No. B343930

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

JESSICA M. and CRIME SURVIVORS, INC.,

Petitioners and Appellants,

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION and CALIFORNIA BOARD OF PAROLE HEARINGS,

Respondents.

Appeal from the Los Angeles County Superior Court,
Honorable Stephen I. Goorvitch,
Case No. 24STCP02901

APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL Second **APPELLATE DISTRICT, DIVISION** 7	COURT OF APPEAL CASE NUMBER: B343930
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 105178 NAME: Kent S. Scheidegger FIRM NAME: Criminal Justice Legal Foundation STREET ADDRESS: 2131 L Street CITY: Sacramento STATE: CA ZIP CODE: 95816 TELEPHONE NO.: (916) 446-0345 FAX NO.: (916) 446-1194 E-MAIL ADDRESS: kent.scheidegger@cjlf.org ATTORNEY FOR (*name*): Jessica M. and Crime Survivors, Inc.	SUPERIOR COURT CASE NUMBER: 24STCP02901
APPELLANT/ PETITIONER: Jessica M. and Crime Survivors, Inc. RESPONDENT/ REAL PARTY IN INTEREST: California Department of Corrections and Rehabilitation and Board of Parole Hearings	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party *(name*): Jessica M. and Crime Survivors, Inc.

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1) Sergio Linares	Prisoner whose parole would be blocked by decision in favor of appellants.
(2)	Named as RPI in trial court but did not appear.
(3)	
(4)	
(5)	

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: May 12, 2025

Kent S. Scheidegger
(TYPE OR PRINT NAME)

Kent S. Scheidegger
(SIGNATURE OF APPELLANT OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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INTRODUCTION

This case is a petition for writ of mandate[1] brought by a victim of crime and a victim service organization against the California Department of Corrections and Rehabilitation and the Board of Parole Hearings. The petitioners allege that section 3051, subdivision (b) of the Penal Code, youth offender parole hearings, as applied to defendants sentenced under section 667.6(c) or (d) of the Penal Code, is an invalid amendment of that section in violation of article II, section 10, subdivision (c) of the California Constitution. These subdivisions were substantively amended in Proposition 83 of 2006 and are "initiative statutes" for the purpose of the constitutional limitation on amending initiative statutes.

In the trial court, petitioners sought a writ of mandate to restrain enforcement of section 3051, subdivision (b) for inmates sentenced to full, separate, and consecutive terms under section 667.6 and to restrain release of inmates granted parole. This is the issue in this appeal.

Also in the trial court, petitioners also asked for cancellation of a parole hearing for inmate Sergio Linares, the perpetrator of the crimes against petitioner Jessica M., scheduled for October 2, 2024. That request was denied and is now moot.

The judgment appealed from is the judgment denying the petition entered January 21, 2025, and the order of December 16, 2024, attached to and incorporated in that judgment.

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1. Petitioners also asked for a writ of prohibition in the alternative if the court found that to be the appropriate writ.

STATEMENT OF FACTS AND PROCEDURE

The facts in this case are not disputed. On July 26, 2008, Jessica M. was waiting for a bus in Los Angeles. Sergio Linares, then 25 years and 9 months old, put a knife to her throat and forced her to walk to his car and get in. (District Attorney's Statement of View, Petition Exh. F, 1 AA 34.)[2] During the drive, Jessica was able to surreptitiously dial 911, and the entire attack was recorded. Linares then drove to an isolated area and committed numerous sex crimes against her over an extended period, including forcible oral copulation, foreign object rape, rape, and forcible sodomy. (1 AA 35.)

Linares was arrested, and his identity as the perpetrator was confirmed by DNA. (1 AA 36.) These crimes qualified for a life sentence under the "One Strike" law. (See Pen. Code, § 667.61.) The District Attorney calculated the possible sentence as 136 years to life. (1 AA 33.) "The People agreed to a plea prior to preliminary hearing for a substantial sentence to ensure public safety, and to prevent the victim from having to endure periodic parole hearings in the future." (*Ibid*.) Linares received a determinate sentence to five full, consecutive eight-year terms for each sex crime and a ten-year weapon enhancement, for a total of fifty years. (Abstract of Judgment, Petition Exh. E, 1 AA 28.) Sentence-reducing credits for violent crimes at the time were limited to 15 percent (Pen. Code, § 2933.1), providing Jessica with an assurance that Linares would be in prison until about 2050,

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2. In the trial court, the crime was described in more detail in Exhibits A–D and Attachments 1–3 of Exhibit F. However, as the facts are undisputed and the additional detail unnecessary for decision of the case, these voluminous scanned documents have been omitted from the Appellants' Appendix. (See Cal. Rules of Court, rule 8.124(b)(3)(A) [unnecessary for proper consideration of the issues], rule 8.74(a)(5) [25-megabyte limit on electronic documents].)

with no need for her to attend parole hearings to oppose earlier release.

As so often happens in cases of sexual violence, this attack caused emotional and psychological injury that lasted long after the crime itself. (See Victim Impact Statement, Atch. 4 to Petition Exh. F, 1 AA 41–42.) The 50-year sentence did provide some sense of safety, however. (1 AA 42.)

In 2013, the Legislature enacted section 3051 of the Penal Code in Senate Bill 260. (Stats. 2013, ch. 312, § 4, Petition Exh. K, 1 AA 59–56.) As originally enacted, it was limited to perpetrators who were juveniles under 18 at the time of the crime (*id*., subd. (a)(1)), and it was related to cases that involved Eighth Amendment limitations on sentencing of juveniles. (*Id*. § 1, 1 AA 51–52.) Later amendments raised the age limit to "under 23" and then "25 years of age or under," i.e., under 26. The increase to 26 was made by Assembly Bill 1308 and Senate Bill 394 in 2017, with SB 394 being chaptered later and therefore controlling. (See Stats. 2017, ch. 684, § 1.5, 1 AA 65–68.)

It is undisputed that neither the original enactment of section 3051 nor any amendment passed both houses by a two-thirds majority. (See Order Denying Petition for Writs of Mandate and Prohibition 5 (Dec. 16, 2024) (Ruling), 3 AA 450.)

The Board of Parole Hearings held a section 3051 hearing for Linares in 2023, his 15th year of incarceration, less than a third of the length of the original sentence. Jessica submitted her victim impact statement, including this statement regarding the impact of this change in the law:

> "His sentence to fifty years, with no parole, provided me with some sense of closure even though it did not change how I was violated. A crime was committed against me, and I have little rights outside of this statement. The system promised

> me he would serve 50 years without parole and now the system has broken that promise. There needs to be change, and unless we see, and treat, rape as the violent crime that it is, it will continue to happen, and the odds are it will be to someone you know and love deeply." (Victim Impact Statement, *supra*, 1 AA 42.)

The Board denied parole for three years, but a year later it turned and ripped away even that minimal assurance, scheduling a new hearing only a year and a half after the first, October 2, 2024. (Petition Exh. P, 1 AA 78; Exh. Q, 1 AA 81.) Both the parole hearings and the time before them were emotionally exhausting and retraumatizing for Jessica. (Declaration of Jessica M. 2, Atch. A to Pet. Merits Brief, 2 AA 205.)

Jessica M. and Crime Survivors, Inc. (CSI) filed the present action on September 10, 2024. CSI provides advocacy and support for victims of crime and has done so for over 20 years. The support includes assistance for victims seeking just punishment of the perpetrators of crimes against them. The additional parole hearings authorized by section 3051 make CSI's task more difficult and put a strain on its resources, which are already limited. (Declaration of Patricia Wenskunas, Atch. B to Pet. Merits Brief, 2 AA 208.)

Petitioners sought a temporary restraining order to halt the parole hearing, which the court denied on September 26, 2024. (Register of Actions 3, 3 AA 500.) At the parole hearing, Linares stipulated that he was unsuitable for parole for three years. (Resp. Req. Jud. Not., 2 AA 172.)

The superior court held a hearing on the merits and on respondents' demurrer on December 6, 2024. On December 16, 2024, the court issued a written ruling denying the petition and dismissing the demurrer as moot. (Ruling 15, 3 AA 439.) Judgment was

entered on January 21, 2025, incorporating the December 16, 2024 order. (3 AA 441.)

APPEALABILITY

The clerk served the notice of entry of judgment on the same day as the judgment, January 21, 2025. (3 AA 463.) Appellants filed a notice of appeal on January 28, 2025. (3 AA 466.)

Final judgments are appealable under section 904.1, subdivision (a)(1) of the Code of Civil Procedure.

