No. S275478

In the Supreme Court of the State of California

THE ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS FOR LOS ANGELES COUNTY,

Plaintiff and Respondent,

v.

GEORGE GASCÓN, AS DISTRICT ATTORNEY FOR THE COUNTY OF LOS ANGELES, *et al.*,

Respondents and Appellants.

Second Appellate District, Division Seven, Case No. B310845
Los Angeles County Superior Court, Case No. 20STCP04250
The Honorable James C. Chalfant, Judge

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STATEMENT OF INTEREST

The Attorney General is the chief law officer of the State of California. (Cal. Const., art. V, § 13.) He supervises the district attorneys and has the "duty . . . to see that the laws of the State are uniformly and adequately enforced." (*Ibid.*; see also Gov. Code, § 12550; Pen. Code, § 923.) The Attorney General also prosecutes certain individual criminal cases and represents the People in appellate proceedings for criminal cases prosecuted at the trial level by district attorneys. Consistent with these responsibilities, the Attorney General has an interest in defending the constitutionality of state laws and in preserving the legitimate discretion of state prosecutors.

This case involves the meaning and constitutionality of an important state statute, enacted by both the Legislature and the voters, that directly implicates the administration of criminal justice and the scope of prosecutorial discretion. As the case comes to this Court, the parties have largely coalesced around an interpretation of the statute that would substantially constrain the discretion of prosecutors and present a serious constitutional question under the separation of powers doctrine. The Attorney General has a powerful interest in advancing an alternative interpretation of the statute that allows the Court to avoid that thorny constitutional question and preserves the discretion of prosecutors under the statute.[1]

[1] The Attorney General submits this brief pursuant to California Rules of Court, rule 8.520, subdivision (f)(8).

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INTRODUCTION

This case concerns a policy adopted by Los Angeles County District Attorney George Gascón that instructs deputy district attorneys not to allege qualifying prior felony convictions for purposes of the sentencing enhancement provisions in Penal Code section 667, commonly known as the Three Strikes Law. The parties largely agree on how to interpret section 667: Gascón contends that "the best reading of the statute" is that it "requires the prosecutor to plead and prove prior strikes in every eligible case" (OBM 26), and the Association of Deputy District Attorneys for Los Angeles County (ADDA) embraces the same mandatory reading (ABM 47-55). Proceeding from that shared premise, the parties devote much of their briefing to debating the unresolved constitutional question whether that mandatory reading of the statute would violate the separation of powers doctrine by intruding on the discretion of executive branch prosecutors.

But the parties are focusing on the wrong question. Under the canon of constitutional avoidance, the central question in this case is whether there is any possible reading of the statute that would allow the Court to avoid that serious constitutional issue. There is no need to proceed beyond that question because it is possible to interpret section 667 in a way that preserves prosecutorial discretion regarding whether to plead prior strikes. Although the text of the statute says that prosecutors "shall plead and prove" prior strikes, this Court has repeatedly construed "shall" as non-mandatory—particularly where (as here) it is used to describe a discretionary activity and a mandatory reading could create constitutional problems. The statutory and

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historical context confirm that a prosecutor's decision whether to plead a prior strike under section 667 involves a discretionary judgment, and further demonstrate that a non-mandatory reading of section 667 is possible. And that reading is also supported by other principles of statutory interpretation.

Under the non-mandatory interpretation of the statute, section 667, subdivision (f)(1) (hereafter section 667(f)(1)), describes the procedural steps required in cases after the prosecutor determines it is appropriate to allege a prior strike—i.e., the prosecutor must "plead and prove" that strike before the defendant's sentence may be enhanced—but it does not eliminate the prosecutor's prerogative to make that discretionary determination in the first instance. Because that alternative interpretation is possible, the canon of constitutional avoidance requires it. There is no need for the Court to answer the separation of powers question or to address the parties' arguments about the scope of mandamus relief. District Attorney Gascón's policy is compatible with the Three Strikes Law as properly construed, and the judgment of the Court of Appeal should be reversed.

LEGAL BACKGROUND

In 1994, the Legislature enacted the Three Strikes Law to increase the length of prison sentences available for certain repeat felony offenders. (Pen. Code, § 667, subds. (b)-(i), added by

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Stats. 1994, ch. 12, § 1.)[2] Later that year, the voters enacted an initiative version of the Three Strikes Law. (§ 1170.12.) There is no material difference between the two versions. (Compare § 667, subd. (f) with § 1170.12, subd. (d).)[3] The Legislature intended "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." (§ 667, subd. (b).) The ballot materials emphasized that the statute would combat the influence of "soft-on-crime judges, politicians, defense lawyers and probation officers" who "care more about violent felons than they do victims." (Ballot Pamp., Gen. Elec. (Nov. 8, 1994), rebuttal to argument against Prop. 184, p. 37.)

Penal Code section 667 establishes that a defendant who has one qualifying prior "serious or violent felony conviction . . . that has been pled and proved" is subject to a minimum sentence of "twice the term otherwise provided as punishment for the current felony conviction." (§ 667, subd. (e)(1).) A defendant who has two or more qualifying prior "serious or violent felony convictions . . . that have been pled and proved" is subject to "an indeterminate term of life imprisonment." (§ 667, subd. (e)(2)(A); see § 667, subds. (e)(2)(A)(i)-(iii) [setting "minimum term" of indeterminate

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

[3] For convenience, this brief (like the party briefs) cites only the legislatively adopted version, Penal Code section 667.

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sentence]; see generally *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 505-506.)

The provision at issue in this case is section 667(f)(1). It states that,

> [n]otwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has one or more prior serious or violent felony convictions as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior serious or violent felony conviction except as provided in paragraph (2).

(§ 667(f)(1).) Paragraph (2) then describes circumstances in which the "prosecuting attorney may move to dismiss or strike a prior serious or violent felony conviction allegation" and the circumstances in which "the court may dismiss or strike the allegation." (§ 667, subd. (f)(2).)

