IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

O.G. **Plaintiff and Respondent,** **v.** **SUPERIOR COURT OF VENTURA COUNTY,** **Respondent** **PEOPLE OF THE STATE OF CALIFORNIA** **Real Party in Interest.**	Case No. S259011

APPLICATION OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT AND REAL PARTY IN INTEREST

Second Appellate District, Division Six, Case No. B295555
Ventura County Superior Court, Case No. 2018017144
The Honorable Kevin J. McGee, Judge of the Superior Court

California District Attorneys Association

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT AND REAL PARTY IN INTEREST

TO: THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT

The California District Attorneys Association (CDAA) acting through its Appellate Committee, and Jeff Rubin, acting on behalf of that committee, respectfully requests leave of this Court to file an amicus curiae brief in support of Respondent and Real Party in Interest.

CDAA was formed in 1910 and incorporated as a non-profit corporation in 1974. It is the statewide organization of prosecuting attorneys. CDAA created its Appellate Committee to utilize and coordinate the resources of District Attorneys' Offices throughout the State to present their views in cases which have major statewide impact upon the prosecution of criminal offenses.

After a review of the matter, the Committee has concluded the case at bench will have a substantial impact upon the administration of justice in criminal cases throughout California. The Committee believes additional arguments and authorities on this issue could help this Court understand why allowing the Legislature, by way of Senate Bill 1391, to alter the balanced approach adopted in Proposition 57 to the handling of juveniles who commit crimes will thwart an obvious intent of the voters, lower the bar for legislative amendment of initiatives to a pretense, and encourage chicanery in the political process. In addition, the Committee is hopeful this brief will assist this Court in clarifying the definition of an "amendment" to an initiative, what it means for an amendment to be "consistent with" either the intent or language of an initiative, and how much significance should be placed on each expressly stated purpose in multi-purposed voter initiatives.

For the reason expressed above, CDAA requests permission to file the enclosed amicus curiae brief in support of Respondent and Real Party in Interest.

Date: July 2, 2020

Respectfully submitted on behalf of the Appellate Committee of the California District Attorneys Association

By:

Jeff H. Rubin, Deputy District Attorney
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Attorney for Amicus Curiae

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AMICUS CURIAE BRIEF

I.
INTRODUCTION

We are living in strange times when it can be argued with a straight face that the intent of the persons who voted for Proposition 57 is furthered by both the *enactment* and *elimination* of the *same* provision of that initiative. If an initiative passes because it successfully and expressly identifies five purposes that resonate with the voters, the Legislature cannot turn around and act as if only one or some of those purposes mattered to the voters. And an interpretation of the limitation imposed by Proposition 57 that an amendment be "consistent with and further the intent of Proposition 57" that would permit the legislature to pass an amendment directly contradicting a critical provision of the initiative expressly enacted by the voters can only encourage cynicism about the political process.

II.
PROPOSITION 57 *ENACTED* THE VERSION OF WELFARE AND INSTITUTIONS CODE SECTION 707, SUBDIVISION (A) CHANGED BYSENATE BILL 1391

When Proposition 57 was passed, it made significant changes to the existing statutes governing when minors could or should be handled in criminal court. Proposition 57 eliminated language in Welfare and Institutions Code section 602 *requiring* the prosecution of 14 and 15-year old offenders in criminal court when such offenders were charged with murder or various sex offenses if certain circumstances were present. (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) (Ballot Pamp.) text of Prop. 57, § 4.1, p. 141 (hereinafter "Ballot Pamp.").) Proposition 57 eliminated subdivision (c) of section 707, which allowed the People to *request* a fitness

hearing for any minor 14 years or older who committed one of the thirty mostly serious and violent felonies listed in subdivision (b) and laid out the criteria for making this determination. (Ballot Pamp., *supra*, text of Prop. 57, § 4.2 at p. 144.) Proposition 57 eliminated subdivision (d) of section 707, which allowed the People to directly file charges against any minor 14 years or older who committed an offense punishable by death or imprisonment for life if committed by an adult, used a firearm, or committed one of the thirty mostly serious and violent felonies listed in subdivision (b) if certain circumstances were present (e.g., a prior finding the minor had committed one of those thirty offenses, if the crime was committed for the benefit of a criminal street gang, if the crime was done with the state of mind necessary for a hate crime, or if the crime was committed against an elder or disabled person. (Ballot Pamp., *supra*, text of Prop. 57, § 4.2 at pp. 144-145.) And Proposition 57 eliminated subdivision (e) of section 707, which required consideration of statements offered by victims of juvenile crime. (Ballot Pamp., *supra*, text of Prop. 57, § 4.2 at p. 145.) On the other hand, Proposition 57 *added* language to section 707, subdivision (a) allowing a judge to decide whether a 14 or 15-year-old minor should be prosecuted in any case involving one of the thirty serious or violent felonies listed in subdivision (b) – without any additional circumstances having to be present. (Ballot Pamp., *supra*, text of Prop. 57, § 4.2 at p. 145.) And, lastly, Proposition 57 made key changes to the way the decision to transfer a minor to adult court is made. (See *People* v. *Castillero* (2019) 33 Cal.App.5th 393, 398.)

Given this extensive restructuring, it cannot reasonably be disputed that the language added by Proposition 57 to section 707, subdivision (a) was ***enacted*** by Proposition 57. It was not a "minor, nonsubstantive" change to an existing statute that constituted a mere "technical

reenactment" of an existing statute. (*County of San Diego* v. *Commission on State Mandates* (2018) 6 Cal.5th 196, 208-209, 212.)

We note that some appellate courts have suggested that the authority to transfer minors under 16 to adult court embedded by Proposition 57 into the revised section 707, subdivision (a) was not "added" by Proposition 57 but was just a continuation of a prior practice. (See *B.M.* v. *Superior Court of Riverside County* (2019) 40 Cal.App.5th 742, 758 review granted Jan. 2, 2020, S259030; *People* v. *Superior Court (T.D.)* (2019) 38 Cal.App.5th 360, 375 review granted Nov. 26, 2019, S257980; *People* v. *Superior Court (Alexander C.)* (2019) 34 Cal.App.5th 994, 1002.) This suggestion should not be viewed as an attempt to characterize the restructuring of section 707, subdivision (a) as a "technical reenactment" rather than a substantive change.

The fact an initiative maintains some aspects of a pre-existing superseded law does not mean that those aspects were not ***enacted*** by the initiative. If this were not true, voters could never intentionally endorse an existing law and protect it from legislative amendment. (See *County of San Diego* v. *Commission on State Mandates*, *supra*, 6 Cal.5th at p. 214 [noting even technical reenactments may not be amended when "the provision is integral to accomplishing the electorate's goals in enacting the initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature's ability to amend that part of the statute."].) In any event, "the question is not whether Proposition 57 was the first law to permit prosecution of 14-and 15-year-olds as adults. Rather, the question is whether the continuation of that prior practice embodies an intent of Proposition 57." (*People* v. *Superior Court (T.D.)*, *supra*, 38 Cal.App.5th at p. 381 (dis. opn. of Poochigian, J).)

III.
THE CHANGE TO PROPOSITION 57 MADE BY SB 1391 IS AN AMENDMENT NOT "CONSISTENT WITH" PROPOSITION 57

A. Whether a New Law Prohibits What is Authorized by an Initiative or Authorizes What is Prohibited is the Most Critical Question to Ask When Deciding Whether a New Law is "Consistent With" an Initiative Even Though the Same Question Can be used to Define What Constitutes an Amendment in Some Cases

Proposition 57, in relevant part, states that Legislature may amend the provisions of the initiative ("the act") relating to the eligibility and transfer of minors to criminal court "so long as such amendments are consistent with and further the intent of this act". (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 57, § 5, at p. 145.) Senate Bill 1391 amended Proposition 57.

