No. S275835

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

FERNANDO ROJAS,
Defendant and Appellant.

Fifth Appellate District, Case No. F080361
Kern County Superior Court, Case No. BF171239B
The Honorable John W. Lua, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

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

The California Constitution protects the people's initiative power by limiting the Legislature's ability to annul what the people have done, without the electorate's consent. (Cal. Const., art. II, § 10(c).) Under article II, section 10, subdivision (c) of the Constitution, voter-adopted initiatives are broadly insulated from legislative adjustment and that constitutional provision "closely circumscribe[s]" the Legislature's power to amend initiative statutes. (*People v. Kelly* (2010) 47 Cal.4th 1008, 1039, 1045.) At the same time, the Legislature "remains free to address a related but distinct area" or "a matter that an initiative matter 'does not specifically authorize *or* prohibit." (*Id.* at pp. 1025-1026, quotation marks omitted.) Without "endors[ing] any . . . expansive definition" of "amendment," the Court has found it "sufficient to observe" that an "amendment includes a legislative act that changes an existing initiative statute by taking away from it." (*Id.* at p. 1027.)

This case presents the question of whether a legislative enactment, Assembly Bill No. 333 (Stats. 2021, ch. 699) (AB 333), constitutes an amendment to a voter-enacted law, specifically, a provision of Proposition 21 adopted by the electorate in 2000. Through Proposition 21, the people established Penal Code section 190.2, subdivision (a)(22), which imposes severe

punishment if a "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."[1] Proposition 21 prohibited legislative amendment except by a supermajority vote of both houses. In 2021, the Legislature passed AB 333, which amended section 186.22 by narrowing the definition of a "criminal street gang" in various ways, including by limiting what constitutes a "pattern of gang activity," on which the definition of a gang depends. AB 333 did not pass by a supermajority vote of both houses.

Applying AB 333's narrowed definition of a criminal street gang to restrict the circumstances in which section 190.2, subdivision (a)(22) is met constitutes an amendment to Proposition 21, in violation of article II, section 10, subdivision (c) of the California Constitution. The text of section 190.2, subdivision (a)(22), including its specific cross-reference to a Penal Code section defining a criminal street gang, the context in which Proposition 21 was passed, and other indicia of voter intent, all reflect that the voters intended to define the offense of special circumstance gang-murder in section 190.2, subdivision (a)(22) by incorporating the existing definition of a criminal street gang. Under this Court's standards for what constitutes an "amendment" and well-established background principles of

[1] All further undesignated statutory references are to the Penal Code.

statutory construction, application of AB 333's new criminal street gang definition to the gang-murder special circumstance is barred by article II, section 10, subdivision (c).

Rojas's contrary arguments are not persuasive. He argues that Proposition 21 did not incorporate the criminal street gang definition in its then-existing form and that AB 333 does not take away from the initiative measure because it maintains more stringent penalties for a subset of certain gang-related murders. Those arguments do not properly address Proposition 21's specific incorporation of the criminal street gang definition that existed in 2000—an incorporation that is amply supported by the electorate's design in defining particular conduct to increase the punishment for special circumstance gang-murder and its overall intent to deter gang violence. They also do not accord adequate weight to the people's initiative power: the question is not whether some subset of gang murders may continue to be punished under section 190.2, subdivision (a)(22), but whether the legislative enactment takes away from the circumstances under which the electorate wanted to punish under the Penal Code. The answer to that question, properly defined, is that applying AB 333's narrowed definition of criminal street gang takes away from the circumstances triggering enhanced punishment, as identified by the electorate in 2000.

Rojas correctly observes that applying separate definitions of a criminal street gang in different but related contexts may result in practical difficulties. But that is the inevitable result when the Legislature chooses to enact its own reforms up against—and

in this application, beyond—the limit of what has already been established by the voters. In passing AB 333, the Legislature was free, as it did, to address a topic related to Proposition 21's subject matter. The bill's many other features, including its amendments to the gang enhancement, pose no constitutional issues. But the Legislature could not, consistent with the electorate's initiative power, extend AB 333's reforms to redefine the crime set out in section 190.2, subdivision (a)(22), without a supermajority vote.

LEGAL BACKGROUND

A. California's constitutional limitation on the amendment of initiative measures

The voter initiative process is the apex of democratic lawmaking in that it allows the people to directly make the laws that govern them. "[I]t is our solemn duty 'to jealously guard' the initiative power, it being 'one of the most precious rights of our democratic process.'" (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 248; see *Rossi v. Brown* (1995) 9 Cal.4th 688, 695; *Legislature v. Eu* (1991) 54 Cal.3d 492, 500-501; *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 250.)

Because the initiative process is so integral to our democracy, the California Constitution protects it from undue legislative interference. Subdivision (c) of article II, section 10, of the California Constitution, allows the Legislature to amend "an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment . . . without the electors' approval." That

means that the Legislature "may not amend an initiative statute without subsequent voter approval unless the initiative permits such amendment, 'and then only upon whatever conditions the voters attached to the Legislature's amendatory powers.'" (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568, quoting *Proposition 103 Enf't Project v. Charles Quackenbush* (1998) 64 Cal.App.4th 1473, 1481.)

The voters thus have "the power to decide whether or not the Legislature can amend or repeal initiative statutes. This power is absolute and includes the power to enable legislative amendment *subject to conditions attached by the voters*." (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1251, quoting *California Common Cause v. Fair Pol. Pracs. Com.* (1990) 221 Cal. App. 3d 647, 649, italics in original.) In this way, "[t]he people's reserved power of initiative is greater than the power of the legislative body." (*Rossi*, *supra*, 9 Cal.4th at p. 715, italics omitted.) A legislative act may not bind future Legislatures, "but by constitutional and charter mandate, unless an initiative measure expressly provides otherwise, an initiative measure may be amended or repealed only by the electorate. Thus, through exercise of the initiative power the people may bind future legislative bodies other than the people themselves." (*Id.* at pp. 715-716, italics omitted.)

However, not all legislation concerning "the same subject matter as an initiative, or even augment[ing] an initiative's provisions, is necessarily an amendment" to the initiative. (*Pearson, supra*, 48 Cal.4th at p. 571.) Rather, "[t]he Legislature

remains free to address a related but distinct area or a matter that an initiative measure does not specifically authorize or prohibit." (*Ibid*., quoting *Kelly*, *supra*, 47 Cal.4th at pp. 1025-1026; see also *People v. Cooper* (2002) 27 Cal.4th 38, 47.) This Court has explained that, in this context, an amendment is "'a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision.'" (*Pearson,* at pp. 570-571; see *Kelly,* at pp. 1026-1027 ["[F]or 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"].) Stated another way, the question is whether the legislation "prohibits what the initiative authorizes, or authorizes what the initiative prohibits." (*Pearson,* at p. 571; see *Cooper*, at p. 47.)

The purpose of this constitutional limitation "is to protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent." (*Kelly*, *supra*, 47 Cal.4th at p. 1025, internal quotation marks omitted.) "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." (*Ibid*., internal quotation marks omitted; see *Estate of Claeyssens* (2008) 161 Cal.App.4th 465, 470-471.) As a result, a reviewing court assessing whether there has been an

unconstitutional amendment resolves doubts in favor of the initiative power. (*Claeyssens*, at p. 471.)

B. The STEP Act, Proposition 21, and AB 333

In 1988, the Legislature enacted section 186.22 as part of the California Street Terrorism Enforcement and Prevention Act (STEP Act). (*People v. Brookfield* (2009) 47 Cal.4th 583, 588.) The statute prohibits active participation in a criminal street gang and also calls for sentence enhancements—which are graduated based on the underlying crime—when a person commits a felony "for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members." (§ 186.22, subd. (b)(1).) "The Legislature passed the act in order '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.'" (*People v. Mesa* (2012) 54 Cal.4th 191, 196, quoting § 186.21.)

The STEP Act defined a "criminal street gang" in section 186.22 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 one or more of [specified] criminal acts . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (Former § 186.22, subd. (f).) The term "pattern of criminal gang activity" was defined, in turn, as "the commission

of, attempted commission of, or solicitation of, sustained juvenile petition for, or conviction of two or more [specified offenses], provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (Former § 186.22, subd. (f).)

