IN SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO ROJAS, Defendant and Appellant.	No. S275835

Fifth Appellant District No. F080361
Kern County Superior Court No. BF171239B
Honorable John E. Lua, Judge Presiding

APPELLANT'S RESPONSE TO THE AMICUS CURIAE BRIEF OF THE CRIMINAL JUSTICE LEGAL FOUNDATION

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Appointment of the California Supreme Court

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INTRODUCTION

Appellant's opening and reply briefs on the merits argue that Assembly Bill No. 333 (A.B. 333) does not unconstitutionally amend Proposition 21 if A.B. 333's amended definition of a criminal street gang in Penal Code section 186.22, subdivision (f) (section 186.22(f)),[1] is applied to the gang-murder special circumstance of section 190.2, subdivision (a)(22) (section 190.2(a)(22)).

The amicus brief of the Criminal Justice Legal Foundation (CJLF) in support of respondent (CJLF's Brief) disagrees with respondent's concession, which was accepted in *People v. Rojas* (2022) 80 Cal.App.5th 542, 546-547

[1] Undesignated section references are to the Penal Code, and undesignated subdivision references are to section 186.22.

(*Rojas*), that A.B. 333 did not unconstitutionally amend subdivisions (e) and (f), as applied to the punishment provisions of section 186.22, only as to section 190.2(a)(22).

Appellant's prior arguments include that applying A.B. 333's amended definition of a criminal street gang to section 186.22's punishment provisions, but not to section 190.2(a)(22), would lead to irrational results.[2] CJLF recognizes this problem and states that the court in *People v. Lee* (2022) 81 Cal.App.5th 232, 242, fn. 36, rev. granted Oct. 19, 2022 (S275449) noted that applying different definitions of a criminal street gang in sections 186.22 and 190.2(a)(22) would mean that "`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.´" (CJLF's Brief, p. 20, fn. 8.)

Taking a different tact from the Attorney General, CJLF argues that A.B. 333 has unconstitutionally amended the definition of a criminal street gang as to all of Proposition 21's punishment provisions, because A.B. 333's enactment did not comply with the requirements of California Constitution, article II, section 10, subdivision (c) (article II, section 10, subdivision (c)). There is no dispute that A.B. 333 did not meet these requirements.

CJLF recognizes that California Constitution, article IV, section 9 (article IV, section 9) compelled Proposition 21 to restate and reenact subdivisions (e) and (f) in section 186.22. CJLF claims the reenactment was not technical but substantive, which converted these previous legislative provisions into initiative provisions, because the definition of a criminal street gang is integral to the goals

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[2] References in this brief to the "definition of a criminal street gang" encompass subdivisions (e) and (f). Subdivision (f) defines a "criminal street gang" as including the requirement that its members engage in or have engaged in a "pattern of criminal gang activity," which subdivision (e) defines.

of the Proposition 21 voters. However, as stated in Argument I, *post*, a proper analysis of the interplay between article II, section 10, subdivision (c) and article IV, section 9 shows that A.B. 333's amendment of subdivisions (e) and (f) was constitutional. Although the definition of a criminal street gang is related to the voters' goal to punish gang-related crimes more severely, the definition is not integral to that goal, and nothing in Proposition 21 suggests the voters intended to limit the amendment of the definition of a criminal street gang through the normal legislative process.

In a second argument, CJLF supports the Attorney General's position that A.B. 333 unconstitutionally amends Proposition 21 if A.B. 333's amended definition of a criminal street gang is applied to section 190.2(a)(22). CJLF's arguments are similar to those of the Attorney General and are incorrect for the reasons stated in Argument II, *post*.

ARGUMENT

I. PROPOSITION 21'S REENACTMENT OF SUBDIVISIONS (e) AND (f) OF PENAL CODE SECTION 186.22, WHICH WAS COMPELLED BY ARTICLE IV, SECTION 9 OF THE CALIFORNIA CONSTITUTION, DID NOT CONVERT THESE LEGISLATIVE PROVISIONS INTO SUBSTANTIVE PROVISIONS OF PROPOSITION 21 AND MAKE THEM SUBJECT TO ARTICLE II, SECTION 10, SUBDIVISION (c) OF THE CALIFORNIA CONSTITUTION

A. Summary of Argument

CJLF's argument relies primarily on language in *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196 (*County of San Diego*), where in a totally different context, this Court considered the relationship between the power of initiative, as protected by article II, section 10, subdivision (c), and the reenactment rule of article IV, section 9, which requires that when a statute is amended in any part, the statute must be restated and reenacted in its entirety. In *County of San Diego*, the Court stated that in most cases, the compelled reenactment of a legislative provision does not prevent future legislative amendment of the provision, "*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." (6 Cal.5th at p. 214, emphasis original.)

The exceptions to the normal reenactment rule do not apply here. The Proposition 21 voters did not focus on the definition of a criminal street gang and were not asked to do so. Their goal was to punish gang-related crimes more severely, and nothing shows the definition of a criminal street gang was integral to that goal. In addition, nothing shows the voters intended to limit the Legislature's ability to amend the definition of a criminal street gang through the normal legislative process. It was never the voters' goal to define a criminal street gang and to convert subdivisions (e) and (f) from legislative provisions into initiative provisions.

