. 14-15, quoting *Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1543.) Neither *Gananian* nor any other case cited by Gascón holds or suggests that prosecutorial discretion extends to the appropriate punishment for a person convicted of a crime where the Legislature has specified a different punishment. (See 199 Cal.App.4th at p. 1542; see also Gascón Br. at p. 14, citing *Boyne v. Ryan* (1893) 100 Cal. 265, 267, and *Taliaferro v. Locke* (1960) 182 Cal.App.2d 752, 757;

Gascón Br. at p. 29, citing *Dix*, *supra*, 53 Cal.3d at p. 451, *People v. Wallace* (1985) 169 Cal.App.3d 406, 409, *People v. Shults* (1978) 87 Cal.App.3d 101, 106, and *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 240-41; Gascón Br. at p. 40, citing *Birks*, *supra*, 19 Cal.4th at p. 134; Gascón Br. at p. 44, citing *People v. Municipal Court (Pellegrino)* (1972) 27 Cal.App.3d 193, 204, and *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 265.) Gascón's generalized invocation of prosecutorial discretion thus gets him nowhere in this context.[6]

To the contrary, a prosecutor must exercise his or her prosecutorial discretion within the legal framework established by the Legislature. For example, if the Legislature has specified that the elements of burglary include entry into a structure (see § 459), a prosecutor has no "discretion" to charge a burglary that does not involve entry into a structure. The prosecutor has

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[6] Similarly, Gascón's invocation of legislative history for the proposition that "'the bill appears to be constitutionally infirm'" (Gascón Br. at pp. 17, 39, quoting Sen. Com. of Judiciary, Analysis of Assem. Bill No. 971 (1993-1994 Reg. Sess.) Feb. 17, 1994, p. 8), is misleading at best. That statement has nothing to do with the separation-of-powers argument advanced by Gascón in this case. Instead, that statement refers to a concern that the law as applied in certain cases might violate the entirely distinct constitutional prohibition on cruel and unusual punishment *if* neither prosecutors nor judges had discretion to strike prior convictions "in furtherance of justice" under § 1385. But that constitutional concern turned out to be misplaced, as prosecutors may move to strike prior convictions "in furtherance of justice" under § 1385, and judges may strike prior convictions under that provision with or without a motion by prosecutors. (See, e.g., *Romero*, *supra*, 13 Cal.4th at pp. 529-30.)

discretion to charge (or not) a defendant with burglary, but if such a charge is brought, the prosecutor must plead and prove entry into a structure. Similarly, if the Legislature has decided that a given crime shall be punished by a prison sentence of between five and ten years, the prosecutor has no "discretion" to seek a sentence of either one year or twenty years. That is the difference between *making* and *executing* laws: a prosecutor may decide which crimes to enforce (and against whom) but may not define the crimes themselves or their punishments. (See, e.g., *Birks*, *supra*, 19 Cal.4th at p. 134 [a prosecutor has "discretion to choose, for each particular case, the actual charges *from among those potentially available*," emphasis added].)[7]

There is a vast difference, which Gascón attempts to elide, between charging a substantive offense, on the one hand, and pleading and proving a prior conviction as a sentencing factor, on the other. Thus, in the course of a single paragraph in his brief,

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[7] Similarly, the Legislature establishes the procedural framework within which a prosecutor exercises discretion, from the mechanism for initiating a prosecution to the mechanism for sentencing. (See, e.g., §§ 948-73 [criminal pleadings], §§ 1170 *et seq*. [sentencing].) Insofar as this framework incidentally limits a prosecutor's discretion—for instance, by requiring the prosecutor to charge certain categories of defendants as juveniles in juvenile court—any such incidental limitation represents an exercise of the core legislative function of establishing a legal system and does not unconstitutionally usurp any core executive (or judicial) function. (Cf. *Manduley, supra*, 27 Cal.4th at p. 552 ["Th[e] broad power to charge crimes extends to selecting the forum, *among those designated by statute*, in which charges shall be filed," emphasis added].)