In 2000, the electorate passed Proposition 21, in part to impose severe penalties for gang-related murders. The electorate viewed gangs to have "become more violent, bolder, and better organized in recent years" and that, while enforcement of existing legislation had been partially effective in combating gangs, they also believed that additional action was warranted "to avoid the predicted, unprecedented surge in juvenile and gang violence." (Prop. 21, § 2, subds. (b), (c), (k).) To that end, Proposition 21 made several statutory changes, including the addition of subdivision (22) to section 190.2, which enumerates the special circumstances that authorize a punishment of death or life in prison without the possibility of parole for first degree murder. (§ 190.2, subd. (a).) The special circumstance in subdivision (a)(22) applies to murders where "[t]he 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." (Prop. 21, § 11; § 190.2, subd. (a)(22),

italics added.)[2] The electorate specified in Proposition 21 that its provisions could not be amended by the Legislature except by a two-thirds vote of each house or a statute that becomes effective only when approved by the voters. (Prop. 21, § 39.)

Over 20 years later, the Legislature passed AB 333, which became effective on January 1, 2022. The Legislature expressed concerns about overbroad application of the gang enhancement statute and its disproportionate effect on "neighborhoods historically impacted by poverty, racial inequality, and mass incarceration." (Stats. 2021, ch. 699, § 2, subds. (a), (d)(1) & (2), (i).) Among other things, the bill narrowed the definition of a "criminal street gang" set forth in section 186.22, subdivision (f). (Stats. 2021, ch. 699, § 3.) Subdivision (f) no longer defines a gang as "any ongoing organization, association, or group," but rather as "an ongoing, organized association or group." And instead of referring to gangs "whose members individually or collectively engage" in a pattern of gang activity, it limited its application to gangs "whose members collectively engage, or have engaged in," such activity. (Stats. 2021, ch. 699, § 3; § 186.22, subd. (f).)[3]

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[2] Section 186.22 was amended several times prior to the passage of Proposition 21, and Proposition 21 itself amended the statute in certain particulars not relevant here. (See Prop. 21, § 4.) At the time the electorate passed Proposition 21, a criminal street gang was defined, in all respects relevant to the issue in this case, as described in the previous paragraph.

[3] The full amended definition under AB 333 of a criminal street gang is "an ongoing, organized association or group of three (continued…)

The term "pattern of criminal gang activity" in section 186.22, subdivision (e)(1), was also narrowed. Instead of requiring the commission of two or more prior gang crimes—so-called "predicate offenses"—within three years after a prior offense, the most recent predicate offense must have been committed both within three years of a prior offense and within three years of the current offense. In addition, the predicate offenses must have commonly benefited the gang in a way that is "more than reputational." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (e)(1).)[4] The bill also added clarifying language stating: "Examples of a common benefit that are more than reputational may include, but are not limited to, financial gain or motivation,

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(…continued)

or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in subdivision (e), having a common name or common identifying sign or symbol, and whose members collectively engage in, or have engaged in, a pattern of criminal gang activity."

[4] The full amended definition under AB 333 of a pattern of gang activity is "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of, two or more of [the offenses enumerated in subdivisions (e)(1)(A)-(e)(1)(Z)], provided at least one of these offenses occurred after the effective date of this chapter, and the last of those offenses occurred within three years of the prior offense and within three years of the date the current offense is alleged to have been committed, the offenses were committed on separate occasions or by two or more members, the offenses commonly benefited a criminal street gang, and the common benefit from the offenses is more than reputational." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (e)(1).)

retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (g).) In addition, AB 333 shortened the list of qualifying predicate offenses, eliminating looting, vandalism, and several financial fraud offenses. (Stats. 2021, ch. 699, § 3; § 186.22, subds. (e)(1)(A)-(e)(1)(Z).) And it specified that "[t]he currently charged offense shall not be used to establish the pattern of criminal gang activity." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (e)(2).)

AB 333 passed in the Assembly on September 8, 2021, with 41 ayes, 30 noes, and 9 members not voting. The bill passed in the Senate on September 1, 2021, with 25 ayes, 10 noes, and 5 members not voting. (Sen. J. (2021-2022 Reg. Sess.) p. 2284; Assem. J. (2021-2022 Reg. Sess.) p. 2927.) Neither house passed AB 333 by two-thirds vote. (See Prop. 21, § 39.)

STATEMENT OF THE CASE

A. The trial

After the passage of Proposition 21, but before the enactment of AB 333, Rojas was tried in the Kern County Superior Court for a gang-related special-circumstance murder. (2CT 408-421, 535-538.)

During the early morning of February 3, 2018, Rojas and Victor Nunez were at an internet casino in Bakersfield. (7RT 784-786, 793-800; 8RT 823-824.) Surveillance videos from the casino and a nearby business showed that, around 2:05 a.m., Brandon Ellington walked into the casino parking lot. (7RT 706.) Ellington appeared to have been trying to sell a baggie of

marijuana to unidentified people in front of the casino. (7RT 734, 787.) One of them sucker-punched Ellington. (7RT 734, 788.) Ellington then began to walk away. (7RT 731.) Rojas walked with Ellington, trying to get Ellington to leave. (7RT 731, 746.) Ellington resisted and backed into a corner. (7RT 746.) He peeled off his shirt and "squared off" against Rojas. (7RT 746, 777-778; 8RT 824.) Rojas threw a beer bottle at Ellington. (7RT 746-747, 777-778.) A group of people rushed toward Ellington, and Ellington ran out of the casino parking lot. (7RT 708, 747.)

Rojas walked over to Nunez, and they had a quick conversation. (7RT 779.) They then jogged back toward Rojas's BMW. (7RT 779-780.) Rojas got into the driver's seat, and Nunez got into the front passenger seat. (7RT 780.) Rojas drove his BMW out of the casino parking lot in Ellington's direction. (*Ibid*.) Rojas stopped his BMW near Ellington. (7RT 711-713.) Nunez then got out of the car and crossed the street toward Ellington. (7RT 712.) Nunez fired five shots from a nine-millimeter semiautomatic handgun at Ellington. (6RT 500, 502-503; 7RT 712-713.) One bullet struck Ellington, killing him. (10RT 1104-1114.) Nunez then got back into Rojas's BMW, and they sped off. (7RT 713-714.)

A sheriff's deputy testified as a gang expert at Rojas's trial. According to the expert, Rojas and Nunez were active members of Varrio Chico Lamont (VCL), which is a criminal street gang whose primary activities included committing homicides, attempted homicides, grand theft auto, and illegal firearms possessions. (10RT 1127-1144, 1172-1205; 11RT 1295.)

Presented with a hypothetical situation mirroring the circumstances of the killing of Ellington, the expert testified that the murder would have been committed in association with VCL and would have benefited the gang and its members. (10RT 1122-1127, 1205-1211.)

The jury convicted Rojas of first degree murder and active participation in a criminal street gang. The jury further found true a criminal street gang enhancement (§ 186.22, subd. (b)(1)), a gang-murder special circumstance (§ 190.2, subd. (a)(22)), and firearm enhancements (§ 12022.53, subds. (d) & (e)(1); § 12022, subd. (d)). (2CT 562-564; 3CT 663-666, 676; 14RT 1516-1523.) The court sentenced Rojas to life in prison without the possibility of parole on the murder count, plus three years and 25 years to life for the respective firearm enhancements (§§ 12022, subd. (d); 12022.53, subds. (d) & (e)(1)), and it imposed but stayed a six-year term for active participation in a gang (§ 186.22, subd. (a)). (3CT 688-691; 16RT 1557-1560.)

