

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

First Appellate District, Division Two, Case No. A125542
San Francisco County Superior Court, Case No. 207818
The Honorable Carol Yaggy, Judge

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Whether the collection and analysis of forensic identification DNA database samples from all adult felony arrestees, as required by Proposition 69, violates article I, section 13 of the California Constitution or the Fourth Amendment of the United States Constitution.

INTRODUCTION

A DNA identification profile is a way of representing certain information about human DNA that is so highly individualized that it amounts, like a fingerprint, to a very specific identifying characteristic. Because of the way the profile is constructed, it does not reveal any sensitive information about an individual. It provides very accurate identification—and nothing else.

In 1998, the Legislature required the collection of DNA identification information from all persons convicted of specified offenses. A number of Court of Appeal decisions sustained that requirement against constitutional challenges, and this court endorsed those decisions in *People v. Robinson* (2010) 47 Cal.4th 1104, 1121. In 2004 the voters adopted Proposition 69, which amended the law to require, beginning in 2009, that all adults arrested for felony offenses provide DNA identification information. At least 27 other states, and the United States, have similar statutes.

Appellant Mark Buza was convicted of refusing to provide a DNA cheek swab during booking for a felony arrest in January 2009. In 2011, the Court of Appeal invalidated Buza's conviction on the ground that requiring him to provide DNA identification information as part of the processing of his arrest violated the Fourth Amendment. This court granted review, but ultimately remanded the case to the Court of Appeal for further consideration in light of the United States Supreme Court's decision in *Maryland v. King* (2013) ___ U.S. ___ [133 S.Ct. 1958, 1980] ("*King*"),

which held that “DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure.” In 2014, the Court of Appeal again invalidated Buza’s conviction, disagreeing with *King*’s result and reasoning but this time basing its holding on the parallel search-and-seizure provision in article I, section 13 of the California Constitution.

California’s collection of DNA identification information from felony arrestees does not violate either the federal or the state Constitution. As to federal law, the Act’s provisions are not materially different from those sustained in *King*, which resolves the Fourth Amendment question. As to state law, this court normally defers to decisions of the federal Supreme Court when that court has first addressed a question that arises under both the federal Constitution and a parallel state provision. Here, the text of the state search-and-seizure provision is substantially identical to that of the Fourth Amendment, and its history shows that the two provisions should be construed and applied in the same way. *King*’s reasoning and result are sound; the decision did not limit rights previously established under federal law; and following it for state purposes would not limit rights previously recognized by this court. Moreover, the challenged provision was adopted directly by the voters, in a statute that is presumed to be valid and must be given effect unless it clearly violates the Constitution. There is no reason for this court to depart from its usual practice and create an unwarranted disparity between state and federal law by declining to follow *King*.

In any event, it is constitutionally reasonable to collect DNA identifying information as part of the booking procedure for every felony arrest. Law enforcement officers have long recorded various identifying characteristics of any person who is subjected to custodial arrest based on probable cause to believe that he or she has committed a crime. This information serves important public interests related to processing arrestees within the criminal justice system, including confirming that an individual

is who he says he is and learning what can be ascertained about his past criminal conduct and prior encounters with the law. Keeping records of identifying characteristics also enables authorities to identify the same individual accurately if he is arrested again in the future or leaves evidence at a future crime scene. DNA identification profiles serve these interests in much the same way as traditional identifiers such as fingerprints or photographs, only better. In contrast to the strong public interest in collecting this information, the collection of DNA identification information imposes only a modest incremental intrusion on the legitimate privacy interests of individuals who are already being arrested. The physical collection involves only a simple cheek swab; an arrestee has no legitimate expectation of privacy regarding his identity; and the law forbids any use of DNA samples or profiles that is not related to identification. The law strictly limits access to samples and the identifying information derived from them, contains multiple safeguards against improper uses, and allows arrestees who are not convicted of a qualifying offense to have their samples destroyed and their information expunged. There is nothing unreasonable about the State's collection and use of DNA identification information in this carefully controlled manner.

STATEMENT OF THE CASE

A. Trial Proceedings

Police arrested Mark Buza on January 21, 2009, after he set fire to a police car parked near a high school. (1 RT 17-19, 22-23, 26-27, 29.) A police officer observed a flame on the tire of the car, and saw Buza jump up from behind the car and run into a wooded area holding something in his hand. (1 RT 22-24.) Another officer found Buza hiding in the wooded area. (1 RT 54-56.) Police searched the area where Buza was hiding and

found a road flare and a bottle containing a clear liquid that smelled like gasoline. (1 RT 41-43, 56.)

After Buza was arrested and brought to the county jail, a sheriff's deputy asked Buza to provide a DNA sample using a cheek swab, as required by Penal Code section 296. (2 RT 107.)¹ The deputy stated that Buza was required to submit a sample and showed him a form explaining the requirement, but Buza refused to provide the sample. (2 RT 108-109.)

The district attorney charged Buza with arson (§ 451, subd. (d)); possession of combustible material with intent to willfully and maliciously set fire to property (§ 453, subd. (a)); vandalism (§ 594, subd. (b)(1)); and refusal to provide a DNA sample in violation of Penal Code section 298.1, subdivision (a), a provision of the DNA and Forensic Identification Data Base and Data Bank Act of 1998 (the DNA Act). (CT 7-8.) Buza pleaded not guilty to all four charges. (CT 9-10.)

Buza moved for an acquittal on the refusal count, arguing that the “nonconsensual gathering of biological samples constitutes a search and seizure subject to Fourth Amendment protection” and that his felony arrest was “a constitutionally inadequate basis for requiring [him] to give a biological sample.” (CT 39.) The trial court denied the motion. (CT 59; see also 7 RT 290-296.)

At trial, Buza admitted that he poured a flammable material on all four tires of the police car and lit the material on fire. (3 RT 186, 193-194.) He knew “the whole car could have went up in flames.” (3 RT 196.) He also admitted refusing to provide a DNA sample after his arrest. (3 RT 197.) The jury found him guilty on all counts. (CT 85-91;

¹ All statutory references are to the Penal Code unless otherwise indicated.

5 RT 266.) Buza provided a DNA sample only after his conviction, when the trial court ordered him to do so. (See CT 121-122, 146-147.)

B. The Court of Appeal's 2011 Decision

In 2011, the Court of Appeal struck down the DNA Act's requirement that adult felony arrestees provide a DNA sample at the time of booking. (Aug. 4, 2011 slip opn., p. 1, invalidating § 296, subd. (a)(2)(C).) It concluded "that the DNA Act, to the extent it requires felony arrestees to submit a DNA sample for law enforcement analysis and inclusion in the state and federal DNA databases, without independent suspicion, a warrant or even a judicial or grand jury determination of probable cause, unreasonably intrudes on such arrestees' expectation of privacy and is invalid under the Fourth Amendment of the United States Constitution." (*Id.* at p. 44.)

This court granted the People's petition for review. (S196200.) After briefing, the court deferred action pending the United States Supreme Court's consideration of *Maryland v. King*, which involved a Fourth Amendment challenge to Maryland's statute requiring the collection of DNA from arrestees. After the federal Supreme Court upheld Maryland's statute, this court transferred Buza's case back to the Court of Appeal "with directions to vacate its decision and to reconsider the cause in light of *Maryland v. King* [citation]."

C. The Court of Appeal's 2014 Decision

In 2014, the Court of Appeal again struck down the DNA Act. The court's summary of its new holding tracked that from its prior opinion word-for-word, except that the new opinion rested exclusively on article I, section 13 of the California Constitution. (Compare opn. p. 60 with Aug. 4, 2011 slip opn., p. 44; see also opn. pp. 2, 17-18.)

The Court of Appeal first discussed the decision in *Maryland v. King*. The court criticized the Supreme Court’s Fourth Amendment analysis (see, e.g., opn. pp. 15, 22, 23, fn. 8, 24), quoting at length from the “piercing dissent” (*id.* at p. 13; see *id.* at pp. 13-15, 21, 28-29, 32, fn. 14, 38, 46). Ultimately, however, the court did not purport to base its decision on the Fourth Amendment.

Turning instead to the state Constitution, the court acknowledged that “our Supreme Court has recognized a ‘*general* principle or policy of deference to United States Supreme Court decisions’ in interpreting provisions of the California Constitution that are textually parallel to those of the federal Constitution” (Opn. p. 19, quoting *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353 (“*Raven*”).) The court declined, however, to defer to *King*. (Opn. p. 22.)

Undertaking its own balancing of interests, the court flatly rejected the premise, accepted by *King* and reflected in the text of the DNA Act, that the State uses DNA identification profiles of arrestees as part of its standard collection of identifying information—including information linking the arrested individual to any prior criminal activity. (Opn. p. 27; see *id.* at pp. 27-38.) In the court’s view, the State’s “actual” interest in obtaining DNA identification profiles was to use them in investigating past or future crimes. (Opn. p. 38, italics omitted.) Reliance on that interest, the court concluded, could not “be squared with established constitutional principles protecting against suspicionless searches.” (*Ibid.*)

The court also rejected *King*’s evaluation of the limited incremental intrusion on privacy involved in collecting DNA identifying information from those already subjected to custodial arrest. To the contrary, it reasoned that the “DNA Act intrudes too quickly and too deeply into the privacy interests of arrestees.” (*Id.* at p. 45; see *id.* at pp. 45-57.) Asserting that the Act “places few restrictions on the law enforcement uses to which”

DNA samples may be put, the court expressed concern that samples could be used for genetic or behavioral research, or that police might make pretextual arrests in order to obtain a suspect's DNA, without a warrant, as part of an otherwise unrelated investigation. (*Id.* at pp. 25-26, 49, 55.) Similarly, the court worried that the State could use "familial" searches to intrude "into the privacy interests of arrestees['] biological relatives" (*id.* at p. 45)—although it acknowledged that California conducts such searches on the database of DNA profiles from convicted offenders, not on the database of profiles from arrestees (*id.* at p. 17). Expressly rejecting the analogy between DNA identification profiles and conventional fingerprints drawn by *King* and other decisions, the court again relied on the potential for unlawful misuse of DNA samples to reason that "fingerprinting presents no threat to privacy comparable to that posed by DNA analysis." (*Id.* at p. 26; see *id.* at pp. 23-26.) Ultimately, the court concluded that privacy concerns outweighed the State's interests in collecting DNA samples from felony arrestees at booking. (See *id.* at pp. 57-60.)

ARGUMENT

I. THE DNA ACT AND PROPOSITION 69

A DNA identification profile is derived by measuring certain loci in an individual's DNA. Those loci all feature a stretch of paired bases that repeat themselves, with the number of repeats varying from person to person. (See *United States v. Kincade* (9th Cir. 2004) 379 F.3d 813, 818 (en banc) ("*Kincade*"); Butler, *Forensic DNA Typing* (2d ed. 2005) pp. 123-142 ("*Typing*").) Forensic scientists use standardized techniques and equipment to measure (or "type") the repeats. (See generally *People v. Jackson* (2008) 163 Cal.App.4th 313, 322-323 (maj. opn. of Cantil-Sakauye, J.); *Typing, supra*, at pp. 7, 85-117, 313-387.)

The result of this process is a standardized profile listing the number of repeats at up to 15 loci in an individual's DNA. (See Chin et al., *Forensic DNA Evidence* (The Rutter Group 2014) § 8.6 (“Forensic DNA”).) Comparing the profiles generated by two different DNA samples allows analysts to determine to a near certainty whether the samples came from the same individual. Thus, for example, analysts may use a DNA identification profile to ascertain whether human biological materials found at a crime scene, such as blood, are very likely associated with any individual whose comparable profile is stored in a database of known offenders. (*Banks v. United States* (10th Cir. 2007) 490 F.3d 1178, 1188 (“*Banks*”); see, e.g., Butler, *Advanced Topics in Forensic DNA Typing: Methodology* (2012) pp. 231-232 (“Methodology”).) Conversely, a profile developed from a sample provided by a particular individual can be compared to existing forensic databases to determine whether, for example, the same individual was present at a prior crime scene. Significantly, however, the loci measured in developing these identification profiles are all found in “noncoding” regions of the human genome: they are not directly related to making proteins, and have no known association with disease or any other genetic predisposition. (Methodology, *supra*, at p. 240.) Accordingly, the profiles themselves are useful only for purposes of comparing them with each other and identifying matches.

California has collected blood, saliva, or cheek swab samples from certain classes of offenders since 1984.² In 1998, the Legislature enacted the DNA and Forensic Identification Data Base and Data Bank Act. (§ 295 et seq.) The DNA Act “require[d] DNA and forensic identification data banks samples from all persons” convicted of specified offenses. (§ 295,

² See former § 290.2, added by Stats. 1983, ch. 700 § 1, repealed and replaced by § 295 et seq., added by Stats. 1998, ch. 696, §§ 1-2.

subd. (b)(2).) In 2004, the voters amended the DNA Act through Proposition 69. (Prop. 69, as approved by voters, Gen. Elec. (Nov. 2, 2004).) Among other things, Proposition 69 required every adult person arrested for or charged with a felony to provide a DNA sample, to be used for identification purposes only. (§ 296, subd. (a)(2)(C).) That new requirement took effect on January 1, 2009. (*Ibid.*)

Proposition 69 modified the standard booking procedure for all felony arrestees. That procedure has long involved “the taking by the police of fingerprints and photographs of the person arrested.” (§ 7, subd. (21).) After Proposition 69, adult felony arrestees must also provide a DNA sample “immediately following arrest, or during the booking or intake or prison reception center process or as soon as administratively practicable after arrest” (§ 296.1, subd. (a)(1)(A); see § 296, subd. (a)(2)(C).) The ordinary method for collecting DNA samples is a “buccal swab,” involving a brief application of a small swab to the inside of the arrestee’s cheek. (§ 295, subd. (e).) The collection must be supervised by a person “trained to assist in buccal swab collection,” using a kit approved by the Department of Justice. (§ 298, subd. (b)(3); see § 295, subd. (i)(2).) After officials collect a sample at booking, they must immediately forward it to the Department of Justice. (§ 295, subd. (i)(1)(C).)

