IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **FERNANDO ROJAS,** Defendant and Appellant.	Case No. S275835 Fifth District Court of Appeal, No. F080361 Kern County Super. Ct. No. BF171239B

APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF, PROPOSED *AMICUS CURIAE* BRIEF ON BEHALF OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF THE PEOPLE OF THE STATE OF CALIFORNIA

GREGORY D. TOTTEN
CEO, California District Attorneys Association
State Bar No. 106639
2495 Natomas Park Drive, Suite 575
Sacramento, CA 95833-2939
Telephone: (916) 443-2017
E-mail: general@cdaa.org
Attorney and CEO for Amicus Curiae, California District Attorneys Association

TABLE OF CONTENTS

Page

APPLICATION TO FILE *AMICUS CURIAE* BRIEF 8

INTERESTS OF *AMICUS* 8

STATEMENT OF THE CASE AND QUESTION PRESENTED 11

ARGUMENT 13

A. THE VOTER'S POWER OF INITIATIVE AND THE STANDARD OF REVIEW 16

B. THE HISTORY OF PENAL CODE SECTION 186.22 18

C. PROPOSITION 21 MADE MAJOR REVISIONS TO THE PENAL CODE, INCLUDING TO SECTION 186.22, AND ADDING SUBDIVISION (A)(22) TO SECTION 190.2 20

D. LEGISLATIVE AMENDMENTS BETWEEN PROPOSITION 21 AND AB 333 26

E. ASSEMBLY BILL 333 (STATS. 2021, CH. 699) 28

F. THIS COURT HAS REPEATEDLY RECOGNIZED THE VOTERS' DESIRE TO EXPAND THE REACH OF PROPOSITION 21'S PROVISIONS 29

1. *Robert L. v. Superior Court* (2003) 30 Cal.4th 894 30

2. *People v. Montes* (2003) 31 Cal.4th 350 31

3. *People v. Briceno* (2004) 34 Cal.4th 451 33

4. *People v. Shabazz* (2006) 38 Cal.4th 55 35

G. THE *PALERMO* RULE EXAMINES VOTER INTENT AND THE VOTERS CLEARLY STATED NO AMENDMENTS 35

H. CONSIDERABLE CONFUSION WILL RESULT, THUS SUPPORTING THE CLAIM THAT THE VOTERS DID NOT INTEND THE BROAD LEGISLATIVE AUTHORITY CLAIMED BY APPELLANT 43

I. A FINDING IN FAVOR OF THE PEOPLE RAISES ADDITIONAL QUESTIONS NOT INCLUDED IN THE QUESTION BEFORE THE COURT 50

CONCLUSION 51

CERTIFICATE OF COMPLIANCE 52

TABLE OF AUTHORITIES

Page

CASES

Amwest Surety Ins. Co. v. Wilson (1995) 11 Cal.4th 1243 ..... 16, 17

Brosnahan v. Brown (1982) 32 Cal.3d 236 47

Cal. Cannabis Coalition v. City of Upland (2017) 3 Cal.5th 924 16

Cunningham v. California (2007) 549 U.S. 270 27

In re Derrick B. (2006) 39 Cal.4th 535 ..... 25, 46

In re Jovan B. (1993) 6 Cal.4th 801 ..... 36, 37, 38

In re Lincoln J. (1990) 223 Cal.App.3d 322 23

In re Oluwa (1989) 207 Cal.App.3d 439 42

Manduley v. Superior Court (2002) 27 Cal.4th 537 ..... 14, 38, 40

Palermo v. Stockton Theatres, Inc. (1948) 32 Cal.2d 53 ..... passim

People v. Armogeda (2015) 233 Cal.App.4th 428 18

People v. Arroyo (2016) 62 Cal.4th 589 12

People v. Briceno (2004) 34 Cal.4th 451 ..... passim

People v. Ewoldt (1994) 7 Cal.4th 380 ..... 42, 43

People v. Falsetta (1998) 21 Cal.4th 903 ..... 16, 17, 18

People v. Gardeley (1996) 14 Cal.4th 605 ..... 26, 29

People v. Green (1991) 227 Cal.App.3d 693 23

People v. Kelly (2010) 47 Cal.4th 1008 29

TABLE OF AUTHORITIES

Page

People v. Loeun (1997) 17 Cal.4th 1 ..... 26, 29

People v. Lopez (2022) 12 Cal.5th 957 30

People v. Montes (2003) 31 Cal.4th 350 ..... 31, 32

People v. Murphy (2001) 25 Cal.4th 136 34

People v. Rojas (2022) 80 Cal.App.5th 542 11

People v. Rossi (1976) 18 Cal.3d 295 41

People v. Shabazz (2006) 38 Cal.4th 55 35

People v. Superior Court (*Caswell*) (1988) 46 Cal.381 44

People v. Superior Court (*Pearson*) (2010) 48 Cal.4th 564 ..... 36, 37, 47

People v. Tran (2022) 13 Cal.5th 1169 29

People v. Trevino (2001) 26 Cal.4th 237 32

People v. Weidert (1985) 39 Cal.3d 836 26

Perry v. Brown (2011) 52 Cal.4th 1116 16

Rainey v. Michel (1936) 6 Cal.2d 259 ..... 15, 42

Robert L. v. Superior Court (2003) 30 Cal.4th 894 ..... 30, 31, 35

Rossi v. Brown (1996) 9 Cal.4th 688 17

STATUTES

Penal Code
§ 182.5 21
§ 190.2 29
§ 190.2, subd. (a)(22) ..... passim

TABLE OF AUTHORITIES

Page

§ 186.22 ..... passim
§ 186.26 ..... 21, 45
§ 186.30 24
§ 186.33 24
§ 187 11
§ 189 11
§ 190.5 39
§ 629.52, subd. (a)(3) 24
§ 667.5, subd. (c)(19) 23
§ 667.5, subd. (c)(20) 23
§ 1192.7, subd. (c) 33
§ 1192.7, subd. (c)(28) 24, 33, 34
§ 1192.7, subd. (c)(40) 33
§ 1172.1 48
§ 1172.6 48
§ 1172.75 48
§ 12022, subd. (d) 11
§ 12022.53 33
§ 12022.53, subd. (d) 11, 32
§ 12022.53, subd. (e)(1) 11

Welfare and Institutions Code
§ 707, subd. (d) 25
§ 707, subd. (b)(21) 33, 34

Evidence Code
§ 1101, subd. (a) 42
§ 1101, subd. (b) 42
§ 1108 17

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

California Constitution
- Art. I, § 28, subd. (f)(2) 42
- Art. II, § 10, subd. (c) ..... passim
- Art. IV, § 1 18
- Art. IV, § 9 43

OTHER AUTHORITIES

California Rules of Court
- Rule 8.520, subd. (f) 8

Legislative Enactments
- Stats. 1988, ch. 1242 (STEP Act) 18, 19
- Stats. 1988, ch. 1256 (STEP Act) 18, 19
- Stats. 1989, ch. 930 (AB 332) 19
- Stats. 1993, ch. 601 (SB 724) 19
- Stats. 1993, ch. 610 (AB 6) 19
- Stats. 1993, ch. 611 (SB 60) 19
- Stats. 1993, ch. 1125 (AB 1630) 19
- Stats. 1994, ch. 451 (AB 2470) 19
- Stats. 1996, ch. 873 (SB 318) 19
- Stats. 1996, ch. 982 (AB 2035) 19
- Stats. 1995, ch. 377 (SB 1095) 19
- Stats. 1997, ch. 500 (SB 940) 19
- Stats. 1997, ch. 982 (SB 940) 19
- Stats. 2001, ch. 854 (SB 205) 28
- Stats. 2005, ch. 482 (SB 444) 26
- Stats. 2006, ch. 596 (SB 1222) 26, 27
- Stats. 2008, ch. 179 (SB 1498) 28
- Stats. 2009, ch. 171 (SB 150) 27
- Stats. 2010, ch. 256 (AB 2263) 27
- Stats. 2010, ch. 178 (SB 1115) 28
- Stats. 2011, ch. 361 (SB 576) 27
- Stats. 2013, ch. 508 (SB 463) 27
- Stats. 2016, ch. 887 (SB 1016) 27
- Stats. 2017, ch. 561 (AB 1516) 28

TABLE OF AUTHORITIES

Page

Stats. 2021, ch. 699 (AB 333) ..... passim

Propositions
Proposition 7 (1978 General Election) 20
Proposition 8 (1982 Primary Election) 23, 42
Proposition 184 (1992 General Election) 23
Proposition 21 (2000 Primary Election) ..... passim
Proposition 57 (2016 General Election) 25

Miscellaneous
Voter Information Guide, 2000 Prim. Elec. (Mar. 7, 2000) 46

APPLICATION TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 8.520, subdivision (f) of the California Rules of Court, the California District Attorneys Association respectfully submits this application and proposed *amicus curiae* brief in support of the People of the State of California. This proposed brief is offered to show that Assembly Bill 333 (Stats. 2021, ch. 699 [AB 333]) improperly amended Penal Code[1] section 186.22 as it applies to the gang-murder special circumstance in section 190.2, subdivision (a)(22) (gang-murder special circumstance).

