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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

The collection and processing of DNA identifying information from adult felony arrestees under the DNA Act is constitutionally reasonable. The Act allows law enforcement to obtain the most discrete and accurate identifying characteristic of the person arrested. This information serves as a modern-day complement to more traditional identifiers such as names, photographs, fingerprints, and distinguishing marks. The routine collection of this identifying information advances important public interests, such as helping law enforcement to confirm who arrestees are and to process them for the crime of arrest by learning about their past criminal conduct. While the DNA samples that are collected and stored under the Act do contain potentially sensitive information, the Act recognizes that concern and addresses it with robust use restrictions and privacy protections. In light of those safeguards, the collection and use of DNA information under the Act imposes little incremental imposition on any legitimate privacy interest of individuals who are subject to custodial arrests based on probable cause to believe they have committed felony offenses. Under these circumstances, the arrestee provisions of the DNA Act are reasonable and valid under both the federal and the state Constitutions.

Appellant Mark Buza responds by seeking to distinguish the DNA Act from the Maryland law sustained against a Fourth Amendment challenge in *Maryland v. King* (2013) ___ U.S. ___ [133 S.Ct. 1958, 1980] ("*King*"), and by discounting the privacy safeguards included in the Act. As the State's opening brief explains, however, the distinctions he advances made no difference to the analysis in *King*. And Buza does not provide any basis for concluding that the DNA Act's privacy protections are ineffective. Buza also urges this court to depart from *King* in interpreting article I, section 13 of the state Constitution. In making that argument, however, he scarcely addresses the State's detailed discussion of this court's precedents

regarding the interpretation of parallel provisions in the state and federal Constitutions. This court has said it will consider creating a divergence in the interpretation of the state and federal charters only in narrow circumstances, where there are persuasive and cogent reasons for departing from the approach of the federal Supreme Court. The State's opening brief demonstrates that no such circumstances are present here, and Buza fails to refute that demonstration. Nor does Buza succeed in establishing that the constitutional inquiry should come out differently even if this court independently balances the strong public interests served by the DNA Act against the incremental intrusion on the privacy interests of felony arrestees.

ARGUMENT

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

Maryland v. King held that, under the Fourth Amendment, "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.) In particular, "[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.*) As the State's opening brief explains (RBOM 12-16), that holding was premised on the conclusion that DNA identification profiles generated from arrestee samples are just "another metric of identification used to connect the arrestee with his or her public persona, as reflected in public records of his or her actions that are available to the police." (*King*, *supra*, at p. 1972.) DNA identification profiles are not fundamentally different from the fingerprints, photographs, or other identifiers that have long been collected

at booking, except perhaps in their "unparalleled accuracy" and "unique effectiveness." (*Id*. at pp. 1972, 1977.) Given the value of this identifying information for legitimate law enforcement purposes and the statutory and scientific safeguards designed to ensure that it is used only as an individual identifying characteristic (see *id.* at pp. 1970-1975, 1979-1980), the collection and analysis of DNA information does "not amount to a significant invasion of privacy that would render the DNA identification impermissible under the Fourth Amendment" (*id*. at p. 1980). That analysis applies with equal force to California's DNA Act. (RBOM 16.)

Buza seeks to distinguish *King* based on three distinctions between the DNA Act and the Maryland statute upheld in *King*. (E.g., ABOM 15, 94-95.) As the State has explained, however, none of these distinctions made any difference to the Supreme Court's analysis in *King*. (RBOM 17-20.)[1]

First, Buza points out that California collects DNA samples from arrestees at booking and begins to analyze them immediately, whereas in Maryland "there is no analysis or submission to a database until after a probable cause finding at arraignment." (ABOM 94-95; see *id.* at pp. 7, 15, 16; RBOM 17-18.)[2] *King* does describe this feature of Maryland's statute

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[1] On each point, other states have made policy choices similar to California's. (See RBOM 17-19; *post*, pp. 34, 37, 51.) Every court to consider a Fourth Amendment challenge to such a statute after *King* has rejected the attempt to distinguish the decision. (See, e.g., *United States v. Davis* (M.D. Fla. 2014) 65 F.Supp.3d 1352, 1367-1368.)

[2] To the extent Buza also suggests that Maryland prohibits the collection of DNA samples from arrestees until after "a prosecutorial charging decision" (e.g., ABOM 39), that reading of Maryland law is unsupported. Although Maryland's statute requires the collection of DNA samples from arrestees who are "charged with" certain enumerated crimes (Md. Pub. Saf. Code Ann., § 2-504, subd. (a)(3)(i)), in Maryland the *police officer* who makes a warrantless arrest must "cause a statement of charges

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in setting out the facts of the case (*King*, *supra*, 133 S.Ct. at p. 1967), but its 13-page constitutional discussion never gives any significance to the timing of collection or analysis in Maryland (see *id.* at pp. 1968-1980). On the contrary, the court states that "taking and analyzing a cheek swab" is "a legitimate police *booking procedure* that is reasonable under the Fourth Amendment." (*King*, *supra*, at p. 1980, italics added). That statement cannot be reconciled with Buza's argument that the Fourth Amendment requires police to wait until well after booking to collect DNA or analyze it to obtain an identification profile.

Buza notes that *King* "referred repeatedly to probable cause in finding that the Maryland statute served legitimate interests for informed pretrial decisions." (ABOM 74.) True enough, but those references support the State's argument here. They involve a police officer's determination that there is probable cause to make an arrest—not some later determination by a magistrate at an arraignment. (See, e.g., *King*, *supra*, 133 S.Ct. at 1970 ["It is beyond dispute that 'probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest.'"].) It is the police officer's determination that authorizes police to detain an arrestee, "reduce[s]" the arrestee's "expectations of privacy and freedom from police scrutiny," and gives rise to "the significant government interest at stake" in obtaining identifying characteristics from the arrestee. (*Id.* at pp. 1978, 1977.)

(…continued)
to be filed against the defendant in the District Court" (Maryland Rules, rule 4-211(b)(2); see also Maryland Rules, rule 4-102(a) [defining "Charging document" to include "a citation, an indictment, an information, and a statement of charges"].) In *King* itself, "[p]ersonnel at the Wicomico County Central Booking facility used a buccal swab to collect a DNA sample from King on the day of his arrest." (*King v. State* (2012) 425 Md. 550, 557.)

Second, Buza observes that the DNA Act applies to all adult felony arrestees, while the Maryland law covers only certain violent crimes and other enumerated offenses. (ABOM 6, 15, 16, 94, 97; see Md. Pub. Saf. Code Ann., § 2-504, subd. (a)(3)(i).) As the State's opening brief pointed out, however, nothing in *King* suggests that the constitutional analysis turns on that difference. (RBOM 18-19.) *King* expressly acknowledges that state laws varied as to "what charges require a DNA sample" (*King*, *supra*, 133 S.Ct. at p. 1968), but focuses only on whether the crime of arrest was one for which officers were authorized to "bring the suspect to the station to be detained in custody" (*id.* at p. 1980)—thus significantly reducing the arrestee's legitimate privacy interests as compared to an ordinary citizen, while simultaneously triggering a "significant government interest" in "DNA identification" of the arrestee (*id.* at p. 1977). Buza argues that the government interest is reduced in the case of those arrested for "non-violent" or "non-serious" felonies, asserting that such arrestees are unlikely to "have previously committed the types of violent crimes that yield DNA evidence." (ABOM 97.) But he cites no evidence for that proposition. *King*, in contrast, considered it "critical" for the government to collect identifying information even when an individual is being "detained for [a] minor offense[]." (*King*, *supra*, at p. 1971.)

Third, Buza points to Maryland's provisions for automatic expungement of DNA records and destruction of samples if a criminal action "does not result in a conviction." (Md. Pub. Saf. Code Ann., § 2-511, subd. (a)(1); see ABOM 7, 15, 16, 95.) California likewise provides for expungement, but an affected individual must initiate the process. (See RBOM 63-66; *post*, pp. 50-51.) Again, however, Maryland's expungement policy plays no role in *King*'s analysis. The court mentions the policy once in its discussion of the background facts (*King*, *supra*, 133 S.Ct. at p. 1967),

but does not refer to it in the passage describing the "statutory protections" that the court viewed as constitutionally significant (*id.* at pp. 1979-1980).

Of course, Buza's core argument is not really that *King* is distinguishable, but that it is wrong. He characterizes the Supreme Court's analysis as "troubling" (ABOM 6), "problematic" (ABOM 65), and "fatally flawed" (ABOM 39), and presses instead the views expressed in the *King* dissent (see ABOM 14, 18-19). Indeed, he invites this court to follow the Court of Appeal in leaving the Fourth Amendment issue undecided, while adopting the reasoning of the *King* dissent as a matter of state constitutional law. (ABOM 8, 20, 94.) The court should reject that invitation. The federal claim is properly presented here, and it is important for purposes of clarity and stability for this court to make clear that *King* resolves that claim, despite the distinctions between California and Maryland law. Moreover, as discussed in the State's opening brief (RBOM 20-29) and in the next section, a recognition that Buza's federal challenge fails under *King* is also the starting point for this court's analysis of the parallel claim Buza advances under article I, section 13 of the state Constitution.

II. THIS COURT SHOULD FOLLOW *KING* WHEN INTERPRETING ARTICLE I, SECTION 13 OF THE CALIFORNIA CONSTITUTION

As the State recognized in its opening brief, the California Constitution is a document of independent force. (RBOM 20.) Buza emphasizes this principle (see, e.g., ABOM 21-22), but he ignores that this court has also made clear that a federal Supreme Court decision applying the Fourth Amendment "ought to be followed" in assessing a claim under the parallel provision in article I, section 13 of the California Constitution, "unless persuasive reasons are presented for taking a different course." (*People v. Teresinski* (1982) 30 Cal.3d 822, 836 ("*Teresinski*"); see also *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353 ("*Raven*") [requiring

"'cogent reasons'" and "good cause for departure" from federal approach].) Buza fails to establish any persuasive reason for this court to depart from that principle of "deference" in the present case. (*Raven*, *supra*, at p. 353.)

A. The Starting Point for This Court's Analysis Should be to Consider *Maryland v. King*

Buza's most sweeping argument is that the court should disregard the Fourth Amendment and *King* when it addresses his claim under section 13, and instead should focus only on state constitutional principles. (ABOM 21-23.) The cases he cites do not support that argument. They generally fall into two categories: cases where the federal Supreme Court has not yet spoken on a question, and cases where this court chooses to adhere to its own prior precedent rather than follow a later federal decision. Neither set of cases is germane here.

In the first category, for example, Buza cites *People v. Cook* (1985) 41 Cal.3d 373, which addressed whether police could survey the defendant's backyard from a fixed-wing aircraft without obtaining a warrant. The United States Supreme Court had recently granted certiorari and heard argument in a case presenting the same question under the Fourth Amendment, but had not yet issued a decision. (*Id.* at p. 376, fn. 1.) With no clear federal answer, this court held that the practice violated section 13. (*Ibid.*) Similarly, Buza points to this court's decision invalidating California's ban on same-sex marriage under the equal protection clause of the state Constitution. (See *In re Marriage Cases* (2008) 43 Cal.4th 757.) As he acknowledges, however, that decision came "seven years before the U.S. Supreme Court" addressed the same issue under the federal Constitution. (ABOM 22.) Both cases stand only for the obvious proposition that this court may choose to address a question independently under the state Constitution when the United States Supreme Court has not yet resolved a parallel question under the federal Constitution. They

provide no basis for ignoring, or declining to follow, a recent federal decision that *did* address a parallel search-and-seizure issue.[3]

The cases in the second category are also inapposite. *People v. Ruggles* (1985) 39 Cal.3d 1 concerned whether it was permissible for police to conduct a warrantless search of closed containers in the trunk of a defendant's car. This court had previously held that the warrantless search of a tote bag in a defendant's trunk violated the Fourth Amendment. (See *id.* at p. 9, citing *People v. Minjares* (1979) 24 Cal.3d 410.) Meanwhile, the federal Supreme Court's decisions on the subject had "followed a wandering course," with one case "appear[ing] to adopt [the] analysis in *Minjares*," and a later decision "express[ing] a contrary view," though still "not definitively determin[ing] the issue." (*Ruggles*, *supra*, at pp. 10-11, citing *Arkansas v. Sanders* (1979) 442 U.S. 753 and *United States v. Ross* (1982) 456 U.S. 798.) Under those circumstances, this court chose to "reaffirm the holding in *Minjares* on the basis of article I, section 13 of this state's Constitution," rather than "await more definitive guidance" from the federal Supreme Court. (*Ruggles*, *supra*, at pp. 13, 11.)

