IN THE 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 OPENING BRIEF ON THE MERITS

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APPELLANT'S OPENING BRIEF ON THE MERITS

ISSUE PRESENTED FOR REVIEW

Appellant's petition for review was granted on the following issue:

Does Assembly Bill No. 333 (Stats. 2021, ch. 699) unconstitutionally amend Proposition 21, if applied to the gang-murder special circumstance (Pen. Code, § 190.2, subd. (a)(22))?

INTRODUCTION

In 1998, the Legislature enacted Penal Code section 186.22[1] to eradicate criminal activity by criminal street gangs. Thereafter, the Legislature amended the statute many times before 2021, when Proposition 21 was adopted by the voters to increase the punishment for gang-related crimes. Among its provisions, Proposition 21 added the gang-murder special circumstance of section

[1] Subsequent undesignated section references are to the Penal Code.

190.2, subdivision (a)(22) (190.2(a)(22)) to the list of special circumstances in 190.2, subdivision (a). The gang-murder special circumstance applies to a person who commits an intentional murder while actively participating in a "criminal street gang," as defined in section 186.22, subdivision (f) (section 186.22(f)). Proposition 21 did not state that the definition in section 186.22(f) was frozen as of any date.

In 2021, the Legislature enacted Assembly Bill No. 333 (A.B. 333), which, inter alia, amended section 186.22(f) and section 186.22, subdivision (e) (section 186.22(e)), which defines a "pattern of criminal gang activity," a requirement to establish a criminal street gang under section 186.22(f). The Legislature made these amendments because the definition of a criminal street gang had been so overly expanded as to result in the mischaracterization of unorganized racial, neighborhood and other groups as criminal street gangs.

A.B. 333 applies retroactively to section 186.22. (*People v. Tran* (2022) 13 Cal.5th 1169, 1206-1207.) As conceded by respondent and as found by the majority opinion in the case below, *People v. Rojas* (2022) 80 Cal.App.5th 542, 546 (*Rojas*), A.B. 333 requires reversal of the gang-related findings under section 186.22, subdivisions (a) and (b) and section 12022.53, subdivisions (d) and (e). The dispute is over whether applying A.B. 333's narrowed definition of a criminal street gang to section 190.2(a)(22) constitutes an unconstitutional amendment of Proposition 21.

In *Rojas, supra,* 80 Cal.App.5th at pp. 550-558, a divided panel of the Fifth District held that to apply A.B. 333's amended definition of a criminal street gang in section 186.22(f) to the gang-murder special circumstance would violate article II, section 10, subdivision (c) of the California Constitution. This constitutional provision restricts the Legislature from amending "an initiative statute by another statute" unless the subsequent statute is "approved by the electors," or "the initiative statute permits amendment. . . without the electors´ approval." A.B. 333

was not approved by the electorate, nor was it passed by two-thirds of the membership of each house, as required by Proposition 21 for its amendment without voter approval. (See Ballot Pamp., Primary Elec. (Mar. 7, 2000), text of Prop. 21, § 39, p. 131 ("Ballot Pamphlet").) However, A.B. 333 is not unconstitutional because it does not constitute an amendment of Proposition 21 under established legal principles.

The analysis of the majority opinion in *Rojas* is flawed under law governing whether a legislative statute unconstitutionally amends an initiative statute. While the majority opinion rejects respondent's legal analysis in significant part, this brief addresses both analyses, as both are erroneous.

In contrast to the majority opinion in *Rojas*, the Second Appellate District, Division Eight, in *People v. Lee* (2022) 81 Cal.App.5th 232 (*Lee*), rev. granted Oct. 19, 2022 (S275449), reached the correct 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 the gang-murder special circumstance. In addition, in *People v. Lopez* (2022) 82 Cal.App.5th 1 (*Lopez*), a different panel of the Fifth District from the panel that decided *Rojas* held in an analogous situation that A.B. 333 does not unconstitutionally amend section 182.5, the gang conspiracy statute, which was also enacted by Proposition 21 and which also incorporates section 186.22's definition of a criminal street gang. (*Id.* at pp. 14-24.)[2] The court in *Lopez* followed the reasoning of *Lee.*[3]

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[2] The People's petition for review in *Lopez* was denied on November 9, 2022 (Case No. S276331).

[3] The only other published decision on the issue is *People v. Lopez* (2021) 73 Cal.App.5th 327, 346-347, which reversed the gang-murder special circumstance finding based on A.B. 333's amended definition of a criminal street gang. However, the constitutional issue was not raised, and the opinion contains only a summary holding that A.B. 333's changes to the definition of a criminal street gang apply to the gang-murder special circumstance. (*Id*. at p. 346.)

As explained in the argument section of this brief, under all the principles of construction that govern the interpretation of an initiative, A.B. 333's amended definition of a criminal street gang, if applied to the gang-murder special circumstance, does not constitute an amendment of Proposition 21.

STATEMENT OF THE CASE

On September 18, 2019, appellant and his codefendant Victor Nunez were found guilty by jury of deliberate, premeditated murder (§ 187, subd. (a)), with true findings of the gang-murder special circumstance (§ 190.2(a)(22)), a gang enhancement (§ 186.22, subd. (b)(1)), and vicarious firearm allegations (§ 12022, subd. (d); §12022.53, subds. (d)&(e)). Appellant and Nunez were both also found guilty of active participation in a criminal street gang, Varrio Chico Lamont (VCL). (§ 186.22, subd. (a)). Nunez alone was found to have personally discharged a firearm causing death. (§ 12022.53, sub. (d)). (3 CT 676; 14 RT 1516-1520.) The trial court sentenced appellant on his murder conviction to life imprisonment without the possibility of parole, plus 25 years, and stayed his sentence for active gang participation. (3 CT 724, 726; 16 RT 1557-1558.)

Appellant appealed, raising several issues. During his appeal, the Legislature enacted A.B. 333, effective January 1, 2022, which changed the requirements under section 186.22(f) to establish a criminal street gang. (Stats. 2021, ch. 699, § 3.) Appellant filed a supplemental opening brief, arguing that A.B. 333 applied retroactively to him and required vacating all the gang-based findings in his case because the prosecution had failed to prove, as required by new subdivision (g) of section 186.22, that the murder commonly benefited VCL by more than reputational evidence. Appellant also joined in Nunez's supplemental opening brief in Nunez's separate appeal (Case No. F080359), which argued that all the gang-based findings should be reversed because the jury instructions failed to require proof of the necessary pattern of criminal gang activity under A.B. 333. In a supplemental brief, respondent conceded that A.B.

333 applied retroactively and required reversal of all the gang-based findings, except for the gang-murder special circumstance, because a reasonable jury could conclude that the common benefit of the murder was based only on reputational evidence. In light of this concession, respondent did not address appellant's arguments regarding the evidentiary deficiencies in the required pattern of criminal gang activity under A.B. 333.

On June 29, 2022, the Court of Appeal affirmed the judgment, except to reverse the gang enhancement and vicarious firearm findings on appellant's murder conviction and his conviction of active gang participation, because the prosecution had not met A.B. 333's requirement that the common benefit to the gang was more than reputational. (*Rojas, supra,* 80 Cal.App.5th at p. 546.) In the published portion of the opinion, a divided panel found that A.B. 333 unconstitutionally amended Proposition 21 as to the gang-murder special circumstance. (*Id.* at pp. 550-558.) Justice Snauffer dissented from this published holding. (*Id.* at pp. 558-561 (conc. & dis. opn. of Snauffer, J.).)

On October 19, 2022, this Court granted appellant's petition for review, limited to the issue of whether A.B. 333 unconstitutionally amends Proposition 21, if A.B. 333 is applied to the gang-murder special circumstance.

