# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

O.G.,

Petitioner,

vs.

THE SUPERIOR COURT OF VENTURA COUNTY,

Respondent;

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

**COURT NO. S259011**

Court of Appeal
No. B295555

Ventura County
Superior Court
No. 2018017144

Hon. Kevin J. McGee, Judge of the Superior Court

## REAL PARTY IN INTEREST'S ANSWER BRIEF ON THE MERITS

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TO CHIEF JUSTICE TANI CANTIL-SAKAUYE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Real Party in Interest, the People of the State of California, by and through Gregory D. Totten, District Attorney of the County of Ventura, respectfully submits this answer brief on the merits.

## INTRODUCTION

The Public Safety and Rehabilitation Act of 2016, Proposition 57, enacted balanced juvenile justice reform. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) Prop. 57, pp. 54-59, 141-146 (hereafter Voter Information Guide); exhibit C[1], pp. 63-74.) Voters made their multiple intentions clear, including the intent to keep the public safe from violent offenders. The voters also intended to eliminate direct filing and instead require a judge to decide whether to try the most violent and dangerous juvenile offenders, ages 14 through 17, as adults. Voters were told the initiative might reduce the numbers of juveniles prosecuted as adults, but nothing in Proposition 57 or the Official Voter Information Guide that

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[1] As in the Opening Brief on the Merits, all citations to exhibits are to those exhibits filed in support of the petition for writ of mandate in the Court of Appeal.

accompanied it evidence a voter intent to eliminate all possibility of criminal jurisdiction over 14- and 15-year-old offenders.

Voters had no warning that the measure that promised to put public safety first and require a judge to decide whether a 14- or 15-year-old would be tried as an adult would later be used as an avenue for indiscriminate leniency to some of the most violent and predatory youthful offenders, with no regard for public safety or the efficacy of rehabilitative measures. But it was. By enacting Senate Bill 1391 (SB 1391) (Stats. 2018, c. 1012 (S.B. 1391), eff. Jan. 1, 2019; see exhibit C, pp. 76-78), the Legislature eliminated the voter enacted transfer process for 14- and 15-year-olds charged with the most violent crimes and upended the balance the voters sought.

The people's reserved power of initiative is our democracy's most precious right. Voter enactments are protected from legislative overreach by the California constitution, so that the Legislature cannot act contrary to the people's directives. But here, the voters enacted a system to require judges determine the appropriate jurisdiction for 14-and 15-year-old violent offenders, and the Legislature repealed that system. The voters entrusted judges, not the Legislature, to balance public safety with rehabilitation. SB 1391 upends that balance. The Legislature's action is neither consistent with the voters' enactments nor does it further the voters' express and manifest intentions. For these reasons, the principles that protect the power of initiative require SB 1391 be declared unconstitutional.

## STATEMENT OF FACTS

Petitioner declined to set out the underlying facts of O.G.'s crimes, asserting instead that "what is relevant is that petitioner was 15 years old at the time of the alleged crimes." (Opening Brief on the Merits, p. 14.) But the voters who enacted the *Public Safety* and Rehabilitation Act of 2016 (italics added), were concerned about *public safety* and thus the alleged facts – those about which the trial court was aware when ruling on the motion to transfer (see exhibit C, pp. 17-19)– are relevant to the question at hand: Did the voters intend violent criminals like O.G. to be indiscriminately eliminated from transfer jurisdiction?

On April 22, 2018, at approximately 8:00 p.m., petitioner, age 15 years and 4 months, Jorge Ortega, age 20, and a third male went to a parking lot adjacent to Channel View Park in the Hollywood Beach neighborhood of Oxnard. The three were members of the UPN gang, which claims as its territory the Little Africa neighborhood in Oxnard some five miles from the park. They then "hit up" people in the parking lot, asking them where they were from.

They first confronted three teenage boys who were standing outside their vehicle. Petitioner, while brandishing a handgun, asked the teens where they were from. Terrified, the teens replied that they were from "nowhere" and after some conversation were able to deflect the violent interests of petitioner and Ortega. According to the teens, petitioner and Ortega told them they were from UPN and told them their monikers, then moved on.

After leaving the teens, the three suspects spotted victim Jose Lopez as he sat in front passenger seat of a sedan. His girlfriend, Lizeth Torres, sat in the driver's seat. Lopez was a member of Colonia Chiques, a rival of UPN, but on this night, he was unarmed and simply looking out over the Pacific Ocean, drinking beer and listening to music. Petitioner walked up to Torres where she sat in her car, pointed a chrome revolver at her and asked her where she was from. As petitioner threatened Torres, Ortega, also brandishing a handgun, "hit-up" Lopez. Unarmed, Lopez got out of the vehicle and told Ortega that he was from Colonia. Petitioner ran around the car and, with Ortega, immediately opened fire on Lopez with a barrage of .22 caliber gunfire. Lopez was shot four times in the head, neck and back and fell where he stood, still next to his girlfriend's car, dead.

Less than one month after murdering Jose Lopez, on May 20, 2018, just before 4 a.m., petitioner was a passenger in a car driven by fellow UPN gang member Joseph Llamas. A 16-year-old minor, Ruiz, was also in the car. The car ran out of gas and as the three pushed the car eastbound on Bard Road in Oxnard, they passed Adrian Ornelas, a 26-year-old local artist who was walking westbound on the sidewalk. Joemar Reano, an acquaintance of Ornelas, was riding a bicycle alongside Ornelas. Petitioner and Ruiz and approached Ornelas and demanded his money. Petitioner and Ruiz then assaulted Ornelas. They stabbed Ornelas twice, once in the shoulder and another, fatal stabbing to the chest. Petitioner and Ruiz took the bag of liquor Ornelas had been carrying, and returned to Llamas's car, pushed it, quickly, around the corner, parked and got inside.

Left to die, Ornelas stumbled for approximately a quarter mile before collapsing and succumbing to his injuries. Reano fled during the assault, but he had called 911 and as the police swiftly responded they happened upon the vehicle containing both minors and Llamas parked just around the corner from where Ornelas was stabbed. In the pocket behind the front passenger seat of Llamas's vehicle, directly in front of where petitioner was seated, was a fixed-blade knife with blood on the tip which was later confirmed by DNA testing to be from victim Ornelas. Petitioner's DNA was detected on the handle of the knife as was Ruiz's. During investigatory questioning, petitioner first claimed no knowledge of the assault, then stated that there was a physical confrontation, but it was instigated by the victim and didn't include him. During his contact with police, petitioner was flippant and glib and showed neither remorse nor concern for Ornelas.

## ARGUMENT

## I.

## STANDARD OF REVIEW

### A. Courts Jealously Guard the People's Precious Power of Initiative.

The reserved power of the people to enact laws through the process of initiative is recognized in article II, section 8, subdivision (a) of the California Constitution which states, "[t]he initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." Championed by the great reformer Governor of California, Hiram Johnson, the

process was added to the state constitution in a special election in 1911. (*Chula Vista Citizens for Jobs and Fair Competition v. Norris* (9th Cir. 2015) 782 F.3d 520, 532.) It's inclusion in our constitution was a response to the dominance of the Southern Pacific Railroad over the California Legislature; for a period of thirty years, "not a single bill opposed by the Southern Pacific Railroad was enacted in Sacramento." (*Ibid.*) It has been lauded as "one of the outstanding achievements of the progressive movement of the early 1900's." (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.)

Courts have described the initiative and referendum as "articulating 'one of the most precious rights of our democratic process.' " (*Associated Home Builders etc., Inc. v. City of Livermore*, *supra*, 18 Cal.3d at p. 591.) As such it is constitutionally protected. Article II, section 10, subdivision (c) of the California Constitution provides:

> 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.

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." (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1484, quoted with approval in *People v. Kelly* (2010)

47 Cal.4th 1008, 1025 (*Kelly*).) "[U]nder article II, section 10, subdivision (c) [of the California Constitution], the voters have the power to decide whether or not the Legislature can amend or repeal initiative statutes. This power is absolute and includes the power to enable legislative amendment *subject to conditions attached by the voters.*" (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1251 (*Amwest*), italics original.) As the Court of Appeal in this case observed, "[u]nder the guise of 'amendment,' an initiative may not be 'annulled' by the Legislature." (*O.G. v. Superior Court* (2019) 40 Cal.App.5th 626, 628.)

B. Review is De Novo with a Liberal Construction Applied to the Initiative Power to Protect Against Improper Annulment.

Petitioner has appropriately conceded that because SB 1391 amended Proposition 57, the constitutional validity of SB 1391 depends on whether the Legislature heeded Proposition 57's amendment clause. (See Opening Brief on the Merits, p. 26.) Real party agrees with petitioner that "[t]he constitutionality of a statute is a question of law, so it is reviewed de novo." (Opening Brief on the Merits, p. 22; see *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354, 1365, citing *Amwest*, *supra*, 11 Cal.4th 1243, 1254; *Gardner v. Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1374 (*Gardner*).)