B. Background – Penal Code Section 186.22 and Its Reenactment by Proposition 21

"In 1988, the Legislature enacted the California Street Terrorism Enforcement and Prevention Act (STEP Act or Act; Pen. Code, § 186.20 et seq.) to eradicate `criminal activity by street gangs.´ [Citation.]" (*People v. Valencia* (2021) 11 Cal.5th 818, 828.) The STEP Act created a substantive offense of active gang participation in section 186.22, subdivision (a) and sentence enhancements for persons convicted of felonies committed for the benefit of, at the direction of, or in association with a criminal street gang, as set forth in subdivision (b). (*Id.* at p. 829.) After 1988, the Legislature made many amendments to the definition of a criminal street gang and to a pattern of criminal gang activity. By the latter part of the 1990's, the Legislature had amended the STEP Act "almost every year, sometimes several times in a year." (*People v. Gardeley* (1996) 14 Cal.4th 605, 615, fn. 7, disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) Section 186.22 was purely a legislative statute. (See *People v. Prado* (2020) 49 Cal.App.5th 480, 482 (*Prado*).

Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998, was passed by the voters in 2000. (Initiative Measure (Prop. 21, §§ 1, 4, eff. March 8, 2000.) Proposition 21 was enacted due to concern that youth and gang violence would increase. (Ballot Pamphlet, Primary Elec. (March 7, 2000), Findings and Declarations, Prop. 21, § 2, p. 119 ("Ballot Pamphlet").) Proposition 21 addressed the subjects of gang violence, juvenile crime and the sentencing of repeat offenders. (See *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 574-575 [setting forth Proposition 21's sections covering each subject].) A major purpose of Proposition 21, as indicated to the voters, was to punish all gang-related crimes more severely. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 907 (*Robert L.*)

Proposition 21 substantially amended subdivision (b) of section 186.22, the

gang enhancement provision, to increase the punishment for a person convicted of a crime committed "for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members." Proposition 21's increased punishment for a gang enhancement included creating "a new tiered system of enhancements with five-year enhancements for individuals convicted of serious felonies and 10-year enhancements for individuals convicted of violent felonies" and creating in subdivision (b)(4), "an alternate penalty provision prescribing indeterminate terms of life imprisonment for those who committed certain enumerated felonies under the same gang-related circumstances [Citation.]" (*People v. Lopez* (2022) 12 Cal.5th 957, 969-970.) Proposition 21 put the provisions of subdivision (d), which permitted the striking of punishment for an enhancement, into new subdivision (g) and enacted a new subdivision (d), which created another alternate penalty provision. (*Robert L.*, *supra,* 30 Cal.4th at p. 900.) Proposition 21 greatly increased the potential sentences for gang-related crimes, which included the enactment of section 190.2(a)(22).

The only change Proposition 21 made to subdivisions (e)'s definition of a "pattern of criminal gang activity" was to increase the list of offenses that qualified as predicate offenses and to add "conspiracy to commit" to subdivision (e). Proposition 21 made no change to subdivision (f)'s definition of "criminal street gang," other than to change the number of predicate offenses. (Ballot Pamphlet, text of Prop. 21, § 4, p. 120.) The voters did not otherwise alter the definition of a criminal street gang. CJLF acknowledges that "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.´" (CJLF's Brief, pp. 29-30.)

Proposition 21 restated the entirety of section 186.22, which was required by the reenactment rule of article IV, section 9. Nothing in Proposition 21

indicates subdivisions (e) and (f) were restated for any other reason.

In terms of gang-related crimes, the Ballot Pamphlet focused on the need to increase the punishment for such crimes, not on the definition of a criminal street gang. The only reference in the Ballot Pamphlet to the definition of a criminal street gang was in the Legislative Analyst's summary of the gang provisions, which stated:

> **Gang Provisions**
>
> ***Background.*** Current 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. Under current law, anyone convicted of a gang-related crime can receive an extra prison term of one, two, or three years.
>
> ***Proposal.*** 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, 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.

(Ballot Pamphlet, Analysis by the Legislative Analyst, Gang Provisions, p. 46.)

CJLF notes that A.B. 333 amended the definition of a "criminal street gang" and a "pattern of criminal street gang activity" in a manner making it more difficult to prove a criminal street gang. (CJLF's Brief, pp. 16-19.) This is true. (See *People v. Tran* (2022) 13 Cal.5th 1169, 1206.) However, A.B. 333 did not change the sentences imposed by Proposition 21's gang provisions.

C. Proposition 21 Did Not Transform Penal Code Section 186.22, Subdivisions (e) and (f) into Proposition 21's Substantive Provisions Because Nothing Suggests the Voters Intended This Result or That the Definition of a Criminal Street Gang Is Integral, Rather Than Just Related to the Voters' Goal of Punishing Gang-Related Crimes More Severely

1. Legal Principles

"In California, statutes can be described as initiative statutes, legislative statutes, or referendum statutes. An initiative statute is a statute enacted by the electorate. A legislative statute is a statute enacted by the Legislature. A referendum statute is a statute that was first proposed by the Legislature, then approved by the electorate." (*Prado, supra,* 49 Cal.App.5th at p. 482.)

Article II, section 10, subdivision (c) provides: "The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." The Legislature remains free to amend a legislative or referendum statute in contrast to an initiative statute. (*Prado, supra,* 49 Cal.App.5th at p. 485.)

