October 10, 2018

Susan S. Miller
Clerk of the Court
Court of Appeal of the State of California
Sixth Appellate District
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

RE: *C.S. v. Superior Court*
Sixth Appellate District, Case No. H045665
Santa Clara County Superior Court, Case Nos. JV38951, 213156

Dear Ms. Miller,

This letter is written on behalf of the Santa Clara County District Attorney's Office (SCCDA). The SCCDA is a Real Party in Interest in this proceeding. The writ petition in the instant case is currently being handled by the Attorney General's Office. However, since the Attorney General may not raise the issue of the constitutionality of Senate Bill 1391 in responding to this Court's question regarding the effect of SB 1391 on the pending writ, we are seeking permission to file a supplemental letter brief as an *amicus curiae*.[1] Should permission be granted, our *amicus curiae* supplemental letter brief begins immediately below.

[1] Since our argument is based on the claim that SB 1391 is an unconstitutional amendment to Proposition 57, this letter *may* also be authorized pursuant section 8 of Proposition 57 which provides: "Notwithstanding any other provision of law, if the State, government agency, or any of its officials fail to defend the constitutionality of this act, following its approval by the voters, any other government employer, the proponent, or in their absence, any citizen of this State shall have the authority to intervene in any court action challenging the constitutionality of this act for the purpose of defending its constitutionality, whether such action is in any trial court,

I. Senate Bill 1391 Should Not Have Any Impact in the Instant Case Because It is an Unconstitutional Amendment of Proposition 57

The amendment to Proposition 57 enacted by Senate Bill 1391 (hereinafter "SB 1391") that eliminated a court's ability to transfer jurisdiction over a 15-year old charged with murder to adult criminal court violates the California Constitution, because it is not consistent with Proposition 57 and does not further the intent of Proposition 57 as it was approved by the voters.

Proposition 57 eliminated the ability of prosecutors to directly file criminal charges against minors in adult court, instead requiring such cases be reviewed and approved by a judge. The enactment of Proposition 57 specifically addressed an extremely challenging issue for the criminal justice system: How should we treat 14- and 15-year-old juveniles who commit the most serious crimes such as murder? Proposition 57 modified existing law to craft an answer: If a juvenile commits murder, or another delineated serious crime, when he or she is 14 or 15 years old, then a Court alone will decide if he or she shall be adjudicated in adult court (with its greater focus on public safety and accountability) or in juvenile court (with its greater focus on rehabilitation). In other words, a cornerstone of Proposition 57 was giving judges the discretion to make this decision. SB 1391 deletes this express provision and replaces judicial discretion with a legislative fiat that prohibits any judge from even considering the issue in these most dangerous cases. SB 1391 effectively negates this provision of Proposition 57 and introduces an inconsistent legislative enactment. Accordingly, SB 1391 is unconstitutional.

"Although the legislative power under our state Constitution is vested in the Legislature, 'the people reserve to themselves the powers of initiative and referendum.' (Cal. Const., art. IV, § 1.)" (*Legislature* v. *Eu* (1991) 54 Cal.3d 492, 500–501.) To protect the powers of initiative and referendum, the California Constitution provides that "[t]he Legislature may amend or repeal an initiative statute by another statute that becomes effective ***only when approved by the***

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on appeal, or on discretionary review by the Supreme Court of California or the Supreme Court of the United States."

electors unless the initiative statute permits amendment or repeal without the electors' approval." (Cal. Const., art. II, § 10(c), emphasis added.) This "constitutional limitation on the Legislature's power to amend initiative statutes" protects "the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.'" (*People* v. *Kelly* (2010) 47 Cal.4th 1008, 1025.)

"The power vested in the electorate to decide whether the Legislature can amend an initiative statute "'is absolute and includes the power to enable legislative amendment ***subject to conditions attached by the voters***.'"" (*Shaw* v. *People ex rel. Chiang* (2009) 175 Cal.App.4th 577, 597, emphasis in original.) "[A]mendments which may conflict with the subject matter of initiative measures must be accomplished by popular vote, as opposed to legislative[ ] enact[ment]...." (*Proposition 103 Enforcement Project* v. *Quackenbush* (1998) 64 Cal.App.4th 1473, 1486.)

