IN THE COURT OF APPEAL OF THE STATE OF CALIFO
FIRST APPELLATE DISTRICT, DIVISION TWO

The People of the State of California, Plaintiff and Respondent, **v.** **Mark Buza,** Defendant and Appellant.	**Case No. A125542** (San Francisco County Superior Court No. 207818)

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

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

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APPLICATION TO FILE *AMICUS* BRIEF

The American Civil Liberties Union of Northern California and Professor Joseph R. Grodin respectfully apply for leave to file the attached *amicus* brief to discuss the California Constitution's protections against unreasonable searches and seizures, Article I § 13. This provision is more protective than its federal counterpart in that it prohibits the police from conducting warrantless searches of arrestees "in the hope of discovering evidence of a more serious crime." *People v. Laiwa*, 34 Cal.3d 711, 727-28 (1983). As this Court has previously held, this is the exact purpose of California's arrestee-testing law: to allow the police to seize and search an arrestee's DNA to "determine whether the arrestee can be connected to a past unsolved crime" or to a future offense. *People v. Buza*, 129 Cal.Rptr.3d 753, 780, rev. granted, 132 Cal.Rptr.3d 616 (2011). The statute therefore violates Article I § 13, regardless of whether it violates the Fourth Amendment.

STATEMENT OF INTEREST

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

The national ACLU and the ACLU-NC have been active participants in the debate over the expansion of DNA databanks. As part of this work, the ACLU-NC submitted an amicus brief to the California Supreme Court in this case[1] and is currently litigating the validity of this same statute in federal court in *Haskell v. Harris*.[2]

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[1] Available at https://www.aclunc.org/issues/technology/asset_upload_file303_12367.pdf.

[2] The Ninth Circuit has ordered supplemental briefing in Haskell and has set the case for re-argument in the week of December 9 2013. *See* http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000584.

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

Joseph R. Grodin is Distinguished Emeritus Professor at the University of California, Hastings College of the Law and Associate Justice of the California Supreme Court, 1982–1987. Much of his work as a scholar and as a jurist has focused on the California Constitution. *See, e.g.*, Joseph R. Grodin *et al.*, THE CAL. STATE CONSTITUTION (1993); Joseph R. Grodin, *Freedom of Expression under the California Constitution*, 6 Cal. Legal History 187 (2011); Joseph R. Grodin, *Liberty and Equality under the California Constitution*, 6 Cal. Legal History 167 (2012).[4] His

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

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

primary interest in this matter is to support the independent vitality of the California Constitution.

Because of these interests, *amici* respectfully request that this Court allow them to submit this brief addressing the state constitutional issue. *See* Rule of Ct. 8.200(b)(2), (c).[5]

No person or entity other than *amici* and their counsel authored the attached brief or made any monetary contribution to its preparation.

Dated: October 2, 2013

Respectfully submitted,

By: _____
Joseph R. Grodin

_____
Michael T. Risher

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[5] As discussed in section II(4) of the attached brief, it is important that this Court address this issue, even though the law also violates the Fourth Amendment.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Mr. Buza's supplemental briefing fully discusses the differences between the Maryland statute at issue in *Maryland v. King*, 133 S.Ct. 1958 (2013), and the law now before this Court, and why this Court's prior conclusion that California's law violates the Fourth Amendment is still correct after *King*. This brief therefore addresses only the California Constitution's protections against unreasonable searches and seizures, a provision that provides Californians with greater privacy protections than does the Fourth Amendment.

