No. S275746

In the Supreme Court of the State of California

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

v.

KEJUAN CLARK,
Defendant and Appellant.

Fourth Appellate District, Division Two, Case No. E075532
Riverside County Superior Court, Case No. RIF1503800
The Honorable Bambi J. Moyer, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Can the People meet their burden of establishing a "pattern of criminal gang activity" under Penal Code section 186.22 as amended by Assembly Bill No. 333 (Stats. 2021, ch. 699) by presenting evidence of individual gang members committing separate predicate offenses, or must the People provide evidence of two or more gang members working in concert with each other during each predicate offense?

INTRODUCTION

Assembly Bill No. 333 (AB 333) recently amended Penal Code section 186.22's provisions governing gang enhancements.[1] At issue here is the scope of those amendments.

One requirement for proving a gang enhancement under section 186.22 is establishing the existence of a criminal street gang. Subdivision (f) of the statute previously defined a "criminal street gang" in pertinent part as "any ongoing organization . . . whose members *individually or collectively* engage in, or have engaged in, a pattern of criminal gang activity." (Former § 186.22, subd. (f), italics added.) Among other changes to the gang enhancement statute, AB 333 removed the words "individually or" so that amended section 186.22, subdivision (f), now states that, in addition to other criteria, a criminal street gang is an organized group "whose members

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[1] Further undesignated statutory references are to the Penal Code. Undesignated references to subdivisions (e) and (f) are to Penal Code section 186.22.

collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f).)

The term "pattern of criminal gang activity" is separately defined in subdivision (e) of the statute. That section requires, among other things, that prior offenses committed by the gang's members—so called "predicate offenses" that are used to establish the pattern of gang activity—must have been "committed on separate occasions *or* by two or more members." (Italics added.)

AB 333 did not change subdivision (e)'s language describing the two ways of proving predicate offenses. Clark argues, however, that the removal of the words "individually or" from subdivision (f) means that the only way to now prove the required predicate offenses under subdivision (e) is to show that each was committed by two or more gang members. The argument is unpersuasive.

Clark's interpretation, reliant on a narrow definition of a single word, inadequately accounts for the language and grammatical structure of section 186.22 as a whole as well as the Legislature's intent in passing AB 333. The text of subdivision (e) is clear and unambiguous. Yet Clark's approach would result in the nullification of one of the two alternative ways of proving predicate offenses. Nothing about the Legislature's revision to subdivision (f) supports that highly disfavored result.

AB 333's essential focus was on narrowing and refining the gang enhancement statute to ensure that it targeted activity undertaken for a common gang purpose, rather than for an

individual purpose, and to prevent imposition of enhanced punishment based on mere "guilt by association." To that end, the Legislature added, among other things, a specific requirement that gang predicate offenses must have "commonly benefitted a criminal street gang." The deletion of the words "individually or" from subdivision (f) harmonizes with, and reinforces, the statute's sharpened focus on viewing a gang as an organized, collective endeavor and targeting criminal activity undertaken for the gang's common benefit, as opposed to activity undertaken for individual benefit. There is no conflict or tension between the two subdivisions that would require resolution in the way Clark urges, by reading language out of subdivision (e).

Clark's interpretation would lead to results that are manifestly inconsistent with the purpose and goals of the gang enhancement statute as amended by AB 333. Under his reading, even an obviously gang-related crime like the assassination of a rival gang leader would be disqualified as a predicate offense if committed by a lone gang member. There is nothing to suggest that the Legislature intended such a result. Rather, the plain language of subdivision (e) means what it says and is consistent with a natural reading of the statute as a whole and the legislative intent behind AB 333: a crime committed by a gang member acting alone may serve as a predicate offense so long as the other requirements of subdivision (e) are met, including that the crime commonly benefitted the gang.

LEGAL BACKGROUND

A. The STEP Act

To combat criminal activity by street gangs, the Legislature in 1988 enacted the California Street Terrorism Enforcement and Prevention Act. (STEP Act; § 186.20 et seq.) "Underlying the STEP Act was the Legislature's finding that 'California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.' (Pen. Code, § 186.21, 2d par.)" (*People v. Valencia* (2021) 11 Cal.5th 818, 828.)

"The act's express purpose was 'to seek the eradication of criminal activity by street gangs.'" (*People v. Gardeley* (1996) 14 Cal.4th 605, 609, quoting § 186.21.) In pursuit of this goal, the STEP Act focuses upon "patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs." (§ 186.21; *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1129.)

"The Act was specifically structured to protect both free association and public safety." (*Valencia, supra,* 11 Cal.5th at p. 828.) "Among other things, the STEP Act created 'a sentencing enhancement for a felony committed "for the benefit of, at the direction of, or in association with any criminal street gang" (§ 186.22, subd. (b)(1)).'" (*People v. Tran* (2022) 13 Cal.5th 1169, 1205-1206, quoting *Valencia,* at p. 829.) It "imposes increased criminal penalties only when the criminal conduct is felonious and committed not only 'for the benefit of, at the direction of, or in association with' a group that meets the specific statutory

conditions of a 'criminal street gang,' but also with the 'specific intent to promote, further, or assist in any criminal conduct by gang members.'" (*Gardeley*, *supra*, 14 Cal.4th at p. 624-625, citing former § 186.22, subd. (b)(1).)

Since its enactment, the STEP Act has been amended many times, "sometimes several times in a year." (*Gardeley*, *supra*, 14 Cal.4th at p. 615 fn. 7.) Amendments were generally driven by the Legislature's fear that without adequate intervention, the state would endure a surge of gang violence. (Ballot Pamp., Primary Elec. (Mar. 7, 2000) text of Prop. 21, § 2, subds. (b), p. 119 [noting that criminal street gangs continued to "pose a significant threat to public safety"], (d) & (k).)

B. Assembly Bill No. 333's amendments to the STEP Act

Proponents of the STEP Act "claimed the prosecution would be unable to prove an offense was committed for the benefit of, or in association with, a gang 'except in the most egregious cases where a pattern of criminal gang activity was clearly shown.' (Bill analysis of AB 1555, Senate Committee on Judiciary (June 1987).)" (2021 Stats., ch. 699, § 2, subd. (g).) But by 2021 the Legislature had become concerned about overbroad application of the gang enhancement statute and its disproportionate effect on "neighborhoods historically impacted by poverty, racial inequality, and mass incarceration." (Stats. 2021, ch. 699, § 2, subds. (a), (d)(1) & (2), (i).) This led to the passage of AB 333, which became effective on January 1, 2022. (See 2021 Stats., ch. 699, § 2, subd. (g) ["The STEP Act has been continuously expanded through legislative amendments and court rulings. As

a result of lax standards, STEP Act enhancements are ubiquitous"].) AB 333's changes to the gang-enhancement statute included narrowing the definition of a criminal street gang and more clearly defining what constitutes conduct that benefits the gang. (See *Tran*, *supra*, 13 Cal.5th at p. 1206; Stats. 2021, ch. 699, § 3.)

Prior to the passage of AB 333, section 186.22 defined a "'criminal street gang'" as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of [certain offenses enumerated in former subdivision (e) of the statute], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (Former § 186.22, subd. (f).) The term "'pattern of criminal gang activity'" was defined, in turn, as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of, two or more of [the offenses enumerated in former subdivision (e)], provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (Former § 186.22, subd. (e).) Subdivision (e) of the statute, referenced in relation to both the gang's "primary activities" and its "'pattern of criminal gang activity,'" listed more than 30 offenses ranging from unlawful

homicide to fraudulent use of an access card. (Former § 186.22, subd. (e).)

