

# SUPREME COURT COPY

No. S223698

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IN THE  
**Supreme Court of California**

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THE PEOPLE OF THE STATE OF  
CALIFORNIA,

Plaintiff and Respondent,

v.

MARK BUZA,

Defendant and Appellant.

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SUPREME COURT  
FILED

DEC 02 2015

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Deputy

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

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**UNOPPOSED APPLICATION FOR LEAVE TO FILE  
AMICUS BRIEF AND [PROPOSED] BRIEF  
FOR AMICUS CURIAE DNA SAVES IN SUPPORT OF  
THE STATE OF CALIFORNIA AND REVERSAL**

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Counsel for Amicus Curiae DNA Saves

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**UNOPPOSED APPLICATION OF DNA SAVES FOR  
LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF THE  
STATE OF CALIFORNIA AND REVERSAL**

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Pursuant to California Rules of Court, Rule 8.520(f), amicus curiae DNA Saves respectfully submits this application to file the accompanying amicus brief in support of plaintiff and respondent, The People of the State of California (the “State”). Both appellant and respondent have represented that they do not object to the filing of this brief.

**STATEMENT OF INTEREST**

DNA Saves is a 501(c)(4) non-profit association that educates policy-makers and the public about the value of forensic DNA.<sup>1</sup> It was

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<sup>1</sup> Pursuant to Rule 8.520(f)(4), DNA Saves states that no party or any counsel for a party in the pending appeal authored the proposed amicus

formed by Jayann and David Sepich in late 2008, marking the five-year anniversary of the vicious murder of their daughter, Katie. Had a DNA sample been taken from Katie's murderer, Gabriel Avilla, upon arrest for an unrelated crime, the Sepichs would have discovered who killed their daughter only three months after her death. Instead, Avilla remained free for over three years to victimize more daughters, while the Sepichs waited for answers. The Sepichs hope that by advocating for better DNA testing laws they can prevent other parents from asking "why?" DNA Saves was granted leave to participate as an *amicus curiae* in prior proceedings in this

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brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief; and that the following individuals and organizations, who are not parties to this action, have made monetary contributions intended to fund the preparation and submission of this brief: Lisa Adair, Mike Antiporda, Jill Barkley, Francis Beeman, BES Rental & Sales, Joe Brininstool, Bill Brown, Carol Brown, John Caraway, Suzanne Carlsen, Staci Carrell, Robert Chacon, Denise Chacon, Michael Cleary, Anthony Cooper, Stacy Cooper, T. Arlene Cooper, Ann Cross, Danny Cross, Mike Currier, Don Dayton, Christy Dickerson, Juan Dorado, Tommy and Sheryl Dugger, William D. Finley, Jay Francis, Tracy Francis, David Fritschy, Myrtle Fritschy, Patty Fugate, Deanna Garringer, Mike Garringer, Garth Goodey, Heidi Goodey, John Gratton, Tom Gray, Jeanne Hall, Karla Hamel, Joan Hargrave, Veronica D. Hernandez, Chad Hewitt, Todd Hyden, Chad Ingram, Matthew John, Chris Jones, Kathy M. Jones, Erin Kennedy, Debra Kimbley, Peggy King, Cindy Klein, Jeff Knox, Jody Knox, Gary Lanier, Matt Leroch, Tracy Leroch, Rita London, Sam Mendez, Gabriel Lujan, Charles and Phyllis McEndree, Sam Mendez, Larry Mitchell, Bob Murray, Judy Murray, Vance Parrott, PR Consultants, Inc, Springtime Janitorial Supply, Dave & Kim Rogers, Shauna Rodgers, Kimberly Rogers, Dave and Jayann Sepich, Mike and Karen Sepich, Roger and Cindy Short, Service Solutions, Kassie Simmons, Craig Stephens, Sheri Stephens, Brenda Suggs, Thermo Fisher Scientific, Paul Trone, Debe Wagner, Dustin Walker, Judi Waters, James Weller, Janelle Whitlock, Richard Wilkinson, Sharon A. Williams, Ryan Williamson, Connie Wilson, Alan Wood, James Wood, Christopher Woodland, and Bob and Caroline Yeager.

case. (*See People v. Buza*, No. S196200 (leave to file brief granted June 11, 2012).)

DNA Saves is committed to working with every state and the federal government to pass laws allowing DNA to be taken upon arrest, and to provide meaningful funding for DNA programs. In January 2007, New Mexico implemented “Katie’s Law,” which requires DNA profiles for most felony arrestees to be included in the database. New Mexico’s DNA database program has already registered more than 1,000 matches of unsolved crimes to individual arrestee DNA profiles. Forty-nine of those matches identified suspects in unsolved murders, and 148 identified suspects in unsolved sex-related crimes. The very first arrestee sample was matched to a double homicide case, leading to a conviction.

DNA Saves is also vitally committed to ensuring that courts correctly apply the Constitution and allow legislatures to enact these sensible and effective laws. The resolution of this issue will have a direct and profound effect on DNA Saves’ efforts to expand the use of DNA identification of arrestees throughout the country so that more recidivist crime can be prevented.

### **NEED FOR FURTHER BRIEFING**

DNA Saves is familiar with the issues and the scope of their presentation and participated as an amicus in prior proceedings in this case and in other important cases raising similar issues. (*See People v. Buza*, S196200 (leave to file brief granted June 11, 2012); *Maryland v. King* (2013) 133 S. Ct. 1958; *Haskell v. Harris* (9th Cir. 2012) 669 F.3d 1049, reh’g granted, 686 F.3d 1121, op. on reh’g en banc, (9th Cir. 2014) 745 F.3d 1269 (en banc); *United States v. Mitchell* (3d Cir. 2011) 652 F.3d 387 (en banc); *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010), vacated as moot, *United States v. Pool* (9th Cir. 2011) 659 F.3d 761 (en banc).)

As a public interest organization dedicated to the protection of lives through DNA identification of arrestees, DNA Saves believes that further briefing will aid the Court by providing vital information and argument on the critical interest that the government and the people have in obtaining DNA identification of all arrestees and how that interest far outweighs the limited interest arrestees have in the privacy of their identities. Further, the brief discusses the myriad protections of the law that prevent the government from going beyond this very limited use of arrestees' DNA and why it would be inappropriate for the Court to rule based on speculation about potential government abuse that has never been a problem in the history of DNA identification profiling.

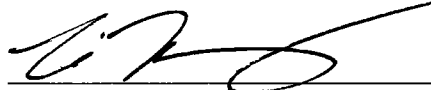
Mandatory DNA sampling of arrestees, as it is implemented in the California DNA Act, fully comports with all constitutional requirements. DNA Saves therefore urges the Court to reverse the judgment below, which fails to implement the Supreme Court's ruling in *King* and fails to recognize that the interests of the government and its law-abiding citizens in protection from preventable violent crimes outweighs the non-existent privacy interest arrestees have against accurate and minimally-invasive DNA profiling for identification purposes.

## CONCLUSION

For the foregoing reasons, DNA Saves respectfully requests that this court grant leave to file the accompanying amicus brief.

November 20, 2015

Respectfully submitted,



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**[PROPOSED] BRIEF FOR AMICUS CURIAE DNA SAVES IN  
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**INTRODUCTION**

Arrestee DNA identification “is a reasonable search that can be considered part of a routine booking procedure.” (*Maryland v. King* (2013) 133 S. Ct. 1958, 1980.) It serves precisely the same purposes as fingerprinting and photographing, which are likewise “legitimate police booking procedure[s],” (*id.*), and which have never raised any constitutional concerns. Like fingerprinting and photographing, DNA sampling under the stringent protections of the DNA and Forensic Identification Database and Data Bank Act of 1998 (Cal. Penal Code, § 295 *et seq.*) (the “DNA Act”), as amended by Proposition 69 in 2004, is minimally intrusive, and useful only for identification. The only difference

is that it is a *better* means of identification that is more effective in protecting the public from recidivist criminals. California law, just like the Maryland law upheld by the U.S. Supreme Court in *King*, allows DNA testing *solely* for purposes of identification: to identify the arrestee as the person who has a particular DNA profile. This is no different from fingerprinting and photographing, which identify the arrestee as the person who has particular fingerprints or visual traits.

The Court of Appeal, however, departed from *King* in concluding that provisions of the DNA Act violate Article I, Section 13 of the California Constitution. (*People v. Buza* (2014) 180 Cal.Rptr.3d 753.) In the Court of Appeal's view, the purpose of the DNA Act "is investigation of crime, not identification of arrestees," and the differences in the California and Maryland DNA laws "significantly alter the weight of the governmental interests and privacy considerations to be balanced in determining constitutionality under the Fourth Amendment." (*Id.* at p. 767.)

The Court of Appeal seriously erred. Arrestee DNA, like fingerprinting or photographs, serves only the purpose of identification, enabling law enforcement to learn who the person in custody is by reference to uniquely identifying markers and information already lawfully in the government's possession. While DNA profiles can, and do, aid investigations when they match evidence from crime scenes, fingerprints and other identification tools are also used in the same way. Nothing in either the U.S. or California Constitutions disables law enforcement from connecting such identifying information with other evidence left at a crime scene. Indeed, such a holding would drastically imperil public safety. Making a DNA identification at the time of booking is critical, because it allows law enforcement to assess the dangerousness of the arrestee, and also helps solve past crimes, prevent future ones, and exonerate the



wrongly convicted or accused. Whether this Court views the validity of the DNA Act as a Fourth Amendment or a California Constitutional issue, the governmental interests in arrestee DNA sampling overwhelmingly outweigh the diminished privacy interests of Mr. Buza (a confessed arsonist) and other arrestees.

