Case No. S275478

IN THE SUPREME COURT OF CALIFORNIA

GEORGE GASCÓN, AS DISTRICT ATTORNEY, ETC. ET AL.,
Petitioners,
v.

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

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

APPLICATION TO FILE BRIEF OF AMICI CURIAE and [PROPOSED] BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

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APPLICATION TO FILE BRIEF OF AMICI CURIAE

Pursuant to California Rules of Court, Rule 8.520(f), Amici Curiae, 13 professors of local government, state constitutional, and criminal law, respectfully request leave to file the accompanying [Proposed] Brief of Amici Curiae in support of Petitioner George Gascón.

Amici are law professors who research and teach state constitutional law, local government law, criminal law, and other related fields in California and states around the country. They have professional expertise regarding local government, state preemption, and criminal justice and prosecutorial reform. They are interested in this case because of their deep scholarly and civic interest in the state constitutional law topics before this Court. They believe that the proper interpretation of the constitutional structures at issue in this case will have significant implications for separation of powers doctrine and urgent matters of local democracy not only in California, but in states across the country.

Amici believe that further briefing is necessary to address important issues that have not been adequately presented by the parties' briefs. Amici provide a valuable perspective on the sweep of state constitutional law regarding separation of powers protections for elected local district attorneys' charging discretion. Amici's brief supplements those of the parties by examining the state constitutional protections afforded to locally

elected prosecutors in other states that share relevant features of California's constitution.

Specifically, Amici explain how, in other states, the conscious choice to designate locally elected prosecutors as constitutional executive officials has protected them from legislative attempts to control their charging decisions akin to the Three Strikes Law. Amici's perspective will help inform this Court's reasoning as it analyzes analogous provisions in California's constitution, which expressly enshrine district attorneys as locally elected executive officials whose charging decisions are subject to oversight by their local electorates and the Attorney General, not the legislature.

No party or counsel for any party authored the proposed amicus curiae brief, nor did any outside entity fund its preparation by Amici. A full list of Amici is attached as Appendix A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA CASES

OTHER STATE CASES

FEDERAL CASES

CALIFORNIA STATUTES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

The California constitution, like that of nearly every state and the federal government, enshrines discretion as an inherent power of the prosecutor, either expressly or as a matter of structural logic. In 2020, Los Angeles District Attorney George Gascón defeated an incumbent district attorney on the promise to use his prosecutorial discretion to seek fairer sentences. He kept that promise. Yet the courts below blocked the District Attorney's exercise of that discretion, asserting that a provision of the Three Strikes Law, (Cal. Penal Code, § 667),[1] restricted his inherent power to choose which charges to bring against which defendants. This judicial intervention strayed from California's core constitutional principles and would pull the state outside the mainstream of American law. This Court should correct this intrusion on the District Attorney's powers, so he may continue to represent the interests of Los Angeles voters within his proper constitutional role.

INTERESTS OF AMICI

Amici are law professors who research and teach state constitutional law, local government law, criminal law, legal ethics, and other related

[1] The Three Strikes Law was also codified by initiative at Penal Code section 1170.12. As the Court of Appeal recognized, the relevant provisions of both sections are "virtually identical," and Amici's argument applies to both versions. (See *Association of Deputy District Attorneys for Los Angeles County v. Gascón* (2022) 79 Cal.App.5th 503, 532 fn. 6.)

fields. They have professional expertise regarding issues before the court in this case, specifically in the areas of local government, state constitutional law, and criminal justice. Their scholarship has included analysis of the constitutional separation of powers principles that ensure that local officials—here, elected district attorneys—remain accountable to local electorates. They write to emphasize the importance of interpreting California's constitution in line with the state's traditions. These traditions grow from a constitutional structure that entrusts oversight of prosecutorial policy to elected district attorneys within the executive branch. In states throughout the country with similar constitutional features, courts have read analogous constitutional structures to protect district attorneys' charging discretion from legislative micromanagement.[2] Though states vary widely in their substantive approaches to criminal justice policy, they consistently respect traditions of prosecutorial discretion. Those traditions vest the decisions about which charges to bring in elected district attorneys who are directly accountable to the communities they serve. The structure of California's constitution presents no persuasive reason to deviate from

[2] The nomenclature for locally elected prosecutors varies across the states, where they are known by titles such as District Attorney, State's Attorney, or Prosecuting Attorney. Amici use the term "district attorney" throughout this brief to refer to locally elected prosecutors generally, comporting with the California constitution's chosen title for these officers.

these traditions; to the contrary, it counsels firm adherence to them. A list of Amici is attached as Appendix A.

ARGUMENT

I. The Lower Courts' Injunction Undermines California's Constitutional Structure and Tradition of Prosecutorial Discretion.

