Case No. S275478

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS
FOR LOS ANGELES COUNTY,

Plaintiff and Respondent,

vs.

GEORGE GASCÓN, ET AL.,

Defendants and Appellants.

On review from the decision of the Court of Appeal,
Second Appellate District, Division 7, Case No. B310845,
affirming in part the grant of a preliminary injunction by the
Los Angeles County Superior Court, Case No. 20STCP04250
The Honorable James C. Chalfant, Judge

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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SUMMARY OF ARGUMENT

Appellants paint a distorted picture of both the history of the Three Strikes Law and the state of the research on long sentences. Three Strikes gained its needed momentum after the horrifying kidnap and murder of a 12-year-old girl by a habitual criminal, who certainly should not have been at large, demonstrated conclusively that existing law was inadequate. More importantly, the people have voted on amendments twice since then. The law as it now stands is the considered judgment of the people far removed from the passions of 1994.

Appellants' assertions about what "studies show" bear little resemblance to what reviews of the research literature as whole by multiple reviewers really show. The District Attorney cherry-picked a single unpublished study for an assertion that runs contrary to the bulk of the literature published in peer-reviewed journals.

A writ of mandate properly issues to an executive officer when a statute requires a specific act and leaves no discretion. A requirement to "prove" prior convictions will not be impractical to enforce in most cases because priors are generally simple facts, easily demonstrated by court records. Any exceptions can be dealt with when and if they arise.

The mandatory nature of the provisions at issue has been recognized by this court and multiple courts of appeal from the first years after enactment. There is no need to change this long-established understanding merely to avoid a constitutional question. As this court has previously held, avoidance should not be carried to the point of "disingenuous evasion," which that would be. Excessive avoidance produces distorted statutory interpretation and sloppy constitutional reasoning. It is a practice that should, itself, be avoided.

Enacting a rule of mandatory charging of priors is well within the legislative authority. The duties and authority of district attorneys are established by statutes, not the Constitution, and can be modified by statutes. Most cases holding that the discretion of the prosecutor cannot be controlled by the courts do not involve mandatory charging statutes and are therefore not on point. The few mandatory charging statutes that do exist have been upheld and enforced. *Board of Supervisors v. Simpson* (1951) involved a statute that court found to be "penal in nature," even though civil in form. The holding in that case that such statutes can be enforced by the courts expressly includes criminal cases.

This is not a case of the legislative authority attempting to exercise executive discretion. The is a case of legislation establishing a rule of law that the executive has a duty to see faithfully executed. It is an example of the proper interrelatedness of the branches of government, where one branch acting within its own sphere has an

effect on the others. This is the system of checks and balances operating as designed.

The mandatory charging provision of Three Strikes is consistent with the constitutional principle of article V, section 13 of the Constitution that the laws of the State should be "uniformly and adequately enforced." The statutes and the preliminary injunction in this case should be upheld.

ARGUMENT

This case turns on the meaning and constitutionality of two provisions of the Penal Code which are identical in substance: subdivision (f)(1) of section 667 and subdivision (d)(1) of section 1170.12. Section 667, subdivisions (b) through (i), and section 1170.12 are the legislative and initiative versions of the Three Strikes Law, respectively. Subdivision (d)(1) of the initiative version reads:

> "Notwithstanding any other law, this section shall be applied in every case in which a defendant has one or more prior serious or violent felony convictions as defined in this section. The prosecuting attorney shall plead and prove each prior serious or violent felony conviction except as provided in paragraph (2)."

The legislative version is identical except for replacing the first "this section" with "subdivisions (b) to (i)" and the second "this section" with "subdivision (d)."

Following the lead of *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 508 (*Romero*), this brief will refer to the legislative provision as "section 667(f)(1)." Similarly, "section 1170.12(d)(1)" refers to the initiative version.

I. Appellants paint a distorted picture of the history of the Three Strikes Law and the state of the research.

This case calls on the judicial branch to survey the line between the executive and legislative powers of the state. In theory, judgments about the wisdom of the competing policies should not matter in marking out this line. In the ebb and flow of political change, the sides could switch at any time. Even so, appellants have chosen to set forth as background information a sharply skewed portrait of both the history of the Three Strikes Law and the current state of research regarding public safety and sentence length. The problem with appellants' version is partly what they say, but even more what they don't say.

