ORIGINAL

In the Supreme Court of the State of California

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

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SACRAMENTO,

Respondent.

CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION et al.,

Real Parties in Interest.

Case No. S232642

Sacramento County Superior Court, Case No. 34-2016-80002293
Honorable Shelleyanne W. L. Chang, Judge

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As directed by this Court's February 25, 2016 order, Real Party in Interest Attorney General Kamala D. Harris submits this preliminary response to the Emergency Petition for Writ of Mandate and Request for Immediate Stay and/or Other Appropriate Relief.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should move with urgency to issue a peremptory writ of mandate and reverse the trial court's erroneous judgment. The trial court made multiple, manifest errors of statutory interpretation that must be corrected. Writ relief is required not just to prevent irreparable harm to petitioners, but also to settle the appropriate standard, which has now been thrown into doubt, for determining whether an amendment to an initiative measure meets applicable requirements under the Elections Code. Indeed, without immediate action from this Court, the trial court's ruling could invite litigation against the numerous other measures that were amended and subsequently cleared for signature gathering, not just this one.

Elections Code section 9002 permits any amendments—including substantive, even sweeping, amendments—after the close of public comment, provided they are "reasonably germane to the theme, purpose, or subject of the initiative measure as originally proposed." (Elec. Code, § 9002, subd. (b), (b)(4).) Instead of applying the statute as written, the trial court effectively rewrote it.

Among other errors, the trial court held that "substantive" amendments may not be submitted after the close of the public comment period, notwithstanding that the statute expressly permits "amendments"—without limitation—up to five days *after* the close of public comment. A prior version of the statute expressly distinguished between substantive and "technical, nonsubstantive amendments." (Former Elec. Code, § 9002, subd. (a) (West 2014).) The trial court ignored this, however, and

effectively reinstated terms that the Legislature omitted when it enacted Senate Bill 1253.

The trial court also inaccurately framed the original version of the measure as exclusively focused on reforming the juvenile justice system, and then compounded its error by concluding the amendments are not reasonably germane to the theme, purpose, or subject of the original. The original measure focused on promoting rehabilitation and public safety, with a special emphasis on juvenile offenders, many of whom are prosecuted and sentenced as adults. It eliminated so-called "direct filing" of criminal charges against juveniles in adult court. But, contrary to the trial court's conclusion, it would have had an immediate impact on adults and the adult system, as well.

It included a provision that would expand parole eligibility for adult inmates who are now serving long prison sentences for Three Strikes crimes they committed before they turned 24. It would also have removed restrictions that prevent courts from ordering the destruction of juvenile court records, thus aiding adults who have served their time and are now trying to rehabilitate themselves and reintegrate into the community.

In keeping with the original theme, purpose, or subject of promoting rehabilitation and public safety, the amended measure expands the class of inmates who would be eligible for parole relief. It now covers all "non-violent" felons, including but not limited to inmates who committed a "non-violent" felony punishable under the Three Strikes law before they turned 24. At the same time, it excludes inmates convicted of a felony deemed "violent" under the Penal Code, including but not limited to "violent" Three Strikes inmates who would have been eligible for parole relief under the original measure.

In addition, the amendments authorize the California Department of Corrections and Rehabilitation to grant credits for rehabilitative and

educational achievements. Finally, the amended version carries over and modifies terms from the original that prevent "direct filing" against juveniles in adult court, and that require a fitness hearing before a judge in order to charge a juvenile as an adult. In addition to inmates currently in state prison, juveniles who are transferred to adult court under the terms of the amended measure would also benefit from the amended measure's expanded parole and credit provisions.

The trial court was apparently persuaded by arguments that the amendments are not "reasonably germane" because they propose a constitutional amendment, rather than statutory changes only, would affect a large number of existing laws, and make extensive revisions to the original text by deleting several pages of material. But these considerations shed no light on whether the amendments are "reasonably germane," i.e., sufficiently *related* to the theme, purpose, or subject of the original. The "germaneness" requirement is not a word counting exercise.

Because the trial court strayed from the plain text and meaning of the statute, and this case raises issues of broad public importance that must be resolved promptly, the Attorney General respectfully urges this Court to issue a peremptory writ of mandate to immediately correct the trial court's abuse of discretion.

II. BACKGROUND

A. SB 1253

In 2014, the Legislature adopted Senate Bill 1253, the "Ballot Initiative Transparency Act," to update numerous procedures and requirements governing the submission, circulation, and public review of ballot measures. (Stats. 2014, ch. 697, § 2(b) (hereafter "SB 1253").) Of particular relevance here, SB 1253 established an extended pre-qualification process for ballot measures, including:

- a 30-day public comment period on all proposed ballot measures, with comments to be submitted to the Attorney General's website and then relayed to the proponents (Elec. Code, § 9002, subd. (a)(1)-(2));
- a greater opportunity for proponents to make changes to proposed measures by allowing them to submit amendments up to 35 days after the initial submission of the measure (*id.*, § 9002, subd. (b), (b)(4));
- more time—180 days instead of 150—after issuance of the circulating title and summary for proponents to collect enough valid signatures to qualify a proposed measure for the ballot (*id.*, § 9014, subd. (b));
- an opportunity for the Legislature to hold hearings on a proposed measure before, rather than after, it qualifies for the ballot (*id.*, § 9034); and
- added flexibility for proponents to withdraw a ballot measure at any time before it qualifies for the ballot, including after the petition and signatures are submitted to elections officials (*id.*, § 101, subd. (b)).

Overall, the Legislature sought to improve the quality of ballot measures by providing mechanisms for proponents to obtain feedback from the public and the Legislature, and to make it easier for proponents to amend and/or withdraw a proposed measure "before it appears on the ballot." (Stats. 2014, ch. 697, § 2(b)(3).)

