In the Supreme Court of the State of California

O.G., Petitioner, **v.** **SUPERIOR COURT OF VENTURA COUNTY,** Respondent; **THE PEOPLE,** Real Party in Interest.	Case No. S259011

Second Appellate District, Division Six, Case No. B295555
Ventura County Superior Court, Case No. 2018017144
The Honorable Kevin J. McGee, Judge

BRIEF OF THE ATTORNEY GENERAL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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AMICUS CURIAE STATEMENT

Pursuant to this Court's May 27, 2020, invitation, the Attorney General respectfully submits this amicus brief on the constitutionality of Senate Bill 1391 (2017-2018 Reg. Sess.) (SB 1391), Stats. 2018, ch. 1012. The People are represented in this interlocutory matter by the District Attorney of Ventura County. The District Attorney, who is prosecuting O.G. in the trial court, argues that SB 1391 unlawfully contradicts the provisions of Proposition 57, in violation of Article II, section 10(c) of the California Constitution. As the "chief law officer of the State" (Cal. Const., art. V, § 13), however, the Attorney General is convinced that SB 1391 is in fact an allowable amendment under Proposition 57's express amendment provision. To assist the Court in deciding the case, this brief will explain the reasons for that conclusion in the context of Proposition 57 and California juvenile justice as a whole.

INTRODUCTION AND SUMMARY OF ARGUMENT

The parties to this case disagree about the answer to a challenging public policy question: at what age should the State treat a minor accused of a crime as an adult? The answer to that question has changed over time. From the mid-1990s until 2019, the minimum age was 14. But for three decades before that, the minimum age was 16. In 2018, the Legislature decided to return the minimum age to 16. It enacted SB 1391 to eliminate prosecutors' authority to have 14- and 15-year-olds transferred from juvenile court to adult court. In this case, a district attorney has challenged SB 1391, arguing that it impermissibly amended Proposition 57, The Public Safety and Rehabilitation Act of 2016.

Proposition 57 marked a significant shift in California criminal law. Its juvenile justice provisions focused on reforming a somewhat different facet of prosecutorial authority. In the years before Proposition 57's enactment, prosecutors could bypass the juvenile court, file charges against certain minors directly in adult court, and effectively exercise an absolute power to have those juveniles treated as adult criminals. Proposition 57 eliminated that imbalance, returning California to its historical practice of requiring judges to rule on prosecutors' requests to have juveniles tried as adults. Although Proposition 57 did not prevent minors as young as 14 from being transferred to adult court, a practice that started in 1995, it recognized that the precise limitations included in the law would necessarily be the starting-point in realizing the initiative's goals. It therefore

authorized the Legislature to amend its juvenile-transfer provisions to further advance the initiative's purposes.

SB 1391 was a permissible amendment under that provision. The voters who enacted Proposition 57 listed five purposes behind the law: enhancing public safety; stopping wasteful spending on prisons; preventing federal courts from indiscriminately releasing prisoners; emphasizing juvenile rehabilitation; and eliminating the system under which prosecutors, with no judicial review, could decide to try a juvenile in adult court. SB 1391 advances each of those purposes.

SB 1391 also advanced Proposition 57's overarching purpose of promoting an evidence-based focus on juvenile rehabilitation. The Legislature considered California's historical practice regarding juveniles, recent developments in cognitive science and constitutional law, and evidence showing racial and regional disparities in juvenile transfers. It concluded that the law originally allowing 14- and 15-year-olds to be transferred had been based on a misunderstanding of brain development and had resulted in unfair implementation. It designed SB 1391 to address those problems.

The District Attorney argues that SB 1391 does not advance public safety and that it interferes with judicial oversight of prosecutors' motions to transfer 14- and 15-year-olds to adult court. But these arguments amount to policy disputes that the voters authorized the Legislature to resolve. Six out of seven appellate courts to address the issue presented by this case closely examined Proposition 57's amendment provision and

concluded that SB 1391 is permissible. The contrary ruling of the Court of Appeal in this case rests on an unnatural reading of Proposition 57 and a misunderstanding of how courts should examine amendment claims for Propositions that in fact permit amendments. This Court should reverse the judgment.

BACKGROUND

A. Juvenile Justice in California

California has long treated juvenile offenders differently from adult offenders. As early as 1876, this Court recognized that the focus of a proceeding against a juvenile offender should be on rehabilitation, not "punishment for the offense done." (See *Ex parte Ah Peen* (1876) 51 Cal. 280, 281.) At the turn of the 20th Century, the State enacted its first juvenile justice law, which implemented modest procedures for addressing criminal charges against youths under 16. (See Act of Feb. 26, 1903, 1903 Stats., ch. 43, § 1, p. 44.) Over the next 60 years, the law progressed in fits and starts.[1]

Today's framework for addressing crimes by juveniles has its origin in a 1961 act commonly known as the Arnold-Kennick Juvenile Court Law. (See Act of July 14, 1961, 1961 Stats.,

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[1] See Juvenile Court Law, 1909 Stats., ch. 133, p. 213; Act of Apr. 5, 1911, 1911 Stats., ch. 369, p. 658; Act of June 16, 1913, 1913 Stats., ch. 673, p. 1285; Juvenile Court Law, 1915 Stats., ch. 631, p. 1225; Act of May 25, 1937, 1937 Stats., ch. 369, p. 1005; see generally *Andrews v. Superior Court* (1946) 29 Cal.2d 208, 210-211; Lemhert, Social Action and Legal Change (1970) (analyzing development of juvenile justice in California during the first half of the Twentieth Century).

ch. 1616, p. 3459.) That law "initiated the now-familiar best interest of the child standard." (*People v. Superior Court (K.L.)* (2019) 36 Cal.App.5th 529, 536 [citing Stats. 1961, ch. 1616, § 502, p. 3460], review den. July 17, 2019, S256637.) And it recognized numerous procedural protections, including notice rights, the right to counsel, and the right to have the State meet a burden of proof. (Stats. 1961, ch. 1616, § 502 at pp. 3474-3476, 3481-3482, former Welf. & Inst. Code, §§ 554, 633-634, 701-702.) These procedural protections heralded the United States Supreme Court's landmark decision *In re Gault* (1967) 387 U.S. 1, which recognized that juveniles facing a loss of liberty are entitled to the same "essentials of due process and fair treatment" as defendants in adult criminal proceedings. (*Id.* at p. 30; see also *id.* at p. 41, citing Arnold-Kennick Juvenile Court Law; *B.M. v. Superior Court* (2019) 40 Cal.App.5th 742, 751 ["'California can take just pride in having initiated the trend towards procedural protection of the rights of juveniles,'" quoting Boches, *Juvenile Justice in California: A Re-Evaluation* (1967) 19 Hastings L.J. 47, 47], review granted January 3, 2020, S259030.)