There is some degree of confusion in writ of mandate cases as to whether the judgment that starts the time to appeal is an order resolving all of the issues in the case or the subsequent judgment designated as such. (See *Meinhardt v. City of Sunnyvale* (2024) 16 Cal.5th 643, 649–650 [noting problem and adopting bright-line rule for administrative mandate cases].) In this case, appellants appealed both the December 16 order and January 21 judgment and did so 43 days from the earlier date, within the 60-day window for both. (Cal. Rules of Court, rule 8.104(a)(1).) There is no doubt of appealability in this case.

STANDARD OF REVIEW

This case involves only questions of law on undisputed facts. In such a case, the trial court's decision on a petition for writ of ordinary mandate is reviewed de novo. (*Stryker v. Antelope Valley Community College Dist.* (2002) 100 Cal.App.4th 324, 329.)

> "Any doubts [regarding whether a statute is an amendment] should be resolved in favor of the initiative and referendum power, and amendments that *may* conflict with the subject matter of initiative measures must be accomplished by popular vote, as opposed to legislatively enacted ordinances, where the original initiative does not provide otherwise."

(*Estate of Clayssens* (2008) 161 Cal.App.4th 465, 471, italics in original.)

ARGUMENT

I. This case is justiciable and not limited to a single prisoner.

The superior court assumed without deciding that appellant Jessica M. had individual standing, but only as to the effect of section 3051 on Sergio Linares, and that the case was ripe. This assumption without holding is curious given that these are threshold issues (see, e.g., *Spotlight on Coastal Corruption v. Kinsey* (2020) 57 Cal.App.5th 874, 882) and the ruling goes on to explain why the standing and ripeness requirements are indeed met. (Ruling 8–9, 3 AA 432–433.) The ruling then goes on to hold that Crime Survivors, Inc. lacks organizational standing and that neither petitioner has public interest standing or standing with regard to any other inmate. (Ruling 9–10, 3 AA 433–434.) For the reasons explained below, the standing and ripeness claims are met across the board.

A. Standing.

"As a general rule, a party must be 'beneficially interested' to seek a writ of mandate." (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 165.) Standing to sue generally and "beneficial interest" for seeking a writ of mandate are largely the same and equivalent to the "injury in fact" test in federal cases. (See *People for the Ethical Operation of Prosecutors v. Spitzer* (2020) 53 Cal.App.5th 391, 407-408.) It is only necessary to find one petitioner with standing on one basis for the case to go forward. (See *Strauss v. Horton* (2009) 46 Cal.4th 364, 399, fn. 6 [some petitioners have standing, no need to decide if others do]; *Save the Plastic Bag Coalition*, at p. 170 [direct interest found, no need to resort to public interest].)

1. Victims' standing.

Absent the public interest exception, discussed below, the petitioner must have "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796.) Marsy's Law contains multiple recognitions that victims have an elevated interest in criminal proceedings and punishment. Crime victims have a right to justice and a right to due process and they have standing to object to unlawful acts or laws. Marsy's Law's recitation of rights begins: "In order to preserve and protect a victim's rights to justice and due process ...." (Cal. Const., art. I, § 28, subd. (b).) Marsy's Law also provides that victims may enforce their rights in any trial or appellate court with jurisdiction and that the courts shall act promptly on such a request. (Cal. Const., art. I, § 28, subd. (c)(1).)

With regard to the parole of the perpetrators of crimes against them, Marsy's Law makes clear that victims of crime have a far greater interest than the general public. (See Cal. Const., art. I, § 28, subds. (a)(6) [finality], (b)(8) [to be heard on post-release decision], (b)(9) [final conclusion of the case], (b)(12) [notice of scheduled release], (b)(15) [notice of parole hearing, right to be heard, notice of release]; (b)(16) [to have safety considered in parole decision]; Pen. Code, § 3041.5, subds. (a)(2) [not to be questioned by perpetrator or attorney], (a)(4) [copy of parole hearing record]; (b)(3) [consideration in scheduling of hearing]; (b)(4) [consideration of views and safety in parole decision]; (d)(1) [consideration in decision to advance hearing]; Pen. Code, § 3043, subds. (a)(2) [greater advance notice of hearing], (b) [right to be heard and scope of views], (c) [unlimited choice of representative], (d) [entire and uninterrupted statement], (e) [additional family members]; Pen. Code, § 3044, subd. (a) [limitation of parolee's

rights in revocation to protect victim from harassment].) To say that a victim of crime does not have a "special interest" in the perpetrator's parole beyond that of the general public would be absurd.

The *Carsten* rule, *supra*, does not require that the petitioner's interest be a specific legal right not shared by the general public. In environmental cases, standing may be granted to persons who merely want to visit an area that is open to the public, such as national forests. "[R]ecreational or even the mere esthetic interests of the plaintiff ... will suffice." (*Summers v. Earth Island Institute* (2009) 555 U.S. 488, 494; see also *In re Big Thorne Project* (9th Cir. 2017) 857 F.3d 968, 974 [" 'enjoy the solitude' available only in 'remote, undeveloped areas on the Tongass' "].) People who actually use a particular public area have standing to object to developments with environmental impact, while other members of the public who could but do not use it do not have standing. (*Sierra Club v. Morton* (1972) 405 U.S. 727, 735.)

In *Friends of Oceano Dunes, Inc. v. San Luis Obispo County Air Pollution Control Dist*. (2015) 235 Cal.App.4th 957, 962-963, recreational vehicle enthusiasts had standing and a beneficial interest to challenge a restriction on RV activity in a state park with no requirement to show that they had any more right to use the park than anyone else. The restriction affected them, and that was a sufficient interest.

If "mere esthetic interests" in public lands are sufficient, the interest of victims of crimes in sufficient punishment of those who have committed horrible crimes against them must be vastly more than sufficient. The interest in justice is shared with the general public, to be sure. (See Cal. Const., art. I, § 28, subds. (a)(4), (a)(5), (f)(5).) But the interests of victims are far more intense and more personal, particularly in crimes such as those in this case. (See Declaration of Jessica M., 2 AA 204–206.) "Marsy's

Law clearly demands a broad interpretation protective of victims' rights." (*Santos v. Brown* (2015) 238 Cal.App.4th 398, 418.) Marsy's Law powerfully acknowledged the interests of families of murder victims in the parole process. (See Prop. 9 of 2008, § 2, subds. 5–9, Stats. 2008, p. A-299, 2 AA 244.) We should be long past the brutal notion that the victim of a crime has no interest in the outcome of the case or the enforcement of the judgment.

Thus, it is not necessary to identify a particular legal right within Marsy's Law that is being violated in order for the victim to have standing. The public generally has the right to have the law enforced, but the victim of a crime has a greater, more personal interest, analogous to but stronger than the interests of people who actually use public areas in the environmental cases cited above. For these reasons and those stated in the superior court's ruling, the individual petitioner in this case, Jessica M., has standing and a beneficial interest for writ of mandate.

2. Organization standing.

The impact of a regulation on an organization itself can provide standing. In *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1977) 74 Cal.App.3d 150, 154-155, an organization had standing to challenge a precedential decision on unemployment insurance. The organization had employees of its own and was potentially affected by the decision. (*Id.* at p. 157.) The legislative history of the statute on standing in such cases indicated it was intended to have the same scope as challenges to administrative regulations by writ of mandamus. (*Id.* at pp. 155–156.) This interest was enough to give the organization standing to contest the decision. In this case, Crime Survivors, Inc. (CSI) provides services to victims opposing parole for the perpetrators of crimes against them. The increased number of parole hearings puts a strain on its already limited resources. (See Declaration of Patricia Wenskunas, 2 AA 208.)

The superior court found the basis of CSI's standing to be "conclusory and speculative" (Ruling 9, 2 AA 433), but this statement is itself conclusory and states no basis for finding it speculative. Ms. Wenskunas's declaration does not speculate that the increased number of hearings might in the future put a strain on the resources available for its mission; she states that this effect is already happening. (2 AA 208.) Neither the superior court's ruling nor the respondent stated any basis for distinguishing the cases upholding organizational standing on this basis. The primary case in this area, *Havens Realty Corp. v. Coleman* (1982) 455 U.S. 363, is nearly identical. A nonprofit organization dedicated to equal housing opportunity alleged that its mission was frustrated and its resources impacted by the defendant's discriminatory practices. (See *id.* at pp. 368–369.) This allegation was sufficient for standing. "Such concrete and demonstrable injury to the organization's activities — with the consequent drain on the organization's resources — constitutes far more than simply a setback to the organization's abstract social interests [citation]." (*Id.* at p. 379.) On these allegations, dismissal for lack of standing was error. (*Ibid.*)

California follows *Havens*. "As *Havens* and its progeny make clear, an organization that has expended staff time or other resources on responding to a new threat to its mission, diverting those resources from other projects, has suffered an economic injury in fact." (*California Medical Assn. v. Aetna Health of California Inc.* (2023) 14 Cal.5th 1075, 1095.) Given that injury in fact on the federal standard is equivalent to beneficial interest for California mandate (see *supra* at p. 14), CSI has standing. Its standing is not limited to a single inmate or to subdivision (c) rather than subdivision (d) of section 667.6. It is across the board.