STATEMENT OF THE FACTS

The evidence at trial is not relevant to the issue on review, which presents a pure question of law.

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. Summary of Argument

A.B. 333 does not alter or refer to the language of section 190.2(a)(22). Section 190.2(a)(22) still states, as enacted by Proposition 21: "The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang."

Because nothing in section 190.2(a)(22) or Proposition 21 states that section 186.22(f)'s definition of a criminal street gang is frozen as applied to section 190.2(a)(22), the question of whether A.B. 333, nevertheless, is an unconstitutional amendment of Proposition 21 is a matter for judicial interpretation. Respondent has conceded that Proposition 21 does not prohibit the amendment of section 186.22(f) and (e) as applied to section 186.22's gang enhancement provisions or the crime of active gang participation in section 186.22, subdivision (a).

For the following reasons and based on all the pertinent legal principles, A.B. 333 does not unconstitutionally amend Proposition 21, if A.B. 333's amendment of section 186.22(f) is applied to section 190.2(a)(22).

First, contrary to the majority opinion in *Rojas, supra,* 80 Cal.App.5th at pp. 554-555, A.B No. 333 does not "take away" from Proposition 21's enactment of section 190.2(a)(22). The punishment of death or life imprisonment without the possibility of parole for a gang-murder special circumstance, as mandated by Proposition 21, remains after A.B. 333. The voters still have what they enacted in Proposition 21, harsh punishment for the gang-murder special circumstance. (See

Argument D.1., *post*.)

Second, as permitted by established law, A.B. 333 legislates on a subject related to, but distinct from, the subject of section 190.2(a)(22). The definition of a criminal street gang in section 186.22(f) is related to, but distinct from, the gang-murder special circumstance, which is a punishment statute. (See Argument D.2.)

Third, because Proposition 21 did not express that the reference to section 186.22(f) in section 190.2(a)(22) was a time-specific incorporation, the modern application of *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53 (*Palermo*) requires determining the intent of the Proposition 21 voters. It is clear that the voters did not intend a time-specific incorporation of section 186.22(f), because they froze other definitions in Proposition 21, but they chose not to do so with respect to section 190.2(a)(22)'s reference to section 186.22(f). The Ballot Pamphlet accompanying Proposition 21 also shows that the voters would have believed that future amendments to section 186.22(f), which had occurred often in the past, would continue and apply to statutes covering criminal street gangs, including section 190.2(a)(22). (See Argument E.)

Fourth, A.B. 333's amendments of the definition of a criminal street gang in section 186.22(f) are based on over 20 years of actual experience, to ensure that only members of organized criminal street gangs are punished, not just persons who are associated with unorganized neighborhood, racial, or other groups. This refinement in definition of a criminal street gang comports with the purpose of Proposition 21, which is to treat violent crimes by organized criminal street gangs harshly. (See Argument F.)

Fifth, applying different definitions of a criminal street gang to section 186.22's punishment provisions and section 190.2(a)(22) would lead to anomalous, unreasonable consequences. It would be easier to prove a criminal street gang to impose capital punishment than to prove the crime of active participation in a criminal street gang (§ 186.22, subd. (a)) or a gang enhancement

(§ 186.22, subd. (b)). In addition, so many statutes refer to section 186.22, that to find the incorporated references were frozen as of the date of each statute's enactment would be largely unworkable and would lead to difficulty in the administration of the laws covering criminal street gangs. (See Argument G.)

For these reasons, this Court should reject the holding of *Rojas,* and instead, as held in *Lee, supra,* 81 Cal.App.5th 232, find that applying A.B. 333's amended definition of a criminal street gang to the gang-murder special circumstance does not unconstitutionally amend Proposition 21.

B. History of Penal Code Sections 186.22 and 190.2, Subdivision (a)(22)

1. Legislative Enactment of Penal Code Section 186.22 and Amendments Before 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 (*Valencia*).) The STEP Act went into effect on September 26, 1988. (*Id.* at p. 829, fn. 9.) "Underlying the STEP Act was the Legislature's finding that `California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.´ (Pen. Code, § 186.21, 2d par.)" (*Valencia, supra,* 11 Cal.5th at p. 828.) To combat this problem, the Legislature declared its intent "to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs." (§ 186.21, 2d par.) The STEP Act created the substantive offense of active gang participation (§ 186.22, subd. (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 (§ 186.22, subd. (b). (*Valencia, supra,* 11 Cal.5th at p. 829.) The STEP Act defined a criminal street

gang in section 186.22(f) and a pattern of criminal gang activity in section 186.22(e). (*Ibid.*)

After 1988, the Legislature made amendments to section 186.22 (f) and (e) before Proposition 21's adoption. In 1993, for example, the Legislature added crimes that constitute a pattern of criminal gang activity (commonly called predicate offenses) to section 186.22(e). (Stats. 1993, c. 611 (S.B. 60), eff. Oct. 1, 1993.) By the latter part of the 1990's, the STEP Act had "been amended 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.)

2. Proposition 21's Enactment of Penal Code Section 190.2, Subdivision (a)(22) and Other Relevant Provisions

The gang-murder special circumstance was added to the special circumstances listed in section 190.2(a) as part of Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998. (Prop. 21, §§ 1, 4, eff. March 8, 2000.) "[T]he voters intended to dramatically increase the punishment for *all* gang-related crime." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 907 (*Robert L.*).)

The Ballot Pamphlet given to the electorate included the text of proposed Proposition 21 and uncodified findings and declarations. (See *People v. Shabazz* (2006) 38 Cal.4th 55, 65.) Proposition 21's findings and declarations included:

> Criminal street gangs and gang-related violence pose a significant threat to public safety and the health of many of our communities. Criminal street gangs have become more violent, bolder, and better organized in recent years. (Ballot Pamphlet, text of Prop. 21, § 2, subd. (b), p. 119.)

> Gang-related crimes pose a unique threat to the public because of gang members' organization and solidarity. Gang-related felonies should result in severe penalties. Life without the possibility of parole or death should be available for murderers who kill as part of

> any gang-related activity. (Ballet Pamphlet, text of Prop. 21, § 2, subd. (h), p. 119.)

Proposition 21 contains 39 sections. Among its provisions relevant to the issue before this Court, Proposition 21 added four statutes other than section 190.2(a)(22) that refer to definitions in section 186.22. None of these statutes froze the referenced definitions. In particular, 182.5, created a new crime of gang conspiracy, which incorporated the definitions in section 186.22 (f) and (e), without freezing them as of a certain date. (Ballet Pamphlet, text of Prop. 21, § 3, p. 119.) Section 182.5 is the statute analyzed in *Lopez, supra,* 82 Cal.App.5th at pp. 14-24, where the court found that applying A.B. 333's amendments of section 186.22 to section 182.5 did not unconstitutionally amend Proposition 21.

Proposition 21, sections 14 and 16, specified "lock-in dates" for determining qualifying offenses, such as violent or serious felonies, under the Three Strikes law. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 574-575; Ballot Pamphlet, text of Prop. 21, §§ 14, 16, pp. 123-124.)

These provisions and other relevant material in the Ballot Pamphlet are discussed *post*.

3. Assembly Bill No. 333

In 2021, the Legislature enacted A.B. 333, which amended section 186.22 and added section 1109 on bifurcation of allegations under section 186.22. (Stats. 2021, ch. 699, §§ 1-5.)[4] The reasons for A.B. 333 are stated in the Legislature's uncodified findings and declarations. These findings and declarations include:

> Current gang enhancement statutes criminalize entire neighborhoods historically impacted by poverty, racial inequality, and mass incarceration as they punish people based on their cultural identity, who they know, and where they live. (Stats. 2021, ch. 699, § 2, subd. (a).)

