In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MARK BUZA,

Defendant and Appellant.

Case No. S223698

First Appellate District, Division Two, Case No. A125542
San Francisco County Superior Court, Case No. 207818
The Honorable Carol Yaggy, Judge

ANSWER TO AMICUS CURIAE BRIEFS

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
STEVEN T. OETTING
Deputy Solicitor General
MICHAEL J. MONGAN
Deputy Solicitor General
State Bar No. 250374
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-2548
Fax: (415) 703-2552
Email: Michael.Mongan@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

OTHER AUTHORITIES

INTRODUCTION

The amicus briefs filed in support of appellant Mark Buza do not undermine the State's arguments. The broad holding in *Maryland v. King* (2013) 133 S.Ct. 1958 ("*King*") resolves Buza's Fourth Amendment challenge to the DNA Act in favor of the State. This court's precedents also counsel that the court should apply *King* when analyzing Buza's claim under article I, section 13 of the California Constitution. Even if the court were to conduct an independent analysis under section 13, it was constitutionally reasonable for the voters to require the collection of DNA identifying information from adult felony arrestees at booking. DNA identification profiles are the most precise and immutable identifying characteristic presently available. Obtaining DNA profiles from felony arrestees serves the same important and long-recognized government interests as collecting other identifiers—and only those interests, because the DNA Act is carefully designed to preclude the use of DNA for any purpose other than identification. Under these circumstances, DNA collection imposes only a minimal incremental intrusion on the legitimate privacy expectations of arrestees.

ARGUMENT

I. THE DNA ACT IS CONSTITUTIONAL UNDER *MARYLAND V. KING*

As the State has explained, *Maryland v. King* controls the Fourth Amendment inquiry in this case. (See RBOM 12-20; Reply 2-6.) The amicus brief filed by the Electronic Frontier Foundation and others ("EFF") describes *King* as a narrow decision with no application outside "the specifics of Maryland's DNA collection law." (EFF Br. 9.) That description ignores *King*'s statement that the similarity between Maryland's law and the DNA statutes in other states "means that this case implicates

more than the specific Maryland law." (*King*, *supra*, 133 S.Ct. at p. 1968.) It also ignores the broad language the Supreme Court used in describing its holding in *King*, which was not tethered to the specifics of the Maryland law. The Supreme Court held that "DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure." (*Id.* at p. 1980.) In particular, "[w]hen officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment." (*Ibid.*)

EFF also argues that the DNA Act violates the Fourth Amendment because of "dramatic differences between California's DNA collection statute and Maryland's." (EFF Br. 9; see *id.* at pp. 9-17.) The State has explained why the differences identified by EFF provide no basis for distinguishing *King* or for a different result here: none of the points of distinction mattered to the Supreme Court's constitutional analysis. (RBOM 16-20; Reply 3-6.)[1] As this court recognized even before *King*, "interstate statutory differences do not control the meaning of the Fourth Amendment, which does not depend on the differing and evolving DNA collection laws of particular states at particular times." (*People v. Robinson* (2010) 47 Cal.4th 1104, 1123 ("*Robinson*").)

---

[1] An amicus brief filed by the ACLU of Northern California and former Justice Grodin seeks to distinguish *King* (at pp. 9, 10) on the additional grounds that identification "is not the purpose of California's" DNA Act and DNA identifying information is not "useful for custody and bail determinations" in California. As explained below, those arguments are wrong. (See *post*, pp. 15-20.)

Moreover, EFF's arguments reflect a misunderstanding of the Maryland statute at issue in *King*. For example, EFF argues that Maryland "requires a judicial finding of probable cause prior to DNA collection." (EFF Br. 12.) That is incorrect. The Maryland statute requires DNA collection as soon as arrestees are "charged with" a qualifying offense (Md. Pub. Saf. Code Ann., § 2-504, subd. (a)(3)(i)), and in Maryland it is the *police officer* who "cause[s] a statement of charges to be filed against the defendant in the District Court" following a warrantless arrest (Maryland Rules, rule 4-211(b)(2)).[2] EFF also argues that Maryland collects DNA only from those arrested for "serious, violent felonies." (EFF Br. 10.) In fact, the qualifying offenses in Maryland include non-violent burglary crimes as well as attempt crimes that qualify as misdemeanors. (See Md. Pub. Saf. Code Ann., § 2-504, subd. (a)(3)(i); CDAA Br. 3-5.) *King* must be construed based on what it said. EFF's confusion on these points of Maryland law underscores the perils of construing *King* based on statutory details that "merely lurk in the record" but were never mentioned in *King*'s constitutional analysis. (E.g., *Webster v. Fall* (1925) 266 U.S. 507, 511.)

Finally, EFF's comparison of the "impact of arrestee DNA collection laws" in California and Maryland provides no basis for distinguishing *King*. (EFF Br. 12.) EFF notes that the number of arrestee DNA profiles submitted to the national database through CODIS is greater in California, both in real terms and as a percentage of state population. (*Ibid.*) That is not surprising. California has more than six times the population of

---

[2] In any event, EFF fails to explain how California could violate the Fourth Amendment by collecting DNA identifying information from arrestees at booking when the Supreme Court in *King* held that "taking and analyzing a cheek swab" is "a legitimate *police booking procedure* that is reasonable under the Fourth Amendment." (*King*, *supra*, 133 S.Ct. at p. 1980, italics added.)

Maryland. And, unlike the Maryland statute, California's DNA Act applies to all adult felony arrestees—as do the laws of more than a dozen other states and the federal government. (Reply 34.) This distinction did not escape notice by the Supreme Court. *King* acknowledged that state laws "vary" with respect to "what charges require a DNA sample." (*King*, *supra*, 133 S.Ct. at p. 1968.) It nevertheless used broad reasoning extending to every custodial arrest based on probable cause, which the Court acknowledged would have nationwide implications. (See *id.* at pp. 1968, 1980.)

II. THIS COURT SHOULD FOLLOW *KING* WHEN INTERPRETING ARTICLE I, SECTION 13 OF THE CALIFORNIA CONSTITUTION

The ACLU of Northern California and former Justice Grodin ("the ACLU") urge this court to depart from *King* and decide this case based solely on an independent analysis under the California Constitution. (ACLU Br. 7-11, 26-28.) But they fail to address this court's policy of following Fourth Amendment decisions of the United States Supreme Court when analyzing a claim under article I, section 13 of the California Constitution "unless persuasive reasons are presented for taking a different course." (*People v. Teresinski* (1982) 30 Cal.3d 822, 836 ("*Teresinski*").)[3]

---

[3] The ACLU cites *Teresinski* once, in a footnote, but omits the statement that there must be persuasive reasons for departure. (ACLU Br. 8, fn. 9; see also *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353 [reiterating that there must be "cogent" reasons].) Instead, the ACLU relies on *People v. Pettingill* (1978) 21 Cal.3d 231, 248, which stated that federal Supreme Court decisions "are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law." As *Teresinski* noted when it distinguished *Pettingill*, however, the principle quoted above is "inapposite" in cases like this one, where following federal precedent would "not threaten to overturn a settled line of California precedent." (*Teresinski*, *supra*, 30 Cal.3d at p. 838; see *post*, pp. 5-6; Opn. p. 21 [acknowledging that this case involves a question "of first impression"].)

As the State has explained, none of the factors this court has traditionally considered in deciding whether to break with a federal precedent provides a persuasive reason for departing from the approach in *King*. (See RBOM 20-26; Reply 11-21.) Nor does any other argument advanced by the ACLU.

A. Buza's Amici Identify No Persuasive Reason for Departing from *King*

The ACLU argues that following *King* here "would require this Court to completely reverse course and overrule [its] prior" section 13 cases, including *People v. Brisendine* (1975) 13 Cal.3d 528 ("*Brisendine*") and subsequent decisions relying on *Brisendine*. (ACLU Br. 9; see *id.* at pp. 3-7.) That argument fails because the cases cited by the ACLU had nothing to do with the collection of identifying information from felony arrestees as part of a routine booking procedure. (See RBOM 26-29.)[4] Even the Court of Appeal acknowledged that "following *King* would not overturn established California doctrine affording greater rights" to defendants. (Opn. p. 21.) The Court of Appeal recognized that "*Brisendine* did not address the scope of booking searches," and noted that the "only point we draw from *Brisendine* is that the substantive scope of article I, section 13, is not limited by the United States Supreme Court's interpretation of the Fourth Amendment, and may in compelling circumstances afford greater protection of an arrestee's privacy interests." (*Id.* at p. 40.)

