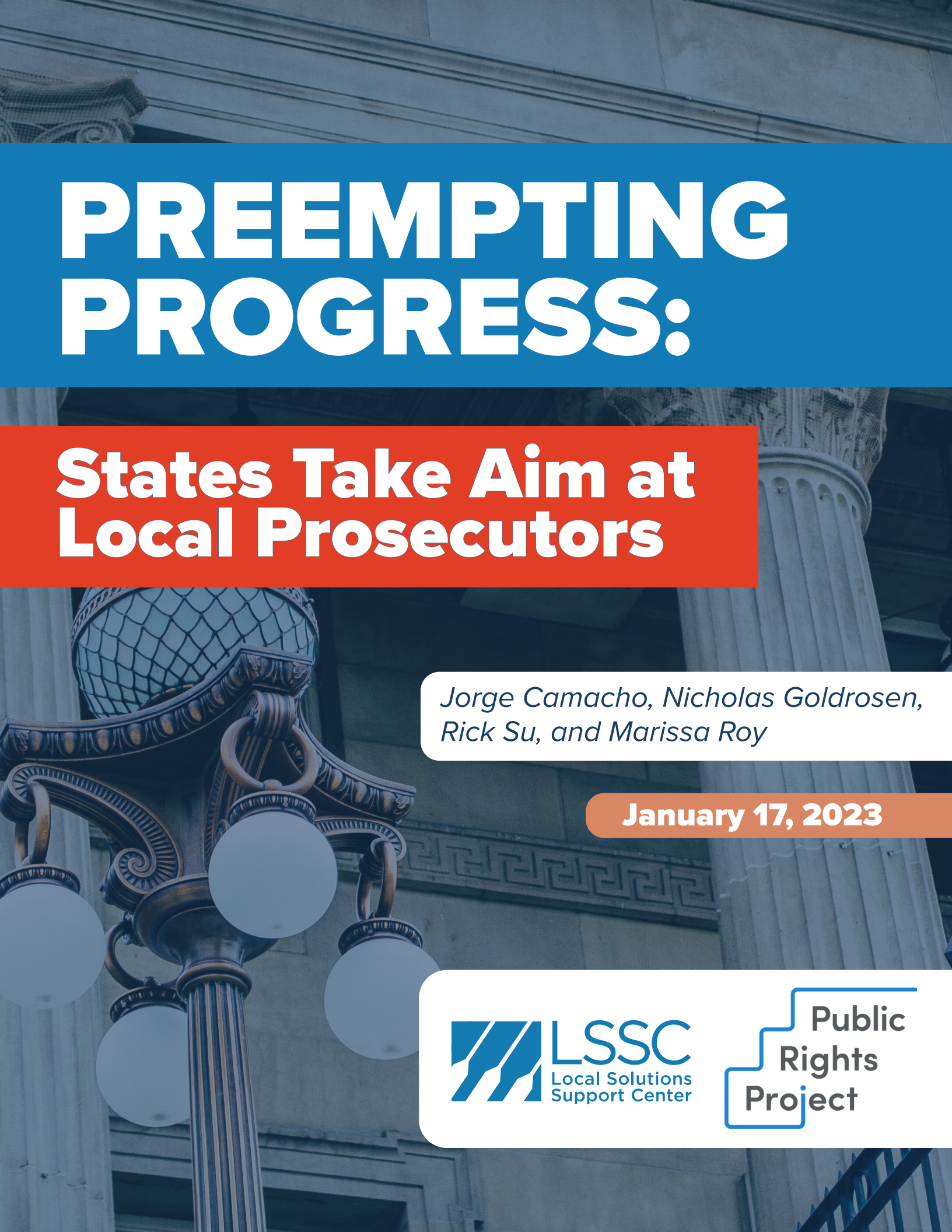

PREEMPTING PROGRESS:

States Take Aim at Local Prosecutors

Jorge Camacho, Nicholas Goldrosen, Rick Su, and Marissa Roy

January 17, 2023

LSSC Local Solutions Support Center

Public Rights Project

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Authors

- **Jorge Camacho** is a Clinical Lecturer in Law and the Policing, Law, and Policy Director of the Justice Collaboratory at Yale Law School, a group of academics, researchers, and social scientists who have joined together to build a more just, effective, and democratic criminal legal system.
- **Nicholas Goldrosen** is a Gates Cambridge Scholar who uses network analysis and other quantitative methods to study police misconduct and related phenomena. His research interests include progressive prosecution as well as the intersections of local government law and criminal justice reform.
- **Rick Su** is a Professor of Law at the University of North Carolina School of Law, where he teaches and writes in the areas of local government law, immigration, and federalism. His research focuses on the intersection between cities, immigration, and the criminal justice system.
- **Marissa Roy** is the Legal Team Lead at the Local Solutions Support Center, a national hub that coordinates and creates efforts to counter the abuse of preemption and strengthen local democracy.

Acknowledgements

We deeply appreciate the feedback, insights, and support we received throughout the drafting of this paper. In particular we would like to acknowledge contributions from the following organizations:

Public Rights Project is a nonprofit that empowers state, local, and tribal governments to fight for civil rights and for economic and environmental justice by providing them with talent and resources to proactively enforce their residents' legal rights. We thank Jill Habig, Jon Miller, and Josh Rosenthal for their feedback on this paper as well as Christina Schuler da Costa Ferro for their contributions to the supplement.

Public Rights Project

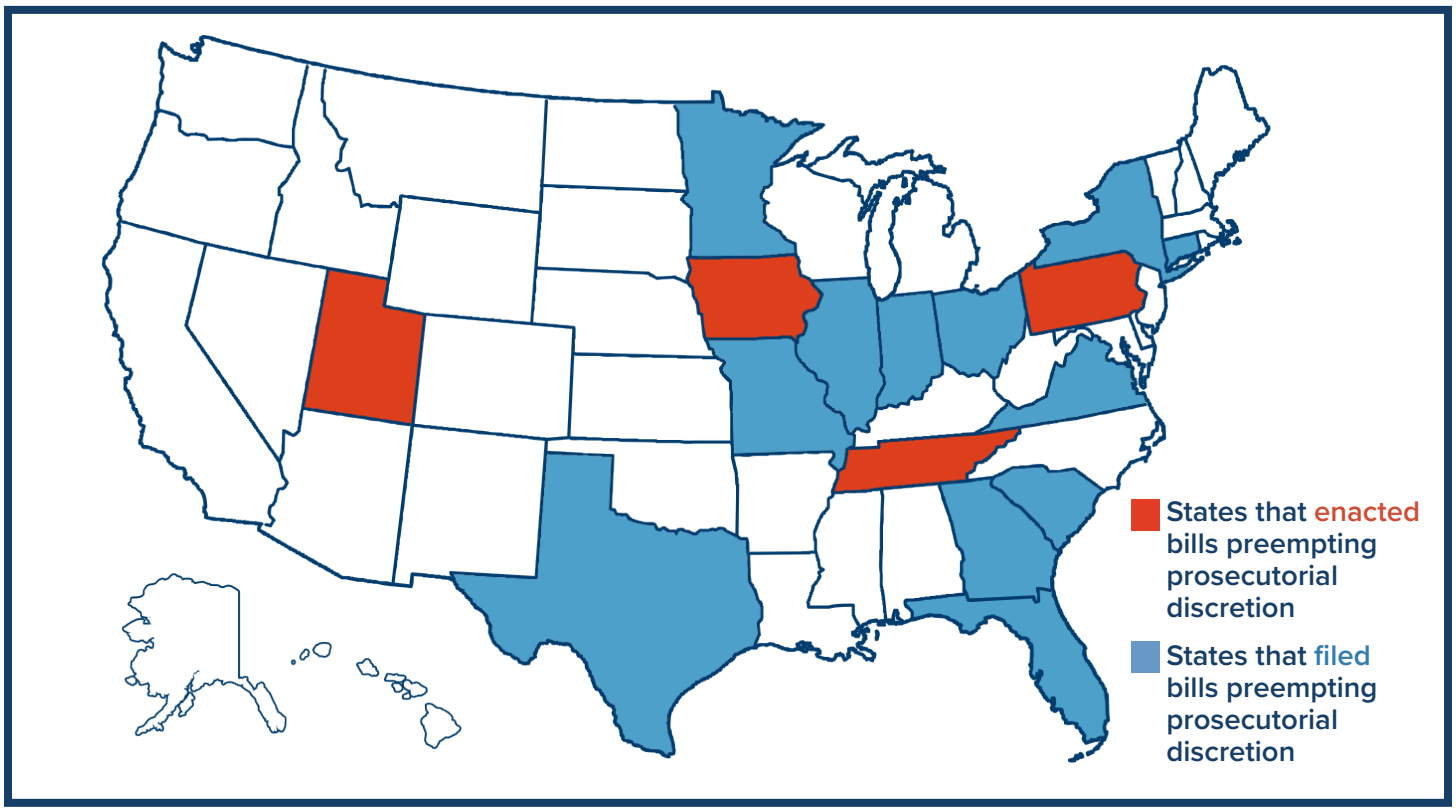
Vera Institute of Justice is a national organization that partners with impacted communities and government leaders to transform the criminal legal and immigration systems until they're fair for all. We develop just, antiracist solutions so that money doesn't determine freedom; fewer people are in jails, prisons, and immigration detention; and everyone is treated with dignity.We thank Mona Sahaf and Marta Nelson for their feedback on this paper and the work they have done to highlight racial disparities in our criminal justice system.

Fair and Just Prosecution is an organization that brings together elected local prosecutors as part of a network of leaders committed to promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility. We thank Miriam Krinsky, Estela Dimas, and Kalyn Hill for their feedback on this paper as well as their coordination of local prosecutors to stand for equity and justice.

Several scholars also took the time to review and provide feedback on this paper. We thank in particular Professor Nestor Davidson of Fordham Law School; Professor Richard Briffault of Columbia Law School; Preeti Chauhan, Professor of psychology at John Jay College of Criminal Justice and the Graduate Center, City University of New York (CUNY); and Professor Erin Scharff of the Sandra Day O'Connor School of Law at Arizona State University.

We also thank members of the Local Solutions Support Center team, including Katie Belanger for coordinating this project, Dan Rafter, Linda Zhang, and Rosa Colman for communications support, and Adam Polaski for his design of this paper.

Introduction – 'Preempting Progress: States Take Aim at Local Prosecutors'



Recognizing that mass incarceration does not make communities safer, many prosecutors have moved away from the default of over-incarceration to introduce evidence-based diversion strategies that reduce recidivism and deprioritize prosecution where it would cause more harm than good. At the same time, many local prosecutors have pledged not to enforce state laws born of extremism, such as abortion bans and bans on gender-affirming care. This philosophy has won the support of voters in major metropolitan centers across the country, from Los Angeles County, California to Durham County, North Carolina.

As prosecutors have begun to implement reforms at the local level, however, reactionary state legislatures have responded by preempting their discretion to execute these reforms. As documented in the Appendix, in the past three state legislative sessions, at least 28 preemption bills have been proposed in 16 states to undermine anti-carceral uses of prosecutorial discretion. Governors have also taken action to limit reform. Generally, these preemptive actions take three main approaches:

- **Supersession of Local Discretion:** States have considered new powers for the attorney general, or another official, to prosecute offenses where a locally elected prosecutor refuses to do so. Most notably, Tennessee's H.B. 9071 allows the attorney general to petition a local court for appointment of a special prosecutor, in response to an elected prosector's policy not to pursue specific crimes.

- **Punitive Measures Against Specific Prosecutors:** States have taken actions to penalize and even remove prosecutors for exercising their discretion. Iowa's S.F. 342 authorizes the Attorney General to sue a local prosecutor and to withhold all state funding, so long as the prosecutor maintains a policy limiting the enforcement of any state law. Multiple Florida prosecutors have had cases diverted or been entirely removed due to state-level disagreement with their prosecutorial decisions, and Philadelphia's Larry Krasner has been facing impeachment proceedings for his choices in how to exercise his authority.

