IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

O.G., Petitioner, v. THE SUPERIOR COURT OF VENTURA CO., Respondent; THE PEOPLE OF THE STATE OF CALIFORNIA Real Party in Interest.	Supreme Court No. S259011 Court of Appeal No. B295555 Ventura County Superior Court No. 2018017144

The Honorable Kevin J. McGee, Judge Presiding

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

The parties agree that this case turns on whether there is "*any* reasonable construction" that Senate Bill (S.B.) 1391 is consistent with and furthers the intent of Proposition 57. (*Amwest Surety Insurance Company v. Wilson* (1995) 11 Cal.4th 1243, 1256 (*Amwest*), emphasis added, Answer, p. 18.) There is.

Real Party in Interest, the People of the State of California, represented by the Ventura County District Attorney (hereafter the District Attorney) argues that Proposition 57 clearly intended that there be transfer hearings for 14- and 15-year-olds charged with enumerated crimes, thus, there is no reasonable construction that S.B. 1391 satisfies Proposition 57's amendment clause. (Answer, p. 20.) Even though the amendment clause dictates that it "shall be broadly construed to accomplish its purposes," the District Attorney argues that the amendment clause allows only "minor" technical changes or changes to correct drafting errors. (Answer, p. 25.) The District Attorney reads the amendment clause too narrowly.

The rule suggested by the District Attorney, requiring express consistency with the text of the initiative (Answer, pp. 17,

21, 23, 57), would make it nearly impossible for any amendments - even minor technical ones - to pass muster. As will be argued below, the text and provisions of Proposition 57 cannot be the sole embodiment of its intent and purpose, such that any amendment that modifies that text and changes a provision is for that reason impermissible.

The District Attorney reads the text of Proposition 57 as placing transfer hearings for 14- and 15-year-olds outside the power of the Legislature to eliminate; according to the District Attorney, our youngest offenders must always be subject to adult incarceration in order to protect the community. (Answer, pp. 42, 43.) Given that the major and fundamental purpose of Proposition 57 was to reduce the number of juveniles in the adult criminal system, with a preference for rehabilitation, the District Attorney's interpretation cannot be the only one.

Petitioner's construction - that eliminating transfer hearings for the youngest minors is consistent with and furthers the intent of Proposition 57 - is certainly reasonable. Thus, there is a "reasonable construction" that S.B. 1391 satisfies Proposition 57's amendment clause and according to this Court's rule in

Amwest, S.B. 1391 must be found constitutional.

FACTUAL SUMMARY

The District Attorney presents conclusory facts, as if there has already been an adjudication or conviction, as facts "about which the trial court was aware when ruling on the motion to transfer." (Answer, p. 11.) To the contrary, the trial court never ruled on the transfer motion because the trial court did not hold a transfer hearing. Similarly, a probation report was not prepared or presented prior to the court ruling that S.B. 1391 was unconstitutional. (1 C.T. 126.)

ARGUMENT

I.

CONTRARY TO THE DISTRICT ATTORNEY'S ARGUMENTS, IT IS A REASONABLE CONSTRUCTION THAT S.B. 1391 COMPLIES WITH PROPOSITION 57'S AMENDMENT CLAUSE

A. The Applicable Standard of Review Starts With The Presumption That The Legislature Acted Within Its Authority

As noted, the District Attorney concedes that this Court's test in *Amwest* governs and this Court must independently review whether, under any reasonable construction, S.B. 1391 satisfies Proposition 57's amendment clause. (Answer, p. 18, *Amwest, supra*, 11 Cal.4th at p. 1256.) In the next sentence, however, the District Attorney cites to a case pre-dating *Amwest* by 20 years, arguing that "[a]ny doubts whether such a reasonable construction exists should be resolved in favor of the initiative." (Answer, p. 19, citing *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.) The *Amwest* Court, however, did not cite to that case and held the opposite, saying "starting with the presumption that the Legislature acted within its authority, we shall uphold the validity of [the legislative act] if, by any reasonable construction, it can be said

that the statute furthers the purposes of [the initiative]."

(*Amwest, supra,* 11 Cal.4th 1243 at p.1256.)

The District Attorney also cites to a Court of Appeal case to suggest that amendments which "may" conflict with the subject matter of an initiative must be accomplished by a popular vote (*Proposition 103 Enforcement Project v. Quackenbush* (1998), 64 Cal.App.4th 173, 1485, Answer, p. 16), but that is not a limitation this Court has adopted.

B. <u>This Court Should Not Accept The District Attorney's Reading of The Amendment Clause That Does Not Allow for Changes to the Text of Proposition 57 and Improperly Narrows the Initiative's Amendment Clause</u>

Proposition 57's amendment clause says:

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

(Prop. 57 Ballot Pamp., General Elec. (November 8, 2016) [hereafter Prop. 57 Pamp.], text of proposed laws § 5, p. 145; Exhibit C, p. 73.)

1. Grammar And Rules Of Statutory Construction Do Not Support The District Attorney's Reading of the Amendment Clause

Reviewing courts "first examine the statutory language, giving it a plain and commonsense meaning . . . not in isolation, but in the context of the statutory framework as a whole." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) "If the statutory language is unambiguous, then its plain meaning controls." (*Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1107.) If the language is not ambiguous, courts presume the voters intended the meaning apparent from that language, and courts may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure. [Citation.]" (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571 (*Pearson*).)

The District Attorney argues that "[b]oth the words and construction of the amendment clause are clear," (Answer, p. 22)

but simultaneously asks this Court to accept a reading that requires the reader to add and reorder words in the amendment clause sentence at issue. The District Attorney reads the amendment clause as a two-part test requiring that any lawful amendment is "consistent with [this act]" and "furthers the intent of this act." (Answer, p. 23, emphasis in the original.) The result of this construction, the District Attorney argues, is that permissible amendments must be strictly consistent with the express provisions and text of Proposition 57. (Answer, pp. 17, 21, 23, 57.) Petitioner disagrees.

