IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

O.G.,

Petitioner,

vs.

THE SUPERIOR COURT OF VENTURA COUNTY,

Respondent;

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

COURT NO. S259011

Court of Appeal
No. B295555

Ventura County
Superior Court
No. 2018017144

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

REAL PARTY IN INTEREST'S ANSWER TO THE BRIEFS OF AMICI CURIAE

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ARGUMENTS IN REPLY TO THE BRIEFS OF AMICI CURIAE

I.

THIS CASE IS ABOUT THE LIMITS OF LEGISLATIVE AUTHORITY TO AMEND VOTER INITIATIVE ENACTMENTS: IT IS NOT ABOUT JUVENILE JUSTICE

The only issue in front of this court is whether Senate Bill 1391 satisfies Proposition 57's amendment clause which requires legislative amendments be "consistent with and further the intent of" the act. As such, this case is about self-governance and the limits of legislative authority to override the voice of the people.

Several amici have disserted on the evolution of juvenile justice policy in California. (E.g. Brief of the Attorney General [hereafter AG Brief] at pp. 10-18; Brief of Human Rights Watch, the Anti-Recidivism Coalition, and the W. Haywood Burns Institute [hereafter Human Rights Watch and HRW Brief] at pp. 7-8.)[1] But, as the Court of Appeal in this case correctly noted, the history of juvenile murderers' treatment is "largely [] irrelevant" to the issue at hand. (*O.G. v. Superior Court* (2019) 40 Cal.App.5th 626, 629 (*O.G.*).) Likewise, the discussions of scientific and scholarly research (e.g. AG Brief at p. 26; Brief of

[1] Human Rights Watch includes several "lived experiences," of juvenile offenders. (HRW Brief at pp. 19-27, 33-38.) With the possible exception of the Senate testimony of Robert Garcia (see HRW Brief at p. 24, fn. 15), these unsworn stories are neither part of the record in this case nor subject to judicial notice. Real party in interest requests this court not consider these "lived experiences." (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn. 14 [court can strike or disregard material outside record and not subject to judicial notice].)

Equal Justice Initiative [hereafter EJI Brief] at p. 21; Brief of the Pacific Juvenile Defender Center and Independent Juvenile Defender Program Los Angeles County Bar (hereafter Pacific Juvenile Defender Center and PJDC Brief] at pp. 29-30, 33, 35), while relevant in a juvenile policy debate, are pertinent here only to the extent those writings informed the voters' decision to enact Proposition 57.

The issue presented for this court's review is neither the appropriate age at which a juvenile murderer might be transferred to adult court (see AG Brief at p. 10; Brief of Amicus Populi [hereafter AP Brief] at p. 18) nor the role of science in informing public safety policies. (See Brief of the Los Angeles District Attorney [hereafter LADA Brief] at 11; AP Brief at pp. 72-76.) The issue isn't what the juvenile policy should be, or whether the Legislature's approach in SB 1391 is wise, or wiser, than the approach adopted by the voters in Proposition 57. (See *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1265 (*Amwest*) [question not whether exempting surety insurance from some provisions of Proposition 103 furthers the public good, but whether doing so furthers the purposes of Proposition 103]; see also *Gardner v. Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1372-1373, 1378 (*Gardner*) [rejecting amendment to Proposition 36 (drug treatment); question not about wisdom of legislation but about consistency with initiative].)

The issue isn't even whether *petitioner* should be transferred. The Pacific Juvenile Defender Center mistakenly allege the Ventura Superior Court granted the prosecutor's motion to transfer petitioner. (See PJDC Brief at p. 14.) Instead,

the court ordered a probation report be prepared so that a hearing could be held. (See Brief of the Criminal Justice Legal Foundation [hereafter CJLF Brief] at p. 9.) Upholding the decision of the Court of Appeal in this case means only that petitioner will get a transfer *hearing*, there is no guarantee of the result.

Whatever impact this case has on juvenile justice, it will also have reverberating impacts on the initiative process itself. How the court construes Proposition 57's amendment clause and the relative deference shown to the electorate and the Legislature will inform future initiative authors and voters deciding whether and to what extent to permit legislative amendment to initiative measures. (See *Amwest*, *supra*, 11 Cal.4th at p. 1256 [without effective review drafters of future initiatives will withhold permission to amend]; Brief of the California District Attorneys Association [hereafter CDAA Brief] at p. 47.)

The California Constitution proudly stands alone in its reverence for self-governance. (See e.g. *People v. Kelly* (2010) 47 Cal.4th 1008, 1033-1035 (*Kelly*) [discussing uniqueness of California's initiative protections]; Real Party in Interest Answer Brief on the Merits [hereafter Answer Brief] at pp. 12-14; AP Brief at pp. 78-79; CJLF Brief at pp. 21-24; LADA Brief at pp. 12-15.) Thus, this court may only approve SB 1391 if by any reasonable construction its amendments are consistent with and further the intent of Proposition 57. (See *Amwest*, *supra*, 11 Cal.4th at p. 1120.) Yet amici in support of petitioner advance positions that, by overwriting or narrowly construing the expressly stated intent of Proposition 57, would ultimately accord undue deference to legislation that overturns voter

enacted policy. (See LADA Brief at p. 13 [noting petitioner is asking court to make it easier for Legislature to amend initiatives].)

It may be that as amendments are tried and tested, few will survive scrutiny. That result should not be decried. It is undisputed that the voters have the absolute right to preclude amendment altogether, to permit unfettered amendment, or to allow only minor changes. Whatever they choose, the voters' choice is supreme. (*Amwest*, *supra*, 11 Cal.4th at p. 1251.) Amendments falling outside the boundaries set by the electorate's amendment clause might become law, but only if the voters give consent to those amendments at the ballot box. As the Los Angeles District Attorney observes, obtaining voter approval is not an onerous task for the Legislature. (LADA Brief at p. 14.) More importantly, requiring voter approval ensures the electorate's intentions will be honored.

