

Ct. App. No. B310806

**IN THE CALIFORNIA COURT OF APPEAL  
SECOND APPELLATE DISTRICT, DIVISION SEVEN**

REHAN NAZIR,  
*Petitioner,*

v.

THE LOS ANGELES COUNTY SUPERIOR COURT,  
*Respondent, and*

THE PEOPLE OF THE STATE OF CALIFORNIA.  
*Real Party in Interest.*

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**BRIEF OF AMICI CURIAE 76 CURRENT AND FORMER  
ELECTED PROSECUTORS AND ATTORNEYS GENERAL  
IN SUPPORT OF PETITIONER'S PETITION FOR WRIT  
OF MANDAMUS/PROHIBITION**

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## INTRODUCTION

Pursuant to Rule 8.487(e) of the California Rules of Court, Amici Curiae, 76 Current and Former Elected Prosecutors and Attorneys General, respectfully request that this Court grant the relief both the Petitioner Rehan Nazir and the People, the real party in interest, seek in this case.

In the trial court below, the District Attorney appropriately exercised his discretion when he moved to withdraw previously filed sentencing enhancements against the defendant. Amici urge this Court to reverse the trial court's denial of the District Attorney's motion. Doing so will not only preserve the separation of powers between elected prosecutors and the judiciary, but it will also make clear that trial courts are not permitted to thwart the will of voters and the district attorneys they elect. The Court should clarify the authority of elected prosecutors to implement new and lawful criminal justice policies aimed at unwinding decades of mass incarceration that have adversely impacted people of color. The trial court's decision, if left intact, will set a dangerous precedent and undermine well-settled discretion uniquely vested in our nation's elected prosecutors. And it will erode an elected prosecutor's ability to craft and implement officewide policies that ensure that the fortuity of an individual prosecutor will not significantly impact the outcome of a case and the treatment of similarly situated individuals who come into the justice system. In a District Attorney's Office the size of Los Angeles', with nearly 1,000 prosecutors, these concerns are particularly acute.

## INTEREST OF AMICI

Amici Curiae, 76 current and former elected prosecutors and Attorneys General, file this brief in support of the Petitioner's Petition for Writ of Mandamus/Prohibition, as well as the arguments presented by the People, the real party in interest.

As elected prosecutors and Attorneys General past and present, amici have a deep understanding of the important role that prosecutorial discretion plays in the criminal justice system, and are extremely concerned that the trial court's order below would undermine, in an unprecedented fashion, the longstanding constitutional authority and responsibility of elected prosecutors.

Prosecutors are elected and sworn to uphold the law, protect public safety, and serve the interests of justice. The duly elected District Attorney's policies at issue here do just that. No prosecutor has the ability and resources to prosecute *every* case and *every* violation of the law – nor should they. Prosecutors also must consider appropriate punishments, concentrating on proportionality, public safety, and overall fairness. As such, it is well-settled that elected prosecutors make decisions about where and how limited resources are best exercised and what cases merit entry into the justice system.

A prosecutor's broad discretion over whom to prosecute and what offenses to charge also necessarily encompasses the ability to determine what penalties and sentences to seek, and whether to pursue available sentencing enhancements, in order to best protect community safety and advance justice. This authority is enshrined in separation of powers principles included in most

state constitutions, including California's, and their federal counterpart. Furthermore, elected district attorneys must be able to guide the exercise of discretion by their deputies and the use of inherently limited criminal justice resources through transparent and straightforward policies. Indeed, the district attorney is elected by the community to do exactly that, and is accountable to the voters for those decisions.

Because the issues this case raises have national significance, amici come not only from California, but also from jurisdictions across the country. Although amici's views on when and if a particular sentencing enhancement should be used may differ, amici come together in our steadfast belief that elected prosecutors cannot effectively carry out their constitutional responsibilities if they cannot ensure implementation of policies officewide and are, instead, forced to charge offenses and seek penalties that, in the elected prosecutor's judgment, do not advance public safety or serve the interests of justice. Amici are also intimately familiar with the challenges of running an office in times of limited resources, as well as transforming office culture and past outdated conceptions of justice; these challenges require decisions and leadership by the elected office head and clear instructions that guide deputy discretion and avoid disparate results based on the views and happenstance of the individual prosecutor in each case.

