IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. REFUGIO RUBEN CARDENAS, Defendant and Appellant.	No. S151493 Tulare County Superior Court No. VCF117251 **CAPITAL CASE**

Appeal from Judgment of the Superior Court
of the State of California for the County of Tulare

Honorable Patrick J. O'Hara, Judge

APPELLANT REFUGIO RUBEN CARDENAS'S THIRD SUPPLEMENTAL OPENING BRIEF

GALIT LIPA
State Public Defender

HASSAN GORGUINPOUR
State Bar No. 230401
Supervising Deputy State Public Defender
Hassan.Gorguinpour@ospd.ca.gov

770 L Street, Suite 1000
Sacramento, CA 95814
Phone: (916) 322-2676
Facsimile: (916) 327-0459

Attorneys for Appellant
REFUGIO RUBEN CARDENAS

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XVIII. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE GANG ENHANCEMENT AND GANG SPECIAL CIRCUMSTANCE UNDER THIS COURT'S RECENT HOLDING IN *PEOPLE V. RENTERIA*

A. Introduction

In the initial briefing in this case, Appellant Refugio Ruben Cardenas argued that the prosecutor failed to prove essential elements of the gang charges she alleged. (AOB 333, 355.) Specifically, she failed to prove that Mr. Cardenas acted with the specific intent to promote, further, or assist other gang members in criminal acts, as required under Penal Code sections 186.22, subdivision (b), and 190.2, subdivision (a)(22).[1] (*Ibid.*) This brief

[1] All undesignated statutory citations are to the Penal Code.

Section 186.22, subdivision (b), permits additional punishment when defendants commit a gang-related offense with the intent to facilitate criminal conduct by gang members. This

addresses significant new authority that underscores the failure of proof.

In *People v. Renteria* (2022) 13 Cal.5th 951 (*Renteria*), the Court considered a lone-actor gang prosecution and cured an error in the way lower courts had interpreted the gang enhancement. The Court explained that the enhancement does not apply where a defendant commits a crime for his "own, personal reasons" rather than to promote specific criminal activities of the gang. (*Id.* at p. 973.) The statute requires proof that the defendant intended to help other gang members commit crimes. This more stringent reading of the enhancement was guided by due process principles, which required evidence that the person offered "concrete and practical" encouragement of the group's criminal acts. (*Id.* at p. 965, citations and internal quotations omitted.) *Renteria* recognized that gang statutes were meant from their inception to combat the *joint* crimes of gang members. The Court thus construed these statutes to apply, especially in lone-actor gang prosecutions, only when the defendant acted with an intent that his crime would help another gang member commit a crime that can be specifically identified. (*Ibid.*)

Lacking this understanding, prosecutors and gang police officers sometimes exploited these statutes to add harsh penalties

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statute will be referred to as "the gang enhancement" or "the enhancement."

Section 190.2, subdivision (a)(22), renders a defendant subject to the death penalty if he intentionally kills while an active participant in a criminal street gang and in order to further the activities of the gang. This provision will be referred to as "the gang special circumstance" or "the special circumstance."

for one-off crimes by persons who were alone and engaged in acts unconnected to the gang's other crimes. (See *Renteria, supra,* 13 Cal.5th at pp. 958-960, 968 [noting overbroad interpretation].) The gang enhancement was overused to strike at troubled children or young men from certain communities, who dressed a certain way, and who committed crimes on their own because they were angry and wanted their neighbors and friends to see them or their group as tough. (Assem. Bill No. 333 (Stats. 2021, ch. 699, § 2) (AB 333) [legislative findings showing gang enhancement statute over-criminalized activity based solely on identity, family, social networks, or location].) The Court in *Renteria* corrected this overreach and restored the statute's original scope and purpose.

The prosecutor here charged Ruben Cardenas with one count of murder, two counts of attempted murder, and several related charges and enhancements for a shooting in October 2003 in Visalia. (3CT 663-672.) The prosecutor further alleged that the gang enhancement and the gang special circumstance applied to these charges. (*Ibid.*) These claims were based on actions Mr. Cardenas allegedly took by himself, with no assistance from others, including any gang members.

As explained below, the gang enhancement allegations fail under *Renteria* because the prosecutor failed to prove that Mr. Cardenas intended to assist any other gang member in the commission of any other offense. Her theory was that Mr. Cardenas was simply angered at seeing members of an opposing gang in the area and wanted to send a "message" about how tough his gang was.

(20RT 1898.) But that is the precise theory that *Renteria* found insufficient to prove the enhancement.

The gang special circumstance allegation fails for the same reason. The special circumstance mirrors the gang enhancement in its language and purpose: both statutes impose additional punishment for joint criminality, and the same due process principles guide their application. Thus, the same failure in proof that leaves the gang enhancement finding void also leaves the gang special circumstance finding void.

This Court should reverse the findings on the gang enhancement allegations and the gang special circumstance due to insufficiency of the evidence—the failure to prove Mr. Cardenas intended to further any identifiable conduct by gang members.

B. Factual Background

At the time of the events at issue here, Ruben Cardenas was 19 years old. (2CT 381-382, 390.) Just a few months earlier, he was released from a juvenile commitment to the California Youth Authority (CYA). (7CT 1726; 19RT 1499, 1502.) While there, he kept a photo album in which he collected handwritten notes, pictures of cars and girls pulled from magazines, and a few photos mailed to him by friends and family back home in Visalia. (People's Exhibit 119; 20RT 1850; 21RT 2017.) Many of the children at the CYA had similar albums. (21RT 2113.) When he was released, he took the album with him and moved in with his aunt and uncle. (19RT 1499-1500; 20RT 1750.) They lived near the neighborhood where he lived as a child, and where old friends still teased him with the nickname "Dirty Ruben." (19RT 1499-1500, 1502; 21RT 2046-2048.)

One night in that neighborhood, Mr. Cardenas and his childhood friend, Gloria Carrasco, chatted outside her home on Northwest Second Street. (19RT 1447-1448.) Mr. Cardenas and Ms. Carrasco had gone to elementary school together. (19RT 1448.) Another friend, Maricela Hernandez, who lived down the road, was also there. (18RT 1352, 1354.) Also present were other friends or acquaintances of Mr. Cardenas from the neighborhood. (18RT 1374.) Northwest Second Street was described by a police officer as the territory of a Norteño subset called Northside Visalia or NSV. (20RT 1753.)

Across the street from Carrasco's home lived her uncle Quirino Rosales and her aunt Sofia Rosales. (18RT 1207; 19RT 1462.) That evening, Carrasco's cousins Octavio and Gerardo Cortez were outside Rosales's home talking and listening to music. (19RT 1450, 1461.) Octavio and Gerardo previously lived on Northwest Second Street. (18RT 1310.) They were known members of a Sureño gang. (20RT 1782-1783.) But when they arrived on Northwest Second Street that night, they were greeted as friends by some of the people with Mr. Cardenas; they had all known each other for years. (18RT 1289-1290.)

In the early evening, Mr. Cardenas and a friend named Luis Rebolledo, who was labeled as an NSV member, left the house to get pizza. (19RT 1449.) At a mini-mart, Rebolledo told a person wearing a blue jersey something to the effect that he was in the "North Side." (21RT 2147.) Mr. Cardenas said something unknown, and the person's mother, who was nearby, denied any gang ties. (18RT 1356.) They all left without incident. (18RT 1358.)

Back at Gloria Carrasco's house, Mr. Cardenas's friends stayed around to "mooch" pizza. (18RT 1374.) As they ate, Mr. Cardenas discussed with them whether the people at the Rosaleses' house, who were wearing blue and standing near a blue car, were "scraps," a derogatory term for members of a Sureño gang.[2] (19RT 1450-1452.) He was apparently referring to Gerardo and Octavio Cortez, whom they all knew. (*Ibid.*) Mr. Cardenas knew Gerardo, as well, because he had been in a childhood fight with Gerardo years earlier. (21RT 2023.) Ms. Carrasco responded that he was mistaken, that the people at the Rosales house were tenants who lived behind the house. (19RT 1450-1453, 1472-1473.)

After some time, Mr. Cardenas left alone on a bicycle and came back to the street alone with a shotgun. (18RT 1363-1364; 19RT 1458, 1464.) He approached the blue car and, while holding the shotgun, took a moment to etch the initials of his nickname and the number 14 on the trunk of the car. (20RT 1919.) Accounts differ as to whether he said anything, but he may have asked whether there was "some sort of problem." (20RT 1914.) He then fired three shots from the shotgun (18RT 1223), killing Gerardo Cortez (19RT 1679) and wounding a man at the Rosales house named Jorge Montez. (18RT 1292.)

A few weeks later, Mr. Cardenas was apprehended with a shotgun matching that used in the shooting (19RT 1654), walking

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[2] This statement describes the facts in the light most favorable to the prosecution for purposes of substantial evidence review. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) In doing so, Mr. Cardenas does not concede the truth of these allegations.

alone by a highway, beside a ditch, in full view of a police officer who wrestled him to the ground.[3] (19RT 1702-1703.)

