No. A172930

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION ONE

CENTER FOR GENETICS AND SOCIETY, ET AL.,
Plaintiffs/Respondents,

v.

ROB BONTA, ET AL.,
Defendants/Appellants

San Francisco Superior Court
Case No. CPF-18-516440
Hon. Victor Hwang

RESPONDENTS' BRIEF

Avram Frey (SBN 347885)
afrey@aclunc.org
Isir Said (SBN 805653)
isaid@aclunc.org
ACLU FOUNDATION OF
NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493

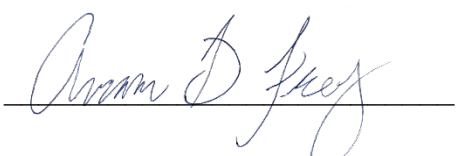
Attorneys for Plaintiffs/Respondents

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

In accordance with Rule 8.208 of the California Rules of Court, Plaintiffs/Respondents, by and through their undersigned counsel, certify that there are no interested entities or persons that must be listed in this Certificate under Rule 8.208.

Dated: December 9, 2025

Respectfully submitted,



Avram Frey (SBN 347885)
afrey@aclunc.org
Isir Said (SBN 805653)
isaid@aclunc.org
ACLU FOUNDATION OF
NORTHERN CALIFORNIA

Attorneys for Plaintiffs/Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Other Authorities

INTRODUCTION

The Department of Justice ("Department" or "DOJ") is holding the DNA of hundreds of thousands of people who are statutorily eligible for expungement. This violates the California Constitutional right to privacy.

A person's DNA is highly sensitive information. It reveals a great deal about one's family lineage, physical characteristics, health, propensity for disease, ethnicity, and more. In California, law enforcement collects the DNA of people arrested on suspicion of a felony. But the law contemplates a critical protection: arrestees who are not convicted of that felony, and who are not otherwise required to submit their DNA to the Department, are entitled to have their DNA expunged. Yet that protection is all but illusory—because the Department does not provide notice of it. Instead, arrestees must determine eligibility on their own and then submit an application with supporting documentation. Since California began collecting DNA at arrest in 2009, only 2,059 people have gained expungement through this process. And while the precise number of people eligible for expungement is unknown, reasonable estimates place it in the hundreds of thousands. This means that less than 1.5% of eligible Californians have had their DNA expunged. Worse, because the Department's expungement policy compounds multiple racial disparities, the Department's DNA database dramatically overrepresents people of color.

The Department prefers it this way. It maintains, without evidence, that the bigger the database, the more likely the match. But this is untrue—as the record here established. Research and real-world data show that it is who is submitting the DNA, not the amount in the database, that matters. And people who are arrested but not convicted are not the right population—their DNA is no more likely to match to another crime scene

than that of any member of the general public. The Department is therefore holding the DNA of hundreds of thousands of people for no reason.

The Department's indefinite retention of the DNA of people eligible for expungement transgresses the California Constitution's right to privacy. In passing Proposition 11, the initiative that added privacy as an expressed constitutional right, voters were specifically addressing a concern about government "stockpiling unnecessary information" with the aid of encroaching technologies and "[c]omputerization of records." (2 AA 320-21.) This lawsuit concerns the very thing that the voters feared.

Cognizant of the voters' intent in enacting California's right to privacy, and applying the balancing test set out in *Hill v. NCAA* (1994) 7 Cal.4th 1, the trial court found the privacy interests at issue substantial and the government's interests slight. It accordingly concluded that Plaintiffs were entitled to judgment on their constitutional claims. This Court should affirm that well-reasoned conclusion.

This Court should also affirm the trial court's modest remedial order. Being careful not to exceed its authority in mandamus, the court ordered the Department to exercise its discretion in accordance with the Constitution and submit a remedial plan within 90 days. Plaintiffs do not contend that the Department must immediately identify and expunge all eligible DNA. Clearing the backlog of hundreds of thousands of expungement-eligible samples, and implementing systems for future cases, will surely take time and resources. But the Constitution requires the Department to begin this work. State-initiated ("automatic") expungement is the only way to uphold the voters' intent in making privacy an express provision of the state constitution. Accordingly, as the trial court ordered, the Department should be required to devise a plan to initiate expungements.

BACKGROUND

I. California Created an Express Constitutional Right to Privacy to Shield Against Government Stockpiling of Sensitive Personal Information Like DNA.

a. The Voters Added "Privacy" to the State Constitution to Prevent the Government from Using Emerging Technology to Warehouse Personal Information.

California created a constitutional right to privacy by voter initiative, Proposition 11, in 1972. The initiative was placed on the ballot by Assembly Constitutional Amendment (ACA) 151, the staff report to which stated, "the technological revolution and the age of cybernetics" had rendered existing privacy protections insufficient "against state surveillance, record collection and government snooping into our personal lives." (Kelso, *California's Constitutional Right to Privacy* (1992) 19 Pepperdine L.Rev. 327, 472 [reprinting Staff Report, Assembly Const. Com., ACA 51 (1972)].)

The proponent of ACA 151, Assemblyman Kenneth Cory, wrote the ballot argument, beginning:

> The proliferation of government snooping and data collecting is threatening to destroy our traditional freedoms. Government agencies seem to be competing to compile the most extensive sets of dossiers of American citizens. Computerization of records makes it possible to create "cradle-to-grave" profiles on every American. At present there are no effective restraints[.]

(2 AA 320.) Cory identified "[m]odern technology" as the catalyst, noting its capacity for "monitoring, centralizing and computerizing [] information" without the public's knowing "these records even exist." (2 AA 321.) Proposition 11, he argued, would "prevent[] government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us." (*Ibid.*) The initiative passed with a 63%

majority. (See Ballotpedia, CA Proposition 11, Const. Right to Privacy Amend. (1972).)[1]

b. DNA is Sensitive, Personal Information.

DNA holds sensitive, personal information. A sample "contain[s] a person's entire genetic makeup," including information regarding one's "physical attributes, ancestry, disease predisposition, developmental anomalies, and family relationships." (12 AA 1842, 1845-46 [specifying, e.g., "eye color, height, skin color," "risk of Alzheimer's," "disorder[s] such as cystic fibrosis or achondroplasia," continent of ethnic origin]; 11 AA 1565 ["likelihood of developing arthritis or autism, cancer or diabetes, and Huntington's or Parkinson's disease."].) Additionally, "[t]he magnitude of information that can be derived from a DNA sample and its associated data is not stagnant." (12 AA 1836.) DNA may yet predict "sexual orientation, behavioral traits, [and] intellectual aptitude"—research is ongoing and well-funded. (11 AA 1566; 12 AA 1836 ["This is a rapidly growing field."].) At present, the information contained within one's DNA can be the basis for "discrimination [and] stigmatization," determinations of tribal privileges, and immigration relief, among other outcomes. (12 AA 1846-47.) If research demonstrates a genetic predisposition to violence, pedophilia, or sociopathy (see 12 AA 1846-47), it is foreseeable that DNA may be tested for decisions relative to criminal detention or civil confinement. (11 AA 1566 [such discoveries are plausible and would create "tremendous pressure to unlock the cabinet and check those stored samples in the name of crime prevention"].)

DNA profiles, while less invasive, also reveal personal information—principally, one's relations. Searching CODIS for "partial"

[1] <https://ballotpedia.org/California_Proposition_11,_Constitutional_Right_to_Privacy_Amendment_(1972)> (as of Dec. 8, 2025).

matches can link a profile to "every person in [one's] genetic line backwards and forward through time." (11 AA 1567; see also 12 AA 1844.)[2] It may soon be possible to take a profile from CODIS and reverse-engineer the entire genome. (8 AA 1356:22-1357:23 [research is ongoing].) Scientists have already identified "traits of functional or medical significance" correlated with DNA profiles; further study may "permit statistical inferences." (12 AA 1842; see 11 AA 1565-66 [profiles have been associated with epilepsy, Alzheimer's, depression, and schizophrenia].)

Unsurprisingly, studies consistently show that people do not want their DNA in the government's possession. "[I]nterviews, focus groups, and other social science research" demonstrate that "[m]any people view . . . continuous storage of [a] sample . . . and repeated searching [of a profile]" as a governmental intrusion. (12 AA 1847 [citing studies]; see also 7 AA 1294:5-19 [discussing research showing that "particularly amongst communities of color" DNA retention is considered "intrusive [and] burdensome" and "lead[s] to lower perceptions of legitimacy of law enforcement"].) In one survey of approximately 4,600 Americans, 75% were "somewhat" or "very" concerned about the government possessing their DNA, and 84% expressed concern with possession by law enforcement, specifically. (17 AA 2778:25-2881:19.) In a recent Pew survey, a majority of Americans stated that they do not believe law enforcement should have access to the databases of private DNA testing companies. (9 AA 1413:3-12; 12 AA 1784.) Even among those who voluntarily submitted their DNA to the company GEDMatch, only between 1/5 and 1/3 opted to share their data with law enforcement. (12 AA 1783-84.)

---

[2] California permits partial matching for convicted offenders only. (3 AA 604:7-12.)

II. The DNA Act Compels DNA Expungement, but the Department Uses its Discretion to Requires Arrestees to Initiate the Process.

a. Proposition 69 Authorized Collection and Analysis of DNA at Arrest but Provided for Expungement of Those Not Convicted.

In 2004, the voters passed Proposition 69, the DNA Fingerprint, Unsolved Crime and Innocence Protection Act ("DNA Act"). Pursuant to this statute, since 2009, law enforcement collect DNA from anyone arrested on suspicion of a felony and send it to the Department's DNA Laboratory. (§§ 295.1, subd. (c), 296, subd. (a)(2)(C).)[3] There, the samples are analyzed to create an individual profile (§ 295.1, subd. (c))—"a series of numbers" which function "like a barcode" to "represent the DNA from that person." (3 AA 567:6-15.) The Department retains the sample. (§ 295.1, subd. (c); 3 AA 719:7-15, 720:6-15.)

