IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

O.G.,	)	
	)	
Petitioner ,	)	S259011
	)	
v.	)	
	)	
The Superior Court of Ventura County,	)	
	)	
Respondent;	)	
	)	
The People of the State of California,	)	
	)	
Real Party in Interest.	)	
	)	

Ventura County Superior Court, Case Number 2018017144
Hon. Kevin McGee, Judge
Second Appellate District, Division Six, Case Number B295555

Application to File Amicus Curiae Brief and Amicus Curiae Brief of Amicus Populi Supporting Real Party in Interest The People of the State of California

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Application to File Amicus Curiae Brief of Amicus Populi Supporting The People of the State of California.

To the Honorable Tani Cantil-Sakauye, Chief Justice,
and the Honorable Associate Justices of the Supreme Court:

Amicus curiae Amicus Populi requests permission to file the attached amicus curiae brief supporting the People of the State of California, pursuant to Rule 8.520(f) of the California Rules of Court.

Amicus Populi represents individuals who worked as prosecutors during the past three decades, when California became much safer. From 1993 to 1998 alone, the state's homicide rate was cut in half. From 1993 to 2014, the homicide rate dropped from 12.9 to 4.4 (per 100,000), its lowest

in 50 years. The violent crime rate dropped from 1059 to 393 in 2014, so there were about 3,275 fewer homicides and 256,400 fewer violent crimes in that year than there would have been had crime remained at its 1993 level. The reversal of the crime rate saved tens of thousands of lives and prevented millions of violent crimes over two decades.

Amicus Populi works to preserve this improvement, balancing the imperative of punishing offenders according to their culpability with the imperative of protecting public safety, the first duty of government. (See *People ex rel. Gallo v. Acuna* (1996) 14 Cal.4th 1090, 1126; *People v. Blake* (1884) 65 Cal. 275, 277.) Amicus believes this Court can benefit from additional penological perspectives, as well as discussion of the constitutional issues presented by the case.

If this Court grants this application, amicus curiae requests the Court permit the filing of this brief which is bound with the application.

_____

Mitchell Keiter
Counsel for Amicus Curiae
Amicus Populi

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Introduction

In *Democracy in America*, Alexis de Tocqueville contrasted the two models of protecting the public from governmental authority and tyranny: prohibitions on outcome or protections through process. The "European way" protected freedom by "forbidding or preventing society form acting in its own defense" under certain circumstances, but the American model protected the public not by limiting state powers but "distributing [their] exercise **among various hands** and in **multiplying functionaries**, to each of whom is given the degree of power necessary for him to perform his duty." (Tocqueville, Democracy in America (Daniel Boorstin ed. 1990), Vol. I, p. 70, emphasis added.) This second model of distributing powers shaped California's constitution. (*Parker v. Riley* (1941) 18 Cal.2d 83, 89; *People ex rel. Attorney General v. Provines* (1868) 34 Cal.520, 537.)

Proposition 57 distributed powers several times over. It enabled millions of Californian *voters* to express their direct voice on important policies. It authorized *prosecutors* to exercise discretion in choosing whom to try as an adult (rather than follow a categorical mandate), and request approval from a *judge*, whose own discretion was informed by reports from *probation officials*, which could be informed by statements from *victims*. SB 1391 displaced this trust placed in prosecutors, judges, and the electorate.

Prop. 57 replaced juveniles' categorical inclusion in adult proceedings with individualized determinations by a judge, to distinguish inmates "deserving" rehabilitation from "dangerous" criminals, to be kept

"behind bars." Replacing individualized determinations by categorically *excluding* juveniles from adult court did not facilitate the initiative but narrowed it. (*Chesney v. Byram* (1940)15 Cal.2d 460, 463-464.) Statutes may clarify an initiative or address unforeseen circumstances, but not directly contravene it. (*People v. Kelly* (2010) 47 Cal.4th 1008, 1026, fn. 19; *Consulting Engineers & Land Surveyors of California, Inc. v. Professional Engineers in California Government* (2007) 42 Cal.4th 578, 588 *(CELSOC*).)

Petitioner contends such contravention is permissible because SB 1391 reduced punishment further than Prop. 57, and moved the law in the same direction. But Prop. 57 presented balanced priorities, emphasizing it "keeps the most dangerous criminals behind bars." It promised to minimize the costs of overpunishment and underpunishment. Petitioner asserts the voters did not implement individualized determinations, but set the state on an inexorable march toward ever lesser punishment. But just as the three strikes law's purpose was not a mantra that could always justify the longest possible sentence, the rehabilitative imperative of Prop. 57 cannot always justify the shortest. (*People v. Susser* (2015) 61 Cal.4th 1, 16.) Voters passed Prop. 57 because it re-affirmed juvenile murderers could be tried as adults, while narrowing the circumstances to cases where a judge approved, just as voters passed Prop. 36 because it re-affirmed life sentences for habitual offenders, while narrowing the circumstances to cases where the third strike was serious or violent. Neither authorized — or permitted — the complete abolition of that outcome.

The issue is not the proper minimal age for adult prosecution, as the Attorney General contends (Attorney General Brief (AGB) 10), but *the minimum age Proposition 57 prescribed*. On that, reasonable minds cannot differ.

Standard of Review

A statute's constitutionality is a question of law; a court's conclusion about it is reviewed independently. (*Howard Jarvis Taxpayers Assn. v. Newsom* (2019) 39 Cal.App.5th 158, 169; *Gardner v. Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1374.) Nor does this Court defer to the Legislature's finding Senate Bill 1391 constitutionally furthers Proposition 57's purposes. (See *Howard Jarvis*, *supra*, 39 Cal.App.5th at p. 169: "The Legislature made an express finding that Senate Bill No. 1107 did further the purposes of [Proposition 9]. We are not bound by this finding and are not required to defer to it.") As the Court of Appeal recognized, the Legislature's assertion is "self-serving" and adds nothing to the review. (Slip op. at 5.) The Legislature will *always* believe its enactments are constitutional; one expects lawmakers would never knowingly violate the Constitution. But they might violate it unknowingly — and often do. (See e.g. *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1265; *Howard Jarvis*, at p. 174, *Gardner*, *supra*, 178 Cal.App.4th at p. 1380; *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005)132 Cal.App.4th 1354, 1373; *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1475, 1481, 1495.) It would be pointless to make the Constitution supreme, with judges swearing to support it, if courts must "take the legislative construction as correct." (*Nogues v. Douglass* (1857) 7 Cal. 65, 70.)

The *construction* of texts favors constitutionality. Where multiple constructions are reasonable, courts should credit the constitutional one:

"[C]ourts should construe statutes so they may be held constitutional where it is reasonably possible to do so." (*In re Shafter-Wasco Irrigation Dist.* (1942) 55 Cal.App.2d 484, 488, cited in *Briggs v. Brown* (2017) 3 Cal.5th 808, 850-851.) *Briggs* construed the five-year timeline in death penalty appeals as directory, which rendered Proposition 66 constitutional, and not mandatory, which would have rendered it unconstitutional. (*Briggs*, at pp. 858-859.) Construction is not an issue here; both Proposition 57 and SB 1391 have unambiguous effect. The former authorizes trying a 15-year-old murderer in adult court upon a court's finding he belongs there, which the latter prohibits. This is not a case where this Court can reasonably construe the law in multiple ways, one of which one is constitutional and the other is not. (See *Briggs*, at pp. 849-858.)

No greater presumption was established by *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243. As summarized in *Gardner*, *supra*, 178 Cal.App.4th 1366, 1374, *Amwest* declined to use a "deferential standard of review in determining whether the [statute] . . . further[ed] the purposes of Proposition 103." If judicial review were deferential rather than "effective," drafters of future initiatives might not authorize any amendment, "lest even the most limited grant of authority to amend be used by the Legislature to curtail the scope of the initiative." (*Amwest*, at p. 1256.)

The case *Amwest* cited in recognizing a statute's "strong presumption of constitutionality" involved an ambiguous provision that, like Proposition 66, needed construction. (*Amwest*, at p. 1251, citing *California Housing*

Finance Agency v. Patitucci (1978) 22 Cal.3d 171, 175.) *Patitucci* concerned a constitutional provision that required a vote before development of any "low rent housing project." (*Id.* at p. 173.) The Legislature enacted a law construing what qualified as such a project. (*Id.* at p. 174.) The Supreme Court thus needed to determine whether the Legislature had correctly construed the scope of the constitutional provision. Because the measure was "not unambiguous" and "subject to varying interpretations," this Court favored a construction rendering the legislation constitutional. (*Id.* at pp. 176-177.)

Amwest did not involve such deference because the provision there was not "ambiguous or in need of clarification." (*Amwest*, *supra*, 11 Cal.4th at p. 1260.) To the contrary, it was "clear that the provisions of Proposition 103 applied to surety insurance." (*Id.* at p. 1261.) It is also clear Proposition 57 authorizes trying 15-year-old murderers as adults with judicial approval, and SB 1391 does not. Accordingly, this Court must apply "effective judicial review," not deference to the Legislature's self-serving conclusion of constitutionality. (*Amwest* at p. 1256; *Gardner*, *supra*, 178 Cal.App.4th 1366, 1374.)

Though petitioner cites *Amwest* for the proposition that legislative findings deserve "great weight" (Petitioner's Opening Brief (POB) 24), that statement concerned "whether a particular program serves a public purpose." (*Amwest*, *supra*, 11 Cal.4th at p. 1152.) The question in *Amwest*, and here, is not whether the statute "furthers the public good" but whether

it "furthers the purposes of the initiative." (*Id.* at p. 1265.) For that, no deference applies. (*Howard Jarvis, supra,* 39 Cal.App.5th 158, 169; *Gardner, supra,* 178 Cal.App.4th 1366, 1374.)

Deference in *Amwest* applied "not to the judgment of the legislature, but to that of the people, as expressed in the initiative." (Manheim & Howard, *A Structural Theory of the Initiative Power in California* (1998) 31 Loyola L.A. L.Rev. 1165, 1201, cited in *People v. Kelly* (2010) 47 Cal.4th 1008, 1030.)

> [T]he Legislature did not purport to interpret the Constitution, but only to amend . . . Proposition 103. The issue before us is whether the Legislature exceeded its authority. The "rule of deference to legislative interpretation" of the California Constitution, therefore, has no application in the present case.

(*Amwest, supra*, 11 Cal.4th at p. 1253.)

