IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| THE PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br>v.<br><br>KEJUAN DARCELL CLARK,<br><br>Defendant and Appellant. | Case No. S275746<br><br>Court of Appeal<br>No. E075532<br><br>Super. Ct. No.<br>RIF1503800 |

# AMICUS CURIAE BRIEF OF THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF APPELLANT CLARK


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## AMICUS CURIAE BRIEF OF THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF APPELLANT CLARK

### INTEREST OF AMICUS

The Office of the State Public Defender (OSPD) represents indigent persons in their appeals from criminal convictions in both capital and non-capital cases and has been instructed by the Legislature to "engage in … efforts for the purpose of improving the quality of indigent defense." (Gov. Code, § 15420, subd. (b).) Further, OSPD is statutorily "authorized to appear as a friend of the court[.]" (Gov. Code, § 15423.) OSPD has a longstanding interest in the fair and uniform administration of California criminal law and in the protection of the constitutional and statutory rights of those who have been accused or convicted of crimes.

OSPD's clients regularly raise issues involving the proper interpretation and application of gang enhancements and the gang special circumstance, which often hinge on the construction of Penal Code[1] section 186.22. OSPD has participated as amicus curiae in several cases involving gang issues, including *People v. Renteria* (2022) 13 Cal.5th 951 (*Renteria)*, *People v. Valencia* (2021) 11 Cal.5th 818, *In re Lopez* (2023) 14 Cal.5th 562, and *People v. Curiel* (Nov. 25, 2019, G058604) review granted Jan. 26, 2022, S272238.

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[1] Unless otherwise specified, all further statutory references are to the Penal Code.

## INTRODUCTION

The statute at issue in this case is Assembly Bill 333, also known as the STEP Forward Act of 2021. (Stats. 2021, ch. 699, §§ 1-5) ("A.B. 333"). A.B. 333 now requires that lengthy gang enhancements be applied only to a "criminal street gang" whose members "*collectively* engage in, or have engaged in, a pattern of criminal activity." (§ 186.22, subd. (f), italics added.) This language narrows the requirement under prior law that the members could "collectively *or individually*" engage in the pattern of criminal activity. (Former § 186.22, subd. (f), italics added.)

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

Helpfully, a short answer is stated explicitly in A.B. 333's legislative history. As the Attorney General ultimately concedes, legislative analysis of A.B. 333 indicates that the statute now requires a showing that gang predicates "were committed by two or more members." (ABOM[2] at p. 50, citing Aug. 30, 2021 Sen. Floor Analysis of AB 333 (2021-2022 Reg. Sess.) as amended July 13, 2021, p. 4. ("Senate Analysis").) However, although the Court should

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[2] Answer Brief on the Merits.

give effect to this clear statement of legislative intent, the term "collectively" denotes *more* than simply crimes committed by two or more persons. As traced below, the statute requires an actual and intended benefit flowing to the gang as a whole – a requirement not met here. Thus, OSPD submits this brief both to answer the Court's question and to offer a fuller explanation for the requirement that gang members "collectively engage" in a pattern of criminal activity.

## I.
## THE TEXT OF THE STATUTE SUPPORTS A REQUIREMENT OF MULTIPLE GANG MEMBERS ACTING IN CONCERT

As the legislative findings within the bill establish, and as the Attorney General agrees, the Legislature passed A.B. 333 to address the overbroad application of the gang enhancement statute. (A.B. 333, § 2, subds. (a), (d)(1) & (2), (i); ABOM at pp. 14-15.) The Legislature noted that the STEP Act has been "continuously expanded through legislative amendments and court rulings. As a result of lax standards, STEP Act enhancements are ubiquitous." (A.B. 333, § 2, subd. (g).) Indeed, even as the prison population in California decreased by 38,000 from 2011 to 2019, the use of gang enhancements in prison sentences increased by almost 40 percent. (A.B. 333, § 2, subd. (d)(3).)

