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 TO AMICI CURIAE BRIEFS

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## INTRODUCTION

The parties' briefing before the Court addresses whether a pattern of criminal gang activity under Penal Code[1] section 186.22, as amended by Assembly Bill No. 333 (AB 333), may be established by evidence of individual gang members committing separate predicate offenses or whether, instead, evidence must be presented that two or more gang members worked in concert during each predicate offense. Amici, the Office of the State Public Defender (OSPD), the Peace and Justice Law Center (PJLC), the Santa Clara County Independent Defense Counsel (IDO) and the Pacific Juvenile Defender Center (PJDC), ask this Court to interpret the statute to mean that each predicate offense must have been committed by two or more gang members acting in concert. Amici's arguments largely elaborate on the same points made by Clark and should be rejected for the reasons explained in the People's answer brief.

Principally, amici focus on the Legislature's intent in passing AB 333 to narrow the scope of the gang enhancement's application. They argue that their interpretation of the statute is necessary in order to fulfill that legislative purpose. But the unambiguous statutory text permitting lone-actor predicates can easily be harmonized with the Legislature's purpose. AB 333 made a number of changes to the gang enhancement statute that, taken together, substantially narrow its scope. Whether the

[1] Further statutory references are to the Penal Code unless otherwise indicated.

Legislature intended the particular change at issue here is a more specific question, however, and there is little support for amici's view. Rather, the other new requirements governing proof of predicate offenses—most prominently the requirement that any predicate offense must have commonly benefitted the gang—amply fulfill the legislative purpose and answer amici's stated concern that the use of lone-actor crimes as predicate offenses might not fulfill the legislative goals of AB 333.

In conjunction with their focus on the general legislative intent behind AB 333, amici point to several asserted textual problems in section 186.22 that, they argue, undermine the People's interpretation of the statute. Those arguments are also unpersuasive. The statutory language permitting the use of lone-actor predicate offenses does not conflict with any other part of the statute. Nor is there any evidence of a drafting error, or apparent likelihood of absurd consequences, that would require departure from the statute's plain text.

## ARGUMENT

### I. AMICI'S READING OF SECTION 186.22 IS NOT REQUIRED AS A MATTER OF LEGISLATIVE INTENT

The parties and amici agree that the Legislature passed AB 333 to rein in what it had come to view as overbroad application of the gang statute and to focus its application on collective criminal gang activity. (OSPD Br. 9; PJLC Br. 6-9; PJD Br. 10-11; IDO Br. 16-17; OBM 15; ABM 14-16, 45-46.) Amici focus primarily on this broad legislative intent, arguing that their reading of the gang statute to exclude the use of lone-actor crimes as predicate offenses under section 186.22, subdivision (e) is

essential to fulfill the purpose of AB 333. (IDO Br. 17, 36; PJLC Br. 8-9; PJD Br. 12.)[2] But as explained in the People's answer brief, the text of subdivision (e) is facially unambiguous in allowing 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." (*People v. Loeun* (1997) 17 Cal.4th 1, 9-10; ABM 28-29.) And the Legislature's decision to leave in place the option of using a lone-actor crime as a predicate offense is not in any tension with the overall purpose of AB 333 to narrow the scope of the gang enhancement. (See ABM 54-55.)

A statutory enactment typically involves the balancing of competing policy considerations, not the advancement of a single objective at the expense of all others. It therefore does not follow from the fact that the Legislature sought to narrow application of the gang enhancement statute that section 186.22 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 allowing for predicate offenses to

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[2] PJDC characterizes the People's position as advocating for an "expansion" of the gang statute that "removes the requirement" that predicate offenses must be committed by two or more members in concert. (PJDC Br. 15-16.) But it is the People's position that section 186.22 never included such a requirement, before or after AB 333 took effect. Amici, like Clark, espouse an interpretation of the statute that would effectively nullify the statutory phrase "on separate occasions or."

be "committed on separate occasions *or* by two or more members" (§ 186.22, subd. (e), italics added). (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'"].)

