Case No. S196200

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MARK BUZA

Defendant and Appellant.

After a Decision of the Court of Appeal
First Appellate District, Division Two, Case No. A125542
San Francisco County Superior Court, Case No. 207818
The Honorable Carol Yaggy, Judge

APPLICATION FOR LEAVE TO FILE *AMICUS* BRIEF AND PROPOSED BRIEF OF *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S CHALLENGE TO PROPOSITION 69'S EXPANSION OF CALIFORNIA'S DNA COLLECTION PROGRAM TO MERE ARRESTEES

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ATTORNEYS FOR *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

APPLICATION FOR LEAVE TO FILE *AMICUS* BRIEF IN SUPPORT OF APPELLANT'S CHALLENGE TO PROPOSITION 69'S EXPANSION OF CALIFORNIA'S DNA COLLECTION PROGRAM TO MERE ARRESTEES

Pursuant to California Rule of Court, Rule 8.520(f), the American Civil Liberties Union of Northern California hereby respectfully applies for leave to file the attached *amicus* brief in support of the Appellant Mark Buza, challenging the expansion of California's DNA collection statute to mere arrestees. Attorneys for *Amicus* represent a class of plaintiffs who are challenging this same provision in federal court, are familiar with the question presented by this case, have read the briefs submitted by the parties, and believe that further argument is useful, as discussed below.

STATEMENT OF INTEREST

The American Civil Liberties Union is a nationwide nonprofit, nonpartisan organization with over 550,000 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, 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. The organizations submitted extensive comments when the United States Department of Justice promulgated regulations mandating the DNA testing of persons arrested by federal authorities.[1] The ACLU-NC has twice challenged the

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[1] Available at http://www.aclu.org/crimjustice/gen/35392leg 20080519.html.

constitutionality of Proposition 69's arrestee-testing provisions. In the first of these cases, the federal district court held that the claims were not ripe for adjudication because they were not to take effect until 2009. *Weber v. Lockyer*, 365 F. Supp. 2d 1119 (N.D. Cal. 2005). In the second of these cases, the lawyers who authored this brief are counsel for a class of Californians who were forced to provide DNA samples following their arrests, even though many of them (including three of the named plaintiffs) were never even charged with a crime. *See Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012). A petition for rehearing *en banc* is currently pending before the Ninth Circuit on *Haskell*'s central question: whether the Fourth Amendment permits the State to force every person it arrests to provide a DNA sample to be used to investigate unrelated crimes, without a conviction or even a judicial finding of probable cause to hold the individual.

By virtue of the litigation in federal court, *Amicus* can provide a useful perspective regarding federal precedent governing the warrantless, suspicionless DNA testing of arrestees. Specifically, *Amicus* will address the following topics:

1. The State has the burden to justify the warrantless search and seizure of DNA from mere arrestees, and it cannot meet its burden by merely citing the text of Proposition 69;
2. The "special needs" test is the proper framework for assessing the suspicionless DNA searches of arrestees, and Proposition 69 fails that test; and
3. Even under the totality of the circumstances approach, Proposition 69 violates the Fourth Amendment.

Accordingly, the proposed *Amicus* respectfully request this Court's leave to file the accompanying brief.

No party or counsel for any party in the pending appeal authored the attached brief or made any monetary contribution to its preparation. Cal. Rules of Court, Rule 8.520(f)(4)(A), (B).

Dated: June 1, 2012

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.

By: _____
Michael Risher

Dated: June 1, 2012

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case implicates two fundamental tenets of our criminal justice system: the right to free from unreasonable searches and seizures and the presumption of innocence. The warrantless, suspicionless DNA searches of *mere arrestees*, as authorized under California Penal Code § 296(a)(2)(c) ("Proposition 69") violates both tenets. It authorizes the compulsory search and seizure of DNA without probable cause for the evidence, and it treats individuals who have been arrested but never convicted of any crime as if they had already been convicted.

Cases interpreting the Fourth Amendment have set clear rules. When a search or seizure is made without a warrant, the State has the burden to justify it. *See People v. Redd*, 48 Cal. 4th 691, 719 (2010); *see also King v. State*, 2012 WL 1392636, *20 (Md. 2012) ("The State bears the burden of overcoming the arrestee's presumption of innocence and his expectation to be free from biological searches before he is convicted of a qualifying crime."). The issue before this Court is whether the government has met its burden to show that compulsory collection of biological samples from all adult felony arrestees for purposes of DNA testing comports with the Fourth Amendment.

The State has failed to meet its burden. Under United States Supreme Court precedent, suspicionless DNA searches of arrestees can only be justified where there is some "special need" unrelated to normal law enforcement objectives. *Ferguson v. City of Charleston*, 532 U.S. 67, 78, 83 n.21 (2001). The totality of the circumstances balancing inquiry applies to assess the reasonableness of a suspicionless DNA search from arrestees *only after* a suspicionless DNA search has been deemed to satisfy

a "special need" of the State. *United States v. Fraire*, 575 F.3d 929, 931–32 (9th Cir. 2009) (holding that the government could not get to the balancing step before first showing that the special needs exception applied). Thus, before engaging in any totality of the circumstances inquiry, the State must show a "special need" unrelated to law enforcement. Because arrestee DNA testing is intended to serve standard law-enforcement purposes, it does not qualify under the "special needs" exception, and the searches are therefore *per se* unconditional. No further balancing of interests is appropriate.

Even if the Court were to get to the next step and consider the totality-of-the-circumstances, the search and seizure of DNA from mere arrestees is still unconstitutional. Although the State asserts several justifications for arrestee testing, none withstands scrutiny. Arrestees' rights to bodily integrity and reasonable expectation of privacy against warrantless, suspicionless searches far outweigh the State's purported interest in arrestee DNA testing. *See King*, 2012 WL 1392636, *1, *20–24. Accordingly, no exception to the warrant requirement exists.

Amicus agrees with the compelling arguments that Appellant has raised. Even *Scientific American* counsels against the expansion of the government's power to collect DNA evidence and to create DNA profiles for individuals who have never been convicted of any crime.[2] Proposition 69, to the extent that it requires felony arrestees to submit a DNA sample

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[2] The Editors concluded that "DNA samples should not be taken until a suspect is convicted[.]" *Stop the Genetic Dragnet*, Scientific American (Nov. 22, 2011), available at http://www.scientificamerican.com/article.cfm?id=stop-the-genetic-dragnet.

for analysis and inclusion in state and federal DNA databases without independent suspicion to collect the evidence, a warrant for the evidence, or even a judicial or grand jury determination of probable cause to support the arrest, constitutes a violation of established Fourth Amendment principles. This Court should find the warrantless, suspicionless collection of DNA from mere arrestees unconstitutional, as Maryland's highest court recently did in *King*, 2012 WL 1392636.

ARGUMENT

I. THE STATE HAS THE BURDEN TO JUSTIFY THE WARRANTLESS SEARCH AND SEIZURE OF GENETIC MATERIAL FROM ARRESTEES WITH REAL EVIDENCE

Warrantless, suspicionless searches "'are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). Because warrantless searches are presumptively unreasonable, the government bears the burden "of demonstrating a legal justification for the search." *Redd*, 48 Cal. 4th at 719.[3] The State thus bears the burden of establishing that the warrantless search and seizure of an arrestee's DNA falls within an exception to the warrant requirement, is reasonable, and is therefore constitutional.[4]

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[3] This has long been the rule in this Court. *See, e.g.*, *People v. Henry*, 65 Cal. 2d 842, 845 (1967) ("Since the search was made without a warrant, the burden was on the prosecution to show proper justification.") (citations omitted) (collecting cases).

[4] It is undisputed that both the compelled extraction of DNA and the government's subsequent analysis of DNA constitute "searches" for

(continued...)