By granting preliminary mandamus relief, the courts below upended California's constitutional provision for the separation of powers. The state constitution vests the executive branch–primarily, the state's locally elected and constitutionally enshrined district attorneys–with the exclusive authority to decide whether to bring criminal charges and which charges to bring. This structure entrusts regulation of that authority to local electorates and the Attorney General, *not* the legislature. Thus, the decisions below that mischaracterized the nature of the district attorney's power to select which charges to bring and endorsed legislative control of that power are fundamentally flawed.

"The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch." (*In re Lira* (2014) 58 Cal.4th 573, 583.) The California constitution entrusts the core function of prosecution to the executive branch: the Attorney General and district attorneys. (Cal. Const., art. V, § 13.) "An unbroken line of cases in California has recognized [prosecutorial] discretion" as a "principle" that has constitutional foundations "rooted in

the separation of powers and due process clauses of our Constitution." (*Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1543, quoting *People v. Municipal Court* (*Pellegrino*) (1972) 27 Cal.App.3d 193, 207.) This principle establishes the prosecutor's "sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek"—the significant decisions that district attorneys must make at each stage of a prosecution. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 451.)

The guarantee of separation of powers thus precludes the legislature from imposing on a district attorney a ministerial duty to charge an offense and prevents the judiciary from enforcing such a purported duty through mandamus. In light of "the complex considerations necessary for the effective and efficient administration of law enforcement," prosecutors' authority "generally is not subject to supervision by the judicial branch." (*People v. Birks* (1998) 19 Cal.4th 108, 134.) Instead, when statutes entrust authority to the district attorney in purportedly mandatory terms—such as the Three Strikes Law's statement that "[t]he district attorney *shall* plead and prove" certain prior convictions, courts generally interpret such language as only legislative guidance. (See Opening Br. 30.)

This protection for district attorney discretion is reinforced by three key decisions made by the framers of California's constitution: First, the constitution elevates the office of district attorney to constitutional status. (Cal. Const., art. V, § 13; art. XI, § 1, subd. (b).) Second, each county's

district attorney is elected by the residents of that county. (Cal. Const., art. XI, § 1, subd. (b).) Finally, when the question was put to them, the People of the state of California chose to vest supervisory authority over district attorneys in the executive branch through a 1934 popular amendment. (See *Pitts v. County of Kern* (1998) 17 Cal.4th 340, 357 fn.4 [describing the history of article V, section 13].) These constitutional choices bolster the independence of district attorneys against legislative and judicial interference. In other words, a district attorney's exercise of discretion is subject only to "the power of the electorate to remove him" and the "supervision of the Attorney General." (*Hicks v. Bd. of Supervisors* (1977) 69 Cal.App.3d 228, 240.)

That prosecutorial independence is particularly essential in the context of charging discretion.[3] With limited resources, every district attorney's office lacks the capacity to prosecute every violation of every law.[4] This recognition of charging discretion allows the locally elected district attorney to fulfill her most important duties: furthering the public safety goals of the community she serves and achieving just outcomes.[5] To do so,

[3] Camacho et al., *Preempting Progress: States Take Aim at Local Prosecutors* (2023) pp. 6-7, available at https://perma.cc/XLW9-CRW4 (describing the importance of discretion for core prosecutorial decisions such as charging.)
[4] *Id.* at p. 4.
[5] *Id.* at p. 6 (noting the hundreds of thousands of potential criminal violations available to prosecutors, such that charging each with the

she must have the ability to devote her office's resources to the prosecution of those offenses and charges that comport with the interests of justice and most significantly affect public safety. (See *Davis v. Municipal Court* (1988) 46 Cal.3d 64, 77 [recognizing that the district attorney's discretion entails inherent power to direct her deputies' exercise of discretion].)

However, in violation of the clear prerogative of district attorneys to decide how to charge a particular offense, both the Court of Appeal and the ADDA mischaracterize the Three Strikes Law as defining sentences, rather than directing prosecutorial activities. (See *Gascón, supra,* 79 Cal.App.5th 503 at p. 541; ADDA Br. 33-34.) Not only does their analysis ignore the plain text of the statute, it also improperly suggests that the prosecutor's role is limited to a binary decision of "to charge or not to charge." In fact, when presented with nearly any unlawful activity, a prosecutor must select among multiple possible charges. (See *Davis*, *supra*, 46 Cal.3d at pp. 88-89 [recognizing the district attorney's discretion to decide whether to charge a felony or misdemeanor where underlying conduct would support either].) While the legislature defines the consequences of that choice, it is the district attorney's prerogative to decide not only "whom to charge" but also "what charges to file and pursue." (*Dix*, *supra*, 53 Cal.3d at p. 451.)

"maximum allowable penalty" would be both practically impossible and contrary to "true democratic preferences.")