The continuing dangers presented by gang violence in California are outlined in section 186.21, which states that violent gang crimes "both individually and collectively, present a clear and present danger to public order and safety . . . ." (See also *People v. Prunty* (2015) 62 Cal.4th 59, 74 [recognizing that the Legislature has identified criminal street gangs as "pos[ing] a more serious threat to public safety than other criminals"].) While AB 333 made a number of changes designed to tighten the scope of the gang enhancement, it did not alter or repeal section 186.21. (Stats. 2021, ch. 699, § 2; see also ABM 48; IDO Br. 10, fn. 3 ["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"].)[3] In

[3] As discussed in the People's answer brief, AB 333 redefined "'criminal street gang'" (§ 186.22, subd. (f)), 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)), provided examples of gang purposes (§186.22, subd. (g)) and narrowed the list of qualifying predicate

(continued…)

passing AB 333, the Legislature thus sought to balance these competing concerns, and the question is one of degree.

Prominent among the new features of the gang enhancement statute is the requirement that any predicate offenses used to show a pattern of gang activity "commonly benefited a criminal street gang, and the common benefit from the offenses is more than reputational." (§ 186.22, subd. (e)(1).) The "question about a common benefit asks about how the specific predicate offense actually benefited the gang." (*People v. Cooper* (2023) 14 Cal.5th 735, 743.) This new requirement by itself answers the objections raised by amici that permitting lone-actor predicates would fail to fulfill the legislative purpose of AB 333. The "common benefit" requirement ensures that any predicate offense must have been committed for a collective gang purpose rather than for individual purposes, in accord with subdivision (f), and prevents the "guilt by association" that AB 333 was designed to guard against. (See ABM 46-49.) On the other hand, the reading amici propose—eliminating lone-actor predicates altogether—would do little to advance the legislative purpose, as it would simply exclude some predicate offenses that clearly were committed for a common, collective gang benefit. Whether a predicate offense was committed by a gang member acting alone or in concert with

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offenses (compare § 186.22, subd. (e)(1), with former § 186.22, subd. (e)). (ABM 15-17, 54-55.)

others says little, by itself, about whether the predicate satisfies AB 333's purpose of refocusing the gang enhancement statute on collective gang activity; in either case, the predicate might have been committed for the actual, common benefit of a street gang, or it might have been committed for individual or non-gang purposes.

Amici's arguments about the hypotheticals given in the People's answer brief illustrate the point. (PJLC Br. 15-16; OSPD Br. 15-17; IDO Br. 49-50; see ABM 37-38.) For example, IDO argues that the People's hypotheticals "do not actually require collective action in order to meet the 'pattern' requirement." (IDO Br. 50 ["the hypothetical prosecutor will be freed of the burden of presenting any evidence of what might be recognizable as collective action"].) This misses the point. The hypotheticals provided in the People's answer brief show that it is possible for lone actors to commit crimes for the collective benefit of a gang. And the "separate occasions or" clause does not operate in a vacuum. The crimes given in the examples could serve as predicate offenses establishing a pattern of criminal street gang activity only if the prosecution provides sufficient evidence to meet the *other criteria* of subdivision (e), including the common-benefit requirement. (See *Cooper*, *supra*, 14 Cal.5th at pp. 741-742.)

The fact that prosecutors may not be able to allege some lone-actor cases as predicate offenses due to an inability to prove all of the statute's requirements, including the common-benefit requirement, is in line with the intent of the Legislature to limit

the scope of the gang statute. By adding new elements to the substantive offense and enhancements, AB 333 effectively "'increase[d] the threshold for conviction of the section 186.22 offense and imposition of the enhancement,' with obvious benefit to defendants" like Clark. (*People v. Tran* (2022) 13 Cal.5th 1169, 1207.) Juries will now be instructed on the amended elements required to prove a gang enhancement, including, for example, that the predicate offenses must have "commonly benefited" the gang and that the benefit is "more than reputational." (See *Cooper*, *supra*, 14 Cal.5th at p. 742; § 186.22, subd. (e)(1).)