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[4] The amendments were effective until January 1, 2023, and were reenacted operative January 1, 2023. (Stats. 2021, c. 699 (A.B.333), § 4.)

> People frequently receive gang enhancements based on the conduct of other people whom they have never even met. (Stats. 2021, ch. 699, § 2, subd. (d)(7).)
>
> The social networks of residents in neighborhoods targeted for gang suppression are often mischaracterized as gangs despite their lack of basic organizational requirements such as leadership, meetings, hierarchical decisionmaking, and a clear distinction between members and nonmembers. (Stats. 2021, ch. 699, § 2, subd. (d)(8).)
>
> People are also frequently automatically lumped into a gang social network simply because of their family members or their neighborhood. (Stats. 2021, ch. 699, § 2, subd. (d)(8).)
>
> The STEP Act was originally enacted to target crimes committed by violent, organized criminal street gangs (Section 186.21 of the Penal Code). Proponents claimed the prosecution would be unable to prove an offense was committed for the benefit of, or in association with, a gang "except in the most egregious cases where a pattern of criminal gang activity was clearly shown." [Citation.] However, The STEP Act has been continuously expanded through legislative amendments and court rulings. As a result of lax standards, STEP Act enhancements are ubiquitous. (Stats. 2021, ch. 699, § 2, subd. (g).)

Because of these concerns, A.B. 333 amended section 186.22(f) and (e) in the following manner, as described in *People v. Tran, supra,* 13 Cal.5th at p. 1206:

> First, it narrowed the definition of a "criminal street gang" to require that any gang be an "ongoing, *organized* association or group of three or more persons." (§ 186.22, subd. (f), italics added.) Second, whereas section 186.22, former subdivision (f) required only that a gang's members "individually *or* collectively engage in" a pattern of criminal activity in order to constitute a "criminal street gang," Assembly Bill 333 requires that any such pattern have been "*collectively* engage[d] in" by members of the gang. (§ 186.22, subd. (f), italics added.) Third, Assembly Bill 333 also narrowed the definition of a "pattern of criminal activity" by requiring that (1) the last offense used to show a pattern of criminal gang activity occurred within three years of the date that the currently charged offense is alleged to have been committed; (2) the offenses were committed by two or more gang "members," as opposed to just "persons"; (3) the

> offenses commonly benefitted a criminal street gang; and (4) the offenses establishing a pattern of gang activity must be ones other than the currently charged offense. (§ 186.22, subd. (e)(1), (2).) Fourth, Assembly Bill 333 narrowed what it means for an offense to have commonly benefitted a street gang, requiring that any "common benefit" be "more than reputational." (§ 186.22, subd. (g).)

A.B. 333 also removed looting, felony vandalism, and specified personal identity fraud violations from the predicate offenses listed in section 186.22(e)(1). (Stats. 2021, ch. 699, § 3.)

C. Statutory Rules of Construction Apply to Interpreting Proposition 21

The same principles govern a court's interpretation of a ballot initiative as govern interpretation of a legislative statute. (*People v. Gonzalez* (2018) 6 Cal.5th 44, 49 (*Gonzalez*).) As explained in *Gonzalez*:

> We first look to "the language of the statute, affording the words their ordinary and usual meaning and viewing them in their statutory context." [Citation.] The words of a statute must be construed in context, keeping in mind the statutory purpose. [Citation]. Our principal objective is giving effect to the intended purpose of the initiative's provisions. [Citation.] If the provisions remain ambiguous after we consider its text and the statute's overall structure, we may consider extrinsic sources, such as an initiative's election materials, to glean the electorate's intended purpose. [Citation.] Finally, we presume that the "adopting body" is aware of existing laws when enacting a ballot initiative. [Citation.].)

(*Id.* at pp. 49-50.) 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.)

The majority opinion in *Rojas, supra,* 80 Cal.App.5th at p. 553, emphasizes the importance of the People's power of initiative, but in *People v. Kelly* (2010) 47 Cal.4th 1008 (*Kelly*), this Court explained both the importance of this power and the Legislature's authority to enact laws on the general subject of an initiative as to a related but distinct area:

> . . . "[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.]" [Citation.]) In this vein, decisions frequently have asserted that courts have a duty to " ' "jealously guard" ' " the people's initiative power, and hence to " ' "apply a liberal construction to this power wherever it is challenged in order that the right" ' " to resort to the initiative process " ' "be not improperly annulled" ' " by a legislative body. [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.] (Emphasis added.)

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"]).

Questions of interpretation of a ballot initiative and a legislative statute are reviewed de novo. (*Gonzalez, supra,* 6 Cal.5th at p. 49.)

D. Assembly Bill No. 333 Permissibly Amends the Definition of a Criminal Street Gang Because Assembly Bill No. 333 Does Not "Take Away" From Proposition 21, and the Definition of a Criminal Street Gang Is Related to, but Distinct from, the Subject of Penal Code Section 190.2, Subdivision (a)(22)

1. Assembly Bill No. 333 Does Not Take Away from Proposition 21, As the Harsh Punishment for the Gang-Murder Special Circumstance Remains

As explained in *People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571 (*Pearson*), it is erroneous to conclude that legislation amends an initiative statute in violation of article II, section 10, subdivision (c) of the California Constitution 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 deciding whether a particular statute amends an initiative, "we simply need to ask whether it prohibits what the initiative authorizes, or authorizes what the initiative prohibits." (*Ibid.*) "In resolving the question, we must decide what the voters contemplated. `[T]he voters should get what they enacted, not more and not less.´ [Citation.]" (*Ibid.*)

In *Kelly, supra,* 47 Cal.4th at p. 1026, this Court did not endorse an overly broad definition of what constitutes an "amendment" under article II, section 10, subdivision (c) of the California Constitution from prior case law. The Court stated, "It is sufficient to observe that for purposes of article II, section 10, subdivision (c), an amendment includes a legislative act that changes an existing initiative statute by taking away from it." (*Ibid.*)

The majority opinion in *Rojas* holds that A.B. 333 is an unconstitutional amendment of Proposition 21 because A.B. 333 reduces the scope of the murders punishable under section 190.2(a)(22) in that the requirements to prove a criminal street gang are more difficult under A.B. 333's amendments to section 186.22(f), so that in effect, A.B. 333 "`takes away´" from Proposition 21. (*Rojas, supra,* 80 Cal.App.5th at pp. 554-555.) However, A.B. 333's amendments of section 186.22(f) do not take away from Proposition 21 with regard to section 190.2(a)(22). A.B. 333 does not change the fact that the gang-murder special circumstance remains to impose harsh punishment for an intentional murder meeting the terms of section 190.2(a)(22), and A.B. 333 is consistent with Proposition 21's fundamental purpose of severely punishing gang crimes (*Robert L., supra,* 30 Cal.4th at p. 907.)

The case of *Kelly, supra,* 47 Cal.4th at pp. 1012-1030, illustrates the type of situation in which a legislative statute takes away from an initiative statute because the legislative statute conflicts with the terms of the initiative statute. In *Kelly,* the initiative statute at issue was the Compassionate Use Act (CUA), which stated that statutes relating to the possession and cultivation of marijuana "`shall not apply to a patient. . . who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician,´" without stating any quantity limitations on the amount of marijuana a patient may possess or cultivate. (*Id.* at p. 1012-1013.) Later, the Legislature enacted a statute that did not literally amend the CUA, but that established quantity limitations, including for those persons who under the CUA could possess any quantity of marijuana reasonably necessary for their medical needs. This new statute had the effect of burdening an affirmative defense under the CUA to a charge of possession or cultivation of marijuana. (*Id.* at pp. 1013-1015, 1017, 1025.) This Court held that the legislative statute by specifying a cap on how much marijuana a patient could possess and cultivate, unless a physician

recommended a greater amount, conflicted with, and took away from, the CUA, which imposed no cap, and thus, the legislative statute was unconstitutionally amendatory. (*Id.* at pp. 1027-1030, 1042-1043.)

