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Supreme Court of California
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No. S273797

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

RAYMOND GREGORY REYNOZA,
Defendant and Appellant.

Sixth Appellate District, Case No. H047594
Santa Clara County Superior Court, Case No. C1775222
The Honorable Charles E. Wilson, Judge

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Does Penal Code section 136.1, subdivision (b)(2), encompass attempts to dissuade a witness from "assisting in the prosecution" of a case after a complaint has been filed?

INTRODUCTION

Rafael Cornejo died because appellant and his coconspirators wanted Cornejo to not assist the prosecution in a case against appellant's brother. Cornejo and two others had been charged with misdemeanor possession of a firearm. When appellant—a brother of one of Cornejo's codefendants—and others confronted Cornejo outside of a bar, they called Cornejo a "snitch" and demanded that he "drop the charges." One of the men punched Cornejo, who fell to the ground and died.

Appellant was convicted of witness dissuasion in violation of Penal Code section 136.1, subdivision (b)(2).[1] Section 136.1, subdivision (b) prohibits any "attempt[] to prevent or dissuade another person who . . . is witness to a crime from doing any of the following," including, in paragraph (2), "[c]ausing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof." (§ 136.1, subd. (b)(2) (§ 136.1(b)(2)).) In interpreting the latter part of subdivision (b)(2), which begins with the typically conjunctive word "and," the Courts of Appeal have divided over whether a person can be convicted for attempting to dissuade a witness from assisting in the prosecution of an accusatory

[1] All subsequent statutory references are to the Penal Code.

pleading, or whether the attempt must be made to prevent the filing of such a pleading. (Compare *People v. Velazquez* (2011) 201 Cal.App.4th 219, 232-233 with Opinion 1-2, 7-9 (Opn.).)

Section 136.1(b)(2) should be construed as encompassing attempts to dissuade a witness from assisting in the prosecution of a filed accusatory pleading. Section 136.1 is part of a comprehensive statutory scheme that protects the administration of justice by addressing interference with witnesses. Specifically, section 136.1 prohibits several types of witness dissuasion in subdivisions (a) and (b) and, in subdivision (c), prescribes increased punishment on proof of certain facts. Section 136.1 was drawn from an inartfully phrased model statute drafted by the Criminal Law Section of the American Bar Association. Although section 136.1(b)(2) is ambiguous, the Legislature intended to prohibit dissuasion of more than the mere filing of an accusatory pleading. The prohibition encompasses dissuading a person from assisting in the prosecution of an already filed accusatory pleading. That it does so is reflected in the broadly expansive phrasing of section 136.1, subdivision (b), the grammatical structure of subdivision (b)(2), and the legislative history. Other standard tools of statutory construction—the canon against surplusage and a review of the decisions of other states that, like California, adopted the ABA's model statute—further confirm that understanding.

STATEMENT OF THE CASE

A. The death of Rafael Cornejo

On February 11, 2017, Rafael Cornejo, Benjamin Valladares, and Francisco Rosales were arrested in Gilroy with an

unregistered firearm in their vehicle. (7RT 1132.) Valladares considered Cornejo to be his uncle. (9RT 1479; 12RT 1914.) The men were charged with misdemeanor possession of a firearm. (7RT 1132.) They made several court appearances together, including one on June 15, 2017. (7RT 1132-1133.) On that day, Rosales went to court for an appearance, and Cesar Chavez and Gilbert Chavez accompanied him. (7RT 1133.)

One week later, on June 22, 2017, Cornejo and Valladares were at a bar in San Jose. (8RT 1363; 9RT 1487, 1496, 1501.) The manager warned Valladares there was a group of men outside. (9RT 1503, 1512-1515; 10RT 1613.) Valladares went outside to check "[b]ecause there had been problems in the past" at that bar. (9RT 1514-1516.) Someone asked, "[W]here's your bitch ass uncle at?" (ACT 21; People's Exh. 52), which meant to Valladares that the men knew his uncle, Cornejo, was at the bar (ACT 21). Valladares went back inside and told Cornejo to remain there. (9RT 1516, 1521.) Cornejo disregarded the advice and went outside. (9RT 1521.)

A bouncer at the bar tried to defuse a confrontation between the two groups. (8RT 1363, 1373-1379.) The group that confronted Cornejo and Valladares was larger and included Guillermo Cervantes, Cesar Chavez, and appellant. (10RT 1627-1628, 1631-1632, 1637.) Appellant was the brother of Rosales, the third man charged in the misdemeanor firearm possession case with Cornejo and Valladares. (7RT 1133.)

The bouncer heard a man in the larger group say, "'Drop the charges,'" (8RT 1379) and something indicating that if the

charges were dropped, everything would be good (8RT 1389). A person told Valladares, "[W]e don't fuck with snitches." (ACT 21.)

Cervantes punched Cornejo once, and Cornejo fell to the ground (ACT 22; 8RT 1379; 10RT 1651-1653), never to regain consciousness (6RT 1065; 7RT 1161-1168; 8RT 1409-1410; 9RT 1537, 1539-1540; 10RT 1659-1661, 1667). He died from blunt force injury to his head, consistent with the impact of the punch and the fall. (6RT 1008; 7RT 1215-1218.)

B. Appellant's conviction of witness dissuasion

The Santa Clara County District Attorney charged appellant, Cervantes, and Chavez with murder (§ 187) and dissuading or attempting to dissuade a witness (§ 136.1(b)(2)) with allegations that the dissuasion was committed with the use of force upon a person (§ 136.1, subd. (c)(1)) and that the dissuasion was done in furtherance of a conspiracy (§ 136.1, subd. (c)(2)). (1CT 28-30; 2CT 353, 355; 17RT 2359-2361.)

The jury acquitted all three defendants of murder but found Cervantes guilty of involuntary manslaughter.[2] (2CT 441; 19RT 5406-5409.) Chavez was acquitted on all charges. (19RT 5407-5408.) Appellant and Cervantes were convicted of witness dissuasion. (2CT 443; 19RT 5407, 5409.) The jury found true the allegation that appellant acted maliciously and in furtherance of

[2] To demonstrate that Cervantes killed with malice, the People introduced evidence that Cervantes had been a successful amateur boxer. (See, e.g., ACT 12-19; People's Exh. 51.) The trial court instructed the jury to consider that evidence only as to Cervantes (2CT 381, 392-393), who was, in any event, acquitted of murder.

a conspiracy to intimidate a witness but found not true the allegation that he used force. (2CT 443; 19RT 5409.) The jury found both penalty allegations true for Cervantes. (19RT 5407.)

The trial court sentenced appellant to two years in prison. (2CT 487, 525; 20RT 5711-5712.)

