Case No. D074845

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

TYRONE SIMMONS,
Petitioner and Appellant,

v.

CITY OF SAN DIEGO; SAN DIEGO POLICE DEPARTMENT,
Respondents.

Appeal from a Final Order of the San Diego Superior Court,
Case No. 37-2018-00001190-CL-PT-CTL
Hon. Laura H. Parsky, Judge Presiding

Brief of Amicus Curiae American Civil Liberties Union of San Diego and Imperial Counties In Support of Petitioner-Appellant

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INTRODUCTION

After a state audit uncovered rampant errors in the CalGang system, the Legislature enacted AB 2298 to create a transparent gang designation review process. The Legislature sought to ensure that members of the public like Tyrone Simmons would have the information they need to determine whether and how to contest their erroneous designations. Consistent with due process, AB 2298 prohibits law enforcement agencies from relying on secret evidence when defending a challenge to an individual's inclusion in a statewide gang database. It also requires them to prove active gang involvement by clear and convincing evidence. The passage of AB 2298 sent a message that the Legislature was aware of the damage that a CalGang designation could do, and that it had taken measures to ensure that law enforcement agencies could not inflict that damage on anyone without good reason.

Mr. Simmons put the process created by AB 2298 to the test, but his efforts to receive a fair hearing were thwarted by a series of rulings that contradict the message the Legislature intended. The superior court violated the governing statute and due process by considering secret evidence presented during an *in camera* hearing. (I Reporter's Transcript (RT) 20:8-21; Clerk's Transcript (CT) 100.) It also permitted Respondents to use criteria issued by the California Gang Node Advisory Committee as a proxy for active gang involvement. (CT 100-101.) In so doing, it declined to hold Respondents to the far more demanding standard imposed by the Legislature.

The potential impact of these errors is far reaching. In creating a court process to challenge gang database designations, the Legislature did not intend to create a system of secret tribunals that would keep people in the dark. Yet such a system is precisely what will result if the superior court's rulings are permitted to stand. As a growing number of individuals start to challenge gang designations, this Court has the opportunity to establish much needed guidance that will allow individuals' petitions to be fully and fairly adjudicated.

The superior court committed structural error by considering secret evidence. It also failed to hold Respondents to their burden of establishing active gang involvement by clear and convincing evidence. This Court should make clear that trial courts hearing petitions pursuant to AB 2298 and Penal Code § 186.35 must not consider any evidence that is not part of the evidentiary record as limited by Penal Code § 186.35(c) and should not mechanistically use outmoded criteria to justify CalGang inclusion based on mere suspicion.

AB 2298 has the potential to help prevent erroneous listings and bring light to the designation process. This case presents the question whether that promise will be fulfilled, or law enforcement agencies will continue to rely on secret evidence, and on vague, overbroad, and outmoded criteria that could be used to designate virtually everyone living in particular communities as gang members.

CONTEXT FOR THE ENACTMENT OF AB 2298

Shortly before the passage of AB 2298, the California State Auditor issued a report on the CalGang database finding that inclusion in

the database "has the potential to seriously affect a person's life."[1] The report highlights some of the consequences of CalGang designations. For example, they have been used for employment and military-related screenings.[2] Courts have relied on them to provide "support for expert opinions that individuals were or were not gang members."[3] They have had a pronounced impact for people of color, who are included in the database in numbers vastly disproportionate to their percentage of the population.[4] The report also documented serious problems with CalGang designation procedures. Most notably, the State Auditor discovered "42 individuals in CalGang who were supposedly younger than one year of age at the time of entry—28 of whom were entered for 'admitting to being gang members.'"[5]

Aware of these errors, the racial disparities, and of community concerns about the impact of CalGang, the Legislature enacted AB 2298

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[1] California State Auditor, *Report 2015-130: The CalGang Criminal Intelligence System* (August, 2016), at 36, https://www.auditor.ca.gov/pdfs/reports/2015-130.pdf

[2] *Id*.

[3] *Id*. at 2.