On November 8 of 2016, the electorate of California passed Proposition 57, an initiative measure entitled the "The Public Safety and Rehabilitation Act of 2016." Proposition 57 shifted the role of deciding which minors should be tried in adult court from prosecutors to judges. Proposition 57 accomplished this goal by amending Welfare and Institutions Code section 707 to eliminate the ability of prosecutors to file charges against minors directly in adult criminal court and instead required prosecutors to make motions in juvenile court to transfer a minor to adult criminal court. The power to decide whether to grant this motion was given solely to judges.[2] However, subject to judicial approval, section 4.2 of Proposition 57 still *expressly authorized* the prosecution in adult court of a minor who was 14 or 15 at the time the minor was alleged to have committed one of the serious or violent

[2] The change enacted by Proposition 57 was allowed even though the prosecution's ability to direct file in adult criminal court had been put into effect by Proposition 21 ("The Gang Violence and Juvenile Crime Prevention Act") – an initiative measure – because, inter alia, section 39 of Proposition 21 allowed amendment of its provisions by, inter alia, "a statute that becomes effective only when approved by the voters." (Prop 21, § 39.)

offenses listed in Welfare and Institutions Code section 707(b), including the offenses with which the petitioner in the instant case has been charged and convicted: murder and assault by any means of force likely to produce great bodily injury. (See Prop 57, § 4.2; Welf & Inst. Code, § 707(a)(1) & 707(b).)

Section 5 of Proposition 57 stated: "This act shall be broadly construed to accomplish its purposes. The provisions of Sections 4.1 and 4.2 of this act may be amended so long as such amendments are consistent with and further the intent of this act by a statute that is passed by a majority vote of the members of each house of the Legislature and signed by the Governor." Thus, any amendment to Proposition 57 is only authorized if the amendment is "consistent with *and* further[s] the intent of Proposition 57." (Emphasis added.)

As enacted by Proposition 57, subdivision (a)(1) of Welfare and Institutions Code section 707, in pertinent part, provides:

> "In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any felony criminal statute, ***or of an offense listed in subdivision (b) when he or she was 14 or 15 years of age, the district attorney or other appropriate prosecuting officer may make a motion to transfer the minor from juvenile court to a court of criminal jurisdiction***." (Welf. & Inst. Code, § 707(a)(1), emphasis added.)

Subdivision (b) of Welfare and Institutions Code section 707, in pertinent part, currently provides: "Subdivision (a) shall be applicable in any case in which a minor is alleged to be a person described in Section 602 by reason of the violation of one of the following offenses ***when he or she was 14 or 15 years of age***: ¶ (1) Murder. ¶ (14) Assault by any means of force likely to produce great bodily injury. ¶ (21) A violent felony, as defined in subdivision (c) of Section 667.5 of the Penal Code, which also would constitute a felony violation of subdivision (b) of Section 186.22 of the Penal Code . . .". (Welf. & Inst. Code, § 707(b), emphasis added.)[3]

[3] This language reflects the law as of today as the changes to Welfare and Institutions Code section 707 enacted by SB 1391 do not go into effect until January 1, 2019 as SB 1391 was not an urgency measure. (See *People* v. *Henderson* (1980) 107 Cal.App.3d 475, 488 ["Under the California Constitution, a statute enacted at a regular session

Notwithstanding Proposition 57's explicit retention of judicial authority to permit prosecution of a 14 or 15-year old minor in criminal court for violations of the offenses listed in section 707(b), SB 1391 completely eliminated the ability to prosecute any 14 or 15-year old in criminal court *regardless* of how violent or serious the offense and *regardless* of a judicial determination that such prosecution is appropriate – unless the minor is "apprehended" after the "end of juvenile court jurisdiction." (New Welf. & Inst. Code, § 707(a).)[4]

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of the Legislature generally becomes effective on January 1 of the year following its enactment except where the statute is passed as an urgency measure and becomes effective sooner."].)

[4] Specifically, under SB 1391, Welfare and Institutions Code section 707, in pertinent part, will state:
"(a)(1) In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any offense listed in subdivision (b) or any other felony criminal statute, the district attorney or other appropriate prosecuting officer may make a motion to transfer the minor from juvenile court to a court of criminal jurisdiction. . . .

(2) In any case in which an individual is alleged to be a person described in Section 602 by reason of the violation, when he or she was 14 or 15 years of age, of any offense listed in subdivision (b), ***but was not apprehended prior to the end of juvenile court jurisdiction***, the district attorney or other appropriate prosecuting officer may make a motion to transfer the individual from juvenile court to a court of criminal jurisdiction." (Emphasis added.)

