IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

O.G., Petitioner, v. SUPERIOR COURT OF VENTURA COUNTY, Respondent; PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	Supreme Court No. S259011 Court of Appeal, Second Appellate District, Div. Six, No. B295555 Ventura County Superior Court No. 2018017144

The Honorable Kevin J. Mcgee, Judge Presiding

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER O.G.

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STATEMENT OF FACTS AND OF THE CASE

In the November 2016 General Election, the voters of California enacted Proposition 57, the "Public Safety and Rehabilitation Act of 2016." The initiative provided incentives for state prison inmates to participate in rehabilitative programs, and gave the authority for the state parole board to award early release to certain people who had committed non-violent offenses. Proposition 57 also made dramatic changes to California's laws governing transfer of juveniles to the adult system. Further, the measure expressly permitted amendment by a statute passed by a majority of the members of each house of the Legislature and signed by the Governor if the amendment is "consistent with and furthers the intent of" Proposition 57. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016), text of Prop. 57, § 5, p. 145.)

Two years later, the Legislature passed S.B. 1391, which further changed the transfer laws to prohibit the transfer to adult court[1] of youth who were 14 or 15 years of age at the time of the offense, except where they were not apprehended prior to the end of juvenile court jurisdiction. (Stats. 2018, ch. 1012 (S.B. 1391), § 1, effective Jan. 1, 2019.)

Shortly after the effective date of S.B. 1391, an amended juvenile court petition was filed against Petitioner, O.G., in the Ventura County Superior Court, for offenses allegedly committed when he was 15 years of age. Before adjudication, and without even waiting for a social study report to be prepared, the prosecutor moved to try O.G.in adult court, challenging the constitutionality of S.B. 1391 as an improper amendment to Proposition 57. The juvenile court granted the motion, and Division Six of the Second District Court of Appeal (*O.G. v. Superior Court* (2019) 40 Cal.App.5th 626) also found that S.B. 1391 was an unconstitutional amendment. O.G. then petitioned this Court for review.[2]

The court has now granted review to determine whether Senate Bill ("S.B.") 1391 (Stats. 2018, ch. 1012), which eliminated the possibility of transfer to adult criminal court for crimes committed when a minor was 14 or 15 years old, except in the rare case in which the child was apprehended after the expiration of juvenile jurisdiction, was an unconstitutional amendment to

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[1] For purposes of this brief, "courts of criminal jurisdiction" will be referenced as "adult court."

[2] These facts are taken from the Statement of the Case and Facts in Petitioner's Brief on the Merits, pp. 15-17.

Proposition 57. Seven published decisions (17 justices to 3) have found the measure constitutional.[3] Five cases are being held behind this one for review.

STANDARD OF REVIEW AND OVERVIEW OF ARGUMENTS

Under this Court's decision in *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1256, it is presumed that the Legislature acted within its authority, and a statute will be upheld "if, by any reasonable construction, it can be said that the statute furthers the purposes" of the initiative. Of course, the court must examine the express statement of purpose included in the initiative. (*Ibid*.) But also, evidence of its purpose may be drawn from many sources, including the historical context of the amendment, and the ballot arguments favoring the measure. (*Ibid*, citing *California Housing Finance Agency v. Patitucci* (1978) 22 Cal.3d 171, 177.)

Counsel for Petitioner has exhaustively responded to Real Party's legal arguments on statutory interpretation and we will not repeat those arguments here. Instead, we will provide

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[3] *People v. Superior Court* (*Alexander C.*) (2019) 34 Cal.App.5th 994, review den. June 26, 2019; *People v. Superior Court* (*K.L.*) (2019) 36 Cal.App.5th 529, review den. July 17, 2019; *People v. Superior Court* (*T.D.*) (2019) 38 Cal.App.5th 360, review granted Nov. 26, 2019, S257980; *People v. Superior Court* (*I.R.*) (2019) 38 Cal.App.5th 383, review granted Nov. 26, 2019, S257773; *People v. Superior Court* (*S.L.*) (2019) 40 Cal.App.5th 114, review granted Nov. 26, 2019, S258432; *B.M. v. Superior Court* (2019) 40 Cal.App.5th 742, review granted Jan. 2, 2020, S259030; and *Narith S. v. Superior Court* (2019) 42 Cal.App.5th 1131, review granted Feb. 19, 2020, S260090.

historical context and exploration of voter awareness and intent that supports the validity of the S.B. 1391 amendment.

Argument I summarizes the California legislative history of transfer law — its focus on capacity for rehabilitation, as well as longstanding imitations on transfer imposed by making transfer a judicial decision, and setting eligibility at age 16. The argument then turns to the historical interlude occurring between 1994 and 2000, when "get tough" laws permitted transfer at age 14, and, later, mandatory and discretionary transfer by prosecutors. Finally, the argument explores evolving consciousness about treatment of adolescents, research on delinquency, court cases and legislation that formed the context in which voters enacted Proposition 57, reversing the extreme measures of the "get tough" era.

Argument II examines the public discussion surrounding the vote on Proposition 57, and what the voters knew from the text of the measure and the ballot materials.

Argument III concludes that S.B. 1391 was consistent with and furthered the intent of Proposition 57 in subjecting fewer youth to prosecution in the adult system.

* * * * * *

ARGUMENTS

I. PROPOSITION 57 VOTERS INTENDED TO UNDO THE EXCESSES OF THE "GET TOUGH" ERA BY KEEPING MORE YOUTH IN JUVENILE COURT.

A. For Most of Juvenile Court History, Only Youth 16 Years of Age or Older Could Be Transferred and Only After a Judge Made the Decision.