And the racial disparities flowing from these expansive interpretations are staggering. According to the California Department of Corrections and Rehabilitation's statistics, 92 percent of all those imprisoned with a gang enhancement are Black or Latino. (Committee on Revision of the Penal Code, Annual Report and Recommendations (2020) p. 44 ("Committee Report").) In Los

Angeles County, the disparities are even more severe: 98 percent of those against whom gang enhancements are imposed are persons of color. (*Ibid.*; A.B. 333, § 2, subd. (d)(4) [Legislative finding, citing Committee Report].)[3] The Legislature, responding to these flaws and racially disparate outcomes, constricted the scope of the law. Thus, as both parties agree, A.B. 333 is squarely aimed at restricting the overbroad application of the gang enhancement statute.

The legislative change at issue here is fairly straightforward: A.B. 333 changes the definition of criminal street gang from "*any* ongoing *organization*, association, or group . . . whose members *individually or* collectively engage in, or have engaged in, a pattern of criminal gang activity," (Former § 186.22, subd. (f), italics added) to "*an* ongoing, *organized* association or group . . . whose members *collectively* engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f), italics added.) The primary focus of the parties here is the removal of the disjunctive clause including the term "individually," leaving only a pattern of criminal activity in which members "collectively" engage.

One way to resolve the meaning of the Legislature's word choice is to resort to dictionary definitions. (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121–1122 ["When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word"].)

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[3] A.B. 333 was the Legislature's response to the Committee Report, and the legislative findings in the bill largely mirror the findings in the commission report.

Both parties do so. (Compare AOBM[4] at p. 14 [citing the definition "as a whole group rather than as individual persons or things"]; with ABOM at pp. 33-34 [citing definitions including "by collective acts" and "in the aggregate," "in a collective manner or capacity; in a body, in the aggregate, as a whole," "[i]n a collective sense; as a collective" "[o]f, pertaining to or derived from, a number of individuals taken or acting together"].)

Amicus adds to these definitions the following: "of, relating to, characteristic of, or made by *a number of people acting as a group*" (American Heritage Dictionary of the English Language (4th Ed. 2006) p. 362, italics added), "of, relating to, or being *a group of individuals*" and involving "*members* of a group, as *distinct from its individuals*" (Merriam-Webster's Collegiate Dictionary (10th ed., 1993) p. 225, italics added), and "of, as, or characteristic of *a group*; of or by all or *many individuals* in a group *acting together*." (Webster's New World College Dictionary (4th ed. 2005) p. 287, italics added.)

These definitions were not, however, chosen selectively simply to support a reading of the statute which favors a particular legal position. (Cf. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 300-301 (1998) [highlighting the problem of "definition shopping-the choice of which dictionary and which definition to use"].) Instead, the definitions offered by amicus and Mr. Clark supply meanings of the word "collective" which contrast it from the word "individual." These are

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[4] Appellant's Opening Brief on the Merits.

the most natural meanings to apply to this statute. In its original phrasing, the statute referred to the two terms in the disjunctive, demonstrating that the terms were understood in the alternative to one another. (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680 [“use of the word ‘or’ in a statute indicates an intention to use it disjunctively so as to designate alternative or separate categories”].) The Attorney General’s dictionary definitions, while valid, do not capture this contextual meaning.

In sum, any reading of “collectively” must account for the deletion of the word “individually.” The term “collectively” in the statute must therefore be read as “collectively *and not individually*,” as this is what the Legislature accomplished by enacting A.B. 333. The legislative history, discussed below, makes this point explicitly. A natural reading of any such definition is that predicate crimes must, at a minimum, involve two or more gang members acting in concert.

## II.
## THE LEGISLATIVE HISTORY OF A.B. 333 STATES EXPLICITLY THAT PREDICATES MUST BE COMMITTED BY “TWO OR MORE GANG MEMBERS”—A READING SUPPORTED BY THE LEGISLATURE’S EXISTING CONCERNS REGARDING LONE ACTORS

The opinion below did not engage in a complete analysis of the legislative history of A.B. 333. Thus, it failed to cite critical portions of the final legislative analysis of the bill (prepared by for the Senate but also available to the Assembly when it reconciled the changes added by the Senate). One analysis noted that existing law:

> Defines “criminal street” gang to mean any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated, . . . and whose members *individually or collectively* engage in, or have engaged in, a pattern of criminal gang activity.

(Senate Analysis, *supra*, p. 3.)