As amended by AB 333, a criminal street gang is now defined as "an ongoing, organized association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in subdivision (e), having a common name or common identifying sign or symbol, and whose members collectively engage in, or have engaged in, a pattern of criminal gang activity." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (f).) A "pattern of criminal gang activity" is now defined as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of, two or more of [the offenses enumerated in subdivision (e)(1)], provided at least one of these offenses occurred after the effective date of this chapter, and the last of those offenses occurred within three years of the prior offense and within three years of the date the current offense is alleged to have been committed, the offenses were committed on separate occasions or by two or more members, the offenses commonly benefited a criminal street gang, and the common benefit from the offenses is more than reputational." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (e)(1).)

The bill also added clarifying language stating: "Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous

witness or informant." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (g).) Additionally, AB 333 reduced the list from 33 to 26 qualifying offenses that can be used to establish a pattern of gang activity. (Stats. 2021, ch. 699, § 3; § 186.22, subds. (e)(1)(A)-(e)(1)(Z).)[2] And it specified that "[t]he currently charged offense shall not be used to establish the pattern of criminal gang activity." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (e)(2).)

STATEMENT OF THE CASE

A. Clark's trial and convictions

Clark and three other members of the Northside Parkland street gang, a subset of the Sex Cash Money (SCM) street gang, burglarized Jane Doe's home. (2CT 398-399, 435-437.) During the commission of the burglary, Clark raped Doe. (1RT 214, 218-219; 2RT 326.) Later that day, Clark and the other gang members sold items stolen from Doe's home for money and drugs. (3RT 708-709, 717; 4RT 837, 853, 908, 922; 7RT 1434-1435; 2CT 432-433.)

The Riverside County District Attorney charged Clark with first degree burglary while someone other than an accomplice was in the residence (§§ 459, 667.5, subd. (c)(21); count 1),

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[2] The following offenses were deleted from the list: looting; felony vandalism; felony theft of an access card or account information; counterfeiting, designing, using, or attempting to use an access card; felony fraudulent use of an access card or account information; unlawful use of personal identifying information to obtain credit, goods, services, or medical information; and wrongfully obtaining Department of Motor Vehicles documentation.

robbery in concert (§§ 211, 213, subd. (a)(1)(A); count 2), kidnapping (§ 207, subd. (a); count 3), rape (§ 261, subd. (a)(2); count 4), and forcible oral copulation (§ 287, subd. (c)(2)(A), count 5). The prosecution alleged that the burglary and robbery offenses were gang related (§ 186.22, subd. (b)(1)(C)), that the sex offenses were committed during the commission of a burglary (§ 667.61, subd. (e)(2)), and that Clark had a prior strike conviction (§ 667, subds. (c), (e)(1)). (2CT 359-363.)

At trial, in support of the gang allegation, the prosecution called a deputy sheriff who testified as a gang expert. (5RT 950.) As relevant to the issue on appeal, the deputy testified that the primary activities of SCM were burglaries, robberies, illegal weapons possession, narcotic sales, vehicle thefts, and assaults. (5RT 1009, 1017.)

Through the expert, the prosecution introduced certified copies of six different convictions involving SCM gang members to prove a pattern of criminal activity by the gang (5RT 1024; 2CT 466, 474-475):

(1) A certified conviction reflecting SCM member Damon Ridgeway's guilty plea to a robbery (§ 211) committed on October 13, 2014. (5RT 994, 1013, 1015-1016.)

(2) A second certified conviction reflecting Ridgeway's guilty plea on July 30, 2009, to residential burglary with a gang allegation (§§ 459, 186.22, subd. (b)), and active gang participation (§ 186.22, subd. (a)). (5RT 994, 1013-1016.)

(3) (4) & (5) Certified convictions involving coperpetrators of the instant offense, M.M, Demario Mosely, and Eric Parker, based on the

underlying facts of the current case reflecting their guilty pleas to first degree residential burglary with a gang allegation (§§ 459, 186.22, subd. (b)). (5RT 1017-1021.)

(6) A certified conviction reflecting Clark's guilty plea to an attempted residential burglary (§§ 459, 664) committed on April 7, 2014. (5RT 1023.)[3]

The expert explained that committing burglaries and robberies allows gang members to obtain items, like jewelry, clothing, and firearms, which they can sell for money. (5RT 1025-1026.) Committing these crimes also generally elevates a gang's status. (5RT 1031.)

After both sides rested, the jury was instructed with CALCRIM No. 1401, which set forth the elements to prove the gang enhancement applicable at the time of Clark's 2019 trial. (8RT 1544; 2CT 561-562.) That instruction provided that a criminal street gang is an organization whose members, "whether acting alone or together," engage in a pattern of criminal gang activity. (2CT 562.) The instruction also stated that a pattern of criminal gang activity requires evidence that the "crimes were committed on separate occasions, or were personally committed by two or more persons." (2CT 562.)

The jury convicted Clark as charged, except that it found him not guilty of kidnapping and instead found him guilty of the lesser offense of false imprisonment. (3CT 584-585, 588-589.) The jury found true the gang enhancement allegations as to the

[3] The certified conviction packets were not themselves included in the clerk's transcript on appeal in this case.

burglary and robbery offenses. (3CT 584-585, 588-589.) Clark admitted his prior strike conviction. (3CT 585.) The trial court imposed a 10-year term of imprisonment for the gang enhancement as part of Clark's sentence of 20 years plus 90 years to life in prison. (4CT 919-920.)

B. The Court of Appeal's decision

Clark appealed, and while his appeal was pending, AB 333 took effect. (See Stats. 2021, ch. 699, § 2.) In supplemental briefing, Clark argued that newly enacted AB 333 retroactively applied to his case, requiring that his gang enhancements be stricken and his case remanded for resentencing. As relevant here, he asserted that AB 333 now requires that the predicate offenses supporting the gang enhancement were each "collectively" committed, meaning that each predicate offense had to be committed by "multiple members of the gang." (Case No. E075532, Supp. AOB 1-3; Opn. 19.) The evidence at trial, according to Clark, did not support the pattern-of-gang-activity requirement under this narrowed definition. (Case No. E075532, Supp. AOB 3.) Specifically, he claimed that Damon Ridgeway's 2009 burglary conviction and 2014 robbery conviction, and his own 2014 attempted burglary conviction, no longer qualified because there was no evidence those crimes were committed with another SCM gang member. (Case No. E075532, Supp. AOB 3.)

In a unanimous published decision, the Court of Appeal affirmed. The court acknowledged that there was no dispute that the amendments to section 186.22 applied to Clark's nonfinal case. (Opn. 19, fn. 11.) But it rejected Clark's argument as to the

extent of the statutory changes. Analyzing the revised statutory language, the court reasoned that the plural word "members" indicates that "multiple members of the gang must be involved in the pattern of criminal gang activity." (Opn. 20.) Given that, the court held that the plain meaning of the phrase "the offenses were committed on separate occasions or by two or more members" means that there are now two options for establishing the requisite pattern of gang activity: "(1) prove two different gang members separately committed crimes on two occasions; or (2) prove two different gang members committed a crime together on a single occasion." (Opn. 20.) The court explained that it would be insufficient under the revised statute to show that one gang member committed two crimes on two different occasions. (Opn. 20.)

The court acknowledged that its holding conflicted with the Second District Court of Appeal's decision in *People v. Delgado* (2022) 74 Cal.App.5th 1067. In *Delgado*, the court held that the term "collectively" in the general definition of "criminal street gang" under section 186.22, subdivision (f), should be interpreted "in a commonsense manner" to mean that each of the predicate offenses used to prove a pattern of criminal gang activity under subdivision (e) must be "committed by more than one person." (*Delgado*, at pp. 1088-1089.) The *Delgado* court noted that legislative analysis of AB 333 described the amendment to the "criminal street gang" definition as requiring "that engagement in a pattern of criminal activity must be done by members collectively, not individually." (*Delgado*, at p. 1089.) It also

relied upon the uncodified legislative declarations in AB 333, which "make[] clear the Legislature's intent to dramatically limit the scope of the gang enhancement." (*Delgado*, at p. 1089.) The *Delgado* court concluded that an interpretation permitting the commission of predicate offenses on separate occasions by individual gang members "would do little to further this legislative purpose." (*Ibid*.)