C. The reversal of the conviction

The Court of Appeal reversed appellant's conviction, holding it was not supported by substantial evidence based on the court's interpretation of the elements of dissuading a witness in violation of section 136.1(b)(2). Disagreeing with the decision in *Velazquez*, *supra*, 201 Cal.App.4th 219, the Court of Appeal held that section 136.1(b)(2) applies only to dissuading a witness from causing the filing of an accusatory pleading, whether original or amended. Because appellant's conduct occurred after the complaint had been filed and there was no evidence that appellant anticipated the filing of an amended complaint, the Court of Appeal held the record did not contain sufficient evidence to support an element of the offense. (Opn. 1-2, 7-9.)[3]

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[3] Having reversed appellant's conviction based on his first claim, the Court of Appeal did not reach appellant's second claim, in which he argued that insufficient evidence supported the jury's finding that he committed the witness dissuasion in furtherance of a conspiracy. (See AOB 39-50.) If this Court reverses, the Court of Appeal will address that claim. (Cal. Rules of Court, rule 8.528(c) ["If it decides fewer than all the issues presented by the case, the Supreme Court may remand the cause to a Court of Appeal for decision on any remaining issues"].)

ARGUMENT

I. SECTION 136(B)(2) ENCOMPASSES DISSUADING A WITNESS FROM ASSISTING IN THE PROSECUTION OF A FILED ACCUSATORY PLEADING

The meaning of the entire statutory text, the canon against surplusage, and the legislative history demonstrate that the Legislature intended section 136.1(b)(2) to encompass attempts at dissuasion both before and after the filing of a complaint. This construction, which was adopted by the Court of Appeal in *Velazquez*, *supra*, 201 Cal.App.4th at pages 232-233, is also consistent with the decisions of other states, which have grappled with the inartful drafting of the model statute. And, contrary to the view of the Court of Appeal, the *Velazquez* construction of section 136.1(b)(2) is not undermined by other appellate decisions addressing section 136.1, subdivision (b).

A. Statutes are construed to best effectuate legislative intent

"The principles of statutory construction are well established." (*People v. Skiles* (2011) 51 Cal.4th 1178, 1185.) "'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.'" (*Ibid.*) In effectuating this purpose, a reviewing court "must first look at the plain and commonsense meaning of the statute because it is generally the most reliable indicator of legislative intent and purpose." (*People v. Cochran* (2002) 28 Cal.4th 396, 400.) "If there is no ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it said," and courts "need not resort to legislative

history to determine the statute's true meaning." (*Id.* at pp. 400-401.)

To the extent the statutory text is ambiguous, courts may look to extrinsic interpretive aids, including the ostensible objectives to be achieved and the legislative history. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1369.) Ultimately, a court should adopt "the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute." (*Ibid.*, internal quotation marks and citations omitted.)

B. The history of section 136.1(b)(2)

Section 136.1 is the product of the Legislature's effort in 1980 to update the prohibitions against witness dissuasion. To do that, the Legislature drew from a model statute drafted by the Criminal Justice Section of the American Bar Association.

1. The law before the 1980 amendments

The Legislature has long been concerned with maintaining the integrity of the judicial process. As enacted in 1872, Penal Code part I, title VII ("of crimes against public justice") prohibited various efforts to pervert the course of justice, including, in chapter VI ("falsifying evidence"), dissuading a witness's attendance (former § 136) and bribing a witness (former § 137).

Those provisions were amended over the years, including in 1979, the year of the last amendment before the Legislature turned to the ABA's model statute. Thus, former section 136 made it a misdemeanor to "willfully and unlawfully prevent[] or

dissuade[] any person who is or may become a witness, from attending upon any trial, proceeding, or inquiry, authorized by law." (Former § 136, subd. (a), as amended by Stats. 1979, ch. 944, § 1.) The same conduct was a felony when the person dissuaded the witness "by means of force or threats of unlawful injury to person or damage to the property of another." (Former § 136, subd. (b), as amended by Stats. 1979, ch. 944, § 1.)

Former section 137 prohibited offering a witness a bribe to influence testimony, forcibly attempting to induce false testimony by a witness, and inducing false testimony or the withholding of true testimony. (Former § 137, as amended by Stats. 1979, ch. 944, § 2.)

2. The 1979 model witness-dissuasion statute

In 1979, the Criminal Justice Section of the ABA proposed a model witness-dissuasion statute. (ABA Section on Crim. Justice, Victims Com., Reducing Victim/Witness Intimidation: A Package (1979) (ABA Package).) The model statute included a misdemeanor offense that would, in California, be the basis for section 136.1, subdivision (b): "Except as provided in [the felony offense], every person who knowingly and maliciously . . . attempts to prevent or dissuade another person who . . . is a witness to a crime . . . from (a) making any report of such victimization to any peace officer or state or local or federal law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge; (b) causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted and assisting in the prosecution thereof;

(c) arresting or causing or seeking the arrest of any person in connection with such victimization, is guilty of a misdemeanor." (*Id.* at pp. 7-8.)

The commentary to this provision explained that "the [ABA] Committee wished to broaden substantially the coverage of many state laws." (ABA Package, *supra*, at p. 8.) One of the ABA Committee's aims was to address dissuasion occurring before court proceedings begin: "Under present law with its emphasis on possession of a subpoena, witness protection statutes provide minimal assistance for victims, particularly immediately after the crime is committed, which is often the most critical time framework." (*Ibid.*)

3. The Legislature adopts the model statute, with some modifications, in 1980

In 1980, Assembly Bill No. 2909 (1979-1980 Reg. Sess.) was introduced to update California's witness dissuasion laws along the lines of the ABA model statute. (Assem. Com. on Crim. Justice, Analysis of Assem. Bill No. 2909 (1979-1980 Reg. Sess.) Apr. 7, 1980, p. 2; *People v. Wahidi* (2013) 222 Cal.App.4th 802, 808; *Babalola v. Superior Court* (2011) 192 Cal.App.4th 948, 956-957.) It was enacted by Statutes 1980, chapter 686.

That enactment made several changes. It added section 136.1. (Stats. 1980, ch. 686, § 2.1.) Subdivision (a) of that new section prohibited dissuading a witness from attending or testifying. Subdivision (b) of the new section prohibited attempts to prevent or dissuade a victim or witness from "doing any of the following . . . : [¶] (1) Making any report of such victimization . . . . [¶] (2) Causing a complaint, indictment,

information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof. [¶] (3) Arresting or causing or seeking the arrest of any person in connection with such victimization." (Stats. 1980, ch. 686, § 2.1.) The statute also repealed section 136 and replaced it with definitional provisions. (Stats. 1980, ch. 686, §§ 1 & 2.) And it added section 136.2, which addressed court orders in pending criminal cases (a subject previously addressed in former section 136). (Stats. 1980, ch. 686, § 2.2.) The statute did not amend section 137, although it was amended by a different statute later that year. (Stats. 1980, ch. 1120, § 1.)

