No. S274743

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

FRANCISCO BURGOS, ET AL.,
Defendants and Appellants.

Sixth Appellate District, Case No. H045212
Santa Clara County Superior Court, Case Nos. C1518795, C1756994
The Honorable Cynthia A. Sevely, Judge

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES
(continued)

Page

COURT RULES

OTHER AUTHORITIES

ARGUMENT

I. PROCEDURAL CHANGES THAT IMPROVE FAIRNESS DO NOT FALL WITHIN THE LOGIC OR SPIRIT OF *ESTRADA* AND ARE NOT RETROACTIVE

A statute that alters punishment or a person's susceptibility to punishment is ameliorative within the rationale of *In re Estrada* (1965) 63 Cal.2d 740 and, therefore, retroactive to nonfinal cases. Appellants agree but go farther. They believe that a statue that alters trial procedures with the goal of enhancing fairness and reducing the number of wrongful convictions also triggers *Estrada*'s rule of retroactivity. That is incorrect. The question is one of legislative intent. Because the ordinary default rule is that new criminal legislation operates prospectively, *Estrada* requires a particularly compelling indication of retroactive intent in the absence of an express statement, such as would be present when the Legislature chooses to reduce punishment for particular conduct. That principle, and the scope of its application, have long been well understood. There is no reason, therefore, to infer that the Legislature silently intends retroactive application of a procedural statute like Penal Code section 1109.[1] Appellants' proposed expansion of *Estrada* loses sight of the rationale for ascertaining legislative intent in these circumstances and stretches this Court's precedents beyond their limits to the point of annulling the Legislature's expressly stated retroactivity policy.

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[1] Undesignated statutory references are to the Penal Code.

A. Overview

Section 3 sets out the general rule of prospectivity for that code absent an express statement of retroactivity. (*People v. Brown* (2012) 54 Cal.4th 314, 319.) However, *Estrada* recognized an important exception to that mandate. *Estrada* adopted a presumption that the Legislature intends for an enactment that ameliorates punishment to apply to all nonfinal cases, based on the premise that the Legislature could have no legitimate basis for prospective-only application when it has "expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act." (*Estrada*, *supra*, 63 Cal.2d at p. 745.)

Estrada explained, "A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance. As to a mitigation of penalties, then, it is safe to assume, as the modern rule does, that it was the legislative design that the lighter penalty should be imposed in all cases that subsequently reach the courts." (63 Cal.2d at pp. 745-746, internal quotation marks omitted.) In that situation, a "clear and unavoidable" inference of retroactivity (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1202) based on the legislature's judgment about proper penalty justifies a "contextually specific qualification to the ordinary presumption

that statutes operate prospectively" (*Brown*, *supra*, 54 Cal.4th at p. 323).

Different forms of legislative mitigation trigger *Estrada*'s presumption of retroactivity where *Estrada*'s "logic" and rationale control. (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 312.) *Estrada*'s presumption applies when legislation eliminates or alters the metes and bounds of criminal liability for conduct, such as by repealing a provision defining a crime, adding an element to an offense or an enhancement, or establishing a new affirmative defense. (OBM 24-25.) Likewise, *Estrada*'s presumption applies if a change is directed at the punishment designated for criminal conduct by, for example, lowering the specified punishment for a crime, adding a discretionary lower tier of punishment, rendering enhancements inapplicable to a crime by making the crime a misdemeanor rather than a felony, or giving trial courts discretion to strike an enhancement. (OBM 25.)

Recently, this Court determined in *Lara* and *People v. Frahs* (2020) 9 Cal.5th 618 that opening an avenue that can lead to more lenient, nonpunitive treatment also triggers the presumption of retroactivity under *Estrada*'s rationale. (OBM 25-26.) Thus, repealing the prosecution's authority to charge juveniles directly in criminal court "ameliorated the possible punishment for a class of persons, namely juveniles" (*Lara*, *supra*, 4 Cal.5th at p. 308) because "'the potential benefit of a juvenile transfer hearing is that it may, in fact, dramatically alter a minor's effective sentence'" (*id*. at p. 311). Similarly,

legislation allowing defendants with mental disorders "an opportunity for diversion and ultimately the dismissal of charges" (*Frahs*, *supra*, 9 Cal.5th at p. 624), thereby precluding conviction and punishment, fell within the spirit of *Estrada* (*id.* at p. 631).

By contrast, legislation not reducing or eliminating criminal liability or reducing the potential punishment or creating an alternative to punishment does not fall within the logic or spirit of *Estrada*'s presumption, even when the legislation effectively shortens a defendant's sentence. (*Brown*, *supra*, 54 Cal.4th at p. 325 [statutory increase in rate of earning prison conduct credits "does not represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an . . . inference of retroactive intent" as described in *Estrada*].) That sort of legislation does not by its nature compel a clear and unavoidable inference of retroactive intent like the one that *Estrada* identified as necessary to overcome section 3's otherwise clear express-statement rule.

Section 1109 does not fall within *Estrada*'s logic or rationale because it does not reduce or eliminate criminal culpability for engaging in conduct that triggers gang enhancements, does not reduce the punishment for gang enhancements, and does not set out a new pathway to different treatment that precludes punishment. Rather, it is a prophylactic procedural protection designed to ensure fairness in the criminal justice system by guarding against a particular potential harm—an erroneous guilty verdict that could arise from jurors being unable to abide by limiting instructions and considering gang evidence for an

improper purpose, resulting in the conviction of a factually innocent person. Improving fairness in the judicial system by reducing the risk of an erroneous conviction is undeniably a laudable goal and an important State interest within the Legislature's purview. But such legislation is not akin to a reduction in punishment or an opportunity for more lenient treatment in the sense that it can be inferred that the Legislature could only have intended retroactive application even in the absence of the express statement required by section 3.

