

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

FEB 29 2016

GOVERNOR EDMUND G. BROWN, JR., MARGARET R. PRINZING,  
and HARRY BEREZIN,  
*Petitioners,*

Frank A. McGuire Clerk  
Deputy

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,  
COUNTY OF SACRAMENTO,  
*Respondent.*

CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, ANNE  
MARIE SCHUBERT, an individual and in her personal capacity, and  
KAMALA HARRIS, in her official capacity as Attorney General of the  
State of California,  
*Real Parties In Interest.*

On Appeal from the Superior Court of California, County of Sacramento  
Case No. 34-2016-80002293-CU-WM-GDS  
Hon. Shelleyanne Chang

**REAL PARTIES IN INTEREST, CALIFORNIA DISTRICT  
ATTORNEYS ASSOCIATION AND ANNE MARIE SCHUBERT'S  
NOTICE OF LODGING REPORTER'S TRANSCRIPT**

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Real Parties in Interest, California District Attorneys Association and Anne Marie Schubert, by and through their counsel of record, Bell, McAndrews & Hiltachk, LLP, hereby lodge with the above-entitled Court, the record of the oral proceeding:

1. Reporter's Transcript of Proceedings dated February 24, 2016, 43 pages in the matter of *California District Attorneys Association, et al. v. Attorney General of the State of California, Kamala Harris, et al.*, Sacramento Superior Court Case Number 34-2016-80002293.

Dated: February 29, 2016. Respectfully submitted,

**BELL, McANDREWS & HILTACHK, LLP**

By:  \_\_\_\_\_


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SCHUBERT

**CERTIFICATE OF COMPLIANCE**

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) and 8.360(b)(1) of the California Rules of the Court, the enclosed brief of CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION is produced using 13-point Times New Roman type including footnotes and contain approximately 81 words, which is less than the total words permitted by the rules of the court. Counsel relies on the word count of the computer program, Microsoft Word 2010, used to prepare this brief.

Dated: February 29, 2016 **BELL, McANDREWS & HILTACHK, LLP**

By:   
\_\_\_\_\_  
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**PROOF OF SERVICE**

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is 455 Capitol Mall, Suite 600, Sacramento, CA 95814.

On February 29, 2016, I served the following: **REAL PARTY IN INTEREST, CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AND ANNE MARIE SCHUBERT'S NOTICE OF LODGING REPORTER'S TRANSCRIPT**

on the following parties:

**SEE ATTACHED SERVICE LIST**

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X **BY FEDERAL EXPRESS MAIL:** By placing said documents(s) in a sealed envelope and depositing said envelope, with postage thereon fully prepaid, in the FEDERAL EXPRESS MAIL SERVICE BOX, in Sacramento, California, addressed to said party(ies).

     **BY EXPRESS MAIL:** By placing said documents(s) in a sealed envelope and depositing said envelope, with postage thereon fully prepaid, in the U.S.P.S. EXPRESS MAIL SERVICE BOX, in Sacramento, California, addressed to said party(ies).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on February 29, 2016, at Sacramento, California.



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ATTORNEY GENERAL OF  
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CALIFORNIA, KAMALA  
HARRIS

Respondent SACRAMENTO  
SUPERIOR COURT

# **EXHIBIT 1**



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1 **WEDNESDAY, FEBRUARY 24, 2016**

2 **AFTERNOON SESSION**

3 ---o0o---

4 The matter of the CALIFORNIA DISTRICT ATTORNEYS  
5 ASSOCIATION, et al., Petitioners, versus ATTORNEY GENERAL  
6 OF THE STATE OF CALIFORNIA, KAMALA HARRIS, et al.,  
7 Respondents, Case Number 34-2016-80002293, came on  
8 regularly before the Honorable SHELLEYANNE W.L. CHANG,  
9 Judge of the Superior Court of California, County of  
10 Sacramento, Department 24.

11 The Petitioners were represented by THOMAS W.  
12 HILTACHK and BRIAN T. HILDRETH, Attorneys at Law.

13 The Respondents were represented by PAUL STEIN and  
14 CONSTANCE L. LeLOUIS, Attorneys at Law.

15 The Real Parties in Interest were represented by  
16 JAMES C. HARRISON, Attorney at Law.

17 The following proceedings were then had:

18 THE COURT ATTENDANT: Please come to order. Court  
19 is now in session.

20 THE COURT: Good afternoon, ladies and gentlemen.

21 MR. HILTACHK: Good afternoon.

22 MR. STEIN: Good afternoon.

23 THE COURT: All right. May I have the appearances  
15:38:29 24 of counsel, and we'll start on my left.

25 MR. HILDRETH: Good afternoon, your Honor. Brian  
26 Hildreth representing petitioners.

27 MR. HILTACHK: Good afternoon, your Honor. Tom  
28 Hiltachk on behalf of petitioners.

1 MR. HARRISON: Good afternoon, your Honor. James  
2 Harrison of Remcho, Johansen & Purcell, representing real  
3 parties.

4 MR. STEIN: Good afternoon. Paul Stein of the  
5 Attorney General.

6 MS. LeLOUIS: Good afternoon. Constance LeLouis  
7 from the Attorney General representing the respondent.

8 THE COURT: Before we proceed, I did want to  
9 disclose to counsel and the parties that I am acquainted  
10 with Mr. Harrison. His law firm represented and worked  
11 with the governor's office when I worked for Governor Gray  
12 Davis. I hate to say how many years ago that was, but it  
13 was approximately 14 years ago or so, and his firm did  
14 represent me when I was -- well, as a former employee of  
15 Governor Davis in a matter involving some issues that came  
16 before the governor.

17 MR. HILTACHK: Thank you.

18 THE COURT: All right. I will say I have read all  
19 of the papers. I appreciate all of the filings.

20 So, Mr. Hiltachk, I'll let you go first.

21 MR. HILTACHK: It occurred to me that maybe I  
22 should provide a little context for you. I think all of  
23 us sort of jumped right into the issue without really  
24 describing the initiative process in California and how it  
25 actually starts.

26 So briefly, I'll just say that the way that the  
27 initiative process works, it's governed by the State  
28 constitution and the Elections Code, in that a voter who

1 has an idea for a proposed initiative simply must write  
2 down that idea in the form of a law and attach a check for  
3 \$200 and submit it to the Attorney General's office with a  
4 request that the Attorney General issue a title and  
5 summary. It's called a circulating title and summary in  
6 the first instance. That sets in motion two different  
7 things:

15:40:27

8 First, it sets in motion the Attorney General's  
9 commencement of the preparation of the circulating title  
10 and summary. A circulating title and summary is a  
11 one-hundred-word summary of the effect of the initiative,  
12 what the initiative proposes to do. It's called a chief  
13 purposes and points of the initiative. And that is an  
14 important document because that hundred-word summary is  
15 reprinted on the top of every initiative petition that is  
16 circulated among the voters in an event to qualify the  
17 measure for the ballot.

