IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

JOHN DOE, Plaintiff/Appellee, v. KAMALA D. HARRIS, Defendant/Appellant.	)	**No. S191948** SUPREME COURT FILED JAN - 6 2012 Frederick K. Ohlrich Clerk Deputy

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

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

This proceeding arises from a federal civil rights suit filed in the Northern District of California that, in turn, was based on a plea bargain entered in a criminal proceeding in the state courts of California. An evidentiary hearing was held in the federal district court before judgment was entered in favor of plaintiff-appellee Doe. The brief filed by the California Attorney General in this Court contains a detailed summary of the evidence taken at that hearing and of the findings made by the district court. But the legal issues before this Court this time have nothing to do with the testimony taken or the findings made in federal court; indeed, those issues dwarf in importance to the outcome of this particular case.

The terms of the contractual bargain entered into by Doe and the state of California were settled in Judge Larson's district court decision. At the time of the plea, all parties understood and intended that the law then in effect, including privacy protections contained therein, would govern the responsibilities of the parties to the contract. The federal trial concluded as a factual matter that it was the mutual intent of all parties to the plea agreement that Doe's sex offender registration obligations, and the responsibilities of the government, would be covered by the privacy protections codified in Penal Code section 290 at that time. Those factual findings of the federal district court are not in dispute in this state court proceeding. Rather, the Ninth Circuit certified to this Court a pure question of law concerning California's contract jurisprudence.

The question for this Court is whether a settled term of a contract can be altered by subsequent changes in statutory law, absent a contractual provision permitting such future alteration. That issue certainly is of monumental consequence to the criminal justice system. The Attorney General's position is that contractual terms of plea agreements can be voided by future changes in the law, even where contrary to the demonstrated intent of the agreeing parties. Were that rule adopted, the Sixth Amendment right to the effective assistance of counsel would require that all defendants contemplating a plea be informed that the terms of the proffered bargain would be written in sand, capable of being amended to the defendant's detriment at any time by future changes in the law.[1] In the face of such uncertainty, plea bargaining, without which the criminal justice system would collapse, might grind to a halt.

But the draconian consequences of the state's proposed rule will affect far more citizens than those facing criminal charges. California, like every other American jurisdiction, interprets plea bargains under general contract principles. And California's general contract law, as well as that of all other states, holds, as it logically must, that the terms of contracts cannot be altered by subsequent legislation. Were it otherwise, as the state would have it, there would be no certainty of contract, rendering the commonplace

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[1] The United States Supreme Court has recognized the "critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement." *Libretti v. United States* (1995) 516 U.S. 29, 50-51; *accord, Padilla v. Kentucky* (2010) 130 S. Ct. 1473 (Sixth Amendment right to effective assistance of counsel requires counsel to advise client contemplating guilty plea of consequent risk of deportation.)

commercial transaction a potential fool's bargain. The state's radical position, for which there is no precedential support, would inject confusion, if not chaos, into both our criminal and civil law systems. This Court should reject it.

FACTUAL AND PROCEDURAL BACKGROUND

A. Appellee Doe's 1991 Plea Agreement

In August 1991, Appellee Doe pled no contest to one count of violating California Penal Code section 288(a) (a lewd and lascivious act with a minor). As a result of this plea, Doe was required to register as a sex offender for life pursuant to California Penal Code section 290. The registration requirement was memorialized on Doe's written plea form. The relevant portion of the plea form reads as follows: "the maximum penalty... which [can] be imposed as a result of [this] plea(s) [includes] ... 290 P.C. registration..."

The words "290 P.C. registration" refer to Penal Code section 290 and were handwritten on Doe's plea form by the assistant district attorney prosecuting the case. Doe and his trial attorney initialed the "290 P.C. registration" language added by the prosecutor. The agreement was then signed by Doe, his attorney, the prosecutor, and the Superior Court judge who accepted the plea.

B. Amendments to California's Registration Scheme

Subsequent to Doe's plea, the California legislature enacted several significant amendments to the state's sex offender registration scheme. Three changes to the registration rules are relevant here:

First, in 1994, the legislature amended subsection (i) of Penal Code section 290 to provide public access to identifying information provided by people who are required to register as sex offenders. Prior to this amendment, subsection (i) provided that all identifying information collected by the state shall be "confidential . . . [and] shall not be open to inspection by the public or by any person other than a regularly employed peace officer or other law enforcement officer." Cal. Penal Code § 290(i) (circa 1991).

Second, also in 1994, the legislature amended subsection (a) of Penal Code section 290 to require that registered sex offenders update their registration with state officials annually, within ten days of the registrant's birthday. Prior to this amendment, registrants were required to update their registration information only upon a change of residence. Cal. Penal Code § 290(a) (circa 1991).[2]

Third, in 2004, the legislature enacted Penal Code section 290.43, known as "Megan's Law." Megan's Law directed the California Attorney General to establish and maintain a publicly available website containing the name, photograph, and home address of persons convicted of certain sex crimes, including the offense to which Doe pleaded guilty in 1991. The law expressly applies to offenders convicted prior to enactment of the statute. Cal. Penal Code § 290.43(m).

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[2] In California, sex offenders must provide officials a current photograph and verification of a home address. Cal. Penal Code § 290. In 1996, the California legislature amended this section again to require that registrants update their registration information within five days of their birthdays, rather than within ten days.

C. Federal Court Proceedings

In 2007, Doe filed a civil complaint in United States District Court, claiming that enforcement of the sex offender registration rules enacted subsequent to his conviction violated the terms of his 1991 plea agreement and his federal constitutional right to due process of law. Doe claimed — and ultimately prevailed on the factual issue — that he entered his plea in significant part based on the parties' agreement that his registration information would remain confidential pursuant to then-existing law. *See Santabello v. New York*, 404 U.S. 257, 262 (1971) (Holding that under the Due Process Clause, "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.").

