In the Supreme Court of the State of California

JOHN DOE,

Plaintiff and Appellee,

v.

KAMALA D. HARRIS,

Defendant and Appellant.

Case No. S191948

Ninth Circuit Court of Appeals, Case No. 09-17362
United States District Court for the Northern District of California,
Case No. C 07-03585 JL

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

The United States Court of Appeals for the Ninth Circuit certified the following question of California law to this Court:

"Under California law of contract interpretation as applicable to the interpretation of plea agreements, does the law in effect at the time of a plea agreement bind the parties or can the terms of a plea agreement be affected by changes in the law?"

INTRODUCTION

This case involves the implementation of plea bargains, "a desirable and essential component of the administration of justice." (*People v. Masloski* (2001) 25 Cal.4th 1212, 1216.) It concerns no less than the Legislature's power to enact general and uniform laws applying to all criminal defendants, including those who enter into a plea bargain.

The certified question arises in the context of plaintiff's theory that state law principles of contract interpretation make a plea bargain a binding agreement by the parties to apply only those laws in existence at the time of the plea. Under that theory, the accused who accepts a plea bargain acquires immunity from future amendments to statutes—including amendments regularly adopted under the state's police power and expressly intended to apply retroactively and uniformly to all convicted defendants.

The Attorney General asserts that plea bargains are not implied agreements to "freeze" the law to its corpus on the day of the plea. When applied to a plea bargain, California contract law principles no more imply an agreement constraining legislative power to amend statutes than they imply an agreement constraining judicial power to interpret the Constitution. Plea agreements incorporate *all* extant law—including the reserve power to legislate retroactively, subject to such constitutional requirements as may exist or be declared in the future.

That power includes statutory amendments intended to secure public safety, including amendments requiring the posting of registered sex offender information on the state's Megan's Law website. Plaintiff's theory of plea-bargain immunity from post-bargain legislation is unsupported by California decisions applying contract law to plea agreements. Likewise, his notion of a class of plea-bargaining defendants perpetually exempt from amendatory legislation threatens serious conflict with the constitutional guarantee of equal protection of the law. It also makes the state's sex offender registration requirements unadministrable in practice and unenforceable in law.

STATEMENT OF THE CASE AND FACTS

A. State Court Proceedings

In February 1991, the San Mateo County District Attorney charged plaintiff John Doe[1] with six counts of lewd and lascivious acts on a child (Pen. Code, § 288, subd. (a)), which carried a maximum sentence of 18 years in prison. (ER 139-141, 145.[2]) In August 1991, Doe entered into a plea bargain, whereby he pleaded no contest to one count in exchange for the dismissal of the other five counts and a promise that he would not be

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[1] The federal district court granted Doe's request to proceed under a pseudonym and ordered documents identifying Doe to be filed under seal. The Ninth Circuit also granted Doe's request to proceed under a pseudonym and to file the briefs and supporting documents under seal. However, the Ninth Circuit declined to seal or to redact its published order in this case, which in any event contained "scant information" about plaintiff's identity, because of "'the public interest in understanding the judicial process.'" (*Doe v. Harris* (9th Cir. 2011) 640 F.3d 972, 973, fn. 1, citation omitted). Doe has not sought to seal the briefs in this Court. Any descriptors in this brief appeared in the Ninth Circuit's order.

[2] "ER" refers to the Excerpts of Record filed in the Ninth Circuit, which were transmitted to this Court pursuant to Cal. Rules of Court, rule 8.548(c). "CR" refers to the Clerk's Record of the district court's civil docket; numbers are to the particular docket entries.

sent to prison. Doe was ultimately sentenced to probation and four months in a work furlough program.

As a result of the plea, Doe was automatically subject to the mandatory sex offender registration requirement of Penal Code section 290. At the time of the plea, the parties agreed that Doe had to register, but did not otherwise discuss the registration requirement. The written plea agreement stated only that the bargain's consequences included "290 P.C. registration." (ER 273 [change of plea form].)

In 1991, Penal Code section 290 stated that the registration information was not open to inspection except by law enforcement personnel, and that the defendant had to register only once unless he moved from his primary residence. Subsequently, the California Legislature amended section 290 to require the posting of registration information on a state-maintained website, and to require the updating of registration information annually. (Pen. Code, § 290.46; see http://www.meganslaw.ca.gov). The amendments expressly provided that the public notification provisions applied retroactively to every person described in the statute without regard to the date of the offense or the registration obligation. (Pen. Code, § 290.46, subd. (m) ["The public notification provisions of this section are applicable to every person described in this section, without regard to when his or her crimes were committed or his or her duty to register pursuant to Section 290 arose, and to every offense described in this section, regardless of when it was committed."] Under the amendments to section 290, Doe's registration information became available on California's Megan's Law website, and he had to register every year.

B. District Court Proceedings

On July 11, 2007, Doe filed a complaint pursuant to 42 United States Code section 1983 in the federal district court. (CR 1.) Doe alleged that

the amendments to Penal Code section 290 were contrary to his plea bargain and that implementation of the amendments by the Attorney General violated his right to due process.[3] Doe sought a permanent injunction directing the state to remove his registration information from the Megan's Law website and to set aside the annual registration requirement.

