DAVID LOY, Cal. Bar No. 229235
ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
PO Box 87131
San Diego, CA 92138-7131
Telephone: 619-232-2121
Facsimile: 619-232-0036
E-mail: davidloy@aclusandiego.org

Attorney for Amicus Curiae
AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, v. BRANDON DUNCAN, Defendant.	CASE NO. SCD256609 DA NO. ADR991 **MEMORANDUM OF POINTS AND AUTHORITIES OF AMICUS CURIAE IN SUPPORT OF DEFENDANT BRANDON DUNCAN'S MOTION TO SET ASIDE INFORMATION PURSUANT TO PENAL CODE § 995** Date: Time: Dept: Readiness: February 27, 2105 Trial: April 20, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

Brandon Duncan is a singer. Among other topics, he sings about crime, shootings, and gangs. As singers do, he talks about his songs on social media. The First Amendment protects his songs and social media posts, as it does any other artistic, musical, or personal expression. Mr. Duncan has not committed any shooting, aided and abetted any shooting, or agreed to commit any shooting. However, the state is prosecuting him under an untested statute for allegedly "promoting, furthering, or assisting" or "benefiting" from several alleged gang shootings by singing about shootings and gangs in general. The charges boil down to prosecuting Mr. Duncan because of the content of his speech. That is a clear violation of the First Amendment and the California Constitution, both of which protect speech about crime and violence, even if the speaker is recounting or lionizing criminal acts. The Constitution protects speech because "[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002). As a result, the Constitution makes "vital distinctions between words and deeds, between ideas and conduct." *Id.* The prosecution in this case crosses that line. The state may prosecute individuals for unlawful conduct. It may not prosecute them for singing about it. For that reason, the charges against Mr. Duncan are unconstitutional and must be dismissed.

BACKGROUND

In 1988, the Legislature addressed the problem of "violent street gangs" and sought "the eradication of criminal activity by street gangs." Penal Code § 186.21.[1] At the same time, the Legislature properly "recognize[d] the constitutional right … to harbor and express beliefs." *Id.* The Legislature created a new crime of "active gang participation" that punishes:

> Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.

[1] Undesignated section references are to the Penal Code.

§ 186.22(a). In 1998, as part of Proposition 21, which also concerned the problem of "street gangs and gang-related violence," 2000 Cal. Legis. Serv., Prop. 21 § 2(b), the People adopted section 182.5, using terms drawn from section 186.22:

> Notwithstanding subdivisions (a) or (b) of Section 182, any person who actively participates in any criminal street gang, as defined in subdivision (f) of Section 186.22, with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, as defined in subdivision (e) of Section 186.22, and who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by members of that gang is guilty of conspiracy to commit that felony and may be punished as specified in subdivision (a) of Section 182.

§ 182.5. To date, no reported case has addressed a prosecution under this statute.

The state has charged Brandon Duncan with violating section 182.5. According to the evidence at the preliminary hearing, individuals such as Mr. Duncan "express theirselves [sic] … through the form of rapping." 4 Preliminary Hearing Transcript ("Prelim. Tr.") 677:10-11. Detective Castro testified that Mr. Duncan created and issued an album called "Gimme Back My Bullets" on which he raps about "just being a gang member … shootings ... if you disrespect … me or the set … there's consequences to it … talking about put you in a body bag … stuff of that nature." *Id.* at 681:17-20. Mr. Duncan also created and issued an album entitled "No Safety," which has a picture of a revolver and bullets on the cover. *Id.* at 682:2-7. As characterized by the detective, the songs on that album "primarily have the same basis … talking about … having firearms … put you in a body bag if you disrespect … sex with females … the gang violence that gang members commit… shootings [and] pimping." *Id.* at 682:15-28. Detective Castro also testified "No Safety" contains lyrics about "putting people in body bags" and "I'm holding a pistol for you … We have to defend ourselves." 5 Prelim. Tr. at 851:4-8. Detective Castro contended Mr. Duncan was singing "about essentially felonious criminal conduct on the CDs 'No Safety' and 'Gimme Back My Bullets.'" 4 Prelim. Tr. 683:1-3. However, as Detective Castro admitted, "[t]here's no particular lyric" that promoted or assisted any particular shooting. 5 Prelim. Tr. 849:25. He admitted that no suspect ever told him "I committed this shooting because of gangsta rap or gangsta rap encouraged me to do that." *Id.* at 852:8-9. Finally, he admitted none of Mr. Duncan's songs refer to any of the charged shootings, and there is no evidence anyone who committed the shootings listened to Mr. Duncan's music. 6 Prelim. Tr. 948:17—949:6.

Mr. Duncan used social media to discuss and publicize his "No Safety" album. 4 Prelim. Tr. 692:25-26 ("Up on my way to the lab 'No Safety'!!!"); 700:7-8 ("profile picture" for Duncan's Twitter page was "his cover for his CD … 'No Safety.'"); 707:3-7 (Duncan "shared his album cover 'Tiny Doo No Safety' on both Facebook and Instagram"). According to Detective Castro, the posting of certain rap music on social media "promote[s] gang violence" because it "entices the younger generations to want to become or emulate these older gang members" and "to want to commit crimes." 5 Prelim Tr. 765:22, 766:6-12. Detective Castro further testified that Mr. Duncan made various posts to social media platforms such as Facebook, Twitter, and Instagram, in which Mr. Duncan was shown, for example, "tossing up … L hand signs for Lincoln." 4 Prelim. Tr. 685:17-19. Mr. Duncan posted "free my baby bro," referring to "freedom" for someone "recently incarcerated." 4 Prelim. Tr. 698:26-27—699:5.