There is little dispute among the parties in the instant case, or among appellate courts that have addressed the validity of the changes made to the statutory language enacted by Senate Bill 1391 [hereafter SB 1391], over *whether* SB 1391 was an "amendment." (See *B.M.* v. *Superior Court of Riverside County, supra,* 40 Cal.App.5th at p. 746; *O.G.* v. *Superior Court* (2019) 40 Cal.App.5th 626, 629 review granted Nov. 26, 2019, S259011; *People* v. *Superior Court (S.L.)* (2019) 40 Cal.App.5th 114, 118 review granted Nov. 26, 2019, S258432; *People* v. *Superior Court (T.D.)*, *supra*, 38 Cal.App.5th at p. 370; *People* v. *Superior Court (I.R.)* (2019) 38 Cal.App.5th 383, 392 review granted Nov. 26, 2019, S257773; and *People* v. *Superior Court (K.L.)* (2019) 36 Cal.App.5th 529, 538.)

Rather, the dispute in this case and in those appellate court cases has largely centered on whether SB 1391 is "consistent with and further[s] the intent of" Proposition 57 (i.e., whether SB 1391 was a lawful amendment) and not on how an "amendment" is defined.

But *how* an amendment is defined has an impact on the primary question of whether SB 1391 was a lawful amendment. This is because if an amendment is defined too narrowly then the test for what constitutes an amendment and the test of whether the new law is "consistent with" an initiative can be treated as identical and the full significance of the fact that the new law prohibits what an initiative authorized is lost.

In assessing whether a post-initiative legislation is an amendment, Petitioner would have this Court simply ask "whether [the new law] prohibits what the initiative authorizes, or authorizes what the initiative prohibits" citing to *People* v. *Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571. (Petitioner's Brief on the Merits [hereinafter "Pet. Brief"] at p. 25.) But if that is the sole test for whether a new law amends an initiative, then the requirement that the new law be "consistent with" an amendment becomes redundant. "Consistent with" must thus be interpreted as meaning *something more than* authorizing what the initiative prohibited. Conversely, if the definition of an amendment is more expansive than the definition provided by Petitioner, then there would be no redundancy in interpreting the requirement that a new law be "consistent with" the initiative as meaning that any new law that prohibits what the initiative authorizes is an unlawful amendment (as generally concluded by the Court of Appeal).

Although there is some question as to what laws passed by the legislature will qualify as an "amendment" of an initiative, we respectfully suggest the most nuanced understanding of what constitutes an amendment recognizes that while an amendment *can* be a statute that authorizes what the initiative prohibits, or prohibits

what the initiative authorizes, this is a just a particular *type* of amendment.

When, as in *People* v. *Superior Court (Pearson)*, *supra*, 48 Cal.4th 564 and *People* v. *Kelly* (2010) 47 Cal.4th 1008, this Court is resolving the question of whether a law touching upon a "related but distinct area" (even one that "augments" an initiative's provisions), then the test for whether the new law is an amendment can be simply decided by asking whether the new law "prohibits what the initiative authorizes, or authorizes what the initiative prohibits." (*Pearson*, *supra*, at p. 571; *Kelly*, *supra*, at pp. 1025-1026.) But that should *not* be the test for defining what constitutes an amendment when there is a modification to the actual statutory language enacted by the initiative.

Unlike in the case before this Court, the case of *Pearson* did not involve a change to the *actual* language of a statute enacted by an initiative. Nor did it involve a question of whether the change proposed was consistent with or furthered the intent of the statute. Rather, it involved the question of whether the legislature could add a statute governing discovery in *habeas* cases over an objection that doing so was an unauthorized amendment of Proposition 115.

Proposition 115 enacted language stating that "[n]o order requiring discovery shall be made in *criminal* cases except as provided by this chapter," and that the "chapter shall be the only means by which the defendant may compel" discovery from prosecutors or law enforcement agencies. (Pen. Code, § 1054.5, subd. (a).) Proposition 115 only allowed amendments (*regardless of whether it was consistent with or furthered the language or intent of Proposition 115*) if the new law was passed by "a two-thirds majority vote in each house." In 2002, the legislature passed a new

statute (Penal Code section 1054.9) governing discovery in post-trial habeas corpus proceedings. (*Id.* at p. 567.)

This Court held that Penal Code section 1054.9 was not an amendment, because a habeas proceeding is not a criminal proceeding: "A habeas corpus matter has long been considered a separate matter from the criminal case itself." (*Id.* at p. 572.) Thus, while Penal Code section 1054.9 clearly "augmented" Proposition 115, it addressed "an area that is *related to Proposition 115's discovery provisions but, crucially, it is also a distinct* area." (*Id.* at p. 573.)

The definition of what constitutes an amendment when what is being changed is not the language of the initiative itself can be restrictively defined by asking whether the new law prohibits what the initiative authorizes, or authorizes what the initiative prohibits. But when the language enacted by the initiative *itself* is being changed, an amendment is defined more broadly. (See *Brown* v. *Superior Court* (2016) 63 Cal.4th 335, 354 ["An amendment is '. . . any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form'"]; see also *People* v. *Kelly*, *supra*, 47 Cal.4th at pp. 1026-1027 [recognizing other decisions have defined the amendment process as broader but using test identified in *Pearson* because for "purposes of resolving the *issue in the present case* we need not endorse any such expansive definition"].)

Thus, as the Court of Appeal in the instant case intuited (but did not necessarily fully articulate), while not all changes that can properly be viewed as amendments prohibit what is authorized or vice versa, *if* the initiative allows amendments but requires any

amendments be "consistent with" either the language or intent of the initiative, and the new law amends the initiative by prohibiting what the initiative authorized, such an amendment should be viewed as per se unlawful.

B. Under the Grammatical Rule of Parallel Construction, Any Amendment of Proposition 57 Must be "Consistent With" the *Language* of the Initiative

As noted earlier, section 5 of Proposition 57 requires that any amendment be "consistent with and further the intent of this act". (*Ante*, at p. 16.) Real Party in Interest has commendably explained how, by applying the grammatical principle of parallel usage (i.e., that every element in a parallel series must play the same grammatical role), any ambiguity is dissipated so that it becomes apparent that section 5 requires that any amendment be both consistent with Proposition 57 *and* with the intent behind Proposition 57. (People's Answer Brief, at pp. 23-26.)

Nevertheless, Petitioner claims "the District Attorney's parallel series grammatical premise is flawed and cannot be relied upon as dispositive of the way voters understood the amendment clause" because "the District Attorney's analysis starts with the [erroneous] observation that 'consistent with' and 'furthers the intent of' are both prepositional phrases". (Petitioner's Reply Brief on the Merits at p. 18.)

It is not entirely clear why, even assuming the Petitioner's definition of prepositional phrase is correct, it makes a difference in the analysis. But the grammatical argument is more easily understood by simply recognizing that "with" is a preposition and "of" is a preposition. (Merriam–Webster's Online Dict. <http://www.merriam-webster.com/dictionary/preposition> [as of

June 27, 2020] ["The most common prepositions are at, by, for, from, in, *of*, on, to, and *with*."], emphasis added.)

If section 5's phrase "The provisions of Section 4.1 and 4.2 of this act may be amended so long as such amendments are *consistent with and further the intent of this act* . . ." is read as meaning the amendment must be "consistent ***with*** [the act] and further the intent ***of*** the act," then you have parallel construction.

