U.C.L.A. Law Review

# Can Fourteen- and Fifteen-Year-Olds Be Transferred to Adult Court in California?: A Conceptual Roadmap to the Senate Bill 1391 Litigation

Michael Cohen


## ABSTRACT

In 2016, voters passed California Proposition 57, an initiative vesting the authority to transfer juveniles to adult court solely in juvenile court judges. Reaching for further juvenile justice reform, the California Legislature amended Prop. 57 with California Senate Bill 1391, which prohibited the transfer of fourteen- and fifteen-year-olds beyond narrow exceptions. In response, the California courts have faced a series of cases brought by district attorneys challenging the constitutionality of SB 1391. While initially declining to review the matter, the Supreme Court now faces a district split at the appellate level. This Article describes the sources of disagreement throughout this litigation and makes the case for SB 1391's constitutionality.



## AUTHOR

Michael Cohen is a 2L at UCLA School of Law and serves as a staff member on the UCLA Law Review. Michael earned his B.A. at University of Colorado in English Literature and Philosophy, followed by an M.A. in Legal and Political Theory at University College London.

## TABLE OF CONTENTS

## INTRODUCTION

The California courts have recently been flooded with cases concerning the authority of juvenile court judges to transfer fourteen- and fifteen-year-old defendants to adult criminal court. The news media and individual commentators have certainly taken notice, and the Office of Attorney General and other parties have been quick to file amicus briefs.[1] This dispute stems from a legislative move to amend a voter initiative. California Ballot Proposition 57 (Prop. 57) was a 2016 initiative introducing several criminal justice-focused reforms, including removing the authority to make criminal court transfer decisions for minors from prosecutors and vesting it in juvenile court judges.[2] The change was welcomed by youth justice reform advocates who had long lamented prosecutors exploiting the possibility of transfer to adult court to exert greater influence over juvenile defendants.[3] In 2018, Governor Jerry Brown signed California Senate Bill 1391 (SB 1391), prohibiting the transfer of fourteen- and fifteen-year-olds to the adult criminal system in most cases.[4]

SB 1391 is another link in a long chain of criminal justice reforms aimed at remedying California's tough-on-crime mistakes of the past. Prop. 57

1. *See* Erwin Chemerinsky, *Prosecutors' Attack on Youth Justice Reform Undermines Democracy*, SACRAMENTO BEE (Feb. 10, 2019, 12:01 AM), https://www.sacbee.com/opinion/california-forum/article225921805.html [https://perma.cc/7WTP-DH46]; Sara Tiano, *California Court Upholds Contested State Law That Keeps Youth Under 16 Out of Adult Prison*, CHRON. OF SOC. CHANGE (May 15, 2019), https://chronicleofsocialchange.org/justice/juvenile-justice-2/california-court-upholds-sb-1391-contested-state-law-that-keeps-youth-under-16-ot-of-adult-prison/35010 [https://permac.cc/9C24-5PGB]; Michael Todd, *Santa Cruz Judge to Rule on SB 1391*, SANTA CRUZ SENTINEL (May 2, 2019, 5:39 PM), https://www.santacruzsentinel.com/2019/05/02/santa-cruz-judge-to-rule-on-sb-1391 [https://perma.cc/QG2C-VZC6]. *See, e.g.*, *Appellate Courts Case Information*, CAL. CTS., https://appellatecases.courtinfo.ca.gov/search/case/partiesAndAttorneys.cfm?dist=2&doc_id=2278388&doc_no=B295555&request_token=NiIwLSIkTkg%2FWyBFSyNdXEpIUDw6USxTKiNOUz9SICAgCg%3D%3D [https://perma.cc/S6HD-8MBX].
2. Proposition 57, California Ballot Initiative (2016).
3. *See, e.g.,* Tom Petersen, *Prosecuting Juvenile as Adults Has Had Unintended, and Negative, Consequences*, MIAMI HERALD (Apr. 10, 2019, 6:59 PM), https://www.miamiherald.com/opinion/op-ed/article229097264.html (describing that Florida's statute authorizing prosecutors to direct file juvenile offenders in adult court generated a number of unintended negative consequences, including the threatening of juveniles with adult persecution unless they plead guilty).
4. SB 1391 maintains a narrow exception for minors "not apprehended prior to the end of juvenile court jurisdiction." CAL. WELF. & INST. CODE § 707(a)(2) (West 2019). In other words, if a fifteen-year-old evades capture by law enforcement until the age of nineteen, SB 1391 cannot be invoked to prohibit their transfer to adult court.

restored the discretion to transfer juvenile offenders to judges. SB 1391 subsequently scaled back this discretion by preventing judges from transferring fourteen- and fifteen-year-old defendants. In going one step further than Prop. 57, SB 1391 was met with mixed reactions. Youth justice reformers had another victory to celebrate,[5] but the families of victims felt the change would result in a failure to hold offenders accountable.[6]

The courts must now decide whether SB 1391 is constitutional. The inquiry is both substantive and procedural. The California Constitution sets forth conditions for statutory amendments to voter initiatives, and the constitutionality of SB 1391 depends on meeting those conditions.[7] The cases are brought by district attorneys wishing to try alleged offenders in adult court. The district attorneys argue that SB 1391 is an unconstitutional amendment to Prop. 57 because it is fundamentally at odds with the latter's provisions authorizing juvenile court judges to transfer fourteen- and fifteen-year-olds, thereby failing one of the constitutional conditions. In a single case, the California Court of Appeals agreed.[8] However, in six other cases, the California courts found that SB 1391 met the constitutional conditions for valid statutory amendments.[9] Other courts now face the question,[10] but may not have the chance to answer it themselves before the California Supreme Court resolves the appellate level split.