Proposition 69 contains detailed findings and declarations of purpose. (Prop. 69, Gen. Elec. (Nov. 2, 2004) § I, subd. (d).) The electorate found that “[t]he state has a compelling interest in the accurate identification of criminal offenders, and it is reasonable to expect qualifying offenders to provide forensic DNA samples for the limited identification purposes set forth in this chapter.” (*Id.* § II, subd. (f).) Expanding California’s DNA database to include profiles from felony arrestees would also help “accomplish effective crime solving in California,” “aid in the

identification of missing and unidentified persons,” and help “exonerate persons wrongly suspected or accused of crime.” (*Id.* § II, subd. (d)(1).)

Consistent with these important but circumscribed goals, the DNA Act strictly limits the use of DNA samples to “identification purposes.” (§ 295.1, subd. (a).) It expressly forbids the use of samples collected under the Act “as a source of genetic material for testing, research, or experiments, by any person, agency, or entity seeking to find a causal link between genetics and behavior or health.” (§ 295.2.) It also makes the information obtained from DNA samples confidential, including barring the Department from disclosing the information under public disclosure laws. (§ 299.5, subds. (a)-(b).) Only certain designated government laboratories may upload crime-scene profiles and profiles obtained from arrestees and convicted offenders and make comparisons between them. (§ 297, subd. (a).) All laboratories that process DNA samples must be accredited and must meet federal and state quality-assurance requirements. (§ 297, subd. (d).)

Anyone who knowingly uses a DNA sample or profile for anything other than “criminal identification or exclusion purposes” or “the identification of missing persons” is guilty of a crime punishable by up to three years in prison. (§ 299.5, subd. (i)(1)(A).) Anyone who misuses DNA samples or profiles for the purpose of financial gain is subject to a criminal fine. (§ 299.5, subd. (i)(1)(B).) Any employee of the Department of Justice who knowingly misuses DNA information is also liable for civil damages. (§ 299.5, subd. (i)(2)(A).)

California’s DNA database program is part of the nationwide Combined DNA Index System (CODIS). (See § 297, subd. (b) [authorizing participation].) This system enables laboratories at the federal, state, and local levels to exchange and compare DNA identification profiles electronically by uploading profiles to a national database operated by the

FBI. Like fingerprint database programs, CODIS uses computers to identify DNA profiles from crime scenes and other sources by comparing them to the stored profiles of arrestees and convicted offenders. (See generally FBI, Combined DNA Index System <http://www.fbi.gov/about-us/lab/biometricanalysis/codis/codis_brochure> [as of May 13, 2015].)³ As a participant in CODIS, California must meet privacy and quality-control requirements set by the federal government, in addition to those imposed independently by state law. (42 U.S.C. § 14132(c); see § 297, subds. (b), (d); see also Typing, *supra*, at p. 41 and Appendix IV.) Federal law also provides additional criminal penalties for unauthorized access to or disclosure of DNA information contained in any federal databases. (42 U.S.C. § 14133(c).)

California allows arrestees to have their DNA identification information expunged, and their samples destroyed, under certain circumstances. The expungement process is ordinarily initiated by the arrestee. (§ 299, subd. (b).)⁴ An arrestee may seek a court order requiring the State to expunge a profile and destroy the corresponding sample if the case was dismissed, the arrestee was found not guilty or factually innocent of the charged offense, or if no felony charges were filed within the applicable time period. (§ 299, subds. (b), (c).) Alternatively, the arrestee

³ A DNA profile from an arrestee or convicted offender must contain information for 13 “core” loci before it may be submitted to the national database through CODIS. (Typing, *supra*, at pp. 94, 441.) California, like many other states, currently tests 15 loci, including the core CODIS loci. (See generally Forensic DNA, *supra*, §§ 2.2, 8.6.)

⁴ The expungement process for individuals arrested for federal crimes operates the same way. (See 42 U.S.C. § 14132(d); FBI, CODIS-Expungement Policy <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis_expungement> [as of May 13, 2015].)

may request expungement through a simplified and expedited process using a two-page form available on the Department of Justice website.⁵

As explained below, these protections ensure that the collection of DNA identification information involves little incremental intrusion on the legitimate privacy interests of individuals who become subject to custodial arrests for felony offenses. Whether evaluated under the federal Supreme Court's decision in *Maryland v. King* or by conducting an independent balancing under the California Constitution, the DNA Act is constitutionally reasonable.

II. THE DNA ACT IS CONSTITUTIONAL UNDER *MARYLAND V. KING*

In *Maryland v. King*, the United States Supreme Court held that “DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure.” (*King, supra*, 133 S.Ct. at p. 1980.) Thus, “[w]hen officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee’s DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.” (*Ibid.*) These conclusions leave no room for any Fourth Amendment challenge to the arrestee identification provisions in California’s DNA Act.

A. Obtaining DNA Samples from Arrestees at Booking Is Categorically Reasonable

In *King*, the Supreme Court first concluded that the constitutionality of the Maryland statute before it, requiring collection of DNA samples from

⁵ See Cal. DOJ, Streamlined DNA Expungement Application Form <http://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/expungement_app.pdf> [as of May 13, 2015].

arrestees for identification purposes, was to be determined on a categorical basis. (*King, supra*, 133 S.Ct. at pp. 1968-1970.) The law applied to all persons arrested for certain offenses, without any exercise of discretion on the part of processing officers; and it involved only a minimal incremental intrusion on individuals who were “already in valid police custody for a serious offense supported by probable cause.” (*Id.* at p. 1970.) Under these circumstances, the searches effected by taking a buccal swab of every covered arrestee fell “within the category of cases this Court has analyzed by reference to the proposition that the ‘touchstone of the Fourth Amendment is reasonableness, not individualized suspicion.’” (*Ibid.*) Determining the reasonableness of this category of searches required weighing “‘the promotion of legitimate governmental interests’ against ‘the degree to which the search intrudes upon an individual’s privacy.’” (*Ibid.*, brackets omitted.)

Applying this analysis, the court recognized that obtaining DNA samples from arrestees at booking serves significant state interests. (See, e.g., *King, supra*, 133 S.Ct. at pp. 1970-1974.) These include:

- (1) determining or verifying an arrestee’s identity, including what can be known about his past criminal conduct, by comparing his DNA profile with a database of profiles obtained from crime scenes (*id.* at pp. 1971-1972);
- (2) reducing security risks at the detention facility for staff, other detained individuals, and the arrestee (*id.* at p. 1972);
- (3) determining whether the arrestee presents a flight risk on account of his connection with an unsolved crime (*id.* at pp. 1972-1973);
- (4) assessing the danger the arrestee poses to the public if released (*id.* at pp. 1973-1974); and
- (5) preventing “suspicion against or prosecution of the innocent” (*id.* at p. 1977; see *id.* at p. 1974).

In describing these interests, the court noted that the name provided by an arrestee at booking may be “of little value.” (*King, supra*, 133 S.Ct. at p. 1971.) An arrestee may lie, and identification documents may be

falsified. (*Ibid.*) Moreover, an arrestee’s “identity is more than just his name or Social Security number, and the government’s interest in identification goes beyond ensuring that the proper name is typed on the indictment.” (*Ibid.*) A “suspect’s criminal history is a critical part of his identity that officers should know when processing him for detention.” (*Ibid.*) That history bears on the threat posed by an arrestee to others within a detention facility and the risk that he will flee or harm the public if he is released. (*Id.* at pp. 1972-1973.) And even when police know an arrestee’s name and aliases, conventional criminal history records may be inaccurate or incomplete. (See *id.* at pp. 1971-1972.)

The court emphasized that “[p]olice already [sought] this crucial identifying information” before they were authorized to collect DNA samples from arrestees. (*King, supra*, 133 S.Ct. at p. 1971.) Authorities have long obtained photographs, fingerprints, descriptions of scars and tattoos, and other identifying characteristics as part of routine booking procedures. (*Id.* at pp. 1971-1972, 1975-1976.) They commonly search “public and police records” based on such identifying characteristics “to see what is already known about” an arrestee. (*Id.* at p. 1972.) For example, police compare the arrestee’s photograph “to sketch artists’ depictions of persons of interest,” show the photograph to witnesses of past crimes, and make “a computerized comparison of the arrestee’s fingerprints against electronic databases of known criminals and unsolved crimes.” (*Id.* at pp. 1971-1972.) A DNA profile is “another metric of identification used to connect the arrestee with his or her public persona, as reflected in records of his or her actions that are available to the police.” (*Id.* at p. 1972.) Such records “are checked as a routine matter to produce a more comprehensive record of the suspect’s complete identity,” and “[f]inding occurrences of the arrestee’s CODIS [DNA] profile in outstanding cases is consistent with this common practice.” (*Id.* at p. 1972.) A comparison of DNA profiles “uses a

different form of identification than a name or fingerprint, but its function is the same.” (*Ibid.*) Indeed, “the familiar practice of fingerprinting arrestees” is “[p]erhaps the most direct historical analogue” to the creation of a DNA identification profile. (*Id.* at p. 1976.) With respect to comparing the identity of a person arrested against “databases of known criminals and unsolved crimes,” the “only difference” between the two identifying features “is the unparalleled accuracy DNA provides.” (*Id.* at p. 1972.)

Against “the significant government interest at stake in the identification of arrestees” and “the unique effectiveness of DNA identification” in serving that interest, the Supreme Court found little to weigh in the balance in terms of any intrusion on arrestees’ legitimate expectations of privacy. (*King, supra*, 133 S.Ct. at p. 1977; see *id.* at pp. 1977-1980.) Initially, the court noted that a cheek swab is a “gentle” and “minimal” intrusion, involving “a light touch on the inside of the cheek,” that “does not increase the indignity already attendant to normal incidents of arrest.” (*Id.* at pp. 1969, 1979.) Moreover, it explained that the “expectations of privacy of an individual taken into police custody ‘necessarily are of a diminished scope.’” (*Id.* at p. 1978, brackets omitted; see *id.* at pp. 1978-1979.) The court then identified three reasons why the analysis of a DNA sample, once obtained, also does not unreasonably intrude on an arrestee’s privacy. First, the loci analyzed for criminal identification purposes “come from noncoding parts of the DNA that do not reveal the genetic traits of the arrestee.” (*Id.* at p. 1979.) Second, even if the loci could provide such information, “they are not in fact tested for that end.” (*Ibid.*) Third, the Maryland statute provided protections that guarded against any inappropriate invasion of privacy by prohibiting any use of arrestee DNA samples, or of identification profiles generated from them, for any “purpose other than identification.” (*Id.* at pp. 1979-1980.) In view

of these “scientific and statutory safeguards,” Maryland’s analysis of arrestee DNA samples “pursuant to CODIS procedures did not amount to a significant invasion of privacy that would render the DNA identification impermissible under the Fourth Amendment.” (*Id.* at p. 1980.)

B. There Is No Basis for Distinguishing *King*

The Court of Appeal expressed dissatisfaction with *King*, and suggested that California’s DNA Act might be distinguished from the Maryland law that *King* upheld. (See, e.g., opn. pp. 15-18, 22.) In the end, however, the court did not actually hold that *King* could be distinguished from this case. (*Id.* at pp. 17-18.) Nor could it have.

Like the Maryland law at issue in *King*, the DNA Act requires collection of DNA samples, using a simple buccal swab, only from persons who are validly subject to custodial arrest based on probable cause to believe they have committed a crime. (Compare *King, supra*, 133 S.Ct. at p. 1970, with § 296, subd. (a)(2)(C), § 296.1, subd. (a)(1)(A), and § 836, subd. (a)(3) [probable cause requirement for warrantless felony arrests].) As in *King*, too, the DNA Act leaves nothing about the collection to any officer’s discretion. (Compare *King, supra*, 133 S.Ct. at p. 1970, with § 296, subd. (a)(2)(C) [requiring collection from “any adult person arrested or charged with any felony offense”].) Accordingly, the Fourth Amendment balancing approach used in *King* applies equally in reviewing California’s DNA Act. (See *King, supra*, 133 S.Ct. at p. 1970.)

The result of the balancing is also the same. The government interests identified in *King* (see *King, supra*, 133 S.Ct. at pp. 1970-1975) are common to Maryland, California, and every other state that collects DNA identification information from arrestees. No matter the jurisdiction, there is a “need for law enforcement officers in a safe and accurate way to process and identify the persons . . . they must take into custody.” (*Id.* at p. 1970.) The countervailing privacy analysis is also the same. Arrestees

have sharply diminished expectations of privacy, and cheek swabs are a minimal incremental intrusion, in the context of every custodial arrest. (See *id.* at p. 1977.) California, like Maryland, uses DNA samples for the “sole purpose of generating a unique identifying number against which future samples may be matched,” using only loci “from noncoding parts of [an arrestee’s] DNA that do not reveal the genetic traits of the arrestee.” (*Id.* at p. 1979.) California’s statute expressly prohibits using DNA samples for any “purpose other than identification,” like Maryland’s statute. (*Id.* at p. 1980; see § 295.1, subd. (a).) And California has in place the same “scientific and statutory safeguards” that *King* identified as sufficient to allay legitimate privacy concerns. (*King, supra*, at p. 1980.)

Although the Court of Appeal suggested that the DNA Act might be distinguished from Maryland’s statute, there is no material difference between the two statutes. The Court of Appeal noted that Maryland did not process DNA samples until after arraignment, whereas California may begin to use samples to generate identification profiles immediately after collecting them at booking. (Opn. p. 16.) That distinction could not have escaped the *King* court’s attention, because several *amici* pointed out that two-thirds of the states collecting DNA from arrestees, including California, did not delay processing until after arraignment. (See, e.g., Nat. Assn. of Federal Defenders Br. p. 26 & fn. 11; Br. of California et al. p. 23, fn. 11.)⁶ Yet nothing in *King*’s analysis turns on the specific timing of collection or processing of samples. On the contrary, *King* holds that “taking and analyzing a cheek swab” is a reasonable “*booking* procedure.” (*King, supra*, 133 S.Ct. at p. 1980, italics added.) That holding leaves no

⁶ Copies of the *amicus* briefs filed in *Maryland v. King* are available at <http://www.scotusblog.com/case-files/cases/maryland-v-king/> [as of May 13, 2015].

room to argue that California violates the Fourth Amendment by collecting samples and generating identification profiles as part of booking.