Under the Arnold-Kennick Act, anyone under the age of 18 accused of a crime came within the jurisdiction of the juvenile court. (Stats. 1961, ch. 1616, § 502 at p. 3472, former Welf. & Inst. Code, § 603.) Prosecutors could request that the juvenile court find certain minors 16 years of age or older who had been accused of felonies be found "not a fit and proper subject" for juvenile court proceedings and prosecuted in adult court. (*Id.* at

p. 3485, former Welf. & Inst. Code, § 707.)[2] "In 1975, the Legislature established the relevant criteria for the fitness or transfer determination, which remain essentially the same today." (*B.M.*, *supra*, 40 Cal.App.5th at p. 751, citing Stats. 1975, ch. 1266, § 4.) The age limit preventing prosecution of those younger than 16 in adult court remained in place from 1961 until 1994.

That year, prompted by fear that juveniles were becoming increasingly violent, the Legislature reduced the minimum age to 14. (See Stats. 1994, ch. 453; see also Sen. Comm. on Judiciary, Analysis of Assem. Bill 560 (1993-1994 Reg. Sess.) [AB 560], as amended April 21, 1994, pp. 2-4.) Laws adopted in 1999 and 2000 "gave prosecutors authority to directly file charges against minors in criminal court *without a judicial determination of unfitness*." (*B.M.*, *supra*, 40 Cal.App.5th at p. 751.) "The most significant of these changes was Proposition 21, which California voters passed in 2000, based primarily on concerns about gang violence." (*Ibid.*) Proposition 21 broadened the circumstances in which minors 14 years of age and older could be tried as adults. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 545, 549.) In some situations, the law mandated that prosecutors charge minors as young as 14 in adult court. (*Id.* at p. 549, citing former Welf. & Inst. Code, § 602, subd. (b).)

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[2] The juvenile court's authority to deem a minor unfit for treatment as a juvenile dates to at least 1915. (See Stats. 1915, ch. 631, § 4c, p. 1228.)

The decision to send juveniles to the adult system can have significant consequences. Juvenile courts have available to them a variety of services to assist a troubled child. (*People v. Vela* (2018) 21 Cal.App.5th 1099, 1105 ["a [juvenile court] judge can impose a wide variety of rehabilitation alternatives after conducting a 'dispositional hearing'"].) For instance, juvenile judges and probation officers can enroll children—and, in certain situations, parents or guardians—in counseling or education programs, or arrange for mental health services for the child. (See Welf. & Inst. Code, §§ 727, 741.) These programs and services are integral to the juvenile system because that system focuses on achieving the reform and rehabilitation seen as possible in those who commit crimes at a young age. (See Welf. & Inst. Code, § 202; *Vela*, *supra*, 21 Cal.App.5th at pp. 1104-1105; cf. *Miller v. Alabama* (2012) 567 U.S. 460, 471 [recognizing that juveniles have "greater prospects for reform" than adults].)

B. Proposition 57

Voters eventually decided that prosecutors had been given too much power over juveniles. In 2016, voters enacted Proposition 57, a criminal justice reform initiative. Proposition 57's juvenile justice provision ended the experiment of authorizing prosecutors to directly file charges against minors in adult court. (Ballot Pamph., Gen. Elec. (Nov. 8, 2016), text of Prop. 57, pp. 141-146 [Prop. 57].) The ballot pamphlet informed voters that "[y]ouths accused of committing certain severe crimes would no longer automatically be tried in adult court and no youth could be tried in adult court based only on the decision of a

prosecutor." (Ballot Pamph., Gen. Elec. (Nov. 8, 2016) at p. 56; see also *J.N. v. Superior Court* (2018) 23 Cal.App.5th 706, 710-711 ["The voters apparently rethought their votes on Proposition 21 and passed Proposition 57 at the November 8, 2016, general election"].) "All remnants of Proposition 21 were deleted by passage of Proposition 57." (*K.L.*, *supra*, 36 Cal.App.5th at p. 534 fn. 3.) This "largely returned California to the historical rule" governing juvenile proceedings. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 305.)

The voters declared that their purpose and intent in passing the law was to:

1. Protect and enhance public safety.
2. Save money by reducing wasteful spending on prisons.
3. Prevent federal courts from indiscriminately releasing prisoners.
4. Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles.
5. Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court.

(Prop. 57, § 2, ¶¶ 1-5.) Under Proposition 57, all accusatory pleadings against minors must once again be brought in juvenile court. (See *id.*, §§ 4.1-4.2, amending Welf. & Inst. Code, §§ 602, 707, subd. (a).) Minors accused of certain serious offenses, including 14- and 15-year-olds, were not automatically exempt from trial and conviction as an adult. (*Id.*, § 4.2, amending Welf. & Inst. Code, § 707, subd. (a)(2), (b).) But a prosecutor's motion to transfer the minor to adult court could not take effect unless a judge agreed that the minor should be transferred. (*Ibid.*) Generally speaking, the electorate intended these provisions "to

broaden the number of minors who could potentially stay within the juvenile justice system, with its primary emphasis on rehabilitation rather than punishment." (*Vela*, *supra*, 21 Cal.App.5th at p. 1107.)

