In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellant,
v.
ALEXIS ALEJANDRO FUENTES,
Respondent.

Case No. S219109

Fourth Appellate District, Division Three, Case No. G048563
Orange County Superior Court, Case No. 13NF0928
The Honorable Nicholas S. Thompson, Judge

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QUESTION PRESENTED

Whether Penal Code section 186.22, subdivision (g), eliminates a trial court's power under Penal Code section 1385, subdivision (a), to dismiss a gang enhancement alleged pursuant to Penal Code section 186.22, subdivision (b)(1).

INTRODUCTION

The prosecutor charged defendant Alexis Alejandro Fuentes with vehicle theft and receiving stolen property and alleged Fuentes committed both crimes for the benefit of a criminal street gang. After the trial court dismissed the gang enhancement allegations, over the prosecutor's objection, Fuentes admitted the substantive charges and the trial court placed him on three years' probation. The People appealed the dismissal of the gang allegations. The Court of Appeal ruled the trial court had discretion to dismiss the gang allegations under Penal Code section 1385,[1] because there was no clear legislative direction precluding a trial court from doing so. The Court of Appeal was mistaken.

The plain language of section 186.22, subdivision (g), which directly conflicts with section 1385, establishes that a trial court is limited to striking only the *punishment* for gang enhancements and not the gang allegations themselves. This interpretation of the law is bolstered by the legislative history of sections 186.22 and 1385. It is also consistent with the principle of statutory construction that the more specific statute, section 186.22, subdivision (g), controls over the general one, section 1385. This interpretation requires that findings be made on gang allegations and preserves true findings in order to prosecute future gang-related crimes and further the gang statute's purpose of eradicating gang crime. Accordingly,

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[1] All future undesignated code references are to the Penal Code.

this Court should adhere to the Legislature's intent and hold the discretion of a trial court is limited to striking the punishment of a gang enhancement according to the terms of section 186.22, subdivision (g).

STATEMENT OF THE CASE

On March 18, 2013, Fuentes was charged by felony complaint with unlawfully taking a vehicle (Veh. Code, § 10851, subd. (a)) and receiving stolen property (§ 496d, subd. (a)). The complaint alleged these charges were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b).) (CT 1-2.) On May 2, 2013, following an unrecorded chambers conference, the prosecutor objected to the trial court's indicated sentence, which provided that if Fuentes pled guilty to the charges, the court would dismiss the gang enhancement allegations pursuant to section 1385. (RT 1.) The prosecutor argued the trial court had engaged in improper judicial plea bargaining because it lacked the discretion to dismiss the gang allegations under section 1385, and was limited to striking the additional punishment for the purpose of sentencing. (RT 1-2.) The trial court explained that it had balanced the circumstances of the crimes, Fuentes' prior record, and the threat he posed to the community before choosing to exercise its discretion. (RT 2-3.) The trial court overruled the objection and granted Fuentes' motion to dismiss the gang allegations under section 1385, subdivision (a). (RT 1-3, 12-13.) Thereafter, Fuentes pled guilty to the remaining charges and was granted three years' formal probation with the condition he serve 240 days in local custody. (CT 5-14, 23; RT 10.) The Orange County District Attorney appealed the trial court's order dismissing the gang allegations. (CT 15-16; § 1238, subds. (a)(1) & (8).)

In a published decision, the Court of Appeal concluded section 186.22, subdivision (g), did not eliminate the trial court's section 1385, subdivision (a), power to dismiss or strike a section 186.22, subdivision (b), gang enhancement. (Slip Opn. at p. 2.) Specifically, the court ruled the

phrase, "notwithstanding any other law" in section 186.22, subdivision (g), was not clear direction that the Legislature intended to eliminate a trial court's authority under section 1385, subdivision (a), to dismiss a gang allegation because the statutes are not conflicting, contrary, or inconsistent. (Slip Opn. at pp. 5-8.) In this regard, the court reasoned that, because section 186.22, subdivision (g), was enacted prior to section 1385, subdivision (c), which grants discretion to strike the additional punishment in lieu of dismissing the allegation, section 186.22, subdivision (g), complemented, rather than displaced section 1385, subdivision (a). (Slip Opn. at pp. 8-9.) Thus, the Court of Appeal affirmed the trial court's order dismissing the gang enhancement allegations, but remanded the matter to permit the trial court to state its reasons for dismissing the allegations in an order entered upon the minutes. (Slip Opn. at pp. 12-13.)

On August 13, 2014, this Court granted the District Attorney's petition for review. Thereafter, the matter was transferred to the Attorney General's Office to represent the People in this Court.

ARGUMENT

I. SECTION 186.22, SUBDIVISION (G), GRANTING COURTS THE DISCRETION TO DISMISS THE ADDITIONAL PUNISHMENT FOR QUALIFIED GANG ENHANCEMENTS, ELIMINATES A TRIAL COURT'S GENERAL DISCRETION TO DISMISS GANG ALLEGATIONS UNDER SECTION 1385

The Legislature has provided broad authority to trial courts to dismiss actions and strike punishment under section 1385, and this discretion is retained in the absence of clear legislative direction to the contrary. The Legislature enacted section 186.22, subdivision (g), to limit judicial discretion to dismiss under section 1385 in favor of both providing stricter and longer terms for crimes committed in furtherance of a criminal street gang, and also preserving gang findings. The Legislature manifested this intent in the plain language of section 186.22, subdivision (g), which

directly conflicts with section 1385. The legislative history confirms this conflict.

When section 186.22, subdivision (g), was enacted, courts already had discretion to strike the punishments for enhancements under section 1385, subdivision (a), and former section 1170.1, subdivision (h). Therefore, section 186.22, subdivision (g), conflicts with rather than complements the authority in section 1385, subdivision (a), to dismiss actions. The subsequent addition of section 1385, subdivision (c), does not establish otherwise as this provision, which expressly authorizes a court to strike punishment for enhancements, was added to clarify existing authority. Additionally, as the more specific statute, the Legislature intended section 186.22, subdivision (g), to apply exclusively to a trial court's discretion to dismiss or strike the punishment on gang enhancements. Furthermore, the Court of Appeal's contrary interpretation leads to absurd consequences by granting courts the broad authority to dismiss, but limited authority to strike punishment. Applying section 1385 to section 186.22, subdivision (b), enhancements would render section 186.22, subdivision (g), surplusage.

