In the Supreme Court of the State of California

JOHN DOE, **Plaintiff and Appellee,** **v.** **KAMALA D. HARRIS,** **Defendant and Appellant.**	Case No. S191948

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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

INTRODUCTION

As a matter of state law, defendants who enter into plea bargains are subject to retroactive legislative amendments to the extent it is constitutionally permissible. That is, the enforceable terms of a plea agreement incorporate, under contract law, the reserve power of the Legislature to enact non-punitive retroactive amendments in criminal cases. The decisions addressing that issue uniformly hold the parties' silence in a plea bargain about subsequent legislative amendments is not an agreement that the defendant's case is exempted from retroactive legislation in the future.

Plaintiff John Doe attempts to avoid the force of those decisions by altering the premise on which the certified question is presented to this court. He claims the magistrate judge of the United States District Court for the Northern District of California made a factual finding that a condition of the 1991 plea bargain in this case exempts Doe from sex offender registration laws—save those in effect at the time of his plea. Doe argues subsequent amendments to Penal Code section 290 cannot alter that settled term of his bargain because the factual finding of the magistrate judge is binding on this court.

The undisputed record shows no such condition in Doe's plea bargain. Nor does Doe correctly impute to the magistrate judge a contrary factual finding, let alone a finding that binds this court. The Ninth Circuit Court of Appeals clearly did not view the magistrate judge's order as a factual finding, particularly given the question it certified.

ARGUMENT

I. THE QUESTION BEFORE THIS COURT IS WHETHER, AS A MATTER OF STATE LAW, PLEA BARGAINS IN CALIFORNIA REPRESENT AGREEMENTS THAT EXCLUDE RETROACTIVE APPLICATION OF SUBSEQUENT AMENDING LEGISLATION

Doe contends "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." (Answer Brief on the Merits [ABM] at p. 23.) He thus asserts the question is *not* whether "every plea bargain automatically and sub silencio incorporates by reference the law in effect at the time of [the] plea," but "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." (*Ibid.*) For the following reasons, the former question is precisely what is at issue.

First, the undisputed evidence shows no agreement that Doe would receive the benefit of "privacy protections" in effect at the time of the plea. During the plea negotiations, the parties did not discuss the sex offender registration law, apart from the bare fact that the law applied to Doe. That, of course, was a mandatory requirement based on the offense to which Doe pleaded. The parties never discussed, much less agreed about, whether or not Doe was to be deemed exempt from future changes in the sex offender registration law (or for that matter whether or not Doe was to be deemed exempt from future amendments to any state laws implicated by the plea bargain). (ER 82-83 [testimony of defense counsel]; 149-152 [testimony of prosecutor]; 186 [testimony of Doe]; 271 [letter from defense counsel to

prosecutor].)[1] The written plea agreement stated only that Doe would be subject to "290 P.C. registration." (ER 273.) The agreement recited that Doe had not been induced to plead guilty by "any promise or representation of a lesser sentence, probation, reward, immunity, or anything else," except that he would plead to one count and would not receive a prison term; that provision did not mention exemption from future amendments to the registration law. (ER 274.)

Second, the magistrate judge found, based on the foregoing uncontradicted evidence, that "[p]rior to entry of the plea there was no discussion between the prosecutor and defense counsel about the registration requirement except the fact that it was required, which the prosecutor memorialized by adding it to the change of plea form." (ER 2.) The magistrate judge also found, "No qualification or reservation of rights pending future legislative changes was contemplated or written in by either party." (ER 3.) Accordingly, the magistrate judge's only finding of an arguably factual nature on this point was that the plea bargain did *not* include an agreement that Doe was exempt from future changes in the registration law.