The report explains that, under the new version of the statute, “engagement in a pattern of criminal activity must be done *by members collectively, not individually.*” (Senate Analysis, at p. 4.) Even more explicitly, the report explains that A.B. 333

> *Revises the definition* of “pattern of criminal gang activity” to *additionally require* that the last of those offenses have occurred within three years of the prior offense and within three years of the current offense, *the offenses were committed by two or more members*, the offenses commonly benefited a criminal street gang, and the common benefit from the offenses is more than reputational.

(*Ibid.*, italics added)

Although the Attorney General insists that the italicized language is “ambiguous” (ABOM at p. 50), there is no linguistic uncertainty in this explanation. The analysis states unequivocally that the predicates must be “offenses committed by two or more members” (and that the offenses “commonly benefited a criminal street gang,” as a *separate* requirement). (Senate Analysis, *supra*, at p. 4.) The legislative and historical context supplied by this Court in its interpretation of the STEP Act in other cases only bolsters this reading.

Even before A.B. 333, the Legislature had expressed unique concern for "lone actor" gang crimes. As this Court explained in *Rodriguez*, the Legislature "sought to avoid punishing mere gang membership in section 186.22(a) by requiring that a person commit an underlying felony *with at least one other gang member*." (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1134, italics added.) The logic behind this limitation was the "Legislature's attempt to provide a nexus between the felonious conduct and gang activity." (*Id.* at p. 1135.) While the precise textual mechanism for excluding lone actors in *Rodriguez* was different, the overarching concern is quite similar to those applicable to predicates: lone actor crimes may have nothing to do with the gang at all, and extending punishment based on such crimes threatens to punish "mere membership" in a gang. (See *ibid.*; see also *id.* at p. 1138 [the "Legislature sought to punish gang members who acted *in concert* with other gang members in committing a felony"], italics in original.)

A similar legislative concern for lone actor crimes was outlined by this Court in its recent decision in *Renteria*. The Court noted an obvious difficulty in cases "involving a lone actor" namely that "[n]ot every crime committed by an individual gang member is for the gang's benefit or to promote criminal conduct by gang members. . . gang members can, of course, commit crimes for their own purposes." (*Renteria*, *supra*, 13 Cal.5th at p. 957.) Although the gang enhancement does permit punishment for lone actor crimes, targeting such crimes nonetheless poses substantial concerns – both constitutionally and with respect to the content of the required proof. The Legislature "consciously sought to avoid" constitutional

problems by requiring a "close[] connection" to the gang and by mandating additional proof beyond mere expert testimony about reputational benefits. (*Id*. at p. 967.) And it also imposed clear evidentiary burdens for applying enhancements to such crimes: it is only when the lone actor crime is committed for "(1) for the benefit of the gang, and (2) with specific intent to promote, further, or assist the criminal conduct of gang members" that it satisfied the "constitutional requirement of personal guilt." (*Id.* at p. 965.)

While *Rodriguez* and *Renteria* addressed different aspects of the STEP Act, the unifying theme between these cases and the present case is that lone actor gang crimes pose particular evidentiary and constitutional difficulties. It is often entirely unclear whether a given lone actor crime is committed for personal purposes or to benefit the gang as a whole. Thus, the legislative history of the STEP Act from its inception supports the distinction that Mr. Clark attempts to draw: the Legislature was concerned with the use of lone actor predicates to prove the existence of a criminal street gang and thus required the pattern of criminal activity be demonstrated using "collective[]" and not "individual[]" crimes.

The Attorney General voices concern with Mr. Clark's interpretation because now (in its view) even crimes with an "obviously" gang-related purpose will not suffice to serve as gang predicates. (ABOM at pp. 12, 48.) But which lone actor crime is "obviously" gang-related may be considerably more complicated than the Attorney General lets on. Requiring more concrete proof – by requiring that the existence of a gang be proven with evidence of

joint criminality – avoids the complications that arise in lone-actor cases.