The parties agreed that this kind of plea bargain dispute is governed by state law. (*Ricketts v. Adams* (1987) 483 U.S. 1, 6, fn. 3; *Buckley v. Terhune* (9th Cir. 2006) (en banc) 441 F.3d 688, 695.) On August 31, 2007, the Attorney General moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (CR 16-7). The motion was based on the Ninth Circuit's recognition that, "in California, contracts (including plea bargains) are 'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws.'" (*Davis v. Woodford* (9th Cir. 2006) 446 F.3d 957, 962 (*Davis*), quoting *People v. Gipson* (2004) 117 Cal.App.4th 1065, 1070 (*Gipson*).) On February 22, 2008, the Magistrate Judge denied the motion to dismiss. The Magistrate Judge stated that the question was whether any promises were made that Doe's registration information would remain confidential regardless of any future changes to the law. (ER 283.) The Magistrate Judge determined that dismissal was premature because "[h]ypothetically, other statements besides the bare recitals in the plea

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[3] Doe did not argue that the retroactivity of the public notification provisions in the amended statute violate the ex post facto clauses of the state or federal Constitutions. Every court to examine that question has concluded that sex offender registration laws do not constitute punishment, and therefore can be applied retroactively. (E.g., *Smith v. Doe* (2003) 538 U.S. 84, 105-106; *Hatton v. Bonner* (9th Cir. 2003) 356 F.3d 955; *People v. Castellanos* (1999) 21 Cal.4th 785, 788.)

agreement might have been made to the Plaintiff in court at the time of the plea or the sentence or in other circumstances." (*Ibid.*)

Following discovery, the Attorney General, on September 25, 2008, moved for summary judgment, on the ground that the undisputed evidence showed that no other promises regarding the registration requirement had been made to Doe. The parties agreed that they did not discuss the scope of the registration requirement at the time of the plea or sentencing; therefore, the prosecutor could not have agreed that Doe would be exempt from any amendments to Penal Code section 290. (CR 40.) On November 12, 2008, the Magistrate Judge orally indicated that he wanted to further develop the record, and denied the motion.

At an evidentiary hearing on January 16, 2009, Doe called his two retained trial attorneys; the Attorney General called the prosecutor; and Doe testified in rebuttal. The evidence confirmed that the prosecutor and defense counsel did not discuss the registration requirement at the time of the plea or sentencing, other than the fact that it applied to Doe. (ER 82-83, 149-151, 162-163.) Defense counsel had filled out the change of plea form, but forgot to include any of the mandatory consequences in the "maximum penalty" section. The prosecutor reviewed the form, noticed the omissions, and wrote in the mandatory consequences of the plea, including parole, fines, testing, and "290 P.C. registration." There was no dispute that Doe was subject to those mandatory consequences, and counsel and Doe initialed the additions to the form. (ER 65-66, 85-86, 152-154, 273). Doe also indicated on the change of plea form that he had not "been induced to plead guilty or nolo contendere by any promise or representation of a lesser sentence, probation, reward, immunity, or anything else except: 1 count conditional plea, no state prison." (ER 274.) Doe discussed the details of the registration requirement only with his own attorneys, and they did not discuss with him the possibility that the law could change. (ER 91, 179.)

Doe acknowledged that neither the prosecutor nor the judge made any promises at the change of plea or sentencing hearings that his registration information would always remain confidential regardless of any future changes in the law. (ER 186.)[4]

In posthearing briefing, the Attorney General argued that *Davis* and *Gipson,* as well as numerous other cases, had adopted the rule that plea bargains in California incorporate the reserve power of the state to amend the law. (CR 62.) Doe countered that the term "290 P.C. registration" in the written plea agreement implicitly "includes a promise that his sex offender registration requirements would be governed by Penal Code section 290 as the statute existed at the time of his plea," and that Doe had relied on that implied promise, thus exempting him from future statutory amendments. (CR 58 at p. 15.)

On September 18, 2009, the Magistrate Judge granted Doe's request for a permanent injunction. (CR 72.) The Magistrate Judge found that "[p]rior to entry of the plea there was no discussion between the prosecutor and defense counsel about the registration requirement except the fact that it was required, which the prosecutor memorialized by adding it to the change of plea form." (ER 2.) The Magistrate Judge ruled that the written plea form's reference to "P.C. 290," included an implied promise that Doe would only be subject to the law as it existed in 1991. (ER 2; ER 4-5 [finding enforceable obligation based on "the plain language of Section 290 as written at the time, which was incorporated in his change of plea—that his registration would remain confidential and distribution of his registration information would be limited according to the terms of the

[4] The transcript of the change of plea hearing is no longer available, as the court reporter destroyed the notes after 10 years. (See Gov. Code, §§ 68152(j)(7), 69955(e).)

statute"]; ER 16 [the term "P.C. 290" in the plea agreement meant "compliance with that section of the Penal Code, as it was written at the time of the plea"].)[5]

C. Ninth Circuit Proceedings

The Attorney General appealed to the Ninth Circuit Court of Appeals.[6] On April 2, 2011, the Ninth Circuit issued a published order certifying a question of state law to this Court regarding California's approach to contract interpretation as it applies to plea bargains. (*Doe v. Harris* (9th Cir. 2011) 640 F.3d 972). Identifying five California cases as potentially relevant, the Ninth Circuit indicated its view that two of the decisions were "in tension" with the other three. (*Id.* at pp. 975-977.) The Ninth Circuit stated that it was unclear which set of cases applied to this potentially determinative question, and asked this Court to accept its certification request. (*Id.* at p. 977.) On June 15, 2011, this Court granted the certification request on the question set forth above.

SUMMARY OF ARGUMENT

California law does not provide that plea bargains include an implied agreement that the defendant will only be subject to the law in effect at the

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[5] The Magistrate Judge also found that Doe's reliance on the implied agreement created an enforceable term of the plea bargain. (ER 4-5, 27.) The Ninth Circuit noted that this finding was based only on "private discussions which Doe had with his attorneys, and on Doe's testimony about his motivations for pleading guilty." (*Doe v. Harris*, *supra,* 640 F.3d at p. 974.) We have found no decision holding that such reliance alone creates an implied agreement under California law. (See *In re Honesto* (2005) 130 Cal.App.4th 81, 92 ["A plea agreement violation claim depends upon the actual terms of the agreement, not the subjective understanding of the defendant or deficient advice provided by his attorney."].)

[6] The state complied with the injunction pending resolution of the appeal, by removing Doe's information from the Megan's Law website and setting aside the annual registration requirement.

time of the plea. Instead, case law makes clear that plea bargains incorporate the reserve power of the state to enact retroactive changes to the law.