A. This Court Has Long Refused To Defer To Legislative Findings When Constitutional Rights Are At Stake

Although the State asserts that this Court should defer to legislative findings in assessing the reasonableness of collecting and analyzing DNA from arrestees, such deference is inappropriate when constitutional rights are implicated. As this Court recently reiterated in examining the constitutionality of another criminal-justice initiative, "[w]hen a constitutional right . . . is at stake, the usual judicial deference to legislative findings gives way to an exercise of independent judgment of the facts to ascertain whether the legislative body has drawn reasonable inferences based on substantial evidence." *People v. McKee*, 47 Cal. 4th 1172, 1206 (2010) (citations omitted). In such cases, "assertions, written into the findings of [a proposition] by those who drafted the initiative, are not the same as facts" and are insufficient to satisfy the government's burden. *Id.*

This rule is not new; this Court has consistently applied it when assessing the constitutionality of legislation. *See, e.g.*, *American Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 349–50 (1997) (plurality opinion) ("Numerous decisions establish that when a statute impinges upon a

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(...continued)

purposes of the Fourth Amendment. *People v. Robinson*, 47 Cal. 4th 1104, 1119–20 (2010) (nonconsensual DNA sampling is search); *People v. King*, 82 Cal. App. 4th 1363, 1370–71 (2000) ("chemical analysis of such [DNA] samples to obtain physiological data, implicate[s] Fourth Amendment privacy interests."); *see Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 616 (1989) (holding that the compelled breath and urine tests for the purposes of detecting alcohol and drugs constitute "searches" and that "[t]he ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests").

constitutional right, legislative findings with regard to the need for, or probable effect of, the statutory provision cannot be considered determinative for constitutional purposes."); *id.* at 360, 377–78, 383 (Kennard, J., concurring);[5] *Prof'l Eng'rs v. Dep't of Transp.*, 15 Cal. 4th 543, 572–74 (1997); *Coral Const., Inc. v. City and Cnty. of San Francisco*, 50 Cal. 4th 315, 338 n.20 (2010). That Proposition 69 was passed by initiative does not affect the constitutional analysis; *McKee* itself involved an initiative, and statutes enacted by initiative are judged by the same standards as those passed by the legislature. *Wallace v. Zinman*, 200 Cal. 585, 593–95 (1927); *Weaver v. Jordan*, 64 Cal. 2d 235, 241 (1966); *see McKee*, 47 Cal. 4th at 1206.

The United States Supreme Court, too, has long made clear that it "retains an independent constitutional duty to review factual findings where constitutional rights are at stake." *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (citing *Crowell v. Benson*, 285 U.S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law[.]")); *see also Chandler v. Miller*, 520 U.S. 305, 318–19 (1997) (government must show need for new statutory exception to warrant requirement).

The cases that the State cites do not disturb this long-established rule. *Legislature v. Eu*, 54 Cal. 3d 492 (1991), never even mentions deference to legislative findings. *Loder v. Mun. Ct.*, 17 Cal. 3d 859 (1976),

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[5] Together, the *American Academy of Pediatrics* lead opinion and concurrence of Justice Kennard formed a majority of this Court.

exercised independent review and found no statutory or constitutional violation, and only then upheld the law at issue. *Loder* deferred to the legislature only in the sense that it refused to upset a statutory balance that the Court had already found to be constitutional, and did so in light of the legislature's "continuing desire and ability to" amend the law as needed. *Id.* at 876–77.[6]

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981), another case the State relies on, involved rational-basis scrutiny, a standard of review that expressly calls for deference to the legislature. This Court has already distinguished *Clover Leaf Creamery* from cases involving other constitutional rights for this very reason, noting that *Clover Leaf Creamery* involved rational-basis review, not the "greater judicial scrutiny" necessary

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[6] The State also cites a decision from the Court of Appeal that is distinguishable (because it involved true legislative findings) and inconsistent with this Court's precedent. *See Alfaro v. Terhune*, 98 Cal. App. 4th 492 (2002). *Alfaro* seems to hold that courts lack authority to look behind legislative findings when examining the validity of a statute under California's constitutional right to privacy. *Id.* at 509–12. But *Alfaro*'s holding cannot be reconciled with this Court's decisions, particularly *American Academy of Pediatrics*, which holds that courts must "go beyond the legislative findings accompanying the statute to determine whether" the law violated the California right to privacy. 16 Cal. 4th at 349. *Alfaro* relied on cases that do not involve constitutional rights. *Id.* at 510–12. The primary case it cites is *American Bank & Trust Co. v. Community Hospital*, 36 Cal. 3d 359 (1984), which this Court previously distinguished as inapplicable to constitutional litigation. *American Acad. of Pediatrics*, 16 Cal. 4th at 349. *Alfaro* also relies on *Schabarum v. California Legislature,* 60 Cal. App. 4th 1205 (1998), without acknowledging that that opinion deferred to the legislature because the case involved the constitutionality of a budget bill, a fact on which *Schabarum* relied to distinguish that case from cases involving constitutional rights. *See Schabarum*, 60 Cal. App. 4th at 1221 n.8.

"[w]hen an enactment intrudes upon a constitutional right." *American Acad. of Pediatrics*, 16 Cal. 4th at 349 & n.25 (where "rational basis" test is applicable, "[s]tates are not required to convince the courts of the correctness of their legislative judgments") (quoting *Clover Leaf Creamery*, 449 U.S. at 464). Rational-basis scrutiny applies to challenges to run-of-the-mill economic or social-welfare legislation that do not affect fundamental constitutional rights; "the burden of demonstrating the invalidity of a classification under this standard rests squarely upon the party who assails it." *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 299 (2007) (citation omitted). In contrast, where fundamental rights are involved, "the state bears the burden." *Id.*; *see also McKee*, 47 Cal. 4th at 1208–09 (remanding to allow the "trial court to determine whether the [government] . . . can demonstrate the constitutional justification for" the law at issue).

B. Independent Judicial Review Is Required In Cases Involving Constitutional Rights

Good reasons support independent judicial review of cases involving constitutional rights. First, the Bill of Rights serves as a check on the power of the legislative and executive branches, one that is enforced by the judiciary. Thus, in cases involving individual constitutional rights, although the "legislature appropriately inquires into and may declare the reasons impelling legislative action," it is the courts that must determine "whether the legislation is consonant with the Constitution." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 844 (1978). The courts determine whether a search is unreasonable and therefore violates the Fourth Amendment; neither the legislature nor the voters can *ipse dixit*

transform an unreasonable search into a reasonable one, simply by crafting legislative findings that declare the importance of the authority to search or denigrate the privacy rights at stake. To the contrary, under the Fourth Amendment, "whether state law authorize[s] the search [is] irrelevant." *Virginia v. Moore*, 553 U.S. 164, 171 (2008); *see also Cooper v. California*, 386 U.S. 58, 61 (1967) ("a search authorized by state law may be an unreasonable one"). Because it is "emphatically the province and duty of the judicial department to say what the law is," a statute cannot withstand constitutional challenge simply because it contains findings that purport to deem it constitutional; such a doctrine of judicial review "would subvert the very foundation of all written constitutions." *Marbury v. Madison*, 1 Cranch 137, 177–78 (1803).

More practically, upholding the search of a person's DNA because of legislative findings conflicts with the principle that the Fourth Amendment applies uniformly throughout our nation, regardless of what searches are authorized or forbidden by state laws. *Moore*, 553 U.S. at 176 ("Whether or not a search is reasonable within the meaning of the Fourth Amendment . . . has never depended on the law of the particular State in which the search occurs.") (internal citations omitted). If California's arrestee-testing statute is constitutional because of Proposition 69's findings, as the State suggests, then another state's law, identical in operation, could be unconstitutional simply because it lacked those same purported statements of fact. Such a proposition cannot stand.