In the experience of the California Department of Justice, over the nearly three decades since the Three Strikes Law was enacted, many local prosecutors have understood section 667(f)(1) to preserve prosecutorial discretion regarding whether to "plead and prove" a prior serious or violent felony conviction. The declarations in the record below confirm that local practice. For example, a senior prosecutor in Northern California described how policies in his office "encouraged . . . exercising discretion on whether to allege prior" felony convictions under the Three Strikes Law. (2 Appellant's Appendix (AA) 342.) A veteran public defender in Southern California attested that "my experience [has been] that prosecutors do not always file all strikes and enhancements" but "exercise discretion to determine

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. . . whether strikes should be filed and enhancements alleged." (2 AA 338.)[4]

In recent years, the Three Strikes Law has been the subject of continued debate and reform efforts. In 2012, the electorate passed the Three Strikes Reform Act, which reduced the punishment for certain third-strike defendants and authorized certain defendants previously sentenced to life imprisonment to seek resentencing. (Prop. 36, Gen. Elec. (Nov. 6, 2012).) The Reform Act "was motivated in large measure by a determination that sentences under the prior version of the Three Strikes law were excessive." (*People v. Conley* (2016) 63 Cal.4th 646, 658.) More recently, an independent state committee recommended the repeal of the Three Strikes Law, arguing that it "has been applied inconsistently and disproportionately against people of color" and its intended "crime-prevention effects . . . have not been realized." (Com. on Revision of the Pen. Code, Ann. Rep. and Recommendations (Dec. 2021) p. 41.)[5]

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[4] See also 2 AA 345 (declaration of longtime criminal defense attorney observing that prosecutors frequently do not allege all prior strikes); see generally Legis. Analyst, A Primer: Three Strikes – The Impact After More Than A Decade (2005) ("Primer on Three Strikes"), <https://lao.ca.gov/2005/3_strikes/3_strikes_102005.htm> (as of Apr. 21, 2023) (describing "variation in the application" of the Three Strikes Law, based on "prosecution practices" that "change over time as counties experience turnover of district attorneys").

[5] See also Cal. Policy Lab, Three Strikes in California (Aug. 2022) pp. 33-42 <https://www.capolicylab.org/wp-content/uploads/2022/08/Three-Strikes-in-California.pdf> (as of Apr. 21, 2023) (suggesting that Three Strikes Law had limited

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STATEMENT OF THE CASE

This case involves Special Directive 20-08, a policy adopted by District Attorney Gascón, which instructs deputy district attorneys not to allege prior qualifying felony convictions under section 667 in any case. (1 AA 35-38.) Related policies, which focus on pending cases, instruct deputies to join in defense motions to strike (or to move independently to strike) previously-alleged prior qualifying convictions in pending cases. (1 AA 41 [Special Directive 20-14], 1 AA 55-56 [Special Directive 20-08.1]; see 1 AA 35-36.) One policy includes a script for deputies to use to support those motions, which asserts that section 667 unconstitutionally infringes prosecutorial authority. (1 AA 55-56.)

ADDA sued to enjoin Special Directive 20-08. ADDA alleged that section 667 prohibits the District Attorney from declining to pursue prior strikes because it establishes a mandatory duty for prosecutors to "plead and prove" all qualifying prior convictions. (§ 667(f)(1).)

In addressing that claim, the superior court recognized that the canon of constitutional avoidance might apply to the

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crime-reduction impacts, despite increasing incarceration rate and disproportionately impacting Black population); Legis. Analyst, Primer on Three Strikes, *supra* (noting that Three Strikes Law increased prison population and costs, with uncertain effect on public safety); see also 1 AA 37 (appendix to Special Directive 20-08 tying racial disparities in justice system and high rates of incarceration to Three Strikes Law).

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interpretive question raised by ADDA. (2 AA 506.) It identified "ambiguity in the language" of section 667(f)(1), observing that the text could "reasonably" be read to mean that, "consistent with due process, a criminal defendant may not be sentenced under the Three Strikes law unless the necessary allegations have been pled and proved." (2 AA 506-507.) The court also noted that such an interpretation would be "supported by the obvious fact that a prosecutor cannot be compelled to actually prove a strike prior," which cuts against a mandatory reading of the "shall plead *and prove*" clause. (2 AA 507.) But it ultimately chose not to apply the avoidance canon, guided in part by precedent from the Courts of Appeal which it viewed as endorsing the mandatory interpretation of the clause and resolving any constitutional question. (2 AA 508-514.) The court therefore held that the statute creates a mandatory duty for prosecutors to plead and prove strikes, and does not violate the separation of powers doctrine of the state Constitution. (2 AA 514.) It enjoined Special Directive 20-08, prohibiting the District Attorney from enforcing that policy to prevent deputies from pleading prior strikes. (2 AA 525.)

The Court of Appeal affirmed the injunction against Special Directive 20-08. (Opn. 4-5.) It held that section 667(f)(1) imposes a mandatory requirement for prosecutors to plead all qualifying prior convictions in every case. (Opn. 41-42.) The court reasoned that requiring prosecutors to plead prior strikes did not violate the separation of powers doctrine because the prosecutor's "sole discretion over whom to charge, what to charge, what

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punishment to seek from among available alternatives, and how to conduct a trial to prove the charges brought" remains intact. (Opn. 50; see Opn. 44-54.) It acknowledged, however, that the statute could not require prosecutors to *prove* prior strikes—because prosecutors retain exclusive authority to control criminal trials, and a prosecutor cannot in any event control whether strikes are ultimately "proven" to a judge or jury. (Opn. 56-58.) Nonetheless, the court asserted that the statutory requirement to "prove" was obligatory in practice, reasoning that "once a prosecutor alleges a prior strike," ethical duties require the prosecutor to "endeavor to prove it or move to dismiss it." (Opn. 58-59.)

ARGUMENT

I. THE THREE STRIKES LAW CAN AND SHOULD BE CONSTRUED TO PRESERVE PROSECUTORIAL DISCRETION OVER WHETHER TO ALLEGE PRIOR QUALIFYING CONVICTIONS

Both ADDA and Gascón urge the Court to read Penal Code section 667(f)(1) as requiring prosecutors to plead all qualifying prior convictions as strikes in every case, the same interpretation adopted by the courts below. But the proper issue here is not what is "the best reading of the statute." (OBM 26.) Because the mandatory reading favored by the parties would force this Court to confront a novel and serious question under the separation of powers doctrine of the state Constitution, the central issue in this case is whether it is possible to read the statute in a different way that would avoid any need to answer that constitutional question. It is. Construing the contested provision in light of the text, the surrounding statutory framework, the history

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surrounding the enactment, and the longstanding tradition of prosecutorial discretion in this area, it is (at least) possible to read section 667(f)(1) in a non-mandatory way. Under that interpretation, section 667(f)(1) describes the procedural steps required in cases after the prosecutor determines it is appropriate to allege a prior strike—but does not eliminate the prosecutor's prerogative to make that inherently discretionary determination in the first instance. Because that non-mandatory interpretation is a possible one that would avoid the hotly contested constitutional issues in this case, the canon of constitutional avoidance requires its adoption regardless of the plausibility of any alternative interpretations.