In contrast to the situation in *Kelly*, nothing in A.B. 333 conflicts with, or takes away from, section 190.2(a)(22). The voters who approved Proposition 21 got, and still have what they enacted, a gang-murder special circumstance mandating severe punishment. Although under A.B. 333's amendments to section 186.22(f), fewer persons convicted of an intentional murder may be subject to the gang-murder special circumstance, given the amendments' stricter requirements to prove a criminal street gang, A.B. 333 does not diminish the fact that the sentence of a person convicted of the gang-murder special circumstance is still the death penalty or life imprisonment without the possibility of parole. (See *People v. Nash* (2020) 52 Cal.App.5th 1041, 1059 (*Nash*) ["While the class of individuals standing convicted of murder may be reduced in light of Senate Bill No. 1437's changes to the felony-murder rule and the natural and probable consequences doctrine, the legislation does not change or take away from the sentences those convicted of murder are subject to, which is the mandate of Proposition 7"].)

Here, A.B. 333 is fully consistent with, does not take away from, Proposition 21. As noted by Justice Snauffer's minority opinion in *Rojas*: "The Proposition 21 electorate was undoubtedly concerned with increasing the punishment for certain gang-related murders. [fn. 5]. That increased punishment—life without parole or death—survives AB 333." (*Rojas, supra,* 80 Cal.App.5th at p. 561 (conc. & dis. opn. of Snauffer, J.).)

2. The Definition of a Criminal Street Gang Is Related to, but Distinct From, the Gang-Murder Special Circumstance

The majority opinion in *Rojas* takes the position that a crime's punishment is not distinct from the crime's definition in an effort to support its position that A.B. 333 takes away from Proposition 21. (*Rojas, supra,* 80 Cal.App.5th at pp.

555-557.) The majority opinion claims that *People v. Superior Court* (*Gooden*) (2019) 42 Cal.App.5th 270 (*Gooden*) is "misguided" in concluding that a crime's punishment and the crime's definition are distinct subjects. (*Rojas, supra,* 80 Cal.App.5th at p. 555.) However, 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"]; *People v. Anderson* (2009) 47 Cal.4th 92, 119 [a "sentencing enhancement or other penalty provision is not an element of an offense under California law"].) Although a crime and its punishment are related, they cover distinct subjects.

Furthermore, sections 190.2(a)(22) and 186.22(f) do not even bear the relationship of a crime and its punishment. Section 190.2(a)(22) does not define the crime of murder but is a punishment statute. (See *People v. Jones* (2009) 47 Cal.4th 566, 576; *People v. Anderson, supra,* 47 Cal.4th at p. 115.) Section 186.22(f) simply defines a criminal street gang, a term used in many statutes, as discussed in Argument G.

Despite the fact that section 190.2(a)(22) and section 186.22(f) do not bear the relationship of a crime and its punishment, *Gooden* is a significant problem for the majority opinion in *Rojas,* because *Gooden* presents an instructive example of a legislative statute that is not an unconstitutional amendment of an initiative, in that the statute covers a subject related to, but distinct from, the subject of the initiative.

In *Gooden, supra,* 42 Cal.App.5th 270, the court 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) of the California Constitution by impermissibly amending Proposition 7, which had increased the punishment for first and second degree murder. (*Id.* at pp. 279-286.)[5] The court in *Gooden, supra,*

[5] 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

42 Cal.App.5th at pp. 279-280, cited *Pearson, supra,* 48 Cal.4th at pp. 570-571, and other case law on the constitutional issue and concluded:

> . . . not all legislation concerning "the same subject matter as an initiative. . . is necessarily an amendment" to the initiative. [Citation.] On the contrary, " '[t]he 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.]

(*Id.* at p. 280.)

Based on these principles, *Gooden* rejected the argument that S.B. 1437's amendment of the mens rea requirement for murder took away from Proposition 7's increase in the punishment for murder. (*Gooden, supra,* 42 Cal.App.5th at p. 281.) *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.) *Gooden* found that S.B. 1437 "presents a classic example of legislation that addresses a subject related to, but distinct from, an area addressed by an initiative. [Citations.]" (*Id.* at p. 282; see also *Nash, supra,* 52 Cal.App.5th at p. 1061 [same conclusion].)

A.B. 333 presents the same classic example as in *Gooden* of a legislative statute that covers a subject related to, but distinct from, the subject covered by an initiative. In enacting section 190.2(a)(22), Proposition 21 was focused on, establishing a new gang-murder special circumstance, which would mandate severe punishment, not the related but distinct subject of the definition of a

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case that has rejected *Gooden's* analysis and conclusions. (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 holding that S.B. 1437 did not unconstitutionally amend Proposition 7].)

criminal street gang.

A.B. 333's amendments of section 186.22(f) do not unconstitutionally amend Proposition 21, if applied to section 190.2(a)(22). A.B. 333 does not "take away" from the harsh punishment mandated by section 190.2(a)(22), and A.B. 333's amended definition of a criminal street gang is related to, but distinct from, the subject of section 190.2(a)(22).

E. Under the *Palermo* Rule, the Reference in Penal Code Section190.2, Subdivision (a)(22) to the Definition of a Criminal Street Gang in Penal Code Section 186.22, Subdivision (f) Was Not Frozen in Time Expressly or As a Matter of the Voters' Intent, and Consequently, the Legislature Was Permitted to Amend the Definition of a Criminal Street Gang As Applied To the Gang-Murder Special Circumstance

1. The *Palermo* Rule Requires Determining the Intent of the Voters in Enacting an Initiative Statute, Unless the Initiative Specifies a Time-Specific Incorporation

In *Palermo, supra,* 32 Cal.2d at p. 58-59, the Court stated, "`[W]here a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form in which they exist at the time of the reference and not as subsequently modified.... [Citations.]´" On the other hand, "`there is a cognate rule, recognized as applicable to many cases, to the effect that where the reference is general instead of specific, such as a reference to a system or body of laws or to the general law relating to the subject in hand, the referring statute takes the law or laws referred to not only in their contemporary form, but also as they may be changed from time to time....´ [Citations.]" (*Id.* at p. 59.) Application of what is known as the *Palermo* rule has evolved over time, so that the rule, as modernized, requires examination of the intent of the body enacting the referring statute, whether this is the Legislature or the voters, unless the referring statute specifies the incorporation is time-specific.

As noted in *In re Jovan B*. (1993) 6 Cal.4th 801 (*Jovan B.*), "[W]here the

words of an incorporating statute do not make clear whether it contemplates only a time-specific incorporation, `the determining factor will be. . . legislative intent. . . .´ [Citation.]" (*Id.* at p. 816.) Rules of construction are not to be rigidly applied; the "touchstone is always the intent of the legislation." (*Woodbury v. Brown-Dempsey* (2003) 108 Cal.App.4th 421, 432; 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"].) "Several modern decisions have applied the *Palermo* rule, but none have done so without regard to other indicia of legislative intent." (*Jovan B., supra,* 6 Cal.4th at p. 816, fn. 10.) Thus, the incorporation by reference of a specific provision of law does not automatically render that provision a time-specific reference under *Palermo*; the determining factor is the intent of the body that enacted the referring statute.

The majority opinion in *Rojas* does not rely on the *Palermo* rule, but in *Rojas,* respondent relied on the rule to argue A.B. 333 unconstitutionally amended Proposition 21. This position was rejected in *Lee, supra,* 81 Cal.App.5th at pp. 236-245, and *Lopez, supra,* 82 Cal.App.5th at pp. 14-24.