C. Proposition 69's Assertions Do Not Adequately Support Any State Interests

Moreover, even if it were appropriate to defer to the legislative findings here (it is not), the State exaggerates when it suggests that all of the initiative's stated purposes and findings support arrestee testing. Many of the findings relate to Proposition 69's most significant and immediate consequence—*expanding the types of* ***convictions*** that allowed DNA testing from a few serious offenses to any felony, a change that quadrupled the annual number of convicted persons who were required to provide samples.[7] Thus, the references in the initiative's findings concerning the DNA database mostly referred to this expansion, not the much smaller expansion to include arrestees in 2009. Only finding "(e)" appears to relate to arrestee testing: "The state has a compelling interest in the accurate identification of criminal offenders, and DNA testing at the earliest stages of criminal proceedings for felony offenses will help thwart criminal perpetrators from concealing their identities and thus prevent time-consuming and expensive investigations of innocent persons." Prop. 69, Dec. of Purpose, § II(e).[8] The flaws of this purported finding are discussed below.

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[7] Michael T. Risher, *Racial Disparities in Databanking of DNA Profiles*, in Sheldon Krimsky and Kathleen Sloan, eds., Race and the Genetic Revolution (Columbia Univ. Press 2011), 50 & nn.11–12 ("In 2008, about 53,000 people in California were convicted of offenses that would have qualified for inclusion in the database under the Pre-Prop. 69 version of the law. But when all felony convictions are included, this number quadruples to more than 227,000.").

[8] Ballot Pamp., Gen. Elec. (Nov. 2, 2004), available at http://vote2004.sos.ca.gov/voterguide/english.pdf.

II. THE STATE CANNOT MEET ITS BURDEN OF JUSTIFYING A NEW EXCEPTION TO THE WARRANT REQUIREMENT

The State does not claim that seizing DNA from every Californian arrested on suspicion of any felony – a group that includes people arrested for such crimes as simple drug possession,[9] knowingly bouncing a check,[10] or entering a store with the intent to shoplift some item of minor value[11] – falls within an existing exception to the warrant requirement. Instead, it asks this Court to create a new exception to the warrant requirement that covers arrestees, relying on cases that have allowed DNA sampling of convicted felons, based on a totality-of-the-circumstances analysis. But there is a fundamental problem with this approach: the balancing test that the State advocates is not itself an exception to the warrant requirement. If it were, it would completely swallow the warrant requirement and allow warrantless searches of anybody or any place whenever the government could point to an important enough interest, such as its interest in solving any crime. The Supreme Court has squarely rejected this position, recognizing that the whole point of the Fourth Amendment is to ensure that privacy is not sacrificed in the name of law-enforcement efficiency. *Mincey v. Arizona*, 437 U.S. 385, 394–95 (1978).

Instead, this general balancing of interests is an analysis that courts use to determine the constitutionality of a warrantless search only *after* they

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[9] *See* Health and Safety Code §§ 11350, 11377.

[10] *See* Penal Code 476a(a); *People v. Swanson*, 123 Cal. App. 3d 1024, 1031–32 (1981).

[11] *See* Penal Code § 459; *People v. Hambrick*, 162 Cal. App. 2d 239, 245 (1958).

have determined that the search falls within an exception to the warrant requirement. Thus, the Supreme Court has refused to apply a general balancing test to allow the government to surreptitiously test the urine of pregnant women for drugs because no established exception to the warrant requirement applied to such tests, despite the low level of intrusion (the women were already giving urine samples for medical reasons) and the need to prevent pregnant women from using dangerous drugs. *Ferguson v. City of Charleston*, 532 U.S. 67, 78, 83 n.21 (2001). Similarly, in analyzing the warrantless searches of convicted felons on parole or supervised release, the Court first determined that the special status of parolees, and the government's need to supervise them, meant that the police could search them without a warrant and with something less than probable cause. *United States v. Knights*, 534 U.S. 112, 121–22 (2001). Only later did it hold that the Fourth Amendment permits suspicionless searches of such people in *Samson v. California*, 547 U.S. 843, 852 (2006). This is the same approach it has taken in other cases that allow searches on less than probable cause. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325, 333 n.2 (1985); *id.* at 351 (Blackmun, J., concurring) (special needs justifies warrantless searches of students based on reasonable suspicion); *Safford Unif. Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 129 S. Ct. 2633, 2642–43 (2009) (strip search unconstitutional even with reasonable suspicion under general balancing test).

Here, however, the State is asking this Court to jump to step two's balancing test without first finding any exception to the warrant requirement. But none of the cases it cites supports this approach.

A. Cases Involving Searches Of Convicted Felons Cannot Justify Searches Of Mere Arrestees

Most of the cases the State cites involve searches of convicted felons who are in prison or on parole, people who "have severely diminished expectations of privacy by virtue of their status alone." *Samson*, 547 U.S. at 852 (parolee does "not have an expectation of privacy [in his home] that society would recognize as legitimate"). But mere arrestees have not suffered this same elimination of their privacy; indeed, the Court has refused to allow the police even to search the car of an arrestee without sufficient cause, writing that the notion that an arrest creates a "police entitlement" to conduct warrantless investigatory searches is "anathema to the Fourth Amendment." *Gant*, 556 U.S. at 347. Thus, just as the government may search a parolee's house (where Fourth Amendment protections are strongest) without any reason to think he has done anything wrong, based on his status alone, it can take his DNA. But just as it cannot use the mere fact of an arrest to search an arrestees' car (even though Fourth Amendment protections for the car are weak), it cannot use that fact of an arrest to justify taking a person's genetic blueprint. *See id.* at 351. The cases involving convicted felons that the State cites are inapplicable here.

B. A Finding Of Special Needs Is A Necessary Prerequisite To A Totality Of The Circumstances Analysis

In cases involving individuals other than convicted felons, courts refuse to employ a general-balancing test unless they have first found that the special-needs test applies. *United States v. Amerson*, 483 F.3d 73, 79 (2nd Cir. 2007) ("nothing in *Samson* suggests that a general balancing test should replace special needs as the primary mode of analysis of

suspicionless searches outside the context of the highly diminished expectation of privacy presented in *Samson*"); *see United States v. Weikert*, 504 F.3d 1, 9 (1st Cir. 2007) (noting that *Samson* indicated that the totality of the circumstances analysis was the appropriate framework to apply in situations involving suspicionless searches of *conditional releasees*, "notwithstanding the lack of individualized suspicion," but not in any other context). Under this test, "[w]hen such 'special needs' – concerns other than crime detection – are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests[.]" *Chandler*, 520 U.S. at 314 (striking down state statute requiring drug-urinalysis for political candidates). Even when the government can establish that the special-needs exception applies, it is only the government's special needs, not its law-enforcement interests, that can be balanced against the individual's privacy interest. *Ferguson*, 532 U.S. at 78 (A court "weigh[s] the intrusion on the individual's interest in privacy against the 'special needs' that supported the program.").