The Court of Appeal below rejected the reasoning of *Delgado* on the ground that it failed to devote sufficient attention to the plain language of the statute and instead "turned to legislative history after merely defining the word 'collectively.'" (Opn. 21.) The court observed that *Delgado*'s interpretation would render part of the statutory text surplusage, since the prosecution would always be required to prove that predicate offenses were committed by "two or more members," and it could not alternatively prove, as the text indicates, that they were "committed on separate occasions." (Opn. 21-22.)

The Court of Appeal below also rejected reliance on *People v. Lopez* (2021) 73 Cal.App.5th 327, which held, prior to AB 333's effective date, that when the bill became operative it would "require the prosecution to prove collective, not merely individual, engagement in a pattern of criminal gang activity." (*Lopez*, at p. 345.) The Court of Appeal concluded that *Lopez* did not support Clark's interpretation, because it made that observation without any analysis of the statute. (Opn. 22.)

Finally, applying the revised statutory terms as it interpreted them, the Court of Appeal concluded that the

instructional error was harmless. (Opn. 23.) Because the prosecution presented evidence that on separate occasions Damon Ridgeway committed a robbery and Clark committed an attempted residential burglary, it concluded that the jury would have found beyond a reasonable doubt that members of SCM "collectively" engaged in a pattern of criminal activity. (Opn. 23.)

ARGUMENT

I. WHEN THE OTHER CRITERIA OF PENAL CODE SECTION 186.22, SUBDIVISION (E) ARE MET, A PREDICATE OFFENSE COMMITTED BY AN INDIVIDUAL GANG MEMBER FOR THE COMMON BENEFIT OF THE GANG MAY BE USED TO SHOW A "PATTERN OF CRIMINAL GANG ACTIVITY"

The parties agree that AB 333 applies to Clark's nonfinal case. (See *Tran*, *supra*, 13 Cal.5th at pp. 1206-1207; *In re Estrada* (1965) 63 Cal.2d 740.) At issue is a question of statutory interpretation: whether, under the amendments to section 186.22 made by AB 333, each predicate offense used to support a gang enhancement must have been committed by two or more gang members acting together.

In passing AB 333, the Legislature unquestionably intended to narrow the scope of the gang enhancement statute in several respects. But both the text of the revised statute and the legislative history demonstrate that it did not intend the specific change that Clark posits. Section 186.22, subdivision (e) unambiguously states that a predicate offense may be established by evidence of crimes committed by individual gang members on separate occasions, and nothing in subdivision (f) conflicts with that clear language. Rather, the change to subdivision (f) harmonizes with the statute's renewed focus on activity

undertaken for common gang purposes, rather than for individual purposes, viewing the gang as an organized, collective enterprise. As long as the other criteria of subdivision (e) are met, evidence of a predicate offense committed by a lone gang member for the common benefit of a gang may be considered as part of the required pattern of criminal gang activity.

A. Principles of statutory construction

"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 doing so, 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.) Because statutory language generally provides the most reliable indicator of that intent (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871), reviewing courts first turn to the words themselves, giving them their "usual and ordinary meanings" and construing them in context (*People v. Loeun* (1997) 17 Cal.4th 1, 9). "[C]ourts should 'strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous.'" (*In re C.H.* (2011) 53 Cal.4th 94, 103, citations omitted.) Rules of statutory construction also require that "statutes 'must be read as a whole.'" (*United States v. Atlantic Research Corp.* (2007) 551 U.S. 128, 135 [applying that maxim, the United States Supreme Court considered two subdivisions of

the same statute together, noting that "the language of subparagraph (B) can be understood only with reference to subparagraph (A)," and "[t]he provisions are adjacent and have remarkably similar structures"].) "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." (*Cochran*, at pp. 400-401; *Loeun*, at p. 9.)

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 language and structure of section 186.22 show that a predicate offense committed by an individual gang member may be used to establish a "pattern of criminal activity"

After passage of AB 333, just as before, section 186.22, subdivision (e), allows the prosecution to prove the predicate offenses supporting a "pattern of criminal gang activity" in two ways: with evidence of gang crimes "committed on separate occasions *or* by two or more members." (§ 186.22, subd. (e), italics added.) Clark nonetheless contends that the amendment to subdivision (f), removing the words "individually or" from that section's more general definition of a criminal street gang, operates to mean that gang predicates under subdivision (e) must

have been committed by two or more gang members together. (OBM 9-16.)

Clark's interpretation would mean that the phrase "on separate occasions or" in subdivision (e) is inoperative and meaningless. "This would violate the rule that '[c]ourts 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.) The far more natural reading of AB 333's amendments is that the removal of the words "individually or" from subdivision (f) was meant to harmonize with, and underscore, the statute's renewed focus on viewing a gang as an organized, collective enterprise, and punishing conduct undertaken for the common benefit of a gang, rather than conduct undertaken for individual purposes. Consistent with that focus, and with the unambiguous language of subdivision (e), a crime committed by a lone gang member for the common benefit of the gang may qualify as a predicate offense under the gang statute.

1. With AB 333, the Legislature made no change to the clear and unambiguous language of subdivision (e)

This Court has previously held that the language of section 186.22, subdivision (e), is clear and unambiguous in providing two alternative paths to proving gang predicates: either the predicates must have been committed on separate occasions or they must have been committed by two or more gang members. In enacting AB 333, the Legislature left that clear language

unaltered, which strongly supports an inference that the Legislature understood that it was not changing its meaning.[4]

In *Loeun*, *supra*, 17 Cal.4th 1, this Court considered whether the requisite two predicate offenses supporting a "pattern of criminal gang activity" could be established by evidence of the charged offense and proof of another offense committed on the same occasion by a fellow gang member. (*Id.* at p. 5.) The defendant in *Loeun* and a fellow gang member attacked a gas station clerk, believing he was a member of a rival gang. The defendant hit the clerk with a baseball bat and then another member struck the clerk with a tire iron. The defendant and his companion admitted they were members of a Crip gang sect called Cambodians With Attitude (CWA). (*Id.* at pp. 6-7.) At trial, the defendant was convicted of assault with a deadly weapon (§ 245, subd. (a)(1)), and the jury found true a gang allegation (§ 186.22, subd. (b)). (*Loeun*, at p. 7.)

Under the version of the statute applicable at the time, the term "pattern of criminal gang activity" was defined as "'the commission, attempted commission, or solicitation of two or more of [the statutorily enumerated "predicate offenses"], provided at least one of those offenses occurred after the effective date of this chapter [September 26, 1988] and the last of those offenses

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[4] AB 333 did change the word "persons" to "members" in this statutory language. As explained below, the change clarified the statute consistent with intervening decisional authority. The Legislature did not, however, alter the two methods of proving a gang predicate offense.

occurred within three years after a prior offense, and the offenses are committed on separate occasions, or by two or more persons.'" (*Loeun*, *supra*, 17 Cal.4th at p. 8, quoting former section 186.22, subd. (e).) The predicate acts underlying the gang enhancement included the charged assault and also the assault committed during the same incident by defendant's fellow CWA member. (*Id.* at p. 8.) This Court held that the "pattern of criminal gang activity" could be established by evidence of the charged offense and the offense committed contemporaneously by the defendant's fellow gang member. (*Id.* at pp. 9-10.)

In reaching its holding, this Court noted that the language of subdivision (e) is "clear and unambiguous": the "Legislature's use of the disjunctive 'or' in the language . . . indicates an intent to designate alternative ways of satisfying the statutory requirements. [Citations.] This language allows the prosecution the choice of proving the requisite 'pattern of criminal gang activity' by evidence of 'two or more' predicate offenses committed 'on separate occasions' *or* by evidence of such offenses committed 'by two or more persons' on the same occasion." (*Loeun*, *supra*, 17 Cal.4th at pp. 9-10, italics in original.)