Similarly, in *Serrano v. Priest* (1976) 18 Cal.3d 728 ("*Serrano II*"), this court had previously held that strict scrutiny applied to a claim involving equal protection and educational rights. (See *Serrano v. Priest* (1971) 5 Cal.3d 584, 614-615 ("*Serrano I*").) The United States Supreme Court then held that a claim alleging discrimination on the basis of wealth was subject only to rational basis review under the federal Constitution.

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[3] See also *In re Johnson* (1965) 62 Cal.2d 325, 329 [recognizing state constitutional right to counsel in misdemeanor cases before federal decision in *Argersinger v. Hamlin* (1972) 407 U.S. 25]; cf. *People v. Monge* (1997) 16 Cal.4th 826, 873 (dis. opn. of Werdegar, J.) [noting that policy of deference is "not presented" where "the United States Supreme Court has never ruled on the precise issue before us"].

(See *San Antonio Independent School Dist. v. Rodriguez* (1973) 411 U.S. 1, 40.) In *Serrano II*, this court adhered to its strict-scrutiny approach as a matter of state constitutional law. (*Serrano II*, *supra*, at pp. 761-766.)

The court's decision in *People v. Ramos* (1984) 37 Cal.3d 136 ("*Ramos II*") followed a comparable pattern. The court held that the "Briggs Instruction" in capital cases violated the state due process clause, notwithstanding a recent United States Supreme Court decision permitting the instruction under federal law. (See *California v. Ramos* (1983) 463 U.S. 992.) As in *Serrano II*, this court emphasized that it had previously held the instruction unconstitutional on federal grounds before it was reversed by the Supreme Court. (*Ramos II*, *supra*, at pp. 142, 150-151, citing *People v. Ramos* (1982) 30 Cal.3d 553 ("*Ramos I*").)[4] Here, in contrast to *Ruggles*, *Serrano II*, and *Ramos II*, there is no prior decision of this court prohibiting the State from collecting DNA samples from felony arrestees at booking, under either section 13 or the Fourth Amendment.

Buza also cites several concurring and dissenting opinions from past decisions of this court (see ABOM 22), but those opinions do not support

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[4] See also *Cardenas v. Superior Court* (1961) 56 Cal.2d 273, 276 [declining to follow recent federal Supreme Court decision regarding double jeopardy that "does not accord with the uniform construction placed by this court upon the jeopardy provision of the California Constitution"]; *cf. Stone v. Superior Court* (1982) 31 Cal.3d 503, 510 [discussing this court's double jeopardy jurisprudence and noting that "we remain free to delineate a higher level of protection" under the California Constitution than provided by the Fifth Amendment]. In *People v. Wheeler* (1978) 22 Cal.3d 258, which held that the state Constitution prohibits discriminatory peremptory challenges, the court largely relied on California case law that had developed on a separate course from federal law because it pre-dated the federal Supreme Court's 1975 decision to incorporate the "representative cross-section rule" of the Sixth Amendment against the states. (See *id.* at pp. 270-272, citing *Taylor v. Louisiana* (1975) 419 U.S. 522.)

his argument here. In *People v. Barrett* (2012) 54 Cal.4th 1081 ("*Barrett*"), the court rejected a claim that the civil commitment statute for mentally disabled individuals violated the equal protection provisions of the federal and state Constitutions. The court followed the rational basis standard applied by the federal Supreme Court in *Heller v. Doe* (1993) 509 U.S. 312. (See *Barrett*, *supra*, at p. 1111, fn. 21.) Justice Werdegar and Justice Liu would instead have adopted the arguably more protective standard of *Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432 as a matter of state constitutional law. (See *Barrett*, *supra*, at p. 1113 (conc. & dis. opn. of Werdegar, J.); *id.* at pp. 1144-1146 (conc. & dis. opn. of Liu, J.).) That position, which did not command a majority of the court, is different from the argument Buza makes here. Where the federal Supreme Court "'hands down a decision which limits rights established by earlier precedent" of that court, that development may weigh in favor of this court declining to follow the new decision as a matter of state constitutional law. (*Teresinski*, *supra*, 30 Cal.3d at p. 836; see *post*, pp. 11-12.) Here, however, *Maryland v. King* was a case of first impression that did not limit previously established rights. (See opn. p. 21.)

In *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, the court considered whether the federal Constitution prohibited religious invocations and benedictions at public high school graduation ceremonies. The court held the practice invalid under the First Amendment based on an analysis of federal precedent. (See *id.* at pp. 870-882 (lead opn. of Kennard, J.).) Buza cites Justice Mosk's concurrence, which argued for striking the practice down based only on existing state constitutional doctrine. (See *id.* at pp. 905-914.) Only Justice Mosk, however, would have taken that approach; and only two other justices would have held, in

the alternative, that the practice violated the state Constitution.[5] In any event, *Sands* presented a stronger case for departing from federal precedent than this case. The state constitutional provisions before the court included not only the establishment clause of the state Constitution, which tracks the First Amendment's establishment clause, but also two other provisions concerning religion that "hav[e] no counterparts in the federal charter." (*Id.* at p. 883 (lead opn. of Kennard, J.); see *Teresinski, supra*, 30 Cal.3d at p. 836 [noting that differences "in the language or history of the California provision" may weigh in favor of departing from federal precedent]; *post*, pp. 12-13.)[6]

B. The Court's Precedents Counsel Deferring to *King*

Not only is it appropriate for the court to begin its section 13 analysis by considering *King*, as the State has explained (RBOM 21-26), the factors this court considers when deciding whether to defer to a prior federal decision counsel in favor of following *King* here. Buza does not contend that *King* "limits rights established by earlier [federal] precedent."

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[5] Those justices joined a three-paragraph analysis in the lead opinion that contained little discussion of state authority and emphasized that "federal cases may supply guidance for interpreting" parallel provisions of the state Constitution. (*Sands*, *supra*, 53 Cal.3d at pp. 882-883 (lead opn. of Kennard, J.); see *id.* at p. 902 (conc. opn. of Lucas, C.J.) [noting that only "three justices have concluded that the practice violates our state Constitution"].) Meanwhile, Chief Justice Lucas explained in his concurrence why he believed it was appropriate "to consider the federal constitutional issues first and forgo consideration of the state constitutional issues in this case," noting the court's "policy of deference to United States Supreme Court decisions" concerning parallel constitutional provisions. (*Id.* at pp. 902, 903.)

[6] See also *Sands*, *supra*, 53 Cal.3d at p. 907 (conc. opn. of Mosk, J.) ["Particularly with regard to the provisions of the California Constitution that apply to religion in public schools [citations], the different history of our charter justifies the difference in interpretation."].

(*Teresinski*, *supra*, 30 Cal.3d at p. 836.) Rather, he agrees that *King* "was the Court's first DNA search case." (ABOM 37.) Nor does he argue that following *King* would "overturn established California doctrine affording greater rights to the defendant." (*Teresinski*, *supra*, at p. 837; see opn. p. 21 ["following *King* would not overturn established California doctrine affording greater rights"].)[7] Instead, Buza focuses on two other factors: "the language [and] history" of the state constitutional provision, and dissenting opinions or academic commentary criticizing the federal decision. (*Teresinski*, *supra*, at p. 836; see ABOM pp. 28-30, 34-39.) Neither factor provides a persuasive reason for this court to depart from *King*; nor do any of the other arguments raised by Buza.

1. There is no material textual difference between section 13 and the Fourth Amendment

Regarding the constitutional text, Buza correctly acknowledges that "there is little textual difference between article I, section 13, and the Fourth Amendment." (ABOM 36.) The two provisions are essentially identical in wording. (See *Teresinski*, *supra*, 30 Cal.3d at p. 835, fn. 9.) Moreover, section 13's history establishes that the framers of the California Constitution intended to mirror the Fourth Amendment. (RBOM 21-22; see Browne, Report of the Debates in the Convention of California on the Formation of the State Constitution in September and October, 1849 (1850)

[7] Like the Court of Appeal, Buza does contend that section 13 "provide[s] more robust protections than the Fourth Amendment in the specific area of arrestee searches." (ABOM 26, italics omitted; see opn. p. 21.) As explained below, however, the cases he cites did not purport to provide greater protections for felony arrestees at booking, and they involved situations where following federal precedent would have required this court to overturn established state precedent. (*Post*, pp. 19-20; see RBOM 26-29.)

p. 48.) Buza instead argues that the textual similarity is irrelevant, invoking this court's observation that "'[s]tate courts are the ultimate arbiters of state law, even textually parallel provisions of state constitutions . . . .'" (ABOM 36, italics omitted, quoting *People v. Brisendine* (1975) 13 Cal.3d 528, 548.) But it is this court's own decisions that point to textual similarity as a significant factor in deciding whether to follow a prior federal decision. (See *Teresinski*, *supra*, 30 Cal.3d at p. 836.) When this court considered that factor with respect to the precise provision at issue here, it concluded that there is "nothing in the language or history of" section 13 warranting any divergence from the Fourth Amendment. (*Ibid.*; see also *id.* at p. 835, fn. 9.)

Buza also contends that the State's "textual similarity argument ignores that the state's explicit privacy clause (art. I, § 1) has no express federal counterpart." (ABOM 37.) To the contrary, the State's opening brief devotes more than a page to that issue. (See RBOM 22-24.) And this court has expressly clarified that the "'privacy' protected by [section 1] 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*").)