- **Limitations on Discretion to Prosecute Specific Crimes:** States have considered targeted limitations on prosecutorial discretion to undermine sensible decisions not to prosecute anti-racism protesters, people seeking abortion, and providers of gender-affirming care.

Introduction

Although only five preemption laws have passed, this new trend is part of a larger movement by reactionary states to use preemption to thwart criminal justice reform and undermine the will of local constituents calling for this change. **We expect this preemption trend to not just continue, but to accelerate.**

State preemption of prosecutorial discretion undermines public safety, local democracy, and civil rights. The efforts to limit prosecutorial discretion represent a blind push toward carceral responses to crime, ignoring the substantial evidence that a less punitive approach can better promote public safety. Moreover, local voters have chosen these reform policies in electing specific prosecutors, and state preemption efforts override the express desire of that electorate. These preemption efforts thus serve as anti-democratic checks on experimentation, preventing reforms from taking effect and voters from realizing their impact. Finally, states' preemption efforts often serve to reinforce extremist moves to criminalize the exercise of bodily autonomy, target marginalized communities, and silence civil-rights protests. It is essential for civil rights and criminal justice reform advocates to take heed of this emerging threat.

The United States has the largest carceral system in the world: Over 2,000,000 people in the U.S. are incarcerated,[1] with another 4.5 million on probation or parole.[2] This carceral system perpetuates racial disparities as people of color are disproportionately imprisoned–although Black men represent 13% of the general population, they constitute 35% of those incarcerated.[3] The impact of the carceral system is life-long: those who have been incarcerated see their subsequent earnings reduced 52% with estimated lifetime losses over half a million dollars, entrenching people in cycles of poverty.[4]

Feeding the United States' bloated criminal justice system is an astronomically high rate of arrests. Every three seconds, someone in the United States is arrested.[5] Of the 10.5 million arrests per year, the vast majority (over 80%) are for lower level offenses such as disorderly conduct or drug possession.[6] These arrests disproportionately target people of color: Black people are over two times more likely than white people to be arrested for "drug abuse violations," despite using drugs at similar rates.[7] Arrests for lower level offenses are highly disruptive: pre-trial detention for even as short as 24 hours have been shown to have negative effects, leading to job loss, towed cars, risk of disease, and more.[8]

Standing between arrest and incarceration is the prosecutor. The prosecutor shapes public safety priorities by playing a gatekeeper role between arrests and incarceration, exercising significant discretion to decide whether to bring charges, the severity of the charges, whether to request bail, the terms of any plea deal to someone charged with an offense, and the requested sentence. These exercises of prosecutorial discretion are necessary to the function of a prosecutor: with finite resources and so many arrests–most for lower level offenses–prosecutors must evaluate and prioritize when prosecution would actually help the community and further public safety. No prosecutor has the resources to prosecute every case and every violation of the law; instead, the smart exercise of discretion is inherent in the job and consistent with the prosecutor's role. While a prosecutor can exercise their immense power to convert charges into a prison sentence and life-long criminal record, a prosecutor can also create opportunities for alternatives to incarceration and focus on rehabilitation as a way to improve public safety, including creating diversion, restorative justice, and

1. See John Gramlich, America's Incarceration Rate Falls to Lowest Level Since 1995, Pew Research Center (Aug. 15, 2021), https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/#:~:text=The%20World%20Prison%20Brief's%20data,564%20inmates%20per%20100%2C000%20people).
2. See Probation & Parole Systems Marked by High Stakes, Missed Opportunities, Pew Charitable Trusts (Aug. 2018), https://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf.
3. See Criminalization & Racial Disparities, Vera Inst. https://www.vera.org/ending-mass-incarceration/criminalization-racial-disparities (last visited Nov. 13, 2022).
4. A Criminal Record Shouldn't Be a Life Sentence to Poverty, Center for American Progress (May 28, 2021), https://www.americanprogress.org/article/criminal-record-shouldnt-life-sentence-poverty-2/#:~:text=A%20recent%20study%20by%20the,excess%20of%20%24372%20billion%20every.
5. See Rebecca Neusteter & Megan O'Toole, Every Three Seconds, Vera Inst. (Jan. 2019), https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/findings.
6. Id.
7. See Neusteter & O'Toole, supra note 5, https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/findings.
8. See Alexandra Napatoff, Punishment Without Crime 22-23 (2018).

other programs. All of these decisions are consistent with the prosecutor's role as ministers of justice.

Exercising prosecutorial discretion to embrace alternatives to incarceration can make communities safer and more equitable. Declining to prosecute non-violent misdemeanors reduces recidivism and crime overall, for example.[9] Refusing to criminalize conduct that should be protected–the First Amendment right to protest or the right to choose abortion–can advance civil rights.

Communities have an important role to play in informing the exercise of prosecutorial discretion for state criminal offenses at the local level. The leaders of local prosecutorial offices[10] are generally elected by voters in the community. Increasingly, voters have been calling on local prosecutors to use their significant discretion to build a more effective and equitable approach to public safety, particularly as the stark racial disparities in arrest and incarceration have been put in the public eye. A new philosophy on prosecution has emerged that emphasizes greater care and fairness throughout the criminal justice system. And, a new wave of reform prosecutors has been ushered into office as voters embrace their promises to improve the overall fairness of the criminal legal system, move away from over-incarceration as a solution to social problems, and emphasize alternatives to incarceration.

Many prosecutors at the forefront of this wave have triggered backlash from reactionary state legislatures. Though discretion has traditionally been accepted as necessary to the function of a local prosecutor, extremist state legislatures are now using preemption to disrupt this historical tradition and reverse the mandate of local voters calling for criminal justice reform. These states are proposing laws to supersede local prosecutors' jurisdiction, direct certain prosecutorial outcomes, and punish prosecutors who embrace reform, regardless of local mandate. These are often the same states moving more broadly to criminalize abortion, protest, gender-affirming care, and election activities–offenses that many local prosecutors have pledged not to prosecute.

While a majority of these state preemption laws have not passed, they signal an emerging trend of state intervention in an office that has traditionally been independent and accountable to the local electorate. This intervention is part of a larger wave of new

> *"Although only five preemption laws have passed, this new trend is part of a larger movement by reactionary states to use preemption to thwart criminal justice reform and undermine the will of local constituents calling for this change. We expect this preemption trend to not just continue, but to accelerate."*

preemption to block local criminal justice reform. Particularly in the two years since the murders of George Floyd, Breonna Taylor and so many others spurred a renewed call for an end to police brutality and institutionalized racism, community advocates have worked at the local level to reform the criminal justice system. States have responded to these locally embraced reforms with a rash of preemption laws that block civilian oversight, remove local control over budgets, criminalize protest, and now prevent and impede the efforts of reform-minded prosecutors delivering on their promises to constituents. These state preemption laws are inherently anti-democratic, supplanting locally supported reforms with state partisanship, and stand as a significant obstacle to meaningful criminal justice reform.

We only expect this trend to escalate in the 2023 legislative session and beyond, particularly as a growing number of local prosecutors have pledged to stand for reproductive rights by declining to enforce state laws criminalizing abortion.[11] This white paper thus lays out the growing trend of state preemption of prosecutorial discretion to illustrate that meaningful reform cannot happen when states abuse preemption and second guess the reforms called for by local communities and implemented by duly elected local prosecutors. Local prosecutors must maintain the ability to exercise discretion, so that communities can hold them accountable to pursue the meaningful reforms

9. See Amanda Agan, et al., A New Study Reveals That Not Prosecuting People for Nonviolent Misdemeanors May Actually Reduce Crime, TIME (May 4, 2021), https://time.com/6045637/not-prosecuting-misdemeanors-reduce-crime/.
10. Throughout this paper, we will refer to the head of an office charged with enforcing state criminal law in local jurisdictions as the "local prosecutor," as there are many names for this position including district attorney, county attorney, state's attorney, prosecuting attorney, or commonwealth's attorney.
11. Joint Statement from Elected Prosecutors (June 24, 2022), https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf.

I Local Prosecutors Have the Potential to Usher Significant Criminal Justice Reforms.

Local prosecutors are central to the application of criminal law. Although criminal violations are predominantly set out under state law, locally elected prosecutors determine the priorities for enforcing these laws. The local prosecutor traditionally has maintained a great deal of independence exercising this discretion, and thus, the local prosecutor has an important role in the movement for criminal justice reform.

A. Prosecutorial Discretion Shapes the Application of Criminal Law.

Prosecutorial discretion is a functional necessity in a criminal legal system that sets out more violations than could possibly be enforced.[12] In the federal system alone, there are over 300,000 potential criminal violations.[13] Overall, federal and state criminal law "cover more conduct, and punish it more harshly, than true democratic preferences would support."[14] Neither prosecutors nor the courts nor prisons could process every arrest or citation with the maximum allowable penalty. Thus, "resource constraints as well as prudence dictate the conclusion that . . . criminal law cannot be applied in its full rigor."[15] For example, a prosecutor may decide to prioritize homicide and violent crime, and allocate fewer resources for misdemeanors. Prosecutors must necessarily use their discretion to mitigate the breadth and severity of criminal law as well as make important determinations about what charges could actually further public safety in their communities.

Prosecutors exercise their necessary discretion at several pivotal points in the criminal justice process:

Pursuing Conviction or Opting for Diversion or Dismissal:

Prosecutors use their discretion to decide whether criminal charges should be brought in response to a citation or arrest in the first place. A prosecutor may decline to bring charges for several reasons: the conduct may be too insignificant for criminal charges; lack of evidence or police misconduct may underscore the weakness of the charges; or the law itself may be too severe (or unconstitutional) to merit enforcement.

Moreover, seeking a criminal conviction does not always further public safety. In fact, declining to prosecute nonviolent misdemeanors reduces recidivism and overall crime rates.[16] For these reasons, prosecutors are increasingly favoring diversion programs–which emphasize provision of services and community-based responses rather than criminalizations–for quality-of-life offenses, such as those stemming from poverty or addiction. These diversion programs can address the underlying causes of the charged conduct in a way that supports the individual and makes the whole community safer.[17]

When prosecutors do decide to seek a criminal conviction, they still must choose between overlapping charges applicable to the same conduct, for example whether conduct should be charged as a felony or a more minor misdemeanor, whether to include a charge that carries a mandatory minimum sentence, and whether to seek sentencing enhancements, as well as who to charge.

Seeking Cash Bail or Recommending Release:

When individuals are charged with a crime, prosecutors use their discretion to recommend in favor or against pre-trial detention. Pre-trial detention is generally supposed to be used for people who are deemed a danger to society or a flight risk. When individuals are detained before trial–i.e. when they are still presumed innocent–they risk losing their job, their residence, and even custody of their children. Currently, two-thirds of people in city and county jails are detained pre-trial.[18] Like many aspects of the criminal legal system, people of color are disproportionately affected by pretrial detention: Forty-three percent of pretrial detainees are Black. And because pre-trial detention generally rests on cash bail, those who remain in pretrial detention overwhelmingly live below the poverty line.[19]

12. See Kate Stith, The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion, 117 Yale L.J. 1420, 1423 (2008).
13. See Overcriminalization, Heritage Inst., https://www.heritage.org/crime-and-justice/heritage-explains/overcriminalization (last visited Nov. 13, 2022).
14. See Zachary Price, Faithful Execution in Fifty States, 57 Ga. L. Rev. __ (draft at 9) (forthcoming 2022).
15. See Stith, supra note 12, at 1423.
16. See Agan, supra note 9.
17. See Promising Practices in Prosecutor-Led Diversion, Fair & Just Prosecution (2017), https://www.fairandjustprosecution.org/staging/wp-content/uploads/2017/09/FJPBrief.Diversion.9.26.pdf.
18. See Pretrial Detention, Prison Pol. Initiative, https://www.prisonpolicy.org/research/pretrial_detention/ (last visited Nov. 13, 2022).

