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 CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutions

Other Authorities

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INTRODUCTION

The California District Attorneys Association (CDAA) in it amicus brief (CDAA's Brief) agrees with the argument of the Criminal Justice Legal Foundation (CJLF) in it amicus brief that Assembly Bill No. 333 (A.B. 333) unconstitutionally amends the definition of a criminal street gang in Penal Code section 186.22, subdivision (f) as to all of Proposition 21's punishment provisions.[1] CDAA claims this result follows because the Legislature's enactment

[1] Undesignated section references are to the Penal Code, and undesignated subdivision references are to section 186.22. References 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 A.B. 333 did not comply with California Constitution, article II, section 10, subdivision (c) (article II, section 10, subdivision (c)). (CDAA's Brief, p. 13.) CDAA states it does not address the constitutionality of A.B. 333 as applied to all of Proposition 21 and asks this Court to save the issue for another day. (CDAA's Brief, pp. 12, 51.) In reality, CDAA does discuss the issue in its argument regarding the confusion engendered by applying different definitions of a criminal street gang to section 186.22's enhancement and section 190.2(a)(22). (See CDAA's Brief, pp. 43-45, 47-49.)

CDAA recognizes that the issue on review requires determining whether A.B. 333's narrowing of the definition of a criminal street gang was actually an amendment of Proposition 21, and that the critical consideration is whether the Proposition 21 voters intended to permit future legislative amendment of the definition through the normal legislative process. CDAA's argument that the voters intended to restrict such amendment hinges on CDAA's position that the voters intended to prohibit future legislative amendment of subdivisions (e) and (f) due to Proposition 21's amendment section (amendment clause). However, as discussed in Argument A, *post,* the voters would not have viewed subdivisions (e) and (f) as among Proposition 21's substantive provisions that were subject to the amendment clause. It was clear from the Ballot Pamphlet that subdivisions (e) and (f) preexisted Proposition 21 and were not among Proposition 21's substantive provisions.

In addition to relying on Proposition 21's amendment clause, CDAA relies heavily on Proposition 21's broad goal of increasing punishment for gang-related crimes and Proposition 21's comprehensive nature. CDAA argues that as a result, the voters would not have wanted the Legislature to be able to amend the definition of a criminal street gang. However, as set forth in Argument B, *post,* A.B. 333 does not violate Proposition 21's purpose of increasing punishment for gang-related crimes. The gang-murder special circumstance still remains with its

harsh punishment. As permitted by established law, A.B. 333 properly amended the definition of a criminal street gang, which is a subject related to but distinct from the subject of section 190.2(a)(22), a punishment provision.

Third, CDAA misinterprets the rule of *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53 (*Palermo*), which is at the heart of the issue on review. As discussed in Argument C, *post,* and in appellant's opening brief on the merits (appellant's opening brief) and appellant's reply brief on the merits (appellant's reply brief), the reference in section 190.2(a)(22) to subdivision (f) is a general reference, and thus, the Legislature had the authority to amend the definition of a criminal street gang.

CDAA's arguments regarding the consequences of interpreting Proposition 21 as having frozen the definition of a criminal street gang as to section 190.2(a)(22), but not as to section 186.22's punishment provisions, are discussed in Argument D, *post*.

Nothing CDAA has to say refutes appellant's arguments 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).

ARGUMENT

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

A. The Amendment Clause of Proposition 21 Does Not Show the Voters Intended to Preclude Legislative Amendment of the Definition of a Criminal Street Gang Through the Normal Legislative Process, Nor Could the Voters Restrict the Legislature's Authority to Amend the Definition, Which Was Only Technically Reenacted in Proposition 21

CDAA's Brief repeatedly argues that the following section of Proposition 21 shows the voters intended to preclude amendment of the definition of a criminal street gang through the normal legislative process:

> 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.

(Ballot Pamphlet, text of Prop. 21, § 39, p. 131.)