To make this out as a gang case, the prosecutor relied on Officer Luma Fahoum, who had been a gang officer for three-and-a-half years when she testified in 2007. (20RT 1737.) She investigated this case around three years and two months before her testimony. (1CT 73.) She had taken classes on gangs presented by other officers but said that the strongest source of her expertise came from daily work and from speaking with gang members, who she acknowledged were sometimes inaccurate. (20RT 1738-1739, 1803, 1824.) During a search of Mr. Cardenas's room on October 10, 2003 (1CT 67), she flipped through his photo album and pulled out a picture of him at a neighborhood market with other "Hispanic male juveniles," some of whom were "throwing up signs of some sort." (20RT 1750-1753, 1826-1827.)

After Mr. Cardenas's release from the CYA, his only contact with law enforcement appeared to have been an encounter with an officer named Dwight Brumley, who said that Mr. Cardenas was riding a red bicycle and had a red hairbrush. (20RT 1967, 1969.) Mr. Cardenas told Brumley that he had previously been a Norteño and still got along with some Northerners. (20RT 1963-1964, 1968.)

Officer Fahoum told the jury that Mr. Cardenas was a member of the NSV gang, basing her opinion in part on two juvenile offenses, two times he had violated curfew with people she identified

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[3] The officer told the jury that it was difficult to complete the arrest because Mr. Cardenas was "kind of greasy." (19RT 1705.)

as gang members, and allegations about the current offenses.[4] (20RT 1766-1768, 1775-1776.) Officer Fahoum also said that the NSV gang had "shot callers," or "big homies" who have "a little more say" and "are there to look over the young soldiers on the street." (20RT 1758.) She did not identify any specific shot caller (20RT 1806) and never suggested any of them knew who Mr. Cardenas was. She opined on a set of hypotheticals mirroring the allegations here. Her specific claims are laid out more fully below. In summary, she said that the crime would have been committed because the shooter felt insulted by the presence of opposing gang members and wanted to prove that he and his gang were tough. (20RT 1786.) The prosecutor urged the jury to find the gang enhancement and gang special circumstance true based on that theory. (22RT 2403.)

C. Standard of Review

In evaluating a judgment for substantial evidence, the Court must decide whether the evidence, considered in the light most favorable to the judgment, would support a reasonable jury in finding every required element true beyond a reasonable doubt. (*People v. Cuevas* (1995) 12 Cal.4th 252, 260; see *In re Winship*

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[4] Officials at CYA identified Mr. Cardenas as a member of a different gang called "Visa Reefa Loco." (21RT 2133.) This was not among the gangs that Officer Fahoum listed when she described the Norteño gangs in Visalia. (20RT 1753.) She never explained the discrepancy or how it affected her opinion. Instead, she told the jury her opinion was bolstered by the fact that Mr. Cardenas associated with "known gang members," had a tattoo associated with Northern gangs, had a photo of "known gang members or perceived gang members," and was named as a member by "other *Northerners*" and people "from the neighborhood." (20RT 1777, italics added.)

(1970) 397 U.S. 358.) Evidence that raises a mere suspicion of guilt or that suggests guilt is not substantial evidence. (*People v. Soriano* (2021) 65 Cal.App.5th 278, 286.) The evidence of each element must be "'reasonable, credible, and of solid value.'" (*Renteria, supra,* 13 Cal.5th at p. 970, citations omitted.) And any inferences offered to support a judgment "'cannot be based entirely on the suspicions of the officers involved in the case and the conjecture of the prosecution.'" (*People v. Ware* (2022) 14 Cal.5th 151, 168 (*Ware*), citation omitted.)

The evidentiary deficiency here does not turn on credibility or competing theories on an element. Instead, there was simply no evidence from which the jury could find that Mr. Cardenas set out to further the crimes of any other gang member.

D. The prosecutor failed to prove that Mr. Cardenas, who allegedly acted alone, had the mental state required to impose the gang enhancement.

Under *Renteria*, the prosecution theory here—that the shooting was motivated by anger and a desire to send a message of toughness to opposing gang members and others—is insufficient to prove the gang enhancement. (*Renteria, supra,* 13 Cal.5th at p. 966.) The prosecutor was required to show beyond a reasonable doubt that this shooting was intended to facilitate some other known crime (*id.* at p. 964), but she offered nothing to meet this test. Because there was no evidence that tied this lone act to any *other* criminal activities, the evidence failed to prove an essential element. The gang enhancement findings must, therefore, be reversed.

The gang enhancement imposes additional punishment if the prosecution proves two elements or prongs:

1. That defendant committed the current crime "for the benefit of, at the direction of, or in association with a criminal street gang"; and,
2. That, in doing so, the defendant acted with "the specific intent to promote, further, or assist in any criminal conduct by gang members."

(§ 186.22, subd. (b).)[5]

The first prong ties the defendant to the gang by requiring proof that his acts grew out of a loyalty to, or association with, it. This is often called the "gang-related" prong. (*People v. Rios* (2013) 222 Cal.App.4th 542, 564.)

The second prong describes something different, a specific intent that connects the defendant's crime to the crimes of other gang members. This requires proof that the defendant committed the charged offense with a specific goal of participating in a set or pattern of crimes by gang members. (*People v. Fontenot* (2019) 8 Cal.5th 57, 66-67 [a specific intent requires a showing of the defendant "engaging in goal-oriented, purposive thinking"].) The inclusion of this prong comports with the Legislature's stated purpose to combat "patterns of criminal gang activity and … the

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[5] AB 333 recently modified section 186.22 to tighten the definitions of terms used in the enhancement and referred to in the special circumstance. These changes are addressed in the Second Supplemental Opening Brief. The claims raised here arise from the failure to prove the enhancement and special circumstance as they existed at the time of the offense.

organized nature of street gangs." (§ 186.21.) The second prong, in other words, requires proof of *joint* criminality.

When a group of gang members commits a crime together, these prongs may be proven more easily because the single event can show that the defendant set out to assist the criminal acts of the other members in that very event. (*Renteria, supra,* 13 Cal.5th at p. 963-964.)

But things are not so straightforward in a lone-actor gang prosecution. (*Renteria, supra,* 13 Cal.5th at p. 963-964.) When a gang member acts alone, there are no other members whose criminal conduct he could further in that event. Thus, the prosecution must show that the defendant intended his crime to further or promote "criminal activity other than the charged offense." (*Id.* at p. 966.)

Renteria explained what is required to prove this. The Court began with the constitutional backdrop of the enhancement. (*Renteria, supra,* 13 Cal.5th at p. 964.) Due process bars states from punishing individuals merely for committing a crime while a member of a disfavored group. (*Id.* at p. 965.) Section 186.22 could not be read to punish "mere gang membership" or to punish a defendant "merely because [they] happened to belong to a gang when they committed a crime." (*Id.* at pp. 965, 967.) The Constitution instead requires proof that the relationship between the defendant's conduct and the group's criminality was sufficiently substantial to satisfy the "'constitutional requirement of personal guilt.'" (*Id.* at p. 965, citation omitted.)

With this in mind, *Renteria* held that the specific intent prong required "a significant connection between the defendant's guilty knowledge and intent and the criminal conduct of the defendant's associates—that is, concrete and practical encouragement of specifically illegal activities." (*Renteria, supra,* 13 Cal.5th at p. 965, citing *Scales v. United States* (1961) 367 U.S. 203, 227, internal quotations omitted.) Evidence that a defendant's acts made the gang appear violent did not meet this test because it did not "support an inference that the defendant committed a particular violent crime … with the intent to facilitate known criminal activity by other gang members." (*Renteria, supra,* at p. 967.)

This conclusion was founded on a long history of cases interpreting gang statutes as focused on joint criminal behavior. For example, in 1991, the Court of Appeal held in *People v. Green* that the words "promote," "further," and "assist" used in section 186.22, subdivision (a)—the substantive gang participation offense—describe aiding and abetting another gang member's crime. (*People v. Green* (1991) 227 Cal.App.3d 692, 703-704 (*Green*), overruled on another point in *People v. Castenada* (2000) 23 Cal.4th 743, 752 (*Castenada*).) In *Rodriguez* and *Castenada*, this Court held that those words require proof that the defendant aided and abetted an offense. (*Castenada, supra*, at p. 752; *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138 (plur. opn. of Corrigan, J.) (*Rodriguez*).) And in *People v. Gardeley*, this Court held that the enhancement did not punish a defendant merely for the acts of his associates but applied only to a "defendant who committed a felony to aid or abet criminal conduct of a group … and who acted with the specific intent to do

so." (*People v. Gardeley* (1996) 14 Cal.4th 605, 624, fn. 10 (*Gardeley*), disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665.) *Renteria* drew on this long history when it found the enhancement required proof that a defendant intended to provide concrete assistance to known crimes.

