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February 25, 2016



**By Hand Delivery**

Honorable Chief Justice Tani Cantil-Sakauye and the
Honorable Associate Justices of the California Supreme Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

RE: *Brown v. Superior Court*, Case No. S_____; *CDAA et al. v. Harris et al.* (Sacramento Superior Court, Case No. 34-2016-80002293)

Dear Chief Justice Cantil-Sakauye:

In support of petitioners in *Brown v. Superior Court*, No. S_____, Real Party In Interest Attorney General Kamala D. Harris respectfully urges this Court to issue an immediate stay of proceedings and writ of mandate to correct the trial court's erroneous judgment in *CDAA v. Harris* (captioned above). Yesterday, the Sacramento Superior Court issued a peremptory writ requiring the Attorney General to reject the amendments to initiative measure number 15-0121A1, the "Public Safety and Rehabilitation Act of 2016," on the grounds that the amendments were accepted in violation of Elections Code section 9002, subdivision (b) (hereafter "Section 9002(b)"). The trial court's ruling not only threatens to irreparably harm the interests of the measure's proponents and supporters, but also poses serious implications for the Attorney General's administration of Section 9002(b).

The trial court adopted an unworkable standard for assessing whether a ballot measure amendment is acceptable under Section 9002(b), a determination that the Attorney General must make routinely as the state official in charge of drafting the official circulating title and summary for all statewide ballot measures and referenda. (Cal. Const., art. II, § 10, subd. (d); Elec. Code, § 9004, subd. (a).) The trial court's vaguely defined standard also threatens to create public uncertainty about the scope of permissible amendments, thereby discouraging, rather than encouraging, the proponents of ballot measures to submit changes, and frustrating the Legislature's intent in adopting Section 9002(b). For these reasons, in addition to those set forth in the moving papers submitted by the petitioners, this Court should move with urgency to correct the trial court's abuse of discretion.

**Senate Bill 1253**

In 2014, the Legislature adopted Senate Bill 1253 (hereafter "SB 1253"), which revised numerous procedures and requirements governing the submission, public review, circulation, and qualification of ballot measures. Of particular relevance here, SB 1253 established a 30-day public comment period on all initiative measures, with comments to be submitted to the Attorney General's website and then relayed to the proponents. (Elec. Code, § 9002, subd. (a)(1)-(2).) SB 1253 further provides that "amendments" may be accepted up to five days after the close of the public comment period, but without any requirement that the comment period be extended or restarted when amendments are submitted close to or even after the expiration of the 30-day period. (*Id.*, § 9002, subd. (b)(4).) Similarly, there is no extension of time for the Legislative Analyst's Office to prepare a fiscal analysis of the measure, or for the Attorney General to draft the official circulating title and summary, even where amendments are submitted close to or after the close of public comment. (Elec. Code, §§ 9002, subds. (b)(3)-(4); 9004, subd. (b); 9005, subd. (c).)

The Legislature anticipated that public comments "may address perceived errors in the drafting of, or perceived unintended consequences of, the proposed initiative measure." (Stats. 2014, ch. 697, § 2(b)(3).) Of critical importance, however, it imposed no limitation on what public comments might address, and no obligation on proponents of ballot measures to act upon, or even consider, the comments received. The Legislature also imposed no limitation on the scope of permissible amendments, except that they must be "reasonably germane to the theme, purpose, or subject of the initiative measure as originally proposed." (Section 9002(b).) Thus, on its face, SB 1253 permits the submission of amendments, even broad, sweeping changes, additions, or deletions—and even *after* the close of the comment period—provided they are "reasonably germane."

**The Litigation Below**

The instant case concerns a ballot measure that would effect changes in laws governing criminal sentencing of both juveniles and adults. After the close of public comment, the proponents submitted amendments to the measure. Considering both the original measure's stated intent and its operative provisions, the Attorney General identified the "theme, purpose, or subject" as promoting rehabilitation of criminal offenders and thereby enhancing public safety, with a special emphasis on juvenile and youthful offenders. The Attorney General then examined the amendments and determined they are "reasonably germane" to that theme, purpose, or subject. Accordingly, as required by SB 1253, the Attorney General accepted the amendments and began preparing the official circulating title and summary based on the measure as amended.

Claiming the amendments constitute a "complete rewrite" of the original measure, the California District Attorneys Association sued the Attorney General for a writ of mandate that would require this Office to reject the amendments, and to treat the amended measure as a "new" submission, which would include collecting a new filing fee and initiating a new public comment period. (Elec. Code, § 9002, subd. (b)(4).) In granting the writ, the trial court rejected the

Attorney General's determination of the original measure's theme, purpose, or subject (see Reporter's Transcript (RT) 36:26-27),[1] notwithstanding that the Attorney's General's determination of the chief points and purposes of a ballot measure is ordinarily entitled to deference. (*Epperson v. Jordan* (1938) 12 Cal.2d 61, 70; *Lungren v. Superior Court* (1996) 48 Cal.App.4th 435, 439-440 [holding that "[w]ithin certain limits what is and what is not an important provision is a question of opinion," and "[w]ithin those limits the opinion of the attorney-general should be accepted by this court"], internal quotations and citations omitted.)