As an initial matter, assuming *arguendo*, any amendments to Proposition 57 must be consistent with "this act," S.B. 1391 is. Any commonsense definition of "consistent" would not require explicit textual duplication. The District Attorney's interpretation defies the common sense test; a change that is "consistent with" does not mean only a change that is "the same as." S.B. 1391 is consistent with "this act" because, similar to Proposition 57, S.B. 1391 narrows the class of juveniles subject to adult prosecutions by further restricting a prosecutor's ability to transfer minors to adult court.

Citing to a First Circuit case out of Maine about grammar rules in a parallel series, the District Attorney says that his interpretation describes "how English readers would ordinarily understand the language of the initiative." (Answer, p. 23.) Not so. The District Attorney's analysis starts with the observation that "consistent with" and "furthers the intent of" are both prepositional phrases (Answer, p. 23), but this is wrong. "A prepositional phrase is a group of words that *begins* with a preposition and ends with a noun or pronoun. This noun or pronoun is called the 'object of the preposition.'" (Rozakis, *English Grammar for the Utterly Confused* (2012) at pp. 9, 102-103, emphasis added, cited by *In re Arnold* (2012) 471 B.R. 578.) For example, "of this act" is a prepositional phrase which modifies "the intent," acting to identify which *intent* is the focus of what is to be amended. As a result then, the District Attorney's parallel series grammatical premise is flawed and cannot be relied upon as dispositive of the way voters understood the amendment clause

At worst, the amendment clause is ambiguous, which is what the majority found in *People v. Superior Court (T.D.)* (2019)

38 Cal.App.5th 360, 372, review granted November 26, 2019, S257980 (*T.D*). According to the majority in *T.D.*, since the clause lacks a comma, "[i]t can be read to allow amendments that are consistent with the express language of the Act and that further the intent of the Act; or, it can be read to allow amendments that are consistent with the intent of the Act and that further the intent of the Act." (*T.D., supra*, 38 Cal.App.5th at 372.) Limiting authorized amendments to those consistent with the express language of the act, as requested by the District Attorney, would preclude any amendment that deletes or repeals any portion of the act, no matter how consistent such action might be with the purpose of the act itself.[1] As the majority in *T.D.* concluded, had that been the aim of the language in question it seems likely Proposition 57 would have been drafted to not allow any amendments whatsoever absent voter approval. (*Id.* at p. 372,

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[1] The Court in *People v. Superior Court* (*Alexander C.*) (2019) 34 Cal.App.5th 994, 1003 (*Alexander C.*) agreed with this conclusion, which was also shared by the majority in *People v. Superior Court* (*S.L.*) (2019) 40 Cal.App.5th 114, 122 (*S.L.*), review granted November 26, 2019, S258432 and highlighted by the Court in *Narith S. v. Superior Court* (2019) 42 Cal.App.5th 1131, 1141 (*Narith S.*), review granted February 19, 2020, S260090.

citing *People v. Kelly* (2010) 47 Cal.4th 1008, 1042 [Prop. 215 did not allow legislative amendment.]) This is a sound conclusion to draw as it is a maxim of statutory interpretation that courts should give meaning to every word of a statute and should avoid constructions that would render any word or provision surplusage. (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 634.) "An interpretation that renders statutory language a nullity is obviously to be avoided." (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 357.) If the District Attorney's reading is correct it renders the amendment clause a nullity.

The District Attorney says the majority in *T.D.*'s conclusion that if the electorate intended to only permit amendments "consistent with," the express language of Proposition 57, it would have prohibited any amendments, "is incorrect." (Answer, p. 25.) The District Attorney then suggests that amendments "consistent with" Proposition 57 could include "minor" amendments to "clarify ambiguous terms, to correct drafting errors in the original language" or "cross-referencing issues" that might arise. (Answer, p. 25.) Later, the District Attorney suggests permissible

amendments might "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." (Answer, p. 26.)

There are at least two very large problems with the District Attorney's approach. First, amendments that clarify terms or correct drafting errors would be *necessarily* inconsistent with the express text of Proposition 57. Changes to "adjust procedures for filing" (Answer, p. 26) would necessarily change Proposition 57's current procedures for filing and, therefore, be inconsistent with the statutory language. (Prop. 57 Pamp., text of proposed laws, §4.2, Welf. & Inst., Code, § 707, subd. (a)(2), p. 142; Exhibit C, p. 70.) A changed definition of a term is *per se* not "consistent with" the text or language of Proposition 57.

Second, the District Attorney's hypothetical permissible amendments to Proposition 57 are likely not actually amendments at all. (Answer, p. 26.) Proposition 57 does not say anything one way or the other about using video technology or identify specific diagnostic tools the parties may use to measure

juvenile suitability or to facilitate rehabilitation. Under this Court's test in *Pearson,* an act is an amendment only if it "prohibits what the initiative authorizes, or authorizes what the initiative prohibits." *(Pearson, supra,* 48 Cal.4th at p. 567.) In *Pearson*, a law allowing convicted inmates access to post-conviction discovery (Pen. Code, § 1054.9) was not an amendment to Proposition 115 because that initiative dealt only with pre-trial discovery. (*Id.* at 573.) Similarly, laws mandating or sanctioning the use of various technological options or new diagnostic or programming tools not specifically discussed in Proposition 57 fail the *Pearson* test and, therefore, would not be amendatory because they would not be authorizing something Proposition 57 prohibited. Accordingly, the District Attorney fails to rebut the majority in *T.D.* Court's conclusion that an amendment clause that permits only amendments consistent with the express statutory language of the amended statute is the functional equivalent of an initiative that does not permit amendments at all.