The lower courts' injunction thus upended California's constitutional structure for the exercise and supervision of prosecutorial discretion, displacing not only district attorneys' authority to make discretionary charging decisions, but also the Attorney General's intra-branch supervisory function. The decisions below improperly allow the legislature to wholly usurp the "core" and "essential function" of making and checking discretionary prosecutorial decisions, oversight functions that California's constitution has reserved solely for local constituencies and the executive branch. (See *People v. Bunn* (2002) 27 Cal.4th 1, 14.) This stark contravention of California law on separation of powers renders Respondent's reading of the Three Strikes Law unconstitutional and illuminates the fatal infirmities of the decisions below. Moreover, as Amici will explain, the injunction is inconsistent with most other states' grant of power to prosecutors—especially those states that have made similar constitutional choices to California.

II. State Supreme Courts Have Repeatedly Construed Constitutional Structures Analogous to California's to Provide Protection for District Attorneys' Independent Exercise of Their Charging Discretion.

As noted above, California has made three significant constitutional choices regarding district attorneys: (1) their constitutional codification, (2) their election by local communities, and (3) their supervision within the executive branch. From Louisiana to Washington, courts have understood

that each of these structural features protects prosecutorial charging discretion from legislative control.[6] The injunction at issue here gave unduly short shrift to the significance of each of these features, let alone California's decision to embrace all three.

A. District Attorneys' Constitutional Status Protects Them From Legislative Interference with Their Exercise of Charging Discretion.

States' choice to recognize district attorneys as constitutional officers protects their inherent powers, including the discretion to choose which charges to bring, from legislative interference. At least 32 states, including California, establish district attorneys as constitutional officers. (Cal. Const., art. V, § 13; art. XI, § 1, subd. (b).)[7] State high courts interpreting such provisions have recognized that the elevation of district

[6] Notably, even though federal prosecutors are neither constitutionally provided for nor elected, the U.S. Supreme Court has recognized that the U.S. Constitution vests "exclusive authority and absolute discretion to decide whether to prosecute a case" in the executive, and specifically in the prosecutor. (*U.S. v. Nixon* (1974) 418 U.S. 683, 693; see also *Young v. U.S. ex rel. Vuitton et Fils S.A.* (1987) 481 U.S. 787, 807.) In fact, federal prosecutors maintain prosecutorial guidelines that define if and when certain charges or mandatory minimums should be pursued and how limited resources should best be utilized in pursuing or not pursuing specified violations of federal law. (See, e.g., U.S. Atty. Gen. Eric Holder, mem. to U.S. Attys. and Asst. Atty. Gen. for the Crim. Div., Aug. 12, 2013, available at https://perma.cc/ENQ4-P36G.) This well-settled discretionary authority is strengthened by states' choice to make the district attorney's role both constitutionally enshrined and subject to direct democratic accountability.

[7] See Appendix B.

attorneys to constitutional status protects their inherent powers, including the exercise of discretion, from legislative infringement.[8]

Mirroring the present case, the Washington Supreme Court confronted a statutory scheme purportedly requiring that prosecutors "shall file" sentencing enhancements in all eligible cases. (*State v. Rice* (Wash. 2012) 279 P.3d 849, 854-55.) There, the court refused to read this language as mandatory because such a reading would infringe on the district attorney's power as a "locally elected executive officer who has inherent authority to decide which available charges to file, if any, against a criminal defendant." (*Id.* at p. 857.) In reaching this conclusion, the court relied on the constitutional status of Washington's district attorneys (known as "prosecuting attorneys"). "Without broad charging discretion, a prosecuting attorney would cease to be a 'prosecuting attorney' as intended by the state constitution." (*Id.* at p. 859.) Accordingly, the court rejected the notion that the legislature "could require any such filing [of charges] to include a draconian imposition of all (or the most severe) charges supported by available evidence." (*Ibid.*) Because the "very concept" of a constitutionally

[8] See, e.g., *State v. Rice* (Wash. 2012) 279 P.3d 849; *State v. Superior Oil, Inc.* (Tenn. 1994) 875 S.W.2d 658, 660-61; *Meshell v. State* (Tex. Ct. Crim. App. 1987) 739 S.W.2d 246, 254; *State v. Burdette* (S.C. 1999) 515 S.E.2d. 525, 528; *People v. Viviani* (N.Y. 2021) 169 N.E.3d 224, 231; *State v. Walton* (Or. 1909) 99 P. 431, 433; *Murphy v. Yates* (Md. 1975) 348 A.2d 837, 847-48; *County of Cook ex. rel. Rifkin v. Bear Stearns & Co.* (Ill. 2005) 831 N.E.2d 563, 569-570; *Northcutt v. Howard* (Ky. 1939) 130 S.W.2d 70, 72; *McGinley v. Scott* (Pa. 1960) 164 A.2d 424, 431.

enshrined local prosecutor "includes the core function of exercising broad charging discretion" the legislature has no power to "interfere with" this "core" function. (*Ibid.*)[9]

By contrast, where state high courts have tolerated a degree of statutory infringement on prosecutorial discretion, they have often relied on district attorneys' lack of constitutional status (an exception to the norm of codifying district attorneys in state constitutions). For example, in *State ex inf. Moore v. Farnham* (Or. 1925) 234 P. 806, the Oregon Supreme Court addressed the validity of a law providing for the usurpation of district attorneys' duties. (*Id.* at p. 807.) The court held that, although the district attorney's office had previously been constitutionally established and thus protected from legislative abolition or abridgement of its duties, a constitutional amendment had abolished this status. (*Ibid.*) Accordingly, because the office "was not a constitutional office protected by