The Department uploads all profiles into the Combined DNA Index System ("CODIS"), an FBI-administered collection of national, state, and local databases. (3 AA 559:18-560:12, 562:1-6, 563:13-25, 565:7-11.) State and federal administrators search CODIS for "hits"—matches between an individual and forensic (crime scene) profile—on an ongoing basis. (3 AA 566:15-25, 569:24-570:3.)

The DNA Act provides for expungement, *i.e.* destruction of samples, deletion of profiles, and removal of profiles from databanks. (See § 299, subd. (c)(2).) Eligibility is limited to those for whom the underlying arrest did not yield a felony conviction, as when: the prosecution did not charge a felony; the defendant was found not guilty of a felony at trial; the felony conviction was reversed and the case dismissed; or the defendant was found factually innocent in habeas corpus. (§ 299, subd. (b)(1)-(4).) To be eligible, individuals must also have no prior felony conviction and no conviction for

[3] All statutory citations are to the Penal Code unless otherwise noted.

a misdemeanor that requires registration as a sex or arson offender. (§ 299, subd. (d).) For those eligible, expungement is mandatory, as follows:

> A person whose DNA profile has been included in the databank . . . *shall* have his or her DNA specimen and sample destroyed and searchable database profile expunged . . . pursuant to the procedures set forth in subdivision (b) if the person has no past or present offense or pending charge which qualifies that person for inclusion . . . .

(§ 299, subd. (a), italics added.)

In *People v. Buza*, the California Supreme Court upheld collection of DNA at arrest under the Fourth Amendment; article I, section 13; and the privacy initiative, article I, section 1. ((2018) 4 Cal.5th 658.) The Court declined to consider the defendant's challenge to the expungement procedures, however, noting the defendant lacked standing and there was no relevant record. (*Id.* at pp. 693-94.)

b. Although Expungement is Mandatory Under the DNA Act, Department Policy Requires Arrestees to Initiate It.

The DNA Act details a process for arrestee-initiated expungement. (§ 299, subds. (b)-(c).) Following the statute, an individual must write to the superior court in the county of arrest, providing notice to the county prosecutor and DOJ, with proof of service on all parties. (*Id.*, subd. (c)(1).) The requestor must then demonstrate eligibility at a noticed hearing and obtain a court order. (*Id.*, subd. (c)(2).) The requestor then provides to the Department: the court's expungement order; the underlying written request; proof of service; a certified copy of the court order or a letter from the county prosecutor demonstrating eligibility; and a court order verifying that no appeal or retrial is pending, and that neither the prosecutor nor DOJ has objected. (§ 299, subd. (c)(2)(A)-(D).)

The Department has created a second arrestee-initiated process. "[T]o give effect to the intent and purpose of" the DNA Act, the

Department has discretion to "adopt policies and enact regulations . . . as necessary." (§ 295, subd. (h)(1).) The Department relied on this authority to create a "streamlined" process that allows application to the Department directly, without need of a noticed hearing, proof of service, or court order. (10 AA 1471-72; see *Buza*, *supra*, 4 Cal.5th at pp. 682-83.) Requestors must submit a two-page form attesting to their basis for eligibility under penalty of perjury and "attach the documentation" proving eligibility. (10 AA 1472.)

III. Arrestee-Initiated Expungement Is Not Working, and the Consequences Are Significant, Particularly to Communities of Color.

a. Eligible Individuals Face Significant Obstacles in Initiating Expungement.

Under both the statutory and streamlined processes, arrestee-initiated expungement imposes substantial barriers. To begin, the Department does not provide adequate notice. Though DOJ claims it "has engaged in significant outreach" (Brief at p. 50), its efforts are limited to two: (1) the Department's website notes the possibility of expungement, refers users to section 299 to determine eligibility, and provides a link to the streamlined form (13 AA 2215-16); and (2) the Department offered to print posters for 187 of California's 506 law enforcement agencies and did so for the 22 that responded. (4 AA 859:16-861:25.)

It is thus "questionable whether the vast majority of people entitled to expungement even know about the process." (See *Buza*, *supra*, 4 Cal.5th at p. 698 (Liu, J., dissenting).) Declarant Kalanie Ewing is demonstrative: she "did not know . . . [her] sample would be kept . . . or that [she] would need to take any action" to expunge it before seeing this case on the news. (11 AA 1600.)

For those who learn that expungement is possible, there is no right to counsel (see 4 AA 854:8-13), and the process is daunting. Professors

Pamela Herd and Donald Moynihan are experts in "administrative burden"—how bureaucratic processes impact exercise of rights or receipt of benefits. (12 AA 1762-64, 1766.) Herd and Moynihan examined both the statutory and streamlined processes and found them "opaque, complex, onerous and psychologically costly." (12 AA 1765.) They identified numerous, substantial burdens common to both, including: lack of notice and the need to determine eligibility from complex statutes without counsel (12 AA 1777-79); the compliance costs of obtaining documentation, completing legalistic forms, and attesting under penalty of perjury (12 AA 1779-82); and the psychological costs of reengaging with a system that arrested and perhaps sought to prosecute would-be applicants (12 AA 1782-83). From this, Herd and Moynihan concluded that "the number and intensity of the burdens facing those who have a right to expungement is unusually high and will predictably result in very few eligible individuals accessing this right." (12 AA 1765, italics removed.)[4] They found it "also predictable that . . . eligible Black people will apply for expungement less often than others, and that they will make up a disproportionate share of California's DNA database." (12 AA 1785.) This is because "[p]sychological costs are especially high for Black would-be applicants" owing to historical "discrimination and disparate treatment at the hands of law enforcement and the criminal justice system . . . . that renders them much more reluctant to voluntarily engage." (12 AA 1782.) As compared to nationwide processes "across differing policy areas, including health, education, voting, tax, and anti-poverty policies," Herd and Moynihan found DOJ's expungement processes "among the worst we have analyzed." (12 AA 1776-77, 1786.)

[4] Again, Ms. Ewing offers a case in point: she was initially confused by the streamlined form and filled it out incorrectly; she submitted it only after former counsel for Plaintiffs assisted pro bono. (11 AA 1600.)

b. A Tiny Percentage of Those Eligible Gain Expungement.

Predictably, then, only a small fraction of those eligible gain expungement. As of 2024, 2,059 people in California have gained expungement. (4 AA 856:3-8). This number is paltry on its face—tellingly, it appears nowhere in the Department's brief. But dividing it by the number eligible is more revealing still. The Department does not track this and insists "it is not possible to accurately estimate." (Brief at p. 56.)[5] But reasonable estimates are possible.

Through discovery, Plaintiffs have shown that the Department can presently identify 130,780 people eligible for expungement. (12 AA 1926-28; 12 AA 1912-13; 3 AA 699:9-18, 700:20-702:5, 728:11-730:21; 4 AA 918:5-9.) But this figure is only the floor—the actual number is much higher. There are 700,537 people who are eligible but for an "open arrest" preceding 2017 (12 AA 1913); such arrests are beyond the six-year statute of limitations for most felonies, meaning that most are likely time-barred, and therefore eligible for expungement. (*Ibid.* [citing §§ 799-801.8].) And these figures are relative to former arrestees with digitized records—older cases, with paper files, add an unknown number more. (2 AA 452:1-453:4.)

But no matter what estimate is used, the rate at which eligible people seek and gain expungement is miniscule. Using the minimum estimate of 130,780, the total number of expungements (2,059) yields a take-up rate of 1.57%, while a high-end estimate of 700,000 yields 0.29%. Even a take-up

---

[5] This is itself significant. "Burdens are most likely to occur when governments do not monitor or track burdens." (12 AA 1765.) Government agencies commonly undertake similar estimates "across a range of different . . . social welfare programs." (9 AA 1402:21-1403:2 ["[The] generic approach is not that hard. . . . [T]here's no reason why California shouldn't be able to come up with . . . a rough estimate."].) The Department's refusal thus "suggests an indifference to the process, or even a desire to maintain burdens that contribute to a low take-up rate." (12 AA 1765.)

rate of 2% is "unheard of in terms of what you should expect in terms of people accessing a basic service, benefit or right." (See 9 AA 1403:2-8.)

c. Retaining Expungement-Eligible DNA Offers Scant Benefit.

The Department does not track the number of cases in which DNA eligible for expungement was used to solve a crime or exonerate someone. In response to interrogatories, however, DOJ noted 12 cases in which such DNA solved a crime. (10 AA 1460-64.) On appeal, the Department reduces this number to five. (Brief at pp. 62-63.) As detailed below, these cases are at best equivocal: it is not clear that any would have been removed from the database under a system of automatic expungement. (See *infra*, pp. 46-47.) Meanwhile, DOJ was unable to identify any cases in which DNA eligible for expungement was used to exonerate someone. (10 AA 1465.)

At bottom, the Department's theory as to their interest in retaining these DNA profiles is not empirically grounded. Rather, the Department assumes that "the larger the database, the higher the number of 'hits.'" (3 AA 795:23-24.) The record refutes this. The United Kingdom removed from its database all DNA from people arrested but never convicted—1.7 million profiles—and remained as effective in solving crime. (11 AA 1606, 1620-22; see also 8 AA 1364:1-1365:21 [arrestee DNA is not "a primary driver of DNA solving crime"].) And criminological research confirms that mere arrest is not a reliable indicator of future criminality, *i.e*. the DNA of people arrested but never convicted is not the DNA that is useful for solving future crimes. (12 AA 1880-84.) The Department is thus retaining the DNA of people eligible for expungement for no measurable benefit.

d. Retaining Expungement-Eligible DNA Harms Individuals and Society.

