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on behalf of themselves and others similarly situated

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ELIZABETH AIDA HASKELL and REGINALD ENTO, on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

EDMUND G. BROWN, JR., Attorney General of California; EVA STEINBERGER, Assistant Bureau Chief for DNA Programs, California Department of Justice; and MICHAEL HENNESSEY, Sheriff, San Francisco County,

Defendants.

Civil Case No. C 09-4779 CRB

CLASS ACTION

REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date: December 4, 2009
Time: 10:00 a.m.
Dept.: Courtroom 8, 19th Floor

Hon. Charles R. Breyer

Complaint Filed: October 7, 2009

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SUMMARY OF ARGUMENT

"The warrantless, suspicionless, forcible extraction of a DNA sample from a private citizen violates the Fourth Amendment." *Friedman v. Boucher*, 580 F.3d 847, 858 (9th Cir. 2009). Under *Friedman* and the long line of authority recognizing the constitutionally-significant difference between arrestees and persons who have been convicted of a crime, California's mandatory, warrantless, and suspicionless DNA testing of arrestees under Penal Code § 296(a)(2)(C) is unconstitutional. Defendants' Opposition brief and misleading declarations do nothing to change this (nor could they).

First, to justify California's unconstitutional program, Defendants continue to make the flawed and misleading analogy between DNA and fingerprints. DNA contains a whole host of private information that a fingerprint cannot capture or show. And, unlike with DNA, it is unclear whether the taking of a fingerprint even constitutes a search. Defendants' attempt to get around these legal principles by claiming that DNA, like fingerprints, can identify arrestees, does not change this. *See Davis v. Mississippi*, 394 US. 721, 727 (1969) ("Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search."); *Nicholas v. Goord*, 430 F.3d 652, 658 (2d Cir. 2005). And because the state maintains the biological sample, rather than just the genetic profile that is uploaded to CODIS, all of this information is available to law enforcement for analysis.

Second, Defendants are not taking DNA to identify arrestees; they are taking it to enter those samples into CODIS as "known samples" so that they can try to connect those arrestees (who have already been identified with fingerprints) to crime scenes. This is not identification. It is investigation for the purposes of inculpation.

Third, Defendants' anecdotal declarations describing cases where specific crimes supposedly could have been prevented had arrestee DNA testing been available are also completely misleading. An examination of the complete facts shows that mandatory testing of *convicted* persons would have generated the results before the later crimes occurred. Arrestee testing would have added nothing to the investigative process.

Fourth, Defendants' offer to expunge Plaintiffs' DNA samples collected upon arrest completely disregards Cal. Penal Code § 299's expungement process, which requires a filed petition, 180-days notice to the appropriate prosecutor, hearing, and a court order. (*See* Docket No. 29, Von Beroldingen Decl. ¶ 8.) Government officers are prohibited from willfully removing or destroying government records, and doing so is punishable by up to four years imprisonment. *See* Cal. Gov't Code § 6200. Even if the existence of statutory protections could somehow cure the violation of Plaintiffs' constitutional rights, that Defendants are so willing to ignore some provisions of Proposition 69 shows how imprudent it would be to rely on their promises that the statutory protections are sufficient to ensure that no samples will be misused in any way.

Finally, Defendants argue that Plaintiffs' "delay" in bringing suit five years after Proposition 69 passage has harmed Defendants because California has incurred time, effort, and expense to ready itself for the January 1, 2009 implementation date for mandatory arrestee testing. (Docket No. 28, State Defendants' Opposition Brief ("Opp.") at 15.) In fact, lawyers with the ACLU did file suit to challenge Proposition 69's arrestee testing provision soon after the initiative passed, but the State successfully moved to dismiss the case on the grounds that the case would not be ripe until 2009. *Weber v. Lockyer*, 365 F. Supp. 2d 1119, 1122 (N.D. Cal. 2005). Now that the controversy is plainly ripe, Defendants cannot switch gears and take the astounding position that the "delay" in bringing suit has caused them hardship. In any event, a constitutional violation does not become any less so with the mere passing of time.

Defendants' Opposition fails to overcome Plaintiffs' case for preliminary injunctive relief. Plaintiffs will succeed on the merits because the police can lawfully seize an arrestee's tissue sample *only* if they have a warrant *or* both probable cause to believe that the sample will provide relevant evidence of a crime *and* exigent circumstances exist that make obtaining a warrant impracticable. *Schmerber v. California*, 384 U.S. 757, 769-70 (1966). This rule applies to the exact type of search here at issue: the seizure of DNA from arrestees. *Friedman v. Boucher*, 580 F.3d 847, 852 (9th Cir. 2009). Defendants fail to cite a single case upholding arrestee DNA testing. In contrast, Plaintiffs have cited several cases holding that arrestee collection violates the Fourth Amendment, and just this month another court has struck down the federal arrestee DNA

testing provisions in an extremely thorough opinion. *United States v. Mitchell*, 2009 U.S. Dist. Lexis 103575 (W.D. Penn. Nov. 6, 2009). Defendants cannot show that show that arrestee testing advances substantial government interests that testing upon felony conviction does not already achieve.