15:40:58

18 The second thing that happens is that the Attorney  
19 General's office immediately transmits the proposed  
20 initiative to the office of the legislative analyst. And  
21 the purpose there is for the legislative analyst to look  
22 at the initiative, to figure out what it does or doesn't  
23 do and to determine whether the initiative will have a  
24 fiscal impact on the State or local government. In other  
25 words, will it save the State money or will it cost the  
26 State money if the initiative were to be implemented.

27 That analysis, the summary of that analysis,  
28 becomes part of the circulating title and summary and is

15:41:28

1 actually the last words on the circulating title and  
2 summary.

3 So the combination of those two things are what  
4 the voters are presented with when they see a petition in  
5 front of their grocery store and being asked to sign a  
6 petition to place something on the ballot.

7 A proponent cannot commence circulating an  
8 initiative petition until it receives that circulating  
9 title and summary, and from that point forward, a  
10 proponent has 180 days, six months, to collect the  
11 necessary signatures to qualify an initiative for the  
12 ballot.

15:41:56

13 In the case of a constitutional amendment, like  
14 the January 26th submission here, that would be about  
15 600,000 ballot signatures, either 50, 60,000 ballot  
16 signatures, in order to qualify for a ballot.

15:42:29

17 In this case, what we're talking about is a  
18 situation in which there was an initial filing on December  
19 26th -- or December 22nd, of an initiative that dealt  
20 almost exclusively with juvenile justice provisions.

21 35 days later, on January 26th, an amendment was  
22 proposed to that initiative. And under Elections Code  
23 Section 9002, the Attorney General can accept an amendment  
24 of a previously filed initiative if that amendment is  
25 reasonably germane to the originally filed initiative, and  
26 that is the subject of this case.

15:42:58

27 On January 26th, a purported amendment was  
28 submitted to the Attorney General's office that we believe

1 was not reasonably germane to the original filing and  
2 should have been rejected.

3 After the briefing, it's clear to me that the  
4 Attorney General's brief reveals the two fundamental  
5 errors that occurred in this case:

6 First, the respondent, Attorney General, has  
7 concluded that the text of Elections Code Section 9002 is  
15:43:29 8 the equivalent of the single subject rule, which is under  
9 our State constitution under Article 2, Section 8(d). And  
10 under Article 2, Section 8(d), it provides that no measure  
11 should be submitted to the voters if that measure embraces  
12 more than one subject, the single subject rule.

13 A lot of cases have been decided on the single  
14 subject rule, and the test that the court employs is one  
15 that if looking at the whole, if you look at the basket of  
15:43:58 16 laws that are proposed in a single initiative, if all of  
17 those provisions are reasonably germane to each other and  
18 to a common theme or purpose or goal, then that satisfies  
19 the single subject rule.

20 That's quite different in our view than the words  
21 of Elections Code Section 9002. While the words  
22 "reasonably germane" are used, the test is not to look at  
23 the whole, to not look at the new document and say does  
24 this satisfy the single subject rule, but rather, to look  
15:44:30 25 at the original filing, that the original filing  
26 establishes the frame, i.e., the subject that the  
27 amendment must pertain to. And in that regard, our  
28 argument is that in this case it did not.

1           So how do we know that to be the case? And  
2 there's two reasons why we think it's clear that the  
3 Elections Code 9002 is not the equivalent of the single  
4 subject rule:

15:44:59

5           First is, 35 years ago, the California Supreme  
6 Court in Schmitz v. Younger told the Attorney General's  
7 office that it had no authority to decide whether a  
8 proposed initiative did or did not violate the single  
9 subject rule in advance of issuing a title and summary.  
10 It said that's a really complicated issue. It's a  
11 constitutional question, and that decision should be  
12 rendered only by a court, not by the Attorney General.

15:45:29

13           So in Schmitz v. Younger, the court said this is  
14 really a judicial role. And the legislature certainly was  
15 aware of the case of Schmitz v. Younger when it enacted  
16 its amendments to 9002 which raised this amendment issue.

15:45:58

17           And secondly, the legislative history of the  
18 amendment of 9002 clearly indicates that the purpose of  
19 the amendment provision was to allow proponents an  
20 opportunity to essentially fix mistakes or errors or  
21 unintended consequences or things that they didn't realize  
22 would cost so darn much money prior to getting a title and  
23 summary.

24           That process was unavailable to them before 9002  
25 was amended a couple years ago. And that was actually a  
26 widely discussed criticism of the initiative process.  
27 That people would submit initiatives and along the way  
28 we'd find there was some major defect in them, but there

15:46:30 1 was nothing we could do to fix them. So the amendments to  
2 9002 were intended to provide an opportunity, a 35-day  
3 opportunity, to do that. It accomplished that objective  
4 in a couple of ways:

5 One is it created a new public comment period. So  
6 now when you submit your initiative to the Attorney  
7 General's office, she posts it on her Web site, and  
8 anybody in the state, any government agency, any voter,  
9 anyone, can go online and submit a comment or a suggestion  
10 or a critique or, hey, there's a typo on page 3, directly  
15:46:59 11 to the proponent through the Attorney General's Web site.  
12 But the comment goes directly to the proponent, and the  
13 proponent can choose to accept the recommendation or not.  
14 It's up to the proponent. But at least it provides an  
15 opportunity.

16 Secondly, by having the legislative analyst  
17 commence their analysis at the very beginning, many times  
18 the legislative analyst figures out that there's a  
19 problem. So in discussions with the proponents, in many  
20 cases, in those cases, the legislative analyst will invite  
15:47:28 21 the proponents of an initiative to come to the legislative  
22 analyst's office. Sit down with us. Tell us what it is  
23 you were trying to do with this initiative. We want to  
24 understand it.

25 And sometimes they'll say, gosh, you know, now  
26 that we hear what you wanted to do, we really don't think  
27 your initiative does that. It gives the proponent an  
28 opportunity to fix that. And that process actually has

1 been employed and serves the objective to the amendment to  
2 9002.

15:47:59

3           So it's our view that that is the legislative  
4 history, and the fact that this determination that an  
5 initiative is or is not violative of the single subject  
6 rule being a judicial determination, clearly evidences  
7 that what the purpose behind 9002 was was not to empower  
8 the Attorney General's office to make this constitutional  
9 determination, but rather to focus and determine what was  
10 the subject matter of the original filing, and does the  
11 second proposed amendment, or any further amendment, fit  
12 within that subject, fit within that common theme or  
13 purpose.

15:48:28

14           The second error that we think is revealed in the  
15 briefs filed by the respondent is that even if the  
16 Attorney General would have done the analysis correctly,  
17 she misunderstood what the purpose of the original filing  
18 was and what the effect that the supplement or the  
19 subsequent amendment would have on California law.

15:48:57

20           So on page 1 of the respondent's brief she says,  
21 quote, "The measure as amended continues to focus on the  
22 same theme, purpose and subject of promoting  
23 rehabilitation, enhancing public safety, with special  
24 emphasis on youthful offenders, many of whom are  
25 prosecuted and sentenced as adults."

26           The only explanation that I have for this  
27 incorrect conclusion is that the Attorney General simply  
28 doesn't understand the far-reaching impact that the



15:49:28

1 January 26th amendment would have on California law.

2 The January 26th submission did not place a  
3 special emphasis on youthful offenders. In fact, it did  
4 just the opposite.