Unfortunately, the statute does not identify when juvenile court jurisdiction "ends." (*Compare* Welf. & Inst. Code, § 602 [stating that "[e]xcept as provided in Section 707, any person who is under 18 years of age when he or she violates any law . . . is within the jurisdiction of the juvenile court . . ."] *with* Welf. & Inst. Code, § 1769(d)(2) ["A person who at the time of adjudication of a crime or crimes would, in criminal court, have faced an aggregate sentence of seven years or more, shall be discharged upon the expiration of a two-year period of control, or when the person attains 25 years of age, whichever occurs later, unless an order for further detention has been made by the committing court pursuant to Article 6 (commencing with Section 1800) of Chapter 1 of Division 2.5."] and Welf. & Inst. Code, § 607 (g)(2) ["A person who, at the time of adjudication of a crime or crimes, would, in criminal court, have faced an aggregate sentence of seven years or more, shall be discharged upon the expiration of a two-year period of control, or when the person attains 25 years of age, whichever occurs later, unless an order for further detention has been

SB 1391 cannot rationally be viewed as being consistent with Proposition 57 since SB 1391 ***took out*** the very ability to prosecute 14 and 15-year old minors that was ***put into*** the new version of Welfare and Institutions Code section 707(a) enacted by Proposition 57. (Cf., *People* v. *Kelly* (2010) 47 Cal.4th 1008, 1026–1027 ["for purposes of article II, section 10, subdivision (c), an amendment includes a legislative act that changes an existing initiative statute by taking away from it"].) In interpreting the intent behind a voter initiative, it is improper to read out of the enacted statute words that were expressly included. (See *Delaney* v. *Superior Court* (1990) 50 Cal.3d 785, 798–799 [rejecting an interpretation of a constitutional provision that would read out of the statute expressly included language].)

"The goal in interpreting a statute enacted by voter initiative is to determine and effectuate voter intent. (*Williams* v. *Superior Court* (2001) 92 Cal.App.4th 612, 622 [citing to numerous cases].) "To determine intent, we first look to the words of the statute, giving them their usual and ordinary meaning." (*Id*. at pp. 622-623; accord *Committee for Responsible School Expansion* v. *Hermosa Beach City School* Dist. (2006) 142 Cal.App.4th 1178, 1186 ["To interpret both constitutional and statutory provisions, we first look to their plain language."].)

In looking at the words of the statute enacted by Proposition 57, it is obvious the voters *did not intend to eliminate* prosecution in criminal court of 14 and 15-year old minors who commit one of the heinous crimes listed in subdivision (b) of section 707 (except in very limited circumstances) because the voters approved of language that *did not eliminate it*. In this regard, there is no ambiguity. (See *Murphy* v. *Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103 ["If the statutory language is clear and unambiguous our inquiry ends."].)

"In discerning the purposes of an initiative so as to determine whether a legislative amendment furthers its purpose and thus is valid, [courts] are guided by, but not limited to, the general statement of purpose found in the initiative." (*Proposition 103 Enforcement Project* v. *Charles Quackenbush* (1998) 64

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made by the committing court pursuant to Article 6 (commencing with Section 1800) of Chapter 1 of Division 2.5."].)

Cal.App.4th 1473, 1490–1491; accord *Gardner* v. *Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1374.) There were multiple intents identified in Proposition 57, reflecting a balancing of, among other things, the interest in public safety versus the interest in rehabilitation of juveniles.

These intents were identified as the following:

"1. Protect and enhance public safety.

2. Save money by reducing wasteful spending on prisons.

3. Prevent federal courts from indiscriminately releasing prisoners.

4. Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles.

5. ***Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court***." (Proposition 57, sec. 2, emphasis added.)

While the ballot argument in favor of Proposition 57 repeatedly told voters that minors should be rehabilitated, it also told voters that judges would be given the discretion to decide whether minors who committed the most serious crimes should be prosecuted as adults. (See Ballot Pamphlet, "Argument in Favor of Proposition 57 at p. 58 ["Prop. 57 is straightforward—here's what it does: . . . *Requires judges instead of prosecutors to decide whether minors should be prosecuted as adults*, emphasizing rehabilitation for minors in the juvenile system."; "Further evidence shows that minors who remain under juvenile court supervision are less likely to commit new crimes. Prop 57 focuses on evidence-based rehabilitation and *allows a juvenile court judge to decide whether or not a minor should be prosecuted as an adult*."], emphasis added.)