4. The statutory scheme in effect today

With additional amendments, section 136.1, subdivision (b), now prohibits a number of acts punishable as wobblers:

> (b) Except as provided in subdivision (c) [the felony provision], every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:
>
> (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge.
>
> (2) Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof.
>
> (3) Arresting or causing or seeking the arrest of any person in connection with that victimization.

(§ 136.1, subd. (b).)[4] Under subdivision (c) of section 136.1, a violation of subdivision (b) is punishable by two, three, or four years in prison under specified aggravating circumstances, including when the person uses force or acts in furtherance of a conspiracy. (§ 136.1, subd. (c).)

Section 137 continues to address offering a witness a bribe to influence testimony, forcibly attempting to induce false testimony from a witness or the withholding of true testimony, and inducing false testimony or the withholding of true testimony. (§ 137, subds. (a)-(c).) As amended in 1980, this section also encompasses influencing a witness to give false information to or withhold true information from law enforcement officials. (§ 137, subds. (a), (b), (c), (e).)

C. The competing interpretations of section 136.1(b)(2)

The Courts of Appeal have adopted two competing interpretations of section 136.1(b)(2). In *Velazquez*, *supra*, 201 Cal.App.4th at page 233, the Court of Appeal recognized the broad scope of section 136.1(b)(2). The defendant in that case "threatened [the victim] in an attempt to persuade her to drop the charges against his fellow gang members." (*Ibid.*) Because that act satisfied the second phrase of 136.1(b)(2)—prohibiting attempts to dissuade the victim from "assisting in the

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[4] A "wobbler" is a crime that can be punished as either a felony or a misdemeanor. (See generally *People v. Statum* (2002) 28 Cal.4th 682, 685; *People v. Upsher* (2007) 155 Cal.App.4th 1311, 1320 [Legislature changed § 136.1, subd. (b) from a misdemeanor to a wobbler offense in 1998].)

prosecution" of the complaint—the Court of Appeal upheld the conviction under section 136.1(b)(2). (*Ibid.*; see also *People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1519 [defendant violated section 136.1(b)(2) every time he asked his sister to "attempt to persuade a witness from assisting in a prosecution"].)

This case arose on similar facts: Appellant's brother had been charged in a complaint, and appellant and his coconspirators demanded that Cornejo "'[d]rop the charges.'" (8RT 1379, 1389.) In this case, however, the Court of Appeal disagreed with *Velazquez* and held that 136.1(b)(2) encompasses only one type of witness dissuasion: attempts to prevent or dissuade the filing of an accusatory pleading. (Opn. 7-9.) According to the Court of Appeal, once a person knows a complaint has been filed, he cannot violate section 136.1(b)(2) unless he is trying to prevent the filing of an amended complaint or other accusatory pleading. (Opn. 9.)

D. Section 136.1(b)(2), properly construed, encompasses attempts to dissuade a witness from assisting in the prosecution of a filed accusatory pleading

This Court should reject the analysis of the decision below and adopt our commonsense construction of the statute because it is the most faithful reading of the statutory text and punctuation, and would best effectuate the Legislature's intent.

1. The wording of the statute

The words the Legislature chose demonstrate that in cases in which an accusatory pleading has already been filed, section 136.1(b)(2) does more than prohibit attempts to dissuade the filing of an amended pleading. That provision extends to

dissuasion attempts directed at the prosecution of the filed pleading.

"[T]he plain and commonsense meaning of the statute . . . is generally the most reliable indicator of legislative intent and purpose." (*Cochran*, *supra*, 28 Cal.4th at p. 400.) A commonsense reading of section 136.1(b)(2) criminalizes two types of conduct: attempts to prevent or dissuade a victim or witness from advocating for the filing of an accusatory pleading, *and* attempts to prevent or dissuade a victim or witness from assisting in the prosecution of an accusatory pleading that has already been filed. Section 136.1(b)(2) prohibits any attempt to prevent or dissuade a witness from "[c]ausing a complaint . . . to be sought and prosecuted, and assisting in the prosecution thereof." The term "prosecution" describes "'every step in an action from its commencement to its final determination.'" (*Melancon v. Superior Court* (1954) 42 Cal.2d 698, 707-708.)

Statutory "language must also be construed in the context of the *statute as a whole*." (*People v. Valencia* (2017) 3 Cal.5th 347, 358, italics added, internal quotation marks omitted.) Subdivision (b) of section 136.1 includes three paragraphs that prohibit different types of witness dissuasion. Each of these paragraphs must be construed in light of the introductory language in subdivision (b): "[E]very person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing *any of the following* is guilty of a public offense . . . ." (Italics added.)

"'Any' is a term of broad inclusion, meaning 'without limit and no matter what kind.'" (*Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 635.) Thus, "any of the following" means that each of the things that follows is within the ambit of the statute. What follows in subdivision (b) of section 136.1 is a variety of present participles that introduce a gerund phrase: "(1) *Making* any report of that victimization . . . . [¶] (2) *Causing* a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and *assisting* in the prosecution thereof. [¶] (3) *Arresting* or *causing* or *seeking* the arrest of any person in connection with that victimization." (Italics added.)

The broadly inclusive term "any" is then repeated again in section 136.1, subdivision (d), which explains that "[e]very person attempting the commission of *any* act described in subdivisions (a), (b), and (c) is guilty of the offense attempted without regard to success or failure of the attempt." (Italics added.)

Thus, under the structure of the statute, the acts—"any" of which is a public offense—are identified by participle. Section 136.1(b)(2) contains two prohibitions, one in each gerund phrase with the phrases separated by a comma followed by "and." The first phrase makes it illegal to attempt to dissuade a witness from "causing a complaint . . . to be sought and prosecuted." The second phrase makes it illegal to attempt to dissuade a witness from "assisting in the prosecution thereof," with "thereof" referring to the complaint. Thus, attempting to dissuade a person from "assisting in the prosecution" of the complaint is one of the "any" prohibited acts in section 136.1(b)(2).

This is so, notwithstanding the baseline rule—implicitly relied on by the Court of Appeal (Opn. 7-8)—that "and" is typically conjunctive and "or" is typically disjunctive. (Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012) p. 116 ["*And* joins a conjunctive list, *or* a disjunctive list—but with negatives, plurals, and various specific wordings there are nuances" (bold omitted)]; *In re C.H.* (2011) 53 Cal.4th 94, 101 ["The ordinary and usual usage of 'and' is as a conjunctive, meaning 'an additional thing,' 'also,' or 'plus'" (some internal quotation marks omitted)].) This rule "covers the vast majority of wordings. But as with so many other interpretative issues, there is a vast array of possible permutations in phrasing." (Scalia & Garner, Reading Law: The Interpretation of Legal Texts, *supra*, at p. 123.) For example, "[t]he wording of the lead-in may be crucial to the meaning. If the introductory phrase is *any one or more of the following*, then the satisfaction of any one of the elements, or any combination of elements, will suffice." (*Id.* at p. 122.)