Buza argues that this oft-repeated rule "cannot be considered a holding of the Court" (ABOM 31-32) because it has appeared in cases that did not present any search-or-seizure claim (ABOM 32-33 [discussing *Hill* and *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992]), and originated in an opinion that did not command a majority of the court (ABOM 31-32 [discussing *People v. Crowson* (1983) 33 Cal.3d 623]). But he does not respond to the State's reliance on *In re York* (1995) 9 Cal.4th 1133 ("*York*"), a unanimous decision that applied this rule in resolving a challenge to the practice of conditioning own-recognizance (OR) release of

felony arrestees on random drug testing and warrantless searches and seizures. (See RBOM 22-23 [citing *York* for this point].) *York* involved claims under the privacy and due process provisions of the California Constitution, as well as the search-and-seizure provisions of section 13 and the Fourth Amendment. After quoting *Crowson* for its statement that the privacy provision "has never been held to establish a broader protection [in the search-and-seizure context] than that provided by the Fourth Amendment of the United States Constitution or article I, section 13 of the California Constitution," the court conducted an analysis "guided by federal constitutional principles." (*York*, *supra*, at p. 1149.) The court rejected the petitioners' claims because the conditions on OR release did "not violate Fourth Amendment protections." (*Ibid.*) *York* confirms that the privacy clause does not augment section 13 in the context of government searches and seizures, and this rule cannot be dismissed as "dictum." (ABOM 32.)[8]

Next, Buza contends that the voters' adoption of the privacy clause demonstrates "that Californians have a greater and more firmly-established reasonable expectation of informational privacy, for purposes of article I, section 13, than the residents of states without such separate privacy

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[8] According to Buza, *Sheehan* "demonstrates that the privacy clause may sometimes provide greater protection" than section 13, "even in a search context," because the court held that a lawsuit challenging patdown searches of fans by a private football team stated a claim under the privacy clause. (ABOM 32.) *Sheehan* follows *Hill*'s holding that a privacy claim may sometimes be brought against a private entity. (See *Sheehan*, *supra*, 45 Cal.4th at p. 1001; see also *Hill*, *supra*, 7 Cal.4th at pp. 19-20.) But that does not mean the privacy clause provides greater protection than section 13 or the Fourth Amendment in a challenge to a government search or seizure. (See *York*, *supra*, 9 Cal.4th at p. 1149.) Indeed, *Hill* recognizes the co-extensive scope of the two provisions in the search-and-seizure context, even while providing for a cause of action against a nongovernmental entity. (See *Hill*, *supra*, 7 Cal.4th at p. 30, fn. 9.)

guarantees." (ABOM 33-34, italics omitted.) That argument is inconsistent with cases ranging from *Crowson* to *York*, and with the history of both the Privacy Initiative and more recent ballot measures. The ballot materials for the Privacy Initiative never suggested it would curtail the ability of law enforcement to conduct legitimate searches or seizures permitted under existing constitutional guarantees. Rather, proponents emphasized that the initiative would "not prevent the government from collecting any information it legitimately needs." (*Hill*, *supra*, 7 Cal.4th at p. 22, italics omitted.) The measure was instead intended to "prevent misuse of this information for unauthorized purposes and [to] preclude the collection of extraneous or frivolous information.'" (*Ibid.*, italics omitted; see *post*, pp. 55-56.) Moreover, in the years following the adoption of the Privacy Initiative, California voters approved two measures designed to harmonize application of section 13 with search-and-seizure doctrine under the Fourth Amendment. (See RBOM 23 [discussing Proposition 8 and Proposition 115].) They also adopted Proposition 69, authorizing the collection of DNA identifying information from all adult felony arrestees at booking. This history belies any argument that the privacy clause in section 1 "necessarily means" that Californians reasonably expect section 13 will prohibit law enforcement from collecting DNA identifying information at booking, even when the Fourth Amendment permits that very practice.[9]

[9] See generally *Hill*, *supra*, 7 Cal.4th at p. 37 ["A 'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms."].

2. The *King* dissent and academic commentary do not warrant departing from *King*

As Buza notes, this court has "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; ABOM 35.) But the State is not aware of any case in which such considerations alone have caused this court to depart from a federal Supreme Court decision that has settled the construction of a parallel federal provision. The two examples cited in *Teresinski* both involved compelling additional reasons for departing from federal precedent. In one, the federal decision at issue "[could]not be reconciled" with prior decisions of this court and was arguably "incompatible with" prior federal Supreme Court decisions. (See *Com. to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 267 & fn.17, discussing *Harris v. McRae* (1980) 448 U.S. 297.) In the other, the federal Supreme Court held there was no right to counsel at a pre-indictment lineup after this court had reached the opposite conclusion three years earlier. (See *People v. Bustamante* (1981) 30 Cal.3d 88, 91-92, 95, 102, discussing *Kirby v. Illinois* (1972) 406 U.S. 682.)

In any event, neither Justice Scalia's dissent nor other commentary provides a persuasive reason for creating an inconsistency between state and federal law in this area by declining to follow *King*. Buza emphasizes that *King* was a sharply divided decision with a spirited dissent. (ABOM 35.) But a divided decision nonetheless settles the meaning of federal law. And Justice Scalia's dissent is ultimately unpersuasive, because it rests on the false 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.).) As *King* explains, and California's

experience confirms, collection of this information at booking is not fundamentally different from the observation and recording of other identifying characteristics, and similarly serves a range of important public interests. (See *id.* at pp. 1971-1974; RBOM 13-15, 32-48; *post*, pp. 26-28.)

Moreover, the collection of DNA identifying information as part of a felony arrest presents privacy considerations markedly different from those at issue in the "special needs" cases invoked by Justice Scalia and by Buza. In those cases, the individuals searched were not already subject to valid custodial arrests based on probable cause. (See *King, supra*, 133 S.Ct. at p. 1978; see also RBOM 24-25.) For example, Buza discusses federal cases concerning "border searches and immigration checkpoints, drug tests of certain categories of governmental employees, and administrative inspections of closely regulated businesses," as well as vehicle checkpoints to interdict unlawful drugs and drug testing of obstetrics patients in state hospitals. (ABOM 50-51, citing *City of Indianapolis v. Edmond* (2000) 531 U.S. 32 and *Ferguson v. City of Charleston* (2001) 532 U.S. 67; see also *King, supra*, at pp. 1981-1982 (dis. opn. of Scalia, J.).) As *King* explains, however, collecting a DNA identification sample from arrestees at booking, for limited purposes enforced by strict controls, "differs from the sort of programmatic searches of either the public at large or a particular class of regulated but otherwise law-abiding citizens that the Court has previously labeled as 'special needs' searches." (*King, supra*, 133 S.Ct. at p. 1978, some internal quotation marks omitted.)[10]

[10] The sole "special needs" decision of this court that Buza cites likewise involved wholly different privacy considerations. (See *People v. Maikhio* (2011) 51 Cal.4th 1074 [sustaining fish and game warden's stop of car to demand display of angler's catch, without any reasonable suspicion that the angler violated any statute or regulation].)

Finally, Buza argues that this court should disregard *King* because it has attracted criticism from some commentators. (ABOM 35-36 & fn. 22.) It is unsurprising that a divided Supreme Court decision in an important Fourth Amendment case has generated debate outside the courts. That debate is not a sound reason for this court to create a disparity between state and federal law on the question at issue here—especially when the considered judgment of a majority of the federal Supreme Court is consistent with statutes adopted by 28 states and the federal government; the decisions of federal courts of appeals that addressed the question prior to *King*; and the views of other commentators in the public sphere.[11]

3. Past cases applying section 13 to arrestees do not justify departing from *King*

Like the Court of Appeal, Buza maintains that section 13 "has historically provided more robust protections than the Fourth Amendment

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[11] See, e.g., *United States v. Mitchell* (3d Cir. 2011) 652 F.3d 387 (en banc) ("*Mitchell*") [rejecting Fourth Amendment challenge to 42 U.S.C. § 14135a(a)(1)(A)]; National Conference of State Legislatures, DNA Arrestee Laws <http://www.ncsl.org/Documents/cj/ArresteeDNALaws.pdf> [as of Oct. 12, 2015] [describing state statutes]; Amar & Katyal, *Why the Court Was Right to Allow Cheek Swabs*, N.Y. Times (June 3, 2013) ["Justice Scalia failed to identify even one source from the founders articulating the ultraprecise rule that he claims is the central meaning of the Fourth Amendment. And his version of the Fourth Amendment would lead to absurd results."]; Bower, *Maryland v. King: Textualism Meets Reason* (2013) 14 Engage: J. Federalist Soc'y Prac. Groups 29, 29 ["[A]ll things considered, the majority got it right."]; cf. Kaye, *Why So Contrived? Fourth Amendment Balancing, Per Se Rules, and DNA Databases After Maryland v. King* (2014) 104 J. Crim. L. & Criminology 535, 550, 593 [criticizing the dissent in *King* as "inaccurate" and "superficial," and arguing that the dissent's theory of the Fourth Amendment "does not fit all the case law and should not prevent a state from adopting a bona fide multimodal system of biometrics—including DNA along with physical features—for identity authentication and subsequent criminal intelligence gathering made possible by modern databases"].

in the specific area of arrestee searches." (ABOM 26, italics omitted; see opn. p. 21.) As the State's opening brief explains, however, the cases identified by Buza are inapposite here. (See RBOM 26-29.) Although the court has occasionally declined to follow federal precedent on particular questions involving the search-incident-to-arrest doctrine when doing so would have required the court to overturn existing state precedent, those cases do not involve the collection of identifying information at booking and do not support Buza's theory that section 13 compels a "more robust" protection in every case involving arrestees.

In particular, Buza points to *People v. Brisendine* (1975) 13 Cal.3d 528 ("*Brisendine*") as evidence that this court has "struck a different balance than the U.S. Supreme Court between privacy interests and asserted institutional or security purposes in the specific area of arrestee searches." (ABOM 27.) There, the court decided to "adhere to [its own] precedential decisions" regarding discretionary field searches of a nonfelony arrestee's person and effects instead of following *United States v. Robinson* (1973) 414 U.S. 218, an intervening federal decision that was "irreconcilable" with this court's precedent. (*Brisendine*, *supra*, at pp. 548, 547; RBOM 27-28.) Buza does not respond to the State's discussion of *Brisendine* in its opening brief, or explain how that case could justify departing from *King* where, as here, this court has not previously addressed the question presently before it.

Buza also cites *People v. Laiwa* (1983) 34 Cal.3d 711, *People v. Longwill* (1975) 14 Cal.3d 943, and *People v. Norman* (1975) 14 Cal.3d 929. (ABOM 27.) Those cases likewise provide no support for departing from *King*. In *Longwill* and *Norman*, the court simply followed *Brisendine*, declining to apply the federal decision in *United States v. Robinson* that was inconsistent with prior California precedent. (*People v. Longwill*, *supra*, at pp. 951-952; *People v. Norman*, *supra*, at pp. 938-939; see RBOM

27.) In *Laiwa*, the court had no occasion to decide whether or not to follow federal precedent because the "sole contention" made by the People on appeal was that prior state law permitted the search. (See *People v. Laiwa*, *supra*, at pp. 724-725; see also RBOM 29, fn. 13.) Buza does not respond to the State's arguments concerning any of these cases.

4. This court's decisions concerning Proposition 8 and Proposition 115 provide no support for departing from *King*

Buza also argues that this court's decisions in *Raven* and *In re Lance W.* (1985) 37 Cal.3d 873 are consistent with the decision below. (ABOM 23-26.) As the State has explained, however, those cases weigh in favor of following *King*. (See RBOM 23-24.)

Raven concerned Proposition 115, which the voters adopted in 1990. (See Prop. 115, approved by voters, Prim. Elec. (June 5, 1990).) Among other things, that initiative provided that the rights "to be free from unreasonable searches and seizures" and "to privacy" would be construed in criminal cases "in a manner consistent with the Constitution of the United States." (*Ibid.*) This court held that Proposition 115 amounted to an invalid revision of the California Constitution, not because it continued the policy of deference to federal Supreme Court decisions, but because it created a mandatory and categorical "imperative" that precluded California courts from interpreting the state Constitution in a manner more protective than the federal Constitution. (*Raven*, *supra*, 52 Cal.3d at p. 354.) In so holding, the court reiterated its longstanding principle "that 'cogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution.'" (*Id.* at p. 353, quoting *Gabrielli v. Knickerbocker* (1938) 12 Cal.3d 85, 89.) The State relies on the same principle here.

In *Lance W.*, the court construed Proposition 8, which prohibits the exclusion of "relevant evidence . . . in any criminal proceeding." (*Lance W.*, *supra*, 37 Cal.3d at p. 879; see Cal. Const., art. I, § 28, subd. (f)(2).) Proposition 8 effectively eliminated differences between state and federal doctrine regarding exclusion, requiring state courts to apply Fourth Amendment precedent when resolving suppression motions. (See *Lance W.*, *supra*, at p. 890.) In light of Proposition 8, a decision creating a disparity between state and federal law on the question at issue here would have anomalous results, such as allowing courts to consider evidence derived from DNA identifying information collected in Maryland and other states, while prohibiting California from collecting that information during its own felony arrests. Although Proposition 8 did not affect the "substantive scope" of section 13 (*id.* at p. 886), the possibility of such anomalies makes it particularly appropriate here for the court to follow its historical policy of deference to federal Supreme Court decisions.

