No. S281282

# In the Supreme Court of the State of California

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

v.

LARRY LEE FLETCHER, ET AL,
*Defendants and Appellants.*

Fourth Appellate District, Division Two, Case No. E077553
Riverside County Superior Court, Case No. BAF2001566
The Honorable Louis R. Hanoian, Judge

## ANSWER BRIEF ON THE MERITS

ROB BONTA (SBN 202668)
*Attorney General of California*
LANCE E. WINTERS (SBN 162357)
*Chief Assistant Attorney General*
CHARLES C. RAGLAND (SBN 204928)
*Senior Assistant Attorney General*
MICHAEL R. JOHNSEN (SBN 210740)
*Supervising Deputy Attorney General*
ALAN L. AMANN (SBN 301282)
*Deputy Attorney General*
WARREN J. WILLIAMS (SBN 270622)
*Deputy Attorney General*
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 738-9059
Fax: (619) 645-2044
Warren.Williams@doj.ca.gov
*Attorneys for Plaintiff and Respondent*

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## ISSUES PRESENTED

Does Assembly Bill No. 333 amend the requirements for a true finding on a prior strike conviction (Pen. Code, §§ 667, subds. (b)-(i) & 1170.12 (a)-(d)) and a prior serious felony conviction (Pen. Code, § 667, subd. (a)), or is that determination made on "the date of that prior conviction"? (See Pen. Code, §§ 667, subd. (d)(1) & 1170.12, subd. (b)(1).)

Does Assembly Bill No. 333 (Stats. 2021, ch. 699), which modified the criminal street gang statute (Pen. Code, § 186.22), unconstitutionally amend Proposition 21 and Proposition 36, if applied to strike convictions and serious felony convictions?

## INTRODUCTION

Penal Code section 667, subdivision (a), and the Three Strikes Law (§§ 667, subd. (b)-(i), 1170.12)[1] are recidivist provisions that call for increased punishment in a current case when the defendant was previously convicted of a serious felony listed in section 1192.7, subdivision (c) (section 1192.7(c)). One of those serious felonies is "a felony violation of Section 186.22," which describes both a substantive gang offense and a gang enhancement. (§ 1192.7, subd. (c)(28).) This case concerns whether the amendments made by Assembly Bill No. 333 (AB 333) to section 186.22 affect recidivist sentencing under section 667, subdivision (a), and the Three Strikes Law based on pre-AB 333 gang convictions. They do not.

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

California's recidivist laws are fundamentally backward-looking. This is true of the particular recidivist provisions at issue here, as confirmed by their statutory language and purpose. They authorize increased punishment in a current case based on a defendant's status as one who was *previously convicted* of a serious felony offense. That rationale is separate from other considerations that might motivate the Legislature to alter the elements of an offense as applicable to current cases. Such an alteration does not negate a person's status as one who was previously convicted of a serious offense and therefore is deserving of increased punishment in a subsequent case. Nor does it imply that the Legislature intended to limit or prohibit the use of convictions under the former law for recidivist sentencing purposes.

Accordingly, when section 1192.7(c)'s list of serious felonies references a particular statute or body of law, the reference is to the statute or body of law as it existed at the time of the prior conviction. An intervening change to a statute referenced in section 1192.7(c) thus does not affect the determination whether a defendant previously suffered a conviction for the serious felony defined by reference to that statute. Indeed, the list of serious felonies in section 1192.7(c) includes offenses that have been repealed altogether, but prior convictions based on those now-repealed offenses may still be used for recidivist sentencing purposes. Any alteration to the status of prior convictions as serious felonies may be accomplished through direct amendment

of section 1192.7(c) itself. It is not properly inferred from the amendment of a statute referenced in section 1192.7(c).

The practical implications of appellants' proposed contrary approach underscore that it is mistaken. Their approach would require a court in making the serious felony determination to look to the current requirements of any offense referenced in section 1192.7(c). But that would effectively preclude the use of the vast majority of pre-AB 333 gang convictions as prior serious felonies. This is an unlikely result to have been accomplished through AB 333, which did not purport to address any recidivist sentencing issue, much less to amend section 1192.7(c). Even more counterintuitively, appellants' approach would make some strikes subject to a more rigorous amendment requirement than others. Those that are defined by particular conduct, and whose definitions can therefore only be altered by direct amendment of section 1192.7(c), would be subject to the supermajority vote requirement governing that section's application to the Three Strikes Law. But under appellants' theory, the Legislature could bypass the supermajority requirement when altering the definition of a strike defined by reference to a statutory offense, since that could be accomplished simply by amending the referenced statute. Appellants do not offer any sound explanation for that improbable result, nor is any apparent.

## LEGAL BACKGROUND

### A. The five-year prior serious felony enhancement and the serious felony list

In June 1982, the electorate enacted section 667 as part of Proposition 8. (*People v. Jackson* (1985) 37 Cal.3d 826, 830.)

Commonly referred to as the "nickel prior" statute (see, e.g., *People v. Panighetti* (2023) 95 Cal.App.5th 978, 1001), it calls for an additional term of five years when a person has committed one of the serious felonies enumerated in section 1192.7(c) and "previously has been convicted a serious felony." (§ 667, subd. (a); *Jackson*, at p. 830.)

Section 1192.7(c)'s list of serious felonies was enacted at the same time, also through Proposition 8. (*Jackson*, *supra*, 37 Cal.3d at p. 830.) As this Court has described it, the list is "an amalgam of different elements." (*Id.* at p. 832.) "Two describe former felonies, now repealed. Another refers generally to 'any felony punishable by death or imprisonment . . . for life.'" (*Ibid.*) In addition, two paragraphs "incorporate enhancements which may attach to any felony" and two others "describe criminal conduct which does not correspond precisely to the elements of any then-existing criminal offense." (*Ibid.*) Thus, this Court has construed some of the serious felonies enumerated in section 1192.7(c), as referring "not to specific criminal offenses, but to the criminal conduct described therein." (*People v. Cruz* (1996) 13 Cal.4th 764, 773.) Other enumerated serious felonies generically include an entire category of offense, regardless of the degree, like murder. (E,g., § 1192.7, subd. (c)(1) ["murder or voluntary manslaughter"].) Still others are designated by the precise statutory offense. (E.g., § 1192.7, subd. (c)(38) ["criminal threats, in violation of Section 422"].)

### B. The Three Strikes Law and subsequent amendments to the list of serious felonies

The Three Strikes Law was enacted in 1994 to ensure "longer prison sentences and greater punishment" for repeat offenders. (Former § 667, subd. (b), as amended by Stats. 1994, ch. 12, § 1, pp. 71, 72.) The law "consists of two, nearly identical statutory schemes.'" (*People v. Conley* (2016) 63 Cal.4th 646, 652.) In March 1994, the Legislature codified its version of the Three Strikes Law by adding subdivisions (b) through (i) to section 667 with the enactment of Assembly Bill No. 971. The electorate passed its ballot initiative, Proposition 184, in November of the same year, adding section 1170.12. These statutes set out an alternate sentencing scheme calling for specified lengthy sentences when a person is convicted of a current serious or violent felony and has suffered one or more prior "strike" convictions. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 505.) A strike conviction is any offense defined in section 1192.7(c) as a serious felony, as well as any offense defined in section 667.5, subdivision (c), as a violent felony. (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1).) The Three Strikes Law thus, in part, relied on the pre-existing list of serious felonies enacted by Proposition 8. (See *People v. Moenius* (1998) 60 Cal.App.4th 820, 825-26 [serious felony list was added by Proposition 8 in 1982 and incorporated into the Three Strikes scheme a decade later].)

Both versions of the Three Strikes Law have included from their inception so-called "determination clauses." (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1).) These provisions, as originally

enacted, stated that "[t]he determination of whether a prior conviction is a prior felony conviction" for purposes of the Three Strikes Law "shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor." (Stats. 1994, ch. 12, § 1; Prop. 184, as approved by voters, Gen. Elec. (Nov. 8, 1994), § 1, eff. Nov. 9, 1994.) Section 1170.12's determination clause was later amended to provide that "[t]he determination of whether a prior conviction is a prior *serious or violent felony* conviction for purposes of this section shall be made upon the date of that prior conviction . . . ." (Prop. 36, § 4; § 1170.12, subd. (b)(1), italics added.)