The Court thus clarified that the enhancement could be imposed on a defendant who acted alone.[6] (*Renteria, supra,* 13 Cal.5th at p. 962.) But, in lone-actor gang prosecutions, the connection between the current offense and the gang's criminality was a function of the defendant's mental state, which must include an intent to concretely further some other specific crime that the gang's members commit. (*Id.* at p. 965.) The statute required in lone-actor gang prosecutions a tight connection between the current offense and the future offense that the defendant intended to facilitate. As in aiding and abetting, this mental state necessarily included a knowledge requirement, or proof that the defendant was "aware of the type of criminal activity" his gang committed. (*Id.* at p. 965, citing *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131.) This was so because "[o]ne cannot intend to help someone do something without knowing what that person meant to do." (*Ibid.*)

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[6] This is distinguished from the substantive offense of gang participation described in section 186.22, subdivision (a). In *Castenada, supra,* 23 Cal.4th and *Rodriguez, supra,* 55 Cal.4th, this Court held that the substantive offense requires a *completed* act of aiding and abetting another gang member in an offense. There are no lone-actor prosecutions under subdivision (a), and, thus, the Court had no need to address the more complex constitutional and statutory issues that arise in lone-actor gang prosecutions until it addressed the enhancement in *Renteria.*

All told, the second prong of the gang enhancement requires proof beyond a reasonable doubt of two components: the defendant's knowledge of specific criminal acts members of his gang commit; and the defendant's specific intent that the current offense will promote, further, or assist *in those known offenses*.[7]

The Court made several key points in applying these principles. The defendant in *Renteria* was a gang member who acted alone in shooting at two houses. The gang expert opined that this "[i]ntimidation of witnesses and the community increases the gang's control of territory." (*Renteria, supra,* 13 Cal.5th at p. 960.) The Court of Appeal reasoned that this met the specific intent prong because the shootings could have been meant to "intimidate rival gang members and neighborhood residents, 'thus facilitating future crimes committed by himself and his fellow gang members.'" (*Ibid.*) But this Court found the evidence insufficient to prove the gang enhancement, in part because the prosecution failed to prove the defendant intended the shooting to promote any other specific criminal acts the gang committed. (*Id.* at p. 972 [despite claim about

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[7] The gang statutes, thus, describe a mental state similar to that found in other theories of joint criminal liability. For example, conspiracy statutes punish combinations, or agreements between persons to commit crimes, and aiding-and-abetting laws punish those who directly promote the crimes of others. (*Ware, supra,* 14 Cal.5th at p. 165 [describing mental state of conspiracy]; *People v. Prettyman* (1996) 14 Cal.4th 248, 268 (*Prettyman*) [aiding and abetting requires proof that the defendant advanced a specific crime].) The gang enhancement is not identical to these theories, but they each require a showing that the defendant intended to advance his cohorts' specified criminal acts.

territory, prosecutor failed to "identify the criminal conduct Renteria's actions might have facilitated"].)

The Court also contrasted the facts before it with those in three earlier cases that approved use of the gang enhancement. It first distinguished the facts before it from those in *People v. Albillar* (2010) 51 Cal.4th 47, in which it affirmed gang enhancement findings against three gang members who committed a rape in concert. (*Renteria, supra,* 13 Cal.5th at p. 968.) The Court explained that the defendants committed the joint offense in an apartment filled with gang paraphernalia, and a jury could rightly conclude that the defendants intended to intimidate "specific, identifiable witnesses"—the victim—thereby ensuring they could complete the rape that was then ongoing.[8] (*Ibid.*) The Court contrasted this with lone-actor gang prosecutions where the theory was that the members of the gang sought only to bolster their general reputation for violence and to generally intimidate the community. (*Id.* at pp. 968-969.)

In *People v. Rivera* (2019) 7 Cal.5th 306 (*Rivera*), the evidence was sufficient to support a gang enhancement because it showed that the defendant was involved in a gang's ongoing drug sales and murdered a police officer who had been investigating those sales. The defendant substantially participated in an ongoing crime, which

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[8] *Albillar* was not a lone-actor gang prosecution. The gang members acted jointly in the rape. The Court cited the witness intimidation theory only to buttress a finding based on current joint action. By contrast, lone-actor gang prosecutions, as in this case and *Renteria*, require more stringent focus on the connection between the current offense and some other offense.

supported an inference that he intended to facilitate that identified crime through the murder of a specific officer working to end that activity. (*Renteria, supra,* 13 Cal.5th at p. 969.)

The Court also highlighted *People v. Gardeley, supra*, 14 Cal.4th at pp. 612-613, to show how proper expert testimony can connect gang territory to specific crimes the gang commits. The two defendants in *Gardeley* assaulted a stranger who had entered an area where they regularly sold cocaine. (*Ibid.*) An expert opined that the gang's primary purpose was to sell narcotics, and assaults that the defendants committed would allow members to maintain their drug-selling stronghold. (*Ibid.*) Thus, the protection of turf was tied in *Gardeley* to a specific offense of which the defendants were aware and which they sought to continue. (*Renteria, supra,* 13 Cal.5th at p. 969, citing *Gardeley*, *supra*, at pp. 612-613.)

In the narrow circumstances described in these three cases, a jury could conclude that the defendant committed the current offense with the intent to eliminate specific witnesses to a crime or to secure an area where a known, ongoing offense was regularly committed—thereby promoting a specific crime identified by the prosecution. The Court in *Renteria* contrasted this with prosecutions in which the "jury was left to speculate about the target of the intimidation by the gang members or what criminal activity the gang members intended to facilitate." (*Renteria, supra,* 13 Cal.5th at pp. 968-969.)

This reveals the precise problem of proof here. The prosecutor offered no evidence, nor even a theory, that Mr. Cardenas intended the shooting in this case to encourage other known criminal activity

by gang members. The prosecutor instead pressed a theory that Mr. Cardenas was angered by seeing Sureño gang members wearing blue on Northwest Second Street and wanted to let it be known that the street was NSV territory. She provided no evidence of any crimes that Cardenas could have intended to promote through these alleged lone acts. The theory fails to meet the test *Renteria* set forth.[9]

Mr. Cardenas allegedly acted alone, bringing the case within the reasoning of *Renteria.* The prosecutor withdrew her request for a jury instruction about other perpetrators because she recognized the evidence did not support the request. (21RT 2234-2235; 6CT 1445.) While other members were gathered near the scene of the shooting, there was no evidence that any of them participated in the crime. Thus, the specific intent prong of the gang enhancement could be proven only if there was substantial evidence that Mr. Cardenas intended this crime to facilitate *other* known criminal conduct by gang members. (*Renteria, supra,* 13 Cal.5th at p. 966 [in a lone-actor gang prosecution, the evidence must show an "intent to promote criminal activity other than the charged offense"].)

The prosecution's failure to prove this mental state is on display most clearly in the testimony of Officer Luma Fahoum. She offered her opinion about the purpose of this crime several times, but in none of her statements did she explain how it would have

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[9] This brief focuses on the second prong of the enhancement, but Mr. Cardenas does not concede that the first prong was adequately proven. The failure of proof as to that prong is addressed at pages 306 to 333 of the Opening Brief and 122 to 125 of the Reply Brief.

facilitated any other crime. Instead, she told the jury that the crime was motivated by Mr. Cardenas's anger over seeing opposing gang members on NSV turf and his desire to send a message to them:

- The crime would benefit the gang because a "gang is nothing if it doesn't provide fear or instill fear into witnesses, victims, society in general" (20RT 1786);
- A crime like this one would benefit the gang because "fear and intimidation is [sic] the main goal for gang members," and the shooting shows they are "stand[ing] up for their hood or their place, their territory" (20RT 1788);
- The crime would benefit the gang because a "message has been sent … Southerners now know that's North side territory" (20RT 1789);
- A crime like this benefits the NSV gang because there were "two Southerners there … obviously … making themselves known" (20RT 1835); and,
- The crime "fits gang culture" because it would boost the shooter's "reputation on the street … [because] gang members thrive on their reputation he's a bad dude [sic]." (20RT 1822).

These claims offer no connection between the current shooting and any other criminal activity by NSV gang members.[10] The thrust

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[10] Notably, Fahoum never testified at all about the second prong of the enhancement or whether this offense would have furthered any other criminal acts of gang members. The prosecutor asked once whether a hypothetical event matching this offense would "further benefit or promote" the NSV gang, and Fahoum answered only that it would "benefit" the gang. (20RT 1786.) Later,

of Fahoum's opinion was that the crime would make NSV seem tough and would answer an "insult" caused by opposing gang members entering Northwest Second Street, all with a goal of scaring Sureño members away in the future and scaring people generally. (20RT 1788.) As the Court explained in *Renteria,* proof of a defendant's motive to enhance the gang's reputation for violence is insufficient by itself to prove the gang enhancement. Without more, such evidence leaves the jury to "speculate about … what criminal activity the gang members intended to facilitate." (*Renteria, supra,* 13 Cal.5th at p. 969.) Fahoum offered no "connection between the defendant's guilty knowledge and intent and the criminal conduct of the defendant's associates." (*Id.* at p. 965, internal quotations omitted.)