II.

THE PUBLIC DRAFTING HISTORY OF PROPOSITION 57 INFORMED THE VOTERS' INTENT TO ENACT A BALANCED JUVENILE JUSTICE POLICY

The Pacific Juvenile Defender Center argues nothing in the voter materials or the text of Proposition 57 supports real party's "argument that the voters intended to restore balance to the system, providing rehabilitation to most youth, but reserving transfer for the most egregious cases involving 14 and 15-year-olds." (See PJDC Brief at p. 42, referring to Answer Brief at pp. 41-42.) Real party submits the argument about the voters' balanced approach is apparent throughout

the ballot materials and Proposition 57's provisions which enacted a system where most youths would receive juvenile rehabilitative services while the most egregious cases would be transferred to the adult system. (See CDAA Brief at pp. 13-15[extensive restructuring leaves no reasonable dispute that language added by Proposition 57 to § 707, subd. (a) enacted by Proposition 57].) The argument that the voters intended a balanced approach is also supported by the drafting history of Proposition 57.

In *Brown v. Superior Court* (2016) 63 Cal.4th 335, 340-341, decided a few months before the election, this court explained that the proponents of Proposition 57 initially drafted the initiative to "[e]stablish 16 as the minimum age at which juveniles may be transferred to adult court." (*Ibid*.) After speaking with various stakeholders including the California District Attorneys Association and the Governor, "the proponents submitted a revised measure . . . ." which permitted transfer "for 14 or 15 year olds accused of certain serious crimes." (*Ibid*.) The proponents also changed the title of the act from "The Justice and Rehabilitation Act" to "The Public Safety and Rehabilitation Act of 2016." (*Brown v. Superior Court*, *supra*, 63 Cal.4th at pp. 340-341.) The revisions also changed the amendment clause dramatically, replacing the original version which had specified that "[t]he provisions of this measure may be amended to further reduce the number of categories of youth transferred to the adult system or otherwise incarcerated by a statute that is passed by a majority vote of the members of each house of the Legislature and presented to the Governor." (See *The Justice and*

Rehabilitation Act, 15-0121, as submitted to the Attorney General Dec. 22, 2015, Real Party in Interest Request for Judicial Notice, exhibit 1, pp. 34-35.)

As some amici have noted, there are numerous possible explanations for the amendments. (See AP Brief at pp. 38-39; CDAA Brief at p. 47.) What matters here however, is what the voters expected. An initiative cannot be interpreted "in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114; see also *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 909; *People v. Valencia* (2017) 3 Cal.5th 347, 375 (*Valencia*).) The drafters' intentions are, therefore, inconsequential to this case. But that does not mean the public drafting history is irrelevant.

The rule that "[t]he opinion of drafters or legislators who sponsor an initiative is not relevant" is based in large part on the fact that courts generally "cannot say with assurance that the voters were aware of the drafters' intent. [Citations.]" (*Robert L. v. Superior Court*, *supra*, 30 Cal.4th at p. 904, citing *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Comm.* (1990) 51 Cal.3d 744, 764–765, fn. 10.) In this case, however, the drafting history of Proposition 57 was presented in a public forum. As CDAA has noted, "the original version of Proposition 57 was posted on a public website for 30 days and made available to anyone with a computer . . . ." (CDAA Brief at p. 44 and fn. 4; Elec. Code, § 9002, subd. (a).) Moreover, the history was discussed by this court in *Brown v. Superior Court*, *supra*, 63 Cal.4th at pp. 340-341.

For these reasons, the court's refusal in *People v. Superior Court (T.D.)* (2019) 38 Cal.App.5th 360, 376–377, to conclude voters were aware of the drafting history was incorrect. A well-informed electorate would be aware of the publicized history of the initiatives they were asked to consider. (See *Valencia*, *supra*, 3 Cal.5th at p. 369, [voters presumed to have voted intelligently, aware of the law].) The voters reasonably could know, and therefore should be presumed to have known, the published draft history of Proposition 57.

The issue isn't whether the voters understood or agreed with the authors' intentions. Even if the voters didn't know why the changes were made, the voters knew that the authors had (1) rejected 16 as the minimum age for transfer and (2) eliminated permission for the Legislature to use the initiative as a stepping stone toward wholesale repeal of transfer jurisdiction. And, as this court recognized in *Kelly*, *supra*, 47 Cal.4th at p. 1042, fn. 59, voters permit amendments believing that the Legislature will not seek to amend voter approved statutes "without at least the tacit approval of the proponents." (See CJLF Brief at p. 26.) Thus, the question is whether, armed with publicly available knowledge of the initiative's drafting history, the voters reasonably could have believed that re-instating a categorical ban on transfer of 14- and 15-year-old offenders would be consistent with and further the intent of Proposition 57. Real party submits the answer is "no," because nothing in the initiative or ballot materials could have enlightened that intent. (See *Valencia*, *supra*, 3 Cal.5th at p. 375.)

Two panels of the Court of Appeal concluded differently. In *People v. Superior Court (K.L.)* (2019) 36 Cal.App.5th 529, 536, fn. 4, the court concluded that the drafting changes demonstrate SB 1391 furthers the proponents' intent. In *People v. Superior Court* (*Alexander C.*) (2019) 34 Cal.App.5th 994, 1002–1003, the court concluded the drafting changes meant permitting transfer of juveniles under the age of 16 was not a purpose of Proposition 57. Respectfully, both positions are of little consequence as both focus on the intent of the proponents which is not at issue here. Moreover, those cases did not discuss the significance of the changes to the amendment clause. No *voter* aware of the drafting history would presume the proponents, after removing the 16 year age limitation and the provision that would expressly have permitted additional age limitations on transfer, intended to have the Legislature replace the ban on transfer of 14- and 15-year-old offenders.