The District Attorney accuses petitioner and the majority in *T.D.* of interpreting the amendment clause as containing "but a

single requirement . . . that amendments further the intent of the act." (Answer, p. 22.) In fact, petitioner argued throughout his Opening Brief on the Merits (OBM, pp. 40-61) that S.B. 1391 was "consistent with and furthers the intent of" Proposition 57. It would not be, however, unauthorized surplusage, as suggested by the District Attorney (Answer, p. 22), to read "consistent with" as allowing the same type of amendatory changes to Proposition 57 that "furthers the intent of" does. That the amendment clause may be redundant does not render S.B. 1391 unconstitutional. Legal doublets containing redundant words litter the legal landscape, so surplusage can be inherent in the drafting of a statute and may have been used by the drafters for emphasis. (*C.f.* "aid and abet" [Pen. Code, § 31]; "facts and circumstances" [Welf. & Inst. Code, § 731, subd. (c)]; "fit and proper subject" [former Welf. & Inst. Code, § 707, subd. (a)(1)]; "lewd and lascivious conduct" [Pen. Code, § 288, subd. (a)]; "null and void" [Welf. & Inst. Code, § 1400, Art. XI, subd. (d)(2)]; "terms and conditions" [Pen. Code, § 1203, subd. (j)]; "true and correct" [Judicial Council Forms, Form SUBP-002, Civil Subpoena (Duces Tecum)].)

Ultimately, it is a mistake to read the "consistent with" provision as a requirement that the courts run a fine-tooth comb through every sentence of Proposition 57 looking for textual inconsistencies to invalidate amendments. Such a reading defies basic principles of grammar and statutory interpretation. It also ignores the explicit voter-approved option to amend the initiative, which becomes a dubious prospect when the amendment clause is read to require such a granular analysis.

2. Proposition 57's Amendment Clause is Explicitly Broad and Thus, Should Not Be Interpreted Narrowly

The District Attorney's version of the amendment clause requiring strict consistency with the text of Proposition 57 must also be rejected as it goes against the voter's command that the whole of Proposition 57 be "liberally construed to effectuate its purposes" with an amendment clause "broadly construed to accomplish its purposes." (Prop. 57 Pamp., text of proposed laws, §§ 5, 9, pp. 145-146; Exhibit C, pp. 73-74.) This Court has already found that Proposition 57 is an "ameliorative change[] to the criminal law" that we infer the electorate intended "to extend as broadly as possible." (*People v. Superior Court (Lara)* (2018) 4

Cal.5th 299, 309 (*Lara*), *People v. Conley* (2016) 63 Cal.4th 646, 657.) A broad reading of the amendment clause does not square with a reading that limits amendments to those that strictly adhere to the express language of Proposition 57 or that only allow for possible amendments to clarification of terms, drafting errors or technological advances.

On this point, a comparison to another historical California initiative is instructive. In Proposition 63 from 2004, an initiative authorizing taxation for those with personal incomes in excess of one million dollars, the amendment clause contained the same broad mandate as in Proposition 57, that "[t]his act shall be broadly construed to accomplish its purposes" and thereafter included the same phrase at issue here, that Proposition 63 could be amended, "so long as such amendments are consistent with and further the intent of this act." (Prop. 63 Ballot Pamp., General Elect. (Nov. 2, 2004), text of proposed law, § 18, p. 108.)[2] Thereafter, Proposition 63's amendment clause contains a second sentence, with a lower threshold legislative vote, to "add

[2] Available at https://repository.uchastings.edu/ca_ballot_props/1225/.

provisions to clarify procedures and terms including the procedures for collection of tax surcharges imposed by Section 12 of this act." (*Ibid*.) As Proposition 63 demonstrates, if voters want to specifically limit amendments to clarify terms or change procedures, there are amendment clauses that do that, as distinct from an amendment clause that says, "consistent with and further the intent of the act." In Proposition 57 there is no similar indication that the voters intended such a narrow scope for potentially substantive amendments.

The District Attorney argues that, "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." (Answer, p. 25.) An amendment clause which allows only limited and narrow changes cannot also be described as broad and liberal. Indeed, it is an oxymoron to describe an amendment clause that only allows technical changes as broad. Webster's Dictionary defines the ordinary meaning of "broad" as "extending far and wide" and also

"widely applicable." ("broad" Merriam-Webster.com. 2020 https://www.merriam-webster.com/dictionary/broad (May 30, 2020); see also Garner's Dict. of Legal Usage (3rd ed. 2011, p. 475) [Defines "broad interpretation" as synonymous with "liberal interpretation" which it defines as"[a] broad interpretation of a text's language, including use of related writings for deriving meanings, and possibly also a consideration of modern meanings, all with a view to effectuating the "spirit" of the text."])

In sum, this Court should reject the District Attorney's narrow reading of Proposition 57's amendment clause which contravenes rules of statutory construction.

C. The District Attorney's Arguments Do Not Compel This Court To Find S.B. 1391 Unconstitutional

1. Following *Amwest*, This Court Can Distill An Overall, Major or Fundamental Purpose of Proposition 57

The District Attorney suggests that no party nor any court may designate one or more stated purposes as primary, major or fundamental and ignore other manifest intents and purposes. (Answer, p. 28, 46-48.) Respectfully, petitioner is not suggesting any purposes or intents be ignored, manifest or otherwise. In his

OBM, petitioner argued that S.B. 1391 furthers all of the stated purposes of Proposition 57.