3. Public interest standing.

In petitions for writ of mandate, California law has long recognized an exception to the beneficial interest requirement for standing to "promote[] the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." (*Green v. Obledo* (1981) 29 Cal.3d 126, 144; *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 479; *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166.) That doctrine applies in this case, and no exception to it applies.

The superior court stated that "Petitioners do not identify a clear 'public right' and 'public duty' they seek to enforce." (Ruling 9, 3 AA 433.) That is simply not true. The petition alleged in paragraph 42 that CDCR "has a mandatory duty under Penal Code § 1215 to keep inmates sentenced to state prison in custody until the completion of their sentences ...." (1 AA 23.) This was also noted in the briefing. (Pet. Opp. Demurrer 5, 2 AA 370.) Respondents did not specifically deny that they have this duty under section 1215. They only denied something that the petitioners had not alleged, i.e., that "section 1215 restricts the Legislature from implementing postjudgment proceedings like the parole programs recently enacted for nonviolent offenders, youthful offenders, and elderly offenders." (Answer 6, ¶ 42, 1 AA 105.) Section 1215 supplies the public duty and right, not the rule on the merits. To the extent that respondents' denial has any relevance at all, it would only go to the merits, not standing. As noted *supra*, standing is a threshold issue before reaching the merits. The petition alleged the requisite legal duty needed for public interest standing. Whether respondents were in breach of that duty goes to the merits, not standing.

The superior court also held that *Dix v. Superior Court* (1991) 53 Cal.3d 442, 450 blocks standing in this case. On its face, *Dix* applies to the "commencement, conduct, or outcome of a criminal proceeding against another." (*Ibid.*) Appellants are not attempting to alter the commencement, conduct, or outcome of any criminal proceeding. The criminal proceeding ends with the rendering of the criminal judgment and its affirmance on appeal, if any. In the specific case of Sergio Linares, the criminal proceeding ended in 2008 with a plea bargain and imposition of judgment. The judgment was amended in 2023 with no change regarding incarceraction. (See Petition Exhs. E & F, 1 AA 28–31.) Petitioner Jessica M. made no attempt to alter the criminal proceeding beyond her victim impact statement. The present civil writ proceeding is an effort to require the corrections and parole authorities to do their duty, not an effort to change the outcome of a criminal proceeding.

One need not look far for the definitive word regarding whether actions like the present one are barred by *Dix*. The answer is in *Dix* itself.

> "A rule against public intervention in individual criminal cases will not cause important issues to evade review, as the majority [in the court of appeal] implied. Whatever unusual circumstances apply to this case, the natural adversary relationship between the People and criminal defendants will usually ensure litigation of significant questions. Moreover, *nothing we say here affects independent citizen-taxpayer actions raising criminal justice issues*. (See, e.g., Code Civ. Proc., § 526a; *Van Atta v. Scott* (1980) 27 Cal.3d 424, 447-452 [166 Cal.Rptr. 149, 613 P.2d 210).)" (*Dix*, 53 Cal.3d 454, fn. 7, italics added in part.)

While the code section and case cited refer to taxpayer actions, public interest standing in mandate cases is largely the same. Both doctrines "confer standing on the public at large to hold the government accountable to fulfill its obligations to the

public." (*People for Ethical Operation of Prosecutors etc. v. Spitzer*, *supra*, 53 Cal.App.5th at p. 396; see also *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 29.) If the public policy underlying *Dix* does not bar one, as *Dix* unmistakably says, it does not bar the other. *Dix* is all about protecting the district attorney's discretion in the prosecution of individual criminal cases. (*Dix*, 53 Cal.3d at pp. 453–454.) It has no application to the determination of the validity of statutes regarding early release on parole long after the criminal case has concluded. The notion that a single action asking for a one-time determination of whether section 3051 can validly apply to section 667.6 sentences risks "disrup[tion] of the legislative process and the administration of justice" (Ruling 10, 3 AA 434) is baseless. Mandate petitions challenging the validity of criminal laws by citizens with no individual interest are routinely considered on the merits. (See, e.g., *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 240 [Prop. 8 of 1982, "taxpayers and voters"]; *Raven v. Deukmejian*, 52 Cal.3d 336, 340 (1990) [Prop. 115 of 1990, "taxpayers and voters"].) Further, *someone* must have standing or else illegal enactments would be immune from judicial review. (See *Farm Sanctuary, Inc. v. Department of Food & Agriculture* (1998) 63 Cal.App.4th 495, 503.) If the present petitioners do not have standing, it is difficult to see anyone who does.

The other case that respondents relied on in the trial court, *People v. Board of Parole Hearings* (2022) 83 Cal.App.5th 432,[3] expressly disclaimed any ruling on victim standing. It noted a

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3. Respondents miscited this case as *People v. Superior Court (Ramazzini)*. (Mem. P&A in Support of Demurrer 5, 2 AA 130.) The case was an appeal by the Board of Parole Hearings and real party in interest Ramazzini from a superior court decision in favor of the People. It was not an original writ petition in the Court of Appeal. (*People v. Board of Parole Hearings*, *supra*, 83 Cal.App.5th at p. 437–438.)

then-pending case in which a victim challenged another aspect of section 3051:

> "Further, our decision here does not signal that Senate Bill No. 394 is beyond challenge. Without opining on the merits of litigation not before us, we observe that Senate Bill No. 394 is currently being challenged in a separate proceeding brought by a crime victim, who is represented by a civil rights law firm, pursuant to Code of Civil Procedure sections 1085 and 1103. (See *Peterson v. Bd. of Parole Hearings*, [Super. Ct. Sacramento County, 2022,] No.34-2022-80003792.)" (*Id*. at p. 457.)

To eliminate any doubt of the nature of the case the court referred to, appellants requested and received judicial notice of the proceedings in the *Peterson* case. (See 2 AA 282–327; 3 AA 431.) That case is indistinguishable from the present case regarding standing. A victim of crime sought a writ to preclude parole of a perpetrator under section 3051 earlier than the initiative statute under which he was sentenced permits. (See 2 AA 287–292.) *People v. Board of Parole Hearings*, *supra*, expressly stated that its holding did not preclude standing in that case and refrained from opining on it. *People v. Board of Parole Hearings* is therefore not precedent against standing in the present case.

The superior court also noted that "courts have been hesitant to confer public interest standing when there are alternative remedies." (Ruling 10, 3 AA 434, citing *California Dept. of Consumer Affairs v. Superior Court* (2016) 245 Cal.App.4th 256, 263 and *Spotlight on Coastal Corruption v. Kinsey* (2020) 57 Cal.App.5th 874, 883.) However, in *Spotlight on Coastal Corruption* at page 883 that holding was expressly based on the fact that the action was not a petition for writ of mandate, and the public interest standing exception is limited to mandate cases. *California Dept. of Consumer Affairs v. Superior Court* (2016) 245 Cal.App.4th 256, 259 was also not a writ of mandate case. In

addition, the court found that conferring public interest standing on people with no concrete interest was unnecessary because others with real, concrete disputes were actively litigating their cases. (*Id*. at pp. 263–264.) The present case is just the opposite. There is no one with a more concrete interest than the present petitioners, and most of those with equal interests will be unable to afford to litigate their cases.

The alternate remedy of other victims of crime bringing the same claim in individual cases (Ruling 10) is not a barrier to public interest standing. *Green v. Obledo*, *supra*, 29 Cal.3d at page 131, involved a challenge to the validity of a welfare regulation brought by welfare recipients. The Supreme Court granted the plaintiffs public interest standing to challenge portions of the regulation applicable to other recipients and held that the trial court erred in limiting the case. (*Id*. at pp. 144–145.) The proper calculation of benefits was public right, and the correct implementation was a public duty. (*Id*. at p. 145.)