In addition, both the statutory and the initiative versions of the Three Strikes Law include so-called "lock-in" provisions. (See *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 578-579.) As originally enacted, section 667, subdivision (h), provided that "[a]ll references to existing statutes in subdivisions (c) to (g), inclusive, are to statutes as they existed on June 30, 1993." (Stats. 1994, ch. 12, § 1.) Similarly, an uncodified portion of Proposition 184 provided that "[a]ll references to existing statutes [in section 1170.12] are to statutes as they existed on June 30, 1993." (Prop. 184, as approved by voters, Gen. Elec. (Nov. 8, 1994), § 2, eff. Nov. 9, 1994.) The effect of these provisions was to freeze the applicable lists of serious or violent felonies; offenses added to those lists after June 30, 1993, could not be alleged as strike priors (though they could be alleged as nickel priors)

unless and until the lock-in date was revised. (*People v. Johnson* (2015) 61 Cal.4th 674, 683-684.)

The electorate revised the Three Strikes Law's lock-in date with the passage of Proposition 21 in 2000. By that time, several additional crimes had been added to the serious felony list. (*Manduley*, *supra*, 27 Cal.4th at p. 577, fn. 11.) Proposition 21 itself also added several offenses to the list. (*Id.* at pp. 578-579.) To ensure that these new serious felonies would qualify not only as nickel priors, but as strike priors as well, Proposition 21 updated the original June 1993 lock-in provision of the Three Strikes Law by adding sections 667.1 and 1170.125 to the Penal Code. (*Johnson*, *supra*, 61 Cal.4th at p. 684; see Prop. 21, §§ 14, 16.) These two sections provided that, for offenses committed on or after March 8, 2000 (the effective date of Proposition 21), any references to existing statutes in the Three Strikes Law were to the statutes as amended on that date. (*Ibid.*)

After the passage of Proposition 21 in 2000, the serious felony list was updated once more in 2002 without simultaneously amending the lock-in date. At that time, the use of a weapon of mass destruction in violation of subdivision (b) or (c) of section 11418 was added to the serious felony list. (Stats. 2002, ch. 606 (AB 1838), § 3, eff. Sept. 17, 2002.) Four years later, the Legislature updated the lock-in dates in sections 667.1 and 1170.125 to September 20, 2006, which incorporated this serious felony offense into the Three Strikes scheme. (Stats. 2006, ch. 337 (SB 1128), § 37, eff. Sept. 20, 2006.)

In 2012, the electorate again updated the Three Strikes lock-in date when it passed the Three Strikes Reform Act. (Prop. 36, as approved by voters, Gen. Elec. (Nov. 6, 2012).) That ballot initiative amended the law to reduce the punishment prescribed for certain third strike defendants and to permit persons then serving an indeterminate term of life imprisonment imposed under the prior version of the Three Strikes Law to seek resentencing. (§ 1170.126, subd. (a).) Among other things, Proposition 36 also amended sections 667, 667.1 and 1170.125 to provide that, for offenses committed on or after November 7, 2012 (the effective date of the Act), references in the Three Strikes Law to existing statutes were to the statutes as they existed on that date. (*Johnson*, *supra*, 61 Cal.4th at p. 684; Prop. 36, §§ 3, 5.)

Most recently, the Legislature updated the serious felony list and the Three Strikes lock-in date simultaneously in 2023 when it passed Senate Bill No. 14. (Stats. 2023, ch. 230, § 1, eff. Jan. 1, 2024.) As part of this law, the Legislature amended section 1192.7(c) to add human trafficking of a minor to the list of serious felonies. (Stats. 2023, ch. 230, § 4.) To ensure that this offense could be alleged as a strike prior, the Legislature amended the lock-in date under sections 667.1 and 1170.125 to January 1, 2024 (the effective date of the new law), for offenses committed after that date. (Stats. 2023, ch. 230, §§ 2, 3.)

**C. Gang offenses as serious felonies**

In 1988, the Legislature enacted the Street Terrorism Enforcement and Prevention Act (STEP Act) to combat criminal

activity by street gangs. (§ 186.20, et seq.) "Underlying the STEP Act was the Legislature's finding that 'California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.' (§ 186.21, 2d par.)." (*People v. Valencia* (2021) 11 Cal.5th 818, 828.) "The act's express purpose was 'to seek the eradication of criminal activity by street gangs.'" (*People v. Gardeley* (1996) 14 Cal.4th 605, 609, quoting § 186.21.) "[T]he STEP Act created 'a sentencing enhancement for a felony committed "for the benefit of, at the direction of, or in association with any criminal street gang" (§ 186.22, subd. (b)(1)).'" (*People v. Tran* (2022) 13 Cal.5th 1169, 1205-1206.) It also created a new offense prohibiting active participation in a criminal street gang. (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130 ["the STEP Act created a substantive offense, section 186.22(a)"].)

Since its enactment in 1988, the STEP Act has been amended many times, "sometimes several times in a year." (*Gardeley*, *supra*, 14 Cal.4th at p. 615, fn. 7.) Most relevant here, the electorate updated the STEP Act in various ways when it passed Proposition 21 in 2000. Declaring that gangs had "become more violent, bolder, and better organized in recent years," the electorate concluded that additional legislation was warranted "to avoid the predicted, unprecedented surge in juvenile and gang violence." (Prop. 21, § 2, subds. (b), (c), (k).) As noted, Proposition 21 added several additional crimes to the list of serious felonies in section 1192.7(c). (*Manduley*, *supra*, 27

Cal.4th at pp. 578-579.) Among those was "any felony offense, which would also constitute a felony violation of Section 186.22." (Prop. 21, § 17; § 1192.7, subd. (c)(28).)

More than 30 years after passage of the STEP Act, the Legislature enacted AB 333, which became effective on January 1, 2022. (See Stats. 2021, ch. 699, § 2, subd. (g) ["The STEP Act has been continuously expanded through legislative amendments and court rulings. As a result of lax standards, STEP Act enhancements are ubiquitous"].) The bill sought to narrow the scope of section 186.22, motivated by concerns about its overbroad application 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), (g), (i).) Alongside other changes, AB 333 altered the definitions of "criminal street gang" and "pattern of criminal gang activity" in section 186.22 so as to make the gang offense and enhancement under that section more difficult to prove. (See *Tran*, *supra*, 13 Cal.5th at p. 1206; Stats. 2021, ch. 699, § 3.)

## STATEMENT OF THE CASE

### A. Appellants' crimes, convictions, and sentences

In December 2020, appellants Fletcher and Taylor, both members of the Four Corner Hustler Crips criminal street gang, performed a gang "hit up" on an unknown patron inside a Hemet convenience store. (1RT 134-36, 171-72.) Taylor told the patron that "[n—s] around here have guns." (1RT 136-37, 172-73.) When the patron left the store and began to drive away, Fletcher and Taylor both followed on foot, firing multiple gunshots at him.

(1RT 75-77, 79, 88-89, 90-93, 115-16, 173-74, 179; see also Opn. 2.)

A jury convicted appellants of attempted premeditated murder (§§ 187, subd. (a), 664); active participation in a criminal street gang (§ 186.22, subd. (a)); unlawful possession of a firearm (§ 29800, subd. (a)(1)); assault with a semiautomatic firearm (§ 245, subd. (b)); and willful discharge of a firearm at an occupied motor vehicle (§ 246). (1CT 251-252, 256; 2CT 315, 317-320, 322, 324-327; 2RT 329-335.) The jury found true in connection with the attempted murder that appellants each personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and, in connection with the assault with a semiautomatic firearm, that they each personally used a firearm (§ 12022.5, subd. (a); see 1192.7, subd. (c)(8)). (1CT 251-252, 256; 2CT 316, 319, 323, 326; 2RT 330-331, 333-334.) The jury also found that appellants committed attempted murder, assault with a firearm, and discharge of a firearm at an occupied motor vehicle to benefit a criminal street gang (§ 186.22, subd. (b)). (1CT 248-252, 256; 2CT 315, 319-320, 322, 326-327; 2RT 330-335.) In addition, the jury found that, in committing the crime of unlawfully possessing a firearm, appellant Taylor was personally and intentionally armed with a deadly weapon (§ 667, subd. (e)(2)(C)(iii)). (2CT 318; 2RT 334.)