Additionally, the District Attorney is incorrect that courts are not permitted to do their own assessments of an overarching purpose, after considering all of the properly reviewable materials. In his OMB, as guided by *Amwest*, petitioner considered the text, ballot materials, history of juvenile justice reform in California and relevant United States Supreme Court opinions before coming to the conclusion that the major and fundamental purpose of Proposition 57 was to reduce the number of minors who would be prosecuted as adults, with a preference for rehabilitation in the juvenile system. (BOM, p. 38, *Amwest, supra*, 11 Cal.4th at p. 1257.) This inquiry was in keeping with *Amwest*, in which this Court reviewed available evidence about Proposition 103 and the historical regulation of insurance in California before coming to its own conclusion that the "two major purposes" of Proposition 103 were to reduce insurance rates by at least 20% and to replace the old insurance regulation system with a system where an insurance commissioner had pre-approval of rates. (*Amwest, supra*, 11 Cal.4th at p. 1259.) Those purposes

were *not* exactly the same as the enumerated purposes[3] listed in the text of the initiative. Thus, contrary to the suggestion of the District Attorney, courts *can* assess the major purpose of an initiative. *(Alexander C., supra,* 34 Cal.App.5th 994 at 1003-1004 [The purpose and intent of Proposition 57 can and should be articulated at a similarly high level].) Doing a comprehensive review is in accord with *Gardner v. Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1377-1378, which held an amendment invalid that "took a significantly different policy approach" so it could not "be said to further the proposition." Here, the Legislature's act to further shield the youngest offenders from adult court and return to the pre-1995 historical norm with S.B. 1391 is not a significantly different policy approach than the one taken by the voters who supported more rehabilitation for juvenile offenders with Proposition 57.

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[3] Section 2: Purpose. The purpose of this chapter is to protect consumers from arbitrary insurance rates and practices, to encourage a competitive insurance marketplace, to provide for an accountable Insurance Commissioner, and to ensure that insurance is fair, available, and affordable for all Californians. (Prop. 103 Ballot Pamp., General Elect. (Nov. 8, 1988), text of proposed law, §2, p. 99, available at https://repository.uchastings.edu/ca_ballot_props/984/.)

2. In Prior Cases, Post-Initiative Laws Were Struck Down Because They Violated Amendment Clauses, Not Because the New Laws Changed the Statutory Text Added by the Initiative

Second, seeking to argue that this Court is compelled to strike down S.B. 1391 (Answer, p. 29) the District Attorney cites several cases where courts struck down legislation that amended Proposition 103. The laws that were struck down in those cases were not just contrary to the text of the initiative, but they were antithetical to the purposes of the initiative. There was no a reasonable construction under which the new legislation furthered the purposes of Proposition 103, which was required by the amendment clause. (*Amwest, supra*, 11 Cal.4th at p. 1249.) These cases do not require S.B. 1391 be struck down. On the contrary, they support petitioner's argument that S.B. 1391 satisfies Proposition 57's amendment clause.

Proposition 103, which added article 10, "Reduction and Control of Insurance Rates" to the Insurance Code (Ins. Code, § 1861.01 et seq.), was a consumer-rights focused initiative, backed by consumer advocate Ralph Nader, that promised Californians that their car, home and business insurance premiums would be

reduced by 20%. It instituted the election of an Insurance Commissioner and established specific criteria by which insurance rates shall be determined. (Prop. 103 Ballot Pamp., General Elect. (Nov. 8, 1988), text of proposed law, argument in favor, pp. 99-100). Subsequent legislation sought to change aspects of the rollbacks and consumer protections.

In *Amwest,* the post-initiative legislation at issue gave the surety insurance industry (not a specific insurance industry mentioned in the text of Proposition 103) an exemption from the insurance rate roll backs codified in Proposition 103. (*Amwest, supra*, 11 Cal.4th p. 1250.) As noted, this Court did an expansive analysis of the enumerated and implied purposes of Proposition 103, reviewing the text, the ballot materials, and Proposition 103 in the context of the history of insurance regulation. (*Id*. at pp. 1256-1262.) This Court determined that the new law did not satisfy the amendment clause's requirement that it further the purpose of Proposition 103. This Court found that voters intended Proposition 103 to apply broadly to all types of

insurance[4] and limiting the scope of the initiative by excluding some forms of insurance did not further the purpose of the initiative. (*Id.* at 1264.)

Several years later, in *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, the Court of Appeal struck down a law passed that "resulted in a significant reduction of the amount of refunds payable to policyholders." (*Id.* at pp. 1477-1478.) The Court of Appeal found that the application of the new rule shifted the payment and burden of taxes and commissions paid on excess premiums from the insurers to the policy holders. (*Id.* at p. 1483.) In evaluating the amendment clause, the Court found that the changes in the refund calculations did not further the intent of Proposition 103. (*Id.* at p. 1494.) Analyzing the initiative as a whole, and drawing an inference from looking at two additions to the Insurance Code

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[4] Proposition 103 modified Insurance Code section 1861.01, subdivision (a) states: "For any coverage for a policy for automobile and *any other form of insurance* subject to this chapter issued or renewed on or after November 8, 1988, every insurer shall reduce its charges to levels which are at least 20% less than the charges for the same coverage which were in effect on November 8, 1987." (Prop. 103 Ballot Pamp., General Elect. (Nov. 8, 1988), text of proposed law, p. 99, emphasis added.)

made by Proposition 103 (Ins. Code, §§ 1861.01, subd. (a) and 1861.05, subd.(b)), the Court found, "it is apparent that the overall purpose of Proposition 103 is to require that premiums be set at the lowest rate possible . . . the purpose is to return to the policy holders the maximum amount of premium refunds." (*Id*. at 1491.) The post-initiative law did not satisfy the amendment clause because it allowed for something other than the lowest rates and maximum refunds and, therefore, did not further its purpose. (*Ibid*.)