Defendants do not contend that the requested relief – a preliminary injunction enjoining enforcement of Cal. Penal Code § 296(a)(2)(C) or the use of profiles already created or samples already taken pursuant to that authority – is impossible to implement. Plaintiffs respectfully request a preliminary injunction enjoining Defendants and their agents from seizing or analyzing biological samples for DNA analysis under the authority of Cal. Penal Code § 296(a)(2)(C), or from making any use of profiles already created or samples already taken, until and only if the subject is actually convicted of a felony, unless such seizure is supported by a warrant issued on probable cause, consent freely given, or exigent circumstances combined with probable cause.

I. INTRODUCTION

Like the pre-trial detainee in *Friedman v. Boucher* whose Fourth Amendment rights were violated when his DNA was seized without a warrant, neither Plaintiff was on parole or under the supervision of any authority when law enforcement seized their DNA solely due to the fact of arrest. *Friedman v. Boucher*, 580 F.3d 847 (9th Cir. 2009). Defendants' interests "simply to gather human tissue for a law enforcement databank" is not one that "cleanse[s] an otherwise unconstitutional search" under these circumstances. *See id.* at 858. This case falls squarely within *Friedman* and the long line of authority recognizing the constitutionally-significant difference between arrestees and persons who have been convicted of a crime.

Defendants, although they fail to cite even a single case upholding warrantless DNA collection from arrestees,[1] would have this Court ignore the critical distinction between people who have been convicted of a felony and those whom our Constitution presumes to be innocent. Their approach (which would justify taking DNA from every American) advocates a wholesale overturning of the warrant requirement, as well as the holdings in *Samson v. California*, 547 U.S. 843 (2006), and *Friedman*. But Defendants cannot escape *Friedman*, which squarely holds that "[t]he warrantless, suspicionless, forcible extraction of a DNA sample from a private citizen violates the Fourth Amendment." *Friedman*, 580 F.3d at 858. This is consistent with the long-standing recognition that arrestees enjoy the presumption of innocence and give up only those rights as necessary to ensure jail security and safety. *See United States v. Mitchell*, 2009 U.S. Dist. Lexis 103575 at *25-27 (W.D. Penn. Nov. 6, 2009) (holding that arrestee testing violates the Fourth Amendment).

Plaintiffs have shown that they will prevail on the merits, and they have met all the other requirements for preliminary injunctive relief. This relief is necessary to protect the

[1] The only case Defendants cite that even remotely supports their position relies on a judicial order and finding of probable cause to authorize the testing. *United States v. Pool*, --- F. Supp. 2d ---, 2009 WL 2152081 at *4 (E.D. Cal. May 27, 2009) (appeal pending). This opinion predates *Friedman*.

constitutional rights of the tens of thousands of Californians who will be arrested in the months or years before a trial in this matter.

California's mass, programmatic, and suspicionless DNA sampling of arrestees should therefore be enjoined pending a trial on the merits.

II. PLAINTIFFS HAVE DEMONSTRATED A LIKELIHOOD OF SUCCESS.

A. *Friedman*, Which Held That Warrantless Seizure of DNA Violated an Arrestees' Fourth Amendment Rights, Controls.

Friedman, which controls, squarely held that "[t]he warrantless, suspicionless, forcible extraction of a DNA sample from a [pretrial detainee] violates the Fourth Amendment." *Friedman*, 580 F.3d at 858. Kenneth Friedman pled guilty to a crime in Montana, completed his sentence, and was unconditionally released from any government supervision. *Id.* at 851. Later, Friedman moved to Nevada where he was arrested and jailed on unrelated charges. *Id.* A police detective asked him to provide a DNA sample and Friedman repeatedly refused. The officer then took a buccal swab from Friedman's mouth over his objection. *Id.* The search had nothing to do with the pending charges; rather, the prosecutor sought Friedman's DNA in order to see whether it would generate any "cold hits" for crimes. *Id.* When Friedman later brought a § 1983 suit arguing that this search had violated his clearly established rights under the Fourth Amendment, the Ninth Circuit *expressly rejected* the government's argument that Friedman's status as a pre-trial detainee justified the seizure of his DNA, writing that "neither the Supreme Court nor this Court has ever ruled that law enforcement officers may conduct suspicionless searches on pretrial detainees for reasons other than prison security." *Id.* at 856-57.