The only reasonable interpretation is that the voters approved Proposition 57 aware that it "embodied a compromise position" and in so doing anticipated "the version they **approved**, not the one **withdrawn**, would govern the state" (AP Brief at p. 39, original emphasis) and not be merely a "starting point" for enacting the withdrawn policy. (See AG Brief at pp. 10-11.)

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III.

NO REASONABLE CONSTRUCTION OF PROPOSITION 57'S AMENDMENT CLAUSE CAN INCLUDE FEWER THAN TWO DISTINCT REQUIREMENTS

A. The Voters Did Not Make It Easy to Amend Proposition 57.

The California Public Defenders Association and Todd W. Howeth, Public Defender for the County of Ventura (hereafter the California Public Defenders Association) argue that by not requiring a super majority vote, the voters made Proposition 57 easy to amend. (Brief of the California Public Defenders Association [hereafter CPDA Brief] at pp. 15-16.) The California Public Defenders Association argues further that because the authors of the initiative "enjoyed a great relationship with the Legislature . . . ." they trusted the Legislature with a "very permissive amendment clause . . . ." (CPDA Brief at p. 15.) This assumption may or may not be correct, but there is no evidence before this court allowing it to be made.

Moreover, if the drafters intended to include a permissive amendment clause so that the Legislature could unilaterally reduce the number or categories of youth transferred to the adult system, they would have asked to voters to enact a clause providing: "The provisions of this measure may be amended to further reduce the number or categories of youth transferred to the adult system or otherwise incarcerated . . . ." They did not. In fact, that exact language was *eliminated* from the final version of the initiative after the initial version of the

proposal was posted on the Attorney General's public comment website pursuant to Elections Code section 9002, subdivision (a). (See *The Justice and Rehabilitation Act*, 15-0121, as submitted to the Attorney General Dec. 22, 2015, Real Party in Interest Request for Judicial Notice, exhibit 1, pp. 34-35; see also CDAA Brief at p. 44 and fn. 4.) Informed voters would therefore have been aware of the change.

Had opponents of Proposition 57 claimed that its passage would allow the Legislature to prohibit transfer of a category of youth – or all youth – regardless of whether the transfer decision was subject to judicial oversight, the proponents undoubtedly would have labeled the allegation farcical since they had expressly removed that authorization from the final version of the initiative. (See CDAA Brief at p. 43 [claims that Propositon 57 would give Legislature carte blanche "to eliminate *all* criminal prosecutions" of juvenile offenders "too far-fetched to have made it into the campaign or ballot arguments by those opposed to Proposition 57"].) More importantly, as presented, no voter aware of the drafting history would presume the amendment clause presented for their approval would have functioned identically to the version that had been withdrawn.

Real party also disagrees with the presumption that the content restrictions imposed by Proposition 57 are easier to comply with than a supermajority requirement. Even if it is generally easier to pass a bill by a simple majority, the point is whether the bill, as passed, is permitted. With the requirement of a supermajority, the Legislature would have been free to amend the law in any

manner that body saw fit. But with the requirement that any amendment be consistent with *and* further the intent[2] of the initiative, legislative action is restrained no matter how many lawmakers are in favor of the change.

Because "[i]t is common for an initiative measure to include a provision authorizing the Legislature to amend the initiative without voter approval only if the amendment furthers the purpose of the initiative. . . ." (*Amwest*, *supra*, 11 Cal.4th at p. 1251), the fact that a more restrictive two-factor provision was included in Proposition 57 does not indicate an electorate particularly trusting of the Legislature or amenable to sweeping amendments. This court should read the clause to mean what it actually says: voters were amenable only to amendments that would be both consistent with and further the purpose of Proposition 57.

B. Both Factors in the Amendment Clause – Consistent with and Furthers the Intent of – Must Be Given Significance.

Grammatically the clause "consistent with and furthers the intent of the Act" is like this sentence: "She is walking with and enjoying the company of her best friend." No commas are needed. No English speaker would understand this sentence to mean the girl is walking with her best friend's company. As written, without commas, the sentence conveys the girl is walking with her best friend and enjoying the company of her best friend.

[2] As the Los Angeles District Attorney has correctly observed, the word "intent" is always singular in Proposition 57. (See LADA Brief at p. 15.) However, as the enacted "Purpose and Intent" provision contains five distinct prongs, real party sometimes refers to these as multiple purposes and intents of Proposition 57.

Real party submits the absence of commas in the amendment clause means that "consistent with" and "furthers the intent of" both act on the subject, "this act" in the same way "walking with" and "enjoying the company of" both act on the subject "her best friend." (See CDAA Brief at pp. 20-21; AP Brief at pp. 30-32.) In this interpretation, both phrases and all words have significance; nothing is surplusage. This interpretation also means amendments that are not consistent with Proposition 57 are not permitted. Accordingly, the court below properly found SB 1391 was "inconsistent as a matter of law" with Proposition 57. (*O.G.*, *supra*, 40 Cal.App.5th at p. 629.)

Amici for petitioner argue the phrase "consistent with" acts on "the purpose of this act" and thereby adds very little, if anything at all, to an examination of whether an amendment is lawful. However, as amici in support of real party have aptly noted: "[i]t is nigh impossible to conceive of an amendment that furthers the intent of an initiative without also being consistent with it. . . ." (CDAA Brief at pp. 21-22) because "every change *furthering* a purpose, a fortiori, will be *consistent* with that purpose . . . ." (AP Brief at p. 32). Bedrock principles of construction warn however that a "construction that renders a phrase or word surplusage should be avoided. . . ." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 [use of word "any" in newsperson's shield law meant disputed section applied to all information, even if not confidential].) "[E]very word should be given some significance, leaving no part useless or devoid of meaning." (*City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54 ["special" in term

"special tax" does not mean "extra or supplemental" because all new taxes would be "extra or supplemental" and thus "special" would be written out of statute].) The interpretation favored by amici for petitioner must be rejected because it would render the phrase "consistent with" and the word "and" devoid of meaning.

