IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent No. S223825

-vs-

DAVID VALENCIA,

Petitioner

/

APPLICATION OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE FOR PERMISSION TO APPEAR AS *AMICUS CURIAE* ON BEHALF OF PETITIONER

–o0o–

BRIEF IN SUPPORT OF PETITIONER

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

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Petitioner

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APPLICATION OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE TO APPEAR AS *AMICUS CURIAE* ON BEHALF OF PETITIONER DAVID VALENCIA (RULE 8.520(f)) AND BRIEF IN SUPPORT OF PETITIONER

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, CALIFORNIA SUPREME COURT, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT:

California Attorneys for Criminal Justice (hereafter CACJ) apply under California Rules of Court, Rule 8.520(f), to appear as *amicus curiae* on behalf of petitioner David Valencia. The application is made in compliance with Rule 8.520(f)(2) in that petitioner filed his Reply Brief on the Merits on November 18, 2015. Thus, this brief is filed within 30 days of that brief, and complies with Rule 8.520.

A. Identification of CACJ[1]

CACJ is a nonprofit California corporation. According to Article IV of its bylaws, CACJ was formed to achieve certain objectives including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California and other applicable law." CACJ is administered by a Board of Governors consisting of criminal defense lawyers practicing within the State of California. The organization has approximately 2,000 members, primarily criminal defense lawyers practicing before Federal and State courts. These lawyers are employed throughout the State both in the public and private sectors.

CACJ has often appeared before this Court, the United States Supreme Court, and the Courts of Appeal in California on issues of importance to its membership. CACJ's appearance as an *amicus curiae* before this Court has been recognized in a number of the Court's published decisions.

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[1] The undersigned member of and attorney for CACJ certifies to this Court that no party involved in this litigation has tendered any form of compensation, monetary or otherwise, for legal services related to the writing or production of this brief, and additionally certifies that no party to this litigation has contributed any monies, services, or other form of donation to assist in the production of this brief.

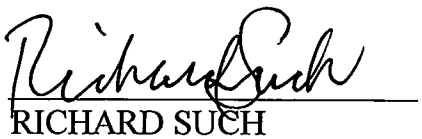
B. Statement of interest of *amicus curiae*

CACJ has both a general and specific interest in the subject matter of this litigation. Our membership, which includes many Public Defenders, represents many prisoners in the State of California who are serving third-strike sentences for non-violent, non-serious felonies and who have petitioned for re-sentencing under the Three Strikes Reform Act of 2012 (Proposition 36), some of whose petitions are pending in the Superior Court and Court of Appeal and who have an interest in the application to their cases of the definition of "unreasonable risk of danger to public safety," which was adopted and made applicable "throughout this [Penal] Code" by the Reduced Penalties for Some Crimes Initiative (Proposition 47).

In summary, CACJ and its legal representatives have the necessary experience and interest in matters involving representation of prisoners in Proposition 36 re-sentencing petitions to serve this court as *amicus curiae*.

For these reasons, CACJ respectfully asks that this Court grant CACJ permission to appear as *amicus curiae* on behalf of petitioner Valencia.

Dated: December 14, 2015



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BRIEF IN SUPPORT OF PETITIONER

QUESTION PRESENTED

Does the definition of "unreasonable risk of danger to public safety", adopted as part of the Reduced Penalties for Some Crimes Initiative (Proposition 47, 2014), "as used throughout this Code" (Pen. Code, § 1170.18, subd. (c)) apply to petitions for re-sentencing under the Three Strikes Reform Act of 2012 (Proposition 36), as used in Penal Code section 1170.126, subdivision (f)?

INTRODUCTION

In 2012, the California electorate approved Proposition 36, the Three Strikes Reform Act of 2012, which added section 1170.126 to the Penal Code. That section provides that prisoners serving third-strike, 25-to-life sentences for non-violent, non-serious felonies may petition for re-sentencing to double-the-base-term, second-strike sentences. Subdivision (f) of section 1170.126 provided sentencing courts with discretion to deny re-sentencing in cases of prisoners who pose "an unreasonable risk of danger to public safety."

The vagueness of that phrase and the lack of objective standards in applying it gave rise to different interpretations and wide disparities in the disposition of re-sentencing petitions from county to county and, within counties, from judge to judge. (See Elias, "Voters OK'd Three Strikes Review but Some Counties Balking," Bakersfield Californian (May 11, 2013) [http://www.bakersfield.com/news/2013/05/12/voters-ok-d-3- strikes-reviews-but-some-counties-balking.html].) It generated numerous appeals which

raised questions of abuse of discretion in denying petitions and of whether the immutable facts of a prisoner's prior record would support a finding of "unreasonable risk" without the showing and an articulation of a "nexus" between those facts and current dangerousness.

Thus, there was an apparent need for a tighter, more objective and, therefore, more uniformly applicable definition of "unreasonable risk." That definition was supplied by Proposition 47, the Reduced Penalties for Some Crimes Initiative, of 2014. The general objectives of both Proposition 36 and Proposition 47 were the same: to reduce the populations of overcrowded and mal-functioning prisons and the great public cost of maintaining them by excluding from them persons convicted of relatively minor felonies, converting them to misdemeanors, and reducing the penalties for them. Many prisoners serving 25 years to life for minor offenses, such as thefts of property worth $950 or less or possession of controlled substances were eligible for release under the provisions of both Propositions. Persons with prior records of certain violent or serious felonies were ineligible under both Propositions. The ground for denying relief – re-sentencing under Proposition 36 and reduction to misdemeanors under Proposition 47 – were identical: whether or not the convict continued to pose "an unreasonable risk of danger to public safety." But Proposition 47 supplied the well-defined, objective standard for exercise of the court's discretion which Proposition 36 lacked and made it

applicable "as used throughout this Code" (§ 1170.18, subd. (c)), thereby solving the problem of vagueness and nonuniform enforcement that Proposition 36 created.