The Court of Appeal also observed that California generates DNA identification profiles as part of every felony booking, while the Maryland law in *King* applied to certain categories of “serious” crimes. (Opn. p. 17; see *King, supra*, 133 S.Ct. at 1965.) Again, however, the *King* court was informed that nearly half the states collecting DNA from arrestees, including California, did so for every felony arrest. (E.g., Nat. Assn. of Federal Defenders Br. p. 21 & fn. 8.) Indeed, the court expressly noted that state statutes “var[ied] in their particulars, *such as what charges require a DNA sample.*” (*King, supra*, at p. 1968, italics added.) It did so, however, only in the course of making clear that the general *similarity* of these statutes meant that “this case implicates more than the specific Maryland law” before the court. (*Ibid.*) Nothing in the court’s analysis suggests that the constitutionality of any statute might turn on the particular types of custodial arrests to which it applied.

King sometimes describes the offenses covered by the Maryland statute as “serious” ones. (E.g., *King, supra*, 133 S.Ct at pp. 1965, 1967, 1970, 1980.) But the court’s analysis focuses only on whether the crime of arrest is one for which officers may “bring the suspect to the station to be detained in custody,” thus initiating the “booking” procedure during which a DNA sample is collected. (See *id.* at p. 1980; see also *id.* at pp. 1977-1979.) That analysis provides no basis for distinguishing the offenses for which collection was authorized in *King* and the felonies for which it is authorized in California. As in *King*, the California offenses are all ones for which the law authorizes both custodial arrests and, upon conviction,

substantial punishments. To the extent *King* suggests any “serious offense” requirement, the DNA Act meets it.⁷

The Court of Appeal also sought to distinguish *King* from this case on the ground that “Maryland expressly prohibits familial DNA searches.” (Opn. pp. 16-17.) As the court acknowledged, however, California’s policy on familial searches does not allow this type of analysis on profiles in the arrestee database. (*Id.* at p. 17.) Certainly Buza has never alleged that any such search was conducted, or would have been conducted, using an identification profile generated as part of his arrest. Nor could one have been, since Buza refused to provide a sample as an arrestee. This case thus presents no question concerning familial searches. (See *post*, pp. 61-62.) And although *King* noted Maryland’s familial search restriction in describing the statute at issue there, the court’s constitutional analysis made no reference to that restriction. (Compare *King, supra*, 133 S.Ct. at p. 1967 with *id.* at pp. 1968-1980.)

Finally, the Court of Appeal observed that, unlike in *King*, California law does not require automatic destruction of a DNA sample, and expungement of the related identification profile, if an arrestee is ultimately not convicted of a crime. (Opn. p. 16.) Here too, however, *amici* informed the *King* court that “[e]ighteen States keep [an arrestee’s] DNA even if the defendant is acquitted, unless and until the defendant seeks expungement” (Nat. Assn. of Federal Defenders Br. p. 26), and that California was among

⁷ See also *Haskell v. Harris* (9th Cir. 2014) 745 F.3d 1269, 1274 (en banc) (conc. opn. of M. Smith, J.) [“A felony is, of course, a serious crime.”]; *United States v. Davis* (M.D. Fla. Dec. 3, 2014) ___ F.Supp.3d ___, ___ [2014 WL 6826918, p. *14] [“[T]he Court reads *King* to apply to DNA searches of arrestees for all felonies”]; cf. *Baldwin v. New York* (1970) 399 U.S. 66, 68, 73-74 [crime is “serious,” triggering right to jury trial, if punishable by more than six months’ imprisonment, regardless of label applied by state law].

these states (Br. of California et al. p. 23, fn. 11). Nonetheless, nothing in *King* suggests that automatic expungement is constitutionally required. The court’s constitutional analysis never even refers to the Maryland expungement provision.

In short, the distinctions identified by the Court of Appeal are either “illusory” or “are not constitutionally relevant.” (*Haskell v. Harris, supra*, 745 F.3d at pp. 1272, 1273 (conc. opn. of M. Smith, J.).) After *King*, there can be no question that California’s statute requiring felony arrestees to provide DNA samples is consistent with the Fourth Amendment.

III. THIS COURT SHOULD FOLLOW *KING* AS A MATTER OF CALIFORNIA LAW

As the Court of Appeal correctly recognized, the California Constitution is a document of independent force. (See, e.g., opn. at pp. 18-19; *People v. Teresinski* (1982) 30 Cal.3d 822, 835-836 (“*Teresinski*”).) In construing that document, however, this court has consistently applied a “general principle or policy of deference to United States Supreme Court decisions” when a state constitutional provision parallels one in the federal Constitution. (*Raven, supra*, 52 Cal.3d at p. 353, italics omitted [collecting cases].) Under that principle, a decision such as *King* interpreting the Fourth Amendment “ought to be followed” in construing article I, section 13 of the California Constitution, “unless persuasive reasons are presented for taking a different course.” (*Teresinski, supra*, at p. 836; see *Raven, supra*, at p. 353 [requiring ““cogent reasons”” and “good cause for departure”].) Here, there is no persuasive reason for this court to decline to follow *King* in applying section 13 to the DNA Act’s arrestee provisions.⁸

⁸ Buza’s motion for acquittal before the trial court invoked only the Fourth Amendment. (CT 38-40.) His opening brief in the Court of Appeal likewise argued only that his conviction “violated his Fourth Amendment right.” (Jan. 22, 2010 Br. p. 9.) The only citation to the state Constitution
(continued...)

A. This Court’s Precedents Counsel Adherence to *King*

When deciding whether to break from federal precedent, this court has considered several factors. Initially, the court considers whether anything “in the language or history of the California provision suggests that the issue before [this court] should be resolved differently than under the federal Constitution.” (*Teresinski, supra*, 30 Cal.3d at p. 836.) In the case of section 13, this court has previously recognized that there is “nothing in the language or history” of the provision that suggests any divergence from the Fourth Amendment. (*Ibid.*)⁹ On the contrary, the state provision is “based upon the Fourth Amendment,” using almost identical language. (*Id.* at p. 835, fn. 9.) And its history confirms that the drafters intended to mirror the federal provision.

Section 13 was adopted at the 1849 constitutional convention. A few days before, delegate Lansford Hastings had urged his colleagues to use the federal Constitution “as a guide,” calling it “the best book extant on human

(...continued)

in that brief pointed to the privacy clause in article I, section 1—not section 13. (*Id.* at p. 14.) The first brief in the case to present any argument based on section 13 was an amicus brief filed by the First District Appellate Project at the invitation of the Court of Appeal. (See Dec. 6, 2010 FDAP Br. pp. 83, 88.) (The Court of Appeal later appointed the Appellate Project to serve as Buza’s counsel.) It was inappropriate for the Court of Appeal to reverse Buza’s conviction on a ground not raised by Buza in the trial court or in his opening brief on appeal. By doing so, however, the court cast doubt on the constitutionality of an important state statute, and this court has now granted review. At this point, the People believe it would be best for this court to address and resolve the state constitutional question.

⁹ The Court of Appeal described *Teresinski* as a case involving the “federal free speech clause.” (Opn. p. 20.) In fact, it involved application of the Fourth Amendment and an “alternative [state] claim based on article I, section 13 of the California Constitution.” (*Teresinski, supra*, 30 Cal.3d at p. 835.)

rights and human government.” (Browne, Report of the Debates in the Convention of California on the Formation of the State Constitution in September and October, 1849 (1850) p. 28.) Immediately before the convention adopted section 13, a delegate explained that “this section, as amended, was [taken] word for word from the Constitution of the United States, 4th [Amendment].” (*Id.* at p. 48.) In 1974, the voters approved a proposition making a few “minor nonsubstantive changes in wording” to section 13. (Grodin et al., *The California State Constitution* (2011) p. 59.)

This background contrasts sharply with that of some other provisions, where text and history have provided a basis for departing from federal precedent. In *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, for example, this court considered a compelled-speech challenge to a statute affecting plum producers. Highlighting textual differences between California’s free-speech clause and the First Amendment, the court explained that the drafters had modeled the state provision on the New York Constitution, “*not* [on] the First Amendment to the United States Constitution.” (*Id.* at p. 489.) In the particular circumstances of *Gerawan*, the court held that these differences “mandate[d]” a different result under the state Constitution. (*Id.* at p. 512.) There is nothing similar here.

Nor do other provisions support a more expansive construction of section 13. Article I, section 1 sets out an express right of privacy. (See *opn.* p. 53.) As this court has made clear, however—and the Court of Appeal acknowledged (*ibid.*)—that right “is no broader *in the area of search and seizure* than the ‘privacy’ protected by the Fourth Amendment or by article I, section 13 of the California Constitution.” (*Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 30, fn. 9 (“*Hill*”), italics added, citing *People v. Crowson* (1983) 33 Cal.3d 623, 629; see *In re York*

(1995) 9 Cal.4th 1133, 1149.)¹⁰ Moreover, other amendments to article I of the California Constitution reflect the voters' intent to harmonize state and federal search-and-seizure doctrine. Proposition 8, approved by the voters in 1982, amended article I to prohibit courts from excluding evidence on the ground that it was seized in violation of section 13. (*In re Lance W.* (1985) 37 Cal.3d 873, 879; see Cal. Const., art. I, § 28, subd. (f)(2).) That amendment effectively eliminated differences between state and federal doctrine regarding exclusion, requiring state courts to apply Fourth Amendment precedent when resolving suppression motions. (See *opn. p.* 44.)¹¹ More recently, the voters amended article I to require that the rights “to be free from unreasonable searches and seizures” and “to privacy” be construed in criminal cases “in a manner consistent with the Constitution of the United States.” (Cal. Const., art. I, § 24; see Prop. 115, approved by voters, Prim. Elec. (June 5, 1990).) This court struck down that amendment because it amounted to a revision that could be adopted only by a constitutional convention. (See *Raven, supra*, 52 Cal.3d at pp. 349-356.) It was, however, adopted through a statewide popular vote—the same way as Proposition 69. Those election results squarely refute the Court of

¹⁰ The Court of Appeal observed that “[t]his case . . . does not involve a claim of invasion of privacy in violation of article I, section 1,” and acknowledged that, “in any event, such a privacy claim in the search and seizure context would not offer more protection than a claim under article I, section 13.” (*Opn. p.* 53.)

¹¹ Departing from *King* in this case would therefore create an anomalous situation. Proposition 8 requires that evidence obtained in accordance with the Fourth Amendment, including under *King*, must be admitted. That allows California investigators, prosecutors, and courts to use evidence derived from DNA identification information lawfully collected from arrestees in Maryland and other states. Under the Court of Appeal’s reasoning, however, California could not collect such identifying information during its own felony arrests.

Appeal's theory that, in this context, "California society" would want section 13 construed to provide felony arrestees with more protection than that provided by the Fourth Amendment. (See *opn.* p. 54.)

Another factor this court considers when deciding whether to follow a new federal Supreme Court decision is whether that decision "limit[ed] rights established by earlier precedent" of that court. (*Teresinski, supra*, 30 Cal.3d at p. 836.) Here, as the Court of Appeal acknowledged, *Maryland v. King* "did not overrule past precedent or limit previously established rights." (*Opn.* p. 21.) Indeed, it was "a case of first impression." (*Ibid.*) The Court of Appeal nonetheless reasoned that *King* "deviated sharply from prior Fourth Amendment jurisprudence on suspicionless searches and searches incident to arrest." (*Ibid.*) That is not correct. *King* discussed and relied on prior cases from those contexts. The court explained why in some respects they supported its analysis, while in others they did not bear directly on the question of obtaining DNA samples as part of a custodial arrest. (See *King, supra*, 133 S.Ct. at pp. 1969-1970, 1974, 1977-1979.)

This court has also "on occasion been influenced not to follow parallel federal decisions by the vigor of the dissenting opinions and the incisive academic criticism of those decisions." (*Teresinski, supra*, 30 Cal.3d at p. 836.) Here, the Court of Appeal noted that "*King* was decided by a narrow majority of five justices" (*opn.* p. 21), and made clear its own sympathy with the "piercing dissent" (*id.* at p. 13). That dissent, however, rests on the incorrect premise that the only interest served by collecting DNA identification information at booking is to conduct suspicionless investigations of past crimes. (See, e.g., *King, supra*, 133 S.Ct. at pp. 1982-1983 (dis. *opn.* of Scalia, J.)) Instead, as *King* explains, collection of this information at arrest, for limited purposes enforced by strict controls, serves a range of important interests. (*Id.* at pp. 1971-1974.) It is a logical modern extension of conventional booking processes, such as

photographing and fingerprinting arrestees. (*Id.* at pp. 1971-1972.) The collection of this modern form of identifying information involves privacy considerations markedly different from those at issue in earlier “special needs” cases, where the individuals being searched were not *already* subject to valid custodial arrests based on probable cause to believe they had committed crimes. (*Id.* at p. 1978.) Under these circumstances, the *King* dissent, while surely spirited, should not persuade this court to reject the majority’s contrary decision, which would create an unwarranted divergence between state and federal law.

The Court of Appeal did not identify any “incisive academic criticism” as a basis for departing from *King*. (See *opn.* p. 21.) In any event, any scholarly criticism should carry little weight in comparison to the considered judgment of legislators across the country. A majority of the states—at least 28 as of this writing—have examined this issue and concluded that it is appropriate to collect DNA samples from arrestees for identification purposes.¹² Those enactments reflect a broad policy consensus supporting *King*’s conclusion that “DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure.” (*King, supra*, 133 S.Ct. at p. 1980.)