The trial court also rejected this Office's plain language construction of Section 9002(b). The trial court held, in sum, that the Attorney General abused its discretion by accepting "substantive" amendments after the close of the 30-day public comment period, "without the ability of the public to review it" before the amended measure is circulated for signature gathering. (RT 36:22-25; 38:13-19.) The trial court further held the Attorney General violated the "purpose and intent" of Section 9002(b) (*id.*, 37:12-13), and permitted the proponents to engage in "gut and amend" tactics that the Legislature sought to prohibit (*id.*, 38:11-20). The express terms of Section 9002(b) include no such limitations on amendments.

**The Need for a Stay and Writ Relief**

Section 9002(b) provides only that an amendment must be: (1) accepted no later than 35 days after submission of the original measure, i.e., up to five days after the close of the public comment period; and (2) "reasonably germane to the theme, purpose, or subject of the initiative measure as originally proposed." But under the trial court's ruling, the Attorney General apparently must venture far beyond these limitations, and must also determine whether a given amendment is "substantive"; whether the public had an *adequate* opportunity to comment, even where a "substantive" amendment is submitted before the close of the public comment period; and whether a given amendment violates the Legislature's "purpose and intent." This would complicate administration of Section 9002(b)'s provision for amendments. There is nothing in the trial court's ruling, and certainly nothing in the text or legislative history of Section 9002(b), that could help the Attorney General make these determinations fairly and consistently. It could also create public uncertainty about the scope of permissible amendments, and thereby discourage, rather than encourage, proponents from submitting changes to proposed measures.

Section 9002(b) provides a broad, permissive standard for determining whether an amendment must be accepted or rejected. Indeed, the controlling test—*reasonably germane to the theme, purpose, or subject*—was copied virtually verbatim out of case law expounding the single subject rule, which this Court has repeatedly said must be construed leniently. (*Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735, 764; accord *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 547.) In accord with this understanding, an amendment will be rejected only in unusual cases. In fact, this Office has yet to reject an amendment since Section 9002(b) took effect on January 1, 2015. The majority of amendments will be accepted,

[1] The trial court's ruling from the bench, as reflected in the Reporter's Transcript, is attached to this letter as Exhibit A.

thus allowing the proponents to move expeditiously to the signature gathering phase without being required to re-submit their amendment as a "new" measure, pay another (substantially increased) filing fee,[2] and submit to another 30-day comment period. This approach is faithful to the express terms of Section 9002(b), as well as this Court's admonition that the power of state and local officials to "impede or delay the initiative process" is "narrowly circumscribed." (*Schmitz v. Younger* (1978) 21 Cal.3d 90, 92). Under the trial court's rationale, however, the Attorney General would be required to serve as a much more active gatekeeper, and would be both empowered and duty bound to reject any amendment submitted after the close of the public comment period that might be deemed "substantive," notwithstanding the lack of any such limitation in the statute itself.

But that is not the only aspect of initiative amendments this Office would be charged with policing. Under the trial court's rationale, the Attorney General must also apparently determine whether the public had an *adequate* opportunity to comment in light of the scope of the amendments and how much time, if any, the public had to submit comments through the Attorney General's website, and whether the proponents engaged in prohibited (but undefined) "gut and amend" tactics by submitting a "substantive" amendment near, on, or after the close of the 30-day period. This inquiry would depend on such factors as how many existing laws may be affected by the amendments (RT 37:10-11), the sheer volume of the changes to the original text, and whether the amendments, if ultimately approved by the voters, would be located in the Constitution or statutory law (*ibid.*), notwithstanding that such considerations will generally shed no light on whether an amendment is "reasonably germane to the theme, purpose, or subject."

Beyond the negative impacts on the proponents of ballot measures and the people's right of initiative, the trial court's decision, if left uncorrected, would require the Attorney General to divert precious time and resources to deciding whether amendments submitted by proponents meet the "purpose and intent" of SB 1253, as vaguely defined by the trial court. The Attorney General would then have to defend those decisions in court, even though Section 9002(b) does not include any of the restrictions that the trial court grafted on to the statute.

In sum, the trial court created, out of whole cloth, additional limitations on ballot measure amendments that will make it more difficult, costly, and time consuming for ballot measure proponents to proceed to the signature gathering stage. These judicially implied limitations could also discourage amendments by creating uncertainty about what sort of amendments may be submitted at various points in time during the public comment period. Finally, they would require this Office to ensure compliance with vague and non-existent standards divined by the trial court, rather than the plain text and meaning, of Section 9002(b).