The electorate designed Proposition 57 to be construed "broadly" and "liberally" to accomplish its purposes. (Prop. 57 §§ 5, 9.) The initiative authorized a majority of the Legislature to amend the juvenile transfer provisions "so long as such amendments are consistent with and further the intent of this act." (*Id.* § 5.)

C. Senate Bill 1391

Two years later, the Legislature enacted SB 1391, which eliminated prosecutors' authority to file motions to transfer 14- and 15-year-olds to adult court. (See Stats. 2018, ch. 1012, § 1, amending Welf. & Inst. Code, § 707, subd. (a).)[3] The Legislature traced the history of transferring 14- and 15-year-olds to adult court back to the 1996 enactment of AB 560. (Sen. Comm. on Pub. Saf., Analysis of SB 1391 (2017-2018 Reg. Sess.) April 3, 2018, p. 4 [Sen. Comm. Pub. Saf.]; Assem. Comm. on Pub. Saf., Analysis of SB 1391 (2017-2018 Reg. Sess.) as amended May 25, 2018, p. 4 [Assem. Comm. Pub. Saf.].) Based on developments in cognitive science, the Legislature concluded that the prevailing belief in 1996 that "the human brain [is] fully developed at age 12

[3] An exception remains for 14- and 15-year-olds who commit specified serious crimes but who are "not apprehended prior to the end of juvenile court jurisdiction." (Welf. & Inst. Code, § 707, subd. (a)(2).) Those offenders may be prosecuted in adult court if the juvenile court concurs.

or 13" was mistaken, and that recent "cognitive science has demonstrated youth continue to develop into their mid-twenties[.]" (Sen. Comm. Pub. Saf. at p. 4.) As the Legislature recognized, these scientific developments had informed a series of United States Supreme Court decisions holding that "children are constitutionally different from adults" and "have diminished culpability and greater prospect for reform[.]" (*Id.* at p. 5, quoting *Miller v. Alabama* (2012) 567 U.S. 460, 471.)

The Legislature also considered evidence about juveniles who enter the criminal justice system. That evidence showed that many young people in the criminal justice system have experienced trauma that inhibits development, and that the effect of that trauma often has been compounded by mental health disorders or learning disabilities. (Sen. Comm. Pub. Saf. at p. 3; see also Assem. Comm. Pub. Saf. at p. 4.) There were disturbing racial and regional discrepancies in minors tried in adult court. (Sen. Comm. Pub. Saf. at pp. 4, 7.) Ninety-two percent of minors sent to the adult system were youths of color, and "[s]ome localities [sent] many youth to the adult system while others [relied] more heavily on the resources and tools available in the juvenile system." (*Id.* at p. 4.) Taking all these considerations into account, the Legislature enacted SB 1391 and found that the new law "is consistent with and furthers the intent of Proposition 57[.]" (*Id.*, § 3.)

D. Procedural History

In this case, the People allege that in 2018 Petitioner O.G. committed two murders when he was 15 years old. (Exhs. in

Support of Petn. for Writ of Mandate at pp. 5-6, 17-19.) In the first, he allegedly shot and killed Jose Lopez after learning Lopez was in a rival gang. (*Id.* at p. 18.) In the second, he allegedly stabbed and killed Adrian Ornelas during a robbery. (*Id.* at p. 19.)

After petitioner was arrested, the People filed a juvenile court petition and filed a motion to have a probation officer prepare a report and to have petitioner transferred to adult court. (*Id.* at pp. 3-7, 16-38.) The People recognized that SB 1391 precluded the motion, but argued that SB 1391 was invalid because it impermissibly amended Proposition 57. (*Id.* at pp. 25-29.) The superior court agreed, ruling that SB 1391 was invalid because it was inconsistent with "the voter approved Proposition 57 determination that minors age 14 or 15 can be subject to adult court prosecution for serious crimes like murder." (*Id.* at p. 133.) The court granted the District Attorney's motion to have Petitioner's case referred for a probation report so a transfer hearing could be conducted. (*Id.* at pp. 134-135.)

Petitioner filed a petition for a writ of mandate in the Court of Appeal. (*O.G. v. Superior Court* (2019) 40 Cal.App.5th 626, 628.) The court denied the petition, holding that SB 1391 is invalid because it prevents the transfer of 14- and 15-year-olds while Proposition 57 authorized those transfers. (*Id.* at p. 630.) In reaching that result, the court disagreed with four published decisions upholding the law against similar challenges brought by district attorneys. (See *id.* at p. 628; see also *People v. Superior Court (Alexander C.)* (2019) 34 Cal.App.5th 994 [First Dist.,

Div. 4], review den. June 26, 2019, S255985; *K.L.*, *supra*, 36 Cal.App.5th 529 [Third Dist.]; *People v. Superior Court (T.D.)* (2019) 38 Cal.App.5th 360 [Fifth Dist.], review granted November 26, 2019, S257980; *People v. Superior Court (S.L.)* (2019) 40 Cal.App.5th 114 [Sixth Dist.], review granted November 26, 2019, S258432.) After the court's decision, two more courts published decisions upholding the law. (*B.M.*, *supra*, 40 Cal.App.5th 742 [Fourth Dist., Div. 2]; *Narith S. v. Superior Court* (2019) 42 Cal.App.5th 1131 [Second Dist., Div. 3], review granted February 19, 2020, S260090.)

ARGUMENT

I. SB 1391 IS VALID UNDER ARTICLE II, SECTION 10(C)

A. Proposition 57 Allows Legislative Amendments in Appropriate Circumstances.

Article II, section 10, subdivision (c), of the California Constitution provides that "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*" (emphasis added). Proposition 57, in turn, makes use of that exception, providing that:

> This act shall be broadly construed to accomplish its purposes. The provisions of sections 4.1 and 4.2 of this act may be amended so long as such amendments are consistent with and further the intent of this act by a statute that is passed by a majority vote of the members of each house of the Legislature and signed by the Governor.

(Prop. 57, § 5.)

