IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

vs.

MIGUEL ANGEL JIMENEZ,

Defendant and Respondent.

COURT NO. S249397

Court of Appeal
No. B283858

Ventura County
Superior Court
No. 2016041618

OPENING BRIEF ON THE MERITS

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TO CHIEF JUSTICE TANI CANTIL-SAKAUYE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant, the People of the State of California, by and through Gregory D. Totten, District Attorney of the County of Ventura, respectfully submits this opening brief on the merits.

ISSUE PRESENTED

Does the unauthorized use of the personal identifying information of another in violation of section 530.5, subdivision (a) of the Penal Code, constitute theft subject to reclassification as a shoplifting as defined by Penal Code section 459.5, pursuant to Penal Code section 1170.18 and Proposition 47?

OVERVIEW OF PROPOSITION 47

On November 4, 2014, the voters approved Proposition 47, the "Safe Neighborhoods and Schools Act" ("the Act"). Its stated goal was "to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70.) Though the Act aims to reduce spending, this court has recognized that "the purpose of saving money does not mean we should interpret the statute in every way that might maximize any monetary savings." (*People v. Morales* (2016) 63 Cal.4th 399, 408.)

Proposition 47 targets specific, enumerated theft and drug crimes as offenses that should be penalized in most instances as misdemeanors. (Pen. Code,[1] §§ 1170.18, 459.5, 490.2.) The act allows a person convicted of a felony to be resentenced if the person would have been guilty of a misdemeanor had the Act been in effect at the time of their offense. (See § 1170.18, subds. (a)-(i); Voter Information Guide, *supra*, text of Prop.47 §§ 2-3.) One way an offense may be deemed a misdemeanor is pursuant to section 490.2, which provides that "obtaining any

[1] Subsequent statutory references, if undesignated, are to the Penal Code.

property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft."[2]

In section 459.5, Proposition 47 created the new crime of shoplifting, "defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (§ 459.5, subd. (a).)[3] In most cases, shoplifting is a misdemeanor but if a defendant has an enumerated prior conviction the crime may be punished as a felony.

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[2] Section 490.2, subdivision (a) provides in full:

> Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290.

[3] Section 459.5, subdivision (a) provides in full:

> Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor, except that a person with one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290 may be punished pursuant to subdivision (h) of Section 1170.

(§ 459.5, subd. (a).) The shoplifting statute has a defined preclusive effect on the charging of "burglary or theft of the same property." (§ 459.5, subd. (b).)

SUMMARY OF ARGUMENT

Respondent was charged with violations of section 530.5, subdivision (a)[4] (§ 530.5(a)), colloquially known as "identity theft." Section 530.5(a) provides in pertinent part: "Every person who willfully obtains personal identifying information ... of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense ...." and shall be punished as either a misdemeanor or felony. Section 530.5(a) was neither amended by Proposition 47 nor made expressly subject to the resentencing provisions in section 1170.18. For this reason, the charged crime in this case can only be reduced or reclassified based on the direction found in sections 459.5 and 490.2. Application of the normal rules of statutory construction means the questions raised in this case are answered by the text of sections 490.2 and 459.5.

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[4] Section 530.5(a) provides in full:

> Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170.

The trial court reclassified respondent's convictions as shoplifting, and the Court of Appeal agreed. But, the public offense defined in section 530.5(a) is not an act of shoplifting. The conduct required for its violation reaches beyond the mere and incidental entry into a commercial establishment that would be punished by the shoplifting statute, and the victim of the misuse of identity is not the store but is instead the person or entity whose information was used. Moreover, section 530.5(a) is not included in the unambiguous and concise list of the crimes which cannot be jointly or alternately charged when a defendant's conduct meets the definition of shoplifting.

Respondent has relied primarily on the language found in subdivision (b) of section 459.5 requiring that an act of shoplifting be charged as shoplifting, but that direction can only be properly understood in light of the immediately following phrase proscribing only additional burglary or theft charges related to "the same property." The preclusion does not apply here. The misuse of identity in violation of section 530.5(a) as charged in this case is defined not as theft or grand theft but instead as a public offense. More importantly, the crime lacks the "hallmarks of theft" relied upon by this court when construing the Act's application to other statutes. As such, a violation of section 530.5(a) is not subject to the preclusive impact of subdivision (b) of section 459.5. Furthermore, the personal identifying information at issue in a charged violation of section 530.5(a) is not the same property that would be at issue in a shoplifting charge.

Extrinsic considerations also support the conclusion that identity theft was excluded from Proposition 47's ameliorative reach. No part of the initiative or the voter materials informed the voters that the unauthorized use of their personal identifying information would be subject to reduced penalties if the initiative passed. To the contrary, the voters' materials signaled that identity theft is a different type of offense by informing voters that check forgery committed in combination with identity theft could still be prosecuted as a felony. (§ 473, subd. (b).)

STATEMENT OF THE CASE

Respondent, Miguel Angel Jimenez, was charged by Information with two felony counts of the acquisition and unauthorized use of the personal identifying information of another, in violation of section 530.5 (a). It was further alleged that he had suffered a prior strike conviction for assault with a deadly weapon and a prison prior. (§§ 245, subd. (a)(1); 667, subds. (c)(1), (e)(1); 1170.12, subds. (a)(1), (c)(1); 1170, subd. (h)(3); 667.5, subd. (b).)

On two separate occasions in June of 2016, respondent went to Loan Plus, a check cashing company in Oxnard. On each occasion, respondent presented a check allegedly issued from the corporation known as OuterWall, Inc. At the time respondent cashed them, the checks were made payable to respondent, for $632.47 and $596.60, respectively, and OuterWall's account information appeared on both checks. In fact, neither check had been issued by OuterWall in respondent's name

and respondent did not have permission to possess, issue, or use the checks or the personal identifying information contained on the checks.[5]

Respondent was charged with neither burglary nor theft from Loan Plus. (§§ 459, 484.) He was charged only with two counts of the willful acquisition of the personal identifying information (bank account number) of OuterWall, Inc. and its unconsented to use for an unlawful purpose. (§530.5 (a).)