The majority opinion in *Rojas* found that respondent's analysis missed the mark in distinguishing *Gooden* on different grounds than did the majority opinion.[6] The majority opinion stated:

> The Attorney General notes that while Proposition 7 increased the punishment for an existing crime[,] Proposition 21 created a special circumstance where none had existed before. And the relevant provisions of Proposition 7 did not incorporate by reference the provisions altered by Senate Bill 1437; whereas section 190.2, subdivision (a)(22) incorporates by reference a provision altered by Assembly Bill 333 (§ 186.22, subd. (f).) However, these formalistic

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[6] The court in *Gooden, supra,* 42 Cal.App.5th at pp. 282-284, rejected the People's argument that Proposition 7's reference to murder meant the law of murder was incorporated as existing at the time of the reference and not as subsequently modified and held that the cognate rule of *Palermo* applied.

distinctions do not go to the heart of the issue.

(*Rojas, supra,* 80 Cal.App.5th at p. 555, fn. 13.) On these two points, the majority opinion in *Rojas* is correct. That Proposition 7 increased the punishment for an existing crime, while Proposition 21 enacted a new special circumstance is a distinction without a difference, and under the *Palermo* rule, even when a statute refers to a specifically designated statute, as does section 190.2(a)(22) in referring to section 186.22(f), the issue is whether the enactors of the referring statute intended a time-specific incorporation.

The case of *Doe v. Saenz* (2006) 140 Cal.App.4th 960 (*Saenz*) illustrates the importance of the issue of intent. The context in *Saenz* was that Health and Safety Code statutes provided that persons convicted of crimes other than minor traffic offenses were presumptively disqualified from working in licensed community care facilities. (*Id.* at p. 972.) Although the Director of the Department of Social Services was authorized to grant exemptions to persons convicted of certain offenses to work in the facilities, four exemption statutes prohibited the Director from granting an exemption to a person convicted of specified offenses. (*Id.* at pp. 972-974.) Each exemption statute prohibited granting an exemption to a person convicted of a "`crime *against an individual* specified in subdivision (c) of section 667.5 of the Penal Code.´" (*Id.* at p. 982; original italics.) The exemption statutes did not incorporate section 667.5, subdivision in any time-specific way. (*Id.* at pp. 972-974, 981.)

Based on *Jovan B. supra,* 6 Cal.4th at p. 816, and other case law, *Saenz* noted that "a formulaic application of the *Palermo* rule is inappropriate. . . when the incorporating statute does `not make clear whether it contemplates only a time-specific incorporation,´" and that "the determining factor of whether a reference is specific or general is legislative intent in light of all relevant evidence." (*Saenz*, *supra*, 140 Cal.App.4th at p. 981.) The court noted that section 667.5 contained a declaration by the Legislature that the crimes in section 667.5 "`merit special

consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence *against the person.*" (*Id.* at p. 982*;* italics original.) The court stated:

> All parties concede that "crime against an individual" is synonymous with "crime against the person." The fact the declaratory language in the incorporated statute parallels language in the incorporating statute suggests the cross-reference to Penal Code section 667.5(c) is not a specific adoption of the components of that subdivision as it existed as [of] some fixed point in time, but is rather a reference to a general body of law setting forth violent crimes the Legislature has deemed particularly worthy of condemnation. [Citations.]

(*Ibid.*)

The court in *Saenz*, *supra*, 140 Cal.App.4th at p. 982, further noted that its task was to interpret the exemption statutes in "a workable and reasonable manner." The court found that because at least 18 different statutes contained employment or licensing restrictions based on convictions specified in section 667.5, it was not workable or reasonable to believe the Legislature intended to freeze the list of disqualifying offenses based on those listed in section 667.5, subdivision (c) on the "fortuitous timing of the incorporating statute's adoption." (*Id.* at pp. 982-983.) The court concluded that "the Legislature intended the cross-reference to Penal Code section 667.5(c) in the exemption statutes as a general reference that automatically incorporates changes that may be made to that subdivision over time." (*Id.* at p. 983.)

In other words, *Saenz* found that the references to section 667.5, subdivision (c) in other statutes were so numerous as to constitute general references to a body of law under *Palermo,* given the absence of time-specific limitations being stated in the incorporating exemption statutes. Section 186.22 also is incorporated in numerous other statutes, and as result, section 186.22, like section 667.5, should be viewed as a general body of law under *Palermo,* since section 186.22(f) defines a criminal street gang, an entity whose members are

subject to numerous criminal laws. (See Argument G.)

In *People v. Van Buren* (2001) 93 Cal.App.4th 875, 878-880 (*Van Buren*), overruled on other grounds by *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 3, the court held that section 2933.1, which limits worktime custody credits for persons convicted of felonies "listed in Section 667.5," was not a time-specific incorporation of the felonies listed in section 667.5, but that section 667.5, subdivision (c) was intended to apply generally to felonies listed in section 667.5 as amended from time to time. The court noted that section 667.5, subdivision (c) "is a critical element in the general body of law concerning treatment of violent criminals." (*Id.* at p. 880.) The court held that based on the scope of section 667.5, subdivision (c) and the legislative history of the statute to punish violent crimes, and the fact that section 667.5, subdivision (c) had been amended several times before section 2933.1 was enacted, the Legislature must have believed that the list of violent crimes in section 667.5, subdivision (c) would continue to change. (*Id.* at pp. 880-881.) With regard to the Legislature's intent, the court explained:

> The Legislature must have contemplated that the category of violent felonies would continue to change as offenses were added to or deleted from section 667.5, subdivision (c), to reflect the experience of law enforcement, changes in crime statistics, and the will of the public. Since these changes would not alter the statute's purpose to single out violent crimes for special treatment, it is unlikely the Legislature intended to restrict section 2933.1 to the 1994 version of section 667.5, subdivision (c).

(Id. at p. 881.) Similarly here, the Proposition 21 voters had every reason to believe that section 186.22(f) would continue to be amended, as in the past, based on practical experience, and that the changes to section 186.22(f) would apply to section 190.2(a)(22), since the changes would not alter the purpose of Proposition 21 to single out members of criminal street gangs for special treatment. (See Argument F.)

In re Oluwa (1989) 207 Cal.App.3d 439 (*Oluwa*) also illustrates that even

when an incorporating statute refers to another statute by specific designation, the critical issue is the intent of the enactors of the incorporating statute. *Oluwa* concerned Proposition 7,[7] which was enacted by the voters in 1978, and which revised section 190 to increase the prison 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 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code [Article 2.5] 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. (*Ibid.*) The legislative analysis in Proposition 7's ballot pamphlet explained the effect of the behavior credits as, "`A person sentenced to 15 years would have to serve at least 10 years before becoming eligible for parole.´" (*Id.* at pp. 442-443.) In 1982, Oluwa was sentenced to 15 years to life in prison on his conviction of second degree murder. (*Id.* at p. 442.) After he began serving his sentence, the Legislature added sections to Article 2.5, which provided that an already sentenced prisoner could receive 1-for-1 credits. (*Id.* at p. 443.) The issue on appeal was whether Oluwa was entitled to the more generous 1-for-1 credits. (*Ibid.*) The court ruled against Oluwa based both on the factor that the reference in Proposition 7 to Article 2.5 was specific and the factor of the voters' intent. (*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

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[7] Proposition 7 is the same initiative found not to have been unconstitutionally amended by S.B. 1437 in *Gooden, supra,* 42 Cal.App.5th at pp. 279-286.

> 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.)

This Court has confirmed that a critical factor in *Oluwa* was its reliance on the intent of the electorate. (See *Jovan B., supra,* 6 Cal.4th at p. 816, fn. 10 [*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,´" as showing the electorate intended a second-degree murderer to serve 10 calendar years].)