The Attorney General asserts this principle can be ignored because in his view, "consistent with and further" is an idiom akin to such common terms as "true and correct" or "cease and desist." (AG Brief at p. 38 and fn. 6.) This assertion fails initially because "consistent with and further" is not an idiom. Merriam-Webster defines idiom as "an expression in the usage of a language that is peculiar to itself either in having a meaning that cannot be derived from the conjoined meanings of its elements (such as *up in the air* for 'undecided') or in its grammatically atypical use of words (such as *give way*) . . . ." (Merriam-Webster Online Dict. https://www.merriam-webster.com/dictionary/idiom (accessed 9/24/20), original emphasis.) Even in legal circles, however, "consistent with and further" is not a common expression with a peculiar meaning, nor is the wording common in everyday usage. (See *People v. Brigham* (1979) 25 Cal.3d 283, 296, (conc. opn. of Mosk, J.) [noting jurors would not understand the term "moral evidence" because it had passed out of the common idiom by lack of usage].)

In contrast, regardless of whether the terms identified by the Attorney General (AG Brief at p. 38 and fn. 6) are, in fact, idioms, it is clear they have long been entrenched in popular and legal jargon. (See e.g. *Kibbe v. Kibbe* (Conn. Super. Ct. 1786) 1 Kirby 119, 122 [early usage of "free and clear of all

incumbrances whatever"]; *Taylor's Ex'rs v. M'Donald* (S.C. Const. App. 1818) 9 S.C.L. 178, 321 [2 Mill Const. 178] [early usage of "true and correct state of the case"]; *Chamberlin v. Griggs* (N.Y., May 1846) 3 Denio 9, 10 [1846 WL 4114] [early usage of "cease and desist from his just opposition"]; *Blair v. Wallace* (1863) 21 Cal. 317, 318 [early usage of "various and sundry misunderstandings and disagreements"].) Even so, the continued usage of these terms does not provide grounds for perpetuating *new* redundancies and surplusage in statutory construction.

However it is punctuated, "consistent with and further" is not likewise established. The combination of words was used by California's voters in Proposition 116, the Clean Air and Transportation Improvement Act of 1990, and in Proposition 117, the California Wildlife Protection Act of 1990. As Amicus Populi notes, these acts inserted commas into the full clause so that amendment is permitted only if the change "is consistent with, and furthers the purposes of," the initiative enactment. (See Pub. Util. Code, § 99605, as enacted by Prop. 116; Voter Information Guide, Primary Elec. (June 5, 1990) text of Prop. 117, p. 76; see also AP Brief at p. 32.) In contrast, Government Code section 51040.1, enacted by the Legislature (Stats. 2013, c. 406 (A.B. 551)), placed the commas differently in its finding that "small-scale" urban farming "is consistent with, and furthers, the purposes of this act." (Gov. Code, § 51040.1 was unrelated to Prop. 116 or Prop 117.)

The words, written without commas, have been interpreted by the Legislature in the manner urged by real party. In 2004, voters approved Proposition 63, the Mental Health Services Act (MHSA). Like Proposition 57, the MHSA omitted commas, allowing amendments that "are consistent with and further the intent of this act." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 63, p. 108.) Thereafter, in 2019 the Legislature enacted SB 389 which amended portions of the MHSA. The Legislature inserted commas, finding that its amendments were "consistent with, and further[ed] the intent of, the Mental Health Services Act . . . ." (Stats. 2019, ch. 209 (S.B. 389), § 2.) The Legislature construed the words, originally written without commas, in the exact manner as real party submits Proposition 57's amendment clause should be construed.

As real party has already discussed (see Answer Brief at p. 24) the majority in *T.D.*, *supra,* 38 Cal.App.5th 360, 372, acknowledged that when the amendment clause is interpreted as written, SB 1391 is unconstitutional. (*Id*. at p. 372; see also *Narith S. v. Superior Court* (2019) 42 Cal.App.5th 1131, 268 [if clause provided for "amendments that are consistent with, and further the intent of, the proposition," analysis might be different].) The *T.D.* court rejected the plain language based in part on supposition that a clause with two restrictions would preclude any amendment at all, and that if the voters intended that result, they simply would have refrained from allowing amendments. (*Ibid.*) The express use of commas in initiative measures such as Propositions 116 and 117, and the Legislature's use of commas in amending Proposition 63 demonstrate both aspects

of the *T.D.* majority's supposition were incorrect because (1) reading the amendment clause "to allow amendments that are consistent with the express language of the Act and that further the intent of the Act" (*T.D., supra,* 38 Cal.App.5th at p. 372) *does* permit amendment; and (2) voters *would* incorporate both restrictions in initiative measures.

C. Construing the Amendment Clause to Contain Two Distinct Requirements Does Not Prevent Legislative Amendment.

Amici for petitioner, and several panels of the Court of Appeal have asserted that if the changes rendered by SB 1391 are not permitted, no amendment at all will be possible. (See e.g. *T.D.*, *supra*, 38 Cal.App.5th at p. 372; accord *Narith v. Superior Court* (2019) 42 Cal.App.5th 1131, 1141; AG Brief at p. 36.) Real party has already addressed this assertion (Answer Brief at pp. 24-25) as has the California District Attorneys Association. (CDAA Brief at pp. 16-20, 22-24.)[3] Amici for petitioner's all or nothing position represents a misreading of real party's arguments. Real party's arguments are not about amendments to mere language. Instead real party's argument is that SB 1391 repeals an intentional policy decision made by the electorate, as evidenced by the express statement of the voters' intent and the specific statutory provisions enacted by Proposition 57. Indeed, if the Legislature can, in the guise of furthering an initiative's purpose,

[3] Real Party does not agree that the changes discussed by the Los Angeles District Attorney (LADA Brief at pp. 21-22) would be consistent with and further the purpose of Proposition 57.

reverse the underlying policy determination selected by the voters, then far more sweeping amendments will also be permitted until the law as amended bears no resemblance to the law enacted by the voters.

