**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR**

NELSON CHAVEZ ZEPEDA,
Petitioner,
v.

THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

No. A166159

Below: San Francisco County Superior Court
Superior Court No. 21001875
Hon. Eric Fleming

APPLICATION OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA TO APPEAR AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER NELSON CHAVEZ ZEPEDA

Emi Young (SBN 311238)
eyoung@aclunc.org
39 Drumm Street
San Francisco, CA 94111
Tel.: (415) 621-2493
Fax: (415) 255-8437
ACLU FOUNDATION OF
NORTHERN CALIFORNIA

Attorney for *Amicus Curiae*

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APPLICATION TO APPEAR AS *AMICUS CURIAE*

The American Civil Liberties Union of Northern California ("ACLU NorCal") respectfully applies for permission to file the attached *Amicus Curiae* brief under California Rule of Court 8.200.

ACLU NorCal is an affiliate of the national ACLU, a nationwide nonprofit, nonpartisan organization with approximately two million members dedicated to preserving and protecting the principles of liberty and equality embodied in the state and federal Constitutions and related statutes. As a legal organization and on behalf of its members, ACLU NorCal has an abiding interest in protecting the due process rights of the criminally accused and in ensuring the integrity of fundamental constitutional principles including the separation of powers doctrine.

With respect to Penal Code section 1170(b)(2) and aggravating factors alleged thereunder, ACLU NorCal has submitted several letters as *amicus curiae* in other matters raising similar due process concerns with the government's overbroad interpretation of this statute. *Amicus curiae's* participation in the present matter will accordingly assist the Court in resolving the significant issues here presented.

No party or counsel for any party in this matter has authored any part of the accompanying proposed brief of *Amicus Curiae*, nor has any person or entity made any monetary contributions to fund the preparation or submission of this brief.

BRIEF OF *AMICUS CURIAE*

I. Introduction

This case presents the question of whether the government may use non-statutory circumstances in aggravation, taken from California Rules of Court Rule 4.421, to increase a criminal defendant's maximum eligible sentence for a felony offense. The answer is categorically no. The Legislature, as the only branch entrusted to make law by statute, holds the exclusive and non-delegable power to write criminal statutes, including sentencing enhancements. Neither the executive nor the judicial branch may usurp this function under the constitutional separation of powers, article III, section 3, and the statute cannot be read to assign responsibility to a non-legislative body to define sentencing enhancements.

Additionally, reliance on the Rule 4.421 circumstances runs afoul of due process because these factors were not crafted with the requisite specificity to function as elements to be pled and proven to a jury, and they are void for vagueness as used in this context. Because the government's position threatens to erode the fundamental constitutional principles of separation of powers and due process, *amicus curiae* urges this Court to grant the Petition for Writ of Mandate and adopt Petitioner's interpretation of Penal Code section 1170(b)(2), which would limit the meaning of "circumstances in aggravation" to only statutorily-defined aggravating factors. (*See* Petition at pp. 45-46.) This result is consistent with the principle that courts "should endeavor to construe the statute in a manner which *avoids* any doubt concerning its validity." (*People v. Leiva* (2013) 56 Cal.4th 498, 507.)

II. Factual Background

Senate Bill 567 ("SB 567"), enacted in 2021, changed the maximum sentence for most felony offenses, providing that when "the statute specifies three possible terms," the court may not exceed the middle term except “when there are circumstances in aggravation of the crime that [so] justify...[and] have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial.” (Pen. Code, § 1170, subd. (b)(1)-(2).) While SB 567 changed the presumptive maximum term of imprisonment for most felony offenses and created new procedural rights attendant to the imposition of an aggravated term, it did not explicitly identify or define the circumstances in aggravation that must be pled and proven to a jury to increase the maximum sentence for an offense.

In the absence of explicit identification, the District Attorney’s office argues it may allege any circumstances in aggravation encompassed by California Rule of Court 4.421. Rule 4.421 contains a list of sentencing considerations promulgated by the Judicial Council, a non-legislative body that is permitted to “adopt rules for court administration, practice and procedure.” (Cal. Const., art. VI, § 6.) The Rule was drafted to provide criteria for trial courts’ exercise of sentencing discretion, Pen. Code, § 1170.3, and was neither intended nor written to define elements to be pled and proven to a jury.

III. Argument

A. Utilizing Non-statutory Circumstances in Aggravation to Enhance Maximum Penalties for an Offense Violates the Separation of Powers Doctrine.