Article IV, section 9 provides in relevant part: "A section of a statute may not be amended unless the section is re-enacted as amended." Under this constitutional provision, known as the "reenactment rule," any statute that is amended, even in a tiny part, must be restated in its entirety. (*American Lung Assoc. v. Wilson* (1996) 51 Cal.App.4th 743, 748.) "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, supra,* 6 Cal.5th at p. 208.)

Government Code section 9605, subdivision (a)(1) provides the following interpretive rule regarding amended statutes:

> When a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form. The unaltered provisions are to be considered as having been

> the law from the time when those provisions were enacted. The new provisions are to be considered as having been enacted at the time of the amendment. The omitted provisions are to be considered as having been repealed at the time of the amendment.

Government Code section 9605 was enacted "to ensure that the intent of the Legislature would be carried out, consistent with article IV, section 9, whenever statutes are amended." (*In re Lance W.* (1985) 37 Cal.3d 873, 895.) The effect of Government Code section 9605 is "to avoid an implied repeal and reenactment of unchanged portions of an amended statute, ensuring that the unchanged portion operates without interruption." (*Ibid;* see *St. John's Well Child & Family Center v. Schwarzenegger* (2010) 50 Cal.4th 960, 984 [reiterating this effect].)

In *People v. Kelly* (2010) 47 Cal.4th 1008, 1025 (*Kelly*), this Court explained both the people's initiative power and the Legislature's authority to amend initiative statutes, as follow:

> . . . "[t]he purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes is to 'protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.' [Citations.]"
>
> * * *
>
> At the same time, despite the strict bar on the Legislature's authority to amend initiative statutes, judicial decisions have observed that this body is not thereby precluded from enacting laws addressing the general subject matter of an initiative. The Legislature remains free to address a " 'related but distinct area' " [Citations.]

Furthermore, there is a strong presumption favoring the constitutionality of the Legislature's acts (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1253), and "courts will presume a statute is constitutional unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity." (*People v. Falsetta* (1999) 21 Cal.4th 903, 912-913; see also *Dittus v. Cranston* (1959) 53 Cal.2d 284, 286 ["the presumption

is in favor of constitutionality, and the invalidity of the legislation must be clear before it can be declared unconstitutional"]).

In *County of San Diego, supra,* 6 Cal.5th at p. 211, this Court considered the interplay between article II, section 10, subdivision (c) and article IV, section 9, based on a consideration of the voters' intent. CJLF's Brief, pages 21-33, discusses this case, but the case does not support CJLF's position and is very different contextually from the instant case.

In *County of San Diego, supra,* 6 Cal.5th.at pp. 200, 203, the issue was whether the State of California or certain counties were responsible for the costs of implementing duties mandated by the Sexually Violent Predators Act (SVPA), which was a 1995 legislative enactment that enabled involuntary commitment of certain convicted sex offenders. The SVPA made county governments responsible for the commitment process and housing individuals during the process. (*Id.* at p. 200.) Relevant to the issue was that the California Constitution requires the state to reimburse local governments for mandates imposed by the Legislature, but there is an exception under Government Code section 17556, subdivision (f) for mandates imposed by the voters through a ballot measure. (*Id*. at pp. 201-202, 207.)

The Legislature created the Commission on State Mandates (Commission) to resolve disputes between the state and the counties for the costs of mandated programs and adopted procedures for adjudicating the disputes, which permitted a county to file a test claim. (*County of San Diego, supra,* 6 Cal.5th at pp. 200, 202.) The Commission would then decide whether the statute that was the subject of the test claim (the test claim statute) required state reimbursement. (*Id.* at p. 202.)

A county filed a claim seeking reimbursement for the costs of implementing the SVPA, and in 1998, the Commission adopted a statement of decision approving state reimbursement for eight specified mandates imposed on local governments. (*County of San Diego, supra,* 6 Cal.5th at pp. 203-204.)

In 2006, the voters enacted Proposition 83, which amended and reenacted several of the sections of the Welfare and Institutions Code that were the basis of the Commission's decision on mandates. (*County of San Diego, supra,* 6 Cal.5th at pp. 200, 204.) In 2013, the state sought to terminate its payments to the counties and argued that Proposition 83 had ended the state's reimbursement obligation. (*Id.* at pp. 200-201, 204.) The Commission ultimately ruled that Proposition 83 had transformed almost all eight mandates into voter-mandated activities, making them no longer reimbursable by the state. (*Id.* at p. 205.)

The issue on review, as stated in *County of San Diego, supra,* 6 Cal.5th at p. 206, was "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." The parties conceded that Proposition 83 had reprinted the statutory provisions on which the Commission's ruling had relied solely due to article IV, section 9. (*Id.* at p. 204.)

This Court in *County of San Diego, supra,* 6 Cal.5th at p. 209, first rejected the Commission's position that Proposition 83's mere reenactment of the SVPA code sections that gave rise to the mandated duties changed the mandates into voter-enacted provisions. The Court stated that to view every provision subject to compelled restatement in an initiative under article IV, section 9, as a voter-enacted provision under Government Code section 17556 "would sweep in vast swaths of the California Code." (*Ibid.*) The Court further explained:

> According pivotal significance to a mere technical restatement also would prove difficult to reconcile with Government Code section 9605.
>
> * * *
>
> As we have long held, " '[t]he portions of the amended section which are copied without change are not to be considered as having been repealed and again re-enacted, but to have been the law all along.' " (*Vallejo etc. R. R. Co. v. Reed Orchard Co.* (1918) 177 Cal. 249, 255, 170 P. 426.) Statutory provisions that are not actually

> reenacted and are instead considered to " 'have been the law all along' " (*ibid*.) cannot fairly be said to be part of a ballot measure within the meaning of Government Code section 17556, subdivision (f).