Finally, the Legislature enacted the STEP Act as a tool to eradicate gangs. A crucial part of proving gang activity is establishing the existence of a gang and its criminal activities. The true findings of gang allegations are vital to proving these components in future cases. Therefore, public policy advocates the preservation of the gang findings themselves, even if they are not used immediately to enhance a sentence. Accordingly, the Court of Appeal was incorrect in its conclusion that section 186.22, subdivision (g), does not eliminate a trial court's discretion to dismiss gang enhancements under section 1385.

A. Statutory History of Penal Code sections 1385, 186.22, and 1170.1

Section 1385 was enacted in 1872. As relevant here, in 1988 section 1385, subdivision (a), provided, "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading." Subdivision (b)[2] of this section stated, "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667."

"Section 1385 has been construed to provide judicial power to dismiss or strike -- within the court's discretion -- allegations which, if proven, would enhance punishment for alleged criminal conduct." (*People v. Tanner* (1979) 24 Cal.3d 514, 518; *People v. Burke* (1956) 47 Cal.2d 45, 50-51.) Although not expressly provided by statute, trial courts commonly struck proven prior convictions or other allegations at sentencing in the interest of justice to avoid imposing statutorily increased penalties. (*People v. Burke, supra*, 47 Cal.2d at pp. 50-51.)

In 1988, the Legislature enacted the California Street Terrorism Enforcement and Prevention Act (STEP Act; § 186.20). The STEP Act included section 186.22, subdivision (b), which codifies gang enhancements for the purpose of imposing additional punishment when a felony is committed in furtherance of a criminal street gang. As discussed

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[2] In *People v. Fritz* (1985) 40 Cal.3d 227, the court held a trial court could strike in the furtherance of justice prior serious felony conviction allegations made under section 667, subdivision (a), which mandated a five-year enhancement for each conviction. Section 1385, subdivision (b), was added in 1986 in response to the *Fritz* opinion in order to withdraw the trial court's power to strike these allegations. (Stats. 1986, ch. 85, § 2.)

post, section 186.22 lists the specific punishments applied to varying base crimes. Section 186.22, subdivision (b)(4), expressly addressed a trial court's discretion regarding these punishments: "Notwithstanding any other provision of law, the court may strike the additional punishment for the enhancements provided in this section in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition." (Stats. 1988, ch. 1242, § 1.) The following year, section 186.22, subdivision (b)(4), was designated as subdivision (d), and "or refuse to impose the minimum jail sentence for misdemeanors" was added. (Stats. 1989, ch. 144, § 1.) In 1993, section 186.22, subdivision (d), was amended by removing "provision of." (Stats. 1992, ch. 611, § 3.09.) Finally, in 2001, section 186.22, subdivision (d), was designated as subdivision (g), and reads as it does today:

> Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

(§ 186.22, subd. (g); Stats. 2001, ch. 854, § 22.)

At the time the STEP Act was enacted, former section 1170.1, subdivision (h), read as follows:

> (h) Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in subdivision (c) of Section 186.10 and Sections 667.15, 667.5, 667.8, 667.83, 667.85, 12022, 12022.1, 12022.2, 12022.4, 12022.6, 12022.7, 12022.75, and 12022.9 of this code, or the enhancements provided in Section 11370.2, 11370.4, or 11379.8 of the Health and Safety Code, if it determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment.

In 1997, Sentencing Reform Bill 721 was enacted by the Legislature as the first of three steps of basic sentencing reform to simplify the Determinate Sentence Law (DSL) without significantly altering the general sentencing scheme. This included deleting former section 1170.1, subdivision (h). (Stats. 1997, ch. 750, § 9.) "In repealing subdivision (h) of Section 1170.1, which permitted the court to strike the punishment for certain listed enhancements, it is not the intent of the Legislature to alter the existing authority and discretion of the court to strike those enhancements or to strike the additional punishment for those enhancements pursuant to Section 1385, except insofar as that authority is limited by other provisions of the law." (*Ibid.*) Senate Bill 1900, the substance of which is not relevant to this matter, was the second step taken to reform the DSL. (Stats. 1998, ch. 926.)

In Assembly Bill 1808, the third and final step to sentencing reform, the Legislature found it necessary to clarify the discretion of the courts to strike the additional punishment of an enhancement by adding section 1385, subdivision (c), which provided as follows:

> (c) (1) If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a).
>
> (2) This subdivision does not authorize the court to strike the additional punishment for any enhancement that cannot be stricken or dismissed pursuant to subdivision (a).

(Stats. 2000, ch. 689, § 3.)

B. Principles of Statutory Construction

This Court's "role in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law. [Citations.] 'We consider first the words of the statute because they are generally the most reliable indicator of legislative intent.'" (*In re J.W.* (2002) 29 Cal.4th

200, 209; *People v. Gardeley* (1996) 14 Cal.4th 605, 621.) "[W]e construe the words in question in context, keeping in mind the nature and obvious purpose of the statute .... We must harmonize the various parts of a statutory enactment ... by considering the particular clause or section in the context of the statutory framework as a whole." (*In re Greg F.* (2009) 55 Cal.4th 393, 406, quoting *People v. Mendoza* (2000) 23 Cal.4th 896, 907-908, internal citations and quotations omitted.) Furthermore, an interpretation that would lead to absurd results should be avoided. (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.)

However, if the terms of a statute are unclear or ambiguous, this Court may "'look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.'" (*People v. Scott* (2014) 58 Cal.4th 1415, 1421, quoting *People v. Harrison* (2013) 57 Cal.4th 1211, 1221–1222.) The interpretation of sections 186.22 and 1385 is subject to de novo review. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.)

C. Penal Code section 1385 Grants the Trial Court Discretion to Dismiss an Enhancement Unless Clear Legislative Direction Indicates Otherwise

Section 1385 vests a trial court with the general authority to dismiss a criminal action, which includes the charges themselves and allegations. (*In re Varnell* (2003) 30 Cal.4th 1132, 1137.) "[T]he judicial power to reduce a defendant's sentence by striking a sentencing allegation in furtherance of justice is statutory. Because the power is statutory, the Legislature may eliminate it." (*People v. Superior Court (Romero)* (hereinafter *People v. Romero*) (1996) 13 Cal.4th 497, 518; *People v. Thomas* (1992) 4 Cal.4th 206, 210-211.) "This does not mean, however, that any statute defining the

punishment for a crime can be read as implicitly eliminating the court's power to impose a lesser punishment by dismissing, or by striking sentencing allegations, under section 1385. This is because the statutory power to dismiss in furtherance of justice has always coexisted with statutes defining punishment and must be reconciled with the latter." (*People v. Romero, supra,* 13 Cal.4th at p. 518.) A court should not interpret a statute as eliminating the court's power under section 1385 absent a clear legislative direction to that effect. (*Ibid.*, citing *People v. Rodriguez* (1986) 42 Cal.3d 1005, 1019.) The trial court retains its discretion "where the Legislature has not clearly evidenced a contrary intent." (*People v. Thomas*, *supra*, 4 Cal.4th at p. 211, quoting *People v. Williams* (1981) 30 Cal.3d 470, 482.)

