IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **KEJUAN DARCELL CLARK,** Defendant and Appellant.	**No. S275746** (Court of Appeal No. E075532) (Superior Court No. RIF1503800)

Review of the Decision by the Court of Appeal,
Fourth Appellate District, Division Two,
on Appeal from the Superior Court of Riverside County,
Honorable Bambi J. Moyer, Judge

BRIEF OF *AMICUS CURIAE* SANTA CLARA COUNTY INDEPENDENT DEFENSE COUNSEL OFFICE IN SUPPORT OF DEFENDANT AND APPELLANT CLARK

Sylvia Perez MacDonald (178518), Director
sylvia.macdonald@ido.sccgov.org

Lana M. Kreidie (234034), Assistant Director
lana.kreidie@ido.sccgov.org

INDEPENDENT DEFENSE COUNSEL OFFICE (IDO)
373 West Julian Street, Suite 300
San Jose, California 95110
(408) 758-4250

* William Safford (286948)
(847) 744-4903
saffordlegal@gmail.com

Attorneys for Amicus Curiae

[* *designated for communication*]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

The idea that there is power in collective action is a first principle of American democracy. By associating with others of like minds, voters and advocates increase their ability to "contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." (*Pacific Gas & Electric Co. v. Public Utilities Com.* (1986) 475 U.S. 1, 8, quoting *First National Bank v. Bellotti* (1978) 435 U.S. 765, 783, further citations omitted.) Robust labor unions demonstrably reduce inequality, improve working conditions, and even increase productivity. (Risher, *The Growing Income Inequality as a Global Problem* (2014) 46(2) Compensation & Benefits Review 63.)[1]

Like many human devices, such power is inherently neither positive nor negative, but its misuse can certainly be a cognizable social problem. The era of Jimmy Hoffa and the Rancho La Costa Country Club gave America the Racketeering Influenced and Corrupt Organizations Act ("RICO"), designed to combat "highly sophisticated, diversified, and nation-wide illegal activity". (Geary, *The creation of RICO: Law as a knowledge diffusion process* (2000) 33 Crime, Law & Social Change 329, 342-346.)[2] Similarly, California's criminal street gang law addressed a

---

[1] Available at http://www.saffordlegal.com/courtesy/Risher2014.pdf [original].

[2] Available at http://www.saffordlegal.com/courtesy/Geary2000.pdf [original].

perceived public safety problem by "focusing 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." (Pen. Code, § 186.21.)[3] Both legislative endeavors targeted something greater than a mere 'conspiracy', but nonetheless focused on the power of *groups* to achieve criminal ends. (Geary, *supra*, 33 Crime, Law & Social Change 329, 346; Pen. Code, § 186.21.)[4]

Yet, over time, it became clear that the gang law, as written, did not fully maintain its focus on patterns of group behavior and organizational movement. While it was written to address a problem of collective action, the reality, in the intervening decades, has not been tailored to that ideal. The result has been a structure for gang prosecution that sweeps with

---

[3] No opinion is offered here as to whether legislative fears were justified. (See, e.g., Cyr, *The Folk Devil Reacts: Gangs and Moral Panic* (2003) 28(1) Criminal Justice Review 26, 31-32, available at http://www.saffordlegal.com/courtesy/Cyr2003.pdf [original].) It is accepted that gang crime is real, and the gang law is real; the question of the day is how the latter should be interpreted and applied to the problem of the former.

[4] Notably, RICO also incorporated a shift in major crime legislation away from exclusively focusing on violence, instead displaying a broader interest in economic impacts. (Geary, *supra*, 33 Crime, Law & Social Change 329; and, see Pen. Code, § 186.21 ["effective means of punishing and deterring the criminal activities of street gangs is through forfeiture of the profits, proceeds, and instrumentalities acquired, accumulated, or used"].)

a much wider net, but in so doing, fails to effectively achieve its purpose of deterring specific group activities.

After more than 30 years of this, the STEP Act has now become the target of legislation designed to overhaul Penal Code section 186.22 – the STEP Forward Act of 2021 – a substantive realignment, shifting the technical elements of the law to more closely match the substantive goals of its creators. (Assem. Bill No. 333 (2021-2022 Reg. Sess.) ("STEP Forward Act").)[5] In relevant part, this meant narrowing the scope of what it means for an alleged gang to engage in a "pattern of criminal gang activity", now requiring collective engagement in the pattern, where once individual engagement would have sufficed. (*Id.* at § 3, amending Pen. Code, § 186.22, subd. (f).)

Of course, a new law comes with a new set of interpretive questions. By granting review here, this Court agreed to take on one such question – precisely how *collective* a gang's action must be – in other words, to what extent the very existence of a criminal street gang is proved by the behavior of its members in concert. On its face, this is an issue of statutory interpretation, but if it were a simple one, there would be no conflict in the districts. Instead, what appears to be a snarl in phrasing must be resolved in a fashion that both upholds the "plain and commonsense meaning" of the statute, but looks to history and

---

[5] Available at http://www.saffordlegal.com/courtesy/2021AB333.pdf [original].

context "to determine the Legislature's intent so as to effectuate the law's purpose." (*People v. Scott* (2014) 58 Cal.4th 1415, 1421, citations omitted.)

As explained herein, the Court of Appeal in this matter reached the wrong conclusion, if for understandable reasons. Appellant Kejuan Clark correctly observes that, between the two sides of the interpretative debate, "*Delgado* and *Lopez* have the better argument." (Appellant's Opening Brief on the Merits ("AOBM") 13, referring to *People v. Delgado* (2022) 74 Cal.App.5th 1067, review den. Apr. 27, 2022, S273722, and *People v. Lopez* (2021) 73 Cal.App.5th 327, review den. Mar. 30, 2022, S273023.) At the same time, the Court of Appeal here offered a fair criticism of those cases, to the extent it cautioned against an interpretation which rendered a portion of the statute "surplusage". (*People v. Clark* (2022) 81 Cal.App.5th 133, 145, citing *People v. Loeun* (1997) 17 Cal.4th 1, 9.) But, although the criticism is valid, the Court of Appeal committed nearly as egregious a sin, effectively reading the new collective action requirement out of the statute. This is, in large part, because of the assumption that the proper interpretation of the STEP Forward Act requires a choice between doctrines of interpretation; that *either* the literal language *or* the legislative intent must control.

Not so. This Court need not indulge such a dichotomy. Submitted here is an analysis of the statute's language and purpose which gives full effect to *both*.

INTEREST OF *AMICUS*

Coming before this Court to speak to these questions as *amicus curiae* is the Santa Clara County Independent Defense Counsel Office ("IDO"). Since 2008, IDO has provided counsel for criminal defendants and youth in the juvenile justice system who are ineligible for representation by the Public or Alternate Defenders. However, IDO is not just a 'conflicts panel'.

As the agency which brings in counsel for some of the biggest and most complicated cases the county sees, IDO has grown into far more than a referral service. The program also includes a robust roll of top-notch investigators, paralegals, experts, and other support personnel; provides training and education in the form of MCLE sessions, resource repositories, and mentorship arrangements; and has developed pilot programs designed to implement innovative criminal defense solutions to complex case representation. IDO holds attorneys to the highest standards of effective criminal defense practice, ensuring they have the skills and tools needed to meet those standards and consistently demonstrate best practices.

In criminal street gang prosecutions, IDO occupies a unique structural position. Gang cases manifest a higher-than-normal need for 'conflict' appointments, since they almost inevitably involve evidence of activities by other defendants previously charged in the same county, thus rendering the Public and Alternate Defenders ineligible to provide representation in a much higher percentage of cases. In the large-indictment cases,

IDO generally provides attorneys for most, if not *all* defendants – in some cases, numbering in the dozens.

Multi-defendant gang cases are where the legislative sense of collective criminal action is given depth and breadth. IDO attorneys routinely ask: Was there a criminal street gang? Did the accused act with the alleged gang or independently from it? What collective purpose was or could have been achieved by such an action? The answers to these questions have changed in the wake of STEP Forward, though it remains to be seen exactly how.

The result of IDO's structural position has been the development of substantial experience and expertise amongst a group of attorneys who routinely tread the same common ground. When IDO collectively speaks on the reality of gang prosecution, it is more than a recitation of anecdotes; it reflects a body of knowledge beyond what a defense agency normally has to offer.[6] Attorneys assigned by IDO, benefiting from that knowledge, regularly raise questions which get to the heart of the evolving nature of gang law, to be answered by the Sixth District Court of Appeal, and sometimes by this Court. (See, e.g., *People v. Burgos* (2022) 77 Cal.App.5th 550, review granted Apr. 13, 2022, S274743; *Menifee v. Super. Ct.* (2020) 57 Cal.App.5th 343.)[7]

---

[6] As a result, in the past few years, multiple IDO attorneys have been invited to speak to legislative committees as they crafted significant ameliorative law changes.