(*Id.* at pp. 209-210.)

The state in *County of San Diego, supra,* 6 Cal.5th at p. 211, argued that the compelled reenactment of the statutes in question created a voter-imposed mandate, because the Proposition 83 voters had simultaneously limited the Legislature's ability to revise or repeal the statutes in accordance with article II, section 10, subdivision (c). This Court rejected the argument that the technically restated provisions could not be amended, except as provided in Proposition 83's amendment clause. (*Ibid.*) The Court stated as to article II, section 10, subdivision (c):

> The evident purpose of limiting the Legislature's power to amend an initiative statute " 'is to "protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent." ' " (*Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, 597, 96 Cal.Rptr.3d 379 (*Shaw*).) But we have never had occasion to consider precisely "what the people have done" and what qualifies as "undoing" (*ibid*.) when the subject is a statutory provision whose reenactment was constitutionally compelled under article IV, section 9 of the Constitution.

(*Id.* at p. 211.) The Court found the state took "a narrow view of the Legislature's power to amend a statutory provision when its reenactment in a ballot measure was compelled by the state Constitution." (*Id.* at p. 212.)

The Court noted that the state's argument was based only on one case, *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577 (*Shaw*), and that *Shaw* "analyzed a legislative amendment aimed at the heart of a voter initiative, not a bystander provision that had been only technically restated." (*County of San Diego, supra,* 6 Cal.5th at p. 211.) As the Court explained, the legislation at issue in *Shaw* directly contradicted provisions of Proposition 116, which required that

certain tax revenues be placed in a trust fund to be used only for specified purposes. (*Id.* at pp. 212-213.) The legislation added provisions that diverted the funds for other purposes and "sought to undo the very protections the voters had enacted in Proposition 116" and defeated "a core purpose of Proposition 116" contrary to "the voters' careful handiwork, both the text and its intended purpose, and therefore was required to comply with the limitations in the initiative's amendment clause." (*Id.* at p. 213)[3]

In County of *San Diego, supra,* 6 Cal.5th at p. 213, this Court explained that Proposition 83 was very different from Proposition 116, as follows:

> By contrast, nothing in Proposition 83 focused on duties local governments were already performing under the SVPA. No provision amended those duties in any substantive way. Nor did any 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.
>
> * * *
>
> Indeed, no indication appears in the text of the initiative, nor in the ballot pamphlet, to suggest voters would have reasonably understood they were restricting the Legislature from amending or modifying any of the duties set forth in the test claim statutes. Nor is an overbroad construction of article II, section 10 of the California Constitution necessary to safeguard the people's right of initiative. (See *Bartosh v. Board of Osteopathic Examiners* (1947) 82

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[3]In *Shaw, supra,* 175 Cal.App.4th at p. 597, the court of appeal noted that Proposition 116 had reenacted a specific statute in full under article IV, section 9, but the court assumed that section II, section 10, subdivision (c) governed and held that as stated in Proposition 116, the statute could only be amended by a statute passed by two-thirds of each house "if the statute is consistent with, and furthers the purposes of this section." The court assumed without analysis that Proposition 116's legislatively enacted statutes had been transformed into initiative statutes. In *County of San Diego, supra,* 175 Cal.App.4th at p. 214, fn. 4, this Court disapproved *Shaw* to the extent it was inconsistent with the opinion in *County of San Diego*.

> Cal.App.2d 486, 491-496, 186 P.2d 984.) To the contrary: Imposing such a limitation as a matter of course on provisions that are merely technically restated would unduly burden the people's willingness to amend existing laws by initiative.

(*Id.* at pp. 213-214.) Rather, the Court stated:

> A more prudent conclusion is to assign somewhat more limited scope to the state constitutional prohibition on legislative amendment of an initiative statute. When technical reenactments are required under article IV, section 9 of the Constitution — yet involve no substantive change in a given statutory provision — the Legislature in most cases retains the power to amend the restated provision through the ordinary legislative process. 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 of article II of the Constitution is consistent with the people's precious right to exercise the initiative power. (Italics original.) (See *Legislature v. Eu* (1991) 54 Cal.3d 492, 501, 286 Cal.Rptr. 283, 816 P.2d 1309.) It also comports with 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. (See *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691, 97 Cal.Rptr. 1, 488 P.2d 161.)

(*Id.* at p. 214.)

Thus, in most cases where the voters amend a legislative statute, the provisions of that statute only technically reenacted under article IV, section 9 are not converted into initiative provisions making them subject to the amendment requirements of article II, section 10, subdivision (c). The only exception is for statutory provisions that are integral to accomplishing the electorate's goals, or where there is evidence the voters reasonably intended to limit the Legislature's ability to amend the technically reenacted provisions.