It is unlikely the voters would have viewed subdivisions (e) and (f) as among the "provisions of this measure" subject to the amendment clause. The voters knew which provisions of Proposition 21 preexisted Proposition 21 and were simply restated to give coherence to Proposition 21 as presented to them. The Ballot Pamphlet, before setting forth the text of Proposition 21, contained the prefatory 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.) Subdivisions (e) and (f) were largely left unchanged by Proposition 21. There is no reason to believe the voters would have thought future legislative amendments to subdivisions (e) and (f) were restricted, particularly given that the focus of Proposition 21's amendments to section 186.22 was to

increase punishment. The voters meant to increase punishment, not change the definition of a criminal street gang.

At a minimum, Proposition 21's amendment clause is ambiguous regarding its application to previous provisions that were just restated in Proposition 21, such as subdivisions (e) and (f).[2] In the case of ambiguity regarding an initiative's provisions, the court's "`primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure.´ [Citation.]" (*People v. Briceno* (2004) 34 Cal.4th 451, 459.) An examination of all indicia of the voters' intent points to the absence of intent to restrict legislative amendment of subdivisions (e) and (f) through the normal legislative process.

Regarding the voters' power of initiative and the Legislature's authority to enact legislation, CDAA argues that the principle that legislative acts are presumed to be constitutional does not override the people's power with regard to initiatives under article II, section 10, subdivision (c). Respondent distinguishes *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1253, and *People v. Falsetta* (1999) 21 Cal.4th 903, 912-913, factually from the instant case. (CDAA's Brief, pp. 16-18.) However, appellant cited these cases in his opening brief, page 20, as supporting the presumption in favor of the constitutionality of the Legislature's acts, not because the cases are factually similar to the issue on review.

Contrary to CDAA's claim, appellant has not argued that A.B. 333 overrides article II, section 10, subdivision (c) because A.B. 333 came later in time than Proposition 21. (CDAA's Brief, p. 18.) Appellant's argument is that under all the principles of judicial construction relevant to the interpretation of an

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[2] CDAA does not claim that Proposition 21's changes to subdivisions (e) and (f) were other than minor, technical changes. CDAA notes that Proposition 21 only added conspiracies to all pattern offenses and two additional pattern offenses and expanded the range of grand thefts qualifying as pattern offenses. (CDAA's Brief, pp. 20-21.)

initiative, A.B. 333's refined definition of a criminal street gang does not constitute an amendment of Proposition 21 under article II, section 10, subdivision (c). As permitted, A.B. 333 legislated on the definition of a criminal street gang, which is a subject related to, but distinct from, the subject of section 190.2(a)(22), a punishment provision. (See *People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571 (*Pearson*) [legislation is not considered an amendment to an initiative statute in violation of article II, section 10, subdivision (c) where the legislation covers a related but distinct area as that in the initiative and does not prohibit what the initiative authorizes, or authorize what the initiative prohibits].)

Furthermore, subdivisions (e) and (f), previous legislative provisions, were restated and reenacted in Proposition 21 under compulsion of California Constitution, article IV, section 9 (article IV, section 9). As discussed in appellant's response to CJLF's amicus brief, Proposition 21's reenactment of subdivisions (e) and (f) was not substantive but technical. Thus, the Legislature was free to amend these subdivisions in A.B. 333 without compliance with article II, section 10, subdivision (c) and Proposition 21's amendment clause.

In *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196 (*County of San Diego*), this Court considered the relationship between the power of initiative, as protected by article II, section 10, subdivision (c), and the compelled reenactment of statutes under article IV, section 9, and considered what constitutes the undoing of an initiative when these two constitutional provisions are involved. (*Id.* at p. 211.) The Court rejected the argument that any technically reenacted legislative provision that did not comply with the amendment clause of an initiative violates article II, section 10, subdivision (c). (*Id.* at pp. 212-213.)

As explained in appellant's response to CJLF's brief, the reenactment of subdivisions (e) and (f) in Proposition 21 falls with the normal application of the reenactment rule, which states: "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." (*County of San Diego, supra,* 6 Cal.5th at p. 214.)