But if you read the phrase as saying "consistent ***with*** [the intent of the act] and ***further*** the intent of the act," then there is *not* parallel construction because the *preposition* "with" directly precedes the term "the intent" but it is the *verb* "further" that directly precedes the term "the intent."[1]

In other words, if the object noun of the phrase is "the act" you have parallel construction. If the object noun of the phrase is "the intent of the act" then you do not have parallel construction.

Applying this rule has significance because it helps show that voters wanted all amendments to be both "consistent with" Proposition 57 *and* to further the intent of Proposition 57. It is not enough for the amendment to further the intent of Proposition 57. The amendment must also be "consistent with" the actual language of Proposition 57.

This interpretation is also supported by the rule of statutory interpretation that "every word and every provision is to be given

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[1] The word "further" as used in the phrase "consistent with and further the intent of the Act" is being used to mean "to help forward." When used in this manner, it is a verb. (See Merriam–Webster's Online Dict. "Definition of further (Entry 3 of 3)" <https://www.merriam-webster.com/dictionary/further > [as of June 27, 2020].)

effect [and that n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." (*Nielsen* v. *Preap* (2019) ___ U.S. ___ [139 S.Ct. 954, 969].) It is nigh impossible to conceive of an amendment that furthers the intent of an initiative without also being consistent with it. Thus, if the language were interpreted as requiring only consistency with the *intent* of the initiative, the term "consistent with" would be surplusage.

Taking a leaf from the appellate court decision in *T.D.*, *supra*, 38 Cal.App.5th 360, Petitioner claims that "[l]imiting authorized amendments to those consistent with the express language of the act, as requested by the District Attorney, would preclude any amendment that deletes or repeals any portion of the act, no matter how consistent such action might be with the purpose of the act itself. (Petitioner's Reply Brief on the Merits at p. 19 [and noting as well that "had that been the aim of the language in question it seems likely Proposition 57 would have been drafted to not allow any amendments whatsoever absent voter approval"].)

Accordingly, Petitioner assumes section 5 should be interpreted as simply requiring an amendment be consistent with and further *the intent* of Proposition 57. Petitioner then tries to dismiss the significance of including the term "consistent with" altogether by claiming that even ignoring the inclusion of the term "consistent with" would not render that term unauthorized surplusage because it is a mere inconsequential redundancy. (See Petitioner's Reply Brief on the Merits at p. 23.)

In sum, Petitioner doubles down on the claim "that an amendment clause that permits only amendments consistent with the express statutory language of the amended statute is the

functional equivalent of an initiative that does not permit amendments at all." (*Id.* at p. 22.)

This is a straw man argument since *nobody* is contending that every amendment that modifies the text is impermissible. Nor is anybody claiming the requirement that amendments be "consistent with" the Proposition 57 (or even just the intent of Proposition 57) precludes any amendment to the initiative.

Indeed, in addition to all the types of valid amendments described in Real Party in Interest's Answer Brief on the Merits [hereafter "People's Answer Brief"] at pp. 25-26, amendments comporting with the requirement that the amendments be "consistent with" Proposition 57 can potentially be very significant and dramatic. For example, a law modifying subdivision (a) of Welfare and Institutions Code section 602 or adding a subdivision that gave juvenile courts jurisdiction to persons over 18 would be a permissible amendment. (See e.g., Pending Sen. Bill 889 (2019-2020 Reg. Sess.) as amended Mar. 25, 2020.)[2]

Here, for example, is a hypothetical re-writing of the language of the most pertinent paragraph of Welfare and Institutions Code section 707 enacted by Proposition 57. The re-write is still "consistent with" Proposition 57 even though words and concepts have been added, omitted, and changed:

> In any case in which a ~~minor~~ *juvenile is alleged to have committed a felony offense listed in section 602* ~~be a person described in Section 602 by reason of the violation,~~ when *the juvenile* ~~he or she~~ was between the ages of 16 and 18 ~~16 years of age or older, of any felony criminal statute,~~ or ~~of an~~ *felony* offense listed in

[2] We express no opinion on the merits of the bill – only that it would not run afoul of the requirement that amendments to Proposition 57 be consistent with the initiative.

> subdivision (b) when *the juvenile* ~~he or she~~ was *over 14 and under 16* ~~14 or 15~~ years of age, the district attorney or other appropriate prosecuting officer, may make a motion to transfer the juvenile ~~from juvenile court~~ to a court of criminal jurisdiction. *The motion must specify the reasons transfer is requested and whether the prosecuting officer has consulted with the probation department as to whether transfer is in the best interests of the juvenile.* The motion must be made prior to the attachment of jeopardy. Upon such motion, the juvenile court shall ~~order the probation officer~~ *require the probation department* to submit a report on the behavioral patterns*, criminal*, ~~and~~ social*, and other relevant background* history of the minor. The report shall include any written or oral statement offered by the victim pursuant to Section 656.2 *or a victim as defined in the California Constitution, Article I, section 28(e).*

C. This Court Can Reasonably Define What It Means to be "Consistent With" an Initiative in a Narrow or Broad Fashion, But It Cannot Reasonably Define "Consistent With" So Broadly that the Definition Permits Amendments that are "*In*consistent With" the Initiative.

The term "consistent with" can be given a ***narrow or broad*** interpretation by this Court. "Consistent with" has several meanings, some of which would broadly allow for an omission or addition of terms that are merely "compatible with" an initiative (see Merriam–Webster Online Dict. (2020) < http://www.merriam-webster.com/dictionary/consistent [1a : marked by harmony, regularity, or steady continuity : free from variation or contradiction . . . b : marked by agreement : compatible —usually used with with . . ."].) A broad interpretation would allow for a wide array of amendments to Proposition 57 so long as the amendments furthered its purposes.

However, the term "consistent with" cannot be defined so broadly that the definition encompasses the *opposite* meaning of the

term. Under no reasonable definition can it ever be said that a new law is "consistent with" an initiative if new law and the initiative are contradictory, are irreconcilable, or cannot co-exist.

Indeed, in other areas of statutory interpretation, while courts will generally seek to find a later enacted statute or regulation is consistent with a previously enacted statute, courts will ***not*** do so if the two are contradictory or irreconcilable. For example, when the question before a court is whether an implied repeal of a statute has occurred, a court will, "[a]bsent an express declaration of legislative intent, . . . find an implied repeal 'only when there is no rational basis for harmonizing the two potentially conflicting statutes [citation], and the statutes are "*irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation*." ' " (*Medical Bd. of California* v. *Superior Court* (2001) 88 Cal.App.4th 1001, 1018, emphasis added.) When a court is deciding whether an administrative agency's interpretation of a statute or regulation is valid, "[c]ourts must defer to an administrative agency's interpretation of a statute or regulation involving its area of expertise unless the challenged construction *contradicts* the clear language and purpose of the interpreted provision." (*Hoitt* v. *Department of Rehabilitation* (2012) 207 Cal.App.4th 513, 526, emphasis added.) And in deciding whether a "statute dealing with a narrow, precise, and specific subject" is "submerged by a later enacted statute covering the general spectrum," courts will find it is not submerged "unless the later statute expressly *contradicts* the original act or unless that construction is absolutely necessary in order that all of the words of the later statute have any meaning at all." (*Hughes Electronics Corp.* v. *Citibank Delaware* (2004) 120 Cal.App.4th 251, 268, emphasis added.)

Thus, under any logical definition of "consistent with," SB 1391 is not consistent with Proposition 57 because it ***contradicts and eliminates*** express language enacted by the initiative.