Indefinite retention of expungement-eligible DNA hurts those directly impacted in myriad ways. The gravest danger is the possibility of wrongful arrest, prosecution, or conviction. Obtaining a DNA sample,

creating a profile, and confirming a CODIS "hit" are each subject to error. (11 AA 1568.) A DNA sample may reflect transfer, where a person inadvertently puts the DNA of another at a crime scene. This happened to Lukis Anderson, who spent five months in jail on capital charges because paramedics transported him in an ambulance before transferring his DNA to a murder victim. (11 AA 1573-74.) Even when a sample is from the right person, analysts make mistakes like sample contamination, switching, or mislabeling, all of which have resulted in false "hits." (11 AA 1572-73 [noting "pressure on analysts to raise efficiency standards to unrealistic levels, at the expense of accuracy and thoroughness"]; see, e.g., 10 AA 1478-82 [individual spent four years in prison due to sample switch].)

Generating a profile ("genotyping") may present further issues. Genotyping is subjective; analysts must examine the "peaks and valleys" at particular loci and determine which represent a pair of alleles from a single individual, a judgment often complicated by sample degradation, insufficient genetic material, or mixture of the DNA of different people. (11 AA 1568-71.) There is also potential for bias. Analysts often "personally identify with the law enforcement mission" or perform their work "with an eye towards proving the prosecutor's theory of a case." (11 AA 1572 ["'We often see indications, in the laboratory notes themselves, that the analysts are familiar with the facts of their cases . . . and that they are acutely aware of which results will help or hurt the prosecution team,'" citation omitted].) Finally, there is deliberate malfeasance. Numerous scandals nationwide show that DNA is often "too tempting a resource" for use in accordance with law or protocols. (11 AA 1568 [discussing San Francisco Police Department's unauthorized search of sexual assault victim DNA against forensic database]; 8 AA 1340:7-1341:4 ["there's been a handful of labs throughout the state [of California] that have had either misconduct or failure of proficiency tests or alleged coverups"].)

Indefinite retention of one's DNA also produces a more widespread harm: distress regarding the government's possession of sensitive personal information. (See *Buza*, *supra*, 4 Cal.5th at p. 721 (Cuellar, J., dissenting) ["That the government retains access to a person's most private, sensitive genetic information—and the risks implicit in such access—constitutes a violation in itself[.]"]; cf. *Birchfield v. North Dakota* (2016) 579 U.S. 438, 464 [collection of blood for alcohol testing "places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information . . . . [which] may result in anxiety for the person tested"].) Whatever the current safeguards against mistake or abuse, the possibility of error or malfeasance remains, and there is no safeguard against future changes in law or policy—particularly as future developments suggest new uses. (See 9 AA 1387:14-1389:4 ["the history of DNA has been constantly exploiting the most recent development"]; see also 7 AA 1291:4-16 [noting history of "expanded uses . . . well beyond the reasons for which [DNA] was initially collected"]; see, e.g., 7 AA 1310:11-1311:1 [literature review identified "[public] concern that data would be used to deny access to . . . employment and insurance"].) Kalanie Ewing gave voice to this discomfort, calling her "DNA sample sitting in a criminal database . . . more upsetting than being arrested and having to spend a day in jail." (11 AA 1599.)

The Department's retention of expungement-eligible DNA also harms society because it creates a DNA database that significantly over-represents people of color. That overrepresentation results from a number of factors. First, Black and brown people are much more likely to have their DNA collected because police disproportionately arrest people of color. (11 AA 1539; see 12 AA 1884 [percent of population with one arrest by age 23 "is close to 50% for minority males while only approximately 30% for the general population"].) Numerous studies, including by the Department,

recognize widespread over-policing of communities of color due to "intentional and subconscious biases of law enforcement, racial segregation, and geographically concentrated disadvantage." (11 AA 1539 [citing research].) The Department's data confirm this: of the total number of cases in which law enforcement noted race at the time of DNA collection, Black people constitute 13.9%, Latinx people make up 40.9%, and white people are 29.4%, despite representing 5.7%, 39.4%, and 41.2% of the state, respectively. (Compare Defs.' Resp. to Special Interrogatories, 10 AA 1451, with U.S. Census Bureau, *California: 2020 Census*.[6])

Second, "felony arrests of African Americans disproportionately result in no charges or dropped charges." (*Buza*, *supra*, 4 Cal.5th at p. 698 (Liu, J., dissenting); 6 AA 1261:12-25 [study of 9 million arrests showed that the "overall dismissal rate . . . [is] around 40 percent" but "over 65 percent" for people of color].) In other words, arrestees who are Black are more likely to be eligible for expungement.

Finally, Black and brown people are less likely to seek expungement regardless of eligibility. Racial disparities in socioeconomic status, education, experiences of the legal system, and trust in government all erect greater obstacles for people of color. (11 AA 1544-45; 12 AA 1782-83; see, e.g., 11 AA 1601 [stating of Black community members, "[n]obody wants to start problems with the police or the justice system[.] . . . [T]hey are worried that the police will harass them or retaliate[.]"].)

The result of these compounding disparities is a database that disproportionately warehouses the DNA of Black and Latinx people. Plaintiffs' expert Professor Erin Murphy used two separate methods to determine this: a Public Records Act request for the demographic

---

[6] <https://www.census.gov/library/stories/state-by-state/california.html> (as of Dec. 8, 2025).

breakdown of the DNA database, and an attempt to reverse engineer the database from public information. (See 11 AA 1580-82 [citing Murphy & Tong, *The Racial Composition of Forensic DNA Databases* (2020) 108 Cal. L.Rev. 1847].) The methods yielded comparable results: compared to white people, Black people are between 3.38 and 3.94 times, and Latinx people 1.24 times, as likely to have their DNA in the database. (*Ibid.*)

The consequences of this disparity include unequal distribution of burdens and entrenchment of a two-track system of justice. Over-representation in the DNA database means that Black and brown people eligible for expungement are more likely to suffer the harms of state possession of their DNA. But it also means that law enforcement has a better chance of a CODIS match for people of color. In other words, even where DNA evidence works as it should, the Department's expungement policy relies on and worsens racial disparities in the criminal law. (11 AA 1582-83.)

IV. The Department Has the Practical Tools to Begin Expunging Eligible DNA.

The Department could utilize its discretion under section 295, subdivision (h)(1) to initiate expungement for eligible people of its own accord through a combination of queries to the ACHS database, delegation to local agencies, and reform of its expungement processes.

Initially, there is no difference between arrestee- and state-initiated expungement in terms of the Department's protocol: in either case, the Department goes through the identical steps. (3 AA 739:16-740:25; see 11 AA 1530-33.) In essence, the process entails verifying possession of a sample, identifying the corresponding Record of Arrest and Prosecution ("RAP sheet"), analyzing the RAP sheet for eligibility, and if the individual is eligible, destroying the sample, removing the profile from CODIS, and deleting it. (*Ibid.*) The Department has either one or two analysts available

to process expungements. (4 AA 879:9-20.) If required, DOJ would devote these personnel to identifying and expunging eligible DNA absent an arrestee request or court order. (3 AA 741:13-742:15.)

The Department could begin that process now. Many cases are easy: most RAP sheets can be pulled quickly from the Department's Automated Criminal History System ("ACHS") (2 AA 414:2-415:10, 538:22-539:18), and if the RAP Sheet does not have an open arrest, a DOJ analyst can determine eligibility for expungement from the RAP Sheet alone in a matter of minutes. (3 AA 676:7-19, 699:9-18, 701:1-702:5, 728:11-730:21; 4 AA 918:5-9 ["If the documentation is clear that there's no further avenue to potential prosecution for that offense, and there's nothing else in the RAP sheet that would qualify the person," then analyst may determine eligibility from the RAP Sheet].) The above-noted figure of 130,780 individuals eligible for expungement represent such easy cases. The Department could identify further easy cases by querying ACHS, *e.g.* to determine which of the 700,537 with an open arrest predating 2017 were arrested for an offense that is now time-barred. (2 AA 518:10-520:15 [DOJ can query ACHS to identify the offense of arrest].) This would yield a list of likely hundreds of thousands of easy expungements. (See, *supra*, p. 18.)

The Department could also seek the assistance of local agencies and courts to fill disposition gaps. The Department has statutory authority to:

> [D]irect any agency . . . that maintains, or has received . . . criminal offender records to produce for inspection statistical data, reports, and other information concerning the storage and dissemination of criminal offender record information.

(§ 11079, subd. (a).)[7] The Department already sends counties an "open arrest report" to spur voluntary provision of disposition information. (2 AA 484:5-10.) Under section 11079, the Department could make this mandatory. By outsourcing the obligation to provide missing dispositions in bulk, DOJ would eliminate the most time-consuming aspect of the expungement protocol.

The Department has employed these methods to comply with statutory mandates. Assembly Bill 1076 (2019-2020 Reg. Sess.) required record clearance for certain categories of arrests and low-level offenses on a monthly basis. To give this effect, the Department queried ACHS and its sex and arson databases for arrests going back to 1973 to identify eligible candidates; as of 2024, DOJ had granted relief to 6 million people within a budget of $11.2 million, and it identifies cases prospectively at a cost of $1.9 million per year. (2 AA 518:24-524:1; 10 AA 1484-86.) Meanwhile, Assembly Bill 1793 (2017-2018 Reg. Sess.) gave the Department two years to identify cannabis-related convictions for sentencing relief. The Department met this deadline, identifying 200,000 cases at a cost of $5 million by querying ACHS and seeking assistance from local prosecutors. (2 AA 492:10-496:17.) Similarly, the Department has the means to initiate expungements of its own volition.

PROCEDURAL HISTORY

Plaintiffs filed a Verified Petition for Writ of Mandate against the Attorney General and Department of Justice on December 10, 2018. (1 AA 10-64.) The superior court sustained the Department's demurrer (1 AA 122-45), and the Court of Appeal reversed and remanded in part. (*Center for Genetics & Soc. v. Bonta* (Ct. App., June 10, 2021) 2021 WL 2373436

[7] The Department has overlapping authority to direct local agencies in this manner under section 295, subdivision (h)(1), by promulgating "regulations for the implementation of this chapter." (§ 295, subd. (h)(1).)