Deference to the Legislature would be especially ironic considering the subject. The public trusted judges to provide effective, nondeferential judicial review of prosecutors' assertions that certain defendants should be tried as adults. If the judiciary should not defer to the Executive Branch's assertions about its charging decisions, it should not defer to the Legislature's assertions about its statutory enactments.

Argument

I. Proposition 57 authorized individualized judicial decisionmaking, to reduce both "false negatives" and "false positives," and thereby optimize both public safety and rehabilitation.

The Court of Appeal deemed the history of juvenile murderers' treatment "largely [] irrelevant" to SB 1391's constitutionality. (Slip op. at p. 4.) Amicus Populi agrees this Court may resolve the question by reference to its text and that of Proposition 57 alone. Nonetheless, because other briefs address history and penology at length, Amicus Populi will also.

A. The crime roller-coaster

The Legislature set the minimum age for adult trial at 16 in 1961. (AGB 14.) That year, the California homicide rate was 3.7 per 100,000 Population. (California Dept. of Justice, Office of the Attorney General, Criminal Justice Info. Sys, Homicide in California 1998, p. 2.) In 1966, the violent crime rate was 298 per 100,000 people. (Crime in California 2019, p. 10.)[1] After myriad legal changes including new criminal law doctrines and sentencing provisions, the homicide rate increased to 12.9 in 1993, and the violent crime rate rose to 1059 in 1993. (*Ibid.*) For every victim in the 1960's, there were **3.5** in the 1990's. With a 1993 population of 31,740,000,

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1 https://data-openjustice.doj.ca.gov/sites/default/files/2020-06/Crime%20In%20CA%202019.pdf

California had approximately **2,920 more homicides**, and **241,500 more violent crimes** in that year alone than there would have been if the rate had stayed at the 1960's rates.

Californians initiated numerous policy changes. They reduced the minimum age for adult trials to 14, limited violent felons to no more than a 15 percent worktime sentence credit, and precluded any sentence credit for murderers (Stats. 1994, chs. 453, 713, § 1; Stats. 1996, ch. 598, § 3.) Voters further approved Proposition 21, which gave prosecutors unilateral authority to charge juveniles as adults. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 544-545.)

These myriad changes proved effective. By 2014, the homicide rate had dropped from 12.9 per 100,000 to 4.4, its lowest in 50 years, and violent crime dropped from 1059 to 393 in 2014. (Crime in California 2019, p. 10.) With California's population of approximately 38.5 million, there were about **3,275 fewer homicides** and **256,400 fewer violent crimes** in 2014 than there would have been had crime remained at its 1993 level. Over decades, this reversal saved **tens of thousands** of lives and prevented **millions** of violent crimes.

B. Individualized calibration

The crime drop led to concerns about overpunishment, particularly of juveniles, and their wholesale transfer into adult court: "[I]t is important that the juvenile courts' response to juvenile offenders be calibrated to have sufficient effectiveness as a deterrent while not being overly punitive." (See e.g. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, OJJDP Juvenile Justice Bulletin (June 2010), p. 8 (*Juvenile Transfer Laws)*, cited in PJDB 25, 31.) Redding relied heavily on Fagan et al., who also urged a balanced approach: "[T]he community must be protected from predatory youth who are unlikely to be helped by treatment-oriented . . . sanctions, but delinquent youth also must be protected from the overreach of wholesale waiver." (Fagan, Kupchik, & Lieberman, *Be Careful What You Wish For: Legal Sanctions and Public Safety Among Adolescent Offenders in Juvenile and Criminal Court*, Columbia Law School Scholarship Archive (2004) pp. 70-71 (*Be Careful*).) Fagan et al. distinguished "false negatives," where juvenile courts retain jurisdiction over youth "who are likely to re-offend," with "false positives," where courts transfer to adult court youth "who would benefit from a juvenile court's rehabilitative services." (*Id.* at p. 71.) Wholesale transfer policies minimized false negatives but maximized false positives.

Rejecting categorical rules based on only "age and instant offense," and instead authorizing courts to exercise discretion based on individual factors, would optimize outcomes for juveniles and the public. (*Be Careful*,

supra, at p. 72.) Individualized determinations could "simultaneously protect vulnerable youth who are amenable to rehabilitation, and protect the community from those most likely to re-offend." (*Ibid.*) Not only were judges disinterested decisionmakers, but individualized decisionmaking, rather than categorical rules, ensured accountability. (*Ibid.*) "A regime of individualized decision making would take seriously the responsibility for mistakes on both sides of the decision threshold." (*Ibid.*)

C. Proposition 57[2]

Proposition 57 prescribed individualized decisionmaking. Revising the model where 14- and 15-year-olds would **always** be tried for murder as adults, it initially proposed returning California law to its prior rule, when 14- and 15-year olds would **never** be tried as adults, regardless of their crimes. (*Brown v. Superior Court* (2016) 63 Cal.4th 335, 340.) Before the election, sponsors substituted a modified version whereby 14- and 15-year-olds could **sometimes** be tried as adults, if approved by the court, which essentially returned the law to where it stood in the later 1990's, when the homicide and violent crime rates dropped the fastest. Proponents literally followed Fagan's advice, and were careful in what they wished the public to approve.

The very title, The Public Safety and Rehabilitation Act of 2016, confirmed the dual imperative. The measure promised to protect the community from predatory youth who were unlikely to be helped by juvenile treatment, and also promised to protect youth who *would* benefit from rehabilitative services from wholesale waiver. (*Be Careful*, *supra*, at pp. 71-72.) The initiative prescribed an extensive set of specific factors, including the "circumstances and gravity of the offense," so two-time

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[2] It is Prop. 57's scope, not SB 1391's wisdom, at issue, so the materials that matter are those considered by the voters in approving Prop. 57, not those considered later by the Legislature.

murderers could be more likely to face adult proceedings than a lesser offender. (Welf. & Inst. Code, § 707, subd. (a)(2)(E)(i).) Judges could also consider the individual's amenability to rehabilitation by considering his criminal sophistication, maturity, impetuosity, mental and physical health, family and community environment, previous delinquent history, and previous rehabilitation attempts, in deciding "Whether the minor can be rehabilitated" during the juvenile court's jurisdiction. (Welf. & Inst. Code, § 707, subd. (a)(2)(A)-(D).) The minor's age and instant offense were factors, but **did not categorically determine the outcome**.

The ballot arguments favoring Proposition 57 emphasized public safety.

- "Prop. 57 focuses resources on keeping dangerous criminals behind bars";
- "Keeps the most dangerous offenders locked up";
- Policies will be "consistent with protecting and enhancing public safety";
- Parole eligibility will help "*only . . . prisoners convicted of non-violent felonies*":
- The argument concluded, "Prop. 57 keeps the most dangerous criminals behind bars."

The rebuttal argument similarly promised Prop. 57 "Does NOT prevent judges from issuing tough sentences."

The argument for rehabilitation also stressed its potential to reduce crime and protect the public rather than emphasize minors' reduced culpability.

- In the past, "too few inmates were rehabilitated and most re-offended after release";
- "[T]he more inmates are rehabilitated, the less likely they are to re-offend";
- "[R]ehabilitation for juveniles and adults . . . is better for **public safety** than our current system." (Emphasis added.)

The arguments emphasized individualized decisionmaking rather than categorical leniency.

- "To be granted parole, all inmates, current and future, must demonstrate that they are rehabilitated and do not pose a danger to the public";
- "The Board of Parole Hearings—made up mostly of law enforcement officials—determines who is eligible for release";
- "[J]udges instead of prosecutors [will] decide whether minors should be prosecuted as adults."

The rebuttal argument summarized Proposition 57's potential to prevent both false positives and false negatives by "rehabilitating deserving juvenile and adult inmates and keep[ing] dangerous criminals behind bars."

Prop. 57 trusted judges to distinguish the "deserving" from the "dangerous," protecting the former from overpunishment and the public from the latter. By rejecting the extremes that 15-year-old murderers should *always* or *never* be tried as adults, the initiative followed the wisdom of Justice Robert Jackson: "[B]ecause one should avoid Scylla is no reason for crashing into Charybdis." (Jackson, Decisional Law and Stare Decisis, 30 A.B.A. J. 334 (1944), quoted in *Ramos v. Louisiana* (2020) 140 S.Ct. 1390, 1412 (conc. opn. of Kavanaugh, J.)

II. This Court must invalidate SB 1391 because it is not consistent with Proposition 57.

The Court of Appeal held SB 1391 prohibited what the initiative authorized: prosecuting a 15-year-old murderer as an adult. (Slip op. at 5, citing *People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571.) *Pearson* referenced two circumstances that may be classified as establishing a *direct contravention* of an initiative by a later statute; either the latter prohibits what the former authorizes, or the latter authorizes what the former prohibits. (*Ibid.*) Such direct contravention precludes a conclusion the statute is consistent with and furthers the intent of Proposition 57.

A. Proposition 57 required all amendments be consistent with it.

Division Six's opinion is an outlier, but only due to a mistaken point of grammar. Several panels agreed SB 1391 is not "consistent with" Proposition 57, but denied such consistency was necessary. (*People v. Superior Court* (*T.D.*) (2019) 38 Cal.App.5th 360, 372; *People v. Superior Court* (*Alexander C.*) (2019) 34 Cal.App.5th 994, 1003; see also *Narith v. Superior Court* (2019) 42 Cal.App.5th 1131, 1141.) Proposition 57 limited amendments to those that are "consistent with and further the intent of this act." (See *T.D.*, *supra*, at p. 372.) The Fifth District questioned whether this required amendments be consistent with "this act," or with "the intent of this act." (*T.D.*, at p. 372.) It concluded either construction was possible, whereas the First District, without analysis, required consistency with the

intent, not the act itself: "[I]f any amendment to the provisions of an initiative is considered inconsistent with an initiative's intent or purpose, then an initiative such as Proposition 57 could never be amended." (*Alexander C.*, *supra*, 34 Cal.App.5th 994, 1003.) But the People do not challenge "any amendment," just one *directly contravening* the initiative it supposedly furthers. *Alexander C.*'s reasoning renders meaningless the limitation imposed, because the electorate intended something more than "the Legislature may amend the section." (*Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, 600, disapproved on another ground in *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 214, fn. 4.)

With commas, the two options presumably would be:

- "consistent with, and furthers the intent of, this act," OR
- "consistent with, and furthers, the intent of this act."

Proposition 57 does not reasonably support both constructions.

