IN SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutions

Other Authorities

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INTRODUCTION

Appellant's opening brief on the merits sets forth why Assembly Bill No. 333 (A.B. 333) does not unconstitutionally amend Proposition 21, if A.B. 333's amended definition of a criminal street gang in Penal Code section 186.22, subdivision (f) (section 186.22(f)),[1] is applied to the gang-murder special circumstance of section 190.2, subdivision (a)(22) (section 190.2(a)(22)). Respondent makes three main arguments in the following order.

First, respondent's answer brief on the merits claims that because section 190.2(a)(22) refers to and cites section 186.22(f), the reference is a time-specific incorporation under *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53 (*Palermo*). (Ans. Brief, pp. 27-36.) It is not. Under the modern interpretation of

[1] Undesignated section references are to the Penal Code.

the *Palermo* rule, unless the statute that makes the reference states, or somehow signals, a time-specific incorporation, the issue is one of judicial construction, especially regarding the intent of the body that enacted the referring statute. (See Argument A, *post.*)

Second, respondent acknowledges that the *Palermo* rule requires consideration of the enacting body's intent where a reference to another statute is unclear. However, respondent incorrectly argues that all indicia of voter intent show section 186.22(f) was a time-specific incorporation into section 190.2(a)(22). (Ans. Brief, pp. 36-39.) Nothing supports this conclusion. All indicia of voter intent, and all relevant rules of judicial construction, show the reference was not time-specific. (See Argument B, *post.*)

Third, respondent echoes the majority opinion in *People v. Rojas* (2022) 80 Cal.App.5th 542, 554-555 (*Rojas*), which holds the narrowed definition of a criminal street gang in Assembly Bill No. 333 (A.B. 333) takes away from Proposition 21, if applied to section 190.2(a)(22), because the potential universe of offenders subject to the gang-murder special circumstances would be reduced. (Ans. Brief, pp. 39-42.) Under established legal principles, A.B. 333 does not take away from Proposition 21. The Proposition 21 voters still have what they enacted in section 190.2(a)(22), a gang-murder special circumstance, which prescribes harsh punishment. As permitted, A.B. 333's amended definition of a criminal street gang is related to, but distinct from, the gang-murder special circumstance. (See Argument C, *post.*)

In a separate and final section of respondent's brief, respondent discusses and opposes appellant's arguments. (Ans. Brief, pp. 43-58.) To provide coherence to the parties' arguments, this brief replies to respondent's three main arguments in the order presented. Concurrently, appellant integrates and addresses respondent's claims from the final section of respondent's brief as relevant to each main argument.

ARGUMENT

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

A. The *Palermo* Rule Does Not Support Respondent's Argument That Because Penal Code Section 190.2(a)(22) Cites Penal Code Section 186.22(f), the Reference is Time-Specific to the Date of Proposition 21's Adoption

Respondent prefaces its argument under the *Palermo* rule with the caption: "Proposition 21's citation of section 186.22, subdivision (f) indicates that the incorporation of that statute was time-specific." (Ans. Brief, p. 27.) Respondent argues that Proposition 21's language unambiguously reflects an intent to incorporate the definition of a criminal street gang in section 186.22 as it existed in 2000. (Ans. Brief, pp. 27-28.) Respondent's argument is erroneous under the modern application of the *Palermo* rule.

As explained in *In re Jovan B.* (1993) 6 Cal.4th 801 (*Jovan B.*), a specific citation or reference to another statute, unless stated as time-specific, is considered ambiguous and always requires examination of the intent of the body that enacted the referring statute. (*Id.* at p. 816.) "Several modern decisions have applied the *Palermo* rule, but none have done so without regard to other indicia of legislative intent." (*Id.* at p. 816, fn. 10; see also *People v. Pecci* (1999) 72 Cal.App.4th 1500, 1505 ["the *Palermo* rule is not to be applied in a vacuum;" the "determining factor is legislative intent"].)

Because section 190.2(a)(22) refers to "a criminal street gang, as defined in subdivision (f) of Section 186.22," without stating a time-specific limitation, the reference is considered unclear, and the intent of the Proposition 21 voters is the critical consideration.

Respondent argues *Palermo* is instructive. (Ans. Brief, pp. 28-30.)

Palermo is a 1948 decision, which initially states, "`[W]here a statute adopts by specific reference the provisions of another statute. . . , such provisions are incorporated in the form in which they exist at the time of the reference. . . ." (*Palermo, supra,* 32 Cal.2d at p. 58-59.) On the other hand, *Palermo* states "`there is a cognate rule. . . 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.)

Under the cognate rule of *Palermo, supra,* 2 Cal.2d at p. 59, section 190.2(a)(22)'s reference to section 186.22(f)'s definition of a criminal street gang is a general reference. Appellant's opening brief discusses two cases that support this conclusion, *People v. Van Buren* (2001) 93 Cal.App.4th 875 (*Van Buren*), overruled on other grounds by *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 3, discussed in appellant's opening brief, page 30, and *Doe v. Saenz* (2006) 140 Cal.App.4th 960 (*Saenz*), discussed in appellant's opening brief, pages 28-29, and 43. Respondent makes no effort to refute these cases.

Both cases hold that a specific citation to section 667.5, subdivision (c) (section 667.5(c)), which defines a "violent felony," is a general, not a specific reference, because section 667.5(c) defines a particular term and is an important subject present in many statutes. Similarly, section 186.22(f) defines a particular term, a "criminal street gang," which is an important subject present in many other statutes. (See appellant's opening brief, pp. 41-43, noting some of these statutes.)