A. The Three Strikes Law.

Appellants describe what they call a "media-fueled backlash" over the murder of Kimber Reynolds and her father's subsequent sponsorship of the Three Strikes Law. (Appellants' Opening Brief (AOB) 17.) This might also be described as well-deserved publicity and outrage over a murder that the state could have and should have prevented. Curiously, they barely mention "another highly publicized murder" (*ibid.*) that was, in fact, the outrage that built the public determination to fix the problem into a force that even California's perpetrator-friendly Legislature could not resist.

At times, a single outrage can wake up a sleeping public to truths they were not aware of and shift public opinion overnight. The video-recorded death of George Floyd is a recent example. (See *B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 30 (conc. opn. of Liu, J.).) The abduction and murder of 12-year-old Polly Klaas in 1993 had a similar effect.

The facts of the crime and the record of the chronic criminal who abducted and murdered Polly are set forth in this court's opinion in *People v. Davis* (2009) 46 Cal.4th 539, 551-564. Polly was

abducted out of her own home during a slumber party by a knife-wielding intruder. (*Id*. at pp. 552-554.) Two months later, habitual criminal Richard Davis was arrested. He confessed and led police to Polly's badly decomposed body. (*Id*. at pp. 557-558.)

From 1976 to 1985, Davis had racked up a horrific record of crimes, including violent and sexual crimes. (*Id*. at pp. 560-564.) Four of his crimes qualified as serious felony convictions. (*Id*. at p. 551.) Yet despite all this, he was granted parole in 1993. (*Ibid*.)

The horrific murder of Polly was proof positive that California at that time was too lenient on habitual perpetrators of serious crimes. Releasing Davis before the full term of his sentence was a gross abuse of discretion, and an innocent little girl was abducted and murdered as a result.

The Legislature passed Reynolds' bill, and the Governor signed it. (Weintraub, *'3 Strikes' Law Goes Into Effect*, L.A. Times (Mar. 8, 1994) <https://www.latimes.com/archives/la-xpm-1994-03-08-la-me-threestrikes-wilson-samuel-timeline-story.html> [as of April 18, 2023].) Reynolds had already gathered the signatures to qualify the initiative version and was in the process of submitting them when the Legislature acted. (*Ibid*.) He proceeded with the initiative for the obvious and valid reason that the Legislature could easily repeal its own version but faced a higher hurdle for an initiative. (*Ibid*.; Cal. Const., art. II., § 10, subd. (c).)

The law was not perfect, as many laws are not. A particularly contentious aspect, even among those who supported the concept generally, was the original law's use of any felony for the third strike, rather than the much more limited set on the "serious" or "violent" lists. Yet in their fulminations about the initial law's real and perceived shortcomings, appellants neglect to mention that the people have already considered and voted on whether to change it, twice. (Cf. AOB 18-19.) The people rejected the first proposed

amendment to the law, Proposition 66 of 2004. (Cal. Sect. of State, Statement of the Vote, Gen. Elec. (Nov. 2, 2004) p. 48 <https://elections.cdn.sos.ca.gov/sov/2004-general/sov_2004_entire.pdf>.). The people later approved a narrower amendment, Proposition 36 of 2012. (Cal. Sect. of State, Statement of Vote Summary Pages (2012) <https://elections.cdn.sos.ca.gov/sov/2012-general/ 06-sov-summary.pdf>.)

Soon after the Three Strikes Law passed, this court recognized that the language at issue in the present case "purports to eliminate the prosecutor's charging discretion in Three Strikes cases" (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 523), while expressing no opinion on whether it constitutionally could do so. (*Id.* at p. 515, fn. 7, p. 523, fn. 10.) Yet the drafters of neither of the two reform efforts saw fit to change this language in any way relevant here. Proposition 36 amended the paragraphs in question, but only to specify that all three "strikes" must be "serious and/or violent felony convictions." (See Official Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Proposition 36, pp. 107, 109 [amending Pen. Code, §§ 667, subd. (f)(1), 1170.12, subd. (d)(1)].)