As in most plea bargains, the parties here did not discuss the possibility that future statutory amendments would cause a consequence of the plea to be implemented contrary to the expectations or preferences of one of the parties. There was no negotiation, to say nothing of agreement, about the consequences of the plea being implemented according to existing law only. To put it another way, even assuming that avoidance of the reserve power of a state to make and amend laws could constitute a condition of a plea bargain, it plainly was not here.

Doe nevertheless asserts that an implied agreement to that effect exists in all California plea bargains. To the contrary, the California cases that have addressed the issue unanimously reject the theory that a plea bargain's consummation at a single temporal point implies, without more, an agreement to immunize the defendant from later amendments to statutory law. Rather, unless there is some demonstrable basis for concluding otherwise, defendants who plead guilty are subject to retroactive amendments that are enacted pursuant to the state's reserve police power to promote public safety.

The approach to plea bargains posited by Doe is unworkable. It would arbitrarily tie the hands of the Legislature by exempting defendants who plead guilty from amendments that were expressly intended to apply retroactively and uniformly to all defendants. It would also give rise to serious claims of equal protection violations between defendants convicted by plea and those convicted by jury. And it would frustrate the enforcement of retroactive amendments, including the sex offender registration provisions in Penal Code section 290. This Court should

conclude that plea bargains incorporate the reserve power of the state to amend the law in order to advance public policy.

ARGUMENT

I. THE RETROACTIVE APPLICATION OF A STATUTORY CHANGE DOES NOT VIOLATE A PLEA BARGAIN

A. Plea Bargains Do Not Include an Implicit Agreement That Only the Existing Law Applies

"Plea bargains are generally governed by a specialized form of the law of contracts." (*People v. Kim* (2011) 193 Cal.App.4th 1355, 1360.) Under that law, there must be a meeting of the minds between the prosecution and the defense in order to create an enforceable term of a plea bargain. (*People v. Martin* (2010) 51 Cal.4th 75, 79 ["A plea bargain is a negotiated agreement between the prosecution and the defendant by which a defendant pleads guilty to one or more charges in return for dismissal of one or more other charges"]); *People v. Orin* (1975) 13 Cal.3d 937, 943 [authorizing "a process of 'bargaining' between the adverse parties to the case—the People represented by the prosecutor on one side, the defendant represented by his counsel on the other—which bargaining results in an agreement between them"]; see *Santobello v. New York* (1971) 404 U.S. 257, 262 ["when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled"].)

A term of a plea bargain may be implied. (E.g., *People v. Martin, supra*, 51 Cal.4th at p. 82 [where prosecutor dismissed some charges in exchange for guilty plea to other charges, an implied term of the plea bargain was that conditions of probation could not be based on the facts underlying the dismissed counts]; *People v. Arbuckle* (1978) 22 Cal.3d 749, 756-757.) However, "the record must affirmatively demonstrate some basis" for concluding that the parties implicitly agreed on a particular term.

(*People v. Ruhl* (1985) 168 Cal.App.3d 311, 315; *In re Mark L.* (1983) 34 Cal.3d 171, 177 [finding an implied agreement that the same judge who accepted the plea would impose sentence where "the record indicates an actual assumption by the court and parties that the officer taking the plea would have final and exclusive dispositional authority," as demonstrated by the judge's use of the personal pronoun and his advisement that the minor had a right to have the same judicial officer who took the plea handle the disposition].)

All of the California courts to address the specific issue before this Court have concluded that the mere fact that the parties enter into a plea bargain, without more, does *not* constitute an implied promise by the prosecutor that the defendant will only be subject to the law then in existence and will be exempt from future legislative changes. Accordingly, the courts have rejected the argument that the retroactive application of a change in the law necessarily violates the plea bargain.

1. California Jurisprudence Permits Retroactive Application of Amendments to Plea Bargains

In *People v. Acuna* (2000) 77 Cal.App.4th 1056, the defendant pleaded guilty in 1993 to a violation of Penal Code section 288 and received a probationary sentence. At the time, he was eligible to seek expungement of the conviction pursuant to Penal Code section 1203.4. However, in 1997, the Legislature amended section 1203.4 to bar expungement for violations of section 288, in order to enhance public safety by preventing child molesters from representing that they had no such conviction. (*Id.* at p. 1060.) In 1999, defendant moved to expunge his conviction, which was denied based on the amended law. On appeal, defendant claimed, inter alia, that the application of the amended statute to his case deprived him of the benefit of his plea bargain, which he contended included an implied term that he would be able to seek expungement under

the law in effect at the time he pleaded guilty. The Court of Appeal, Second Appellate District, rejected the contention, because no express provision of the agreement mentioned expungement, and it clearly was not part of the parties' understanding. (*Id.* at p. 1062.)

In *People v. Gipson,* 117 Cal.App.4th 1065, the defendant pleaded guilty in 1992 to a serious felony. The plea bargain incorporated by reference Penal Code section 667, which at that time authorized a five-year sentence enhancement for a prior conviction. Subsequently, the Legislature and the voters enacted the three strikes law, which permitted the use of the prior conviction as a strike. When the defendant was convicted of a new crime in 2002, the prior conviction was used as a strike to double the sentence. On appeal, defendant claimed that the application of the strike statute violated the state and federal contracts clauses, because "his 1992 plea bargain was a contract between the state and him, which the Legislature could not impair by subsequent enactments." (*Id.* at p. 1068.) The Court of Appeal acknowledged that the existing law is part of every contract, but rejected the claim that existing law constituted "an intrinsic part of his plea agreement, creating an enforceable obligation." (*Id.* at p. 1069.) The Court of Appeal held:

> not only is the existing law read into contracts in order to fix their obligations, but the reservation of the essential attributes of continuing governmental power is also read into contracts as a postulate of the legal order. . . . Consequently, contracts are "deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. . . . " (*In re Marriage of Walton* (1972) 28 Cal.App.3d 108, 112 [104 Cal.Rptr. 472].)