As the Ninth Circuit has explained, the special-needs test requires a "two-step analysis," and the government cannot even get to the balancing step unless it first shows that the special-needs exception applies. *Fraire*, 575 F.3d at 931–32. Thus, in *Ferguson*, once the Supreme Court determined that the special-needs exception did not apply, it refused to apply a general balancing test to decide whether the government's need to protect newborns from the effect of material drug use outweighed the mothers' privacy interests; instead, it struck down the program as unconstitutional. *See Ferguson*, 532 U.S. at 84–86, 84 n.21 (refusing to "appl[y] a balancing test to determine Fourth Amendment

reasonableness"); *id.* at 88–89 (Kennedy, J., concurring) (discussing government's important interests but agreeing that search was illegal because of law-enforcement involvement). Similarly, in a case involving drug-interdiction checkpoints, after holding that the special-needs exception did not apply, the Court refused to allow the government to use the "severe and intractable nature of the drug problem as justification for the checkpoint program," even though the program at issue involved only brief vehicle stops. *Indianapolis v. Edmond*, 531 U.S. 32, 38, 40, 42–43 (2000). In doing so, the Court rejected the dissent's argument that it should apply a general balancing test. Compare *id.* at 46–47 with *id.* at 52–53 (Rehnquist, C.J., dissenting) (arguing for balancing test). The same analysis that the Court applied in *Ferguson* and *Edmond* applies here to searches that are much more intrusive than the analysis of samples voluntarily given and the car stops in those cases: if the special-needs exception to the warrant requirement does not apply, the government cannot justify the compulsory searches under a general balancing test.

C. Arrestee Testing Does Not Serve A Special Need Beyond The Normal Need For Law Enforcement

The Supreme Court has explicitly considered and rejected the contention that the government's ever-present generalized interest in criminal law enforcement qualifies as a "special need." *Edmond*, 531 U.S. at 38, 44 (checkpoint program violated the Fourth Amendment because the primary purpose of the program was "ultimately indistinguishable from the general interest in crime control," including narcotics-interdiction). In special needs cases, suspension of the Fourth Amendment's warrant or probable cause requirement is generally tolerated in part because "there was

no law enforcement purpose behind the searches in those cases, and there was little, if any, entanglement with law enforcement." *Ferguson*, 532 U.S. at 79 n.15. On this basis, the Supreme Court has upheld certain regimes of suspicionless searches where the program was designed to serve special needs "beyond the normal need for law enforcement." *Edmond*, 531 U.S. at 37. But when the "primary purpose" of a search regimen is to control or solve crime, the special-needs exception does not apply. *Ferguson*, 532 U.S. at 81–82.[12]

Here, the suspicionless DNA searches of arrestees authorized under Proposition 69 are undeniably conducted for law enforcement purposes. The State expressly expanded DNA collection from convicted individuals to mere arrestees to solve crime: Proposition 69 was intended "to substantially reduce the number of unsolved crimes; to help stop serial crime by quickly comparing DNA profiles of qualifying persons and evidence samples with as many investigations and cases as necessary to solve crime and apprehend perpetrators." Prop. 69 § II(c).[13] The State

[12] Justice Kennedy would focus on the whether the objects of the search would be used by law-enforcement, as well as whether the subject had given some sort of consent, to determine whether the special-needs test could apply. *See Ferguson*, 532 U.S. at 88–89 (Kennedy, J., concurring) ("The traditional warrant and probable-cause requirements are waived in our previous cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes."); 90–91 ("An essential, distinguishing feature of the special needs cases is that the person searched has consented" in some way to the search). Under this formulation it is also clear that the tests here at issue cannot be justified under a special-needs analysis, as they are conducted by law-enforcement to collect evidence and without any sort of consent.

[13] Findings and Declarations of Purpose at 135, available at http://vote2004.sos.ca.gov/voterguide/english.pdf.

itself argues that the program is "a vital crime solving tool." Gov't Opening Br. ("OB") at 9. Solving cold cases – the overriding purpose of Proposition 69 – is a normal law enforcement function. *See Friedman v. Boucher*, 580 F.3d 847, 853 (9th Cir. 2009) ("Because . . . the State's interest [in a pretrial detainee's DNA] is the use of data for purely law enforcement purposes, the 'special needs' exception is inapplicable."). Proposition 69 therefore fail under the "special needs" Fourth Amendment analysis.[14] As the suspicionless DNA searches of arrestees authorized under Proposition 69 cannot qualify under the "special needs" exception, the searches are per-se unconstitutional, and no further balancing of interest is appropriate.

III. THE STATE CANNOT MEET ITS BURDEN UNDER THE TOTALITY OF THE CIRCUMSTANCES APPROACH

Even if it were appropriate to apply a general totality-of-the-circumstances balancing test without first assessing the State's special need (again, it is not), the compulsory search and seizure of DNA from mere arrestees is unconstitutional. Arrestees' rights to bodily integrity and genetic privacy far outweigh the marginal utility of arrestee DNA testing

[14] Moreover, the Supreme Court has already determined the proper balance between an arrestee's right against bodily intrusions and the government's interest in collecting evidence: the Fourth Amendment prohibits law enforcement from intruding into the bodies of arrestees to seize biological evidence unless they have either a warrant or both probable cause to believe than an examination of the sample will produce relevant evidence of a crime *and* exigent circumstances exist that make obtaining a warrant impracticable. *See Schmerber v. California*, 384 U.S. 757, 769–70 (1966) ("The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.").

(as compared with DNA testing post-conviction). No new exception to the warrant requirement has been (or could be) justified here.

A. The State Has Failed To Show That Taking DNA Upon Arrest Advances Any Government Interest To Justify A New Exception To The Warrant Requirement

The State has failed to show that taking DNA from arrestees is effective in advancing any government interest. The State can, and does, collect DNA from persons upon conviction and enter that DNA into the DNA databank. *See* Penal Code § 296(a)(1). Thus, the crucial question is whether the State can show that taking DNA from mere arrestees, rather than waiting until conviction, is so useful as to justify a new exception to the warrant requirement. The State has not made this showing.

B. Each Justification Asserted By The State For Arrestee DNA Testing Fails To Withstand Scrutiny

As discussed above, the State cannot escape its burden of establishing that the warrantless searches and seizures of arrestees under Proposition 69 are justified by pointing to the legislative findings contained within the Proposition. Equally importantly, each justification asserted by the State fails to withstand scrutiny.

1. *The State Has No Actual Interest in Using DNA To Identify Who It Has Arrested*

- ***Fingerprints definitively identify an arrestee at the time of arrest.***

Taking DNA from persons arrested or released pending trial – before conviction – does not advance any governmental interest in determining the identity of the person who has been arrested. The actual process of DNA

analysis of a known sample takes about twenty hours of laboratory work, which is usually spread out over several days. Of course, samples must also be transported to the lab for testing. Because of federal and state backlogs, the time from taking a sample to getting an analysis, in reality, is measured in weeks or months. *See Haskell v. Brown*, 677 F. Supp. 2d 1187, 1201 (N.D. Cal. 2009) (noting that government claimed average processing time was 31 days).

In contrast, the FBI guarantees that a request for a fingerprint identification of an arrestee using the nationwide Automated Fingerprint Identification System will be processed and sent back to the requesting agency "within two hours or less" of the FBI's electronic receipt of a scanned print.[15] The FBI further promises that fingerprint comparison "offers[s] an infallible means of personal identification."[16]

- ***California in fact uses fingerprints to identify an arrestee to determine whether to take DNA.***

California requires that local law enforcement determine the identity of the person before they take a DNA sample from him: the first step under the California Department of Justice "collection mechanics" section of its DNA website is "identify the subject," specifically including the use of "Live Scan" for the "collection of identifying fingerprints (via the

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[15] Federal Bureau of Investigation, Fingerprint Identification Overview at 2, available at http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/fingerprint-overview.

[16] *Id.* at 1 ("Fingerprints offer an infallible means of personal identification.").

Automated Fingerprint Identification System)."[17] In its regulations detailing agency responsibilities, the Department confirms that "The collecting agency has exclusive responsibility for verifying an offender's identity and status as a person qualifying for DNA collection . . . . Live Scan-based collection and query of the automated criminal history will suffice to meet the verification requirement."[18] In fact, the State does not even take DNA from an arrestee if this identification shows that he has already provided a sample.[19] These mandatory procedures belie the State's litigation position that it needs to use DNA to confirm an arrestees' identify, because it only takes DNA from arrestees that it has already conclusively identified through fingerprints.