CDAA's argument of the primacy of the people's power of initiative and the conclusive effect of Proposition 21's amendment clause, which is based on article II, section 10, subdivision (c), is contrary to the reasoning of *County of San Diego.* Because the Legislature was free to amend subdivisions (e) and (f), the amendment clause of Proposition 21does not apply as a matter of law to these subdivisions. The voters do not have the power to restrict the Legislature's future amendment of legislative provisions that were only technically reenacted in an initiative. The voters can amend those provisions, but only through the initiative process, which has not occurred with respect to subdivisions (e) and (f). Otherwise, the voters would be permitted to negate the authority of the Legislature to legislate and to amend a purely legislative statute. (See Cal. Const. art. IV, § 1 [the "legislative power of this State is vested in the California Legislature. . . , but the people reserve to themselves the powers of initiative and referendum"].) "The power to legislate includes by necessary implication the power to amend existing legislation." (*Johnston v. City of Claremont* (1958) 49 Cal.2d 826, 835, disapproved on other grounds in *Associated Home Builders etc, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 596, fn. 14.)

Thus, Proposition 21's amendment clause does not show the voters intended to prevent future legislative amendment of subdivisions (e) and (f) through the normal legislative process, nor could the amendment clause be applied to override the Legislature's authority to amend these previous legislative provisions, which were only technically reenacted in Proposition 21.

B. The Broad Purpose of Proposition 21 to Punish Gang-Related Crimes More Severely Does Not Show the Proposition 21 Voters Intended to Freeze the Definition of a Criminal Street Gang As to Penal Code Section 190.2, Subdivision (a)(22)

CDAA's Brief, page 14, argues that Proposition 21 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.)" One of the main purposes of Proposition 21, as indicated in the Ballot Pamphlet given to voters, was to punish all gang-related crimes more severely. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 907.) Proposition 21's goal was not to define a criminal street gang or to limit the definition of a criminal street gang.

Nothing in Proposition 21's Ballot Pamphlet focused on the definition of a criminal street gang. As to gang-related crimes, the focus was on increasing punishment for such crimes. The only reference to the definition of a criminal street gang in the Analysis by the Legislative Analyst was in the 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.)

The reference to "current law" in the Ballot Pamphlet 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 criminal street gang or the required primary activities could not be changed through the normal legislative process. In addition, the "Proposal" sets forth Proposition 21's changed punishment provisions and states nothing about the definition of a gang.

CDAA posits that A.B. 333's "undisputed intent [was] to repeal the broad scope of section 186.22's incorporated provisions by substantially narrowing its application," and that A.B. 333 has "the expressed purpose of capturing less conduct." (CDAA's Brief, pp. 14-15.) It is the intent of the Proposition 21 voters that is at issue, not that of A.B. 333. In any case, it was not A.B. 333's purpose to repeal the scope of Proposition 21's punishment provisions or to narrow those provisions to capture less conduct. As explained in appellant's opening brief, pages 37-40, A.B. 333's amendments to the definition of a criminal street gang were based on over 20 years of experience and were enacted to ensure that only members of organized criminal street gangs are punished, not just persons connected to unorganized racial, cultural, or neighborhood groups. By refining the definition of a criminal street gang, A.B. 333 supports the overriding purpose of Proposition 21 to single out members of organized criminal street gangs, who commit serious crimes, for serious punishment. A.B. 333's goal was not to change the punishment provisions of Proposition 21, and in fact, A.B. 333 did not change the punishment for a violation of section 190.2(a)(22) or any other punishment statute in Proposition 21.

CDAA argues that the Legislature may not accomplish indirectly what it cannot do directly and implies this is what A.B. 333 did. (CDAA's Brief, p. 15.)

However, this is not what A.B. 333 did as to section 190.2(a)(22) or any other punishment provision. As set forth in appellant's opening brief, pages 21-26, and reply brief, pages 27-34, A.B. 333 does not "take away" from Proposition 21 if A.B. 333's amended definition of a criminal street gang is applied to section 190.2(a)(22). Because A.B. 333 narrowed the definition of a criminal street gang, some defendants will not be subject to the gang-murder special circumstance, but this is only due to their not being 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.