[7] Two of the three *Burgos* defendants were represented by IDO-assigned attorneys before their appeal, and will enjoy that

From this context, IDO seeks the opportunity to speak to this Court about the proper interpretation of the requirement, in Penal Code section 186.22, subdivision (f), that members of a criminal street gang "*collectively* engage in, or have engaged in, a pattern of criminal gang activity" – referred to herein as the "collective action" requirement. This is the subject of dispute in pending cases involving IDO attorneys, in Superior Court and on appeal, and a matter of intense interest to many IDO clients, who face the prospect of dramatically enhanced prison sentences based on conduct by other members of their alleged gangs.

In IDO's view, this Court can interpret the statute so as to give full effect to every part, while protecting the legislative intent behind the STEP Forward amendments. Because the experience of IDO suggests this is a crucial issue, likely to impact a significant volume of cases, both in Santa Clara County and across the state, and because a perspective is offered herein which has not already been expressed in the briefs, IDO asks this Court to consider the arguments and authorities in the following pages. (Cal. Rules of Court, rule 8.520(f)(1).)[8]

---

distinction again when the case returns from this Court. Charles Menifee was represented by IDO attorneys in both his Superior Court and writ proceedings.

[8] The undersigned are grateful to IDO-affiliated attorneys Dana Fite, Leah Gillis, Cheryl McLandrich, and Michelle May Peterson, for advice, feedback, input, and review as this brief was developed; and to Noah Coyle, for assistance in locating sources.

ARGUMENT

The Legislature is not expected to achieve perfection on the first try, if at all. Sometimes, a statute almost immediately manifests problems and must be 'fixed'. This was the case, for example, with the law created by the California Racial Justice Act of 2020, which was amended less than two years after enactment, to improve its reach and practicalize tools for implementation. (Pen. Code, § 745, enacted by Assem. Bill No. 2542 (2019-2020 Reg. Sess.), amended by Assem. Bill No. 256 (2021-2022 Reg. Sess.).)[9]

Sometimes, however, it may take decades to realize that a statute 'lost its way'. This might be a result of difficulties in understanding the implementation and impact of a law, or it might simply be because it is necessary for the law, the courts, and the public to evolve. This was arguably the case with California's juvenile transfer laws, which once bestowed considerable discretion on district attorneys to charge children as adults, but in recent years have been substantially realigned, beginning with the electorate's elimination of direct filing, and followed by legislation conferring appellate rights and imposing a more robust standard. (*People v. Super. Ct. (Lara)* (2018) 4 Cal.5th 299, 304-305, discussing Prop. 57 (Gen. Elec., Nov. 8,

---

[9] Available at http://www.saffordlegal.com/courtesy/2020AB2542.pdf [original] and http://www.saffordlegal.com/courtesy/2022AB256.pdf [original].

2016); Assem. Bill No. 624 (2021-2022 Reg. Sess.), enacting Welf. & Inst. Code, § 801; Assem. Bill No. 2361 (2021-2022 Reg. Sess.), amending Welf. & Inst. Code, § 707, subd. (a)(3).)[10]

On its face, the STEP Forward Act presents itself as a 'correction' of the gang law; a matter of technical adjustments to an already-complex set of elements. Yet, it is much more than that. STEP Forward embodies a complete realignment of a law which, in the decades since its creation, drifted further and further away from its originally intended purpose, and produced outcomes divorced from the public safety goals it purported to serve. (STEP Forward Act, § 2, subd. (g) ["no empirical evidence indicating that [gang enhancements] are effective in reducing gang crime"; rather, "heavy-handed gang suppression tactics may be counterproductive"].)

The legislative bolstering of the collective action requirement, at issue here, is hardly tangential to that realignment. To the contrary, it is *essential*. In the pages which follow, IDO explains why and how the interpretive question in this matter must be guided and informed by the history of the gang law and the objectives of STEP Forward.

First, a brief historical discussion is provided. The STEP Forward Act can only be properly analyzed in light of that which

---

[10] Available at http://www.saffordlegal.com/courtesy/2021AB624.pdf [original] and http://www.saffordlegal.com/courtesy/2022AB2361.pdf [original].

it seeks to realign. As the collective action requirement was refined through interpretation, it drifted from the original purpose of the gang law. This must be distinctly understood, or nothing coherent can be made of the intent analysis which follows thereafter.

Second, by reference to legislative materials and the authorities which informed the Legislature through the development of STEP Forward, the realigned legislative view of collective action is presented. While the drafting of a statute may be understood through a technical lens, an interpreting court is not required to disregard the plain objectives of the law in pursuit of literalism. Thus, those objectives are explored here.

Third and finally, IDO sets forth its view of the statutory interpretation, with the rest of this as context. Against the backdrop of past treatment and present intent, the collective action requirement can be interpreted without disregarding *either* the plain language of the statute *or* the substantive goals of the STEP Forward Act. Instead, this Court can resolve the disputed element with proper deference to both.

I. THE CRIMINAL STREET GANG LAW WAS DESIGNED TO ADDRESS A PROBLEM OF COLLECTIVE CRIMINAL ACTION, NOT TO PUNISH INDIVIDUALS FOR THEIR ASSOCIATIONS.

Enacted in 1988, the Street Terrorism Enforcement and Prevention Act ("STEP Act") was driven by the belief 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.' . . . . 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, overruled in part by *People v. Sanchez* (2016) 63 Cal.4th 665, 686 fn. 13.)

Almost immediately, the STEP Act faced constitutional challenges. Appellants argued that the act was "fatally overbroad and vague and punishe[d] the right to free association in violation of the First Amendment of the United States Constitution". (*People v. Gamez* (1991) 235 Cal.App.3d 957, 962, disapproved on other grounds by *Gardeley*, *supra*, 14 Cal.4th 605, 624 fn. 10.) This was based on the perception that the act "punishe[d] membership in . . . any group whose *individual* members may commit criminal offenses." (*Gamez*, *supra*, 235 Cal.App.3d 957, 970, original emphasis.)

The Court of Appeal disagreed, pointing out that Penal Code section 186.22 did *not* "punish association with a group of individuals who, in a separate capacity, may commit crimes. Rather, it require[d] that one of the primary activities of the group or association itself be the commission of crime." (*Gamez*, *supra*, 235 Cal.App.3d 957, 971.) The court went on to note, "[O]ne is free to associate with whomever one wishes under the statute, so long as the primary purpose of associating one's self with the group is not to commit crime. It is not the association with other individuals *alone* which [Penal Code] section 186.22 addresses, but the association with others *for the purpose of promoting, furthering or assisting them in the commission of crime*." (*Ibid.*, original emphasis; accord *People v. Green* (1991)

227 Cal.App.3d 692, 700-702 [stating similar], disapproved on other grounds by *People v. Castenada* (2000) 23 Cal.4th 743, 748.)

This view makes sense, provided both the objectives of the gang law and the mechanism by which it serves those objectives are what they appear to be. As noted previously, the declared focus of the STEP Act was on the threat posed by "street gangs" as entities, which is why the Legislature sought "the eradication of criminal activity by street gangs", and directed attention to "patterns of criminal gang activity" and "the organized nature of street gangs". (Pen. Code, § 186.21.)

This is consistent with the idea that an organization – whether a business, non-profit, social club, or street gang – can have its own motivations, intent, and goals. In the academic study of organizational behavior, "it is common to speak of an organization's visions, strategies, goals and responsibilities", but "it is also common to attribute competencies for reflection, evaluation, learning and considered choice solely to individuals." (Pruzan, *The Question of Organizational Consciousness: Can Organizations Have Values, Virtues and Visions?* (2001) 29 Journal of Business Ethics 271.)[11] The result is an odd but generally accepted dichotomy – the recognition of a motivational and ethical distinction between the *group* and the *members* of the

---

[11] Available at http://www.saffordlegal.com/courtesy/Pruzan2001.pdf [original].

group. (*Id.* at p. 276 ["unreasonable to expect that all persons in a collectivity have the same values""].)

Although these are not the terms in which the Legislature discussed the "state of crisis . . . caused by violent street gangs" (Pen. Code, § 186.21), the dichotomy is nonetheless integral to the STEP Act. When a person acts by himself, his motivations are his own; but when a person acts in concert with others, they act out of a shared motivational space. The group's intent, values, and purpose, manifesting in its primary activities and patterns of activity, are more than just the sum of their parts. The STEP Act targeted these separate motivational artifacts, existing in the space between gang members, to the extent that they were inherently and demonstrably criminal.