Gascón jumps from the unremarkable proposition that a prosecutor has "'discretion to choose, for each particular case, the actual charges from among those potentially available'" (Gascón Br. at p. 40, quoting *Birks*, *supra*, 19 Cal.4th at p. 134), to the completely unsupported (and incorrect) proposition that "alleging a prior strike is part of the prosecutor's unreviewable, inherent charging discretion" (*id.* at pp. 40-41). Contrary to that assertion, a prior conviction used for sentencing purposes has nothing to do with the substantive offense at issue. (See, e.g., *People v. Bouzas* (1991) 53 Cal.3d 467, 473 [distinguishing sentencing factors from elements of substantive offense]; see generally *Almendarez-Torres*, *supra*, 523 U.S. at p. 244 ["[R]ecidivism does not relate to the nature of the offense, *but goes to the punishment only*," internal quotations omitted and emphasis in original].) A prior conviction is simply a historical fact resulting from a previous exercise of prosecutorial discretion to charge a substantive offense. Such facts relating to sentencing provide the information necessary for the sentencing court to impose the proper sentence required by law.

Although, as a matter of convenience, prosecutors typically charge prior convictions in the same charging document as a new substantive offense, they are not required to do so. Precisely because a defendant's prior convictions are not elements of the new substantive offense, evidence relating to such convictions need not be presented at a preliminary hearing. (See, e.g., *People v. Rogers* (2016) 245 Cal.App.4th 1353, 1362, fn.7; *Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 148-51; *People v.*

Superior Court (Arevalos) (1996) 41 Cal.App.4th 908, 911; *Miranda v. Superior Court* (1995) 38 Cal.App.4th 902, 907-09; *People v. Shaw* (1986) 182 Cal.App.3d 682, 685.) Indeed, a prosecutor may amend an indictment or information to allege a prior conviction "[w]henever it shall be discovered that a pending indictment or information does not charge all prior felonies of which the defendant has been convicted either in this State or elsewhere," even *after* the jury has returned a verdict on the charged substantive crime. (§ 969a; *People v. Valladoli* (1996) 13 Cal.4th 590, 596-606.) In sharp contrast, prosecutors may not amend an indictment or information to "change the offense charged" after the preliminary hearing. (§ 1009.) In this regard, prior convictions pleaded under the Three Strikes law are completely different than prior convictions "alleged as an element of a charged offense." (§ 1025, subd. (d); see generally *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1262 ["A sentencing factor is only an element of the offense … if the crime as defined by statute cannot be accomplished without performance of the acts which constitute such factor."].)

Gascón thus gets nowhere by observing that qualifying prior convictions must be "charg[ed]" in a "charging document." (Gascón Br. at p. 42.) Under longstanding California law that long predates the Three Strikes law, any fact that increases the statutory maximum sentence must be proved to a jury. (See §§ 969, 1025, 1158; *Epps*, *supra*, 25 Cal.4th at p. 29; *Wiley*, *supra*, 9 Cal.4th at p. 589; *Pollack*, *supra*, 38 Cal.3d at pp. 373-73; *LoCicero*, *supra*, 71 Cal.2d at p. 1192; *Cavassa*, *supra*, 206 Cal. at

p. 313.) The same general rule applies under the Sixth Amendment to the federal Constitution, although the Supreme Court has specifically exempted prior convictions used as sentencing factors from that rule. (See, e.g., *Alleyne v. United States* (2013) 570 U.S. 99, 111, fn. 1; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 487-90; *Jones v. United States* (1999) 526 U.S. 227, 248-49; *Almendarez-Torres*, *supra*, 523 U.S. at pp. 239-47.) It follows that such prior convictions must be "charged" in a "charging document" even though they are merely sentencing factors, not substantive elements of the offense. But the fact that these sentencing factors must be "charged" and proved to a jury does not mean that they are for all intents and purposes indistinguishable from the substantive crimes that also must be "charged." To the contrary, as noted above, California law draws a sharp distinction between sentencing factors and the elements of a substantive crime. A criminal defendant has a right to a jury trial for facts that may increase the available sentence, but a prosecutor has no corresponding right not to charge such facts if the Legislature has required that he or she do so.

Gascón thus promotes a false equivalence by insisting that "[b]oth the decision to allege sentencing enhancements and the decision to allege prior strikes involve prosecutorial judgments made based on 'the complex considerations necessary for the effective and efficient administration of law enforcement,' including the need to prove allegations in the charging document beyond a reasonable doubt." (Gascón Br. at p. 42, quoting *Birks*, *supra*, 19 Cal.4th at p. 134.) Alleging a new substantive crime

does indeed involve such "complex considerations," but alleging facts (including qualifying prior convictions) for sentencing purposes does not. The Three Strikes law specifies which prior convictions are implicated, and pleading the fact of those prior convictions is a non-discretionary ministerial task. (See § 667, subd. (d); *ADDA, supra*, 79 Cal.App.5th at p. 537.) In the unusual event that a prosecutor believes that he or she cannot prove the fact of a qualifying prior conviction beyond a reasonable doubt, the prosecutor may move the court to dismiss or strike that conviction. (See § 667, subd. (f)(2).) It is inconceivable that the separation-of-powers allows the *judiciary* to require a prosecutor to continue prosecuting a substantive crime against his or her wishes (see § 1386; *Tenorio*, *supra*, 3 Cal.3d at p. 94), but does not allow the *legislature* to require a prosecutor to establish qualifying prior convictions so that the court may impose the criminal sentence provided by law.