Although rejected in *Friedman*, Defendants make the same argument in their Opposition to Plaintiffs' motion for injunctive relief. (Opp. at 6 ("As with parolees and probationers, arrestees, who are in police custody because there is probable cause that he or she has committed a felony, have a diminished expectation of privacy of their identity.")). Defendants argument is contrary to established law. *See United States v. Scott*, 450 F.3d 863, 872 (9th Cir. 2006) ("probationers have a lesser expectation of privacy than the public at large . . . People released pending trial, by contrast, have suffered no judicial abridgment of their constitutional rights.")

(internal quotations and citations omitted); *United States v. Kincade*, 379 F.3d 813, 835-36 (9th Cir. 2004) (*en banc*) (upholding warrantless and suspicionless DNA testing of convicted felons on supervised release and emphasizing "the limited nature of [the plurality's] holding" to "lawfully adjudicated criminals"); *Friedman*, 580 F.3d at 856-857 (recognizing constitutional principle that pre-trial detainees retain privacy interests for the purposes of Fourth Amendment analysis that forbid intrusions on mere chance that desired evidence may be obtained).

Defendants attempt to distinguish *Friedman* on the ground that in this case § 296 authorizes collection of Plaintiffs' DNA. (Opp. at 10.) But "adherence to a state statute does not guarantee compliance with the Fourth Amendment." *Friedman*, 580 F.3d at 853 (citing *Moore*, *infra*). Because the Fourth Amendment limitations on police power apply uniformly throughout the nation, the existence of a state law that authorizes, or prohibits, specific police searches or seizures is irrelevant. "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." *Virginia v. Moore*, 128 S. Ct. 1604, 1607 (2008) (citation and changes omitted); *see California v. Greenwood*, 486 U.S. 35, 43-44 (1988); *Cooper v. California*, 386 U.S. 58, 61 (1967) ("a search authorized by state law may be an unreasonable one").

B. The Constitution Prohibits Treating Arrestees, Who Are Presumed Innocent and Retain Their Privacy Rights, as if They Had Been Convicted.

1. Arrestees – Unlike Convicted Felons – Are Ordinary People Whose Privacy Rights Enjoy the Utmost Protection.

Although Defendants argue that arrestees should be treated as though convicted, they are in fact "ordinary people who have been accused of a crime but are presumed innocent." *Scott*, 450 F.3d at 871. They have not suffered the "transformative changes wrought by a lawful conviction and accompanying term of conditional release." *Id.* at 873 (quoting *Kincade*). A convicted felon has almost no privacy rights – the police can search his body, his possessions, and his house at any time, with no reason at all. *Samson*, 547 U.S. at 850 (recognizing continuum of state imposed punishments after conviction). But a person who has merely been arrested and charged retains the right to be free from such intrusions. *Scott*, 450 F.3d at 874-75 (state court could not require a criminal defendant to waive Fourth Amendment rights as a condition of pre-

trial release). Thus, in *Kriesel* and *Kincade*, where the Ninth Circuit upheld DNA testing of convicted felons, the court expressly stated that these rulings did not apply to arrestees or people who had completed their sentences. *United States v. Kriesel*, 508 F.3d 941, 948-49 (9th Cir. 2007) ("We emphasize that our ruling today [upholding DNA testing of convicted felons on supervised release] does not cover DNA collection from arrestees or non-citizens detained in the custody of the United States."); *Kincade*, 379 F.3d at 841 (Gould, J., concurring) ("I also write to emphasize what we do not decide today . . . . What we do not have before us is a petitioner who has fully paid his or her debt to society, who has completely served his or her term, and who has left the penal system."). Although arrestees necessarily sacrifice some privacy rights as necessary for jail security, law-enforcement safety, or evidence preservation, the DNA testing at issue here serves none of those interests.[2] *See Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009); *Way v. County of Ventura*, 445 F.3d 1157, 1161 (9th Cir. 2006). For purposes of compulsory, suspicionless DNA testing, arrestees are the same as anybody else who has not been convicted of a crime.

2. DNA Is *Not* Identical to Fingerprints.

Defendants' attempts to get around these legal principles by claiming that DNA, like fingerprints, can identify arrestees, does not change this. As an initial matter, as discussed in Plaintiffs' opening brief, Defendants are not taking DNA to identify arrestees; they are taking it to enter those samples into CODIS as "known samples" so that they can try to connect those arrestees (who have already been identified with fingerprints) to crime scenes. (Konzak Decl. at ¶¶ 3, 12.) This is not identification; it is investigation for the purposes of inculpation.[3] Moreover, Defendants' oft-used analogy between DNA profiling and fingerprinting is flawed factually and

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[2] As discussed in Plaintiff's opening brief, it would be impossible for an arrestee to hide or destroy his DNA. (*See* Docket No.12, Plaintiffs' Motion at p. 7.)