---

[4] In addition to the cases previously addressed by the State, the ACLU cites two other cases applying the *Brisendine* line of precedent: *People v. Maher* (1976) 17 Cal.3d 196 and *Miller v. Superior Court* (1981) 127 Cal.App.3d 494. Both cases involved field searches of bags found on the person of an arrestee. They said nothing about the constitutionality of the routine collection of identifiers at booking from individuals who are subject to a lawful custodial arrest.

In a related argument, the ACLU contends that this court has "expressly rejected the Fourth Amendment rule that animates *King*." (ACLU Br. 8.) It reasons that United States Supreme Court precedents regarding the search-incident-to-arrest doctrine, including *United States v. Robinson* (1973) 414 U.S. 218, were "fundamental to the *King* analysis," and that "this Court has rejected . . . this line of cases." (ACLU Br. 3.) But the ACLU misreads *King*. *King* never suggested that the constitutionality of collecting DNA identifying information from arrestees was governed by search-incident-to-arrest precedents, or any other existing Fourth Amendment precedent. Rather, the Supreme Court recognized that it was "a question the Court ha[d] not yet addressed," and therefore applied a general balancing analysis to determine whether the collection was a reasonable search. (See *King*, *supra*, 133 S.Ct. at p. 1968; see *id.* at pp. 1969-1970.) *King* occasionally cited *United States v. Robinson* and other search-incident-to-arrest cases for purposes of analogy and to explain background Fourth Amendment principles (see *id.* at pp. 1970-1971, 1974), but the court was considerably more persuaded by the analogy to cases involving routine booking searches (see *id.* at pp. 1971, 1974-1975, 1978, 1980). Following *King* here would not overrule this court's prior cases that rejected *United States v. Robinson* for purposes of article I, section 13. (See generally RBOM 27-28.)

The ACLU also advances three reasons why this court "should decide the matter under the California Constitution" without regard to *Maryland v. King*. (ACLU Br. 27.) None of these reasons is among the factors this court routinely looks to when weighing whether to depart from federal precedent, and none of them is persuasive. First, the ACLU contends that deciding the case on state constitutional grounds "will eliminate a level of potential review." (*Ibid.*) Amici's desire to insulate a decision from scrutiny by the United States Supreme Court should not be a factor in this

court's calculus about whether to depart from federal precedent. Although amici point to *People v. Ruggles* (1985) 39 Cal.3d 1 as support for this argument, *Ruggles* is inapposite. The court based its decision in *Ruggles* on prior California precedent that prohibited the search at issue (see *id.* at pp. 12-13); here, there is no such precedent. Moreover, the issue in *Ruggles* had already been before the United States Supreme Court on certiorari review twice, and that court had failed to give any "definitive guidance." (*Id.* at p. 11; see *id.* at p. 7, fn. 3.) In view of that unique posture, a majority of this court opted to decide the case by reaffirming its prior precedent on the basis of article I, section 13. (*Id.* at p. 13.) No equivalent consideration is present in this case.[5]

Second, the ACLU argues that "courts should decide cases on state constitutional grounds if doing so will avoid the need to decide a novel question under the federal charter." (ACLU Br. 28, citing *People v. Cook* (1985) 41 Cal.3d 373, 376, fn. 1.) Whatever the merits of that argument, it is not implicated here. In contrast to *Cook*, where the United States Supreme Court had not yet decided whether the police conduct at issue violated the Fourth Amendment (*Cook*, *supra*, at p. 376, fn. 1), *King* definitively resolved the Fourth Amendment question at issue here (see RBOM 12-20). After *King*, there is no "novel question" of federal constitutional law for this court to avoid.

Third, the ACLU argues that this court should resolve the case on state constitutional grounds to ensure that section 13's "independent vitality

---

[5] *People v. Krivda* (1973) 8 Cal.3d 623 is also inapposite. There, the United States Supreme Court granted certiorari, vacated this court's judgment, and remanded, because it was "unable to determine" whether this court had based its opinion on the federal or state Constitution, or on both. (*Ibid.*) This court then reiterated its prior decision, clarifying that it was based on both the federal and state Constitutions. (*Ibid.*)

does not wither from desuetude." (ACLU Br. 28.) That argument misunderstands the issue. No one is asking this court to "ignore[] or disregard[]" section 13. (*Ibid.*) The issue is whether, in this case, the meaning of section 13 should be interpreted with reference to the United States Supreme Court's decision in *King*. Given the textual similarity between section 13 and the Fourth Amendment, this court has held that a federal Fourth Amendment decision like *King* "ought to be followed" in construing section 13 unless there are persuasive reasons for departure. (*Teresinski*, *supra*, 30 Cal.3d at p. 836.) Amici's desire to reinvent section 13 does not provide such a reason.[6]

B. Amici's Criticisms of *King* are Unpersuasive

EFF and the ACLU both contend that *King*'s analysis contains "flawed reasoning" and "myriad problems." (ACLU Br. 7; EFF Br. 17.) None of their criticisms is valid. Initially, EFF argues that *King* "focuse[d] its analysis of the arrestee's privacy interest solely on" the cheek swab and "failed to recognize . . . that arrestees maintain a substantial privacy interest in their genetic material." (EFF Br. 18, quoting *King*, *supra*, 133 S.Ct. at p. 1979.) That misreads *King*. The Supreme Court considered not only the minimal intrusion imposed by swabbing King's cheek, but also how "the processing of respondent's DNA" affected his privacy interests. (*King*, *supra*, at p. 1979.) It reviewed "the scientific and statutory safeguards" ensuring that law enforcement may only "analyze DNA for the sole purpose of generating a unique identifying number"—which does "not reveal the genetic traits of the arrestee"—and it discussed statutory

---

[6] The ACLU also laments the fact that section 13 is seldom invoked now that it "no longer result[s] in exclusion of evidence." (ACLU Br. 28.) Of course, that development is the result of a state constitutional amendment, adopted by the voters and upheld by this court. (See *In re Lance W.* (1985) 37 Cal.3d 873, 879.)

provisions that guard against misuse. (*Id.* at pp. 1980, 1979.) Only after considering these safeguards did the court conclude that the analysis of arrestee DNA samples "did not amount to a significant invasion of privacy" that would violate the Fourth Amendment. (*Id.* at p. 1980.)

Relatedly, EFF argues that *King* "failed to recognize" the "multiple and repeated searches at issue," which must be "disaggregat[ed]" for Fourth Amendment purposes. (EFF Br. 18, 20.) In EFF's view, the initial buccal swab is a search; the "extraction of [a] DNA profile from that sample is a second search"; transmitting a "DNA profile into a state and national database and running the profile through CODIS for 'hits' is another search"; and "every subsequent use of [the] DNA profile for 'matching'" is also a search. (*Id.* at pp. 20-21.) EFF's understanding of the Fourth Amendment is wrong. First, none of the cases cited by EFF conducted a distinct Fourth Amendment analysis for these different events, as EFF suggests the Supreme Court should have done in *King*. Some of the cited cases referred to the processing of DNA samples as a "second search," as a means of emphasizing that arrestees' privacy interests extend beyond the brief physical intrusion of a cheek swab. But the cases all conducted the same kind of analysis as the Supreme Court in *King*: they considered arrestees' privacy interests with respect to both the initial swab and the subsequent analysis as part of a single balancing for reasonableness.[7]

---

[7] Opn. pp. 10, 57-59 [describing analysis of DNA sample as the "second" "part of the search authorized by the DNA Act" before conducting general balancing analysis]; *United States v. Mitchell* (3d Cir. 2011) 652 F.3d 387, 402 (en banc) [describing processing of DNA sample and creation of DNA profile as the "second 'search' at issue," in the context of considering it as part of general balancing of arrestees' privacy interests against government interests]; see *King v. State* (Md. 2012) 42 A.3d 549, 566, 575-581 [citing *Mitchell* for its statement that processing and creation

(continued...)

Second, it was established well before *King* that "the government's retention and matching of [a DNA] profile against other profiles in CODIS . . . does not constitute a separate search under the Fourth Amendment." (*Boroian v. Mueller* (1st Cir. 2010) 616 F.3d 60, 67-68 ("*Boroian*"); see *Johnson v. Quander* (D.C. Cir. 2006) 440 F.3d 489, 498 ("*Johnson*") ["[A]ccessing the records stored in the CODIS database is not a 'search' for Fourth Amendment purposes."]; *Haskell v. Brown* (N.D. Cal. 2009) 677 F.Supp.2d 1187, 1199-1200, fn. 10 [same].)

