JUDICIAL COUNCIL OF CALIFORNIA
GOVERNMENTAL AFFAIRS
520 Capitol Mall, Suite 600 • Sacramento, California 95814-3368
Telephone 916-323-3121 • Fax 916-323-4347 • TDD 415-865-4272

TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

MARTIN HOSHINO
Administrative Director

CORY T. JASPERSON
Director, Governmental Affairs

September 1, 2021

Hon. Sydney K. Kamlager
Member of the Senate
State Capitol, Room 4062
Sacramento, California 95814

Subject: Assembly Bill 333 (Kamlager), as amended July 13, 2021—Neutral, if amended.

Dear Senator Kamlager:

The Judicial Council is neutral, if amended, on AB 333 which, among other things, requires (1) if requested by the defense in a case where a sentencing enhancement for participation in a criminal street gang is charged, that the defendant's guilt of the underlying offense first be proved and that a further proceeding on the sentencing enhancement occur after a finding of guilt and (2) a charge for active participation in a criminal street gang be tried separately from all other counts that do not otherwise require gang evidence as an element of the crime.

The Judicial Council is concerned that the bill will place new burdens on courts without achieving the author's intended purpose of excluding prejudicial evidence relating to gang activity in the case in chief when as a practical matter that evidence is necessary to proving the case in chief and will likely be presented. To avoid unnecessary duplication of efforts when facts relating to participation in a criminal street gang necessarily are presented in the case in chief, the Judicial Council is respectfully requesting amendments to proposed Penal Code section 1109 that are consistent with the following:

SEC. 5. Section 1109 is added to the Penal Code, to read:

1109. (a) If requested by the defense, a case in which a gang enhancement is charged under subdivision (b) or (d) of Section 186.22 shall be tried in separate phases as follows:

(1) The question of the defendant's guilt of the underlying offense shall be first determined. *If evidence related to an allegation of an enhancement under subdivision (b) or (d) of*

Section 186.22 is relevant and otherwise admissible to the charged offense or any defense thereto, it may be admitted during this guilt phase.

(2) If the defendant is found guilty of the underlying offense and there is an allegation of an enhancement under subdivision (b) or (d) of Section 186.22, there shall be further proceedings to the trier of fact on the question of the truth of the enhancement *to the extent there is any evidence relevant to the allegation and otherwise admissible that was not introduced in the guilt phase.* Allegations that the underlying offense was committed for the benefit of, at the direction of, or in association with, a criminal street gang and that the underlying offense was committed with the specific intent to promote, further, or assist in criminal conduct by gang members shall be proved by direct or circumstantial evidence. *Any evidence admitted in the guilt phase of a case where a gang enhancement is alleged can be used by the jury in the bifurcated hearing regarding the enhancements set forth in subdivisions (b) and (d).*

(b) If a defendant is charged with a violation of subdivision (a) of Section 186.22, this count shall be tried separately from all other counts that do not otherwise require gang evidence as an element of the crime *or gang evidence found to be relevant to the other counts by a court after a motion in limine.* This charge may be tried in the same proceeding with an allegation of an enhancement under subdivision (b) or (d) of Section 186.22.

In addition, the Judicial Council notes that if AB 333 is amended in this manner, it will reduce the council's fiscal estimate.

Please contact me at 916-323-3121 or sharon.reilly@jud.ca.gov if you would like further information or have any questions of this legislation on the judicial branch.

Sincerely,

Cory T. Jasperson
Director of Governmental Affairs

CJ/SR/lb
cc: Mr. Esteban Núñez, Director of Advocacy and Community Organizing, Anti-Recidivism Coalition
Ms. Balkis Awan, Legislative Aide, Office of Senator Sydney Kamlager
Ms. Danica R. Rodarmel, State Policy Director, San Francisco Public Defender's Office
Ms. Jessica Devencenzi, Deputy Legislative Affairs Secretary, Office of the Governor
Mr. Martin Hoshino, Administrative Director, Judicial Council of California