On January 16, 2009, the District Court heard from four witnesses concerning the negotiation, drafting, and execution of Doe's 1991 plea agreement: Doe's two trial lawyers from 1991, the deputy district attorney who negotiated the plea for the state, and Doe himself.

On September 18, 2009, the District Court issued a written decision finding most of Doe's allegations true and holding that the state breached Doe's 1991 plea agreement. Specifically, the District Court found that Doe's 1991 plea bargain included an implied promise that the privacy protections provided in the Penal Code in effect at the time of Doe's plea would govern his registration requirement. The District Court found that "the

parties intended the law in effect at the time to apply." The Court found further that: "The evidence indicates that [Doe] relied on the confidentiality provision of the statute at that time," and, "[T]he confidentiality of the reporting requirement was essential to [Doe's] plea bargain."

The District Court also observed that Doe's plea agreement specifically referred to the registration requirement provided in Penal Code section 290, and that the prosecutor was responsible for handwriting the registration term on Doe's plea agreement.

The District Court concluded that "one cannot reasonably interpret the language of [Doe's] plea agreement, which reads 'P.C. 290,' to mean other than compliance with that section of the Penal Code, as it was written at the time of the plea." The District Court thus ruled that enforcement of subsequently enacted registration rules, which violated the agreed-upon terms of Doe's plea agreement, could not be enforced in Doe's case.

The government appealed the District Court's decision to the United States Court of Appeals for the Ninth Circuit. On April 4, 2011, the Ninth Circuit issued an Order certifying a question of law to this Court, pursuant to rule 8.54 of the California Rules of Court. *Doe v. Harris* (9th Cir. 2011) 640 F.3d 972. The Ninth Circuit presented the question this way:

> Whether, under California law, the default rule of contract interpretation is (a) that the law in effect at the time of a plea agreement binds the parties, or (b) that the terms of a plea agreement may be affected by changes in law.

Ibid.

On June 15, 2011, this Court granted the Ninth Circuit's request for certification.

ARGUMENT

I. UNDER CALIFORNIA LAW OF CONTRACTS AS APPLICABLE TO CRIMINAL PLEA AGREEMENTS, THE LAW IN EFFECT AT THE TIME OF THE PLEA AGREEMENT BINDS THE PARTIES AND, ABSENT AN EXPRESS CONTRACTUAL PROVISION TO THE CONTRARY, CANNOT BE AFFECTED BY SUBSEQUENT CHANGES IN THE LAW

Pursuant to this Court's Order of June 15, 2001, the question now before this Court is: "Under California law of contract interpretation as applicable to plea agreements, does the law in effect at the time of the plea agreement bind the parties or can the terms of a plea agreement be affected by changes in the law?"

A. Black Letter California Law

(1) Plea Agreements Are Interpreted According to General Contract Principles

In *People v. Feyrer* (2010) 48 Cal.4th 426, 437, this Court unanimously held that "Because a 'negotiated plea agreement is a form of contract,' it is interpreted according to general contract principles." (quoting *People v. Shelton* (2006) 37 Cal.4th 759, 767.)

In *People v. Segura* (2008) 44 Cal.4th 921, 929, this Court unanimously explained:

> [T]he process of plea negotiation contemplates an agreement negotiated by the People and the defendant and approved by the court. Pursuant to this procedure the defendant agrees to plead guilty [or no contest] in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged. This more lenient disposition of the charges is secured in part by prosecutorial consent to the imposition of such clement punishment, by the People's acceptance of a plea

> to a lesser offense than that charged, either in degree or kind, or by the prosecutor's dismissal of one or more counts of a multi-count indictment or information. Judicial approval is an essential condition precedent to the effectiveness of the 'bargain' worked out by the defense and prosecution. But implicit in all of this is 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.
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> * * * *
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> Because a negotiated plea agreement is a form of contract, it is interpreted according to general contract principles. Acceptance of the agreement binds the court and the parties to the agreement. When a guilty [or nolo contendere] plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement.

Segura, 44 Cal.4th at 929 (punctuation omitted) (citing, among others, *People v. Shelton* (2006) 37 Cal.4th 759, 767). This ruling is consistent with virtually every other state and federal court in the country, all of which consistently apply ordinary civil contract law to the interpretation of criminal plea agreements.[3]

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[3] *See, e.g.*, *Wilder v. State* (Fla. App. 2011) 69 So.3d 1096 ("A plea agreement is a contract and the rules of contract law are applicable to plea agreements."); *Com. v. Anderson* (Penn. Super. 2010) 995 A.2d 1184, 1191 ("Although a plea agreement occurs in a criminal context, it remains contractual in nature and is to be analyzed under contract-law standards."); *McClanahan v. Com.* (Ky. 2010) 308 S.W.3d 694, 701 ("Generally, plea agreements in criminal cases are contracts between the accused and the Commonwealth, and are interpreted according to ordinary contract principles."); *State v. Wills* (S.C. App. 2010) 700 S.E.2d 266, 268 ("[P]lea agreements are to be construed in accordance with general contract principles."); *Green v. State* (Ark. 2009) 313 S.W.3d

(2) Under General Contract Law Principles, the Law in Effect at the Time of the Formation of the Contract Binds the Parties at a Later Date

In *Swenson v. File* (1970) 3 Cal. 3d 389, 394-395, this Court unanimously held that "laws enacted subsequent to the execution of an agreement are not ordinarily deemed to become part of the agreement unless [the agreement's] language clearly indicates this to