Lastly, in *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354, the Court of Appeal struck down a law that allowed for the possibility of discounts for drivers who previously maintained car insurance. Proposition 103 had directly added to the statute a promise that, "[t]he absence of prior automobile insurance, in and of itself, shall not be a criterion for determining" discount rates or for rates generally. (*Id*. at 1360.) The Court of Appeal did not mince words in invalidating the law having found it, "flies in the face of

the initiative's purposes."[5] (*Id.* at 1371.) The Legislature was not permitted to pass legislation that allowed the discriminatory insurance rate-setting practices that Proposition 103 had specifically outlawed.

Like Proposition 103, Proposition 57 instituted broad reform to a very complicated and technical area of law. In the Proposition 103 cases, the courts applied the *Amwest* "reasonable construction" test and the laws were invalidated as a result. (*Foundation for Taxpayer & Consumer Rights v. Garamendi, surpa,* 132 Cal.App.4th at pp. 1370-1371, *Amwest, supra*, 11 Cal.4th at p. 1265, *Proposition 103 Enforcement Project v.*

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[5] As an aside, the District Attorney repeatedly quotes a passage from *Foundation for Taxpayer & Consumer Rights v. Garamendi, supra,* 132 Cal.App.4th 1354, 1370, suggesting that it is a rule 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." (Answer, pp. 21, 31.) In fact, that is a quote from the intervening party Mercury Insurance Company's brief that the Court of Appeal described as a concession. (*Ibid.*) The Court of Appeal arguably accepted Mercury's statement as dicta, but that was not the court's holding. Describing the act of changing the words added to a statute by an initiative is not necessarily "violence" if there is an amendment clause authorizing that change in furtherance of a larger purpose.

Quackenbush, supra, 64 Cal.App.4th at p. 1490, 1494.) The subsequent legislation failed not because the laws changed the text of the statute, as suggested by the District Attorney, but because the laws benefitting the insurance industry did not further the consumer goals enshrined in Proposition 103. There was no a reasonable construction that laws providing insurance rate rollbacks and allowing discriminatory practices were furthering Proposition 103's purposes as required by Proposition 103's amendment clause. (*Amwest, supra*, 11 Cal.4th at p. 1249.)

3. There Is a Reasonable Construction That S.B. 1391 Satisfies Proposition 57's Amendment Clause

Unlike in the amendments rejected in the Proposition 103 cases, here, there is a reasonable construction that the amendment satisfies the amendment clause. Further restricting the number of juveniles eligible for transfer to adult court is consistent with and furthers the intent of Proposition 57. Proposition 57's major and fundamental purpose was to limit the number of juveniles subject to adult prosecution, which an emphasis on rehabilitation. S.B. 1391 moves the law in the same direction as Proposition 57 – toward the historical rule placing

minors under 16 within the exclusive jurisdiction of the juvenile courts. (See Welf. & Inst. Code, § 707.) As a hypothetical comparison, if the Legislature passed a law expanding the list of crimes that would make a juvenile transferable to adult court, that would "fly in the face of" the intent Proposition 57 and there would not be a reasonable construction that it satisfied the amendment clause.[6]

More specifically, Proposition 57 voters were not promised that 14- and 15-year-olds would forever be retained as eligible for adult court. As will be discussed, *infra*, it cannot be inferred that specifically retaining 14- and 15- year-olds as a transferrable class in perpetuity was the intent of Proposition 57. The District Attorney points to Proposition 57's statutory text in Welfare and Institutions Code section 707, subdivision (a)(1) that "in any case"

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[6] As the majority in *B.M. v. Superior Court* (2019) 40 Cal.App.5th 742, 759-760, review granted January 2, 2020, S259030 *(B.M.)*, observed, "S.B. 1391 is the mirror image of the amendment in *Amwest*. Where that amendment returned a category of insurance to the unregulated, free-market system Proposition103 had repealed, S.B. 1391 does the reverse. It takes Proposition 57's protections for youth offenders one step further, by shielding a class of minor from the criminal justice system. To be analogous to *Amwest*, S.B. 1391 would have to subject the class of minors to the prosecutorial direct filing practices that Proposition 57 repealed."

where a 14- or 15-year-old has committed a crime listed in section 707 subdivision (b) the minor remains transferrable, but petitioner has not disputed that S.B. 1391 explicitly terminates the prosecutor's power to request to transfer a minor in some cases. As an amendment to S.B. 1391, it is changing the statutory text that Proposition 57 implemented. An amendment is necessarily a change. (*People v. Kelly, supra,* (2010) 47 Cal.4th at pp. 1026, 1027.)

Contrary to the arguments of the District Attorney, the fifth enumerated purpose identified in the text of the proposed law[7] did not bestow judges with the power to transfer 14- and 15-year-olds to adult court; rather, it promised that when there was a transfer decision to be made, it would be made by a judge, not a prosecutor. Furthermore, voters knew that the amendment clause in Proposition 57 was specifically targeted at the juvenile transfer provisions so it cannot be said that the voters "had no warning" (Answer, p. 10) that the youngest juveniles might

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[7] In enacting this act, it is the purpose and intent of the people of the State of California to: . . . 5. Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court. (Prop. 57 Pamp., text of proposed law, § 2, p. 141; Exhibit C, p. 69.)

someday be treated differently under the law. The voters approved of changing the rules related to juvenile transfers as long as any change was in the same direction as Proposition 57, which, in historical context, was voter endorsement of a more rehabilitative and amelorative treatment of juveniles in the justice system, as this Court has already acknowledged. (*Lara, supra*, 4 Cal.5th 299, 309.)