2. Proposition 21's Restatement of Penal Code Section 186.22, Subdivisions (e) and (f) Constitutes a Technical Reenactment of the Definition of a Criminal Street Gang, Not a Substantive Reenactment

CJLF argues that Proposition 21 substantively reenacted subdivisions (e) and (f), making them initiative provisions, which could only be legislatively amended in compliance with article II, section 10, subdivision (c). This argument is based on CJLF's erroneous contention that subdivisions (e) and (f) "were fully enmeshed within and central to the entire comprehensive statutory scheme and thus `integral to accomplishing the electorate's goals´" within the meaning of *County of San Diego, supra,* 6 Cal.5th at p. 214. (CJLF's Brief, p. 32.)

This Court in *County of San Diego, supra,* 6 Cal.5th at p. 214, did not state what it meant by the exception for an "integral" provision, but the wording of the exception for "*other* indicia [that] support[s] the conclusion that voters reasonably intended to limit the Legislature's ability to amend that part of the statute" suggests that the restated provision must be so integral to the voters' goals as to support a finding that the voters reasonably intended to limit legislative amendment of the provision. CJLF acknowledges that the question of whether subdivisions (e) and (f) "were substantively reenacted by Proposition 21 comes down to voter intent." (CJLF Brief's, p. 30.)

In interpreting an initiative, the primary consideration is the purpose of the initiative. (See *People v. Gonzales* (2018) 6 Cal.5th 44, 49 [court's "principal objective is giving effect to the intended purpose of the initiative's provisions"]; *People v. Briceno* (2004) 34 Cal.4th 451, 459 [court's "`primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure´"].)

There is nothing in Proposition 21 or its Ballot Pamphlet to suggest the voters intended to limit the Legislature's ability to amend subdivisions (e) and (f) going forward or that they believed these subdivisions were integral to Proposition 21's goals. Given the reenactment requirement of article IV, section 9, it should

not be assumed, with no evidence at all, that the restatement of these subdivisions was more than a technical reenactment.

There is no doubt, as noted by CJLF, that Proposition 21 was enacted to increase penalties for gang-related crimes. (CJLF's Brief, p. 31.) This was the clear goal as to Proposition 21's gang-related punishment provisions, and this goal was conveyed to the voters. (*Robert L.*, *supra,* 30 Cal.4th at p. 907.) However, contrary to CJLF's claim, Proposition 21's increased punishment for such crimes did not center on the definitions of a criminal street gang and a pattern of criminal gang activity. (CJLF's Brief, p. 31.) These definitions are related to Proposition 21's punishment provisions, but the punishment provisions did not center on the definitions. Had this been the case, it would be reasonable to expect at least focus on the definitions in the Ballot Pamphlet.

It is important to take into account that although article II, section 10, subdivision (c) precludes the Legislature from undoing what the people have done without the voters' consent, the Legislature remains free to address a related but distinct subject. (*Kelly, supra,* 47 Cal.4th at pp. 1025-1026.) As explained in *People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571 (*Pearson*), it is erroneous to conclude that legislation even amends an initiative statute in violation of article II, section 10, subdivision (c) simply because the legislation concerns the same subject matter:

> We have described an amendment as "a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision." [Citation.] But this does not mean that any legislation that concerns the same subject matter as an initiative, or even augments an initiative's provisions, is necessarily an amendment for these purposes. "The Legislature remains free to address a ' "related but distinct area" ' [citations] or a matter that an initiative measure 'does not specifically authorize *or* prohibit.' " [Citations.]

In view of these principles, it would make little sense to hold that the Legislature cannot amend legislative provisions, such as subdivisions (e) and (f),

that were restated and reenacted in an initiative only under compulsion of article IV, section 9, when those provisions are related to but distinct from the initiative's substantive provisions. Accordingly, for a provision to be "integral to accomplishing the electorate's goals," as stated in *County of San Diego, supra,* 6 Cal.5th at p. 214, the provision must cover more than a distinct subject that is simply related to the voters' goals in adopting the initiative.

As stated in appellant's reply brief on the merits, page 27, A.B. 333 did not amend Proposition 21 at all within the meaning of article II, section 10, subdivision (c), as the definition of a criminal street gang is related to, but distinct from, the subject of section 190.2(a)(22), which is a punishment provision. The same is true of the definition of a criminal street gang as applied to Proposition 21's other punishment provisions. A.B. 333 did not change the punishment provisions of Proposition 21, and the Proposition 21 voters still have what they enacted, severe punishment for gang-related crimes.

CJLF cites portions of Proposition 21's findings and declarations that show concern with the threat posed by gang-related crimes because of gang members' organization and solidarity and their better organization in recent years. (CJLF's Brief, p. 32-32.) CJLF is stretching to find some suggestion that Proposition 21 was directed at the definition of a criminal street gang or that the voters focused on the definition. Nothing in the findings and declarations or anywhere else in Proposition 21 or the Ballot Pamphlet supports this suggestion. Proposition 21 was not focused or centered on the definition of a criminal street gang. Proposition 21 was focused on the enactment of harsher punishment for gang-related crimes. (*Robert L.*, *supra,* 30 Cal.4th at p. 907.)