CDAA does not discuss *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270 (*Gooden*), which supports appellant's position that A.B. 333 does not take away from Proposition 21. (See appellant's opening brief, pp. 24-27, and reply brief, pp. 31-34.) *Gooden* rejected the argument that Senate Bill No. 1437 (S.B. 1437), which changed the mens rea for murder, violated article II, section 10, subdivision (c) by impermissibly taking away from Proposition 7, which increased the punishment for first and second degree murder. (*Id.* at pp. 279-286.) *Gooden* explained that the People had conflated the distinct concepts of the elements of murder and the punishment for murder, and that Proposition 7 covered the punishment for murder, while S.B. 1437 did not address the subject of punishment at all or prohibit the punishment for murder authorized by Proposition 7. (*Id.* at pp. 281-282.) Similarly here, section 190.2(a)(22), as enacted by Proposition 21, covers the punishment for a gang-related murder, while A.B. 333 does not address the subject of punishment at all or prohibit the punishment authorized by Proposition 21. A.B. 333 constitutionally addresses a related but distinct subject from that of section 190.2(a)(22).

Instead of discussing *Gooden* and other pertinent cases discussed by both appellant and the Attorney General that concern what constitutes an unconstitutional "taking away" from an initiative, such as *People v. Kelly* (2010)

47 Cal4th 1008, and the case law under *Palermo,* CDAA argues that the parties have not taken into account four cases specific to Proposition 21 on the issue of the voters' intent. (CDAA's Brief, pp. 29-30.) CDAA argues that in these four cases, this Court viewed Proposition 21's purposes as being "to capture a larger range of conduct and to punish that conduct more severely." (CDAA's Brief, p. 30.)

Indisputably, a major purpose of Proposition 21 was to impose more severe punishment for gang-related crimes. However, the four cases cited in CDAA's Brief, pages 30-35, only show that the voters' intent is relevant in interpreting an ambiguous statute, and the cases are not analytically similar to the instant case. In each case, this Court engaged in a typical judicial construction of an ambiguous statute or an arguably ambiguous statute and found the purpose of Proposition 21 to punish gang-related crimes more severely was one relevant consideration in interpreting statutory language. (See *Robert L. v. Superior Court, supra,* 30 Cal.4th pp. 897, 900-909 [section 186.22, subdivision (d)'s reference to "a public offense punishable as a felony or a misdemeanor" includes not just "wobbler" offenses, but all felonies and misdemeanors]; *People v. Montes* (2003) 31 Cal.4th 350, 352, 354-361 [section 186.22, subdivision (b)(5)'s reference to "a felony punishable by imprisonment in the state prison for life" is limited to only felonies that by their own terms provide for a life sentence]; *People v. Briceno, supra,* 34 Cal.4th at pp. 456, 458-465 [the definition of a "serious felony" in section 1192.7, subdivision (c)(28) for "any felony offense, which would also constitute a felony violation of Section 186.22," applies to section 186.22's substantive offense and gang enhancement]; *People v. Shabazz* (2006) 38 Cal.4th 55, 59, 62 (*Shabazz*) [section 190.2(a)(22)'s requirement that an active participant in a criminal street gang "intentionally killed the victim," applies to a defendant who discharged a firearm with the intent to kill one person but instead killed another individual].) None of these cases addresses the complex issue of whether the Legislature's

amendment of the definition of a term used in a legislative statute, which was only technically reenacted in an initiative, is constitutional if the amended definition is applied to a new statute enacted by the initiative.

Only *Shabazz, supra,* 38 Cal.4th 55, which is discussed in CDAA's Brief, page 35, concerns section 190.2(a)(22). In determining that section 190.2(a)(22)'s requirement that the defendant have "intentionally killed the victim" applied to a defendant who discharged a firearm with the intent to kill one person but instead killed another person, *Shabazz* found that the application of the transferred intent doctrine to section 190.2(a)(22) was strongly supported by the purpose underlying the gang-murder special circumstance. (*Id.* at pp. 64-65.) *Shabazz* noted that Proposition 21's finding and declarations included, "`Gang-related felonies should result in severe penalties. *Life without the possibility of parole or death should be available to murderers who kill as part of any gang-related activity.´* [Citation.]" (*Id.* at p. 65.) *Shabazz* held that based on the italicized language, "neither the focus of the proposition nor the intent of the electorate was directed to a particular *class* of victim (unlike. . . in certain other special-circumstance provisions. . .), but rather to the specific *act* of *gang-related killing.*" (*Ibid.*) In contrast in appellant's case, nothing in Proposition 21 or the Ballot Pamphlet suggests the answer to whether applying A.B. 333's amended definition of a criminal street gang to section 190.2(a)(22) is unconstitutional.