The hypothetical crimes described by the Attorney General as supporting its "collective" action requirement illustrate the difficulties lone actor crimes pose. The Attorney General posits that gang member and drug dealer "A" whose drug sales incidentally benefit from a murder (committed by gang member "B") of a "competing drug dealer" has engaged in a "collective[]" pattern of criminal activity – "regardless of whether gang member A knew about or conspired in the murder of the competing drug salesman." (ABOM at p. 37.) Yet the Attorney General does not even provide reason to believe that the competing drug dealer was murdered for the collective purposes of the gang, much less that a street level drug-dealer (unaware of the murder, or its purpose) should be considered part of a criminal street based on a killing committed by an individual that they may not even know. Similarly, the Attorney General suggests that gang member "C" (who takes possession of "B's" firearm after the murder) "acted for the common good of his gang even if he took possession of the gun with no knowledge it was used in a murder." (*Ibid.*)

Again, the hypothetical provided by the Attorney General illustrates the problems with its theory, rather than proving that the Legislature intended for such attenuated and potentially unrelated acts to suffice to prove the existence of a gang. Gang member "C" may have (illegally?) taken the firearm for purely personal reasons entirely unrelated to the gang, for instance to sell it and buy something for his girlfriend. While gang member "B" may

have received an incidental benefit in the removal of the weapon from his person after a crime, this was not "C's" intent, and such an action may be unrelated to the organized structure of the supposed criminal street gang.

Further, none of the hypothetical defendants knew of each other's crimes, and indeed it is possible under this expansive theory that they did not even know the other members existed. (Cf. Sen. Pub. Safety Comm., A.B. 333 (2021-2022 Reg. Sess.), July 6, 2021 hearing [arguments in support of A.B. 333 by San Francisco Public Defender, a co-sponsor of the bill: "Our young clients . . . are incredulous that they can be accused of being a gang member based on decades old convictions of people they have never met and don't know"]; Assem. Pub. Safety Comm. (2021-2022 Reg. Sess.), April 6, 2021 hearing [another co-sponsor's arguments in support: "AB 333 safeguards against someone's prior convictions being used to convict another person - even though the two may have never even met"]; see also *Renteria*, *supra*, 13 Cal.5th at p. 972 [insufficient evidence of intent to benefit gang absent evidence defendant "*knew of* and thus might have intended to promote the criminal activities of his gang's members"], italics added.)

Equally striking, the Attorney General claims that, if a gang's primary activity is selling drugs, "any gang member's convictions for selling drugs in the gang's territory" may evidence the collective "pattern of criminal activity." (ABOM at p. 49.) Yet people routinely sell drugs for purely personal reasons, unrelated to benefitting anyone but themselves. (*People v. Cooper* 14 Cal.5th 735 (*Cooper*) [not all narcotics crimes are committed to benefit the gang]; see also

*Renteria*, supra, 13 Cal.5th at p. 971 [fundamental flaw in prosecution case was the lack of proof that defendant "intended his actions to be attributed to his gang" nor "does the record support a conclusion that Renteria could have reasonably anticipated the community would perceive a gang connection"].) Absent an evidentiary showing involving shared proceeds, shared protection, or some other intended common gang benefit, such conduct would not have even satisfied the "benefit" prong of the gang enhancement under *prior* law, much less the narrower requirement for predicates under A.B. 333.

And the Attorney General's argument does not even begin to grapple with the time-consuming, collateral mini-trials that will be spawned if ambiguous, lone actor crimes are permitted to be used as predicates. It is difficult to conceive of a legislative intention to focus substantial portions of a trial on the contested characteristics of predicates with uncertain gang origin or intended benefit that have nothing to do with what the defendant on trial actually did. Requiring multi-actor crimes committed for clear gang purposes will thus streamline gang prosecutions, in addition to avoiding wrongly identifying criminal street gangs.

A contrary legislative intent to allow lone actor crimes – despite their manifest difficulties – is particularly unlikely given that no court or party has even attempted to articulate a true *need* to use them as predicates. Prosecutors are still free to look through the pertinent history of crimes committed by gang members in their jurisdictions to find multi-actor gang crimes that are entirely unambiguous. And if prosecutors cannot find two multi-actor gang

crimes in the entire jurisdiction over the relevant period, there is substantial reason to believe that a criminal street gang does not exist in the first place.

The Attorney General notes that lone actor crimes are available for the enhancement and claims that it would be "odd, to say the least, for the Legislature to have contemplated that lone-actor crimes could support a gang enhancement . . . but that lone-actor crimes could not qualify as gang predicates[.]" (ABOM at p. 43.) But there is nothing "odd" about more broadly punishing *actual criminal conduct* committed by a defendant and more clearly and narrowly defining the predicates crimes that establish a criminal street gang's existence in the first instance. Little will be lost, and much time will be saved, by enforcing such a distinction.

