SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

The People of the State of California,

Plaintiff and Respondent,

v.

Mark Buza,

Defendant and Appellant.

Case No. S223698

(San Francisco County Superior Court No. 207818, First Appellate District, Div. 2, No. A125542)

Application of the American Civil Liberties Union of Northern California and Professor Joseph R. Grodin to File Amicus Curiae Brief And Amicus Brief in Support of Appellant Mark Buza

Appeal from the Judgment of the
Superior Court of the State of California
for the City and County of San Francisco,
Honorable Carol Yaggy, Judge

DEC 02 2015

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APPLICATION TO FILE *AMICUS* BRIEF

The American Civil Liberties Union of Northern California and Professor Joseph R. Grodin respectfully apply for leave to file the attached *amicus* brief to discuss why taking DNA from people arrested but not convicted of any crime violates the California Constitution's protections against unreasonable searches and seizures, Article I § 13. The proposed brief addresses the differences between this provision and the Fourth Amendment, the magnitude and significance of the government's marginal interests in taking DNA at arrest (as opposed to taking it after conviction or after a judicial finding of probable cause), and the government's assertion that the fact that the law here was adopted through the initiative process should insulate it from judicial review.

STATEMENT OF INTEREST

The American Civil Liberties Union is a nationwide nonprofit, nonpartisan organization with over 500,000 members, dedicated to the defense and promotion of the guarantees of individual rights and liberties embodied in the state and federal constitutions. The American Civil Liberties Union of Northern California (ACLU-NC), founded in 1934 and based in San Francisco, is the largest ACLU affiliate.

The national ACLU and the ACLU-NC have been active participants in the debate over the expansion of DNA databanks. As part of this work, the ACLU-NC submitted amicus briefs in the court below and in this Court when this case was previously before it. It submitted an amicus brief in *Maryland v. King*[1] and is currently litigating the validity of this same statute in federal court in *Haskell v. Harris*.[2]

The ACLU-NC also has a separate interest in helping to ensure that the California Constitution maintain its independent force and continue to provide Californians with more privacy protection than does the Fourth Amendment.[3]

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[1] 133 S.Ct. 1958 (2013).

[2] *See Haskell v. Brown*, 677 F. Supp. 2d 1187 (N.D. Cal. 2009) *aff'd sub nom. Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012) on reh'g en banc, 745 F.3d 1269 (9th Cir. 2014) and *aff'd sub nom. Haskell v. Harris*, 745 F.3d 1269 (9th Cir. 2014) (per curiam). The District Court has stayed proceedings in *Haskell* while this Court considers this appeal.

[3] *See, e.g.*, *Offer-Westort v. City and County of San Francisco* (S.F. Sup. Ct. No. CGC-13-529730) (challenge to searches of arrestees' cell phones under Article I, §§ 1, 13); *Brown v. Shasta Union High School Dist.*, 2009 WL 8731563 (Shasta County Sup. Ct. No. 164933) (enjoining student drug-testing program under Article I, §§ 1, 13), *aff'd*, No. C061972, 2010 WL 3442147 (Cal. Ct. App. Sept. 2, 2010).

Joseph R. Grodin is Distinguished Emeritus Professor at the University of California, Hastings College of the Law and Associate Justice of the California Supreme Court, 1982–1987. Much of his work as a scholar and as a jurist has focused on the California Constitution. *See, e.g.*, Joseph R. Grodin *et al.*, THE CAL. STATE CONSTITUTION (1993); Joseph R. Grodin, *Freedom of Expression under the California Constitution*, 6 Cal. Legal History 187 (2011); Joseph R. Grodin, *Liberty and Equality under the California Constitution*, 7 Cal. Legal History 167 (2012).[4] His interest in this matter is to support the independent vitality of the California Constitution and the proper standard for judicial review of initiative statues; Professor Grodin has no particular expertise in the mechanics or efficacy of DNA collection. He therefore does not join the sections of this brief that address those matters (sections (II)(4)-(6)).

Because of these interests, *amici* respectfully request that this Court allow them to submit this brief addressing the question of whether collecting DNA from arrestees, without a warrant or any judicial finding of probable cause, violates Article I § 13 of the California Constitution. *See* Rule of Ct. 8.520(f)(3).

No person or entity other than *amici* and their counsel authored the attached brief or made any monetary contribution to its preparation. *See* Rule of Ct. 8.520(f)(4).

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[4] The latter two articles are available at http://www.law.berkeley.edu/files/Grodin-Reprints__CLH11-12.pdf.

Dated: November 19, 2015

Respectfully submitted,

By: ______________________________

Joseph R. Grodin

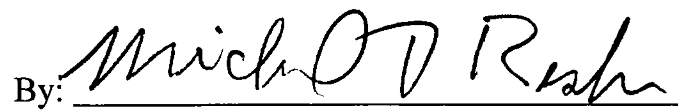
By: 

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TABLE OF CONTENTS

APPLICATION TO FILE *AMICUS* BRIEF i

STATEMENT OF INTEREST ii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vi

I. INTRODUCTION AND SUMMARY OF ARGUMENT 1

II. ARGUMENT 2

1. Unlike the Fourth Amendment, Article I § 13 prohibits the police from conducting warrantless, suspicionless searches of arrestees for evidence of unrelated crimes. 2

2. Seizing and analyzing the DNA of everybody arrested on suspicion of a felony violates these established Article I § 13 rules. 6

3. *King*'s flawed reasoning does not control the Article I § 13 analysis. 7

4. Taking DNA from every arrestee does not advance the government's claimed interests so as to make it reasonable 11

5. The government does not actually use DNA to identify arrestees 18

6. That the government can take fingerprints from arrestees does not mean it can take DNA from them, too. 23

7. This Court applies the same constitutional scrutiny to initiative statutes as to any other legislation. 24

8. This Court should decide the question on state constitutional grounds even though the law violates the Fourth Amendment. 26

III. CONCLUSION 29

CERTIFICATE OF COMPLIANCE 31

TABLE OF AUTHORITIES

Page(s)

Cases

American Academy of Pediatrics v. Lungren,
16 Cal.4th 307 (1997) 8

Buckley v. Am. Constitutional Law Found.,
525 U.S. 182 (1999) 25

Dant v. Superior Court,
61 Cal. App. 4th 380 (1998) 10

Davis v. Mississippi,
394 U.S. 721 (1969) 23

Delaware v. Prouse,
440 U.S. 648 (1979) 12

Elec. Privacy Info. Ctr. v. Transp. Sec. Admin.,
No. CIV.A. 03-1846 CKK, 2006 WL 626925 (D.D.C. Mar. 12, 2006) 22

Golden Gateway Center v. Golden Gateway Tenants Assn.,
26 Cal.4th 1013 (2001) 28

Green v. Nelson,
595 F.3d 1245 (11th Cir. 2010) 17

Gustafson v. Florida,
414 U.S. 260 (1973) 3

Haskell v. *Brown*,
No. 3:09-cv-04779-CRB (N.D. Cal.) .... *passim*

Hays v. Wood,
25 Cal. 3d 772 (1979) 2, 24

Hotel Employees and Restaurant Employees Intern. Union v. Davis,
21 Cal.4th 585 (1999) 24

Kuba v. 1-A Agr. Ass'n,
387 F.3d 850 (9th Cir. 2004) 28

Kyllo v. United States,
533 U.S. 27 (2001) 24

In re Lance W.,
37 Cal.3d 873 (1985) 2

Legislature v. Deukmejian,
34 Cal. 3d 658 (1983) 24

Legislature v. Eu,
54 Cal. 3d 492 (1991) 25, 26

Lockyer v. City & Cty. of San Francisco,
33 Cal. 4th 1055 (2004) 26

Loder v. Mun. Court,
17 Cal. 3d 859 (1976) 23, 24

In re Marriage Cases,
43 Cal. 4th 757 (2008) 25, 26

Maryland v. King,
133 S.Ct. 1958 (2013) .... *passim*

Michigan v. DeFillippo,
443 U.S. 31 (1979) 3

Miller v. Superior Court,
127 Cal.App.3d 494 (1981) 5, 6

Mills v. Superior Court,
42 Cal. 3d 951 (1986) 26

Nicholas v. Goord,
430 F.3d 652 (2d Cir. 2005) 23

Obergefell v. Hodges,
135 S. Ct. 2584 (2015) 25

People v. Brisendine,
13 Cal.3d 528 (1975) .... *passim*

People v. Chavez,
26 Cal.3d 334 (1980) 7

People v. Cook,
41 Cal.3d 373 (1985) 8, 28

People v. Henry,
65 Cal. 2d 842 (1967) 10

People v. Jablonski,
37 Cal. 4th 774 (2006) 26

People v. Krivda,
8 Cal.3d 623 (1973) 27

People v. Laiwa,
34 Cal.3d 711 (1983) 4, 5, 6

People v. Longwill,
14 Cal.3d 943 (1975) 5

People v. Maher,
17 Cal.3d 196 (1976) 4

People v. McInnis,
6 Cal. 3d 821 (1972) 23, 24

People v. McKay,
27 Cal. 4th 601 (2002) 11

People v. McKee,
47 Cal. 4th 1172 (2010) 10, 23, 25

People v. Norman,
14 Cal.3d 929 (1975) 5

People v. Pettingill,
21 Cal.3d 231 (1978) 7, 8

People v. Ruggles,
39 Cal.3d 1 (1985) 27

People v. Scott,
21 Cal. 3d 284 (1978) 12

People v. Teresinski,
30 Cal.3d 822 (1982) 8

Raven v. Deukmejian,
52 Cal.3d 336 (1990) 2, 7

In re Rottanak K.,
37 Cal. App. 4th 260 (1995) 18

San Pasqual Band of Mission Indians v. State,
194 Cal. Rptr. 3d 231 (Ct. App. Oct. 2, 2015) 24