Several initiatives, including Proposition 103, Proposition 35, and Proposition 9, permitted amendment that furthered the purpose of the initiative, without requiring consistency. (See *CELSOC, supra,* 42 Cal.4th 578, 588; *Amwest*, *supra*, 11 Cal.4th 1243, 1255; *Howard Jarvis*, *supra*, 39 Cal.App.5th 158, 162.) Purpose-furthering alone seems to have been the condition required for amendment in most initiatives. (*Kelly, supra,* 47 Cal.4th 1008, 1042, fn. 59.) Proposition 57 *added* to that a consistency requirement, which would be superfluous if the required consistency applied

only to its purpose. That is because every change *furthering* a purpose, a fortiori, will be *consistent* with that purpose; the greater, active act of furthering necessarily includes the passive condition of being "consistent with." Courts should construe laws to give every word meaning, and avoid constructions rendering any word surplusage. (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.)

The Court of Appeal rejected surplusage in *Shaw*, *supra*, 177 Cal.App.4th 577, 605, where an initiative changed a funding limitation from "transportation purposes" to "transportation planning and mass transportation purposes." The previously-absent qualifier "mass" must have meant to further limit funding, so defining "mass" as serving "multiple people," like all state transportation projects, would have rendered the new limitation meaningless. (*Ibid.*) Justice Cantil-Sakauye thus held the revised funding qualification was narrower than the former one.

Proposition 57's nine-word phrase has included commas twice before in initiatives, and both times it appeared the first way, consistent with (and furthering!) amicus' argument. Proposition 116 permits statutory amendment "*if the statute is consistent with, and furthers the purposes of, this section*." (*Shaw*, *supra*, 175 Cal.App.4th 577, 600.) Proposition 11 likewise permits amendment by a statute that is "consistent with, and furthers the purposes of, this chapter." (Lab. Code, § 890.)

Proposition 57, revised in haste after its initial submission, has numerous drafting flaws more noteworthy than two missing commas, including the presence of a subdivision (a)(1)(A) without a subdivision (a)(1)(B). (*Brown*, *supra*, 63 Cal.4th 335, 360-361 (conc. opn. of Chin, J.).) This Court should not invest the commas' absence from Prop. 57 as authorizing the direct contravention of its substance.

B. Amendments may clarify an initiative but not rewrite it to contravene what it promised.

The Fifth District concluded that requiring consistency with the act itself (rather than its broad purposes) would preclude *any* amendment, "no matter how consistent such action might be with the purpose of the Act." (*T.D.*, *supra*, 38 Cal.App.5th at p. 372.) *T.D.* speculated this was not the intent, because if it had been, Proposition 57 would have been drafted to preclude any legislative amendment. (*Ibid.*, citing *Kelly*, *supra*, 47 Cal.4th 1008, 1042.) To the contrary, there is ample room for amendments that do not contravene the initiative's basic terms. *Kelly* provides a perfect framework for understanding the range of permissible modifications, and why SB 1391 crossed the line.

Californians passed Proposition 215 in 1996 to permit possession or cultivation of marijuana for "personal medical purposes," which one panel construed as amounts "*reasonably related to the patient's current medical needs*." (*Kelly*, *supra*, 47 Cal.4th at p. 1012.) Uncertainty regarding the permissible quantity frustrated both officers enforcing the law and patients seeking its protection. As *Kelly's* author, former Chief Justice George recalled, "somewhat" in jest, "what was viewed as a reasonable amount in Orange County, which might be one joint, might differ very much from a reasonable amount in Mendocino County, where it might mean a large truckload." (George, Chief: The Quest for Justice in California (2013) p.

585.)[3] To clarify the law's scope, the Legislature enacted Health and Safety Code section 11362.77, which permitted a quantity of eight ounces. (*Kelly*, at p. 1015, fn. 6.)

Kelly recognized amendments could be justified by the need to resolve uncertainties or address circumstances "not covered by the original" provision. (*Kelly, supra,* 47 Cal.4th 1008, 1026, fn. 19.) The example cited in *Amwest*, *supra*, 11 Cal.4th 1243, 1252, of permissible clarifying language came from *In re Nose* (1924) 195 Cal. 91, which concerned an odious law restricting Japanese immigrants' property rights but which remains instructive for its analysis of whether an amendment furthered the initiative's purpose. The amendments there "facilitated the operation" of the initiative but did not "enlarge upon its intent." (*Id.* at p. 93.) One section initially addressed "Any leasehold or other interest in real property less than the fee . . . ." (*Id*. at p. 94.) The amendment inserted after "fee" the following provision: "including cropping contracts, which are hereby declared to constitute an interest in real property less than the fee." (*Ibid*.) As *Patitucci*, 22 Cal.3d 171, 176-178, would later explain, this amendment would be proper so long as construing a cropping contract as a property interest less than the fee was reasonable. But if the initiative had *authorized*

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[3] The initiative's imprecision could have been by design, to facilitate greater deference to "contemporary community standards" — including Orange County's. (See *Miller v. California* (1973) 413 U.S. 15, 32-33 [Orange County could proscribe materials acceptable in Las Vegas or New York City].)

Japanese immigrants to acquire property and the amendment *prohibited* it, the amendment would not have furthered the initiative. (*Nose,* at pp. 94-95.) Only because the Act denied those property rights (and the U.S. Supreme Court found this constitutional) was amendment proper. (*Ibid.*)

The Supreme Court has long required statutes further the purpose of constitutional provisions.

> Legislation may be desirable, by way . . . regulating the claim of the right so that its exact limits may be known and understood; but all such legislation must be subordinate to the constitutional provision, and in **furtherance of its purpose**, and must not in any particular attempt to **narrow or embarrass it**.'

(*Chesney, supra,* 15 Cal.2d 460, 463-464, emphasis added.)

Chesney held the Legislature could require veterans to file affidavits to exercise a tax exemption, because the law "in no manner prevents any person from signing but merely facilitates the operation of the constitutional provision." (*Id.* at p. 463.) Although the Legislature could not alter who was constitutionally entitled to vote, it could require their registration. (*Id.* at pp. 464-466, citing *Bergevin v. Curtz* (1899) 127 Cal. 86.) Unlike the legislation in *Chesney,* which did not alter who could receive an exemption, or *Bergevin*, which did not alter who could vote, SB 1391 does affect who can be tried as an adult, and does not merely regulate the process. It did not facilitate or clarify the constitutional provision; it narrowed it.

Proposition 215, however, did not authorize any amendment, so the Supreme Court invalidated the legislative fix. (*Kelly, supra,* 47 Cal.4th.

1008, 1045-1046.) Where permitted, however, non-contradictory amendment can resolve a subject that the initiative did not address, because, for example, the drafters did not foresee an intervening change in the statutory framework (see *People v. DeLeon* (2017) 3 Cal.5th 640, 648-649), or an emerging technology. For example, if the drafters of Proposition 215 prescribed an eight-ounce possession limit because they anticipated users would smoke it, clarification might be needed if other means (edible marijuana or rubbing cream/oil) became more common decades later. A statute specifying a permissible quantity for reasonable use through eating or rubbing could regulate the right and clarify its application, and thereby further the purpose of the law. (*Chesney*, *supra*, 15 Cal.2d 460, 463-464.)

But that would not occur if there was a *direct contravention*, and the condition *was foreseen*. For example, if the initiative specified an eight-ounce maximum, and the Legislature then permitted a "truckload," that would directly contravene the initiative by authorizing what it prohibited and not further its purpose. Or if the initiative (as it did) required the approval of a disinterested professional, amendment could not abolish that professional check. Even if Proposition 215 had permitted amendment, it would not amount to automatic approval of "any change . . . in the same direction as the initiative." (PRB 38.) One could not construe the law's purpose as "increasing the amount one could legally possess" so that increasing it from eight ounces to eight thousand would fulfill that function (but reducing it to seven would not). The drafters privately might have

preferred a larger limit — or non-medicinal use — but realized voters might reject the initiative if it seemed too radical.

This is what happened below. The drafters initially banned trying 15-year-old murderers as adults, and then removed that ban, so the issue was certainly foreseen. One panel cited this history as favoring the amendment's validity: "That it was the proponents' intent, at least at one time, to eliminate criminal prosecution of 14 and 15 year olds in Proposition 57 . . . suggests that S.B. 1391 furthers that intent to have more juveniles fall within juvenile jurisdiction." (*People v. Superior Court* (*K.L.*) (2019) 36 Cal.App.5th 529, 536, fn. 4.) But the relevant intent is not that of the proponents who presented the initiative but the voters who approved it, in *its final form*.[4]

The proponents removed the ban either because they opposed its sweeping reach or they feared categorically barring adult prosecution of 15-year-old murderers might prove so controversial it would doom the entire measure. Sponsors may have hoped the initiative would be just the "starting point" of changes, but that was not what voters were told, or what they supported. (AGB 10.) Proponents could have "rolled the dice in a high

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[4] "The opinion of drafters or of legislators who sponsor an initiative is not relevant since such opinion **does not represent the intent of the electorate** and we cannot say with assurance that the voters were aware of the drafters' intent." (*Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm.* (1990) 51 Cal.4th 744, 764, fn. 10, emphasis added.)

stakes game of chance, betting that the [voters] faced with choice" of unilateral prosecutorial filing of 15-year-old murders or a categorical ban on adult treatment would favor the latter. (See *People v. Barton* (1995) 12 Cal.4th 186, 204 [describing compromise jury instruction].) But Proposition 57 embodied a compromise position, and that is what the voters approved. They expected the version they **approved**, not the one **withdrawn**, would govern the state. They had no reason to expect, as the Attorney General asserts, the Legislature would "supplement" Prop. 57 by contravening its terms with those of the withdrawn version. (AGB 26.)

This Court may not "interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." (*People v. Valencia* (2017) 3 Cal.5th 347, 375.) To adopt a construction never mentioned by the Attorney General or the Legislative Analyst, and which contravened the stated purposes and assurances read by voters could "encourage the subversion and manipulation of" "voters' democratic "right to directly enact laws." (*Id.* at p. 374.)

The upcoming ballot shows why voters might wish to ensure future amendments do not merely *further* the initiative's purpose but are also *consistent* with it. Proposition 15 proposes to supersede Proposition 13 by taxing commercial but not residential property on its market value. Just as Prop. 57's sponsors may have preferred the substance of SB 1391, so 14- and 15-year-old murderers would never face adult consequences, but realized

the initiative would win more votes if it offered that option, so too might many Prop. 15 backers prefer raising taxes on both residential and commercial property, but realize the initiative will win more votes if it preserves the lower base for residences. If it passes and subsequent legislation then extends the same rule to residences, that law could easily be justified as *furthering the purpose* of raising more money for schools. Only if the measure has a separate condition that amendments *be consistent with* the initiative could voters ensure the Legislature will not raise taxes on residential property.