("*CGS*").) Pertinent here, the Court of Appeal held that Plaintiffs have public-interest mandamus standing to "challenge the overall implementation and operation of the statutory expungement process as constitutionally infirm." (*Id.* at p. *10.) The Court held that Plaintiffs raise an appropriate as applied challenge, and that they met "the minimally required allegations that the expungement provisions implicate the right of privacy . . . [such that] a rigorous balancing standard applies." (*Id.* at pp. *11-12.) The Court noted that *Buza*, which upheld DNA collection at arrest, did not foreclose Plaintiffs' challenge:

> [W]e are not persuaded that an individual who is *no longer* an arrestee or a defendant, and who meets all the legal requirements to have his or her DNA information expunged, does not have a measurably greater privacy interest than does an arrestee in custody in his or her genetic information.

(*Id.* at p. *12.) The Court concluded that "plaintiffs have sufficiently alleged a claim warranting further development." (*Ibid.*)

On remand, after discovery, the trial court granted judgment on the petition. The court initially held that the action was properly brought in mandamus because the Department has discretion to determine its DNA expungement and retention policies. (Order on Mot. for Judgment ("Order"), 19 AA 3219-3221.) Next, the court applied the *Hill* balancing test and held that the Department's expungement policies violated article I, section 1 of the California Constitution. (19 AA 3222-28.) The particulars of this analysis are detailed, below. Finally, the court issued a peremptory writ ordering the Department to "devise a plan to expunge samples such that the privacy rights of Californians are respected." (19 AA 3228.) This appeal followed.

LEGAL STANDARD

"In reviewing a judgment granting a writ of mandate, [courts] apply the substantial evidence standard of review to the court's factual findings, but independently review its findings on legal issues." (*City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69, 78.)

ARGUMENT

I. The Department is Wrong that the DNA Act Compels Arrestee-Initiated Expungement.

a. The Department Has Discretion to Initiate Expungements on Its Own.

The Department has discretion to expunge eligible DNA on its own, The DNA Act authorizes the Department to "adopt policies and enact regulations" to implement its provisions (§ 295, subd. (h)(1)), and the Department has already relied on this authority to deviate significantly from the statutory process. (See, *infra*, p. 28 [streamlined process foregoes statutory requirements of noticed hearing, court order finding eligibility, court order verifying no retrial or appeal, and court order attesting to 180 days since notice of request without objection from the prosecutor].) The Department must therefore explain how subdivision (h)(1) purportedly authorizes it to dispense with some features of the statutory process but not others. It fails to do so.

Furthermore, even setting aside the express authority of section 295, subdivision (h)(1), a statute's provision of one process does not foreclose others unless it was intended to be exclusive. In *Conlan v. Bonta* (2002) 102 Cal.App.4th 745, Medi-Cal beneficiaries brought a petition for mandamus against the Department of Health Services ("DHS") seeking a reimbursement required under federal law that was not realized in practice. (*Id.* at pp. 746-748, 753-754.) As here, DHS argued that it had no discretion because the relevant state statute made "recovery from the provider [] the

exclusive means by which a recipient may obtain reimbursement." (*Id.* at p. 756.) The court rejected this argument. Finding no evidence that the statutory process was intended to be exclusive, the Court ordered DHS to devise a process that would secure the federal right. (*Id.* at pp. 756, 763-764.) The pertinent question is thus whether the voters intended the statutory, applicant-initiated expungement process to be exclusive. The Department insists they did under several theories, but none is availing.

First, the Department argues that because section 299, subdivision (a) provides that a person "shall have his or her DNA specimen . . . expunged . . . pursuant to . . . subdivision (b)," and because subdivision (b) entails "a written request," the text makes arrestee initiation a necessary condition for expungement. (Brief at p. 33.) But the same is true of the many features of the statutory process that the Department has now jettisoned. Subdivision (c)(2), for example, provides that "the Department of Justice shall [expunge eligible DNA] . . . upon receipt of": a court order determining eligibility; a court order verifying that no retrial or appeal is pending; and a court order stating that it has been 180 days since the applicant noticed the expungement request and that the prosecuting attorney has not objected. (§ 299, subd. (c)(2)(A)-(D).) Thus, nothing in the text of the DNA Act distinguishes arrestee initiation from other features of the statutory process as uniquely inalterable.

Second, the Department argues that *In re C.B.* (2018) 6 Cal.5th 118 supports its position that the statute compels arrestee-initiated expungement. (Brief at p. 34.) Because *C.B.* held "compliance with the procedures set forth in subdivision (b)" a requirement for expungement, the Department concludes that the "written request" language of subdivision (b) is exclusive. (*Ibid.* [citing *C.B.*, *supra*, 6 Cal.5th at pp. 125-26].) But that case opines on only the written requirements for expungement under the statutory process, not on the Department's authority to devise a new

process under section 295, subdivision (h)(1).[8] In any event, *C.B.* did not concern the "written request" requirement at all. The case concerned two juveniles declared wards of the court based on a felony later reclassified as a misdemeanor; the Court refused to order their DNA expunged because such reclassification is not among the four bases of eligibility enumerated in section 299, subdivision (b). (*C.B.*, *supra*, 6 Cal.5th at p. 128.) Thus, the portion of subdivision (b) the Court held essential for expungement concerned the four bases for eligibility, not the written request provision. (*Id.* at p. 126.)

Third, the Department looks to *Buza*, noting that the Legislature enacted an alternative to the DNA Act that provided for automatic expungement that would have gone into effect had the Court struck down the original statute; that the Court did not, the Department suggests, says something about the Court's view of automatic expungement. (Brief at pp. 34-35.) The argument is meritless. *Buza* explicitly left the constitutionality of the expungement provisions for another day, stating, "we have no occasion here to resolve any questions that might arise about the implementation of the expungement provisions." (*Buza*, *supra*, 4 Cal.5th at p. 683.)[9]

Fourth, the Department cites to Proposition 69's Ballot Pamphlet materials—specifically, two lines in the Rebuttal to Argument in Favor that read, "69 TRAPS YOUR DNA ALONGSIDE CONVICTED CRIMINALS.

---

[8] The Court was also careful to note the absence of "any constitutional privacy claim" and expressed "no views whatsoever on the merits of such a claim." (*C.B.*, *supra*, 6 Cal.5th at p. 133.)

[9] The Department argues in a footnote that *Buza* "left open only whether some aspect of the operation of the expungement process may be problematic, not the [issue of arrestee initiation]." (Brief at p. 39 fn. 12.) This is unsupported—*Buza* did not resolve "*any questions*" about expungement. (*Buza*, *supra*, 4 Cal.5th at p. 683, italics added.)

Once your DNA is in the database, government has no obligation to remove it." (Brief at p. 36, citation omitted.) The Department calls this proof the voters "understood and intended that, absent an expungement request, arrestee DNA information would be retained indefinitely." (*Ibid.*) Putting aside that these two lines are a slim reed on which to hang the voters' intent, the Department misconstrues them. Under Proposition 69's *actual text*, the government *does* have an obligation to expunge eligible DNA, and the DNA of many people is *not* "trapped alongside convicted criminals." The cited excerpt is hyperbole designed to curry opposition, not a factual statement of the law's effects. As such, it cannot support an inference of intent.

Fifth, the Department notes that "Proposition 69 changed [the expungement] procedure to require a written request . . . in all cases." (Brief at p. 36.) This is true, but it does not speak to whether the Department may also expunge records of its own volition. The voters may have imagined that arrestees would be in the best position to know if they were eligible for expungement. The voters could not have known that the take-up rate from an arrestee-initiated process would later prove abysmal. (See, *supra*, pp. 18-19.)

In sum, neither the plain text, nor the legislative history, nor any case law offers a credible basis to conclude that the voters intended to make arrestee-initiation the exclusive means of expungement. State-initiated expungement is thus within the Department's discretionary authority under section 295, subdivision (h)(1).

b. Plaintiffs Properly Challenge the Department's Abuse of Discretion As-Applied.

Plaintiffs' claim is as-applied: the Department's discretionary retention policies are unconstitutional as applied to individuals eligible for expungement whose DNA remains in the Department's possession. (See

People v. Super. Ct. (J.C. Penney Corp., Inc.) (2019) 34 Cal.Ap.5th 376, 387 ["as-applied challenge contemplates analysis of the facts of [] particular . . . cases to determine . . . whether in those particular circumstances the application [was unconstitutional]."] This Court held, on appeal from demurrer, that Plaintiffs' as-applied challenge "warrant[s] further development." (*CGS*, *supra*, 2021 WL 2373436 at p. *12.) As the trial court noted, "the Court of Appeal was clear that Plaintiffs have stated facts sufficient to allege an as-applied challenge to keeping DNA samples and profiles of arrestees who are never convicted and have no prior qualifying convictions." (19 AA 3221-3222.)

Nonetheless, the Department contends that this Court's remand order required Plaintiffs to develop evidence from individual cases, and that Plaintiffs instead attack the language of the statute itself. (Brief at pp. 37-39.) The Department is wrong on both counts.

First, the Department argues that "Plaintiffs did not show that the expungement procedures have been implemented in an unconstitutional manner as to anyone," and that the trial court "misread this Court's decision to mean that an as-applied challenge could be maintained . . . without any [such] showing.'" (Brief at pp. 37-38 [adding, "if that were the case, there would have been no need for a remand"].)

The remand order did not direct Plaintiffs to develop evidence from particular cases. As this Court was aware, Plaintiffs are not individuals who have "been personally affected by the DNA statute." (*CGS*, *supra*, 2021 WL 2373436 at pp. *10-11, citation and quotation marks omitted.) Rather, Plaintiffs properly "invoke public-interest mandamus . . . standing and challenge the implementation and operation of the statutory expungement process," a permissible form of "'as applied' challenge." (*Ibid.*) Thus, the Court remanded for Plaintiffs to develop proof that the "overall" operation of the expungement process is "constitutionally infirm." (*Id.* at p. *10.)