Appellants disagree. They argue that a statutory change that increases the chance for acquittal is necessarily a potential sentence reduction, which is ameliorative under *Estrada*. What appellants fail to acknowledge is that *any* procedural change to the criminal justice system designed to improve fairness has the concomitant effect of reducing the chance of an erroneous conviction by some quantum. "Most statutory changes are, of course, intended to improve a preexisting situation and to bring about a fairer state of affairs, and if such an objective were itself sufficient to demonstrate a clear legislative intent to apply a statute retroactively, almost all statutory provisions and initiative measures would apply retroactively rather than prospectively." (*Evangelatos*, *supra*, 44 Cal.3d at p. 1213.) Consistent with that understanding, courts have never held that every procedural change designed to enhance fairness in some manner should be classified as an ameliorative change implicating *Estrada*. (*People v. Ramos* (Apr. 13, 2023, D074429) 90 Cal.App.5th 578, ___ [2023 WL 2926302, *27] ["Current

precedent from our Supreme Court does not support an extension of the *Estrada* rule to a statutory change that may possibly benefit a criminal defendant but that does not redefine the conduct subject to criminal sanctions or, at least potentially, reduce or eliminate the applicable punishment"].)

Despite that, appellants ask for a rule that any new legislation benefitting criminal defendants in a way that might lead to fewer erroneous convictions must be applied to all nonfinal cases. Such an approach goes far beyond *Estrada*'s logic and would effectively judicially abrogate section 3's requirement of an express indication when the Legislature intends retroactive application of a new statute.

B. Statutory procedural changes to improve reliability of criminal trials have never been seen as presumptively retroactive

The Legislature has taken numerous steps to improve the fairness of criminal trials since *Estrada*, all of which potentially could reduce erroneous convictions by some quantum. Yet courts have not considered those changes ameliorative under *Estrada* and, consequently, have not given retroactive effect to them—until the Court of Appeal strayed from this universally accepted understanding. Said another way, before the decision below, every court to consider the retroactivity of a procedural change designed to improve fairness recognized that such changes do not require drawing the inevitable inference of an impermissible motive of vengeance from applying such procedural changes only prospectively.

For example, *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 290-291, reaffirmed the "general rule that statutes addressing the conduct of trials are prospective." Notably, in evaluating retroactivity, *Tapia* relied on *People v. Hayes* (1989) 49 Cal.3d 1260, 1273-1275. (*Tapia*, at p. 291.) *Hayes* held that newly enacted Evidence Code section 795, limiting the admissibility of testimony by witnesses who had undergone hypnosis, was prospective, notwithstanding that application of the statute could result in the exclusion of eyewitness evidence. (*Hayes*, at p. 1274.) Under appellants' approach to retroactivity, however, a statute excluding a class of eyewitnesses would increase the potential for an acquittal and would thus trigger *Estrada*.

In 2016, the Legislature amended section 859.5—which required that custodial interrogations of juveniles suspected of committing serious felonies be recorded—by extending it to custodial interrogations of adult murder suspects. (Stats. 2016, ch. 791, § 2.) The Legislature made several findings, including that "false confessions extracted during police questioning of suspects have been identified as a leading cause of a wrongful conviction" (*id.*, § 1, subd. (a)(1)) and that "[r]ecording interrogations decreases wrongful convictions based on false confessions and enhances public confidence in the criminal justice process" (*id.*, § 1, subd. (b)).

As with section 1109, section 859.5, as enacted and amended, established a procedural protection for a class of offenders that was specifically designed to reduce the chances of wrongful convictions. Under appellants' logic, section 859.5

would be ameliorative under *Estrada* because of the express legislative goal of decreasing wrongful convictions by effectively excluding a certain type of evidence (false confessions). The net effect would be to increase the possibility of acquittal by making trial proceedings fairer. However, the only published decision to consider retroactivity of that section held that *Estrada* did not apply. (*People v. Cervantes* (2020) 55 Cal.App.5th 927, 938-941.) *Cervantes* concluded that section 859.5 was not ameliorative, appropriately observing, "The amendments do not . . . alter the substantive requirements for conviction, nor affect the available punishments in the event of conviction. They do not alter or reduce criminal punishment or treatment." (*Id*. at p. 940.) *Cervantes* added that the original and amended versions of section 859.5 did not fall within the "logic of *Estrada*" even though "they were designed to reduce biased interpretation of, and ensure the accuracy of the evidence of, the communication that occurs in an interrogation." (*Id*. at p. 941.)

Richardson does not dispute that *Cervantes* was correctly decided. (Richardson ABM 26-27.) Rather, he contends that it is distinguishable because "the central purpose behind the law was not to aid defendants but to ensure that juries received accurate information." (Richardson ABM 27; see also *People v. Ramos* (2022) 77 Cal.App.5th 1116, 1130-1131 [distinguishing *Cervantes* for this reason].) His argument, however, ignores that the primary concern motivating the legislation was to reduce false confessions, which the Legislature identified as a leading cause of wrongful convictions. (Stats. 2016, ch. 791, § 1, subd. (a)(1); see

also *id*., subd. (a)(2) ["Mandating electronic recording of custodial interrogations" will "reduce the likelihood of wrongful convictions, and further the cause of justice"].) Indeed, the parallels between the reasons for and effect of section 859.5 and those of section 1109 are compelling. (See Stats. 2021, ch. 699, § 2, subd. (d)(6) ["Gang enhancement evidence . . . perpetuates unfair prejudice in juries and convictions of innocent people"].)

Similarly, in 2016, the Legislature enacted the California Electronic Communications Privacy Act, which created new grounds for defendants to seek suppression of evidence. (Stats. 2015, ch. 651, § 1 [enacting § 1546.4].) Expanding the grounds for suppressing inculpatory evidence necessarily increases the chances of an acquittal. Nevertheless, *People v. Sandee* (2017) 15 Cal.App.5th 294 correctly held that "[t]he retroactivity principle discussed in *Estrada* is not applicable here because the ECPA does not have the effect of lessening the punishment for a crime." (*Id*. at p. 305, fn. 7.)