The Legislature anticipated that public commenters "may address perceived errors in the drafting of, or perceived unintended consequences of, the proposed initiative measure." (Stats. 2014, ch. 697, § 2(b)(3).) Of critical importance, however, it imposed no limitation on what public commenters might address, or on the scope of amendments submitted by

proponents, except that they be "reasonably germane to the theme, purpose, or subject of the initiative measure as originally proposed." (Elec. Code, § 9002, subd. (b) (hereafter "Section 9002(b)").)

Proponents must now notify elections officials as soon as they have collected 25 percent of the signatures required to qualify a measure for the ballot. This, in turn, triggers legislative hearings on "the subject of the measure not later than 131 days before the date of the election." (Elec. Code, § 9034, subd. (b).) It was anticipated that providing for legislative review during the circulation period "could lead to agreements with the Legislature and withdrawal of some measures from circulation." (Petitioners' Appendix (Pet. App.), Vol. 1, Tab 4 [Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of Sen. Bill No. 1253 (2013-2014 Reg. Sess.) as amended Aug. 22, 2014, p. 6].) SB 1253, however, expressly provides that "[t]his section shall not be construed as authority for the Legislature to alter the initiative measure or prevent it from appearing on the ballot." (Elec. Code, § 9034, subd. (c).)

In sum, while SB 1253 relieved restrictions that previously made it difficult or impossible for proponents to amend or withdraw proposed measures before they qualified for the ballot, it did not change the fundamental nature of the initiative process, which has been described as a "legislative battering ram which may be used to tear through the exasperating tangle of the traditional legislative procedure and strike directly toward the desired end." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 228, quotations and citation omitted.)

B. The Disputed Amendments

On December 22, 2015, the proponents submitted a proposed measure called "The Justice and Rehabilitation Act" to the Attorney General for preparation of a circulating title and summary. Upon receipt of the

measure, the Attorney General assigned it a unique identifying number (15-0121), and, as required by SB 1253, posted the text of the measure online for public comment. (See Elec. Code, § 9002, subd. (a).) On January 25, 2016, after the close of the 30-day public comment period, but within the time permitted by SB 1253 (see Elec. Code, § 9002, subd. (b)(4)), the proponents submitted amendments to the measure, re-titling it "The Public Safety and Rehabilitation Act of 2016."[1]

As originally proposed, the measure focused primarily on easing statutory sentencing requirements for juveniles, many of whom are prosecuted and sentenced as adults each year, as well as expanding parole opportunities for adult inmates who committed Three Strikes offenses before they turned 24 years old. (See 15-0121, §§ 4-6, 8.) The measure's principal stated goals were to "[e]nsure that California's juvenile and criminal justice system resources are used wisely to rehabilitate and protect safety"; "make us safer" by reducing "extreme sentences that fail to rehabilitate"; and "ensure that California's juvenile and criminal justice systems effectively stop repeat offending and improve public safety." (*Id.*, §§ 2, 3.)

The amendments focus on the same theme, purpose, and subject. (See 15-0121A1, § 2.) The amended parole provision would include all "non-violent" felons, including but not limited to inmates who committed a "non-violent" crime before they turned 24 and were punished under the Three Strikes law. At the same time, the amendments would exclude anyone convicted of a felony deemed "violent" under the Penal Code, including but not limited to "violent" Three Strikes offenders who would have been

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[1] The original (15-0121) and amended (15-0121A1) versions of the measure are appended as Exhibits 1 and 2, respectively, to the Emergency Petition for Writ of Mandate and Request for Immediate Stay and/or Other Appropriate Relief (hereafter "Emergency Petition").

eligible under the original version. (*Id.*, § 3 [adding proposed article I, section 32 to the California Constitution].) In addition, the amended measure authorizes the California Department of Corrections and Rehabilitation to expand opportunities for prisoners to earn credit for rehabilitation, good behavior, and educational achievements. (*Ibid.*) The amendments also change and delete provisions contained in the original version dealing with procedures and requirements for charging juveniles as adults (*id.*, § 4; see also 15-0121, §§ 5, 6), and delete provisions pertaining to juvenile court records (see 15-0121, § 7).

Upon review, the Attorney General determined the amendments are "reasonably germane to the theme, purpose, or subject of the initiative measure as originally proposed." (Section 9002(b).) Accordingly, the Attorney General updated the measure's identifying number to 15-0121A1 to reflect that it had been amended, and began preparing the official circulating title and summary.[2]

The Legislative Analyst's Office and the Department of Finance submitted their joint fiscal analysis of the amended measure to the Attorney General on February 11, 2016—one day past the 50-day period prescribed by statute. (Elec. Code, § 9005, subd. (c).) Under SB 1253, the Attorney General has fifteen days after receipt of the joint fiscal analysis to complete the official circulating title and summary. (*Id.*, § 9004, subd. (b).) Thus, upon receipt of the fiscal analysis, the Attorney General had until February 26, 2016 to issue the title and summary.

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[2] Section 9002(b) separately provides that a measure may not be amended if the original version does not "effect a substantive change in law." The Attorney General determined that the measure, as originally proposed, would effect a substantive change in the law, and that issue is not in dispute.