For all of these reasons, we are deeply troubled by the trial court's refusal to dismiss, when the prosecutor requested it, the firearm enhancements in this case. There is no justification,

either in law or policy, for courts to override the lawful, discretionary policy decisions of the elected District Attorney chosen by the voters of Los Angeles to transform the criminal justice system in their community.

Amici have an interest in preserving both the ability of an elected prosecutor to develop and implement policies within their office and jurisdiction, as well as the proper roles and responsibilities in the criminal legal system between the elected official and the judiciary. We offer our views here respectfully as friends of the Court.

## BACKGROUND

Los Angeles County, which has more than 10 million residents, is home to the nation’s largest local criminal justice system.<sup>1</sup> Over the past few years, prior District Attorneys in Los Angeles implemented a number of “tough-on-crime” policies – such as seeking harsh sentences, including the death penalty and gang enhancements – and opposed many criminal justice reform efforts.<sup>2</sup> As a direct result of these policies, Los Angeles County’s prison incarceration rate was higher than 56 of 58 counties in the state,<sup>3</sup> and nearly five times as high as that of San Francisco.<sup>4</sup>

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<sup>1</sup> Jessica Pishko, *How District Attorney Jackie Lacey Failed Los Angeles*, *The Appeal* (Nov. 12, 2019), <https://bit.ly/2QpZol9>.

<sup>2</sup> *Id.*

<sup>3</sup> Center on Juvenile and Criminal Justice, *2016 State prison incarceration rates*, California Sentencing Institute, <http://casi.cjcj.org/>.

<sup>4</sup> In 2016, Los Angeles County’s prison incarceration rate was 609 per 1,000 felony arrests. The statewide average was 446. San Francisco County’s rate was 131. *See id.* (last visited Sept. 17, 2021).

In 2020, Los Angeles voters elected George Gascón, the former District Attorney of San Francisco County. Gascón has long been committed to reforming the criminal justice system, reducing incarceration, and focusing on public safety rather than punishment. During his campaign, Gascón was transparent about his vision for the office and the changes to prosecutorial practices he intended to implement. These reforms included ending death penalty prosecutions, the use of money bail, and the criminalization of mental illness and homelessness,<sup>5</sup> as well as curtailing lengthy prison sentences and the use of sentencing enhancements<sup>6</sup> – all objectives consistent with the boundaries of the legal system and the sound exercise of prosecutorial discretion. The Los Angeles community elected him by a margin of more than a quarter million people to carry out these promises and bring a new vision to the Los Angeles criminal legal system.<sup>7</sup>

Upon taking office, District Attorney Gascón immediately sought to reform a number of long-standing prosecutorial practices in his office – practices that research shows had not simply ballooned California’s incarcerated population, but also

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<sup>5</sup> George Gascón for District Attorney, *On the Issues*, <https://www.georgegascon.org/on-the-issues/> (last visited Sept. 17, 2021).

<sup>6</sup> Daniel Nichanian, *How George Gascón Wants to Reform Los Angeles and Achieve “The Lowest Level of Intervention,”* The Appeal (Jan. 9, 2020), <https://bit.ly/2RVJZzR>.