This Article seeks to give the reader a conceptual roadmap to the ongoing litigation determining the constitutionality of SB 1391. It argues that the courts are correct insofar as they find SB 1391 constitutional, and predicts that

5. Sara Tiano, *Landmark Juvenile Justice Reform Challenged by California DAs*, CHRON. OF SOC. CHANGE (Jan. 30, 2019), https://chronicleofsocialchange.org/justice/juvenile-justice-2/sb1391-juvenile-justice-reform-challenged-by-california-das/33597 [https://-perma.cc/A5S9-MDZM].
6. *See* Lloyd Billingsley, *SB 1391 Functioning as the MS-13 Empowerment Act,* CAL. GLOBE (Aug. 8, 2019, 6:59 AM), https://californiaglobe.com/section-2/senate-bill-1391-functioning-as-the-ms-13-empowerment-act/ [https://perma.cc/DG5Y-X2RH]; Darrel Smith, *Sacramento's 'Community of Victims' Fight Law Shortening Sentences for Young Killers*, SACRAMENTO BEE (Mar. 31, 2019, 2:40 AM), https://www.sacbee.com-/news/local/article228387809.html [https://perma.cc/FH3Z-9S6C.
7. *See* CAL. CONST. art. II, § 10, subdiv. (c).
8. O.G. v. Superior Court (*O.G.*), 40 Cal. App. 5th 626 (2019).
9. People v. Superior Court (*Alexander C.*), 34 Cal. App. 5th 994 (2019); People v. Superior Court (*K.L.*), 36 Cal. App. 5th 529 (2019); People v. Superior Court (*T.D.*), 38 Cal. App. 5th 360 (2019); People v. Superior Court (*I.R.*), 38 Cal. App. 5th 383 (2019); People v. Superior Court (*S.L.*), 40 Cal. App. 5th 114 (2019); People v. Superior Court (*Baker*), A156502 (Cal. Ct. App. Aug. 29. 2019).
10. People v. Superior Court (*Baker*), A156502 (Cal. Ct. App. Aug. 29. 2019); People v. Hall, E072463 (Cal. Ct. App. Mar. 27, 2019); K.N. v. Superior Court, F079208 (Cal. Ct. App. Nov. 27, 2019).

SB 1391 will ultimately survive challenges to its constitutionality despite recent findings to the contrary.

## I. BACKGROUND

Historically, California required a juvenile court to declare a minor unfit for the juvenile system before the government could prosecute that minor in the adult criminal court system.[11] This changed approximately 20 years ago through a series of amendments to the Welfare and Institutions Code, culminating in March 2000 with the passage of California Ballot Proposition 21 (Prop. 21).[12] For specified murders and sex crimes, Prop. 21 required prosecutors to charge minors fourteen or older in criminal court.[13] For other specified serious offenses, Prop. 21 provided prosecutors with discretion to charge minors fourteen or older in criminal court instead of juvenile court. The changes implemented by Prop. 21 were rolled back in November 2016 with the passage of Prop. 57, the Public Safety and Rehabilitation Act of 2016.[14]

Prop. 57 implemented a series of criminal justice reforms. For juvenile defendants, Prop. 57 "largely returned California to the historical rule" by eliminating direct filing in criminal court.[15] Under Prop. 57, "'[c]ertain categories of minors . . . can still be tried in criminal court, but only after a juvenile court judge conducts a transfer hearing to consider various factors such as the minor's maturity, degree of criminal sophistication, prior delinquent history, and whether the minor can be rehabilitated.'"[16] For minors sixteen or older, prosecutors can seek transfer to criminal court for any felony offense.[17] For fourteen- and fifteen-year-olds, prosecutors could seek transfer to criminal court only for specified serious or violent offenses.[18]

Advocates and lawmakers sought to further limit the possibility of transferring fourteen- and fifteen-year-olds to adult court. The California Governor approved SB 1391 in September 2018. It took effect January 1, 2019, amending Prop. 57 by eliminating prosecutors' ability to seek transfer of

11. People v. Superior Court (*Lara*), 4 Cal. 5th 299, 305 (2018).
12. Proposition 21, California Ballot Initiative (2000). *See generally* Rene Sanchez & William Booth, *California Toughens Juvenile Crime Laws*, WASH. POST (Mar. 13, 2000), http://www.washingtonpost.com/wp-srv/WPcap/2000-03/13/009r-031300-idx.html [https://perma.cc/7Y78-VE98].
13. CAL. WELF. & INST. CODE § 602(b) (West 2019) (amended by Proposition 57 § 4.1 (2016)).
14. CAL. WELF. & INST. CODE § 707(d) (West 2019) (amended by Proposition 57 § 4.2 (2016)).
15. *Lara*, 4 Cal. 5th at 305.
16. *Id.*
17. CAL. WELF. & INST. CODE § 707(a)(1) (West 2019).
18. CAL. WELF. & INST. CODE § 707(a)(1), (b) (West 2019) (repealed 2018).