[9] At an earlier stage, Respondent invoked a Washington state case to argue against "blanket prosecutorial policies that prohibit case-by-case discretion." (See COA Response Br. 54-56 [discussing *State v. Pettit* (Wash. 1980) 609 P.2d 1364].) Respondent's reliance on *Pettit*, which does not address the separation of powers question at issue in this case, was misplaced. As the foregoing discussion illustrates, *Rice* resolves the relevant separation of powers question by conclusively rejecting the notion that the legislature may statutorily require a prosecutor to seek charging enhancements. Furthermore, Respondent misread *Pettit*, which does not disapprove of blanket charging policies generally, but instead identifies a due process violation in a blanket charging policy that mechanically seeks arbitrarily *harsh* penalties, as its companion cases make clear. (See *State v. Barton* (Wash. 1980) 609 P.2d 1353, 1357; *State v. Rinier* (Wash. 1980) 609 P.2d 1358, 1362.)

constitutional guarantees," it could be "subject to the valid exercise of the legislative power." (*Id.* at p. 809.)

Other state courts have similarly endorsed a greater scope of legislative interference where district attorneys' offices are not constitutionally codified. (See, e.g., *In re Gilson* (Kan. 1886) 9 P. 763, 764; *State ex rel. Doerfler v. Price* (Ohio 1920) 128 N.E. 173, 175; *Childs v. State* (Okla. Ct. Crim. App. 1910) 113 P. 545, 547; see also *State ex rel. Hamstead v. Dostert* (W. Va 1984) 313 S.E.2d 409, 413 [relying on the West Virginia legislature's general constitutional authority to "prescribe" the "powers [and] duties . . . of all public officers"].) These state constitutional structures are squarely distinguishable from California, where the district attorney is a constitutional officer.

B. District Attorneys' Status as Locally Elected Officials Protects Them From Legislative Interference with Their Exercise of Charging Discretion to Prioritize Local Needs.

The elected status of district attorneys in most states makes them directly accountable to the communities they serve and provides the primary check on their exercise of discretion. Forty-five states, including California, elect their district attorneys.[10] As with constitutional status, state

[10] California codifies the elected status of district attorneys in its constitution. (Cal. Const., art XI, § 1, subd. (b).) For other states, see Appendix B; see also Ellis, Note, *The Origins of the Elected Prosecutor* (2012) 121 Yale L.J. 1528, 1530 fn.3. District attorneys are not elected in Alaska, Connecticut, Delaware, New Jersey, and Rhode Island. (*Ibid.*)

high courts have recognized that the election of district attorneys justifies their independent exercise of discretion free from heavy-handed legislative control.

District attorneys enjoy particular protection from legislative infringement where they are both constitutional officers and locally elected. To illustrate, in *Superior Oil, Inc.*, *supra*, 875 S.W.2d, the Tennessee Supreme Court confronted a law that required prosecutors to obtain approval from a legislative commission before prosecuting offenses under a particular statute. (*Id.* at p. 659.) The court held that this requirement unduly infringed on the rights of the district attorney, an "elected constitutional officer," and forbade the legislature from "enact[ing] laws which impede the inherent discretion and responsibilities of the office." (*Id.* at pp. 660-61.) As a later Tennessee court noted, "[i]f voters are in disagreement with a prosecutor's charging determinations, they have the ultimate veto at the ballot box." (*Quillen v. Crockett* (Tenn. Ct. Crim. App. 1995) 928 S.W.2d 47, 51.) Likewise, in *Rice*, the Washington Supreme Court not only highlighted district attorneys' constitutional status, as described above, but also emphasized that they are elected to legitimate their "exercis[e of] broad charging discretion . . . on behalf of the local community." (*Rice*, *supra*, 279 P.3d at p. 859.)

Even without constitutional designation, the elected status of district attorneys has justified protection for their discretion. For example,

Missouri's district attorneys are elected but not constitutionally established. That state's supreme court emphasized the importance of district attorneys' locally elected status in conferring the broadest degree of independence: a district attorney is "elected to exercise her discretion to the dictates of her own judgment and conscience uncontrolled by the judgment and conscience of any other person." (*State ex. rel. Gardner v. Boyer* (Mo. 2018) 561 S.W.3d 389, 398, cleaned up.) The court further noted that the "locally elected status of American prosecuting attorneys provides them with an independent source of power and is the reason they enjoy discretionary privilege unmatched in the world," and that undue restraint of prosecutorial authority "unjustifiably circumvents the voters' choice to have their interests represented" by their elected district attorney. (*Ibid.*, internal quotation marks omitted.)