(*Id.* at pp. 1069-1070, additional citations and internal quotes omitted.)[7] The Court of Appeal noted that the purpose of the three strikes law is "to promote the state's compelling interest in the protection of public safety and in punishing recidivism," which clearly advances public policy. (*Id.* at p. 1070.) Accordingly, the Court of Appeal found that "[t]he 1994 amendment to section 667 did not affect the 1992 plea bargain," and upheld the retroactive application of the change in the law. (*Ibid.*)[8]

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[7] In *Walton,* the court held that the state was entitled to change the statutory grounds on which dissolution of a marital contract could be granted as a matter of public policy: "When persons enter into a contract or transaction creating a relationship infused with a substantial public interest, subject to plenary control by the state, such contract or transaction is deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy, and such legislative amendments or enactments do not constitute an unconstitutional impairment of contractual obligations." (28 Cal.App.3d at p. 112.)

[8] To date, at least 24 district courts have similarly held on federal habeas corpus review that, under California law, a plea bargain involving a serious or violent felony, obtained prior to enactment of the three strikes law, did not include an implicit agreement that the defendant would only be subject to the five-year sentence enhancement then in existence. (*Price v. Ollison* (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 53203, *108-109; *Muhammed v. Runnels* (E.D. Cal. 2011) 2011 U.S. Dist. LEXIS 10443, *66-67; *Meier v. Haviland* (E.D. Cal. 2010) 2010 U.S. Dist. LEXIS 117743, *7-8; *Echols v. Pliler* (C.D. Cal. 2010) 2010 U.S. Dist. LEXIS 110955, *22-23; *Piper v. Adams* (C.D. Cal. 2010) 2010 U.S. Dist. LEXIS 104065, *78-79; *Felton v. Ayers* (C.D. Cal. 2010) 2010 U.S. Dist. LEXIS 73201, *12-19; *Anderson v. Felker* (C.D. Cal. 2010) 2010 U.S. Dist. LEXIS 66714, *9-10; *Owens v. Lamarque*, (C.D. Cal. 2010) 2010 U.S. Dist. LEXIS 61198, *37-39; *Castleberry v. Lewis* (C.D. Cal. 2010) 2010 U.S. Dist. LEXIS 94415, *4 n. 1; *Frize v. Hernandez* (C.D. Cal. 2010) 2010 U.S. Dist. LEXIS 32387, *22-25; *Watkin v. Adams* (E.D. Cal. 2010) 2010 U.S. Dist. LEXIS 22601, *16-19; *Zaragosa v. Marshall* (C.D. Cal. 2009) 2009 U.S. Dist. LEXIS 75160, *6-13; *Escalera v. Almager* (E.D. Cal. 2009) 2009 U.S. Dist. LEXIS 25601, *24-25; *Gamble v. Subia* (E.D. Cal. 2009) 2009 U.S. Dist. LEXIS 19233, *37-41; *Clark v. Marshall* (C.D. Cal.

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In re Lowe (2005) 130 Cal.App.4th 1405, concerned a defendant's 1985 guilty plea, which resulted in an indeterminate sentence for second degree murder. At the time, the Board of Prison Terms (BPT) had exclusive authority under Penal Code section 3041.2 to determine a defendant's suitability for parole. In 1988, the statute was amended to give the California Governor final authority over the parole decision. In 2002, the BPT granted parole to defendant, but the Governor reversed that decision. The superior court granted defendant's habeas corpus petition, finding an "express and implied promise" in the plea agreement that the BPT's decision would control, because the "existing applicable law at the time of this plea bargain contract with the state was that if Petitioner was granted parole by the Parole Board he would, in actual fact, be released on parole." (*Id.* at p. 1417, internal quotations omitted.) The Court of Appeal reversed, holding that no violation of the plea agreement had occurred, and noting that defendant "never was promised, as part of his plea bargain, that a specific release date or his parole suitability would be determined by any particular person or persons." (*Id.* at p. 1424.)[9]

(...continued)
2008) 2008 U.S. Dist. LEXIS 110445, *17-18; *Aiyedogbon v. Ayers* (N.D. Cal. 2008) 2008 U.S. Dist. LEXIS 111829, *33; *Thompson-Bonilla v. Marshall* (N.D. Cal. 2008) 2008 U.S. Dist. LEXIS 90701, *43-44; *Garren v. Kramer* (C.D. Cal. 2008) 2008 U.S. Dist. LEXIS 54241, *63-64; *Callegari v. County of San Joaquin* (E.D. Cal. 2008) 2008 U.S. Dist. LEXIS 51043, *2-4; *Joshua v. Dexter* (C.D. Cal. 2008) 2008 U.S. Dist. LEXIS 39536, *7-9; *Travalini v. California* (E.D. Cal. 2008) 2008 U.S. Dist. LEXIS 18081, *13-14; *Burleson v. Kernan* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 86964, *53-54; *Walker v. Carey* (E.D. Cal. 2007) 2007 U.S. Dist. LEXIS 37537, *16-17; *Oberg v. Carey* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 21347, *16-17, amended Oct. 30, 2007.)

[9] In *Seiler v. Brown* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 66412, the district court similarly held on federal habeas corpus review that, under California law, the plea bargain did not include an implied promise that the

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In *People v. Arata* (2007) 151 Cal.App.4th 778, the Court of Appeal, Third Appellate District, confronted the same issue raised in *Acuna*, i.e., whether the retroactive application of the change in the expungement law violated the plea bargain. The Court of Appeal "first consider[ed] whether section 1203.4 relief was a term of defendant's plea bargain." (*Id.* at p. 787.) It appears that the expungement statute was not expressly discussed by the parties at the time of the plea, but "advisement of section 1203.4 relief appeared on the probation papers." (*Id.* at p. 782.) The parties did agree as part of the plea bargain that "[t]here would be no State Prison at the outset as a promise." (*Id.* at p. 781.) The Court of Appeal concluded, "By agreeing to give defendant probation, the plea bargain implicitly included the promise of section 1203.4 relief as part of probation." (*Id.* at p. 787.) The Court of Appeal also held that the implied promise was a significant aspect of the plea bargain, because "the act of clemency in granting probation would be significantly diminished if not accompanied by the eventual reward of section 1203.4 relief." (*Id.* at p. 788.)