[4] In 2016, 20.54% of the individuals listed in GalGang were Black, and 64.93% were Hispanic. *Id*. at 66, table B. For comparison's sake, only 6.5% of the state's population is Black or African American, while only 39.1% is Hispanic or Latino. United States Census Bureau, *Quick Facts California*, https://www.census.gov/quickfacts/ca.; see also Assembly Comm. on Pub. Safety Analysis of SB 2298 at 8 (2016).

[5] California State Auditor, *Report 2015-130* at 3.

so that individuals could challenge their gang designations. *See* Assemb. Comm. on Pub. Safety Analysis of AB 2298 at 5-6, 8 (2016).

ARGUMENT

I. COURTS CONSIDERING GANG DATABASE PETITIONS MAY NOT RELY ON SECRET EVIDENCE.

By relying on secret evidence that SDPD presented during an *in camera* hearing, the superior court violated the governing statute, which limits the evidentiary record to documentation provided to or by the petitioner. Law enforcement agencies may withhold privileged information, but that information may not then be considered by the reviewing court. These statutory limits comport with well established due process principles against secret evidence. By nevertheless considering such evidence, the superior court also violated Mr. Simmons' due process rights.

A. Penal Code § 186.35(c) Expressly Limits the Materials a Court May Consider When Determining the Merits of a Gang Database Removal Petition.

As a threshold matter, the superior court erred in considering secret evidence outside the "evidentiary record" as defined by the governing statute. "The evidentiary record for the court's determination of the petition shall be limited to the agency's statement of the basis of its designation" provided to petitioner "and the documentation provided to the agency by the person contesting" entry into the database. Penal Code § 186.35(c). The statute does not provide any exceptions to this express limitation to the evidentiary record. The Legislature would not have

"limited" the evidentiary record in this way had it intended reviewing courts to consider other types of evidence. *See Garcia v. McCutchen*, 16 Cal. 4th 469, 476 (1997) (courts "must presume that the Legislature intended every word, phrase and provision ... in a statute ... to have meaning and to perform a useful function.") (citation and quotation marks omitted).

In responding to a request for the basis of its designation, an agency need not "disclose any information protected under Section 1040 or 1041 of the Evidence Code or Section 6254 of the Government Code." Penal Code § 186.34(f). But § 186.34(f) does not authorize the agency to expand the evidentiary record by submitting such information to the court if the agency chooses not to disclose it. Nor does it authorize the court to consider that evidence when such consideration is expressly prohibited by the plain language of Penal Code 186.35(c). There is nothing in the text of the statute or in its legislative history to support Respondents' assertion that the Legislature "implicitly recognized" that courts could consider secret evidence or "assume[d] potential reliance" on it. (Resp't Brief at 33, 32). The superior court erred in rewriting the statute to conform to this assumed intention. *See Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 573 (1998) (courts "are not authorized to insert qualifying provisions not included, and may not rewrite the statute to conform to an assumed intention which does not appear from its language.") (superseded by statute on other grounds as stated in *Arias v. Superior Court*, 46 Cal. 4th 969, 977) (2009).

This plain reading does not "preclude[] law enforcement from relying on investigative materials or privileged materials in terms of

deciding who should be included in a gang database" in the first instance, as the superior court assumed. I RT 20:21-25. Instead, law enforcement may rely on such materials, but it must waive the applicable privilege as to those materials if it wishes to rely on them in court when defending a challenged designation. Given the backdrop of erroneous designations, it was not at all "unreasonable" for the Legislature to strike this balance. *Id*. Of course, any law enforcement agency is free to rely on such materials in maintaining its own gang investigations, free from disclosure. But if it wishes to use those materials to defend a challenged designation in court, and continue subjecting someone to a shared gang database and increased statewide law enforcement exposure, it must disclose them.

The statute makes clear that a court reviewing a CalGang petition denial may consider only the "evidentiary record" as explicitly defined in the statute. Penal Code § 186.35(c). The corresponding Rule of Court, Rule 3.2300(e)(2) confirms that "[t]he record is limited to the documents required by Penal Code 186.35(c)." Section 186.34(f) does not authorize reading ambiguity into the clear language of § 186.35(c) or an exception into the evidentiary limits imposed by that subsection. If an agency wishes to defend the designation of someone on a shared gang database in court, it must ensure that all evidence on which it seeks to rely becomes part of the evidentiary record by disclosing it to the petitioner. As the Legislature was necessarily aware, an agency may not use privilege as both sword and shield. *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992); *Dalitz v. Penthouse Int'l Ltd.*, 168 Cal. App. 3d 468, 477 (1985).