CJLF next argues that when the voters enacted Proposition 21, they were cognizant of the definitions of a criminal street gang and a pattern of criminal gang activity, as defined in subdivisions (e) and (f). (CJLF's Brief, p. 32.) The voters were aware of the definitions, because subdivisions (e) and (f) were restated in

section 186.22, as compelled by article IV, section 9. However, the voters knew subdivisions (e) and (f) pre-existed Proposition 21. The Ballot Pamphlet, before setting forth the text of Proposition 21, contained the explanatory statement that "existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new." (Ballot Pamphlet, prefatory paragraph to "Proposed Law," p. 119.) Because subdivisions (e) and (f) were largely left unchanged by Proposition 21, there is no reason to believe the voters focused on these subdivisions or thought future legislative amendments to them were restricted, particularly given that the focus of Proposition 21's amendments to section 186.22 was to increase punishment.

CJLF quotes *Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1332, as follows: "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. [Citations.]" (CJLF's Brief, p. 32.) Although true, this does not mean the Proposition 21 voters intended a substantive reenactment of subdivisions (e) and (f) and believed they were restricting further amendment of these subdivisions through the normal legislative process.

The fallacy of CJLF's position regarding the voters' intent is revealed by the following argument: "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.* (Emphasis.)" (CJLF's Brief, p. 32.) There is no indication the voters focused on the definition of a criminal street gang or a pattern of criminal street gang activity and considered whether the definitions were sufficient to suit their purpose of increasing punishment for gang-related crimes. CJLF is speculating that the voters considered the breadth of the definition of a criminal street gang, but the voters' mindset in this regard cannot be

divined from their silence. (See *People v. Nash* (2020) 52 Cal.App.5th 1041, 1065 [the voters' intent is not ascertainable from their silence; where an argument regarding the voters' intent is not founded on language in a proposition or in the ballot material, the argument is purely speculative].)

The Ballot Pamphlet referred to the definition of a criminal street gang only once and very generally. As noted *ante,* the Legislative Analyst stated the following:

> ***Background.*** Current 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.

(Ballot Pamphlet, Analysis by the Legislative Analyst, Gang Provisions, p. 46.) The reference to "current law" appears to be purely informational as to the current definition of a gang. The reference does not even mention the components of a pattern of criminal gang activity or remotely imply that the definition of a criminal street gang or the required primary activities could not be changed in the future through the normal legislative process.

CJLF's Brief, page 33, lifts language from this Court's description of *Shaw, supra,* 175 Cal.App.4th 577, in *County of San Diego, supra,* 6 Cal.5th at pp. 212-213, and contends that A.B. 333's amendment of the definition of a criminal street gang was aimed at the "heart" of Proposition 21 and was not "a bystander provision that had been only technically restated" and that A.B. 333 sought to "undo the very protections" the Proposition 21 voters had enacted by "careful handiwork." *Shaw* is very different from the instant case. In *Shaw*, as explained in *County of San Diego, supra,* 6 Cal.5th at pp. 212-213, the Legislature's enactments directly contradicted provisions of Proposition 116 that required certain tax revenues be placed in a trust fund to be used only for specified purposes and allowed the appropriation of trust fund money for other uses. In contrast, A.B. 333's definition of a criminal street gang does not contradict or take

away from Proposition 21. The same punishment provisions remain after A.B. 333.

Furthermore, had the STEP Act placed the definition of a criminal street gang (subdivisions (e) and (f)) in a statute separate from section 186.22, the current issue would not exist. There would have been no constitutionally compelled reenactment of the definition in Proposition 21. It is difficult to conclude that because subdivisions (e) and (f) were placed in section 186.22, that the definition of a criminal street gang became an initiative provision, absent evidence the voters intended this result. (See *County of San Diego, supra,* 6 Cal.5th at p. 210 ["if the local government duties listed here happened to appear in a completely separate statute not subject to technical reenactment rather than appearing in the section Proposition 83 amended in other respects, they would have remained state mandates," that is, legislative enactments].)

It is clear from this Court's discussion of *Shaw* in *County of San Diego, supra,* 175 Cal.App.4th at 212-214, that there is a significant difference between legislation, as in *Shaw,* that contradicts an initiative's "core purpose," and legislation, as in *County of San Diego* and the instant case*,* that does not change the core purpose of the initiative, particularly where there is no indication in the initiative that the technically restated provisions require "special protection from alteration by the Legislature."

D. Conclusion

A.B. 333's amendment of the definition of a criminal street gang did not violate article II, section 10, subdivision (c)'s limitation on legislative amendment of an initiative statute. Proposition 21's reenactment of subdivisions (e) and (f), which were previous legislative provisions, was compelled by article IV, section 9, and this reenactment did not convert the definition of a criminal street gang into Proposition 21's initiative provisions. Nothing shows the definition of a criminal street gang was integral to the Proposition 21 voters' goal of increasing

punishment for gang-related crimes, rather than being a distinct but related subject, or that the voters intended to limit amendment of the definition of a criminal street gang in the future. Consequently, the Legislature was free to amend the definition of a criminal street gang through the normal legislative process. (See *County of San Diego, supra,* 6 Cal.5th at p. 214.)