The question of whether the prosecution has proven that a predicate offense committed by a lone actor commonly benefited the gang is, in short, for the jury to decide. (See *Cooper*, *supra*, 14 Cal.5th at p. 742.) That such evidence may be hard to produce in some instances does not support an argument that the Legislature intended to categorically exclude evidence of predicate offenses committed by lone actors. Rather, it shows the opposite: that requiring proof of a common benefit (as well as proof relating to the other new statutory requirements) guards against the precise concerns raised by amici about overbroad application of the gang enhancement statute, while categorical exclusion of lone-actor predicates would do little to advance the purpose of AB 333.

Further, amici do not grapple with an inherent tension in their argument that the Legislature must have intended to exclude lone-actor cases as predicate offenses. Amici and appellant agree that the gang enhancement applies to a current

crime committed by a lone actor. (PJLC Br. 15 ["there is no requirement that the currently charged offense must be committed by two or more individuals"]; OSPD Br. 13; ARB 14-15.) As discussed in the People's answer brief, that the statute permits an individual actor to be sentenced to an enhancement for committing a *current* crime for the benefit of his gang is strong evidence that the legislative purpose of narrowing the statute does not extend to the exclusion of lone-actor *predicate* offenses that are shown to have commonly benefitted the gang. (§ 186.22, subd. (e)(1); ABM 43.) In other words, if the gang enhancement applies when a lone-actor gang member is convicted of committing a crime and the jury finds that the crime was committed for the benefit of his gang, there is no reason to infer that the Legislature intended to exclude the use of a similar crime that commonly benefitted the gang from serving as a predicate offense to prove a pattern of criminal gang activity. The two inquiries are closely related. (*People v. Albillar* (2010) 51 Cal.4th 47, 67 [proving gang enhancement requires evidence that defendant committed a felony for the benefit of his gang with "the specific intent to promote, further, or assist criminal conduct by gang members," italics omitted]; *Cooper*, *supra*, 14 Cal.5th at pp. 743-744 ["the question about a common benefit asks about how the specific predicate offense actually benefited the gang"].)

And indeed, evidence that the Legislature did not contemplate the categorical exclusion of lone-actor cases as gang predicates is also found in its decision to maintain crimes often committed by lone actors on the list of qualifying predicate

offenses. (ABM 50; 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 further undermines amici's arguments about any conflict between section 186.22, subdivision (e)'s predicate offense requirements and the Legislature's intent in passing AB 333.

Finally, amici's reliance on a single paragraph from one committee report as evidence that the Legislature intended for each predicate offense to be committed by two or more gang members is also unpersuasive. (OSPD Br. 11-12; PJLC Br. 11; IDO Br. 34-35.) Contrary to the assertion by OSPD, the People do not concede that this statement shows that the Legislature intended for the statute to require that each predicate crime was committed by two or more gang members. (OSPD Br. 7.) Rather, as explained in the People's answer brief, the isolated statement in one committee report is, in context, ambiguous and of little probative value. (ABM 50-51; see *West Virginia University Hospitals, Inc. v. Casey* (1991) 499 U.S. 83, 98-99.) On the whole, the legislative history on that point falls far short of compelling amici's countertextual reading of the statute. (ABM 50-51.)

## II. THERE IS NO TEXTUAL CONFLICT OR AMBIGUITY IN SECTION 186.22, AND NO EVIDENCE OF A DRAFTING ERROR, THAT WOULD SUPPORT AMICI'S PROPOSED CONSTRUCTION OF THE STATUTE

In conjunction with their reliance on the general legislative purpose behind AB 333, amici point to several purported textual problems in section 186.22 that they argue would undermine the People's interpretation of the statute. OSPD argues, for example,

that the People's reading of the statute "deprives the phrase 'collectively' of any useful function." (OSPD Br. 21.) IDO contends that the statutory text reflects a "snarl in phrasing." (IDO Br. 11-12.) And PJLC suggests that the drafters simply "erroneously failed to change the 'or' in subdivision (e) to 'and.'" (PJLC Br. 11.) These arguments are unpersuasive.