When the Arnold-Kennick Juvenile Justice Law was enacted in 1961, it included section 707, allowing the court to transfer a young person to adult court for felony offenses if they "would not be amenable to the care, treatment and training program available through the facilities of the juvenile court," and the youth was 16 years or older at the time of the alleged commission of the offense. (Stats. 1961, ch. 1616, Art. 8, p. 3485.)[4]

The Law followed the 1960 recommendations of a Governor's Special Study Commission, which had strongly supported a continuation of the protective and rehabilitative philosophy of the juvenile court. (*Report of the Governor's Special Study Commission on Juvenile Justice, Part I: Recommendations for Changes in California's Juvenile Court Law* (1960), p. 12.)[5]

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[4] Unless otherwise specified, all statutory references are to the Welfare and Institutions Code. Also, while statutory and case law going back to at least 1909 characterized children as being "fit" or "unfit" to remain in juvenile court, Proposition 57 has eliminated these archaic terms and refers, instead, to whether a young person's case should be transferred to adult court for prosecution. The terms "fit," "unfit," and "fitness" are used in this brief only when called for by reference to specific statutory language or cases.

[5] The very first juvenile court law in California only applied to youth under the age of 16 and did not address transfer. (Stats. 1903, ch. 43, § 8, p. 47.) Beginning in 1909 California law allowed

With respect to certification to adult court, the Commission specified that it should be limited to those youth who could not be rehabilitated: "Transfers to criminal court should be decided solely on the question as to whether the minor can benefit from the juvenile court's rehabilitative services." (*Id.* at p. 17.)

For the next decade-and-a-half, section 707 remained relatively unchanged. But after the law was changed to require consideration of five specific criteria in the transfer decision (Stats. 1975, ch. 1266, § 4, p. 3325), section 707 began to undergo amendments that made it easier to send youth to adult court. The changes coincided with changing perceptions about violent crime by juveniles and how to address them.

B. Changes in the "Get Tough" Era Made It Easier to Try Youth as Adults.

Beginning in the late 1970's, the attitude of the public and policymakers toward juveniles entered what has been described as a "get tough" period. The idea was that youth who committed serious crimes should be subject to adult-type lengthy sentences, or in then popular terms, "if you do the crime, you do the time." Initially, this was prompted by crime rates. Juvenile crime rates in California peaked in the mid-1970s, dropped briefly during the mid-1980s, then rose again during the late 1980s. (Legislative Analyst's Office, *Juvenile Crime--Outlook for California: Part II* (May 1995),

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transfer to adult court, but did not set a lower age; the statute was notable, however, in allowing youth up to age 21 at the time of their offense to be handled in the juvenile court if the court made a determination that they were "fit" for juvenile court treatment. (Stats. 1909, ch. 133, §§ 16-18, pp. 219-222.)

<https://lao.ca.gov/1995/050195_juv_crime/kkpart2.aspx> [as of June 2, 2020].) For much of this time, the juvenile arrest rate for violent crime exceeded that for adults. (*Ibid.*) Although crime rates began to drop by the mid-1990's and have dropped precipitously since that time (*Juvenile Felony Arrest Rate, Year(s) 1980-2018*, Kidsdata.org <https://www.kidsdata.org/topic/165/arrest-rate/trend#fmt=2332&loc=2&tf=96,108> [as of June 2, 2020], policymakers harnessed public fear by enacting harsher laws, including laws making it easier to move youth to the adult system.

Perceptions about violent juvenile crime were also fueled by prominent social scientists' predictions. James A. Fox, a criminologist, warned of "a blood bath of violence" that could soon wash over the land. (Haberman, *When Youth Violence Spurred 'Superpredator' Fear,* N.Y. Times (Apr. 6, 2014).) John J. DiIulio Jr., then a political scientist at Princeton, received widespread media attention for his view that we were about to be overwhelmed by tens of thousands of severely morally impoverished juvenile super-predators capable of committing the most heinous acts of physical violence for the most trivial reasons. (DiIulio, *The Coming of the Super-Predators*, Washington Examiner (Nov. 27, 1995).) Although DiIulio later apologized and said he had been wrong (Haberman, *supra*, *When Youth Violence Spurred 'Superpredator' Fear*), the damage had been done. The media and politicians from both parties picked up on this fear and ran with it (*ibid.*), using it to justify harsher, more punitive penalties and procedures.

There was also growing concern about juvenile gangs. The media were full of sensationalized stories about gang crimes, and people were afraid of being caught in the crossfire. After a series of gang-related shootings felled a number of innocent bystanders, Los Angeles Police Chief Daryl Gates vowed to "obliterate" the violent gangs and exert control over "the rotten little cowards." (Feldman, *War on 'The Rotten Little Cowards': Irate Gates Pledges 1,000 Officers for Gang Sweeps*, L.A. Times (Apr. 3, 1998).) The perception that we needed a "war" on gangs was driven by the militaristic law enforcement approach to gang intervention. Chief Gates said, "It's like having the Marine Corps invade an area that is still having little pockets of resistance…We can't have it…We've got to wipe them out." (Freed, *Gates Blames Drugs, Gangs for 4% Rise in L.A. Crime*, L.A. Times (Dec. 26, 1986), at p. II-1, col. 6.)

1. Successive Changes to Section 707 Expanded Eligibility for Transfer.

The perceived need for stronger measures to stem violent juvenile crime resulted in successive changes to section 707 making it easier to try youth as adults. Beginning in 1976, the Legislature divided transfer cases into two categories – section 707, subdivision (a) applied to less serious cases [age 16 and alleged violation of any criminal statute or ordinance], and section 707, subdivision (b) applied to more serious cases [age 16 and alleged to have committed one of 11 listed offenses]. (Stats. 1976, ch. 1071, § 28.5, pp. 4825-4827, amending Welf. & Inst. Code, § 707.) This was the first time the Legislature specified the

offenses (commonly referred to as "707(b) offenses") that would make it more difficult to stay in juvenile court.

From the late 1970's to the late 1990's transfer was made even easier by expanding the list of 707(b) offenses, the ages for eligibility, and making the findings more stringent for retention in juvenile court.[6] By the beginning of 1999, there were 29 offenses on the list of 707(b) offenses that rendered a young person presumptively "unfit" for juvenile court. (Stats. 1998, ch. 936 (A.B. 105), §§ 21 & 21.5, pp. 6908-6909.)