Third, the magistrate judge determined Doe was exempted from future amendments to the registration law based on the reference in the written plea agreement to the relevant statute, "P.C. 290." The magistrate judge's interpretation of the statutory citation in the written statement of the consequences of the plea bears no resemblance to a factual resolution of

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[1] Because the parties' declarations on this fact were undisputed, the state moved for summary judgment in the district court. (ER 289, CR 40.) The magistrate judge denied the motion from the bench, without articulating a legal ground for proceeding with an evidentiary hearing. (ER 289, CR 44.) The evidentiary hearing merely confirmed the plea discussions as recounted in the earlier declarations.

conflicting evidence offered to establish a condition of a plea bargain. The magistrate judge made that clear by acknowledging that the scope of the plea bargain had to be resolved by an application of California law. (ER 13.) Concluding that Doe was not subject to future legislative alterations of the registration requirement, the magistrate judge cited "the plain language of Section 290 as written at the time, which was incorporated in his change of plea," which he interpreted to mean Doe's "registration would remain confidential and distribution of his registration information would be limited according to the terms of the statute." (ER 4-5; ER 16 ["one cannot *reasonably interpret the language of the 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," emphasis added].)[2] As the Ninth Circuit observed, the magistrate judge "inferred" that conclusion from what the lower court "felt" resulted from a citation of the sex registration statute in the written plea agreement. (*Doe v. Harris* (9th Cir. 2011) 640 F.3d 972, 975.) In other words, the "inference" of Doe's exemption from retroactive legislation from the citation to section 290 represented the magistrate judge's construction of California law in light of the undisputed contents of the written plea agreement.[3] That was not a factual finding but a legal

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[2] The magistrate judge's conclusion on the point was responsive to the issue as argued by the parties over the course of multiple briefs and arguments: whether the reference to section 290 was to be interpreted under California law as an exemption of Doe from subsequent amendments to the sex registration laws. (E.g., ER 291, CR 58 at p. 15 [Doe's Post Evidentiary Hearing Brief in Support of Plaintiff's Complaint]; ER 289, CR 42 at p. 10 [Doe's Memorandum in Opposition to Defendant's Motion for Summary Judgment].)

[3] The magistrate judge also found that Doe had relied on his own subjective hope that the registration requirement would not change. (ER 4-5, 27.) As the Ninth Circuit noted, this was based on "private discussions

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conclusion. (See *People v. Doolin*, 45 Cal.4th 390, 413 fn. 17 (2009) ["Where, as here, the meaning of [the] agreement does not turn on the credibility of extrinsic evidence, interpretation is a question of law, and we will independently determine the agreement's meaning."]; *Parsons v. Bristol Development Co.*, 62 Cal.2d 861, 865 (1965) ["'An appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument. . . where there is no conflict in the evidence.'"].)

Fourth, the Ninth Circuit did not view the magistrate judge's order as a factual finding. Had it construed the order that way, it would have lacked a reason to certify the question of state law to this court, in view of its prior precedents. (See *Davis v. Woodford* (9th Cir. 2006) 446 F.3d 957, 962 [in an "unusual case" where the evidence showed that "the prosecutor made a specific promise" on the record, the Ninth Circuit enforced that term of the plea bargain]; cf. *Brown v. Poole* (9th Cir. 2003) 337 F.3d 1155, 1159 ["While interpretation of the terms of a plea agreement often rests on questions of fact, this one rests on a question of law. There is no factual dispute about what the prosecutor said to Brown during the colloquy."].)

Although Doe argued in the Ninth Circuit that the Magistrate Judge had made a binding factual finding, the Ninth Circuit found instead that this

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which Doe had with his attorneys, and on Doe's testimony about his motivations for pleading guilty." (*Doe v. Harris, supra*, 640 F.3d at p. 974.) Yet, even those discussions concerned only the existing state of the law: both Doe and defense counsel testified that they did not discuss the possibility the law could change or how that might affect Doe's registration obligation. (ER 91 [defense counsel], 179 [Doe].) Reliance alone is insufficient to create an implied agreement under California law. (See *In re Honesto* (2005) 130 Cal.App.4th 81, 92 ["A plea agreement violation claim depends upon the actual terms of the agreement, not the subjective understanding of the defendant or deficient advice provided by his attorney."].) Accordingly, Doe's personal hope or belief that he would not be subject to changes in the law is irrelevant to the inquiry before this court.