[3] Cases under the Fifth Amendment illustrate this distinction: that the police can lawfully require arrestees or detainees to identify themselves does not mean that they can force them to identify themselves as being involved in a crime. *See Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 189-91 (2004).

legally. Taking a fingerprint following a lawful arrest may not even constitute a search for purposes of the Fourth Amendment. *Davis v. Mississippi*, 394 US. 721, 727 (1969) ("Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search."); *see Nicholas v. Goord*, 430 F.3d 652, 658 (2d Cir. 2005). Fingerprints reveal nothing but identity. "But unlike fingerprints, DNA stores and reveals massive amounts of personal, private data about that individual, and the advance of science promises to make stored DNA only more revealing in time." *Kincade*, 379 F.3d at 842 n.3 (Gould, J., concurring). (*See* Nussbaum Decl. ¶¶ 19-21, 24; Murphy Decl., ¶¶ 30-40.) And because the state maintains the biological sample, rather than just the genetic profile that is uploaded to CODIS, all of this information is available to law enforcement for analysis.[4]

That the police routinely fingerprint arrestees, then, does not mean that they can also routinely seize their genetic blueprints.[5] Rather, as discussed in Plaintiff's opening brief, the real significance of arrestee fingerprinting is simply that it obviates any need to take DNA as a way to identify arrestees. *See Nelson v. City of Irvine*, 143 F.3d 1196, 1201 (9th Cir. 1998).

Finally, Defendants claim that the statutory restrictions on the use of Plaintiffs' DNA eliminate any possibility of abuse. But even if the samples are not disclosed or subject to analysis beyond what is authorized, merely being in the database may subject one to the danger of being falsely inculpated in a crime. (*See* Murphy Decl. ¶¶ 26-31; *cf. id.* ¶¶ 18-22.) Furthermore, the Fourth Amendment does not allow the government to seize and warehouse our personal papers

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[4] Defendants also suggest that DNA collection is lawful because a buccal swab, like a blood draw, is only "minimally intrusive." (Opp. at 9.) Whether or not this is true (it isn't; the State is penetrating the body), it is irrelevant. *Schmerber's* exception to the warrant requirement applies *because* the Court regarded such procedures as minimally invasive, and despite the fact that the blood could only be tested for alcohol.

[5] As Professor Murphy discusses at length, the older cases upholding fingerprinting of arrestees are inapt for another reason: although fingerprinting has been used since the early 1900s, the databasing of fingerprints only began in the 1980s, with the period of most sophisticated databasing occurring in the 1990s. (Murphy Decl. ¶ 36-38.) As a result, "[d]atabases as we know them, whether for fingerprints or criminal records or DNA profiles, are simply too new to the scene to have been thought about in a careful and searching way." (*Id.* ¶ 39.)

just because it promises not to examine them, and the rule should be no different with our genetic blueprint. *See generally Weeks v. United States*, 232 U.S. 383, 393 (1914) ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."); *United States v. Murphy*, 516 F.3d 1117, 1125 (9th Cir. 2008) (reversing denial of motion to suppress evidence seized during unlawful warrantless search).

3. California's Statutory Protections Are Irrelevant to the Court's Constitutional Analysis.

That Proposition 69 authorizes the specific police searches or seizures at issue is irrelevant. *See Virginia v. Moore*, 128 S. Ct. at 1607 (holding that State law does not affect the reasonableness analysis under Fourth Amendment). Moreover, the statute's privacy protections do not offer any assurances. Defendants claim they are willing to deviate from the statutory requirements for maintaining DNA samples when doing so serves their purposes. This is shown by their apparent willingness to disregard § 299's comprehensive expungement procedure and to remove Plaintiff Haskell's sample – and perhaps Mr. Ento's – from the database. (Von Beroldingen Decl. ¶¶ 6-8; Wood Decl. ¶ 8; *cf.* Opp. at 4.)[6] Expunging profiles and destroying samples without court order or statutory authority would be a felony violation of Cal. Gov't Code § 6200, which prohibits government officers from willfully removing or destroying government records. *Loder v. Municipal Court*, 17 Cal. 3d 859, 862 (1976) (arrest records). Although Defendants argue that there is no reason to think government officials would abuse information in CODIS, they are apparently ready to break the law when it comes to destroying DNA evidence in violation of the statute.[7]

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[6] The Von Deroldingen declaration never mentions anything about destroying samples in the arrestee database, only in the separate convicted offender database. It appears that the Department of Justice has yet to destroy any arrestee samples.