2. A.B. 560 Dropped the Minimum Age for Transfer to 14.

Even in the "get tough" era, policymakers had resisted changing the age of eligibility for transfer. But then, in 1994, A.B. 560 amended section 707 to drop the age for transfer to 14 for some offenses. (Stats. 1994, ch. 453 (A.B. 560), § 9.5, pp. 2525-2526.) Under section 707, subdivision (d), as amended, the court had the authority to transfer youth as young as 14 for one of the offenses on a list that mirrored the 707, subdivision (b) list; and

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[6] Stats, 1977, ch. 1150, § 2, p. 3694; Stats. 1979, ch. 944, § 19, p. 3264; Stats. 1979, ch. 1177, § 19; Stats. 1979, ch. 1177,§ 2, pp. 4509-4601; Stats. 1982, ch. 283, § 2, p. 924; Stats. 1982, ch. 1094, § 2, p. 3982; Stats. 1982, ch. 1282, § 4.5, p. 4750; Stats. 1983, ch. 390, § 2, p. 1632; Stats. 1986, ch. 676, § 2, p. 2296; Stats. 1989, ch. 820, § 1, p. 2700; Stats. 1990, ch. 249 (A.B. 2601), § 1, p. 1515; Stats. 1991, ch. 303 (A.B. 1780), § 1, p. 1872; Stats. 1993, ch. 610 (A.B. 6), § 30, p. 3422; Stats. 1993, ch. 611 (S.B. 60), § 34, p. 3587; Stats. 1994, ch. 448 (A.B. 1948), § 3, p. 2427; Stats. 1994, ch. 453 (A.B. 560), § 9.5, p. 2528; Stats. 1997, ch. 910 (S.B. 1195), § 2, p. 6532; Stats. 1998, ch. 925, (A.B. 1290), § 7, p. 6194; Stats. 1998, ch. 936 (A.B. 105), §§ 21 & 21.5, pp. 6909, 6914.)

subdivision (e), as amended, presumed the 14-year-old unfit for a smaller list of homicide offenses with particular characteristics.[7]

In the Senate Judiciary Committee analysis of A.B. 560, Senator Peace stated that this change was needed because

> the public is legitimately concerned that crimes of violence committed by juveniles are increasing in number and in terms of the level of violence… This approach is one that Juvenile Court judges in San Diego County support as they feel that there are a finite number of 14 to 16-year-olds who do not belong in the juvenile court and are infecting other juveniles.

(Sen. Com. on Judiciary, Analysis of Assem. Bill No. 560 (1993-1994 Reg. Sess.) as amended Apr. 21, 1994, p. 3.) The analysis revealed that three other bills would also reduce the age to 14, and highlighted data showing a high crime rate among the 14 and 15-year-old age cohort. (*Id.* at p. 5.)

3. The "Get Tough" Era Culminated in 1999-2000 (S.B. 334 and Proposition 21).

While the crime rates that had originally spurred "get tough" legislation had begun to decline by the mid-1990's, punitive legislation continued to be popular in Sacramento. In the most extreme measure to that point, the 1999 Legislature enacted section 602, subdivision (b), ***requiring*** adult court prosecution of youth 16 and older who committed specified homicide and sex offenses, if they had previously been made a

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[7] Real Party in this case repeatedly asserts that Proposition 57 affirmatively added the provisions on 14 and 15-year-olds (Real Party In Interest's Answer Brief on the Merits ("Answer"), pp. 23-24, 32, 39-40, 51), but in fact, those provisions have been in section 707 since A.B. 560 was enacted in 1994.

ward of the court for a felony at age fourteen or older. (Stats. 1999, ch. 996 (S.B. 334), § 12.2, pp. 7560-7561.)

The culmination of the "get tough" era arrived in 2000, when the voters enacted Proposition 21, the "Gang Violence and Juvenile Crime Prevention Act of 1998." (Initiative Measure (Prop 21), § 26, approved March 7, 2000, effective March 8, 2000.) The measure made dozens of changes to juvenile and criminal laws, primarily directed at increasing penalties, creating new crimes, reducing traditional protections juveniles enjoyed, broadening the kinds of cases that could result in transfer, and most notably, allowing prosecutors to file cases against juveniles directly in criminal court without a judicial hearing. (*Ibid.*)[8]

Proposition 21 indisputably intended to increase punishment for young people. The Findings and Declarations for Proposition 21 set the stage for more punitive measures, informing voters that "The juvenile justice system is not well-equipped to adequately protect the public from violent and repeat serious juvenile offenders." (Voter Information Guide, Primary Elec. (Mar. 7, 2000), Proposition 21: Text of Proposed Law, § 2, p. 119.) The Legislative Analyst confirmed for voters in the Ballot Pamphlet, that Proposition 21 "[r]equires more juvenile offenders to be tried in adult court." (Voter Information Guide, Primary Elec. (Mar. 7, 2000), Proposition 21, p. 45.) The constitutionality of direct filing of cases against juveniles in adult court pursuant

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[8] Proposition 21 was almost identical to unsuccessful legislation sponsored by Governor Pete Wilson in the 1998 legislative session. (S.B. 1455 (Rainey 1998); and see Sen. Subcom. on Juv. Justice, Analysis of S.B. 1455 (1997-1998 Reg. Sess.) as amended Apr. 17, 1998.)

to section 707, subdivision (d), added by the initiative, was later upheld in *Manduley v. Superior Court* (2002) 27 Cal.4th 537.

4. The Public Became More Aware That the Consequences of Transfer to the Adult System Are Life Changing.

In the public debate over Proposition 21, it became more apparent that life for youth who are handled in the adult system is very different than for youth retained in the juvenile system. The voters knew, for example, that youth in the juvenile system receive rehabilitation and are held for a shorter time in custody, while youth in the adult system face prison and long sentences. (Voter Information Guide, Primary Elec. (Mar. 7, 2000), Proposition 21: Analysis by Legislative Analyst, pp. 45-46; Arguments for and Against Proposition 21, pp. 48-49.) None of this has changed since Proposition 21.