IV.

NO REASONABLE CONSTRUCTION OF PROPOSITION 57 CAN CONCLUDE THAT SB 1391 IS CONSISTENT WITH AND FURTHERS THE INTENT OF PROPOSITION 57

A. SB 1391 Is Not Consistent with and Does Not Further the Intent of Proposition 57 to Require a Judge to Determine whether a Juvenile Offender Should be Transferred to Adult Court.

Amici in support of petitioner have unilaterally condemned real party's assessment that the intent of Proposition 57, as defined and enacted by the voters, was to authorize transfer of 14- and 15-year-old offenders by requiring a judge decide when transfer is appropriate. Instead amici in support of petitioner argue the purpose of Proposition 57 was to reduce by any means the number of juvenile offenders tried as adults. (See, e.g. AG p 24, 36, CPDA 14-15.) Amici's arguments fail because construing a potential *result* referenced in the ballot materials as a more expansive *purpose* than any of the expressly stated intents would be inconsistent with and would not further the intent of Proposition 57. (See *Valencia*, *supra*, 3 Cal.5th at pp. 363, 364.) The argument fails the *Amwest* standard because an amendment cannot reasonably be construed as furthering voter intent if upholding the amendment requires abrogating one of the expressly

stated intents with any other overarching, fundamental, or even express purpose. (See CDAA Brief at pp. 13, 27; LADA Brief at pp. 24-25.)

Though it is appropriate for the court to look outside an express statement of intent, no purpose, express or otherwise, can abrogate any prong of the "purpose and intent of the people of the State of California" (Voter Information Guide, *supra*, text of Prop. 57, § 2, p. 141; exhibit C, p. 69; see LADA Brief at p. 24-25.) That amici in support of petitioner might identify one, several, or dozens of implied purposes furthered by SB 1391 is irrelevant. Unless the amendments further each expressly enacted purpose and intent *and* any additionally identified purpose, the legislation is invalid. (See *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354, 1370 [even amendment shown to further initiative purposes will be invalid if it violates a specific primary mandate]; *Gardner*, *supra*, 178 Cal.App.4th 1366, 1378 -1379 [invalidating amendment to initiative even if consistent with one purpose because it was "inconsistent with the proposition's other primary purposes"].) This court in *Amwest* did not draw the initiative's purpose "from many sources" in order to find a single overarching purpose that the contested amendments furthered, but instead to ensure the amendments furthered *all* of the initiative's intents and purposes, express or implied. (*Amwest*, *supra*, 11 Cal.4th 1243, 1256-1257.)

As the Pacific Juvenile Defender Center notes, the initiative and ballot materials were transparent about the intent of Proposition 57. (PJDC Brief at p. 39.) The initiative's text transparently identified that "[i]n enacting this act, it is

the purpose and intent of the people of the State of California to . . . . Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." (Voter Information Guide, *supra*, text of Prop. 57, § 2, p. 141; exhibit C, p. 69; see LADA Brief at p. 15 [intent of Proposition 57 easy to find].) This express intent was discussed repeatedly in the Voter Information Guide (See Answer Brief at pp. 35-37; Voter Information Guide, *supra*, Official Title and Summary, pp. 53-55; exhibit C, pp. 63-65), and realized in the codified statutory enactments of Proposition 57. (Welf. & Inst. Code, § 707, subd. (a); Voter Information Guide, *supra*, text of Prop. 57, § 4.2, pp. 142-143; exhibit C, pp. 70-71.) As the California District Attorneys Association observes, "[t]he ***only*** language ***enacted*** by Proposition 57 requiring a judge to decide whether a juvenile should be tried as an adult is the language added to section 707(a) . . . . Thus, the voters were unmistakably told the enactment of this provision carries out the purpose and intent of Proposition 57." (CDAA Brief at p. 28, original emphasis.)

The Attorney General argues that the "goal of 'requiring judges, not prosecutors, to decide whether juveniles should be tried in adult court'" was narrowly focused only on limiting prosecutorial power. (See AG Brief at p. 23, 30, citing *Alexander C.*, *supra*, 34 Cal.App.5th at p. 1001; *K.L.*, *supra*, 36 Cal.App.5th at p. 539.) This narrow construction of the expressly stated intent falters against Proposition 57's instructions to construe its provisions liberally and broadly. (Voter Information Guide, *supra*, text of Prop. 57, §§ 5, 9, pp. 145, 146; exhibit C, pp. 73, 74; See CDAA Brief at p. 27 citing *T.D.*, *supra*, 38 Cal.App.5th at p. 381

(dis. opn. of Poochigian, J.).) As the Criminal Justice Legal Foundation observes, when liberally construed, the express intent of the voters was to require individualized determinations after full evidentiary hearings. (CJLF Brief at p. 31-32.) The Attorney General's position however would construe the provision so narrowly that the entire fifth intent could be wholly neutralized by legislative action. If SB 1391 can eliminate transfer for 14- and 15-year-old offenders, because doing so does not change the judicial function (see AG Brief at 23), then the Legislature can as easily eliminate transfer jurisdiction altogether – because doing so also would not change the judicial function. (See CDAA Brief at p. 36-37, citing *Strauss v. Horton* (2009) 46 Cal.4th 364, 450, abrogated by *Obergefell v. Hodges* (2015) 576 U.S. 644 [proper for court to consider foreseeable ramifications of decision].) A purpose to authorize wholesale elimination of transfer jurisdiction however means the voters did not intend to "require a judge" to do anything and the fifth enacted intent is surplusage in its entirety. This is not a reasonable construction of Proposition 57.