case turned on "an unsettled question of California law." (*Doe v. Harris, supra,* 640 F.3d at p. 975.) The Ninth Circuit described the question as follows:

> Under the Due Process Clause, criminal defendants have a right to enforce the terms of their plea bargains enforced. *See Santobello v. New York*, 404 U.S. 257, 261, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). Plea agreements are "construed in accordance with state law." *Buckley v. Terhune*, 441 F.3d 688, 690 (9th Cir. 2006). Here, the district court found that, when Doe pleaded guilty in 1991, "[n]o qualification or reservation of rights pending future legislative changes was contemplated . . . by either party." Accordingly, the question is 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.*)

By expressly referencing the *absence* of any agreement about future legislative changes, the Ninth Circuit requested this court's answer to the question whether the plea bargain should be construed under California law to include an implied promise regarding the effect, if any, of changes to the law following the bargain's execution. Thus, contrary to Doe's assertion, the language of the certified question, as well as the Ninth Circuit's description of the issue in its published order, demonstrates that the court did *not* "posit as a given" (see ABM 23) that Doe's plea bargain factually encompassed an exemption from future changes in the law.

Finally, it is telling that Doe couples his factual finding argument to an inexplicable misconstruction of the state's position in his case. The state presented seven briefs and four oral arguments in federal court concerning the plea bargain in his case. It has never argued that an *agreed-upon* term of a plea bargain may be abrogated by subsequent legislative fiat. Our position in federal court, and in the opening brief filed in this court, is that, absent an agreement to the contrary between the parties, the existing law,

standing alone, does not create an enforceable promise that a defendant will only be subject to the law in effect on the day of the plea, to the exclusion of any retroactive changes in law. That is the issue posed by the certified question. Doe's answer to a *different* question is unhelpful.

II. CALIFORNIA LAW AUTHORIZES THE RETROACTIVE APPLICATION OF AMENDMENTS TO PLEA BARGAINS

Doe cites a number of cases for his argument 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 have been the intention of the parties." (ABM at pp. 9-10, quoting *Swenson v. File* (1970) 3 Cal.3d 389, 394-395.) All of those cited cases concern commercial contracts. (ABM at pp. 9-12 & fns. 3-5.) As the state explained in the opening brief, significant policy differences characterize the formation and enforcement of commercial contracts and criminal plea bargains. (Opening Brief on the Merits ["OBM"] at pp. 20-23.) To reiterate briefly, the court prohibited the retroactive changes in *Swenson* to prevent "uncertainty in commercial transactions" (*Swenson*, 3 Cal.3d at p. 394), while it allowed them in plea bargain cases "for the public good and in pursuance of public policy." (*People v. Gipson* (2004) 117 Cal.App.4th 1065, 1070.) "A plea bargain is not a commercial exchange. It is an instrument for the enforcement of the criminal law." (*United States v. Barron* (9th Cir. 1999) 172 F.3d 1153, 1158.) Unlike commercial contracts that are simply agreed upon between two parties, plea bargains must be offered by a public prosecutor and approved by a judge, both of whom are required to ensure that justice is served. "When persons enter into a contract or transaction creating a relationship infused with a substantial public interest, subject to plenary control by the state, such contract or transaction is deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact

additional laws for the public good and in pursuance of public policy." (*In re Marriage of Walton* (1972) 28 Cal.App.3d 108, 112.) In addition, the change in the law at issue in *Swenson* operated prospectively, while the amendments to the sex offender registration law at issue here were expressly made retroactive by the Legislature.