5 The January 22nd, the original submission, which  
6 was Exhibit A to our petition, your Honor, is 26 pages  
7 long, single space. The amendment is only 11 pages long.

15:49:54

8 The January -- Exhibit B. So 15 pages were removed by the  
9 amendment.

10 The initial submission, the December 22nd  
11 submission, was exclusively a juvenile justice reform  
12 initiative. They've removed 15 pages of proposed changes  
13 of law to the juvenile justice system in their proposed  
14 amendment. And then they had -- the kicker was, what did  
15 they add? They added a constitutional provision. To this  
16 previous statutory initiative, they added a constitutional  
17 provision, which as we indicated, applies to all adult  
18 incarcerated persons now and in the future.

15:50:29

19 It effectively repeals by constitutional  
20 supremacy -- I think we've counted up to now 40 statutes  
21 or provisions in statutes that impose determinate  
22 sentencing and at least six voter-approved statewide  
23 initiatives. None of those deal with juvenile justice.

15:50:58

24 And so we think it's clear that even had the  
25 Attorney General applied the right standard, that she  
26 still didn't understand the import of the proposed  
27 amendment.

28 In that regard, I think if you take a step back

15:51:29

1 and you say, well, okay, what was -- if you just looked at  
2 the first submission and you say, well, what was this  
3 trying to do? And it was clear that it was directed at  
4 juvenile justice reform, primarily at the front end of the  
5 process. Can a prosecutor direct file in court without  
6 getting approval through the juvenile justice system? All  
7 provisions that were enacted by the voters in Prop 22,  
8 most of those were being scaled back by the original  
9 filing.

15:51:58

10 And now we have an initiative that is -- where  
11 we've stripped out a good chunk of those provisions, 15  
12 pages of them, and replaced them with a four-sentence  
13 constitutional amendment that wipes out 40 years of  
14 determinate sentencing.

15:52:28

15 And I'm not here to argue whether that's good  
16 policy or bad policy, your Honor. All I'm arguing is that  
17 is a significantly different thing than the original  
18 submission. And now if you looked at this and said, Well,  
19 what is the main thing going on here? And you'd say,  
20 Well, it's changing the determinate sentencing provisions  
21 of California law. It's a massive policy shift from what  
22 was changed 40 years ago. In fact, the governor's office  
23 has freely admitted that's what the intent of this  
24 initiative is to do.

25 And what I think you have now is you have  
26 essentially the tails wagging the dog. That the main  
27 thrust of this initiative, and I presume that if a title  
28 and summary is ever issued for this, it's going to focus,

1 I would hope, on this massive change in public policy and  
2 less on the juvenile justice elements, which are now  
3 ancillary, frankly, to where we are now.

4           So what follows from the Attorney General's error  
15:52:58 5 in this regard? Two things: First the public didn't get  
6 any of the 30-day review period to look at this proposed  
7 new initiative and say, Hey, gee, did you really want this  
8 to apply to current offenders? Did you want it to apply  
9 to this list of crimes?

10           I'm sure your Honor is quite familiar. There's a  
11 list of serious and violent felonies. And once you -- and  
12 once you call something a serious felony, you grab the  
13 entire list. That could be changed. They could write law  
15:53:29 14 to do that. And so none of that was available. The  
15 public had no opportunity to say, Hey, you know, even if  
16 you think you know what you're doing, you didn't do it in  
17 the right way, or you shouldn't do this in the  
18 constitution. Why don't you actually change the statutes?

19           There's a variety of things that the public could  
20 have said about this, or that other government agencies  
21 could have said, or that my clients might have said in  
22 response to this proposal.

15:53:59 23           The other is that the legislative analyst was  
24 given 15 days to analyze this sweeping initiative to  
25 determine what the fiscal impacts of this are. And I  
26 would hesitate to -- I don't hesitate to argue, your  
27 Honor, that if you had a complex legal question that you  
28 wanted your law clerk to research and write an opinion for

1 you on, would you rather have that law clerk have 15 days  
2 to do it or 50 days to do it?

15:54:27

3 And I think the voters, the public, the  
4 legislative analyst, were all entitled to the statutory  
5 50-day period to analyze this effectively new initiative,  
6 for the benefit of the voters, when they get the  
7 circulating title and summary from the Attorney General's  
8 office.

15:54:58

9 So at the end of the day, what we're asking for is  
10 simply that the real parties be compelled to follow the  
11 rules and that the Attorney General's office not accept --  
12 should not have accepted the January 25th filing as an  
13 amendment. It should have been only accepted as a new  
14 filing, and that that process should commence as if it was  
15 a new filing, allowing 9002 and all of the provisions  
16 therein to take effect.

17 THE COURT: Thank you. Mr. Stein.

18 MR. STEIN: Thank you, your Honor.

15:55:29

19 Let me start with the plain terms of the statute,  
20 because after all, that's the touchstone for deciding this  
21 case. The plain terms, Section 9002(b), permit  
22 substantive amendments after the close of the public  
23 comment period. The fact that an amendment may be  
24 substantive, even sweeping potentially, does not  
25 necessarily mean it's not germane to the theme, purpose or  
26 subject of the measure as originally proposed.

27 Germaneness is a function of whether or not the  
28 amendment is sufficiently related. Not whether it's

15:55:56 1 substantive. Not whether it's sweeping. In fact, SB 1253  
2 was adopted to encourage proponents to amend ballot  
3 measures. Their position, I think, boils down to the  
4 notion that this reading of the statute somehow destroys  
5 the legislature's goal in establishing this public comment  
6 period and the ability to amend up to day 35.

7 But the purpose has to be determined from the  
8 language that the legislature adopted. There's no  
15:56:28 9 ambiguity here in 9002(b) that would require you or  
10 justify resorting to legislative history here.

11 THE COURT: But, Mr. Stein, didn't the legislature  
12 by virtue of the language in 9002 indicate some intent  
13 that any amendments be nonsubstantive? First, there is  
14 the ability for a proponent to amend the original  
15:56:58 15 initiative five days after the close of the public comment  
16 period, thereby indicating some intent by the legislature  
17 that any amendments would be basically nonsubstantive,  
18 because for the very fact that the public would not have  
19 had the opportunity to comment on any amendments.

20 MR. STEIN: Well, I would disagree with that, your  
21 Honor, because the legislature did not say only  
22 nonsubstantive amendments.

15:57:28 23 If you look back, if you look at former Election  
24 Code Section 9002(b), there's a distinction drawn there  
25 between technical and nonsubstantive amendments and other  
26 sorts of amendments. There is no such distinction in this  
27 statute. It permitted amendments without limitation,  
28 except that they be reasonably germane to the original

1 theme, purpose or subject. And that's the language that  
2 has to be enforced.

3           What they are asking your Honor to do is to graft  
15:57:58 4 onto the statute a requirement that's not there. And  
5 that's not the function of the court. This is just a  
6 basic principle of statutory construction. On its face,  
7 the language is extremely broad and flexible. There's no  
8 requirement that the public comment period be extended if  
9 the proponent submits a substantive amendment post day 30.  
10 It's not there.

