**IN THE SUPREME COURT OF CALIFORNIA**

O. G.,
Petitioner,
v.
THE SUPERIOR COURT OF VENTURA COUNTY,
Respondent;

THE PEOPLE,
Real Party in Interest.

S259011

Second District, Division 6
B295555

Ventura County Superior Court
2018017144

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# APPLICATION OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND TODD W. HOWETH, PUBLIC DEFENDER FOR THE COUNTY OF VENTURA, TO APPEAR AS *AMICI CURIAE* ON BEHALF OF PETITIONER O. G.

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TO THE HONORABLE TANI GORRE CANTILE-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THIS COURT:

The California Public Defenders Association (CPDA) and Todd W. Howeth, the Public Defender for the County of Ventura, respectfully request your permission to file a brief in support of Petitioner O. G.. This application summarizes the nature and history of your amici and our interest in the issues presented in this case and explains how our brief will assist the court in deciding the matter. (No

party nor any counsel for a party authored this proposed brief in whole or in part nor made a monetary contribution intended to fund the preparation or submission of the brief.)

## A Statement of Our Interest and Expertise

I.

**The California Public Defenders Association is the largest and most influential association of criminal defense attorneys and public defenders in the State of California. Our collective experience regarding the law and our appellate advocacy on criminal justice issues puts us in a unique position to assist the court in this case.**

With nearly four thousand members, the California Public Defenders Association (CPDA) is the state's largest nonprofit organization of criminal defense practitioners. CPDA is uniquely situated to assist this court.

CPDA promotes the legal rights of Californians in both our state's criminal and juvenile justice systems. CPDA is a leader in continuing legal education for California defense attorneys and is an approved provider of Mandatory Continuing Legal Education, Criminal Law Specialization Education, and Appellate Law Specialization Education. CPDA is one of only two organizations deemed by the Legislature to be an "automatically" approved MCLE provider.

California courts have granted CPDA leave to appear as amicus curiae in nearly 70 cases. (See, e.g., *Facebook v. Superior Court* (*Touchstone*) (S245203) [briefed re alternatives for access to information under the Stored Communications Act]; *Association for Los Angeles Deputy Sheriffs v. Superior Court* (2019) 8 Cal.5th 28 [statute allowed Sheriff to disclose to prosecutor the fact that deputy sheriff might have relevant impeaching material in deputy's confidential personnel file]; *Gardner v. Appellate Division* (2019) 6 Cal.5th 998 [pretrial prosecution

appeal of suppression order qualifies as critical stage of the prosecution at which the defendant has right to appointed counsel]; *People v. Buycks* (2018) 5 Cal.5th 857 [enhancements required to be stricken following reduction of underlying felonies to misdemeanors]; *Facebook, Inc. v. Superior Court* (*Hunter*) (2018) 4 Cal.5th 1245 [service provider may properly be subject to compliance with a subpoena]; *San Diego County v. Commission on State Mandates* (2018) 6 Cal.5th 196 [reversing the Commission's determination regarding the SVP act]; *People v. Adelmann* (2018) 4 Cal.5th 1071 [resentencing petition required to be filed in sentencing county]; *People v. Romanowski* (2017) 2 Cal.5th 903 [conviction for grand theft under Penal Code section 484e is eligible for section 1170.18 relief]; *People v. Gonzales* (2017) 2 Cal.5th 858 [entering a bank with the intent to cash a forged check is shoplifting, not burglary]; *People v. Morales* (2016) 63 Cal.4th 399 [presentence credits do not reduce the Safe Neighborhoods and Schools Act parole period]; *People v. Mosley* (2015) 60 Cal.4th 1044 [discretionary sex offender registration isn't "punishment" within the meaning of the Sixth Amendment]; *People v. Beltran* (2013) 56 Cal.4th 935 [heat of passion does not require provocation that would cause the average person to kill]; *Robey v. Superior Court* (2013) 56 Cal.4th 1218 ["plain-smell" did not permit warrantless search]; *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112 [Penal Code section 1054.3, subdivision (b)(1), permitting a compelled mental examination of a criminal defendant who has placed his mental state at issue, does not violate the Fifth Amendment]; *People v. Albillar* (2010) 51 Cal.4th 47 [sex offenses subject to gang enhancement]; *Barnett v. Superior Court* (2010) 50 Cal.4th 890 [post-trial discovery]; *Galindo v. Superior Court* (2010) 50 Cal.4th 1 [pre-prelim discovery]; *People v. Lessie* (2010) 47 Cal.4th 1152 [*Miranda* waiver after minor's request for parent]; *People v. Lenix* (2008) 44 Cal.4th 602 [comparative juror analysis for first time on appeal]; *People v. Nelson* (2008) 43 Cal.4th 1242 [DNA evidence in a cold-hit case]; *People v. Richardson* (2008) 43 Cal.4th 959 [use of