C. The Underlying Lawsuit and the Trial Court's Ruling

Shortly before the deadline for issuing the circulating title and summary, the California District Attorneys Association (CDAA) and Sacramento District Attorney Anne Marie Schubert, in her individual capacity, filed suit seeking a writ of mandate that would require the Attorney General to reject the amendments, and bar her from issuing a circulating title and summary for the measure as amended. (See Pet. App., Vol. 1, Tab 2, pp. 6-7.) Claiming the amendment constitutes a "complete rewrite" of the original, CDAA argued that accepting "broad changes to a proposed ballot measure after the close of the public comment period" would "destroy[] the very purpose of Section 9002—to give the public and voters a meaningful opportunity to review proposed initiative measures and comment on those measures for the purpose of correcting errors." (*Ibid.*) Relatedly, CDAA contended that Section 9002(b) only permits proponents to submit amendments that "correct errors and consider and implement public comments into the originally filed initiative." (*Id.*, p. 6.) "The intent of the statutory changes is not to allow a proponent to 'gut-and-amend' a previously filed measure." (*Ibid.*)

On February 23, 2016, after expedited briefing and oral argument (see Pet. App., Vol. 1, Tab 2; Vol. 2, Tabs 6-14), the trial court granted the requested writ. (*Id.*, Vol. 2, Tabs 15-16; see also Reporter's Transcript of Proceedings (RT).)[3] In doing so, the trial court held that Section 9002(b) prohibits "substantive" amendments after the close of the public comment period, and that the Attorney General abused her discretion by accepting the amendment "without the ability of the public to review it." (RT 39:17-20; 41:6-15].)

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[3] The reporter's transcript is attached to the Declaration of Paul Stein, submitted concurrently with this brief, as Exhibit A.

The trial court further held the Attorney General violated the "purpose and intent" of Section 9002(b) (RT 40:7-8), which is to "give voters an opportunity to comment on an initiative measure" (RT 40:11-12). Thus, the trial court found it "irrelevant" that Section 9002(b) places no obligation on ballot measure proponents to act on or even consider public comment, and that the proponents in this case have no intention of amending it again. (RT 40:20-25.)

Relatedly, the trial court held "the Legislature was concerned about gut and amend," and that the amendment here "was the type of mischief that the Legislature had in mind." (RT 41:6-15.) In support of this conclusion, the trial court relied on the last sentence in Section 9002(b), which bars any amendments if the original measure would not "effect a substantive change in law." (RT 41:6-15.) Although the trial court acknowledged that the original version of the measure "did effect a change in substantive law," it nonetheless found this prohibition "instructive." (RT 41:6.)

Finally, the trial court held the original theme, purpose, or subject was "reform of the juvenile justice system," whereas the "[t]he amendment deals with primarily reform of the adult justice system," and therefore the amendment is not "reasonably germane" as required by Section 9002(b). (RT 39:21-28 ["While some of the provisions may have some impact on youthful offenders, nevertheless, the court finds that the amendment deals primarily with the reform of the adult justice system."].) In reaching this determination, the trial court found it "significant that the amendment was a constitutional amendment which effects numerous statutes affecting adult offenders," and that "one of the purposes of the amendment as articulated was to address federal court mandates of overcrowding of the adult prison system." (RT 40:1-6.)

D. Proceedings in the Supreme Court

The day after the trial court entered judgment, petitioners filed their emergency petition and request for an immediate stay, and the Attorney General submitted a letter in support of petitioners. Later the same day, this Court directed real parties in interest to file, no later than February 29, 2016, preliminary responses addressing all issues in the emergency petition, including whether this Court should exercise its original jurisdiction in mandamus.

On February 26, 2016, petitioners filed a letter and supplemental declaration addressing the need for an immediate temporary stay. CDAA submitted a letter in response, opposing the requested stay. Later that day, this Court entered a temporary stay of proceedings pending final resolution of the issues raised by the petition.

The temporary stay restored the *status quo ante*, under which the Attorney General had a statutory obligation and ministerial duty to issue the circulating title and summary no later than February 26, 2016. (Elec. Code, § 9004, subd. (b); *Schmitz v. Younger* (1978) 21 Cal.3d 90, 92-93). The Attorney General did so immediately after receiving the stay order. A copy of the Attorney General's official circulating title and summary is attached to this brief as Exhibit A.

III. ARGUMENT

A. As It Has Done in Election Matters Many Times in the Past, This Court Should Exercise Its Original Jurisdiction in Mandamus.

Although it does so infrequently, this Court will hear an emergency writ as an original matter when "the issues presented are of great public importance and must be resolved promptly." (*Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 808, quoting *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 845.) It has

"repeatedly" intervened in election disputes involving ballot measures in which "an expeditious ruling was necessary to the orderly functioning of the electoral system." (*Vandermost v. Bowen* (2012) 53 Cal.4th 421, 452 [collecting cases]; see also, e.g., *Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020 [original review of writ petition challenging appellate court decision barring Secretary of State from placing measure on ballot]; *Brosnahan v. Eu* (1982) 31 Cal.3d 1 [original review of writ petition to prevent Secretary of State from certifying initiative measure for the ballot]; *Legislature v. Eu* (1991) 54 Cal.3d 492 [original review of writ petition challenging constitutional validity of measure passed by the voters].) This case, which has serious implications for both the "Public Safety and Rehabilitation Act of 2016" and the ballot measure qualification process in general, merits immediate review and resolution as well.

1. This case raises issues of broad public importance.

As petitioners explain, this case raises issues of critical importance to the public. These include "the ability of voters to consider an important statewide ballot measure" with far-reaching impacts on juvenile and adult criminal offenders, as well as the State's ability to respond to a federal court mandate to reduce its prison population. (Emergency Petition, pp. 3, 5.) If left standing, however, the trial court's erroneous judgment would do more than preclude the public from debating and voting on this particular measure. It would also complicate the Attorney General's administration of Section 9002(b) by grafting additional restrictions on to the statute that are not in the text, and that could not be administered fairly and consistently going forward. These restrictions include whether an amendment could be deemed "substantive" or "sweeping," and whether the public had an *adequate* or *meaningful* opportunity to comment, even for amendments submitted before the close of the 30-day comment period.

The trial court's rationale would also create public uncertainty about the scope of permissible amendments. Given this uncertainty, many proponents might decline to submit an amendment rather than risk its being rejected and deemed a "new" measure that requires another public comment period and another $2,000 filing fee. This, in turn, would discourage, rather than encourage, amendments, thereby frustrating the Legislature's intent in enacting SB 1253.