Even the disallowed predicate causing the Attorney General the most consternation – the "assassination of a rival gang leader" (ABOM at p. 12) – is not as clear-cut as the Attorney General suggests. As an initial matter, an "assassination" usually involves two or more people. (See *id.* at p. 36 [noting that "gang members may be given a 'green light' [by other gang members] to attack a rival"], citing *People v. Gomez* (2018) 6 Cal.5th 243, 263.) Thus, cases in which multiple individuals were convicted for conspiring in, soliciting, aiding or abetting, and/or perpetrating an assassination would qualify under a reading of "collectively" encompassing "two or more individuals."[5]

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[5] A more complicated question arises when only one individual was convicted of the crime, but there is evidence suggesting that two or more individuals were involved. Such

Of course, there may exist cases of retaliation against rival gang members that truly involve a "lone wolf" – a gang member who acts without the direct support, instruction, or encouragement of other gang members. But in such cases, it may be quite difficult to discern the difference between purely personal retaliation, e.g., revenge for the loss of a friend or relative, and "official gang business." (*People v. Roberts* (2017) 13 Cal.App.5th 565, 571 [defense theory was that "shooting involved an incident of personal revenge rather than being gang related"]; see also *People v. Ochoa* (2009) 179 Cal.App.4th 650, 663 [there was "no evidentiary support for a conclusion that any 'retaliation' was anything but personal to defendant"].)

In short, there is strong evidence that the Legislature believed lone actor crimes should be handled with caution, and ultimately chose to prohibit their use as predicates.

## III.
## THE PHRASING OF SUBDIVISION (E)(1) DOES NOT MANDATE A DIFFERENT RESULT

Both the court below and the Attorney General rest their argument primarily on the language of subdivision (e)(1). The lower court reasoned that the disjunctive phrasing of subdivision (e)(1) – "the [predicate] offenses were committed on separate occasions *or by two or more members*," requires, by negative implication, that

scenarios are complicated by questions of hearsay, confrontation, and general issues of reliability of evidence supporting the guilt of the unconvicted party. However, this case does not present that issue and this Court need not, and should not, decide it.

predicates can be committed by only one member. (*People v. Clark* (2022) 81 Cal.App.5th 133, 145, italics added.) Any other interpretation, it concluded, would render "[t]he alternative option that 'the offenses were committed on separate occasions'" mere "surplusage." (*Ibid.*)

This logic suffers from two flaws. First, it fails to recognize that the phrase "collectively" (better understood in context as "collectively *and not individually*") modifies the entirety of subdivision (e)(1). Thus, the clause of subdivision (e)(1) should be read to allow predicate offenses which "were committed on separate occasions [collectively *and not individually*] or by two or more members [collectively *and not individually*]." Understood in this way, the clause simply allows the predicate requirement to be satisfied by two crimes committed on separate occasions or by two crimes, committed by two or more members, on a single occasion – but in either event they must be committed *collectively* and *not individually*. (See *People v. Delgado* (2022) 74 Cal.App.5th 1067, 1089 (*Delgado*), citing Senate Analysis at p. 4 [A.B. 333 requires "that engagement in a pattern of criminal activity must be done *by members collectively, not individually*." (Italics added.)].) At a minimum, this reading is sufficiently reasonable that the proper interpretation of the statute is ambiguous, allowing resort to A.B. 333's legislative history – which expressly answers the question. (See *Flannery v. Prentice* (2001) 26 Cal.4th 572, 579 [despite evidence in favor of one interpretation, statute "sufficiently ambiguous to warrant our consideration of evidence of the Legislature's intent beyond the words of the statute. [citation.]"].)

The second flaw is that the interpretation offered by both the Attorney General and the lower court deprives the phrase "collectively" of any useful function. Courts "should give significance to every word, phrase, and sentence of an act" and "any construction rendering certain words surplusage should be avoided." (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 121–122; see also ABOM at p. 26, citing *People v. Franco* (2018) 6 Cal.5th 433, 437 ["'[c]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.'"].)

