Case No. S275478

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

George Gascón, District Attorney of Los Angeles County, et al.

Appellants,

v.

The Association of Deputy District Attorneys for Los Angeles County,

Plaintiff and 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
The Honorable James C. Chalfant

PROPOSED BRIEF OF AMICUS CURIAE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PLAINTIFF AND RESPONDENT

GREG D. TOTTEN, SBN 106639
Chief Executive Officer
California District Attorneys Association
ALBERT C. LOCHER, SBN 66616
Assistant District Attorney (Ret.)
Sacramento County District Attorney's Office
ROBERT P. BROWN, SBN 200844
Assistant District Attorney
San Bernardino County District Attorney's Office
Attorneys for Amicus Curiae
California District Attorneys Association
2495 Natomas Park Drive, Suite 575
Sacramento, CA 95833
Telephone: (916) 443-2017

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I
INTRODUCTION

Serious crime places victims on a cruel and lengthy path. The path begins with the crime itself, but the journey through a criminal justice system that continually marginalizes the victim's suffering exacts the harshest tolls on those unlucky enough to find themselves forced to walk its length. The California District Attorneys Association (CDAA) endeavors to keep them from walking alone.

The People of the State of California have acted time and again in attempts to minimize the damage and prevent threats to community safety. With amendment to the state constitution in 1982, the People, "[found] and declare[d] that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern." (Prop. 8, § 3 (June 8, 1982).) In 1990, the People declared, "We . . . find that the rights of crime victims are too often ignored by our courts and by our State Legislature . . . and that comprehensive reforms are needed in order to restore balance and fairness to our criminal justice system." (Prop. 115, § 1, subd. (a) (June 5, 1990).) In 1994, the People sought to "ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (Prop. 184, Preamble (Nov. 8, 1994).)[1] In 2008, "The People of the State of California declare that the 'Victims' Bill

[1] The genesis of the electorate's version of Three Strikes.

of Rights Act of 2008: Marsy's Law' is needed to remedy a justice system that fails to fully recognize and adequately enforce the rights of victims of crime." (Prop. 9, § 2, subd.(2) (Nov. 4, 2008). Time and again those charged with the stewardship of this State have failed them.

Now the District Attorney of Los Angeles County (District Attorney) appears before this Court trumpeting his commitment to that failure and seeking this Court's approval of his willful disobedience to the law. By his actions, he attempts to cast aside a long-standing and exhaustively-reviewed recidivist statute created by the electorate by proclaiming that his prosecutorial discretion outweighs the People's will, the Legislature's actions, and the Judiciary's review.

Demonstrating a lack of understanding of the source of his authority, the District Attorney perversely turns the separation of powers doctrine on its head in an attempt to insulate his actions. He mischaracterizes the nature of "discretion" to apply to his capricious nullification of the law. He compels his subordinates to violate their own legal duties and ethical obligations. And he cloaks his actions in secrecy by failing to abide by a process that would put the impact of his decisions more squarely in the public eye.

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II

THE DISTRICT ATTORNEY'S AUTHORITY FLOWS FROM LEGISLATIVE STATUTE

The District Attorney focuses the bulk of his argument on a belief that California's separation of powers doctrine insulates him from statutory control and influence, whether the origin is from the Legislature's action or that of the electorate. (See Appellant's Opening Brief (AOB) at pp. 27 – 31.) This fails to recognize that, although his office is constitutional in nature, the scope of his role and authority is fundamentally defined by the Legislature through statute. That scope may therefore be modified by either the Legislature or the electorate.

California's constitution sets forth the basic separation of powers premise. "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) Our state's separation of powers differs from the federal counterpart as it divides the executive and permits legislative involvement in the appointment and creation of executive officials. (*Marine Forests Society v. California Coastal Commission* (2005) 36 Cal.4th 1, 31.)

The office of a county district attorney carries both a constitutional and statutory component. The former creates the office, but also explicitly involves the Legislature in the definition of the office. "The Legislature shall provide for county powers, an elected county sheriff, an elected district

attorney, an elected governing body in each county." (Cal. Const., art. XI, § 1, subd. (b).) The nature of the office, however, is defined by statute. "The district attorney is the public prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses." (Gov. Code, § 26500.) The Legislature further set forth other areas in which a district attorney may act, ranging from criminal proceedings, (Gov. Code, § 26501), to consumer fraud cases, (Gov. Code, § 26509), to unfair competition litigation, (Bus. & Prof. Code, §§ 17200 & 17204), to civil mental health proceedings, (Gov. Code, § 26530). Consequently, the Legislature necessarily defines the scope of the District Attorney's role in the courts and government.