Strauss v. Horton,
46 Cal. 4th 364 (2009) 25

United States v. Robinson,
414 U.S. 218 (1973) 3, 4, 6

Virginia v. Moore,
553 U.S. 164 (2008) 11

Wallace v. Zinman,
200 Cal. 585 (1927) 25, 26

Weaver v. Jordan,
64 Cal. 2d 235 (1966) 24

West v. Thomson Newspapers,
872 P.2d 999 (Utah 1994) 27, 28

White v. Davis,
13 Cal. 3d 757 (1975) 9

Statutes and Rules

44 U.S.C. § 3501 22

DNA Act 18

E-Government Act of 2002, P.L. 107-347, 116 STAT. 2899,
2921 22

Penal Code
§ 7(21) 18
§ 295(h)(1), (2) 18
§ 296(a)(2)(c) 29

Rules of Court
8.520(c) 30
8.529(h) 16, 17, 19

Other Authorities

86 Ops. Cal. Atty. Gen. 198 (2003) 29

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In construing Article I § 13, this Court has expressly rejected the proposition, central to *Maryland v. King*,[5] that arrestees lack any privacy interests that limit the authority of the police to search them. Instead, it has repeatedly held that, unlike the Fourth Amendment, Article I § 13 requires the government to justify searches of arrestees with something other than the mere fact of arrest: they cannot conduct warrantless exploratory searches of arrestees simply in the hope of discovering evidence of some other crime. Upholding the search here at issue would mean abandoning this line of precedent and instead adopting a federal rule that this Court has expressly and repeatedly rejected as incompatible with the purpose of Article I § 13.

Furthermore, the government has not shown that the marginal utility of taking DNA samples at arrest – as opposed to after conviction, or at least after a judicial finding of probable cause – justifies such a change of course or makes the arrestee sampling reasonable; and the limited research in this area suggests just the opposite. The government's claim that it is using DNA to identify arrestees in the common sense of the term (i.e., to determine who they are as opposed to connecting them in unsolved crimes) is belied by the fact that the state requires law enforcement to identify arrestees through their fingerprints before deciding whether to take a DNA sample from them.

Finally, the government's suggestion that the statute here at issue is constitutional because it was adopted as part of an initiative ignores the numerous cases in which this Court has held that "[s]tatutes adopted by the

[5] 133 S.Ct. 1958 (2013).

initiative process are subject to the same measure of constitutional scrutiny as is applied to laws adopted by the normal legislative process." *Hays v. Wood*, 25 Cal. 3d 772, 786 (1979) (citations omitted).

This Court should therefore hold that this provision violates the California Constitution, whether or not it addresses the federal constitutional question.

II. ARGUMENT

1. Unlike the Fourth Amendment, Article I § 13 prohibits the police from conducting warrantless, suspicionless searches of arrestees for evidence of unrelated crimes.

"California citizens are entitled to greater protection under [Article I § 13 of] the California Constitution against unreasonable searches and seizures than that required by the United States Constitution." *People v. Brisendine*, 13 Cal.3d 528, 551 (1975); *see id.* at 548-552.[6] Most relevant to this case, this Court has repeatedly held that Article I § 13 is more protective of the privacy rights of arrestees than is the Fourth Amendment and, specifically, that it protects them against "exploratory" police searches for evidence of unrelated crimes. *Id.* at 534-35 (collecting cases). In doing so, it has expressly rejected the reasoning of a line of U.S. Supreme Court cases that allow the police to conduct broad – nearly unlimited – searches

[6] As Mr. Buza explains, although a 1983 constitutional amendment (Proposition 8) eliminated the exclusionary rule as a remedy for violations of this provision, its "substantive scope … remains unaffected" by that initiative. *In re Lance W.*, 37 Cal.3d 873, 886-87 (1985). *Brisendine* and its progeny therefore remain good law except to the extent they require exclusion of evidence. *Id.*; *see Raven v. Deukmejian*, 52 Cal.3d 336, 352 (1990). Because all of these cases have been abrogated as to this remedy by Proposition 8, his brief does not separately note that abrogation in the individual citations.

of persons whom they have arrested, with no justification other than the arrest itself. These federal Fourth Amendment cases – exemplified by *United States v. Robinson*, *Gustafson v. Florida,* and *Michigan v. DeFillippo*[7] – are fundamental to the *King* analysis because they mean that "an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person." *Brisendine*, 13 Cal.3d. at 547 (quoting *Robinson*, 414 U.S. at 237 (Powell, J. concurring)). But this Court has rejected this notion – and this line of cases – and has instead held that under Article I § 13, arrestees *do* retain significant privacy interests. *Id.*; *see id.* at 545-46 & n.13. Unlike the Fourth Amendment, California law therefore prohibits the police from conducting suspicionless exploratory searches of arrestees in the hope of finding evidence of unrelated crimes. Although concerns relating to officer safety, the need to inventory an arrestee's possessions and to prevent the introduction of contraband or weapons into a jail will justify many searches of arrestees, neither these interests nor any other legitimate government interest justifies taking DNA at arrest, much less taking it from everybody arrested on suspicion of any felony.

This court first rejected the federal rule allowing unlimited searches of arrestees in *Brisendine*. That case involved the authority of the police to search backpackers whom they had arrested but would be citing and

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[7] *Michigan v. DeFillippo*, 443 U.S. 31 (1979); *United States v. Robinson,* 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973). *Robinson* and *Gustafson* were decided together, and this Court has used "*Robinson*" to refer to both of them. *See Robinson*, 414 U.S. at 220; *Brisendine*, 13 Cal.3d at 546 n.13. The relevant part of *DeFillippo* merely restates the rule set forth in those two cases without further analysis. *See DeFillippo*, 443 U.S. at 35.

releasing after they transported them to their patrol cars, some distance away. The court held that, although the need for the officers to escort these particular arrestees to their patrol cars raised unusual officer-safety concerns that justified searching them for weapons, the officers violated Article I § 13 by searching areas that could not conceal weapons. 13 Cal.3d. at 534-35; *see id.* at 544-45. It expressly rejected the idea that the police could conduct "an exploratory search" of an arrestee to look for evidence of some crime, unrelated to the crime of arrest. *Id.* at 534-35; *see id.* at 545-47. Instead, searches of arrestees must be limited to those that serve governmental interests other than the general interest in crime detection, such as the need to ensure officer safety, prevent the destruction of evidence or the introduction of weapons or contraband into jails, and safeguard the arrestee's property. *See id.* at 539; *People v. Maher*, 17 Cal.3d 196, 200-201 (1976).

Brisendine also addressed at length and ultimately rejected the government's argument that Article I § 13 should provide arrestees with no greater protections than does the Fourth Amendment as interpreted by *Robinson* and its ilk. *Brisendine*, 13 Cal.3d at 545-52. Although the federal constitution provides "minimum" national standards, "fundamental principles of federalism" mean that the states, through their constitutions, statutes, and courts, are "independently responsible for safeguarding the rights of their citizens." *Id.* at 545, 550-551. Thus, although it recognized that its holding was "irreconcilable" with *Robinson*, the Court held that the searches violated Article I § 13 and reversed the conviction. *Id.* at 548, 552; *see id.* at 546 n.13. It has since repeatedly reaffirmed this rule and refused to dilute it to conform to the less-protective federal standard. *See People v. Laiwa*, 34 Cal.3d 711, 726-27 (1983)(expanding principle to

include custodial arrests, as discussed below); *People v. Longwill*, 14 Cal.3d 943, 949-52 & n.4 (1975) (again rejecting federal rule and expanding *Brisendine* to prohibit unlimited searches of all persons arrested for public drunkenness); *People v. Norman*, 14 Cal.3d 929, 939 (1975) (again "rejecting the *Robinson/Gustafson* rule" and refusing to allow exploratory search of arrestee who would be taken before magistrate).

Although *Brisendine* involved people arrested for minor offenses who would be released on their promise to appear, both this Court and the Court of Appeal have since held that its rule applies to full custodial arrests for more serious offenses. In the first of these cases, the police arrested a man for burglary and then searched a bag he was carrying. *Miller v. Superior Court*, 127 Cal.App.3d 494, 496-97 (1981). The Court of Appeal held that although the search complied with the Fourth Amendment because it was incident to a custodial arrest, it violated Article I § 13 because it was not justified by any "need to uncover evidence of the crime [of arrest or] weapons." *Id.* at 505 (quoting *Brisendine*). Even in the context of a custodial arrest for a felony, our constitution does not allow the police to justify a search of an arrestee "by referring to diminished expectation of privacy or the *ipse dixit* conclusion that a lawful arrest justifies infringement of any privacy interest." *Id.* at 511. Instead, Article I § 13 demands that the government show that a search of a particular arrestee is justified by the facts of the particular arrest. *Id.* at 504.