According to the ACLU, *King* rests on the mistaken premise "that there is no danger of abuse" because "the police take DNA from everybody arrested for the listed offenses." (ACLU Br. 9, citing *King*, *supra*, 133 S.Ct. at p. 1970.) Again, that is not what *King* said. *King* merely recognized that the routine and mandatory collection of DNA identifying information from arrestees at a booking station is different from ad hoc searches by police in the field, which are "subject to the judgment of officers whose perspective might be colored by their primary involvement in the often competitive enterprise of ferreting out crime." (*King*, *supra*, at p. 1970, quoting *Terry v. Ohio* (1968) 392 U.S. 1, 12, some internal quotation marks omitted.) The court thus considered the constitutionality of the collection system as a categorical matter, rather than requiring analysis of individual collections on a case-by-case basis. (See *King*, *supra*, at p. 1970.)[8]

(...continued)
of DNA profile is a "second search," before proceeding to general balancing analysis].

[8] The ACLU also suggests that police will subject citizens to unlawful arrests for the purpose of obtaining their DNA profiles (ACLU Br. 9), but that ignores the substantial practical and legal checks against such misconduct (see Reply 40).

The ACLU accuses *King* of upholding "the Maryland law based on speculation about how arrestee DNA might someday be used, rather than based on facts about how it is being, or can currently be, used." (ACLU Br. 10.) In truth, *King* based its holding on the actual practice in states that collect DNA identifying information from arrestees and the actual interests served by that practice. (*King*, *supra*, 133 S.Ct. at pp. 1971-1974.) It explained how DNA profiles can lead to information about an arrestee's criminal history that is "critical" to deciding how to process him, such as whether to revoke his release or subject him to particular security measures at a detention facility. (*Id.* at pp. 1972, 1974.) The ACLU does not point to any passage in the majority opinion in *King* showing that the opinion was based on improper speculation. (See ACLU Br. 10 [citing only the *King* dissent].)

EFF warns that *King* will lead to a parade of horribles, but that warning is unfounded. (EFF Br. 23-27.) Nothing in *King* authorizes "DNA collection and search in any context in which a fingerprint is collected" (*id.* at p. 23)—although the strong analogy between DNA identification profiles and fingerprints is certainly relevant to the reasonableness balancing in *King* and in this case (see *post*, pp. 36-37). Nor does *King* enable California to test an arrestee's DNA for "a 'pedophile gene' or a 'violence gene," or to search for a genetic proclivity towards "violence or mental disorder." (EFF Br. 27.) *King* addressed only whether law enforcement could obtain a particular "metric of identification" from arrestees. (*King*, *supra*, 133 S.Ct. at p. 1972.) It did not authorize genetic analysis of arrestee DNA samples. Indeed, one of the factors informing the *King*

decision was that DNA identification profiles "do *not* reveal the genetic traits of the arrestee." (*Id.* at p. 1979, italics added.)[9]

As under the statute in *King*, "[n]o purpose other than identification is permissible" under California's DNA Act, and the only analysis performed on arrestees' DNA samples involves "generating a unique identifying number" based on noncoding loci. (*King*, *supra*, 133 S.Ct. at p. 1980; see Pen. Code, § 295.1, subd. (a).)[10] What is more, the DNA Act expressly prohibits any "testing, research, or experiments . . . seeking to find a causal link between genetics and behavior or health." (§ 295.2.) While EFF prefers to read *King* and the DNA Act as authorizing the kind of genetic analyses described above, the State has never interpreted them or applied them that way. Speculation about hypothetical practices is not a legitimate basis for deciding the constitutional question presently before the court (see *post*, pp. 27-29) or for departing from *King*.

---

[9] EFF cites *Raynor v. State* (Md. 2014) 99 A.3d 753, as an example of *King*'s supposedly harmful consequences. (EFF Br. 24-25.) It says that *Raynor* "addressed the constitutionality of collecting and profiling DNA inadvertently left behind" by a defendant who "agreed to an interview at a police station" but "who was not under arrest and who refused to consent to DNA collection." (*Id.* at p. 24.) In fact, the defendant in *Raynor* conceded that the police lawfully obtained his DNA (see *Raynor*, *supra*, at pp. 754-755), so "the only legal question" before the court was whether analyzing a lawfully obtained DNA sample for the limited purpose of determining its DNA identification profile "was a search for purposes of the Fourth Amendment" (*id.* at p. 755). *Raynor* held that this was not a search, a holding that is consistent with California authority from before *King*. (See *People v. Gallego* (2010) 190 Cal.App.4th 388, 397.) EFF also cites a case involving the consent exception to the Fourth Amendment's warrant requirement—an issue not presented here. (EFF Br. 25-26, citing *Varriale v. State* (Md. 2015) 119 A.3d 824, petition for cert. pending, No. 15-618.)

[10] All further statutory references are to the Penal Code unless otherwise indicated.

Like most decisions that draw a dissenting opinion, reasonable people can disagree about whether *King* adopted the best interpretation of the Constitution. It cannot be disputed, however, that *King* commanded a majority of the federal Supreme Court, and is now the law of the land as far as the Fourth Amendment is concerned. Rejecting *King* here would create a marked disparity between state and federal search-and-seizure doctrine—depriving California of an important tool for identifying arrestees that is reasonable and permissible under the federal Constitution. While disparities between state and federal law occasionally arise in our federal system (cf. ACLU Br. 10-11), this court has declined to create them in the context of parallel constitutional provisions unless there are "persuasive reasons" for doing so (*Teresinki*, *supra*, 30 Cal.3d at p. 836). Neither the Court of Appeal, nor Buza, nor any of his amici has identified such a reason here.

III. THE DNA ACT IS INDEPENDENTLY REASONABLE UNDER SECTION 13

Even if this court conducts an independent analysis of the DNA Act under section 13, it should sustain Buza's conviction. (See RBOM 30-66; Reply 23-56.)

A. The DNA Act Is Presumptively Valid and Is Subject to a General Balancing Analysis for Reasonableness

Buza's amici do not dispute that the DNA Act is presumptively valid, and may only be struck down if it appears "clearly, positively, and unmistakably" that the challenged provisions violate the Constitution. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 501 ("*Eu*").) Nor do they dispute that any independent analysis of the DNA Act under section 13 should be governed by a general balancing of interests to determine whether the statute is reasonable. (See RBOM 30; cf. *King*, *supra*, 133 S.Ct. at p. 1970; *Robinson*, *supra*, 47 Cal.4th at p. 1123.)

The ACLU insists that, for purposes of this balancing analysis, the State must "justify California's [DNA Act] with actual evidence." (ACLU Br. 10.) The State carried any evidentiary "burden of justifying the warrantless search in the case at bar" (*Brisendine*, *supra*, 13 Cal.3d at p. 534, fn. 4), however, by establishing that police had probable cause to arrest Buza for the felony crime of setting fire to a police cruiser, an offense that triggers the mandatory collection of DNA identifying information under Penal Code section 296.[11] To the extent the ACLU suggests that the State's burden required it to introduce evidence in the trial court that is unrelated to the circumstances of Buza's case, regarding the range of interests served by collecting DNA profiles or the details of the State's implementation of the DNA Act, none of the cases cited by the ACLU supports such a requirement.

The ACLU describes the State's briefs as suggesting that the DNA Act is necessarily constitutional "because it was adopted as part of an initiative." (ACLU Br. 1.) That is not the State's position. (See, e.g., RBOM 30-31.) Rather, initiative statutes are entitled to the same strong presumption of validity accorded to statutes adopted by the Legislature. (*Eu*, *supra*, 54 Cal.3d at p. 501.) The ACLU acknowledges this court's holding in *Eu*, but also argues that initiative statutes "may be particularly vulnerable to constitutional challenge," noting that "they are passed by voters who may have only a 'superficial knowledge of proposed laws to be voted upon.'" (ACLU Br. 25, quoting *Wallace v. Zinman* (1927) 200 Cal. 585, 592-593.) The very case that the ACLU relies on for this argument, however, stresses that the "validity of laws adopted at the polls must be

---

[11] In this case, no warrantless search involving a buccal swab actually took place at the time of Buza's arrest and booking, because he refused to comply with the requirements of the DNA Act. (2 RT 108-109.)

determined like enactments by the legislative assembly." (*Wallace v. Zinman*, *supra*, at p. 592, quoting *State v. Richardson* (Or. 1906) 85 P. 225, 229.) Moreover, when determining whether it is constitutionally reasonable to collect DNA identifying information from felony arrestees at booking, the fact that Proposition 69 was approved by a substantial majority of California voters is surely relevant. A "'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms." (*Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 37.) When the constitutionality of a statute passed by a legislature "turns on what is reasonable," the general presumption of validity is "especially" strong, because the legislature represents the broader community and its norms. (*United States v. Watson* (1976) 423 U.S. 411, 416, internal quotation marks omitted.) That principle applies with even greater force when the broader community has adopted the statute directly, as California voters did here.