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[17] Cal. Office of the Attorney General, BFS DNA Frequently Asked Questions, available at http://oag.ca.gov/bfs/prop69/faqs.

[18] Cal. Dep't of Justice, Information Bulletin 08-BFS-02, Expansion of State's DNA Data Bank Program on January 1, 2009 (Dec. 15, 2008), available at http://ag.ca.gov/bfs/pdf/69IB_121508.pdf. *See* Cal. Dep't of Justice, The DNA Fingerprint, Unsolved Crime and Innocence Protection Act (Proposition 69 - 2004) Agency Responsibilities at 14, available at http://oag.ca.gov/sites/all/files/pdfs/bfs/agency_respons.pdf (local law enforcement agencies "[m]ust confirm the subject's identity prior to DNA collection"). These Administrative bulletins constitute binding regulations. Penal Code § 295(h)(1), (2).

[19] "[T]o the extent that individuals entering the system through arrest or detention previously have had DNA samples collected . . . repetitive collection is not required." 73 Fed. Reg. 74932, 74941 (Dec. 10, 2008); *see also* 28 C.F.R. § 28.12(e)(2). The California protocol similarly states that DNA will not be taken from persons until after they have been identified through fingerprint comparison and found not to have given samples. California Dep't of Justice Information Bulletin No. 08-BFS-02, at 2, 4, available at http://ag.ca.gov/bfs/pdf/69IB_121508.pdf.

- ***The State does not use an arrestee's DNA profile to crosscheck fingerprint information.***

Finally, the State argues that DNA profiles can be used to resolve conflicts in fingerprint and criminal history data. But the State cannot even establish that it actually uses DNA profiles to cross check its databases or even that it could do so. The State has admitted that participating laboratories are not permitted to upload a case or "donor" name into CODIS along with the analyzed sample; a DNA profile is tracked only by a number and "the name of the donor is associated with a record only after a 'cold hit.'" *See* OB at 37 ("NDIS does not contain case-related or other personally identifying information about the person from whom the DNA sample was collected. . . . [P]ersonal information such as names [is] not found in NDIS." (citing 61 Fed. Reg. 37496 (July 18, 1996))).[20] As the State admits, DNA collected from arrestees cannot be used in connection with "cross-checking information systems," as there is no way to compare the data contained within the systems.

- ***The State does not use an arrestee DNA profile to confirm an individual's identity at the time of arrest or even after the creation of a DNA profile.***

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[20] The State's assertion should be treated as an admission of a factual point, controlling the disposition of the case. *See Estate of Stevens*, 27 Cal. 2d 108, 115 (1945) ("we refrain from expressing an opinion upon these conceded points, deciding this case in reliance upon appellant's concessions"); *see also Sacramento Cnty. Deputy Sheriffs' Ass'n v. Cnty. of Sacramento*, 51 Cal. App. 4th 1468, 1474 (1996); 9 Witkin, Cal. Proc. Appeal § 704 (5th ed. 2008).

Once a DNA sample is taken and analyzed, there is no procedure for comparing that sample to the other offender samples in CODIS (it is only compared with crime scene samples in an attempt to link the new sample to crime).[21] Thus, taking DNA samples has ***no*** relationship to the goal of ascertaining the true identity of arrestees or persons to be released pending trial; the DNA samples are used only in an effort to solve crimes.

It is undisputed in this case that an arrestee's identity will have been verified through a fingerprint analysis weeks, if not months, before any DNA analysis. *See King*, 2012 WL 1392636, *1 (finding that the State "had no legitimate need for a DNA sample in order to be confident who it arrested or to convict [the arrestee] on the . . . charges").[22] The State,

[21] As the FBI explains on its website, there are two types of CODIS hits used in the criminal-justice system: hits between a known sample and a crime-scene sample, and hits between two crime-scene samples. *See* FBI, Frequently Asked Questions, available at http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet ("CODIS hits are tracked as either an offender hit (where the identity of a potential suspect is generated) or as a forensic hit (where the DNA profiles obtained from two or more crimes scenes are linked but the source of these profiles remains unknown).").

[22] The State's only interest in collecting DNA is to investigate whether an arrestee has committed any unsolved "cold" crimes. *See* Ballot Pamp., Gen. Elec. (Nov. 2, 2004), argument in favor of Prop. 69, available at http://vote2004.sos.ca.gov/voterguide/propositions/prop69-arguments.htm ("Taking DNA during the booking process at the same time as fingerprints is more efficient and helps police conduct accurate investigations. . . . Currently, California's DNA database is too small, unable to deal with thousands of unsolved rapes, murders, and child abductions."). The State uses DNA evidence obtained from arrestees only to investigate each arrestee's involvement in unrelated cold cases, not to determine, verify, or track his identity. *See King*, 2012 WL 1392636, *23 (recognizing that solving cold cases is a legitimate government interest but holding that "a warrantless, suspicionless search can not be upheld by a 'generalized interest' in solving crimes").

however, attempts to skirt past the evidence that it lacks any cognizable need for DNA to identify arrestees by pointing out that fingerprint cases were upheld prior to an effective nationwide automated fingerprint system. *See* Gov't Reply Br. at 15. Arguing that the timing should be disregarded in assessing the constitutionality of Proposition 69, the State fails to note that when fingerprinting first because popularized in the early part of the twentieth century, "law enforcement was desperate for some means of documenting and tracing the identities of convicted criminals;" the only true alternative to fingerprinting for criminal identification at that time was the Bertillon method, "which had proved both administratively and scientifically suspect."[23]

The State further fails to present any evidence that it *needed* to collect Appellant's DNA in order to accurately determine his identity. The State does not allege that it had any problems identifying Appellant through traditional booking routines, or that Appellant had altered his fingerprints or presented false identification. *See King*, 2012 WL 1392636, *23 (finding that the state presented no evidence that it had a legitimate need for the arrestee's DNA in order to accurately identify him). This Court should not allow the warrantless, suspicionless searches of biological materials

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[23] Corey Preston, *Faulty Foundations: How The False Analogy to Routine Fingerprinting Undermines the Argument For Arrestee DNA Sampling*, 19 Wm. & Mary Bill Rts J. 475, 486 (2010) (citing Martine Kaluszynski, Republican Identity: Bertillonage as Government Technique, in Documenting Individual Identity: The Development Of State Practices In The Modern World 123, 127, 131 (Jane Caplan & John Torpey, eds., 2001)).

without a showing that accurate identification was not possible using traditional booking procedures.[24] *Id.* at *24.

The State attempts to support its contention that Appellant cannot distinguish fingerprint identification systems with DNA databases by citing new "evidence" from its own website. Gov't Reply Br. at 14–16 & n.15. First, appellate courts generally will not receive new evidence on appeal. *See Matuz v. Gerardin Corp.*, 207 Cal. App. 3d 203, 206–07 (1989) ("an appellate court is required to ignore matters mentioned in a brief which are not presented by the record on appeal"). An appellate court will of course take notice upon proper request of matters subject to judicial notice, and briefs often discuss reliable scholarly works to "assist the court by broadening its perspective on the issues raised by the parties." *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 405 n.14 (1992). But the State is not allowed to put before this Court purported facts that are "not part of the record, were not subjected to the testing mechanisms of the adversary process or independent professional review, and do not qualify for judicial notice[.]" *Id.*

Further, any new information that the State presents from its own website, rather than some neutral source, should be viewed with particular skepticism. The State cannot transform argument – much less facts that are *not* subject to judicial notice – into evidence simply by posting them on its website. Although some facts on the State's website may be

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[24] Again, upon conviction, the State may, and does, collect and profile an individual's DNA. Penal Code § 296(a)(1). *Before conviction*, the State may collect DNA from an arrestee after securing a warrant premised on probable cause. *See infra*, Section III.B.7, at 32.

incontrovertible (*e.g.*, the number of felony arrests in California every year), most of the matter the State cites to support its side of this case is the subject of intense dispute (or it contains only some of the relevant information).