Indeed, even if the language of the statute was ambiguous, the Court would have to interpret it as prohibiting courts from relying on secret evidence, because the statute would otherwise be unconstitutional, as discussed below. *People v. Morera-Munoz*, 5 Cal. App. 5th 838, 856 (2016) ("The doctrine of constitutional avoidance commands courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose the constitutional reading … courts may construe statutes in a manner that renders them constitutional.") (citations, brackets and quotation marks omitted).

B. Due Process Prohibits Courts From Considering Secret Evidence Offered by Law Enforcement Agencies to Maintain Challenged Gang Database Designations.

By relying on secret evidence, the superior court "violated principles of due process upon which our judicial system depends to resolve disputes fairly and accurately." *Lynn v. Regents of Univ. of California*, 656 F.2d 1337, 1346 (9th Cir. 1981). "The system functions properly and leads to fair and accurate resolutions, only when vigorous and informed argument is possible. Such argument is not possible, however, without disclosure to the parties of the evidence submitted to the court." *Id.*; *cf. Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1381 (9th Cir. 1989) ("The risk of error is considerable when such determinations are made after hearing only one side."); *People v. Sanchez*, 18 Cal. App. 5th 727, 752 (2017) (noting "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights") (citation and quotation marks omitted).

While "the procedural requirements that are necessary to satisfy due process" may vary, "at a minimum, due process requires notice and an opportunity for a hearing." *Menefee & Son v. Dept. of Food & Agric.*, 199 Cal. App. 3d 774, 781 (1988). The superior court's decision to rely upon secret evidence ensured that neither of these most basic due process requirements were met. *See Kaur v. Holder*, 561 F.3d 957, 962 (9th Cir. 2009) ("the use of secret evidence is cabined by constitutional due process limitations. Although the Federal Rules of Evidence do not apply in administrative proceedings, we have long held that there are limits on the admissibility of evidence and that the test for admissibility includes fundamental fairness.") (citation and quotation marks omitted). No one ever provided Mr. Simmons with notice of what allegations or evidence were levied against him and discussed behind closed doors. Consequently, the court gave him no opportunity to challenge or meaningfully respond to that evidence. The lack of notice was therefore fatal to the requirement of a fair hearing.

The superior court was satisfied that there was no notice problem because "there was notice to the Petitioner that the law enforcement agency was relying on privileged information in addition to what was disclosed." (I RT 21:8-11.) But notice that a law enforcement agency intends to rely on evidence that it will never disclose is no notice at all.

In a criminal trial, if the prosecution informed the defendant that it intended to rely on secret evidence, no court would find that it had provided adequate notice. *People v. Garcia*, 67 Cal. 2d 830, 836 (1967) ("although the government is generally privileged to withhold the identity of informers, the privilege must give way when it comes into conflict with

the fundamental principle that a person accused of crime is entitled to a full and fair opportunity to defend himself."). This would constitute notice only in the Kafkaesque sense that the defendant would know that he was about to be convicted without knowing why. It certainly would not be notice in the sense that due process requires. It would not be the kind of notice that would allow the defendant to evaluate the strengths and weaknesses of the prosecution's case. Nor would it suffice to afford the defendant "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984).

That this is not a criminal proceeding, and Mr. Simmons is not a defendant, does not change the fundamental issue that Mr. Simmons never had an opportunity to mount a meaningful defense to SDPD's case. *See Lubey v. City and County of San Francisco*, 98 Cal. App. 3d 340, 342 (1979) (due process requires that a public employee be provided "an opportunity to refute the charge and to clear his name" when terminated based upon charges of misconduct that stigmatize his or her reputation, seriously impairs his or her ability to earn a living or might seriously damage his or her standing in the community) (citation, quotation marks and brackets omitted); *Roth v. Workmen's Comp. Appeals Bd.*, 20 Cal. App. 3d 452, 460 (1971) (vacating order to dismiss workers' compensation claim because case was dismissed "without affording the applicant notice and an opportunity to be heard").