Clearly, the text of an initiative is what one can look at to inform a voter's or a reviewing court's understanding of an initiative's purpose. Importantly, however, every word or provision of the initiative is not the purpose such that each and every amendment that modifies that text is for that reason impermissible. Therefore, the cases cited by the District Attorney do not establish a rule that, if a later law changes explicit statutory language added by an initiative, which petitioner acknowledges Proposition 57 does, then it must be struck down. These cases underscore the use of the rule that petitioner is urging this Court to apply - the *Amwest* "reasonable construction" test. Consider all material available to understand the intent of Proposition 57 voters and decide whether the legislative act is

consistent with and furthers the intent of Proposition 57. If there is a reasonable construction of constitutionality, the law must be upheld, as it should be here.

D. The District Attorney's Arguments As To Voter Intent Do Not Require Invalidating S.B. 1391

The District Attorney suggests that in Proposition 57 there was a specific voter intent to require judges to transfer 14- and 15-year-olds (Answer, pp. 34-39) and the voters saw this as the only way to protect public safety. (Answer, pp. 40-46.) The District Attorney's arguments as to these implied purposes are fundamentally flawed, which is why these same conclusions have been rejected by Courts of Appeal across the state. (*Alexander C.*, *supra*, 34 Cal.App.5th at pp. 1002-1003; *People v. Superior Court (K.L.)* (2019) 36 Cal.App.5th 529, 541; *T.D., supra*, 38 Cal.App.5th at p. 375-376; *B.M. v. Superior Court, supra,* 40 Cal.App.5th 742, 758-759, fn. 4.)

1. Judges Retaining the Ability to Transfer 14- and 15-Year -Olds Was Not Clearly An Intent of Voters Supporting Proposition 57 That Therefore Could Not Be Eliminated

The District Attorney argues that the fifth enumerated

purpose[8] and intent "plainly reveals the voters intended judges to make the determination whether offenders, as specified, be tried in adult court" and suggests that petitioner is not reading the statute broadly to allow it to apply to 14- and 15-year-olds. (Answer, p. 35.) In general, this enumerated purpose explains to voters the change that was made by eliminating the power of prosecutors to direct file against juveniles. The fifth enumerated purpose, however, says nothing about 14-and 15-year-olds specifically. Interpreting the fifth purpose to apply to 14- and 15-year -olds specifically would not be construing it broadly, but rather, adding words to the statute, which is not permissible. (*People v. Guzman* (2005) 35 Cal.4th 577, 587 [Courts adding words to a statute violates a cardinal rule of statutory construction.])

Thereafter, the District Attorney cites to examples of places in the text and ballot materials where the possibility of transfer for 14- and 15-year-olds is mentioned and, from those references,

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[8] As noted, *supra*, the fifth enumerated purpose states: "Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." (Prop. 57 Pamp., text of proposed law, § 2, p. 141; Exhibit C, p. 69.)

draws the conclusion that voters necessarily intended 14- and 15-year-olds to remain possible defendants in adult court. (Answer, pp. 35-39.) The District Attorney says that "Proposition 57 did not need to create a new [transfer] 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)" as still transferable to adult court and that "Proposition 57 carved out a careful exception so that the worst offenders would be included in its transfer hearing process." (Answer, p. 39.)

As discussed in petitioner's BOM, the minimum age for transfer was set at 14 years of age in 1995 with the Legislature's approval of A.B. 560. (BOM, p. 31.) Thus, leaving 14- and 15-year-old juveniles subject to the juvenile transfer process was not something new or more harsh than pre-Proposition 57. In fact, the transfer proceedings voters were putting in place with Proposition 57 were dramatically *more* favorable to juveniles than what had existed previously. With Proposition 57, voters sanctioned a complete reform of the juvenile transfer process, making it less likely that 14- and 15-year-olds would be sent to

adult court at all. (See Welf. & Inst. Code, § 707, former subd. (c).) In a post-Proposition 57 transfer hearing, there is no longer a presumption that the minor is unfit for juvenile court. Moreover, now, the minor does not have to prove himself fit under all five transfer criteria. The five factors must be considered, but a judge has more discretion as to the weight given to each. (*People v. Garcia* (2018) 30 Cal.App.5th 316, 324-325.) As observed by the Court in *Alexander C., supra*, 34 CalApp.5th 994, 1003, "Proposition 57 effected change to the procedure for prosecuting minors in criminal court, but it did not expand – and was not intended to solidify – the class of juvenile offenders subject to that procedure." As echoed by the *B.M.* Court, Proposition 57's changes to the juvenile transfer section of Welfare and Institutions Code section were not about "*effectuating* the transfer of juveniles to criminal court," they were about repealing the District Attorneys direct filing power. (*B.M*, *supra*, 40 Cal.App.5th at p. 758, emphasis in the original.)

By retaining the class of juveniles already subject to the possibility of transfer to adult court, Proposition 57 voters were not clearly intending to mandate that a subset of those juveniles

be subject to transfer forever. Instead, they were acting to reign in prosecutorial discretion and increase the chances that juveniles would be treated as juveniles, with rehabilitation as the goal.

2. Contrary to The District Attorney's Argument, S.B. 1391 Is Consistent With and Furthers Proposition 57's Purpose to Protect Public Safety