Review under article II, section 10, subdivision (c) of the California Constitution, however, requires a different perspective. In this review the normal deference accorded acts of the Legislature is modified in order to adequately protect the people's reserved power of initiative. It has long been this court's "judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." (*Associated Home Builders etc., Inc. v. City of Livermore*, *supra,* 18 Cal.3d 582, 591; see also *Kelly*, *supra*, 47 Cal.4th at p. 1025.) "Any doubts should be resolved in favor of the initiative and referendum power, and amendments which *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." (*Proposition 103 Enforcement Project v. Quackenbush*, *supra*, 64 Cal.App.4th 1473, 1485, italics original.)

More recently, in *Kelly*, *supra*, this court reaffirmed its fidelity to the duty to " ' "protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent," ' " and therefore to " ' " 'jealously guard' " ' the people's initiative power, and hence to ' " 'apply a liberal construction to this power wherever it is challenged in order that the right' " ' to resort to the initiative process ' " 'be not improperly annulled' " ' by a legislative body." (*Kelly*, *supra*, 47 Cal.4th at pp. 1025-1026,

quoting *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776, and *Proposition 103 Enforcement Project v. Quackenbush*, *supra*, 64 Cal.App.4th at p. 1484.) The court found this liberal construction necessary based on its detailed analysis of the historical and modern importance of the people's reserved power of initiative. (*Kelly*, *supra*, 47 Cal.4th at pp. 1031-1042.) As this court's analysis demonstrated, the failures of a century's worth of efforts to permit unrestrained legislative amendment to initiative measures "highlights and reinforces the closely circumscribed limits of the Legislature's authority. . . ." (*Kelly*, *supra*, 47 Cal.4th at p. 1045.)

Proposition 57 permits amendment by a statute passed by a majority of the members of each house of the Legislature and signed by the Governor[2], but only if the amendment is "consistent with and furthers the intent of" Proposition 57. (Voter Information Guide, text of Prop. 57, § 5, p. 145; exhibit C, p. 73.) Both content requirements need to be met – the amendment must be consistent with Proposition 57 and must further the intent of Proposition 57 –for the court to hold the amendment lawful. (See *B.M. v. Superior Court* (2019) 40 Cal.App.5th 742, 762, *review granted*, Jan. 2, 2020 (S259030), dis. opn. of McKinster, J. (*B.M.*).)

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[2] Real party agrees SB 1391 was passed by a majority vote in both houses and was signed by the Governor.

While the Legislature proclaimed that SB 1391 "is consistent with and furthers the intent of Proposition 57" (Stats. 2018, c. 1012 (SB 1391), § 3; exhibit C, p. 78), the court is not required to accept this conclusion. "The 'rule of deference to legislative interpretation' of the California Constitution, therefore, has no application" in analyzing whether a legislative amendment to an initiative measure comports with the initiative's amendment clause. (See *Amwest*, *supra*, 11 Cal.4th at p. 1253.) For example, in *Gardner*, *supra*, 178 Cal.App.4th 1366, 1373, the Legislature stated that the provisions of the act in question were consistent with the Substance Abuse and Crime Prevention Act of 2000, Proposition 36, the initiative being amended. The court declined to adopt a "deferential standard of review" (*id*. at p. 1374) and found instead that the Legislature's amendment was not consistent with the initiative and was therefore invalid. (*Id*. at p. 1376.) Similarly, in *Foundation for Taxpayer & Consumer Rights v. Garamendi*, *supra,* 132 Cal.App.4th 1354, 1371, the court rejected the Legislature's finding that its amendment furthered the purpose of the Insurance Rate Reduction and Reform Act, Proposition 103, an initiative measure regarding insurance rates. The court stated, "The Legislature cannot simply in the guise of amending Proposition 103 undercut and undermine a fundamental purpose of Proposition 103, even while professing that the amendment 'furthers' Proposition 103." (*Ibid*.)

This court must therefore independently review whether, under any reasonable construction (*Amwest*, *supra*, 11 Cal.4th at p. 1256), the Legislature's amendment to Proposition 57 is "consistent with and furthers the intent of"

Proposition 57. (Voter Information Guide, *supra*, text of Prop. 57, § 5, p. 145; exhibit C, p. 73.) Any doubts whether such a reasonable construction exists should be resolved in favor of the initiative. (See *Associated Home Builders etc., Inc. v. City of Livermore*, *supra,* 18 Cal.3d 582, 591.)

The courts below relied too heavily on the test articulated in *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571, (see Opening Brief on the Merits, p. 25, fn. 4) but the Court of Appeal correctly questioned whether the Legislature may prohibit the transfer hearing process for 14-and 15-year-olds that was expressly enacted, and thereby authorized, by initiative. (See, *O.G. v. Superior Court* (2019) 40 Cal.App.5th 626, 629.) Nor does it appear the Court of Appeal ruled based solely on the test articulated in *Pearson*. Instead, the court concluded, "S.B. 1391 is a jurisdictional change in substantive criminal law/juvenile law. It is not merely procedural. This attempt to 'overrule' Proposition 57 violates the well settled rule that the Legislature may not enact a law that thwarts the initiative process without the consent of the people." (*O.G.*, *supra*, 40 Cal.App.5th at p. 630.)

More importantly, this court reviews the ruling, not the reasoning; if the ruling is correct on any ground this court should affirm. (See *People v. Brooks* (2017) 3 Cal.5th 1, 39[admission of hearsay statements], citing *People v. Zamudio* (2008) 43 Cal.4th 327, 351, fn. 11 [ruling regarding non-statements].) "To justify a reversal, it is incumbent upon the appellant to show an erroneous

ruling, and not merely bad reasoning." (*Davey v. Southern Pac. Co.* (1897) 116 Cal. 325, 329-330[admission of evidence].)

The Court of Appeal reached the correct result. The court correctly concluded that S.B. 1391's jurisdictional change overrules a substantial enactment of Proposition 57. (*O.G.*, *supra*, 40 Cal.App.5th at p. 630.) There is no reasonable construction of SB 1391 that is consistent with Proposition 57's provisions or intent or that furthers Proposition 57's manifest intent to authorize transfer hearings for 14-and 15-year-olds charged with heinous, violent crimes such as the murders committed by petitioner.

## II.

## PROPOSITION 57'S AMENDMENT CLAUSE HAS TWO LIMITATIONS, BOTH OF WHICH MUST BE OBEYED FOR AN AMENDMENT TO BE DEEMED CONSTITUTIONAL

Petitioner characterizes Proposition 57's amendment clause as an invitation to amend the initiative. (Opening Brief on the Merits, p. 19.) Real party emphatically disagrees: The amendment clause is not an invitation; it is a limitation which must be followed if the initiative's command to construe its provisions – all of its provisions – liberally and broadly is to be obeyed. (See Voter Information Guide, *supra*, text of Prop. 57, §§ 5, 9, pp. 145, 146; exhibit C, pp. 73, 74.)

Proposition 57's limitation on amendments reads:

> 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.

(Voter Information Guide, *supra*, text of Prop. 57, § 5, p. 145; exhibit C, p. 73.)

Understanding the two limitations in the amendment clause is aided by *Foundation for Taxpayer & Consumer Rights v. Garamendi, supra,* 132 Cal.App.4th 1354, 1370, where the court accepted a concession that "[a] valid amendment to Proposition 103 must not only further its purposes in general, but it cannot do violence to *specific provisions* of Proposition 103. *So even if an amendment can be shown to further its purposes, it may nonetheless be invalid if it violates a specific primary mandate."* (Italics added.) Thus, legislative amendment of Proposition 57 requires compliance with *two* requirements: that it is consistent with the proposition, and that it furthers the intent of the proposition. (See *B.M.*, *supra*, 40 Cal.App.5th at p. 762, dis. opn. of McKinster, J.) SB 1391 meets neither of these requirements.

In *People v. Superior Court (T.D.)* (2019) 38 Cal.App.5th 360, 372, (review granted Nov. 26, 2019, S257980 (*T.D.*)), the majority opinion concluded the amendment clause was "for want of punctuation, patently ambiguous." The court in *Narith S. v. Superior Court* (2019) 42 Cal.App.5th 1131, 1141, (review granted Feb. 19, 2020, S260090 (*Narith S.*)) also believed commas were needed to

ascertain the clear meaning. The *T.D.* majority and *Narith S*. concluded that Proposition 57's amendment clause contains but a single requirement. (*Ibid*.) Likewise, petitioner treats the amendment requirement as only a single command, that amendments further the intent of the act.