I. THE PLAIN MEANING OF "AS USED THROUGHOUT THIS CODE" IS THAT THE PROPOSITION 47 DEFINITION OF "UNREASONABLE RISK OF DANGER TO PUBLIC SAFETY" APPLIES TO THE USE OF THE SAME PHRASE IN PROPOSITION 36.

There is no need for *amicus* to elaborate on petitioner's self-evident contention that, where Penal Code section 1170.18, subdivision (c), provides "*As used throughout this Code*, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of [specified provisions of section 667]", the italicized phrase refers to the only other provision of the Code in which "unreasonable risk of danger to public safety" appears, section 1170.126, subdivision (f). Otherwise, the phrase would be completely meaningless, and the electorate, in enacting it, would have engaged in an idle act, which it is presumed not to have done. (People v. Craft (1986) 41 Cal.3d 554, 560 ["a statute should not be given a construction that results in rendering one of its provisions nugatory"]; Dix v. Superior Court (1991) 53 Cal.3d 442, 459 ["Where reasonably possible, we avoid statutory constructions that render particular provisions superfluous or unnecessary"].) In Craft, the Court also said:

> Central to this case is the meaning of "separate occasions" in subdivision (d) [of section 667.6]. In construing the phrase we rely on well settled principles of statutory construction. A court should "ascertain the intent of the Legislature so as to effectuate

the purpose of the law." [Citations. In determining such intent, the court "turns first to the words themselves for the answer" [citations], giving to them "their ordinary and generally accepted meaning." [Citation.] Finally, we keep in mind that "'[t]he defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute.'" [Citations.]

(Id. at pp. 559-560.)

Likewise, in Curle v. Superior Court (2001) 24 Cal.4th 1057, 1063, the Court said:

"Our role in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law. [Citation.] In determining intent, we look first to the words of the statute, giving the language its usual, ordinary meaning. If there is no ambiguity in the language, we presume the Legislature meant what it said, and the plain meaning of the statute governs." [Citation.] *If the Legislature has provided an express definition of a term, that definition ordinarily is binding on the courts.* [Citations.] Furthermore, we consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose. [Citation.]

(Italics added.)

Citing Curle, the Court in People v. Canty (2004) 32 Cal.4th 1266, 1276, said:

In interpreting a voter initiative such as Proposition 36 [the Substance Abuse and Crime Prevention Act of 2000], we apply the same principles that govern the construction of a statute. [Citations.] ...

Our first task is to examine the language of the statute enacted as an initiative, giving the words their usual, ordinary meaning. [Citations.] If the language is clear and unambiguous,

we follow the plain meaning of the measure. [Citations.]

The plain meaning of "as used throughout this Code" in section 1170.18 is that what follows applies "throughout this Code" and, therefore, to section 1170.126.

II. THE COURT OF APPEAL FAILED TO FOLLOW THIS COURT'S PRECEDENTS WHEN IT DECIDED THAT THE ELECTORATE DID NOT READ AND UNDERSTAND THE INITIATIVE MEASURE AND, THEREFORE, COULD NOT HAVE INTENDED THAT ITS PROVISIONS SHOULD BE GIVEN THEIR PLAIN MEANING.

The Court of Appeal opinion in this case was based on two propositions (1) that applying Penal Code section 1170.18, subdivision (c)'s definition of "unreasonable risk of danger to public safety" to proceedings under Penal Code section 1170.126 would undermine the public safety purpose of Proposition 36 and was incompatible with Proposition 47's purpose of providing re-sentencing procedures to modify only certain felonies to misdemeanors (id. at pp. 239-240) and (2) that none of the ballot materials in Proposition 47 mentioned any impact on three strikes offenders seeking re-sentencing under Penal Code section 1170.126. (Id. at pp. 240-241.)

1. The primary purpose of Proposition 36 was not to promote public safety but to reduce third-strike terms for non-violent, non-serious felonies, where it could do so consistent with public safety.

On this first point, although the uncodified section 7 of the Three Strikes Reform Act of 2012 (Proposition 36) provided that "This act is an

exercise of the public power of the people of the State of California for the protection of the health, safety, and welfare of the people of the State of California," the main purpose of the Act was clearly not to provide for public safety. Rather, its central purpose was to restore the Three Strikes Law to its original purpose by replacing 25-to-life sentences for third-strike sentences for non-violent, non-serious felonies, with second-strike sentences, thereby to eliminating what the public regarded as excessive punishment. Its purpose was also to reduce the cost of imprisoning about 3000 of the 8800 persons serving life sentences. (See http://ballotpedia. org/California_ Proposition_36,_Changes_in_the_%22Three_Strikes%22_ Law_(2012).) Its "Fiscal Impact," as summarized by the Legislative Analyst was that it would achieve "State savings related to prison and parole operations of $70 million annually on an ongoing basis, with even higher savings – up to $90 million annually – over the next couple of decades." (Ibid.) The Arguments in Favor of the proposition in the Voter Guide stated: "Taxpayers could save over $100 million per year – money that can be used to fund schools, fight crime and reduce the state's deficit." (Ibid.) Its authors and proponents wished to reassure the public that its safety would not be compromised by the measure. The Arguments in Favor stated: "The Three Strikes law will continue to punish dangerous career criminals who commit serious violent crimes –

keeping them off the streets for 25 years to life" (ibid.), but that clearly was not the main purpose of the Act.