The District Attorney argues that by supporting Proposition 57, voters endorsed a vision of public safety where the public was only safe if 14- and 15-year-olds were still eligible to go to adult prison. The District Attorney bases his argument on sentence fragments from the Arguments in Favor and Rebuttal Arguments from the Voter Guide. (Answer, pp. 40-41.) It is undisputed that the ballot arguments for and against Proposition 57 say nothing specifically about 14- and 15-year-old offenders, as distinct from, 16- and 17-year-old offenders. The District Attorney fails to acknowledge that many of the statements in the ballot materials, for both proponents and opponents, focused on addressing voters' concerns related to the potentially large-scale release of adult "non-violent" prison inmates with potentially

violent prior convictions,[9] or perhaps convictions not technically defined as violent (Pen. Code, § 667.5, subd. (c)), that would be allowed if Proposition 57 was approved. Contrary to what the District Attorney argues, keeping the "most dangerous criminals behind bars" likely refers to adult prisoners. It certainly does not expressly include 14- and 15- year-old juveniles. Objectively, not every sentence in the ballot materials about inmates being kept in prison necessarily refers to juveniles. Arguments in favor of Proposition 57 highlighted a focus on "keeping dangerous criminals behind bars, while rehabilitating juvenile and adult inmates and saving tens of millions of taxpayer dollars. Over the last several decades . . . too few inmates were rehabilitated and most re-offend after release." (Prop. 57 Pamp., argument in favor, p. 58; Exhibit C, p. 67.) A serious review of the ballot arguments does not provide support for the argument that voters supporting Proposition 57 had a distinguishable opinion on public safety related to 14- and 15-year-olds specifically.

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[9] Proposition 57, added a provision to California's Constitution stating: "Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense." (Cal. Const., art. I, § 32, subd. (a)(1).)

Moreover, despite the fact that the measure was called the "Public Safety and Rehabilitation Act of 2016," the opponents of Proposition 57 told voters that the changes made by the initiative would have the opposite effect: it would make Californians unsafe. Arguments made by the opponents included, "Make no mistake. If Prop. 57 passes, every home, every neighborhood, every school will be less safe than it is today," (Prop. 57 Pamp., argument against, p. 59; Exhibit C, p. 68) and, nevertheless, 64% of voters approved of the measure.[10] Because the voters rejected the arguments the opponents presented as promoted by "District Attorneys, Courtroom Prosecutors, Police, Sheriffs, Crime Victims, [and] Superior Court Judges," (Prop. 57 Pamp., argument against, p. 59; Exhibit C, p. 68) it is reasonable to conclude that they did not all share the District Attorney's view that equates public safety with a lengthy adult prison sentence. (Answer, p. 47.) As observed by the Court in *Narith S.*, underlying the argument that the "elimination of a prosecutors' ability to try juveniles under 16 in criminal court" thwarts public

[10] Available at https://www.cdcr.ca.gov/proposition57/, [as of May 30, 2020].

safety "is an assumption that locking up 14- and 15-year-olds in adult prisons is the only way to protect the public." (*Narith S., supra*, 42 Cal.App.5th at p. 1142.) In short, the conclusions as to voters' views about public safety are not as obvious as the District Attorney asserts.

What is clear is that the District Attorney does not agree with a theory of rehabilitation for 14- and 15-year-olds charged with serious crimes listed in section 707, subdivision (b), including murder, arson, robbery and certain rapes. The District Attorney opines that "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." (Answer, p. 42.) There is no information appropriately in the record as to anything personal about petitioner other than the charges he faces, but the District Attorney suggests that, for an "offender like petitioner," a life sentence with a parole hearing at 25 years would "more adequately protect the community and provide more time for rehabilitative programming." (Answer, pp. 42-43.) The District Attorney further opines that some 14- and 15- year-olds pose a danger to the public such that keeping them

in the juvenile system "would not meet government's responsibility to protect the public." (Answer, p. 44.) Respectfully, at issue is not what practices fulfill the government's responsibility to protect the public or what the District Attorney feels would be best for the community. What is at issue is voter intent. The proponents of Proposition 57 adopted a more ameliorative juvenile justice ideology than the one advanced by the District Attorney. Voters approved of a measure promoted as increasing the number of minors in the juvenile system in order to protect and enhance public safety, since "minors who remain under juvenile court supervision are less likely to commit new crimes." (Prop. 57 Pamp., argument in favor, p. 58; Exhibit C, p. 67.) By supporting Proposition 57 the voters endorsed that concept. It is not unreasonable that the Legislature could later conclude that S.B. 1391 protects and enhances public safety in the same vein because S.B. 1391 expands the category of minors who will remain in the juvenile system. (Accord, Assem. Com. on Public Safety, Rep. on Sen. Bill 1391 (2017–2018 Reg. Sess.) as amended May 25, 2018, p. 4 ["When youth are given age-appropriate services and education

that are available in the juvenile justice system, they are less likely to recidivate"].)

The District Attorney's assessment of whether S.B. 1391 furthers Proposition 57's goal of public safety is also clouded by reliance on outdated and rejected punishment philosophies. As support for his argument, the District Attorney cites to *Hicks v. Superior Court* (1995) 36 Cal.App.4th 1649 (*Hicks*), referencing a "disproportionately high number of violent crimes committed by juveniles, and in particular by those 14 or 15 years old" and the Court of Appeal's observation, from the legislative history of the bill under review, that "14 or 15 year-olds . . . now exhibit a degree of criminal sophistication and antisocial behavior comparable to the worst adult offenders." (Answer, p. 43.) The statistics as to juvenile crime from *Hicks* are from 1992 – 24 years before Proposition 57 went before the voters. (*Id.* at p. 1659.) Much has changed since that time and the public attitude toward juvenile offenders has evolved with science. Equating 14- and 15-year-olds with the worst antisocial adult offenders completely throws out the window the sea change in penology regarding the

relative culpability[11] and rehabilitation possibilities for juvenile offenders. (See, e.g., *Graham v. Florida* (2010) 560 U.S. 48, 67 [176 L.Ed. 2d 825, 130 S.Ct. 2011] [a juvenile cannot be sentenced to life without the possibility of parole (LWOP) for a nonhomicide offense]; see also *Miller v. Alabama* (2012) 567 U.S. 460, 469–472 [183 L.Ed.2d 407, 132 S.Ct. 2455, 2463–2464] [no more mandatory LWOP sentences for juveniles, even a homicide offense; there must be a consideration of youth-related factors in sentencing].) Thereafter, the District Attorney cites to national juvenile crime statistics from 2012 and 2014 (Answer, p. 44), several years before the voters approved Proposition 57, as evidence that "[v]iolent crimes by juveniles remain a serious problem in California." (Answer, pg. 44.) Presumably, California voters experienced the crime rates of 2012 and 2014 and, nevertheless, supported Proposition 57 as a juvenile justice reform that focused on rehabilitation and reducing the numbers