C. The Decision of the Vermont Supreme Court in *State v. Medina* Provides No Basis for Departing from *King*

Finally, Buza argues that *State v. Medina* (Vt. 2014) 102 A.3d 661 ("*Medina*") provides "compelling grounds" for breaking from *King* in this case. (ABOM 91.) It does not. Unlike this case, *Medina* did not involve a settled state policy of deference to United States Supreme Court decisions regarding parallel constitutional provisions.[12] Instead, *Medina* analyzed Vermont's arrestee-collection statute under a "special needs" framework adopted by the Vermont Supreme Court in a prior decision upholding the collection of DNA information from convicted felons. (See *Medina*, *supra*,

[12] Significantly, unlike the text of section 13, the text of the Vermont constitutional provision at issue in *Medina* does not closely parallel the Fourth Amendment. (See Vt. Const., ch. I, art. 11; *Medina*, *supra*, 102 A.3d at p. 72 [quoting article 11].)

at pp. 669-683, citing *State v. Martin* (2008) 955 A.2d 1144.) That is not the framework this court has used in assessing searches and seizures of either convicts or arrestees—in the DNA context or otherwise. (See *People v. Robinson* (2010) 47 Cal.4th 1104, 1120-1123 ("*Robinson*") [using general balancing analysis to conclude that collection of DNA identifying information from convicted offenders is consistent with Fourth Amendment]; *York*, *supra*, 9 Cal.4th at pp. 1148-1151 [using general balancing to reject section 13 and Fourth Amendment challenge to warrantless searches of arrestees released on their own recognizance].) As discussed above, there is no basis in federal or California precedent for invoking the "special needs" doctrine here. That doctrine applies to programmatic searches of the public at large or broad categories of citizens who are not already subject to a custodial arrest based on probable cause. (See *ante*, p. 17; *King*, *supra*, 133 S.Ct. at p. 1978.)[13]

[13] Even if analyzed under a "special needs" framework, the DNA Act is reasonable. As the Vermont Supreme Court recognized, the collection of DNA identifying information from arrestees does serve such needs. (See *Medina*, *supra*, 102 A.3d at p. 678 ["'assist[ing] in identifying persons at future crime scenes'"]; *ibid.* ["identifying missing persons"]; *ibid.* ["deterrence"].) Weighed against the minimal incremental intrusion on the legitimate privacy expectations of an individual who is already subject to a custodial arrest, those and other special needs served by the collection establish that the DNA Act is reasonable. *Medina* reached a different conclusion only after overstating the intrusion on arrestees' privacy interests and minimizing the public interests at issue. (See *Medina*, *supra*, at pp. 679-683.)

III. THE DNA ACT IS INDEPENDENTLY REASONABLE UNDER SECTION 13

Even if this court assesses the DNA Act independently under section 13, it should sustain the conviction at issue here. Any such analysis must balance the public interests served by the DNA Act against any intrusion on an arrestee's legitimate privacy interests. (See, e.g., *Robinson*, *supra*, 47 Cal.4th at p. 1120; RBOM 30.) Here, the analysis must also take account of the fact that Buza challenges Proposition 69, a measure adopted directly by the people. Such a statute is presumed to be valid, and may not be struck down unless it appears "clearly, positively, and unmistakably" that the challenged provisions violate the state Constitution. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 501; see RBOM 30.) Buza does not dispute either the general balancing standard or the strong presumption of constitutionality that applies in the context of Proposition 69.

As the State's opening brief explains, 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. A "DNA profile is arguably the most discrete, exclusive means of personal identification possible." (*Robinson*, *supra*, 47 Cal.4th at p. 1134, internal quotation mark omitted, quoting *State v. Dabney* (Wisc.Ct.App. 2003) 663 N.W.2d 366, 372.) As with other kinds of identifying information, such as photographs, fingerprints, tattoos, or scars, collecting identifying DNA information at the time of an arrest and then maintaining it in law enforcement records serves important public interests. It helps appropriate officials process arrestees for the crime of arrest by learning more about their past criminal conduct and dangerousness; confirm who arrestees are; dispel suspicion from innocent suspects; identify missing persons; and deter or solve future crimes that arrestees may commit. (See RBOM 35-48.) Those powerful interests outweigh any incremental intrusion on the privacy

interests of individuals who are already subject to valid custodial arrests, in light of the DNA Act's robust privacy protections and strict limitations on the State's use of DNA information. (See RBOM 52-66.)

Buza again argues that the DNA Act is unreasonable because it differs from the Maryland statute with respect to the list of crimes covered, the timing of sample analysis, and the process for expunging samples and DNA identifying information. (See, e.g., ABOM 87-89.) None of these distinctions between the two laws affected Buza. First, although he criticizes California for collecting DNA identifying information from all adult felony arrestees instead of just those arrested for "violent" or "serious" offenses (e.g. ABOM 65), Buza was arrested for arson, a crime that even he does not describe as "non-serious" or "non-violent." Second, Buza refused to give a DNA sample until after he was *convicted* for that crime. Third, because he was convicted, Buza has no right to expungement. In any event, the specific choices made by California in framing its DNA collection program are consistent with those of the federal government and many other states, and do not intrude unreasonably on any legitimate privacy interest.

A. Buza Ignores the Long History of Collecting Identifying Characteristics from Arrestees at Booking

Buza's arguments simply ignore the extensive body of precedent regarding the collection of identifying information from arrestees. As the State explained in its opening brief, California has a long history of collecting and recording the identifying characteristics of arrestees at booking. (See RBOM 32-35.) That information has always served multiple important interests, such as allowing officials to learn about an arrestee's criminal background and dangerousness, and informing decisions about charging, release, bail, and the exercise of prosecutorial discretion. This court has rejected challenges to the government's retention and use of

identifying information from arrestees. In *Loder v. Municipal Court* (1976) 17 Cal.3d 859, 864-865 ("*Loder*"), the court unanimously rejected a state constitutional challenge to the government retaining and using an arrest record from an individual who was never charged or convicted, noting the State's "compelling interest" in such records, which contain photographs, fingerprints, and "other recorded physical description[s]." In *People v. McInnis* (1972) 6 Cal.3d 821 824-826 ("*McInnis*"), the court approved the practice of retaining a booking photograph from a prior arrest and using it to identify the perpetrator of a later crime. Courts elsewhere have reached similar results.[14]

These cases also establish that the kind of identifying information that may be collected from arrestees is not frozen in time. For much of the nineteenth century, written records of offenders' distinguishing features were the only available identifying characteristics. (See Cole, Suspect Identities (2001) pp. 10-11.) Later, technological advancements enabled the government to collect fingerprints and photographs as well. (See *id.* at pp. 20-22, 118, 196.) Those advancements have allowed the government to maintain a multifaceted set of identifying characteristics about each arrestee that better serves the public's interests. Courts have not viewed the availability of one type of identifying characteristic as a reason for prohibiting the government from collecting another, complementary identifier. (See, e.g., *Haskell v. Brown* (N.D. Cal. 2009) 677 F.Supp.2d 1187, 1199 ["The more ways the government has to identify who someone is, the better chance it has of doing so accurately."].)

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[14] For example, the "blanket fingerprinting of individuals who have been lawfully arrested or charged with a crime" has met with "universal approbation." (*Mitchell, supra*, 652 F.3d at p. 411; see *Smith v. United States* (D.C. Cir. 1963) 324 F.2d 879, 882 [collecting cases]; see also RBOM 33-34 & fn. 14 [same].)

The balancing analysis in the present case should be conducted with this background in mind, but Buza ignores it. He does not discuss *Loder* or *McInnis*, or even cite them. And he offers no persuasive explanation why our state Constitution would permit the government to collect, retain, and use a range of identifying characteristics from arrestees, while prohibiting the government from obtaining DNA profiles—the most accurate identifying characteristic available. (See *Robinson*, *supra*, 47 Cal.4th at pp. 1134, 1141.)

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

California's collection of DNA identification information from felony arrestees advances the same interests that are served by the collection of other identifiers, but in a particularly powerful way.

1. DNA identification profiles are powerful identifiers that serve important public interests

DNA identification information offers "'as close to an infallible measure of identity as science can presently obtain.'" (*Robinson*, *supra*, 47 Cal.4th at p. 1141; RBOM 36-39.) Obtaining DNA identification profiles from felony arrestees at booking and preserving them in confidential databases serves a range of important public interests. Those interests are described in detail in the State's opening brief. (RBOM 39-48.) They include the following:

First, DNA profiles allow law enforcement to learn whether the arrestee is connected to prior unsolved crimes, "a critical part of his identity that officers should know when processing him for detention." (*King*, *supra*, 133 S.Ct. at p. 1971; see *Mitchell*; *supra*, 652 F.3d at p. 414; *Haskell v. Brown*, *supra*, 677 F.Supp.2d at p. 1199; RBOM 39-43.) If jail officials obtain this information when the arrestee remains in pretrial detention, it can inform security decisions at the jail and release decisions, including

those made under the Criminal Justice Realignment Act. (See, e.g., *King*, *supra*, at p. 1972-1974.) If the arrestee has already been released on bail or his own recognizance when officials obtain that information, it can provide a basis for reconsidering that decision. (*Id.* at p. 1974; cf. *Loder*, *supra*, 17 Cal.3d at p. 867.) In any event, the information may inform the prosecutor's decisions regarding charging and other matters. (See *Loder*, *supra*, at p. 866.) The availability of DNA identifying information for these purposes helps to promote "more efficient law enforcement and criminal justice," an interest this court has already recognized as "compelling." (*Id.* at p. 864.)

Second, DNA identification information may be used to help confirm who an arrestee is at booking. At present, law enforcement primarily uses fingerprints for this purpose, but the collection of DNA profiles helps the State to improve the accuracy of the fingerprint database. (See RBOM 43-44.) The usefulness of DNA information for this purpose will only improve in coming years, as "Rapid DNA" technology becomes widely available, allowing the State to obtain DNA identification profiles in a matter of hours.[15]

Third, a "hit" that results from comparing arrestee DNA profiles to profiles from unsolved crimes 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; see *King*, *supra*, 133 S.Ct. at p. 1974; RBOM 44-45.)

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[15] See FBI, Rapid DNA or Rapid DNA Analysis <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/rapid-dna-analysis> [as of Oct. 12, 2015]; 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 Oct. 12, 2015].

Fourth, the DNA profiles collected from arrestees at booking aid in locating people who have gone missing, an undeniable state interest. (See Pen. Code, § 14250; *id.* § 299.5, subd. (i)(1)(A); Prop. 69, Gen. Elec. (Nov. 2, 2004) § II, subd. (d)(1); RBOM 45.)[16]

Fifth, 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. (See RBOM 45-48.) This serves a "strong government interest" (*United States v. Hensley* (1985) 469 U.S. 221, 229), and "helps bring closure to countless victims of crime" (*United States v. Kincade* (9th Cir. 2004) 379 F.3d 813, 839 ("*Kincade*"); see *Loder*, *supra*, 17 Cal.3d at p. 865 [noting that identifying characteristics in arrest records "may be used by the police in several ways for the important purpose of investigating and solving similar crimes in the future"]).