In *Van Buren, supra,* 93 Cal.App.4th at pp. 878-880, the court held that section 2933.1, which limits custody credits for persons convicted of felonies "listed in Section 667.5" was not a time-specific incorporation of section 667.5 as of the date of section 2933.1's adoption, despite the specific reference to section 667.5. The court held that section 2933.1 was intended to apply generally to the

violent felonies listed in section 667.5(c) as amended from time to time. (*Ibid.*) The court noted that section 667.5(c) "is a critical element in the general body of law concerning treatment of violent criminals," and that the legislative history of section 2933.1 confirmed the Legislature "was considering crimes of violence as a category of offense which may evolve over time." (*Id.* at pp. 880-881.)

In *Saenz, supra*, 140 Cal.App.4th at pp. 972-974, the court considered four statutes that granted exemptions to persons otherwise prohibited from working in licensed care facilities, but excluded from exemption, any person convicted of a crime specified in section 667.5(c). (*Id.* at pp. 972-974, 982.) *Saenz* held that the exemption statutes did not incorporate section 667.5(c) in any time-specific way, and that based on a consideration of legislative intent, the reference was a general reference, which automatically incorporated changes made to section 667.5(c) over time. (*Id.* at pp. 972-974, 981-982.) *Saenz* noted that section 667.5(c) contained a legislative declaration that particularly violent felonies warranted punishment and held that section 667.5(c) was "a reference to a general body of law setting forth violent crimes the Legislature has deemed particularly worthy of condemnation." (*Id*. at p. 982.) In reaching this conclusion, *Saenz* also relied on the practical consideration that the references to section 667.5(c) in other statutes containing employment or licensing restrictions were so numerous, that it was "unlikely the Legislature intended to freeze the list of disqualifying offenses for each licensing statute based upon the version of Penal Code section 667.5(c) in effect at the time each statute's incorporating language was enacted." (*Id.* at pp. 982-983.)[2]

Based on the same analysis as in *Van Buren* and *Saenz*, the reference in section 190.2(a)(22) to section 186.22(f) is a general, not a specific reference. Just

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[2] Respondent cites *Saenz* only in arguing that the consequences of a given interpretation are only relevant in construing a legislative, not an initiative statute. (Ans. Brief, p. 57.) This claim is erroneous, as set forth in Argument B, 4, *post*.)

as the references to section 667.5's definition of a violent felony is a general subject covered in many statutes, the references to section 186.22(f)'s definition of a criminal street gang is a general subject covered in many statutes. In addition, nothing in Proposition 21 or its ballet material suggests the voters intended a time-specific incorporation of the then-current version of section 186.22(f) into section 190.2(a)(22). All indications are to the contrary. (See Argument B, *post*.)

Although respondent recognizes that the purpose of the *Palermo* rule is to arrive at an interpretation consistent with the law's purpose and the intent of the enacting body, respondent, nevertheless, maintains that when a statute refers *specifically* to another statute, the reference is the same as if the referred to statute was set out verbatim and means the reference remains fixed. (Ans. Brief, pp. 29-30.) Respondent misinterprets the *Palermo* rule, which has evolved over time. As explained in *Jovan B., supra,* 6 Cal.4th at p. 816, "[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.]" In such cases, the overarching consideration is the intent of the body that enacted the referring statute.

Respondent states appellant relies principally on *Jovan B.*, which respondent argues is distinguishable factually from the instant case. (Ans. Brief, pp. 35-36.) Appellant does rely on the *principles* set forth in *Jovan B.* No case from this Court since *Jovan B.* has deviated from *Jovan B.'s* holding that under the modern application of the *Palermo* rule, where the reference to another statute is not clear that a time-specific incorporation is intended, the issue is one of legislative intent. (*Jovan B., supra,* 6 Cal.4th at pp. 816, 816, fn. 10.)

Jovan B. does rely on statutes different from those at issue here, as noted by respondent. However, *Jovan B.* largely turns on the issue of legislative intent. In *Jovan* B., the minor argued that an enhancement under section 12022.1, which was part of the Determinate Sentencing Act (DSA), did not apply to his maximum

period of confinement under Welfare and Institution Code section 726, because section 12022.1 used terms applicable only to criminal proceedings, such as "conviction. "(*Jovan B., supra,* 6 Cal.4th at p. 808.) Under Welfare and Institutions Code section 726, a juvenile could not be held longer than the maximum term of imprisonment applicable to an adult convicted of the same offense, and the statute referred to Penal Code sections 1170, subdivision (a)(2) and 1170.2, subdivision (a), which were part of the DSA. (*Id.* at pp. 809-810, 818.) This Court rejected the minor's argument that the enhancement, which was added to the DSA after Welfare and Institutions Code section 726 was last amended, did not apply to him. (*Id.* at pp. 815-816, 820.) The Court found that under *Palermo,* Welfare and Institutions Code section 726's reference to sections 1170, subdivision (a)(2) and 1170, subdivision (a) was a general reference to the DSA, based on the determination of legislative intent to treat adult and juvenile offenders the same in terms of their maximum terms of confinement. (*Id.* at p. 816, 819.) The Court also noted the absurdity of believing the Legislature would have anticipated that Welfare and Institution Code section 726 would have to be amended every time the determinate sentencing law was amended. (*Id.* at p. 819.)

Jovan B. shows that a specific reference may, in context, be a general reference, and *Jovan B.* did not indicate that a statutory reference had to be to a whole system or body of laws, such as the determinate sentencing law, to be a general reference that would change over time.

None of the three other modern cases discussed by respondent holds that a specific citation of another statute or reference to a law, by itself, indicates a time-specific incorporation, or supports respondent's claim that section 190.2(a)(22)'s citation of section 186.22(b) was a time-specific reference. The issue is more complex and requires consideration of the intent of the Proposition 21 voters in enacting section 190.2(a)(22).