For example, the State now argues that booking fingerprints and latent prints from unsolved crimes typically take up to two days to process. But the primary purpose of fingerprints – the purpose for which fingerprinting of mere arrestees was upheld – is identification.[25] That it takes the State two days to analyze fingerprints for purposes of a secondary, investigatory use of fingerprint information does not justify allowing the unconstitutional search of DNA, which takes even more time to process. The State's argument merely establishes that its only interest in obtaining DNA from arrestees is for investigation, not identification.

2. *Taking and Databanking DNA From Persons Not Convicted of Any Crime Does Not Improve the Databank's Effectiveness at Solving Crime*

As discussed in Appellant's Answer Brief on the Merits ("AAB"), the State's use of arrestees' DNA is limited to solving cold case and the practice does not effectively further that goal. AAB at 59–73. Namely, Appellant notes that the State has failed to present reliable evidence

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[25] This primary purpose distinguishes fingerprinting from DNA collection and means that the former practice should be analyzed under the special-needs exception to the warrant requirement, particularly since fingerprinting is not even considered a search for Fourth Amendment purposes. *See Davis v. Mississippi*, 394 U.S. 721, 727 (1969) ("Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search.").

showing that *all* felony arrestees, including those not ultimately convicted, effectively furthers the State's interest in solving cold cases. *Id.* at 61–69. As Appellant points out, all that is clear is that Proposition 69's extension of California's DNA collection program to mere arrestees advances the time of collection for the two-third of DNA profiles that would have been collected anyway after conviction. *Id.* at 66. The State has failed to provide a compelling reason why DNA should be collected from arrestees immediately following arrest, without even an opportunity for a judicial determination of probable cause. *See Haskell*, 669 F.3d 1049, 1067 (9th Cir. 2012) (W. Fletcher, J., dissenting). Thus, there is no evidence to support that arrestee DNA testing furthers the State's interest in solving crimes more than the pre-existing *convicted-offender* database.

Taking DNA from tens of thousands of individuals arrested each year but never convicted serves little purpose and does not justify the creation of a new exception to the warrant requirement. Although DNA evidence and databanks have revolutionized the criminal-justice system, the benefits of adding more and more "known samples"[26] taken from a broader and broader range of persons, including innocent persons, is limited, because the databanks then include many samples from people who are innocent or who have committed only minor crimes where DNA evidence is rarely involved. In this regard, the experience in the United Kingdom, which has had an arrestee-testing program since 2004, is instructive. A

[26] A "known sample" is one taken from an identified individual, as opposed to a forensic sample, which is collected from a crime scene.

2006 report analyzed government statistics from the British Home Office and concluded that

> it 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 making a detection—would have increased as the NDNAD expanded.[27]

The British program of retaining the DNA of persons arrested but not convicted was subsequently struck down by the European Court of Human Rights. *Marper v. United Kingdom*, 48 E.H.R.R. 50, 158 N.L.J. 1755, 2008 WL 5044408 (2008).[28]

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[27] Helen Wallace, The UK National DNA Database: Balancing crime detection, human rights and privacy, European Molecular Biology Organization Report 7(SI) (July 2006), available at http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1490298.

[28] The full opinion is also available at http://www.bailii.org/eu/cases/ECHR/2008/1581.html.

3. *Taking and Databanking DNA From Persons Not Convicted of Any Crime Does Not Serve To Exonerate the Innocent*

The State's claim that DNA Databanks are useful to exonerate the innocent is meritless. The State cites no evidence to support its claim that collection of DNA evidence from mere arrestees helps to exonerate the innocent. Rather, the State cites the exoneration of a single innocent man, Kevin Green, in support of the more general claim that DNA databanks can help to exonerate the innocent. *See* OB at 64. But Kevin Green was exonerated in 1996, long before Proposition 69.[29] There, the DNA hit linked the crime to Gerald Parker, whose DNA had been submitted after he was *convicted*—not merely arrested—of kidnapping and rape in 1980.[30] Moreover, Green's exoneration was not directly the result of a DNA database hit; rather, it was the result of Parker's confessing to the crime while he was being interrogated about other crimes[31] and, just as importantly, the fact that the sperm found in the victim's vagina did not belong to Green, an exonerating fact that would have come to light far earlier had the government not opposed his attempts to get DNA tests

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[29] *See* Innocence Project, Know the Cases: Kevin Green, available at http://www.innocenceproject.org/Content/Kevin_Green.php.

[30] *See* Robert D. Keppel, William J. Birnes, The Psychology of Serial Killer Investigations: The Grisly Business Unit 17 (2003).

[31] Barry Scheck, Peter Neufeld, Jim Dwyer, Actual Innocence, at 242 (Doubleday 2000) (Parker "had something to say about a case that was not even on the list of unsolved crimes"). The reason that the police were interrogating Parker was because of a cold hit. *Id.* at 241–42.

done.[32] Here, just as the district court noted in *Haskell*, "Though convicting the right person can theoretically serve to exonerate (or obviate the risk of investigating and prosecuting) the wrong person, [the State] has not yet introduced evidence that the taking of arrestees' DNA has led to either an increase in exonerations or a decrease in false accusations/convictions." *Haskell*, 677 F. Supp. 2d at 1201 n.12.

Although DNA *analysis* has been critical in exonerating the wrongly accused and convicted, this process rarely involves DNA databanks or compelled DNA testing. Exoneration involves a comparison of two samples: a sample left by the perpetrator at the crime scene and a sample taken from the wrongfully accused or convicted, usually voluntarily at his request, as Kevin Green tried to do. If the DNA from the crime scene does not match the accused's DNA, then the case for innocence is shown and that should end the matter, irrespective of whether the real culprit is identified.[33] *See, e.g.*, *People v. Dodds*, 801 N.E.2d 63, 71–72 (Ill. App.

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[32] *Id.* at 241, 243; AB 110 § 1(a)(17) (1999) ("While incarcerated, Kevin Lee Green attempted, unsuccessfully, to raise the money to obtain his own DNA test in order to reopen his case, and despite the fact that court records showed that Kevin Lee Green passed at least one, and perhaps another, polygraph test before his trial took place, police investigators ignored his requests to reopen his case."), available at ftp://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_0101-0150/ab_110_bill_19991010_chaptered.html.

[33] Of course, law enforcement may be more willing to admit they arrested or convicted the wrong person if they can say who the actual culprit was, but this is a public-relations, not a logical obstacle to exoneration. In any event, even when post-conviction DNA testing does lead to a cold hit that proves that a different person was involved in the offense, the government may argue, sometimes successfully, that the conviction should stand. *See, e.g.*, *Grayson v. King*, 460 F.3d 1328, 1339 (continued...)

2003) (discussing the significance of a post-conviction finding of a non-match); *see also* DNA Evidence as Newly Discovered Evidence Which Will Warrant Grant of New Trial or Other Postconviction Relief in Criminal Case, 125 A.L.R.5th 497 § 4(a) (2005 and 2008 update) (collecting cases).

The Innocence Project notes that of the "289 post-conviction DNA exonerations in the United States," the true perpetrator has been identified (through DNA or other means) in only 139 of them.[34] DNA exoneration simply does not require DNA databanks, much less DNA databanks populated with people who have never been convicted of any crime. In fact, the DNA analysis backlogs arising from arrestee testing may lead to delays in testing DNA voluntarily given by persons wrongfully accused or convicted. And the time and money spent testing arrestees who may never be charged, much less convicted, of any crime mean less resources are available for wrongly convicted people like Kevin Green to get access to the DNA testing that can exonerate them.