Plaintiffs have done so—proving that there is no notice of expungement, the application process is burdensome, a tiny fraction of those eligible apply, and the Department's retention policies serve no legitimate purpose.[10] (See, *infra*, pp. 16-19.)

Second, Plaintiffs' challenge is to the Department's actions (or rather inaction)—not to the text of the DNA Act. The Department argues that by challenging DOJ's policy "that a person seeking DNA expungement must make a written request," Plaintiffs challenge the statute on its face because "the 'written request' requirement is part of the DNA Act itself." (Brief at pp. 38-39.) But as discussed, the statutory expungement process is not exclusive, and the Department has discretion to expunge DNA automatically. (See, *supra*, pp. 27-30.) Plaintiffs' challenge is thus to the Department's failure to exercise its discretion to expunge eligible DNA automatically—not to the legality of the statutory expungement process, standing alone.

In any event, the Department's emphasis on the distinction between facial and as-applied challenges is misguided. As the U.S. Supreme Court stated: "The label is not what matters. The important point is [to hold plaintiffs to the appropriate legal standard in light of their] claim and the relief that would follow[.]" (*Doe v. Reed* (2010) 561 U.S. 186, 194; see, e.g., *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 509-510 ["[T]he propriety of resolving a constitutional claim on demurrer does not depend upon whether a challenge is styled facial or as-applied; rather, it depends upon whether the complaint sets forth a claim that can be resolved as a question of law."].) On appeal from demurrer, this Court understood the nature of Plaintiffs' systemic challenge and ordered the case to proceed so

---

[10] Plaintiffs also present the Declaration of Kalanie Ewing, which *is* evidence of operation of the expungement process in one particular case. (See Ewing Decl., 11 AA 1598-1601.)

that Plaintiffs could develop more evidence about the failures of the arrestee-initiated expungement process. What matters, therefore, is not the label of their claims, but that Plaintiffs demonstrate that the Department's indefinite retention of the DNA of people eligible for expungement violates the right to privacy. As the trial court found, Plaintiffs have done so.

II. The Right to Privacy Operates Independently of the Fourth Amendment in this Case.

The Department urges the Court to follow *People v. Roberts* (2021) 68 Cal.App.5th 64, and rule against Plaintiffs under the Fourth Amendment, foregoing any analysis under the *Hill* test. (Brief at pp. 41-44.) The Court should decline. As the trial court found, "[o]nly in the search and seizure context is the privacy right coextensive with the right against unreasonable search and seizure." (19 AA 3222.) Because the present case does not arise in the search and seizure context, the Court must perform an independent analysis.

In *Roberts*, a criminal defendant was arrested on a charge for which he was not prosecuted; when DNA taken at arrest matched to an earlier crime scene and he was convicted of murder, he argued that his DNA should have been suppressed because the Department should have expunged his DNA automatically. (*Roberts*, supra, 68 Cal.App.5th at pp. 77-79.) The Court disagreed, analyzing under the Fourth Amendment, then California's search and seizure clause, article I, section 13, before summarily rejecting an argument under the privacy provision because, "in the context of search and seizure, [] the privacy protected by article I, section 1 of the California Constitution is no broader than the privacy protected by the Fourth Amendment or by article I, section 13 of the California Constitution." (*Id.* at p. 108 [citing, *inter alia*, *People v. Crowson* (1983) 33 Cal.3d 623, 629].)

It would be a cruel irony to hold that the Fourth Amendment governs here. The voters made "privacy" an express provision of the Constitution out of concern that "[m]odern technology" enabled "monitoring, centralizing and computerizing" vast troves of personal data without the public's knowledge "these records even exist." (2 AA 321.) They determined that existing constitutional provisions "do not offer sufficient protection against state surveillance, record collection and government snooping into our personal lives." (Staff Report, Assem. Const. Comm., ACA 151 (1972), reprinted in Kelso, *supra*, 19 Pepperdine. L.Rev. at p. 474; accord 2 AA 320.) And they were motivated to "develop new safeguards to meet the new dangers" through "expansion of constitutional protections." (Staff Report, Assem. Const. Comm., ACA 151 (1972), reprinted in Kelso, *supra*, 19 Pepperdine. L.Rev. at p. 474.) The essential purpose in adding "privacy" to article I, section 1 was thus to "prevent[] government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other[s]." (2 AA 321.) To nonetheless apply a Fourth Amendment analysis in the present case—a civil challenge to government stockpiling of highly personal data—would thwart the intent of the voters.

In any event, *Crowson* and *Roberts* do not apply because this is not a search and seizure case—it does not concern "'police surveillance in the criminal context.'" (*Crowson*, *supra*, 33 Cal.3d at p. 629 [citing *People v. Owens* (1980) 112 Cal.App.3d 441, 448-449].) Plaintiffs are not criminal defendants or former arrestees; they rely on public interest and taxpayer standing to seek mandamus in civil court. They do not seek suppression of any evidence, a hallmark of the search and seizure context. (*People v. Buza* (2014) 180 Cal.Rptr.3d 753, 785, reversed on other grounds by *Buza*, *supra*, 4 Cal.5th at p. 658 ["[I]t is highly unusual for search and seizure

issues to arise in any context other than a suppression motion[.]"].) Nor is the Department retaining any expungement-eligible DNA in conjunction with a criminal matter. To be sure, DNA in the Department's possession was likely *collected* in conjunction with criminal matters, but by virtue of eligibility for expungement, such matters have resolved—the DNA *remains* in the Department's possession because DOJ refuses to expunge it. Plaintiffs' challenge in civil court to this exercise of the Department's discretion over its database and retention policies is far different from an interaction between one individual and law enforcement in the search and seizure context.

The Department's position appears to be that *Roberts* applies in any case that challenges any aspect of the DNA Act. (Brief at p. 43.) But *Roberts* merely held that the privacy claim in *that* case—appeal of a murder conviction, seeking suppression—arose in the search and seizure context. (*Roberts*, *supra*, 68 Cal.App.5th at pp. 108-109.) It said nothing of the DNA Act as a whole. Likewise, the Department's contention that "the DNA Act operates and is applied in the context of search and seizure," while sometimes true, is irrelevant. That the government's collection and use of DNA frequently occur in the context of criminal cases has no bearing on the specific legal issue raised here, *i.e.* the Department's discretionary decision to retain the DNA of people who are eligible for expungement. The Department's plaint notwithstanding, the Court must analyze this case under article I, section 1.

III. Under the *Hill* Test, the Department's Indefinite Retention of DNA Eligible for Expungement Violates California's Right to Privacy.

Courts analyze a claim alleging a violation of the California constitutional right to privacy using the three-step balancing test set out in *Hill*, *supra*, 7 Cal.4th 1. The first step measures asks whether the relevant

privacy interest under three threshold satisfies three elements: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (*Id.* at pp. 39-40.) These serve "to screen out claims that do not involve a significant intrusion" but should not foreclose a balancing inquiry "in any case that raises a genuine, nontrivial invasion of a protected privacy interest." (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 891, 893-894.) Where a plaintiff satisfies these elements, the defendant may prove, "as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests." (*Id.* at p. 40.) The defendant must demonstrate a legitimate interest based on actual evidence, not theory or conjecture. (See *Mathews v. Becerra* (2019) 8 Cal.5th 756, 784-786.) In the third step, a plaintiff "may rebut a defendant's assertion" with "feasible and effective alternatives" having a "lesser impact on privacy interests." (*Id.*) Where a defendant does not demonstrate a legitimate interest at step two, neither the plaintiff nor the court need proceed to step three. (See, e.g., *Am. Acad. Of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 359.)

a. <u>This Court has already held that Plaintiffs satisfy the threshold elements establishing a privacy interest.</u>

On appeal from demurrer, this Court decided that Plaintiffs satisfied the three threshold privacy elements set forth in *Hill*, holding:

> [P]laintiffs have made the minimally required allegations that the expungement provisions implicate the right of privacy secured by our state constitution. As plaintiffs point out, a rigorous balancing standard applies when the right of privacy is implicated.

(*CGS*, *supra*, 2021 WL 2373436 at p. *12.) The Court's statement that "a rigorous balancing standard" now applies is dispositive—courts only proceed to the second balancing step where the first is satisfied. (See *County of Los Angeles v. Los Angeles County Employ. Rel. Com.* (2013) 56

Cal.4th 905, 930 ["Because [plaintiff] made a sufficient showing . . . , we next consider whether the invasion of privacy is justified."]; see *Williams v. Super. Ct.* (2017) 3 Cal.5th 531, 555 [where "threshold *Hill* requirements are absent [], [court] need not move on to a balancing of interests"].) This is the law of the case. (See *People v. Barragan* (2004) 32 Cal.4th 236, 246 [appellate court's statement of "principle or rule of law necessary to the decision . . . becomes the law of the case," citation and quotation marks omitted].)

The Department counters that this Court "merely held that plaintiffs had 'alleged a claim warranting further development.'" (Brief at p. 47 [citing *CGS*, *supra*, 2021 WL 2373436 at pp. *11-12 & fn. 8.) But this ignores the language "the expungement provisions implicate the right of privacy" and a "rigorous balancing standard applies." The Court should not revisit its prior holding. But even if this Court's prior holding was unclear, Plaintiffs' claims easily satisfied the first step of *Hill*.

(1) *People Have a Legally Protected Privacy Interest in Their DNA.*

For good reason, the Department does not dispute that people have a legally protected privacy interest in their DNA. *Buza* held that "the heightened privacy interests in the sensitive information that can be extracted from a person's DNA . . . . implicate . . . privacy rights . . .[under] article I, section 1[.]" (*Supra*, 4 Cal.5th at pp. 689-90.)