Detective Henderson contended that Mr. Duncan engaged in "actions that would either promote further or assist … felonious criminal conduct" by making music with "lyrics being inflammatory towards other sets or rivals." 6 Prelim. Tr. at 996:7-13. In particular, he testified "there are words … or phrases within those songs" on the "No Safety" album that "promote [or] further the goal of … violent conduct." *Id.* at 997:12-13, 21-22. In addition, by talking or rapping about "the acts that gang members are doing," Mr. Duncan allegedly had "the ability to write about it" and gain "respect from … the people that have committed the violent acts" and "the community." *Id.* at 1005:18-26, 1006:5-7. Although Detective Henderson testified to "possible tangible benefit" in the form of "sales of those records glorifying those violent acts," he did not know what Mr. Duncan's album sales were before or after the alleged shootings. *Id.* at 1006:2-3, 1092:28—1093:5. The prosecution admitted there was no evidence that "any money exchanged hands between anyone and Mr. Duncan." 8 Prelim. Tr. at 1349:25-27.

As the prosecution argued, "Mr. Duncan is rapping about … the things that he's lived in the gang world" and "the violence that actually happened." *Id.* at 1316:5-10. The prosecution's theory hinges on "statements that he makes about the gang." *Id.* at 1348:18. If Mr. Duncan were "to make statements in his music" about matters "other than the gang and what the gang does, then obviously there wouldn't be a connection" to gang activity. *Id.* at 1348:19-23. To make its case,

the prosecution relied on "the lyrics that were summarized based upon Detective Castro having listened to the song," including "'guns to the head,' 'bodies in a body bag," [and] 'no safety on my pistol.'" *Id.* at 1395:12-15. As the prosecution argued, "we're not just talking about a CD of anything, of love songs. We're talking about a CD that … has a revolver that has loaded bullets or … the cylinder is loaded. And the entire CD theme and thrust of it is no safety. Meaning a revolver does not have a safety. I'm using a gun with no safety. And one of the lyrics is putting a gun to your head with no safety." *Id.* at 1350:19-25.

With respect to the social media postings, the prosecution made several arguments. First, it contended the social media posts were "presented … to show that these guys are active gang members and to show what the nature of and the goal of the gang is." *Id.* at 1313:17-19. Second, it argued they show, "I'm for this gang. I'm for what this gang does." *Id.* at 1313:10. Third, it asserted that Mr. Duncan's social media posts show he was "working on these … recordings and these statements," which "advocate and promote and further and assist felony conduct by gang members." *Id.* at 1347:7-10. Fourth, it claimed he was "posting and/or adopting" statements "that promote, further or assist the felonious criminal conduct by gang members" in the form of "shooting of rival gang members" in general, without regard to specific individuals, or "throwing up signs which advocate the gang." *Id.* at 1347:13-19.

As argued by the prosecutor, crimes committed by gang members "gave him a benefit of allowing him to promote and further the statements that he makes about the gang" in his music. *Id.* at 1348:17-18. The prosecutor contended that "as a direct basis and a direct relation to the shootings that his fellow gang members did in 2014," Mr. Duncan "was able to put out that CD 'No Safety.'" *Id.* at 1349:10-13. In addition, Mr. Duncan allegedly received "accolades" and "praise" or "promotion" for singing songs about gang conduct. *Id.* at 1349:7, 1350:8.

ISSUE PRESENTED

Does the prosecution of Mr. Duncan violate freedom of speech because the state's interpretation of section 182.5 criminalizes protected speech?

ARGUMENT

The prosecution of Mr. Duncan violates his freedom of speech. The First Amendment to the United States Constitution and Article I, section 2 of the California Constitution protect the music written and performed by Mr. Duncan. As interpreted by the prosecution and applied to Mr. Duncan, section 182.5 would violate the First Amendment and/or Article I, section 2 by punishing Mr. Duncan for the content of his speech. This Court must prevent that violation by reading the statute in a reasonable way that applies it only to conduct unprotected by the First Amendment and Article I, section 2. Because the evidence does not show that Mr. Duncan engaged in any unlawful conduct, the charges against him must be dismissed.

The Court is bound to follow the "principle encouraging early resolution of free speech cases because of the chilling effect upon the exercise of First Amendment rights caused by unnecessarily protracted litigation." *McCoy v. Hearst Corp.*, 227 Cal.App.3d 1657, 1663 (1991). That principle has special force in a criminal case, because that chilling effect "may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). The Court should therefore take this opportunity to send a clear message that prosecution for protected speech will not be tolerated.

A. The First Amendment Protects Mr. Duncan's Right to Sing His Songs and Post Statements or Images in Social Media and Prohibits the State from Imposing Punishment Based on Their Content, even if They Are Offensive.

1. Mr. Duncan's music and social media postings are protected speech.

The prosecution attacks Mr. Duncan for the songs he sings, the cover photograph on one of his albums, and posting statements or images about his album or other matters in social media. Each is pure speech protected by the Constitution. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) ("photographs … are entitled to full First Amendment protection") (quoting *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996)); *Bland v. Roberts*, 730 F.3d 368, 386-88 (4th Cir. 2013) (liking or posting on a Facebook page "constitutes speech within the meaning of the First Amendment").

The First Amendment covers "[e]ntertainment, as well as political and ideological speech," and thus protects Mr. Duncan's expression regardless of the nature of its message. *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981); *see also Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 569 (9th Cir. 1984) (First Amendment covers both "political and non-political" expression). The "life of the imagination and intellect is of comparable import to the presentation of the political process; the First Amendment reaches beyond protection of citizen participation in, and ultimate control over, governmental affairs and protects in addition the interest in free interchange of ideas and impressions for their own sake, for whatever benefit the individual may gain" from any "artistic and literary expression." *McCollum v. CBS, Inc.*, 202 Cal.App.3d 989, 999 (1988). Even allegedly "low-grade entertainment" is "inherently expressive and thus entitled to First Amendment protection." *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 391 (4th Cir. 1993).

The First Amendment guarantees both the right of "the artist to give free rein to his creative expression" and that of "the listener to receive that expression. [T]he central concern of the First Amendment ... is that there be a free flow from creator to audience of whatever message" might be conveyed. *McCollum*, 202 Cal.App.3d at 999 (citations omitted), Therefore, "free expression" is "of transcendent value to all society, and not merely to those exercising their rights." *Dombrowski*, 380 U.S. at 486.