The Court of Appeal appeared to believe that the unconstitutionality of SB 1391 was automatic if it amended Proposition 57. (See *O.G.*, *supra*, 40 Cal.App.5th at pp. 628-630.) But that view failed to give effect to article II, section 10(c), and Proposition 57's provisions permitting amendments. The question here is whether SB 1391's amendment of Proposition 57 accorded with the initiative's amendment provision. As shown below, it did.

B. SB 1391 Is an Appropriate Amendment

1. SB 1391 Serves Proposition 57's Express Purposes

According to Proposition 57, the initiative's "purpose and intent" was to:

1. Protect and enhance public safety.
2. Save money by reducing wasteful spending on prisons.
3. Prevent federal courts from indiscriminately releasing prisoners.
4. Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles.
5. Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court.

(Prop. 57, § 2, ¶¶ 1-5.) In enacting SB 1391, the Legislature found that its new law "is consistent with and furthers the intent of Proposition 57[.]" (Stats. 2018, ch. 1012, § 3.)

SB 1391 serves Proposition 57's purpose of protecting and enhancing public safety, by ensuring that offenders under the age of 16 stay in a system which provides the rehabilitative services needed for offenders of that age to become law-abiding members of society. The voters who enacted Proposition 57 recognized that

"minors who remain under juvenile court supervision are less likely to commit new crimes." (See Ballot Pamp., Gen. Elec. (Nov. 8, 2016), at p. 58.) "It follows that the Legislature could reasonably conclude that SB 1391 protects and enhances public safety because SB 1391 expands the category of minors who will remain in the juvenile system." (*Alexander C.*, *supra*, 34 Cal.App.5th at p. 1001; see also *B.M.*, *supra*, 40 Cal.App.5th at p. 756 ["SB 1391 can easily be construed to promote public safety and reduce crime, since it increases the number of youth offenders who will remain in the juvenile justice system and avoid prison where the chance of recidivism is higher"].) The Legislature determined that keeping 14- and 15-year-olds in the juvenile system would ensure more access to treatment and other tools, which would "protect[] public safety[.]" (Sen. Comm. Pub. Saf. at p. 4.) It cited "[e]xtensive research . . . establish[ing] that youth tried as adults are more likely to commit new crimes in the future than their peers treated in the juvenile system." (*Ibid.*)

SB 1391 advances Proposition 57's second and third purposes: saving money by reducing wasteful spending on prisons and preventing federal courts from indiscriminately releasing prisoners. (See Prop. 57, § 2.) Keeping more minors in the juvenile system means, by definition, that money will not be spent to house them in prisons. It also reduces the prison population, lessening the likelihood of a federal court order to remedy overcrowding by releasing prisoners. (See, e.g., *Alexander C.*, *supra*, 34 Cal.App.5th at p. 1002; *S.L.*, *supra*, 40 Cal.App.5th at pp. 121-122.)

SB 1391 advances Proposition 57's purpose of emphasizing juvenile rehabilitation by keeping 14- and 15-year-olds in the juvenile justice system, which treats juveniles "quite differently [from adult prisoners], with rehabilitation as the goal." (See *Lara*, *supra*, 4 Cal.5th at pp. 306-307; *Vela*, *supra*, 21 Cal.App.5th at p. 1104; see also, e.g., *S.L.*, *supra*, 40 Cal.App.5th at p. 121 ["SB 1391 clearly emphasizes the rehabilitation of juveniles"].) Like Proposition 57 itself, this "focuses our system on evidence-based rehabilitation for juveniles." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016), at p. 58.)

Finally, SB 1391 serves—or at least does not undercut—Proposition 57's fifth purpose: "requiring judges, not prosecutors, to decide whether a juvenile should be transferred to adult court." SB 1391 narrowed prosecutors' authority by withdrawing their discretion to file motions to transfer 14- and 15-year-olds to adult court. (Stats. 2018, ch. 1012, § 1, amending Welf. & Inst. Code, § 707, subd. (a); see also Sen. Comm. Pub. Saf. at p. 2 ["The purpose of this bill is to repeal the authority of a prosecutor to make a motion to transfer a minor from juvenile court to adult criminal court if the minor was alleged to have committed certain serious offenses when he or she was 14 or 15 years old," italics omitted]; Assem. Comm. Pub. Saf. at p. 4 [same].) But SB 1391 did not change the role of judges in the transfer process; "where a transfer decision must be made, a judge rather than a prosecutor [still] must make the decision." (*Alexander C.*, *supra*, 34 Cal.App.5th at p. 1001.)

2. SB 1391 Serves Proposition 57's Overarching Purpose

Courts considering a challenge to a legislative statute under article II, section 10(c) will consider not only an initiative's statements of purpose or intent, but also the initiative "as a whole." (See *Amwest Surety Insurance Company v. Wilson* (1995) 11 Cal.4th 1243, 1257 ["we are guided by, but not limited to, the general statement of purpose found in the initiative"]; *Gardner v. Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1374 ["We must give effect to an initiative's specific language, as well as its major and fundamental purposes"].) That inquiry, too, confirms the permissibility of SB 1391.

The major and fundamental purpose of Proposition 57's juvenile justice provisions—as evidenced by the Proposition's text, the changes it made to existing law, and the ballot materials presented to voters—was to revisit past policies that focused on punishment more than rehabilitation. As this Court has held, the initiative was an "ameliorative change to the criminal law" that "extend[ed] as broadly as possible." (*Lara*, *supra*, 4 Cal.5th at p. 310, brackets and quotation marks omitted.) Proposition 57 thus sought to reverse the shift towards adult prosecution that had occurred in the previous two decades: "while the intent of the electorate in approving Proposition 21 was to broaden the number of minors subject to adult criminal prosecution, the intent of the electorate in approving Proposition 57 was precisely the opposite." (*Vela*, *supra*, 21 Cal.App.5th at p. 1107.) To support that change, the voters focused on evidence-based juvenile justice reforms. They decided to take away prosecutors' authority to

directly file charges against juveniles in adult court because "[e]vidence shows that the more inmates are rehabilitated, the less likely they are to re-offend," and "[f]urther evidence shows that minors who remain under juvenile court supervision are less likely to commit new crimes." (See Ballot Pamp., Gen. Elec. (Nov. 8, 2016), at p. 58.)