peremptory challenges to excuse any juror who expressed reservation about the death penalty did not violate defendant's right to a representative jury]; *Chambers v. Superior Court* (2007) 42 Cal.4th 673 [*Pitchess* procedures]; *People v. Salazar* (2005) 35 Cal.4th 1031 [*Brady* suppression in context of experts]; *People v. Sanders* (2003) 31 Cal.4th 318 [search could not be a reasonable "parole search" without knowledge of the suspect's parole status]; *Manduley v. Superior Court* (2002) 27 Cal.4th 537 [no separation of powers violation by the direct filing of juvenile cases in the criminal court]; *People v. Loyd* (2002) 27 Cal.4th 997 [jail taping of phone calls]; *People v. Mooc* (2001) 26 Cal.4th 1216 [need for reviewable record of in camera hearing]; *Albertson v. Superior Court* (2001) 25 Cal.4th 796 [confidentiality in SVP proceedings].)

CPDA has also served as amicus curiae to the United States Supreme Court. (See, e.g., *Gonzales v. Duenas–Alvarez* (2007) 127 S.Ct. 815 [aiding and abetting theft justifies removal]; *Samson v. California* (2006) 547 U.S. 843 [individual suspicion not needed for parole search]; *Ewing v. California* (2003) 538 U.S. 11 [Life sentence for theft of golf clubs, under California's three-strikes law, was constitutional]; *California v. Trombetta* (1984) 467 U.S. 479 [the duty to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense]; *Monge v. California* (1998) 524 U.S. 721 [double jeopardy clause does not bar retrial of a prior conviction allegation after an appellate finding of evidentiary insufficiency].)

In addition to its amicus work, CPDA is heavily involved in proposing and drafting legislative solutions to statewide criminal justice and juvenile law problems. Our lobbyists attend key state Senate and Assembly committee meetings weekly, and members of our association routinely testify in the Legislature regarding proposed bills relevant to criminal justice and to juvenile law. Additionally, CPDA

has sponsored legislation and has taken a position on thousands of bills which, if adopted, would impact our members and their clients.

CPDA has both a general and specific interest in the subject matter of this litigation. CPDA's members represent the vast majority of individuals charged with serious criminal and juvenile offenses in California's courts.

In light of this collective experience, CPDA is in a unique position to offer, as your amicus, a practitioner perspective of the issue presented in this case.

## II.

## The Ventura County Public Defender's office is established pursuant to Government Code sections 27700-27712 to provide quality legal representation to indigent persons in the courts of Ventura County. Historically, the Public Defender is well-versed on all issues relating to California's criminal and juvenile justice systems and often provides amicus services to the California courts on issues of statewide and national significance.

Todd W. Howeth is the Public Defender of Ventura County. Each year, the Public Defender provides a defense in some 16,000 new misdemeanor cases and over 3,500 new felonies. Our collective trial and appellate experience well equips us to assist this court on the issues presented in this case.

The Public Defender of Ventura has been permitted to appear as amicus in our state Supreme Court since 1969. In 2005, the court also allowed the Public Defender to present oral argument as an amicus in *People v. Salazar* (2005) 35 Cal.4th 1031. The author of this brief was allowed to appear in oral argument on behalf of these same amici.

The Public Defender takes an active presence in our courts of review as a party, an attorney for a party, or in the role of amicus. (See, e.g., *Erwin v. Appellate Dept.* (1983) 146 Cal.App.3d 715 [Public Defender as petitioner].) The author of this brief has worked for the Ventura County Public Defender (VCPD) for over 20 years, and is a Senior Deputy responsible for our appellate practice and training.