The "permutations in phrasing" here (Scalia & Garner, Reading Law: The Interpretation of Legal Texts, *supra*, at p. 123)—particularly the expansive introductory phrase "any of the following"—show that the Legislature did not mean "and" as a conjunctive in section 136.1(b)(2). Or at least it is not a conjunctive in the usual sense of identifying a series of elements that together define a single offense, e.g., "It is a crime to drink *and* drive." Rather, the "and" is conjunctive in the sense of joining a list of independently prohibited acts, e.g., "It is a crime

to drink and drive, *and* drive and not have a license, *and* drive and not have insurance, *and* drive and not have working brake lights." In the latter example, each italicized "and" has a disjunctive effect and could have been replaced by "or" to the same grammatical effect, whereas no nonitalicized "and" could be so replaced without changing the meaning.

Such a disjunctive use of "and" is more than theoretical, as this Court's decision in *Bianco v. Industrial Acci. Com.* (1944) 24 Cal.2d 584 demonstrates. There, the Court considered a provision in which expansive introductory language gave the word "and" a disjunctive meaning in a statutory list. *Bianco* construed a statute of limitations containing "'periods within [which] *may be* commenced proceedings for the collection of the death benefit.'" (*Id.* at p. 586.) A claim could be brought within "'[o]ne year from the date of death, and in any event within—[¶] (1) Two years from the date of injury.'" (*Ibid.*) The plaintiff had satisfied the first part of this provision (filing suit within one year of the decedent's death) but not the second (filing suit within two years of the decedent's injury). (*Id.* at pp. 585-586.)

Bianco interpreted the statute to allow any claim "commenced *either* one year after death or two years after the injury, whichever fixes the period at the later date." (*Bianco*, *supra*, 24 Cal.2d at p. 587, italics added.) In reaching that conclusion, the Court emphasized the statute's "permissive" and "affirmative" language allowing that claims "*may be* commenced within certain periods." (*Ibid.*) Although the Court acknowledged that the use of "or" would have made its

construction of the statute "beyond question," it nonetheless concluded that the statutory language sufficiently conveyed the intent of the Legislature to permit claims to be filed within either period. (*Ibid.*)

Just as the "may be" language in *Bianco* demonstrated that what followed constituted two alternative dates joined by "and," the use of "*any* of the following" in subdivision (b) of section 136.1 (italics added) and "the commission of *any* act" in subdivision (d) of section 136.1 (italics added) demonstrate that phrase "and assisting in the prosecution thereof" is not one element of a single offense that begins with "[c]ausing a complaint . . . to be sought and prosecuted" but is instead one of two alternative means of violating section 136.1(b)(2). Thus, the Legislature intended the witness dissuasion statute to encompass attempts to deter a witness from assisting in the prosecution of a filed complaint.

2. The punctuation between the gerund phrases

The alternative nature of section 136.1(b)(2) is further demonstrated by the Legislature's punctuation. The inclusion of a comma before the phrase "and assisting in the prosecution thereof" confirms that the two gerund phrases of section 136.1(b)(2) are independent.

"Punctuation is a permissible indicator of meaning." (Scalia & Garner, Reading Law: The Interpretation of Legal Texts, *supra*, at p. 161, bold omitted; see *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.* (1993) 508 U.S. 439, 454 ["the meaning of a statute will typically heed the commands of its punctuation"].) A comma is "normally used to

divide and isolate ideas." (*In re S.C.* (2009) 179 Cal.App.4th 1436, 1441; see Micheli, Introduction to Drafting Legislation in California (2021) p. 213 ["As a general rule, the comma should be used at the end of a complete cause [*sic*], or a self-contained phrase, in a legislative sentence. The comma is often used . . . to separate items in a series"].) Here, the comma separates the two gerund phrases in section 136.1(b)(2), thereby emphasizing the separation between the two phrases. That separation demonstrates that each gerund phrase establishes a separate crime in section 136.1(b)(2).

3. The canon against surplusage

The canon against surplusage further supports reading the two gerund phrases in section 136.1(b)(2) as specifying independently prohibited acts. Under this canon, "courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage." (*People v. Franco* (2018) 6 Cal.5th 433, 437, internal quotation marks omitted.) The Court of Appeal misapplied the canon, rendering the bulk of section 136.1(b)(2) surplusage in an attempt not to render one word surplusage.

Section 136.1(b)(2) contains the word "and" twice: The provision prohibits attempts to dissuade a witness from "[c]ausing a complaint . . . to be sought *and* prosecuted, *and* assisting in the prosecution thereof." (§ 136.1(b)(2), italics added.) The Court of Appeal focused on the second "and" as the keystone of its analysis. The court concluded that to read the second "and" as a disjunctive—as *Velazquez* did—rather than

conjunctive would fail to give significance to each word in the statute. (Opn. 7-8.)

The court's analysis was incorrect for two reasons. First, as explained above, reading the second "and" as a conjunction joining two phrase that independently prohibit conduct gives effect to every word and jot of punctuation chosen by the Legislature with no surplusage.

Second, the Court of Appeal's interpretation renders unnecessary much of section 136.1(b)(2), in violation of the surplusage canon. (See Scalia & Garner, Reading Law: The Interpretation of Legal Texts, *supra*, at p. 174 [no word or provision "should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence" (bold omitted)].) Again, section 136.1(b)(2) prohibits "[c]ausing a complaint . . . to be sought and prosecuted, and assisting in the prosecution thereof." If, as the Court of Appeal believed, each "and" in section 136.1(b)(2) is interpreted as a conjunction joining elements of a single offense, then much of the provision is surplusage. Dissuasion done to prevent the witness from causing a complaint "to be sought" also is an attempt to prevent the witness from "assisting in the prosecution thereof." (§ 136.1(b)(2).) Everything from the second "and" is rendered surplusage by the Court of Appeal's construction.

The Court of Appeal justified its construction by reasoning that even with its narrower reading, section 136.1(b)(2) could encompass conduct occurring after the filing of the complaint in two circumstances. First, the court opined that the statute covers

conduct intended to deter the filing of a complaint where the defendant is ignorant of the fact that the complaint has already been filed. Second, the court posited that section 136.1(b)(2) covers conduct intended to deter "an *amended* complaint or some other subsequent charging document" from being filed. (Opn. 9.)[5] But neither of these circumstances gives meaning to the phrase "assisting in the prosecution thereof." That phrase would, therefore, remain surplusage in the Court of Appeal's construction.