SB 1391 is consistent with that approach. Like Proposition 57, it undoes a policy first enacted during an era when the Legislature and voters prioritized punishment over rehabilitation. In considering SB 1391, the Assembly Committee on Public Safety concluded that the pre-Proposition-57 decision to lower the minimum transfer age to 14 had been a mistake "fueled by media's portrayal of youth as 'super-predators,' consistent with the era's tough on crime attitude." (See Assem. Comm. Pub. Saf. at p. 4.) And the Senate Committee on Public Safety found that lowering the minimum age at which minors could be tried as adults had been based on the misunderstanding that "the human brain was fully developed at age 12 or 13 and that young people engaged in criminal activity would always be criminals." (Sen. Comm. Pub. Saf. at p. 3.) Both the Senate and Assembly Committees on Public Safety identified developments in cognitive science undercutting that view for 14- and 15-year-olds. (Sen. Comm. Pub. Saf. at pp. 3-5; Assem. Comm. Pub. Saf. at p. 5.) The Senate Committee also cited a developing body of case law that reflected a shift in how juveniles may be treated and that had "prompted the passage of several recent juvenile justice reform measures." (Sen. Comm. Pub. Saf. at p. 5 [citing *Roper v.*

Simmons (2005) 543 U.S. 551; *Graham v. Florida* (2010) 560 U.S. 48; *J.D.B. v. North Carolina* (2011) 564 U.S. 261; *Miller*, *supra*, 567 U.S. 460].)

Much of this evidence was available at the time the electorate enacted Proposition 57. But that initiative did not purport to fix all past juvenile justice policies. The proponents of Proposition 57 said it was designed to "*help* fix a broken system[.]" (Ballot Pamp., Gen. Elec. (Nov. 8, 2016), at p. 59, italics added.) Voters knew they were taking an incremental step, one in a series of steps taken in the years leading up to Proposition 57's enactment. (See Sen. Comm. Pub. Saf. at p. 5, citing 2012 Stats., Ch. 828 (Senate Bill 9 (Yee)), 2013 Stats., Ch. 312 (Senate Bill 260 (Hancock)), 2015 Stats., Ch. 471 (Senate Bill 261 (Hancock).) And as the amendment provision itself shows, voters further expected Proposition 57's reforms to be supplemented by later ones, if the Legislature deemed such changes necessary in furtherance of Proposition 57's goals.

C. Possible Contrary Views of How to Accomplish Proposition 57's Goals Do Not Invalidate the Legislature's Choice

The District Attorney disagrees with the Legislature's determination that SB 1391 is consistent with and furthers the intent of Proposition 57. His arguments are incorrect for the reasons that follow. But they are also fundamentally incorrect because they "take an initiative clearly intended to limit prosecutorial power, increase rehabilitative opportunities for youth, and reduce prison spending, and recharacterize it as a law

concerned with *effectuating* the transfer of juveniles to criminal court." (See *B.M.*, *supra*, 40 Cal.App.5th at p. 758.)

1. The District Attorney's Arguments Are Policy Disagreements That Proposition 57 Allows the Legislature to Resolve

The District Attorney focuses his arguments on Proposition 57's first and fifth purposes, concerning public safety and the allocation of authority between judges and prosecutors. (ABM 34-46.) As to public safety, his argument boils down to the proposition that incarceration alone ensures public safety. (See ABM 40.) But the voters who enacted Proposition 57 rejected that approach for juveniles. They accepted "evidence show[ing] that minors who remain under juvenile court supervision are less likely to commit new crimes." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016), at p. 58.) The Legislature relied on developments in science showing that young people's brains are not fully developed, and those young people who commit crimes will not always be criminals. (Sen Pub. Saf. at p. 3.) By "[k]eeping 14 and 15 year olds in the juvenile justice system," the Legislature intended to "help ensure that youth receive treatment, counseling, and education they need to develop into healthy, law abiding adults." (Assem. Comm. Pub. Saf. at p. 4.) That view has ample support in law and science. The United States Supreme Court's conclusion that "children are constitutionally different from adults" rested in part on evidence that because "a child's character is not as well formed as an adult's[,] his traits are less fixed and his actions less likely to be evidence of irretrievable

depravity." (*Miller*, *supra*, 567 U.S. at p. 471, quotation marks and brackets omitted.)

As the legislative record shows, deciding whether increasing the age at which minors can be tried as adults to 16 will promote public safety involves weighing several factors, including brain development, the efficacy of rehabilitative programs, and the potential for prison to make a 14- or 15-year-old more dangerous upon their release. (Sen Pub. Saf. at pp. 3-5; Assem. Comm. Pub. Saf. at pp. 4-5.) It is a topic on which reasonable minds may differ. The Court of Appeal below thought it possible that SB 1391 "may" undercut public safety. (*O.G.*, *supra*, 40 Cal.App.5th at p. 630; cf. *S.L.*, *supra*, 40 Cal.App.5th at p. 124 (dis. opn. of Grover, J.) ["Whether taking 14- and 15-year-olds who have committed serious offenses out of juvenile court is the best way to promote public safety can be fairly debated"].) The Legislature concluded otherwise, and because Proposition 57 permits amendments, that legislative determination, "while not binding on the courts, [is] given great weight and will be upheld unless [it is] found to be unreasonable and arbitrary.'" (*Amwest*, *supra*, 11 Cal.4th at p. 1252, quoting *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 583.)