It is a bedrock principle of statutory construction that "courts should strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous," and should "harmonize statutory provisions, if possible, giving each provision full effect." (*In re C.H.* (2011) 53 Cal.4th 94, 103.) As explained in the People's answer brief, section 186.22 is readily harmonized so that all of its provisions are given meaning. There is no ambiguity or conflict that would support amici's arguments.

Removal of the words "individually or" from subdivision (f) is easily understood as eliminating any ambiguity about whether individually-oriented acts may amount to "criminal street gang" activity and underscoring the statute's renewed focus on organized, collective groups and on acts that commonly benefit the organization. (See *United States v. Hansen* (2023) __ U.S. __ [143 S.Ct. 1932, 1944] [rejecting argument that removal of two words from immigration statute changed its meaning; rather, the "streamlined formulation" of the statute "is further evidence that Congress was engaged in a cleanup project, not a renovation"]; ABM 38-44.) That statutory focus is not in any conflict with the Legislature's choice to leave in place the "clear and unambiguous"

language of subdivision (e) that "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; ABM 28-29.) As discussed, even lone-actor crimes must constitute part of a collective pattern of gang activity by, among other things, having been undertaken for the gang's common benefit. (*Ante*, p. 11.) 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. (See ABM 40-44, 49.)

PJLC's further assertion that gang members cannot "'collectively engage' in a 'pattern of criminal gang activity' without collectively 'doing or taking part' in the crimes that make up the pattern" is simply wrong. (PJLC Br. 14.) As noted by this Court, a criminal street gang "engages through its members" in a pattern of criminal gang activity. (*People v. Gardeley* (1996) 14 Cal.4th 605, 610; ABM 34-35.) The individual members of a gang may play specific roles that benefit the gang in different ways. (*People v. Johnson* (2013) 57 Cal.4th 250, 256, 262 [describing different roles individual gang members filled within the structure of the gang]; ABM 35-36.) Accordingly, it is consistent with the common structure and operation of gangs to permit a pattern of criminal activity to be established by viewing qualifying crimes collectively, whether those crimes were

undertaken by a lone actor or multiple gang members acting in concert. (ABM 33-34.)

PJLC also speculates that the failure to change "or" to "and" may be explained by the drafters' desire to minimize "strike-throughs and additions" in order to "avoid the appearance of a radical rewrite of the law." (PJLC Br. 10.) But there can be no dispute that AB 333 *is* a substantial rewrite of the gang statute, and there is nothing to suggest that the Legislature sought to conceal that fact. (IDO Br. 53 [AB 333 is "best understood as a complete substantive realignment" of the gang statute].) To the contrary, the Legislature sharply criticized the existing gang statute in its uncodified legislative findings and committee reports. (ABM 46-48.) The drafters of AB 333 made no secret of their intention to narrow and refine the statute to more specifically target activity undertaken for the common benefit of a criminal street gang. (ABM 14-16, 46-48.) There is little reason to suppose that it would have shied away from directly deleting statutory text that it intended to repeal.

Finally, the contention that the language of the statute must be reformed to correct a manifest drafting error is unfounded. It is a "basic principle of statutory and constitutional construction . . . that courts, in construing a measure, [will] not undertake to rewrite its unambiguous language." (*People v. Skinner* (1985) 39 Cal.3d 765, 775.) Disregard of that rule is justified "when it appears clear that a word has been erroneously used, and a judicial correction will best carry out the intent of the adopting body." (*Ibid.*) Literal language may also be rejected to

avoid "'absurd consequences which the Legislature did not intend.'" (*People v. Pieters* (1991) 52 Cal.3d 894, 898-899.) These principles do not support a departure from the plain statutory text in this case.