When the people authorized California, like the federal government and 27 other states, to take and use arrestee DNA profiles, they enacted a sensible law, employing the best identification technology available, in a manner that safeguards privacy interests and serves compelling governmental interests. And the law has produced results. Since the beginning of California's program through September 2015, a total of 2,516,941 DNA samples have been collected and logged, resulting in 43,451 hits, and 50,582 investigations aided. (Bureau of Forensic Sci., Cal. Dep't of Justice ("Cal. DOJ") *Proposition 69 DNA Data Bank Program Report for Third Quarter 2015* ([oag.ca.gov/sites/all/files/agweb/pdfs/bfs/quarterlyrpt-q3-2015.pdf](http://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/quarterlyrpt-q3-2015.pdf).) The number of hits and investigations aided have increased by over 400% since January 2009, when California implemented the rule requiring DNA collection from all adult felony arrestees. (Cal. DOJ, *CAL-DNA Hits Reported, January 1984 to March 2015* ([oag.ca.gov/sites/all/files/agweb/pdfs/bfs/cal\\_dna\\_hit\\_trends.pdf](http://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/cal_dna_hit_trends.pdf).)

We will never know the exact number of people whose lives will be saved, or crimes that will be prevented or solved, by identifying recidivist arrestees before they strike again. But if even a single life is lost or a single person is harmed by not allowing this simple and non-intrusive tool, that is one too many. If California is deprived of this useful tool, innocent people will die who would otherwise be saved, preventable harm will befall many others, and still others may languish in prison for crimes they did not commit while the real criminals remain at large. If there were real privacy interests at stake, perhaps these dire consequences would have to be

tolerated. But just as with traditional fingerprinting and other forms of identification, no arrestee has a protected interest in concealing his identity so that nobody can link him to crime scene evidence, and law enforcement have a compelling interest in assessing the dangerousness of the person in their custody. Future victims and their loved ones should not have to suffer and grieve because arrestees like Mr. Buza want to hide their identities. Arrestees' illegitimate interest in withholding their identifying information pales in comparison with the vital interests of these countless unknown future victims.

## **BACKGROUND**

### **A. Like Photographs And Fingerprints, DNA Testing Is Used Solely As An Identification Tool Under The Statute.**

Simply knowing an arrestee's name does not mean that that person has been fully identified. An arrestee may give a false name, the name may be, and likely is, shared by many other people, and a mere name may provide no information that is useful for determining an arrestee's dangerousness or the conditions under which he or she should be held. Accordingly, for more than 100 years, law enforcement agencies have routinely used other means to identify arrestees, including taking photographs and collecting fingerprints to learn the identity of the person in custody. Police have "us[ed] photography to capture the faces of criminals almost since its invention." (*King, supra*, 133 S. Ct. at p. 1975 (citation omitted).) A determined suspect, however, may change his facial features to evade photographic identification (*id.* at p. 1976) or may elude the scrutiny of a camera while carrying out misdeeds, thwarting the effort to compare a present likeness to a past one.

Better yet is fingerprinting, "[p]erhaps the most direct historical analogue" to DNA profiling technology. (*King, supra*, 133 S. Ct. at p. 1976.) Fingerprinting not only identifies a person by a unique set of

markers, but it also maintains a record that enables law enforcement to learn whether he or she is the same person involved in past crimes. (See *Anderson v. Commonwealth* (Va. 2007) 650 S.E.2d 702, 705; *United States v. Kincade* (9th Cir. 2004) 379 F.3d 813, 836 n.31 (en banc); *Jones v. Murray* (4th Cir. 1992) 962 F.2d 302, 306.) By the middle of the 20th century, “it was considered ‘elementary that a person in lawful custody may be required to submit to photographing and fingerprinting as part of routine identification processes.’” (*King*, at p. 1976 (quoting *Smith v. United States* (D.C. Cir. 1963) 324 F.2d 879, 882 (Burger, J.)).) Even the strong identifying power of fingerprints, however, can be evaded; “Criminals can easily hide their fingerprints by wearing gloves, but they cannot mask their DNA.” (*Haskell v. Harris* (9th Cir. 2012) 669 F.3d 1049, 1063, reh’g granted, (9th Cir. 2012) 686 F.3d 1121, op. on reh’g en banc, (9th Cir. 2014) 745 F.3d 1269 (en banc) (citing *United States v. Mitchell* (3d Cir. 2011) 652 F.3d 387, 414 (en banc))).<sup>1</sup>

“DNA identification represents an important advance in the techniques used by law enforcement to serve legitimate police concerns for as long as there have been arrests . . . .” (*King, supra*, 133 S. Ct. at p. 1975.) A DNA profile of the sort collected by California’s law “is used solely as an accurate, unique, identifying marker—in other words, as fingerprints for the twenty-first century.” (*Mitchell, supra*, 652 F.3d at p. 410; see also *King*, at p. 1979 (“It is undisputed that law enforcement officers analyze DNA for the sole purpose of generating a unique

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<sup>1</sup> The Ninth Circuit’s panel decision in *Haskell* was withdrawn when that court granted rehearing en banc. However, the en banc Ninth Circuit affirmed the district court’s decision in a short per curiam opinion that relied on *King*. While the panel opinion is no longer precedential in the Ninth Circuit, it has continuing persuasive value because of its detailed and thorough analysis of the DNA Act and issues in this case.

identifying number against which future samples may be matched.”.)  
“The information derived from the [DNA] sample is substantially the same as that derived from fingerprinting—an identifying marker unique to the individual from whom the information is derived.” (*Rise v. Oregon* (9th Cir. 1995) 59 F.3d 1556, 1559.), overruled on other grounds by *City of Indianapolis v. Edmond* (2000) 531 U.S. 32.) But “DNA is a further—and in fact a more reliable—means of identification” than fingerprints. (*United States v. Sczubelek* (3d Cir. 2005) 402 F.3d 175, 184.) DNA identification “provides a dramatic new tool” for identifying perpetrators because “[e]ven a suspect with altered physical features cannot escape the match that his DNA might make with a sample contained in a DNA bank or left at the scene of a crime within samples of blood, skin, semen, or hair follicles.” (*Id.* at p. 185 (quoting *Jones, supra*, 962 F.2d at p. 307); *see also Green v. Berge* (7th Cir. 2004) 354 F.3d 675, 679.) (“DNA is the most reliable evidence of identification—stronger even than fingerprints or photographs . . .”).)

Each person’s DNA is unique (with the exception of identical twins), and is found in samples from the crime scene and elsewhere. (*See* Nat’l Inst. of Justice (“NIJ”), *DNA Evidence: Basics of Identifying, Gathering and Transporting* ([nij.gov/topics/forensics/evidence/dna/basics/pages/identifying-to-transporting.aspx](http://nij.gov/topics/forensics/evidence/dna/basics/pages/identifying-to-transporting.aspx).) DNA can be found almost anywhere, such as on eyeglasses, a cigarette, a bite mark or a ligature; only a tiny sample of blood, hair or other body tissues or biological products are needed, even if invisible to the naked eye. (*Id.*)

In this case, the government sought a DNA sample from Mr. Buza pursuant to the DNA Act. The people of California recognized that DNA “analysis is a useful law enforcement tool for identifying and prosecuting criminal offenders and exonerating the innocent.” (Cal. Penal Code § 295(b)(1).) Thus, they enacted a requirement for law enforcement to

collect a felony arrestee's DNA sample "immediately following arrest, or during the booking . . . process or as soon as administratively practicable after arrest." (*Id.* at § 296.1(a)(1)(A).) "The purpose of [this] program is to assist . . . law enforcement agencies . . . in the expeditious and accurate detection and prosecution of individuals responsible for sex offenses and other crimes, the exclusion of suspects who are being investigated for these crimes, and the identification of missing and unidentified persons, particularly abducted children." (*Id.* at § 295(c).) "Like the collection of fingerprints, the collection of DNA samples . . . is an administrative requirement to assist in the accurate identification of criminal offenders." (*Id.* at § 295(d).)

Under the DNA Act, samples are collected through a simple buccal (cheek) swab, which the arrestee can do by himself. (*Id.* at § 296(a)). DNA samples obtained from arrestees will be used solely for "identification or exclusion" purposes. (*See id.* at § 299.5(i) (providing criminal penalties for the use of DNA profiles for any purpose other than criminal identification or exclusion or the identification of missing persons).)

Collected profiles are kept in California's DNA Data Bank, which is part of the FBI's Combined DNA Index System ("CODIS"). (*Id.* at § 298.3.) CODIS permits the more than 190 participating law enforcement laboratories to share and compare data by providing a central database of DNA profiles from all user laboratories, known as the National DNA Index System ("NDIS"). (*See* FBI, *CODIS Combined DNA Index System* ([www.fbi.gov/about-us/lab/biometric-analysis/codis\\_brochure-2010](http://www.fbi.gov/about-us/lab/biometric-analysis/codis_brochure-2010)).) When a match between a profile and forensic data results in a "hit," information is exchanged between the CODIS software and the laboratory that originally submitted the profile. *See* FBI, *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System* ([www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-](http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-)

sheet). Matches between forensic and offender profiles can confirm the identity of a suspect. (*Id.*) And a match made between forensic profiles can link crime scenes to each other, possibly identifying serial offenders. (*Id.*) When an offender hit is made, a new DNA sample is typically obtained from that suspect so the match can be confirmed by a crime laboratory before a new arrest is made. (*Id.*)

The NDIS database includes only a very small amount of identifying information for each individual, referred to as a DNA profile or DNA fingerprint, which is essentially a “string of numbers.” (*King, supra*, 133 S. Ct. at p. 1968 (citation omitted); *see also* 28 C.F.R. § 28.12(f)(1) (collection of DNA samples).) The FBI has chosen 13 “short tandem repeat” (“STR”) regions found on nuclear DNA to serve as the uniform standard for CODIS DNA profiles. (*See* NIJ, *DNA Evidence Basics of Analyzing* ([nij.gov/topics/forensics/evidence/dna/basics/pages/analyzing.aspx](http://nij.gov/topics/forensics/evidence/dna/basics/pages/analyzing.aspx))). The DNA profile is based on loci at which the STR alleles are noted and compared, making possible “extreme accuracy in matching individual samples,” with a random match probability of approximately 1 in 100 trillion. (*King*, at p. 1968).