fourteen- and fifteen-year-olds from juvenile court to criminal court, save for a narrow exception if the minor is "not apprehended prior to the end of juvenile court jurisdiction."[19]

## II. THE TEST FOR CONSTITUTIONALITY

At this time, the constitutionality of SB 1391 is uncertain. Its constitutionality was upheld in six Court of Appeals cases.[20] Other divisions of the Court of Appeal are just coming to face the question.[21] The California Supreme Court denied the petition for review in *People v. Superior Court* (*Alexander C.*), in which the Court of Appeal, First District, found SB 1391 to be constitutional, on June 26, 2019.[22] Since that denial, though, the Court of Appeal, Second District, in *O.G. v. Superior Court of Ventura County* found SB 1391 unconstitutional.[23] The *O.G.* court fundamentally disagreed with the way in which other courts construed the constitutional test, opting for a stringent reading of the "consistency" requirement between voter initiatives and statutory amendments.[24] Given the disagreement at the appellate level, the California Supreme Court is soon likely to grant review.

In this constitutionality inquiry, it is first necessary to determine whether SB 1391 amends Prop. 57 at all.[25] If it does not, it cannot be challenged as an unconstitutional amendment to Prop. 57.[26] An amendment is "any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions . . . ."[27] To decide whether a statutory change constitutes an amendment, "we simply need to ask whether it prohibits what the initiative authorizes, or authorizes what the initiative prohibits."[28] Prop. 57

19. CAL. WELF. & INST. CODE § 707(a)(2) (West 2019).
20. People v. Superior Court (*Alexander C.*), 34 Cal. App. 5th 994 (2019); People v. Superior Court (*K.L.*), 36 Cal. App. 5th 529 (2019); People v. Superior Court (*T.D.*), 38 Cal. App. 5th 360 (2019); People v. Superior Court (*I.R.*), 38 Cal. App. 5th 383 (2019); People v. Superior Court (*S.L.*), 40 Cal. App. 5th 114 (2019); People v. Superior Court (*Baker*), A156502 (Cal. Ct. App. Aug. 29. 2019).
21. People v. Hall, E072463 (Cal. Ct. App. Mar. 27, 2019); K.N. v. Superior Court, F079208 (Cal. Ct. App. Nov. 27, 2019).
22. *Alexander C.*, 34 Cal. App. 5th, *cert. denied*, 246 Cal. Rptr. 3d 712 (2019).
23. O.G. v. Superior Court (*O.G.*), 40 Cal. App. 5th 626 (2019).
24. *See id.* at 629.
25. Most courts have confronted and dispatched with this issue quickly. *See, e.g.*, People v. Superior Court (*T.D.*), 38 Cal. App. 5th 360, 372 (2019).
26. Its constitutionality may be challenged on other grounds, of course, but to date, no other constitutional challenges have been brought.
27. Brown v. Superior Court, 63 Cal. 4th 335, 354 (2016).
28. People v. Superior Court (*Pearson*), 48 Cal. 4th 564, 571 (2010).

authorizes transfer of fourteen- and fifteen-year-old defendants to adult court; SB 1391 prohibits this practice, thereby amending Prop. 57. The courts are in agreement on this point.[29]

When passing a bill, the California State Legislature may only amend a ballot initiative, such as Prop. 57, under certain conditions. It may not, without a vote of the people, amend an initiative "unless the initiative statute permits amendment or repeal without the electors' approval."[30] Prop. 57 expressly permits amendment by a majority vote of the Legislature, but only "so long as such amendments are consistent with and further the intent" of the proposition.[31] Therefore, the question is whether SB 1391 is consistent with and furthers the intent of Prop. 57. If SB 1391 complies with these conditions, it is constitutional.

## III. ARGUMENTS AND FINDINGS

The core of the arguments between the parties in this series of cases revolves around three key issues: (1) whether SB 1391 furthers the purposes explicitly mentioned in the text of Prop. 57; (2) whether voters specifically intended Prop. 57 to authorize the transfer of fourteen- and fifteen-year-olds to adult court, making SB 1391 inconsistent with Prop. 57; and (3) whether the drafting history of Prop. 57 demonstrates voter intent that SB 1391 contravenes. This is not an exhaustive list of the arguments brought by the parties. For instance, in *People v. Superior Court* (*I.R.*) the district attorney contended that SB 1391 is unconstitutionally vague.[32] The prosecution in *People v. Superior Court (T.D.)* claimed a finding in favor of SB 1391's constitutionality might encourage the Legislature to invalidate Prop. 57 entirely.[33] In *People v. Superior Court (S.L.)*, the court considered whether writ relief was appropriate in the absence of statutory authorization.[34] Nevertheless, every case has had to contend with these core issues. They are the most plausible grounds for disagreement, and it is these questions which

29. *See, e.g.*, People v. Superior Court (*Alexander C.*), 34 Cal. App. 5th 994 (2019); People v. Superior Court (*K.L.*), 36 Cal. App. 5th 529 (2019).
30. CAL. CONST. art. II, § 10, subdiv. (c).
31. CAL. ATT'Y GEN., CRIMINAL SENTENCES. PAROLE. JUVENILE CRIMINAL PROCEEDINGS AND SENTENCING. INITIATIVE CONSTITUTIONAL AMENDMENT AND STATUTE. CALIFORNIA PROPOSITION 57 (2016), https://www.courts.ca.gov/documents/BTB24-5H-1.pdf [https://perma.cc/7GY3-55ER].
32. People v. Superior Court (*I.R.*), 38 Cal. App. 5th 383, 390 (2019).
33. People v. Superior Court (*T.D.*), 38 Cal. App. 5th 360, 377–78 (2019).
34. People v. Superior Court (*S.L.*), 40 Cal. App. 5th 114 (2019).

led the *O.G.* court to find SB 1391 unconstitutional.[35] They are also the most likely issues to be of concern to the courts which have yet to decide the matter. Understanding these three arguments, then, provides the reader with strong explanatory and predictive value.