The ability to determine the validity of an enactment in a single proceeding serves an important public interest because many of the citizens affected lack the means to litigate individual cases. That was certainly true of the welfare recipients in *Green*, and it is largely true of victims of crime. Litigating such a claim with retained counsel is out of the reach of most people. Few victims of violent crime have the means to do so. There are not many organizations or law firms willing to take on such cases *pro bono publico*. Telling victims of modest means throughout the state to hire lawyers to litigate their individual cases is a "let them eat cake" approach to the standing issue.

Finally, under appellants' theory of the law, the validity of section 3051 does *not* "depend on whether the inmate was sentenced under subdivision (c) or (d) and whether the controlling offenses were included in section 667.6 before Jessica's Law."

(Ruling 10.) The superior court disagreed on the merits, issues briefed in Parts II and III, but that is the merits, not standing.

B. Ripeness.

To be justiciable, a case must be "ripe":

> "[The] basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. *The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.*" (*Pacific Legal Foundation v. California Coastal Com*. (1982) 33 Cal.3d 158, 171, quoting *Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 148-149, italics added by the *PLF* court.)

The superior court oddly assumed that the case is ripe rather than holding that it is, even while making the findings that show it is indeed ripe. The court held that the case "could be decided now" (Ruling 8, 3 AA 432) thereby meeting the fitness prong. In the previous paragraph, while addressing standing, the court acknowledged that the parole hearings themselves cause a hardship independently of whether they result in release (*Ibid*.), thereby meeting the hardship prong.

The fitness prong is met when the case presents only "clear-cut legal issues" and is not met when it requires speculation as to the factual scenarios of future application. (*Pacific Legal Foundation v. California Coastal Com.*, 33 Cal.3d at p. 172 [contrasting case before the court with *Abbott*].) The hardship prong is met when compliance with an enactment of dubious validity is imminent and not met when the challenger will only be impacted at

some time in the future and can make the challenge then. (*Ibid*. [same].)

In *Castellanos v. State of California* (2023) 89 Cal.App.5th 131, 167–168,[4] a challenge to an initiative was ripe when it had already been enacted, the challenge did not require any concrete facts, and the measure was already having the effects complained of.

The present challenge does not require any additional facts to be made sufficiently concrete. The situation is presented where an adult perpetrator sentenced to full, consecutive terms pursuant to Penal Code section 667.6, subdivision (c) or (d) is actively considered for release on parole without serving those consecutive terms under section 3051 of the Penal Code, a law adopted and amended without the requisite majority needed to amend Proposition 83. Nothing that will happen in the future will bring the legal issues into focus any more clearly than they are today.

Respondents argued in the trial court that the needed concreteness for ripeness requires that an "identified offender [be] found suitable for parole and scheduled for release." (Demurrer 8, 2 AA 133.) But no new fact that would be established in that event has any relevance to the questions of law to be decided in this case. The issue is whether the Board of Parole Hearings has the authority to consider or grant parole *at all* to sex criminals sentenced under section 667.6 who have no Eighth Amendment claim against their sentence. There is no dispute that the Board is holding those hearings and has already held two in the case

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4. The Supreme Court granted review, limited to the merits, and affirmed. (*Castellanos v. State of California* (2024) 16 Cal.5th 588, 600, 610.) The Court of Appeal opinion remains citable for points not addressed by the Supreme Court. (Cal. Rules of Court, rule 8.1115(e)(2).)

involving Jessica M. The superior court's statement that the case can be decided now is correct and resolves this prong of the test.

The hardship prong is met in spades. Petitioner Jessica M. has already been forced to choose between the injustice of the perpetrator of these vile acts getting out early due to the lack of effective opposition and the trauma of having to face him again and relive the horrors he forced upon her. This has already happened *twice*. The looming threat of reoccurrence is causing psychological harm now. (Declaration of Jessica M., 2 AA 204–206.) If she must wait for notice of another hearing before bringing her action, the ponderous pace of the judicial process may very well result in a third occurrence before final adjudication. Indeed, in that scenario the perpetrator could be released before completion of that case through the appellate level, resulting in Jessica's challenge being "overripe," i.e., moot.[5] The superior court correctly acknowledged that waiting for a decision "would create an unnecessary 'fire drill' for the parties and the court since Marsy's Law entitles victims to only 90 days' notice of a parole hearing." (Ruling 9, 3 AA 433.) This could happen within a year, as the Board of Parole Hearings can advance a hearing on its own motion or on the prisoner's application. (Ruling 8, 3 AA 432.)

Petitioner Jessica M.'s challenge is therefore ripe. Petitioner Crime Survivors, Inc.'s challenge is also ripe as the present application of Penal Code section 3051 is causing harm statewide to victims whose interests it seeks to protect as well as to the organization itself, as described in Part I.A, *supra*. The standing and ripeness requirements are met, and this case is justiciable.

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5. Another case involving a different challenge to section 3051 did indeed become moot on appeal when the perpetrator was released (see 2 AA 320–322), and to this day we have no published precedent on that issue.

II. Penal Code § 667.6 (c) & (d), as amended by Proposition 83, are "initiative statutes," not "technical reenactments," for the purpose of the constitutional limit on the Legislature's power to amend.

A. The Anti-Amendment Protection and San Diego v. CSM.

From the time the initiative was first adopted in California in 1911, the Constitution has protected initiative statutes from amendment by the Legislature, "to protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent." (*People v. Kelly* (2010) 47 Cal.4th 1008, 1025, internal quotation marks omitted.) The initially absolute prohibition (see *id.* at pp. 1035–1036) was later modified to allow the Legislature to propose an amendment to the voters for their approval (*id.* at p. 1038) and to allow the initiative itself to grant amendment authority (*id.* at p. 1040), but all other efforts to reduce this protection have failed. (See *id.* at pp. 1041–1042.)[6]

Despite numerous cases addressing the amendment limitation (see *Kelly*, 47 Cal.4th at pp. 1025–1026), it was over a century before the Supreme Court addressed the application of this limitation to the unchanged portions of a pre-existing statute amended by an initiative. (See *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211 (*San Diego*).)[7]

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6. The current version reads: "The Legislature may amend or repeal a referendum statute. The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval." (Cal. Const., art. II, § 10, subd. (c), cited below as "section 10(c)".)

7. The initiative in question was the same one as in this case, Proposition 83 of 2006. (See *id.* at p. 200.) The text of the initiative is in Attachment C of appellants' opening merits

As the case name implies, this was a state mandate case rather than a challenge to the validity of a subsequent statute, but the court tied the two together on the theory that a statute that the Legislature cannot amend cannot be the source of a legislative mandate. (*Id*. at p. 207.)

Article IV, section 9 of the California Constitution requires that when a statute is amended the entire section must be reenacted as amended. (*San Diego*, 6 Cal.5th at p. 208.) This requirement results in initiatives that make substantive changes to some subdivisions of a section, while also including "restatement[s] of existing provisions with only minor, nonsubstantive changes—or no changes at all." (*Ibid*.) *San Diego* refers to the latter as "technical reenactments" (*id*. at p. 214) and "untouched statutory bystanders." (*Id*. at p. 210.) Giving these provisions unamendable status would carry the anti-amendment provision too far. The *San Diego* court rejected the theory of the Commission on State Mandates that a code section amended and reenacted in an initiative comes under the anti-amendment limitation in its entirety. (*Ibid*.)[8] The court instead established this rule:

> "When technical reenactments are required under article IV, section 9 of the Constitution—yet involve *no* substantive change in *a given statutory provision*—the Legislature in most cases retains the power to amend the restated provision through the ordinary legislative process. This conclusion applies *unless* the provision is integral to accomplishing the electorate's goals in enacting the initiative or other indicia support the conclusion that voters reasonably intended to

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brief in the superior court, 2 AA 211–240.

8. To the extent that the superior court's ruling implies that appellants made a similar "entire codified statute" argument (Ruling 12, 1st full para., 3 AA 436), the court was very much mistaken. Appellants argued nothing of the sort. (See Pet. Merits Brief 17–19, 2 AA 195, 197.)

limit the Legislature's ability to amend that part of the statute." (*Id*. at p. 214, italics added in part.)

Significantly, this test says "no substantive change." It does not say "not much substantive change." If the "given statutory provision" involves a substantive change, then it is not a "technical reenactment." The *San Diego* rule is a court-created exception to the constitutional prohibition on amending "an initiative statute." It follows that any "given statutory provision" that is not a "technical reenactment" is protected from amendment. If a "provision" is "materially changed" then it is not an "untouched statutory bystander." (See *id*. at p. 210.) This tees up the question of what portion of a code section is a "provision."