B. The Court of Appeal's decision

Rojas appealed, and while his appeal was pending, AB 333's changes to the definition of a criminal street gang took effect. He argued that these changes required reversal of his conviction for active participation in a criminal street gang (§ 186.22, subd. (a)), as well as the criminal street gang enhancement (§ 186.22, subd. (b)), the vicarious firearm enhancement based on a gang member's discharge of a gun (§ 12022.53, subds. (d) & (e)), and the gang-murder special circumstance (§ 190.2, subd. (a)(22)). (Opn. 27.) The People conceded reversal of the street gang

participation conviction and the enhancements (see Opn. 27), but maintained that AB 333's amendments to the definition of a criminal street gang could not be applied to the gang-murder special circumstance (§ 190.2, subd. (a)(22)) because doing so would run afoul of the California Constitution.

A majority of the Court of Appeal accepted the People's concessions as to the gang participation conviction and gang enhancements, and affirmed the gang-murder special circumstance conviction. (Opn. 27-37.) The court held that AB 333 would unconstitutionally amend Proposition 21 if applied to the gang-murder special circumstance because that application would "'take[] away' from the scope of conduct that Proposition 21 made punishable under section 190.2," and AB 333 was not passed by a supermajority vote. (Opn. 32-33.) The court gave several examples of situations in which a crime would be punishable as a special-circumstance murder under the former definition of a criminal street gang, but not under AB 333's narrowed definition. (Opn. 32-33.) The court further reasoned that Proposition 21's increase in the punishment for certain gang-related murders was "definitionally and conceptually inseparable" from the gang conduct defined in section 186.22, and therefore applying AB 333's new definition of a criminal street gang to the gang-murder special circumstance would be unconstitutional even though AB 333 did not reduce the penalty established by Proposition 21's gang-murder special circumstance. (Opn. 34-37.) The court concluded that the

appropriate remedy is "to disallow this unconstitutional application of Assembly Bill 333." (Opn. 37.)

One justice dissented, reasoning that the voters who passed Proposition 21 were concerned only with "increasing the punishment for certain gang-related murders," but not with the underlying definition of any crime. (Dis. Opn. 3-5.) In the dissenting justice's view, Proposition 21's voters "'got, and still have, precisely what they enacted—stronger sentences for persons convicted of [gang-related special circumstance] murder,'" and therefore there is no constitutional barrier to the application of AB 333's narrowed definition of a criminal street gang in the context of the gang-murder special circumstance. (Dis. Opn. 3-5.)

ARGUMENT

THE CALIFORNIA CONSTITUTION BARS APPLICATION OF AB 333 TO THE GANG-MURDER SPECIAL CIRCUMSTANCE, WHICH WAS ESTABLISHED BY INITIATIVE MEASURE

The gang-murder special circumstance created by Proposition 21 in section 190.2, subdivision (a)(22) defines particular conduct that will subject a person to increased punishment for first degree murder. In defining that conduct, the special circumstance specifically references and incorporates section 186.22, subdivision (f), for the definition of a criminal street gang. As a rule of statutory interpretation, such a reference to a particular code section is generally understood to reflect the enacting body's design to effect a time-specific incorporation. Moreover, other evidence of the electorate's intent in enacting Proposition 21 supports the conclusion that the voters

did not envision that the Legislature would be able to narrow the scope of the gang-murder special circumstance by amending the incorporated definition in section 186.22 without a supermajority vote. Given those circumstances, AB 333's narrowed definition of a criminal street gang would, if applied to the gang-murder special circumstance, impermissibly take away from what the voters established through Proposition 21 by reducing the scope of conduct covered by the gang-murder special circumstance. Article II, section 10, subdivision (c), therefore bars that application.

A. Proposition 21 incorporated section 186.22's definition of "criminal street gang" in its then-existing form, and therefore a narrowing of that definition would impermissibly amend the voter initiative

Because AB 333 did not pass in both houses of the Legislature with a two-thirds majority, it did not meet the vote threshold that would be required to alter the terms of Proposition 21. Thus, if application of AB 333's new, narrowed definition of a "criminal street gang" to the gang-murder special circumstance would add to or take away from Proposition 21, then the application would amount to an amendment that is prohibited by article II, section 10, subdivision (c). (See *Pearson, supra*, 48 Cal.4th at pp. 570-571; *Kelly, supra*, 47 Cal.4th at pp. 1026-1027.)

In this case, whether AB 333 adds to or takes away from Proposition 21 hinges on a matter of statutory interpretation. Proposition 21's gang-murder special circumstance incorporates the definition of a "criminal street gang" set forth separately in section 186.22, subdivision (f). Whether the electorate, in

incorporating that separate statute by reference, intended to permit future amendments to that provision by the Legislature, or whether it intended to incorporate the definition as it stood at the time Proposition 21 passed, substantially informs—and under the circumstances presented here, controls—the amendment question under article II, section 10, subdivision (c).

As a rule of statutory construction, courts interpret a *specific* reference to another law as reflecting the enacting body's intent to incorporate that law in its then-existing form and not as subsequently modified, unless a clear contrary intent to include subsequent modifications is expressed. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 58-59; see also *People v. Anderson* (2002) 28 Cal.4th 767, 779; *Ramish v. Hartwell* (1899) 126 Cal. 443, 446 ["It is a rule of statutory construction that the adoption in one statute . . . of the provisions of another statute, by reference thereto, does not include subsequent modifications of these provisions in the statute referred to, unless a clear intent to do so is expressed"].)[5] On the other hand, where the reference is a general one, "such as a reference to a system or body of laws or to the general law relating to the subject in hand," then courts will interpret the reference as incorporating the law or laws referred to "not only in their contemporary form, but also as they

[5] Even when a specifically incorporated statute is later repealed altogether, it continues to exist through the incorporating statute in its form at the time of incorporation. (*Palermo*, *supra*, 32 Cal.2d at p. 59; *People v. McGee* (1977) 19 Cal.3d 948, 958, fn. 3; *People v. Clunie* (1886) 70 Cal. 504, 504-507; *People v. Whipple* (1874) 47 Cal. 592, 593-594.)

may be changed from time to time." (*Palermo*, at p. 59; *Anderson*, at p. 779.)

A reviewing court should be especially careful before concluding that a reference in a voter-enacted statute is a general one, because, unlike with purely legislative enactments, an incorrect construction would permit legislative alteration that is constitutionally prohibited and would interfere with "one of the most precious rights of our democratic process." (*Amador Valley Joint Union High Sch. Dist.*, *supra*, 22 Cal.3d at p. 248, internal quotation marks omitted.)

1. Proposition 21's citation to section 186.22, subdivision (f) indicates that the incorporation of that statute was time-specific

As when interpreting a legislative act, courts construing a voter initiative aim to effectuate the purpose of the enactment. (*Pearson*, *supra*, 48 Cal.4th at p. 571; *People v. Canty* (2004) 32 Cal.4th 1266, 1276.) "We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole." (*Pearson*, at p. 571.) If the language is unambiguous, it is presumed that "the voters intended the meaning apparent from that language," and a court "may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language." (*Ibid.*) If the language is ambiguous, however, a court "may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure." (*Ibid.*)

The language of Proposition 21 unambiguously reflects an intent to incorporate the definition of a criminal street gang as it

existed in section 186.22 in 2000. The gang-murder special circumstance defined in section 190.2, subdivision (a)(22), incorporates by reference and contains as an element section 186.22, subdivision (f), which itself relies on subdivision (e). These subdivisions together define a "criminal street gang" by laying out the various requirements to prove the existence of a gang. There could be no more "specific reference" to a definition of a particular term. (*Palermo*, *supra*, 32 Cal.2d at p. 58.) It is a "specific reference to the title" and subdivision of the incorporated law, section 186.22. (*San Diego County v. Milotz* (1956) 46 Cal.2d 761, 769 ["[W]hen one statute incorporates the provisions of another by specific reference to the title, the latter is incorporated as it exists and not as it is subsequently modified"]; see also *McGee*, *supra*, 19 Cal.3d at p 958, fn. 3 [same].)