Finally, this court has considered whether following federal precedent for state purposes would “overturn established California doctrine affording greater rights to the defendant.” (*Teresinski, supra*, 30 Cal.3d at p. 837.) Here, as the Court of Appeal acknowledged, it would not. (*Opn.* p. 21.) This case is unlike, for example, *People v. Bunyard* (1988) 45 Cal.3d 1189, 1243, which declined to follow a federal decision concerning jury

¹² See generally National Conference of State Legislatures, Forensic Science Database <<http://www.ncsl.org/research/civil-and-criminal-justice/dna-database-search-by-state.aspx>> [as of May 13, 2015] [describing state statutes].

instructions that would have overturned longstanding state due process doctrine; or *Serrano v. Priest* (1976) 18 Cal.3d 728, 761-766, where following an intervening federal decision would have entailed reversing the court's own decision from a few years before concerning the extent of state equal protection and educational rights. Here, on the contrary, earlier decisions of this court have endorsed the State's practice of collecting identifying information about arrestees at booking and retaining that information, even where the arrest does not result in a conviction. (*Loder v. Municipal Court* (1976) 17 Cal.3d 859 ("*Loder*"); *People v. McInnis* (1972) 6 Cal.3d 821 ("*McInnis*"); see *post*, pp. 34-35.) Accepting *King* would comport fully with prior California law.

B. The Cases Cited By the Court of Appeal Do Not Justify Departing from *King*

The Court of Appeal reasoned that following *King* would “run counter to” the “express constitutional protection of informational privacy” in the state Constitution and this court’s “prior application of a ‘higher standard of reasonableness under article I, section 13.’” (Opn. p. 21, citing *People v. Brisendine* (1975) 13 Cal.3d 528, 552 ("*Brisendine*"); see opn. pp. 38-41, 53-57.) As noted above, however, this court has previously made clear that the state Constitution’s separate protection of individual privacy adds nothing to section 13 (or the Fourth Amendment) “in the area of search and seizure.” (*Hill, supra*, 7 Cal.4th at 30, fn.9.) And none of the cases cited by the Court of Appeal in which this court has construed section 13 to provide greater protection than the Fourth Amendment supports departing from *King* here. In those cases, following federal precedent would have overturned established state law. (See *Teresinski, supra*, 30 Cal.3d at p. 837.) Moreover, none of the cases involved a presumptively valid statute enacted by the electorate, and none involved the collection of identifying characteristics from arrestees as part of standard booking procedures.

Most of the cases cited by the Court of Appeal addressed a conflict involving the permissible scope of searches of persons or their belongings incident to an arrest. In *People v. Superior Court (Simon)* (1972) 7 Cal.3d 186, this court held that police making an arrest for a nonfelony traffic offense, which would have no “fruits” or “instrumentalities,” could not routinely search the person of the arrestee unless there were particular facts suggesting he might be armed. (See *id.* at pp. 201-206, citing *People v. Superior Court (Kiefer)* (1970) 3 Cal.3d 807.) A year later, the federal Supreme Court adopted a different construction of the Fourth Amendment. In *United States v. Robinson* (1973) 414 U.S. 218, 235, that court held that whenever there is a lawful custodial arrest, the Fourth Amendment permits police to search the person of the arrestee regardless of “the probability in a particular arrest situation that weapons or evidence would in fact be found.” It upheld a search of Robinson’s person and of a crumpled cigarette package found in his pocket as part of his arrest for driving a motor vehicle with a revoked license—even though that offense was unlikely to be associated with physical evidence or weapons. (*Id.* at pp. 220-223, 233.)

This court considered the conflict between *Simon* and *Robinson* in *People v. Brisendine*—the main case cited by the Court of Appeal here. Recognizing that the two decisions were “irreconcilable” (*Brisendine*, *supra*, 13 Cal.3d at p. 547), this court decided in *Brisendine* to “adhere to [its own] precedential decisions” (*id.* at p. 548), and to base its holding “exclusively on article I, section 13, of the California Constitution” (*id.* at p. 545). The Court of Appeal also cited two other cases from the same year in which this court adhered to *Brisendine*’s approach. (See *People v. Norman* (1975) 14 Cal.3d 929, 939; *People v. Longwill* (1975) 14 Cal.3d 943, 951.)

The *Brisendine* cases all involved a situation in which following a federal Supreme Court decision would have required overturning

established California law. Indeed, the search of the crumpled cigarette package at issue in *Robinson* would never have occurred in California in the first place, because state statutes limited officers to conducting a pat-down search for weapons before transporting a suspect arrested for a nonfelony traffic offense in a patrol car. (*Brisendine, supra*, 13 Cal.3d at p. 546 [citing former Veh. Code, § 40303, subd. (h)].) Thus, the rule in *Robinson* was contrary not just to this court’s decision in *Simon*, but also to procedures and protections established by the state Legislature. In this case, state law (enacted by the voters) requires, rather than prohibits, collection of DNA identifying information from arrestees. Following *King* for purposes of state constitutional law would uphold, not displace, established California law.

The *Brisendine* cases also involved a different type of search-and-seizure issue. The court compared the fire-code violation that gave rise to the arrest and search in *Brisendine* to a nonfelony traffic violation, for which police could take the arrestee before a magistrate but were prohibited by statute from booking him or performing a pre-booking search. (*Brisendine, supra*, 13 Cal.3d at pp. 536-537; see generally *Simon, supra*, 7 Cal.3d at pp. 199-201.) Thus, *Brisendine* did *not* involve the permissible scope of a search performed on a felony arrestee at booking—the subject matter of this case. (See *Brisendine, supra*, at p. 547.)

Finally, *Robinson* and *Brisendine* both involved case law construing general constitutional restrictions on discretionary searches conducted by police on their own initiative in the field. They did not involve the constitutionality of a presumptively valid, voter-approved statute *requiring* law enforcement to conduct a search as part of the routine booking procedure for custodial arrests. Departing from established federal constitutional precedent in order to strike down such a statute would be an odd way to assert the independence of state law.

The Court of Appeal also cited *People v. Ruggles* (1985) 39 Cal.3d 1. (Opn. at pp. 40-41.) That case, like *Brisendine*, involved both a different aspect of search-and-seizure law and a federal decision at odds with existing California law. *Ruggles* turned on the existence of a prior California decision, *People v. Minjares* (1979) 24 Cal.3d 410, which held that it violated the Fourth Amendment for police to search a tote bag in the trunk of an arrestee's car without a warrant. (*Ruggles, supra*, at p. 9.) This court acknowledged that *United States v. Ross* (1982) 456 U.S. 798 had later "expressed a contrary view," but decided to adhere to the reasoning in *Minjares* and "reaffirm [its] holding" under section 13. (*Ruggles, supra*, at pp. 11, 13.) Here, there is no prior California precedent prohibiting the State from collecting DNA samples from felony arrestees at booking, under either section 13 or the Fourth Amendment. Nor is there any other reason for adopting a construction of section 13 different from the construction of the Fourth Amendment already adopted in *King*.¹³

¹³ The Court of Appeal also relied on *People v. Laiwa* (1983) 34 Cal.3d 711, but that case is inapposite. In *Laiwa*, police searched the tote bag an arrestee was carrying before transporting him to the police station for booking. (*Id.* at p. 715.) The People presented only one justification for the search, and the majority considered only whether such a search was permissible under section 13 because it would inevitably have been performed anyway at booking. (*Id.* at p. 724-725.) The court held that the "so-called 'accelerated booking search' is not a permissible exception to the warrant requirement" under section 13. (*Id.* at p. 728.) As the dissent pointed out, the search was likely permissible under federal Supreme Court precedent applying the Fourth Amendment. (See *id.* at p. 728 (dis. opn. of Richardson, J.)) But the majority concluded that issue was not before the court, and thus had no occasion to decide whether or not to follow that federal precedent. (See *ibid.*)

IV. THE DNA ACT IS INDEPENDENTLY REASONABLE UNDER CALIFORNIA LAW

In any event, the DNA Act's provisions for collecting identifying information from arrestees are fully consistent with the California Constitution. As under the Fourth Amendment, the "touchstone" of any analysis under article I, section 13 is "reasonableness." (*Ingersoll v. Palmer* (1987) 43 Cal.3d 1321, 1329 ("*Ingersoll*").) In assessing reasonableness, this court applies "a general balancing test 'weighing the gravity of the governmental interest or public concern served and the degree to which the challenged government conduct advances that concern against the intrusiveness of the interference with individual liberty.'" (*Hill, supra*, 7 Cal.4th at p. 29, quoting *Ingersoll, supra*, at p. 1338, brackets omitted; see *In re York, supra*, 9 Cal.4th at p. 1149 [applying balancing analysis to section 13 claim regarding pretrial defendants].) This is the same test the court applied in concluding that collection of DNA identifying information from convicted offenders is reasonable under the Fourth Amendment. (See *People v. Robinson, supra*, 47 Cal.4th at p. 1123 ("*Robinson*").) It is also the test applied by the Court of Appeal here (see, e.g., opn. p. 58), although that court reached the wrong result.

In this case, the constitutional balancing must also take account of the strong presumption of validity accorded to state laws adopted directly by the people. (See *Legislature v. Eu* (1991) 54 Cal.3d 492, 500-501.) That presumption applies with special force here, because the analysis turns on whether the challenged provisions of the DNA Act are reasonable under the state Constitution. (Cf. *United States v. Watson* (1976) 423 U.S. 411, 416.) Although this case involves application of the DNA Act to Buza, the Court of Appeal's decision in effect invalidates the Act's arrestee-collection provisions on their face. And an initiative measure, in particular, may not be struck down on such grounds unless it appears "clearly, positively, and

unmistakably” that the challenged provisions violate the Constitution. (*Legislature v. Eu, supra*, at p. 501.)

Here, on the contrary, the balance of interests establishes that it is reasonable for California to require adult felony arrestees to provide DNA identifying information when they are booked. Just as with other identifying information such as aliases, photographs, fingerprints, tattoos, or scars, collecting identifying DNA information at the time of an arrest and then keeping it in law enforcement records helps appropriate officials to confirm who an arrestee is, learn about his past criminal conduct, deter or solve future crimes he might commit, and identify missing persons. In this regard, the only differences between DNA identification profiles and other identifying characteristics are the unparalleled sensitivity and precision of DNA technology.

The State’s powerful interests in collecting DNA identifying information for these purposes outweigh any incremental intrusion on the privacy interests of individuals who are already subject to valid custodial arrests. Arrestees have no legitimate expectation of privacy in their identity, and as to other matters such expectations are sharply reduced. (See, e.g., *Robinson, supra*, 47 Cal.4th at p. 1121; *Kincade, supra*, 379 F.3d at p. 837; *Jones v. Murray* (4th Cir. 1992) 962 F.2d 302, 306 (“*Jones*”).) Collection of a DNA sample entails only a cheek swab at booking, and use of the sample is strictly limited and subject to robust protections—the same limitations and protections that were involved when this court concluded that it is constitutionally reasonable for the State to collect DNA samples from convicted offenders. (See *Robinson*, 47 Cal.4th at p. 1121.) Under these circumstances, the State’s collection of DNA samples to generate identification profiles is no less reasonable than its collection and recording of other identifying characteristics of felony arrestees.

A. It Is Reasonable for Law Enforcement to Collect Information About the Identifying Characteristics of Arrestees and to Retain and Use That Information

California has a long history of collecting and recording the identifying characteristics of arrestees at booking. It is standard booking procedure for authorities to photograph arrestees, take their fingerprints, and retain this and similar information. (*Loder, supra*, 17 Cal.3d at p. 865; § 7, subd. (21).) Before those technologies became commonplace, police recorded detailed measurements of arrestees' bodies at booking. (Cole, *Suspect Identities* (2001) p. 51 ("Cole").) Police also collect and record information about arrestees' scars, tattoos, or other distinguishing features.

Law enforcement uses these individual identifying characteristics for a variety of purposes. Fingerprints and other identifiers allow law enforcement to confirm that an arrestee is who he says he is at the time of arrest. (E.g., *Sterling v. City of Oakland* (1962) 208 Cal.App.2d 1, 4 ("*Sterling*").) Officers also use identifiers to learn about an arrestee's criminal history—not only by checking the name provided at booking against the records corresponding to that name, but also, for example, by checking to see if the arrestee's fingerprints match those "recovered from a crime scene," or by comparing a new photograph to others already on record to see if the arrestee is the same person pictured in "a wanted poster of a previously unidentified suspect." (*King, supra*, 133 S.Ct at p. 1972.) This sort of comparison, linking an individual who is being processed as part of a new arrest to information already in government files, is highly relevant to custodial officials, prosecutors, and courts in making informed decisions about how to proceed with the arrestee in connection with the new arrest. (See *King, supra*, at pp. 1971-1974; *Loder, supra*, 17 Cal.3d at pp. 866-867.) Moreover, once information that identifies the particular individual with the current arrest becomes part of the government's

legitimate law enforcement records, officers are similarly able to use it in the future, if the occasion arises, to identify the individual as the same one who was previously arrested. Thus, for example, officers in the future may show photographs taken during previous arrests “to a witness who is asked to identify the perpetrator of a subsequent crime.” (*Loder, supra*, 17 Cal.3d at p. 865; see also *McInnis, supra*, 6 Cal.3d at p. 826.)

The practice of collecting fingerprints and other identifying characteristics at booking has met with “universal approbation” from the courts. (*United States v. Mitchell* (3d Cir. 2011) 652 F.3d 387, 411 (en banc) (“*Mitchell*”).) Courts have concluded that “it is elementary that a person in lawful custody may be required to submit to photographing [citation] and fingerprinting [citation] as part of routine identification processes.” (*Smith v. United States* (D.C. Cir. 1963) 324 F.2d 879, 882.)¹⁴ Law enforcement officials may properly collect and record this identifying information as part of a valid custodial arrest, because there is probable cause to believe that the individual whose identity is being recorded has committed a crime. That determination authorizes police to deprive the arrestee of his liberty, bring him into the criminal justice system, and

¹⁴ See, e.g., *King, supra*, 133 S.Ct at p. 1976 [courts have “had no trouble determining that fingerprinting was a natural part of ‘the administrative steps incident to arrest’”]; *Doe v. Sheriff of DuPage County* (7th Cir. 1997) 128 F.3d 586, 587-588 [booking procedure including fingerprinting and photographing does not violate the Fourth Amendment]; *Jones, supra*, 962 F.2d at p. 306 [discussing the “universal approbation of ‘booking’ procedures that are followed for every suspect arrested for a felony, whether or not the proof of a particular suspect’s crime will involve the use of fingerprint identification”]; *United States v. Kelly* (2d Cir. 1932) 55 F.2d 67, 69 (opn. of A. Hand, J.) [fingerprinting is “no more than an extension of methods of identification long used in dealing with persons under arrest” and “a very certain means devised by modern science” that “has become especially important” due to increased population].

collect information about his identifying characteristics. (See *Mitchell*, *supra*, at pp. 411-412.)