Respondent first discusses *People v. Anderson* (2002) 28 Cal.4th 767

(*Anderson*) as being instructive. (Ans. Brief, p. 30.) *Anderson* is instructive, but only in a manner supporting appellant's position that in the face of ambiguity whether a reference to another law is time-specific, the key issue is the intent of the body that enacted the reference. The statute at issue in *Anderson* was section 26, which since its adoption in 1872, had provided for the defense of duress "unless the crime be punishable with death." (*Id.* at p. 773.) At that time, all first degree murders were "punishable with death." (*Ibid.*) Defendant argued he was entitled to the defense of duress because his first degree murder conviction, which did not contain a special circumstance finding, was not "punishable with death." (*Id.* at pp. 771-772.) This Court concluded that "duress is not a defense to any form of murder." (*Id.* at p. 780.) The Court ruled primarily on a consideration of legislative intent based on the history of section 26, dating back to the statute's 1850 precursor, as well as the common law, which had provided that fear for one's own life did not justify killing an innocent person. (*Id.* at pp. 770, 774.) The Court found that section 26's exception to the defense of duress for a crime "punishable with death" was intended to cover all killings of innocent persons, as there was no suggestion the Legislature had ever intended the law of duress to fluctuate based on changes in death penalty law. (*Id.* at pp. 774-775.) Among the factors cited by the Court was that otherwise, there would be "strange anomalies," including that "death penalty jurisprudence would control the substantive law of duress." (*Id.* at p. 775.) In rejecting defendant's *Palermo* argument that section 26's reference to a crime "punishable with death" was a general reference, the court noted that although the issue was not clear, and section 26 did not cite specific statutes, "the subject of crimes punishable with death is quite specific," and that under *Jovan B.*, *supra*, 6 Cal.4th at p. 816, the determining factor was legislative intent. (*Anderson, supra*, 28 Cal.4th at p. 779.)

Thus, *Anderson* held that in the face of ambiguity regarding the meaning of a statute's reference to another law, the critical issue is the intent of the body that

enacted the referring statute. Just as *Anderson* looked at the reference from a historical perspective and avoided an interpretation that would lead to anomalous and unreasonable results, this same approach should be followed as to section 190.2(a)(22)'s reference to section 186.22(f). Nothing shows the Proposition 21 voters intended the reference to be time-specific, and such a finding would lead to anomalous and unreasonable results. (See Argument B, *post.*)

Respondent next argues *People v. Domagalski* (1989) 214 Cal.App.3d 1380 (*Domagalski*) is instructive. (Ans. Brief, pp. 31-32.) It is instructive, but like *Anderson,* in appellant's favor. *Domagalski* shows that even in the case of a specific citation to another statute, legislative intent must be considered. In *Domagalski*, the defendant was arrested for Vehicle Code violations and was released pursuant to Vehicle Code section 40307, which permitted release on a written promise to appear as provided in section 853.6, subdivisions (a) through (f). (*Id.* at p. 1383-1384.) After Vehicle Code section 40307's enactment and amendment in 1970, section 853.6, subdivision (e) was amended, and at the time of defendant's arrest, provided that the prosecution's failure to file a complaint within 25 days of arrest required the prosecution to proceed by a new citation or an arrest warrant. (*Id.* at pp. 1384-1385.) Defendant argued his prosecution was barred under this amended version of section 853.6, subdivision (e). (*Id.* at p. 1385.) *Domagalski* adopted the reasoning of an earlier case, *People v. Ramirez* (1984) 154 Cal.App.3d Supp. 1 (*Ramirez*), which held that Vehicle Code section 40307 incorporated section 853.6 only as existent at the date of Vehicle Code section 40307's enactment. (*Id.* at pp. 1385-1386.) *Ramirez* found compelling evidence that the reference was specific, because Vehicle Code section 40307 incorporated only subdivisions (a) through (f) of section 853.6, when section 853.6 then consisted of additional subdivisions. (*Id.* at p. 1386.) In other words, in adopting Vehicle Code section 40307, the Legislature had parsed the provisions of section 853.6 that applied to Vehicle Code section 40307. *Ramirez* also examined

the legislative histories of Vehicle Code section 40307 and section 853.6 and the purposes of these two statutes and found there was no intent to apply the subsequent restrictive provisions on prosecution in section 853.6, subdivision (e) to Vehicle Code section 40307. (*Id.* at pp. 1386-1387.) *Domagalski* explained:

> "A close reading of *Palermo* and the cases cited therein also makes it clear that in cases where it is questionable whether only the original language of a statute is to be incorporated or whether the statutory scheme, along with subsequent modifications, is to be incorporated, the determining factor will be the legislative intent behind the incorporating statute. Legislative intent in this case is evident."

(*Ibid.*) Although *Domagalski* found the citation in Vehicle Code section 40307 to section 853.6, subdivision (e) was a time-specific reference, *Domagalski* relied heavily on legislative intent.

Jovan B. cited *Domagalski* for the proposition that where the words of an incorporating statute do not make clear whether it contemplates only a time-specific incorporation, the determining factor is legislative intent. (*Jovan B.*, *supra* 6 Cal.4th at p. 816.) *Jovan B.* also cited *Domagalski* as among the modern cases that have not applied the *Palermo* rule "without regard to other indicia of legislative intent." (*Id.* at p. 816, fn. 10.) Thus, *Domagalski* does not support respondent's argument that the mere citation to another statute means that the statute was incorporated in a time-specific way.