The Legislature determined that petitioners' interests were sufficiently strong to place the burden on the government by clear and convincing evidence, and the process for vindicating that interest must comply with core due process protections. *See* Assemb. Comm. on Pub.

Safety Analysis of AB 2298 at 4 (2016) (AB 2298 "Mandates Basic Due Process" for people "designated in a shared gang database to challenge that designation"). Without those protections, Mr. Simmons will be forever denied the chance to know why the superior court denied his petition to remove his name from gang databases. And without such opportunity and knowledge, the hearing could not come close to meeting the requirement of "fundamental fairness." *Kaur*, 561 F.3d at 962.

C. The Superior Court's Decision to Rely Upon Secret Evidence is a Structural Error Requiring Reversal.

The superior court's reliance on secret evidence is so bound up with the final judgment that there is no way to determine whether the decision would have been the same if not for that error. It is the kind of "structural error [that] requires per se reversal because it cannot be fairly determined how [the petition] would have been resolved if the grave error had not occurred." *People v. Anzalone*, 56 Cal. 4th 545, 554 (2013). "A structural error requires reversal without regard to the strength of the evidence or other circumstances." *In re Enrique G.*, 140 Cal. App. 4th 676, 685 (2006).

Structural error exists where the error involves the kind of "basic protection whose precise effects are unmeasurable and whose denial defies analysis by 'harmless-error' standards." *People v. Blackburn*, 61 Cal. 4th 1113, 1135 (2015) (citation, brackets and quotation marks omitted); *see also Sustache-Rivera v. United States*, 221 F.3d 8, 17 (1st Cir. 2000) ("If [an error] did constitute structural error, there would be per se prejudice, and harmless error analysis, in whatever form, would not apply.").

Structural errors are errors that "implicate[] the fundamental fairness of judicial proceedings." *Diamond v. Reshko*, 239 Cal. App. 4th 828, 849 (2015). "In the civil context, structural error typically occurs when the trial court violates a party's right to due process by denying the party a fair hearing." *Aulisio v. Bancroft*, 230 Cal. App. 4th 1516, 1527 (2014) (citation and quotation marks omitted).

For example, in *Fremont Indem. Co. v. Workers' Comp. Appeals Bd.*, 153 Cal. App. 3d 965 (1984), a workers' compensation judge contacted and talked with an independent medical examiner and obtained additional medical reports to clarify his opinion after the case had been submitted. The Court of Appeal annulled the decision below and remanded the case because "[t]he right of cross-examination of witnesses is fundamental, and its denial or undue restriction is reversible error." *Id*. at 971.

The denial of a fair hearing was also structural error in *Judith P. v. Superior Court*, 102 Cal. App. 4th 535 (2002). That juvenile dependency case concerned the failure to timely serve the mother with a status report prepared by the Department of Children and Family Services ("DCFS"). She did not receive the report until the morning of the hearing, even though she was statutorily entitled to receive it at least 10 calendar days earlier. The delay compromised her ability to prepare for the hearing. This was "structural error" because it involved "basic protections, ... without which a dependency trial cannot reliably serve its function as a vehicle for determination of whether a child cannot be safely returned to its parent's custody." *Id*. at 557 (quotation marks and brackets omitted). Under these circumstances, the resulting deprivation of custody or

termination of parental rights could not "be regarded as fundamentally fair." *Id*.

The due process right to know and respond to the evidence used against someone is just as much of a "basic protection" as the right to cross-examine witnesses or to prepare for a status review hearing. Indeed, the due process violation is arguably greater here than in *Fremont.* In that case, the workers' compensation judge called the medical expert only to obtain clarification about the expert's opinion. 153 Cal. App. 3d at 968. The judge ultimately obtained additional reports from the witness but struck those reports from the record due to the petitioner's objection. *Id*. at 969. The court never made an explicit determination that this was a kind of evidence that needed to be kept from the applicant, or from similarly situated applicants in the future. Here, in contrast, the superior court overruled Mr. Simmons' objection. (I RT 20:8-21.) It then considered secret evidence, determining that it was proper for law enforcement agencies to rely on this type of evidence even while refusing to disclose it to Mr. Simmons or other AB 2298 petitioners. (CT 100.) Mr. Simmons still has no idea what secret evidence the superior court relied on, more than a year after it denied his petition.