(2) *People Eligible for Expungement May Reasonably Expect that the Department Will Not Retain Their DNA Indefinitely.*

Plaintiffs likewise have a reasonable expectation of privacy under the circumstances. This element asks whether a legally protected privacy interest is reasonable in light of factors like "advance notice," "opportunities to consent," or "customs, practices, and physical settings." (*Hill*, *supra*, 7 Cal.4th at pp. 36-37.) Here, the question is whether people

have a privacy interest in their DNA at the time they become eligible for expungement.

They do. No one tells arrestees how their DNA will be used, how long it will be kept, and whether and how expungement is possible. Under these circumstances, arrestees may reasonably expect that their DNA will be searched against a forensic database. (See *Maryland v. King* (2013) 569 U.S. 435, 480 (Scalia, J., dissenting) ["What DNA adds . . . is the ability to solve unsolved crimes, by matching old crime-scene evidence against the profiles of people whose identities are already known."].) But they would not expect the Department would hold and use it forever. That is particularly so after any of the triggering events of eligibility for expungement. Once a prosecutor declines to bring charges, or a defendant is acquitted, or has a conviction reversed or vacated and is not retried, the individual in question would reasonably expect that their DNA would not be used by the government. After all, what justification could law enforcement have for retaining it?

The trial court agreed, relying on *Thompson v. Spitzer* (2023) 90 Cal.App.5th 436. (19 AA 3223.) In *Thompson*, taxpayers challenged the Orange County District Attorney's ("OCDA") practice of offering to drop or reduce misdemeanor charges in exchange for DNA they sent to a third party for genotyping. (*Id.* at pp. 445-46.) Although the alleged misdemeanants signed a waiver stating that law enforcement would "permanently retain, search, and use the DNA," the waiver did not mention disclosure to the third party. The Court found this dispositive, concluding that the alleged misdemeanants maintained a reasonable expectation that their DNA would not be retained indefinitely by a third party. (*Id.* at p. 460.)

Thompson's holding is on point. Here, as in *Thompson*, law enforcement sends DNA to the Department without providing any

information about how it will be used, and for how long. And unlike the alleged misdemeanants in *Thompson*, felony arrestees have no indication that their DNA will be indefinitely retained by anyone, much less after their arrest does not result in a felony conviction.

The Department argues that arrestees nonetheless lack a reasonable expectation of privacy on several bases. Ultimately, none is compelling.

First, the Department cites *Roberts* for the proposition that where DNA is lawfully collected, indefinite retention poses "no additional intrusion." (Brief at p. 42 [citing *Roberts*, *supra*, 68 Cal.App.5th at p. 104].) As noted, *Roberts* did not conduct a distinct analysis under *Hill*, but the point is unpersuasive regardless. *Roberts* relied upon the caselaw of mugshots and fingerprints to conclude that retention and continued use of DNA poses "no additional intrusion into the arrestee's privacy." (*Supra*, 68 Cal.App.5th at p. 104.) But as *Buza* noted, "the question . . . is whether, given the uniquely sensitive nature of DNA information, a different rule should apply[.]" (*Supra*, 4 Cal.5th at p. 680.) It should. Several courts have persuasively held that ongoing "analysis and maintenance of [] information in CODIS" is "a second and potentially much more serious invasion of privacy[.]" (*United States v. Amerson* (2d Cir. 2007) 483 F.3d 73, 85, citation and quotation marks omitted; accord *United States v. Mitchell* (3d Cir. 2011) 652 F.3d 387, 407; see, e.g., *County of San Diego v. Mason* (2012) 209 Cal.App.4th 376, 381 ["[I]t is well established that the analysis of a DNA sample is independent from the taking of that sample, and presents its own distinct privacy concerns."]; *People v. Thomas* (2011) 200 Cal.App.4th 338, 341 ["collection and subsequent analysis . . . [are] separate searches"]; see also *Mario W. v. Kaipio* (Ariz. 2012) 281 P.3d 476, 481.) Indeed, indefinite retention "is a far more significant invasion of an arrestee's privacy" as it "has the potential to reveal vast amounts of personal information . . . and to be used in ways starkly different relative to

what justified the scheme." (*Buza*, 4 Cal.5th at p. 720 (Cuellar, J., dissenting).)

Second, DOJ alleges that arrestees are given notice of the possibility of expungement by the Department's "significant outreach" and because "'ignorance of the law does not excuse.'" (Brief at p. 50, citation omitted.) The Department's publication efforts are not significant, however. The information on DOJ's website is minimal, and arrestees have no reason to go there in the first place. The Department's informational posters, meanwhile, were sent to only 22 counties, and the Department has no idea what became of them. (*Supra*, p. 16.) This is not sufficient notice.

The Department's claim that "ignorance of the law is no excuse" fares no better. This is a criminal law maxim applicable to defendants with "the requisite mental state in respect to the elements of [a] crime [who] claim[] to be unaware of the existence of a statute proscribing his conduct.'" (*Unicolors Inc. v. H&M Hennes & Mauritz, L.P.* (2022) 595 U.S. 178, 188, citing *Rehaif v. United States* (1994) 588 U.S. 225.) It does not apply in the civil context to deprive someone of a right or benefit. (*Lambert v. California* (1957) 355 U.S. 225, 228 [maxim does not apply to "conduct that is wholly passive," "where a penalty or forfeiture might be suffered for mere failure to act."].) Thus, actual notice is required before the government may effect a forfeiture or deny a right—constructive notice via the statute itself will not suffice. (*People v. Ruiz* (2020) 59 Cal.App.5th 372, 382-383; accord *People v. Swink* (1984) 150 Cal.App.3d 1076, 1082-1083.) In this civil case concerning intrusion on a privacy right resulting from wholly passive conduct, the maxim does not apply.

Third, the Department argues that any implicated privacy interests are adequately protected by the safeguards noted in *Buza*, *i.e.* "'the limited

nature of the information stored in databases,'"[11] "'the legal protections against possible misuse,'" and the "'availability of procedures for [expungement].'" (Brief at p. 48 [citing *Buza*, *supra*, 4 Cal.5th at p. 692].) But *Buza* discussed the value of safeguards with respect to the privacy intrusion of DNA *collection.* But the interest raised in this case is that of DNA retention at the point when a person is no longer subject to felony prosecution. As this Court stated:

> [I]n contrast to an arrestee . . . , we are not persuaded that an individual who is *no longer* an arrestee or a defendant, and who meets all the legal requirements to have his or her DNA information expunged, does not have a measurably greater privacy interest . . . .

(*CGS*, *supra*, 2021 WL 2373436 at p. *12.) Indeed, retention poses special privacy concerns because technology, and laws, can change. (See *Thompson*, *supra*, 90 Cal.App.5th at p. 450 fn. 3.)

Moreover, *Buza* was careful to avoid opining directly on the issue of expungement, noting the absence of a record on that question. (4 Cal.5th at p. 692.) Here, Plaintiffs have made that record: there is no notice, no legal assistance, and significant barriers to application, which explains why only a tiny fraction of those eligible, likely between 0.29 and 1.57%, achieve it. (Order, 19 AA 3224-3225; *supra*, at p. 18.)

Third, the Department argues that opt out provisions are generally sufficient to protect privacy. The Department relies on cases wherein defendants invoked article I, section 1 to challenge discovery requests for the contact information of prospective class members. (Brief at p. 49 [citing *Williams*, *supra*, 3 Cal.5th at pp. 554-555; *Belaire-West Landscape, Inc. v. Super. Ct.* (2007) 149 Cal.App.4th 554, 557-559; *Pioneer Electronics (USA), Inc. v. Super. Ct.* (2007) 40 Cal.4th 360, 372].) In finding no

[11] DOJ retains DNA samples, and the information in samples is not limited.

violation, those decisions held it sufficient that prospective class members received notice and an opportunity to opt out. But the cornerstone of the reasoning in those cases was the courts' general finding that prospective class members would "reasonably expect, and even hope, that their names and addresses" would be disclosed to the class action plaintiff. (*Williams*, *supra*, 3 Cal.5th at p. 554-555 [employees of defendant sued for wage and hour violations], quotation marks and citation omitted; *Belaire-West*, *supra*, 149 Cal.App.4th at pp. 557-559 [same]; *Pioneer*, *supra*, 40 Cal.4th at p. 372 [purchasers of defective DVD players who had complained to the seller].) People eligible for expungement do not reasonably expect, let alone hope, that their DNA will be given to the Department to be retained indefinitely.

Fourth, the Department points to "norms and customs," initially pointing to California laws placing "the burden of seeking relief or benefits on the individual." (Brief at pp. 50-51.) This alleged norm is too broad to be meaningful. Whether a statute makes a given right or benefit user-initiated turns on a host of legal and pragmatic considerations—there is no general, societal acceptance that all such burdens be placed on the individual.

Next, the Department notes that many states and the federal government provide for arrestee-initiated expungement. (Brief at pp. 51-52.) But neither the federal government nor all other states have chosen to make "privacy" an inalienable right expressly included in their constitutions. California did so specifically to provide protection over and above the Fourth Amendment against stockpiling of sensitive personal data. (*Supra*, pp. 11, 34.) And the record is clear that DNA is highly sensitive, and that people do not want it in the government's possession. (*Supra*, pp. 12-13.) Plaintiffs have established a reasonable expectation of privacy under the circumstances.

(3) *Indefinite Retention of DNA is a Serious Privacy Intrusion.*

As the trial court found, the Department's indefinite retention of the DNA of people eligible for expungement is a serious invasion of privacy. (19 AA 3224-3225.) DNA contains highly sensitive information about an individual's family, race, predisposition to disease, and more. (*Id.*; see *supra*, p. 12.) The Department's retention of DNA can subject people to wrongful arrest, prosecution, and incarceration. (*Supra*, p. 20.) Possible uses will only expand as the science develops. (*Supra*, p. 12.) And the Department's arrestee-initiated expungement process is largely unknown to arrestees and highly burdensome, as evidenced by an extremely low take-up rate.