The Legislature also enacted Welfare and Institutions Code section 625.6, requiring that a juvenile consult with counsel before custodial interrogation. (Stats. 2017, ch. 681, § 2 [youths under 16]; Stats. 2020, ch. 335, § 2 [extending to all juveniles].) One of the Legislature's goals was reducing coerced or false confessions. (Stats. 2017, ch. 681, § 1.) Doing that would in turn reduce wrongful convictions and increase the chance of acquittal. However, that enactment has not been applied retroactively. (Cf. *Y.C. v. Superior Court* (2021) 72 Cal.App.5th 241, 252 [recognizing that age-expansion will apply prospectively].)

Notably, the only deviations from this unbroken line of authority came as a direct result of the decision below. Relying on it, *People v. Venable* (2023) 88 Cal.App.5th 445 held that recently enacted Evidence Code section 352.2—which simply requires consideration of additional factors under Evidence Code section 352 before admitting creative expression, such as rap lyrics—is retroactive under *Estrada*. (*Id*. at pp. 457-458, petn. for review filed Mar. 21, 2023, S279081.) After reciting the fairness and possibility-of-acquittal rationales of the decision below, *Venable* held, without further explanation or analysis: "The same is true of Evidence Code section 352.2." (*Ibid*.) *Venable* highlights the absence of any discernable limiting principle for the expansive interpretation of *Estrada* adopted below and advanced by appellants.[2]

Ultimately, most modern legislative changes to the criminal trial process are designed to make proceedings fairer, reducing circumstances that could lead to wrongful convictions. Such enactments—including section 1109—necessarily increase the chances of acquittal to some degree. But they do not change the elements of an offense or enhancement, nor reduce the punishment for a crime or enhancement, nor create an

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[2] *Venable*'s extension of *Estrada* was rejected in *Ramos*, *supra*, 2023 WL 2926302, *27. (See also *id*. at p. *26 ["to decide whether Evidence Code section 352.2 is retroactively applicable to nonfinal cases, we must determine whether it is either legislation 'lessening criminal punishment' or legislation 'reducing criminal liability.' [Citation.] The answer to both questions is clearly no"].)

alternative pathway for avoiding conviction or punishment. Therefore, they do not implicate *Estrada*'s rationale.

Other jurisdictions sometimes presume retroactive application of ameliorative statutes akin to *Estrada*. For example, *Estrada* relied on the decision of the New York Court of Appeals in *People v. Oliver* (1956) 1 N.Y.2d 152. (*Estrada*, *supra*, 63 Cal.2d at p. 745.) Yet appellants cite no out-of-state authority deeming a procedural change of the type at issue here ameliorative and therefore retroactive.[3]

Indeed, such a rule would not be retroactive in New York. *Oliver* recognized that "[s]tatutes dealing with matters other than procedure are not to be applied retroactively absent a plainly manifested legislative intent to that effect." (*Oliver*, *supra*, 1 N.Y.2d at p. 157.) And the rule "that procedural statutes are generally retroactive" means "they apply to pending proceedings, and even with respect to such proceedings they only affect procedural steps taken after their enactment. . . . . [¶] Actually, therefore, such statutes are not retroactive at all, but are prospective under the rule that procedural matters are governed by the law in force when they arise." (Com. foll. N.Y. Stat. Law § 55 (McKinney), fns. omitted.)[4]

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[3] See generally *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 275, footnote 29 ("[T]he mere fact that a new rule is procedural does not mean that it applies to every pending case. . . . [T]he promulgation of a new rule of evidence would not require an appellate remand for a new trial").

[4] The concurring opinion in *People v. Austen* (N.Y.App.Div. 2021) 153 N.Y.S.3d 247 usefully discusses these principles. (See (continued…)

Also informative is how the inverse rule—namely, the preclusion of retroactive application of punitive changes as ex post facto—has been interpreted. The U.S. Supreme Court's ex post facto jurisprudence similarly recognizes a categorical distinction between substantive changes to punishment for crimes, elements of crimes, or defenses to crimes versus procedural changes to trials that disadvantage a defendant for purposes of triggering its protections. In *Collins v. Youngblood* (1990) 497 U.S. 37, the Court reiterated precedent explaining the scope of the ex post facto protection (which is the exact inverse of *Estrada*): "'It is settled . . . that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.'" (*Id.* at p. 42.) *Collins* observed that "numerous cases" "have held that 'procedural' changes do not result in *ex post facto* violations." (*Id.* at p. 50; e.g., *Dobbert v. Florida* (1977) 432 U.S. 282, 293 ["Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto"].) And *Collins* expressly

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(…continued)

id. at pp. 250-251 (conc. opn. of Smith, J.P.) [explaining legislative change to the timing of mandatory disclosure of witness statements, which improved fairness, was nevertheless a nonretroactive procedural change]; accord, *People v. Maharrey* (N.Y.App.Div. 2022) 169 N.Y.S.3d 426, 427.)

overruled *Kring v. Missouri* (1883) 107 U.S. 221 because *Kring* had suggested the ex post facto clause "include[s] not merely the [above-quoted] categories, but any change which 'alters the situation of a party to his disadvantage.'" (*Collins*, at p. 50.) Though the context is inverted, the rejected *Kring* approach is surprisingly similar to the position now advanced by appellants.

Appellants' contention that an increased chance of acquittal through improved fairness constitutes a reduction in punishment under *Estrada* founders because that assertion is inconsistent with the holding and logic of *Estrada* and applies to most, if not all, modern legislative changes to procedure. (Cf. *Evangelatos*, *supra*, 44 Cal.3d at p. 1213.) Adopting appellants' expansion of *Estrada* would effectively judicially abrogate section 3's requirement of an express statement of retroactivity for all but the most unusual procedural statutes—those that actually undermine fairness or do not provide any potential benefit to a defendant. Moreover, extending *Estrada* to encompass *any* increased potential for acquittal has no discernable stopping point. There is no quantifiable metric for assessing increased fairness or reduced potential for wrongful convictions to draw meaningful lines between retroactive and nonretroactive beneficial procedural changes. Increasing the possibility of acquittal by some inarticulable degree cannot be the sine qua non of retroactivity.