The superior court acknowledged during the second day of the petition hearing that its decision was based, in part, on its evaluation of the secret evidence. (II RT 43:14-21.) This was confirmed in the Minute Order denying the petition, which explained that the court was relying on the evidentiary record, and that "[i]n addition, the Court has considered the limited information from April 27, 2013" that it reviewed *in camera*. March 23, 2018 Minute Order at 2. The superior court provided no

indication of the extent to which its decision was based on the secret evidence as opposed to the evidentiary record delineated in Penal Code § 186.35(c).

The superior court's inability or unwillingness to untangle the ways in which it relied upon secret evidence makes it "impossible to divine" how these proceedings would have been resolved if the "grave error" of relying on secret evidence and violating due process "had not occurred." *F.P. v. Monier*, 3 Cal. 5th 1099, 1108 (2017) (citation and quotation marks omitted). This is the kind of error that "falls within that class requiring automatic reversal because its effects are unmeasurable and def[y] analysis by harmless-error standards." *Sandquist v. Lebo Auto., Inc.*, 1 Cal. 5th 233, 261 (2016) (citation and quotation marks omitted).

II. THE SUPERIOR COURT ERRED IN ALLOWING THE VAGUE, OVERBROAD, AND OUTMODED ADVISORY COMMITTEE CRITERIA TO SERVE AS A PROXY FOR ACTIVE GANG INVOLVEMENT.

A. SDPD Was Required to Prove by Clear and Convincing Evidence that Mr. Simmons Has More Than Nominal or Passive Involvement in a Gang.

A court will order a local law enforcement agency to remove a person from all shared gang databases if, after "de novo review of the record" and arguments, the agency "has failed to establish the person's active gang membership, associate status, or affiliate status by clear and convincing evidence." Penal Code § 186.35(d).

By using the term "active" to modify alleged gang status, the Legislature incorporated the understanding of "active" as defined in

relevant case law. *See People v. Overstreet*, 42 Cal. 3d 891, 897 (1986) ("[T]he Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted."). This Court has held that only "an active gang member" may be subject to a gang injunction, and an "active" member is one "who participates in or acts in concert" with the gang in a manner that is "more than nominal, passive, inactive or purely technical." *People v. Englebrecht*, 88 Cal. App. 4th 1236, 1239 (2001); *see also People v. Castenada*, 23 Cal. 4th 743, 747 (2000) (active participation in gang requires involvement "that is more than nominal or passive"). By adopting a law on a similar subject, the Legislature intended the term "active" to incorporate the concept of active participation explained in *Englebrecht* and *Castenada*.

Respondents' attempt to dismiss *Castenada* and related cases because they involved different liberty interests is unavailing for two reasons. (Resp't Brief at 42.) First, the *Castenada* court relied on dictionary definitions to determine the meaning of "actively participates," following the fundamental canon of construction to give the words their "usual and ordinary meanings and construing them in context." 23 Cal. 4th at 747 (citations and quotation marks omitted); *see People v. Loeun*, 17 Cal. 4th 1, 9 (1997). There are no "usual and ordinary" meanings of "active participation" that are contrary to participation "that is more than nominal or passive," and any such construction would "lead to absurd results" that the exact same phrase in two sections of the same penal code have different meanings. *Id.* ("[S]tatutes must be harmonized, both internally and with each other, to the extent possible.").