Californians have now voted twice, through Propositions 215 and 64, to allow possession of marijuana. The Legislature could not criminalize marijuana now just because that "goes no further than returning the [law] to where it was before 1994." (*B.M. v. Superior Court* (2019) 40 Cal.App.5th 742, 759.) Through Proposition 21 and Proposition 57, the public has also voted twice in this century (loosely defined) to allow adult prosecutions of 15-year-old murderers. Those decisions deserve the same respect.

III. Because SB 1391 directly contravenes and could not operate concurrently with Proposition 57, it does not further its purposes.

Because SB 1391 directly contravenes Proposition 57, it is not consistent with it. Even if Proposition 57 did not require consistency with its provisions, SB 1391 is still invalid, because the "Legislature cannot take action . . . that contravenes a constitutional provision." (*CELSOC, supra,* 42 Cal.4th 578, 588.) Petitioner has not cited any case finding a statute furthered the purposes of an initiative by directly contravening it. To the contrary, because SB 1391 cannot operate concurrently with Proposition 57, it effected an implied repeal of the initiative, which was beyond the Legislature's authority. (*Rossi v. Brown* (1995) 9 Cal.4th 688, 715-716.)

A. A statute that directly contravenes an initiative effects an invalid implied repeal.

As explained in the standard of review section, courts may credit any reasonable construction of the meaning of the initiative's *text*, not the fit between subsequent legislation and the initiative's *purposes*. (See *B.M.*, *supra*, 40 Cal.App.5th 742, 756: "SB 1391 can easily be construed to promote public safety and reduce crime.") Because the constitutional provision in *Patitucci*, *supra*, 22 Cal.3d 171, was "not unambiguous," the Court could consult other sources in construing the provision's meaning. "Where, as here, **a constitutional amendment is subject to varying interpretations**, evidence of its purpose may be drawn from many sources."

(*Id*. at p. 177, emphasis added.) The Court declined to adopt an "unduly restrictive interpretation[] of *constitutional language*," and held the Legislature acted reasonably in defining a project where most units were not for low-income tenants was not a low-income project. (*Id*. at p. 179, emphasis added.) But the canon of favoring a constitutional construction does not extend to affirming legislative modifications that were "**clearly inconsistent with the express language** or clear import" of the "direct expression of the People." (*Id.* at p. 177, emphasis added.) And the only reasonable construction of Proposition 57 is that it authorizes prosecutors to move to try 15-year-old murderers in adult court, and authorizes judges to grant or deny those motions. No other construction is reasonable.

Petitioner's authorities confirm that amendments do not further an initiative's purposes by directly contradicting it. (POB 47-50.) The court in *Gardner, supra,* 178 Cal.App.4th 1366, 1370, recalled Proposition 36 had three **expressed purposes**: to (1) divert nonviolent drug offenders from incarceration to treatment; (2) halt wasteful spending on incarceration; and (3) enhance public safety by saving jail space for serious/violent offenders and improve public health by reducing drug abuse. The Legislature cited a study showing most nonviolent drug offenders were not completing the desired drug treatment, and prescribed short incarcerations to encourage compliance. (*Id*. at pp. 1372-1373.) The Legislature proclaimed the statute consistent with Proposition 36's purposes. (*Id*. at p. 1373.)

The Court of Appeal invalidated the statute. (*Gardner*, *supra*, 178 Cal.App.4th at pp. 1374-1380, citing *Foundation, supra,* 132 Cal.App.4th 1354, 1370, emphasis added: valid amendment "must not only further [initiative's] purposes in general, but it **cannot do violence** to [its] specific provisions.") Proposition 36's purposes included enhancing public safety by "freeing jail cells for violent criminals" and saving money by providing "treatment in lieu of incarceration." (*Id.* at p. 1377.) The statute "clearly contravene[d]" those goals by reducing jail space available for violent criminals and increasing costs incurred by the state. (*Id.* at p. 1378.) The statute's divergence from the initiative's specific provisions rendered it unconstitutional:

> Because Senate Bill 1137 **takes a significantly different policy approach** to such violations than the one reflected in Proposition 36, [it] cannot be said to further the Proposition, even though its professed aim was to promote the Proposition's public health purpose by encouraging participation in drug treatment.

(*Ibid.*, emphasis added.)

SB 1391 takes a "significantly different policy approach" to 15-year-old murderers than Proposition 57, and therefore does not further its purposes.

Even milder deviation was invalidated in *Shaw, supra,* 175 Cal.App.4th 577. Because Proposition 116 authorized particular funds be used only for "transportation planning and mass transportation purposes," funds could not be used for "seismic retrofitting of highways and bridges" even though that involved "planning," because the planning concerned

retrofitting, not transportation. (*Id.* at p. 607.) *Shaw* also precluded funding for the "worthy causes" of transportation for schoolchildren and the disabled because those activities were not "mass transportation." (*Id.* at p. 608.) The question was not whether these expenditures furthered some desirable purpose but whether they furthered the *initiative*'s purpose of funding "transportation planning" and "mass transportation." (*Id.* at pp. 608-609, 615.) As with *Patitucci*, *supra*, 22 Cal.3d 175, it was the text of the initiative, not the fit between the statute and the initiative's purposes, that required judicial construction. (*Shaw*, at p. 595.)

Review was independent, though construction was "liberal" in guarding the People's right to initiative and referendum, "one of the most precious rights of our democratic process." (*Id.* at pp. 595-596, quoting *Rossi, supra,* 9 Cal.4th 688, 694-695.) Where the Legislature amends the work of the People,

> our judicial policy [is] to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.

(*Rossi*, at p. 695.)

This Court seeks to harmonize divergent laws, and give effect to all their provisions. (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955.) However, where two provisions are irreconcilable, so they cannot possible operate concurrently, there is an implied repeal of the first. (*Ibid.*) For example, an amendment authorizing higher compensation to take effect after a sheriff's election was "incompatible" with a

constitutional prohibition on raising compensation after election. (*Shay v. Roth* (1923) 64 Cal.App. 314, 316-318.) No concurrent operation is possible for Proposition 57 and SB 1391, as the former authorizes prosecuting 15-year-olds as adults and the latter prohibits it. One or the other must yield.

This Court has multiple tools for determining which conflicting provision takes precedence in implied repeal cases, but none apply here. An initiative may impliedly repeal a statute enacted by the Legislature (*Briggs, supra,* 3 Cal.5th 808, 840), and the Legislature may impliedly repeal its own legislation. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 477.) But the Legislature may not impliedly repeal a provision approved by initiative: "The people's reserved power of initiative *is* greater than the power of the legislative body. . . . through the exercise of the initiative power the people *may* bind future legislative bodies other than the people themselves." (*Rossi*, *supra*, 9 Cal.4th 688, 715-716.) Or, as Division Six observed, "The Legislature cannot overrule the electorate." (Slip op. at 1.)

B. SB 1391 directly contravenes Proposition 57.

Because legislation directly contravening an initiative cannot stand, several appellate panels labored to conclude Proposition 57 did not really authorize judges to decide whether 15-year-olds should be tried as adults. None of these rationales is persuasive.

1. A statute may not flout a constitutional mandate even indirectly.

One panel opined the judicial check was conditional; Prop. 57 did not authorize courts to determine whether the defendant should be tried in adult court, but only to make a determination "if one was to be made," which would not always be necessary. (*T.D.*, *supra*, 38 Cal.App.5th at p. 374.) Presumably, just as prosecutors could decline to seek transfer in any individual case without contravening the judicial prerogative, the Legislature could do so categorically. (See AGB 31.)

CELSOC, supra, 42 Cal.4th 578, rejected even indirect constrictions of an initiative's provisions. Proposition 35 authorized the state to contract with private entities to produce public improvement works. (*Id.* at p. 581.) Nevertheless, the state employees' bargaining unit, and the agency responsible for bargaining with state employees, agreed to a memorandum of understanding (MOU) curtailing the circumstances where the state would contract with outsiders. (*Id.* at pp. 582-583.) The MOU favored state employees over private contractors, though it did not completely prohibit private contracts. (*Id.* at p. 583.) The employees defended the MOU by

noting Prop. 35 was permissive; it *authorized* private contracts but did not *mandate* them. (*Id.* at p. 588.) Even though the state was authorized to contract privately in any individual case, the argument went, "voluntarily" desisting from exercising that authority did not improperly amend the initiative. (*Ibid.*)

CELSOC unanimously rejected this reasoning. The initiative prescribed contracting decisions be determined by merit, and the MOU preferences would "flout this mandate." (*CELSOC*, *supra*, 42 Cal.4th 578, 589.) SB 1391 flouts Prop. 57's mandate even more throughly. Though the MOU only tilted the balance in individual cases to favor state employees, the instant statute completely precludes judges from considering the merits of any case at all. A fortiori, SB 1391 flouts Prop. 57's mandate and "contravenes a constitutional provision." (*Id.* at pp. 588-589.)

2. SB 1391 could not contravene prior provisions incorporated into Proposition 57.

Another theory emphasized judicial determinations did not *originate* with Proposition 57. (*K.L.*, *supra,* 36 Cal.App.5th 529, 539.) Though Proposition 57 authorized prosecution of 15-year-olds as adults, *Alexander C.*, *supra*, 34 Cal.App.5th 994, 1002, found such prosecution could be prohibited because it did not enjoy the electorate's endorsement but was just a "continuation of prior practice." *T.D.*, *supra*, 38 Cal.App.5th 360, 377 likewise minimized any conflict because Prop 57 did not *create* the adult court provision but "simply continued existing procedure." Both panels

suggested the Legislature could modify as it pleased any provisions not *created* by the initiative.

Initiatives, however, incorporate pre-existing law. Prior to Proposition 103, the Insurance Code's chapter 9 encompassed surety insurance. (*Amwest*, *supra*, 11 Cal.4th 1243, 1258.) Prop. 103 did not directly reference surety insurance and "did not purport to alter the scope of chapter 9." (*Id*. at p. 1261.) In other words, Prop. 103 did not *create* chapter 9, and simply continued pre-existing law. Regardless, "the provisions of Proposition 103 applied to surety insurance," so post-103 legislation affecting pre-existing provisions on surety insurance *improperly amended Proposition 103*. (*Ibid*.) Similarly, Proposition 57 continued adult prosecution of 15-year-olds, so post-57 legislation erasing these pre-existing provisions improperly amended Proposition 57.