Two years later this Court confirmed this principle and held that Article I § 13 prohibits exploratory searches of arrestees who will be booked into jail and held in custody. *See Laiwa*, 34 Cal.3d at 727-28 (rejecting theory that police could conduct "accelerated booking searches" of people who are subject to a full custodial arrest and jailing). Although

the fact that these arrestees will be held in jail means that they, unlike Brisendine, may be subject to a booking search to inventory their property and maintain jail security, this cannot justify searches that do not serve these purposes. *See id.* at 726. Thus, even full custodial arrest, booking, and incarceration do not authorize the police to search an arrestee "in the hope of discovering evidence of a more serious crime." *Id.* at 727-28. Instead, all suspicionless searches of arrestees, however classified, must be justified by some legitimate governmental interest other than the mere desire to search for evidence of some potential, unknown crime. *See id.*

2. Seizing and analyzing the DNA of everybody arrested on suspicion of a felony violates these established Article I § 13 rules.

This difference between the state and federal constitutions means that regardless of whether California's arrestee-testing law violates the Fourth Amendment, it violates Article I § 13. *King*'s holding rests on what it calls the "settled" proposition, established in *Robinson*, that the "fact of a lawful arrest, standing alone, authorizes a search" of virtually unlimited scope, without "any indication that the person arrested possesses weapons or evidence." *King*, 133 S.Ct. at 1970-71 (quoting *Robinson*, 414 U.S. at 224 and *DeFillippo*, 443 U.S. at 35); *see id.* at 1974-75. But, as discussed above, "California does not subscribe to the rule of [*Robinson*], insofar as it permits full searches of any person under lawful custodial arrest without inquiry into whether the justifications for search incident to arrest apply to the particular arrestee." *Miller*, 127 Cal.App.3d at 504 (citation omitted). Our constitution therefore does not allow the police to use the mere fact of an arrest to justify an exploratory search for evidence of unrelated crimes.

As the court below discussed at length, Proposition 69 purports to authorize just this type of unconstitutional practice authorize because it allows the police to use the mere fact of an arrest to search arrestees' DNA in order to try to connect them to unrelated, unknown crimes without a warrant or individualized suspicion. *See* slip opn., pp. 27-38. This is precisely the type of exploratory search for evidence of unrelated crimes that Article I § 13 forbids.

3. *King's* flawed reasoning does not control the Article I § 13 analysis.

"Rights guaranteed by [California's] Constitution are not dependent on those guaranteed by the United States Constitution." Cal. Const., Art. I § 24. Thus, California courts have an "obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions." *People v. Chavez*, 26 Cal.3d 334, 352 (1980); *see Raven*, 52 Cal.3d. at 353-354. When interpreting our state constitution, this Court will give U.S. Supreme Court decisions the same respect that it would accord any appellate court but will mirror its holdings "only when they provide no less individual protection than is guaranteed by California law." *People v. Pettingill*, 21 Cal.3d 231, 248 (1978) (citations omitted); *see id.* at 247-48; *see* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977) (state courts interpreting state constitutions should follow federal precedents "only if they are found to be logically persuasive and well-reasoned"). "[E]ven when the terms of the California Constitution are textually identical to those of the federal Constitution," our courts will not abandon past interpretation of our constitution to follow federal decisions that would

weaken Californians' privacy rights. *American Academy of Pediatrics v. Lungren*, 16 Cal.4th 307, 325-28 (1997) (lead opn. of George, C.J.); *see Brisendine*, 13 Cal.3d at 549-50; Hans A. Linde, *E Pluribus-Constitutional Theory and State Courts*, 18 GA.L.REV. 165, 181-82 (1984). Thus, although in deciding this case, the Court can look to long-established Fourth Amendment principles that "provide no less individual protection than is guaranteed by California law,"[8] it should not follow *King*'s departure from these fundamental principles, because *King*'s analysis is inconsistent with California law, is unpersuasive, and provides less protection than does settled California law.[9]

First, this Court has already held that the state provision is more protective than the federal charter *in the precise context* of whether the police can conduct exploratory searches of arrestees, as discussed above in § II-1. In doing so, it expressly rejected the Fourth Amendment rule that animates *King* – that a person arrested by an officer in the field, with no

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[8] *Pettingill*, 21 Cal.3d at 248. *Brisendine* itself relied on earlier Fourth Amendment precedent from state and federal courts that limited the scope of searches incident to arrest but refused to follow *Gustafson's* and *Robinson's* departure from those earlier principles. *See Brisendine*, 13 Cal.3d at 538-5429; *see also People v. Cook,* 41 Cal.3d 373, 376 n.1 (1985) (lead opn. of Grodin, J.).

[9] Although this Court has sometimes said that it will follow such precedent absent a reason to do otherwise, it has not done so when that would mean overturning California precedent. *See People v. Teresinski*, 30 Cal.3d 822, 835-39 (1982). California courts have long rejected the underlying theory of *King*; moreover, as the four dissenting justices in *King* made clear, the majority opinion represents a sharp and sudden departure from the core Fourth Amendment principle that the police need a warrant – or at least probable cause – to search for evidence of a crime. *See King*, 133 S.Ct. at 1980-83, 1989 (Scalia, J., dissenting). Mr. Buza's brief discusses the substantial academic criticism of *King*.

judicial review, "retains no significant Fourth Amendment interest in the privacy of his person." *Brisendine*, 13 Cal.3d. at 547 (citation omitted). Adopting the *King* holding would require this Court to completely reverse course and overrule these prior cases in favor of a rule it has repeatedly rejected.

Second, *King* rests on the premise that Maryland is seizing DNA in order to identify arrestees and supervise them as they progress through the criminal-justice system, rather than to investigate unsolved crimes. *Compare King*, 133 S.Ct. at 1970-72 *with id.* at 1982-88 (Scalia, J., dissenting). Even if that is the purpose of Maryland's law, it is not the purpose of California's, as the court below explained. Under Article I § 13, that actual purpose matters; the police cannot use an administrative search as a pretext to justify an exploratory search for evidence. *Brisendine*, 13 Cal.3d at 534-35; *cf. White v. Davis*, 13 Cal. 3d 757, 774 (1975) (California constitutional right to privacy "prevents government ... from misusing information gathered for one purpose in order to serve other purposes.").

Third, the *King* majority wrongly posits that the fact that the police take DNA from everybody arrested for the listed offenses means that there is no danger of abuse because the police who take the DNA at booking have no discretion to decide who must provide a sample. *King*, 133 S.Ct. at 1970. But as the court below, scholars, and the British Human Genetics Commission have explained, this ignores the reality that mandatory arrestee-testing laws simply transfer that same unchecked discretion to the arresting officers and in fact give the police "incentives to turn every encounter into an arrest" so they can obtain a DNA sample. Elizabeth E. Joh, *Maryland v. King: Policing and Genetic Privacy*, 11 OHIO ST. J. CRIM. L. 281, 285-286 (2013) (citation omitted); *see* slip opn., pp.48-49.

Fourth, even if *King*'s conclusion that DNA testing will be useful for custody and bail determinations may be correct in some jurisdictions, it is inapposite in California, where these determinations must be made within two business days of arrest while the results of DNA testing will not be available for at least one month. *Compare King,* 133 S.Ct. at 1972-75 *with Dant v. Superior Court*, 61 Cal. App. 4th 380, 385-87, 389-90 (1998). And the government's suggestion that a court might later rely on test results to revoke pretrial release cannot justify taking DNA from the thousands of Californians who are arrested each year on suspicion of a felony but are never charged with any offense and therefore are not subject to pretrial detention or release.

Fifth, the *King* majority upholds the Maryland law based on speculation about how arrestee DNA might someday be used, rather than based on facts about how it is being, or can currently be, used. *See id.* at 1988-89 (Scalia, J., dissenting). In California, the government must justify a warrantless search with actual evidence; it cannot rely on speculation or mere assertions. *See Brisendine*, 13 Cal.3d at 534 n.4; *People v. Henry*, 65 Cal. 2d 842, 845, 847 (1967) (collecting cases); *see also People v. McKee*, 47 Cal. 4th 1172, 1206 (2010). The government here has failed to justify California's law with actual evidence. And, as discussed below, there is little indication that taking samples from people who are arrested but not charged or convicted of any offense actually serves the government's claimed interests.