The trial court subsequently found that appellants Fletcher and Taylor had each suffered a prior conviction in 2015 for possession of a firearm for a gang purpose by a person previously convicted of a felony (§§ 29800, subd. (a)(1), 186.22, subd.

(b)(1)(A)), which qualified as both a nickel prior and a strike prior (§§ 667, subds. (a), (c) & (e)(1), 1170.12, subd. (c)(1), 1192.7, subd. (c)(28)). (1CT 151-52, 253, 256; 2CT 307; 2RT 325, 341-42.) The court also found that appellant Taylor had suffered a prior conviction in 2011 for attempted first degree burglary, which likewise qualified as a nickel prior and a strike prior (§§ 459, 664). (2RT 322-28, 341-42.)

The trial court sentenced appellant Fletcher under the Three Strikes Law to an indeterminate term of 30 years to life, plus a determinate term of 26 years four months in prison, which included a five-year enhancement under section 667, subdivision (a). (2CT 331-32.) The court sentenced appellant Taylor under the Three Strikes Law to an indeterminate term of 70 years to life, plus a determinate term of 30 years in prison, which included two five-year enhancements under section 667, subdivision (a). (2CT 357-58.)

### B. The Court of Appeal's decision

AB 333 became effective while appellants' cases were jointly on appeal. (See 2CT 353-356, 383-392.) Appellants argued in the Court of Appeal below that AB 333's changes to section 186.22 applied to their nonfinal cases and required reversal of their current gang participation convictions and gang enhancements as well as the trial court's determination that their 2015 convictions qualified as prior serious felonies. (Opn. 4-6.) The Court of Appeal reversed appellants' gang convictions and enhancements but declined to reverse the serious felony findings. (Opn. 11.)

The Court of Appeal held that, while AB 333 is retroactive to nonfinal cases, applying the new law to the serious felony findings premised on prior violations of section 186.22 would constitute an improper legislative amendment of a ballot initiative. (Opn. 6.) The court observed that Proposition 21 locked in the definitions of serious felonies as of the initiative's effective date. (Opn. 8.) And those definitions were locked in a second time a dozen years later when the electorate amended the same statutes through Proposition 36. (Opn. 9.) The court thus reasoned that, "[b]ecause the definition of a serious felony for purposes of the Three Strikes Law is what constituted a serious felony in 2012, Assembly Bill 333 can only apply to that definition if it satisfies Proposition 36's amendment requirements." (Opn. 9.) Those requirements specify that its provisions shall not be altered or amended except by a statute approved by a majority of voters or a statute passed by the Legislature with a two-thirds majority in each house. (Opn. 9.) Since AB 333 satisfied neither requirement, the court concluded that it "does not alter the definition of a serious felony or strike prior." (Opn. 9-10)

## ARGUMENT

### I. ASSEMBLY BILL NO. 333 DOES NOT AFFECT THE SERIOUS FELONY DETERMINATION IN APPELLANTS' CASES

Appellants contend that AB 333's recent amendments to section 186.22 apply to the determination whether their prior gang convictions from 2015 qualify as serious felonies under the nickel prior statute and the Three Strikes Law. According to appellants, references to statutes in section 1192.7(c)'s list of

current felonies incorporate any changes that may be made to those statutes; thus, when making the serious felony determination in a current case, a court is required to assess whether the record of a pre-AB 333 gang conviction shows that the facts necessarily supporting the conviction would satisfy the elements of the amended version of section 186.22. (Fletcher OBM (FOBM) 17-28; Taylor OBM (TOBM) 21-41.)

While AB 333's amendments to section 186.22 are retroactive to nonfinal cases, those changes are irrelevant to determining whether appellants were *previously convicted* of violating section 186.22 in their prior, final cases. References to statutes or bodies of law in section 1192.7(c)'s list of serious felonies are retrospective, requiring a court in making the serious felony determination to look to any referenced law as it existed at the time of the prior conviction. Appellants' contrary position cannot be reconciled with the language and purpose of the nickel prior statute, the Three Strikes Law, and recidivist sentencing schemes generally. Those schemes exist to punish reoffenders for their recidivism, regardless of any subsequent changes to the statutory offenses upon which their prior convictions were based.

### A. Assembly Bill No. 333 applies retroactively to nonfinal judgments, but that does not answer how the new law might affect a particular case

At the threshold, the parties agree that AB 333's changes to the elements of section 186.22's gang enhancement and gang participation offense are retroactive under the rule of *In re Estrada* (1965) 63 Cal.2d 740. (See FOBM 22-23; TOBM 17, 27.) That rule can be summarized as follows: "'new laws that reduce

the punishment for a crime are presumptively to be applied to defendants whose judgments are not yet final.'" (*People v. Padilla* (2022) 13 Cal.5th 152, 158; see *People v. Esquivel* (2021) 11 Cal.5th 671, 675 [*Estrada* principle has been "a fixture of our criminal law for more than 50 years"].) This Court has previously determined that amended section 186.22 is *Estrada*-retroactive. (*People v. Tran*, *supra*, 13 Cal.5th at p. 1206.)

That these statutory changes are retroactive to nonfinal judgments, however, does not necessarily mean that they affect the serious felony determination in appellants' current cases. "The *Estrada* rule only answers the question of *whether* an amended statute should be applied retroactively. It does not answer the question of *how* that statute should be applied." (*People v. Stamps* (2020) 9 Cal.5th 685, 700.) The effect, if any, of a new *Estrada*-retroactive law on a particular case depends on the nature of any issue in the case potentially implicating the intervening legislation. (See *id.* at p. 701.)

The *Estrada* rule does not make AB 333 directly applicable to appellants' prior judgments that were used to support recidivist sentencing in their current cases, as those prior judgments are final. Appellants do not contend otherwise. They argue only that the determination whether they were previously convicted of serious felonies—a determination made in their current cases—must take into account AB 333's changes to section 186.22. (FOBM 24-29; TOBM 16-17, 22-23, 25.) But nothing in AB 333 indicates that it was intended to affect longstanding law governing prior conviction determinations like

the ones at issue in this case. (See *Stamps*, *supra*, 9 Cal.5th at p. 701 ["defendant must establish not only that Senate Bill 1393 applies retroactively, but that, in enacting that provision, the Legislature intended to overturn long-standing law that a court cannot unilaterally modify an agreed-upon term by striking portions of it under section 1385"].) And as explained below (see Arg. I.B, *post*), AB 333 does not indirectly result in any change to the serious felony determination, which is made by reference to the law existing at the time of the prior conviction.

Additionally, appellants are mistaken in relying on *People v. Strike* (2020) 45 Cal.App.5th 143 and *People v. Watts* (2005) 131 Cal.App.4th 589, in support of their argument that AB 333 should apply to the serious felony determination. (FOBM 16, 25-26, 28-29; TOBM 29, 38.) Those decisions were solely concerned with subsequent judicial interpretation of the elements of a prior conviction, not a legislative change to those elements. (See *Strike*, at p. 146 ["Although the elements of gang participation in section 186.22(a) have not changed since defendant pleaded guilty, our understanding of them has"]; *Watts*, at pp. 596-597 [plea admitted all required elements of prior offense, but those elements were subsequently interpreted to be ambiguous].) As correctly noted in two recent cases addressing this issue, the serious felony determinations in *Strike* and *Watts* were properly guided by intervening judicial authority because that authority declared what the elements of the prior convictions had always been. (See *People v. Gonzalez* (2024) 98 Cal.App.5th 1300, 1312-1313, review granted April 10, 2024; *People v. Scott* (2023) 91

Cal.App.5th 1176, 1182-1184, review granted September 27, 2023.) AB 333 is not "declaratory of previously existing law" like the judicial determinations in *Strike* and *Watts*, but a legislative change to previously existing law. (See *Gonzalez*, at p. 1313; see also *Scott*, at pp. 1183-1184.)