A. The canon of constitutional avoidance informs the proper interpretation of section 667(f)(1)

1. The canon of constitutional avoidance is "a 'cardinal principle' of statutory interpretation," invoked by courts "'for so long . . . that it is beyond debate.'" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373.) It applies whenever a possible construction of a statute would "raise serious and doubtful constitutional questions" or make the statute "unconstitutional in whole or in part." (*In re Friend* (2021) 11 Cal.5th 720, 734.) In such circumstances, the canon directs a court to consider whether there is any other "possible reading[]" of the statute that would avoid the constitutional question. (*Id.* at p. 739; see also *Romero*, *supra*, 13 Cal.4th at p. 509, quoting *Crowell v. Benson* (1932) 285 U.S. 22, 62 ["whether a construction of the statute is fairly possible by which the question may be avoided"].) If so, "the court will adopt" that construction—even where, as a textual

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matter, the construction that would present a serious constitutional question "is equally reasonable." (*Friend*, *supra*, 11 Cal.5th at p. 734.)

A court need not "definitively resolve the constitutional debate" in order to apply the avoidance canon. (*Friend*, *supra*, 11 Cal.5th at p. 736.) So long as the court "observe[s] that the constitutional questions" that would arise from one statutory interpretation "are both novel and serious," it should adopt the alternative interpretation that avoids them. (*Ibid.*; see also *Gutierrez*, *supra*, 58 Cal.4th at p. 1373 [canon "applies whenever '[a proposed interpretation] would raise serious constitutional questions on which precedent is not dispositive'"].)

The canon rests on principles of judicial restraint and respect for the legislative branch. It reflects "'a judgment that courts should minimize the occasions on which they confront and perhaps contradict the legislative branch.'" (*Gutierrez*, *supra*, 58 Cal.4th at p. 1373.) Moreover, in construing statutes, courts presume that legislators and voters do not intend "'to violate the Constitution, but to enact a valid statute within the scope of [their] constitutional powers.'" (*Romero*, *supra*, 13 Cal.4th at p. 509.) This Court's practice, accordingly, is to "address and resolve statutory issues prior to, and if possible, instead of, constitutional questions," meaning that it will "not reach constitutional questions unless absolutely required to do so." (*Facebook, Inc. v. Superior Court* (2018) 4 Cal.5th 1245, 1275, fn. 31.)

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This Court has frequently applied the avoidance canon, including in contexts closely related to this case. For example, the Court has read statutes with seemingly mandatory terms as non-mandatory in order to avoid "serious separation of powers concerns." (*Briggs v. Brown* (2017) 3 Cal.5th 808, 849; see *id.* at pp. 849-859 [citing cases]; see *post*, p. 27.) And it has "repeatedly construed penal laws, including laws enacted by initiative," by adopting "the less constitutionally problematic interpretation" where it is "'reasonably possible'" to do so. (*Gutierrez*, *supra*, 58 Cal.4th at pp. 1373-1374; see, e.g., *Friend*, *supra*, 11 Cal.5th at pp. 735-737 [construing initiative barring "successive" habeas petitions to apply only to claims that could have been raised earlier because alternative interpretation would raise "novel and serious" constitutional questions]; *People v. Lopez* (2020) 9 Cal.5th 254, 276 [construing initiative to allow prosecutors to bring certain charges because alternative interpretation would present "constitutional doubts"].)

Most relevant for present purposes, this Court applied the canon of constitutional avoidance in *Romero*, which raised a constitutional challenge to the Three Strikes Law. (*Romero*, *supra*, 13 Cal.4th at pp. 508-509.) In that case, the prosecution argued that section 667, subdivision (f)(2), does not allow a court to dismiss the prosecutor's allegation of a prior strike unless the prosecutor so requests. (*Id.* at p. 507.) This Court reasoned that depriving a trial court of the power to independently dismiss such an allegation would create problems under the separation of powers doctrine. (*Id.* at pp. 508-513.) Accordingly, it adopted a

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"reasonably possible" interpretation of the provision that preserved judicial authority to unilaterally dismiss alleged prior strikes. (*Id.* at p. 513.) The Court also acknowledged the distinct constitutional question presented here: whether requiring the prosecutor to plead and prove all prior strikes under subdivision (f)(1) "may violate separation of powers as between the legislative and the executive branch, since the latter has traditionally retained broad discretion to determine whom, and for what offenses, to prosecute." (*Id.* at p. 515, fn. 7.) Recognizing that it was unnecessary to resolve that question to dispose of the case before it, however, the Court stated that it took "no view on the issue." (*Ibid.*)

2. The mandatory interpretation of section 667(f)(1) advanced by the parties here would force the Court to answer the separation of powers question regarding prosecutorial discretion that it declined to reach in *Romero*. That question is a serious one as to which this Court's precedents are not dispositive. (See *Gutierrez*, *supra*, 58 Cal.4th at p. 1373.)

Article III of the California Constitution provides that "[t]he powers of state government are legislative, executive, and judicial," and "[p]ersons 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.) "Although the language" of that provision "may suggest a sharp demarcation" between the three branches, "in reality" it is permissible for "the actions of one branch [to] significantly affect those of another branch." (*Briggs*, *supra*, 3 Cal.5th at p. 846, internal quotation

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marks omitted.) What the separation of powers doctrine prohibits, however, is one branch "exercising power in a way 'that undermines the authority and independence'" of another. (*United Auburn Indian Community of Auburn Rancheria v. Newsom* (2020) 10 Cal.5th 538, 559, alteration omitted.)