Finally, the government's claim that this Court should follow *King* because adhering to *Brisendine* and its progeny would produce "anomalous results" – in that state law would thus forbid some searches that do not result in the suppression of evidence (because they do not violate the Fourth

Amendment) – ignores the reality that this is already the case, as well as basic principles of federalism. California law limits the authority of peace officers in many ways that are not required by any constitutional provision. For example, California police are prohibited from making a custodial arrest for many misdemeanors and virtually all traffic violations if the suspect has satisfactory identification. *See People v. McKay*, 27 Cal. 4th 601, 605, 619-20 (2002). But after Proposition 8, when the police violate these limits, courts cannot suppress the fruits of those violations. *Id.* at 618-19. Instead, enforcement of these state-law protections must come in civil suits for damages or equitable relief, or in administrative disciplinary actions. *See id.* And far from being some sort of anomaly, this result is a fundamental aspect of our federalism, one that allows individual states to provide their people with more protections than the floor set by the federal Constitution without thereby incurring what some consider to be the high costs of an exclusionary remedy. *See Virginia v. Moore*, 553 U.S. 164, 174 (2008); *see also id.* at 180 (Ginsburg, J., concurring). It is no reason to weaken the protections of the California Constitution.

4. Taking DNA from every arrestee does not advance the government's claimed interests so as to make it reasonable[10]

The government also argues that arrestee testing is constitutional under Art. I § 13 because its benefits outweigh its costs. *See* Gov't Reply Br. at 23. But even if this type of cost-benefit analysis were reason for this Court to depart from its prior decisions and allow exploratory searches of

[10] As noted in the application, because Professor Grodin has no particular expertise relating to DNA collection, this section and the two that follow it (Sections II (4-6)) are submitted only by the ACLU.

arrestees, the government has not – and cannot – meet its burden to show that testing at arrest sufficiently serves its asserted interests.

As an initial matter, the government is wrong to criticize the Court of Appeal for pointing-out that the government has failed to show a substantial reason for testing immediately after arrests, as opposed to after conviction or, at the very least, after the initiation of actual charges and a judicial finding of probable cause. *See* Gov't Opening Br. at 49. Although it may be that the government need not choose the least-intrusive alternative when it invades personal privacy, any rational analysis of the costs and benefits of a law or policy must take into account the available alternatives. Even an extremely intrusive search may nevertheless be reasonable if it is truly necessary to achieve a critical goal, but not if there are equally effective alternatives that are less intrusive. *See People v. Scott*, 21 Cal. 3d 284, 293 (1978) (the "possibility that the evidence may be recovered by alternative means less violative of Fourth Amendment freedoms" weighs against allowing the search). Conversely, even a minor intrusion is unconstitutional if its "marginal contribution" to serving the government's interests do not outweigh the intrusion it entails. *Delaware v. Prouse*, 440 U.S. 648, 659-661 (1979) (suspicionless drivers'-license checks violated Fourth Amendment because "[g]iven the alternative mechanisms available," their "marginal contribution to roadway safety" did not outweigh the intrusion). Here, too, it is the marginal benefit of testing mere arrestees – as opposed to persons convicted of crime or, potentially, those like Mr. King who are not just arrested but also charged with a crime and have gone before a neutral magistrate who has found probable cause – that must be evaluated.

The limited research in this area indicates that arrestee testing is not significantly more effective at solving crime than is taking samples only after conviction. For example, the U.K. has the second-largest DNA database in the world and has had an arrestee-testing program since April 2004. In 2006, the British Home Office evaluated its program and concluded that "the number of matches obtained from the Database (and the likelihood of identifying the person who committed the crime) is 'driven' primarily by the number of crime scene profiles loaded on the Database," rather than from the number of arrestee/offender profiles.[11] In fact, the number of DNA database matches peaked in 2002-03, just *before* the UK started taking DNA at arrest, and then decreased in 2003-04 and 2004-05, after the government instituted arrestee testing.[12] Not coincidentally, the number of new crime-scene DNA profiles loaded into the system also peaked in 2002-03.[13] A 2006 report by Dr. Helen Wallace further analyzed these statistics and concluded that arrestee testing had failed to lead to increased hits:

> [I]t is the number of DNA profiles from crime scenes added to the [National DNA Database]—not the number of individuals' profiles retained—that largely determines the number of detections. This analysis is further confirmed by comparing the DNA-detection rate with those from previous years; this number has remained relatively constant for the years for which figures are available (38% in 2002/2003, 43%

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[11] Great Britain Home Office, Forensic Science and Pathology Unit, *DNA Expansion Programme 2000-2005: Reporting Achievement* (2005), at 10 ¶ 32, available at http://www.statewatch.org/news/2006/jan/uk-DNA-database.pdf.

[12] *Id.* at 12 ¶ 38 and table; *see id.* at 6. The U.K. had previously taken samples only from persons actually charged with crimes. *See id.* at 6 ¶ 16.

[13] *See id.* at 9 ¶ 21.

in 2003/2004 and 40% in 2004/2005), whereas the number of individuals' profiles kept in the NDNAD has expanded rapidly during this period (from 2 million in 2002/2003 to 3 million in 2004/2005 ...). This implies that detections have increased since 1999 because more crime-scene DNA profiles have been loaded, not because there have been more detections per crime-scene DNA profile. If adding or keeping more DNA from individuals rather than from crime scenes were important, the DNA detection rate—the likelihood of making a detection—would have increased as the NDNAD expanded.[14]

Dr. Wallace submitted a declaration in the *Haskell* case that updated her research, concluding that "it is likely that California's expansion of mandatory DNA testing to all adult felony arrestees . . . will not lead to a significant increase in the number of crimes being solved."[15]

The RAND Corporation reached the same conclusion in a 2010 report finding that DNA "database matches are more strongly related to the number of crime-scene samples than to the number of *offender profiles in*

[14] Helen Wallace, *The UK National DNA Database: Balancing Crime Detection, Human Rights and Privacy*, EUROPEAN MOLECULAR BIOLOGY ORG. REPORT 7(SI) (July 2006), available at http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1490298.

[15] *Haskell* v. *Brown*, No. 3:09-cv-04779-CRB (N.D. Cal.), Dkt. 19, Declaration of Helen Wallace, at ¶ 29.

the database."[16] The RAND report specifically found that California's focus on adding more known samples – rather than crime-scene samples – has led to a decrease in databank efficacy. RAND 2010 at 20. Indeed, in comparison with other large states, most of which had much narrower laws, RAND noted that "California is anomalous in the relatively low number of investigations aided for such a large number of offender profiles." *Id.* at 19. In light of these and other factors, it concluded that "a more effective means of increasing hit rates is to increase the number of crime-scene profiles uploaded into the database rather than continue to add more suspects and arrestees (and convicts to lesser crimes) to the database net." *Id.* at 20.

The government, of course, claims that arrestee testing has led to a significant increase in hits. Gov't Opening Br. at 46-47. But the district court in *Haskell*, which had before it the actual California data through November 30, 2009, as well as additional data from government witnesses, specifically found to the contrary. *Haskell I*, 677 F. Supp. 2d at 1200-01 (Noting that government's "statistics suggest, unsurprisingly, that arrestee

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[16] Jeremiah Goulka, Carl Matthies, Emma Disley, Paul Steinberg, *Toward a Comparison of DNA Profiling and Databases in the United States and England* (RAND 2010) at 18, available at https://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR918.pdf The government's attempt to discredit the RAND study based on a magazine article reporting that the American Society of Crime Labs said in an email it was "not in a position to respond to [the magazine's] questions" is singularly unpersuasive. *Compare* Gov't Opening Br. at 50, *with* Julie Vallone, *DNA Analysis Can Do Better Solving U.S. Crimes: Rand*, Investor's Business Daily (Apr. 29, 2011), available at http://news.investors.com/technology/042911-570604-dna-analysis-can-do-better-solving-us-crimes-rand.htm#ixzz3qZZ3fFcC.

submissions contribute to the solution of crimes, but not to the same degree as convicted offender submissions."). And the data that the state now presents are completely consistent with this conclusion because the increase in hits that the government reports correlates directly to the near five-fold increase in size of California's *crime-scene* database, which grew from 15,348 in January 2007 to 23,450 in December 2008 (just before the start of arrestee testing) to 73,611 as of September 2015.[17] The government's analysis completely ignores this crucial fact, as well as research discussed above, and instead credits arrestee testing for its increased number of hits.[18]

Moreover, the government's argument and data completely fail to address the critical question of whether a significant percentage of hits relates to persons who are arrested but not charged or convicted of crimes, which is fundamental to addressing whether the marginal benefit of arrestee testing as compared to testing after conviction. There are currently

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[17] Copies of the California Dep't of Justice, Jan Bashinski DNA Laboratory Monthly Statistics, downloaded from the state's website at http://oag.ca.gov/sites/all/files/pdfs/bfs/Monthly.pdf for these three months are attached to this brief for the Court's convenience under Rule of Court 8.529(h).

[18] In addition, "one must be cautious about equating more database matches with improved public protection." RAND 2010 at 18. As one of the original CODIS architects explained in a declaration submitted in *Haskell*:

> Some hits have been held at the databank laboratory; some hits have sat on an investigator's desk; some hits have been useless . . . ; some hits are from cases where the suspect had been identified and only a confirmation is desired (i.e., not a 'cold hit'). . . . Unfortunately, we cannot know the proportion of hits that result in assisting convictions[.]

Haskell v. *Brown*, No. 3:09-cv-04779-CRB (N.D. Cal.), Dkt. 17, Declaration of Bruce Bedowle, at ¶ 26.