### B. References to statutes or bodies of law in Penal Code section 1192.7, subdivision (c), are to the law as it existed at the time of the prior offense, not to current law

AB 333 has no effect on appellants' recidivist sentences because its changes to section 186.22 are irrelevant to the prior serious felony determination under section 1192.7. The text and purpose of the recidivist provisions under which appellants were sentenced—especially when considered against the historical background of California's recidivist laws generally—show that the determination whether a person has previously been convicted of a serious felony looks backward. Statutory references in section 1192.7(c)'s list of serious felonies are to the law as it existed at the time of the prior conviction, and no inquiry is required as to whether the prior record of conviction satisfies the elements of any amended offense today. Contrary to the Court of Appeal's conclusion below, the Three Strikes Law's lock-in provisions are irrelevant to that retrospective inquiry. The lock-in provisions are designed simply to provide an additional measure of caution concerning strike priors: they ensure that changes to the serious or violent felony lists become applicable to the Three Strikes Law only after the Legislature has made a deliberate decision to permit that by amending the

lock-in date by the required two-thirds majority vote (or the electorate itself changes the lock-in date).

### 1. The serious felony determination under Penal Code section 1192.7, subdivision (c), is backward-looking

Recidivist sentencing provisions have been a feature of California law since the nineteenth century. These provisions have long been understood as punishing "persistence in the perpetration of crime," rather than imposing additional punishment for past conduct. (*People v. Stanley* (1873) 47 Cal. 113, 116; see also *People v. Camperlingo* (1924) 69 Cal.App. 466, 470-471 [no ex post facto violation in relying on prior conviction predating effective date of recidivist legislation]; *People v. James* (1925) 71 Cal.App. 374, 378-379 [same].) Historically, recidivist statutes have thus permitted increased punishment for subsequent offenses as an "appropriate penalty for the *person* who, after conviction of one crime commits another." (*People v. Dutton* (1937) 9 Cal.2d 505, 507.) In other words, increased penalties under recidivist schemes are attributable to the defendant's status as a repeat offender, and not to the prior conviction itself. (*In re Foss* (1974) 10 Cal.3d 910, 922; *People v. Forrester* (2007) 156 Cal.App.4th 1021, 1024.) As this Court stated almost 90 years ago, "it is the second or subsequent offense which is punished, not the first," and "in determining the nature of the penalty to be inflicted, the Legislature is justified in taking into consideration the previous criminal conduct of the defendant." (*People v. Biggs* (1937) 9 Cal.2d 508, 512.) Recidivist laws, in short, are concerned with whether the defendant is a

person who has failed to adhere to the law despite being convicted of a serious offense in the past.

The language of each recidivist provision at issue here is consistent with this retrospective orientation. Section 667, subdivision (a), provides that "a person convicted of a serious felony *who previously has been convicted of a serious felony* in this state" is to receive an additional five-year enhancement "for each such prior conviction," which is any "serious felony listed in subdivision (c) of section 1192.7." (§ 667, subds. (a)(1) & (a)(4), italics added.) The Three Strikes Law similarly applies where a defendant "has one or more *prior serious or violent felony convictions*" under section 1192.7(c), or section 667.5, subdivision (d). (§ 667, subd. (c), italics added.)

The determination clauses in the two versions of the Three Strikes Law contain even more specific language orienting the serious felony determination to the time of the prior conviction. Section 1170.12 states that the "determination of whether a prior conviction is a prior serious or violent felony conviction for purposes of this section shall be made upon the date of that prior conviction." (§ 1170.12, subd. (b)(1).) Section 667 similarly states that the "determination of whether a prior conviction is a prior felony conviction" for purposes of the Three Strikes Law "shall be made upon the date of that prior conviction . . . ." (§ 667, subd. (d)(1).) Cases interpreting the Three Strikes Law shortly after its enactment confirmed that this language does not require a declaration of strike status contemporaneous with the prior conviction but instead "fixes" the "qualifying status of a

conviction . . . upon the date of the prior conviction, so that no subsequent actions . . . could alter that status." (*People v. Anderson* (1995) 35 Cal.App.4th 587, 600; see also *People v. Green* (1995) 36 Cal.App.4th 280, 283 [section 667, subdivision (d)(1), requires a court to "look backward to see if, at the time of the conviction of the past offense, such past offense qualified as a serious or violent offense under section 1192.7(c) or section 667.5, subdivision (c)"]; *People v. Reed* (1995) 33 Cal.App.4th 1608, 1612 [section 667, subdivision (d)(1) requires that "the determination whether a prior conviction is a 'strike' to be made . . . *by reference to* the date of the prior conviction"].)

The legislative purpose behind each provision also aligns with the retrospective orientation of the statutory language. When Proposition 8 added sections 667 and 1192.7 to the Penal Code, the stated purpose of the additions was to "increase prison sentences for persons convicted of specified felonies" by adding an "additional five-year prison term for each such prior conviction." (Voter Information Guide, Primary Elec. (Jun. 8, 1982), p. 54 [Prop. 8].) In adding section 28 to Article I of the California Constitution, Proposition 8 stated that the purpose of the amendment was to protect public safety and deter criminal behavior. (Voter Information Guide, Primary Elec. (Jun. 8, 1982), p. 33 [Prop. 8].)

The purpose of the Three Strikes Law is described in the law itself. Section 667, subdivision (b), states that "[i]t is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those

who commit a felony and have been previously convicted of one or more serious or violent felony offenses." (§ 667, subd. (b).) The Legislative Analyst's analysis of Proposition 184 established that the purpose of the voter initiative was the same. (See Ballot Pamp., analysis of Prop. 184 by Legislative Analyst as, Gen. Elec. (Nov. 8, 1994), p. 33 ["the provisions of this measure . . . require substantially longer prison sentences for certain repeat offenders"].) As one court stated in addressing the Three Strikes Law after its enactment, "[t]he core idea is that those who have not drawn the proper lesson from a previous conviction and punishment should be punished more severely when they commit more crime." (*People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1329.)

The statutory text and purpose of the nickel prior statute and the Three Strikes Law are thus inconsistent with appellants' contention that a statutory reference in section 1192.7(c)'s list of serious felonies incorporates any changes to the referenced statute after the time of a prior conviction. As this Court recently explained, when one statute references or incorporates another statute or body of law, the meaning of such a reference is ultimately a question of legislative or electoral intent. (*People v. Rojas* (2023) 15 Cal.5th 561, 570-574.) In the context of the recidivist provisions at issue here, section 1192.7(c)'s references to statutes or bodies of law are properly understood as looking to the law as it existed at the time of the prior conviction. The serious felony inquiry does not, as appellants contend, take into

account intervening developments, such as the amendment of the elements of an offense referenced in section 1192.7(c).

Several additional considerations support this plain and commonsense reading over appellants' interpretation. Perhaps the most obvious indication that appellants' reading is incorrect is that, as this Court has observed, the list of serious felonies includes offenses that have been repealed altogether. (See *Jackson*, *supra*, 37 Cal.3d at p. 832 & fn. 7.) For example, the crime of assault with intent to commit robbery (§ 1192.7, subd. (c)(10)) "was deleted as a distinct crime in 1978." (*Jackson*, at p. 832, fn. 7.) If section 1192.7(c)'s references to repealed statutes incorporated intervening changes, such an offense could not qualify as a serious felony and its inclusion in the list would make no sense.

More generally, the retrospective orientation of California's recidivist provisions is demonstrated by the longstanding principle that a prior conviction for which the defendant was pardoned may be used to support increased punishment in a subsequent case under a recidivist statute. (See *Biggs*, *supra*, 9 Cal.2d at p. 512.) The rationale for that approach is that, while the defendant's civil liberties may have been restored as an act of grace, "one who commits a crime after having been convicted of another crime is a greater offender than as though he had not previously been convicted, and the punishment inflicted is solely for the second offense, to which a greater degree of criminality is thus attached." (*Id*. at p. 513.)