First, it is instructive to review *Palermo* and the purpose of the rule it discusses. In that case, the Court considered the meaning of a statute that gave rights to foreign corporations to hold property under "any treaty *now existing*" between the United States and Japan. (*Palermo*, *supra*, 32 Cal.2d at p. 55, italics added.) The question was whether the statute should continue to be applied under the terms of that treaty after the treaty itself had been abrogated. The Court held that it should. *Palermo* restated the rule—which even then was long-established—that specific references within a statute to another law are to the form that the incorporated law had at the time of the reference, and not as subsequently amended. (*Id.* at p. 59.) Conversely, the Court explained that where the reference is

general rather than specific, "a cognate rule" applies: "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 . . . ." (*Ibid*.)

Palermo held that the statute's reference to a "now existing" treaty was a specific one, meaning corporations retained the same rights even after the treaty was abrogated. The Court reasoned that concluding otherwise would make state law subject to later changes to the treaty, which would have effectively delegated the Legislature's control over state property rights to the treaty-making authority of the United States. (*Palermo*, *supra*, 32 Cal.2d at pp. 59-60.) Because the Court had "grave doubts" about whether such an arrangement would even be constitutional, it declined to adopt that interpretation. (*Ibid*.) Moreover, the property statute lacked any language making its provisions "coterminous with those of the treaty," suggesting the Legislature did not intend for the statute to expire merely because the treaty was abrogated. (*Id*. at p. 62.)

At bottom, the purpose of the *Palermo* rule is to arrive at a statutory interpretation that is in accordance with the law's apparent purpose and the intent of the enacting body. (*People v. Kirk* (1990) 217 Cal.App.3d 1488, 1499.) The rule is designed to accomplish this goal because when the adopting statute *specifically* references the adopted statute, the effect is "the same as if the adopted statute had been set out verbatim," which

conveys the enacting body's intent that a "subsequent modification of the statute referred to did not affect the adopting statute." (*People v. Domagalski* (1989) 214 Cal.App.3d 1380, 1385.)

For example, in *Anderson*, this Court considered *Palermo* as part of its analysis of whether duress could be asserted as a defense to murder. Section 26 permits a defense of duress to any crime "unless the crime be punishable with death." (*Anderson*, *supra*, 28 Cal.4th at p. 773.) When that provision was adopted in 1872, all first degree murder was punishable by death, but the law of murder was subsequently changed to restrict the death penalty only to special-circumstance murder. (*Ibid.*) Responding to an argument that section 26's reference to crimes punishable with death was a general reference that would incorporate subsequent changes to that category of offenses, the Court stated that "[t]he question is not so clear." (*Id.* at p. 779.) It explained: "Section 26 does not cite specific statutes, but the subject of crimes punishable with death is quite specific. It is, for example, far narrower than the reference that the *Palermo* court found to be *specific* for this purpose: '"any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject."'" (*Ibid.*) The Court went on to conclude that, in any event, evidence of legislative intent showed that the Legislature intended to prohibit the duress defense for crimes that were punishable by death at the time section 26 was enacted, even if later amendments eliminated the death penalty for those offenses. (*Ibid.*)

The Court of Appeal's decision in *Domagalski* is also instructive. There, the court addressed an incorporation contained in Vehicle Code section 40302, which governs post-arrest appearance and release under that code. (*Domagalski*, *supra*, 214 Cal.App.3d at p. 1384.) When the provision was enacted, it incorporated section 853.6, subdivisions (a) through (f), which describes particular bail and release procedures for misdemeanor offenses. (*Ibid*.) Section 853.6 was later amended, imposing new procedural requirements. (*Id*. at p. 1385.) The court held that the Vehicle Code provision incorporated section 853.6, subdivisions (a) through (f) as they existed at the time, before they were amended. (*Id*. at p. 1386.)

Summarizing the authority interpreting and applying *Palermo*, the *Domagalski* court observed that "[w]ithout exception, in each case where a statute, or some portion of it, was incorporated by reference to its section designation, the court found the reference to be specific and the effect was the same as if the adopted statute had been set out verbatim in the adopting statute, so that repeal or subsequent modification of the statute referred to did not affect the adopting statute." (*Domagalski*, *supra*, 214 Cal.App.3d at p. 1385, internal quotation marks omitted.) In contrast, "[o]nly in those cases where an entire body of law relating to a particular subject was adopted by reference did the court find the reference to be general so that subsequent amendments to the incorporated statute affected the adopting statute." (*Id*. at pp. 1385-1386, internal quotation marks omitted.) Thus, the court concluded, "[t]he fact that Vehicle Code

section 40307 incorporated only subdivisions (a) through (f) of Penal Code section 853.6 when at the time of the incorporation Penal Code section 853.6 consisted of subdivisions (a) through (i) is compelling evidence that the reference was specific." (*Id*. at p. 1386.) The court also went on to hold that additional evidence of legislative intent confirmed that conclusion. (*Id*. at pp. 1386-1387.)

Also apposite is *In re Oluwa* (1989) 207 Cal.App.3d 439. There, the Court of Appeal analyzed whether an inmate was subject to the custody credit calculation established by the voters through Proposition 7 or whether he was entitled to invoke more generous credit provisions later enacted by the Legislature. (*Id.* at pp. 445-446.)[6] Proposition 7 contained a statement that "[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" in calculating custody credit for sentences like the inmate's in *Oluwa*. (*Id*. at p. 442.) Proposition 7 did not authorize the Legislature to amend or repeal its provisions without voter approval. (*Id*. at p. 446.)

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[6] Proposition 7, commonly known as the Briggs Initiative, also increased the punishment for first degree murder from a term of life imprisonment with parole eligibility after seven years to a term of 25 years to life. (Prop. 7, §§ 1-2.) It increased the punishment for second degree murder from a term of five, six, or seven years to a term of 15 years to life. (*Ibid*.) Further, it amended section 190.2 to expand the special circumstances under which a person convicted of first degree murder may be punished by death or life imprisonment without the possibility of parole. (*Id*., §§ 5-6.)

As the *Oluwa* court described, article 2.5 contained three sections governing custody credit calculation at the time Proposition 7 was passed. (*Ibid.*) Only later did the Legislature add several new sections to that article. (*Ibid.*) The inmate claimed that the later-enacted provisions could govern his sentence on the theory that Proposition 7's "reference to the provisions of article 2.5 containing the sections evinces the intent of the electorate that sections subsequently added thereto and dealing with the same subject matter should be engrafted onto section 190." (*Id.* at p. 444.)

The court in *Oluwa* rejected that theory. It relied on the same "well established principle of statutory law" discussed in *Palermo*, that "where 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 . . . .*" (*Oluwa, supra,* 207 Cal.App.3d at p. 445, italics in original, quoting *Palermo*, *supra*, 32 Cal.2d at pp. 58-59, internal quotation marks omitted.) The court also recognized the "cognate rule" that, where the electorate has made a general rather than specific reference to the law, "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 . . . ." (*Oluwa,* at p. 445, quoting *Palermo*, at p. 59, internal quotation marks omitted.)

The *Oluwa* court concluded that the reference in Proposition 7 was "not a reference to a system or body of laws or to the general law relating to the subject at hand," but rather was "a specific and pointed reference to an article of the Penal Code which contained only sections 2930, 2931 and 2932 at the time Proposition 7 incorporated article 2.5 into section 190." (*Oluwa, supra,* 207 Cal.App.3d at p. 445.) In other words, it was a specific definition of conduct credits that indicated what the voters "clearly intended" to enact. (*Ibid*.) The court concluded that the inmate's contrary interpretation "would permit the Legislature to amend the provisions of Proposition 7 by reducing the amount of time a second degree murderer must serve before being eligible for a parole hearing without submitting that matter to the voters" and "[t]he Legislature should not be permitted to do indirectly that which it cannot do directly." (*Id*. at p. 446; compare *Cooper, supra,* 27 Cal.4th at p. 48 [citing *Oluwa* with approval and distinguishing its analysis with respect to presentence conduct credits, which were neither authorized nor prohibited by Proposition 7].)

When the electorate passed Proposition 21 in 2000, the rule discussed in *Palermo* governing specific versus general statutory incorporation had been established for many decades.[7] It is presumed that the electorate is aware of such interpretive principles when it acts. (*People v. Gonzales* (2017) 2 Cal.5th 858,

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[7] By 2000, *Palermo* was over 50 years old, and the authorities cited in *Palermo* itself for this rule spanned the 19th and 20th centuries. (*Palermo*, *supra*, 32 Cal.2d at p. 59.)