Officer Fahoum's claims about gang territory did nothing to fill the evidentiary gap. She opined that turf is the "primary fight for all gang members." (20RT 1790.) But the opinion does not show how this crime, even if committed to protect territory, facilitated any other criminal activity. Fahoum's testimony is like the testimony offered by the gang expert in *Renteria,* which the Court rejected as insufficient. Like Fahoum, the expert there tied the crime's effect on the gang's reputation to the securing of turf: "[i]ntimidation of witnesses and the community increases the gang's control of territory." (*Renteria, supra,* 13 Cal.5th at p. 960.) But the Court rejected this general reputation theory, even in combination with a

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Fahoum said the crime would "promote [the shooter's] status within the gang." (20RT 1788.) None of that even touches on what is required to prove the second prong.

desire to secure "territory," as insufficient to prove the elements of the gang enhancement.

When asked about the NSV gang's primary activities, Fahoum responded: "Oh, geez, they range from graffiti, grand theft auto, carjacking, assault with a deadly weapon, a drive-by shooting, murder, attempted murder." (20RT 1758.) But no evidence established, or even suggested, Mr. Cardenas was aware of these acts as ongoing activities of the gang, especially given that he had returned to the area just two months before the shooting. (19RT 1502.) Nor did the prosecutor show how shooting a Sureño gang member on Northwest Second Street could have possibly facilitated any of these alleged primary acts. Fahoum never tied any of those crimes to the neighborhood.

Fahoum's testimony thus fell short of the examples *Renteria* offered of cases showing a concrete connection between the current offense and other gang offenses. (*Renteria, supra,* 13 Cal.5th at p. 969.) Unlike the evidence in *Gardeley, supra,* 14 Cal.4th at pp. 612-613, and *Rivera, supra,* 7 Cal.5th at p. 332, Fahoum failed to offer any theory about how the current offense would have facilitated the NSV gang's other crimes. In the absence of any evidence of specific crimes tied to the territory, there is an equally plausible inference of intent: that the lone actor killed the rival solely because the rival had encroached into his home turf and not with the intent to facilitate any future crimes by other gang members. It is that precise gap that the prosecutor attempted to fill with Fahoum's testimony about reputational benefit. But that is the theory this Court foreclosed in *Renteria.*

This theory is flawed in another way that *Renteria* recognized. The Court cautioned against relying on the fact that the crime took place in gang territory because it "may not be particularly probative when, for example, the territory in question is also where the defendant lives." (*Renteria, supra,* 13 Cal.5th at p. 968, fn. 9, citation omitted.) While Mr. Cardenas did not live on Northwest Second Street, he lived within half a mile of it. (19RT 1500.) It was the home of his friends and the location of the pizza party he attended. (19RT 1447-1450.) Moreover, Fahoum believed that essentially all of Visalia was NSV turf, saying that they were predominant in the north side, but "[t]here's a lot of them so they are throughout the city." (20RT 1753.) Given all this, the fact that the crime took place in a location she identified as part of the NSV's territory is even less probative.

Respondent's initial brief pointed to two categories of evidence to support the judgment, but each of these fails to prove what *Renteria* required. Respondent first suggested that Mr. Cardenas's participation in two crimes in the year 2000—when he was a 16-year-old boy (7CT 1730)—proved his intent in the events three years later. Specifically, witnesses described Mr. Cardenas assaulting Rolando Viera for reporting an unspecified prior crime to authorities (20RT 1891) and assaulting Jose Pena, purportedly at the periphery of a larger altercation (20RT 1985). Respondent argued a jury could infer from these two childhood events that Mr. Cardenas was predisposed to commit unprovoked assaults on members of rival gangs. (RB 205.) Respondent then flatly asserted this proved the second prong of the gang enhancement, but it failed to explain how

it did so. (*Ibid.*) Because this was a lone-actor gang prosecution, the prosecutor was required to show Mr. Cardenas committed the current offense to facilitate some other offense by members of the gang. His personal animus toward rival gang members falls far short of doing that; and in fact, respondent fails to suggest any crime it could have furthered.

Respondent also pointed to the claims that Mr. Cardenas asked about "scraps" and "etched" DRX4 onto the trunk of the blue car; but none of this would prove anything more than that he may have acted out of animus toward the victims as opposing gang members. (RB 203.) In finding both prongs unsupported by the facts before it, *Renteria* explained that prior Court of Appeal cases demonstrated the "limits of reputation testimony" by noting the absence of additional factors, like whether the public would know the crime was committed by a particular gang, whether the defendant explicitly referenced the gang during the crime, or whether the crime was committed in retaliation for conduct by opposing gang members. (*Renteria, supra,* 13 Cal.5th at p. 968, citing *People v. Ochoa* (2009) 179 Cal.App.4th 650; *People v. Perez* (2017) 18 Cal.App.5th 598, 609; and *People v. Ramirez* (2016) 244 Cal.App.4th 800, 819.) Each of the cases *Renteria* cited found the gang enhancement unsupported in the absence of the factors they cited, but none held that the presence of these factors would be sufficient to establish *both* prongs. (*Ibid.*) In the remainder of the opinion, *Renteria* set forth what the evidence must prove in order to establish the second prong, and it remains true that the

enhancement requires proof of an intent to facilitate the criminal acts of gang members. (*Renteria, supra,* at p. 968.)

Respondent repeatedly described the evidence as proving the following: Mr. Cardenas "had a particular interest that day in protecting his gang's territory and intimidating rivals *in order to ensure his gang's reputation*." (RB 202-203, emphasis added.) That succinctly describes the type of theory that *Renteria* rejected.

The flawed theories offered by the prosecutor and respondent grow from a core misunderstanding of what the gang enhancement punishes. As this Court explained in *Renteria*, the gang enhancement does not punish crimes by gang members committed to gain reputation, look tough, or act out on personal animosity. The gang enhancement must be read to increase punishment only for joint criminality, for gang members acting together or acting alone to help each other commit criminal acts.

Fahoum testified that the shooting was typical of gang culture, that it drew from gang rivalry over territory, and that it increased the gang's reputation for violence. This was not sufficient to meet the second prong of the enhancement. Because Mr. Cardenas was a lone actor, the second prong of the enhancement required proof of his intent to assist some other known criminal acts. There was no evidence showing that the crime could have done so. The evidence thus failed to prove an essential element of the gang enhancement, requiring that the true findings thereon be stricken.

E. For the same reasons, the evidence did not prove the gang special circumstance.

The gang special circumstance allegation fails for the same reason. The Court should interpret the special circumstance to require a specific intent to promote known, identified conduct by the gang. This is so because the enhancement and special circumstance mirror each other in their language and purpose. Moreover, the same constitutional principles that guided the Court's interpretation of the enhancement must also guide its reading of the special circumstance. And there is an even greater need for clarity as to the special circumstance because of the unique constitutional burdens that apply when a state wishes to kill one of its citizens. Once the special circumstance is properly construed, the same failure of proof that undermined the finding on the enhancement also undermines the finding on the special circumstance. The Court should, thus, reverse the special circumstance finding based on insufficiency of the evidence.

The special circumstance subjects a defendant to a death sentence if he intentionally kills "while an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang."

It should be construed consistently with the gang enhancement because the two statutes address the same subject, are phrased similarly, and are part of a unified scheme of gang enforcement. (See *People v. Carr* (2010) 190 Cal.App.4th 475, 488 [the special circumstance "substantially parallels" the enhancement].) In fact, the gang special circumstance expressly

incorporates the definition of "criminal street gang" used in section 186.22. (*People v. Rojas* (2023) 15 Cal.5th 561 (*Rojas*).)

The Court of Appeal has repeatedly recognized the connection between the gang enhancement and the gang special circumstance. In *People v. Lee* (2022) 81 Cal.App.5th 232, 245, the court held that the gang special circumstance was intended to remain "permanently parallel" with the gang enhancement. And in *People v. Montano*, the court collected prior opinions that had noted the connections between the special circumstance and section 186.22:

> The 'active participant' requirement [of section 190.2, subdivision (a)(22)] is indistinguishable from the 'active participation' element of section 186.22, subdivision (a). (*Ibid.*; see *People v. Castenada* (2000) 23 Cal.4th 743, 747, 97 Cal.Rptr.2d 906, 3 P.3d 278.) The special circumstance provision expressly incorporates section 186.22, subdivision (f)'s definition of a criminal street gang, and the third element 'substantially parallels the language of section 186.22, subdivision (b)(1).' (*People v. Carr* (2010) 190 Cal.App.4th 475, 488, 118 Cal.Rptr.3d 221.) The phrase 'activities of the criminal street gang' has been held to mean 'the same activities that constitute the gang's pattern of criminal activity as described in section 186.22, subdivision (e).' ([*People v.*] *Arce* [(2020) 47 Cal.App.5th 700 ,] 713 [*(Arce*)] … .)

(*People v. Montano* (2022) 80 Cal.App.5th 82, 112 [rejecting vagueness challenge to statute], disapproved on another ground in *People v. Burgos* (2024) 16 Cal.5th 1 (*Burgos*).)

Each statute applies when a defendant has been found to have committed a crime and two additional elements or prongs are proven. Under both statutes, the additional punishment may be imposed only if the prosecutor proves (1) a general connection between the crime and the gang, and (2) a specific intent to further

the criminal acts the gang engages in. Thus, each statute contains a gang-related prong and a specific intent prong that requires proof the defendant intended to assist criminal conduct. (*Renteria, supra,* 13 Cal.5th at p. 965 [specific intent of the enhancement]; *Arce, supra,* 47 Cal.App.5th at p. 714 [describing the final element of the special circumstance as a specific intent].)