Gascón fares no better by arguing that the Three Strikes law usurps inherent executive authority because charging prior convictions under the law "occur[s] during the stage of the criminal process that is within the prosecutor's exclusive purview—the time 'before an accusatory pleading is filed and thus before the jurisdiction of a court is invoked and a judicial proceeding initiated.'" (Gascón Br. at p. 43, quoting *People v. Adams* (1974) 43 Cal.App.4th 697, 707; see also *id.* at p. 42 ["'[C]harging decisions made before the jurisdiction of a court is invoked and before a judicial proceeding is initiated … involve

purely prosecutorial functions,'" quoting *Manduley*, *supra*, 27 Cal.4th at p. 554].)

As an initial matter, the premise of Gascón's argument is flawed: as noted above, there is no requirement that qualifying prior convictions under the Three Strikes law be charged before a case is filed; to the contrary, they may be charged at any time before sentencing. (See § 969a; *Valladoli*, *supra*, 13 Cal.4th at pp. 596-606.) In any event, the cases quoted by Gascón stand only for the truism that a *court* has no authority over a criminal case before any charges are filed. In no way do those cases suggest that the *Legislature* has no such authority. To the contrary, as noted above, the Legislature establishes the entire legal framework in which prosecutors exercise their discretion: it creates substantive crimes and their punishments as well as the procedure for bringing charges. Needless to say, prosecutors do not operate in a legal vacuum before filing an accusatory pleading; to the contrary, the procedure for filing an accusatory pleading is itself established by law. (See, e.g., §§ 948-973.)

Indeed, there is irony in Gascón's invocation of prosecutorial discretion, because he is not actually purporting to exercise any "discretion" at all. Rather, he broadly directed his deputies not to file "sentence enhancements or other sentencing allegations, including under the Three Strikes law" (App. A35) (although he later retreated with respect to certain sentencing enhancements (see Special Directive 20-08.2, App. A58-60)), because he disagrees with the law. This is not mere non-enforcement. It is not an exercise of prosecutorial discretion. It

is not a matter of enforcement priorities. Rather, it is the unilateral executive creation of a new substantive criminal sentencing scheme under which recidivist felons receive the *same* sentence as first-time felons. That scheme is expressly contrary to the scheme democratically adopted by the Legislature and the People, under which recidivist felons receive a *different* sentence than first-time felons. This case thus involves nothing less than an executive claim to exercise legislative power, and no decision of this Court (or any other court) supports it.

The notion that a mandatory duty to "plead and prove" qualifying prior convictions as part of the criminal sentencing process usurps core executive discretion is fanciful. Indeed, the separation-of-powers attack on mandatory sentencing provisions like the Three Strikes law has generally been that they unconstitutionally limit traditional *judicial* discretion over sentencing—and that attack has fared no better. Prosecutors must seek, and judges must impose, the criminal sentences established by law unless those sentences are independently unconstitutional; there is nothing inherently unconstitutional about a scheme that strips either prosecutors or judges of discretion over criminal sentencing. (See, e.g., 16A Am.Jur.2d (2022) Constitutional Law, § 297 ["Although sentencing is an exclusively judicial function, the legislature may choose to narrow the independent exercise of the courts' sentencing discretion. Indeed, the legislature has the authority to define criminal punishments without giving the courts any sentencing discretion, and mandatory sentences do not violate the principle

of separation of powers," footnotes omitted]; cf. *Romero, supra*, 13 Cal.4th at p. 516 ["That the Legislature and the electorate may eliminate the courts' power to make certain sentencing choices may be conceded. Subject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested *exclusively* in the legislative branch," emphasis added and internal quotation omitted].)

Insofar as Gascón complains that the Three Strikes law has effectively conscripted him to participate in a sentencing system with which he disagrees, and against which he campaigned, that complaint is insubstantial. Gascón's election as District Attorney did not wipe California's Three Strikes law off the books in Los Angeles County or elsewhere. In a system of separated powers, it is not uncommon for public officials (including not just prosecutors but also judges) to be constrained by laws with which they disagree. But, in a society subject to the rule of law, such disagreement provides no basis for flouting the law. (See generally *Lockyer*, 33 Cal.4th at pp. 1108, 1120.)