As the *Amwest* amendment infringed the principle of popular sovereignty described in *Rossi*, *supra*, 9 Cal.4th 688, a fortiori, the instant amendment infringed it here. The "Chapter 9" addressing surety insurance was adopted by the Legislature and remained essentially unchanged until Proposition 103. (*Amwest*, *supra*, 11 Cal.4th at p. 1258.) By contrast, the electorate itself authorized adult prosecution for 15-year-olds through Proposition 21 — and never voted against it.

3. Proposition 57 guaranteed judges' authority to make individualized determinations.

The other rationale advanced by courts of appeal was that the public did not really vote to authorize judges to decide whether 14- and 15-year-olds could be tried as adults, but only to reduce prosecutors' authority to charge them. This probably would surprise voters who passed the initiative after learning it:

> ■"Provides juvenile court judges *shall* make determination, upon prosecutor motion, whether juveniles 14 or older should be prosecuted as adults for specified offenses."

(Official Title and Summary, emphasis added.)

> ■"Requires judges instead of prosecutors to decide whether minors should be prosecuted as adults."

(Ballot argument.)

> ■"[T]he juvenile court *shall decide whether the minor should be transferred to a court of criminal jurisdiction*."

(Welf. & Inst. Code, § 707, subd. (a)(2).)

And one of the initiative's purposes and intents was to:

> ■"Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court."

(Proposition 57, sec. 2.)

All four sentences informed voters such juveniles could be prosecuted as adults. This was the only construction presented by the Attorney General and Legislative Analyst. (*Valencia*, *supra*, 3 Cal.5th 347, 374.)

Though Proposition 57 included judicial authorization of adult trials as an one of its five expressed intents and purposes, the Third District questioned whether it was a "*major and fundamental* purpose," or a "*specific* intent," so that SB 1391 created a " 'clear and unquestionable' conflict" with Proposition 57. (*K.L.*, *supra,* 36 Cal.App.5th 529, 539, emphasis added.) *K.L.* held language providing a "judge, not a prosecutor, ... decide whether juveniles should be tried in adult court" reflected not a "focus on retaining the ability to charge juveniles in adult court so much as removing the discretion of district attorneys to make that decision." (*Id.* at p. 539, cited in *S.L. v. Superior Court* (2019) 40 Cal.App.5th 114, 121.)

Neither the law nor facts support this re-characterization of Proposition 57. Surety insurance was not a "focus" of Proposition 103; it was not even referenced. Nonetheless, because there was "no doubt prior to the passage of Proposition 103 that the insurance regulations set forth in chapter 9 applied to surety insurance," no post-initiative legislation could alter that application. (*Amwest*, *supra*, 11 Cal.4th 1243, 1261.) The factual conclusion that granting judicial discretion to approve or reject juvenile transfers was subordinate to restricting prosecutors' capacity to "make that decision" was no sounder. Of the four quoted sentences above, one did not mention prosecutors at all, and the other three referenced the judge's role before the prosecutor's. Although the initiative reduced prosecutors' capacity to effect transfer, it expressly authorized such requests: "[T]he district attorney or other **prosecuting officer may make a motion** to

transfer the minor from juvenile court to a court of criminal jurisdiction." (Welf. & Inst. Code, § 707, subd. (a)(1), emphasis added.) In forbidding prosecutors from so moving, SB 1391 directly contravened Proposition 57.

Through SB 1391, the Legislature extinguished the authority granted by the electorate to *judges* to "decide whether juveniles should be tried in adult court" and transferred it to itself. Instead of having judges make the determination on a case-by-case basis, depending on individual facts, the Legislature created a categorical rule to resolve the same question based on age alone, indifferent to individualized factors. The Legislature unconstitutionally violates an initiative where it usurps the constitutional authority of a designated party to perform a state function. (*Howard Jarvis Taxpayers Assn. v. Bowen* (2011) 192 Cal.App.4th 110, 122-124 [where initiative prescribes Attorney General shall prepare summary of ballot initiative, Legislature could not take that role for itself.]

SB 1391 directly contravenes Proposition 57.

C. Proposition 57's expressed purpose regarding juveniles concerned the *process* of a judicial check, not the *outcome* of fewer adult prosecutions.

The initiative expressed its purpose to provide a judicial check on prosecutions: "Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." In evaluating Proposition 57's purposes, however, the Court of Appeal ignored this actual one and substituted (created) an unexpressed one. The Third District surmised at the beginning of a paragraph, "it appears the intent of Proposition 57 was to reduce the number of youths who would be prosecuted as adults." (*K.L.*, *supra*, 36 Cal.App.5th 529, 541.) By the end of the paragraph it described the "*stated* purpose and intent of Proposition 57 to have fewer youths removed from the juvenile justice system." (*Ibid.*, emphasis added.) The initiative nowhere stated that purpose.

K.L. conflated purpose and effect. The Legislative Analyst did predict "there would be fewer youths tried in adult court," but the purpose was the *process* of judicial gatekeeping to foster "individualized decision making" and distinguish the deserving from the dangerous, and thereby prevent "mistakes on both sides," not the *outcome* of a raw reduction of numbers, and certainly not the outright abolition of adult prosecutions. Prior to 1972, the law presumed mothers of young children deserved custody when parents divorced. (*In re Marriage of Carney* (1979) 24 Cal.3d 725, 730.) The Legislature amended the law to require judges to weigh the particular facts of each case and independently determine custody according

to "the best interests of the child." (*Ibid*.) According to the reasoning of *K.L.*, *supra*, 36 Cal.App.5th 529, 541, and *Alexander C.*, *supra*, 34 Cal.App.5th 994, 1000, it would further that amendment's purpose — and merely go "one step further" — to create a presumption favoring paternal custody, or categorically prohibit mothers from receiving custody at all. But requiring judges to individually weigh case-specific facts is an end in itself, and promotes "responsibility for mistakes on both sides of the decision threshold." (*Be Careful, supra,* at p. 72.)

The purpose of "*requiring*" a judge to decide whether juveniles should be tried as adults is not furthered by *prohibiting* judges from deciding whether juveniles should be tried as adults. Court of Appeal decisions rest on the premise that judicial decisionmaking was merely a means to reduce the number of juveniles tried as adults, and not an end in itself, but that was not what the voters were told.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held states could not impose a sentence enhancement on a defendant for committing a crime for racial intimidation purposes unless a jury found the intimidation purpose true beyond a reasonable doubt. Under petitioner's reasoning, the New Jersey Legislature would have furthered *Apprendi*'s purpose by abolishing the racial purpose sentencing enhancement altogether, ensuring "fewer" offenders would be exposed to its provisions. (*K.L.*, *supra*, 36 Cal.App.5th 529, 541.)

But reducing the number of defendants subject to its terms was not necessarily what motivated those who "voted" for the jury prerequisite. Justice Scalia joined *Apprendi* (and authored its successor, *Blakely v. Washington* (2004) 542 U.S. 296) because he favored the procedural check of a unanimous jury finding for its own sake, *despite* how it would impede punishment. (*Ring v. Arizona* (2002) 536 U.S. 584, 610 (conc. opn. of Scalia, J.).) Similarly, many voters likely voted for Proposition 57 because it created an independent check on prosecutors *instead of* completely shielding from adult court the worst 15-year-old offenders — like two-time murderers.

That adult trial required the approval of *both* prosecutor and judge was a virtue, not a vice. One panel diminished the value of the judicial role because the judge did not initiate the transfer process, but "merely acted as a check on the prosecutor's discretionary decision by ruling on the motions for transfer, [and] did not independently decide which charged youths should be subject to the possibility of transfer." (*K.L.*, *supra*, 36 Cal.App.5th 529, 541.)The *Apprendi* jury was also a mere check, which did not decide whom to charge, but that hardly rendered it expendable. In refining Proposition 21's mandatory, unilateral filing procedure into a discretionary, bilateral procedure, where the prosecutor could request transfer and the judge could approve (or deny) the request, Proposition 57 implemented the value Tocqueville celebrated as "distributing the exercise of its powers among various hands and in multiplying functionaries." This distribution

was not just a means for achieving the outcome of "fewer" juveniles in adult court; the procedural value of individualized decisionmaking was a legitimate goal in its own right. "[D]iscretionary decision making on transfer would . . . promote accountability for decision makers that is diffused in a statutory context where legislators . . . remove entire classes of offenders from the juvenile court." (*Be Careful*, *supra*, at 72.) Removing an entire class of offenders from *adult* court likewise evades accountability. Whereas the voters expressly wanted *judges* "to decide whether juveniles should be tried in adult court," the Legislature usurped that function through SB 1391 and itself decided all 14- and 15-year-olds would not, no matter how severe their crimes. This frustrated rather than furthered voters' intent.

The rationale favoring "individual decision making" rather than categorical rules is that the model "takes seriously the responsibility for mistakes on both sides." (*Be Careful, supra,* at p. 72.) Such mistakes occur when juveniles "who would benefit from a juvenile court's rehabilitative services" are transferred to adult court, **and** when those "likely to re-offend" wrongly remain in juvenile proceedings. (*Id.* at p. 71.)

D. Initiatives do not authorize any legislation that moves the law in the "same direction."

Petitioner contends legislators have carte blanche to amend so long as they move the law "in the same direction" as the initiative. (POB 56, PRB 38.) This implies the public cannot possibly prefer a balanced approach, creating a judicial gatekeeper to distinguish between the deserving and the dangerous, and thereby protect "delinquent youth from the overreach of wholesale [transfer]" *and* the community from "predatory youth." Instead, in petitioner's imagination, voters can do no more than point their collective finger in one or the other direction and grunt "more" or "less" punishment. But just as the three strikes law's purpose was not a mantra that could always justify the longest possible sentence, the rehabilitative imperative of Prop. 57 cannot always justify the shortest. (*Susser, supra,* 61 Cal.4th 1, 16.)

The three strikes controversy parallels the instant issue. Just as Proposition 21 gave prosecutors unilateral filing authority, Proposition 184 imposed indeterminate life sentences for habitual offenders. Just as Proposition 57 undid the mandatory, unilateral filing provision (but not the potential to file against 15-year-olds), Proposition 36 sought to "restore the original intent" of the three strikes law by removing life sentences for a third strike, unless that offense was also violent or serious, or the defendant had previously been convicted of murder, rape, or child molestation. Both sought to evade Scylla without crashing into Charybdis.

Proposition 36's ballot argument presented the same principles as Proposition 57's.