Courts in other states, too, have recognized the primacy of elections in regulating district attorneys' exercise of their discretion. (See, e.g., *Northcutt*, *supra*, 130 S.W.2d at p. 72 [when district attorneys fail to enforce the law, the situation "must necessarily be remedied by resort to" impeachment or "their removal by the exercise of the ballot"]; *State ex rel. Kurkierewicz v. Cannon* (Wis. 1969) 166 N.W.2d 255, 260 ["the district attorney is not answerable to any other officer of the state in respect to the manner in which he exercises those powers [to decide which cases to

prosecute]" but is instead "answerable to the people, for if he fails in his trust he can be recalled or defeated at the polls"].)[11]

Ultimately, states that, like California, choose to have locally elected district attorneys have made a conscious choice to "provide[] accountability to local communities." (*Rice*, *supra*, 279 P.3d at p. 859.) Until the present injunction, California courts have aligned with this consensus, understanding that district attorneys are ultimately "answerable to the electorate for the manner in which [they] conduct [their] office." (*Pellegrino*, *supra*, 27 Cal.App.3d at p. 208.) This Court should take this opportunity to clarify the independence from legislative control that local election confers on California's district attorneys.

C. District Attorneys' Position in the Executive Branch Protects Them from Legislative Interference with Their Exercise of Charging Discretion, a Core Executive Function.

District attorneys' position as executive branch officers subject to limited supervision by the Attorney General further insulates them from

[11] Where district attorneys are appointed, they are subject to executive, not legislative, supervision. (See, e.g., *Wright v. State* (N.J. 2001) 778 A.2d 443, 462 [noting that local prosecutor's "law enforcement function . . . remains at all times subject to the supervision and supersession power" of the attorney general]; *In re House of Representatives* (R.I. 1990) 575 A.2d 176, 179 ["Attorney General is the only state official vested with prosecutorial discretion"]; *State v. Breeze* (Alaska Ct. App. 1994) 873 P.2d 627, 633 ["the attorney general is to maintain appropriate supervision, direction, and control" over local prosecutors]; Del. Code Ann. tit. 29 § 2504 [state attorney general "[has] charge of all criminal proceedings].)

legislative overreach. The vast majority of states, including California, contemplate some degree of supervision of district attorneys by an executive official, usually the Attorney General. (See Cal. Const., art. V, § 13 [specifying that "[i]t shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced" through "direct supervision over every district attorney" and discretionary prosecution when "any law of the State is not being adequately enforced in any county"]; Cal. Gov. Code, § 12550; see generally Yeargain, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials* (2018) 68 Emory L.J. 95, 98, 110-112.) These supervisory structures reflect a conscious decision, repeated in state after state, to situate the entirety of the law enforcement power, including oversight of district attorneys' charging decisions, within the executive branch. Most states have mechanisms that permit state prosecutors to direct, displace, assist, or prosecute in the stead of district attorneys under certain conditions.[12] Yet despite the wide variation in the relationship between district attorneys and statewide officials, such supervision is generally limited and direct *legislative* supervision of local prosecutorial policy has

[12] See Appendix B.

no place.[13] The default "[i]n almost every state . . . has been [] to defer to local prosecutors."[14]

Even where state law grants state executive officials seemingly broad supervisory or supersession power over district attorneys, courts have nonetheless recognized and respected the independence of district attorneys. (See, e.g., *Amemiya v. Sapienza* (Haw. 1981) 629 P.2d 1126, 1129 [holding that broad statutory language facially empowering Attorney General to prosecute "cannot sensibly be construed as a reservation of the power to usurp, at [the Attorney General's] sole discretion, the functions of the public [local] prosecutor"]; *Ryan v. Eighth Judicial Dist. Court* (Nev. 1972) 503 P.2d 842, 844 [same].)[15] The default within state traditions of prosecutorial discretion is thus to respect the authority and autonomy of the district attorney while ensuring that any appropriate oversight power is cabined within higher level executive branch officials. (See *Petition of*

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[13] In a few states–most notably, Texas–district attorneys are members of the judicial branch. (Tex. Const., art. V, § 21.) Nonetheless, Texas law robustly protects district attorneys from encroachment on their inherent powers both by the legislature, (*Meshell, supra,* 739 S.W.2d 246 at pp. 253-57), and by the Attorney General, who remains a member of the executive branch, (*State v. Stephens*, (Tex. Ct. Crim. App. Dec. 15, 2021) _S.W.3d_, 2021 WL 591798, at *10.)

[14] Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States* (2011) 109 Mich. L. Rev. 519, 545.

[15] See also *People v. Buffalo Confectionery Co.* (Ill. 1980) 401 N.E.2d 546, 549; *Kemp v. Stanley* (La. 1943) 15 So.2d 1, 4-5; *Com. v. Carsia* (Pa. 1986) 517 A.2d 956, 957-59; *Williams v. State* (Miss. 2014) 184 So.3d 908, 915; *State v. Camacho* (N.C. 1991) 406 S.E.2d 868, 871; *Stephens*, *supra*, 2021 WL 5917198 at p. *10.