Because there is no categorical rule that a statute's specific reference to another statute freezes the referred to statute as of the date of the reference, unless so stated, the predominant consideration in the instant case is whether the voters in enacting Proposition 21 intended to freeze the definition of a criminal street gang as applied to section 190.2(a)(22).

2. The Voters Who Enacted Proposition 21 Did Not Intend the Reference to Section 186.22, Subdivision (f) in Section 190.2, Subdivision (a)(22) to Freeze the Definition of a Criminal Street Gang, or They Would Have Frozen the Definition, Since They Froze Other Definitions in Penalty Provisions

It is significant that the Proposition 21 voters explicitly froze statutory definitions of a serious and a violent felony, which were referred to in sections 667 and 1170.12 (the Three Strikes law). Proposition 21 added section 667.1, which expressed the voters' intent to freeze statutory definitions in section 667, as follows:

> Notwithstanding subdivision (h) of Section 667, for all offenses committed on or after the effective date of this act, all references to existing statutes in subdivision (c) to (g), inclusive, of section 667, are to those statutes as they existed on the effective date of this act, including amendments made to those statutes by this act.

(Ballot Pamphlet, text of Prop. 21, §14, p. 123.) Proposition 21 also added section 1170.125, which made explicit the voters' intent to freeze statutory definitions in section 1170.12, by stating:

> [F]or all offenses committed on or after the effective date of this act, all references to existing statutes in Section 1170.12 are to those statutes as they existed on the effective date of this act, including amendments made to those statutes by this act.

(Ballot Pamphlet, text of Prop. 21, §16, p. 124)

Before the March 8, 2000 effective date of Proposition 21, section 667, subdivision (d)(1) provided that "[n]otwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as. . . [a]ny offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state." (Stats. 1994, c. 12 (A.B. 971), § 1, eff. March 7, 1994.) At that same time, section 1170.12, subdivision (b)(1) defined a prior conviction of a felony the same way. (Added by Initiative Measure (Prop. 184, § 1, approved Nov. 8, 1994.) Thus, as to the Three Strikes law, the Proposition 21 voters expressly froze the incorporated definition of a violent felony in section 667.5, subdivision (c) and of a serious felony in section 1192.7, subdivision (c) as of the effective date of Proposition 21.

"It is a general rule of statutory construction that `[w]hen one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning.´ [Citations.]" (*Klein v. United States of America* (2010) 50 Cal.4th 68, 80 (*Klein*); accord *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 73; *In re Espinoza* (2011) 192 Cal.App.4th 97, 105.) This same principle governs analysis of the voters' intent as to Proposition 21. (See *Gonzalez, supra,* 6 Cal.5th at p.44.)

Accordingly, the fact that the Proposition 21 voters froze definitions

referred to in the Three Strikes law, but not section 186.22(f)'s definition of a criminal street gang in section 190.2(a)(22), indicates the voters did not intend to freeze the definition of a criminal street gang in section 190.2(a)(22). There is certainly no basis for inferring that the voters understood the definition of a criminal street gang would be frozen as to section 190.2(a)(22). As stated in *Lee, supra,* 81 Cal.App.5th at pp. 242-243, because the voters changed the lock-in date for determining qualifying offenses under the Three Strikes law, but made no time-specific incorporation of section 186.22(f) into section 190.2(a)(22), "[t]here is simply no basis to believe that the voters understood they were precluding future amendments of subdivision (f) of section 186.22 as referred to in the gang-murder special circumstance, while permitting such future amendments for section 186.22 itself."

The reasoning of *Lopez, supra,* 82 Cal.App.5th at pp. 14-25, also supports appellant's position. Regarding the analogous issue of whether A.B. 333 unconstitutionally amends section 182.5, the gang conspiracy statute, if A.B. 333's amendments to section 186.22 (f) and (e) are applied to section 182.5, *Lopez* found A.B. 333 does not unconstitutionally amend Proposition 21.[8] The court examined the *Palermo* rule and rejected respondent's reliance on *Oluwa, supra,* 207 Cal.App.3d 439, and noted that in *Jovan B., supra,* 6 Cal.4th at p. 816, fn. 10, this

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[8] Section 182.5, as added by Proposition 21 and as still in effect, provides:

> Notwithstanding subdivisions (a) or (b) of Section 182, any person who actively participates in any criminal street gang, as defined in subdivision (f) of Section 186.22, with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, as defined in subdivision (e) of Section 186.22, and who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by members of that gang is guilty of conspiracy to commit that felony and may be punished as specified in subdivision (a) of Section 182.

(Ballet Pamphlet, text of Prop. 21, § 3, pp. 119-120.)

Court had limited the *Palermo* holding, and that the line of authority following *Jovan B.* holds that when the incorporating statute does not make clear that it contemplates a time-specific incorporation, the dispositive factor is the voters' intent. (*Lopez, supra,* 82 Cal.App.5th at pp. 22-23.) The court ruled that because Proposition 21 froze provisions incorporated in other statutes as of Proposition 21's effective date, the absence of an express freezing date in section 182.5 of the incorporated definitions of section 186.22 (f) and (e) showed the voters did not intend to freeze those definitions in section 182.5. (*Id.* at pp. 24-25.)

Thus, under the modern application of the *Palermo* rule, the fact that no time-specific limitation was placed on the definition of a criminal street gang in section 190.2(a)(22), while Proposition 21 froze incorporating definitions as to other penalty statutes, shows the voters did not intend to freeze the definition of a criminal street gang in section 190.2(a)(22).

3. From Proposition 21's Ballot Material, the Voters Would Have Believed That Future Changes to the Definition of a Criminal Street Gang in Penal Code Section 186.22, Subdivision (f) Would Apply to Other Gang Statutes, Including Penal Code Section 190.2, Subdivision (a)(22)

The voters who adopted Proposition 21 are presumed to know that section 186.22 had been amended repeatedly by the Legislature in the past, as stated in *People v. Gardeley, supra,* 14 Cal.4th at p. 615, fn. 13. (See *Gonzalez, supra,* 6 Cal.5th at p. 50 ["we presume that the `adopting body´ is aware of existing laws when enacting a ballot initiative"].) The voters had no reason to believe this trend would stop, or that future amendments to section 186.22(f) would not apply to section 190.2(a)(22).

The Ballot Pamphlet accompanying Proposition 21 repeatedly refers to *gang*-related crimes and *gang*-related murder without any suggestion that a criminal street gang might have a different meaning as to either. Proposition 21's findings and declarations state: "*Gang-related crimes* pose a unique threat to the

public because of gang members' organization and solidarity. *Gang-related felonies should result in severe penalties. Life without the possibility of parole or death should be available for murderers who kill as part of any gang-related activity*." (Ballet Pamphlet, § 2, subd. (h), p. 119, italics added.)

The official summary of Proposition 21 includes: "Increases punishment for *gang-related felonies*; *death penalty for gang-related murder*; indeterminate life sentences for home-invasion robbery, carjacking, witness intimidation and drive-by shootings; and creates crime of recruiting for gang activities; and authorizes wiretapping for gang activities;" and "Requires registration for *gang related offenses*." (Ballot Pamphlet, Official Title and Summary Prepared by the Attorney General, p. 44, italics added.) The Legislative Analyst's overview refers to "*gang-related offenders*," and "*gang-related crimes*." (Ballot Pamphlet, Analysis by the Legislative Analyst, Overview, p. 45, italics added.) The Legislative Analyst's statement of the Gang Provisions includes 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. 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''. . . 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, italics added.) The Legislative Analyst's summary of fiscal effects of the gang provisions includes "Increases penalties for *gang-related crimes* and requires gang

members to register with local law enforcement agencies." (Ballot Pamphlet, Analysis by the Legislative Analyst, Summary of Fiscal Effects of Major Provisions, p. 46, italics added.) The argument sections of the Ballot Pamphlet refer generally to "gang offenders" and "gang members" (Ballot Pamphlet, *supra*, argument regarding Prop. 21, pp. 48-49.)