### A. SB 1391 Furthers the Purposes and Intent of Prop. 57

In deciding whether SB 1391 is constitutional, the court looks to Prop. 57's statement of "purpose and intent" to determine if SB 1391 pursues the five listed purposes.[36] The six courts that have decided the matter agreed that SB 1391 furthers the initiative's purposes.[37] The seventh disagreed.[38] Prop. 57's five purposes are discussed below, along with the arguments typically raised to address them:

1. Protect and enhance public safety.

The evidence overwhelmingly suggests that minors who are kept in the juvenile system are less likely to recidivate than juvenile offenders who are transferred to the adult system.[39] One oft-cited reason is that transferred juveniles "leapfrog" over treatment options available in the juvenile system, which is specifically designed for rehabilitation.[40] Since SB 1391 only expands the category of minors who will remain in the juvenile system, it serves to reduce the rates of recidivism for juvenile offenders once released, protecting and enhancing public safety.[41] As the relevant metric for adjudication is the intention of the voters in passing Prop. 57, it is significant that this idea is reflected in the legislative history and ballot materials of Prop. 57. The Senate Committee on Public Safety noted the safety benefits of channeling more

35. O.G. v. Superior Court (*O.G.*), 40 Cal. App. 5th 626 (2019).
36. CAL. ATT'Y GEN., *supra* note 31, at 141.
37. *See supra* note 9.
38. *O.G.*, 40 Cal. App. 5th.
39. *See* Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001 (2005); Kristin Johnson et al., *Disregarding Graduated Treatment: Transfer Aggravates Recidivism*, 57 CRIME & DELINQUENCY 757 (2011); *see also* Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001 (2005); Robert 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 Preventative Services*, 56 MORBIDITY & MORTALITY WKLY. REP., Nov. 30, 2007, at 6–9.
40. *See, e.g.*, JAMES C. HOWELL ET AL., A HANDBOOK FOR EVIDENCE-BASED JUVENILE JUSTICE SYSTEMS 52 (2014).
41. *See* People v. Superior Court (*Alexander C.*), 34 Cal. App. 5th 994, 999–1001 (2019).

juveniles into the juvenile justice system in its discussion of the bill.[42] The arguments in favor of Prop. 57 in the ballot materials reflect the very same idea, meaning voters could reasonably conclude that they were acting to combat future crime by voting for rehabilitation.[43]

Because defendants tried as juveniles generally must be released by their 25th birthday,[44] district attorneys worry that they will be released while still a threat to the public.[45] They are quick to point to statistics showing a high number of crimes committed by juveniles.[46] This evidence is irrelevant on two grounds. First, the question is not whether fourteen- and fifteen-year-olds pose a threat to the public, but whether those same minors pose a greater threat to the public upon exiting the juvenile versus criminal system. Second, a prosecutor is able to petition a court to extend the duration of juvenile court jurisdiction if the offender is a public threat.[47] The governor even considered this possibility when signing SB 1391, recognizing "the fact that young people adjudicated in juvenile court can be held beyond their original sentence if necessary."[48]

District attorneys have argued that SB 1391 instead threatens public safety by allowing violent offenders to avoid prison in the first place.[49] The *O.G.* court agreed.[50] By disallowing the discretion of a judge to transfer violent

42. CAL. ASSEM. COMM. ON PUBLIC SAFETY, REPORT ON SB 1391 4 (2018) ("Extensive research has established that youth tried as adults are more likely to commit new crimes in the future than their peers treated in the juvenile system . . . .").
43. CAL. ATT'Y GEN., *supra* note 31, at 58.
44. CAL. WELF. & INST. CODE § 607(g)(2) (West 2019) ("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.").
45. *See Alexander C.*, 34 Cal. App. 5th at 999–1001.
46. For instance, there were 31,324 referrals for felony offenses in 2018 alone. CAL. DEP'T OF JUSTICE, JUVENILE JUSTICE IN CALIFORNIA 15 (2018), https://data-openjustice.doj.ca.gov/sites/default/files/2019-07/Juvenile%20Justice%20In%20CA%202018%-2020190701.pdf.
47. *See* CAL. WELF. & INST. CODE § 1800(a) (West 2019); *see also Alexander C.*, 34 Cal. App. 5th at 999–1001. A person is a public threat when they are "physically dangerous to the public" because of a "mental or physical deficiency, disorder, or abnormality that causes the person to have serious difficulty controlling his or her dangerous behavior." CAL. WELF. & INST. CODE § 1800(a) (West 2019).
48. SB 1391 Letter from Edmund G. Brown Jr., Office of the Cal. Governor, to the Members of the Cal. State Senate (Sept. 30, 2018); *see also Alexander C.*, 34 Cal. App. 5th at 999–1001.
49. *See, e.g.*, People v. Superior Court (*T.D.*), 38 Cal. App. 5th 360, 375 (2019).
50. O.G. v. Superior Court (*O.G.*), 40 Cal. App. 5th 626, 630 (2019).

juveniles, the court found that SB 1391 "provides less protection for the public."[51] This assertion ignores the net benefit to public safety gained from channeling significantly more juvenile offenders into a system specifically designed for their rehabilitation.