In challenging the lower court's holding, the Department again relies on the safeguards against misuse and the prospect of expungement. (Brief at p. 53.) These arguments lack merit.

First, as noted, errors and malfeasance have happened nationwide despite such safeguards, and laws change—what is prohibited today may be authorized or even required tomorrow. The Department argues that such possibilities are speculative. (Brief at p. 53.) But *Hill* requires that the seriousness inquiry consider "actual or *potential* impact." (*Supra*, 7 Cal. 4th at p. 37, italics added.)

Second, arrestee-initiated expungement is effectively illusory. The Department attacks this on several grounds. Initially, it hypothesizes that the low number of expungements may reflect indifference, and that the process for arrestees is not burdensome; according to this view, expungement is readily available for those few who are interested, making the privacy intrusion slight. But the Department offers no proof to support this theory, and the record shows the opposite. Numerous, uncontested surveys show that people do not want their DNA in the Department's

possession; even people who willingly give their DNA to corporate third parties overwhelmingly refuse to provide it to the government. *(Supra*, at p. 13.) The record is also uncontested that DOJ's arrestee-initiated processes impose numerous, substantial burdens—lack of notice, legalistic forms, absence of counsel, requirement to swear under penalty of perjury, need for supporting documentation—that contribute to a historically low take-up rate. (*Supra*, at pp. 16-17.) The Department's attempt to reframe its low take-up rate based on speculation should be rejected out of hand.

Next, DOJ protests that Plaintiffs submitted no "evidence that a *single* person was unduly burdened by California's expungement procedures." (Brief at p. 54.) But Kalanie Ewing declared that she did not know that expungement was available or understand how to apply. (11 AA 1600-1601.) And the blunt fact that barely anyone has applied for expungement, though hundreds of thousands are eligible, shows that a great many people are unduly burdened. Plaintiffs need not rely on individual arrestees to show this. In *Thompson*, the defendants complained that taxpayer plaintiffs had not identified anyone harmed by the challenged DNA program, but the Court held that they were not so required, reasoning that such a requirement would be impractical and contrary to the "broad remedial purpose" of taxpayer standing. (*Thompson, supra*, 90 Cal.App.5th at p. 455.) So, too, here. Plaintiffs are entitled to rely on statistical, aggregate proof in the form of research, surveys, and expert opinion.

Third, the Department argues that the trial court erred in estimating the number of people eligible for expungement because no reasonable estimate is possible. (Brief at pp. 54-56.) This is untenable. It is uncontested that at least 130,780 people are presently eligible for expungement under the Department's existing policies. (*Supra* at p. 18.) The Department's belated rejoinder—that this number includes people whose felony convictions are sealed or who were court-ordered to submit DNA—runs

headlong into the testimony of the Department's own DNA Laboratory Manager that the Department *ignores* these possibilities in the ordinary course. And as noted, the 130,780 figure is the floor. Over 700,000 people have an open arrest for an offense beyond the statute of limitations in most cases, and even this figure does not include individuals whose RAP sheets remain in paper format. In other words, there are certainly several hundred thousand people eligible for expungement, making the take-up rate extremely low.

Fourth, the Department incorrectly asserts that the number of people impacted is not pertinent to the seriousness analysis. In *County of Los Angeles v. Superior Court*, the Court held that a discovery order "threaten[ed] a serious invasion of privacy interests" because "the number of patient records implicated by the court's order [was] staggering." ((2021) 65 Cal.App.5th 621, 646-647.) Similarly, in *Greenley v. Kochava, Inc.*, the district court found the corporate defendant's data-collection practices to be a serious privacy intrusion in light of the "vast amount of personal information [collected]" across users. ((S.D.Cal. 2023) 684 F.Supp.3d 1024, 1047.) Thus, the seriousness of the intrusion reflects both the individual privacy interest at issue and the scope of the intrusion across people. (*Hill*, *supra*, 7 Cal.4th at p. 37 ["Actionable privacy interests must be sufficiently serious in their nature, scope, and actual or potential impact . . . ."].) The trial court therefore rightly relied on the volume of expungement-eligible DNA in the Department's possession in finding a serious invasion of privacy.

b. <u>The Department Has No Significant Interest in Expungement-Eligible DNA.</u>

Because Plaintiffs have demonstrated a privacy intrusion in this case, the burden shifts to the government to offer a countervailing interest that justifies the intrusion. (*Hill*, *supra*, 7 Cal.4th at pp. 38, 40.) The trial

court correctly determined that the Department's legitimate interests are insufficient. The Department asserts two interests: solving crimes and exonerating the innocent. (Brief at pp. 57-58.) As to the first, the court found that "Defendants fail[ed] to prove retention furthers the goal of identifying suspects"—specifically, that while *collecting* DNA at arrest has solved crimes, there is no evidence that *indefinite retention* of expungement-eligible DNA has done so. (19 AA 3226-3227.) Regarding DOJ's interest in exonerating the innocent, the court acknowledged that it held some weight but found it "not enough to tip the scale." (19 AA 3227.) The court concluded by expressing concern that the Department's interests would authorize retention for the public at large. (19 AA 3227-3228.)

The Department urges this Court to reverse based on several theories, but none is persuasive.

First, the Department charges that "[t]he trial court did not even address the state interest in exonerating the innocent." This is flatly untrue. The trial court credited the Department's representation that "'the identification of any offender tends to exonerate the innocent—because it tends to eliminate everyone else.'" (19 AA 3227, citation omitted). The court simply found this insufficient to justify the privacy intrusion. (*Ibid.*) The Department offers no reason to dispute this, and if anything, the trial court's finding was generous: as the Department notes, the interest in exoneration is with respect to "'persons wrongly suspected or accused.'" (Brief at p. 59 [citing Proposition 69 § II, subd. (g)].) In this sense, it is not the case that identification of any offender necessarily exonerates others—in many cases, a suspect identified using DNA is the first suspect identified. Properly construed, the Department has never identified anyone exonerated by DNA that was eligible for expungement.

Second, the Department argues that "reduc[ing] the size of the database reduce[s] its effectiveness" (Brief at p. 60), *i.e.* "the larger the

database, the higher the number of hits." (3 AA 795:23-24; 10 AA 1426.) The Department conceded that this assumption is unsupported (3 AA 795:3-798:16), and because the Department must justify its privacy intrusion with actual evidence, that concession alone defeats the justification. (*Hill*, *supra*, 7 Cal.4th at p. 40 ["A defendant may prevail . . . by pleading and *proving*, as an affirmative defense, that the invasion of privacy is justified", italics added]; see, e.g., *Mathews*, *supra*, 8 Cal.5th at pp. 784-786 [Department was required to provide actual evidence that mandatory reporting of child pornography by psychotherapists protects children].)

The Department's assumption is also false. When the United Kingdom removed the DNA profiles of 1.7 million arrestees who were never convicted, law enforcement remained just as likely to obtain a match anytime a new forensic profile was placed in the database. (*Supra*, p. 19.) This result—against an enormous data set, over a decade of observation—shows that the value of DNA is qualitative, not quantitative, and just as importantly, individuals who are arrested but never convicted are not the ones whose DNA is useful to solving crime. (*Supra*, p. 19.)

This empirical finding is in harmony with the literature. Arrest is simply not a good indicator of future criminality. Too many people are arrested, too many arrests do not reflect criminal conduct, and too many people who do commit crimes either never do so again or desist within several years. (12 AA 1880, 1884.) Indefinite retention of the DNA of people eligible for expungement is thus no more useful to solving crime than holding the DNA of an equivalent portion of the general public (*id.*)—neither will help solve future crimes in any significant number of cases.

Third, the Department argues that "the voters themselves declared the state interest in an expanded database." (Brief at p. 58.) Setting to the side that the voters also gave the Department discretion to expunge automatically (§ 295, subd. (h)(1)), for purposes of the *Hill* test, the

Department must provide evidence that its policy *furthers* the stated interests. (See *Hill*, *supra*, 7 Cal.4th at p. 38 ["Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it *furthers* legitimate and important competing interests," italics added].) A legitimate interest untethered to the effects of the Department's policy is not enough. (*Lungren*, *supra*, 16 Cal.4th at p. 354 ["overwhelming evidence" showed parental consent law did not further health of minors or parent-child relationship].)

Fourth, the Department claims that "the State's interest in arrest record information continues regardless of the outcome of the criminal proceedings." (Brief at pp. 59-60 [citing *Loder v. Mun. Ct.* (1976) 17 Cal.3d 859, 863-868, and *Roberts*, *supra,* 69 Cal.App.5th at p. 100].)[12] Though it does not say so directly, the Department thus again attempts to call forth the interests in DNA collection identified in *King*. (*Supra*, 569 U.S. at pp. 449, 452-46.) But the interests in suspect identification, risk-assessment for officer safety, and dangerousness in the event of release are inapplicable once an arrestee becomes eligible for expungement. Under article I, section 1, the government must present interests to justify the intrusion at issue. (*Loder v. City of Glendale*, *supra*, 14 Cal.4th at p. 891 ["[W]hen a challenged practice or conduct intrudes upon a constitutionally protected privacy interest, the interests or justifications *supporting the challenged practice* must be weighed or balanced," italics added]; see also *White v. Davis* (1975) 13 Cal.3d 757, 775 ["principal 'mischiefs' at which the [privacy] amendment is directed" include "use of information properly obtained for a specific purpose . . . for another purpose."].) Nor does *Loder*

---

[12] The Department also cites *People v. Laird* (2018) 27 Cal.App.5th 458, 471, and *People v. Baylor* (2002) 97 Cal.App.4th 504, 508. As noted, these cases concerned individuals statutorily ineligible for expungement and are not persuasive here. (*Infra*, at p. 50.)

authorize the Court to engage in the legal fiction that DOJ's interests persist indefinitely. That case concerned records of arrest, which, again, begs the question whether "a different rule should apply here[.]" (*Buza*, *supra*, 4 Cal.5th at p. 680.)