To be sure, a properly retroactive ameliorative change may increase the chance for acquittal, for example by establishing a new affirmative defense. But it is the alteration of society's

perception of what conduct is wrongful, or the degree to which it is wrongful (punishment), that has long been understood to justify retroactive treatment despite legislative silence under *Estrada*'s rationale.

Looking, as the Court of Appeal did, for a theoretical increased possibility of acquittal to determine whether an enactment is ameliorative mistakenly strays from *Estrada*'s rationale by focusing on ancillary outcomes as opposed to the core concerns of criminal law—conduct and punishment (§ 15). When the Legislature changes its mind about conduct or punishment—when it, in other words, makes "a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law" (*Estrada*, *supra*, 63 Cal.2d at p. 745, internal quotation marks omitted)—it has "by necessary implication provided, that the amendatory statute should prevail" (*id.* at pp. 744-745). On the other hand, when it makes any of the many changes that may enhance fairness—changes that do not alter what conduct is criminal, mitigate punishment for that conduct, or create a path to alternative treatment under the law—it is adjusting trial procedure, not ameliorating what it now perceives to be "too severe" prior law. (*Id.* at p. 745.) In those circumstances, the Legislature is aware of the longstanding rule against retroactivity and does not intend retroactive application absent express declaration. (§ 3; *Evangelatos*, *supra*, 44 Cal.3d at p. 1213.)

Section 1109 does not ameliorate based on a new societal assessment concerning conduct or punishment. Discretionary

bifurcation would not be spoken of as establishing "too severe" a punishment or treatment for conduct. (*Estrada*, *supra*, 63 Cal.2d at p. 745.) Trial, unitary or bifurcated, is neither punishment (§ 15) nor other treatment imposed as a consequence of criminal conduct. The decision to mandate bifurcation on request does not reflect a desire for increased lenity. Society's assessment *has* changed as shown by the amendment to section 186.22. But it is *that* amendment that is retroactive, not section 1109.

Estrada and its progeny have demarked a clear and workable rule for when the statutory presumption of prospectivity is overcome by an unavoidable implied legislative intent for retroactivity predicated on punishment reduction or preclusion. The rationale and scope of *Estrada*'s exception have long been well understood, and there is no reason to think that the Legislature in enacting a new procedural rule like section 1109 would intend retroactive application without expressly saying so as required by section 3. Appellants' attempt to dramatically expand *Estrada*'s rule by looking for any indirect increased chance of acquittal through improved fairness is unjustified on grounds of legislative intent, which is the very principle the *Estrada* rule is meant to vindicate.

C. Alterations to a defendant's plea bargain assessments do not implicate *Estrada*'s rationale

Burgos also contends that section 1109 reduces punishment by improving defendants' plea bargaining "posture." (Burgos ABM 18; see Opn. 16-18.) This claim is closely related to the preceding one and fails for the same reasons. The premise is that a defendant, knowing that gang evidence will be bifurcated,

experiences some reduced pressure to accept the prosecutor's plea offer, which Burgos contends will result in reduced punishment. However, the extent of such a reduction is speculative at best and far removed from the type of punishment reduction or preclusion that would implicate *Estrada*'s logic.

Estrada's logic extends to enactments creating the possibility of receiving different punishment or different treatment *through judicial discretion* in light of *legislatively altered* punishment or treatment. (E.g., *People v. Francis* (1969) 71 Cal.2d 66, 75-76; *Lara*, *supra*, 4 Cal.5th 299.) Burgos goes beyond that logic to include the possibility of receiving different punishment *through plea bargaining* in light of a change in trial mechanics *without a legislative alteration* in the specified punishment or treatment.

Moreover, Burgos's assessment of the effect that section 1109 might have on plea bargaining is overstated. A defendant faces the same aggregate potential punishment after the effective date of section 1109 as before, and aggregate punishment exposure presumably is one of the primary drivers of plea bargaining. Section 1109 alters the order of proof, not the aggregate punishment exposure. Nor is there any reason to believe the prosecution's offer will be different in light of mandatory bifurcation. Prosecutors alleging gang enhancements have already concluded that they have proof beyond a reasonable doubt, without regard to any potential for prejudicial spillover effect. (See *People v. Lopez* (2020) 9 Cal.5th 254, 276 [recognizing that "a prosecutor has a duty to charge only those offenses she

believes she can prove beyond a reasonable doubt" (internal quotation marks omitted)].)

Defendants confronted with an offer in a gang case must first assess the risks of going to trial in light of the overall sentence they face and the weight of incriminating evidence. They presumably also attempt to assess the risk of prejudicial spillover effect from gang evidence in a unitary trial and whether that risk would be reduced by the new bifurcation procedure. They also need to account for the fact that some gang-related evidence may still be relevant and admissible for other purposes in the primary trial. And in undertaking this calculus, a defendant must also factor in that the jury considering gang allegations at a bifurcated hearing will have already reached a guilty verdict on the substantive offenses and thus may be looking at the defendant with a jaundiced eye at the second stage.[5]

After balancing the competing factors, presumably some defendants who before would have bargained will now reach a different calculus in light of bifurcation and go to trial. However, many, or even most, of those now opting for a trial, will likely be convicted on more charges than specified in the offer, resulting in

[5] If jurors are susceptible to misusing gang evidence, they would seem equally likely to misuse an actual guilt finding. (Cf. *Richardson v. Marsh* (1987) 481 U.S. 200, 211.)

a much longer sentence than they would have received had they accepted the bargain.[6]

Reducing the potential for an unfair outcome will provide a modicum of additional assurance to all defendants in plea decisions, an important and laudable goal, but that does not provide any guarantee of a better outcome in any individual case. Moreover, because the potential for an erroneous conviction is not quantifiable, it is impossible to determine how many factually innocent defendants would avoid pleading guilty and instead go to trial with bifurcation in place and obtain an acquittal. It is likewise impossible to determine in the aggregate whether any change in the number of defendants going to trial versus accepting a plea bargain will result in a net increase or decrease in aggregate sentencing across all gang cases.[7]

These highly abstract possibilities reflect that "[p]lea bargains involve complex negotiations suffused with uncertainty." (*Premo v. Moore* (2011) 562 U.S. 115, 124.)