In addition, the Legislature's imposition of a clear and convincing evidence standard – the same standard used in gang injunctions – reflects its determination that the petition process implicates significant liberty interests. *See Englebrecht*, 88 Cal. App. 4th at 1255-56 ("the need for a heightened standard of proof arises both from constitutional due process and more general public policy considerations."); *Weiner v. Fleischman*, 54 Cal. 3d 476, 487 (1991) ("Proof by clear and convincing evidence is required 'where particularly important individual interests or rights are at stake,' such as the termination of parental rights, involuntary commitment, and deportation.") (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983); *Renee J. v. Superior Court*, 26 Cal. 4th 735, 749 (2001) (noting that the Supreme Court imposed a clear and convincing evidence standard for termination of parental rights "[b]ecause of the fundamental nature of the rights at stake and the irreparable harm an erroneous decision to terminate them would cause") (citing *Santosky v. Kramer*, 455 U.S. 745, 769) (1982). The California Supreme Court has "recognized that the standard of proof may depend upon the gravity of the consequences that would result from an erroneous determination of the issue involved." *Harris v. City of Santa Monica*, 56 Cal. 4th 203, 238 (2013) (citation and quotation marks omitted). "The default standard of proof in civil cases is the preponderance of the evidence." *Id*. A heightened standard is "uncommon, and in fact … ordinarily recognized only when the government seeks to take unusual coercive action … against an individual." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989). The Legislature surely knew it was departing from the default evidentiary standard. Contrary to Respondents' attempt

to diminish the liberty interests at stake, it chose to adopt a heightened standard precisely because of the grave consequences of an erroneous CalGang designation.

The history of the CalGang reform legislation confirms the Legislature's awareness of concerns that CalGang "dramatically expands the criminalization of individuals and communities," as "the database is used routinely to determine who should be served with civil gang injunctions, given gang enhancements during sentencing and targeted for saturation policing." Senate Pub. Safety Comm. Analysis of SB 458 at 7 (2013); *see also* Assemb. Comm. on Pub. Safety Analysis of AB 2298 at 6 (2016). The Legislature was thus aware of the database's use in seeking gang injunctions and intended to ensure that entries into the database met the standard necessary to include individuals in a gang injunction as specified in *Englebrecht*. By adopting the clear and convincing evidence standard, the Legislature further mirrored *Englebrecht*, which required that standard to justify issuance of a gang injunction. 88 Cal. App. 4th at 1256. Accordingly, SDPD must prove by clear and convincing evidence that Mr. Simmons' "active participation" in a gang was "more than nominal or passive," in accord with the way that term is defined in case law addressing this issue. *Castenada*, 23 Cal. 4th at 747.

B. The California Gang Node Advisory Committee's CalGang Criteria, Relied Upon by the Superior Court, Cannot Provide a Basis for Establishing Active Gang Involvement by Clear and Convincing Evidence.

Clear and convincing evidence "requires a finding of high probability" based on evidence that is "so clear as to leave no substantial doubt" and "sufficiently strong to command the unhesitating assent of every reasonable mind." *In re Angelia P.*, 28 Cal. 3d 908, 919 (1981) (citation and quotation marks omitted). That demanding standard cannot be met by attempting to use the California Gang Node Advisory Committee's CalGang criteria ("Advisory Committee criteria") as a proxy for active gang involvement. In deciding otherwise, the superior court effectively rewrote the standard that the Legislature has established for maintaining a challenged gang designation. *See* II RT 44:7-17 (affirming San Diego Police Department's reliance on the Advisory Committee criteria). In so doing, the superior court ultimately held SDPD to a lower evidentiary burden than required by Penal Code § 186.35(d).

Until recently, the Advisory Committee criteria were "the required criteria that must be met to enter a gang or an individual into the CalGang system."[6] They were required to comply with § 28 of the Code of Federal Regulations, Part 23.[7] They were never intended as indicators of anything more than reasonable suspicion of gang activity, *see* 28 C.F.R. 23,.20,

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[6] Los Angeles County Sheriff's Department, Audit and Accountability Bureau, *CalGang Criminal Intelligence System Audit Project No. 2016-13-A Audit Report* (March 30, 2017) at 2, http://www.la-sheriff.org/s2/static_content/aab/documents/2016-13-A%20CalGang%20Criminal%20Int%20System%20Audit.pdf

[7] *Id*.

and it is unclear whether they are useful for even that limited purpose. Indeed, the Legislature has expressed clear skepticism about their value, having directed the California Department of Justice to reform the gang database system and adopt regulations to establish "[c]riteria for designating a person as a gang member or associate that are unambiguous, not overbroad, and consistent with empirical research on gangs and gang membership." Penal Code § 186.36(l)(2). The Ninth Circuit has also noted that "objective criteria" are inadequate to determine active gang participation, which can often be fleeting and informal. *Vasquez v. Rackauckas*, 734 F.3d 1025, 1046 & n.21 (9th Cir. 2013). The problems with the Advisory Committee criteria are evident when considering several that were applied in Mr. Simmons' case.