Moreover, there is a benefit to public safety in aiding compliance with a 2009 federal court order to limit the prison population. *Coleman* mandated a reduction in the prison population to 137.5 percent of the institutions' design capacity.[52] By channeling potential juvenile prisoners away from these institutions, SB 1391 helps officials avoid indiscriminately releasing prisoners from criminal custody. Those released in compliance with the *Coleman* mandate may prove dangerous themselves, and their continued imprisonment should appease prosecutors involved in their initial incarceration.

2. Save money by reducing wasteful spending on prisons.

Prop. 57 aimed to reduce state prison and parole costs by channeling potential minor inmates away from the prison system and dismissing supervision by state parole agents following their release from prison.[53] Because SB 1391 serves to narrow the number of minors who would be subject to lengthy prison sentences and parole agent supervision, it reduces spending on prisons.[54] In no case has the district attorney challenged that SB 1391 furthers this purpose.

3. Prevent federal courts from indiscriminately releasing prisoners.

Prop. 57 was also meant to facilitate compliance with a federal court order to reduce the prison population to 137.5 percent of the institutions' design capacity.[55] As mentioned above, SB 1391's effect of retaining more minors in the juvenile system channels potential inmates away from prison, preventing an indiscriminate release of prisoners in compliance with the federal court order.[56] The greater the influx of new prisoners, the more existing prisoners officials will have to release to comply with the order. This process is inherently uncertain despite promulgated guidelines because numerous officials must ultimately exercise their discretion in final release decisions—discretion which will inevitably vary from official to official. District attorneys have not challenged whether SB 1391 furthers this intent of Prop. 57, but, as mentioned

51. *Id.*
52. *See* Coleman v. Schwarzenegger, 922 F. Supp. 2d 882, 962 (E.D. Cal. 2009).
53. *See* CAL. ATT'Y GEN., *supra* note 31, at 57.
54. *Alexander C.*, 34 Cal. App. 5th at 1002.
55. *See Coleman*, 922 F. Supp. 2d.
56. *Alexander C.*, 34 Cal. App. 5th at 1002.

above, the resulting benefit of preventing indiscriminate release to public safety was ignored by the *O.G.* court.

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

Minors receive treatment, counseling, and education not given to inmates in state prison.[57] In this way, the juvenile system is especially oriented toward juvenile rehabilitation. In pursuit of channeling minors into a system with greater rehabilitative potential, Prop. 57 eliminated Prop. 21's system of granting prosecutors the authority to try minors in adult court.[58] SB 1391 promotes this goal by ensuring that almost all who commit crimes at the age of fourteen or fifteen will be processed through the juvenile system, and thus receive rehabilitative services.[59]

The district attorney argued in *T.D.* that the minor defendant would not remain under juvenile court jurisdiction long enough to receive any meaningful rehabilitative services. As that court noticed, though, those individual circumstances do not speak to the effect of SB 1391 overall, and therefore have no bearing on its effort to emphasize rehabilitation.[60] Ultimately, the *T.D.* court agreed that SB 1391 served to further emphasize juvenile rehabilitation.[61]

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

SB 1391 continues to grant judges the authority to make transfer decisions rather than prosecutors. While SB 1391 narrows the class of minors who are subject to review by the juvenile court for transfer to adult court, this in no way undercuts judicial authority.[62]

District attorneys have, however, challenged that SB 1391's consistency with this purpose, and the *O.G.* court agreed. All six courts approving of SB 1391's constitutionality found to the contrary.[63] This point of disagreement is discussed in detail below. Prop. 57 authorized judges to make transfer decisions, and SB 1391 partially strips judges of that authorization. Namely, under SB 1391, judges now lack the authority to transfer fourteen and

57. *See* CAL. ASSEM. COMM. ON PUBLIC SAFETY, *supra* note 42, at 4.
58. CAL. ATT'Y GEN., *supra* note 31, at 56.
59. *Alexander C.*, 34 Cal. App. 5th at 1000.
60. People v. Superior Court (*T.D.*), 38 Cal. App. 5th 360, 374 (2019).
61. *T.D.*, 38 Cal. App. 5th at 373-74.
62. *See e.g.*, *Alexander C.*, 34 Cal. App. 5th at 1000.
63. *Alexander C.*, 34 Cal. App. 5th; People v. Superior Court (*K.L.*), 36 Cal. App. 5th 529 (2019); *T.D.*, 38 Cal. App. 5th; People v. Superior Court (*I.R.*), 38 Cal. App. 5th 383 (2019); People v. Superior Court (*S.L.*), 40 Cal. App. 5th 114 (2019).

fifteen-year-olds. Since SB 1391 prohibits authority which Prop. 57 set out to grant, SB 1391 is arguably inconsistent with this purpose of the initiative. Such reasoning depends on an overly granular reading of the consistency requirement. Instead, the consistency requirement should be considered satisfied when the statutory amendment comports with the broader purpose and intent motivating the voter initiative.