B. Defining "Provision."

This case raises a question of first impression regarding how small a portion of a statute may be considered a "provision" for the purpose of the *San Diego* rule and section 10(c), or whether there is any limit at all. Is a "provision" some definable level of subdivision, or can a court dissect a statute all the way down to individual words to make this determination?

Given that *San Diego*, decided only seven years ago, was the first case to address this amendment issue with regard to section 10(c), there is not much precedent directly on point. Most of the provisions that *San Diego* discusses are whole sections or first-level subdivisions of sections. (See *San Diego*, 6 Cal.5th at pp. 208, 214–215.) As it was undisputed that these provisions were technical restatements and there was no indication that they were "integral to accomplishing the initiative's goals," (*id*. at p. 214), there was no need to examine them in detail.

The one exception was section 24 of the initiative (2 AA 232–234), amending section 6600 of the Welfare and Institutions Code to make several substantive changes to the definition of

"sexually violent predator." (See *San Diego*, 6 Cal.5th at pp. 216.) The Supreme Court did not resolve the question of the Legislature's ability to amend the unchanged paragraphs and subparagraphs but instead sent the case back to the Commission to consider whether the expansion had any real effect on the duties of local governments (*id*. at p. 217), a question not relevant to the present case.

Cases involving section 10(c) after *San Diego* do not shed any light on the "provision" question. Proposition 115 of 1990 amended the first paragraph of section 189 of the Penal Code, subsequently designated subdivision (a), to add additional crimes to the list of first-degree felony-murder offenses, and it restated the remainder of the section without change. A subsequent amendment to add subdivision (e) regarding mental state for accomplices was uniformly held not to violate section 10(c). (See, e.g., *People v. Superior Court (Gooden)* (2020) 42 Cal.App.5th 270, 287–288, citing *San Diego*.) Similarly, Proposition 21 of 2000 made changes to section 186.22 of the Penal Code, but subdivision (f), defining "criminal street gang," was reenacted with no change except updating a cross-reference. (See Prop. 21 of 2000, § 4, 2000 Stats. A-265 to A-268; *People v. Rojas* (2023) 15 Cal.5th 561, 569–570.) These cases are significant for the question of what is an amendment, discussed in Part III, *infra*, but as they involve first-level subdivisions of statutory sections they do not shed much light on what is a provision.

As the *San Diego* court was plowing new ground regarding section 10(c), it took guidance from cases involving related provisions of law, particularly *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, which it cited three times. (See *San Diego*, 6 Cal.5th at pp. 208–210.) *Yoshisato* addressed subdivision (b) of section 10 of article II of the Constitution: "If provisions of 2 or more measures approved at the same election conflict, those of the measure

receiving the highest affirmative vote shall prevail." *Yoshisato* held that while an initiative can be knocked out completely by a competing initiative that gets more votes, when two initiatives are complementary or supplementary only the conflicting provisions of the lower-scoring initiative are negated. (*Yoshisato*, at p. 988.) "The measures should be compared 'provision by provision,'[5] and the provisions of the measure receiving the lower number of affirmative votes are operative so long as they do not conflict ...." (*Ibid*.)

This necessarily requires a definition of "provision," and footnote 5 provides one: "For this purpose, we construe 'provision' to mean a paragraph (or a numbered subpart of a paragraph) of a measure." (*Yoshisato*, 2 Cal.4th at p. 988, fn. 5.) This, appellants submit, should also be the definition of "provision" for the purpose of applying the *San Diego* rule for subdivision (c) of the same section, i.e., article II, section 10.

The *Yoshisato* court's "provision by provision" comparison eliminates any doubt of the definition. Section 190.2 of the Penal Code is a long, complex, extensively subdivided section. Each of these numbered divisions is a "provision" that the court went through to look for any conflicts. "The amendments made by Proposition 115 to those provisions that Proposition 114 simply reenacted without amendment of any kind are clearly operative." (*Yoshisato*, 2 Cal.4th at p. 991.)

The court also regarded the opening paragraph of subdivision (a) as a "provision" separate from the numerous numbered provisions within subdivision (a) that follow it. Hence, the substantive change in the opening paragraph made by Proposition 115 took effect, even though Proposition 114 made a substantive change to subdivision (a)(7). (*Ibid*.)

But that is as far as it goes. Changes *within* "a paragraph (or numbered portion of a paragraph)" are not "provisions" in themselves. This required the court to address separately "Proposition 115's substantive amendments to those provisions of section 190.2 that were reenacted by Proposition 114 with minor, *nonsubstantive* changes." (*Id.* at p. 992.) The victim-witness special circumstance, subdivision (a)(10), was amended by Proposition 114 to make gender-neutrality changes, but Proposition 115 also made substantive changes to extend the circumstance to witnesses to juvenile proceedings. If the words that Proposition 115 added to this single numbered paragraph were separate "provisions" this discussion would not have been necessary. It was necessary because subdivision (a)(10) is a single "provision." The court held that the Proposition 115 changes took effect because the two amendments were not in conflict, not because they were separate provisions. (*Ibid.*)

There is no apparent reason why "provision" should have different meanings for two subdivisions of the same constitutional section. Subdivisions (b) and (c) of article II, section 10 both deal with conflicts in enactments, the former between two initiatives and the latter between an initiative statute and a later legislative statute. The *San Diego* court had *Yoshisato* in mind as it distinguished substantively amended provisions from those with nonsubstantive amendments (see *San Diego*, 6 Cal.5th at p. 210, citing *Yoshisato*), and there is no indication that it meant anything different when it used a word central to that precedent. The *Yoshisato* definition of "provision" provides a precise meaning that courts and statute drafters can use in the future when they anticipate section 10(c) issues, and it should be adopted.

C. Application to Section 667.6.

With the *Yoshisato* definition of "provision," the application of the *San Diego* rule to the amendment of subdivision (c) of Penal

Code section 667.6 in Proposition 83 is straightforward. Subdivision (c) was a single paragraph with no separately numbered parts before and after its amendment by the initiative. (See Prop. 83 of 2006, § 11, Cal. Stats. 2006, pp. A-306 to A-307, 2 AA 218–219.) It is therefore a single provision under the *Yoshisato* definition. The whole subdivision is therefore either a "technical reenactment" or it is not. It cannot be a "technical reenactment" in some cases but not in others. (Cf. Ruling 10, 2d para., 2 AA 434.)

In the present case, the superior court narrowed its focus to "the 'full, separate, and consecutive' language of section 667.6(c)" as the relevant "statutory provision." (Ruling 11–12, 2 AA 435–436.) This was error. That unamended language is not even a whole sentence, much less a paragraph, and it is not a "numbered portion of a paragraph." The superior court got the wrong answer because it asked the wrong question. The question is whether the subdivision as a whole is a technical reenactment, not a four-word fragment of the provision.

Subdivision (c) is not a technical reenactment because Proposition 83 made substantive changes. First, the specification of the crimes for which "full, separate, and consecutive term[s]" may be imposed were removed from subdivision (c) and placed in new subdivision (e). While the new unified list of offenses in new subdivision (e) contains most of the same crimes as the subdivision-specific list removed from subdivision (c), there are substantive changes in the removal of the prior conviction requirement for assault with intent to commit a sex crime (Pen. Code, § 667.6, subd. (e)(9)) and the addition of subdivision (g) of section 289. (§ 667.6, subd. (e)(8).) This is a substantive change just like Proposition 115's addition to the felony-murder special circumstance was a substantive change. (See *Yoshisato*, 2 Cal.4th at p. 991.)

Second, the scope of subdivision (c) was changed from "on the victim or another person whether or not the crimes were committed during a single transaction" to "if the crimes involve the same victim on the same occasion." This is a substantive change which sometimes makes a difference. (See *People v. Goodliffe* (2009) 177 Cal.App.4th 723, 727–728.)

Third, Proposition 83 added a sentence to resolve an ambiguity in the prior text. "A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e)." The previous language had produced a deep split in the courts of appeal. (See *People v. Jones* (1988) 46 Cal.3d 585, 592, fn. 4.) The Supreme Court divided by the narrowest of margins when it resolved the ambiguity. (See *id.* at pp. 603–604, conc. and dis. opn. of Mosk, J. joined by Broussard, J.; *id.* at p. 610, conc. and dis. opn. of Arguelles, J.) While the added sentence did not change the law from the then-current interpretation of subdivision (c), it is not a "nonsubstantive" change in the sense that *San Diego* and *Yoshisato* use that term. It is not a change "to renumber the section, correct punctuation or grammar errors, or substitute gender-neutral language." (*San Diego*, 6 Cal.5th at p. 210, citing *Yoshisato*, 2 Cal.4th at pp. 983, 985.) It is a change that prevents the Supreme Court from overruling *Jones* and accepting the alternate interpretation. This is substantive, not technical.