Nowhere does the Ballot Pamphlet differentiate between the meaning of a criminal street gang as applied to the gang-murder special circumstance and gang-related felonies or statutes, nor does the Ballot Pamphlet remotely imply that the definition of a criminal street would remain static, given the many times the definition had been amended in the past. Further, there is no suggestion that future amendments to the definition of a criminal street gang in section 186.22(f) would not apply to the gang-murder special circumstance, or for that matter, the four other statutes adopted by Proposition 21 that incorporated provisions of section 186.22, as set forth in Argument G.

Because the voters who adopted Proposition 21 are presumed to know the law (*Gonzalez, supra,* 6 Cal.5th at p. 50), which includes that section 186.22 had repeatedly been amended in the past, and that in other statutes incorporating section 186.22, the references had never been interpreted as frozen, it is inconceivable that they would have thought, or intended, that Proposition 21 froze the definition of a criminal street gang as to section 190.2(a)(22). It is not the court's "role to rewrite the initiative by inserting language the drafters never included and the voters never considered." (*Gooden, supra,* 42 Cal.App.5th at p. 284.)

F. Assembly Bill No. 333's Refinement of the Definition of a Criminal Street Gang, Based on Over 20 Years of Experience, So As to Cover Only Organized Criminal Street Gangs, Comports with the Voters' Intent in Adopting Proposition 21

Applying A.B. 333's amendments to the definition of a criminal street gang to the gang-murder special circumstance is consistent with, and supportive of, the

purpose of Proposition 21, which is to punish gang-related crimes by organized criminal street gangs more severely. (*Robert L., supra,* 30 Cal.4th at p. 907.) The harsh punishment for a gang-murder special circumstance remains intact after A.B. 333. A.B. 333 simply refines what constitutes an organized criminal street gang, consistent with current knowledge, based on over 20 years of experience. Before A.B. 333's enactment, the definition of a criminal street gang had been so loosely interpreted and overly expanded as to include individuals who were not members of organized criminal street gangs who were collectively engaged in gang-related crimes. The "original definition of a criminal street gang was not narrowly focused on punishing true gang-related crimes." (*Lee, supra,* 91 Cal.App.5th at p. 245.) By refining the definition of a criminal street gang, A.B. 333 supports the purpose of Proposition 21.

From the STEP Act's enactment of section 186.22, to the adoption of Proposition 21, through the enactment of A.B. 333, the intent of the Legislature and the voters has been to impose harsh punishment for gang-related crimes committed by members of organized criminal street gangs. When the STEP Act was first enacted in 1988, it included section 186.21, which stated the Legislature's intent was to eradicate "criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs." (Added by Stats.1988, c. 1242, § 1, eff. Sept. 26, 1988.) This intent still remains codified in section 186.21.

The findings and declarations of Proposition 21, which was enacted in 2000, note that "[c]riminal street gangs have become more violent, bolder, and better organized in recent years;" and "[g]ang-related crimes pose a unique threat to the public because of gang members' organization and solidarity." (Ballot Pamphlet, text of Prop. 21, § 2, subds. (b) & (h).)

Over 20 years later, when A.B. 333 was enacted in 2021, it had become

evident, as noted in A.B. 333's findings and declarations, that gang statutes were not just criminalizing organized criminal street gang but "entire neighborhoods historically impacted by poverty, racial inequality, and mass incarceration," punishing "people based on their cultural identity, who they know, and where they live," that gang enhancements were frequently meted out to persons "based on the conduct of other people whom they never met," and that residents of neighborhoods were "often mischaracterized as gangs despite their lack of basic organizational requirements." (Stats. 2021, ch. 699, § 2, subds. (a), (d)(7)&(8).) A.B. 333's findings and declarations also noted that although the "STEP Act was originally enacted to target crimes committed by violent, organized criminal street gangs [citation]," that as a result of legislative amendments and court rulings, the STEP Act had been continuously expanded, resulting in "lax standards," and that as a result, gang enhancements had become "ubiquitous." (Stats. 2021, ch. 699, § 2, subd. (d)(8).)

"`[L]egislative findings, while not binding on the courts, are given great weight and will be upheld unless they are found to be unreasonable and arbitrary. [Citations.]´" (*Amwest Surety Ins. Co. v. Wilson, supra,* 11 Cal.4th at p. 1252.)

A.B. 333's refinement of the definition of a criminal street gang based on two decades of experience to ensure that in punishing crimes as gang-related, a criminal street gang is accurately defined as an organized group whose members collectively commit predicate offenses, instead of labeling crimes as gang-related when committed only individually or by persons merely associated socially, culturally, racially, or by neighborhood is entirely consistent with Proposition 21. The overriding purpose of Proposition 21 is to single out members of organized criminal street gangs, who commit serious crimes, for serious punishment.

By refining the definition of a criminal street gang based on real-life experience regarding what really constitutes an organized criminal street gang, A.B. 333 enhances Proposition 21's goals. As stated *ante,* A.B. 333 does not

prohibit what Proposition 21 authorizes or authorize what Proposition 21 prohibits (see *Pearson, supra*, 48 Cal.4th at p. 571), nor does A.B. 333 "take away" from Proposition 21 (see *Kelly, supra,* 47 Cal.4th at p. 1026). A.B. 333 supports the goals of Proposition 21.

G. The Consequences of Interpreting Proposition 21 As Having Frozen the Definition of a Criminal Street Gang As to Penal Code Section 190.2, Subdivision (a)(22) Would Be Unreasonable and Anomalous

Another well-settled principle of statutory construction supports appellant's position. Where the meaning of a provision appears to be uncertain, courts should consider the consequences of a particular interpretation in evaluating legislative intent. (*People v. Taylor* (2021) 60 Cal.App.5th 115, 131[courts are required to construe a statute "`"to promote its purpose, render it reasonable, and avoid absurd consequences"´"]; *Mejia v. Reed* (2003) 31 Cal.4th 657, 663 ["the court may consider the impact of an interpretation on public policy, for `[w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation´"].) Where there is ambiguity in a statute, courts adopt the most reasonable reading of the statute and seek to avoid "peculiar results." (See *People v. Jones* (1993) 5 Cal.4th 1141, 1150-1151.) In addition, "if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [Citation.]" (*People v. Shabazz, supra,* 38 Cal.4th at p. 68.)

Interpreting Proposition 21 to mean that for purposes of section 190.2(a)(22), the definition of a criminal street gang is frozen as of the date of Proposition 21's enactment, but that for purposes of section 186.22's punishment provisions, the narrower definition of A.B. 333 applies, would lead to the anomalous result that it would be easier to prove a criminal street gang for purposes of imposing the death penalty or life imprisonment without the possibility of parole than imposing the less serious punishment for violations of section 186.22. "It is difficult to discern a rational reason for such an anomalous

choice. . . ." (*Lee, supra,* 81 Cal.App.5th at p. 242.) As noted in *Lee*:

> The Attorney General concedes that his interpretation of the gang murder special circumstance will cause "considerable confusion" in application. A jury will have to apply one definition of a criminal street gang for the sentence enhancements under section 186.22, and another definition for purposes of determining whether the defendant is eligible for capital punishment under section 192, subdivision (a)(22). Indeed, the definition of a criminal street gang applied for purposes of the gang sentence enhancements would be narrower than that applied to the special circumstance. Thus, anomalously, 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.