<sup>7</sup> Gascón received over 1.6 million votes in ousting incumbent Lacey in November 2020. Priya Krishnakumar and Iris Lee, *How George Gascón unseated L.A. County Dist. Atty. Jackie Lacey*, L.A. Times (Nov. 6, 2020), <https://lat.ms/3eUgG8y>.

offered little if any benefit to public safety.<sup>8</sup> Gascón implemented policies based on empirical evidence and designed to advance public safety, community health, and equal justice throughout Los Angeles. Among the new policies were directives that sought to curtail the use of several sentencing enhancements, including those that are among California’s most notorious, draconian, and racially disparate penalties. These extreme penalties have also been shown to have little to no impact on crime, while draining

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<sup>8</sup> See, e.g., Wally Hilke, *The Truth Limpes After: Sentence Enhancements and the Punishment Paradigm*, 23 Univ. of Penn. J. of Law and Social Change 69, 87-90 (2020), <https://bit.ly/3grasiP> (describing the mechanisms through which lengthy sentences imposed on gang members act to increase, rather than decrease, community violence); National Research Council, *Priorities for Research to Reduce the Threat of Firearm-Related Violence* (Washington, DC: The National Academies Press, 2013) at 44, <https://www.nap.edu/download/18319#> (noting that most studies examining enhancements or increased sentences for the use of firearms have found no impact on crime rates); Joshua A. Jones, *Assessing the Impact of “Three Strikes” Laws on Crime Rates and Prison Populations in California and Washington*, 4 Inquiries J. 2 (2012), <https://bit.ly/3n5PKGI> (summarizing studies showing that three strikes laws did not have any positive impact on crime rates); University of California – Riverside, *Three-strikes law fails to reduce crime*, Phys.org (Feb. 28, 2012), <https://bit.ly/3tHmAQu> (reporting that the three strikes law has not decreased the incidence of violent crime); California Legislative Analyst’s Office, *A Primer: Three Strikes - The Impact After More Than a Decade* (Oct. 2005), <https://bit.ly/3vcCwKS> (reporting that the three strikes law increased jail and prison populations, lengthened prison terms, increased the age of prisoners, increased racial disparities, and cost the state 500 million dollars per year during the first 10 years following its enactment, but had no clear impact on crime rates or public safety).

much needed legal, judicial, police, jail, and state prison resources.<sup>9</sup>

This case raises important issues that go to the core of the role of the prosecutor and separation of powers between the executive and judicial branches. By refusing to allow the line prosecutor to follow the District Attorney's directives and dismiss or abandon the sentencing enhancements in this case, the lower court invaded the well-settled discretion of the elected prosecutor, threatened principles of separation of powers, and thwarted the will of the Los Angeles County electorate. Permitting this type of judicial interference in the discretionary policy decisions of an elected prosecutor would strip the District Attorney of the inherent powers of his office and would deprive Los Angeles voters of the leadership and policy agenda they embraced at the polls. Indeed, we could not find a single case in California where courts have overridden a prosecutor's decision *not* to file charges or sentence enhancements.

Amici, a group of 76 current and former elected prosecutors and Attorneys General from across the country, file this brief to add their voices to this important issue, as well as to underscore how this type of prosecutorial discretion is inherent in the

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<sup>9</sup> Council of Economic Advisors, *Economic Perspectives on Incarceration and the Criminal Justice System* (Apr. 2016) at 3-4, 7, <https://bit.ly/3vCjfTB>; Jeremy Travis, Bruce Western, and Steve Redburn, eds., *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, National Research Council (2014), [www.nap.edu/read/18613/chapter/4](http://www.nap.edu/read/18613/chapter/4); Anthony N. Doob and Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, in Michael Tonry, ed., *Crime and Justice: A Review of Research*, vol. 30, at 187 (2003).



responsibility of any elected prosecutor and critical to the functioning of our justice system.