Dated: July 9, 2020

Respectfully Submitted,

Michael C. McMahon

Michael C. McMahon, SBN 71909
State Bar Certified Specialist - Criminal Law
State Bar Certified Specialist - Appellate Law
For the California Public Defenders Association
and the Public Defender of Ventura County,
Applicants for amici curiae status in support of
Petitioner O. G.

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# AMICI BRIEF OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND TODD W. HOWETH, PUBLIC DEFENDER FOR THE COUNTY OF VENTURA, ON BEHALF OF PETITIONER O. G.

TO THE HONORABLE TANI GORRE CANTILE-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THIS COURT:

## The Public Safety and Rehabilitation Act of 2016

In November 2016, California voters enacted Proposition 57, The Public Safety and Rehabilitation Act of 2016 (Proposition 57 or Prop 57). As relevant here, Prop 57 required a judge, not a prosecutor, to decide whether juveniles should be tried in adult court. The Act also accelerated eligibility for parole consideration of most nonviolent offenders and the manner by which conduct credits could be earned by state prison inmates.

## Senate Bill No. 1391 (2018)

In 2018, the Legislature enacted Senate Bill No. 1391 (2017–2018 Reg. Sess., hereinafter S.B. 1391). S.B. 1391 prohibits the transfer of most 14- and 15-year-old offenders to adult criminal court.

Your amici are convinced that S.B. 1391 was a valid amendment of Prop 57.

In its voter information, Proposition 57 listed the following five purposes and intents:

"1. Protect and enhance public safety[;]"

"2. Save money by reducing wasteful spending on prisons[;]"

"3. Prevent federal courts from indiscriminately releasing prisoners[;]"

"4. Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles[;]" and

"5. Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." (Voter Information Guide, Gen. Elect. (Nov. 8, 2016) text of Prop. 57, § 2, p. 141.)

## I. Because Prop 57 was authored by a Governor with a high level of trust for the Legislature, its Amendment Clause permits amendments passed by a simple majority, rather than a supermajority. This is a factor this court should consider in determining the validity of S.B. 1391.

Governor Jerry Brown was an author of Proposition 57 and wrote the official argument in support of Proposition 57 found in the state voters guide.

Because Governor Brown enjoyed a great relationship with the Legislature, Prop 57 contains a very permissive amendment clause that states: "**SEC. 5. Amendment.** This Act shall be broadly construed to accomplish its purposes. The provisions of Section 4 of this measure may be amended so long as such amendments are consistent with and further the intent of this Act by a statute that is passed by *a majority vote* of the members of each house of the Legislature and signed by the Governor." (Text of Prop 57, emphasis added.)

### A. Comparison to the 1982 Justice Reforms

In stark contrast, Proposition 8 on the June 1982 ballot (The Victims Bill of Rights) required a supermajority (two-thirds) to enact amendments. Proposition 8 consisted of several reforms of the criminal justice system, including provisions on victim's restitution, rules for granting bail, abolition of the diminished capacity defense, enhancement of sentences for habitual criminals, and curtailment of plea bargaining. (See, *Brosnahan v. Brown (*1982) 32 Cal.3d 236, 242-245.) Proposition 8 also amended the state Constitution. Proposition 8 contains a provision known as the Right to Truth-in-Evidence, which is

now codified at article I, section 28(f)(2). In relevant part, the provision states: "Except as provided by statute hereafter enacted by *a two-thirds vote of the membership in each house of the Legislature*, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782, or 1103." (Now found at art. I, § 28(f)(2) [formerly subd. (d)], emphasis added.)

The heated rhetoric in the voter information guide clearly demonstrated that the drafters and supporters of that initiative shares a deep distrust of judges, justices, and the Legislature. They also had little trust for those who might later seek amendments. (See, Voter Information Guide, 1982 Primary Election, Arguments in Favor of Proposition 8, at pp. 34 and 35.) In several instances, those ballot arguments specifically blamed the Legislature for the many serious problems sought to be fixed by Proposition 8. These ballot arguments are accepted sources from which to ascertain the voters' intent and understanding of initiative measures. They reek of distrust for the Legislature.