The District Attorney argues that some especially dangerous 14- and 15-year-old offenders cannot be rehabilitated by the time they leave the juvenile system at age 25. (ABM 44.) But even assuming that *some* incorrigible 14- and 15-year-olds exist, the District Attorney does not show that they constitute any substantial portion of the population that was eligible for, or

being, transferred to adult proceedings before SB 1391. Nor does the District Attorney's argument address the problem identified by the United States Supreme Court in *Graham*—a case-by-case approach does not necessarily "allow courts to distinguish with sufficient accuracy the few juvenile offenders having sufficient psychological maturity and depravity to merit a life without parole sentence from the many that have the capacity for change." (*Graham*, *supra*, 560 U.S. at p. 77.)

The racial and regional disparities identified in the pre-Proposition 57 era suggest that the system did not work as cleanly as the District Attorney presupposes. (See Sen. Comm. Pub. Saf. at p. 4.) The Legislature identified data revealing "vast disparities in who gets sent to adult court instead of juvenile court for the same crimes." (Sen. Comm. Pub. Saf. at p. 4.) Some counties relied heavily on trying youths as adults, while others relied on the juvenile system. (*Ibid.*) And "[y]outhes of color [made] up nearly 92 percent of youth sent to the adult system." (*Ibid.* [citing 2015 data].)[4]

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[4] The Legislature relied on data from the California Department of Justice for the year 2015—the year before Proposition 57 went into effect. (See Sen. Comm. Pub. Saf. at p. 6.) In 2018 and 2019, the most recent years for which data is available, youths of color still make up over 78 and 86 percent, respectively, of youth sent to the adult system. (Becerra, Juvenile Justice in California (2018) at p. 47; Becerra, Juvenile Justice in California (2019) at p. 47, both reports available at https://oag.ca.gov/cjsc/pubs#juvenileJustice [last visited Aug. 5, 2020].)

Given those statistics, it was reasonable for the Legislature to conclude that the existing system's assignment of many youths to adult court reflected factors other than an accurate or reliable assessment of how public safety would best be served. It was likewise reasonable to conclude that public safety could be best served by categorically assigning offenders under age 16 to a system designed for those offenders. The Legislature was well-situated to determine whether any public safety benefits that came from transferring a few truly incorrigible children under the prior regime were outweighed by the harms to public safety caused by the far larger numbers of children for whom transfer interfered with an otherwise achievable rehabilitation.[5]

Next, the District Attorney argues that SB 1391 is inconsistent with Proposition 57's goal of "requiring judges, not prosecutors, to decide whether juveniles should be tried in adult court." (See ABM 35.) But when the voters said they intended "a judge, not a prosecutor, to decide whether juveniles should be tried in adult court" (Prop. 57, § 2), their focus was on limiting prosecutorial power. (*K.L.*, *supra*, 36 Cal.App.5th at p. 539 ["This language does not suggest a focus on retaining the ability to charge juveniles in adult court so much as removing the discretion of district attorneys to make that decision"].) "[T]here

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[5] In addition, incorrigible dangerous offenders will not necessarily be released into the public at age 25. (See, e.g., *Alexander C.*, *supra*, 34 Cal.App.5th at pp. 1001-1002, citing Welf. & Inst. Code, § 1800, subd. (a), and Governor's message to Sen. on SB 1391 (Sept. 30, 2018) Sen. J. (2017–2018 Reg. Sess.) p. 6230.)

is nothing in the language of Proposition 57 or the ballot materials to suggest that it was a specific intent of Proposition 57 to ensure that 14- and 15-year-old juvenile offenders would continue to be subject to adult criminal prosecution." (*Id.* at p. 541.) The initiative simply returned California to the historical practice of having judges decide whether juveniles should be sent to criminal court. (See *Lara, supra*, 4 Cal.5th at p. 305.)

As a result, the argument that SB 1391 "effectively *prohibits* judges from determining whether certain juveniles should be transferred to criminal court" (*T.D.*, *supra*, 38 Cal.App.5th at p. 378 (dis. opn. of Poochigian, J.)), misses the mark. Before SB 1391, judges also had no authority to unilaterally transfer juveniles to criminal court; prosecutors could effectively prohibit judges from determining whether a minor should be transferred by not bringing a transfer motion in the first place. The true effect of SB 1391, therefore, was not to eliminate judicial authority, but rather to further cabin prosecutors' authority—a furtherance of Proposition 57's own goals.

Finally, the District Attorney argues that SB 1391 "is inconsistent with the specific provisions of Proposition 57 which allow a prosecutor to make a motion to transfer a minor age 14 or 15 to adult court[.]" (ABM 36; see also Prop. 57, § 4.2, amending Welf. & Inst. Code, §707.) As the court in *Alexander C.* pointed out, however, this "argument presumes, incorrectly, that amendments to the *provisions* of Proposition 57 necessarily change the *intent* of Proposition 57." (*Alexander C.*, *supra*, 34 Cal.App.5th at p. 1003.) By authorizing legislative amendment,

the voters necessarily contemplated that the Legislature would be "adding or taking from it some particular provision." (See *People v. Cooper* (2002) 27 Cal.4th 38, 44.) SB 1391 took away the provision allowing for the transfer of certain 14- and 15-year-olds to adult court. The Legislature's ability to make such changes, in order to further achieve Proposition 57's purposes, was expressly intended by the voters.

2. SB 1391 Enjoys a Presumption of Constitutionality

Where an initiative statute expressly allows for amendment, amendments enacted by the Legislature receive the same "strong presumption of constitutionality" that generally accompanies legislation. (*Amwest*, *supra*, 11 Cal.4th at p. 1253.) Courts "presume [an act's] validity, resolving all doubts in favor of the Act." (*Id.* at p. 1252.) The limitation that article II, section 10(c) places "upon the power of the Legislature must be strictly construed[.]" (*Amwest*, *supra*, 11 Cal.4th at p. 1255.) A conflict with article II, section 10(c) must be "clear and unquestionable" before a court will invalidate a legislative statute. (*Id.* at p. 1252.) Requiring a clear and unquestionable conflict ensures that the voters "get what they enacted, not more and not less." (See *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.)