869.) In light of those well-established background principles of construction, the electorate's decision to incorporate section 186.22 in Proposition 21 must be construed as a specific and not a general reference to an existing statute. Indeed, the reference is even more specific than the reference at issue in *Anderson* (and in *Palermo* itself) and at least as specific as the references at issue in *Domagalski* and *Oluwa*. The reference to section 186.22 thus comes within *Palermo*'s rule that it is understood to reflect the electorate's design to effect a time-specific incorporation.

Rojas disagrees, arguing that Proposition 21's reference to section 186.22 is a general one, allowing legislative alteration. (OBM 26-27.) He relies principally on the decision in *In re Jovan B.* (1993) 6 Cal.4th 801, 816. At issue in *Jovan B.* was a provision of the Welfare and Institutions Code stating that, when a juvenile court orders a ward confined, the confinement may not exceed "the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court." (*Id.* at p. 810, quoting Welf. & Inst. Code, § 726.) The juvenile there argued, in part, that this provision's reference to adult sentencing law could not include adult sentencing statutes enacted after the incorporating provision. (*Id.* at pp. 815-816.) This Court disagreed, holding that the reference was to the entire system or body of laws in the Determinate Sentencing Act, and was therefore not time-specific. (*Id.* at pp. 816-820.)

The provisions at issue in *Jovan B.* are materially different from those at issue in this case. Again, Proposition 21's reference to section 186.22 is a citation to a specific code section and subdivision defining a particular term. It is not a general incorporation of an entire body or system of laws as in *Jovan B.* The electorate would thus have understood that the specific reference would limit the legislature's authority to amend the circumstances in which the gang-special circumstance could be narrowed after its enactment.

2. The electorate's clearly stated intent in passing Proposition 21 confirms that the incorporation of section 186.22, subdivision (f) was time-specific

The *Palermo* rule states that to determine whether an enacting body intended to incorporate one statute within another in its contemporaneous form, a court should look to the specificity of the reference. But even when the degree of specificity in the text is unclear, the analysis remains focused on the enacting body's intent. (*Jovan B.*, *supra*, 6 Cal.4th at p. 816 [Where the words of an incorporating statute do not by themselves unambiguously reflect whether the incorporation is time-specific, the "determining factor" is the intent of the enacting body].) In that scenario, courts may look beyond the text of the voter-enacted statute to consider other indicia of intent. (*Pearson*, *supra*, 48 Cal.4th at p. 571.) Here, those indicia confirm that the electorate's reference to section 186.22 was a time-specific one.

As this Court has recognized, "Proposition 21 sought to tackle, in 'dramatic' fashion, the onerous problem of gang violence and gang crime." (*Robert L. v. Superior Court* (2003) 30 Cal.4th

894, 906.) Accordingly, as presented to the voters, Proposition 21's ballot materials argued for dramatically increasing criminal sanctions for gang crime. (*Id*. at p. 907.) The argument in favor of the proposition stated that, "[a]lthough we strongly support preventive mentoring and education, the law must be strengthened to require serious consequences, protecting you from the most violent juvenile criminals and gang offenders." (Ballot Pamp., Primary Elec. (Mar. 7, 2000) argument in favor of Prop. 21, p. 48.) And while the argument against the proposition urged that "California already has tough laws against gang and youth crime" (Ballot Pamp., Primary Elec. (Mar. 7, 2000) argument against Prop. 21, p. 49), the voters approved the initiative measure by a wide margin (see https://ballotpedia.org/California_Proposition_21,_Treatment_of_Juvenile_Offenders_Initiative_(March_2000) [reporting final vote tally of 62.09 percent to 37.91 percent]).

The findings and declarations adopted by the voters as part of Proposition 21 reflect that the measure was designed to ensure robust protection against gang violence. Those findings and declarations reflect the public sentiment in 2000 that "[c]riminal street gangs and gang-related violence pose a significant threat to public safety" and "have become more violent, bolder, and better organized in recent years." (Prop. 21, § 2, subd. (b).) They noted that "vigorous enforcement and the adoption of more meaningful criminal sanctions, including the voter-approved 'Three Strikes' law" had reduced some forms of crime, but that youth gang violence "has proven most resistant to this positive

trend." (Prop. 21, § 2, subd. (c).) The voters also declared that "[g]ang-related felonies should result in severe penalties" and "[l]ife without the possibility of parole or death should be available for murderers who kill as part of any gang-related activity." (Prop. 21, § 2, subd. (h).) And they concluded that "[d]ramatic changes are needed in the way we treat juvenile criminals [and] criminal street gangs . . . if we are to avoid the predicted, unprecedented surge in juvenile and gang violence." (Prop. 21, § 2, subd. (k).) These findings do not suggest that the voters intended to grant the Legislature the power to narrow the scope of Proposition 21's new protections, such as by amending the definition of a criminal street gang without supermajority consensus.

To further the electorate's purposes, Proposition 21 made a number of changes to strengthen the laws concerning juvenile offenders, for example by mandating prosecution in adult court for certain crimes. (Prop. 21, §§ 18-34.) Proposition 21 also, among other things, increased penalties for existing specific offenses (see Prop. 21, §§ 4, 12) and added new gang-related offenses (see Prop. 21, §§ 3, 4, 5, 6). Among these reforms was the creation of the new special circumstance for murders where "[t]he 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." (Prop. 21, § 11.)

Legislative narrowing of Proposition 21's reforms, including the gang-murder special circumstance, would be incongruent with the electorate's unambiguously broad intent to deter and reduce gang violence through increased criminal sanctions, particularly as related to "murderers who kill as part of *any* gang-related activity." (Prop. 21, § 2, subd. (h), italics added.) Indeed, the electorate specified as part of the enactment that "if any provision in this act conflicts with another section of law which provides for a greater penalty or longer period of imprisonment that the latter provision shall apply, pursuant to Section 654 of the Penal Code." (Prop. 21, § 37.) This provides a strong indication of the electorate's understanding that, if anything, the Legislature might separately bolster Proposition 21's protections, but it could not contract them without the supermajority required to amend the initiative.

3. Because Proposition 21 incorporated the then-existing definition of a criminal street gang, a later narrowing of that definition would take away from the initiative measure

For the foregoing reasons, Proposition 21's incorporation of the criminal-street-gang definition in section 186, subdivision (f), must be understood as time-specific. Given the time-specific incorporation, application of AB 333's later, narrowed definition to the gang-murder special circumstance would take away from, and therefore impermissibly amend, Proposition 21.

For instance, as the court below correctly noted (Opn. 32-33), under the version of section 186.22 in effect in 2000, an active gang member who intentionally killed a person would be subject to a sentence of death or life without parole under section 190.2,

subdivision (a)(22), even if the prosecution's evidence showed only that the gang's pattern of criminal activity benefitted it in strictly reputational ways. (Prop. 21, §§ 4, 11.) The same would be true for a gang-related killing where the prosecution's evidence showed that the gang's primary activities included only looting and felony vandalism, or where the prior crimes establishing the pattern of criminal activity were more than three years old. (Prop. 21, §§ 4, 11.) But those same gang members would not be subject to the gang-murder special circumstance under AB 333's amendments to section 186.22. In these situations, AB 333's narrowed definition of a criminal street gang would effectively reduce the universe of offenders liable for enhanced punishment under Proposition 21.