2. California uses arrestees' DNA information only as an identifying characteristic

Buza never disputes that the public interests described in the State's opening brief are important. Instead, he counters that the "true purpose" underlying the DNA Act is "ordinary law enforcement *investigation*, not 'identification' in any conventional sense of the term" (ABOM 58, 18, capitalization omitted), and argues that this renders the DNA Act constitutionally invalid (ABOM 50-52). That argument fails.

The identification profiles that California obtains from arrestees' DNA samples are "only useful for human identity testing," and do not disclose any sensitive information about the arrestee. (Butler, Advanced Topics in Forensic DNA Typing: Methodology (2012) p. 240

[16] All further statutory references are to the Penal Code unless otherwise indicated.

("Methodology").) Indeed, the loci that are measured by a DNA profile "'were purposely selected because they are not associated with any known physical or medical characteristics.'" (*Kincade*, *supra*, 379 F.3d at p. 818, quoting H.R. Rep. No. 106-900(I), 2d Sess., p. 27 (2000).) DNA profiles therefore "function as identification records not unlike fingerprints, photographs, or social security numbers." (*Boroian v. Mueller* (1st Cir. 2010) 616 F.3d 60, 65.)

As with those other identifiers, the government uses DNA profiles for identification purposes. It compares two identification 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. (See RBOM 37; see generally *Haskell v. Brown*, *supra*, 677 F.Supp.2d at pp. 1190-1191.) Except for its greater precision, that analysis is not materially different from comparing two photographs, two sets of fingerprints, two scars, or two tattoos for identification purposes. Regardless of what identifying metric is used, it can yield the same kind of information about an arrestee's criminal history. That information—"a critical part of [an arrestee's] identity" (*King*, *supra*, 133 S.Ct. at pp. 1971-1972)—is crucial to making informed decisions about processing the arrestee and "promot[ing] more efficient law enforcement and criminal justice." (*Loder*, *supra*, 17 Cal.3d at p. 864; see *id.* at pp. 864-867; *ante*, pp. 26-28.)

Buza responds by dividing the State's interests in collecting and recording identifying characteristics from arrestees into two categories—one he acknowledges as "legitimate" and one he contends is impermissible. (E.g., ABOM 52.) Under Buza's paradigm, it is legitimate for the State to use identifying characteristics to "determin[e] an arrestee's identity—who the person is." (*Id.* at p. 58.) That includes "verifying the arrestee's true name" as well as conducting a search for "any documented history of prior criminal convictions, pending charges or arrests." (*Id.* at pp. 55, 54 italics

omitted.) It is impermissible, however, for law enforcement to collect an arrestee's identifying characteristics for purposes of learning anything about his "unknown past conduct." (*Id.* at p. 54, alteration and quotation mark omitted, quoting *King*, *supra*, 133 S.Ct. at p. 1973 (dis. opn. of Scalia, J.).) In other words, Buza believes that the state Constitution bars law enforcement from obtaining identifiers at booking if they uncover "any uncharged and unsuspected criminal conduct the arrestee may have committed in the past." (ABOM 56.) Buza's argument fails in two respects.

First, the State's recognized interest in identifying arrestees extends well beyond confirming their true names, even on Buza's narrow understanding.[17] Buza concedes that it is essential for law enforcement to learn about arrestees' prior criminal history, including pending charges. In California, law enforcement routinely uses "John Doe" arrest warrants that describe the suspect only by reference to his DNA profile, a practice this court has approved. (See *Robinson*, *supra*, 47 Cal.4th at pp. 1137-1143.) For this category of arrest warrants, a DNA profile is the only type of identifying information obtained at booking that can serve the State's interest in obtaining "any documented history of . . . pending charges or arrests." (ABOM 54, italics omitted.) So Buza is not correct in arguing that fingerprints are "more than sufficient" to serve even the narrow identification purpose that he believes is legitimate. (ABOM 59.)

Second, there is no basis for drawing a constitutional line that allows law enforcement to use an arrestee's identifying characteristics to learn

[17] Moreover, as noted above, the State *does* use DNA profiles to help improve the process for confirming an arrestee's name at booking, and the usefulness of DNA for this purpose will only improve with the widespread adoption of Rapid DNA technology. (See *ante*, p. 27; RBOM 43-44.)

about his known criminal history, while prohibiting use of identifying characteristics to learn whether the arrestee is connected to previously unsolved crimes. Either way, the information is highly relevant in ascertaining who it is that the authorities are dealing with. (See *King*, *supra*, 133 S.Ct. at pp. 1971-1972; *Loder*, *supra*, 17 Cal.3d at pp. 866-868.) Moreover, this is another way in which DNA identifying information is indistinguishable from fingerprint identifiers. When police collect fingerprints from arrestees at booking, they use those identifying characteristics not only to confirm the arrestee's name and access his known criminal history, but also to query the database of latent fingerprints corresponding to unsolved crimes.[18] "In this respect the only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides." (*King*, *supra*, at p. 1972.)

Underlying Buza's argument is the theory that Proposition 69 is invalid because it also has the important beneficial effect of advancing the public interest in "facilitat[ing] crime-solving through "cold hits" to unsolved cases.'" (ABOM 56, citation omitted; see *id.* at pp. 58-59.) Identifying the perpetrators of unsolved crimes and crimes committed in the future is one benefit of the State's collection and use of arrestee DNA profiles. The State has never disputed that. (See *ante*, p. 28; RBOM 45-48.) This is not the only benefit of Proposition 69, but it is surely an important one. (See Prop. 69, Gen. Elec. (Nov. 2, 2004) § II.) The collection of DNA identifying information from all felony arrestees at booking has measurably contributed to the State's ability to catch criminals. (See RBOM 46-47.) For example, the likelihood that the State's DNA identification database

[18] See, e.g., National Institute of Justice, The Fingerprint Sourcebook <https://www.ncjrs.gov/pdffiles1/nij/225320.pdf > p. 6-10 [as of Oct. 12, 2015]; RBOM 38 & fn. 16.

will provide a lead when police submit a sample from a crime scene has almost doubled since the current arrestee provisions went into effect—from 35% in 2008 to 67.9% in 2012.[19] Before the current arrestee provisions went into effect, 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.[20] In any reasonableness balancing, these benefits of Proposition 69 weigh in favor of its constitutionality—not against it. (*Loder*, *supra*, 17 Cal.3d at p. 865 [considering the use of identifiers in arrest records "for the important purpose of investigating and solving similar crimes in the future"]; *Mitchell*, *supra*, 652 F.3d at p. 414 ["To the extent that DNA profiling assists the Government in accurate criminal investigations and prosecutions (both of which are dependent on accurately identifying the suspect), it is in the Government's interest to have this information as soon as possible."].)

Buza also argues that the "logistics of California's DNA testing and comparison process" indicate that California does not use DNA profiles for any purpose other than solving cold cases. (ABOM 59, capitalization omitted.) This argument is based on the fact that, at present, it takes around 30 days on average to generate an identification profile from an arrestee's DNA sample. See *Haskell v. Brown*, *supra*, 677 F.Supp.2d at p. 1201.[21] Once again, Buza simply does not respond to the State's arguments on this

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

[20] 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 Oct. 12, 2015].

[21] The period is often much shorter in a given case, and emerging Rapid DNA technology holds the potential to provide DNA profiles within a few hours of collection. See FAQs, *supra*, [Effects of the All Adult Arrestee Provision, Q2].

point. (See RBOM 41-42.) It is true that, in many cases, arrestees will have been released from custody before the State obtains the arrestee's DNA profile. But information that the arrestee has been linked to another crime remains highly relevant for processing the crime of arrest under those circumstances: it can provide a basis for revoking bail or own-recognizance release, and can inform a range of prosecutorial decisions going forward. (See *ante*, pp. 26-27.) In those cases where the arrestee remains in custody when law enforcement acquires such information, the information can also have a significant effect on decisions about appropriate security measures and release. (*Ibid.*) Moreover, regardless of the timing of an arrestee's release in a given case, the collection of DNA profiles helps the State to identify missing persons and to improve its process for confirming who arrestees are at booking. (See *ante*, pp. 27-28.) Ultimately, the "question of how long it takes to process identifying information obtained from a valid search goes only to the efficacy of the search for its purpose of prompt identification, not the constitutionality of the search." (*King*, *supra*, 133 S.Ct. at p. 1976.)

3. Collecting DNA information from all felony arrestees at the time of booking advances significant state interests

Buza argues that the public interests served by the DNA Act are diminished because the "Act sweeps more broadly" than necessary in two respects: it applies to all adult felony arrestees; and it requires collection and analysis of the sample to begin at booking. (E.g., ABOM 6-7.) This argument fails at the threshold because search-and-seizure doctrine contains no least-restrictive-means requirement. Even if California could effectively serve its interests by narrowing the DNA Act in the ways suggested by Buza, that does not mean it is constitutionally bound to do so. (Cf. *City of Ontario v. Quon* (2010) 560 U.S. 746, 763; *People v. Maikhio*, *supra*, 51

Cal.4th at pp. 1100-1101; RBOM 49.) In addition, both features of the DNA Act do serve important public interests.

a. Collection from all adult felony arrestees

California collects DNA identifying information from all adult felony arrestees, as do more than a dozen other States and the federal government. (§ 296, subd. (a)(2)(C); see ABOM 66 fn. 37.)[22] Buza contends that "it makes no sense to collect DNA from every felony arrestee" because it "is more likely that defendants charged with rape or other violent crimes may have previously committed similar offenses." (ABOM 67.)[23] Experience demonstrates, however, that many people arrested for nonviolent felonies in California have been linked by their DNA identification profiles to violent and heinous crimes such as rape and murder. (RBOM 50-51; cf. *Florence v. Bd. of Chosen Freeholders of County of Burlington* (2012) ___ U.S. ___, ___ [132 S.Ct. 1510, 1520] ("*Florence*"); *King*, *supra*, 133 S.Ct. at p. 1971). In *People v. Shamblin* (2015) 236 Cal.App.4th 1, for example, a man arrested for a drug offense was linked by his DNA profile to the rape and murder of an elderly woman three decades earlier. Indeed, a 2012 study reviewing a limited sample of hits between arrestee DNA profiles and forensic samples showed that a majority of the hits relating to rape, murder, and robbery crimes resulted from arrests for nonviolent offenses. (See Cal. DOJ, Study #1: Arrestee Hits to Violent Crimes <http://oag.ca.gov/

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[22] See generally National Conference of State Legislatures, DNA Arrestee Laws <http://www.ncsl.org/Documents/cj/ArresteeDNALaws.pdf> [as of Oct. 12, 2015] [identifying 14 States that collect from all felons].

[23] It is curious that Buza invokes the interests of those arrested for "nonviolent" offenses, given that he insists he is making an as-applied challenge to the DNA Act (see opn. pp. 21-22, fn. 7), and he was arrested for arson after setting fire to a police squad car (see RBOM 3-4).

sites/all/files/agweb/pdfs/bfs/arrestee_2013.pdf> [as of Oct. 12, 2015].) Whether or not a person arrested for a nonviolent felony is "likely" to have committed a rape, murder, or other violent crime, there is a compelling public interest in alerting law enforcement whenever an arrestee such as Mr. Shamblin *did* commit such a crime.

Moreover, Buza's argument appears to be premised on the incorrect assumption that forensic DNA samples are only obtained from the scenes of violent crimes involving blood or other bodily fluid. But modern techniques allow law enforcement to obtain DNA profiles from skin or other cells left at the scene of a burglary or nonviolent crime. (See Butler, Forensic DNA Typing (2d ed. 2005) p. 168 ("Typing").) Knowledge that an arrestee is connected to such a crime advances the same public interests described above. (*Ante*, pp. 26-28.)