### B. SB 1391 is Consistent with Prop. 57 Because Consistency is a Broadly Construed Analysis, Not a Granular One

District attorneys and the *O.G.* court read the "consistent with and furthers" condition disjunctively, as imposing two separate conditions on statutory amendments: "consistent with" and "furthers."[64] The lack of punctuation leaves the clause ambiguous.[65] As the argument goes, SB 1391 fails this first, distinct condition. Specifically, it is inconsistent with the fifth listed purpose of Prop. 57, which "require[s] a judge, not a prosecutor, to decide whether juveniles should be tried in adult court."[66] Prop. 57's language contemplates the prosecution of fourteen- and fifteen-year-old minors in adult court "[i]n any case" in which a minor is charged with certain offenses.[67] Section 4 of the initiative's proposed changes to subdivision (a) of Welfare & Institutions Code section 707 also specifically authorized transfer to adult court for minors aged fourteen and fifteen. The Prop. 57 ballot materials likewise stated that those who commit certain crimes "when they were age 14 or 15" may be tried in adult court.[68] Prop. 57 did not eliminate the power of the prosecution to seek transfer of fourteen- and fifteen-year-olds in adult court. Yet SB 1391 precludes transfer to adult court in most cases involving minors of that age, making it, they have argued and continue to argue, inconsistent with Prop. 57.

The *O.G.* court found that this difference renders SB 1391 unconstitutional under the abovementioned *Pearson* test—"whether [the statute] prohibits what the initiative authorizes, or authorizes what the initiative prohibits."[69] But this should not be the relevant test. In *Pearson*, the question was whether a change to the Penal Code amended Proposition 115.[70]

64. *See* O.G. v. Superior Court (*O.G.*), 40 Cal. App. 5th 626, 627 (2019).
65. *T.D.*, 38 Cal. App. 5th at n.3.
66. CAL. ATT'Y GEN., *supra* note 31, at 141.
67. CAL. WELF. & INST. CODE §§ 707(a)(1)–(a)(2) (West 2019) (amended by Proposition 57).
68. *See* CAL. ATT'Y GEN., *supra* note 31, at 56.
69. People v. Superior Court (*Pearson*), 48 Cal. 4th 564, 571 (2010).
70. *Pearson,* 48 Cal. 4th .

Finding that the Penal Code modification was not an amendment, the court never faced the question of whether the change comported with the amendment clause in Prop. 115.[71] The court therefore applied a test properly brought to bear on the first question—whether a statute amends an initiative—to determine the second question—whether the amendment complies with the mechanism for amendment provided in the initiative. The *Pearson* test, then, is not the appropriate test for this analysis. Not only does the *O.G.* court expand *Pearson* beyond its clear limits, but its application here ignores that the test for consistency should be broader than the test for the threshold question of amendment. This idea is explored below.

While other courts have not specifically rejected the *Pearson* test, they have agreed that the question of consistency with voter intent depends on an inquiry broader than just the language of the initiative. As the *Alexander C.* court remarked: it is a "mistake . . . [to] define the intent of the electorate in adopting Proposition 57 at a level so granular as to equate that intent with each of the specific provisions in the initiative."[72] The *People v. Superior Court (K.L.)* court agreed:

> While Proposition 57 did continue to permit transfer of fourteen- and fifteen-year-olds to adult court for prosecution, there is nothing in the language of Proposition 57 or the ballot materials to suggest that it was a specific intent of Proposition 57 to ensure that fourteen- and fifteen-year-old juvenile offenders would continue to be subject to adult criminal prosecution.[73]

When the voters stated their intent to "[r]equire a judge, not a prosecutor" to make transfer decisions, their focus was arguably on restraining prosecutorial discretion, not conferring new powers on the courts or acting deliberately to authorize judges to transfer fourteen- and fifteen-year-olds.[74] This may be why the Legislative Analyst, who reports on the projected impact of new bills, focused on new protections for minors and not on the scope of authority granted to juvenile court judges.[75]

The provisions above should be read as comporting with a broader intent, and not as expressing a specific intent to authorize the transfer of fourteen- and fifteen-year-olds. The California Supreme Court has adopted this strategy when analyzing an initiative's purpose. In *Amwest v. Wilson*, the Court

71. *Pearson,* 48 Cal. 4th at 567.
72. People v. Superior Court (*Alexander C.*), 34 Cal. App. 5th 994, 1003 (2019).
73. People v. Superior Court (*K.L.*), 36 Cal. App. 5th 529 (2019).
74. CAL. ATT'Y GEN, *supra* note 31, at 141.
75. ALEX PADILLA, CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE 55–57 (2016).

construed the "major purposes" of Proposition 103 broadly when considering the validity of an insurance reform initiative.[76] Prop. 57 invites this treatment, as the "Amendment" section of the initiative begins by stating that "This act shall be broadly construed to accomplish its purposes."[77] The Court did so in *People v. Superior Court (Lara)* in deciding whether Prop. 57 applies retroactively,[78] observing that voters intended Prop. 57 to "ameliorate the possible punishment for a class of persons, namely juveniles."[79] Likewise, in assessing the validity of a legislative reform designed to improve the election process, the Court recognized in *Brown v. Superior Court* that the purpose of Prop. 57 was to ensure "that California's juvenile and criminal justice system resources are used wisely to rehabilitate and protect public safety [sic]."[80] The Court repeated as much in *Vela* when it remanded a case for application of Prop. 57 by identifying Prop. 57's "primary emphasis on rehabilitation."[81] The purposes of Prop. 57 should thereby be characterized broadly, as the initiative itself mandates and cases indicate, meaning each individual provision does not represent a specific purpose which SB 1391 might contravene.