B. California Has Compelling Interests in Collecting DNA Identification Profiles from Arrestees

Buza's amici contend that there is only "marginal utility" in collecting DNA identifying information from felony arrestees at booking. (E.g., ACLU Br. 1.) In fact, California has compelling interests in the routine collection at booking of arrestees' DNA identification profiles—which are "arguably the most discrete, exclusive means of personal identification possible." (*Robinson*, *supra*, 47 Cal.4th at p. 1134, internal quotation marks omitted; see generally RBOM 35-48.) EFF and the ACLU's arguments to the contrary lack merit.

1. California uses DNA identification profiles for identification purposes

Both amicus briefs filed in support of Buza argue that California "does not actually use DNA to identify arrestees." (ACLU Br. 18; see EFF

Br. 7.) As evidence in support of this argument, amici note that California currently uses fingerprints to confirm an arrestee's name and his state ID number at the time of booking, and that the comparison of electronic booking fingerprints takes only a few minutes, whereas it currently takes a few weeks to obtain an arrestee's DNA identification profile. (See ACLU Br. 18-21.) Amici's argument misunderstands what identifying information is and how it has historically been used to serve legitimate law enforcement objectives.

An identifier is a characteristic that distinguishes a particular individual from the rest of the population. Once obtained and stored in secure government files, this information can be used by law enforcement to match the recorded characteristic of a known person to the corresponding characteristic of a person who, for example, left evidence of his presence at a crime scene or was taken into custody by police. Identifiers include names; social security or driver's license numbers; recorded descriptions of height, weight, hair color, eye color, scars, or tattoos; photographs of a person's face; and fingerprints or palm prints. A DNA identification profile serves the same basic function as these traditional identifiers. It "is used solely as an accurate, unique, identifying marker—in other words, as fingerprints for the twenty-first century." (*United States v. Mitchell* (3d Cir. 2011) 652 F.3d 387, 410 (en banc) ("*Mitchell*").) The only relevant differences are that DNA profiles are immutable and far more precise. (See, e.g., *Green v. Berge* (7th Cir. 2004) 354 F.3d 675, 679; RBOM 36-39; DNA Saves Br. 4-6; L.A. Dist. Atty. Br. 12-14, 18.)

The fact that one identifying characteristic (fingerprints) is presently used to confirm the names and ID numbers of arrestees at booking does not mean that other characteristics serve no identification purpose. For example, law enforcement retains a "compelling interest" in collecting photographs or other recorded physical descriptions from arrestees, because

these too can serve "identification function[s]," such as by allowing police to show photographs "to a witness who is asked to identify the perpetrator of a subsequent crime." (*Loder v. Municipal Court* (1976) 17 Cal.3d 859, 864, 865 ("*Loder*").)

Amici's argument also ignores the history of fingerprint identifiers. The rapid, computerized process of comparing booking fingerprints with a database of fingerprints from known persons is a recent innovation. Computers were not capable of searching fingerprint files until the 1980s, and the federal Integrated Automated Fingerprint Identification System (IAFIS) was not launched until 1999. Prior to 1999, "the processing of ten-print fingerprint submissions was largely a manual, labor-intensive process, taking weeks or months to process a single submission." (FBI, Integrated Automated Fingerprint Identification System <http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis> [as of Dec. 22, 2015].) Yet, even before advances in computer science made this rapid comparison possible, the State still had a strong interest in collecting fingerprints from arrestees at booking for "identification" purposes. (E.g., *Loder*, *supra*, 17 Cal.3d at p. 865; *United States v. Kelly* (2d Cir. 1932) 55 F.2d 67, 69.)

As with fingerprints, technological advancements should soon allow DNA identification profiles to be used for quick comparisons at the time of arrest. EFF itself highlights the existence of "Rapid DNA analyzers" that "can produce a DNA profile in 60 minutes or less" and "are already used by law enforcement in Florida and Arizona." (EFF Br. 39.) The fact that DNA profiles (and many other identifying characteristics) are not presently used for this type of direct comparison at the time of booking is hardly evidence that they serve no identification purpose. (See ACLU Br. 18-

20.)[12] Every one of the government interests described by the State in this litigation involves identification: a neutral comparison of the DNA profiles from known arrestees against other profiles to determine whether any profiles came from the same person. (See RBOM 39-48.)

Moreover, as the State has explained, California presently uses DNA identification profiles to help improve the process of confirming an arrestee's name and ID number at booking. (RBOM 43-44.) The ACLU complains that "it is not clear how this is happening" (ACLU Br. 22), but the process is explained on the Department of Justice website. Although the State does not typically collect DNA samples more than once from the same person under its current practices, in some circumstances multiple DNA profiles associated with the same state ID number are obtained. In those circumstances, the State automatically compares the DNA profiles to confirm that they match. If the profiles conflict, it may reveal that the same ID number has mistakenly been assigned to two different people, and the State can promptly resolve that mistake. Because the fingerprint database relies on the same ID numbers, this cross-checking function helps to improve the accuracy of the fingerprint database as well. (See Cal. DOJ, BFS DNA Frequently Asked Questions [Effects of the All Adult Arrestee Provision, Q3] <http://oag.ca.gov/bfs/prop69/faqs> ("FAQs") [as of Dec. 22, 2015].)

---

[12] Likewise, although the Department of Justice generally does not collect a DNA sample from an arrestee if it determines (after confirming the arrestee's name and ID number through a fingerprint comparison) that it already has a sample from that person on file (ACLU Br. 18-19), that does not prove that DNA profiles serve no identification purpose.

2. DNA identification profiles help the State to process current arrestees

The ACLU joins Buza in arguing that DNA identification information is not "useful for custody and bail determinations" in California, because "these determinations must be made within two business days of arrest while the results of DNA testing will not be available for at least one month." (ACLU Br. 10.) This argument ignores two practical realities of California's criminal justice system.

First, felony arrestees are not always arraigned within two business days of arrest, as the ACLU suggests—meaning that an arrestee's DNA identification profile may be available by the time of arraignment in many cases. If the arrestee is released on his own recognizance, or under the county bail schedule, or if the prosecutor delays bringing charges pending further investigation, the arraignment can take place far later than two business days after arrest. (Reply 37-38; CDAA Br. 23-24.)[13] For example, the Orange County District Attorney's Office reports that more than 40% of Orange County felony arrestees between 2009 and 2014 were released prior to their arraignment. For those arrestees, the arraignment took place more than 35 days after the filing of charges, on average.[14] In contrast, the average turn-around time for obtaining DNA profiles from arrestee DNA samples at the state DNA laboratory is now down to just 18 days. (See FAQs, *supra* [Effects of the All Adult Arrestee Provision, Q2].)

---

[13] Indeed, release of low-level felony arrestees prior to arraignment is becoming increasingly common under Realignment, as county jails take on more convicted felons and have less space for arrestees. (Reply 38.)

[14] See Orange County District Attorney's Office, DNA Research Analysis on Felony Offenses, pp. 2-3 <http://orangecountyda.org/civicax/filebank/blobdload.aspx?BlobID=23410> [as of Dec. 22, 2015].

Second, even where an arrestee's DNA identification profile is unknown at the time of his arraignment, it will become available soon thereafter. If that DNA profile reveals that the arrestee is linked to another crime—information that is "a critical part of his identity"—it can provide a basis for a court to revoke bail or own-recognizance release, or for officials to reassess security measures at the jail. (See *King*, *supra*, 133 S.Ct. at pp. 1971, 1972, 1974.) The ACLU responds by arguing that this "cannot justify taking DNA from" arrestees who have not yet been charged "and therefore are not subject to pretrial detention or release." (ACLU Br. 10.) When police conduct a custodial arrest based on their own determination of probable cause, however, there is no way to know at the time of booking whether prosecutors will decide to bring charges or not. Moreover, if prosecutors learn that an arrestee who has not yet been charged is connected to other criminal conduct, it may inform "the exercise of prosecutorial discretion," including "whether to file a formal charge" for the crime of arrest. (*Loder*, *supra*, 17 Cal.3d at p. 866.) So even when prosecutors do not immediately bring charges against an arrestee, a database hit that links the arrestee to other criminal conduct may affect how the State processes him for the crime of arrest.