In February 2017, a jury convicted respondent of both felony counts and he admitted the special allegations. Before he was sentenced, respondent filed a motion to reduce his conviction offenses to misdemeanor shoplifting pursuant to § 459.5, § 1170.18, Proposition 47, and *People v. Gonzales* (2017) 2 Cal.5th 858 (*Gonzales I*). Thereafter, at respondent's May 26, 2017 sentencing hearing, over the People's objection, the court granted respondent's motion and reclassified the felony convictions to misdemeanor shoplifting convictions under section 459.5.

The People filed a timely notice of appeal, and the case was heard in the Second Appellate District, Division Six. The Court of Appeal issued its published decision on May 8, 2018, affirming the trial court's order. (*People v. Jimenez* (2018) 22 Cal.App.5th 1282.) The People's petition for review was granted by this court on July 26, 2018.

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[5] Cashing checks stolen from a company is sufficient to establish a violation of section 530.5(a). (*People v. Barba* (2012) 25 Cal.App.4th 214, 228.) Penal Code section 530.55, subdivision (a) provides: "For purposes of this chapter, 'person' means a ... firm, association, organization, partnership, business trust, company, corporation, limited liability company ...."

ARGUMENT

I.

STANDARD OF REVIEW

Whether a defendant is entitled to have a conviction reclassified as a misdemeanor under Proposition 47 is a question of statutory interpretation that is reviewed de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71; *People v. Gonzales* (2018) __ Cal.5th __ [237 Cal.Rptr.3d 193, 198] (*Gonzales II*).)

Voter initiatives are construed by the same principles applied to legislative enactments. (*People v. Johnson* (2015) 61 Cal.4th 674, 682.) The inquiry begins with the "language of the statute, to which we give its ordinary meaning and construe in the context of the statutory scheme." (*Ibid.*) The process begins with the statutory language because "the statutory language is generally the most reliable indicator of legislative intent." (*People v. Leiva* (2013) 56 Cal.4th 498, 506, citing *People v. King* (2006) 38 Cal.4th 617, 622 [punctuation omitted].) For this reason, when the statutory language is unambiguous, "the plain meaning controls" (*People v. Leiva, supra*, 56 Cal.4th at p. 506, citing *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 519), and "there is no need for construction ...." (*People v. Zambia* (2011) 51 Cal.4th 965, 972.)

The statutory language is not considered in isolation. Instead the court must look to "'the entire substance of the statute ... in order to determine the scope and purpose of the provision .... [Citation.]' [Citation.]" (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) Every "word, phrase, sentence, and part of an act" is significant.

(*People v. Canty* (2004) 32 Cal.4th 1266, 1276-1277.) "'If the Legislature has provided an express definition of a term, that definition ordinarily is binding on the courts.'" (*Ibid.*, citing *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063.) Omissions are also significant: "failure to make changes in a given statute in a particular respect when the subject is before the Legislature, and changes are made in other respects, is indicative of an intention to leave the law unchanged in that respect." (*Kusior v. Silver* (1960) 54 Cal.2d 603, 618.)

II.

SECTION 530.5(A) DEFINES A PUBLIC OFFENSE WHICH IS NOT THEFT

Misuse of identity in violation of section 530.5(a) is commonly referred to as "identity theft." However convenient this term of art has become, it does not define the crime itself. (See *People v. Barba* (2012) 211 Cal.App.4th 214, 226-227 [use of shorthand term "identity theft" does not alter statute to require proof of personation].) Instead, section 530.5(a) provides that "[e]very person who willfully obtains personal identifying information ... and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services ... or medical information without the consent of that person, is guilty of a public offense ...."

"Notably absent from [the elements of identity theft] is any requirement—central to the crime of theft—that the information be stolen at all. (*People v. Thuy Le Truong* (2017) 10 Cal.App.5th 551, 561-562.) "Theft ... requires a taking with intent to steal the property—that is, the intent to permanently deprive the owner of its

possession." (*People v. Page* (2017) 3 Cal.5th 1175, 1182 [*Page*].) For a violation of section 530.5(a), however, the information does not have to be taken away from its owner. By possessing a victim's identifying information, "the defendant does not deprive the rightful owner of it; any number of people can be in simultaneous possession of the same information." (*People v. Thuy Le Truong, supra,* 10 Cal.App.5th at pp. 561-562.) Nor does acquisition of the personal identifying information have to be without the owner's consent or otherwise fraudulent, as required by the definition of theft in section 484.[6] (See *In re Rolando S.* (2011) 197 Cal.App.4th 936, 941 [act of memorizing password shared in unsolicited text message was sufficient to establish minor willfully obtained the information].) Moreover, any unlawful use will satisfy the second element. A defendant might use the victim's identity to obtain cash or goods but also might try to obtain medical information or infiltrate a victim's social media accounts. (See *ibid.* [unlawful purpose includes causes of action under civil tort law].)

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[6] Section 484, subdivision (a), which defines theft, provides in pertinent part:

> Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.

Whatever the unlawful use, "no injurious intent or result is required." (*People v. Hagedorn* (2005) 127 Cal.App.4th 734, 744 [defendant used victim's identity to cash check which was payment for work performed by defendant in victim's name].) "It is evident from the legislative history of section 530.5 and *Hagedorn* that the purpose of section 530.5, subdivision (a) is to criminalize the willful use of another's personal identifying information, regardless of whether the user intends to defraud and regardless of whether any actual harm or loss is caused." (*People v. Johnson* (2012) 209 Cal.App.4th 800, 816-818 [violation of section 530.5(a) does not require proof that victim was harmed].)