In the adult system, transferred youth are subjected to the adult sentencing statutes (Pen. Code, §§ 1168, 1170), up to and including a sentence of life without the possibility of parole. (Pen. Code, § 190.5, subd. (b).) In the adult system, the court's primary sentencing options are jail and state prison. Sentencing, in the adult system, is focused on punishment. Although Penal Code section 1170, subdivision (a)(1) has been amended to provide that "purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice" (Stats. 2015 (A.B. 2590), ch. 378. § 1), no one familiar with California's state prison system would suggest that this purpose has been realized or will be meaningfully attained in the foreseeable future. (See, e.g., Cal. Rehabilitation Oversight Board, *C-ROB Report* –

September 13, 2019 (2019), detailing deficiencies in the number of inmates receiving rehabilitative programming.)[9]

In contrast, young people in juvenile court receive a dispositional order that makes "reasonable orders for the care, supervision custody, conduct, maintenance, and support of the minor or nonminor, including medical treatment …." (Welf. & Inst. Code, § 727.) Juvenile court law requires that they receive the individualized rehabilitative care and treatment required by section 202, subdivision (a).[10] In the juvenile system, a young

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[9] Youth in adult prison report that much of their time is spent learning criminal behavior from other inmates and proving how tough they are. (Redding, *Juvenile Transfer Laws: An Effective Deterrent?* OJJDP Juvenile Justice Bulletin (June 2010) p. 7.) More than 30 percent report having been assaulted or having witnessed assaults by prison staff. (*Ibid.*) As compared with those in juvenile facilities, juveniles incarcerated in adult prison are eight times more likely to commit suicide, five times more likely to be sexually assaulted, and almost twice as likely to be attacked with a weapon by inmates or beaten by staff. (*Ibid.*, citation omitted.) These concerns are confirmed in studies of young inmates in California prisons. (See, e.g., Human Rights Watch, *When I Die…They'll Send Me Home* (2008) pp. 54-56.)

[10] Section 202, subdivision (b) provides, in pertinent part:

> Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall . . . receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. This guidance may include punishment that is consistent with the rehabilitative objectives of this chapter . . . family preservation and family reunification are appropriate goals for the juvenile court to consider when determining the disposition of a minor under the jurisdiction of the juvenile court as a consequence of delinquent

person may be held only up to age 25. (Welf. & Inst. Code, §§ 607, subd. (b), 1769, subd. (b).) The juvenile court has wide discretion in ordering that the youth receive rehabilitative services and/or be placed in one of many residential settings or institutions designed for children — including non-secure placements (foster care with a resource family, short-term residential therapeutic programs), juvenile hall commitment programs, camps or ranches, or the Division of Juvenile Facilities. (Welf. & Inst Code, §§ 725, 726, 727, 730, subd. (a), 731.)[11] Youth in juvenile facilities must receive educational services that meet state high school graduation requirements. (Cal. Code of Regs., tit. 15, § 1370.) Parents are an important part of the proceedings in juvenile court (see, for example, Welf. & Inst. Code, §§ 630, 633, 675, 706),

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> conduct when those goals are consistent with his or her best interests and the best interests of the public. . . .

[11] As this brief is being filed, the Governor's revised budget has proposed shifting responsibility for youth held in state Division of Juvenile Justice facilities to counties. The parameters of that shift are as yet unknown, but the stated intent is consistent with the rehabilitative purposes of the system:

> Closing state juvenile facilities and directing a portion of the state savings to county probation departments will enable youth to remain in their communities and stay close to their families to support rehabilitation. Local juvenile detention facilities have a significant number of vacant beds, providing an opportunity to house a greater number of youthful offenders locally.

(Budget Summary: Public Safety (May Revision 2020-2021) p. 88 <http://www.ebudget.ca.gov/2020-21/pdf/Revised/BudgetSummary/FullBudgetSummary.pdf> [as of June 8, 2020].)

but nothing in the adult court law requires that parents be present or involved. Although youth in juvenile court proceedings suffer collateral consequences as a result of their case (see Pacific Juvenile Defender Center, *Collateral Consequences of Juvenile Delinquency Proceedings in California* (2011)), they are spared many of the consequences attendant to an adult conviction because a juvenile adjudication is not considered a conviction. (Welf. & Inst. Code, § 203.) While the juvenile system is not perfect, it offers much greater opportunities for young people to succeed.

C. In the 21st Century, the Public Mindset Shifted Away from Punishment.

By the time Proposition 21 was enacted in 2000, several things were starting to percolate into public consciousness that would shift public perception about juvenile crime and what to do about it. These changes would have an important impact on how the voters evaluated the merits of Proposition 57.

1. Juvenile Crime Rates Continued to Decline.

Although much of the rhetoric in Proposition 21 referred to rampant juvenile crime, even by the time it was enacted in early 2000, the rate of juvenile felony arrests had already decreased 34.4 percent since 1995. (Cal. Dept of Justice, *Crime and Delinquency in California 2000*, p. viii.) As the new century progressed, juvenile crime rates continued to decline. In 2016, the year Proposition 57 was on the ballot, the Attorney General's data revealed that 97,376 juveniles were arrested for felonies in 1980, and in 2016, only 19,656. (Cal. Dept. of Justice, *Crime in*

California 2016, Table 16, pp. 16-17.) [12] The rate of felony arrests per 100,000 population had dropped from 3,197.7 in 1980, to 470.7 in 2016. (*Ibid*.)