11           THE COURT: But at least a thought that has  
12 occurred to the court is that that is another indicia of  
15:58:30 13 the legislature's intent that any amendments be  
14 nonsubstantive. The fact that the period for which the  
15 LAO and Department of Finance have to prepare fiscal  
16 analysis is not extended by virtue of any amendments,  
17 again, is some indication that the legislature intended  
18 that the amendments be nonsubstantive.

19           MR. STEIN: Well, again, I respectfully disagree,  
15:58:58 20 your Honor. The way the rule works is, even if a  
21 proponent submits an amendment at or after the close of  
22 the period, the time for the LAO is not extended, and the  
23 inference to be drawn from that is that the legislature  
24 wanted to keep this process moving quickly, not that it  
25 only wanted to accept nonsubstantive technical amendments.

26           You have to think about the process of drafting a  
27 ballot measure. It's hard to define what a nonsubstantive  
15:59:27 28 or technical amendment might be. Any amendment, no matter

1 how minor, could raise new ramifications that the public  
2 might want to address. California law is extremely  
3 complicated. There are a million ways to draft a law that  
4 conflicts with other laws that are on the books that could  
5 have unintended consequences, that could have drafting  
6 errors.

7           So even if it were limited to incorporating  
8 comments into the amended version of the measure, there's  
15:59:58 9 still a very, very serious possibility that the proponents  
10 would be amending language that the public would want to  
11 address and would not have an opportunity to address.  
12 There is simply no guarantee in this statute that the  
13 public will have a right to comment. That the purpose of  
14 the law, we submit, was to benefit the proponents of  
15 ballot measures, not necessarily the public. It was for  
16:00:27 16 the purpose of benefiting the proponents by giving them  
17 easier access to feedback from the public and a greater  
18 expanded right to amend.

19           And you see this in the fact that the comments are  
20 not to be publicized. Comments are to be kept nonpublic  
21 and relayed solely to the proponents, which suggests that  
22 this process is for the benefit of the proponents and not  
23 to give the public this iron-clad right of comment.

16:01:04 24           Now, the next indicator I think the court --

25           THE COURT: Well, before you move on to that, Mr.  
26 Stein, and I'm looking at the SB 1253, and I'm looking at  
27 Section 2 of the bill, and specifically paragraph --  
16:01:27 28 subparagraph (b) (3).

1 MR. STEIN: Yes, your Honor.

2 THE COURT: And the language says, "This Act would  
3 give voters an opportunity to comment on an initiative  
4 before the petition is circulated for signatures."

5 So hasn't the legislature also indicated that  
6 there is to be a public benefit to this public comment  
7 period? It's not solely for the benefit of the drafters?

8 Sure. As the legislature says, these comments  
16:01:59 9 might address perceived errors and that sort of thing, but  
10 the legislature has said it's also to give the voters sort  
11 of a preview of what may be circulated to them for their  
12 signatures.

13 MR. STEIN: It does indeed say, as your Honor just  
14 read it, that the public would have an opportunity to  
15 comment. But the question in this case is, what's the  
16 scope of that opportunity? What are the limits on what  
16:02:28 17 they call this right to comment? And our view of it is  
18 that the legislature allowed amendments with the only  
19 limitation being that they be germane. That leaves a  
20 substantial possibility that substantive, even sweeping,  
21 amendments will be submitted after the close of public  
22 comment.

23 And, again, the plain language of the statute has  
16:02:56 24 to be enforced, and our reading of the statute we believe  
25 is reinforced by the single subject case law. They don't  
26 dispute that the language of the statute was copied  
27 verbatim out of the McPherson case and other single  
28 subject cases. They don't dispute the rule of statutory



1 construction that when the legislature borrows technical  
2 terms from judicial decisions and enacts them into law,  
3 that it intends to adopt the same standards.

4 We haven't heard anything from the petitioners  
16:03:28 5 about that. That's just a basic rule of statutory  
6 construction. That's another reason why there's really no  
7 other way to read this.

8 THE COURT: But I think the arguments of the  
9 petitioners are that then applying the single subject rule  
10 in this particular case, it's not an issue of do all the  
11 pieces fit together, do all the different portions of the  
12 law fit together.

13 In this case, what I understand the petitioners'  
14 argument to be, is that you look at the original  
15 initiative measure. You look at what was the theme,  
16 purpose and scope there, and then you take the amendment  
17 and you look at whether or not that is consistent with the  
18 original initiative. So it's not an issue necessarily of  
19 do the parts all fit together, as I understand the  
20 argument.

21 MR. HILTACHK: Right.

22 THE COURT: The issue is, you look at one set,  
16:04:29 23 basically, of information, of laws, and then you look at  
24 the second set. And then you decide, do they have -- are  
25 they reasonably germane to each other.

26 MR. STEIN: Your Honor, I agree with everything  
27 you just said. And I think the difference of opinion here  
28 is we believe we applied the standard correctly and

1 reached the correct result. We looked at the theme,  
2 purpose or subject of the measure as it was originally  
16:04:58 3 proposed. We then looked at the amendments and decided  
4 whether they were reasonably germane to the theme, purpose  
5 or subject.

6 And if you look at the measure as it was  
7 originally proposed in Section 2, it says, "The People  
8 enact the Justice and Rehabilitation Act to ensure that  
9 California's juvenile and criminal justice systems," both,  
16:05:26 10 plural, not juveniles exclusively, "the juvenile and the  
11 criminal justice system effectively stop repeat offending,  
12 i.e., by promoting rehabilitation and promote public  
13 safety."

14 If you look at Section 3, Number 1, it's very  
15 similar. It says, "To ensure that California's juvenile  
16 and criminal justice system resources are used wisely,"  
17 juvenile and criminal justice system resources, both, not  
16:05:57 18 exclusively juveniles, "are used wisely to rehabilitate  
19 and protect public safety."

20 So we determined that the theme here was promoting  
21 rehabilitation, enhancing public safety. The substantive  
22 terms of the measure, as it was originally submitted, are  
23 closely linked to those purposes. They would promote  
24 rehabilitation by limiting the authority of prosecutors to  
25 charge juveniles as adults instead of sending juveniles to  
16:06:30 26 prison later in life.

27 They further promote rehabilitation by offering  
28 earlier parole for people who were sentenced under the

1 three strikes law for offenses that they committed when  
2 they were 23 or younger. That includes adults. That  
3 includes anybody who committed a three strikes offense  
4 between the ages of 18 and 23. So it's not juveniles  
5 we're talking about here. It's adults. Young adults.

16:06:58

6 The original measure also included a provision  
7 dealing with juvenile court records. Specifically, what  
8 happens to those records when a juvenile who is convicted  
9 becomes an adult. So that portion of the measure also had  
10 a direct effect on adults.

16:07:28

11 Okay. So we then looked at the amendments, as I  
12 said, and we determined that they were reasonably germane.  
13 The title of the Act was stated more precisely. The  
14 Public Safety and Rehabilitation Act. Those are the  
15 themes expressed in the original. The purpose is now  
16 stated as, "Protecting and enhancing public safety and  
17 emphasizing rehabilitation, especially for juveniles."