The Supreme Court has recognized only a few "well-defined and narrowly limited classes of speech" exempt from the First Amendment. *United States v. Stevens*, 559 U.S. 460, 468-69 (2010). Those exceptions include obscenity, pornography produced with children, torts such as fraud, and true threats.[2] *Miller v. California*, 413 U.S. 15, 24 (1973) (obscenity); *Free Speech Coalition*, 535 U.S. at 246 (child pornography); *Stevens*, 559 U.S. at 468 (fraud); *Virginia v. Black*, 538 U.S. 343, 359 (2003) (true threats). Other than the "narrow categories" defined by the

[2] "Obscenity" is a narrow term of art that does not include speech merely because it is offensive. *See Miller*, 413 U.S. at 21.

Supreme Court, "all speech is protected by the First Amendment." *Tichinin v. City of Morgan Hill*, 177 Cal.App.4th 1049, 1081 (2009).

The limited exceptions recognized by the Supreme Court "cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Stevens*, 559 U.S. at 472. In particular, the Supreme Court has "rejected a State's attempt to shoehorn speech about violence into obscenity." *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2734-35 (2011). The Court struck down restrictions on violent video games in which "[v]ictims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces" and [b]lood gushes, splatters, and pools," no matter how disgusting they might be, because "disgust is not a valid basis for restricting expression." *Id.* at 2738.

Similarly, although the state may punish criminal conduct, the First Amendment protects speech about crime, even if the speaker committed the crime in question. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116-18 (1991) (striking down statute that targeted speech by accused or convicted criminals about their crimes); *Keenan v. Superior Court*, 27 Cal.4th 413, 428 (2002) (striking down statute that singled out convicted criminals' speech about their crimes); *cf. Stevens*, 559 U.S. at 469 (while government may enforce "prohibition of animal cruelty itself … *depictions* of animal cruelty" are not excluded "from 'the freedom of speech' codified in the First Amendment") (emphasis in original).

As a result, the First Amendment protects rap music, even with "vulgar and violent lyrics," given that "hyperbolic and violent language is a commonly used narrative device in rap, which functions to convey emotion and meaning—not to make real threats of violence."[3] *Bell v. Itawamba Cnty. Sch. Bd.*, 774 F.3d 280, 282, 301 (5th Cir. 2014); *see also Torries v. Hebert*, 111 F. Supp. 2d 806, 809-10, 819 (W.D. La. 2000) ("First Amendment protection extends to rap music" and "the First Amendment protection is not weakened because the music takes on an unpopular or even dangerous viewpoint," even if it is claimed to be "gangster rap" that is

[3] "Of course, the use of violent rhetorical imagery in music is not exclusive to rap." *Bell*, 774 F.3d at 302 (citing examples from music of Johnny Cash, Dixie Chicks, and Bob Marley).

"disgusting and offensive") (citations omitted). As Detective Castro admitted, Mr. Duncan "express[es]" himself "through the form of rapping," 4 Prelim. Tr. 677:10-11, and that expression falls squarely within the First Amendment.

The First Amendment protects Mr. Duncan's speech even if it endorses or encourages illegal acts (which is not conceded). "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Free Speech Coalition*, 535 U.S. at 253. As a result, speech is not outside the First Amendment "simply because it advocates an unlawful act."[4] *White v. Lee*, 227 F.3d 1214, 1227 (9th Cir. 2000). The First Amendment does not permit the government to punish advocacy of unlawful acts "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). To qualify for this narrow exception, the incitement must be "intended to produce," and in fact "likely to produce" imminent crime. *Hess v. Indiana*, 414 U.S. 105, 109 (1973). A "tendency to lead to violence" or the "advocacy of illegal action at some indefinite future time … is not sufficient to permit the State to punish [a person's] speech." *Id.* at 108-09. Under this settled rule, the First Amendment protects speech that "merely endorse[s] or encourage[s] the violent actions of others." *Planned Parenthood of Columbia/Willamette, Inc. v. American Coal. of Life Activists*, 290 F.3d 1058, 1072 (9th Cir. 2002). This principle does not apply "only to political discourse," and "all expression" must "meet the *Brandenburg* test before its regulation for its tendency to incite violence is permitted." *James v. Meow Media, Inc.*, 300 F.3d 683, 699 (6th Cir. 2002); *see also Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1024 (5th Cir. 1987) (rejecting contention that "non-political speech" should be subject to "less stringent standard than the *Brandenburg* test"). In particular, "gangster rap" is subject to *Brandenburg* and does "not in and of itself incite imminent lawless action under *Brandenburg*." *Torries*, 111 F. Supp. 2d at 820.

[4] This case does not involve solicitation of crime, which requires asking another to commit a specified crime with intent that the crime be committed and which is unprotected by the First Amendment. § 653f; *McCollum*, 202 Cal.App.3d at 1000.

Mr. Duncan's speech does not fall within any narrowly defined exception to the First Amendment, nor can one be manufactured to justify punishing his speech. The state cannot exempt this case from the First Amendment merely by accusing Mr. Duncan of "gang conspiracy." To be sure, the First Amendment does not protect traditional conspiracy, the essence of which is agreement to commit an unlawful act. *Iannelli v. United States*, 420 U.S. 770, 777 (1975); *United States v. Pulido*, 69 F.3d 192, 209 (7th Cir. 1995). However, this is not a traditional conspiracy case. The prosecution alleges no agreement by Mr. Duncan to commit a crime, and section 182.5 requires none. *People v. Johnson*, 57 Cal.4th 250, 262 (2013). The "State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). Otherwise, the government could define the First Amendment out of existence simply by labeling speech unlawful. To state that position is to refute it.

2. The First Amendment prohibits punishment of protected speech based on its content.

Above all else, the First Amendment means that government has no power to punish protected expression "because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). As the Supreme Court has held, "one man's vulgarity is another's lyric," and "the "Constitution leaves matters of taste and style" to the individual precisely "because governmental officials cannot make principled distinctions in this area." *Cohen v. California*, 403 U.S. 15, 25 (1971). It is therefore "well established that speech may not be prohibited because it concerns subjects offending our sensibilities." *Free Speech Coalition*, 535 U.S. at 245. Any "esthetic and moral judgments" about the value of protected expression "are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000). Speech "is not actionable simply because it is 'base and malignant'" and "may not be suppressed simply because it is offensive." *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1199 (9th Cir. 1989).