Neither the People of the State of California nor any of the appellants, or their counsel, authored any part of this brief, in whole or in part, or made a monetary contribution for the preparation or submission of this brief.

INTERESTS OF *AMICUS*

The California District Attorneys Association (CDAA) is the statewide organization of California prosecutors. It is a professional organization that has been in existence for more than 90 years and was incorporated as a nonprofit public benefit corporation in 1974. CDAA has over 2,500 members, with membership open to all elected and appointed

[1] All further statutory references are to the Penal Code unless otherwise noted.

district attorneys, the Attorney General of California, city attorneys principally engaged in the prosecution of criminal cases, and attorneys employed by these officials. In addition to offering seminars, publications, legislative advocacy, and extensive online tools, CDAA serves as a forum for the exchange of information and innovation in the development of criminal justice. Amicus has a keen interest in ensuring the voices of California prosecutors are heard in any case which affects their operations and their pursuit of justice. That is particularly so in a case such as this.

Because the Attorney General has limited his argument to the unconstitutionality of the gang-murder special circumstance amendment only, while conceding the applicability of AB 333 to all other non-final section 186.22 cases, the result will be considerable confusion. This confusion has been argued by Appellant as evidence that the Attorney General's position with respect to the voters' intent with Proposition 21 is incorrect. Amicus has a different view. Amicus agrees that the voters did not intend to permit a future legislature to create the considerable confusion that would result from amending section 186.22 in the way AB 333 does, but retaining the original language of section 186.22 for the purposes of the gang-murder special circumstance. Rather, the voters did not permit the Legislature to amend section 186.22 in the manner AB 333 does at all.

Whether the sanctity of a voter initiative over a legislative statute was violated here in part, is an important question of law. However, the

question of whether AB 333 infringed upon the supremacy of a voter initiative, and to what extent, has not been fully addressed by the parties. The legal question has broad ranging spillover effects on the prosecutors of the State of California who must apply these laws before juries and judges across the state. Accordingly, Amicus offers its perspective on the issues that have not been adequately addressed by the parties in order to assist this Court.

STATEMENT OF THE CASE AND QUESTION PRESENTED

Relevant to this amicus brief, Appellant was convicted of first degree murder (§ 187, 189 - count 1) and active participation in a criminal street gang (§ 186.22, subd. (a) - count 2). (3CT 663.) The jury additionally found true allegations under sections 189, 186.22, subd. (b)(1), 12022.53, subds. (d) & (e)(1), and 12022, subd. (d). (3 CT 664-666, 668.) The jury also found true the gang-murder special circumstance (§ 190.2, subd. (a)(22)). (3CT 676.)

During the pendency of Appellant's direct appeal, the Legislature enacted, and the Governor signed, Assembly Bill 333. Before the Fifth District Court of Appeal, the Attorney General conceded the applicability of AB 333 to the case generally, but challenged the constitutionality of its application to the gang-murder special circumstance. (*People v. Rojas* (2022) 80 Cal.App.5th 542, 546, 561, fn. 6.) As a result of the concession, the Court of Appeal vacated the jury's findings for the active participation charge, the gang enhancement, and the firearm enhancement that required a finding on the gang enhancement. (*Id*. at p. 558.) Agreeing with the challenge by the Attorney General of AB 333, the Court of Appeal upheld the gang-murder special circumstance. In doing so, it held that AB 333 effected an illegal amendment to Proposition 21. (*Id*. at pp. 550-558.)

This Court granted review on the following question: "Does Assembly Bill No. 333 (Stats. 2021, ch. 699) unconstitutionally amend

Proposition 21, if applied to the gang-murder special circumstance (Pen. Code, § 190.2, subd. (a)(22))?"

Presumably due to the Attorney General's concession, Amicus recognizes that the issue before this Court is limited to the voters' intent with respect to Proposition 21's gang-murder special circumstance. In that analysis, the statute must be "construed in the context of the statute as a whole and the overall statutory scheme in light of the electorate's intent" in which the statute falls. (*People v. Arroyo* (2016) 62 Cal.4th 589, 593 cleaned up.) As a result, any discussion of Proposition 21 necessarily includes the voters' intent with respect to AB 333's other changes to section 186.22. It is here where Amicus and the Attorney General part ways. However, in light of the limited nature of the question presented, Amicus invites this Court to expressly state that it is leaving for another day the propriety of the Attorney General's concession of the applicability of AB 333 to the other aspects of Appellant's judgment.

Amicus is hopeful that because the issue in this case is limited to the gang-murder special circumstance, this Court's ruling will expressly allow the broader question of AB 333's constitutionality to be decided in a future case when the issue is properly before the Court and fully briefed by the parties.

ARGUMENT

> The 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.

(Prop. 21, Prim. Elec., Mar. 7, 2000, § 39.)[2] Despite this clear and unambiguous statement, Appellant argues that the voters actually intended the inverse, that a future bare-majority Legislature could amend its provisions. Appellant is wrong.

Voter initiatives may not be amended by the Legislature absent voter approval. (Cal. Const., art. II, § 10, subd. (c).) It is undisputed that AB 333 did not satisfy the requirements for amendment in Proposition 21. As a result, if AB 333 amended Proposition 21, it was improper.

Proposition 21, throughout its additions to the Penal Code, incorporated language and definitions found in section 186.22. Some of the references, such as the gang-murder special circumstance at issue here, could not operate without the incorporated definition. Under this Court's precedents, such an incorporation adopts the referred to language as if it was part of the enactment of the statute. Further, this Court has repeatedly stated that such an incorporation indicates an intent to adopt the language as

[2] For simplicity, this brief will describe Proposition 21 as prohibiting amendment without including at every reference its two exceptions to the prohibition.

then written, and not as subsequently amended.

Nevertheless, Appellant argues there are questions about voters' intent with Proposition 21. Amicus disagrees. Appellant's doubts about the voters' intent should be resolved with both the constitutional directive that prohibits amendments along with Proposition 21's express directive of the same absent the voters' consent. However, even if one ignored the voters' specific directive about no amendments to Proposition 21's provisions, this Court has recognized that the voter initiative was a comprehensive measure designed to greatly expand the scope of the gang statute both by capturing more behavior and by expanding its consequences. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 574-576.)

When conducting this analysis, this Court has stated that any repeal of the incorporated provision "does not affect the adopting statute, in the absence of a clearly expressed intention to the contrary." (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 58-59.) It certainly does so here as Appellant's voter-mandated gang-murder special circumstance would be reversed.

In fact, the very goal of AB 333 reveals an undisputed intent to repeal the broad scope of section 186.22's incorporated provisions by substantially narrowing its application. However, at no point did the voters express a "clear intent" to permit a bare-majority Legislature to do so. This

Court has recognized that AB 333 has substantially narrowed the reach of section 186.22 by rewriting the incorporated definition of a "criminal street gang" found in the gang-murder special circumstance at issue here. Amicus argues that there is no principled basis to permit the Legislature to substantially narrow the statutory definition of a "criminal street gang" with the expressed purpose of capturing less conduct when the same Legislature under this Court's precedents could not repeal the very same language. This Court properly stated nearly one hundred years ago that a Legislature may not accomplish indirectly, that which it cannot do directly. (*Rainey v. Michel* (1936) 6 Cal.2d 259, 282-283.)