The Attorney General's interpretation is least acceptable on this account. According to its proffered construction, the new requirement for solely "collective[]" action has no independent effect and merely "reinforces" the language of subsection (e)(1): that the predicate crimes must "commonly benefit a criminal street crime." (ABOM at p. 12 [deletion of "individually" from subdivision (f) merely "harmonizes with, and reinforces" the "commonly benefit" provision]; *id.* at p. 31 ["collectively" is "most naturally read as supporting and reinforcing the new requirement that gang predicates be committed for the common benefit of the gang"]; *id.* at p. 38 ["The alteration is consistent with and reinforces the concept otherwise reflected in the revised statutory text that gang predicates must commonly benefit the gang"]; *id.* at p. 48 [deletion of "individually" serves to "eliminate[] any ambiguity and reinforces" the commonly benefit requirement].)

The shortcoming of this construction, as the brief concedes, is that the "commonly benefit requirement" is "otherwise reflected in the revised statutory text." (ABOM at p. 38.) In other words, there

would be no need to delete "individually" from subdivision (f) to achieve this end, rendering the word "collectively" mere surplusage. (Cf. *Cooper*, *supra,* 14 Cal.5th at p. 744 [refusing to adopt a construction involving the meaning of predicates that would render A.B. 333's additional textual requirements unnecessary].)[6]

Perhaps equally important, the Attorney General's interpretation is anachronistic. The disjunctive phrase "collectively or individually" was included in the original STEP Act, which lacked any requirement that predicates "commonly benefit" the gang. (See former § 186.22, subd. (d).)[7] Indeed, there was no separate clause defining a "pattern of gang activity" to which "collectively" *could* refer. (*Ibid.*) Since the phrase "collectively or individually" predated the common benefit requirement since added by A.B. 333, the term "collectively" cannot have been intended to "reinforce" the meaning of a term that did not exist at the time it was first introduced into the statute.

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[6] The Attorney General refuses to adopt even the minimal effect attributed to "collectively" proposed by the Court of Appeal – that the same individual cannot commit both predicates – arguing that it is "not clear that so much can be read into" the statute and the issue "need not be decided here." (ABOM at p. 44, fn. 7.)

[7] In its original form, the STEP Act stated "As used in this chapter, 'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (7) of subdivision (c), which has a common symbol, whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (Former § 186.22, subd. (d) (1988).)

The Court of Appeal below appropriately recognized the flaw in depriving the term "collectively" of *any* meaning, and thus held that "multiple members of the gang must be involved in the pattern of criminal gang activity." (*Clark, supra*, 81 Cal.App.5th at p. 144.) Thus, "[i]t would not suffice to prove . . . that one gang member committed two crimes on two different occasions." (*Ibid*.) In its words, "one individual gang member on a crime spree would be insufficient to prove a collective pattern of criminal activity." (*Ibid*.) However, there is no evidence in the legislative history of A.B. 333 that this idiosyncratic scenario was even a concern of the Legislature. (*Delgado*, *supra*, 74 Cal.App.5th at p. 1089 [concluding that "[s]uch a minimal change to the statute" is inconsistent with legislative intent].)

Moreover, the lower court's analysis seems to concede the critical point: the term "collectively" in subdivision (f) is targeted at modifying the clause in subdivision (e)(1): "were committed on separate occasions or by two or more members." But in applying "collectively" to this portion of subdivision (e)(1), the lower court failed to grapple with the overwhelming textual and contextual evidence that A.B. 333 intended the meaning of "collectively *and not individually*." (*Delgado*, *supra*, 74 Cal.App.5th at p. 1089 [citing legislative history], italics added.) As explained above, properly incorporating a definition of "collectively, *and not individually*" means that neither component of the disjunctive clause can be committed by individual gang members.

## IV.
## A.B. 333 REQUIRES BOTH THAT QUALIFYING PREDICATES INVOLVE 1) MULTIPLE GANG MEMBERS ACTING IN CONCERT AND 2) THAT THE GANG MEMBERS ARE ACTING TOGETHER TO ACHIEVE A COLLECTIVE PURPOSE OF THE GANG

As detailed above, the text and legislative history of A.B. 333 indicate that predicate crimes must be committed by two or more members, acting in concert. However, as the Attorney General justifiably argues, merely because two or more gang members committed a crime together would not satisfy the "collective[]" benefit requirements for the predicate crimes. (ABOM at p. 49, citing *People v. Albillar*, (2010) 51 Cal.4th 47, 62 ["it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang"].)