Because the Court of Appeal's construction does not give significance to every word of section 136.1(b)(2), on balance, the choice between competing interpretations favors the *Velazquez* construction. (Scalia & Garner, Reading Law: The Interpretation of Legal Texts, *supra*, at p. 59 ["No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions" (bold omitted)].)

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[5] In felony cases not prosecuted by indictment, "some other subsequent charging document" (Opn. 9)—an information—will *always* be filed if the defendant is held to answer after the preliminary hearing. (§§ 737, 739.) Misdemeanor cases, on the other hand—like the prosecution of appellant's brother and Cornejo—are prosecuted by complaint alone. (§ 740.) Thus, as discussed in Argument section I.D.4, *post*, the Court of Appeal's construction of section 136.1(b)(2) treats dissuasion of witnesses in felony prosecutions differently than dissuasion of witnesses in misdemeanor prosecutions.

4. The legislative history

When statutory text is ambiguous, legislative history may be relevant to shed light on the statutory meaning. (*Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 344.) The legislative history supports *Velasquez*'s interpretation of the statute because it demonstrates the legislative intent to prohibit attempts to dissuade witnesses from assisting in the prosecution of a filed complaint.

The Legislature based section 136.1 on the model witness-dissuasion statute by the ABA Section on Criminal Justice. But the Legislature added a comma between the gerund phrases of section (b)(2) of the model witness-dissuasion statute. Because a comma serves to "divide and isolate ideas" (*In re S.C.*, *supra*, 179 Cal.App.4th at p. 1441), the addition suggests the Legislature was clarifying that the gerund phrases as adopted in section 136.1(b)(2) refer to independently prohibited acts.

The Legislative Analyst's analysis of Assembly Bill No. 2909 also suggested that section 136.1 would prohibit attempts to dissuade a witness from assisting in the prosecution of a filed complaint. The analysis explained that the bill would "make[] it a misdemeanor to knowingly and maliciously prevent or dissuade (or attempt to prevent or dissuade) a witness to, or victim of, a crime from (1) attending or giving testimony at any legal proceeding *or* (2) assisting law enforcement or prosecution activities." (Legis. Analyst, analysis of Assem. Bill No. 2909 (1979-1980 Reg. Sess.), May 10, 1980, p. 1, italics added; see also Assem. Off. of Research, 3d reading analysis of Assem. Bill No. 2909 (1979-1980 Reg. Sess.), May 15, 1980, p. 1 [similar].) This

broad language does not suggest that attempts to dissuade a witness from "assisting . . . prosecution activities" would be prohibited by the bill only if done in connection with the filing of an accusatory pleading. Or, stated conversely, this broad language does not suggest that it would be *lawful* under the bill to dissuade a witness from assisting in the prosecution of a complaint provided that the dissuasion occurs after the complaint has been filed and the dissuader knows that the complaint has been filed and intends only to dissuade assisting in the prosecution of the as-filed complaint, not the filing of an amended complaint.

To be sure, the legislative history also reflects that the Legislature was concerned about dissuasion before the filing of an accusatory pleading and intended to expand prohibitions on witness dissuasion to address such conduct. (See ABA Package, *supra*, at p. 8 [model statute addressed dissuasion of witnesses "immediately after the crime is committed," which the authors believed was not sufficiently addressed "[u]nder present law with its emphasis on possession of a subpoena"].) That the drafters of the model statute intended to prohibit witness dissuasion before the filing of a complaint does not suggest that witness dissuasion after the filing of a complaint was excluded from the reach of the model statute or the statute as enacted by the Legislature. (See *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 79 ["statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the

provisions of our laws rather than the principal concerns of our legislators by which we are governed"].)

Construing the statutory intent so narrowly would contradict the more expansive intent of the Legislature to broadly prohibit witness dissuasion. (Cf. *People v. Foster* (2007) 155 Cal.App.4th 331, 337 ["[t]he legislative history reveals that lawmakers enacted section 136.1 to close loopholes and expand prosecution for the variety of intimidating acts which had eluded coverage under former section 136"; "[t]he goal of the legislation was to discourage all who attempted to dissuade witnesses, regardless of the means selected or the success of the attempt"].)

Nor does the legislative history suggest that the Legislature intended to treat dissuasion in felony cases differently than in misdemeanor cases. But under the Court of Appeal's interpretation, section 136.1(b)(2) could address dissuasion in a felony case that would not be covered in a misdemeanor case. In a felony case, dissuasion of a witness from assisting the prosecution between the filing of the complaint and the information could be construed as dissuasion to prevent the filing of the information and therefore prohibited by section 136.1(b)(2). But misdemeanor cases are prosecuted by complaint alone, not by information (§ 740), so dissuading a witness from assisting in the prosecution of a filed complaint in a misdemeanor case would only violate section 136.1(b)(2) if it was aimed at a forthcoming amended complaint or if the dissuader was unaware that the complaint had been filed. The legislative history does not suggest that the Legislature intended to treat dissuasion of witnesses in

felony cases differently than dissuasion of witnesses in misdemeanor cases simply because an additional charging document is required in felony cases.

One other aspect of the legislative history bears mentioning. The Senate Committee on the Judiciary observed in its report on Assembly Bill No. 2909 that "the ABA proposal is a draft model intimidation statute" that "has numerous rough edges." (Sen. Com. on Judiciary, Rep. on Assem. Bill No. 2909 (1979-1980 Reg. Sess.) p. 5, underscoring omitted.) The committee observed that "the quality of language is far worse than that produced by our Legislative Counsel" and urged that "[a]t some point the bill should be cleaned-up and rewritten in order to smooth out such rough spots." (*Id.* at pp. 5-6.) Although the committee identified issues like the "[t]he syntax is cumbersome" and the definitions of witness and victim "defy the common sense meaning of the words," the committee did not specifically highlight the inartful phrasing of section 136.1(b)(2). (*Id.* at pp. 5-6.)

For these reasons, this Court should construe section 136.1(b)(2) as prohibiting attempts to dissuade a witness from assisting in the prosecution of an already filed complaint. That construction best effectuates the legislative intent discerned from the statutory text and legislative history.

E. Other jurisdictions have addressed the ambiguity in the model statute and included postfiling witness-dissuasion attempts within its scope

As noted, our Legislature added a comma to the model statute when enacting section 136.1(b)(2). Several other jurisdictions that adopted the model statute also made changes to

clarify the (b)(2) provision of the model statute.[6] In states that retained the "and" from the model, courts have held that the (b)(2) provision encompasses attempts to dissuade a witness from assisting in the prosecution of a filed complaint. These legislative and judicial developments (in Missouri, Delaware, Wisconsin, and Kansas) confirm that the ambiguity in section 136.1(b)(2) is best resolved by construing it as encompassing dissuasion directed at a witness's assisting in the prosecution of a filed complaint. (See *Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966, 978 [California courts may look to "how other court have interpreted" a uniform code for guidance in construing California law "adopted verbatim" from that uniform code].)[7]

Missouri changed the model statute's "and" to "or," prohibiting attempts to dissuade a witness from "[c]ausing a complaint, indictment or information to be sought and prosecuted *or* assisting in the prosecution thereof." (Mo. Rev. Stat. § 575.270, italics added.)