The District Attorney does correctly assert that statutes created by initiative are subject to the same constitutional limitations as those created by the Legislature. (AOB at p. 31.) "We do not recognize an initiative measure as having any greater strength or dignity than attaches to any other legislation. Throughout section 1 of article IV of the constitution a distinct line of demarcation is kept between a law or an act and a constitutional amendment." (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 674.) But the underlying compulsion to act as the prosecutor, whether it be in the broader criminal spectrum or as to recidivist offenders as described in Penal Code section 1170.12, originates in statute.

If the Legislature possess the power to define the District Attorney's role via statute, then the People assuredly have the power to modify or shape that role. "All political power is inherent in the people. Government is instituted for their protection, security and benefit, and they have the right to alter or reform it when the public good may require." (Cal. Const., art. II, § 1.) Moreover, "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum." (Cal. Const., art. IV, § 1.) As this Court described it,

> The initiative and referendum are not rights granted the people, but powers reserved by them. Declaring it the duty of the courts to jealously guard this right of the people, it has long been our judicial policy to apply a liberal construction to this power whenever it is challenged in order that the right not be improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.

(*Rossi v. Brown* (1995) 9 Cal.4th 688, 695 (internal ellipses, brackets, quotations and citations omitted).)

The Three Strikes law embodied by Penal Code section 1170.12[2] infringes on executive discretion (the nature of which

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[2] As described by both parties, Three Strikes arose out of two separate statutes, Penal Code sections 667 (created by the Legislature) and 1170.12 (created by initiative). (AOB at pp. 17 – 19; Respondent's Answer Brief (RAB) at pp. 15 – 18.) While the District Attorney chose to reference only section 667 for

is discussed further in section III, *post*) no more than Government Code section 26500 does. For if the initiative directive that a prosecutor "shall plead and prove all known prior serious or violent felony convictions" violates separation of powers (Pen. Code, § 1170.12, subd. (d)(1) & (e)), so, too, does the authorizing language for district attorneys in the first place, directing that they "shall attend the courts . . .," (Gov. Code, § 26500), as well as the language that says, "[t]he district attorney shall institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses . . .," (Gov. Code, § 26501).

Fundamentally, the District Attorney's argument, if correct, undermines his authority to participate in prosecution at all. It is not correct, of course, for the courts have long recognized the legislature's authority to define a district attorney's power. (See, e.g., *Safer v. Superior Court* (1975) 15 Cal.3d 320 [describing the need for legislative authorization for a district attorney's participation in civil actions].)

Separation of powers arguments challenging Three Strikes have failed when brought by criminal defendants. "The provision in the Three Strikes law requiring the prosecutor to allege and prove prior serious felony offenses is not unlike other laws requiring that officer to act . . .." (*People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1333 (listing other statutes compelling a district attorney's action); accord, *People v. Gray*

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convenience, (AOB at p. 18, fn. 2), CDAA instead references the statute created by the People of the State of California, section 1170.12.

(1998) 66 Cal.App.4th 973, 995.) The District Attorney cannot now step into the shoes of those defendants and nullify both the electorate's law and the judicial branch's analysis of the issue.

III

DISCRETION DIFFERS FROM NULLIFICATION

The District Attorney complains of an infringement upon his discretion but fails to grasp the nature of discretion itself. Discretion provides a prosecutor with the ability to "choose, *for each particular case*, the actual charges from among those potentially available aris[ing] from the complex considerations necessary for the effective and administration of law enforcement." (*People v. Birks* (1998) 19 Cal.4th 108, 134, emphasis added, internal quotations and citations omitted (*Birks*).)[3] Blanket proclamations negating a statewide law cannot possibly be the exercise of discretion for each particular case.

This Court provided an overview of the nature of prosecutorial discretion in the capital case setting. "Many circumstances may affect the litigation of a case chargeable under the death penalty law. They include factual nuances, strengths of evidence, and in particular, the broad discretion to show leniency." (*People v. Keenan* (1988) 46 Cal.3d 478, 506.) The District Attorney chooses legislative usurpation over factual nuance and strength of evidence.