Courts have also repeatedly rejected challenges to the government's retention and continued use of identifying information after an arrest. In *Loder*, the plaintiff was arrested for battery and other offenses, but the municipal court dismissed the criminal complaint against him for lack of prosecution after the government decided not to press charges. (*Loder*, *supra*, 17 Cal.3d at p. 864.) He then brought an action for a writ of mandate, challenging the "retention and dissemination of his arrest record" under the privacy and due process provisions of the state Constitution. (*Ibid.*) This court unanimously rejected the challenge. (See *id.* at p. 877.) It observed that the State had a "compelling" interest in retaining arrest records—typically containing photographs, fingerprints, and "other recorded physical description[s]." (*Id.* at p. 864-865.) That interest "may be characterized generally as the promotion of more efficient law enforcement and criminal justice" and is "manifested at a number of stages of the criminal process." (*Id.* at p. 864.) The information in arrest records allows law enforcement to identify arrestees correctly (*id.* at p. 865); it informs charging decisions and "the exercise of prosecutorial discretion" (*id.* at p. 866); it assists the court in "deciding whether to release the defendant on recognizance or in fixing the appropriate amount of bail" (*id.* at p. 867); and it also "may be used by the police in several ways for the important purpose of investigating and solving similar crimes in the future" (*id.* at p. 865). The court acknowledged that retention of arrest records created risks of "adverse effects on an individual's later life," but it was "convinced that in California the risks have been greatly diminished in recent years by significant legislative and executive action." (*Id.* at p. 869.) Among those precautions, the Legislature had "established multiple

safeguards against the improper dissemination of arrest records,” including “criminal penalties for unauthorized dissemination.” (*Id.* at pp. 872-873.)

In *People v. McInnis*, this court approved of the police practice of using photographs from prior arrests to identify the perpetrator of a later robbery. The court recognized that it is “standard police procedure” to take a photograph of an arrestee at booking, and to keep these photographs “in permanent files regardless of the eventual disposition of the case.” (*McInnis, supra*, 6 Cal.3d at pp. 825-826.) Indeed, the court observed that “thousands of persons ultimately found to be entirely innocent undoubtedly have their photographs, as well as fingerprints, on record with law enforcement agencies.” (*Id.* at p. 826.) Although the photograph at issue in *McInnis* was taken by police in connection with what turned out to be an improper arrest, it could properly be included among those the police showed to the victim of a later crime. (See *id.* at pp. 824-826; see also *Sterling, supra*, 208 Cal.App.2d at pp. 3-8 [police could retain fingerprints and photographs even after charges against arrestee were dismissed].)

These cases reflect a judicial and social consensus: When there is probable cause for the police to believe a suspect has committed a crime, it is appropriate for officers to take the suspect into custody and to collect and record identifying information about him. Having lawfully obtained and recorded that information, the State may use it for legitimate law enforcement purposes—including confirming who the individual is, linking him to any past criminal conduct, and identifying him in the future if, for example, he leaves evidence of his presence at the scene of another crime.

B. California Has a Compelling Interest in Collecting DNA Identification Information from Arrestees

Forensic scientists devised DNA identification profiles as a uniform metric that could precisely identify a specific individual *without* revealing anything further about him, such as health information or other genetic

traits. Law enforcement uses DNA identification profiles in the same way as it has traditionally used other identifying characteristics. In important respects, however, DNA identification serves the public interest far more effectively. It is ““as close to an infallible measure of identity as science can presently obtain.”” (*Robinson, supra*, 47 Cal.4th at p. 1141.)

1. DNA identification profiles provide a limited but powerful identifying metric

DNA identification profiles are compiled by measuring (or “typing”) loci in the noncoding regions of an arrestee’s DNA. (See *ante*, pp. 7-8.) They identify a specific individual very precisely, while revealing nothing about potentially sensitive issues such as genetic predispositions toward disease. (*Ibid.*) They thus provide an individual identifying measurement very much like other information historically collected by police at booking. (See, e.g., *Boroian v. Mueller* (1st Cir. 2010) 616 F.3d 60, 65 (“*Boroian*”) [“DNA profiles currently function as identification records not unlike fingerprints, photographs, or social security numbers.”].) Indeed, the “Bertillon system,” one of the earliest methods for collecting identifying characteristics from arrestees, also involved recording a series of measurements of specific parts of the arrestee’s body. (Cole, *supra*, at p. 34.) That system, however, was criticized for its imprecision. (*Id.* at pp. 53, 149.) In contrast, the measurements contained in a DNA identification profile are extraordinarily precise. When a profile is based on all 15 of the loci currently measured by the State, “the resulting statistics establish that the [individual] profile is astronomically rare.” (*People v. Xiong* (2013) 215 Cal.App.4th 1259, 1270.)

DNA profiles are so precise a measure of identity that this court has held they may support a “John Doe” arrest warrant. In *Robinson*, an arrest warrant was issued that contained a fictitious name and described the suspect only by referencing his profile. (*Robinson, supra*, 47 Cal.4th at p.

1115.) This court held that the profile described the suspect with sufficient particularity to support the warrant, and emphasized that “the prevalence of DNA databanks today as a criminal justice tool supports the conclusion that a defendant can be properly identified by a DNA profile, especially in light of the accuracy of this identification.” (*Id.* at p. 1141.)

Law enforcement uses DNA identification profiles just the way it uses fingerprints: by comparing profiles to see if they match, with the match indicating that the same person was the source of the DNA used to generate each profile. Thus, for example, the state DNA laboratory generates a profile for each arrestee using his cheek swab. (See generally *Haskell v. Brown* (N.D. Cal. 2009) 677 F.Supp.2d 1187, 1190 (opn. of Breyer, J.)) The resulting profile is uploaded into the arrestee index in California’s DNA data bank, and submitted through CODIS to the national database operated by the FBI. (See *id.* at pp. 1190-1191.) Arrestee profiles are automatically compared against existing databases of profiles generated from crime scenes and missing persons. (See *id.* at p. 1191.)¹⁵ If this automated comparison generates a “hit” between a current arrestee’s profile and another in the database, the state DNA laboratory individually verifies that the two profiles match, including by reanalyzing the arrestee’s DNA sample to confirm the profile. (See *ibid.*) If the match is confirmed, the state laboratory forwards that information to local authorities. (See *ibid.*; see generally *Forensic DNA, supra*, § 8:15.)

This analysis is not materially different from comparing two photographs or two sets of fingerprints for identification purposes. Indeed,

¹⁵ See also National DNA Index System (NDIS) Operational Procedures Manual (effective Jan. 1, 2015) p. 44 <<http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-procedures-manual>> [as of May 13, 2015]. The database of profiles of past arrestees is also checked when officials are trying to identify otherwise unidentified human remains.

it closely parallels the current computerized system for automatically comparing booking fingerprints from arrestees against a database of latent fingerprints collected from crime scenes, a system that California also uses.¹⁶ But DNA profiles offer at least two important advantages over more traditional identification methods.

First, DNA profiles are the most precise and “reliable means of identifying individuals.” (*Banks, supra*, 490 F.3d at p. 1188.) A match between two profiles “excludes the rest of the population from suspicion to a near 100% certainty.” (*Ibid.*)

Second, law enforcement is often able to identify a person using a DNA profile even where fingerprint information is unavailable or unusable. At many crime scenes there are no recoverable fingerprints, or the fingerprints recovered are smudged or otherwise of limited use. Moreover, computer comparison of fingerprint images is necessarily complex, and when technicians compare a latent print from a crime scene to the database of fingerprints from known arrestees the “chance of missing an identification, even when the mate is in the database, is 25%.” (National Institute of Justice, *The Fingerprint Sourcebook* <<https://www.ncjrs.gov/pdffiles1/nij/225320.pdf>> p. 6-11 [as of May 13, 2015].) In contrast, a reliable DNA identification profile may be generated even “from small amounts of biological material,” including skin cells, blood, semen, hair, saliva, urine, feces, or even dandruff. (*Typing, supra*, at pp. 34, 168.) And if a profile can be generated, it can also be more precisely digitized and compared with other profiles by computer. Thus, DNA profiles offer “a

¹⁶ See generally National Institute of Justice, *The Fingerprint Sourcebook* <<https://www.ncjrs.gov/pdffiles1/nij/225320.pdf>> p. 6-10 [as of May 13, 2015]; Cal. DOJ, *BFS DNA Frequently Asked Questions [Effects of the All Adult Arrestee Provision, Q1]* <<http://oag.ca.gov/bfs/prop69/faqs>> [as of May 13, 2015].

critical complement to fingerprint analysis in the many cases in which perpetrators of crimes leave no recoverable fingerprints but leave biological residues at the crime scene.” (73 Fed.Reg. 74932, 74933-74934 (Dec. 10, 2008) [DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction].)

2. The use of DNA identification profiles serves important public interests

The State uses the DNA identification profiles it generates during felony arrests only for identification purposes. (See § 295.1, subd. (a).) Just as with fingerprints or other identifying information, this use of DNA profiles as one neutral, precise, and enduring identification metric serves important public interests.

a. Learning about the past criminal conduct of individuals subject to custodial arrest

Law enforcement routinely compares arrestees’ DNA identification profiles with profiles generated from biological material left at prior crime scenes to identify the person who was the source of that material. This is a blanket comparison, not an investigation of any particular prior crime or any particular current arrestee. It can provide important information about an arrestee’s criminal history, informing decisions about how best to process him in the criminal justice system—the primary government interest emphasized by the federal Supreme Court in *King*. (See *King*, *supra*, 133 S.Ct. at pp. 1971-1974.)

If an arrestee remains in pretrial detention, knowledge that he has been linked to a prior crime is useful for determining what level of security is appropriate. The precautions appropriate for an arrestee accused of fraud might not suffice if it is learned that he was also at the scene of a rape or murder. An arrestee’s potential connection to a prior crime is also relevant to decisions about whether he can safely be released during the pretrial

period. In making determinations about bail and release on recognizance, judges and magistrates must consider “the protection of the public” and any previous criminal history. (§ 1275, subd. (a)(1); see § 1270, subd. (a); *Loder, supra*, 17 Cal.3d at p. 867 [an arrestee’s criminal history may “be considered by the court . . . in deciding whether to release the defendant on recognizance or in fixing the appropriate amount of bail”].) Even if the arrestee has already been released on bail or on his own recognizance, learning that he is potentially linked to another crime can provide a basis for reconsidering that decision. (See generally 73 Fed.Reg. at 74934 [DNA profiles help “authorities to assess whether an individual may be released safely to the public pending trial and to establish appropriate conditions for his release, or to ensure proper security measures in case he is detained”].) Similarly, where prosecutors initially exercise their discretion not to charge an arrestee, new information about his involvement in past criminal conduct may cause them to file a complaint at a later date. (See *Loder, supra*, at p. 866 [prosecutors consider an individual’s past criminal history “in deciding whether to file a formal charge”].)¹⁷

Information about an arrestee’s past criminal conduct is particularly useful in the wake of the Criminal Justice Realignment Act of 2011. (Stats. 2011, ch. 15 (A.B. 109).) The overriding purpose of that Act was to transfer responsibility for many felony offenders from state prisons to county jails. To help county jails accommodate this increase in population,

¹⁷ If an arrestee absconds before trial, having a DNA identification profile generated as part of the arrest may also “assist[] in the recapture.” (Cf. *Sterling, supra*, 208 Cal.App.2d at p. 4.) For example, if the missing arrestee leaves DNA at the scene of a new crime, connecting him to that scene using the profile created during the prior arrest will provide law enforcement with a lead as to the present location of the absconded defendant.

the Realignment Act authorized the release of certain arrestees far earlier than would have been allowed prior to the Act. For example, Penal Code section 1203.018 provides that certain individuals arrested on felony charges who cannot make bail are eligible for discretionary release 60 days after the date of their arraignment. (See § 1203.018, subd. (c)(1)(B).) As correctional administrators make decisions about which arrestees to release to make room for convicted offenders, access to accurate criminal history information takes on even greater importance.

Indeed, as *King* and other courts have recognized, the State's interest in using identifying characteristics to learn about an arrestee's past criminal conduct is an integral part of its interest in accurately identifying the arrestee. In the arrest context, "identification means both who [a] person is (the person's name, date of birth, etc.) and what that person has done (whether the individual has a criminal record, whether he is the same person who committed an as-yet unsolved crime across town, etc.)." (*Haskell v. Brown, supra*, 677 F.Supp.2d at p. 1199; see *King, supra*, 133 S.Ct at pp. 1971-1972 ["A suspect's criminal history is a critical part of his identity that officers should know when processing him for detention."]); *Mitchell, supra*, 652 F.3d at p. 414 [quoting *Haskell v. Brown*].) No one questions that it is proper and sensible for authorities booking an arrested suspect to obtain the suspect's name and fingerprints and check them against records of prior arrests and crimes, in part to see just who it is they are dealing with. Obtaining DNA identifying information and running the same kind of check against records of past crimes is no different.