The argument discounting the role of judicial discretion also mistakenly presumes that giving or preserving *prosecutors'* discretion was not itself a fundamental purpose of Proposition 57. But the Attorney General told voters the initiative: "Provides juvenile court judges shall make determination, *upon prosecutor motion*, whether juveniles *age 14 and older* should be prosecuted and sentenced as adults for specified offenses." (Voter Information Guide, *supra*, Official Title and Summary, p.54, italics added; exhibit C, p. 64.) The Attorney

General did not explain there was a possibility that prosecutors might not be able to make a motion for transfer in the first place. Similarly, the Legislative Analyst told voters that "*prosecutors can* only" – not "might be able to" – seek transfer hearings for youths accused of specified crimes "when they were age 14 or 15 . . . ." (Voter Information Guide, *supra*, Analysis by the Legislative Analyst, p. 56, emphasis added; exhibit C, p. 66.) And, in section 707(a)(1) the voters enacted language authorizing prosecutors to move for transfer of minors aged 14 and 15. (See Voter Information Guide, *supra*, text of Prop. 57, § 4.2, pp. 142-143; exhibit C, pp. 70-71; see also CDAA Brief at pp. 13-15 [language added to § 707, subd. (a) enacted by Proposition 57].)

If, as the Attorney General and the Pacific Juvenile Defender Center have argued (AG Brief at pp. 10-11; PJDC Brief at p. 49), the proponents of Proposition 57 meant the initiative to be but an incremental step to wholesale elimination of transfer jurisdiction, the intent was obfuscated. "In fact, based on the analysis and summary they prepared, there is no indication that the Legislative Analyst or the Attorney General were even aware that the measure might" permit the amendments now under consideration. (See *Valencia*, *supra*, 3 Cal.5th at p. 367; see CDAA Brief at p. 43 [claims that overturning direct filing policies would give Legislature carte blanche "to eliminate *all* criminal prosecutions" of juvenile offenders "too far-fetched to have made it into the campaign or ballot arguments by those opposed to Proposition 57"].) No reasonable construction of Proposition 57 may assume "that voters, with greater acumen than the legal professionals of

the offices of the Attorney General and Legislative Analyst, somehow discerned" an intent to abolish prosecutors' discretion to move for transfer of 14- and 15-year-old offenders. (See *Valencia*, *supra*, at pp. 357, 375.)

The authors of Proposition 57 easily could have written the fifth intent to say, "eliminate the system of direct filing . . ." or "limit prosecutorial power. . . ." or "reduce the number of juvenile offenders transferred to adult court . . . ." They did not, and thus the voters did not agree to any of these statements of intent. (See *People v. Orozco* (2020) 9 Cal.5th 111, 123[court must interpret statutory language the electorate actually wrote].) Instead the voters enacted a provision setting out specifically the purpose to "[r]equire a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." The choice of language specifically referencing the judges' role evinces the voters' intent to preserve the mechanism for individualized judicial determinations. This intent is supported by the act's actual statutory language. (See Welf. & Inst. Code, § 707, subds. (a), (b); Voter Information Guide, Gen. Elec. (Nov. 8, 2016) Prop. 57, § 4.2, pp. 142-143; exhibit C[1], pp. 70-71 (hereafter Voter Information Guide); exhibit C, p. 65.)

Finally it bears noting that, according to the Attorney General if the fifth enacted intent is construed as focusing more on prosecutors than judges, SB 1391 "*does not undercut* Proposition 57's fifth purpose . . . ." (AG Brief at p. 23.) But "does not undercut" is not the standard – the amendment must *further* the initiative's purpose. No reasonable construction of SB 1391 leads to a conclusion that its amendments *further* the expressly enacted intent of Proposition 57.

B. SB 1391 Is Not Consistent with Proposition 57's Provisions and is Not Consistent with the Policy of Authorizing Prosecutors to Move for Transfer of 14- and 15-Year-Old Offenders to Adult Court.

SB 1391 is inconsistent with the specific provisions and policy determinations of Proposition 57. The Attorney General argues that for an amendment to be "consistent with . . . the act," it must be "harmonious or *compatible* with the purpose, overall approach, and scheme of the act." (AG Brief at p. 39.) SB 1391 fails this test. As has been discussed, the initiative expressly permitted prosecutors to move for transfer of juveniles ages 14 through 17 and required judicial determination of the motion based on enumerated criteria applied to facts and information specific and personal to the current offense and offender. (Welf. & Inst. Code, § 707, subds. (a), (b).) None of the amici have argued SB 1391 is consistent with these specific provisions.

But SB 1391's inconsistency goes beyond the reversal of specific provisions. The overall approach to juvenile proceedings enacted by Proposition 57 was a balance between returning juvenile transfer discretion to judges and maintaining public safety achieved through individualized decision making. SB 1391 undermines this balance by its indiscriminate exclusion of minors aged 14 and 15 – regardless of the nature of their offense, criminal history, culpability, or amenability to available rehabilitative efforts. SB 1391 is therefore not harmonious with Proposition 57's approach to public safety or juvenile justice.

The court below found SB 1391 was inconsistent with Proposition 57 "as a matter of law." (*O.G.*, *supra*, 40 Cal.App.5th 626, 629.) At least two other panels of the Court of Appeal have agreed SB 1391 is not consistent with Proposition 57. (See *T.D.*, *supra*, 38 Cal.App.5th at p. 372; *Narith*, *supra*, 42 Cal.App.5th 1131, 1141.) The courts' recognition of inconsistency is well taken. As the California District Attorneys Association aptly observed, "[u]nder no reasonable definition can it ever be said that a new law is 'consistent with' an initiative if [the] new law and the initiative are contradictory, are irreconcilable, or cannot co-exist." (CDAA Brief at pp. 24-25.)