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[3] The District Attorney cites to *Birks* (see AOB at pp. 40, 42) but misses this Court's particularized approach.

California appellate courts address issues of discretion with great frequency. Claims that a trial court abused its discretion fill the annals of appellate cases. This Court provided a clear framework for understanding the nature of discretion in *People v. Superior Court (Howard)* (1968) 69 Cal.2d 491. Addressing the exercise of a court's discretion in the context of dismissal, this Court taught that discretion "involves a balancing of many factors, including the weight of the evidence indicative of guilt or innocence, the nature of the crime involved, . . ." and other factors specific to the defendant and the case. (*Id.* at p. 505.) And in the setting of Three Strikes itself, this Court again focused on factors that were case-specific, not a generalized antipathy toward the law. "[T]he court in question must consider whether, in the light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character and prospects, the defendant may be deemed outside the scheme's spirit . . .." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Respondents ably describe the path toward entropy if individual elected officers simply selected the laws they wished to follow and jettisoned the others from their jurisdictions. (RAB at pp. 25 – 28.) A public official exercises appropriate discretion when the official reaches "an equitable decision of what is just and proper *under the circumstances*." (*Burgdorf v. Funder* (1966) 246 Cal.App.2d 443, 449, emphasis added.) Only then may a decision be made specific to the facts, and more importantly, the people, in each case. A District Attorney

should know the names and the faces of those whose lives are impacted by a criminal case and his decisions about that case. Only then is discretion truly exercised.

IV

PROSECTORS INDIVIDUALLY OWE A CONSTITUIONAL DUTY TO VICTIMS OF CRIME

The District Attorney's edicts effectively put his subordinate prosecutors in an impossible quandary. Do they follow his command to avoid workplace backlash, or do they obey their duty to the victims of crime under the California Constitution?

As described above, the People of the State of California have struggled for more than 35 years to have the rights of crime victims acknowledged and enforced in the state's criminal courts. The genesis of the constitutional provisions known collectively as "The Victim's Bill of Rights" originated in 1982 with the enactment of article I, section 28 of the California Constitution via initiative. (*People v. Hannon* (2016) 5 Cal.App.5th 94, 99 – 100.) The People later amended and expanded the constitutional rights of victims in 2008 with the passage of "Marsy's Law." (*Id.* at p. 99.)

The importance of governmental focus on public safety and the rights of victims is spelled out clearly in those constitutional provisions. "California's victims of crime are largely dependent upon the proper functioning of the government, upon the criminal justice system and upon the expeditious enforcement of the rights of victims of crime . . . in

order to protect the public safety and to secure justice when the public safety has been compromised by criminal activity." (Cal. Const., art. I, § 28, subd. (a)(2).) Similarly, the People's expectations were also not left to the imagination of the courts or the executive. "Victims of crime have a collectively shared right to expect that persons convicted of committing criminal acts are sufficiently punished in both the manner and the length of the sentences imposed by the Court of the State of California. (Cal. Const., art.I, § 28, subd. (a)(5).)

To effect these essential goals, article 28 provides a litany of rights afforded to victims of crime. These rights include 17 nonexclusive, explicit areas guiding the criminal justice system, including the rights for the victim to be protected, (subd. (b)(2)), the right to have victim safety considered in the setting of bail, (subd. (b)(3)), the rights of the victim to be apprised of the proceedings and how the prosecution intends to proceed, (subds. (b)(6) – (8), (10) – (12)), and the right to restitution, (subd. (b)(13)). Article I, section 28 is not the only part of the Constitution in which California prescribed the need to protect victims of crime.[4] Article I, section 12 also lists particular circumstances in which bail may be denied altogether based upon the danger to victims or others. Article I, section 29 guarantees the rights of due process and speedy trial to the People, from which the same rights may be attributed to crime victims. (*People v. Lynch* (2010) 50 Cal.4th 693, 727, overruled on other grounds, *People v. McKinnon*

[4] Among Californians' inalienable rights is the right to pursue and obtain safety. (Cal. Const., art. I, § 1.)

