Case No. S275478

IN THE SUPREME COURT OF CALIFORNIA

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

v.

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

After Partial Affirmance Of A Grant Of A Motion for Preliminary Injunction By The Court Of Appeal, Second Appellate District, Division Seven,
Case No. B310845

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

APPLICATION TO FILE BRIEF OF AMICI CURIAE LAW PROFESSORS PAUL G. CASSELL, MARGARET GARVIN, AND JOHN C. YOO

and

[PROPOSED] BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS

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APPLICATION TO FILE BRIEF OF AMICI CURIAE

Pursuant to California Rules of Court, Rule 8.520(f), Amici Curiae, Law Professors Paul G. Cassell, Margaret Garvin, and John C. Yoo ("Amici"), respectfully request leave to file the accompanying [Proposed] Brief of Amici Curiae in support of Respondent Association of Deputy District Attorneys for Los Angeles County.

Amici are law professors who research and teach victims' rights, criminal law and procedure, and constitutional law. They have an interest in the maintenance of the separation of powers—specifically the maintenance of the Legislature's power to prescribe crimes and punishments. Moreover, Amici, as victims' rights scholars and advocates, have an interest in ensuring that prosecutors properly consider victims' rights—as required by the California Constitution.

Amici believe that their brief will more fully explain the contours of the Legislative and prosecutorial powers in California's government. Amici demonstrate that the Legislature validly exercises its power in passing sentencing laws. Amici also show that the separation of powers of California's government—as enshrined in the Constitution and as explained by this Court's case law—requires prosecutors to abide by the Legislature's mandatory sentences. Amici also explain how Marsy's Law—codified in California Constitution, Article I, § 28—further limits a prosecutor's discretion.

No party or counsel for any party authored the proposed amicus brief, nor did any outside entity fund its preparation by Amici.

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INTRODUCTION

The California Constitution grants the state Legislature plenary legislative power, including the sole power to codify crimes and their punishments.[1] The executive is bound to follow and carry out those commands. Petitioner Los Angeles District Attorney George Gascón concedes as much, yet he refuses to comply with the Three Strikes Law. He claims that the separation of powers grants him the license to defy admittedly valid legislation and substitute his own policy preferences. That proposal inverts separation of powers principles. It would allow a local elected official to seize the Legislature's policy-making power. In this case, would defeat the Legislature's authority to enact criminal law and transfer to prosecutors the power to rewrite criminal law.

District Attorney Gascón believes that the Three Strikes Law (Pen. Code, § 667, subd. (b)-(i)) mandates unfair sentences. That is his right. But his disagreement with the policy of a statute does not allow him, as an executive officer, to refuse to execute its terms.[2] Gascón may choose not to bring the charges that trigger the Three Strikes Law, or he

[1] For purposes of the argument, power of the "Legislature" includes the power of the people to legislate through the initiative process, since the powers are "coextensive." (See *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 552.)

[2] Gascón has not argued that the Three Strikes Law is unconstitutional beyond his separation of powers claim.

may choose to bring misdemeanors rather than felonies. But if he pleads and proves felony charges against defendants who fall under the Three Strikes Law, he must also seek the punishments required by statute. The process set out by the California Constitution for Gascón to pursue his policy disagreement with the Legislature is by persuading its members to amend the law, not to refuse to execute the law unilaterally.

The issue in this case is not only the limits on the policy positions of a single district attorney. The principle at stake is the separation of power, one of the most important frameworks in the California Constitution and the American Constitution. The separation of powers was Montesquieu's ingenious solution to a problem that plagued civilizations for millennia before him: create a government that is effective enough to protect individual rights, but not so effective that the same government can violate individual rights without consequence. A government vested with no power can do no good. But a government vested with broad powers can affect great damage if those powers go unchecked.

Thus, the Founders of our Nation provided for a "necessary partition of power among the several departments." (James Madison, *Federalist No. 51* in The Federalist (Carey and McClellan, ed., 1990) p. 267). By dividing government functions, the Framers correctly believed, power would check power and thus reduce unconstitutional violations of

the people's rights and liberties. Fundamental to the separation of powers was the division of the executive and legislative powers. As Montesquieu declared: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty." (1 Montesquieu, Complete Works: Spirit of the Laws (1777) p. 199). The California Constitution explicitly adopts this vision of the separation of powers. Article III, Section 3 declares: "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.)

To vindicate this core principle of the California Constitution, this Court must uphold the decision of the Court of Appeal below and restrain District Attorney Gascón within the proper limits of his constitutionally mandated role: to enforce, not make, the laws.