The Legislature did not characterize section 530.5(a) as a theft offense. In *Romanowski*, this court analyzed whether theft of access cards in violation of section 484e[7] was subject to reduction pursuant to section 490.2." (*People v. Romanowski*

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[7] Section 484e provides:

> (a) Every person who, with intent to defraud, sells, transfers, or conveys, an access card, without the cardholder's or issuer's consent, is guilty of grand theft.
> (b) Every person, other than the issuer, who within any consecutive 12-month period, acquires access cards issued in the names of four or more persons which he or she has reason to know were taken or retained under circumstances which constitute a violation of subdivision (a), (c), or (d) is guilty of grand theft.
> (c) Every person who, with the intent to defraud, acquires or retains possession of an access card without the cardholder's or issuer's consent, with intent to use, sell, or transfer it to a person other than the cardholder or issuer is guilty of petty theft.
> (d) Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person, without the cardholder's or issuer's consent, with the intent to use it fraudulently, is guilty of grand theft.

(2017) 2 Cal.5th 903, 908 [*Romanowski*].) Added by Proposition 47, "section 490.2, subdivision (a), mandates misdemeanor punishment for a defendant who 'obtain[ed] any property by theft' where the property is worth no more than $950." (*Page*, *supra*, 3 Cal.5th at p. 1183.) The answer in *Romanowski* therefore hinged on whether section 484e was a theft crime. Noting first that section 484e was defined as "grand theft" (§ 484e, subd. (d)), this court next observed "[s]ection 484e also resides in chapter 5 of the Penal Code, which is titled 'Larceny.'" (*Romanowski*, *supra*, 2 Cal.5th at p. 908.) Based on the statutory definition and chapter placement, this court concluded: "In just about every way available, the Legislature made clear that theft of access card information is a theft crime." (*Ibid.*)

The same conclusion cannot be made about the misuse of identity at issue in this case. Unlike section 484e, section 530.5(a) is defined as a public offense and contains no references to theft or its hallmarks. Moreover, section 530.5 "is placed in the chapter of the Penal Code defining 'False Personation and Cheats,' which includes crimes such as marriage by false pretenses (§ 528), and falsifying birth certifications and licenses (§§ 529a, 529.5)." (*People v. Liu* (2018) 21 Cal.App.5th 143, 151, review granted on a different issue, April 10, 2018, S248130; see also *People v. Sanders* (2018) 22 Cal.App.5th 397, 403-404, review granted and held behind this case, July 25, 2018, S248775.) Here, with regard to misuse of identity, the Legislature has used "just about every way available," to make clear that a violation of section 530.5(a) is *not* a theft offense.

Aware of its statutory definition, the Legislature has specifically listed section 530.5 when it has meant to include it in a statute. For example, subdivision (d) of section 368 specifies:

> Any person who is not a caretaker who violates any provision of law proscribing theft, embezzlement, forgery, or fraud, *or who violates Section 530.5 proscribing identity theft*, with respect to the property or personal identifying information of an elder or a dependent adult, and who knows or reasonably should know that the victim is an elder or a dependent adult, is punishable as follows.

(Emphasis added.) Identity theft is expressly listed alongside theft, embezzlement, forgery, and fraud, because the misuse of identifying information it proscribes is not, by definition, in the same classification of crimes.

That section 530.5 has developed as a non-theft offense is significant. In *Gonzales I*, this court held that the electorate is presumed to have understood, based on the historical development of the burglary and theft statutes, that the use of the term "larceny" in section 459.5 included each of the three different types of theft as enumerated in section 484. (*Gonzales I, supra*, 2 Cal.5th 858, 869-871.) The defendant in *Gonzales I* was charged with check forgery. (*Ibid.*) Check forgery, under section 476, applies when a person makes or uses a forged check "with intent to defraud." Fraudulently depriving another person of money or goods is, by definition theft. (See § 484.) But because shoplifting applies to "larceny," it was necessary for this court to determine whether "theft" and "larceny" could be used interchangeably. To do so, this court turned to section 490a, which was enacted by the Legislature to consolidate "all three ways in which property could be unlawfully stolen" into the

definition of theft. (*Gonzales I, supra*, 2 Cal.5th at p. 865.) Section 490a provides that "[w]herever any law or statute of this state refers to or mentions *larceny, embezzlement, or stealing*, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." [Emphasis added.] With these statutes in mind, this court easily concluded the use of the term larceny in the definition of shoplifting included theft crimes like check forgery such that an *entry* to commit check forgery was an act of shoplifting and not burglary. (*Gonzales I, supra*, 2 Cal.5th at pp. 865, 870.)

The same conclusion cannot be reached in this case. A violation of section 530.5(a) requires neither a taking nor any intent to defraud. (*People v. Hagedorn, supra,* 127 Cal.App.4th at p. 744; People *v. Johnson, supra*, 209 Cal.App.4th at pp. 816-818.) Moreover, the terms theft, larceny, embezzlement, and stealing, "the three ways in which property can be unlawfully stolen" (*Gonzales I, supra*, 2 Cal.5th at p. 865) are entirely absent from section 530.5(a). As this court reiterated in *Gonzales I*, "'a judgment of conviction of theft, based on a general verdict of guilty, can be sustained only if the evidence discloses the elements of one of the consolidated offenses.'" (*Id.*, at pp. 865-866, citing *People v. Ashley* (1954) 42 Cal.2d 246, 258.) For this reason, misuse of identity in violation of section 530.5(a), by any name, is not theft.