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[6] While the legislative findings note that unbifurcated trials "may lead to wrongful convictions" and could make conviction "more likely" (Stats. 2021, ch. 699, § 2, subd. (e)), the Legislature neither quantified these concerns nor suggested that a significant number of unbifurcated trials convicted the factually innocent.

[7] And it is doubtful we will ever know. Far more significant for conviction rates and the plea bargain calculus is the legislative imposition of more restrictive elements for finding gang crimes and enhancements. Narrowing the enhancement's applicability will have a much more dramatic effect on the number of cases in which it is pleaded and ultimately proven than bifurcation ever will.

Estrada, however, deals with legislative certitude that the previously established punishment was too severe and that lenity should be extended through the absolute or discretionary reduction in punishment or availability of punishment-preclusive treatment. Burgos would extend *Estrada* to situations in which the Legislature has left punishment and treatment unchanged but has indirectly injected marginal uncertainty into plea negotiations. But again, both the logic of *Estrada*'s rule, and the well-established understanding of its scope, refute Burgos's claim that the Legislature must have intended retroactive application of section 1109.

D. The Legislature's findings in passing Assembly Bill 333 do not demonstrate that it intended section 1109 to be retroactive

Appellants point to the Legislature's findings in passing Assembly Bill No. 333 (2021-2022 Reg. Sess.) as demonstrating that it intended the bifurcation procedure to apply retroactively. Their reliance on those findings is understandable given the important fairness considerations identified by the Legislature as motivating the change in trial procedure set out in section 1109. (Stats. 2021, ch. 699, § 2, subds. (d)(6), (e) & (f).) However, even after highlighting these considerations, the Legislature elected not to universally mandate bifurcation of the trial of gang enhancement allegations (§ 186.22, subds. (b) & (d)), which are by far the most common gang charges filed under the STEP Act. Nor did the Legislature create a presumption in favor of bifurcation. Rather, section 1109 only mandates bifurcation of gang enhancements upon request by the defense. (§ 1109, subd.

(a).) Accordingly, while the Legislature considered bifurcation an important tool for enhancing fairness, the actual approach it employed reflects that the Legislature did not consider bifurcation indispensable to achieving its fairness goals.

Appellants emphasize the Legislature's findings about racial disparities in the application of gang enhancements. However, the fact that aspects of Assembly Bill 333 were motivated by the Legislature's desire to address racial disparities does not inform whether the Legislature intended all parts of the bill to be retroactive.

First, many of the findings tie racial disparity and the length of sentences to the former gang enhancement provision, not discretionary bifurcation. (E.g., Stats. 2021, ch. 699, § 2, subds. (a), (b), (d)(1), (2), (4), (5), (9).) The amendments to section 186.22 are designed to cure those problems by making it harder to allege and prove a gang enhancement allegation, and those amendments operate retroactively.

Second, appellants are simply incorrect to the extent they assert that, because Assembly Bill 333 was in part motivated by a desire to address disparate impact, both legislative changes—the amendment to section 186.22 and the addition of section 1109—must be retroactive. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the

law." (*In re Friend* (2021) 11 Cal.5th 720, 740, quoting *Rodriguez v. United States* (1987) 480 U.S. 522, 525-526.) That the Legislature considers practical concerns even when legislating on matters as important as reducing racial disparities and makes express choices about the retroactivity of such legislation is evident: The Legislature has enacted other reforms directed at addressing racial disparities in the criminal justice system, only some of which it made retroactive. And when it did so, it did so expressly.

For example, the California Racial Justice Act of 2020, as enacted, was strictly prospective. (Stats. 2020, ch. 317, § 3 [enacting former § 745, subd. (j)].) And when the Legislature decided to make the act retroactive, it added an express retroactivity provision. (Stats. 2022, ch. 739, § 2 [amending § 745, subd. (j)].) Even that provision took a measured approach, granting full retroactivity to nonfinal judgments (§ 745, subd. (j)(1)) but annually expanding retroactivity for other cases based on various criteria (*id.*, subds. (j)(2)-(5)). Likewise, legislative reforms to the peremptory challenge system to address racial disparities in jury selection were made prospective. (Stats. 2020, ch. 318, § 2 [enacting Code Civ. Proc., § 231.7, subd. (i)].)

Thus, the Legislature has endorsed a nonretroactive approach to important procedural changes designed to address racial disparities and improve fairness. And when it wants to make those changes retroactive (whether to nonfinal or final judgments), it knows how to do so explicitly. That a legislative change is motivated by a desire to address racial disparities does

not compel a finding of retroactivity. Accordingly, that Assembly Bill 333 addresses, in part, racial disparities is not informative of legislative intent as to bifurcation in the face of legislative silence on retroactivity and the presumption that arises from such silence under section 3.

E. Fiscal considerations do not support retroactivity

Burgos next suggests that fiscal considerations demonstrate a legislative intent for retroactive application of section 1109. (Burgos ABM 35-36.) The argument is unpersuasive.