The parties properly identify that the competing definitions of a "criminal street gang" would create confusion in the application of the law. Appellant argues that the voters could not have intended such confusion. That is surely true, but the inference that Appellant takes from that reality—that the voters therefore must have permitted a bare-majority future legislature to substantially narrow its terms across the board—is inconsistent with the vast expansions created by Proposition 21 and serves to directly negate the clearly stated command prohibiting amendments absent a supermajority. In any statutory interpretation matter, this Court has repeatedly stated when the words are clear, there is nothing more for the Court to do. AB 333 did not garner the necessary votes, therefore it cannot amend Proposition 21's gang-murder special circumstance, which

expressly adopted the definition of a "criminal street gang" as it was then written.

A. THE VOTER'S POWER OF INITIATIVE AND THE STANDARD OF REVIEW

The People's initiative power is "one of the most precious rights of our democratic process." (*Cal. Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 930.) The initiative process was created because of "dissatisfaction with the then governing public officials and a widespread belief that the people had lost control of the political process." (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1141.) This Court has unanimously held that defense of voter initiatives is of such paramount significance that the authority to defend them extends beyond the government officials ordinarily charged with their defense, including the Attorney General. (*Perry*, *supra*, 52 Cal.4th at pp. 1125-1127, 1165.) "[W]hen weighing the tradeoffs associated with the initiative power, [this Court has] acknowledged the obligation to resolve doubts in favor of the exercise of the right whenever possible." (*Cal. Cannabis Coalition* at p. 934.)

Appellant cites *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243 and *People v. Falsetta* (1998) 21 Cal.4th 903 for the proposition that legislative acts are presumed to be constitutional. As a general principle, this is correct, and the presumption applies to legislation passed by the voters as well as a legislature. However, the presumption should not

operate to override the constitutional primacy of the People over the Legislature with respect to initiatives. (See Cal. Const., art. II, § 10, subd. (c).) Doing so would undermine the command of this Court that it is "the duty of the courts to jealously guard this right of the people" and "to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled." (*Rossi v. Brown* (1996) 9 Cal.4th 688, 695.)

Given the supremacy of voter initiatives over the laws of a legislature, the presumption of constitutionality cannot act as a thumb on the scale on the side of the Legislature over that of the People. Despite Appellant's citation to them, neither *Amwest* nor *Falsetta* hold to the contrary. Rather, in *Amwest* the initiative at issue expressly permitted amendment in furtherance of the initiative's objectives. *Amwest* held that the legislative judgment that the amendment "furthered the initiative" was entitled to the presumption. (*Amwest*, *supra*, 11 Cal.4th at p. 1256 ["Accordingly, starting with the presumption that the Legislature acted within its authority, we shall uphold the validity of [the legislative act] *if, by any reasonable construction, it can be said that the statute furthers the purposes* of Proposition 103"], emphasis added.) Proposition 21 has no such provision, and instead prohibits amendment.

In *Falsetta*, the issue was whether the then newly enacted Evidence Code section 1108 violated Due Process. (*Falsetta*, *supra*, 21 Cal.4th at pp.

912-913.) This Court properly noted that to make such a showing, the defendant carried a heavy burden. (*Ibid*.) In *Falsetta*, this Court was not addressing the issue here, which is whether a voter initiative has been amended by a legislature or whether there was a presumption of validity of the Legislature's act over the laws enacted by the voters.

Appellant's claimed presumption of the constitutionality AB 333, simply because the Legislature was acting later in time, would fundamentally invert the hierarchy of our constitutional structure. With respect to initiatives, the voters come first; a concept baked into our California Constitution. (Cal. Const., art. II, § 10, subd. (c); art. IV, § 1.) Applying the presumption here would, in effect, create a presumption that the voters permitted amendment of an initiative by the Legislature. There is no such presumption to be found in the cases and, indeed, it would be inconsistent with the language found in our Constitution that categorically prohibits amendments to an initiative absent voter consent.

The application of these standards in evaluating whether section 190.2, subdivision (a)(22), was unlawfully amended is *de novo*. (*People v. Armogeda* (2015) 233 Cal.App.4th 428, 435.)

B. THE HISTORY OF PENAL CODE SECTION 186.22

The Legislature enacted the "California Street Terrorism Enforcement and Prevention Act" (STEP Act) in 1988. (Stats. 1988, ch. 1242, 1256.) The original statute: (1) criminalized active participation in a

criminal street gang; (2) created an enhancement for felonies committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members"; (3) created a wobbler for any crime committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members"; and (4) required that the minimum parole eligibility term for any life crime be no less than 15 calendar years. (Stats. 1988, ch. 1242, § 1; 1256, § 1.)

A "pattern of criminal gang activity" and "criminal street gang" were specifically defined in subdivisions (c) and (d), respectively.[3] (Stats. 1988, ch. 1242, § 1, subd. (c); 1256, § 1, subd. (d).)

Between 1989 and 2000, the Legislature amended the STEP Act several times to add pattern offenses (Stats. 1989, ch. 930 (AB 332); Stats. 1993, ch. 601 (SB 724); Stats. 1993, ch. 610 (AB 6); Stats. 1993, ch. 611 (SB 60); Stats. 1993, ch. 1125 (AB 1630); Stats. 1994, ch. 451 (AB 2470)), repeal the sunset clause (Stats. 1996, ch. 873 (SB 318); Stats. 1996, ch. 982 (AB 2035)), expand its scope (Stats. 1995, ch. 377 (SB 1095); Stats. 1997, ch. 500 (SB 940)), and to increase various punishments (Stats. 1993 ch. 601 (SB 724); Stats. 1995, ch. 377 (SB 1095); Stats. 1997, ch. 982 (SB 940)).

[3] These paragraphs are now found in subdivisions (e) and (f).

C. PROPOSITION 21 MADE MAJOR REVISIONS TO THE PENAL CODE, INCLUDING TO SECTION 186.22, AND ADDING SUBDIVISION (A)(22) TO SECTION 190.2

In 2000, the voters enacted Proposition 21 (Gang Violence and Juvenile Crime Prevention Act of 1998). (Prop. 21, Primary Election, Mar. 7, 2000.) "Proposition 21 made significant changes in the law concerning gang-related crime." (*People v. Briceno* (2004) 34 Cal.4th 451, 456.)

Included in Proposition 21, and at issue here, was the addition of a special circumstance which extended Proposition 7's penalties of death or life without the possibility of parole to a defendant who "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*." (Prop. 21, § 11, codified at § 190.2, subd. (a)(22), emphasis added.) At the time Proposition 21 was passed, subdivision (f) of 186.22 defined a "criminal street gang" to require among other things, to have "engaged in a pattern of criminal activity." (Prop. 21, § 4, subd. (f).) The definition of a "pattern of criminal activity" was contained in subdivision (e). (Prop. 21, § 4, subd. (e).) Despite referencing them as part of the gang-murder special circumstance, Proposition 21 did not alter the language in subdivisions (e) or (f), except to add conspiracies to all pattern offenses as well as two additional pattern offenses: namely, criminal threats and firearm theft, and to expand the range of grand thefts that would qualify as a pattern offense.

(Prop. 21, § 4, subds. (e) and (f).) The language in section 190.2, subdivision (a)(22) of "further the activities of the criminal street gang" was also not further defined.

Additionally, Proposition 21 repeated verbatim and specifically referenced the pre-existing definitions throughout its provisions. For example, Proposition 21 added the new crimes of sections 182.5 and 186.26,[4] each of which also used similar incorporation language that is found in the gang-murder special circumstance:

> **182.5**. Notwithstanding subdivisions (a) or (b) of Section 182, any person who actively participates in any criminal street gang, *as defined in subdivision (f) of Section 186.22*, with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, *as defined in subdivision (e) of Section 186.22*, and *who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by members of that gang* is guilty of conspiracy to commit that felony and may be punished as specified in subdivision (a) of Section 182.
>
> **186.26**. (a) Any person who solicits or recruits another to actively participate in a criminal street gang, *as defined in subdivision (f) of Section 186.22*, with the intent that the person solicited or recruited participate in a pattern of criminal street gang activity, *as defined in subdivision (e) of Section 186.22*, or with the intent that the person solicited or recruited *promote, further, or assist in any felonious conduct by members of the criminal street gang*, shall be punished by imprisonment in the state prison for 16 months, or two or three years.
>
> (b) Any person who threatens another person with physical violence on two or more separate occasions within any 30-day period with the intent to coerce, induce, or solicit any person

[4] Proposition 21 repealed the previous section 186.26 and replaced it entirely. (Prop. 21, §§ 5, 6.)