3. Collecting DNA identification profiles from arrestees effectively serves the government's interests

Buza's amici also argue that collecting DNA identifying information from felony arrestees "is not significantly more effective" at identifying the perpetrators of unsolved crimes "than is taking samples only after conviction." (ACLU Br. 13; see *id.* at pp. 13-15; EFF Br. 35-36.) This argument fails in two respects. First, it ignores California's interests in learning, *before* a trial or conviction, whether an arrestee has been linked to past criminal activity. As discussed above, that information can inform a

range of important decisions regarding charging, bail, release, conditions of pre-trial confinement, and so forth. (See *ante*, p. 20; RBOM 39-43.) None of these interests would be served by a regime that collected DNA identifying information only from convicted offenders.

Second, the argument rests on a misunderstanding of a 2010 RAND study.[15] Buza's amici quote that study for its conclusion that "DNA 'database matches are more strongly related to the number of crime-scene samples than to the number of offender profiles in the database.'" (ACLU Br. 14-15, italics omitted, quoting RAND Corporation, Center on Quality Policing, *Toward a Comparison of DNA Profiling and Databases in the United States and England* (2010) p. 20 ("RAND Study"); EFF Br. 35.) That is an accurate quotation, but it is an incomplete description of the study's findings. DNA databases make anonymous comparisons between profiles associated with unsolved crimes and profiles obtained from known arrestees and offenders. (See, e.g., Butler, Advanced Topics in Forensic DNA Typing: Methodology (2012) pp. 215-216, 226.) It is "[o]bvious[]" that "no DNA database search can work without a companion known persons database." (Murphy, Inside the Cell (2014) p. 271.) The RAND study found that *both* increases in the number of profiles from known persons *and* increases in the number of profiles from unsolved crime scenes led to a greater number of database hits: a "1-percent increase in the number of offender profiles increases the percentage of investigations aided by 0.53 percent, while a 1-percent increase in the number of crime-scene profiles increases the percentage of investigations aided by 0.86 percent." (RAND Study, *supra*, p. 20.) Even taking the RAND study on its own terms, then, it is inaccurate for Buza's amici to suggest that increasing the

---

[15] The data and conclusions in that study are now a half-decade old and its methods have been the subject of criticism. (See RBOM 50, fn. 29.)

number of DNA profiles by collecting them from known arrestees at booking has no significant effect on database hits. (See ACLU Br. 13.)[16] In fact, California's experience since Proposition 69 was fully implemented in 2009 suggests the opposite: the number of database hits has increased substantially, from an average of 183 hits per month in 2008 to an average of 517 hits per month in mid-2013, with even higher numbers in many months since then. (See RBOM 47.)[17]

To be sure, the RAND study did criticize California for "devoting too few resources to DNA testing of crime-scene evidence," and argued that it would "be a wiser use of California's resources to devote them to analyzing the backlog of crime-scene evidence." (RAND Study, *supra*, p. 20.) For purposes of a constitutional balancing analysis, however, the choice among reasonable policy alternatives "remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources." (*Mich. Dept. of State Police v. Sitz* (1990) 496 U.S. 444, 454.) In any event, California *has* devoted substantial resources to collecting forensic samples from crime scenes and reducing any backlogs in

---

[16] The 2005 study about Great Britain's DNA database discussed by the ACLU (at p. 13) is of dubious value in judging the efficacy of California's policy of collecting DNA identifying information from all adult felony arrestees, which was not implemented until 2009. In any event, that study is also consistent with the obvious conclusion that both crime-scene profiles and profiles from known arrestees/offenders are necessary to generate database hits.

[17] The ACLU says it is skeptical of these figures because they do not isolate the number of hits involving arrestee DNA profiles. (ACLU Br. 16.) Although there is no public, citeable source providing that breakdown, in the Department's experience, a substantial percentage of these hits are to profiles in the arrestee database, including more than 100 hits in each of the six months preceding December 2015.

processing those samples.[18] The ACLU itself highlights "the near five-fold increase in size of California's crime-scene database, which grew from . . . 23,450 in December 2008 (just before the start of arrestee testing) to 73,611 as of September 2015." (ACLU Br. 16, italics omitted.) As a result of that increase, collecting DNA identifying information from felony arrestees at booking is now even more likely to yield crucial information about arrestees' past criminal history than before.

C. The DNA Act Minimizes Any Intrusion on Privacy

In contrast to the substantial government interests served by the DNA Act, any incremental intrusion on legitimate privacy interests of arrestees is minimal. (RBOM 52-66; Reply 41-56.)

1. The DNA Act involves a minimal incremental intrusion on the privacy interests of arrestees, who have no expectation of privacy in their identities

In arguing that the DNA Act "pose[s] very real threats to the liberty interests" of arrestees (EFF Br. 41), Buza's amici give short shrift to the statute that is actually before this court. As the State has explained, the DNA Act protects the privacy of arrestees by limiting the use of DNA samples to identification purposes, ensuring the confidentiality of DNA samples and the information obtained from them, imposing accreditation and quality-control requirements on laboratories, and creating civil and criminal penalties for abuses. (RBOM 10-12, 56-59.) California also must comply with federal statutes and regulations, which provide an added layer of privacy protection. (RBOM 10-11, 60-61; DNA Saves Br. 10-11.)

---

[18] See, e.g., California Department of Justice, *Attorney General Kamala D. Harris Announces End to Backlog that Slowed DNA Analysis at Justice Department Labs*, Jan. 25, 2012 <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-end-backlog-slowed-dna-analysis> [as of Dec. 22, 2015].

Consistent with these restrictions, the State uses DNA samples for the sole purpose of generating a precise identification profile, which measures loci in noncoding regions of the DNA that are not directly related to making proteins and have no known association with disease or other genetic predisposition. (RBOM 7-8, 60; see EFF Br. 30 [acknowledging that "the alleles that make up a CODIS profile are non-coding"].) In light of the "limits imposed on the collection, analysis, and use of DNA information by the statute," the "intrusion on privacy effected by the statute [is] similar to the intrusion wrought by the maintenance of fingerprint records." (*Nicholas v. Goord* (2d Cir. 2005) 430 F.3d 652, 671 ("*Nicholas*").) It involves little incremental intrusion on the legitimate privacy interests of persons who are subject to a valid custodial arrest, and therefore "cannot claim privacy in their identification." (*Robinson*, *supra*, 47 Cal.4th at p. 1121.)

EFF invites the court to ignore these statutory protections, arguing that "restrictions on accessing this data cannot cure an otherwise unconstitutional search and seizure." (EFF Br. 22, fn. 39.) But it is settled that statutory restrictions on the use of DNA information are central to any analysis into whether the search authorized by a DNA collection statute is constitutionally reasonable. (See, e.g., *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 508 [considering the fact that "the [DNA] Act appropriately limits the state's use of the specimens, samples, and print impressions that it requires"]; *Robinson*, *supra*, 47 Cal.4th at p. 1121 [agreeing with *Alfaro*]; *King*, *supra*, 133 S.Ct. at p. 1980 [considering "statutory safeguards" in analyzing the reasonableness of the Maryland statute].)

EFF analogizes the search at issue here to other types of searches, but those analogies do not hold. Obtaining a DNA identification profile from a sample is not "the equivalent of the government seizing and searching an

entire computer" and "rummaging through all of its data . . . to find one specific file." (EFF Br. 21-22.) Forensic scientists obtain a DNA profile by using standardized techniques and equipment that isolate and measure the number of repeats at certain designated loci—and nothing more.[19] If the nuclear DNA in a single human cell were 100,000 miles long, the amount examined to create a DNA identification profile would span just 300 feet. (Butler, Fundamentals of Forensic DNA Typing (2010) p. 6.) Nor is this case analogous to *United States v. Jones* (2012) 132 S.Ct. 945, which involved the warrantless use of a GPS device to track a vehicle, or *Riley v. California* (2014) 134 S.Ct. 2473, which concerned the warrantless search of a smart phone seized at arrest. (See EFF Br. 36-37.) Unlike the process of obtaining a DNA identification profile, *Jones* and *Riley* involved ad hoc police searches that could reveal large amounts of potentially sensitive personal information and were not subject to specific statutory protections or use restrictions. (See, e.g., *United States v. Jones*, *supra*, at p. 956 (conc. opn. of Sotomayor, J.) [search in *Jones* gave government "unfettered discretion" to obtain "a substantial quantum of intimate information"].)