(...continued)

(11th Cir. 2006) ("The requested DNA tests, even if exculpatory, would simply indicate that a third man was involved and had raped Mrs. Orr and would not exclude Grayson's involvement in the capital murder, much less definitively show his innocence.").

[34] The Innocence Project, Facts on Post-Conviction DNA Exonerations, available at http://www.innocenceproject.org/Content/351.php.

4. *Taking and Databanking DNA From Persons Not Convicted of Any Crime Does Not Serve To Supervise Persons Released Pending Trial*

Another purported justification offered by the State for taking DNA from persons not convicted of any crime is the need to supervise persons released on bail. But DNA cannot be used to supervise. Unlike a GPS device or electronic monitoring anklet, DNA cannot be used to track a person. Certainly, if the government collected DNA from a crime scene, and that DNA turned out to match the DNA of a person released pre-trial, that would connect the person and the crime. However, this is simply another way of saying that including the person's DNA in CODIS may help the government's generalized interest in solving crime. Although this interest may be an important one, it cannot justify compulsory DNA collection from all arrestees when the State – at present – does not even complete DNA analysis before bail determinations are made. *See Dant v. Super. Ct.*, 61 Cal. App. 4th 380, 385–87, 390 (1998) (right to bail at or before arraignment).

5. *Taking and Databanking DNA From Persons Not Convicted Does Not Serve To Assist in the Sentencing of Felony Offenders*

The State's claim that suspicionless DNA searches of mere arrestees is "more necessary than ever" in light of the Criminal Justice Realignment Act of 2011 is equally meritless. OB at 58. The concerns raised by the State – the proper sentencing of *convicted* felony offenders and the determination of who should be allowed to participate in alternative pre-trial custody under Penal Code section 1203.018 – do not justify the collection of DNA from mere arrestees. First, if DNA is collected by

offenders upon conviction and analyzed expeditiously, data regarding any potential cold hits would be available to the State at the time of sentencing.

Second, the pre-custody release authorized under Penal Code section 1203.018 is available to only low-risk felony offenders. Participants in the program cannot have any holds or outstanding warrants on their record and are subject to discretionary review for eligibility and compliance by a correctional administrator. Penal Code § 1203.018(c). Not only is the State's concern merely hypothetical, but the State advances no reason why the statutory safeguards built into the text of the newly enacted Penal Code section are not sufficient to protect against its hypothetical concern. In any event, the quest for efficiency cannot justify disregarding the Fourth Amendment. *Mincey*, 437 U.S. at 393; *Gant*, 556 U.S. at 349–50. Therefore, without a valid rationale for collecting DNA before conviction, the State has made no showing to justify this purported basis for compulsory DNA databanking at the time of arrest.

6. *Taking and Databanking DNA From Persons Not Convicted of Any Crime Hurts Public Safety by Exacerbating Backlogs and Creating More Delays*

Because including samples of individuals who have never been convicted to the database does not meaningfully increase the number of crimes solved, the overall effect may in fact *decrease* public safety by diverting laboratory and other resources away from the important work of promptly and thoroughly analyzing crime-scene DNA evidence and/or convicted offenders' DNA. The state and federal backlogs of both of these types evidence are enormous, and as more and more jurisdictions enact

arrestee-testing laws, the backlogs increase.[35] A March 2009 report by the U.S. Justice Department reports a total national backlog of more than 700,000 samples.[36] At the end of April, 2012, California alone reported a backlog of 43,143 samples in its state DNA lab, an increase of several thousand over the 38,862 backlogged samples it reported at the start of the month and a figure that does not include the thousands of samples sitting in local crime labs throughout the state.[37] The State's assurances that its efficiency in processing time is ever increasing and its backlogs are getting smaller cannot erase the fact that these backlogs exist now.

7. *In Cases Where Taking DNA Is Important, the State Can Get a Warrant*

Finally, it is important to remember that if the police have reason to think that taking DNA from an arrestee will be of some use, they can get a warrant, as they did for years before the provisions at issue here went into effect. In any case where there is DNA evidence left at the scene, the same probable cause that is needed to support an arrest will necessarily also support a warrant to obtain the arrestee's DNA. If the police have only a

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[35] A report by the Justice Department concludes that the increase in incoming samples caused by arrestee testing could offset current attempts to reduce these backlogs and "estimate[d] that the expansion of legislation to include arrestees would increase the annual receipt of DNA samples by 223 percent for those states." U.S. Dep't of Justice, Audit of the Convicted Offender DNA Backlog Reduction Program (Mar. 2009) at 31–32, available at http://www.usdoj.gov/oig/reports/OJP/a0923/final.pdf.

[36] *Id.* at 16.

[37] Monthly report available on http://www.ag.ca.gov/bfs/pdf/Monthly.pdf. A copy of the April 2012 report is attached to this brief under California Rules of Court, Rule 8.204(d).

hunch that the arrestee has committed some other crime where DNA might be relevant, they can ask for consent to take a sample. Or they may be able to obtain a sample though a ruse. *See People v. Thomas*, 200 Cal. App. 4th 338 (2011) (allowing police to obtain DNA from breathalyzer mouthpiece following traffic stop that did not result in arrest). Of course, in the case of a person who is guilty of the crime for which he has been arrested, the State can wait until he is convicted, at which point he will have to provide a sample. Penal Code § 296(a)(1).

C. Arrestees' Have Significant Rights To Bodily Integrity And Genetic Privacy

On the other side of the balancing inquiry, arrestees have significant rights to bodily integrity and genetic privacy—rights understated by the State in this case.

1. *The State Cannot Treat Arrestees As If They Were Convicted Felons With No Privacy Rights*

Although arrestees and persons in custody may not qualify as the "general public," they have greater expectations of privacy in their genetic material than convicted felons. *Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995); *King*, 2012 WL 1392636, *22 ("A judicial determination of criminality, conducted properly, changes drastically an individual's reasonable expectation of privacy."). The police are entitled to search parolees for any purpose, without any justification other than their status as parolees; they cannot conduct such unlimited searches of mere arrestees. Compare *Samson*, 547 U.S. at 853 with *Gant*, 556 U.S. at 345–47. An arrestee who has not been charged, tried, or convicted of anything – and who may never be – is not like a convicted offender. She does not have the

same status, she does not present the same risks as a convicted felon on parole, and her privacy rights are correspondingly greater.

The government's argument that the Fourth Amendment allows it to test *all* arrestees simply because two-thirds of them will later be convicted[38] shows a fundamental misunderstanding of the concept of *individual* liberty. The reason that the Constitution requires individualized suspicion is to prevent the government from engaging in just this sort of fallacious reasoning: the Fourth Amendment requires that a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).

That many, even most, other people who have been arrested will ultimately be convicted is of no solace to the tens of thousands of Californians arrested every year on suspicion of a felony who are never convicted of anything but are nonetheless forced to provide samples of their genetic blueprints for the government to analyze and databank. That two-thirds of the persons arrested are later convicted means only that the government can take DNA from those people, and only after a trial. It cannot simply treat all arrestees as if they have been convicted.

Finally, the notion that requiring every person arrested for a felony to provide a sample renders a warrant unnecessary through eliminating any element of discretion is absurd. *See* OB at 22–23. DNA collection occurs immediately after arrest by a single police officer, without any review by a

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[38] Gov't Reply Br. at 23 n.13.

supervisor, much less a court or a prosecutor. This is nothing like a checkpoint that stops every car that passes through it, or a system that take DNA from every person *convicted* of a crime, with the rights to counsel and a trial.