Among the criteria that provided the basis for Mr. Simmons' entry into the CalGang database are that he was seen: "affiliating with documented gang members," "displaying gang symbols and/or hand signs," and "wearing gang dress." (CT 9-10) Each of these criteria are, as Penal Code § 186.36(l)(2) indicates, ambiguous and overbroad.

The criterion of "affiliating" with documented gang members provides no indication of the nature or duration of a relationship that constitutes "affiliation." Without clear definition and limits, the criterion could be applied to someone who spends time with a relative who is a documented gang member, or to someone who has merely been seen in the company of gang members. Such mere proximity or incidental association cannot show gang membership, much less prove active participation by clear and convincing evidence. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("[A] person's mere propinquity to others

independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."); *Castenada*, 23 Cal. 4th at 749 (noting "mere association with a group cannot be punished unless there is proof that the defendant knows of and intends to further its illegal aims").

Any criterion for inclusion in the database based on a notion of "affiliation" that does not offer any limits on how that term may be interpreted is "so vague and standardless," *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999), that it inherently threatens "arbitrary and discriminatory application." *People ex rel. Gallo v Acuna*, 14 Cal. 4th 1090, 1116 (1997). The affiliation criterion therefore cannot provide the basis for establishing Mr. Simmons' active gang participation by clear and convincing evidence.

Nor can the allegation as to "hand signs." Individuals may engage in expressive conduct associated with gangs that does not support any allegation of active gang participation or membership. *See Gatto v. County of Sonoma*, 98 Cal. App. 4th 744, 773 (2002) (noting "a substantial number of non-gang-related youths also favor the wearing of baseball caps backward, and there was no reason to believe a member of the general public, seeing [persons] wearing their caps backward, would have thought they were gang members") (citation and quotation marks omitted). Gang culture has become a ubiquitous part of American popular culture. So even if it is true Mr. Simmons was seen using hand signals associated with gangs, that would establish nothing more than that he found something appealing about an aspect of popular culture.

The allegation as to gang dress is no less ambiguous or overbroad. According to SDPD, members of the Lincoln Park gang that Mr. Simmons is alleged to belong to "may associate with the colors Red and/or Green … [they] may also display the letters 'B' for blood, 'L' or 'LPK' for Lincoln Park and 'a green four leaf clover'. These colors and symbols can range from being bold and prominent to being subdued and subtle." (CT 10)

Based on this description, no single listed fashion choice is essential for someone to be classified as wearing Lincoln Park dress. Members "may" associate with "Red and/or Green" and "may also" display one of the key letters or symbols. Presumably, then, someone could be classified as wearing Lincoln Park gang dress based solely on having a single item of clothing with the color "Red and/or Green" in it, regardless of whether that color is "prominent" or "subdued."

The wearing of red clothing cannot justify designation in a gang database. San Diego firefighters' uniforms include arm patches that are, in part, bright red, as are some of their helmets. But presumably SDPD would not argue that firefighters are members of the Lincoln Park gang. To accept the assertion that "red" clothing justifies an inference of active gang participation would confer effectively unfettered discretion on law enforcement to designate almost anyone as a gang member. This is a result the Legislature repudiated in calling for criteria "that are unambiguous, not overbroad, and consistent with empirical research on gangs and gang membership." Penal Code § 186.36(l)(2).

Indeed, the Court of Appeal has acknowledged "the imprecision of the phrase 'gang colors.'" *Gatto*, 98 Cal. App. 4th at 774. As the court

noted, "gang colors" can "include a wide and undefined range of clothing" that is "not necessarily gang related." *Id*. at 774 n.20. For example, a "Duke University baseball cap" is blue, and "people with no known gang connections wear Duke hats." *Id*. At any time, "almost any color combination may become gang colors," and "[w]hat is innocent today may become a gang symbol tomorrow according to the whim of the gangs themselves. Were a gang (however defined) to adopt red, white, and blue as its colors or the crucifix as a symbol, every church and school would be flashing gang symbols." *Id*. (citation and quotation marks omitted).