Public safety: "Proposition 36 helps ensure that prisons can keep dangerous criminals behind bars for life."

Savings: "Prop. 36 could save $100 million every year."

Zero-sum confinement: "Prop. 36 will help stop clogging overcrowded prisons with non-violent offenders, so we have room to keep violent felons off the streets."

And, like Prop. 57, it promised **distinctions** between "truly dangerous criminals" and "nonviolent offenders who pose no risk to the public."

Proposition 36 did not permit amendment. If it had, under the reasoning of petitioner and most appellate courts, the Legislature could have abolished the indeterminate life sentence altogether, notwithstanding provisions promising such sentences. Just as courts have construed SB 1391 as limiting not judges' authority to approve a transfer but prosecutors' authority to propose it, a legislative amendment could restrict not courts' authority to impose life sentences but prosecutors' authority to *charge third strikes*. And then reviewing courts could conclude that as Prop. 36 reduced the number of habitual offenders sentenced to life imprisonment, the amending statute took that imperative and "moved the ball" "one step further" by banning them altogether (*Alexander C.*, *supra*, 34 Cal.App.5th 944, 1000), or find both Prop. 36 and the amending statute intended to undo Proposition [184]'s more severe [habitual] offender provisions." (*B.M.*,

supra, 40 Cal.App.5th 742, 759.) A court could likewise find a "stated" purpose of Proposition 36 was to have *fewer* habitual offenders sentenced to life imprisonment," so the amendment furthered the initiative's purpose. (See *K.L.*, *supra*, 36 Cal.App.5th 529, 541.)

Under this model of constitutional analysis, any initiative reducing overall punishment commits the state to an inexorable march toward ever lesser punishment. After two initiatives favoring life imprisonment for third-strike offenders, the Legislature could not abolish the principle, just because such a law "goes no further than returning the [law] to where it was before 1994." (*B.M.*, *supra*, 40 Cal.App.5th 742, 759.) Such a distortion of voter intent explains why some initiatives "withhold such legislative authority completely." (*Amwest*, *supra*, 11 Cal.4th 1243, 1256.) If every initiative inch becomes the Legislature's mile, the public will prohibit the Legislature form making even minor, technical alterations to an initiative to correct drafting errors or facilitate the initiative's operation in changed circumstances. (*Ibid.*)

Just as voters approved a "Goldilocks" compromise between mandatory, unilateral filing for 15-year-old murderers and no adult prosecutions at all (and allowing an indeterminate life sentence for habitual serious/violent offenders but not lesser ones), so too do courts balance competing concerns by upholding legislation that *furthers the purposes* of an initiative and invalidating legislation that *directly contravenes* it. SB 1391 did the latter.

IV. SB 1391did not further any of Proposition 57's purposes.

Proposition 57 itself identified its fivefold "purpose and intent."

"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 or crime by emphasizing rehabilitation, especially for juveniles.

5. Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court."

The Court of Appeal lamented that if SB 1391 is not a valid amendment, then no amendment could be, and it would be too hard to modify an initiative. (*T.D.*, *supra*, 38 Cal.App.5th at p. 372.) The reason why it is difficult to prove an amendment furthers Proposition 57's intent is that it has *five* distinct intents — with substantial tension among them.

Perhaps the most obvious tension exists between the first two: protecting and enhancing public safety on the one hand, and saving money by reducing wasteful prison spending on the other. For example, one panel found Proposition 57 would enhance public safety because "minors who *remain under juvenile court supervision* are less likely" to re-offend." (*Alexander C.*, *supra*, 34 Cal.App.5th 994, 1001, emphasis added.) The opinion's next page found Proposition 57 would also serve the purpose of

saving money because "youths would *no longer . . . be supervised* by state parole agents following their release." (*Id.* at p. 1002, emphasis added.)

If an amending statute could pass constitutional muster by merely furthering *one* of the five intents, the electorate would have no protection at all against Legislative alterations. The Legislature could lengthen sentences across the board and justify it as furthering public safety. The Legislature could shorten sentences across the board and justify it as reducing prison spending. This is not the "effective judicial review" envisioned by *Amwest*, *supra*, 11 Cal.4th 1243, 1256.

It is axiomatic that a statute does not further a purpose of requiring a judge to decide whether juveniles should be tried as adults by prohibiting a judge from deciding whether juveniles should be tried as adults. (Argument IIIC, *ante*.) Though the connection between SB 1391 and other intents may be less obvious, the statute furthers none of them.

A. SB 1391 does not further the purpose of protecting and enhancing public safety.

The first purpose identified in Proposition 57 is protecting and enhancing public safety, which conforms to what California has identified as the overall purpose of sentencing: "The Legislature finds and declares that the purpose of sentencing is public safety, achieved through punishment, rehabilitation, and restorative justice." (Pen. Code, § 1170, subd. (a)(1).) The ballot arguments made clear this public safety purpose is furthered by confining *dangerous* criminals. As the ballot argument promised (boldface added), "Prop. 57 focuses resources on **keeping dangerous criminals behind bars** . . . . [¶.] [A] court-ordered release of **dangerous prisoners** . . . . This is an unacceptable outcome that puts Californians in danger." The argument for Prop. 57 recognized the priority of confining violent offenders: "parole eligibility in Prop. 57 applies "*only to prisoners convicted of non-violent felonies,*" and concluded by emphasizing "Prop. 57 **keeps the most dangerous criminals behind bars**."

One panel found that requiring that all 15-year-olds be tried as juveniles, and released by age 25, would further public safety because " 'minors who remain under juvenile court supervision are less likely to commit new crimes.' " (*Alexander C.*, *supra*, 34 Cal.App.5th 994, 1001.) Less likely than . . . who? Minors remaining under juvenile court supervision might be less likely to commit crimes than those not under juvenile court supervision, but they are more likely to commit crimes than those remaining "behind bars." At least that was the premise accepted by Prop. 57.

Despite Proposition 57's own recognition that keeping dangerous criminals behind bars protects the public, appellate panels have inferred voters rejected that premise by passing the initiative. The Fifth District agreed it was possible that longer sentences might protect the public, but inferred voters rejected that reasoning: "[H]ad the electorate agreed with the District Attorney's position, it seems unlikely voters would have eliminated prosecutorial direct-filing capabilities with respect to any of the offenses listed in section 707, subdivision (b), regardless of the age of the offender." (*T.D.*, *supra*, 38 Cal.App.5th 360, 375.) One could just as easily observe that if Proposition 57 had denied the protective effect of confinement in adult prison, it would not have authorized it when warranted by the facts of the case. The Second District, Division Three even more emphatically rejected the possibility that voters had tried to create a balance to prevent mistakes on both sides. It characterized the District Attorney's argument as "an assumption that locking up 14- and 15-year-olds in adult prisons is the *only* way to protect the public." (*Narith S.*, *supra*, 42 Cal.App.5th 1131, 1142, emphasis added.) To the contrary, Proposition 57 won voters' approval because it avoided the extreme assertion that locking up juvenile murderers is *never* protective, and instead presented the more reasonable position that it is at least sometimes conducive to public safety. If Proposition 57 had rested on the premise that adult prosecution of 14- and 15-year-old never furthers public safety, it would not have expressly authorized it.

SB 1391 does not further the purpose of protecting and enhancing public safety.

B. SB 1391 does not further the purpose of stopping the revolving door of crime.

The strongest argument for finding alignment between SB 1391 and Proposition 57 rests on the imperative of rehabilitation. Yet rehabilitation was stressed not as the ultimate purpose but the *means* of preventing the "revolving door" that exists when offenders are released from custody, only to re-offend and return. In other words, this purpose was not "to have fewer youths removed from the juvenile justice system" (*K.L.*, *supra*, 36 Cal.App.5th 529, 541), but to have fewer (released) youths *return to custody*. The ballot argument thus emphasized that **rehabilitation furthered pubic safety**. In the past, "too few inmates were rehabilitated and most re-offended after release," so rehabilitation is "better for public safety."

The incomplete development of minors renders their misconduct less "morally reprehensible" than adults'. (*Roper v. Simmons* (2005) 543 U.S. 551, 569-570.) This incomplete development also renders them more amenable to rehabilitation. (*Id.* at p. 570.) But reduced culpability and greater rehabilitation potential are distinct concepts.

Roper followed from *Atkins v. Virginia* (2002) 536 U.S. 304, which shielded mentally impaired offenders from capital punishment due to their reduced culpability, but did not find they are more amenable to rehabilitation, as their impairments probably render them *less* so. (See *Atkins* at p. 321, citing *Penry v. Lynaugh* (1989) 492 U.S. 302, 324, emphasis added, disapproved in *Atkins*, *supra*, 536 U.S. 304: "Penry's mental retardation . . . is thus a two-edged sword: it may diminish his

blameworthiness for his crime even as it indicates that there is a probability that he will be *dangerous in the future*.") The Model Penal Code also acknowledges that for impaired offenders, "the factors that call for mitigation . . . are the very factors of an individual's personality that make us most fearful of his future conduct." (Model Penal Code, § 210.3 commentary at 71-72 (1962).) Similarly, if teenagers are unconcerned with their own futures, they could also be less solicitous of others'. (Equal Justice Initiative Brief 37.) Rehabilitation aims to prevent future crimes, not reduce punishment for past ones.

Stopping the "revolving door" requires balance. If offenders are released without being rehabilitated, they will recidivate and return to custody, and the door will keep revolving. Absent *successful* rehabilitation, it would more effectively stop the revolving door to simply keep offenders behind bars. Therefore, stopping the revolving door requires not just *attempts* at rehabilitation but its *successful completion*, which depends on distinguishing those "amenable to rehabilitation" from "those most likely to re-offend." (*Be Careful, supra,* et al. at p. 72.)

PJD cites studies showing recidivism rates were higher among juveniles tried as adults than among those who remained in juvenile proceedings. (PJDB 31, citing Redding, *Juvenile Transfer Laws, supra,* p. 6.)

> A higher percentage of youth who were tried for robbery in criminal court were rearrested (91 percent) than those tried for robbery in juvenile court (73 percent).

(*Ibid.*)

These data support multiple policy alternatives to stop the revolving door.

One would categorically exempt minors from adult proceedings, to possibly treble the probability (27 percent against 9) they will avoid future arrest. A categorical shield against adult consequences, however, could alter the criminal calculus.