Nor has the Legislature seen fit to amend its own version of this subdivision or place the initiative version back on the ballot to fix this perceived problem. It has only made the stylistic change of removing Proposition 36's "and/or." (Stats. 2021, ch. 626, §§ 27, 42.)

Given the subsequent history, appellants' incomplete history of the initial passage of Three Strikes nearly three decades ago is irrelevant. The law as it stands today is the result of considered decisions regarding what to change and what to keep, made long after the passions of 1994 had subsided.

The basic decision stands as modified. Habitual criminals with three convictions, *all three* of which are contained on either the "serious" or "violent" list, are subject to the law unless the court

exercises its discretion to "strike a strike." The people have decided three times that the protection of innocent people through incapacitation of chronic felons is worth the cost. They have not delegated discretion to make exceptions to the district attorney, and they most certainly have not delegated that officer the discretion to negate the law altogether.

B. Sentence Length and Research.

Appellants try to portray their policies as enlightened and following the science. They make the remarkable claim that strong sentencing policies "increase recidivism rates, have little-to-no deterrent effect, and keep people in prison 'long after they pose any safety risk to their community.' " (AOB 19.) The only authority cited is their own special directives, reprinted in the Court of Appeal appendix, cited below as "App." Delving into the special directives to the claims made within them and comparing them to the actual body of research literature, we find a very different picture.

In Special Directive 20-08, the District Attorney claimed, "While initial incarceration prevents crime through incapacitation, studies show that each additional sentence year causes a 4 to 7 percent increase in recidivism that eventually outweighs the incapacitation benefit." (1 App. A35.) Despite the plural "studies," only one study is cited for this claim, an unpublished manuscript. (1 App. A35, fn. 1, citing Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration* (2015) available at <https://sites.lsa.umich. edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf> [as of April 18, 2023].) The author's website indicates that the article remains unpublished eight years after it was written. (Michael Mueller-Smith, Research, <https://sites.lsa.umich.edu/mgms/research> [as of April 18, 2023].)

"Studies show" is one of the most misused phrases in public discourse, and its meaning is not entirely clear. Perhaps the District

Attorney meant that he could cherry-pick a single study to support a result he had decided on for ideological reasons. If so, the statement would be true, but it would have a probative value near zero. If "studies show" was intended to mean that a survey of the research literature as a whole supports the proffered claim, then it is a patent falsehood.

When Special Directive 20-08 was issued, there was one published survey in a peer-reviewed journal on this topic, though it was 11 years old at the time. (Nagin, Cullen, & Johnson, *Imprisonment and Reoffending* (2009) 38 Crime & Just. 115.) This review noted an important distinction between two different sentencing decisions, creating two different research questions. For offenders at the lower end of the severity scale, the first question is whether to sentence them to incarceration at all or grant probation. For those at the higher end, where probation is clearly inappropriate, the question is the length of sentence. (*Id*. at p. 122.) There are fewer studies on the latter question. (*Id*. at p. 167.) On this point, the survey's conclusion was that, as of 2009, "there [was] little convincing evidence on the dose-response relationship between time spent in confinement and reoffending rate." (*Id*. at p. 183.)

Two reviews have been published after Special Directive 20-08. One was co-authored by the lead author of the 2009 survey. (Loeffler & Nagin, *The Impact of Incarceration on Recidivism* (2022) 5 Ann. Rev. Criminology 133.) This review focused on two types of studies that have been done since the 2009 review. The focus was more on the "in/out decision," incarceration or not, than on the sentence length decision. The authors find support for the proposition that pretrial detention has a negative effect (*id*. at p. 149), but "postconviction imprisonment has little impact on the probability of recidivism." (*Id*. at p. 147.) They also emphasized that most research is done with low-level offenders and does not necessarily apply to those with more extensive criminal histories or more serious

offenses. For these subpopulations, additional research is needed. (*Id*. at p. 149.)