As the Court of Appeal below pointed out, the Legislature has directly eliminated section 1385, subdivision (a), authority to dismiss or strike an enhancement allegation in some statutory provisions with the express language, "Notwithstanding section 1385." (Slip Opn. at p. 7, citing §§ 667.61, subd. (g), 667.71, subd. (d), 12022.5, subd. (c), & 12022.53, subd. (h).) But clear legislative direction does not require that the Legislature expressly refer to section 1385 in order to preclude its operation. (*People v. Thomas*, *supra*, 4 Cal.4th at p. 211.) It may be evidenced by a "more specific proscription on the court's power." (*People v. Rodriguez, supra,* 42 Cal.3d at p. 1019 [Legislature's enactment of section 1203.06 disclosed an intent to preclude the exercise of discretion by a trial court from striking the use finding].) Also, clear legislative intent abrogating the trial court's authority to strike under section 1385 may exist where the invocation of section 1385 would nullify a particular result intended by a statutory scheme. (*People v. Tanner*, *supra*, 24 Cal.3d at p. 520.)

D. The Statutory Language of section 186.22, subdivision (g), Provides Clear Legislative Direction that Precludes the Application of section 1385 to Gang Enhancements[3]

The plain language of section 186.22, subdivision (g), exhibits the Legislature's intent that judicial discretion be limited to striking or refusing to impose otherwise mandatory punishment for gang allegations. Section 186.22, subdivision (b), identifies three distinct categories of base crimes and the corresponding punishments. Section 186.22, subdivision (b)(1), is an enhancement and imposes an additional determinate term of two, three or four years, unless it is a serious or violent felony, in which a five-year or ten-year term applies. (§186.22, subd. (b)(1).) Section 186.22, subdivisions (b)(4) and (b)(5), are alternate penalty provisions providing for an indeterminate sentence and minimum 15 years imprisonment before parole eligibility. (§ 186.22, subds. (b)(4) & (5).) In addition, when the underlying offense is punishable as a felony or misdemeanor, section 186.22, subdivision (d), an alternate penalty provision imposing a minimum jail term, applies. (See *People v. Briceno* (2004) 34 Cal.4th 451, 460, fn. 7.)

Section 186.22, subdivision (g), expressly grants trial courts the limited authority to strike the additional punishment for gang enhancements and the alternate penalty provision imposing a minimum jail term. It does not authorize striking the enhancement itself. The language of the statute

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[3] In *People v. Venegas* (2014) 229 Cal.App.4th 849, the Court of Appeal held section 186.22, subdivision (g), did not provide clear language the Legislature intended to eliminate a trial court's section 1385, subdivision (a), authority to strike a section 186.22, subdivision (b)(4), allegation imposing an alternate sentencing scheme. On December 10, 2014, this Court granted the Petition for review filed in *People v. Venegas* (CSC S221193) and deferred briefing pending the outcome of the current matter.

evidences clear legislative direction that section 1385, a conflicting and more general statute, does not apply.

1. Section 186.22, subdivision (g), is in conflict with section 1385, subdivisions (a) and (c)

The plain language of section 186.22, subdivision (g), expressly limits a court's authority to strike gang enhancements. As set forth earlier, section 186.22, subdivision (g), provides:

> *Notwithstanding any other law*, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition.

(Italics added.)

As this Court has observed, "When the Legislature intends for a statute to prevail over all contrary law, it typically signals this intent by using phrases like 'notwithstanding any other law' or 'notwithstanding other provisions of law.'" (*In re Greg F., supra*, 55 Cal.4th at p. 406.) "'The statutory phrase "notwithstanding any other provision of law" has been called a '"'"term of art"'"' [citation] that declares the legislative intent to override all contrary law.'" (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 983, quoting *Klajic v. Castaic Lake Water Agency* (2004) 121 Cal.App.4th 5, 13.)

In *People v. Romero, supra,* 13 Cal.4th 497 (*Romero*), this Court addressed whether section 1385 authorized a trial court to strike prior felony conviction allegations under the Three Strikes law (§ 667, subd. (f)). (*Id.* at p. 504.) Section 667, subdivision (f)(1), provided: "Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has a prior felony conviction as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior

felony conviction except as provided in paragraph (2)." Subdivision (f)(2) of section 667 read: "The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation." (*Romero, supra*, at p. 508.)

Unlike section 186.22, subdivision (g), section 667, subdivision (f), presented a potential violation of the doctrine of separation of powers if the trial court were authorized to dismiss under section 1385 only at the behest of the prosecutor. (*People v. Romero, supra* 13 Cal.4th at p. 513.) Recognizing the prosecutor did not have "veto power" over the trial court's judicial responsibility of disposing of the charges, this Court reaffirmed that the Legislature may not condition judicial sentencing authority on the approval of the prosecutor. (*Romero, supra*, 13 Cal.4th at p. 516.) "When the jurisdiction of a court has been properly invoked by the filing of a criminal charge, the disposition of that charge becomes a judicial responsibility. [Citations.]" (*Id.* at p. 517.)

The court in *Romero* next considered the language of the statute to determine if the Legislature had intended the trial court to retain the authority to dismiss in furtherance of justice on its own motion. (*People v. Romero, supra* 13 Cal.4th at pp. 519-520.) The use of the words "pursuant to Section 1385" indicated the Legislature was proceeding on the assumption that section 1385 applied to cases coming under the Three Strikes law. Otherwise, the Legislature could have authorized a motion to dismiss without invoking section 1385 by not using that language, or approved an amendment to the statute removing the language. (*Id.* at p. 520.) Moreover, a review of the history of conflict between the branches of

government showed references to section 1385 in sentencing statutes are not "lightly or thoughtlessly made." (*Id.* at p. 522.)

The Court also considered whether the phrase, "Notwithstanding any other law, subdivisions (b) to (i)" meant the Three Strikes law applied in every case where a defendant had a prior conviction. (*People v. Romero, supra,* 13 Cal.4th at pp. 523-524.) A trial court's discretion under section 1385 was not limited by this phrase because it was expressly authorized within the Three Strikes law, and thus, a part of it. (*Ibid.*) Other uses of this phrase were found in section 667 subdivisions (c) and (d), and were not inconsistent with a trial court's authority to strike under section 1385. (*Id.* at p. 524.)