As it became clear that the decline in juvenile crime was real and substantial, the public and policymakers gradually relaxed their fear about violent juveniles. Polls on juvenile justice reflected shifting attitudes among voters. A 2014 Pew Charitable Trusts poll found that voters overwhelmingly support rehabilitation for juveniles, and care less about whether or how long juvenile offenders are incarcerated than about preventing crime. (Pew Charitable Trusts, *Public Opinion on Juvenile Justice in America: Issue Brief* (Nov. 2014) pp. 2-3.) A Youth First Initiative poll of 1,000 Americans in early 2016 found that 78% of those polled supported proposals to reform the youth justice system because youth who commit delinquent acts have the ability to change for the better, and 79% felt that the best thing for society is to rehabilitate these youth so they can become productive members of society instead of incarcerating them. (*Poll Results on Youth Justice Reform*, GBA Strategies (Feb. 1, 2016).)

[12] California juvenile arrest rates have continued to fall dramatically. In 2018, the most recent year for which there is published data, there were only 17,265 juvenile felony arrests (Cal. Dept. of Justice, Criminal Justice Statistics Center, *Juvenile Justice in California 2018* (2019) Table 4, Juvenile Felony Arrests, 2018, p. 57.)

2. The Public Became Aware of Advances in Brain Science and Adolescent Development.

a. Research Was Widely Circulated and Discussed.

In the late 1990's, the John D. and Catherine T. MacArthur Foundation started the Research Network on Adolescent Development & Juvenile Justice. The Network was concerned about the justice system's disregard for the basic principle underlying the existence of a separate juvenile justice system: that children are less mature than adults, and that the juvenile legal system that deals with them should reflect that reality. It set out to explore that premise, drawing from and expanding upon the latest research on child and adolescent development. Its members included people with expertise in social science, neuroscience, and legal policy and practice. The Network launched a series of research studies resulting in eight books and 212 articles in peer reviewed journals and books, which have had a notable influence on how juveniles are seen and treated in the American justice system. (See <https://www.macfound.org/networks/research-network-on-adolescent-development-juvenil/> [as of June 10, 2020].)

Also, the National Academies of Sciences pulled together dozens of top scientists and juvenile justice experts to explore and present current findings in adolescent development and brain science as they relate to youth justice. In 2013, they published *Juvenile Justice Reform: An Adolescent Development Approach* (Bonnie, et al. Eds., National Research Council (2013)). Their research made it clear that the things youth need to develop in a

healthy way are difficult to secure in long-term institutional confinement. (*Id*. at pp. 3-6, 134.). Additional research established that even youth who commit serious crimes are unlikely to continue their criminal behavior into adulthood. (Mulvey, *Highlights from Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders*, OJJDP Fact Sheet (March 2011) p. 3.)

News of adolescent development research findings also appeared in popular print and non-print media. The public began to see the kinds of books and articles about the "teenage brain" that are now familiar. (See, e.g., Sifferlin, *Why Teenage Brains Are So Hard to Understand*, Time (Sept. 8, 2017); Layton, *Why are Teens Oblivious to the Pile of Dirty Clothes on the Bedroom Floor?* Washington Post (Apr. 22, 2015); Steinberg, *Age of Opportunity: Lessons from the New Science of Adolescence*, Houghton Mifflin (2014).) The connection between adolescent development and the need for age-appropriate interventions became common knowledge.

There was also widely disseminated research showing that trying youth as adults is actually harmful to public safety. A study by the Centers for Disease Control found that "transfer to the adult criminal justice system typically increases rather than decreases rates of violence among transferred youth" after they have been released. (Hahn et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, Department of Health and Human Services, Centers for Disease Control and Prevention

(Nov. 2007), p. 9.) A Department of Justice analysis of then existing studies determined that rates of recidivism were higher among juveniles who were tried in adult courts than among those kept in the juvenile system, and that transfer "does not engender community protection," but instead "substantially increases recidivism." (Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency? supra*, p. 6.)

b. Court Opinions Relied on the Adolescent Development Research.

Beginning in 2005, the adolescent development research found its way into a groundbreaking series of Supreme Court opinions which formed the backdrop against which the voters considered Proposition 57.

In *Roper v. Simmons* (2005) 543 U.S. 551, the United States Supreme Court struck down capital punishment for juveniles, finding that a lack of maturity and underdeveloped sense of responsibility are more understandable in the young, and that these qualities often result in impetuous and ill-considered actions and decisions. (*Id.* at p. 569.) Because of this, the principles of deterrence and retribution that undergird adult criminal justice cannot be fairly be applied to young people. (*Id.* at p. 571.)

In *Graham v. Florida* (2010) 560 U.S. 48, 68, the Supreme Court prohibited life without parole sentences in juvenile non-homicide cases, reiterating that compared with adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer

pressure; and their characters are not as well formed. The court noted that it is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. (*Graham, supra,* 560 U.S.at p. 68, citing *Roper, supra,* 543 U.S. at p. 573.) The court concluded that a juvenile is not absolved of responsibility for his actions, but his transgression is not as morally reprehensible as that of an adult. (*Graham, supra*, 560 U.S. at p. 68.)

These adolescent development principles were crystallized in *Miller v. Alabama* (2012) 567 U.S. 460, in which the court disapproved mandatory life without parole statutes for juveniles. In *Miller*, the court looked to research showing that only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior. (*Miller, supra*, 576 U.S. at p. 471.) The court reasoned that the fundamental differences between juvenile and adult minds mean that the child's moral culpability is lessened, and that as neurological development occurs, the deficiencies will be reformed. (*Miller, supra*, 576 U.S. at. pp. 471-472.) The court's summary of the hallmark features of youth has been widely applied,[13] and *Miller* held that sentencing schemes must allow

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[13] The *Miller* factors are:

- Immaturity, impetuosity, and failure to appreciate risks and consequences;
- Family and home environment that surrounds the youth—and from which he cannot usually extricate himself;

consideration of these factors before permitting the imposition of imposing life without the possibility of parole on juveniles.