Therefore, speech may not be punished merely because the government deems it "valueless or unnecessary." *Stevens*, 559 U.S. at 471. As the California Supreme Court recently confirmed, "We cannot be influenced ... by the perception that the regulation in question is not a

major one because the speech is not very important. The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly." *People v. Chandler*, 60 Cal.4th 508, 524 (2014).

B. To Prevent the Prosecution from Violating Mr. Duncan's First Amendment Rights, the Court Must Find that Section 182.5 Does Not Punish or Burden Protected Speech.

With First Amendment principles in mind, this brief turns to the proper construction of section 182.5 as applied to the facts of this case. Though adopted by initiative, section 182.5 is construed like any statute. *People v. Lopez*, 34 Cal.4th 1002, 1006 (2005). The Court must avoid a construction that would produce absurd or unconstitutional results. *In re Greg F.*, 55 Cal.4th 393, 406 (2012); *People v. Freeman*, 46 Cal.3d 419, 425 (1988). The Court "must give the benefit of any doubt to protecting rather than stifling speech." *Citizens United v. FEC*, 558 U.S. 310, 327 (2010). Therefore, "a statute must be construed, if reasonably possible, in a manner that avoids a serious constitutional question," especially "[t]o avoid substantial First Amendment concerns associated with criminalizing speech." *Chandler*, 60 Cal.4th at 524-25. As construed by the prosecution and applied to Mr. Duncan, section 182.5 would violate the First Amendment by penalizing protected speech. The Court must reject that interpretation and instead construe the statute only to reach conduct unprotected by the First Amendment, as California law requires.

1. Although the California Supreme Court has discussed how section 182.5 differs from traditional conspiracy, it has not addressed whether section 182.5 violates the First Amendment as applied to specific facts.

Though it imposes the same punishment as traditional conspiracy, section 182.5 differs from traditional conspiracy in several ways, two of which are salient.[5] First, it "does not require any prior agreement" to commit a crime. *Johnson*, 57 Cal.4th at 262. Second, it punishes "an active and knowing participant who merely *benefits* from the crime's commission, even if he or

[5] The other differences are that section 182.5 applies to "an active gang participant with knowledge of other members' pattern of criminal gang activity" instead of any person, relates "only to the commission of a felony," and "requires the actual commission of felonious criminal conduct as either an attempt or a completed crime." *Johnson*, 57 Cal.4th at 261.

she did not promote, further, or assist in the commission of that particular substantive offense." *Id* (emphasis in original).

However, by explaining how section 182.5 differs from traditional conspiracy, *Johnson* did not address, much less decide, the question whether section 182.5 violates the Constitution as applied to protected speech such as Mr. Duncan's. The issue in *Johnson* was "whether one may conspire to actively participate in a criminal street gang" in violation of sections 182 and 186.22. 57 Cal.4th at 255. The court discussed section 182.5 only to distinguish it from traditional conspiracy, holding that "[t]he creation of a new basis for conspiracy liability under section 182.5 does not reflect a legislative intent to *preclude* the use of section 186.22(a) as an object of a traditional conspiracy under section 182," because "sections 182 and 182.5 are quite different provisions." *Id.* at 263 (emphasis in original). The court said nothing about whether section 182.5 violates the First Amendment as applied to certain facts, because that question was not before the court. "It is axiomatic that cases are not authority for propositions not considered." *People v. Jennings*, 50 Cal.4th 616, 684 (2010). Therefore, while *Johnson* aids in construing section 182.5, it says nothing about whether prosecuting Mr. Duncan is constitutional or how the statute must be interpreted to avoid First Amendment violations in particular cases.

2. Properly construed, section 182.5 is not unconstitutional on its face, but the prosecution's theory would unconstitutionally punish Mr. Duncan for engaging in protected speech on the facts of this case.

Properly construed, section 182.5 does not violate freedom of speech on its face, but as interpreted by the prosecution, it would violate the First Amendment as applied to Mr. Duncan by criminalizing his protected speech.

a. As construed by California courts, the term "promotes, furthers, or assists" means "aiding and abetting," which Mr. Duncan did not commit.

California law rejects the contention that Mr. Duncan can "promote, further, or assist" a crime by singing his songs or posting to social media. As suggested at the preliminary hearing, the term "promotes, furthers, or assists" means "aiding and abetting," 8 Prelim. Tr. 1317:14-18, which the evidence against Mr. Duncan does not establish. In construing section 186.22, the Court of Appeal held that "the phrase 'promote, further, or assist' … has been consistently used by

the courts to describe 'aiding and abetting.'" *In re Alberto R.*, 235 Cal.App.3d 1309, 1322 (1991); *see also People v. Castenada*, 23 Cal.4th 743, 749 (2000) ("those who promote, further, or assist a specific felony" have "aided and abetted a separate felony offense"). It must be construed the same way in section 182.5, as must all terms drawn from section 186.22. The People were necessarily aware of the "long-standing judicial construction of the phrase ['promotes, furthers, or assists'] as used in other Penal Code statutes and intended to incorporate it" in section 182.5. *People v. Jones*, 25 Cal.4th 98, 109 (2001); *see also People v. Masbruch*, 13 Cal.4th 1001, 1007 (1996) ("Where a statute is framed in language of an earlier enactment on the same or an analogous subject, and that enactment has been judicially construed, the Legislature is presumed to have adopted that construction."). Therefore, as with section 182.66, "[o]ne may promote, further, or assist in the felonious conduct" only by "(1) directly perpetrating the felony with gang members or (2) aiding and abetting gang members in the commission of the felony." *People v. Johnson*, 229 Cal.App.4th 910, 920-21 (2014).