While these examples illustrate the ambiguity and overbreadth of the Advisory Committee criteria, that is only part of the problem in allowing SDPD to rely on them when defending a challenged CalGang designation. Even if these criteria did not sweep in all sorts of purely innocent conduct that could categorize virtually anyone living in particular neighborhoods as gang members, they could at best fulfill their intended purpose of establishing reasonable suspicion of gang participation. They would remain inadequate for meeting the considerably higher burden of proving active gang involvement by clear and convincing evidence. For this, a reviewing superior court must analyze the evidence without regard for the criteria.

It is immaterial that Penal Code § 186.34 refers to "suspected" gang members, associates, or affiliates, and does not reference "active" gang membership. (Resp't Brief at 43.) This proves nothing more than that the standard for entering someone into a gang database is different than the standard for maintaining a gang designation once a person is

notified that he is suspected and elects to challenge that determination. Respondents do not deny that Penal Code § 186.35(d) requires removal of a person's name from a shared gang database if the law enforcement agency cannot prove "active" (not "suspected") gang involvement by clear and convincing evidence.

It is not for Respondents or "for this court to second-guess the wisdom of the Legislature's policy choices." *Jones v. Lodge at Torrey Pines P'ship*, 42 Cal. 4th 1158, 1185 (2008). Indeed, the precise purpose of the legislation was to create a process for people included in gang databases based only on suspicion to clear their names. *See* Assemb. Comm. on Pub. Safety Analysis of AB 2298 at 4 (2016). Just as it is not anomalous to require a probable cause standard for arrest but a higher "beyond a reasonable doubt standard" to justify conviction, it would not be odd or "anomalous" (Resp't Brief at 43) for the Legislature to conclude that there is a heightened need to ensure that the designation is appropriate under such circumstances.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the superior court, and hold that trial courts hearing petitions pursuant to AB 2298 and Penal Code § 186.35 must not consider any evidence that is not part of the evidentiary record as limited by Penal Code § 186.35(c).

Dated: April 5, 2019

Respectfully submitted,

/s/ Jonathan Markovitz

Jonathan Markovitz
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CERTIFICATE OF COMPLIANCE

I certify that the text in the attached brief contains 5790 words- as calculated by Microsoft Word, including footnotes but not the caption, the table of contents, the table of authorities, signature blocks, or this certification- and that this document was prepared in a 13-point Times New Roman font. *See* Rule of Court 8.204 (c)(1), (3).

Dated: April 5, 2019

Respectfully submitted,

/s/ Jonathan Markovitz

Jonathan Markovitz

PROOF OF SERVICE

I, the undersigned, declare: I am a resident of the State of California and over the age of eighteen years, and not a party to the within-entitled action; my business address is P.O Box 87131, San Diego, California 92138. On **April 5, 2019**, I served the within document(s), with all exhibits (if any):

1. **Application of Amicus Curiae American Civil Liberties Union of San Diego and Imperial Counties In Support of Petitioner-Appellant**

2. **Brief of Amicus Curiae American Civil Liberties Union of San Diego and Imperial Counties In Support of Petitioner-Appellant**

☒ **VIA ELECTRONIC SERVICE/TRUEFILING**: by e-filing the document(s) listed above via the Electronic Filing System (EFS) TrueFiling Portal on all parties in this action listed below.

Party	Attorney/Address Served
Respondents: City of San Diego and San Diego Police Department	Mara W. Elliott, City Attorney Sanna Singer, Assistant City Attorney Michelle A. Garland, Deputy City Attorney OFFICE OF THE CITY ATTORNEY 1200 Third Avenue, Suite 1620 San Diego, CA 92101 Telephone: (619) 533-5800 Facsimile: (619) 533-5856
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☒ **VIA U.S. MAIL**: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below.

The Honorable Laura Parsky
San Diego County Superior Court
Central Courthouse
1100 Union St., Dept. SD-1602
San Diego, CA 92101

Respondent Court

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 5, 2019, at San Diego, California.

/s/ Linda Naters
LINDA NATERS