Respondent also argues that *In re Oluwa* (1989) 207 Cal.App.3d 439 (*Oluwa*) is apposite regarding the correct interpretation of *Palermo*. (Ans. Brief, pp. 32-34.) Respondent ignores the importance *Oluwa* ascribes to the voters' intent as reflected in ballot material. Proposition 7, which was enacted in 1978, revised section 190 to increase the sentence for second degree murder to 15 years to life and to provide that in applying custody credits to the fixed portion of a life term, "[t]he provisions of Article 2.5 (commencing with Section 2930). . . 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.*) In 1982, the defendant in *Oluwa* was sentenced to 15 years to life in prison for second degree murder. (*Id.* at p. 442.) Afterward, the Legislature added sections to Article 2.5 that provided that an already sentenced prisoner could receive 1-for-1 credits. (*Id.* at p. 443.) The court rejected the defendant's argument that he was entitled to the more generous 1-for-1 credits. The court's ruling was premised on both the fact that Proposition 7's reference to Article 2.5 was specific and 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 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.)

Jovan B. cited *Oluwa* as an example of the modern cases under *Palermo* that require consideration of legislative intent and also noted that *Oluwa* "stressed the legislative analysis accompanying the 1978 initiative, which advised voters that murderers sentenced to prison terms of 15 years to life `would have to serve a minimum of 10 years before becoming eligible for parole,´" which showed the electorate intended a second-degree murderer to serve 10 calendar years. (*Jovan B. supra,* 6 Cal.4th at p. 816, fn. 10; see also *People v. Cooper* (2002) 27 Cal.4th 38, 48 [making the same point].)

Thus, *Anderson, Domagalski,* and *Oluwa* do not support respondent's argument that under the *Palermo* rule, section 190.2(a)(22)'s citation or reference to the definition of a criminal street gang in section 186.22(f) must be construed as

a time-specific incorporation. In each of these cases, the court looked to indicia of the enacting body's intent to determine whether a reference to another statute was time-specific or not. Respondent has cited no modern case under the *Palermo* rule that holds that the mere citation or reference to another statute conclusively establishes a time-specific incorporation.

Respondent also argues that voters are presumed to know the interpretive law, and that when the voters passed Proposition 21 in 2000, the *Palermo* rule had for decades held that a citation to another statute was a time-specific incorporation. (Ans. Brief, pp. 34-35.) This argument rests on a factual fallacy. By 2000, judicial interpretations of the *Palermo* rule, including *Jovan B.*, which was decided in 1993, had clearly indicated that unless the language of the reference to another statute is time-specific, the critical consideration is the intent of the body that enacted the referring statute.

Under *Palermo*, there is no categorical, mechanical rule that a statute's specific citation or reference to another statute is a time-specific incorporation, unless stated as such. The predominant consideration is the intent of the body that enacted the referring statute.

B. Under All the Relevant Rules of Judicial Construction, Proposition 21 Did Not Freeze the Definition of a Criminal Street Gang in Penal Code Section 190.2(a)(22)

1. The Proposition 21 Voters' Objective of Imposing Severe Punishment For Gang-Related Crimes Does Not Show They Intended to Make Penal Code Section 190.2, Subdivision (a)(22)'s Reference to Section 186.22, Subdivision (f) a Time-Specific Incorporation

Respondent's answer brief, pages 36-38, notes that the Proposition 21 voters wanted gang-related crimes to be severely punished and argues this confirms section 190.2(a)(22)'s reference to section 186.22(f) was a time-specific incorporation. The voters' goal of imposing severe punishment for gang-related crimes does not mean they intended to freeze the definition of a criminal street gang in section 190.2(a)(22).

Respondent relies on the ballot materials accompanying Proposition 21 in a selective manner and misconstrues the import of the findings and declarations in Proposition 21 to support its claim. As set forth in appellant's opening brief, pages 35-37, the Ballot Pamphlet accompanying Proposition 21 repeatedly and consistently referred to *gang*-related crimes and *gang*-related murder interchangeably, and nothing in the Ballot Pamphlet suggested that future amendments to section 186.22(f) would be impermissible or not apply to section 190.2(a)(22).

Respondent argues that Proposition 21's findings and declarations do not suggest the voters intended to permit the Legislature to narrow the scope of Proposition 21's protections by amending the definition of a criminal street gang without supermajority consensus. (Ans. Brief, p. 38.) The findings and declarations do not address this subject.

Respondent tries to counter appellant's position regarding the import of the Ballot Pamphlet with two arguments. First, respondent argues that in light of the voters' intent to augment the protections against violent gang crimes, including gang murder, it would be strange to conclude the voters would have understood

the Legislature could narrow the scope of the protections established by Proposition 21. (Ans. Brief, pp. 53-54.) A.B. 333 does not narrow the scope of the protections established by Proposition 21; the gang-murder special circumstance still exists. In addition, what would be strange is to infer that the voters believed the Legislature could amend section 186.22(f) without a supermajority vote as to section 186.22's own punishment provisions, but that the amendments would not apply to section 190.2(a)(22).[3] It is unlikely any voter would have engaged in such convoluted thinking.