Fifth, the Department points to evidence showing that "expansion of the DNA program to include arrestees" has solved crimes. (Brief at pp. 61-62.) But individuals whose DNA is collected at arrest are a markedly larger group than those eligible for expungement—most conspicuously, the former includes people convicted of felonies. Thus, the trial court properly found that "[w]hile Defendants show that DNA bank broadly aids investigation, they have not shown that the indefinite retention policy furthers that goal." (19 AA 3226.) The Department's discussion of its Arrestee Index falls into the same trap. (See Brief at p. 61.) The Arrestee Index is not synonymous with eligibility for expungement—it includes many individuals who have been convicted but not moved to the Convicted Offender Index, as well as arrestees for whom the statute of limitations has not expired. (3 AA 601:16-604:1.) What DOJ must provide, and has not, is evidence that expungement-eligible DNA is useful for solving crime.

Sixth, in this vein, the Department offers five purported examples of crimes solved using DNA that was eligible for expungement. At the outset, even accepting the Department's representation, five is a minuscule number of hits against hundreds of thousands of profiles eligible for expungement. There is no evidence, and little reason to believe, that the same quantum of DNA from the general public would not produce the same number of hits. (See 3 AA 798:1-19 [agreeing that "the reason [DOJ] want[s] people in the database is because, the more people in the database, the more hits you might get no matter who it is"].)

But the Department's examples are also equivocal—none is a clear-cut case of solving a crime using DNA that would have been removed

under a plausible system of automatic expungement. In *Roberts*, DNA collected at arrest was matched to a *prior* forensic sample—the hit occurred only two months after arrest and collection. (*Supra*, 68 Cal.App.5th at p. 67.) No system of automatic expungement would have removed the sample in this time frame. The same likely goes for Michael Elijah Adams; in his case, the hit occurred four months after an arrest on charges dismissed in the interest of justice, and there, the Department admitted it "[l]ikely would have followed up with the district attorney's office" because of the prospect of refiling. (3 AA 806:22-808:9). In *People v. Robinson*, the defendant's DNA was taken after conviction for a felony that did not qualify for DNA collection at the time. ((2010) 47 Cal.4th 1104, 1118.) But all felony convictions now require collection, so this defendant would not be eligible for expungement. Likewise regarding the defendant in *People v. Baylor*, whose DNA was collected and matched prior to creation of a statutory right to expungement— because the expungement provision is not retroactive, he had no right to expungement, either. (*Supra*, 97 Cal.App.4th at p. 507.) Lastly, in the case of Antolin Garcia-Torres, the defendant's DNA was matched two years after an arrest for a charge that was dismissed, but it is unclear from the record whether the charged was dismissed prior to the match. (3 AA 801:18-803:9; 17 AA 2943.)

In sum, the Department presents no meaningful evidence of a legitimate interest in retaining indefinitely the DNA of people eligible for expungement. Because the privacy interest is substantial, under *Hill*, the balance tips in Plaintiffs' favor, and the Court should affirm the finding that the Department's expungement policy violates article I, section 1.

IV. This Court Should Affirm the Trial Court's Order to Produce a Remedial Plan Given the Availability of Feasible Alternatives More Protective of the Right to Privacy.

Plaintiffs were not required to show feasible and effective alternatives to the Department's expungement policy. (See *Hill*, *supra*, 7 Cal.4th at p. 40 [a plaintiff "may" demonstrate alternatives to "rebut" legitimate interests].) Nonetheless, as the trial court found, Plaintiffs "identified multiple ways that Defendants could cure the constitutional violation." (19 AA 3220.) The court did not impose any particular remedy, however, but instead directed the Department to submit its own remedial plan within 90 days. This was in accordance with "the well-settled rule that traditional mandate does not 'lie to command the exercise of discretion to compel some action upon the subject involved.'" (*Ibid.* [citing *Hollman v. Warren* (1948) 32 Cal.2d 351, 355-356].)

The trial court was correct and its Order mandating submission of a remedial plan should be upheld: Plaintiffs have presented feasible alternatives to the Department's expungement policy that better protect the privacy right—namely, to begin expunging eligible DNA automatically.

The Department has the means to identify 130,780 "easy" cases that could be expunged quickly using the ACHS database. The Department resists this conclusion, arguing that "an unknown number [of those 130,780] do not qualify" because they were "required by court order to submit DNA as a condition of a misdemeanor plea agreement, or because the person has a felony conviction, but the record has been sealed." (Brief at p. 56.) But the Department does not account for such contingencies in the ordinary course: the Department's own PMQ testified that DNA laboratory staff can and do determine eligibility for expungement based on the RAP sheet alone in circumstances identical to those that characterize the 130,780. (3 AA 699:9-18, 700:20-702:5, 728:11-730:21; 4 AA 918:5-9 ["If

the documentation is clear . . . and there's nothing else in the RAP sheet . . ., that doesn't require follow up."].) The Department's belated attempt to complicate its expungement practices for purposes of this litigation is belied by its actual practice.

And the Department could identify many more using the list of over 700,000 cases identified by ACHS as having missing disposition information only for arrests over seven years old. The Department could also utilize its authority under section 11079, subdivision (a) to require local law enforcement agencies to fill missing disposition information. This would greatly reduce Department staff time, as would possible changes to the Department's internal protocols to reduce redundancies and take advantage of economies of scale. (3 AA 724:19-726:24, 737:2-4 [Department's supervisory review of expungements is redundant]; 11 AA 1528 [identifying economies of scale].)

The Department objects that automatic expungement would be too expensive. Initially, the Department should not be permitted to create an unconstitutional database and then plead poverty when tasked with dismantling it. And it bears repeating that the cost of expungement is the same whether initiated by an arrestee or the Department. The Department's financial objection is thus, at bottom, an admission that it is unprepared to expunge in large numbers. Furthermore, the Court of Appeal has already held that the Department may be compelled by the privacy initiative to contact local law enforcement agencies to fill disposition gaps—the most time-consuming and expensive step in the expungement protocol. In *Central Valley Chapter Seventh Step Foundation, Inc. v. Younger* (1989) 214 Cal.App.3d 145, the Court held over the Department's objection that the Department's duty to perform background checks compelled such outreach. Accordingly, expense will not prevent a necessary constitutional remedy.

Nevertheless, the Department's cost estimates—between several hundred million and $5 billion—are enormously inflated. In compliance with AB 1076, the Department granted relief for over 6 million people by querying ACHS at a cost of $11.2 million for retroactive cases and $1.9 million annually. To give effect to AB 1793, the Department queried ACHS and corresponded with local law enforcement agencies to identify 200,000 people for relief, all in the span of two years, and for approximately $5 million.

And closer inspection of the Department's estimate reveals numerous issues. Putting aside the myriad needless, redundant, and inflated costs, most broadly, it entails digitization of all historical records (13 AA 2075), and it assumes an objective of complete expungement within five years (13 AA 2076). Neither is warranted. It is unclear why such an extensive digitization process is included in the estimate as cases in which the individual has no DNA in the database, for example, need not be uploaded.[13] And the Department's target of total expungement in five years is not responsive to the relief Plaintiffs seek. Plaintiffs have never claimed that total expungement of all eligible cases by some point certain is constitutionally required. Rather, Plaintiffs allege that the Department must make reasonable efforts to address the backlog and expunge automatically going forward. To determine how best to achieve this in the first instance, the trial court ordered the Department to produce a remedial plan "to expunge samples such that the privacy rights of Californians are respected[.]" (19 AA 3228.) It should be required to do so now.

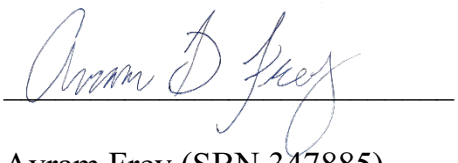
[13] The Department has already undertaken to digitize its historical records for its own purposes—as of 2024, it had scanned 800,000 documents, and it expects to have automated 15-20% of the total by the end of 2025. (2 AA 514:3-517:7.)

CONCLUSION

For the foregoing reasons, the trial court's decision should be affirmed.

Dated: December 9, 2025

Respectfully submitted,

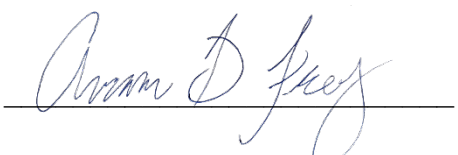


Avram Frey (SBN 347885)
afrey@aclunc.org
Isir Said (805653)
isaid@aclunc.org
ACLU FOUNDATION OF
NORTHERN CALIFORNIA

Attorneys for Plaintiffs/Respondents

CERTIFICATE OF WORD COUNT

The text of this Brief comprises 13,584 words as counted by the Microsoft Word program used to generate it. This includes footnotes but excludes the tables of contents and authorities, the cover information, any certificate of interested entities or persons, the signature blocks, this certificate, any proof of service, and any attachment. See California Rule of Court 8.204(c).



Avram Frey (SBN 347885)
afrey@aclunc.org
Isir Said (805653)
isaid@aclunc.org
ACLU FOUNDATION OF
NORTHERN CALIFORNIA

Attorneys for Plaintiffs/Respondents

PROOF OF SERVICE

I, Kassie Dibble, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is kdibble@aclunc.org. On December 9, 2025, I served the attached,

RESPONDENTS' BRIEF

BY ELECTRONIC TRANSMISSION OR U.S. MAIL: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system or a hard copy of the document via U.S. Mail as indicated:

Sharon O'Grady
California Department of Justice
Office of the Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-7004
Sharon.OGrady@doj.ca.gov
Counsel for Appellants
Served via TrueFiling

San Francisco Superior Court
For: Hon. Victor Hwang
400 McAllister St.
San Francisco, CA 94102
Served via U.S. Mail

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 9, 2025 at San Francisco, CA.

Kassie Dibble