This Court's precedent illustrates the limited circumstances in which judicial correction of a statute's plain text is warranted. In *Skinner*, *supra*, 39 Cal.3d 765, for example, this Court rejected a literal reading of section 25, subdivision (b), which was adopted by the electorate in June 1982 as part of the Proposition 8 initiative measure. The new statute provided that the insanity defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act "*and*" of distinguishing right or wrong at the time of the commission of the offense. (*Skinner*, at p. 765, italics added.) The defendant in *Skinner* had strangled his wife while on a day pass from a mental hospital. (*Ibid.*) The trial court found that the defendant did not establish he was legally insane because, although he was incapable of understanding right from wrong, he understood the nature of his act. (*Ibid.*) The trial court concluded that the electorate, in using the conjunctive "and" in section 25, subdivision (b), intended to establish a stricter standard than the traditional *M'Naghten*[4] test. (*Skinner*, at p. 765.)

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[4] *M'Naghten's Case* (1843) 8 Eng.Rep. 718, 722.

This Court disagreed with the trial court's interpretation. It recognized that, in general, courts avoid rewriting unambiguous statutory language, but it pointed out that one exception to that rule applies when "it appears clear" that a word has been erroneously used and that correction is required to effectuate legislative (or electoral) intent. (*Skinner*, *supra*, 39 Cal.3d at p. 775.) This Court explained that the determination of whether the use of "and" was a drafting error depended on the intent of the electorate when it adopted Proposition 8. (*Skinner*, at p. 776.) It concluded that section 25, subdivision (b), was intended to reinstate, without modifying, the *M'Naghten* test, which used the disjunctive "or" instead of "and," and which was "itself among the fundamental principles of our criminal law." (*Skinner*, at p. 769.) The use of "and," moreover, to create a conjunctive test of insanity would significantly alter the long-understood test under *M'Naughten* and raise constitutional questions. (*Skinner*, at pp. 776-777.) This Court concluded that there was no evidence that the electorate intended such a "fundamental, far-reaching change in the law of insanity" and that the use of "and" in section 25, subdivision (b), was a drafting error. (*Skinner,* at p. 777.)

This Court's decision in *Pieters*, *supra*, 52 Cal.3d 894, involved reformation of the literal terms of a statute where those terms would have led to a manifestly absurd result in light of the legislative intent. In *Pieters*, the defendant was convicted of offering to sell narcotics (Health & Saf. Code, § 11352), and the jury found true that the narcotics weighed more than 10 pounds (Health & Saf. Code, § 11370.4, subd. (a)(2)). (*Pieters*, at p. 897.)

Before the defendant in *Pieters* committed his offense, the Legislature enacted enhancement provisions to "punish more severely" those defendants who trafficked large quantities of drugs, but it did not except those enhancements from the general provision limiting the maximum term for cases involving multiple sentences to "twice the number of years imposed as the base term under Penal Code section 1170, subdivision (b)." (*Id.* at p. 898.) After commission of the offense in *Pieters*, however, drug quantity enhancements were specifically exempted from the double-base-term limitation rule. (*Ibid.*)

The trial court sentenced the defendant in *Pieters* to a base term of three years for the drug charge and a consecutive five years for the weight enhancement allegation. (*Pieters*, *supra*, 52 Cal.3d at p. 898.) On appeal, the defendant argued that his sentence violated the double-base-term limitation in effect at the time of his offense. (*Id.* at p. 897.) This Court rejected that argument, holding that the double-base-term rule did not apply to the drug quantity enhancements. (*Id.* at p. 901.) It reasoned that, even before the express exception for those enhancements was passed, the Legislature had created an implied exception to the double-base-term rule when it established the drug quantity enhancements because a contrary interpretation would violate the "unambiguous expression of legislative purpose" to more severely punish persons dealing in large quantities of narcotics. (*Id.* at pp. 901-902, fn. 5.)

This case does not involve any circumstance similar to those highlighted in *Skinner* and *Pieters* that would justify departing

from the unambiguous language of section 186.22, subdivision (e), that permits the use of lone-actor cases as predicate offenses for purposes of the gang-enhancement statute. As explained, that provision does not conflict with any unambiguous expression of legislative intent on the particular point and is readily harmonized with the remaining statutory language and the overall purpose of AB 333.

## CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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September 19, 2023

## CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER TO AMICI CURIAE BRIEFS uses a 13-point Century Schoolbook font and contains 3,763 words.

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September 19, 2023

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