Romero's analysis of the interplay between section 1385 and the Three Strikes law guides the statutory interpretation of sections 1385 and 186.22, subdivision (g). Most notably, unlike in *Romero*, section 1385 is not referenced in section 186.22, and therefore, does not expressly come within the parameters of section 186.22. To put it more succinctly, the Legislature's omission of section 1385 means there is no clear legislative direction that section 1385 *does* apply to section 186.22. The "notwithstanding" clause in *Romero* did not have the effect of precluding section 1385 because that section and discretion were expressly included in the Three Strikes law, which contemplated it applied to those cases. In stark contrast, section 186.22, subdivision (g), does not have a similar reference, or any reference to the authority to dismiss gang allegations, and so the notwithstanding clause precludes section 1385.

Therefore, by virtue of section 186.22, subdivision (g)'s "notwithstanding" clause, those provisions of law that conflict with, are contrary to, or inconsistent with section 186.22, subdivision (g), are inapplicable to actions brought under section 186.22. (See e.g., *Arias v. Superior Court, supra,* 46 Cal.4th at p. 983 [Labor Code section 2699,

subdivision (a), "notwithstanding any other provision of law" meant provisions that conflict with the act's provisions are inapplicable to actions brought under the act].) As *People v. Campos* (2011) 196 Cal.App.4th 438 (*Campos*) concluded, section 1385 is such a provision.

In *Campos*, the Court of Appeal determined the trial court did not have the authority to strike or dismiss a section 186.22, subdivision (b)(5), alternate penalty provision. (*Campos, supra*, 196 Cal.App.4th at p. 454.) In reaching this conclusion, the court first observed that section 186.22, subdivision (g), did not grant the authority because it expressly applied to enhancements and the alternate penalty provision providing for a minimum jail sentence, not the alternate penalty provisions in subdivisions (b)(4) and (b)(5). (*Id.* at pp. 448-450.)

Next, *Campos* determined section 1385 did not confer the authority to dismiss gang allegations. (*People v. Campos, supra*, 196 Cal.App.4th at pp. 452-454.) *Campos* relied on section 186.22, subdivision (g)'s beginning phrase, "Notwithstanding any other law." It recognized "[u]se of this term of art expresses a legislative intent to have the specific statute control despite the existence of other law which might otherwise govern and declares the legislative intent to override all contrary law." (*Id.* at p. 452, internal citations and quotations omitted.) Thus, its inclusion in section 186.22, subdivision (g), "indicates that courts are to apply that statute—and not any other potentially applicable statute, such as section 1385, subdivision (a)—when considering whether to exercise the powers granted by that statute." (*Ibid.*)

Campos found support for this interpretation in *Romero* where this Court understood the intent behind the phrase "notwithstanding any other law" in the context of the Three Strikes law to be: "The Three Strikes law, when applicable, takes the place of whatever law would otherwise determine defendant's sentence for the current offense. The language thus

eliminates potential conflicts between alternative sentencing schemes." (*Romero, supra*, 13 Cal.4th at p. 524.) "By parity of reasoning, use of the phrase '[n]otwithstanding any other law' in section 186.22, subdivision (g) means that that statute 'takes the place of whatever law would otherwise' govern the exercise of trial courts' power to strike allegations or enhancements or to refuse to impose alternate penalties in gang cases." (*Campos, supra,* at p. 452; *Romero, supra*, at p. 524.) Thus, absent section 186.22, subdivision (g), section 1385, subdivision (a), would govern, but the language eliminates any actual or potential conflicts between the laws. (*Campos, supra,* at pp. 452-453.)

Section 186.22 expressly grants limited discretion to trial courts to strike the additional punishment for section 186.22, subdivision (b), enhancements. It does so without reference to section 1385. Since the authority to strike the additional punishment is also provided in section 1385, the statutes conflict and the notwithstanding clause directs that section 186.22, subdivision (g), governs a trial court's disposition of the gang enhancement.

2. The legislative history confirms that sections 186.22, subdivision (g), and 1385, subdivision (a), conflict

Here, the Court of Appeal declined to follow the reasoning in *Campos* and determined the statutory language "notwithstanding any other law" in section 186.22, subdivision (g), did not provide the necessary legislative direction because it did not conflict with the trial court's power to dismiss under section 1385. The Court of Appeal reasoned the two sections are not in conflict because when section 186.22 was enacted, it complemented section 1385, subdivision (a), by providing the authority to strike the additional punishment, an act of discretion granted 12 years later by section 1385, subdivision (c). (Slip Opn. at pp. 7-9, 11)

The Court of Appeal's review of the statutes led to the wrong result. Sections 186.22 and 1385 are in conflict and the "notwithstanding" clause in section 186.22 is revealing of the Legislature's intent. As mentioned, in the face of ambiguity, this Court may look to the legislative history to assist in statutory interpretation. (*People v. Scott, supra,* 58 Cal.4th at p. 1421.) Here, the legislative history of sections 186.22 and 1385, subdivision (c), establish that section 186.22, subdivision (g), was enacted to divest the court of discretion to dismiss gang enhancements.

The Court of Appeal sought to resolve the conflict between sections 186.22 and 1385 by relying on the later enactment of section 1385, subdivision (c). However, section 1385, subdivision (c), was not added for the purpose of granting or expanding judicial discretion, but merely to clarify that a trial court's discretion to strike the additional punishment of an enhancement was included in its authority to dismiss an action under section 1385, subdivision (a), in the wake of repealing former section 1170.1, subdivision (h). (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391, fn. 2 ["The 1997 repeal of former section 1170.1, subdivision (h) does not affect the power of a trial judge to strike an enhancement pursuant to section 1385, subdivision (a)."]) Thus, section 186.22, subdivision (g), was not added to complement section 1385, but rather, it was the alternative judicial discretion that applied to gang enhancements.

Although the repeal of former section 1170.1, subdivision (h), was never intended to affect the existing discretion to strike the additional punishment for enhancements under section 1385, subdivision (a), the Legislature found it necessary to clarify this by adding section 1385, subdivision (c), in 2000. (Stats. 2000, ch. 689, § 3.)