> to actively participate in a criminal street gang, as *defined in subdivision (f) of Section 186.22*, shall be punished by imprisonment in the state prison for two, three, or four years.
>
> (c) Any person who uses physical violence to coerce, induce, or solicit another person to actively participate in any criminal street gang, *as defined in subdivision (f) of Section 186.22*, or to prevent the person from leaving a criminal street gang, shall be punished by imprisonment in the state prison for three, four or five years.
>
> (d) . . . .
>
> (e) . . . .

(Prop 21, §§ 3, 6, emphasis added.)

As to penalty, Proposition 21 created an alternative penalty scheme for enumerated felonies "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further or assist, in any criminal conduct by gang members." (Prop 21, § 4; codified at § 186.22, subd. (b)(4).) It also resurrected the alternative penalty scheme for a gang-motivated[5] public offense punishable as a misdemeanor or a felony. (Prop 21, § 4; codified at § 186.22, subd. (d).) The gang-motivated language found in subdivisions (b)(4) and (d)—copied verbatim from subdivision (b)(1)—was not further defined except for the definition of a "criminal street gang" found in subdivision (f).

[5] Amicus will use the term "gang-motivated" as shorthand for the language found in subdivisions (b) and (d).

Proposition 21 also added subdivision (i) to section 186.22, which further defined the required elements for the active participation charge found in subdivision (a):

> In order to secure a conviction, or sustain a juvenile petition, pursuant to subdivision (a), it is not necessary for the prosecution to prove that the person devotes all, or a substantial part of his or her time or efforts to the criminal street gang, nor is it necessary to prove that the person is a member of the criminal street gang. Active participation in the criminal street gang is all that is required.

(Prop 21, § 4, subd. (i).) This subdivision was specifically added to address caselaw restricting the scope of "active participation" in a criminal street gang pursuant to subdivision (a).[6]

With respect to Proposition 8 ("Habitual Criminals") and Proposition 184 ("Three Strikes"), Proposition 21 added extortion and witness intimidation, "which would constitute a felony violation of Section 186.22 of the Penal Code" to the list of violent felonies (Prop. 21, § 15; codified at § 667.5, subds. (c)(19) and (20)) and made ***all*** felonies, "which would also constitute a felony violation of Section 186.22" serious felonies.

---

[6] "[I]t is the intent of the people to reaffirm the reasoning contained in footnote 4 of *In re Lincoln J.*, 223 Cal.App.3d 322 (1990) and to disapprove of the reasoning contained in *People v. Green*, 227 Cal.App.3d 693 (1991) (holding that proof that 'the person must devote all, or a substantial part of his or her efforts to the criminal street gang' is necessary in order to secure a conviction under subdivision (a) of Section 186.22 of the Penal Code)." (Prop. 21, § 35, italics added.)

(Prop 21, § 17; codified at § 1192.7, subd. (c)(28); see also *Briceno*, *supra*, 34 Cal.4th 451.)

Proposition 21 Act added gang registration for adults and juveniles and created a new crime for failing to register. (Prop. 21, §§ 7, 10; codified at §§ 186.30, 186.33.) Registration was required "for any of the following offenses: (1) Subdivision (a) of Section 186.22. (2) Any crime where the enhancement specified in subdivision (b) of Section 186.22 is found to be true." (Prop. 21, § 7, subd. (b).) It also extended wiretapping authorization to "[a]ny felony violation of Section 186.22" (Prop 21, § 13; codified at § 629.52, subd. (a)(3)), and reduced the monetary threshold for felony vandalism (Prop. 21, § 12, subd. (b)(1).).

Finally, Proposition 21 amended various provisions of the Welfare and Institutions Code. The initiative eliminated informal probation for juveniles committing felonies, reduced confidentiality protections for juvenile offenders, and authorized direct filing for juveniles 14 and 16 years of age or older who committed specified felonies, including if the felony was "committed for the benefit of, at the direction of, or in association with any criminal street gang, *as defined in subdivision (f) and Section 186.22* of the Penal Code, with the specific intent to *promote, further or assist, in any*

criminal conduct by gang members." (Prop. 21, §§ 18, 19, 22, 25, 26; Welf. & Inst. Code § 707, subd. (d), emphasis added.)[7]

In the above-described additions, Proposition 21 included the following references to existing and amended sections of 186.22:

1. "as defined in subdivision (f) of Section 186.22" (criminal street gang defined) (§§ 3, 6, 26);

2. "as defined in subdivision (e) of Section 186.22" (pattern of criminal gang activity defined) (§§ 3, 6);

3. "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members (§ 4);

4. "Subdivision (a) of Penal Code section 186.22" (§ 7);

5. "Any crime where the enhancement specified in subdivision (b) of Section 186.22 is found to be true," (§ 7);

6. "which would constitute a felony violation of Section 186.22 of the Penal Code," (§ 15); and,

7. "The offense was committed for the benefit of, at the direction of, or in association with any criminal street gang as prohibited by Section 186.22 of the Penal Code." (§ 26.)

When the voters amended section 186.22 and added numerous provisions that either adopted existing language verbatim or referenced its definitions, they were presumed to be aware of the judicial constructions that this Court has given to them. (*In re Derrick B.* (2006) 39 Cal.4th 535,

[7] Some of these provisions were repealed by the voters with Proposition 57, a voter initiative in 2016.

540; *People v. Weidert* (1985) 39 Cal.3d 836, 845-846.) For example, in *People v. Gardeley* (1996) 14 Cal.4th 605, 610, this Court held that to establish a "pattern of criminal gang activity" the statutorily required "two or more" pattern offenses "on separate occasions, or by two or more persons" may be established by proof of the current offenses. (*Gardeley* at p. 625.) With respect to the same question, this Court, in *People v. Loeun* (1997) 17 Cal.4th 1, held that the pattern offenses could be established by proof the crimes were committed by two different gang members on the same occasion against the same victim. (*Id*. at p. 10.)

D. LEGISLATIVE AMENDMENTS BETWEEN PROPOSITION 21 AND AB 333

In 2005, the Legislature added five new pattern offenses to the definition of "pattern of criminal gang activity" in subdivision (e), and added a new subdivision (j). (Stats. 2005, ch. 482, § 1 (SB 444).) The Legislative Counsel's Digest informed the Legislature: "Existing law authorizes the Legislature to amend these provisions with a 2/3 vote of each house." (Stats. 2005, ch 482.) The votes for Senate Bill 444 exceeded the required threshold.

The Legislature amended the provisions of Proposition 21 again in 2006 by adding three firearm offenses, subparagraphs (31) to (33), to subdivisions (e), (f), and (j) of section 186.22. (Stats. 2006, ch. 596 (SB 1222), § 1.) Again, the Legislature was informed that a two-thirds vote was

required for these amendments. (Stats. 2006, ch. 596 (SB 1222).) The votes for Senate Bill 1222 exceeded the threshold.

Following *Cunningham v. California* (2007) 549 U.S. 270, the Legislature amended subdivision (b)(3) of section 186.22 in 2009 to delete the requirement that the court impose the middle term, as specified, from those provisions and instead provided that the court, in its discretion, impose the enhancement that best serves the interests of justice. (Stats. 2009, ch. 171 (SB 150), § 1.) The bill included a sunset clause. (SB 150, § 1, subd. (k).) The Legislature specifically recognized these amendments required a vote of two-thirds of each house per Proposition 21. The votes for Senate Bill 150 exceeded the threshold.

The Legislature later extended the repeal date in section 186.22, subdivision (k), to January 1, 2012, then to January 1, 2014, January 1, 2017, and, finally, to January 1, 2022. (Stats. 2010, ch. 256 (AB 2263), § 1; Stats. 2011, ch. 361 (SB 576), § 1; Stats. 2013, ch. 508 (SB 463), § 1; Stats. 2016, ch. 887 (SB 1016), § 1.) The Legislative Counsel's Digest in each bill contained the following advisement:

> This bill would amend Proposition 21, an initiative statute adopted by the voters at the March 7, 2000, statewide primary election that provides that its provisions may be amended by the Legislature by a 2/3 vote of the membership of each house, and therefore requires a 2/3 vote.