Respectfully, this conclusion is incorrect and contravenes the normal rules of statutory construction. Interpreting the two-pronged amendment clause as but a single requirement ignores the ordinary meaning of the word "and;" disregards the ordinary import of the grammatical construction of the sentence; and renders the first phrase, "consistent with" surplusage. Obeying but a single prong of the clause moreover is inconsistent with the initiative's command to liberally construe its provisions. (See Voter Information Guide, *supra*, text of Prop. 57, §§ 5, 9, pp. 145, 146; exhibit C, pp. 73, 74.)

The amendment clause must be construed using the same rules as for any other statutory interpretation. Thus, the court should begin with the words themselves. "Because the statutory language is generally the most reliable indicator of [legislative] intent, we look first at the words themselves, giving them their usual and ordinary meaning." (*People v. Ruiz* (2018) 4 Cal.5th 1100, 1105.) Every word of a statute should be given meaning, and an interpretation that renders some terms surplusage should be avoided. (*City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54.) When the words are clear, there is no ambiguity and there is no need for further construction. Both the words and construction of the amendment clause are clear.

The amendment clause requires amendments be consistent with *and* further the purpose of the initiative. "And" is defined as "[t]ogether or along with: as well as." (Webster's II New College Dictionary (3rd ed. 2005), p. 42.) Applying these principles here, the words "consistent with" and "and" should be given meaning, so that amendments to the initiative are permissible only if they are both consistent with the initiative and further the purpose of the initiative.

This interpretation follows the grammatical principle of parallel usage, that every element in a parallel series must play the same grammatical role. (*O'Connor v. Oakhurst Dairy* (1st Cir. 2017) 851 F.3d 69, 74-75.) In the present case, "consistent with [this act] and furthers the intent of this act" are parallel since both underlined terms are prepositional phrases. Under this rule, the sentence cannot be read as "consistent with [the intent of this act]" and "furthers [the intent of this act]" because "consistent with" is a prepositional phrase, and "furthers" is a verb. The issue is not whether drafters of initiatives only use correct grammar, or whether voters can articulate the parallel usage rule. Instead, the rule describes how English readers would ordinarily understand the language of the initiative.

"Words and phrases are construed according to the context and the approved usage of the language . . . ." (Civ. Code, § 13; Code Civ. Proc., § 16.) Courts, including this court, have relied on common grammar as an aid in statutory construction for at least the last century. "The ordinary rules of grammar should be followed if by applying them such interpretation does not lead to an absurdity." (*People v. One 1940 Chrysler Convertible Coupe* (1941) 48

Cal.App.2d 546, 549.) "[P]unctuation is resorted to as an aid to construction (citation), and, where the statute as punctuated is neither inconsistent, absurd, nor ambiguous, but has a reasonable meaning apparently in accord with the legislative intent, the punctuation will be followed and the statute construed accordingly (*Treiman v. Kennon* (1934) 139 Cal.App.Supp. 796, 799, citing *Rocca v. Boyle* (1913) 166 Cal. 94, 99 [construing provision regarding employment of temporary help].) "We agree generally that the presence or absence of commas is a factor to be considered in interpreting a statute . . . ." (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 747-748 [construing Welf. & Inst. Code, § 361.5].) "While not of controlling importance, punctuation is part of a statute and should be considered in its interpretation in attempting to give the statute the construction intended by the drafter." (*Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 160 [construing Pen. Code, § 1054.3 to require defense counsel to disclose unrecorded oral statements of witnesses].) The Court of Appeal relied on the parallel usage principle to construe 33 U.S.C. § 1342, a provision of the Clean Water Act. (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 882-883 [appellant's "proposed interpretation—'control techniques and system, design, and engineering methods'—without a comma after the word 'techniques' does not logically serve as a parallel construct with the 'and such other provisions' clause"].)

Punctuation is not dispositive if strict adherence to the rules of grammar would result in an interpretation that is either absurd or plainly at odds with clearly

expressed legislative intent. (See e.g. *Renee J. v. Superior Court*, *supra*, 26 Cal.4th 735, 747–748; *Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1017–1018 [finding punctuation not dispositive interpreting Pen. Code, § 1387].) Here, however, applying the ordinary rules of the written English language confers on the amendment clause a reasonable meaning in accord with the express legislative intent that the provisions of Proposition 57 be construed liberally and broadly. Requiring amendments be both consistent with Proposition 57 and further the intent of Proposition 57 construes the amendment clause broadly and assures the initiative will be construed liberally and not be unduly narrowed by amendments that are inconsistent with its terms or fail to further its purpose.

The majority in *T.D.* acknowledged that when interpreted as written, SB 1391 is unconstitutional. (*T.D.*, *supra*, 38 Cal.App.5th at p. 372.) That same majority then decreed that the plain meaning would preclude any amendment and that if that is what was meant the initiative would simply have prevented amendment. (*Ibid.*, citing *Kelly*, *supra*, 47 Cal.4th at p. 1042; see also *Narith S.*, *supra*, 42 Cal.App.5th at p. 268 [relying on *T.D.*, *supra*].) That prediction is incorrect.

Any number of amendments would satisfy the clause as written including amendments to clarify ambiguous terms, to correct drafting errors in the original language, or to correct cross-referencing issues that might arise. These amendments may seem minor, but inability to correct such issues can have significant impacts on a statute's effectiveness. (See e.g. *Kelly*, *supra*, 47 Cal.4th

at p. 1043-1044 [amendment to clarify terms not permitted no matter how desirable]; *In re Chavez* (2004) 114 Cal.App.4th 989, 998 [drafting error returned determinate sentence to indeterminate sentence].) This court has recognized that both the initiative and legislative process is diminished when the Legislature is "prohibited from making even minor, technical alterations to an initiative to correct drafting errors or facilitate the initiative's operation in changed circumstances" (See *Amwest*, *supra*, 11 Cal.4th 1243, 1256.) Amendments might also adjust procedures for filing, for holding transfer hearings via remote video technology, for distance supervision and programming, or for adding new tools to assess whether a minor is suitable for treatment in juvenile court or new programs for better rehabilitation.

It should not be doubted that the voters intended the amendment clause would significantly restrict legislative amendment. Voters enacted Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998, at the March 7, 2000, Primary Election. (*Manduley v. Superior Court* (2002) 27 Cal.4th 887A, 544–545.) Proposition 21 made substantial changes to juvenile justice, but it permitted any amendment that garnered a two-thirds majority vote in each house of the Legislature. (Juvenile Crime, California Proposition 21 (2000) § 38, p.

131.[3]) In contrast, Proposition 57 requires fewer votes, but imposes content limitations. The difference in the two amendment clauses evidences a voter intent to restrict the Legislature in a meaningful way.

To reach its conclusion SB 1391 was a lawful amendment, the majority in *T.D.* rewrote the amendment clause, inserting the words "with the intent of the act," after the prepositional phrase "consistent with." (*T.D.*, *supra*, 38 Cal.App.5th at p. 372.) The court in *Narith S.*, *supra*, 42 Cal.App.5th at p. 1141, did the same. Similarly, petitioner would have this court rewrite the clause to remove the requirement that amendments be consistent with the initiative. But courts are not permitted to rewrite statutes. The courts' task is "to construe, not to amend," and a court may not " 'insert what has been omitted or omit what has been inserted . . . .' (Citation.)" (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349; See also *People v. One 1940 Ford V–8 Coupe* (1950) 36 Cal.2d 471, 475[court "may not rewrite the statute to conform to an assumed intention which does not appear from its language"].) The courts must construe Proposition 57's as written, and as written the amendment clause contains two restrictions. This court should jealously guard the initiative by broadly construing and enforcing both.

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[3] Available at http://repository.uchastings.edu/ca_ballot_props/1192.

## III.

## AMENDMENTS MUST BE CONSISTENT WITH THE PROVISIONS OF PROPOSITION 57 AND MUST FURTHER ALL OF THE INITIATIVE'S EXPRESS AND MANIFEST INTENTS

The Legislature may amend Proposition 57 only if it is consistent with the entire intent of the voters. A legislative attempt to amend an initiative is invalid where, as here, it promotes some purposes of the initiative but violates other "primary mandates." (*Foundation for Taxpayer & Consumer Rights v. Garamendi*, *supra*, 132 Cal.App.4th 1354, 1370-1371.) Neither petitioner, the Attorney General, the Legislature, nor any court may designate one or more stated purposes of Proposition 57 as "primary" "major" or even "fundamental," (see e.g. Opening Brief on the Merits, p. 40) and ignore other manifest intents and purposes. (See, *Gardner*, *supra*, 178 Cal.App.4th at pp. 1378-1379.)