These elements may be compared simply in the following table:

	§ 186.22, subd. (b)	***§ 190.2, subd. (a)(22)***
Gang Related	"For the benefit of, in association with, or at the direction of a criminal street gang"	"While an active participant in a criminal street gang"
Specific Intent	"With the specific intent to promote, further, or assist any criminal conduct by gang members"	"Carried out to further the activities of the criminal street gang"

These connections demonstrate that the statutes should be read consistently with each other. *Renteria, supra,* 13 Cal.5th at p. 965, read the language of the enhancement (the left column) to require that the defendant both knew of and intended to concretely assist in specific illegal conduct. Because there is no reasoned basis on which to distinguish the effectively identical language on the same subject in the column on the right, it must be read in the same way. (*National City v. Fritz* (1949) 33 Cal.2d 635, 637 ["[S]tatutes should be construed in the light of other statutes dealing with the

same subject matter."]; Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012) Related-Statutes Canon, p. 252 [The rule "rests on two sound principles: (1) that the body of the law should make sense, and (2) that it is the responsibility of the courts, within permissible meanings of the text, to make it so."].)

It makes sense to read the second prong of the special circumstance as requiring proof that the defendant intended to facilitate known, identifiable crimes. The second prong begins with a specific intent, or a requirement that the defendant commit the offense with a specific goal in mind. This is the import of the phrase "carried out to further." (§ 190.2, subd. (a)(22); *Arce, supra,* 47 Cal.App.5th at p. 714 [holding that this phrase sets forth a specific intent requirement].) The remainder of the second prong describes what the defendant's goal must be: to further the "activities of the criminal street gang." (§ 190.2, subd. (a)(22).) This phrase has been construed as a reference to the criminal activities of the gang described in section 186.22, subdivision (f): the gang's pattern of criminal gang activity. (*Arce, supra,* at p. 713 [the second prong requires proof "that the murder be committed to further the criminal street gang's pattern of criminal behavior as described in section 186.22, subdivision (e)"[11]].) The words of the second prong of

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[11] The second prong could also be read as a reference to the crimes identified as the gang's "primary activities," generally a broader set of offenses identified by the gang expert. (§ 186.22, subd. (f).) It is not necessary to resolve this question here, though, because the evidence was insufficient under either interpretation. There was no showing that Mr. Cardenas set out to further any identifiable criminal acts at all.

the gang special circumstance, when read together, require that the prosecution prove the defendant committed a killing in order to facilitate any of the crimes identified as primary activities or predicate offenses.

Again, this mirrors the second prong of the enhancement. It reveals the drafters' focus on joint criminality and *patterns* of gang crime. (See § 186.21.) By describing an intent to further the criminal conduct of another, both statutes draw on familiar principles of aiding and abetting. (See *Green, supra,* 227 Cal.App.3d at pp. 703-704 [the words "promote," "further," and "assist" require proof that the defendant aided and abetted an offense].) Courts have long recognized that a finding of vicarious liability requires proof that the defendant set out to further specific, identifiable, and known crimes. (*Prettyman, supra,* 14 Cal.4th at p. 268 [holding that vicarious criminal liability cannot be based on a "generalized belief that the defendant intended to assist … unspecified 'nefarious' conduct"].) This is the most natural reading of the words used in both gang statutes.

Moreover, the same due process concerns that guided the Court's reading of the enhancement must also guide its reading of the special circumstance. The due process clauses of the state and federal Constitutions bar states from punishing a defendant for mere membership in a disfavored group, or for being a member of that group while committing a crime. (*Renteria, supra,* 13 Cal.5th at p. 965.) *Renteria* therefore construed the gang enhancement to require proof that the defendant specifically intended his current acts to facilitate known criminal conduct. (*Ibid.*) Concrete and

practical assistance of specific illegal acts is an essential element of the enhancement.

The gang special circumstance also imposes additional punishment based on the relationship between the defendant's crime and an allegedly criminal group. The special circumstance applies on proof that the defendant intentionally killed while "an active participant in a criminal street gang" and that the killing was "carried out to further the activities of the criminal street gang." (§ 190.2, subd. (a)(22).) Read too broadly, this language could subject a defendant to a death sentence based on their mere membership in a gang and without proof that their acts were substantially related to the gang's criminal acts. As with the gang enhancement, this risk is heightened in cases where the defendant acts alone because the current offense cannot directly prove the joint criminality on which the special circumstance must focus. To avoid unconstitutional application and achieve uniformity of its decisions, this Court should read the essentially identical terms of the gang special circumstance to similarly require proof that the defendant intended to offer concrete and practical assistance of specific illegal conduct.

To be sure, the words of the enhancement and special circumstance are not identical, but the differences between them are insignificant here and do not undercut the principles that control their meaning. For example, the second prong of the gang enhancement applies to a defendant who intends to "promote, further, or assist" in gang members' criminal conduct. (§ 186.22, subd. (b).) The gang special circumstance uses only the word "further." (§ 190.2, subd. (a)(22).) This creates no meaningful

difference, though, because the words used in the enhancement are all ways of describing one concept: a mental state like that of an aider and abettor. (*Rodriguez, supra,* 55 Cal.4th at p. 1132, fn. 6 [explaining that the definitions of "promote," "further," and "assist" are "largely tautological" because they refer to each other].)

There are also differences between the gang enhancement and gang special circumstance in their descriptions of the defendant's target offense. But again, these differences do not change the result. In the gang enhancement, the defendant must have intended to facilitate "criminal conduct by gang members." (§ 186.22, subd. (b).) *Renteria* read the plural term "members" as supporting its holding that the enhancement required an intent to help *others* engage in crime—in keeping with the statute's focus on joint criminality. (*Renteria, supra,* 13 Cal.5th at p. 965.) The gang special circumstance uses the phrase "to further the activities of the gang." This also contains a plural phrase, "activities of the gang." A gang is defined as a group that engages in specific, repeated criminal acts. (§ 186.22, subd. (f); *Arce, supra,* 47 Cal.App.5th at p. 713 [holding that the phrase "activities of the gang" refers the pattern of crimes identified in section 186.22, subdivision (f)].) The words of the special circumstance, then, require proof that the defendant set out to assist this group of people in these repeated crimes.

This is simply another description of the joint criminality that animates the gang enhancement and other gang statutes. It is arguably narrower in that it focuses on a subset of criminal activity in which gang members engage: those crimes identified as the

primary activities or pattern of gang activity. (§ 186.22, subd. (f).) But these differences do not change the fact that the defendant's intent in both statutes must be essentially outward facing and aimed at joint criminality with gang members. (*Renteria, supra,* 13 Cal.5th at p. 966 [when the defendant acts alone, the gang enhancement must require proof that he set out to assist some other offense].) Both the gang enhancement and gang special circumstance must be read to require proof that the defendant intended to offer concrete assistance of known criminal acts in the way *Renteria* described.

Finally, there is a difference between the *first prong* of the gang enhancement and the first prong of the special circumstance. The enhancement requires that the defendant's current offense be motivated by gang loyalty or gang connections, while the first prong of the gang special circumstance requires only the defendant's status as an "active participant." (Compare § 186.22, subd. (b), to § 190.2, subd. (a)(22).) But this difference does not change the fact that the second prong special circumstance must be read to require that the defendant committed the current offense in order to provide concrete assistance of specific and known crimes.

This Court has construed active participation as having a low threshold. (*Castenada, supra,* 23 Cal.4th at p. 747.) The defendant need not be a member, nor even dedicate a substantial part of his time to the gang. (*Id.* at p. 750.) All the phrase requires is a showing that the defendant is involved in the gang in some way that is more

than nominal.[12] (*Ibid*.) Unlike the gang enhancement, the first prong here requires no proof that the current offense was motivated by loyalty to or a desire to benefit the gang. The first prong of the special circumstance describes only the defendant's status.

The low threshold at the first prong elevates the stakes of the second prong. It is the only prong of the gang special circumstance that can be read to meet the rule described in *Renteria*—the rule that the lone actor defendant may be punished only if the prosecutor proves that he intended to facilitate known and identified criminal conduct of the gang.

As stated in Section C. ante, the prosecutor failed to prove that Mr. Cardenas acted with that specific mental state when he acted alone. And respondent's descriptions of the case only highlight the failure of proof. The prosecutor failed to show that Mr. Cardenas offered concrete and practical encouragement of any known criminal conduct at all, let alone of a subset of criminal conduct identified as the activities of the gang. The prosecution operated on the false belief that gang statutes punish defendants who act in ways typical of gang behavior, act out of mere anger at their opposition, or wish to make themselves look tough. These statutes though require a more concrete connection between the defendant's acts and specific

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[12] In the Opening Brief at p. 339, Mr. Cardenas argues that the first prong should be interpreted as a reference to the crime of active participation set forth in section 186.22, subdivision (a). If the Court adopts that analysis, all elements of the active participation offense would be incorporated into the gang special circumstance, including the requirement that multiple gang members act jointly in the current offense. (*Rodriguez, supra,* 55 Cal.4th at pp. 1132-1134.) The argument here is presented in the alternative to that claim.

identifiable crimes of others involved in the gang. For all the reasons identified in Section C. *ante*, the prosecutor failed to establish that connection as to the gang special circumstance.