In the Ninth Circuit's view, *Arata* "appears to be in tension" with *Acuna, Gipson,* and *Lowe*. (*Doe v. Harris, supra*, 640 F.3d at p. 977.) However, for purposes of the question of contractual interpretation before this Court, *Arata* is notable for what it did *not* hold. The *Arata* court did not find that the expungement statute in effect at the time of the plea created an implied promise that defendant would be able to seek expungement regardless of any changes in the law. Rather, *Arata* held that the express promise of probation from the outset, a necessary prerequisite to expungement, gave rise to an implied promise of expungement in that

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petitioner would only be subject to the law at the time of the plea giving the BPT final authority over the decision whether to grant parole. (*Id.* at pp. *6-7.)

case, in light of specific declarations by the defendant and defense counsel reflecting that section 1203.4 was mentioned in the probation papers, that counsel discussed the fact that defendant would be able to have the case dismissed under that law, and that section 1203.4 relief was a motivating factor in the plea. (*Arata, supra,* 151 Cal.App.4th at pp. 781-782.) Thus, *Arata* identified a specific agreement by the prosecutor at the time of the plea that formed the basis for the corresponding implicit agreement about the expungement statute as it then existed.[10] (Cf. *People v. Paredes* (2008) 160 Cal.App.4th 496, 512 [distinguishing *Arata* in a case where "there is no basis for concluding that the plea agreement contains either an express or implied promise of 'no deportation'"].)

The Ninth Circuit adopted the same approach on federal habeas corpus review in *Davis v. Woodford,* 446 F.3d 957. In that case, the petitioner pleaded guilty in 1986 to eight counts of robbery that had been charged in two separate informations. At that time, under Penal Code section 667, subdivision (a), each prior serious felony conviction that was brought and tried separately could enhance the sentence by five years, which would permit a 10-year enhancement if petitioner reoffended. (*Id.* at p. 959.) However, the prosecutor stated on the record during the plea hearing, "For all purposes, it is the People's position that this would be one five-year prior on their record as a violent felony pursuant to Proposition 8." (*Ibid.*) After the state enacted the three strikes law, petitioner was convicted of additional felonies in 2000, and the court enhanced his

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[10] The reed upon which *Arata* based the implied agreement was a slim one, and it is arguable that the particular result in that case is in conflict with the result in *Acuna.* However, this Court need not resolve any discrepancy regarding the expungement statute here, because, as explained herein, the appellate courts are in agreement about the overarching principle of law at issue.

sentence with eight strikes. The Ninth Circuit held that "in California, contracts (including plea bargains) are 'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws.'" (*Id.* at p. 962, quoting *People v. Gipson*, 117 Cal.App.4th at 1070.) The Ninth Circuit stated:

> The present case is easily distinguishable from *Gipson*. There, the court upheld application of the Three Strikes Law against a defendant whose plea agreement in an earlier case had incorporated section 667(a) by reference. Here, the plea agreement *did not merely incorporate existing law by reference*; rather, it included a specific promise about how many prior convictions would be placed in Petitioner's criminal record as a result of the guilty plea.

(*Ibid.*, emphasis added and citation omitted.) Thus, in that "unusual case" where the prosecutor had made a promise on the record about the number of prior convictions that could be used as a result of the guilty plea, the Ninth Circuit enforced *that* promise by allowing a sentence enhancement with only one strike. (*Id.* at p. 963.) Significantly, the *Davis* court acknowledged that the plea bargain "did not purport to freeze the law as it was in 1986. Instead, the parties agreed on the facts (number of 'priors') that could be used, later, to sentence Petitioner *under whatever law might then be in effect*." (*Id.* at p. 962, emphasis added.) Thus, like *Arata,* the Ninth Circuit in *Davis* did not hold that a bald reference in a plea bargain to a statute such as Penal Code section 667, subdivision (a), is itself an implied agreement that the defendant henceforth would only be subject to that statute as it existed at the time of the plea and nothing else. Had the Ninth Circuit ruled as Doe would have the law, the Ninth Circuit in *Davis* would have found that only one five-year enhancement could be imposed, instead of one strike. Thus, *Davis* confirmed that a defendant like Doe is subject to retroactive changes in law.

Accordingly, the cases discussed above are not "in tension" with regard to the law of contractual interpretation governing plea bargains. Both *Arata* and *Davis,* as well as *Acuna, Gipson,* and *Lowe,* hold that the retroactive application of a change in the law does not necessarily violate a plea bargain, unless there is some demonstrable basis in the record for concluding that the parties did enter into an agreement that the defendant would only be subject to the existing law. The mere fact that the law in effect at the time is referenced in the plea bargain is insufficient to establish the defendant's right to its continued operation even after the state legislature enacts a retroactive amendment, because there is no implied incorporation of the law as it was at the time of the plea bargain. Rather, a plea bargain is deemed to encompass the Legislature's reserve power to amend the law for public policy reasons. Thus, the typical plea bargain that is almost always silent about future changes in the law does *not* implicitly "rest[] in any significant degree on a promise or agreement of the prosecutor" that the law will forever be frozen as to the defendant (see *Santobello v. New York, supra,* 404 U.S. at p. 262), and consequently does not create any implied binding agreement that the defendant will not be subject to statutory amendments.

This conclusion is bolstered by *People v. McClellan* (1993) 6 Cal.4th 367. In that case, the defendant, pursuant to a plea bargain, pleaded guilty to assault with intent to commit rape, in exchange for the dismissal of other charges and a maximum prison term of 13 years. At the plea hearing, the court forgot to advise defendant of the mandatory sex offender registration requirement under Penal Code section 290. At the sentencing hearing where the court imposed a 13-year sentence, defendant did not object upon being informed of the registration requirement. (*Id.* at pp. 371-373.) When defendant challenged that requirement on appeal, the Court of Appeal characterized the trial court's omission as a violation of the plea bargain,

and remanded the case to allow defendant either to reaffirm the plea bargain including the registration requirement or to withdraw the plea. (*Id.* at p. 374.)