II. THE APPLICATION OF ASSEMBLY BILL No. 333'S DEFINTION OF A CRIMINAL STREET GANG TO PENAL CODE SECTION 190.2, SUBDIVISION (a)(22) DOES NOT UNCONSTITUTIONALLY AMEND PROPOSITION 21

CJLF supports the Attorney General's position that, as held in *Rojas, supra,* 80 Cal.App.5th at pp. 554-555, A.B. 333 unconstitutionally amends Proposition 21 if A.B. 333's amended definition of a criminal street gang is applied to section 190.2(a)(22). CJLF argues that A.B. 333 "would reduce the scope of the murders punishable under section 190.2(a)(22)" and thus, "`takes away´ from the scope of conduct" punishable under Proposition 21. (CJLF's Brief, pp. 36-37.) CJLF states that appellant fails to recognize that although section 190.2(a)(22)'s severe punishment remains, A.B. 333 "materially changes and narrows the scope of conduct being penalized" and takes that punishment away for some "murderers that the electorate intended to punish when they voted and enacted Proposition 21." (CLIF's Brief, pp. 37-38.)

Appellant has recognized that some murderers may not be subject to section 190.2(a)(22) because of A.B. 333's narrowed definition of a criminal street gang, but this is only because they were not active participants in what is now recognized as an organized criminal street gang, or because they did not commit murder to further the activities of such a gang. This effect does not constitute an unconstitutional taking away under *Pearson, supra,* 48 Cal.4th at p. 571, because the definition of a criminal street gang is related to, but distinct from, the subject of section 190.2(a)(22), and because there is no conflict between Proposition 21 and A.B. 333. (See appellant's reply brief on the merits, pp. 27-28.)

CJLF further argues that a trier of fact's decision whether to sustain a special circumstance allegation under section 190.2(a)(22) must rely on the definition of a criminal street gang in subdivision (f), and any change in that definition directly affects that decision. (CJLF's Brief, p. 39.) This is true, but under *Pearson, supra,* 48 Cal.4th at p. 571, the Legislature was permitted to

amend the definition of a criminal street gang because the definition is related to the gang-murder special circumstance but is a distinct subject.

CJLF adopts the position of the majority opinion in *Rojas, supra,* 80 Cal.App.5th at pp. 556-557, that a crime and its punishment are not distinct but inseparable. (CJLF's Brief, pp. 38-39.) This position is legally incorrect, putting aside that section 190.2(a)(22) and section 186.22, subdivisions (e) and (f) do not bear the relationship of a crime and its punishment, but of a punishment provision and a definition in that provision on a related but distinct subject. It is well-established that a crime is distinct from the punishment for the crime. (See *People v. Solis* (2020) 46 Cal.App.5th 762, 779 [the "definition of a crime is distinct from the punishment for a crime"].)

As set forth in appellant's opening brief on the merits, pages 24-26, the majority opinion in *Rojas* takes the position that a crime and its punishment are not distinct in an effort to negate *People v. Superior Court* (*Gooden*) (2019) 42 Cal.App.5th 270 (*Gooden*). *Gooden* supports appellant's position as an example of a related but distinct subject, even though legislation may reduce the scope of persons subject to an initiative's punishment provision.[4]

In *Gooden, supra,* 42 Cal.App.5th at pp. 279-286, the court rejected the argument that Senate Bill No. 1437 (S.B. 1437), which changed the mens rea for murder, unconstitutionally amended Proposition 7, which had increased the punishment for first and second degree murder. (*Id.* at pp. 279-286.) Although S.B. 1437 increased the requirements to establish murder and thus, reduced the body of persons potentially subject to Proposition 7's punishment for murder, S.B.

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[4] In *Gooden,* this Court denied the People's petition for review and request to depublish the decision. (Case No. S259700.) Appellant is aware of no appellate case that has rejected *Gooden's* analysis and conclusions other than the majority opinion in the instant case. (See *People v. Superior Court of Butte County* (2020) 51 Cal.App.5th 896, 902, and *People v. Nash, supra,* 52 Cal.App.5th at p. 1053 [both joining and citing appellate cases reaching the same conclusion as *Gooden*].)

1437 was held not to have unconstitutionally amended Proposition 7. *Gooden* concluded that absent voter indications of intent to freeze the elements of murder in place as they existed at the time of Proposition 7's adoption, S.B. 1437, which did not address the subject of punishment, could not be considered an amendment to Proposition 7. (*Id.* at p. 286.) Similarly here, because there is no indication the Proposition 21 voters intended to freeze the definition of a criminal street gang as to section 190.2(a)(22), A.B. 333, which did not address the subject of punishment, permissibly amended the definition of a criminal street gang, a related but distinct subject from that of section 190.2(a)(22).

CJLF's final argument is that under *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53 (*Palermo*), section 190.2(a)(22)'s reference to subdivision (f) is a specific reference, which shows the voters intended that the definition of a criminal street gang could only be amended by the Legislature upon a two-thirds vote of each house. (CJLF's Brief, pp. 40-43.) Appellant's opening brief on the merits, pages 26-32, and appellant's reply brief on the merits, pages 9-18, explain that under the modern application of the *Palermo* rule, the reference to subdivision (f) was a general reference, because section 190.2(a)(22) did not express a time-specific incorporation, and nothing shows the voters intended to freeze the definition of a criminal street gang in section 190.2(a)(22). As a result, the Legislature was authorized to address the definition of a criminal street gang through the normal legislative process