The STR loci identify an individual uniquely, but do *not* disclose traits, disorders, or dispositions. (*See Mitchell, supra*, 652 F.3d at p. 400; *Kincade*, 379 F.3d at 818-19; *Johnson v. Quander* (D.C. Cir. 2006) 440 F.3d 489, 498.) This “junk” DNA, “while useful and even dispositive for purposes like identity, does not show more far-reaching and complex characteristics like genetic traits.” (*King, supra*, 133 S. Ct. at p. 1967.) These STR loci are “non-genic stretches of DNA not presently recognized as being responsible for trait coding,” and were “purposely selected” for DNA analysis because they are not “associated with any known physical or medical characteristics.” (*Mitchell*, at p. 400-01 (quoting *Kincade, supra*, 379 F.3d at p. 818; H.R. Rep. No. 106-900(I), at 27 (2000)).) Loci used in

the NDIS database “come from noncoding parts of the DNA that do not reveal the genetic traits of the arrestee.” (*King*, at p. 1979.) Those markers do not at present reveal information beyond identification, and “even if the non-coding alleles could provide some information, they are not in fact tested for that end.” (*Id.*)

CODIS “operates much like an old-fashioned fingerprint database (albeit more efficiently).” (*Quander, supra*, 440 F.3d at p. 499.) Without some variation by state, profiles are entered into NDIS at the local, state, or national levels. (*See FBI, supra, Frequently Asked Questions (FAQs).*) The database contains forensic profiles, including those from cases where the perpetrator is unknown, as well as profiles from convicts and arrestees. (*Id.*) In addition to the federal government and California, 27 other states have passed legislation to allow for collection of arrestee profiles. (NIJ, *DNA Sample Collection from Arrestees* ([www.nij.gov/topics/forensics/evidence/dna/pages/collection-from-arrestees.aspx](http://www.nij.gov/topics/forensics/evidence/dna/pages/collection-from-arrestees.aspx).)

#### **B. The Use Of Collected DNA Samples Is Narrowly Circumscribed By Law.**

The DNA Act limits access to information obtained from DNA samples to law enforcement personnel for “identification purposes.” (Cal. Penal Code § 295.1(a).) Samples may only be used for “identification or exclusion purposes” or “the identification of missing persons.” (*id.* at § 299.5(i).) Anyone who misuses a sample is subject to criminal penalties including a term of imprisonment, and if any employee of the Department of Justice knowingly misuses DNA information, the Department is liable in civil damages to the donor of the DNA information. (*Id.*) To date, no one has been charged under that section, nor has any audit of a California CODIS lab revealed any violation of confidentiality or use restrictions. (*Haskell v. Brown* (N.D. Cal. 2009) 677 F.2d 1187, 1190-91.)

Including the DNA profiles in CODIS entails virtually no risk of misuse at the federal level. “CODIS records contain only an identifier for the agency that provided the DNA sample, a specimen identification number, and the name of the personnel associated with the analysis.” (*Kincade, supra*, 379 F.3d at p. 819 n.8; *see also King, supra*, 133 S. Ct. at p. 1968.) Only the originating laboratory can identify an individual by name after a hit occurs. (*See* 61 Fed. Reg. 37,495, 37,496 (July 18, 1996) (“Since NDIS records contained in NDIS do not include personal identifiers of the individuals from whom the DNA samples were collected, retrieval by personal identifiers of these record subjects is not possible.”).) This means that even if someone has access to the NDIS database, it is impossible to obtain the DNA profile of any specific person. The only information stored in NDIS consists of the identifying markers; it is impossible to use those markers to match that information to a name.

As in California, “[t]he design and legal rules governing the operation of CODIS reflect the system’s function as a tool for law enforcement identification, and do not allow DNA samples or profiles within the scope of the system to be used for unauthorized purposes.” (73 Fed. Reg. 74,932, 74,933 (Dec. 10, 2008); *see also* 42 U.S.C. §§ 14132, 14133(b)-(c), 14135e.) Disclosing a DNA sample to one not authorized to receive it is punishable by imprisonment for one year or a fine not to exceed \$250,000. (42 U.S.C. § 14135e(c).) Law enforcement access to the federal index may be canceled for failing to meet the quality control and privacy requirements of federal law. (*Id.* at § 14132(c); 61 Fed. Reg. 37,495, 37,497 (July 18, 1996) (“criminal justice agencies with direct



access to NDIS must agree to . . . restrict access to DNA samples and data”).)<sup>2</sup>

Annual audit procedures ensure that participating laboratories adhere to CODIS requirements, including use and disclosure restrictions. (See 42 U.S.C. § 14131; see also *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.”).) The DNA Advisory Board established by Congress publishes quality assurance standards for audits. (See FBI, *Standards for Forensic DNA Testing Laboratories* ([www.fbi.gov/about-us/lab/codis/stds\\_testlabs](http://www.fbi.gov/about-us/lab/codis/stds_testlabs)); *Quality Assurance Standards for DNA Databasing Laboratories* ([www.fbi.gov/about-us/lab/codis/qas\\_databaselabs](http://www.fbi.gov/about-us/lab/codis/qas_databaselabs)).)

### **C. Arrestee DNA Identification Provides The Added Benefit Of Solving And Preventing Crime.**

The DNA profile is not only a powerful tool for identifying an arrestee, it helps solve and prevent crimes by connecting an arrestees’ identifying information to information already in the government’s lawful possession. CODIS has achieved remarkable success, in large part due to the number of available profiles. As of September 2015, the NDIS contained 11,962,222 offender profiles, 2,120,729 arrestee profiles and 657,298 forensic profiles. (FBI, *CODIS—NDIS Statistics* ([www.fbi.gov/about-us/lab/codis/ndis-statistics](http://www.fbi.gov/about-us/lab/codis/ndis-statistics)).) And CODIS has produced over 296,490 hits assisting in more than 282,175 investigations.

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<sup>2</sup> California law also provides a procedure for expungement of DNA information if the underlying conviction is overturned, if charges against an arrestee are dismissed or result in acquittal, or if no charges are filed within the applicable time period. (Cal. Penal Code § 299.) Federal law includes a similar provision. (See 42 U.S.C. § 14132(d)(1)(A).)

(*Id.*) That remarkable number includes more than 110,000 investigations assisted *just since 2012*, when DNA Saves filed its prior brief in this case.

Arrestee DNA can catch repeat offenders before they strike again. Seventy percent of America's crime is committed by only six percent of its criminals. (See James E. Hooper, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 Mich. L. Rev. 1951, 1951 n.3 (1991).) From 1990-2002, 56% of violent offenders had prior convictions. (U.S. Dep't of Justice, Bureau of Justice Statistics, *Violent Felons In Large Urban Counties* 1 (2006) ([bjs.ojp.usdoj.gov/content/pub/pdf/vfluc.pdf](http://bjs.ojp.usdoj.gov/content/pub/pdf/vfluc.pdf).) And this does not include the many crimes that are never resolved. Studies show that for every burglary conviction obtained through DNA matches, 7.4 additional crimes are avoided. (John K. Roman, *et al.*, *The DNA Field Experiment: Cost-Effectiveness Analysis of the Use of DNA in the Investigation of High-Volume Crimes* 13 (Urban Inst. Justice Pol'y Ctr. 2008).) Some serial burglars are individually responsible for more than 200 crimes a year. (J.M. Chaiken *et al.*, *Varieties of Criminal Behavior* 44 (1982).) Sexual assault offenders commit an average of eight sexual assaults for every one detected. (A. Nicholas Groth, *et al.*, *Undetected Recidivism Among Rapists and Child Molesters*, 28 Crime & Delinquency 450-458 (1982).)

Arrestee DNA can catch repeat offenders before they strike again. Arrestees are far more likely than the general public to be recidivists. Approximately 77% of arrestees have prior arrests, 69% have multiple prior arrests and 61% have at least one prior felony conviction. (See *Violent Felons in Large Urban Counties*, *supra* at pp. 4-5.) By contrast, only about 6.5% of the U.S. population has ever had a felony conviction. (See Joan Petersilia, *When Prisoners Come Home* 215 (2003) (data as of 2002).)

California statistics not only show that recidivism is an issue, but also demonstrate the importance of obtaining DNA of individuals arrested

even for lesser felonies, because the DNA profile may result in a “hit” to a more serious crime. California Department of Justice statistics show that the majority of identification hits to rape, robbery or murder offenses do not come from DNA samples collected at arrest for other such crimes, but from samples taken at booking for low level crimes, such as drugs, fraud, and property crimes. (Cal. DOJ, *DNA Database Hits to Murder, Rape, and Robbery: Two Studies of the Correlations Between Crime of Arrest and DNA Database Hits to Murder, Rape, Robbery Offenses* (oag.ca.gov/sites/all/files/agweb/pdfs/bfs/arrestee\_2013.pdf?)).) One study, reviewing a sample of 100 adult felony arrestees with no prior felony convictions, found that the majority of DNA database hits between these persons and murder, rape and robbery crimes come from DNA database samples collected at their arrest for drug, DUI, fraud or property offenses. In 82% of the cases, the previously unsolved murder, rape or robbery was committed *before* the arrest for which their DNA was collected. (*Id.*) A second study found that, based on a sample of 3,778 adult felony arrestees, only 8% of the DNA database hits to murder, rape and robbery crimes come from DNA database samples collected from persons who have their DNA collected at arrest for another such crime. That is, 92% of the time the arrestee booking offense was an offense *other than* murder, rape or robbery. The overwhelming majority of the arrestees were arrested on nonviolent charges, their DNA was taken, and they were linked to a previous violent crime.