Prosecutors can avoid the inequities that cash bail perpetuates by recommending release unless there is strong evidence that a person represents a flight risk or danger to others.

Negotiating a Plea:

Criminal cases very rarely proceed to trial. It is estimated that 90-95% of criminal charges are resolved by a plea deal, where a defendant agrees to plead guilty and waive the right to a trial in return for dropped charges or a reduced sentencing recommendation.[20] Prosecutors wield an enormous amount of discretion in the plea bargaining process because they play the role of attorney and judge, evaluating the strength of the case and judging the appropriate charges or sentence to offer a defendant. Ultimately, prosecutors influence the leniency or severity of the criminal system by negotiating the outcome of the vast majority of criminal cases.

Recommending a Sentence:

A prosecutor's decision about which charges to file has an enormous effect on the potential sentence a defendant will receive. And when charges do proceed to a trial, prosecutors retain enormous discretion in recommending a sentence to the judge. As repeat players before judges–who are frequently former prosecutors themselves[21]–prosecutors often command a degree of deference as they recommend and request a sentence against a defendant. At both the charging stage and sentencing stage of a criminal prosecution, prosecutors can use their discretion to seek a harsh or lenient sentence, to opt whether or not to seek the death penalty, to decline to seek an adult sentence for a minor, or to take immigration consequences into consideration when recommending a sentence.

The sum of these discretionary decisions has enormous implications for the carceral system as well as significant impacts on individuals charged with an offense. Prosecutors hold the power to alter the course of someone's life and their exercise of discretion can make all the difference. And traditionally, their discretionary decisions are given immunity, both from interference by other branches of government and from private right of action.

B. Local Prosecutors Exercise Their Discretion Accountable to Local Communities.

Although local prosecutors are generally state constitutional officers who prosecute on behalf of the state as a whole (or at least in the name of the state), they have historically been accountable to their local electorates. Unlike the U.S. Attorneys, who are appointed by the President, neither the governor nor the state attorney general appoints local prosecutors in most states or determines how their discretion is exercised. Rather, these prosecutors are typically locally elected and predominantly funded by local governments, a deliberate policy choice to "ensure that prosecutors would remain accountable to the local communities they served."[22]

As state-law empowered officials accountable to local constituents, local prosecutors can apply state law in a way that serves the needs and priorities of varying local communities. The historic discretion afforded to local prosecutors allows them to make independent judgments about which criminal violations should be prioritized and what extenuating circumstances should be considered. Local accountability further ensures that in the exercise of their discretion, prosecutors carefully balance the impact of prosecutorial decisions on the communities that they are elected to serve. This is not to say that local prosecutors are entirely unaccountable to the state government; state legislatures craft the criminal laws that prosecutors enforce, and governors are sometimes empowered to remove them for cause. But traditionally, local prosecutors are officials who by design operate independently of the state government.

19. Id.
20. See Lindsey Devers, Plea and Charge Bargaining, U.S. Dep't of Justice (Jan. 24, 2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearch-Summary.pdf.
21. See Clark Nelly, Are a Disproportionate Number of Federal Judges Former Government Advocates, Cato Inst. (May 27, 2021), https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates.
22. Michael J. Ellis, The Origins of the Elected Prosecutor, 121 Yale L.J. 1528, 1568 (2012); see also Jordan C. Harris, Justice for Sale: The Cost of Private Financing of Prosecution, When is it Worth it, 31 Geo. J. of Legal Ethics 635, 646 (2018) ("An elected prosecutor's accountability to the voting public cannot easily be avoided if she plans to seek re-election.").

C. Local Communities Are Calling On Prosecutors to Use Their Discretion for Criminal Justice Reform.

The American political landscape for local prosecutors is marked by considerable variability. Nationwide, more than 2,300 local districts across 45 states elect their local prosecutors.[23] These districts vary tremendously in size, with the largest—Los Angeles County, California—comprising a population of nearly 10 million constituents, and the smallest—Arthur County, Nebraska—comprising around 460.[24]

Across all districts, contested elections involving more than one candidate are comparatively rare, having occurred in only about 700 districts in recent election cycles.[25] However, among the largest districts—typically located in urban and metropolitan areas—contested elections are more common, particularly when there is no incumbent.[26] Considering that the largest 148 districts comprise over one-half of the U.S. population,[27] the politics of the prosecutor elections within these districts are immensely influential both locally and nationally. And it is within this band of contested elections that a new class of candidate has arisen over the past decade: reform prosecutors.

Promises of change by candidates for local prosecutors' offices are nothing new. Yet many candidates are embracing new principles for prosecution, where fairness and equity in prosecution are key pillars of public safety.[28] Rather than reflexively deferring to strategies that over-incarcerate, these prosecutors develop alternatives that can avoid the collateral damage of the carceral system and tailor their approach on a case-by-case basis.[29] And, these candidates themselves embody a new type of prosecutor. Candidates for elected district attorney and state's attorney offices regularly have been career prosecutors or come from related fields, like law enforcement. By contrast, this new wave of prosecutors are often elected because of their close affiliations with political organizations or movements that have historically had an adversarial relationship with prosecutors. Several, including former San Francisco District Attorney Chesa Boudin and Philadelphia District Attorney Larry Krasner, were former public defenders; others came from non-governmental public interest backgrounds, such as Durham County District Attorney Satana Deberry, formerly Executive Director of the North Carolina Housing Coalition, and Travis County District Attorney José Garza, formerly with the Workers Defense Project.

Larry Krasner
Philadelphia, PA

Satana Deberry
Durham County, NC

George Gascón
Los Angeles, CA

José Garza
Travis County, TX

Kim Foxx
Cook County, IL

Such candidates have squarely situated their campaigns in opposition to tough-on-crime politics and sometimes against conservative politics more generally. Boudin specifically promised to "stand up to...the Trump administration" and to eliminate racial disparities,

23. The Prosecutors and Politics Project of the University of North Carolina School of Law, National Study of Prosecutor Elections 5 (2020).
24. Id.
25. Id. at 5, 8 (providing a count for the number of contested elections in the most recent election cycle as of February 2020, and noting that for some jurisdictions, the most recent election cycle occurred in 2017, while in others it occurred as far back as 2012).
26. Id. at 6 (noting a 100% rate of contested elections in communities with populations over 100,000 when no incumbent ran).
27. Id. at 357.
28. See 21 Principles for the 21st Century Prosecutor, Fair & Just Prosecution, https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf (last visited Nov. 13, 2022).
29. Id.

end mass incarceration, decriminalize homelessness and mental illness, and prosecute "bad cops."[30] Cook County District Attorney Kim Foxx similarly criticized the policies of her predecessor and pushed an agenda that focused on diversion of low-level drug offenses, greater accountability for police officers, and decriminalization of school misconduct.[31] Krasner vociferously opposed the death penalty during his campaign, argued against disproportionately long prison sentences, and viewed addiction–and the offenses motivated by it–as a public health problem, not a criminal justice problem.[32] The promise of prosecutorial reform has galvanized emerging political constituencies that have, historically, avoided participation in local prosecutor elections but have since organized themselves into organizations like Reclaim Philadelphia[33] and Millennials in Action.[34]

Once elected, these prosecutors have taken action to fulfill their promises to voters. They are deprioritizing charging offenses where prosecution would not lead to public safety: for example, Davidson County District Attorney Glenn Funk has eliminated prosecution for simple marijuana possession charges[35]–arguing that they do not further public health or safety–a policy that has now been emulated nationwide.[36] They have created innovative diversion programs that address root causes of crime and reduce recidivism: for instance, Foxx inherited one of the most punitive district attorney's offices in the country and increased diversion for lower-level offenses by 30%, allowing people access to programs for drug treatment and mental health, among other services, to give them a second chance.[37] They have dramatically reduced or entirely eliminated the system of cash bail that disproportionately affects those with fewer resources: for example, Los Angeles District Attorney George Gascón immediately eliminated cash bail for certain categories of felonies with the object of phasing out all cash bail and transitioning to evidentiary hearings for pre-trial detention.[38] And they have implemented sentencing reforms, including issuing moratoria on seeking the death penalty and declining to charge minors as adults.[39]

These reforms have fomented staunch opposition from groups hostile to social justice, civil rights, and the progressive movement more generally. Organizations like the Law Enforcement Legal Defense Fund and politicians like former U.S. Attorney General William Barr have speciously linked the policies of these prosecutor offices to rising crimes rates,[40] claims that are not only unsupported by data, but may be demonstrably false.[41] Opponents have further sought to use special recall elections,[42] which typically draw smaller voter turn-out and engender greater voter confusion,[43] and impeachment proceedings[44] to oust reform prosecutors.[45]

30. See Chesa Boudin for San Francisco District Attorney, November 5, 2019 (campaign video), available at https://www.youtube.com/watch?v=Z33jPp8Rxeg (last accessed May 3, 2022); Chesa Boudin for San Francisco DA, 2019 (campaign video), available at https://www.youtube.com/watch?v=EL4HHmxuMP0 (last accessed May 3, 2022); see also Bryan Schatz, Is Chesa Boudin Radical Enough?, Mother Jones (Nov. 4, 2019).
31. See John Byrne & Hal Dardick, Foxx: Cook County's State's Attorney Win About 'Turning the Page', Chi. Tribune (Mar. 16, 2016).
32. See Layla A. Jones, D.A. Candidate Larry Krasner Gathers Early Attention in Race, Phlia. Tribune (Mar. 4, 2017).
33. Reclaim Philadelphia, https://www.reclaimphiladelphia.org/ (last visited Nov. 13, 2022).
34. Millennials in Action, http://miapac.com/.
35. See Steven Hale, Nashville DA's Office Will No Longer Prosecute Simple Marijuana Possession, Nashville Scene (July 1, 2020), https://www.nashvillescene.com/news/pithinthewind/nashville-das-office-will-no-longer-prosecute-simple-marijuana-possession/article_de2485d1-afd2-5f59-bb51-565e11a7ca6c.html.
36. See Mary Alice Royse, Biden 'Simple Possession' Pardon Echoes DA Glenn Funk 2020 Decree, WSMV 4 (Oct. 6, 2022), https://www.wsmv.com/2022/10/06/biden-simple-possession-pardon-echoes-da-glenn-funk-2020-decree/.
37. See Reclaim Chicago, et al., Decarcerating Cook County (Mar. 2021), https://www.chicagoappleseed.org/wp-content/uploads/2021/03/22021-03-CCSAO-Diversion-Report-FINAL.pdf.
38. See Horus Alas, Why L.A. County's District Attorney Has Joined the Movement to End Bail, US News (Jan. 14, 2021), https://www.usnews.com/news/cities/articles/2021-01-14/los-angeles-county-district-attorney-joins-movement-to-end-cash-bail.
39. See, e.g., Press Release, Manhattan District Attorney Alvin Bragg Releases Comprehensive Reforms to Deliver Safety and Justice for All (Jan. 4, 2022), https://www.manhattanda.org/manhattan-district-attorney-alvin-bragg-releases-comprehensive-reforms-to-deliver-safety-and-justice-for-all/.
40. See, Jason C. Johnson, Prosecutors Like Krasner Go Soft-on-Crime and it has Consequences for Cities, Law Enforcement Legal Defense Fund, https://www.policedefense.org/prosecutors-like-krasner-go-soft-on-crime-and-it-has-consequences-for-cities/) (last visited Nov. 13, 2022) (linking crime rate increases in cities with progressive prosecutor offices to reduced felony charging and conviction rates within those offices); Zack Budryk, Barr predicts Progressive Prosecutors Will Lead to 'More Crime, More Victims', The Hill (Aug. 12, 2019), https://thehill.com/homenews/administration/457120-barr-predicts-progressive-prosecutors-will-lead-to-more-crime-more//.
41. See Are Progressive Prosecutors to Blame for an American Homicide Wave?, The Economist (Feb. 19, 2022), https://www.economist.com/graphic-detail/2022/02/19/are-progressive-prosecutors-to-blame-for-an-american-homicide-wave (recounting recent studies that indicate no linkage between progressive prosecutorial policies and increases in homicide); Jennifer Doleac, Don't Blame Progressive Prosecutors for Rising Crime (Opinion), Bloomberg (Sep. 13, 2021), https://www.bloomberg.com/opinion/articles/2021-09-13/don-t-blame-progressive-prosecutors-for-rising-crime-rates (discussing the author's research that suggests that progressive prosecutorial policies may actually drive crime down).
42. See, e.g., Jeremy B. White, San Francisco District Attorney Ousted in Recall Election, Politico (June 6, 2022) https://www.politico.com/news/2022/06/08/chesa-boudin-san-francisco-district-attorney-recall-00038002 (discussing the recall of San Francisco D.A. Chesa Boudin); Soumya Karlamangla, Effort to Recall Los Angeles District Attorney George Gascón Fails, N.Y. Times (Aug. 16, 2022), https://www.nytimes.com/2022/08/16/us/gascon-recall-district-attorney-los-angeles.html (discussing the recall attempt against Los Angeles D.A. George Gascón).
43. Cf. Pedro Nava, Opinion: How to Fix California's Undemocratic But Popular Recall Elections, Mercury News (Feb. 17, 2022), https://www.mercurynews.com/2022/02/17/opinion-how-to-fix-californias-undemocratic-but-popular-recall-elections/.
44. See, e.g., Campbell Robertson, Pennsylvania House Moves to Impeach Philadelphia's Progressive D.A., N.Y. Times (Oct. 26, 2022) https://www.nytimes.com/2022/10/26/us/larry-krasner-philadelphia-impeachment.html (discussing the filing of articles of impeachment by Republican members of the Pennsylvania House of Representatives against Philadelphia D.A. Larry Krasner).
45. As of the publication of this paper, two prominent recall efforts have concluded, including that of Chesa Boudin, which resulted in Boudin's ouster from office, and George Gascón, who survived the effort against him after the recall petition against him failed to qualify for the ballot. Additionally, at least one impeachment proceeding–against Philadelphia D.A. Larry Krasner–has been initiated by members of a state legislature against a local prosecutor. Although the politics of these recall and impeachment efforts share certain similarities to that of state preemption efforts against local prosecutors and are therefore noteworthy, these developments are ultimately distinct and fall outside the scope and analysis of this paper.