This Court disagreed with the Court of Appeal. First, it noted that defendant did not suggest that the registration requirement "was a subject of negotiation (or even discussion) during the plea-negotiation process, or that the prosecutor made any promises or inducements relevant" to that law. (*Id.* at p. 379.)[11] Thus, the Court determined that "the trial court's *omission*, at the change of plea hearing, of advice regarding defendant's statutory obligation to register as a sex offender did not transform the court's error into a *term of the parties' plea agreement*." (*Ibid.*, emphases in original.) The Court observed that the registration requirement is statutorily mandated and therefore "is not a permissible subject of plea agreement negotiation; neither the prosecution nor the sentencing court has the authority to alter the legislative mandate that a person convicted of assault with intent to commit rape shall register as a sex offender pursuant to the provisions set forth in section 290." (*Id.* at p. 380.) The Court concluded:

> Because the registration requirement is statutorily mandated for every person convicted of assault with intent to commit rape, that requirement was an inherent incident of defendant's decision to plead guilty to that offense and was not added "after" the plea agreement was reached. The record does not suggest that the prosecution misled or deceived defendant; no promise or suggestion ever was made that the mandatory registration requirement would not be imposed. . . . the circumstance that a statutorily mandated consequence of a guilty plea is not

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[11] Likewise, in this case the parties had no discussion about the registration law, except that it was required. Indeed, the prosecutor testified that he did not believe he had the authority to agree that Doe would be exempt from subsequent legislative changes to the law, and that his subjective understanding was that Doe *would* be subject to changes in the law. (ER 151.)

> embodied specifically within the terms of a plea agreement does not signify that imposition of such a consequence constitutes a violation of the agreement.

(*Id.* at pp. 380-381.)[12]

Although *McClellan* did not involve a change in the law, it is nonetheless significant in two respects. First, the Court gave substantial weight to the fact that the registration requirement was statutorily mandated and could not be diluted by way of a plea bargain. Accordingly, it drew every inference in favor of ensuring that the legislative intent was effectuated. (Accord, *In re Moser* (1993) 6 Cal.4th 342 [upholding imposition of lifetime parole term notwithstanding court's misadvisement that it was 36 months; where "the subject of parole was not encompassed by the parties' plea negotiations, imposition of the statutorily mandated term of parole would not constitute a violation of the parties' plea agreement"].) In this case, plaintiff's approach would thwart the Legislature's pellucid intent that the amendments to Penal Code section 290 apply retroactively to "every person described in this section, without regard to when his or her crimes were committed or his or her duty to register pursuant to Section 290 arose, and to every offense described in this section, regardless of when it was committed." (Penal Code, § 290.46, subd. (m).)

Second, the Court in *McClellan* found that the *omission* of an advisement did not create an implicit term of the plea bargain. This supports a conclusion that the parties' *silence* on whether a defendant will

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[12] We note that in *Smith v. Doe* (2002) 538 U.S. 84, the defendants pleaded guilty to sex offenses years before the Alaska registration law was enacted. While not faced directly with a contention that the new law violated the plea bargains, the Supreme Court held that the defendants were subject to the registration law, even though registration was not discussed or even contemplated at the time of the pleas.

be subject to changes in the law does not give rise to an implied agreement that he will in fact be exempt. As noted above, "the record must affirmatively demonstrate some basis" for concluding that the parties implicitly agreed to a particular term of a plea bargain. (*People v. Ruhl, supra,* 168 Cal.App.3d at 315.) Silence does not affirmatively demonstrate agreement. (See *People v. Crandall* (2007) 40 Cal.4th 1301, 1311 (conc. opn. of Baxter, J.) ["If the record does not disclose any agreement, one way or the other, on a particular subject, there is no reason to assume a term favorable to the defendant."].)

Accordingly, in the words of the Ninth Circuit's original certified question, the "default rule" of contract interpretation as it applies to a plea bargain is that the defendant is subject to statutory amendments that are expressly made retroactive.

2. *Swenson* Is Distinguishable

Doe has cited no California case holding that a plea bargain implicitly incorporates the law in effect at that time. Instead, he primary relies on *Swenson v. File* (1970) 3 Cal.3d 389, a civil case, involving a partner at an accounting firm who withdrew and opened his own business. The Business and Professions Code statute in effect at that time provided that the withdrawing partner could not operate a similar business in the same city or town. Subsequently that statute was amended to preclude a similar business in the same county or city. This Court held that the former statute governed, because "laws enacted subsequent to the execution of an agreement are not ordinarily deemed to become part of the agreement unless its language clearly indicates this to have been the intention of the parties." (*Id.* at p. 393.)

Swenson, of course, did not involve a plea bargain. Further, it is distinguishable because the Legislature did not make the amendment to the law regarding covenants not to compete retroactive. "[L]egislative

provisions are presumed to operate prospectively, and [] they should be so interpreted 'unless express language or clear and unavoidable implication negatives the presumption.'" (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208, citation omitted; *People v. Alford* (2007) 42 Cal.4th 749, 753-755; see Pen. Code, § 3; Civ. Code, § 3.) By contrast, the Legislature clearly did intend the changes to the various criminal laws discussed above, including Penal Code section 290, to be retroactive.