IV.
EVEN ASSUMING AMENDMENTS TO PROPOSITION 57 MUST ONLY BE CONSISTENT WITH AND FURTHER THE *INTENT* OF PROPOSITION 57, SB 1391 STILL FAILS THE TEST OF A VALID AMENDMENT BECAUSE IT CONTRAVENES AT LEAST ONE EXPRESS PURPOSE/INTENT OF PROPOSITION 57

Proponents of an initiative may seek to capture a wide swath of voters by identifying different purposes - each of which may appeal to a different segment of the population. This is a legitimate tactic, but if the initiative requires that amendments to the initiative be "consistent with and further the intent" of the initiative, it means that each of these purposes must be respected. An amendment that minimizes or ignores one purpose of an initiative at the expense of others, especially an expressly stated purpose, cannot be considered "consistent with" the initiative. (See *Gardner* v. *Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1374 [courts "must give effect to an initiative's specific language, as well as its major and fundamental purposes."]; *Foundation for Taxpayer & Consumer Rights* v. *Garamendi* (2005) 132 Cal.App.4th 1354, 1370 [legislation furthering one purpose of an initiative, but violating another of the initiative's "primary mandate[s]" could not reasonably be found to further initiative's purposes and noting amendment must not "violate[ ] a specific primary mandate" or "do violence to specific provisions" of the initiative].)

To paraphrase *Gardner* v. *Schwarzenegger*, supra, 178 Cal.App.4th 1366: "[E]ven if these provisions of Senate Bill [1391]

could be deemed to further Proposition [57's juvenile rehabilitation] purpose, they would still be unconstitutional because they are inconsistent with the proposition's other primary purposes [to 'Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court' and, arguably, 'Protect and enhance public safety']." (*Gardner*, at pp. 1378-1379.)

The authority of judges, enshrined by Proposition 57, to determine whether minors such as the petitioner in this case may be prosecuted in adult criminal court is inconsistent with and cannot operate concurrently with SB 1391's elimination of judicial discretion to authorize such prosecution in adult criminal court. (Cf., *People* v. *Park* (2013) 56 Cal.4th 782, 798 ["the provisions of a voter initiative may be said to impliedly repeal an existing statute when "'the two acts are so inconsistent that there is no possibility of concurrent operation'""].)

Indeed, section 5 of Proposition 57 requires that "[t]his act shall be broadly construed to accomplish its *purposes*." (Ballot Pamp., *supra*, text of Prop. 57, § 5 at p. 145, emphasis added.) Purposes is the plural of purpose. The mandate is adherence to *purposes* not purpose. It is impossible to comply with this mandate if an overly broad construction of one purpose (juvenile rehabilitation) results in an overly *narrow* construction of another purpose (i.e., that judges decide whether minors can be transferred). (See *People* v. *Superior Court (T.D.)*, *supra*, 38 Cal.App.5th at p. 381 (dis. opn. of Poochigian, J.).)

That said, the following discussion assumes, *arguendo*, that if SB 1391 is consistent with and furthers the *intent* (as opposed to the actual language) of Proposition 57, the amendment is proper.

A. It is Illogical to Claim that the Intent of an Initiative Is Furthered by *Giving* Courts Authority to Determine Whether Minors Under 16 Can be Prosecuted in Adult Court and Is *Also* Furthered by *Taking Away* that Same Authority.

It is illogical to conclude that an amendment may be viewed as being "consistent with" the intent of an initiative even if the amendment ***contradicts and eliminates*** express language enacted by the initiative.

Proposition 57 states: "In enacting this Act, ***it is the purpose and intent*** of the People of California to: . . . (5) Require a judge, not a prosecutor to decide whether juveniles should be tried as an adult." (Ballot Pamp., *supra*, text of Prop. 57, § 1 at p. 141, emphasis added.) The ***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) which, inter alia, expressly provided that a judge decides whether a minor "alleged to be a person described in section 602 by reason of a violation . . . of an offense listed in subdivision (b) when he or she was 14 or 15 years of age". (Former Welf. & Inst. Code, § 707(a); Ballot Pamp., *supra*, text of Prop. 57, § 4.2 at p. 142.) Thus, the voters were unmistakably told the enactment of this provision carries out the purpose and intent of Proposition 57.

Moreover, in looking at the words of the statute enacted by Proposition 57, it is obvious the voters ***did not intend to eliminate*** prosecution in criminal court of minors under 16 who commit one of the crimes listed in subdivision (b) of section 707 (except in very limited circumstances) because the voters enacted language that ***allowed*** it. In this regard, there is no ambiguity. (See *Murphy* v. *Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094,

1103 ["If the statutory language is clear and unambiguous our inquiry ends."]; see also *Delaney* v. *Superior Court* (1990) 50 Cal.3d 785, 798–799 [rejecting an interpretation of a constitutional provision that would read out of the statute expressly included language].)

To conclude that ***removing*** this very same authority is ***also*** consistent with and furthers the intent of Proposition 57 violates the rule of logic known as the "law of noncontradiction." That rule of logic provides that "opposite assertions cannot be true at the same time". (Gottlieb, Aristotle on Non-contradiction, The Stanford Encyclopedia of Philosophy (Spring 2019) https://plato.stanford.edu/archives/spr2019/entries/aristotle-noncontradiction/ (as of June 30, 2020); see also *County of San Diego* v. *Commission on State Mandates*, *supra*, 6 Cal.5th at p. 213 [characterizing a legislative amendment to an initiative as "suspect" because "it sought to undo the very protections the voters had enacted in" the initiative].) This logical conundrum, by itself, should put a dagger in the contention that SB 1391 is consistent with the intent behind Proposition 57.

B. Proposition 57 Is Not a Boat that Drifts Only Towards Elimination of Criminal Prosecution of All Juveniles. It is a Buoy Reflecting a Stable Position of Compromise Focusing on Rehabilitation Within Reasonable Parameters and Under Judicial Oversight

Broadening the number of minors who could stay in the juvenile justice system was undoubtedly *a* primary purpose of Proposition 57. (See *Narith S.* v. *Superior Court* (2019) 42 Cal.App.5th 1131, 1137, review granted Feb. 19, 2020, S260090; *People* v. *Superior Court (K.L.)*, *supra*, 36 Cal.App.5th at p. 541.) But, based on the language of the initiative and the accompanying

ballot materials, it is also clear that the "overall" intent of Proposition 57 was not to keep expanding ***without limitation*** the number of minors who remain in the juvenile justice system.

"In discerning the purposes of an initiative so as to determine whether a legislative amendment furthers its purpose and thus is valid, [courts] are guided by, but not limited to, the general statement of purpose found in the initiative." (*Proposition 103 Enforcement Project* v. *Charles Quackenbush* (1998) 64 Cal.App.4th 1473, 1490–1491; accord *Gardner* v. *Schwarzenegger*, *supra*, 178 Cal.App.4th at p. 1374.) There were multiple primary intents identified in Proposition 57, reflecting a balancing of, inter alia, the interest in public safety as well as the interest in rehabilitation.

One of the primary intents identified in the initiative was to: "***Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court***." (Ballot Pamp., *supra*, text of Prop. 57, § 2 at p. 141)

"[T]he phrasing 'Require a judge ... to decide whether juveniles should be tried in adult court' means exactly what it says. The intent of Proposition 57 is to 'require' a particular person (i.e., a judge) to make a particular decision (i.e., whether a juvenile should be tried as an adult)." (*People* v. *Superior Court (T.D.)*, *supra*, 38 Cal.App.5th at p. 381 (dis. opn. of Poochigian, J).) "[T]he phrase, 'not a prosecutor' embodies an intent to deny prosecutors the power to ultimately decide whether juveniles should be tried in adult court." (*Ibid*.) "Under Senate Bill 1391, neither a prosecutor *nor a judge*, may decide whether 14-and 15-year-old juveniles may be tried in adult court. Instead, the *Legislature* has made the decision for 14- and 15-year-old juveniles." (*Ibid*, emphasis in original.)