2,436,383 "offender and arrestee" samples in the database.[19] Because approximately 2/3 of persons arrested on suspicion of a felony are eventually convicted, if the state only took samples from people actually convicted of a crime it would have well over 1.6 million offender samples. Since the purpose of our criminal-justice system is to sort the innocent from the guilty, one would hope that the vast majority of the 43,451 hits that the state's DNA system has obtained relate to those 1.6 million people who have been found guilty of committing a crime, rather from those who have not been convicted and in many cases have not even been charged with any crime. In any event, the government has not presented evidence to suggest otherwise. *Cf. Haskell*, 677 F.Supp.2d at 1198 ("no evidence has been presented in this case that arrestees are more likely to commit future crimes than members of the general population.").

Thus, even if the California Constitution allowed the government to justify a warrantless, suspicionless search on the grounds that it was useful at solving crimes, taking DNA samples from arrestees (as opposed to taking it upon conviction) does not do this. The government has failed to meet its burden to justify this intrusive program.[20]

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[19] Jan Bashinski DNA Laboratory Monthly Statistics, September 2015, *supra* note 17, attached to this brief under Rule of Court 8.529(h).

[20] Importantly, in those few cases where DNA is recovered from the crime scene, there is no need to use the statute to take a DNA sample from the arrestee because the same probable cause that supports the arrest will allow the police to get a search warrant to compel the arrestee to provide a sample to compare to the crime-scene DNA. *See Green v. Nelson,* 595 F.3d 1245, 1252 (11th Cir. 2010) (rape victim's identification of suspect is in itself probable cause to obtain a warrant to seize and search his DNA).

5. The government does not actually use DNA to identify arrestees.

The structure of CODIS and the way that the government takes and processes arrestee DNA samples demonstrate that the government is not using arrestee DNA samples to verify who a person is, in the sense of determining his name, criminal record, or outstanding warrants. Several aspects of the program demonstrate this:

First, California expressly requires that the police identify an arrestee using an electronic fingerprint at the time they seize his DNA; it relies on this fingerprint identification to determine whether to take a sample and then to track the DNA sample. Persons arrested on suspicion of a felony are taken into custody and booked, meaning that they are fingerprinted and photographed. Penal Code § 7(21); *see In re Rottanak K.*, 37 Cal. App. 4th 260, 276-77 (1995). As California Department of Justice Regulations, the Department's website, and declarations submitted by the state in the *Haskell* litigation make clear, law-enforcement personnel then use the arrestee's fingerprints to determine that person's identity and criminal history *before* they take DNA samples. For example, the California Department of Justice's protocols, which serve as binding regulations under the DNA Act,[21] state that "Before [DNA] collection occurs, the collecting, agency should check the subject's criminal history record for a DNA

[21] The law specifically exempts these regulations from the notice-and-comment requirements of the Administrative Procedure Act. Penal Code § 295(h)(1), (2).

collection flag."[22] The flags instruct the agency either "DO NOT COLLECT DNA," "COLLECT DNA" (some of the "collect DNA" flags require additional research into the arrestee), or "DNA SAMPLE NOT VERIFIED BY FINGERPRINT HAS BEEN ... UPLOADED INTO THE CAL-DNA DATA BANK," in which case the officers are only to take a new sample if instructed to do so by the fingerprint-system. *Id.* at 3-4.

Similarly, the state's website lists as the first step in taking a sample "identify the subject" (collecting the sample is step 5).[23] The state DNA Lab Director Kenneth C. Konzak summarized the process in *Haskell,* explaining that the state "Department of Justice provides a standard DNA collection kit to all local and state law enforcement agencies" and that this "kit requires local agency personnel to: identify the subject (preferably via prints); [and] determine that a DNA sample needs to be collected...."[24] Then the collecting "agencies must, prior to [DNA] collection, check the individual's rap sheet in the criminal history system to see if a flag indicates that [a] sample already has been submitted."[25]

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[22] Cal. Department of Justice, Division of Law Enforcement Information Bulletin 08-BFS-02 (12/15/08) at 2.A copy of this bulletin, downloaded from the state's website at http://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/69IB_121508.pdf, is attached to this brief under Rule of Court 8.529(h).

[23] State *of* California Department *of* Justice, Office *of the* Attorney General, BFS DNA Frequently asked questions: Collection Mechanics § 1, available at https://oag.ca.gov/bfs/prop69/faqs.

[24] Dec. of Kenneth C. Konzak (Dkt. 30) in *Haskell v. Brown*, No. 3:09-cv-04779-CRB (N.D. Cal.) at 8 ¶ 20.

[25] *Id.* at 11 ¶ 28.

99.6% of these identifying fingerprints are sent electronically to the FBI to process through its Integrated Automated Fingerprint Identification System (IAFIS).[26] Within minutes, the FBI responds with the identity of the arrestee or a report that the person's fingerprints are not on file (which also means that no DNA sample would be on file).[27] This system provides "results that are better than 99% accurate";[28] with proper procedures, "the

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[26] *See* https://www.fbi.gov/about-us/cjis/fingerprints_ biometrics/iafis/iafis_facts. "AFIS systems are the primary identification tool for virtually every law enforcement agency in the United States." PETER KOMARINSK, AUTOMATED FINGERPRINT IDENTIFICATION SYSTEMS *(AFIS)*, at 4 (Elsevier 2005); *see id.* at 112-14 (discussing tenprint identification procedures). For a detailed discussion of AFIS, *see id.* and U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, *The Fingerprint Sourcebook*, Chapter 6 (July 2011), at http://www.nij.gov/pubs-sum/225320.htm §§ 6.2.4, 6.4.2 (2011).

[27] The FBI reports that it processed 62.7 million ten-print submissions in 2013, 56.33% of which were criminal inquiries. *See FBI, IAFIS Fact Sheet*, available at https://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_facts. Its average response time to those requests for a person's criminal history based on a ten-print sample was just over one minute; for other criminal samples, it was just over 18 minutes. *See id.*

[28] Fingerprint Sourcebook, *supra* n.26, § 6.2.1.1. If there were a problem with this fingerprint identification, DNA could not cure it, because the FBI's entire criminal-records system relies on the accuracy of fingerprint identification; each record in that system is created and updated though the submission of arrestee fingerprints. *See* https://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_services ¶¶ 1, 3; *see also* https://www.fbi.gov/about-us/cjis/background-checks ("An Identity History Summary—often referred to as a criminal history record or a 'rap sheet'—is a listing of certain information taken from fingerprint submissions retained by the FBI in connection with arrests ....").

accuracy rate can exceed 99.97%."[29] Thus, arrestees are nearly always identified through fingerprints at the time they are providing a DNA sample, long before that sample could possibly be used to identify them.[30]

Finally, it is not at all clear that there is any mechanism for actually using DNA to identify an arrestee. Doing this would require that the government compare an arrestee's DNA profile with other known profiles. But, as the government notes in its brief, CODIS is designed to routinely compare arrestees' DNA profiles with crime-scene and missing-person samples, not with samples taken from previous arrestees or convicted persons (because repeated samples are not supposed to be taken). *See* Gov't Opening Br. at 37 ("Arrestee profiles are automatically compared against existing databases of profiles generated from crimes scenes and missing persons."). In fact, the FBI's Privacy Impact Assessment for the system, which must by law identify the intended use of the information being collected, specifically states that DNA profiles are being collected from individuals only for the purposes of seeking matches between the offender index and the crime-scene index, or within the forensic index; there is no

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[29] AUTOMATED FINGERPRINT IDENTIFICATION SYSTEMS (AFIS), *supra* n.26, at 122. This type of comparison involving two full sets of scanned fingerprints should be contrasted with those involving latent prints taken from crimes scenes, which are often incomplete and may result in errors. *See id.* at 114. It is important to note, too, that DNA databank comparisons are far from error-free, which is why the initial database match is used only to show probable cause, not as evidence of guilt.

[30] In those rare cases where the police are not able to use fingerprints to identify the arrestee at the time they seize his DNA (because the person's fingerprints are not on file), the sample itself is labeled with the arrestee's fingerprints. *See* Information Bulletin 08-BFS-02 at 4 ("The buccal swab sample must be accompanied by two right thumbprints.").

mention of checking for matches within the known-person index.[31] Thus, although the government claims that "in some cases" (out of 2,436,383 samples taken to date) comparing two DNA samples linked to the same identification number has revealed errors, it is not clear how this is happening. *See* Gov't Opening Br. at 44; *see also King*, 133 S. Ct. at 1986 (2013) (Scalia, J., dissenting) (Arrestee samples "are checked against the Unsolved Crimes Collection—rather than the Convict and Arrestee Collection, which could be used to identify them.").