Next, EFF contends that the DNA Act unreasonably intrudes on the privacy interests of arrestees who are never charged or convicted. (See, e.g., EFF Br. 13-14, 17.) That argument does not apply to Buza, who, like the substantial majority of California felony arrestees, *was* charged and

---

[19] As one of the amici who joined the EFF brief has explained, these techniques "reduce[] the 3.2 billion base pair genome down to the particular fragments that the forensic analyst is interested in, and . . . cop[y] just those segments so that they may be examined more closely." (Murphy, Inside the Cell (2014) p. 10.)

convicted.[20] Even if the court considers the interests of arrestees who are differently situated from Buza, EFF's argument misses the point. As this court has recognized, "individuals in lawful custody cannot claim privacy in their identification." (*Robinson*, *supra*, 47 Cal.4th at p. 1121; see *Jones v. Murray* (4th Cir. 1992) 962 F.2d 302, 306.) Once a person is "'lawfully arrested and booked into state custody'" (*Robinson*, *supra*, at p. 1121), the state may collect identifying information from him, record it, and use it for legitimate purposes in the future—even if the government ultimately "decide[s] not to press the charges against" the arrestee (*Loder*, *supra*, 17 Cal.3d at p. 862). EFF does not cite any authority establishing that an arrestee who is not charged or convicted suffers a constitutional wrong if his identifying information remains in government records, and the State is aware of none. (Cf. *post*, pp. 33-34.)[21]

---

[20] EFF relies on its own interpretation of a state report to calculate that "31.1%" of California arrestees in 2014 were "never charged or convicted." (EFF Br. 13 & fn. 19.) EFF's arguments illustrate why the report warns that "[c]aution should be used when interpreting this information." (Cal. DOJ, Crime in California 2014, Table 38A <https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd14/cd14.pdf> [as of Dec. 22, 2015].) For example, the cited column for 2014 presents information on *dispositions* of felony arrests in that year, regardless of the year of arrest; so the figures do not describe the outcomes of arrests "in 2014," as EFF suggests. (EFF Br. 13, fn. 19.) In addition, EFF includes in its count the "12.4% [of arrestees who] had their cases dismissed." (*Ibid.*) But the report shows that this figure includes defendants who successfully completed diversion programs, and remain obligated to provide DNA identifying information (see § 296, subd. (b)). Regardless of the precise percentage of arrestees who are not charged or convicted in a particular year, the fact of a valid custodial arrest based on probable cause justifies collecting and retaining an arrestee's identifying information. (See, e.g., *post*, p. 37.)

[21] Of course, California allows arrestees to have certain identifying information destroyed as a matter of statutory law in appropriate cases. (See, e.g., § 299; § 851.8.) But that does not confer a constitutional right.

Furthermore, it is inaccurate for EFF to describe arrestees who are not charged or convicted as having been "determined after their arrest to be innocent in the eyes of the law of the crime for which they were arrested." (EFF Br. 14.) California has established a process for an arrestee who is not charged or convicted to seek a legal determination that he is "factually innocent" of the crime of arrest. (See § 851.8.) That determination provides a statutory basis for the destruction of his arrest records (see *ibid.*), and is one of several possible grounds for expungement of his DNA identifying information (see § 299, subd. (b)(3).) The mere fact that an arrestee is not charged or convicted is not sufficient, however, to support a determination that he is "innocent." Prosecutors may decline to bring charges for a variety of reasons, including resource constraints or when witnesses prove uncooperative or evidence goes missing. Even when a defendant is acquitted at trial, it "does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." (*United States v. One Assortment of 89 Firearms* (1984) 465 U.S. 354, 361; cf. § 851.8, subd. (e).)

2. Speculation about hypothetical uses of DNA samples is not a legitimate basis for invalidating the DNA Act

Although it is undisputed that California uses arrestee DNA samples only to generate identification profiles, Buza's amici do not focus on that actual use. Instead, they urge the court to strike down the DNA Act based on a litany of hypothetical uses of DNA. They suggest a future where the government uses arrestee DNA samples:

- to "determine race, intelligence, criminality, sexual orientation, and even political ideology" (EFF Br. 7);
- to tell "whether a person is more or less likely to have a given trait or get a specific disease" (*id.* at p. 8);

- to learn about an arrestee's "predisposition toward mental illness, violence, sexual deviance, or addiction" (*id.* at p. 29); and
- to model the physical appearance of arrestees (*id.* at p. 38).

Similarly, they posit that it "is highly likely" that law enforcement will "min[e]" the "full genomic data" that some individuals have voluntarily contributed to commercial databases, and use it in conjunction with arrestee DNA profiles to "enable inferences about the . . . genetic makeup" of arrestees. (EFF Br. 31, 30.)

Amici's arguments provide no basis for striking down the DNA Act because the State does not and cannot use arrestee DNA samples in any of these ways. The DNA Act limits the use of DNA samples to "identification purposes" (§ 295.1, subd. (a)), and bars any use for testing or research into the linkage "between genetics and behavior or health" (§ 295.2). While some amici suggest that these protections might one day be modified (see, e.g., EFF Br. 30), this court must consider the DNA Act as it presently exists. It need not "decide any question which might be presented . . . by a system that did not contain comparable security provisions." (*Whalen v. Roe* (1977) 429 U.S. 589, 605-606; accord, *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 219 ["'Analysis of the problems which may arise respecting the interpretation or application of particular provisions of the act should be deferred for future cases in which those provisions are more directly challenged.' [Citation.]"].)

The Ninth Circuit rejected similar arguments in *United States v. Kincade* (9th Cir. 2004) 379 F.3d 813, an en banc decision concerning a challenge to the convicted-offender provisions of the federal DNA Act. Even "beyond the fact that the DNA Act itself provides protections against such misuse, our job is limited to resolving the constitutionality of the program before us, as it is designed and as it has been implemented." (*Id.*

at pp. 837-838.) If ever "some future program permits the parade of horribles" envisioned by Buza and his amici, "courts will respond appropriately." (*Id.* at p. 838.) For now, analysis of Buza's constitutional challenge to the statute at hand must be based "not on dramatic Hollywood fantasies, [citation], but on concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record." (*Ibid.*)

3. The State's policy for "familial searches" of the database for convicted offenders in isolated cases does not intrude on arrestees' privacy interests

EFF suggests that California's "familial search" policy intrudes on the privacy interests of arrestees and their families. But EFF acknowledges that "California currently does not conduct familial searches on arrestee DNA," and it fails to identify any basis for its argument that "familial searching exposes an arrestee's family members to risks to their liberty interests." (EFF Br. 33.) Speculation that the State might one day expand this policy is not a valid ground for striking down the arrestee provisions of the DNA Act. Only the actual "exploitation of technological advances" implicates constitutional protections against searches and seizures—"not their mere existence." (*United States v. Karo* (1984) 468 U.S. 705, 712.)

In addition, as the State has explained, "familial searches" of the database for convicted offenders involve only a neutral comparison of identifying markers, a comparison that is authorized in only a narrowly defined set of cases after rigorous review within the Department of Justice. That comparison may provide a lead that the perpetrator of an unsolved crime is likely a close relative of a known convicted offender; law enforcement must then use traditional investigative methods to pursue that lead further. (RBOM 61-62; Reply 48-49.) Nothing about this neutral comparison invades the privacy of convicted offenders, who are

definitively excluded as the source of the crime-scene sample. And the "familial search" policy does not authorize any search or seizure of offenders' family members. If this policy raises concerns, they should be reviewed in the context of a concrete case that actually presents the issue. The policy does not provide any ground for striking down the DNA Act in this case.[22]

4. The DNA Act is designed and implemented to guard against mistakes and errors

EFF also raises concerns about the risk of "false matches" and "lab mistakes" (EFF Br. 43, 44), but it ignores the numerous protections guarding against any such risk. Only relevant profiles attributable to the perpetrator of a crime may be uploaded to the forensic database. (See, e.g., NDIS Procedures Manual (2015) § 4.2.1.3 <https://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-procedures-manual/view> [as of Dec. 22, 2015] ("NDIS Procedures Manual").) Forensic DNA profiles must meet technical requirements before they are uploaded to the California database or the federal database, including containing data for a minimum number of loci, to ensure that the profiles are sufficiently rare. (See Chin et al., Forensic DNA Evidence (The Rutter Group 2014) § 8.11 ("Forensic DNA").) In addition, laboratories in California that participate in CODIS are subject to requirements regarding:

---

[22] EFF also argues that "[f]amilial searching, like DNA databanks as a whole, compounds the criminal justice system's disproportionate impact on people of color because criminal databases contain disproportionally more minority DNA." (EFF Br. 48.) As the State has explained, the DNA Act treats arrestees equally, regardless of their race. (RBOM 63.) To the extent that the composition of the arrestee population does not mirror that of the general population, the questions presented by that phenomenon go beyond the scope of the issues before the court in this case. They do not provide any basis for holding that the facially neutral DNA Act is unconstitutional.