When the Legislature passed AB 333, it was aware of the definition of "pattern of criminal activity" as interpreted by this Court in *Loeun*. (*In re Greg F.* (2012) 55 Cal.4th 393, 407 [it is presumed that the Legislature knows about and acts against the backdrop of existing case law]; *People v. Lawrence* (2000) 24 Cal.4th 219, 231 [Generally, "[w]here the language of a statute uses terms that have been judicially construed, the presumption

is almost irresistible that the terms have been used in the precise and technical sense which had been placed upon them by the courts], internal quotation marks omitted; *People v. Overstreet* (1986) 42 Cal.3d 891, 897 [Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted acted in light of such decisions].)[5] Had the Legislature intended to require proof that each predicate offense was committed by two or more gang members, it would have drafted AB 333 to excise the relevant language from subdivision (e), along with the substantial other changes made to that subdivision. It did not.

Instead, the Legislature expressed its partial disagreement with *Loeun* by leaving the disjunctive language of subdivision (e) intact, yet tightening the requirements necessary to show a "pattern of criminal gang activity" in other ways. For example, in adding subdivision (e)(2), which states "[t]he currently charged offense shall not be used to establish the pattern of criminal gang activity," AB 333 directly addressed this Court's holdings in *Loeun* and *Gardeley* allowing the opposite. (See *Loeun*, *supra*, 17 Cal.4th at pp. 9-10 [proof of predicate offense satisfied by evidence of (1) the charged crime of assault with a deadly weapon, and (2) a separate assault with a deadly weapon on the

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[5] The legislative history confirms that the Legislature was aware of *Loeun's* holding and how it applied to subdivision (e). (See Assem. Com. on Pub. Saf., Analysis of AB 333 (2021–2022 Reg. Sess.) as amended March 30, 2021, p. 4 [citing *Loeun*'s definition of "pattern of criminal gang activity"].)

same victim committed contemporaneously with the charged offense by the defendant's fellow gang member]; *Gardeley*, *supra*, 14 Cal.4th at p. 625 [predicate offenses could include the defendant's commission of (1) the charged offense of aggravated assault, and (2) an earlier incident in which a fellow gang member had shot at an occupied dwelling].)

Further, in *Valencia*, *supra*, 11 Cal.5th 818, this Court noted that the then-current version of subdivision (e) "did not state that a predicate offense must be committed by a gang member," but concluded that "[t]aken together the statutory scheme requires proof that gang members committed at least two predicate offenses within the statutory timeframe." (*Id.* at p. 830.) AB 333 modified subdivision (e) so that, consistent with the interpretation advanced in *Valencia*, it now expressly requires that the predicate offenses be committed by "members" of the gang, rather than "persons." (§ 186.22, subd. (e)(1).)

That AB 333 amended subdivision (e) in these other ways provides further evidence that the Legislature was aware of existing law interpreting section 186.22, and in leaving the "on separate occasions or by two or more members" language intact, the Legislature intended no change to *Loeun's* interpretation of those words. (*Greg F.*, *supra*, 55 Cal.4th at p. 412 ["'The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended'"].)

2. The natural reading of subdivision (f), together with subdivision (e), is that a predicate offense, whether committed by a single gang member or multiple gang members, must have commonly benefitted the gang as part of its collective activity

Not only is Clark's reading of subdivision (e) counter to the unambiguous text of that subdivision, it is also at odds with a natural reading of subdivision (f), which can readily be harmonized with subdivision (e) and the statute as a whole. There is no "dissonance" between the two subdivisions that needs to be resolved in favor of one or the other. (See OBM 13-14.)

One of the changes made by AB 333 to subdivision (e) was to add the requirement that gang predicates "commonly benefitted a criminal street gang, and the common benefit from the offenses is more than reputational." The term "collectively engage" in subdivision (f) is most naturally read as supporting and reinforcing the new requirement that gang predicates be committed for the common benefit of the gang, rather than for individual benefit, as well as the related, broader focus on viewing a criminal street gang as an organized, collective entity. Under that natural reading, a predicate offense committed by an individual gang member for the gang's common benefit may be used to show a pattern of criminal gang activity. Clark urges that use of the plural "members" and the word "collectively" in subdivision (f) mean that, when applying subdivision (e), members "acting together must engage in a pattern of criminal activity." (OBM 14-16.) But that argument "overlooks the language and grammatical structure of the statute." (See *Rodriguez*, *supra*, 55 Cal.4th at p. 1132; see also *ibid.*

[interpreting verb, direct object, and prepositional phrase together as a whole in context section 186.22, subd. (a)].)

Establishing the existence of a criminal street gang under subdivision (f) means the prosecution must show that its "members collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f).) The verb "engage" has several meanings. As used here, "engage" is an intransitive verb meaning "to do or take part in something." (<https://www.merriam-webster.com/dictionary/engage>, accessed April 13, 2023.) When used in this sense, the verb "engage" must be understood in conjunction with the preposition "in." (*Ibid.*) Consequently, the verb engage should not be viewed in isolation but must be construed together with the prepositional phrase that modifies it as an adverb. As the subdivision is constructed, the prepositional phrase "in a pattern of criminal gang activity" contextualizes the action of the intransitive verb "engage." "Collectively," in turn, modifies the whole clause "engage in a pattern of criminal gang activity." This signals that the predicate crimes used to show such a pattern must have been undertaken for a common, rather than just an individual, benefit as part of the gang's overall collective activity. But it does not otherwise affect the clear subsidiary language of subdivision (e) that permits proof of a gang predicate by showing either that the crimes were committed on separate occasions or by two or more gang members. Clark erroneously attempts to divorce "collectively" from the rest of the clause; yet, without the

prepositional phrase "in a pattern of criminal gang activity," the words "collectively engage" have no independent meaning.

To form a pattern as defined by subdivision (e), the convictions underlying the predicate offenses must be enumerated offenses, they must have been committed within the requisite time period, and they must have commonly benefited the gang. (§ 186.22, subd. (e).) Subdivision (f)'s more general description of a criminal street gang as having members who "collectively engage in, or have engaged in, a pattern of criminal gang activity" must be understood in light of and together with the more specific definition of a pattern of gang activity. So viewed, "collectively" is best understood as referring to the actions of gang members, undertaken as lone actors or in concert, considered as a whole to determine whether a pattern of criminal gang activity that commonly benefits the gang is shown.

Webster's Dictionary defines "collectively" as "by collective acts" and "in the aggregate." (Webster's Third New Internat. Dict. (2002) p. 445.) Relatedly, it defines "collective behavior" as "the unified action of an assembly of persons whether organized or not." (*Ibid.*) The Oxford English Dictionary (OED) likewise defines the word "collectively" as "[i]n a collective manner or capacity; in a body, in the aggregate, as a whole." (OED, 2nd Edition, Vol. III (1989) p. 479.) Alternately, the OED defines collectively as "[i]n a collective sense; as a collective." (*Ibid.*) In turn, the second definition of "collective" given in the OED is "[o]f, pertaining to or derived from, a number of individuals taken or acting together." (*Id.* at p. 478.) The first definition of

"collective" found in Merriam-Webster's Collegiate Dictionary is "denoting a number of persons or things *considered* as one group or whole," and "formed by collecting." (11th Ed. (2020) p. 243, italics added.)

As these definitions illustrate, to view something "collectively" does not require that the individual parts within the collection act simultaneously or in concert. The different shades of meaning depend on the context in which the word is used. For example, pollsters gather opinions from unrelated individuals and later analyze that data collectively to determine public opinion. Shells picked up from a beach over numerous vacations can be viewed collectively when back home. (See also *Corbello v. DeVito* (9th Cir. 2015) 777 F.3d 1058, 1070 (conc. opn. of Sack, J.) ["[T]he events or circumstances of a person's life, *viewed collectively* are, by definition, distinct from the events or circumstances themselves. A collective viewing may entail characterizing events to form a trajectory or story arc, rather than a mere collection of individual events"], italics in original.)