Courts have also taken a retrospective approach in considering whether offenses committed before the enactment of a particular recidivist law may be used to support increased punishment in a current case. In *Jackson*, for example, this Court held that convictions predating the enactment of section 667 could be used as nickel priors. *(Jackson*, *supra*, 37 Cal.3d at p. 833.) The Court reasoned that the basic purpose of section 667 would be frustrated by a forward-looking construction that permitted the use of only those prior convictions occurring after the enactment of the recidivist legislation. It observed that "[s]ection 667 plainly was intended to take account of antecedent crimes; it includes in the list incorporated from section 1192.7 crimes which were repealed prior to the effective date of the initiative. . . . The basic purpose of the section—the deterrence of recidivism—would be frustrated by a construction which did not take account of prior criminal conduct." (*Ibid*.) Courts reached the same conclusion following enactment of the Three Strikes Law, holding that convictions predating that law could be used as strikes. (See, e.g., *Gonzales v. Superior Court* (1995) 37 Cal.App.4th 1302, 1309.)

In the federal context, the United States Supreme Court has addressed similar issues under the Armed Career Criminal Act (ACCA), adopting a backward-looking approach much like California's. The ACCA requires a 15-year minimum prison sentence for offenders with three previous convictions for a violent felony or a "serious drug offense," defined in part as a prior drug offense that carries "a maximum term of

imprisonment of ten years or more." (*McNeill v. United States* (2011) 563 U.S. 816, 817-18.) In *McNeill*, the defendant argued that his state drug-trafficking convictions that occurred between 1991 and 1994 did not qualify as "serious drug offenses" under the ACCA in his current federal case because the state offenses no longer carried a maximum term of imprisonment of ten years or more. (*Id*. at p. 818.)

The Court rejected that interpretation of the ACCA's recidivist sentencing scheme. It reasoned that the "plain text of ACCA requires a federal sentencing court to consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense," and "[t]he only way to answer this backward-looking question is to consult the law that applied at the time of that conviction." (*McNeill*, *supra*, 563 U.S. at p. 820.) The Court explained that the "ACCA is concerned with convictions that have already occurred." (*Ibid*.) And the "previous conviction" question, it observed, "can only be answered by reference to the law under which the defendant was convicted." (*Ibid*.)

The Court also concluded that this "natural reading" of the ACCA avoided the "absurd results that would follow from consulting current state law to define a previous offense." (*McNeill*, *supra*, 563 U.S. at p. 822.) Under that approach, it explained, "a prior conviction could 'disappear' entirely for ACCA purposes if a State reformulated the offense between the defendant's state conviction and federal sentencing." (*Ibid*.) But "[i]t cannot be correct that subsequent changes in state law can

erase an earlier conviction for ACCA purposes." (*Id*. at p. 823.) The Court observed that "[a] defendant's history of criminal activity—and the culpability and dangerousness that such history demonstrates—does not cease to exist when a State reformulates its criminal statutes in a way that prevents precise translation of the old conviction into the new statutes." (*Ibid*.)

More recently, in *Brown v. United States* (2024) ___ U.S. ___, 144 S.Ct. 1195, the Court considered whether a prior drug conviction could support recidivist punishment under the ACCA when the state's definition of the drug at issue matched the definition in the relevant federal drug schedule at the time of the prior offense but the federal definition was later changed. (*Id*. at pp. 1201-1202.) Following the backward-looking approach of *McNeill*, the Court rejected an argument that the ACCA's reference to the definition in the federal drug schedule incorporated any changes that might thereafter be made to the schedule. (*Id*. at p. 1208.) It held that the "ACCA requires sentencing courts to examine the law as it was when the defendant violated it, even if that law is subsequently amended." (*Id*. at p. 1204.) This is because the ACCA "is a recidivist statute that gauges what a defendant's 'history of criminal activity' says about his or her 'culpability and dangerousness,'" through "a 'backward-looking' examination . . . of 'previous convictions' that bear on dangerousness." (*Ibid*.)

The Court rejected an argument in *Brown* that, "when the Federal Government changes the federal drug schedules, it necessarily concludes that the de-scheduled substance does not

implicate the culpability or harm that federal law previously attributed to it," so as to preclude recidivist punishment based on past convictions involving that drug. (*Brown*, *supra*, 144 S.Ct. at p. 1205, internal quotation marks and alteration omitted.) The Court concluded that the rationale for the ACCA's recidivist scheme continued to support application of enhanced punishment despite the changed legislative judgment about the underlying crime. The prior conviction, the Court explained, "reveals that the defendant previously engaged in illegal conduct that created a dangerous risk of violence, either with law enforcement or with others operating in the same illegal field." (*Id*. at pp. 1205-1206.) "That risk does not cease to exist if the law under which the defendant was convicted is later amended or eliminated." (*Id*. at p. 1206, internal quotation marks omitted.)

The language and rationale of the recidivist statutes at issue here support the same interpretation. California's recidivist laws, including the ones under which appellants were sentenced, are designed to augment punishment in a current case based on the offender's status as a repeat felon. (*Foss*, *supra*, 10 Cal.3d at p. 922; *Dutton*, *supra*, 9 Cal.2d at p. 507; *Stanley*, *supra*, 47 Cal. at p. 116.) The serious felony determination thus requires courts to "examine the law as it was when the defendant violated it, even if that law is subsequently amended." (*Brown*, *supra*, 144 S.Ct. at p. 1204; see also *Jackson*, *supra*, 37 Cal.3d at pp. 831, 833 & fn. 7.) For example, section 1192.7(c)'s serious felony list includes "murder or voluntary manslaughter." (§ 1192.7, subd. (c)(1).) But a prosecutor would not be required to show that a

murder conviction predating Senate Bill No. 1437 satisfied the statutory changes made by that bill before the conviction could be used as a serious felony. Similarly, section 1192.7(c)'s serious felony list includes "any felony punishable by death or imprisonment in the state prison for life." (§ 1192.7, subd. (c)(7).) If the Legislature reconsidered and reduced the punishment for such an offense, a conviction preceding that change could still be used as a serious felony. Such subsequent changes do not negate the defendant's status in a new case as a "greater offender" than one "who had not previously been convicted." (*Biggs*, *supra*, 9 Cal.2d at pp. 512-513; see also *Brown*, at pp. 1205-1206.)[2]

Any changes regarding how offenses listed in section 1192.7(c) may qualify as serious felonies for purposes of recidivist sentencing are instead properly accomplished by direct

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[2] To be sure, in some situations that do not involve what this Court has referred to as "'per se' serious felonies" (*People v. Kelii* (1999) 21 Cal.4th 452, 456)—that is, serious felonies designated by reference to a particular crime—a court may be required to examine the prior record of conviction to determine whether the facts necessarily supporting that conviction align with the definition of a serious felony in section 1192.7. (See *People v. Gallardo* (2017) 4 Cal.5th 120, 134, 138-139 [addressing determination of serious felony defined by conduct more specific than generic statutory offense].) But that kind of inquiry is different from an inquiry into whether the prior judgment would satisfy an intervening change to a statutory offense referenced in section 1192.7(c). Consistent with the backward-looking approach that the serious felony determination requires, the inquiry in those circumstances would also look to any referenced legal provision or body of law as it existed at the time of the prior conviction. (Cf. *Brown*, *supra*, 144 S.Ct. at pp. 1204-1205; *McNeill*, *supra*, 563 U.S. at pp. 820-823.)

amendment of that section, not indirect alteration of statutes it references. (Cf. *Biggs*, *supra*, 9 Cal.2d at p. 514 ["the legislature could doubtless make an exception in favor of persons pardoned, if it had reason to believe that such persons, though found guilty of a subsequent offense, were no more dangerous to society, because no more criminal in character, than persons first convicted"].) That makes sense in light of the rationale of recidivist laws to punish repeat offenders, which differs from the rationale for ameliorating crimes prospectively. When the Legislature makes the latter choice, it does not necessarily or obviously follow that the intent was also to restrict or erase the use of prior convictions under the old law for purposes of recidivist sentencing. And nothing in AB 333 suggests such an intent with respect to its amendments of section 186.22.[3]