In the Court of Appeal, Buza suggested that DNA identification profiles cannot serve this category of interests because of the time it can take to generate a profile. (See, e.g., Sept. 26, 2013 Appellant's Supp. Br. p. 23.) That is not correct. At present, it takes around 30 days on average to generate an identification profile from an arrestee's DNA sample,

although in a given case the period is often much shorter. (*Haskell v. Brown*, *supra*, 677 F.Supp.2d at p. 1201; Cal. DOJ, BFS DNA Frequently Asked Questions (“FAQs”) [Effects of the All Adult Arrestee Provision, Q2] <<http://oag.ca.gov/bfs/prop69/faqs>> [as of May 13, 2015].) Within the next decade new “Rapid DNA” technology is likely to cut the turnaround time to just a few hours.¹⁸ Even now, however, information from database hits some time after the arrest can factor into related custody or release determinations, as described above—just as information obtained using booking fingerprints can still be relevant even when there is a lapse of time before officials receive any results from the comparison of the prints to the database of forensic prints. (See FAQs, *supra* [Effects of the All Adult Arrestee Provision, Q1].)

Buza has also argued that the interest in developing an accurate criminal history does not apply to felony arrestees who are not charged or prosecuted. (Sept. 26, 2013 Appellant’s Supp. Br. pp. 20-24.) Buza is in no position to make that argument, since he *was* charged, held to answer, prosecuted, and convicted. In any event, arrestees may still be subject to prosecution for some time, even if they are not charged or held to answer immediately following the arrest. Prosecutors may delay filing a complaint for a variety of reasons. Even if a magistrate initially dismisses a case, prosecutors may re-file it later after locating new evidence or witnesses. In

¹⁸ See generally FBI, Rapid DNA or Rapid DNA Analysis <<http://www.fbi.gov/about-us/lab/biometric-analysis/codis/rapid-dna-analysis>> [as of May 13, 2015]; FAQs, *supra* [Effects of the All Adult Arrestee Provision, Q2].

the meantime, learning that the arrestee is also linked to a different crime may materially alter the handling of the case.¹⁹

b. Confirming who an arrestee is at booking

In criminal proceedings, it “must be known who has been arrested and who is being tried.” (*Hiibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt County* (2004) 542 U.S. 177, 186.) The Court of Appeal reasoned that DNA profiles are not—and, indeed, “cannot be”—used to help verify who a person is at the time of arrest. (Opn. pp. 31-32.) But that is incorrect. Although the State presently relies primarily on a fingerprint database for this purpose, that may well change as technology evolves. Moreover, even now, the State uses DNA profiles to improve the accuracy of the fingerprint database.

When law enforcement officials book a suspect, they currently use his fingerprints to search an electronic database comprised of fingerprints from prior arrestees and other sources. If that search results in a match, the database provides a name and identification number, which enables the booking official to obtain the arrestee’s known criminal history. (FAQs, *supra* [Effects of the All Adult Arrestee Provision, Q1]; see generally FBI, Integrated Automated Fingerprint Identification System <http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis> [as of May 13, 2015].)

California already uses DNA identification profiles to help improve this process. Each person with fingerprints in the database is meant to have a single, unique identification number. (FAQs, *supra* [Effects of the All Adult Arrestee Provision, Q3].) Sometimes, however, the same number is

¹⁹ Arrestees who are not ultimately convicted of a qualifying offense may have their DNA profile and sample expunged and the underlying sample destroyed. (See *post*, pp. 63-64.)

erroneously assigned to different people because of poor-quality fingerprints or administrative errors. (*Ibid.*) Such errors present problems for both law enforcement and arrestees because police might mistake one arrestee for another with a different criminal history.²⁰ The DNA Act helps the State to correct those errors. In some cases, comparison of the DNA identification profiles for two arrestees with the same identification number reveals that they are not the same person. California's DNA laboratory flags that problem for further scrutiny and correction. (See *ibid.*) While fingerprint analysis currently plays the lead role in confirming who a person is, there is no question that DNA technology *can* be used in the same way and for the same purpose. Its usefulness for that purpose will only improve in the future as Rapid DNA technology becomes widely available. And the potential for such use confirms the reasonableness of the State's decision to collect and store the information.

c. Excluding innocent suspects from criminal scrutiny

An additional identification purpose served by the DNA Act is excluding potential suspects whose DNA identification profiles do *not* match those obtained from crime scenes. (See § 295, subd. (c); Prop. 69, Gen. Elec. (Nov. 2, 2004) § II, subd. (d)(1).) A hit from California's DNA database can help dispel suspicion that might otherwise focus on innocent persons. This advances “the overwhelming public interest in prosecuting crimes *accurately*.” (*Mitchell, supra*, 652 F.3d at p. 415, quoting *Kincade, supra*, 379 F.3d at p. 839, fn. 38; see also *King, supra*, 133 S.Ct. at p.

²⁰ In *Perez-Torres v. California* (2007) 42 Cal.4th 136, 138-140, for example, this court considered the claim of a plaintiff detained for three weeks because he was mistakenly assigned the same index number as a different offender, who had been paroled and deported to Mexico years before.

1974.) Used in this way, the DNA identifying information collected from arrestees allows police to conserve resources by training their attention on the more likely suspect, and spares innocent individuals the time, expense, and embarrassment of being investigated for a crime they did not commit.

d. Identifying missing persons and unidentified remains

Another express purpose of Proposition 69 is “to aid in the identification of missing and unidentified persons.” (Prop. 69, Gen. Elec. (Nov. 2, 2004) § II, subd. (d)(1); see § 299.5, subd. (i)(1)(A).) California collects DNA identifying information from otherwise unidentified human remains and, where possible, about certain categories of missing persons. (See § 14250.) Those profiles, and similar profiles from other jurisdictions, are routinely compared against the State’s database of DNA identifying information collected over time from arrestees.²¹ This comparison advances the considerable government interests in identifying human remains that are otherwise unrecognizable and in locating people who have gone missing.

e. Identifying the perpetrators of crimes

Finally, comparing arrestees’ DNA identifying information to profiles obtained from crime scenes substantially improves the State’s ability to identify the perpetrators of unsolved crimes and crimes committed in the future. As this court recognized in the context of fingerprints and photographs, this further use of identifying characteristics also serves important interests. (See *Loder, supra*, 17 Cal.3d at p. 865.) It helps police

²¹ See National DNA Index System (NDIS) Operational Procedures Manual (effective Jan. 1, 2015) p. 44 <<http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-procedures-manual>> [as of May 13, 2015].

take dangerous criminals off the streets, underscores our society's commitment to the rule of law, and brings a measure of closure to victims and their families. (Cf. *United States v. Hensley* (1985) 469 U.S. 221, 229 [discussing the “strong government interest in solving crimes and bringing offenders to justice”]; *Kincade*, *supra*, 379 F.3d at p. 839 [“DNA profiling of qualified offenders helps bring closure to countless victims of crime”].) This is a particularly weighty interest given the startling number of crimes that go unsolved. Between 2001 and 2008, for example, there were over 1,580,000 “violent crimes” in California—a category comprising homicide, forcible rape, robbery, and aggravated assault.²² During the same period, law enforcement solved less than half that many violent crimes.²³

Proposition 69 allows law enforcement to serve this interest more effectively by comparing the identity of felony arrestees to databases of identification profiles recovered from crime scenes. California began collecting DNA samples from all adult felony arrestees on January 1, 2009.²⁴ Before that date, California recorded fewer than 8,000 “hits” between offender DNA profiles and profiles linked with unsolved crimes. Since then, the State has recorded more than 31,000 hits.²⁵ The number of

²² See Cal. DOJ, Table 1, Crimes and Crime Rates By Category and Crime Statewide (2010) <<http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/prof10/1/00.pdf>> [as of May 13, 2015].

²³ See Cal. DOJ, Table 1, Crime Clearances and Clearance Rates by Category and Crime Statewide (2010) <<http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/prof10/1A/00.pdf>> [as of May 13, 2015].

²⁴ Before 2009, California primarily collected DNA samples from all convicted felons, although it also collected samples from limited categories of felony arrestees between 2004 and 2009. (See § 296, subs. (a)(1), (a)(2)(A)-(B).)

²⁵ See CAL-DNA Hits Reported January 1984 to March 2015 <http://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/cal_dna_hit_trends.pdf> [as of May 13, 2015].

hits per month increased dramatically: from an average of 183 hits per month in 2008, to an average of 517 hits per month in mid-2013, to 827 hits in March 2015.²⁶ The likelihood that the State’s DNA identification database will provide a lead when police submit a sample from a crime scene has almost doubled: from 35% in 2008 to 67.9% at the end of 2012.²⁷ Many of these leads are for violent crimes, including rapes and murders.²⁸

This use of DNA identification information yields substantial benefits. When law enforcement can identify an arrestee who may have been at the scene of a crime, that information can lead to prosecution, conviction, and incarceration—solving and punishing one crime, and potentially preventing others. (See *King, supra*, 133 S.Ct. at p. 1974 [““Prompt DNA testing would speed up apprehension of criminals before they commit additional crimes.””], quoting Dwyer et al., *Actual Innocence* (2000) p. 245, brackets and ellipses omitted; see, e.g., *People v. Shamblin* (2015) 236 Cal.App.4th 1 [affirming first-degree murder conviction for 1980 murder of 67-year-old woman that was solved after hit with defendant’s DNA profile resulting from 2010 drug arrest].) Collecting and maintaining DNA identification profiles from arrestees also helps to fight future crime—both by improving the ability of police to identify the perpetrators of future crimes and by creating a deterrent effect, because an individual has more reason to pause before committing a crime if he knows that his

²⁶ FAQs, *supra* [Effects of the All Adult Arrestee Provision, Q2]; CAL-DNA Hits Reported January 1984 to March 2015 <http://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/cal_dna_hit_trends.pdf> [as of May 13, 2015].

²⁷ FAQs, *supra* [Effects of the All Adult Arrestee Provision, Q2].

²⁸ See FAQs, *supra* [Effects of the All Adult Arrestee Provision, Q2].

identifying profile is in the State's database and that leaving DNA at a new crime scene is likely to lead to his identification. (Cf. *Kincade, supra*, 379 F.3d at pp. 838-839.)

The public safety interest served by California's collection of DNA from arrestees also extends beyond the State's own borders. As discussed above, California participates in the Combined DNA Index System (CODIS), a federal system connecting DNA databases across the nation. (See § 297, subd. (b); Methodology, *supra*, at pp. 222-223.) Arrestee profiles from California currently make up 29% of the total collection of arrestee profiles searchable through CODIS, and are searched against forensic profiles from throughout the nation on a regular basis. (Methodology, *supra*, at p. 234; see FBI, CODIS-NDIS Statistics <<http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics/#California>> [as of May 13, 2015] [reporting number of profiles as of March 2015].) Eliminating these profiles would materially reduce the ability of law enforcement agencies throughout the nation to solve crimes using CODIS.

The Court of Appeal viewed these crime-fighting benefits of DNA identification as an unacknowledged purpose weighing *against* the constitutionality of Proposition 69. (See *opn.* pp. 31-38.) That is factually and legally incorrect. Using identifying information about felony arrestees to help address the problem of unsolved crimes was one of several interests asserted on the face of Proposition 69. (Prop. 69, Gen. Elec. (Nov. 2, 2004) § I, subd. (d).) That interest weighs in *favor* of constitutionality in a balance asking whether it is reasonable for the State to collect and record arrestees' DNA identification profiles along with other identifying characteristics. (See, e.g., *Mitchell, supra*, 652 F.3d at pp. 414-415.)

3. California's interests in obtaining DNA identification profiles from arrestees are not negated by alternative policy options

Many of the arguments advanced by Buza and embraced by the Court of Appeal focus on alternative policy options that California might have adopted but did not. The Court of Appeal reasoned that these alternatives undermine the State's interest in obtaining DNA identification profiles from felony arrestees. (See, e.g., *opn.* pp. 46-47.) But even if California could effectively serve its interests by narrowing the DNA Act in one way or another, that does not mean it is constitutionally bound to do so. (Cf. *City of Ontario v. Quon* (2010) 560 U.S. 746, 763 ["This Court has 'repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment.'"]; *People v. Maikhio* (2011) 51 Cal.4th 1074, 1100-1101 ["Past cases . . . do not support the suggestion that a state is obligated to utilize the least restrictive alternative in establishing such administrative procedures in order to satisfy the Fourth Amendment."].) Such choices among policy alternatives are normally ones for the Legislature (or the voters), not the courts.

In any event, the policy alternatives identified by Buza and the Court of Appeal would be less effective in serving the State's interests. Initially, the Court of Appeal suggested that the State could limiting the collection of DNA identification profiles to convicted offenders. (See *opn.* p. 37, fn. 20.) It hypothesized that collecting arrestees' profiles is of little use because many arrestees "have previously been convicted, so already have profiles in the database, and many of the others will have profiles added upon conviction." (*Ibid.*) California has already tested that hypothesis, however, and found it wanting. The DNA Act *was* limited to convicted offenders before the voters enacted Proposition 69. After California began to collect profiles from all adult felony arrestees beginning in January 2009, the

number of database hits increased more than threefold. (See *ante*, pp. 46-47.)²⁹ In addition, waiting until after a criminal conviction to collect DNA identifying information could deprive the State of significant information in the period before conviction. (*Ante*, pp. 39-41.) And it would delay the resolution of cold cases that could be solved earlier if profiles were collected at booking—a delay with obvious and unwarranted costs for victims and their families.

Buza suggests that California should collect DNA identification profiles only from persons arrested for certain violent felonies, arguing that other felony arrestees are less “likely to have committed the types of violent crimes that typically yield DNA evidence, particularly murders and sex offenses.” (Sept. 26, 2013 Appellant’s Supp. Br. p. 31.) But even people “detained for minor offenses can turn out to be the most devious and dangerous criminals.” (*Florence v. Bd. of Chosen Freeholders of County of Burlington* (2012) ___ U.S. ___, ___ [132 S.Ct. 1510, 1520] (“*Florence*”); cf. *King, supra*, 133 S.Ct. at 1971 [noting that Timothy McVeigh and a

²⁹ The Court of Appeal suggested that collecting DNA profiles from arrestees is an ineffective policy, citing a RAND Corporation study. (See *opn.* p. 37, fn. 20.) That study involved a flawed analysis and has been criticized by experts in the field. The American Society of Crime Lab Directors, for example, noted that its “members have serious questions about the Rand Study, including its limited data, its methods, premises, and conclusions as well as Rand’s limited understanding of state databases and the U.K. system.” (Vallone, *DNA Analysis Can Do Better Solving U.S. Crimes: Rand, Investor’s Business Daily* (Apr. 29, 2011) <<http://news.investors.com/Article/570604/201104291554/LAPD-Chief-Others-Say-US-DNA-Analysis-Can-Improve.htm>> [as of May 13, 2015].) In any event, even the RAND study acknowledged that increasing the number of arrestee profiles in a database increases the number of hits. (See RAND Corporation, Center on Quality Policing, *Toward a Comparison of DNA Profiling and Databases in the United States and England* (2010) p. 20.)