## ARGUMENT

### **I. All prosecutors – including California District Attorneys – have well-settled discretionary authority to make decisions that are fundamental to the allocation of scarce resources and the pursuit of justice**

“The capacity of prosecutorial discretion to provide individualized justice is firmly entrenched in American law.”<sup>10</sup> Prosecutors hold exclusive control over whether to bring cases against individuals, what charges and penalties to pursue, and what plea bargains to offer. The independence of the prosecutor is inherent in the separation of powers enshrined in both the United States and California Constitutions, and dates back to the founding of our country.<sup>11</sup>

As the California Supreme Court has noted, district attorneys are “given complete authority” to enforce the state criminal law in their counties.<sup>12</sup> Because a district attorney has discretion over whom to charge in the first instance, the district attorney’s authority “is even stronger” when choosing among various punishments to seek: “The decision of what charges to bring (or not to bring) – and, more to the point here, which sentencing enhancement to allege (or not to allege) – belongs to

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<sup>10</sup> *McCleskey v. Kemp*, 481 U.S. 279, 311–12 (1987) (internal quotations omitted).

<sup>11</sup> U.S. Const. art. I, § 1, art. II, § 1, art. III, § 1; Ca. Const. art. III, § 3; *see also* J. Madison, Federalist No. 51.

<sup>12</sup> *Pitts v. County of Kern*, 17 Cal. 4th 340, 358 (1998) (citation and punctuation omitted); *see also* Cal. Gov. Code § 26500.

the prosecutors who are charged with executing our state’s criminal law.”<sup>13</sup> Further, “the prosecutor’s decision not to charge a particular enhancement ‘generally is not subject to supervision’ – or second guessing – ‘by the judicial branch.’”<sup>14</sup>

An elected prosecutor’s duty is to utilize this discretion to pursue justice and protect public safety.<sup>15</sup> In individual cases, the prosecutor has “a heightened duty to ensure the fairness of the outcome of a criminal proceeding from a substantive perspective – to ensure both that innocent people are not punished and that the guilty are not punished with undue harshness.”<sup>16</sup> But seeking justice requires much more than fair play or a proportionate outcome in the context of a single case or trial. An elected

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<sup>13</sup> *People v. Garcia*, 46 Cal. App. 5th 786, 791 (2020) (noting that decision-making regarding which firearms enhancements, if any, to seek is a purely prosecutorial function); *see also People v. Birks*, 19 Cal. 4th 108, 129 (1998) (“the prosecution, the traditional charging authority, has broad discretion to base its charging decisions on all the complex considerations pertinent to its law enforcement duties”).

<sup>14</sup> *Id.*

<sup>15</sup> *See Berger v. United States*, 295 U.S. 78, 88 (1935) (A prosecutor “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”); Marc L. Miller and Ronald F. Wright, *The Black Box*, 94 Iowa L. R. 125, 148 (2008) (noting that elected prosecutors must make charging and sentencing decisions that respond to the evolving public conceptions of justice: “Current public opinion constantly rewrites the terms of a criminal code drafted by legislatures over many decades.”).

<sup>16</sup> Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 Fordham Urb. L. J. 607, 636 (1999).

prosecutor also has a duty as a “minister[] of justice’ to go beyond seeking convictions and legislatively authorized sentences in individual cases, and to promote the delivery of criminal justice on a systemic level by advancing criminal justice policies that further broader societal ends.”<sup>17</sup>

Inherent in this larger duty to the public is the prosecutor’s obligation to spend limited criminal justice resources efficiently to protect the safety and well-being of the community.<sup>18</sup> Elected prosecutors – empowered by their community with carrying out the duties of that job – make decisions every day about where and how limited resources are best expended, including decisions about which cases merit entry into the justice system, and what charges and penalties to seek when they do.

In the 1990s and 2000s, our nation witnessed a proliferation of sentencing schemes authorizing extreme and severe penalties for a range of offenses and individuals.<sup>19</sup> These laws played an oversized role in dramatically expanding the number of people we imprison and the length of time we hold them.<sup>20</sup> As with charging decisions in general, however, different

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<sup>17</sup> R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor’s Ethical Duty to Support Sentencing Reform*, 45 Loyola Univ. of Chicago L. J. 981, 983 (2014), <https://bit.ly/3xdqF1c>.

<sup>18</sup> *Id.* at 996.

<sup>19</sup> Urban Institute, *A Matter of Time: The Causes and Consequences of Rising Time Served in America’s Prisons* (2017), <https://urbn.is/3vbVSAa>.