In *People v. Superior Court (Alexander C.)* (2019) 34 Cal.App.5th 994, 1004, the court ruled that in assessing the intent of Proposition 57, it was limited to the "Purpose and Intent" section of the initiative. (Voter Information Guide, *supra*, text of Prop. 57, § 2, p. 141; exhibit C, p. 69.) Similarly, petitioner asks this court to assess the intent of the voters in enacting Proposition 57 by looking everywhere but at the substantive language enacted by Proposition 57. (Opening Brief on the Merits, pp. 35-38.) Respectfully, this approach is misguided.

"The goal of interpreting a statute enacted by voter initiative is to determine and effectuate voter intent." (*Williams v. Superior Court* (2001) 92 Cal.App.4th

612, 622.) Here, the best means of assessing voters' intent is the statutory language authorizing transfer of minors aged 14 and 15. "To determine intent, we first look to the words of the statute, giving them their usual and ordinary meaning." (*Id.* at pp. 622-623; see also *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037 [unambiguous intent of electorate found in initiative's specific provision, confirmed by statement of purpose].) Courts should presume the voters "read the actual text" of the initiative. (See *B.M.*, *supra*, 40 Cal.App.5th 742, 768–769, dis. opn. of McKinster, J.)

This court's analysis is not limited to the 'Purpose and Intent" portion of the initiative; it can and should consider all of the initiative's provisions. (*Amwest*, *supra*, 11 Cal.4th at p. 1256.) "In discerning the purposes of an initiative so as to determine whether a legislative amendment furthers its purpose and thus is valid, [courts] are guided by, but not limited to, the general statement of purpose found in the initiative." (*Proposition 103 Enforcement Project v. Quackenbush*, *supra*, 64 Cal.App.4th 1473, 1490-1491.) Beyond considering the statutory enactments to glean intent, courts also "must give effect to an initiative's *specific language*, as well as its major and fundamental purposes." (*Gardner, supra,* 178 Cal.App.4th 1366, 1374, italics added [invalidating legislative authorization of "flash incarceration" as conflicting with Proposition 36].) Heeding this command, numerous cases have rejected legislative amendments that conflicted with or failed to further the purpose of an initiative's express statutory language.

In three cases, courts have invalidated attempts to amend Proposition 103, the Insurance Rate Reduction and Reform Act enacted in 1988. The initiative's stated purpose was "to ensure that 'insurance is fair, available, and affordable for all Californians.' " (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 813.) Proposition 103 provided that "[t]he provisions of this act shall not be amended by the Legislature except to further its purposes." The courts in the cases described below invalidated legislation that conflicted with Proposition 103's statutory mandates even though the amendments did not necessarily conflict with the initiative's express statement of purpose.

In *Amwest, supra,* 11 Cal.4th 1243, the court invalidated legislation excepting surety insurers from Proposition 103, rejecting the argument that the exemption was just a clarification, and finding that the amendment did not further the initiative's purposes. In so doing, this court relied on the initiative's statutory provisions to determine "that two major purposes of Proposition 103 were to reduce, by at least 20 percent, the rates for all insurance regulated under chapter 9 and to replace the former system for regulating insurance rates . . . with a system in which the commissioner must approve such rates prior to their use." (*Ibid*.)

In *Proposition 103 Enforcement Project v. Quackenbush, supra*, 64 Cal.App.4th 1473, the court invalidated legislation authorizing reduction of rollback obligations based on taxes paid on excess premiums. (*Id*. at p. 1494.) The Court of Appeal relied on *Amwest*, *supra*, to conclude that Proposition 103 had multiple purposes. One of its purposes, to require insurance premiums be set at the

"*lowest rate possible,*" was found in a statutory provision. (*Id*., at p. 1491, italics original.) The court concluded that reducing insurers rollback obligations did "not further the provisions of Proposition 103." (*Id*. at p. 1494.)

In *Foundation for Taxpayer & Consumer Rights v. Garamendi*, *supra*, 132 Cal.App.4th 1354, 1370, the Court of Appeal found yet another purpose of Proposition 103 in its statutory provisions. Specifically, Proposition 103's statutory enactment prohibiting insurers from using the lack of prior automobile insurance as a factor to increase rates "itself manifests the voters' intent to eliminate" discrimination against the uninsured. The court therefore invalidated legislation giving insurance premium discounts based on prior history of having insurance. (*Id*. at p. 1365.) " '[A] valid amendment to Proposition 103 must not only further its purposes in general, but it cannot do violence to specific provisions of Proposition 103. So even if an amendment can be shown to further its purposes, it may nonetheless be invalid if it violates a specific primary mandate.' " (*Id*., at p. 1370 [accepting party's concession].)

The courts have invalidated statutes that conflicted with the express statutory language in other initiatives as well. For example, in *Howard Jarvis Taxpayers Assn. v. Bowen* (2011) 192 Cal.App.4th 110, the court addressed a ballot initiative, Proposition 9, that adopted the Political Reform Act of 1974. The Political Reform Act's express purposes included that the ballot pamphlet should be "a useful document so that voters will not be entirely dependent on paid advertising for information. . . ." (Gov. Code, § 81002, subd. (d)), and its specific

provisions required that the Attorney General prepare the official title and summary for initiative measures. (*Id*. at p. 115.) The initiative allowed legislative amendment "to further its purposes." (*Id*. at p. 116.) The court held that the Legislature acted improperly in itself writing the ballot title and summary for a bond measure to fund a high speed passenger train because doing so "negated" the requirement that the Attorney General prepare the official summary and title of the bill. (*Id*. at p. 116.)

In *Gardner*, *supra*, 178 Cal.App.4th 1366, the court invalidated legislation that allowed "flash incarceration" for violations of probation related to non-violent drug offenses, because the legislation violated the provisions of Proposition 36, which enacted statutory limitations on incarceration for first or second violations of probation. Proposition 36 required that " '[a]ll amendments to this act shall be to further the act and shall be consistent with its purposes.' " (*Gardner*, *supra*, 178 Cal.App.4th at p. 1370.)

Petitioner asserts the *Gardner* court relied exclusively on the initiative's "enumerated purposes." (Opening Brief on the Merits, p. 49.) But this is only partly true. While the court relied on the expressed purposes in part, the court also relied on the "findings and declarations, and the Voter Information Guide arguments . . . ." as well as on the specific provisions enacted by the initiative that provided two chances for nonviolent drug possession offenders to avoid jail. (*Gardner*, *supra*, 178 Cal.App.4th at pp. 1377-1378.) "An 'apparent purpose and intention behind Proposition 36 [is] to give two chances to nonviolent drug

offenders who commit additional nonviolent drug possession offenses or violate drug-related probation conditions to reform before they are no longer eligible for probation under the Act.' " (*Ibid*., quoting *People v. Tanner* (2005) 129 Cal.App.4th 223, 236, which in turn relied on the analysis of Pen. Code, § 1210.1 in *People v. Johnson* (2003) 114 Cal.App.4th 284, 295-296.)

Like Proposition 57, Proposition 36 had multiple purposes. The Court of Appeal in *Gardner* recognized that the amendment at issue might further the public safety function of Proposition 36, but invalidated the amendment anyway because the Legislature's amendment took "a significantly different policy approach to [probation] violations than the one reflected in Proposition 36." (*Gardner*, *supra*, 178 Cal.App.4th at pp. 1378-1379.) Even if the amendment furthered one purpose of the initiative, it was still unconstitutional because it was "inconsistent with the proposition's other primary purposes of saving jail cells for violent offenders and saving money with use of treatment instead of incarceration." (*Ibid*.)

Likewise, even if SB 1391 furthers an implied intent of Proposition 57 by exposing fewer juveniles to criminal jurisdiction, it does so by taking a significantly different policy approach than the one approved by the voters. It is thus inconsistent not only with the express statutory language but also with one of the initiative's other primary purposes – to enhance public safety, to let prosecutors move to try violent 14- and 15-year-olds in adult court, and to require that judges decide whether or not to retain the offender in juvenile court.

## IV.

## SB 1391 IS INCONSISTENT WITH PROPOSITION 57 AND DOES NOT FURTHER THE INTENT OF THE INITIATIVE

### A. One Intent of Proposition 57 Was to Provide Prosecutors the Discretion to Seek and Require Judges to Decide whether to Transfer 14- and 15-Year-Old Offenders Charged with the Worst Violent Crimes to Criminal Court.