(*Ibid*.) Each bill received more than two-thirds of the required votes.

The Legislature also made several technical, non-substantive, changes to sections added by Proposition 21. (See Stats. 2001, ch. 854 (SB 205), § 22; Stats. 2008, ch. 179 (SB 1498), § 236; Stats. 2010, ch. 178 (SB 1115), § 97; Stats. 2017, ch. 561 (AB 1516), § 178.)

E. ASSEMBLY BILL 333 (STATS. 2021, CH. 699)

In 2021, the Legislature passed AB 333. The bill did not meet the two-thirds threshold as required by Proposition 21 for an amendment—in either house.[8] For the first time since the enactment of Proposition 21 twenty-three years earlier, the Legislative Counsel *failed* to advise the Legislature of the two-thirds vote requirement for a substantive amendment of section 186.22. In fact, Proposition 21 and its supermajority requirement were not mentioned at all in AB 333.

This Court has recently explained the changes AB 333 made to section 186.22:

> Assembly Bill 333 essentially adds new elements to the substantive offense and enhancements in section 186.22—for example, by requiring proof that gang members "collectively engage" in a pattern of criminal gang activity, that the predicate offenses were committed by gang members, that the predicate offenses benefitted the gang, and that the predicate and underlying offenses provided more than a reputational benefit to the gang. *These changes have the effect of increasing the threshold for conviction of the section 186.22 offense and the imposition of the enhancement,* with obvious benefit to defendants like Tran.

[8] AB 333 passed by one vote, 41 to 30 (9 no votes recorded), in the Assembly and 25 to 10 (5 no votes recorded) in the Senate.

(*People v. Tran* (2022) 13 Cal.5th 1169, 1206–1207, cleaned up, emphasis added.) Additionally, section 186.22, subdivision (e)(2), now prohibits the prosecution from using the currently charged offense to establish the pattern of criminal gang activity. AB 333 further purports to define the phrase "to benefit, promote, further, or assist." (§ 186.22, subd. (g).) However, this definition, which narrows the range of gang behavior within its ambit, is limited to "this chapter." (*Id*.) Section 190.2 is not part of the same chapter.

If allowed to stand, AB 333 effectively overturns this Court's interpretations of what is required to prove a pattern of criminal activity as held in *Gardeley* and *Loeun*, despite the voters presumed understanding, and adoption, with section 190.2, subdivision (a)(22).

F. THIS COURT HAS REPEATEDLY RECOGNIZED THE VOTERS' DESIRE TO EXPAND THE REACH OF PROPOSITION 21'S PROVISIONS

The parties focus almost exclusively on this Court's analysis of amendments in *People v. Kelly* (2010) 47 Cal.4th 1008 and the rules of statutory construction in *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53. The parties correctly identify that a key component in each type of analysis is the intent of the voters. The parties then argue how their interpretation of interpretive doctrines from these cases supports their respective positions that the voters did, or did not, intend to restrict the

Legislature's ability to increase the threshold for conviction of the gang-murder special circumstance by changing the definitions specifically included in that circumstance.

Missing in that discussion are some of this Court's cases, specific to Proposition 21, repeatedly looking to the overarching purposes of Proposition 21 in support of interpretations that were consistent with its goal to capture a larger range of conduct and to punish that conduct more severely. Amicus will discuss some of these cases below.[9]

1. *Robert L. v. Superior Court* (2003) 30 Cal.4th 894

Robert L. involved section 4 of Proposition 21, which added subdivision (d) to section 186.22. Section 186.22, subdivision (d) provides, "Any person who is convicted of a public offense punishable as a felony or a misdemeanor, which *is committed for the benefit of, at the direction of or in association with, any criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members*, shall be punished by . . . ." (Prop. 21, § 4, subd. (d).)

[9] This is not to say that every case examining the added provisions of Proposition 21 has been decided expansively. This Court has concluded that the language employed in section 186.22 was sufficiently clear to not require an exploration beyond the language. (See, e.g., *People v. Lopez* (2022) 12 Cal.5th 957 [interpreting Proposition 21's addition of section 186.22, subd. (b)(4)].) *Lopez* was not, however, examining Proposition 21's no amendment clause.

The gang-motivated language in subdivision (d) was copied verbatim from pre-existing subdivision (b)(1).[10] In *Robert L.*, this Court confronted whether subdivision (d) applies to all misdemeanors and all felonies or only to "wobblers"; namely, those public offenses that are punishable, in the alternative, as a misdemeanor or a felony. (*Robert L. v Superior Court* (2003) 30 Cal.4th 894, 897.)

This Court concluded that subdivision (d) applied to any crime that is a misdemeanor or a felony. (*Robert L.*, *supra*, 30 Cal.4th at p. 901). As part of its evaluation, this Court looked to the entirety of Proposition 21 stating, "the electorate's intent to punish all gang crime more severely would be undermined if section 186.22(d) applied only to wobblers, and not to all misdemeanors, because section 186.22(d) provides for lower punishment than many, if not all, wobbler crimes that are charged as felonies." (*Id.* at p. 907.)

2. *People v. Montes* (2003) 31 Cal.4th 350

In *Montes*, this Court analyzed section 186.22, subdivision (b)(5), which provides that a defendant who commits "a felony punishable by imprisonment in the state prison for life" for the benefit of a criminal street gang results in a minimum parole eligibility term of 15 years. This Court

[10] The gang-motivated language was also copied verbatim in subdivision (b)(4), which was also added by Proposition 21. (Prop 21, § 4.)

granted review to determine whether this provision applied only if the defendant commits a felony that, by its own terms, provides for a life sentence. This Court stated:

> Where a voter initiative contains a provision that is identical to a provision previously enacted by the Legislature, in the absence of an indication of a contrary intent, we infer that the voters intended the provision to have the same meaning as the provision drafted by the Legislature. (See *People v. Trevino* (2001) 26 Cal.4th 237, 241 [] ["Section 190.2 was enacted by voter initiative in 1978, but the language of its subdivision (a)(2) is identical to a provision that the Legislature enacted as part of the 1977 death penalty law. [Citation.] In the absence of anything suggesting the contrary, we infer that the voters who enacted section 190.2 intended subdivision (a)(2) to have the same meaning as the identically worded provision drafted by the Legislature."].) Because there is no evidence of a contrary intent here, we infer that the voters intended section 186.22(b)(5) to have the same meaning as the identically worded provision drafted by the Legislature in 1988.

(*Montes*, *supra*, 31 Cal.4th at pp. 355-356, footnote omitted.)

Even though Proposition 21 did not alter the language contained in subdivision (b)(5), a provision previously added by the Legislature, this Court still looked to the voters' intent in enacting Proposition 21 as a whole when evaluating its terms. This Court held the subdivision applies only where the underlying felony itself provides for a life term because "the circumstance that a defendant committed a crime to benefit a criminal street gang would be meaningless in every case where the defendant committed a gang-related felony providing for a determinate term *and* was found in violation of the section 12022.53(d) firearm enhancement." (*Id.* at p. 361,

fn. omitted.) This Court "declined to thwart the will of the voters in such a manner." (*Ibid.*)

3. *People v. Briceno* (2004) 34 Cal.4th 451

In *Briceno*, this Court held that the addition of section 1192.7, subdivision (c)(28), which added to the list of serious felonies "any felony offense, which would also constitute a felony violation of Section 186.22," applied to both the substantive offense of active participation in a criminal street gang defined in section 186.22, subdivision (a), and the gang sentence enhancement found in subdivision (b)(1). Acknowledging a potential ambiguity, this Court stated the broader interpretation must prevail when the provisions of Proposition 21 are read together.

> The most compelling evidence that the term 'felony violation' as used in section 1192.7(c)(28) includes a sentence enhancement under section 186.22(b)(1) is that the list of serious felonies in section 1192.7, subdivision (c) itself contains a provision in which the term "violation" specifically references a sentence enhancement. Section 1192.7, subdivision (c)(40), enacted by Proposition 21, adds to the list of serious felonies "any violation of Section 12022.53."