The California cases that address this question in the context of plea bargains uniformly support the conclusion that there is no implied incorporation of the existing law into the plea agreement. Doe relies on the newly-decided case of *People v. Jerry Z.* (2011) 201 Cal.App.4th 296, petition for review filed Jan. 11, 2012, which he states is "on all fours" with this case. (ABM at p. 14.) To the contrary, the Sixth District in *Jerry Z.* stated, "It is not clear whether the law existing at the time of a plea bargain is implicitly incorporated into the agreement," and declined to answer that question, noting that it was currently pending in this case. (*Jerry Z., supra,* 201 Cal.App.4th at p. 314 & fn. 12.)[4]

Nor does the Court of Appeal's holding in *Jerry Z.* conflict with the state's position here. The appellate court there found the plea bargain included an implied promise that the defendant would be able to seek expungement of his child molestation conviction even after the law had changed to eliminate that relief, because the parties agreed as part of the plea bargain that he would be placed on probation, a necessary prerequisite to expungement under the law then in effect. (*Id.* at pp. 315-316.) Significantly, the appellate court did *not* find that the law at the time of the plea, in and of itself, created an implied promise that the defendant would be exempt from changes to the law regulating expungement of convictions.

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[4] This shows that the Sixth District also viewed the certified question as raising the issue briefed by the state, and not the issue Doe now claims it presents.

Rather, the court pointed to an actual sentencing concession—the agreement that defendant would receive probation—to conclude that the availability of expungement was an implicit term of the plea bargain. (*Ibid.*)

Jerry Z. relied on *People v. Arata* (2007) 151 Cal.App.4th 778, which reached the same conclusion, and which we have distinguished for the same reasons. (OBM at pp. 14-16.) Doe makes an important concession by reiterating that distinction in his answering brief: "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 . . . , 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." (ABM at p. 15 fn. 7.) Accordingly, Doe makes our point that the existing law alone is not enough to create an enforceable term of the plea bargain. Rather, "the record must affirmatively demonstrate some basis" for concluding that the parties implicitly agreed on a particular term. (*People v. Ruhl* (1985) 168 Cal.App.3d 311, 315.) As should be abundantly clear, no such implicit agreement occurred here.[5]

Further, the court in *Jerry Z.* effectively found an *express* agreement precluding retroactive application of the change in law, based on declarations in which the defendant and his attorney claimed that a prosecutor and superior court judge had agreed that defendant would be eligible for expungement if he successfully completed probation and committed no other offenses for ten years. Because the district attorney's

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[5] As noted above, the parties had no discussion about the possibility that the registration law might be amended. Moreover, the prosecutor testified that he did not have the authority to agree that Doe would be exempt from subsequent legislative changes to the law, and, hence, thought that Doe would be subject to such changes. (ER 151.)

office never filed (or was asked for) an opposition, the appellate court accepted the declarations imputing acceptance of such an agreement by the prosecutor and the judge as true. (*Jerry Z., supra,* 201 Cal.App.4th at p. 324.) Here, by contrast, it is undisputed that no such express agreement occurred. Accordingly, *Jerry Z.* supports the state's position, and is no more "in tension" with the other California cases discussing the applicability of legislative amendments to plea bargains than *Arata.*

Doe also relies on *People v. Castillo* (2010) 49 Cal.4th 145. In *Castillo*, uncertainty about the retroactive application of a law lengthening the commitment period for sexually violent predators caused the Los Angeles County District Attorney, the Los Angeles County Public Defender, and the Presiding Judge of the Los Angeles County Superior Court to stipulate that the previous law would apply to all pending recommitment petitions. Although several courts subsequently held that pending recommitment petitions are subject to the new law, this court determined that the stipulation must be enforced. (*Id.* at pp. 172-174.) Again, *Castillo* involved an express agreement and is clearly distinguishable from this case.

Doe also points to *Davis v. Woodford,* 446 F.3d 957. However, that case also turned on an express agreement: "the prosecutor unequivocally stated that Petitioner would have only one prior conviction on his record 'for all purposes.'" (*Id.* at p. 962.) Doe contends that because the Ninth Circuit enforced this promise, it "refused to apply the *Gipson* rule urged by the state." (ABM at p. 19.) He is wrong. Quoting *People v. Gipson,* 117 Cal.App.4th at p. 1070, the Ninth Circuit recognized 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, supra,* 446 F.3d at p. 962.) Far from refusing to apply *Gipson,* the Ninth Circuit stated that its

holding "respects this principle." (*Ibid.*) It distinguished the case before it from *Gipson* because "the plea agreement did not merely incorporate existing law by reference; rather, it included a specific promise about how many prior convictions would be placed in Petitioner's criminal record as a result of the guilty plea." (*Ibid.*) Thus, while recognizing that existing law, without more, does not create a binding contract that the defendant would be exempt from changes in the law, the Ninth Circuit found that something "more" did exist in the express terms of that plea bargain.