The District Attorney’s position would require this Court to find that the Legislature delegated its power to define what conduct is punishable by enhanced criminal penalties to other entities, including to the Judicial Council and individual prosecutors. Yet such an interpretation is barred by the constitutional mandate of separation of powers. (Cal. Const., art. III, § 3.) The constitution “vest[s] each branch with certain ‘core’ or ‘essential’ functions.” (*People v. Bunn* (2002) 27 Cal.4th 1, 14, citations omitted.) To maintain a balance of powers, “one branch of government may not exercise an essential or core function belonging to another branch." (*People v. Marquez* (2020) 56 Cal.App.5th 40, 49.)

The constitution confers upon the legislature the power to make laws by statute, article IV, section 1, and "the power to define crimes and fix penalties is vested exclusively in the legislative branch." (*Manduley v. Superior Ct.* (2002) 27 Cal.4th 537, 552, *as modified* (Apr. 17, 2002); *see also People v. Farley* (2009) 46 Cal.4th 1053, 1119 ["We repeatedly have observed that the power to define crimes and fix penalties is vested exclusively in the legislative branch"] [citations omitted].) Indeed, California courts recognize that "foremost" among powers "uniquely in the domain of the Legislature" are "the definition of crime and the determination of punishment." (*People v. Baker* (2018) 20 Cal.App.5th 711, 724.)

The Legislature may not delegate its primary responsibility to determine "what conduct is unlawful and the penalty for the unlawful conduct." (*People v. Figueroa* (1999) 68 Cal.App.4th 1409, 1415.) To hold otherwise would render the criminal law ad hoc, replacing the Legislature's "fundamental policy decisions" of general applicability with "imposition of disparate and inequitable criminal sanctions for like conduct" based on executive or judicial discretion. (*Id*.) Under these principles, while the Legislature may delegate limited authority to an agency to "adopt rules and regulations to promote the purposes of the legislation," it must retain ultimate responsibility for the statutory framework, including by providing the overarching definition of operable terms in a criminal statute. (*People v. Martin* (1989) 211 Cal.App.3d 699, 710.)

In *Martin*, for instance, the Court of Appeal considered a challenge to a statutory scheme penalizing the disposal and transportation of hazardous waste. (*Id*. at 705-06.) While the Legislature explicitly defined the statutory term "hazardous waste," it also directed the Department of

Health Services to adopt a list of substances that it determined to be hazardous *under the statutory definition*. (*Id*. at 706, 710.) The Court of Appeal found that this did not amount to an unconstitutional delegation, as the *Legislature* made the policy determination about what conduct was punishable under the statute and provided "adequate standards for administrative application of the statutory scheme." (*Id*. at 710.)

The District Attorney argues that because the Legislature used the term "circumstances in aggravation," it intended the statute to incorporate the list of factors enumerated in California Rule of Court 4.421. But the Rules of Court are not static – the Judicial Council retains the ability to adopt and modify existing rules in accordance with its mandate – and Rule 4.421(c), which defines a circumstance in aggravation to include "any other factors . . . that reasonably relate to the defendant or the circumstances under which the crime was committed," permits broad discretion to define additional aggravating circumstances on a case-by-case basis. Thus, adopting the District Attorney's interpretation of Penal Code section 1170 would require this Court to find that the Legislature delegated its power to define an operable statutory term to *both* the Judicial Council and to individual prosecutors.

This interpretation is untenable for several reasons. First, a statute should not be read to accomplish delegation of legislative functions by implication. (*Figueroa*, *supra*, 68 Cal.App.4th at pp. 1414-15 [absent a statutory directive, non-legislative body's attempt to define statutory elements "would constitute an improper usurpation of the Legislature's function"].) Second, a delegation of the type contemplated here would amount to unlawful allocation of the power to make fundamental policy decisions, including to define operable terms in a criminal statute. This is not a case like *Martin*, where the Legislature created a definitional framework for the relevant statutory term and then delegated to other bodies the ability to specify items falling within that definition. Under the District Attorney's interpretation, prosecutors would have virtually unfettered authority to define aggravating factors relating to the defendant or the circumstances of the crime, subject to only post hoc review by the court. Such a delegation is prohibited by the state constitution, article III, section 3, and interpreting Penal Code section 1170(b)(2) in this way would render the statute unconstitutional.