This court's decision in *Page* does not alter the conclusion that section 530.5(a) is not a theft offense. In *Page*, this court determined the application of Proposition 47 to violations of section 10851 of the Vehicle Code, which is not only

defined as a public offense, but is found outside of the Penal Code. (*Page*, *supra*, 3 Cal.5th 1175.) In this sense, *Page* establishes that such designation and chaptering will not always be determinative of the issue. Even so, *Page* did not expand the definition of theft or stretch the application of section 490.2 beyond its plain language. Instead, this court relied on its own established precedent distinguishing "between the theft and non-theft forms of" Vehicle Code section 10851. (*Page*, *supra,* 3 Cal.5th at p. 1183, citing *People v. Garza* (2005) 35 Cal.4th 866, 871.) Adhering to precedent, *Page* repeated: "Unlawfully taking a vehicle with the intent to permanently deprive the owner of possession is a form of theft .... For this reason, a defendant convicted under [Vehicle Code] section 10851(a) of unlawfully taking a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction ...." (*Ibid.*)

Page's conclusion, that "obtaining an automobile worth $950 or less by theft constitutes petty theft under section 490.2" (*Page*, *supra,* 3 Cal.5th at p. 1187), does not, however, advance respondent's cause here. "It is important to remember that *Page* involved vehicle theft, which has at all times been defined as grand theft. (§ 487, subd. (d)(1) ['Grand theft is committed ... [w]hen the property taken is ... an automobile'].)" (*People v. Soto* (2018) 23 Cal.App.5th 813, 824-825, review denied, Aug. 29, 2018, S249622.) Misuse of identity in violation of section 530.5(a), on the other hand, has not been similarly defined as theft. Instead, the misuse of identity at issue in this case more closely resembles the non-theft driving offense also defined in Vehicle Code section 10851. Unlawfully driving a vehicle, like the misuse of identity

at issue here, requires neither a felonious taking nor an intent to permanently deprive the owner of possession. (*Page*, *supra,* 3 Cal.5th at p. 1183.) Instead, the offense of unlawfully driving a vehicle penalizes the unconsented use of another's car in the same way section 530.5(a) penalizes the unconsented use of another's identification. Neither offense is theft as defined in section 484, as consolidated in section 490a, or as contemplated in sections 459.5(b) or 490.2.

This court's decisions in *Romanowski* and *Page* have been cited as support for the argument that the misuse of identity charged in this case must be reclassified as shoplifting. But as the Court of Appeal has recently explained, both of those cases "involve crimes that were previously *classified* as grand theft," and "[n]othing in *Romanowski* or *Page* suggests that section 490.2 extends to any course of conduct that happens to include obtaining property by theft worth less than $950." (*People v. Soto*, *supra*, 23 Cal.App.5th at p. 822 [emphasis original].) In *Soto*, the Court of Appeal drew a useful distinction between the theft crimes considered in *Romanowski* and *Page* and offenses which are "not identified as grand theft and require[] *additional necessary elements* beyond [theft]." (*Ibid.* [emphasis original].) The *Soto* court labeled the second category of offenses "theft plus" offenses. (*Ibid.*) The "theft-plus" offense at issue in *Soto* was theft from an elder, in violation of section 368, subdivision (d), that occurred when the defendant used his grandmother's birthdate and social security number to obtain a line of credit in her name. (*Id.*, at p. 816.)

The Court of Appeal in *Soto* did not specifically consider whether a violation of section 530.5(a) should, by itself, be considered theft, but the "theft plus" logic, when applied to the misuse of identity at issue here, supports the position that the crime is not subject to resentencing. As the facts of this case demonstrate, a victim's personal identifying information might be misused to commit a theft. Even when this is true, "*additional necessary elements*" (*People v. Soto*, *supra*, 23 Cal.App.5th at p. 822 [emphasis original]), must be proven before a charged violation of section 530.5(a) can be sustained, namely the initial acquisition of the victim's personal identifying information and the fact that the ultimate use of that identification occurred without the victim's consent. As in *Soto*, the existence of additional necessary elements takes section 530.5(a) out of reach of Proposition 47.

"The electorate 'is presumed to be aware of existing laws and judicial construction thereof,'" and when "the courts have construed the meaning of any particular word, or expression, and the [L]egislature subsequently undertakes to use these exact words in the same connection, the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts." (*Gonzales I, supra*, 2 Cal.5th at p. 869 [citation and internal punctuation omitted].) These principles permit the presumption the electorate anticipated the outcomes in *Gonzales I*, *Romanowski*, and *Page*, but they do not support resentencing in this case. Instead, the electorate must be presumed to have known that general statutory references to theft are properly understood only as references to theft as defined in section 484 and consolidated in section 490a, and not to the misuse of

personal identifying information at issue here. When limiting the list of precluded offenses in the shoplifting statute to "burglary or theft," and incorporating the value limitations in section 490.2 only into theft crimes, moreover, the electorate is presumed to have been aware "of the ramifications of its choice of language." (*Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 850, fn. 3; accord *Gonzales I, supra*, 2 Cal.5th at p. 871.) In other words, the voters knew misuse of identity was not a theft offense and intended that section 530.5(a) would be excluded from the preclusive effect of section 459.5 as well as from the value limitation in section 490.2.

III.

THE NARROW DEFINITION OF SHOPLIFTING IN SECTION 459.5 DOES NOT INCLUDE THE MISUSE OF IDENTITY IN VIOLATION OF SECTION 530.5(A)

The definition of shoplifting is found in subdivision (a) of section 459.5, which provides a person commits shoplifting upon "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (§ 459.5, subd. (a).) As this court explained in *Gonzales I, supra,* "Section 459.5 provides a specific definition of the term 'shoplifting.' In doing so, it creates a term of art, which must be understood as it is defined..." (*Gonzales I, supra,* 2 Cal. 5th at p. 871.) "'[W]hen the Legislature uses a term of art, a court construing that use must assume that the Legislature was aware

of the ramifications of its choice of language.' (*Ruiz v. Podolsky*, *supra*, 50 Cal.4th at p. 850, fn. 3.) The same principle applies to the electorate." (*Gonzales I*, *supra*, 2 Cal.5th at p. 871.)