Burgos selectively quotes from the Senate Committee on Appropriations to argue for cost savings resulting from bifurcation. (Sen. Com. on Appropriations, Analysis of Assem. Bill No. 333 (2021-2022 Reg. Sess.) as amended July 13, 2021, p. 1.) But a careful review of that committee analysis reflects that, for prisons, the cost savings was directly tied to reduced sentences from the change in the elements of the gang enhancements. (*Ibid*. [referring to savings from narrowing of gang crime definition].) Burgos also sidesteps the remainder of that analysis, which reported uncertainty about the fiscal effect of bifurcation on prisons. (*Ibid*.) As for the courts, the analysis clearly recognized a significant *increase* in costs due to the bifurcation provision. (*Ibid*. ["Courts: Unknown, potentially major workload cost pressures in the low millions of dollars annually to the courts to bifurcate gang-related and non-gang related charges in a prosecution"].) And staff comments regarding the fiscal impact of the bifurcation procedures were all

stated in terms of its application to *future* trials, without suggesting any retroactive effect. (*Id*. at p. 3.)

Accordingly, while hardly determinative, the Senate Committee on Appropriations' fiscal analysis is actually more indicative of a legislative expectation that the bifurcation provision would be prospective, rather than retroactive. But even if part of the Legislature's goal in enacting Assembly Bill 333 was to save money, that would shed little light on the particular question at issue here—whether the Legislature intended section 1109 to operate retroactively—which involves important considerations quite apart from cost savings. (Cf. *People v. Morales* (2016) 63 Cal.4th 399, 408.)

F. Prospective application of section 1109 does not implicate equal protection principles

Burgos argues that applying section 1109 prospectively violates equal protection. (Burgos ABM 43-45.) However, this Court has repeatedly rejected similar timing-based claims in situations in which the enactment does lessen punishment. (See *People v. Floyd* (2003) 31 Cal.4th 179, 188 ["Defendant has not cited a single case, in this state or any other, that recognizes an equal protection violation arising from the timing of the effective date of a statute lessening the punishment for a particular offense. Numerous courts, however, have rejected such a claim—including this court"]; *People v. Buycks* (2018) 5 Cal.5th 857, 879, fn. 7; *People v. Morales*, *supra*, 63 Cal.4th at pp. 408-409.) As the Court explained in *Floyd*: "*Estrada* itself recognized that when the Legislature has amended a statute to lessen the punishment, its determination as to which statute should apply to all

convictions not yet final, 'either way, would have been legal and constitutional.' That the Legislature's choice, either way, would be constitutional is the foundation for our oft-repeated statement that, in this type of circumstance, the problem 'is one of trying to ascertain the legislative intent—did the Legislature intend the old or new statute to apply?' Defendant's equal protection argument presumes that the *Estrada* rule is constitutionally compelled. As we have stated repeatedly, it is not." (*Floyd*, at pp. 188-189, citations omitted.)

A fortiori, enactments such as section 1109 that do *not* ameliorate punishment also do not violate equal protection simply because they are not retroactive. Given that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic" (*Landgraf*, *supra*, 511 U.S. at p. 265), and "accords with widely held intuitions about how statutes ordinarily operate" (*id.* at p. 272), it would be remarkable to now discover that statutory procedural changes must be given effect on appeal as a matter of constitutional compulsion. (Cf. *id.* at p. 275, fn. 29.)

II. APPELLANTS HAVE NOT ESTABLISHED PREJUDICE FROM THE ABSENCE OF BIFURCATION

Even if section 1109 is retroactive, any error in not bifurcating was harmless in this case. The Court of Appeal's analysis reaching a contrary conclusion was deficient.

A. The issue of prejudice is fairly included in the grant of review

Appellants contend that the question of prejudice is not fairly included in the grant of review. (Burgos ABM 44; Richardson ABM 34; Stevenson ABM 36.) But when the Court grants review to assess the merits of a claim, the question whether the asserted error requires reversal necessarily follows and is therefore ordinarily fairly included. Under article VI, section 13 of the California Constitution, a court cannot set aside a judgment "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." If the Court holds there was error because section 1109 is retroactive, it must still determine whether that error was prejudicial before the judgment can be set aside. (See *People v. Tran* (2022) 13 Cal.5th 1169, 1209-1210.) Of course, the Court has the discretion to remand to the Court of Appeal for the determination of prejudice when the complexity of the trial record and the difficulty of the issue does not lend itself to resolution by this Court. (*In re Lopez* (2023) 14 Cal.5th 562, ___ [526 P.3d 88, 109].) But that is generally not the case for bifurcation error. (*Tran*, at pp. 1209-1212.)

Even if not included, the Court should exercise its discretion under California Rules of Court, rule 8.516(b)(2) to decide the issue. Appellants were aware of the issue, which was briefed and decided below, and they have had a full opportunity to brief the issue now. (*Ibid.*; *Tran*, *supra*, 13 Cal.5th at p. 1208; *People v. Braxton* (2004) 34 Cal.4th 798, 809.) Moreover, the Court of

Appeal's misguided analysis remains published. It therefore merits this Court's attention to rectify and discourage misapplication of the *Watson* standard.

B. Appellants have not demonstrated prejudice

The Court of Appeal's prejudice analysis overturning appellants' robbery convictions was inadequate and heavily influenced by its skepticism about bifurcation error's susceptibility to any form of harmless error analysis—a view rejected in *Tran*, *supra*, 13 Cal.5th at pages 1208-1210. (OBM 50-55.) Before their convictions may be reversed, appellants must show that there is a reasonable probability they would have obtained a more favorable result at trial had the new bifurcation rule been applied there. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *Tran*, at p. 1209.) Appellants offer several arguments to meet this burden. Their arguments are unpersuasive.

1. Identification evidence

Appellants contend that bifurcation would have made a difference to the outcome of the trial, asserting that the gang evidence must have influenced the jury to convict because identification evidence against them was weak. They point to inconsistencies in the victims' descriptions of the assailants and their reluctance to testify at trial. However, the identity of appellants as the perpetrators was not dependent on the victims' identification. Byrd testified that Lozano, Burgos, Richardson, and Stevenson—and only those four men—left Byrd's apartment complex together after midnight to walk to the nearby 7-Eleven. (42RT 123406-12347; 44RT 12963-12964, 12990.) Video from inside the 7-Eleven showed Burgos, Richardson, Stevenson, and

Lozano together in the store shortly before the robbery. (29RT 8424, 8436-8437, 8455-8456; 42RT 12316.)