Buza's argument is also based on a flawed legal premise. He suggests that the DNA Act may only be upheld if the State presents "'uncontroverted evidence' establishing that those arrested for non-violent or non-serious felonies are likely to have committed the types of violent crimes that typically yield DNA evidence, particularly murders and sex offenses." (ABOM 68.) The law imposes no such requirement. Buza cites *Rise v. Oregon* (9th Cir. 1995) 59 F.3d 1556, a Fourth Amendment challenge to Oregon's statute requiring collection of DNA information from certain convicted offenders. In affirming the district court's grant of summary judgment in favor of Oregon, the court noted that one of the asserted state interests was preventing recidivism, and that Oregon "produced uncontroverted evidence documenting the high rates of recidivism among certain types of murderers and sexual offenders." (*Id.* at p. 1561.) Given the summary judgment posture of that civil case, it is hardly surprising that the court focused on whether there was "uncontroverted evidence" supporting the State's asserted interests. But *Rise* did not hold or suggest

that a Fourth Amendment challenge to an arrestee-collection statute in a criminal appeal must be sustained absent a showing of "uncontroverted evidence" that the arrestees covered by the statute "are likely to have committed" violent crimes. (ABOM 68.) Even if it had, that rule would not have survived *Maryland v. King*, which imposed no such requirement.

Finally, Buza contends that the State's "real argument" is that obtaining DNA profiles from arrestees will increase the number of hits to unsolved crimes, an argument Buza says proves too much because it would support DNA collection from any "other group[] of ordinary citizens who interact with the state." (ABOM 70.) Of course, the legitimate privacy interests of ordinary citizens are very different from those of someone who the police have probable cause to believe has committed a felony, and who is therefore subject to a valid custodial arrest. (See RBOM 53-54; *post*, p. 41.) And the relevant state interests in the arrestee context include not only the total number of hits, but also the interest in obtaining a comprehensive understanding of the past criminal activity and dangerousness of a current felony arrestee. (See *ante*, pp. 26-27.) The reasonableness balancing in this case is unique to the arrest context. Nothing in the DNA Act authorizes the collection of DNA identification information in the way suggested by Buza.[24]

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[24] Buza also argues that collecting DNA samples from all adult felony arrestees "slows the process" of obtaining DNA profiles from those arrested for violent felonies. (ABOM 71.) He offers no support for this argument, other than citing Justice Scalia's dissent in *King* discussing the timing of analysis in Maryland, Ohio, and Louisiana. (*King*, *supra*, 133 S.Ct. at p. 1988.) In California, it currently takes around 30 days on average to obtain a DNA profile from an arrestee. (See FAQs, *supra* [Effects of the All Adult Arrestee Provision, Q2]; cf. California Department of Justice, *Attorney General Kamala D. Harris Announces End to Backlog that Slowed DNA Analysis at Justice Department Labs*, Jan. 25, 2012

(continued…)

b. Collection and analysis at booking

California collects DNA from arrestees at booking and begins to analyze it immediately. (§ 295, subd. (i)(1)(C); § 296.1, subd. (a)(1)(A); see ABOM 71-82 & fn. 48.) This policy tracks the approach of the federal government and most other states that collect DNA identifying information from arrestees.[25] Buza contends that it "does not serve any legitimate non-investigative purpose" to begin the process at booking, rather than waiting until after a magistrate's probable cause determination at an arraignment. (ABOM 72.) That is incorrect for at least three reasons.

First, postponing collection and analysis of DNA samples until after a judicial probable cause determination would lengthen the process of obtaining DNA profiles in every case. (RBOM 52.) Buza contends that the delay would never be more than "two-to-four days" (ABOM 7), but that is not true. Buza's argument (ABOM 73-74) focuses on the general constitutional requirement of a "judicial determination[] of probable cause within 48 hours of arrest." (*County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 51; see ABOM 73-74.) That requirement, however, deals with arrestees who are "*held in custody* without having received a probable cause determination" for 48 hours. (*Id.* at p. 46, italics added.) Felony arrestees frequently do not remain in custody for 48 hours after their arrest, such as when they are released prior to arraignment according to the county

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(…continued)
<https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-end-backlog-slowed-dna-analysis> [as of Oct. 12, 2015].)

[25] At least 17 states collect DNA samples from arrestees at booking, and the vast majority of those states permit analysis to begin immediately. (See generally National Conference of State Legislatures, DNA Arrestee Laws <http://www.ncsl.org/Documents/cj/ArresteeDNALaws.pdf> [as of Oct. 12, 2015].)

bail schedule (see § 1269b, subd. (b)), or on their own recognizance, or when the prosecutor delays in bringing charges. Immediate release of low-level felony arrestees has become increasingly prevalent following the shift of convicted felons from state prison to county jail under Realignment. In such cases, an arrestee's arraignment can take place well beyond two-to-four days after his arrest, and Buza's proposed postponement would substantially delay the State's ability to obtain DNA identifying information from the arrestee.[26]

Second, Buza forgets that information about an arrestee's past criminal conduct is relevant to "the exercise of prosecutorial discretion." (*Loder*, *supra*, 17 Cal.3d at p. 866.) Even where a felony arrestee is not initially charged, information that he is connected to a past crime might inform a prosecutor's decision to proceed with charges regarding the crime of arrest. If the past crime is an unsolved one involving a forensic DNA sample, the only way to make that connection is by obtaining the arrestee's DNA profile at booking.

Third, postponement would also present greater logistical difficulties than a system where officials obtain DNA samples along with fingerprints, photographs, and other identifying characteristics from all felony arrestees during intake at the jail. (RBOM 52.) Among other things, law enforcement would have to implement separate procedures for those arrested pursuant to a warrant, for whom a probable cause determination

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[26] Buza asserts that there is "no possibility" that an arrestee's DNA profile will be known by the time of an arraignment that occurs two to four days after arrest. (ABOM 75.) While that is currently true in many cases, in the future, Rapid DNA technology may provide DNA identifying information before the time of arraignment in the typical case. (See *ante*, p. 27.)

has already been made by a magistrate, and those arrested based on the probable cause determination of a police officer.

Buza argues that the arraignment "serves a vital constitutional function." (ABOM 73.) That is true, but that function has never been understood to involve deciding whether officials may collect identifying information from a person who is already subject to a custodial arrest based on a police determination of probable cause. It is that initial police determination that "reduce[s]" the arrestee's "expectation of privacy and freedom from police scrutiny," and justifies bringing the arrestee into custody and collecting his identifying characteristics. (*King*, *supra*, 133 S.Ct. at pp. 1978.) Moreover, it remains unclear what constitutional value would be served by postponing the collection of DNA identifying information until after arraignment. Buza and the Court of Appeal both reason, incorrectly, that collecting DNA identifying information at booking constitutes a "suspicionless search[]" regarding past "criminal conduct unrelated to the crime of arrest." (Opn. pp. 27, 38; see ABOM 34.) But it would not address that concern to wait for the judicial determination made at an arraignment, which focuses only on whether there is probable cause to believe an arrestee committed the crime of *arrest*.

Buza also expresses concern for the minority of felony arrestees who—unlike him—are never charged, arraigned, or convicted for the crime of arrest. (E.g., ABOM 75-77.) Of course, submitting to a buccal swab is not the only privacy intrusion experienced by such individuals as a consequence of a valid custodial arrest. Felony arrestees are often handcuffed, transported to jail in a locked squad car, searched, fingerprinted, photographed, and detained. The collection of DNA identification information as part of the booking process imposes only a modest incremental intrusion on an arrestee's privacy interests. (See *post*, p. 41.) Further, felony arrestees who are never charged or convicted are eligible to

have their DNA samples destroyed and their identification profiles expunged from the State's database. (See *post*, pp. 50-51.)[27]

Finally, Buza argues that obtaining DNA identifying information prior to arraignment "is an invitation for abuse" and "police overreaching," suggesting that police will subject citizens to illegal custodial arrests for the purpose of obtaining DNA profiles. (ABOM 80, 82, capitalization omitted.) Speculation that officials will administer a statute improperly is not a proper reason for a court to strike down the statute. (See, e.g., *Whalen v. Roe* (1977) 429 U.S. 589, 601-602.) Nor is there any basis for Buza's speculation. Lawful methods exist by which police may obtain a suspect's DNA identification profile: if police have probable cause, they can obtain a warrant; if police lack probable cause, they can obtain a DNA sample from a cigarette butt or soda can discarded by the suspect. (See *People v. Gallego* (2010) 190 Cal.App.4th 388, 395-396.) Moreover, there is always a substantial check against unlawful police conduct in this area. An arrest that is not supported by probable cause may violate the Fourth Amendment and give rise to a claim under 42 U.S.C. § 1983. (See, e.g., *Caballero v. City of Concord* (9th Cir. 1992) 956 F.2d 204, 206.)

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[27] Buza argues that in approximately 15% of felony arrests, prosecutors decline to file charges, based on his own interpretation of state data. (ABOM 13.) As the report he cites expressly warns, "[c]aution should be used when interpreting this information." (Cal. DOJ, Crime in California 2014, Table 38A <https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd14/cd14.pdf> [as of Oct. 13, 2015].) In any event, a prosecutor's decision not to charge an arrestee does not imply that the police lacked probable cause to make the arrest. (Cf. *United States v. Lovasco* (1977) 431 U.S. 783, 791 [noting "that prosecutors are under no duty to file charges as soon as probable cause exists"].)

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

Weighed against the considerable public interests served by collecting and recording DNA identifying information from arrestees, any incremental intrusion on arrestees' legitimate privacy interests is minimal. Arrestees have diminished expectations of privacy in certain important respects, and no privacy interest in their identification. The DNA Act protects arrestees' privacy interests in their DNA samples, erecting confidentiality protections, restricting the use of samples and the identification profiles obtained from them, and imposing criminal and civil penalties for violations. Arrestees who are not ultimately convicted may have their samples destroyed and records of their identification profiles expunged. Under these circumstances, the constitutional balance weighs in favor of the State.

1. Arrestees have diminished expectations of privacy and no privacy interest in their identity

A custodial arrest constitutes "a most extreme interference with the 'right to be left alone.'" (*People v. Crowson*, *supra*, 33 Cal.3d at p. 629 (lead opn. of Kaus, J.).) The legitimate privacy expectations of an individual who is arrested and taken into custody after police determine that there is probable cause to believe he committed a crime "'necessarily are of a diminished scope.'" (*King*, *supra*, 133 S.Ct. at p. 1978, alteration omitted.) Law enforcement officials may subject an arrestee to a range of restraints and intrusions, including prolonged detention and searches of intimate body parts. (See *ibid.*; *Florence, supra*, 132 S.Ct. at pp. 1517-1519.) In particular, arrestees "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; *Jones v. Murray* (4th Cir. 1992) 962 F.2d 302, 306; RBOM 54.)

Buza never addresses this authority, but proposes several different theories for why the privacy expectations of felony arrestees preclude the State from collecting DNA identification information at booking. First, he asserts that "[i]ndividuals arrested for lower level non-violent offenses do not require the same close pretrial supervision as those charged with violent crimes and accordingly have greater privacy expectations." (ABOM 87.) But this court has long sanctioned intrusive searches that apply to *anyone* subject to a custodial arrest, regardless of the crime of arrest. For example, police may conduct a booking search "'at the place of incarceration during the period of post-arrest detention,'" for purposes that include "promot[ing] jail security." (E.g., *People v. Hamilton* (1988) 46 Cal.3d 123, 137.) The "permissible scope of a booking search is broad" and "may even extend to a strip search.'" (*Id.* at 138, 137; see also *People v. Miranda* (1987) 44 Cal.3d 57, 81-82.) The court has never suggested, however, that such searches may only be conducted on those arrested for violent felonies.