Obviously, the purpose of the "Safe Neighborhoods and Schools Act" (Proposition 47) was not to increase public safety, either, but to reduce sentences for *all* persons convicted of minor property and drug offenses and also to reduce prison populations and state expenditures. According to the Court of Appeal's opinion in this case, Proposition 47 "emphasized monetary savings." (181 Cal.Rptr.3d at p. 240.) Thus, there is no incompatibility whatsoever between the purposes of Proposition 36 and Proposition 47. One proposition achieved those purpose by one means, the other proposition by other means. The provision of Proposition 47, defining the same concept that appears, in the same terms, in Proposition 36, "unreasonable risk of danger to public safety," furthers the purposes of both measures to reduce sentences and the cost of imprisonment.

2. The Court of Appeal's decision fails to follow this Court's clear and consistent precedents that the electorate is presumed to have read and understood the provisions of initiative measures.

The Court of Appeal's decision in this case failed to follow the law clearly and consistently laid down by this Court insofar as it held that the plain meaning of the phrase with introduces that concept in subdivision (c) of section 1170.18, "As used throughout this Code," is literally obliterated by the

fact that the ballot materials provided to the voters in connection with Proposition 47 – *not counting the full text of the measure* – did not say anything about the application of that definition to re-sentencing under other provisions of the Code, such as section 1170.126.

In Day v. City of Fontana (2001) 25 Cal.4th 268, 282, this Court held that "it is of no consequence here that the ballot materials did not specifically refer to the act's application in actions against local public entities for nuisance and dangerous condition of property." In Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal.4th 220, 237, the Court said that ballot arguments "are not legal briefs and are not expected to cite every case the proposition may affect." In Delaney v. Superior Court (1990) 50 Cal.3d 785, 802-803, the Court observed: "The most reasonable inference is that the proponents chose to emphasize (in the limited space available for ballot arguments) what they perceived as the greatest need." The earliest of these cases had these highly pertinent things to say on the subject:

> Delaney also relies on the ballot argument in favor of Proposition 5 in 1980, the measure that created article I, section 2(b). Ballot arguments are accepted sources from which to ascertain the voters' intent. (In re Lance W. (1985) 37 Cal.3d 873, 888, fn. 8; White v. Davis (1975) 13 Cal.3d 757, 775, fn. 11.) As with the legislative history of section 1070, however, *we need not look beyond the language of the enactment (article I, section 2(b)) when its language is unambiguous.* (Lungren v. Deukmejian [(1988)] 45 Cal.3d 727, 735.) The ballot argument (unlike the legislative history) is, however, at least relevant to determining the

> voters' intent. We therefore consider the ballot argument (set forth in full in the margin) to determine if it demonstrates the voters did not mean what they said. [Fn. omitted.] The repeated references in the argument to confidentiality and the like permit the inference the proponents of the measure intended to protect only confidential information. The same inference may be drawn from the Legislative Analyst's statement. [Fn. omitted.] The inference, however, is far from compelling. The ballot materials emphasized the need for confidentiality but did not state that only confidential matters would be protected. The most reasonable inference is that the proponents chose to emphasize (in the limited space available for ballot arguments) what they perceived as the greatest need. We cannot conclude that, by emphasizing one purpose, perhaps the primary purpose of the measure, the argument misled voters into thinking confidentiality was the only purpose, especially when *the measure itself* made clear that all unpublished information would be protected. Moreover, a possible inference based on the ballot argument is an insufficient basis on which to ignore *the unrestricted and unambiguous language of the measure itself.* It would be a strained approach to constitutional analysis if we were to give more weight to a possible inference in an extrinsic source (a ballot argument) than to a clear statement in the Constitution itself. We decline to do so. [Fn. omitted.]
>
> (50 Cal.3d at pp. 802-803 [italics added].)

With respect to Proposition 47, whatever the ballot arguments said, "the unrestricted and unambiguous language of the measure itself" – that its definition of "unreasonable risk of danger to the public safety" applies "throughout this Code" – cannot be ignored.