Delaware (1) changed the first and second "and" in the model statute's (b)(2) to "or"; (2) separated the two phrases by inserting a comma before the second "or" (much like the California Legislature inserted a comma before the second "and");

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[6] This provision was subdivision (b) of section 2 of the model statute; we refer to it as (b)(2) because that was the numbering adopted by the Legislature in section 136.1.

[7] The following discussion describes the relevant changes to the model's (b)(2), not every legislative modification to the entire model statute.

and (3) added "from" before the "assisting" phrase (which established parallelism with the introductory "from" that Delaware used). Thus Delaware prohibits attempts to dissuade a witness "from" "[c]ausing a complaint, indictment, information, probation or parole violation to be sought or prosecuted, *or* from assisting in the prosecution thereof." (Del. Code tit. 11, § 3532, italics added.)

Wisconsin adopted the "and assisting in the prosecution" phrase of the model statute without change. (Former Wis. Stat. § 940.44 [in effect from 1981 to 2015].) The Wisconsin Court of Appeals addressed the same ambiguity at issue in this case in *State v. Freer* (Wis.Ct.App. 2009) 779 N.W.2d 12. A criminal complaint was filed against Freer based on an altercation with the victim. Freer then left a message threatening to cause the victim reputational harm. (*Id.* at p. 13.) It was "undisputed that this alleged act of intimidation did not occur in time to prevent or dissuade [the victim] from 'causing a complaint to be sought.'" (*Ibid.*) The court determined the statute was ambiguous. (*Id.* at p. 15.) After considering the statutory text, the canon against surplusage, and the statute's legislative history, the court concluded that "and" was correctly interpreted to be disjunctive in the clause "and assisting in the prosecution thereof." (*Id.* at pp. 14-19.) Accordingly, it upheld Freer's conviction for witness dissuasion. In 2015, the Wisconsin legislature codified *Freer*, replacing the ambiguous "and" with "or." (Wis. Stat. § 940.44, effective April 10, 2015.)

Kansas, like California, added a comma before the "and assisting" phrase, prohibiting attempts to dissuade a witness from "causing a complaint, indictment or information to be sought and prosecuted or causing a violation of probation, parole or assignment to a community correctional services program to be reported and prosecuted, and assisting in its prosecution." (Kan. Stat. Ann. § 21-5909.) As in California (*Velazquez*) and Wisconsin (*Freer*), the appellate court in Kansas construed the statute to encompass attempts to convince the witness to "drop" charges that the prosecution had filed. (*State v. Shields* (Kan.Ct.App. Feb. 7, 2020, No. 119,844) 2020 Kan.App. Unpub. Lexis 60, *3, *8 [nonpub. opn.] [upholding conviction for witness dissuasion as supported by substantial evidence; after defendant was arrested for assaulting the victim, they spoke on the phone, and defendant "directed [the victim] to go to the prosecutor's office and demand that it drop the charge against him"].)[8]

The United States Congress substantially rephrased the model statute, prohibiting "intentionally harass[ing] another person and thereby hinder[ing], delay[ing], prevent[ing], or dissuad[ing] any person from—[¶] . . . [¶] (4) causing a criminal

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[8] Under rule 7.04(g)(2) of the Kansas Supreme Court Rules, this unpublished decision is not binding precedent but would be citable in courts of that state because "it has persuasive value with respect to a material issue not addressed in a published opinion of a Kansas appellate court." We cite the decision as persuasive authority here because the Kansas statute is more similar to the California statute than the Wisconsin statute construed in *Freer*, *supra*, 779 N.W.2d 12.

prosecution, or a parole or probation revocation proceeding to be sought *or* instituted, *or* assisting such prosecution or proceeding." (Pub.L. 97-291 (Oct. 12, 1982) 96 Stat. 1249-1250, italics added; see also 18 U.S.C. § 1512(d); see Sen.Rep. No. 97-532, 2d Sess. (1982), reprinted in 1982 U.S. Code Cong. & Admin. News, p. 2521 ["Section 1512 of S. 2420 draws heavily upon a model statute developed by the ABA Victims Committee . . . . Since its adoption by the American Bar Association in August, 1980, the model statute has been the basis of legislation in several other states"].) Congress sought "to enhance and protect the necessary role of crime victims and witnesses in the criminal justice *process*" (96 Stat. 1248-1249, italics added), not just at discrete moments in the process, such as the time during which the dissuader anticipates the filing of an amended accusatory pleading.

The experiences of these jurisdictions confirm the ambiguity of the phrasing of the (b)(2) provision of the ABA model statute. The courts and legislatures of other jurisdictions have consistently treated the "assisting" phrase as a freestanding prohibition—the conclusion reached by *Velazquez* and rejected by the Court of Appeal below—and prohibited attempts to dissuade a witness from assisting in the prosecution of a case after an accusatory pleading is filed.[9]

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[9] The People found no out-of-state authority construing the (b)(2) provision of the model statute as the Court of Appeal did here, i.e., to address witness dissuasion only before a complaint is filed or dissuasion after the complaint has been filed if the

(continued…)

F. No other statute addresses appellant's conduct

The Court of Appeal indicated that the impact of its decision would be minimal because two other statutes deter and punish conduct that occurs after the filing of a complaint. (Opn. 9, citing §§ 136.1, subd. (a)(1), (2) [dissuasion or attempted dissuasion of a victim or witness from giving testimony or attending trial] & 137 [attempts to influence testimony of a witness or information given to law enforcement].) The court implied that one or both of those statutes covered appellant's conduct. (Opn. 9 [the holding on the scope of section 136.1(b)(2) "does not mean the state has no power to deter and punish conduct of the kind described *here*" (italics added)].)

The Court of Appeal was mistaken. First, no other statutory provision covered appellant's conduct in this case. Second, any overlap between criminal statutes on witness dissuasion in other cases does not justify limiting section 136.1(b)(2) to encompass only crimes before the filing of the accusatory pleading.

1. Attempts to dissuade a witness from assisting the prosecution of a filed complaint are not always covered by another dissuasion statute

As this case demonstrates, and contrary to the Court of Appeal's implication, dissuading a witness from "assisting in the prosecution" of a filed complaint by commanding that the witness drop the charges is not always covered by another witness-

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(…continued)

defendant does not know the complaint has been filed or if the defendant intends to dissuade the filing of an amended complaint.

dissuasion statute. Here, one week after a court appearance, Cornejo was confronted by a group that included a codefendant's brother, appellant, and told to "drop the charges." The record contains no indication Cornejo was going to testify against appellant's brother or had information that appellant wanted Cornejo to withhold from law enforcement. Nor did appellant threaten force or offer a bribe in his attempt to intimidate Cornejo. Thus, the demand to drop the charges did not fall within the scope of sections 136.1, subdivision (a) or 137, but it was an attempt to dissuade Cornejo from assisting in the prosecution of the filed complaint.