The superior court brushed the substantive changes aside with the observation that none of them affected Linares's case. (Ruling 12, 3 AA 436.) But the *San Diego* test cannot plausibly be interpreted to be a case-by-case determination that a given statutory provision is or is not a technical reenactment depending on whether its substantive changes affect the case before the court. The question *San Diego* asks is whether the amendment "involve[s] no substantive change in a given statutory provision."

(*San Diego*, 6 Cal.5th at p. 214.) It does not ask whether the substantive change is one that would have changed the result in the case before the court.

This is even more clear in *Yoshisato*. The court went through section 190.2 "provision by provision" and decided whether changes were technical or substantive without regard to whether they were involved in Yoshisato's case. Subdivision (a)(17)(xi) was, all the others were not, but all could be characterized by the Supreme Court to settle the matter of the validity of the Proposition 115 changes. (*Yoshisato*, 2 Cal.4th at pp. 991–992.)

Section 667.6(c) is not a technical reenactment within the meaning of the first part of the *San Diego* test. It is therefore protected from amendment by the Legislature by section 10(c) of article II of the California Constitution.

D. The "Unless" Clause.

If a court decides that a given statutory provision *is* a technical reenactment under *San Diego*, it must go on to address the "unless" clause of the test. The superior court in this case did not do so. After concluding that the sentence fragment it mistakenly believed to be the relevant provision was only a technical reenactment, it moved on to the question of whether section 3051 was an amendment. (Ruling 12, 3 AA 436.) This is also error. Even if the technical reenactment holding were correct, the "unless" clause of the *San Diego* test must be addressed. (See Brief for Petitioner 17–19, 2 AA 195–197.)

Even if the given statutory provision is a technical reenactment, it is still protected from amendment if "the provision is integral to accomplishing the electorate's goals in enacting the initiative *or* other indicia support the conclusion that voters reasonably intended to limit the Legislature's ability to amend that part of the statute." (*San Diego*, 5 Cal.5th at p. 214, italics

added.) Either of these alternatives would be sufficient. Both are met here.

One of Proposition 83's goals is squarely contrary to any watering down of section 667.6(c). "Existing laws that punish aggravated sexual assault, habitual sexual offenders, and child molesters must be strengthened and improved." (Prop. 83, § 2, subd. (h), Cal. Stats. 2006, p. A-299, 2 AA 211.) *San Diego* noted that the duties of local governments was not the focus of Proposition 83 (*San Diego*, 5 Cal.5th at p. 213), but the punishment of rapists most certainly was a focus. Allowing a rapist to be paroled after less than a third of the full, consecutive terms he was sentenced to under section 667.6(c) (see *supra* at p. 11) is diametrically opposed to this goal.

For the second prong of the "unless" clause, the above purpose statement and the amendment clause of Proposition 83 provide the requisite support for the conclusion that the people intended to limit the amendment of the initiative's authorized sentences, including this provision. The initiative permits the Legislature to amend these provisions to increase punishments, but any decrease would require a supermajority or approval by the people. (Prop. 83, § 33, 2 AA 240.) The people did not want the Legislature to weaken the punishments, and there is no reason to believe that this intent was limited to newly enacted ones and excluded the existing statutes referred to in section 2(h).

Whether by the main part of the *San Diego* test or the "unless" clause, section 667.6(c) is protected from amendments that reduce the sentences imposed under it.

E. Section 667.6(d).

The same analysis applies to subdivision (d) of section 667.6. While the substantive amendment of that subdivision is less extensive than for subdivision (c), there still is a substantive

amendment. The scope of the subdivision is expanded by its application to the expanded list of offenses in new subdivision (e). In the initiative, the "full, separate, and consecutive" language was in the same unnumbered paragraph as the substantive amendment (see 2 AA 219), which is now numbered subdivision (d)(1). This is a single "provision" under the *Yoshisato* definition. The analysis of the "unless" clause is the same as subdivision (c).

III. Penal Code § 3051 amends § 667.6 (c) and (d).

A. Defining "Amendment" for Section 10(c).

The constitutional limitation on amendment of initiative statutes is not limited to statutes that expressly amend the code sections enacted by initiatives. It has long been established that indirect amendments are invalid as well. (See, e.g., *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1487 (*Quackenbush*).) "The purpose of California's constitutional limitation on the Legislature's power to amend initiative statutes is to 'protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.' " (*Id.* at p. 1484; *People v. Kelly* (2010) 47 Cal.4th 1008, 1025, quoting *Quackenbush*.) "At the same time, despite [this] strict bar ...., [t]he Legislature remains free to address a ' " related but distinct area. " ' " (*Kelly*, at p. 1025.) The essence of this case is whether a statute that authorizes parole in less than a third of the time of a determinate sentence authorized by an initiative statute is legislating in a "distinct area" or "tak[es] away from" the initiative. (See *Kelly*, at p. 1027.)

Section 3051 of the Penal Code takes away from Proposition 83. Under section 667.6(c) as amended and reenacted by that measure, the trial judge could impose a sentence that guaranteed that a vicious rapist would be incarcerated for several decades, providing assurance to the victim and the public that they would

be safe from him for that time. Section 3051 ripped that assurance away. That is "taking away" by any reasonable understanding of that term, and the precedents on amendment of initiatives affirm that conclusion.

Kelly, at pages 1025 to 1027, noted various formulations of what is and is not an amendment, one of which is "matter that an initiative measure 'does not specifically authorize *or* prohibit.' " (*Kelly*, 47 Cal.4th at pp. 1025–1026, quoting *People v. Cooper* (2002) 27 Cal.4th 38, 47.) The superior court quoted this passage and used it for the conclusion that section 3051 does not amend section 667.6 because the latter does not specifically prohibit parole, even though it authorizes "full" terms. (Ruling 12–13, 3 AA 436–437.) However, *Kelly* itself demonstrates that "specifically" cannot be taken so literally. The protection against the Legislature undoing what the people have done "would be 'of little worth if it can be evaded by so simple a device' " (*Quackenbush*, 64 Cal.App.4th at p. 1487), i.e., if the Legislature could undermine the effect of an initiative through a mechanism not mentioned in the initiative but contrary to its purpose.

Kelly involved a medical marijuana initiative called the Compassionate Use Act (CUA) and a subsequent legislative statute called the Medical Marijuana Program (MMP). (*Kelly*, 47 Cal.4th at p. 1012.) The initiative simply authorized possession for medical purposes on the recommendation of a physician. It said nothing at all about amounts possessed. It was judicially construed to authorize an amount reasonably related to the patient's medical needs (*id.* at p. 1013), but it did not require the physician's recommendation to specify an amount.

While the initiative only provided an affirmative defense in the event of prosecution, the legislative statute provided protection against arrest. (*Id.* at p. 1014.) However, the legislative statute also capped possession generally at eight ounces of dried

marijuana or a larger amount with a doctor's recommendation that it was needed. (*Id*. at p. 1016.) The MMP statute "thereby burden[ed] a defense that might otherwise be advanced by persons protected by the CUA." (*Id*. at p. 1017.)

Nothing in the CUA *specifically* prohibited a requirement that a person who needs an unusually large amount get a doctor's recommendation to that effect. Yet the requirement's burden on the right to possession granted by the CUA was enough to make it an amendment within the meaning of section 10(c). (See *Kelly*, 47 Cal.4th at pp. 1043–1044 & fn. 60.) The requirement "takes away" from what the CUA had established, and that is enough. (*Id*. at p. 1044, fn. 60.)

In the present case, section 667.6(c) establishes that a perpetrator of multiple sex offenses may be sentenced to the full term for each one in those crimes where the sentencing judge determines that such a sentence is appropriate. Section 3051 takes that away for all rapists below the age of 26. It does so by converting the sentence into one with a possibility of parole in 15 years, which may be far earlier than the full, consecutive terms. It sentences the victims to many years of anxiety. (See Declaration of Jessica M., 2 AA 204–206.) Section 3051 takes away from section 667.6(c), and it is therefore an amendment within the meaning section 10(c) as construed and applied by *Kelly*.