These general statistics are borne out by individual case profiles. For example, in 1987, Chester Turner was arrested for assault in California, but freed due to lack of evidence. At that time, California law did not require that his DNA be taken on arrest. Turner continued to terrorize a Los Angeles community and was arrested nineteen more times before being convicted of rape in 2002. Only then was his DNA taken, and it matched evidence found on twelve rape and murder victims, the first murdered only

two months after his 1987 arrest. (See Andrew Blankstein *et al.*, *DNA Analysis Links Inmate to 12 Slayings*, L.A. Times, Oct. 23, 2004, at A1; see also 151 Cong. Rec. S9528 (July 29, 2005) (Sen. Kyl).) That heinous string of crimes could have been prevented had Turner's DNA been taken upon his initial arrest, rather than awaiting a later conviction. (See *Haskell*, 669 F.3d at 1065.)<sup>3</sup>

The background facts of the *King* case also vividly demonstrate not only the substantial public safety benefits of arrestee DNA identification but also the serious adverse consequences of invalidating this new technological advance. In that case, the State of Maryland recorded the DNA profile of a man arrested for menacing a group of people with a shotgun. (*King, supra*, 133 S. Ct. at p. 1965.) That profile identified the arrestee as the man who, in 2003, concealed his face and broke into a Maryland woman's home and raped her at gunpoint. (*Id.*) At the time, police were unable to identify or apprehend the rapist because they lacked a detailed description of him or other helpful evidence. (*Id.*) But the buccal swab sample taken after his 2009 arrest led to a match, helping to solve the 2003 crime. The Maryland Court of Appeals set his rape conviction aside and would have let him back onto the street to potentially victimize other women, but the U.S. Supreme Court reversed that judgment.

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<sup>3</sup> It has been noted that Turner had a prior conviction before his 1987 arrest, and had he been required to provide a DNA sample at the time of that earlier conviction, there would have been little difference in outcome. (*Haskell, supra*, 669 F.3d at p. 1077 (Fletcher, J., dissenting).) However, a hit from Turner's arrestee DNA sample, regardless of a prior conviction, could have prevented further crimes. Or something could have prevented the initial conviction, but made Turner no less dangerous. Even if Turner had a DNA profile taken at the time of his conviction, taking a sample upon any subsequent arrest would have provided another opportunity to alert law enforcement to his dangerousness if no "hit" between his conviction sample and forensic profiles had occurred prior to his arrest.

In California, DNA identification at felony arrest has had dramatic results, with the number of hits to crime scene evidence more than doubling after the state began testing all adult felony arrestees rather than just convicted offenders. California's average number of monthly hits between offender DNA profiles and DNA profiles from unsolved crime scene samples increased from 183 per month in 2008 (the year before full implementation of the law requiring collection from all adult felony arrestees) to over 594 during the period from April 2014-March 2015, aiding an average of 777 investigations per month. (*Id.*) (*See Cal. DOJ, Effects of the All Adult Arrestee Provision* ([oag.ca.gov/bfs/prop69/faqs](http://oag.ca.gov/bfs/prop69/faqs).) Hits through the California program have solved crimes in nearly every other state. (*Id.*)

Conversely, when collection from arrestees was temporarily suspended as a result of the Court of Appeal's first decision in this case, the identifying power of DNA profiles was dramatically curbed. The diminished DNA sample collection at felony arrest resulted in about 200 fewer hits per month, until sample collection at booking was restored when this Court depublished that decision. (*See Cal. DOJ, Impacts of Buza Decision on CAL-DNA Submissions and Hits June 2011-March 2012* ([oag.ca.gov/sites/all/files/agweb/pdfs/bfs/buza\\_effects\\_table.pdf](http://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/buza_effects_table.pdf).)

This data confirms what common sense teaches: that DNA sampling upon arrest, even for non-violent crimes, is a booking procedure that enables law enforcement to learn important facts about arrestees' identities and thereby connect them with other crimes. The kinds of life-saving successes experienced in California are also found in other states where arrestee DNA profiles have expanded databases and aided more investigations. (*See FBI, CODIS Statistics* ([15](http://www.fbi.gov/about-</a></p></div><div data-bbox=)

us/lab/biometric-analysis/codis/ndis-statistics) (state-by-state statistics).<sup>4</sup>

This crucial identification technique helps law enforcement keep communities safe, prevents recidivist criminals from claiming new victims, and brings justice and closure to victims and their families.

#### **D. DNA Identification Exonerates And Reduces Unnecessary Investigations Of The Innocent.**

The Chester Turner story described above is made even worse by the fact that another man, a mentally disabled janitor named David Jones, was wrongfully convicted of three of Turner's murders based on blood-typing evidence and served eleven years in prison for crimes he did not commit. (*See Haskell, supra*, 669 F.3d at p. 1065) Had Turner's DNA been sampled upon his first arrest, this wrongful conviction likely never would have occurred. (*Id.* ("Had the 2004 Amendment been in effect in 1995, it is likely that Jones never would have been imprisoned because police would have had access to Turner's DNA profile."); *see also* The National Registry of Exonerations, *David Allen Jones* ([www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3335](http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3335).) Similarly, in New Mexico an arrestee DNA match under Katie's law both solved the murder of an eleven-year-old girl and exonerated a mentally challenged man who had wrongfully confessed to the crime and was jailed for two years. (*See*

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<sup>4</sup> One reference point is Virginia, whose state Supreme Court was the first state high court to uphold an arrestee DNA law. (*See Anderson, supra*, 650 S.E.2d at p. 705.) Since Virginia began arrestee DNA testing in 2003, it has tracked how arrestee profiles can assist in solving and preventing crime. As of September 2015, there were nearly 397,000 offender/arrestee DNA samples in the state database. (*See* Va Dep't of Forensic Sci., *DNA Databank Statistics* ([www.dfs.virginia.gov/about-dfs/dnadatabank-statistics](http://www.dfs.virginia.gov/about-dfs/dnadatabank-statistics).) Since 2003, the database has provided between 612 and 933 hits per year, with 474 hits through September of this year. (*Id.*) These hits assisted 10,193 investigations, including 709 murders and over 1,390 sex crimes. (*Id.*)

Scott Sandlin, *Man Confessed To Murder He Didn't Commit*, Albuquerque Journal, Aug. 14, 2010 ([www.abqjournal.com/news/metro/1404951\\_metro08-14-10.htm](http://www.abqjournal.com/news/metro/1404951_metro08-14-10.htm).) Thus, DNA identification upon arrest not only catches the guilty, but can exonerate the innocent.

DNA identification also helps reduce invasions of privacy resulting from inefficiency, inaccuracy or bias in law enforcement. Far from trampling on privacy rights, DNA identification actually reduces invasions of privacy as well as inefficient and biased law enforcement. When no DNA match can be made, investigations and prosecutions are often left to the memory of witnesses or the discretion of law enforcement officers and police. DNA, however, is a “silent biological witness at the crime scene.” (John M. Butler, *Forensic DNA Typing: Biology, Technology, and Genetics of STR Markers DNA Initiative 2* (2d ed. 2005).) A DNA match can lead immediately to the right suspect, reducing the need for intrusive investigations of the innocent and eliminating racial profiling or other biases that might otherwise creep into investigations. (*See Kincaid, supra*, 379 F.3d at p. 838; *Sczubelek, supra*, 402 F.3d at p. 185 (“The interest in accurate criminal investigations and prosecutions is a compelling interest that the DNA Act can reasonably be said to advance.”). This permits law enforcement to turn its attention to solving other crimes. The use of DNA to catch serial sexual offenders leads to enormous financial savings. (Ray A. Wickenheiser, *The Business Case for Using Forensic DNA Technology to Solve and Prevent Crime*, 7 J. Biolaw & Bus. 34 (2004).) By responsibly expanding the database to include arrestee profiles, the savings are even greater.

## ARGUMENT

### I. DNA IDENTIFICATION SERVES COMPELLING GOVERNMENTAL INTERESTS.

As a law directly enacted by the people of California, the DNA Act is presumed valid and may not be invalidated unless it “clearly, positively, and unmistakably” violates the state Constitution. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 501, 816 P.2d 1309, 1313.) Mr. Buza does not dispute this presumption. Nor does he argue anywhere in his 100 page brief that California lacks an interest in identifying criminal suspects through DNA or that the interests the State has identified are not important. Instead, he argues only that California somehow has a “lesser” interest in doing so than Maryland because California’s law applies to all felony arrestees based on an officer’s determination of probable cause. (*See, e.g., Buza Br. 8, 87*). This is mistaken. Just as in *King*, California’s interests overwhelmingly outweigh the asserted intrusions on privacy that Mr. Buza claims.

#### A. The DNA Profile Is A Valid And Powerful Booking Tool That Enables Law Enforcement To Identify An Arrestee.

DNA technology is “one of the most significant scientific advancements of our era,” and the “the utility of DNA identification in the criminal justice system is already undisputed.” (*King, supra*, 133 S. Ct. at p. 1966.) Like the Maryland law upheld in *King*, California’s publicly-approved DNA law serves “the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody.” (*Id.* at p. 1970.) “DNA profiling is simply a more precise method of ascertaining identity and is thus akin to fingerprinting, which has long been accepted as part of routine booking procedures.” (*Mitchell, supra*, 652 F.3d at p. 413.) The justification for DNA identification “relies on no argument different in kind from that



traditionally advanced for taking fingerprints and photographs, but with additional force because of the potentially greater precision of DNA sampling and matching methods.” (*Sczubelek, supra*, 402 F.3d at p. 185-86 (quoting *Jones, supra*, 962 F.2d at p. 307).) Indeed, this Court has stated that “for purposes of identifying a particular person as the defendant, a DNA profile is arguably the most discrete, exclusive means of personal identification possible,” providing “as close to an infallible measure of identity as science can presently obtain.” (*People v. Robinson* (2010) 47 Cal.4th 1104, 104 Cal.Rptr.3d 727, 224 P.3d 55, 74, 80 (citations omitted).) With its “unparalleled ability to both exonerate the wrongly convicted and to identify the guilty,” DNA testing has the potential “to significantly improve . . . the criminal justice system” and policing practices. (*King*, at p. 1966 (citation omitted).)