> Seventy-five percent of the transferred juveniles interviewed by Redding and Fuller (2004) felt that their experiences in the adult criminal justice system had taught them the serious consequences of committing crimes. As one juvenile explained, "[Being tried as an adult] showed me it's not a game anymore. Before, I thought that **since I'm a juvenile I could do just about anything and just get 6 months if I got caught**." (Redding and Fuller, 2004:39.) Seventy-five percent of the juvenile offenders said that **if they had known they could be tried and sentenced as adults, they may not have committed the crime** (Redding and Fuller, 2004).

(Redding, *supra*, at p. 6, emphasis added.)

Human Rights Watch confirms some juveniles believe they will escape serious consequences for murder. (HRWB 32.) After SB 1391, they will. And they will have no incentive to help prosecutors convict the adult ringleaders.

Furthermore, juvenile facilities may be less crimogenic than adult facilities through selection bias: only those youth "who would benefit from a juvenile court's rehabilitative services" are placed there, whereas "predatory youth . . . unlikely to be helped" there go to adult facilities. But if, as SB 1391 prescribes, juvenile facilities must absorb not just teenagers warranting milder treatment but also the most dangerous, including murderers, the

same dangers could migrate to juvenile institutions as well. (See *Andrus v. Texas* (2020) 140 S.Ct. 1875, 1877 [16-year-old convicted of robbery-with-firearm sentenced to juvenile detention facility became "steeped in gang culture" there].)

A second option would keep all juvenile offenders confined in adult institutions until they pass the age of high criminal activity, though this would confine at state expense not just those most likely to re-offend but also those amenable to rehabilitation. A third option would try to distinguish the former group from the latter, and would include not only the prosecutor but a judge in the process. The electorate endorsed the third alternative when it passed Proposition 57.

Shifting from the third to the first alternative through SB 1391 did not further the purpose of stopping the revolving door.

C. SB 1391 does not further rehabilitation.

Even if rehabilitation were not a means but an end in itself, it still would be impeded, not furthered, by SB 1391. Petitioner cites *In re Julian R.* (2009) 47 Cal.4th 487, 496, asserting juvenile proceedings seek to rehabilitate, whereas adult proceedings seek to punish. (POB 29.) But that case predated Proposition 57, which vastly expanded the rehabilitative imperative even for adult prisoners.

Essential to rehabilitation is an indeterminate sentence. As the 1931 report of the National Commission on Law Observance and Enforcement (Wickersham Commission) declared, "Physicians, upon discovering disease, cannot name the day upon which the patient will be healed. No more can judges intelligently set the day of release from prison at the time of trial." (Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines* (1990) 80 J. Crim. & Criminology 883, 893 fn. 62.) California, like, other jurisdictions, adopted indeterminate sentencing, whereby sentence length was decided not by judges, at the time of conviction, but correctional officers, upon successful completion of the rehabilitation process.

Indeterminate sentencing provides greater utility in rehabilitating inmates because they can shorten their sentence by reforming, whereas a determinate-sentenced inmate lacks that opportunity for sentence reduction, and thus the motive to reform. The indeterminate sentencing law "affords a person convicted of crime the opportunity to *minimize* the

term of imprisonment by rehabilitating himself." (*Briscoe v. Reader's Digest Assn.* (1971) 4 Cal.3d 529, 539, fn. 12, disapproved on other grounds in *Gates v. Discovery Communications, Inc.* (2004) 34 Cal.4th 679, 697, fn. 9.) The opportunity for accelerating one's release can motivate reform: "The purpose of the indeterminate sentencing law . . . is 'to put before the prisoner great *incentive* to well-doing.' " (*Briscoe,* at p. 539, fn.12, quoting *In re Lee* (1917) 177 Cal. 690, 692, emphasis added.)

Proposition 57 advertised this effect — for adults as well as juveniles. The ballot argument informed voters the initiative "Authorizes a system of credits that can be earned for rehabilitation, good behavior and education milestones or *taken away for bad behavior*." (Emphasis added.) Although proponents emphasized the parole eligibility provisions applied "*only to prisoners convicted of non-violent felonies*," and not to "violent offenders," the sentencing credits provision did extend to all inmates not sentenced to death or LWOP, including murderers.

If sentenced as an adult, petitioner can receive at least a 20 percent reduction of his sentence through "Good Conduct Credits." (Cal. Code Regs. tit. 15, § 3043.2, subd. (b)(2).) He could raise that to **50 percent credits** if he joins those who have "successfully completed the requisite physical fitness training and firefighting training to be assigned as a firefighter to a Department of Forestry and Fire Protection fire camp or as a firefighter at a Department of Corrections and Rehabilitation firehouse." (Cal. Code Regs. tit. 15, § 3043.2, subd. (b)(4).) This alone could reduce a

term of 15 years to life imprisonment (as imposed for second degree murder) to under 8 years. Also available is the "Educational Merit Credit" for completing academic degrees (§ 3043.5), which could advance a potential release date for an inmate serving an indeterminate sentence by up to **900 days**. (§ 3043.5, subd. (b).) The Educational Merit Credit is distinct from the "Milestone Completion Credit," which is available for completing other "academic programs," "social life skills programs," "Career Technical Education programs" and the like. (§ 3043.3(a).) These permit sentence reduction/parole advancement by 12 weeks for every 12-month period of the sentence, nearly a **25 percent sentence reduction**. (§ 3043.3, subd. (b).) And petitioner can also earn "Rehabilitative Achievement Credit" for attending other programs, which can advance the parole date for another 40 days for each 12-month period, another **11 percent reduction**. (§ 3043.4.)

In sum, **even if petitioner is tried and convicted as an adult**, there would be significant "incentive to well-doing." If petitioner is convicted of one count of murder and maximizes his credit earning, he could be eligible for release well before his 25th birthday. If he fails to reform, however, he could remain confined for life.

Petitioner would have no comparable incentive for reform if he stays in juvenile court. No matter how unrehabilitated he is, even if shows no remorse and proudly boasts of his plans to return to gang life, **he is entitled to release when he turns 25**, to return to the same neighborhood where

he committed his crimes, and torment the parents, siblings, and friends of the victim(s) whose lives he stole. Adult punishment enhances the incentive for "well-doing" and successful rehabilitation far more effectively.

SB 1391 does not further rehabilitation.

V. The initiative process guarantees self-government, not "science."

One panel upheld SB 1391 because invalidating it "would unnecessarily and unwisely constrain our lawmakers, prohibiting them from making well-researched and informed policy decisions based on new scientific research." (*B.M.*, *supra*, 40 Cal.App.5th 742, 760.) Though amicus would dispute the adverbs there included, the statement is otherwise correct; the Legislature, no matter how impressed with "scientific research," may not override specific policies enacted by the electorate. (*Gardner*, *supra*, 178 Cal.App.4th 1366, 1372-1373, 1378 [rejecting amendment despite legislative findings based on studies prescribed by Proposition 36 itself; question was not wisdom of amended statute but consistency with initiative]. Through Propositions 21 and 57, the issue of whether 15-year-olds who commit violent felonies may be tried as adults "has been removed from the forum of the [Legislature] to the forum of the electorate." (*Dwyer v. City Council of Berkeley* (1927) 200 Cal. 505, 516.)

Petitioner also cites U.S. Supreme Court cases to assert a recent zeitgeist favoring SB 1391. (POB 34.) But whether juveniles are "constitutionally different," so one who does not take a life may not be sentenced to spend all of his in prison (*Graham v. Florida* (2010) 560 U.S. 48), hardly guarantees that someone who takes two lives is **guaranteed freedom on his 25th birthday.** Confining 25-year-olds protects the public more than confining 70-year-olds.

A. The question of whether to confine murderers past their 25th birthday is one of policy, not science.

Proposition 57 and SB 1391 present issues of policy, not "science." Contrary to SB 1391's supporters, prosecuting 14- and 15-year-olds as adults does not rest on the premise that brains are fully developed by age 12 or 13. (AGB 17.) It does not rest on the premise that youths are *as culpable as* adult offenders; whether a minor warrants adult-like responsibility generally concerns whether she is mature enough, not whether she is as mature as the average adult. (Cf. *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 355, emphasis added: "the overwhelming majority of minors . . . have the *requisite maturity* and capacity to give informed consent to an abortion.") It rests on the premise that the public deserves protection from violent crime. A 15-year-old's bullet can kill like an 18-year-old's.

Juveniles remain deterrable and culpable in an absolute sense, even if they are relatively less deterrable and culpable than adults. (See *Juvenile Transfer Laws, supra,* p. 6, emphasis added: "Seventy-five percent of juvenile offenders said that if they had known they could be tried and sentenced as adults, they may not have committed the crime.") If juveniles are generally less culpable than adults, people *who kill* tend to be more culpable than those who commit nonhomicide offenses: "The age of the offender *and the nature of the crime* each bear on the analysis." (*Graham, supra,* 560 U.S. 48, 69, emphasis added.) Proposition 57 not only authorized individualized consideration but also prescribed a sliding scale regarding age and offense:

18-year-olds are tried as adults regardless of the offense;16- and 17-year-olds may be tried as adults (with judicial approval) only for felonies, and 14- and 15-year-olds may be tried as adults (with judicial approval) only for violent crimes like homicide, rape, torture, carjacking, or aggravated mayhem. (Welf. & Inst. Code, § 707, subds. (a)(1), (b).) There is nothing "scientific" about prosecuting non-violent felons as adults because they are 16 but shielding murderers from adult consequences if they are a few days younger.

The purpose of sentencing in California is public safety. (Pen. Code, § 1170, subd. (a)(1).) Incapacitation is an indispensable tool for achieving it. The decision to confine or release an inmate depends on the risk of recidivism. Experts can accurately predict the proportion of individuals in a given pool who will recidivate, but cannot identify *which individuals* within that pool will recidivate, so they do not know whose confinement is unnecessary and whose release will endanger the public. (Collins, *Punishing Risk* (2018) 107 Geo. L. J. 57, 97; Slobogin, *The Civilization of the Criminal Law* (2005) 58 Vand. L. Rev. 121, 145.) The Attorney General's solution to this uncertainty is to release all young murderers within a few years. (AGB 29.) Whatever the merits of that policy, it was not presented to the voters. "We cannot infer the realization of a voter intent where there was nothing to enlighten it in the first instance." (*Valencia*, *supra*, 3 Cal.5th 347, 375.)

Amici express admirable concern for false positives, offenders who will not commit an offense but whose lives are harmed by overconfinement. But they express no concern for false negatives, offenders who are released

prematurely and extinguish the lives of others due to underconfinement. HRW's "lived experiences of young people" omits Jose Lopez and Adrian Ornelas, the victims shot and stabbed by petitioner.