Proposition 57 was a *compromise*. The voters identified a point on the spectrum between two ends: one end placing *all* minors who commit crimes into the criminal system and the other end placing *no* minors who commit crimes into the criminal system.

"Proposition 57 may have intended to reduce the number of youths to be prosecuted as adults ... but only up to a point. Proposition 57, like any enactment, was written to 'go so far and no further.'" (*People* v. *Superior Court (T.D.)*, *supra*, 38 Cal.App.5th at p. 381, fn. 2 (dis. opn. of Poochigian, J.), citing *Michigan* v. *Bay Mills Indian Cmty*. (2014) 572 U.S. 782, 794].) "[T]he 'direction' in which an enactment moves the law is only one indicator of purpose. How far the enactment moves the law in that direction is another indicator of intent and is 'no less' a part of its 'purpose.'" (*Ibid*., citing *Rapanos* v. *United States* (2006) 547 U.S. 715, 752.)

It is a fallacy to believe that just because Proposition 57 moved the point on the spectrum closer to the "no minors in the criminal system" end, any additional movement toward that point furthers the intent of the voters. And this is "especially true when the "stopping point" at issue – reducing the number of juveniles tried as adults but still ultimately requiring judges to determine whether juveniles will be tried as adults – is an express purpose of the initiative." (*People* v. *Superior Court (T.D.)*, supra, 38 Cal.App.5th at p. 381 (dis. opn. of Poochigian, J.).)

This fallacy is easily revealed when the reasoning of the Court of Appeal is placed in a different context. For example, "[t]he purpose of Proposition 21 . . . was to *expand* the authority of courts of criminal jurisdiction over juveniles who commit criminal offenses." (*People* v. *Arroyo* (2016) 62 Cal.4th 589, 596, emphasis added; see also Ballot Pamp., Primary Elec. (Mar. 7, 2000) text of Prop. 21, § 2,

subd. (i) at p. 119 ["The juvenile justice system is not well-equipped to adequately protect the public from violent and repeat juvenile offenders].) Under the reasoning of Petitioner, an amendment to Proposition 21 requiring *all* minors from the age of 11 or older to be prosecuted in adult court would be consistent with the intent of Proposition 21 - even though Proposition 21 limited its reach to minors 14 years or older who committed certain designated crimes. (See Former Welf & Inst. Code, § 602, subd. (b) [as enacted by Proposition 21 in 2000].)

C. Granting Judges Discretion to Decide Whether Minors Who Commit Heinous Crimes are Unlikely to be Rehabilitated, and Thus Should be Transferred to Criminal Court, Was an Integral Component and Goal of Proposition 57. No Voter Reading Proposition 57 or the Election Materials Accompanying It Would Reasonably Believe Otherwise or That This Discretion Could be Legislatively Eliminated

Everywhere a voter would look in the voter guide highlighted how integral and significant the intent to give judicial discretion over the transfer of minors to criminal court was to Proposition 57.

The Attorney General highlighted judicial discretion as one of only four bullet points describing Proposition 57 in the Official Title and Summary:

> • 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

(Ballot Pamp., Gen. Elec. (Nov. 8, 2016) Official Title and Summary of Prop. 57, p. 54, emphasis added.)

The Secretary of State *also* clearly viewed judicial determination of eligibility as a cornerstone of Proposition 57 - as evidenced by the following language from the Quick-Reference Guide Summary of Proposition 57:

> Allows parole consideration for nonviolent felons. Authorizes sentence credits for rehabilitation, good behavior, and education. ***Provides juvenile court judge decides whether juvenile will be prosecuted as an adult***. Fiscal impact: Net state savings likely in the tens of millions of dollars annually depending on implementation. Net county costs of likely a few million dollars annually.

(Ballot Pamp., Gen. Elec. (Nov. 8, 2016), Quick Reference Guide, Prop. 57, Summary at p. 11, emphasis added.)

Similarly, voters glancing at the Quick-Reference Guide YES/NO Statement of Proposition 57 detailing "WHAT YOUR VOTE MEANS" would also unquestionably recognize that *how* minors could be transferred to adult court (i.e., only after a hearing) was an important aspect of Proposition 57:

> **YES**: A YES vote on this measure means: Certain state prison inmates convicted of nonviolent felony offenses would be considered for release earlier than otherwise. The state prison system could award additional sentencing credits to inmates for good behavior and approved rehabilitative or educational achievements. ***Youths must have a hearing in juvenile court before they could be transferred to adult court***.
>
> **NO**: A NO vote on this measure means: There would be no change to the inmate release process. The state's prison system could not award additional sentencing credits to inmates. ***Certain youths could continue to be tried in adult court without a hearing in juvenile court***.

(Ballot Pamp., Gen. Elec. (Nov. 8, 2016), Quick Reference Guide, Prop. 57, What Your Vote Means at p. 11, emphasis added.)

Moreover, in the ballot argument in favor of Proposition 57, proponents repeatedly told voters that while minors should be rehabilitated, it also told them that judges would be given the discretion to decide whether minors who committed the most serious crimes should be prosecuted as adults. (See Ballot Pamp., Gen. Elec. (Nov. 8, 2016), "Argument in Favor of Proposition 57 at p. 58 ["Prop. 57 is straightforward—here's what it does: . . . *Requires judges instead of prosecutors to decide whether minors should be prosecuted as adults*, emphasizing rehabilitation for minors in the juvenile system."; "Prop 57 focuses on evidence-based rehabilitation and *allows a juvenile court judge to decide whether or not a minor should be prosecuted as an adult*."], emphasis added.)

A voter looking at the Legislative Analysis of Proposition 57 would also get the message. The Legislative Analyst explicitly recognized that Proposition 57 preserved a court's ability to transfer the prosecution of 14 and 15-year old minors charged with the most serious crimes to adult court. The Legislative Analysis stated: "… the measure specifies that prosecutors can only seek transfer hearings for youths accused of (1) committing certain significant crimes listed in state law (such as murder, robbery, and certain sex offenses) ***when they were age 14 or 15*** or (2) committing a felony when they were 16 or 17." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016), Legislative Analysis of Proposition 57 at p. 55, emphasis added.) And under the title "Juvenile Transfer Hearings," the Legislative Analyst explained: "The measure changes state law ***to require*** that, before youths can be transferred to adult court, they must have a hearing in juvenile

court to determine whether they should be transferred." (*Ibid*, at p. 56, emphasis added.)

In sum, voters would not believe a law *eliminating* a provision so highlighted and expressly enacted by Proposition 57 could be "consistent with" the intent of the voters in passing Proposition 57.

D. Claiming SB 1391 is "Consistent With" the Intent of Proposition 57 Because SB 1391 Still Allows Judges to Make the Transfer Decision is Casuistry

The court in *People* v. *Superior Court (Alexander C.)*, *supra*, 34 Cal.App.5th 994 stated that SB 1391 "in no way detracts from Proposition 57's stated intent that, where a transfer decision must be made, a judge rather than a prosecutor must make the decision." (*Id.* at p. 1001; accord *People* v. *Superior Court (K.L.)*, *supra*, 36 Cal.App.5th at p. 539, fn. 5; *People* v. *Superior Court (S.L.)*, *supra*, 40 Cal.App.5th at p. 121.) Petitioner echoes this contention. (See Pet. Brief on the Merits, at pp. 44-45.) This contention is too clever by half.