Doe also mischaracterizes *Davis* as holding that "enforcement of the Three Strikes law violated the terms of the petitioner's earlier plea bargain." (ABM at p. 19.) If his characterization of the decision were correct, the Ninth Circuit would have concluded that the defendant's sentence could only be enhanced by a single five-year prior. Instead, the Ninth Circuit noted that the plea bargain "did not purport to freeze the law as it was in 1987," and emphasized, "We do not here undermine the constitutionality of the Three Strikes Law, nor do we question whether it applied to this case." (*Davis, supra,* 446 F.3d at p. 962.) Far from refusing to apply the new Three Strikes law retroactively, the circuit court held that the defendant's sentence could only be enhanced by *one* strike, pursuant to the express promise in the plea bargain. (*Ibid.*)

Accordingly, *Jerry Z., Arata, Castillo,* and *Davis* are each consistent with state's position here. *Absent an agreement to the contrary between the parties,* the retroactive application of a change in the law does not violate a plea bargain because the existing law itself does not freeze the parties' obligations. Rather, the plea bargain is deemed to incorporate the state's power to enact retroactive amendments to the law.

Doe cites two other cases, both of which are irrelevant to the certified question. (ABM at p. 20-22.) *United States v. Transfiguracion* (9th Cir. 2006) 442 F.3d 1222, concerns a plea agreement by defendants charged

with federal crimes on direct appeal to the circuit court. The decision does not cite a single California opinion and has no bearing on the issue of the "California law of contract interpretation as applicable to the interpretation of plea agreements." *Buckley v. Terhune* (9th Cir. 2006) (en banc) 441 F.3d 688, is also irrelevant, as the case concerns an ambiguity in the terms of a plea bargain, not a change in the law.

Doe distinguishes cases cited in the state's opening brief by, again, misdirecting an answer to the wrong question. He argues that *People v. Gipson,* 117 Cal.App.4th 1065, *People v. Acuna* (2000) 77 Cal.App.4th 1056, and *In re Lowe* (2005) 130 Cal.App.4th 1405, "permit the enforcement of statutes enacted subsequent to plea bargains because the new statutes did not breach terms of the underlying plea agreements." (ABM at p. 29.) He insists that a breach of a term of the plea bargain has occurred here, because the magistrate judge made a factual finding that the plea agreement included a promise that Doe was not subject to changes in the registration law. (*Ibid.*) As shown, no such factual finding exists. Further, the appellate courts in the cited decisions found no violation of a term of the plea bargain for reasons that are fully applicable here. Each of those courts rejected the notion that existing law, in and of itself, amounts to an implied agreement that, regardless of subsequently enacted retroactive legislation, the defendant is subject only to the law existing at the time of the plea.

Doe incorrectly argues that because *Gipson* involved a plea bargain claim under the contracts clause, that case "is not a statement of general California contract law." (ABM at p. 28.) In *People v. Shelton* (2006) 37 Cal.4th 759, this court cited *Gipson* for the specific proposition that "[a] negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles." (*Id.* at p. 767.)