This is, in a nutshell, why the STEP Act survived the associational challenge in cases such as *Gamez* and *Green*. Modern American jurisprudence generally rejects the concept of inherent individual criminality; the law disfavors decision-making based on the idea of a propensity to commit crime. (*Old Chief v. United States* (1997) 519 U.S. 172, 181 [rejecting "bad person deserves punishment" as basis for conviction].) But, when it comes to organizational criminality, the opposite is true – before an association of individuals can be sanctioned, it must be demonstrably criminal, in purpose, intent, and action. (*Gamez*, *supra*, 235 Cal.App.3d 957, 971.) The gang participation statute "reflect[ed] the Legislature's carefully structured endeavor to punish active participants for commission of criminal acts done *collectively* with gang members." (*People v. Rodriguez* (2012) 55

Cal.4th 1125, 1139, original emphasis.) And, before affiliation with the group can be punished, there must be evidence that the individual intended to support the group's criminality, i.e., "to promote, further, or assist in criminal conduct by gang members". (Pen. Code, § 186.22, subd. (b)(1).)

The STEP Act, at least on its face, leaned heavily into this organizational criminality requirement. The original version of the statute, not unlike the present iteration, required knowledge of a "pattern of criminal gang activity" and willful promotion, furtherance, or assistance of "felonious criminal conduct by gang members", if the participation offense was to be proved. (*Former* Pen. Code, § 186.22, subd. (a), as enacted by Assem. Bill No. 2013 (1987-1988 Reg. Sess.), § 1.)[12] An enhancement finding rested on proof of "specific intent to promote, further, or assist in any criminal conduct by gang members". (*Former* Pen. Code, § 186.22, subd. (b).)

Like its federal cousin, the STEP Act baked in an emphasis on the *criminal* nature and purpose of the organization, a necessary step to avoiding the First Amendment associational problem. (*Gamez*, *supra*, 235 Cal.App.3d 957, 975 [discussing RICO analogy], citing *Green*, *supra*, 227 Cal.App.3d 692, 702-703; see, also, *Castenada*, *supra*, 23 Cal.4th 743, 749, citing *Scales v. United States* (1961) 367 U.S. 203, 223; accord *People v. Renteria*

---

[12] Available at http://www.saffordlegal.com/courtesy/1988AB2013.pdf [original]

(2022) 13 Cal.5th 951, 964 [relying upon *Scales* for interpretive guidance].) Consistent with this, proving the existence of a criminal street gang, for either the participation offense or the enhancement, required evidence that the group's "primary activities" included one or more listed crimes, and that the group's "members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (*Former* Pen. Code, § 186.22, subd. (d).)

Again, on its face, as the Legislature had promised, the statute seemed focused on collective action, including the "patterns" and "organized nature" of gangs. However, the goal was imperfectly achieved. As the courts began to interpret Penal Code section 186.22, it became clear that the language of the statute permitted applications which were inconsistent with the original legislation's collective focus.

Gardeley set the stage for much of what followed, as it rejected the idea that offenses used to prove a "pattern of criminal gang activity" had to be "gang related". (*Gardeley*, *supra*, 14 Cal.4th 605, 611.) The defendants argued the prosecutor was obliged to prove each pattern offense ("predicate") was "committed for the benefit of, at the direction of, or in association with the gang." (*Id.* at p. 621.) This Court disagreed, concluding the statute lacked any such express requirement, and finding its language "clear and unambiguous". (*Ibid.*)

A few years later, the Court of Appeal dealt with a related question. The appellant argued that, "in order for the [Penal Code] section 186.22 enhancement to apply, the persons

perpetrating the predicate offenses must be gang members when the crimes were committed." (*People v. Augborne* (2002) 104 Cal.App.4th 362, 366, review den. Apr. 9, 2003, S113584.)[13] The court disagreed. Concluding "[t]he relevant statutory language [was] unambiguous", it held that a requirement of gang membership, contemporaneous to the commission of the predicates, would "add an additional element . . . , something [the courts] are prohibited from doing." (*Id.* at pp. 374-375.) The court relied on *Gardeley*, viewing the two questions as analytically similar. (*Id.* at p. 375, discussing *Gardeley*, *supra*, 14 Cal.4th 605, 620-621.)

The *Gardeley* reasoning also led to cases such as *Albillar*, in which this Court rejected the idea that Penal Code section 186.22, subdivision (b)(1) "requires the specific intent to promote, further, or assist a *gang-related* crime." (*People v. Albillar* (2010) 51 Cal.4th 47, 67.) Parsing the statute into its two parts, the Court noted, "The enhancement already requires proof that the defendant commit a gang-related crime in the first prong – i.e., that the defendant be convicted of a felony committed for the benefit of, at the direction of, or in association with a criminal street gang." (*Ibid.*, citing *Gardeley*, *supra*, 14 Cal.4th 605, 621-622.) The Court recognized "no further requirement that the defendant act with the specific intent to promote, further, or assist a *gang*; the statute require[d] only the specific intent to

---

[13] Three of the seven justices of this Court would have granted review of *Augborne*.

promote, further, or assist criminal conduct by *gang members*." (*Albillar*, *supra*, original emphasis, citing *People v. Ochoa* (2009) 179 Cal.App.4th 650 ("*Ochoa I*"), 661 fn. 6, further citations omitted.)

The reference in *Albillar* to *Ochoa*, without any sign of disapproval, mined an even deeper well. The *Ochoa* court, in the footnote, suggested that "the defendant was, at a minimum, as a gang member himself, doing so with the specific intent to promote, further, or assist criminal conduct by gang *member*(*s*)", and parenthetically identified the gang "member(s)" as "himself and perhaps his passenger". (*Ochoa I*, *supra*, original emphasis.) *Ochoa* took note of another case, *Ramon*, in which the Court of Appeal was reluctant "to hold as a matter of law that two gang members in possession of illegal or stolen property in gang territory are acting to promote *a criminal street gang*." (*Ochoa I*, *supra*, quoting *People v. Ramon* (2009) 175 Cal.App.4th 843, 853, emphasis added by *Ochoa*.) But, the *Ochoa* court in no way shared *Ramon's* reluctance – it would have found "the evidence in *Ramon* sufficient to meet the specific intent prong of the statute." (*Ochoa I*, *supra*.)

Plugging all this into the *gestalt* of *Albillar*, the result was that: (1) a gang enhancement only required the commission of a crime to be 'gang-related' to the extent it met the initial requirement of a gang connection, including merely being committed "in association with" the gang; (2) the specific intent requirement was only directed to criminal conduct by gang members, regardless of whether such conduct had its own gang

connection; and (3) if *Ochoa* had any lasting weight, commission of a crime by a single gang member, acting by himself, might satisfy both parts of the statute. The path taken by the courts to reach this point was not irrational, given the focus on plain language, but neither did it stay anywhere close to the apparent original intent of the STEP Act, which was to criminalize collective action by criminal street gangs.

The divergence of intent and interpretation had implications beyond the courtroom. For example, law enforcement agents throughout the state utilized "CalGang", "a shared criminal intelligence system", to track suspected gang members and accumulate evidence for later prosecution. (Cal. State Auditor, *The CalGang Criminal Intelligence System* (Aug. 2016) ("*CalGang*") p. 1.)[14] Before entering a suspected gang member into the database, officers were required to establish reasonable suspicion to support affirmative answers to two questions: "Is it a gang? Is the individual a gang member?" (*Id.* at pp. 28-29.) The existence of a gang required, *inter alia*, evidence that "members individually or collectively engage in a pattern of criminal gang activity", plainly drawing from the statute. (*Ibid.*, quoting *former* Pen. Code, § 186.22, subd. (d).) The Auditor's report found that this requirement was *not* consistently met (*CalGang*, *supra*, pp. 30-31), but even if it had been religiously obeyed, the definition was set by the courts,

---

[14] Available at http://www.saffordlegal.com/courtesy/CalGang2016.pdf [original].

based on the broad interpretation which had been given to the language of the statute.