[7] Note that Defendants' willingness to expunge the samples of the named Plaintiffs does (continued)

C. The Limited Law Enforcement Benefits of Arrestee Testing Do Not Outweigh Plaintiffs' Privacy Interests Under the Fourth and Fourteenth Amendments.

Defendants argue that expanding the CODIS database with more and more known samples is so useful to the police that this Court should ignore all precedent and allow it. In other words, the end justifies the means. As Plaintiffs discuss in their opening brief, even if it were appropriate for this Court to ignore *Schmerber* and *Friedman*, Defendants' arguments would not prevail, because they cannot show that arrestee testing advances substantial government interests that testing upon a felony conviction does not already achieve.

Defendants' papers actually undermine their misguided notions that (1) testing at the arrestee stage, before conviction, prevents future crimes (thus, assuming all arrestees are both guilty and recidivists); (2) adding arrestees to a DNA databank increases the number of hits (it doesn't – and it slows down the upload of convicted felon and crime scene profiles); (3) arrestee testing will aid in bail determinations (impossible, given the months it takes to process and upload a sample); and (4) arrestee testing will help exonerate the innocent (it won't).

1. Defendants' Cherry-Picked Anecdotal Evidence Regarding Crime Prevention Does Not Support Collecting DNA from Arrestees.

Defendants' principle argument – that arrestee testing should be allowed because it will solve crimes – is completely factual. To show a benefit to crime solving by adding arrestee profiles to the database, Defendants offer anecdotal evidence in the declarations of Denver District Attorney Mitchell R. Morrissey and Jayann Sepich, a private citizen advocate who became a supporter of arrestee DNA testing after her daughter was murdered. Both declarants

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not mean that this procedure will be widely available The only expungement information available to an arrestee is the cumbersome, phased procedure outlined in § 299. That procedure requires the filing of a petition, a hearing 180 days thereafter, notice to the prosecutor, and, if the arrestee is successful, a court order authorizing expungement. There is no way for an arrestee who is never charged to know that the government may be willing to ignore these requirements. And, in fact, when Patrick Lyons, who had been arrested at a political demonstration in San Francisco and then had his charges dismissed called the San Francisco District Attorney's Office to ask how he could get his sample expunged, he was told to get a lawyer. (Lyons Decl. at ¶ 4.) Of course, most persons arrested cannot afford a private lawyer to represent them; and public defenders will not represent arrestees who are not facing criminal charges. (Gauger Decl. at ¶ 3.)

cite specific criminal cases where they contend that mandatory arrestee testing would have linked arrestees to prior crimes and would have resulted in the prevention of future crimes. (*See* Morrissey Decl., Ex. A; Sepich Decl. at ¶¶ 11-24.) But even if this type of anecdotal evidence could support arrestee testing, the actual stories they present do not.

First, anecdotal evidence such as this, no matter how heartbreaking, cannot justify the wholesale infringement of the privacy interests of thousands of people. Any investment of resources into law enforcement will result in some additional crime detection and prevention. If the millions of dollars being spent on arrestee testing were instead spent on hiring more police officers, each of those officers would solve dozens or hundreds of crimes a year. The same could be said of spending resources to eliminate the backlog of untested sex-assault kits in Los Angeles[8] or devoting resources to rehabilitation programs. Similarly, any expansion of police power will solve some crimes – the general warrants that were so offensive to those who wrote our Constitution doubtless resulted in the discovery of some evidence. *See generally Chimel v. California*, 395 U.S. 752, 761 (1969) ("The Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence."). And every time a court suppresses critical prosecution evidence under the Fourth Amendment, there is a chance a criminal may go free. This is the cost of liberty; just as there is no exception to the Fourth Amendment for particularly gruesome cases, this Court should not be persuaded to create an exception to the warrant requirement – one that will affect tens of thousands of people a year – based on an argument that arrestee testing could have prevented some specific crimes.

Defendants' declarations themselves show why this is so. Out of the 17,000 cases Denver prosecutors handle every year,[9] Denver District Attorney Morrissey has apparently selected the five cases, dating back to 1985, that most strongly support his well-publicized agenda of

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[8] (Supp. Meier Decl., Ex. A (Human Rights Watch, Testing Justice: The Rape Kit Backlog in Los Angeles City and County p. 1 (March 2009), available at http://www.hrw.org/node/81826).)

[9] According to the office website, http://www.denverda.org/Office_Overview.htm.

promoting arrestee testing. And even these cherry-picked cases do not support what Morrissey claims they do, because an examination of the actual facts shows that mandatory testing of *convicted* persons would have generated the same result; arrestee testing would have added nothing to the investigative process.