**B. Comparison to the 1990 Justice Reforms**

Similar to Proposition 8, Proposition 115, enacted by the voters in June 1990, made several additional changes to the Penal Code and the criminal justice system. The provisions of Proposition 115 were reviewed at length by this court in *Raven v. Deukmejian* (1990) 52

Cal.3d 336, 342-346. Entitled the "Crime Victims Justice Reform Act," Proposition 115 included such provisions as more expansive rules for allowing joinder of criminal defendants, reciprocal discovery for the prosecution and the defense, voir dire conducted initially by the court rather than by the parties, augmentation of the felony-murder and special circumstance statutes, and certain measures to discourage delays in bringing cases to trial.

As was the case with Proposition 8, Proposition 115 demonstrated that the drafters and supporters of that initiative shared a deep distrust of judges, justices, and the Legislature. They also had little trust for those who might later seek amendments. (Voter Information Guide, 1990 Primary Election, Arguments in Favor of Proposition 115, at pp. 34 and 35.) For this reason, Proposition 115 also required amendment by a supermajority (two-thirds).

*Your amici respectfully submit that the court should consider the amenability of the voters to subsequent amendments (majority vs. supermajority) as one of many factors when deciding whether a subsequent legislative amendment is valid.*

## II. The issue presented has been fully percolated by the justices of the Court of Appeal. The sheer number of justices who have concluded that S.B. 1391 is consistent with and furthers the intent of Prop 57 demonstrates their interpretation of those laws is reasonable.

This case presents an issue that has been widely vetted by the justices of the Court of Appeal. Those learned opinions are of

particular assistance to this court when the question presented is whether an interpretation of law is "reasonable." Here, the large number of justices in agreement on the issue acts as compelling evidence that their consensus of opinion is reasonable. Now, there is a broad jurisprudential view of reasonableness shared by a succession of level-headed jurists on the proverbial "Clapham omnibus." It is as if we had the rare benefit of soliciting the views of all the passengers aboard that bus.

No doubt, this court will give great weight to the learned opinions in the Court of Appeal. (See, *Narith S. v. Superior Court (People) (*2019) 42 Cal.App.5th 1131 (Rev. grntd.); *B.M. v. Superior Court (People)* (2019) 40 Cal.App.5th 742 (Rev. grntd.); *People v. Superior Court (S.L.)* ( 2019) 40 Cal.App.5th 114 (Rev. grntd.); *People v. Superior Court (T.D.)* (2019) 38 Cal.App.5th 360 (Rev. grntd.); *People v. Superior Court (I.R.)* (2019) 38 Cal.App.5th 383 (Rev. grntd.); *People v. Superior Court (K.L.)* (2019) 36 Cal.App.5th 529 (Rev. den.); *People v. Superior Court (Alexander C.)* (2019) 34 Cal.App.5th 994, Rev. den.)

Although this court will not determine the legal issue presented by merely counting the number of justices who have already weighed in on the issue, the number here is unusually large. We know with great confidence that there is a broad consensus of judicial opinion, and this court should be cautious in branding such a strong judicial consensus as unreasonable.

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**III. The judgment of the Court of Appeal, in this case, is just wrong. It gives too much weight to the fact that the text of S.B. 1391 amendment differs from the text of Proposition 57. However, all amendments involve a change of text. This court should focus on the underlying intent and purposes of Proposition 57, not merely its text.**

Even if the view of the Court of Appeal in the instant case is reasonable, that cannot be the end of our analysis. If there are two reasonable interpretations of the amendment clause, one of which finds S.B. 1391 to be valid, and another which finds the amendment to be invalid, this court should adopt the view that S.B. 1391 is valid.

All amendments add something or take something away from the Code which is being amended. This is simply the nature and definition of all amendments. Your amici respectfully suggest that the court use this cause as an opportunity to clarify any misunderstanding regarding the analysis endorsed by this court in *Amwest Sur. Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243. Here, the Court of Appeal erred by placing undue emphasis on the *text* of the two measures, rather than their *underlying intent and purposes.*

Under Prop 57, minors aged 14 or 15 could be tried in adult court only after a juvenile court conducted a transfer hearing, eliminating direct filing in adult court for these minors. One of the stated purposes of Prop 57 was to have a judge, not a prosecutor, decide whether these minors should be tried in adult court. S.B. 1391 removed the authority of the prosecutor to seek transfer to adult court of minors

aged 14 or 15, unless the minor was not apprehended until after the end of juvenile court jurisdiction.