It is not suggested here that the judicial broadening of the STEP Act was necessarily an error of interpretation. One commentator described the interpretive effect as "the product of [the courts'] attempts to make sense of a clumsily drafted act bearing little textual resemblance to the judicial precedent that its proponents cited in support of its constitutionality at the time of its passage." (Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of California's Anti-Gang STEP Act* (2006) 11 Berkeley J. Crim. L. 101, 102.)[15]

Still, however it was achieved, the result of all this was a body of case law allowing for the most relaxed possible construction of Penal Code section 186.22. (Baker, *supra*, 11 Berkeley J. Crim. L. 101, 103 ["courts have effectively interpreted the enhancement . . . to punish mere gang membership"].) As recently as 2019, *Albillar* was cited for its holding that, "if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*People v. Kopp* (2019) 38 Cal.App.5th 47, 72-73, quoting *Albillar*, *supra*, 51 Cal.4th 47, 68, and citing *People v.*

---

[15] Available at http://www.saffordlegal.com/courtesy/Baker2006.pdf [original].

Franklin (2016) 248 Cal.App.4th 938, 949, and *People v. Miranda* (2011) 192 Cal.App.4th 398, 412.)[16]

Most of this has little to do with the predicates, since the question of whether they required any proof of a 'gang-related' nature was settled early by *Gardeley*. But, the trend of the entire body of law was to find, in the plain language of the statute, very little support for a *technical* requirement of collective gang action. The *Gardeley* treatment of the predicates meant, in part, that the existence of a criminal street gang could be established by evidence of the general criminal propensities of its members, without proof that the members acted *together*, nor even proof that they were in fact members when their earlier crimes were committed. (*People v. Garcia* (2020) 46 Cal.App.5th 123, 165 ["predicate offenses need not themselves be 'gang related'"], quoting *Gardeley*, *supra*, 14 Cal.4th 605, 621; *People v. Ochoa* (2017) 7 Cal.App.5th 575 ("*Ochoa II*"), 581 ["need not prove . . . predicate offenses used to establish a pattern of criminal activity were gang related"], citing *Gardeley*, *supra*, 14 Cal.4th 605, 621; and *Augborne*, *supra*, 104 Cal.App.4th 362, 366 ["no duty to prove

---

[16] There have been appellate findings that a prosecutor failed to meet the burden to prove a gang enhancement, but they have been rare, and tended to involve critiques of "[s]peculative testimony by a gang expert". (*People v. Soriano* (2021) 65 Cal.App.5th 278, 288-289, relying upon *People v. Ramon* (2009) 175 Cal.App.4th 843, 847-852; accord *People v. Gonzalez* (2021) 59 Cal.App.5th 643, 649 [abjuring the "black box" of an unsupported expert opinion].)

that the persons perpetrating the predicate offenses were gang members when the enumerated crimes were committed"].)

While one must be mindful not to oversimplify, the divergence in the post-*Gardeley* universe, between legislative intent and judicial interpretation, can be readily demonstrated by a hypothetical construct. If Adam was charged with a 2015 carjacking committed for the benefit of the ABC Gang, the existence of a "pattern of criminal gang activity" might have been proved using Brian's 2013 arson and Carl's 2011 grand theft, even if both Brian and Carl committed their crimes by themselves, and neither joined the ABC Gang until 2014. Alternately, it might have been proved merely by relying upon Adam's carjacking and Brian's arson, with no mention whatsoever of Carl's crime. Either way, a conclusion that the primary activities of the gang were other crimes entirely, such as drug and firearm sales, would not have barred this result, nor would it necessarily have been inconsistent with cases such as *Soriano* and *Ramon*, unless there were substantial deficits in a gang expert's "benefit" opinion, of the type later identified in *People v. Renteria* (2022) 13 Cal.5th 951.

If this seems diametrically opposed to any cognizable meaning of "collective" . . . . yes, it is. But, at the same time, it was the unsurprising result of plain language drafted without fully anticipating how the gang law would be put to work.

II. THE AMENDMENTS TO THE "PATTERN" REQUIREMENT WERE A SUBSTANTIVE AND INTENTIONAL CHANGE, DESIGNED TO REALIGN THE GANG LAW TO ITS ORIGINAL PURPOSE.

The crafting of statutes is a technical exercise. The Legislature begins with an idea, and then attempts to reduce it to a construct of objective and (where necessary) carefully delimited subjective criteria. In the years which follow enactment, the courts pore over that construct with magnifying glasses and stethoscopes, attempting to decipher both the surface of the law and the intent which lies beneath.

This is the story of the STEP Act, and decades later, the STEP Forward Act. In 1988, the Legislature acted out of a concern for public safety, though as explained *ante*, did so with a focus on the problem of collective action by criminal organizations. (Pen. Code, § 186.21.) In 2021, that same Legislature took action again, but emblazoned across the pages of STEP Forward is a clear message of realignment – the need to bring the statute and its judicial interpretations in line with the underlying intent of the law.

There might be a legitimate debate as to whether the proponents of STEP Forward shared the same vision as their 1988 predecessors. Perhaps they did not. But, this is not a question which needs resolution. The Legislature is indisputably entitled to, after gathering decades of anecdotal and empirical data, and in light of evolving sensibilities of crime and punishment, revisit the core principles of the law, realigning the modern statute accordingly. Whether this represents a departure

from or return to the STEP Act's original intent is hardly the point, though the latter is a plausible view.[17]

In any event, the relevant question is, what did the Legislature intend to accomplish with the STEP Forward Act? A proper understanding of this is necessary, if this Court is to carry out its "fundamental task" of "effectuat[ing] the law's purpose." (*Scott*, *supra*, 58 Cal.4th 1415, 1421.)

Early in 2021, the Committee on Revision of the Penal Code ("CRPC") released its annual report, which included a recommendation that the Legislature modify Penal Code section 186.22. (Annual Report and Recommendations (Feb. 2021) Com. on Revision of the Pen. Code (2020) ("Ann. Report") pp. 43-47.)[18] The CRPC observed that gang enhancements "fail to focus on the most dangerous, violent, and *coordinated* activities." (*Id.* at p. 44,

---

[17] During the intervening years, commentators spoke of recapturing the law's original intent: "[C]ourts, prosecutors, and law enforcement officials need to abandon the view that gang crime is simply any crime committed by gang members. Instead, courts should respect the legislative intent and established constitutional precedent behind the STEP Act by treating criminal street gangs as collective criminal enterprises, and by punishing under the Act only those individuals who commit crimes while acting in the capacity of agents for those gangs." (Baker, *supra*, 11 Berkeley J. Crim. L. 101, 128.) It is unclear to exactly what extent these musings influenced the authors of STEP Forward or the legislators who voted to approve it, but Mr. Baker's article was cited in the legislative declaration. (See STEP Forward Act, § 2, subd. (d)(5).)

[18] Available at http://www.saffordlegal.com/courtesy/CRPC2020.pdf [original].

emphasis added.) The report also noted that, "in comparison to California, other states require more evidence of connection or organization between gang members for gang enhancements to apply." (*Id.* at p. 47.)

The authors of the STEP Forward Act paid heed, and went about the business of modifying the gang law. Upon the bill's first appearance in the Assembly Committee on Public Safety, analysts cited the CRPC comparison of California to other jurisdictions. (Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 333 (Apr. 5, 2021) ("ACPS") p. 7, quoting Ann. Report, *supra*.)[19] They also cited the CRPC recommendation that the Legislature "[f]ocus the definition of 'criminal street gang' to target organized, violent enterprises." (ACPS, *supra*, quoting Ann. Report, *supra*, p. 44.)

The initial Committee analysis noted, "A 'pattern of criminal gang activity' can be proven, among other things, through evidence of the charged offense and another offense committed on a prior occasion by the defendant's fellow gang member." (ACPS, *supra*, p. 5, citing *Gardeley*, *supra*, 14 Cal.4th 605, 625.) Responding to this, the STEP Forward Act "require[d] the prosecution to prove the members collectively, rather than individually, engage in, or have engaged in a 'pattern of criminal gang activity.'" (ACPS, *supra*, p. 8.) Opponents of the bill,

---

[19] Available at http://www.saffordlegal.com/courtesy/AB333ACPS.pdf [original].

represented by the San Diego Deputy District Attorneys Association ("SDDDAA"), accused the Legislature of "eviscerat[ing] the current . . . . gang enhancement that is a critical tool in curbing gang violence". (*Id.* at p. 10.) However, while the opponents objected to a requirement that a defendant *know* the perpetrators of predicate crimes,[20] the addition of the common non-reputational benefit language, and the conferral of a right to bifurcation, they did not appear to resist the notion of a more collective focus.[21]

As the bill reached the Assembly floor, the Legislative Counsel analysis reflected its focus – "to require the prosecution to prove an established hierarchy and that the members *collectively* engage in, or have engaged in, 'a pattern of criminal gang activity.'" (Off. of Legis. Counsel, Assem. Floor Analysis

---

[20] This was later removed from the bill.