Moreover, *Swenson* has never been cited in any plea bargain case, and the reason is clear: the policies governing commercial contracts and criminal plea agreements are distinctly different. The court prohibited retroactive changes in *Swenson* to prevent "uncertainty in commercial transactions," (*Swenson,* 3 Cal.3d at p. 394), while it allowed them in *Gipson* "for the public good and in pursuance of public policy" (*Gipson,* 117 Cal.App.4th at p. 1070). Such policy concerns are particularly acute where the legislative intent is to protect public safety in the criminal context, although they may arise in a variety of contexts. For example, in *Home Building & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, the United States Supreme Court held that the state could enact laws altering mortgage contracts during the Depression by postponing foreclosures and extending periods of redemption, because the reservation of state power to protect the public interest is deemed to be a part of all contracts. (*Id.* at p. 439.) The state "continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." (*Id.* at pp. 434-435,

citation omitted.) It cannot be disputed that amendments to California's penal laws that protect public safety advance the public good.[13]

A plea bargain is different from a commercial transaction because it is not simply a contract between two parties who can enter into any agreement they want; one of the parties is a public prosecutor, whose job is to ensure that justice is served, and the agreement must also be approved by the trial judge, who has the same obligation. (*People v. Martin, supra*, 51 Cal.4th at p. 79; *In re Alvernaz* (1992) 2 Cal.4th 924, 941 ["In exercising their discretion to approve or reject proposed plea bargains, trial courts are charged with the protection and promotion of the public's interest in vigorous prosecution of the accused, imposition of appropriate punishment, and protection of victims of crimes."]; see *In re Marriage of Walton, supra,* 28 Cal.App.3d at 112 [authorizing retroactive changes to statutory grounds for divorce because marriage has always been subject to the control of the

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[13] In enacting Megan's Law, the Legislature stated, "To protect the safety and general welfare of the people of this state, it is necessary to provide for continued registration of sex offenders, for the public release of specified information regarding certain more serious sex offenders, and for community notification regarding high-risk sex offenders who are about to be released from custody or who already reside in communities in this state. This policy of authorizing the release of necessary and relevant information about serious and high-risk sex offenders to members of the general public is a means of assuring public protection and shall not be construed as punitive." (Stats. 1996, ch. 908, § 1(f)); *id.* at Sec. 1(b) ["It is a compelling and necessary public interest that the public have information concerning persons convicted of offenses involving unlawful sexual behavior collected pursuant to Sections 290 and 290.4 of the Penal Code to allow members of the public to adequately protect themselves and their children from these persons"]; *id.* at Sec. 1(d) ["[T]he Legislature finds that releasing information about sex offenders under the circumstances specified in this act will further the primary government interest of protecting vulnerable populations from potential harm"]); *see Smith v. Doe*, *supra,* 538 U.S. at 99 ["The purpose and the principal effect of notification are to inform the public for its own safety"].)

Legislature, and when parties enter into such a contract "creating a relationship infused with a substantial public interest, subject to plenary control by the state," it is deemed to incorporate the reserve power of the state to enact additional laws for the public good].) Accordingly, the rationale underlying *Swenson* simply does not apply to plea bargains.

Finally, the retroactive application of new or amended laws to plea bargains is not unlimited. The parameters are imposed by the ex post facto clauses of the state and federal Constitutions. A defendant who pleads guilty cannot be subjected to increased "punishment" resulting from a retroactive change in the law. (E.g., *Lynce v. Mathis* (1997) 519 U.S. 433 [finding that application of statute cancelling early release credits to prison inmates who had already been released violated ex post facto clause]; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 297-299 [prohibiting retroactive application of provisions of Proposition 115 that added crimes that could constitute first degree murder, added new special circumstances, and allowed 16- to 18-year-olds to be sentenced to life without possibility of parole for first degree murder]; *People v. Delgado* (2006) 140 Cal.App.4th 1157, 1166-1171 [finding that new mandatory probation conditions for crimes of domestic violence violated ex post facto clause when applied to offenses committed before enactment of statute].) These constitutional provisions ensure that only nonpunitive statutory amendments will apply retroactively to defendants, including those convicted by way of a guilty plea.

In sum, this Court should conclude that, in California, plea bargains are deemed deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy.

B. Plaintiff's Approach Would Violate Equal Protection

If this Court were to accept Doe's argument and find that a plea bargain contains an implied agreement that the defendant is only subject to the existing law, the ruling would create an equal protection problem that appears insurmountable. Under that approach, defendants convicted by way of a guilty plea would avoid retroactive application of new laws under the guise of enforcement of the plea bargain, while defendants convicted by a jury would be subject to the identical statutory amendments. Thus, a defendant convicted by a jury on the same day as Doe would appear on the Megan's Law website, but Doe would not.

The treatment of two similarly situated groups in an unequal manner violates the equal protection clauses of the state and federal constitutions. (*Heller v. Doe* (1993) 509 U.S. 312.) "'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.'" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199, citation omitted.) By definition, the two groups of defendants in this scenario are similarly situated, as both have been convicted of identical crimes. The *manner* of conviction does not create a distinct class. (See *People v. Statum* (2002) 28 Cal.4th 682, 688 fn. 2 ["A guilty plea is the 'legal equivalent' of a 'verdict'" reached by a jury].)

If no suspect classification is involved, the law is then reviewed to determine if the challenged classification bears a rational relationship to a legitimate state purpose. (*People v. Hofsheier, supra,* 37 Cal.4th at p. 1200.) In *Hofsheier,* the California Supreme Court held that there was no rational basis for requiring sex offender registration for defendants convicted of voluntary oral copulation with a minor, but not for defendants convicted of voluntary sexual intercourse with a minor. (*Id.* at p. 1207.) Similarly, there is no conceivable rational basis for subjecting defendants convicted on a

jury or court verdict to statutory amendments like those involved here, while exempting defendants who plead to the identical crime. Indeed, in this case the Legislature expressly intended Megan's Law to apply to both classes of defendants. (Pen. Code, § 290.46, subd. (m).)