The constitutional question presented by the parties' preferred interpretation of section 667(f)(1) is whether a legislative requirement forcing prosecutors to plead all qualifying strikes permissibly "affect[s]" the prosecutors' actions (e.g., *Briggs*, *supra*, 3 Cal.5th at p. 846), or whether it instead impermissibly "undermines the authority and independence" of the executive branch (e.g., *United Auburn*, *supra*, 10 Cal.5th at p. 559, alteration omitted). No precedent of this Court directly answers that question. To be sure, this Court has described the related spheres of legislative and executive authority in general terms. On the one hand, it has recognized as legitimate many legislative actions that may substantially affect the work of prosecutors. Most obviously, "the power to define crimes and fix penalties is vested exclusively in the legislative branch." (*Romero*, *supra*, 13 Cal.4th at p. 516, internal quotation marks omitted.) The Legislature frequently controls the forum or classification of certain criminal cases, such as by "requir[ing] that particular charges against certain minors always be initiated in criminal court" or "preclud[ing] juvenile dispositions for certain minors

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convicted of specified offenses." (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 554.)[6]

On the other hand, the Court has recognized that "the initiation of criminal proceedings is a core, inherent function of the executive branch." (*Steen v. Appellate Division of Superior Court* (2014) 59 Cal.4th 1045, 1053.) A prosecutor "'ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek.'" (*Id.* at pp. 1053-1054.) That exclusive power encompasses the "authority to frame the accusatory pleading at the outset," including the charged offenses, sentencing allegations, and additional or underlying factual allegations. (*People v. Birks* (1998) 19 Cal.4th 108, 129, 135; see, e.g., *Manduley*, *supra*, 27 Cal.4th at p. 553 [legislative provision allowing prosecutors to make pre-filing decisions that "affect[] the dispositional options available to the court" was in keeping with "the traditional power of the prosecutor to charge crimes"]; *Birks*, *supra*, 19 Cal.4th at p. 135 [judicial rule allowing a defendant to "demand" the addition of "new charges without the prosecution's consent" raised serious separation of powers concerns]; cf. *Dix v. Superior Court* (1991) 53 Cal.3d 442, 452 [recognizing that "[e]xclusive prosecutorial discretion" after proceedings are initiated "extend[s] to the conduct of a criminal action once commenced" (italics omitted)].)

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[6] This Court has held "that the power of the people through the statutory initiative is coextensive with the power of the Legislature." (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 675.)

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But no decision of this Court squarely addresses the constitutional limits of legislative authority to constrain prosecutors' charging-related discretion. One reason for that dearth of precedent is that the Court has invoked the canon of constitutional avoidance to avoid addressing the extent to which the Legislature may restrict prosecutorial authority in this area. In *Steen v. Appellate Division*, for example, the Court interpreted a statute that purported to allow court clerks to initiate certain criminal complaints. (*Supra*, 59 Cal.4th at p. 1051, citing § 959.1, subd. (c).) The Court observed that "the statute would be difficult or impossible to reconcile with the separation of powers" if "the Legislature had intended to validate criminal complaints issued by the clerk without the approval of the executive branch prosecutor." (*Id.* at p. 1054.) Rather than confronting that constitutional problem, the Court construed the statute to require "the prosecutor's approval" before a clerk may issue a "valid complaint[]." (*Ibid.*)

More recently, in *People v. Lopez*, the Court considered Proposition 47, which was designed to require misdemeanor convictions instead of felony convictions for certain nonviolent crimes. (*Supra*, 9 Cal.5th at p. 265.) One part of the Court's opinion held that the voters permissibly limited charging discretion by prohibiting prosecutors from charging shoplifting and theft in the alternative for the same act. (*Id.* at pp. 267-269.) In a separate part of the opinion, however, the Court applied the avoidance canon to hold that Proposition 47 does not "require a prosecutor to charge shoplifting instead of burglary or theft when

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the evidence would support a theory that defendant committed burglary or theft but *not* shoplifting." (*Id.* at p. 275.) The Court noted that a "contrary rule—one that would require a prosecutor to charge shoplifting instead of burglary or theft in these situations—raises ethical concerns and constitutional doubts" by "intru[ding] upon a prosecutor's authority and responsibility to make appropriate charging determinations." (*Id.* at p. 276.)

These precedents reflect that there is undoubtedly a sphere of exclusive prosecutorial authority into which the legislative branch may not intrude. But they do not resolve the question here: whether the separation of powers doctrine would tolerate a statute requiring prosecutors to plead certain facts that trigger a mandatory sentence enhancement. As the Court of Appeal acknowledged, "the act of alleging a prior strike could be viewed as part of a prosecutor's unreviewable pre-charging discretion," especially "because a prosecutor may and often does determine whether a prior strike exists before filing a charging document." (Opn. 53-54.) Under that view, the pre-charging decision whether to allege prior strikes would be "merely incidental to the exercise" of the prosecutor's "exclusive executive function" to make charging decisions (*Manduley*, *supra*, 27 Cal.4th at pp. 553, 556), and a mandatory reading of section 667(f)(1) would undermine that exclusive executive role. Alternatively, as ADDA contends here, a prosecutor's decision about whether to allege strikes might be characterized as "determining an individual's eligibility for a particular sentencing alternative"—a "power [that]

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properly may be exercised by the prosecutor or the Legislature." (*Id.* at p. 558, italics omitted; see ABM 30-34.)

Whatever the merits of the constitutional arguments on either side of this separation of powers question, the question is at least a "serious" one. (E.g., *Friend*, *supra*, 11 Cal.5th at p. 736.) Indeed, that seriousness is underscored by this Court's prior reservation of the question (see *Romero*, *supra*, 13 Cal.4th at p. 515, fn. 7) and by the extensive arguments and analysis by the parties and the courts below in this case (see Opn. 41-59; 2 AA 505-514 [superior court opinion]; OBM 27-31, 39-56; ABM 30-47.) This Court's precedents require it to refrain from answering that question if there is a possible alternative interpretation that would allow the Court to avoid it.

B. It is possible to interpret section 667(f)(1) to preserve prosecutorial discretion and avoid the constitutional question

Ordinary principles of statutory construction guide the inquiry into whether it is possible to interpret section 667(f)(1) in a manner that preserves prosecutorial discretion over whether to plead prior qualifying strikes. The Court looks "first to the language of the statute, giving the words their ordinary meaning" and considering "the context of the statute as a whole, as well as the overall statutory scheme." (*Lopez*, *supra*, 9 Cal.5th at p. 267, internal quotation marks omitted.) The Court also examines whether a proposed interpretation "is consistent with the statute's legislative history." (*Steen*, *supra*, 59 Cal.4th at p. 1052.) In appropriate cases, the Court may consider other interpretive tools, such as the rule of lenity and the principle that a statute

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should be construed with a view toward the practical consequences of competing interpretations. (See *Romero*, *supra*, 13 Cal.4th at p. 530; *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 305.) Here, every step of the interpretive inquiry confirms that it is reasonably possible to read the operative provision of the Three Strikes Law as a non-mandatory statement that describes or guides prosecutorial conduct, but does not override prosecutorial discretion.