Indeed, the Legislature itself has in the past signaled its understanding that Proposition 21 required very similar amendments to section 186.22's definition of a criminal street gang to be approved by a supermajority. For example, in 2005, the Legislature added five new predicate offenses to the definition of "pattern of criminal gang activity" in section 186.22, subdivision (e), and added subdivision (j), which explains how the enumerated offenses may be used to show a pattern of gang activity. And the Legislature amended section 186.22 again in 2006 by adding three firearm offenses—(31) to (33)—to subdivisions (e), (f), and (j) of section 186.22. In both of these instances where it amended the "pattern of criminal gang activity" requirement embedded in 186.22, subdivision (f), the Legislature appropriately recognized and addressed Proposition

21's supermajority requirement. (Legis. Counsel's Dig., Sen. Bill No. 444 (2005-2006 Reg. Sess.) Stats. 2005, ch. 482 ["Existing law authorizes the Legislature to amend these provisions with a 2/3 vote of each house"]; Legis. Counsel's Dig., Sen. Bill No. 1222 (2005-2006 Reg. Sess.) Stats. 2006, ch. 596 [same].) This indicates that even the Legislature itself at one time understood section 190.2's incorporation of the criminal street gang definition to implicate the constitutional rule governing amendment of an initiative measure in article II, section 10, subdivision (c).

Moreover, even aside from the language in section 190.2 that specifically incorporates section 186.22 with respect to the requirement that the defendant was an "active participant in a criminal street gang," the gang-murder special circumstance also requires that the murder "was carried out to further the activities of the criminal street gang." (§ 190.2, subd. (a)(22).) That language is "substantially parallel" to the gang-purpose language of the gang enhancement as it was defined in section 186.22, subdivision (b)(1), before AB 333. (*People v. Carr* (2010) 190 Cal.App.4th 475, 488; see also *People v. Mejia* (2012) 211 Cal.App.4th 586, 613-614; CALCRIM No. 736; CALJIC No. 8.81.22.) AB 333 narrows this gang-purpose requirement, providing that "to benefit, promote, further, or assist means to provide a common benefit to members of a gang where the common benefit is more than reputational." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (g); see *People v. Oliva* (2023) 89 Cal.App.5th 76, 87-88 [AB 333 "clarified what is required to show an offense 'benefit[s], promote[s], further[s], or assist[s]' a criminal street

gang[]" under section 186.22, subdivision (b)(1)].) Applying that definition would run counter to the separate requirement, contained in section 190.2, subdivision (a)(22) itself, that a broader understanding of common benefit controls.

In light of the voters' intent, including the specific incorporation of section 186.22 within Proposition 21 and the other language in section 190.2, as well as the legislative history of earlier amendments to section 186.22, the application of AB 333 to section 190.2, subdivision (a)(22) constitutes an amendment to a voter-enacted statute and is constitutionally barred. (See Cal. Const., art. II, § 10(c); *Kelly, supra,* 47 Cal.4th at p. 1048.) By Proposition 21's express terms, it instead falls to the electorate or a supermajority of the Legislature to alter the scope of the gang-murder special circumstance.[8]

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[8] Only an isolated aspect of AB 333—its amendment of section 186.22, subdivisions (e) and (f), if applied to the gang-murder special circumstance—would improperly amend Proposition 21. As the Court of Appeal held below (Opn. 37), to avoid the constitutional infirmities discussed here, "the appropriate remedy . . . is to disapprove, or disallow, only the unconstitutional application of [the subsequent legislative provision], thereby preserving any residuary constitutional application with regard to the other provisions of the [amended law]." (*Kelly, supra,* 47 Cal.4th at p. 1048.) A statute may be deemed unconstitutional "as applied" to a particular "context" without rendering it "utterly inoperative." (*People v. Rodriguez* (1998) 66 Cal.App.4th 157, 167.)

B. Rojas's contrary arguments are unpersuasive

Rojas makes several arguments in support of his position that the Legislature's narrowed definition of a criminal street gang can constitutionally apply to the gang-murder special circumstance. His arguments are unpersuasive.

1. A narrowed definition of a criminal street gang, if applied to the gang-murder special circumstance, would take away from what the voters intended in passing Proposition 21

Rojas argues that AB 333 does not take away from Proposition 21 within the meaning of article II, section 10, subdivision (c), because some form of gang-murder special circumstance persists after AB 333 and still allows elevated punishment for certain gang murders. (OBM 21-23; see also *People v. Lee* (2022) 81 Cal.App.5th 232, 244, review granted Oct. 19, 2022, S275499.) Rojas is correct that application of AB 333 to the gang-murder special circumstance would not eliminate the offense in its entirety. However, the application Rojas urges would leave the special circumstance in a diminished form that the voters did not intend.

The gang-murder special circumstance is not merely a penalty provision that the electorate intended to apply to a universe of crimes that the Legislature could redefine; rather, the special circumstance states particular conduct necessary to support the increased penalty. That conduct is in part defined by specific citation to section 186.22, subdivision (f). Thus, in establishing the new special circumstance, the electorate necessarily targeted particularly defined conduct as part of its broad effort to combat gang violence.

Rojas's view that the constitutional problem is avoided simply because the Legislature left the gang-murder special circumstance intact in some form cannot be squared either with the specific incorporation of section 186.22 within the definition of the new special circumstance or with the broad vision for combatting gang crime that was expressed by the electorate in passing Proposition 21. All indications concerning the motivations and intent behind Proposition 21 reflect that the electorate wanted to substantially expand protections against gang crime; conversely, there is nothing to suggest that the electorate might have understood that the Legislature could reduce that protection without a supermajority vote by narrowing the particular conduct that the initiative described and targeted for increased punishment.

This Court's decision in *Kelly* is instructive. That case concerned whether an aspect of the legislatively-enacted Medical Marijuana Program (MMP) impermissibly amended Proposition 215's Compassionate Use Act (CUA). The CUA established a defense to certain criminal offenses, permitting individuals to possess and cultivate a quantity of marijuana reasonably related to their medical needs. (*Kelly, supra*, 47 Cal.4th at pp. 1027-1028.) Later, the Legislature enacted the MMP without voter approval, which, among other things, imposed specific quantity limitations on the CUA's personal possession and cultivation defense. (*Id*. at pp. 1012-1014.) This Court held that the quantity limitations violated article II, section 10, subdivision (c).

At the outset, the Court observed that a conclusion that our Constitution "prohibits an amendment that arguably merely clarifies an initiative statute by substituting seemingly reasonable, objective standards and restrictions, in place of a difficult-to-apply 'reasonable amount' test—may at first blush seem to be overly strict." (*Kelly*, *supra*, 47 Cal.4th at p. 1030.) But *Kelly* explained that, while this "almost certainly would *not* be the conclusion reached by a court faced with similar legislation under the law of any other state" it was nonetheless "compelled by, not only the prior California cases that have discussed the initiative power and applied the foregoing constitutional provision, but also by the history of our state's initiative process." (*Ibid*.)

The Court then surveyed the history of the initiative power in the United States and California, observing that this State's implementation of that power leaves "voter-adopted initiative statutes in California far more insulated from adjustment than in any other jurisdiction." (*Kelly*, *supra*, 47 Cal.4th at pp. 1032-1042.) It noted that, although various proposals had been advanced over the years to grant the Legislature some power in California's initiative process, none of those had been adopted. (*Id*. at pp. 1044-1045.) In fact, the only power subsequently granted to the Legislature in this area has been to allow it to merely propose amendment of an initiative measure, subject to approval by the electorate. (*Id*. at p. 1045.) "That minor adjustment to the strict rule of nonamendability highlights and reinforces the closely circumscribed limits of the Legislature's

authority in this regard: the Legislature is powerless to act *on its own* to amend an initiative statute. Any change in this authority must come in the form of a constitutional revision or amendment to article II, section 10, subdivision (c)." (*Id.* at pp. 1045-1046.)

With those principles in mind, the Court concluded that the MMP's quantity limits could not be constitutionally applied to the CUA. It observed that the MMP "did not literally amend the statute" but sought to "clarify the scope of the application" of the CUA by creating several new code sections addressing "the general subject matter covered by the CUA." (*Kelly*, *supra*, 47 Cal.4th at p. 1014.) That, however, did not avoid the constitutional problem. The Court reasoned that the MMP's "quantity limitations conflict with—and thereby substantially restrict—the CUA's guarantee that a qualified patient may possess and cultivate any amount of marijuana reasonably necessary for his or her current medical condition." (*Id.* at p. 1043.) The legislation thus "effectuates a change in the CUA that takes away from rights granted by the initiative statute" and "[i]n that respect, [the MMP] improperly amends the CUA in violation of the California Constitution." (*Ibid.*) "Therefore," the Court continued, "we are compelled to conclude that section 11362.77 impermissibly amends the CUA and . . . is unconstitutional as applied in this case." (*Id.* at p. 1046.)