The California District Attorneys Association, the sponsors of the legislation, explained the purpose of enacting 1385, subdivision (c) was not to alter existing authority, but rather to clarify the court's discretion:

> [T]he bill adds a provision to PC 1385 to clarify and confirm that the court has the authority and discretion to strike either the enhancement itself or the additional punishment for the enhancement in the furtherance of justice. This point was expressly stated in an uncodified provision of SB 721 (as requested by the Judicial Council): 'it is not the intent of the Legislature to alter the existing authority and discretion of the court to strike those enhancements or to strike the additional punishment for those enhancements pursuant to Section 1385 ...' [Stats. 1997, ch. 750 § 9]. Because of possible misunderstanding concerning the court's authority to strike the additional punishment instead of the enhancement itself (see *People v. Bradley* (1998) 64 Cal.4th 386, 401; *People v. Sainz* (1999) 74 Cal.4th 565, 569), statutory clarification is now required. This clarification may actually have a <u>beneficial fiscal impact</u>, because some judges who might be reluctant to strike the enhancement in its entirety may be more willing to strike only the punishment for that enhancement.

(Cal. District Attorneys Assoc., Fiscal Impact, Assembly Bill No. 1808 (1999-2000 Reg. Sess.) at p. 3, excerpted from Sen. Com. On Public Safety bill file.)

The Senate Committee on Public Safety Analysis of AB 1808 also came to the same conclusion:

> Penal Code section 1385 provides that a court can strike an action, or any part thereof, in the interest of justice, unless the Legislature clearly limits that power. Section 1385 includes the power to strike the punishment that may be imposed for a crime or an enhancement, as well as the power to completely dismiss an action, a count or an enhancement. This bill clarifies that judges have power under Penal Code section 1385 to strike the punishment for an enhancement. The confusion on this point may have derived from SB 721 (Lockyer)- Ch. 750 Statutes 1997, that eliminated a provision in Penal Code section 1170.1 that stated that trial judges could strike the 'punishment' for a listed enhancement. The provision was confusing, as it truly added little or nothing to a court's power, since the court could dismiss punishment under Penal Code section 1385. The provision in Penal Code section 1170.1 may, however, have been understood by some judges as limiting their power to strike punishment for an enhancement that was not listed in section

> 1170.1. Arguably, this bill will clearly set out the full range of sentencing discretion for judges. Further, a judge can strike the additional punishment allowed by this bill for enhancements on non-violent subordinate terms.

(Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1808 (1999–2000 Reg. Sess., p. 7.)

The Court of Appeal below reasoned section 186.22, subdivision (g), was enacted to complement section 1385, subdivision (a), by providing the authority to strike the additional punishment, a form of judicial discretion added 12 years later by section 1385, subdivision (c). However, the discretion to strike the additional punishment for enhancements was already included in section 1385, subdivision (a), and was codified at the time in section 1170.1, subdivision (h), for certain enumerated enhancements. If this had been the intent, the Legislature could have easily added section 186.22 to former section 1170.1, subdivision (h), which listed the enhancements for which the court had the authority to strike the additional punishment.

As an example of the Legislature's use of former section 1170.1, subdivision (h), in *People v. Meloney* (2003) 30 Cal.4th 1145, this Court considered a trial court's authority to strike a section 12022.1 on-bail enhancement. It relied on the fact that section 12022.1 was included in former section 1170.1, subdivision (h), which granted the express authority to strike the additional punishment, and that repeal of the section was not intended to alter the existing authority to strike under section 1385. "From this history it is apparent that the Legislature views sentence enhancements under section 12022.1 as being subject to a trial court's discretion to strike pursuant to section 1385." (*Meloney, supra*, 30 Cal.4th 1145, 1155-1156, fn. omitted, citation omitted.)

Unlike the enhancement in *Meloney*, section 186.22 was never included in former section 1170.1, subdivision (h), which would have

shown legislative intent that section 1385 applied to section 186.22. Section 186.22 was enacted in 1988, and section 1170.1, subdivision (h), was not repealed until 1998. During that ten-year span, section 186.22 was never added to the list of enhancements specified in former section 1170.1, subdivision (h). It was wholly unnecessary for the Legislature to include a provision granting a court the general authority to strike the additional punishment on gang enhancements if the Legislature intended the court to already have this discretion. The Legislature's decision to enact 186.22, subdivision (g), in light of these other options shows it was included for the purpose of limiting judicial authority, not to merely compensate and complement section 1385, subdivision (a).

The Legislature enacted section 186.22, subdivision (g), granting the same authority as former section 1170.1, subdivision (h), but limiting its application to certain provisions of section 186.22. When former section 1170.1, subdivision (h), was later repealed and section 1385, subdivision (c), was enacted, the legislative history of section 1385, subdivision (c), reveals that it was not added to grant and expand judicial authority to strike the additional punishment. Instead, it was added by the Legislature to clarify for the courts what the Legislature had always intended and understood: The authority to dismiss under section 1385, subdivision (a), included the authority to strike the additional punishment of an enhancement. The Legislature plainly stated that 1385, subdivision (c), did not increase judicial discretion, and was subsumed by section 1385, subdivision (a). In fact, section 1385, subdivision (c), discretion was entirely dependent on possessing section 1385, subdivision (a), discretion. Section 186.22, subdivision (g), was enacted for a different purpose; it was not to "complement" section 1385, subdivision (a), but rather to impose restraints on judicial authority to dismiss and strike the additional punishment of gang enhancements.

Appellant agrees with the Court of Appeal that there exists a significant difference between dismissing an enhancement and merely striking the punishment. (See *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1444-1445.) The fact the Legislature enacted section 186.22, subdivision (g), providing the discretion, albeit limited, that is currently recognized in section 1385, subdivision (c), further shows section 186.22, subdivision (g), was intended to be an alternative to a section 1385, subdivision (a), dismissal. Section 1385, subdivision (c)(2), specifies that it does not authorize striking the additional punishment for an enhancement that could not otherwise be stricken pursuant to section 1385, subdivision (a). Thus, section 1385, subdivision (c), serves as mere clarification to the courts that section 1385, subdivision (a), also included the alternative of striking the punishment and did not grant additional judicial discretion. Likewise, the grant of discretion to strike the additional punishment conferred by section 186.22, subdivision (g), does not authorize the greater authority to dismiss by way of section 1385, subdivision (a).

Since section 1385, subdivision (c), was enacted merely to clarify already existing authority to dismiss under section 1385, subdivision (a), the technicality relied on by the Court of Appeal that section 186.22, subdivision (g), and section 1385, subdivision (c), do not conflict is illusory. Legislative history shows the authority to strike the additional punishment under section 1385 as an alternative was presumed. Therefore, the Legislature enacted section 186.22, subdivision (g), to provide authority distinct from section 1385 in order to limit the broad discretion to dismiss. Since the authority articulated in the phrase "the court may strike the additional punishment for the enhancements provided in this section" is within the umbrella of section 1385, subdivision (a), in the eyes of the Legislature, the statutes overlap and are contrary to each other. Furthermore, since section 1385, subdivision (c), is completely reliant on

section 1385, subdivision (a), authority, they must be considered together to determine if there is a conflict with section 186.22, subdivision (g).