1. Text

The Three Strikes Law states that "[t]he prosecuting attorney shall plead and prove each prior serious or violent felony conviction except as provided in paragraph (2)." (§ 667(f)(1).) In holding that this language "impose[s] a duty" for prosecutors "to plead and prove prior serious and [violent] felony convictions" in every case, the Court of Appeal focused on the "mandatory" nature of the term "'shall.'" (Opn. 37.) It asserted that "nothing in the plain language of the statute suggests a prosecutor has any discretion not to plead or prove known strikes," noting that the "Legislature could have allowed for prosecutorial discretion by, for example, including language permitting a prosecutor to plead and prove prior strikes "'when warranted'" or "'if deemed appropriate,'" or "by using the permissive 'may' instead of the mandatory 'shall.'" (Opn. 37.)

But that ignores this Court's repeated guidance that "there are unquestionably instances in which" the term "shall" is "permissive" and "not intended to foreclose a governmental entity's or officer's exercise of discretion." (*Morris v. County of*

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Marin (1977) 18 Cal.3d 901, 910, fn. 6.) Indeed, "for over 80 years, California courts have held that statutes may not be given mandatory effect, despite mandatory phrasing," in situations where a mandatory interpretation "would create constitutional problems." (*Briggs, supra*, 3 Cal.5th at p. 854.)

In *Briggs*, for example, the Court considered a voter initiative providing that state courts "shall complete" initial habeas review within five years. (*Supra*, 3 Cal.5th at p. 823, quoting § 190.6, subd. (d).) The Court acknowledged that "[t]he statute is framed in mandatory terms" (*id.* at p. 854), but it nonetheless construed the text as "directive" but "not mandatory," meaning "[n]o jurisdictional consequence" attached to its non-enforcement (*id.* at pp. 858, 859; see *id.* at p. 859 ["the term 'shall' is not mandatory" but "is properly construed as an exhortation to the parties and the courts to handle cases . . . expeditiously"].) The Court recognized that a mandatory reading of "shall" would have undermined a court's "inherent authority and responsibility to fairly and efficiently administer all of the judicial proceedings that are pending before it." (*Id.* at p. 849.)

In *Wilson v. Sharp* (1954) 42 Cal.2d 675, the Court addressed a statute providing that "the district attorney shall institute suit in the name of the county to recover" money paid by a board of supervisors "without authority of law." (*Id.* at p. 678, quoting Gov. Code, § 26525.) Notwithstanding the presence of the term "shall," the Court construed that language to preserve the prosecutor's "discretion" to determine "whether action is justified under all the facts" (*id.* at p. 679), emphasizing that such

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a determination "necessarily requires the exercise of discretion" (*id.* at p. 678).[7]

As discussed in the next section, the context surrounding section 667(f)(1) establishes that a prosecutor's decision about whether to plead and prove a prior strike similarly requires the exercise of discretion and "involv[es] the determination of questions of law and fact." (*Wilson*, *supra*, 42 Cal.2d at p. 678; see *post*, pp. 30-33.) But even viewing the second sentence of subdivision (f)(1) in isolation, the text of the "shall plead and prove" clause provides support for a non-mandatory reading of the word "shall." As the Court of Appeal acknowledged, the decision about whether (and how) to *prove* a prior strike indisputably lies within a prosecutor's discretion: "the Legislature cannot require a prosecutor to prove anything in the abstract or, for that matter, anything at all." (Opn. 56; see Opn. 56-57 [any "duty to prove" would be "aspirational" because "the prosecutor cannot control the verdict"].) It would thus make little sense to construe the statement that "[t]he prosecuting attorney shall . . . prove each prior" strike (§ 667(f)(1)) as imposing a mandatory requirement on the prosecutor. And a non-mandatory meaning of the word "shall" with respect to *proving* strikes is powerful evidence that the same word should

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[7] See also *Fox v. County of Fresno* (1985) 170 Cal.App.3d 1238, 1242 (collecting additional cases and observing that, "[i]n the area of law enforcement, statutes containing 'shall' language are sometimes interpreted as directory or permissive because discretion is inherent in the activity concerned").

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also have a non-mandatory meaning with respect to *pleading* strikes. (See, e.g., *Reno v. Bossier Parish School Bd.* (2000) 528 U.S. 320, 329 [rejecting "a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying"].)

Under that non-mandatory reading, the "shall plead and prove" sentence describes the operation of the statutory scheme in cases in which a prosecutor has decided to plead and endeavor to prove a qualifying strike—following a "discretion[ary]" determination that the "action is justified under all the facts" (*Wilson*, *supra*, 42 Cal.2d at p. 679). As the superior court recognized, that is a "reasonabl[e]" interpretation (2 AA 506), under which subdivision (f)(1) sets a "condition to enhanced sentencing": "a criminal defendant may not be sentenced under the Three Strikes Law unless the necessary allegations have been pled and proved." (2 AA 507.) That reading advances the defendant's due process rights to have fair notice of the basis for his sentence and to have factual allegations supporting any enhancement proven beyond a reasonable doubt. (See *People v. Mancebo* (2002) 27 Cal.4th 735, 746; see 2 AA 507 [subdivision (f)(1) "refers to the prosecutor's due process duty to give notice to the criminal defendant that a prior conviction is alleged as an enhancement, and then to prove that allegation beyond a reasonable doubt"].) The statute's terms may encourage prosecutors to plead and seek to prove strikes in appropriate cases, but they do not require prosecutors to do so in every case. (Cf. *Briggs*, *supra*, 3 Cal.5th at p. 860 [timing provisions in

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Proposition 66 "may serve as benchmarks to guide courts," subject to courts' consideration of "a variety of factors"].)