In recognizing the failure of proof here, the Court can further advance the principles that *Renteria* vindicated. And these concerns carry added weight where a defendant's lone acts could lead to a death sentence. (*Zant v. Stephens* (1983) 462 U.S. 862, 877 [explaining that a capital sentencing factor must "genuinely narrow the class of persons eligible for the death penalty and … reasonably justify the imposition of a more severe sentence on the defendant compared to other found guilty of murder"].) *Renteria* recognized that the risk of error is at its highest when gang statutes are invoked against defendants who have acted alone.

To ensure careful application of these laws, *Renteria* returned to the basic principle that a defendant may be punished for his acts on behalf of a group only if it is proven that he acted with the intent to advance a specific crime or set of crimes, and only if the jury is not left to speculate about what crimes he set out to further. (*Renteria, supra,* 12 Cal.5th at p. 969.) Reading the statutes in this way ensures that the defendant is not subjected to the harshest punishment in violation of core principles of personal guilt.

Because the evidence did not pass that test here, the Court should reverse the finding on the gang special circumstance for insufficient evidence.

XIX.
THE MATTER SHOULD BE REMANDED WITH DIRECTIONS FOR THE COURT TO CONSIDER ANY CLAIMS RELATED TO AMELIORATIVE CHANGES IN THE LAW, INCLUDING THOSE UNDER THE CALIFORNIA RACIAL JUSTICE ACT

It appears the parties agree that the gang enhancement and gang special circumstance findings must be reversed, at least under the newly enacted definition of "criminal street gang" in section 186.22, subdivision (f). (Second Supp. RB 74 [conceding that gang enhancement and gang special circumstance should be reversed if AB 333 applied to both]; *Rojas, supra,* 15 Cal.5th 561.) The gang special circumstance was the only special circumstance alleged (3CT 665), and so the death judgment must be vacated, and the matter remanded for possible retrial of all gang charges.[13]

In its disposition on these grounds, the Court should also specify that the trial court must consider other ameliorative changes in the law that Mr. Cardenas may raise. Two specific changes are addressed here.

A. The trial court on remand must exercise its discretion to strike or reduce the firearm enhancements imposed.

The prosecutor secured an added term of imprisonment under section 12022.53, subdivision (d), which imposes additional punishment for discharge of a firearm causing great bodily injury

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[13] Mr. Cardenas has separately argued that the guilt judgment must also be set aside. If the Court accepts those arguments as well, all of the issues raised here would be raised as part of the complete relitigation of the case.

during the commission of certain enumerated felonies. (6CT 1489, 1491.) While the case was pending on appeal, several significant changes in the law have arisen. First, the Legislature passed and the Governor signed Senate Bill No. 620 (2017-2018 Reg. Sess.) (SB 620). This new law granted trial courts the discretion to strike firearm enhancements imposed under section 12022.53. (*Ibid.*) In two recent cases, this Court clarified the scope of the new discretion, explaining that trial courts have discretion to strike firearm findings entirely or to impose lesser versions of those findings. (*People. v. Tirado* (2022) 12 Cal.5th 688; *People v. McDavid* (2024) 15 Cal.5th 1015.) The Court has also confirmed that SB 620 enacted an ameliorative change in the law applicable to all cases not yet final. (*People v. Flores* (2020) 9 Cal.5th 371, 431.) These developments mean that the trial court in this case has new discretion to either strike or reduce the firearm enhancements imposed here.

As noted, Mr. Cardenas's death sentence and the jury's findings on the gang enhancement and gang special circumstance will all be reversed, at least under AB 333. Even if no other relief is granted on appeal, Mr. Cardenas will receive at least a new bifurcated trial on the enhancement and the special circumstance, leading to a new judgment and sentence. To ensure that he receives the benefit of the new law addressed here, the Court should state in the disposition of the opinion that he may raise claims under SB 620 during those proceedings.

B. Rather than ordering a stay of appeal and remand, the Court should state in the opinion that Mr. Cardenas may pursue relief for any violations of the California Racial Justice Act on remand.

Section 745 establishes a right of criminal defendants to be free of convictions and sentences secured through racial bias or animus. This statute, known as the California Racial Justice Act (RJA), sets forth four possible bases for relief, which are described below. (§ 745, subd. (a)(1)-(4).) The statute applies retroactively to all nonfinal cases and was recently amended to ensure that those with cases pending on appeal could seek to stay the appeal and return to the trial court in order to develop a factual basis for their claims. (§ 745, subds. (b) & (j)(1); Assem. Bill No. 1118 (2023-2024 Reg. Sess.).)

Mr. Cardenas's judgment is not final because his appeal is not yet complete, and this means that he has a right to develop and present claims under the RJA. (*People v. Rossi* (1976) 18 Cal.3d 295, 304 [finality has not occurred until highest court with jurisdiction to review the judgment has done so]; § 745, subd. (j)(1) [RJA applies to all case not yet final].) Mr. Cardenas would, in the normal course, seek a stay of appeal and remand to develop the factual basis for several RJA claims. (§ 745, subd. (b).) But the appeal is nearing its end, and the parties already agree that at least some portions of the verdict and judgment must be reversed. (Second Supp. RB 74.) Because the stay and remand procedure would unduly delay the relief that Mr. Cardenas is concededly entitled to, the Court should instead state in its disposition that Mr. Cardenas is entitled to litigate any RJA claims upon his return to the trial court. This is

within the court's power to craft a disposition that meets the interests of justice and would preserve judicial resources and economy. (§ 1260 [court may "remand the cause to the trial court for such further proceedings as may be just under the circumstances"].)

There are several procedures for raising an RJA claim in a pending appeal, with varying standards. But the standard applied to Mr. Cardenas's request here should be lowest of all because he asks the court only to clarify that he may raise his claim on the remand that will occur in any event.

In some cases, an appellant may believe that the existing appellate record supports a claim for retroactive application of the RJA and seek a "conditional" remand at the end of the appeal solely to raise issues under the RJA. *People v. Frahs* (2020) 9 Cal.5th 618 sets forth the standard for applying a new ameliorative law in this manner, and it is a low one. The conviction in *Frahs* was still on appeal when the Legislature created a new form of mental health diversion. (*Id.* at p. 626.) The statute offered relief if the defendant met several criteria, including that they suffered from a mental health disorder, would agree to treatment, and were found suitable for treatment by a judge. (*Id.* at pp. 626-627.) This Court held that the new law applied retroactively, and it conditionally remanded for proceedings under the new law because the appellate record "disclose[d] that the defendant appear[ed] to meet" *one* of the criteria for diversion. (*Id.* at p. 640.) Requiring a greater showing than that would have undermined the Legislature's intent to apply the statute as broadly as possible. (*Id.* at p. 638.)

In other cases, the appellant may believe that the record could be more adequately developed in the trial court and that awaiting the end of the appeal would unduly delay relief. Such an appellant could seek to stay the appeal and pursue their remedies in the trial court on a limited remand order. (§ 745, subd. (b).) The standard should be lower for a stay and remand because that procedure is meant to develop facts that may not already appear in the record. (*Ibid.*) The Legislature enshrined the right to seek a stay and remand in part so that appellants could develop a factual basis that might not already support an RJA claim on appeal. (*Ibid.*) The RJA includes a provision for obtaining records and materials from the state in order to pursue RJA claims. (§ 745, subd. (d).) The standard for invoking that right to information requires the defendant to offer only a "plausible factual foundation, based on specific facts, that a violation of the Racial Justice Act 'could or might have occurred' in his case." (*Young v. Superior Court* (2022) 79 Cal.App.5th 138, 159 (*Young*), citation omitted.) A stay and remand motion would request permission to return to the trial court, in part to file a motion under the provision that permits an exchange of information. The standard for a stay and remand should be no higher than the standard to secure evidence; otherwise, the hurdle to file a subdivision (d) motion would be higher than the hurdle to succeed on the motion.

The relief requested here should be even more readily available than that because Mr. Cardenas seeks neither a conditional remand at the conclusion of the appeal nor a stay of the appeal and interim remand. Instead, Mr. Cardenas asks the Court

simply to confirm that he may litigate RJA claims upon the remand, retrial, and resentencing that will occur in the case—a salutary result within the Court's power to produce. (§ 1260.)

To the extent necessary, though, Mr. Cardenas can point to specific issues in the appeal that may present grounds for RJA relief when fully developed in the trial court.

Section 745, subdivision (a)(1), states that a violation is established if the defendant shows that "[t]he judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin." These words suggest that violations under this section need not occur in court and need not involve the use of racially discriminatory language. (Compare § 745, subds. (a)(1) and (a)(2).)