The District Attorney, however, argues that the general presumption of constitutionality does not apply when the Legislature amends an initiative. Instead, the District Attorney argues that any amendment that "'*may* conflict with the subject matter of initiative measures must be accomplished by popular vote.'" (ABM 16, quoting *Proposition 103 Enforcement Project v.*

Quackenbush (1998) 64 Cal.App.4th 1473, 1486.) He insists that only that approach will "jealously guard" the people's initiative power. (ABM 16, quoting *People v. Kelly* (2010) 47 Cal.4th 1008, 1025-1026.) But that has things backwards. Invalidating a legislative statute simply because it *may* not comply with an initiative statute's amendment provision would itself defeat the voters' intent. That over-restrictive approach—forbidding amendments that the voters wanted to allow—is no better than allowing an amendment the voters wanted to forbid. (*Amwest*, *supra*, 11 Cal.4th at p. 1256 [explaining that an initiative's amendment provision "must be given the effect the voters intended it to have"].) Indeed, it is worse, because the Legislature has authority to act absent a positive restriction on its power. (*Howard Jarvis Taxpayers Association v. Padilla* (2016) 62 Cal.4th 486, 498 ["it is well established that the California Legislature possesses *plenary* legislative authority except as specifically limited by the California Constitution"].) That background principle of law, moreover, is one that the voters must be presumed to have known would govern interpretation of the initiative. (See *In re Harris* (1989) 49 Cal.3d 131, 136 ["Generally, the drafters who frame an initiative statute and the voters who enact it may be deemed to be aware of the judicial construction of the law that served as its source."].)

D. The District Attorney's and Court of Appeal's Overly Restrictive Reading of Proposition 57's Amendment Provision Cannot Be Sustained

1. The Court of Appeal's View Misapplies this Court's Test for Initiatives that Permit Amendment

The Court of Appeal's decision focused almost exclusively on whether SB 1391 amended Proposition 57 and very little on whether the amendment satisfied the initiative's amendment provision. (See *O.G.*, *supra*, 40 Cal.App.5th at pp. 628-630.) It held "the determinative question" was "whether . . . S.B. 1391 amends Proposition 57," explaining that "we simply need to ask whether it prohibits what the initiative authorizes, or authorizes what the initiatives prohibits." (*Id.* at p. 630, brackets and quotation marks omitted.) The court below thought that the multiple court of appeal cases upholding SB 1391 had erred by not asking this "straightforward determinative question." (*Id.* at p. 629.)

Analysis of a law under article II, section 10(c), proceeds in two steps. First, as the Court of Appeal here recognized, a court determines whether the legislative statute amends the initiative statute at all. (*Pearson*, *supra*, 48 Cal.4th at p. 571.) This step asks whether the legislative statute is "'designed to change the . . . initiative by adding or taking from it some particular provision'" or by "prohibit[ing] what the initiative authorizes, or authoriz[ing] what the initiative prohibits." (*Ibid.*, quoting *Cooper*, *supra*, 27 Cal.4th at p. 44.) No amendment occurs where the Legislature addresses "a related but distinct area or a matter

that an initiative measure does not specifically authorize or prohibit." (*Kelly*, *supra*, 47 Cal.4th at pp. 1025-1026, internal citations and quotation marks omitted.) When a legislative statute does not amend the initiative statute, article II, section 10(c) cannot be used to invalidate the law. (See, e.g., *Cooper*, *supra*, 27 Cal.4th at pp. 44-48 [upholding a legislative statute limiting presentence conduct credits against article II, section 10(c) challenge because the statute did not amend the Briggs Initiative (Proposition 7), which addressed postsentence conduct credits].)

But the finding that an amendment has occurred does not end the inquiry. When a legislative statute does amend an initiative statute, the court must proceed to a second step, which asks whether the initiative statute authorized the amendment. Many initiative statutes do allow legislative amendment. (*Amwest*, *supra*, 11 Cal.4th at p. 1251 ["It is common for an initiative measure to include a provision authorizing the Legislature to amend the initiative without voter approval only if the amendment furthers the purpose of the initiative"].) A legislative statute amending such an initiative is invalid only if it exceeds the scope of the type of amendment that the initiative permits. (*Amwest*, *supra*, 11 Cal.4th at pp. 1255-1256.) The Court of Appeal did not discuss Proposition 57's amendment provision or this Court's decision in *Amwest*. (*O.G.*, *supra*, 40 Cal.App.5th at p. 630.) Yet this is the step on which the question in this case turns, as every other court of appeal to have considered the issue recognized. (*Alexander C.*, *supra*, 34 Cal.App.5th at pp. 1002-1003

& fn. 1; *K.L.*, *supra*, 36 Cal.App.5th at pp. 538-539 & fn. 6; *T.D.*, *supra*, 38 Cal.App.5th at p. 370; *S.L.*, *supra*, 40 Cal.App.5th at p. 121; *B.M.*, *supra*, 40 Cal.App.5th at p. 746; *Narith S.*, *supra*, 42 Cal.App.5th at p. 1140.)

By not proceeding to that second step, the Court of Appeal here not only failed to apply *Amwest*. It also undermined the clear intent of Proposition 57 itself. Any amendment of the legally operative provisions of the statute enacted by Proposition 57 will change what is authorized or prohibited. (See *Cooper*, *supra*, 27 Cal.4th at p. 44.) If that by itself were enough to disqualify an amendment, then no amendment would be permitted, except possibly of the most trivial sort. But if anything is clear from the existence of an amendment provision, it is that the statute "may be amended." (Prop. 57, § 5.) The Court of Appeal's view, by declaring its inquiry complete at step one of the analysis, essentially rewrote that instruction. Such an analysis is incorrect, and even the District Attorney does not attempt to defend it.

2. The District Attorney's View Would Violate the Voters' Intent

In arguing that SB 1391 exceeds the amendment power recognized by Proposition 57, the District Attorney principally focuses on one point: Proposition 57 allowed 14- and 15-year-olds to be tried as adults (with a judge's permission), whereas SB 1391 does not. As a result, the District Attorney argues, SB 1391 is not "consistent with" Proposition 57. (ABM 34.) The argument is incorrect.