That understanding of the word "collectively" as used in subdivision (f) is not only apparent from the grammar and structure of the statute but is also strongly supported by its subject matter, given the reality of how street gangs actually operate. A criminal street gang "engages through its members" in a pattern of criminal gang activity. (*Gardeley*, *supra*, 14 Cal.4th at p. 610.) In *People v. Johnson* (2013) 57 Cal.4th 250, this Court explained that "a criminal street gang . . . involves a network of participants with different roles and varying kinds of

involvement." (*Id.* at p. 266.) *Johnson* illustrates the various roles gang members frequently play within a street gang.

That case involved three codefendants who were part of a 200-member gang called Country Boy Crips (CBC). (*Johnson*, *supra*, 57 Cal.4th at p. 256.) They were convicted of murder with gang-murder special circumstances, attempted murder, active gang participation, conspiracy, and gang enhancements. (*Id.* at pp. 256-257.) This Court's opinion outlined the gang's structure and the different roles individual members filled: "Some sold drugs. Some patrolled the boundaries of the gang's territory to keep out enemies and outsiders. Some would 'hang out,' and some were 'pretty boys' who brought women into the gang. Others would 'ride with the guns' to seek out and kill enemies." (*Id*. at p. 256.) The three defendants themselves performed various functions within the gang: "Defendant Johnson sold drugs and was also a shooter for the gang with the moniker 'Little Rifleman.' Defendant Dixon was considered a gang leader because he had been to prison and had family ties to the gang. Defendant Lee would sell drugs, obtain cars, and drive for and 'ride' with other gang members." (*Ibid.*) This Court observed that "[d]ue to the organized nature of gangs, active gang participants may benefit from crimes committed by other gang members." (*Id.* at p. 262.) As *Johnson* illustrates, the term "collectively" in subdivision (f) is most naturally read to comport with the common structure of gangs and account for individual members' various roles in committing crimes for the common benefit of the gang, viewed as a collective enterprise.

The most obvious examples of collective engagement include, like in *Johnson*, evidence of a common plan. For example, an individual gang member may be tasked with collecting "taxes" from local businesses or drug dealers. (See, e.g., *People v. Sanchez* (2016) 63 Cal.4th 665, 672 [describing expert testimony that "Nonmembers who sell drugs in the gang's territory and who do not pay a 'tax' to the gang risk death or injury"].) The violent extraction of those taxes, even by a gang member acting alone, would satisfy the predicate offense requirement. Similarly, gang members may be given a "green light" to attack a rival. (See, e.g., *People v. Gomez* (2018) 6 Cal.5th 243, 263 [describing expert testimony that "individuals can be placed 'on a green light list' and that 'gang members have a green light or the authorization to assault and murder whoever is on that list'"; gang discipline may also involve ordering a member on the "green light list" to kill someone else in order to be removed from the list].) When an individual member carries out that edict, this too would satisfy the predicate offense requirement. Likewise, a gang member who sells drugs commonly benefits the gang if he was directed to sell the drugs in gang territory and proceeds were used to benefit the gang. (See *People v. Ferraez* (2003) 112 Cal.App.4th 925, 931 [defendant, acting alone, had specific intent to benefit his gang].)

Indeed, identifying collective engagement sufficient to establish a pattern of criminal gang activity entails looking for relationships to establish a pattern, but subdivision (e) does not require evidence of a common *plan*. (§ 186.22, subd. (e).) Evidence of a common plan or agreement between gang members

to commit a felony supports a conviction under sections 182 or 182.5 for conspiracy. (*Johnson*, *supra*, 57 Cal.4th at p. 257 [a conviction for conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense].) Such evidence, however, is not necessary to prove the gang enhancement.

For example, in a hypothetical gang, gang member A sells drugs to make money for the gang, gang member B murders a competing drug salesman who is not part of the gang and incidentally increases A's sales, and gang member C takes possession of the firearm after the murder. Each of these crimes, while committed individually, were related to one another because each was committed for the common benefit of the gang. If gang member A's drug sales increase, the entire gang benefits from the increased profits. If gang member B is not identified as the murderer, he may continue to do work for the gang by committing other crimes.

The gang benefits from these crimes regardless of whether gang member A knew about or conspired in the murder of the competing drug salesman. Gang member C acted for the common good of his gang even if he took possession of the gun with no knowledge it was used in a murder. If gang member C is later arrested for illegally possessing the gun, his crime is no less gang related even though he was alone when arrested and the police failed to identify the gun as the murder weapon. As these examples show, predicate offenses committed by gang members for the common benefit of a gang, but without a common plan or

the direct participation of more than one member, may be looked at collectively to determine whether a pattern of criminal gang activity is shown if the additional criteria of subdivision (e) are met. It is that analysis that the word "collectively" in subdivision (f) reflects.

3. The deletion of "individually or" from subdivision (f) is consistent with the statute's focus on offenses intended to provide a common benefit to a gang, viewed as an organized, collective entity

That the Legislature removed the term "individually or" from subdivision (f) does not change the analysis. The alteration is consistent with and reinforces the concept otherwise reflected in the revised statutory text that gang predicates must commonly benefit the gang, viewed as a collective endeavor, and that offenses committed for individual benefit will not qualify. The change does not signal, as Clark contends, that a crime committed by a lone actor for the gang's common benefit cannot qualify as a predicate offense under the statute.

The amendment of subdivision (f) would be an oblique and unlikely way for the Legislature to have accomplished a partial nullification of subdivision (e). Had the Legislature intended such a change, it is much more likely that it would have simply excised the relevant language in subdivision (e), and worded subdivision (f) differently. With section 186.22, subdivision (a), for example, "the Legislature sought to punish gang members who acted *in concert* with other gang members in committing a felony regardless of whether such felony was gang-related." (*Rodriguez*, *supra*, 55 Cal.4th at p. 1138.) To that end, the

language of subdivision (a) expressly requires evidence of "felonious criminal conduct by members of that gang." (§ 186.22, subd. (a); *Rodriguez*, at pp. 1131-1132.) By using a plural construction, the ordinary meaning of which is clear, the gang offense in subdivision (a) requires felonious criminal conduct committed by at least two "[gang] members," including any defendant who is a member of "that gang." (*Rodriguez*, at p. 1139.)

Subdivision (f) is not similarly constructed. The Legislature drafted subdivision (f) to define a criminal street gang as an organized group of three or more people whose "members collectively engage in a pattern of criminal gang activity." (§ 186.22, subd. (f).) Subdivision (f)'s focus is on the overall attributes of a criminal street gang. Had the Legislature intended the more specific definition of a pattern of gang activity to require evidence of crimes committed *in concert*, it likely would have added language to subdivision (e) requiring evidence that gang members engage in a pattern of criminal gang activity *in concert*. (Cf. Assem. Com. on Pub. Saf., Analysis of AB 333 (2021-2022 Reg. Sess.) April 6, 2021, p. 7 [noting that all 50 states have anti-gang measures but require more evidence for gang enhancements to apply; for example, "[i]n Arkansas, a person commits the offense of engaging in a criminal gang when they commit two or more predicate offenses 'in concert' with two or more other persons"].)

Instead, the removal of "individually or" from subdivision (f), along with the wording of subdivision (e), is consonant with the

statute's refinements aimed at more carefully defining a criminal street gang in terms of its collective activity and limiting its scope to target offenses committed for the common benefit of a gang, rather than for individual benefit. Cases addressing the gang-purpose requirement applicable to the current offense under section 186.22 are instructive as to the similar gang-purpose requirement applicable to predicate offenses.[6]

This Court's recent decision in *People v. Renteria* (2022) 13 Cal.5th 951, highlights some of the concerns AB 333 was geared to address. (*Renteria*, at p. 957 [noting that "gang members can, of course, commit crimes for their own purposes"].) Prior to AB 333, the People's theory in many cases, including lone actor cases, was that the defendant intended for his gang's reputation to benefit from his crime. (*Renteria*, at p. 966.) Under such a theory, any violent crime committed by a gang member would be subject to a gang enhancement "purely" because of the defendant's gang membership. (*Id.* at pp. 966-967.)