“As with fingerprints, the collection of DNA samples at or near the time of arrest . . . can serve purposes relating directly to the arrest and ensuing proceedings.” (73 Fed. Reg. at 74,934.) “[W]hen a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it.” (*Jones, supra*, 962 F.2d at p. 306.) In a criminal matter, “it is known and must be known who has been arrested and who is being tried.” (*King, supra*, 133 S. Ct. at p. 1971 (quoting *Hiibell v. Sixth Jud. Dist. Ct. of Nev.* (2004) 542 U.S. 177, 191).)

Identification, however, is “more than just [a] name or Social Security number, and the government’s interest in identification goes beyond ensuring that the proper name is typed on the indictment.” (*King, supra*, 133 S. Ct. at p. 1971) In fact, “a name is of little value compared to the real interest in identification at stake when an individual is brought into custody.” (*Id.*) “Identity” is “the condition of being the same with something described, claimed, or asserted . . . .” (*Haskell, supra*, 669 F.3d

at p. 1063 (quoting Webster's Third New Int'l Dictionary 1123 (2002); *see also Robinson, supra*, 47 Cal.4th at pp. 1134-35 (an arrest warrant that describes a defendant by his DNA profile, in lieu of a name, satisfies the particularity requirement of both the Fourth Amendment and the Article 1, Section 13 of the California Constitution)). Perpetrators attempt not only to conceal their conduct, but also their identities. (*King*, at p. 1971; *Jones, supra*, 962 F.2d at p. 307 (“Disguises used while committing a crime may be supplemented or replaced by changed names, and changed physical features.”).) They might lie about their names or birthdates.

The government has a compelling interest in utilizing multiple forms of identifying information. Fingerprints provide better information than simply asking one's name or searching for a name, as they physically identify an arrestee as the person with a particular set of unique fingerprints. Thus, the government always takes fingerprints from arrestees even when it already knows their names through other means. But fingerprinting itself does not reveal a person's name. Rather, fingerprints are put into a database that allows law enforcement to legitimately learn whether that identifying information is connected with other records—which may or may not be linked to a name—and maintain a record against which future samples can be matched. (*See Anderson, supra*, 650 S.E.2d at p. 705; *Kincade, supra*, 379 F.3d at p. 819; *Jones, supra*, 962 F.2d at p. 306.) These processes invade no legitimate privacy interests because only identifying information is obtained, which no arrestee ever has a right to conceal. (*See Mitchell, supra*, 652 F.3d at p. 411 (“[I]t is ‘elementary’ that blanket fingerprinting of individuals who have been lawfully arrested or charged with a crime does not run afoul of the Fourth Amendment.”) (citation omitted).)

DNA identification is no different. (*See King, supra*, 133 S. Ct. at p. 1976 (“Perhaps the most direct historical analogue to the DNA technology

used to identify respondent is the familiar practice of fingerprinting arrestees”); *Haskell, supra*, 669 F.3d at p. 1063 (“The collection and use of DNA for identification purposes is substantially identical to a law enforcement officer obtaining an arrestee’s fingerprints to determine whether he is implicated in another crime.”.) The DNA profile “is used solely as an accurate, unique, identifying marker—in other words, as fingerprints for the twenty-first century.” (*Mitchell, supra*, 652 F.3d at p. 410.) The DNA profile identifies someone as the person with a particular unique set of otherwise meaningless DNA markers, just as traditional fingerprinting identifies a person by a particular unique set of lines on his fingers, or photography identifies a person by a particular set of facial characteristics, or production of a driver’s license identifies someone as the person with that license information. The DNA markers *are* the person’s identity, just as much as a name or a birthday or other physical characteristics like facial features and fingerprints.

The only difference is that DNA identification can often do the job better. As the Supreme Court concluded, “the only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides.” (*King, supra*, 133 S. Ct. at p. 1972; *see also Green, supra*, 354 F.3d at p. 679 (“DNA is the most reliable evidence of identification- stronger even than fingerprints or photographs.”).) In some instances, this greater precision can make all the difference. For example, in *King*, the defendant wore a mask during the rape and there was no fingerprint evidence. But he left his DNA, which could not be concealed. Identifying Mr. King as the person with that DNA profile led to an arrest and conviction where fingerprinting would not have.

Mr. Buza argues that this case is distinguishable from *King*, and the weight of governmental interests are different, because California allows the taking of samples from all felony arrestees immediately at booking,

rather than limiting sampling to persons arraigned for certain violent offenses and other enumerated crimes. Buza Br. 94-95. However, the timing of collection or analysis under the Maryland statute was not material to upholding the statute; indeed, the Supreme Court referred to the collection of DNA throughout as a “booking procedure.” (*See, e.g., King, supra*, 133 S. Ct. at p. 1980.)

Mr. Buza also contends that *King* should not be followed because California allows collection of DNA from all felony arrestees, rather than, as in Maryland, only for certain violent crimes and other enumerated offenses. (Buza Br. 6, 15-16, 94, 97; Md. Pub. Saf. Code § 2-504(a)(3)(i).) However, *King* stated that it was “critical” for the government to identify an arrestee even when “detained for [a] minor offense[.]” (*King, supra*, 133 S. Ct. at p. 1971 (citation omitted).) For constitutional purposes, there is no difference between the California and Maryland statutes, and because Mr. Buza was arrested for arson (plainly a serious offense), any distinction is immaterial to his case.

Mr. Buza further asserts, as the Court of Appeal concluded, that the California law is not solely limited to discerning identity, but improperly uses DNA to “investigate” crimes. (Buza Br. 18, 58; *Buza, supra*, 180 Cal. Rptr. 3d at pp. 774-81.) Once an individual is identified through his DNA profile, there is nothing wrong with using identifying information to determine whether that individual is dangerous, which can be discerned by learning whether the DNA profile matches a profile already in the government’s possession because it was previously left at a crime scene. The collection of a DNA sample at booking, which is subsequently used through a DNA profile in CODIS, still serves *only* to identify a suspect. (*See Anderson, supra*, 650 S.E.2d at p. 706 (value of DNA identification of arrestees is “knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his

identification in the event he flees prosecution”).) In *King*, the Supreme Court found it “undisputed” that law enforcement officers “analyze DNA for the sole purpose of generating a unique identifying number against which future samples may be matched.” (*King, supra*, 133 S. Ct. at p. 1979.) And once that identifying number is generated, the only matches are to other DNA profiles that are already in the government’s possession for other reasons (e.g., evidence from another crime scene). Thus, the DNA profile “is another metric of identification used to connect the arrestee with his or her public persona, as reflected in records of his or her actions that are available to the police,” and like fingerprints, those records are already validly in the possession of law enforcement. (*Id.* at p. 1972.)

The rule adopted by the Court of Appeal would even cast doubt on whether the State could use identifying information such fingerprints, names, or photographs to link an arrestee to another crime, because doing so would be purportedly “investigatory.” Such a rule has no support in the law and, if adopted, would dramatically tie the hands of law enforcement and seriously compromise public safety. Once identifying information is obtained, nothing in the California or U.S. Constitutions prohibits the State from connecting that information to other evidence that was voluntarily left at a prior or future crime scene, such as fingerprints or DNA-containing bodily fluids. Quite to the contrary, “[a] suspect’s criminal history is a critical part of his identity that all officers should know when processing him for detention.” (*King, supra*, 133 S. Ct. at p. 1971.)

In this respect, DNA “is no different than matching an arrestee’s face to a wanted poster of a previously unidentified suspect; or matching tattoos to known gang symbols to reveal a criminal affiliation; or matching the arrestee’s fingerprints to those recovered from a crime scene.” (*King, supra*, 133 S. Ct. at p. 1971.) It involves no impermissible investigation; the DNA profile serves only to identify the arrestee by making more

meaningful use of the information already in the government's lawful possession for identification purposes. While DNA profiles can and do aid investigations when they match evidence from crime scenes, they are not themselves investigative. Once that identifying information is provided, it can be—and routinely is—used for other legitimate governmental interests, most notably to link the person to a prior crime. The actual evidence of criminal activity is not the subject of any additional “investigation;” it was not the subject of any warrantless search but rather was voluntarily left by the perpetrator at the crime scene in the form of fingerprints or discarded bodily fluids that are validly in the possession of law enforcement as potential evidence of a crime. The identifying fingerprint or DNA profile obtained upon the earlier or later arrest is simply used to identify the arrestee as that perpetrator.

**B. Identification Through A DNA Profile Serves Many Important Governmental Interests.**

The process of identification through a DNA profile (often in conjunction with other forms of identification) helps to uncover who an arrestee is and what he or she has done, which in turn helps law enforcement make critical assessments about the arrestee's present and future dangerousness. That identifying information also has the demonstrated ability to improve the safety of law enforcement officers and the public, to solve and prevent crimes, and to exonerate the wrongfully convicted or accused.

DNA plays an important role in enabling law enforcement to ensure that arrestees in custody do not create inordinate risks for facility staff, the detainee population and the detainees themselves. (*King, supra*, 133 S. Ct. at p. 1972.) “DNA identification can provide untainted information to those charged with detaining suspects and detaining the property of any felon.” (*Id.*) Officers “must know the type of person whom they are

detaining, and DNA allows them to make critical choices about how to proceed.” (*Id.*)

The government also has an interest in ensuring that persons who are believed to have committed crimes have their bail properly set. Taking an arrestee’s DNA sample reduces this risk. “[A]n arrestee’s past conduct is essential to the assessment of the danger he poses to the public” and informs bail determinations. (*King, supra*, 133 S. Ct. at p. 1973.) “DNA identification of a suspect in a violent crime provides critical information to the police and judicial officials in making a determination of the arrestee’s future dangerousness.” (*Id.*) Establishing identification may also impact decisions to revoke bail at a later date. (*Id.* at p. 1974.)