16:08:00

18 Now, Mr. Hiltachk would have you believe that the  
19 amended version somehow stripped out anything having to do  
20 with juvenile justice, leaving a measure so focused --  
21 focused solely on the adult prison population. But that's  
22 simply not true. The measure as it was originally  
23 proposed included provisions eliminating direct filing in  
24 adult court of juveniles.

16:08:26

25 Those same provisions are carried over to the  
26 amendment in Section 4. And that is why, your Honor, we  
27 say that the measure in its original form and as amended  
28 continues to place a special emphasis on juveniles. The

1 juvenile justice provisions in Sections -- I believe it's  
2 3 -- excuse me, 4 in the original carry over to the  
3 amended.

4 The amended version also includes a constitutional  
5 provision that would expand parole eligibility for  
6 nonviolent offenders. But that is a class of individuals  
16:09:00 7 that subsumes people who would have been eligible for  
8 parole under the original version wherein are these  
9 youthful offenders 23 and under who committed a three  
10 strikes offense. Those folks could be eligible for parole  
11 under the amended terms. There's a direct connection  
12 between the original and the amended in that respect.  
13 These are not completely separate and divorced populations  
14 we're talking about here.

16:09:31 15 It also authorizes CDCR to award credits for good  
16 behavior and rehabilitation and educational achievements.  
17 Again, that's going to benefit both adults and juveniles  
18 who may end up in the adult criminal justice system. They  
19 would be eligible for those credits.

20 The purpose of promoting rehabilitation is to  
21 enhance public safety and to reduce cost systemwide. And  
16:09:58 22 that's because the juvenile and the adult criminal justice  
23 systems are interconnected. We made this point in our  
24 brief. They are not compartmentalized.

25 I want to say one more thing about Schmitz. We  
26 are not claiming any right to decide whether or not a  
16:10:26 27 ballot measure satisfies the single subject rule and to  
28 refuse to issue title and summary on that basis. We

1 understand Schmitz versus Younger. We were told very  
2 clearly by the Supreme Court in Schmitz that we have  
3 administerial duty to issue title and summary, and we are  
4 not to decide on our own whether a measure complies with  
5 the single subject rule with this constitutional standard,  
6 and on that basis, decide on our own whether to issue  
16:10:59 7 title and summary.

8 We abide by Schmitz. And, in fact, just two  
9 months ago we went to court to get an order relieving us  
10 of our duty to prepare title and summary for the so called  
11 Sodomite Suppression Act, because that measure on its face  
12 was blatantly unconstitutional, it was a dead letter, dead  
13 on arrival. We went to court in compliance with Schmitz  
14 and got an order relieving us of our duty to prepare title  
15 and summary.

16:11:30 16 But this is a very different setting. We're not  
17 deciding whether to prepare title and summary at all.  
18 We're not passing on the legitimacy of this ballot  
19 measure. We're only deciding whether an amendment should  
20 be accepted or not. The effect of this decision is  
21 whether or not the proponents are going to have to go back  
22 to the beginning and restart the public comment clock.  
23 We're not saying up or down this measure can be placed  
24 before the voters.

25 And I would add that nothing prevents the  
16:12:01 26 petitioners in this case from bringing a single subject  
27 challenge to this measure. If the amendments are  
28 accepted, if your Honor rejects the writ and the real

1 parties go forth to start collecting signatures, there's  
2 nothing stopping these petitioners or any other member of  
3 the public from bringing a single subject challenge to  
4 this measure.

16:12:29

5 I would add, and I'll just close with this point,  
6 that if your Honor is concerned about this overlap between  
7 the single subject rule and Schmitz and the Elections Code  
8 at issue here, the court can rule against the petitioners  
9 without importing or without deciding the extent to which  
10 the single subject rule should be imported here. The  
11 plain language of the statute by itself defeats their  
12 arguments.

16:12:58

13 There is no requirement in 9002(b) that an  
14 amendment be technical or nonsubstantive. It's just not  
15 there. And the court should not be reading requirements  
16 into the law that are not there.

17 And with that I would just close. We think the  
18 writ should be denied.

19 THE COURT: All right. Thank you. Mr.  
20 Harrison.

21 MR. HARRISON: Thank you, your Honor.

22 Let me start with the question that you posed  
23 about whether or not the legislature intended to permit  
24 substantive amendments under its revision to Section 9002.

16:13:27

25 I think it's important to understand that before  
26 SB 1253 was adopted, proponents of a measure could only  
27 submit technical, nonsubstantive changes to the measure  
28 within the first 15 days after it was filed. And the AG

1 in her discretion determined that those technical  
2 amendments were effectively typographical errors. No  
3 substantive changes were permitted. A substantive change  
4 would have restarted the clock.

16:13:57

5 What the legislature did in adopting SB 1253 was  
6 to permit a broad range of amendments based on public  
7 comment, based on input from other stakeholders, and the  
8 only thing that the legislature tethered the proponents'  
9 right to make amendments to were two things:

10 One, it says proponents can't submit a spot  
11 measure. They have to submit a measure that makes  
12 substantive changes to the law. And the reason for that  
13 was to prohibit what petitioners referred to as the gut  
14 and amend. A situation where proponents submitted what  
15 amounted to an empty measure and then subsequently amended  
16 it to add in all the meat.

16:14:27

17 The other thing that the legislature did was to  
18 adopt language directly from McPherson, the California  
19 Supreme Court's decision in McPherson, that the amendments  
20 had to be reasonably germane to the theme, purpose or  
21 subject of the measure.

16:14:58

22 Now, if Mr. Hiltachk were correct that those  
23 amendments were limited to addressing unintended  
24 consequences or flaws in the measure, those would still be  
25 substantive changes to the law. But the fact is, that the  
26 legislature didn't limit the amendments as it could have  
27 to correcting typographical errors, unintended  
28 consequences or flaws in the measure. Instead it

16:15:27

1 permitted proponents to make changes, as long as they were  
2 reasonably germane to the theme, subject or purpose of the  
3 measure.

4 THE COURT: But, Mr. Harrison, I think part of the  
5 court's concern here is, I agree, there is the reasonably  
6 germane limitation on any amendments, but I think the  
7 court's concern here is that these amendments were  
8 submitted after the public has had an opportunity to  
9 comment.

16:15:58

10 I agree if they're sweeping amendments and they  
11 come during a period when the public has had a full and  
12 fair opportunity to comment on them. And I think there is  
13 a mutual benefit to the public comment period. I don't  
14 think it is simply for the benefit of the proponents. It  
15 is for the public. That is what our democracy is about.

16:16:29

16 If in this case these amendments were done after  
17 the public has had a full and fair opportunity to comment,  
18 that's the court's concern here.