II As Local Prosecutors Use their Discretion for Criminal Justice Reform, States Have Used Preemption to Restrict Local Prosecutorial Discretion.

Although discretion had long been accepted as an inherent and necessary element of the role of a local prosecutor, reactionary state governments have increasingly moved to restrict this discretion to oppose criminal justice reform through preemption. Preemption occurs where a higher level of government (here the state) attempts to restrict or take away authority inherent to a lower level of government (here a local prosecutor's office). While state preemption can be used as a check on local governments abusing power–i.e. allowing the state to step in if local prosecutors are not charging police misconduct–preemption can also be abused by states seeking to substitute their partisan policy objectives for the will of local voters.

The new wave of preemption of prosecutorial discretion has been the abusive type, aimed at thwarting criminal justice reform policies implemented by local prosecutors on the mandate of voters. In response to the election of reform prosecutors, at least 16 states have taken up laws or executive actions seeking to restrict local prosecutorial discretion. A full list of proposed and enacted laws can be found at the Appendix as only a representative sample is discussed herein. While a majority of these laws have not passed, they signal a shift that can be expected to continue and grow in 2023 and beyond.

The methods by which states have tried to preempt prosecutorial discretion have varied widely. Some states have sought to expand the state attorney general's jurisdiction to supersede local prosecutorial decisions. Others have moved to restrict the scope of the local prosecutors' discretionary authority or punish local prosecutors for using their discretion in ways the state disagrees with. Finally, some states have woven restrictions of prosecutorial discretion into their broader policy agendas, limiting the ways in which local governments can craft policy approaches according to their unique needs and values.

A. States Are Using Preemption to Supersede Local Prosecutorial Discretion.

The most common method that states are using to preempt prosecutors is to expand the jurisdiction of the state attorney general to supersede local exercises or prosecutorial discretion. While some state constitutions give attorneys general supervisory authority over district attorneys–allowing attorneys general to step in where DAs may not be adequately investigating offenses, such as when the Minnesota Attorney General took over the prosecution of former police officer Derek Chauvin for the murder of George Floyd[46]–this new supersession preemption has aimed to override criminal justice reform instead. With expanded jurisdiction, state attorneys

46. See Tim Arango, 'Gentle Steering of the Ship': How Keith Ellison Led the Prosecution of Chauvin, N.Y. Times (Apr. 21, 2021), https://www.nytimes.com/2021/04/21/us/keith-ellison-chauvin-trial.html.
47. H.B. No. 9071, Tenn. 112th General Assembly (2021).

general can exercise power to prosecute cases at the local level–either personally or through a chosen proxy–so that a local prosecutors' discretion not to prosecute is essentially rendered meaningless. Generally, this supersession of jurisdiction is triggered when local prosecutors use their discretion to reduce the number of criminal prosecutions they file.

This strategy has become a popular proposal for state legislatures to broadly intervene with the local administration of criminal justice, though so far only one state has enacted such a law.

Proposed & Passed State Legislation to Supersede Local Prosecutorial Discretion

Tennessee HB 9071 *(Bill Passed)*

In 2021, Tennessee enacted H.B. 9071, which triggers alternative prosecution arrangements when a local prosecutor adopts a policy to decline categorically to prosecute specific offenses.[47] Under the law, the state attorney general can then petition a state court to appoint a special prosecutor if certain statutory conditions are met.[48] The "sole purpose" of the special appointed prosecutor would be to "prosecut[e] persons accused of committing [the declined] offense."[49]

Indiana SB 165

In 2022, S.B. 165 was proposed in Indiana, but ultimately did not pass. Like Tennessee's H.B. 9071, this bill would have allowed the attorney general to request that state courts appoint a special prosecuting attorney when a local prosecutor is "categorically refusing to enforce a criminal law."[50] A categorical refusal was defined broadly to include "refusal to enforce a criminal law unless certain conditions are met,"[51] which would appear to broadly sweep many conditional exercises of discretion. A special prosecuting attorney would have jurisdiction over all those offenses which the local prosecutor has declined to prosecute.[52]

Missouri HB 541

In 2019, the Missouri legislature considered but did not pass H.B. 541, which would have allowed the attorney general to review and potentially prosecute any offense that the local prosecutor declines to prosecute at the behest of law enforcement.[53] This broad authority would have given the attorney general the power to supersede any decision about what offenses are charged at the local level.[54] The bill would have further elevated the authority of local law enforcement to override the decision of a local prosecutor by allowing them to forward to the attorney general any offense that local prosecutors have declined to charge–reversing the standard check that prosecutors can exercise when law enforcement overzealously charges offenses.[55]

Virginia SB 563

In 2022, S.B. 563 was introduced in Virginia to grant independent authority to the attorney general to prosecute any violent crime in the state upon request by a local sheriff or chief of police if a local prosecutor had declined to prosecute. Ultimately, this effort failed.

47. H.B. No. 9071, Tenn. 112th General Assembly (2021).
48. Id.
49. Id.
50. S.B. No. 165, Ind. General Assembly 2022 Session (2022).
51. Id.
52. Id.
53. H.B. No. 541, Mo. 100th General Assembly (2019).
54. Id.
55. Id.
56. Kara Kenney, Bill Aimed at "Noncompliant" County Prosecutors Moves Forward, WRTV (Feb. 14, 2022), https://www.wrtv.com/news/wrtv-investigates/bill-aimed-at-noncompliant-county-prosecutors-moves-forward; Indiana Senate Backs Allowing Usurping of County Prosecutors, Assoc. Press (Feb. 1, 2022), https://www.wfyi.org/news/articles/indiana-senate-backs-allowing-usurping-of-county-prosecutors.
57. See Kenney, supra note 56.
58. See Sam Stockard & Anita Wadhwani, Legislature Takes Discretion From District Attorneys General, Tenn. Lookout (Oct. 29, 2021), https://tennesseelookout.com/2021/10/29/legislature-takes-discretion-from-district-attorneys-general/.
59. Id.
60. See News Staff, Miyares Announces His Legislative Agenda, CBS 19 News (Jan. 25, 2022), https://www.cbs19news.com/story/45725170/miyares-announces-his-legislative-agenda.

Although these bills are written in neutral language to confer statewide authority, the circumstances surrounding their passage suggest they are targeted at reducing the power of local prosecutors who are elected on a reform platform while increasing the power of unelected local law enforcement and state attorneys general–who are elected statewide in 43 states. In Indiana, State Senator Mike Young originally introduced S.B. 165 after Marion County Prosecuting Attorney Ryan Mears stated that his office would decline to prosecute certain low-level marijuana offenses, though Young disclaimed that he was targeting Mears specifically.[56] Young's critique of such prosecutors was, "They in essence have become legislatures—determining what laws are valid and which ones aren't." Tennessee legislators expressed similar critiques, with one saying, "A District Attorney does not have the authority to decide what law is good and what law isn't good."[58] There, H.B. 9071 was passed after a local prosecutor, Davidson County District Attorney Glenn Funk, declined to prosecute minor marijuana possession and violations of an anti-trans bathroom access law.[59] In Virginia, S.B. 563 was proposed to help Attorney General Jason Miyares keep his campaign promise to combat "so-called social justice Commonwealth's attorneys . . . in Northern Virginia."[60] Alarmingly, these supersession proposals are spurred by short-term aims to combat specific local prosecutors, but have statewide applicability and long-term ramifications for local prosecution.

These state[61] attempts to supersede local prosecution authority threaten to upend the balance of power between state attorneys general and local prosecutors enshrined in state constitutions.[62] Pre-existing law in Indiana, Tennessee, and Missouri reserved power to local prosecutors and limited supersession authority.[63] For example, in Indiana, the state attorney general "cannot initiate prosecutions; instead, he may only join them when he sees fit."[64] An expansion of supersession is thus a reversal of constitutional tradition. In other states, though, there are already broad legislative powers for supersession (regardless of how infrequently these might be used). Hence, no legislative expansion of these powers may be needed for them to be exercised. What is beginning as a reaction to reform prosecutors can have long-term effects on the ability of local governments to provide for public safety.

"These state attempts to supersede local prosecution authority threaten to upend the balance of power between state attorneys general and local prosecutors enshrined in state constitutions."

56. Kara Kenney, Bill Aimed at "Noncompliant" County Prosecutors Moves Forward, WRTV (Feb. 14, 2022), https://www.wrtv.com/news/wrtv-investigates/bill-aimed-at-noncompliant-county-prosecutors-moves-forward; Indiana Senate Backs Allowing Usurping of County Prosecutors, Assoc. Press (Feb. 1, 2022), https://www.wfyi.org/news/articles/indiana-senate-backs-allowing-usurping-of-county-prosecutors.
57. See Kenney, supra note 56.
58. See Sam Stockard & Anita Wadhwani, Legislature Takes Discretion From District Attorneys General, Tenn. Lookout (Oct. 29, 2021), https://tennesseelookout.com/2021/10/29/legislature-takes-discretion-from-district-attorneys-general/.
59. Id.
60. See News Staff, Miyares Announces His Legislative Agenda, CBS 19 News (Jan. 25, 2022), https://www.cbs19news.com/story/45725170/miyares-announces-his-legislative-agenda.
61. In most instances, these preemption attempts derive from reactionary state legislatures, but in Los Angeles County, the Association of Deputy District Attorneys has attempted to argue that California's existing Three Strikes Law has the effect of preempting local prosecutorial discretion. See Bob Egelko, State Supreme Court Will Decide If Progressive Prosecutors Like George Gascon Can Use Discretion in Three Strikes Cases, S.F. Chron. (Aug. 31, 2022), https://www.sfchronicle.com/bayarea/article/State-Supreme-Court-will-decide-if-progressive-17411117.php. Such revisionist readings of existing law threaten to expand the scope of abusive preemption beyond the attempts of reactionary state legislatures.
62. Price, supra note 14, at 3-4 (citing the 50 state constitutions for the proposition that "the federal government and the fifty states vary widely with respect to both the degree of enforcement discretion they presume and the degree of autonomy they afford to local prosecutors").
63. Id. at 32.
64. Id. at 73 (citing Doe v. Holcomb, 883 F.3d 971, 977 (7th Cir. 2018))..