In sum, this case clearly presents issues of broad public importance supporting an exercise of original mandamus jurisdiction by this Court. It has ramifications for both this particular initiative and the initiative process as a whole, including the Attorney General's ability to fairly and consistently administer Section 9002(b), and the right of initiative measure proponents generally to move expeditiously through the qualification process so they can take their case to the voters.

2. The issues must be resolved promptly.

The second requirement for having an emergency writ heard in this Court as an original matter—urgency—is also met here. In fact, the temporary stay issued by the Court last week amplifies the need for the fastest possible resolution.

Now that the proponents have begun gathering signatures, the need for immediate review is even greater. Every day, thousands of electors will be signing petitions to qualify the measure for the ballot. (Petitioners' Letter and Supplemental Declaration, Feb. 26, 2016.) If the trial court's judgment ultimately survives review— thus invalidating the qualification effort—thousands of voters' signatures on the petition will be negated, potentially damaging public confidence in the initiative process. And, as petitioners explain, the pendency of litigation itself could hamper the measure's chances of qualifying because it raises questions about the validity of the signatures now being collected. (Emergency Petition, p. 6.)

Finally, the Attorney General has processed and cleared for signature gathering nearly 40 other amended measures besides this one. This Court should rule now to prevent the trial court's erroneous ruling from spurring legal challenges to any of these other measures.

These considerations all weigh in favor of the Court exercising its original writ jurisdiction, instead of transferring the matter to the Third District Court of Appeal. It would jeopardize the public interest to require the parties to litigate this case first in the Court of Appeal, and then a second time in this Court, in order to obtain a final resolution. (See *Perry v. Jordan* (1949) 34 Cal.2d 87, 91 [exercising original mandamus jurisdiction in ballot measure litigation and holding "[t]o preserve the full spirit of the initiative the submission of issues to the voters should not become bogged down by lengthy litigation in the courts."].) Accordingly, the Attorney General respectfully urges the Court to exercise its original jurisdiction and issue a peremptory writ of mandate.

B. The Trial Court Abused Its Discretion by Rewriting Section 9002(b), and Its Judgment Should Be Reversed.

1. The Legislature permitted *any* amendments within five days after the close of the public comment period, provided they are "reasonably germane."

On its face, Section 9002(b)'s "reasonably germane" requirement is broad and flexible. "Germane" means "closely akin" or, secondarily, "relevant and appropriate." (Webster's New Collegiate Dictionary (1981).) From that already generous starting point, an amendment need only be "*reasonably* germane" to meet the requirement. Additionally, an amendment need only be reasonably germane to the "theme, purpose, or subject" of the measure as originally proposed; there is no requirement that an amendment bear a functional and/or interlocking relationship to any operative term in the original version of the measure, and no requirement

that amendments make only minor corrections or changes to the existing terms.

The term "amendments" is also quite broad, encompassing virtually any change ranging from minor modifications to new and potentially sweeping substantive additions, changes, or deletions. The Legislature permitted "amendments" without limitation, including substantive, even dramatic, amendments that might expand or restrict the subject(s) covered and/or the class(es) of persons affected by the measure, provided the amendments are "reasonably germane" to the "theme, purpose, or subject of the initiative measure as originally proposed."

Another strong indication that the Legislature intended a broad, flexible reading of Section 9002(b) lies in the fact that it was borrowed directly from judicial decisions construing the single subject rule.[4] Just as Section 9002(b) provides for amendments, the courts have held that a ballot measure satisfies the single subject rule so long as its provisions are "*reasonably germane to a common theme, purpose, or subject.*" (*Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735, 764, italics added.)

The single subject rule has been consistently construed "in an accommodating and lenient manner so as not to unduly restrict the Legislature's or the people's right to package provisions in a single bill or initiative." (*Ibid.*; accord, e.g., *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 574 (conc. opn. of Werdegar, J.) [the single subject rule "should not be interpreted in an unduly narrow or restrictive fashion"],

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[4] The single subject rule derives from article II, section 8, subdivision (d), of the Constitution, which provides that "[a]n initiative measure embracing more than one subject may not be submitted to the electors."

quotations and citation omitted.) Notwithstanding the single subject rule, an initiative may propose comprehensive, "integrated reform measures" that address numerous separate topics within a general area of law. (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 251, quotations and citation omitted; *id.* at p. 246; see also, e.g., *Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 38-39, 41 [holding voter initiatives may "deal comprehensively and in detail with an area of law"].) This Court has upheld, for example, "broad and multifaceted 'reform' measures pertaining to the subjects of probate, property taxation, and politics." (*Brosnahan v. Brown*, *supra*, 32 Cal.3d at p. 247.)[5]

The phrase "reasonably germane to the theme, purpose, or subject" is employed nowhere else in California law. This leaves no doubt that in enacting SB 1253 the Legislature borrowed it from the single subject cases. Thus, the Legislature must have intended a similarly broad standard for determining whether amendments are sufficiently related to the original theme, purpose, or subject. (See *Estate of McDill* (1975) 14 Cal.3d 831, 839 [holding Legislature is "presumed to have had knowledge of existing domestic judicial decisions and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them"], quotations and citation omitted; see also, e.g., *Estate of Sax* (1989) 214 Cal.App.3d 1300,

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[5] The single subject rule is violated only in extreme cases where a measure contains a "grabbag of social, political, economic and administrative enactments," or joins "disparate provisions which appear germane only to topics of excessive generality such as 'government' or 'public welfare.'" (*Brosnahan v. Brown*, *supra*, 32 Cal.3d at p. 253; *Manduley v. Superior Court*, *supra*, 27 Cal.4th at p. 575 [holding single subject rule forbids a measure "so broad that a virtually unlimited array of provisions could be considered germane thereto and joined in this proposition, essentially obliterating the constitutional requirement"], quotations and citation omitted.)