As the above cases illustrate, whether an amendment is consistent with and furthers the intent of Proposition 57 must be determined by analyzing and liberally construing the initiative's substantive provisions and the context of its enactment as well as its statement of intent. Petitioner's singular focus, however, is on the five-part "Purpose and Intent" section. (See Opening Brief on the Merits, pp. 16, 38, 44, 56; Voter Information Guide, *supra*, text of Prop. 57, § 2, p. 141; exhibit C, p. 69.) Petitioner acknowledges that the fifth enumerated "Purpose and Intent" of Proposition 57 is to "[r]equire a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." (Opening Brief on the Merits, p. 44; Voter Information Guide, *supra*, text of Prop. 57, § 2, p. 141; exhibit C, p. 69.) But petitioner construes this provision too narrowly, asserting that the requirement of judicial action should be construed as a mere byproduct of the elimination of direct filing. (Opening Brief on the Merits p. 44-47.) This narrow construction ignores the mandate to construe the initiatives provisions broadly and liberally to accomplish its purposes. (Voter Information Guide, *supra*, text of Prop. 57, §§ 5,

9, pp. 145, 146; exhibit C, pp. 73, 74.) Since requiring a judge to decide whether juveniles should be tried in adult court is an express purpose of the initiative, it must be construed broadly and liberally. It cannot be dismissed as merely incidental or collateral. Thus construed, the fifth enumerated purpose and intent plainly reveals the voters intended judges make the determination whether 14- and 15-year-old offenders, as specified, be tried in adult court. SB 1391 does not further this intent.

The context of Proposition 57 also supports the conclusion that the voters intended the new transfer hearing process to apply to 14- and 15-year-olds charged with the listed offenses. Even if voters were to get no further than the Official Title and Summary to Proposition 57, prepared by the Attorney General, they would find it lists four bullet points, one of which describes the juvenile transfer provisions:

> Provides juvenile court judges shall make determination, upon prosecutor motion, whether juveniles *age 14* and older should be prosecuted and sentenced as adults for specified offenses.

(Voter Information Guide, *supra*, Official Title and Summary, p.54, italics added; exhibit C, p. 63.)

The Analysis of Legislative Analyst described the then current law, informing voters that under "certain circumstances youths accused of committing crimes when they were *age 14 or older can be tried in adult court* and receive adult sentences." (Voter Information Guide, *supra*, Analysis by the Legislative

Analyst, p. 53, italics added; exhibit C, p. 64.) The legislative analyst explained that if the initiative were approved, the law would "require that, before youths can be transferred to adult court, they must have a hearing in juvenile court to determine whether they should be transferred." Voters were further informed that under the initiative's provisions, "prosecutors can only seek transfer hearings for youths accused of (1) committing certain significant crimes listed in state law (such as murder, robbery, and certain sex offenses) *when they were age 14 or 15* or (2) committing a felony when they were 16 or 17." (Voter Information Guide, *supra*, Analysis by the Legislative Analyst, p. 54, italics added; exhibit C, p. 65.)

More importantly, 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 in specified, egregious cases. The voters intended prosecutors have authority to move to transfer an offender "in any case" where a 14- or 15-year-old was alleged to have committed an offense listed in Welfare and Institutions Code[4], section 707, subdivision (b). The broad term, "in any case" appears in both subdivisions (a)(1) and (b) of section 707. Proposition 57 further requires that "[u]pon such motion," the court shall order a probation report, and

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[4] Further statutory references are to the Welfare and Institutions Code unless otherwise designated.

thereafter the court "shall decide whether the minor should be transferred," based upon the consideration of certain enumerated factors.

Petitioner "recognizes that there was language . . . in the 'Text of Proposed Law' where 14- and 15-year-olds were identified as a class potentially transferable to adult court." (Opening Brief on the Merits, p. 52.) That "language" is found in section 707, subdivisions (a), and (b); the actual statutory provisions enacted by the voters to create the new transfer hearing procedure. (See Voter Information Guide, *supra*, text of Prop. 57, § 4.2, pp. 142-143; exhibit C, pp. 70-71.) Put another way, with regard to juveniles, that "language" was what Proposition 57 did. Proposition 57 did not, as petitioner asserts (see Opening Brief on the Merits, p. 16, 44, 45), merely repeal the direct filing provisions of Proposition 21or return the law to its pre-Proposition 21 status. Instead, Proposition 57 repealed all prior avenues by which a 14- or 15-year-old could be tried in adult court, including those in place prior to Proposition 21. (See former § 707, subd. (d) as amended by Stats.1998, c. 936 (A.B.105), § 21.5, eff. Sept. 28, 1998, operative Jan. 1, 1999.) Proposition 57 then specifically and intentionally inserted the language to include 14- and 15-year- old offenders into sections707 subdivisions (a) and (b).

Moreover, even before Proposition 21, neither judges nor prosecutors had discretion to file or adjudicate the charges enumerated in former section 602, subdivision (b) in a court of criminal jurisdiction. (See *Manduley v. Superior Court* (2002) 27 Cal.4th 887A, 549 (*Manduley*); former § 602, subd. (b) as amended by Stats.2014, c. 54 (S.B.1461), § 18, eff. Jan. 1, 2015.) Proposition 21

broadened the scope of mandatory direct filing by decreasing the minimum age and altering the list of qualifying crimes, but Proposition 21 did not create mandatory direct filing. (*Manduley*, *supra*, 27 Cal.4th 887A, 550.) Thus, by repealing former section 602, subdivision (b), Proposition 57 did, in fact, create new jurisdiction for juvenile courts and new discretion for prosecutors. (See Voter Information Guide, *supra*, text of Prop. 57, § 4.1, pp. 141-142; exhibit C, pp. 69-70.) SB 1391 therefore repealed the jurisdiction Proposition 57 granted. (See *O.G.*, *supra*, 40 Cal.App.5th at p. 630.)

Even the Legislature that enacted SB 1391 recognized that Proposition 57 itself "allows the district attorney to make a motion to transfer a minor from juvenile court to a court of criminal jurisdiction . . . or in a case in which a specified serious offense is alleged to have been committed by a minor when he or she was 14 or 15 years of age." (Stats. 2018, c. 1021 (S.B. 1391); exhibit C, p. 76.) This explanation, in SB 1391's preamble, would be unnecessary and incorrect if Proposition 57 had merely continued existing jurisdiction.

Finally, Proposition 57 rewrote portions of section 707 that it did not repeal, eliminating fitness hearings and creating a new process, a transfer hearing, with new and different rules and burdens. For example, even before Proposition 21, "[a] minor 14 years of age or older who [was] alleged to have committed one of the serious crimes specified in section 707, subdivision (b) . . . [was] presumed not to be a fit and proper subject for treatment under the juvenile court law." (See *Manduley v. Superior Court* (2002) 27 Cal.4th 887A, 548-549.) Proposition 57

eliminated that presumption. (See Voter Information Guide, *supra*, text of Prop. 57, § 4.2, p. 144 [repealing former § 707, subd. (c) as amended by Stats.2015, c. 234 (S.B.382), § 2, eff. Jan. 1, 2016]; exhibit C, p. 72.) Proposition 57 also eliminated language that permitted a court presiding over a fitness hearing to find the minor not fit if the minor was not amenable to "care, treatment, and training. . . ." (See Voter Information Guide, *supra*, text of Prop. 57, § 4.2, p. 144 [repealing in part former § 707, subd. (a)(2)]; exhibit C, p. 70.)

Proposition 57 did not need to create a new procedure for determining which juveniles could be tried in adult court nor did it have to expressly include 14- and 15-year-old offenders in section 707 subdivisions (a) and (b). Voters could have eliminated direct filing provisions, as they did, repealed section 707, subdivision (c), as they did, and left the fitness hearing provisions for minors aged 16 and older in place. Such an approach would have been sufficient if the electorate's only goals were to reduce adult prosecutions of juveniles and concomitantly increase rehabilitation efforts. Rather than leave all offenders aged 14 and 15 in the juvenile system, however, Proposition 57 carved out a careful exception so that the worst offenders would be included in its transfer hearing process. "By eliminating the exception entirely, the Legislature has undermined one of the initiative's intended methods of protecting public safety." (*People v. Superior Court (S.L.)* (2019) 40 Cal.App.5th 114, 124, dis. opn. of Grover, J. (*S.L.*).)

B. One Intent of Proposition 57 Is the Protection of Public Safety.

The court need look no further than the title of the act, The Public Safety and Rehabilitation Act of 2016 to discern that the voters intended to protect public safety. (See Voter Information Guide, *supra*, text of Prop. 57, § 1, p. 141; exhibit C, p. 69.) A few lines down, the public safety goal is repeated in the first of the initiative's five expressly stated purposes: "Protect and enhance public safety." (*Ibid*.)