The Legislature provided direction to limit a trial court's discretion by only bestowing authority to "strike the additional punishment for the enhancement" or "refuse to impose the minimum jail sentence," rather than allowing courts to exercise general discretion over all gang enhancements. "Under governing principles of statutory construction, 'the expression of one thing in a statute ordinarily implies the exclusion of other things. [Citation.]'" (*People v. Guzman* (2005) 35 Cal.4th 577, 588, quoting *In re J.W., supra,* 29 Cal.4th at p. 209.) The exclusion of authority to strike punishment for sections 186.22, subdivision (b)(4) and (b)(5), illustrates section 186.22, subdivision (g), was enacted to limit judicial authority with respect to gang enhancements.

Section 186.22, subdivision (g), provides an exception to the obligatory enhanced penalties of section 186.22, subdivision (b), and grants the trial court authority to strike the additional punishment for section 186.22, subdivisions (b)(1) and (d). Section 1385 authorizes a trial court to strike the enhancement allegations or the additional punishment, whereas section 186.22, subdivision (g), authorizes the trial court to strike the additional punishment. Both statutes address the trial court's authority to strike additional punishment and are in conflict. The Court of Appeal erred when it considered section 1385, subdivision (a), and section 1385, subdivision (c), as separate grants of power. Section 1385, subdivision (c), cannot be applied unless there is a preliminary finding that section 1385, subdivision (a), is applicable. Since section 1385, subdivision (c), did not grant additional powers to a trial court, but clarified alternative acts of discretion, there still exists an overlapping scope, in that both statutes empower a sentencing court to strike "additional punishment" for an enhancement. Accordingly, the conflict between the statutes means the

"notwithstanding" clause is applicable and the authorization to strike additional punishment for a gang enhancement is in effect exclusive to section 186.22, subdivision (g).

3. Section 186.22, subdivision (g), is the more specific statute and in substance, the later enacted statute

"The doctrine that a specific statute precludes any prosecution under a general statute is a rule designed to ascertain and carry out legislative intent. The fact that the Legislature has enacted a specific statute covering much the same ground as a more general law is a powerful indication that the Legislature intended the specific provision alone to apply." (*People v. Jenkins* (1980) 28 Cal.3d 494, 505.) "The 'special over the general' rule, which generally applies where two substantive offenses compete, has also been applied in the context of enhancement statutes." (*People v. Coronado* (1995) 12 Cal.4th 145, 153-154, citing *In re Shull* (1994), 23 Cal.2d 745, 750 [when use of a deadly weapon is an integral part of the offense, the additional penalties prescribed by predecessor to § 12022 may not be imposed].)

Section 186.22, subdivision (g), mirrors section 1385 in that it grants the trial court authority to strike additional punishment for enhancements in the furtherance of justice, and requires the reasons for the dismissal to be set forth in an order entered upon the minutes. However, key differences demonstrate section 186.22, subdivision (g), abrogates the use of section 1385. First, section 186.22, subdivision (g), applies solely to section 186.22 of the Penal Code and the subject of the gang enhancements included therein, whereas section 1385 applies generally to criminal actions. (*People v. Campos*, *supra*, 196 Cal.App.4th at p. 453; see *People v. Thomas*, *supra*, 4 Cal.4th at p. 213 [section 1170.1, subdivision (h), is the more specific provision because it provides a specific power to strike

specified enhancements and section 1385 provides a broad, general power to dismiss actions].)

Further, the Legislature's intent to limit judicial authority with section 186.22, subdivision (g), was not undermined by the later enactment of section 1385, subdivision (c), that merely clarified existing judicial authority to strike the additional punishment of enhancements. "'[W]here two statutes deal with the same subject matter, the more recent enactment prevails as the latest expression of the legislative will.'" (*People v. Romero*, *supra*, 13 Cal.4th at p. 526, quoting 2B Sutherland, Statutory Construction (5th ed. 1992) § 51.02, p. 122, fn. omitted; *City of Petaluma v. Pac. Tel. & Tel. Co.* (1955) 44 Cal. 2d 284, 288.)

Section 1385 was enacted in 1872 and section 186.22 in 1988. Although section 1385, subdivision (c), was added after section 186.22, as demonstrated by the legislative history, it merely clarified judicial power already provided for in section 1385, subdivision (a). Since section 1385, subdivision (c), did not substantively change judicial discretion to dismiss or strike the additional punishment of an enhancement, its enactment was not an expression of legislative intent implicating the distinct authority provided in section 186.22, subdivision (g). In substance, section 186.22 was the later enacted statute and applies to striking the punishment for gang enhancements.

E. Limited Judicial Discretion Furthers the Statutory Scheme, Harmonizes the Statutes, and Prevents Absurd Results

The Legislature's intent in enacting the STEP Act was "to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs." (§ 186.21.) With many options before it, the Legislature chose to include a subdivision

that directly addressed a court's discretion to strike the enhancement, specifying it may strike the additional punishment, rather than remaining silent on the issue or including section 186.22 in a broader statute such as former section 1170.1, subdivision (h). The Legislature acted with purpose to divest judicial discretion on the matter. To interpret section 186.22, subdivision (g), as subservient to broader discretion strips it of its purpose. In essence, the exception is swallowed by the rule. The Legislature strategically enacted section 186.22, subdivision (g), as a means to prevent trial courts from dismissing gang enhancements in order to preserve findings, but allow the courts to maintain the discretion to ameliorate the immediate impact on the sentence in the furtherance of justice.

The difference between dismissing an enhancement allegation and striking the resulting sentence from an enhancement that has been found true, can lead to significant differences in sentencing, criminal records, and future prosecution. Removing section 1385 discretion from the courts will require findings on gang enhancements be made. If the enhancement is not proven true, exercise of discretion is not an issue. While if the gang enhancement is proven, then the trial court still has discretion to strike the additional punishment and not include the term in the overall sentence. However, the true finding of the gang enhancement would remain, and this finding inures to the benefit of the prosecution to prove future gang activity and allows future sentencing discretion in the wake of a remand.

The significance is apparent when comparing the dismissal of a gang enhancement that has yet to be proven to that of a felony prior allegation. For instance, when a court strikes a prior felony allegation under section 1385, it "is not the equivalent of a determination that defendant did not in fact suffer the conviction" and "does not wipe out such prior convictions or prevent them from being considered in connection with later convictions." (*In re Varnell, supra*, 30 Cal.4th at p. 1138, quoting *People v. Burke, supra,*

47 Cal.2d at p. 51 and *People v. Romero, supra*, 13 Cal.4th at p. 508.) In those circumstances, the dismissal or striking of the allegation only affects the current sentence and does not implicate future prosecutions. Section 186.22, subdivision (g), serves the same purpose of allowing a trial court to strike the allegations for sentencing purposes, and at the same time, restricts the trial in a manner that mandates gang findings are made and preserved.