19 MR. HARRISON: Let me address that head on, your  
20 Honor.

16:16:57

21 The fact is that the legislature structured 9002  
22 to authorize proponents to submit amendments after the  
23 close of the 30-day public comment period. If the  
24 legislature wanted to ensure that the proponents couldn't  
25 submit any changes that were not subject to the  
26 opportunity for the public to comment, it would have said  
27 all changes have to be submitted within the first 15 days,  
28 or at least within the first 30 days.



1           Instead what it did is say you proponents can  
2 submit amendments up to 35 days after it's filed. Five  
3 days after the public comment period closed. The  
4 legislature didn't say there's a second public comment  
5 period. The legislature recognized the proponents would  
6 make substantive changes and that those changes may not be  
7 subject to that same public comment opportunity.

8           But let me be really clear here. When the  
9 Attorney General received the amendments the proponents  
16:17:29 10 filed here, they were posted on her Web site, along with  
11 the contact information for the proponents. The only  
12 difference here, what this case comes down to is a button  
13 that says public comment on the Attorney General's Web  
14 site.

15           Do you know how many comments the proponents  
16 received when the original measure was filed? Zero. And  
17 yet after the amendments were filed, we were contacted by  
18 two members of the public with questions and ideas about  
19 the measure based on the availability of the proponents'  
16:17:59 20 contact information on the Attorney General's Web site.

21           So that opportunity for public comment the  
22 legislature decided was limited to that 30-day period, and  
23 it authorized proponents of a measure to submit amendments  
24 after that date. So by definition, the legislature  
25 anticipated that some changes would not be subject to that  
26 type of public comment opportunity.

27           And let me be clear here. Mr. Hiltachk describes  
28 it as a right to public comment. It's not. It's an

16:18:29 1 opportunity to -- for the public to comment. And I  
2 understand your Honor's position that it's beneficial to  
3 the public as well, but let's be very clear here, it's not  
4 a public forum. Those comments aren't available on the  
5 Attorney General's Web site. Instead they're provided  
6 only to the proponents, and they are a tool for the  
7 proponents to make changes to the law.

8 In fact, as the declarations in this case  
9 demonstrate, the proponents in this case engaged in  
10 substantial outreach during that 30-day period of time,  
16:18:58 11 and based on the input that they received, they decided to  
12 make changes to the law to strengthen its purposes of  
13 rehabilitation and enhancing public safety. So the  
14 process as envisioned by 1253 worked exactly as it was  
15 intended to work here.

16 Let me briefly address if I could, your Honor, the  
17 substance of the measure itself, because Mr. Hiltachk  
18 ignores the effect of the original measure on the adult  
16:19:29 19 criminal justice system.

20 First, if your Honor reads the original measure  
21 closely and the amended measure, you'll find that the  
22 findings in both measures made clear that the emphasis is  
23 on rehabilitation and public safety. And if you look at  
24 the provisions of the two measures, you'll find that the  
25 amendments are entirely consistent with and advance those  
26 purposes.

16:19:55 27 So let's be clear when we talk about this. Under  
28 the original measure and the amended measure, a judge will

1 make the decision whether a juvenile is tried in adult  
2 court. Both versions of the measure eliminate direct file  
3 by prosecutors. Obviously, this will have an impact on  
4 the adult criminal justice system because it will likely  
16:20:27 5 reduce the number of juveniles tried in adult court.

6 Both versions of the measure expand parole  
7 consideration. Under the original measure, the parole  
8 provision applied to all adult offenders who committed  
9 their offense when they were 23 and under at the time of  
10 the offense. And it expanded eligibility for folks  
11 covered by this section to include individuals who were  
12 sentenced under the three strikes law.

16:20:58 13 In response to feedback that the proponents  
14 received about the fact that this eligibility would apply  
15 to violent offenders, the proponents modified the  
16 provision in two ways: One, they expanded parole  
17 eligibility to all adult inmates, but two, they limited it  
18 to nonviolent felons.

19 The amended measure included credits for  
20 rehabilitation, which was the very purpose of the original  
16:21:26 21 measure. As Mr. Stein says, juveniles who are tried in  
22 the adult system, if the measure is approved by the  
23 voters, will have the opportunity to benefit by those  
24 credits and by the possibility of parole consideration.

25 And finally, the revised version of the measure  
26 required the Department of Corrections and Rehabilitation  
27 to certify that the regulations it adopts to implement  
28 these provisions, enhance and protect public safety, which

16:21:56

1 was in fact the goal of the initial measure.

2 So whether you apply the plain language or the  
3 standard established in the single subject law cases,  
4 these amendments are not only reasonably germane to the  
5 theme, purpose or subject of the measure, they directly  
6 advance those goals.

16:22:28

7 I want to talk about what this case is really  
8 about, your Honor. Because at the end of the day, this is  
9 not a question about whether this measure is valid. You  
10 are not being asked, nor was the Attorney General asked,  
11 to determine whether this measure satisfies the single  
12 subject rule. The only thing that is at issue here is  
13 whether the Attorney General correctly determined that the  
14 amendments that were filed were reasonably germane to the  
15 theme, purpose or subject of the measure.

16:22:57

16 The consequence of that decision is not whether  
17 the measure is capable of appearing on the ballot. It's  
18 whether proponents should be required to start all over  
19 again and there should be a new 30-day public comment  
20 period. And what that comes down to, your Honor, is that  
21 little box.

16:23:29

22 If the court were to grant the writ in this case,  
23 the effect of it would be that the proponents will not  
24 have the time to collect signatures to qualify the measure  
25 for the November 2016 ballot. That means voters won't  
26 have an opportunity to consider whether or not to sign a  
27 petition to qualify the measure now, and they won't have  
28 the opportunity to consider whether to approve or reject

1 it in November 2016. And it means that the juveniles and  
2 adults who would benefit from the opportunities for  
3 rehabilitation under this measure if it were adopted by  
4 the voters won't have that chance and will have to wait  
5 for another two years.

16:23:58

6 Measure that against the harm on the other side.  
7 An abstract right for public comment. Well, in this case,  
8 your Honor, the proponents have in their declarations  
9 submitted to the court, explained that they engaged in an  
10 extensive vetting process, that they made the amendments  
11 that they wanted to make to the measure and that they do  
12 not intend to make any more amendments.

16:24:30

13 So to order a writ under those circumstances, to  
14 enforce an abstract right of public comment would be an  
15 idle act with no practical effect. And the courts have  
16 been extraordinarily clear that a writ of mandate cannot  
17 be used to enforce an idle act that has no practical  
18 benefit. And that's the case here, your Honor.

16:24:57

19 So we would submit to the court that the petition  
20 should be denied, the voters should have the opportunity  
21 to determine whether or not to qualify the measure for the  
22 ballot. And if it does qualify, whether or not to approve  
23 it.

24 THE COURT: Thank you. Mr. Hiltachk?

25 MR. HILTACHK: I'll be brief, your Honor. Let me  
26 start with the last point.

27 It's not our fault that real party waited until  
28 the 12th, 13th hour to decide that maybe they wanted to do

16:25:26

1 an initiative to qualify for the 2016 ballot. That's on  
2 them. What is required is compliance with the law. And  
3 the consequence of that is not just clicking a little box.  
4 It's an analysis, a full 50-day analysis that the LAO  
5 would have provided if it had been given the opportunity.