It cannot be disputed that courts strongly disfavor the application of statutes in a way that gives rise to constitutional error. (See *Jones v. United States* (1999) 526 U.S. 227, 239 ["'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter,'" citation omitted]; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509.) Moreover, fashioning a remedy for a perceived equal protection violation in this case would clearly be problematic. For example, this Court has already "reject[ed] out of hand the option of declaring section 290's mandatory lifetime registration provisions invalid as whole," because those provisions "serve an important and vital public purpose by compelling registration of many serious and violent sex offenders who require continued public surveillance. Total invalidation of section 290's mandatory registration provisions would undoubtedly be unacceptable to the Legislature." (*People v. Hofsheier*, *supra,* 37 Cal.4th at p. 1208.) No other option appears available.

C. Plaintiff's Approach Would Render Some Laws Unenforceable

Were this Court to find that plea bargains include an implied agreement that defendants are *not* subject to legislative changes in the law, the resulting difficulty in implementation would render at least some laws virtually unenforceable. For example, Penal Code section 290 has been amended many times since its enactment. A nonexhaustive list of the amendments to section 290 since 1990 includes the following:

In 1993, the Legislature added new crimes to the list of those that require registration, and expanded the availability of blood and saliva samples to DNA laboratories for law enforcement purposes.

In 1995, the Legislature required registration annually within 10 days of a registrant's birthday; added new offenses requiring registration; required out of state juveniles to register in California; permitted discretionary registration for any sex-related offense; required additional information on registration forms; and increased punishment for failure to register.

In 1996, the Legislature added new crimes that required registration.

In 1997, the Legislature changed the timing for annual registration to within five days of a registrant's birthday; allowed the public release of previously confidential registration information in cases of a high-risk sex offender and where a particular person could be at risk from a registrant; and precluded most registrants from receiving a certificate of rehabilitation as a means of relieving the registration requirement.

In 1998, the Legislature changed the timing of the registration requirement for transients and sexually violent predators to 90 days.

In 1999, the Legislature specified that any registrant who applies for or accepts a position with a group that works with children must disclose his status as a registrant, and implemented a DNA database for forensic purposes.

In 2000, the Legislature clarified the registration requirement when the registrant has more than one residence; required additional information on registration forms; and required out of state registrants employed or attending school in California to register.

In 2002, the Legislature changed the timing of the registration requirement for transients to 60 days; required registrants employed at or enrolled in a school to register with campus police; and precluded

registrants convicted of sex crimes with children under 16 from working with a group that works with children.

In 2004, the Legislature established the Megan's Law website and corresponding requirements.

In 2005, the Legislature expanded the offenses that required posting on the Megan's Law website.

In 2006, the Legislature added new offenses that required registration; expanded the crime of failure to register; and created a statewide system of pre-sentence risk assessment for registered sex offenders.

In 2008, the Legislature added new offenses that required registration.

In 2010, the Legislature required paroled sex offenders to participate in sex offender management programs; required probation departments to make a presentence assessment of every defendant convicted of a registerable offense; and required the risk assessment score of specified sex offenders for future violence to be included on the website.

If plea bargains involving registerable sex offenses "freeze" section 290 to those requirements that were in effect at the time of the plea, implementation of the rule would be an administrative quagmire. It would require the Department of Justice to examine its entire directory of registration records. The Department would have to determine which defendants were convicted by a plea; whether the plea involved a bargain; and if so the exact date of conviction. Such information would be necessary to determine which defendants were impliedly immune from which statutory amendments. The manner of conviction, by plea or jury, is not currently supplied. The Department of Justice would have to obtain or reconstruct records from other sources. There would be no assurance the Department could reliably do so in some older cases.

Even assuming the feasibility of such a herculean task, the Megan's Law website then would have to be recoded completely in order to capture

the innumerable variations in legal status among the state's thousands of registrants. At the end of such a process, section 290's viability as an enforcible statute for the safety of the public would be at least undermined, and at most eviscerated. And section 290 is only one such statute.

The Legislature's intent to "allow members of the public to adequately protect themselves and their children" from sex offenders would be stymied under Doe's plea bargain theory. As this case illustrates, some defendants who otherwise qualify for posting on the Megan's Law website would be shielded from public notification, thereby preventing families from discovering whether registered sex offenders live in their neighborhoods. It is unknown how many defendants would fall into this category because their plea bargain occurred before Megan's Law was enacted. (See generally *In re Alvernaz* (1992) 2 Cal. 4th 924, 933 ["Commentators have estimated that in most jurisdictions, between 80 and 90 percent of criminal cases are disposed of by guilty pleas, which, in the majority of cases, are the product of plea bargains," citations omitted].) This Court must construe statutes "in a manner that effectuates the intent of the Legislature." (*People v. Scott* (2009) 45 Cal.4th 743, 757.) Reading a rule of implied incorporation of the law as it was at the time of the plea bargain into all plea agreements would vitiate, not effectuate, the Legislature's intent to enact retroactive laws.

CONCLUSION

For the reasons stated, the answer to the certified question of the Ninth Circuit Court of Appeal is that under California law of contract interpretation as applicable to the interpretation of plea agreements, the terms of a plea agreement are affected by changes in the law.

Dated: August 15, 2011

Respectfully submitted,

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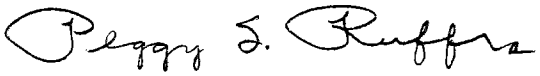

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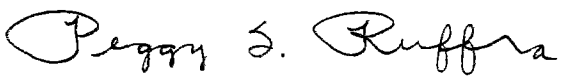
CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 7653 words.

Dated: August 15, 2011

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY CERTIFIED MAIL

Case Name: **John Doe v. Kamala D. Harris**
No.: **S191948**

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 that same day in the ordinary course of business.

On August 15, 2011, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope as certified mail with postage thereon fully prepaid and return receipt requested, 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:

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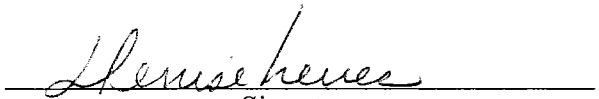
I declare under penalty of perjury under the law of the State of California the foregoing is true and correct and that this declaration was executed on August 15, 2011, at San Francisco, California.

Denise Neves
Declarant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