Indeed, a prosecutor has substantially more discretion under the Three Strikes law than a judge faced with a mandatory sentence that he or she believes is unwarranted or unwise. Under those circumstances, the judge has no choice but to apply the sentence (unless it is independently unconstitutional). Gascón, in sharp contrast, has discretion over whether to charge a crime that would trigger a mandatory sentencing law in the first place. If he does not want to trigger a mandatory sentence, he need not charge a triggering crime. But if he does charge the

triggering crime, he must pursue the sentence specified by law. (See *ADDA*, *supra*, 79 Cal.App.5th at p. 543 ["[T]he three strikes law precludes a prosecutor from charging a recidivist as a first-time offender."].) He cannot have it both ways.

Finally, there is no merit to Gascón's argument that the "[p]rove" element of "plead and prove" (§ 667, subd. (f)(1)), violates the separation of powers, on the ground that the Legislature cannot require the executive to "prove" anything. (See Gascón Br. at pp. 46-47.) "Plead and prove" in the context of recidivist sentencing statutes is a term of art. As the Court of Appeal recognized, it obviously does not mean that a prosecutor is compelled by law to prove something, because the prosecutor may be unable to carry that burden. *(*See *ADDA*, *supra,* 79 Cal.App.5th at p. 546 ["[T]he Legislature cannot require a prosecutor to prove anything in the abstract or, for that matter, anything at all."].) Rather, it means only that a prosecutor must *attempt* to prove the fact of a qualifying prior conviction, if the defendant has one, to trigger the appropriate sentence—a duty already inherent in the prosecutor's professional ethical obligation to attempt to prove (or, if appropriate, move to dismiss) what has been pleaded. (See *id.* at pp. 547-48.) In this sense, it is no different than saying that a prosecutor must prove entry into a structure in burglary cases (see § 459); if the relevant fact is not proven, then the legal consequences of that fact do not attach. None of this has anything to do with the separation of powers. Indeed, because the Court of Appeal accepted Gascón's argument that a writ of mandate could not be used to enforce the

statutory "prove" requirement (see *ibid.*), and that holding has not been challenged in this Court, the question whether the "prove" requirement is unconstitutional is a sideshow.

It is hard to overstate the radical and unprecedented nature of Gascón's position that the Legislature and the People have no constitutional authority to require prosecutors to plead and prove certain facts relating to sentencing. If that were true, then the Legislature and the People could not mandate sentencing enhancements for the most egregious crimes, including hate crimes, elder and dependent adult abuse crimes, child physical abuse crimes, child and adult sexual abuse crimes, and human trafficking crimes. All of these crimes are now subject to discretionary sentencing enhancements (see, e.g., §§ 236.4, 422.7, 422.75, 667.1, 667.9, 12022.7, subd. (d)), and Gascón has made a policy choice (after initially barring his deputies from pursuing *any* sentencing enhancements) to pursue such enhancements for these crimes. (See Special Directive 20-08.2, App. A58-60.)

But under Gascón's separation-of-powers theory, district attorneys with different policy views could categorically forbid their deputies from pursuing such enhancements, even if the Legislature and/or the People made them mandatory and uniform. Similarly, under Gascón's theory, a District Attorney who campaigned for office on an anti-gun-control platform could refuse to pursue gun enhancements, even if the Legislature or the People chose to make such enhancements mandatory and uniform across the State. That is no longer law, but chaos.

At the end of the day, Gascón's separation-of-powers challenge to the Three Strikes law gets things exactly backwards. Because California law requires that facts (including qualifying prior convictions) that increase the maximum sentence for a crime be pleaded and proven to a jury, a recidivist sentencing scheme necessarily requires a prosecutor's participation. Requiring prosecutors to plead and prove qualifying prior convictions as sentencing factors for convicted felons does not usurp any inherent or core executive discretion, but rather ensures that the courts impose the proper sentence while protecting the defendant's jury-trial right. By directing his deputies to ignore that statutory requirement, Gascón arrogated unto himself traditional legislative discretion to define appropriate criminal punishments. In our system of separated powers, it is the Legislature, not a District Attorney, who decides whether recidivist felons deserve a different punishment than first-time felons.