The voter's emphasis on public safety means they did not possess the intent indiscriminately to expand rehabilitative efforts to as many juveniles as possible. Instead, the argument in favor of Proposition 57 explained that the measure "[k]eeps the most dangerous offenders locked up," and that it "[r]equired judges instead of prosecutors to decide whether minors should be prosecuted as adults, emphasizing rehabilitation for minors *in the juvenile system*." (Voter Information Guide, *supra*, Argument in Favor of Prop. 57, p. 58, italics added; exhibit C, p. 67, italics added.) The proponents emphasized targeted "evidence-based rehabilitation," and again told voters Proposition 57 "allows a juvenile court judge to decide whether *or not* a minor should be tried in adult court." (Voter Information Guide, *supra*, Argument in Favor of Prop. 57, p. 58, italics added; exhibit C, p. 67.) In the rebuttal to the argument against Proposition 57, its proponents told voters the initiative "breaks the cycle of crime by rehabilitating *deserving* juvenile and adult inmates . . ." and "WILL focus resources on keeping

dangerous criminals behind bars." (Voter Information Guide, *supra*, Rebuttal to Argument Against Prop. 57, p. 59, capitalization original; exhibit C, p. 68.)

The proponents' arguments therefore informed the electorate that Proposition 57 intended a balanced approach that would focus rehabilitative efforts not on all juveniles, but on *deserving* juveniles that a judge had decided should remain *in the juvenile system*. At the same time, the proponents promised voters Proposition 57 would keep the most dangerous offenders behind bars. This balanced intent is not furthered by SB 1391.

The dissent in *B.M.*, *supra*, reasoned, "[i]f the voters were being asked to change the juvenile justice system to drastically limit or eliminate the number of 14- and 15-year-old juvenile offenders who could be tried and convicted in adult criminal court, I would expect to see an argument for and against that result. But that dog did not bark." (See *B.M.*, *supra*, 40 Cal.App.5th 742, 767, dis. opn. of McKinster, J.) Real party agrees with Justice McKinster's conclusion that "[t]he fact that neither the supporters nor the opponents of Prop. 57 stated the initiative would effectively eliminate the ability to prosecute 14- and 15-year-old juvenile offenders in adult criminal court is strong evidence that the voters who enacted the initiative *did not intend it have that effect.*" (See *Id.*, at p. 768, dis. opn. of McKinster, J., italics original.) In fact, nothing in the Voter Information Guide suggested the initiative would lead to the elimination of transfer jurisdiction as to 14- and 15-year-olds that Proposition 57 created. As it has done before, this court must now refuse to " 'presume that . . . the voters intended the initiative to effect a

change in law that was not expressed or strongly implied in either the text of the initiative or the analyses and arguments in the official ballot pamphlet.'(Citation)" (*People v. Valencia* (2017) 3 Cal.5th 347, 364.)

The focus on public safety led to a balanced policy approach to juvenile justice; the voters endorsed rehabilitation for those who would benefit from it, but also sought to preserve public safety by enacting transfer proceedings for juveniles 14 and older. While Proposition 57 authorizes transfer of minors age 16 or older for "any felony criminal statute," it limited transfer of those aged 14 or 15 only to those charged with offenses listed in section 707, subdivision (b): murder, arson, robbery, certain rapes, etc. (Voter Information Guide, *supra*, text of Prop. 57, § 4.2, p. 142 [amending former § 707(a)(1) as amended by Stats.2015, c. 234 (S.B.382), § 2, eff. Jan. 1, 2016]; exhibit C, p. 70.) The initiative specifically provides for prosecutors to make a motion to transfer a minor "[i]n any case" in which he or she committed an enumerated offense when 14 or 15 years of age (*ibid*.) based on factors including "Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction." (*Id*.; see § 707, subd. (a)(2)(B)(i).)

The juvenile court does not have much time to rehabilitate murderers. If adjudicated as a juvenile, an offender like petitioner must be released by his 25th birthday. (§§ 607(g)(2) and 1769(d)(2).) Requiring that all gang members and other murderers age 14 or 15 be released by the age of 25 does not "[p]rotect and enhance public safety," but instead jeopardizes it. If tried and sentenced as an

adult however, petitioner would be eligible for release on youth offender parole during his 25th year of incarceration, i.e., at the age of 40. (Pen. Code, § 3051, subd. (b)(3).) The longer period of incarceration would more adequately protect the community and provide more time for rehabilitative programming.

Adult treatment of offenders such as petitioner herein furthers the purpose of Proposition 57 to "protect and enhance public safety." This conclusion is supported by *Hicks v. Superior Court* (1995) 36 Cal.App.4th 1649, which upheld the presumption of unfitness for juvenile court under AB 560 (Stats.1994, c. 453 (A.B.560), § 9.5) for minors aged 14 or 15 charged with certain types of murder. The court found that the provision had a rational relationship to a legitimate legislative purpose. (*Id*. at p. 1659.) The court quoted from the legislative history for the bill:

> There is a finite number of juveniles who are under 16 who do not belong in the juvenile court system and need to be dealt with in the adult court.... AB 560 is a rational response to the legitimate public desire to address what is a serious problem.... AB 560 attempts to protect the public and save those youngsters who we can save.

(*Id*. at p. 1658.) The court continued by citing statistics of the disproportionately high number of violent crimes committed by juveniles, and in particular by those 14 or 15 years old. (*Id*. at p. 1659.) The court stated:

> The Legislature recognized (1) 14 or 15 year olds like their older counterparts now exhibit a degree of criminal sophistication and antisocial behavior comparable to the worst adult offenders; (2) some young offenders do not realistically belong in the

> juvenile court system; and (3) there are a number of ways to weed out minors from whom society needs protection and for whom consideration as juveniles is unlikely to make a difference. Section 707, subdivision (e), appears rationally designed to promote that legislative goal.

(*Id*. at p. 1659.)

Violent crimes by juveniles remain a serious problem in California. Statistics for 2014 from the United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, show 86,638 arrests of juveniles in California, including 95 for murder/non-negligent homicide, 2,738 for robbery, 4,798 for aggravated assault, and 294 for arson.[5] The Bureau of Justice Statistics' Violent Crime Index for 2012 shows 156.4 arrests for violent crimes per 100,000 population for offenders age 13 or 14, and 283.3 for offenders age 15.[6]

While real party agrees that most minors aged 14 or 15 are appropriately handled in juvenile court, some pose such a danger to the public that releasing them at age 25 under the juvenile system would not provide adequate punishment and would not meet government's responsibility to protect the public. A case in point is *People v. Marsh* (2018) 20 Cal.App.5th 694. Marsh, "(one month shy of

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[5] https://www.ojjdp.gov/ojstatbb/ezaucr/asp/ucr_display.asp, accessed Feb. 28, 2019.
[6] https://www.ojjdp.gov/ojstatbb/crime/qa05301.asp?qaDate=2012, accessed Feb. 28, 2018.

his 16th birthday) stalked a Davis neighborhood at night and randomly selected the home of the two victims to satisfy a long-standing (and oft-expressed) desire to kill, after which he mutilated their bodies." (*Id*. at p. 697.) So horrifying are the details of the crime that they were deleted from the published portion of the opinion. Marsh is just one example of the type of defendant who cannot be adequately handled in the juvenile system.[7]

Consideration of the serious nature of some crimes committed by 14- and 15-year-olds led the court below to accurately conclude SB 1391 "may contravene Proposition 57's express purpose to 'protect and enhance public safety.' It may

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[7] Some other examples of minors aged 14 or 15 appropriate for treatment as adults include: *People* v. *Erskine* (2019) 7 Cal.5th 279 (among the crimes committed by defendant between the ages of 10 and 15: forcing his seven-year-old sister and her friends of a similar age to orally copulate him; sexually molesting his sister when she was 11; forcing a girl in fifth grade to orally copulate him and digitally penetrating her with finger and sticks; assaulting a 12-year-old girl when she refused to have sex with him; kidnapping a 12-year-old, forcing her into a drainage ditch, sodomizing her, raping her, and forcing her to orally copulate him; and kidnapping a girl at knifepoint and dragging her into a ditch before she escaped); *C.S.* v. *Superior Court* (2018) 29 Cal.App.5th 1009, 1017 (15-year-old defendant who, without provocation, stomped to death a 14-year-old boy as part of a gang assault); *People* v. *Demirdjian* (2006) 144 Cal.App.4th 10, 15 (15-year-old defendant tortured and beat two boys aged 13 and 14 to death with a rock and other items at the playground of their school); *People* v. *Thomas* (2012) 211 Cal.App.4th 987, 991 (15-year-old convicted of, inter alia, two counts of first-degree murder and three counts of premeditated and deliberate attempted murders); *People* v. *Em* (2009) 171 Cal.App.4th 964, 976 (15-year-old defendant with gang-related criminal history actively participated in "senseless and cold-blooded" robbery and murder).

rationally be stated that S.B. 1391 does the opposite." (*O.G.*, *supra*, 40 Cal.App.5th 626, 630.)