Doe also distinguishes three strikes cases involving amendments to sentence enhancement laws on the ground that new laws penalizing recidivism increase the penalty for the current, rather than the past, crime. (ABM at pp. 26-27.) While ex post facto claims against such legislation fail for that reason, the cited decisions involved claimed violations of plea bargains based on an implicit promise barring the retroactive application of the three strikes law. (E.g., *Gipson*, *supra,* 117 Cal.App.4th at p. 1068 ["According to defendant, his 1992 plea bargain was a contract between the state and him, which the Legislature could not impair by subsequent enactments."]; *Davis*, *supra,* 446 F.3d at p. 958 [petitioner argued "that the use of his 1986 conviction as eight separate 'strikes' breached the 1986 plea agreement"].) Rather than hold the change in the sentencing law was not retroactive punishment, as in the context of an ex post facto claim, the courts in those cases found no violation of the plea bargain. Those decisions held that the defendant was subject to the three strikes law, because plea bargains are deemed to incorporate the state's authority to amend the law, and, hence, a reference to the existing five-year prior statute at the time of the plea bargain was not a promise to limit the use of the conviction to that law. Accordingly, the general contract principle applied in those three strikes cases supports the state's position here. And even if the court believes those cases are distinguishable, they certainly do not support Doe's position.[6]

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[6] We also reiterate that the courts have unanimously held that sex offender registration laws do not constitute punishment for purposes of the ex post facto law and therefore can be applied retroactively. (*Smith v. Doe* (2003) 538 U.S. 84, 105-106; *Hatton v. Bonner* (9th Cir. 2003) 356 F.3d 955; *People v. Castellanos* (1999) 21 Cal.4th 785, 788.) In *Doe*, the defendants pleaded guilty to sex offenses and had already been released from prison years before the Alaska registration law was enacted; the

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Finally, Doe has not addressed two points in the state's opening brief. One is the decision in *People v. McClellan* (1993) 6 Cal.4th 367. There, the court held that the trial court's failure to advise the defendant of the duty to register at the change of plea hearing "did not transform the court's error into a term of the parties' plea agreement." (*Id.* at p. 379; see *People v. Crandall* (2007) 40 Cal.4th 1301, 1311 (conc. opn. of Baxter, J.) ["If the record does not disclose any agreement, one way or the other, on a particular subject, there is no reason to assume a term favorable to the defendant."].) *McClellan* clearly supports our position. Because an omitted advisement about the registration requirement does not impliedly exempt the defendant from registration, a statutory citation employed as a shortcut reference in the plea agreement to the registration requirement creates no implied exemption either. (OBM at pp. 17-20.) Doe also failed to address our point that exempting pleading defendants from the retroactive application of legislative amendments, while applying such legislation to defendants convicted by a court or jury, would violate equal protection. (OBM at pp. 24-25.)

III. IF THIS COURT FINDS THAT PLEA BARGAINS FREEZE THE LAW, MANY STATUTES WILL BE EFFECTIVELY UNENFORCEABLE

The state argued in the opening brief that a decision finding plea bargains include an implied agreement exempting defendants from changes in the law would create serious implementation problems and would render certain laws practically unenforceable. (OBM at pp. 25-28.) As explained there, section 290 has been amended many times since its enactment. The administrative barriers and expense that would be necessitated to ascertain

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Supreme Court held that they were subject to the law even though registration was not discussed or even contemplated at the time of the pleas.

which defendants were convicted by guilty plea and what particular provisions were in effect on the day of each plea, in order to attempt to recode the entire Megan's Law website to reflect those myriad differences, could effectively prevent implementation of the law altogether.[7] And it would unquestionably dilute the intent of the public notification provision of that law, as the public would no longer have confidence that the website accurately reflected the sex offenders in their neighborhoods. That approach would also pose difficulties for police officers, who would have to ascertain—sometimes within the brief span of a traffic stop or temporary detention—whether a registered sex offender had pleaded guilty and what provisions applied at the time, before determining whether the offender was currently in violation of the law.

Doe asserts that this is simply a question of appellate courts being able to weed out legitimate claims from bogus ones. He misses the point. This is not simply an issue of appellate review. If the certified question is answered by holding the law in effect at the time of a plea agreement binds the parties, it would immediately exempt numerous defendants who pleaded guilty from all subsequently enacted laws.