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[31] "The information in NDIS is used to match DNA profiles with crime scenes and human remains (missing persons)." Federal Bureau of Investigation, *Privacy Impact Assessment, National DNA Index System (DNS)* (2004), ¶¶ A-C, available at https://www.fbi.gov/foia/privacy-impact-assessments/dns. The FBI's online index of privacy impact assessments does not show any more recent PIA for the CODIS system. *See* Federal Bureau of Investigations, *Department of Justice/FBI Privacy Impact Assessments (PIA)*, available at https://www.fbi.gov/foia/privacy-impact-assessments. These assessments are mandated by § 208(b)(1)(a) of the E-Government Act of 2002, P.L. 107-347, 116 STAT. 2899, 2921, codified as a note to 44 U.S.C. § 3501. As one court has explained, this provision

> requires federal agencies to conduct a privacy impact assessment when developing or procuring information technology or initiating a new collection of information that is based on "information in an identifiable form." The assessment must address what information is to be collected under the system, why the information is being collected, [and] the intended use of the information …

Elec. Privacy Info. Ctr. v. Transp. Sec. Admin., No. CIV.A. 03-1846 CKK, 2006 WL 626925, at *1 n. 2 (D.D.C. Mar. 12, 2006) (citing E-Government Act §§ 208(B)(1)(a), 208(B)(2)(b)(ii)).

6. That the government can take fingerprints from arrestees does not mean it can take DNA from them, too.

The government's argument that because it is allowed to photograph and fingerprint arrestees it should be allowed to seize and search their DNA is a non sequitur. *See* Govt. Reply Br. at 24-26. Fingerprinting and photographing persons who have been lawfully arrested do not constitute searches. *See Nicholas v. Goord*, 430 F.3d 652, 658 (2d Cir. 2005); *see also Davis v. Mississippi*, 394 U.S. 721, 727 (1969) ("Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search."). But even the government agrees that DNA sampling is a search. Thus, fingerprints and booking photos that follow a lawful arrest do not implicate Article I § 13, but DNA sampling does.

In large part because of this, the cases that the government cites as upholding these practices are not relevant to the present case. In *Loder*, which allowed the police to retain fingerprints taken after a lawful arrest, there was no claim that the initial fingerprinting was in any unlawful or unconstitutional; the plaintiff argued only that the *retention* of records relating to a lawful arrest that had not resulted in a conviction violated his rights to privacy and to due process of law. *See Loder v. Mun. Court*, 17 Cal. 3d 859, 862, 864 (1976). The *Loder* opinion does not even mention Article I § 13 or the Fourth Amendment. *See id.* And, of course, the fact that a governmental practice comports with one constitutional protection does not mean that it comports with another, distinct protection. *See People v. McKee*, 47 Cal. 4th 1172, 1207 (2010).

The other case cited by the government, *People v. McInnis*, addressed only the question of whether a booking photograph taken after an illegal arrest must be suppressed in an unrelated prosecution, absent any

showing of bad faith by the police. *People v. McInnis*, 6 Cal. 3d 821, 824, 826 (1972). It did not in any way address substantive scope of Article I § 13 or the Fourth Amendment; indeed, the government had stipulated that the photograph in question was the result of an illegal arrest. *See id.*

Thus, neither *Loder* nor *McInnis* addresses in any way the limits that Article I § 13 places on the authority of the police to conduct searches of arrestees. And even if one accepts the government's incorrect assertion that DNA is being used to identify arrestees in the same way that fingerprints and mug shots are, the "fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the" constitutional protections against unreasonable searches. *Kyllo v. United States*, 533 U.S. 27, 35 n. 2 (2001).

7. This Court applies the same constitutional scrutiny to initiative statutes as to any other legislation.

"A statute inconsistent with the California Constitution is, of course, void." *Hotel Employees and Restaurant Employees Intern. Union v. Davis*, 21 Cal.4th 585, 602 (1999) (citing *Nogues v. Douglass*, 7 Cal. 65 (1857)).[32] That the law at issue was adopted by initiative does not change this: to the contrary, "[s]tatutes adopted by the initiative process are subject to the same measure of constitutional scrutiny as is applied to laws adopted by the normal legislative process." *Hays v. Wood*, 25 Cal. 3d 772, 786 n.3 (1979) (citations omitted); *see, e.g., Legislature v. Deukmejian*, 34 Cal. 3d 658, 674 (1983) (collecting cases); *Weaver v. Jordan*, 64 Cal. 2d 235, 241 (1966); *see also Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182,

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[32] *Abrogated on other grounds as stated in San Pasqual Band of Mission Indians v. State*, 194 Cal. Rptr. 3d 231, 232 (Ct. App. Oct. 2, 2015).

194 (1999). As this Court explained at length 16 years after California first amended its constitution to permit voters to enact statutes directly, "it was at no time intended that such permissive legislation by direct vote should override the other safeguards of the constitution." *Wallace v. Zinman*, 200 Cal. 585, 593 (1927). Thus, this Court will "not recognize an initiative measure as having any greater strength or dignity than attaches to any other legislation." *Id.* at 593; *see id.* at 591-95 (discussing issue, collecting authorities, and holding initiative statute unconstitutional); *see also In re Marriage Cases*, 43 Cal. 4th 757, 851-52 (2008) (same).[33]

In fact, initiative statutes may be particularly vulnerable to constitutional challenge because they do not undergo the same fact-finding and analysis as those enacted by the legislature; instead, they are passed by voters who may have only a "superficial knowledge of proposed laws to be voted upon." *Wallace*, 200 Cal. at 592-93 (quoting *Gibson v. Richardson*, 85 P. 225, 48 Or. 309, 319 (Or. 1906)). This means, for example, that when this Court is analyzing the constitutionality of an initiative, it will give no weight to factual assertions made in ballot measures, even when they are styled as legislative findings. *People v. McKee*, 47 Cal. 4th 1172, 1206-07 (2010).

Even the single case the government cites in support of its position acknowledges that this Court treats constitutional challenges to initiative statutes no differently than it treats challenges to other legislation. *See Legislature v. Eu*, 54 Cal. 3d 492, 501 (1991) (cited in Gov't Opening Br. at 30-31, Reply Br. at 23). This is clear from the first words of the very

[33] Abrogated in part by constitutional amendment as discussed in *Strauss v. Horton*, 46 Cal. 4th 364, 412 (2009), which was then abrogated in part by *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

sentence from which the government extracts its purported rule: "*As with statutes adopted by the Legislature*, all presumptions favor the validity of initiative measures and mere doubts as to validity are insufficient; such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears." *Id.* (emphasis added; citations omitted). The actual rule stated in *Eu* is simply a variation of the rule that, whenever possible, *all* statutes must be given a construction that renders them constitutional. *See Mills v. Superior Court*, 42 Cal. 3d 951, 957 (1986) (superseded on other grounds as stated in *Whitman v. Superior Court*, 54 Cal. 3d 1063, 1076 (1991)); *see also People v. Jablonski*, 37 Cal. 4th 774, 826 (2006) (citing *Mills* and *People v. Davenport*, 41 Cal. 3d 247 (1985)). Similarly, the maxim that statutes are presumed constitutional applies to all statutes, not just those enacted by the voters, and serves simply to ensure that laws are enforceable unless and "until judicially declared" invalid. *Lockyer v. City & Cty. of San Francisco*, 33 Cal. 4th 1055, 1101 (2004). Neither of these principles insulates initiative statues against constitutional challenge. The government's proposed distinction between statutes passed by the Legislature and those passed by initiative would eliminate the "distinct line of demarcation [that] is kept between a law or an act and a constitutional amendment" and "be subversive of the very foundation purposes of our government." *Wallace*, 200 Cal. at 593; *see Marriage Cases*, 43 Cal. 4th 757, 851-52 (collecting cases).

8. This Court should decide the question on state constitutional grounds even though the law violates the Fourth Amendment.

For the reasons set forth in Buza's brief, the California law violates the Fourth Amendment, even after *King,* because of the significant

differences between California's law and Maryland's.[34] Nevertheless, this Court should decide the matter under the California Constitution, for three reasons:

First, deciding the case on state-law grounds will promote a faster resolution of the important question of the law's validity because it will eliminate a level of potential review. *See People v. Ruggles*, 39 Cal.3d 1, 8 n. 3, 11-12 (1985) (deciding case under Art. I § 13 "[r]ather than await more definitive guidance" from U.S. Supreme Court); *see also People v. Krivda*, 8 Cal.3d 623 (1973) (confirming 1971 opinion after grant of certiorari and remand); *West v. Thomson Newspapers*, 872 P.2d 999, 1005 n.6 (Utah 1994). California's arrestee-testing law went into effect on January 1, 2009; although it was challenged in *Haskell* that same year, its validity is still unsettled more than six years later.[35] Both the government and the tens of thousands of Californians who are arrested every year on suspicion of a felony but never convicted, or in many cases even charged with a crime, have an interest in having the legality of these searches resolved without further delay.

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[34] *Amici* agree with Buza that the statute violates the Fourth Amendment. We do not repeat those arguments at length but note that the Maryland law upheld in *King* applies only to a small set of very serious offenses; samples can only be taken from persons actually charged with an offense, not all arrestees; and the police cannot analyze or make any use of a sample unless and until there is a judicial finding of probable cause to believe that the defendant is guilty of one of the enumerated offenses. In contrast, the California law applies to all felonies, to the thousands of individuals who are arrested on suspicion of a felony each year but released without being charged, and there is no judicial involvement.

[35] As noted above, the *Haskell* litigation is stayed pending this Court's resolution of this case.