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[2] Effective January 1, 2016, the filing fee for an initiative measure was increased to $2,000 from $200. (See Stats. 2015, ch. 229, § 1 [amending Elec. Code, § 9001, subd. (c)].)

In this important case of first impression, there is an urgent need for immediate intervention by this Court.

Sincerely,

Paul Stein

For CONSTANCE L. LELOUIS
Supervising Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

CLL:

Cc: Thomas Hiltachk, Esq. (Counsel for Real Parties CDAA and Annemarie Schubert) (by email)
James Harrison, Esq. (Counsel for Petitioners Gov. Edmund G. Brown Jr. et al.) (by email)

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**EXHIBIT A**

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parties is that this is essentially an idea of the governor that he asked them to carry his water for instead of having his own initiative. And by God, he's free to do that, but he should have just stood in line like everybody else and let the chips fall where they may. And we're just asking that the statute be followed.

With that, your Honor, I submit.

THE COURT: Ladies and gentlemen, let's take a short break and give the court reporter a break. She's had a long day. I'll come back and I'll render my decision.

16:36:28 Let's be back here at 4:55, five minutes to 5:00.

MR. HARRISON: Thank you, your Honor.

16:59:48 (Recess.)

THE COURT ATTENDANT: Please come to order. Court's again in session.

THE COURT: The court has considered all of the

16:59:58 arguments of the parties. At this point the court is going to go ahead and grant the peremptory writ of mandate.

The court finds that the Attorney General abused her discretion in accepting the amendment as reasonably germane to the theme, purpose and subject of the original initiative.

The theme and purpose of the original initiative was reform of the juvenile justice system. The amendment deals with primarily reform of the adult justice system,

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17:00:27 including parole eligibility, status and credits of adult offenders. While some of the provisions may have some impact on youthful offenders, nevertheless, the court finds that the amendment deals primarily with the reform of the adult justice system.

I think it's instructive that one of the purposes of the amendment as articulated was to address federal
17:00:56 court mandates of overcrowding of the adult prison system. I also find that it is significant that the amendment was a constitutional amendment which effects numerous statutes affecting adult offenders.

Finally, the court finds that the purpose and intent of 9002 has been violated. The purpose of the public comment period is not only, I think, to identify and correct flaws in a proposed initiative, but also to
17:01:29 give voters an opportunity to comment on an initiative measure before the petition is circulated for signatures.

While it's true that public comment may address perceived errors in the drafting of or perceived unintended consequences of the proposed initiative, I do think it's important to point out the fact that the public comment period is to provide the public with an
17:01:58 opportunity to comment on any perceived unintended consequences.

Thus, I find that the comment period serves as a mutual benefit to both the drafters and the public. That the drafters have submitted declarations indicating that they don't need additional time or that they don't intend

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to make any further amendments to their initiative, the court finds is, frankly, irrelevant.

Here, under these particular facts, the amendment 17:02:29 was submitted after the public comment period, thereby depriving the public of the ability to make a public comment. That the public was able to write to the proponents rather than push a button on a Web site the court finds is not particularly adequate. Even then the proponent could not make a change to the initiative measure in response to the comments.

Finally, the court finds instructive the last 17:02:57 sentence of Section 9002(b). Clearly, the legislature was concerned about gut and amend. While the original measure did effect a change in substantive law, nevertheless, what the amendment did was the type of mischief that the legislature had in mind, otherwise a measure could change substantive law and then after the public comment period, put in a new amendment changing substantive law without 17:03:27 the ability of the public to review it. The court -- the legislature was clearly concerned about spot initiatives.

Now, neither side, and I believe the real parties in interest in their papers, argued substantial compliance. It wasn't raised in oral argument, but I believe that given the procedural steps and the time frames articulated by the legislature, including the right to public comment and a specific time frame for the public 17:03:57 to comment, the court does not believe the doctrine of substantial compliance applies.

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Moreover, even if it did, the court finds no substantial compliance. Reaching out to stakeholders is not sufficient. It's not equivalent to an opportunity to comment on a revised measure. Mailing a letter is not equivalent to pushing a button on a Web site. And more importantly, there was no opportunity to change or amend the measure in response to any comments received to the amendment.

So for all these reasons, the court will issue a peremptory writ of mandate.

Mr. Hiltachk, do you have a proposed order?

MR. HILTACHK: We do, your Honor, but I believe the Attorney General's office has a form that they prefer too that we were going to look at. So we will do that right now and provide that to you.

THE COURT: Okay. We can do that. Do you want me to stay to sign it?

MR. HARRISON: If you wouldn't mind, your Honor, we would appreciate that.

THE COURT: Okay. Just let the staff know when you're ready.

(Brief interruption.)

(Whereupon the proceedings were concluded for the day.)

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