Section 186.22, subdivision (b)(1), requires the prosecution to prove a crime was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1.)) This includes proving the gang is an ongoing association, that one of its primary activities includes one or more of the criminal acts enumerated section 186.22, and its members "either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period." (§ 186.22, subds. (e) & (f); *People v. Hernandez* (2004) 33 Cal.4th 1040, 1047; *People v. Gardeley, supra*, 14 Cal.4th at pp. 616-617.)

Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant and admissible in determining and proving a gang's pattern of criminal conduct. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) Moreover, gang expert testimony based on investigations and crimes committed by gang members is also imperative to establish a gang's primary activities. (*Id.* at p. 324; *Gardeley, supra*, at p. 620.) Prior convictions are indispensable to prove gang enhancements. In *People v. Tran* (2011) 51 Cal.4th 1040, for instance, this Court acknowledged that evidence of prior convictions may be highly probative by providing direct

evidence of a predicate offense, that the defendant actively participated in a gang, and that the defendant knew the gang engaged in a pattern of criminal gang activity. (*Id.* at pp. 1048-1050.)

The entire statutory scheme is grounded on establishing patterns of criminal activity to prove gang existence and involvement. The pervasive criminal nature of gangs is shown largely by prior convictions and true findings. If the Legislature intended the STEP Act to have an impact on gangs, then it is only reasonable that section 186.22, subdivision (g), was enacted to curtail the trial courts' discretion to dismiss under section 1385 in order to effectuate this purpose. Permitting courts to strike gang allegations outright would hamper the prosecution's ability to prove the gang enhancements in future cases and nullify the intended purpose and results of the STEP Act.

Here, the trial court abused its discretion when it struck the gang enhancements over the prosecutor's objection and then allowed Fuentes to plea to the underlying charges. If the prosecution was not willing to dismiss the gang enhancements as a condition of the plea agreement, then the trial court should have required Fuentes to admit the allegations, and then the court could have stricken the additional punishment with the discretion provided in section 186.22, subdivision (g). Or, in the alternative, if the trial court disagreed with the prosecutor's decision to charge the gang enhancements, it had the option of refusing to approve the plea agreement. However, the prosecution was entitled to pursue the gang enhancements and receive a finding on them. The Legislature has provided clear direction that in the limited context of gang allegations the trial court does not have the discretion to dismiss under section 1385.

CONCLUSION

The enactment of section 186.22, subdivision (g), is clear legislative direction that section 1385 does not apply to gang enhancements. If section 186.22, subdivision (g), was enacted for a purpose, and it must be assumed the Legislature does not perform idle acts, then it was to limit judicial discretion striking gang enhancements and additional punishment. The intent behind section 186.22, subdivision (g), is plainly articulated in the language of the statute, and further supported by policy considerations. The subsequent addition of section 1385, subdivision (c), had no impact on this decreed limited discretion, and should not open the door to broader discretion in the limited circumstance of a gang enhancement. If section 1385 is not precluded by section 186.22, subdivision (g), then section

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186.22, subdivision (g), is utterly useless. For these reasons, appellant respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: December 16, 2014

Respectfully submitted,

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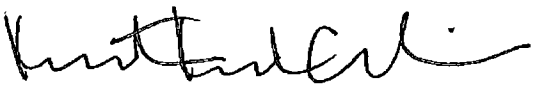

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CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLANT'S OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 7969 words.

Dated: December 16, 2014

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OPINION

Filed 4/30/14

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Appellant, v. ALEXIS ALEJANDRO FUENTES, Defendant and Respondent.	G048563 (Super. Ct. No. 13NF0928) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Nicholas S. Thompson, Judge. Affirmed and remanded with directions. Request for judicial notice. Denied.

Tony Rackauckas, District Attorney, and David R. Gallivan, Deputy District Attorney, for Plaintiff and Appellant.

Frank Ospino, Public Defender, Jean Wilkinson, Chief Deputy Public Defender, Mark S. Brown, Assistant Public Defender, and Miles David Jessup, Deputy Public Defender, for Defendant and Respondent.

The trial court did not, however, state its reasons for dismissing the enhancement allegation in an order entered in the minutes, as required by section 1385(a). We therefore remand to permit the trial court to comply with section 1385(a). In all other respects, the order is affirmed.

BACKGROUND

By complaint filed in March 2013, the District Attorney charged Fuentes with one count (count 1) of unlawful taking of a vehicle in violation of Vehicle Code section 10851, subdivision (a), and one count (count 2) of receiving stolen property in violation of Penal Code section 496d, subdivision (a). The complaint alleged as an enhancement pursuant to section 186.22(b) that Fuentes committed the offenses charged in counts 1 and 2 "for the benefit of, at the direction of, and in association with . . . a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by members of that gang."

As part of an agreement, Fuentes pleaded guilty to counts 1 and 2. He offered the following as the factual basis for the plea: "[O]n 3-14-13 I willfully took a car with the intent to deprive the owner of it and without consent of the owner. I was also in possession of such vehicle."

Over the District Attorney's objection, the trial court granted a defense motion to dismiss, pursuant to section 1385(a), the enhancement alleged under section 186.22(b). The court orally stated its reasons for dismissing the enhancement allegation; however, those reasons do not appear in the court minutes. Fuentes moved to withdraw his not guilty plea to counts 1 and 2 and pleaded guilty. The court pronounced judgment and placed Fuentes on three years of formal probation with terms and conditions.

The District Attorney timely appealed from the dismissal of the enhancement alleged under section 186.22(b). The order dismissing the enhancement is appealable under section 1238, subdivision (a)(1) and (8).

an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading."

The word "action" in section 1385(a) means "'individual charges and allegations in a criminal action.'" (*In re Varnell* (2003) 30 Cal.4th 1132, 1137.) The authority to dismiss an action under section 1385(a) includes the authority to strike factual allegations relevant to sentencing. (*Romero, supra*, 13 Cal.4th at p. 504.)