CDAA views *Shabazz* as "yet another example of this Court's recognition that the voters' intent with Proposition 21[] was a broad expansion of the People's ability to prosecute gang-motivated crimes and secure enhanced penalties." (CDAA's Brief, p. 35.) The fact that Proposition 21 was directed at, and did in fact, create severe punishment for gang-related crimes does not answer the question whether the Proposition 21 voters intended to restrict the Legislature from amending the definition of a criminal street gang as applied to section 190.2(a)(22). Nothing in Proposition 21 or the Ballot Pamphlet focused on the

definition of a criminal street gang and supports the conclusion that the voters had this intent.

Contrary to CDAA's argument, the broad purpose of Proposition 21 to punish gang-related crimes more severely does not show that the voters intended to freeze the definition of a criminal street gang in section 190.2(a)(22).

C. The Modern Application of the *Palermo* Rule Does Not Support The Argument That the Definition of a Criminal Street Gang Was A Specific Reference in Penal Code Section 190.2, Subdivision (a)(22), Nor Do Amicus's Other Arguments

CDAA states that as a consequence of the voters' enactments in Proposition 21, which "either adopted existing language verbatim or referenced" the definitions in section 186.22, the voters are presumed to have been aware of the judicial constructions this Court had given to the definitions. (CDAA's Brief, pp. 25-26.) From this statement, CDAA argues that if A.B. 333 is ruled a constitutional amendment of Proposition 21, the Legislature will not only be allowed to overturn subdivision (e)'s requirements as to a pattern of criminal gang activity but also the judicial constructions of subdivision (e) before A.B. 333's enactment. (CDAA's Brief, p. 29.) This is just a function of the Legislature's power to enact legislation. (See Cal. Const., Art. IV, §1.) Although the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts (see *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 472), the courts may not effectively rewrite statutes and engage in judicial legislation. (See *County of Santa Clara v. Perry* (1998) 18 Cal.4th 435,446.) Thus, if A.B. 333 constitutionally amends subdivision (e), there is no problem if judicial interpretations before A.B. 333 are no longer valid because they are contrary to A.B. 333.

CDAA also seems to argue there is a presumption under *Palermo* that where a statute adopts by specific reference the provisions of another statute, the referenced statute is incorporated in full as it then existed and not as subsequently

modified. (CDAA's Brief, p. 37.) This is not correct. The modern application of the *Palermo* rule depends on whether the referring statute states a time-limited incorporation, and if it does not, as is the case with section 190.2(a)(22), the determining factor is the intent of the voters. (See appellant's opening brief, pp. 26-32, and reply brief, pp. 9-18.)

Falling back on the amendment clause of Proposition 21, CDAA argues that the definition of a criminal street was among the "provisions of this measure," and thus, there was "clear voter intent to prohibit alteration or amendment" of subdivision (f), as referred to in section 190.2(a)(22), during the normal legislative process. (CDAA's Brief, p. 37.) As set forth in Argument I, *ante*, the voters knew that the definition of a criminal street gang preexisted Proposition 21, making it unlikely the voters viewed the technically restated provisions of Proposition 21 as "provisions of this measure." If there was ambiguity in this regard, all other indicia of voter intent support a finding that the voters did not intend to restrict legislative amendment of subdivisions (e) and (f). Furthermore, as a matter of law, because these subdivisions were only technical reenactments, the Legislature was permitted to amend them during the normal legislative process, as it did in A.B. 333. (See *County of San Diego, supra,* 6 Cal.5th at pp. 212-213.)