That the conduct here—an attempt to undermine the "'legitimate and compelling state interest' in protecting the community from crime" (*Schall v. Martin* (1984) 467 U.S. 253, 264) by interfering with a prosecution—is not covered by sections 136.1 or 137 strongly suggests that the Court of Appeal's interpretation of the prohibition on attempting to dissuade a person from "assisting in the prosecution" of a complaint is incorrect.

Notably, section 136.1(b)(2) is the only provision directly addressing dissuading a witness from assisting the prosecution in a manner other than testifying as a witness or providing law enforcement with information. Defendants have attempted to convince witnesses to "drop" the charges in cases across the United States. (See, e.g., *United States v. Johnson* (6th Cir. 2022) 24 F.4th 590, 595 [after charges were filed, defendant sent letters to complaining witness "trying to convince her to drop the

charges and not to testify against him"]; *People v. Becerrada* (2017) 2 Cal.5th 1009, 1014-1015, 1028-1029, 1037 [defendant charged with rape killed victim after she did not comply with his demand to "drop the charges"]; *Sullivan v. State* (Ga.Ct.App. 2014) 761 S.E.2d 377, 378-380 [third party offered rape victim money from defendant to try to persuade her to "drop the charges" against defendant]; *Commonwealth v. Elliffe* (Mass.App.Ct. 1999) 714 N.E.2d 835, 837 [after complaint was filed, defendant assaulted witness while yelling, """Drop the charges!"""]; *People v. Jackson* (Ill.App.Ct. 1992) 596 N.E.2d 1251, 1252-1253 [defendant offered victim money to "drop the charges"]; *State v. Rempel* (Wash. 1990) 785 P.2d 1134, 1135, 1137 [defendant repeatedly called victim from jail to ask her to "drop the charges" of attempted rape].)

These cases could evade prosecution under the Court of Appeal's interpretation of section 136.1(b)(2). Lay people may not know that the decision to "drop" charges is within the prosecutor's purview, not that of witnesses or victims.[10] As a result, some courts do not view a demand that the witness "drop the charges" as an attempt to influence the witness's testimony.

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[10] A prosecutor may take victims' views into consideration when making discretionary charging decisions. (See, e.g., *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1163-1164 [rape charges dismissed after preliminary hearing due to the victim's request].) Nevertheless, "[t]he prosecutor ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 451.)

People v. Cribas (1991) 231 Cal.App.3d 596, 608, for example, addressed a conviction under section 137, subdivision (a). The Court of Appeal rejected the prosecution's argument that by asking the witness to "drop the charges," Cribas was impliedly asking her not to testify. Without affirmative proof to the contrary, the court inferred that the defendant did not know that the victim could not dismiss the case. (*Id.* at pp. 608-609.) Similarly, in *Rantala v. State* (Alaska Ct.App. 2009) 216 P.3d 550, 557, the court concluded that the defendant's request that the complaining witness tell the authorities she wished to drop the charges did not suggest that she "lie about what happened or that she unlawfully withhold testimony." And in *Rempel*, *supra*, 785 P.2d at pages 1137-1138, the Washington Supreme Court concluded that the defendant was not attempting to dissuade the witness from providing truthful testimony when he asked that she "drop the charges." Instead, the court reasoned that the words "'drop the charges' reflect a lay person's perception that the complaining witness can cause a prosecution to be discontinued." (*Id.* at p. 1137.)

Other courts have drawn different conclusions, inferring from the demand to "drop the charges" that the defendant sought to influence testimony or other information provided to law enforcement. (*Sullivan*, *supra*, 761 S.E.2d at pp. 379, 382-383 [court construed offer of money to rape victim to drop charges as attempt to convince her to give the prosecutor false information]; *Bronson v. Hosford* (N.D.Fla. Nov. 20, 2009, 4:08cv444) 2009 U.S. Dist. Lexis 118537, *21-22 ["The phrase 'drop the charges' is

commonly used to indicate an unwillingness to testify in court against a defendant"]; cf. *People v. Young* (2005) 34 Cal.4th 1149, 1210-1211 [it "can be reasonably inferred" that a defendant who knows a witness is cooperating with the police expects that the witness will testify at trial; sufficient evidence of witness dissuasion when defendant battered the witness and said, "'You snitched on me and my lawyer had it in black and white and I should have killed you'"].)

These divergent approaches demonstrate the challenges courts face in determining what defendants mean when they attempt to influence witnesses to "drop the charges," and the corresponding difficulty in prosecuting such cases under statutes like section 136, subdivision (a), or section 137. That the defendants are attempting to intimidate the witnesses and interfere with the prosecution of the filed case is clear. But courts have different views on whether lay people understand that witnesses do not make charging decisions. Because an attempt to have a witness "drop" filed charges is not necessarily an attempt to influence testimony or provide false information to investigators, this type of witness dissuasion is not, contrary to the view espoused by the Court of Appeal, covered by sections 136.1, subdivision (a) or 137 and, in some cases, may only be addressed under section 136.1(b)(2).

The Court of Appeal's confidence that it was not undermining the Legislature's efforts to protect the integrity of the criminal justice system is unfounded. Its interpretation of section 136.1(b)(2) would leave unaddressed many attempts to

dissuade victims and witnesses from "assisting in the prosecution" of a complaint after its filing.

2. Any overlap between witness dissuasion statutes does not support limiting section 136.1(b)(2) to prefiling dissuasion

Contrary to the implication of the Court of Appeal, the existence of some overlap between sections 136.1 and 137 does not undermine the construction of section 136.1(b)(2) advanced here and adopted in *Velazquez*. The Legislature may criminalize the same conduct in different ways under different statutes. It has been "long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." (*United States v. Batchelder* (1979) 442 U.S. 114, 123-124; accord, *People v. Wilkinson* (2004) 33 Cal.4th 821, 834, 838-839 ["*Batchelder* instructs us that neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles"].)

Indeed, the overlapping provisions of sections 136.1 and 137 demonstrate the Legislature's intent to address the problem of witness and victim dissuasion as comprehensively as possible. Legislatures may "'employ[] a belt and suspenders approach'" in writing statutes (*Facebook, Inc. v. Duguid* (2021) 141 S.Ct. 1163, 1172, fn. 7), making overlap among criminal statutes "not uncommon" (*Loughrin v. United States* (2014) 573 U.S. 351, 358, fn. 4). As the Ninth Circuit Court of Appeals explained when

considering overlapping provisions of the federal witness tampering statute, "The term 'belt and suspenders' is sometimes used to describe the common tendency of lawyers to use redundant terms to make sure that every possibility is covered. 'That some wear a belt and suspenders does not prove the inadequacy of either to hold up the pants, but only the cautious nature of the person wearing the pants.'" (*United States v. Carona* (9th Cir. 2011) 660 F.3d 360, 369.) The Legislature's belt and suspenders approach to witness dissuasion does not support a restrictive reading of section 136.1(b)(2).