III. The Three Strikes Law Unambiguously Requires Prosecutors To Plead And Prove Qualifying Prior Convictions.

Gascón devotes an entire subsection of his brief to agreeing with what ADDA has maintained all along: that the plain language of the Three Strike law "mandates that prosecutors 'shall' plead and prove prior strikes," leaving them no discretion in the matter. (See Gascón Br. at pp. 31-39.) Nonetheless, after arguing that the statute is mandatory and unconstitutional, he argues in the alternative that this Court may invoke the canon of

constitutional avoidance to interpret the mandatory phrase "*shall* plead and prove" as a permissive "*should* plead and prove." (See *ibid.*) Once again, that argument is wrong.

The canon of constitutional avoidance is not a license for courts to rewrite statutes. Rather, it provides only that "if a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373, internal quotations omitted.) Neither of the two conditions precedent to the application of the canon is present here.

As described in detail in the preceding Section of this brief, the Three Strikes law's requirement that prosecutors "plead and prove" prior convictions in sentencing convicted felons does not violate the constitutional separation of powers, or even "raise serious and doubtful constitutional questions." Accordingly, as the Court of Appeal noted, there is no constitutional question to avoid. (See *ADDA*, 79 Cal.App.5th at p. 545, fn. 19.)

In any event, there is no plausible way to interpret the mandatory phrase "shall plead and prove" as a permissive "should plead and prove" in the context of the Three Strikes law. Indeed, Gascón himself expressly concedes as much. He admits that "[t]he plain language of the statute indicates that the

Legislature intended to eliminate prosecutorial discretion in the charging and application of the Three Strikes Law." (Gascón Br. at p. 34.) He recognizes that "[t]he Three Strikes Law's careful use of 'may' for permissive provisions and 'shall' for mandatory ones reinforces the conclusion that 'shall plead and prove each prior serious or violent felony conviction' is a mandatory command." (*Id.* at p. 35.) He expressly argues that "[i]n keeping with the other 35 uses of 'shall' in Section 667, 'shall plead and prove' in subdivision (f)(1) should be interpreted as a mandatory command." (*Ibid.*) Indeed, even in his putative "constitutional avoidance" argument, he can never bring himself around to affirmatively stating that the statute is ambiguous, and instead says only that this Court may apply the canon "if *the Court* believes the statute is ambiguous." (*Id.* at p. 56, emphasis added; see also *id.* at p. 59 ["if this Court believes that the Three Strikes Law is ambiguous"]; *id.* at p. 62 ["to the extent that the Court finds the text ambiguous"].) It would be odd, to say the least, for this Court to conclude that the statute is ambiguous if Gascón cannot bring himself to say so. His reticence in this regard is well-justified.

The requirement that a prosecutor "shall plead and prove" the fact of a qualifying prior conviction to ensure that a convicted recidivist is properly sentenced is the very heart of the Three Strikes law. The whole point of the law was to address systemic failures that did not protect the People from recidivist felons. The statutory requirement that prosecutors "*shall* plead and prove" qualifying prior convictions thus stands alongside the

separate statutory requirement that the Three Strikes sentencing scheme "*shall* be applied *in every case* in which a defendant has one or more prior serious or violent felony convictions." (§ 667, subd. (f)(1), emphasis added.) Under the law, the *only* way a prosecutor can seek to keep a qualifying prior conviction from triggering an alternative sentence is to "move [a court] to dismiss or strike a prior serious or violent felony conviction" as set forth in § 667(f)(2). The entire scheme would be rendered nonsensical if the prosecutor had unfettered discretion, as Gascón suggests, to refrain from charging qualifying prior convictions in the first place. And the legislative history only confirms this straightforward point: the Senate Judiciary Committee, in its bill analysis, specifically stated that "[t]his bill *requires* the prosecutor to plead and prove all prior convictions." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 971 (1993-1994 Reg. Sess.) as amended Jan. 26, 1994, p. 8, emphasis added.)[8]

[8] Gascón thus errs by arguing that the "plead and prove" requirement, if deemed unconstitutional, is severable from the rest of the Three Strikes law. (See Gascón Br. at pp. 47-53.) The law would be meaningless if it were discretionary, as its whole point was to ensure that recidivist felons "shall be" sentenced as recidivist felons "in every case" across this State (§ 667, subd. (f)(1)), and to limit prosecutors' discretion to asking a *court* to dismiss or strike a qualifying prior conviction (see § 667, subd. (f)(2)). To hold that prosecutors have blanket discretion to "plead and prove" qualifying prior convictions, as Gascón urges, would nullify the law in those jurisdictions and lead to gross (and potentially unconstitutional) sentencing disparities across the State. There is no reason to believe that the Legislature or the People would have adopted a provision giving prosecutors blanket