These adolescent development principles have repeatedly been recognized and adopted in a series of this Court's opinions, including *People v. Caballero* (2012) 55 Cal.4th 262, *People v. Gutierrez* (2014) 58 Cal.4th 1354, and *In re Kirchner* (2017) 2 Cal.5th 1040. Similarly, this Court has recognized the immense impact on young people's lives of treating them in the juvenile as opposed to the adult system. (*People v. Superior Court* (*Lara*) (2017) 4 Cal.5th 299.)

These decisions helped to increase public awareness of the importance of treating young people differently with respect to adult court sentencing and transfer, and the electorate is presumed to be aware of existing laws and judicial construction thereof. (*In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11; and see *Wishnev v. The Northwestern Mutual Life Ins. Co. Eyeglasses* (2018) 8 Cal.5th 199, 212.)

- Circumstances of the homicide offense, including the extent of participation in the conduct, and the way familial and peer pressures may have affected the youth;
- Incompetencies associated with youth—for example, inability to deal with police officers, prosecutors (including on a plea agreement), or incapacity to assist one's own attorneys;
- Capacity for rehabilitation.

(*Miller, supra*, 567 U.S. at pp. 477-478.)

c. Changing Views on the Treatment of Adolescents Were Reflected in Legislation.

As the voters prepared to vote on Proposition 57 in 2016, they were also aware of recent legislative enactments that incorporated modern concepts of adolescent development into law. California first explored these issues by enacting sentencing review for youth receiving life without the possibility of parole sentences (Stats. 2012 (S.B. 9), ch. 828, § 27, adding Pen. Code, § 1170.2, subd. (d)(2)), and then by incorporating adolescent development factors into laws for parole of juveniles tried in the adult system. (Stats. 2013 (S.B. 260), ch. 312, adding Pen. Code, §§ 3051 & 4801, subd. (c) [establishing youth offender parole]; and Stats. 2014 (S.B. 261), ch. 471, amending Pen. Code, §§ 3051, 4801 [to afford youth offender parole to youth up to age 23 at the time of their offense].)

In 2015, just a year before the voters went to the polls for Proposition 57, there was further evidence of a legislative shift away from "get tough" rules for transfer. That year, the Legislature passed S.B. 382 (Stats. 2015 (S.B. 382), ch. 234), which clarified the section 707 criteria for transfer to adult court by focusing on adolescent development factors, the characteristics of the young person, and facts that would mitigate the gravity of the offense.[14] Much of what is included in the S.B. 382 language

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[14] As amended by S.B. 382, section 707, subdivision (c) provided that the court may consider age, maturity, intellectual capacity, physical, mental, and emotional health at the time of the alleged offense, the minor's impetuosity or failure to appreciate risks and consequences, the effect of familial, adult, or

parallels the language in the decisions of the Supreme Court and this Court. Senator Lara, the author of the bill, stated that the bill was needed because:

> The decision to send a juvenile to the adult system is a very serious one. The juvenile court system is focused on rehabilitation and provides far more supports and opportunities for juvenile offenders compared to adult criminal facilities. Recent U.S. and California Supreme court cases, as well as cognitive science has found that juveniles are more able to reform and become productive members of society, if allowed to access the appropriate rehabilitation.

(Sen. Com. on Pub. Safety, Analysis of S.B. 382 (2015-2016 Reg. Sess.) as amended Apr. 20, 2015, Juvenile: Fitness Criteria, p. 5.) In enacting S.B. 382, the Legislature manifestly intended to narrow the group of youth subjected to the punitive adult system.

News of these legislative enactments was widely disseminated, and the voters are presumed to have been aware of existing law at the time an initiative was enacted. (*People v. Weidert* (1985) 39 Cal.3d 836, 844, 218; *In re Lance W.*, *supra*, 37 Cal.3d at p. 890, fn. 11.)

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peer pressure on the minor's actions, the effect of the minor's family and community environment and childhood trauma, the minor's potential to grow and mature, the adequacy of the services previously provided to address the minor's needs, the minor's actual behavior, mental state, degree of involvement in the crime, level of harm actually caused, and the minor's mental and emotional development. (Welf. & Inst. Code, § 707, subd. (c), as amended by S.B. 382, Stats. 2015, ch. 234, § 2.)

II. THE ELECTORATE INTENDED TO INCREASE THE NUMBER OF YOUTH TO BE HANDLED IN THE JUVENILE SYSTEM.

A. Proposition 57 Was Designed to Increase Rehabilitation.

Given the remarkable scientific developments, court decisions and legislation of the preceding decade, it was hardly surprising that further efforts would be made to turn back California laws that made it easier to try young people in the adult system. In late 2015, Governor Jerry Brown teamed up with youth advocates to bring an initiative to the people of California.[15] For his part, the Governor had experienced second thoughts about his role in the 1977 determinate sentencing laws, which had marked the beginning of the tough on crime era, but had fueled a booming prison population. (Myers, *Gov. Brown to seek November ballot initiative to relax mandatory prison sentences*, L.A. Times (Jan. 26, 2016).) The state had been successfully sued over prison overcrowding and was under a 2009 federal court mandate to reduce population. The initiative would help with that issue, but Governor Brown also voiced concern that the prison system allowed too few chances for rehabilitation. (*Ibid.*) He urged that, by allowing parole consideration if they do good things, inmates will have an incentive to show those who will be judging whether or not they are ready to go back into

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[15] The California District Attorneys Association sought to keep the measure off the ballot. (See, e.g., Associated Press, *Prop. 57 Would Change Governor's Legacy, Simplify Sentences*, Los Angeles Daily News (Oct. 17, 2016).) This Court allowed the measure to go forward. (*Brown v. Superior Court* (2016) 63 Cal.4th 335.)

society. (*Ibid.*) The adult provisions of the initiative would allow corrections officials to more easily award credits toward early release based on an inmate's good behavior, efforts to rehabilitate or participation in prison education programs, and would allow the state parole board to grant early release for nonviolent inmates who complete a full sentence for their primary offense. (*Ibid.*)