Moreover, the Legislative Analyst explicitly recognized that Proposition 57 preserved a Court's ability to transfer the prosecution of 14 and 15 year-old minors charged with the most serious crimes to adult court. The Legislative Analysis stated: "… the measure specifies that prosecutors can only seek transfer hearings for youths accused of (1) committing certain significant crimes listed in state law (such as murder, robbery, and certain sex offenses) when they were age 14 or 15 or (2)

committing a felony when they were 16 or 17." (Ballot Pamphlet, Legislative Analysis of Proposition 57 at p. 55.)

Also significant is the fact that when the *original* version of Proposition 57 was submitted to the Attorney General's office for public comment, it included a provision that would have established *16* as the minimum age at which juveniles could be transferred to adult court. (See *Brown* v. *Superior Court* (2016) 63 Cal.4th 335, 340.) During the comment period, the proponents of the measure spoke with various interest groups and the Governor's office. (*Id*. at p. 341.) After the close of the public comment period, the proponents submitted a revised measure, retitling it "The Public Safety and Rehabilitation Act of 2016." The revised measure retained some of the provisions of the original measure. However, the provision eliminating the ability to prosecute 14 and 15-year-olds in adult criminal court was ***deleted***. Instead, "[t]ransfers were generally limited to minors aged 16 or older, but ***were permitted for 14 or 15 year olds accused of certain serious crimes***." (Ibid, emphasis added.) It was this version of Proposition 57 that was submitted to, and voted upon by, the electorate. It is hard to imagine how amending Proposition 57 to include a provision *intentionally omitted* by the proponents is consistent with Proposition 57. (Cf. *People* v. *Soto* (2011) 51 Cal.4th 229, 245 ["The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision."].)[5]

The inclusion of the exception allowing 14 and 15-year old perpetrators of murder, robbery, and violent sex offenses to be tried as adults undoubtedly played a role in the voters' acceptance of the changes enacted by Proposition 57. If the persons who voted for Proposition 57 thought that it could be amended to preclude *any* 14 and 15-year old charged with murder from being treated like an adult (unless they were arrested after the end of juvenile court jurisdiction), they would likely have viewed the initiative in a very different light. And if voters had intended for

[5] See *People* v. *Canty* (2004) 32 Cal.4th 1266, 1276 ["In interpreting a voter initiative . . ., we apply the same principles that govern the construction of a statute."].)

Proposition 57 to eliminate the ability to prosecute such persons in adult criminal court, they would not have approved language that accomplished the EXACT OPPOSITE. (See *Proposition 103 Enforcement Project* v. *Charles Quackenbush* (1998) 64 Cal.App.4th 1473, 1490 [a legislative amendment to a voter proposition "may only be upheld if, by any reasonable construction, it could be said to further purposes of that Proposition", emphasis added; accord *Foundation for Taxpayer & Consumer Rights* v. *Garamendi* (2005) 132 Cal.App.4th 1354, 1371].)

It is true that section 3 of SB 1391 states, "The Legislature finds and declares that this act is consistent with and furthers the intent of Proposition 57 as enacted at the November 8, 2016, statewide general election." (*Id*; see also *Lockyer* v. *City and County of San Francisco* (2004) 33 Cal.4th 1055, 1119 ["Under long-established principles, a statute, once enacted, is presumed to be constitutional until it has been judicially determined to be unconstitutional."].)

However, this does not mean courts are bound to accept the Legislature's own declaration that its subsequently-enacted statute is consistent with an initiative. To the contrary, courts are required to independently assess whether a statute is, in fact, inconsistent with a voter initiative and must prohibit the legislature from enacting laws that are outside the scope of its authority to promulgate. (See *Amwest Surety Ins. Co.* v. *Wilson* (1995) 11 Cal.4th 1243, 1265; *Gardner* v. *Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1374; *Foundation for Taxpayer & Consumer Rights* v. *Garamendi* (2005) 132 Cal.App.4th 1354, 1371; see also *People v. Kelly* (2010) 47 Cal.4th 1008, 1025 ["courts have a duty to ""jealously guard"" the people's initiative power, and hence to ""apply a liberal construction to this power wherever it is challenged in order that the right"" to resort to the initiative process ""be not improperly annulled"" by a legislative body."].)