II B. States Are Using Preemption to Punish Reform Prosecutors.

Beyond supersession, states have taken steps to punish local prosecutors or impose additional supervision of or restrictions on the exercise of their discretion. Similarly to supersession preemption, there may be instances where punitive preemption could be warranted–to remove a prosecutor who does not investigate police misconduct or civil rights offenses–but this punitive preemption has been wielded as a weapon in a larger war over criminal justice reform. Often, these preemption bills have sought to punish local prosecutors by exposing them to civil or criminal liability for the use of their inherent and often constitutionally protected discretion.

Punitive preemption of local prosecutors has come not only from state legislatures, but also from executive action. Although preemption is sometimes understood as a legislative act—with state legislatures passing laws that override local authority—governors have also attempted to use executive powers to interfere with local policy. The legal tools that permit executive preemptive action are the powers ordinarily entrusted to governors as the heads of state governments. These powers, which include the powers to propose and approve state budgets and to remove state officials from office, are held in some form or another by governors nationwide. So fundamental to the governor's role are these powers that they can be understood as necessary for the effective management of state government by their chief executives. However, as with any authority, they can be abused against political adversaries, even within the same political party.

Increasingly, governors have tested their abilities to remove local prosecutors from specific cases or from office entirely. Recently, Florida Governor Ron DeSantis removed Hillsborough State Attorney Andrew Warren after he signed a pledge not to prosecute people for their decisions to seek or provide abortion or gender-affirming care as well as dropped charges against protesters of racial injustice; Warren is currently fighting this removal in court.[65] Two separate Florida Governors, Rick Scott in 2017 and Ron DeSantis in 2020, removed State Attorney Aramis Ayala from murder cases in which she declined to seek capital punishment.[66] After the Florida Supreme Court upheld her removal, Ayala indicated she would not seek

Proposed & Passed State Legislation to Punish Reform Prosecutors

Iowa SF 342 *(Bill Passed)*

In 2021, Iowa enacted S.F. 342, which prohibits any local entity from adopting a policy that "prohibits or discourages the enforcement of state, local, or municipal laws." The law construes "policy" broadly to include not only formal, written policies but informal and unwritten policies, including internal guidance provided from the district attorney to line prosecutors in the office. S.F. 342 allows the attorney general to file a civil suit against a noncompliant prosecutor's office and to withhold all state funding until the local office comes back into compliance.

Illinois HB 1914

In 2021, H.B. 1914 was introduced but not passed in Illinois, which would have given a private right of action to non-governmental individuals, allowing them to sue local prosecutors who categorically refuse to prosecute certain offenses. This bill would have held prosecutors personally liable to the complainant with no obligation for a city to indemnify any prosecutor for damages assessed.

Minnesota SF 3478 & HF 3482

In 2022, Minnesota legislators unsuccessfully proposed S.F. 3478 and H.F. 3482, both of which would have required county attorneys to prosecute every felony for which they have probable cause. Any "county attorney or assistant county attorney who refuses or intentionally fails to faithfully prosecute a case as required under this section is guilty of a misdemeanor and upon conviction shall forfeit office or be dismissed," exposing not just the elected county attorney but non-elected deputy attorneys to criminal liability. Additionally, the bills would have required local prosecutors to provide monthly reports to the state legislature identifying every case they chose not to prosecute and detailing the reasoning.

65. See Jason Lanning & Jason Delgado, Andrew Warren Will Stay Under Suspension as the Case Goes to Trial, Spectrum News 9 (Sept. 19, 2022), https://www.baynews9.com/fl/tampa/news/2022/09/19/andrew-warren-heads-to-court-to-fight-for-job-back.

re-election. In 2022, Manhattan District Attorney Alvin Bragg came under fire from both Democratic New York Governor Kathy Hochul and her Republican reelection opponents after he released a policy memorandum that articulated his reform policies, including prioritizing diversion, naming offenses that would no longer be prosecuted such as refusing to pay for public transportation and resisting arrest, downgrading certain property crimes from felonies to misdemeanors, reducing the pre-trial detention population, limiting youth tried as adults, and supporting reentry.[67] Governor Hochul, in responding to questions over whether she would intervene to overrule Mr. Bragg's policies, stated that she knows "full well the powers that the governor has," and that she would be speaking with Mr. Bragg to "make sure that we're all in alignment."[68] Three of Governor Hochul's Republican opponents in the election each stated that they would remove Mr. Bragg from office on their first day as governor and encouraged Governor Hochul to do the same.[69] One candidate specifically cited the governor's constitutional powers to remove state officials from office as the basis for his promise, with another justifying the move by claiming that Mr. Bragg's policies were an indication that he was "refusing to do his job" as district attorney.[70]

Florida Gov. Ron DeSantis removed from office ***Hillsborough,*** FL State Attorney Andrew Warren over reform pledges.

Authority over state budgets may be another means for state actors to try to override reforms by local prosecutors. Republican Governor Larry Hogan of Maryland, for example, recently pledged $3.5 million from the state's budget to fund the hiring of 14 additional federal prosecutors statewide, as well as additional support staff (though it is unclear whether the state government properly has authority to fund federal agencies).[71] Governor Hogan specifically cited his opposition to the policies of Baltimore State's Attorney Marilyn Mosby as a basis for routing additional funding to the U.S. Attorney's Office rather than to local prosecutor's offices. Such moves serve to undermine the goals of local prosecutors by depriving them of resources critical to achieving their aims. And although political rhetoric is increasingly focused on doubling down on public investments in the criminal legal system, local prosecutors can find themselves with reduced material and moral support by reactionary adversaries who hold superior office.

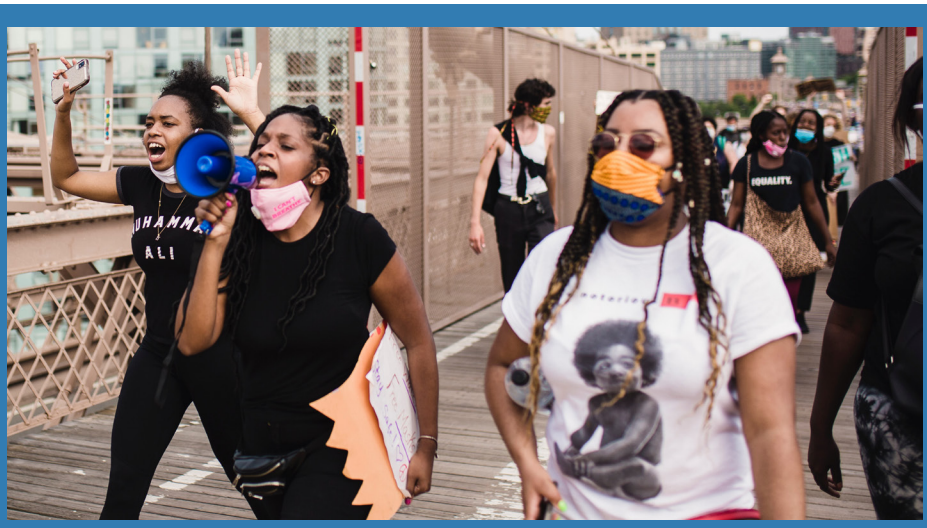
Maryland Gov. Larry Hogan attempted to override reforms from ***Baltimore,*** MD District Attorney Marilyn Mosby.

Punitive preemption causes two-fold harm to local prosecutors. First, they open the door to retaliation against local prosecutors by parties who neither have the benefit of proximity to the case nor are accountable to the local community. Second, because the threat of retaliation and punishment is so harsh under some of these punitive preemption measures, they can have such a powerful deterrent effect, discouraging local prosecutors from exercising their discretion even where it is advisable and the community favors it. While punitive preemption has been necessary where local prosecutors are failing to prosecute police misconduct, hate crimes, or civil rights violations, this preemption is squarely aimed at reform prosecutors.

66. See News Service of Fla., Gov. Ron DeSantis Removes State Attorney Aramis Ayala from Murder Case, Orlando Weekly (Jan. 31, 2020). https://www.orlandoweekly.com/news/gov-ron-desantis-removes-state-attorney-aramis-ayala-from-murder-case-26737790.
67. Memo from N.Y. District Attorney Alvin Bragg (Jan. 3, 2022), https://www.manhattanda.org/wp-content/uploads/2022/01/Day-One-Letter-Policies-1.03.2022.pdf.
68. See Steven Hirsch & Sam Raskin, Manhattan DA Alvin Bragg Dodges Questions After Hochul Warns of 'Powers' to Reverse Oolicies, N.Y. Post (Jan. 27, 2022), https://nypost.com/2022/01/27/alvin-bragg-dodges-questions-after-gov-hochul-warns-of-powers-to-reverse-policies/.
69. See Carl Campanile & Barnadette Hogan, Gubernatorial Hopefuls Slam DA Bragg for New Policies, Call for Removal, N.Y. Post (Jan. 9, 2022), https://nypost.com/2022/01/09/gubernatorial-hopefuls-slam-da-bragg-call-for-removal/.
70. Id.
71. Bryn Stole, 'No. 1 Concern of Marylanders': Hogan to Send Funds, State Troopers to Help Baltimore Police Target Violent Crime, Baltimore Sun (Mar. 24, 2022), https://www.baltimoresun.com/politics/bs-md-pol-hogan-crime-initiative-20220324-kloxvkrmijb7dnudlvbx6xc7ii-story.html.

II C. States are Using Preemption of Prosecutorial Discretion to Further an Extremist Policy Agenda.

In addition to the bills that generally intervene or restrict prosecutorial discretion, states have also integrated restrictions on prosecutorial discretion into their larger extremist policy agendas. A growing number of "targeted" bills seek to displace prosecutorial discretion in specific policy areas that have traditionally been subject to local control. What makes these targeted bills unique is their narrow focus on highly partisan issues, determined effort to produce certain prosecutorial outcomes, and specific aim at particular cities and prosecutors.



Take, for example, the bills proposed in response to the anti-racism protests led by Black Lives Matter in the summer of 2020. Instead of responding to the protesters demands for police accountability, many state legislatures instead set their sights on the protesters themselves. Twenty states passed laws increasing criminal penalties for protest-related activities.[72] At the same time, in an effort to circumvent prosecutors who declined to prosecute protesters, some state lawmakers introduced bills authorizing state attorneys general to press charges in their stead. When the local prosecutor dropped charges against 60 individuals accused of damaging the statehouse and the supreme court buildings in Columbus, Ohio,[73] Ohio lawmakers introduced H.B. 723, which not only would have required the attorney general to investigate any "criminal or improper activity" that occurs on "state property," but also would have granted the attorney general independent authority to prosecute.[74] After protesters occupied Liberty Square in Nashville, partisan panic led a Tennessee lawmaker to introduce H.B. 8004, which would have granted the state attorney general concurrent jurisdiction to prosecute anyone who "adversely impacted the rights of citizens to peaceful demonstrate."[75] In 2021, Pennsylvania lawmakers considered S.B. 438, which would have granted the attorney general the authority to "investigate and institute criminal proceedings for felony offenses" involving disorderly conduct, riots, and related offenses if the local district attorney refuses to act.[76] These anti-protest bills reflect increasing state efforts to increase prosecutions by overriding local prosecutorial discretion.

Yet on other issues, state lawmakers are also introducing bills to block prosecutions that bear on the legitimacy of law enforcement itself, such as police accountability. As accounts of police abuse have proliferated, and in response to demands by local residents, a growing number of local prosecutors have started to press charges for police misconduct. Almost immediately, state lawmakers introduced legislation to deprive them of the authority to do so.