Section 3051 is also an amendment because it changes the decision-maker for the duration of the defendant's incarceration. In *Quackenbush*, an initiative had vested decisions about insurance rates in an elected Insurance Commissioner. A subsequent statute imposed a formula. The statute "'takes away' from the provisions of Proposition 103, which vest ratemaking determinations with the Commissioner," and hence it was an invalid amendment. (*Quackenbush*, 64 Cal.App.4th at p. 1486.) In the present case, the trial judge imposed a sentence of five consecu-

tive eight-year terms for the eight sex crimes plus a ten-year consecutive enhancement. (1 AA 28.) Section 3051 empowers the Board of Parole Hearings to override that decision and release the perpetrator before he has even finished two of the terms. A statute that makes a judge's sentencing decision effectively subject to modification by the Board takes away from the vested discretion and is an amendment under *Quackenbush*.

The cases holding that challenged legislative statutes were not amendments of initiatives are different in kind. *People v. Cooper* (2002) 27 Cal.4th 38, 41–42 involved an initiative that increased sentences for first and second degree murder, but mitigated that increase somewhat by authorizing credit under an existing article of the Penal Code to advance the minimum eligible parole date. The pre-existing statutes the initiative referred to only allowed postsentence credits and did not address presentence credits at all. The Legislature therefore retained the authority to limit application of a presentence credit statute located in a different article not mentioned in the initiative. (*Id*. at pp. 45–47.)[9] Most relevant to the present case, the legislative statute in *Cooper* did not interfere with the intent of the initiative to allow those convicted of murder (other than first degree with special circumstances) to be eligible for parole in two-thirds of the nominal minimum time. (See *ibid*.) In the present case, by contrast, section 3051 allows those convicted of multiple sex crimes to get out of prison in far less time than the sentence authorized in section 667.6 (c) and (d).

People v. Superior Court (Pearson) (2010) 48 Cal.4th 564 is similar. An initiative statute is the exclusive authority for discov-

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9. Eliminating postsentence credits for murderers did require a vote of the people, a vote that happened two weeks after Cooper's crime and was not retroactive. (*Id*. at p. 40, fn. 2; Pen. Code, §§ 190, subd. (e), 2933.2.)

ery "in criminal cases." (*Id*. at p. 567.) It only provides for pretrial discovery, and the court declined to construe it to implicitly prohibit posttrial discovery. (*Id*. at pp. 570–571.) A habeas corpus petition collaterally attacking the judgment "has long been considered a separate matter from the criminal case itself." (*Id*. at p. 572.) The initiative statute was a regulation of criminal trials, and it was neither intended to nor suited to regulate postjudgment matters. (*Ibid*.)

Cooper and *Pearson* are prime examples of a legislative statute regulating a related but distinct matter. In neither case was any goal of the initiative impaired. The initiative statutes continued to have the same effect as they did at the time they were enacted, authorizing postjudgment credits in *Cooper* and regulating trial discovery in *Pearson*. The present case is just the opposite. An existing statute for the punishment of aggravated sex offenders that Proposition 83 sought to strengthen and improve (see Prop. 83, § 2, subd. (h)) is now severely weakened. The just punishment for atrocious crimes and the protection from recidivism provided by the full, consecutive terms are ripped away.

A number of court of appeal decisions addressed whether Senate Bill 1437 of 2018 invalidly amended Proposition 7 of 1978 or Proposition 115 of 1990. (See, e.g., *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 274 (2019) (*Gooden*).) The bill was enacted "to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (*Id*. at p. 275, quoting Stats. 2018, ch. 1015, § 1, subd. (f).)[10]

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10. This standard follows the constitutional limit for capital punishment for felony-murder accomplices. (See *Tison v.*

For Proposition 7, the case was straightforward. That initiative dealt only with the punishment for murder and did not address the elements of the crime at all. (*Gooden*, 42 Cal.App.5th at pp. 281–282.) The definition of the crime and the specification of the punishment are related but distinct. (*Id*. at p. 282.) Proposition 115 presented a somewhat closer call in that it did address degrees of murder, amending section 189 of the Penal Code to add to the list of crimes for first-degree felony murder. (*Id*. at p. 287.) Even so, SB 1437 did not take away from that list but instead addressed the mental state. This is a distinct subject, which no party challenged. The court rejected an argument that a change to a different provision of the same section is an amendment for the reasons discussed in Part II, *supra*. (*Id*. at pp. 287–288, citing *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 208 (*San Diego*).)

The Supreme Court addressed a similar issue and came to the same conclusion in *People v. Rojas* (2023) 15 Cal.5th 561, 577, citing *Gooden*. In *Rojas*, an initiative increasing penalties for gang activity did not define or lock in the existing definition of "criminal street gang," so that issue remained open for legislative amendment. (*Id*. at p. 575.) *Rojas* and *Gooden* turn on the "distinction between the electorate's focus on punishment and the Legislature's focus on the substantive elements of the offense." (*Id*. at p. 577.) *Rojas* emphasized that the crime in question was still subject to the same punishment provided by the initiative. (*Id*. at p. 578.) This is a sharp contrast with the present case, where the initiative and the legislative statute both deal solely with punishment and neither says anything about the elements

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Arizona (1987) 481 U.S. 137, 158.) It was codified in California's capital punishment law by Proposition 115. (See Pen. Code, § 190.2, subd. (d).)

of the offenses. They deal with the same topic in opposite ways, not related but distinct topics.

Finally, we return to *San Diego*, *supra*. Although the Supreme Court disapproved *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577 with regard to technically reenacted provisions (*San Diego*, 6 Cal.5th at p. 214, fn. 4), its discussion of that case leaves no doubt that *Shaw* reached the correct result. A legislative statute "aimed at the heart of a voter initiative" (*id*. at p. 212) which would have "defeated a core purpose" of it (*id*. at p. 213) was correctly struck down. Proposition 83 as a whole has the single "purpose of strengthening laws that punish and control dangerous sexual predators." (*People v. Kisling* (2011) 199 Cal.App.4th 687, 694.) The determination that sex offenders should serve their full terms was certainly part of that purpose (see *infra* at p. 47) and section 3051 defeats it not just for juveniles but also for adults up to their 26th birthday.

B. The Superior Court Ruling.

With these precedents in mind, we can see that the reasons advanced by the superior court on this point, although numerous, are all erroneous. The court brushed off the "takes away" argument without any analysis at all and applied a specificity requirement with a severity that has no basis in the precedents.

Appellants argued in the trial court, as in this court, *supra* at page 39, that section 3051 takes away from section 667.6 in that it permits release far earlier than the sentences the initiative authorizes, analogous to *Kelly* and distinguishable from *Rojas*. (See Pet. Merits Brief 16, 2 AA 194.) The superior court's ruling simply makes the conclusory statement that "section 3051 does not take away or prohibit anything that was 'authorized' by Proposition 83." (Ruling 12, 3 AA 436.) There is not even an attempt to distinguish *Kelly*. Having effectively ignored appel-

lants' main argument, the court pronounced that "the issue [singular] is whether Proposition 83 and the subsequent version of section 667.6(c) 'prohibit' the youth offender parole program created under section 3051." (*Ibid.*)

The court proceeds to answer that question with a series of non sequiturs. The court notes that full, consecutive sentences are discretionary under section 667.6(c) and that parole consideration may be barred if, between conviction and parole, the perpetrators commits one of the few crimes with an element of malice aforethought or is sentenced to life in prison for a new crime. Neither of these facts negates the fact that section 667.6(c) authorizes full, consecutive terms for crimes when the sentencing judge deems them appropriate and section 3051 opens the door to a much earlier release than section 667.6(c) permits in such cases. Section 3051 therefore authorizes early releases that section 667.6(c) prohibits.

Yet, the court says "[t]hus, Proposition 83 and section 667.6 do not expressly prohibit this type of parole eligibility for youth offenders in which the original sentence remains operative." (Ruling 13, 3 AA 437.) The "thus" is puzzling; that does not follow at all. The fact that section 667.6(c) sentencing is discretionary does not make the sentence any less binding in those cases where the judge finds it appropriate and imposes it.[11] There may be a few cases in which "the original sentence remains operative" because the perpetrator committed or attempted a subsequent murder, but there will be many where the original sentence is slashed by a grant of parole.

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11. If discretionary sentencing laws are more easily evaded than mandatory ones, future authors of initiatives will have an incentive to make sentencing laws mandatory. (Cf. *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1256.)