CDAA's next claim is that appellant appears to accept that section 190.2(a)(22)'s reference to the definition of a criminal street gang is a "specific reference" under *Palermo.* (CDAA's Brief, p. 38.) CDAA misconstrues appellant's arguments under *Palermo*. Appellant repeatedly and consistently has argued that section 190.2(a)(22)'s reference to "a criminal street gang, as defined in subdivision (f) of Section 186.22," is a general reference under *Palermo*, because the reference does not express a time-limited incorporation and because the voters did not intend a time-specific incorporation. The reference to a criminal street gang is general, and thus, the Legislature was free to amend the definition in A.B. 333.

CDAA's Brief, pages 38-39, reiterates that in addition to the amendment clause of Proposition 21, this Court can consider the broad scope of Proposition 21's provisions on gangs. As relevant to the issue on review, Proposition 21's goal was to increase the punishment for gang-related crimes, but this does not show the voters intended to restrict future amendment of the definition of a criminal street gang as applied to section 190.2(a)(22).

CDAA disagrees with appellant's position that the voters would have frozen the reference in section 190.2(a)(22) to "a criminal street gang, as defined in subdivision (f) of Section 186.22" had this been the voters' intent. (See appellant's opening brief, pp. 32-35, and reply brief, pp. 22-23.) CDAA argues that the purpose of the lock-in provisions that Proposition 21 did enact "was not to express an intent to allow amendment by a future legislature to the remainder of the initiative provisions," but "to ensure that any previously added offenses to serious/violent felony lists would qualify as strikes. [Citation.]" (CDAA's Brief, pp. 39-40.) Appellant has not argued that the purpose of the lock-in provisions was to express intent to allow future legislative amendment of other provisions in Proposition 21. The significance of the lock-in provisions is that the voters would have frozen the definition of a criminal street gang in section 190.2(a)(22) had this been their intent, since they froze the definitions of serious and violent felonies as to other penalty provisions.

CDAA essentially claims that even if the lock-in provisions arguably might be significant as to the voters' intent, that the expansive nature of Proposition 21 countervails this significance. (CDAA's Brief, p. 40.) However, the purpose of Proposition 21 to punish gang-related crimes more severely does not show the voters intended to freeze the definition of a criminal street gang in section 190.2(a)(22).

CDAA then seems to argue that the reference to subdivision (f) was a specific reference under *Palermo,* and that because subdivision (f) cannot be

repealed under Proposition 21's amendment clause, the Legislature should not be permitted to substantially narrow subdivision (f). (CDAA's Brief, pp. 40-41.) However, the reference in section 190.2(a)(22) to subdivision (f) is a general reference. CDAA also argues that if subdivision (f) is a general reference, the Legislature could repeal subdivision (f), which would result in a de facto repeal of section 190.2(a)(22), and that the Legislature should not be permitted to repeal the gang-murder special circumstance statute piece by piece by amending the definition of a criminal street gang. (CDAA's Brief, pp. 41-42.) Nothing remotely akin to a repeal of section 190.2(a)(22) or the definition of a criminal street gang occurred in A.B. 333, and amending the definition of a criminal street gang does not repeal section 190.2(a)(22) in any respect.

Relying on *People v. Ewoldt* (1994) 7 Cal.4th 380 (*Ewoldt)*, CDAA next argues that the *Palermo* rule is not the only method used to examine the incorporation of existing statutory language. (CDAA's Brief, pp. 42-43.) In *Ewoldt,* this Court held that even if the adoption of Proposition 8 abrogated Evidence Code section 1101, which prohibits use of character evidence to prove conduct on a specified occasion, the Legislature subsequently reenacted the statute by more than the two-thirds vote required by Proposition 8's amendment clause. (*Id.* at pp. 390-392.) *Ewoldt* is not on point because the Legislature complied with article II, section 10, subdivisions (c), and *Ewoldt* did not consider anything similar to the issue on review in the instant case.

Under the modern application of the *Palermo* rule, the reference to subdivision (f) was a general reference, and the Legislature's enactment of A.B. 333 was constitutional.