For example, Morrissey claims that "[i]f the state had required [Ned Pace] to give a DNA sample during his felony arrest for sexual assault on a child on October 8, 1995, a DNA match could have been obtained with the DNA evidence recovered from his first sexual assault/murder. Two subsequent sexual assault/murders and one subsequent sexual assault/kidnapping could have been prevented." This is extremely misleading because court records show that testing at the time of conviction would have had exactly the same effect as arrestee testing. As Morrissey states, Pace was arrested in 1995 for felony sexual assault on a child. But Morrissey omits the fact that Pace pled guilty and was convicted of that same felony on July 9, 1996. (Supp. Risher Decl. at ¶ 5.) The sexual assaults, murders, and kidnappings that supposedly would have been prevented by arrestee testing did not occur until 1999 and 2000, *three years after Pace's felony conviction*. (*Id.*) Thus, it would have made absolutely no difference whether Pace had provided DNA at his October 1995 arrest or at his July 1996 felony conviction – in either event his DNA would have been in CODIS years before he committed his crimes in 1999 and 2000. Morrissey's claims about the Costillo and Lollis cases suffer from this exact same flaw – testing after conviction (and before any subsequent arrest) would have done more to prevent crime than arrestee testing would have accomplished. (*See id.* at ¶¶ 6-8.)

Ms. Sepich's declaration makes the same error in her discussion of the notorious Chester Turner case, claiming that arrestee testing would have prevented 11 murders. (Sepich Decl. at ¶¶ 19-20.) In fact, Sepich's own website shows that Turner was convicted of a felony in 1991 or 1992. (Supp. Risher Decl. ¶ 9.) Thus, if Turner had been required to provide DNA upon conviction, he would have done so before he committed the majority of his crimes.[10]

[10] Similarly, the delay in taking DNA from Ms. Sepich's daughter's killer had little to do with arrestee testing – rather, the government failed to take DNA when he was convicted of a felony. (Supp. Risher Decl. at ¶ 10.) Moreover, the case Ms. Sepich holds up as a prototype for (continued)

2. Arrestee Testing Has Almost No Law Enforcement Benefit, and Causes Backlogs Which Adversely Impact the Public.

Even the above cases, selected from the millions of crimes and prosecutions that have occurred since 1985 (the date of Morrissey's first example) for the very purpose of showing the benefits of arrestee testing, fail to show such benefits.[11] And the actual statistical evidence shows that arrestee testing does not contribute to a material increase in the number of hits in the database. (Murphy Decl. ¶¶ 32-33). Defendants misread the U.K. report, "DNA Expansion Programme 2000-2005: Reporting Achievement" and claim that it proves that arrestee testing is effective, because of the dramatic increase in matches between offender/arrestee profiles and unknown forensic profiles in the U.K. from 1999-2006. (Konzak Decl. at ¶ 15.) But, as the report itself concludes, "the number of matches obtained from the Database (and the likelihood of identifying the person who committed the crime) *is* 'driven' primarily by the number of **crime scene profiles** loaded on the Database." (Supp. Wallace Decl., Ex. A at page 10, ¶ 32 (copy of report) (emphasis in original).) Thus, these data actually show, as stated in Plaintiffs' opening

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why arrestee DNA testing is effective for solving crimes, the case of Robert Gonzales, provides no support whatsoever for her cause. (Sepich Decl. at ¶¶ 15-17.) Sepich claims that had mandatory arrestee testing been the law at the time of Gonzales's arrest for the sexual assault and death of a young girl, police would have found out immediately that another individual's DNA matched crime scene evidence and Gonzales would have avoided false accusations and years of incarceration while awaiting trial. But it was police misconduct, rather than the lack of DNA evidence from the actual perpetrator, that was the cause of Gonzales's predicament. As his lawyer's declaration shows, Gonzales was arrested for the crime without probable cause, as conceded by the prosecutor. (Hall Decl. at ¶ 4.) His DNA did not match the crime scene sample. Nevertheless, Gonzales, a mentally retarded individual with an IQ between 51 and 62 and developmental disabilities, was coerced into confessing to the crime by aggressive interrogators, and charges were prosecuted based almost entirely on the confession. (*Id.* at ¶ 3, 11.) After the DNA evidence was matched to that of the actual perpetrator, the prosecutors still refused to release Gonzales. It was only after the trial court suppressed the coerced confession that prosecutors finally dropped charges. (*Id.* at ¶ 13-14.)