The evidence does not establish that Mr. Duncan either committed or aided and abetted any underlying felony. As with section 186.22, the defendant must aid and abet "a specific felony committed by gang members." *Casteneda*, 23 Cal.4th at 749. The statute thus requires the aiding and abetting of "*specific conduct* of gang members and not inchoate future conduct."[6] *People v. Rodriguez*, 55 Cal.4th 1125, 1137 (2012) (emphasis in original); *see also Johnson*, 57 Cal.4th at 262 (section 182.5 "requires the actual commission of felonious criminal conduct as either an attempt or a completed crime"). To aid and abet, one must provide the required assistance with the necessary state of mind before or when the crime is committed, not afterward.[7] *People v. Delgado*, 56 Cal.4th 480, 486 (2013); *People v. Nguyen*, 21 Cal.App.4th 518, 530-32 (1993);

[6] For this reason, the prosecution cannot show a violation of section 182.5 on the contention that rap music "entices the younger generations to want to become or emulate these older gang members" or "to want to commit crimes" in general at some unspecified time. 5 Prelim. Tr. 766:6-12. In addition, such a contention would raise serious First Amendment problems in light of the stringent *Brandenburg* standard.

[7] Assistance after a crime was committed, with the necessary intent, makes one an accessory after the fact. § 32; *Manson*, 71 Cal.App.3d at 38. There is no evidence Mr. Duncan is an accessory after the fact to any crime.

People v. Manson, 71 Cal.App.3d 1, 38 (1977). There is no evidence Mr. Duncan did any of the above, and therefore he may not be charged as one who "promotes, furthers, or assists" a felony committed by a gang member.

Based on the First Amendment, California law has rejected any claim that the distribution of allegedly "inflammatory" music can be punished on the ground it "promote[s]" crime. 6 Prelim. Tr. 996:7-13. The Court of Appeal held that a musician could not be found liable for inducing a listener's suicide even though the "words and music of his songs and even the album covers for his records" conveyed the message "that life is filled with nothing but despair and hopelessness and suicide is not only acceptable, but desirable." *McCollum*, 202 Cal.App.3d at 995. As the court held, "Plaintiffs' argument that speech may be punished on the ground it has a tendency to lead to suicide or other violence is precisely the doctrine rejected by the Supreme Court." *Id.* at 1001 (citing *Hess*, 414 U.S. at 107-09). The court therefore held that the musician could not be held liable for the "aiding and abetting of a specific suicidal act" by recording and releasing music endorsing suicide. *Id.* at 1007.

That principle applies directly to this case. If the musician in *McCollum* could not be held liable for aiding and abetting suicide by making music about suicide, Mr. Duncan cannot be punished for aiding and abetting crime by singing about crime. The First Amendment principle is the same in both cases—music alone does not aid and abet. Because it contains no incitement as defined in *Brandenburg*, "gangster rap" remains squarely protected by the First Amendment. *Torries*, 111 F. Supp. 2d at 819-20; *cf. Olivia N. v. National Broadcasting Co.*, 126 Cal.App.3d 488, 494 (1981) (First Amendment prohibited imposing liability for rape of child on producers of movie that included rape scene because movie contained no "'incitement' within the meaning of *Brandenburg*"). Indeed, that principle applies even more strongly here, because unlike in *McCollum*, there is no evidence that anyone who committed the charged acts in fact heard the music at issue. As a result, the state cannot prosecute Mr. Duncan for "promoting, assisting, or furthering" under section 182.5.

b. The prosecution's theory of "benefits" would unconstitutionally punish Mr. Duncan for the content of his speech and improperly criminalize many other instances of protected speech.

The term "benefits" is not defined in section 182.5. Ordinarily, it means "anything contributing to an improvement in condition, advantage, help, or profit." *Alberto R.*, 235 Cal.App.3d at 1322. To comply with the First Amendment, however, that definition must exclude protected speech. Otherwise, the statute would violate the First Amendment as applied to Mr. Duncan by punishing him for the content of his speech.

Though it may punish criminal conduct, the state may not criminalize speech about crime, even the speech of convicted criminals discussing their proven crimes.[8] In a case arising from publication of a convicted criminal's memoirs, the Supreme Court struck down a statute that escrowed income from speech by anyone "accused or convicted of a crime … with respect to the reenactment of such crime, or … the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime." *Simon & Schuster*, 502 U.S. at 109. As the Court held, the statute "plainly impose[d] a financial disincentive only on speech of a particular content," *i.e.*, reenactment or recollection of crimes. *Id.* at 116. Though accounts of crime may be offensive, the "fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 118 (citations and quotation marks omitted). The Supreme Court then held the statute was unconstitutional because it was "significantly overinclusive" and burdened speech unrelated to the state's interests. *Id.* at 121.

[8] This case does not involve the unique context of jail, prison, probation, or parole. *See Betts v. McCaughtry*, 827 F. Supp. 1400, 1407 (W.D. Wis. 1993), *aff'd*, 19 F.3d 21 (7th Cir. 1994) (upholding prison policy of denying access to music "tapes that advocate or encourage violence"); *cf. Bailey v. Loggins*, 32 Cal.3d 907, 920 (1982) (allowing censorship of prison newspapers); *People v. Peck*, 52 Cal.App.4th 351, 362 (1996) ("probationer is not entitled to the same degree of constitutional protection as other citizens").

Following *Simon & Schuster*, the California Supreme Court struck down a statute that imposed "an involuntary trust" on "a convicted felon's 'proceeds' from expressive 'materials' … that 'include or are based on' the 'story' of a felony for which the felon was convicted." *Keenan*, 27 Cal.4th at 416. As in *Simon & Schuster*, the statute imposed "a direct financial disincentive on speech or expression about a particular subject"—"discussions of crime"—by targeting a "felon's proceeds from books, films, articles, recordings, broadcasts, interviews, or performances that include the story of the felon's crime." *Id.* at 427-28. The statute violated the First Amendment because it swept "within its ambit a wide range of protected speech" unrelated to the state's interests, in which "[o]ne might mention past felonies as relevant to personal redemption; warn from experience of the consequences of crime; critically evaluate one's encounter with the criminal justice system; document scandal and corruption in government and business; describe the conditions of prison life; or provide an inside look at the criminal underworld." *Id.* at 433-35.