INTERESTS OF AMICI

Amici are law professors who research and teach in the area of victims' rights, criminal law and procedure, and constitutional law. They are interested in the maintenance of the separation of powers. Specifically, they are interested in ensuring that prosecutors follow the Legislature's prescribed criminal sentences. Amici believe that otherwise, prosecutors will have usurped the power of the Legislature—and the people—to define crimes and punishments. As victims' rights scholars and advocates, Amici are also interested in ensuring that prosecutors honor victims' rights—as required by California's Constitution.

ARGUMENT

I. Prescribing criminal punishments is a core constitutional function assigned to the Legislature.

The California Constitution grants the Legislature power over the definition of crimes and punishments for three reasons. First, the Legislature has the sole power to legislate. Second, prescribing criminal punishments is a legislative function. Third, the criminal punishments duly promulgated by the Legislature bind the Executive. The first two of these principles are uncontroversial and uncontested. (See Cal. Const. art. IV, § 1 ["The legislative power of this State is vested in the California Legislature"]; Gascón Br. at p. 27, quoting *People v. Bunn*

(2002) 27 Cal.4th 1, 14) ["[T]hose charged with the exercise of one power may not exercise any other."]; *id.* at p. 28, quoting *People v. Lamoureux* (2019) 42 Cal.App.5th 241, 252) ["Encompassed within the Legislature's core function of passing laws is the responsibility of defining crimes and prescribing punishments."].)

But Petitioner George Gascón, District Attorney for the County of Los Angeles, refuses to abide by the third principle. He argues that the separation of powers grants him a license to defy, and to order his deputies to defy, valid legislation in service of his own policy views. That theory is both unfounded and dangerous. His position renders the legislative power illusory, contravenes the rule of law, and disproportionately aggrandizes the power of executive officers over the Legislature. Gascón's theory should be rejected, and this Court should affirm the decision of the Court of Appeal.

Although the powers of each branch are not "entirely immune from regulation or oversight by another branch," each branch retains "core constitutional functions" over which it may exercise plenary control. (*Bunn*, *supra*, 27 Cal.4th at p. 16.) "The power to define crimes and *fix penalties* is vested exclusively in the legislative branch." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 516, citations omitted and emphasis added.) Prescribing punishments is a "core constitutional function[]" of the Legislature. (See *Bunn*, *supra*, 27

Cal.4th at p.16.) Other branches must "effectuate the purpose of [its] enactments" and refrain from "rewrit[ing] statutes even where drafting or constitutional problems may appear." (*Id.* at p. 16.)

In *Bunn*, this Court rejected a separation of powers challenge to a criminal law adopted by the Legislature.[3] In 1995, Bunn was charged with the rape of his teenage daughter under a law enacted in 1994. (*Bunn*, *supra*, 27 Cal.4th at p. 7.) In 1997, the Court of Appeal affirmed the dismissal of the charges because the statute of limitations had expired under the 1994 law. (*Ibid.*) But in 1996 the Legislature had expanded the limitations period and purported to apply the revision retroactively. (*Id.* at p. 11.) Under the 1996 law, the People recharged Bunn in 1997, after the Court of Appeal had handed down its decision and the Supreme Court had denied review. (*Id.* at p. 12.) Bunn argued that the statute violated separation of powers because it "thwart[ed] final judgments" by allowing the People to refile charges that had previously been dismissed. (*Id.* at p. 17.) This Court rejected that claim because the Legislature acted within its authority and did not encroach on the power of the Judiciary. Making law by statute, this Court reasoned, is "the paramount legislative power." (*Id.* at p. 22.) And the law did not undercut "the

[3] The same law at issue in *Bunn* was declared unconstitutional in *Stogner v. California* (2003) 539 U.S. 607. But that was because it was an *ex post facto* law, not because it violated separation of powers. (*See id.*)

finality of a judicial determination." (*Id.* at p. 23.) The dismissal of charges was not "final" until 1997, when the Supreme Court denied review of the dismissal. (*Id.* at p. 26.) At that time, the 1996 law was already in effect, so the finality was "conditioned" on that law. (*Id.* at p. 23.) Thus, dismissal on separation of powers grounds was unjustified.