It is *implicit* in the initiative that transfer decisions will continue to be made. The Legislature cannot circumvent an intent to require judges to make the transfer decision through the artifice of eliminating the prosecution's right to request a transfer decision. (See *B.M.* v. *Superior Court of Riverside County*, *supra*, 40 Cal.App.5th 742 at fn. 5 (dis. opn. of McKinster, J.).)

Saying that SB 1391 "merely narrowed" the class of juveniles whose jurisdictional fate is required to be decided by judges is just another way of saying that SB 1391 prohibits some of (though not all of) what Proposition 57 required. But leaving intact some of what Proposition 57 authorized, does not change the fact that SB 1391 also

"prohibits what the initiative authorizes". (*Pearson*, *supra*, 48 Cal.4th at p. 571.)

Claiming SB 1391 does not detract from the intent to have judges determine whether minors may be handled in adult court is akin to claiming a bill that eliminates the right to vote is "consistent with" the Fifteenth Amendment because it does not deny or abridge the right to vote "*on account of* race, color, or previous condition of servitude." (U.S. Const., 15th Amend., emphasis added.) Under the rationale asserted by Petitioner, the voters could pass an initiative protecting the right to drive an automobile and the Legislature could turn around and make tires unlawful to purchase or use.

If this Court were to hold an amendment can be deemed "consistent with" the purpose of giving judges the discretion to decide whether to transfer minors to adult court even though the amendment dramatically reduces or eliminates the pool of minors eligible for transfer, this Court would be establishing a precedent that would effectively render "consistent with" devoid of meaning and serve only to encourage voter cynicism. To paraphrase *Foundation for Taxpayer & Consumer Rights* v. *Garamendi*, *supra*, 132 Cal.App.4th 1354, "[t]he Legislature cannot simply in the guise of amending Proposition [57] undercut and undermine a fundamental purpose of Proposition [57], even while professing that the amendment 'furthers' Proposition [57]." (*Id.* at p. 1371, bracketed information added.].)

E. The Rationales Provided for Treating an Amendment of Proposition 57 That Eliminates Judicial Discretion to Decide Whether Minors Under 16 Can Be Handled in Criminal Court Will Apply Equally to an Amendment That Eliminates Such Discretion When It Comes to Minors Under 18

It is worthwhile noting at this juncture that all the alleged arguments relied upon by Petitioner to support the claim that the intent of Proposition 57 is furthered by eliminating the criminal prosecution of 14- and 15-year-old minors would equally support elimination of criminal prosecution of all 16- and 17-year-old minors. Both would reduce spending on prisons. Both would prevent federal courts from indiscriminately releasing prisoners. Both would stop the so-called revolving door of crime by emphasizing rehabilitation. Both would allow judges to technically retain the power to decide transfer motions. And both would protect and enhance public safety. (Pet. Answer Brief on the Merits, at p. 41-57; see also *People* v. *Superior Court (T.D.)*, *supra*, 38 Cal.App.5th at p. 381, fn. 2 (dis. opn. of Poochigian, J.).)

And while this Court is not deciding the issue of whether the Legislature could amend the statute to eliminate all prosecutions of minors (see *People* v. *Buza* (2018) 4 Cal.5th 658, 681 ["a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations"], it is entirely proper to consider eminently foreseeable ramifications of adopting Petitioner's interpretation of what it means for an amendment to be "consistent with and further the intent of" an initiative (see e.g., *Strauss* v. *Horton* (2009) 46 Cal.4th 364, 450, abrogated by *Obergefell* v. *Hodges* (2015) 576 U.S.__ [135 S.Ct.

2584] on other grounds, [noting negative ramifications of adopting petitioner's interpretation of the law as reason for rejecting petitioner's proposal]).

F. Dramatically Shortening the Amount of Time Minors Under 16 Who Commit Horrendous and Violent Crimes Can be Maintained in Custody Does Not Further the Identified Goal of Protecting the Public *in the Way Portrayed* in the Ballot Materials Accompanying Proposition 57

One of the five stated purposes/intents identified in section 2 of Proposition 57 is to "Protect and enhance public safety." (Ballot Pamp., *supra*, text of Prop. 57, § 2 at p. 141.) In a nutshell, Petitioner claims that eliminating the ability of judges to determine whether certain minors under 16 (i.e., those who present the greatest danger) can reasonably be viewed as furthering the goal of public safety because *every* minor under 16 (no matter what crime they committed) can be rehabilitated. According to Petitioner, the intent of making the public safer is carried out because if a minor is released once they reach the age of twenty-five,[3] they will have been rehabilitated and are less likely to re-offend than if the minor received less or no rehabilitation but was incarcerated for a much longer period of time. (Pet. Reply Brief on the Merits, at pp. 41-52; Pet. Answer Brief on the Merits, at pp. 59-62.)

Petitioner criticizes Real Party in Interest for an antiquated view that is "clouded by reliance on outdated and rejected punishment philosophies" (Pet. Reply Brief on the Merits, at p. 48) and asserts, under at least one reasonable construction, SB 1391 can

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[3] We discuss Welfare and Institutions Code section 1800, which, under very limited circumstances, permits detention beyond the age of 25, *post*, at pp. 42-43.)

be construed as being "consistent with and further[ing]" the purpose or intent of Proposition 57. (Pet. Answer Brief on the Merits, at p. 41.)

That interpretation reflects a debatable but not necessarily unreasonable viewpoint. However, whether that interpretation of how public safety may be accomplished is reasonable *in the abstract* is not the true question before this Court. The real question before this Court should be whether that interpretation is a reasonable one in light of how *the voters* would have understand the concept of "public safety" as that purpose and intent was identified and explained *in the proposition at issue*. (See *Horwich* v. *Superior Court* (1999) 21 Cal.4th 272, 277 [considering "the electorate's intended goal *as reflected in the language of the initiative and in the ballot arguments*"]; *People* v. *Valencia* (2017) 3 Cal.5th 347, 375 ["we may not properly interpret the measure in a way that the electorate did not contemplate"].)

If you look at the materials available to the voters, it would not be *reasonable* to conclude they would have believed the goal of "public safety" *referenced in Proposition 57* was the alleged "public safety" engendered by the early release of "rehabilitated" minors who committed violent crimes such as murder, torture, and sexual assault - as now argued by Petitioner.

The title of Proposition 57 was the "Public Safety *and* Rehabilitation Act of 2016," not the "Public Safety *only through* Rehabilitation Act of 2016."

The ballot materials accompanying Proposition 57 reflect a more traditional understanding of "public safety" – one that is furthered by keeping dangerous juvenile and adult offenders behind bars. (See Ballot Pamp., *supra*, Argument in Favor of Proposition 57,

at p. 58 [stating "Prop. 57 focuses resources on keeping dangerous criminals behind bars, while rehabilitating juvenile and adult inmates"]; Rebuttal to Argument Against Proposition 57, at p. 59 [Prop 57 . . . breaks the cycle of crime by rehabilitating deserving juvenile and adult inmates, and keeps dangerous criminals behind bars"]; Quick Reference Guide, Arguments Pro, at p. 11. [Prop. 57 focuses resources on keeping dangerous criminals behind bars, while rehabilitating juvenile and adult inmates"].)

Would any voter believe that the distinction being drawn in the cited ballot language is between juveniles and dangerous adult criminals? Of course not. The obvious contrast is between those inmates (both juvenile and adult) who are dangerous and those inmates (both juvenile and adult offenders) who are deserving of rehabilitation. That is how each of these sentences is constructed.