In construing Article I § 13 of our state constitution, the California Supreme Court has specifically rejected the proposition, central to *King*, that arrestees lack any privacy interests that limit the authority of the police to search them. *People v. Brisendine,* 13 Cal.3d 528, 547-48 (1975).[6] Instead, Article I § 13 requires the government to justify searches of arrestees with something other than the mere fact of arrest: they cannot conduct warrantless "exploratory" searches of arrestees simply in the hope of discovering evidence of some other crime. *Id.* at 534. This difference between the state and federal constitutions means that the same analysis that

[6] As discussed below, the substantive rules laid down in *Brisendine* and its progeny are still good law, although a 1983 ballot initiative abrogated the exclusionary rule as a remedy.

previously led this Court to invalidate the statute under the Fourth Amendment demonstrates that the law is invalid under Article I § 13. This Court should therefore hold that this provision violates the California Constitution, whether or not it addresses the federal constitutional question.

II. ARGUMENT

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

"California citizens are entitled to greater protection under [Article I § 13 of] the California Constitution against unreasonable searches and seizures than that required by the United States Constitution." *Brisendine*, 13 Cal.3d at 551; *see id.* at 548-552. Although a 1983 constitutional amendment (Proposition 8) eliminated the exclusionary rule as a remedy for violations of this provision, its "substantive scope … remains unaffected" by that initiative. *In re Lance W.*, 37 Cal.3d 873, 886-87 (1985). *Brisendine* and its progeny therefore remain good law except to the extent they require exclusion of evidence. *Id.*; *see Raven v. Deukmejian*, 52 Cal.3d 336, 352 (1990) (California courts retain authority "to interpret the state Constitution in a manner more protective of defendants' rights than extended by the federal Constitution."); *id.* at 349-55. Thus, "[w]hat would have been an unlawful search or seizure in this state before the passage of that initiative

would be unlawful today, and this is so even if it would pass muster under the federal Constitution." *Lance W.*, 37 Cal.3d at 886-87.

Most relevant to this case, our supreme court has repeatedly held that Article I § 13 is more protective of the privacy rights of arrestees than is the Fourth Amendment and that it protects them against "exploratory" police searches for evidence of unrelated crimes. In doing so, it has expressly rejected the reasoning of a line of U.S. Supreme Court cases that allow the police to conduct broad – nearly unlimited – searches of persons whom they have arrested, with no justification other than the arrest itself. These federal Fourth Amendment cases – exemplified by *United States v. Robinson*, *Gustafson v. Florida,* and *Michigan v. DeFillippo*[7] – are fundamental to the *King* analysis because they mean that "an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person." *Brisendine*, 13 Cal.3d. at 547 (quoting *Robinson*, 414 U.S. at 237 (Powell, J. concurring)). But our high court has rejected this notion – and these cases – and has instead held that under Article I § 13,

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

arrestees *do* retain significant privacy interests. *Id.*; *see id.* at 545-46 & n.13. Unlike the Fourth Amendment, California law therefore prohibits the police from conducting suspicionless exploratory searches of arrestees in the hope of finding evidence of unrelated crimes. Although concerns relating to officer safety, the need to inventory an arrestee's possessions and to prevent the introduction of contraband or weapons into a jail will justify many searches of arrestees, neither these interests nor any other legitimate government interest justifies taking DNA from *all* arrestees.

Our supreme court first rejected the federal rule allowing unlimited searches of arrestees in *Brisendine*. That case involved the authority of the police to search backpackers whom they had arrested but would be citing and releasing after they transported them to their patrol cars, some distance away. The court held that, although the need for the officers to escort these particular arrestees to their patrol cars raised unusual officer-safety concerns that justified searching them for weapons, the officers violated Article I § 13 by searching areas that could not conceal weapons. *Id.* at 534-35; *see id.* at 544-45. It expressly rejected the idea that the police could conduct "an exploratory search" of an arrestee to look for evidence of some crime, unrelated to the crime of arrest. *Id.* at 534-35; *see id.* at 545-47. Instead, searches of arrestees must be limited to those that serve governmental

interests other than the general interest in crime detection, such as the need to ensure officer safety, prevent the destruction of evidence or the introduction of weapons or contraband into jails, and safeguard the arrestee's property. *See id.* at 539; *People v. Maher*, 17 Cal.3d 196, 200-201 (1976).