The facts of *Renteria* exemplified this problem. The defendant—a Sureño gang member—fired a gun at one house and then at the neighboring house after hearing a dog bark. (*Renteria*, *supra*, 13 Cal.5th at p. 957.) During a police interview, the defendant admitted being a Sureño gang member and said

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[6] A section 186.22 gang enhancement is applicable to a "person who is convicted of a felony committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members." This provision remains the same in all material respects as it was before the passage of AB 333.

that earlier in the day of the shooting he had been "hit up" by Northerners, a rival gang, which he understood as a gang challenge. (*Id.* at p. 958.) The residents of the house defendant shot at claimed not to be gang members, but the expert testified that someone at the house was "associated with" a Northerner gang member. (*Id.* at pp. 958-959.) A neighbor testified that the defendant had been drinking in a field earlier that night with a few other people and called out "Sur-trece," a gang slur. (*Ibid.*) At trial, a gang expert testified that a "person who was previously threatened by Northerners and who shot at the houses while yelling 'Sur trece' would be showing that he was retaliating" against the rival gang and thus elevate his personal status within his gang, and also his gang's reputation. (*Ibid.*) A jury convicted Renteria of two counts of shooting at an inhabited dwelling (§ 246) and found true gang enhancements alleged as to each count. (*Ibid.*)

This Court reversed the enhancements, holding that insufficient evidence supported them for three reasons: (1) no substantial evidence showed that the defendant intended his actions to be attributed to his gang; (2) no evidence showed that the defendant intended the shooting to contribute to the Sureño's rivalry with Northerners; and (3) the prosecution presented no evidence regarding the defendant's degree of involvement with the gang, or otherwise suggesting that he was familiar with the gang's activities, to demonstrate that his actions that night facilitated other criminal conduct by the gang. (*Renteria*, *supra*, 13 Cal.5th at pp. 970-973.) The evidence failed to support an

inference that the defendant acted for the gang's benefit, as opposed to for his own, personal reasons. (*Id.* at p. 973.)

This Court observed that in a lone actor case, "the prosecution cannot rely on the joint nature of the offense to establish either the requisite benefit to the gang or the specific intent to promote the criminal activity of gang members." (*Renteria*, *supra*, 13 Cal.5th at p. 964; cf. *People v. Albillar* (2010) 51 Cal.4th 47, 60-63 [when multiple gang members are involved, the joint involvement itself often provides sufficient evidence of association and benefit to the gang, and also evidence of an intent to promote activities of other gang members].) Rather, in such cases, to provide the requisite nexus between the lone actor and the gang's activity, it must be shown that the defendant was aware of the gang's activities and intended to promote criminal activity by other gang members. (*Renteria*, at p. 966.) Such evidence helps to "avoid punishing mere gang membership, as opposed to gang-related conduct." (*Id.* at p. 968.)

The *Renteria* Court looked to *People v. Rivera* (2019) 7 Cal.5th 306, as an example of a lone-actor case where sufficient evidence established that the defendant specifically intended the murder of a police officer to benefit and promote his gang. (*Renteria*, *supra*, 13 Cal.5th at p. 969.) The evidence in *Rivera* showed that "Rivera was an active gang member, that he participated in and pleaded guilty to offenses related to the gang's drug trade, that the officer killed had been leading an investigation of the gang's drug trade, and that the officer had questioned Rivera and searched his home regarding the

investigation." (*Ibid.*) This Court observed that the facts in *Rivera* "not only connected Rivera's actions to the criminal activities of his gang and its members but also suggested 'substantial participation' in those activities that would support an inference of knowledge and intent to facilitate them through the killing of the investigating officer." *(Ibid.*)

As *Renteria* demonstrates, a lone actor may commit an offense for the benefit of a street gang, though relatively more scrutiny may be required in making the gang-purpose determination in such cases. (See also *Rodriguez*, *supra*, 55 Cal.4th at p. 1138 ["A lone gang member who commits a felony . . . would not be protected from having that felony enhanced by section 186.22(b)(1) . . ."].) And this is still true even though AB 333 has "placed clear limits" on gang prosecutions by requiring that the common benefit to a gang be more than "purely reputational." (*Renteria*, *supra*, 13 Cal.5th at p. 966.) It would be odd, to say the least, for the Legislature to have contemplated that lone-actor crimes could support a gang enhancement under the more particular standard applicable to current offenses but that lone-actor crimes could not qualify as gang predicates even when they "commonly benefited a criminal street gang, and the common benefit from the offense [was] more than reputational." (§ 186.22, subd. (e)(1).)

The removal of the language "individually or" from subdivision (f) is best read in this light as emphasizing the principle that the gang enhancement statute is not meant to punish "mere gang membership, as opposed to gang-related

conduct." (*Renteria*, *supra*, 13 Cal.5th at p. 968.) The change removes any possible ambiguity about the requirement that a predicate offense must have commonly benefitted the gang, viewed as a collective enterprise, and ensures that factual scenarios like the one presented in *Renteria* will not lead to gang enhancements or be used as predicate offenses. Such a reading is far more natural and less strained than Clark's, under which the amendment to subdivision (f) was tacitly meant to nullify a portion of subdivision (e)(1).[7]

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[7] The Court of Appeal below reached the further conclusion that the amendment to subdivision (f) did signify that the two predicate offenses required under section 186.22, subdivision (e)(2) could not both be committed by the same lone actor: "It would not suffice to prove, for instance, that one gang member committed two crimes on two different occasions. Because it must be demonstrated that 'members' (plural) of the gang are collectively involved in criminal activity—one individual gang member on a crime spree would be insufficient to prove a collective pattern of criminal activity." (Opn. 20.) But subdivision (f) of the statute defines a criminal street gang generally as an "organized association or group of three or more persons" with other specified attributes. And even before the passage of AB 333, the statute used the plural word "members" in stating the requirement of individual or collective engagement in a pattern of criminal activity. It is not clear that so much can be read into the use of a plural form in subdivision (f) as to support the implied restriction that the Court of Appeal discerned in the face of subdivision (e)'s otherwise straightforward language. But in any event, because the facts of this case do not implicate that further question, it need not be decided here.

C. Other indicia of the Legislature's intent support the interpretation that a predicate offense need not be committed by two or more gang members acting together

Although the plain language and structure of section 186.22 adequately answer the interpretive question in this case, other indicia of the Legislature's intent further support the conclusion that before and after passage of AB 333, evidence of a predicate offense committed by an individual gang member for the common benefit of the gang may be used to establish a pattern of criminal gang activity. (See *Gutierrez*, *supra*, 58 Cal.4th at p. 1369 [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"].)

The gang statute represents the Legislature's effort "to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs." (§ 186.21.) The focus on patterns and the organized nature of the group is intended to ensure that a defendant "does not risk conviction for mere nominal or passive involvement with a gang . . . . Rather, it applies when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang." (*Albillar*, *supra*, 51 Cal.4th at pp. 67-68; *People v. Castenada* (2000) 23 Cal.4th 743, 752 ["[b]y linking criminal liability to a defendant's criminal conduct in furtherance of a street gang, section 186.22(a) reaches only those street gang participants whose gang involvement is, by definition, 'more than nominal or passive'"].)