The intent and purpose of Proposition 57 was not to permit the prosecution of 14- and 15-year-olds, but to reduce the number of youths who would be prosecuted as adults. This transfer restriction furthers other purposes of Proposition 57 to reduce the number of offenders incarcerated in state prisons, and to increase the opportunities for rehabilitation, particularly for juvenile offenders. S.B. 1391 furthers these purposes of Prop 57 by eliminating adult prison for 14- and 15-year-old offenders. S.B. 1391 nicely furthers the purpose of Proposition 57 by replacing the transfer restriction with a prohibition.

## IV. *Pearson* is readily distinguishable and presented a different issue than the issue presented here.

In *People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564 (*Pearson*) this court was asked to determine whether a postconviction discovery statute (Pen. Code, §1054.9) was an amendment of Proposition 115's discovery provisions. This court held it *was not* an amendment.

Here, all agree that S.B. 1391 *is* an amendment of Proposition 57. The only question presented is whether S.B. 1391 is a valid or invalid amendment. This is a completely different issue than the sole issue presented in *Pearson*. *Pearson* cannot support a proposition of law that was not presented nor decided in that case.

Most statutes do not amend a ballot measure. As was the

case with section 1054.9 in *Pearson*, if no amendment is attempted, there is no need to decide its validity under the analysis governing amendments.

This probably explains why several of the Court of Appeal opinions did not cite or rely on *Pearson*.

## CONCLUSION

This court should adopt the reasonable interpretation of Prop 57's amendment clause as authorizing legislative amendments that are consistent with and further the intent and purposes of the initiative.

It was not unreasonable, nor was it arbitrary, for the Legislature to conclude that S.B. 1391 promotes juvenile rehabilitation, while protecting and enhancing public safety, by ensuring virtually all 14- and 15-year-olds who commit crimes (and who are the youngest teenagers in the justice system) will remain in the treatment, counseling, and education programs offered by the juvenile justice system.

This court should reverse the judgment of the Court of Appeal.

Dated July 9, 2020

Respectfully Submitted,

Michael C. McMahon

Michael C. McMahon, SBN 71909
State Bar Certified Specialist - Criminal Law
State Bar Certified Specialist - Appellate Law
For the California Public Defenders Association
and the Public Defender of Ventura County,
amici curiae in support of Petitioner O. G.

## CERTIFICATE OF WORD COUNT

I do hereby certify that utilizing the word count software feature of MSWord, in Century Schoolbook size 13.5 font, there are 4,771 words in this document, excluding Declaration of Service.

July 9, 2020

Jeane Renick
Legal Mgmt. Asst. III

## DECLARATION OF SERVICE

Case Name: O. G., Petitioner, v. The Superior Court of Ventura County, Respondent; The People, Real Party in Interest.

Case No.: S259011 (Second Dist., Div. 6, B295555, from Ventura County Superior Ct., 2018017144)

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On July 9, 2020, I, Jeane Renick, declare: I am over the age of 18 years and not a party to the within action or proceeding. I am employed in the Office of the Ventura County Public Defender at 800 South Victoria Avenue, Ventura, California 93009. On this date, I *electronically served the following persons via Truefiling, and/or via email, as indicated,* AND/OR via U. S. Mail in the ordinary course of business, with a full, true and correct copy of the attached **Application of the Calif. Public Defenders Assoc. and Todd W. Howeth, Public Defender for the County of Ventura, to appear as Amici Curiae on behalf of Petitioner O. G.; Amici Brief:**

Xavier Becerra, Attorney General via docketingLAAWT@doj.ca.gov
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on the above date at San Buenaventura, California.

TODD W. HOWETH, Public Defender

By: JRenick
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Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 7/14/2020 by Florentino Jimenez, Deputy Clerk

**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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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

7/9/2020

Date

/s/Thomas Hartnett

Signature

Hartnett, Thomas (71909)

Last Name, First Name (PNum)

Todd W. Howeth, Ventura County Public Defender

Law Firm