1304 [holding Legislature is presumed "to be aware of the judicial interpretation of words dealing with the same or analogous topics," and is presumed to "intend the same well-settled meaning of these words" in enacting statutes].)[6]

Finally, the opportunity for public comment under Section 9002(b) is limited, further suggesting that the "reasonably germane" requirement should be read broadly. Because amendments may be accepted up to five days *after* the close of the public comment period (Elec. Code, § 9002, subd. (b)(4)), the Legislature clearly contemplated that some amendments would not be subject to public comment, even amendments that might raise thorny and/or controversial issues of law and policy, but are nonetheless "reasonably germane" to the "theme, purpose, or subject of the measure as originally proposed."

The reality is that *any* amendment to an initiative measure, no matter how "germane" it might be, can suffer from drafting errors or have

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[6] Indeed, there are good reasons to hold that Section 9002(b) provides even *more* flexibility than the single subject rule. The single subject rule is designed to "minimize the risk of voter confusion and deception." (*Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, *supra*, 22 Cal.3d at p. 231; accord *Californians for an Open Primary v. McPherson*, *supra*, 38 Cal.4th at p. 765; *California Trial Lawyers Assn. v. Eu* (1988) 200 Cal.App.3d 351, 360 [single subject rule protects not just voters, but also petition signers from deceptive measures], *abrogated on other grounds*, *Lewis v. Superior Court* (1999) 19 Cal.4th 1232.) In short, the rule protects the integrity of election results, individual voter preference, and public confidence in the initiative system. In contrast, the submission of amendments under Section 9002(b) is an interlocutory, procedural step in the ballot measure qualification process that occurs before a measure is even in final form for circulation to the electors for signatures. Rather than preventing voter deception, it serves the more limited purpose of making it easier for initiative proponents to consider amendments.

unintended consequences, just as much as the original text. (Cf. *McLaughlin v. State Bd. of Educ.* (1999) 75 Cal.App.4th 196, 214 [holding "the initiative process itself, particularly when viewed in light of the number of existing laws that may be affected by any new law and that may require amendment or repeal to avoid creating conflicts, makes conflicts between the new law and existing laws virtually inevitable"].) Despite this reality, the Legislature allowed amendments to be submitted close to or even after the close of the 30-day period without requiring repeated, iterative rounds of comment on the same measure.

The Legislature made a deliberate and practical decision to avoid undue delays in the qualification process by establishing a clearly delineated limit on the public comment phase. At the same time, it ensured the public comment period is not an empty exercise by requiring that amendments be "reasonably germane" to the theme, purpose, or subject of the original measure.

In sum, both the plain text of Section 9002(b) and its origins in the single subject rule confirm that the "reasonably germane" requirement must be construed broadly.[7]

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[7] In the trial court, CDAA suggested the Attorney General was somehow arguing that "the recent changes to [Section 9002(b)] empower the Attorney General with unilateral discretion to determine if a proposed initiative measures conforms to or violates the constitutional 'single subject rule.'" (Pet. App., Vol. 2, Tab 14, p. 1.) The Attorney General makes no such claim. Although Section 9002(b) employs the same standard as the single subject rule, a decision under Section 9002(b) simply determines whether an amended measure may proceed to the signature gathering stage, or must be deemed a "new" submission—and not whether it violates the Constitution. In *Schmitz v. Younger*, *supra*, 21 Cal.3d at pp. 92-93, this Court held the Attorney General has no authority to unilaterally declare that an initiative measure violates article II, section 8(d) of the Constitution. Section 9002(b), in contrast, is a procedural requirement; it merely governs which path an amended initiative measure must take to qualify for the

(continued...)

2. The trial court's ruling rewrites Section 9002(b) to include restrictions on amendments that are not included in the plain text and that are unworkable.

The trial court went far beyond the plain terms of Section 9002(b) by holding that: (1) the Attorney General's acceptance of "substantive" amendments after the close of public comment violated the "purpose and intent" of Section 9002(b), which is to give the public an opportunity to point out "errors" and "unintended consequences"; and (2) the Legislature sought to prohibit "gut and amend" tactics, and the amendments here are "the type of mischief that the Legislature had in mind, otherwise a measure could change substantive law and then after the public comment period, put in a new amendment changing substantive law without the ability of the public to review it." (RT 40:7-41:15; see also RT 15:11-19; 16:11-13.) These restrictions appear nowhere in the text of the statute and otherwise have no basis.

The Legislature permitted *any* amendments, including "substantive" amendments, up to five days after the close of the public comment period, so long as they are reasonably germane. The fact that an amendment may be "substantive," even sweeping, does not necessarily make it any less

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(...continued)
ballot and does not alone preclude the measure from being placed before the voters.

The Constitution provides that the Attorney General shall prepare a title and summary for a ballot measure "as provided by law." (Cal. Const., art. II, § 10, subd. (d).) In enacting Section 9002(b), the Legislature exercised its authority to establish laws governing the title and summary process. To guide the Attorney General's exercise of discretion, it borrowed the standard developed by the courts in single subject rule cases. CDAA apparently has no objection to this framework; it simply contends, without any authority or plausible explanation, that Section 9002(b) is significantly *more* restrictive than the single subject rule.

"germane" to the "theme, purpose, or subject" of the measure as originally proposed.