Brisendine also addressed at length and ultimately rejected the government's argument that Article I § 13 should provide arrestees with no greater protections than does the Fourth Amendment as interpreted by *Robinson* and its ilk. *Brisendine*, 13 Cal.3d at 545-52. Although the federal constitution provides "minimum" national standards, "fundamental principles of federalism" mean that the states, through their constitutions, statutes, and courts, are "independently responsible for safeguarding the rights of their citizens." *Id.* at 545, 549-551. Thus, although it recognized that its holding was "irreconcilable" with *Robinson*, the Court held that the searches violated Article I § 13 and reversed the conviction. *Id.* at 552; *see id.* at 546 n.13. It has since repeatedly reaffirmed this rule and refused to dilute it to conform to the less-protective federal standard. *See People v. Laiwa*, 34 Cal.3d 711, 726-27 (1983)(expanding principle to include custodial arrests, as discussed below); *People v. Longwill*, 14 Cal.3d 943, 949-52 & n.4 (1975) (again rejecting federal rule and expanding *Brisendine* to prohibit unlimited searches of all persons arrested for public drunkenness); *People v. Norman*,

14 Cal.3d 929, 939 (1975) (again "rejecting the *Robinson*/*Gustafson* rule" and refusing to allow exploratory search of arrestee who would be taken before magistrate).

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

Two years later our supreme court confirmed this principle and held that Article I § 13 prohibits exploratory searches of arrestees who will be booked

into jail and held in custody. *See Laiwa*, 34 Cal.3d at 727-28 (rejecting theory that police could conduct "accelerated booking searches" of people who are subject to a full custodial arrest and jailing). Although the fact that these arrestees will be held in jail means that they, unlike *Brisendine*, may be subject to a booking search to inventory their property and maintain jail security, this does not justify searches that do not serve these purposes. *See id.* at 726. Thus, even full custodial arrest, booking, and incarceration does not authorize the police to search an arrestee "in the hope of discovering evidence of a more serious crime." *Id.* at 727-28. Instead, all suspicionless searches of arrestees, however classified, must be justified by some legitimate governmental interest other than the mere desire to search for evidence of some potential, unknown crime. *See id.*

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

This different approach to the privacy rights of arrestees under the state and federal constitutions means that regardless of whether California's arrestee-testing law violates the Fourth Amendment, it violates Article I § 13. *King*'s holding rests on what it calls the "settled" proposition, established in *Robinson*, that the "fact of a lawful arrest, standing alone, authorizes a search" of virtually unlimited scope, without "any indication that the person arrested possesses weapons or evidence." *King*, 133 S.Ct. at

1970-71 (quoting *Robinson*, 414 U.S. at 224 and *DeFillippo*, 443 U.S. at 35); *see id.* at 1974-75. But, as discussed above, "California does not subscribe to the rule of *Robinson*, insofar as it permits full searches of any person under lawful custodial arrest without inquiry into whether the justifications for search incident to arrest apply to the particular arrestee." *Miller*, 127 Cal.App.3d at 504 (citation omitted). Our constitution therefore does not allow the police to use the mere fact of an arrest to justify an exploratory search for evidence of unrelated crimes. And as this Court has previously recognized, this unconstitutional practice is exactly what is at issue here: Prop. 69 purports to authorize the police to use the mere fact of an arrest to search arrestees' DNA in order to try to connect them to unrelated, unknown crimes without a warrant or individualized suspicion. *See People v. Buza*, 129 Cal.Rptr.3d 753, 774-75, rev. granted, 132 Cal.Rptr.3d 616 (2011). This is precisely the type of exploratory search for evidence of unrelated crimes that Article I § 13 forbids.[8]

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

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

"Rights guaranteed by [California's] Constitution are not dependent on those guaranteed by the United States Constitution." Cal. Const., Art. I § 24. Thus, California courts have an "obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions." *People v. Chavez*, 26 Cal.3d 334, 352 (1980); *see Raven*, 52 Cal.3d. at 354.