Victims of crimes and their families and friends also care about the identification of arrestees, because it may help solve crimes perpetrated against them and their loved ones. (*See Kincade, supra*, 379 F.3d at p. 839 (convictions based on DNA profiling “help[] bring closure to countless victims of crime who long have languished in the knowledge that perpetrators remain at large”).) This is the bitter truth for the Sepich family, who founded DNA Saves. Had a DNA sample been taken from Katie Sepich’s murderer upon his arrest for an unrelated crime, the Sepichs would have discovered who killed their daughter only three months after her death. Instead, the murderer remained free for over three years to victimize more daughters, while the Sepichs waited for answers.

There are unfortunately too many other stories that underscore the same compelling need. In *Anderson*, a woman was raped, sodomized and robbed while walking to work in 1991. (*See Anderson, supra*, 650 S.E.2d at p. 703.) A forensic DNA sample was taken, but the case went unsolved until 2003, when Virginia began to take arrestee DNA. (*Id.* at p. 704.) The perpetrator was arrested on unrelated charges, a DNA sample was taken and entered into a database, and a routine analysis resulted in a “cold hit”

that matched his DNA to the 1991 crime. (*Id.*) Analogizing to ordinary fingerprinting, the Virginia Supreme Court found the original sampling constitutional.

The examples of how arrestee DNA has (or could have) solved past crimes and prevent future ones are legion. The Chester Turner story, *supra* at pp. 13-14, 16, stands as a particularly chilling example in California, but there are many others. Because a DNA sample was taken from Octavio Castillo at his 2011 arrest for receiving stolen property, he was identified as the man who, only months earlier, had kidnapped a woman while she was walking home and sodomized and severely beat her.<sup>5</sup> He was identified and convicted based on a match to his DNA profile taken at the earlier arrest, for which he was still out on personal recognizance. According to police, “[t]his case never would have been solved without the DNA evidence,” or “it might have taken a long time to solve.” (Brad Kava, *Teen Arrested for Raping Santa Cruz Woman, Watsonville Patch*, May 13, 2011 ([patch.com/california/Watsonville/teen-arrested-for-raping-santa-cruz-woman](http://patch.com/california/Watsonville/teen-arrested-for-raping-santa-cruz-woman)).) Because Castillo was still on bail from the original arrest, waiting for a conviction would have allowed him to continue to walk the streets and potentially victimize others.

Also in California, a man was arrested and charged with the 2012 abduction and murder of Sierra LaMar, a 15-year-old girl, and three other crimes based on DNA identification performed at his arrest for a different

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<sup>5</sup> See Kimberly White, *DNA Hit Leads Police to Watsonville Man Arrested for Kidnapping and Assaulting Woman in Santa Cruz*, Santa Cruz Sentinel, May 12, 2011 ([www.santacruzsentinel.com/localstories/ci\\_18054267](http://www.santacruzsentinel.com/localstories/ci_18054267)); Jessica M. Pasko, *Watsonville Man Sentenced to 15 Years in Sexual Assault Case*, Santa Cruz Sentinel, Sept. 24, 2012 ([www.santacruzsentinel.com/watsonville/ci\\_21619379/watsonville-man-sentenced-15-yearssexual-assault-case](http://www.santacruzsentinel.com/watsonville/ci_21619379/watsonville-man-sentenced-15-yearssexual-assault-case)).



felony in 2010.<sup>6</sup> The 2010 charge was dismissed when an earlier misdemeanor probation was extended. *Id.* Thus, without DNA identification at arrest, these crimes would never have led to an arrest and a potential recidivist criminal would still be on the streets.<sup>7</sup>

The results are tragically different when a state lacks an arrestee DNA law. In Washington in 2005, Charisa Nicholas was awakened by a masked gunman who broke into her home in the middle of the night.<sup>8</sup> She was bound and forced to watch as her best friend was raped. The man that tortured Charisa and her friends that night was a serial rapist named Anthony Dias. He later victimized 22 other women and children. *All* of those crimes could have been prevented if DNA identification had been conducted on July 31, 2005, when Mr. Dias was arrested for reckless driving and felony hit-and-run.<sup>9</sup> If the state of Washington had

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<sup>6</sup> See Cal. DOJ, *supra*, *Effects of the All Adult Arrestee Provision; Sierra LaMar Slaying Suspect Charged In Attempted Kidnappings*, Los Angeles Times, Nov. 14, 2012 ([latimesblogs.latimes.com/lanow/2012/11/sierra-lamar-suspect.html](http://latimesblogs.latimes.com/lanow/2012/11/sierra-lamar-suspect.html)).

<sup>7</sup> Similar stories have been chronicled in Illinois, Maryland and Colorado, showing how crimes could have been prevented if DNA had been taken from serial rapists and murderers upon an earlier arrest. See City of Chicago, *Chicago's Study on Preventable Crimes* ([www.dnaresource.com/documents/ChicagoPreventableCrimesFinal.pdf](http://www.dnaresource.com/documents/ChicagoPreventableCrimesFinal.pdf)); Maryland Crim. Justice Info. Sys., *Maryland Study on Preventable Crimes* ([www.denverda.org/DNA\\_Documents/MarylandDNAarresteestudy.pdf](http://www.denverda.org/DNA_Documents/MarylandDNAarresteestudy.pdf)); Denver Dist. Att'y Office, *Denver's Study on Preventable Crimes* ([www.denverda.org/DNA\\_Documents/Arrestee\\_Database/Denver's%20Preventable%20Crime%20Study.pdf](http://www.denverda.org/DNA_Documents/Arrestee_Database/Denver's%20Preventable%20Crime%20Study.pdf)).

<sup>8</sup> See *Serial Rapist Gets 227-Year Prison Sentence*, KOMOnews.com, Nov. 20, 2008 ([www.komonews.com/news/local/19220409.html](http://www.komonews.com/news/local/19220409.html)).

<sup>9</sup> See Denver Dist. Att'y Office, *Washington State Preventable Crime* (2008) ([www.denverda.org/DNA\\_Documents/Arrestee\\_Database/WA%20Preventable%20Crime.pdf](http://www.denverda.org/DNA_Documents/Arrestee_Database/WA%20Preventable%20Crime.pdf)).

implemented such testing at that time, Mr. Dias could have been identified when he committed his next rape only a month later and taken off the streets. The horrible crimes committed against Charisa and her friends and 22 others would have been prevented.

Invalidating California's law would not only squander similar future benefits in California, it would have impacts nationwide, depriving the national CODIS system of profiles from California arrestees. As noted, California DNA profiles have helped aid tens of thousands of investigations and solved crimes in nearly every state. Removing them would also undermine other salutary initiatives, in less obvious ways. For example, recent attention has been drawn to the national backlog in rape kits, which contain evidence obtained from an examination of the victim's entire body for DNA evidence left behind by the attacker. A recent joint grant from the U.S. Department of Justice and the Manhattan District Attorney marked "the single largest contribution toward ending the rape kit backlog" and the funds "represent the best opportunity in a generation to take rapists out of our communities." (Steve Reilly *et al.*, *More Than 40 Police Agencies To Get \$79M To Test Rape Kits*, USA Today, Sept. 11, 2015 ([www.usatoday.com/story/news/2015/09/10/rape-kits-biden-sexual-assault-kits/72005372/](http://www.usatoday.com/story/news/2015/09/10/rape-kits-biden-sexual-assault-kits/72005372/)) (quoting District Attorney Cyrus Vance, Jr.). But the value of such testing may decrease significantly if the California law is invalidated. People whose DNA is in the rape kits, if arrested in California, will not be identified as the potential perpetrators of those sex crimes. Recidivist perpetrators would be able to hide their identities and thus never be matched to crime scene evidence.

Actual and potential criminal victims are not the only people who benefit from arrestee DNA identification. Identifying "an arrestee as the perpetrator of some heinous crime may have the salutary effect of freeing a person wrongfully imprisoned for the same offense." (*King, supra*, 133 S.

Ct. at p. 1974; *see also Sczubelek, supra*, 402 F.3d at p. 185 (“While the presence of Sczubelek’s DNA in CODIS may inculcate him in the future, it may also exonerate him.”).) When DNA is used to enable law enforcement to identify the right suspects, communities are made safer, and the innocent will face fewer police intrusions. The DNA database not only helps to exonerate convicted persons, but “will help to eliminate individuals from suspect lists when crimes occur.” (*Haskell, supra*, 669 F.3d at p. 1064.) Using CODIS “promptly clears thousands of potential suspects”—thereby preventing unnecessary intrusions on innocent people and ““advancing the overwhelming public interest in prosecuting crimes *accurately*.”” (*Kincade, supra*, 379 F.3d at p. 839 n.38 (quoting *Mitchell, supra*, 652 F.3d at p. 415); *Sczubelek*, at p. 186 (noting that “the collection of DNA samples will protect society”).) By having an accurate view of the identity of arrestees, police can focus their resources on the right suspects, minimize profiling and follow fewer wrong leads. That increased efficiency may save taxpayers billions of dollars and free up strained law enforcement resources for other cases. (*See Wickenheiser, supra*, at p. 58.)

## **II. THE DNA ACT IMPLICATES NO LEGITIMATE PRIVACY INTERESTS OF ARRESTEES.**

In contrast to all of these compelling governmental objectives, no arrestee ever has a legitimate interest in withholding his or her identifying information, whether fingerprints, names, birth dates, photographs or the loci contained in DNA profiles. The government has a compelling interest in making that identification and thereby protecting the public from criminal activity.