Like *Kelly*, this case does not involve the Legislature's direct alteration of a prior law enacted by initiative measure and could, at an artificially general level, be said to concern only legislation related to the same subject matter. But, similar to the legislation

in *Kelly*, AB 333's alteration of the criminal street gang definition would take away from what the voters established in Proposition 21 by narrowing the scope of the gang-murder special circumstance. Given the language that the electorate chose when enacting section 190.2, subdivision (a)(22), it does not matter, for purposes of article II, section 10, subdivision (c), that AB 333 might still allow application of the special circumstance in some narrower subset of cases. Under the circumstances here, the initiative measure cannot be narrowed in the way AB 333 operates, except by voter approval or a supermajority of the Legislature.

Rojas relies on *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270 to support his argument that the definition of a criminal street gang is distinct from the subject matter of the gang-murder special circumstance for purposes of the amendment question in this case. (OBM 23-26.) He is mistaken. The analysis in *Gooden* was dependent on circumstances that fundamentally distinguish that case from this one.

Gooden concerned Senate Bill No. 1437's recent amendments to the law of murder, which restricted felony murder liability and eliminated entirely the natural and probable consequences theory of liability for murder. (*Gooden*, *supra*, 42 Cal.App.5th at pp. 275-277; see also Stats. 2018, ch. 1015.) The issue in *Gooden* was whether that narrowing of the permissible bases of murder liability amounted to an unconstitutional amendment of

Propositions 7 and 115. (*Gooden*, *supra*, 42 Cal.App.5th at pp. 278-279.)[9]

As explained by the *Gooden* court, Proposition 7, among other things, increased sentences for first and second degree murder and expanded the list of special circumstances that elevate the punishment for murder to death or life in prison without parole. (*Gooden*, *supra*, 42 Cal.App.5th at pp. 280-281.) The court observed that "[t]he elements of an offense and punishment are . . . closely and historically related" but nonetheless are "not synonymous." (*Id*. at p. 281.) It further observed that in enacting Proposition 7, the electorate intended only to increase punishments, whereas SB 1437 did not address punishment but instead amended the mental state requirements for murder. (*Id*. at p. 282.) Thus, the court concluded, "Senate Bill 1437 presents a classic example of legislation that addresses a subject related to, but distinct from, an area addressed by an initiative." (*Ibid*.)

The *Gooden* court noted that the district attorney conceded this distinction but relied on the *Palermo* rule, arguing that Proposition 7 must have intended its increased punishments to apply to murder as it was then defined. (*Gooden*, *supra*, 42

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[9] In *Gooden*, the People were represented by the San Diego County District Attorney's Office, who argued that SB 1437 unconstitutionally amended Propositions 7 and 115. (*Gooden*, *supra*, 42 Cal.App.5th at p. 273.) The Attorney General appeared as amicus curiae at the request of the court and argued that there was no unconstitutional amendment. (*Id*. at pp. 274, 280.)

Cal.App.5th at pp. 282.) The court rejected that argument, concluding instead that Proposition 7's reference to "murder in the first degree" and "murder in the second degree" were only general references and therefore subject to *Palermo*'s "cognate rule" that a general reference takes the law as it may be amended from time to time. (*Id*. at pp. 282-283.) It reasoned: "Proposition 7 did not identify specific provisions of the Penal Code pertaining to the offense of murder, as opposed to the punishments for murder. If the drafters of Proposition 7 had intended to incorporate the definition of murder as the offense was understood in 1978, we expect the initiative, at minimum, would have cited or referred to the statutory provisions defining murder (§ 187), malice (§ 188), or the degrees of murder (§ 189)." (*Id*. at p. 283.)

The court also concluded that no extrinsic indicia of electoral intent indicated that Proposition 7's increased punishments were understood by the voters as applying to murder only as it was then defined. (*Gooden*, *supra*, 42 Cal.App.5th at p. 284.) It observed that the ballot materials "all concern the issue of punishment. By contrast, they are silent on the critical issues addressed by Senate Bill 1437." (*Id*. at pp. 284-285.) Thus, the court concluded that SB 1437's changes to the permissible theories of murder liability did not unconstitutionally amend Proposition 7. (*Id*. at p. 286.)

The *Gooden* court reached the same conclusion with respect to Proposition 115 "[f]or many of the same reasons." (*Gooden*, *supra*, 42 Cal.App.5th at p. 286.) Proposition 115, in relevant

part, "added kidnapping, train wrecking, and certain sex offenses to the list of predicate felonies giving rise to first degree felony-murder liability." (*Id*. at p. 287; see also Prop. 115, § 9.) The court concluded that SB 1437 did not address a matter that Proposition 115 authorizes or prohibits. It "did not augment or restrict the list of predicate felonies on which felony murder may be based, which is the pertinent subject matter of Proposition 115. It did not address any other conduct which might give rise to a conviction for murder. Instead, it amended the mental state necessary for a person to be liable for murder, a distinct topic not addressed by Proposition 115's text or ballot materials." (*Gooden*, *supra*, 42 Cal.App.5th at p. 287.) The *Gooden* court also rejected the district attorney's argument that, by reenacting the Penal Code section listing the predicate felonies for felony murder, Proposition 115 immunized that section from legislative amendment under article II, section 10, subdivision (c). (*Id*. at pp. 287-288.) Pointing to this Court's decision in *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214-215, the court reasoned that a mere technical reenactment like the one made by Proposition 115 does not preclude the Legislature from amending provisions of the reenacted statute. (*Gooden*, *supra*, 42 Cal.App.5th at p. 288.)

Gooden's rationale, including its discussion of the distinction between punishments and underlying crimes, is grounded in circumstances that are materially different from this case. Here, the electorate established a new special circumstance by defining particular conduct in part by way of reference to a specific

statute—section 186.22, subdivision (f)—that the Legislature later amended. Such specific incorporation was conspicuously absent in *Gooden*. Indeed, it was a dispositive basis for the *Gooden* court's rejection of the district attorney's argument with respect to Proposition 7. (*Gooden*, *supra*, 42 Cal.App.5th at p. 283.)

In addition, the *Gooden* court's analysis was driven heavily by different considerations about the electoral intent behind the two initiatives at issue there, both of which focused on subject matter distinct from that of SB 1437's reforms to the mental state requirement for certain theories of murder liability. Here, as explained, Proposition 21's motivation was to broadly combat certain defined gang conduct, and it did so both by establishing new crimes and increasing penalties for particular gang-related offenses. It did not solely focus on issues of punishment as distinct from proscribed conduct; rather, the electorate created the new gang-murder special circumstance itself. Both of those critical differences distinguish *Gooden*'s analysis.

2. The electorate did not intend to allow the Legislature to narrow the scope of the gang-murder special circumstance without a supermajority vote

Rojas gives several reasons why, in his view, the electorate did not intend a time-specific incorporation of section 186.22's definition of a criminal street gang. (OBM 32-40.)

He first attaches significance to the fact that Proposition 21 specifically stated in two separate provisions that the initiative incorporated certain statutes as they existed on the effective date of the act. Rojas contends that the absence of such language in

section 190.2, subdivision (a)(22), thus reveals an intent to allow legislative amendment. Rojas points to Section 14 of Proposition 21, which states: "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 subdivisions (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." (Prop. 21, § 14.) And section 16 of Proposition 21 states: "Notwithstanding Section 2 of Proposition 184, as adopted at the November 8, 1994 General Election, for 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." (Prop. 21, § 16.) Rojas reasons that if the electorate had also intended to make a time-specific incorporation of section 186.22, subdivision (f), in section 190.2, subdivision (a)(22), then the initiative would have said so in a manner similar to sections 14 and 16. (OBM 32-35; see also *People v. Lopez* (2022) 82 Cal.App.5th 1, 24-25; *Lee*, *supra*, 81 Cal.App.5th at pp. 242-243.)