Second, Buza contends that "arrestees who are never charged or prosecuted have substantially greater privacy expectations than pre-trial detainees" who "have been charged by a prosecutor and held over." (ABOM 77, 79, capitalization omitted.) That statement is inapplicable to Buza, who was charged, arraigned, prosecuted, and convicted of arson and other crimes. (See RBOM 4.) It also misses the point. The reasonable expectations of privacy of an individual who is at liberty *after* being released without charges following an arrest may differ in some respects from those of an arrestee who remains in pre-trial detention after an arraignment. The operative question here, however, concerns the privacy expectations of an individual at the time of a custodial arrest supported by a police determination of probable cause to believe he committed a felony. At that juncture, an arrestee's privacy expectations are substantially diminished in important respects, and he has no reasonable expectation of

privacy with respect to his identification. (*Robinson*, *supra*, 47 Cal.4th at p. 1121.)[28]

Third, Buza argues that the collection of a DNA sample from an arrestee at booking and the analysis of that sample to obtain a DNA identification profile is equivalent to an "extended restraint of liberty following arrest." (ABOM 80, internal quotation marks omitted, quoting *Gerstein v. Pugh* (1975) 420 U.S. 103, 114.) But the case Buza relies on provides no support for his argument. It involved "prolonged detention" prior to trial, which "may imperil the suspect's job, interrupt his source of income, and impair his family relationships." (*Ibid.*) In light of those considerations, the federal Supreme Court held that the Fourth Amendment requires a judicial determination of probable cause "as a prerequisite to" such prolonged pre-trial detention. (*Ibid.*) In contrast, the physical intrusion resulting from a buccal swab is minimal and swift. (See *post*, pp. 43-44.) If the arrestee is not charged, or if he is released on bail or his own recognizance, he is free to return to his job and family. The DNA sample obtained at booking and the identifying information derived from it are subject to protections that safeguard the arrestee's privacy interests going forward. (See *post*, pp. 44-46.)

2. The DNA Act, and the State's implementation of that Act, protect the privacy interests of arrestees

Buza makes no complaint about the State's method of obtaining DNA samples from arrestees, which generally entails a buccal swab of an

[28] Buza asserts that "California's DNA regimen is blind to [the] distinction" between arrestees who are charged and those who are not. (ABOM 80.) Not so: arrestees who are never convicted or charged are eligible to have their DNA samples destroyed and their information expunged from the State's databases, provided, of course, that they have no other qualifying offenses. (See *post*, pp. 50-51.)

arrestee's inner cheek cells. (§ 295, subd. (e).) That "gentle process" involves only "a light touch on the inside of the cheek" (*King*, *supra*, 133 S.Ct. at p. 1969), and arrestees typically administer the swab themselves. (See RBOM 54-55.)[29] Instead, Buza focuses on the State's analysis of arrestee samples to obtain DNA identification profiles and the subsequent retention and use of that information. (E.g., ABOM 42.)[30] He argues that the DNA Act provides "little protection" for arrestees' privacy interests. (ABOM 47, capitalization omitted.) Buza is incorrect. The DNA Act contain numerous statutory safeguards designed to protect privacy interests, and the manner in which the State implements the Act provides additional protection.

The DNA 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 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

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[29] Cal. DOJ, Buccal DNA Collection Kit Instructions <http://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/collection_kit.pdf> [as of Oct. 12, 2015].

[30] Buza cites a case that referred to the analysis of DNA samples to obtain a DNA profile as a "second search." (ABOM 42, quoting *Mitchell*, *supra*, 652 F.3d at p. 407.) That case applied essentially the same general balancing analysis that is required under this court's precedents, including taking into account the statutory "safeguards to prevent the improper use of DNA samples," and held that the challenged statute was constitutionally reasonable. (*Mitchell*, *supra*, at p. 399; see *id.* at pp. 400-401, 407-408.)

process DNA samples must be accredited and must meet federal and state quality-assurance requirements (§ 297, subd. (d)). Further, as a participant in the Combined DNA Index System (CODIS), California must meet strict privacy and quality control requirements set by the federal government. (See 42 U.S.C. §§ 14132(c), 14133(c); § 297, subds. (b), (d); *King*, *supra*, 133 S.Ct. at p. 1968 ["To participate in CODIS, a local laboratory must sign a memorandum of understanding agreeing to adhere to quality standards and submit to audits to evaluate compliance with the federal standards for scientifically rigorous DNA testing."]; see generally RBOM 10-11, 60-61.)

To ensure compliance with its requirements, the DNA Act imposes criminal and civil penalties for misuse of DNA samples or information. 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).) In addition, 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)), and any employee of the Department of Justice who knowingly misuses DNA information is liable for civil damages (§ 299.5, subd. (i)(2)(A)).

Moreover, the loci that California's DNA laboratory examines to generate DNA profiles have no known association with any physical or medical characteristic, and the resulting profile "is only useful for human identity testing." (Methodology, *supra*, at p. 240; see *King*, *supra*, 133 S.Ct. at p. 1968; *Kincade*, *supra*, 379 F.3d at p. 818; RBOM 8, 60.) DNA identification profiles are stored in the State's searchable database anonymously, without any reference to the arrestee's name. The same is true of the national database operated by the FBI. (See generally Methodology, *supra*, at p. 240.) Taken together, these "legislative and

executive action[s]" serve to "greatly diminish[]" any potential threat to arrestees' privacy interests. (*Loder*, *supra*, 17 Cal.3d at p. 869.)

Despite these protections, Buza suggests that the court's reasonableness balancing should consider the possibility that an arrestee's DNA sample could "reveal information regarding race, gender, ancestry, familial relationships, sexual orientation, current health, pre-disposition to genetic conditions and diseases (including mental illness and alcoholism), and behavioral traits including a propensity to violence." (ABOM 41.) He warns as well that the "advance of science" could reveal a "'purported "crime gene"'" that would "indicat[e] a pre-disposition to criminal behavior." (*Ibid.*) Buza's speculation should not inform the court's constitutional analysis. The DNA Act flatly prohibits any such use of an arrestee's DNA sample. (§ 295.1, subd. (a); § 295.2; § 299.5, subd. (i)(1)(A).)[31] That type of statutory restriction is normally sufficient to allay similar privacy concerns. (See *NASA v. Nelson* (2011) 562 U.S. 134, 155.) Nor is there any evidence of the kind of abuse that Buza posits.[32] As Buza himself recognizes in a different context, "this Court should not decide"

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[31] "[E]xcept for a genetic indicator of gender, no markers that code for known biological traits are analyzed." (See Chin et al., Forensic DNA Evidence (The Rutter Group 2014) § 8.19.) Although the State does have a policy authorizing "familial searches" on the separate database of profiles from convicted offenders, that type of search involves only a neutral comparison of identifying markers. (See RBOM 61-62; *post*, pp. 48-49.)

[32] Cf. *County of San Diego v. Mason* (2012) 209 Cal.App.4th 376, 383 ("*Mason*") ["There is no evidence in the record to indicate that the County contracted laboratory would intentionally or unintentionally violate Mason's privacy interest by sharing or disclosing his DNA information. With no evidence to the contrary, we follow the maxim of jurisprudence that the law has been obeyed."].

this case based on "hypothetical issues [that] are not before the Court." (ABOM 91, bold emphasis omitted.)[33]

Similarly, Buza quotes the Court of Appeal for the statement that "studies have begun to suggest links between CODIS loci and susceptibility to certain diseases . . . ." (ABOM 43, fn.23, quoting opn. pp. 24-25, fn. 9.) In fact, the scientific literature has found no evidence that sensitive genetic or medical information can be gleaned from DNA identification profiles. (RBOM 62-63; see Katsanis et al., *Characterization of the Standard and Recommended CODIS Markers* (Jan. 2013) 58 J. Forensic Sci. S169, S171; Methodology, *supra*, at pp. 240, 228.) Even if science did permit DNA profiles to be used in that way, the DNA Act would prohibit it. (See *ante*, pp. 44-45.)

Buza criticizes the State for its "long-term retention of the DNA sample." (ABOM 42, capitalization omitted.) As the State explained in its opening brief (RBOM 57), retaining DNA samples is an "important quality control measure" that allows the State to confirm every database hit and

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[33] Buza also cites two federal Supreme Court decisions for the proposition that the government's access to sensitive personal information poses a threat to privacy. (See ABOM 45-46.) Those cases involved police searches revealing large amounts of sensitive personal information that were not subject to specific statutory protections and use restrictions. In *United States v. Jones* (2012) ___ U.S. ___ [132 S.Ct. 945, 948], the court considered the attachment of a GPS tracking device to an individual's vehicle, and ongoing use of that device to monitor the vehicle's movements, which provided "more than 2,000 pages of data over [a] 4-week period." In *Riley v. California* (2014) ___ U.S. ___ [134 S.Ct. 2473, 2489], the court addressed whether, incident to an arrest, police may search a smart phone that can potentially hold "millions of pages of text, thousands of pictures, or hundreds of videos." Here, in contrast, California's collection of DNA samples from felony arrestees is subject to robust protections, and the only information obtained by the State is an arrestee's DNA identification profile.

thereby avoid "any kind of potential error . . . that could cause a lead to be followed and a warrant to be issued for the wrong person." (Methodology, *supra*, at p. 246; see 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 [describing sample retention as "[o]ne of the most important quality practices and protections"].) Buza offers no response.

Buza also challenges the DNA Act's requirement that arrestee samples must be used "only for identification purposes" (§ 295.1, subd. (a)) arguing that this requirement provides "little protection," and could authorize "an assessment of whether that individual's DNA shows a genetic tendency to criminal behavior." (ABOM 47, capitalization omitted.) A similar argument has been made and rejected before. (See *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 508.) The DNA Act permits a neutral comparison of identifying markers contained in an arrestee's DNA to determine if they match the corresponding markers in another DNA sample. It does not authorize—indeed, it expressly prohibits—the type of genetic analysis described by Buza. (§ 295.1, subd. (a); § 295.2.)[34]

Finally, Buza contends that California's policy authorizing "familial searches" of DNA identification profiles in the database for convicted offenders "aggravates the privacy consequents of DNA collection." (ABOM 48, capitalization omitted.) That policy is of little relevance to this

[34] Likewise, the "identification purpose" authorized by section 295.1 cannot reasonably be analogized to police searches of "an arrestee's cell phone, his tablet, or even his home." (ABOM 57.) Even if the phrase "identification purposes" were capable of the near-limitless interpretation suggested by Buza, if that interpretation was constitutionally problematic, then the proper course would be to construe the phrase narrowly in order to avoid any constitutional question. (See, e.g., *In re Klor* (1966) 64 Cal.2d 816, 821.)

case because, as Buza acknowledges, it does not apply to profiles in the database for arrestees. (*Ibid.*) In any event, Buza's concerns are misplaced. As the State explained in its opening brief (RBOM 61-62), the ability to conduct "familial searches" does not give the State any special genetic insight into who a convicted offender's relatives are. A familial search involves only a neutral comparison of certain identifying markers in the DNA of known offenders against the same markers in a DNA sample obtained from a crime scene. In the narrow category of cases in which this comparison is authorized, it may provide a lead that the unknown perpetrator of an unsolved crime is likely a close relative of a known convicted offender. (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 Oct. 12, 2015].) That lead definitively excludes the convicted offender as the source of the crime-scene sample. Police must use traditional investigation methods to pursue the lead further, and may not make any arrest until they have developed probable cause to link the relative to the unsolved crime. Convicted offenders cannot have a reasonable expectation that their privacy interests would prohibit the State from obtaining and pursuing such a lead.[35]

[35] In a footnote, Buza suggests that the DNA Act may "exacerbate the already racially disproportionate representation in our DNA databases." (ABOM 81, fn. 47, citation omitted; see also ABOM 49.) If the composition of the arrestee population does not mirror that of the general population, the questions or concerns raised by that fact are beyond the issues before the court in the present case. Such concerns provide no constitutional basis for holding that the facially neutral DNA Act is unconstitutional.