The *Bunn* command is unremarkable and crystal clear: lawmaking is the job of the Legislature. Duly enacted laws *bind* the other branches absent an extrinsic limit on the legislative power. They are not mere words on paper. The state courts in *Bunn* could not ignore the 1996 law on the basis of their constitutional authority to render final judgments. (See *id.*) A state executive – here district attorneys –similarly cannot refuse to enforce the Three Strikes Law on the ground of its prosecutorial discretion. (See *id.*) In a state in which counties elect their own district attorneys, Gascón's position not only would violate the state constitution, it would also produce an inevitable, yet intolerable, patchwork of different policies for victims and defendants involved in identical crimes.

Citing no authority, Gascón conjures up a novel theory of the Legislature's constitutional authority. The Legislature's power, he argues, is limited to "using purportedly mandatory language" to provide "guidance regarding prosecution priorities." (Gascón Br. at p. 30.) This would reduce mandatory laws to mere suggestions. It would give Gascón

– and each of the other 57 district attorneys in California – the power to decide for themselves the actual provisions of law that apply to private citizens. Gascón's position contradicts this Court's declaration that the Legislature is entitled to "fix" punishments—not merely recommend them on a take-it-or-leave-it basis. (See *Romero*, *supra*, 13 Cal.4th at p. 516.) More fundamentally, the characterization flies in the face of the very separation of powers doctrine Gascón himself invokes. A toothless Legislature, armed only with the ability to provide county prosecutors with "guidance regarding prosecution priorities," would lack any power with which to check the other branches. It would stand on unequal footing with a potent Executive branch retaining all "prosecutorial power." (See Gascón Br. at p. 26, quoting *Monarch Cablevision, Inc. v. City Council of City of Pac. Grove* (1966) 239 Cal.App.2d 206, 211 [separation of powers presupposes "three coequal branches of the government"], 28.)

II. Prosecutorial discretion does not override the legislative power to prescribe punishments.

No definition of prosecutorial discretion gives a district attorney the authority to redefine a law. "[P]rosecutorial discretion is rooted in the separation of powers." (*Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1543.) Prosecutors must weigh "the complex considerations necessary for the effective and efficient administration of law

enforcement." (*People v. Birks* (1998) 19 Cal.4th 108, 134.) In choosing whether to charge a suspect, prosecutors consider factors such as the strength of a case, deterrence, limited investigatory and prosecutorial resources, and enforcement priorities. But this discretion only exists when it is in fact executive power that is being exercised, not that of another branch. A prosecutor's discretion is not limitless.

That discretion does not include the power to decide the statutory sentence. Once prosecutors select the charge, they must abide by the mandatory sentence that the Legislature has established. If prosecutors could also select the sentences, they would effectively rewrite the criminal law enacted by the Legislature. Citing *Wallace*, Gascón acknowledges that prosecutors "have a great deal of discretion in [the] crime-charging function." (Gascón Br. at p. 29, citing *People v. Wallace* (1985) 169 Cal.App.3d 406, 409, quotation marks omitted and modification in original.) But *Wallace* helpfully describes—and Gascón omits—what that "crime-charging function" entails. "Charging discretion takes three basic forms: (1) evidentiary sufficiency—a determination of whether the evidence warrants prosecution; (2) charge selection—a determination of the appropriate charge or charges; and (3) discretion not to prosecute—a determination of whether there is an alternative to formal criminal prosecution." (*Wallace*, *supra*, 169 Cal.App.3d at p. 409.) Neither *Wallace* nor any other precedent of this

Court holds that charging discretion includes a fourth form to ignore a mandatory sentence.

Even within *Wallace*'s "three basic forms," a prosecutor's charging discretion is not absolute. For example, where a "*statute* leaves [the prosecutor] no discretion to exercise," a prosecutor can be compelled to commence a public nuisance action. (*Bd. of Sups. of Los Angeles Cty v. Simpson* (1951) 36 Cal.2d 671, 676, emphasis added.) While "[o]rdinarily a district attorney cannot be compelled . . . to prosecute a criminal case," in *Simpson*, as here, a statute imposed on the prosecutor a "mandatory duty to prosecute" and "le[ft] him no discretion to exercise." (*Ibid.*) There, this Court found it proper to compel the district attorney to prosecute the action. (*Ibid.*) Likewise, a prosecutor's charging discretion does not even allow him to abandon a prosecution unilaterally. (See *Steen v. Appellate Division, Superior Court* (2014) 59 Cal.4th 1045, 1055.) If the Legislature can require a prosecutor to bring charges, it must also be able to require a mandatory sentence for the charges themselves.