First, the argument rests on the premise that, to be permitted under Proposition 57, an amendment must not only be consistent with and further the purposes of Proposition 57 but must also be consistent with each provision of Proposition 57 itself. (See ABM 36.) That argument is far from obvious. Proposition 57's amendment provision provides that "[t]he provisions of Sections 4.1 and 4.2 of this act may be amended so long as such amendments are consistent with and further the intent of this act[.]" (Prop. 57, § 5.) The District Attorney's view is that the object of "are consistent with" is simply "the act"—and that "the intent of the act" is an object only of "further." (ABM 23.) But if the District Attorney's argument were correct, the drafters would have inserted commas:

> The provisions of Sections 4.1 and 4.2 of this act may be amended so long as such amendments are consistent with[,] and further the intent of[,] this act.

That would have made clear that the rather long phrase "further the intent of" was intended to be taken as a single unit that interrupts the connection between the previous phrase ("are consistent with") and its object ("the act"). In contrast, in the version that the voters passed, no such commas were needed to set off a much shorter interruption ("and further") which takes the same object ("the intent of this act") as the prior phrase ("are consistent with").

Indeed, as petitioner points out, the phrase "to be consistent with and further" is read naturally as a unit—that is, as an idiomatic legal doublet, like "various and sundry" or "free and clear." (See Reply 23; see also Garner, A Dictionary of Modern

Legal Usage (1987) p. 197 ["Amplification by synonym has long been a part of the English language, and especially a part of the language of law"].) The phrase is not unique to Proposition 57; ballot initiatives often use it. (See, e.g., *In re J.C.* (2016) 246 Cal.App.4th 1462, 1481 [Prop. 47 2014]; *Jensen v. Franchise Tax Board* (2009) 178 Cal.App.4th 426, 441 [Prop. 63 2004]; *Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, 598-599 [Prop. 116 1990].)[6]

Moreover, the District Attorney's interpretation would fail even if the "are consistent with" requirement is separate from the "further the purpose of" requirement. *Any* amendment could be, in some respect, viewed as "inconsistent with" the preceding law.

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[6] To defend his two-requirement reading, the District Attorney invokes the principle that words must be given "'their usual and ordinary meaning'"—ironically relying on a legal doublet to make his point. (See ABM 22, quoting *People v. Ruiz* (2018) 4 Cal.5th 1100, 1105.) Reducing statutory interpretation to stringing together dictionary definitions, as the District Attorney attempts to do (see ABM 22), while ignoring the meaning of idioms, risks misconstruing the voters' intent. The District Attorney also argues that his construction is necessary under the canon of construction that disfavors treating words as surplusage, because otherwise "are consistent with" would have no effect. (ABM 22, citing *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54.) But no purpose is served by attempting to divine separate meanings for each part of a multiple-word idiom such as "true and correct" or "cease and desist." Indeed, attempts to slice such phrases into purportedly distinct requirements would be more likely to defeat than to vindicate the enactors' intent. "Rules such as those directing courts to avoid interpreting legislative enactments as surplusage are mere guides and will not be used to defeat legislative intent." (*People v. Cruz* (1996) 13 Cal.4th 764, 782.)

That is, after all, what makes an enactment an amendment. (See *Cooper*, *supra*, 27 Cal.4th at p. 44.) But that could not have been the sense of "consistency" that the voters intended—because if it were, they would not have given the Legislature the power to amend. (See *B.M.*, *supra*, 40 Cal.App.5th at p. 760 ["to construe the amendment allowance in Proposition 57 as respondent and the District Attorney do, would be no allowance at all"].) Nor is it plausible, as the District Attorney argues, that the "are consistent with" restriction was intended to allow the Legislature only to clarify ambiguous terms or to correct drafting or cross-referencing errors. (ABM 25.) Reading "are consistent with" so narrowly would effectively eliminate the force of the second condition—furthering the intent of the act. Fixing a cross-referencing error, for example, seems unlikely to reduce wasteful spending on prisons or enhance public safety. If the voters had intended to limit the Legislature to trivial or technical amendments, they could have easily said so.

Even as a freestanding requirement, the requirement that an amendment be "consistent with . . . the act" simply means that the amendment must be harmonious or *compatible* with the purpose, overall approach, and scheme of the act. (See *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2008) 164 Cal.App.4th 1, 9 [explaining that when "the word 'consistent' means 'compatible' it is usually used with 'with,'" citation omitted]; *Shay v. Roth* (1923) 64 Cal.App. 314, 318 ["The phrase 'consistent with' means 'in agreement with; harmonious with'"].) In other words, it would codify the directive in *Amwest* and other

cases that courts must consider not only an initiative's express purposes, but also its overarching purposes. (See *Amwest*, *Amwest*, *supra*, 11 Cal.4th at p. 1257; *Gardner*, *supra*, 178 Cal.App.4th at p. 1374.) An amendment meets that requirement if it is consonant with the approach taken by the act and its overarching scheme, as well as the express purposes intent. As shown above, the changes enacted by SB 1391 are harmonious and consonant with Proposition 57's fundamental approach to juvenile crime. (See *supra*, pp. 18-23.) As a result, SB 1391 is constitutional regardless of whether "are consistent with" states a separate condition or is part of a unitary phrase ("are consistent with . . . and furthers"). To read the amendment power more narrowly would defeat, not vindicate, voter intent.

CONCLUSION

This Court should reverse the Court of Appeal's decision and order the Court of Appeal to enter a writ directing the superior court to deny the District Attorney's motion to transfer Petitioner to adult court.

Dated: August 5, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Brief of the Attorney General as Amicus Curiae in Support of Petitioner uses a 13 point Century Schoolbook font and contains 8,053 words.

Dated: August 5, 2020

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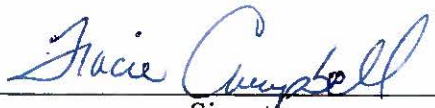
Declarant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