2. Context and structure

Consideration of "the context of the statute as a whole, as well as the overall statutory scheme" (*Lopez*, *supra*, 9 Cal.5th at p. 267) underscores why it is possible to adopt a non-mandatory reading of the "shall plead and prove" language. In particular, the statutory context shows that the decision whether to plead a prior strike under the Three Strikes Law inherently involves prosecutorial discretion.

a. Before alleging a prior strike, a prosecutor must evaluate whether that strike can be proven beyond a reasonable doubt. (*People v. Haney* (1994) 26 Cal.App.4th 472, 475; see also *People v. Woodell* (1998) 17 Cal.4th 448, 461.) That decision involves several subsidiary judgment calls. To begin with, a prosecutor must decide whether a given conviction qualifies as a "prior serious or violent felony conviction" as defined by the statute. (§ 667(f)(1).) The statute enumerates various crimes and categories of crimes that qualify as strikes. (§ 667, subd. (d)(1) [cross-referencing statutory provisions defining "violent felony" and "serious felony"]; see, e.g., § 667.5, subd. (c) [defining "violent felony" by listing crimes and statutory violations].) In some cases, it may be clear from the crime of conviction that the defendant committed an enumerated crime or violated a specified statutory provision. In other circumstances, however, a prosecutor may need to analyze not only the "elements of the prior conviction" but also "the entire record" to decide whether the underlying

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conviction satisfies the statutory definitions of "violent felony" or "serious felony." (*People v. Leng* (1999) 71 Cal.App.4th 1, 8, 9.)[8] That inquiry may be particularly complex when it involves a "prior conviction in another jurisdiction," which qualifies as a strike only if it is "for an offense that, if committed in California, is punishable by imprisonment in the state prison" and "that includes all of the elements of a particular violent felony" or "serious felony" as defined in the California Penal Code. (§ 667, subd. (d)(2).)[9]

To determine whether a prior strike can be proven, the prosecutor must also assess whether the available evidence

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[8] See, e.g., *People v. Learnard* (2016) 4 Cal.App.5th 1117, 1120-1123 (aggravated assault conviction was not a strike under section 667, subdivision (d)(1), because prosecution did not establish that conviction involved use of deadly weapon); *Leng*, *supra*, 71 Cal.App.4th at pp. 8-10 (assault plea was not a strike under section 667, subdivision (d)(3), because prosecution did not establish that defendant personally used a deadly weapon or personally inflicted great bodily injury); *People v. Williams* (1996) 50 Cal.App.4th 1405, 1412-1414 (conviction for assault on a police officer was not a strike under section 667, subdivision (d)(1), because prosecution did not establish that defendant personally used a deadly weapon).

[9] See, e.g., *People v. Navarette* (2016) 4 Cal.App.5th 829, 845-846 (parsing record of Mexican criminal proceedings to determine whether Mexican murder conviction qualified as prior strike, given that elements of Mexican offense were "broader than the elements of murder under California law"); *People v. Saez* (2015) 237 Cal.App.4th 1177, 1193-1196, 1206-1207 (examining record of Wisconsin conviction because Wisconsin crime of false imprisonment did not include four elements necessary to California definition of serious felony).

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regarding the prior conviction would be adequate to support the strike if alleged. (See *Haney*, *supra*, 26 Cal.App.4th at pp. 475-476.) The elements the prosecutor must prove to the jury include whether "the defendant was convicted," whether "the conviction was of an offense within the definition of the particular statute invoked, and any other element required by the statute alleged (e.g., proof defendant served a term in state prison if that is an element of the enhancement)." (*Id.* at p. 475.) A prosecutor must exercise professional judgment to decide whether evidence supporting those elements will be available at trial and admissible under statutory and constitutional standards.[10]

These aspects of the Three Strikes Law illustrate why a prosecutor's determination whether to "plead" a strike "necessarily involves [an] exercise of discretion," following careful evaluation of the facts and circumstances of a particular case. (*Wilson*, *supra*, 42 Cal.2d at p. 679.) It seems unlikely that the Legislature (or the voters) would have created a framework entailing a discretionary prosecutorial undertaking, while at the same time imposing a mandatory obligation for "district

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[10] See, e.g., *Saez*, *supra*, 237 Cal.App.4th at pp. 1207-1208 (trial court's reliance on police officer statements to establish prior strike violated Sixth Amendment); *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1119-1128 (trial court's reliance on hearsay evidence and evidence outside of "record of conviction" was improper); cf. *Leng*, *supra*, 71 Cal.App.4th at p. 9 (noting that the trial "court declined to admit that portion of the documents on which [the prosecutor] presently relies in asserting the underlying adjudication was a serious felony").

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attorneys . . . to plead and prove qualifying prior convictions in every case." (E.g., ABM 54.)

b. It is also possible to harmonize the provisions immediately surrounding the "shall plead and prove" clause with the non-mandatory reading of that clause. The superior court took a different view, concluding that the first sentence in subdivision (f)(1) and the terms of subdivision (f)(2) both establish that "strike priors must be applied in every" case. (2 AA 507; see also Opn. 33-34.) But that is not correct.

The first sentence of subdivision (f)(1) states that, "[n]otwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has one or more prior serious or violent felony convictions as defined in subdivision (d)." (§ 667(f)(1).) As this Court explained in *Romero*, a natural reading of that sentence is that it "eliminates potential conflicts between alternative sentencing schemes," foreclosing any contention that any other statute creates an exception to the substantive provisions of section 667. (*Romero*, 13 Cal.4th at p. 524.) In other words, the enhancement created by the Three Strikes Law is available in every eligible case—subject to a prosecutor's discretionary decision to charge that case and to allege a qualifying prior conviction. (See generally *ibid.* ["The Three Strikes Law, when applicable, takes the place of whatever law would otherwise determine defendant's sentence for the current offense."].)

Subdivision (f)(2) addresses cases in which a prosecutor has already alleged a prior qualifying felony conviction. It states that

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> [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. 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. This section shall not be read to alter a court's authority under Section 1385.

(§ 667, subd. (f)(2).) Subdivision (f)(2) thus applies to cases in which the prosecution initially elected to allege a strike, but subsequently determines that the interests of justice or a lack of evidence warrant dismissing that allegation. As construed by this Court in *Romero*, moreover, subdivision (f)(2) also allows a court to "act[] on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes Law." (*Romero*, *supra*, 13 Cal.4th at pp. 529-530.) Both of those safety valves are consistent with the general principle that the judiciary assumes some authority over pending charges—once the prosecutor has made the decision to submit them to a court. (See, e.g., *id.* at p. 517 ["When the jurisdiction of a court has been properly invoked by the filing of a criminal charge, the disposition of that charge becomes a judicial responsibility."].)

That understanding of subdivision (f)(2) is also consistent with the final words of subdivision (f)(1), which state that prosecuting attorneys "shall plead and prove each prior serious or violent felony conviction *except as provided in paragraph (2).*" (§ 667(f)(1), italics added.) If a prior qualifying conviction has been alleged and the court subsequently "dismiss[es] or strike[s]" the allegation (§ 667, subd. (f)(2)), whether on the prosecutor's

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motion or its own, then there is no longer any need for the prosecutor to put on evidence in an effort to prove that allegation.