When interpreting our state constitution, our courts will give U.S. Supreme Court decisions the same respect that they would accord any appellate court but will follow its holdings "only when they provide no less individual protection than is guaranteed by California law." *People v. Pettingill*, 21 Cal.3d 231, 248 (1978) (citations omitted); *see id.* at 247-48.[9]

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[9] Although our supreme court has sometimes said that it will follow such precedent absent a reason to do otherwise, it has not done so when that would mean overturning California precedent. *See People v. Teresinski*, 30 Cal.3d 822, 835-39 (1982). California courts have long rejected the underlying theory of *King*; moreover, as the four dissenting justices in *King* made clear, the majority opinion represents a sharp and sudden departure from the core Fourth Amendment principle that the police need a warrant – or at least probable cause – to search for evidence of a crime. *See King*, 133 S.Ct. at 1980-83, 1989 (Scalia, J., dissenting). Academic criticism of *King* has already begun. *See* Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 Harv.L.Rev. ___, § III (2013, forthcoming) (discussing "three misconceptions about forensic DNA typing that permeate the *King* opinion"); Andrea Roth, *Maryland v. King and the Wonderful, Horrible DNA Revolution in Law Enforcement*, 11 OHIO ST. CRIM. L. J. __,

"[E]ven when the terms of the California Constitution are textually identical to those of the federal Constitution," our courts will not abandon past interpretation of our constitution to follow federal decisions that would weaken Californians' privacy rights. *American Academy of Pediatrics v. Lungren*, 16 Cal.4th 307, 325-28 (1997) (lead opn. of George, C.J.); *see* Hans A. Linde, *E Pluribus-Constitutional Theory and State Courts*, 18 GA.L.REV. 165, 181-82 (1984). Thus, although in deciding this case this Court can look to long-established Fourth Amendment principles that "provide no less individual protection than is guaranteed by California law,"[10] it should not follow *King's* departure from these fundamental principles, because *King's* analysis is unpersuasive, inconsistent with California law, and provides less protection than does settled California law.

First, *King* rests on the premise that Maryland is seizing DNA in order to identify arrestees and supervise them as they progress through the criminal-justice system, rather than to investigate unsolved crimes. *Compare King*,

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__ (2013, forthcoming); Elizabeth E. Joh, *Maryland v. King: Policing and Genetic Privacy*, 11 OHIO ST. CRIM. L. J. __ (2013, forthcoming).

[10] *Pettingill*, 21 Cal.3d at 248. *Brisendine* itself relied on earlier Fourth Amendment precedent from state and federal courts that limited the scope of searches incident to arrest but refused to follow *Gustafson's* and *Robinson's* departure from those earlier principles. *See Brisendine*, 13 Cal.3d at 538-399; *see also People v. Cook,* 41 Cal.3d 373, 376 n.1 (1985) (lead opn. of Grodin, J.).

133 S.Ct. at 1970-72 *with id.* at 1982-88 (Scalia, J., dissenting). Even if that is the purpose of Maryland's law, it is not the purpose of California's. Here, "DNA samples are collected for purposes of investigating criminal offenses." *Buza*, 129 Cal.Rptr.3d at 780. Under Article I § 13, that actual purpose matters; the police cannot use an administrative search as a pretext to justify an exploratory search for evidence. *Brisendine*, 13 Cal.3d at 534-35.

Second, the *King* majority dismisses the unique privacy issues that DNA raises, asserting that the difference between DNA sampling and fingerprinting "is not significant." *See King*, 133 S.Ct. at 1976, 1979-80. This view "ignores the full extent of the search" involved and is "blind to the nature of DNA." *Buza*, 129 Cal.Rptr.3d at 767, 768.