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521, 524 ("We apply general contract principles in interpreting plea agreements."); *Littleton v. State* (Miss. App. 2008) 3 So.3d 760, 762 ("A negotiated plea agreement between the State and a criminal defendant is a contractual relationship. Whether that relationship actually comes into being must be judged by the same standards as any other contractual relationship."); *State v. Russo* (Me. 2008) 942 A.2d 694, 698 ("Plea agreements are contracts and contract principles apply when interpreting them. Furthermore, because a defendant's constitutional rights are implicated, agreements of this nature are subject to greater scrutiny than is normally afforded to commercial contracts."); *In re Robertson* (D.C. 2008) 940 A.2d 1050, 1059 ("[A] plea agreement is a contract. As a consequence, courts will look to principles of contract law to determine whether the plea agreement has been breached."); *State v. Rivers* (Conn. 2007) 931 A.2d 185, 192 ("[P]rinciples of contract law and special due process concerns for fairness govern our interpretation of plea agreements."); *Evans v. State* (Mo. App. 2004) 134 S.W.3d 725, 728 ("a plea agreement is a binding contract between the State and a defendant."); *Washington v. State* (Del. Super. 2004) 844 A.2d 293, 296 ("[P]lea agreements are undertaken for mutual advantage and governed by contract principles."); *Ex parte Moussazadeh* (Tex. Crim. App. 2001) 64 S.W.3d 404, 411 ("We apply general contract law principles to determine the content of a plea agreement in a criminal case."); *State v. Welwood* (Conn. 2001) 780 A.2d 924, 931 ("plea bargains [are] governed by contract principles"); *State v. Hosey* (Idaho 2000) 11 P.3d 1101, 1104 ("A plea agreement is contractual in nature and must be measured by contract law standards."); *State v. Butts* (Ohio App. 1996) 679 N.E.2d 1170, 1172 ("A plea bargain itself is contractual in nature and subject to contract-law standards."); *State v. Wills* (Kan. 1988) 765 P.2d 1114, 1118 ("We recognize that, before a plea of guilty is entered, the parties are free to contract subject to basically the same legal principles as apply in a commercial contract setting."); *United States v. Yepez* (9th Cir. 2011) 652 F.3d 1182, 1186, fn. 3 ("Plea agreements are generally construed according to the principles of contract law, and the government, as drafter, must be held to an agreement's literal terms.").

have been the intention of the parties."

This ruling is also consistent with virtually every other state and court in the country, all of which hold that contracts assume that the laws in effect at the formation of the contract bind the parties in the future, unless the parties make an agreement to the contrary.[4]

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[4] *See, e.g., Catawba Indian Tribe of South Carolina v. State* (S.C. 2007) 642 S.E.2d 751, 756 ("[This] is a contract between Doe and the State, and it is a fundamental rule of contract construction that the law existing at the time and place of the making of a contract is a part of the contract. [S]tatutes and ordinances enacted subsequent to the execution of a contract, which add burdens or impair the obligations of the contract, may not be deemed to be a part of the agreement unless the language of the agreement clearly indicates this to have been the intention of the parties."); *Fix v. Flagstar Bank, FSB* (Tex. App. 2007) 242 S.W.3d 147, 155 ("It is well-established that laws in effect at the time a contract is entered into should govern the fulfillment of the contract. . . . [C]ourts are reluctant to change the rights and obligations of parties from those originally agreed to by retroactively applying a change in the original law."); *Peterson v. District of Columbia Lottery and Charitable Games Control Bd.* (D.C. 1996) 673 A.2d 664, 667 ("[G]enerally, in the absence of a provision expressly incorporating future amendments to a statute, the parties [to a contract] will not be bound by such changes."); *New Jersey Mfrs. v. O'Connell* (N.J. Super. 1997) 692 A.2d 51, 53-54 ("Settlements are contracts. Consequently, general principles of contract law apply. One of those common law principles is that a contract, valid at its inception, is not invalidated or eviscerated by a subsequent change in decisional or statutory law. The rationale underlying the premise is that the original terms of a contract incorporate the relevant law at the time the contract is made. Consequently, the contract should not be disturbed by subsequent changes in the law."); *Ex parte Brannon* (Ala. 1996) 683 So.2d 994, 997 ("Courts should not change contract law years after parties have entered an agreement based on the law that was in effect when they entered it; rather, such a change should be a matter for the legislature and such a change should apply only to those contracts entered into *after the enactment of the legislation.*") (emphasis added).); *Pioneer Transp. Corp. v. Kaladjian* (NY App. 1984) 481 N.Y.S.2d 136, 137 ("In the absence of a clear expression in the contract that such is the parties' intention, a court may not construe an agreement so that it is modified by a subsequent statutory enactment which changes the rights and obligations of the parties."); *Feakes v. Bozyczko* (Mass. 1977) 369 N.E.2d 978, 980 ("[L]aws enacted after

In *City of Torrance v. Workers' Comp. Appeals Bd.* (1982) 32 Cal. 3d 371 this Court explained:

> Ordinarily, all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated.
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> [T]o hold that subsequent changes in the law which impose greater burdens or responsibilities upon the parties become part of that agreement would result in modifying it without their consent, and would promote uncertainty in commercial transactions. We recognize that the parties could have originally agreed to incorporate subsequent changes in the law . . . but there is no evidence that they did so in this case.

Id., 32 Cal.3d at 378 (quoting *Swenson*, 3 Cal.3d at 393); *see also Equitable Bldg. & Loan*

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the execution of an agreement are not commonly considered to become part of the agreement unless its provisions clearly establish that the parties intended to incorporate subsequent enactments into their agreement."); *Essex Group, Inc. v. Nill* (Ind. App. 1992) 594 N.E.2d 503, 508 ("Laws enacted subsequent to the execution of the agreement are not a part of the contract unless the contract clearly indicates that it was the intention of the parties to incorporate subsequent changes in the law."); *Hatcho Corp. v. Della Pietra* (Conn. 1985) 485 A.2d 1285, 1288 ("[P]arties contract with reference to existing law, except when the contract discloses a contrary intention."); *Florida Beverage Corp. v. Division of Beverages and Tobacco, Dep't of Business Regulation* (Fla. App. 1987) 503 So.2d 396, 398-399 & fn. 2; *S & D Service, Inc. v. 915-925 W. Schubert Condominium Ass'n* (Ill. App. 1985) 478 N.E.2d 478, 483 ("By operation of law, the existing laws, statutes and ordinances become implied terms of the contract."); *City of Little Rock v. Community Chest of Greater Little Rock* (Ark. 1942) 163 S.W.2d 522, 524 ("[T]he law in effect at the date of the contract becomes a part of it, and that the law cannot thereafter be changed so as to alter the contractual rights of the parties thereto to their detriment.")