Delaney was cited by the Supreme Court in Santa Clara County Local Transportation Authority v. Guardino, supra, 11 Cal.4th 220, 237:

> Petitioner next relies on the fact that the ballot argument in support of Proposition 62 mentioned our decision in [City and County of San Francisco v.] Farrell [(1982)] 32 Cal.3d 47, as a

> target of the measure, but did not similarly cite [Los Angeles County Transportation Com. v.] Richmond [(1982) 31 Cal.3d 197]. The point is unpersuasive for several reasons. Ballot arguments are not legal briefs and are not expected to cite every case the proposition may affect. Here Proposition 62 proposed to make a number of changes in the law of local taxation, affecting both general and special taxes, and the ballot argument did not attempt to list all of them. (Cf. Delaney v. Superior Court (1990) 50 Cal.3d 785, 802 ["The most reasonable inference is that the proponents chose to emphasize (in the limited space available for ballot arguments) what they perceived as the greatest need."].) Nevertheless, the argument did confirm that the measure was intended to affect *all types of local taxes*, telling the voters at the outset that "A Yes vote on Proposition 62 gives back your right to vote on any tax increases proposed by your local governments." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 4, 1986), argument in favor of Proposition 62, p. 42, italics added.) Similarly, the Legislative Analyst told the voters that Proposition 62 "establishes new requirements for the adoption of new or higher general and special taxes by local agencies." (Id., analysis by Legislative Analyst, p. 40, italics added.) The voters therefore had no reason to believe that Proposition 62 would not apply to one class of special taxes – those imposed by districts without property taxing power.
>
> (Italics added.)

Similarly, although the ballot arguments in favor of Proposition 47 did not mention Proposition 36, the text of the measure stated clearly that its definition of the dangerousness concept applied "throughout this Code" and thereby affected all determinations of risk of danger to the public safety.

Delaney and Santa Clara Valley Transportation were cited by the Court in Day v. City of Fontana, supra, 25 Cal.4th 268, 278-279, which relied on *three additional decisions of this Court*:

> The ballot arguments do not compel plaintiff's construction

> of the statute. Such arguments, of course, "are not legal briefs and are not expected to cite every case the proposition may affect." (Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal.4th 220, 237; see also Delaney v. Superior Court (1990) 50 Cal.3d 785, 802-803 ["The most reasonable inference is that the proponents chose to emphasize (in the limited space available for ballot arguments) what they perceived as the greatest need"].) Here we may reasonably infer from the ballot arguments that a primary aim of Proposition 213 was to protect insured motorists and to reduce automobile insurance rates. [Citation.] Such arguments, however, did not imply that protection of insured motorists was the initiative's sole aim; nor did they suggest that reductions in automobile insurance premiums would be the initiative's only effect. Rather, the express language and declared purpose of the enactment, as well as *the ballot arguments' broader focus upon the perceived need to reform a system* that had rewarded lawbreakers at the expense of responsible, law-abiding citizens [fn. omitted], persuade us that actions such as the instant one fall within a fair and objective reading of section 3333.4. (See People ex rel. Lungren v. Superior Court (1996) 14 Cal.4th 294, 308 [refusing to limit the scope of an initiative measure based upon the Legislative Analyst's analysis]; Amwest Surety Ins. Co. v. Wilson (1995) 11 Cal.4th 1243 [Proposition 103 applied to surety insurance even though the ballot materials had not specifically told voters of that application]; cf. Calvillo-Silva v. Home Grocery (1998) 19 Cal.4th 714, 732-733 [rejecting argument that Legislature's focus on negligence principles supported a limitation of section 847's immunity provisions to negligent acts].)
>
> (Italics added; see also p. 282.)

Likewise, Proposition 47 – like Proposition 36 – and the arguments in favor had the broad aim of emphasizing the need to "reform a system" of excessive, expensive punishments.

One of its decisions, cited by the Court in Day, Amwest Surety Ins. Co. v. Wilson, supra, 11 Cal.4th 1243, states principles relevant to the present situation. At issue was Proposition 103, an insurance-reform initiative which

clearly (by reference to Insurance Code section 1851) applied to surety insurance. The measure provided that it could not be amended by the Legislature "except to further its purpose" and by a two-thirds votes. Then the Legislature enacted a bill favored by the insurance industry, Insurance Code section 1861.135, which purported to exempt surety insurance. The organization that drafted the proposition challenged the validity of the statute, while Amwest defended it. The Supreme Court held:

> Amwest contends that the enactment of section 1861.135 furthers the purposes of Proposition 103 by clarifying whether surety insurance was meant to be included within the ambit of Proposition 103. This was the reason given by the Legislature for amending Proposition 103. ...
>
> But the Legislature's action constituted an alteration rather than a clarification of the initiative. It was clear prior to the passage of Proposition 103 that the provisions of chapter 9 regulating insurance rates applied to surety insurance. (§§ 1850.4, 1851.) Proposition 103 fundamentally altered the method of regulating insurance rates set forth in chapter 9 but did not alter the types of insurance that were regulated.
>
> The Attorney General [on behalf of the Governor] concedes that "Prop 103 includes surety insurance" and that there is no " *patent* ambiguity" on this point. (Italics in original.) The Attorney General argues instead that "notwithstanding the certainty of surety's inclusion in Prop 103, the Initiative might contain an anomaly or *latent* ambiguity, hidden and not apparent, by virtue of the fact that certain key attributes presumed to apply to all classes of insurance named in Prop 103, might in fact not apply to surety." (Italics in original.) The circumstance that surety insurance differs in material respects from other forms of insurance governed by Proposition 103 is relevant to resolution of the question whether surety insurance *should* have been included within the ambit of the initiative (a point we shall discuss below), but this circumstance does not render the initiative ambiguous or in need of clarification

as to whether Proposition 103 applies to surety insurance. It is clear that it does.