<sup>20</sup> *Id.*; Caitlin J. Taylor, *Ending the Punishment Cycle by Reducing Sentence Length and Reconsidering Evidence-Based Reentry Practices*, 89 Temp. L. Rev. 747, 750 (2017), <https://bit.ly/3sCkx2>.

prosecutors utilized these tools in divergent ways.<sup>21</sup> Some sought enhanced penalties and mandatory minimum terms with enthusiasm, using their discretion to broaden the impact of harsh and punitive legislation.<sup>22</sup> Others leveraged these severe punishments only in rare cases, if at all.<sup>23</sup>

Perhaps most troubling, marginalized and underserved communities have been disproportionately affected by sentencing enhancements in California. For instance, over 80 percent of people in California prisons serving certain sentence

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<sup>21</sup> Cassidy, *supra* note 17, at 988 (noting that mandatory sentencing laws have not achieved uniformity in sentencing, but instead shifted sentencing discretion and authority to prosecutors who can reduce or dismiss the charge or penalty); Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, in Michael Tonry, ed., *Crime and Justice: A Review of Research*, vol. 38 (2009) at 67-68 (mandatory minimum sentencing schemes did not produce uniform results because prosecutors sidestepped severe penalties in some but not all cases); David Bjerck, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J. L. & Econ. 591, 594 (2005).

<sup>22</sup> See David Schultz, *No Joy in Mudville Tonight: The Impact of “Three Strike” Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 Cornell J. L. & Pub. Pol’y 557, 575 (2000) (in general, prosecutors in more populous California counties were less likely to pursue strikes, while smaller counties filed them more often).

<sup>23</sup> *Id.*; see also Peter W. Greenwood, et al., *Three Strikes Revisited: An Early Assessment of Implementation and Effects*, DRR-2 905-NIJ (Aug. 1998) at vi, <https://bit.ly/3eptKmf> (noting that different counties utilized three strikes laws differently and that, for example, under the original version of the three strikes law in Alameda County “only serious felonies are prosecuted under the threestrikes law. Other counties apply the law less selectively.”).

enhancements are people of color.<sup>24</sup> In Los Angeles County in particular, over 90 percent of people serving a gang enhancement are people of color.<sup>25</sup> The three strikes law has also been applied disproportionately against Black defendants and people experiencing mental illness.<sup>26</sup>

Furthermore, the most robust empirical evidence concerning criminal punishment, including research from the National Research Council and National Academy of Sciences, reveals quickly diminishing public safety returns from long prison sentences, such as those imposed under sentencing enhancement laws.<sup>27</sup>

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<sup>24</sup> See California Committee on the Revision of the Penal Code, Staff Memo (Sept. 10, 2020) at 7.

<sup>25</sup> Abené Clayton, *92% black or Latino: the California laws that keep minorities in prison*, The Guardian (Nov. 26, 2019), <https://bit.ly/3eiCOJG>.

<sup>26</sup> See Letter from California Legislative Black Caucus to CDCR Secretary Scott Kernan (July 17, 2019); see also Stanford Three Strikes Project, *Mental Illness Reduces Chances Of Three Strikes Sentence Reduction* (2014), <https://stanford.io/3ngtie8>.

<sup>27</sup> Travis, et al., eds. *supra* note 9; Alex R. Piquero, J. David Hawkins, Lila Kazemian, and David Petechuk, *Bulletin 2: Criminal Career Patterns (Study Group on the Transitions between Juvenile Delinquency and Adult Crime)* (2013), <https://bit.ly/3vcDnLA>; William Rhodes, Gerald G. Gaes, Ryan Kling, and Christopher Cutler, *Relationship Between Prison Length of Stay and Recidivism: A Study Using Regression Discontinuity and Instrumental Variables With Multiple Break Points*, 17 Crim. & Pub. Pol'y 731 (2018), <https://bit.ly/3ekUZhM>; Jordan D. Segall, Robert Weisberg, and Debbie Mukamal, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California*, Stanford Criminal Justice Center (Sept. 2011), <https://stanford.io/32Hrxgh>; see also *In re Stoneroad*, 215 Cal.