Second, respondent argues that the amendments to section 186.22 between the date of its enactment and the passage of Proposition 21 expanded, not limited, the definition of a criminal street gang and thus, the universe of offenders potentially subject to punishment for gang-related crimes. The expansion was due mainly to the increase in the list of predicate offenses that make up a pattern of criminal gang activity under section 186.22, subdivision (e). (Ans. Brief, pp. 54-55.) From this, respondent concludes there is no reason to believe the voters intended to grant the Legislature the power to narrow the definition of a criminal street gang without a supermajority vote. (Ans. Brief, p. 55.) This argument is also flawed. Although the predicate offenses listed in section 186.22, subdivision (e) were only increased before the passage of Proposition 21, there is no reason to believe the Proposition 21 voters thought the definition of a criminal street gang could only be amended in this regard, or that a narrowed definition of a criminal

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[3] Respondent concedes that A.B. 333 permissibly amended section 186.22(f) as applied to section 186.22's own punishment provisions. (Ans. Brief, p. 42, fn. 8.) Section 186.22(f) is not considered to be among Proposition 21's statutory provisions. (See *People v. Campbell* (June 30, 2023) ___Cal.App.5th___ [2023 WL 4286790, *14].)

street gang would only apply to section 186.22's punishment provisions, but not section 190.2(a)(22).

In short, the voters had reason to believe, based on Proposition 21's Ballot Pamphlet and findings and declarations, that with future amendments to section 186.22(f), the definition of a criminal street gang would apply equally to the punishment provisions of section 186.22 and section 190.2(a)(22). All respondent can fall back on is its argument that applying A.B. 333's amendments to section 190.2(a)(22) would reduce the scope of the murders subject to the gang-murder special circumstance. This is not true. A.B. 333 did not change the scope of the murders and conduct required to constitute the gang-murder special circumstance. (See Argument C, *post*.)

2. Assembly Bill No. 333's Refinement of the Definition of a Criminal Street Gang Based on What Actually Constitutes an Organized Criminal Street Gang, Comports with Proposition 21's Intent and Is Not Just a Policy Argument That Must Be Adopted by the Legislature

Appellant's opening brief, pages 37-40, argues that A.B. 333's amendments to the definition of a criminal street gang are based on over 20 years of experience, to ensure that only members of organized criminal street gangs are punished, not just persons connected to unorganized racial, cultural, or neighborhood groups. This refinement supports the intent of Proposition 21 to punish members of organized criminal street gangs who commit gang-related crimes more severely.

Respondent tries to dispose of appellant's position by stating this is just a policy argument that must be adopted by the Legislature by a supermajority. (Ans. Brief., pp. 55-56.) On the contrary, Proposition 21's intent and purpose are relevant to the issue before this Court. In interpreting an initiative, the court's "principal objective is giving effect to the intended purpose of the initiative's provisions. [Citation.]" (*People v. Gonzalez* (2018) 6 Cal.5th 44, 50 (*Gonzalez*).) 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.)

Proposition 21 was concerned with punishing gang-related crimes by members of organized criminal street gangs, as opposed to unorganized groups of people associated on a neutral, non-criminal basis. Proposition 21's findings and declarations 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).) This manifests concern with organized criminal street gangs.

A.B. 333's amendments to section 186.22(f) ensure that punishment is applied to criminal conduct that is related to real criminal street gangs and their patterns of criminal gang activity, as opposed to individual crimes committed by persons merely associated on a neutral, non-criminal basis, such as racially, culturally or by neighborhood. A.B. 333's amendments do not change the length of the sentences imposed, or eliminate the gang-murder special circumstance, which prescribes a punishment of death or life imprisonment without the possibility of parole. The amendments simply ensure that the increased punishments in sections 186.22 and 190.2(a)(22) are applied to the type of criminal conduct and groups that the voters intended to address in Proposition 21.

Thus, A.B. 333's refinement of the definition of a criminal street gang enhances Proposition 21's goals.

3. The Proposition 21 Voters Would Have Frozen the Definition of a Criminal Street Gang in Penal Code Section 190.2, Subdivision (a)(22) Had This Been Their Intent, Since They Froze Other Definitions in Punishment Statutes

The Proposition 21 voters knew how to freeze a statutory definition referred to in another statute. They enacted sections 667.1 and section 1170.126, which froze the definition of a "serious felony" in section 1192.7 and of a "violent felony" in section 667.5, which were amended by Proposition 21, with regard to

sections 667 and 1170.12. Appellant's opening brief, pages 32-35, argues that had the Proposition 21 voters intended to freeze the definition of a criminal street gang in section 190.2(a)(22), they would have similarly done so.

Respondent appears to argue that because Proposition 21 did not directly amend sections 667 and 1170.12, the Proposition 21 voters would have thought that lock-in provisions were necessary regarding the definitions of a serious and a violent felony as to these statutes, but not necessary as to section 190.2(a)(22)'s reference to section 186.22(f). (Ans. Brief, pp. 51-53.)

The distinction drawn by respondent rests on the invalid assumption that the Proposition 21 voters would have believed that section 186.22(f)'s definition of a criminal street gang was already frozen in section 190.2(a)(22). Nothing suggests they would have thought so based on the law they are presumed to know. As stated *ante*, at the time of Proposition 21's adoption in 2000, the *Palermo* rule had evolved to the point that a specific reference in another statute was not deemed time-specific, unless so stated or evident from indicia of intent. There is no basis for inferring the voters believed the definition of a criminal street gang would be frozen as to section 190.2(a)(22) without stating a lock-in provision. The only reasonable inference is that the voters would have included a lock-in provision in section 190.2(a)(22) had this been their intent.

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

Appellant's opening brief, pages 40-44, sets forth why the consequences of interpreting Proposition 21 as having frozen the definition of a criminal street gang as to section 190.2(a)(22) would be unreasonable, anomalous, and engender confusion in the administration of the criminal laws regarding criminal street gangs. 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 punishments for violations of section 186.22. In addition, so many statutes refer to section 186.22(f), that to find the references frozen as of the date of each statute's enactment would lead to confusion and difficult consequences in applying the criminal laws relating to criminal street gangs. (See *Saenz, supra,* 140 Cal.App.4th at pp. 960, 982-983; *Van Buren, supra,* 93 Cal.App.4th at pp. 881-882.)