Gascón thus misses the point (and contradicts his own interpretation of the statute) by noting that, in other statutory contexts, courts have found it possible to read the word "shall" as less than mandatory. (See Gascón Br. at pp. 57-62.) As Gascón himself notes, in other statutory contexts, there may be other factors that "'indicate that apparent obligatory language was not intended to foreclose a governmental entity's or officer's exercise of discretion.'" (Gascón Br. at p. 57, quoting *Morris v. County of Marin* (1977) 18 Cal.3d 901, 910 fn. 6.) As noted above, and as Gascón himself acknowledges, the structure and history of the Three Strikes law leave no question that the "shall plead and prove" requirement was meant to be mandatory and non-discretionary. (See Gascón Br. at pp. 31-39.) Gascón thus proves nothing by citing a line of cases involving other statutes that purported to require prosecutors to initiate particular criminal

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discretion not to plead and prove qualifying prior convictions, especially when the law was motivated by a desire for mandatory sentences for recidivist felons and mistrust of "'soft-on-crime judges [and] politicians.'" (*Romero*, *supra*, 13 Cal.4th at p. 528, quoting Ballot Pamp., rebuttal to the argument against Proposition 184, as presented to the voters, Gen. Elec. (Nov. 8, 1994) p. 37.) Thus, notwithstanding the Three Strikes law's severability provision, the "plead and prove" requirement is neither functionally nor volitionally severable from the rest of the law—it is the very heart of the law. (See § 667, subd. (i) [invalidity of one provision or application of Three Strikes law "shall not affect other provisions of [the law] *that can be given effect without the invalid provision or application*," emphasis added]; *Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, 191; *Barlow v. Davis* (1999) 72 Cal.App.4th 1258, 1266-67.)

proceedings, and were construed as precatory rather than mandatory in light of other statutory language and traditional background norms of prosecutorial discretion. (See *id.* at pp. 57-59, citing *Wilson v. Sharp* (1954) 42 Cal.2d 675, 678; *Boyne, supra,* 100 Cal. at p. 266; *Gananian, supra,* 199 Cal.App.4th at p. 1541; *Nasir v. Sacramento County Off. of the Dist. Atty.* (1992) 11 Cal.App.4th 976, 988-90 & fn. 8; *Ascherman v. Bales* (1969) 273 Cal.App.2d 707, 708.)

Thus, in *Wilson*, the relevant statute provided that a district attorney "shall institute suit" if county money was paid "without authority of law" or "without authorization by the board or law." This Court there rejected a private citizen's effort to enforce that provision against the district attorney, holding that the statutory references to *unauthorized* payments "necessarily require[] the exercise of discretion, and it would seem obvious that the legal officer of the county is the proper person to exercise this discretion." (42 Cal.2d at p. 678.) *Boyne* involved a similar statute, and there again this Court held that it was "questionable" whether the challenged payment of county money was "without authority of law," and that the district attorney was vested with discretion to decide whether to initiate a prosecution. (100 Cal. at pp. 266-67.)[9]

[9] Similarly, the statute in *Ascherman* provided that "'[t]he district attorney shall institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses when he has information that such offenses have been committed.'" (273 Cal.App.2d at p. 708, quoting Gov. Code,

Gananian is even further afield. The statute there provided that *"[i]t is the intent of the Legislature* that upon receipt of allegations of waste or misuse of bond funds authorized in this chapter, appropriate law enforcement officials shall expeditiously pursue the investigation and prosecution of any violation of law associated with expenditure of those funds." (199 Cal.App.4th at p. 1538, quoting Ed. Code, § 15288, emphasis added.) Although Gascón conveniently omits the prefatory language about legislative intent (see Gascón Br. at p. 58), that language was critical to the Court of Appeal's conclusion that the statute was "intended as a statement of legislative policy or preference rather than as a command." (*Gananian*, 199 Cal.App.4th at p. 1541.) Moreover, that statute was drafted "in very general terms" that left prosecutors discretion to initiate a prosecution, especially in light of traditional norms of prosecutorial discretion. (*Id.* at pp. 1541-44.)[10]

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§ 26501.) "Although this statute uses the word 'shall,'" the Court of Appeal explained, "the ensuing clause implies that the duty entailed by the statute is discretionary." (*Ibid.*)