Ass'n v. Wolfangle (1931) 111 Cal. App. 119, 122.[5]

(3) Plea Agreements Are Interpreted to Give Effect to the Intent of the Parties

In *People v. Feyrer* (2010) 48 Cal.4th 426, 437, this Court also unanimously held that all civil contracts and plea agreements must be interpreted to give effect to the intent of the parties:

> Because a negotiated plea agreement is a form of contract, it is interpreted according to general contract principles. The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties.

Feyrer, 48 Cal.4th at 437 (punctuation omitted) (citing, among others, Civ. Code, § 1636).

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[5] Treatises and hornbooks recite this rule as gospel. *See, e.g.*, AMERICAN JURISPRUDENCE CONTRACTS 2d § 372 ("In construing a contract, a court must read into it the laws existing at the time it was made. However, statutes and ordinances enacted subsequent to the execution of a contract, which add burdens or impair the obligations of the contract, may not be deemed to be a part of the agreement unless the language of the agreement clearly indicates this to have been the intention of the parties. The courts may not construe an agreement so that it is modified by subsequent statutory enactments which change the rights and obligations of the parties, in the absence of a clear expression in the contract that such is the parties' intention."); WILLSTON ON CONTRACTS 4th § 30:23 ("The rule providing for incorporation of existing law into contracts applies to the law existing at the time the contract is executed. Thus, as a rule of construction, changes in the law subsequent to the execution of a contract are not deemed to become part of agreement unless its language clearly indicates such to have been intention of parties."); 1 WITKIN, SUMMARY OF CAL. LAW CONTRACTS, section 692, p. 625 (same).

The question before this Court is thus whether subsequently enacted changes in law can supercede the otherwise settled, enforceable, and valid terms of Doe's plea agreement.

B. California Courts Unanimously Hold That Material Terms of a Valid Plea Agreement Cannot Be Altered by Subsequent Legislation

In *Santobello v. New York* (1971) 404 U.S. 257, 262, the United States Supreme Court held that "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."

Every court in California under *Santobello* has concluded that genuine plea terms must be enforced, regardless of subsequent changes in law.

The recently decided case, *People v. Jerry Z.* (2011) 133 Cal. Rptr. 3d 696, is directly on point. In *Jerry Z.,* the First District Court of Appeal ruled that under state contract law a defendant was entitled to enforcement of an unwritten implied promise in his plea agreement despite a subsequent change in law. The *Jerry Z* court enforced an implied term in the defendant's plea agreement that the collateral consequences of his sex crime conviction would be governed by the law in existence at the time of his plea. 133 Cal. Rptr. 3d at 707-09.

Jerry Z. involves a defendant who pled guilty in 1997 to continuous sexual abuse of his minor daughter. At the time of his conviction, state law provided that the defendant had an opportunity to expunge his criminal record after he completed his sentence and

probation. Subsequent to the defendant's plea, but before he could apply for expungement, the legislature amended the relevant statutes to prohibit certain sex offenders (including anyone convicted of continuous sexual abuse of a minor) from receiving the benefit of the expungement process. *Id.* at 700-705.

In 2008, the defendant filed for habeas relief in Superior Court, seeking specific performance of his plea bargain which, according to the defendant/petitioner, included an agreement with the district attorney that he would be able to expunge his record upon completing his punishment. The Superior Court denied the habeas petition on several grounds. The Court of Appeal reversed. It noted that there was an agreement between the defendant/petitioner and the district attorney that the law in effect at the time of the plea (which provided the defendant/petitioner an opportunity to expunge his record) would be available to him upon the completion of his sentence. The Court of Appeal explained:

> Appellant and his attorney . . . claim he was expressly promised [expungement]. But even if the term was merely implicit — and the court below found in December 2007 it was at least that — appellant would be entitled under *Santobello*, to have the bargain enforced.

Jerry Z., 133 Cal. Rptr. 3d at 709.[6]

The instant case is on all fours with *Jerry Z.* Here, as in *Jerry Z.*, a trial court

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[6] The First District reserved judgment on whether a plea agreement automatically incorporated the law in effect at the time of the plea, stating that this question is now before this Court in the instant matter. *Id.* at 709, n.12 (citing *Doe v. Harris*, 640 F.3d at 975–977).

determined that Doe's plea agreement included an implicit term that Doe's sex offender registration would be governed by law in effect at the time of the plea. Indeed, the federal trial court found that this was the plain intent of the parties to Doe's plea agreement; that privacy protections in the law at the time were critical to Doe's decision to plead no contest; and that he would not have entered the deal without that agreement.

In *People v. Arata* (2007) 151 Cal. App. 4th 788, the Third District Court of Appeal reached the exact same decision as did the First District in *Jerry Z.* Like *Jerry Z.* (and the instant matter), *Arata* involved a criminal defendant who pleaded guilty to a sex offense with the implicit agreement that the consequences of his conviction would be governed by law in effect a the time of his plea.[7]

The *Arata* court rejected the state's position that it could amend the terms of a plea agreement by enacting new legislation. Relying on *Santobello v. New York*, the Third District held that even laws that are explicitly retroactive cannot breach the genuine terms of plea bargains. *Arata*, 151 Cal. App. 4th at 786 (agreeing with the defendant that "even an express Legislative intent of retroactive application will not suffice when such an application would impair constitutional rights.") (punctuation omitted).

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[7] Neither *Jerry Z.* nor *Arata* hold that the law in effect at the time of a plea is automatically incorporated into a contract. In both cases (as here), the courts ruled that, according to the evidence there was understanding, intent, and agreement that the law in effect at the time of the plea would govern subsequent responsibilities of the parties. This was a material term of both contracts. *See Feyrer*, 48 Cal.4th at 437 (holding that contracts, including plea agreements, must be interpreted to fulfill the intent of the parties).