(2011) 52 Cal.4th 610, 637 – 643.) And article I, section 30, subdivision (b) permits the use of hearsay testimony at preliminary hearings in order to protect victims and witnesses. Without question, the People of California have taken significant steps to protect victims above the reach of the Legislature, the Executive, or the Judiciary.

As a representative of the sovereign state itself, a prosecutor is bound not to the whims of a client, but rather to a duty of impartial governance and a pursuit of justice in every case. (See *People v. Hill* (1998) 17 Cal.4th 800, 820.) In California, this means that the prosecutor plays a special role in fairly protecting the victims of crime. For while a criminal defendant has among her or his protections a right to be appointed counsel based upon the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, (*Gideon v. Wainwright* (1963) 372 U.S. 335 and *People v. Chavez* (1980) 26 Cal.3d 334, 344), the victim of crime has no equivalent protection. To provide balance against the voice of defense counsel, who owes primary fealty to the accused,[5] the prosecutor must ensure that the constitutional rights and interests of victims do not fall from the attention of the judicial process. Otherwise, the prosecutor's oath and legal duty to "support the Constitution

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[5] See, e.g., Business and Professions Code section 6068, subdivisions (c), (e)(1), (h); rules 1.2(a), 1.3(a), 1.4, 1.4.1(a), 1.9, 3.1(b), 3.6(c), and 3.7(c) of the Rules of Professional Conduct; and *Strickland v. Washington* (1984) 466 U.S. 668, 688 ("Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.")

and laws of the United States and of this state," (Bus. & Prof. Code, § 6068, subd. (a)), become meaningless, particularly when the California Constitution charges prosecutors with enforcement of crime victims' constitutional rights. (Cal. Const, art. I, § 28, subd. (c)(1) ("[T]he prosecuting attorney upon the request of the victim . . . may enforce the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right.").)

The sanctity of this role is further underscored if the Superior Court binds the hands of the victim. (See, e.g., *People v. Subramanyan* (2016) 246 Cal.App.4th Supp. 1, 7 (a victim may not step into the shoes of the prosecutor).) As the only truly-empowered advocate in a criminal court with a duty to pursue a complete and just result, the gravity of the attention to the rights of victims shines paramount. "[The prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer." (*People v. Superior Court (Green)* (1977) 19 Cal.3d 255, 266, citing *Berger v. United States* (1935) 295 U.S. 78.) While the second segment of that aim has often been the subject of much commentary, a view to the core functions of a prosecutor and her or his duty to be the voice for the victimized must not fade in the twilight. While every California attorney shoulders an obligation not to reject the cause of the defenseless or oppressed, (Bus. & Prof. Code, § 6068, subd. (h)), few carry that duty through every case like those in government service practicing criminal law. The role of a public defender in fulfilling that duty is quite visible and easy

to comprehend at a glance. But the commitment of shepherding the powerless in a hostile system plays no lesser role in the hearts of the deputy district attorneys of Los Angeles County as they walk into court each day. Their ability to individually assess the victims of each case, along with the rights of the defendant, should not be undercut because of the District Attorney's commitment to eliminating penal consequences.

V

PUBLIC POLICY AND TRANSPARENCY OF GOVERNMENT SUPPORT THREE STRIKES' "SHALL PLEAD" REQUIREMENT

The District Attorney asserts that overly harsh incarceration sentences, driven by statutes like the Three Strikes law, do not enhance public safety, and claims the opposite effect may be true. (AOB at pp. 19 - 20.) However, a prosecutor should not, indeed cannot, achieve his goals based on political beliefs by ignoring legal requirements which have sound public policy benefits.

Penal Code section 1170.12, subdivision (d)(1) provides that, in cases to which the section may apply, when the defendant has certain qualifying "strike" priors, the prosecuting attorney "shall plead and prove each prior serious or violent felony conviction except as provided in paragraph (2)." Paragraph (2) then sets out the procedure by which the prosecutor, having charged the prior, may move the court to dismiss or strike the allegation of the prior conviction, in the

furtherance of justice under Penal Code section 1385, or based on insufficient evidence to prove the prior.