(*Id.* at p. 460.)

This Court also explained that section 1192.7, subdivision (c)(28), used the same language found in section 707, subdivision (b)(21), of the Welfare and Institutions Code, which was not enacted as part of Proposition

21.[11] This Court explained that the "phrase in Welfare and Institutions Code section 707, subdivision (b)(21), 'which would also constitute a felony violation,' is *identical* to its counterpart in section 1192.7, subdivision (c)(28), and its meaning is clear: the Legislature, and now the voters, intended that the term "felony violation" in Proposition 21 include the section 186.22(b)(1) gang sentence enhancement." (*Briceno*, *supra*, 34 Cal.4th at pp. 461-462, italics in original.)

This Court explained that its conclusion was consistent with the voters' intent to dramatically increase the penalties for all gang-related felony offenses:

> Nothing in the above quoted language suggests that the voters intended to limit section 1192.7(c)(28) to the 186.22, subdivision (a) substantive felony offense of active participation in a criminal street gang. Instead, consistent with their intent to punish *all* gang-related felony offenses more severely, section 1192.7(c)(28) broadly covers "*any* felony offense that violates Section 186.22." By referring to section 186.22 generally, section 1192.7(c)(28) demonstrates the voters' intent also to encompass subdivision (b) of section 186.22, which defines gang-enhanced felonies. (See, e.g., *People v. Murphy* (2001) 25 Cal.4th 136, 143 [] ["the electorate and the Legislature have both shown that they know how to use language expressly requiring a violation of [a specific Penal Code section] when that is their intent"].)

[11] Welfare and Institutions Code section 707, subdivision (b)(21), specifically refers to the term "felony violation" as encompassing the section 186.22, subdivision (b) gang enhancement.

(*Briceno*, supra, 34 Cal.4th at p. 462, emphasis in original, cleaned up.) Yet again, this Court looked to the overarching purpose of Proposition 21 to adopt an expansive reading to effectuate it terms.

4. *People v. Shabazz* (2006) 38 Cal.4th 55

In *Shabazz*, this Court interpreted the gang-murder special circumstance added by Proposition 21, specifically the language "intentionally killed the victim." This Court held that section 190.2, subdivision (a)(22), applies to a defendant who, with the intent to kill one person, unintentionally killed another.

> The voters intended to address gang-related crime generally. (See *Robert L., supra,* 30 Cal.4th at p. 907, [] [noting the electorate's intent "to punish all gang crime more severely"].) An interpretation of section 190.2 encompassing *all* victims of gang-related killings is consistent with that intent. One that encompasses only those gang-related killings in which the assailant correctly identifies and kills the targeted individual (instead of, say, a bystander), as defendant urges here, is not.

(*People v. Shabazz* (2006) 38 Cal.4th 55, 65.) *Shabazz* is yet another example of this Court's recognition that the voters' intent with Proposition 21's was a broad expansion of the People's ability to prosecute gang-motivated crimes and secure enhanced penalties.

G. THE *PALERMO* RULE EXAMINES VOTER INTENT AND THE VOTERS CLEARLY STATED NO AMENDMENTS

This Court is familiar with the rules of statutory interpretation of an initiative. First, the language is examined and the words are given their ordinary meaning and construed in the context of the statute at issue, and in

the context of the initiative as a whole. (*People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571.) "If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language." (*Ibid*.) If the language is ambiguous, a reviewing court may consider ballot summaries and arguments to determine what the voters contemplated. (*Ibid*.)

Both parties cite to this Court's precedent in *Palermo, supra,* 32 Cal.2d 53. *Palermo* provides interpretive guidance when one statute references another statute or body of laws with respect to a legislature's intent. Where a statute adopts by specific reference the provisions of another statute, the referenced statute is incorporated in full as it then existed, not as subsequently modified. (*In re Jovan B.* (1993) 6 Cal.4th 801, 816; *Palermo* at pp. 58-59.) If the reference is a general one, the referring statute takes the then existing language, but also any future modifications. (*Jovan B.* at p. 816; *Palermo* at pp. 58-59.) Critically, this Court added that in this analysis "where the words of an incorporating statute do not make clear whether it contemplates only a time-specific incorporation, the determining factor will be legislative intent." (*Jovan B.* at p. 816.)

The need for this presumption can be more easily understood when one considers when it most often will arise: to legislation passed by a

Legislature. Because the Legislature cannot bind itself in the future, there must be an interpretive tool to understand what the Legislature intends with an original adopting statute. However, the voters can bind all future Legislatures with an initiative statute. Indeed, by default, there can be no amendment of an initiative. (Cal. Const., art. II, § 10, subd. (c).) As a result, there will always be a clear indication of whether the adopting statute permits amendment. Amendment by the Legislature is either expressly permitted in the initiative, subject to any conditions set by the voters, or it is prohibited by operation of our Constitution.

There should be no confusion. Proposition 21 expressly declared that amendments were prohibited absent at least one of two conditions, neither of which is met here. "The provisions of this measure shall not be amended by the Legislature except . . . ." (Prop. 21, § 21.) The "provisions of this measure" necessarily include the incorporated definition of a "criminal street gang" referenced in the gang-murder special circumstance because without it, the special circumstance is incomplete. (See *Jovan B.*, *supra*, 6 Cal.4th at p. 816.) When the plain language is clear, no reach to extrinsic aids is necessary. (*Pearson*, *supra*, 48 Cal.4th at p. 571.) As a result, section 190.2, subdivision (a)(22)'s reference to section 186.22, subdivision (f), declared a clear voter intent to prohibit alteration or amendment of that incorporated language.

Appellant appears to accept that the reference found in section 190.2, subdivision (a)(22) to definitions found in section 186.22—and found throughout Proposition 21—is a specific reference. (AOB at 26-27.) By this argument, Appellant recognizes that Proposition 21 necessarily incorporates language found in section 186.22. Nevertheless, he then argues—citing *Jovan B.*, *supra*, suggesting that voter intent must still be examined—that the voters somehow did not intend to prevent a future legislature from narrowing its reference to the definition of a criminal street gang in section 186.22, subdivision (f); a definition which was then quite well understood as evidenced by several cases from this Court and the intermediate courts of appeal.

Beyond the voters' unequivocal statement that there shall be no amendments to Proposition 21's provisions, this Court can consider the entirety of Proposition 21's terms to understand the voters' intent. As explained in detail in *Manduley*, *supra*, 27 Cal.4th at pp. 574-576, the measure: (1) created new crimes (Prop. 21, §§ 3, 6); (2) lessened the burden on the prosecution to prove a violation of 186.22, subdivision (a) (Prop. 21, § 4, subd. (l)); (3) imposed alternate sentencing schemes to elevate determinate sentences to life sentences (Prop. 21, § 4, subds. (b)(4)); (4) elevated misdemeanor conduct to a felony (Prop. 21, § 4, subd. (d)); (5) raised the penalties for the gang enhancement (Prop. 21, § 4, subd. (b)(1)); (6) added new offenses to the list of pattern crimes (Prop. 21, § 4, subd.

(e)); (7) expanded all pattern crimes to include a conspiracy to commit them (Prop. 21, § 4, subd. (e)); (8) added new crimes to both the serious and violent felony lists, including *all felonies* "which would also constitute a felony violation of Section 186.22" (Prop. 21, §§ 15, 17); (9) modified the statute to override a previous court ruling (Prop. 21, § 35); (10) expanded wiretapping authority (Prop. 21, § 13); and (11) materially altered numerous provisions relating to juveniles that would, for example, expand the ability to prosecute juveniles as adults (Prop. 21, § 18, subd. (b), § 25, subds. (b), (d)).

Other than the expressed desire to maintain section 190.5 (Prop. 21, § 36), Proposition 21's provisions were targeted toward creation of new crimes, *increased* penalties, and *expanded* application of the gang statute to both adults and juveniles. One of its many expressed findings was that "[g]ang-related crimes pose a unique threat to the public because of gang members' organization and solidarity. Gang-related felonies should result in severe penalties. Life without the possibility of parole or death should be available for murderers who kill as part of any gang-related activity." (Prop. 21, § 2, subd. (h).)