This Court's holding in *People v. Castillo* (2010) 49 Cal.4th 145, reaffirms the rule that the state cannot amend the terms of an agreement between prosecutors and criminal defendants by enacting new legislation. *Castillo* involved the administration of California's sexually violent predator law. In September 2006, the California legislature enacted changes to California's civil commitment scheme for sexually violent predators. As this Court noted, the new legislation was not a model of clarity. In October 2006, the offices of the Los Angeles District Attorney and Los Angeles Public Defender entered an agreement detailing how the then-recently enacted changes to the sexually violent predator scheme would apply retroactively to certain individuals convicted before the enactment of the new rules. Subsequent to the stipulation, the California Courts of Appeal interpreted the new legislation so that the new civil commitment rules would apply retroactively in certain relevant cases, contrary to the stipulation between the public defender and prosecutor. *See Castillo*, 49 Cal.4th at 148-50 (describing the time line of events, the stipulation at issue, and how the ambiguities were subsequently resolved by courts of appeal).

The Court of Appeal ruled that the new commitment scheme trumped the October 2006 agreement between the prosecutors and public defenders. *People v. Castillo*, 89 Cal. Rptr. 3d 71 (2009). The Court found that the defendant had not relied on the October 2006 stipulation and therefore had no right to its benefit. *Id.* at 92 ("Castillo fails to show any detrimental reliance on the stipulation[.]"). The Attorney General supported this decision,

while the Los Angeles District Attorney and Los Angeles Public Defender jointly sought review in this Court.

This Court unanimously reversed the Court of Appeal's decision and upheld the agreement between the prosecutors and defense attorneys. This Court held that the agreement between the District Attorney's office and the office of the Public Defender trumped the new sexually violent predator statute.[8] This Court rejected the lower court's reasoning that the agreement could not be honored because it was contrary to the Legislature's intent. *Id.* at 368. The Court held that "it would be inappropriate for us, with the benefit of hindsight, to condemn the stipulation as having been unauthorized or unenforceable[.]" *Id.* at 370.

C. Federal Courts Interpreting California Contract Law Hold That Plea Terms Cannot Be Altered by Subsequent Legislation

The United States Court of Appeals for the Ninth Circuit has consistently interpreted California contract law to strictly enforce the terms of plea agreements despite conflicting legislation.[9] Contrary to the state's argument here, the Ninth Circuit has never

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[8] This Court relied on the doctrine of judicial estoppel, which is discretionary and generally applies when: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." *Id.* at 155.

[9] All but one of these cases fell under the demanding standard of habeas review provided in 28 U.S.C. § 2254, which does not apply here.

enforced the rule that the state may amend the terms of plea agreements by enacting new legislation.

In *Davis v. Woodford* (9th Cir. 2006) 446 F.3d 957, the Ninth Circuit held that a prosecutor's promise during a plea negotiation could not be altered by a subsequent change in law. *Davis* involved a federal habeas corpus petitioner who in 1986 was convicted of eight counts of robbery. During his 1986 plea colloquy, the prosecutor told the petitioner that the robbery convictions would count as only one prior conviction for sentencing purposes in any subsequent case. 446 F.3d at 959. This was a correct statement of law at the time. *See* Cal. Penal Code § 667(a) (circa 1986) (providing that if a defendant was convicted of multiple counts in a single proceeding, it counted only as one prior conviction in a future sentencing proceeding).

Eight years later, in 1994, the legislature (and also the electorate) amended the relevant recidivist sentencing laws by enacting the "Three Strikes and You're Out" law. The Three Strikes law provides that a defendant shall receive a 25-to-life sentence for any felony conviction if the defendant has been previously convicted of two or more specified felonies, including robbery. Cal. Penal Code §§ 667(b), 1192.7(c). In a significant departure from earlier law, the Three Strikes law provides that every prior conviction suffered by a defendant shall count as a separate strike, regardless of whether prior convictions were tried separately or together. *See People v. Fuhrman*, 16 Cal.4th 930 (1997).

In 2000, the petitioner in *Davis* was convicted of a new felony (illegal possession of a firearm) and sentenced to life under the Three Strikes law based on the 1986 conviction on eight counts of robbery. *Davis*, 446 F.3d at 959.

The Ninth Circuit was then faced with petitioner's claim that his 1986 plea agreement (that his eight robbery convictions would count as a single prior conviction in any subsequent case) took precedence over the 1994 Three Strikes amendment to the recidivist sentencing laws in effect at the time of his plea. As here, the state relied on a single California Court of Appeals decision, *People v. Gipson* (2004) 117 Cal. App. 4th 1065, for the proposition 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*, 446 F.3d at 959.

The Ninth Circuit refused to apply the *Gipson* rule urged by the state. *Davis*, 446 F.3d at 959. The Court noted that *Gipson* was "easily distinguishable" from the case before it because, as here, the parties to the plea bargain agreed at the formation of the agreement that existing law governs material terms of the plea. 446 F.3d at 959. The Ninth Circuit granted habeas relief, holding that enforcement of the Three Strikes law violated the terms of the petitioner's earlier plea bargain and his clearly established due process rights. *Davis*, 446 F.3d at 959. The Ninth Circuit ruled that under California state contract law, the plea agreement "must be interpreted so as 'to give effect to the mutual intention of the parties as it existed at the time of contracting.'" *Ibid.* (quoting Cal. Civ.

Code § 1636).