It is no coincidence that the elements necessary to prove shoplifting so closely track those required to prove burglary. "The drafters of the Act clearly had burglary in mind when defining 'shoplifting.'" (*Gonzales I*, *supra*, 2 Cal.5th at p. 869.) Accordingly, this court has already determined that shoplifting encompasses only the act of entering into a commercial establishment with the requisite intent; no actual theft is required. In this way, the definition of shoplifting deviates from the "colloquial understanding" of the word "shoplifting." (*Gonzales I*, at p. 871; accord *People v. Lopez* (2018) 26 Cal.App.5th 382 [237 Cal.Rptr.3d 130, 135-136] [defendant who enters commercial establishment without intent to commit larceny may be prosecuted for theft committed once inside].)

Because the crime of shoplifting occurs, if at all, only upon entry into a commercial establishment, acts that occur before or after entry fall outside the definition of the crime. Respondent's acquisition of OuterWall's identifying information necessarily occurred before he entered Loan Plus and respondent's unauthorized use of that information occurred after his entry was complete. For this reason, none of the acts necessary to prove that respondent violated section 530.5(a) was an act of shoplifting as defined in subdivision (a) of section 459.5. In fact, the two crimes share no common elements. Because the entirety of the conduct constituting the misuse of identity is distinct from the single act defined as shoplifting,

the *Williamson* rule regarding the application of special versus general statutes does not apply to this case. (*In re Williamson* (1954) 43 Cal.2d 651, 654 [where general statute standing alone includes same matter as special act, and conflicts with it, special act is considered an exception to general statute].) The law does not, therefore, mandate that respondent's course of conduct be charged as shoplifting.

The Court of Appeal read this court's opinion in *Gonzales I*, as holding that theft by false pretenses, and by analogy the crime in this case, "'now constitutes shoplifting under [section 459.5, subdivision (a)].'" (*People v. Jimenez*, *supra*, 22 Cal.App.5th 1282, 1289; citing *Gonzales I*, *supra*, 2 Cal.5th 585, 862.) But this court had neither reason nor occasion to reclassify theft by false pretenses as shoplifting because the only charge before it was burglary in violation of section 459. The lengthy discussion about the nature of the crime of cashing a stolen check was necessary because the People had argued Gonzales's intent to cash his grandmother's checks was not the same as the intent to commit larceny required in the shoplifting statute. (*Gonzales I*, *supra*, 2 Cal.5th at pp. 868-869.) This court disagreed. (*Id.*, at p. 862.) Because cashing a stolen check, "traditionally regarded as theft by false pretenses" is a form of larceny pursuant to section 490a, this court held that "a defendant's *act of entering a bank* to cash a stolen check for less than $950 ... now constitutes shoplifting under the statute." (*Ibid.* [emphasis added].)

The holding in *Gonzales I* did not expand the definition of shoplifting to include acts committed before or after entry. The opinion in this case however, does extend the act of shoplifting, reaching beyond the entry to cover an additional, non-

theft crime. The Court of Appeal believed the result was mandated because "Jimenez's conduct is identical to Gonzales's conduct. They both entered a commercial establishment during business hours for the purpose of cashing stolen checks valued at less than $950 each." (*People v. Jimenez*, *supra*, 22 Cal.App.5th at p. 1289; citing *Gonzales I*, *supra*, 2 Cal.5th at pp. 862, 868-869.) But this court recognized in *People v. Martinez* (2018) 4 Cal.5th 647, that similarity of conduct is not the determinative factor. The critical question is instead whether the felony charge "'would have been ... a misdemeanor under [Proposition 47] had [Proposition 47] been in effect at the time of the offense....'" (*People v. Martinez*, *supra, at p.* 652; citing § 1170.18, subd. (a).) *Gonzales I* established that a charged violation of section 459, second degree burglary, based upon a theory that the defendant entered with the intent to cash a stolen check, would be shoplifting under Proposition 47. But respondent was never charged with burglary or theft. Respondent was charged with and convicted only of the unauthorized use of OuterWall's personal identifying information.

This court's precedent confirms that the nature of the charged offense, and not merely the underlying conduct, must drive the determination of whether the charge is subject to Proposition 47 resentencing. For example, in *Romanowski*, this court found section 484e, proscribing theft of access card information, was subject to resentencing because section 484e is defined as grand theft and as such is subject to the value limitations established by Proposition 47 in section 490.2. (*Romanowski*, *supra*, 2 Cal.5th 903, 908-909.) Similarly, the Court of Appeal refused to subject a forgery

crime to resentencing pursuant to the value limitations set in section 473, subdivision (b), when the forged instrument was not one of the "seven specific instruments" identified "for reduced punishment." (*People v. Bloomfield* (2017) 13 Cal.App.5th 647, 652-653, review denied, Oct. 25, 2017, S243918.) "By not using the language in section 470(d) and instead identifying only seven specific instruments for reduced punishment in section 473(b), the voters deliberately signaled their intent not to include all forgery offenses in Proposition 47." (*Ibid.*)

In *Martinez*, this court had an opportunity to adopt the similar circumstances analysis but refused to do so. (*People v. Martinez*, *supra*, 4 Cal.5th 647, 653-654.) The defendant in *Martinez* argued that the conduct underlying his 2007 felony conviction for transportation of methamphetamine (Health & Saf. Code, § 11379) was, after the Legislature's 2013 amendment to that statute, no different than misdemeanor possession of methamphetamine in violation of Health and Safety Code section 11377. Proposition 47, through section 1170.18, specifically authorizes resentencing for defendants convicted of a felony violation of Health and Safety Code section 11377. As the conduct was the same, Martinez argued, his conviction also should be subject to resentencing and reduction. (*People v. Martinez*, *supra*, 4 Cal.5th 647, 653.) Despite the similarities in the conduct, this court rejected the argument for resentencing "because none of the statutes amended or enacted by Proposition 47 altered the offense set forth in section 11379." (*Id.*, at pp. 677-678.)