The most salient fact about the prosecution was the heavy use of gang allegations, which permitted extensive testimony about alleged gang membership and activity. (E.g., 20RT 1736-1835 [gang expert testimony].) As noted in prior briefing, police labeling of members of the community as gang members is notoriously rife with potential bias and often sweeps up members of minority groups. (Supp. AOB 99-105; Supp. ARB 40-44; see, e.g., Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention* (2011) 23 St. Thomas L.Rev. 620, 622.) After that briefing, the Legislature enacted AB 333, which included findings that support the claim. (Stats. 2021, ch. 699, § 2.) Officer Fahoum's testimony about Mr. Cardenas's friends and neighbors, and about Mr. Cardenas himself, relied on the same system of gang labeling and record keeping through "field interview" cards that has been

regularly criticized as racially biased. (20RT 1762-1767; Urban Peace Inst., Analysis of the Attorney General's Annual Report of CALGANG for 2018 (2019) (CALGANG Analysis).[14]) The use of this system against Mr. Cardenas may show that the prosecution and police here exhibited bias in their treatment of Mr. Cardenas.

On remand, Mr. Cardenas intends to gather records to explore these issues. His trial lawyer sought to subpoena records from the Department of Justice about the CALGANG database in which field interview cards are collected. But the subpoena was quashed by the trial court. (4CT 839; 12RT 160-170.) Counsel also subpoenaed records from the Visalia police department about gang enforcement in particular communities, but Officer Fahoum testified that she was unaware of the subpoena, and so she had no statistical information to offer at the time. (20RT 1804-1805.) On remand, Mr. Cardenas may invoke section 745, subdivision (d), to secure access to these records and others that may reveal whether Visalia's system of gang labelling suffered the same bias noted statewide. (CALGANG Analysis, *supra.*)

Section 745, subdivision (a)(2), states that the RJA is violated if the judge, any attorney, any police officer, any expert witness or any juror used racially discriminatory language about the defendant's race, ethnicity or national origin, or otherwise exhibited bias or animus toward the defendant, "whether or not purposeful."

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[14] Urban Peace Inst., *Analysis of the Attorney General's Annual Report of CALGANG for 2018* (Sept. 2019) <https://static1.squarespace.com/static/55b673c0e4b0cf84699bdffb/t/5d7f9846de5a2c25a55a36e5/1568643144338/CalGang+Annual+Report+2018.pdf> (as of June 21, 2024).

Violations under this subdivision must occur in court and during the proceedings. (*Ibid.*) Racially discriminatory language is defined as language that "to an objective observer, explicitly or implicitly appeals to racial bias, including, but not limited to, racially charged or racially coded language, language that compares the defendant to an animal, or language that references the defendant's physical appearance, culture, ethnicity, or national origin." (§ 745, subd. (h)(4).) These violations would appear on the face of the appellate record because they occurred during the proceedings, but additional factual development could be needed to prove that the statements implicitly appealed to bias or amounted to coded language.

In this case, the arresting officer gratuitously testified that Mr. Cardenas was "kind of greasy," which, intentionally or not, invoked a racist slur about Latino men. (19RT 1705; Willis-Esqueda, *Bad Characters and Desperados: Latinxs and Causal Explanations for Legal System Bias* (2020) 67 UCLA L.Rev. 1204, 1212 ["the label 'Greaser' denoted the filth and criminality of those of Mexican descent"].) In addition, some of Officer Fahoum's testimony appeared to have a troubling racial valence. In particular, she fixated on the picture in Mr. Cardenas's CYA photo album, which stood out to her as an indication of gang membership because it included "Hispanic male juveniles," whom she could not identify, wearing "some red clothing" and "throwing up signs of some sort," in a neighborhood she identified as NSV territory along with the entire city of Visalia. (20RT 1751-1753, 1764.) This all may have triggered similar stereotypes and biases. And at one moment in voir dire, defense counsel complained that all those the judge had excluded for cause up to that point had been Hispanic. The judge responded that

"[w]e have plenty of Hispanics left" (16RT 389), suggesting that members of the ethnic group were fungible. Each of these events could be rightly subject to further factual development upon remand to the trial court, to show how they invoked racial stereotypes or coded racial language.

Section 745, subdivision (a)(3), permits defendants to challenge charging decisions and convictions if they show that they were "charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who have engaged in similar conduct and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county …" Mr. Cardenas was 19 years old at the time of the alleged offenses (1CT 35), by all accounts he acted alone (21RT 2234-2235), and his only prior alleged criminal acts were committed when he was a minor (20RT 1891, 1985.) These were significant mitigating circumstances known to the prosecutor well before trial, yet she pursued a death sentence. The only special circumstance was the gang special circumstance, and as explained in the first supplemental briefing, that charge is particularly subject to racially biased enforcement. (Grosso et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement* (2020) 66 UCLA L.Rev. 1394 (Grosso).) All of these facts combined suggest that factual development in the trial court could easily demonstrate a violation of the RJA.

Finally, section 745, subdivision (a)(4)(A), states that a violation of the RJA occurs if a "longer or more severe sentence was

imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense, and longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed." This provision permits defendants to remedy racial bias in the sentences imposed on them, as may be demonstrated through statistical analyses. Here, too, it is significant that Mr. Cardenas was 19 years old (1CT 35), and he had been found guilty of one murder count. (6CT 1489.) He had no prior adult offenses. On remand, he could seek to show that the death sentence imposed on him was more severe than sentences imposed in Tulare County on similarly situated defendants of other races—a fact preliminarily borne out in the statistics cited in the earlier briefing. (Grosso; see also Amicus Curiae Brief of LatinoJustice PRLDEF in Support of Refugio Ruben Cardenas, *People v. Cardenas*, No. S151493 (Jan. 13, 2021).)

The RJA requires the court to select a remedy specific to the violation. (§ 745, subd. (e).) If the violation tainted the conviction, the court would be required to vacate the conviction and sentence, and order new proceedings consistent with the RJA. (*Ibid.*) If only a violation of section 745, subdivision (a)(3), is shown, meaning racial bias in charging or conviction, the court may also modify the judgment to a lesser included or lesser related offense. (*Ibid.*) If the sole RJA violation was under section 745, subdivision (a)(4), for

disparate sentencing, the court would be required to vacate the sentence and impose a new one.

Mr. Cardenas seeks an opportunity to present all of these issues first to the trial court, where his case will likely be returned in light of respondent's concessions under AB 333, and, should the court recognize the merit of his other claims, for a full retrial. Presenting all RJA claims to one judicial body makes sense because the subdivisions "do not describe independent 'violations' of the statute," but instead "describe different means of proving that the state exercised its criminal sanctions power 'on the basis of race, ethnicity, or national origin …'" (*Young, supra,* 79 Cal.App.5th at p. 163.) And so, "evidence offered in support of a theory of violation under one subpart may be corroborative of the evidence supporting another theory of violation under a different subpart." (*Id.* at p. 164) Thus, Mr. Cardenas asks the Court to ensure that each of the items addressed here, and others yet to be discovered, may be litigated fully upon remand to the superior court.

Moreover, even if this Court vacates the sentence under AB 333 or for other reasons, the RJA issues addressed here would not be moot. Mr. Cardenas's proof that the initial trial and sentence violated the RJA would render him ineligible for the death penalty at any new proceeding. (§ 745, subd. (e)(3).)

For all these reasons, Mr. Cardenas asks the court to specify in the disposition of its opinion that he may purse relief under SB 620, the RJA, and any other ameliorative changes in the law upon remand and any potential resentencing in this case.

XX.
THE COURT ABUSED ITS DISCRETION AND VIOLATED MR. CARDENAS'S RIGHT TO A FAIR TRIAL WHEN IT REFUSED TO BIFURCATE THE GANG ALLEGATIONS

AB 333 created section 1109, which newly required that the trial of gang enhancement allegations be bifurcated upon the defendant's request. The Court recently held that this new provision does not apply retroactively, but the Court also confirmed that a failure to bifurcate may be addressed separately as a violation of the defendant's right to due process. (*Burgos, supra,* 16 Cal.5th at pp. 36, 39.) Mr. Cardenas maintains a viable claim that the trial court improperly refused to bifurcate the gang charges and violated his due process rights in doing so. As explained below, the improper inclusion of gang evidence in the trial of the underlying charges skewed the case against him and violated his right to a fair trial.

A. Factual Summary

Defense counsel moved in limine to bifurcate the gang enhancement and gang special circumstance allegations. (5CT 1029.) She explained that the gang evidence would include evidence of Mr. Cardenas's "criminal conduct which in this case includes a previous admission to crimes tagged with the gang enhancement." (5CT 1035.) The prosecutor opposed the request because, she said, evidence about Mr. Cardenas's gang involvement was relevant to his alleged motive and intent in the underlying crime. (15RT 260.) The court denied the motion on those grounds, ruling that the gang rivalry would show motive and be relevant to guilt for that reason. (15RT 261.) The court also conducted a short analysis under

Evidence Code section 352 and declined to bifurcate because the "probative value is really the heart of the case." (*Ibid.*)

The court permitted Officer Fahoum's extensive hearsay testimony about other violent acts of people she believed to be members of the NSV gang. (20RT 1758.) She described NSV as having 500 members and called the younger members "soldiers on the street." (20RT 1758.) She testified that Mr. Cardenas was not just a participant in this violent group but was a member who used the "moniker" "Dirty Ruben." (20RT 1776, 1784.) She said monikers are usually given based on a personal characteristic. (20RT 1757.)