Indeed, the legislative history of the statute clearly forecloses the trial court's rationale. Prior to SB 1253, the statute distinguished between "technical, nonsubstantive amendments" and other amendments. (Former Elec. Code, § 9002, subd. (a) (West 2014).) Specifically, submission of amendments "*other than technical, nonsubstantive amendments*" re-started the clock on the Attorney General's time to prepare the circulating title and summary. (*Ibid.*, italics added.) The Legislature could have, but did not, incorporate the same distinction when it adopted SB 1253. Instead, it permitted "amendments" until the 35th day after submission of the original measure without: (1) any limitation on scope aside from the "reasonably germane" requirement; and (2) any extension of the public comment period, the Legislative Analyst's time to prepare a fiscal analysis, or the Attorney General's time to prepare a circulating title and summary. The trial court erred by reinserting terms the Legislature deliberately omitted when it enacted SB 1253.[8]

The trial court's "gut and amend" restriction likewise appears nowhere in the plain text and would be difficult or impossible to administer. By the trial court's logic, *any* substantive amendment could cause a "gut and amend" problem, even one submitted in the first 30 days.

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[8] The trial court's distinction between "substantive" and "non-substantive" amendments ignores that *any* amendment, no matter how small—even the placement of a comma—can have major substantive ramifications. (See, e.g., *White v. County of Sacramento* (1982) 31 Cal.3d 676, 680 [explaining the "last antecedent rule"].) Despite this fact, the Legislature made no provision to extend or restart the public comment period when amendments are submitted near or after the close of public comment. Such a scheme would only serve to slow down the initiative process, and strongly discourage, rather than encourage, proponents from submitting amendments.

The trial court was explicit about this, voicing concern that whenever "sweeping" amendments are submitted, the public must be given a "full and fair opportunity to comment on them." (RT 26:10-12.) Thus, with each "substantive" amendment, the Attorney General would have to ensure the public had an *adequate* opportunity to comment, which would depend on how much time the public had to study it before the close of the comment period, whether the amendment could be characterized as "sweeping," whether the amendment proposed a constitutional change, or any number of other considerations, none of which appears or is contemplated in Section 9002(b). The trial court's approach is both without basis in the statute and unworkable.

The trial court also misunderstood Section 9002(b)'s prohibition on amendments if the original proposal would not "effect a substantive change in law." *This*—in combination with the "reasonably germane" requirement—was the Legislature's chosen means of addressing potential manipulation of the process by "gut and amend" and "spot initiatives." Here, because the original measure would undoubtedly have effected a substantive change in law, that should have alleviated any concern. Instead, the trial court found it "instructive" that this prohibition exists and then expanded it dramatically by unfounded implication.

The trial court's decision proceeds from the incorrect premise that the "purpose and intent" of Section 9002(b) is to benefit the *public* by giving it an opportunity to comment on initiative measures before they are circulated for signatures. (RT 40:9-19; 40:26-41:5.)[9] In fact, the purpose of Section

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[9] The trial court further suggested that the purpose and intent of SB 1253 was to give the public a "preview of what may be circulated to them for their signatures." (RT 18:11-12.) The problem with this logic is that the Attorney General posts all amendments on its website, so the public does get a "preview" of every amended measure, even if the public

(continued...)

9002(b) is to aid the *proponents of initiative measures* by making it easier for them to obtain public input, and to submit amendments; the opportunity to amend after the close of public comment, by necessity, means there is no iron-clad right to comment on any and all amendments. Plainly, the Legislature meant to encourage amendments without unduly restricting the people's right of initiative by forcing proponents to submit to multiple, potentially duplicative layers of public review before a circulating title and summary has even been issued.[10]

Finally, the trial court erred by ignoring repeated guidance from this Court that, in order to protect the people's right of initiative, "unreasonably literal or inflexible" readings of election law requirements governing the ballot measure process are to be avoided. (*Costa v. Superior Court* (2006) 37 Cal.4th 986, 1013.) This Court has also "narrowly circumscribed" the power of state and local officials to "impede or delay the initiative process." (*Schmitz v. Younger*, *supra*, 21 Cal.3d at p. 92.) In contravention of these well-settled principles, the trial court's expansive and unsupported reading of Section 9002(b) would require the Attorney General to reject amendments whenever, in her judgment, the public did not get a *meaningful* or *adequate* opportunity to comment. By the trial court's logic,

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(...continued)
comment period may have already closed. Aside from that, once title and summary has issued, the circulating petition itself gives the public ample opportunity to study the measure. Indeed, public review and debate about a measure will typically carry on for months before it is actually voted on, which, as petitioners put it, is the "ultimate public comment." (Emergency Petition, p. 3.)

[10] To the contrary, the Legislature deliberately kept the initiative process moving quickly by giving the Legislative Analyst's Office and the Department of Finance only 50 days after initial submission of the measure to complete their fiscal analysis, regardless of whether or when the measure is amended. (Elec. Code, §§ 9002, subd. (b)(3), 9004, subd. (b).)

any amendment that goes beyond a minor modification to the existing terms could violate Section 9002(b). SB 1253 does not give the Attorney General such broad authority to intervene in the initiative measure qualification process.

3. The trial court ignored that the juvenile and criminal justice systems are interconnected, and that the original measure addressed adults as well as juveniles.

The trial court erred in holding that the amendments to 15-0121 are not reasonably germane to the theme, purpose, or subject of the original initiative. As discussed below, the amended measure continues to focus on the same theme, purpose, and subject of promoting rehabilitation of criminal offenders, with a special emphasis on juvenile offenders, and enhancing public safety.

As originally proposed, 15-0121 contained various provisions aimed at reforming "California's juvenile and criminal justice systems" with a particular focus on rehabilitating juveniles, many of whom are prosecuted and sentenced as adults under existing law, as well as inmates who were prosecuted as adults for Three Strikes offenses they committed before they turned 24, and have been serving long prison sentences. (See 15-0121, §§ 2, 3; see also *id.*, § 8.) Whereas existing law requires some juveniles to be prosecuted as adults, and authorizes district attorneys to prosecute some juveniles as adults without first seeking a determination that the accused is unfit for prosecution as a juvenile, Section 4 of the measure eliminated both mandatory and so-called "direct filing" of charges against juveniles in adult court. (*Id.*, § 4 [amending Welf. & Inst. Code, §§ 602, 707, 731]; see also *id.*, §§ 5-6 [amending Pen. Code, §§ 1170.17, 1170.19; Welf. & Inst. Code, §§ 707.01, 707.1, 707.2, and 1732.6].)