The victims left a restaurant near the 7-Eleven after midnight and saw a group of men approaching, with Rodriguez recounting that it looked like the men "had just come from the 7-Eleven or something." (4CT 1129, 1146.) The assailants asked if the victims were from "Meadowfair," announced that they were "Crips" (4CT 1129-1130; 21RT 6042, 6045; 22RT 6354), and demanded to know if the victims "banged" (4CT 1185; see 28RT 8175-8176). One of the assailants pointed a gun at Cortez, and the men took the victims' wallets and phones. (4CT 1130-1131, 1155-1156, 1175-1178, 1185-1186; 21RT 6028-6029, 6043-6045; 22RT 6356, 6399; 23RT 6646; 31RT 9101.)

The four men returned to the apartment complex a short time later and went to Byrd's apartment. (42RT 12347-12348; 43RT 12617.)

Rodriguez's phone was recovered from the car Lozano had driven to the complex that night. (21RT 6040; 25RT 7349, 7351-7352; 27RT 7892; 37RT 10899-10900.) Cortez's phone was inside Byrd's apartment, stuffed inside a small backpack that belonged to Lozano's 10-year-old sister. (24RT 6960-6961; 25RT 7233-7234; 26RT 7513-7514; 27RT 7892; 42RT 12329; 43RT 12618.) Lozano's fingerprint was found on Rodriguez's phone. (40RT 11742-11744.)

Considered together, Byrd's testimony, the video evidence, the recovered stolen items, and the fingerprint evidence pointed unerringly to Lozano, Burgos, Richardson, and Stevenson as

being the four men who together left the apartment, went to the 7-Eleven, robbed Cortez and Rodriguez, and then returned to the apartment before being apprehended by the police, irrespective of the quality of the victims' identifications, and irrespective of the gang evidence.

Cortez's identifications shortly after the robberies further cemented the identities of the four men as the robbers. At an in-field show-up, Cortez identified Lozano as the gun-toting assailant, Burgos as the person who took his wallet, Richardson as the assailant who told the victims to empty their pockets, and Stevenson as being with the other two for the robbery and an intimidating presence during the robbery. (4CT 1176-1183; 28RT 8148-8151; 32RT 9314, 9399.)[8] Rodriguez's identifications were much more equivocal. He identified Byrd as the lead robber, expressed uncertainty about Stevenson and Burgos, and did not identify Lozano or Richardson. (28RT 8124-8142.) His uncertainty, however, did not undermine Cortez's identification, Byrd's testimony, the video footage, or the recovery of the stolen items and the fingerprint further linking Lozano and thus the entire group to the robbery.

Richardson acknowledges that the store video showed he was with the group at the 7-Eleven, but claims that Hames must have been the fourth robber based on his size being closer to the man in Rodriguez's description. (Richardson ABM 35-37.)

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[8] Cortez viewed but did not identify Hames. (4CT 1184; 28RT 8152-8153.)

However, Richardson's speculation ignores Byrd's testimony that Hames did not accompany the four men to the store, as confirmed by the video footage, and Cortez's statement to the police that Hames was not present.

Stevenson likewise argues that the descriptions did not match him (Stevenson ABM 38-39), notwithstanding his being on the video and identified by Cortez. Stevenson also points to Cortez's saying Stevenson did not do anything during the robbery itself, as showing he did not aid and abet the robbery. (Stevenson ABM 39.) This argument ignores that Stevenson was "part of the group" (4CT 1179) that decided to walk over to Cortez and Rodriguez with the purpose of directly confronting the victims about gang affiliation while self-proclaiming Crip affiliation. (4CT 1129-1130, 1146-1147, 1179, 1185, 1191; 21RT 6028, 6031, 6053-6054; 22RT 6354, 6361-6362; 23RT 6635-6636, 6638-6640, 6644.)

Contrary to his claim, Stevenson was not an idle bystander who sat on the sidelines. Along with the others, Stevenson actively took steps to confront the victims. (23RT 6635-6636, 6638-6640, 6644.) And Rodriguez was clear that Stevenson was part of the group and involved in the attack. (4CT 1162 ["[H]e wasn't saying anything, but he was involved"].)

The record shows that Stevenson took an active part in confronting the victims, and by his presence participated in a show of force as part of a group outnumbering the victims during the robbery, before leaving together with his cohorts who had the

victims' property. (See *In re Juan G.* (2003) 112 Cal.App.4th 1, 5; *In re Jessie L.* (1982) 131 Cal.App.3d 202, 217.)

2. Admissibility of gang evidence

Another important consideration in evaluating whether the defendants have demonstrated prejudice from the absence of bifurcation is that some gang evidence would be admissible at the first phase of a bifurcated the trial. (OBM 54; Opn. 7-10 [acknowledging relevance of gang evidence in evaluating sufficiency of the evidence as to identification and intent for the robberies]; see generally *Tran*, *supra*, 13 Cal.5th at p. 1208 ["We have held that gang evidence, even if not admitted to prove a gang enhancement, may still be relevant and admissible to prove other facts related to a crime"]; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 ["[E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime"]; *People v. Oliva* (2023) 89 Cal.App.5th 76, 93 [gang evidence admissible to show identity].) Appellants do not dispute this general principle, but counter that because an intent to steal was inherent in the robbery and not contested, gang evidence to show intent or motive would have been inadmissible. That is incorrect.