72. See US Protest Tracker, Int'l Ctr. for Not-for-Profit Law, https://www.icnl.org/usprotestlawtracker/?location=&status=enacted&issue=&date=&type=legislative# (last visited Nov. 13, 2022).
73. See Jo Ingles, Ohio Bill Would Let Attorney General Prosecute Those Who Damage State Buildings, WOSU (July 9, 2020), https://news.wosu.org/news/2020-07-09/ohio-bill-would-let-attorney-general-prosecute-those-who-damage-state-buildings. Further illustrating the legislature's antagonism against local officials in Columbus, the Speaker of the Ohio House of Representatives also "threatened to withhold state funding from Columbus to cover the cost of repairs," and "suggested taking control of the Capitol Square area away from Columbus." See id.
74. Ohio H.B. 723 (2020).
75. HB 8004 (2020). An earlier version of this proposed bill was far more expansive, granting the attorney general the authority to prosecute any criminal activity in which (1) the victim was a state employee, (2) state property was damaged or destroyed, and (3) the violation delayed the administration of state government at significant cost to the state. See Erik Schelzig, GOP Bill Would Give Tennessee AG Power to Prosecute Criminal Cases, TNJ: On the Hill (Aug. 8, 2020), https://onthehill.tnjournal.net/gop-bill-would-give-tennessee-ag-power-to-prosecute-criminal-cases/.
76. Pa. S.B. 438 (2021).
77. S.C. S.B. 1241 (2020).
78. Id.
79. See Stephen Caruso, How a Controversial Gun Crime Provision Passed Under the Noses of Philadelphia's Lawmakers, Penn. Capital Star (July 12, 2019), https://www.penncapital-star.com/criminal-justice/how-a-controversial-gun-crime-provision-passed-under-the-noses-of-philadelphias-lawmakers/; see also Akela Lacy & Ryan Grim, Pennsylvania Lawmakers Move to Strip Reformist Prosecutor Larry Krasner of Authority, Intercept (July 8, 2019), https://theintercept.com/2019/07/08/da-larry-krasner-pennsylvania-attorney-general/.

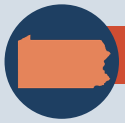
II

State lawmakers are not only introducing bills to dictate prosecutorial outcomes with respect to certain parties, like protesters and police officers; they also seek to dictate political outcomes at the local level.

In short, state lawmakers are increasingly looking to targeted bills that limit the traditional discretion of prosecutors and their accountability to local communities. Right now, these targeted bills are aimed squarely at reform prosecutors. The selective focus of these targeted bills also suggest that state legislatures are increasingly seeking to engineer specific prosecutorial outcomes, like shielding police from accountability while suppressing the protesters demanding such accountability. Thus far, only one of these targeted bills has been enacted: H.B. 1614 in Pennsylvania. Nonetheless, given the growing prevalence of reform prosecutors, a wave of state preemption is increasingly likely as reactionary state lawmakers target prosecutors to pursue partisan aims, such as forcing the prosecution of abortion. Indeed, as these partisan battles escalate, lawmakers on both sides of the aisle may turn to prosecutorial preemption laws to achieve partisan outcomes, further threatening the traditional role of local prosecutors and their responsiveness to local communities.

"State lawmakers are increasingly looking to targeted bills that limit the traditional discretion of prosecutors and their accountability to local communities. Right now, these targeted bills are aimed squarely at reform prosecutors.

Proposed & Passed State Legislation to Preempt Prosecutorial Discretion to Further An Extremist Policy Agenda



Pennsylvania HB 1614 *(Bill Passed)*

in 2019, Pennsylvania enacted H.B. 1614, which expanded the prosecutorial powers of the state attorney general with respect to a specific issue: firearm-related offenses. The structure of the law makes clear that the state was not interested in firearm-related offenses in general, but rather those that fall with the discretion of a particular prosecutor: Larry Krasner. The law was introduced soon after Krasner was elected as the district attorney of Philadelphia on a progressive platform. It applies only to firearm violations that occur within the city. Moreover, the law included a sunset provision of two years, coinciding with the end of Krasner's first term in office. H.B. 1614 uses restrictions on prosecutorial discretion to insert the state into local policy debates.

South Carolina SB 1214

S.B. 1241 was unsuccessfully proposed by South Carolina lawmakers in 2020.[77] This bill would have granted the South Carolina Law Enforcement Division ("SLED") exclusive jurisdiction to investigate "great bodily injury" or "unexpected deaths" involving law enforcement officials and the attorney general the exclusive jurisdiction to prosecute such cases.[78] Thus, the bill would deny local prosecutors the power to both investigate allegations of police misconduct and prosecute criminal misconduct. Instead, only a state agency would handle the investigation, and only the state attorney general would press charges.

80. HB 1614 does not mention Philadelphia by name. But the law only applies "in a city of the first class," and the only first class city in the state is the City of Philadelphia.
81. See Akela Lacy, Pennsylvania Attorney General Josh Shapiro Will Support Repeal of Controversial Law Stripping Larry Krasner of Authority, Intercept (July 12, 2019), https://theintercept.com/2019/07/12/josh-shapiro-larry-krasner-pennsylvania-repeal-hb-1614/.

III The Preemption of Local Prosecutorial Discretion Threatens Civil Rights and Local Democracy.

A. State Preemption of Local Prosecutorial Discretion Undermines Public Safety.

State interference with local prosecutorial discretion will block criminal justice reform, infringe on civil rights, and make communities less safe. Preemption is an empirically groundless criminal justice strategy that will likely have two chief effects. First, in states that adopt these laws, more people will be prosecuted as a result of preemption. The incentive behind preemption by supersession is a one-way ratchet–these statutes allow the state attorney general to prosecute where a local prosecutor has declined rather than provide a review process where charges are pursued. In essence, these laws give state attorney generals a second bite at the apple to prosecute someone. Second, regardless of whether these bills are enacted, punitive preemption will have a chilling effect on reform prosecutors. Prosecutors will be less likely to implement declination policies, for fear of attracting legislative discipline, and might bring more charges as a result. Additionally, they may be less likely to innovate and implement new restorative initiatives, despite growing evidence that diversion and investment in services rather than incarceration can make communities safer. At minimum, their charging policies will become less public and more opaque, reducing accountability.

A growing body of research shows that the prosecution of low-level offenders–which reform prosecutors can use discretion to forgo–is misguided. An analysis of charging decisions in the Suffolk County District Attorney's Office (which mainly covers Boston) under District Attorney Rachael Rollins found that non-violent misdemeanor defendants who were not prosecuted were less likely to be the subject of a new criminal case in the following two years, with the largest effects for first-time defendants.[82] Studies in Houston and San Francisco determined that diverting first-time felony defendants from prosecution cut their likelihood of reoffending and improved their employment outcomes.[83] Reform prosecution policies do not cause crime to rise, either. Using data from 35 cities, researchers found no significant effect of reform prosecutors being elected on reported crime rates.[84] Similarly, eliminating cash bail, another policy favored by reform prosecutors, brought no increase in the rate of failures-to-appear or crimes committed while on pretrial release in Philadelphia.[85] Efforts to preempt reform prosecution are counterproductive. Declining to prosecute low-level offenses reduces recidivism and maintains or improves public safety.

82. Amanda Y. Agan, et al., Misdemeanor Prosecution, NBER Working Paper 28600 (March 2021), https://www.nber.org/papers/w28600.
83. Michael Mueller-Smith & Kevin T. Schnepel, Diversion in the Criminal Justice System, 88 Rev. Econ. Studies 883 (2021); Elsa Augustine, Johanna Lacoe, et al., The Impact of Felony Diversion in San Francisco, J. Pol. Analysis & Management (2022); see also Saba Rouhani, et al., Evaluation of Prosecutorial Policy Reforms Eliminating Criminal Penalties for Drug Possession and Sex Work in Baltimore Maryland, John Hopkins Univ. Bloomberg Sch. of Pub. Health (Oct. 2021), https://publichealth.jhu.edu/sites/default/files/2021-10/prosecutorial-policy-evaluation-report-20211019.pdf.
84. Amanda Y. Agan, et al., Prosecutorial Reform and Local Crime Rate, Law & Econ. Ctr., George Mason Univ. Scalia Law Sch. Research Paper Series No. 22-011 (Oct. 2021).
85. Aurelie Ouss & Megan T. Stevenson, Does Cash Bail Deter Misconduct? (Working paper) (Jan. 2022).

Preemption also imposes a mandate on localities to use prosecution, rather than other evidence-based strategies, to combat crime. Alternatives to prosecution might be more cost effective, improve public safety by reducing recidivism, and inflict less harm on people and their families, yet preemption robs local communities of the choice to deploy them. Numerous non-police and non-prosecution strategies reduce crime and violence:[86] increasing urban green space and cleaning vacant property lowers crime,[87] expanding access to summer jobs for youth lowers violence,[88] and opening up substance abuse treatment, especially via Medicaid expansion.[89] While nothing in a preemption bill stops municipalities from pursuing these strategies, money and resources are finite. Declining to prosecute low-level crimes is a choice to invest human and financial resources in crime prevention through means other than policing, arrest, and prosecution. Mandated prosecution takes away a limited pool of resources from alternative strategies. Local governments might differ on the degree to which they want to pursue those other strategies, but the research is clear that prosecution is not the only way–and indeed, often not the best way–to stop crime. State preemption of police funding decisions similarly forces municipalities to spend money on policing that might be better spent elsewhere.[90] Local communities, and not state lawmakers, deserve to prioritize accordingly.

Preemption of prosecutorial discretion echoes other policy areas where state lawmakers impose counterproductive preemption on local policymakers. In the realm of criminal justice, while cities and towns might want to devote money to alternatives to policing, state preemption forces these resources to go to police, regardless of whether that is the cost-effective choice.[91] Additionally, a trove of research connects loosened local control over gun permits to more homicide and violent crime;[92] yet, state preemption of local gun laws in 45 states obliterates this key tool for public safety.[93] Preemption of reform prosecution stymies a movement to ameliorate racial disparities[94] while preemption of economic justice, public health, and other policies exacerbates racial disparities in health outcomes. [95] As in these areas, preemption and supersession of reform prosecution leads to more unequal and unsafe communities.

> *Preemption and supersession of reform prosecution leads to more unequal and unsafe communities.*

B. State Preemption of Prosecutorial Discretion Thwarts Local Democracy.

The growing wave of preemption of prosecutorial discretion does more than simply undermine criminal justice reform. These laws also threaten to upend our nation's long tradition of democratic accountability in local elections of prosecutors. Indeed, not only are reactionary state legislatures now working to reverse this long-standing tradition, but they are doing so precisely because local prosecutors are responding to the demands of their constituents.