The District Attorney maintains that, by virtue of the inherent nature of his constitutional status as the prosecuting attorney, he cannot be required to charge a case in a particular fashion, i.e., he cannot be required to plead the prior strike conviction. In taking this position, the District Attorney claims the "shall plead" requirement constitutionally impinges on his power and discretion as the charging authority in criminal cases. (AOB at pp. 27 – 56; Appellant's Reply Brief at pp. 17 – 22.) While the office of a public prosecutor certainly carries great authority as to charging decisions, the District Attorney carries his mantel too far. As the opinion of the Court of Appeal below points out, the District Attorney can achieve his goal (that a criminal defendant not be subject to an overly long sentence due to enhancement from a prior strike conviction) by means other than altogether declining to file the prior conviction.

The Court of Appeal, in its analysis of the issue, concluded that, aside from a court-approved dismissal of the allegation, a prosecutor has another path by which he or she can achieve the goal of seeking a conviction on the current charge without the defendant being subjected to the enhanced penalty that the prior "strike" allegation would otherwise mandate. Should the prosecutor charge the prior conviction, as the statute requires, then move to dismiss, and the trial court denies that motion, the prosecutor at trial may simply not put forward any evidence that would prove the prior. The

Court of Appeal concluded that the prosecutor cannot be compelled to offer any particular evidence at trial. (*Association of Deputy District Attorneys for Los Angeles County v. Gascón* (2022) 79 Cal.App.5th 503, 546 - 548.) Since the prosecution bears the burden of proof, the resultant failure of proof would mean that the defendant would not be convicted on the prior allegation. While this process would give the District Attorney that which he seeks, it nevertheless also serves a significant public interest in how such cases are processed in the criminal justice system by putting the process in the public eye

In weighing any supposed infringement on the prosecutor's discretion, this Court should be mindful that the requirement the prosecutor file known prior convictions in the public charging document serves the public interest of transparency in the charging and disposition practices of the prosecutor. The legislative authority (whether exercised by the Legislature, or by the people through the initiative process), has a legitimate and weighty interest in making known to the public the full picture: not only the nature of the current offense, but also the criminal background of the alleged offender, which may be properly considered in deciding the appropriate final disposition. The requirement that known serious or violent priors be charged puts those most serious aspects of these defendant's background on public display, allowing the public to be fully informed as to how serious crimes, committed by persons with serious criminal history, are handled. The charging requirement of Penal Code section 1170.12, subdivision (d)(1) does that. If the District Attorney

is allowed to ignore this requirement, he will be allowed to obscure or hide, in many cases, the full nature of the defendant. Absent the charging requirement, a cloak of secrecy is maintained.

The District Attorney may claim that, because he has announced his general policies with respect to the filing (or more accurately the non-filing) of prior conviction allegations, he has hidden nothing from the public. But such general public pronouncements do not tell the public how this practice works with respect to specific cases, involving specific defendants. In the absence of the pleading requirement of section 1170.12, subdivision (d)(1), the background of such serious offenders might well not be known or readily available to the public.

Certainly, the record of each prior conviction is a public record in the court in which it was entered. But learning of that conviction, if it is not in the same county where the new case was brought, would require inquiry or research at each of the 58 counties in California, and for out-of-state convictions, in each local jurisdiction in each of the other states. This significant obstacle for the general public makes it untenable.

The means by which law enforcement authorities readily learn of such convictions for a particular person is confidential and not available to the general public. Criminal History information is not subject to disclosure under the Public Records Act. (Gov. Code § 7920.000 et seq.) In fact, unauthorized disclosure of such information can be a crime. (Pen. Code, §§ 11140 – 11144; Gov. Code, §§ 6200, 6201.)

As the District Attorney acknowledges in his opening brief in this Court, quoting *People v. Bunn* (2002) 27 Cal.4th 1, "... the 'sensitive balance' underlying the tripartite system of government assumes a certain degree of mutual oversight and influence...." (*Id.* at p.14. See AOB at pp. 29 – 30.) As to the "shall plead" requirement, the issue before this Court is the striking of that balance. Since the Court of Appeal identified a means by which the District Attorney can be required to plead prior convictions and still achieve his goal, on balance the "shall plead" requirement does not weigh so heavily on his independent executive status as to overcome the interest of the legislative authority (through both the Legislature and the People by way of initiative) in achieving the legitimate purpose of public transparency in how the most serious cases, with defendants having the most serious criminal backgrounds, are processed in the criminal justice system. In terms of achieving his goals, all that the District Attorney gains by defeating the "shall plead" requirement is the ability to cast a veil over how his policies are affecting the administration of justice in Los Angeles County.