### 2. The Three Strikes Law's lock-in provisions do not affect the backward-looking aspect of the serious felony determination

Though the Court of Appeal below based its decision in part on the Three Strikes Law's lock-in provisions, the parties now agree that those provisions do not affect how the serious felony

[3] Again, this is illustrated by section 1192.7's reference to offenses that no longer exist. Were the Legislature (or the electorate) to conclude that such prior offenses should no longer be used even for recidivist sentencing purposes, it could eliminate those offenses from the list in section 1192.7(c). The same would be true if the Legislature (or the electorate) wanted to incorporate any changed definition of a referenced offense: it could define the serious felony in section 1192.7(c) itself as requiring compliance with the amended law.

determination operates. (See FOBM 40-41; TOBM 43-44, 57.)[4] At the time of appellants' current offenses in 2020, the version of section 1192.7(c) applicable to them was the one that was locked in as of November 7, 2012. (See § 667.1, subd. (a) ["for all offenses committed on or after November 7, 2012, but before January 1, 2024, all references to existing statutes . . . are to those statutes as they read on November 7, 2012"].) Because that list included "a felony violation of section 186.22" (§ 1192.7, subd. (c)(28)), appellants' prior gang-related convictions could be alleged as strike priors in their current prosecutions. The Three Strikes Law's lock-in provisions, however, were not designed to alter the basic principles governing how courts make the serious felony determination. Rather, the lock-in provisions are simply a method by which the electorate and the Legislature sought to ensure measured implementation of which offenses may be used as strike priors.

The Three Strikes Law initially froze the serious felony list as of June 30, 1993, the effective date of that law. As explained in the Senate committee analysis for Assembly Bill No. 971, the drafters intended to ensure that further alterations to the list would not immediately affect strike priors: "Additional crimes added to the violent and serious felony lists in the future such as carjacking and conspiracy to commit specified drug sales to a

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[4] The People acknowledge that their briefing below advanced an argument similar to the analysis in the Court of Appeal's opinion. Upon further evaluation, and in light of this Court's subsequent decision in *Rojas*, *supra*, 15 Cal.5th 561, the argument appears to be inapt.

minor, which were added October 1, 1993, or additions to be considered today in AB 1568 (Rainey), would not become 'strikes' for the purposes of this bill." (Sen. Com. on Judiciary, analysis of Assem. Bill No. 971 (1993-1994 Reg. Sess.) as amended Jan. 26, 1994, pp. 4-5.)

In contrast, such newly added offenses would immediately become available for use as nickel priors under section 667, subdivision (a). (See *People v. Ringo* (2005) 134 Cal.App.4th 870, 884 ["Based upon the plain language of section 667, subdivision (a), the crucial date for determining if a prior conviction qualifies as a serious felony is the date of the charged offense. If the alleged prior conviction is included in the list of serious felonies in section 1192.7 on the date of the charged offense, the prior conviction qualifies for the five-year enhancement under subdivision (a)"].) But for Three Strikes purposes, an additional and separate determination would have to be made by supermajority vote or by the electorate to update the lock-in provisions before the new list would control which prior convictions could be used as strikes.

For example, the Legislature classified additional offenses as serious or violent felonies following the enactment of the Three Strikes Law. (See, e.g., Stats. 1993, ch. 611 (SB 60), § 18, eff. Oct. 1, 1993 [carjacking]; Stats. 1998, ch. 936 (AB 105), § 13, eff. Sept. 28, 1998 [any attempt to commit a serious felony].) But because it did not amend the June 30, 1993, lock-in date, those newly classified serious or violent felony convictions could not qualify as prior strike convictions despite their serious or violent felony

classification. (*Johnson*, *supra*, 61 Cal.4th at pp. 683-684.) Only with the passage of Proposition 21 in 2000 was the lock-in date advanced, by the addition of sections 667.1 and 1170.125, making the new list controlling as to strike priors for current offenses committed after March 8, 2000. (*Id*. at p. 684.) Similarly, the Legislature amended the lock-in date six years later in 2006 (Stats. 2006, ch. 337 (SB 1128), § 37, eff. Sept. 20, 2006) to incorporate the weapons-of-mass-destruction offense that was added to the serious felony list in 2002 (Stats. 2002, ch. 606 (AB 1838), § 3, eff. Sept. 17, 2002). And Proposition 36, enacted another six years after that, made another change, advancing the lock-in dates in sections 667.1 and 1170.125 to November 7, 2012, for offenses committed on or after that date. (*Johnson*, at p. 684.)

The Legislature most recently described its view of the lock-in provisions in 2023 with the enactment of Senate Bill No. 14, when it added human trafficking of a minor to the list of serious felonies. As the drafters explained in the Senate Committee on Public Safety report pertaining to the bill, the purpose of the amended lock-in date was to carefully limit what offenses can be alleged as strikes: "The effect of the lock-in date is to provide that the listed offenses are "strikes" as of that date. As long as an offense is deemed a strike as of the listed date, the Three Strikes sentencing provisions apply to enhance a person's sentence even if the person was convicted of the offense prior to it being deemed a strike. The specified date also acts to disallow adding a new strike unless the date is extended." (Sen. Com. on

Pub. Safety, comments on Sen. Bill No. 14 (2023-2024 Reg. Sess.), April 22, 2023, p. 10.)

The only purpose of the lock-in provisions is thus to regulate which version of the serious felony list is available for Three Strikes cases. (See *People v. James* (2001) 91 Cal.App.4th 1147, 1150.) They do not affect the nature of the serious felony determination itself—that separate determination is made as described above (see Arg. I.B.1, *ante*).[5]

### C. Appellants' contrary arguments are unpersuasive

Appellants make a number of arguments in support of their interpretation of the serious felony determination, none of which is persuasive.

#### 1. Neither *Rojas* nor *Valenzuela* speaks to the backward-oriented serious felony determination

Appellant Taylor relies in part on this Court's recent decision in *Rojas*, *supra*, 15 Cal.5th 561 in arguing that section 1192.7(c) incorporates intervening changes to a statute referenced in the list of serious felonies for purposes of the serious felony determination. (TOBM 61-67.) *Rojas* concerned section 190.2, subdivision (a)(22)'s gang-murder special circumstance, which makes any intentional killing "while the defendant was an active participant in a street gang, as defined in subdivision (f) of section 186.22," subject to increased

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[5] To the extent some recent Court of Appeal decisions, including the one below, have suggested otherwise (see Opn. 6, 11; *Gonzalez*, *supra*, 98 Cal.App.5th 1300), those decisions are incorrect.

punishment. (*Rojas*, at p. 565.) This Court held that the special circumstance statute's reference to section 186.22 did not freeze the definition of a criminal street gang as of the date section 190.2 was enacted but instead incorporated any subsequent changes to section 186.22 for purposes of applying the gang-murder special circumstance in future cases. (*Id*. at pp. 570-574.)

The *Rojas* decision does not affect the analysis here. That case did not involve any recidivist provision at all; it was concerned only with what law governed the gang-murder special-circumstance determination in connection with the defendant's current offense of murder. As this Court observed in *Rojas*, the meaning of a statutory reference or incorporation depends on a variety of interpretive considerations. (*Rojas*, *supra*, 15 Cal.5th at p. 570.) The determinative consideration in this case is the retrospective orientation of the recidivist provisions of which section 1192.7 is a part. Because *Rojas* did not involve a recidivist statute, it did not implicate or consider the principles discussed above that inform the nature of the serious felony determination under section 1192.7 for purposes of the nickel prior and Three Strikes statutes.[6]

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[6] As this Court observed in *Rojas*, its precedents have indicated that a statute may incorporate by reference another legal provision either as it exists at the time of incorporation or as it may be amended from time to time. (*Rojas*, *supra*, 15 Cal.5th at p. 570.) But it is also possible, as this case illustrates, for a statute to incorporate another legal provision as it previously existed. Again, the question is simply one of statutory construction.