Under *Simon & Schuster* and *Keenan*, the prosecution's interpretation of section 182.5 violates the First Amendment. The prosecution contends that Mr. Duncan "benefits" from alleged felonies committed by gang members in two ways: (1) he sings about "the ins and outs of the shootings or the violent acts … that gang members are doing," and (2) he receives "accolades," "praise," or "respect" for those songs. 6 Prelim. Tr. 1005:23-24, 1006:5; 8 Prelim. Tr. 1349:7. In either case, that theory violates the First Amendment because it imposes a clear "disincentive on speech or expression about a particular subject." *Keenan*, 27 Cal.4th at 427-28. If the First Amendment prohibits sequestering income from the memoirs of proven criminals, it certainly prohibits punishing Mr. Duncan because he allegedly sings about acts committed by gang members or receives "accolades," "praise," or "respect" for doing so.

The holdings of *Simon & Schuster* and *Keenan* "apply with no less force" to this case "merely because the remedy is criminal. The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). Indeed, the violation is more egregious here, because unlike in *Simon & Schuster* and *Keenan*, the state has neither alleged nor proved that Mr. Duncan committed any act discussed in his music. If the speakers in *Simon & Schuster* and *Keenan* did not forfeit their First

Amendment rights to discuss the crimes of which they were convicted, then Mr. Duncan certainly does not forfeit his First Amendment right to sing about acts allegedly associated with gangs merely because he is accused of being a gang member.

The prosecution's argument violates "not only the free speech rights of the author or creator, but also the reciprocal First Amendment right of the work's audience to *receive* protected communications." *Keenan*, 27 Cal.4th at 429 n.15 (emphasis in original). The First Amendment violation is all the more severe for taking the form of criminal prosecution, because "imposing criminal penalties on protected speech is a stark example of speech suppression." *Free Speech Coalition*, 535 U.S. at 244. It is "too evident to require elaboration that such penalties would have an inhibiting effect upon the exercise of First Amendment rights." *Freeman*, 46 Cal.3d at 426 (citation and internal quotation marks omitted).

The state is not offering evidence of Mr. Duncan's speech solely to prove "actual criminal conduct" in violation of an otherwise valid statute.[9] *People v. Smith*, 30 Cal.4th 581, 626 (2003). Instead, the state is prosecuting him because he sings about certain acts or posts to social media about his music—in other words, because it alleges the content of his speech is a crime. The state's case hinges on the content of "statements that he makes about the gang," with lyrics such as "'the Murda Gang shit,' 'guns to the head,' 'bodies in a body bag,' 'no safety on my pistol.'" 8 Prelim. Tr. at 1348:18, 1395:12-15. As the prosecution argued, if Mr. Duncan were "to make statements in his music" about matters "other than the gang and what the gang does," such as "love songs," "then obviously there wouldn't be a connection" to the gang and his speech would not be criminal. *Id.* at 1348:19-23, 1350:19-20. The state is therefore prosecuting Mr. Duncan because of the content of his protected speech in "put[ting] out that CD 'No Safety,'" making his music, and talking about it on social media. *Id.* at 1349:12-13. Under the

[9] To the extent social media posts were offered only "to show that these guys are active gang members," 8 Prelim. Tr. 1313:17-18, such use might not violate the First Amendment, but it is not sufficient to prove a violation of section 182.5, even assuming they show "active participation," which is not conceded. To the extent the prosecution claims Mr. Duncan's social media posts complete the alleged crime itself, as it does with his music, it violates the First Amendment by improperly punishing him for the content or viewpoint of protected speech.

prosecution's theory, Mr. Duncan is "charged with a crime the *actus reus* of which was First Amendment speech." *United States v. Caronia*, 703 F.3d 149, 158 (2d Cir. 2012). It is difficult to imagine a clearer case of content-based prosecution in violation of the First Amendment.

The prosecution cannot contend it is not seeking to censor speech directly. The state "may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011). Because it would punish protected speech based on content, the prosecution's interpretation of section 182.5 cannot survive unless it is "narrowly tailored to promote a compelling Government interest." *Law Sch. Admission Council, Inc. v. State*, 222 Cal.App.4th 1265, 1288 (2014). As did the statutes in *Simon & Schuster* and *Keenan*, the prosecution's theory fails that test.

The state no doubt has a compelling interest in punishing and preventing gang-related crime, but the prosecution's theory is far from narrowly tailored to serving that interest. Instead, it is "overinclusive and therefore invalid" under the First Amendment because it "discourages the creation and dissemination of a wide range of ideas and expressive works which have little or no relationship" to serving the state's interest. *Keenan*, 27 Cal.4th at 432. For example, an alleged active participant might write a book, give an interview, or participate in a documentary about gang crime to seek "personal redemption," warn others of "the consequences of crime," or "provide an inside look at the criminal underworld" that would discourage others from joining it or assist law enforcement to infiltrate it. *Id.* at 433. Another example might be a substance-abuse counselor who draws on personal knowledge of drug crimes committed by fellow gang members to establish credibility with patients and make treatment more effective. These cases involve clearly protected speech in which the speaker's credibility, reputation, and/or effectiveness would be enhanced by participation in the gang and knowledge of crimes committed by gang members.[10]

[10] These are not hypothetical examples. *See, e.g.*, Sanyika Shakur, *Monster: The Autobiography of an L.A. Gang Member* (2004); Leon Bing, *Do or Die* (1992) (book about Los Angeles gangs based on interviews with gang members); Cle Sloan, *Bastards of the Party* (2005), *available at* http://www.bastardsofthepartydvd.com/film/ (award-winning documentary by former gang member featuring "interviews with past and current gang members"); Pam Kragen, *Ex-gang member earns national honor*, U-T San Diego, Feb. 20, 2014, *available at*

Yet under the prosecution's theory, each speaker would violate section 182.5, because they were (a) active participants in a gang, (b) who knew of the gang's pattern of criminal activity, and (c) "benefited" from felonies committed by the gang members.[11] As a result, the prosecution's theory unconstitutionally "sweeps within its ambit a wide range of protected speech," including that of Mr. Duncan. *Id.* at 435. The Court should construe section 182.5 to avoid this absurd result and comply with the First Amendment.