In *United States v. Transfiguration* (9th Cir. 2006) 442 F.3d 1222, 1229, the Ninth Circuit again enforced the terms of a plea agreement even though relevant law changed following the formation of the agreement. *Transfiguration* involved two defendants who pleaded guilty to a drug transportation charge in exchange for a promise from prosecutors that the defendants would not be charged with other non-violent offenses they may have committed. After the agreement was reached, but before the defendants' sentencing, the Ninth Circuit (in a separate case) invalidated the drug transportation statute to which the *Transfiguration* defendants had pled guilty. Recognizing that the *Transfiguration* defendants could overturn their drug transportation convictions with this new decision, prosecutors charged them with other, non-violent, crimes surrounding the drug conspiracy(in violation of the plea agreement. The Ninth Circuit blocked the new prosecutions because they violated the terms of the plea agreement which promised no further prosecutions. The court explained:

> We note that it was the government, as the drafter of the contract, that failed adequately to protect itself from a subsequent change in the law.
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> * * * *
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> It is the government, not an individual criminal defendant, who is the repeat player in the plea bargaining process. Because all plea agreements are negotiated against the backdrop that the law can change . . . the prosecution knew or should have known that comparable changes in the law occur from time to time. The failure of the [government] to [anticipate] . . . a

> development in the substantive law (or for any other reason) is thus a failure to cover a predictable contingency.

Transfiguration, 442 F.3d at 1232 (citations and punctuation omitted).

In *Buckley v. Terhune* (9th Cir. 2006) 441 F.3d 688, an en banc panel of the Ninth Circuit interpreted California contract law to enforce the term of a plea agreement even though the prosecution had entered into it by mistake. *Buckley* involved a habeas corpus petitioner who was charged in California state court with several felony counts including one count of first-degree murder. Prior to his trial, the prosecutor sent the petitioner's attorney a letter including a plea offer. In exchange for the petitioner's testimony against two co-defendants and petitioner's agreement to plead guilty to second-degree murder, the prosecution offered to drop all other charges. Attached to the plea offer was a form very similar to the plea document at issue here. The form stated that the "maximum possible sentence" for petitioner's plea was 15 years. The number "15" was handwritten on the plea form by the prosecutor. The petitioner initialed the relevant paragraph, signed the document, and returned it to the prosecutor. *Buckley*, 441 F.3d at 691-93.

The 15-year offer was apparently a mistake. Under California law in effect at the time, a conviction for second degree murder carried a mandatory sentence of life in prison with *a possibility* for parole after 15 years. *See* Cal. Penal Code § 190 (circa 1986). In other words, 15 years was the *minimum* sentence for second degree murder, not the maximum.

In accepting the plea, the Superior Court appeared to correct the prosecutor's error.

In response to questioning from the bench, the petitioner said that he understood that his maximum sentence was "15 years to life." Eight years into his prison term, the petitioner filed for habeas relief. *Buckley*, 441 F.3d at 693-94.

The Ninth Circuit held that the state was bound to the prosecutor's original (albeit mistaken and illegal) offer of a 15 year maximum sentence. The court reasoned that the conflicting descriptions of the petitioner's sentence created an ambiguity in his plea agreement. Following California contract law, the court ruled that the plea agreement, "'should be interpreted most strongly against the party who caused the uncertainty to exist.'" *Buckley*, 44 F.3d at 698 (quoting Cal. Civil Code § 1654). Because the prosecutor created the ambiguity by stating that the petitioner faced a "maximum" sentence of 15 years in his original letter to the petitioner's attorney, the Ninth Circuit ruled that the petitioner had a clearly established right to the lower prison term. *Id.* at 698-99. *See also Brown v. Poole* (9th Cir. 2003) 337 F.3d 1155 (enforcing another mistaken promise made by a prosecutor).

D. The Cases Cited by the Attorney General Are Easily Distinguishable

The state attempts to confuse the issue before this Court principally by ignoring a central fact in this case: After hearing live testimony from all parties to Doe's plea agreement, the federal District Court concluded as a matter of fact that Doe entered into his plea agreement in reliance on an implicit agreement with the government that the privacy protections contained in the law in effect at the time of his plea would govern his

future obligations.[10] That reliance rendered the privacy protections a material term of the plea bargain, as they must be to merit due process protection. The question referred to this Court by the Ninth Circuit posits as a given that privacy protections of Penal Code section 290, as they then existed, were an established "term" of the plea bargain,[11] and the question, as re-framed by this Court, assumes the same.[12]

In order to prevail on his claim, Doe thus does not need to prove that every plea agreement automatically and *sub silencio* incorporates by reference the law in effect at the time of his plea. Here, it has already been decided that in Doe's particular case his plea bargain included the agreement that he would receive the benefit of privacy protections in effect at the time of the plea. The question before this Court is whether the government can amend that material term of this plea agreement, or any such term in any plea bargain, or, for that matter, any material term of a commercial contract, by enacting new legislation.

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[10] The government concedes, as it must, that plea agreements may contain implicit terms and that these terms are just as binding as explicit provisions. (AOB at 9.) *See also Arata* 151 Cal. App.4th at 787.

[11] The Ninth Circuit presented the question this way: "Whether, under California law, the default rule of contract interpretation is (a) that the law in effect at the time of a plea agreement binds the parties, or (b) that *the terms of a plea agreement* may be affected by changes in law." (Emphasis added)

[12] This Court re-framed the question this way: "Under California law of contract interpretation as applicable to plea agreements, does the law in effect at the time of the plea agreement bind the parties or *can the terms of a plea agreement* be affected by changes in the law?"(emphasis added)

The state claims to rely on cases which enforced legislation in conflict with previously executed plea agreements. That assertion is demonstrably untrue. In each of these cases, the court enforced the new law because the court concluded that the new law *did not conflict* with a material term of the earlier plea agreement. The government has not cited a single case where a valid and material term of a plea agreement was held to be properly abrogated by subsequently enacted legislation.