Naturally, Appellant focuses on Proposition 21's two mirrored provisions relating to the updating of the serious/violent felony lists. (Prop. 21, §§ 14, 16.) As the Attorney General addresses these provisions (ABM at 52-53), Amicus will not repeat the argument. But this Court has

explained the purpose of those "lock-in" provisions, and it was not to express an intent to allow amendment by a future legislature to the remainder of the initiative's provisions. Rather, the lock-in provisions were to ensure that any previously added offenses to serious/violent felony lists would qualify as strikes. (*Manduley*, *supra*, 27 Cal.4th at p. 577, fn. 11 ["The Legislature added some of these crimes to the list of violent and serious felonies before the passage of Proposition 21, but those crimes did not qualify as strikes until Proposition 21 amended the statutory lock-in date for determining qualifying offenses under the Three Strikes law."].)

However, even if those two provisions of Proposition 21 could be interpreted to cast some modicum of pause regarding the intent of the voters with respect to Proposition 21's more than *two dozen other provisions*, the remaining provisions of Proposition 21 overwhelmingly demonstrate that the voters wanted to *expand* the law to capture *more conduct* and punish that conduct *more severely*, not provide an avenue for a bare-majority future legislature to *narrow* the Act's terms and thereby *reverse* Proposition 21's expansions.

One has to wonder, if Appellant's argument is credited, what would happen if the Legislature repealed section 186.22, subdivision (f), in its entirety? For a specific reference, *Palermo* directs that, in that instance, "the repeal of the provisions referred to does not affect the adopting statute, in the absence of a clearly expressed intention to the contrary." (*Palermo*,

supra, 32 Cal.3d at pp. 58-59.) Appellant points to no evidence of a "clearly expressed" consent that a bare-majority future legislature may repeal the language referenced in its gang-murder special circumstance. Rather, the no amendment clause is clear and to the contrary. Surely, the voters did not intend that their new gang-murder special circumstance could be mooted that way. If it cannot be repealed, there exists no principled basis for claiming that it can be amended to substantially narrow its application.

In the event that Appellant is actually claiming that section 190.2, subdivision (a)(22)'s reference to section 186.22 is a general one, *Palermo* instructs that "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 (it may be assumed although no such case has come to our attention) as they may be subjected to elimination altogether by repeal." (*Palermo*, *supra*, 32 Cal.3d at p. 59.) Had AB 333 simply repealed the entirety of subdivision (f)—the definition referred to in the gang-murder special circumstance—it would be a *de facto* repeal of the gang-murder special circumstance because without the necessary definition of a criminal street gang, there can be no special circumstance. Indeed, AB 333—with its added language prohibiting self-predicating offenses for the required proof of a criminal street gang—repealed a fundamentally different understanding of the definition of a criminal street gang. (See *People v.*

Rossi (1976) 18 Cal.3d 295 [statute amended to excluded consensual oral copulation, but still criminalize oral copulation on a minor, in state prison, or when forcible, described as a repeal].)

As previously noted, that which "the legislature is prohibited from doing directly, it cannot do indirectly." (*Rainey*, *supra*, 6 Cal.2d at pp. 282-283; accord, *In re Oluwa* (1989) 207 Cal.App.3d 439, 446.) Appellant makes no argument that the Legislature has the authority to repeal the gang-murder special circumstance with a simple majority vote. Therefore, the Legislature should not have authority to repeal it piece by piece.

As noted above, the parties spend considerable time arguing voter intent as it relates to the rule announced in *Palermo*. However, this Court has utilized other methods to examine a legislative incorporation of existing statutory language. *People v. Ewoldt* (1994) 7 Cal.4th 380 is instructive.

In *Ewoldt*, this Court acknowledged that Proposition 8, with its enactment of its "Truth-in-Evidence provision" (now codified at Cal. Const., art. I. § 28, subd. (f)(2)) impliedly repealed then existing Evidence Code section 1101, subdivision (a). (*Ewoldt*, *supra*, 7 Cal.4th at p. 393.) However, subsequent to Proposition 8, and with a sufficient number of votes to overcome Proposition 8's no amendments clause, the Legislature enacted changes to Evidence Code section 1101, subdivision (b). (*Id*. at pp. 392-393.) This Court concluded that the supermajority amendments to

subdivision (b) necessarily revived the restated subdivision (a)[12] because one would have no effect without the other. (*Ibid.*)

Just as in *Ewoldt*, the gang-murder special circumstance has no meaning without incorporating the restated language—specifically section 186.22, subdivisions (e) and (f), for the requirements of a "criminal street gang." Under *Ewoldt*, that language is considered as if it was added by the legislative act, here by the voters, and therefore subject to the no amendments clause in Proposition 21.

H. CONSIDERABLE CONFUSION WILL RESULT, THUS SUPPORTING THE CLAIM THAT THE VOTERS DID NOT INTEND THE BROAD LEGISLATIVE AUTHORITY CLAIMED BY APPELLANT

Once it is determined that Proposition 21—by its verbatim adoption of existing statutory terms and definitions, and numerous references to section 186.22 and its specific subdivisions—is a specific reference under *Palermo*, the question then becomes what to make of the Attorney General's concession that the Legislature somehow lawfully amended those sections for purposes other than the gang-murder special circumstance. This question does not need to be answered in this case, and indeed this Court has authorized only a limited question. However, the answer is quite important for the undecided issue of whether AB 333 unlawfully amends

[12] It was restated because our Constitution requires it. "A section of a statute may not be amended unless the section is re-enacted as amended." (Cal. Const., art. IV, § 9.)

section 186.22 more broadly than the Attorney General has sought to challenge here.

Despite this Court's limited question, this issue must be discussed because it is this very concession that Appellant uses to promote his position. Appellant argues that parallel, but inconsistent, definitions of what constitutes a criminal street gang, creates substantial confusion that was not intended by the voters. (AOB at 41.) On this point, the Attorney General accepts that confusion would result, but comments that "the divergence is simply the necessary consequence of the enactment of AB 333 without a two-thirds majority, and it is presumed the Legislature was aware of that fact." (ABM at 57.)

There is no direct evidence that the Legislature addressed the confusion that would result, since they were not even informed of the two-thirds majority requirement in contrast to every other post-Proposition 21 substantive modification of section 186.22 that preceded AB 333. Accordingly, the alleged presumption is unsupported. The Legislature may very well have believed, incorrectly, that it could simply rewrite section 186.22 irrespective of Proposition 21. Indeed, the competing definitions may raise constitutional due process concerns as laws must be written so that "person[s] of ordinary intelligence [are given] a reasonable opportunity to know what is prohibited." (*People v. Superior Court* (*Caswell*) (1988) 46 Cal.381, 389.) It strains reason to think that AB 333's bare-majority

intended to create a potential due process violation. Regardless, there is no authority cited by the Attorney General that this alleged presumption is required by law or, more importantly, whether it has any legal significance.

It is the voters' intent that matters. Appellant argues that the voters surely did not intend that its definitional incorporation would be fixed in the gang-murder special circumstance and, presumably also in the new crimes found in sections 186.5, 186.26—but not in the rest of section 186.22. While Appellant is correct that voter intent is the issue, his argument that the voters who enacted Proposition 21 necessarily must have acquiesced in a bare-majority future legislature restricting the scope of Proposition 21 is belied by the terms of the initiative, its factual findings, and its overall expansive intent. Proposition 21 increased punishments, expanded the scope of the gang statute in several different ways, created new crimes, repudiated court precedent narrowing its scope, and fundamentally altered juvenile court jurisdiction for violent crimes, including gang crimes. Before reading a single word of the findings and declarations, Proposition 21 reveals itself as an extraordinary expansion of the statute to cover more behavior and to punish that behavior more severely, all protected by a provision expressly prohibiting amendments.

When discussing the "Gang Provisions" of the statute, the Legislative Analyst first noted 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 primary activities the commission of certain crimes." (Voter Information Guide, 2000 Prim. Elec. (Mar. 7, 2000), Analysis by Leg. Analyst, p. 46.) The voters were presumed to know this existing law as described by the analyst, and the judicial constructions of the terms. (*Derrick B. supra*, 39 Cal.4th at p. 540.)