3. Legislative history

The history of the voter initiative and the legislative enactment at issue provides further support for a non-mandatory reading of section 667(f)(1). As this Court explained in *Romero*, the primary object of the Three Strikes Law was to "restrict *courts'* discretion"—not prosecutorial discretion. (*Romero*, *supra*, 13 Cal.4th at p. 528, italics added.) Proponents of the initiative targeted "soft-on-crime judges, politicians, defense lawyers and probation officers" who "spend all of their time looking for loopholes to get [criminals] out on probation, early parole, or off the hook altogether." (Ballot Pamp., Gen. Elec. (Nov. 8, 1994), rebuttal to argument against Prop. 184, p. 37; see *Romero*, *supra*, 13 Cal.4th at p. 528 [using that ballot argument as evidence of intent of electorate and Legislature].) But that argument did not describe a need to constrain the discretionary choices of the attorneys who initiate and prosecute criminal cases. And given the focus of the voters and the Legislature on restricting the authority of courts, it would be passing strange for the statute to eliminate prosecutors' discretion to allege qualifying prior convictions (under subdivision (f)(1)) and allow them to dismiss strikes only if they obtain the permission of the court (under subdivision (f)(2)).

The committee report invoked by the Court of Appeal and the parties (Opn. 40; OBM 39; ABM 50) is perhaps the strongest historical support for a mandatory reading of subdivision (f)(1).

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But even that report can be viewed as evidence weighing against a mandatory interpretation. The authors of the report described their understanding of several features of the legislation, including their view that "this bill requires the prosecutor to plead and prove all prior convictions" and "[n]o other law has such a firm ban on prosecutorial discretion." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 971 (1993-1994 Reg. Sess.) as amended Jan. 26, 1994, p. 8; see *id.* at pp. 7-8.) In the next sentence, the authors observed that—based on that consideration and other features of the law—the statute "appears to be constitutionally infirm" because it leaves "no option for a lesser sentence in the interest of justice." (*Id.* at p. 8.) A non-mandatory reading of the "shall plead and prove" clause would have addressed that perceived infirmity, and this Court typically "presum[es] that the Legislature intended . . . to enact a valid statute within the scope of its constitutional powers." (*Friend*, *supra*, 11 Cal.5th at p. 734.) The Legislature's decision to enact the statute as written, despite the warning of potential unconstitutionality from committee staff, plausibly suggests that the Legislature did *not* agree that the bill constrained prosecutors as described. (See generally *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 508 [legislative committee reports "are certainly not conclusive" "in determining legislative intent"].)[11]

[11] Gascón also notes that other versions of the Three Strikes Law considered in the 1993-1994 legislative session did not include the "shall plead and prove" clause. (See OBM 38.)

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4. Other interpretive considerations

Other interpretive principles also lend support to the non-mandatory reading of section 667(f)(1). In deciding how to interpret a statute, this Court has considered "the practical consequences that would flow from a contrary construction." (*Lungren*, *supra*, 14 Cal.4th at p. 306.) In the criminal and sentencing context, moreover, the Court has considered principles of lenity (see, e.g., *People v. Lopez* (2022) 12 Cal.5th 957, 964-965; *Romero*, *supra*, 13 Cal.4th at p. 530), which are rooted in "'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should'" (*United States v. Bass* (1971) 404 U.S. 336, 347-348, quoting Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Benchmarks (1967) p. 209).

Here, the reality on the ground is that district attorneys in various counties—who are directly accountable to the voters—have long understood the Three Strikes Law to preserve their discretion to decide whether to allege qualifying prior convictions. (See 2 AA 338, 342; *ante*, pp. 12-13.) They have made individualized decisions and set policies that they view as most

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(…continued)

But "[u]npassed bills, as evidences of legislative intent, have little value." (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 746.) And the presence of the "shall plead and prove" clause in the enacted bill but not the unpassed bills could plausibly be viewed as highlighting the necessary procedural steps for an increased sentence, not tying prosecutors' hands. (See *ante*, p. 29.)

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sensible and appropriate for their jurisdictions.[12] In cases where district attorneys have decided not to allege prior qualifying convictions, that decision has materially shortened the length of the defendant's sentence—by years if not decades. A mandatory interpretation of subdivision (f)(1) would upend that longstanding practice; require district attorneys to allege qualifying prior convictions in every case; burden the courts with motions practice under subdivision (f)(2) as district attorneys seek to dismiss or strike sentencing allegations that in their view should not have been alleged in the first place; and result in some defendants receiving substantially longer sentences than they would under the non-mandatory interpretation.

* * *

Despite acknowledging the canon of constitutional avoidance (Opn. 29-30; 2 AA 506), the courts below did not heed it. They adopted a mandatory reading of subdivision (f)(1) based on considerations that (at best) establish only that such a reading is possible. (See Opn. 31-41; 2 AA 506-514.) In light of the serious separation of powers issue that a mandatory reading would create, however, the question the courts and the parties should have focused on is whether there is any *other* "possible reading[]"

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[12] See Legis. Analyst, Primer on Three Strikes, *supra* ("the manner in which the law is implemented at the local level by prosecutors" has long "varie[d] across counties"); Cal. Policy Lab, Three Strikes in California, *supra*, at p. 10 (describing variations in rates of individuals incarcerated with strike enhancements based in part on "policies set by the elected prosecutor and the specific deputy district attorney prosecuting the case").

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of the statute that would have avoided that constitutional question. (*Friend*, *supra*, 11 Cal.5th at p. 739.) And here all the tools for discerning statutory meaning indicate that the non-mandatory reading of subdivision (f)(1) is at least a possible interpretation—and likely a better and more sensible one.

C. ADDA's contention that section 667(f)(1) can only be read to require prosecutors to plead and prove prior strikes in all cases is not persuasive

None of the remaining arguments raised by ADDA undermines the conclusion that it is possible to read subdivision (f)(1) in a non-mandatory way. As to the text, ADDA acknowledges that the statement in subdivision (f)(1) that prosecutors "shall . . . prov[e]" prior strikes (§ 667(f)(1)) "obviously" is not a strict command "because the prosecutor may be unable to carry th[e] burden" of proving strikes (ABM 45). Instead of viewing this as evidence that "shall" is non-mandatory, however, ADDA asserts that "prove" must mean "*attempt* to prove." (ABM 45.) ADDA cites no dictionary definition or other authority supporting that unusual reading of "prove"—let alone requiring it.