Amwest argues that clarification was "sorely needed" because the materials submitted to the voters regarding Proposition 103 did not mention surety insurance and did not include either the text or a summary of section 1851. Amwest concludes it is unlikely the voters understood that Proposition 103 applied to surety insurance, and contends "it would further the purposes of the Proposition to make it say what the voters thought it meant." In Wright v. Jordan (1923) 192 Cal. 704, 713 [221 P. 915] we rejected a similar argument that the voters intended a constitutional amendment passed by initiative to have a narrower scope than would follow from its broad language, stating in our opinion: "We cannot adopt this narrow interpretation of said subdivision in said amendment to the constitution in view of the particular language of said subdivision .... The criticism which the respondent makes as to the details of the method by which this amendment to the constitution was adopted constitutes matter which cannot be taken advantage of by him in this proceeding, **since it amounts merely to a collateral attack upon an amendment to the constitution which has been adopted by a majority vote of the people, who must be assumed to have voted intelligently upon an amendment to their organic law, the whole text of which was supplied each of them prior to the election and which they must be assumed to have duly considered, regardless of any insufficient recitals in the instructions to voters or the arguments pro and con of its advocates or opponents accompanying the text of the proposed measure."** (Cf. Brosnahan v. Brown (1982) 32 Cal.3d 236, 252;[2]

---

[2] Brosnahan (ibid.), also quoted Wright v. Jordan, in support of the view that

> Petitioners' entire argument that, in approving Proposition 8, the voters must have been misled or confused is based upon the improbable assumption that the people did not know what they were doing. It is equally arguable that, faced with startling crime statistics and frustrated by the perceived inability of the criminal justice system to protect them, the people knew exactly what they were doing. *In any event, we should not lightly presume that the voters did not know what they were about in approving Proposition 8.*
>
> (Italics added.)

Fair Political Practice Com. v. Superior Court (1979) 25 Cal.3d 33, 42; Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 243-244; see also Taxpayers To Limit Campaign Spending v. Fair Pol. Practices Com. (1990) 51 Cal.3d 744, 768.)

> It is clear from the foregoing that the Legislature's stated purpose in enacting section 1861.135 – to clarify the scope of Proposition 103 – does not withstand scrutiny. There was no doubt prior to the passage of Proposition 103 that the insurance regulations set forth in chapter 9 applied to surety insurance. The initiative altered the substance of those regulations but did not purport to alter the scope of chapter 9. Accordingly, it was clear that the provisions of Proposition 103 applied to surety insurance. Section 1861.135, therefore, did not further the purposes of Proposition 103 by clarifying whether the proposition applied to surety insurance; instead it altered its terms in a significant respect.
>
> (11 Cal.4th at pp. 1259-1261 [bold type added].)

Delaney and Guardino were cited in a recent decision by the First District, Division One, in which, as in the present case, there was no ambiguity in the language of an initiative measure (the "Safe Drinking Water and Toxic Enforcement Act of 1986") and, thus, no need to resort to other sources to ascertain the intent of the voters, California Chamber of Commerce v. Brown (2011) 196 Cal.App.4th 233, 263:

> [W]e do not perceive any ambiguity in section 25249.8, subdivision (a), with respect to the inclusion in the Proposition 65 list of reproductive toxins identified by the "current" ACGIH list. We therefore need not consider other indicia of legislative intent. (See Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735 [if statutory language is unambiguous, it is not necessary to resort to indicia of intent].) However, even if we were to do so, we are not persuaded it evinces intent not to incorporate the ACGIH list.

> As we have recited, the ballot materials stated in part: "At a minimum the Governor must include the chemicals already listed as known carcinogens by two organizations of the most highly regarded national and international scientists: The [NTP] and the [IARC]." CalChamber contends failure to mention the ACGIH reflects an intent that it not be used as a listing source. However, *when the ballot materials are considered in light of the express language of the initiative, which was also included in the voter materials,* it is more reasonable to read the references to the NTP and IARC as illustrative of the kinds of organizations providing "minimum" listing content. (See Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal.4th 220, 237 [no inference should be drawn from failure of ballot argument to list all changes initiative would enact because ballot arguments are not legal briefs]; Delaney v. Superior Court (1990) 50 Cal.3d 785, 802 ["The most reasonable inference is that the proponents chose to emphasize (in the limited space available for ballot arguments) what they perceived as the greatest need."].)
>
> Had the intent been to limit listing sources to the NTP and IARC, the statutory language could easily have been drafted to do so. But it was not.
>
> (Italics added.)

Again, although no express reference was made in the Proposition 47 ballot materials to the application of its definition of unreasonable risk to Proposition 36 cases, the express language of the initiative, "As used throughout this Code," which plainly referred to other uses of the concept of "unreasonable risk of danger to public safety" in other sections of the Penal Code, such as section 1170.126 (which, as it happens, is the only other such use), was included in the voter materials. If the intent was the exact opposite of the clear meaning of the words – i.e., "*not* as used elsewhere in this Code but limited

only to this section" – it "could easily have been drafted to do so." (Ibid.)