VI

CONCLUSION

The District Attorney presents this Court with a twisted view of the separation of powers doctrine. Through his reasoning, a single county prosecutor may be empowered to ignore the legal constructs of the People, the Legislature, and the Judiciary, declaring which law will be followed in that

prosecutor's county. Separation of powers provides checks on the branches of government, it does not serve to negate them.

Executive discretion does not mean discretion to ignore the law. As the courts well know, discretion means the considered approach to the facts of each case.

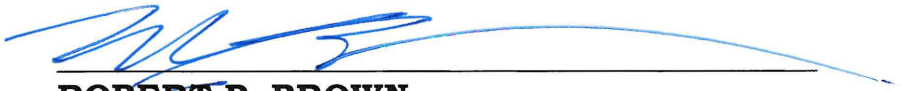
Every prosecutor voluntarily takes on an enormous and unheralded calling by standing up for the victims of crime. It is the only method by which the state's constitutional guarantees might be upheld to protect and serve victims of crime. That task is often difficult and ridiculed when significant forces are gathered to demonize the role. It becomes impossible when a prosecutor's own district attorney issues commands that leave the prosecutor forced to choose between the law and employment.

Perhaps crime victims do not factor into the world view espoused by some. Perhaps they are to be relegated to hushed statistics. CDAA asks this Court not to make this that day.

The Court of Appeal's judgment should be affirmed.

Respectfully submitted,

GREG D. TOTTEN
Chief Executive Officer
California District Attorney's Association
ALBERT C. LOCHER
Assistant District Attorney (RET.)
Sacramento County District Attorney's Office



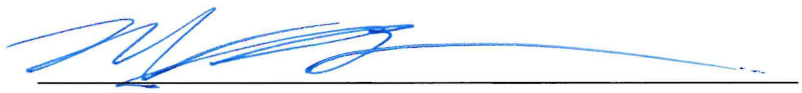
ROBERT P. BROWN
Assistant District Attorney
San Bernardino County District Attorney's Office

CERTIFICATE OF COMPLIANCE

I certify that the attached **PROPOSED BRIEF OF AMICUS CURIAE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENT** uses a 13-point Bookman Old Style font, and contains 4,449 words.

Respectfully submitted this 21st day of April, 2023

GREG D. TOTTEN
Chief Executive Officer
ALBERT C. LOCHER
Assistant District Attorney (Ret).
Sacramento County District Attorney's Office



ROBERT P. BROWN
Assistant District Attorney
San Bernardino County District Attorney's Office

PROOF OF ELECTRONIC SERVICE (RULES OF COURT, RULE 8.78(F))

Pursuant to rule 8.78(f) of the California Rules of Court, the undersigned declares under penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause, and am employed by the San Bernardino County District Attorney's Office, located at 303 W. Third St., San Bernardino, California 92415. My email address is rbrown@sbcda.org.

On April 21, 2023, I served true copies of the foregoing Application to File Amicus Brief in Support of Respondent on the parties in this action:

Counsel for Appellant:

Stephanie Yonekura, stephanie@hoganlovells.com
Neal K. Katyal, neal.katyal@hoganlovells.com
Jo-Ann T. Sagar, jo-ann.sagar@hoganlovells.com
Danielle D. Stempel, danielle.stempel@hoganlovells.com
Dawyn Harrison, dharrison@counsel.lacounty.gov
Adrian G. Gragas, agragas@counsel.lacounty.gov
Jonathan C. McCaverty, jmccaverty@counsel.lacounty.gov
Robert E. Dugdale, rdugdale@kbkfirm.com
Laura W. Brill, lbrill@kbkfirm.com

Counsel for Respondent:

Eric M. George, egeorge@egcfirm.com

David J. Carroll, dcarroll@egcfirm.com

Christopher Landau, clandau@egcfirm.com

Chase Harrington, charrington@egcfirm.com

California Attorney General:

Nichols J. Webster, nicholas.webster@doj.ca.gov

By electronic service: I electronically filed the document with the Clerk of the Court using the TrueFiling system. The parties to the case are registered TrueFiling users and will be served by the system.

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

Executed on April 21, 2023, San Bernardino, California.

Robert P. Brown