A second review was conducted by amicus CJLF. Unlike the article relied on by the District Attorney, this article was accepted and published by a peer-reviewed journal. (Berger & Scheidegger, *Sentence Length and Recidivism: A Review of the Research* (2022) 35 Fed. Sent. Rep. 59.) This article reviewed 20 published studies, 16 of which had sufficiently valid methodology to produce useful results. Eight studies found a reduction in recidivism correlated with sentence length, although the effect size was small in all of them and below the threshold of "statistical signficance" in three of them. Two suggested an opposite result, though in one the result was confounded with another factor. Six had mixed results. (*Id*. at p. 68.) "Importantly, there were *no* studies finding a large aggregate-level criminogenic effect associated with longer sentences." (*Ibid*., italics added.)

The District Attorney's claim that long sentences have a strong criminogenic effect, sufficient to outweigh the incapacitation benefit, is contradicted by the published research literature as a whole, not supported by it.

The claim of "little deterrent effect" fares little better. The only authority cited for this is a quote from Fordham Law Professor John Pfaff with no citation to the source of the quote. (See 1 App. A37.) Professor Pfaff made a similar statement in a book reviewed by counsel for amicus CJLF. The review noted Professor Pfaff had misstated what his source for this assertion actually said. (See Scheidegger, *Refreshing Candor, Useful Data, and a Dog's Breakfast of Proposals: A Review of* Locked In *by John Pfaff* (2019) 20 Fed. Soc. Rev. 124, 130 <https://fedsoc.org/commentary/publications/two-views-on-criminal-justice-reform-the-author-and-a-critic-on-locked-in>.) Further, he simply ignored a well-known study showing

a deterrent effect of a recidivist enhancement by a prominent researcher whom he had cited elsewhere in the same book. (*Ibid*., citing Kessler & Levitt, *Using Sentence Enhancements to Distinguish Between Deterrence and Incapacitation* (1999) 17 J.L. & Econ. 343.)

There is empirical support for a deterrent effect of Three Strikes laws in particular (see Helland & Tabarrok, *Does Three Strikes Deter? A Nonparametric Estimation* (2007) 42 J. Hum. Resources 309), though that is not a unanimous view. Regardless of the answer to this not-yet-determined question, Three Strikes has always been primarily about incapacitation, not deterrence, so a deterrent effect is not needed to justify it.

Finally, the assertion that strong sentencing policies keep people in prison long after they are no longer a threat to the community is supported only by data showing that the *average* criminal tends to age out of crime. (1 App. A52.) This is true but irrelevant, as Three Strikes is not about average criminals. Particularly since the 2012 amendment required all three strikes to be serious or violent, Three Strikes is about the hard core. A study of recidivism by the United States Sentencing Commission showed that age and criminal history are both significant factors in the risk of recidivism. The recidivism rate for inmates released over age 60 in the top two criminal history categories is about the same as the rate for those released in their 20s with minimal criminal history. That is, a little under half of both of these groups were arrested for new offenses within the study period. (U.S. Sentencing Com., Recidivism of Offenders Released in 2010 (2021) table 4, p. 30 <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210930_Recidivism.pdf>.) If half are arrested for new crimes, a considerably larger but unknown number committed new crimes, as most crimes are not cleared by arrest. By no stretch of the imagination can criminals with multiple

serious felony convictions be considered "no longer a threat" merely because they reached 60 or older.

The view of the research set out in the Special Directive and incorporated into appellants' brief is simplistic, superficial, and obviously selected to present only data supporting the pre-determined policies while omitting contrary data. It has no credibility.

II. The writ of mandate was properly issued to require performance of a duty required by law.

A. The Writ of Mandate.

The principles of the writ of mandate[1] were established long before California statehood and remain largely the same today. The writ may be directed to an executive officer who "is directed by law to do a certain act" but not "in a case in which executive discretion is to be exercised." (*Marbury v. Madison* (1803) 5 U.S. 137, 170-171.) Early in its history, this court held that the writ may issue even to the Governor in an appropriate case. "The constitutional injunction that 'he shall see that the laws are faithfully executed,' cannot change the character of a duty which the Legislature has seen fit to impose upon him; for if the given duty is ministerial when it is required to be performed by any officer, it remains of the same nature though required of the chief executive officer of the State." (*Middleton v. Low* (1866) 30 Cal. 596, 601 [following *Marbury*].) The discretionary versus ministerial distinction remains in force, with a couple of qualifications. The writ may issue to compel an official to exercise discretion where an exercise is legally required, "and to exercise it under a proper interpretation of the applicable law." (*Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 442.)