Third, the *King* majority wrongly posits that the fact that the police take DNA from everybody arrested for the listed offenses means that there is no danger of abuse because the police who take the DNA at booking have no discretion to decide who must provide a sample. *King*, 133 S.Ct. at 1970. But as this Court, scholars, and the British Human Genetics Commission have explained, this ignores the reality that mandatory arrestee-testing laws simply transfer that same unchecked discretion to the arresting officers and in fact give the police "incentives to turn every encounter into an arrest" so they can obtain a DNA sample. Elizabeth E. Joh, *Maryland v. King: Policing*

and Genetic Privacy, 11 OHIO ST. J. CRIM. L. __ (2013, forthcoming) at 5-6 (citation omitted); *see Buza*, 129 Cal.Rptr.3d at 780-81.

Fourth, even if *King*'s conclusion that DNA testing will be useful for custody and bail determinations may be correct in some jurisdictions, it is inapposite in California, where these determinations must be made within two business days of arrest while the results of DNA testing will not be available for at least one month. *Compare King,* 133 S.Ct. at 1972-75 with *Dant v. Superior Court*, 61 Cal. App. 4th 380, 385-87, 389-90 (1998); *Buza*, 129 Cal.Rptr.3d at 772.[11]

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[11] The data that the Attorney General publishes suggest that processing samples in fact takes more than two months, because the number of samples processed (uploaded to CODIS) in any month is less than ½ the starting backlog. For example, in July 2013 California started with a backlog of 29,747 samples, received 14,113 new samples, but only processed 13,542 samples. It would therefore take the state more than two months to get through the starting backlog and begin to analyze newly received samples. Similarly, in June, California started with a backlog of 28,766 samples, received 14,064 new samples, but only processed 12,409. Copies of the monthly reports showing these statistics, downloaded from the Attorney General's website (http://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/Monthly.pdf?, updated monthly), are attached under Rule of Court 8.204(d). This ratio is no aberration: although the monthly numbers vary, the number of new samples processed (i.e., profiles uploaded to CODIS) is usually less than ½ of the backlog. *See* Government's Response to Request for Judicial Notice in Haskell Exhibit A (showing monthly statistics from 2007 through March 2012), available at http://cdn.ca9.uscourts.gov/datastore/general/2012/09/11/10-15152_Appellees_Resp_To_Appellants.pdf

Finally, the *King* majority upholds the Maryland law based on speculation about how arrestee DNA might someday be used, rather than based on facts about how it is being, or can currently be, used. *See id.* at 1988-89 (Scalia, J., dissenting). In California, the government must justify a warrantless search with actual evidence; it cannot rely on speculation or mere assertions. *See Brisendine*, 13 Cal.3d at 534 n.4; *People v. Henry*, 65 Cal. 2d 842, 845, 847 (1967) (collecting cases); *see also People v. McKee*, 47 Cal. 4th 1172, 1206 (2010). The government here has failed to justify California's law. As this Court has noted, although the true purpose for California's collection program is to try to solve crimes, there is little indication that taking samples from people who are arrested but not charged actually does this. *See Buza*, 129 Cal. Rptr. 3d at 776-77, 780.

The limited research in this area supports this same conclusion that arrestee testing is not significantly more effective at solving crime than is taking samples only after conviction. For example, the U.K. has the second-largest DNA database in the world and has had an arrestee-testing program since April 2004. In 2006, the British Home Office evaluated its program and concluded that "the number of matches obtained from the Database (and the likelihood of identifying the person who committed the crime) is 'driven' primarily by the number of crime scene profiles loaded on the Database,"

rather than from the number of arrestee/offender profiles.[12] The number of DNA database matches peaked in 2002-03, just before the UK started taking DNA at arrest, and then decreased in 2003-04 and 2004-05.[13] Not coincidentally, the number of new crime-scene DNA profiles loaded into the system also peaked in 2002-03. A 2006 report by Dr. Helen Wallace further analyzed these statistics and concluded that arrestee testing had failed to lead to increased hits:

> [I]t is the number of DNA profiles from crime scenes added to the [National DNA Database]—not the number of individuals' profiles retained—that largely determines the number of detections. This analysis is further confirmed by comparing the DNA-detection rate with those from previous years; this number has remained relatively constant for the years for which figures are available (38% in 2002/2003, 43% in 2003/2004 and 40% in 2004/2005), whereas the number of individuals' profiles kept in the NDNAD has expanded rapidly during this period (from 2 million in 2002/2003 to 3 million in 2004/2005). This implies that detections have increased since 1999 because more crime-scene DNA profiles have been loaded, not because there have been more detections per crime-scene DNA profile. If adding or keeping more DNA from individuals rather than from crime scenes were important, the DNA detection rate—the likelihood of

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

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

making a detection—would have increased as the NDNAD expanded.[14]

Dr. Wallace submitted a declaration in the *Haskell* case that updated her research, concluding that "it is likely that California's expansion of mandatory DNA testing to all adult felony arrestees . . . will not lead to a significant increase in the number of crimes being solved."[15] Even the district court in Haskell agreed that arrestee submissions are less effective at solving crimes than are convicted-offender submissions. *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1200-01 (N.D. Cal. 2009). Thus, even if the California Constitution allowed the government to justify a warrantless, suspicionless search on the grounds that it was useful at solving crimes, taking DNA samples from arrestees does not do this. The government has failed to meet its burden to justify this intrusive program.

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

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

4. This Court should decide the question on state constitutional grounds even though the law violates the Fourth Amendment[16]

For the reasons set forth in Buza's brief, the California law violates the Fourth Amendment, even after *King,* because of the significant differences between California's law and Maryland's.[17] Nevertheless, this Court should decide the state constitutional issue, either alone or along with the Fourth Amendment, for four reasons:

First, deciding the case on state-law grounds will promote a faster resolution of the important question of the law's validity because it will eliminate a level of potential review. *See People v. Ruggles*, 39 Cal.3d 1, 8 n. 3, 11-12 (1985) (deciding case under Art. I § 13 "[r]ather than await more definitive guidance" from U.S. Supreme Court); *see also People v. Krivda*, 8

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[16] Mr. Buza has preserved this state-law claim by raising the analogous federal claim. *See People v. Yeoman*, 31 Cal.4th 93, 117-18 (2003); *see also People v. Runyan*, 54 Cal.4th 849, 859 n.3 (2012) ("Nor would we ignore a constitutional provision directly applicable to an issue in a case before us simply because a party had neglected to cite it.").

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

Cal.3d 623 (1973) (confirming 1971 opinion after grant of certiorari and remand); *West v. Thomson Newspapers*, 872 P.2d 999, 1005 n.6 (Utah 1994). California's arrestee-testing law went into effect on January 1, 2009; although it was challenged in federal court that same year, its validity is still unsettled more than four years later. *See* fn. 2, above. Both the government and the tens of thousands of Californians who are arrested every year on suspicion of a felony but never convicted, or in many cases even charged with a crime, have an interest in having the legality of these searches resolved without further delay.

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

Finally, deciding this case on state constitutional grounds will help to ensure that Article I § 13 retains its independent role in safeguarding the

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

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[18] For example, the Alameda County District Attorney's office's influential POINT OF VIEW advises officers that Prop. 8 "nullifie[d]" or "abrogated" the substantive holdings of cases decided under Article I § 13 in favor of the federal search-incident-to-arrest rule. Alameda County District Attorney, POINT OF VIEW, *Searches Incident to Arrest* at 1 n.6, 6 n. 34, 7 n.45 (Winter 2011), available at http://le.alcoda.org/publications/point_of_view/files/SITA2.pdf. In contrast, the Attorney General correctly advises law enforcement that it must continue to obey Article I § 13's independent protections. *See* 86 Ops. Cal. Atty. Gen. 198 (2003) (state constitution requires California law enforcement to obtain search warrant to obtain pen register, even though Fourth Amendment does not).