The court permitted the prosecutor to admit a packet of documents about Mr. Cardenas's prior juvenile adjudications to prove the predicate offense element of the gang charges. (7CT 1742.) The jury learned from this that Mr. Cardenas had been detained for 500 days prior to his plea; that he was ordered confined for up to 14 years; that he had been convicted of multiple offenses and not just the alleged predicate offense; and that the court ordered restitution to two individuals and one entire family. (7CT 1742-1745.)

B. The court's refusal to bifurcate the gang allegations improperly exposed the jury to prejudicial information it would not have otherwise heard while weighing the charges.

To prove the enhancement and special circumstance, the prosecutor admitted evidence that would have been inadmissible at a trial of just the underlying counts. This was error.

Trial courts have the power to bifurcate gang allegations to avoid undue prejudice, and one key factor courts must consider is whether the evidence used to prove the allegation would be

admitted in any event at a trial on the underlying charges. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048.) The trial court's decision is reviewed for abuse of discretion, which requires a reviewing court to consider whether the trial court properly applied the principles that govern its decision. (*Ibid.*; *People v. Carmony* (2004) 33 Cal.4th 367, 377 [reviewing court must consider "legal principles and policies that should have guided the [trial] court's actions"].)

The court made key errors in ruling on Mr. Cardenas's motion to bifurcate the gang charges. The court held, without analysis, that the gang evidence proffered by the prosecutor was relevant to motive and intent and, thus, admissible to prove guilt. (15RT 261.) But this was not true as to all of the gang evidence that the prosecutor admitted. Some evidence relevant to the enhancement and special circumstance would have to have been excluded at a trial of just the underlying offenses.

There are two categories of extraneous gang evidence the court admitted into the guilt determination. First, the court allowed extensive testimony about the makeup, practices, and prior crimes of the NSV gang. Officer Fahoum told the jury that NSV was a group of 500 people, mostly "Hispanic male juveniles," who "heavily saturated" the city of Visalia, opposed the police, and primarily committed murders, assaults, and car-jackings. (20RT 1750, 1753, 1756, 1758.) She also described young members of this group—like Mr. Cardenas—as "soldiers on the street." (20RT 1758.) None of that testimony would have been proper at a trial of just the underlying allegations. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 227-228

(*Albarran*) [evidence of general gang activity "was irrelevant to the underlying charges and obviously prejudicial"].)

The second category of extraneous gang evidence revealed to the jury instances of Mr. Cardenas's prior juvenile misconduct. If this evidence were offered only to prove motive or intent under Evidence Code section 1101, subdivision (b), the court would have been required to engage in an "extremely careful analysis" of the need for it and of the need to limit it. (*People v. Clark* (2021) 62 Cal.App.5th 939, 957, citations and internal quotations omitted.) But the inclusion of gang allegations let the prosecutor use this prior misconduct as direct proof of elements the jury was to decide: the predicate offense element. (§ 186.22, subds. (e) & (f).) And she chose to use an offense committed by Mr. Cardenas as one of these predicate offenses. (22RT 2394.) In short, the elements at issue in a unitary trial caused the jury to hear far more evidence of Mr. Cardenas's alleged prior misdeeds than would have been possible at a bifurcated trial.

The court missed all of this and failed to account for it when it found that the prosecutor would admit gang evidence to prove motive even at a bifurcated trial. The court's error on that point led to its denial of the motion to bifurcate.

C. The error violated Mr. Cardenas's right to a fair trial, and the judgment should be reversed in its entirety.

As noted, the trial court refused to bifurcate the gang charges, and so the jury heard evidence relevant only to those charges when it decided whether Mr. Cardenas was guilty of the underlying offenses. This extraneous gang evidence was so harmful to the jury's

ability to decide those counts that the trial prejudicially violated Mr. Cardenas's right to due process.

A court's failure to bifurcate allegations can produce a violation of the Constitution and require reversal when it "resulted in 'gross unfairness amounting to a denial of due process.'" (*People v. Burch* (2007) 148 Cal.App.4th 862, 867, citation omitted.) "[W]hen there are no permissible inferences the jury can draw from gang evidence, admission of the evidence can be so inflammatory as to violate federal due process. [Citations.]" (*People v. Huynh* (2021) 65 Cal.App.5th 969, 985.)

The unitary trial not only exposed the jury to extensive evidence of the crimes of other purported NSV members, but also permitted the prosecutor to introduce records of conviction that showed the jury evidence of Mr. Cardenas's own prior misconduct. (E.g., 20RT 1758; 7CT 1742-1745.) The jury even had access to the juvenile court's characterizations of the prior offenses and its decision to impose a long term of confinement, suggesting that the court found the offenses particularly egregious. (*Ibid.*) The jury could see that, despite the long term of confinement, Mr. Cardenas was released within a few years, suggesting, incorrectly, that he had escaped full punishment. (*Ibid.*; *People v. Harris* (1998) 60 Cal.App.4th 727, 732 [noting risk that jury will believe a defendant escaped appropriate punishment when told of defendant's prior offense].) All of this evidence was irrelevant to a trial on just the underlying charges, and this demonstrates the prejudicial effect of the court's refusal to bifurcate.

Respondent argued in its Second Supplemental Brief that the court's instructions to the jury cured any error. (Second Supp. RB 90.) This claim fails. First, the instruction was unclear, as explained in the Second Supplemental Reply at page 28. It did not explain how to weigh Mr. Cardenas's juvenile adjudication. Moreover, even if the instruction were clearer, that would not overcome the prejudice: gang evidence may be "so extraordinarily prejudicial and of such little relevance that it raise[s] the distinct potential to sway the jury to convict regardless of [defendant's] actual guilt." (*Albarran, supra,* 149 Cal.App.4th at p. 228.) "Limiting instructions are less effective … when there is little or no probative value to the evidence and it has a high potential for prejudice." (*Argueta v. Worldwide Flight Services, Inc.* (2023) 97 Cal.App.5th 822, 838.)

This was the case here. The court admitted extensive gang evidence, tying Mr. Cardenas to a group that an expert witness described as primarily engaging in murder and other violent crimes. The prosecutor then added evidence that Mr. Cardenas himself had committed a gang crime and been released after just several years. The combined effect of these events denied Mr. Cardenas his right to a fair trial, under any standard of prejudice that could be applied. (*Chapman v. California* (1967) 386 U.S. 18, 24 [burden on government to show error not prejudicial]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [reverse if miscarriage of justice occurred].)

In fact, the state now recognizes gang evidence as uniquely likely to cause harm. In passing section 1109, the Legislature appears to have created the state's only provision that *requires* bifurcation of any enhancement upon the defendant's request. This

is a stronger bifurcation policy than applies even to allegations of prior convictions. (Compare § 1109 with § 1025 and *People v. Calderon* (1994) 9 Cal.4th 69 [bifurcation of prior convictions not mandatory].) And it reflects the state's recognition of the uniquely damaging potential of gang evidence like that admitted in this case. (AB 333, § 2 [legislative findings].) Thus, Mr. Cardenas asks the Court to find that the refusal to bifurcate was an abuse of discretion that prejudicially violated his constitutional rights.

CONCLUSION

For the reasons addressed above and in prior briefing, the Court should reverse the gang enhancement and special circumstance for insufficient evidence, reverse the remainder of the judgment because the proceedings violated Mr. Cardenas's constitutional rights, and affirm that Mr. Cardenas may pursue remedies under new laws when the case is remanded.

Dated: July 29, 2024

Respectfully Submitted,

GALIT LIPA
State Public Defender

/s/
HASSAN GORGUINPOUR
Supervising Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL

(Cal. Rules of Court, rule 8.360(b)(1))

I am the Supervising Deputy State Public Defender assigned to represent appellant, Refugio Ruben Cardenas, in this appeal. I conducted a word count of this brief using our office's computer software. Based on that computer-generated word count, I certify that this brief is 13,466 words in length, excluding tables and certificates. In addition, the brief totals 50 pages, excluding tables and certificates.

Dated: July 29, 2024

/s/
HASSAN GORGUINPOUR

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Case Number: **Cal. Supreme Ct. No. S151493**
Tulare Co. Super. Ct. No. VCF117251

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APPELLANT REFUGIO RUBEN CARDENAS'S THIRD SUPPLEMENTAL OPENING BRIEF

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Tulare County Superior Court Appeals Department 221 S. Mooney Blvd., Rm. 303 Visalia, CA 93291 *tulare-5dca@courts.ca.gov* *aruiz@tulare.courts.ca.gov*	Nathalia Alejandra Varela Latino Justice PRLDEF 475 Riverside Dr., Ste. 1901 New York, NY 10115 *nvarela@latinojustice.org*
Anna Pletcher O'Melveny & Myers LLP 2 Embarcadero Ctr., 28th Floor San Francisco, CA 94111 *apletcher@omm.com*	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **July 29, 2024**, at Oakland, California.

Margarita Maiz Vazquez

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MARGARITA MAIZ

STATE OF CALIFORNIA
Supreme Court of California

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Gorguinpour, Hassan (230401)

Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm