No. S275835

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

FERNANDO ROJAS,
Defendant and Appellant.

On review from the decision of the Court of Appeal,
Fifth Appellate District, Case No. F080361, affirming in part the judgment of the Kern County Superior Court, Case No. BF171239B
The Honorable John W. Lua, Judge

APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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APPLICATION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

To the Honorable Chief Justice of the Supreme Court of the State of California

The Criminal Justice Legal Foundation (CJLF) respectfully applies for permission to file a brief amicus curiae in support of of respondent pursuant to rule 8.520(f) of the California Rules of Court.[1]

Applicant's Interest

CJLF is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. No party or counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae CJLF made a monetary contribution to its preparation or submission.

In the present case, the Legislature unconstitutionally amended the statutory provisions of Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998, when they significantly redefined the terms "criminal street gang" and "pattern of criminal gang activity" without the requisite concurrence of two-thirds of the membership of both houses as dictated by the initiative. The Legislature's actions are contrary to the interests CJLF was formed to protect.

Need for Further Argument

CJLF is familiar with the arguments presented on both sides of this issue and believes that further argument is necessary.

Date: August 7, 2023

Respectfully Submitted,

KYMBERLEE C. STAPLETON
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BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT

SUMMARY OF FACTS AND CASE

In the very early morning hours of February 3, 2018, Fernando Rojas and Victor Nunez were patronizing an internet casino in Bakersfield, California. (*People v. Rojas* (2022) 80 Cal.App.5th 542, 548.) Surveillance footage showed that at approximately 2:04 a.m., Brandon Ellington appeared outside of the casino and was engaged in a suspected drug sale with unknown individuals. (*Ibid.*) Around this time, Rojas exited the casino and encountered Ellington. (*Ibid.*) Ellington removed his shirt and "squared off" against Rojas. (*Ibid.*) Rojas then threw a beer bottle at Ellington causing him to leave the area. (*Ibid.*)

Nunez, who was seen standing at the entrance of the casino during the altercation, quickly joined Rojas and both got into a silver BMW and drove away from the casino. (*Ibid.*) Rojas drove and Nunez sat in the front passenger's seat. (*Ibid.*) Surveillance video from a nearby store saw the silver BMW pull up near Ellington. (*Ibid.*) The video then showed an individual exit the

passenger's side of the BMW followed by "muzzle flashes." (*Ibid*.) Ellington was struck by a bullet and ran towards a nearby market, eventually collapsing. (*Ibid*.) The shooter reentered the BWM and it sped away. (*Ibid*.) Ellington's body was later found at the location where he had collapsed earlier. (*Ibid*.) Ellington suffered a fatal gunshot wound to the chest. (*Ibid*.)

Rojas was arrested at the same internet casino approximately one week after the shooting. (*Ibid*.) That same day, Nunez was also arrested after being discovered hiding behind a shipping container in a parking lot. (*Ibid*.) Before surrendering to the police, Nunez tossed away a black handgun. (*Ibid*.) The DNA profile on the gun matched Nunez, and a criminalist testified at trial that it was the same gun that fired the shell casings that were found at the crime scene. (*Id*. at pp. 548-549.)

A jury subsequently convicted Rojas of first-degree murder (Pen. Code, §§ 187, subd. (a), 189),[2] and active gang participation (§ 186.22, subd. (a)). (*Rojas*, *supra*, 80 Cal.App.5th at p. 547.) The jury further found true a gang-murder special circumstance allegation (§ 190.2, subd. (a)(22)), a gang enhancement (§ 186.22, subd. (b)(1)), and firearm enhancements (§§ 12022.53, subds. (d), (e)(1), 12022, subd. (d)). Rojas was sentenced to life without parole (LWOP) for the special circumstance first-degree murder of Ellington, plus 25 years to life for the section 12022.53, subdivisions (d) and (e)(1) (firearm enhancement), plus three years for the section 12022, subdivision (d) (firearm enhancement), and a stayed term of six years on the active gang participation conviction. (*Rojas*, at p. 547.)

Rojas appealed. While his appeal was pending, the Legislature enacted Assembly Bill 333 (AB 333) (2021-2022 Reg. Sess.)

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2. Unless otherwise noted, all statutory references are to the Penal Code.

(Stats. 2021, ch. 699, §§ 1-5). AB 333 made significant changes the definitions of "criminal street gang" and "pattern of criminal gang activity" as found in section 186.22, subdivisions (e) and (f). Rojas argued that these changes applied retroactively to him and required his conviction for active gang participation, the gang enhancement, the firearm enhancements, and the gang-murder special circumstance finding be reversed. (Appellant's Opening Brief on the Merits 11-12.) The Court of Appeal accepted the Attorney General's concession that AB 333 required reversal of Rojas' active gang participation conviction and enhancements. (*Ibid*.; *Rojas*, *supra*, 80 Cal.App.5th at p. 546.) A divided panel of the Court of Appeal then affirmed the gang-murder special circumstance finding, holding that AB 333's changes to section 186.22 improperly amended section 190.2, subdivision (a)(22), an initiative statute, in violation of the California Constitution. (*Rojas*, at pp. 557-558.)

This Court granted Rojas' petition for review on October 19, 2022.

SUMMARY OF ARGUMENT

Violent criminal street gangs pose a significant threat to the safety and livelihood of innocent people throughout the state. When a majority of California voters enacted Proposition 21, they did so with the express purpose of making it easier for the state to prosecute gang-related crimes and to also increase the punishment for those convicted of gang-related felonies. The addition of gang-related murder to the list of special circumstances punishable with death or life without parole was further amongst the provisions that increased punishment for gang-related crime as sought by Proposition 21. (Pen. Code, § 190.2, subd. (a)(22).)

The definitions of "criminal street gang" and "pattern of criminal gang activity" cannot be parsed out and viewed in isola-

tion from the entire comprehensive statutory scheme as enacted by the electorate via Proposition 21. The two terms were not constitutionally compelled technical restatements of existing law. Rather, because all of the changes made to existing law by Proposition 21 hinged on those two definitions, they were "integral to accomplishing the electorate's goals" (*County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214) and were substantively reenacted by the initiative.

The California Constitution places strict limits on the Legislature's ability to amend or repeal voter enacted law without voter approval. Like many initiatives, Proposition 21 included a provision expressly authorizing legislative amendment of its statutory provisions so long as two-thirds of the membership of both houses concurred in the vote. When the Legislature enacted Assembly Bill 333 without a two-thirds concurrence in either house and significantly redefined the terms "criminal street gang" and "pattern of criminal gang activity" as defined by Proposition 21's substantive reenactment of Penal Code section 186.22, subdivisions (e) and (f), they disregarded the express limitation placed upon them by the electorate, and is void. Furthermore, because Penal Code section 190.2, subdivision (a)(22) specifically referred to Penal Code section 186.22, subdivision (f), the Legislature's significant changes to that latter subdivision amended Penal Code section 190.2, subdivision (a)(22) and is unconstitutional.

ARGUMENT

I. The definitions of "criminal street gang" and "pattern of criminal gang activity" encompassed within Proposition 21's gang provisions evidence the electorate's intent to create a comprehensive scheme designed to increase punishment for gang-related crime and are integral to accomplishing the initiative's goals.

Many ballot initiatives restate existing statutory provisions with little or no change. (Cal. Const., art. IV, § 9.) As a general rule, the Legislature retains the authority to amend these technically restated provisions through the ordinary legislative process without running afoul of the strict limitations the California Constitution places on legislative amendment of initiative statutes. (Cal. Const. art. II, § 10, subd. (c); *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214.) However, if the restated provisions are "integral to accomplishing the electorate's goals in enacting the initiative," and are thus an inherent part of the entire comprehensive statutory scheme, then the Legislature's independent ability to amend through the ordinary legislative process ceases to exist. (*County of San Diego,* at p. 214.)

Gang-related violence was of significant concern to California voters when they went to the election polls on March 7, 2000, and voted yes on Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998. (Voter Information Guide, Primary Elec. (Mar. 7, 2000), Prop. 21, pp. 44-49, 119-131 ("2000 Voter Guide").) Voters decided that considerable changes to existing law were necessary to stifle the havoc criminal street gangs were increasingly perpetrating on neighborhoods, parks, and schools across the state. (*Id.*, § 2, subd. (k), p. 119.) With the legislatively promulgated definitions of "criminal street gang" and "pattern of criminal gang activity" emphatically specified and fully enmeshed within the proposed changes to existing law, the electorate en-

acted Proposition 21. These two definitions were not mere technical restatements of existing law, but rather were substantively reenacted by the initiative because they were indispensable components of the entire comprehensive statutory scheme, thereby stripping the Legislature's independent authority to amend these provisions.

A. Statutory and Constitutional Framework.

1. The STEP Act.

In the late 1980's, the Legislature formally recognized that California was in a "state of crisis ... caused by violent street gangs whose members threaten[ed], terrorize[d], and commit[ted] a multitude of crimes against the peaceful citizens of their neighborhoods." (Pen. Code, § 186.21.) In an effort to combat this growing and significant problem, in 1988, the Legislature enacted as an urgency measure the California Street Terrorism Enforcement and Prevention Act (STEP Act). (Pen. Code, § 186.20 et seq.; Stats. 1988, ch. 1242; Stats. 1988, ch. 1256; *People v. Valencia* (2021) 11 Cal.5th 818, 829, fn. 9).) As originally enacted, the STEP Act made active participation in a criminal street gang a substantive offense and further authorized a sentencing enhancement for crimes that were committed "for the benefit of, at the direction of, or in association with, any criminal street gang ...." (Former Pen. Code, § 186.22, subds. (a), (b); *Valencia*, 11 Cal.5th at p. 829.)

A "criminal street gang" was defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of [enumerated predicate offenses], which has a common name or common identifying sign or symbol, whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (Former Pen.

Code, § 186.22, subd. (d).) A "pattern of criminal gang activity" was defined as "the commission, attempted commission, or solicitation of two or more of [enumerated predicate] offenses, provided at least one of those offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses are committed on separate occasions, or by two or more persons ...." (Former Pen. Code, § 186.22, subd. (c).)[3]

The Legislature amended the STEP Act several times after its enactment to, amongst other things, expand the list of predicate offenses and increase various punishments. (*People v. Gardeley* (1996) 14 Cal.4th 605, 615, fn. 7, disapproved of on other grounds by *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) In 2000, the electorate significantly amended the STEP Act when it enacted Proposition 21. (2000 Voter Guide, Prop. 21, pp. 44-49, 119-131; *People v. Brookfield* (2009) 47 Cal.4th 583, 588-589.)

2. Proposition 21.

A majority of California voters enacted Proposition 21 because they recognized that "[c]riminal street gangs ha[d] become more violent, bolder, and better organized" since the STEP Act's initial enactment in 1988. (2000 Voter Guide, text of Prop. 21, § 2,

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3. As originally enacted, former Penal Code section 186.22, subdivision (c) included the following seven enumerated predicate offenses: (1) Assault with a deadly weapon or by means of force likely to produce great bodily injury, (2) robbery, (3) unlawful homicide or manslaughter, (4) the sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances, (5) shooting at an inhabited dwelling or occupied motor vehicle, (6) arson, and (7) the intimidation of witnesses and victims.

   Subdivisions (c) and (d) are now found in subdivisions (e) and (f).

subd. (b), p. 119.) Voters decided that because of “gang members’ organization and solidarity,” “[g]ang-related crimes pose a unique threat to the public” and thus “[g]ang-related felonies should result in severe penalties.” (*Id.*, § 2, subd. (h), p. 119.) The initiative significantly reformed the juvenile and criminal justice system in direct response to the growing problem of youth and gang violence. (*Id.*, § 2, subd. (d), p. 119.)[4]

Eight of the twelve sections of the initiative specifically relating to criminal gang activity added to or directly amended several provisions of the STEP Act. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 574; 2000 Voter Guide, text of Prop. 21, §§ 3-10, pp. 119-121.) Along with the additions and changes to the STEP Act itself, the initiative further added gang-murder to the list of special circumstances punishable with death or LWOP. (2000 Voter Guide, text of Prop. 21, § 11, pp. 121-122; Pen. Code, § 190.2, subd. (a)(22).) The Legislative Analyst apprised voters that voting in favor of the initiative would increase “extra prison terms for gang-related crimes .... [M]akes it easier to prosecute crimes relating to gang recruitment, expands the law on conspiracy to include gang-related activities, allows wider use of ‘wiretaps’ against known or suspected gang members, and requires anyone convicted of a gang-related offense to register with local law enforcement agencies.” (2000 Voter Guide, analysis by the Legis. Analyst, p. 46.)

When the electorate was presented with the opportunity to enhance and strengthen the STEP Act’s provisions, the Legislative Analyst informed voters that “[c]urrent law generally defines ‘gangs’ as any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its

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4. Proposition 21 addressed gang violence, juvenile crime, and the sentencing of repeat offenders. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 575.)

primary activities the commission of certain crimes." (*Ibid.*) With this reference to the section 186.22, subdivision (f) definition of criminal street gang unequivocally specified and fully immersed within the proposed amendments to STEP Act's entire comprehensive statutory scheme, the electorate enacted Proposition 21.

Article II, section 10, subdivision (c) of the California Constitution[5] limits the Legislature's authority to amend initiative statutes without voter approval. An initiative statute can be amended by the Legislature only if expressly authorized to do so by the initiative itself, and it must be accomplished in strict compliance with the terms stated therein. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568 (*Pearson*).) Like most initiatives, Proposition 21 included a provision that expressly limited the Legislature's authority to amend its statutory provisions without voter approval. (2000 Voter Guide, *supra*, at p. 131.) Uncodified section 39 of Proposition 21 provides, "[t]he provisions of this measure shall not be amended by the Legislature except by a statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters." (*Ibid.*; see also *Pearson*, *supra*, 48 Cal.4th at pp. 568-569.)

3. AB 333 — The STEP Forward Act of 2021.

In 2021, the California Legislature passed, and the Governor signed, AB 333 into law. (Stats. 2021, ch. 699.) AB 333, the STEP Forward Act of 2021 (Stats. 2021, ch. 699, § 1), significantly redefined the terms "criminal street gang" and "pattern of criminal gang activity" as defined by Penal Code section 186.22, subdi-

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5. Unless otherwise noted, all references to constitutional provisions are to the California Constitution.

visions (e) and (f). (See *People v. Delgado* (2022) 74 Cal.App.5th 1067, 1085-1086.)

When Proposition 21 was enacted, "criminal street gang" was defined as "any ongoing organization, association, or group of three or more persons ... having as one of its primary activities the commission of one or more" of the enumerated predicate offenses found in Penal Code section 186.22, subdivision (e), "whose members individually or collectively engage ... in a pattern of criminal gang activity." (2000 Voter Guide, *supra*, text of Prop. 21, § 4, subd. (f), p. 120.) Furthermore, a "pattern of criminal gang activity" was defined as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more [enumerated predicate offenses], provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons ...." (*Id*., § 4, subd. (e), p. 120.)

AB 333 narrowed both of these definitions so that a "criminal street gang" is now described as an "ongoing, *organized association* or group of three or more persons ... having as one of its primary activities the commission of one or more [enumerated predicate offenses] ... whose members *collectively engage* in ... a pattern of criminal gang activity." (Pen. Code, § 186.22, subd. (f), italics added; *People v. Tran* (2022) 13 Cal.5th 1169, 1206.) To prove a "pattern of criminal gang activity" so as to establish a "criminal street gang," the STEP Forward Act now requires the prosecution to show that

> "(1) the last offense used to show a pattern of criminal gang activity occurred within three years of the date that the currently charged offense is alleged to have been committed; (2) the offenses were committed by two or more gang 'mem-

bers,' as opposed to just 'persons'; (3) the offenses commonly benefitted a criminal street gang; and (4) the offenses establishing a pattern of gang activity must be ones other than the currently charged offense." (*Tran*, at p. 1206.)

AB 333 also eliminated the crimes of looting and felony vandalism from Penal Code section 186.22, subdivision (e)'s list of enumerated predicate offenses, and added subdivision (g) to section 186.22 so as to "require a heightened showing both that the [enumerated] predicate offenses 'commonly benefitted a criminal street gang' and that the common benefit is 'more than reputational.' " (*People v. Cooper* (2023) 14 Cal.5th 735, 741, 744.)[6] This latter subdivision provided examples of a common benefit that is "more than reputational" to include "financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant." (Pen. Code, § 186.22, subd. (g).) The changes made by AB 333 to section 186.22 increase the "threshold for conviction" of the substantive offense of active participation in a criminal street gang and for the sentencing enhancement "with obvious benefit to defendants ...." (*Tran*, 13 Cal.5th at p. 1207.)

AB 333 passed in the Senate with 25 ayes and 10 noes and passed in the Assembly with 41 ayes and 30 noes. (Sen. J. (2021-2022 Reg. Sess.) p. 2284; Assem. J. (2021-2022 Reg. Sess.) p. 2927.) As there are 40 members of the Senate and 80 members of the Assembly (Cal. Const., art. IV, § 2, subds. (a)(1), (2)), AB 333

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6. AB 333 also added section 1109, allowing for the bifurcation of gang enhancement charges under section 186.22 upon request of the defendant, and requiring the substantive offense of active participation in a criminal street gang to be tried "separately from all of the counts that do not otherwise require gang evidence as an element of the crime." (Stats. 2021, ch. 699, § 5.)

did not pass by a vote of two-thirds of the members of either house.

B. Penal Code Section 186.22, Subdivisions (e) and (f) Were Substantively Reenacted by Proposition 21.

As discussed, *supra*, Proposition 21 added a new gang-murder special circumstance to the list of special circumstances, that applies to a certain subset of first-degree murders in which "[t]he defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of section 186.22, and the murder was carried out to further the activities of the criminal street gang." (2000 Voter Guide, *supra*, text of Prop. 21, § 11, pp. 121-122; Pen. Code, § 190.2, subd. (a)(22).) The majority held that the changes AB 333 made to section 186.22, subdivisions (e) and (f) amended the section 190.2, subdivision (a)(22) gang murder special circumstance by "reduc[ing] the scope of murders punishable under [the statute] in several ways." (*Rojas*, 80 Cal.App.5th at p. 554.) Because AB 333 was not passed with a two-thirds vote in either house as required by Proposition 21, a divided panel of the Court of Appeal held that AB 333 unconstitutionally amended section 190.2, subdivision (a)(22) in violation of article II, section 10, subdivision (c).[7] (*Id.* at p. 555.) The majority, however, did not

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7. The question of whether AB 333 unconstitutionally amended provisions of Proposition 21 has also been addressed by four other appellate courts: In *People v. Campbell* (2023) 92 Cal.App.5th 1327, *People v. Lee* (2022) 81 Cal.App.5th 232, and *People v. Lopez* (2022) 2022 Cal.App. Unpub. LEXIS 6712, the First, Second and Fourth Appellate Districts all held that AB 333 did not unconstitutionally amend section 190.2, subdivision (a)(22), and in *People v. Lopez* (2022) 82 Cal.App.5th 1, a different panel of the Fifth Appellate District held that AB 333 did not unconstitutionally amend Penal Code section 182.5, the gang conspiracy statute also

void AB 333 in its entirety. (*Id.* at pp. 557-558.) Rather, they narrowly disavowed the unconstitutional application of AB 333 to only Penal Code section 190.2, subdivision (a)(22) itself and affirmed Rojas' gang-murder special circumstance finding after analyzing Rojas' claims without regard to the changes made by AB 333. (*Ibid.*)

The Court of Appeal then went on to reverse Rojas' conviction for active gang participation, his gang enhancement, and his firearm enhancement after accepting the Attorney General's concession that the retroactive application of AB 333 required reversal of his conviction and enhancements. (*Rojas*, 80 Cal.App.5th at p. 546.) As will be discussed in more detail in Part II, *infra*, amicus agrees with the majority's opinion that AB 333 unconstitutionally amended Penal Code section 190.2, subdivision (a)(22). Amicus disagrees, however, with the court's acceptance of the Attorney General's concession that AB 333 required reversal of Rojas' gang conviction and enhancements.[8] It is amicus' conten-

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enacted by Proposition 21 that also incorporates section 186.22, subdivision (f)'s definition of criminal street gang.

8. Because the Court of Appeal accepted the Attorney General's concession and only disavowed the unconstitutional application of AB 333 to section 190.2, subdivision (a)(22),

> "[a] jury will have to apply one definition of criminal street gang for the sentence enhancements under section 186.22, and another definition for purposes of determining whether [a] defendant is eligible for capital punishment under section 190.2, subdivision (a)(22). ... the definition ... applied for purposes of the gang sentence enhancements would be narrower than that applied to the special circumstance. Thus, . . . for the same gang-related criminal conduct in which a killing occurs, a defendant could be found not to qualify for the lesser gang sentence enhancements, but nonetheless found to qualify for capital punishment." (*Lee*, 81 Cal.App.5th at p. 242, fn. 36.)

tion that because section 186.22, subdivisions (e) and (f) were substantively reenacted by Proposition 21, and because the amendments AB 333 made to those subdivisions were passed without a two-thirds vote of both houses, the legislation is unconstitutional.

1. Technical Restatement Versus Substantive Reenactment.

It is undisputed that Proposition 21 amended several existing statutory provisions of the STEP Act. (*Manduley*, *supra*, 27 Cal.4th at p. 574) This is not uncommon. (*County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 208 ["Many voter initiatives ... amend existing statutory sections"].) However, "[w]hen an existing statutory section is amended — even in the tiniest part — the state Constitution requires the entire section to be reenacted as amended." (*Ibid*; Cal. Const., art. IV, § 9.) The rationale for requiring the entire section of the statute to be set out in full is to avoid confusion and to promote transparency. (*Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 989.) "The underlying purpose of the reenactment rule is to make sure legislators are not operating in the blind when they amend legislation, and to make sure the public can become apprised of changes in the law." (*American Lung Ass'n v. Wilson* (1996) 51 Cal.App.4th 743, 749, citing *Hellman v. Shoulters* (1896) 114 Cal. 136, 152.) "Consequently, a substantial part of almost any statutory initiative will include a restatement of existing provisions with only minor, nonsubstantive changes — or no changes at all." (*County of San Diego*, 6 Cal.5th at p. 208.)

It is well known that article II, section 10, subdivision (c) prohibits the Legislature from independently amending initiative statutes without voter approval. What happens when an initiative restates existing statutory provisions as required by article IV, section 9 with little or no change? Have the restated statutory

provisions completely morphed into initiative statutes that are now immune from independent legislative amendment absent voter approval as required by article II, section 10, subdivision (c)? That precise question was addressed by this court in *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196.

In *County of San Diego,* the Sexually Violent Predator's Act (SVPA) was legislatively enacted in 1995 to allow for involuntary civil commitment hearings for convicted sex offenders diagnosed with a mental disorder that made it likely they would engage in sexually violent behavior if released from prison following the completion of their prison terms. (6 Cal.5th at p. 203.) Under the SVPA, county governments were responsible for filing commitment petitions, providing counsel and experts for all hearings, and housing the sex offenders while the petitions were being adjudicated. (*Id.* at p. 200.) The SVPA was deemed a "state-mandated program" and expenses incurred by the counties in carrying out the act's duties were reimbursable by the State pursuant to article XIII B, section 6, subdivision (a). (*Id.* at pp. 200, 203-204.)

In 2013, California Department of Finance sought to terminate the state's reimbursement of county expenses in light of the electorate's 2006 enactment of Proposition 83, the Sexual Predator Punishment and Control Act: Jessica's Law. (*Id.* at pp. 200-201.) Proposition 83 amended and reenacted several of the Welfare and Institutions Code sections encompassed within the SVPA. (*Id.* at p. 204.) Because Government Code section 17556, subdivision (f) eliminates a state's obligation to reimburse local governments for costs expended pursuant to a statute "impos[ing] duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters ...," the Department of Finance argued that Proposition 83 amounted to a "subsequent

change in law" that terminated the State's obligation to reimburse counties going forward. (*Id.* at pp. 201-202.)

This court noted that Proposition 83 contained several of the same statutory provisions encompassed within the SVPA upon which the Commission on State Mandates ("Commission") had earlier relied upon when finding the state was initially obligated to reimburse counties for their costs associated with implementing the SVPA. (*Id.* at p. 204.) This court also divulged that all parties to the case conceded that these statutory provisions were reprinted in Proposition 83 for the sole reason that article IV, section 9 required them to be reprinted. (*Ibid.*) All parties further admitted that "Proposition 83 made no changes to many of the provisions the Commission had identified as imposing state-mandated duties on local governments and revised the remainder only in nonsubstantive ways." (*Ibid.*) Nevertheless, the Commission sided with the State, "deemed it irrelevant" that Proposition 83 made no "substantive changes" to the SVPA's statutory provisions, and determined that the initiative itself "transformed" a majority of the "local government duties ... from reimbursable state-mandated activities into nonreimbursable voter-mandated activities." (*Id.* at pp. 204-205.)

On appeal, this court considered "whether Proposition 83, by amending and reenacting provisions of the SVPA, constituted a 'subsequent change in law' sufficient to modify the Commission's prior decision, which directed the State of California to reimburse local governments for the costs of implementing the SVPA." (*Id.* at p. 206.) The resolution of this issue required consideration of "four distinct legal principles": (1) the State's constitutional obligation to reimburse local governments for costs of discharging legislatively imposed mandates (Cal. Const., art. XIII B, § 6, subd. (a)); (2) the obligation to reimburse does not apply to activities necessary to implement, or those expressly included in, a

ballot initiative enacted by the electorate (Gov. Code, § 17556, subd. (f)); (3) when an existing statute is amended in any way, the entire statute must be restated and reenacted in full (Cal. Const., art. IV, § 9); and (4) the Legislature's inability to independently amend an initiative statute unless expressly authorized to do so by the initiative itself (Cal. Const., art. II, § 10, subd. (c). (*County of San Diego*, at p. 206.)

This court initially addressed the interplay between legal principles (1), (2), and (3) as applied to the unique facts presented by the case. This court grappled with the question of what "qualifies as a mandate imposed by the voters" as stated in Government Code section 17556, subdivision (f). (*County of San Diego*, *supra*, 6 Cal.5th at pp. 207-208.) This court further narrowed the inquiry by examining the definition of "ballot measure" as that term was used in the statute. This court opined that the text, comprehensive structure of the statute, and related constitutional provisions led to the conclusion "that not every single word printed in the body of an initiative falls within the scope of the statutory term 'expressly included in ... a ballot measure.' " (*Ibid.*) However, this court admitted that "[d]iscerning the extent of the state's obligation to reimburse local governments for existing state mandates in the wake of a voter-approved initiative that includes the text of a previously enacted law — and the Legislature's power to amend any of its provisions — takes a more nuanced analysis." (*Id.* at p. 208.)

As stated, *supra*, it was conceded that Proposition 83 reprinted verbatim or with very minor, nonsubstantive change several statutes that had been legislatively enacted as part of the SVPA. This court was troubled by the fact that the Commission found the initiative's "mere existence" was enough to transform the legislatively enacted statutes into pure voter enacted statutes. (*Id.* at p. 209 ["[i]f the term 'ballot measure' ... were defined

as automatically including every provision subject to constitutionally compelled restatement in an initiative, it would sweep in vast swaths of the California Code"].)

> "By treating those untouched statutory bystanders no differently from materially changed or newly added provisions, the Commission's approach leads to results 'that no one would consider reasonable.'... The Commission's view implies that merely restating a state-mandated duty in a ballot measure to renumber the section, correct punctuation or grammar errors, or substitute gender-neutral language ... automatically relieves the state of its obligation to reimburse local governments for performing their assigned role.... The mere happenstance that the mandated duties were contained in test claim statutes that were amended in other respects not clearly germane to any of the duties — and thus had to be reenacted in full under the state Constitution — should not in itself diminish their character as state mandates." (*Id*. at p. 210.)

This court then delved into the fourth legal issue — the Legislature's inability to independently amend initiative statutes (Cal. Const., art. II, § 10, subd. (c)) — when addressing the State's argument that "the compelled reenactment of the test claim statutes transformed the state mandate into a voter-imposed mandate because the voters *simultaneously* limited the Legislature's ability to revise or repeal the test claim statutes." (*County of San Diego*, 6 Cal.5th at p. 211, italics in original.) Pointing to Proposition 83's amendment clause, the State argued that the restated statutory provisions "no longer qualify as legislatively imposed mandates because the Legislature now lacks the power to amend or repeal these test claim statutes using the ordinary legislative process." (*Ibid*.) This argument, according to this court, assumes that because of article II, section 10, subdivision (c), none of an initiative's technically restated statutory provisions may be legislatively amended except as authorized by the initiative's amendment clause. (*Ibid*.)

This court recognized that article II, section 10, subdivision (c) was added to our state Constitution to " 'protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.' " (*Id.* at p. 211, quoting *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, 597.) However, the question of " 'what the people have done' and what qualifies as 'undoing' when the subject is a statutory provision whose reenactment was constitutionally compelled under article IV, section 9" had yet to be resolved. (*Id.* at p. 211).

The State cited *Shaw*, *supra*, 175 Cal.App.4th 577, in support of their argument. In *Shaw*, the electorate enacted Proposition 116, which in relevant part, amended two existing legislatively enacted statutes having to do with "spillover gas tax revenue." (*Id.* at p. 587-588.) In a nutshell, prior to Proposition 116, the Legislature had enacted Revenue and Taxation Code section 7102. That code section governed the withdrawal and transfer of funds from the Retail Sales Tax Fund. Subdivision (a) required the "spillover gas tax revenue" to be transferred from the Retail Sales Tax Fund into an account within the State Transportation Fund called the Public Transportation Account (PTA) (*Ibid.*)

In 1990, Proposition 116 amended Public Utilities Code section 99310.5 to designate the PTA as a "trust fund" and to require that the funds in the account be used solely "for transportation planning and mass transportation purposes, as specified by the Legislature." (*Id.* at p. 589, italics omitted.) The initiative also amended Revenue and Taxation Code section 7102, subdivision (a)(1) to update the PTA's status as a "trust fund" so as to be consistent with the change made to section 99310.5 (*Id.* at p. 589.) Proposition 116 also added to both sections 99310.5 and 7102 an amendment clause that read: "[t]he Legislature may amend this section by statute passed in each house of the Legislature by

rollcall vote entered in the journal, two-thirds of the membership concurring, if the statute is consistent with, and furthers the purposes of, this section." (*Id*. at pp. 589-590, italics omitted.)

In 2006 and 2007, the Legislature amended Revenue and Taxation Code section 7102, subdivision (a)(1) to add additional subdivisons that "[e]ssentially ... appropriated money that was otherwise directed to the PTA to various other government sources and obligations." (*Id*. at p. 592.) A lawsuit was brought challenging the Legislature's changes to Revenue and Taxation Code section 7102, subdivision (a)(1) as an unconstitutional amendment of Proposition 116. (*Id*. at pp. 594-595.)[9]

In *County of San Diego*, this court distinguished *Shaw* by stating that in that case the court "analyzed a legislative amendment aimed at the heart of a voter initiative, not a bystander provision that had been only technically restated." (6 Cal.5th at p. 212.) This court further stated that the Legislature's amendment

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9. The *Shaw* court did not address whether Proposition 116 "technically restated" or "substantively reenacted" existing statutory provisions. Rather, the court cited to article IV, section 9 and assumed, without further discussion, that because Revenue and Taxation Code section 7102 "was amended in 1990 by Proposition 116, it was actually reenacted in its entirety as amended" and thus became an initiative statute. (*Id*. at p. 597.) Based on this, the court then proceeded to discuss the Proposition's amendment clause to determine whether the Legislature's 2006 and 2007 amendments were "consistent with, and further[ed] the purposes of" the electorate's enactment of the statute. Thus, the *Shaw* court assumed, without further analysis, that Proposition 116 morphed the existing legislatively enacted statutory provisions into initiative statutes by virtue of article IV, section 9. This court in *County of San Diego*, disapproved of *Shaw* to the extent it was "inconsistent with this opinion." (6 Cal.5th at p. 214, fn. 4.)

> "sought to undo the very protections the voters had enacted in Proposition 116..., sought to undermine the voter-created trust fund by adding new provisions to divert those funds from uses the voters had previously designated, [and thus] was not amending a provision that had merely been technically restated by the voters.... Instead, the 2007 amendment sought to alter the voters' careful handiwork, both the text and its intended purpose .... To grant the Legislature free rein to tinker with spillover gas tax revenue and thereby undermine the PTA's integrity would have defeated a core purpose of Proposition 116 ...." (*Id.* at p. 213.)

This court distinguished Proposition 83 from Proposition 116 by stating that nothing in Proposition 83 focused on the duties local governments had been performing all along under the SVPA. (*Ibid.*) Rather, the main focus of the initiative was on the sex offenders themselves — increasing penalties, prohibiting them from residing within a certain distance of schools or parks, requiring lifetime electronic monitoring, etc. — and not how counties carry out their duties to process and adjudicate the civil commitment petitions. (*Ibid.*) This court also focused on the comprehensive nature of Proposition 83 stating that no "aspect of the initiative's structure or other indicia of its purpose suggest that the listed duties merited special protection from alteration by the Legislature." (*Ibid.*)

This Court then returned to the question involving the interplay between legal principles (3) and (4) asked earlier on how to harmonize the article II, section (10), subdivision (c) prohibition of "undoing what the people have done" when the subject is a statutory provision whose technical restatement and reenactment was constitutionally compelled under article IV, section 9. It is worth reiterating that in *County of San Diego* all parties conceded that Proposition 83 made no substantive changes to statutes at issue in the case, but rather they were "technically restated" for

the sole reason that article IV, section 9 required them to be reprinted in whole.

With that in mind, this court answered the above question as follows: As a *general rule*, when an initiative either restates verbatim or makes very minor, technical changes to portions of existing statutory provisions and is restated in its entirety as compelled by article IV, section 9, the entire statutory provision is not automatically considered to be reenacted in its entirety as amended. (See *id.* at p. 214.) Instead, these “constitutionally compelled” mere “technical reenactments” are “considered to ‘have been the law all along’ ” and “the Legislature in *most cases* retains the power to amend the restated provision through the ordinary legislative process.” (*Id.* at pp. 209-210, 214, italics added; see also *Vallejo etc. R.R. Co. v. Reed Orchard Co.* (1918) 177 Cal. 249, 255; Gov. Code, § 9605.)

This court recognized, however, that an *exception* to this general rule exists when considered in light of the electorate’s reserved power to propose and adopt statewide legislation by ballot initiative:

> “This conclusion applies *unless* the provision is integral to accomplishing the electorate’s goals in enacting the initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature’s ability to amend that part of the statute. This interpretation ... is consistent with the people’s precious right to exercise the initiative power.... [and] the Legislature’s ability to change statutory provisions outside the scope of the existing provisions voters plausibly had a purpose to supplant through an initiative.” (*County of San Diego*, *supra*, 6 Cal.5th at p. 214, italics original.)

In this case, when viewed in isolation, Proposition 21 made a very minor change to section 186.22, subdivision (e)’s definition of “pattern of criminal gang activity,” and a minor technical change to section 186.22, subdivision (f)’s definition of “criminal street

gang." Therefore, without closer examination, these two provisions were simply "constitutionally compelled" "technical restatements" of these two provisions and the Legislature theoretically retained the power to make changes to these provisions via the "ordinary legislative process." This was the view taken by the Courts of Appeal in *People v. Campbell* (2023) 92 Cal.App.5th 1327, 1353-1354, *People v. Lee* (2022) 81 Cal.App.5th 232, 242, and *People v. Lopez* (2022) 82 Cal.App.5th 1, 19-22. These three courts focused on *County of San Diego*'s general rule regarding technical restatements without further analysis of the exception to the rule.

When these provisions are analyzed under the exception to the general rule and in light of *County of San Diego*'s discussion of *Shaw*, it is evident that these two subdivisions cannot simply be parsed out and viewed in isolation from the overall comprehensive statutory scheme as enacted by the electorate via Proposition 21. This is because the majority of Proposition 21's additions to and amendments of the STEP Act's statutory provisions hinged on these two definitions and were (1) "integral to accomplishing the electorate's goals" and (2) completely within "the scope of the existing [STEP Act] provisions voters plausibly had a purpose to supplant through an initiative." (*County of San Diego*, 6 Cal.5th at p. 214.)

2. Voter Intent.

The question of whether the definitions of "criminal street gang" and "pattern of criminal gang activity" were substantively reenacted by Proposition 21 comes down to voter intent. Discerning voter intent requires the initiative to be viewed "as a whole." (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1257.) Furthermore, "long-standing principles of interpretation" require that the "entire substance" of the law be examined "in context, keeping in mind the nature and obvious purpose of the statute."

(*People v. Arroyo* (2016) 62 Cal.4th 589, 594-595, internal quotation marks omitted.) Different provisions of the entire measure must be "harmonize[d] ... by considering the particular clause or section in the context of the [legal] framework as a whole." (*Ibid*., internal quotation marks omitted)

In doing this, courts are guided by evidence such as the express language of the initiative, its historical context, and the information provided to the electorate in the 2000 Voter Guide. (*Amwest Surety Ins.*, *supra*, 11 Cal.4th at pp. 1256-1257; *Gardener v. Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1374.) An initiative cannot be interpreted "in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114; see also *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 909.)

Proposition 21 was added to the March 2000 ballot to enhance and strengthen the STEP Act and increase penalties for gang-related crimes. Every section that was added to the STEP Act and amended by Proposition 21 centered around the definitions of "criminal street gang" and "pattern of criminal gang activity." The initiative increased prison terms for gang-related crimes, added gang-related murder to the list of special circumstances, made "it easier to prosecute crimes related to gang recruitment, expand[ed] the law on conspiracy to include gang-related activities, allow[ed] wider use of 'wiretaps' against known or suspected gang members, and require[d] anyone convicted of a gang-related offense to register with local law enforcement agencies." (2000 Voter Guide, *supra*, analysis of Prop. 21 by Legis. Analyst, p. 46.)

Voters found and declared that "[g]ang-related crimes pose a unique threat to the public because of gang members' organization and solidarity." (*Id*., text of Prop. 21, § 2, subds. (b), (h), p.

119.) They further found and declared that because "criminal street gangs and gang-related violence pose a significant threat to public safety and .... have become more violent, bolder, and better organized in recent years" that "[d]ramatic changes" to the way in which criminal street gangs and gang-related crimes were treated were necessary to address the growing problem. (*Id.,* § 2, subds. (b), (k).) Voters were cognizant of the definitions of "criminal street gang" and "pattern of criminal gang activity" as defined by section 186.22, subdivisions (e) and (f) when enacting Proposition 21. "Both the Legislature and the electorate by the initiative process are deemed to be aware of laws in effect at the time they enact new laws and are conclusively presumed to have enacted the new laws in light of existing laws having direct bearing upon them." (*Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1332, citing *Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609.) Voters had no need to make material change to the definitions because they understood them as presented on election day and decided that they were broad enough to encompass the targeted groups of people and their pattern of criminal activities.

Thus, these two definitions were not merely constitutionally compelled technical restatements having no bearing on the changes Proposition 21 made to the STEP Act. Instead, they were fully enmeshed within and central to the entire comprehensive statutory scheme and thus "integral to accomplishing the electorate's goals." (*County of San Diego*, *supra*, 6 Cal.5th at p. 214.)

This court recognized that AB 333 narrowed these two definitions so as to raise the "threshold for conviction" of the substantive offense of active participation in a criminal street gang and the sentencing enhancement "with obvious benefit to defendants ...." (*Tran*, *supra*, 13 Cal.5th at p. 1207.) The core purpose of Proposition 21 was to toughen up on criminal street gangs and

gang-related violence, not ease up on it. Like this court recognized in *Shaw*, the significant changes AB 333 made to the definitions of "criminal street gang" and "pattern of criminal gang activity" were "amendment[s] aimed at the heart of [the] voter initiative, [and] not a bystander provision that had been only technically restated." (*County of San Diego*, 6 Cal.5th at p. 212.) The amendments made to section 186.22, subdivisions (e) and (f) "sought to undo the very protections the voters had enacted" and "alter[ed] the voters' careful handiwork, both the text and its intended purpose ...." (*Id.* at p. 213.)

In this case, it is obvious that the electorate, when enacting Proposition 21, intended to adopt a comprehensive statutory scheme designed to significantly enhance and strengthen the STEP Act as a whole. Thus, any "technical restatements" of section 186.22, subdivisions (e) and (f) were part of the entire comprehensive statutory scheme and were substantively reenacted in their entirety by Proposition 21, thus limiting the Legislature's authority to amend their provisions through the ordinary legislative process.

II. The Legislature unconstitutionally amended both Penal Code section 186.22 and section 190.2.

In California, the electorate's power to enact legislation is generally coextensive with that of the state Legislature. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1042; see Cal. Const., art. IV, § 1.) The power of the electorate "to propose statutes and ... adopt or reject them" (see Cal. Const., art. II, § 8, subd. (a)) has been described by the Court as " 'one of the most precious rights of our democratic process.' " (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591, quoting *Mervynne v. Acker* (1961) 189 Cal.App.2d 558, 563.)

When the people of California established our state government, they delegated to the Legislature "*plenary* legislative authority except as specifically limited by the California Constitution." (*Marine Forests Society v. California Coastal Com'n.* (2005) 36 Cal.4th 1, 31, italics in original); see also *People v. Lynch* (1875) 51 Cal. 15, 27-28.) This court recognizes that our state Constitution does not *grant* legislative power, but rather acts to *limit* legislative power. (*California Housing Finance Agency v. Patitucci* (1978) 22 Cal.3d 171, 175; *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.)

The people explicitly limited the otherwise plenary legislative power in two ways. First, they expressly reserved to the electorate the power of initiative and referendum. (Cal. Const., art. IV, § 1; *Associated Homebuilders*, *supra*, 18 Cal.3d at p. 591 & fn. 5.) Second, the people significantly limited the Legislature's ability to amend or repeal an initiative statute without voter approval. (Cal. Const., art. II, § 10, subd. (c).) "California's legislative drafters proposed, and the California voters ultimately adopted, a measure that — more strictly than any other state (then or now), ... — withheld all independent authority from the Legislature to take any action on measures enacted by initiative, unless the initiative measure itself specifically authorized such action." (*People v. Kelly* (2010) 47 Cal.4th 1008, 1035.)

On its face, the "California Constitution divides the state's legislative power between the electorate and the elected legislature." (Carrillo et al., *California Constitutional Law: Popular Sovereignty* (2017) 68 Hastings L.J. 731, 744.) With respect to enacting law, this shared power has been described as "coextensive." (See *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 675.) However, in regard to *amending or repealing* voter-enacted law, this court has recognized that in effect "[t]he people's reserved power of initiative *is* greater than the power of the legislative

body." (*Rossi v. Brown* (1995) 9 Cal.4th 688, 715-716, italics in original.)

This greater power is not because the electorate can enact laws that the Legislature cannot (see *Deukmejian*, *supra*, 34 Cal.3d at p. 674), but rather because of the strict constitutional limits the people place on the Legislature when they seek to amend or repeal initiative statutes. (*Rossi*, *supra*, 9 Cal.4th at pp. 715-716.) "This reservation of power by the people is, in the sense that it gives them the final legislative word, a limitation upon the power of the Legislature." (*Carlson v. Cory* (1983) 139 Cal.App.3d 724, 728.) As explained by this court, the Legislature acting alone in its legislative capacity cannot "bind future Legislatures" but "through ... the initiative power the people *may* bind future legislative bodies other than the people themselves." (*Rossi*, at pp. 715-716, italics in original.)

As discussed, *supra*, it is amicus' position that because section 186.22, subdivisions (e) and (f) were substantively reenacted by the electorate via Proposition 21, the Legislature was precluded from making any amendments to those provisions absent strict compliance with the initiative's amendment clause. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568; 2000 Voter Guide, *supra*, text of Prop. 21, § 39, p. 131 ["The provisions of this measure shall not be amended by the Legislature except by a statute passed in each house by ... two-thirds of the membership of each house concurring"].) AB 333 significantly narrowed and redefined the terms "criminal street gang" and "pattern of criminal gang activity" as enacted by Proposition 21. Without the requisite two-thirds vote in either house, they were not properly passed amendments of the initiative and are thus void to the extent the two enactments conflict. (See *In re Johnson* (1970) 3 Cal.3d 404, 417 [" 'An unconstitutional law is void, and is as no law' "].)

Because the Court of Appeal accepted the Attorney General's concession that AB 333 was otherwise constitutional, the court limited their discussion to whether AB 333 unconstitutionally amended section 190.2, subdivision (a)(22). Amicus agrees with the majority opinion that AB 333 also unconstitutionally amended that statutory provision.

All parties agree that Penal Code section 190.2, subdivision (a)(22) was enacted by Proposition 21 thereby rendering it an initiative statute. Because it is an initiative statute, the Legislature is bound by Proposition 21's amendment clause if making any amendments to the statute's provisions. This is undisputed. The dispute in this case revolves around whether AB 333's changes to Penal Code section 186.22, subdivisions (e) and (f) amended section 190.2, subdivision (a)(22). The Attorney General says yes. Rojas says no.

A legislative act amends an initiative statute if "it prohibits what the initiative authorizes, or authorizes what the initiative prohibits." (*Pearson*, *supra*, 48 Cal.4th at 571; see also *Kelly*, *supra*, 47 Cal.4th at pp. 1026-1027; *People v. Cooper* (2002) 27 Cal.4th 38, 44 ["An amendment is a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision"].) The majority found that AB 333 "would reduce the scope of murders punishable under section 190.2, subdivision (a)(22) in several ways" and thus " 'takes away' from the scope of conduct" made punishable by the initiative. (*Rojas*, *supra*, 80 Cal.App.5th at pp. 554-555.)

The majority opinion pointed to four specific examples of how AB 333 "takes away" from Proposition 21:

> "Under section 11 of Proposition 21, a defendant who intentionally killed the victim while an active member of a group whose members have individually, but not collectively, engaged in a pattern of criminal gang activity, would be

subject to a sentence of death or LWOP under section 190.2, subdivision (a)(22). Not so under Assembly Bill 333.

"Under section 11 of Proposition 21, a defendant who intentionally killed the victim while an active member of a group that engages, or has engaged, in a pattern of criminal gang activity that benefitted the gang only in reputational ways, would be subject to a sentence of death or LWOP under section 190.2, subdivision (a)(22). Not so under Assembly Bill 333.

"Under section 11 of Proposition 21, a defendant who intentionally killed the victim while an active member of a group whose primary activities include looting and felony vandalism, but do not include the other crimes listed in section 186.22, subdivision (e) would be subject to a sentence of death or LWOP under section 190.2, subdivision (a)(22). Not so under Assembly Bill 333.

"Under section 11 of Proposition 21, a defendant who intentionally killed the victim while an active member of a group that engaged in a pattern of criminal gang activity as evidenced by past crimes that met former [section 186.22,] subdivision (e)'s requirements but not the new requirement that the last offense have occurred 'within three years of the date the current offense is alleged to have been committed,' would be subject to a sentence of death or LWOP under section 190.2, subdivision (a)(22). Not so under Assembly Bill 333." (*Rojas*, 80 Cal.App.5th at pp. 554-555, footnotes omitted.)

Rojas argues that the majority opinion is wrong in holding that AB 333 "takes away" from Proposition 21 because "A.B. 333 does not change the fact that the gang-murder special circumstance remains to impose harsh punishment for an intentional murder meeting the terms of section 190.2(a)(22), and A.B. 333 is consistent with Proposition 21's fundamental purpose of severely punishing gang crimes." (Appellant's Opening Brief 22.) Rojas fails to recognize, however, that even though the "harsh punishment" remains, because AB 333 materially changes and narrows

the scope of conduct being penalized, it is “taking away” that punishment from a certain subset of murderers that the electorate intended to punish when they voted upon and enacted Proposition 21. This is clearly illustrated by the four examples given by the majority opinion.

AB 333 made significant changes to section 186.22, subdivisions (e) and (f), but did not make any direct changes to section 190.2, subdivision (a)(22). Rojas argues that because section 190.2, subdivision (a)(22), as enacted by Proposition 21, simply established a “new gang-murder special circumstance,” AB 333’s changes to the definition of “criminal street gang” did not amend the statute, but instead was “related to, but distinct from” the subject matter encompassed by the initiative. (Appellant’s Opening Brief 23-26; *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270.) More specifically, Rojas contends it is “well-established that a crime is distinct from the punishment for the crime.” (Appellant’s Opening Brief 24.) Thus, when the electorate enacted section 190.2, subdivision (a)(22), they were “focused on establishing a new gang-murder special circumstance, which would mandate severe punishment, [and] not [on] the related but distinct subject of the definition of a criminal street gang.” (Appellant’s Opening Brief 25-26.) Because of this, AB 333’s “amended definition of criminal street gang is related to, but distinct from, the subject of section 190.2(a)(22).” (Appellant’s Opening Brief 26.)

The majority correctly acknowledged that “a legislative enactment can be deemed an amendment to an initiative, even when it does not change the specific language enacted by the initiative itself.” (*Rojas*, 80 Cal.App.5th at p. 554, citing *Kelly*, *supra*, 47 Cal.4th at p. 1030.)

While Rojas is correct when he states that the Legislature retains the ability to enact “laws addressing a general subject

matter of an initiative" (*Kelly*, *supra*, 47 Cal.4th at p. 1025), Rojas' argument lacks merit as applied to the statutory provisions at issue in this case. When a trier of fact is tasked with deciding whether a first-degree murder was intentionally committed "while the defendant was an active participant in a criminal street gang, ... and ... was carried out to further the activities of the criminal street gang" (Pen. Code, § 190.2, subd. (a)(22)), he or she must rely on the section 186.22, subdivision (f) definition of "criminal street gang" to render that decision. Consequently, any changes to the definition of "criminal street gang" directly affects how a section 190.2, subdivision (a)(22) decision is made. Thus, the definition of "criminal street gang" is fully enmeshed within section 190.2, subdivision (a)(22), and is not "related to, but distinct from" the subject matter as Rojas contends.

Further, with respect to Rojas' argument about a crime being distinct from the punishment for the crime, the majority opinion aptly rejected this argument by stating that,

> "punishment is the *consequential relationship* between a criminal penalty *and the conduct on which it is being imposed*.... Identifying the scope of conduct being penalized is as crucial to punishment as identifying the severity of the penalty."
>
> "The connection between conduct and consequence is the very core of the policy choice embodied in a punishment provision. Changing the scope of conduct to which particular penalties are attached 'amends' that policy choice, for better or worse.
>
> "For these reasons, punishment and the scope of conduct being penalized (i.e., the elements of the crime) are not distinct issues.... They are not just related, they are definitionally and conceptually inseparable. They are not distinct." (*Rojas*, 80 Cal.App.5th at p. 556, italics original.)

Both parties are correct to recognize that the question of whether AB 333 amends (*i.e,* adds to or takes away from) section 190.2, subdivision (a)(22) depends on whether the electorate "intended to permit future amendments to [section 186.22, subdivision (f)] by the Legislature, or whether it intended to incorporate the definition as it stood at the time Proposition 21 passed, ..." (Respondent's Answer Brief 26.) The analysis of this question is driven by a rule of statutory construction first articulated in *Palermo v. Stockton Theaters, Inc.* (1948) 32 Cal.2d 53.

> "It is a well established principle of statutory law that, where a statute adopts by specific reference the provisions of another statute, ... such provisions are incorporated in the form in which they exist at the time of the reference and not as subsequently modified, and that the repeal of the provisions referred to does not affect the adopting statute, *in the absence of a clearly expressed intention to the contrary*. [Citations.] ... ¶ [However,] there is a cognate rule, recognized as applicable to many cases, to the effect that where the reference is general instead of specific, such as a reference to a system or body of laws or to the general law relating to the subject in hand, the referring statute takes the law or laws referred to not only in their contemporary form, but also as they may be changed from time to time, and ... as they may be subjected to elimination altogether by repeal." (*Id.* at pp. 58-59, italics added.)

Thus, unless "clearly expressed" otherwise, this court must presume the electorate's inclusion of section 186.22, subdivision (f) within section 190.2, subdivision (a)(22) was intended as specific reference immune from future legislative tinkering without the requisite two-thirds vote of approval in both houses. (*Palermo*, *supra*, 32 Cal.2d at p. 59 ["in the absence of a clearly expressed intention to the contrary"].)

The analytical "steps" a court must take when construing voter-approved statutes are well established. (See, e.g., *People v. Orozco* (2020) 9 Cal.5th 111, 117-118; see also *People v. Valencia*

(2017) 3 Cal.5th 347, 357-358.) As discussed in Part I, *supra*, this court must "interpret the statutory language that the electorate actually wrote." (*Orozco*, at p. 123.) The text of the provision must be examined within the context of Proposition 21 as a whole so as to ascertain the intended purpose of the provision at issue in light of voter intent. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933-934; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-901.)

When the voters went to cast their ballots in favor of Proposition 21, did they do so with the intention that the Legislature would be free to make significant changes in the future to the definition of "criminal street gang" as so defined in the ballot materials so that the harsher penalties would apply to *fewer people* engaged in criminal gang activities and convicted of gang-related crimes? Seems doubtful considering the initiative was enacted to enhance and strengthen the STEP Act and increase penalties for gang-related crimes. Furthermore, the initiative's amendment clause markedly limited the Legislature's ability to amend its statutory provisions without voter approval.

The application of *Palermo* in *In re Oluwa* (1989) 207 Cal.App.3d 439 is instructive. In 1978, the voters' enactment of Proposition 7 significantly increased punishment for first- and second-degree murder by amending Penal Code section 190. (*In re Oluwa*, at p. 442.) In 1972, Oluwa was convicted of second-degree murder and sentenced to 15 years to life. (*Id.* at p. 442.) Proposition 7 contained a provision governing the application of custody credits that applied to the fixed portion of a life term which read in part that " 'The provisions of Article 2.5 (commencing with Section 2930) ... shall apply to reduce any minimum term of 25 or 15 years in a state prison imposed pursuant to this section, but such person shall not otherwise be released on parole prior to

such time.' " (*Ibid.*) Proposition 7 did not contain an amendment clause. (*Id.* at pp. 446-447.)

When Proposition 7 was enacted, article 2.5 only contained Penal Code sections 2930, 2931, and 2932. (*Ibid.*) These three sections allowed for "1-for-2" custody credits for good behavior and participation in prison programs. (*Ibid.*) After Oluwa was sentenced, the Legislature added sections 2933, 2934, and 2935 to article 2.5. (*Ibid.*) These newly added sections allowed for more generous 1-for-1 custody credits. (*Id.* at p. 443.) Oluwa argued that he was entitled to the benefit of the more generous credits because Proposition 7's reference to article 2.5 "evinces the intent of the electorate that sections subsequently added thereto and dealing with the same subject matter should be engrafted onto section 190." (*Id.* at p. 444.)

In analyzing this question, the court applied *Palermo* and rejected Oluwa's argument. The court found that Proposition 7's reference to article 2.5 was "not a reference to a system or body of laws or to the general law relating to the subject at hand. It is a specific and pointed reference to an article of the Penal Code which contained only sections 2930, 2931 and 2932 at the time Proposition 7's incorporated article 2.5 into section 190." (*Id.* at p. 445.) Because Proposition 7 reference to Article 2.5 was specific, and because the initiative prohibited legislative amendment without voter approval, the court held that the Legislature's enactments allowing for more generous custody credits was improper, stating "[t]o allow Oluwa the custody credits he seeks would permit the Legislature to amend the provisions of Proposition 7 by reducing the amount of time a second degree murderer must serve before being eligible for a parole hearing without submitting that matter to the voters. *The Legislature should not be permitted to do indirectly that which it cannot do directly*." (*Id.* at p. 446, italics added.)

As discussed at length in Part I.B.2, *supra*, when voters enacted Proposition 21, they declared that "[g]ang-related felonies should result in severe penalties. [LWOP] or death should be available for murderers who kill as part of *any* gang-related activity." (2000 Voter Guide, text of Prop. 21, § 2, subd. (h), p. 119, italics added.) Because "dramatic changes [were] needed in the way ... criminal street gangs" (*id.*, text of Prop. 21, § 2, subd. (k), p. 119) were treated, the electorate added "gang-related murder to the list of 'special circumstances' that make offenders eligible for the death penalty." (*Id.*, analysis of Prop. 21 by the Legis. Analyst, p. 46.) Thus, similar to *Oluwa*, when the electorate enacted section 190.2, subdivision (a)(22), the reference to section 186.22, subdivision (f) was not a general reference to a "system or body of laws or to the general law relating to the subject at hand," but rather "a specific and pointed reference to" the definition of "criminal street gang." (*Oluwa*, 207 Cal.App.3d at p. 445.)

Because section 190.2, subdivision (a)(22) specifically referred to section 186.22, subdivision (f), and there is no "clearly expressed intention to the contrary," the electorate intended to "incorporate[] [it] in the form in which [it] exist[ed] at the time of the reference and not as subsequently modified, ..." (*Palermo*, 32 Cal.2d at pp. 58-59.) The Legislature's significant narrowing of the definition "with obvious benefit to defendants" (*Tran*, *supra*, 13 Cal.5th at p. 1207) amended section 190.2, subdivision (a)(22) — an initiative statute — without two-thirds approval in both houses as required by Proposition 21's amendment clause, and is unconstitutional.

CONCLUSION

The judgment of the Court of Appeal for the Fifth Appellate District should be affirmed to the extent that it found AB 333 to be unconstitutional as applied to Penal Code section 190.2, subdi-

vision (a)(22). Amicus further requests that this court find that because the voters substantively reenacted Penal Code sections 186.22, subdivisions (e) and (f) via Proposition 21, the changes the Legislature made to those provisions without a two-thirds vote in both houses were not properly passed amendments of the initiative and are void.

Date: August 7, 2023

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court,
Rule 8.520, subd. (c)(1)

I, Kymberlee C. Stapleton, hereby certify that the attached **BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT** contains 10679 words, as indicated by the computer program, WordPerfect, used to prepare the brief.

Date: August 7, 2023

Respectfully Submitted,

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PROOF OF SERVICE

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816.

On August 7, 2023, I served true copies of the following document described as:

APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

on the interested parties in this action as follows:

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

Executed on August 7, 2023, Sacramento, California.

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