[21] The SDDDAA also asserted, "In order to ensure a fair trial, it is often the common practice of prosecutors to intentionally *not* use predicate offense convictions that bear any ties to the defendant on trial so as to clearly delineate the separate legal purpose for which those other convictions are being introduced – simply establishing the existence of the gang as a whole, not proving the guilt of the accused on trial." (ACPS, *supra*, p. 10.) While it is not suggested that this was an intentional misrepresentation, it does perhaps reflect an idealized view of practical reality, or maybe just a reflection of local ideology. It has been the consistent experience of IDO-appointed attorneys that, prior to the STEP Forward Act, charged offenses were *consistently* used as predicates, notwithstanding objections based on prejudicial impact and unsuccessful attempts to obtain a bifurcated trial.

(Apr. 9, 2021) ("AFA-1") p. 1, emphasis added.)[22] Subsequent analyses also emphasized that the amended law would require proof that the "pattern" was "committed by [gang] members, as opposed to persons." (Off. of Legis. Counsel, Assem. Floor Analysis (Sept. 1, 2021) ("AFA-3") p. 1.)[23]

The Senate was then presented with a final version of the bill that reflected these considerations. In committee, the existing law was described as requiring proof that "the group's members either separately or as a group 'have engaged in a pattern of criminal gang activity.'" (Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 333 (July 4, 2021) ("SCPS") p. 6.)[24] The STEP Forward Act, in contrast, was advertised as requiring that "the offenses were committed by two or more members". (Off. of Legis. Counsel, Sen. Floor Analysis (Aug. 30, 2021)

---

[22] Available at http://www.saffordlegal.com/courtesy/AB333AFA1.pdf [original].

[23] Available at http://www.saffordlegal.com/courtesy/AB333AFA3.pdf [original]. This was not intended to suggest (though it might have been linguistically implied) that gang members are not "persons". Rather, the Counsel's point was that the law narrowed the scope of the predicate requirement, such that *only* gang members could commit a qualifying predicate. (See *People v. Tran* (2022) 13 Cal.5th 1169, 1206 ["offenses were committed by two or more gang 'members,' as opposed to just 'persons'"].)

[24] Available at http://www.saffordlegal.com/courtesy/AB333SCPS.pdf [original].

("SFA") p. 4.)[25] This was not just descriptive; taken together, it was comparative.

As the Senate considered the bill, the California District Attorneys Association ("CDAA") issued a blistering press release, pejoratively naming it the "Gang Member Protection Act", accusing the author of duplicity in negotiations over the organizational requirement, and promising dire public safety consequences. (CDAA, *CDAA Warns of Dangerous Public Safety Legislation That Would Protect Gang Members: AB 333* (Sept. 3, 2021).)[26] Yet, absent even from this intense critique was any objection to the STEP Forward Act's focus on *collective* action, or the corresponding changes to the predicate requirement.

The Senate made no substantive amendments. (Cal. Legis. Information, *AB-333 Participation in a criminal street gang: enhanced sentence*, "Compare Versions" [comparing May 28, 2021 Assembly version to final chaptered bill].)[27] Within a week, both

---

[25] Available at http://www.saffordlegal.com/courtesy/AB333SFA.pdf [original].

[26] Available at http://www.saffordlegal.com/courtesy/CDAA2021.pdf [original]. CDAA also accused the legislator's of "advance[ing] this reckless legislation without giving legislators an opportunity to hear how seriously flawed it really is" (*ibid.*), notwithstanding that, by this point, the bill had been through two public safety committees and the floors of both houses, over a period of roughly six months.

[27] Available at http://www.saffordlegal.com/courtesy/AB333PreSenate.pdf [original].

houses passed the bill. (Cal. Legis. Information, *AB-333 Participation in a criminal street gang: enhanced sentence*, "Votes".)[28]

The focus of this brief is narrow – little is said about the larger body of changes made by the STEP Forward Act. But, as explained at the outset, criminal gang prosecution has always been about controlling the collective action of organizations focused on criminality. At a minimum, the history of STEP Forward reflects a conscious legislative commitment to realigning the gang law, such that the existence of a criminal street gang can no longer be proved by relying upon prior crimes committed by unaffiliated individuals, acting by themselves, with no intent to benefit a gang and no personal connection to the gang at the time of commission. This is nuanced, but a huge step toward remedying the flaws identified by the CRPC and the authors of the legislation.

In short, the holdings of cases such as *Gardeley* and *Augborne* have been thoroughly repudiated by the STEP Forward Act. No longer can it be said that a "pattern" offense need not be "gang related" (*Gardeley*, *supra*, 14 Cal.4th 605, 611), nor that the perpetrator need not be a gang member (*Augborne*, *supra*, 104 Cal.App.4th 362, 374-375). Moreover, the manner in which each part of the statute has been modified demonstrates an

---

[28] Available at http://www.saffordlegal.com/courtesy/AB333Votes.pdf [original].

intent to give maximum effect to the requirement that members of the gang "collectively engage". (Pen. Code, § 186.22, subd. (f).) The alteration of that phrase, removing "individually", did more than change the wording of one element – it embodied the overall thesis of STEP Forward.

III. THE COURT OF APPEAL ARTICULATED A VALID CRITICISM OF *DELGADO* AND *LOPEZ*, BUT IN TRYING TO PROTECT ONE PORTION OF THE STATUTE, EFFECTIVELY NEGATED ANOTHER.

This Court has yet to directly engage with the nuances of predicate analysis in the wake of the STEP Forward Act. In *Renteria*, the Court acknowledged that the law had changed, but had no need to analyze the amendments, because "the evidence was not sufficient to sustain the gang penalties even under the law in effect at the time of [the] trial." (*People v. Renteria* (2022) 13 Cal.5th 951, 961 & fn. 6.) In *Tran*, the Court briefly recited the changes, but faced with a concession by the Attorney General, did not dive into the question of whether "the evidence presented at trial failed to establish that the gang members 'collectively' engaged in a pattern of criminal gang activity". (*People v. Tran* (2022) 13 Cal.5th 1169, 1206-1207.) And, just a few weeks ago, *Cooper* came the closest, reversing enhancements which now incorporate a requirement that "the predicate offenses . . . 'commonly benefited [the] criminal street gang, and the common benefit from the offenses is more than reputational'", but not addressing the question at issue here. (*People v. Cooper* (2023) 14

Cal.5th 735, 742; see, also, p. 746 fn. 11 [describing alternative argument, rendered moot].)[29]

Nonetheless, the Court of Appeal has been actively engaged with the interpretive task. Of the rash of opinions interpreting the amendments to Penal Code section 186.22, three are of interest here – *Lopez*, *Delgado*, and *Clark*. (*People v. Lopez* (2021) 73 Cal.App.5th 327, review den. Mar. 30, 2022, S273023; *People v. Delgado* (2022) 74 Cal.App.5th 1067, review den. Apr. 27, 2022, S273722; and *People v. Clark* (2022) 81 Cal.App.5th 133 [this case].)[30] Below, IDO addresses each of these, discusses the

---

[29] The question may not have been raised by the parties, but it seems as though it could have been, since "the records of conviction and gang expert testimony establishing the predicate offenses . . . merely show that two . . . gang members committed one crime each". (*Cooper*, *supra*, 14 Cal.5th 735, 743.)

[30] At least 15 other opinions have addressed aspects of the STEP Forward Act, without reaching the question accepted for review in this case. (See *Mendoza v. Super. Ct.* (2023) 91 Cal.App.5th 42, 51-54, ptn. for review filed June 5, 2023, S279968; *People v. Oliva* (2023) 89 Cal.App.5th 76, 87-89, review granted May 17, 2023, S279485 [briefing deferred, pending *People v. Rojas*, S275835]; *People v. Avalos* (2022) 85 Cal.App.5th 926, 955-956 [review not sought]; *People v. Lopez* (2022) 82 Cal.App.5th 1, 11-14, review den. Nov. 10, 2022, S276331; *People v. Salgado* (2022) 82 Cal.App.5th 376, 380-381 [review not sought]; *People v. Lee* (2022) 81 Cal.App.5th 232, 237-240, review granted Oct. 19, 2022, S275449 [briefing deferred, pending *People v. Burgos*, S274743]; *People v. Montano* (2022) 80 Cal.App.5th 82, 101-105, review den. Oct. 12, 2022, S275633; *People v. Ramirez* (2022) 79 Cal.App.5th 48, 63-64, review granted Aug. 17, 2022, S275341 [briefing deferred Oct. 12, 2022, pending *People v. Burgos*, S274743]; *People v. Perez* (2022) 78 Cal.App.5th 192, 206, review granted Aug. 17, 2022, S275090 [briefing deferred Oct. 12, 2022, pending

tension between them, and comments on the briefing by the parties.