Adhering to the same "faithful application of Proposition 47's text" as this court did in *Martinez*, other courts faced with "similar conduct" arguments have denied relief when the charged offense was not reduced by the Act. (*Martinez*, *supra*, 4 Cal.5th at p. 656 (conc. opn. of Liu, J.).) One such example is found in *People v. Soto*, *supra*, where the Court of Appeal determined that the defendant's conviction for theft from an elder was not a theft offense under section 490.2 and thus not subject to resentencing under section 1170.18. (*People v. Soto*, *supra*, 23 Cal.App.5th 813.) In reaching its conclusion, the *Soto* court observed that eligibility for Proposition 47 relief has not been extended to include what the Court of Appeal labeled a "pure 'theft plus' offense, i.e., one that is not identified as grand theft and requires *additional necessary elements* beyond the theft itself." (*Id.*, at p. 822 [emphasis in original].) The Court of Appeal recognized that Soto's conduct was "similar in some ways to the conduct at issue in *Gonzales I* and *Romanowski*" (*id.*, at p. 824), but did not determine the case based on the similarities. Instead, noting that "[n]othing in *Romanowski* or *Page* suggests that section 490.2 extends to any course of conduct that happens to include obtaining property by theft worth less than $950," the Court of Appeal denied relief because the charged violation of section 368, subdivision (d), "require(d) *additional* necessary elements." (*People v. Soto*, *supra*, 23 Cal.App.5th at p. 823 [emphasis in original].)

Interpreting the shoplifting statute in a way that mandates reclassification not only for the crime of burglary with the intent to misuse identity, but also the violation of section 530.5(a) itself, expands the statutory definition in a manner that is neither

authorized by the text nor justified by policy considerations. *Soto* cautioned:

> "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Theft is a lesser included offense of robbery. [Citations.] A robber might take property by larceny worth less than $950. [Citation.] An over-expansive reading of *Romanowski* and *Page* might construe that "theft-plus" offense as petty theft under section 490.2. Such a construction would thwart Proposition 47's objective to reduce sentences for *nonviolent* crimes while shifting spending toward *more serious* offenses. [Citation.]

(*People v. Soto*, *supra*, 23 Cal.App.5th at pp. 822-823.) The same cautionary note is appropriate here. The overly expansive reading of *Gonzales I* urged by respondent would insulate a defendant from prosecution for any number of additional criminal acts and courses of conduct that begin before and conclude after an act of shoplifting, including robbery when the victim is an employee or customer of a commercial establishment. (*People v. Estes* (1983) 147 Cal.App.3d 23, 26-27.)

Respondent contends, and the Court of Appeal agreed, that subdivision (b) and this court's opinion in *Gonzales I*, required the charged violations of section 530.5(a) be reclassified as shoplifting. But this court's holding, that a *burglary* charge, predicated on an entry "with the intent to commit identity theft" by "cashing the same stolen check to obtain less than $950," was precluded by the shoplifting statute (*Gonzales I*, *supra*, 2 Cal.5th at pp. 876-877), does not demand reclassification of the misuse of identity offense at issue here. Subdivision (b) of section 459.5, which directs that an act of shoplifting be "charged as shoplifting" applies only when the

charged conduct meets the statutory definition of shoplifting such as the burglary at issue in *Gonzales I*.

To benefit from this statutory direction, respondent equates his crime with shoplifting by focusing only on that part of the crime committed inside the premises of Loan Plus. He has therefore argued that he committed a violation of section 530.5(a) in the course of a shoplifting. This characterization, however, is inapt. Respondent did not enter Loan Plus with the intent to violate section 530.5(a) because that crime was already in progress. He may have entered Loan Plus with the intent to cash OuterWall's check, but to violate section 530.5(a), respondent first had to acquire OuterWall's personal identifying information, here the corporation's name and address and checking account number. (See § 530.55, subd. (b).)[8] It is undisputed that respondent obtained OuterWall's checks before he arrived at Loan

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[8] In its entirety, subdivision (b) of section 530.55 reads

> For purposes of this chapter, "personal identifying information" means any name, address, telephone number, health insurance number, taxpayer identification number, school identification number, state or federal driver's license, or identification number, social security number, place of employment, employee identification number, professional or occupational number, mother's maiden name, demand deposit account number, savings account number, checking account number, PIN (personal identification number) or password, alien registration number, government passport number, date of birth, unique biometric data including fingerprint, facial scan identifiers, voiceprint, retina or iris image, or other unique physical representation, unique electronic data including information identification number assigned to the person, address or routing code, telecommunication identifying information or access device, information contained in a birth or death certificate, or credit card number of an individual person, or an equivalent form of identification.

Plus. He could not, therefore, have harbored the intent to steal OuterWall's personal identifying information as he was entering Loan Plus.

IV.