C. All of the Judicial Opinions and Scientific and Scholarly Research Relied Upon by the Legislature in Support of SB 1391 Existed Prior to Passage of Proposition 57.

Amici in support of petitioner suggest the turnaround in policy was justified because the Legislature had become aware of significant new developments related to juvenile justice. (See AG Brief at pp. 17-18; HRW Brief at pp. 44-45.) Whether or not there were new developments related to juvenile justice is not relevant to the voters' intent in passing Proposition 57. But even if it was, there is no evidence of *new* developments – unavailable when Proposition was on the ballot – that prompted the Legislature to enact SB 1391;[4] instead the legislative

[4] In fact, all of the judicial opinions and scientific and scholarly research expressly relied upon by the Legislature in support of SB 1391 existed prior to passage of Proposition 57. (See Sen. Comm. on Pub. Saf., Analysis of SB 1391 (2017-2018

history reveals the Legislature just preferred a different plan. More importantly, even if the Legislature had relied on new information, that fact would not mean its amendments were consistent with or furthered the intent of Proposition 57. A contradiction in policy, even if supported by science, is still a contradiction in policy.

D. SB 1391 Does Not Further the Intent of Protecting and Enhancing Public Safety and Stopping the Revolving Door by Emphasizing Rehabilitation.

1. AB 1391 Does Not Provide Additional Enhancements to Public Safety.

Amici in support of petitioner argue SB 1391 is consistent with Proposition 57's intent to protect public safety and emphasize rehabilitation because juveniles who are successfully rehabilitated will commit fewer crimes. (See e.g. AG Brief at pp. 21-22; EJI Brief at pp. 53-56; HRW Brief at pp. 38-29.) The Attorney General goes so far as to suggest real party's arguments delineate a position where only incarceration protects public safety. (See AG Brief at p. 27, referring to Answer Brief at p. 40.) The Attorney General's hyperbole is unfounded. Real party's argument is that sometimes incarceration is the best answer, and that the voters

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Reg. Sess.) April 3, 2018, p. 5 [Sen. Comm. Pub. Saf.]; Assem. Comm. on Pub. Saf., Analysis of SB 1391 (2017-2018 Reg. Sess.) as amended May 25, 2018, p. 4; Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business analysis of Sen. Bill No. 1391 (2017-2018 Reg. Sess.) as amended Aug. 8, 2018, pp. 4-5.)

The Legislature considered only one "recent" data analysis which included information about juvenile transfers from 2016 – prior to Proposition 57's passage. (See Sen. Comm. on Pub. Saf., p. 7.)

recognized the same in Proposition 57's treatment of juveniles and intended incarceration remain an option for the most dangerous juvenile offenders.[5] Regardless of how the electorate conceptualizes public safety, SB 1391 does not further the voters' public safety intent in Proposition 57.

To further the purpose of enhancing public safety and rehabilitation, it is not enough that SB 1391 makes the public safer or provides more rehabilitation than before Proposition 57. To satisfy the amendment clause, amendments must make the public safer than they would be if Proposition 57 had not been amended. Thus, it is problematic that the Legislature did not wait to see the results of Proposition 57's policy changes. (See Sen. Comm. on Pub. Saf., p. 4; Sen. Comm.

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[5] The electorate has signaled its continued concern with violent crime by excluding violent offenders from previous ameliorative sentencing changes. (See Pen. Code, §§ 1170.126, subd. (e), enacted by Prop. 36, as approved by voters, Gen. Elec. (Nov. 6, 2012) [excluding inmates with prior violent and sex offenses as enumerated from Three-Strikes re-sentencing]; 1170.18, subd. (i), enacted by Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014) [excluding individuals with prior violent and sex offenses as enumerated from misdemeanor resentencing].) California voters also continue to support the death penalty for the state's most violent offenders. In 2016 the electorate rejected efforts to repeal the death penalty (Prop. 62, The Justice that Works Act of 2016, Gen. Elec. (Nov. 8, 2016)) and enacted the Death Penalty Reform and Savings Act of 2016, Proposition 66, designed to "facilitate the enforcement of judgments and achieve cost savings in capital cases." (*Briggs v. Brown* (2017) 3 Cal.5th 808, 822.) The voters' decisions evince a continuing desire to penalize the most violent, most culpable offenders in any category – recidivist felons, would be misdemeanants, potential parolees, murderers, and juveniles – more harshly. It appears the authors of Proposition 57 addressed the voters' concerns not only by eliminating the categorical bar on transfer of juveniles under the age of 16, but also by limiting Proposition 57's increased parole eligibility only to state prisoners convicted of a "nonviolent felony offense." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) Prop. 57, pp. 141-145.)

on Appropriations, Analysis of SB 1391 (2017-2018 Reg. Sess.) as introduced Feb. 16, 2018, p. 2 [at time SB 1391 introduced Legislature had no data related to post Proposition 57 transfers of juveniles].)[6] Instead the Legislature relied, as does Human Rights Watch (see HRW Brief at pp. 40-42), on data collected prior to Proposition 57's effective date to reach its conclusions. But numbers collected prior to implementation of Proposition 57 are irrelevant to this case. Accepting for the sake of argument the concept of public safety urged by amici for petitioner, SB 1391 only furthers that purpose if it shifts juveniles from adult prosecution (1) who would have been transferred to adult court under Proposition 57's policies and (2) who are actually amenable to rehabilitation. This analysis can only be made with data reflecting the results of Proposition 57's policies.

That data demonstrates Proposition 57's policy of individual decision making is reducing the number of juveniles transferred to adult court dramatically, especially as it relates to 14- and 15-year-old offenders. As the Criminal Justice Legal Foundation writes:

> Since Proposition 57 went into effect, D.A.'s have exercised their authority to request a transfer hearing sparingly in cases involving eligible 14-and 15-year-old offenders. In 2017, out of 255 total transfer hearings reported, only 13 of them were for 15 year olds and two were for 14 year olds. (Cal. Dept. of Justice, Juvenile Justice in California (2017) table 27, p. 86.) Of those combined fifteen reported transfer hearings for the two

[6] When that data became available it was considered only by the Assembly Committee on Appropriations. (Assem. Comm. on Appropriations, Analysis of SB 1391 (2017-2018 Reg. Sess.) as amended May 25, 2018, p. 1.)