Today, around the country, communities are retreating from these and other “tough on crime” policies that have driven mass incarceration by electing prosecutors with a new vision for our justice system.<sup>28</sup> These prosecutors recognize that overly punitive approaches undermine public safety and community trust. They are making evidence-based decisions around when, and if, to exercise their tremendous power to pursue criminal charges or seek harsh sentences. This shift in perspective in no way justifies or permits judicial interference with the will of the voters or the exercise of the discretion that is fundamental to the prosecutorial function.

**II. Meaningful criminal justice reform requires elected prosecutors to implement and enforce officewide policies; judicial interference with those policies intrudes on separation of powers**

An abundance of data and empirical evidence illustrates that the exercise of discretion across offices yields startlingly different criminal justice outcomes, even between offices within the same state and governed by the same laws.<sup>29</sup> These patterns

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App. 4th 596, 634 (2013) (“criminality . . . declines drastically after age 40 and even more so after age 50”).

<sup>28</sup> Allison Young, *The Facts on Progressive Prosecutors*, Center for American Progress (Mar. 19, 2020), <https://ampr.gs/3n7cYw9>.

<sup>29</sup> See, e.g., Center on Juvenile and Criminal Justice, *supra* note 3; Vera Institute of Justice, *Incarceration Trends in Texas* (Dec. 2019), <https://bit.ly/3ejteGp> (reporting that “the highest rates of prison admissions [in Texas] are in rural counties, and pretrial detention continues to increase in smaller counties even as it is on the decline in larger counties”); Felicity Rose, et al., *An Examination of Florida’s Prison Population Trends*, Crime and Justice Institute (May 2017) at 12, <https://bit.ly/2Qd6uzT> (reporting that trends in prison admissions rates vary widely by

are largely attributable to “prosecutors responding to social norms and living up to group expectations about what it means to be a prosecutor in that particular office.”<sup>30</sup> Elected prosecutors play a critical role in forming – and reforming – these office norms.<sup>31</sup> Officewide policies, enacted by the elected prosecutor and consistent with the public’s sense of justice, play a critical role in communicating and changing the governing culture in an office.<sup>32</sup> “Policy priorities in the office... might not result from any actual change in the criminal law, but they palpably change the norms that define what prosecutors are expected to do.”<sup>33</sup>

Across the country, prosecutors routinely exercise their discretion by articulating general policies regarding charging, diversion, sentencing, and enforcement priorities. These policies may be driven by location, resources, staffing, values, or beliefs about how to best advance public safety and community well-being. For instance, it is not unusual for prosecutors to have “an intra-office policy of prosecuting only drug cases involving x-

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jurisdiction in Florida, from a low of 55 per 100,000 residents to a high of 612.7).

<sup>30</sup> Miller and Wright, *supra* note 15, at 131.

<sup>31</sup> *Id.* at 178; Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 *Tem. Pol. & Civ. Rts. L. Rev.* 369, 373 (2010), <https://bit.ly/3atAqP3>.

<sup>32</sup> *Id.* at 374; *see also* Bruce Frederick and Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making*, Vera Institute of Justice (Dec. 2012) at 15, <https://bit.ly/2QdZt1P> (a study of decision-making by line prosecutors revealed that “norms and policies” limiting discretion are the “contextual factor with the most direct impact on prosecutorial decision making.”).