Second, courts should decide cases on state constitutional grounds if doing so will avoid the need to decide a novel question under the federal charter. *See People v. Cook,* 41 Cal.3d 373, 376 n.1 (1985) (lead opn. of Grodin, J.); *see also Kuba v. 1-A Agr. Ass'n,* 387 F.3d 850, 856 (9th Cir. 2004); *West*, 872 P.2d at 1006-07 & n.9 (collecting cases); Linde, *supra*, 18 GA.L.REV. at 178-79 ("A state court always is responsible for the law of its state before deciding whether the state falls short of a national standard, so that no federal issue is properly reached when the state's law protects the claimed right.") (citation omitted).

Finally, deciding this case on state constitutional grounds will help to ensure that Article I § 13 retains its independent role in safeguarding the rights of Californians. Those who drafted our state constitution intended that it be "the principal bulwark protecting the liberties of Californians *from governmental encroachment.*" *Golden Gateway Center v. Golden Gateway Tenants Assn.,* 26 Cal.4th 1013, (2001) (lead opn. of Brown, J.) (quoting Grodin *et al.*, THE CAL. STATE CONSTITUTION (1993) p. 21). But because the Fourth Amendment and its exclusionary remedy now apply to the state, and violations of Article I § 13 no longer result in exclusion of evidence, the state provision is often ignored or disregarded.[36] This court should ensure that this provision's independent vitality does not wither from desuetude. *See* Linde, *supra*, 18 Ga.L.Rev. at 177-78.

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[36] For example, the Alameda County District Attorney's office's influential POINT OF VIEW advises officers that Prop. 8 "nullifie[d]" or "abrogated" the substantive holdings of cases decided under Article I § 13 in favor of the federal search-incident-to-arrest rule. Alameda County District Attorney, POINT OF VIEW, *Searches Incident to Arrest* at 1 n.6, 6 n.34, 7 n.45 (Winter 2011), available at http://le.alcoda.org/publications/point_of_view/files/SITA2.pdf. In

III. CONCLUSION

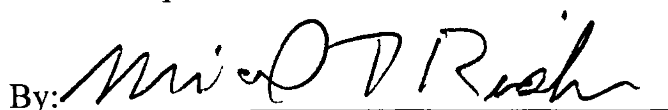
Because Penal Code § 296(a)(2)(c) is inconsistent with Article I § 13 of the California Constitution, the statute is invalid. Buza's conviction for violating it must therefore be reversed.

Dated: November 19, 2015

Respectfully submitted,

By: ______________________________

Joseph R. Grodin

By: 

Michael T. Risher

Attorneys for *Amicus Curiae*

American Civil Liberties Union of Northern California, Inc. and Professor Joseph Grodin

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contrast, the Attorney General correctly advises law enforcement that it must continue to obey Article I § 13's independent protections. *See* 86 Ops. Cal. Atty. Gen. 198 (2003) (state constitution requires California law enforcement to obtain search warrant to obtain pen register, even though Fourth Amendment does not).

CERTIFICATE OF COMPLIANCE

I certify under Rule of Court 8.520(c) that the text in the attached Amicus Brief contains 8,328 words, including footnotes but not the caption, the table of contents, the table of authorities, the application, signature blocks, or this certification, as calculated by Microsoft Word.

Dated: November 19, 2015 By:

Michael T. Risher

California DNA Program
Monthly Statistics for
January 2007
December 2008
September 2015

and

California Department of Justice
Division of Law Enforcement
Information Bulletin
08-BFS-02 (12/15/08)
(per Rule of Court 8.520(h))

Edmund G. Brown Jr., Attorney General

<table>
<tr><td>California Department of Justice
DIVISION OF LAW ENFORCEMENT
George B. Anderson, Director </td><td colspan="2">INFORMATION BULLETIN</td></tr>
<tr><td>Subject:
Expansion of State's DNA Data Bank Program on January 1, 2009: Collection of DNA Samples From All Adults Arrested for Any Felony Offense</td><td>No.
08-BFS-02
Date:
12/15/08</td><td>Contact for information:
Bureau of Forensic Services
CAL-DNA Data Bank Program
(510) 620-3300</td></tr>
</table>

TO: All Police Chiefs, Sheriffs, and District Attorneys

Beginning on January 1, 2009, all adults arrested for any felony offense must provide a buccal swab (inner cheek scraping) DNA sample, and thumb and palm print impressions for the State of California's DNA (CAL-DNA) Data Bank Program (Penal Code section 296(a)(2)(C)). This expands 2008 CAL-DNA Data Bank law provisions governing collection of DNA samples from arrestees. The 2008 law requires adults arrested for a felony Penal Code section 290 registerable sex offense, murder, or voluntary manslaughter (including attempts of these crimes) to provide samples for the CAL-DNA Data Bank (Penal Code section 296(a)(2)(A) and (B)).

The following sets forth information pertinent to the January 1, 2009, expansion of CAL-DNA Data Bank Program providing for DNA identification sample collection from all adult felony arrestees:

- **The 2009 expansion of the CAL-DNA Data Bank Program applies only to *adults* arrested for felony offenses, not to juveniles.**

  - No samples should be collected at arrest from persons under the age of 18. This limitation applies even if the juvenile arrestee is subsequently charged and prosecuted as an adult pursuant to Welfare and Institutions Code section 707.

  - Samples from qualifying juvenile felony offenders should continue to be taken after adjudication or when disposition is rendered. The CAL-DNA Data Bank Program requiring DNA samples from both adults and juveniles who are convicted or adjudicated for felony crimes, and from other qualifying offenders such as registering sex or arson offenders, remains operative, and is unaffected by the 2009 expansion of DNA sample collection to include all adult felony arrestees.

- **Collection of DNA samples from an adult arrested for a felony offense must be based solely upon the offense that was the basis for the arrest.**

  - The January 1, 2009, provisions governing DNA sample collection from adults arrested for any felony offense are not retroactive and so do not permit collection for arrests that took place prior to 2009.

  - DNA sample collection from any qualifying adult felony arrestee (whether 2008 or 2009) must be based solely upon the offense that precipitated the arrest, and not upon the arrested individual's other criminal history (including prior felony convictions or adjudications).

- For example, a person arrested for a misdemeanor offense will not have to provide a DNA sample as an arrestee, even if that person has one or more murder or rape convictions of record. However, by virtue of the CAL-DNA Data Bank law's other provisions (Penal Code section 296.1(a)(3)), if the same person is currently on probation or parole, the prior felony conviction(s) would mandate DNA collection as a convicted offender independent of his or her arrestee status.

- **DNA collection of arrestees should occur at booking and after checking an arrestee's California automated criminal history record for a DNA collection flag.**

  - A qualifying person must provide a DNA sample and palm print impressions for the CAL-DNA Data Bank Program if a suitable DNA sample and print impressions are not already on file for that individual with the Department of Justice (DOJ).

  - The DNA collection from arrestees should occur during the booking process or as soon as possible after the arrest and before the subject is released from confinement or custody (Penal Code section 296.1(a)(1)(A)). The law does not specify any particular local agency as having exclusive responsibility for collecting DNA samples from qualified arrestees. The law does provide, however, that the Chief Administrative Officer of the detention facility, jail, or other facility in which the collection takes place, is responsible for transmitting the completed sample collection kits to the DOJ Jan Bashinski DNA Laboratory (Penal Code section 298(a)).

    - The DOJ Jan Bashinski DNA Laboratory is located at: 1001 West Cutting Boulevard, Suite 110, Richmond, CA 94804-2028.

  - Before collection occurs, the collecting agency should check the subject's criminal history record for a DNA collection flag. (See DNA flags listed below.) Questions concerning an offender's correct collection status may also be directed to the CAL-DNA Data Bank Outreach Program via e-mail, fax, or telephone. (See contact information below.)

  - Before collection occurs, the collecting agency should also check any available local databases that may have been established to help prevent collection of duplicate samples. (See below.)

  - If a qualified arrestee (whose original felony arrest was on or after January 1, 2009), did not provide the requisite DNA sample and prints before being released from custody, please ensure that the court at arraignment orders him or her to report to the county jail or other designated facility to provide the DNA sample and prints (Penal Code section 296.1(a)(1)(B)).

  - Wobblers and Duration of Arrest.

    - If the adult is arrested for a crime that could be charged as a felony or misdemeanor (i.e., it is a wobbler offense), the arrest is considered to be a felony arrest for the purposes of determining qualification for collection under Penal Code section 296. (See *People v. Status* (2002) 28 Cal.4th 682, 685. ["An alternative felony/misdemeanor, also known as a wobbler, is deemed a felony unless charged as a misdemeanor by the People . . . "] See also Penal Code section 299(f).)

- An "arrest" for purposes of DNA collection lasts as long as the subject remains in continuous physical custody after the arrest and prior to conviction or adjudication (Penal Code section 835).

- **Individual counties are encouraged to establish a means of communicating the fact of collection to help avoid duplicate sample collection by local agencies.**

- **The Automated Criminal History System (ACHS) can assist in identifying whether individuals qualify for collection or already have provided a DNA sample.**

  - **DNA collection flags**
    CAL-DNA Data Bank Program flags found in the ACHS provide information regarding the individual's DNA collection status. The specific DNA flags that can be found on an individual's ACHS record are listed in the chart below.