86. John Jay Coll. Research Advisory Grp. on Preventing & Reducing Cmty. Violence, Reducing Violence Without Police: A Review of Research Evidence (2020).
87. Frances E. Kuo & William C. Sullivan, Environment and Crime in the Inner City: Does Vegetation Reduce Crime? 33 Envt. & Behavior 343 (2001); Dexter H. Locke, et al., Did Community Greening Reduce Crime? Evidence from New Haven, CT, 1996-2007, 161 Landscape & Urban Planning 72 (2017); Ruth Moyer, et al., Effect of Remediating Blighted Vacant Land on Shootings: A Citywide Cluster Randomized Trial, 109 Am. J. Pub. Health 140 (2019).
88. Alicia S. Modestino, How Do Summer Youth Employment Programs Improve Criminal Justice Outcomes, and For Whom? 38 J. Pol. Analysis & Management 600 (2019); Jonathan M.V. Davis & Sara B. Heller, Rethinking the Benefits of Youth Employment Programs: The Heterogeneous Effects of Summer Jobs, 102 Rev. Econ. & Statistics 664 (2020).
89. Samuel R. Bondurant, et al., Substance Abuse Treatment Centers and Local Crime, 104 J. Urban Econ. 124 (2018); Hefei Wen, et al., The Effect of Medicaid Expansion on Crime Reduction: Evidence from HIFA-Waiver Expansions, 154 J. Pub. Econ. 67 (2017).
90. Nestor Davidson, et al., Preempting Police Reform: A Roadblock to Social Justice, Local Solutions Support Center (October 2021) https://static1.squarespace.com/static/5ce-4377caeb1ce00013a02fd/t/6176eb48b158eb2ed44100e4/1635183433487/PreemptingPoliceReform-October2021.pdf.
91. Id.
92. Raiden B. Hasegawa, et al., Evaluating Missouri's Handgun Purchaser Law: A Bracketing Method for Addressing Concerns About History Interacting with a Group. 30 Epidemiology 371 (2019); Alexander D. McCourt, et al., Purchaser Licensing, Point-of-sale Background Check Laws, and Firearm Homicide and Suicide in 4 US States, 1985-2017, 110 Am. J. Pub. Health 1546 (2020); Cassandra K. Crifasi, et al., Association Between Firearm Laws and Homicide in Large, Urban U.S. Counties, 95 J. Urban Health 383 (2018) (correction published in 95 J. Urban Health 773); Michael Siegel, et al., The Impact of State Firearm Laws on Homicide and Suicide Deaths in the USA, 1991-2016: A Panel Study, 34 J. Gen. Internal Med. 2021 (2019); Michael Siegel, et al., Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States, 107 Am. J. Pub. Health 1923 (2017).
93. Michael Siegel, et al., Firearm-Related Laws in All 50 US States, 1991–2016, 107 Am. J. Pub. Health 1122 (2017).
94. See Ojmarrh Mitchell, et al., Are Progressive Chief Prosecutors Effective in Reducing Prison Use and Cumulative Racial/Ethnic Disadvantage? Evidence from Florida, 21 Crim. & Pub. Pol. 535 (2022).
95. Courtnee Melton-Fant, New Preemption as a Tool of Structural Racism: Implications for Racial Health Inequities, 50 J. L., Med. & Ethics 15 (2022).
96. The first state to make prosecutors an elected position was Mississippi in 1832. See Michael J. Ellis, The Origins of the Elected Prosecutor, 121 Yale L.J. 1528, 1540 (2012). Several states followed in the nineteenth century. See id.
97. Prosecutors in forty-six states are locally elected. See Joan E. Jacoby, The American Prosecutor: From Appointive to Elective Status 25, 28 & n.12, Prosecutor (Sept.-Oct. 1997). The exceptions are Connecticut, New Jersey, and Alaska where local prosecutors are appointed, and Rhode Island where the state Attorney General handles all criminal prosecutions. See id.
98. Ellis, supra note 96, at 1551.

Democratic accountability of prosecutors has been a cornerstone of our criminal justice system for almost two centuries.[96] In nearly all states, prosecutors are elected at the local level.[97] And the reason for this is to ensure that prosecutors are responsive to the local electorate that they serve. Constitutional reformers in the 19th century embraced local elections as a way to ensure that prosecutors "reflect the priorities of local communities rather than officials in the state capital."[98] This system endured because it was believed that state criminal laws needed to be tailored to the needs of specific communities in their enforcement. In contrast to state officials, local prosecutors understand the facts and circumstances on the ground and can provide the flexibility and discretion necessary to ensure criminal law enforcement responds to local preferences. Indeed, the reason why gubernatorial appointments were abandoned in favor of elections was to enhance local accountability and limit the interference of state officials.

The recent wave of prosecutorial preemption laws not only seeks to undermine local accountability in favor of centralized control, it has also emerged when local prosecutors are becoming more responsive to their constituents. By campaigning on explicit policies and platforms, reform prosecutors offer voters a clear choice when they go to the polls. They are being elected because of local demands for criminal justice reforms, especially in those communities most impacted by decades of overcriminalization. In other words, reform prosecutors won office because voters approved of the policies they promised to implement.

But it is precisely this kind of democratic accountability that states now seek to subvert through preemption. In the past, state involvement was thought necessary in cases where conflicts of interests lead local prosecutors to eschew the interests of their community, such as prosecutions of police misconduct. Similarly, concurrent jurisdiction was invoked by the federal government to prosecute civil rights offenses when justice would otherwise be denied to marginalized residents. In both instances, intervention targeted prosecutors who failed to serve the interests of the local community. But states today are seeking to intervene precisely because local prosecutors have become more responsive to the demands of their constituents.

More troublingly, these recent attacks on local democratic accountability are being pursued for purely partisan aims. The discretion of local prosecutors is being undermined because reactionary state legislatures disagree with their vision of criminal justice reform. Local democratic interests are being sidelined because states are dismissing the concerns of marginalized communities. All the while, preemption of prosecutorial discretion is frequently being used to secure specific policy outcomes: the prosecution of anti-racism protesters, the protection of police officers accused of misconduct, an increase in law enforcement actions targeting communities of color in large cities, among some examples. In other words, politics, rather than public safety, is driving this new preemption wave. Moreover, by undermining the historic role of local prosecutors, there is the chance that both sides of the partisan divide will engage in a tit-for-tat on specific policy issues, leading to a "race to the bottom" with respect to the traditional discretion and authority of local prosecutors.

Criminal laws in the United States are largely enacted at the state level. The long tradition of local elected prosecutors, however, ensures that the enforcement of those laws is tailored to, and serves the interests of, the communities most affected by their enforcement. Preemption of prosecutorial discretion not only threatens this long-standing tradition, but also does so for purely partisan ends. The danger with these laws then is not just that criminal justice reforms might stall, but that a central pillar of our criminal justice system might also be dismantled along the way.

III C. State Preemption of Prosecutorial Discretion Directly Threatens the Broader Movement for Equity and Justice.

States' campaigns to quell reforms of local prosecutors should not be understood narrowly as a reaction to the individual officeholders. Instead, efforts to undermine prosecutors by eroding their discretion or removing them by executive fiat are more accurately understood as part of larger extremist campaigns against national movements for social justice.

After going unchallenged for centuries, prosecutorial discretion has come under fire only after local prosecutors have begun to use it to combat–rather than entrench–systemic racism. Historically, the criminal legal system evolved after the abolition of slavery to deprive communities of color, particularly the Black community, of liberty and "extract labor from enslaved people's descendants."[99] The discretionary decisions of local prosecutors have done much to contribute to the modern state of mass incarceration of people of color, and Black men in particular. As the movement against mass incarceration has grown with decades of dedicated activism from advocates, changes within prosecutors' offices has offered one of the most immediate ways to bring reform. Repealing criminal laws at the federal or state level is a cumbersome, politically fraught process, so declining to prosecute can achieve the ends of decriminalization locally.[100] While not a silver bullet to solve racial disparities in the criminal legal system,[101] the more equitable exercise of prosecutorial discretion can help to create less punitive and less discriminatory criminal justice outcomes. By preempting prosecutorial discretion, states strip local communities of a key tool to combat the overcriminalization that upholds systemic racism.

Preemption of prosecutorial discretion is set to further accelerate as prosecutors seek to protect the rights of women and LGBTQ+ people. After the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* eliminated federal constitutional protection for abortion, states have rapidly begun criminalizing reproductive rights.[102] In the wake of these state bans, at least 90 prosecutors–notably many reform prosecutors–have publicly pledged not to prosecute any person who seeks, provides, or supports an abortion, putting local prosecutors on the front lines of the fight for reproductive rights.[103] Florida Governor Ron DeSantis has already removed one local prosecutor who signed onto this pledge.[104] Similarly, a number of states have enacted or are considering laws that would criminalize the provision of gender-affirming healthcare to transgender youth.[105] Local prosecutors will ultimately determine whether these laws result in prosecutions and convictions. Indeed, states have already begun to target the local prosecutors who will stand up for transgender rights; Tennessee's preemption law was aimed at Davidson County district attorney Glenn Funk after he stated he would not prosecute violations of the state's anti-trans bathroom access law.[106] State preemption of local prosecutors imperils the use of prosecutorial discretion to shield people from discriminatory state laws.

State preemption of local prosecutorial discretion is intertwined with larger counter-movements to social justice, individual rights, and democracy. It is telling that in a country where a near-consensus of states—45 in total[107]—have chosen to elect local prosecutors by popular vote, efforts to diminish the capacity and authority of these prosecutors have come to fruition only after historically marginalized and disenfranchised groups have begun to enjoy significant electoral victories. Campaigns against reform prosecutors are motivated by a desire to retrench both criminal policy and politics generally in the status quo, which reveals the stakes of victory and defeat for all sides.

"Campaigns against reform prosecutors are motivated by a desire to retrench both criminal policy and politics generally in the status quo, which reveals the stakes of victory and defeat for all sides.

99. Kica Matos & Jamila Hodge, The Chains of Slavery Still Exist in Mass Incarceration, Vera Inst. (June 17, 2021), https://www.vera.org/news/the-chains-of-slavery-still-exist-in-mass-incarceration#:~:text=Because%20the%2013th%20Amendment,permission%20from%20a%20white%20person.
100. Brenner Fissell, Against Criminal Law Localism, Md. L. Rev., forthcoming, 1–3 (2022).
101. Daniel Fryer, Race, Reform, & Progressive Prosecution, 110 J. Crim. L. & Criminology 769, 790–791 (2020) (highlighting the need for race-conscious progressive prosecution if it is to succeed as a strategy for racial justice).
102. See Tracking the States Where Abortion is Now Banned, N.Y. Times (Oct. 13, 2022), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html.
103. See Joint Statement from Elected Prosecutors, supra note 11; see also Tierney Sneed, Roe v. Wade Reversal Would Put Local Prosecutors on the Front Lines of the Abortion Fight, CNN (May 7, 2022) https://edition.cnn.com/2022/05/07/politics/abortion-roe-reversal-prosecution-discretion/index.html.
104. See Lanning & Delgado, supra note 65.
105. Oliver Laughland, Alabama Governor Signs Two Anti-transgender Bills Into Law, Guardian (April 8, 2022) https://www.theguardian.com/us-news/2022/apr/08/alabama-trans-gender-youth-medical-care-bill; Matt Lavietes, At Least 7 States Proposed Anti-trans Bills in First Week of 2022, NBC (January 7, 2022) https://www.nbcnews.com/nbc-out/out-politics-and-policy/least-7-states-proposed-anti-trans-bills-first-week-2022-rcna11205
106. See Stockard & Wadhwani, supra note 58.
107. See Nat'l Study of Prosecutor Elections, The Prosecutors and Politics Project at the U.N.C. School of Law (Feb. 2020), https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf.

IV Conclusion

This new trend of state preemption of local prosecutorial discretion presents a grave threat to criminal justice reform, civil rights, and local democracy. Local prosecutors play an enormous role in a criminal legal system that has long entrenched systemic racism. As voters elect local prosecutors to implement new reforms to combat systemic racism and build new models for public safety, state preemption threatens to undo this progress and engineer outcomes against the will of communities. This preemption will also have the long-term effect of eroding the local accountability of prosecutors.

That state preemption of prosecutorial discretion is still a nascent trend–only a small number of proposed bills have passed–makes it all the more important to pay attention now. As more local prosecutors exercise their discretion to further racial justice, uphold bodily autonomy, and protect the LGBTQ+ community, extremist states will increasingly seek to preempt them.

Advocates for criminal justice reform and civil rights must be ready to organize against state preemption of prosecutorial discretion as preemption is increasingly proposed and threatened by extremist state legislatures and executives. And local prosecutors must be ready to invoke robust constitutional protections to fight for the discretion their offices rightfully retain. Protecting local prosecutorial discretion in tandem with electing reform prosecutors provides a meaningful path toward a more just and equitable criminal justice system.

“This new trend of state preemption of local prosecutorial discretion presents a grave threat to criminal justice reform, civil rights, and local democracy. ... Protecting local prosecutorial discretion in tandem with electing reform prosecutors provides a meaningful path toward a more just and equitable criminal justice system.