It is well settled that a plea of not guilty puts every element at issue, and the prosecution always has the burden of proving

every element, whether contested or not by the defense. (*People v. Jones* (2011) 51 Cal.4th 346, 378 ["Defendant's assertion that his defense to the two charges was bound to focus upon identity, and not intent, would not eliminate the prosecution's burden to establish both intent and identity beyond a reasonable doubt"]; see also *People v. Soper* (2009) 45 Cal.4th 759, 776-777; *People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4.) Thus, evidence relevant to intent and motive is properly admissible under Evidence Code section 1101, subdivision (b), even if uncontested, absent a stipulation to that element by the defense.

Here, the gang evidence was front and center to the confrontation and was admissible to show appellants' gang motives in committing the robbery. By their own actions and statements, appellants demonstrated that their motive for stopping the victims, pulling a gun, and stealing their money and phones was not simply financial, but was in fact a gang confrontation, with the four men seeking out possible rival gang members to threaten and rob. (See *Tran*, *supra*, 13 Cal.5th at p. 1208 [gang evidence "may still be relevant and admissible to prove other facts related to a crime"].) Similarly, the gang evidence showed that all four acted in concert in this gang confrontation. Accordingly, regardless of bifurcation, evidence of appellants' gang membership and the accompanying expectations of gang members to aid and participate in any street

confrontation with possible rivals, including robbery, would have been admitted given appellants' actual gang motivation.[9]

3. Limiting instructions

The trial court also took appropriate steps to guard against undue prejudice by instructing the jury to consider evidence of gang activity for specified evidentiary purposes only and forbidding it from using the evidence to "conclude . . . that the defendant is a person of bad character or that he has a disposition to commit a crime." (7CT 1926; see also 7CT 1883 [CALCRIM No. 303].) Another instruction limited the jury's consideration of prior conviction evidence only to "the gang allegation" and reminded the jury, "You may not consider this evidence as proof that the defendants engaged in the robbery alleged to have occurred on August 29th, 2015." (7CT 1886; 45RT 13243-13244.) The court further directed the jury pursuant to CALCRIM No. 1401 that it could consider the gang enhancement allegations only after returning guilty verdicts on one or both of the robbery counts. (7CT 1918; 45RT 13262-13263.)

The jury is, of course, presumed to have followed the court's instructions. As this Court has explained, "we and others have described the presumption that jurors understand and follow

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[9] Burgos and Richardson also take issue with introduction of rap videos to show gang affiliation, citing new Evidence Code section 352.2. (Burgos ABM 52-54; Richardson ABM 30-40.) However, the rap videos were not offered for their lyrics, but for the images of Burgos and other gang members wearing gang colors and throwing gang signs. (34RT 9984-9994.) And the nonretroactivity of that statute is discussed above.

instructions as '[t]he crucial assumption underlying our constitutional system of trial by jury.'" (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.) Critically, that presumption controls unless affirmatively rebutted by the record. (*People v. Waidla* (2000) 22 Cal.4th 690, 725; see *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 ["We presume that jurors comprehend and accept the court's directions. . . . Defendant's assertion to the contrary notwithstanding, that presumption stands unrebutted here"].)

Appellants respond by relying on the Legislature's findings in Assembly Bill 333. (Richardson ABM 42; Stevenson ABM 43-44; Burgos ABM 44-45; Stats. 2021, ch. 699, § 2, subd. (e).) The problem with appellants' reliance on these findings is that the Legislature identified generalized concerns with unbifurcated gang evidence. The Legislature did not find that admission of gang evidence was necessarily prejudicial in every case, nor did it abrogate the foundational principle that juries are presumed to follow instructions absent evidence to the contrary. Rather, it took steps to mitigate those unfortunate situations when the jury would not abide by limiting instructions.

Here, however, appellants have the burden of demonstrating prejudice from the failure to bifurcate gang charges under the specific facts of this case. (*Tran*, *supra*, 13 Cal.5th at p. 1209.) To do so, they must first overcome the presumption that the jury abided by the limiting instructions as to gang evidence. (*Waidla*, *supra*, 22 Cal.4th at p. 725.) That they have not done.

Notably, the jury rendered a split verdict, acquitting Gregory Byrd of all charges (7CT 2006) and hanging on the

firearm-use-by-a-principal allegations against all three appellants (7CT 2006). This split verdict demonstrates that the jury abided by the instructions and was not overcome by prejudice from the gang evidence such that it was not able to properly assess the evidence and render individualized verdicts on each charge and allegation.

Richardson attempts to downplay the significance of the jury's acquittal of Byrd by pointing to the fact that Byrd testified in his own defense and presented other witnesses. (Richardson ABM 41.) However, this proves precisely the opposite of what Richardson argues. Notwithstanding that the prosecution introduced similar expert testimony of gang membership for Byrd, the jury was not blinded or prejudiced by that presentation and was able to abide by the instructions and to rationally evaluate the evidence relating to the robberies separately from the gang evidence. The jury credited Byrd's testimony that he did not go to the store or participate in the robbery, and rendered an individualized verdict based on the evidence and not on impermissible prejudice due to gang evidence. Similarly, the hung verdicts on all arming allegations reflect that the jury was not overwhelmed by prejudice from the gang evidence as to any of the appellants. Rather, the jury carefully considered each allegation separately as to Burgos, Stevenson, and Richardson and rendered its verdicts based on the evidence relevant to each allegation, notwithstanding the gang evidence.

Therefore, the Court of Appeal erroneously held appellants had proved prejudice as to the robbery convictions under *Watson*.

CONCLUSION

The judgment of the Court of Appeal should be reversed as to the robbery counts and the matter remanded for resolution of the remainder of appellants' claims.

Respectfully submitted,

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May 16, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 8,353 words.

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May 16, 2023

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Francisco Burgos et al.** No.: **S274743**

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 collecting and processing electronic and physical correspondence. 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. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On May 16, 2023, I electronically served the attached **Reply Brief On The Merits** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on May 16, 2023, I placed 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 and the United States of America the foregoing is true and correct and that this declaration was executed on May 16, 2023, at San Francisco, California.

B. Wong
Declarant

/s/ B. Wong
Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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/s/Beverly Wong

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