B. Use of Vague Rule 4.421 Factors to Define Circumstances in Aggravation Also Raises Grave Due Process Concerns.

Interpreting Penal Code section 1170(b)(2) to permit enhanced sentences on the basis of Rule 4.421 circumstances also poses due process vagueness concerns. A penal statute violates due process and is void for vagueness if it fails to provide ordinary people with fair notice of the conduct it punishes or is so broad and standardless that it invites arbitrary and discriminatory enforcement. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.) This doctrine "is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." (*Sessions v. Dimaya* (2018) 138 S.Ct. 1204, 1212.) Vague laws "hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and [] leave people with no sure way to know what consequences will attach to their conduct." (*U.S. v. Davis* (2019) 139 S.Ct. 2319, 2323.) Moreover, a criminal law lacking sufficient specificity may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections" and lead to disparate application of the law. (*Kolender*, *supra*, 461 U.S. at p. 358.) These reasons for invalidating vague criminal statutes "apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." (*Johnson v. U.S.* (2015) 576 U.S. 591, 596, *citing U.S. v. Batchelder* (1979) 442 U.S. 114.)

Section 1170(b)(2) does not define the term "circumstances in aggravation" as used in the statute. As a preliminary matter, the absence of any statutory definition of this term raises doubts about its constitutionality, unless the Court construes "circumstances in aggravation" to include only those aggravating factors which are defined elsewhere in the statutory scheme.

If this Court were to interpret "circumstances in aggravation" to include Rule 4.421 factors this would generate serious due process concerns, because many of these factors do not give adequate notice of what conduct will be subject to increased maximum sentences, nor do they provide sufficiently specific and fact-based criteria to avoid disparate application. As the California Supreme Court has previously recognized, circumstances in aggravation defined in Rule 4.421 of the Rules of Court "were drafted for the purpose of guiding judicial discretion and not for the purpose of requiring factual findings by a jury beyond a reasonable doubt." (*People v. Sandoval* (2007) 41 Cal.4th 825, 849.) As such, "they are 'framed more broadly than' criminal statutes and necessarily 'partake of a certain amount of vagueness which would be impermissible if those standards were attempting to define specific criminal offenses.'" (*Id*. at 1155, citation omitted.) Nor are they "readily adaptable" to the purpose of requiring factual findings by a jury, "because they include imprecise terms that implicitly require comparison of the particular crime at issue to other violations of the same statute, a task a jury is not well-suited to perform." (*Id*. at 849.)

Take, for instance, Rule 4.421(b)(1)—one of the allegations challenged by Petitioner in this case—which states that "[t]he defendant has engaged in violent conduct that indicates a serious danger to society." The rule fails to define "violent conduct" and a "serious danger to society," phrases too vague to provide notice of the conduct that is subject to enhanced punishment. But more generally, existing law requires evidence that the purported aggravating factor makes the offense "distinctively worse than the ordinary." (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110.) The notion that jurors with no familiarity with the criminal system are supposed to know what constitutes an "ordinary" case is precisely the type of "imagined abstraction" repeatedly disavowed by the Supreme Court. (*Johnson*, *supra*, 576 U.S. at p. 597 [finding unconstitutional a definition of "violent felony" that required trier of fact to "imagine how the idealized ordinary case of the crime subsequently plays out"]; *see also Dimaya*, *supra*, 138 S.Ct. at pp. 1215-16 ["How does one go about divining the conduct entailed in a crime's ordinary case? Statistical analyses? Surveys? Experts? Google? Gut instinct?"].) Indeed, the District Attorney's suggestion that experts should be brought in to assist jurors "in evaluating alleged aggravating factors that require comparison to other cases," *see* Return to Order to Show Cause at p. 37, with competing experts attempting to define what is an "ordinary" crime, only highlights that any such standard fails to provide sufficient notice of what conduct is subject to enhanced punishment.

Worse yet, as discussed above, Rule 4.421(c) leaves it entirely to a prosecutor's discretion to define circumstances in aggravation that "reasonably relate to the defendant or the circumstances under which the crime was committed." No defendant has advance notice of the specific conduct or circumstances that may lead to increased penalties under this section, and the absence of clear limits on discretion is a recipe for "arbitrary and discriminatory enforcement" that the vagueness doctrine seeks to avoid. (*Kolender, supra,* 461 U.S. at p. 357.) Plainly, such a result is inconsistent with the principles of due process.

C. This Court Should Apply the Constitutional Doubt Canon and Rule of Lenity in Construing Penal Code Section 1170.

Petitioner has offered an alternative interpretation of Penal Code section 1170(b)(2) that does not raise the profound separation of powers and due process issues attendant to the view propounded by the District Attorney's office. (Petition at p. 46.) Both the canon of constitutional doubt and rule of lenity counsel in favor of adopting this interpretation.