DNA flag language used in ACHS	Action required
DO NOT COLLECT DNA. DNA SAMPLE HAS BEEN RECEIVED, TYPED, AND UPLOADED INTO THE CAL-DNA DATA BANK. FOR INFO (510) 620-3300 OR PC296.PC296@DOJ.CA.GOV.	No action required. Sample previously collected.
DO NOT COLLECT DNA. VERIFIED DNA SAMPLE IS ON FILE WITH THE CAL-DNA DATA BANK. FOR INFO (510) 620-3300 or PC296.PC296@DOJ.CA.GOV.	No action required. Sample previously collected.
DO NOT COLLECT DNA. SAMPLE NOT VERIFIED BY FINGERPRINT RECEIVED BY THE CAL-DNA DATA BANK. FOR INFO (510) 620-3300 OR PC296.PC296@DOJ.CA.GOV.	Collected, print not yet verified or not yet qualified-for those prior to Prop 69.
DNA SAMPLE NOT VERIFIED BY FINGERPRINT HAS BEEN RECEIVED, TYPED, AND UPLOADED INTO THE CAL-DNA DATA BANK. FOR INFO (510) 620-3300 OR PC296.PC296@DOJ.CA.GOV.	Do not collect unless instructed by the Live Scan "DNS" Transaction. DNA Lab is not currently requesting new samples in these cases. If this changes agencies will be notified.

FOR CALIFORNIA AGENCIES ONLY – COLLECT DNA. THE DNA SAMPLE PREVIOUSLY SUPPLIED IS EITHER INADEQUATE OR NOT VERIFIABLE BY FINGERPRINTS. REQUEST KITS AND INFO AT (510) 620-3300 OR PC296.PC296@DOJ.CA.GOV.	Collect DNA sample if the subject is incarcerated or on probation or parole (as there is a previous felony conviction of record) or if the subject is otherwise qualified for collection based on arrest or sex/arson registration. New sample needed.
FOR CALIFORNIA AGENCIES ONLY - COLLECT DNA IF PC 290 SEX OR PC 457.1 ARSON REGISTRANT. REQUEST KITS AND INFO AT (510) 620-3300 OR PC296.PC296@DOJ.CA.GOV.	Collect DNA sample from sex/arson registrant.
FOR CALIFORNIA AGENCIES ONLY – HAS PREVIOUS QUALIFYING OFFENSE, COLLECT DNA IF INCARCERATED, CONFINED, OR ON PROBATION OR PAROLE FOLLOWING ANY MISDEMEANOR OR FELONY CONVICTION. REQUEST KITS AND INFO AT (510) 620-3300 OR PC296.PC296@DOJ.CA.GOV.	Collect DNA sample if the subject is incarcerated, or on probation or parole as there is a previous felony conviction on the record.
Due to the limited period of jurisdiction for DNA collection on arrest, there will not be a DNA flag set upon arrest where no previous felony conviction exists in the criminal history.	

- **Thumbprint and palm print collection**
  The buccal swab sample must be accompanied by two right thumbprints. A full palm print impression of each hand must be collected and submitted separately from the DNA Kit. The preferred, but not required, method of palm print submissions is electronic transmission via a Live Scan device (Penal Code section 296(a)).

- **Funding**
  Proposition 69 provides for substantial funding routed directly to counties. Therefore, DOJ will not reimburse collecting agencies for buccal swab/blood or palm print collection expenses.

- **Verification procedures**
  The collecting agency has exclusive responsibility for verifying an offender's identity and status as a person qualifying for DNA collection (Penal Code section 295(i)(1); 298(b)(5)). Collecting agencies should use all means reasonably available to certify the offender's identity and qualifying status. This includes review of all available criminal history records. When implemented, Live Scan-based collection and query of the automated criminal history will suffice to meet the verification requirement.

- **DOJ contact information**

  - **DNA Buccal Collection Kits** - To order kits, contact the Bureau of Forensic Services CAL-DNA Data Bank Program, preferably by e-mail to PC296.PC296@doj.ca.gov, or by phone at (510) 620-3300.

  - **DNA Buccal Collection Training or Collection of DNA Samples** - For questions pertaining to DNA buccal training or the collection of DNA samples, please contact the Bureau of Forensic Services CAL-DNA Data Bank Outreach Program at (916) 227-3405 or email: PC296.PC296@doj.ca.gov.

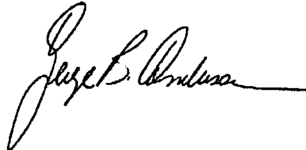
  - **DNA Legal Unit** – Please inform the DOJ's DNA Legal Unit at (415) 703-5892 or email at Michael.Chamberlain@doj.ca.gov immediately if your agency is named in a lawsuit involving CAL-DNA Data Bank sample collection, sample use, or any aspect of the CAL-DNA Data Bank Program, or if discovery of privileged database information is sought or may be ordered by a court in your jurisdiction.

  - **Live Scan DNA Data Automation Project** – Please direct questions pertaining to the Live Scan DNA Data Automation project to the Bureau of Criminal Identification and Information Client Services Program at (916) 227-3332 or email: LiveScan.DNA@doj.ca.gov.

  - **Palm Print Cards** - To order palm print cards or for palm print inquiries, please contact the Bureau of Criminal Identification and Information Fingerprint Expedite Unit at (916) 227-1206 or email at palm.print@doj.ca.gov.

  - **Website Information** - All Information Bulletins regarding *The DNA Fingerprint, Unsolved Crime and Innocence Protection Act (Proposition 69 – 2004)* can be viewed on the Attorney General's California Law Enforcement Web (CLEW) site at: http://clew.doj.ca.gov or on the Attorney General's Internet site at: http://ag.ca.gov/bfs/prop69.php.

Sincerely,



GEORGE B. ANDERSON
Division of Law Enforcement Director

For EDMUND G. BROWN JR.
Attorney General

Jan Bashinski DNA Laboratory Monthly Statistics

Month	**January 2007*** (*as of January 31, 2007)
Starting Backlog	**176,220**
New Samples Added	19,048
Profiles Uploaded into CODIS	36,722
Other Samples Removed from Backlog (Duplicates, Failed Samples, etc.)	TBD (Number to be determined)
Ending Backlog	**158,546**
Total Forensic Unknown Profiles in CODIS	15,348
Total Data Bank Profiles in CODIS	**736,863**
Hits This Month	261
Total Data Bank Hits	3,827

Jan Bashinski DNA Laboratory Monthly Statistics

Month	**December 2008** (as of December 31, 2008)
Starting Backlog	35,664
New Samples Added	11,346
Profiles Uploaded into CODIS	11,593
Total Removed from Backlog (Includes Expunged, Removed or Failed Samples, or where a New Sample was Requested)	22,269
Ending Backlog	???
Total Forensic Unknown Profiles in CODIS	23,450
Total Data Bank (Offender) Profiles in CODIS	**1,139,193**
Hits This Month	196
Total Data Bank Hits	7,887

Jan Bashinski DNA Laboratory Monthly Statistics

Month	**September 2015**
Starting Inventory	**15,444**
New Samples Added	10,523
Profiles Uploaded into CODIS	11,616
Removed from Inventory*	-1,024
Ending Inventory	**15,375**
Total Forensic Unknown Profiles in CODIS	73,611
Total Data Bank (Offender and Arrestee) Profiles in CODIS	**2,436,383**
Hits This Month	637
Total Data Bank Hits	43,451

*Note: if this number is negative, it is because successful results were obtained on samples previously removed from the inventory due to lack of qualification data or inadequate sample or two or more analytical failures.

CERTIFICATE OF SERVICE

The People of the State of California v. Mark Buza
Case No. S223698

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of San Francisco, State of California. My business address is 39 Drumm Street, San Francisco, CA 94111. On November 20, 2015, I caused to be served a true copy of the attached,

Application of the American Civil Liberties Union of Northern California and Professor Joseph R. Grodin to File Amicus Curiae Brief And Amicus Brief in Support of Appellant Mark Buza

on each of the following, by placing same in an envelope(s) addressed as follows:

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Edward C. Dumont
Gerald A. Engler
Jeffrey M. Laurence
Steven T. Oetting
Michael J. Mongan
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Counsel for The People, Plaintiff and Respondent

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Counsel for Mark Buza, Defendant and Appellant

The Honorable George Gascon
District Attorney's Office
San Francisco County
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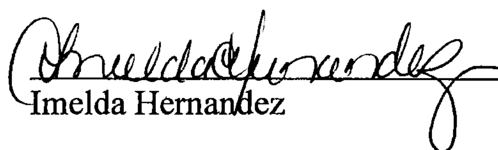
The Honorable Carol Yaggy
Department 28
San Francisco County Superior Court
Hall of Justice
850 Bryant Street
San Francisco, CA 94103

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

Each said envelope was sealed and the postage thereon fully prepaid. I am familiar with this office's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice each envelope would be deposited with the United States Postal Service in San Francisco, California, on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 20, 2015, at San Francisco, California.


Imelda Hernandez