- compliance with the FBI's Quality Assurance Standards for Forensic DNA Testing Laboratories and for DNA Databasing Laboratories;
- compliance with the National DNA Index System's (NDIS) Operational Procedures;
- accreditation in DNA services by a nonprofit professional association, which includes regular audits by the accrediting body;
- validation of analytic protocols;
- specific training protocols for personnel, including competency and semi-annual proficiency testing;
- inspection and approval by the State; and
- periodic on-site inspections and audits by the United States Department of Justice.[23]

Further, every potential match reported by the State must be evaluated by the local lab that uploaded the crime-scene profile to determine whether the lead is scientifically valid. (See Forensic DNA, *supra*, § 8.15.) These and other protections minimize any risk of errors.

Indeed, some of the practices that EFF characterizes as intruding on arrestees' privacy interests are actually important tools for avoiding mistakes or false matches. EFF complains that the State retains arrestee DNA samples in secure government facilities. (EFF Br. 29-30.) As the State has explained, however, this is "[o]ne of the most important quality practices and protections" in any DNA database system. (Herkenham, *Retention of Offender DNA Samples Necessary to Ensure and Monitor Quality of Forensic DNA Efforts* (2006) 34 J. of Law, Medicine & Ethics 380, 381; RBOM 57-58; Reply 47-48.) It allows the Department of Justice

---

[23] See generally § 297, subds. (a), (b); NDIS Procedures Manual, *supra*; ASCLD/LAB-International Supplemental Requirements for the Accreditation of Forensic Science Testing Laboratories <http://des.wa.gov/SiteCollectionDocuments/About/1063/RFP/Add7_Item4 ASCLD.pdf> [as of Dec. 22, 2015].

to "re-analyze the [arrestee] reference sample in its possession to confirm the validity of the original profile," which helps to avoid any mistaken hits *before* a potential lead is reported to investigating officers. (See Forensic DNA, *supra*, § 8.15.)

Similarly, EFF argues that "threats to privacy will only increase as . . . the number of alleles included in a CODIS profile increases—which the FBI is already considering." (EFF Br. 34.) It is true that the FBI is expanding the number of "core" CODIS loci, effective January 2017. (See Hares, Letter to the Editor, *Selection and Implementation of Expanded CODIS Core Loci in the United States* (2015) 17 Forensic Science Internat.: Genetics 33 <http://www.sciencedirect.com/science/article/pii/S1872497315000435> [as of Dec. 22, 2015].) But that expansion will not intrude on any legitimate privacy interest of arrestees. Like the original 13 core loci, the new CODIS loci "have no known predictive value for medical condition or disease." (*Id.* at p. 33.) The reasons for this expansion include making DNA profiles even more discerning and further reducing the possibility of an "adventitious match"—that is, an apparent match between the DNA profiles of two different people. (See *ibid.*; see also RBOM 58, fn. 35.)

EFF also warns of accidents resulting from "[s]loppy policing," problems at local crime laboratories, or inaccuracies that might result from the use of "low copy number DNA" to generate forensic DNA profiles. (EFF Br. 41, 43; see *id.* at pp. 41-46.) The State takes seriously any possibility of mistakes or misconduct at state or local DNA laboratories. That is why, for example, labs must be audited and accredited, and every potential database hit is reanalyzed at the state and local levels to confirm whether there is a genuine match. (See *ante*, pp. 30-31.) Where there is evidence or an allegation of misconduct, the state CODIS administrator is authorized to investigate and, where appropriate, recommend suspension of

a local laboratory's participation in CODIS. (See NDIS Procedures Manual, *supra*, §§ 2.5, 2.6.4-5.) Equally important, as Buza's own amici emphasize, the trial process itself further protects arrestees against the possibility of a mistake: "the initial database match is used only to show probable cause, not as evidence of guilt." (ACLU Br. 21, fn. 29.) If a suspect is arrested as a result of a database hit, law enforcement will generally obtain a search warrant for a reference sample of the suspect's DNA, and the analysis of that sample along with crime-scene DNA will form the identification evidence used at trial. (Forensic DNA, *supra*, § 8.15.) If the case proceeds to trial, that evidence will be subject to extensive discovery and adversarial testing.

5. Amici's arguments concerning expungement provide no basis for affirming the Court of Appeal

California allows arrestees who (unlike Buza) are not charged or convicted to request the destruction of their DNA samples and expungement of their DNA identification profiles. (See RBOM 63-66; Reply 50-51.) EFF points to the DNA Act's expungement provisions as evidence that the Act "unreasonably burdens arrestees' privacy interests" (EFF Br. 17; see *id.* at pp. 11-14), but that characterization is incorrect. California's expungement policies provide no basis for striking down the DNA Act.

First, where law enforcement obtains identifying information from a person subject to a valid custodial arrest, there is no constitutional right for that person to have the information expunged. That is true even if the individual is not convicted—indeed, even if he is never tried or charged. As the D.C. Circuit recently recognized, "we have never held that an innocent individual has a Fourth Amendment right to expunge the government's records of his identity." (*Johnson*, *supra*, 440 F.3d at p. 497.) For example, "an individual has no constitutional right to the

expungement of his mugshots and fingerprints, notwithstanding the fact that his conviction was subsequently set aside." (*Ibid.*, citing *Stevenson v. United States* (D.C. Cir. 1967) 380 F.2d 590.)[24] Similarly, in *Loder*, this court held that the privacy and due process provisions of the California Constitution did not require the State to destroy records containing an arrestee's photograph, fingerprints, and other recorded physicial descriptions, even though the arrestee was not charged or tried. (*Loder*, *supra*, 17 Cal.3d at pp. 862, 864-865.) There may be legitimate policy debates about how best to structure a statutory expungement process, but those debates are not of constitutional dimension.[25]

Second, in characterizing California's expungement process as "onerous" for arrestees (EFF Br. 14), EFF ignores the fact that California has established an expedited process that is both simpler and faster than the statutory process described by EFF (see *id.* at pp. 15-16). The streamlined process involves filling out a two-page form and is generally completed in two to four weeks if the form is completed properly. (See RBOM 63-62; Reply 50.)

Third, the data relied on by EFF in its arguments about expungement do not actually support those arguments. EFF cites data compiled by one of the amici that it represents, Professor Elizabeth Joh, which were derived

---

[24] See also *United States v. Amerson* (2d Cir. 2007) 483 F.3d 73, 86 ("*Amerson*") ["except for in extraordinary circumstances, the government is not required to return photographs or fingerprints taken incident to a lawful arrest or expunge an arrest record even when the arrestee is acquitted"], citing *United States v. Schnitzer* (2d Cir. 1977) 567 F.2d 536, 539-540.

[25] EFF suggests that a court might act "capricious[ly]" by denying a request for expungement even when the statutory criteria are satisfied (EFF Br. 14), but identifies no cases where that has actually happened. If such a case ever arises, an arrestee who believes that he is constitutionally entitled to expungement may attempt to raise that claim.

from public records requests. (EFF Br. 13-14; see Joh, *The Myth of Arrestee DNA Expungement*, 164 U.Pa.L.Rev.Online 51, 57 <https://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-51.pdf> [as of Dec. 22, 2015] ("Joh").) Based on those data, EFF argues that the result of California's "seemingly capricious" expungement process is that "only 98 people in 6 years have been able to have their DNA data and sample expunged." (EFF Br. 14.) But EFF fails to mention Professor Joh's finding that California received only 103 requests from arrestees for expungement during that period—meaning that expungement requests were granted more than 95% of the time. (Joh, *supra*, at p. 57.) Of the five denials reported in Professor Joh's article, the State has confirmed that all involved circumstances where the individual had another qualifying offense.[26] The State has acknowledged that only a small percentage of arrestees take advantage of the readily available process for requesting expungement. (See Reply 52.) That does not make the DNA Act unreasonable. Rather, it may suggest that many arrestees who are eligible for expungement simply do not share EFF's concerns about the maintenance of their DNA identification information in confidential government files.

EFF also compares the small percentage of California arrestees whose profiles have been expunged with the much larger percentage in Maryland. (EFF Br. 13.) That difference is the natural result of the two states adopting different policies. Like the federal government and a majority of the states that collect DNA identifying information from arrestees, California requires eligible arrestees to initiate the expungement process. (§ 299, subd.