Those time-locking provisions, however, were necessary to convey the electorate's intent that sections 667 and 1170.12, which Proposition 21 did not directly amend, were to implement the initiative's amendments to *other* statutes that sections 667 and 1170.12 referenced and which Proposition 21 did amend. Section 667 addresses sentencing for repeat offenders, and section 1170.12 describes the sentencing procedure when a prior

violent or serious felony has been pled and proved. Both of those statutes refer to the list of serious felonies at section 1192.7 and to the list of violent felonies at section 667.5. Proposition 21 amended both of those lists, but did not directly alter section 667 or section 1170.12. (Prop. 21, §§ 15, 17.) It therefore set out the time-locking provisions in order to clarify that the lists of serious and violent felonies to be applied under sections 667 and 1170.12 were the ones that Proposition 21 had just amended.

No such procedure was necessary as to the gang-murder special circumstance that Proposition 21 created by establishing section 190.2, subdivision (a)(22). That section itself specifically incorporated the already-existing section 186.22 definition of a criminal street gang. And while Proposition 21 amended section 186.22 in other respects, it left the broad language defining gangs and gang activity in subdivisions (e) and (f) untouched. (Prop. 21, § 4.) It would have been unnecessary for the electorate to state that it endorsed the definitions in a statute that were not disturbed by Proposition 21 itself. Thus, the inference Rojas seeks to draw from Proposition 21's other time-locking provisions is unsound, as those provisions were drafted as they were for reasons that are inapplicable to section 190.2, subdivision (a)(22).

Rojas additionally contends that "[t]he voters who adopted Proposition 21 are presumed to know that section 186.22 had been amended repeatedly by the Legislature in the past" and thus would have had no reason to believe that "future amendments to section 186.22(f) would not apply to section 190.2(a)(22)." (OBM 35-37.) But that argument is inconsistent

with the electorate's manifest intent to substantially augment protections against violent gang crime, including by punishing more harshly "murderers who kill as part of *any* gang-related activity." (Prop. 21, § 2, subd. (h), italics added.) It would be strange, in light of that intent, to conclude that the electorate also understood that the Legislature was free to narrow—in potentially significant ways—the scope of the protections that Proposition 21 established.

Indeed, the history of amendments that Rojas points to only reinforces that this was not likely the electorate's understanding. The amendments to section 186.22 between its creation and the passage of Proposition 21 had expanded rather than limited the universe of offenders potentially subject to punishment for gang-related crimes. For example, in 1994, section 186.22 was amended to increase the number of crimes that may be used as gang predicate offenses, including by adding felony vandalism and looting. (Former § 186.22, subd. (e)(13), (20), as amended by Stats. 1994, ch. 47, § 1.) The law was further amended that same year to add the offenses of criminal sale of a firearm and possession of a concealable firearm. (Former § 186.22, subds. (e)(22)-(23), as amended by Stats. 1994, ch. 451, § 1.) In 1997, the law was again amended to criminalize witness intimidation by gangs. (Former § 186.22, subd. (b)(5), as amended by Stats. 1997, ch. 500, § 2.)

What the Legislature had *not* done between the creation of section 186.22 in 1988 and the passage of Proposition 21 in 2000 was *limit* the definition of a street gang. The original version of

the STEP Act listed seven predicate offenses that could be used to show a gang's pattern of criminal activity under section 186.22, subdivision (e). By the time the voters passed Proposition 21 in 2000, the list had substantially expanded to 25 offenses rather than seven. (Prop. 21, § 4.) And the provision defining a pattern of criminal gang activity had been amended to generally include conspiracies to commit the listed crimes. (Prop. 21, § 4.)

In short, there is no reason to believe, based on the Legislature's amendments to section 186.22 leading up to 2000, that the electorate expected or intended to grant the Legislature the power to limit the application of section 186.22 without a supermajority. To the contrary, the voters adopted Proposition 21 to create *harsher* punishments for criminal street gangs that commit murder, and, in doing so, limited the Legislature's ability to amend such punishments. The electorate would not have expected that the Legislature would be able to narrow the definition of a criminal street gang as it saw fit, without adhering to the supermajority requirement in the initiative, especially given that the Legislature had never undertaken to limit the law in that way before.

Finally, Rojas makes a more general argument that AB 333's change to the definition of a criminal street gang "comports with the voters' intent in adopting Proposition 21" because it "simply refines what constitutes an organized criminal street gang, consistent with current knowledge, based on over 20 years of experience." (See OBM 37-40.) Those policy arguments, however, must be directed at the electorate and a supermajority

of the Legislature. The legal question presented in this case is whether the electorate intended to authorize the Legislature to alter the circumstances in which the gang-murder special circumstance would apply. The answer to that question is no. Proposition 21 authorizes changes based on evolving public policy as determined by the Legislature—but only when consensus on that question reaches a supermajority. There was no such consensus behind AB 333.

3. Any practical irregularities are simply the product of the Legislature's choice to enact reforming legislation up to, and in this case beyond, the constitutional limit of its power

Finally, Rojas contends that applying the definition of a criminal street gang as it existed when Proposition 21 was enacted to the gang-murder special circumstance would lead to "unreasonable consequences." (OBM 40-44.) He points out 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." (OBM 40-41.) He also observes that section 186.22's definition of a criminal street gang has been incorporated in other statutes besides section 190.2, none of which would require application of a different definition as would the gang-murder special circumstance. (OBM 41-43.)

Rojas overstates the extent to which differing applications of the gang enhancement statute and the gang-murder special circumstance would lead to practical difficulties or irregularities. It is not incongruous to impose harsher punishment for gang-related special circumstance murder, while narrowing the cases

in which gang-related enhancements apply for lesser crimes. To be sure, it would be simpler and potentially less confusing to implement parallel definitions of the term "criminal street gang" under all statutes that incorporate that term. But the divergence is simply the necessary consequence of the enactment of AB 333 without a two-thirds majority, and it is presumed the Legislature was aware of that fact. (See, e.g., *Oluwa*, *supra*, 207 Cal.App.3d at pp. 444-446 [time-specific incorporation by initiative measure resulting in simultaneous operation of both former and current custody credit formulae]; see also *Arthur Andersen v. Superior Court* (1998) 67 Cal.App.4th 1481, 1500-1501 [the Legislature is presumed to know existing law when it enacts a new statute].)

The practical difficulties Rojas points to might very well be relevant in construing a purely legislative enactment. (See OBM 43, discussing *Doe v. Saenz* (2006) 140 Cal.App.4th 960, 982-983.) But those considerations cannot overcome the requirements of article II, section 10, subdivision (c). Were it otherwise, the Legislature could always circumvent that constitutional provision by simply crafting legislation in a way that presents sufficient practical problems to justify overriding the will of the electorate.

Given article II, section 10, subdivision (c), the Legislature's prerogative to implement its policy choices—at least, absent a supermajority—must end where the electorate has already spoken. "[I]t matters not whether the drafters, voters or legislators consciously considered all the effects and interrelationships of the provisions they wrote and enacted." (*People v. Garcia (*1999) 21 Cal.4th 1, 14.) "We must take the

language . . . as it was passed into law, and must, . . . without doing violence to the language and spirit of the law, interpret it so as to harmonize and give effect to all its provisions." (*Ibid*.) In this instance, the Legislature has exercised its authority to amend the definition of a criminal street gang as that term applies to the gang enhancement statute—and as it may apply in other contexts as well (see OBM 41-42)—but it may not amend Proposition 21. Our Constitution requires that the electorate's understanding of the scope of the gang-murder special circumstance controls when applying section 190.2, subdivision (a)(22).

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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May 19, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Century Schoolbook font and contains 11,757 words.

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May 19, 2023

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

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

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically.

On May 19, 2023, I electronically served the attached **ANSWER BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system or by electronic mail. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on May 19, 2023, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013-1230, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on May 19, 2023, at Los Angeles, California.

E. Obeso	/s/ E. Obeso
Declarant	Signature

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Supreme Court of California

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