Appellant Taylor's reliance on *People v. Valenzuela* (2019) 7 Cal.5th 415 is misplaced for similar reasons. (TOBM 23-25.) In that case, the defendant stole a bicycle and was convicted of both grand theft and street terrorism. (*Valenzuela*, at p. 419.) The latter conviction was based on his having committed felonious conduct—the grand theft—for gang purposes. (*Id.* at p. 420.) The defendant later successfully petitioned for reduction of the felony grand theft conviction to a misdemeanor. (*Ibid.*) This Court concluded that reduction of the felony conviction to a misdemeanor removed an "essential element" of the street terrorism conviction, requiring dismissal of that conviction. (*Id.* at p. 427.)

*Valenzuela* does not support the proposition that a prior conviction must be reassessed at the time of sentencing, as appellant Taylor asserts. (TOBM 23.) Rather, in *Valenzuela*, the offenses at issue were current offenses. Because the grand theft as a felony was an essential element of the street terrorism offense, the subsequent reduction of the theft to a misdemeanor required dismissal of the street terrorism conviction because it negated an essential element of that offense. (*Valenzuela*, *supra*, 7 Cal.5th at p. 427 ["The reduction of defendant's felony grand theft conviction therefore established the absence of an essential element of the street terrorism crime"].) *Valenzuela* did not involve, and did not purport to address, any question about how

to assess whether a prior conviction qualifies as a serious felony for purposes of a recidivist statute.[7]

### 2. The Three Strikes Law's determination clauses support respondent's interpretation, not appellants'

Appellants also argue that the Three Strikes Law's determination clauses do not support a backward-looking approach to the serious felony determination. They focus on language in the latter part of the determination clauses stating that the prior conviction determination "is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor." (See §§ 667, subd. (d)(1), 1170, subd. (b)(1).) Based on that language, they argue that the sole function of the determination clauses is to make clear that a prior wobbler offense that was a felony at the time of conviction is considered a felony for strike purposes even if it was later reduced to a misdemeanor. (FOBM 17-24;

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[7] Appellant Taylor also cites *Kelii*, *supra*, 21 Cal.4th 452, which addressed the scope of a court's (as opposed to a jury's) authority to make the serious felony determination under the Three Strikes Law. (TOBM 56-57; see also p. 37, fn. 2, *ante*.) In the course of its analysis, the Court in *Kelii* observed that section 1192.7 lists some offenses that are "'per se' serious felonies"—those defined by reference to a particular offense—and stated, "If a defendant's prior conviction falls into this group, and the elements of the offense have not changed since the time of that conviction, then the question whether that conviction qualifies as a serious felony is entirely legal." (*Kelii*, at p. 456.) But that case did not analyze or resolve any question regarding an intervening change to the elements of a "per se serious felony" referenced in section 1192.7, and the decision is therefore not authority on that question. (See *Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 44-45.)

TOBM 28-29.) Respondent does not contend, however, that the language of the determination clauses is vital to proper resolution of the question presented here. Rather, respondent observes only that those clauses are consistent with other interpretive considerations establishing that the serious felony determination for purposes of the nickel prior statute and the Three Strikes Law focuses on the law as it existed at the time of the prior conviction. Thus, even if appellants' reading of the determination clauses is correct, that would not affect the analysis.

But appellants' reading of the determination clauses is nonetheless mistaken. They make little effort to grapple with section 1170.12, subdivision (b)(1), which explicitly states that the determination of whether a prior conviction is a "prior *serious or violent* felony conviction . . . shall be made upon the date of that prior conviction and is not affected by the sentence imposed . . . ." (§ 1170.12, subd. (b)(1), italics added.) By adding the above-italicized language to section 1170.12, subdivision (d)(1), as part of Proposition 36, the electorate removed any possible ambiguity about whether the determination clause is directed to the prior offense's status as a serious or violent felony at the time of conviction, as opposed to only the felony or misdemeanor status of the conviction. (See *Gonzalez*, *supra*, 98 Cal.App.5th at p. 1311; *People v. Aguirre* (2023) 96 Cal.App.5th 488, 491; *Scott*, *supra*, 91 Cal.App.5th at p. 1181.) Appellants' reading would improperly erase the words "serious or violent" that the voters placed into section 1170.12, subdivision (b)(1)'s

determination clause as part of Proposition 36. (See *People v. Leiva* (2013) 56 Cal.4th 498, 506 [courts should avoid a construction that renders part of a statute inoperative, unless doing so would conflict with its manifest purpose or otherwise yield absurd results].)

Appellants focus instead on the parallel determination clause in section 667, subdivision (d)(1). That provision states (as it always has) that "[t]he determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor." (FOBM 20-24; TOBM 31-33, 39-40.) Appellants overlook that even section 667, subdivision (d)(1), states that the determination is to be made "for purposes of subdivisions (b) to (i), inclusive"—the very subdivisions that describe the use of serious or violent felony prior convictions in the operation of the Three Strikes Law. That reference to subdivisions (b) to (i), moreover, matches subdivision (d)'s language describing what constitutes a serious or violent felony for Three Strikes purposes. (See § 667, subds. (d), (d)(1) ["Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a serious or violent felony shall be defined as . . . [a]n offense defined in subdivision (c) of Section 667.5 as a violent felony or an offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state"].) And the reference comports with subdivision (c),

stating that "one or more prior serious or violent felony convictions *as defined in subdivision (d)*" are required to support a Three Strikes sentence. (§ 667, subds. (d), italics added.)

Appellants also point to several decisions interpreting the determination clauses shortly after enactment of the Three Strikes Law. (See FOBM 20-24; TOBM 30-31, 35-36.) These early decisions addressed claims that the determination clauses meant that a prior conviction suffered before its addition to the serious felony list, or before the enactment of the Three Strikes Law, could not qualify as a strike. In rejecting those claims, they described the determination clauses as addressing only the felony or misdemeanor status of a prior conviction. (See *People v. Moenius*, *supra*, 60 Cal.App.4th at p. 826; *People v. Turner* (1995) 40 Cal.App.4th 733, 739; *Gonzales*, *supra*, 37 Cal.App.4th at pp. 1306-1307; *People v. Sipe* (1995) 36 Cal.App.4th 468, 477-478.)[8]

That reading of the determination clauses, however, must be understood in light of those decisions' ultimate and more specific holding that the clauses do not mean that a prior conviction had

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[8] Other early cases addressing claims that the determination clauses required an actual declaration of the conviction's strike status at the time of the prior conviction appear to have interpreted those clauses more broadly "to mean that the court is presently required to look backward to see if, at the time of the conviction of the past offense, such past offense qualified as a serious or violent offense." (*Green*, *supra*, 36 Cal.App.4th at p. 283; see also *Anderson*, *supra*, 35 Cal.App.4th at pp. 600-601; *Reed*, *supra*, 33 Cal.App.4th at pp. 1610-1612.)

to be on the list of serious felonies at the time of its commission—or occur after the enactment of the Three Strikes Law—to qualify as a strike. The decisions appellants rely on had no occasion to address the question presented here: whether any intervening changes to the definition of an offense that is referenced in section 1192.7(c) affects the serious felony determination. Nor did those courts have the benefit of the clarifying language pertinent to that question that was later added by Proposition 36. More fundamentally, it was unnecessary for those courts to read the determination clauses so narrowly as to cast doubt on any of the general principles or specific interpretive considerations requiring a backward-looking serious felony determination. Those same principles and considerations, with which the determination clauses are consonant, permit the use of prior convictions committed before their addition to the list of serious felonies. To the extent the cited cases might suggest or imply otherwise, they are incorrect.

### 3. Practical consequences also favor respondent's interpretation

Appellant Fletcher argues that the failure to incorporate the amended elements of the gang statute into the serious felony determination as to prior convictions predating AB 333 would lead to "anomalous, unfair, and absurd" results. (FOBM 58-61.) As an example, Fletcher posits that a jury in 2024 could be faced with determining whether an offense with an alleged gang enhancement meets the elements of amended section 186.22, while also being required to determine whether a prior gang-related conviction constitutes a serious felony under section

186.22 as it existed prior to AB 333, which would require two sets of jury instructions. (FOBM 59-60.)