> age groups, *none of them* were transferred to adult court by a judge. (*Ibid.*) In 2018, the numbers were even lower. Out of the 161 total transfer hearings reported, only four were for 15 year olds and another four were for 14 year olds. (Cal. Dept. of Justice, Juvenile Justice in California (2018) table 27, p. 86.) Similar to the year before, of those eight combined reported transfer hearings between the two age groups, *none were transferred* to adult court. (*Ibid*.)

(CJLF Brief at p. 19, original emphasis.)

The relevant data demonstrate Proposition 57's policy of individual decision making was working to enhance public safety – as amici for petitioner define it – because judges were retaining juvenile offenders whose needs were best served in the juvenile justice system. (See CJLF Brief at p. 20.) Given this data, it becomes clear that SB 1391's blanket exclusion can only take away from the purpose of enhancing public safety by forcing juvenile treatment of those few offenders who, based on careful individualized considerations, are not amenable to juvenile rehabilitative efforts. (See AP Brief at pp. 25, 54-55, 65-66, 73; CJLF Brief at pp. 15-16.) Even if SB 1391's amendments can reasonably be construed as being consistent with public safety for the reasons stated by amici for petitioner, its amendments do not provide additional enhancements to public safety and thus do not further the purpose of protecting public safety.

2. Indiscriminate Anti-Transfer Policies Do Not Further Public Safety.

Amici for petitioner have referred to recent opinions of the United States Supreme Court to support their argument that public safety is enhanced by an indiscriminate ban on transfer. (See e.g. AG Brief at pp. 27-28; EJI Brief at p. 55.)

The Supreme Court, however, has not proscribed adult treatment of juveniles. (See e.g. *Miller v. Alabama* (2012) 567 U.S. 460 [prohibiting mandatory LWOP for juveniles but 14-year-old murderer could receive LWOP if judge or jury considered characteristics of youth in determination of sentence]; *Montgomery v. Louisiana* (2016) 136 S.Ct. 718, 734 [*Miller* drew "line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption . . . . life without parole could be a proportionate sentence for the latter kind of juvenile offender"].) California has followed suit. (See *People v. Caballero* (2012) 55 Cal.4th 262, 268 [state must provide opportunity for persons incarcerated as juveniles to demonstrate rehabilitation and fitness to reenter society].) Concurring with the opinion in *People v. Gutierrez* (2014) 58 Cal.4th 1354 [no presumption in favor of LWOP for juvenile special circumstance murders], Justice Corrigan wrote:

> The special attributes of youth mentioned in *Miller* may well be present in the case of some minors. There will be other minors, however, who have grown beyond them. It is because each case is different, and should be treated accordingly, that we repose confidence in the discretion of the court to impose a sentence that is appropriate in light of *all* relevant circumstances.

(*Id*., at p. 1393, (conc. opn. of Corrigan, J.), original emphasis.].)

Real party submits that while successful rehabilitation of offenders can protect public safety, wholesale preclusion of transfer of juveniles under the age of 16 will not further the goal of protecting public safety because not all juveniles are amenable to rehabilitation. (See CDAA at pp. 38-41[discussing public safety

intent of Proposition 57]; CJLF Brief at pp. 15-16.) Proposition 57's policy of personalized decision making serves the intent to enhance public safety and rehabilitation efforts by recognizing the need to have a judge evaluate what public safety benefits might be gained through rehabilitation on an individual basis (see HRW Brief at p. 39) and choose the appropriate path, through the juvenile or adult system, in light of *all* relevant circumstances.[7]

CONCLUSION

To avoid a result repugnant to the people's reserved power of initiative, Proposition 57's amendment clause must impose meaningful limitations on legislative action. Exactly where Proposition 57's amendment boundary is set need not be determined in this case. It is sufficient for this court to declare that legislation like SB 1391 that "undercut[s] and undermine[s] a fundamental purpose" of an initiative or reverses a fundamental policy enactment is on the wrong side of the line.

Ultimately this court may uphold SB 1391 only if there is a reasonable construction of Proposition 57 wherein the Legislature's amendments are

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[7] The Attorney General and the Equal Justice Initiative suggest that Welfare and Institutions Code section 1800 is a suitable substitute for judicial transfer discretion. (See AG Brief at p. 30, fn. 5; EJI Brief at p. 56, fn. 79.) It is not. As explained by the California District Attorneys Association, petitions under section 1800 cannot be raised by prosecutors or judges, the requirements for a successful petition are burdensome, and, when granted, the extension lasts only two years. (CDAA Brief at pp. 42-43; Welf. & Inst. Code, §§ 1800, subd. (a); § 1800.5; § 1802.) Regardless of the suitability of this process, a policy substituting Welfare and Institutions Code section 1800 petitions for judicial discretion was neither considered nor approved by the voters.

"consistent with and further the intent of" the initiative. Amici for petitioner have not put forward any construction of Proposition 57's express or implied purpose and intent or of its specific provisions under which SB 1391 is consistent with and furthers the intent of Proposition 57.

For the reasons addressed in this brief, in real party's Answer Brief on the Merits, and in the amici briefs of Amicus Populi, the California District Attorneys Association, the Criminal Justice Legal Foundation, and the Los Angeles District Attorney, the positions of amici for petitioner should be rejected and the opinion of the Court of Appeal below should be affirmed.

Respectfully submitted,

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Dated: October 8, 2020 By: Michelle J. Contois

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STATE OF CALIFORNIA
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