[11] That anecdotal evidence is so susceptible to biased selection is one reason that courts have refused to accept it. *See Jinro America, Inc. v. Secure Investments, Inc.*, 266 F.3d 993, 1005-06 (9th Cir. 2001) (refusing to accept anecdotal evidence derived from a "skewed sample"). Plaintiffs have filed concurrently objections to Defendants' improper anecdotal evidence which lacks competence, personal knowledge, and credibility. The Court should give Defendants' evidence very little, if any, weight in resolving Plaintiffs' preliminary injunction motion.

papers, that it was the increase in the number of unknown crime-scene profiles, not the increase in the number of known (*i.e.*, arrestee) profiles, that boosted the number of matches. In fact, the number of matches in the U.K. database peaked in 2002/2003, long before the U.K. government began even collecting DNA from arrestees (in April 2004); matches have since declined, despite the U.K. continuing use of arrestee testing. (Supp. Wallace Decl. at ¶ 7.)

In addition, these claims ignore the adverse impact on public safety caused by the backlogs that result from arrestee testing. (Murphy Decl. ¶ 34.) A 2009 Justice Department report concludes that arrestee testing could derail current attempts to reduce these backlogs and "estimate[s] that the expansion of legislation to include arrestees would increase the annual receipt of DNA samples by 223 percent." As a result of these backlogs, samples go untested for months or years, sometimes with disastrous consequences. According to this same federal report, "16 percent of the state laboratories reported that they were aware of specific instances where additional crimes may have been committed by an offender while that offender's DNA sample was part of the backlog in their state." (*Id.* at ¶ 6; *see supra* n.10.)

3. Arrestee Testing Cannot Be Used in Bail Determinations.

Mass arrestee testing cannot play a part in pretrial-release decisions unless that analysis of the sample and uploading of the profile into CODIS occur immediately, which by Defendants' own admission is not the case. The Laboratory Director of the California DNA lab states in his declaration that "the average processing time for arrestee samples is currently about 31 calendar days," and that the lab currently has "about a two-month backlog" of samples." (Konzak Decl. at ¶ 40; *cf.* Docket No. 14, Risher Decl. at ¶¶ 8-10.) Bail decisions must be made within days of arrest, not after months of pre-trial incarceration.

Moreover, absent an individualized determination of dangerousness, the law cannot assume that an arrestee is more likely to commit crime than is any other person. *Scott*, 450 F.3d at 873-74 & n.15. The government's argument that it has a particular interest in deterring or detecting crimes that could justify DNA testing is an insult to the presumption of innocence, and simply conflates arrestees with convicted felons. *Compare id. with* Opp. at 14.

4. Exoneration of the Innocent Does Not Require Arrestee DNA Profiles.

Finally, Defendants claim that arrestee testing can exonerate the innocent.[12] But DNA exoneration usually involves a comparison of two samples – a sample left by the perpetrator at the crime scene (*e.g.*, semen in a rape kit) and a sample taken from the wrongfully accused or convicted, usually at his request. If the DNA from the crime scene does not match the accused's DNA, that should end the matter, whether or not the process also results in the identification of the real culprit.[13] Consequently, the Innocence Project website (which Defendants cite, Opp. at 8) notes that of the 244 post-conviction DNA exonerations in the United States, the true perpetrator has been identified in only 104 of them; in the other 140 cases, DNA databanks could not possibly have been involved.[14]

III. THE BALANCE OF EQUITIES, THE PUBLIC INTEREST, AND THE THREAT OF IRREPARABLE HARM FAVOR PLAINTIFFS

For all of the reason set forth above and in Plaintiffs' opening papers, the equities tip in Plaintiffs' favor, warranting preliminary injunctive relief. Plaintiffs have been unfairly compelled to submit their most personal information to authorities, while the government pursues an unconstitutional program that does not even aid law enforcement. The intrusion into Plaintiffs' personal privacy causes irreparable harm, as does the loss of their freedom from unreasonable searches and seizures. The public rights at stake in this case are paramount, and Defendants should be enjoined until all issues are fully litigated.

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[12] This is somewhat ironic in light of the state and federal governments' attempts to block such people from using the CODIS database to prove their innocence. *See Rivera v. Mueller*, 596 F. Supp. 2d 1163 (N.D. Ill. 2009). *See also* Murphy Decl. at ¶¶ 38, 40 & Ex. B.

[13] Murphy Decl. ¶¶ 23-25; *see, e.g.*, *People v. Dodds*, 801 N.E.2d, 63, 71-72 (Ill. App. 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).

[14] Available at http://www.innocenceproject.org/Content/351.php.

Defendants' argument that Plaintiffs, or their lawyers, should have filed suit five years ago when Proposition 69 was passed is confounding.[15] (Opp. at 1, 15.) In fact, lawyers with the ACLU of Northern California *did* file suit to challenge these provisions 35 days after the initiative passed. *See Weber*, 365 F. Supp. 2d at 1121 (N.D. Cal. 2005).[16] The California Department of Justice responded to the suit by issuing an Information Bulletin directing local law enforcement not to enforce the arrestee-testing provisions retroactively, and then moving to dismiss on the grounds that the challenge was premature. *Id.* at 1122. Based on the this Bulletin, the Court granted the government's motion to dismiss the case as unripe. *Id*. at 1126.