III. CONCLUSION

"A statute inconsistent with the California Constitution is, of course, void."[19] As this Court discussed in its previous opinion in this matter, Penal Code § 296(a)(2)(c) purports to authorize the police to conduct warrantless, suspicionless, exploratory searches of arrestees for evidence of unrelated crimes. Because this is inconsistent with Article I § 13 of the California Constitution, the statute is invalid. Buza's conviction for violating it must be reversed.

Dated: October 2, 2013

Respectfully submitted,

By: _____
Joseph R. Grodin

_____
Michael T. Risher

Attorneys for *Amicus Curiae*
American Civil Liberties Union Of Northern California, Inc. and Professor Joseph Grodin

[19] *Hotel Employees and Restaurant Employees Intern. Union v. Davis*, 21 Cal.4th 585, 601-02, 615-16 (1999) (striking down initiative statute) (citation omitted); *see generally American Academy of Pediatrics*, 16 Cal.4th 307 (striking down criminal statute as violating California right to privacy).

CERTIFICATE OF COMPLIANCE

I certify that the text in the attached Amicus Brief contains 4,520 words, including footnotes but not the caption, the table of contents, the table of authorities, the application, signature blocks, or this certification, as calculated by Microsoft Word. *See* Rule of Court 8.360(b)(1).

Dated: October 2, 2013

By_____
Michael T. Risher

California DNA Program Monthly Statistics for June and July, 2013 (per Rule of Court 8.204(d)

Jan Bashinski DNA Laboratory Monthly Statistics

Month	**June 2013**
Starting Backlog	**28,766**
New Samples Added	14,064
Profiles Uploaded into CODIS	12,409
Newly Removed from Backlog (Overall Total of **46,709** removed from backlog – including any samples Expunged, Removed or Failed twice, as well as where a New Sample has been requested—Note: if this number is negative it is because successful results were obtained on samples previously removed from the backlog due to inadequate sample or two or more analytical failures.)	674
Ending Backlog	**29,747**
Total Forensic Unknown Profiles in CODIS	55,026
Total Data Bank (Offender and Arrestee) Profiles in CODIS	**2,117,987**
Hits This Month	479
Total Data Bank Hits	27,700

Jan Bashinski DNA Laboratory Monthly Statistics

Month	**July 2013**
Starting Backlog	**29,747**
New Samples Added	14,113
Profiles Uploaded into CODIS	13,542
Newly Removed from Backlog (Overall Total of **47,080** removed from backlog – including any samples Expunged, Removed or Failed twice, as well as where a New Sample has been requested—Note: if this number is negative it is because successful results were obtained on samples previously removed from the backlog due to inadequate sample or two or more analytical failures.)	371
Ending Backlog	**29,947**
Total Forensic Unknown Profiles in CODIS	55,666
Total Data Bank (Offender and Arrestee) Profiles in CODIS	**2,131,529**
Hits This Month	503
Total Data Bank Hits	28,203

DECLARATION OF SERVICE BY MAIL AND ELECTRONIC SERVICE
Re: *People v. Mark Buza* Case No.:A125542

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of San Francisco, State of California. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is clamprecht@aclunc.org. On October 2, 2013, I served a true copy of the attached,

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

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

Enid A. Camps, Deputy Attorney General
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3664

Richard Shikman,
Attorney at Law
15 Boardman Place, Third Floor
San Francisco, CA 94103

San Francisco County District Attorney
880 Bryant Street
San Francisco, CA 94102

San Francisco County Superior Court
Attn: Hon. Carol Yaggy, Judge
Hall of Justice, 850 Bryant Street
San Francisco, CA 94103

Kamala D. Harris, Attorney General
Office of the Attorney General
1300 "I" Street
Sacramento, CA 95814-2919

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 2, 2013, at San Francisco, California.

_____
Carey Lamprecht, Declarant