CJLF makes two specific arguments that the reference in section 190.2(a)(22) to subdivision (f) is specific. First, CJLF states that under *Palermo,* "unless `clearly expressed´ otherwise," this Court must presume that section 190.2(a)(22)'s reference to subdivision (f) was a specific reference. (CLJF's Brief, p. 40.) This is erroneous under the modern application of the *Palermo* rule; the determining factor is the voters' intent unless the reference is stated as time-specific. As explained in *In re Jovan B*. (1993) 6 Cal.4th 801, 816 (*Jovan B.*), a

specific citation or reference to another statute, unless stated as time-specific, is considered ambiguous and always requires examination of the intent of the body that enacted the referring statute. "Several modern decisions have applied the *Palermo* rule, but none have done so without regard to other indicia of legislative intent." (*Id.* at p. 816, fn. 10; see also *People v. Pecci* (1999) 72 Cal.App.4th 1500, 1505 ["the *Palermo* rule is not to be applied in a vacuum;" the "determining factor is legislative intent"].) Because section 190.2(a)(22) refers to "a criminal street gang, as defined in subdivision (f) of Section 186.22," without stating a time-specific limitation, the reference is considered unclear, and the intent of the Proposition 21 voters is the critical consideration. As set forth in appellant's prior briefs on the merits, under all the relevant rules of construction, all indicia of the voters' intent point to the absence of intent to freeze the definition of criminal street gang in section 190.2(a)(22).

Second, CJLF argues that *In re Oluwa* (1989) 207 Cal.App.3d 439 (*Oluwa*) is instructive. CJLF reads *Oluwa* selectively and ignores the importance *Oluwa* ascribes to the voters' intent in adopting Proposition 7. Proposition 7 revised section 190 to increase the sentence for second degree murder to 15 years to life and to provide that in applying custody credits to the fixed portion of a life term, "[t]he provisions of Article 2.5. . . of the Penal Code 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." (*Id.* at p. 442.) At the time of Proposition 7's enactment, Article 2.5 included section 2931, which provided that prisoners might reduce their sentences by a maximum one-third for good behavior and participation in prison programs, giving them 1-for-2 credits. In 1982, the defendant in *Oluwa* was sentenced to 15 years to life for second degree murder. (*Ibid*.) Afterward, the Legislature added sections to Article 2.5 that provided 1-for-1 credits for an already sentenced prisoner. (*Id.* at p. 443.) The court in *Oluwa* rejected the defendant's argument that he was entitled to these

more generous credits. The court's ruling was premised on both the voters' intent and the fact that Proposition 7's reference to Article 2.5 was specific. (*Id.* at pp. 444-445.) As to the voters' intent, the court explained:

> [T]he legislative analysis accompanying the initiative specifically addressed the availability of conduct credits and advised voters that those persons sentenced to 15 years to life in prison would have to serve a minimum of 10 years before becoming eligible for parole. Thus, the electorate clearly intended service of 10 calendar years by a second degree murderer before parole consideration.

(*Id.* at p. 445.) With the more generous 1-for-1 credits, a defendant with a 15-year sentence could be released before 10 years' imprisonment, contrary to what the Proposition 7 voters were told.

Furthermore, *Jovan B.* cited *Oluwa* as an example of the modern cases under *Palermo* that require consideration of legislative intent and also noted that *Oluwa* "stressed the legislative analysis accompanying the 1978 initiative, which advised voters that murderers sentenced to prison terms of 15 years to life `would have to serve a minimum of 10 years before becoming eligible for parole,´" which showed the electorate intended a second-degree murderer to serve 10 calendar years. (*Jovan B. supra,* 6 Cal.4th at p. 816, fn. 10; see also *People v. Cooper* (2002) 27 Cal.4th 38, 48 [making same point].) It was only in this context, that *Oluwa* stated that the Legislature should not be permitted to do indirectly what it could not do directly. (207 Cal.App.3d at p. 446.) Thus, *Oluwa* does not support CJLF's position, which ignores the importance of the voters' intent.

For the reasons set forth in appellant's opening and reply briefs on the merits, all the pertinent rules of construction support the conclusion that A.B. 333 does not unconstitutionally amend Proposition 21 if A.B. 333's amended definition of a criminal street gang is applied to section 190.2(a)(22).

CONCLUSION

This Court should reverse the Court of Appeal's opinion that the application of A.B. 333's definition of a criminal street gang to section 190.2(a)(22) is an unconstitutional amendment of Proposition 21 and otherwise affirm the opinion.

Dated: September 27, 2023

Respectfully submitted,

Sharon G. Wrubel

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CERTIFICATE OF WORD COUNT

I, Sharon G. Wrubel, counsel for appellant certify under penalty of perjury that this brief contains 7,787 words as counted by Microsoft Word.

Executed on September 27, 2023, at Pacific Palisades, California.

Sharon G. Wrubel

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I am an active member of the State Bar of California, over 18 years of age, employed in Los Angeles County, California, and am not a party to the subject action. My business address is: P.O. Box 1240, Pacific Palisades, CA 90272. On September 27, 2023, I served the foregoing appellant's response to the amicus curiae brief of the Criminal Justice Legal Foundation as follows:

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

Executed on September 27, 2023, at Pacific Palisades, California.

Sharon G. Wrubel
SHARON G. WRUBEL

STATE OF CALIFORNIA
Supreme Court of California

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Case Name: **PEOPLE v. ROJAS**
Case Number: **S275835**
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