The juvenile provisions of Proposition 57 were just as dramatic. Media accounts at the time clearly tied the law changes — including requiring a judge's approval before juveniles could be tried in an adult court — to an intention to reverse Proposition 21. (Myers, *Why Gov. Jerry Brown is staking so much on overhauling prison parole*, L.A. Times (Oct. 27, 2016), <https://www.latimes.com/politics/la-pol-ca-prop-57-jerry-brown-prison-parole-20161027-story.html> [as of June 4, 2020].) Some specifically stated that "prosecutors have wrongly moved too many juveniles into the adult legal system, missing chances for rehabilitation." (*Ibid.*)

B. The Text of Proposition 57 Dramatically Changed Transfer Law.

Even if voters were unaware of the public policy discussion, the text of Proposition 57 clearly indicated its intent to increase the number of youth who would remain in the juvenile system to be rehabilitated. The Voter Guide graphically presented exactly what would be deleted or added, and what remained the same. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016), text of Prop. 57, § 4, pp. 141-146.)

The measure:

- Abolished prosecutorial direct filing of cases involving juveniles in adult court;
- Eliminated the presumption of "unfitness" and instead, placed the burden on prosecutors to show that the young person should be transferred;
- Eliminated language that had allowed youth to be found "unfit" on a single criterion, substituting a requirement that the court decide whether the young person should be transferred based on consideration of all the criteria, "inclusive"; and
- Repealed Welfare and Institutions Code sections 602, subdivision (b), and 707, subdivision (d), which had required filing certain cases directly in adult court.[16]

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[16] Specifically, Proposition 57 repealed previously existing section 707, subdivision (d), which gave prosecutors the power to directly file certain cases in adult criminal court; eliminated language in former section 707, subdivision (c) that had permitted a finding of unfitness based on a single criterion and that had provided that "the minor shall be presumed to be not a fit and proper subject to be dealt with under the juvenile court law;" and repealed section 602, subdivision (b), which provided for automatic filing in criminal court for a limited class of cases. (Prop 57, §§ 4.1 & 4.2, approved Nov. 8, 2016; Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, pp. 141–145.) The Initiative also narrowed the circumstances in which a young person may be transferred to adult criminal court. It collapsed previously existing sections into one eligibility section that allows transfer only if the person is 16 years of age or older and accused of a felony, or is 14 or 15 and accused of committing one of the listed serious offenses. It retained the requirement that the transfer decision be made by the court. (Prop 57, § 4.2, approved Nov. 8, 2016; Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, p. 142.)

The text retained the "youth friendly" criteria for transfer that had been enacted in S.B. 382; the longstanding provisions that transfer be decided by a judge; and did not change existing provisions on age of eligibility for transfer. (*Ibid.*)

C. Voter Materials Were Transparent About the Intentions of the Initiative.

As the voters marked their ballots in November 2016, they were armed not only with the text of the measure, but also with the ballot materials that had outlined the arguments for and against Proposition 57. Although most of the arguments for and against Proposition 57 focused on the adult provisions of the measure, the voters knew that they were ending direct filing by prosecutors and that more youth would be rehabilitated in the juvenile system. The "Analysis by Legislative Analyst" described the then existing juvenile court transfer process under which youth could be automatically tried in adult court, subjected to prosecutorial direct file, or subjected to a judicial transfer hearing. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016), p. 55.) The analysis contrasted what happens to youth retained in the juvenile system versus what happens after conviction in adult court. (*Ibid.*) The Legislative Analyst then described what Proposition 57 would do,[17] explaining that, if the measure is enacted:

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[17] Real Party has characterized descriptive parts of the Legislative Analyst's text as showing voter intent. For example, Real Party argues that because 14 and 15 year-olds are included in the description, the voters intended that 14 and 15 year-olds may be transferred, and that because judicial transfer is in the description, the voters affirmatively wanted judges to be able to

> [T]he only way a youth could be tried in adult court is if the juvenile court judge in the hearing decides to transfer the youth to adult court. Youths accused of committing certain severe crimes would no longer automatically be tried in adult court and no youth could be tried in adult court based only on the decision of a prosecutor.
>
> In addition, 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. As a result of these provisions, there would be fewer youths tried in adult court.

(Voter Information Guide, Gen. Elec. (Nov. 8, 2016) p. 56.)

In assessing the costs of enacting Proposition 57, the Legislative Analyst evaluated state costs based on the expectation that youth affected by the measure would generally spend a greater amount of time in state juvenile facilities. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016), p. 57.) Also, the Legislative Analyst predicted the fiscal effects on counties based on the idea that fewer youths would be tried and convicted as adults. (*Ibid.*)

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transfer 14 and 15 year-olds. (Answer, pp. 34-39.) But the text of those provision was not added or changed in Proposition 57. The law had allowed transfer of 14 and 15-year-olds since 1994 (Stats. 1994, ch.453 (A.B. 560), § 9.5), and judicial transfer had existed since 1909 (Stats. 1909, ch. 133, §§ 16-18, pp. 219-222). Government Code section 9605, subdivision (a) provides that when a statute is amended, "… [t]he portions which are not altered are to be considered as having been the law from the time they were enacted."

The "Argument in Favor of Proposition 57" told the voters that the initiative would require judges instead of prosecutors to decide whether minors should be prosecuted as adults, emphasizing rehabilitation for minors in the juvenile system.

> We know what works. Evidence shows that the more inmates are rehabilitated, the less likely they are to re-offend. 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.

(Voter Information Guide, Gen. Elec. (Nov. 8, 2016), p. 58.) In contrast, neither the "Rebuttal to Argument in Favor of Proposition 57" nor the "Argument Against Proposition 57" mention juveniles at all. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016), pp. 58-59.)

Finally, the voters were presented with the "Purpose and Intent" language of the initiative, which appeared in the Voter Guide just before the text of the measure. It provided that the "purpose and intent" of enacting the measure was to:

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.

(Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, § 2, p. 141.)