Arrestees’ reasonable privacy expectations are far less than those of the general public. DNA collection occurs only after it has been determined that there is probable cause to believe the arrestee has committed a crime. Arrestees have no right to shield their identity.

(*Illinois v. Lafayette* (1983) 462 U.S. 640.) An arrestee's belongings may be subjected to warrantless search in part because "inspection of an arrestee's personal property may assist the police in ascertaining or verifying his identity." (*Id.* at p. 646.) Once a suspect is arrested upon probable cause, "his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it." (*Jones, supra*, 962 F.2d at p. 306.) As this Court has held, "individuals in lawful custody cannot claim privacy in their identification." (*Robinson, supra*, 224 P.3d at p. 65.)

"When probable cause exists to remove an individual from the normal channels of society and hold him in legal custody, DNA identification plays a critical role in serving" the interests of law enforcement in booking and jailing a suspect. (*King, supra*, 133 S. Ct. at p. 1971.) Arrestees possess a diminished expectation of privacy in their own identity, which has traditionally justified taking their fingerprints and photographs. (*Mitchell, supra*, 652 F.3d at p. 412.) They can be subjected to numerous intrusions not faced by the general public. (*See, e.g., Bell v. Wolfish* (1979) 441 U.S. 520 (strip searches); *Haskell*, 669 F.3d at 1058 (arrestees may be subjected to body cavity searches; be monitored by guards of the opposite sex while they shower and use the toilet; be restrained and pepper-sprayed, and be subjected to 23-hour lockdowns).) A brief buccal swab for DNA "does not increase the indignity already attendant to normal incidents of arrest." (*King*, at p. 1979)

This applies to arrestees as well as convicts. Arrestees are always required—forcibly if necessary—to provide multiple forms of identification, including fingerprints, photographs, and documents, which can then be matched with other information already in the government's possession to determine if the person is linked to other events. "DNA profiles currently function as identification records not unlike fingerprints, photographs, or social security numbers." (*Boroian v. Mueller* (1st Cir.

2010) 616 F.3d 60, 65.) Thus, “the fact that the government may lawfully retain and access these more traditional means of identifying [a person] only emphasizes that the government’s retention and matching of his DNA profile does not intrude on [his] legitimate expectation of privacy . . . . [A] DNA profile simply functions as an additional, albeit more technologically advanced, means of identification.” (*Id.* at p. 67.) Wherever the privacy interests of arrestees may fall along a continuum, they have no greater interest in withholding the identifying information contained in the “junk” markers used in CODIS than in withholding their fingerprints or preventing their photograph from being taken.

**A. Methods Used For Taking DNA Samples, Like Fingerprinting, Are An Insignificant Intrusion.**

DNA identification is no different than other non-intrusive means of identifying a suspect in government custody. Compared to the “substantial governmental interest and the unique effectiveness of DNA identification, the intrusion of a cheek swab to obtain a DNA sample is a minimal one.” (*King, supra*, 133 S. Ct. at p. 1977.) Like fingerprinting, DNA identification “can only be described as minimally invasive—both in terms of the bodily intrusion it occasions, and the information it lawfully produces.” (*Kincade, supra*, 379 F.3d at p. 838.)

Previously, DNA samples were generally obtained by drawing blood from the arm. (73 Fed. Reg. at 74,935.) But now, as in this case, they are generally collected by buccal swab (*id.*), which the arrestee can perform by himself. (*King, supra*, 133 S. Ct. at p. 1969 (“A buccal swab is a far more gentle process than a venipuncture to draw blood.”).) When performed this way, DNA sampling “is perhaps the least intrusive of all seizures—it involves no penetration of the skin, pain, or substantial inconvenience.” (Jules Epstein, “*Genetic Surveillance*”—*The Bogeyman Response to Familial DNA Investigations*, 2009 U. Ill. J.L. Tech. & Pol’y 141, 152

(2009).) This procedure is a de minimis intrusion, especially when compared with drawing blood, which the Supreme Court has already recognized as minimally invasive. (See *Skinner v. Ry. Labor Execs. Ass'n* (1989) 489 U.S. 602, 625; *Haskell, supra*, 669 F.3d at p. 1059 (“[T]he physical extraction of DNA using a buccal swab collection technique is little more than a minor inconvenience to felony arrestees, who have diminished expectations of privacy. Moreover, it is substantially less intrusive, both physically and emotionally, than many of the other types of approved intrusions that are routinely visited upon arrestees.”).)

#### **B. DNA Profiles Are Used Solely For Identification Purposes.**

The intrusion on arrestees’ legitimate privacy interests in their DNA is non-existent because only identifying information is obtained for use in the CODIS database. The Court of Appeal was concerned that “[a] DNA sample contains the entire human genome,” (*Buza, supra*, 180 Cal.Rptr.3d at p. 771 (emphasis added).) But the DNA *profile* that is entered in the CODIS database does not have Mr. Buza’s (or anyone else’s) genetic blueprint. Even the Court of Appeal acknowledged that the profile is “limited.” (*Id.* at p. 772.) The loci markers used in CODIS are useful for no purpose other than identification. They are “non-genic stretches of DNA not presently recognized as being responsible for trait coding,” and were “purposely selected” for DNA analysis 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), at 27 (2000); *King, supra*, 133 S. Ct. at p. 1979 (“CODIS loci come from noncoding parts of the DNA that do not reveal the genetic traits of the arrestee.”).)

Nonetheless, based on the premise that an arrestee DNA *sample* reveals the “entire human genome,” (*Buza, supra*, 180 Cal.Rptr.3d at pp. 771-73), the Court of Appeal rejected King’s analogy between fingerprints

and DNA profiles. “DNA analysis,” the court concluded, “has the *potential* to reveal every aspect of the person’s genetic make-up,” while fingerprinting, which only shows the arrestees identity, “presents no threat to privacy comparable to that posed by DNA analysis.” (*Id.* at p. 773 (emphasis added).)<sup>10</sup>

By relying on the mere “potential” for wrongdoing, the Court of Appeal set itself in direct opposition to *King*. There, the U.S. Supreme Court concluded that the loci in King’s profile “ did not intrude on [King’s] privacy in a way that would make his DNA identification unconstitutional.” (*King, supra*, 133 S. Ct. at p. 1979.) The Court found that “even if non-coding alleles could provide some information, they are not in fact tested for that end,” and it “undisputed” that law enforcement officers “analyze DNA for the sole purpose of generating a unique identifying number against which future samples may be matched.” (*Id.*) Likewise, in California, DNA profiles are merely used for identification.

There is no reason to ignore all of the significant advantages of DNA profiling over fingerprinting based on fears that DNA samples have the “potential” to reveal personal information if misused. The California Constitution, no more than the U.S. Constitution does not require courts to “adopt a Luddite approach that would prevent the Government from using

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<sup>10</sup> Like the Court of Appeal, Mr. Buza also objects to “familial” DNA searching. (Buza Br. 48; *Buza*, at pp. 767, 772.) As the State explains, that policy has little relevance here because it does not apply to the DNA profiles in the database for *arrestees*. (State Reply Br. 49.) “Familial searches” are used only to compare certain identifying markers in the DNA of *convicted* offenders against the same markers in a DNA sample obtained from a crime scene, which may provide a lead that the unknown perpetrator of an unsolved crime is likely a close relative of a known convicted offender, and which may definitively exclude the convicted offender as the source of the crime-scene sample. (State Br. 61-62.) Convicted offenders have no reasonable expectation of privacy that would prohibit the State from obtaining and pursuing such a lead.

this new and highly effective tool to replace (or supplement) older ones.” (*Haskell, supra*, 669 F.3d at p. 1063.) Indeed, “DNA identification is an advanced technique superior to fingerprinting in many ways, so much so that to insist on fingerprints as the norm” makes little sense. (*King, supra*, 133 S. Ct. at p. 1976.)

The fears that DNA *profiles* will be misused to “mine” arrestees’ personal information are fantastical. The profile information sent to the state agency and kept in the NDIS database consists of “junk” markers, which are not associated with a name. Thus, even if someone illegally gained access to CODIS, the only way to learn any genetic information about a specific arrestee would be to risk criminal penalties by (1) finding out where that person was arrested; (2) conspiring with the state agency to gain access to the physical sample taken at arrest; and (3) surreptitiously performing additional laboratory tests on that sample to generate additional data. There is no apparent reason why anyone would be motivated to obtain such information in the first place. And if someone truly had a nefarious reason to learn a person’s genetic information, it would be far easier to find and test a strand of hair or another discarded sample.

It is highly doubtful that a “rogue” employee would risk a career and criminal penalties to disclose the information in a DNA profile, and doing so poses such significant technical hurdles that it is unlikely such wrongdoing could be accomplished. (*See* 155 Cong. Rec. S12904-07 (Dec. 10, 2009) (remarks of Sen. Kyl).) This is borne out by the FBI’s experience. Although millions of offender profiles have been added to the NDIS database over more than ten years, and the FBI has been analyzing DNA for over twenty years, “there has never been one noted case in which a lab employee has ever made an unauthorized disclosure of DNA information.” (*Id.* at S12905.) Therefore, “[t]he risk that lab employees will undertake such acts is not substantial enough to merit consideration in



a reasoned analysis of the privacy risks posed by the operation of NDIS.” (*Id.*) It is entirely far-fetched to think that persons in California law enforcement would risk criminal sanctions to carry out such an elaborate plot, which would be revealed as soon as the information was used.