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1. The writ was renamed from "writ of mandamus" in the 1872 codification, as California sought to minimize use of Latin to make the codes more accessible. (See Code Civ. Proc., § 1084.)

Appellants put much weight on the "and prove" requirement of sections 667(f)(1) and 1170.12(d)(1) and the consideration of practical difficulties of enforcing a writ of mandate for a complex endeavor such as proving a case. (See Reply Brief 12-17; *Boyne v. Ryan* (1893) 100 Cal. 265, 267.) But practical considerations necessarily depend on context. In the typical case, proving a prior conviction is far simpler than proving guilt of the current charge. Priors are generally facts easily established by existing court records. Courts often order parties to produce factual evidence. (See, e.g., Pen. Code, § 1054.5, subd. (b).) If there is a practical problem in an atypical case, that situation can be dealt with when it arises.

The mandate question thus reduces to a question of whether a mandatory duty is imposed by a valid statute. This presents a statutory interpretation question and possibly[2] a constitutional interpretation question.

B. A Mandatory Duty by Statute.

Appellants correctly argue that the text, context, and legislative history of the Three Strikes Law all establish that both versions of the law remove discretion from the district attorney and make mandatory the charging of prior convictions under the law. (AOB 31-39.) Yet they then make a gymnastic flip to argue that the court can construe the law differently to avoid a perceived constitutional difficulty. (AOB 56-57.) The latter invitation should be rejected.

The canon of constitutional avoidance " 'is qualified by the proposition that "avoidance of a difficulty will not be pressed to the point of disingenuous evasion." ' " (*People v. Gutierrez* (2014) 58

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2. "Possibly" because this court could decide this case on the basis of section 3.5 of article III of the California Constitution and *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1093-1094. (Answer Brief 12-15.)

Cal.4th 1354, 1373, quoting *Rust v. Sullivan* (1991) 500 U.S. 173, 191.) Disingenuous evasion would be an apt description of interpreting this portion of the Three Strikes Law to be a mere suggestion. The law was born out of extreme but justified frustration that the persons responsible for protecting the people of California from repeating predators had shirked their duty and misused their discretion to turn the predators loose to commit new, violent crimes.

The practice of "using the avoidance canon to usher in legal change," termed "active avoidance," has come under scholarly criticism:

> "It leads to tortured constructions of statutes that bear little resemblance to laws actually passed by the elected branches. Such judicially rewritten laws can be nearly impossible to change by legislative action. In addition, avoidance leads to — even requires — sloppy and cursory constitutional reasoning. Instead of encouraging judges to carefully limit the zone of unconstitutionality, which defines the space in which the elected branches may not operate, avoidance often leaves legislators in the dark. The avoidance canon requires only that a judge advert to some theoretical 'doubt' about a law's constitutionality, which naturally leads to vague and imprecise constitutional analysis. Further, the canon allows judges to articulate constitutional principles in a context where the real impact of those principles — the invalidation of a law — will be unfelt. The statute by definition will survive, even if in distorted form." (Katyal & Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change* (2015) 128 Harv. L. Rev. 2109, 2112.)

Part II of the AOB asks this court to engage in active avoidance to change the long-understood meaning of sections 667(f)(1) and 1170.12(d)(1). The plain meaning of a mandatory duty was understood in the court of appeal decisions that rejected the constitutional challenges in the years following the adoption of Three Strikes. (See *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1133; *People v. Kilborn* (1996) 41 Cal.App.4th 1325,1327; *People v. Butler* (1996) 43

Cal.App.4th 1224, 1247; *People v. Gray* (1998) 66 Cal.App.4th 973, 994-995.) The same meaning was understood in two decisions by this court which interpreted these provisions as context for the interpretation of other provisions.