<sup>33</sup> Miller and Wright, *supra* note 15, at 178.

grams of crack cocaine, while declining to prosecute drug cases involving a lesser amount.”<sup>34</sup> These policies vary by jurisdiction: Smaller offices “may not have minimum thresholds for prosecuting certain drug offenses inasmuch as they occur relatively infrequently in the jurisdiction,” whereas “offices located in urban areas may be overwhelmed with drug offenses, and therefore will allocate prosecutorial resources only for the most serious of these offenses.”<sup>35</sup>

For these and other reasons, local elected prosecutors in Chicago,<sup>36</sup> Brooklyn,<sup>37</sup> and St. Louis,<sup>38</sup> among other places, have publicly stated that they generally will not prosecute low-level drug crimes, and will instead direct their resources toward more serious offenses. Elected prosecutors across the country have adopted similar policies regarding other crimes as well. For instance, in December 2016, Chicago’s top prosecutor announced her office generally would not file felony charges in theft cases involving goods worth less than \$1,000, even though the felony

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<sup>34</sup> Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 Notre Dame L. Rev. 221, 241 (2003), <https://bit.ly/3gzObzH>.

<sup>35</sup> *Id.*

<sup>36</sup> Greg Hinz, *Alvarez: “We’re Not Being Soft on Crime. We’re Being Smart,”* Crain’s Chicago Business (Apr. 20, 2015), <https://bit.ly/3ayuIuJ>.

<sup>37</sup> Stephanie Clifford and Joseph Goldstein, *Brooklyn Prosecutor Limits When He’ll Target Marijuana*, N.Y. Times (July 8, 2014), <https://nyti.ms/3ash64w>.

<sup>38</sup> Sarah Fenske, *St. Louis Will No Longer Prosecute Marijuana Possession under 100 Grams*, Riverfront Times (June 13, 2018), <https://bit.ly/3sypYfm>.



threshold under Illinois law is \$500.<sup>39</sup> Several prosecutors have committed to declining prosecution of offenses arising out of consensual sex work, including those in Manhattan, New York<sup>40</sup> and Ann Arbor, Michigan.<sup>41</sup> Following the protests last summer over systemic racism and police violence, several elected prosecutors announced that they would not prosecute peaceful protestors arrested for minor, public order offenses.<sup>42</sup>

The same holds true for certain punishments. Prosecutors across the country, including those elected this past year in Athens and Atlanta, Georgia; Austin, Texas; New Orleans, Louisiana; Portland, Oregon; and Tucson, Arizona; have vowed to never seek the death penalty, regardless of the facts or

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<sup>39</sup> Steve Schmadeke, *Top Cook County Prosecutor Raising Bar for Charging Shoplifters with Felony*, Chicago Tribune (Dec. 15, 2016), <https://bit.ly/3azWmaV>.

<sup>40</sup> Jonah E. Bromwich, *Manhattan to Stop Prosecuting Prostitution, Part of Nationwide Shift*, N.Y. Times (Apr. 21, 2021), <https://nyti.ms/3au3g1O>.

<sup>41</sup> Oralandar Brand-Williams, *Washtenaw County prosecutor will no longer prosecute 'consensual' sex work*, The Detroit News (Jan. 14, 2021), available at <https://bit.ly/3ejfziB>.

<sup>42</sup> See, e.g., Shane Dixon Kavanaugh, *Multnomah County DA declines to prosecute 70% of Portland protest cases*, The Oregonian (Oct. 7, 2020), <https://bit.ly/3dBRft6>; Robert Patrick, *St. Louis officials won't prosecute trespassing cases in protest on Portland Place*, St. Louis Post-Dispatch (Sept. 30, 2020), <https://bit.ly/3xb5Nrk>; Kathryn Varn, Jack Evans, and Tony Marrero, *Hillsborough state attorney won't prosecute muralists, protesters; charges 120 others*, Tampa Bay Times (Sept. 4, 2020), <https://bit.ly/3gu9d2o>; Kiro 7 News Staff, *Dozens of protesters arrested by Seattle police may never be prosecuted*, KIRO 7 News (June 18, 2020), <https://bit.ly/3dCa4w8>.