C. Rehabilitation Is Not the Only "Primary Purpose" of Proposition 57

Real party disagrees with petitioner's assertion that SB 1391 is valid because Proposition 57's "major and fundamental" intent was to reduce "the occurrence of juveniles in adult court with an emphasis on rehabilitation . . . ." (Opening Brief on the Merits, p. 39.) First, Proposition 57 eliminated direct filing for minors aged 14 and 15, *and* for minors aged 16 or 17; there is no support for the claim that the 14-15-year-old group was the "fundamental intent" of Proposition 57. Second, although promotion of rehabilitation was one of several purposes of Proposition 57, there is no basis to determine that this alone was *the* major and fundamental purpose, and that other purposes, such as protection of public safety, and transfer hearings for 14- and 15-year-olds were secondary. Moreover, while an intent of Proposition 57 was to limit prosecutors' authority and replace it with judicial discretion, nothing in the text of Proposition 57 or the supporting materials shows an intent to *eliminate* criminal prosecution of minors 14 or 15 years old. There is no indication reducing the number of juveniles in adult court was a separate, free-standing intent of the voters. (Voter Information Guide, *supra*, Analysis by the Legislative Analyst, p. 54, italics added; exhibit C, p. 65.)

Petitioner relies on a statement in *People v. Vela* (2018) 21 Cal.App.5th 1099, 1107, that "the intent of the electorate in approving Proposition 57 was to

broaden the number of minors who could potentially stay within the juvenile justice system, with its primary emphasis on rehabilitation rather than punishment." The *Vela* court was addressing the retroactivity of the requirement that juveniles receive a transfer hearing before being tried in adult court – it was not considering SB 1391. Unlike the court in this case therefore, the *Vela* court did not need to consider all of Proposition 57's intents. Perhaps for this reason the court never discussed the first purpose enumerated in Proposition 57: "Protect and enhance public safety." (Voter Information Guide, *supra*, text of Prop. 57, § 2, p. 141; exhibit C, p. 69.) More importantly, even if rehabilitation was a primary *emphasis*, it remains true that another major, fundamental, and primary intent of Proposition 57 was to protect the public by allowing judges to transfer the most dangerous of juveniles, including those aged 14 or 15, to adult court.

Petitioner argues further that SB 1391 is consistent with the intent to "[s]top the revolving door of justice." (Opening Brief on the Merits, pp. 41-43.) It is not. The voters' intent was to stop the revolving door by replacing the old system with a more balanced approach, which specifically includes the transfer of certain 14- or 15-year-olds to adult court. By implementing the transfer hearing process, voters manifest their intent to require a judge to determine whether a juvenile should be tried as an adult and struck a balance between rehabilitation and expending resources for juveniles who will benefit from such efforts, and protecting and enhancing public safety with longer adult sentences for those who will not. This balance stops the revolving door.

Petitioner argues that SB 1391 furthers "the major and fundamental intent" and purpose of Proposition 57 because it reduces the number of juveniles being prosecuted in criminal court. (Opening Brief on the Merits, p. 40.) Nothing in Proposition 57 or the voter materials reveals a free-standing desire to limit the number of juveniles tried as adults. Instead what petitioner claims was the major and fundamental purpose of Proposition 57 is mentioned only once, described by the legislative analysist as a mere result of the intent to require judges to decide which juveniles would be transferred: "*As a result of these provisions*, there would be fewer youths tried in adult court." (Voter Information Guide, *supra*, Analysis by the Legislative Analyst, p. 54, italics added; exhibit C, p. 65.) On the next page, the legislative analyst was more skeptical, noting that the fiscal impacts of the initiative's amendments to juvenile law would occur "*If* the measure's transfer hearing requirements result in fewer youths being tried and convicted in adult court . . ." (Voter Information Guide, *supra*, Analysis by the Legislative Analyst, p. 55, italics added; exhibit C, p. 66.)

## V.

## NEITHER THE LEGISLATURE NOR THE COURT CAN OVERRIDE THE VOTERS' POLICY DETERMINATIONS

Petitioner argues that eliminating the ability of trial courts to transfer minors 14 or 15 years of age to adult court furthers the goal of rehabilitation and is in response to "[e]xtensive research." (Opening Brief on the Merits, pp. 58-59.)

While the Legislature properly relies upon such considerations when it has the constitutional power to legislate, neither the Legislature nor the courts have the authority to substitute their own opinions for those adopted by the voters through the initiative process, no matter how well researched their opinions may be.

"The question before [the court] is not whether [the legislative change] furthers the public good, but rather whether doing so furthers the purposes of [the initiative]." (*Amwest, supra*, 11 Cal.4th 1243, 1265; *Gardner*, *supra*, 178 Cal.App.4th 1366, 1374.) As the Supreme Court stated in *Brown v. Superior Court* (2016) 63 Cal.4th 335, 352, fn. 11, "when reviewing initiative measures…[w]e pass no judgment on the wisdom, efficacy, or soundness of the proposal before us." Similarly, in *Manduley v. Superior Court*, *supra*, 27 Cal.4th 537, 545, the court declined to address "any question regarding the wisdom of authorizing the prosecutor, rather than the court, to decide whether a minor accused of committing a crime should be treated as an adult and subjected to the criminal court system. . . we are not called upon to resolve the competing public policies implicated by the measure, considered by the electorate when it voted upon Proposition 21."

Here, the voters have determined that 14- and 15-year-old minors may be tried as adults when charged with enumerated serious crimes and when a judge, evaluating the criteria designated by the voters, finds it is appropriate. Petitioner, members of the Legislature, and the court are free to disagree, but they may not override an initiative approved by the voters by substituting their own opinions.

## VI.

## NEITHER THE COURT NOR THE DISTRICT ATTORNEY IS BOUND BY THE POSITION OF THE ATTORNEY GENERAL

The Attorney General of California has taken the position in other cases, and in this case in the court below, that SB 1391 is in compliance with the state constitution. (See, e.g. *C.S. v. Superior Court* (2018) 29 Cal.App.5th 1009, 1039; *Alexander C., supra*, 34 Cal.App.5th 994, 999.) Neither the court nor the district attorney is bound to follow the Attorney General's position.

In *People v. Thompson* (1990) 221 Cal.App.3d 923, 934, the Court of Appeal declined to accept the Attorney General's concession that the People had waived the issue of defendant's standing to challenge a search. The court stated, "either through poor preparation, inadequate research or overzealous advocacy, the Attorney General is not always right, and we deem it to be an improvident concession on his part (see *People v. Vaughn* [1989] 209 Cal.App.3d 398, 401, 257 Cal.Rptr. 229) by which we are not bound (*People v. Alvarado* [1982] 133 Cal.App.3d 1003, 1021, 184 Cal.Rptr. 483) and which we do not accept (*People v. Cowger* [1988] 202 Cal.App.3d 1066, 1074, 249 Cal.Rptr. 240)." In *Alvarado*, the court declined to follow the Attorney General's concession that reversible error occurred. (133 Cal.App.3d at pp. 1020-1022.) In *Cowger*, the court declined to accept the Attorney General's concession that it was improper to give the jury a flight instruction. (202 Cal.App.3d at pp. 1073-1074.)

Nor is the district attorney required to follow the position of the Attorney General. "[I]t is hardly uncommon for public officials or entities to take different legal positions with regard to the validity or proper interpretation of a challenged state law." (*Perry v. Brown* (2011) 52 Cal.4th 1116, 1155.) In *People v. Castillo* (2010) 49 Cal.4th 145, the court sided with the position taken by the district attorney and the public defender (to honor a stipulation to extend a Sexually Violent Predators Act commitment for two years) and rejected the contrary position of the Attorney General.

The legal context in which the Attorney General's position is made is significant. The Attorney General is generally the public official that "ordinarily ha[s] the responsibility of defending a challenged law." (See *Perry v. Brown*, *supra,* 52 Cal.4th 1116, 1149; Devins & Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend* (2015) 124 Yale L.J. 2100.) While the Attorney General has the discretion to refuse to do so, particularly as to initiative measures (*Perry v. Brown, supra*, 52 Cal.4th at pp. 1155-1156), this appears to be the exception rather than the rule. But in deciding to defend SB 1391, the Attorney General has failed to defend the direct action of the voters in enacting Proposition 57.