In *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, the question presented turned on the second paragraph of the same subdivision in each statute, regarding the trial court's authority to dismiss strikes. (Pen. Code, §§ 667, subd. (f)(2), 1170.12, subd. (d)(2).) However, the first paragraph provided context for that interpretation. "The immediately preceding subdivision purports to eliminate the prosecutor's charging discretion in Three Strikes cases ...." (*Romero*, at p. 523.) The word "purports" was included because the court reserved judgment on whether the provision was constitutional (*id.* at pp. 515, fn. 7, 523, fn. 10), but there is no reservation as to its meaning. This understanding was reiterated in *People v. Casper* (2004) 33 Cal.4th 38, 41, as part of the court's characterization of the law as "a comprehensive, integrated sentencing scheme that applies to all cases coming within its terms." *All cases*, not all cases in counties where the district attorney chooses that it apply.

The settled meaning of these important provisions should not be overturned merely to avoid a constitutional question. That would be "sloppy and cursory constitutional reasoning," as Katyal and Schmidt, *supra*, put it, and it would cast a shadow over other long-established statutes, such as section 969 of the Penal Code. (See Answer Brief 34-35.) The duty imposed by sections 667(f)(1) and 1170.12(d)(1) is mandatory.

III. The Three Strikes mandatory charging provision is well within the legislative authority.

Whether an executive officer has discretion in a given matter in the absence of a statute on point is a different question from

whether the legislative authority[3] has the power to remove that discretion and mandate an action in particular circumstances. Cases answering the first question with regard to prosecutor discretion on matters where there is no mandatory statute will generally be inapposite to the second question.

The legislative authorities cannot exercise judicial or executive power, of course. (AOB 28; Cal. Const., art. III, § 3.) But that does not mean that valid exercises of legislative power cannot change the scope of discretion of judicial and executive officers. (See *People v. Bunn* (2002) 27 Cal.4th 1, 14-15 [discussing separate yet interdependent powers].) The "essential function [of legislation] embraces the far-reaching power to weigh competing interests and determine social policy." (*Ibid*.) The legislative power may eliminate a discretionary power traditionally held by a judicial or executive officer if that power is not vested by the Constitution. (See, e.g., *People v. Thomas* (1992) 4 Cal.4th 206, 213 [judicial discretion to strike firearm enhancement eliminated by statute].)

Very few discretionary powers are conferred by the Constitution in its text. The Governor has command of the militia and discretion over the substance, though not the procedure, of clemency. (Cal. Const., art. V, §§ 7, 8, subd. (a).) For most matters, the executive power and duty is to "see that the law is faithfully executed." (Cal. Const., art. V, § 1.) As the law is determined by legislation in the absence of a constitutional constraint, executive power is determined by statute to a large degree.

In *McCauley v. Brooks* (1860) 16 Cal. 11, 55-56, Chief Justice Field discussed the office of Controller, noting that the Constitution provided for the office but did not assign the duties of the office. This

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3. Unlike the federal government, California has two legislative authorities: the Legislature and the people themselves. (Cal. Const., art. II, §§ 8, 9, art. IV, § 1.)

left the office to be defined by statute, and the Legislature had provided for mostly ministerial duties. In the current Constitution, similarly, the office of district attorney is required and must be elected (Art. XI, §§ 1, subd. (b), 4, subd. (c)), but no powers are specified. Section 13 of Article V designates the Attorney General as chief law enforcement officer and refers to district attorneys but does not spell out any powers or duties of district attorneys. The basic definition of the office as the public prosecutor is in a statute. (Gov. Code, § 26500.) District attorneys are vested with authority by this statute with authority to "conduct on behalf of the people all prosecutions for public offenses" (*ibid*.), but they must do so according to the law.

Appellants complain that the Legislature is directing prosecutorial discretion (AOB 45), but it is not. The statute says there is no discretion in a narrowly defined set of circumstances. It is the district attorney's choice to initiate the prosecution and to charge the defendant with a current violation of a felony on the serious or violent lists of offenses. Whether the defendant has prior convictions of felonies from those lists is a historical fact, and the statute says that the district attorney has no discretion to omit that fact from the charging document. The Legislature is not exercising executive discretion. It is not deciding whether strikes will be charged in an individual case. It is laying down a rule of law that the executive must see is faithfully executed in all cases. This is not one branch exercising the power of another but rather an example of interrelatedness, how one branch's exercise of its own power affects the other branches in the exercise of theirs. This is the system of checks and balances at work.