In this case the Court of Appeal regarded section 1170.18, subdivision (c)'s definition of unreasonable risk of danger to public safety "As used throughout this Code" as "Hidden in the lengthy, fairly abstruse text of the proposed law, as presented in the official ballot pamphlet – and nowhere called to voters' attention ...." *Of course, the same could be said of the definition itself,* in which case, according to the Court of Appeal's reasoning, it would not apply even to section 1170.18. All the Argument in Favor of Proposition 47 said about the determination of dangerousness was that "It authorizes resentencing for anyone who is incarcerated for these offenses and poses no threat to public safety." (http://ballotpedia.org/ California_ Proposition_ 47_Reduced_ Penalties_ for_Some_Crimes_ Initiative_(2014) #Arguments_ in_favor) The Analysis by the Legislative Analyst said that "no offender who has committed a specified severe crime could be resentenced or have their conviction changed", but did not state what those crimes were. (http://web.archive.org/web/ 20140908180059/ http://voterguide. sos.ca.gov/ en/propositions/47/analysis.htm) It could not rationally be argued that, because the pamphlet did not bring to the voters' attention that such "threat" means an unreasonable risk of committing one of the "super strikes" enumerated in section 667, subdivision (e)(2)(C)(4), such risk is not the test, *even for purposes of re-sentencing under section 1170.18.*

3. Interpreting "as used throughout this Code" according to its plain meaning and applying it to section 1170.126 would not result in "absurd" consequences of which the voters were unaware.

Bootstrapping what it said in People v. Osuna (2014) 225 Cal.App.4th 1020, 1033-1034 ["The literal language of a statute does not prevail if it conflicts with the lawmakers' intent"], the Court of Appeal embarked on a search, not for what the voters meant by "As used throughout this Code," but for whether the voters intended that the definition of unreasonable risk should be applied to other provisions of the Penal Code, specifically section 1170.126, and, finding no evidence for such intent in the ballot materials, concluded that they could not have meant what they said. (181 Cal.Rptr.3d at p. 238.) But the language quoted from Osuna does not support ignoring the plain meaning of the words. The authority cited for the proposition in Osuna was Lungren v. Deukmejian, supra, 45 Cal.3d 727, 735, and that was a case in which this Court said that the words of a statute may not be given their literal meaning *if they conflict with other provisions of the same statute*: "Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute." There is nothing elsewhere in section 1170.18 which conflicts with the provision of subdivision (c) that its definition applies "throughout this Code." Aside from that misinterpretation of Lungren, the Court of Appeal's departure from the plain meaning of that phrase, based on the absence of evidence in the ballot materials that the voters were informed by anything

other than the text of the initiative measure that it would apply to other sections of the Code, flies in the face of this Court decisions discussed on pages 12-18 above.

Continuing, the Court of Appeal drew support from the statement in In re Michele D. (2002) 29 Cal.4th 600, 606, that "[I]t is settled that the language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the [voters] did not intend." (181 Cal.Rptr.3d at p. 238.) That is no doubt a correct statement of the law, but it has no relation to this case, because the application of the subdivision (c) definition to section 1170.126 re-sentencing proceedings clearly would not result in "absurd consequences." If the consequences were "absurd" in such proceedings, they would also be "absurd" in section 1170.18 proceedings,[3] and it certainly cannot be said that, therefore, the voters did not intend in approving that section that its definition should not be applied to proceedings under it.

On February 18, 2015, the Court granted judicial notice of documentation which shows that, as an historical fact, voters – including those

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[3] There have been some cases in which prisoners who were denied relief under Proposition 36 on "dangerousness" grounds were found not to be "dangerous" and were granted relief under Proposition 47. (See, e.g., People v. Franco (2014) 232 Cal.App.4th 831 (Petition for Review No. S224157 mooted by granting of Proposition 47 petition[http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2099339&doc_no=S224157].) Those results have not been deemed so "absurd" by the People that they have appealed them.

who were in a position to, and did, focus the attention of other voters on the matter – were aware that the Proposition 47 definition would apply to Proposition 36 re-sentencing. The website of Californians Against Proposition 47, which was sponsored by the California Public Safety Institute and Peace Officers Research Association of California - Political Issues Committee, (Exhibit 7 to petitioner's Request for Judicial Notice; http://californians against47.com/, p. 3), stated:

> Under the Three Strikes Reform Act of 2012 (Proposition 36), Penal Code § 1170.126 provides for resentencing petitioners previously sentenced to life terms pursuant to the Three Strikes Law (Penal Code §§ 667(b)-(i) and 1170.12) whose committing offense was non-violent and non-serious.
>
> The proposed language in Penal Code § 1170.18(c) would require the prosecution to prove, and the court to find, that the defendant is an unreasonable risk to society because he or she would likely commit a sexually violent offense, murder, certain sex crimes with children under 14, solicitation to commit murder, assault with a machine gun on a peace officer, possession of weapons of mass destruction or a crime punishable by death or life imprisonment.
>
> Many potentially violent individuals will be released – not because they do not pose a violent risk to society, but because the Act has unreasonably limited the scope of what is considered a risk of danger to society and what the prosecution can present to counter the defendant's eligibility.

The California District Attorney's Association posted the following statement on the "No on 47" website (http://californiansagainst47.com/about-proposition-47/, pp. 1-4):

CDAA LOOKS AT PROPOSITION 47

August 29, 2014

...

The Standard of Dangerousness Proposed for Resentencing is Impossible to Meet

Although other statutes have provided a favorable standard for defendants applying for resentencing, none have imposed the burden on the prosecution or the court, in exercising discretion to grant or deny a petition for resentencing, to the level that Penal Code § 1170.18 proposes.