The analyst then described:

> This measure increases the extra prison terms for gang-related crimes to two, three, or four years, unless they are serious or violent crimes in which case the new extra prison terms would be five and ten years, respectively. In addition, this measure adds gang-related murder to the list of ''special circumstances'' that make offenders eligible for the death penalty. It also makes it easier to prosecute crimes related to gang recruitment, expands the law on conspiracy to include gang-related activities.

(*Ibid*.) With passage of Proposition 21, the voters adopted the existing law as understood at the time and injected into numerous facets of the Penal Code, and the Welfare & Institutions Code, terms for the specific purpose of increasing punishments and expanding the reach of the gang statute. Not a single non-codified finding in Proposition 21 (see § 2) supports Appellant's arguments that the voters were ambivalent about a future bare-majority expressly narrowing its terms or creating conflict and confusion in the enforcement of its provisions.

It is "wholly unrealistic to require the proponents of [an initiative] to anticipate and specify in advance every change in existing statutory provisions which could be expected to result from the adoption of that

measure." (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 257.) It is similarly unrealistic to expect the voters to anticipate every move of a future Legislature or seemingly clever arguments of appellate counsel to negate the plain language of a no amendments clause. "If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language." (*Pearson*, *supra*, 48 Cal.4th at p. 571.) "The language" here that is "not ambiguous" is the no amendments clause. (Prop. 21, § 39.)

While Appellant gets the question right—voter intent—he is wrong on the answer. The voters *did not intend* to permit a future legislature to create a hodgepodge of provisions with respect to criminal street gangs with competing definitions and requirements that both simultaneously expand and narrow the application of the law. Rather, an examination of the initiative shows a comprehensive and interrelated series of provisions referring back to section 186.22, and its subdivisions, some of which were amended by Proposition 21 with the goal to create a cohesive, and expansive, application of the law.

Appellant does properly point out that competing definitions of a "criminal street gang" would generate the absurdity of the gang-murder special circumstance requiring a lesser quantum of proof for its heightened penalty when compared to the enhancement. Amicus agrees that makes

little sense and no reading of Proposition 21, whether its express terms, legislative findings, or other history, supports that they intended such a result. But the voters did intend that the gang-murder special circumstance be enacted because "gang-related crimes pose a unique threat to the public because of gang members' organization and solidarity. Gang-related felonies should result in severe penalties. Life without the possibility of parole or death should be available for murderers who kill as part of any gang-related activity." (Prop. 21, § 2, subd. (h).) In reality, this point favors the People's argument for an expansive definition throughout section 186.22, and unmolested by AB 333.

Numerous jury verdicts on gang crimes, gang enhancements, and other enhancements that require a gang finding have been reversed and referred back to the trial courts. The courts, including this Court, have grappled with legal issues surrounding the "instructional error" when the Legislature changes the law midstream and without notice to the parties on cases already decided, but not yet final, sometimes more than a decade later. Accepting Appellant's position and the Attorney General's partial concession will create further confusion on how to handle cases implicated by AB 333 when they are reopened under other statutes, such as sections 1172.1, 1172.6, and 1172.75. This is especially true for cases in which the defendant pled guilty, so there is no trial record to examine.

Amicus agrees that AB 333 has created considerable confusion in its wake. The voters of the State of California did not create that confusion. The voters clearly did not intend to substantially narrow crimes and enhancements, including the gang-murder special circumstance, validly proven under Proposition 21's terms. Rather, they urgently demanded a comprehensive scheme of laws to attack the identified problem of criminal street gangs. "Gang-related crimes pose a unique threat to the public because of gang members' organization and solidarity. Gang-related felonies should result in severe penalties." (Prop. 21, § 2, subd. (h).) "Dramatic changes are needed in the way we treat ... criminal street gangs ... if we are to avoid the predicted, unprecedented surge in ... gang violence." (Prop. 21, § 2, subd. (k).)

The electorate did not vote to allow a future bare-majority legislature to override their express intent and rob them of one of the "most precious rights of the democratic process"—the constitutional primacy of the People over the legislature with respect to voter initiatives. AB 333's rewriting of Proposition 21's provisions to narrow, or invalidate, the very laws and penalties the People voted to add, expand, and increase, constitutes a clear violation of section 39 of Proposition 21. As such, AB 333, having failed to comply with the express terms of the voter-approved initiative, constitutes an unconstitutional amendment of Proposition 21.

I. A FINDING IN FAVOR OF THE PEOPLE RAISES ADDITIONAL QUESTIONS NOT INCLUDED IN THE QUESTION BEFORE THE COURT

Amicus would prefer to also engage the argument that the Attorney General's concession—that AB 333 is a lawful amendment as it relates to sections 186.22, subds. (a) and (b), and Appellant's convictions of the same—is incorrect. However, we are mindful that this Court did not seek briefing on that question. Amicus respectfully honors this Court's directive. It must be briefly noted that if the Attorney General is correct on both points—that AB 333 is unconstitutional as it relates to the gang-murder special circumstance, but is valid with respect to sections 186.22, subds. (a) and (b)—there necessarily are additional questions raised. One such question is severability.

It is Amicus' view that AB 333's unconstitutionality, as outlined here and in support of the Attorney General, is not severable from the majority, if not all, of its remaining provisions. Because of this Court's limited question, that argument will remain for another day.

CONCLUSION

Amicus respectfully requests that this Court find that Proposition 21, with respect to its incorporation of section 186.22, subdivision (f) as well as its own language with respect to furthering the activities of the criminal street gang were improperly amended by AB 333. Amicus invites this Court to leave for another day the implications of invalidating only a portion of AB 333, as the more comprehensive question has not been briefed by the parties.

Dated: August 7, 2023

/S/ Gregory D. Totten
GREGORY D. TOTTEN
CEO, California District Attorneys Association

Attorney and CEO for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify that the attached *AMICUS CURIAE* APPLICATION AND BRIEF uses a 13-point Times New Roman font and contains 10,161 words excluding title page, tables, word count and signature blocks.

Dated: August 7, 2023

/S/ Gregory D. Totten
GREGORY D. TOTTEN
CEO, California District Attorneys Association
Attorney for Amicus Curia

DECLARATION OF ELECTRONIC SERVICE

Case Name: *People v. Rojas*
No.: S275835

I declare:

I am employed by the California District Attorneys Association. I am 18 years of age or older and not a party to this matter.

On August 7, 2023, I electronically served the attached Application for Permission to File Amicus Curiae Brief, Proposed Amicus Curiae Brief by transmitting a true copy to the following parties:

Louis M. Vasquez
Amanda D. Cary
William K. Kim
Office of the Attorney General
2550 Mariposa Mall, Suite 5090
Fresno, CA 93721
Louis.Vasquez@doj.ca.gov

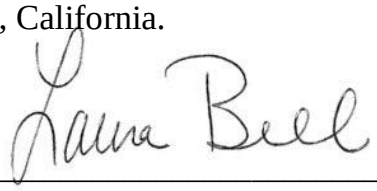
Sharon Wrubel
PO Box1240
Pacific Palisades, CA 90272
sharonlaw@verizon.net

Cynthia Zimmer
Kern County District Attorney
1215 Truxtun Avenue, 4th Floor
Bakersfield, CA 93301
czimmer@kernda.org

Fifth District Court of Appeal
2425 Ventura Street
Fresno, CA 93721
5DC-ClerksC/DTeam@jud.ca.gov

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct, and that this declaration was executed on August 7, 2023, at Sacramento, California.

Laura Bell
Declarant



Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. ROJAS**
Case Number: **S275835**
Lower Court Case Number: **F080361**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **gtotten@cdaa.org**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S275835 Rojas CDAA Amicus Curiae App & Brief

Service Recipients:

Person Served	Email Address	Type	Date / Time
Stacy Schwartz Office of the Attorney General 191971	stacy.schwartz@doj.ca.gov	e-Serve	8/7/2023 3:38:05 PM
William Kim Office of the Attorney General 207818	William.Kim@doj.ca.gov	e-Serve	8/7/2023 3:38:05 PM
Sharon Wrubel Sharon G. Wrubel 47877	Sharonlaw@verizon.net	e-Serve	8/7/2023 3:38:05 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

8/7/2023
Date

/s/Laura Bell
Signature

Totten, Gregory (106639)
Last Name, First Name (PNum)

California District Attorneys Association
Law Firm