LSSC Local Solutions Support Center

Public Rights Project

List of Actions Targeting Prosecutorial Discretion

January 17, 2023

As local prosecutors have begun to reconceive their role and embrace criminal justice reforms, reactionary states have moved to interfere with their use of prosecutorial discretion through preemption. The Local Solutions Support Center discusses this rising trend, its origins and its implications, in detail in its white paper, **Preempting Progress: States Take Aim at Local Prosecutors**. This supplement sets out a more detailed list of state legislative as well as executive, judicial, and private attempts to preempt prosecutorial discretion.

Proposed Bills & Enacted Laws Targeting Discretion

STATE	NAME	YEAR	STATUS	SUMMARY
 Connecticut	Raised Bill No. 462	2020	Failed	Would have revised the description of the existing statewide Criminal Justice Advisory Board to have it make policy regarding, amongst other things, "enumeration of specific offenses for which charges will be presumptively declined or dismissed."
	Raised Bill No. 1018	2021	Failed	Would have provided that the Criminal Justice Commission be an autonomous body; required biennial performance evaluations of state's attorneys; required adoption and implementation of uniform policies; amended training requirements for prosecutors; outlined data upon which state's attorney performance ratings are based; and repealed the requirement that in the investigation and prosecution of crime, priority be given to crimes involving physical violence or the possession of a firearm.
	SB 307	2022	Failed	Would have provided that the Criminal Justice Commission be an autonomous body; required biennial performance evaluations of state's attorneys; required adoption and implementation of uniform policies; amended training requirements for prosecutors; outlined data upon which state's attorney performance ratings are based; and repealed the requirement that in the investigation and prosecution of crime, priority be given to crimes involving physical violence or the possession of a firearm.
 Florida	SB 1812	2022	Failed	Would have provided that a state attorney's "neglect of duty" may serve as a basis for an investigation, a case, or a matter to be reassigned to another judicial circuit; required state attorneys to exercise prosecutorial discretion in a specified manner. Would have penalized a state attorney for adopting certain categorical policies not to prosecute and required the state attorney to provide a specified written response, upon the Governor's request.

Proposed Bills & Enacted Laws Targeting Discretion

STATE	NAME	YEAR	STATUS	SUMMARY
 Georgia	HB 411	2022	Failed	Would have created the Prosecuting Attorneys Oversight Commission to check the discretion of local prosecutors.
 Illinois	HB 1914	2021	Failed	Would have allowed a private right of action against a prosecutorial office or judge that sets a policy of refusing to enforce an existing law or that does not exercise discretion based on the individualized merits of a particular case, but rather the purpose of refusing to enforce an existing law, unless there is a written, good faith belief that the law in question is unenforceable as a matter of law; under this private right of action, a prosecutor or judge would have been personally liable to an injured party for legal or equitable relief with no obligation that a local government would indemnify for these damages.
	HB 5712	2022	Failed	Would have established a procedure for an election to recall the Cook County State's Attorney within 60 days of petitions being certified by the Cook County Clerk, an action directly targeting Cook County District Attorney Kim Foxx who is a proponent of bail reform and diversion programs in lieu of sentencing.
 Indiana	SB 436	2020	Failed	Would have granted the attorney general authority to appoint a special prosecutor to prosecute certain crimes if the county prosecuting attorney categorically refuses to prosecute those crimes.
	SB 165	2022	Failed	Would have permitted the attorney general to request the appointment of a special prosecuting attorney if a prosecuting attorney categorically refuses to prosecute certain crimes.
 Iowa	SF 342	2021	Enacted	Prohibits a "local entity or law enforcement department [from] adopt[ing] or enforc[ing] a policy or tak[ing] any other action under which the local entity or law enforcement department prohibits or discourages the enforcement of state, local, or municipal laws." "Policy" is to be broadly construed under the act to include both informal and formal and written and unwritten policies. Allows the attorney general to file a civil suit in the state's district courts upon receipt of a complaint that this section has been violated, and upon judicial determination, the local entity will be denied all state funding until it comes back into compliance.

Proposed Bills & Enacted Laws Targeting Discretion

STATE	NAME	YEAR	STATUS	SUMMARY
 Minnesota	HF 3482	2021	Failed	Would have required county attorneys to prosecute every felony for which they have probable cause, in line with "generally applicable standards regarding the prosecutorial function and duties of a county attorney," and required each county attorney to maintain a list of the reasoning for every case they chose not to prosecute on a monthly basis. A county attorney or assistant county attorney who refused to prosecute a case as required would have been guilty of a misdemeanor and upon conviction would have had to forfeit office or be dismissed.
	SF 3478	2021	Failed	Would have required county attorneys to prosecute every felony for which they have probable cause, in line with "generally applicable standards regarding the prosecutorial function and duties of a county attorney," and required each county attorney to maintain a list of the reasoning for every case they chose not to prosecute on a monthly basis. A county attorney or assistant county attorney who refused to prosecute a case as required would have been guilty of a misdemeanor and upon conviction would have had to forfeit office or be dismissed.
	SF 2841	2022	Failed	Would have required county attorneys to collect, forward to the state Sentencing Guidelines Commission, post publicly, and report to the legislature the details of and reason for any dismissal of any part of a criminal action against a defendant charged with a felony.
 Missouri	HB 541	2019	Failed	Would have required that cases a prosecuting attorney declines to prosecute may be forwarded to the attorney general's office for review, after which the attorney general may prosecute the case.
	SB 889	2020	Failed	Would have modified provisions regarding the jurisdiction of the Attorney General for violations of certain offenses; would have additionally granted the Attorney General concurrent jurisdiction over certain homicide cases in cities that are not part of a county, which would only apply to St. Louis and Circuit Attorney Kimberly Gardner.
 New York	SB 9484	2022	Failed	Would have created a process to the recall a district attorney for any reason with the signature of 20% of those who voted in the most recent election.
 Ohio	HB 723	2020	Failed	Would have provided the Attorney General concurrent jurisdiction over crimes involving destruction of state property and certain protest activities and required prosecuting authority to notify the Attorney General of decision not to prosecute.

Proposed Bills & Enacted Laws Targeting Discretion

STATE	NAME	YEAR	STATUS	SUMMARY
 Pennsylvania	SB 1222	2018	Enacted	Dictates minimum imprisonment guidelines for those found guilty of violating The Controlled Substance, Drug, Device and Cosmetic Act, where the controlled substance or a mixture containing it is fentanyl or a fentanyl derivative, and eliminated the prosecutor's discretion to request a lower sentence.
	HB 1614	2019	Enacted	Creates concurrent jurisdiction for the Attorney General to file charges related to certain categories of firearm offenses.
	SB 1321	2020	Failed	Would have given the Attorney General concurrent jurisdiction over crimes relating to protest and damage to monuments and provided that when a district attorney elects not to prosecute these offenses, the Attorney General shall prosecute the case.
	SB 438	2022	Failed	Would have provided the Attorney General concurrent jurisdiction to prosecute certain protest-related offenses.
	HB 2238	2022	Failed	Would have limited the city's top prosecutor to two, four-year terms, specifically targeting Philadelphia District Attorney Larry Krasner.
 South Carolina	SB 1241	2020	Failed	Would have granted the South Carolina Law Enforcement Division (SLED) exclusive jurisdiction to investigate "great bodily injury" and "unexpected deaths" of individuals in law enforcement custody, soon after release, or undergoing arrest by a law enforcement official and granted the Attorney General
 Tennessee	HB 8004	2020	Failed	Would have allowed the Attorney General to prosecute cases concerning offenses at protests.
	HB 9071	2021	Enacted	Allows the attorney general to petition the state supreme court for the appointment of a district attorney general pro tem if a district attorney general categorically refuses to prosecute a criminal offense, and requires the state supreme court to appoint a district attorney general pro tem if the court finds the district attorney general has refused to attend and prosecute according to law.
 Texas	SB 1257	2020	Failed	Would have given the Texas Attorney General greater jurisdiction to investigate and prosecute human trafficking offenses.

Proposed Bills & Enacted Laws Targeting Discretion

STATE	NAME	YEAR	STATUS	SUMMARY
 Utah	HB 257	2022	Enacted	Prohibits prosecuting attorneys from filing misdemeanor offenses if felony charges are available.
 Virginia	SB 563	2022	Failed	Would have allowed the Attorney General to prosecute any violent crime if requested by the chief of police or sheriff investigating the crime and if the commonwealth's attorney responsible declined to prosecute.
 U.S. Senate	Senate Amendment 3568	2021	Failed	Would have authorized withholding federal funding to any local government whose district attorney refuses to prosecute certain violent offenses.

Additional Targeted Actions Against Specific Prosecutors By State

STATE	YEAR	SUMMARY
LEGISLATIVE ACTIONS		
 Pennsylvania	2022	Pennsylvania's Republican-controlled state house of representatives voted to impeach Philadelphia District Attorney Larry Krasner after he just won reelection. The impeachment was set to proceed to trial in the state senate, though that could be impacted by a recent ruling from the Pennsylvania Commonwealth Court holding that the impeachment proceedings against Krasner did not meet the standards required by law.
EXECUTIVE ACTIONS		
 Florida	2017 / 2020	Former Florida Governor Rick Scott removed 9th Judicial Circuit State's Attorney Aramis Ayala from 24 death penalty cases after she stated she would not seek the death penalty. Ayala challenged her removal, but the Florida Supreme Court upheld the governor's power to do so under Florida Statutes section 27.14(1) (2016) in *Ayala v. Scott.* Governor Ron DeSantis similarly removed Ayala from a murder prosecution in 2020.
	2022	After promising not to prosecute crimes related to abortion or gender-affirming care, State Attorney Andrew Warren was suspended by Ron DeSantis. Warren is suing DeSantis for retaliation in violation of the First Amendment and for exceeding the Governor's limited authority to remove a State Attorney for incompetence or neglect of duty.

Additional Targeted Actions Against Specific Prosecutors

STATE	YEAR	SUMMARY
EXECUTIVE ACTIONS		
 Georgia	2020	In 2020, Gov. Brian Kemp and Sec. of State Brad Raffensperger attempted to cancel a district attorney election for the Western Judicial District to thwart candidate Deborah Gonzalez, a candidate running won a reform platform. The election was held following a preliminary injunction granted by the U.S. District Court for the Northern District of Georgia and affirmed by the U.S. Court of Appeals for the 11th Circuit. (*Gonzalez v. Governor,* No. 20-12649 (11th Cir. 2020)). Gonzalez won the election. State Representative Houston Gaines is now lobbying for her district to be redistricted out of existence, citing her policy of declining to prosecute lower-level drug charges.
JUDICIAL ACTIONS		
 Massachusetts	2020	After Suffolk County District Attorney Rachael Rollins released a list of fifteen "Charges to Be Declined," certain judges attempted to obstruct her reform efforts by denying requests from her prosecutors to dismiss charges for some low-level crimes. She has had to go to the Supreme Judicial Court multiple times in order to appeal those cases.
 Pennsylvania	2019	Federal judge Mitchell Goldberg denied Philadelphia District Attorney Larry Krasner's request to vacate a defendant's death sentence. Goldberg appointed the Pennsylvania attorney general's office to represent the prosecution's position.
PRIVATE ACTIONS		
 California	2021/2022	Los Angeles County District Attorney George Gascón issued a "special directive" forbidding his deputies from using a defendant's prior convictions for serious or violent felonies to obtain longer prison sentences under California's Three Strikes Law and requiring his deputies to withdraw strike allegations in cases brought under his predecessor. The Association of Deputy District Attorneys (ADDA) for Los Angeles County sued, and the Los Angeles Superior Court found the directive invalid. The California Court of Appeals upheld the Superior Court's opinion. Gascón has petitioned the California Supreme Court to review the previous decisions.
 Massachusetts	2018	The National Police Association filed a Massachusetts state bar complaint against Suffolk County District Attorney Rachael Rollins after she released a policy outlining fifteen charges to be declined for prosecution.