Courts have good reason to construe initiatives broadly when evaluating their compliance with the constitutional conditions for amendment. It does not solely reflect the understanding that voters will rarely have specific intent as to a single provision of an initiative. It also reacts to the reality that "no complex law can be drafted perfectly, and few laws can be left in place for years without needing fine-tuning or additions."[82] For instance, as the social and cognitive sciences develop, new information about juvenile offenders may call for further amendment of Prop. 57. It is a mistake to presume that each provision of the initiative is a manifestation of voter intent, and misguided to read the consistency condition as a fine-toothed comb for the initiative's language.

The courts have generally agreed that SB 1391 is consistent with Prop. 57 in removing the authority to transfer fourteen- and fifteen-year-olds to criminal court. However, they have not always implemented sound reasoning to reach this decision. The courts in *Alexander C.* and *T.D.* found that

76. Amwest Sur. Ins. Co. v. Wilson, 11 Cal. 4th 1243, 1256 (1995); *see also Alexander C.*, 34 Cal. App. 5th at 1003–04.
77. CAL. ATT'Y GEN, *supra* note 31, at 141.
78. People v. Superior Court (*Lara*), 4 Cal. 5th 299, 308–09 (2018).
79. *Id.* at 308.
80. Brown v. Superior Court, 63 Cal. 4th 335, 340 (2016).
81. People v. Vela, 21 Cal. App. 5th 1099, 1107 (2018).
82. People v. Kelly, 222 P.3d 186, 209 n.59 (Cal. 2010).

implementing the *Pearson* test would mean that Prop. 57 could never be amended.[83] Prop. 57 clearly indicated that the Legislature could amend its provisions. The court determined in *Kelly* that "an amendment includes a legislative act that changes an existing initiative statute by taking away from it."[84] Relying on this language, the *Alexander C.* and *T.D.* courts found that by permitting amendment, the voters necessarily allowed the Legislature to take away specific provisions and thus the two laws are consistent.[85]

This justification of SB 1391's consistency with Prop. 57 misreads *Kelly* and takes an overly narrow view of defining a statutory amendment. In *Kelly*, the court grappled at length with how to define a statutory amendment, and settled on the above definition only to resolve the dispute before them.[86] The court did not say that an amendment necessarily subtracts from an initiative—only that it might.[87]

Other cases indicate that an initiative can be amended by addition.[88] And even if Prop. 57 could only be amended by addition, this would not mean that it could never be amended. It would still be permissible to amend section 707 of the Welfare & Institutions Code by adding requirements to the juvenile transfer process, for instance, by requiring additional psychological evaluations or some other procedural measure. It is therefore not the case that permitting amendment is equivalent to authorizing the Legislature to take away specific provisions. The Legislature's ability to do so rests not on the need to animate the authorization to amend Prop. 57, but on the amendment's compliance with the conditions for amendment described in the initiative.

This analysis gives rise to a new, clearer test for the constitutionality of statutory amendments to voter initiatives. At the first stage, a court should implement the *Pearson* test, asking whether the statute prohibits what the initiative authorizes, or authorizes what the initiative prohibits. If it does, the court should next derive a list of the purposes and intent behind the initiative, which will often be contained within a provision of the initiative itself. The purposes and intent should be read in the broader context of voter intent (e.g., an effort to achieve youth justice reform, as was the case with Prop. 57) and

83. People v. Superior Court (*Alexander C.*), 34 Cal. App. 5th 994, 1003 (2019); People v. Superior Court (*T.D.*), 38 Cal. App. 5th 360, 372 (2019).
84. *Kelly*, 22 P.3d at 198.
85. *Alexander C.*, 34 Cal. App. 5th at 1003; *T.D.*, 38 Cal. App. 5th at 372.
86. *Kelly*, 22 P.3d at 197–98.
87. *Id.*
88. Brown v. Superior Court, 63 Cal. 4th 335, 354 (2016) (stating that an amendment is "any change of the scope or effect of an existing statute, whether by *addition*, omission, or substitution . . . .") (emphasis added).

what materials were available to them to conclude that the initiative serves those ends (e.g., ballot pamphlets). Specific language in the statute may also describe the way in which its provisions are to be interpreted, as is the case with Prop. 57, which calls for a broad construal of its provisions. The question of what statutory language captures voter intent for the purposes of this analysis should be a highly fact-intensive and context-sensitive inquiry.