---

[26] Four had felony convictions; the fifth was a juvenile who was adjudicated of a felony offense. (See § 296, subd. (a)(1); see generally RBOM 64, fn. 39.)

(c)(1).)[27] In contrast, Maryland makes expungement automatic. (Md. Pub. Saf. Code Ann., § 2-511, subd. (a)(1).) EFF may prefer Maryland's policy choice, but that does not make California's statute unconstitutional.[28]

D. Any Reasonableness Balancing Must Consider the Long History of Collecting and Recording Arrestees' Identifying Characteristics at Booking

Finally, the ACLU asserts that the practice of collecting photographs, fingerprints, and other identifying characteristics from arrestees at booking, and the many cases upholding that practice, are "not relevant to the present case." (ACLU Br. 23.) In fact, they are directly relevant to this case.

The ACLU posits that the court should ignore the history of routine collection of identifying information from arrestees at booking because fingerprinting and photographing arrestees "do not constitute searches." (ACLU Br. 23.) Whether or not those practices qualify as searches, however, the search at issue in this case must be evaluated by weighing the government's interests in collecting DNA identifying information against any intrusion on arrestees' legitimate privacy interests. (See RBOM 30.) And the history of collecting fingerprints and other identifiers from arrestees is relevant to both sides of that balance. It reflects the government's strong interests in obtaining and recording precise and reliable identifiers from arrestees, and thus supports the collection of modern DNA identifying information that law enforcement uses "in

---

[27] See generally National Conference of State Legislatures, DNA Arrestee Laws <http://www.ncsl.org/Documents/cj/ArresteeDNALaws.pdf> [as of Dec. 22, 2015].

[28] When comparing California with three other states that also require arrestees to initiate expungement, Professor Joh's data show that California has comparable or higher rates of expungement requests and expungements, as a percentage of total arrestee DNA samples. (See Joh, *supra*, at p. 57.)

substantially the same way that the Government uses fingerprint and photographic" identifiers. (*Banks v. United States* (10th Cir. 2007) 490 F.3d 1178, 1192 ("*Banks*").) This history also informs the analysis of the privacy expectations of persons subject to a custodial arrest based on probable cause. In light of the "universal approbation" of "blanket fingerprinting of individuals who have been lawfully arrested" (*Mitchell, supra*, 652 F.3d at p. 411), for example, arrestees cannot reasonably expect to avoid routine booking procedures that quickly and painlessly provide law enforcement with another similar, but even more precise, identifier.[29]

Because the historical collection and use of identifying information is relevant to the reasonableness balance, courts addressing constitutional challenges to DNA statutes have routinely and appropriately considered the analogy between DNA identification profiles, fingerprints, and other identifiers.[30] In light of the numerous privacy safeguards in the DNA Act,

---

[29] There is no need in this case to resolve whether fingerprinting qualifies as a search. (Cf. *King, supra*, 133 S.Ct. at p. 1987 (dis. opn. of Scalia, J.) ["[O]ur cases provide no ready answer to that question."].) But it is surely debatable whether a buccal swab is a greater intrusion on personal autonomy than collecting a print of all ten digits on an arrestee's hands, which takes longer and requires officers to manipulate each digit. (See CDAA Br. 8-10.)

[30] See, e.g., *Robinson, supra*, 47 Cal.4th at pp. 1120-1121 [comparing DNA and fingerprints]; *King, supra*, 133 S.Ct. at p. 1972 ["the only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides"]; *Mitchell, supra*, 652 F.3d at p. 410 ["a DNA profile is used solely as an accurate, unique, identifying marker—in other words, as fingerprints for the twenty-first century" (3d Cir.)]; *Boroian, supra*, 616 F.3d at p. 65 ["DNA profiles currently function as identification records not unlike fingerprints, photographs, or social security numbers" (1st Cir.)]; *Nicholas, supra*, 430 F.3d at p. 671 ["the intrusion on privacy effected by the statute [is] similar to the intrusion wrought by the maintenance of fingerprint records" (2d Cir.)]; *Johnson, supra*, 440 F.3d at p. 499 ["CODIS operates much like an

(continued...)

California uses DNA identification profiles in substantially the same way that law enforcement has traditionally used identifiers (*Banks*, *supra*, 490 F.3d at p. 1192), with a "similar" intrusion on the privacy interests of arrestees (*Nicholas*, *supra*, 430 F.3d at p. 671). The collection and use of these highly precise identifiers for legitimate law enforcement purposes, subject to statutory protections against disclosure and misuse, is a reasonable practice under the Fourth Amendment and article I, section 13 of the California Constitution.

(...continued)
old-fashioned fingerprint database (albeit more efficiently)" (D.C. Cir.)]; *Rise v. Oregon* (9th Cir. 1995) 59 F.3d 1556, 1659 [DNA identification profiles are "substantially the same as" the information "derived from fingerprinting—an identifying marker unique to the individual from whom the information is derived"]; cf. *People v. Thomas* (2011) 200 Cal.App.4th 338, 341 ["Courts recognize that current forensic DNA testing functions like genetic fingerprinting because it is used solely for purposes of identification."].

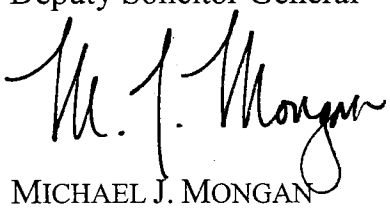
CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: January 4, 2016

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
STEVEN T. OETTING
Deputy Solicitor General



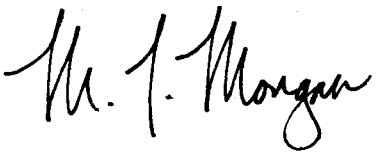
MICHAEL J. MONGAN
Deputy Solicitor General
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I certify that the attached Answer to Amicus Curiae Briefs uses a 13 point Times New Roman font and contains 11,533 words.

Dated: January 4, 2016

KAMALA D. HARRIS
Attorney General of California



MICHAEL J. MONGAN
Deputy Solicitor General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Mark Buza***
No.: **S223698**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 4, 2016, I served the attached **ANSWER TO AMICUS CURIAE BRIEFS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

J. Bradley O'Connell
Kathryn Seligman
First District Appellate Project
475 Fourteenth Street, Suite 650
Oakland, CA 94612

Rachelle Barbour
Assistant Federal Defender
Federal Defender's Office
801 "I" Street, 3rd Floor
Sacramento, CA 95814

The Honorable George Gascon
District Attorney
San Francisco County
District Attorney's Office
Hall of Justice
850 Bryant Street, Room 325
San Francisco, CA 94103

Joseph R. Grodin
University of California Hastings
College of the Law
200 McAllister Street
San Francisco, CA 94102
Amicus Curiae for Appellant

Michael T. Risher, Esq.
ACLU Foundation of Northern California, Inc.
39 Drumm Street
San Francisco, CA 94111
Amicus Curiae for Appellant

Jennifer Ann Lynch
Electronic Frontier Foundation
815 Eddy Street
San Francisco, CA 94109
Amicus Curiae for Appellant

Ronald F. Remmel
Attorney at Law
P.O. Box 1059
Mountain View, CA 94042
Amicus Curiae for Respondent

Roberta T. Schwartz
Office of the District Attorney/Appellate Division
320 W. Temple Street, Suite 540
Los Angeles, CA 90012
Amicus Curiae for Respondent

Mark Louis Zahner
Albert C. Locher
California District Attorney Association
921 11th Street, Suite 300
Sacramento, CA 95814
Amicus Curiae for Respondent

Eric Andrew Herzog
Norton Rose Fulbright US LLP
555 South Flower Street
Forty-First Floor
Los Angeles, CA 90071
Amicus Curiae for Respondent

Martin J. Mayer
Jones & Mayer
3777 N. Harbor Boulevard
Fullerton, CA 92835
Amicus Curiae for Respondent

Camille Ann Hill
Orange County District Attorney's Office
P.O. Box 808
Santa Ana, CA 92702
Amicus Curiae for Respondent

Christopher H. Asplen
Hill Wallack L.L.P.
777 Township Line Road
Yardley, PA 19067
Amicus Curiae for Respondent

County of San Francisco
Hall of Justice
Superior Court of California
850 Bryant Street
San Francisco, CA 94103

First Appellate District
Division Two
Court of Appeal of the State of California
350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 4, 2016, at San Francisco, California.

Ryan E. Carter
Declarant

Signature

SF2015400268/20738169.doc