The legislative history of AB 333 reveals an aim to strengthen the gang statute's focus on collective activity in order to avoid overbroad application of the statute based on individually motivated criminal behavior and mere association with gang members. Indeed, the first change to the gang statute listed in AB 333's uncodified prefatory summary is the requirement that gang predicates be committed for a common benefit that is more than merely reputational. (Stats. 2021, ch. 699, preface.) The uncodified legislative findings attached to the bill, moreover, make clear the Legislature's concern that the gang statute had been applied disproportionately against people of color simply based on the communities in which they live. (Stats. 2021, ch. 699, § 2, subd. (d).) They note that social networks "are often mischaracterized as gangs," and that "[p]eople are frequently automatically lumped into a gang social network simply because of their family members or their neighborhood." (*Ibid.*)

Legislative committee reports relating to AB 333 reflect the same focus on preventing "guilt by association." (Sen. Com. on Pub. Saf., Analysis of AB 333 (2021-2022 Reg. Sess.) July 6, 2021, p. 4.) The Senate Committee on Public Safety observed, for example, that "[i]n recent years, courts of appeal have reversed gang enhancements for insufficient evidence where a gang member was acting alone, the defendant's fellow gang members were unaware of the crime, and where no gang signs were displayed and no gang attire was worn during the crime." (*Id.* at p. 7, citing *People v. Soriano* (2021) 65 Cal.App.5th 278, 286.)

Other reports similarly criticized the gang statute for "criminalizing culture and relationships among people in low-income Black and Latino communities." (Assem. Floor Analysis of AB 333 (2021-2022 Reg. Sess.) as amended March 30, 2021, p. 2; Assem. Floor Analysis of AB 333 (2021-2022 Reg. Sess.) as amended May 28, 2021, p. 2.) One report noted that while the then-existing version of the gang statute required the current offense to be committed for the benefit of the gang, it contained no similar provision for predicate offenses. (Assem. Com. on Pub. Saf., Analysis of AB 333 (2021-2022 Reg. Sess.) April 6, 2021, pp. 5-6.) And another stated that AB 333 would "limit[] the possibility of a charged person being convicted based on mere rumor, speculation, and conjecture." (Assem. Floor Analysis of AB 333 (2021-2022 Reg. Sess.) as amended March 30, 2021, p. 2.)

When the Legislature passed AB 333, it did not alter section 186.21, which outlines the continuing dangers presented by gang violence in California. Nor did it choose to repeal the gang statute altogether. Instead, it made the standards for applying a gang enhancement more "rigorous." (Sen. Com. on Pub. Saf., Analysis of AB 333 (2021-2022 Reg. Sess.) July 6, 2021, p. 6; see also Concurrence in Sen. Amends. to Assem. Bill No. 333, Off. of Assem. Floor Analysis (2021-2022 Reg. Sess) as amended July 13, 2021, p. 2.) [noting the "vague definitions and weak standards of proof" that characterize gang enhancements].) As the legislative findings and committee reports show, the intent behind AB 333 was to narrow and refine the statute to more specifically target activity undertaken for the common benefit of a criminal street

gang and to ensure that criminal activity undertaken for individual purposes would not be swept within the gang statute by mere association. That focus supports the interpretation that removal of the term "individually or" from section 186.22, subdivision (f), eliminates any ambiguity and reinforces the requirement that gang predicates be committed for the common benefit of a gang, viewing the gang as a collective endeavor.

Conversely, a requirement that each predicate offense must be committed in concert with another gang member would do little to advance the Legislature's goal of targeting patterns of organized gang activity and avoiding guilt by association. For example, under Clark's interpretation of subdivision (f), evidence that two gang members were convicted of murdering a witness set to testify in a fellow gang member's trial would qualify as a predicate offense. By contrast, evidence that a single gang member committed that murder would not qualify as a predicate offense. Yet, nothing in the legislative history suggests that the Legislature would consider the assassination to be any less of a gang crime if one gang member acting alone murdered the witness to prevent his or her testimony. (See § 186.22, subd. (g) [noting examples of common benefit to gang include silencing a witness].) Rather, in either event, the offense satisfies the Legislature's goal of ensuring that the gang statute is focused on collective gang activity, rather than individual activity.

Similarly, a gang member's conviction for possessing a firearm may support a pattern of criminal activity if it is a "gang gun" and not held for personal protection. This remains the case

whether or not another gang member was present during the arrest for illegal gun possession. If a gang's primary activities include selling drugs, any gang member's convictions for selling drugs in the gang's territory may evidence a pattern of criminal activity. Gang member A selling drugs alone on a street corner works for the collective benefit of his gang as much as gang members B and C who sell drugs together on the next block.

On the other hand, two gang members acting together to take a car joyriding for their own personal reasons would not satisfy the requirements for a gang predicate offense, since the crime would not have been committed for the common benefit of the gang. (See *Albillar*, *supra*, 51 Cal.4th at p. 62 ["'it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang'"].) All of these examples advance the Legislature's purpose to focus the gang statute on activity undertaken for a gang purpose and to prevent "guilt by association." The key consideration, consistent with the Legislature's intent in enacting AB 333, is not the number of offenders but the collective purpose or effect of the offense.

Other choices made by the Legislature in enacting AB 333 reinforce that view. In revising subdivision (e), the Legislature removed from the list of qualifying predicate offenses a number of crimes that it viewed as peripheral to the core, violent gang activity it sought to combat. (See 2021 Stats., ch. 699, preface ["The bill would remove looting, felony vandalism, and specified personal identity fraud violations from the crimes that define a

pattern of criminal gang activity"]; Assem. Com. on Pub. Saf., Analysis of AB 333 (2021-2022 Reg. Sess.) as amended March 30, 2021, pp. 5-7, 10-12 [describing goal of focusing statute on violent gang activity].) In doing so, however, the Legislature left in place several firearm possession crimes that are typically, if not exclusively, committed by individuals. (See § 186.22, subds. (e)(1)(U) [possession of firearm capable of being concealed], (e)(1)(X) [prohibited possession of a firearm], (e)(1)(Y) [carrying a concealed firearm], (e)(1)(Z) [carrying a loaded firearm].) This is an additional strong indication that the Legislature did not contemplate excluding as a predicate offense under section 186.22, subdivision (e), a crime committed by a lone actor for the collective benefit of a gang.

Finally, it is true that one committee report on AB 333 noted that the bill, among other things, would require that gang predicates "were committed by two or more members." (Sen. Floor Analysis of AB 333 (2021-2022 Reg. Sess.) as amended July 13, 2021, p. 4.) In context, the statement is ambiguous. The same paragraph lists other textual changes that are in fact reflected in subdivision (e) itself. It states that the bill revised the definition of a "pattern of criminal gang activity" to additionally require "that the last of those offenses have occurred within three years of the prior offense and within three years of the current offense, the offenses were committed by two or more members, the offenses commonly benefited a criminal street gang, and the common benefit from the offenses is more than reputational." (*Ibid.*) No corresponding textual change was

made to the "on separate occasions or by two or more members" language, nor does the analysis suggest that its interpretation derives from the amendment to subdivision (f). No other analysis of AB 333 contains any similar indication, even though the relevant language in the bill did not change at any point. Nor does the prefatory summary of the bill as finally enacted contain that description. (Stats. 2021, ch. 699, preface.)

In light of the textual analysis above and the remaining indicia of legislative intent, this lone reference is far from probative. Where the text of a statute "contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." (*West Virginia University Hospitals, Inc. v. Casey* (1991) 499 U.S. 83, 98-99.) The statutory language, in particular, is of primary import because committee reports are not crafted with the same "care and scrutiny." (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1117-1118 ["We examine the language first, as it is the language of the statute itself that has successfully braved the legislative gauntlet. It is that statutory language which has been lobbied for, lobbied against, studied, proposed, drafted, restudied, redrafted, voted on in committee, amended, re-amended, analyzed, reanalyzed, voted on by two houses of the Legislature, sent to a conference committee, and, after perhaps more lobbying, debate and analysis, finally signed 'into law' by the Governor. The same care

and scrutiny does not befall the committee reports, caucus analyses, authors' statements, legislative counsel digests and other documents which make up a statute's 'legislative history,'" citations, quotation marks, and alterations omitted].)