Many released inmates, perhaps most, will return and enrich their communities with nonprofit work. (HRWB 33.) Some, however, will return to terrorize their communities with violence. Confinement policies depend on how much priority society places on preventing false positives, and how much on preventing false negatives. (Eaglin, *Constructing Recidivism Risk* (2017) 67 Emory L.J. 59, 91-92.) These policies present not empirical questions but normative ones, on which reasonable minds can differ. (*Id.* at pp. 93, 99-100.)

With any inmate, there is a less than 100 but greater than 0 percent probability of recidivism. Assuming "most" will "mature out of crime," what level of risk should society tolerate?

> Is it better to err on the side of over predicting arrest [which potentially could result in correctional overcrowding] or under predicting arrest [which potentially could result in more crime] [?] How much better? That is, **how many false positives equal one false negative** . . . ?

(*Punishing Risk,* at p. 97, citing Pa. Comm. on Sentencing Risk/needs Assessment Project, Interim Report 5: Developing Categories of Risk (2012) 15, emphasis added.)

As with COVID, both overconfinement and underconfinement impose costs on the public.

Should the law aim to prevent false positives and false negatives

equally, so for every recidivist there is one successfully released inmate? Two successful releases? Five? "Scientific research" cannot supply the answer.

Balancing the costs of preventing false negatives (through overconfinement) and preventing false positives (through underconfinement) is a policy matter, which does not yield an objective answer, and is a question for a self-governing public, not experts. (*Eaglin*, *supra*, 67 Emory L.J. at p. 92.)

> Ultimately, the degree of risk necessary to authorize intervention, and the restraint on liberty and intrusiveness of treatment legitimated by a given degree of risk, are **moral/legal questions that laypeople and legal decisionmakers**, not clinical experts, should decide.

(*Slobogin*, *supra*, 58 Vand. L. Rev. 121, 167, emphasis added.)

B. The policy question should be decided by the self-governing electorate.

Shorter confinements and accelerated releases will produce many successes. When "false positives" become productive citizens, many will celebrate these outcomes: the legislators who enacted the law, the attorneys who defended it, and the appellate justices who affirmed it. These successes will have hundreds of parents.

But there will be failures too, as some of those released return to their criminal ways. And these failures will be orphans. Their costs will be borne disproportionately by people who could vote on Proposition 57 but not SB 1391. It will be *their* communities to which crime returns, and they will be the ones paying for the decisions of others. They deserve a voice in the decisionmaking process.

The voting public tends to favor more punishment than elites, who are less often victims of crime.[5] California's legal development has followed this model. The electorate superseded the Supreme Court's rejection of capital punishment. (Compare *People v. Frierson* (1979) 25 Cal.3d 142, 178; *People v. Anderson* (1972) 6 Cal.3d 628.) In 1993, the Assembly Committee

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Attitudes toward the EU, Chatham House - Kantar Public Survey (2017), https://www.chathamhouse.org/publication/future-europe-comparing-public-and-elite-attitudes; Ipsos MORI Death Penalty Drama (2009), https://www.ipsos.com/ipsos-mori/en-uk/survey-channel-4-attitudes-towards-death-penalty.

on Public Safety rejected a proposed three strikes law, only to have the electorate pass it the following year. (*Ewing v. California* (2003) 538 U.S. 11, 14-15.) And, as PJD recalls, the Legislature rejected the substance of Proposition 21 two years before the voting public approved it. (PJDB 23, fn. 8.)

The People deserve the same opportunity to set policy on juvenile sentencing here, and decide whether a multiple-murderer is *entitled* to release by his 25th birthday.

> [W]e federal judges live in a world apart from the vast majority of Americans. After work, we retire to homes in placid suburbia or to high-rise co-ops with guards at the door. We are not confronted with the threat of violence that is ever present in many Americans' everyday lives. The suggestion that the incremental [preventive] effect of . . . punishment does not seem "significant" reflects, it seems to me, a let-them-eat-cake obliviousness to the needs of others. Let the People decide how much incremental [prevention] is appropriate.

(*Glossip v. Gross* (2015) 135 S.Ct. 2726, 2749 (conc. opn. of Scalia, J); see also *Tocqueville*, *supra*, at p. 282: "He who punishes the criminal is therefore the real master of society.")

C. The California Constitution maximizes self-government.

Tocqueville's contrast remains true today. (See Introduction, *ante*.) Germany forbade permanent punishment (LWOP) in a case involving a Nazi war criminal who sent 50 people to the gas chambers, and the Council of Europe followed, in a case involving a quintuple-murderer, by abolishing LWOP as a permissible sentence *ever*. (*Case of Vinter and Others v. United Kingdom* [Eur. Ct. H.R.] 66069/09 (2013); *War Criminal* case, 72 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 105 (1986).) Even though more than 85 percent of respondents in all countries surveyed (France, Germany, Italy, Spain, and the United Kingdom) favored LWOP as an available sentence for aggravated murderers,[6] they have no recourse, because Europeans cannot implement public opinion into policy. (John Paul Stevens, *On the Death Sentence* (Dec. 23, 2010) N.Y. Rev. of Books.)

Americans have that opportunity; many state constitutions enable voters to create or change law through initiatives. (*Kelly*, *supra*, 47 Cal.4th 1008, 1031.) Throughout its history, California in particular has facilitated self-government and direct democracy. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 495-496; Keiter, *Criminal Law Principles in California: Balancing a "Right to be Forgotten" with a Right to Remember* (2018) 13 Cal. Legal Hist. 421, 446, 460.) Direct democracy is just one areas where

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6 IpsosMORI Death Penalty International Poll (https://www.ipsos.com/ipsos-mori/en-uk/death-penalty-international-poll.)

"California has always occupied, in relation to other regions, much the same relation that America has occupied toward Europe: it is the great catch-all, the vortex at the continent's end into which elements of America's diverse population have been drawn, whirled around" (McWilliams, *California: The Great Exception* (1949) 63, 83-84.) In its tradition of self-government, California is like America, "only more so . . . the national culture at its most energetic end." (Stegner, "California Rising" in *Unknown California* (1967) Eisen, Fine, & Eisen (eds.) 8.) The near sacrosanct status of legislation enacted through direct participatory democracy reflects Californians' adherence to Lockean principles and distrust of governing institutions. (*A Structural Theory*, *supra*, 31 Loy. L.A. L.Rev. 1165, 1197, cited in *Kelly*, *supra*, 47 Cal.4th at p. 1030.) More than any other state, California entrusts its voters with authority to shape state law, by restricting the Legislature from overriding its decisions. (*Kelly*, *supra*, at p. 1031; *A Structural Theory*, at p. 1197.)

The legislatures of other states may have the authority to follow "well-researched and informed policy decisions based on new scientific research" and override the public's decision. In this area as others, California remains the great exception.

Conclusion

Every few years there is an initiative to abolish capital punishment in California. It promises to replace execution with LWOP, and advertises it will "require that persons convicted of murder with special circumstances remain behind bars for the rest of their lives." (Proposition 34 Text.) SB 1391 proves such a promise might not be kept.

Prop. 34 promised voters defendants convicted of "murder with special circumstances [will] remain behind bars." But if the electorate decides to exchange death for LWOP, the Legislature could then abrogate Penal Code section 190.2 — not to prevent judges from *sentencing* "special circumstance" murderers to LWOP but to forbid prosecutors from *charging* special circumstances, just as SB 1391 supposedly does not abrogate judges' authority to approve transfer but only prosecutors' authority to initiate it. (See *K.L.*, *supra*, 36 Cal.App.5th 529, 539.) And appellate courts could then review the stated purposes and construe a new one. If an intent of Prop. 34 was "eliminat[ing] the risk of executing innocent people," a panel could find abolishing LWOP would go "one step further" (*Alexander C.*, *supra*, 34 Cal.App.5th 944, 1000), by "eliminating the risk of having innocent people die in prison," or having "fewer" innocent people imprisoned (*K.L.*, *supra*, 36 Cal.App.5th 529, 541), or finding both the statute prescribing LWOP for special circumstance murderers and the statute forbidding it "intended to undo [the prior law's] more severe . . . provisions." (*B.M.*, *supra*, 40 Cal.App.5th 742, 759.) Petitioner would note

it moved the law in the "same direction" of less punishment. (POB 56.) And thus life without parole could become life with parole, or 20 years in prison . . . or guaranteed release on one's 25th birthday.

Even when initiatives permit amendment, they exclude amendments directly contravening the initiative itself. SB 1391 is not consistent with Prop. 57, and does not further its intent. Californians, twice in this (loosely defined) century, denied a 15-year-old murderer is *entitled* to freedom on his 25th birthday. It was not for legislators to overrule this judgment, no matter how unnecessary or unwise it finds the public's desire to confine violent predators like petitioner.

In passing Prop. 57, Californians placed their trust in the judiciary. They trusted trial judges to distinguish the deserving from the dangerous, and protect them from juveniles likely to re-offend. And they trusted courts to distinguish amendments that were consistent with it and properly furthered its intent from those that contravened it. The Legislature denigrated that trust, categorically removing 15-year-olds from adult court, and denying judges the opportunity to make individualized findings. And they declared their own product constitutional, seeking "deferential" rather than "effective" judicial review. (*Amwest*, *supra*, 11 Cal.4th 1243, 1256.) But it is for this Court, not the Legislature, to say what the law is. (*Marbury v. Madison* (1803) 1 Cranch 137, 177.)

SB 1391 unconstitutionally amended Proposition 57.

Dated: August 6, 2020

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Mitchell Keiter
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Amicus Populi

Certification of Word Count
(Cal. Rules of Court, rule 8.360(b).)

I, Mitchell Keiter, counsel for Appellant, certify pursuant to the California Rules of Court, that the word count for this document is 13,991 words, excluding tables, this certificate, and any attachment permitted under rule 8.360(b). This document was prepared in WordPerfect version X3 word-processing program, using 13-point Goudy Old Style, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Certificate of Nonassistance

Amicus curiae certifies that no party or counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

Dated: August 6, 2020

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Mitchell Keiter
Counsel for Amicus Curaie
Amicus Populi

Proof of Service

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. On September 11, 2019, I served the foregoing document described as **AMICUS CURIAE BRIEF** of **AMICUS POPULI** in case number **S259011** on the interested parties in this action (and all others registered on TrueFiling):

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Executed this 6th day of August 2020, at Beverly Hills, California.

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Mitchell Keiter