Doe further suggests that the court should place the burden on prosecutors to "contract around" possible changes in the law. (ABM at p. 31.) He cites *United States v. Transfiguracion, supra,* 442 F.3d at p. 1232, footnote 15, where the Ninth Circuit noted that the United States Attorney

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[7] For example, in complying with the magistrate judge's order for injunctive relief pending appeal, the state found it impossible to indicate in its records that Doe only had to register once unless he moved, instead of annually under the current law, because there was no option for recording the old requirement. As a result, the state indicated that Doe was no longer required to register at all. Thus, at this point, if Doe does move without re-registering, law enforcement will have no way of knowing that he is in violation even under the old law.

had drafted some plea agreements that included "language addressing the possibility that in the event there is a change in the law and the defendant cannot proceed to sentencing for the agreed upon offense the defendant will agree to plead guilty to another charge encompassing the same or similar conduct." In *Transfiguracion,* the prosecutor agreed to dismiss conspiracy charges involving drug smuggling upon sentencing, if the defendants cooperated with law enforcement and pleaded guilty to importing drugs "into the United States from anyplace outside thereof." Prior to sentencing, the Ninth Circuit held that transporting drugs from Guam to this country did not constitute a violation of that statute, which nullified the guilty plea to that count. The majority in *Transfiguracion* held that the defendants could not still be prosecuted for the conspiracy charges, because the prosecutor had failed to cover a "predictable contingency" in the plea agreement that the law might change by way of judicial interpretation. (*Id.* at p. 1232.)[8]

Even if the Ninth Circuit has adopted a requirement that federal prosecutors anticipate possible changes in the law by incorporating contingencies into the plea agreement, no California court has done so. Moreover, it is difficult to see how such a condition subsequent could have been drafted here. After all, that task is far more nebulous than ensuring that the defendant pleads guilty to a valid charge, as in *Transfiguracion.* Because the prosecutor here was not prescient, he could not, for example, have made this plea bargain contingent on Doe's agreement to post his

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[8] *Transfiguracion* was decided by a divided panel of the Ninth Circuit. The majority admitted that its interpretation of the plea bargain resulted in a "windfall" for the defendants, who thereby escaped conviction altogether. (442 F.3d at p. 1235.) The dissenting judge believed the majority had "moved the goal-post and the government loses once again." (*Id.* at p. 1237 (Gibson, J., dissenting).)

registration information on an internet website, if the law were amended to require that in the future. Advances in technology highlight the folly of such a contingency requirement.

True, a prosecutor might include in each and every plea bargain a belts-and-suspender statement that statutory requirements sometimes change and that the defendant might become subject to changes in law that are both retroactive and non-punitive. But to what end? That is already the state of the law. Such a "condition" is unnecessary. For the policy reasons asserted by the state, and based on the uniform approach of California courts with respect to contractual interpretation of plea bargains, this court should reject Doe's suggestion.

CONCLUSION

For the reasons stated, the certified question of the Ninth Circuit Court of Appeal should be answered by concluding that the terms of a plea bargain are affected by changes in the law.

Dated: February 8, 2012

Respectfully submitted,

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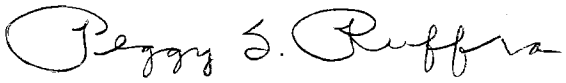

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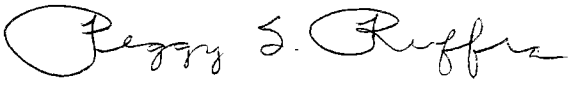
CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF** uses a 13 point Times New Roman font and contains 4873 words.

Dated: February 8, 2012

KAMALA D. HARRIS
Attorney General of California



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I declare:

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

On February 10, 2012, I served the attached **REPLY BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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United States Court of Appeals
Ninth Circuit
San Francisco Branch
P.O. Box 193939
San Francisco, CA 94119-3939

Honorable Mark S. Boessenecker
Judge, Napa County Superior Court
Historic Courthouse - Department C
825 Brown Street
Napa, CA 94559

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 10, 2012, at San Francisco, California.

D. Desuyo
Declarant

Signature

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