First, the state relies on *People v. Acuna* (2000) 77 Cal App. 4th 1056. (AOB at 10.) *Acuna* is remarkably similar to *Jerry Z.* and *Arata*, except that it comes out the other way, ruling in favor of the prosecution and enforcing law enacted subsequent to a plea agreement. In *Acuna*, a defendant pleaded guilty to a violation of Penal Code section 288. Subsequent to his plea, the legislature changed the rules concerning the consequences of a sex offender conviction, prohibiting most sex offenders from expunging their criminal records. As in *Jerry Z.* and *Arata*, the defendant in *Acuna* claimed that he should be permitted to expunge his record because his plea agreement pre-dated the change in law that eliminated his eligibility for expungement. The defendant in *Acuna* claimed that he would not have pleaded guilty without the opportunity to apply for expungement. However, unlike the courts in *Jerry Z.* and *Arata,* the Second District Court of Appeal found the claim of reliance completely unsupported by the evidence. As a result, the Second District concluded that the ability to apply for expungement was *not* a material part of the defendant's plea agreement and that therefore the change in law (rendering him

ineligible for expungement) did not violate the terms of the plea bargain. *Acuna*, 77 Cal App. 4th at 162 ("[The defendant] points to nothing in the record to support the assertion [that expungement was material to his decision to plead guilty]. Such unsupported speculation is not a ground for reversal.")

Both the First District in *Jerry Z.*, 133 Cal. Rptr. at 709, and the Third District in *Arata*, 151 Cal. App. 4th at 788, distinguish *Acuna* on this very ground. In other words, both *Jerry Z.* and *Arata* hold that a material term of a plea agreement cannot be superceded by subsequent change in law. *See also Davis*, 446 F.3d at 959 (making the same distinction). *Acuna* comes out the other way because there was no material term in the defendant's plea agreement breached by the change in law in that particular case.

Second, the state relies on *People v. Gipson*, 117 Cal. App. 4th 1065. (AOB at 11.) In *Gipson*, the Sixth District Court of Appeal rejected a defendant's claim that his sentence, which was enhanced under the Three Strikes law by a prior conviction in 1982, violated the Contracts Clause of the United States Constitution.[13] The defendant argued that he was not subject to the sentence enchantment because the Three Strikes law was enacted subsequent to his 1982 plea agreement. The Sixth District found the claim untenable because, although the defendant's 1982 plea cited existing law by reference, the defendant was not induced to enter his 1982 agreement on the understanding that future

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[13] The Contracts Clause provides: "No State shall . . . pass any . . . Law impairing the obligations of contracts." U.S. Const. Art. I, sec 10.

cases would be governed by the law that existed in 1982. The *Gipson* court explained:

> Subsequent to the plea bargain, the Legislature amended the law; defendant committed another crime; defendant became subject to the penalty described in the amended statute. The increased penalty in the current case had nothing to do with the previous case except that the existence of the previous case brought defendant within the description of persons eligible for a five-year enhancement for his prior conviction on charges brought and tried separately.

Id. at 1070.

Because the state has relied on *Gipson* during the previous course of this litigation, and does so again here, it merits comment how specious the comparison to the present case truly is. A defendant who pled guilty to a felony prior to the passage of the Three Strikes law received a certain sentence in return for his plea. He was then told what the added consequences of having that prior felony conviction would be if he re-offended — *i,e.*, a five year prior felony penalty enhancement. Being so informed was a threat by the prosecution and the court, not a promise. The purpose of the warning was to discourage a future offense, not to guarantee that the consequences of a future crime would be limited to the threat. The warning could not be a contractual provision, because the state received no consideration in return. And if the penalty for an enhancement for priors increased before a new offense is committed, that is an increase in penalty for the *future* crime, not the *past* one. The burdens imposed for the past crime under the plea bargain are not altered by the new law, which only increases the price to be paid for a future crime. In sum, *Gipson* has nothing to do with the issue of legislation affecting the terms of contracts

previously concluded.

Here, not only did the federal District Court find there was an agreement at the time of Doe's 1991 plea agreement that his registration obligation would be governed by the privacy protections in effect at the time, but the new registration rules imposed by the government are not the consequence of any new criminal act by Doe. They flow directly from his 1991 plea.[14]

Throughout this protracted litigation, the state has relied on a single sentence in *Gipson*, which is taken out of context. In *Gipson*, the Sixth District states that "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." *Gipson*, 117 Cal. App. 4th at 1070. This is a recitation of the United States Supreme Court's jurisprudence *under the Contracts Clause* of the federal Constitution. *See, e.g., Home Building & Loan Assn. v.*

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[14] The government cites to several other unpublished habeas corpus decisions issued by federal district courts in cases raising the claim that imposition of a Three Strikes sentence violates plea agreements in the underlying prior felony convictions. (AOB at n.8.) These cases are all distinguishable for the same reason as *Gipson*. First, here (unlike those cases) a federal court has found that Doe was induced to plead guilty with the agreement that the consequences of his conviction would be controlled by the privacy protections then encoded in Penal Code section 290. Even the government acknowledges that none of these cases include an agreement that the Three Strikes law would not apply. (*Ibid.*) *Cf. Davis, supra*, 446 F.3d at 959 (refusing to apply the Three Strikes law when a material term of an underlying plea promised that the convictions would not be counted as separate strikes in a future proceeding). Second, here (unlike the Three Strikes cases) the government's actions are a direct consequence of Doe's original plea. Doe has committed no new criminal act. If he does, he will be subject to the sanctions currently in effect.

Blaisdell (1934) 290 U.S. 398. It is not a statement of general California contract law.[15] As with all constitutional provisions, the Contracts Clause serves as backstop to state laws and provides wider latitude than specific state contract laws. *Gipson* is a Contracts Clause case. *See Gipson*, 117 Cal. App. 4th at 1070 (Rejecting the defendant's argument and ruling: "Thus defendant's contract clause challenge fails.")[16]

Third, the state relies on *In re Lowe* (2005) 130 Cal. App. 4th 1405. *In re Lowe* involved a defendant who pleaded guilty to second degree murder and received an indeterminate life sentence in 1985. Subsequent to his plea, the legislature amended parole rules providing the governor final authority over parole decisions. The defendant filed a

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[15] *See, e.g.*, AMERICAN JURISPRUDENCE CONTRACTS 2d § 372 ("In construing a contract, a court must read into it the laws existing at the time it was made. However, statutes and ordinances enacted subsequent to the execution of a contract, which add burdens or impair the obligations of the contract, may not be deemed to be a part of the agreement unless the language of the agreement clearly indicates this to have been the intention of the parties. The courts may not construe an agreement so that it is modified by subsequent statutory enactments which change the rights and obligations of the parties, in the absence of a clear expression in the contract that such is the parties' intention."); WILLSTON ON CONTRACTS 4th § 30:23 ("The rule providing for incorporation of existing law into contracts applies to the law existing at the time the contract is executed. Thus, as a rule of construction, changes in the law subsequent to the execution of a contract are not deemed to become part of agreement unless its language clearly indicates such to have been intention of parties."); 1 WITKIN, SUMMARY OF CAL. LAW CONTRACTS, section 692, p. 625 (same).