D. The Anomalous and Unreasonable Consequences of Interpreting Proposition 21 As Having Frozen the Definition of a Criminal Street Gang in Penal Code Section 190.2, Subdivision (a)(22) Support the Conclusion That Assembly Bill No. 333 Did Not Unconstitutionally Amend Proposition 21

Appellant's opening brief, pages 40-44, and reply brief, pages 23-26, set forth why the consequences of interpreting Proposition 21 as having frozen the definition of a criminal street gang in section 190.2(a)(22) support the conclusion that A.B. 333 did not unconstitutionally amend Proposition 21. CDAA agrees with appellant that the voters would not have intended the confusion engendered by applying different definitions of a criminal street gang to different provisions of the law. (CDAA's Brief, p. 15.) CDAA states that having "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." (CDAA's Brief, p. 47.) CDAA also acknowledges that nothing in Proposition 21, its express terms, findings, or other history supports a finding that the voters intended this anomalous result. (CDAA's Brief, pp. 47-48.)

CDAA questions how the Attorney General could concede that the Legislature lawfully amended the definition of a criminal street gang as applied to section 186.22's punishment provisions. (CDAA's Brief, p. 43.) The concession was necessary because Proposition 21 restated and reenacted subdivisions (e) and (f) in section 186.22 under compulsion of article IV, section 9. As a result, the definition of a criminal street gang remained a legislative provision of section 186.22, not one of Proposition 21's substantive provisions that is subject to article II, section 10, subdivisions (c). (See *County of San Diego, supra,* 6 Cal.5th 196 at pp. 211-213; and appellant's response to CJLF's brief.)

The unreasonable consequences of interpreting Proposition 21 as having frozen the definition of a criminal street gang as to section 190.2(a)(22) but not as to section 186.22's punishment provisions support appellant's position that A.B.

333 does not unconstitutionally amend Proposition 21 if the amended definition of a criminal street gang is applied to section 190.2(a)(22).

CONCLUSION

Proposition 21's compelled technical restatement of subdivisions (e) and (f), previous legislative provisions, and Proposition 21's amendment cause do not show the voters intended to restrict future legislative amendment of the definition of a criminal street gang as applied to section 190.2(a)(22). A.B. 333's amendment of the definition is constitutional under all the relevant rules of judicial construction.

Under the modern application of the *Palermo* rule, section 190.2(a)(22)'s reference to subdivision (f) is a general reference, and an examination of the voters' intent shows they did not intend to freeze the definition of a criminal street gang in section 190.2(a)(22). In addition, A.B. 333 does not take away from what the voters enacted in Proposition 21, a gang-murder special circumstance, which mandates either capital punishment or life imprisonment without the possibility of parole. That punishment remains. Although A.B. 333 and section 190.2(a)(22) relate to the same subject of criminal street gangs, they cover distinct subjects, which left the Legislature free to amend the definition of a criminal street gang.

Furthermore, A.B. 333's amendment of the definition is consistent with Proposition 21's purpose. The amendment ensures that only organized criminal street gangs whose members engage collectively in a pattern of criminal gang activity meet the definition of a criminal street gang, based on over 20 years of experience. The amendment avoids punishing people merely because they associate with racial, neighborhood or other groups.

Moreover, the consequences of applying different definitions of a criminal street gang in section 186.22's punishment provisions and in section 190.2(a)(22) would lead to anomalous consequences that were never intended by the voters.

Appellant requests that this Court reverse the Court of Appeal's opinion insofar as it holds that the application of A.B. 333's amended definition of a criminal street gang to section 190.2(a)(22) unconstitutionally amends

Proposition 21.

Dated: September 27, 2023

Respectfully submitted,

Sharon G. Wrubel
SHARON G. WRUBEL
Attorney for Appellant Fernando Rojas

CERTIFICATE OF WORD COUNT

I, Sharon G. Wrubel, counsel for appellant certify under penalty of perjury that this brief contains 5,476 words as counted by Microsoft Word.

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

Sharon G. Wrubel
SHARON G. WRUBEL
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PROOF OF SERVICE

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 California District Attorneys Association 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
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STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. ROJAS**
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Date

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