2. *DNA Testing Constitutes a Significant Infringement on Privacy Interests*

Although both DNA and fingerprints may be used to identify the person from whom they are obtained, all persons – arrestees included – have a greater expectation of privacy in their DNA than in their fingerprints. *Rise*, 59 F.3d at 1569 (Nelson, J., dissenting); *see also United States v. Kriesel*, 508 F.3d 941, 947–48 (9th Cir. 2007) ("concerns about DNA samples being used beyond identification purposes are real and legitimate"). Unlike fingerprints, DNA samples contain massive amounts of private, personal data. *Kriesel*, 508 F.3d at 947–48. A "vast amount of sensitive information . . . can be mined from a person's DNA" and thus arrestees have "very strong privacy interests . . . in this information." *Amerson*, 483 F.3d at 85 (citing *Kincade*, 379 F.3d at 843 (Reinhardt, J., dissenting)). The fact that the State places restrictions on the *use* of the biological material obtained—such as analyzing only a portion of the DNA samples taken—"does not change the nature of the search." *King*, 2012 WL 1392636, *21. While the information derived from an individual's fingerprint is related only to physical characteristics, "[a] DNA sample, obtained through a buccal swab, contains within it unarguably much more than a person's identity." *Id.* at *20–21 ("[T]he expectation of privacy of an arrestee renders the government's purported interests in DNA collection reduced greatly.").

These privacy concerns are magnified where collection is mandatory and done in a law enforcement context, as compared to therapeutic, voluntary, or medical ones. As Congress recognized when it passed the Genetic Information Nondiscrimination Act of 2008, Americans want to have their genetic information used for medical purposes, but at the same time worry that this same information could be misused by governmental or private entities.[39] Research by the Johns Hopkins University Genetics and Public Policy Center found that although 86 percent of Americans surveyed would trust their doctors with their genetic test results, 54 percent of them stated that they had little or no trust in law enforcement having access to their this information.[40] A more recent survey conducted by the Center in 2008 questioned 4,659 Americans on their interest in participating in a large prospective cohort study on genes and environment and found that 84 percent of responders indicated that it would be important to have laws protecting research information from law enforcement.[41] Our society plainly recognizes both the value of physicians' access to our genetic information and the paramount importance of protecting our genetic privacy DNA from infringement by law-enforcement officials.

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[39] Genetic Information Nondiscrimination Act of 2008, Pub. L. 110-233, 122 Stat. 881 § 2 (2008) (findings).

[40] U.S. Public Opinion on Uses of Genetic Information and Genetic Discrimination 2, available at http://www.dnapolicy.org/resources/GINAPublic_Opinion_Genetic_Information_Discrimination.pdf; *see generally* E.W. Clayton, *Ethical, Legal, and Social Implications of Genomic Medicine*, 349 N. Engl. J. Med. 562–69 (2003).

[41] David J. Kaufman, *et al.*, *Public Opinion about the Importance of Privacy in Biobank Research*, 85 Am. J. of Human Genetics 5 (2009).

That the government claims it will use DNA collected under this program only for law-enforcement identification purposes does not eliminate these concerns.[42] The Fourth Amendment does not allow the government to seize and warehouse our personal papers just because it promises not to examine them, and the rule should be no different with our DNA. Unfortunately, the police sometimes violate the law, willfully or not, and the same pressures that lead to violations of the Fourth Amendment and other statutory or legal privacy protections in more traditional investigations exist in our nation's crime labs, whether run by government or private contractors. For example, an investigation of the Houston, Texas crime lab found multiple instances of misconduct, including cases where analysts "reported conclusions, frequently accompanied by inaccurate and misleading statistics, that often suggested a strength of association between a suspect and the evidence that simply was not supported by the analyst's actual DNA results" and other instances where lab personnel simply fabricated test results.[43] In fact, the temptation to break or push the limits of what is allowed by law may well be greater in the privacy of a crime lab, shielded from public scrutiny, particularly if the purpose is to develop investigative leads that will never be subject to examination in court.

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[42] The use restrictions and confidentiality requirements contained within Proposition 69 are not the basis for drawing a legal comparison between the collection and use of fingerprints and forensic identification. *See* OB at 20. Rather, these safeguards show how sensitive the information contained within DNA samples is compared to what is contained within fingerprints.

[43] Final Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room (June 13, 2007) at 5, available at http://www.hpdlabinvestigation.org/reports/070613report.pdf.

CONCLUSION

The government rightly states that arrestee testing "functions much like a programmatic warrant."[44] But it fails to appreciate that this is not a virtue, because the Fourth Amendment was specifically intended to prohibit that type of general warrant. Those who wrote the Bill of Rights crafted the Fourth Amendment to ensure that the "people of this new Nation should forever be secure in their persons, houses, papers, and effects from intrusion and seizure by officers acting under the unbridled authority of a general warrant," a law-enforcement tool that they denounced "as the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book, because they placed the liberty of every man in the hands of every petty officer." *Stanford v. Tex.*, 379 U.S. 476, 481 (1965) (internal citations omitted). If the State wants to obtain a DNA sample from an arrestee to try to obtain cold hits in CODIS, it can apply for an actual warrant, it can ask for consent, or it can wait until our criminal-justice system has done its job and separated the guilty from those who have merely been the object of a single officer's suspicion. It cannot rely on what it calls a "programmatic warrant."

The law is clear that warrants based on probable cause are the rule except in limited situations. When a search or seizure is made without a warrant, the State bears the burden of demonstrating that the search was justified, regardless of whether a statute purports to authorize it. The State has failed to show that the warrantless, suspicionless search of DNA from

[44] OB at 22.

mere arrestees, as authorized under Proposition 69, is consistent with the Fourth Amendment. This Court should therefore hold that the arrestee-testing provision here at issue is unconstitutional.

Dated: June 1, 2012 Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.

By: _____
Michael Risher

Dated: June 1, 2012 PAUL HASTINGS LLP

By: _____
Eric A. Long

Attorneys for *Amicus Curiae*

Jan Bashinski DNA Laboratory Monthly Statistics

Month	**April 2012**
Starting Backlog	**38,862**
New Samples Added	15,272
Profiles Uploaded into CODIS	10,588
Newly Removed from Backlog (Overall Total of **34,275** removed from backlog – including any samples Expunged, Removed or Failed twice, as well as where a New Sample has been requested—Note: this months number is negative because successful results were obtained on samples previously removed from the backlog due to inadequate sample or two or more analytical failures.)	403
Ending Backlog	**43,143**
Total Forensic Unknown Profiles in CODIS	46,222
Total Data Bank (Offender) Profiles in CODIS	**1,912,493**
Hits This Month	412
Total Data Bank Hits	21,572

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of the Court, Rule 8.520(c)(1), I certify that the Brief for *Amicus Curiae* American Civil Liberties Union of Northern California is proportionately spaced, has a typeface of 13 points or more and contains 10,584 words, excluding the parts of the brief exempted by California Rules of Court, Rule 8.520(c)(3), as determined by the firm's word processing system.

Dated: June 1, 2012

Eric A. Long

PROOF OF SERVICE

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at Paul Hastings LLP, 55 Second Street, 24th Floor, San Francisco, CA 94105.

On June 1, 2012, I served the following document(s):

APPLICATION FOR LEAVE TO FILE *AMICUS* BRIEF AND PROPOSED BRIEF OF *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S CHALLENGE TO PROPOSITION 69'S EXPANSION OF CALIFORNIA'S DNA COLLECTION PROGRAM TO MERE ARRESTEES

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California on the following person(s) addressed as set forth below:

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I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed June 1, 2012, at San Francisco, California.

NANETTE COSENTINO