[10] Gascón's reliance on *Nasir* is inexplicable. The Court of Appeal there directed the *grant* of a writ of mandate requiring a district attorney to proceed with a judicial forfeiture action where the statute provided that "[i]f a claim is timely filed and served, then the Attorney General or district attorney *shall* file a complaint for forfeiture pursuant to this section within 30 days of the receipt of the claim." (11 Cal.App.4th at pp. 989, fn. 8 [emphasis added], 990-96.) If anything, the case underscores that the Legislature may impose certain non-discretionary duties on district attorneys, at least insofar as they do not involve the

Nor is there any merit to Gascón's argument that the Three Strikes law's "shall plead and prove" requirement may be read as nothing more than a requirement that the prosecutor must plead and prove prior serious or violent felonies *if, but only if,* he or she wishes to trigger the Three Strikes law, as a due-process protection for criminal defendants. (See Gascón Br. at pp. 62-65.) As noted in the preceding Section of this brief, the "plead and prove" requirement certainly does provide due-process notice to criminal defendants, and vindicates their right to a jury trial on facts that may increase their sentences, but that does not mean that the statute serves *only* a due-process notice function.

As noted above, the "plead and prove" requirement does not exist in a vacuum. To the contrary, it follows a sentence providing that the Three Strikes law "*shall* be applied *in every case* in which a defendant has one or more prior serious or violent felony convictions." (§ 667, subd. (f)(1), emphasis added.) Needless to say, the law could not be applied "in every case" unless district attorneys were required to plead and prove qualifying prior convictions in every case. The "plead and prove" requirement is the *only* mechanism for the fact of a qualifying prior conviction to be established. It would be incoherent for the statute to say in one sentence that its recidivist sentencing scheme shall be applied in every case and then say in the very next sentence that the only mechanism for applying that scheme

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initiation of criminal proceedings. (See *Gananian, supra,* 199 Cal.App.4th at p. 497 [distinguishing *Nasir* on this ground].)

is discretionary. In context, there is no way to read the "plead and prove" requirement as nothing more than "a duty to give notice to the criminal defendant that a prior conviction has been alleged, and then to prove that allegation beyond a reasonable doubt" when the prosecutor so chooses. (Gascón Br. at p. 62, capitalization modified.)[11]

Indeed, both this Court and the Court of Appeal have recognized that § 667(f) imposes a mandatory and non-discretionary duty on prosecutors. (See, e.g., *Romero, supra*, 13 Cal.4th at p. 523; *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, 144; *People v. Andrews* (1998) 65 Cal.App.4th 1098, 1102; *Kilborn*, *supra*, 41 Cal.App.4th at p. 1332; *Miranda, supra*, 38 Cal.App.4th at p. 906.) On top of the precedential value of these cases, the fact that dozens of jurists have uniformly recognized over more than a quarter-century that "plead and prove" operates as such a limitation is also important historical evidence that this is the meaning that both the People and the Legislature intended.

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[11] Moreover, as noted above, the Three Strikes law did not invent the requirement that a prosecutor must plead and prove to a jury prior convictions used to trigger an enhanced or alternative criminal sentence. (See §§ 969, 1025, 1158; *Epps*, *supra*, 25 Cal.4th at p. 29; *Wiley*, *supra*, 9 Cal.4th at p. 589; *Pollack*, *supra*, 38 Cal.3d at pp. 373-74; *LoCicero*, *supra*, 71 Cal.2d at p. 1192; *Cavassa*, *supra*, 206 Cal. at p. 313.) Rather, the law's "plead and prove" requirement simply reflected that long pre-existing requirement. (See generally *ADDA*, 79 Cal.App.5th at p. 536.)

Because the Three Strikes law leaves no ambiguity whatsoever regarding the meaning of its "plead and prove" requirement, and because there is nothing remotely unconstitutional about requiring prosecutors to plead and prove sentencing factors, the doctrine of constitutional avoidance has no role to play in this case. To the contrary, as noted above, interpreting the statute to give prosecutors discretion over criminal sentences the Legislature and the People very consciously made mandatory would itself violate the separation of powers.

* * *

In the final analysis, Gascón is left with nothing more than the groundless assertion that "granting mandamus here would break with more than a century of history and tradition, upsetting the careful balance struck in the California Constitution between the separate branches of government." (Gascón Br. at p. 67.) As noted above, that argument gets things precisely backwards: it is Gascón who is asking this Court to break with history and tradition by holding for the first time that prosecutors have discretion to ignore criminal sentencing factors mandated by the Legislature and the People. Given California's longstanding requirement that any fact that increases the maximum punishment otherwise available for a crime must be proven to a jury, the *only* way a recidivist sentencing law can work in this State is for prosecutors to plead and prove the fact of a qualifying prior conviction. Thus, if Gascón were correct that the California Constitution itself prevents the Legislature from

requiring prosecutors to plead and prove the fact of a qualifying prior conviction, California would be the only jurisdiction in the Nation where the Legislature could not create a mandatory alternative sentencing scheme for recidivists. (See *Almendarez-Torres, supra*, 523 U.S. at p. 243.)