Even before the amendments took effect, some courts saw these issues coming and began addressing the nuances of the STEP Forward Act. One of these was *Lopez*, in which the Second District considered evidence that one gang member committed a pair of murders, and another gang member committed a carjacking and robbery. (*Lopez*, *supra*, 73 Cal.App.5th 327, 344.) Characterizing this as "evidence that these gang members individually engaged in a pattern of criminal gang activity", the court measured it against the new requirement "to prove collective, not merely individual, engagement", and concluded, "No evidence was introduced at trial to establish that the crimes committed by [the two individuals] . . . constitute collective criminal activity by the . . . gang." (*Id.* at pp. 344-345.)

People v. Burgos, S274743]; *People v. Ramos* (2022) 77 Cal.App.5th 1116, 1125-1128, review den. July 27, 2022, S274781; *People v. Burgos* (2022) 77 Cal.App.5th 550, 561-562, review granted Apr. 13, 2022, S274743; *People v. Rodriguez* (2022) 75 Cal.App.5th 816, 822-823, review den. May 12, 2022, S273730; *People v. E.H.* (2022) 75 Cal.App.5th 467, 477-478 [review not sought]; *People v. Vasquez* (2022) 74 Cal.App.5th 1021, 1032-1033, review den. Apr. 26, 2022, S273462; and *People v. Sek* (2022) 74 Cal.App.5th 657, 664-665 [review not sought].) Within the last two weeks, a 16th opinion joined their ranks, and while it recognized the issue, the Court of Appeal declined to clearly choose a side. (*Rodas-Gramajo v. Super. Ct.* (2023) __ Cal.App.5th ___, ___ fn. 7 [2023 Cal.App.LEXIS 461; 2023 WL 4014085].)

Less than two months later, a different division of the Second District waded deeper into these waters. The appellant argued that the requirement of collective action imposed a burden on the prosecutor "to prove that two or more gang members committed each predicate offense in concert". The Attorney General disagreed, asserting that "proof that individual gang members committed the predicate offenses on separate occasions is sufficient to show the gang members 'collectively' engaged in a pattern of criminal activity". (*Delgado*, *supra*, 74 Cal.App.5th 1067, 1088.)

The *Delgado* court began by looking to familiar directives, offered by this Court, on statutory interpretation. "As in any case involving statutory interpretation, [an appellate court's] fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose. [The court must] begin by examining the statute's words, giving them a plain and commonsense meaning. . . . . [It] look[s] to the entire substance of the statute . . . in order to determine the scope and purpose of the provision . . . . That is, [the court] construe[s] the words in question in context, keeping in mind the nature and obvious purpose of the statute . . . . [The court] must harmonize the various parts of a statutory enactment . . . by considering the particular clause or section in the context of the statutory framework as a whole." (*Delgado*, *supra*, quoting *People v. Lewis* (2021) 11 Cal.5th 952, 961, further citations and internal quotations omitted.) "If the statutory language permits more than one reasonable interpretation, courts may consider other

aids, such as the statute's purpose, legislative history, and public policy." (*Delgado*, *supra*, quoting *Mendoza v. Fonseca McElroy Grinding Co., Inc.* (2021) 11 Cal.5th 1118, 1125, further citation omitted.)

Delgado then interpreted "the term 'collectively' in a commonsense manner to mean what it says – committed by more than one person, and not, as argued by the People, individually but on a different day." (*Delgado*, *supra*, 74 Cal.App.5th 1067, 1088-1089.) This sensibility was derived in part from the same legislative materials discussed by IDO, *ante*, including the understanding, in the Senate, that the STEP Forward Act newly "require[d] that engagement in a pattern of criminal activity must be done by members collectively, not individually." (*Id.* at p. 1089, citing SFA, *supra*, p. 4.)

The *Delgado* court went on to point out how truly minimalist the change to the predicate requirement might be if the Attorney General's argument prevailed. The key disjunctive language at issue, "committed on separate occasions or by two or more members," appeared in the statute both before and after the amendment. (*Delgado*, *supra* [comparing Pen. Code, § 186.22, subd. (e)(1), to prior versions].) The court reasoned that, if the only effect of removing "individually" was to slightly narrow this requirement, such that it was "no longer sufficient for a single individual to commit both predicate offenses on different days,"

then the requirement that the pattern be committed "collectively" would impact very few cases. (*Delgado*, *supra*.)[31]

Consistent with its obligation to "determine the Legislature's intent so as to effectuate the law's purpose" (*Scott*, *supra*), the *Delgado* court reiterated the objectives of the STEP Forward Act. "[T]he amendment was designed to 'narrow the conduct that is prosecutable, and lead[s] to enhanced sentences, as criminal street gang activity.'" (*Delgado*, *supra*, quoting Sen. Com. on Appropriations, Analysis of Assem. Bill No. 333 (Aug. 13, 2021) ("SCA") p. 1.)[32] The Act itself "likewise makes clear the Legislature's intent to *dramatically limit* the scope of the gang enhancement because of its criminalization of 'entire neighborhoods historically impacted by poverty, racial inequality, and mass incarceration,' disproportionate impact on people of color, and legitimization of severe punishment." (*Delgado*, *supra*,

---

[31] Experientially, IDO attorneys can say that cases such as the one described – where the prosecutor offers two predicates, each committed by the same individual but on two separate occasions – are relatively unusual. This might be because, in part, as a practical matter, the enhanced punishment attached to gang crimes renders it unlikely that a gang member will finish serving one sentence quickly enough to commit another gang crime and face a second prosecution within the time limits set by Penal Code section 186.22, subdivision (e)(1). Thus, the *Delgado* court's appraisal, that the Attorney General's narrow interpretation would only remove a very small class of cases from the law's reach, and thus was likely to do very little to accomplish its purpose, accurately reflects practical realities.

[32] Available at http://www.saffordlegal.com/courtesy/AB333SCA.pdf [original].

emphasis added, quoting STEP Forward Act, § 2, subd. (a), and citing subd. (d)(1)-(2) & (i).) Accordingly, the court reasoned, "Reading the amendment to [Penal Code] section 186.22, subdivision (f), to limit application of the gang enhancement to situations where individual gang members commit the predicate offenses on separate occasions would do little to further this legislative purpose." (*Delgado*, *supra*.)

Together, *Lopez* and *Delgado* formed the backdrop to the Court of Appeal decision in this case. The court began by citing the same principles of statutory interpretation. (*Clark*, *supra*, 81 Cal.App.5th 133, 144 ["fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose"], quoting *Scott*, *supra*, further citations omitted.) Nonetheless, the court reached a very different conclusion.

The Court of Appeal interpretation here has the allure of simplicity. First, the court acknowledged that use of the plural "members", in conjunction with the word "collectively", "means more than one member of the gang must have engaged in criminal conduct." (*Clark*, *supra*, quoting Pen. Code, § 186.22, subd. (f).) Building on this, the court then held that "the plain meaning of the phrase 'the offenses were committed on separate occasions or by two or more members' means there are two options for establishing the requisite pattern: (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." (*Clark*, *supra*, quoting Pen. Code, § 186.22, subd. (e)(1).)

To explain how this interpretation might still give the law full effect, the Court of Appeal pointed to the possibility of a lone gang member's actions supporting multiple predicates: "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." (*Clark*, *supra*.) This was, of course, the exact law change identified by the *Delgado* court as fundamentally too narrow to be consistent with the legislative intent. (See *Delgado*, *supra*, 74 Cal.App.5th 1067, 1089 ["no longer sufficient for a single individual to commit both predicate offenses on different days"].)

The remainder of the analysis was a criticism of *Delgado* and *Lopez*. The court characterized *Delgado* as too hastily turning to legislative intent, instead of "devot[ing] sufficient attention to the plain language of the statute." (*Clark*, *supra*, 81 Cal.App.5th 133, 145, critiquing *Delgado*, *supra*, 74 Cal.App.5th 1067, 1088-1089.) The court reasoned that the result of *Delgado's* interpretation would be that "collectively" would be "rendered surplusage." (*Clark*, *supra*.) As for *Lopez*, the court here noted the lack of "a plain language analysis of the statute pertaining to the phrases", and thus found it unpersuasive. (*Clark*, *supra*, describing *Lopez*, *supra*, 73 Cal.App.5th 327, 344-345.)