The “bleak Orwellian” prognosis of the Court of Appeal “ignores the clear statutory limitations drawn by the Legislature, and the fact that there is no evidence in the record of a single case of DNA misuse in California.” (*Haskell, supra*, 669 F.3d at p. 1061 (emphasis in original).) A court “cannot legitimately weigh the constitutionality of the current legal regime by arguing about hypothetical and highly speculative actions” that would violate both California and federal law. (*Id.* at p. 1062.) Rather, a court’s “job is limited to resolving the constitutionality of the program before us, as it is designed and as it has been implemented” and “courts base decisions not on dramatic Hollywood fantasies, . . . but on concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record.” (*Kincade, supra*, 379 F.3d at p. 838; *accord Haskell, supra*, at p. 1062.) As the Ninth Circuit has explained, if and when “some future program permits the parade of horrors the DNA Act’s opponents fear—unregulated disclosure of CODIS profiles to private parties, genetic discrimination, state-sponsored eugenics, . . . we have every confidence that courts will respond appropriately.” (*Kincade*, at p. 838.)

The Court of Appeal also rejected *King*’s view that analysis of arrestees’ DNA is intended or in fact used for identification rather than investigation, or that identifying information may be employed to ascertain criminal history. (*Buza, supra*, 180 Cal. Rptr. 3d at p. 774.) If using identifying information in a manner that enables an assessment of a person’s dangerousness is unconstitutional, that would also cast doubt on whether names, fingerprints and other forms of identification can ever serve as identification, and “our entire criminal justice system would be

upended.” (*Haskell, supra*, 669 F.3d at p. 1061.) It would potentially invalidate the entire system of fingerprinting because under the Court of Appeal’s theory law enforcement could not require an arrestee to submit to fingerprinting if the records were ever to be used to link the person to a prior crime. (*See id.* (if DNA profiles and fingerprint records “may only be used in connection with the crime for which probable cause was found,” law enforcement “would be prevented from using basic investigative tools” and “could never be allowed to match crime scene fingerprints to databases of prints collected from past arrestees”).)

Just as with fingerprints, DNA identification is not a search of private information for evidence of a crime. The physical evidence against which the comparison is made is not obtained through any new search but rather was abandoned at a crime scene, and an arrestee has no legitimate interest in concealing that he is the person who has those identifying characteristics. No one can assert a Fourth Amendment right to the privacy of his past criminal endeavors. (*See Rakas v. Illinois* (1978) 439 U.S. 128, 143-44 n.12 (“[A] ‘legitimate’ expectation of privacy, by definition, means more than a subjective expectation of not being discovered.”); *United States v. Cardoza-Hinojosa* (5th Cir. 1998) 140 F.3d 610, 616 (“[T]he ‘subjective expectation of not being discovered’ conducting criminal activities is insufficient to create a legitimate expectation of privacy”) (citation omitted).) As with fingerprints, photographs, handwriting samples, and other forms of identification, using DNA identification to link a person with another event does not involve or justify any additional, more intrusive searches for evidence of wrongdoing.

It is therefore irrelevant whether the government offers released individuals a way to expunge their DNA records, or how easy any such process is. (*Buza, supra*, 180 Cal.Rptr.3d at pp. 785, 789; *Buza Br.* 7, 15, 16, 95.) That issue does not even arise in this case, because Mr. Buza was

convicted rather than acquitted or released after dismissal and therefore has no right to expungement. (*See* State Reply Br. 24.) But the argument fails regardless. Although California offers a relatively simple expungement procedure that the California Department of Justice readily publicizes (*see* Cal. DOJ, *Remove Your DNA Sample from the DNA Database* (oag.ca.gov/bfs/prop69)), that mechanism is immaterial to the constitutionality of the DNA Act. Just as there is no constitutional right to expungement of fingerprint records lawfully obtained, there is no constitutional right to expungement of DNA profiles. Tellingly, *King*'s analysis assigned no importance to Maryland's expungement provisions.

### **C. Samples Containing DNA Information Are Ubiquitous.**

The Court of Appeal placed great emphasis on its view that information contained in a DNA sample is "deeply personal." (*Buza, supra*, 180 Cal.Rptr.3d at p. 793.) This view, however, is out of step with the law and common sense. As noted above, arrestees have a lesser privacy interest than the general population. Given these lessened interests, the creation of a limited DNA profile represents no intrusion on any legitimate privacy interests. An arrestee has no protected interest in concealing his fingerprints, and even less of an interest in preventing DNA identification.

But the constitutional balancing test should also take into account the widespread availability of samples containing DNA information. Only a tiny fraction of the full DNA sample is recorded in the NDIS database. But by the time a DNA sample has been taken formally through a buccal swab, an arrestee has already left his DNA all over the police station, at the place of arrest, and almost everywhere else he has been. Our "DNA is exposed to the public and abandoned every time we move." (*Epstein, supra*, at p. 151.) No one—and particularly not arrestees—can have a reasonable expectation of privacy in material they leave lying about. For example, there is no reasonable expectation of privacy in trash left on the

curb for collection. (*California v. Greenwood* (1988) 486 U.S. 35, 41.) That is because “plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.” (*Id.* at p. 40.)

DNA samples are no different. Thus, the Fourth Amendment does not prohibit police searches of DNA inadvertently provided to police even when the suspect has not been arrested. In one case, police obtained a DNA sample by posing as a law firm inviting a suspect to join a class action suit. (*State v. Athan* (Wash. 2007) 158 P.3d 27, 31.) They tested his DNA from saliva left on the return letter, and the defendant was convicted of a 20-year-old rape and murder. (*Id.* at pp. 31-32.) The Supreme Court of Washington held that the search was reasonable because he had no reasonable expectation of privacy in the DNA information left in his saliva. (*Id.* at p. 37.). Courts in California and elsewhere have reached similar conclusions.<sup>11</sup>

Given that police can lawfully test found DNA samples to determine the identity of a suspect who has not been arrested—even without statutory safeguards—it follows that the government can use minimally invasive methods to take a DNA sample from someone who has been arrested on probable cause, subject to stringent restrictions on the use of the information. DNA profiles catalogued under the DNA Act are useful only

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<sup>11</sup> See, e.g., *People v. Gallego* (2010) 190 Cal.App.4th 388, 395-396 (no expectation of privacy where defendant voluntarily discarded his cigarette butt by tossing it onto a public sidewalk); *U.S. v. Posadas* (D. Neb. Sept. 17, 2009) No. 09-cr-147, 2009 WL 3021163, at \*3 (no reasonable expectation of privacy in DNA sample on abandoned bag); *Piro v. State* (Idaho Ct. App. 2008) 190 P.3d 905, 912 (suspect had little reasonable expectation of privacy in DNA taken from water bottle left in interrogation room); *Commonwealth v. Ewing* (Mass. App. Ct. 2006) 854 N.E.2d 993, 1001 (no reasonable expectation of privacy in DNA contained on cigarette butts left in interrogation room).

for identification purposes, and samples cannot be used for any other purposes. And in the normal process of arrest and booking, an arrestee has just as little interest in keeping his identifying DNA information a secret as he does his name, fingerprint, or photograph.

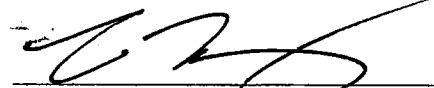
Thus, as the Supreme Court found in *King*, “DNA identification of arrestees is a reasonable search that can be considered a part of a routine booking procedure.” (*King, supra*, 133 S. Ct. at p. 1980.) Like the federal government and 27 other states, the California public expressly granted its law enforcement permission to obtain DNA identification profiles from felony arrestees at booking and preserve them in confidential databases. Doing so enables law enforcement to test early enough to reap the benefits of DNA identification, but with limits that ensure there are no privacy concerns. This sensible law should not be invalidated.

### CONCLUSION

For all these reasons, and the reasons set forth in the State of California’s briefs, DNA Saves respectfully requests that the Court reverse the judgment of the Court of Appeal. The people of the State of California determined that public safety will be protected if felony arrestees’ identifying DNA information is collected along with their fingerprints, photographs and other identifying information. If a recidivist criminal has left his DNA at a crime scene for anyone to find, the state has a compelling interest in identifying an arrestee as that person, and he has no privacy interest in concealing that information. The people’s will should not be undermined because such arrestees wish to conceal their identities. Concealing those identities protects no legitimate privacy interest and creates the risk that innocent people will die or be harmed who would otherwise be saved.

November 20, 2015

Respectfully submitted,



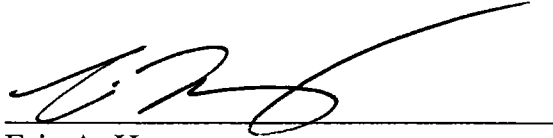
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**CERTIFICATE OF COMPLIANCE**

In compliance with Cal. R. Ct. 8.520(c), I certify that the attached brief uses a 13 point Times New Roman font and contains 11,947 words, including footnotes.

Dated: November 20, 2015

A handwritten signature in black ink, appearing to read 'E. Herzog', is written over a horizontal line.

Eric A. Herzog  
Counsel for Amicus Curiae DNA Saves

## PROOF OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Forty-First Floor, Los Angeles, California 90071. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service.

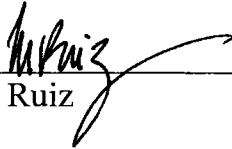
On November 20, 2015, I served the attached **UNOPPOSED APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND [PROPOSED] BRIEF FOR AMICUS CURIAE DNA SAVES IN SUPPORT OF THE STATE OF CALIFORNIA AND REVERSAL** on each interested party listed on the attached service list:

XX (VIA MAIL) I placed the envelope for collection and mailing, following the ordinary business practices.

XX (VIA ELECTRONIC SERVICE) I further declare that a true and correct copy of the foregoing document has been filed via Electronic Documents Submission (Supreme Court) on the Court's website, with the original and eight (8) copies delivered via Overnight Delivery to:

Office of the Clerk  
SUPREME COURT OF CALIFORNIA  
350 McAllister Street, Room 1295  
San Francisco, California 94102-4797

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 November 20, 2015, at Los Angeles, California.

  
\_\_\_\_\_  
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