"The prosecutor *ordinarily* has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 451, italics added.) Appellants quote this statement but ignore the

word "ordinarily." (AOB 29.) The *Dix* court must have included it for a reason. If the discretion were an absolute constitutional grant with no possibility of exceptions, "ordinarily" would not be there. *Dix* and other cases in the appellants' " 'unbroken line of cases' " (AOB 14) do not involve statutory limits on discretion and are therefore not on point.

Appellants cite *People v. Shults* (1978) 87 Cal.App.3d 101, 106 for their argument of constitutionally unlimitable charging discretion (AOB 29), but that case actually cuts the other way. Shults had been charged with a traffic offense as an infraction rather than a misdemeanor and exercised his statutory option to elevate it to a misdemeanor by alleging three traffic strikes against himself, thereby gaining the right to a jury trial. (See *Shults*, at pp. 103-105.) This option "does not interfere with the prosecutorial function of deciding whether to charge a defendant with an offense." (*Id.* at p. 107.) The charged offense was within the prosecutor's sole control, but the severity-enhancing priors were not, and the statute so providing "does not unconstitutionally interfere with the prosecutorial function of the People." (*Ibid.*)

Appellants also rely on *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228. (AOB 29.) That case deals with undermining the office of the district attorney by placing an essential part of the function under the supervision of the sheriff and is inapposite.

There are few statutes requiring district attorneys to institute actions, but this court in *Board of Supervisors v. Simpson* (1951) 36 Cal.2d 671 upheld one of the few. Appellants seek to distinguish a statute similar to the two in that case on a ground that a court might invoke (AOB 45, citing Gov. Code, § 26528), possibly an attempt to undermine *Simpson* without mentioning it. But that is not what this court actually held in *Simpson*.

Simpson involved the Red Light Abatement Act (Stats. 1913, ch. 17, p. 20) and section 731 of the Code of Civil Procedure. Section 3 of the uncodified statute act imposed a mandatory duty on the district attorney to abate the nuisance of houses of prostitution ("must"), and section 731 imposed a duty on the district attorney to abate nuisances more generally when directed by the board of supervisors. (*Simpson*, *supra*, 36 Cal.2d at p. 673.) Because both statutes imposed the duty, the involvement of the Board of Supervisors was not essential.

The district attorney did not want the case and said the county counsel should take it. (*Id*. at p. 672.) To resolve the dispute, the *Simpson* court examined the statute and found it to be "penal in nature" and coming under the duties of the district attorney as public prosecutor. (*Id*. at pp. 674-675.) The court's holding in the case makes no distinction between this abatement action and a criminal prosecution. "Ordinarily a district attorney cannot be compelled by mandamus to prosecute a criminal case (see *Boyne v. Ryan*, 100 Cal. 265 ...) but here the mandatory duty to prosecute is imposed on him and the statute leaves him no discretion to exercise." (*Id*. at p. 676.)

" 'The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them.' " (*Achen v. Pepsi-Cola Bottling Co.* (1951) 105 Cal.App.2d 113, 124, quoting Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L.J. 161; see also *People v. Davis* (1994) 7 Cal.4th 797, 823 (dis. opn. of Mosk, J).) This court in *Simpson* did not regard the fact that this was a civil action, at least in form, to be material. The holding, as expressly stated, applies to criminal cases as well. The court distinguished the cases declining to issue mandamus to compel prosecution solely on the ground that this case involved a statute imposing a mandatory duty, and *Boyne* and other cases did not. *Simpson* prefaces the statement of the *Boyne* rule

with "ordinarily," and holds that cases involving a mandatory statute are an exception to that rule.