September 11 hijacker were detained for traffic offenses].) This court has never held that police may collect identifying information from arrestees only where the particular circumstances surrounding the arrest suggest that those characteristics are “likely” to identify the arrestee as the perpetrator of some past crime. On the contrary, “a tax evader is fingerprinted just the same as is a burglar.” (*Jones, supra*, 962 F.2d at p. 306.) Moreover, Buza’s theory that people arrested for nonviolent felonies do not commit violent crimes cannot be squared with the available evidence, which indicates that many individuals arrested in California for nonviolent felonies (such as impaired driving or drug, fraud, or property offenses) have been linked by their profiles to unsolved murders, rapes, or robberies.³⁰ For example, the defendant in *People v. Shamblin, supra*, 236 Cal.App.4th 1, was arrested for a drug offense in October 2010. (*Id.* at p. 1.) Within two months, the DNA identification profile resulting from that arrest connected him to the rape and murder of an elderly woman three decades earlier, and he was subsequently convicted of first degree murder for that crime. (*Ibid.*)

Last, the Court of Appeal proposed that California could wait to collect DNA samples from an arrestee until after judicial confirmation that there is probable cause to believe the arrestee committed the crime of arrest. (See, e.g., opn. pp. 16, 46-47, 60.) That view is premised on the court’s conclusion that “because of the length of time necessary for processing a DNA sample,” the profile “will not be available . . . before the arrestee is

³⁰ See Cal. DOJ, Study #1: Arrestee Hits to Violent Crimes <http://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/arrestee_2013.pdf> [as of May 13, 2015]. Buza has taken issue with the sample sizes of these limited studies, but “[n]othing in the Constitution prohibits a State from reaching . . . a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.” (*Whalen v. Roe* (1977) 429 U.S. 589, 598, fn. 21.)

either released or arraigned.” (*Id.* at p. 16.) But the State’s recognized interest in collecting identifying characteristics at booking does not vanish if the process of obtaining or analyzing the information extends beyond arraignment. If it did, then courts would have forbidden police from collecting fingerprints at booking before the federal government launched its automated fingerprint database in 1999, when it took “weeks or months” for police to process the “ten-print” fingerprint submissions taken at booking. (FBI, Integrated Automated Fingerprint Identification System <http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis> [as of May 13, 2015].)

Further, collecting DNA samples from arrestees after arraignment would not serve the State’s interests as effectively as collecting samples as part of the routine booking process. In addition to lengthening the process of generating a DNA identification profile for every arrestee, it would pose greater logistical difficulties, as compared with a system where officials obtain DNA samples along with fingerprints, photographs, and other identifying characteristics during intake at the jail. Finally, it is not clear what constitutional value would be served by the Court of Appeal’s proposal. The court reasoned, incorrectly, that collecting cheek swabs from arrestees constitutes a “suspicionless search[]” regarding past “criminal conduct unrelated to the crime of arrest.” (Opn. pp. 27, 38.) But waiting for the judicial determination made at an arraignment—that there is probable cause to believe an arrestee committed *the crime of arrest*—would do nothing to address that concern.

C. The DNA Act Minimizes Any Intrusion on Legitimate Privacy Interests

The State’s compelling interests in collecting and recording the DNA identifying information of felony arrestees, along with information about their other identifying characteristics, must be weighed against any

accompanying intrusion on legitimate privacy interests. Under the DNA Act, however, any such intrusion is minimal. The cheek cells the State obtains from felony arrestees at booking do contain potentially sensitive information. But DNA identification profiles, which are the only information the State actually generates based on those cells, do not. The Act tightly restricts the use of both the samples and the resulting profiles, imposing criminal and civil penalties for misuse. Arrestees who are not ultimately convicted may have their samples destroyed and records of the profiles expunged. Any risk to legitimate privacy interests that might otherwise be posed is thus “greatly diminished” by the “legislative and executive action” reflected in the program’s design and operation. (*Loder, supra*, 17 Cal.3d at p. 869; cf. *NASA v. Nelson* (2011) 562 U.S. 134, 155.) Given the “stringent limitations on the creation and use of DNA samples,” the arrestee DNA database “functions much like a traditional fingerprint database” (*Boroian, supra*, 616 F.3d at p. 66), and “the intrusion on privacy effected by the statute [is] similar to the intrusion wrought by the maintenance of fingerprint records.” (*Nicholas v. Goord* (2d Cir. 2005) 430 F.3d 652, 671.) Under these circumstances, the constitutional balance weighs sharply in favor of the State. (Cf. *Hill, supra*, 7 Cal.4th at p. 38 [“[I]f intrusion is limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, privacy concerns are assuaged.”].)

1. Arrestees have no privacy interest in their identity

Arrestees have diminished expectations of privacy in certain important respects. (See, e.g., *King, supra*, 133 S.Ct. at p. 1978.) A custodial arrest itself involves “a most extreme interference with the ‘right to be left alone’” (*People v. Crowson, supra*, 33 Cal.3d at p. 629), including restraints and intrusions that are permissible only because police determined there was probable cause to believe the individual involved had

committed a crime. In some circumstances, for example, arrestees may be strip searched, with law enforcement officials inspecting their bodies for tattoos or other signs of gang affiliation. (*Florence, supra*, 132 S.Ct. at pp. 1517-1519; cf. *In re York, supra*, 9 Cal.4th at p. 1149 [rejecting the “flawed premise that a defendant who seeks OR release has the same reasonable expectation of privacy as that enjoyed by persons not charged with any crime”].) Most relevant for this case, “it is established that individuals in lawful custody cannot claim privacy in their identification.” (*Robinson, supra*, 47 Cal.4th at p. 1121; see *Kincade, supra*, 379 F.3d at p. 837 [“once lawfully arrested and booked into state custody” an arrestee “can claim no right of privacy” in a DNA profile establishing “only a record of the defendant’s identity”]; *Jones, supra*, 962 F.2d at p. 306 [“[W]hen a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it.”].)³¹

2. Collection of DNA samples involves minimal physical intrusion

The DNA Act minimizes any physical intrusion on arrestees by generally limiting the method of obtaining samples to “collection of inner cheek cells of the mouth (buccal swab samples).” (§ 295, subd. (e).)³² A

³¹ The Court of Appeal noted that arrestees “enjoy the presumption of innocence,” and reasoned that the privacy interests of arrestees who have not yet been arraigned are “closest on the spectrum of privacy rights to an ordinary citizen.” (Opn. p. 47.) While “the presumption of innocence plays an important role in our criminal justice system . . . it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.” (*In re York, supra*, 9 Cal.4th at p. 1148, quoting *Bell v. Wolfish* (1979) 441 U.S. 520, 533, italics omitted.)

³² The Act authorizes the Department of Justice to request another means of collection, such as a blood sample. (See § 295, subd. (e).) In the Department’s experience, this rarely happens.

buccal swab is a “gentle process” involving “a light touch on the inside of the cheek.” (*King, supra*, 133 S.Ct. at p. 1969.) The process is brief, does not break the surface of the skin, and “involves virtually no risk, trauma, or pain.” (*Id.* at p. 1979.) The State instructs local law enforcement agencies to have the arrestee collect the cheek swab himself.³³ Nothing about this process “increase[s] the indignity already attendant to normal incidents of arrest.” (*Ibid.*) Unlike a search of a person’s papers or effects, it involves no scrutiny of private thoughts or conduct.³⁴

Additionally, law enforcement officers have “no discretion” over whether to collect DNA samples from felony arrestees. (*Haskell v. Brown, supra*, 677 F.Supp.2d at p. 1190.) They must obtain a sample from every felony arrestee at booking or as soon as practicable thereafter. (§ 296, subd. (a)(2)(C); § 296.1, subd. (a)(1)(A).) This lack of discretion ensures “evenhandedness” and “contributes to [the] reasonableness” of the DNA Act. (*Rise v. Oregon* (9th Cir. 1995) 59 F.3d 1556, 1561; cf. *King, supra*, 133 S.Ct. at p. 1969; *Ingersoll, supra*, 43 Cal.3d at pp. 1342, 1347 [describing “limits on the discretion” of law enforcement officers as a “safeguard” that can “minimize the intrusiveness” of a seizure].)

³³ Cal. DOJ, Buccal DNA Collection Kit Instructions <http://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/collection_kit.pdf> [as of May 13, 2015].

³⁴ As Justice Stevens noted in a speech shortly after *King* was decided, “taking a DNA sample—or a fingerprint sample—involves a far lesser intrusion on an ordinary person’s privacy than a search that allows an officer to rummage through private papers.” (See Remarks of Justice John Paul Stevens (Ret.), American Constitution Society Convention (June 14, 2013), p. 15 <http://www.supremecourt.gov/publicinfo/speeches/JPS%20Speech_6-14-13.pdf> [as of May 13, 2015].)

3. California protects privacy interests by restricting the use and disclosure of DNA samples

The DNA Act contains strict use restrictions and confidentiality protections. (*Ante*, pp. 10-12.) Among other things, the Act limits the use of DNA samples to “identification purposes.” (§ 295.1, subd. (a).) It expressly forbids any use for testing or research into the linkage “between genetics and behavior or health.” (§ 295.2.) The Act also creates criminal and civil penalties for any abuse of DNA samples or information. Those penalties include up to three years in prison for anyone who knowingly uses a DNA sample or profile for any purpose other than “criminal identification or exclusion” or “the identification of missing persons.” (§ 299.5, subd. (i)(1)(A).)

The process of obtaining and analyzing DNA samples is strictly controlled. After police collect a sample at booking, they must forward the entire sample to the Department of Justice “immediately.” (§ 295, subd. (i)(1)(C).) The DNA Act makes the information obtained by the Department of Justice confidential, and bars the Department from disclosing the information under otherwise applicable public disclosure laws. (§ 299.5, subds. (a)-(b).) Only certain accredited government laboratories may upload and compare forensic profiles against the profiles obtained from arrestees. (§ 297, subds. (a), (d).)

These are the same privacy restrictions that govern the State’s collection of DNA samples from convicted offenders. In that context, the Court of Appeal concluded years ago that the collection was constitutionally reasonable and that the DNA Act “appropriately limits the state’s use of specimens, samples, and print impressions.” (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 508 (“*Alfaro*”).) This court approved that reasoning in *Robinson*. (47 Cal.4th at pp. 1121-1123 [noting

agreement with *Alfaro* and other decisions upholding collection from convicted offenders].)

In this case, however, the Court of Appeal concluded that the DNA Act “places few restrictions on the law enforcement uses to which [DNA] information may be put.” (Opn. p. 25.) It interpreted the statutory requirement that DNA samples may only be used for “identification purposes” as imposing no real limit. (See *id.* at p. 34.) But that is simply incorrect (see, e.g., *Alfaro, supra*, 98 Cal.App.4th at p. 508), and any speculation about potential abuse is without foundation. If there is ever evidence that the State is making some possibly inappropriate use of collected DNA information, that issue should be raised in an as-applied challenge based on a relevant record.

The Court of Appeal was also mistaken when it viewed the State’s “indefinite retention” of underlying DNA samples as a factor that increased the intrusion on individual privacy. (E.g., opn. p. 55; see § 299.5(b).) There are important reasons for retaining samples. “One of the most important quality practices and protections” in a DNA database system “is the reanalysis of an offender sample in the event that a potential match is identified.” (Herkenham, *Retention of Offender DNA Samples Necessary to Ensure and Monitor Quality of Forensic DNA Efforts* (2006) 34 J. of Law, Medicine & Ethics 380, 381 (“Herkenham”).) California follows this practice by reanalyzing the relevant DNA sample after every database hit. (Forensic DNA, *supra*, § 8:15.) This “important quality control measure . . . helps prevent any kind of potential error during laboratory processing that could cause a lead to be followed and a warrant to be issued for the wrong person.” (Methodology, *supra*, at p. 246.) The State can only do this if it retains the samples. Retaining samples thus makes the database more accurate, and “the more accurate the identification method the less intrusive it is because of the associated reduced risk that the sample will

result in misidentification.” (*United States v. Amerson* (2d Cir. 2007) 483 F.3d 73, 86.)³⁵

The Court of Appeal also speculated about “the potential for research to identify genetic causes of antisocial behavior” or “research into the intersection of genetics and delinquency”; the possibility of efforts by law enforcement to “mine” for a “pedophile gene” or a “violence gene”; and the risk that DNA samples would be used to “reveal every aspect of the person’s genetic make-up.” (Opn. pp. 25-26, quoting Murphy, *License, Registration, Cheek Swab* (2013) 127 Harv. L.Rev. 161, 180.) But the DNA Act prohibits any such use of a sample. (§ 295.1, subd. (a); § 295.2; § 299.5, subd. (i)(1)(A).) This type of statutory restriction is normally sufficient to allay similar privacy concerns. (See *NASA v. Nelson*, *supra*, 562 U.S. at p. 155.) Moreover, there is no evidence of any abuse of any sample collected from an arrestee (or anyone else) under the Act, and no reason to think that any will occur. On the contrary, the law presumes that “official duty [is] regularly performed.” (Evid. Code, § 664; see, e.g., *Cutting v. Vaughn* (1920) 182 Cal. 151, 156 [“[I]t is of course presumed that all public officers perform their duties in a lawful and proper

³⁵ That is not the only way that retaining samples allows for greater accuracy. The FBI is in the process of expanding the number of core CODIS loci beyond the current 13, which will allow for DNA analysis to be even more discerning and may improve the chances of obtaining a useable identification profile from some forensic samples in the future. (See Methodology, *supra*, at pp. 108, 246-247.) Like the existing loci, any new loci added to CODIS must not be “diagnostic of any known medical condition or disease status.” (FBI, Planned Process and Timeline for Implementation of Additional CODIS Core Loci <<http://www.fbi.gov/about-us/lab/biometric-analysis/codis/planned-process-and-timeline-for-implementation-of-additional-codis-core-loci>> [as of May 13, 2015].) By retaining arrestee samples, California will be able to add these new loci to an arrestee’s DNA profile in the future. (Herkenham, *supra*, at p. 381.)

manner.”].) The Court of Appeal’s rank speculation would turn that presumption on its head.