3. Arrestees who are not convicted may have their DNA samples destroyed and identification profiles expunged

As an additional protection, California allows arrestees to have their DNA identification information expunged and their samples destroyed if no felony charges will be filed against them, their case is dismissed, or they are found not guilty or factually innocent of the charged offense. An arrestee may initiate the expungement process in one of two ways. First, he may use the streamlined process developed by the California Department of Justice, involving a two-page form that is available online.[36] In the Department's experience, this process is usually completed within two to four weeks so long as the arrestee provides the required documentation, with the vast majority of requests resulting in expungement. (See FAQs, *supra* [Getting Expunged or Removed from the CAL-DNA Data Bank, Q1]; RBOM 63-64.) Second, an arrestee may seek a court order requiring expungement. (§ 299, subds. (b), (c).) There is a one-page Judicial Council form, also available online, that allows arrestees to initiate this procedure.[37]

Although Buza criticizes these procedures as unduly cumbersome, they are not.[38] He suggests that there is no clear way for the arrestees "to even learn of the existence of the expungement process." (ABOM 85.) But a simple internet search, using terms such as "California and DNA" or

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[36] See Cal. DOJ, Streamlined DNA Expungement Application Form <http://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/expungement_app.pdf> [as of Oct. 12, 2015].

[37] See CR-185, Petition for Expungement of DNA Profiles and Samples <http://www.courts.ca.gov/documents/cr185.pdf> [as of Oct. 12, 2015].

[38] Of course, as a convicted arsonist, Buza himself is not eligible for expungement.

"DNA and expunge," will quickly lead any arrestee to the pages on the Department of Justice website describing California's expungement process and providing the required forms. Buza also argues that "[f]ormer arrestees who are not charged must wait until the statute of limitations has run . . . before applying for expungement." (ABOM 84.) That is not true. Such arrestees may request expungement before the statute of limitations has run by submitting a letter from a prosecutor certifying that no charges will be filed based on the arrest, or a copy of the complaint reflecting that only misdemeanor charges were filed.[39]

Buza acknowledges that the federal government and the majority of states that collect DNA from arrestees employ similar procedures, requiring arrestees to initiate the expungement process, unlike the automatic-expungement procedure that Buza champions. (ABOM 83, fn. 49.) He contends that California's process renders the DNA Act unconstitutional because arrestees have no absolute legal entitlement to expungement; courts retain "the discretion to grant or deny the request" for expungement based on the particular circumstances of a case. (ABOM 84, italics omitted, quoting § 299, subd. (c)(1); see also *ibid.* [noting that court's decision is not reviewable by petition or writ].) Buza does not identify any instances where the Department of Justice and the courts have denied expungement requests even though the statutory criteria for expungement were satisfied. Although the State does not believe that the state or federal Constitutions would require expungement in that scenario, that issue could be litigated in a particular case if one ever arose. But the mere possibility of such a case does not make the DNA Act categorically unreasonable.

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[39] See Cal. DOJ, Streamlined DNA Expungement Application Form, p. 2 <http://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/expungement_app.pdf> [as of Oct. 12, 2015].

Buza also suggests that the number of arrestees who have requested expungement is relevant to the court's analysis. (See ABOM 85-86.) He faults the State for "offer[ing] no statistics" regarding the number of expungement requests in California. (ABOM 86 & fn. 52, italics omitted.) And he references a 2012 study funded by the National Institute of Justice for the conclusion that "very few people initiate" the expungement process in California and other states that require arrestees to initiate expungement. (ABOM 85.) The State does not maintain comprehensive statistics on requests for expungement, but the Department's experience so far has been that the number of requests is low relative to the pool of potentially eligible arrestees. The fact that only a small percentage of arrestees have taken advantage of the readily available process for requesting expungement, however, does not establish that the DNA Act is unreasonable. Indeed, it may suggest that many arrestees who (unlike Buza) ultimately were not charged or convicted do not share his stated concern about the maintenance of their DNA identification information in confidential government files. (See ABOM 86.)

Finally, Buza argues that "the state has no legitimate governmental interest—zero—in continued retention" of DNA identifying information from "non-convicted arrestees." (ABOM 88, italics omitted.) That argument is belied by this court's decision in *Loder*, which Buza does not discuss or even cite. *Loder* directly addressed the State's retention and use of identifying characteristics resulting from "an arrest which did not result in conviction." (*Loder*, *supra*, 17 Cal.3d at p. 862.) As the court recognized, the State has a "compelling interest" in preserving such records for identification purposes in the future. (*Id.* at pp. 864.) That is why California generally maintains records of photographs, fingerprints, and other identifying characteristics collected from arrestees, even when the arrest does not result in a conviction. DNA identifying information serves

the same purposes. California's decision to allow arrestees who are not charged or convicted to request expungement of their DNA samples and identifying information reflects a substantial accommodation for those who prefer to have this information removed from the State's confidential databases. But the State's continued retention and use of DNA identifying information from eligible arrestees who make no such request serves compelling interests and is reasonable.

* * *

Although much of Buza's answer brief focuses on differences between the DNA Act and Maryland law, his true argument appears to be much broader. He suggests that the DNA Act would violate the California Constitution "[e]ven if California's DNA regimen were identical to Maryland's." (ABOM 39.) In discussing a law enacted by the State Legislature after the filing of Buza's answer brief—which would revise the DNA Act to address certain differences between the California and Maryland statutes in the event that this court upholds the decision below—Buza argues that there would still be "compelling grounds for finding a violation of the California Constitution, even with the proposed revisions." (ABOM 91.)[40] At bottom, Buza seems to believe that *any* regime authorizing the collection of DNA from arrestees before they are convicted should be unconstitutional. This court should reject Buza's invitation to adopt that view under the California Constitution. The minimal burden

[40] The State agrees with Buza's position that the referenced statute should not affect the Court's analysis in this case. (See ABOM 89-91.) By its terms, the statute will only modify the DNA Act "if the California Supreme Court rules to uphold the California Court of Appeal decision in *People v. Buza* (2014) 231 Cal.App.4th 1446 in regard to the provisions of Section 298 [and 299] of the Penal Code . . . ." (Assem. Bill No. 1492 (2015-2016 Reg. Sess.) §§ 3, 5.)

imposed by collecting a DNA sample, and then using it to develop a profile that precisely identifies the specific individual arrested, is justified by the fact of a valid custodial arrest based on probable cause to believe the individual has committed a felony. 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.

IV. THE DNA ACT IS CONSISTENT WITH THE PRIVACY PROTECTION IN ARTICLE I, SECTION 1 OF THE CALIFORNIA CONSTITUTION

Buza also contends that the DNA Act violates the privacy clause of the California Constitution. (Cal. Const., art. I, § 1; e.g., ABOM 65, 100; see also ABOM 1 (characterizing the issues presented to include whether the DNA Act violates art. I, § 1). That issue is not before this court. The Court of Appeal did not address whether the DNA Act offends the privacy clause. (Opn. p. 53.) The State's petition for review did not present that issue, and Buza did not raise it in an answer or a separate petition for review. (See generally Cal. Rules of Court, rule 8.500(a)(2).) Although this court may nonetheless be free to reach the issue (see Cal. Rules of Court, rule 8.516(b)(2)), there is no clear reason for it to do so here.

In any event, Buza's argument lacks merit. First, as the Court of Appeal recognized, "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; see *ante*, pp. 13-14.) Here, the DNA Act is reasonable under section 13 for the reasons discussed in Parts II and III above. Because the DNA Act satisfies section 13, the statute does not violate the privacy clause.

Second, cases construing the privacy clause establish that the State's collection of DNA identifying information from arrestees, subject to

substantial privacy protections and use restrictions, does not offend article I, section 1. One of this court's earliest decisions regarding the privacy clause rejected an arrestee's argument "that official retention and dissemination of his arrest record violates his right of privacy (Cal. Const., art. I, § 1)." (*Loder*, *supra*, 17 Cal.3d at p. 864.) The court emphasized that the constitutional right of privacy "is not absolute." (*Ibid.*) The State has a "compelling" interest in recording and retaining arrest records—typically containing photographs, fingerprints, and "other recorded physical description[s]"—which serve "the promotion of more efficient law enforcement and criminal justice." (*Id.* at pp. 864-865.) Any threat to an arrestee's privacy from the State's retention and use of such records is mitigated by "legislative and executive action" including "criminal penalties for unauthorized dissemination" and other "safeguards against the improper dissemination of arrest records." (*Id.* at pp. 869, 873, 872.) There is no basis for concluding that the privacy clause applies any differently here.[41]

Even outside the search-and-seizure context, the court has acknowledged that our Constitution permits the collection and use of sensitive information so long as the information is protected from disclosure. *Hill* addressed the standard governing a private right of action against a nongovernmental entity under the privacy clause. (*Hill*, *supra*, 7 Cal.4th at p. 9.) The court observed that "if intrusion is limited and confidential information is carefully shielded from disclosure except to

[41] Indeed, one of the cases that Buza relies on also supports this conclusion, noting that the privacy interest in DNA information "is not absolute," and "can be abridged for a compelling opposing interest where laws are in place to limit the use of the DNA to a specific purpose intended to satisfy that interest." (*Mason, supra*, 209 Cal.App.4th at p. 381; see ABOM 30 [citing *Mason*].)

those who have a legitimate need to know, privacy concerns are assuaged." (*Id.* at p. 38.) Buza ignores this passage, relying on *Hill* instead for its general statement that "[i]nformational privacy is the core value furthered by" article I, section 1. (*Id.* at p. 35; see ABOM 29.) While that is an accurate quotation, *Hill* also acknowledged that the privacy clause was not intended to forbid the government from collecting sensitive information in service of public interests. As the court noted, the ballot argument in favor of the privacy clause stated that the clause "will not prevent the government from collecting any information it legitimately needs. It will only prevent misuse of this information for unauthorized purposes and preclude the collection of extraneous or frivolous information.'" (*Hill*, *supra*, p. 22, italics omitted.) Collection of DNA identifying information from adult felony arrestees under the DNA Act advances legitimate and important public interests. (*Ante*, pp. 24-40; RBOM 39-48.) The Act narrowly limits the use of this information and protects against disclosure or other unauthorized uses. (*Ante*, pp. 43-49; RBOM 56-63.) That is not the type of conduct the privacy clause forbids.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: October 16, 2015

Respectfully submitted,

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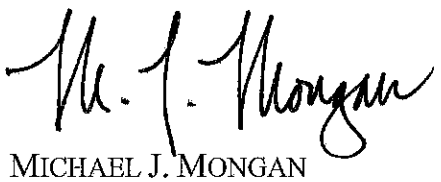

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CERTIFICATE OF COMPLIANCE

I certify that the attached Reply Brief on the Merits uses a 13 point Times New Roman font and contains 17,061 words.

Dated: October 16, 2015

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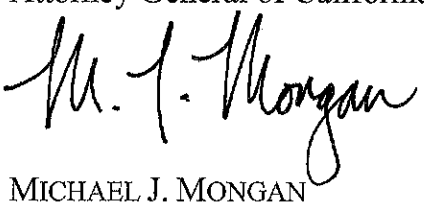

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DECLARATION OF SERVICE BY U.S. MAIL

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 October 16, 2015, I served the attached **REPLY 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 October 16, 2015, at San Francisco, California.

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Signature

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