The plain implication is that proponents are claiming Proposition 57 will keep dangerous criminals (juveniles *or* adults) behind bars while greater emphasis will be placed "rehabilitating juvenile and adult inmates" who are not dangerous. This language supports the notion that the voters were being assured that public safety (as met by keeping dangerous criminals behind bars) would not be jeopardized by the reduction in sentences for dangerous juvenile and adult criminals. In fact, it created the impression that Proposition 57 would *enhance* the likelihood that dangerous juvenile and adult criminals would not be released.

As neatly summed up by Justice Grover of the Sixth District Court of Appeal:

> By eliminating the exception entirely, the Legislature has undermined one of the initiative's intended methods of protecting public safety. *Whether taking 14-and 15-year-olds who have committed serious offenses out of*

> *juvenile court is the best way to promote public safety can be fairly debated. But what cannot reasonably be debated is that the voters wanted to do it that way*. The Legislature's removal of one mechanism the voters preserved to protect public safety is contrary to the intent of the initiative.

(*Superior Court of Santa Clara County (S.L.)*, *supra*, 40 Cal.App.5th at p. 124 (dis. opn. of Grover, J), emphasis added.)

G. Prohibiting Judges from Determining Whether Minors Under 16 Who Commit Horrendous and Violent Crimes and Who are Not Likely to be Rehabilitated Does Not Even Further the Intent of Rehabilitation

In many ways, SB 1391 cannot even be said to further the intent to emphasize rehabilitation for juveniles.

Not only did Proposition 57 eliminate the presumption that a minor charged with certain crimes was not fit for the juvenile court system (see *People* v. *Castillero*, supra, 33 Cal.App.5th at p. 398; former Welf. & Inst. Code, § 707, subd.(a)), it reconstructed section 707 to require the juvenile court to consider five factors in deciding whether "to treat the minor in the juvenile court system or transfer the matter to the criminal court. Those factors are the minor's degree of criminal sophistication, whether the minor can be rehabilitated in the time before the juvenile court would lose jurisdiction over the minor, the minor's prior history of delinquency, the success of prior attempts by the juvenile court to rehabilitate the minor, and the circumstances and gravity of the charged offense. (§ 707, subd. (a)(2)(A)(i)-(E)(i).)" (*J.N.* v. *Superior Court* (2018) 23 Cal.App.5th 706, 711.)

These criteria are all clearly targeted at determining whether the minor can be rehabilitated by the juvenile justice system.

Assuming the goal of rehabilitation, *in general*, can be met by expanding the category of minors who will remain in the juvenile system (because of its emphasis on rehabilitation), it definitely *cannot* be met by allowing minors under 16 to remain in the juvenile system when a court has effectively determined the minors are ***not going to be sufficiently rehabilitated*** by remaining in the juvenile system. This is especially true considering that a minor who is not captured until shortly before his or her 25th birthday will receive little or no rehabilitation whatsoever under the version of section 707 enacted by SB 1391.

In *People* v. *Superior Court (Alexander C.)*, *supra*, 34 Cal.App.5th 994, the appellate court was skeptical that the purpose behind Proposition 57 of furthering rehabilitation was undermined by the fact that 14-and 15-year-old offenders might "not have time to rehabilitate in the juvenile systems before the expiration of the juvenile court's jurisdiction" because, inter alia, the appellate court believed such concerns could be "mitigated" by the existence of Welfare and Institutions Code section 1800, which allows a court to extend jurisdiction after a person attains 25 years of age in very limited circumstances. (*Id*. at pp. 1001-1002.)

But this is akin to saying that concerns over widespread poverty can be mitigated by the existence of the state lottery. Section 1800 radically limits the circumstances when rehabilitative services can be provided and requires lengthy, expensive, and adversarial proceedings.

Prosecutors do <u>not</u> even have the ability to initiate a petition to extend control of a juvenile. They may do so *only upon* request of the Division of Juvenile Facilities (Welf. & Inst. Code, § 1800, subd. (a)) or potentially upon request of the Board of Parole Hearings (Welf. & Inst. Code, § 1800.5). Moreover, before a minor can be maintained in

custody, it must be determined beyond a reasonable doubt by jury trial that not only is the minor someone who "would be physically dangerous to the public" but it must be shown (i) the dangerousness is specifically due to "person's mental or physical deficiency, disorder, or abnormality" and (ii) the deficiency, disorder, or abnormality is one "that causes the person to have serious difficulty controlling his or her dangerous behavior". (*Ibid.;* see also *In re Howard N.* (2005) 35 Cal.4th 117, 135.) And even assuming all these hurdles can be overcome, the extension is only for two years. Any further extension must once again be initiated by the Division of Juvenile Facilities "in accordance with the provisions of Section 1800 if continued detention is deemed necessary." (Welf. & Inst. Code, § 1802.)

V.
CONDONING THE AMENDMENT OF PROPOSITION 57 BY SB 1391 WILL ULTIMATELY ENCOURAGE CHICANERY BY PROPONENTS OF FUTURE INITIATIVES AND FOSTER PUBLIC CYNICISM

Imagine how the opponents of Proposition 57 would have been ridiculed and accused of fear-mongering had they claimed, during the election, that Proposition 57 was opening the door to the Legislature to abolish, without voter approval, the ability of judges to even place any minor under 16 (or even over 16) in criminal court regardless of how horrific the crime committed. Proponents would undoubtedly have pointed out all the arguments currently being made for why Proposition 57 did *not* authorize an amendment such as SB 1391, including the fact that original version of Proposition 57 was expressly modified to *allow*

14-and 15-year-old perpetrators of murder, robbery, and violent sex offenses to be tried as adults.[4]

Of course, any claim that by overturning Proposition 21 and enacting Proposition 57, voters would be giving carte blanche to the Legislature to eliminate *all* criminal prosecutions of those under 18 was simply too far-fetched to have made it into the campaign or ballot arguments by those opposed to Proposition 57. Yet here we are.

Had it been *remotely obvious* that Proposition 57 could be amended without voter approval to eliminate criminal prosecutions of all persons under 16 (or 18), opponents might have mobilized the victims or families of those victims who had been murdered, tortured, or sexually assaulted by minors to speak out against the initiative on a statewide level.

And it is reasonable to believe that had the voters heard the anguish, pain, and horror experienced by these victims and their families, it would have made a difference. The crimes that could have been brought to the voter's attention are certainly horrific enough to

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[4] It is fair to presume that some voters would have been aware that the provision giving judges the discretion to decide whether certain minors under 16 should be handled in adult court was *added* to the final version of the initiative after being *omitted* from the original version. (See *Brown* v. *Superior Court*, *supra*, 63 Cal.4th 335, 340.) Pursuant to recent changes made to section 9002 of the Election Code, the original version of Proposition 57 was posted on a public website for 30 days and made available to anyone with a computer. (*Ibid.*) The whole point of the posting was to give voters an opportunity to ***see*** and comment upon the original version of an initiative. (Elec. Code, § 9002, subd. (a).) And just as voters are presumed to be aware of existing laws, regardless of how obscure the laws are (see *Viking Pools, Inc.* v. *Maloney* (1989) 48 Cal.3d 602, 609), so should they be presumed to be aware of an original version of the initiative specifically posted on an official government website.

have given voters pause before deciding to grant authority to the Legislature to pass a bill like SB 1391.[5]