Section 8 of the measure expanded parole consideration for inmates who were convicted and sentenced under the Three Strikes law for crimes

they committed before they turned 24. (*Id.*, § 8 [amending Pen. Code, § 3051, subds. (a)(2)(B), (h)].) Although Penal Code section 3051 provides for "youthful offender parole" hearings, that is a misnomer of sorts because the inmates covered by that section have already served long prison sentences by the time they become eligible. (*Id.*, subd. (b)(1)-(3).) Thus, the beneficiaries of Section 8 of the original measure would have been adult inmates exclusively, not juveniles.

Section 7 removed statutory restrictions on court orders sealing or requiring the destruction of juvenile court records of offenders convicted of various crimes deemed serious or violent. (*Id.*, § 7 [amending Welf. & Inst. Code, § 781, subds. (a)(1)(D), (d), (f)].) This provision, too, would have benefited adults who committed offenses while they were juveniles and are now trying to rehabilitate themselves and reintegrate into the community.

The amendments to 15-0121 reasonably relate to the theme, purpose, or subject of the measure as originally proposed. Amended Sections 1-3 provide, like the original, that the amended measure will reform California's juvenile and criminal justice systems to "[s]top the revolving door of crime by emphasizing rehabilitation, especially for juveniles," "[p]rotect and enhance public safety," and "[s]ave money by reducing wasteful spending on prisons." (15-0121A1, § 2; see also *id.*, § 3 [stating purpose to "enhance public safety" and "improve rehabilitation"].) In keeping with the overall theme of promoting rehabilitation and enhancing public safety, the amendments add that the measure will "[p]revent federal courts from indiscriminately releasing prisoners." (*Id.*, § 2.)

Whereas Section 8 of the original measure authorized earlier parole opportunities for Three Strikes offenders who committed their crimes before they turned 24, the amendments cover all "non-violent felons." Thus, the amended measure expands the class to include "non-violent" inmates generally, and at the same time excludes anyone convicted of a

"violent" felony, including but not limited to "violent" Three Strikes offenders who would have been eligible under the original measure.

Specifically, the measure as amended provides that "[a]ny person convicted of a non-violent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense," meaning "the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence," including but not limited to alternative sentences or enhancements imposed under the Three Strikes law. (*Id.*, § 3 [proposing new Cal. Const., art. I, § 32].) These amendments are reasonably germane to the theme, purpose, or subject of the measure as originally proposed, i.e., promoting rehabilitation and enhancing public safety.

The changes to Section 4 and the deletion of Sections 5-6 are also "reasonably germane." The amended measure, like the original, eliminates mandatory and so-called "direct filing" against juveniles in criminal court and requires that all youths have a hearing in juvenile court before they can be transferred to adult court. (15-0121A1, § 4.)

Finally, the amended measure deletes Section 7 pertaining to juvenile court records. This deletion is also "reasonably germane"; the amended version continues to focus on the overriding theme, purpose, or subject of promoting rehabilitation and enhancing public safety, but simply does so without the previously considered changes to handling of juvenile court records.

The trial court's decision was based on considerations that have no bearing on whether an amendment is "germane." The fact that the amendments propose a new constitutional provision, rather than statutory changes only, does not render the amendments any less "germane." (RT 40:4-6.) The voters are empowered to use the initiative process to achieve

their aims via constitutional and/or statutory changes. There is no authority for the proposition that any constitutional change necessarily comprises a separate and distinct "subject" from a proposed statutory amendment simply by virtue of the fact that the provisions approved by the voters will be located in the Constitution instead of statutory law. It is routine for ballot measures addressing a particular subject to make changes to the relevant portions of both statutes and the Constitution.

That the amendments may conflict with, override, or otherwise affect the operation of numerous criminal sentencing laws also sheds no light on the "germaneness" inquiry. (RT 40:4-6.) An initiative measure, after all, proposes changes to existing law. The question here is confined to whether the amendments are "reasonably germane" to the original theme, purpose, or subject of the measure; so long as they satisfy that requirement—and they do—the amendments must be accepted, regardless of how many laws they might affect. (See, e.g., *Brosnahan v. Brown*, *supra*, 32 Cal.3d at pp. 246-247 [citing with approval *Evans v. Superior Court* (1932) 215 Cal. 58, which upheld a measure encompassing "[1,700] sections covering a wide spectrum of topics within the general 'area' of 'probate law,' which sections were contained in part in several codes and statutes"]; *id.* at p. 249 [further noting that in *Evans v. Superior Court*, *supra*, the Supreme Court upheld "extensive probate legislation concerning such diverse and unrelated topics as the rights of intestate succession, the powers of guardians over the persons and estates of incompetent persons, and the sale and leasing of estate property, on the express ground that all of these provisions 'have one general object'"].)

The trial court compounded its error in holding that the "theme and purpose of the original initiative was reform of the juvenile justice system," whereas the amendment "deals primarily with reform of the adult justice system, including parole eligibility, status and credits of adult offenders.

While some of the provisions may have an impact on youthful offenders, nevertheless, the court finds that the amendment deals primarily with the reform of the adult justice system." (RT 39:21-28.) Contrary to the trial court's finding, the original measure proposed changes to "California's juvenile *and* criminal justice systems" (15-0121, §§ 2, 3, italics added), as do the amendments.