Respondent argues that any practical problems or anomalous results are based on the Legislature's choice to exceed its constitutional power. (Ans. Brief, pp. 56-58.) This argument begs the very question before this Court of whether the Legislature did exceed its constitutional power. In deciding the question, the consequences of interpreting Proposition 21 as having frozen the definition of a criminal street gang in section 190.2(a)(22) are relevant.

Where a law appears to be uncertain, courts consider the consequences of a particular interpretation and try to render the statute reasonable, promote the purpose of the statute, and avoid absurd consequences. (See *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´"]; *People v. Jones* (1993) 5 Cal.4th 1141, 1150-1151 [where there is ambiguity in a statute, courts adopt the most reasonable reading of the statute and seek to avoid "peculiar results"].)

Respondent sees no incongruity in using A.B. 333's narrowed definition of a criminal street gang as to section 186.22's punishment provisions, while using the looser definition as to section 190.2(a)(22), which prescribes much harsher punishment. (Ans. Brief, pp. 56-57.) It is, of course, true that the gang-murder special circumstance warrants harsher punishment from the conduct constituting a

gang enhancement. Appellant's point is that it makes no sense to use the looser definition of a criminal street gang, which 20 years of experience have shown captures person who are not participants in organized criminal street gangs, to prove the gang-murder special circumstance, which can lead to the imposition of the death penalty, but use A.B. 333's stricter definition for purposes of a gang enhancement.

Respondent acknowledges it would be simpler and potentially less confusing to use the same definition of a criminal street gang in the many statutes incorporating this term, but argues that having to use different definitions is just the result of A.B. 333's failure to obtain a supermajority vote. (Ans. Brief, p. 57.) Again, this just begs the question of whether the application of A.B. 333's amended definition of a criminal street gang to section 190.2(a)(22) violates article II, section 10, subdivision (c) of the California Constitution.

Respondent also claims that the practical difficulties noted by appellant might be relevant in construing a legislative statute but implies this is not true when construing an initiative statute. (Ans. Brief, p. 57.) However, the same principles govern a court's interpretation of a ballot initiative as a legislative statute. (*Gonzalez, supra,* 6 Cal.5th at p. 49.) Accordingly, the consequences of interpreting Proposition 21 as having frozen the definition of a criminal street gang in section 190.2(a)(22) are relevant to the issue before this Court.

Insofar as respondent's answer brief, page 57, claims the consequences are irrelevant, because otherwise, the Legislature could intentionally craft legislation to create sufficient practical problems to avoid compliance with constitutional requirements, this reasoning does not apply to A.B. 333. Nothing indicates the Legislature was trying to create practical problems in enacting A.B. 333 so as to avoid constitutional problems. The Legislature was trying to address the reality that gang findings had become overly ubiquitous due to legislative amendments and court rulings that were no longer targeting crimes committed only by violent,

organized criminal street gangs. (Stats. 2021, ch. 669, § 2, subd. (g).) It is also doubtful the Legislature would engage in such tactics in any case.

Respondent's argument finally rests on the claim that the Legislature's policy choices end where the electorate has spoken. (Ans. Brief, pp. 57-58.) The problem for respondent is that the Proposition 21 voters did not speak regarding whether the definition of a criminal street gang was frozen as to section 190.2(a)(22). This is the very reason why judicial rules of construction apply to this issue, including whether the consequences of a particular conclusion are reasonable.

C. Assembly Bill No. 333's Amendment of the Definition of a Criminal Street Gang, if Applied to Penal Code Section 190.2, Subdivision (a)(22), Does Not Unconstitutionally "Take Away" from Proposition 21

Appellant's opening brief, pages 21-26, argues that A.B. 333 does not "take away" from Proposition 21, and that the definition of a criminal street gang is permissibly related to, but distinct from, the subject of section 190.2(a)(22). Following the majority opinion in *Rojas, supra,* 80 Cal.App.5th at pp. 554-555, respondent argues that A.B. 333 is an unconstitutional amendment of Proposition 21, because A.B. 333 takes away from Proposition 21 by reducing the scope of the murders punishable under section 190.2(a)(22). (Ans. Brief, pp. 39-42, 43-51.)

Respondent's position is premised on its erroneous argument that Proposition 21 incorporated the then-existing definition of a criminal street gang in section 190.2(a)(22). (Ans. Brief, p. 39.) There was no time-specific incorporation for the reasons stated in Arguments A and B, *ante*.

A.B. 333 does not amend Proposition 21 at all within the meaning of the California Constitution, article II, section 10, subdivision (c), under the prevailing principles of *People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571 (*Pearson*). Section 190.2(a)(22) is a special-circumstance punishment statute, which covers a defendant who committed an intentional murder "while the defendant was an active participant in a criminal street gang," as defined in section 186.22(f), where "the murder was carried out to further the activities of the criminal street gang." A.B. 333 permissibly amends the related but distinct subject of the definition of a criminal street gang, and A.B. 333 does not prohibit what Proposition 21 authorizes, a gang-murder special circumstance, or authorize what Proposition 21 prohibits. (See *Pearson, supra,* 48 Cal.4th at p. 571.)