Let there be no mistake: although Gascón attempts to dress up his position in separation-of-powers garb, he is seeking to arrogate the power of the Legislative Branch to define crimes and their punishments and the power of the Judicial Branch to determine in the first instance the constitutionality of a mandatory statutory duty. Gascón does not like the Three Strikes law, but he is not vested with any unilateral power to repeal or nullify state law. If he does not want to trigger recidivist sentences for felons, then he need not charge recidivists with felonies. But he cannot charge recidivists with felonies and then, if he secures a conviction, seek only the sentence specified for first-time felons by declaring that the mandatory sentencing scheme is unconstitutional. This case highlights exactly why the Constitution separates powers: the same person is attempting to prosecute crimes, to determine the appropriate sentence for such crimes, and to determine the constitutionality of state law. Because the Constitution creates "a government of laws, and not of men (or women)" (*Lockyer*, *supra,* 33 Cal.4th at p. 1068), this Court should reject that attempt and affirm the judgment.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeal.

January 30, 2023

Respectfully submitted,

ELLIS GEORGE CIPOLLONE
O'BRIEN & ANNAGUEY LLP
Eric M. George
Christopher Landau
David J. Carroll
Chase Harrington

By: /s/ *Eric M. George*
Eric M. George
Attorneys for Plaintiff and Respondent The Association of Deputy District Attorneys for Los Angeles County

CERTIFICATE OF WORD COUNT
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/s/ *Eric M. George*
Eric M. George

PROOF OF SERVICE

The Association of Deputy District Attorneys for Los Angeles County v. George Gascón, et al.
Case No. S275478

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 2121 Avenue of the Stars, 30th Floor, Los Angeles, CA 90067.

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Executed on January 30, 2023, at Los Angeles, California.

/s/ Claudia Bonilla
Claudia Bonilla

SERVICE LIST

The Association of Deputy District Attorneys for Los Angeles County v. George Gascón, et al.

Case No. S275478

Stephanie Yonekura, Esq. HOGAN LOVELLS US LLP 1999 Avenue of the Stars Suite 1400 Los Angeles, CA 90067 Telephone: (310) 785-4600 Facsimile: (310) 785-4601 stephanie.yonekura@hoganlovells.com	*Attorneys for Respondents and Appellants George Gascón and Los Angeles District Attorney's Office*
Neal Kumar Katyal, Esq. Jo-Ann Tamila Sagar, Esq. Danielle Desaulniers Stempel, Esq. HOGAN LOVELLS US LLP 555 Thirteenth St. NW Washington, DC 20004 Telephone: (202) 637-5600 Facsimile: (202) 637-5910 neal.katyal@hoganlovells.com jo-ann.sagar@hoganlovells.com danielle.stempel@hoganlovells.com	*Attorneys for Respondents and Appellants George Gascón and Los Angeles District Attorney's Office*

Dawyn Harrison, Esq. Adrian G. Gracas, Esq. Jonathan C. McCaverty, Esq. OFFICE OF COUNTY COUNSEL 500 West Temple Street Floor 6 Los Angeles, CA 90012 Telephone: (213) 974-1807 Facsimile: (213) 687-8822 dharrison@counsel.lacounty.gov agragas@counsel.lacounty.gov jmccaverty@counsel.lacounty.gov	*Attorneys for Respondents and Appellants George Gascón and Los Angeles District Attorney's Office*
Robert E. Dugdale, Esq. Laura W. Brill, Esq. KENDALL BRILL & KELLY LLP 10100 Santa Monica Blvd. Suite 1725 Los Angeles, CA 90067 Telephone: (310) 556-2700 Facsimile: (310) 556-2705 rdugdale@kbkfirm.com lbrill@kbkfirm.com	*Attorneys for Respondents and Appellants George Gascón and Los Angeles District Attorney's Office*
Nicholas J. Webster, Esq. OFFICE OF THE CALIFORNIA ATTORNEY GENERAL 300 South Spring Street Los Angeles, CA 90013 nicholas.webster@doj.ca.gov	Per CRC 8.29