ADDA also contends that the use of "shall" in other subdivisions of section 667 to convey mandatory obligations or commands requires the word to have the same meaning when it appears in subdivision (f)(1). (ABM 49; see OBM 35.) It is true, of course, that courts "generally presume[] that when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in another part of the same statute." (*People v. Blackburn* (2015) 61 Cal.4th 1113, 1125,

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quoting *People v. Dillon* (1983) 34 Cal.3d 441, 468.) But as this Court's precedents demonstrate, that general presumption can be trumped by the more specific rule governing the interpretation of "shall"—which recognizes that the word can be either "obligatory" or "permissive" depending on the particular context. (See *Morris*, *supra*, 18 Cal.3d at p. 910, fn.6.)

In *Briggs*, for example, the Court assumed that some provisions in Proposition 66 containing the word "shall" had a mandatory meaning. (See *Briggs*, *supra*, 3 Cal.5th at pp. 823, 849 & fn.25, citing § 190.6, subd. (d) [Judicial Council "shall adopt" rules within 18 months]; *id.* at pp. 824, 855, citing § 190.6, subd. (b) [opening brief in a capital appeal "shall be filed" within seven months].) Nonetheless, the Court held that a different provision stating that courts "shall complete" habeas review within five years could be read as non-mandatory, in light of the immediately surrounding context and separation of powers concerns. (*Id.* at pp. 858-859.) Here, as the parties recognize, there are other uses of the word "shall" in the Three Strikes Law that are best read as mandatory. (See, e.g., § 667, subd. (d) ["a prior conviction of a serious or violent felony shall be defined as . . ."]; § 667, subd. (e)(1) [a sentence for a defendant with one prior strike "shall be twice the term otherwise provided"].) But just as in *Briggs*, it remains possible to read the word as having a non-mandatory meaning in subdivision (f)(1), especially given all

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of the other textual and contextual cues indicating that a non-mandatory reading is possible. (See *ante*, pp. 26-38.)[13]

ADDA seeks to distinguish cases that construed "shall" as non-mandatory, arguing that those cases are irrelevant here because they "purported to require prosecutors to initiate particular criminal proceedings." (ABM 51-52.) That argument misses the point. The Court has construed "shall" as non-mandatory where doing so will avoid serious constitutional concerns or respect the inherent discretion of a governmental actor. (See, e.g., *Briggs*, *supra*, 3 Cal.5th at pp. 849-859 [citing cases]; *Wilson*, *supra*, 42 Cal.2d at pp. 678-679; see *ante*, pp. 26-28.) While some of the cited cases focused on statutes addressing initiation of criminal proceedings by prosecutors, others did not (see, e.g., *Briggs*, *supra*, 3 Cal.5th at p. 859 [collecting cases]). All of that authority reflects a more general principle that is not limited to statutes involving the initiation of a prosecution: it is possible for the word "shall" to carry a permissive meaning, and the proper interpretation depends on the particular context.

ADDA also contends that this Court in *Romero* already resolved the interpretation of subdivision (f)(1) here. (ABM 55; see also 2 AA 507.) That overreads *Romero*, which principally addressed the construction of a different provision, subdivision

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[13] The parties also emphasize that some provisions in the Three Strikes Law use "'may'" to describe permissive activities. (ABM 49; OBM 35-36.) But the same is true of Proposition 66. (See, e.g., *Briggs*, *supra*, 3 Cal.5th at pp. 824-825, quoting §§ 190.6, subd. (e), 1509, subd. (g).)

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(f)(2). The dicta invoked by ADDA commented on the "purport[ed]" meaning of the "shall plead and prove" clause in subdivision (f)(1). (*Romero*, *supra*, 13 Cal.4th at p. 523.) But when *Romero* spoke directly to the meaning of subdivision (f)(1), it was to reserve the issue of the provision's constitutionality for a later day. (See *id.* at p. 515, fn. 7.) The Court did not adopt a definitive interpretation of subdivision (f)(1)—or consider the provision's meaning through the lens of the avoidance canon, as its precedents require it to do *before* adopting a definitive interpretation.

The Court of Appeal decisions invoked by ADDA as "recogniz[ing] that § 667(f) imposes a mandatory and non-discretionary duty on prosecutors" (ABM 55) are not binding on this Court and are unpersuasive. In *People v. Kilborn* (1996) 41 Cal.App.4th 1325, for example, the court asserted without analysis or explanation that subdivision (f)(1) "requires the prosecutor to plead and prove all prior serious and violent felony convictions." (*Id.* at p. 1332.) Similarly, each of the other Court of Appeal cases cited by ADDA merely assumed, with limited or no discussion, that subdivision (f)(1) is mandatory.[14]

Finally, ADDA argues that a mandatory interpretation of subdivision (f)(1) is essential to fulfill the statutory purpose: to

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[14] See ABM 55; *People v. Laanui* (2021) 59 Cal.App.5th 803, 815, 818; *People v. Vera* (2004) 122 Cal.App.4th 970, 982; *People v. Roman* (2001) 92 Cal.App.4th 141, 145; *People v. Andrews* (1998) 65 Cal.App.4th 1098, 1102; *Miranda v. Superior Court* (1995) 38 Cal.App.4th 902, 906; see also Opn. 49-50, fn. 15.

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"ensure longer prison sentences and greater punishment" for recidivist offenders. (§ 667, subd. (b); ABM 49-50.) But "no legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." (*Friend*, *supra*, 11 Cal.5th at p. 740, quoting *Rodriguez v. United States* (1987) 480 U.S. 522, 525-526.) Under any reading of the Three Strikes Law, the statute's purpose is limited by structural constraints such as the prosecutor's decision whether to charge the case, the trial court's discretion to dismiss prior strike allegations, and the ultimate adjudication of guilt or acceptance of an eligible plea. A non-mandatory reading of subdivision (f)(1) would recognize an additional constraint—a prosecutor's discretion to determine whether it is appropriate to plead a prior strike. Where prosecutors exercise that discretion to plead a prior qualifying strike, and then successfully prove that strike beyond a reasonable doubt, the statute will result in increased punishments for recidivist offenders. That may not be the only available interpretation of subdivision (f)(1), but it is at least a possible one. And because it avoids the serious constitutional questions that the parties' mandatory interpretation would present, it should control the meaning of the statute.

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CONCLUSION

The judgment of the Court of Appeal should be reversed.

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CERTIFICATE OF COMPLIANCE

I certify that the attached Amicus Brief of the Attorney General of California uses a 13 point Century Schoolbook font and contains 9,023 words.

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