(*Id.* at p. 242, fn. 36.) It is extremely unlikely that this result was intended by the voters, since they did not expressly freeze the definition of a criminal street gang in section 190.2(a)(22), nor did they have any reason to believe the definition would be frozen. (See Argument E.2 and 3.)

Furthermore, so many statutes refer to section 186.22, that to find the references frozen as of the date of each statute's enactment would lead to confusion and difficult consequences in the administration of criminal laws relating to criminal street gangs.

In addition to section 190.2(a)(22), the following statutes enacted by Proposition 21 refer to provisions of section 186.22:

> Section 182.5, the new crime of gang conspiracy, incorporates the definitions in section 186.22 (f) and (e) of a criminal street gang and a pattern of criminal gang activity. (Ballot Pamphlet, Prop. 21, §3, p. 119.)

> Section 182.26, covering the crime of gang solicitation and recruitment, refers to the same definitions as in section 182.5. (Ballot Pamphlet, Prop. 21, §6, p. 121.)

> New section 186.30, requiring registration by gang members,

> requires conviction of section 186.22, subdivision (a) or a gang enhancement under section 186.22, subdivision (b). (Ballot Pamphlet, Prop. 21, §7, p. 121.)
>
> New section 186.32, regarding gang registration, requires service of a notice by law enforcement that includes that the juvenile or adult belongs "to a gang whose members engage in or have engaged in a pattern of criminal gang activity as described in subdivision (e) of Section 186.22." (Ballot Pamphlet, Prop. 21, §7, p. 121.)

None of these statutes expresses that the definitions referred to in section 186.22 are frozen as of the date of Proposition 21's adoption, or as of any other date.

In addition, over 15 other statutes refer to provisions of section 186.22, including the following:

> Section 30305, subdivision (b)(1) [a person "enjoined from engaging in activity pursuant to an injunction. . . as a member of a criminal street gang, as defined in Section 186.22, may not own, possess, or have under the person's custody or control, any ammunition or reloaded ammunition"].
>
> Section 246.1, subdivision (a) [requires sale of a vehicle used in the "unlawful possession of a firearm by a member of a criminal street gang, as defined in subdivision (f) of Section 186.22, while present in a vehicle"].
>
> Section 27590, subdivision (b)(5) ["a person who actively participates in a `criminal street gang,´ as defined in Section 186.22" is guilty of a felony if the person violates an article covering crimes related to the sale, lease, or transfer of firearms].
>
> Section 19200, subdivision (b) [". . . a first offense involving any metal military practice handgrenade or metal replica handgrenade shall be punishable only as an infraction unless the offender is an active participant in a criminal street gang as defined in the Street Terrorism and Enforcement and Prevention Act (Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1)"].

> Section 25850, subdivision (c)(3) [carrying a loaded firearm in public is punishable as a felony "[w]here the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22, under the Street Terrorism Enforcement and Prevention Act. . ."].

In these examples, the statutes were enacted before Proposition 21, and none of them has ever been interpreted as having frozen the definitions that refer to section 186.22.

In *Saenz, supra,* 140 Cal.App.4th 960, 982-983,[9] where the court concluded the Legislature intended the cross-references to section 667.5, subdivision (c) in exemption statutes as a general reference, which automatically incorporated changes made to section 667.5, subdivision (c) over time, the court stated its task was to interpret the exemption statutes in "a workable and reasonable manner." The court found that because at least 18 different statutes contained employment or licensing restrictions based on convictions specified in section 667.5, it was not reasonable or workable to believe the Legislature intended to freeze the list of disqualifying offenses based on those listed in section 667.5, subdivision (c) on the "fortuitous timing of the incorporating statute's adoption." (*Id.* at pp. 982-983; see also *People v. Van Buren, supra,* 93 Cal.App.4th at pp. 881-882 ["not reasonable to believe that the Legislature intended to require a parallel amendment to section 2933.1 each time section 667.5, subdivision (c), was amended].)

Likewise, as to section 186.22, the only workable and reasonable manner in which to interpret section 190.2(a)(22), as well as the other statutes in Proposition 21 that incorporate definitions from section 186.22, is to find there was no intent by the voters to freeze the definition of a criminal street gang as to these statutes. In addition, interpreting the numerous other California statutes that specifically refer to section 186.22 as freezing the definition of a criminal street gang as of the

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[9] *Saenz* is discussed more fully in Argument E.1. regarding the *Palermo* rule.

date each statute's enactment would lead to the confusing result that the meaning of a criminal street gang would differ from statute to statute based on the date of each statute's enactment. This would engender confusion and difficulty in applying the many statutes that refer to section 186.22. In any one case in which there were multiple allegations under statutes referring to section 186.22, the court and the parties would be faced with needing to determine and explain to the jury the different meanings of a criminal street gang as to each statute. This would confuse juries, waste judicial resources and be inimical to sound public policy.

In enacting the gang-murder special circumstance, the voters needed to define a criminal street gang for the special circumstance not to be unconstitutionally vague. (See *People v. Superior Court* (*Engert*) (1982) 31 Cal.3d 797, 801-803 [reference in section 190.2, subdivision (a)(14) to "heinous, atrocious, or cruel, manifesting an exceptional depravity" was unconstitutionally vague]; see also *People v. Carrasco* (2014) 59 Cal.4th 924, 970.) For ease of reference and to avoid vagueness problems, section 190.2(a)(22) logically refers to the definition in section 186.22(f), as do many other statutes, but this does not mean the Proposition 21 voters intended to freeze the definition in section 190.2(a)(22) as of the effective date of Proposition 21 or as of any other date.

Thus, consideration of the anomalous, unreasonable consequences of interpreting Proposition 21 as having frozen the definition of a criminal street gang in section 190.2(a)(22) gives support to the other significant reasons for finding that the definition of a criminal street gang was not frozen in section 190.2(a)(22).

CONCLUSION

Under all the pertinent rules of construction, A.B. 333 does not unconstitutionally amend Proposition 21, if A.B. 333's refinement of the definition of a criminal street gang is applied to section 190.2(a)(22). A.B. 333 does not take away from what the voters obtained in Proposition 21, a gang-murder special circumstance with harsh punishment. Although A.B. 333 and

Proposition 21 relate to the same subject of criminal street gangs, they cover distinct subjects, which left the Legislature free to refine the definition of a criminal street gang in A.B. 333, since Proposition 21 did not specifically prohibit such legislation. Under the *Palermo* rule, section 190.2(a)(22)'s reference to section 186.22(f) did not freeze the definition of a criminal street gang in section 190.2(a)(22) based on the paramount consideration of the voters' intent. A.B. 333's refinement of the definition of a criminal street gang 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, and avoids including people merely because they associate with racial, neighborhood or other groups. A.B. 333 is also consistent with, and supportive of, the purpose of Proposition 21, that is, to punish crimes by organized criminal street gangs harshly. Furthermore, the consequences of having a different meaning for a criminal street gang in section 186.22 and in section 190.2(a)(22) would be unreasonable and anomalous.

This Court should hold that the application of A.B. 333's definition of a criminal street gang to section 190.2(a)(22) is not an unconstitutional amendment of Proposition 21 and direct the Court of Appeal to vacate the gang-murder special circumstance finding as to appellant and remand for possible retrial under the additional requirements of A.B. 333. (See *Lee, supra*, 81 Cal.App.5th at p. 245 [vacating the gang-murder special circumstance finding under section 190.2(a)(22) and remanding to afford the People the opportunity to retry the allegation].)

Dated: February 16, 2023

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I, Sharon G. Wrubel, counsel for appellant certify under penalty of perjury that this brief contains 11,756 words as counted by Microsoft Word.

Executed on February 16, 2023, at Pacific Palisades, California.

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