Fletcher misapprehends the nature of the serious felony inquiry. For "per se" serious felonies designated by reference to a particular offense, no inquiry into the elements of the crime is required and it would not matter whether the prior offense was adjudicated before or after any change to its elements. All that need be determined, factually, is whether the defendant was previously convicted of the specified crime by reference to the law as it existed at the time. (See Arg. I.B, *ante*.) In any event, that determination would not have to be made by a jury—indeed, it may not be made by a jury—since the serious felony determination is for the court alone. (See *Gallardo*, *supra*, 4 Cal.5th at pp. 138-139.)[9]

Instead, it is appellants' approach that founders on its consequences. A showing under section 1192.7 that a pre-AB 333 gang conviction meets the elements of amended section 186.22 would likely be impossible in the vast majority of guilty-plea cases. Their approach would therefore preclude the use of most prior gang convictions as serious felonies. It seems unlikely that such a dramatic result would be accomplished in an oblique

[9] As noted, there are situations in which an assessment of the facts that supported a prior conviction would be necessary in making the serious felony determination—such as for out-of-state convictions or serious felonies that are narrower than a statutory offense (see p. 37, fn. 2, *ante*). But neither Fletcher's hypothetical nor his legal theory implicates those circumstances.

way—through amendment of a referenced statute—rather than directly by amendment of section 1192.7(c) itself.

Appellants' approach would also result in markedly divergent treatment of different types of serious felonies. As explained, section 1192.7(c)'s list of serious felonies includes some that are defined by reference to a specific statutory offense (e.g., "criminal threats, in violation of Section 422"), and others that are defined in terms of particular conduct (e.g., "any felony in which the defendant personally used a dangerous or deadly weapon"). (See *Kelii*, *supra*, 21 Cal.4th at p. 456; see also TOBM 57-58.) It is only the former, however, that are susceptible to indirect amendment under appellants' theory, and thus, under that theory, would call for different inquiries depending on the date of the prior conviction. Even more oddly, such indirect amendment of a serious felony definition—even one that might make a prior conviction "disappear" altogether (see *McNeill*, *supra*, 563 U.S. at p. 822)—would alter the availability of a strike without regard to the elevated two-thirds majority requirement governing the application of section 1192.7(c)'s list to the Three Strikes Law that was established by voter initiative (see Arg. II, *post*). In contrast, serious felonies not defined by reference to a specific statutory offense could only be amended through direct alteration of section 1192.7(c), which would require a supermajority vote (or a vote by the electorate) before they could be used as strikes.

These consequences suggest that appellants' proposed interpretation is, at the least, highly improbable. Not only is

their interpretation at odds with the retrospective orientation of recidivist laws in general and the serious felony inquiry specifically, but it would lead to anomalous and sometimes unduly complicated implementation of that inquiry. They offer no sound rationale for such odd practical consequences.

In addition, appellant Taylor argues that appellants' interpretation of the serious felony inquiry "would further racial equality under the law" while a contrary view would "produce the anomalous result that harsher Three Strikes sentencing could be satisfied by a lesser evidentiary showing" than would be required for a current offense. (TOBM 68-69.) To be sure, AB 333 was motivated in part by what the Legislature described as section 186.22's disproportionate effect on "neighborhoods historically impacted by poverty, racial inequality, and mass incarceration." (Stats. 2021, ch. 699, § 2, subds. (a), (d)(1) & (2), (i).) But the issue in this case concerns the proper operation of recidivist provisions—in particular the nickel prior statute and the Three Strikes Law—which AB 333 did not address. Appellants themselves do not contend that AB 333 directly affects their prior convictions or that it directly altered the recidivist statutes at issue; rather, they argue only that the serious felony determination must indirectly take into account changes made by the amendment of statutes referenced in section 1192.7(c). (FOBM 14, 17, 27-28; TOBM 25, 40-41.) The motivation for AB 333 is thus of little relevance to determining how the serious felony determination is made for purposes of the nickel prior statute and the Three Strikes Law.

In any event, "'no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.'" (*In re Friend* (2021) 11 Cal.5th 720, 740.) The cited motivation of AB 333 is insufficient, in light of the considerations discussed above, to support appellants' theory of how the prior serious felony determination operates.

## II. CALIFORNIA'S CONSTITUTIONAL PROHIBITION AGAINST LEGISLATIVE AMENDMENT OF AN INITIATIVE MEASURE IS NOT IMPLICATED UNDER EITHER COMPETING INTERPRETATION HERE

The Court of Appeal below based its analysis in part on the principle that the Legislature may amend an initiative measure only according to the terms set out for amendment by the initiative itself. (Opn. 6-11; see Cal. Const., Art. I § 10(c).) It held that the list of felonies applicable to appellants' cases was locked in by Proposition 36 in 2012; and because AB 333 did not comply with Proposition 36's supermajority amendment requirement, its changes to the gang offense referenced in the serious felony list could not apply here. (Opn. 9-10.) Respondent does not espouse that analysis. (See Arg. I, *ante*.)[10] Neither legal theory now advanced by the parties implicates the issue of an unconstitutional amendment.

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[10] Again, the People acknowledge that their briefing below advanced such an argument, prior to re-evaluation of the issue in light of, among other things, this Court's decision in *Rojas*.

In appellants' view, the nickel prior and Three Strikes statutes are properly interpreted to require a court, in making the serious felony determination, to construe references to other statutes in section 1192.7(c) as incorporating any intervening changes to the referenced statutes. (FOBM 24-29; TOBM 16-17, 22-23, 25; see also TOBM 44-45, citing *Rojas*, *supra*, 15 Cal.5th at p. 570.) Under that theory, the constitutional issue identified by the Court of Appeal below is not implicated. This is because the test for whether a legislative act improperly amends an initiative measure is whether it adds to or takes away from what the electorate intended (without satisfying the initiative's terms for amendment). (*Rojas*, at p. 574.) And when an initiative measure refers to a different statute or body of law, the question whether the reference incorporates any future legislative changes to the referenced provision is also one of electoral intent. (*Id.* at p. 570.) So if it appears as a matter of statutory construction that an initiative measure's reference to another statute was intended to incorporate legislative changes to that statute in the future, then such a change does not add to or take away from what the electorate intended when passing the measure. (*Id.* at p. 575.) Under appellants' theory, then, AB 333's amendment of section 186.22 did not need to satisfy the initiative measure's requirements governing amendment of section 1192.7(c), because section 1192.7(c) itself contemplates incorporating any changes to referenced statutes. (See *Rojas*, at pp. 570-578.)

As respondent has explained, however, appellants' analysis of how the serious felony determination operates is mistaken.

The proper statutory interpretation is that references to other statutes or bodies of law in section 1192.7(c)'s list of serious felonies are to the law as it existed at the time of the prior conviction. (Arg. I, *ante*.) That approach also does not implicate the proper manner of amending section 1192.7(c) because any intervening changes to the statutes referenced in section 1192.7(c) are irrelevant to the backward-looking serious felony determination.

## CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

ROB BONTA
*Attorney General of California*
LANCE E. WINTERS
*Chief Assistant Attorney General*
CHARLES C. RAGLAND
*Senior Assistant Attorney General*
MICHAEL R. JOHNSEN
*Supervising Deputy Attorney General*
ALAN L. AMANN
*Deputy Attorney General*

**S/ WARREN J. WILLIAMS**
WARREN J. WILLIAMS
*Deputy Attorney General*
*Attorneys for Plaintiff and Respondent*

July 24, 2024

## CERTIFICATE OF COMPLIANCE

I certify that the attached Answer Brief on the Merits uses a 13 point Century Schoolbook font and contains 12,227 words.

ROB BONTA
*Attorney General of California*

**S/ WARREN J. WILLIAMS**
WARREN J. WILLIAMS
*Deputy Attorney General*
*Attorneys for Plaintiff and Respondent*

July 24, 2024

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**STATE OF CALIFORNIA**
Supreme Court of California

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Last Name, First Name (PNum)

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