[16] The very line from *Gipson* that the govenment's argument depends upon ("contracts . . . are deemed to incorporate . . . the reserve power of the state to amend the law . . .") comes from another California court of appeals case, *In re Marriage Walton*, 28 Cal. App. 3d 108 (1972). *Walton* is also a Contracts Clause case. *Walton*, 28 Cal. App. 3d at 112 (citing Article I, section 10, of the U.S. Constitution, and distinguishing a claim under that clause from claims raised under the Due Process Clause).

habeas corpus petition claiming that the new law violated the terms of his 1985 plea agreement because at the time of his plea parole decisions were left to the Parole Board. The Sixth District rejected the claim because the defendant/petitioner's plea bargain did not include an agreement on who would have final authority over parole decisions. *In re Lowe*, 130 Cal. App. 4th at 1424 ("[Defendant/petitioner] 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.") Therefore there was no breach of contract.

Simply put, the cases relied upon by the state — *Acuna*, *Gipson*, and *In re Lowe* — all permit the enforcement of statutes enacted subsequent to plea bargains because the new statutes did not breach terms of the underlying plea agreements. Here, there can be no dispute that the government is breaching a material term of Doe's 1991 plea agreement in light of the district court's finding that the privacy protections in effect at the time were a critical element of Doe's decision to plead guilty and that he entered his plea agreement with the agreement that he would be protected by those privacy laws. Under these circumstances, the courts are unanimous: the government may not breach the terms of a plea agreement by enacting new legislation.

II. PUBLIC POLICY CONCERNS SUPPORT THE POSITION THAT PLEA AGREEMENTS CANNOT BE AMENDED BY SUBSEQUENT LEGISLATIVE ACTION

The state argues that if this Court rules in Doe's favor, clarifying that plea agreements cannot be amended by subsequent changes in law, the resulting difficulty in

implementation would render important sex offender registration laws "virtually unenforceable." In light of the number of changes to the sex offender registration scheme over the past ten years, the state argues that enforcement of plea agreements that would exclude some defendants from some registration requirements would result in an "administrative quagmire." (AOB at 25-28.)

Experience has shown that the opposite is true. The decisions in *Jerry Z.*, *Arata*, and *Acuna* have demonstrated that courts are able to weed out legitimate claims about terms of earlier plea agreements from bogus ones. *Arata* was decided almost five years ago and it has not opened a flood gate of defendants seeking modification of sex offender registration obligations based on alleged agreements in earlier plea bargains. Indeed, the petitioner in *Jerry Z.* and Doe appear to be the only defendants in California since *Arata* who have persuaded judges that their plea agreements included terms guaranteeing specific protections later withdrawn by legislation.

On the other hand, if the government was permitted to amend any plea agreement without warning by enacting new legislation, then criminal defendants may be less willing to entertain offered plea bargains. This Court has noted that in the civil context, permitting the government to amend contracts by legislation would create "uncertainty in commercial transactions." *City of Torrance*, 32 Cal.3d at 378. The problem would be even more acute in the criminal context because the government is a party to every plea agreement and would have both incentive and opportunity to amend the terms of an agreement after it is

entered.

The government urges this Court to adopt the rule that plea agreements include an unwritten rule that the terms can be amended by the legislature at any time. This unwritten rule would even abrogate agreements made by the district attorney and defendant at the time of the plea, as is the case here. There is a simple solution to this problem, which the federal government has already adopted. As the Ninth Circuit recognized in *Transfiguration*, a change in law is a foreseeable contingency that the prosecution can contract around. The Ninth Circuit noted that "the U.S. Attorney has . . . drafted plea agreements including language addressing the possibility that in the event there is a change in law [impacting the plea terms, the defendant] . . . will agree to plead guilty to another charge encompassing the same or similar conduct." *Transfiguration*, 442 F.3d at 1232, n.15. Doe suggests that this Court encourage the same approach here.

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CONCLUSION

In conclusion this court should rule that material terms of a valid plea agreement cannot be abrogated by subsequently enacted legislation.

Dated: January 6, 2012

Respectfully Submitted

Dennis P. Riordan
Donald M. Horgan
Michael Romano
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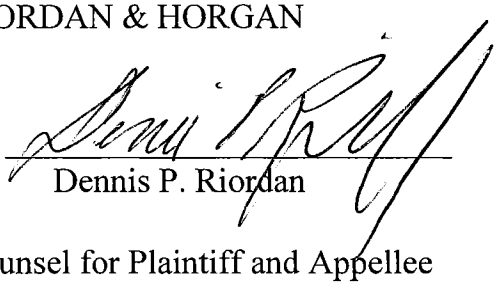
RIORDAN & HORGAN

By 
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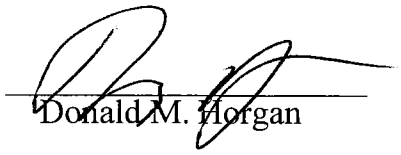
CERTIFICATE OF COMPLIANCE

I, Donald M. Horgan, hereby certify that the attached brief is proportionately spaced, has a typeface of 13 points, and contains 9,214 words.

Dated: January 6, 2012



Donald M. Horgan

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Re: Doe v. Harris No. S191948

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