Padget (Wyo. 1984) 678 P.2d 870, 874 [explaining that while the attorney general, as an executive official vested with prosecutorial discretion, may supersede prosecution of a case in a district attorney's jurisdiction, "it is not allowable for the district court to assume these duties"].) Across these many state traditions, crucially, legislatures do not have a role in the management of local prosecutorial decisions. This Court should not uproot such a tradition in a state that has chosen to respect the executive power of district attorneys and enshrine supervision in the executive branch.

III. State Supreme Courts Have Repeatedly Held That These Structures Protect Prosecutorial Charging Decisions from Legislative Interference.

The courts below failed to appreciate the nature of these constitutional guardrails. By imposing a legislative mandate on the district attorney to bring certain charges, the courts below violated California's constitution because they did not recognize how these constitutional structures protect district attorneys' charging discretion. When other states' courts have considered whether the separation of powers limits similar legislative attempts to control prosecutors' exercise of discretion in deciding which charges to bring, they have consistently considered such attempts to be an unconstitutional violation on the basis of constitutional provisions analogous to California's.

The Washington Supreme Court's *en banc* decision in *Rice*, discussed above at pp. 18-19, presents the clearest analogue to the present case.

There, the court confronted a trio of sentence enhancing statutes that provide that the prosecutor "shall file" special allegations "when sufficient admissible evidence exists" to justify a finding of triggering conditions. (*Rice*, *supra*, 279 P.3d at p. 854.) The court read the statutes as directory rather than mandatory, holding that "[t]he separation of powers doctrine . . . precludes the legislature from requiring prosecuting attorneys to file any supplemental charges," (*id.* at p. 857), because such a requirement would infringe on the "prosecutor's broad charging discretion [that] is part of the inherent authority granted to prosecuting attorneys as executive officers under the Washington State Constitution." (*Id.* at p. 859.)

Similarly, a Florida appellate court rescued the state's "10/20/Life" habitual offender scheme from constitutional jeopardy by finding that, though the statute provided that certain felony charges involving the use of a weapon "shall be reclassified" to a higher degree, the statute does "not eliminate all prosecutorial discretion in seeking enhanced penalties under the statute, but instead clearly contemplates that in some qualifying cases prosecutors will use their discretion not to seek enhanced penalties under the statute." (*Green v. State* (Fla. Ct. App. 2001) 792 So.2d 643, 644.) The statute was found not to unconstitutionally "encroach on the executive's prosecutorial discretion" because it did "not eliminate" the prosecutor's "discretion [to forgo enhanced penalties]." (*Ibid.*)

The South Carolina Supreme Court also rejected a reading of the state's Three Strikes sentencing scheme that would require the district attorney to seek enhancements and thereby violate the state constitution's separation of powers. The court construed the statute to preserve the prosecutor's discretion to "choose not to pursue the triggering offenses" or "plea the charges down to non-triggering offenses," thereby preventing the statute from "interfer[ing] with any of the prosecutorial rights" enumerated in the state's constitutional jurisprudence and saving it from constitutional infirmity. (*Burdette, supra,* 515 S.E. 2d at p. 528.)[16]

Even where some state courts have acquiesced to apparent legislative efforts to direct prosecutorial action, the background and analysis within those cases highlights such rulings' inconsistency with California law. Most glaringly, after a comprehensive review, Amici could not identify even one decision that squarely addresses the separation of powers concerns at issue in this case and still endorses legislative control of prosecutorial discretion. Of these cases that endorse a greater degree of control over prosecutors' charging discretion, some are squarely contradicted by other decisions of the same states' courts.[17] Two rely on state constitutions that generally

[16] The challenged provision was subsequently removed by legislative amendment. (2010 S.C. Act 273, § 20.)

[17] Compare *Com. v. Wilkerson* (Va. Cir. Ct. Sept. 1, 2021) 2021 WL 8315071, at *1 (suggesting mandatory duty to prosecute certain charges) and *State v. Lujan* (N.M. 1977) 560 P.2d 167, 168 (same) with *In re Horan* (Va. 2006) 634 S.E.2d 675, 679 (recognizing protections for prosecutorial

empower legislative control over district attorneys.[18] Another four concern district attorneys that were not constitutionally established and address other forms of control over prosecutors, not the legislative imposition of a mandatory duty and corresponding judicial intrusion of mandamus that Respondent seeks here.[19]

In short, courts in states with similar constitutions to California have consistently safeguarded prosecutorial discretion regarding which cases to prosecute against legislative interference. The lower courts' injunction strayed from this mainstream and should be corrected.

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charging discretion) and *State v. Trujillo* (N.M. 2007) 157 P.3d 16, 19 (same). As another example of a decision that reflects no analysis of separation of powers questions, see, e.g., *Cunny v. State* (Ala. Cr. App. 1993) 629 So.2d 693, 695.