To assert that these examples are protected because they do not "promote" crime would unconstitutionally discriminate against Mr. Duncan's speech because of its alleged viewpoint. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). Nor may the Court rely on any promise by the state to use the statute "responsibly," because "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *Stevens*, 559 U.S. at 480.

In any event, the prosecution's theory is also not narrowly tailored because there is "a less restrictive alternative" that "would serve the Government's purpose" of punishing and preventing gang-related crime. *Law Sch. Admission Council*, 222 Cal.App.4th at 1288. Instead of punishing protected speech, the state may target benefits willfully reaped through conduct unprotected by the First Amendment. For example, the state may prosecute an active participant who takes a cut of proceeds from a robbery committed by gang members or relies on the reputational benefit of gang shootings in threatening others, assuming the statute covers intangible benefits. In such cases, the state would punish and deter the conduct of willfully benefiting from "gang activities" without

---

http://www.utsandiego.com/news/2014/feb/20/ex-gang-member-earns-national-honor/ ("aspiring substance-abuse counselor said" gang experiences "help him better connect with teen gang members"); Suzanne Smalley, *How Do You Leave a Gang*, Newsweek, Feb. 6, 2009, *available at* http://www.newsweek.com/how-do-you-leave-gang-82499 (quoting "former gang member and drug addict who is now a substance-abuse counselor").

[11] Section 182.5 does not apparently require "active participation" at the time of prosecution, which may presumably occur any time within the statute of limitations.

penalizing protected speech.[12] *Johnson*, 57 Cal.4th at 262. This result is fully "in harmony with the clearly expressed intent" of section 182.5. *Mt. Hawley Ins. Co. v. Lopez*, 215 Cal.App.4th 1385, 1412 (2013). It also conforms to the hallowed principle that "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech." *Olivia N.*, 126 Cal.App.3d at 495 (quoting *Whitney v. California*, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring)). Accordingly, the prosecution's theory violates the First Amendment as applied to Mr. Duncan.

c. Though section 182.5 may be valid on its face, the Court must give it a reasonable limiting construction to avoid violating the First Amendment as applied to Mr. Duncan on these facts.

Though section 182.5 may not be unconstitutional as written, freedom of speech is "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Healy v. James*, 408 U.S. 169, 183 (1972). Even "regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment" if improperly applied. *Simon & Schuster*, 502 U.S. at 117. To dismiss the charges against Mr. Duncan, the Court need not find section 182.5 is invalid "on its face." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984). Instead, it need only find section 182.5 "is unconstitutional as applied to [Mr. Duncan's] particular speech … even though the law may be capable of valid application to others." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). The First Amendment standard remains the same whether a statute is challenged on its face or as applied. *Legal Aid Servs. of Oregon v. Legal Servs. Corp.*, 608 F.3d 1084, 1096 (9th Cir. 2010). As a result, the misuse of an otherwise valid statute to prosecute Mr. Duncan violates the First Amendment no less than prosecution under a statute invalid on its face.

---

[12] The prosecution's contention that "willfully" does not modify "benefits from," 8 Prelim. Tr. 1357:8-10, violates the rules of "grammatical structure" by which statutes are construed. *People v. Youngblood*, 91 Cal.App.4th 66, 71 (2001). Just as an adjective before a series of nouns modifies each noun in the series, an adverb before a series of verbs modifies the whole series of verbs. *People ex rel. Younger v. Superior Court*, 16 Cal.3d 30, 41 (1976); *Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal.App.4th 548, 554 (2003).

The Supreme Court has specifically upheld that principle. For example, in *Cohen v. California*, the defendant was charged with violating a statute that prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person … by … offensive conduct." 403 U.S. at 16. On its face, the statute did not violate the First Amendment. However, on the facts of the case, Cohen was prosecuted only for "wearing a jacket bearing the words 'Fuck the Draft,'" on the theory that merely wearing the jacket might cause others "to commit a violent act" against him or attempt to "remove his jacket" by force. *Id.* at 16-17. Cohen did not challenge the statute on its face but instead "claimed that, as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments." *Id.* at 18. As the Court held, the "conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message"—in other words, the content of his speech—and therefore "rests squarely upon his exercise of the 'freedom of speech' protected from arbitrary governmental interference by the Constitution." *Id.* at 18-19. As applied to other facts—for example, "raucous emissions of sound trucks"—the statute did not necessarily violate the First Amendment. *Id.* at 21. However, the statute violated the First Amendment as applied to Cohen. *Id.* at 23-26.

The same principle applies here. Under the prosecution's theory, section 182.5 would violate the First Amendment as applied to Mr. Duncan, even if it is valid as applied to others. In these circumstances, the proper course is to give the statute a reasonable limiting construction that avoids "substantial First Amendment concerns associated with criminalizing speech" yet preserves the power to punish unprotected conduct in other cases. *Chandler*, 60 Cal.4th at 525.

The California Supreme Court has consistently followed that course. For example, in order to prevent "an inhibiting effect upon the exercise of First Amendment rights," the court held that a statute prohibiting "lewd and dissolute conduct … was not intended to apply to live performances in a theater before an audience," though the statute could have properly been applied in other cases. *Barrows v. Municipal Court*, 1 Cal.3d 821, 825, 827-28 (1970). Not long after *Barrows*, in order "to avoid the penalization of free speech," the court adopted a "narrowing construction" of the statutory term "disrupted" that preserved the state's ability to prevent

"unlawful disruptive, coercive conduct" without punishing protected speech. *Braxton v. Municipal Court*, 10 Cal.3d 138, 143-44, 146, 151 (1973); *see also In re Brown*, 9 Cal.3d 612, 619 (1973) ("The statute … cannot be interpreted consistent with the First Amendment … as making criminal all loud shouting or cheering which disturbs and is intended to disturb persons.").

Later, the court held that "the application of the pandering statute to the hiring of actors to perform in the production of a nonobscene motion picture would impinge unconstitutionally upon First Amendment values," because application of the statute would have "place[d] a substantial burden on the exercise of protected First Amendment rights." *Freeman*, 46 Cal.3d at 422, 425-26. Since the movie was not obscene, it remained "protected by the guaranty of free expression found in the First Amendment," regardless of "the social utility of this particular motion picture," and therefore its producer could not be punished for making it. *Id.* at 425.