circumstances of a case.<sup>43</sup> Others have focused on mandatory penalties, seeking to avoid their application in a range of cases. For example, in Fairfax County, Virginia, the Commonwealth’s Attorney requires line attorneys to take decisive steps to avoid most statutory minimum sentences in every case, including those involving allegations of violence.<sup>44</sup> New Jersey’s prior Attorney General issued a directive earlier this year requiring all state prosecutors to waive statutory mandatory minimum sentences for a list of nonviolent drug crimes.<sup>45</sup>

These policies, however, can do little to shift norms if courts interfere with their implementation. There is no constitutional or legal doctrine that permits the court to subvert these decisions simply because they are “blanket” policies with broad application, rather than the result of a case-by-case analysis. The discretionary determinations that underlie them are no less reasoned, thoughtful, or valid than those that are specific to the precise facts of a given case. Indeed, judicial intrusion into these decisions strikes at the heart of separation of powers concerns

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<sup>43</sup> Daniel Nichanian, *Newly Elected Prosecutors are Challenging the Death Penalty*, *The Appeal* (Dec. 9, 2020), <https://bit.ly/3xfRKR9>.

<sup>44</sup> Fairfax County, VA Commonwealth’s Attorney Steve Descano, *Guidelines for Plea Bargaining, Charging Decisions, and Sentencing* (Dec. 15, 2020), <https://bit.ly/3tHA9zv>.

<sup>45</sup> New Jersey Attorney General Gurbir S. Grewal, *Attorney General Law Enforcement Directive No. 2021-4, Directive Revising Statewide Guidelines Concerning the Waiver of Mandatory Minimum Sentences in Non-Violent Drug Cases Pursuant to N.J.S.A. 2C:35-12* (Apr. 19, 2021), <https://bit.ly/3eg09LW>.

and erodes the rights of voters to select a prosecutor who aligns with their vision for promoting safer and healthier communities.

The legislature provides a broad and varied toolkit that prosecutors can harness to seek justice. Absent any showing of misconduct, how elected prosecutors choose to use those tools is their decision, and their decision alone. And at the end of the day, they will be held accountable to voters for the exercise of this discretion and the resulting outcomes.

### CONCLUSION

The trial court's refusal to strike sentencing enhancements here interferes with the District Attorney's exclusive authority to set enforcement priorities, is an inappropriate intrusion by the judiciary on the executive branch, and ultimately sabotages and serves to override the will of the voters.

It is troubling that courts did not interfere with prosecutorial discretion when that discretion was being used to ramp up prison and jail populations and fuel "tough on crime" thinking and mass incarceration. And it is particularly troubling that, now, as reform-minded prosecutors are being elected in cities and counties across the country – put in office by the voters specifically because of their commitment to changing the way the criminal justice system operates – some courts are attempting to interfere with prosecutorial decisions they perceive as too lenient.<sup>46</sup> Such intervention is not only at odds with well-settled

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<sup>46</sup> For example, where a judge tried to compel Suffolk County (Boston), Massachusetts District Attorney Rachael Rollins to prosecute a protester case, the Massachusetts Supreme Judicial Court promptly overruled the decision. *See* Roberto Scalse,

prosecutorial discretion, but it also violates separation of powers principles, usurps local control, and runs counter to the growing consensus across the political spectrum about the need to reverse the course of mass incarceration in our nation. It also defies the will of the voters.

Here, the Los Angeles community chose a District Attorney who promised to bring to his office a new vision of how to allocate limited resources and promote public safety. The trial court's obstructionism threatens that community-embraced vision and, in doing so, would set a dangerous precedent undermining the discretion uniquely vested in our nation's elected prosecutors.

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*Mass. High Court Sides With Suffolk DA Rollins In Battle With Judge Over Protester Charge*, WBUR.org (Sept. 9, 2019), <https://wbur.fm/2Elz1g6>.

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The undersigned counsel certifies that pursuant to Rule 8.204(c) of the California Rules of Court, the text of this brief was produced using 14-point Times New Roman font and contains 4,805 words. Counsel relies on the word count of the computer program used to prepare this brief.

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