The voters have also limited prosecutorial discretion by constitutional amendment. Marsy's Law limits prosecutorial discretion by guaranteeing that crime victims are "[t]o be treated with fairness and respect for his or her privacy and dignity." (Cal. Const. art. I, § 28, subd. (a)(3).) It specifically requires that victims' safety be "considered in

fixing the amount of bail and release conditions." (*Id*. at subd. (b)(3).) It also requires the government to give reasonable notice and "to reasonably confer" with victims regarding arrests, charges, and pretrial dispositions. (*Id.* at subd. (b)(6).) These rights are not empty promises. Instead, victims' interests must be considered, even when prosecutors exercise their discretion. (See Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law for Florida* (2020) 110 J. Crim. L. & Criminology 99, 123-24.)

No California authority holds that the separation of powers gives prosecutors discretion to disregard the Legislature's commands generally or mandated sentences specifically. For example, Gascón cites a case pre-dating the Three Strikes Law for the proposition that the prosecutor "ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek." (Gascón Br. at p. 29, citing *Dix v. Superior Court* (1991) 53 Cal.3d 442, 451) But this Court's statement addressed whether a "private citizen"—the victim in a case predating Marsy's Law—had standing to intervene in a criminal defendant's sentencing. (*Dix*, *supra*, 53 Cal.3d at p. 451.) That does not implicate the separation of powers. (See David A. Carrillo & Danny Y. Chou, *California Constitution: Separation of Powers* (2011) 45 U.S.F. L. Rev. 655, 657 [the separation of powers doctrine "establishes a

system of checks and balances to protect *any one branch* against the overreaching of *any other branch*," citing *Bixby v. Pierno* (1971) 4 Cal.3d 130, 141, emphasis added].) *Dix* did not prohibit the Legislature from restricting a prosecutor's discretion over sentencing.

Citing *Kirkpatrick*, Gascón further argues that "prosecutors exercise discretion in determining which sentence to seek," and that prosecutors "can exercise their discretion to pursue a particular sentence." (Gascón Reply Br. at p. 20, citing *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1024.) But the citation to *Kirkpatrick* is not on point. The legislature in that case had "delegate[d] to each district attorney the power" to pursue a death sentence. (*Kirkpatrick*, *supra*, 7 Cal.4th at p. 1024.) The issue was whether the Legislature could *delegate*, not whether it could *restrict*, a prosecutor's discretion over sentencing. Only after finding that the Legislature could "delegate sentencing authority" to the prosecutor's discretion, the Court held that the prosecutor could exercise that "discretion to pursue a particular sentence." (*See Kirkpatrick*, 7 Cal.4th at p. 1024; Gascón Reply Br. at p. 20.) That case had no occasion to hold—and did not hold—that the prosecutor had discretion to reject the Legislature's explicit commands. Indeed, *Kirkpatrick*'s holding implicitly recognizes that the permissible delegation of some discretionary authority presupposes limits on that discretion.

Prosecutors have discretion to pursue a heavier or lighter sentence within the range of sentences prescribed by the Legislature, provided that they comply with statutory victims' rights, such as the right to confer. But prosecutors may not deviate from that range. To allow them to seek a lighter (or heavier) sentence than the law requires would allow them to rewrite the law—a job only for the Legislature.

III. The separation of powers requires district attorneys to abide by legislative sentencing mandates such as the Three Strikes Law.

The District Attorney's refusal to enforce the Three Strikes Law not only violates the text of the California constitution and this Court's precedents, it also rejects California's implementation of the principle of the separation of powers. The California Constitution vests the "responsibility of defining crimes and prescribing punishments" solely in the state Legislature. (*Lamoureux*, *supra*, 42 Cal.App.5th at p. 252.) At the same time, the Executive branch of the state government is responsible for "see[ing] that the law is faithfully executed," which includes "prosecut[ing] any violations of the law." (Cal. Const., art. V, §§ 1, 13.)

The District Attorney primarily rests his abrogation of his duties on prosecutorial discretion. But the District Attorney may *not* insulate himself from "faithfully execut[ing]" the laws enacted by the state Legislature, and the people of California, by raising a general claim of

prosecutorial discretion. Like all other powers vested in the Executive branch by the California Constitution, prosecutorial discretion is not absolute. The form of discretion Gascón claims aggrandizes the traditional scope of the executive power under the California Constitution, subverts and encroaches upon the role of the Legislature, and ignores the will of the people.