Most recently, the court "construe[d] the offense of attempted criminal threat to require proof that the defendant had a subjective intent to threaten *and* that the intended threat under the circumstances was sufficient to cause a reasonable person to be in sustained fear," because "criminalizing a statement that is intended as a threat but is not objectively threatening raises serious constitutional issues." *Chandler*, 60 Cal.4th at 524-25 (emphasis in original). The court's interpretation ensured that the statute would not criminalize speech that "any reasonable person would have understood … as 'political hyperbole,'" while preserving the power to punish genuine threats, attempted or completed. *Id.* at 523.

The principle running through these cases is that the Constitution requires courts to prevent overzealous prosecution under otherwise valid statutes from infringing on protected speech. This Court must follow that principle in construing section 182.5. Because the prosecution's interpretation of "benefit" would violate the First Amendment as applied to Mr. Duncan, the Court should adopt a limiting construction under which the statute does not punish protected speech or alleged "accolades," "praise," or "respect" for that speech. That construction would preserve the state's power to punish unprotected conduct without violating the First Amendment. Because there is no evidence that Mr. Duncan willfully benefited from any alleged crimes through conduct unprotected by the First Amendment, the charges against him must be dismissed.

Finally, the decision in *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090 (1997) does not justify prosecuting Mr. Duncan for his speech, as the state has suggested. In *Acuna*, the court affirmed a narrowly drawn injunction against gang members that prohibited them "from engaging in any form of social intercourse with anyone known to them to be a gang member 'anywhere in public view' within the four-block area" covered by the injunction, due to "the threat of *collective* conduct by gang members loitering in a specific and narrowly described neighborhood." *Id.* at 1121 (emphasis in original). As the court noted, the injunction's effect "on defendants' protected *speech* is minimal," especially given that even within the covered area "gang members may associate" and speak "freely out of public view." *Id.* at 1121-22 (emphasis in original). By contrast, the prosecution seeks to punish Mr. Duncan because of the content of his protected speech, regardless of where and how he engaged in that speech. Therefore, *Acuna* does not support the prosecution of Mr. Duncan for engaging in protected speech.

3. The state may not prosecute Mr. Duncan on the theory that every active participant benefits from crimes committed by gang members, because that theory deletes the term "benefits" from section 182.5.

The state may not prosecute Mr. Duncan on the theory that every active participant necessarily benefits from any crimes committed by gang members. *See* 6 Prelim. Tr. 1001:13-23 (detective claimed "the whole gang ultimately benefits" from crimes committed by members through "respect" and "stature"); 8 Prelim. Tr. 1348:12-14 (prosecutor argued that all members benefited "because of the additional elevation and respect … as a result of these shootings"); 8 Prelim. Tr. 1355:20-22 (prosecutor argued that "[b]eing an active participant of the gang and having knowledge of the activities of the gang" is sufficient to prove "benefit"). That theory would improperly rewrite section 182.5 by deleting an essential element of the offense.

As the Court noted during the preliminary hearing, the element of "willfully promoted, assisted or benefited … would be redundant … if all you have to do is prove that he's an active gang member and that he knew." 8 Prelim. Tr. 1355:27-1356:2. If every person who "actively participates in any criminal street gang" with "knowledge that its members engage in or have engaged in a pattern of criminal gang activity" necessarily "benefits from any felonious criminal conduct by members of that gang," § 182.5, then the offense of benefiting from such conduct

would be complete solely upon proof that the defendant is an active participant with the required knowledge. The state's position would improperly "render superfluous the statute's use of the word ['benefits']," *People v. Phillips*, 41 Cal.3d 29, 72 (1985), a result the Court must reject because it must "give meaning to every word in a statute" and "avoid constructions that render" any term superfluous. *Klein v. United States*, 50 Cal.4th 68, 80 (2010); *see also People v. Campos*, 196 Cal.App.4th 438, 454 (2011) ("We do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous.") (quoting *Shoemaker v. Myers*, 52 Cal.3d 1, 22 (1990)) The People cannot legally have intended that any term in section 182.5 would become "mere surplusage." *People v. Hudson*, 38 Cal.4th 1002, 1010 (2006). Therefore, to violate the "benefits" prong of section 182.5, one must willfully benefit from "felonious criminal conduct" in a way distinct from any alleged general benefit to all members. As there is no evidence of alleged "benefit" against Mr. Duncan other than protected speech, the charges against him must be dismissed.

C. Article I, section 2 of the California Constitution Independently Prohibits the Prosecution of Mr. Duncan Due to the Content of His Speech.

Article I, section 2 of the California Constitution protects speech independently of the federal Constitution. Article I, section 2 is "at least as broad" and "in some ways is broader than" the First Amendment, because it "specifies a 'right' to freedom of speech explicitly" and "expressly embrace[s] all subjects." *Beeman v. Anthem Prescription Mgmt., LLC*, 58 Cal.4th 329, 341 (2013) (citations and internal quotation marks omitted). The provisions of Article I, section 2 are "more protective, definitive and inclusive of rights to expression of speech than their federal counterparts." *San Diego Unified Port Dist. v. U.S. Citizens Patrol*, 63 Cal.App.4th 964, 970 (1998). The California Supreme Court has expressly relied on Article I, section 2 to strike down statutes that violate "freedom of expression." *People v. Glaze*, 27 Cal.3d 841, 844 & n.2 (1980). In particular, the court's holding in *Keenan* independently relied on "the liberty of speech clause of the California Constitution." 27 Cal.4th at 436. For reasons similar to those explained in *Keenan* and as discussed in this brief, the prosecution's interpretation of section 182.5 violates

Article I, section 2 as applied to Mr. Duncan, and the charges against him must be dismissed on that ground as well.

CONCLUSION

For the foregoing reasons, the Court is respectfully requested to dismiss the charges against Brandon Duncan.

Respectfully submitted,

Dated: February 3, 2015

David Loy
Attorney for Amicus Curiae