Under the Three Strikes Reform Act of 2012 (Proposition 36), Penal Code § 1170.126 provides for resentencing petitioners previously sentenced to life terms pursuant to the Three Strikes Law (Penal Code §§ 667(b)-(i) and 1170.12) whose committing offense was non-violent and non-serious. Penal Code §1170.126 requires that when a petitioner meets the basic criteria for eligibility, the court shall resentence the offender unless the petitioner poses "an unreasonable risk of danger to public safety." (Penal Code § 1170.126(f).) The language in § 1170.126(f) strongly favors the defendant, stating that the petitioner "shall" be resentenced as a second strike offender "unless" the court determines that resentencing the petitioner is too dangerous. The burden of proof is on the prosecution and must be established by a preponderance of the evidence. (People v. Superior Court (Kaulick) (2013) 215 Cal. App. 4th 1279, 1301-1302.) Although this is a demanding standard, it provides a fair balance and allows the prosecution and court to rely on several sources and areas of risk to establish that the individual is unsuitable for resentencing.

Penal Code § 1170.18, however, changes that standard to an altogether unreachable level. The proposed language in Penal Code § 1170.18(c) would require the prosecution to prove, and the court to find, that the defendant is an unreasonable risk to society because he would likely commit one of the listed violent crimes in § 667(e)(2)(C)(iv).

Those crimes are limited to sexually violent offenses, murder, certain sex crimes with children under 14, solicitation to commit murder, assault with a machine gun on a peace officer, possession of weapons of mass destruction or a crime punishable by death or life imprisonment, or "Super Strikes" as they are sometimes known. ...

...

Moreover, to be eligible for the resentencing, the defendant must not have committed one of these "super strikes" in the past. So, the prosecution's burden is to prove that someone who has never committed one of these particular offenses before, poses an unreasonable risk of committing one in the future.

As such, Proposition 47 severely narrows the definition of "dangerousness" and the scope of what the prosecution is able to present at the hearing when asserting the inmate poses a risk to public safety. ...

...

Put simply, not only is this an impossible standard to meet, but it is disenguously disguised as giving the court discretion to deny the resentencing, when it is designed to ensure that the court has no discretion and hence provides that no defendant could be denied. And if a judge does deny a petitioner that resentencing, it creates an immediately appealable issue.

As a consequence, many potentially violent individuals will be released – not because they do not pose a violent risk to society, but because the Act has excessively limited the scope of what is considered a risk of danger to society and what the prosecution can present to counter the defendant's eligibility. The standard will far exceed the aim of Proposition 47. Instead of simply reducing prison populations by setting non-violent misdemeanants free, sentenced inmates with violent histories will have a higher likelihood of freedom, at a substantial risk to the public.

Further, this proposed new definition of "dangerousness" is not

limited to only the types of offenders serving terms for crimes affected by this Act, but applies to any resentencing permitted by the Penal Code. Proposed Penal Code § 1170.18 (c) states, "As used throughout this Code, "unreasonable risk of danger to public safety means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of [§ 667(e)(2)(C)(iv)]." (§ 1170.18, subd. (c) [emphasis added].) By referring to "Code," § 1170.18 would alter the meaning of "unreasonable risk of danger to public safety," not only as it is applied in § 1170.18 resentencing hearings, but in all other hearings that rely on the dangerousness standard throughout the entire Code. As a result, the prosecution would face the impossible barrier when opposing resentencing for the Three Strikes defendants under Penal Code § 1170.126.

Moreover, for any of the Three Strikes defendants previously denied resentencing based upon a judicial finding of dangerousness, may appeal that ruling and request the court now apply this new standard of dangerousness, resulting in a further cost to a court system already struggling financially.

(Bold type added.)

(It can be seen that the Court of Appeal's view that application of the Proposition 47 standard to Proposition 36 proceedings would be "absurd" is just a reiteration of the C.D.D.A.'s exaggerated position that the standard would be "impossible" for the prosecution to meet – in re-sentencing proceedings under Proposition 36 and Proposition 47 alike.)

Attorneys working at the Judicial Council were also aware of these consequences of the Proposition 47 definition of dangerousness, and they made all Presiding Judges of the Superior Courts aware of them. In a

Memorandum to such judges, dated October 24, 2014, Criminal Justice Services attorneys and the Supervising Attorney of the Center for Families, Children, and the Courts wrote (p. 8):

> **Implications for Resentencing Proceedings under Proposition 36**
>
> Under Proposition 36, the Three Strikes Reform Act of 2012, certain third strike offenders are eligible to petition for resentencing as a second striker. (§ 1170.126(a).) Assuming the petitioner is eligible, the court must resentence the petitioner "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126(f); emphasis added). This is the same consideration courts would perform during resentencing under Proposition 47, which also prescribes the same set of criteria for consideration. (§ 1170.18(g).)
>
> Unlike Proposition 36, however, Proposition 47 narrowly defines the phrase "unreasonable risk of danger to public safety" as "an unreasonable risk that the petitioner will commit a new violent felony within the meaning of section 667(e)(2)(C)(iv)." As noted above, Proposition 47 would apply this new definition of the phrase "unreasonable risk of danger to public safety" as used throughout the Penal Code (§ 1170.18(c)), including the identical provisions under Proposition 36. As such, Proposition 47 may be interpreted to significantly expand the category of petitioners eligible for resentencing under Proposition 36, limiting ineligibility to only those petitioners deemed at risk to commit crimes enumerated under section 667(e)(2)(C)(iv). The implications of the new definition would likely raise uncertainties for all pending and past Proposition 36 petitions.