Respondent argues that A.B. 333's narrowed definition of a criminal street gang reduces the universe of offenders subject to section 190.2(a)(22). (Ans. Brief, pp. 39-40.) It is true that because A.B. 333 narrowed the definition of a criminal street gang, some defendants will not be subject to the gang-murder special

circumstance, but this is only because they were not active participants in what is now recognized as an organized criminal street gang, or because they did not commit murder to further the activities of such a gang. This does not constitute an unconstitutional taking away under *Pearson, supra,* 48 Cal.4th at p. 571, because A.B. 333's amendment of section 186.22(f) is related to, but distinct from, the subject of section 190.2(a)(22), and because there is no conflict between Proposition 21 and A.B. 333. Respondent cites no case supporting a contrary view. As discussed, *post*, respondent's reliance on *People v. Kelly* (2010) 47 Cal.4th 1008 (*Kelly*) is erroneous.

Respondent notes that the Legislative Counsel's Digest in the past had signaled that Proposition 21 required that any amendment to section 186.22(f)'s definition of a criminal street gang be approved by a supermajority. (Ans. Brief, pp. 40-41.) The Legislative Counsel did not indicate a supermajority vote was required when A.B. 333 was enacted. In any case, the Legislature's views regarding the legality of its enactments are not binding on the judiciary. (See *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244 [legislative declarations are "neither binding nor conclusive," as the "interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts"]; see also *People v. Lopez* (2022) 82 Cal.App.5th 1, 21, fn. 5 ["If Assembly Bill 333 permissibly amends section 186.22, the Legislature's belief in the need for a supermajority vote to amend the statute on prior occasions--whether correct or not--is irrelevant"].)

Respondent notes that not only does section 190.2(a)(22) require that the defendant was an "active participant in a criminal street gang," but also that the murder "was carried out to further the activities of the criminal street gang." Respondent states that before A.B. 333 was enacted, the furtherance provision in section 190.2(a)(22) had been interpreted as paralleling the gang-purpose language of section 186.22's gang enhancement. Respondent argues that as a result, A.B.

333 impermissibly narrowed the gang-purpose requirement by requiring that the common benefit to the gang be more than reputational. (Ans. Brief, pp. 41-42.) This additional requirement of A.B. 333 adds nothing to respondent's position. The requirement of more than a reputational benefit is just a facet of the definition of a criminal street gang and the proof required to show the existence of a true criminal street gang. The requirement that there be more than a reputational benefit does not counter Proposition 21's purpose and is related to, but distinct from, the subject of section 190.2(a)(22).

Respondent concedes appellant "is correct that application of A.B. 333 to the gang-murder special circumstance would not eliminate the offense in its entirety." (Ans. Brief, p. 43.) Section 190.2(a)(22) is not an offense; it is a punishment provision. What is significant is that A.B. 333 does not eliminate the gang-murder special circumstance in any way.

Respondent also claims "the gang-murder special circumstance is not merely a penalty provision," but rather, "states particular conduct necessary to support the increased penalty." (Ans. Brief, p. 43.) Section 190.2(a)(22) is just a penalty provision, and like the other special circumstances in section 190.2, subdivision (a), states the conduct necessary to its application. This does not show that A.B. 333's amendment of section 186.22(f), which does not redefine the gang-murder special circumstance, amends Proposition 21, if the amended definition is applied to section 190.2(a)(22). Respondent has tried to convert the gang-murder special circumstance into something it is not.

There is no doubt, as noted by respondent, that the Proposition 21 voters were concerned with punishing gang-related crimes more severely. (Ans. Brief, p. 44.) However, the voters were not focused on defining a criminal street gang. Respondent argues that nothing suggests they might have understood that without a supermajority vote, the Legislature could reduce protection against gang crimes "by narrowing the particular conduct that the initiative described and targeted for

increased punishment." (Ans. Brief, p. 44.) The flaw in this argument is that A.B. 333 did not change the conduct targeted for increased punishment. It only amended the definition of a criminal street gang. Section 190.2(a)(22) is still exactly as enacted by Proposition 21.

Respondent relies on *Kelly, supra,* 47 Cal.4th 1008, because *Kelly* held that although the Legislature did not directly change the law enacted by an initiative, new legislation took away from the initiative. (Ans. Brief, pp. 44-47.) Appellant's opening brief, pages 22-23, discusses *Kelly*. *Kelly* is highly distinguishable from appellant's case, because in *Kelly,* the Legislature enacted a statute that directly conflicted with the initiative. After the voters enacted the Compassionate Use Act (CUA), which provided an affirmative defense to the charge of possessing or cultivating marijuana if the marijuana was for personal medical purposes and specified no quantity limitations, the Legislature enacted the Medical Marijuana Program (MMP), which established quantity limitations on the amount of marijuana that could be possessed and cultivated with qualified exceptions for greater amounts on a doctor's recommendation, a condition not required by the CUA. (*Id.* at pp. 1012-1015, 1017, 1028.) *Kelly* held that the MMP 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.)

Respondent argues that the instant case is like *Kelly*, because if A.B. 333's amended definition of a criminal street gang is applied to section 190.2(a)(22), A.B. 333 would indirectly take away from the gang-murder special circumstance, just as the MMP indirectly altered the CUA. (Ans. Brief, pp. 46-47.) This is a false analogy. In *Kelly*, the CUA imposed no quantity limitations on possession and cultivation of marijuana, and then, the MMP came along and imposed limitations directly conflicting with the CUA. In contrast, A.B. 333's amended

definition of a criminal street gang does not conflict with section 190.2(a)(22) at all, because Proposition 21 did not freeze the definition of a criminal street gang in section 190.2(a)(22). In no sense, does A.B. No. 333's amended definition of a criminal street gang take away from Proposition 21. Rather, the amended definition supports the purpose of both the Proposition 21 voters and the Legislature to punish gang-related crimes committed by members of actual criminal street gangs.