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[11] Because "'[t]he heart of the retribution rationale'" relates to an offender's blameworthiness, "'the case for retribution is not as strong with a minor as with an adult.'" (*Graham v. Florida, supra*, 560 U. S. 71, quoting *Tison v. Arizona* (1987) 481 U. S. 137, 149 [481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127]; *Roper v. Simmons* (2005) 543 U.S. 551, 571 [125 S.Ct. 1183, 161 L.Ed. 2d 1].)

of juveniles in the adult prison system. Furthermore, focusing on statistics about juvenile crime is minimally relevant because the question is not whether 14- and 15-year-olds pose a threat to the public, but whether those same minors pose a greater threat to the public upon exiting the juvenile versus the adult criminal system. The District Attorney's adoption of the Court of Appeal in *O.G.*'s assessment below, that S.B. 1391 "rationally" does the opposite of protecting public safety, ignores the net benefit to public safety voters believed would be gained by channeling significantly more juvenile offenders into a system specifically designed for their rehabilitation.

Lastly, the District Attorney echoes a criticism of dissenting Justice McKinster, in *B.M*, suggesting that, "[t]he fact that neither supporters nor 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 to have that effect." (*B.M., supra*, 40 Cal.Ap.5th 742, 767, dis opn. Of McKinster, J.) On the contrary, there is no requirement that voters explicitly pre-approve any amendments. As the Court

of Appeal explained in *People v. Cordova* (2016) 248 Cal.App.4th 543, 558–55, the contents of the ballot pamphlet "are constrained by considerations of space, time, and subjective determinations of materiality." Here there was an amendment clause that allowed for future changes to Proposition 57 with respect to juvenile transfers as the circumstances evolved so voters were not required to consider in advance all permissible amendments.

Ultimately, there can be little doubt that the drafters of Proposition 57 would never define the concept of "public safety" in the same way as the District Attorney. At issue is what the voters endorsed and resolution of this question is determined by application of the appropriate standard of review. That is, this Court is only evaluating whether there is any reasonable construction by which S.B. 1391 is consistent with and furthers the intent of Proposition 57. S.B. 1391 can be reasonably construed to further Proposition 57's purpose of enhancing public safety in light of evidence underlying both S.B. 1391[12] and

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[12] As the Assembly Committee on Public Safety concluded when it analyzed the legislative amendment, "Keeping 14 and 15 year olds in the juvenile justice system will help to ensure that youth receive treatment, counseling, and education they need to develop into healthy, law abiding adults." (Assem. Com. on

Proposition 57,[13] that rehabilitation of juveniles through juvenile court rather than adult court protects public safety in the long-run by discouraging recidivism. (Accord *B.M., supra*, 40 Cal.App.5th at 755-757.)

E. Since There Is A Reasonable Construction That S.B. 1391 Satisfies Proposition 57's Amendment Clause, S.B. 1391 is Constitutional

As the District Attorney acknowledges, seven cases from six districts of the Courts of Appeal have determined that S.B. 1391 is constitutional and the instant case is the only published outlier. (Answer, p. 52.) While obviously not binding on this Court, having poured over the same statutory text and Proposition 57 ballot materials, these courts have found there is a reasonable construction by which S.B. 1391 is consistent with and furthers the intent of Proposition 57.

Public Safety, Rep. on Sen. Bill 1391 (2017–2018 Reg. Sess.) as amended May 25, 2018, p. 4.)

[13] Proposition 57's proponents pointed out that keeping minors in the juvenile system protects and enhances public safety, because those "who remain under juvenile court supervision are less likely to commit new crimes." (Prop. 57 Pamp., argument in favor, p. 58; Exhibit C, p. 67.)

As discussed in detail in petitioner's BOM, whether this Court wants to review all available material and distill an implied "major" intent as this Court did in *Amwest* (*Amwest, supra*, 11 Cal.4th at p. 1259, BOM pp. 40-41), evaluate the five enumerated purposes and intents offered by the drafters of Proposition 57 and endorsed by the voters (BOM, pp. 41-61), or evaluate the implied purposes of Proposition 57, it is a reasonable construction that eliminating 14- and 15- year-old minors from adult court is consistent with and furthers the intent of Proposition 57. Under the controlling standard of review, petitioner should prevail. (*Amwest*, *supra*, 11 Cal. 4th at p. 1256.)

CONCLUSION

For all the foregoing reasons, and all of those discussed in petitioner's BOM, the Court of Appeal's affirmance of the lower court's order must be vacated and petitioner's matter assigned to the juvenile court of all purposes.

Dated: June 4, 2020

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT

RICHARD B. LENNON
Executive Director

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JENNIFER HANSEN
Attorney at Law

WORD COUNT CERTIFICATION
O.G. v. the Superior Court of Ventura County

I certify that this document was prepared on a computer using Corel Wordperfect, and that, according to that program, this document contains 8,267 words.

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JENNIFER HANSEN

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On June 4, 2020, I served the within

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in said action, by emailing and e-filing through Truefiling a true copy thereof to:

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and by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California:

Honorable Kevin J. McGee
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O.G.
(Confidential Address)

I declare under penalty of perjury that the foregoing is true

and correct.

Executed June 4, 2020, at Los Angeles, California.

_____

JACQUELINE GOMEZ

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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