In sum, a concern about an overlap does not warrant deviating from the most sensible construction of section 136.1(b)(2) under all of the canons addressed herein. If a court construing a statute considers the existence of another statute that covers some of the same conduct a reason to limit the scope of the first statute, the court puts a thumb on the statutory construction scale unrelated to the text of the statute and risks interfering with the Legislature's prerogative to define crimes, including by enacting multiple statutes that criminalize the same conduct. The Court of Appeal cited no authority for doing so.

G. The other decisions cited by the Court of Appeal are not persuasive here

The Court of Appeal found support for its construction of section 136.1(b)(2) in *People v. Hallock* (1989) 208 Cal.App.3d 595, *People v. Fernandez* (2003) 106 Cal.App.4th 943, and *People v. Brown* (2016) 6 Cal.App.5th 1074. (Opn. 6-7.) None of those decisions is persuasive because none addressed the ambiguity in section 136.1(b)(2) or applied the canons of statutory construction

to resolve the ambiguity. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.)

Hallock was convicted of violating section 136.1, subdivision (c)(1) for threatening to blow up the victim's house if she told "'anybody anything'" about his attempt to rape her. (*Hallock*, *supra*, 208 Cal.App.3d at pp. 597-598.) The jury was erroneously instructed under subdivision (a) of 136.1—addressing interference with a witness's testimony—rather than subdivision (b). (*Id.* at pp. 606-607.) The Court of Appeal reversed the dissuasion conviction because the record contained no evidence that Hallock had attempted to dissuade the victim from testifying, and the jury had not been instructed on the theory that he had attempted to dissuade her from reporting the crime to the police. (*Id.* at pp. 607-610.) In summarizing the types of witness intimidation "basically" prohibited by section 136.1, *Hallock* omitted any mention of assisting the prosecution: "Subdivision (b) prohibits preventing or dissuading a witness or victim from (1) reporting the victimization; (2) causing a complaint or similar charge to be sought; and (3) arresting or causing or seeking the arrest of any person in connection with such victimization." (*Id.* at p. 606.) Because Hallock's conduct was charged under section 136.1, subdivision (a)(1) and prohibited by subdivision (b)(1), the Court of Appeal had no reason to further address the meaning of subdivision (b)(2).

In *Fernandez*, the defendant was convicted of violating section 136.1, subdivision (b)(1) for trying to persuade a key

witness not to testify truthfully at the preliminary hearing. (*Fernandez*, *supra*, 106 Cal.App.4th at pp. 945-946.) The Court of Appeal overturned the conviction, relying on *Hallock*, *supra*, 208 Cal.App.3d at pages 605-607 for the proposition that "the offenses defined in section 136.1, subdivision (b) targeted pre-arrest efforts to prevent a crime from being reported to the authorities, rather than courtroom testimony." (*Fernandez*, *supra*, at p. 950.) "To the extent the court in *Fernandez* intended to include subdivision (b)(2) in its statement that subdivision (b) applies only to prearrest attempts to dissuade the reporting of a crime, the statement is dictum." (*Velazquez*, *supra*, 201 Cal.App.4th at p. 232; see also *Brown*, *supra*, 6 Cal.App.5th at p. 1083 [in *Fernandez,* "[t]here was simply no issue before the court concerning section 136.1, subdivision (b)(2)"].)

Brown is more pertinent, but nevertheless of limited persuasive value. Brown was convicted of witness intimidation under section 136.1, subdivision (c), for telling the victim "to take back her report to the police" and threatening her life. (*Brown*, *supra*, 6 Cal.App.5th at pp. 1076, 1079.) He argued that he should instead have been convicted under section 137, which he viewed as the more specific statute, and which carried a lesser punishment. (*Id.* at pp. 1077, 1080.) The issue, therefore, was "whether a violation of section 137, subdivision (c) will *commonly* constitute a violation of section 136.1, subdivision (b)(2)." (*Id.* at p. 1081.) *Brown* concluded that the two statutes would not "commonly" overlap for three reasons: (1) under section 136.1(b)(2), "the prevention must occur before the relevant

charging document has been filed"; (2) "the victim must be so central to the case as to be able to *cause* the filing"; and (3) section 136.1(b)(2) "applies only to attempts to *exculpate* the accused." (*Id.* at p. 1082.) These first two conclusions contradict the *Velazquez* construction of the statute, which interprets section 136.1(b)(2) to cover dissuasion occurring after the filing of the charging document. This aspect of *Brown* is not persuasive because the Court of Appeal did not address the canons of statutory construction analyzed herein. Instead, the *Brown* court mistakenly read the "and assisting in the prosecution" clause out of section 136.1(b)(2) entirely. To the extent that *Brown* can be read as supporting the Court of Appeal's interpretation of section 136.1(b)(2) in this case, this Court should limit *Brown*.

In sum, neither the Court of Appeal below nor the cases on which it relied reached any conclusion about the role of the second phrase in section 136.1(b)(2). Neither the Court of Appeal nor the cases on which it relied considered fully the words, punctuation, and structure of section 136.1(b)(2) or its legislative history. When those matters are considered, the Court of Appeal's error become apparent. That provision encompasses all postfiling attempts to dissuade a witness from assisting in the prosecution of a case, not just postfiling attempts done without knowledge that the accusatory pleading has been filed or with knowledge that an amended pleading will be filed.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Respectfully submitted,

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July 11, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached Opening Brief on the Merits uses a 13 point Century Schoolbook font and contains 10,151 words.

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July 11, 2022

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Raymond Gregory Reynoza**
No.: **S273797**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On July 11, 2022, I electronically served the attached **OPENING BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on July 11, 2022, at Sunnyvale, California.

Nam Bui	**/s/**
Declarant for eFiling	Signature

Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on July 11, 2022, a true copy thereof enclosed in a sealed envelope has been placed in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

County of Santa Clara
Criminal Division - Hall of Justice
Superior Court of California
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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on July 11, 2022, at San Francisco, California.

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Declarant for U.S. Mail

S. Kowalski
Signature

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Supreme Court of California
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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

Case Name: **PEOPLE v. REYNOZA**
Case Number: **S273797**
Lower Court Case Number: **H047594**

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Stowe, Katie (257206)

Last Name, First Name (PNum)

California Dept of Justice, Office of the Attorney General

Law Firm