Similarly, the Court of Appeal speculated that “the DNA Act might provide an incentive to pretextually arrest a person from whom the police desire a DNA sample.” (Opn. p. 49.) There is no basis to speculate that police will engage in pretextual arrests when they suspect that a particular person is involved in a particular crime, instead of using proper methods to substantiate or dispel that suspicion. If police have probable cause, they can seek a warrant. Even if they do not have probable cause, they may obtain a DNA sample by analyzing a cigarette butt, soda can, or piece of chewing gum discarded by the suspect. (See *People v. Gallego* (2010) 190 Cal.App.4th 388, 395-396, citing *California v. Greenwood* (1988) 486 U.S. 35.)

A statute may not be held unconstitutional based on such a hypothetical possibility of inappropriate conduct. (See, e.g., *Whalen v. Roe, supra*, 429 U.S. at pp. 601-602; *Mitchell, supra*, 652 F.3d. at p. 408.) That is especially so in the context of a case that arises from application of the statute to a particular individual in an entirely appropriate way. Nor is it proper to strike down a statute out of fear that it might one day be amended to trench on the privacy interests of arrestees. (See *Whalen, supra*, at p. 606 [courts need not “decide any question which might be presented . . . by a system that did not contain comparable security provisions”].) It is the actual “exploitation of technological advances” that implicates privacy interests, “not their mere existence.” (*United States v. Karo* (1984) 468 U.S. 705, 712.) If the DNA Act is ever modified to authorize the intrusions feared by the Court of Appeal, future courts will be available to address the constitutionality of those modifications on an appropriate record in an actual case presenting the issue.

4. DNA identification profiles are used in a manner that protects privacy interests

As noted above, the loci that California’s DNA laboratory examines to generate DNA profiles have no known association with any physical or medical characteristic. (See *ante*, p. 8; *opn.* p. 5; *King, supra*, 133 S.Ct. at p. 1968; *Kincade, supra*, 379 F.3d at p. 818.) The information obtained by analyzing these loci “is only useful for human identity testing.” (Methodology, *supra*, at p. 240; see *id.* at pp. 228-229.)

Consistent with the protections in the DNA Act, DNA profiles from arrestees are stored in the State’s searchable database anonymously, without any reference to the arrestee’s name. After the laboratory derives an identification profile from a sample, the only information it transmits to the national database through CODIS is the profile, the specimen ID number, a number that identifies the agency that submitted the sample, and the names of laboratory personnel who conducted the analysis. (See *Kincade, supra*, 379 F.3d. at p. 819, fn. 8; *opn.* p. 7.) The State does not submit any “personal information, criminal history information, or case-related information” to the national database. (Methodology, *supra*, at p. 240.)

As a participant in CODIS, California must also meet strict privacy and quality control requirements set by federal law. (See 42 U.S.C. § 14132(c).) Among other things, those requirements:

- prohibit disclosure of DNA samples and analyses to criminal justice agencies for any purpose other than “law enforcement identification purposes” (*id.* § 14132(b)(3)(A); § 14135e(a));
- impose tight quality control standards on California’s DNA laboratory, including regular accreditation and audits (*id.* § 14132(b)(1)-(2); see FBI, Quality Assurance Standards for DNA Databasing Laboratories <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/qas_databaselabs.pdf> [as of May 13, 2015]); and

- create additional penalties for misuse of information or unauthorized disclosure (42 U.S.C. § 14133(c) [fines of up to \$250,000 and imprisonment for up to a year]).

California's access to CODIS may be cancelled if it does not comply with these requirements. (See 42 U.S.C. § 14132(c).)

The Court of Appeal paid scant attention to these actual protections, focusing instead on uses that might theoretically be made of DNA identification profiles. In particular, the court raised concerns about California's "familial search" policy. (See *opn.* pp. 16-17, 24, 26, 35-36, 45, 51-52.) That policy allows the State, under defined and narrow circumstances, to conduct special searches of the database of profiles from *convicted offenders*. These searches, combined with other steps and subject to various safeguards, can allow the Department of Justice to provide a lead to local law enforcement by releasing the name of an offender who shares a sufficient number of rare alleles with an unidentified DNA sample from a crime scene. (See DNA Partial Match (Crime Scene DNA Profile to Offender) Policy <http://ag.ca.gov/cms_attachments/press/pdfs/n1548_08-bfs-01.pdf> [as of May 13, 2015].) This process actually *excludes* the convicted offender as the source, but reveals a strong probability that the source is a close relative of the offender.

That policy is of little relevance here. It is not a part of the DNA Act or Proposition 69, and it applies only to the State's database of profiles obtained from convicted offenders, not arrestees. It certainly had no effect on Buza as an arrestee, since he did not provide a DNA sample until after he had been convicted. In any event, the Court of Appeal's concerns are misplaced. The thrust of the court's discussion seems to be that the ability to conduct familial searches shows that DNA identification profiles give the State some special genetic insight into who an offenders' relatives are. (See, e.g., *opn.* pp. 24, 34-35, 45.) That is not so. A familial lead tells the

State only that the unknown perpetrator of an unsolved case is likely a close relative of a particular convicted offender. That can be an important lead, but it is no more than that. Police must rely on traditional methods to investigate further, including developing information on who the offender's relatives are through conventional sources such as birth and death records. Nothing about the "familial" search of the DNA identification database invades the privacy of the offender—who, again, is thereby *excluded* as the source of the crime-scene sample. A person who is definitively linked to a crime scene by a combination of a familial lead and conventional investigative methods can hardly complain about a system of DNA identification records, or a familial search policy, that managed to make that link without any search or seizure involving him.³⁶

The Court of Appeal also worried that "studies have begun to suggest links between the CODIS loci and susceptibility to certain diseases." (Opn. p. 24, fn.9.) But there is no scientific evidence that sensitive genetic or medical information can be gleaned from DNA identification profiles.³⁷ John Butler, the author of the "canonical text" on DNA analysis (see *Dist. Attys. Off. for the Third Jud. Dist. v. Osborne* (2009) 557 U.S. 52, 82 (conc. opn. of Alito, J.)), addressed this issue in his 2012 textbook. He explained

³⁶ Cf. *In re Lance W.*, *supra*, 37 Cal.3d at p. 879 [after Proposition 8, defendant has no standing to object to introduction of evidence seized in alleged violation of rights of a third person].

³⁷ The "studies" cited by the Court of Appeal are nonscientific law review articles and web publications. One of them actually emphasizes, correctly, that "there are reasons to be skeptical of claims that the particular tetranucleotide sequences used in CODIS-compatible databases are likely to cause or to be strongly predictive of any medical conditions." (See Kaye, *What the Supreme Court Hasn't Told You About DNA Databases* (2013) p. 5 <<http://www.promega.com/resources/profiles-in-dna/2013/what-the-supreme-court-hasnt-told-you-about-dna-databases/>> [as of May 14, 2015].)

that the loci characterized by a DNA profile “are not known to have any association with a genetic disease or any other genetic predisposition” and “do not predict disease.” (Methodology, *supra*, at pp. 240, 228.) A recent analysis concluded that “individual genotypes” at the 13 core CODIS loci “are not at present revealing information beyond identification,” and that there is no evidence that these genotypes are “causative of any documented phenotypes either in the literature or in the interrogated databases.”

(Katsanis et al., *Characterization of the Standard and Recommended CODIS Markers* (Jan. 2013) 58 J. Forensic Sci. S169, S171.) And even if science did permit any of the information reflected in a DNA profile to be used to predict an arrestee’s genetic or medical condition, the DNA Act flatly prohibits that type of analysis. (See *ante*, p. 10.)

Finally, the Court of Appeal suggested that the DNA Act might be unfair because of a disproportionate representation of racial minorities in the database. (Opn. p. 59, fn. 35.) But the DNA Act requires all adult felony arrestees to provide DNA samples. (§ 296, subd. (a)(2)(C); § 296.1, subd. (a)(1)(A).) If the composition of the arrestee population does not mirror that of the general population, the questions or concerns raised by that observation go far beyond the issues before the court in this case. They provide no constitutional basis for holding that the facially neutral DNA Act is unconstitutional—any more than they provide a basis for prohibiting the collection of other identifying characteristics from arrestees, or for invalidating other types of searches that police routinely perform as a consequence of a lawful arrest.

5. Arrestees who are not convicted may have their DNA samples destroyed and identification profiles expunged from the State’s database

If an arrestee’s case is dismissed, he is found not guilty or factually innocent of the charged offense, or no felony charges will be filed against

him, he may request that the State destroy his sample and expunge his identification profile from its database (and from the national database). California has created a streamlined process for these requests, involving a two-page form that may be obtained readily from the Department of Justice website.³⁸ When an individual provides the required documentation, the Department generally completes the expungement process within two to four weeks. (See FAQs, *supra* [Getting Expunged or Removed from the CAL-DNA Data Bank, Q1].) In the Department’s experience, the vast majority of requests have resulted in expungement.³⁹

The Court of Appeal largely ignored this expedited expungement process. It focused instead on the process outlined in the statute itself, which the court viewed as “neither quick nor guaranteed.” (Opn. p. 7.) The court construed a statutory subsection as “vest[ing] the prosecutor with power to prevent expungement merely by objecting to the request.” (Opn. pp. 49, discussing § 299, subd. (c)(2)(D).) But that provision does not prevent the Department of Justice from destroying an arrestee’s sample and expunging his profile immediately upon confirming that no felony charges can or will be filed, pursuant to the Department’s expedited expungement policy. The Court of Appeal also criticized the review mechanism in the Act. (Opn. p. 8, discussing § 299, subd. (c)(1); see opn. p. 50.) That

³⁸ See Cal. DOJ, Streamlined DNA Expungement Application Form <http://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/expungement_app.pdf> [as of May 13, 2015]. The Department of Justice is responsible for implementing the DNA Act. (See § 295, subd. (h)(1).)

³⁹ For a small fraction of requests, the State has confirmed that no DNA sample was ever submitted under the name provided. In the remaining cases, the State has refused to expunge based on statutory standards that make it appropriate to retain a record of the identification, such as when an offender has another qualifying offense. (FAQs, *supra* [Getting Expunged or Removed from the CAL-DNA Data Bank, Q1].)

mechanism provides an additional protection to arrestees, allowing them to seek court-ordered expungement if the Department has denied an expedited expungement request or they prefer to obtain a court order. There is a one-page Judicial Council form that allows arrestees to initiate this procedure.⁴⁰ Although this additional protection is not directly relevant to Buza—because he refused to provide any sample until after his conviction—it is another reason why the DNA Act is categorically reasonable.

Finally, the Court of Appeal criticized the DNA Act on the ground that it “does not provide for automatic expungement.” (Opn. p. 49; see *id.* at pp. 15, 16, 45, 49.) The Act is not unique in this regard. A majority of the states that collect DNA identifying information from arrestees retain that information, even for arrestees who are not ultimately convicted, unless the arrestee requests expungement. (See *ante*, p. 19.) So does the federal government. (See 42 U.S.C. § 14132(d)(1)(A); FBI, CODIS-Expungement Policy <http://www.fbi.gov/about-us/lab/biometricanalysis/codis/codis_expungement> [as of May 13, 2015].) This tracks the longstanding practice of law enforcement in keeping records of identifying information collected at booking—a practice that serves the “compelling” interest of promoting “more efficient law enforcement and criminal justice.” (*Loder, supra*, 17 Cal.3d at pp. 864.) The “fact that the government may lawfully retain and access these more traditional means of identifying” arrestees “only emphasizes that the government’s retention” of DNA identification profiles from arrestees who do not elect to request expungement “does not intrude on [any] legitimate expectation of privacy.” (*Boroian, supra*, 616 F.3d at p. 67; see also *Johnson v. Quander* (D.C. Cir. 2006) 440 F.3d 489,

⁴⁰ See CR-185, Petition for Expungement of DNA Profiles and Samples <<http://www.courts.ca.gov/documents/cr185.pdf>> [as of May 14, 2015].

497 [“[W]e have never held that an *innocent* individual has a Fourth Amendment right to expunge the government’s records of his identity.”].)

Taken together, these protections minimize the risk of intrusion into any legitimate privacy interest. They allow California to use an arrestee’s “DNA profile in substantially the same way that the Government uses fingerprint and photographic evidence” (*Banks, supra*, 490 F.3d at p. 1192), resulting in a “similar” intrusion on any privacy interest (*Nicholas v. Goord, supra*, 430 F.3d at p. 671). The minimal burden imposed by collecting a DNA sample, and then using it to develop a profile that does nothing more than precisely identify the specific individual arrested, is amply justified by the fact of a valid custodial arrest based on probable cause to believe the individual has committed a felony. And the State’s collection and use of this information in the carefully controlled manner authorized by the DNA Act is constitutionally reasonable, in light of the balance between the minimal burden imposed and the important public interests served by the Act.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: May 20, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Opening Brief on the Merits uses a 13 point Times New Roman font and contains 20,119 words.

Dated: May 20, 2015

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A handwritten signature in black ink, appearing to read "M. J. Mongan". The signature is written in a cursive style with a large, looping initial "M".

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Mark Buza**
No.: **S223698**

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 May 20, 2015, I served the attached **OPENING BRIEF ON THE MERITS** 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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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 May 20, 2015, at San Francisco, California.

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Declarant



Signature