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[5] In addition to the crimes described in Real Party in Interest's Answer Brief on the Merits at pp. 44-45, opponents might have highlighted crimes like those of the murder and sexual assault of an eight-year old girl allegedly committed by a 15-year-old neighbor who lured her into his apartment and feigned assistance in searching for the child after dumping her body into a recycling bin. (See Todd, Accused Teen killer of 8-Year-old Santa Cruz Girl to Face Adult Proceedings, Santa Cruz Sentinel (May 17, 2019) <https://www.mercurynews.com/2019/05/17/judge-in-aj-gonzalez-case-says-sb1391-is-unconstitutional/> (as of June 30, 2020).) Or they might have brought out the Legislature could preclude the prosecution of a 15-year old, who, in conjunction with another, was convicted of murder based on enticing a 58-year old victim outside his home with a plea for help and, following an assault upon the victim with a baseball bat, returning to shoot the victim in the head to make sure he was dead. (See Staff, Two Men Found Guilty of Killing, Robbing 58-Year-Old Phelan Man in 2015 (April 23, 2018) <https://www.vvdailypress.com/news/20180423/two-men-found-guilty-of-killing-robbing-58-year-old-phelan-man-in-2015> (as of June 30, 2020.) Indeed, every published decision touching upon the question of whether SB 1391 was an improper amendment of Proposition 57 has involved a minor alleged to have committed *at least* one murder or attempted murder. (See *Narith S.* v. *Superior Court*, *supra*, 42 Cal.App.5th at p. 1137 [attempted murder, shooting at inhabited dwelling, and discharging firearm from motor vehicle]; *B.M.* v. *Superior Court of Riverside County*, *supra*, 40 Cal.App.5th at p. 742 [special circumstances arson-murder]; *O.G.* v. *Superior Court*, *supra*, 40 Cal.App.5th at p. 629 [murder of two people]; *People* v. *Superior Court (S.L.)*, *supra*, 40 Cal.App.5th at p. 118 [murder and multiple attempted murders]; *People* v. *Superior Court (T.D.)*, *supra*, 38 Cal.App.5th at p. 370 [first degree murder during attempted carjacking]; *People* v. *Superior Court (I.R.)*, *supra*, 38 Cal.App.5th at p. 392 [murder]; and *People* v. *Superior Court (K.L.)*, *supra*, 36 Cal.App.5th at p. 532 [murder]; *People* v. *Superior Court (Alexander C.)*, *supra*, 34 Cal.App.5th at p. 998 [15 felonies, including two counts of attempted murder, two counts of torture, and various sex offenses]; *C.S.* v. *Superior Court* (2018) 29 Cal.App.5th 1009, 1014 [murder].)

The average voter might not have been so quick to approve of Proposition 57 had they recognized that its purpose and intent could be interpreted to permit the passage of SB 1391 or elimination of criminal prosecution of any minor.

It is possible it would not have made a difference.[6] And we can only speculate what the voters would have done if they had been aware of the power that was being passed to the Legislature. But giving an after-the-fact interpretation to the scope of section 5 of Proposition 57 as urged by Petitioner will undoubtedly have many citizens second-guessing their vote for Proposition 57.

Moreover, the door to future gamesmanship will be opened if the language of Proposition 57 can be interpreted so broadly as to permit the elimination of criminal prosecutions of anyone under 16 despite such purpose being directly contradicted by the actual language of Proposition 57 and by the ballot materials.

Even assuming opponents of future propositions recognize the possibility that broad language regarding intent might result in the passage of legislation repealing provisions expressly enacted by an initiative, it will be easy for proponents to sit back and point out the lack of any specific language supporting such a possibility to the unsophisticated voter. Or more devastatingly, they will be able to point *to* the *inclusion* of express language that refutes the opponent's

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[6] The California Secretary of State website lists proponents of Proposition 57 as spending approximately *13.7* million dollars while opponents spent approximately *1.7* million dollars. (See California Secretary of State, Ballot Measure Total Contributions – Proposition 57 (Feb. 7, 2017) <https://www.sos.ca.gov/campaign-lobbying/cal-access-resources/measure-contributions/proposition-57-criminal-sentences-juvenile-criminal-proceedings-and-sentencing-initiative-constitutional-amendment-and-statute/> (as of June 30, 2020).

claims. It will create an inherently unfair advantage for proponents who have designs not apparent from the language of the initiative.

A dangerous precedent will be set, resulting in an increase in the number of future initiatives that make it difficult for the voters to have any confidence that expressly enacted provisions of an initiative will not subsequently be wiped out by legislative amendment. And, once that increase occurs, it may even diminish the likelihood that voters will give the legislature *any* power to amend an initiative. (See *Amwest Surety Ins. Co.* v. *Wilson* (1995) 11 Cal.4th 1243, 1256.) This is not a desirable outcome.

True, the record in the instant case does not include any evidence the provision eliminating all criminal prosecutions of minors under 16 was taken out by the proponents as a political maneuver in exchange for promises that it could be put back in by the Legislature once the voters passed the initiative. But, significantly, treating SB 1391 as a proper amendment of Proposition 57, will undoubtedly *make it easier* for initiative proponents to engage in this *type of* "bait and switch" in the future. (Cf., *People* v. *Valencia*, *supra*, 3 Cal.5th at p. 385, fn. 3 (conc. opn. of Kruger, J.) [expressing a fear that interpreting an "oblique reference" in Proposition 47 to modify an existing resentencing scheme under Proposition 36, "in the face of considerable evidence suggesting the intended scope of the statute is materially narrower, would undoubtedly encourage drafters in future cases to deploy similarly oblique references to hide the true scope of proposed legislation from the electorate"].)

VI.
CONCLUSION

Because Proposition 57 was an initiative enacted by the voters that limited the ability of the Legislature to amend its provisions unless the amendments are consistent with and further the intent of Proposition 57, the Legislature did not have the authority to make the amendments to Proposition 57 made by SB 1391. (See Cal. Const., art. II, § 10, subd. (c).) As such, it is an invalid amendment of Proposition 57 and cannot be applied to prevent a juvenile court from holding a transfer hearing of a minor under 16 who commits an offense listed in Welfare and Institutions Code section 707(b) in adult criminal court. Accordingly, the California District Attorneys Association respectfully requests that this Court uphold the decision of the Court of Appeal in the instant case.

Dated: July 2, 2020

Respectfully submitted,

Appellate Committee of the
California District Attorneys
Association

By:
Jeff Rubin
Deputy District Attorney
Santa Clara County District
Attorney's Office

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rules 8.486(a)(6) and 8.204(c), I certify that Application for Leave and Amicus Brief have been prepared using 13 point Georgia font and, respectively, contain 343 and 10, 220 words, inclusive of footnotes, but excluding table, covers, this certificate, and declaration of proof of service. I have relied on the word count feature and other features of Microsoft Word, the computer program used to author this brief, for certification.

July 2, 2020

_____

Jeff Rubin

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare: I am a resident of or employed in the County Sacramento. I am over the age of 18 years and not a party to the within action. My business address is 2495 Natomas Park Drive, Suite 575, Sacramento, CA 95833. On July 2, 2020, I served a true copy of the within:

APPLICATION OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT AND REAL PARTY IN INTEREST

on the following, by emailing and e-filing through Truefiling to:

Michelle Contois
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Court of Appeal
Second Appellate District, Div. 6
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and by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Sacramento, California:

Honorable Kevin J. McGee
4353 E. Vineyard Avenue #122
Oxnard, Ca 93036

I declare the foregoing to be true and correct under penalty of perjury.

Executed on July 2, 2020, at Sacramento, California

_____
Declarant: Laura Bell

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **O.G. v. S.C. (PEOPLE)**
Case Number: **S259011**
Lower Court Case Number: **B295555**

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7/2/2020
Date

/s/Laura Bell
Signature

Zahner, Mark (137732)
Last Name, First Name (PNum)

California District Attorneys Association
Law Firm