The Legislature may eliminate a court's power under section 1385(a); however, "we will not interpret a statute as eliminating courts' power under section 1385 'absent a clear legislative direction to the contrary.'" (*Romero, supra*, 13 Cal.4th at p. 518; see *People v. Fritz* (1985) 40 Cal.3d 227, 230 [requiring "clear language eliminating a trial court's section 1385 authority whenever such elimination is intended"].) The Legislature need not expressly refer to section 1385(a) to provide such clear legislative direction. (*Romero, supra*, at p. 518.)

B. *The Meaning of "Notwithstanding Any Other Law" in Section 186.22(g)*

Section 186.22(g) states: "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition." The District Attorney argues the phrase "[n]otwithstanding any other law" is the Legislature's clear direction to eliminate the trial court's power under section 1385(a) to dismiss or strike enhancement allegations made pursuant to section 186.22(b).

The word "notwithstanding" is defined as "without prevention or obstruction from or by : in spite of" (Webster's 3d New Internat. Dict. (2002) p. 1545, col. 3) or, more simply, as "despite" (Merriam-Webster's Collegiate Dict. (11th ed. 2004)

This interpretation is consistent with other statutory provisions limiting the trial court's power under section 1385(a). When the Legislature has intended to eliminate the trial court's section 1385(a) power to dismiss or strike an enhancement allegation, it has done so directly and by using the word "notwithstanding" to juxtapose inconsistent propositions. Examples are:

1. Section 667.61, subdivision (g): "Notwithstanding Section 1385 or any other provision of law, the court shall not strike any allegation, admission, or finding of any of the circumstances specified in subdivision (d) or (e) for any person who is subject to punishment under this section."

2. Section 667.71, subdivision (d): "Notwithstanding Section 1385 or any other provision of law, the court shall not strike any allegation, admission, or finding of any prior conviction specified in subdivision (c) for any person who is subject to punishment under this section."

3. Section 12022.5, subdivision (c): "Notwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."

4. Section 12022.53, subdivision (h): "Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."

In each of these examples, the statutory provision prohibiting the trial court from dismissing or striking the enhancement allegation is contrary to, in conflict with, or inconsistent with the court's power granted by section 1385(a).

C. *Section 186.22(g) Is Not Contrary to, in Conflict with, or Inconsistent with Section 1385(a).*

Is section 186.22(g) contrary to, in conflict with, or inconsistent with section 1385(a)? No. Section 1385(a) gives the trial court power to dismiss or strike

Assembly Bill No. 1808 (1999-2000 Reg. Sess.). (Historical and Statutory Notes, 51A pt. 1 West's Ann. Pen. Code (2011 ed.) foll. § 1385, p. 287.) Section 186.22(g) was enacted as part of the original legislation in 1989 and initially was codified as section 186.22, subdivision (d). (Stats. 1989, ch. 930, § 5.1, pp. 3253-3254; 47 West's Ann. Pen. Code (1999 ed.) amend. history foll. § 186.22, p. 465.)

Thus, when section 186.22 was enacted, section 1385 did not include subdivision (c) and did not give the trial court authority to strike the additional punishment for the enhancement. Section 186.22(g) (initially codified as section 186.22, subdivision (d)) complemented, rather than displaced, section 1385(a) by granting the trial court such additional power.

E. People v. Campos

The District Attorney urges us to follow *People v. Campos* (2011) 196 Cal.App.4th 438, 450 (*Campos*), in which the Court of Appeal held that section 1385(a) did not authorize the trial court to refuse to impose the alternate penalty imposed by section 186.22(b)(5). *Campos* was not cited to the trial court in this case.

The trial court in *Campos* sentenced the defendant to a prison term of seven years to life on an attempted murder count, struck various enhancement allegations, and stayed execution of the punishment prescribed by section 186.22(b)(5). (*Campos*, *supra*, 196 Cal.App.4th at pp. 446-447.) The Court of Appeal concluded the sentence on one of the attempted murder counts was unauthorized. (*Id.* at p. 447.) Because the jury had found gang allegations under section 186.22(b) to be true, section 186.22(b)(5) applied and imposed a minimum sentence of 15 years before consideration of parole. (*Campos*, *supra*, at p. 447.)

The defendant in *Campos* argued the trial court had discretion under sections 186.22(g) and 1385(a) to dismiss or strike the gang allegations and refuse to impose the alternate punishment prescribed by section 186.22(b)(5). (*Campos*, *supra*,

Appeal"]), and fundamentally differ from *Campos* in its interpretation of the word "notwithstanding." The Court of Appeal in *Campos* interpreted "notwithstanding," in effect, as a word of preemption; that is, the phrase "[n]otwithstanding any other law" in section 186.22(g) means courts are to apply that statute to the exclusion of all other potentially applicable statutes. But California Supreme Court authority defines "notwithstanding" as meaning a statute prevails over conflicting, contrary, or inconsistent law, not all law. In *Arias v. Superior Court*, *supra*, 46 Cal.4th at page 983, the Supreme Court stated: "Thus, by virtue of [Labor Code section 2699,] subdivision (a)'s 'notwithstanding' clause, only those provisions of law that *conflict* with the act's provisions—not, as defendants contend, every provision of law—are inapplicable to actions brought under the act." (Italics added; see *In re Greg F.*, *supra*, 55 Cal.4th at p. 406 ["contrary" law]; *Romero*, *supra*, 13 Cal.4th at p. 524 ["inconsistent" law].) This interpretation is in keeping with the standard definition of "notwithstanding" to mean "despite" and with its use in other statutes limiting the trial court's power under section 1385(a).

We also part ways with the *Campos* court in its conclusion that section 186.22(g) would be redundant or unnecessary if section 1385(a) gave the trial court power to dismiss or strike gang enhancement allegations. As we have explained, there is a difference between dismissing or striking the enhancement allegation and striking the additional punishment for that allegation. The grant of power under section 1385(a) to dismiss or strike the enhancement allegation would not also grant the trial court power to strike the additional punishment. This is shown by the fact section 1385, subdivision (c)(1) was enacted in 2000, over 125 years after the enactment of section 1385, to grant the trial courts such power. Section 186.22(g) is not redundant because it was enacted before section 1385, subdivision (c)(1).

DISPOSITION

Because the trial court failed to state its reasons for dismissing the gang enhancement allegation in a written order entered upon the minutes, we remand to give the trial court the opportunity to comply with section 1385(a). In all other respects, the order is affirmed.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Fuentes***
No.: **S219109**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **December 16, 2014**, I served the attached **APPELLANT'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Miles David Jessup, Esq.
Orange County Public Defender
901 West Civic Center Drive, Suite 200
Santa Ana, CA 92703-2352

Attorney for Respondent
(2 Copies)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **December 16, 2014**, at San Diego, California.

S. McBrearty
Declarant

S. McBrearty
Signature

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