First, "a statute must be interpreted in a manner, consistent with the statute's language and purpose, that eliminates doubts as to the statute's constitutionality." (*Harrott v. Cnty. of Kings* (2001) 25 Cal.4th 1138, 1151; *see also Leiva*, *supra,* 56 Cal.4th at pp. 506-07 ["[W]e adhere to 'the precept 'that a court, when faced with an ambiguous statute that raises serious constitutional questions, should endeavor to construe the statute in a manner which *avoids* any doubt concerning its validity''"].) Under this rule, often referred to as the "constitutional doubt" canon:

> If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable.

(*Harrott, supra,* 25 Cal.4th at p. 1153.) The canon "applies whenever 'the Government's view would raise serious constitutional questions on which precedent is not dispositive' [] and 'whether the cases raising the constitutional doubt antedate or postdate a statute's enactment.'" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373, citations omitted.)

Here, the government's interpretation of section 1170 clearly raises serious constitutional questions that have not been definitively resolved.

The doctrine of constitutional doubt, which reflects a judgement that "courts should minimize the occasions on which they confront and perhaps contradict the legislative branch," *id*., thus militates in favor of adopting Petitioner's strict construal of section 1170 to encompass only statutorily defined circumstances in aggravation.[1]

This interpretation finds further support in the rule of lenity, which "generally requires that 'ambiguity in a criminal statute should be resolved in favor of lenity, giving the defendant the benefit of every reasonable doubt on questions of interpretation.'" (*People v. Reyes* (2020) 56 Cal.App.5th 972, 989.) "To the extent that the language or history of [a statute] is uncertain, this 'time-honored interpretive guideline' serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." (*Harrott*, *supra,* 25 Cal.4th at 1154, citations omitted.)

As discussed above, the ambiguities inherent to Rule 4.421 factors do not give meaningful notice to defendants about what conduct may enhance the eligible sentence for an offense, and catch-all factors like Rule 4.421(c) would enable prosecutors to continually broaden the range of behavior chargeable as an aggravating circumstance. In keeping with the basic principles of due process and fair notice, this Court should construe section 1170 to encompass only those circumstances in aggravation which have been clearly defined by statute.

IV. Conclusion

For the foregoing reasons, *amicus curiae* respectfully requests that the Court *grant* the petition for mandate challenging the use of non-statutory circumstances in aggravation.

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[1] A list of such aggravating circumstances is included in footnote 9 of the Petition.

Dated: March 17, 2023

Respectfully submitted,

Emi Young (SBN 311238)
eyoung@aclunc.org
ACLU FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111

Attorney for *Amicus Curiae*

CERTIFICATE OF WORD COUNT

I certify pursuant to California Rule of Court 8.204 that this Brief of *Amicus Curiae* contains 2,647 words, including footnotes, but excluding the cover, application, tables, signature blocks, proof of service, and this certification, as calculated by the word count feature of Microsoft Word.

Dated: March 17, 2023

Emi Young

Emi Young (SBN 311238)
eyoung@aclunc.org
ACLU FOUNDATION OF
NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111

Attorney for *Amicus Curiae*

PROOF OF SERVICE

I, Kassandra Dibble, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is kdibble@aclunc.org. On March 17, 2023, I served the attached,

APPLICATION OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA TO APPEAR AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER NELSON CHAVEZ ZEPEDA

BY EMAIL OR ELECTRONIC TRANSMISSION: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system:

San Francisco Public Defender's Office
Eric Sebastian Quandt
Oliver A. Kroll
555 Seventh St
San Francisco, CA 94103
Email: Eric.Quandt@sfgov.org, oliver.a.kroll@sfgov.org
Counsel for Nelson Chavez Zepeda, Petitioner

The Attorney General of the State of California
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
Email: sfagdocketing@doj.ca.gov
Counsel for the People, Real Party in Interest

San Francisco District Attorney's Office
Allison G. Macbeth
Brian Albert Bringardner
350 Rhode Island Street
North Building, Suite 400N
San Francisco, CA 94103
Email: allison.macbeth@sfgov.org, brian.bringardner@sfgov.org
Counsel for the People, Real Party in Interest

[Continued on next page]

Los Angeles County Public Defender's Office
Nick Kevin Stewart-Oaten
320 W Temple St., Suite 590
Los Angeles, CA 90012
Email: nstewart-oaten@pubdef.lacounty.gov
Counsel for Amici Curiae Los Angeles County Public Defender's Office and the California Public Defender's Association

BY MAIL: I mailed a copy of the document identified above by depositing the sealed enveloped with the U.S. Postal Service, with the postage fully prepaid.

Clerk of the San Francisco County Superior Court
For: Hon. Eric Fleming
Hall of Justice
Room 101
850 Bryant St.
San Francisco, CA 94103

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 17, 2023 in Alameda, CA.

Kassandra Dibble