[18] See *Hamstead*, *supra*, 313 S.E.2d at p. 413 (noting that the West Virginia constitution provides for the legislature to "prescribe" the "powers [and] duties . . . of all public officers"); *In re Ringwood Fact Finding Committee* (N.J. 1974) 324 A.2d 1, 4 (noting that under state constitution, local prosecutors do not enjoy separation of powers protections against the legislature.)

[19] See *Wilson v. Koppy* (N.D. 2002) 653 N.W.2d 68, 72 (remedy for prosecutorial inaction is appointment of special prosecutor); *State v. Langley* (Or. 1958) 323 P.2d 301, 309 (remedy for prosecutorial inaction is criminal prosecution); *State on Inf. of McKittrick v. Graves* (Mo. 1940) 144 S.W.2d 91, 93 (remedy for prosecutorial inaction is ouster proceeding); *State ex rel. Johnston v. Foster* (Kan. 1884) 3 P. 534, 536 (remedy for prosecutorial inaction is criminal prosecution or ouster proceeding). Another similar case upheld a criminal prosecution for a prosecutor who had charged a misdemeanor instead of a felony as part of a conspiracy to support criminal activity. (See *Speer v. State* (Ark. 1917) 198 S.W. 113, 115.)

CONCLUSION

California's constitution enshrines district attorneys' authority and attendant charging discretion within the purview of the executive branch. California's conscious choices–to recognize the district attorney as a constitutional officer, to empower local constituencies to elect district attorneys, and to contain supervision within the executive branch–reinforce that district attorneys' discretion is not subject to legislative infringement. The Three Strikes Law should not be read to upend this constitutional tradition and take California out of step with every state that has rigorously considered this question in light of the constitutional protections that it shares with California. Respondent can bring its disagreements to the court of public opinion in November 2024, but it is inappropriate for Respondents to ask this Court to upset California's fundamental constitutional norms. Amici thus urge this Court to reverse the ruling below.

APPENDIX A
List of Amici Curiae[20]

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APPENDIX B
Selected State Constitutional Provisions and Statutes

State	Constitutional provisions or statutes providing for the local election of prosecutors.	Provisions enshrining local prosecutors in state constitutions.	Constitutional provisions or statutes subjecting local prosecutors to direction, displacement, supervision, or assistance by state executive branch officials.
Alabama	Ala. Const. art. VI, § 160	Ala. Const. art. VI, § 160	Ala. Code §§ 12-17-184, 36-15-14
Alaska			Alaska Stat. Ann. § 44.23.020
Arizona	Ariz. Const. art. XII, § 3	Ariz. Const. art. XII, §§ 3-4	Ariz. Rev. Stat. Ann. § 41-193
Arkansas	Ark. Const. amd. LXXX, § 20	Ark. Const. amd. LXXX, § 20	Ark. Code Ann. §§ 25-16-702, 705
California	Cal. Const. art. XI, § 1	Cal. Const. art. V, § 13; art. XI, § 1	Cal. Const. art. V, § 13; Cal. Penal Code § 923
Colorado	Colo. Const. art. VI, § 13	Colo. Const. art. VI, § 13	Colo. Rev. Stat. Ann. § 24-31-101
Connecticut		Conn. Const. art. IV, § 27	Conn. Gen. Stat. Ann. §

			51-2177
Delaware			Del. Code Ann. tit. 29 § 2505
Florida	Fla. Const. art. V, § 17	Fla. Const. art. V, § 17	Fla. Const. art. IV, §§ 4, 7; Fla. Stat. Ann § 27.14
Georgia	Ga. Const. art. VI, § 8, ¶ 1	Ga. Const. art. VI, § 8, ¶ 1	Ga. Code Ann. §§ 45-15-3, 45-15-10, 45-15-35
Hawaii	Haw. Rev. Stat. Ann. § 46-1.5(17)		Haw. Rev. Stat. Ann. §§ 26-7, 28-2, 46-1.5
Idaho	Idaho Const. art. V, § 18	Idaho Const. art. V, § 18	Idaho Code Ann. §§ 31-2227, 67-1401
Illinois	Ill. Const. art. VI, § 19	Ill. Const. art. VI, § 19	15 Ill. Comp. Stat. Ann. § 205/4
Indiana	Ind. Const. art. VII, § 16	Ind. Const. art. VII, § 16	Ind. Code Ann. § 4-6-1-6
Iowa	Iowa Code Ann. § 331.751		Iowa Code Ann. § 13.2
Kansas	Kan. Stat. Ann. § 19-701		Kan. Stat. Ann. §§ 75-702, 75-704
Kentucky	Ky. Const. § 97	Ky. Const. § 97	Ky. Rev. Stat. Ann. §§ 15.200, 15.205, 69.013