In scrutinizing this language to understand whether Proposition 57 was intended to be retroactive, this court has already observed that "… some hints can be gleaned as to electoral intent. One stated purpose of the act is to '[s]top the revolving door of crime by emphasizing rehabilitation, especially for juveniles.' (Voter Information Guide, Gen. Elec. (Nov. 8, 2016), text of Prop. 57, § 2, p. 141.) Proposition 57 also provides that the 'act shall be liberally construed to effectuate its purposes.' (*Id*., § 9, p. 146.)" (*People v. Superior Court* (*Lara*), *supra*, 4 Cal.5th at p. 309.)

There is nothing in the voter materials or the text of the initiative itself to support Real Party's argument that the voters intended to restore balance to the system, providing rehabilitation to most youth, but reserving transfer for the most egregious cases involving 14 and 15-year-olds. (Answer, pp. 41-42.)[18] Instead, the voters restored a different kind of balance in providing procedures that favored youth in transfer hearings and doing away with discretionary and mandatory direct filing of cases in adult court. If balance was restored, it was by tipping the transfer process away from the excesses of Proposition 21.

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[18] Real Party devotes two pages of the brief to individual cases involving youth who are not deserving of rehabilitation. (Answer, pp. 44-45 and fn. 7.) Also, Real Party looks to a 1995 case – decided in the midst of the "get tough" era – as support for a balanced approach that permits 14 and 15-year-olds to be tried as adults. (Answer, p. 46, citing *Hicks v. Superior Court* (1995) 36 Cal.App.4th 1649.)

The appellate court in *J.N. v. Superior Court* (2018) 23 Cal.App.5th 706 agreed:

> In 2000, the electorate passed Proposition 21, making changes in the way juveniles are charged with serious offenses. Prosecutors were given the authority to "direct file" a felony complaint in adult court, eliminating the juvenile court's ability to determine at an early stage of the proceedings whether the juvenile should be treated in the juvenile court system or transferred to adult court. (§ 707, former subd. (d), as amended by initiative (Prop. 21, § 26, as approved by voters. Primary Elec. (Mar. 7, 2000), eff. Mar. 8, 2000, and repealed by Prop. 57, § 4.2, as approved by voters, Gen. Elec. (Nov. 8, 2016), eff. Nov. 9, 2016).) The voters apparently rethought their votes on Proposition 21 and passed Proposition 57 at the November 8, 2016, general election.

(*J.N. v. Superior Court, supra,* 23 Cal.App.5th at pp. 710-711.)

III. S.B. 1391 IS "CONSISTENT WITH AND FURTHERS THE INTENT" OF PROPOSITION 57.

Proposition 57 specifically permits amendment by a statute passed by a majority of the members of each house of the Legislature and signed by the Governor if the amendment is "consistent with and furthers the intent of" Proposition 57. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016), text of Prop. 57, § 5, p. 145.) The intent of the Proposition was to assure that more youth remain in the rehabilitative juvenile system. S.B. 1391 is "consistent with" and "furthers" that intent.

Real Party has argued that Proposition 57 intended to keep most youth in juvenile court, but to allow youth charged with the

most heinous offenses to be transferred (Answer, pp. 44-48), but there is nothing to support that claim.[19] Respondent's arguments are based on an outmoded and flawed perception of "public safety." The voters have moved on from the belief that public safety is produced by punishment and lengthy incarceration of young people and have rejected the idea that public safety is inconsistent with rehabilitation.

The legislation permitting transfer of 14 and 15-year-olds (A.B. 560) was enacted during a punitive era that has now given way to widespread recognition that rehabilitative services are what work best. In restoring the longstanding rule that 14 and 15-year-olds may not be transferred to the adult system, S.B. 1391 represents a small but important step in California's evolving youth justice system, honoring the voters' intention that public safety be achieved through rehabilitation. In returning the longstanding minimum age to 16, the Legislature has enacted a law that is "consistent with and furthers the intent" of the initiative. This is a reasonable construction under *Amwest.*

* * * * * *

[19] In fact, the Supreme Court rejected arguments against a bright line age rule for capital crimes in *Roper v. Simmons*, *supra*, 543 U.S. 551, 553, out of concern that "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe." Here, the age cohort protected against transfer to adult court is made up of young people, who are still in middle school or just entering high school.

CONCLUSION

For all the foregoing reasons, and those discussed in petitioner's Brief on the Merits and Reply Brief, this court should find S.B. 1391 constitutional, vacate the order of the Court of Appeal, and order that O.G.'s case be handled in the juvenile court for all purposes.

Dated: June 12, 2020

Respectfully submitted,

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WORD COUNT CERTIFICATE

I, Sue Burrell, amici curiae for petitioner, hereby certify, pursuant to rule 8.204(c)(1) of the California Rules of Court, that I prepared the attached **BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER O.G.**, and that the word count is **8,315** words (not including the cover or the tables). This brief therefore complies with the rule, which limits briefs to 14,000 words. I certify that I prepared this document in Microsoft Word, and that this is the word count Microsoft Word generated for this document.

Dated: June 12, 2020

Susan L. Burrell

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California Supreme Court No. S259011
Court of Appeal, Second Appellate District, Div. Six, No. B295555
Ventura County Superior Court No. 2018017144
O.G. v. Superior Court of Ventura County

PROOF OF SERVICE

I, the undersigned, declare that I am a citizen of the United States and a resident of Mariposa County. I am over the age of eighteen years and not a party to the within above entitled action. My business address is P.O. Box 1847, Mariposa, CA 95338.

On June 12, 2020, I served the within **BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER** on the interested parties in said action, by emailing and e-filing through Truefiling a true copy thereof to:

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Additionally, I served the within document by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Mariposa, California:

Honorable Kevin J. McGee	O.G.
4353 E. Vineyard Avenue #122	(Confidential Address)
Oxnard, Ca 93036	(Petitioner)

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on June 12, 2020.

Sabine Jordan