The meaning of the term "collectively" may, as the Attorney General argues, include a component of collective action, as "in the aggregate, as a whole," a meaning that may also include – but is more than simply – a summing together of "two or more." (ABOM at p. 33, citing dictionary definitions.) The Legislature, while clearly expressing a definition that excluded "individual" action, appears to have *also* contemplated action for the collective benefit of the gang. A.B. 333 specifically includes the additional requirement of an "*organized* association," defined by a new requirement that predicates "commonly benefited" the gang in a non-reputational manner. (§ 186.22, subd. (e)(1).)

As this Court already held in *Cooper*, while crimes such as "robbery and the sale of narcotics typically provide a financial

benefit to the offender" the commission of such crimes could also "rationally lead to a contrary finding regarding whether the fruits of the offenses *were intended to or did* benefit the gang *as a whole*." (*Cooper*, *supra*, 14 Cal.5th at p. 743, final italics in original.) In other words, the question of whether an offense is within the gang's primary activities "is distinct from the question of whether a particular offense has 'commonly benefited a criminal street gang.'" (*Ibid*., citing § 186.22, subd. (e)(1).) Ultimately, in *Cooper*, the Court concluded that mere evidence that "there was a robbery and a sale of narcotics by gang members and that a primary activity of the gang is to commit robberies and the sale of narcotics" was insufficient to establish that the predicate crimes "commonly benefited" the gang in a non-reputational manner. (*Cooper*, *supra*, 14 Cal.5th at p. 746.)

Thus, the new structure of A.B. 333 suggests that there must be 1) an intended 2) and actual (non-reputational) benefit conferred to 3) the gang as a whole. (See *Cooper*, *supra*, 14 Cal.5th at p. 739 [evidence of predicate offenses must show "whether the gang as a whole (as opposed to the predicate offenders themselves) benefited from the offenses in a nonreputational manner"].) Neither the opinion below nor the Attorney General explain how the 2009 or the 2014 convictions of Mr. Ridgeway commonly benefited the gang as a whole, regardless of whether the offenses included two or more members. Although the Attorney General notes that the guilty plea to a lone actor burglary by Mr. Ridgeway in 2009 included a gang-allegation (ABOM at p. 56), this allegation was under prior law and therefore may have rested on a purely reputational benefit. And

neither of these convictions themselves demonstrates that the predicates "commonly benefitted" the gang as a whole rather than simply "the predicate offenders themselves." (*Cooper*, *supra*, 14 Cal.5th at p. 739.) For this reason, too, the evidence was insufficient to establish a criminal street gang under A.B. 333.

## CONCLUSION

For the reasons stated above, amicus asks the Court to hold that A.B. 333 requires that predicate crimes involve 1) two or more gang members, acting in concert and 2) a collective (intended, actual and non-reputational) benefit to the gang as a whole.

Dated: July 20, 2023        Respectfully submitted,

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## CERTIFICATE OF COUNSEL

I, Elias Batchelder, have conducted a word count of this brief using our office's computer software. On the basis of the computer-generated word count, I certify that this brief is 5,242 words in length, excluding the tables and this certificate.

Dated: July 20, 2023 Respectfully submitted,

/s/

ELIAS BATCHELDER
Supervising Deputy State Public Defender

## DECLARATION OF SERVICE

Case Name: ***People v. Clark***
Case Number: **Supreme Court Case No. S275746**
**Riverside County Superior Court No. RIF1503800**
**5DCA Case No. E075532**

I, **Ana Boyea**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95820. I served a true copy of the following document:

**AMICUS CURIAE BRIEF OF THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF APPELLANT CLARK**

by enclosing it in envelopes and placing the envelopes for collection and mailing with the United States Postal Service with postage fully prepaid on the date and at the place shown below following our ordinary business practices.

The envelopes were addressed and mailed on **July 20, 2023**, as follows:

| Hon. Bambi J. Moyer, Judge<br>Riverside County Superior Court, Dept. 54<br>4100 Main Street<br>Riverside, CA 92501 |
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The aforementioned document(s) were served electronically (via TrueFiling) to the individuals listed below on **July 20, 2023**:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **July 20, 2023**, at Sacramento County, California.

________________________________
ANA BOYEA