16:25:58

6 And when we're talking about a proposed amendment  
7 here that is so sweeping that I can't even tell you with  
8 assurance that the 40 statutes I listed are the only 40  
9 that are affected by this initiative. Because, as you  
10 know, sentencing law is kind of complicated. And I can't  
11 assure you that the six statewide initiatives that have  
12 been enacted by the voters are the only initiatives that  
13 are affected by this. I think it is. But I'm sure that  
14 the LAO had the same problem. And with the benefit of  
15 time, the LAO analysis would have been more complete, more  
16 full, and that then goes directly to what the voters are  
17 told when the AG issues a circulating title and summary.  
18 That summary of that fiscal impact is part of that title  
19 and summary. So there is a public impact to that.

16:26:26

20 And with all due respect, stand in line like  
21 everybody else. Lots of folks have been asking the  
22 Attorney General for a title and summary. Many of them  
23 have made nonsubstantive, technical amendments because  
24 they found typos or they found that they misquoted  
25 something or they had the wrong idea how something worked  
26 and then fixed it. That's what this statute was intended  
27 to accomplish.

28

We've talked a little bit about the five-day

16:26:59 1 issue. It's clear what the five-day issue was. 30 days  
2 for public comment. A few days for the proponent to  
3 respond to that. Submit an amendment that dealt with  
4 that. It gives the proponent an opportunity to meet with  
5 the LAO if they want to and see what the LAO thinks about  
6 these things. So there's a perfectly logical explanation  
7 as to why there was a little five-day window tacked on to  
16:27:29 8 the end of the 30-day public inspection period. It may  
9 take some time to make those changes and get them  
10 submitted to the Attorney General's office.

11 Certainly, that little five-day window was not an  
12 indication by the legislature that you can literally gut  
13 and amend a previously filed initiative. And that's what  
14 really occurred here, your Honor. This was a 26-page  
15 initiative that amended eleven statutes, and most of those  
16:27:54 16 were taken out by the subsequent filing and replaced with  
17 a constitutional provision that is completely and wholly  
18 unrelated to the subject matter of the first filing.

19 So let me go back to that. And we talked about it  
20 originally. Is you're not -- the court shouldn't look,  
21 and neither should the Attorney General, look to the  
22 self-serving statement of findings of purposes and intent  
23 that may have been written in either draft to see -- I  
24 mean, good lawyers are smart, your Honor. They'll know to  
16:28:27 25 figure out if I just use the right buzz words in this  
26 nonsubstantive, nonimportant text, that's not really the  
27 law, that I'll be able to get one over on them. No, not  
28 at all.

1           What were the substantive provisions here? This  
2 was the Welfare and Institutions Code that was largely  
3 amended. The Welfare and Institutions Code applies to  
4 juveniles. A handful of Penal Code sections apply to  
5 juveniles. Section 3051, the right of a juvenile to have  
6 a parole hearing with the youthful offender parole board  
16:28:59 7 if they are under 23 applies when that person committed  
8 that crime while a juvenile. Now, sure, they were tried  
9 in adult court, but that is -- we're still focused on  
10 juveniles.

11           So this initiative goes far beyond that now. In  
12 fact, it affects less juveniles now than it did when it  
13 was originally proposed and now affects 30, 40,000 current  
14 inmates sitting in state prison who are all adults. And  
16:29:28 15 there is no way that we can all sit here and look at each  
16 other and say, well, that's just an extension, a fix, a  
17 reasonably germane change to the initial filing.

18           And with that, your Honor, I think it's clear that  
19 this amendment should not have been accepted. And with  
20 that I'll submit, your Honor.

21           THE COURT: Mr. Stein, one of the issues, and Mr.  
22 Hiltachk raised it, but one of the concerns, obviously,  
16:29:56 23 from the legislature's standpoint was the idea of a gut  
24 and amend initiative.

25           Now, the language of 9002 talks about no amendment  
26 shall be submitted if the original did not make a  
27 change -- effect any change in substantive law. But in  
28 effect, the legislature was concerned by that language by



1 what has happened here. Don't you think?

16:30:28

2 I mean, granted, the original initiative in this  
3 case effected some change in substantive law. But by the  
4 amendments, it changed the focus and did delete huge  
5 portions of that original initiative, pared it down to  
6 simply just whether or not a judge or the prosecutor has  
7 the discretion to decide whether or not juveniles should  
8 be tried in adult court but added the constitutional  
9 amendment.

16:30:58

10 So isn't what happened here the very concern that  
11 the legislature had when it inserted that language talking  
12 about gut and amend initiatives?

13 MR. STEIN: I would, again, respectfully disagree,  
14 your Honor. The gut and amend issue is addressed  
15 separately by this requirement that amendments are not  
16 permitted if the original measure would not effect a  
17 substantive change in law. That's what gut and amend  
18 means.

16:31:29

19 When someone says this is a gut and amend bill,  
20 they're talking about a nonsubstantive placeholder bill  
21 that sits there and at the end of the legislative session  
22 is dramatically rewritten and voted on before the  
23 legislature or the public has had an opportunity to look  
24 at it.

25 That is not what happened in this case, and I  
26 don't believe that gut and amend actually is a fair way of  
27 describing what happened to this measure. Because we have  
28 to look at it again through the lens of whether the

1 amendments are reasonably germane to the original theme,  
16:31:59 2 purpose or subject of the measure. And they are. They  
3 continue to benefit both juveniles and adults. The parole  
4 provision that Mr. Hiltachk mentioned a minute ago applied  
5 not just to juveniles, but to adults ages 18 to 23 as  
6 well.

7 So what they're trying to do is create this  
8 artificial distinction between the original and the  
9 amended. The original was strictly limited to juvenile  
16:32:30 10 justice, whereas this new measure deals solely with  
11 adults. It's just not true. The direct filing provisions  
12 carry over between both.

13 And we're really getting far afield when we judge  
14 the validity of an amendment by how many statutes an  
15 amendment might affect. That's not the test. The test  
16 here is whether the amendment is reasonably germane to the  
17 original theme, purpose or subject.

18 THE COURT: Okay. Mr. Harrison?

16:32:59 19 MR. HARRISON: Briefly, your Honor. I'm grateful  
20 that Mr. Hiltachk recognized our handiwork in streamlining  
21 the provisions relating to juveniles and as a consequence  
22 reducing the length of our brief, but that's what it is.  
23 We streamlined the juvenile transfer provisions to try to  
24 make it tighter based on the comments that the proponents  
25 received. The substance, the core of those provisions,  
26 remains the same.

16:33:28 27 The only change with respect to the juvenile  
28 provisions in the original measure is that the juvenile

1 records provision was deleted. Again, based on comments  
2 that the proponents received from stakeholders.

3 So I think it's important for the court to  
4 recognize that the comments that came in, not through the  
5 Attorney General's Web site, again, zero comments, but the  
6 comments that came in as a result of the outreach,  
7 informed the process and improved the measure. But the  
16:33:59 8 amendments themselves are, as I said, not only reasonably  
9 germane to the theme, subject or purpose, but directly  
10 advance it.