In their briefing on the merits, the parties lean into this controversy, each aligning with one side. Mr. Clark asks this

Court to follow *Delgado* and *Lopez*, and points to what he describes as "a dissonance between subdivision (e)(1), which, in order to establish a 'pattern of criminal activity,' states that predicate offenses 'were committed on separate occasions or by two or more members' and subdivision (f) which requires that gang 'members collectively engage in, or have engaged in, a pattern of criminal gang activity.'" (AOBM 13-14, citing Pen. Code, § 186.22, subd. (e)(1) & (f).) He then focuses on the meaning of "collectively", and its tethering to "members" in the amended statute. (AOBM 14.)

The Attorney General responds by suggesting the Legislature was aware of, and intended to leave intact, existing interpretations of the pattern requirement. (Respondent's Answer Brief on the Merits ("RABM") 27-30, discussing *People v. Loeun* (1997) 17 Cal.4th 1, 5-10, and *People v. Valencia* (2021) 11 Cal.5th 818, 830.)[33] He emphasizes the importance of "engage", a term he contends "should not be viewed in isolation but must be

---

[33] In support of this overall view, the Attorney General also suggests the Legislature's recognition of similar laws in other states, which apply in the manner evident in *Delgado*, indicates the Legislature could have adopted a similar construction, but chose not to. (RABM 39, citing ACPS, *supra*, p. 7, quoting, in turn, Ann. Report, *supra*, p. 44, citation omitted.) However, he misses the point. The CRPC report, and the ACPS recitation of it, highlighted a deficiency in California law, compared to other jurisdictions, and proposed correcting that flaw. The inference that the Legislature did in fact act to correct it, by passing the STEP Forward Act, is far more credible than the assumption that it willfully rejected this one aspect of the comparison.

construed together with the prepositional phrase that modifies it as an adverb." (RABM 32.)

The Attorney General also signals that he would go a step further, dialing back the STEP Forward amendments even more than the Court of Appeal did here. He criticizes the conclusion that "the two predicate offenses . . . could not both be committed by the same lone actor", and suggests the existence of the word "members", in both the prior and current versions of the statutes, undercuts that holding. (RABM 44 fn. 7.) He then offers to leave that issue on the table, but essentially, the Attorney General would have this Court conclude that the commission requirements for the predicates are *entirely* unchanged.

Turning to the broader intent of the law, the Attorney General acknowledges "an aim to strengthen the gang statute's focus on collective activity". (RABM 46.) However, he suggests "removal of the term 'individually' . . . 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." (RABM 48, emphasis added.) Thus, in his view, removal of the term has no effect on its own, but merely supports the interpretation of another change in the statute.[34]

---

[34] This seems at odds with the interpretive principle which the Attorney General repeatedly espouses, that a court should "strive to give meaning to very word in a statute and to avoid constructions that render words, phrases, or clauses superfluous". (RABM 53-54, quoting *In re C.H.* (2011) 53 Cal.4th 94, 103.)

In rebuttal, Mr. Clark rejects the Attorney General's perception (shared by the lower court here) of the statutory language as clear, unambiguous, and free from conflict. To the contrary, he argues, "[T]he Legislature's removal of the word 'individually' . . . renders the remaining word 'collective[ly]' in conflict with respondent's assertion that subdivision (e) refers to acts *individually* committed by gang members." (Appellant's Reply Brief on the Merits ("ARBM") 6-7, citing Pen. Code, § 186.22, subd. (e)(1).) He credibly accuses the Attorney General of "reactivat[ing] the word 'individually,' which the Legislature intentionally excised," thus rendering "individual acts again susceptible to the danger of being mischaracterized as undertaken for a common gang purpose". (ARBM 7.)

As noted at the outset, IDO joins Mr. Clark in suggesting that "*Delgado* and *Lopez* have the better argument." (AOBM 13.) However, IDO submits that this is not simply because the *Delgado* treatment of statutory language is better than the treatment by the Court of Appeal here. Rather, it is because the opinions on the two sides of this controversy each offer a *partial* treatment of the overall interpretive question.

The lower court here leveled a somewhat valid criticism of *Delgado* – that it engaged directly with the Legislature's intent before fully exploring whether the statutory language could be given full effect on its face. (*Clark*, *supra*, 81 Cal.App.5th 133, 145, critiquing *Delgado*, *supra*, 74 Cal.App.5th 1067, 1088-1089.) However, in its zeal to find the answer in the plain language of the statute, the Court of Appeal leaned too far in the opposite

direction, and effectively eliminated the consciously-added requirement of collective action in the predicates.

Missing from both sides of the debate is a recognition that the interpretive task is not about selecting one option over another; it is not a *choice* between plain language and intent (unless a choice is forced by inherent contradictions). Rather, as the language from *Scott* and its many progenitors makes clear, the task is to give full effect to *intent*, and to give great weight to plain language in order to *illuminate* that intent. "[A]lthough the words used by the Legislature are the most useful guide to its intent, [the courts] do not view the language of the statute in isolation." (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1083, citing *Flannery v. Prentice* (2001) 26 Cal.4th 572, 578.)

The result is an interpretive framework in which neither consideration fully gives way to the other. "[T]he 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose". (*Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 54, quoting *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; accord *California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333 ("*CSEA*"), 340, citing same.) This Court "need not follow the plain meaning of a statute when to do so would 'frustrate[] the manifest purposes of the legislation as a whole or [lead] to absurd results.'" (*CSEA*, *supra*, citations omitted; see, also, *Bank of Alameda County v. McColgan* (1945) 69 Cal.App.2d 464, 474 ["substance rather than

mere form that often governs in the construction of statutes if strict adherence to form would result in an injustice"], citations omitted.) "Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." (*Lungren*, *supra*.)

Early in this analysis, IDO offered a hypothetical scenario – the diverse and independent criminal acts of the ABC Gang. This was to illustrate the dysfunction between what appeared to be the original intent of the STEP Act, versus the far more expansive range of qualifying evidence that the *Gardeley* interpretation allowed. In the wake of STEP Forward, the same example may be of service again. Supposing that Brian's 2013 arson and Carl's 2011 grand theft were committed for the non-reputational benefit of the gang, and supposing that Brian and Carl were in fact members of the gang at those times, these crimes would satisfy the new requirements to prove the predicates were 'gang-related' and committed by members. Yet, their acts were standalone crimes, committed by individuals, with no hint of collective action. The question is, would they be eligible as predicates?

The Attorney General's interpretation of the "pattern" requirement would offer no bar to using these as predicates, because individual acts, as he sees them, can nonetheless indicate collective engagement in a pattern. Yet, the examples he uses to illustrate his point are highly suspect. His proposed scenarios include: "a single gang member committing [a] murder"

of a witness; a single gang member possessing a "gang gun"; and a gang member "selling drugs alone on a street corner". (RABM 48-49.)

The problem is, the Attorney General's scenarios each include facts which, although they temptingly paint a picture of *implied* collective activity, do not actually require collective action in order to meet the "pattern" requirement as the lower court construed it here. The gang member who commits the hypothetical murder of a witness will have committed a predicate offense regardless of whether he did so with the endorsement of other members, or entirely on his own. The gang member who possesses a "gang gun" will have established a predicate even if he purchased that gun on his own, told nobody, and never did anything with it. And the gang member "selling drugs alone" need not be shown to have coordinated his activities with any other drug seller in the gang, obtained the drugs from the gang, or otherwise received approval for his actions. In each case, the Attorney General's description suggests that collective action must have taken place, but the statute, as he construes it, will not require the drawing of any such inference, so the hypothetical prosecutor will be freed of the burden of presenting any evidence of what might be recognizable as collective action.

This separation of the facts offered from the legal standard argued highlights the crucial flaw in the interpretation embraced by the lower court and the Attorney General – that plain language controls to the *exclusion* of intent. Nothing in this Court's history suggests such a stark treatment is proper. To the

contrary, the task of an appellate court is *always* to consider a statute's language and history organically, giving due deference to both. (*Katz*, *supra*; *CSEA*, *supra*.)

As this Court recently observed, in a closely-related context, "[S]uch an interpretation is inconsistent with the legislative history indicating the Legislature was concerned with 'lax' interpretations of the prior law that allowed for overly expansive application of gang enhancements . . . and therefore sought to amend the law by 'making the standards for applying a gang enhancement more rigorous.'" (*Cooper*, *supra*, 14 Cal.5th 735, 744-745, citations omitted.) Again, the plain language of the statute is entitled to great weight, but not at the cost of the equally plain objectives of the Legislature in authoring it.