While "the separation of powers doctrine has never been applied rigidly," it is unequivocally violated "when the actions of a branch of government defeat or materially impair the inherent functions of another branch." (*Case v. Lazben Financial Co.* (2002) 99 Cal.App.4th 172, 183, 184; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 662; *Marine Forest Society v. Cal. Coastal Com.* (2005) 36 Cal.4th 1, 15.) The District Attorney's Special Directive 20-08 materially impairs, if not defeats, the Legislature's inherent function to prescribe punishments. The Three Strikes Law falls within the core legislative function because it "defines the term for the crime itself, supplanting the term that would apply but for the prior serious or violent felony." (*People v. Martin* (1996) 32 Cal.App.4th 656, 668.) The Three Strikes Law does not provide an added term to a crime; it defines the crime based on a "status that the defendant either does or does not have." (*People v. Garcia* (1999) 20 Cal.4th 490, 502.) It "either does or does not apply." (*Id.* at p. 502.) When applied, the Three Strikes Law is coterminous with the crime. In

seeking non-enforcement of the Three Strikes Law, Gascón seeks to redefine the law based upon an individual policy position. Prosecutorial discretion has never been understood to give a California district attorney the authority to rewrite criminal law in this manner.

Gascón's claim that the Three Strikes Law materially impairs the inherent function of the Executive branch fails. Prosecutors retain the traditional scope of his prosecutorial discretion under the Three Strikes Law. They can determine whom to charge with a crime and what charges to bring. (See Gascón Br. at p. 40, quoting *Birks*, *supra*, 19 Cal.4th at p. 134.). A district attorney could choose to bring no charges against a felon who has committed a third felony or charge a two-time felon who commits another crime only with a misdemeanor. But a "prosecutor's discretionary charging decision" does not also involve the ability, after charging an individual with a crime, to redefine the crime charged. (See *Manduley*, *supra*, 27 Cal.4th at p. 555.) To do so would vest prosecutors with near unfettered executive and legislative power. Indeed, prosecutorial discretion is limited to the range of charges made "potentially available." (*Birks*, *supra*, 19 Cal.4th at p. 134; see also *People v. Bizieff* (1990) 226 Cal.App.3d 130, 138 ["This discretion includes the choice of maximizing the *available* sentence…"], emphasis added.) Because the express language of the Three Strikes Law applies "in every case in which a defendant has one or more prior serious or

violent felony convictions[,]" the Legislature has expressly limited the range of "potentially available" opportunities for the exercise of prosecutorial discretion. (*People v. Laanui* (2021) 59 Cal.App.5th 803, 815.)

Gascón's theory of prosecutorial discretion proves too much. It would extend prosecutorial discretion beyond its traditional bounds and subsume the role of the Legislature and the will of the people in defining crimes. Prosecutors act on behalf of the people in exercising discretion to charge individuals with a crime. However, their mandate has limits. While the Legislature has limited authority to tell the Executive *how* to execute the law, it has complete authority to define the underlying law to be executed. The Legislature acts to perform its constitutionally mandated function to define crimes and prescribe their penalties upon this fundamental understanding of the difference between the legislative and the executive function. The Three Strikes Law states that it "*shall be applied in every case*" and that "[t]he prosecuting attorney *shall plead and prove* each prior serious or violent felony conviction [except in limited circumstances]." (Pen. Code, § 667, subd. (f)(1), emphasis added.) In using such clear language, the Legislature gave no freedom to prosecutors to choose to ignore the prior felony convictions of a defendant.

CONCLUSION

Special Directive 20-08 conflicts with the fundamental constitutional principle that the Legislature, acting on behalf of the people, has the authority to execute the will of the people through the criminal laws. District Attorneys have no authority, under the guise of prosecutorial discretion, to defeat the intent of the people by refusing to carry out duly enacted laws.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204(c)(1), the text of this brief, including footnotes, contains 4434 words, as counted by Microsoft Office Word software. The typeface is Times New Roman with a font size of 13 points, and the text (excluding footnotes and headings) is double-spaced.

DATED: April 24, 2023

DEGROOT LEGAL

By *_/s/ David A. DeGroot_*
David A. DeGroot
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 161 29th Street, San Francisco, CA 94110.

On April 24, 2023, I served true copies of the following document(s) described as **APPLICATION TO FILE BRIEF OF AMICI CURIAE LAW PROFESSORS PAUL G. CASSELL, MARGARET GARVIN, AND JOHN C. YOO and [PROPOSED] BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS**

on the interested parties in this action as follows:

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

Executed on April 24, 2023, at San Francisco, California.

/s/ David A. DeGroot
David A. DeGroot

SERVICE LIST

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Case Number S275478

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