Appellants rely heavily on *Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, so heavily as to warrant a "passim" in their table of authorities. (AOB 6.) While *Gananian* is surely correct as to its actual holding—that section 15288 of the Education Code is not a mandatory prosecution statute—its expansive dicta on constitutional issues need to be taken with a grain of salt. The constitutional discussion is at best a makeweight argument after the text and legislative history had already indicated the statute was not mandatory. (See *Gananian*, at pp. 1540-1542.) If this were a holding on a constitutional question it would violate the *Ashwander* principle that constitutional issues should not be decided absent a necessity to do so. (See *People v. Navarro* (2007) 40 Cal.4th 668, 675, citing *Ashwander v. Tennessee Valley Authority* (1936) 297 U.S. 288, 347 (conc. opn. of Brandeis, J.).)

No such holding would be justified by the authorities that *Gananian* relies on. It cites *People v. Mikhail* (1993) 13 Cal.App.4th 846, 854, which in turn relies on *People v. Sidener* (1962) 58 Cal.2d 645, 650, overruled on other grounds in *People v. Tenorio* (1970) 3 Cal.3d 89, 91. But *Sidener* on that page expressly acknowledges the legitimacy of a statute whereby prosecuting attorneys "are bound to charge all prior convictions." Whatever the authorities relied on by *Gananian* may mean, they surely do not mean that such a statute is unconstitutional.

Turning to *Board of Supervisors v. Simpson*, *supra*, *Gananian* got that case completely wrong. "The *Simpson* court expressly left untouched the rule that a district attorney cannot be compelled by mandamus to prosecute a *criminal* case." (*Gananian*, *supra*, 199 Cal.App.4th at p. 1544, citing *Simpson*, *supra*, 36 Cal.2d at p. 676, italics in original.) Actually, on that page, *Simpson* unambiguously

limited that rule *in criminal cases* to cases where there was no mandatory statute on point: "Ordinarily a district attorney cannot be compelled by mandamus to prosecute a criminal case [citations] but here the mandatory duty to prosecute is imposed upon him and the statute leaves him no discretion to exercise." As discussed *supra* at page 24, *Simpson* regarded the statute as "penal in nature" and did not distinguish the cases denying a writ of mandate on a civil versus criminal basis.

Interpreting *Gananian*'s constitutional discussion as background dicta rather than holding is further supported by this statement:

> "Thus, even assuming for the sake of analysis that the Legislature could constitutionally mandate prosecutions for one category of alleged criminal offenses, it would be remarkable if it did so without acknowledging and clearly stating that it was making an exception to the principle of prosecutorial discretion." (199 Cal.App.4th at p. 1544.)

That is true, and the statutes in the present case are clear on that point, as the parties agree. (AOB 31-39; Answer Brief 47-56.) This statement, combined with the *Ashwander* principle, indicates that *Gananian* is best understood as avoiding the constitutional question by interpreting the statute rather than deciding the constitutional question.

Generally, it is within the legislative power to determine whether executive acts will be mandatory or discretionary. No reason has been shown to make an exception here. There is nothing to the contrary in the text of the Constitution. No other branch is usurping the discretion to make case-by-case judgment calls where such calls are allowed. This limited exception to the general rule of discretion poses no threat to the overall function of the district attorney's office. It provides uniformity across all 58 of California's counties, rather than radically differing penalties by county in

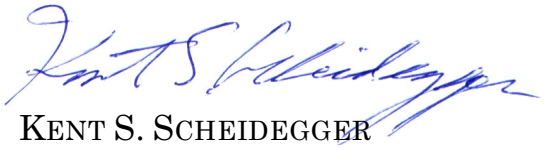
otherwise indistinguishable cases. (See Cal. Const., art. V, § 13.) Penal Code sections 667, subdivision (f)(1) and 1170.12, subdivision (d)(1) are constitutional.

CONCLUSION

The decision of the Court of Appeal should be affirmed.

April 24, 2023

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE

**Pursuant to California Rules of Court,
Rule 8.520, subd. (c)(1)**

I, Kent S. Scheidegger, hereby certify that the attached **BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT** contains 6016 words, as indicated by the computer program used to prepare the brief, WordPerfect.

Date: April 24, 2023

Respectfully Submitted,

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PROOF OF SERVICE

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816.

On April 24, 2023, I served true copies of the following document described as:

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

on the interested parties in this action as follows:

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Executed on April 24, 2023, Sacramento, California.

Kent S. Scheideggger

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