MISUSE OF IDENTITY IS NOT SUBJECT TO THE PRECLUSIVE EFFECT OF A CHARGE OF SHOPLIFTING

This second sentence in subdivision (b), brings the first sentence into better focus by specifying the preclusive effect a charge of shoplifting will have on prosecutorial discretion: "No person who is charged with shoplifting may also be charged with burglary or theft of the same property." (§ 459.5, subd. (b).) The limited nature of the preclusion in subdivision (b) confirms the electorate did not intend a defendant's act of shoplifting to insulate him from accountability for all other criminal acts, but only to ensure prosecutors would not also pursue charges for second degree burglary or theft. As this court has recognized, "[t]he expression of some things in a statute necessarily means the exclusion of other things not expressed." (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852.) Here, the expression of preclusion of two types of offenses excludes preclusion of other offenses. (See *ibid.*) In directing the preclusive impact of shoplifting only at "burglary or theft of the same property" (§ 459.5, subd. (b)), the electorate is presumed to have understood and used the terms "in accordance with their established legal or technical meaning." (*People v. Carter* (1996) 48 Cal.App.4th 1536, 1540.) Thus, because a violation of section 530.5(a) is neither burglary nor theft, the charge is not precluded by the shoplifting statute.

As this court observed: "The statute's use of the phrase 'the same property' confirms that multiple *burglary* charges may not be based on entry with intent to commit different forms of *theft* offenses if the property intended to be stolen is the *same property* at issue in the shoplifting charge." (*Gonzales I, supra,* 2 Cal.5th at p. 876 [emphasis added].) This is the prevailing view. With the exception of the Court of Appeal that decided this case, (See *People v. Brayton* (2018) 25 Cal.App.5th 734, 738) no court considering the implementation of section 459.5 has ruled that a charge other than burglary should be reclassified pursuant to its provisions. (See, e.g., *Gonzales I, supra*, 2 Cal.5th 858 [second degree burglary reduced to shoplifting]; *People v. Martin* (Aug. 29, 2018, No. B283097) __ Cal.App.5th __ [2018 WL 4103178] [conspiracy to commit theft, § 182, not reclassified to shoplifting]; *People v. Lopez, supra*, 26 Cal.App.5th 382 [petty theft with prior, §666, not reclassified to shoplifting when intent to commit larceny not proven]; *People v. Sanders, supra*, 22 Cal.App.5th 397, 403 [§ 530.5 (a), is not petty theft; second degree burglary reduced to shoplifting]; *People v. Washington* (2018) 23 Cal.App.5th 948 [second degree burglary reduced to shoplifting]; *People v. Bunyard* (2017) 9 Cal.App.5th 1237 [second degree burglary reduced to shoplifting]; *People v. Huerta* (2016) 3 Cal.App.5th 539 [same]; *People v. Garrett* (2016) 248 Cal.App.4th 82 [same].) *People v. Segura* (2015) 239 Cal.App.4th 1282 [conspiracy to commit theft, § 182, not reduced; second degree burglary reduced to shoplifting].)

The last phrase in subdivision (b) explains that even additional burglary or theft charges are not precluded unless "the property intended to be stolen is the same property at issue in the shoplifting charge." (*Gonzales I, supra*, 2 Cal.5th at p. 876.) Respondent has argued that because he entered Loan Plus with the intent to steal cash, his entry was an act of shoplifting. If this were so, Loan Plus would be the named victim in the shoplifting charge. But Loan Plus was not the victim of the violation of section 530.5(a) as charged, OuterWall was. "Section 530.5, subdivision (a) ... is intended to protect the person or entity ... whose personal information has been misappropriated and used for an unlawful purpose. ...[S]ection 530.5 addresses disruptions caused in victims' lives when their personal identifying information is used, even if those victims may not have been financially harmed as a result of a defendant's conduct." (*People v. Barba, supra*, 211 Cal.App.4th 214, 226.)

Moreover, the harm to OuterWall was not the theft of cash but was instead the acquisition and unauthorized use of their identifying information. "[T]he harm suffered by identity theft victims [extends] well beyond the actual property obtained through the misuse of the person's identity." (*Ibid.*, citing *People v. Valenzuela* (2012) 205 Cal.App.4th 800, 807-808.) Therefore, even if the court defines the misuse of identity as theft, OuterWall's identifying information is not "the same property" as the cash respondent obtained from Loan Plus.

This court must give every "word, phrase, sentence, and part of an act" significance. (*People v. Canty, supra*, 32 Cal.4th 1266, 1276-1277.) Doing so in this case means the preclusive effect of subdivision (b) does not apply to the violation of

section 530.5(a) charged in this case because the misuse of identity is not burglary or theft and it does not involve "the same property at issue in the shoplifting charge." (*Gonzales I, supra*, 2 Cal.5th at p. 876.)

V.

THE VOTERS DID NOT INTEND TO LIMIT IDENTITY THEFT CHARGES

Because the language is clear, it is not "necessary to resort to indicia of the intent of the [voters]." (*People v. Zambia, supra*, 51 Cal.4th 965, 972.) Still, nothing in Proposition 47 or its history provides any reason to suppose the voters intended to impact the penalties associated with section 530.5(a). That the voters enacted Proposition 47 to reduce prison expenses is insufficient proof of an intent to impact section 530.5. "[T]he purpose of saving money does not mean we should interpret the statute in every way that might maximize any monetary savings." (*People v. Morales, supra*, 63 Cal.4th 399, 408.) Rather, if ambiguity is found, this court must again turn to the "materials that were before the voters" for guidance. (*People v. Valencia* (2017) 3 Cal.5th 347, 364 [*Valencia*].)

The Legislative Analyst is duty bound to "prepare an impartial analysis of the measure" that is "easily understood by the average voter" and includes "the effect of the measure on existing law and the effect of enacted legislation which will become effective if the measure is adopted, and shall generally set forth in an impartial manner the information the average voter needs to adequately understand the measure." (Elec. Code, § 9087, subds. (a), (b); see *Valencia, supra*, 3 Cal.5th at pp.

365-366.) In *Valencia*, this court found significance in the fact that "[n]othing in the materials accompanying the text of Proposition 47 suggested that the initiative would alter the resentencing criteria under the previously enacted Three Strikes Reform Act ...." (*Id.* at p. 364.)