CONCLUSION

Unlike some organizations which routinely voice an opinion before this Court, IDO rarely attempts to speak as an *amicus curiae*. Yet, upon reading the decision by the lower court here, IDO was compelled to weigh in. The debate, as it stands, is over two alternate views of how to interpret a statute. IDO submits, as explained herein, that this matter should be resolved by one holistic treatment – neither ignoring plain language in favor of intent, nor ignoring intent in service of literalism.

In the everyday practical world of criminal law, systemic actors – including the Legislature, the judiciary, and the parties litigant – consistently attempt to forge a direct connection between the deterrent objective of a criminal statute and the

method which the statute applies in order to achieve that goal. They do not always succeed, and certainly, their methodologies evolve over time.

This is exactly what happened with the STEP Act and the STEP Forward Act. The former sought to deter collective criminal action, but met with limited success, because the language of the law fit imperfectly to the deterrent goal, allowing for a lineage of interpretations which only increased that disconnect. In response, the latter represents a carefully-considered legislative attempt to remedy problems of fit and realign the gang statute with its original objectives. This Court, cognizant of its obligation "to determine the Legislature's intent so as to effectuate the law's purpose" (*Scott*, *supra*), must interpret the modernized collective action requirement in a manner consistent with the STEP Forward Act's remedy.

But, in the end, what exactly does this mean? It has been suggested that this Court must make a choice between *Delgado* and *Clark*. This manifests as a choice between literal and intent-based interpretation, which then becomes a choice between protecting public safety and showing lenience.[35] At each level, these are presented as binary choices; one or the other.

---

[35] The Attorney General, in particular, leans heavily into the public safety dichotomy, suggesting an interpretation rooted in legislative intent would exempt "obviously gang-related crime" from the statute's reach. (RABM 12.) But, as noted previously, IDO's practical experience teaches otherwise.

IDO submits that *none* of this is right. This Court is not compelled to elevate literalism or substance to the exclusion of the other, nor must it sacrifice public safety in favor of defense rights (or *vice versa*). Instead, both the language of the law and the history behind it offer a better path.

As explained previously, the STEP Act suffered from a dilution of and divergence from its purpose, beginning in the era of *Gamez*, *Green*, and *Gardeley*, and carrying forward across the next 25 years. At the end of that trajectory, the STEP Act hardly resembled the law enforcement tool its creators envisioned; a framework which would enable "the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs". (Pen. Code, § 186.21.)

Instead, the Act's reach "continuously expanded through legislative amendments and court rulings",[36] such that "STEP Act enhancements are ubiquitous", despite "no empirical evidence indicating that they are effective in reducing gang crime", and ample evidence "that heavy-handed gang suppression tactics may be counterproductive." (STEP Forward Act, *supra*, § 2, subd. (g).) With this history behind it, the STEP Forward Act is best understood as a complete substantive realignment, designed to

---

[36] Again, this is not to suggest *blame* for the trajectory of the law. The point is merely that the trajectory exists, is cognizable, and must inform what comes next.

find the best way to utilize modern methodologies to achieve the original objectives.

As a result, this Court stands at an inflection point. If the Court accepts an invitation to endorse the most literal possible interpretation of the collective action requirement, setting the most relaxed possible standard for what constitutes a pattern of criminal gang activity, then this might be the beginning of a similar trajectory, at the end of which another realignment will be needed. However, drawing on a wealth of knowledge of how the STEP Act has been utilized in the courtroom, and firsthand experience with the severe disconnect between the practical application of the gang law and its original intent, IDO submits that *there is a better way*.

This Court has the opportunity to set a new trajectory – not to someplace extreme, but to an interpretation which balances both plain language and intent (*Katz*, *supra*; *CSEA*, *supra*), and ensures that public safety is protected by focusing on *criminal collectivity* (*Rodriguez*, *supra*, 55 Cal.4th 1125, 1139). This is what the STEP Act intended, and it is what the STEP Forward Act sought to instill back into the law. The success of the new law, in both achieving public safety objectives *and* addressing the wide range of harms identified as stemming from past enforcement actions, can best be achieved by an interpretation which neither subverts plain language nor disregards legislative intent. In short, IDO submits that the collective action law must be interpreted as including the collective action requirement its authors intended – nothing more, and nothing less.

Respectfully submitted this 27th day of June, 2023, by the Santa Clara County Independent Defense Counsel Office (IDO):

DocuSigned by:
Sylvia Perez-Macdonald
F693D28050E945C...

Sylvia Perez MacDonald 178518
Attorney for Amicus Curiae
IDO Director
373 West Julian Street, Suite 300
San Jose, California 95110
(408) 758-4250
sylvia.macdonald@ido.sccgov.org

DocuSigned by:
Lana Kreidie
7175E6742771142C...

Lana M. Kreidie 234034
Attorney for Amicus Curiae
IDO Assistant Director
373 West Julian Street, Suite 300
San Jose, California 95110
(408) 758-4250
lana.kreidie@ido.sccgov.org

William Safford 286948
Attorney for Amicus Curiae
P.O. Box 3486
Barrington, Illinois 60011
(847) 744-4903
saffordlegal@gmail.com

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(c)(1), I hereby certify that this filing contains 11,385 words, including footnotes, based on the count provided by Microsoft Word immediately prior to printing of the document. Pursuant to California Rules of Court, rules 8.74(b)(1)-(2) and 8.204(b)(4)-(5), the document has been formatted in a minimum of one-and-a-half line spacing and at least a 13-point font size.

Pursuant to California Rules of Court, rule 8.520(f)(4), I further certify that no party or other entity, except for the *amicus curiae*, its members, and its counsel in this matter, authored any part of the brief or made a monetary contribution intended to fund its preparation or submission.

Respectfully submitted,

By: _____

William Safford 286948
Attorney for Amicus Curiae

DECLARATION OF ELECTRONIC SERVICE

I, the undersigned, am a citizen of the United States, over 18 years of age, and not a party to this action. I hereby certify that, on or before this day, I caused a true and accurate copy of the foregoing BRIEF OF *AMICUS CURIAE* SANTA CLARA COUNTY INDEPENDENT DEFENSE COUNSEL OFFICE IN SUPPORT OF DEFENDANT AND APPELLANT CLARK to be submitted electronically to the Court via TrueFiling and served upon each of the following by the method indicated:

Paige B. Hazard, Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
paige.hazard@doj.ca.gov (by TrueFiling)
adieservice@doj.ca.gov (by TrueFiling)

OFFICE OF THE RIVERSIDE COUNTY DISTRICT ATTORNEY
appellate-unit@rivcoda.org (by TrueFiling)

Patrick Morgan Ford (for Appellant Clark)
ljlegal@sbcglobal.net (by TrueFiling)

Judge Bambi J. Moyer, Criminal Division (by U.S. Mail)
RIVERSIDE COUNTY SUPERIOR COURT
4100 Main Street
Riverside, California 92501

Executed under penalty of perjury, pursuant to the laws of the State of California, this 27th day of June, 2023.

By: _____
William Safford 286948
Attorney for Amicus Curiae

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. CLARK**
Case Number: **S275746**
Lower Court Case Number: **E075532**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **saffordlegal@gmail.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
APPLICATION	S275746_ACA_IDO
BRIEF	S275746_ACB_IDO

Service Recipients:

Person Served	Email Address	Type	Date / Time
Paige Hazard Department of Justice, Office of the Attorney General-San Diego 234939	Paige.Hazard@doj.ca.gov	e-Serve	6/27/2023 6:33:55 PM
Patrick Ford Attorney at Law 114398	ljlegal@sbcglobal.net	e-Serve	6/27/2023 6:33:55 PM
Office of the Attorney General	adieservice@doj.ca.gov	e-Serve	6/27/2023 6:33:55 PM
Office of the Riverside County District Attorney 265891	appellate-unit@rivcoda.org	e-Serve	6/27/2023 6:33:55 PM
Judge Bambi J. Moyer, Criminal Division	4100 Main Street Riverside, CA 92501	Mail	6/27/2023 6:33:55 PM
Sylvia Perez MacDonald, Director (for Amicus IDO)	sylvia.macdonald@ido.sccgov.org	e-Serve	6/27/2023 6:33:55 PM
Lana M. Kreidie, Assistant Director (for Amicus IDO)	lana.kreidie@ido.sccgov.org	e-Serve	6/27/2023 6:33:55 PM
William Safford (for Amicus IDO) 286948	saffordlegal@gmail.com	e-Serve	6/27/2023 6:33:55 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

6/27/2023
Date

/s/William Safford

Signature

Safford, William (286948)

Last Name, First Name (PNum)

Safford Legal

Law Firm