At the time Proposition 69 passed and the state started spending its resources to prepare to implement arrestee testing, a three-judge panel of the Ninth Circuit had struck down DNA testing of ***convicted violent felons*** in *Kincade*, and a bare majority of the *en banc* court had reversed that decision in an opinion that expressly reserved the constitutionality of arrestee testing. In 2005, a federal district court struck-down arrestee testing; the next year the Minnesota Court of Appeal did so, too.[17] If Defendants had wanted a binding ruling on the legality of arrestee testing before spending the money to implement it, they could have obtained one by litigating *Weber* on the merits, rather than interpreting the law so as to raise a procedural bar to that suit. Their failure to do so, and the fact that the state subsequently sunk resources into a law-enforcement method that had already been ruled unconstitutional in state and federal courts, does not give the state license to continue to violate the constitutional rights of tens of thousands of Californians. *See Stone v. City and County of San Francisco*, 968 F.2d 850, 858 (9th Cir. 1992) ("financial constraints do

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[15] Of course, Plaintiffs Haskell and Ento were not even arrested until 2009. Even if they had been arrested before 2009, they would not have been subject to DNA testing, because § 296(a)(2)(C) did not go into effect until this year. They could not have brought suit when the Defendants claim they should have. Defendants do not suggest that these two individuals, who are both still subject to prosecution following their 2009 arrests, should have brought suit sooner.

[16] Thus, the *status quo* to be preserved is conviction, rather than arrestee, testing. *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000); *contra* Opp. at 4. Of course, for class members who have not been arrested, the *status quo* is that their DNA is their own, not the governments.

[17] *In the Matter of the Welfare of C.T.L.*, 722 N.W.2d 484, 488-91 (Minn. App. 2006); *United States v. Purdy*, 2005 WL 3465721, at *7 (D. Neb. Dec. 19, 2005).

not allow states to deprive persons of their constitutional rights") (citations omitted). Nor could it, as a constitutional violation is not mitigated by the passage of time.

Moreover, Defendants' plea that limitations of their system would make an injunction onerous to implement is no reason to deny preliminary injunctive relief. (Konzak Decl. at ¶¶ 33-39.) Defendants can simply exclude arrestee profiles from their searches, which they admit are identified separately from other profiles. (Von Beroldingen Decl. at ¶ 13.) Although Defendants claim each incoming sample to the laboratory would have to be confirmed for whether it came from an arrestee pursuant to § 296(a)(2)(C), this process could be expedited by engaging the submitting agencies (agents of Defendant Brown), who "typically have this information at hand and have a much better opportunity to know when a sample is required." (Konzak Decl. at ¶ 33.) (noting that "agencies typically have data on the collection subject[.]").

Plaintiffs have been diligent in bringing their case. Their DNA profiles are currently being searched in CODIS, in violation of their informational privacy rights. Moreover, absent a preliminary injunction, every Californian who is arrested for a felony while this case is pending will have his or her DNA taken and analyzed in violation of the Constitution.[18] Money cannot compensate plaintiffs or the class members for this violation of their constitutional rights,[19] and "the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," justifying preliminary injunctive relief. *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009); *see* Plaintiffs' Motion at 13 n.16 (collecting cases).

IV. CONCLUSION

Defendants' Opposition fails to overcome Plaintiffs' case for preliminary injunctive relief. Plaintiffs have shown they will succeed on the merits and that denial of a preliminary injunction will result in wholesale violation of the Fourth and Fourteenth Amendments. Defendants do not contend that the requested relief – a preliminary injunction enjoining enforcement of Cal. Penal

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[18] The parties have stipulated that relief will apply class-wide. Docket Nos. 10 & 11.

[19] The case defendants cite involving the NFL, *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 634 F. 2d 1197, 1202 (9th Cir. 1980), is irrelevant because it holds simply that a corporation's loss of income can be compensated by damages.

Code § 296(a)(2)(C) or use of profiles already created or samples already taken pursuant to that authority, is impossible to implement. The parties have stipulated that any preliminary injunctive relief should apply to protect all Californians.

Accordingly, Plaintiffs respectfully request a preliminary injunction enjoining Defendants and their agents from seizing or analyzing biological samples for DNA analysis under the authority of Cal. Penal Code § 296(a)(2)(C), or from making any use of profiles already created or samples already taken, until and only if the subject is actually convicted of a felony, unless such seizure is supported by a warrant issued on probable cause, consent freely given, or exigent circumstances combined with probable cause.

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