Because many juveniles are prosecuted and sentenced as adults, and some are sent to state prison when they turn 18, the juvenile and adult justice systems are interconnected, not compartmentalized, as the trial court assumed. In an attempt to promote rehabilitation, enhance public safety, and reduce cost system-wide, the original version placed a special, but not exclusive, focus on youthful offenders, including young adults.[11]

The amended measure seeks to promote these same aims, only on a larger scale, by extending eligibility for early parole to non-violent offenders as a class, and at the same time excluding anyone convicted of a "violent" crime (including but not limited to Three Strikes offenders), and authorizing CDCR to award credits for good behavior and rehabilitation, provided it certifies that its regulations in this area will "enhance public safety." (15-021A1, § 3.) The amended version also continues to emphasize rehabilitation of youthful offenders by carrying over and modifying provisions from the original which would limit the

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[11] In reaching its conclusion about the theme or purpose of the original measure, the trial court ignored that the Attorney's General's identification of the chief points and purposes of a ballot measure is ordinarily entitled to deference. (*Epperson v. Jordan* (1938) 12 Cal.2d 61, 70; *Lungren v. Superior Court* (1996) 48 Cal.App.4th 435, 439-440 [holding that "[w]ithin certain limits what is and what is not an important provision is a question of opinion," and "[w]ithin those limits the opinion of the attorney-general should be accepted by this court"], internal quotations and citations omitted.)

circumstances in which juveniles can be charged and sentenced as adults. (*Id.*, § 4.)

In *Manduley v. Superior Court*, this Court rejected a single subject challenge to a multi-faceted criminal justice measure—like this one—that encompassed changes to the juvenile justice system specifically, as well as the general criminal laws. The Court's reasoning in that case is instructive. At issue was Proposition 21, the "Gang Violence and Juvenile Crime Prevention Act of 1998," which greatly increased the authority of prosecutors to charge juveniles as adults, and made a number of changes to laws specifically aimed at criminal gang activity. (*Manduley v. Superior Court*, *supra*, 27 Cal.4th at pp. 574-575.) The measure also changed the Three Strikes law by expanding the list of crimes that qualify as "strikes" for sentencing purposes, including such crimes as robbery; kidnapping; first degree burglary; exploding a destructive device causing bodily injury; throwing acid or a flammable substance; and assaulting a peace officer or firefighter. (*Id.* at pp. 575, 577.)

While acknowledging that "some of these crimes, at first blush, might not bear an obvious relationship to juvenile or gang offenders," the Supreme Court reasoned that "[e]ven if some of the crimes . . . are more likely to be committed by an adult who is not a gang member, the offenses nonetheless constitute crimes that commonly are committed by members of street gangs and/or juvenile offenders and thus bear a reasonable and commonsense relationship to the purpose of [reducing juvenile and gang-related crime]." (*Manduley v. Superior Court*, *supra*, 27 Cal.4th at p. 578.) "The circumstance that the Three Strikes provisions affect adults in addition to juveniles and gang members does not mean that these provisions are not reasonably germane to the purpose of the initiative." (*Ibid.*)

Just as the Three Strikes amendments in Proposition 21 bore a reasonable relationship to a common theme, the amendments here bear "both a topical and a functional relationship" (*Manduley v. Superior Court*, *supra*, 27 Cal.4th at p. 578) to the theme, purpose, or subject of the measure as originally proposed. Expanding parole eligibility for non-violent offenders generally, and authorizing CDCR to award credits for good behavior and rehabilitative achievements (see 15-0121A1, § 3), will enhance public safety and promote rehabilitation to the benefit of both adults *and* juveniles who may be prosecuted as adults.

CONCLUSION

For the foregoing reasons, this Court should exercise its original jurisdiction in mandamus and enter a peremptory writ of mandate reversing the trial court's judgment.

Dated: February 29, 2016

Respectfully submitted,

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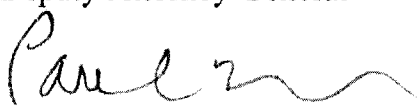

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CERTIFICATE OF COMPLIANCE

I certify that the attached **PRELIMINARY RESPONSE OF REAL PARTY IN INTEREST ATTORNEY GENERAL KAMALA D. HARRIS** uses a 13 point Times New Roman font and contains 8,147 words.

Dated: February 29, 2016

KAMALA D. HARRIS
Attorney General of California

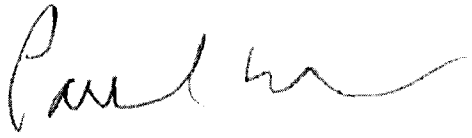

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EXHIBIT A

February 26, 2016
Initiative 15-0121 (Amdt. #1)

The Attorney General of California has prepared the following title and summary of the chief purpose and points of the proposed measure:

CRIMINAL SENTENCES. JUVENILE CRIMINAL PROCEEDINGS AND SENTENCING. INITIATIVE CONSTITUTIONAL AMENDMENT AND STATUTE.

Allows parole consideration for persons convicted of nonviolent felonies upon completion of full prison term for primary offense, as defined. Authorizes Department of Corrections and Rehabilitation to award sentence credits for rehabilitation, good behavior, or educational achievements. Requires Department of Corrections and Rehabilitation to adopt regulations to implement new parole and sentence credit provisions and certify they enhance public safety. Provides juvenile court judges shall make determination, upon prosecutor motion, whether juveniles age 14 and older should be prosecuted and sentenced as adults. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local government: **Net state savings that could range from the tens of millions of dollars to the low hundreds of millions of dollars annually primarily due to a reduction in the prison population from additional paroles granted and credits earned. Net county costs that could range from the millions to tens of millions of dollars annually, declining to a few million dollars after initial implementation of the measure.** (15-0121.)

DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **Governor Edmund G. Brown Jr., et al. v. Superior Court of the State of California, County of Sacramento**
No.: **S232642**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 29, 2016, I served the attached

PRELIMINARY RESPONSE OF REAL PARTY IN INTEREST ATTORNEY GENERAL KAMALA D. HARRIS

by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

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

N. Newlin
Declarant

Signature

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