11 Let me just briefly take issue with two comments  
12 Mr. Hiltachk made.

13 First of all, real parties didn't delay. Real  
14 parties submitted the measure in a timely manner that  
15 would allow them sufficient time to qualify. The delay  
16 here is the delay Mr. Hiltachk and his clients are seeking  
17 in order to prevent this measure from qualifying for the  
16:34:27 18 ballot in order to prevent the voters from having an  
19 opportunity to consider it. So let's call that what it  
20 is.

21 The second thing Mr. Hiltachk raised was the LAO.  
22 I have not heard the LAO complaining about the lack of  
23 time to review the amendments. In fact, the legislature  
24 expressly gave the LAO an additional two weeks after the  
25 amendments were filed to determine what impact, if any,  
26 those amendments might have on the LAO's fiscal analysis.

27 Furthermore, to the extent that the measure  
28 qualifies, the LAO will have another opportunity to

16:34:58

1 conduct a fiscal analysis of the measure, which would be  
2 presented to the voters at the time the measure appears on  
3 the ballot.

4 So at the end of the day, your Honor, there is  
5 significant public harm if the court were to issue a writ  
6 in this case. On the other side, all that's lost is this  
7 abstract right to public comment which has no practical  
8 effect here in light of the decision the proponents have  
9 made not to amend the measure any further.

10 Thank you, your Honor.

11 THE COURT: Thank you. Mr. Hiltachk, anything in  
12 closing? I'll give you the last word.

16:35:27

13 MR. HILTACHK: No. I think, your Honor, you  
14 pointed to the provision of 9002 that clearly prohibits a  
15 gut and amend where there's really no substantive change  
16 in law proposed. But that's not the only way you can  
17 accomplish that objective. And the legislature knows full  
18 well how to do it. So you simply propose some modest  
19 changes to some statutes and you say, well, this is my  
20 placeholder. I've got my place in line now, and I'll just  
21 wait till the 35 days runs and I'll put in a whole new  
22 measure. And that's really what happened here.

16:35:57

23 You know, the evidence from -- submitted by real  
24 parties is that this is essentially an idea of the  
25 governor that he asked them to carry his water for instead  
26 of having his own initiative. And by God, he's free to do  
27 that, but he should have just stood in line like everybody  
28 else and let the chips fall where they may. And we're

1 just asking that the statute be followed.

2 With that, your Honor, I submit.

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

16:36:28 7 Let's be back here at 4:55, five minutes to  
8 5:00.

9 MR. HARRISON: Thank you, your Honor.

16:59:48 10 (Recess.)

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

13 THE COURT: The court has considered all of the  
16:59:58 14 arguments of the parties. At this point the court is  
15 going to go ahead and grant the peremptory writ of  
16 mandate.

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

21 The theme and purpose of the original initiative  
22 was reform of the juvenile justice system. The amendment  
23 deals with primarily reform of the adult justice system,  
17:00:27 24 including parole eligibility, status and credits of adult  
25 offenders. While some of the provisions may have some  
26 impact on youthful offenders, nevertheless, the court  
27 finds that the amendment deals primarily with the reform  
28 of the adult justice system.

1 I think it's instructive that one of the purposes  
2 of the amendment as articulated was to address federal  
17:00:56 3 court mandates of overcrowding of the adult prison system.  
4 I also find that it is significant that the amendment was  
5 a constitutional amendment which affects numerous statutes  
6 affecting adult offenders.

7 Finally, the court finds that the purpose and  
8 intent of 9002 has been violated. The purpose of the  
9 public comment period is not only, I think, to identify  
10 and correct flaws in a proposed initiative, but also to  
17:01:29 11 give voters an opportunity to comment on an initiative  
12 measure before the petition is circulated for signatures.

13 While it's true that public comment may address  
14 perceived errors in the drafting of or perceived  
15 unintended consequences of the proposed initiative, I do  
16 think it's important to point out the fact that the public  
17 comment period is to provide the public with an  
17:01:58 18 opportunity to comment on any perceived unintended  
19 consequences.

20 Thus, I find that the comment period serves as a  
21 mutual benefit to both the drafters and the public. That  
22 the drafters have submitted declarations indicating that  
23 they don't need additional time or that they don't intend  
24 to make any further amendments to their initiative, the  
25 court finds is, frankly, irrelevant.

26 Here, under these particular facts, the amendment  
17:02:29 27 was submitted after the public comment period, thereby  
28 depriving the public of the ability to make a public

1 comment. That the public was able to write to the  
2 proponents rather than push a button on a Web site the  
3 court finds is not particularly adequate. Even then the  
4 proponent could not make a change to the initiative  
5 measure in response to the comments.

17:02:57

6 Finally, the court finds instructive the last  
7 sentence of Section 9002(b). Clearly, the legislature was  
8 concerned about gut and amend. While the original measure  
9 did effect a change in substantive law, nevertheless, what  
10 the amendment did was the type of mischief that the  
11 legislature had in mind, otherwise a measure could change  
12 substantive law and then after the public comment period,  
13 put in a new amendment changing substantive law without  
14 the ability of the public to review it. The court -- the  
15 legislature was clearly concerned about spot initiatives.

17:03:27

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

17:03:57

24 Moreover, even if it did, the court finds no  
25 substantial compliance. Reaching out to stakeholders is  
26 not sufficient. It's not equivalent to an opportunity to  
27 comment on a revised measure. Mailing a letter is not  
28 equivalent to pushing a button on a Web site. And more

1 importantly, there was no opportunity to change or amend  
2 the measure in response to any comments received to the  
3 amendment.

17:04:30

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

6 Mr. Hiltachk, do you have a proposed order?

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

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

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

17:04:55

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

17 (Brief interruption.)

18 (Whereupon the proceedings were concluded  
19 for the day.)

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CERTIFICATE OF CERTIFIED SHORTHAND REPORTER

STATE OF CALIFORNIA        )  
                                  )    ss.  
COUNTY OF SACRAMENTO    )

I, LISA A. BUSATH, hereby certify that I am an Official Certified Shorthand Reporter, and that at the times and places shown, I recorded verbatim in shorthand writing all the proceedings in the following described action completely and correctly, to the best of my ability:

Court: Superior Court of California,  
County of Sacramento.

Judge: HON. SHELLYANNE W.L. CHANG,  
Department Number 24.

Case: CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION,  
et al., Petitioners,  
vs. ATTORNEY GENERAL OF THE STATE OF  
CALIFORNIA, KAMALA HARRIS, et al.,  
Respondents,  
Case Number 34-2016-80002293.

Date: WEDNESDAY, FEBRUARY 24, 2016.

I further certify that my said shorthand notes have been transcribed into typewriting, and that the foregoing pages 1 to 42, inclusive, constitute an accurate and complete transcript of all of my shorthand writing for the dates and matter specified.

I further certify that I have complied with CCP 237(a)(2) in that all personal juror identifying information have been redacted, if applicable.

Dated: February 26, 2016.

**COPY**

LISA A. BUSATH, RPR, CSR NO. 10751