The same is true in this case — nothing in the voters' materials suggests that Proposition 47 applies to section 530.5(a). Voters were told Proposition 47 would "'reduce[ ] penalties for certain' but not all 'offenders convicted of nonserious and nonviolent property and drug crimes.' (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), analysis of Prop. 47 by Legis. Analyst, p. 35.)"[9] The Legislative Analyst specifically listed the offenses which would receive reduced penalties: "grand theft, shoplifting, receiving stolen property, writing bad checks, check forgery, and drug possession." (*Valencia*, *supra*, 3 Cal.5th at p. 366; citing Voter Information Guide, *supra*, analysis of Prop. 47, pp. 35-36.) Section 530.5(a) was not on the list of impacted crimes. Misuse of identity was also absent from the explanation of the new shoplifting crime; voters were informed only that that "[u]nder current law, shoplifting property worth $950 or less (a type of petty theft) is often a misdemeanor." (Voter Information Guide, *supra*, analysis of Prop. 47 by Legis. Analyst, p. 35.)

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[9] The Official Voter Information Guide may be accessed at the California Secretary of State's web site, vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf. The court may take judicial notice of the Official Voter Information Guide. (*People v. Brown* (2014) 230 Cal.App.4th 1502, 1509, fn. 4; *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 171, fn. 3.)

Based on the information presented to the voters, a similar conclusion can be made here as was in *Valencia* — "there is no indication that the Legislative Analyst or the Attorney General were even aware that the measure might" impact section 530.5(a). (See *Valencia, supra*, 3 Cal.5th at p. 366.) And, as in *Valencia*, the lack of information is significant because a court "'cannot presume that ... the voters intended the initiative to effect a change in law that was not expressed or strongly implied in either the text of the initiative or the analyses and arguments in the official ballot pamphlet.'" (*Valencia, supra*, 3 Cal.5th at p. 364, citing *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 857-858.)

Instead, it appears that the Legislative Analyst and the Attorney General were aware that section 530.5(a) would *not* be impacted. The Voter Information Guide made only one reference to "identity theft." Under the caption "Check Forgery," the Legislative Analyst explained, "Under this measure, forging a check worth $950 or less would always be a misdemeanor, except that it would remain a wobbler crime if the offender commits identity theft in connection with forging a check." (Voter Information Guide, *supra*, analysis of Prop. 47 by Legis. Analyst, p. 35.) To effectuate this intent, the last line of section 473(b) reads: "This subdivision shall not be applicable to any person who was convicted of both forgery and of identity theft, as defined in Section 530.5." (See *Gonzales II, supra*, __ Cal.5th __ [237 Cal.Rptr.3d 193].) The use of identity theft to elevate a crime of check forgery demonstrates the voters' perception that the unlawful use of personal identifying information is more serious than the theft offenses reduced to misdemeanors under Proposition 47. (See

Gonzales II, *supra*, __ Cal.5th __ [237 Cal.Rptr.3d at p. 202].) It is also prima facie evidence that the voters intended to exclude the misuse of identity from the reach of Proposition 47.

In *Page*, this court found support for its conclusion that vehicle theft in Vehicle Code section 10851 was subject to resentencing under the Act by reference to the words of the Legislative Analyst who explained to the voters "that under existing law, theft of property worth $950 or less could be charged as a felony 'if the crime involves the theft of certain property (*such as cars*).'" (*Page*, *supra,* 3 Cal.5th 1175, 1187; citing Voter Information Guide, *supra*, analysis of Prop. 47 by Legis. Analyst, p. 35 [emphasis added].) In contrast, the voters were not told that the crimes enumerated in section 530.5 would be reduced by Proposition 47 under any circumstances. Instead the voters were told only that "forging a check worth $950 or less would ... remain a wobbler crime if the offender commits identity theft in connection with forging a check." (Voter Information Guide, *supra*, analysis of Prop. 47 by Legis. Analyst, p. 35; see also § 473(b).) If the Legislative Analyst's reference to "property (such as cars)" required an "inclusive interpretation," the reference to identity theft as an aggravating factor can only require the opposite conclusion: section 530.5 was intentionally excluded from Proposition 47. (See *Page*, *supra,* 3 Cal.5th at p. 1187.)

Because the only thing the voters were told about section 530.5 is that commission of identity theft would elevate check forgery to a wobbler, the voters could not have anticipated that the misuse of identity in violation of section 530.5(a)

would otherwise be subject to resentencing or reclassification if the perpetrator obtained or attempted to obtain goods or services valued at $950 or less. "In the case of a voters' initiative statute ... we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." (*Valencia, supra*, 3 Cal.5th at p. 375.)

CONCLUSION

The crime charged against respondent can only be reclassified as shoplifting if the crime itself is "an act of shoplifting," or if the crime is burglary or theft of the same property that would have been at issue in the shoplifting offense. Misuse of identity in violation of section 530.5(a) however, is none of these things. A comprehensive analysis of both the plain language of the statutes at issue, and the extrinsic evidence of the voters' intent, reveals no indication that misuse of identity is, or should be subject to reclassification under Proposition 47.

Respectfully submitted,

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Dated: September 21, 2018

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CERTIFICATE OF WORD COUNT

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Dated: September 21, 2018

By: Michelle J Contois
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Deputy District Attorney

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, Pamela Booker say that:

I am a citizen of the United State, over the age of 18 years, a resident of the County of Ventura, and am not a party to the above-entitled action; my business address is 800 South Victoria Avenue, Ventura, California; on September 21, 2018, I served the OPENING BRIEF ON THE MERITS on:

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Office of the Attorney General
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by e-mail.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 21, 2018, at Ventura, California.

Pamela Booker