Louisiana	La. Const. art. V, § 26	La. Const. art. V, § 26	La. Const. art. IV, § 8
Maine	Me. Rev. Stat. Ann. tit. 30-A, § 251		Me. Rev. Stat. Ann. tit. 5, § 199
Maryland	Md. Const. art. V, § 8	Md. Const. art. V, § 7	Md. Const. art. V, § 3
Massachusetts	Mass. Const. amd. art. XIX; Mass. Gen. Laws Ann. ch. 54, § 142		Mass. Gen. Laws Ann. ch. 12, § 6
Michigan	Mich. Const. art. VII, § 4	Mich. Const. art. VII, § 4	Mich. Comp. Laws Ann. §§ 14.28, 14.30
Minnesota	Minn. Stat. Ann. § 388.01		Minn. Stat. Ann. § 8.01
Mississippi	Miss. Const. art. VI, § 174	Miss. Const. art. VI, § 174	Miss. Code. Ann. § 7-5-53
Missouri	Mo. Ann. Stat. § 56.010		Mo. Ann. Stat. § 27.030
Montana	Mont. Code Ann. §§ 7-4-2203, 2205		Mont. Code Ann. § 2-15-501
Nebraska	Neb. Rev. Stat. Ann. § 32-522		Neb. Rev. Stat. Ann.§§ 84-203, 84-204
Nevada	Nev. Rev. Stat. Ann. § 252.020		Nev. Rev. Stat. Ann. §§ 228.120, 228.130
New Hampsh	N.H. Rev. Stat. Ann. § 7:33	N.H. Const. pt. II, § 71	N.H. Rev. Stat. Ann. §§ 7:6, 7:11, 7:34

New Jersey		N.J. Const. Art. VII, § 2	N.J. Stat. Ann. § 52:17B-103
New Mexico	N.M. Const. art. VI, § 24	N.M. Const. art. VI, § 24	N.M. Stat. Ann. §§ 8-5-2, 8-5-3
New York	N.Y. Const. art. XIII, § 13	N.Y. Const. art. XIII, § 13	N.Y. Exec. Law § 63
North Carolin	N.C. Const. art. IV, § 18	N.C. Const. art. IV, § 18	N.C. Gen. Stat. Ann §§ 114-2, 114-11.6
North Dakota	N.D. Cent. Code Ann. § 11-10-02		N.D. Cent. Code Ann. §§ 54-12-02 - 04, 11-16-06
Ohio	Ohio Rev. Code Ann. § 309.01		Ohio Rev. Code Ann. §§ 109.02, 2939.10
Oklahoma	Okla. Stat. Ann. tit. 19, § 215.20	Okla. Const. art. XVII, § 2	Okla. Stat. Ann. tit. 74, § 18b
Oregon	Or. Rev. Stat. Ann. 8.610		Or. Rev. Stat. Ann. § 180.070
Pennsylvania	Pa. Const. art. IX, § 4	Pa. Const. art. IX, § 4	71 Pa. Stat. and Cons. Stat. Ann. § 732-205
Rhode Island			R.I. Gen. Laws Ann. §§ 42-9-1, 42-9-4
South Carolin	S.C. Const. art. V, § 24	S.C. Const. art. V, § 24	S.C. Code Ann. §§ 1-7-100, 1-7-320

South Dakota	S.D. Codified Laws § 7-16-1		S.D. Codified Laws § 1-11-1
Tennessee	Tenn. Const. art. VI, § 5	Tenn. Const. art. VI, § 5	Tenn. Code Ann. §§ 8-6-112, 8-6-303
Texas	Tex. Const. art. V, § 21	Tex. Const. art. V, § 21	Tex. Code Crim. Proc. Ann. art. 2.07
Utah	Utah Const. art. VIII, § 16	Utah Const. art. VIII, § 16	Utah Code Ann. § 67-5-1
Vermont	Vt. Const. ch. II, §§ 43, 50	Vt. Const. ch. II, §§ 43, 50	Vt. Stat. Ann. tit. 3, §§ 152, 153, 157
Virginia	Va. Const. art. VII, § 4	Va. Const. art. VII, § 4	Va. Code Ann. § 2.2-511
Washington	Wash. Const. art. XI, § 5	Wash. Const. art. XI, § 5	Wash. Rev. Code Ann. §§ 43.10.090, 43.10.232
West Virginia	W.Va. Const. art. IX, § 1	W.Va. Const. art. IX, § 1	W. Va. Code Ann. § 5-3-2
Wisconsin	Wis. Const. art. VI, § 4	Wis. Const. art. VI, § 4	Wis. Stat. Ann. §165.25
Wyoming	Wyo. Stat. Ann. § 9-1-802		Wyo. Stat. Ann. § 9-1-603

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court rules 8.204(b) and 8.204(c)(1), I hereby certify that this Amicus Curiae brief has been prepared using proportionately double-spaced 13-point Times New Roman typeface. According to the "Word Count" feature in Microsoft Word for Office 365, this brief contains 6,397 words (including Application to File, footnotes, and Appendices, but excluding the Table of Contents, Table of Authorities, and Certificate of Compliance).

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on April 20th, 2023.

By: /s/ Jacob Seidman

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