With the purposes and intent behind the initiative determined, the next stage of the analysis regards the constitutional conditions for statutory amendments. The first question is whether the statute furthers those purposes and intents. This analysis does not require that the statute further the ends of the initiative to any particular degree—only that its effects may reasonably be expected to result in circumstances closer to the goals of the initiative. The second question is whether the statute is consistent with these purposes and intent. Unlike the *Pearson* test, the consistency analysis queries whether there is total overlap between the broadly construed ultimate ends of the initiative and those of the statute. While this test is broader than the specific language of the statute, it still serves to capture statutory amendments that further the goals of an initiative, however slightly, but are nevertheless contrary to its spirit. If a court answers these questions in the affirmative, the statutory amendment is constitutional. With this final test in mind, and contrary to the *O.G.* court's finding, SB 1391 is consistent with the purposes described in Prop. 57.

### C. The Drafting History of Prop. 57 Does Not Render SB 1391 Unconstitutional

District attorneys have argued that Prop. 57's drafting history demonstrates that SB 1391 is contrary to the voters' intent in passing Prop. 57.[89] An earlier version of Prop. 57 included language which established sixteen "as the minimum age at which juveniles may be transferred to adult court."[90] When the Attorney General's website opened the earlier version of the initiative up to public comment, they received none.[91] The initiative's proponents ultimately amended the measure to exclude this language,

89. *See, e.g.*, *Alexander C.*, 34 Cal. App. 5th at 1004.
90. *Brown*, 63 Cal. 4th at 340.
91. *Id.* at 341 ("During the comment period [the proponents of the earlier version of SB 1391] spoke with a number of individuals and groups interested in justice reform, including members of the Governor's staff. A political action committee supporting the measure engaged in discussions with numerous interest groups, including the California District Attorneys Association (CDAA). The Governor and his staff were significantly involved in these discussions as well.").

permitting courts to transfer fourteen- and fifteen-year-olds accused of certain serious crimes to adult court.[92]

The district attorneys assert that the consideration and ultimate rejection of that language demonstrates that SB 1391 is contrary to the voter intent behind Prop. 57.[93] As the argument goes, and the court has found in the past, this change may very well be "most persuasive to the conclusion that the [initiative] should not be construed to include the omitted provision."[94] But no one is claiming that Prop. 57 contains the ultimately omitted provision. Rather, it is SB 1391 which introduces the contested provision.[95] There is no statutory presumption that the mere omission of a considered provision in the process of drafting an initiative disfavors the later amendment of that initiative on similar terms.

Voters who approve an initiative are presumed to "have voted intelligently upon an amendment to their organic law, the whole text of which was supplied [to] each of them prior to the election and which they must be assumed to have duly considered . . . ."[96] Even if this is presumed, there is no reason to believe that voters read and based their decision on a draft of the initiative which none ventured to comment upon and which was not included in the ballot materials, as the California Supreme Court has agreed. In *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Comm.*,[97] the California Supreme Court declined to credit the presumption that voters had thoroughly studied ballot materials and the probable impact of proposed initiatives. In *Robert L. v. Superior Court*, the Court was likewise unwilling to hold that voters were aware of the intent of an initiative's drafters.[98] Both cases express a clear limit to the presumption that voters are familiar with every dimension of an initiative. The court may assume that voters engage intelligently with initiatives without going so far as to presume that they have pored over past versions of an initiative.

Even if the court presumes that voters considered the earlier version of the initiative, there is no reason to think that the specific provision is equivalent

92. *Id.*
93. *See, e.g.*, *Alexander C.*, 34 Cal. App. 5th at 1003.
94. People v. Soto, 245 P.3d 410, 420 (Cal. 2011); *see also Alexander C.*, 34 Cal. App. 5th at 1004; People v. Superior Court (*T.D.*), 38 Cal. App. 5th 360, 376 (2019).
95. *See Alexander C.*, 34 Cal. App. 5th at 1004.
96. Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1299 (Cal. 1978) (quoting Wright v. Jordan, 192 Cal. 704, 713 (1923)).
97. Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Comm., 51 Cal. 3d 744, 769–70 (1990).
98. Robert L. v. Superior Court, 30 Cal. 4th 894, 957 (2003).

to the purpose and intent of the initiative. The provision was one of many that sought criminal justice reform, as discussed above. Further, there is no evidence to suggest that proponents of Prop. 57 removed this particular provision to appeal to voters. It is just as plausible that proponents removed the provision seeking further legislative findings or more incremental legislative change. The ultimate exclusion of this provision from Prop. 57, then, does not suggest that voters or anyone else was rejecting the purpose and intent expressed by the excluded provision.

## Conclusion

In light of the presumption in favor of SB 1391's constitutionality, it seems the statutory amendment is constitutional on every significant basis on which it might be challenged. That is, it furthers and is consistent with Prop. 57's purposes and intent, and its drafting history does nothing to suggest otherwise. The California state courts have accordingly upheld its constitutionality in six cases and counting. The California Supreme Court may have denied review in *Alexander C.* because they did not anticipate any appellate division disagreeing with that court's assessment of SB 1391's constitutionality. No doubt the recent trend toward reducing punishment for juvenile offenders, which the California Supreme Court has remarked upon themselves,[99] was a factor in the Court's consideration. At the time the Court denied review, cases had only come out in favor of SB 1391's constitutionality. Since then, though, a single case has rejected this trend. Sooner or later, the California Supreme Court will have its hand forced in reviewing the matter. When they do, the Court should find 1391 constitutional.

99. People v. Superior Court (*Lara*), 4 Cal. 5th 299, 305–06 (2018).