It can be inferred from the Court of Appeal's request on November 7, 2014 (three days after the voter's approval of Proposition 47) for supplemental briefing in this case on the effect of Proposition 47, and even more clearly

from its setting of oral argument on November 5, 2014, in three companion cases,[4] that the justices of the Court of Appeal in this case were also voters who were aware of the relation between the Proposition 47 definition and Proposition 36 re-sentencing. The Court of Appeal majority, however, assumed that, unlike the voters referred to in the preceding paragraphs, the great, unsophisticated masses of voters would not have read the text of Proposition 47 and become aware of its consequences for Proposition 36 cases.

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[4] This case was fully briefed in March 2014. The parties waived oral argument. On November 7, the Court of Appeal requested supplemental briefing on the effect of Proposition 47, within 15 days, with no extensions of time. The briefs were filed by December 1, 2014, and the court's opinion was filed on December 16, 2014. (http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=5&doc_id=2055962&doc_no=F067946) The "companion" cases, in which the same court reached the same conclusion in the unpublished portions of the opinions, filed during the next week – People v. Payne (Dec. 17, 2014) formerly published at 232 Cal.App.4th 579 (petition for review No. S223856 granted March 25, 2015), People v. Losa (Dec. 19, 2014) 232 Cal.App.4th 789, and People v. Franco (Dec. 22, 2014) 232 Cal.App.4th 831 (mooted by granting of Proposition 47 petition) – were all set for oral argument on November 5, 2014, one day after the election, although briefing was complete in those cases in, respectively January, February, and May of that year, and in all those cases supplemental briefing on the effect of Proposition 47 was also requested. (http://appellatecases.courtinfo.ca.gov/search/ case/dockets.cfm? dist=5&doc_id=2054774&doc_no=F067838; http://appellatecases.courtinfo. ca.gov/ search/case/dockets.cfm?dist=5&doc_id=2046634&doc_no=F067279; http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=5&doc_id=2045754&doc_no=F067223) It is apparent that the court, when it set those cases for oral argument, was aware of the issue of the applicability of the Proposition 47 definition of "unreasonable risk" to Proposition 36 re-sentencing proceedings and that it scheduled those cases so that it could be "the first out the gate" with opinions that the definition did not apply.

It was inappropriate for the Court of Appeal to take this elitist, anti-democratic position. A common complaint about the legislative branch of government is that legislators adopt measures – including highly complex regulatory schemes – without adequately studying or even reading their provisions. (See, e.g., N.Y. Times editorial (April 10, 2005), "Revising the Patriot Act" ["After Sept. 11, Congress was in such a rush to pass the Patriot Act that, disturbingly, many members did not even read it before they voted for it"] (http://www.nytimes.com/2005/04/10/opinion/ 10sun1.html?_r=0); Teaparty.org website ["it is abundantly clear now that members of Congress really did not, as then-Speaker Pelosi admitted, even read the Obamacare bill before they passed it" (http:// www.teaparty.org/ did-president-read-obamacare-before-he-signed-it-29595/#sthash. 0GAZICDg.dpuf).) But the respect which the judicial branch owes to the legislative branch in our tripartite form of government restrains the judiciary from expressing the view – at least in public pronouncements – that the lawmakers had no idea what they were doing and from invalidating legislation on that ground. The same restraint should be shown by the courts in reviewing the actions of the people of the state when they, through the initiative process, take on the role of the Legislature. Just as the judiciary would be overstepping its boundaries by interpreting a bill passed by the Legislature based on the assumption that

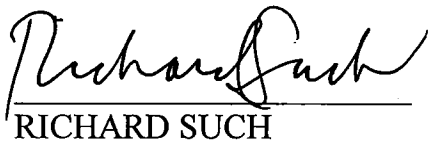
legislators were acting blindly, a court crosses the line when it refuses to give to the words approved by the voters their clear significance on the ground that they were the product of inattention and ignorance by the electorate. That is what the Court of Appeal majority did when it said "Voters cannot intend something of which they are unaware." (181 Cal.Rptr.3d at p. 242.) As this Court has said, time and again (see pp. 12-18, supra), the voters must be presumed to have known what they were doing and to have voted intelligently.

CONCLUSION

For the foregoing reasons, this Court should presume that the voters read and understood the provisions of Proposition 47 and meant exactly what they said when they provided that its definition of "unreasonable risk of danger to public safety" applies throughout to Penal Code to that concept as used in Proposition 36.

Dated: December 14, 2015

Respectfully submitted,



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CERTIFICATE OF LENGTH

Counsel for appellant hereby certifies that this brief consists of 7857 words (excluding tables, proof of service, and this certificate), according to the word count of the computer word-processing program. (Cal. Rules of Court, rule 8.360(b)1).)

RICHARD SUCH

PROOF OF SERVICE BY MAIL

I, RICHARD SUCH, say:

I am over the age of eighteen years, a citizen of the United States, and a resident of Santa Clara County, California. My address is 1120 College Avenue, Palo Alto, CA, 94306. On December 16, 2015, I served the within Application for Leave to Appear as Amicus Curiae and Brief in Support of Petitioner on the following persons by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Oakland, California, addressed as follows:

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

Executed this 16th day of December, 2015, at San Francisco, California.

Richard Such
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