Moreover, when an initiative has multiple purposes, courts "must give effect to an initiative's *specific language*, as well as its major and fundamental purposes." (*Gardner* v. *Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1374, emphasis added; see also *Amwest Surety Ins. Co.* v. *Wilson* (1995) 11 Cal.4th 1243, 1259, 1260 [identifying initiative's "major purposes"; argument that initiative had "a narrower

scope than would follow from its broad language" rejected "'in view of the particular language'" used]; *Foundation for Taxpayer & Consumer Rights* v. *Garamendi* (2005) 132 Cal.App.4th 1354, 1370 [citing initiative's "fundamental purpose"; amendment must not "violate[ ] a specific primary mandate" or "*do violence to specific provisions*" of the initiative, emphasis added].)

If provisions of a statutory amendment are consistent with some of the primary intents of the initiative but inconsistent with others, they will still be found unconstitutional. (See *Gardner* v. *Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1379; *Foundation for Taxpayer & Consumer Rights* v. *Garamendi* (2005) 132 Cal.App.4th 1354, 1370 [legislation furthering one purpose of an initiative, but violating another of the initiative's "primary mandate[s]" could not reasonably be found to further initiative's purposes].)

To paraphrase *Gardner* v. *Schwarzenegger* (2009) 178 Cal.App.4th 1366: "[E]ven if these provisions of Senate Bill [1391] could be deemed to further Proposition [57's juvenile rehabilitation] purpose[6], they would still be unconstitutional because they are inconsistent with the proposition's other primary purposes [to "Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court" and "Protect and enhance public safety"]. (*Gardner* at pp. 1378-1379.)

And to paraphrase *Foundation for Taxpayer & Consumer Rights* v. *Garamendi* (2005) 132 Cal.App.4th 1354: "The Legislature cannot simply in the guise of amending Proposition [57] undercut and undermine a fundamental purpose of Proposition [57], even while professing that the amendment 'furthers' Proposition [57]. The power of the Legislature may be 'practically absolute,' but that power must yield when the limitation of the Legislature's authority clearly inhibits its action. (*Amwest*, *supra*, 11 Cal.4th at p. 1255, 48 Cal.Rptr.2d 12, 906 P.2d 1112.) Since Sen.

[6]Under the new version of section 707 enacted by SB 1391 and depending on how "the end of juvenile court jurisdiction" is interpreted, a person who is arrested a short time before the end of juvenile court jurisdiction will likely receive little or no rehabilitation. Therefore, this change can also frustrate the rehabilitative goal of Proposition 57.

Bill [1391] flies in the face of [at least two of] the initiative's purposes, it exceeds the Legislature's authority." (*Foundation for Taxpayer & Consumer Rights* at p. 1371.)

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

Considering the multiple intents identified in Proposition 57, it may be difficult to identify a single overriding purpose. But even assuming such an overriding purpose exists, the purpose was not to keep *all* juveniles out of the adult court system because Proposition 57 expressly told voters that judges would be vested with the power to decide which juveniles who have committed the most serious and violent crimes should be tried as adults and which should be adjudicated as minors. This express power was eliminated by SB 1391.

If the voters passed an initiative that increased taxes on all persons except those making under $10,000 dollars a year, and the legislature then passed a statute eliminating the exemption for those making under $10,000 dollars, would this Court have any hesitation in finding the statute inconsistent with the initiative notwithstanding the general thrust of the initiative was to reduce taxes? Of course not! A similar obvious inconsistency exists between SB 1391 and Proposition 57 as the former takes away authority expressly given to the court by the latter – no matter what the general thrust of Proposition 57 is conceived to be.

II. Conclusion

Passage of SB 1381 was an unconstitutional act by the legislature in contravention of subdivision (c) of section 10 of Article II of the California Constitution. As such, it is invalid and cannot be applied to prevent a juvenile court from permitting the prosecution of a 14 or 15-year old who commits an offense listed

in Welfare and Institutions Code section 707(b) in adult criminal court. Accordingly, we respectfully submit that SB 1381 should not have any impact on the issues raised by the petitioner.

Dated: October 10, 2018

Respectfully submitted,

JEFFREY F. ROSEN
DISTRICT ATTORNEY

By: _____
Jeff H. Rubin
Deputy District Attorney