Instead, notwithstanding that indication in one committee report, the amendments to subdivisions (e) and (f) are textually consonant and entirely consistent with the Legislature's intent to narrow and refine the gang statute to punish conduct committed for the common benefit of a gang, even when undertaken by a lone actor, rather than conduct committed for individual benefit.

D. The arguments advanced by Clark and in the *Delgado* decision are unpersuasive

Rather than reading the relevant provision in context and taking into account the structure and purpose of the statute, Clark's argument hinges on the definition of the single word "collectively" in subdivision (f). Clark defines "collectively" to mean "'as a whole group rather than as individual persons or things.'" (OBM 14, citing <https://www.dictionary.com/browse/collectively>.) He narrowly interprets this definition, arguing that establishing a pattern of criminal activity must now require evidence that each predicate offense was committed by gang members in concert because "[m]embers cannot collectively commit a crime if only a single person is implicated in the crime." (OBM 14.)

This definition fails to consider the grammatical structure of subdivision (f), as well as its context in the statute as a whole, which shows that the word collectively must be interpreted to modify how gang members engage in an overall pattern of

criminal activity—that is, they must do so for the purposes of benefitting the gang's collective activity. Clark's interpretation, which ignores the "pattern" language, leads to an incorrect assumption that the word "collectively" must modify and restrict the language of subdivision (e), which otherwise clearly sets out the two types of gang predicates that may be shown. The assumption is incorrect for the reasons stated above.

Clark also asserts that this Court's decision in *Gardeley* supports his reading because it "combines the elements in subdivision (e) with those in subdivision (f) to reach an overall definition of 'criminal street gang.'" (OBM 15-16, citing *Gardeley*, *supra*, 14 Cal.4th at p. 623.) He misreads *Gardeley*. The central question in *Gardeley* was whether the prosecution was required to establish that the predicate offenses were "gang related." (*Gardeley*, at p. 621.) This Court held that there was no such requirement (*id* at pp. 621-624)—a requirement that has since been added by AB 333. *Gardeley* did not analyze the language of subdivision (f) or the definition of "criminal street gang" in the manner Clark asserts. (See *Gardeley,* at pp. 620-621.)

The *Delgado* opinion is unpersuasive for the same reasons. *Delgado* purported to "read the term 'collectively' in a commonsense manner to mean what it says—committed by more than one person. . . ." (*Delgado*, *supra*, 74 Cal.App.5th at p. 1088.) But the Court of Appeal there made no attempt to harmonize the statute as a whole. It instead advanced a disfavored interpretation that renders part of the language in subdivision (e)(1) inoperative. (See *In re C.H.*, *supra*, 53 Cal.4th

at p. 103 [courts should "'strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous'"].) And it did so on the basis of perceived legislative intent, while seemingly failing to consider that subdivisions (f) and (e) could naturally be read together in a way that does not conflict and would not require negating part of the statutory language.

The *Delgado* court's reliance on legislative intent, moreover, was itself misguided. The court justified its interpretation on the basis that it advanced the Legislature's intent to "dramatically limit" the scope of the gang enhancement statute. (*Delgado*, *supra*, 74 Cal.App.5th at p. 1089.) But the court failed to account for the numerous other changes implemented by AB 333. Among other things, the bill tightened the recency requirement for predicate offenses (§ 186.22, subd. (e)(1)), prohibited the use of the currently charged offense to prove a pattern of gang activity (§ 186.22, subd. (e)(2)), specified that predicate crimes must be committed by gang members rather than individuals and for a gang purpose (§ 186.22, subd. (e)(1)), narrowed the list of qualifying predicate offenses (compare § 186.22, subd. (e)(1), with former § 186.22, subd. (e)), and required that a gang enhancement allegation be tried separately from the underlying offense under certain circumstances (§ 1109). Taken together, these changes accomplish the substantial revision that the Legislature envisioned. While the Legislature intended to (and did) narrow the scope of the gang enhancement in some ways, it does not follow that the statute should be interpreted as narrowly

as possible in every respect—especially where, as here, that narrow reading would result in nullification of otherwise clear statutory text. (See *In re Friend* (2021) 11 Cal.5th 720, 736 ["no legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law"]; *People v. Morales* (2016) 63 Cal.4th 399, 408 [one purpose of Proposition 47 was to save money, "and the measure has done so by causing the release of some prisoners and reducing the number of future felony sentences. But the purpose of saving money does not mean we should interpret the statute in every way that might maximize any monetary savings"].)

II. REVERSAL IS NOT REQUIRED EVEN UNDER THE COURT OF APPEAL'S INTERPRETATION OF THE STATUTE

The only challenge Clark makes to his gang enhancement based on AB 333 is that subdivision (e) now requires each predicate offense to have been committed by two or more gang members. Because that theory is incorrect, the judgment should be affirmed.

As noted above, however, the Court of Appeal discerned a different requirement that it thought had been imposed by the amendments to subdivisions (e) and (f): that both required predicate offenses may not be committed by the same lone actor. (See fn. 8, *ante*.) Even if the Court of Appeal's interpretation of the statute is correct, reversal is not required here.

"When a substantive change occurs in the elements of an offense and the jury is not instructed as to the proper elements, the omission implicates the defendant's right to a jury trial under

the Sixth Amendment, and reversal is required unless 'it appears beyond a reasonable doubt' that the jury verdict would have been the same in the absence of the error." (*Tran*, *supra*, 13 Cal.5th at p. 1207; *Chapman v. California* (1967) 386 U.S. 18.)

The record shows beyond a reasonable doubt that three predicate offenses involving Clark and Ridgeway established a pattern of criminal activity even under the Court of Appeal's interpretation of subdivision (e).[8] In April 2014, Clark pleaded guilty to an attempted residential burglary (§§ 459, 664). (5RT 1023.) Clark testified to being a founding member of his gang subset prior to 2014, and to the details of that burglary attempt he committed with four others. (7RT 1319, 1321, 1327.) Clark admitted planning a burglary that night, and admitted that he drove the group and directed others to act as lookouts. (7RT 1349, 1457-1462.) In July 2009, Ridgeway, also a member of SCM, pleaded guilty to residential burglary with a gang allegation (§§ 459, 186.22, subd. (b)), and active gang

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[8] The Court of Appeal determined that any error was harmless in reliance on evidence of the two predicate offenses from 2014 involving Clark and Ridgeway. In supplemental briefing, respondent mistakenly conceded that Ridgeway's 2009 residential burglary conviction no longer qualified as a predicate offense under amended section 186.22. It does qualify because there was another offense committed within three years of the charged offense. The Court of Appeal did not address the 2009 predicate offense in its harmless error analysis. The parties agree that the remaining three offenses involving coperpetrators M.M., Mosely and Parker do not qualify as gang predicates under amended section 186.22 because they involve the charged offenses. (§ 186.22, subd. (e)(2).)

participation (§ 186.22, subd. (a)). (5RT 994, 1013-1016.) Ridgeway subsequently also pleaded guilty to a robbery (§ 211) committed on October 13, 2014. (5RT 994, 1013, 1015-1016.) These convictions involved two different SCM gang members who committed qualifying offenses within the requisite period. (§ 186.22, subd. (e)(1)(B), (K).) There is therefore no doubt that these convictions demonstrate collective engagement in a pattern of criminal gang activity even under the Court of Appeal's view.

Should the Court disagree, however, the matter should be remanded "to give the People the opportunity to prove the applicability of the enhancements under the amendments to section 186.22." (E.g., *People v. Vasquez* (2022) 74 Cal.App.5th 1021, 1033; *People v. Sek* (2022) 74 Cal.App.5th 657, 669-670 [retrial of gang enhancement not barred by double jeopardy when reversal not based on insufficiency of evidence required to prove a violation at the time of trial]; *Delgado*, *supra*, 74 Cal.App.5th at p. 1091 [reversed the gang enhancements and remanded the case for the People to decide whether to retry the gang enhancement].)

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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April 20, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13-point Century Schoolbook font and contains 11,859 words.

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April 20, 2023

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