## VII.

## REAL PARTY REQUESTS THIS COURT DISAPPROVE CASES FROM THE COURT OF APPEAL THAT HOLD SB 1391 IS CONSTITUTIONAL

Real party is aware of seven cases from six districts of the Court of Appeal that have ruled, against real party's position, that SB 1391 is constitutional. This court denied review as to two of them, *People v. Superior Court (Alexander C.)* (2019) 34 Cal.App.5th 994, *review denied (June 26, 2019)*, and *People v. Superior Court (K.L.)* (2019) 36 Cal.App.5th 529 *review denied (July 17, 2019)*, but has granted review of the remaining five cases, holding them behind this case. (*People v. Superior Court (T.D.)* (2019) 38 Cal.App.5th 360, *review granted* Nov. 26, 2019 (S257980); *People v. Superior Court (I.R.)* (2019) 38 Cal.App.5th 383, *review granted* Nov. 26, 2019 (S257773); *People v. Superior Court (S.L.)* (2019) 40 Cal.App.5th 114, *review granted* Nov. 26, 2019 (S258432); *B.M. v. Superior Court* (2019) 40 Cal.App.5th 742, *review granted* Jan. 2, 2020 (S259030); *Narith S. v. Superior Court* (2019) 42 Cal.App.5th 1131 *review granted* Feb. 19, 2020 (S260090). For the reasons discussed above, and those explained below, real party respectfully believes these decisions are incorrect and should be disapproved.

The court in *Alexander C.* case evaluated only whether SB 1391 furthered the statements of Purpose and Intent. (34 Cal.App.5th 994, 1004; See pp. 27-32 *supra*.) In so doing the court failed to honor both prongs of Proposition 57's amendment clause (Voter Information Guide, *supra*, text of Prop. 57, § 5, p. 145;

exhibit C, p. 73) and imposed upon itself a limitation for finding voter intent only in express statements of "purpose", that this court has rejected. (*Amwest*, *supra*, 11 Cal.4th 1243, 1256-1257.)

The court in *K.L.* similarly refused to consider the initiative's plain language as a controlling factor in determining voter intent. (*K.L.*, *supra*, 36 Cal.App.5th at pp. 538-539.) Instead the *K.L.* opinion discounted the unambiguous statutory language finding it did not represent "one of the 'major and fundamental purposes' of Proposition 57." (*Ibid*.) The court cited *Gardner, supra*,178 Cal.App.4th 1366, 1374, as support, but true adherence to the opinion in *Gardner* requires courts "give effect to an initiative's *specific language*, as well as its major and fundamental purposes." (*Ibid*., italics added.) Both *K.L.* and *Alexander C.* failed to give effect to Proposition 57's specific language enacting a transfer hearing procedure for 14- or 15-year-olds "in any case" in which the minor is charged with certain offenses.

*T.D.'s* dissenting justice saw the flaw. "One purpose of the Public Safety and Rehabilitation Act of 2016 (Proposition 57) is to *require* that judges determine whether juveniles should be transferred to criminal court. In contrast, Senate Bill No. 1391 (2017–2018 Reg. Sess.) (Stats. 2018, ch. 1012, § 1) effectively *prohibits* judges from determining whether certain juveniles should be transferred to criminal court. Whatever the wisdom of each enactment, it cannot be said that Senate Bill 1391 "further[s] the intent" (Prop. 57, § 5) of Proposition 57." (See *T.D.*, *supra*, 38 Cal.App.5th at p. 378, dis. opn. of Poochigian, J.)

The same court that decided *T.D.*, also decided *I.R.* on the same day. *I.R.* considered several issues not raised here. As to the issues that are raised in this case, *I.R.* relied exclusively on *T.D.* and thus suffers from the same flaws.

The majority of the court that decided *S.L.*, expressly relied on *Alexander C.*, *K.L.*, *T.D.*, and *I.R.* Like the courts in *Alexander C.* and *K.L.* moreover, *S.L.* refused to heed Proposition 57's statutory language as an indicator of intent. Instead the court accused the District Attorney of divining the initiative's purpose "from a few select provisions." (*S.L.*, *supra*, 40 Cal.App.5th at p. 122.) With respect to the court those "few select provisions" are the sum total of the amendments enacted by Proposition 57 that have any impact on juvenile proceedings. If the voters' intent with regard to treatment of juvenile offenders cannot be gleaned from all of the amendments the voters enacted regarding juvenile offenders, then it cannot be fairly determined at all.

*S.L.'s* dissenting justice had the better view: noting that by enacting SB 1391 the Legislature "unilaterally stripped the prosecutor's power to seek and the juvenile court's discretion to consider criminal prosecution for certain 14-and 15-year olds. Proposition 57 ensured that a judge would determine whether qualifying juveniles should be tried in criminal court. After Senate Bill 1391, judges no longer have that authority. The Legislature has taken away from prosecutors and courts a power that the electorate had chosen to provide." (*S.L.*, *supra*, 40 Cal.App.5th at p. 124, dis. opn. of Grover, J.)

The majority in *S.L.* discussed each of the five enumerated "purposes" of Proposition 57, giving each one broad construction *except* the "fifth purpose" which it interpreted narrowly, as does petitioner herein, to refer only to the elimination of direct filing. (*S.L.*, *supra*, 40 Cal.App.5th 114, 121–122.) But, as petitioner has pointed out, Proposition 57 commands, *twice*, that all of its provisions be broadly or liberally construed. (Opening Brief on the Merits, p. 18, Voter Information Guide, *supra*, text of Prop. 57, §§ 5, 9, pp. 145, 146; exhibit C, pp. 73, 74.)

In *B.M.*, the court accorded too much deference to the Legislature's own determination that its act was lawful. (40 Cal.App.5th at p. 746) and adopted the flawed reasoning of *Alexander C.*, *supra*, 34 Cal.App.5th at p. 1003, that if the specific provisions of Proposition 57 were interpreted as manifesting the voters' intent no amendment at all would be permitted. As real party has argued at pp. 17-18, *supra*, this reasoning is incorrect and must be rejected. The dissenting justice in *B.M.* had the better position:

> I perceive no ambiguity in Prop. 57 that justifies delving into the legislative history to discern the voters' intent because that intent is clearly discernable on the face of section 707 as amended by the initiative. And, because Senate Bill No. 1391 purports to amend section 707 to eliminate the prosecutor's ability to request a fitness hearing except in the rarest of cases—something Prop. 57 affirmatively *granted* to prosecutors—I conclude the amendment is not "consistent with" and does not "further the intent" of the voters.

(*B.M.*, *supra*, 40 Cal.App.5th at pp. 764-765, dis. opn. of McKinster, J.)

## CONCLUSION

The transfer hearing process enacted by Proposition 57 is more than mere language. It is a deliberately enacted statutory provision manifesting the intent of the electorate. Over and again Proposition 57 reveals one of its intents was to provide prosecutors the discretion to seek transfer of certain juveniles aged 14 and older and to require judges decide whether *or not* a juvenile would be tried in criminal court. As expressed and manifest, the intent to require a judge to determine the jurisdictional fate of an offender like the petitioner in this case, must be construed broadly and liberally, and cannot be dismissed as merely incidental to the initiative's other goals.

SB 1391 took away the prosecutorial discretion and judicial transfer jurisdiction that Proposition 57 enacted.. Rather than require a judge to make an informed, case by case decision as to the appropriate jurisdiction for individual 14- and 15-year-old offenders, the Legislature decided that all of them, regardless of the specifics of the crimes or the offenders, regardless of the likelihood of successful rehabilitation, and regardless of the risk to public safety, would be retained in juvenile court.

Proposition 57's restrictions on the Legislature must also be construed liberally and broadly. The two limitations cannot be pared down to one; both must be obeyed. Yet both are violated by SB 1391.

SB 1391 is not consistent with Proposition 57. It repeals a major component of the initiative's enactment of transfer hearings for juvenile offenders, evidencing a substantially different policy determination than the one the voters were asked to – and did – make. SB 1391 does not further the purpose of Proposition 57 to require a judge to determine whether or not to transfer a 14- or 15-year-old offender to adult court. As it fails both of the content restrictions the voters placed on legislative amendments, SB 1391 is unconstitutional and must be stricken.

Therefore, for the reasons discussed above, real party respectfully requests this court affirm the decision of the Court of Appeal below.

Respectfully submitted,

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County of Ventura, State of California

Dated: May 15, 2020

By: Michelle J Contois

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CERTIFICATE OF WORD COUNT

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Dated: May 15, 2020 By: 

MICHELLE J. CONTOIS
Deputy District Attorney

Supreme Court of California
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**STATE OF CALIFORNIA**
Supreme Court of California

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