Respondent next argues that appellant's reliance on *People v. Superior Court* (*Gooden*) (2019) 42 Cal.App.5th 270 (*Gooden*) is mistaken in that the circumstances in *Gooden* are materially distinguishable. (Ans. Brief, pp. 47-51.)[4] Appellant's opening brief, pages 24-26, discusses *Gooden*. The initiative and statute at issue in *Gooden* are different from those in appellant's case, but *Gooden* fully supports appellant's position that A.B. 333's amendment of section 186.22(f), if applied to section 190.2(a)(22), is not an unconstitutional amendment of Proposition 21.

In *Gooden, supra,* 42 Cal.App.5th at pp. 279-286, the court held that Senate Bill No. 1437 (S.B. 1437), which amended the mens rea for murder and increased the requirements to prove felony murder, did not unconstitutionally amend Proposition 7, which had increased the punishment for murder. (*Id.* at pp. 279-286.) *Gooden* rejected the argument that S.B. 1437 took away from Proposition 7's increase in the punishment for murder. (*Id.* 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, or prohibit the

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[4] The majority opinion in *Rojas, supra,* 80 Cal.App.5th at p. 555, does not try to distinguish *Gooden,* but finds that *Gooden* was "misguided." *Gooden* has been followed by every court that has issued a published opinion on whether Senate Bill No. 1437 invalidly amended Proposition 7. (*People v. Campbell, supra,* 2023 WL 4286790, *16, fn. 24 [listing cases].)

punishment for murder authorized by Proposition 7. (*Id.* at pp. 281-282.) *Gooden* found that S.B. 1437 permissibly addressed "a subject related to, but distinct from," Proposition 7. (*Id.* at p. 282.)

Here, respondent conflates the distinct subject of section 190.2(a)(22), a punishment provision covering persons who commit first degree murder while actively participating in a criminal street gang, with the related but distinct subject of the definition of a criminal street gang, which does not cover the subject of punishment.

Respondent tries to distinguish *Gooden* on two untenable bases. First, respondent states Proposition 21 established a new special circumstance covering particular *conduct referred to in section 186.22(f)*, whereas a specific incorporation was absent in Proposition 7, which respondent claims was a dispositive basis for *Gooden's* holding. (Ans. Brief, pp. 50-51.) However, section 190.2(a)(22) does not proscribe *conduct referred to in section 186.22(f)*. Section 186.22(f) does not proscribe conduct at all; it defines a criminal street gang. Section 190.2(a)(22) sets forth the conduct constituting the gang-murder special circumstance, with no indication the Proposition 21 voters intended the reference to section 186.22(f) to be frozen. In addition, in *Gooden*, the fact that Proposition 7 did not identify specific Penal Code provisions on murder was not the dispositive factor, only a factor that the court would expect to find "at minimum" if the voters intended to preclude the Legislature from amending the definition of murder. (42 Cal.App.5th at p. 283.) The court further noted that Proposition 7 did not state any time-specific limitations, which also would be expected had the voters had such intent. (*Ibid.*)

The court in *Gooden* did not say a specific reference shows a time-specific incorporation, which would be contrary to the modern application of the *Palermo* rule. Before even discussing the *Palermo* rule, the court noted that the Proposition 7 electorate intended to increase the punishment for persons convicted of murder,

while S.B. 1437 did not address punishment at all, but the mental state requirements for murder. (42 Cal.App.5th at pp. 282-282.) Similarly here, the Proposition 21 electorate intended to increase punishment for gang-related crimes, while A.B. 333 did not address punishment at all, but the definition of a criminal street gang.

Second, respondent tries to construe the voters' different intents in Proposition 7 and Proposition 21 as somehow significant. Respondent argues that the motivation of the Proposition 21 voters was to combat gang crime broadly and that the voters "did not solely focus on issues of punishment as distinct from proscribed conduct; rather, the electorate created the new gang-murder special circumstance itself." (Ans. Brief, p. 51.) Proposition 21 did create a new special circumstance, but this does not mean A.B. 333 unconstitutionally amended Proposition 21 by amending the definition of a criminal street gang. The dispositive point is that absent Proposition 21's stating or indicating that section 186.22(f)'s definition of a criminal street gang was locked into section 190.2(a)(22), the Legislature was permitted to amend the definition as to section 190.2(a)(22). This is so because the definition of a criminal street gang is distinct from the related subject of punishment in section 190.2(a)(22). In no manner, did Proposition 21 manifest intent to freeze the definition of a criminal street gang in section 186.22(f) as applied to section 190.2(a)(22).

Moreover, *Gooden* is contrary to respondent's basic argument that A.B. 333's amended definition of a criminal street gang, if applied to section 190.2(a)(22), would take away from Proposition 21 by reducing the body of potential persons subject to the gang-murder special circumstance. In *Gooden* itself, although S.B. 1437 increased the requirements to establish murder and thus, reduced the body of potential persons subject to Proposition 7's punishment for murder, S.B. 1437 was held not to have unconstitutionally amended Proposition 7. *Gooden* concluded that absent voter indications of intent to freeze the elements of

murder in place as they exited at the time of Proposition 7's adoption, S.B. 1437, which did not address the subject of punishment, could not be considered an amendment to Proposition 7. (*Gooden, supra,* 42 Cal.App.5th at 286.)

Thus, A.B. 333's amendment of section 186.22(f), if applied to section 190.2(a)(22), does not unconstitutionally amend Proposition 21.

CONCLUSION

Based on the foregoing and appellant's opening brief, 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 to afford the prosecution the opportunity to retry the allegation.

Dated: July 7, 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 8,276 words as counted by Microsoft Word.

Executed on July 7, 2023, at Pacific Palisades, California.

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