The court asks the odd question of "whether Proposition 83 and section 667.6 should be read to implicitly prohibit a program creating parole eligibility for youth offenders." Of course they don't prohibit creating the program; they prohibit release earlier than section 667.6 permits. The Legislature validly excluded defendants sentenced under the "One Strike" law (Pen. Code, § 667.61) and adults sentenced to life without parole. (See *People v. Williams* (2024) 17 Cal.5th 99, 110 (*Williams*); *People v. Hardin* (2024) 15 Cal.5th 834, 838–839.) If it had simply excluded those sentenced under section 667.6 also, there would have been no problem.[12] Appellants do not claim that the whole program is forbidden, only its application to cases where parole would contradict the initiative statute. (See *Kelly*, 47 Cal.4th at p. 1048.)

In *Kelly*, the Supreme Court did not require a showing that the Compassionate Use Act intended to forbid the creation of the Medical Marijuana Program. It was sufficient that the CUA and MMP provided for different results in the case of someone who needed a large quantity of marijuana but did not have a doctor's recommendation on amount. See *supra* at p. 39. In this case, the superior court has created a highly specific intent requirement that is not justified by any of the precedents and contrary to *Kelly*.

Nor does the existence of a genuine constitutional issue in a very narrow category of cases justify a legislative statute that contradicts an initiative statute in a much larger category. (Ruling 13, 3 AA 437.) To be sure, there is a constitutional problem in a case where a *juvenile* is sentenced for a nonhomicide crime to a term so long that it precludes ever being released, *de facto* life without parole. (*People v. Caballero* (2012) 55 Cal.4th 262,

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12. This omission may be nothing but a drafting error. (See Pet. Reply Brief 13, 2 AA 409; Stats. 2013, ch. 312, § 4, Legislative Counsel's Digest, last para., 1 AA 51.)

268–269.) But the constitutional line is drawn at 18, and the Legislature's ballooning of the category to everyone under 26 is merely a policy choice. (See *Williams*, 17 Cal.5th at p. 115.) Further, section 3051 is not limited to *de facto* life sentences but shortens every determinate sentence longer than 15 years. This policy choice is vastly broader than *Caballero*'s suggested remedy of "a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile." (*Caballero*, at p. 269, fn. 5.) However gross a miscarriage of justice it may be, that policy choice is the Legislature's to make *except* where it contradicts a policy enacted into law by the people themselves, and that is this case.

No, "Proposition 83 does not show an intent by the electorate to foreclose legislation that responds to such developments in the law." (Ruling 13.)[13] It shows an intent that rapists be fully punished under the terms of the initiative and to foreclose legislation that waters down those sentencing statutes. This intent is evident not only in the statutory text but also in the prefatory section, the amendment section, and the ballot arguments. The initiative twice declares its purpose to strengthen and improve existing statutes that punish aggravated sexual assault. (Prop. 83 §§ 2, subd. (h), 31, 2 AA 211, 239.) It expressly limits amendments by simple majority vote in the Legislature to those that increase punishment, limiting those that decrease punishment to bills approved by two-thirds of the members or the people. (Prop.

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13. The notion that these developments have a scientific basis comes from a combination of shallow understanding of what the science actually means and advocacy bias. Professor of Law and Psychology Stephen Morse has dubbed this "Brain Overclaim Syndrome." (See Morse, *Brain Overclaim Redux* (2013) 31 L. & Ineq. 509, 510, 528; see also Pet. Brief 20, 2 AA 198.)

83, § 33, 2 AA 240.) The argument in favor of the proposition expressly declares an intent that the "*predatory sex criminals will be punished* and serve their full sentence in every case." (Voter Information Guide, Gen. Elec. (Nov. 7, 2006) argument in favor of Prop. 83, p. 46, italics in original.)

The trial court ruling brushes all this aside, claiming that an express intent that sex criminals serve their full sentences is insufficient to demonstrate an intent to preclude paroling them before the end of the sentence term, simply because the ballot materials "do not mention 'parole'." (Ruling 14, 3 AA 438.) One can scarcely imagine a more stark violation of the principle that the people's precious right of initiative not be evaded by simple devices. (*Quackenbush*, 64 Cal.App.4th at p. 1487.) "[A]s a matter of substance, section [3051] does change the effect of existing law," and therefore the court's "duty to protect the voters' constitutional powers to enact laws through the initiative process" requires that this be recognized as the invalid amendment that "it really is." (*Id*. at p. 1488.) There is no requirement in the precedents that the particular tool of evasion be anticipated and called out by name in the initiative. The precedents are just the opposite. (See *People v. Armogeda* (2015) 233 Cal.App.4th 428, 435 [initiative prohibition of parole cannot be evaded with postrelease community supervision]; *supra* at p. 39 [*Kelly* held that amount limit was amendment of initiative not mentioning amounts].)

Finally, there is no validity to the superior court's statement that "[s]ection 667.6 is a sentencing statute, not a parole statute, and section 3051 does not amend the sentencing authority set forth in section 667.6." (Ruling 13, 3 AA 437.) Statutes that regulate eligibility for parole and minimum time to eligibility, as opposed to parole procedures, *are* sentencing statutes. For example, Penal Code section 190, which sets the penalty for various

types of murder, specifies which types are eligible for parole and the minimum time for those types that are eligible. So does the indeterminate sentence law for aggravated sex offenses. (Pen. Code, § 667.61, subds. (a), (b).) There can be no doubt that a statute that retroactively eliminated the possibility of parole or increased the minimum time would be an *ex post facto* law because it would increase the punishment. (See, e.g., *In re Vicks* (2013) 56 Cal.4th 274, 287.)

The Supreme Court has already stated in no uncertain terms that section 3051 changes the sentences of the inmates to whom it applies. In *Williams*, *supra*, 17 Cal.5th at p. 110, the Supreme Court considered whether section 3051's exclusion of inmates sentenced under section 667.61 violated the Equal Protection Clause. In the course of the discussion, the court needed to characterize the change made by section 3051:

> "Section 3051 'reflects the Legislature's judgment that 25 years is the maximum amount of time that [most youth] offender[s] may serve before becoming eligible for parole.' (*Franklin*, *supra*, 63 Cal.4th at p. 278;[14] see *id*. at p. 281 [§ 3051 'effectively reforms the parole eligibility date of a [youth] offender's original sentence'].) By superseding the statutorily mandated sentences of most prisoners who committed their controlling offense before the age of 26, section 3051 'changed the manner in which the [youth] offender's original sentence operates by capping the number of years that he or she may be imprisoned before becoming eligible for release on parole.' (*Franklin*, at p. 278.)" (*Id*. at p. 115.)

The superior court said that the Supreme Court's characterization of the change made by section 3051 does not matter because the court was not specifically addressing section 667.6 or the section 10(c) issue. (Ruling 14, 3 AA 438.) This is no basis for brushing off this passage. The court was describing the effect that

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14. *People v. Franklin* (2016) 63 Cal.4th 261.

section 3051 has on "most prisoners," meaning those not excluded by the statute's terms, which would necessarily include those sentenced under section 667.6. Nor does the fact that the court was not specifically addressing a section 10(c) issue transform the effect that section 3051 has. If section 3051 " 'effectively reforms the parole eligibility date of a [youth] offender's original sentence' " then it necessarily takes away from that sentence as authorized by section 667.6.

The superior court's ruling threw a lot against the wall, but none of it sticks. Section 3051 takes away from section 667.6 by authorizing release of sexual predators much earlier than the sentences authorized by section 667.6 permit. That is an amendment within the meaning of section 10(c).

CONCLUSION

The judgment of the superior court should be reversed and the case remanded with instructions to grant the writ as requested in the petition.

Date: May 12, 2025

Respectfully submitted,

KENT S. SCHEIDEGGER
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court,
Rule 8.204, subd. (c)(1)

I, Kent S. Scheidegger, hereby certify that the attached **APPELLANTS' OPENING BRIEF** uses a 13-point Century Schoolbook font and contains 12,540 words, as indicated by the computer program, WordPerfect, used to prepare the brief.

Date: May 12, 2025

Respectfully Submitted,

KENT S. SCHEIDEGGER
Attorney for Appellants

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

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816.

On the date below, I electronically filed the attached document, **APPELLANTS' OPENING BRIEF**, by transmitting a true copy using the TrueFiling system. All participants in the case are registered TrueFiling users and will be served by the TrueFiling system.

In addition, I served on each person named below by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail addressed as follows and by electronically emailing a digital copy to the email addresses indicated:

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For: Honorable Stephen I. Goorvitch
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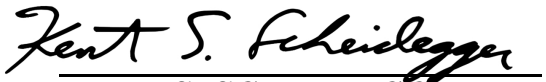

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